

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

VESTIBULAR DISORDER CONSULTANTS,)	
INC.,)	
)	
Petitioner,)	LUBA No. 89-112
)	
vs.)	FINAL OPINION
)	AND ORDER
CITY OF PORTLAND,)	
)	
Respondent.)	

Appeal from City of Portland.

William T. Rhodes, Portland, filed the petition for review.

Ruth Spetter, Portland, filed the response brief.

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

AFFIRMED

04/06/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision approving its application for a four lot subdivision, but imposing conditions and denying variances to front yard setback requirements.

FACTS

This appeal concerns petitioner's request to create a total of four lots out of 1.65 acres of property described in the record as Tax Lots 59 and 74. Access to the property is from S.W. Arnold Street. Large lots developed with single family dwellings adjoin the property to the east and west. Undeveloped Tax Lot 58, which includes approximately one acre, adjoins the property to the north. Tax Lot 58 is bordered on its north by by an unimproved portion of the S.W. Comus Street right of way.

In March 1988, lot line adjustments affecting Tax Lots 59 and 74, as well as two other tax lots, were approved by the city. Tax Lot 59 became a flag lot with frontage on S.W. Arnold Street. Tax Lot 74 was increased in size to become a buildable lot.

In October 1988, petitioner submitted a request for a major partition to partition Tax Lot 59 into three lots. Prior to approval of the major partition request, petitioner requested a second lot line adjustment to enlarge Tax Lot 74 and reduce Tax Lot 59. Petitioner withdrew its application

for a major partition, and the city approved the requested lot line adjustment.

In March 1989, petitioner submitted a request to partition Tax Lot 74 into three parcels. Additionally, petitioner's proposed partition map shows a fourth parcel and an additional tract of land, designated as "Tract A," which are to be created from Tax Lot 59. Petitioner proposes to use "Tract A" as a private road to provide access from the four parcels to S.W. Arnold Street. Over petitioner's objections, the city elected to process the application as a "subdivision" rather than a "major partition." The city hearings officer approved a four lot subdivision, but imposed conditions (including a condition that petitioner dedicate a right of way between S.W. Arnold Street and the northerly boundary of the site) and denied petitioner's request for variances.¹

Petitioner appealed the hearings officer's decision to the city council, which conducted a de novo review of the application, accepted additional testimony and evidence, and approved the subdivision application with the same conditions as imposed by the hearings officer. This appeal followed.

¹The required right of way does not now connect with S.W. Comus Street to the north, and the hearings officer did not require as a condition of approval that the dedicated right of way be fully improved at this time. One of the conditions of approval provides that a non-standard road may be constructed within the right of way to provide interim access to the four lots.

FIFTH ASSIGNMENT OF ERROR

"Respondent erred in applying subdivision statutes to a major partition application and in failing to hold an appeal on the record and to provide a transcript when requested to do so by petitioner."

A. Subdivision Versus Major Partition

Petitioner contends the city incorrectly characterized its application as requesting approval for a four lot subdivision rather than approval for a major partition.² Petitioner argues the characterization is important because the city may impose requirements for improvements as conditions of subdivision approval that it may not impose on persons seeking approval of a major partition.

The city concedes that the approval petitioner requested in this matter is for a major partition rather than a subdivision.³ However, the city argues the code's distinction between subdivisions and major partitions is unimportant in this case as each of the code sections the city relied upon in imposing the conditions of approval

²Under Portland City Code (PCC) 34.16.045, partitions include divisions of a "tract of land into two or three parcels within a calendar year when such * * * tract of land exists as a unit or contiguous units of land under single ownership at the beginning of such year. * * *" Partitions which create a public or private street are defined as major partitions. PCC 34.16.040.

³The city bases its concession regarding the nature of the application on its discovery that petitioner sold Tax Lot 59 on December 28, 1988. Therefore, petitioner's request to divide Tax Lot 74 into three parcels is a partition, as defined under the code. Respondent's Brief 4. The city notes it was not aware of this sale and the sale was not mentioned by petitioner to the city council or in the petition for review filed in this appeal.

challenged by petitioner applies equally to subdivisions and minor partitions.⁴

Petitioner does not cite any PCC section which contradicts the city's contention. Specifically, petitioner cites no approval standards that were applied by the city to impose the conditions challenged in this appeal which apply differently to major partitions and subdivisions. We therefore conclude the city's mischaracterization of the application as requesting subdivision approval was harmless error. Publishers Paper Co. v. Benton County, 63 Or App 632, 636, 665 P2d 357 (1983); Muhs v. Jackson County, 12 Or LUBA 201, 216 (1984).

This subassignment of error is denied.

B. Scope of Review and Requirement for a Transcript

Petitioner's next argument under this assignment of error is that the city should have limited its review to the record of the proceedings before the hearings officer.

The city responds that the city council has discretion to hear appeals on the record or to allow additional testimony or evidence. PCC 33.215.190(E) provides:

"The City Council may at its option hold the hearing 'on the record' limited to the points or issues raised in the appeal; or may admit

⁴PCC 34.70.030 states in part that "[t]he same improvements shall be installed to serve each parcel in a major partition as is required to [serve each lot in] a Subdivision." The city's policy concerning future extension of streets applies to land divisions of all types. PCC 34.50.020.

additional testimony and other evidence, or may hold a de novo hearing. If additional testimony, issues, or evidence are presented, opposing persons shall be given a reasonable opportunity to respond."

Petitioner does not argue that it was surprised in any way by the city's decision to allow additional testimony and evidence, as PCC 33.215.190(E) clearly allows. Neither does petitioner contend the city failed to provide a reasonable opportunity to respond to any new issues, testimony or other evidence. We agree with the city that the city council committed no error by failing to limit its review to the record of proceedings before the hearings officer.

Finally, petitioner contends that if the city council's review is limited to the record before the hearings officer, due process requires that the city provide a transcript.

We rejected petitioner's argument that the city council was required to limit its review in this matter to the record of proceedings before the hearings officer. In addition, petitioner cites no PCC section granting it a right to a transcript, and the city contends there is none. To the extent petitioner's claim of a right to a transcript is constitutionally based, petitioner does not develop an argument in support of its theory. Mobile Crushing Company v. Lane County, 11 Or LUBA 173, 182 (1984); Constant v. Lake Oswego, 5 Or LUBA 311, 327 (1982). We reject petitioner's claim that the city erred by failing to provide a transcript.

This subassignment of error is denied.

The fifth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

"Respondent failed to consider substantial evidence contained in the whole record as to the creation of a hazardous condition in the siting of a dangerous street corner."

THIRD ASSIGNMENT OF ERROR

"Respondent erred in failing to consider substantial evidence of [sic] the whole record as to the lack of need for a connecting road through the property."

As noted earlier in this opinion, the city's decision approving petitioner's requested land division is conditioned on dedication of a right of way from S.W. Arnold Street to the northern boundary of Tax Lot 74, where it abuts Tax Lot 58.

Petitioner contends its traffic engineer demonstrated that American Association of State Highway and Transportation Officials (AASHTO) intersection site distances are not met where the right of way required by city intersects S.W. Arnold Street. Petitioner further contends the city improperly relied on evidence that other intersection alternatives would be more dangerous and ignored testimony from nearby property owners that they would prefer the short cul de sac serving only the four lots, as proposed by petitioner.

The city based its requirement for dedication of a right of way to permit a future connection between S.W.

Arnold Street and S.W. Comus Street to the north on PCC 34.50.020, which provides in part:

"Where a Subdivision or partition associated with any major or minor land division adjoins unsubdivided land, streets, which should be continued in the event of the division of the adjoining land, will be required to be provided to the boundary lines of the tract. * * *."

The city's findings explaining why it required the dedication of a right of way as a condition of approval, and addressing petitioner's concern that the resulting intersection would create a dangerous intersection, are as follows:

"There is a need for a future public street through this site. The proposed Tract A and a 40-foot-wide strip of land extending to the north property boundary will need to be public right-of-way in order for a connection to be made to Tax Lot 58 and the Comus Street right-of-way to the north. Comus Street will eventually extend from SW 35th Avenue east, to Arnold Woods, a 41-lot subdivision. Future access and circulation is needed in order to provide a connected local street system in the area. The undeveloped properties to the north includes [sic] 1- to 3-acre sites * * * which abut [an] * * * unbuilt portion of the Comus Street right-of-way. There is a potential for the area north of the applicants' site to develop with at least 25 homes.

"* * * For a 3,100-foot distance along SW Arnold Street between SW 35th Avenue and Lancaster Road, the two north-south neighborhood collector streets in the area, there is only one north-south street.

"A north-south street connection will augment the east-west access that Comus Street will provide. A north-south connection will also serve Arnold Woods, a 41-lot subdivision located 400 feet east

of the applicants' site. This subdivision currently has one access point; however, four street plugs exist at the subdivision perimeter for the streets to be extended * * *. The reserve strip provided on the west boundary of Arnold Woods subdivision demonstrates the intent for Comus Street to be extended west north of Tax Lot 58. * * *

* * * * *

"Three cul-de-sacs, as proposed by the applicants, will not provide adequate circulation for this area. The applicants' proposal is for two cul-de-sacs at the east and west end of Comus Street and a third cul-de-sac at the applicants' site. The need for a street connection through this site was identified as early as July 15, 1980, when the Hearings Officer approved the tentative plan for * * * a nine-lot residential development that included the applicants' site and Tax Lots 58 and 74.

* * * * *

"This site provides the best location for access from Comus Street to SW Arnold. Due to the topography and existing development between SW 29th and SW 35th, there are limited locations where a north-south street can be constructed along SW Arnold Street. The subject location is suitable and will provide a much needed north-south street that the area lacks.

"There would be adequate sight distance at the intersection created by the new street and Arnold Street. The minimum sight distance standard (Policy on the Geometric Design of Highways and Streets) for this intersection is 220 feet; whereas, 224 feet of sight distance exists to the west and 316 feet to the east providing sufficient sight distance. The applicants' traffic engineer's sight distance findings vary with staff. The Traffic Management staff gave testimony at the City Council hearing that the applicants' consultant finding of 194 feet of sight distance to the west was based on the wrong

standard in the Policy on the Geometric Design of Highways and Streets. The consultant used a standard which pertains to cross traffic from the south; whereas, there is no street or access to or from the south. In addition, staff indicated that the consultant's * * * 194-foot measurement was taken viewing across the ravine, whereas the correct measurement would be along Arnold Street, south of the ravine. The City of Portland uses stopping-sight distance, assumes the minor street is stopped, [assumes] that the 85th percentile standard for roadway speed * * * [applies, and] that the guideline of 31 miles per hour is applicable. The posted speed on Arnold Street is 35 miles per hour and there is a sign which indicates that speed near the applicants' site should be 25 miles per hour." Record 13-15.

We conclude the above-quoted findings are adequate to explain why the city determined application of PCC 34.50.020 in this case supports the condition that a right of way for a future connection between S.W. Arnold Street and S.W. Comus be provided.

We also find no support in the record for petitioner's contention that the city failed to consider the evidence offered by petitioner concerning the desirability of requiring a right of way dedication, as opposed to a cul de sac, in this location.⁵ The city simply was persuaded to reach the decision it did by other evidence in the record of a need for a connection between S.W. Arnold Street and S.W.

⁵In fact, the city expressly recognized that petitioner and other property owners in the area would prefer to live on dead-end streets. However, the city found that its policies favoring a connected local street system to better distribute traffic and provide alternative routes for bicyclists, school children, and emergency vehicles outweigh the property owners' preference for dead-end streets. Record 23.

Comus Street to avoid significant residential development on long cul de sacs.

As we explained in Benjamin Franklin Dev. v. Clackamas County, 14 Or LUBA 758, 761 (1986), the city's findings and the evidentiary record supporting its decision to impose conditions of approval need only be sufficient to demonstrate that the conditions support or further a legitimate planning purpose. It is not required that the evidentiary record "prove the need for a condition, but it must lead a reasonable person to conclude that the evidence supports a need for the condition." Id. We conclude the city's findings in this case are sufficient to show a legitimate planning purpose is furthered by the condition requiring the right of way dedication.

The city also responded to petitioner's arguments concerning the sight distances and the safety of the required intersection. The record submitted to the Board shows petitioner's expert and city transportation planners disagreed about whether the sight distance standards noted in the findings quoted above are met. The city transportation planners stated those sight distance standards are met, and contended petitioner's expert applied the wrong standard and miscalculated the westerly sight distance. Petitioner suggests the city applied the wrong sight distance standard.

Neither party identifies where the "Policy on the

Geometric Design of Highways and Streets" (Street Design Policy) may be found. Furthermore, while the parties assume the applicability of this policy, neither party explains its legal status. Neither party has provided a copy of the Street Design Policy, and we are unaware of any provision in the city's comprehensive plan or the PCC which establishes "standards" relating to sight distances.

We cannot ascertain whether the sight distance standards found in the Street Design Policy are approval standards in the sense that an intersection lacking the sight distances provided in the policy could not properly be approved. However, assuming that the Street Design Policy does provide such intersection approval standards, at best petitioner has only established that there is conflicting evidence in the record regarding the city's conclusion that its condition requiring right of way dedication is consistent with the policy. Where we conclude a reasonable person could reach the decision the local government adopts, in view of all of the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 13-14.

In this case, the city reasonably relied upon the

calculations of its city engineer in determining that sight distances at the intersection are adequate to comply with the policy. Additionally, the city explained in its decision that it believed petitioner's expert applied the wrong sight distance standard and miscalculated the disputed sight distance.⁶ It is up to petitioner to explain what is wrong with the city's conclusion, and petitioner has not provided this explanation. Standard Insurance Co. v. Washington County, 16 Or LUBA 30, 33 (1987) (petitioner must do more than assert the decision maker reached the wrong conclusion); Collins Foods v. City of Oregon City, 14 Or LUBA 311, 313 (1986).

The first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

"Respondent erred in applying a street policy that has never been legislatively enacted."

Petitioner contends the city improperly relied upon a document entitled "Local Street Connection Guidelines" in finding that its proposed cul de sac should not be approved. Petitioner contends that this document has not been adopted by the city and may not be applied to deny its request for approval of a cul de sac for access to the proposed lots.

The city agrees that the cited document is an unofficial internal document, but contends that the

⁶Petitioner offers no response to the city's explanation.

challenged findings concerning the document merely state that the decision adopted by the city is consistent with guidelines in the document. The city contends numerous other findings, quoted supra under our discussion of the first and third assignments of error, explain why the right of way dedication was required. In essence, the city argues the findings concerning the internal document are properly viewed as surplusage.

We agree with the city.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

"Respondent erred in requiring a dedicated street, nonaccess strips and improved water lines as no substantial evidence was submitted showing a need for any of these conditions."

A. Dedication of Right of Way

We understand petitioner to contend under this subassignment of error that the city erred by requiring dedication of the right of way as a condition of approval rather than allowing petitioner to dedicate the right of way at a future date. Petitioner contends that the city required dedication as a condition of approval simply because an agreement for a future right of way dedication would be too difficult to draft.

The city explains in its findings that, in imposing the dedication requirement, it relied upon ORS 92.090(3), which provides in part:

"No plat of a proposed subdivision or partition shall be approved unless:

"(a) Streets and roads for public use are dedicated without any reservation or restriction other than reversionary rights upon vacation of any such street or road and easements for public utilities.

"* * * * *"

Assuming the city is required to explain why it chooses to require dedication now, rather than in the future, petitioner makes no attempt to explain why the cited statute does not provide a sufficient basis for requiring dedication of the right of way as a condition of approval.

This subassignment of error is denied.

B. Nonaccess Strips and Water Lines

Petitioner contends the city's findings and the evidentiary record do not support a need for the conditions of approval adopted by the city concerning nonaccess strips and improved water lines.⁷

⁷Although petitioner does not quote or explicitly identify the conditions it challenges, apparently they are as follows:

"* * * * *

"E. A one-foot non-access strip shall be placed along the SW Arnold Street frontage of Lot 4 to prohibit direct access to Arnold and shown on the final plat.

"F. A one-foot non-access strip shall be placed along the north boundary of the required right-of-way.

"* * * * *

"H. Water service lines shall be upgraded according to the specifications of the Water Bureau, with improvement

Petitioner is incorrect about the lack of findings concerning the nonaccess strip and water line conditions. The city explained that a reserve strip across the north of the required right of way was necessary to allow the city to control access to the north of the required right of way. Record 15. The city explained the nonaccess strip along S.W. Arnold Street was required because the lot fronting on S.W. Arnold would have access from the newly dedicated right of way, there is no need for a second access onto S.W. Arnold Street, and a second access would only create unnecessary traffic conflicts. Id.

The city's findings concerning the water line condition are as follows:

"The Water Bureau indicates that the existing eight-inch water line in Arnold Street may not have adequate pressure to serve all four lots. Extension of a water main may be required depending upon the building elevation and desired water pressure." Record 22.

As was the case under the previous subassignment of error, petitioner does not develop an argument in support of its position that the conditions quoted in n 7 supra were improperly imposed. Petitioner does not explain why the city's stated need for the nonaccess strips is inadequate. Neither does petitioner argue the city lacks authority to

costs borne by the developer to the extent required by the Water Bureau.

"* * * * *." Record 24-25.

impose on the developer the cost of any water service facilities upgrading that may be necessary to provide water service to the lots.

As we explained earlier in this opinion, the city is only required to assure that the record and its findings are adequate to demonstrate that the conditions of approval imposed further a legitimate planning purpose. Benjamin Franklin Dev. v. Clackamas County, supra. In the absence of an argument by petitioner explaining why the reasons expressed by the city for imposing the challenged conditions are improper, we conclude the city's findings and the record in this case are adequate to support its decision to impose the challenged conditions. Standard Insurance Co. v. Washington County, supra.

This subassignment of error is denied.

The fourth assignment of error is denied.

The city's decision is affirmed.