

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

DEC 5 3 17 PM '80

OF THE STATE OF OREGON

3 EDWARDS INDUSTRIES, INC.,)
 4 an Oregon Corporation,)
)
 5 Petitioner,)
)
 6 vs.)
)
 7 BOARD OF COMMISSIONERS OF)
 WASHINGTON COUNTY, OREGON,)
)
 8 Respondent.)

LUBA NO. 80-029

FINAL OPINION
AND ORDER

9
10 Appeal from Washington County.

11 Jack L. Orchard, Portland, filed a brief and argued the
12 cause for Petitioner. With him on the brief were O'Connell,
Goyak & Ball, P.C.

13 Gregory S. Hathaway, Hillsboro, filed a brief and argued
14 the cause for Respondent.

15 Kevin L. Hanway, Portland, filed a brief and argued the
16 cause for Amicus Homebuilders Association of Metropolitan
17 Portland.

18 Cox, Referee; Reynolds, Chief Referee; Bagg, Referee;
19 participated in the decision, with Referee Bagg dissenting.

20 Reversed and Remanded.

12/05/80

21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of Oregon Laws
23 1979, ch 772, sec 6(a).
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1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner is appealing the denial by respondent of
4 preliminary plat approval for the Bauerwoods subdivision. The
5 contested denial was reduced to writing and signed by the Board
6 of Commissioners on February 22, 1980. Petitioners seek a
7 reversal of Respondent's decision and request a declaration by
8 this Board that there is no legal basis upon which Washington
9 County can deny preliminary plat approval of the Bauerwoods
10 project.

11 STANDING

12 Standing is not an issue.¹

13 ALLEGATIONS OF ERROR

14 Petitioners assert two allegations of error stated as
15 follows:

16 1. "At its December 12, 1979 hearing, the
17 Washington County Board of Commissioners was barred
18 from entering findings and making a decision contrary
19 to the findings and decision made by the County
20 Planning Commission on September 12, 1978."

21 2. "The Board of Commissioners did not have
22 sufficient basis for denying preliminary plat approval
23 for the Bauerwoods Planned Unit Development."

24 FACTS

25 The subject property consisting of approximately 50 acres
26 is located in eastern Washington County and abuts N. W.
Saltzman Road, a county road. Under the Washington County
comprehensive framework plan, the property is designated as
urban intermediate carrying an RS-1 zone which permits single

1 family development at a density of two lots per gross acre.
2 Petitioners initially proposed to develop a 146 lot
3 single-family subdivision on the subject property. That
4 proposal was denied on March 29, 1978. However, discussion was
5 held by the Planning Commission and the Planning Director as to
6 the Planning Department's reaction to petitioner's
7 reapplication for a RS-1 planned unit development (PUD) on the
8 property. As a result of the discussions held, petitioner
9 submitted a RS-1 PUD proposal. The matter first came before
10 the Planning Commission on September 12, 1978. At the
11 conclusion of the September 12, 1978 hearing, the Planning
12 Commission voted to approve with conditions an Outline Master
13 Plan for the Bauerwoods Planned Unit Development (PUD) and a
14 conditional use permit for development of the property. The
15 decision of the Planning Commission was not appealed.
16 Petitioners next submitted for approval, pursuant to
17 Respondent's zoning ordinance, a Final Master Plan together
18 with a preliminary plat. On November 29, 1978, the Planning
19 Commission conducted a public hearing and received testimony
20 concerning the preliminary plat application. At the conclusion
21 of the hearing, the Planning Commission voted, based on its
22 subdivision ordinance, to deny preliminary plat approval for
23 the proposed development. Petitioners appealed that decision
24 to the Board of Commissioners. During the pendency of the
25 appeal, the Planning Commission voted on January 30, 1979, to
26 approve the "Final Master Plan for the Project."

1 Petitioner's appeal of the November 29, 1978 decision was
2 initially heard by the Board of Commissioners on April 3,
3 1979. The Board remanded the matter to the Planning Commission
4 to make specific findings relating to seven service related
5 questions. The seven issues included transportation, sewer,
6 fire protection, water, and school capacity. The matter was
7 again heard by the Planning Commission on October 10, 1979.
8 The October 10, 1979 Planning Commission session was attended
9 by only five of the nine commissioners. At the conclusion of
10 the hearing a motion was made to reaffirm the Planning
11 Commission's November 29, 1978 denial of the preliminary plat
12 application. The motion was voted on and was approved by a
13 vote of 3 to 2. However, due to the fact that four of the five
14 members present needed to concur in order to have a final
15 action, the motion to reaffirm failed on procedural grounds.
16 The matter was then returned to the Board of County
17 Commissioners without recommendation.

18 On December 18, 1979, the Board of Commissioners again
19 heard the matter. At the conclusion of that hearing, the Board
20 concluded that all development criteria for the preliminary
21 plat had been satisfied other than the transportation issue.
22 Based on the Board's perception that the Bauerwoods development
23 would adversely impact the roadways serving the development,
24 the preliminary plat application was again denied. Following
25 entry of findings on February 22, 1980 by the Board of
26 Commissioners, Petitioner filed this appeal.

1 DECISION

2 Respondent's zoning ordinance Chapter 250 defines the
3 purpose of a planned unit development (PUD) district as:

4 "The purpose of the PUD district is to provide a
5 framework for the development of a more desirable,
6 [sic] living environment by application of
7 contemporary site planning techniques and
8 architectural forms, which are not permitted through
9 the strict application of a [sic] primary district
10 regulations, zoning article, subdivision article or
11 other article or regulations of Washington County
12 related to development of land.

13 "The PUD is designed to be used as a conditional
14 use district in combination with specified
15 residential, commercial and industrial Districts.
16 Whenever a primary District is combined with a PUD
17 conditional use district, the specific regulations of
18 the primary district may be modified according to the
19 PUD district provisions as may be thereafter approved."

20 Respondent's zoning ordinance then sets forth the
21 objectives and development plans which are intended to guide
22 the applicant in preparation of the land use and development
23 plan. These objectives are said to be used as the basis for
24 evaluation of the land use and development plan by the county's
25 professional staff, Planning Commission and Board of
26 Commissioners. (Chapter 253, Washington County Zoning
27 Ordinance). The initial step requires the applicant to submit
28 an "Outline Master Plan." Section 253-2.1 sets forth that an
29 Outline Master Plan:

30 " * * * shall include both maps and a written
31 statement, and shall show enough of the surrounding
32 area to demonstrate the relationship of the PUD to
33 adjoining uses, both existing and proposed."
34 (Emphasis added).

35 In addition, the Outline Master Plan "must" contain maps

1 and a written statement. The materials submitted must include:

- 2 "a. Existing topographic character of the site;
- 3 "b. Existing and proposed land uses and their
4 approximate location;
- 5 "c. The character and approximate net residential
6 denisty;
- 7 "d. Circulation, including collector and arterial and
8 pedestrian;
- 9 "e. Public uses, including schools, parks, open
10 space, etc." (Emphasis added).

11 The record indicates that the planning staff initially
12 recommended denial of the PUD proposal in part due to their
13 feeling that an inadequate road system existed to serve the
14 site. The staff's written recommendation contained, however, a
15 suggested set of conditions to be imposed if the Planning
16 Commission decided to approve the Outline Master Plan. Those
17 conditions dealt in part with the roads serving the
18 development. Correspondence between the planning staff and the
19 Planning Commission indicates that consideration went to the
20 question of the road system serving the site. Consideration
21 included the capacity of the road serving the proposed PUD to
22 carry additional traffic and the phasing of improvements to the
23 road system serving the PUD. As a result of the September 12,
24 1978 hearing, a recommendation was made for approval of the
25 Outline Master Plan subject to conditions set forth in Exhibit
26 B to the resolution and order.

27 One of the conditions placed on the project was that its
28 development be phased over a four year period with no more than

1 one third of the total building permits being issued in any one
2 year through the overall phasing period. The record indicates
3 that this phasing consideration was directed at the concerns
4 for the timing of improvements to N.W. Saltzman Road and other
5 roads serving the development. Another condition was the
6 developer realign portions of N.W. Saltzman Road.

7 The Planning Commission's decision approving the Outline
8 Master Plan became final pursuant to Chapter 2200 of Washington
9 County's Zoning Ordinance within 15 days of the September 12,
10 1978 action unless appealed by an aggrieved party or the Board
11 of Commissioners on its own motion ordered review. As is
12 stated by Section 2201-4.1:

13 "The decision of the hearings officer or body
14 shall be final unless a notice of review from an
15 aggrieved party is received by the Planning Director
16 within ten days of initial action on the proposed
action or unless the Board, on its own motion, orders
review within 15 days of the initial action."

17 No such appeal or order for review was taken.

18 Throughout numerous subsequent hearings, the petitioner
19 consistently took the position that the September 12, 1978
20 action regarding the Outline Development Plan had settled the
21 issues regarding public services such as streets and roads
22 serving the PUD. According to the resolution and order of
23 February 22, 1980 which is being appealed herein and as
24 supported by the transcript of hearing, the sole basis for
25 denial of petitioner's proposed subdivision plat agreed to by
26 all Commissioners was the concern over the roads serving the

1 PUD. That matter was not properly before the respondent as it
2 had been finally decided on September 12, 1978.

3 A complete reading of respondent's ordinances regarding
4 planned unit development districts indicates that the Outline
5 Master Plan proceeding is the stage when concerns regarding
6 services external to the perimeter of the PUD are considered.
7 None of the items relating to the Outline Master Plan were
8 appealed or ordered reviewed pursuant to respondent's own
9 ordinance conditions. Therefore, the matter of road systems
10 serving the PUD became final when no appeal or motion for
11 review occurred.

12 Under the county's scheme, once a PUD is approved at the
13 Outline Master Plan stage what has been created is essentially
14 an island or portion of the county whose internal configuration
15 is to be the subject of the Final Master Plan considerations.
16 The Final Master Plan requirements relate entirely to design
17 type consideration internal to the PUD. Washington County
18 Zoning Ordinance Section 253-2.3.

19 Respondents inappropriately reopened the issue of roads
20 serving the PUD during the hearing on petitioner's subdivision
21 plat application. The vehicle used to reopen consideration of
22 matters external to the PUD was the requirement that a
23 preliminary subdivision plat be submitted by petitioner in
24 conjunction with its Final Master Plan. As Section 254-3.1
25 entitled "Processing the Final Master Plan: Preliminary
26 Subdivision Required" states:

1 "Before a Final Master Plan shall be approved by
2 the Planning Department and Planning Commission, a
3 preliminary subdivision plat shall be prepared to be
4 considered in conjunction with the Final Master Plan."

5 "This [preliminary subdivision] shall not be
6 required in event subdivision of the land will not be
7 required under the Washington County Subdivision
8 Article."

9 The subdivision plat relates only to property inside the
10 perimeter of the PUD unit. The petitioner's request for
11 preliminary plat approval is not to be used, as was done by
12 respondents, to reconsider roadways external to the PUD's
13 perimeter. This limitation on the scope of consideration is
14 evidenced in both the provisions of zoning ordinance section
15 254-3.3 entitled "Planning Commission Action on Final Master
16 Plan" and in paragraph two of the above cited section 254-3.1.

17 Section 254-3.3 states:

18 "Upon receipt of the Planning Department review
19 and recommendation, the Planning Commission shall
20 establish a finding that the final Master Plan is
21 consistent with the Outline Master Plan, or that it is
22 inconsistent.

23 "In event it is determined that the final Master
24 Plan is consistent with the approved Outline Master
25 Plan, the Planning Commission shall approve the Final
26 Master Plan, or approve the Final Master Plan with
27 modifications or conditions.

28 "In event it is determined that the final Master
29 Plan is inconsistent with the approved Outline Master
30 Plan, the Planning Commission shall set a public
31 hearing date, and shall give notice and provide an
32 opportunity to be heard to each of the following:
33 first, any person who is on record as having appeared
34 at the public hearing on the Outline Master Plan;
35 second, any other person who has indicated to the
36 Planning Commission in writing that he wishes to be
37 notified. After the public hearing the Planning
38 Commission shall approve or disapprove the final

1 Master Plan, or approve the final Master Plan with
2 modifications or conditions."

3 The only reasonable construction to be given the above
4 terminology is that matters considered and decided at the
5 Outline Master Plan hearing become the standards to which
6 factors internal to the PUD unit are to conform. Therefore,
7 any street or road considerations taken up at the time of the
8 preliminary subdivision plat approval hearing are limited to
9 how streets or roads internal to the PUD conform to or are
10 consistent with the street or roads determined at the Outline
11 Master Plan stage to be available to the PUD.

12 Furthermore, the second paragraph in Ordinance Section
13 254-3.1 once again states:

14 "This [preliminary subdivision] shall not be
15 required in event subdivision of the land will not be
16 required under the Washington County Subdivision
Article."

17 To use preliminary subdivision plat approval consideration
18 as a means of reopening matters concerning roadways decided at
19 the Outline Master Plan hearing is to make an unsupportable
20 distinction between PUDs containing subdivided lots and PUDs
21 containing residences held in other than single lot ownership.
22 To interpret the Final Master Plan ordinance to allow such a
23 distinction leads to an absurd result. Washington County's
24 subdivision ordinance defines subdivide to mean:

25 "partition a parcel of land into four or more
26 parcels of less than five acres each for the purpose
of transfer of ownership or building development****"

1 If petitioners had decided to develop the 100 units they
2 propose for other than single lot ownership, they would not
3 have been subject to subdivision considerations even though the
4 development could have resulted in identical transportation
5 consequences. In such a situation the issue of roads and
6 streets serving the PUD, decided on September 12, 1978 would
7 not have been reopened as it was on November 29, 1978 and
8 ultimately used as the basis for respondent's February 22, 1980
9 decision.

10 Notice

11 Respondent argues that it was necessary to reopen the
12 matter of roadways so members of the neighborhood would have an
13 opportunity to testify about the issues. The respondent
14 contends that due to insufficient notice on its part there had
15 not been enough public participation at the September 12, 1978
16 hearing to get public input regarding the roads serving the
17 PUD.

18 A review of the notice of public hearing issued by the
19 county reveals that it was sufficient to notify any interested
20 party of the proposed action. It gives the proposed
21 development's location and states that the Planning Commission
22 will consider Edwards Industries, Inc.'s application for
23 "Conditional Use for Planned Unit Development - Bauerwoods."

24 The notice states the issues to be:

25 "In considering the application the Planning
26 Commission will determine whether the subject property
qualifies for exception from the requirements of LCDC

1 Goal No. 3 concerning agricultural lands and if
2 sufficient public need exists to justify an urban
conversion at this time."

3 The notice directs questions to the county's planning
4 department. Any interested persons had ample opportunity to
5 learn the scope of the hearing and the position taken by the
6 planning department. We find the notice adequate and cannot,
7 therefore, agree with the county.

8 Based on the foregoing, it is the decision of this Board
9 that Respondent was in error in denying petitioner's
10 application for preliminary subdivision plat approval based
11 solely on the lack of sufficient roadways serving the
12 development. That issue had been decided by the respondent's
13 Planning Commission at the Outline Master Plan stage and it
14 became final when respondent chose not to order review of the
15 Planning Commission's decision. Therefore, we reverse and
16 remand respondent's denial. Respondent failed to follow the
17 procedure applicable to the matter before it and as a result
18 prejudiced the substantial rights of the petitioner. In
19 addition, respondent improperly construed the applicable law.

20 It is this Board's perception that the January 30, 1979
21 final master plan approval may be incomplete in light of the
22 Planning Commission's misapplication of the preliminary
23 subdivision plat process. Therefore, on remand the county
24 should assure itself that the subdivision plat conforms to the

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1 Outline Master Plan provisions and that the criteria contained
2 in its subdivision ordinance are applied to concerns internal
3 to the PUD.

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5 Reversed and remanded with instructions.

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1 BAGG, Referee, Dissenting.

2 I do not agree with the majority opinion. The majority
3 views the Outline Master Plan as "the stage when concerns
4 regarding services external to the perimeter of the PUD are
5 considered," and the subdivision plat to control "only property
6 inside the perimeters of the PUD unit." The majority finds the
7 approval of the county's Outline Master Plan to be final and
8 binding on the county unless appealed within the fifteen day
9 time specified in the ordinance. The majority concludes the
10 county erred in "reconsidering" traffic issues outside the PUD
11 during the subdivision process where the same issues were
12 considered at the Outline Master Plan stage.

13 Presumably, the county ordinance requires a preliminary
14 subdivision plat in conjunction with certain PUDs simply
15 because a division of property will occur that meets the
16 definition of "subdivision" in Oregon law. ORS 92.010(13).
17 However, there is nothing in the ordinance to guide the
18 applicant beyond the demand for filing a preliminary plat.
19 Further, there is nothing in the ordinance that waives the
20 requirements of the subdivision ordinance or otherwise ties the
21 preliminary plat requirement to the planned unit development.

22 Because there is no explanation of how the PUD proposal and
23 the preliminary plat are to be used together, it is my view
24 that the ordinance should be read to require both the
25 subdivision approval and the planned unit development
26 requirements and procedures to be followed as much as

1 possible. That means, in this case, that the planning
2 commission and the board of commissioners would be within their
3 respective powers to review a development proposal for
4 compliance with any requirement in either the PUD ordinance,
5 the subdivision ordinance, or both. Traffic issues outside the
6 limits of the subdivision may be considered in conjunction with
7 a PUD to whatever degree the county could consider such matters
8 under an application for a subdivision alone.

9 The county's current practice is in keeping with this
10 view. At the hearing in this case, the county counsel noted
11 that it is the county's practice to issue two separate orders.
12 One order approves the planned unit development and another
13 order approves the subdivision. The separate requirements of
14 each ordinance would have to be met before an order on the PUD
15 or the subdivision could issue. Perhaps the facts in one
16 application could be used to support the other application, but
17 nothing in the county ordinances suggests a requirement exists
18 to do so. This process is a bit clumsy, but I believe it is a
19 "reasonable" interpretation of the ordinances read together.

20 The majority mentions that a construction of the ordinance
21 such as I have suggested leads to an absurd result. That is,
22 all the petitioner need do is drop its proposal for single lot
23 ownership and thereby escape the requirements of the
24 subdivision ordinance. Escaping subdivision requirements would
25 leave the petitioner with an approved outline plan. That
26 approved outline plan is only appealable or reviewable,

1 approved outline plan is only appealable or reviewable,
2 according to the majority, if a proper appeal is perfected
3 within the time limit provided in the ordinance. The majority
4 reads the ordinance to require Final Master Plan approval
5 whenever it is found that the Final Master Plan is consistent
6 with the approved Outline Master Plan. Indeed, section 254-3.3
7 of the ordinance seems to require just that result. I do not
8 believe Section 254-3.3 settles the matter, however.

9 As part of the Final Master Plan approval process, the
10 ordinance requires the planning department to prepare a
11 recommendation for the planning commission. In its review,
12 Section 254-3.2 requires the planning department to

13 "as a minimum give consideration to the
14 conformance of the Final Master Plan to the Outline
15 Master Plan concepts as well as the criteria of the
County Comprehensive Plan and this Zoning Article
regarding a PUD."²

16 This provision requires a broad scope of inquiry at the
17 Final Master Plan level. The Comprehensive Framework Plan's
18 emphasis on safety must be considered. The information
19 required in the Outline Master Plan is not sufficient to
20 conduct this required review. The Outline Master Plan
21 submittals appear to be suitable for conceptual approval of a
22 development and not particular or final approval. For example,
23 maps of a "general, schematic form" are called for along with a
24 written statement that asks for

25 "a. An explanation of the character of the PUD and
26 the manner in which it has been planned to take
advantage of the PUD regulations.

- 1 "b. A statement of present ownership of all land
2 included within the proposed PUD.
- 3 "c. A general indication of the expected schedule of
4 development.
- 5 "d. A general indication of the expected public
6 interest to be served by the proposed PUD, and
7 conformance of the PUD to the County
8 Comprehensive Plan.
- 9 "e. General statement regarding conformance to the
10 'Qualifying Conditions' for the various
11 categories of PUD."

12 In contrast, section 253-2.3 (listing requirements for Final
13 Master Plan submittal) requires much more detailed information.

14 Final Master Plan Elements. The master plan shall
15 include maps and such written material, as may be
16 appropriate, to show the following:

- 17 "a. A topographic map of the unit.
- 18 "b. An inventory and classification of the soil types
19 within the unit and suitable uses therefor.
- 20 "c. A general plan showing the size and extent of
21 public, quasi-public recreational and educational
22 or other facilities to be provided.
- 23 "d. A preliminary study of facilities required to
24 provide adequate storm drainage, sewage disposal
25 and public utilities for the unit.
- 26 "e. A plan for pedestrian and vehicular circulation
showing the general locations and widths of a
comprehensive system of major traffic
thoroughfares, residential and commercial
streets, trails or other pedestrian ways, and
their recommended treatment.
- "f. A general plan showing the proposed use of all
lands within the unit.
- "g. Computation of density or intensity for each land
use within the unit, the average net residential
density, and the estimated population of the unit.

1 "h. A statement of methods to be employed to assure
2 maintenance of common facilities to be provided.

3 "i. A design plan, consisting of standards and
4 principles governing the subdivision of land and
5 the architectural character of the unit.

6 "j. Such additional information as may be required by
7 the Planning Commission concerning any phase of
8 the proposed community development." (Emphasis
9 in original).

10 It is my view that the information required of the Final
11 Master Plan applicant is detailed enough to allow the staff and
12 the Planning Commission to conduct the broad review required by
13 Section 254-3.2. The Final Master Plan approval provision
14 allows the Planning Commission to look at "any phase of the
15 proposed community development." This provision, along with
16 that requiring the county to review the development against the
17 Framework Plan, gives the county authority to approve or
18 disapprove a Final Master Plan application on more than its
19 simple conformity to an approved Outline Master Plan. In
20 short, I believe the county may reject a proposal at this later
21 stage if it finds any matter was neglected or incompletely
22 considered at the Outline Master Plan stage. The Outline
23 Master Plan approval, then, is not determinable of the outcome
24 of a development proposal if the Final Master Plan review
25 discloses reasons to deny the proposal.

26 To be sure, the ordinance leaves much to question as to how
it is to be read and used. I favor resolving the questions to
preserve county authority to test each application fully. I
believe the county's interpretation that it may review the

1 traffic issue is not absurd but is reasonable and should be
2 upheld. Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904,
3 rev den (1977).

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FOOTNOTE

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3 Homebuilders Association of Metropolitan Portland (HBAMP)
4 originally sought to intervene on behalf of petitioners.
5 Washington County objected on procedural grounds. HBAMP
6 amended its motion to seek involvement in the case as amicus.
7 After hearing argument by Washington County and HBAMP, we
8 granted HBAMP's status as amicus.

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7 The Washington County Comprehensive Framework Plan (revised
8 January, 1977) includes a section on transportation. The
9 section on transportation includes policies which could be used
10 to measure public safety and convenience against any
11 development. Similarly, the Washington County subdivision
12 ordinance includes a policy statement sufficiently broad to
13 allow the county to examine any proposed development to see
14 whether the proposed development will "lessen vehicular traffic
15 congestion, provide for vehicular visibility, and provide for
16 access for emergency vehicles * * * *" Ordinance No. 128,
17 amending Washington County subdivision regulations.