BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRUCE M. PHILIPPI and RON BOCHSLER, Petitioners, vs. CITY OF SUBLIMITY, Respondent.	LUBA No. 83-093 FINAL OPINION AND ORDER

Appeal from the City of Sublimity.

M. Chapin Milbank, Salem, filed the Petition for Review and argued the cause on behalf of Petitioners. With him on the brief were Schlegel, Milbank, Jarman and Hilgemann.

James D. Tiger, Stayton, filed the response brief and argued the cause on behalf of Respondent. With him on the brief were Duncan and Tiger.

BAGG, Chief Referee; DUBAY, Referee; KRESSEL, Referee; participated in this decision.

REMANDED 01/04/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion By Bagg.

NATURE OF THE DECISION

Petitioners appeal a denial of their requested residential subdivision. Petitioners ask the Board to reverse the decision and require the City of Sublimity to approve the subdivision.

FACTS

This subdivision is before the Board for the third time. The first two cases resulted in remands to the City. Philippi v City of Sublimity, 4 Or LUBA 291 (1981) (Philippi I); Philippi v City of Sublimity, 6 Or LUBA 233 (1982) (Philippi II).

As in the two previous cases, petitioners seek to subdivide a ten acre parcel within the city. The area is designated for residential development in the city's comprehensive plan and is zoned SFR (Single Family Residential). The city's plan and implementing ordinances have been acknowledged by LCDC as being in compliance with statewide land use planning goals.

This lastest application was made on April 11, 1983. On May 12, the Sublimity planning commission voted to deny the subdivision. Denial was based on a conflict between the proposal and comprehensive plan policies disfavoring "leap-frog" development and the premature conversion of agricultural land to urban residential use. The commission also noted that inadequate streets served the proposed development. The city council adopted the planning commission's findings of fact and denied the application on

June 13, 1983. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners challenge the city's actions in two ways. First, petitioners characterize most of the city's findings as being unsupported by evidence in the record. Second, petitioners claim the city's attempt to deny the proposal under a general plan policy contravenes a statute enacted by the 1983 legislature. We take up the latter point first.

I. The Agricultural Land Retention Policy

A. Effect of 1983 Or Laws, ch 827, §19

Petitioners' challenge to the city's reliance on a plan provision favoring retention of agricultural land is best understood in the context of the case law and legislative developments which have been triggered by previous attempts to secure approval of this subdivision. In Philippi II, the Board remanded denial of the subdivision request in part because of a Court of Appeals' opinion in Philippi v. City of Sublimity, 59 Or App 295, 650 P2d 1038 (1982). The Board relied on the Court of Appeals' view that a policy in the comprehensive plan favoring retention of agricultural land within an acknowledged urban growth boundary may not be used to preclude development on land designated and zoned for residential use. The Board, therefore, did not apply a provision in the city's comprehensive plan which states:

> "Land which is inside the city limits and urban boundary that is in agricultural use shall remain in agricultural use until it is needed for urbanization

and can be provided with urban services." City of Sublimity Comprehensive Plan at 11.

However, in Philippi v. City of Sublimity, 294 Or 730, 662 P2d 325 (1983), the Oregon Supreme Court overturned the Court of Appeals decision. The Supreme Court found that a policy, such as the one quoted above, was an appropriate tool to control the timing of urban development. The Court stated:

> "A plan policy to retain agriculturally productive land in that use until such time as it is needed for the zoned use is not inconistent with the concept of zoning designations. A zoning ordinance may be, but is not necessarily, a mere catalog of existing uses; nor does a zoning ordinance necessarily give an automatic license to a landowner to develop his or her property to any use permitted by its particular zone class. The comprehensive plan here involved sets forth a legislative decision as to which future property uses will or will not be in the public interest, and in what order. Where the comprehensive plan permits uses more intensive than a parcel's present use, the question of when and under what conditions the parcel may be permitted to be further developed can be made to turn on policies or factors within the zoning ordinance itself or the plan, provided they are applicable, clearly set out, and consistent with the zoning designation. Sublimity points out that the entire city is presently zoned at the ultimate end use designation.
>
> "We disagree with respondents' contention that Sublimity's 'agricultural retention policy' is necessarily so inconsistent and inimical to a SFR zone that it cannot, as a matter of law, be employed to delay development of properties so zoned. With regard to respondents' parcel, the policy does not stand as an absolute bar to residential development -- it merely delays such development until either the parcel cannot be realistically or productively farmed or there is a need in Sublimity for more residential lots. Moreover, retaining the parcel as agricultural does not, as a practical matter, affect respondent's ability to develop it for residential use some time in the future. Therefore, assuming that respondents' parcel is capable of agricultural production and that

there is no present need in Sublimity for more residential lots, we conclude that Sublimity may employ its 'agricultural retention policy' to defer the residential development of respondents' parcel at this time." (footnote omitted) 294 Or at 737.

Without question, the Supreme Court's decision in Philippi lends support to the city's refusal to approve this subdivision by virtue of conflict with the comprehensive plan. However, petitioners argue the Supreme Court's decision is no longer effective to guide review of this case. Petitioners claim that 1983 Or Laws, ch 827, §19 prohibits the city from using a plan policy to control development of land which is within the urban growth boundary and is zoned for urban development. 1983 Or Laws, ch 827, §19 provides:

"(1) Lands within urban growth boundary shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards.

"(2) Notwithstanding subsection (1) of this section, lands not needed for urban uses during the planning period may be designated for agricultural, forest or other non-urban uses."

Petitioners maintain that paragraph 1 of the quoted legislation required the city to treat the land in question as "available for urban development." They argue that the exception provided under paragraph 2 was not available because the city failed to designate the land for non-urban use.

The city argues that 1983 Or Law, ch 827, §19 controls only those local government decisions made after the effective date of the law. The city argues the law should be applied

prospectively; because the city made the decision before the effective date of the new law, the city is not obliged to conform its plan and ordinances to the new requirements.

We do not believe the provisions of 1983 Or Laws, ch 827, §19 control our review in this case. It is correct that the new law is a general law applicable to all cities and counties within the state. See Klamath Falls v OLCC, 146 Or 83, 94-95, ___ P2d ___ (1934). However, new laws are to be applied prospectively unless the legislature declares its intent that the law apply retroactively, or the law applies to procedure or the law is "remedial" in the sense that it corrects a legislative error. See Denny v Bean, 51 Or 180, 93 P2d 693, 94 P2d 503 (1908); Josephine v Lowry, 261 Or 545, 295 P2d 273 (1972); Thornton v Hamlin, 41 Or App 363, 597 P2d 1307 (1979).

1983 Or Laws, ch 827, §19 does not appear to fit any of these exceptions. We conclude that action taken before its passage, as here, are not subject to its provisions. Also, the fact the matter was on appeal to this Board at the time the new law became effective does not require us to apply it. It would be anomalous, to say the least, to hold the city responsible for non-compliance with a substantive law which was not in effect when the city took action. In our view, only if the application were pending before the city at the time the new law took effect would the city be obliged to apply the law. See Central Freightlines, Inc. v United States, 669 F2d 1063 (5th Cir., 1982).[1]

B. Sufficiency of The City's Findings Under the Agricultural Lands Retential Policy

The fact that the Board finds the new law does not apply to it review of this proceeding is not sufficient to permit the Board to affirm the city's decision. The city's comprehensive plan requires the same kind of need analysis as is required under the second paragraph of the new law. By the terms of its own plan, the city must find the land subject to this review is needed for urban uses.

> "Agriculture is of major importance to the Sublimity area. The lands surrounding the City are currenlty in agricultural use as pastures and for grains and grass seeds, and are classified as either Class II or III soils. The City recognizes this resource and seeks to preserve this land in its natural open state as a means of maintaining the rural atmosphere for which the town was named. Land which is inside the City limits and the urban growth boundary that is in agricultural use shall remain in agricultural use until it is needed for urbanization and can be provided with urban facilities." City of Sublimity Comprehensive Plan at 11.[2]

In its review of this request, the city, in essence, held the required showing of need for urban development could not be made. As to whether there existed a need to take this land out of agricultural use the city found:

> "That as of March 8, 1982, the City has an inventory of 136 approved building lots available for development and home construction. That said lots are closer to the core of the City than the proposed lots. That said inventory is sufficient to meet housing needs through 1985-1990. That the available lots are primarily adjacent to arterial streets. That said available lots meet current public needs and provide lots available which are similar to that proposed by applicants. That no evidence was received showing a need for the proposed housing.

"The Comprehensive Plan provides that 57% of the projected population growth will be met by multi-family housing and mobile homes with only 43% of projected growth by single-residential homes, the plan provides that only 287 SR units will be required from 1979 to 2000.

"That the tract is prime agricultural land and has been farmed for not less than 25 years with the most recent crop being harvested in the summer of 1982, with former crops consisting of grean [sic] beans, sweet corn, and grass seed." Findings of Fact 14, 15, 16, Record 9-10.

In Philippi I, the Board rejected a similar discussion of this subdivision proposal's compliance with the plan provision favoring retention of agricultural land. The Board concluded the city had failed to identify what it meant by "needed for urbanization" as the term was used in the plan. In this case, the city made more findings about need, but the applicant (and the Board) still do not have a clear idea of what the city means.

For example, the city repeats its earlier finding that the inventory buildable lots is sufficient to meet housing needs through 1985-1990, with some figures about housing and population growth. At the same time, however, the city speaks of a currently "sufficient inventory of available lots" as if to say that need is to be measured in terms of present need. At one moment, the city speaks of housing needs through 1985-1990 and also the year 2000 and at the next moment the city speaks of current housing needs with no discussion of how these findings fit together and reflect the city's

understanding of the need standard in its plan.

Of particular importance is the fact that the city failed to explain how the proposed 34 lots in this subdivision would or would not be used to satisfy either current or future housing needs. If the city felt the need referred to in the plan is an immediate need, then what must the developer do to show there is a current need? The confusion occasioned by these findings makes it impossible for the Board to tell whether the city's interpretation of its own comprehensive plan is reasonable or not. See Alluis v Marion County, 7 Or LUBA ___ (1983). We conclude the city has still not explained what it believes its plan refers to in the need standard.

Included in the finding quoted above is a reference to another plan policy which the city relies upon to deny this proposal. The plan policy is one that discourages "leap-frog" development. As the Board understands the findings, not only does the city believe a current need for urban land uses must be shown, but development to meet that need must be close to the city center in order to avoid jumping over vacant buildable lands close to the city center.

As to the plan's prohibition against "leap-frog" development, the city found as follows:

> "The Comprehensive Plan provides that 'leap frog' development passes over vacant land to use outlying parcels that may be less expensive to acquire, but creates a situation that prematurely takes agricultural land and open space out of production. Not only is this an inefficient use of land, but an unattractive use as well. Therefore, the following

policy was adopted:

> "Residential development shall be encouraged to utilize vacant parcels of bypassed land in order to achieve a more compact community. (CP 34)." Record 11.

The city then draws a conclusion as follows:

> "That available areas which are closer to city center should be developed first with the growth progressing outward from the core area according to demand. When available areas which are closer to the core area are developed and applicant can show need for additional housing units, the request should be approved, assuming appropriate finding of fact refecting compliance with the comprehensive plan and subdivision ordinance." Record 14.

In Philippi II, the Board found fault with the city's discussion of this policy on the ground the city failed to advise the applicants as to what action would be necessary in order to comply with the plan policy. See Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978). The Board said

> "the city concluded that if it were to approve the subdivision the city would not be encouraging residential development on vacant parcels of bypassed land and, thus, not achieving a more compact community and avoiding leap-frog development. The conclusion does not tell the applicants, however, what the applicants must do or what facts must exist in order for the applicants to satisfy this policy in the plan. In other words, the city does not tell the applicants when, if ever, approval of the subdivision request will be consistent with the policy of achieving a compact community. The city was required to so inform the applicants as the Court of Appeals stated in Commonwealth Properties v. Washington County, supra. * * * *" (footnote omitted) Philippi, 6 Or LUBA at 241.

The city attempted to remedy this defect in the instant

case. The city told the applicants

> [w]hen available areas which are closer to the core area are developed and applicant can show need for additional housing units [a reference to the agricultural land policy], the request should be approved, assuming appropriate finding [sic] of fact reflecting compliance with the Comprehensive Plan and Subdivision Ordinance." Record 14.

The city's statement in this case does not add much to an understanding of what an applicant must do to comply with the city plan. As with the city's discussion of "need," the applicants are still left with having to guess as to the standard the city will apply when reviewing any proposal to divide this land. That is, there is no explanation of what "closer to the core area" means and how this closeness is to be measured.

Based on the above, we conclude the petitioners are correct that the findings are simply repetitive of previously disapproved findings. A remand is in order.

C. Other Alleged Errors

Petitioners also argue that the city's finding that the proposal is not compatible with the surrounding area is in error because there is no indiction of what "compatibility" means to the city. Presumably, petitioners are referring to the following findings:

> "10. That the minimum lot size in the proposed subdivision is 8,800 square feet.
>
> "11. That the minimum lot size of existing lots in the area is 16,000 square feet.
>
> "12. That the proposed minimum lot size is

> incompatible with the surrounding lots and the existing rural character." Record at 9.

As the Board understands the Residential-Single Family Zone, a minimum lot size is 7,000 square feet. City of Sublimity Zoning Ordinance, §3.3(B)(a). The Board is not cited to and it is not aware of a "compatibility" requirement in the city's subdivision ordinance providing that the minimum lot size in the SRA Zone is not available if other lots in the area are larger than the minimum lot size. Additionally, the city does not cite the Board to a general compatibility standard in the comprehensive plan or anywhere in the city ordinance scheme. A simple finding that proposed lot sizes are not the same as others in the area, where the ordinance makes allowance for even smaller lots sizes, does not adequately explain the matter of compatibility. See Vincent v Benton County, 5 Or LUBA 266 (1982). It is not clear, however, that the city relied on incompatibility to deny this request. If the city did not intend its denial to be based on incompatibility then the finding is surplusage and does not compel remand. If, on the other hand, the city based its denial, in part, on incompatibility then we find the city to have erred. The city appears to have created this criterion out of thin air and has not explained what the term means and how it is applicable to this subdivision request.

Lastly, petitioners make a general claim of error on the grounds that the city's findings are not supported by

substantial evidence in the record.

Petitioners say the findings of fact adopted by the city council are essentially unchanged from the findings made in Philippi II. Findings numbered 16 through 36 are identical to the findings reviewed by the Board and found to be inadequate in the prior Philippi cases, according to petitioners. Petitioners also claim findings of fact numbered 11 through 36 are not supported by substantial evidence in the record.

Petitioners take particular offense at the city's finding that the property is "prime agricultural land." See Record 10. Petitioners cite a study they had performed as proof the property is "grossly unsuited for farm land." Petition for Review at 3. Petitioners wrote to a number of farmers in the area, and answers received by petitioners show the property is not suitable for farming, according to petitioners. As evidence, petitioners point to letters which assert, among other things, that no one wishes to lease the property for farm purposes because it is too small to be farmed profitably, and it is too close to nearby residences. The Board notes the letters do not say the property is not suitable for farm production because of characteristics of the land itself. Petitioners complain the city failed to address this evidence, and assert that failure to do so constitutes error. See Advance Health Systems v Washington County, 4 Or LUBA 20 (1981).[3]

With respect to petitioners' charge about the city's

findings on agricultural land, the Board agrees the city needs to address the petitioners' evidence about the quality of the agricultural land. The plan provision relied upon speaks of "prime" agricultural land. The evidence to which petitioners cite calls into question the quality of the agricultural land (but not the fact that the land may be suitable in some manner for agricultural use), and the evidence should have been addressed. See Sane Orderly Development v Douglas County, 2 Or LUBA 196 (1981).

As to the remaining assertions about the findings, the Board declines what it understands to be an invitation to examine each and every one of the findings of fact and then search the record to find whether substantial evidence exists to support the findings. The Board believes it is petitioners' responsibility to state which finding is not supported. A general claim that all of the findings are unsupported, where there are many findings covering many issues, is too broad an allegation to review. The Board declines, therefore, to review the findings generally as requested.

CONCLUSION

The decision of the City of Sublimity is remanded for further proceedings not inconsistent with this opinion. The Board is mindful petitioners have asked for a reversal of the city's decision and an order compelling the city to approve the subdivision. The Board does not have the power to compel the city to approve the subdivision. Phillipi II, supra. Also,

the Board believes remand is appropriate where, as here, the city has failed to address applicable criteria. See OAR 661-10-070(1)(c)(4). The Board shares petitioners' concern, however, that this case is before the Board for the third time and the city has still failed to adequately address the criteria existing within its own plan and ordinance structure.

On remand, the city must proceed in accordance with the provisions of 1983 Or Laws, ch 827, §19.

While we understand the city must decide for itself how the new law applies, we expect the city will be asked to approve this subdivision request again. We offer the following discussion in the hope of providing some guidence to the parties. We are aware of the city's view that it has already complied with the new law. The city asserts that

> "the 'locally adopted development standards' are contained in [the city's] acknowledged comprehensive plan and development ordinances." Brief of City at 7.

In other words, the city states that its ordinance scheme provides for development of land within urban growth boundaries in accordance with its comprehensive plan and implementing ordinances.

We do not agree with the city's interpretation of the first paragraph of 1983 Or Laws, ch 827, §19. As we understand the provision, lands inside urban growth boundaries are to be considered available for urban development. The "locally adopted development standards" are the standards providing for the provision of key urban facilities and services and for

other specific controls on development. "Development standards" does not refer to policy statements in the comprehensive plan or broad classifications of uses but to the specifics of development. For example, subdivision ordinances typically contain development standards controlling the width of streets, gutters, sidewalks, setbacks, heighth restrictions, lot sizes, utility placement controls and other concrete requirements. Were the legislature to have intended "development standards" to include policy provisions and broad siting and planning controls such as those found in a comprehensive plan, there would be no need for subsection 2 of section 19.

Subsection 2 of section 19 allows an exception from the general rule that land inside a UGB is available for development where a local government finds certain lands within the urban growth boundaries are not needed for urban uses. However, under the provisions of subsection 2, if a local government desires to preserve land for agricultural, forest or other non-urban uses, whether in the form of reserve areas or permanent areas, we believe it must specifically designate the land available for such uses in its plan and zoning ordinance, or both as may be appropriate. The designation should be carried out in such a way as to clearly notify landowners of what lands are unavailable for immediate development. A general statement in the plan that all lands in agricultural use are unavailable, i.e., the kind of statement relied on by

the city in this case, would appear to be insufficient notice. We note also that the designation permitted by the new law should be accompanied by proper explanatory findings showing why the property is not needed for urban uses. In making the need analysis, under the law the city should clearly articulate what it means by "need," so that review of the decision is possible.

FOOTNOTES

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[1] Of course, because this case is remanded, when the application is again before the city, it will be obliged to act in conformity with the 1983 law. See the Board's direction on remand, infra.

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[2] The Board notes the provision in the comprehensive plan requiring a showing of need before agricultural land is taken for urban uses is not a policy. It is simply a provision in the plan, and while it is stated in mandatory terms, it is not a "policy" which the comprehensive plan defines as:

> "Specific guidelines for action directed toward the achievement of the goals in this comprehensive plan. Land use decisions made by the city shall be based on the policies of the plan." City of Sublimity Comprehensive Plan at ii.

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[3] Petitioners also point to a recently approved subdivision to show the city's decision was inconsistent. The Board does not understand petitioners to be arguing that the city's decision in the instant case is arbitrary and capricious. Petitioners have not stated such an assignment of error, and the Board understands the matter of the other subdivision, known as the Sunset West subdivision, to be evidence that the city's conclusions about the need for additional housing are suspect.

Petitioners may be correct that the Sunset West subdivision was granted approval in error. However, any error involving Sunset West does not mean the city's act here was error.