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

PROPERTY RIGHTS AND OWNERS, LTD.,)
)
Petitioner,)
)
vs.)
)
CITY OF SALEM,)
)
Respondent,)
)
and)
)
WILLIAM KOSTENBORDER,)
)
Intervenor-Respondent.)

LUBA No. 97-223
FINAL OPINION
AND ORDER

Appeal from City of Salem.

Terrence Kay, Salem, filed the petition for review and argued on behalf of petitioner.

Paul A. Lee, Assistant City Attorney, Salem, argued on behalf of respondent.

Kris Jon Gorsuch, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld, Griggs, Gorsuch, Alexander & Emerick.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 03/26/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's tentative approval of a
4 six-lot subdivision.

5 **MOTION TO INTERVENE**

6 William Kostenborder (intervenor), the applicant below,
7 moves to intervene on the side of respondent. There is no
8 opposition to the motion, and it is allowed.

9 **DISCUSSION**

10 Intervenor requested tentative approval from the city for
11 a six-lot subdivision, which constitutes the third phase
12 (phase three) of the Croisan Mountain subdivision (the
13 subdivision). The subdivision is subject to an Urban Growth
14 Management (UGM) agreement, which, in relevant part, requires
15 additional infrastructure once building permits have been
16 issued for 75 dwelling units. Phases one and two of the
17 subdivision have been fully built out. Those phases together
18 include 71 platted lots, which have been developed with 69
19 dwelling units.

20 In granting tentative plat approval for phase three, the
21 city made findings that either all applicable criteria have
22 been satisfied, or that compliance with those criteria is
23 feasible. One of the criteria for which the city established
24 compliance is feasible is Salem Revised Code (SRC)
25 63.051(a)(7), which requires that

26 "[t]he purpose of tentative plan review of a
27 subdivision or partition is to insure that:

1 "* * * * *

2 "(7) Adequate measures have been planned to
3 alleviate identified hazards and limitations to
4 development:

5 "* * * * *

6 "B. For unstable areas these measures shall be
7 documentation, as approved by the
8 Department of Public Works, that streets
9 and building sites are on geologically
10 stable soil considering the stress and
11 loads to which the soil may be subjected."

12 A condition imposed to assure compliance with that
13 criterion states:

14 "Development plans including street layouts, cuts,
15 fills, lot locations, future public facilities, and
16 building pads shall be required to be reviewed and
17 approved by a registered geotechnical engineer. Due
18 to the slope of the property, a grading plan,
19 erosion control plan and geotechnical report for the
20 proposed lots and facility improvements shall be
21 submitted and approved by the Public Works
22 Department prior to the issuance of construction
23 permits for facilities and final plat approval.
24 These geotechnical studies shall be provided to the
25 Homeowner's Association and be made available to the
26 public. The parties shall be given 14 calendar days
27 to provide expert commentary to the Public Works
28 Department. The final administrative decision shall
29 be made by Public Works without further hearings."
30 Record 7-8.

31 Petitioner makes two challenges to the city's decision:
32 (1) the city "failed to comply with existing ordinance or law"
33 because approval of the requested six lots exceeds the 75-lot
34 total permitted in the subdivision; and (2) that the city
35 "delegated away the land use decision making process" when it
36 conditioned the approval upon submission of future
37 geotechnical studies without providing for additional public

1 hearings.¹ We find no merit to either allegation.

2 As intervenor correctly explains, the UGM agreement to
3 which the subdivision is subject requires additional
4 infrastructure once 75 dwelling units have been permitted. It
5 does not limit the subdivision to 75 platted lots; nor does it
6 limit the subdivision to 75 dwelling units. Thus,
7 petitioner's initial premise that the subdivision limits
8 development to 75 units is incorrect, as is its specific
9 factual contention that the proposed phase three would permit
10 more than 75 dwelling units. Petitioner has established no
11 violation by the city's tentative plat approval of the six
12 units proposed for phase three, which will bring the total
13 dwelling units in the subdivision to 75.²

14 We likewise reject petitioner's contention that the city
15 was required to conduct additional hearings on the
16 geotechnical report. Petitioner has cited no authority that
17 requires such a hearing. To the extent petitioner's argument

¹We presume petitioner alleges the city has "delegated away" compliance with SRC 63.051(a)(7). Petitioner has not identified a code section that it alleges has been violated or that requires additional public hearings. Rather, petitioner contends alternatively that either, as "a check and balance," the city should have required a hearing on the required geotechnical study, or that "without further public review" the decision lacks substantial evidence because the "staff has demonstrated manifest bias" in describing the standard by which the code requires the geotechnical study be evaluated. Petition for Review 4. Petitioner develops no plausible argument to support its claim of bias.

²As intervenor points out, even if the approval of phase three resulted in more than 75 developable lots in the subdivision, petitioner has established no violation of the UGM agreement or the subdivision code. Neither the UGM agreement nor the subdivision code limits the number of lots allowed. Rather, regardless of the number of lots approved, the UGM agreement limits only the number of building permits that may be issued to 75 before additional infrastructure is required.

1 can be read to imply that the city impermissibly deferred
2 compliance with a mandatory approval criterion by failing to
3 first establish the feasibility of compliance, we reject that
4 contention. The city conditioned its approval on additional
5 geotechnical studies only after it determined that compliance
6 with the mandatory criterion is "feasible."³ There is
7 substantial evidence in the record to support that
8 determination.⁴

9 Petitioner's assignments of error are denied.

10 The city's decision is affirmed.

³It is well established that a city can demonstrate compliance with a mandatory approval criterion by determining first that the proposal can comply with the criterion and then relying on the imposition of conditions to ensure compliance. Meyer v. City of Portland, 67 Or App 274, 678 P2d 742, rev den 197 Or 82 (1984); Just v. Linn County, ___ Or LUBA ___, (LUBA No. 96-157, January 24, 1997); Wicks-Snodgrass v. City of Reedsport, ___ Or LUBA ___, (LUBA No. 95-240, January 16, 1997), rev'd on other grounds, 148 Or App 217, 939 P2d 625 (1997); Thomas v. Wasco County, 30 Or LUBA 302, 311 (1996); Burghardt v. City of Molalla, 29 Or LUBA 223, 236 (1995); Eppich v. Clackamas County, 26 Or LUBA 498, 507 (1994); Rhyne v. Multnomah County, 23 Or LUBA 442 (1992).

⁴Even if petitioner had made a showing that additional input was somehow required or warranted, the challenged condition expressly permits petitioner the opportunity to submit "expert commentary" to respond to the required geotechnical report. Petitioner does not establish how that opportunity to submit additional input is insufficient to allow it to participate.