

MAR 4 2 26 PM '82

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

LUCILLE OLNEY,

Petitioner,

v.

THE TOWN OF HAMMOND,  
Daniel G. Ferrell and  
Roger D. Stillick,

Respondents.

LUBA NO. 81-120

FINAL OPINION  
AND ORDER

Appeal from Town of Hammond.

Philip L. Nelson, Astoria, filed a brief and argued the cause for Petitioners. With him on the brief were Miller & Nelson.

Heather Reynolds, Astoria, filed a brief and argued the cause for Respondent. With her on the brief were MacDonald, McCallister & Snow.

Daniel G. Ferrell and Roger D. Stillick, filed a brief and argued the cause on their own behalf.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed.

3/04/82

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 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner appeals the Town of Hammond's denial of her  
4 request for preliminary plat approval of a mobile home  
5 development. The Town of Hammond's Common Council reversed the  
6 city planning commission's approval of the preliminary plat.

7 ALLEGATIONS OF ERROR

8 Petitioner assigns the following as error:

9 "Assignment of Error No. 1

10 "The Council should not have considered the appeal of  
11 Respondents Ferrell and Stillick when the filing fee  
for the appeal was not paid."

12 "Assignment of Error No. 2

13 "The Hammond Common Council should have affirmed the  
14 Planning Commission's decision. The Respondent's  
15 appeal did not challenge the approval of the  
16 preliminary plat but actually attacks the zoning  
ordinance. Petitioner's preliminary plat complied  
with the Town's subdivision ordinance."

17 "Assignment of Error No. 3

18 "The Council did not make findings of fact and  
conclusions of law."

19 "Assignment of Error No. 4

20 "The Council failed to give Petitioner adequate notice  
21 of the hearing when it continued it to October 13,  
1981, for further comment. The notice to Petitioner  
22 gives a starting time of 7:30 p.m., but the minutes  
show a starting time of 7:15 p.m."

23 FACTS

24 Petitioner initially requested preliminary plat approval  
25 for a 56 lot extension of an existing mobile home subdivision.  
26 Initially the planning commission tabled the petitioner's

1 request due to a lack of required information. At a subsequent  
2 hearing, however, the planning commission approved development  
3 of 20 of the 56 lots. The planning commission's decision was  
4 appealed pro se to the city council by Respondents Stillick and  
5 Ferrell. They stated that their appeal was based upon city  
6 zoning ordinance and comprehensive plan. They did not pay a  
7 \$150 filing fee required by the zoning ordinance. The Town of  
8 Hammond's subdivision ordinance, however, does not require  
9 payment of a filing fee.

10 At the public hearing before the Common Council part of the  
11 evidence presented was a staff report which noted that the  
12 original request for 56 lots had been tabled by the planning  
13 commission due to lack of specific information concerning,  
14 among other things, traffic access and flooding and drainage  
15 problems. The list of deficiencies was detailed in the staff  
16 report which had been submitted to the planning commission. It  
17 is not clear from the record why the planning commission  
18 subsequently approved 20 of the requested 56 lots because  
19 additional information had still not been submitted by the  
20 petitioner.

21 According to the staff report, a large portion of the  
22 subdivision property lies within a fresh water wetlands area.  
23 The report stated that if filling, drainage or other  
24 alterations would be necessary, a permit from the Division of  
25 State Lands and the U. S. Army Corps of Engineers would be  
26 required. The report indicates the property is part of a major

1 marsh complex protected by Statewide Goal 17 and is also  
2 indicated on a Housing and Urban Development Flood Insurance  
3 Rate Map as being within a floodplain. The staff report also  
4 notes that certain buffering standards required by ordinances  
5 have not been addressed. The report addresses the additional  
6 automobile trips generated by approval of a 20 lot subdivision  
7 and the associated problems generated by that increased  
8 traffic. The staff report concludes that while a portion of  
9 the area proposed for the subdivision could conceivably develop  
10 without intrusion on the wetlands or the floodplain, the  
11 preliminary plat submitted by petitioner did not discriminate  
12 between the areas subject to floodplain or wetland controls.  
13 In addition, the report indicates that information required by  
14 all subdivisions was lacking on the submitted preliminary  
15 plat. This other information includes street crossings,  
16 availability of power and telephone service, soil suitability,  
17 storm drainage and a more detailed plat map.

18 After hearing testimony, both in favor of and opposing the  
19 proposed development, the city council announced a continuation  
20 of its hearing until October 13 at 7:00 p.m. Published notice  
21 in local newspapers also indicated the hearing was to be held  
22 at 7:00 p.m. Notice of the hearing was mailed to the council  
23 members and all the parties to the appeal stating, however,  
24 that the hearing was set for 7:30 p.m. On October 13, 1981,  
25 the Common Council began the hearing at 7:15 p.m. No  
26 additional testimony was received at the October 13, 1981

1 hearing. Attorney for petitioner arrived at 7:30 p.m., relying  
2 on the written notice sent to his office. The petitioner did  
3 not object to the "early" start.

4 The common council voted to reverse the planning  
5 commission's partial approval of the preliminary plat  
6 application based on the following:

7 "The stated reasons by which the Council's decision  
8 was made are:

- 9       "- Insufficient information was furnished by the  
10       applicant per the CTIC staff report on this  
11       subdivision.
- 12       "- There is a lack of adequate [sic] access to the  
13       proposed subdivision.
- 14       "- Proper wetland permits were not obtained by the  
15       applicant.
- 16       "- No Storm drainage plan was presented by the  
17       applicant.
- 18       "- At the time of the Planning Commission's action  
19       in granting the subdivision, there was no  
20       provision for this matter in the meeting agenda.
- 21       "- The proposal does not comply with buffer zone  
22       requirements.
- 23       "- There were non-existing or inadequate [sic]  
24       surface drainage plans for the proposed  
25       subdivision.

26 "These reasons for overriding the Planning Commission  
decision were based on failure to meet certain  
specified criteria as stated in the Town's Subdivision  
Ordinance.

"The applicant may submit another application for a  
subdivision of the same parcel of land.

"While the Subdivision ordinance does not specify an  
appeal fee, certain costs in mailings and  
publications of notices were incurred by the Town as a  
result of your appeal.

1 "Those items directly applicable and exclusive to the  
2 appeal are billed to you at actual cost per the  
3 enclosed statement."

3 Assignment of Error No. 1

4 Petitioner first alleges that the council was without  
5 authority to consider the appeal of Respondents Ferrell and  
6 Stillick since the filing fee required by the zoning ordinance  
7 was not paid. Petitioner relies on Section 14.050, as amended  
8 by ordinance 81-2, of the Town of Hammond's Zoning Ordinance  
9 which states:

10 "A fee of \$150 will be paid to the zoning  
11 administrator when an appeal to the common council is  
12 filed."

12 Respondent Town of Hammond argues that the procedures  
13 applicable to the proceeding are those set forth in its  
14 subdivision ordinance, Section 5.040 and not the zoning  
15 ordinance as cited by petitioner. The record clearly indicates  
16 this matter was a request for a subdivision preliminary plat  
17 approval and as such is governed by the subdivision ordinance  
18 provisions of the Town of Hammond. Petitioner correctly points  
19 out that the Respondents Stillick and Ferrell mentioned in  
20 their notice of intent to appeal the zoning ordinance. Their  
21 mention of the zoning ordinance does not, however, change the  
22 nature of the proceeding. Since no filing fee is called for by  
23 the governing subdivision ordinance, petitioner's first  
24 assignment of error is denied.

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1 Assignment of Error No. 2

2       Petitioner here alleges first, that Respondents Ferrell and  
3 Stillick's appeal did not challenge the approval of the  
4 preliminary plat but actually attacked the zoning ordinance.  
5       Second, petitioner alleges her preliminary plat complies with  
6 the Town's subdivision ordinance.

7       The first portion of this assignment of error has been  
8 answered above. The subdivision ordinance not the zoning  
9 ordinance controls regardless of the misstatement existing in  
10 the pro se appeal notice. Regarding petitioner's second  
11 assertion that her preliminary plat complied with the Town of  
12 Hammond's subdivision ordinance, we disagree. The thrust of  
13 petitioner's argument is that the subdivision ordinance does  
14 not require the petitioner at preliminary plat stage approval  
15 to address such things as drainage and access plans.  
16       Petitioner reasons that since the land has been designated in  
17 the comprehensive plan and zoning ordinance for mobile homes as  
18 a permitted use, there is no requirement that petitioner  
19 address the factors stated by the city as the basis for its  
20 denial of her preliminary plat at the preliminary plat stage.

21       Respondents agree with petitioner that the proposed  
22 subdivision is in an area zoned R-5 which allows mobile home  
23 development. However, citing ORS 92.040,<sup>1</sup> respondent Town of  
24 Hammond claims that preliminary plat approval is binding upon  
25 it and that once approved it becomes the standard against which  
26 future reviews are judged.<sup>2</sup> Commonwealth Properties, Inc. v.

1 Washington County, 35 Or App 387, 396 (1978). The Town of  
2 Hammond argues that it cannot approve a preliminary plat  
3 without adequate facts on which to base its opinion and that  
4 the information required by the subdivision ordinance was not  
5 provided by petitioner. The Town points out there is no  
6 lighting plan, centerline profile of streets approved by the  
7 town engineer, or plan for sewage disposal. In addition, no  
8 natural features are shown on the plat nor are the areas  
9 subject to storm water overflow outlined. Furthermore, the  
10 Town argues the contours and scale of the plat submitted were  
11 incorrect. Citing Ordinance Section 3.020(4), as amended by  
12 Ordinance 79-9, the Town argues that flood base elevation data  
13 is required for portions of subdivisions located in flood  
14 hazard zones. Since the Flood Hazard Insurance Rate Map on  
15 file with the Town of Hammond designates a portion of the  
16 proposed subdivision as falling within the flood hazard zone,  
17 petitioner is required to provide for such elevation data on  
18 her preliminary plat map. The Town says the information was  
19 not submitted.

20 Section 4.090(1) of the Subdivision Ordinance states:

21 "subdivisions which, within two calendar years will  
22 have ten or more dwelling units shall comply with  
23 provisions governing large scale developments in  
Sections 5.200, item 2 through item 8 of the zoning  
ordinance."

24 Item 3 of Section 5.200 of the referenced zoning ordinances  
25 states that the subdivider must present a storm water  
26 management plan to alleviate dangers from collection of storm

1 water.

2 Section 4.020 requires:

3 "The location, width and grade of streets will be  
4 considered in their relation to existing and planned  
5 streets, topographical additions, public convenience  
6 and safety and their appropriate relation to the  
7 proposed use of the land to be served by the streets."

8 Subdivision Ordinance Section 3.020(d) states:

9 "The following existing conditions shall be shown on  
10 the preliminary plat:

11 \*\* \* \* \*

12 "3. Location and direction of all water courses  
13 on and abutting the tract. Approximate location of  
14 areas subject to inundation or stormwater overflow or  
15 standing water.

16 "4. Natural features, such as rock outcroppings,  
17 marshes, wooded areas and isolated preservable trees."

18 Section 3.020(f) of the subdivision ordinance states:

19 "Explanatory information. Any of the following  
20 information which may be required by the Planning  
21 Commission and which may not be shown practicably on  
22 the preliminary plat shall be submitted in separate  
23 statements accompanying the preliminary plat:

24 "1. Proposed deed restrictions in outline form.

25 "2. Statement of subdivision improvements to be  
26 made or installed, including landscape planting, street  
27 lighting, etc. and when such improvements are to be  
28 made.

29 "3. Approximate center line profiles showing the  
30 finished grade of all streets as approved by the Town  
31 Engineer including extensions for a reasonable  
32 distance beyond the limits of the proposed subdivision.

33 "4. Typical cross sections of proposed streets  
34 showing widths of roadways, curbs, location and width  
35 of sidewalks and the location and size of utility  
36 mains.

1 "5. Approximate plan and profiles of proposed  
2 sanitary and storm sewers with grades and pipe sizes  
3 indicated and plan of the proposed water distribution  
4 system, showing pipe sizes and the loation of valves  
and fire hydrants. If sewers are not provided then an  
alternate method of sewage disposal, approved by the  
County Sanitarian, must be shown."

5 The Town of Hammond's findings indicate that sufficient  
6 information was not submitted by petitioner. The record,  
7 including the subdivision ordinance provisions quoted above,  
8 supports the findings. Petitioner did not submit the necessary  
9 material and her argument that it was unnecessary at the  
10 preliminary plat stage is unwarranted in light of the above  
11 cited ordinance provisions. Petitioner's second assignment of  
12 error is denied.

13 Assignment of Error No. 3

14 Petitioner next argues that the Town of Hammond Common  
15 Council did not make sufficient findings of fact and  
16 conclusions of law. Petitioner argues that the Common Council  
17 failed to state a factual basis for its decision and,  
18 therefore, was not able to apply the facts to the policies. In  
19 addition, she argues the findings of fact are not supported by  
20 substantial evidence in the record. We disagree with  
21 petitioner. On October 14, 1981, the Town of Hammond caused to  
22 be issued a letter (the major portion of which is quoted supra)  
23 setting forth the reasons why the town council decided to  
24 override the decision of the planning commission and deny the  
25 requested subdivision. While the facts found are not  
26 extensive, they are sufficient to inform petitioner of the

1 reasons for denial of her subdivision request. The reasons  
2 stated by the town council refer to the subdivision ordinance  
3 and identify some of the areas where petitioner's preliminary  
4 plat was deficient. Specifically, the findings indicate  
5 inadequate information was submitted on storm drainage,  
6 buffers, access and the matters identified in the staff  
7 report. As the court stated in Sunnyside Neighborhood v.  
8 Clackamas County, 280 Or 1, 21, 569 P2d 1063 (1977):

9 "No particular form is required and no magic words  
10 need be employed. What is needed for adequate  
11 judicial review is a clear statement of what,  
12 specifically, the decision-making body believes, after  
hearing and considering all the evidence, to be the  
relevant and important facts upon which its decision  
is based. Conclusions are not sufficient."

13 As for petitioner's assertion that the findings are  
14 unsupported by substantial evidence, we disagree. One need  
15 look only at the subdivision ordinance provisions addressed  
16 supra to find the requisite amount of support. As the court  
17 stated in Jurgenson v. County Court, 42 Or App 505, 510, 600  
18 P2d 1241 (1979):

19 "A denial is supported by substantial evidence within  
20 the meaning of ORS 34.040(3) unless the reviewing  
21 court can say the proponent of change sustained his  
burden of proof as a matter of law."

22 It is clear the petitioner here did not sustain her burden of  
23 proof. She didn't submit the required information. We,  
24 therefore, deny petitioner's third assignment of error.

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1 Assignment of Error No. 4

2 Petitioner argues that the council failed to give her  
3 adequate notice of the continued hearing. She states "The  
4 notice to Petitioner gives a starting time of 7:30 p.m., but  
5 the minutes show a starting time of 7:15 p.m." The record does  
6 not reveal petitioner having objected to the 7:15 starting time  
7 even though her attorney was present at the hearing within  
8 sufficient time to make such an objection. We have said in  
9 prior cases that when a procedural error occurs at the time of  
10 hearing and the party claiming to have been harmed by the error  
11 had an opportunity to object but failed to do so, we will not  
12 allow the issue to be raised for the first time on appeal to  
13 us. In Dobaj v. Beaverton, 1 Or LUBA 237, 241 (1980), we  
14 stated

15 "Where a party before the governing body has the  
16 opportunity to raise procedural matters which are  
17 capable of being cured by the governing body but fails  
18 to raise such issues, this Board will not permit such  
19 issues to be raised on appeal. See Sunnyside  
20 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d  
21 1063 (1977)." 1 Or LUBA at 241

22 Petitioner herein could have objected to the "early" start and  
23 requested to be heard. No such objection or request was made  
24 and, therefore, we deny petitioner's fourth assignment of error.

25 Affirmed.  
26

FOOTNOTES

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3 1

ORS 92.040 states:

4 "Before a plat of any subdivision or the map of any  
5 major partition may be made and recorded, the person  
6 proposing the subdivision or the major partitioning or  
7 his authorized agent or representative shall make an  
8 application in writing to the county or city having  
9 jurisdiction under ORS 92.042 for approval of the  
10 proposed subdivision or the proposed major partition  
11 in accordance with procedures established by the  
12 applicable ordinance or regulation adopted under ORS  
13 92.044. Each such application shall be accompanied by  
14 a tentative plan showing the general design of the  
15 proposed subdivision or the proposed major partition.  
16 No plat for any proposed subdivision and no map for  
17 any proposed major partition may be considered for  
18 approval by a city or county until the tentative plan  
19 for the proposed subdivision or the proposed major  
20 partition has been approved by the city or county.  
21 Approval of the tentative plan shall not constitute  
22 final acceptance of the plan of the proposed  
23 subdivision or the map of the proposed major partition  
24 for recording; however, approval by a city or county  
25 of such tentative plan shall be binding upon the city  
26 or county for the purposes of the preparation of the  
plat or map and the city or county may require only  
such changes in the plat or the map as are necessary  
for compliance with the terms of the proposed  
subdivision or the proposed major partition."

19 2

20 Section 3.040 states that when the final plat is submitted  
21 to the planning commission for review, approval of the final  
22 plat is to be made in terms of the preliminary plat. A portion  
23 of Section 3.040 states:

24 "If the final plat is not in full conformance with the  
25 preliminary plat and conditions if any, it shall be  
26 submitted to the Planning Commission for further  
review."