BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FAYE WRIGHT NEIGHBORHOOD PLANNING COUNCIL and DEAN ORTON, Petitioners, v. THE CITY OF SALEM and RON JONES & CO., WILLIAM PETERSON, RON JONES, Respondents.	LUBA NO. 80-171 FINAL OPINION AND ORDER

Appeal from City of Salem.

Richard C. Stein, Salem, filed a brief and argued the cause for petitioners. With him on the brief were Ramsay, Stein, Feibleman & Myers.

William G. Blair, Salem, filed a brief and argued the cause on behalf of Respondent City of Salem. With him on the brief was William J. Juza, City Attorney.

Thomas B. Brand, Salem, filed a brief and argued the cause on behalf of Respondents Ron Jones & Co., William Peterson, Ron Jones. With him on the brief were Brand, Lee, Ferris & Embick.

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

Reversed. 4/29/81

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

Petitioners challenge a variance granted by the City of Salem allowing a cul-de-sac in excess of 800 feet to serve "The Woods" Subdivision. Petitioners seek reversal of the decision on grounds that the city council improperly construed the applicable law and that the decision was not supported by substantial evidence.

STANDING

Petitioner Dean Orton claims to have received notice and appeared at various city hearings on the matter. Additionally, he says he owns property approximately 900 feet from the subject property. He claims to be aggrieved in that the granting of the variance would result in increased traffic on Alderbrook Avenue S.E., the street fronting his property.

Petitioner Faye Wright Neighborhood Planning Council says it is the official body representing citizens in the Faye Wright Neighborhood before the City of Salem's planning bodies. This development is within the Faye Wright Neighborhood. In its capacity as a neighborhood organization, the planning council was entitled to and received notice of various hearings on the matter, and the Council appeared at hearings on the issue. Petitioner Faye Wright Neighborhood Planning Council claims that the "subdivision as approved will increased [sic] traffic in the Faye Wright neighborhood area with a corresponding decrease in the quality of said

neighborhood." Petition for Review at 1.

Respondent City of Salem does not challenge petitioner's standing. Respondents Ron Jones and William Peterson challenge standing on the ground that petitioners' complaint concerns increased traffic onto Alderbrook Avenue S.E., a roadway in the vicinity of the subdivision that would, presumably, receive traffic from the subdivision. As the variance complained of concerns a cul-de-sac variance, respondent says "[i]t follows as a matter of logic, that granting a cul-de-sac in excess of 800 feet cannot possibly increase traffic on Alderbrook, SE." Brief of Respondent Ron Jones, et al at 1.

We do not agree with this view. The variance makes possible a particular means of access to the development. That means of access will discharge traffic, in part, on to Alderbrook Avenue S.E. We conclude that granting the variance will increase traffic on Alderbrook Avenue S.E. and that petitioners have standing to bring this appeal.[1]

FACTS

This case is before us for the second time. In the prior case, Faye Wright Neighborhood v. City of Salem, 1 Or LUBA 246 (1980), petitioners challenged the subdivision on several grounds and also challenged the variance which is the subject of this appeal. The Board upheld the subdivision, but reversed the city on the variance. The Board declared the variance to be invalid because the findings had not adequately demonstrated compliance with section 63.332(a) of the Salem Revised Code.

The city reconsidered the variance, and granted it again. This time, however, the grant was accompanied by detailed findings.

This particular proposal was originally conceived as "Phase II" of "The Woods" Subdivision. The original plan called for access to Phase II to be onto Idylwood Dr. SE. Both Phase I and Phase II of the development were submitted to the city council, and the city council granted the development including variances on July 10, 1978. Final approval for Phase I was given in January of 1979. In August of that year, Ron Jones & Co., the developer, notified the city that it was abandoning Phase II of the project and was submitting a new plan for a conventional subdivision. The new plan provided for 15 detached single family homes, and access was to be through an extension of a cul-se-sac known as Stagecoach Way. Stagecoach Way presently serves Phase I of The Woods development, and its extension into Phase II will increase the traffic on Stagecoach Way. As a consequence of the increased traffic on Stagecoach Way, traffic on other streets in the area including Alderbrook Avenue S.E., will also be increased.

When the city finally approved the new subdivision on April 7, 1980, an appeal was taken to the Land Use Board of Appeals. Our order, invalidating the variance but approving the subdivision, was issued September 2, 1980, and the city reheard the cul-de-sac variance October 27, 1980. On November 17, 1980, the county entered Resolution 80-272 granting the variance, and a notice of intent to appeal was later filed with

this Board.

ASSIGNMENTS OF ERROR

Each of petitioners' four assignments of error is based upon one of the four conditions included in SRC 63.332(a), "Basic Conditions for a Variance." All four of the conditions must be met before a variance may be granted. The conditions are as follows:

> "(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." SRC 63.332(a)(1-4).

ASSIGNMENT OF ERROR NO. 1

Assignment of error no. 1 alleges

> "The City of Salem erred in finding that special conditions inherent in the property composing 'The Woods' subdivision made strict compliance with SRC 63.225(c) an unreasonable hardship on the developer in that there is no substantial evidence to support said finding."

As quoted above, SRC 63.332(a)(1) requires a finding that there are special conditions making strict compliance with the substantive provisions of the ordinance "an unreasonable hardship." The city found that there were special conditions inherent in the property. The city describes the property as an irregularly shaped parcel. Part of the property is on a slope with a grade of approximately 17 percent. These conditions occasioned consideration of various access alternatives and lot configurations.

The access alternative chosen was onto Stagecoach Way with an 1100 foot cul-de-sac. Another alternative would require no variance and would lead to Stagecoach Way on a shortened cul-de-sac of 800 feet. If that alternative were chosen, however, the configuration of the lots would change in a manner that was unacceptable to the developer and the city. The apparent reason for the city's conclusion that this change would not be acceptable was the city's finding that a shortened cul-de-sac would end in such a way as to be "impractical, unsafe in inclement weather, and unacceptable under SRC 63.225(b) without substantial and unsightly cut and fill * * * *" Record 4.[2] The city then concludes that without the desired access, "the parcel would be land locked and be undevelopable without acquisition of additional property or rights-of-way to provide access to a public street." Record 4.

Our review of the record does not show how this 800 foot cul-de-sac proposal would be different in terms of grades and

allignment than the 1100 foot cul-de-sac allowed by the variance. Compare Record 38 showing contour lines with the 800 foot cul-de-sac and the map of the development as approved. We are at a loss as to how exactly this rejected proposal is anymore "impractical" in terms of physical features on the land than the alternative chosen. There is an engineering report in the record submitted by the developer. The city relies on the engineering report, but the report does not add any clear facts tying physical features on the land to the particular development scheme and street pattern chosen. Further, the report does not explain how it is that the rejectred proposal is "impractical" or "unsafe." We are cited to no testimony in the record to support that conclusion, and our own search of the record reveals no such evidence. We conclude that the finding rejecting the 800 foot cul-de-sac proposal is not supported by substantial evidence in the record. Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777, rev denied (1976).

The city's order discusses other alternatives that would require the purchase of off-site rights-of-way. The city dismisses these alternatives in large part, because it believes it is a "hardship" and perhaps not even legally possible under the city code to force the developer to provide alternate access by purchase of right of way. Even if this belief were so, it does not explain why the alternative of an 800 foot cul-de-sac would create an unreasonable hardship. That is,

there is no unreasonable hardship if the property can be developed with an 800 foot cul-de-sac.

The word "hardship" has taken on special meaning in land use law. The term has been held to exclude a financial burden, unless the burden robs the developer of a return on his investment. See 3 Anderson, Amercian Law of Zoning, section 185.1 (2nd Edition, 1977). No facts showing such a financial burden are in the record here. We are mindful that the city uses the term "unreasonable hardship," but we do not find "unreasonable hardship" as used by the city to impose any less a standard than the term "unnecessary hardship." This latter term has been construed strictly in Oregon to exclude conditions that would simply favor a more profitable use.[3] See Lovell v Independence Planning Commission, 37 Or App 3, 586 P2d 99 (1978).

Here the project can be finished without the variance. The lots would be designed differently and there could be fewer lots. We do not find these changes rob the owner of a return on his investment, however, based upon the record before us. We are not here saying that the development proposed by the applicant and approved by the city is not a proper development or even not perhaps the best development scheme for this property from an engineering and land use planning perspective. But the city's variance code does not permit deviations from other provisions of the city code solely on the basis of what appears to be the best development scheme. It

could be drafted in such a manner, but it simply is not.[4] We must give meaning to all provisions of Salem's variance code. We cannot ignore the first requirement, i.e. that some special condition inherent in the property would create an unreasonable hardship if the variance were not granted.[5] As witnessed by the applicant's own testimony, the evidence clearly reflects the property could be developed with 15 lots without the variance, although the lots would be odd shaped. See Record 40-41. Odd shaped lots do not equal unreasonable hardship.

Assignment of error no. 1 is sustained.

ASSIGNMENTS OF ERROR NO. 2 AND 3

Assignments of error 2 and 3 combine SRC 63.332(2) and (3). Petitioners' allegation is that the requested variance is not necessary for the proper development of the subdivision or the preservation of the owners' property rights and values. Further, petitioners allege the city erred in finding there were no reasonable practical means whereby the considerations appearing in SRC 63.332(a)(1) and (2) could be satisfied without granting a variance. Petitioner points out that "proper development" appearing in 63.332(a)(2) does not mean a development in accordance with the developer's wishes. Petitioner asserts "[i]t means development consistent with the topography and location, provision for municipal services, and consistent with city and county comprehensive plans and the public interest." Petition for Review 7-8. As long as development is proper without the variance, the variance should

not be allowed, claim petitioners. Petitioners say alternatives exist in this case whereby topographical conditions and the preservation of property values may be taken into account without requiring a variance. Petitioners are not speaking of an 800 foot long cul-de-sac extension to Stagecoach Way requiring shifting of the lots within the subdivision, but petitioners are speaking of two access alternatives, one from Idylwood Drive and one from Commercial Streets SE. Both alternatives would require the developer to purchase or lease right of way. The former of these alternatives was the selected method of access found in the original Phase II planned unit development abandoned by the developer. Petitioners claim, in essence, this original proposal was chosen because it was superior to the others.[6]

There is not sufficient explanation in the findings as to why this development is the "proper" development. This is the same problem which we faced in our earlier consideration of this variance

> "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." Faye Wright Neighborhood v. City of Salem, 1 Or LUBA 246, 251 (1980).

In the present case, the city made no findings supported by substantial evidence explaining why it believed development

with an 800 foot cul-de-sac would not also equal proper development. The city made a finding rejecting alternatives but, as we noted supra at 7, the finding was not supported by substantial evidence. We are left, then, with no finding explaining the propriety of the alternative chosen. Without such a finding the city could not conclude the variance (i.e. 1100 foot cul-de-sac) was "necessary for the proper development of the subdivision." SRC 63.332(a)(2).

As to the matter of "preservation of property rights and values," the city apparently concluded that the developer has a right "which the City of Salem cannot withhold absent just compensation, to access his property onto Stagecoach Way." Record 5. In other words, under the circumstances of this case, the city equates preservation of property rights and values to mean compliance with the developer's plan. If the developer's plan is not followed, the city claims to owe him compensation. We do not agree that the developer has such a right. The developer's property right and values may be deminished by local ordinance provisions, but that possibility alone does not equal justification for a variance. 3 Anderson, American Law of Zoning, sec 18.22 (2d Ed 1968).

ASSIGNMENT OF ERROR NO. 4

Assignment of error no. 4 alleges that SRC 63.332(4) is violated. Petitioner says the city was mistaken in finding that the variance will not have an adverse affect on public health, safety and welfare, or on the comfort and convenience

of other property owners in the area. Petitioners here argue that the increased traffic flow will increase air and noise pollution and the likelihood of accidents.

Respondents argue that "comfort and convenience" is an ambiguous term, and the Board should defer to the council's interpretation. The increased noise, pollution and accident hazard, according to the city, is a factor inherent in any development of property.

We agree with the city that any development will most likely cause some inconvenience. However, the ordinance is quite strict in that it appears to us to demand that no adverse effect on the comfort and convenience of surrounding land owners be likely from the variance. The ordinance does not allow for the minimal adverse effect any development may occasion. We view increased traffic to be an adverse effect on comfort and convenience, at least as petitioners discuss it under assignment of error no. 4. The city in its findings cannot redefine the ordinance to read "unreasonable adverse effect."[7]

The grant of variance is reversed.

COX, Dissenting.

This is a very close case which has resulted in much debate by this Board. The source of our difficulty in deciding the case is found in the terms of Salem's variance procedure which does not easily allow for urban infill on an oddly shaped piece of property substantially landlocked by prior development. Given this limitation inherent in the city's variance procedure and reading the record as a whole, I feel substantial evidence exists to support the finding that "strict compliance" with Salem's community development standards would result in an "unreasonable hardship." There are many topographical features, both natural and manmade (i.e., prior development, street intersections and grades, etc.) which had to be weighed by the city in reaching its decision to grant the chosen variance alternative in order to develop this urban land. The record reflects the city's consideration of those topographical features.

Further, I do not feel the majority is correct in relying on its evaluation of a contour map as a basis for its conclusion that the record fails to show a difference between the 800 and 1100 foot cul-de-sac alternatives. There is discussion in the record regarding the adverse effect of a "hump" which exists at the point where the proposed 800 foot cul-de-sac "bulb" would be placed. The "hump" is not reflected on the contour map. The majority disregards the city's reliance on information identifying this physical

characteristic and relies instead on its own ability to read a "contour" map which may or may not accurately reflect detailed surface characteristics.

In addition, contrary to the majority's decision, I feel the petitioners have failed to show the alleged adverse effect on their comfort and convenience is anything but trivial in nature. The street which would absorb the increased traffic is far below its allowed capacity of 1600 vehicle trips per day as defined by city standards. The 15 additional homesites will not cause traffic in excess of that capacity; a capacity which the petitioners should have been aware of at the time they moved to the neighborhood. The majority's strict interpretation of the terms "comfort and convenience" could be used to prevent the addition of even one residence to a neighborhood. The applicable terminology in the city's code does not refer to "no adverse effect" as the majority states. All the city needs to determine is that it is "unlikely" the variance will have an adverse effect on the neighbors' comfort and convenience. The city made that determination and it is supported by the record.

I would affirm the City of Salem's decision.

FOOTNOTES

[1] We note respondent Jones has not said the petitioners have failed to allege an injury. In that regard, this case is distinguishable from Parsons v Josephine County, ___ Or LUBA ___ (LUBA No. 80-159, 1981) wherein the challenge to standing was made on the basis of petitioner's failure to claim the facts alleged resulted in an injury. We note here also that petitioners describe an "injury" resulting from increased traffic in the body of the petition. See Petition for Review, pp. 18-19.

[2] SRC 63.225(b) includes the city's streets standards and grades.

[3] The Independence City Zoning Ordinance Section 1402 provides:

> "The commission may permit and authorize a variance when it appears from the application, or the facts presented at the public hearing, or by investigation by or at the instance of the commission, that there are exceptional or extraordinary circumstances or conditions applying to the land, building, or use referred to in the application, which circumstances or conditions do not apply generally to land, building, or uses in the same district * * *." Lovell v. Planning Commission of Independence, 27 Or App 3, 586 P2d 99 (1978).

Professor Anderson comments on the use of a term "unusual hardship" in place of "unnecessary hardship." He notes

> "Evidence is lacking that this and similar attempts of municipal draftsmen to broaden or narrow the concept of 'unncessary hardship' have profoundly affected the content of the term or its capacity to confine the discretion of boards of adjustment. The term has developed meaning in the judicial opinions, and many drafting attempts to define it borrow the language of the courts."

[4] See 1000 Friends v. Clackamas Co., 40 Or App 529, 595 P2d 1268 (1979) for an example of a more liberal variance standard.

[5] We do not understand any of the respondents to be arguing either that the variance should be granted because the property would be deprived of a valuable natural resource or that the public health, safety or welfare would be adversely affected without the variance. SRC 63.332(a)(1).

[6] On page 16 of the petition, petitioners claim that an extended cul-de-sac to Idylwood or Commercial Streets would possibly require a variance.

[7] The city finding is as follows:

> "Perhaps it could be argued that the addition of one additional vehicle trip per day amounts to some quantum of adverse effect, but we believe and find that the proper interpretation of this ordinance requirement necessarily involves a determination that some degree of what the surrounding property owners may subjectively consider to be adverse effect must be accepted, and that it is only unreasonable adverse effect that will be found to amount to a justification for denial of this type of variance.