

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

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2
3
4 BARBARA ANDREWS, LYLE W. ANDREWS, DUANE)
5 BANKOFIER, SHARON BANKOFIER, FRANK J. BEGLEY,))
6 LAQUETTA BEGLEY, RICHARD BLAKE, EUGENE M.)
7 BRICK, VIVIAN S. BRICK, LESLIE BJORVIK, BENNY))
8 B. BIRKBY, JEAN RAE BIRKBY, AUDRA BRENNAN,)
9 ANNA M. BROWN, RICHARD S. BROWN, WARREN R.)
10 BROWN, DONALD CHILDRESS, VESTA M. CHILDRESS,)
11 ROGER CROW, JOHN DAVENPORT, CHARLES A. DIX,)
12 FRANCIS J. DIX, JIM DUTCHUK, DUANE R. ECKER,)
13 STANLEY GREEN, RAY HELTON, SARAH HELTON, EDNA))
14 HOPKINS, GLEN HOPKINS, KATHY HUNTLEY, ENOLA)
15 M. JACKSON, MARVIN W. JACKSON, JULIA KOON,)
16 RONALD W. KOON, OLIVIA KRAMER, WILLIAM)
17 KRAMER, LLOYD E. LEWIS, IVA M. LINENS, ERNEST))
18 MCKENZIE, BRUCE MORGANTI, MARY JO MORGANTI,)
19 LEONARD S. MORRIS, RUBY L. MORRIS, CYNTHIA M.))
20 OYSTER, MIKE OYSTER, AMBER POKORNY, DAVID J.)
21 POKORNY, JUDY L. POKORNY, AMBER PRIDEMORE,)
22 JAMES R. PRIDEMORE, GARY ROMINE, RAMONA)
23 ROMINE, JOHN N. SAY, NAOMI J. SAY, JAMES W.)
24 SIPPEL, ELLEN M. SIPPEL, DEEDEE SOWERS,) LUBA No. 94-
25 101
26 ROBERT SOWERS, LARRY STEPHENS, MAXINE)
27 STEPHENS, CHARLES M. STRAUGHAN, MARYLOU) FINAL OPINION
28 STRAUGHAN, LESLIE SULLIVAN, VIRGINIA E.) AND ORDER
29 SULLIVAN, LENORE TYLER, TYRONE WELTY, EDNA)
30 WITTY, JOAN WITTY, JOHN WITTY, LYLE A.)
31 WOMACK, PHILIP WORTMAN, VICKY WORTMAN and)
32 SHIRLEY WHITING,)
33)
34 Petitioners,)
35)
36 vs.)
37)
38 CITY OF PRINEVILLE,)
39)
40 Respondent,)
41)
42 and)
43)
44 PRINEVILLE PROPERTIES, INC.,)
45)

1 Intervenor-Respondent.)
2
3

4 Appeal from City of Prineville.
5

6 Robert S. Lovlien, Bend, filed the petition for review
7 on behalf of petitioners. With him on the brief was Holmes
8 Hurly Bryant Lovlien & Lynch.
9

10 No appearance by respondent.
11

12 No appearance by intervenor-respondent.
13

14 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
15 Referee, participated in the decision.
16

17 REMANDED 02/14/95
18

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS
21 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a limited land use decision
4 granting tentative plan approval for a subdivision located
5 within the City of Prineville Urban Growth Boundary.¹

6 **MOTION TO INTERVENE**

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

10 **FACTS**

11 On January 26, 1994, the city provided written notice
12 to 42 property owners of a February 15, 1994 planning
13 commission public hearing to consider an application for
14 approval of Phase I of the Pioneer Heights Subdivision. The
15 planning commission conducted a public hearing on February
16 15, 1994. On March 1, 1994, the planning commission voted
17 to approve the tentative plan, with conditions.

18 Two persons appealed the planning commission's decision
19 to the city council. On April 4, 1994, notice of an April
20 12, 1994 city council meeting to consider the appeal was
21 provided to the two local appellants and the applicant.²

¹LUBA has jurisdiction to review "land use decisions" and "limited land use decisions," as those terms are defined by ORS 197.015(10) and (12). ORS 197.825(1). As relevant, ORS 197.015(12) defines "limited land use decision" to include final local government decisions concerning approval or denial of subdivisions on sites located within an urban growth boundary.

²The local appellants were Joan and John Witty, two of the petitioners in this appeal.

1 The April 12, 1994 city council meeting was continued to
2 April 26, 1994.

3 At the April 26, 1994 meeting, the city council
4 provided a public hearing, but limited testimony to two
5 topics--water and traffic. The local appellants were
6 allowed 15 minutes to present oral and written testimony,
7 the applicant was allowed 15 minutes to present oral and
8 written testimony. Both the local appellants and the
9 applicant were given an opportunity for rebuttal testimony.
10 The record was held open for seven days to allow the local
11 appellants and the applicant to submit additional rebuttal
12 to the written material submitted on April 26, 1994. At its
13 May 10, 1994 meeting, the city council voted to deny the
14 appeal, and the written decision denying the appeal and
15 upholding the planning commission's decision granting
16 tentative plan approval was adopted on May 24, 1994. This
17 appeal followed.

18 **INTRODUCTION**

19 Our review is hampered because neither respondent nor
20 intervenor-respondent filed a brief in response to the
21 petition for review. Moreover, no party provided LUBA with
22 copies of the city's comprehensive plan and land use
23 regulations. We therefore resolve this case based on
24 petitioners' arguments and those portions of the city's land
25 use regulations and comprehensive plan set out in the
26 petition for review.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners contend the city failed to provide the
3 notices required by ORS 197.195(3)(b) and Prineville
4 Ordinance No. 805, Section 12.070.

5 **A. ORS 197.195(3)(b)**

6 As noted above, the challenged decision is a limited
7 land use decision. ORS 197.195 sets out minimum procedures
8 the city must follow in adopting limited land use decisions.
9 ORS 197.195 does not require that the city conduct a public
10 hearing before making a limited land use decision, although
11 the city provided two public hearings in this case.³
12 However, ORS 197.195(3)(b) does impose a requirement that
13 the local government "provide written notice to owners of
14 property within 100 feet of the entire contiguous site for
15 which the application is made."⁴

16 Petitioners contend that because the notice of the
17 April 26, 1994 city council hearing in this matter was

³The city appears to have attempted to comply with both the statutory requirements for limited land use decisions set out in ORS 197.195 and the statutory requirements for quasi-judicial land use decision making set out in ORS 197.763. Compliance with the ORS 197.763 requirements for quasi-judicial land use decision making will generally suffice to comply with the requirements of ORS 197.195. Barrick v. City of Salem, 27 Or LUBA 417, 426 n 6 (1994).

⁴Under the statutory requirements for limited land use decision making, the local government must provide an opportunity for submission of written comments on the application. ORS 197.195(3)(c)(A). Thereafter, the local government must provide notice of the decision to all persons submitting comments and include an explanation of appeal rights. ORS 197.195(3)(c)(H).

1 provided only to the two local appellants and the applicant,
2 it violates ORS 197.195(3)(b). However, the January 26,
3 1994 notice of the February 15, 1994 planning commission
4 public hearing was provided to 42 property owners.
5 Petitioners make no attempt to explain why that notice was
6 inadequate to satisfy the notice requirement imposed by
7 ORS 197.195(3)(b).

8 This subassignment of error is denied.

9 **B. Ordinance No. 805, Section 12.070**

10 ORS 197.195(3)(a) provides:

11 "In making a limited land use decision, the local
12 government shall follow the applicable procedures
13 contained within its acknowledged comprehensive
14 plan and land use regulations and other applicable
15 legal requirements."

16 Petitioners contend the notice of the April 26, 1994
17 city council hearing in this matter does not comply with
18 Ordinance No. 805, Section 12.070. Petitioners argue:

19 "City of Prineville Ordinance No. 805, Section
20 12.070 states: 'The procedure, public notice and
21 type of hearing for an appeal or review shall be
22 in the same manner as for any quasi-judicial land
23 use action.'" (Emphasis in original.) Petition
24 for Review 9.

25 We do not have a copy of Prineville Ordinance No. 805.
26 Petitioners do not quote or identify the Prineville
27 Ordinance No. 805 public notice requirements for quasi-
28 judicial land use actions that they believe are violated by
29 the notice of the April 26, 1994 city council hearing in
30 this matter. Because petitioners fail to provide a basis

1 for concluding the notice of the April 26, 1994 city council
2 hearing in this matter violates Ordinance No. 805, Section
3 12.070, we deny this subassignment of error.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Ordinance No. 805, Section 9.060(7)(a) provides:

7 "The proponent of the application or permit has
8 the burden of proving justification for its
9 approval; the more drastic the request, or the
10 greater the impact of the application or permit on
11 the neighborhood, area, or City, the greater is
12 the burden on the proponent.'" Petition for
13 Review 11.

14 In one of its "General Findings and Conclusions," the city
15 council explains its understanding of Ordinance No. 805,
16 Section 9.060(7) as follows:

17 "14. As attested to by the opponents, the [City]
18 Council also finds that, pursuant to Section
19 9.060(7) of City ordinance 807 [sic]
20 governing quasi-judicial hearings and land
21 use applications, that the proponent (i.e.
22 the appellant) has the 'burden of proof' of
23 proving the justification for the approval of
24 the subject appeal." Record 11.

25 Petitioners contend the above finding misinterprets
26 Ordinance No. 805, Section 9.060(7) and shows the city
27 improperly placed the burden of proof on the local opponents
28 of the proposal rather than on the applicant.

29 Petitioners are correct. In addition to the above
30 quoted finding, there are a number of other instances where
31 the city council found that the local appellants failed to
32 carry their burden of proof concerning failure of the

1 proposal to comply with approval standards. Record 14,
2 16-17, 19-20. While the city council may require that local
3 appellants identify the particulars in which the local
4 appellants believe the planning commission decision is
5 erroneous, the applicant retains the burden of proof to
6 establish compliance with approval standards. As we
7 explained in Strawn v. City of Albany, 20 Or LUBA 344, 349-
8 50 (1990):

9 "[R]espondents' appellate court practice analogy
10 fails to recognize critical differences between
11 the function performed by local governments in
12 their quasi-judicial land use decision making and
13 the function performed by appellate courts. As
14 respondents recognize, the applicant bears the
15 burden of proof in demonstrating that all relevant
16 approval standards * * * are met. Fasano v.
17 Washington Co. Comm, 264 Or at 586; Billington v.
18 Polk County, 13 Or LUBA 125 (1985); Bobitt v.
19 Wallowa County, 10 Or LUBA 112 (1984). The
20 [local] hearings board determined that burden was
21 met. However, once the hearings board's decision
22 is appealed to the city council, the applicant is
23 obligated to carry its burden of proof before the
24 city council. See 1000 Friends of Oregon v.
25 Benton County, 20 Or LUBA 7, 14 (1990)."

26 The city might reject the local appellants' arguments
27 and evidence, and elect to believe the arguments and
28 evidence submitted by the applicant. If it does so, the
29 city council might also agree with the planning commission
30 and conclude the applicant carried its burden of proof. The
31 city council's decision could then be sustained on appeal to
32 LUBA, provided LUBA concludes the city council's ultimate
33 decision is supported by supported by substantial evidence,

1 i.e., evidence a reasonable person would believe. However,
2 the city council may not, in its review of the planning
3 commission's decision, shift the burden of proof concerning
4 compliance with approval standards to the local appellants.⁵

5 The second assignment of error is sustained.

6 **THIRD AND FIFTH ASSIGNMENTS OF ERROR**

7 **A. Limit on New Evidence**

8 According to petitioners, Ordinance No. 805, Section
9 12.050 provides:

10 "An appeal or review proceeding shall be based on,
11 but not limited to, the Record of the decision
12 being appealed or reviewed."

13 Petitioners argue the city council's notice of its April 26,
14 1994 public hearing in this matter improperly suggested the
15 city council might decide to limit its review to the
16 planning commission record. However, the city council in
17 fact did allow the parties to submit additional evidence at
18 the April 26, 1994 public hearing. To the extent the
19 suggestion in the notice constitutes error, petitioners do
20 not explain how it prejudiced their substantial rights.

21 This subassignment of error is denied.

⁵It is possible that the city council did not mean to shift the burden of proof concerning compliance with approval standards from the applicant to the opponents and was merely imposing an obligation on the local appellants to demonstrate error in the planning commission's decision. However, there are simply too many findings in the decision challenged in this appeal suggesting the city council did improperly shift the burden of proof from the applicant to the local appellants in reaching its decision for us to conclude otherwise.

1 **B. Limitation of Issues on Appeal**

2 Petitioners also contend the city council improperly
3 limited its consideration to two issues, water and traffic.⁶
4 Petitioners contend a number of additional issues were
5 raised before the planning commission.

6 We agree with petitioners that Ordinance No. 805,
7 Section 12.050 does not provide a basis for the city council
8 to limit the scope of its review on appeal. However,
9 neither does that section require that the city council
10 consider all issues petitioners wish to raise. Ordinance
11 No. 805, Section 12.050 simply states the city council's
12 record shall include the record made before the planning
13 commission and the additional evidence and argument
14 presented to the city council. Ordinance No. 805, Section
15 12.050 says nothing about the city council's scope of
16 review.

17 Petitioners also cite Ordinance No. 805, Section
18 12.070, which is quoted supra, under the first assignment of
19 error. The reference in Ordinance No. 805, Section 12.070
20 to provisions elsewhere in Prineville Ordinance No. 805 may
21 well support petitioners' position that the city council
22 must conduct a de novo hearing and entertain any relevant

⁶The notice of the city council's April 26, 1994 hearings states that "[i]ssues to be considered by the [City] Council are limited to those issues which are set forth as the 'Grounds for Appeal' in [the local appellants'] Appeal document." Record 104. The local notice of appeal filed by petitioners Witty does not appear to be limited to the issues of water and traffic.

1 issues petitioners wish to raise. However, as was the case
2 under the first assignment of error, petitioners do not
3 provide those provisions so that we can determine if that is
4 the case.

5 A local government's land use regulations may include
6 local appeal provisions that either allow or require the
7 governing body to limit its scope of review in reviewing
8 decisions of inferior local tribunals. See Smith v. Douglas
9 County, 93 Or App 503, 506-07, 763 P2d 169 (1988), aff'd 308
10 Or 191 (1989). As we explain above, we cannot determine
11 what local land use regulation provisions the city council
12 relied on in limiting its scope of review to the two issues
13 identified above. However, the challenged decision appears
14 to limit the issues considered at the city council hearing
15 to those raised before the planning commission. Even if the
16 city council does have authority under Ordinance No. 805 to
17 limit the issues it will consider on appeal to those issues
18 raised before the planning commission, we agree with
19 petitioners that in this case limiting the issues to traffic
20 and water was improper.⁷

21 Under their fifth assignment of error, petitioners
22 point out the minutes of the four-hour February 15, 1994
23 planning commission hearing are set out on one page. The

⁷In view of our disposition of this assignment of error, we need not and do not determine whether the city council has authority under Ordinance No. 805 to limit its scope of review on appeal of planning commission decisions concerning tentative plans.

1 arguments of both proponents and opponents are set out in a
2 single paragraph and those minutes are inadequate to
3 identify the issues raised during the February 15, 1994
4 planning commission hearing. There is a document at Record
5 105-09 entitled "Hearing Record" which apparently is a
6 description of the February 15, 1994 planning commission
7 hearing prepared by the city planning director. However,
8 petitioners contend there is no way to tell how that
9 document was prepared or what its official status may be.

10 Petitioners requested tapes of the February 15, 1994
11 planning commission hearing from the city. However, the
12 tapes for approximately three-fourths of that hearing cannot
13 be located. In short, with the possible exception of the
14 planning director's four and one-half page summary of the
15 planning commission's February 15, 1994 public hearing,
16 there is no way to tell whether the city council correctly
17 concluded that only water and traffic issues were adequately
18 preserved for review on appeal by the city council.

19 We conclude that, even if the city council has the
20 authority or duty under its land use regulations to limit
21 its review to issues raised during the planning commission
22 proceedings, in this case the city failed to maintain a
23 sufficient record of the planning commission proceedings to
24 allow LUBA to determine whether the city council correctly
25 limited its review to the issues of water and traffic.

26 This subassignment of error is sustained.

1 **C. Rebuttal Evidence**

2 Petitioners contend the city also erred by allowing the
3 applicant to submit written evidence during and after the
4 April 26, 1994 city council public hearing, without
5 providing the opponents an adequate opportunity to rebut
6 that evidence.

7 Based on our review of the record, petitioners appear
8 to be correct. This subassignment of error is sustained.

9 The third assignment of error is sustained in part.
10 The fifth assignment of error is sustained.

11 **FOURTH ASSIGNMENT OF ERROR**

12 Petitioners contend the city planning director and the
13 applicant's representative erroneously advised the planning
14 commission that it could not deny the requested subdivision
15 tentative plan approval.

16 The challenged decision is the city council's decision,
17 not the planning commission's decision. Moreover, it is not
18 clear the planning commission agreed with the advice of the
19 planning director and applicant concerning the planning
20 commission's authority to deny the requested tentative
21 subdivision approval.

22 The fourth assignment of error is denied.

23 **SIXTH ASSIGNMENT OF ERROR**

24 According to petitioners, Ordinance No. 805, Section
25 4.010 specifies the following minimum street frontage
26 requirements:

1 "Access - Minimum Frontage. Every lot shall abut
2 a street, other than an alley, for at least 50
3 feet."

4 Petitioners identify four lots included in the approved
5 subdivision tentative plan that lack the required 50 feet of
6 street frontage. Petitioners contend approval of lots with
7 less than the required 50 feet of street frontage is error.

8 The challenged decision does not approve a variance
9 from Ordinance No. 805, Section 4.010, or explain how the
10 proposed lots comply with that section. Without a response
11 from respondent or intervenor-respondent to this challenge,
12 we must agree with petitioners.

13 The sixth assignment of error is sustained.

14 **SEVENTH ASSIGNMENT OF ERROR**

15 ORS 197.195(1) requires that limited land use decisions
16 "be consistent with applicable provisions of [the city's]
17 comprehensive plan and land use regulations."⁸ Petitioners
18 contend the challenged tentative plan violates comprehensive
19 plan and land use regulation provisions regarding minimum
20 street standards and access.

21 **A. Relevant Plan and Ordinance No. 805 Requirements**

22 Comprehensive Plan Priority Factor #8 provides, in
23 part:

24 " * * * In the case of development not having

⁸In addition, Ordinance No. 805, Section 3.020 provides a tentative plan may not be approved unless the subdivision "will be in compliance with the Comprehensive Plan and the standards set forth in [Ordinance No. 805]."

1 immediate access to an existing improved arterial
2 or collector, such access must be established and
3 the initial cost therefore should be assumed by
4 the [proposed] development."

5 Ordinance No. 805, Sections 8.010, 8.020(2) and 8.020(7)
6 provide:

7 "Any land division, whether by subdivision,
8 creation of a street or other right-of-way,
9 partitioning or planned unit development, shall be
10 in compliance with the design standards set forth
11 by this ordinance." Ordinance No. 805, Section
12 8.010.

13 "* * * Unless otherwise approved in the tentative
14 development plan, the street right-of-way and
15 roadway surfacing widths shall not be less than
16 the minimum width in feet shown in the following
17 table and shall be in conformance with standards
18 and specifications set forth in Appendix 'A' of
19 this ordinance and other applicable city standards
20 and specifications."⁹ Ordinance No. 805, Section
21 8.020(2).

22 "Whenever existing streets, adjacent to or within
23 a tract, are of inadequate width, additional
24 right-of-way shall be provided at the time of the
25 land division by the developer." Ordinance No.
26 805, Section 8.020(7).

27 According to petitioners, Loper Avenue is the affected
28 collector providing access to the challenged subdivision.
29 Petitioners contend Loper Avenue does not meet minimum

⁹According to the table set forth in the petition for review, Ordinance No. 805 specifies a minimum right-of-way width of 80 feet for collector and continuous local streets and minimum roadway surface widths for such streets of 56 feet and 50 feet, respectively. For local streets of less than 1000 feet, a minimum right-of-way width of 60 feet and a minimum roadway surface width of 40 feet is specified.

1 pavement width requirements.¹⁰ Petitioners also contend
2 none of the five local streets which provide access to Loper
3 Avenue meet the minimum standards for "Continuous Local
4 Streets" and only two of the five meet the pavement width
5 requirements for "Local Streets."

6 Petitioners contend the tentative plan approved by the
7 challenged decision violates the above plan and ordinance
8 requirements because the streets serving the challenged
9 subdivision are substandard and the city did not impose the
10 right-of-way dedication required by Ordinance No. 805,
11 Section 8.020(7).

12 **B. The City's Findings**

13 **1. Plan Priority Factor 8**

14 The city's findings explain that while Plan Priority
15 Factor #8 (quoted in relevant part, supra) states that
16 access to an existing improved collector "must" be
17 established, it also states that the initial cost of doing
18 so "should be assumed by the [proposed] development." The
19 city found Plan Priority Factor #8 did not impose a
20 mandatory requirement that the disputed development assume
21 the cost of improving Loper Avenue to the standard required

¹⁰According to petitioners, Loper Avenue has a pavement width of 30 feet in one location and narrows to 24 feet in another location. Petitioners also contend Loper Avenue lacks sidewalks, but do not cite any requirement that sidewalks be provided.

1 by Ordinance No. 805.¹¹

2 The city council's interpretation of Plan Priority
3 Factor #8 is neither "clearly wrong" nor "beyond all
4 colorable defense." Zippel v. Josephine County, 128 Or App
5 458, 461, 876 P2d 854, rev den 320 Or 272 (1994); Goose
6 Hollow Foothills League v. City of Portland, 117 Or App 211,
7 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89,
8 840 P2d 1354 (1992); Cope v. City of Cannon Beach, 115 Or
9 App 11, 836 P2d 775 (1992), aff'd 317 Or 339 (1993).

10 This subassignment of error is denied.

11 **2. Ordinance No. 805, Sections 8.010 and**
12 **8.020(2)**

13 Although Ordinance No. 805, Section 8.010 requires
14 "compliance with the design standards set forth by this
15 ordinance," Ordinance No. 805, Section 8.020(2) provides,
16 "[u]nless otherwise approved in the tentative development
17 plan, the street right-of-way and roadway surfacing widths
18 shall not be less than the minimum width in feet [specified
19 in Ordinance No. 805]." (Emphasis added.) The city found
20 that the emphasized language of Ordinance No. 805, Section
21 8.020(2) allows the city to decide, in approving a
22 subdivision tentative plan, not to require that existing
23 substandard streets be brought up to the standards required

¹¹The city explained that the substandard condition of Loper Avenue is an existing condition, "with or without the proposed development." Record 13.

1 by Ordinance No. 805. This interpretation of Ordinance No.
2 805 is neither "clearly wrong" nor "beyond all colorable
3 defense."

4 This subassignment of error is denied.

5 **3. Ordinance No. 805, Section 8.020(7)**

6 With regard to the requirement of Ordinance No. 805,
7 Section 8.020(7), quoted supra, the county found:

8 "[T]he only existing street adjacent to or within
9 the subject tract of land being proposed for
10 development is Sunrise Lane, and, even though no
11 issues of inadequacy relative thereto were raised,
12 the developer is proposing to improve said street
13 to those standards required by the Commission."
14 Record 13.

15 Petitioners do not specifically attack the above
16 findings, and we conclude they are adequate to explain why
17 the challenged tentative subdivision approval complies with
18 Ordinance No. 805, Section 8.020(7).

19 This subassignment of error is denied.

20 The seventh assignment of error is denied.

21 The city's decision is remanded.