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

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WILLIAM DICKAS,)
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Petitioner,)
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vs.)
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CITY OF BEAVERTON,)
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Respondent,)
)
and)
)
SPECTRA NOVAE, LTD. and)
BEAVERTON SCHOOL DISTRICT #48,)
)
Participants-)
Respondents.)

LUBA No. 87-086
FINAL OPINION
AND ORDER

William Dickas, Beaverton, filed the petition for review and argued on his own behalf.

Pamela J. Beery, Beaverton, filed a response brief and argued on behalf of Respondent City.

BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REMANDED 04/11/88

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 City of Beaverton decision approving
4 the preliminary plat of MacArthur Park, a 114-lot residential
5 subdivision.

6 FACTS

7 Participant-respondent Spectra Novae, Ltd. (Spectra) filed
8 an application for approval of the preliminary plat of the
9 MacArthur Park subdivision with the City. MacArthur Park
10 subdivision is located on an approximately 27 acre portion of a
11 38 acre parcel owned by participant-respondent Beaverton School
12 District #48. Spectra is the contract purchaser of the 27 acre
13 subdivision site.

14 The school district planned the 38 acres for a high school,
15 but declared the property surplus. The district is, however,
16 retaining 11 acres in the southeast corner of the 38 acres as a
17 possible future elementary school site. Record 97.

18 The Beaverton Area General Plan (plan) map designation for
19 the vacant 38 acre parcel is Public Facilities. The parcel is
20 zoned Single Family (Standard) Density, 7,000 Sq.Ft. (R-7).
21 Both the plan map and the zoning map identify the 38 acres as
22 "Future School Site." Most of the northern half of the 38
23 acres is identified on the plan Natural Resources Map as an
24 "Other Important Natural Resources" area because of the
25 presence of a significant stand of trees. The area surrounding
26 the site includes predominantly residential uses.

1 The requested subdivision was approved on April 15, 1987 by
2 the City of Beaverton's planning commission. Petitioner
3 appealed the decision to the city council. The council
4 approved the development with certain conditions. This appeal
5 followed.

6 FIRST ASSIGNMENT OF ERROR

7 "The Comprehensive Plan Designates the Property as
8 Future School Site."

9 The plan and zoning maps identify the subject property as a
10 "Future School Site." Petitioner argues the approval of a
11 residential subdivision on the property violates the
12 requirement of ORS 197.175(2)(d), ORS 227.173 and Beaverton
13 Development Code (code) Section 201.2 requiring the subdivision
14 preliminary plat conform to the plan and code.

15 The city responds that location of a school on the subject
16 property is not mandated by the plan and code. The city cites
17 a portion of the city's plan stating:

18 "It should be understood that the proposed schools
19 symbolized on the Plan are intended to indicate
20 general locations and not specific sites." Plan p. 62.

21 The city also advises the subject property is zoned R-7.
22 Schools are a conditional use in that zone. The city states
23 the code does not include an institutional or public use zone.
24 Respondent City concludes it properly interpreted the
25 appearance of the term "Future School Site" on its plan and
26 zoning maps as advisory in nature, rather than as a prohibition
against use of property for other than school purposes.

1 We believe the city's interpretation of its plan and code
2 is reasonable, and we will sustain the interpretation. Alluis
3 v. Marion County, 64 Or App 478, 668 P2d 1242 (1983). The
4 development code and the zoning map show there is no zone for
5 institutional or public use corresponding to the plan map's
6 Public Facilities designation. Schools are a conditional use
7 in the city's single family residential zones. The plan text
8 clearly provides that proposed school sites are intended to
9 show general locations and not specific sites. We are cited to
10 nothing in the plan or code limiting the city to allowing only
11 a school on the subject property.

12 The first assignment of error is denied.

13 SECOND ASSIGNMENT OF ERROR

14 "There Are Not Adequate Public Facilities Available."

15 Petitioner argues that code Sections 130.5.C and
16 201.2.C.¹ require the applicant to prove that there will be
17 adequate school facilities to serve the proposed subdivision.
18 According to petitioner, an impact statement by the school
19 district shows that both the elementary school and high school
20 will be over design capacity.²

21 The city's findings state "adequate school facilities exist
22 to serve this residential development" and reference comments
23 from the school district. Record 16. The school district
24 comments, in part, that

25 "We would anticipate 61 school-age children from your
26 proposal for 112 single-family dwellings (see attached
memo dated October 1985).

1 "The number of students projected from your proposal
2 can be housed at the above schools, with the following
3 qualilfications:

3 "Elementary:

4 "Greenway is currently over capacity and projected to
5 be further over capacity for the next school year.
6 District administration is recommending that a modular
7 addition be placed at Greenway School this summer.
8 The addition would bring capacity to 528.

7 "High School:

8 "Beaverton High is currently over capacity, but
9 utilizes space at a closed elementary school directly
10 across the street. Beaverton High will begin to
11 decline next year as smaller classes or students begin
12 moving up and through the high school grades." Record
13 23.

11 We note the district's enrollment projection includes 85
12 kindergarten students. If kindergarten students are included
13 in the projected enrollment, Greenway Elementary School would
14 be 56 students over capacity, as petitioner complains.³

15 The school district's remarks do not clearly state adequate
16 schools are available. The school district says that the
17 students can be "housed" at the schools with "qualifications."
18 The qualification mentioned in the city's letter is that the
19 elementary and high schools serving this area are currently
20 over capacity. Additional students generated by the
21 development would place the schools even more over capacity.
22 Neither the city's findings nor the school district's comments
23 offer an explanation as to how the excess of 56 students at the
24 Greenway Elementary School will be accommodated by the school
25 district.⁴

26 //

1 It is not at all clear what the capacity figures mean. We
2 are not advised as to whether the capacity figure is simply a
3 desirable figure or whether it is a standard which, if
4 exceeded, means the school cannot provide adequate service.⁵

5 In sum, the record simply does not support the city's
6 finding that adequate public facilities exist. While it may be
7 that the city may approve this development notwithstanding an
8 elementary school where enrollment is over capacity, some
9 explanation of the effect of exceeding the school's capacity is
10 needed to demonstrate compliance with Code Sections 130.5.C and
11 201.2.C.

12 The second assignment of error is sustained.

13 THIRD ASSIGNMENT OF ERROR

14 "The Subdivision Replaces a Designated Wildlife
15 Habitat."

16 Petitioner argues that the northern 12 acres of the
17 subdivision site are occupied by a forested wildlife habitat
18 which is designated as an important natural resource in the
19 plan. Petitioner contends that the city's economic, social,
20 environmental and energy (ESEE) analysis (performed to comply
21 with Statewide Planning Goal 5) examined the consequences of
22 developing the site for a school, not residential use. See OAR
23 660-16-005(2). According to petitioner,

24 "When the city disregarded the [Future School Site]
25 Plan designation it simultaneously created a result
26 (intended or otherwise) under which no appropriate

1 Goal 5 analysis would ever be performed on the
2 habitat." Petition for Review at 7.

3 We understand this assignment of error to challenge not
4 only compliance with the comprehensive plan, but also Goal 5.
5 Petitioner appears to argue that because the site was not
6 designated for residential development by the plan, there was
7 no proper analysis performed comparing the consequences of
8 preserving the habitat against those of permitting residential
9 use. Therefore, according to petitioner, use of the site for
10 anything other than school purposes not only violates the plan
11 designation for the site but also results in a condition
12 contrary to Goal 5.

13 The city argues that its ESEE analysis discloses the site
14 was identified as zoned "residential" and as a "potential
15 school," but with no commitment to a particular use. Record
16 151. The city argues that the plan's Other Important Natural
17 Resources designation encourages the protection or enhancement
18 of these natural features. However, full development of these
19 areas is allowed by the plan. According to the city,
20 applicable plan policies require it to encourage protection of
21 these resources "to the extent feasible in the development of
22 these areas." Plan, p. 111. The city met the resource
23 protection requirement by imposing conditions on the
24 development approval which preserved trees. Record 10-11.

25 The city's plan provides that Other Important Natural
26 Resources areas may be protected to the extent feasible by
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1 incorporating such features into development. The plan
2 provides, in part, that

3 "* * * [T]hese areas are mapped to provide notice to
4 owners, the City and the general public of their value
5 and the existence of data and information in the
6 Inventory which could be of assistance in determining
7 types or methods of development. . . The overall
8 intent is to allow full development of these areas and
9 to encourage the maintenance or improvement of the
10 resources present to enhance the overall
11 development." Plan, pp. 110-111.

12 The plan also states:

13 "Upland vegetation areas are particularly valuable for
14 mature trees or shrubs [sic] and these should be
15 retained to the extent feasible in the development of
16 these areas." Plan, p. 111.

17 Given these plan provisions, we believe the city's
18 interpretation of the plan is reasonable and correct. Alluis,
19 supra. We are cited to nothing mandating further protection of
20 this area.⁶

21 The third assignment of error is denied.

22 FOURTH ASSIGNMENT OF ERROR

23 "The Plat Permits Local Residential Street Access to
24 S.W. 125th in Violation of the Plan."

25 Petitioner argues that plan Circulation Policy 7 prohibits
26 local residential street access to S.W. 125th. Petitioner also
argues it is apparent from the plat that proposed Longhorn Lane
is a local residential street as defined in the code, yet
accesses S.W. 125th in violation of the plan. Petitioner adds
that the plat does not comply with unspecified plan
requirements for setbacks from S.W. 125th and a bicycle path

1 along S.W. 125th.

2 The city replies that Circulation Policy 7 is not a
3 mandatory prohibition against access onto S.W. 125th from a
4 local residential street, since it states such streets "should
5 not" be given direct access. The city also argues that,
6 although Longhorn Lane will function as a local street
7 providing direct access to 6-8 lots, it will serve as a minor
8 collector for traffic from the remaining 106-108 lots of the
9 subdivision. Eventually, it will also serve traffic from the
10 undeveloped multi-family residential site to the north of the
11 subdivision. Thus, the city concludes that Longhorn Lane is a
12 minor collector, from which access onto S.W. 125th is clearly
13 permitted by the plan and code.

14 As to petitioner's charge about setbacks, the city states
15 Circulation Policy 7 requires either setbacks or acoustic
16 barriers along S.W. 125th, and the city's decision complies
17 with this policy by requiring in its conditions that a
18 continuous noise barrier be constructed. Record 10.

19 Lastly, the city points out that a bikepath already exists
20 along S.W. 125th, and the city required provision of sidewalk
21 bikepaths through the subdivision by condition.

22 We agree with the city's analysis of Circulation Policy 7.
23 It does not appear to absolutely prohibit the access provided
24 for in the subdivision plat. Further, Policy 7 provides that
25 either setbacks or acoustic barriers are appropriate, and the
26 city complied with this policy by requiring a continuous noise

1 barrier be constructed.

2 With respect to petitioner's charge about bike paths, we
3 note a condition in the city's order requiring that the
4 developer design sidewalks so as to provide for bike paths
5 "where appropriate." Record 9. Petitioner's argument does not
6 state the source of the requirement for bike paths. There is a
7 map in the record showing bike paths, but we are unable to
8 determine whether the map evidences a requirement that bike
9 paths be constructed along with each development, or whether
10 the map shows the location of existing bike paths. The city
11 argues that bike paths already exist on both sides of S.W.
12 125th.

13 Without citation of authority to a plan or code requirement
14 that the subdivision plat show the existence of bike paths, we
15 are unable to sustain petitioner's charge. Petitioner does not
16 give us a legal reason why the city's decision in this regard
17 is in error. Deschutes Development Co. v. Deschutes County, 5
18 Or LUBA 218, 220 (1982).

19 The fourth assignment of error is denied.

20 FIFTH ASSIGNMENT OF ERROR

21 "The City Council May Not Accept Private Advice from
22 the City Attorney on a Permit Appeal."

23 Petitioner argues that the "motion record" before LUBA
24 shows that city council members received private written advice
25 from the city attorney about the subject matter of petitioner's
26 appeal after the public hearing was closed. Petitioner argues

1 that in a quasi-judicial proceeding, it is "fundamentally
2 unfair" to permit a government attorney to secretly persuade
3 the decisionmaker to the attorney's point of view without
4 permitting the parties to the proceeding to know what was said.

5 The city replies that the letter in question constitutes
6 legal advice to the governing body from its attorney. This
7 advice is a privileged communication not subject to disclosure
8 under the Public Records Law or in this proceeding, according
9 to the city. The city adds that petitioner failed to identify
10 any legal theory under which relief may be granted.

11 ORS 227.180(4) provides that communications between staff
12 and the deciding body are not ex parte communications within
13 the meaning of ORS 227.180(3). We find this statute
14 establishes a legislative policy to encourage communication
15 between public bodies and their supporting staff members.
16 Petitioner cites us to no prohibition against such
17 communication, except to say that it is unfair. Petitioner
18 does not advise how this unfairness, if it exists, prejudices
19 petitioner's substantial rights. Such prejudice is necessary
20 before we may reverse or remand a decision on this ground. ORS
21 197.835(8)(a)(B).

22 Without a legal theory upon which we can base reversal or
23 remand for this alleged error, we are bound to deny this
24 assignment of error. Deschutes Development Co. v. Deschutes
25 County, supra.

26 The fifth assignment of error is denied.

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The decision of the City of Beaverton is remanded.

FOOTNOTES

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4 Code Section 130.5.C provides that the applicant has the
5 burden of proof in all criteria, and Section 201.2(C) requires
6 a finding that "Adequate public facilities are available to
7 serve the proposal * * *."

8 2
9 Petitioner also argues that there is evidence in the record
10 that the population in this area "breeds at a rate somewhat
11 above average," and therefore the proposed subdivision will
12 produce more elementary students than the city has projected.

13 3
14 If kindergarten students are counted as 1/2 students (as
15 suggested by respondent at oral argument) the total enrollment
16 exceeds capacity by 14 students.

17 4
18 The school district's comments do indicate that the excess
19 students at Beaverton High School are accommodated by using
20 additional space in nearby closed elementary schools. Record
21 23.

22 5
23 We note ORS 332.072 requires the district to educate
24 children within its boundaries, presumably whether or not the
25 district believes it has sufficient room to house the students
26 at a particular school. However, we believe some explanation
as to how that will be accomplished is required under Code
Section 201.2.C where, as here, the district's own figures show
only that the available school facility does not have adequate
capacity to handle the projected enrollment.

27 6
28 We understand petitioner's assignment of error number three
29 to attack the county's compliance with its own plan.
30 Petitioner's suggestion that the city violated Goal 5 is
31 mistaken. The city's comprehensive plan has been acknowledged
32 by the Land Conservation and Development Commission as being in
33 compliance with all statewide goals. Under the provisions of
34 ORS 197.835, the applicable standard for review of this
35 decision is the city's comprehensive plan and implementing
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ordinances, not the statewide planning goals. Byrd v.
Stringer, 295 Or 311, 666 P2d 1332 (1983).

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