

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

DESIGN HOME CONSTRUCTION, INC.,)
Petitioner,)
vs.)
CITY OF SILVERTON,)
Respondent,)
and)
DANNY JOHNSON and LOUISE JOHNSON,)
Intervenors-Respondent.)

LUBA No. 96-138

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Mark D. Shipman, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Wallace W. Lien, P.C.

Richard D, Rodeman, Corvallis, filed a response brief and argued on behalf of respondent.

Donald M. Kelley, Silverton, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Kelley & Kelley.

LIVINGSTON, Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 02/28/97

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 granting preliminary plat approval of a residential
5 subdivision.

6 **MOTION TO INTERVENE**

7 Danny Johnson and Louise Johnson (intervenors), the
8 applicants below, move to intervene in this proceeding on
9 the side of the respondent. There is no opposition to the
10 motion, and it is allowed.

11 **FACTS**

12 On March 8, 1996, intervenors submitted an application
13 for preliminary plat approval of a 13-lot subdivision,
14 including a request for a variance, to the city planning
15 department. The proposed subdivision lies on either side of
16 a proposed roadway. Record 157. The variance, requested
17 under Silverton Zoning Ordinance (SZO) 17.16.030, was to
18 "[r]educe the required right of way from 60 feet to 40 feet
19 with a 10 foot public utility easement on each side with a
20 sidewalk on one side." Record 186.

21 A city planner reviewed the application and notified
22 intervenors on March 14, 1996 that certain additional items
23 would be required within the next 10 days. One of these
24 items was a "[w]ritten Applicant statement dealing with the
25 subdivision and variance." Record 171. The request for a
26 written applicant statement was apparently made pursuant to

1 Part IV of the application form.¹ Although intervenors
2 submitted additional information in response to the city
3 planner's March 14, 1996 letter, they did not submit a
4 written applicant statement. They did, however, invite the
5 city planner to "advise if there are further steps we need
6 to take in regard to your letter of March 14, 1996." Record
7 170. The city planner did not request additional
8 information.

9 After two hearings, the city planning commission
10 approved the proposed subdivision on May 14, 1996 in
11 Resolution No. PC-96-09. Record 91-95. Petitioner appealed
12 the decision to the city council, which held a de novo
13 hearing on July 1, 1996 and adopted a motion affirming the
14 decision of the planning commission. Record 17.

15 This appeal followed.

¹Part IV of the application form states:

"A written statement shall be submitted with this application
and shall contain the following information:

- "a) The character of the proposed development;
- "b) The proposed manner of financing;
- "c) The method proposed to maintain any private common open
areas, buildings, private thoroughfares or other
facilities;
- "d) The proposed time schedule of development."

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Written Statement Requirement**

3 Petitioner contends the city failed to comply with
4 applicable law by approving the preliminary plat application
5 without requiring intervenors to provide a written narrative
6 statement, required by the subdivision application form,
7 pertaining to the character of the subdivision. The city
8 and intervenors (respondents) contend in their briefs (1)
9 that petitioner may not raise this issue, because it was not
10 raised below and is therefore outside the scope of our
11 review under ORS 197.835(3);² and (2) that the written
12 narrative is not required by the city's comprehensive plan
13 or land use regulations. At oral argument petitioner
14 acknowledged the issue of the written narrative was not
15 raised below, but responded that because the notice of the
16 hearings before the planning commission and city council did
17 not list the applicable criteria from the ordinance and plan
18 that applied to the application, as required by ORS
19 197.763(3)(b),³ ORS 197.835(4)(b) permits this Board to

²ORS 197.835(3) states:

"Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

³ORS 197.763(3) states, in relevant part:

"The notice provided by the jurisdiction shall:

** * * * *

1 consider the issue of the missing written narrative.

2 ORS 197.835(4) provides, in relevant part:

3 "A petitioner may raise new issues to the board
4 if:

5 "* * * * *

6 "(b) The local government failed to follow the
7 requirements of ORS 197.763(3)(b), in which
8 case a petitioner may raise new issues based
9 upon applicable criteria that were omitted
10 from the notice. However, the board may
11 refuse to allow new issues to be raised if it
12 finds that the issue could have been raised
13 before the local government; or

14 "* * * * *" (Emphasis added.)

15 Although the written narrative is requested on the
16 city's application form, petitioner has not identified an
17 applicable legal standard or criterion that requires its
18 submission. Therefore, petitioner may not raise new issues
19 based on the city's failure to include such a criterion on
20 the notice of hearings. Furthermore, since petitioner has
21 not shown the failure to require the written narrative
22 violates any legal standard, petitioner has stated no basis
23 for reversal or remand. Nalette v. City of Klamath Falls,
24 28 Or LUBA 709, aff'd 134 Or App 414, rev den 321 Or 512
25 (1995); Frankton Neigh. Assoc. v. Hood River County, 25 Or
26 LUBA 386, 389 (1993).

"(b) List the applicable criteria from the ordinance and the
plan that apply to the application at issue;

"* * * * *"

1 This subassignment of error is denied.

2 **B. Additional Variance Requirement**

3 Intervenor applied for and were granted a variance to
4 reduce the required right-of-way from 60 feet to 40 feet.
5 Petitioner contends intervenors should also have been
6 required to obtain a second variance to reduce the curb
7 width of the right-of-way from 34 feet, which is required by
8 SZO 17.16.030, to the 30 feet shown on the preliminary plat.

9 Respondents answer that this issue was not raised
10 during the local proceedings and therefore is outside of the
11 scope of our review under ORS 197.835(3). At oral argument,
12 petitioner contended that because the notice of the hearings
13 before the city planning commission and city council did not
14 include a reference to SZO 17.16.030, they are permitted by
15 ORS 197.835(4)(b) to raise this issue on appeal.

16 The notice of the hearings does not include a reference
17 to SZO 17.16.030. Therefore, petitioner may raise the issue
18 of a required variance to SZO 17.16.030 before this Board.
19 Cummings v. Tillamook County, 26 Or LUBA 139, 145 (1993).

20 SZO 17.16.030(B) states:

21 "The street right-of-way in or along the boundary
22 of a subdivision shall have the following minimum
23 width, except a boundary street may be half such
24 width where it is apparent that the other half
25 will be dedicated from adjacent properties as
26 follows:

27

Right-of-Way Width	Curb-to-Curb Width
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"* * * * *

Minor Streets	60 feet	34 feet
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"* * * * *"

1 Intervenors argue the paving width criterion is a
2 "design parameter not requiring a variance." Intervenors'
3 Brief 6. The city argues that petitioner has failed to show
4 why the right-of-way width and the curb-to-curb width could
5 not have been addressed in one variance, rather than two.

6 Although the text of SZO 17.16.030(B) addresses only
7 street right-of-way, the inclusion of curb-to-curb width in
8 the accompanying table appears to establish a mandatory
9 standard for curb-to-curb width. The challenged decision
10 does not address that standard in any way. While the city
11 may be correct that the curb-to-curb width standard could
12 have been interpreted, in the challenged decision, as
13 included in the variance concerning right-of-way width, it
14 was not so interpreted.

15 This subassignment of error is sustained.

16 The first assignment of error is sustained, in part.

17 **SECOND ASSIGNMENT OF ERROR**

18 Petitioner attacks the findings in support of the
19 challenged decision on the ground they do not satisfy the
20 requirements of ORS 227.173(2), which states:

21 "Approval or denial of a permit application,
22 expedited land division or limited land use
23 decision shall be based upon and accompanied by a

1 brief statement that explains the criteria and
2 standards considered relevant to the decision,
3 states the facts relied upon in rendering the
4 decision and explains the justification for the
5 decision based on the criteria, standards and
6 facts set forth."

7 See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3,
8 20-21, 569 P2d 1063 (1977); Heiller v. Josephine County, 23
9 Or LUBA 551, 556 (1992).

10 Petitioner identifies certain approval standards that
11 it contends are not addressed by the findings. These
12 include certain comprehensive plan provisions, the SZO
13 standards generally, and the variance standard. Petitioner
14 also contends certain findings with respect to issues raised
15 below should have been made that were not made. Intervenors
16 contend the issue of the findings is outside the Board's
17 scope of review under ORS 197.835(3) because it was not
18 raised below.

19 A petitioner is not required to anticipate the actual
20 findings a local government ultimately adopts in support of
21 its final decision or question the adequacy of the evidence
22 accepted into the record to support such findings. Lucier
23 v. City of Medford, 26 Or LUBA 213, 216 (1993). Petitioner
24 may therefore raise the adequacy of the adopted findings as
25 an issue before this Board.

26 **1. Comprehensive Plan Standards**

27 Petitioner contends the findings (in particular,
28 Finding 6) are inadequate with respect to the Urbanization

1 Element and the Natural Hazards Element in the city's
2 comprehensive plan. Both elements contain specific
3 policies: the Urbanization Element has seven policies
4 addressing residential development, and the Natural Hazards
5 Element has two policies addressing development in natural
6 hazard areas.

7 Intervenor's argue Finding 6 is "extraneous to the
8 City's approval because the City has not incorporated its
9 Comprehensive Plan into its land use regulation." Finding 6
10 states:

11 "[T]he proposed use is consistent with applicable
12 policies of the Silverton Comprehensive Plan, in
13 particular the Urbanization Element, and with the
14 requirement that all lots which have slopes
15 greater than 15% be identified on the final plat
16 and that a site specific geo-technical report be
17 provided to the Building Official prior to any
18 building permit approval the goals and policies of
19 the Natural Hazards Element will be met."

20 The failure of the SZO to incorporate specifically any
21 or all of the standards of the comprehensive plan as
22 relevant approval standards does not, of itself, preclude
23 the city from applying them. Whether comprehensive plan
24 policies apply directly to land use applications depends
25 largely on the city's interpretation of its plan and land
26 use regulations. Shelter Resources, Inc. v. City of Cannon
27 Beach, 27 Or LUBA 229, 236, aff'd 129 Or App 433 (1994). In
28 the absence of a local interpretation, where a comprehensive
29 plan or land use regulation does not explicitly designate
30 which portions of the plan or land use regulation operate as

1 mandatory land use approval criteria, a case-by-case
2 inquiry, examining the wording and context of the particular
3 plan and land use regulation provisions, is required to
4 identify mandatory approval standards. Eskandarian v. City
5 of Portland, 26 Or LUBA 98, 104 (1993).

6 The challenged decision specifically identifies the
7 Urbanization Element and the Natural Hazards Element as
8 relevant to the approval of the preliminary plat
9 application. We are required to defer to the city's
10 determination of which local code or plan provisions are
11 approval criteria unless it is indefensible. DeBardelaben
12 v. Tillamook County, 142 Or App 319, 325, 922 P2d 683
13 (1996). The city's identification, in the challenged
14 decision, of the Urbanization Element and the Natural
15 Hazards Element as applicable standards is not indefensible,
16 and we defer to it.

17 Intervenors contend that because the challenged
18 decision is a limited land use decision, governed by ORS
19 197.195, the findings may be more cursory than they would
20 have to be for a land use decision. We reject this
21 contention. ORS 227.173(2), which governs findings, makes
22 no such distinction. We agree with petitioner that the
23 findings in the challenged decision do not adequately
24 identify and address the applicable standards or policies
25 contained in the Urbanization Element and the Natural
26 Hazards Element of the city's plan.

1 **2. SZO Standards**

2 Petitioner contends the findings (in particular,
3 Finding 7) do not adequately address applicable zoning
4 standards. Finding 7 states:

5 "[T]he proposed 13 (thirteen) lot single family
6 residential development complies with the
7 applicable zoning standards of the R-1 Single
8 Family district within Ordinance No. 498 and the
9 requirements outlined within Chapter 17 on
10 Subdivisions."

11 We agree with petitioner this finding fails to satisfy
12 ORS 227.173(2) and is unacceptably conclusory.

13 **3. Variance Standard**

14 Petitioner contends, in connection with the variance
15 that was taken with respect to right-of-way width, that
16 while the findings adequately identify the criteria that
17 must be satisfied to justify a variance, they do not discuss
18 the facts that support a conclusion that the criteria are
19 satisfied.

20 The variance criteria stated in SZO 17.24.020 are:

21 "A. Special conditions or circumstances peculiar
22 to the property under consideration make a
23 variance necessary;

24 "B. The variance is necessary for the proper
25 development of the subdivision and the
26 preservation of property rights and values;

27 "C. The variance will not at present or hereafter
28 be detrimental to the public welfare, or
29 injurious to other properties adjacent to or
30 in the vicinity of the proposed subdivision."

31 In response to these criteria, the city made the

1 following findings:

2 "10. [T]he application also contained a concurrent
3 request to reduce the street right of way
4 from 60 feet to 40 and to allow a sidewalk on
5 only one side of the street. The variance
6 request was reviewed consistent with the
7 review criteria outlined in Chapter
8 17.24.020.

9 "11. [B]ecause of steep slope constraints the
10 request for concurrent variances was
11 approved." Record 7.

12 The city's findings identify steep slope constraints as
13 a reason to grant a variance, but do not explain why, in
14 this case, a variance is "necessary," and so are inadequate
15 with respect to SZO 17.24.020(B). They do not address
16 SZO 17.24.020(C) at all. We agree with petitioner the
17 findings with respect to SZO 17.24.020 do not satisfy
18 ORS 227.173(2).

19 **4. Findings With Respect to Issues Raised Below**

20 Petitioner's final argument relates to findings that
21 petitioner contends should have been made, but were not.⁴
22 Petitioner maintains that neighbors raised "relevant issues
23 with respect to containing off site surface water drainage
24 and other debris, and with future development plans of the
25 remainder parcel." Petition for Review 12. Petitioner

⁴Petitioner again raises the missing narrative statement, this time to contend the findings with respect to the narrative statement requirement are inadequate. Because we conclude above the requirement for a narrative statement is not imposed by identified plan or land use regulations, we do not address the contention under this assignment of error.

1 cites to Record 130, the minutes of the planning commission
2 hearing, where testimony was received concerning "storm
3 drainage" and "water drainage"; and Record 135, where there
4 is a reference to "surface run off water." Petitioner
5 argues these issues are relevant to compliance with SZO
6 17.08.010(2)(i), which lists, as a preliminary plan
7 requirement, the "location of any drainage ways or easements
8 in or adjacent to the proposed subdivision."

9 Findings must address and respond to specific issues,
10 raised in the proceedings below, that are relevant to
11 compliance with applicable approval standards. Hillcrest
12 Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293,
13 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or
14 App 849, 853, 604 P2d 896 (1979); McKenzie v. Multnomah
15 County, 27 Or LUBA 523, 544-45 (1994); Heiller v. Josephine
16 County, 23 Or LUBA 551, 556 (1992). However, the issues
17 must be raised with enough specificity to permit the local
18 decision maker to address them. We disagree with petitioner
19 that the comments quoted above sufficiently raise as an
20 issue compliance with SZO 17.08.010(2)(i), which addresses
21 the location of drainage ways or easements.

22 Notwithstanding the deficiencies in the findings,
23 respondents invite us to affirm under ORS 197.840(11)(b)
24 that part of the decision supported by the record.⁵

⁵ORS 197.840(11)(b) provides:

1 Respondents rely on the staff report which was provided to
2 the city planning commission and city council and which
3 contains more detailed observations in relation to specific
4 standards, the planning commission's consideration of
5 "various aspects related to the subdivision," and statements
6 from the engineering firm that assisted with petitioner's
7 application.

8 We decline respondents' invitation. As we stated in
9 Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101,
10 122-23 (1995), ORS 197.829(2) and ORS 197.835(11)(b) allow
11 us to remedy oversights and imperfections in local
12 government land use decisions. However, we need not take
13 over the responsibilities of local governments, such as the
14 interpretation of comprehensive plans and land use
15 regulations, the preparation of adequate findings and the
16 weighing of evidence. See also Squires v. City of Portland,
17 ___ Or LUBA ___ (LUBA No. 95-187, July 1, 1996), slip op 12
18 n4; Canby Quality of Life Committee v. City of Canby, 30 Or
19 LUBA 166, 173 (1995); Waugh v. Coos County, 26 Or LUBA 300,
20 306-08 (1993).

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

- 1 The second assignment of error is sustained, in part.
- 2 The city's decision is remanded.