

LAND USE  
BOARD OF APPEALS

SEP 2 2 55 PM '80

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

FAYE WRIGHT NEIGHBORHOOD )  
PLANNING COUNCIL and )  
DEAN ORTON, )  
Petitioners, )  
v. )  
CITY OF SALEM and RON )  
JONES & CO., LARRY YORK, )  
WILLIAM PETERSON, ROBERT )  
MCKELLAR, RON JONES )

LUBA No. 80-052  
FINAL OPINION  
AND ORDER

Appeal from the City of Salem.

Richard C. Stein, Salem, filed the petition and argued the cause for Petitioners Faye Wright Neighborhood Planning Council and Dean Orton. With him on the brief were Ramsay, Stein & Feibleman.

William J. Juza, Salem City Attorney, filed a brief for Respondent City of Salem. With him on the brief was William G. Blair, Assistant City Attorney.

Thomas B. Brand, Salem, filed a brief and argued the cause for Respondents Ron Jones & Co., Larry York, William Peterson, Robert McKellar and Ron Jones. With him on the brief were Brand, Lee, Ferris & Embick.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in the decision.

Reversed.

9/2/80

You are entitled to Judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee

2 STATEMENT OF THE CASE

3 On April 7, 1980, the City of Salem approved a tentative  
4 plan and certain variances for "The Woods" subdivision.  
5 Petitioners challenge the approval on the ground that the City  
6 of Salem erred in considering this subdivision apart from an  
7 older (1978) planned unit development also known as "The  
8 Woods." Additionally, petitioners' assert a failure by the  
9 City of Salem to adopt adequate findings to support subdivision  
10 approval.

11 STANDING

12 The standing of petitioners is not challenged in this  
13 proceeding.

14 FACTS

15 In April of 1978, the Salem Planning Commission granted  
16 approval of an "outline plan" for "The Woods" planned unit  
17 development. The planned unit development (PUD) was divided  
18 into two phases, with Phase I including thirty-one single  
19 family detached dwellings. Phase II included thirty-four  
20 single family attached dwellings spread over about seven acres,  
21 Record 166, 208. A "unified plan"<sup>1</sup> including certain  
22 variances was approved for Phases I and II on July 10, 1978.  
23 One of the conditions attached to the July 10th approval was a  
24 restriction that the vehicular access to Phase II of the  
25 development be routed only through Idylwood Drive, Southeast.  
26 Record 166, 205.

1 Detail plans for Phase I were approved in January of 1979.  
2 Record 166, 259. Included in the approval of Phase I of "The  
3 Woods" was a reduction in the width of the street from 28 to 24  
4 feet and a requirement that parking be limited to one side of  
5 the streets. Record 274. The record reveals no "detail plan"  
6 approval of phase II. Detail plan approval is necessary before  
7 improvements may be made while the "outline plan" process is an  
8 optional first step in PUD approval. See Salem Revised Code  
9 (SRC) 121.160, 121.220, 121.260.

10 In August of 1979, the developer notified the city that it  
11 was abandoning Phase II of the planned unit development and was  
12 submitting instead a new plan for a fifteen lot single family  
13 home subdivision. Access to the newly proposed subdivision was  
14 not by Idylwood Drive but through the already developed Phase I  
15 of the planned unit development by an extension of a cul-de-sac  
16 known as Stagecoach Way, Southeast. In order to provide access  
17 to all 15 lots, a variance for a cul-de-sac length in excess of  
18 the permitted eight hundred feet was requested. Record 166,  
19 205, 208. Further, variances were requested to allow a maximum  
20 street grade of twelve percent. Record 208.

21 The Salem Planning Commission heard the matter on September  
22 25 and November 13 of 1979, and the Planning Commission  
23 approved the new plans including the variances on December 11,  
24 1979. Record 3 through 6. An appeal was taken to the city  
25 council, and hearings were held on February 25, March 10 and 24  
26 of 1980. On April 7, 1980, the city council affirmed the

1 planning commission decision. Record 1 and 2.

2 ASSIGNMENT OF ERROR ONE AND TWO

3 Petitioners make two separate assignments of error as set  
4 out below and combine them for discussion in the petition:

5 ASSIGNMENT OF ERROR #1

6 The City of Salem erred in considering a new  
7 subdivision application for Phase II of "The Woods."

8 ASSIGNMENT OF ERROR #2

9 The City of Salem erred in refusing to consider  
10 the subdivision application herein for Phase II of  
11 "The Woods" in relation to the previous approval of  
"The Woods" Phases I and II as a PUD.

12 Under the Salem Revised Code, a PUD provides

13 " . . . a means whereby larger parcels of ground  
14 may be developed with more latitude as regards site  
15 development, common areas and open space than is  
16 possible through additional zoning controls with  
17 residential densities similar to the zone in which it  
is to be located; to establish standards and controls  
18 necessary to assure the community of a well related,  
19 harmonious development; and to provide within existing  
20 zones the development of residential uses with  
21 increased amenities." SRC 121.010

22 Petitioners cite the above portion of the city code and  
23 claim that the City of Salem should not have considered a new  
24 application for a subdivision in place of Phase II of the  
25 planned unit development originally submitted. That is, the  
26 City of Salem approved Phase I of "The Woods" planned unit  
development along with variances regarding street and  
cul-de-sacs because it viewed the project as a single unit made  
up of both Phase I and Phase II. Viewed as a whole, the  
variances granted to Phase I (but in contemplation of Phase II)

1 contributed to the uniqueness of the whole development in  
2 keeping with the purpose of a PUD. Petitioners further assert  
3 that the developer is bound by his proposal after his final  
4 plat is filed, and in support of this proposition petitioners  
5 cite Rockaway v. Stefani, 23 Or App 639, 543 P2d 1089 (1975).  
6 In petitioner's view, even if the city's acceptance of a new  
7 application in place of Phase II were permissible, the city  
8 erred in refusing to consider this new subdivision application  
9 in the light of its original approval of Phase I of "The Woods"  
10 planned unit development.<sup>2</sup> The upshot of petitioners'  
11 argument is to require Phase II of the PUD to be developed as  
12 originally planned or not developed at all.

13 Respondent Jones & Company asserts there is nothing in the  
14 law which says that a developer must proceed to develop an  
15 entire parcel as planned. That is, a developer is not  
16 "prohibited from seeking changes or modifications by subsequent  
17 petition if he desires, and developers do it all the time."  
18 Brief of Respondent Jones & Company at 9. In support of that  
19 proposition, petitioners cite Frankland v. City of Lake Oswego,  
20 267 Or 452, 517 P2d 1042 (1973) wherein the court said:

21 "Once approved, the developer should be bound by  
22 the plans unless any changes are approved by the  
23 planning authorities in accordance with the PUD  
24 ordinance." 267 Or at 462-463.

24 The Board does not find sufficient facts alleged by  
25 petitioners to conclude that Phase I of the planned unit  
26 development was so inexorably tied to Phase II of that proposal

1 so as to make one development dependent upon the other. Only  
2 the optional "outline" or conceptual plan approval was given to  
3 Phase II of the original PUD proposal; and the substantive  
4 approval, the "detail" plan approval giving the go ahead for  
5 improvements on the land, was only given to Phase I of the  
6 original PUD. See SRC 121.160 and SRC 121.240-280.

7 Apparently, building has occurred in conformance with the  
8 original Phase I of the planned unit development, but nowhere  
9 is it asserted that construction on lands involved in Phase I  
10 of the PUD was dependent upon conditions placed on lands set  
11 aside in Phase II of the PUD. That is, the development of  
12 Phase I did not require access through Phase II properties or  
13 was otherwise linked to Phase II so as to make the development  
14 of Phase I dependent upon some activity in conformance with the  
15 plan of Phase II. Without some such linking of the two  
16 developments, we cannot say that Phase II of the PUD must be  
17 developed in accordance with the original outline plan or not  
18 developed at all.<sup>3</sup>

19 Also, the developer did return to the planning authorities  
20 with a new subdivision in place of the abandoned Phase II PUD.  
21 He did not attempt to proceed without planning authority  
22 approval or in violation of a previous formal or binding  
23 approval. The cases cited by petitioners do not require  
24 slavish adherence to a proposal, particularly one approved in  
25 tentative or "outline" form only. See Frankland v. Lake  
26 Oswego, supra; Rockaway v. Stefani, supra.

1 Included in the petitioners' case is the assertion that the  
2 new subdivision cannot be "considered" apart from the old two  
3 phase PUD proposal. Petitioners appear to mean that the new  
4 subdivision must somehow be reviewed conceptually along with  
5 the old Phase I PUD. The record in this case contains a  
6 detailed history of both the old PUD and the new subdivision.  
7 That history contains petitioners' complaints about street  
8 width and access to the proposed development. Even if the  
9 record were devoid of the complete history of "The Woods," the  
10 relevant issues of access, relation to surrounding property and  
11 all the other concerns raised by petitioners were placed before  
12 the city by the developer and the opponents of the project.

13 Because we do not view the projects as inexorably linked,  
14 we find no error prejudicial to petitioners in the way the old  
15 Phase II PUD was treated and "considered" (or not considered)  
16 in relation to the new subdivision. The presentation of "The  
17 Woods" subdivision was reviewed in the light of relevant facts  
18 whether or not the presentation included the old Phase I PUD.

19 Assignments of error I and II are denied.

20 ASSIGNMENT OF ERROR #3

21 The assignment of error #3 says the city adopted findings  
22 that were inadequate and not supported by substantial  
23 evidence. The substance of the complaint is that the findings  
24 are vague, incomplete and conclusory. The primary issue here  
25 is the adequacy of the findings granting a variance to the 800  
26 foot limit on cul-de-sac length for an extension to Stagecoach

1 Way. Stagecoach Way provides access to the new subdivision and  
2 the variance allowed an extension of the cul-de-sac to 1100  
3 feet, 300 feet over the limit established by the city code.

4 The city's standards for granting a variance are as follows:

5 "63.332 BASIC CONDITIONS FOR A VARIANCE.

6 (a) No variance shall be granted except upon a  
7 finding by the planning administrator that each of the  
8 following conditions is met:

9 (1) There are special conditions inherent in the  
10 property (such as topography, location, configuration,  
11 physical difficulties in providing municipal services,  
12 relationship to existing or planned streets and  
13 highways, soil conditions, vegetation, etc.) which  
14 would make strict compliance with a requirement of SRC  
15 63.115 to 63.265 an unreasonable hardship, deprive the  
16 property of a valuable natural resource, or have an  
17 adverse effect on the public health, safety and  
18 welfare;

19 (2) The variance is necessary for the proper  
20 development of the subdivision and the preservation of  
21 property rights and values;

22 (3) There are no reasonably practical means  
23 whereby the considerations found under (1) or (2)  
24 above can be satisfied without the granting of the  
25 variance; and

26 (4) It is unlikely that the variance will have  
adverse effect on the public health, safety, and  
welfare, or on the comfort and convenience of owners  
and occupants of land within and surrounding the  
proposed subdivision or partition.

(b) Except as to variances granted under SRC  
63.334, each specific variance shall be separately  
considered, and no variance shall be granted if, taken  
together with all other requested variances, the  
cumulative effect would be to subvert the purpose  
expressed in SRC 63.020. (Ord No. 77-78; Ord No.  
184-79)"

Respondent City agrees that the findings are not in the  
form suggested by the above four conditions but says the

1 findings are sufficient to show compliance with the ordinance.  
2 We note the findings do contain many relevant facts.

3 Our reading of the findings as a whole does not provide us  
4 with enough information to conclude that each of the four  
5 standards in SRC 63.332 have been met. For example, Findings  
6 10 and 11 discuss why access alternatives are not practical or  
7 safe, finding 12 shows (in very vague language) that access on  
8 Idylwood Drive is "critical," perhaps meaning "unsafe;" and  
9 finding 13 says that the property will be landlocked without  
10 access to Stagecoach Way. However, there is no statement in  
11 the findings as to why the variance is "necessary for proper  
12 development of the subdivision and the preservation of property  
13 rights and values." SRC 63.332(2). The variance extended the  
14 cul-de-sac 300 feet, but a map included in the record shows an  
15 800 foot cul-de-sac would still provide access to the  
16 property. Granted, the specific development plan might have to  
17 be changed to include only an 800 foot cul-de-sac, but there is  
18 no statement as to why this development plan equals "proper"  
19 development of the parcel thereby requiring a variance. Also,  
20 finding 7<sup>4</sup> provides facts relative to traffic patterns and  
21 trip generation, but it does not announce a "policy" that shows  
22 the variance will not "have adverse effect on the public  
23 health, safety, and welfare, or on the comfort and convenience  
24 of owners and occupants of land within and surrounding the  
25 proposed subdivision . . . " as claimed by the city. SRS  
26 63.332(4).<sup>5</sup>

1 In short, we believe the city's own ordinance demands a  
2 detail in the findings missing here. We cannot conclude for  
3 the city that the facts in the findings and the record add up  
4 to the required findings in SRC 63.332. We believe the city  
5 must articulate in an understandable form that those four  
6 conditions have been met. See Sunnyside Neighborhood v.  
7 Clackamas County Comm., 280 Or 3, 569 P2d 1063 (1977).

8 OTHER ALLEGATIONS

9 In addition to attacking the city's conformance to its own  
10 ordinance in the granting of a cul-de-sac variance for this  
11 development, petitioners assert that "there were a number of  
12 issues raised at the hearing that were not addressed by the  
13 findings." Petitioners brief at 12. Petitioners then go on to  
14 mention an LCDC goal objection and several violations of the  
15 Salem area comprehensive plan that were raised by the opponents  
16 of this development but not addressed in the findings.  
17 Petitioners conclude that if an issue is raised at a hearing it  
18 should be addressed in the findings, and cite Norvell v.  
19 Portland Metro. LGBC, 43 Or App 849, 604 P2d 896 (1979) in  
20 support of that proposition.

21 The Board does not accept the proposition that every issue  
22 or concern raised at a hearing on a land use matter must be  
23 addressed by a local jurisdiction in its findings. Formal  
24 issues and major relevant concerns raised must be addressed in  
25 some fashion, but not every assertion by a participant in a  
26 land use decision warrants a specific finding.

1 In the Norvell case cited by petitioners, the court noted  
2 "a good deal of focused evidence and discussions" had occurred  
3 on a Goal 4 matter below. Norvell, 43 Or App at 853. The  
4 court, on the basis of that "focused" discussion, concluded a  
5 finding was necessary. Here petitioners point us to no such  
6 "focused" or major discussion occurring below.

7 The absence of a focused or major discussion does not mean  
8 that a relevant goal or land use standard cannot be raised.  
9 However, Petitioners have not assigned an LCDC goal violation  
10 as error. Similarly, they have not assigned violations of the  
11 city comprehensive plan as error. We treat petitioners'  
12 discussion at pages 12 and 13 of their brief as comment  
13 generally on the adequacy of the city's findings and not as  
14 separate assignments of error upon which this Board must  
15 rule.<sup>6</sup>

#### 16 SUBSTANTIAL EVIDENCE

17 Also under its third assignment of error, petitioners  
18 include a section on "Substantial Evidence." As we understand  
19 the argument, however, petitioners again refer to the granting  
20 of the cul-de-sac variance and say in essence that there is no  
21 evidence in the record showing a hardship inherent in the land  
22 that might warrant the granting of a variance. Petitioners  
23 note that obtaining a variance requires a demonstration of a  
24 particular hardship or practical difficulty. Lovell v.  
25 Independent Planning Commission, 37 Or App 3, 586 P2d 99  
26 (1978).

1 We need not discuss this assertion by petitioners as we  
2 have found the findings to be incomplete. We might note,  
3 however, that the record contains enough facts to support the  
4 findings that were made. Whether the record is sufficient to  
5 support additional needed findings is, of course, unknown.

6 Assignment of error no. 3 is sustained in part.  
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FOOTNOTE

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We do not know what a "unified plan" is. The city's PUD ordinance does not discuss this "unified plan." We assume it is part of the "outline plan" approval process in 121.160. 121.220.

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It should be noted here again, however, that the City of Salem did not give "detail" approval to Phase II of the Woods PUD, but only "outline" approval. Record 166. No where is it asserted that any final approval was given to Phase II of the planned unit development.

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There is mention in petitioners' brief of a 45 foot right-of-way for a pedestrian walkway. We do not believe a 45 foot right-of-way for a pedestrian walkway is a sufficient tie between the two bodies of land to make an inexcusable connection between development of the properties in conformance with the original two phase planned unit development proposal. See Record 87, 207, 231. Also, even with such a linking of the two phases, the developer still has the option to seek the planning jurisdiction's approval for a change in plans.

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"7. Statistical evidence of traffic generation presented by the Faye Wright Neighborhood Association in opposition to the subdivision indicated that "The Woods - Phase I" would generate 387 vehicle trips per day, and the "The Woods-II" Subdivision would generate 194 vehicle trips per day for a total of 581 vehicle trips generated per day. Statistical evidence of traffic generation presented by the traffic Division at the September 25, 1979 public hearing indicated that "The Woods - Phase I" would generate 300 vehicle trips per day, and "The Woods-II" Subdivision would

1 generate 150 vehicle trips per day for a total of 450  
2 vehicle trips generated per day. Statistical evidence  
3 submitted by the Traffic Division at the November 13,  
4 1979 public hearing indicated traffic counts taken  
5 October 9, 1979 and October 23, 1979 on the following  
6 streets to be significantly lower than anticipated at  
7 the September 25, 1979 public hearing: Stagecoach Way  
8 SE, Snow White Way SE, Welcome Way SE, McKinley Street  
9 SE, Alderbrook SE, and Winding Way SE. Based on those  
10 traffic counts, traffic volumes projected by the Faye  
11 Wright Neighborhood Association for these same streets  
12 were substantially higher than those projected by the  
13 Traffic Division. The Commission finds the traffic  
14 volumes submitted by the Traffic Division to be the  
15 more reliable."

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The city also claims it made a policy announcement contained in Finding 7, in effect choosing access for this project. According to the city, that policy statement is not reviewable by this Board; and, therefore, sec 63.332(a)(4) requiring a finding by the planning administrator that it is unlikely the variance will have an adverse effect on health, safety and welfare has been satisfied. We do not reach this contention because of our view that finding 7 recites facts but does not announce a "policy."

6  
In order for this Board to consider an allegation of error, a separate assignment of error must be listed with a supporting argument for each. See Board Rule 7(C) 3 & 4. It is our view that these "comments" on the adequacy of the findings and the apparent incompleteness of the findings are used to assert petitioners' point, rejected by the Board, that any issue raised that a land use matter must be addressed in the findings.