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

JOHN H. ROSENFELD and )  
LEON H. GARTUNG, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF LAKE OSWEGO, )  
 )  
Respondent. )

LUBA No. 86-093

FINAL OPINION  
AND ORDER

Appeal from City of Lake Oswego.

John H. Rosenfeld, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Tonkin, Torp, Galen, Marmaduke & Booth.

James M. Coleman, Lake Oswego, filed a response brief and argued on behalf of Respondent City.

DuBay, Chief Referee; Bagg, Referee, participated in the decision.

AFFIRMED 03/12/87

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 The city's decision interpreted its current and former  
4 development code to deny the petitioners the request to submit an  
5 amended final subdivision plat.

6 FACTS

7 Petitioners' preliminary plat of Penn Woods Subdivision was  
8 approved by the city on September 25, 1979. The city's  
9 development code then in effect required approval of a final  
10 plat, prepared in accordance with the code and ORS 92.080 and  
11 92.120. The code stated:

12 "The official plat must be prepared and submitted within  
13 six (6) months following the approval given on the  
14 preliminary plat by the planning commission and city  
15 council and it shall incorporate the recommendations and  
16 conditions made by the commission and any made by the  
17 city council. If the owner or subdivider wishes to  
18 proceed with the subdivision of his land after the  
19 expiration of the six (6) month period following the  
20 approval of the preliminary plat, he must resubmit his  
21 preliminary plat to the planning commission and make any  
22 revisions considered necessary by the planning commission  
23 and city council to meet changed conditions." Lake  
24 Oswego Code (LOC) Sec. 44.310.

19 Petitioners applied for, and received from the planning  
20 commission, a six-month extension to submit a plat for final  
21 approval. On September 4, 1980, petitioners submitted a plat of  
22 Penn Woods Subdivision to the city. On September 17, the County  
23 Surveyor sent to the applicant's engineer a copy of a letter  
24 describing two errors on the submitted plat. The applicants  
25 filed no amended plat.

26 In 1983, the city planning director answered an inquiry about

1 the status of the plat approval. In her letter to applicant's  
2 representative, she outlined the steps needed to "reactivate" the  
3 plat without mentioning the time limits in LOC Sec. 44.310. In  
4 November, 1985, petitioners asked the planning director about the  
5 status of the subdivision and were told the preliminary plat was  
6 no longer in effect. They appealed the planning director's  
7 decision to the planning commission, which approved the  
8 director's interpretation. Petitioners then appealed to the city  
9 council, which affirmed the planning director's decision.

10 FIRST ASSIGNMENT OF ERROR

11 Petitioners allege the city misconstrued LOC 44.310.  
12 According to petitioners, they complied with the ordinance when  
13 the plat was submitted on September 4, 1980. They contend the  
14 ordinance requires only that an "official plat" must be filed.  
15 That term occurs only in LOC 44.310 and is not defined.  
16 Petitioners argue that "official plat" and "final plat" have  
17 different meanings in the ordinance, and that it is unreasonable  
18 for the city to interpret the ordinance to require an approvable  
19 final plat within the stated time limits.

20 The city says LOC Sec. 44.310 requires that a final  
21 recordable plat must be submitted within six months after  
22 approval of the preliminary plat. According to the city, this  
23 interpretation is consistent with other provisions of the  
24 development code emphasizing timely processing of subdivision  
25 applications. Since these other provisions impose numerous  
26 deadlines, the city argues that petitioners' interpretation of

1 LOC Sec. 44.310 would depart from the purpose for subdivision  
2 approval time constraints in the ordinance.

3 The resolution of this assignment of error requires an  
4 interpretation of "official plat" in LOC Sec. 44.310. While the  
5 responsibility to interpret the ordinance is ours, we may defer  
6 to the local body when its interpretation is reasonable and not  
7 contrary to the express terms of the ordinance. Cook v. Yamhill  
8 County, 13 Or LUBA 137 (1985). Petitioners say the city's  
9 interpretation is unreasonable because it is unrealistic to  
10 expect an applicant to file a final plat free of even minor  
11 technical errors within the time limits.

12 Although petitioners may be correct about the harshness of  
13 the city's interpretation, the city's reasons for imposing strict  
14 standards are not contrary to the subdivision ordinance. The  
15 ordinance establishes time limits for both applicants and the  
16 city to complete various steps in the approval process. The  
17 city's interpretation is consistent with the clear intent of the  
18 ordinance to ensure timely performance of each step along the way  
19 from application to construction.

20 We find the city's interpretation that LOC Sec. 44.310  
21 requires submission of an approvable final plat within six months  
22 after preliminary plat approval is a reasonable interpretation.  
23 Accordingly, we deny this assignment of error.

24 SECOND ASSIGNMENT OF ERROR

25 Petitioners allege the city incorrectly applied LOC Sec.  
26 44.310. Petitioners complain that the city departed from its

1 "usual procedure of notifying the applicants of any necessary  
2 corrections or amendments." Petition at 7. Petitioners say the  
3 first time they were notified of any plat deficiencies was on  
4 June 2, 1986. According to petitioners, this delay is not  
5 authorized by LOC Sec. 44.310 and unfairly denies them their  
6 rights to obtain final plat approval.

7 We reject this claim. LOC Sec. 44.310 does not require the  
8 city to give notice of errors in the plat. Petitioners cite no  
9 legal authority to support their claim that the city was required  
10 to give notice of errors on documents submitted in the subdivision  
11 approval process.<sup>1</sup> Without citation to a legal obligation to  
12 give notice of deficiencies, petitioners claim that the city  
13 failed to give such notice is not grounds for remand or reversal.

14 Petitioners attempt to establish the city's obligation based  
15 on the city's "usual procedure" to give notice of errors.  
16 However, petitioners do not explain what the procedure was, or why  
17 the procedure should be considered a legal obligation by the city.

18 This assignment of error is denied.

19 THIRD ASSIGNMENT OF ERROR

20 Petitioners allege the city misconstrued LOC 49.090(2). This  
21 ordinance, adopted in 1981, states in part:

22 "...subdivisions...for which preliminary plat  
23 approvals...were granted prior to September 5, 1981  
may occur pursuant to such approvals." Record 190.

24 According to petitioners, their preliminary subdivision plat  
25 approved in 1979 is covered by this provision.

26 The city found the 1979 preliminary plat approval became void

1 when a recordable plat was not timely filed. The city reasoned:

2 "Because the preliminary plat approval was voided in  
3 1980 by operation of LOC 44.310 (1978), the applicant  
4 had no preliminary plat approval in 1981, and, there-  
fore, his project enjoys none of the protection from  
further review granted by LOC 49.090(2)." Record at 4.

5 As we read LOC 44.310, failure to submit a plat within six  
6 months prevents final plat approval unless the preliminary plat is  
7 resubmitted for possible revisions to meet changed conditions.  
8 The ordinance only invalidates the right to obtain final approval  
9 of the plat until the plat is resubmitted for the limited purpose  
10 of making revisions to meet changed conditions. No time limits  
11 are stated for resubmission.

12 The city's view that the preliminary plat approval was voided  
13 because of the deficiencies in the later-submitted plat is not  
14 expressed in LOC 44.310. Although the deficiencies may have  
15 prevented approval of the submitted plat, the ordinance sets out a  
16 resubmission procedure to obtain final approval. However, the  
17 right granted in LOC 44.310 to resubmit a preliminary plat at any  
18 time was not available after the city amended its code in 1981.

19 In 1981, the city adopted substantial revisions to its  
20 development code, including changes to the standards for  
21 subdivisions and the procedures for their approval. The new  
22 provisions included LOC 49.090(2), quoted above, allowing  
23 subdivisions that had received preliminary plat approval before  
24 September 15, 1981, to "occur pursuant to such approval."

25 Other procedures in the 1981 ordinance differ from the  
26 procedures in effect when Penn Woods subdivision received

1 preliminary approval. The new ordinance requires submission of a  
2 final plat within one year after preliminary plat approval. LOC  
3 49.330(1). The one-year period may be extended upon application.  
4 When submitted, a final plat is reviewed for conformity with the  
5 preliminary approval decision, including conditions, and the  
6 applicable land use regulations. LOC 49.335(1). If the plat is  
7 deficient, the planning staff is required to give written notice  
8 to the applicant of any defect. LOC 49.335(3). The plat must be  
9 corrected within 30 days after the written notice. LOC 49.335(4).

10 In the absence of a provision in the new ordinance that  
11 preserves the approval procedures in the former ordinance, the  
12 procedures in the 1981 ordinance for final plat approval are  
13 applicable to all plats, including those that received preliminary  
14 plat approval before September 15, 1981. See 1A Sands,  
15 Sutherland, Statutory Construction Sec. 22.32 (4th ed, 1985). The  
16 right to resubmit a corrected preliminary plat at any time is not  
17 available under the new ordinance. LOC 49.335 limits the time to  
18 submit a corrected plat to 30 days following a written notice from  
19 the planning staff that lists defects in a submitted final plat.

20 The planning staff gave the notice required by LOC 49.335 in a  
21 November 23, 1983 letter to petitioners' representative. Record  
22 43. The letter identified the steps to obtain final plat  
23 approval, including correction of the deficiencies on the plat  
24 submitted in 1980. Although petitioners relied on this letter  
25 (see discussion in Fourth Assignment of Error), they did not file  
26 a corrected plat.

1 By the terms of LOC 49.335(4), petitioners' right to submit a  
2 corrected plat expired 30 days after the November 23rd letter.  
3 Petitioners do not explain the failure to submit a corrected plat  
4 within the 30 day period, nor provide any reason why LOC 49.335(4)  
5 should not apply. Therefore, petitioners are not entitled to  
6 relief even though the city may have misconstrued LOC 49.090(2) at  
7 a later time.<sup>2</sup>

8 This assignment of error is denied.

9 FOURTH ASSIGNMENT OF ERROR

10 Petitioners allege the city is estopped from changing its  
11 position that the subdivision project could be approved without  
12 again applying for preliminary plat approval under the new  
13 ordinance. Petitioners say they relied on a November 23, 1983  
14 letter from the city planning director listing the steps necessary  
15 to obtain final approval. Limitation of a new request for  
16 preliminary plat approval was not required in the director's  
17 letter.

18 We deny this claim. Estoppel cannot arise from an action of a  
19 city official who purports to waive the provisions of a mandatory  
20 ordinance or otherwise exceeds his authority. Bankus v. City of  
21 Brookings, 252 Or 257, 260, 449 P2d 646 (1969); Solberg v. City of  
22 Newberg, 56 Or App 23, 641 P2d 44 (1982).

23 Affirmed.

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FOOTNOTES

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Amendments to the code in 1981 require the planning staff to give notice of defects in submitted final plats. See our discussion under the Third Assignment of Error.

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The record shows that the planning director first notified applicant's representative by letter dated March 20, 1986 that the city would not apply LOC 49.090(2) to Penn Woods subdivision. However, nothing in the 1983 letter from the Planning Director indicates the city would not apply LOC 49.090(2) in the way that petitioners urge it should be applied.