

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

3
4 BARRY SULLIVAN and DALE BAKER,)
5))
6 Petitioners,)
7))
8 vs.))
9))
10 CITY OF WOODBURN,))
11))
12 Respondent,))
13))
14 and))
15))
16 GARRY LaPOINT,))
17))
18 Intervenor-Respondent.)

LUBA No. 97-068
FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Woodburn.

22
23 Vance M. Croney, Salem, filed the petition for review
24 and argued on behalf of petitioners.

25
26 No appearance by respondent.

27
28 Dale L. Crandall, Salem, filed the response brief and
29 argued on behalf of intervenor-respondent.

30
31 LIVINGSTON, Referee; HANNA, Chief Referee, participated
32 in the decision.

33
34 REMANDED 07/03/97

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a limited land use decision of the
4 city council approving a site plan for a gas station.

5 **MOTION TO INTERVENE**

6 Gary LaPoint (intervenor), the applicant below, moves
7 to intervene on the side of the respondent. There is no
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenor wishes to construct a gas station with a car
11 wash on a vacant lot within the city's General Commercial
12 (GC) zone. In Sullivan v. City of Woodburn, 31 Or LUBA 192
13 (1996) (Sullivan I), we remanded intervenor's site plan for
14 additional findings on two site plan review criteria,
15 Woodburn Zoning Ordinance (WZO) 11.020(d) and (e).¹ Five

¹WZO 11.020 provides:

"Site Plan Composition. The following shall be required for any application for Site Plan Review:

- "(a) A site plan, drawn to scale, showing the proposed layout of all structures and other improvements including, where appropriate, driveways, pedestrian walks, landscaped areas, fences, walls, off-street parking and loading areas, and railroad tracks. The site plan shall indicate the location of entrances and exits and the direction of traffic flow into and out of off-street parking and loading areas, the location of each parking space and each loading berth and areas of turning and maneuvering vehicles. The site plan shall indicate how utility service and drainage are to be provided.
- "(b) A landscape plan, drawn to scale, showing the location of existing trees proposed to be removed and to be retained

1 months after our decision in Sullivan I, intervenor
2 submitted a "modified" site plan for city council review
3 during remand proceedings.²

4 The planning director concluded the modified site plan
5 was not in substantial conformance with the original site
6 plan and recommended the city council refuse to consider the
7 modified site plan. The staff report explains:

8 "The following differences [between the original
9 and modified site plans] should be noted:

10 "• The original site plan consisted of 828
11 square feet for offices and 908.16 square
12 feet for the car wash for a total of 1,736.16
13 square feet.

14 "• The new submittal has a reconfigured and
15 combined car wash and office complex. The
16 total square footage is 2,900 square feet,

on the site and the location and design of landscaped
areas, and other pertinent landscape features.

"(c) Architectural drawings or sketches, drawn to scale, in
sufficient detail to permit computation of yard
requirements and showing all elevations of the proposed
structures and other improvements as they will appear on
completion of construction.

"(d) Specifications as to type, color and texture of exterior
surfaces of proposed structures.

"(e) A sign plan, drawn to scale, showing the location, size,
design, material, color and methods of illumination of
all exterior signs.

"(f) Shadow patterns of proposed structures (showing shadow
during the Solar Access Standard period)."

²As explained in the staff report, Record 26, intervenor originally sought approval of a Texaco gas station and car wash. During the proceedings on remand, intervenor sought approval of an Exxon gas station and car wash.

1 this is 1,163.84 square feet larger than the
2 original structures.

3 "• The original site plan shows the office to
4 the easterly property line and the car-wash
5 on the southerly portion of the site.

6 "• The new submittal shows the entire facility
7 on the southerly portion of the site.

8 "• The original site plan had two buildings; the
9 new submittal consists of one building.

10 "• The canopy for the gas pumps on the new
11 submittal is 4,048 square feet while the
12 canopy on the original site plan is 4,508
13 square feet.

14 "• The trash enclosure has been repositioned and
15 a vacuum station added on the eastern portion
16 of the property in the new submittal.

17 "• The parking configuration has changed in the
18 new submittal.

19 "• The planter-strip on the eastern portion of
20 the property has been reconfigured in the new
21 submittal to reflect the removal of the
22 office complex on that portion of the site.

23 "• The LUBA remand requires the City Council to
24 address the Texaco sign and color scheme and
25 site plan[,] not the new submittal of the
26 Exxon service station." Record 31-32.

27 The city council conducted a remand hearing and
28 approved the modified site plan. This appeal followed.

29 **FIRST ASSIGNMENT OF ERROR**

30 **A. New Site Plan**

31 Petitioner contends the city's approval of the modified
32 site plan violates the WZO, because the modified site plan
33 is not in substantial compliance with the original site

1 plan. Petitioner argues that intervenor "has submitted a
2 new site plan on the coattails of the original." Petition
3 for Review 5.

4 The challenged decision contains only three findings.
5 The first two findings address WZO 11.020(d) and (e)
6 separately. The third finding states:

7 "Applicant submitted a modified site layout
8 diagram, identified as the 'Proposed Submittal',
9 and at hearing, through counsel, explained the
10 modifications. The 'Proposed Submittal' is in
11 substantial compliance with the standards for
12 review of a site plan, and is substantially
13 similar to the site layout diagram submitted with
14 the application originally, such that it does not
15 substantially change the application nor
16 substantially alter the consequences, upon other
17 landowners or the public, of this proposed use of
18 the subject property." Record 4.

19 A review of the two site plans, Record 104-06, confirms
20 the assessment of the planning director and petitioner that
21 very little beyond the location of the gas pumps is carried
22 forward from the original site plan to the modified site
23 plan. A reasonable person simply could not conclude that
24 the two plans are substantially similar. The finding that
25 the consequences of adopting the modified plan and the
26 original plan are substantially similar does not answer
27 whether or why the modified plan satisfies the site plan
28 review criteria stated in WZO 11.020.

29 **B. New Application**

30 Petitioner contends the modified site plan is a new
31 site plan that requires a new application, notice and

1 hearing. Petitioner does not identify any WZO provision
2 that requires a new application when modifications to an
3 application are made.

4 In Wentland v. City of Portland, 23 Or LUBA 321, 326
5 (1992), we explained that when an application is modified on
6 remand in small ways that do not cause it to significantly
7 differ from the original application, the local government
8 does not err in failing to require that a new application be
9 filed. In Bonner v. City of Portland, 11 Or LUBA 40, 60
10 (1984), we allowed the city "substantial latitude" in
11 determining whether revisions to an application, made during
12 the local hearing and appeal process, require treatment as a
13 new application.

14 In this case, intervenor, the same applicant as in
15 Sullivan I, seeks site plan review of a gas station
16 development on the same property as in Sullivan I.
17 Petitioner was allowed to participate in the process leading
18 to approval of the modified site plan. Although
19 intervenor's modified site plan differs from the original
20 site plan in many significant respects, petitioner's
21 substantive rights have not been prejudiced by the city's
22 election to treat the submission of the modified site plan
23 as a continuation of the original application. See
24 Billington v. Polk County, 13 Or LUBA 125, 135-36 (1985).
25 The city may, in the absence of a code prohibition or some
26 other obstacle identified by petitioner, find the modified

1 proposal to be a continuation of the original application.³

2 Because we agree with petitioner that the modified site
3 plan is not substantially similar to or (to use petitioner's
4 words) "in substantial compliance with" the original site
5 plan, we sustain the first assignment of error.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner contends the challenged decision is not
8 supported by substantial evidence in the whole record. As
9 stated above, we agree the evidence in the record to which
10 we are cited overwhelmingly contradicts the city's
11 conclusion that the modified site plan is substantially
12 similar to the original site plan.

13 The second assignment of error is sustained.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner contends the challenged decision does not
16 contain adequate findings with respect to the modified site
17 plan.

18 Findings must (1) identify the relevant approval
19 standards, (2) set out the facts which are believed and
20 relied upon, and (3) explain how those facts lead to the
21 decision on compliance with the approval standards.

22 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-

³Petitioner does not contend the applicable WZO criteria have changed since the application for site plan review was filed in 1995. We do not reach the issue of whether a new application should be required when the applicable code standards are amended between the city's consideration of an original site plan and a later, significantly altered site plan.

1 21, 569 P2d 1063 (1977); Heiller v. Josephine County, 23 Or
2 LUBA 551 556 (1992). The city's finding, quoted above, that
3 the modified site plan is substantially similar to the
4 original site plan is unacceptably conclusory. Because the
5 two plans are substantially different, the city must apply
6 each subsection of WZO 11.020 (with the exception of WZO
7 11.020 (d) and (e), where findings have already been made
8 and not appealed) to the modified site plan and make
9 appropriate findings.

10 The third assignment of error is sustained.

11 The city's decision is remanded.