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

SUE JOHNSTON and ROBLEY W.)
JOHNSTON,)
)
Petitioners,)
)
vs.)
)
CITY OF ALBANY,)
)
Respondent,)
)
and)
)
RICHARD B. LEFOR, JACQUELINE O.)
LEFOR, DAVID KRAEMER, and)
THORNTON COFFEY, dba PERIWINKLE)
PARK PARTNERSHIP,)
)
Intervenors-Respondent.)

LUBA No. 97-076
FINAL OPINION
AND ORDER

Appeal from City of Albany.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson Kloos & Sherton.

No appearance by respondent.

David Hilgemann, Salem, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Graves & Hilgemann.

LIVINGSTON, Administrative Law Judge; HANNA, Administrative Law Judge, participated in the decision.

REMANDED 01/13/98

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 Petitioners appeal a decision by the city planning staff
4 to approve a site plan review application for a 68-unit
5 manufactured home park.

6 **MOTION TO INTERVENE**

7 Richard B. LeFlor, Jacqueline O. LeFlor, David Kraemer
8 and Thornton Coffey, dba Periwinkle Park Partnership
9 (intervenors), move to intervene on the side of respondent.
10 There is no opposition to the motion, and it is allowed.

11 **FACTS**

12 Intervenors seek to establish a 68-unit manufactured home
13 park on a site zoned Residential Single Family District (RS-
14 6.5). The precise size of the site is in dispute; it is
15 approximately 10 acres. The subject property is bordered to
16 the north by Grand Prairie Road, and to the south by
17 Periwinkle Creek. Under Albany Development Code (ADC) 3.050,
18 manufactured home parks are permitted in an RS-6.5 zone
19 subject to site plan review.

20 Intervenors submitted their original site plan review
21 application on July 29, 1996. Record 306. After a comment
22 period, and in response to issues raised by neighboring
23 property owners, intervenors submitted a revised site plan on
24 December 2, 1996, and a second revised site plan on February
25 18, 1997. Record Exhibits B, D. The city mailed notice to
26 neighboring property owners on February 21, 1997, providing a

1 14-day comment period that closed on March 7, 1997. Record
2 120. The city planning division issued its decision approving
3 intervenors' application, with conditions, on March 31, 1997.
4 Record 5. On April 4, 1997, the city issued an amended notice
5 of decision, including an additional finding of fact and
6 condition of approval regarding storm drainage. Record 1.

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners contend that the city failed to comply with
10 an applicable provision of the city's land use regulations by
11 acting on an application that includes property not owned by
12 the applicants. Petitioners argue that the city's decision
13 violates ADC 1.203(2), which requires that a land use
14 application shall include a

15 "[s]igned statement indicating that the property
16 affected by the application is in the exclusive
17 ownership or control of the applicant, or that the
18 applicant has the consent of all partners in
19 ownership of the affected property."

20 **A. Tax Lot 115**

21 The proposed manufactured home park includes all or
22 portions of five tax lots, which are numbered 100, 102, 103,
23 113, and 115. Record 18; Record Exhibit H. Tax lot 115 is
24 located on the northern edge of the subject property, and is
25 owned by Larry and Linda Klinefelter. The eastern half of tax
26 lot 115 contains a house owned and occupied by the
27 Klinefelters; the western half contains a septic system and
28 drain field for that house. The western half of tax lot 115

1 is included as part of the proposed manufactured home park in
2 the application approved by the city.

3 Petitioners contend that intervenors failed to obtain the
4 necessary consent of the Klinefelters to include the western
5 half of tax lot 115 in the development application.
6 Petitioners point to a letter in the record from the
7 Klinefelters to the city planner in which they raise numerous
8 objections to the application. Record 82-83.

9 Regarding the ownership of the western portion of tax lot
10 115, the findings set forth in the staff report state:

11 "Tax Lot 115 is subject to the terms and provisions
12 of a 1976 agreement * * *. In that agreement, a
13 former owner had agreed to convey the western
14 portion of the property in exchange for connection
15 to city services when available. This agreement has
16 not been challenged by any party, and accordingly
17 the portion of TL 115 has been included in the
18 subject property, the 1976 agreement serving as
19 consent to the application." Record 19.

20 The 1976 agreement was entered into by the Easdales and
21 the Wingos, when tax lot 115 was conveyed by the Easdales to
22 the Wingos. Under the agreement, the Wingos took title to
23 both the eastern portion of tax lot 115, containing the house,
24 and to the western portion, containing the drain field.
25 However, the agreement provides that the Wingos, or their
26 successors in interest, must reconvey the western portion of
27 the property back to the Easdales, or to their successors in
28 interest, within six months after the city provides an
29 available sewer connection to the property. Record 43-46.
30 The Klinefelters purchased tax lot 115 subject to the 1976

1 agreement.

2 Petitioners contend that the 1976 agreement, standing
3 alone, does not provide evidentiary support for the city's
4 finding that the requisite consent has been obtained under ADC
5 1.203(2). We agree. The 1976 agreement requires that the
6 Klinefelters must connect to the city sewer system within six
7 months after the city makes connection to a sewer line in an
8 adjoining street or sewer easement available. Record 45.
9 Only after the connection with the sewer line is made and the
10 existing septic system is abandoned must the Klinefelters
11 reconvey the western portion of tax lot 115 back to the
12 sellers. Record 46. Until that time, under the terms of the
13 agreement, the Klinefelters retain full control and possession
14 of tax lot 115 in its entirety. Under ADC 1.203(2), no
15 portion of that property can be included in a development
16 application without a signed statement indicating that
17 intervenor has obtained the consent of the Klinefelters. The
18 record contains no such signed statement. The city's
19 determination that the mere existence of the 1976 agreement
20 establishes the requisite consent to the application was in
21 error.¹

¹The copy of the 1976 agreement in the record before this Board contains only the signatures of the Easdales, and not the signatures of the Wingos, who are the Klinefelters' predecessors in interest. Record 46. Petitioners argue that the agreement is therefore unenforceable. If there is no version of the 1976 agreement that contains the signatures of the Wingos, petitioners may be correct. See, e.g., Martin v. Allbritton, 124 Or App 345, 349, 862 P2d 569 (1993). However, since we conclude that even if the agreement were enforceable, it would not constitute consent, we need not reach petitioners' argument that the agreement is not enforceable.

1 Intervenors contend that petitioners do not have standing
2 to raise an objection based on the lack of consent from the
3 Klinefelters, because only the Klinefelters can raise this
4 issue. Intervenors are incorrect. Petitioners appeared
5 below, and are entitled to challenge the city's conclusion
6 that the consent requirement of ADC 1.203(2) is satisfied by
7 the terms of the 1976 agreement. Although petitioners are not
8 parties to the 1976 agreement, petitioners have standing to
9 challenge the city's reliance on that agreement to satisfy an
10 applicable approval criterion.

11 This subassignment of error is sustained.

12 **B. Tax Lots 100 and 113**

13 Petitioners contend that the city's decision violates ADC
14 1.203(2) because there is no evidence in the record that a
15 city official with authority to do so consented to the
16 inclusion of city-owned portions of tax lots 100 and 113 in
17 the subject application. Regarding the ownership of tax lots
18 100 and 113, the staff report states:

19 "The ownership of a portion of TL 100 over
20 Periwinkle Creek became an issue when it was
21 discovered in early January 1997 that the City of
22 Albany had apparently received title in 1975 (Linn
23 County Vol 113, Page 116) but a closer examination
24 of the legal description disclosed an incorrect
25 bearing that the applicant was willing to contest.
26 The chain of title could not be resolved without
27 litigation. In lieu of litigation, the City agreed
28 to consent to the application due to the clouded
29 ownership interest of a portion of TL 100 in
30 exchange for other consideration.

31 "* * * The applicant negotiated with the City for
32 the acquisition of Tax Lot 113. The City agreed to
33 release a portion of TL 113 in exchange for other

1 consideration and consented to the application."
2 Record 18-19.

3 Petitioners argue that the record contains only
4 statements by city planning division staff that the city has
5 agreed to allow certain city-owned portions of tax lots 100
6 and 113 to be included in the application, and that

7 "[t]here are no actual documents in the record,
8 signed by a city official with responsibility for
9 the City's proprietary interests in real property,
10 allowing the City's portions of Tax Lots 113 and 100
11 to be included in a private manufactured home park."
12 Petition for Review 10-11.

13 We agree. ADC 1.203(2) requires a "[s]igned statement
14 indicating that * * * the applicant has the consent of all
15 partners in ownership of the affected property." Intervenors
16 point to the above-quoted findings set forth in the city staff
17 report as evidence that the city consented to the application.
18 However, the city's findings, which were issued as part of the
19 final decision, do not constitute substantial evidence in the
20 record supporting that decision.

21 Intervenors also argue that there is "ample evidence that
22 duly authorized representatives of [the city] consented to the
23 inclusion" of city-owned portions of tax lots 100 and 113.
24 Response Brief 9. First, we note that even if intervenors are
25 correct, the applicable criterion is not satisfied. ADC
26 1.203(2) requires that a land use application must include the
27 signed statement of the applicant, indicating that the
28 applicant either owns the property or has obtained the consent
29 of those who do. Aside from the above-quoted findings,

1 intervenors point only to a letter from an associate city
2 planner to intervenors stating that "the city has consented"
3 to including portions of the tax lots at issue as part of the
4 application. Record 59. However, that letter is dated March
5 11, 1997, which is one day after the close of the record, and
6 even if the letter had been included in the record, the
7 planners' statement would not satisfy ADC 1.203(2).

8 This subassignment of error is sustained.

9 The first assignment of error is sustained.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioners contend that the city failed to comply with
12 provisions of the city's land use regulations applicable to
13 manufactured home park applications containing land within a
14 floodplain district. Specifically, petitioners argue that,
15 under applicable code provisions, the city was required to
16 process intervenors' application using a "Type III" process,
17 and that its failure to provide a required public hearing
18 prejudiced petitioners' substantial rights.

19 ADC 6.080 provides that the city's floodplain district
20 regulations, which are set forth in ADC 6.070 to 6.170, apply

21 "to all areas within the City of Albany that are
22 subject to inundation from a 100-year flood. These
23 areas are depicted on federal Flood Insurance Rate
24 Maps (FIRMs) and Floodway Maps by the letter A, AE,
25 or AO."

26 In its decision, the city concludes that, under the applicable
27 FIRMs, "for the stretch of Periwinkle Creek that flows through
28 the subject property, Zone A is contained within the channel

1 of the creek on the subject property." Record 30-31.
2 Specific regulations set forth at ADC 6.131 apply to
3 manufactured home parks that are planned in a floodplain
4 district:

5 "Manufactured home parks and manufactured home
6 subdivisions proposed in the floodplain district
7 shall be reviewed by the Planning Division.
8 Notwithstanding other provisions of this code, all
9 manufactured home park and subdivision applications
10 which contain land within the floodplain district
11 shall be processed under a Type III process. In
12 addition to the general review criteria applicable
13 to manufactured home parks and subdivisions in
14 Article 10, application for such within the
15 floodplain district shall include an evacuation plan
16 indicating alternate vehicular access and escape
17 routes." (Emphasis added).

18 Notwithstanding its determination that the subject
19 property contains Zone A land that is subject to inundation by
20 a 100-year flood, the findings adopted by the city conclude
21 that the provisions of ADC 6.131 relating to manufactured home
22 parks in floodplain districts do not apply because there will
23 be no homes placed in the floodplain area:

24 "The proposed development will be reasonably safe
25 from flooding because that portion of the subject
26 property within Periwinkle Creek that has been
27 identified as a flood hazard area, Zone A, has been
28 excluded from the proposed development and set aside
29 for open/ recreational space. The flood hazard area
30 will not be improved for the proposed development.
31 All manufactured homes will be sited on the portion
32 of the property outside the flood hazard area and
33 access to the proposed development will not be
34 impeded by the flood hazard area. Therefore, the
35 provisions for flood plain land use [ADC 6.070-
36 6.160], and particularly a manufactured home
37 development [ADC 6.131], are not applicable to this
38 request." Record 31. (Bracketed text in original.)

39 Petitioners argue, and we agree, that the above-quoted

1 findings fail to establish that the subject application does
2 not "contain land within the floodplain district," which is
3 the sole criterion for whether the provisions of ADC 6.131
4 apply. Further, the city's finding that "[t]he flood hazard
5 area will not be improved for the proposed development" cannot
6 be reconciled with the conditions of approval imposed by the
7 city that require intervenors to construct a 10-foot wide
8 paved bicycle/pedestrian path and an access ramp within the
9 flood hazard area. Record 7-8.

10 We conclude that the city's decision does not comply with
11 applicable provisions of the floodplain regulations set forth
12 in ADC 6.070 to 6.170, and that the decision must be remanded
13 for application of those provisions, and for any applicable
14 Type III procedures required by ADC 6.131. See Venable v.
15 City of Albany, 149 Or App 274, ___ P2d ___ (1997).

16 The second assignment of error is sustained.

17 **THIRD ASSIGNMENT OF ERROR**

18 **A. Access to Evidence**

19 Petitioners contend that during the course of the
20 proceedings below, they were improperly denied access to
21 certain documents related to the proposed mobile home park
22 that were submitted to the city planning staff prior to the
23 date the original application was filed. In response,
24 intervenors submit two affidavits of city staff who state that
25 petitioners were informed that any documents submitted to the
26 city by intervenors prior to the application date should not

1 be considered part of the application file. However,
2 according to intervenors and the city staff affidavits,
3 petitioners were never denied access to the entire file,
4 including the pre-application documents, and in fact had
5 regular access to the entire file. Based on the affidavits
6 submitted by both parties, we agree with intervenors.

7 This subassignment of error is denied.

8 **B. Acceptance of Evidence after Close of Comment Period**

9 Petitioners assert that the city improperly accepted
10 evidence from intervenors after the close of the final comment
11 period on March 7, 1997. Petitioners point to four documents
12 in the record that were received by the planning division
13 after March 7, 1997, and which were specifically relied upon
14 by the city in making the challenged decision. Among those
15 documents is the 1976 agreement on which the city based its
16 determination that the applicant had satisfied the "consent"
17 requirement of ADC 1.203(2), and which is the subject of
18 petitioners' first assignment of error. That document, along
19 with an attached warranty deed, was received by the county on
20 March 21, 1997. Record 43. According to petitioners, they
21 had no knowledge that those documents had been placed before
22 the decision maker until after the challenged decision was
23 issued on March 31, 1997. Petition for Review 20.

24 Intervenor respond that petitioners were not prejudiced
25 by this "procedural error" because they were generally aware
26 of the issues discussed in the disputed documents and were

1 able to raise arguments regarding those issues earlier in the
2 proceedings before the city. Regarding the 1976 agreement and
3 warranty deed, intervenors assert that because petitioners
4 were able to include extensive argument regarding those
5 documents in their brief before this Board, they were not
6 prejudiced in the proceedings below. Intervenors' arguments
7 are without merit. Where the city closes the 14-day comment
8 period required for a limited land use decision under ORS
9 197.195(3)(c)(A), but continues to accept additional evidence
10 from intervenors after the close of the 14-day period, the
11 city violates ORS 197.195(3)(c)(F) and ADC 1.330(4)(f).
12 Azevedo v. City of Albany, 29 Or LUBA 516, 520 (1995).

13 This subassignment of error is sustained.

14 The third assignment of error is sustained, in part.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioners contend that the city's findings regarding
17 the acreage of the proposed manufactured home park and the
18 related findings regarding the density of the proposed park
19 are not supported by substantial evidence in the record. The
20 findings adopted by the city state:

21 "1.2 The proposed development meets the minimum area
22 requirement for a manufactured home park
23 because the subject property is approximately
24 10.5 acres as calculated from Linn County
25 Assessor's records: Tax Lot 100, 5.7 acres;
26 Tax Lot 102, 2.28 acres; Tax Lot 103, 1.53
27 acres; a portion of Tax Lot 113, 0.4 acres; and
28 a portion of Tax Lot 115, 0.5 acres.

29 * * * * *

30 "1.3 The proposed 68-space development complies with

1 the density standard for a manufactured home
2 park because the 10.5-acre park area divided by
3 the 6,500 square foot minimum lot area of the
4 RS-6.5 zone yields a maximum of 70 spaces. The
5 resulting density is 6.5 spaces per acre."
6 Record 20.

7 This Board is authorized to reverse or remand a
8 challenged limited land use decision if it is "not supported
9 by substantial evidence in the record." ORS 197.828(2)(a).
10 Where petitioners challenge the evidentiary support for
11 findings addressing an applicable approval standard, and no
12 party cites any evidence in the record to support such
13 findings, the challenged decision must be remanded. Neuman v.
14 City of Albany, 28 Or LUBA 337, 346 (1994).

15 Petitioners are correct that the above-quoted findings
16 regarding park size and density are not supported by
17 substantial evidence in the record. Intervenors do not point
18 to any evidence in the record supporting the city's conclusion
19 that the proposed park will be 10.5 acres in size.² Rather,
20 intervenors rely exclusively on findings prepared by the
21 staff, which were not available until after the expiration of
22 the period for the submission of comments and evidence. The
23 staff findings state that the acreage determination is based

²The second notice of filing mailed by city planning staff states the size of the proposed park as 12.11 acres. Record 181, 197. The third notice of filing states the acreage as 10.88 acres. Record 120. The record also contains a February 26, 1997 letter from intervenors' own engineer, stating his conclusion, based on a review of the site plan, that "the total area within the park boundary is 9.68 acres." Record 105. The February 26, 1997 letter responds to a February 24, 1997 memorandum from a city planner that expresses concerns about the south property line of the subject property and the boundaries of tax lots 100 and 115. Record 110. This is the extent of the evidence in the record to which we are directed regarding the acreage of the proposed park.

1 on the county assessor's records. However, the data from the
2 county assessor is not in the record. Because the city's
3 findings regarding the acreage of the proposed park are not
4 supported by substantial evidence in the record, the
5 corresponding findings regarding the density standards set
6 forth in ADC 10.220 are also defective.

7 The fourth assignment of error is sustained.

8 **FIFTH ASSIGNMENT OF ERROR**

9 Petitioners contend that the challenged decision does not
10 comply with applicable standards regarding landscaping and
11 maintenance of common outdoor space. According to
12 petitioners, the decision fails to satisfy ADC 10.390, which
13 provides, in relevant part:

14 "Landscaping. All common areas within a
15 manufactured home park -- exclusive of required
16 buffer areas, buildings and roadways -- shall be
17 landscaped and maintained in accordance with the
18 following minimum standards per each 1,000 square
19 feet of open area.

20 "(1) One tree at least six feet in height.

21 "(2) Five shrubs or accent plants.

22 "(3) The remaining area containing walkways and
23 attractive ground cover at least 50% of which
24 must be living ground cover within one year of
25 planting."

26 The city's decision states:

27 "The only common area shown on the site plan is the
28 open/recreation space over Periwinkle Creek. As
29 noted under the recreation area standard * * *, the
30 open/recreation space over Periwinkle Creek will
31 remain in a natural condition without landscaping,
32 which would increase the difficulty of creek
33 maintenance and increase the flood hazard associated
34 with the creek. This area will be maintained in its

1 natural condition with the exception of the
2 construction of a pedestrian/bicycle path located on
3 the north side of the stream, and also with the
4 exception of periodic maintenance to maintain
5 adequate stream flow. For this reason, the standard
6 [of ADC 10.390] does not apply." Record 24.

7 Petitioners argue that the standards set forth in ADC
8 10.390 do not provide an exception from the landscape
9 requirements for manufactured home parks where the common
10 areas are located in a floodplain. Petitioners point out that
11 the only areas that are excepted from the common space
12 landscaping requirements of ADC 10.390 are required buffers,
13 buildings, or roadways, none of which are present in this
14 instance.

15 Intervenors respond that the pedestrian/bicycle path
16 located in the identified common area fits within the ADC
17 10.390 exception for roadways. According to intervenors, the
18 city's decision

19 "recognizes that the open/recreation space contains
20 a bicycle path/maintenance roadway which must be
21 kept clear of landscaping and other development to
22 facilitate periodic maintenance of the banks of
23 Periwinkle Creek to maintain adequate stream flows."
24 Response Brief 20.

25 Intervenors maintain that the city correctly concluded that
26 the requirements of ADC 10.390 do not apply to intervenors'
27 application.

28 We disagree. The challenged decision does not include
29 findings that the "required roadway" exception to the ADC
30 10.390 landscaping requirements applies to the Periwinkle
31 Creek common area as a result of the bicycle/pedestrian path.

1 Rather, the findings state that ADC 10.390 does not apply
2 because landscaping around the creek "would increase the
3 difficulty of creek maintenance and increase the flood hazard
4 associated with the creek." Record 24. Although this
5 conclusion may be correct, the city's decision does not
6 suggest that this site fits any exception to the requirements
7 set forth in ADC 10.390 regarding landscaping of common areas
8 in manufactured home parks.

9 The fifth assignment of error is sustained.

10 **SIXTH ASSIGNMENT OF ERROR**

11 Petitioners contend that the challenged decision does not
12 comply with applicable site plan review standards regarding
13 the compatibility of design and operating characteristics of
14 the proposed manufactured home park with surrounding
15 development and land uses. Petitioners argue that the city's
16 decision fails to demonstrate compliance with ADC 8.070(3),
17 which provides:

18 "Review Criteria. A site plan approval will be
19 granted if the review body finds that the applicant
20 has met all of the following criteria which are
21 applicable to the proposed development.

22 "* * * * *

23 "(3) The design and operating characteristics of the
24 proposed development are reasonably compatible
25 with surrounding development and land uses, and
26 any negative impacts have been sufficiently
27 minimized."

28 Petitioners argue that the findings adopted by the city
29 fail to adequately identify the physical characteristics of
30 the surrounding development and the proposed development, and

1 therefore fail to make the required assessment regarding
2 compatibility. Intervenors respond that, in its final
3 decision, the city

4 "carefully considered each of the four review
5 criteria set forth in ADC 8.070, and summarized its
6 analysis, findings, and conclusions at length in its
7 Staff Report. In conducting its review, [the city]
8 incorporated conditions of approval into its
9 decision in order to minimize any negative impacts
10 of the proposed development." Response Brief 22.

11 The findings describe past and present development
12 patterns in the area surrounding the subject property. These
13 development patterns are considered in the evaluation of the
14 physical design of the proposed development, including
15 building placement, setbacks, parking areas, external storage
16 areas, open areas and landscaping. Record 32-33. The
17 findings adequately address ADC 8.070(3).

18 The sixth assignment of error is denied.

19 The city's decision is remanded.