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

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BENJAMIN FRANKLIN DEVELOPMENT,)
INC.,)
Petitioner,)
vs.)
CLACKAMAS COUNTY,)
Respondent.)

LUBA No. 86-020
FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Douglas G. Pickett, Portland, filed a petition for review and argued on behalf of petitioner. With him on the brief were Niehaus, Hanna, Murphy, Green, Osaka & Dunn.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent County.

Jeff Bachrach, Lake Oswego, filed a motion to intervene and response brief, and argued on behalf of Petitioner-Intervenor Home Builders Association of Metropolitan Portland.

BAGG, Referee; KRESSEL, Chief Referee; DuBAY, Referee; participated in the decision.

AFFIRMED 07/23/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of Clackamas County Board of
4 Commissioners approving a subdivision known as Panorama
5 Estates. Specifically, petitioner challenges a condition
6 attached to the subdivision approval.

7 INTERVENTION

8 The Home Builders Association of Metropolitan Portland
9 seeks to intervene in this proceeding on behalf of petitioner.
10 Respondent makes no objection to the intervention, and the
11 intervention is allowed. For convenience, petitioner and
12 intervenor will be referred to as petitioner in this opinion.

13 FACTS

14 Petitioner applied for construction of a new subdivision on
15 its property located at the west end of Dundee Drive in the Mt.
16 Scott area of Clackamas County. The property includes eight
17 acres and is not developed.

18 The area near petitioner's property includes some suburban
19 development. A planned unit development, known as Coventry
20 Hills, exists to the east, but property north, south and west
21 is undeveloped. Access for Coventry Hills subdivision is
22 Dundee Drive which runs north and south through Coventry Hills
23 and dead ends at the eastern boundary of petitioner's property.

24 The property has a paved driveway traversing the southern
25 boundary. The driveway is nine feet wide and is within an
26 easement serving a residence east of petitioner's property.

1 The easement provides access to Southeast 92nd Avenue, a major
2 north and south street running west of the property. Wooded
3 terrain separates Southeast 92nd Avenue from petitioner's
4 western boundary.

5 In August, 1985, petitioner requested approval of a 20 lot
6 subdivision, and Clackamas County Planning Department staff
7 recommended approval of the application subject to 29
8 conditions. The county board heard the application on
9 September 25, 1985 and on October 23, 1985. At the October
10 hearing, an additional condition, Condition 30, was adopted,
11 and the subdivision approved. The condition provides:

12 "[N]o heavy trucks or other construction equipment
13 utilized in construction of the subdivision shall use
14 Dundee Drive." Record at 74.

14 Petitioner asked for a rehearing because it considered
15 Condition 30 adverse to its interests. A rehearing was held,
16 but the county board denied the request to delete Condition
17 30. This appeal followed.

18 ASSIGNMENT OF ERROR NO. 1

19 "The decision of the Board of County Commissioners to
20 exclude certain construction traffic utilized in the
21 development of subdivision from using Dundee Drive as
22 a means of access to the construction site is not
23 supported by substantial evidence in the whole record."

22 Petitioner argues the county's decision should be remanded
23 because there is not substantial evidence in the whole record
24 to support the board's conclusion that

25 "...the potential negative effects of the use of
26 Dundee Drive by construction vehicles outweigh the
operational difficulties created for the developer;

1 "...the imposition of such condition of approval is
2 reasonably necessary to protect public health, safety
3 and general welfare from the potential deleterious
4 effects of the approval of the subdivision." Record
5 at 74.

6 This conclusion forms the basis for Condition 30.

7 Petitioner argues that the board's conclusion relies on
8 testimony of residents of the Coventry Hills subdivision.
9 Petitioner says this evidence does not support the conclusion
10 that public health, safety and welfare of the citizens mandates
11 prohibition of construction vehicles on Dundee Drive.

12 Petitioner claims the evidence shows that the subdivision
13 is consistent with the comprehensive plan and that the
14 Clackamas County planning staff recommended approval without
15 Condition 30. Petitioner claims construction traffic
16 incidental to development will be much less than the traffic
17 existing when the subdivision is completed.¹ According to
18 petitioner, the Coventry Hills residents themselves believe
19 that traffic on Dundee Drive will increase by 25 percent after
20 the construction is completed and the subdivision occupied.

21 Petitioner argues that it has been singled out of all users
22 of Dundee Drive in that Condition 30 limits petitioner's use of
23 heavy equipment, but other heavy equipment users are under no
24 similar restriction. We understand petitioner to say the
25 county's condition discriminates against it. Petitioner states
26 automobiles, trucks and school buses use Dundee Drive, and
nothing in the record shows petitioner's construction vehicles

1 are any more dangerous than these other users. Petitioner
2 insists the evidence in the record shows petitioner will
3 control the speed of trucks, post warning signs, clean up
4 Dundee Drive and repair any damage to it. These actions
5 illustrate that petitioner will operate its vehicles safely.

6 Lastly, petitioner argues that the prohibition on use of
7 Dundee Drive requires petitioner to use the driveway easement
8 from Southeast 92nd Avenue to the property. This access will
9 create a serious hazard. Petitioner claims the access has poor
10 visibility, is steep and narrow and will therefore create a
11 construction hazard. In addition, development of the access so
12 that it is suitable for construction vehicles will be
13 difficult, expensive and perhaps render the project
14 economically impractical. See Petition for Review at 29.

15 We do not find these arguments persuasive. ORS 215.416(4)
16 provides that approval of land use permits "may include such
17 conditions as are authorized by statute or county
18 legislation." Also, the Clackamas County Zoning and
19 Development Ordinance recognizes the need for and grants
20 authority to attach conditions.

21 "The hearings officer shall make a finding for each of
22 the applicable criteria and approve or deny the
23 application. If approved, the hearings officer may
24 attach certain development or use requirements beyond
25 the minimum standards as conditions to the approval if
such conditions are necessary to satisfy the criteria
for approval or minimize the detrimental effect to
others." Clackamas County Zoning and Development
Ordinance, Section 104.01(C)(3).

26 We find the appropriate standard for review of approval

1 conditions to be whether the conditions are reasonable
2 considering the evidence in the record. A reasonable condition
3 is one which furthers a planning policy or goal and which
4 arises out of evidence in the record. The evidence need not
5 prove the need for a condition, but it must lead a reasonable
6 person to conclude that the evidence supports a need for the
7 condition. We find the county met this standard.

8 In this case, the county's imposition of conditions is a
9 reasonable consequence of its concern over the likelihood of
10 future events. That is, the county commission was required to
11 anticipate potential adverse effects and apply conditions in
12 order to protect the health, safety and welfare of its
13 citizens. In this case, there is testimony in the record that
14 children play in the area, that cars may be parked on either or
15 both sides of the streets limiting Dundee Drive to one-way
16 traffic, and the area is hilly with no sidewalks. See Record
17 15, 16 and 20. The concern that heavy construction equipment
18 may endanger children under these circumstances is reasonable;
19 the likelihood of harm is not remote.

20 In Scenic Sites v. Multnomah County Commission, 33 Or App
21 199, 576 P2d 23 (1978), the Oregon Court of Appeals upheld a
22 conclusion requiring a road dedication on the grounds that the
23 condition was "reasonable based on this record." Scenic Sites,
24 33 Or App at 205. See also, 4 R. Andersen, American Law of
25 Zoning, Sec. 23.24 (2d. Ed., 1977); Miller v. City of Port
26 Angelos, 38 WA App 904, 691 P2d 229 (1984); O'Keefe v. City of

1 West Linn, ___ Or LUBA ___ (LUBA No. 85-064, February 10,
2 1986). We believe the county acted appropriately.

3 We decline to overturn the decision as not supported by
4 substantial evidence.

5 The First Assignment of Error is denied.

6 ASSIGNMENT OF ERROR NO. 2

7 "The decision of the Board of County Commissioners to
8 exclude certain construction traffic utilized in the
9 development of the subdivision from using Dundee Drive
10 as a means of access to the construction site
11 improperly construes the applicable law in that said
12 condition of approval thwarts the comprehensive plan
13 policy of encouraging the infill of Immediate Urban
14 Areas."²

11 ;
12 Petitioner argues that the standards in the Clackamas
13 County Comprehensive Plan and Implementing Ordinances are
14 satisfied by this development proposal. Inclusion of Condition
15 30 is not necessary to comply with the plan; and, indeed, it
16 causes the order to violate the plan, according to petitioner.

17 Petitioner cites a plan provision providing it is the
18 policy of the county

19 "[t]o make use of existing urban service capacities
20 without damaging the character of existing low-density
21 neighborhoods and

22 "[t]o achieve this policy at least in part by
23 encouraging development of Immediate Urban Areas where
24 services are available." Clackamas County
25 Comprehensive Plan, Chapter 49.

26 Petitioner argues that imposition of Condition 30 imposes such
operational difficulties as to deny its use of an existing and
feasible access and requiring it to expend considerable sums
which may render the project "economically unfeasible." See

1 Petition for Review at 32. The result is a violation of the
2 plan in that

3 "a subdivision which is compatible with the
4 comprehensive plan which fulfills the policy of
5 encouraging infill of Immediate Urban Areas may not be
6 constructed." Petition for Review at 32.

7 Petitioner states that if the policy of encouraging infill
8 is to be effectuated,

9 "then that policy must be interpreted so as to allow
10 the travel of construction traffic through existing
11 residential areas where adequate standards can be
12 provided for residents of those areas." Petition for
13 Review at 33.

14 We do not find that the county violated its plan. There is
15 nothing in the plan keeping the county from taking those steps
16 necessary to protect its citizens and property from dangers
17 associated with development. Indeed, the policy itself, while
18 encouraging development, does so "where services are
19 available."

20 Conditions making development difficult or expensive do not
21 necessarily create a violation of a county policy encouraging
22 development. The condition may be appropriate where, as here,
23 it is necessary to protect health, safety and welfare of the
24 citizens.³

25 ASSIGNMENT OF ERROR No. 3⁴

26 Condition No. 30 is improper due to its vagueness and
ambiguity."

Petitioner argues the condition is too vague to enable the
developer to comply. The condition prohibits trucks and
equipment "utilized in construction of the subdivision" from

1 Dundee Drive. This language suggests the prohibition will be
2 in effect during the development phase only, according to
3 petitioner. Petitioner notes, however, that one of the county
4 commissioners at the October 23 hearing indicated his desire
5 that the prohibition should continue to apply to construction
6 of the individual houses.

7 In addition, petitioner notes Condition 29 requires that
8 "access for the existing house adjoining the subject
9 property on the east must be provided from the street
10 stub located between lots 19 and 20, when the new
11 streets are constructed. The existing access from
12 this residence to Southeast 92nd must be discontinued
13 at such time."

14 Petitioner does not explain why the alleged vagueness of
15 the condition is reversable (or remandable) error. If we
16 assume petitioner asserts the alleged vagueness of Condition 30
17 results in denial of a due process right, then petitioner must
18 show that the condition is "ad hoc policy making" which will

19 "grant to some citizen or class of citizens,
20 privileges, or immunities, which, upon the same terms,
21 [do] not equally belong to all citizens.' Or Const.,
22 Art I." Andersen v. Peden, 284 Or 313, 326, 587 P2d
23 59 (1978).

24 Petitioner has made no such showing.

25 Similarly, petitioner does not explain why the alleged
26 inconsistency between Condition 29 and Condition 30 requires us
to reverse or remand the decision. We add, however, that the
conditions need not be read as inconsistent.

Condition 29 simply insures access for the private
residence near the boundary of petitioner's property and 92nd

1 Avenue. The condition calls for a change in access for the
2 residence when the new streets are constructed. This condition
3 does not limit petitioner's construction activities. We
4 understand petitioner may find road construction necessary to
5 fulfill the condition disruptive, but this disruption does not
6 mean the condition is improper.

7 We deny the Third Assignment of Error.

8 The decision of Clackamas County is affirmed.

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FOOTNOTES

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Petitioner adds that the chief assistant county counsel wrote a letter on behalf of the county board to petitioner representing the board did not intend to prohibit use of Dundee Drive to pickup trucks and vans driven by persons working on the subdivision. Petitioner claims that there is no evidence to support the apparent conclusion that heavy trucks should be singled out and excluded from Dundee Drive. For the reasons discussed herein, we reject petitioner's argument.

2

This assignment of error is substantially similar to Intervenor's First Assignment of Error which states:

"Condition No. 30 is inconsistent with the county's acknowledged comprehensive plan, particularly policies encouraging infill development of Immediate Urban Areas."

3

We note also the county's urbanization goal includes a policy encouraging "infilling of Immediate Urban Areas with a minimum of disruption to existing neighborhoods...." Clackamas County Comprehensive Plan and Urbanization Goal 3.0(b).

4

This assignment of error is Intervenor's Second Assignment of Error.