BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FAYE WRIGHT NEIGHBORHOOD PLANNING COUNCIL and DEAN ORTON, Petitioners, v. CITY OF SALEM and RON JONES & CO., LARRY YORK, WILLIAM PETERSON, ROBERT McKELLAR, RON JONES	LUBA No. 80-052 FINAL OPINION AND ORDER

Appeal from the City of Salem.

Richard C. Stein, Salem, filed the petition and argued the cause for Petitioners Faye Wright Neighborhood Planning Council and Dean Orton. With him on the brief were Ramsay, Stein & Feibleman.

William J. Juza, Salem City Attorney, filed a brief for Respondent City of Salem. With him on the brief was William G. Blair, Assistant City Attorney.

Thomas B. Brand, Salem, filed a brief and argued the cause for Respondents Ron Jones & Co., Larry York, William Peterson, Robert McKellar and Ron Jones. With him on the brief were Brand, Lee, Ferris & Embick.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in the decision.

Reversed. 9/2/80

You are entitled to Judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

BAGG, Referee

STATEMENT OF THE CASE

On April 7, 1980, the City of Salem approved a tentative plan and certain variances for "The Woods" subdivision. Petitioners challenge the approval on the ground that the City of Salem erred in considering this subdivision apart from an older (1978) planned unit development also known as "The Woods." Additionally, petitioners' assert a failure by the City of Salem to adopt adequate findings to support subdivision approval.

STANDING

The standing of petitioners is not challenged in this proceeding.

FACTS

In April of 1978, the Salem Planning Commission granted approval of an "outline plan" for "The Woods" planned unit development. The planned unit development (PUD) was divided into two phases, with Phase I including thirty-one single family detached dwellings. Phase II included thirty-four single family attached dwellings spread over about seven acres, Record 166, 208. A "unified plan"[1] including certain variances was approved for Phases I and II on July 10, 1978. One of the conditions attached to the July 10th approval was a restriction that the vehicular access to Phase II of the development be routed only through Idylwood Drive, Southeast. Record 166, 205.

Detail plans for Phase I were approved in January of 1979. Record 166, 259. Included in the approval of Phase I of "The Woods" was a reduction in the width of the street from 28 to 24 feet and a requirement that parking be limited to one side of the streets. Record 274. The record reveals no "detail plan" approval of phase II. Detail plan approval is necessary before improvements may be made while the "outline plan" process is an optional first step in PUD approval. See Salem Revised Code (SRC) 121.160, 121.220, 121.260.

In August of 1979, the developer notified the city that it was abandoning Phase II of the planned unit development and was submitting instead a new plan for a fifteen lot single family home subdivision. Access to the newly proposed subdivision was not by Idylwood Drive but through the already developed Phase I of the planned unit development by an extension of a cul-de-sac known as Stagecoach Way, Southeast. In order to provide access to all 15 lots, a variance for a cul-de-sac length in excess of the permitted eight hundred feet was requested. Record 166, 205, 208. Further, variances were requested to allow a maximum street grade of twelve percent. Record 208.

The Salem Planning Commission heard the matter on September 25 and November 13 of 1979, and the Planning Commission approved the new plans including the variances on December 11, 1979. Record 3 through 6. An appeal was taken to the city council, and hearings were held on February 25, March 10 and 24 of 1980. On April 7, 1980, the city council affirmed the

planning commission decision. Record 1 and 2.

ASSIGNMENT OF ERROR ONE AND TWO

Petitioners make two separate assignments of error as set out below and combine them for discussion in the petition:

ASSIGNMENT OF ERROR #1

> The City of Salem erred in considering a new subdivision application for Phase II of "The Woods."

ASSIGNMENT OF ERROR #2

> The City of Salem erred in refusing to consider the subdivision application herein for Phase II of "The Woods" in relation to the previous approval of "The Woods" Phases I and II as a PUD.

Under the Salem Revised Code, a PUD provides

> " . . . a means whereby larger parcels of ground may be developed with more latitude as regards site development, common areas and open space than is possible through additional zoning controls with residential densities similar to the zone in which it is to be located; to establish standards and controls necessary to assure the community of a well related, harmonious development; and to provide within existing zones the development of residential uses with increased amenities." SRC 121.010

Petitioners cite the above portion of the city code and claim that the City of Salem should not have considered a new application for a subdivision in place of Phase II of the planned unit development originally submitted. That is, the City of Salem approved Phase I of "The Woods" planned unit development along with variances regarding street and cul-de-sacs because it viewed the project as a single unit made up of both Phase I and Phase II. Viewed as a whole, the variances granted to Phase I (but in contemplation of Phase II)

contributed to the uniqueness of the whole development in keeping with the purpose of a PUD. Petitioners further assert that the developer is bound by his proposal after his final plat is filed, and in support of this proposition petitioners cite Rockaway v. Stefani, 23 Or App 639, 543 P2d 1089 (1975). In petitioner's view, even if the city's acceptance of a new application in place of Phase II were permissible, the city erred in refusing to consider this new subdivision application in the light of its original approval of Phase I of "The Woods" planned unit development.[2] The upshot of petitioners' argument is to require Phase II of the PUD to be developed as originally planned or not developed at all.

Respondent Jones & Company asserts there is nothing in the law which says that a developer must proceed to develop an entire parcel as planned. That is, a developer is not "prohibited from seeking changes or modifications by subsequent petition if he desires, and developers do it all the time." Brief of Respondent Jones & Company at 9. In support of that proposition, petitioners cite Frankland v. City of Lake Oswego, 267 Or 452, 517 P2d 1042 (1973) wherein the court said:

> "Once approved, the developer should be bound by the plans unless any changes are approved by the planning authorities in accordance with the PUD ordinance." 267 Or at 462-463.

The Board does not find sufficient facts alleged by petitioners to conclude that Phase I of the planned unit development was so inexorably tied to Phase II of that proposal

so as to make one development dependent upon the other. Only the optional "outline" or conceptual plan approval was given to Phase II of the original PUD proposal; and the substantive approval, the "detail" plan approval giving the go ahead for improvements on the land, was only given to Phase I of the original PUD. See SRC 121.160 and SRC 121.240-280. Apparently, building has occurred in comformance with the original Phase I of the planned unit development, but nowhere is it asserted that construction on lands involved in Phase I of the PUD was dependent upon conditions placed on lands set aside in Phase II of the PUD. That is, the development of Phase I did not require access through Phase II properties or was otherwise linked to Phase II so as to make the development of Phase I dependent upon some activity in conformance with the plan of Phase II. Without some such linking of the two developments, we cannot say that Phase II of the PUD must be developed in accordance with the original outline plan or not developed at all.[3]

Also, the developer did return to the planning authorities with a new subdivision in place of the abandoned Phase II PUD. He did not attempt to proceed without planning authority approval or in violation of a previous formal or binding approval. The cases cited by petitioners do not require slavish adherence to a proposal, particularly one approved in tentative or "outline" form only. See Frankland v. Lake Oswego, supra; Rockaway v. Stefani, supra.

Included in the petitioners' case is the assertion that the new subdivision cannot be "considered" apart from the old two phase PUD proposal. Petitioners appear to mean that the new subdivision must somehow be reviewed conceptually along with the old Phase I PUD. The record in this case contains a detailed history of both the old PUD and the new subdivision. That history contains petitioners' complaints about street width and access to the proposed development. Even if the record were devoid of the complete history of "The Woods," the relevant issues of access, relation to surrounding property and all the other concerns raised by petitioners were placed before the city by the developer and the opponents of the project.

Because we do not view the projects as inexorably linked, we find no error prejudicial to petitioners in the way the old Phase II PUD was treated and "considered" (or not considered) in relation to the new subdivision. The presentation of "The Woods" subdivision was reviewed in the light of relevant facts whether or not the presentation included the old Phase I PUD.

Assignments of error I and II are denied.

ASSIGNMENT OF ERROR #3

The assignment of error #3 says the city adopted findings that were inadequate and not supported by substantial evidence. The substance of the complaint is that the findings are vague, incomplete and conclusory. The primary issue here is the adequacy of the findings granting a variance to the 800 foot limit on cul-de-sac length for an extension to Stagecoach

Way. Stagecoach Way provides access to the new subdivision and the variance allowed an extension of the cul-de-sac to 1100 feet, 300 feet over the limit established by the city code.

The city's standards for granting a variance are as follows:

> "63.332 BASIC CONDITIONS FOR A VARIANCE.
>
> (a) No variance shall be granted except upon a finding by the planning administrator that each of the following conditions is met:
>
> (1) There are special conditions inherent in the property (such as topography, location, configuration, physical difficulties in providing municipal services, relationship to existing or planned streets and highways, soil conditions, vegetation, etc.) which would make strict compliance with a requirement of SRC 63.115 to 63.265 an unreasonable hardship, deprive the property of a valuable natural resource, or have an adverse effect on the public health, safety and welfare;
>
> (2) The variance is necessary for the proper development of the subdivision and the preservation of property rights and values;
>
> (3) There are no reasonably practical means whereby the considerations found under (1) or (2) above can be satisfied without the granting of the variance; and
>
> (4) It is unlikely that the variance will have adverse effect on the public health, safety, and welfare, or on the comfort and convenience of owners and occupants of land within and surrounding the proposed subdivision or partition.
>
> (b) Except as to variances granted under SRC 63.334, each specific variance shall be separately considered, and no variance shall be granted if, taken together with all other requested variances, the cumulative effect would be to subvert the purpose expressed in SRC 63.020. (Ord No. 77-78; Ord No. 184-79)"

Respondent City agrees that the findings are not in the form suggested by the above four conditions but says the

findings are sufficient to show compliance with the ordinance. We note the findings do contain many relevant facts.

Our reading of the findings as a whole does not provide us with enough information to conclude that each of the four standards in SRC 63.332 have been met. For example, Findings 10 and 11 discuss why access alternatives are not practical or safe, finding 12 shows (in very vague language) that access on Idylwood Drive is "critical," perhaps meaning "unsafe;" and finding 13 says that the property will be landlocked without access to Stagecoach Way. However, there is no statement in the findings as to why the variance is "necessary for proper development of the subdivision and the preservation of property rights and values." SRC 63.332(2). The variance extended the cul-de-sac 300 feet, but a map included in the record shows an 800 foot cul-de-sac would still provide access to the property. Granted, the specific development plan might have to be changed to include only an 800 foot cul-de-sac, but there is no statement as to why this development plan equals "proper" development of the parcel thereby requiring a variance. Also, finding 7[4] provides facts relative to traffic patterns and trip generation, but it does not announce a "policy" that shows the variance will not "have adverse effect on the public health, safety, and welfare, or on the comfort and convenience of owners and occupants of land within and surrounding the proposed subdivision . . . " as claimed by the city. SRS 63.332(4).[5]

In short, we believe the city's own ordinance demands a detail in the findings missing here. We cannot conclude for the city that the facts in the findings and the record add up to the required findings in SRC 63.332. We believe the city must articulate in an understandable form that those four conditions have been met. See Sunnyside Neighborhood v. Clackamas County Comm., 280 Or 3, 569 P2d 1063 (1977).

OTHER ALLEGATIONS

In addition to attacking the city's comformance to its own ordinance in the granting of a cul-de-sac variance for this development, petitioners assert that "there were a number of issues raised at the hearing that were not addressed by the findings." Petitioners brief at 12. Petitioners then go on to mention an LCDC goal objection and several violations of the Salem area comprehensive plan that were raised by the opponents of this development but not addressed in the findings. Petitioners conclude that if an issue is raised at a hearing it should be addressed in the findings, and cite Norvell v. Portland Metro. LGBC, 43 Or App 849, 604 P2d 896 (1979) in support of that proposition.

The Board does not accept the proposition that every issue or concern raised at a hearing on a land use matter must be addressed by a local jurisdiction in its findings. Formal issues and major relevant concerns raised must be addressed in some fashion, but not every assertion by a participant in a land use decision warrants a specific finding.

In the Norvell case cited by petitioners, the court noted "a good deal of focused evidence and discussions" had occurred on a Goal 4 matter below. Norvell, 43 Or App at 853. The court, on the basis of that "focused" discussion, concluded a finding was necessary. Here petitioners point us to no such "focused" or major discussion occurring below.

The absence of a focused or major discussion does not mean that a relevant goal or land use standard cannot be raised. However, Petitioners have not assigned an LCDC goal violation as error. Similarly, they have not assigned violations of the city comprehensive plan as error. We treat petitioners' discussion at pages 12 and 13 of their brief as comment generally on the adequacy of the city's findings and not as separate assignments of error upon which this Board must rule.[6]

SUBSTANTIAL EVIDENCE

Also under its third assignment of error, petitioners include a section on "Substantial Evidence." As we understand the argument, however, petitioners again refer to the granting of the cul-de-sac variance and say in essence that there is no evidence in the record showing a hardship inherent in the land that might warrant the granting of a variance. Petitioners note that obtaining a variance requires a demonstration of a particular hardship or practical difficulty. Lovell v. Independent Planning Commission, 37 Or App 3, 586 P2d 99 (1978).

We need not discuss this assertion by petitioners as we have found the findings to be incomplete. We might note, however, that the record contains enough facts to support the findings that were made. Whether the record is sufficient to support additional needed findings is, of course, unknown.

Assignment of error no. 3 is sustained in part.

FOOTNOTE

1

We do not know what a "unified plan" is. The city's PUD ordinance does not discuss this "unified plan." We assume it is part of the "outline plan" approval process in 121.160. 121.220.

2

It should be noted here again, however, that the City of Salem did not give "detail" approval to Phase II of the Woods PUD, but only "outline" approval. Record 166. No where is it asserted that any final approval was given to Phase II of the planned unit development.

3

There is mention in petitioners' brief of a 45 foot right-of-way for a pedesterian walkway. We do not believe a 45 foot right-of-way for a pedesterian walkway is a sufficient tie between the two bodies of land to make an inexcerablly connection between development of the properties in conformance with the original two phase planned unit development proposal. See Record 87, 207, 231. Also, even with such a linking of the two phases, the developer still has the option to seek the planning jurisdiction's approval for a change in plans.

4

> "7. Statistical evidence of traffic generation presented by the Faye Wright Neighborhood Association in opposition to the subdivision indicated that "The Woods - Phase I" would generate 387 vehicle trips per day, and the "The Woods-II" Subdivision would generate 194 vehicle trips per day for a total of 581 vehicle trips generated per day. Statistical evidence of traffic generation presented by the traffic Division at the September 25, 1979 public heraing indicated that "The Woods - Phase I" would generate 300 vehicle trips per day, and "The Woods-II" Subdivision would

generate 150 vehicle trips per day for a total of 450 vehicle trips generated per day. Statistical evidence submitted by the Traffic Division at the November 13, 1979 public hearing indicated traffic counts taken October 9, 1979 and October 23, 1979 on the following streets to be significantly lower than anticipated at the September 25, 1979 public hearing: Stagecoach Way SE, Snow White Way SE, Welcome Way SE, McKinley Street SE, Alderbrook SE, and Winding Way SE. Based on those traffic counts, traffic volumes projected by the Faye Wright Neighborhood Association for these same streets were substantially higher than those projected by the Traffic Division. The Commission finds the traffic volumes submitted by the Traffic Division to be the more reliable."

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5 The city also claims it made a policy announcement contained in Finding 7, in effect choosing access for this project. According to the city, that policy statement is not reviewable by this Board; and, therefore, sec 63.332(a)(4) requiring a finding by the planning administrator that it is unlikely the variance will have an adverse effect on health, safety and welfare has been satisfied. We do not reach this contention because of our view that finding 7 recites facts but does not annnounce a "policy."

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6 In order for this Board to consider an allegation of error, a separate assignment of error must be listed with a supporting argument for each. See Board Rule 7(C) 3 & 4. It is our view that these "comments" on the adequacy of the findings and the apparent incompleteness of the findings are used to assert petitioners' point, rejected by the Board, that any issue raised that a land use matter must be addressed in the findings.