

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FEB 10 4 52 PM '86

1 SANDRA YATES O'KEEFE and)
2 JOHN WAYNE WAITS,)
3)
4 Petitioners,)

5 vs.)

6 CITY OF WEST LINN,)
7 Respondent.)

LUBA No. 85-064

FINAL OPINION
AND ORDER

8 _____)
9 SKYLAND INVESTMENTS, INC,)
10 Petitioner,)

11 vs.)

12 CITY OF WEST LINN,)
13 Respondent.)

LUBA Nos. 85-076
85-080

14 Appeal from West Linn.

15 Sandra Yates O'Keefe, John Wayne Waits, and Patricia Tryon,
16 West Linn, filed a joint petition for review in LUBA No.
85-064, and argued on their own behalf.

17 Patricia Tryon, West Linn, filed a petition for review in
18 LUBA Nos. 85-076/080 and argued on her own behalf.

19 John Wayne Waits, West Linn, filed a response brief in LUBA
Nos. 85-076/080 and argued on his own behalf.

20 John Hammond, Oregon City, filed a response brief in both
21 LUBA No. 85-064 and Nos. 85-076/080 and argued on behalf of
Respondent City.

22 Kenneth M. Elliott, Portland, filed a petition for review
23 in LUBA Nos. 85-076/080 and Timothy V. Ramis, Portland, filed a
24 response brief in LUBA No. 85-064 and argued on behalf of
Skyland Investment, Inc. With them on the briefs were
O'Donnell, Ramis, Elliott and Crew.

25 DUBAY, Referee; KRESSEL, Chief Referee; BAGG, Referee;
participated in the decision.

26 REMANDED

02/10/86

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

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1 Opinion by DuBay.

2 NATURE OF DECISIONS

3 The owner of eight acres applied to the city for approval
4 of a hotel and convention center development. The city changed
5 the plan and zone map designations and partially approved a
6 conditional use permit for the project. There are three
7 appeals. The individual petitioners each appeal the map
8 changes and the conditional use permit. Skyland Investment.
9 Inc. (Skyland) appeals portions of the the conditional use
10 permit.

11 FACTS

12 The eight acres are designated Office Business Center (OBC)
13 on the zoning map and Commercial on the comprehensive plan
14 map. The owners propose to build a motel with convention
15 facilities. The project cannot be developed without a change
16 of the plan designation to Industrial and a change of the zone
17 designation to Campus Industrial. The planning commission
18 recommended approval of the project and the necessary plan and
19 zone change. After hearings, the city council approved the
20 changes.

21 The city council also considered a conditional use permit
22 for the motel complex. The council divided the approval
23 proceedings into two phases, similar to the city's permit
24 process for planned unit developments. The first phase
25 approves preliminary design of the project, including size of
26 the buildings, parking space requirements, and identification

1 of other facilities on the site. The second phase would
2 encompass all aspects of final design. The city approved the
3 first phase subject to conditions.

4 COMPREHENSIVE PLAN AND ZONING MAP CHANGES

5 The city's comprehensive plan includes procedures and
6 criteria for revising the plan and zoning ordinance text and
7 maps. The criteria for minor (quasi-judicial) revisions
8 include the following finding requirement:

9 "There is a public need for the change or...the change
10 can be demonstrated to be in the best interest of the
present and future community."

11 The individual petitioners contend this provision
12 establishes alternative criteria for revisions, i.e., either
13 "public need for the change" or "the best interest of the
14 present and future community." These petitioners allege the
15 city elected to demonstrate compliance only with the public
16 need criterion, and that the findings of public need are not
17 supported by substantial evidence in the record.

18 This challenge is premised on the following finding:

19 "There is a public need for the plan/zone change as
20 justified...above." Record at 97.

21 While this finding indicates the city found a public need
22 for the changes, the city also found:

23 "This proposed plan/zone change would allow the
24 community to benefit from an esthetically designed,
employee-intensive development as the 'Campus
25 Industrial' section of the code intended." Record at
26 86.

"The plan/zone change request--in concert with the use
and design approval requests--provides the community

1 many opportunities, improved employment and tax bases;
2 tourism-generating activities; and a quality
3 'landmark' facility to strengthen the community's
4 image." Record at 86

5 These findings, reciting the community benefits to accrue
6 from the proposal, address the best interests of the
7 community. Substantial evidence in the record supports these
8 findings. Letters to the city and testimony at the hearing
9 showed the lack of facilities for large business meetings and
10 the value of convention and tourist facilities to the city's
11 economy. Record at 42, 159, 160.

12 It is not necessary to decide whether the "public need" and
13 "best interests of the community" articulate alternative
14 criteria or are different expressions of the same public
15 interest standard. Assuming they are separate criteria as
16 petitioners claim, satisfaction of either criterion will
17 support a minor revision of the plan and zoning maps.
18 Petitioners' challenge fails because they wrongly assume the
19 city made no findings addressing the best interest of the
20 community. As we noted, the city did make findings addressing
21 this criterion.

22 The assignment of error is denied.

23 CONDITIONAL USE PERMIT-INDIVIDUAL PETITIONERS' CLAIMS

24 The individual petitioners challenge the Phase I approval
25 of the conditional use permit. The challengers first contend
26 the city's findings are inadequate and not supported by
substantial evidence. These petitioners also contend the

1 bifurcated approval process is not authorized by the city's
2 ordinances and does not insulate the decision from future
3 modifications.¹ We first discuss the challenges to the
4 findings.

5 The West Linn Code states the following criterion for
6 conditional use permits:

7 "The granting of the proposal will provide for a
8 facility that is consistent with the overall needs of
9 the community." Section 60.070A(3) West Linn Community
10 Development Code.

11 The city found:

12 "The request responds to the demonstrated and
13 documented needs of the community."

14 The individual petitioners correctly say this is a
15 conclusion only. However, they are incorrect that no finding
16 sets forth facts to support the conclusion.

17 The community needs are identified in the order by
18 reference to certain comprehensive plan provisions. For
19 example, the findings refer to General Policy No. 1 of the
20 plan, which "encourage(s) the development of commercial and
21 office facilities in West Linn which will increase employment
22 opportunities...." (Emphasis added.) Record at 84. The
23 findings also quote the economic inventory section of the plan,
24 describing the city's advantageous position in the region's
25 transportation network. The plan notes:

26 "This locational advantage needs to be used not only
to provide for residential areas for people employed
outside West Linn, but also to bring industry and
additional businesses into West Linn." Record at 85.

1 These plan provisions establish the overall need in the
2 community for additional businesses that take advantage of the
3 city's access to the transportation network. The proposed
4 development is clearly commercial.² The city found the site
5 appropriate for the project as follows:

6 "No other site in West Linn offers the unique
7 combination of access, scenic views, site size, I-205
8 and area visibility and proximity to tourism foci
9 (i.e., river, falls, locks, historic sites.)"

10 We find no error in the city's conclusion that the proposal is
11 consistent with the needs identified in the city's plan and
12 order.

13 The individual petitioners also claim the two phase
14 approval procedure is not provided for in the ordinance. They
15 say the two-stage process increases the burden on affected
16 citizens by requiring repetitious review proceedings. In
17 particular, the individual petitioners object that, under this
18 procedure, the developer is permitted to seek changes in the
19 parts of the decision approved in Phase I.

20 The ordinance does not provide for a Phase I and II review
21 process. However, the ordinance does have two levels of review
22 for conditional use permits. The first level requires
23 application of the approval standards for conditional use
24 permits. West Linn Community Development Code (WLCDC) Section
25 60.070. The approval standards include criteria regarding site
26 size and dimension, site suitability for the proposed use,
consideration of community needs, adequacy of public

1 facilities, and general conformance of the project with the
2 zone designation and comprehensive plan policies.³

3 The second approval level is in the provisions for design
4 review of approved conditional use permits. Chapter 55 of the
5 code sets forth procedures and approval standards for all
6 development in the city except construction of attached
7 single-family dwellings. The standards require submittal of a
8 development plan which includes a site plan, grading plan,
9 architectural drawings, landscape plan, sign plan, a site
10 analysis and samples of all exterior building materials and
11 colors. The approval standards incorporate other chapters of
12 the code and set forth additional criteria.⁴

13 Design reviews are approved by the planning director after
14 hearings. WLCDC Section 55.020. The director's decision may
15 be appealed to the planning commission. WLCDC Section 99.240.

16 Although the approval criteria for a conditional use permit
17 are separate from the criteria for design review, the city did
18 not divide the criteria in the same manner as the code in this
19 proceeding. That is, some design review standards, in addition
20 to the conditional use standards, were found to be satisfied in
21 Phase I approval. Record at 99. Consideration of other design
22 review criteria was deferred to Phase II.

23 Because some of the criteria in Chapter 55 were found
24 satisfied in the Phase I approval, presumably these criteria
25 need not be considered again in Phase II. The possibility that
26 they may be reconsidered gives rise to the complaint by the

1 individual petitioners. However, petitioners do not support
2 the complaint with legal authority and we are aware of no such
3 authority. Indeed, the WLCDC includes procedural requirements
4 for modification of both approved conditional uses and
5 development plans approved under Chapter 55. WLCDC Sections
6 60.050(B), 55.020(D). We reject this challenge.

7 The individual petitioners next challenge the city's
8 findings about the adequacy of city services. They say the
9 findings that the drainage system is adequate are not supported
10 by substantial evidence.

11 The conditional use approval criteria in WLCDC Section
12 60.070(4) require a finding that:

13 "All required public facilities have adequate capacity
14 to serve the proposal."

15 In addition, the design review criteria in WLCDC Section
16 55.100(A)(12) require an engineer's statement supported by
17 factual data, that excess storm runoff water will be retained
18 on site.

19 The city found the drainage criteria satisfied by a report
20 by the developer's engineering consultant. Computations in the
21 report show 1950 cubic feet of water storage capacity is needed
22 to meet ordinance standards. The area for the location of the
23 storage facility was also identified in the report. The city
24 found these provisions for amount and location of water storage
25 to be adequate. The city also found the final plans for the
26 drainage facility will be approved by the Oregon Department of

1 Transportation (ODOT).

2 Petitioners do not contest the completeness or accuracy of
3 the engineer's report. Instead, they allege the city has not
4 approved plans for the drainage facility, but has delegated
5 approval authority to ODOT.

6 We reject this claim for two reasons. First, neither the
7 conditional use criteria nor the design review criteria require
8 final plans for a drainage system. The engineer's statement
9 described in WLCDC Section 55.100(A)(12) is sufficient to meet
10 the design review criteria. Only in the absence of an
11 engineer's feasibility statement does the code require a plan
12 to mitigate off-site adverse effects. Here, however, the
13 evidence shows satisfaction of the requirement. No final plans
14 are required.

15 Second, the ordinance does not defer to ODOT any
16 determination of compliance with code standards. The order
17 merely recites the drainage plan is adequate and will receive
18 ODOT approval. This reference to ODOT approval neither makes
19 ODOT approval a condition of the permit, nor detracts from the
20 city's finding that the storm drainage system should be
21 adequate.

22 The petitioners next allege the city's findings do not
23 assess the impacts on adjacent residential areas from increased
24 traffic and from the effects of noise and glare from the
25 project. They point to the code requirement that conditional
26 uses must have minimal adverse impacts on permitted adjacent

1 uses. WCLCD Section 22.060(A)(1). They say the findings
2 address impacts on an adjacent school and natural area, but
3 fail to assess impacts on adjacent residential areas.

4 The city considered these issues in its discussion of
5 landscaping and buffering for the project. Record at 94-95.

6 The city found:

7 "There are a number of buffering techniques provided
8 to decrease noise level, screen lights, and provide an
9 overall visual barrier for neighboring residences."
Record 94 (emphasis added).

10 "Little visual buffering is needed on the west 'A'
11 side of the site, since activity will be contained
12 within or behind the hotel. A 20-foot change in
13 elevation, together with extensive landscaping plans,
to include London Plane Trees, Shore Pines, and
Pacific Wax Myrtle, will buffer adjoining residences
from the activity above." Record 95 (emphasis added).

14 "Due to the intensity of use and high vantage point of
15 future patrons, the hotel/convention center will have
16 a negative impact on abutting residences regarding
privacy and increased noise levels from traffic. The
proposal mitigates those impacts to the degree
possible." Record 95.

17 These findings are adequate to show the criterion in the
18 code was considered and satisfied. The code does not require
19 there be no adverse impacts on abutting properties from a
20 proposed use. The use must have minimal adverse impacts
21 considering the characteristics and features of the proposal.
22 We construe the quoted findings to show that this standard is
23 satisfied.

24 Last, petitioners claim the city's deferral of
25 consideration of signs until Phase II is inconsistent with the
26 grant of a conditional use permit. However, as noted above,

1 the code provides for review of a sign plan in the design
2 review process, described in Chapter 55 of the code. Design
3 review occurs after conditional use approval. The deferral is
4 in accord with the code.

5 This assignment of error is denied.

6 CONDITIONAL USE PERMIT - SKYLAND'S CLAIMS

7 Skyland attacks two conditions the city attached to the
8 conditional use approval. Condition No. 10 requires the
9 developer to:

10 "Install all street improvements (to include signal
11 lights, facilities and design costs) at the
12 intersection of Willamette Falls Drive/Highway 43
13 deemed necessary by the City Engineer and the Oregon
14 Department of Transportation (ODOT); and execute a
15 written agreement with those two parties for said
16 improvements satisfactory to the City Attorney and
17 Attorney General. Said lights at Willamette Falls
18 Drive/Highway 43 to be synchronized with light at
19 I-205 Northbound Ramp/Highway 43."

20 Condition No. 11 requires the developer to:

21 "To sign a written agreement with the city of West
22 Linn to fund the redesign and installation of signals
23 at the intersection of Willamette Falls Drive/West 'A'
24 Street. Timing of said signals to be subject to City
25 Engineer's specifications."

26 FIRST ASSIGNMENT OF ERROR

The intersection at Willamette Falls Drive and West "A"
Street does not involve a state highway. Therefore, ODOT does
not have jurisdiction over the intersection. ORS 810.010. At
the city council hearing, Skyland representatives sought to
explain why a signal at this intersection is not warranted
under state criteria and that Clackamas County has a policy not

1 to participate in signal installations unless the state
2 criteria are satisfied. The city attorney considered such
3 testimony as new matter and advised the city council not to
4 consider it. The city attorney's advice was based on the city
5 code, which generally confines review of planning commission
6 decisions to the record.

7 Skyland contends the testimony should have been admitted.
8 We disagree.

9 The county policy is not in the record. Skyland argues,
10 however, that the county's policy is within the scope of
11 argument on whether the signal should be required. However,
12 unless the policy is a law susceptible to official notice, the
13 city correctly considered it to be outside the record.
14 Further, even if the city erred in excluding the evidence, no
15 prejudice has been shown. Relief, therefore, is unavailable in
16 this forum. ORS 197.835(8)(a)(B).

17 This assignment of error is denied.

18 SECOND ASSIGNMENT OF ERROR

19 Skyland says no substantial evidence in the record supports
20 the imposition of Conditions 10 and 11.

21 This evidentiary challenge is on two grounds. First,
22 Skyland says no evidence shows the state highway engineer has
23 approved a signal at the state highway intersection.⁵ We
24 reject this attack because the condition does not require a
25 signal without the necessary official approvals. The developer
26 is required to install a signal deemed necessary by the city

1 engineer and the Oregon Department of Transportation.

2 Skyland secondly alleges the evidence does not show the
3 proposed use will so greatly increase traffic at the Highway 43
4 intersection as to justify imposing the entire expense for the
5 signal on the developer. Skyland contends traffic congestion
6 already exists at the intersection and any increase in traffic
7 resulting from the project only contributes to the existing
8 problems.

9 Evidence in the record shows existing peak-hour traffic of
10 1630 vehicles at the intersection. This volume results in
11 "failure-extreme congestion" levels of service. Record at
12 165. The traffic impact analysis by Skyland's expert also
13 shows an additional 510 vehicles will use this intersection
14 during the peak traffic hour after development. Record at 171.
15 The city found the "development would exacerbate this existing
16 traffic conflict." Record at 94. Although congestion at the
17 intersection existed before the development, substantial
18 evidence clearly supports the city's finding.

19 Skyland's principal argument is that the decision to exact
20 the entire signalization cost from the developer is
21 "inequitable." This Board, of course, has no authority to
22 reverse or remand a land use decision that may be inequitable.
23 Skyland refers to case law from other jurisdictions to support
24 its argument that exactions must be "uniquely attributable" to
25 the proposed development. See Rosen v. Village of Downers
26 Grove, 165 N.E.2d 230 (Ill 1960). However, no Oregon

1 authorities adopt this standard. Further, Skyland does not
2 explain why we should depart from the standards stated in a
3 1979 Oregon Attorney General's Opinion. After analyzing the
4 legal aspects of exactions as a condition to zone changes, the
5 Attorney General concluded such conditions will be upheld if
6 they are, inter alia, "reasonably related to the land or
7 development from which the exaction is required." 39 Op Atty
8 Gen 467, 472 (1979). Without more analysis than provided by
9 Skyland's request to adopt the rule in Rosen, supra, we decline
10 to do so.

11 Given the increase in traffic attributable to the project,
12 a traffic signal at the Highway 43 intersection meets the
13 "reasonably related" standard.

14 Skyland challenges Condition 11 on the grounds the city
15 failed to explain why the city's planning staff recommendation
16 was rejected. The planning staff recommended a three-way stop
17 sign at the intersection of Willamette Falls Drive and West "A"
18 street.⁶ Petitioner states the error as follows:

19 "Respondent erred in imposing a condition contrary to
20 its staff finding and to substantial evidence in the
21 record without explaining in its order why it rejected
22 the findings and evidence." Petition at 9.

23 The city committed no error as alleged. Findings are not
24 required to explain the choices between credible evidence in
25 the record. Morse v. Clatsop County, 12 Or LUBA 70 (1984).

26 This assignment of error is denied.

1 THIRD ASSIGNMENT OF ERROR

2 Skyland's last assignment of error alleges Condition No. 11
3 improperly delegates the city's legislative powers to the city
4 engineer. Condition 11 requires the developer to install
5 signal lights with the "(t)iming of said signal to be subject
6 to City Engineer's specifications." Petitioners contend the
7 city did not provide any standards to guide the engineer's
8 decision. Skyland argues Condition No. 11 impermissibly
9 delegates legislative functions because neither standards nor
10 safeguards limit the engineer's discretion to decide when and
11 if a signal is required.

12 The condition is ambiguous. The city engineer's authority
13 is not clearly stated. The condition may require the engineer
14 to synchronize the signal. Alternatively, the city engineer
15 may be restricted to a determination when the signal is to be
16 installed. Still possible is that the condition may allow him
17 to determine if a signal is required. No findings indicate
18 what meaning should be given to Condition 11. If the city
19 engineer may determine whether or not to impose the
20 signalization requirement, Skyland's assignment of error may be
21 cognizable. However, because several meanings may be given to
22 the condition, we are unable to review the city's order for
23 compliance with applicable standards. See Hoffman v. DuPont,
24 49 Or App 699, 621 P2d 63 (1980), rev den 290 Or 651 (1980). A
25 remand to clarify Condition No. 11 is necessary.

26 Remanded.

FOOTNOTES

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The individual petitioners also challenge the Phase I approval of the conditional use permit on the ground the underlying decision changing the comprehensive plan and zoning designations are invalid. The bases for the alleged invalidity are the same as asserted in the challenge to the plan and zone change in LUBA No. 85-064, discussed in the text above. We denied the assignment of error there, and deny the assignment of error here for the same reasons.

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The project includes 125 guest rooms, a restaurant/lounge, swimming pool, 500 seat conference room, small retail shop and a 402 space parking lot.

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Section 60.070(A)(1) through (7) states:

"A. The Planning Commission shall approve, approve with conditions, or deny an application for a conditional use, except for a manufactured/mobile home subdivision in which case the approval standards and conditions shall be those specified in Section 36.030, or to enlarge or alter a conditional use based on findings of fact with respect to each of the following criteria:

"1. The site size and dimensions provide:

"a. Adequate area for the needs of the proposed use, and

"b. Adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses.

"2. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features.

"3. The granting of the proposal will provide for a facility that is consistent with the overall needs of the community.

- 1 "4. All required public facilities have adequate
2 capacity to serve the proposal.
- 3 "5. The applicable requirements of the zone are met
4 except as modified by this chapter.
- 5 "6. The supplementary requirements set forth in
6 Chapters 52 and 55, if applicable, are met.
- 7 "7. The use will comply with the applicable policies
8 of the comprehensive plan."

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8 Section 55.100 of the WLCDC has criteria for each of the
9 following subjects:

- 10 1. Relationship to the natural and physical environment.
11 2. Compatibility between adjoining uses buffering and
12 screening.
13 3. Privacy and noise
14 4. Private outdoor uses.
15 5. Shared outdoor recreational area
16 6. Demarcation of public--semipublic and private spaces.
17 7. Access and circulation
18 8. Public Transit
19 9. Parking
20 10. Landscaping
21 11. Drainage
22 12. Crime prevention and safety.
23 13. Provisions for the handicapped.
24 14. Signs.

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18 ORS 810.210(2)(e) sets forth a procedure for a city to
19 obtain approval of the state highway engineer for a signal
20 device on a state highway within city limits. In brief, a city
21 must submit findings and recommendations to the highway
22 engineer who has 90 days to approve or disapprove signalization.

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23 The staff had earlier recommend a stoplight at the West "A"
24 Street intersection. Based on a revised engineer's report
25 submitted by the applicant, the staff changed its
26 recommendation to a stop sign. Record at 35.