

1                               BEFORE THE LAND USE BOARD OF APPEALS

2                               OF THE STATE OF OREGON

3  
4 BILL SOFICH, SUSAN SOFICH,            )  
5 CLYDE TAMBLING, KIM TAMBLING,        )  
6 TERRI POWERS, and MICHAEL POWERS,        )

7    )  
8                               Petitioners,            )  
9    )

10               vs.    )

11    LUBA No. 91-157

12 CITY OF OREGON CITY,                                    )  
13    )

14    FINAL OPINION  
15    AND ORDER

16                               Respondent,            )  
17    )

18               and    )  
19    )

20 V. GORDON LINVILLE,                                    )  
21    )

22                               Intervenor-Respondent.            )

23               Appeal from City of Oregon City.

24  
25               Bill Sofich, Susan Sofich, Clyde Tambling, Kim  
26 Tambling, Terri Powers and Michael Powers, Oregon City,  
27 filed the petition for review. Terri Powers argued on her  
28 own behalf.

29  
30               Mark J. Greenfield, Portland, and Steven W. Abel,  
31 Portland, filed a response brief on behalf of respondent and  
32 intervenor-respondent. With them on the brief were Schwabe,  
33 Williamson & Wyatt and Preston, Thorgrimson, Shidler, Gates  
34 and Ellis. Mark J. Greenfield argued on behalf of  
35 respondent and Steven W. Abel argued on behalf of  
36 intervenor-respondent.

37  
38               KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,  
39 Referee, participated in the decision.

40  
41                               AFFIRMED                               01/10/92

42  
43               You are entitled to judicial review of this Order.  
44 Judicial review is governed by the provisions of ORS  
45 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an Oregon City City Commission<sup>1</sup>  
4 order approving a preliminary plan for a planned development  
5 (PD) on property zoned R-6 Single Family Residential (R-6).

6 **MOTION TO INTERVENE**

7 G. Gordon Linville filed a motion to intervene on the  
8 side of respondent. There is no objection to the motion,  
9 and it is allowed.

10 **FACTS**

11 This is the second time a decision approving the  
12 subject PD has been appealed to this Board. In White v.  
13 City of Oregon City, \_\_\_ Or LUBA \_\_\_\_ (LUBA No. 90-128,  
14 February 27, 1991) (White), we set forth the relevant facts  
15 as follows:

16 "Intervenor-respondent (intervenor) applied for  
17 permission to expand the existing Barclay Village  
18 Planned Development (Barclay I) to place 74  
19 residential units on the subject property. \* \* \*

20 "The subject property is 5.26 acres in size, zoned  
21 [R-6] and designated on the city comprehensive  
22 plan map as Low Density Residential. The subject  
23 property is undeveloped. Barclay I consists of  
24 146 multifamily units located across the street  
25 from the subject property. Barclay I is located  
26 on 8.5 acres of land zoned Multifamily Residential  
27 Development and designated on the comprehensive  
28 plan map as High Density Residential Development.  
29 Properties to the west and south of the proposed

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<sup>1</sup>The governing body of the City of Oregon City is referred to as the  
"City Commission."

1 development are zoned R-6 and R-10 Single Family  
2 Residential." White, supra, slip op at 3-4.

3 In White we remanded a decision approving a preliminary  
4 plan for the proposed PD on the basis that the findings  
5 failed to address relevant issues raised by petitioners  
6 concerning whether the proposal satisfied Oregon City Zoning  
7 and Development Ordinance (ZDO) 11-10-3(A)(4) with regard to  
8 traffic and pedestrian safety on Magnolia Street, a street  
9 providing access to the proposed PD.<sup>2</sup>

10 In White, the city determined the proposal satisfied  
11 ZDO 11-10-3(A)(4) because, among other things, the decision  
12 required the construction of sidewalks within the right of  
13 way on both sides of Magnolia Street, in order to minimize  
14 traffic and pedestrian conflicts. We determined the city  
15 had failed to explain how the above emphasized portion of  
16 ZDO 11-10-3(A)(4) would be satisfied by the required  
17 sidewalks, in view of petitioners' evidence regarding the

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<sup>2</sup>ZDO 11-10-3(A)(4) provides:

"Conditional Approval by the Planning Commission. Following the public hearing, the Planning Commission may conditionally approve in principle the preliminary plan and program, require amendment and modification thereto, or reject said planned development. Such action shall be based upon the Comprehensive Plan, the standards of this Title, and other applicable regulations and the suitability of the proposed development in relation to the character of the area \* \* \*. Approval in principle of the preliminary acceptability of the land uses proposed and their inter-relationships \* \* \* shall not be construed to endorse precise location of uses nor engineering feasibility. The Planning Commission may require additional information to be submitted with the final development plan and program." (Emphasis supplied.)

1 narrowness of the Magnolia Street right of way and that the  
2 proposed sidewalks were contemplated to be constructed in an  
3 area extremely close to the foundations of existing homes.

4 On remand, the city commission conducted further  
5 hearings concerning the proposal and adopted another  
6 decision approving the PD. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 "The city reached a decision which was beyond the  
9 scope of the LUBA remand, when it arbitrarily  
10 decided that a sidewalk on one side of the street  
11 was sufficient to assure safety of pedestrians on  
12 Magnolia St. and adopted findings inadequate to  
13 demonstrate compliance with the criteria."

14 Petitioners argue the challenged decision fails to  
15 establish compliance with ZDO 11-10-3(A)(4) because it only  
16 requires sidewalks on one side of Magnolia Street and not on  
17 both sides of Magnolia Street, as was originally required by  
18 the city decision appealed in White, supra. Petitioners  
19 contend the city must adopt findings explaining why  
20 sidewalks on one side of Magnolia Street are as safe as  
21 sidewalks on both sides of Magnolia Street.

22 Respondent and intervenor-respondent (respondents)  
23 argue that ZDO 11-10-3(A)(4) requires the city to establish  
24 "\* \* \* the suitability of the proposed development in  
25 relation to the character of the area \* \* \*," not that  
26 sidewalks on one side of Magnolia Street will be as safe as  
27 sidewalks on both sides of Magnolia Street. Respondents  
28 point out the challenged decision describes the character of

1 the area with regard to streets and sidewalks as follows:

2       "\* \* \* In this area, existing sidewalks are as  
3 follows:

4       "Molalla Avenue -- sidewalks on one side

5       "Mount Hood Street -- sidewalks on both sides

6       "Barclay Hills Drive -- partial sidewalks on one  
7 side

8       "Cascade Street -- sidewalks on the north side  
9 only

10       "No other streets in the geographic area have  
11 sidewalks. The only local street with sidewalks  
12 on both sides is Mount Hood Street, which has 3  
13 foot sidewalks, a parking strip and a paved width  
14 of approximately 22 feet. Rights-of-way in the  
15 area are uniformly 40 feet. The City Commission  
16 finds that the character of the area consists of  
17 40 foot right-of-ways with only occasional  
18 sidewalks." Record 7.

19 Respondents further point out that the challenged decision  
20 determines the proposed development is suitable in relation  
21 to the character of the area as follows:

22       "\* \* \* After review of the plans, the Applicant  
23 now proposes a single sidewalk located on the east  
24 side of Magnolia Street having a width in  
25 compliance with the requirements of the Oregon  
26 City Code. The single sidewalk on the east side  
27 of Magnolia Street is the recommendation of the  
28 City Engineer in his staff report on traffic  
29 issues. The construction of the sidewalk will be  
30 totally within the existing right-of-way.

31       "\* \* \* The Applicant's proposal goes far beyond  
32 the requirements of the Code. The Applicant is  
33 proposing a sidewalk located on Magnolia Street  
34 off-site from the Applicant's new development.  
35 The off-site sidewalk provides a substantial  
36 positive benefit to the area by providing a much  
37 needed sidewalk which provides a substantial

1 increase in public safety. This is a substantial  
2 positive benefit derived from the project."  
3 Record 10.

4 "\* \* \* The addition of a sidewalk where none  
5 presently exists will dramatically increase  
6 pedestrian safety. \* \* \*" Record 13.

7 We agree with respondents that what ZDO 11-10-3(A)(4)  
8 requires the city to determine with regard to the proposed  
9 sidewalk on one side of Magnolia Street is that this aspect  
10 of the proposed development is suitable "in relation to the  
11 character of the area." The findings establish that it is  
12 consistent with the character of the area for a street to  
13 have sidewalks on one side of the street only. The findings  
14 also establish that inclusion of sidewalks on one side of  
15 Magnolia Street is a substantial benefit to the area,  
16 greatly improving pedestrian safety, and conclude the  
17 construction of such sidewalks is feasible. Therefore, the  
18 findings are adequate to establish that with regard to the  
19 issue raised in this assignment of error concerning  
20 sidewalks, the proposed PD is suitable "in relation to the  
21 character of the area," as required by ZDO 11-10-3(A)(4).<sup>3</sup>

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 "The city erroneously determined suitability in  
25 relation to the character of the area."

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<sup>3</sup>We disagree with petitioners' contention that simply because the city adopted a decision different from the decision appealed in White, without explaining the reason for the differences, that this establishes the challenged decision is "arbitrary."

1           As we understand it, petitioners argue under this  
2 assignment of error that the city comprehensive plan  
3 requires local streets to be at least 50 feet wide, that  
4 Magnolia Street, a local street, is not 50 feet wide and,  
5 consequently, no development may be approved which requires  
6 access from Magnolia Street.

7           We find no comprehensive plan or ZDO standards  
8 requiring that local streets be 50 feet in width before any  
9 development requiring access from those streets may be  
10 approved. Consequently, that Magnolia Street is not 50 feet  
11 wide is irrelevant to approval of the proposed PD.

12           The second assignment of error is denied.

13           The city's decision is affirmed.