

LAND USE
BOARD OF APPEALS

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

SEP 9 10 16 AM '87

3 BETTY GRIFFITHS, STEPHEN HAWKES,)
4 PAUMULA HAWKES, STEVEN SPRECHER,)
5 LYNDA SPRECHER, BRUCE JOHNSON and)
6 ROSE JOHNSON,)
7)
8 Petitioners,)
9 vs.)
10 CITY OF CORVALLIS,)
11 Respondent,)
12 and)
13 GARY R. HAWKINS and JOHN S.)
14 BRANDIS, JR.,)
15 Respondent-Intervenors.)

LUBA No. 87-043

FINAL OPINION
AND ORDER

13 Appeal from City of Corvallis.

14 J. Stefan Gonzalez, Albany, filed the petition for review
15 and argued on behalf of petitioners.

16 Michael Newman, Corvallis, filed a response brief and
17 argued on behalf of Respondent City.

18 Roderick L. Johnson, Corvallis, filed a response brief and
19 argued on behalf of Respondent-Intervenors. With him on the
20 brief were Johnson & Adkins.

21 BAGG, Referee; DuBAY, Chief Referee; HOLSTUN, Referee;
22 participated in the decision.

23 REMANDED

09/09/87

24 You are entitled to judicial review of this Order.
25 Judicial review is governed by the provisions of ORS 197.850.
26

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal approval of a development plan for the
4 "Timberhill Shopping Center." The approval allows construction
5 of a 200,000 square foot shopping center in the City of
6 Corvallis.

7 FACTS

8 The subject property is a 21.73 acre parcel at the corner
9 of Kings and Walnut Boulevards. The site is an undeveloped
10 hillside with a grade of from 3 to 40 percent. The property is
11 zoned Community Shopping District (CS) and is subject to a
12 planned development overlay (R2). Surrounding uses include
13 offices and duplexes.

14 The city's planning commission reviewed the application in
15 March, 1987 and granted approval for Phase I (the shopping
16 center is planned for two phases).

17 The city council conducted a hearing on the application on
18 April 6, 1987, and approved the application with conditions on
19 May 18, 1987.

20 FIRST ASSIGNMENT OF ERROR

21 "The city erred in adopting the foundation engineering
22 study as a condition of approval."

23 Under this assignment of error, petitioners first argue that
24 the shopping center site is subject to geologic hazard.

25 Because the area is subject to geologic hazard, Plan Policy

26 3.2.5 applies. The policy states:

1 "THE CITY SHALL ADOPT STANDARDS IN THE LAND
2 DEVELOPMENT CODE FOR OPEN SPACE/HILLSIDE AREAS AND
3 OTHER AREAS WITH STEEP SLOPES THAT WILL ACHIEVE THE
4 FOLLOWING GUIDELINES IN AREAS WHERE DEVELOPMENT IS
5 PERMITTED:

6 "- PLAN DEVELOPMENT TO FIT THE TOPOGRAPHY, SOIL,
7 GEOLOGY, AND HYDROLOGY OF HILLSIDES AND TO ENSURE
8 HILLSIDE STABILITY BOTH DURING AND AFTER
9 DEVELOPMENT.

10 "- MINIMIZE SOIL DISTURBANCES [SIC] AND THE REMOVEAL
11 OF NATIVE VEGETATION AND, IF POSSIBLE, AVOID
12 THESE ACTIVITIES DURING WINTER MONTHS."

13 The city's order makes it clear the city considered the first
14 of the two guidelines quoted above to be applicable to this
15 decision.¹

16 The applicant commissioned two geologic studies by James K.
17 Maitland, a professional engineer. The first study is in the
18 form of a letter dated December 16, 1986, addressed to Brent
19 Coals. The second is a document entitled "Foundation
20 Investigation" dated February 1987.

21 The Maitland letter proposes several conditions and
22 recommendations for coping with the geologic hazards on the
23 property. The foundation investigation includes more
24 recommendations with options for various construction
25 strategies.

26 Petitioners allege these studies were considered at the
planning commission hearing on March 4, 1987. Mr. Maitland
testified about the studies, but did not offer the studies or
letter into the record. Indeed, the respondent maintains that
the letter and the study are not part of the record of the

1 city's proceeding.

2 According to petitioners, the planning commission and the
3 city council adopted a condition requiring that the project
4 comply with the recommendations of the engineering report, the
5 same report petitioners contend is not in the record.

6 Petitioners' argument is that the decision is at least in part
7 based on the two engineering studies, neither of which is in
8 the record, and therefore the decision is not supported by
9 substantial evidence in the record. See ORS 197.835(8)(a)(C).

10 Petitioners point out that while the engineer, Mr.
11 Maitland, testified about the geo-technical feasibility of
12 building on the site, the city did not rely on the testimony.
13 Instead, the city relied on the missing study. The city's
14 order states:

15 "A geo-technical study prepared by Jim Maitland,
16 Professional Engineer, and submitted with the
17 application indicates the soils, sub-surface geology,
18 and hydrology would support the proposed
19 development." Record 15, 265, 88, and 100.

20 Petitioners claim the geo-technical investigation is
21 critical to this decision because the stability of the hillside
22 is assured, according to the county's order, only if the
23 project complies with the recommendations of the Maitland
24 reports. See Condition 6, Record 15.

25 Petitioners next argue that it is not clear which of
26 several recommendations in the Maitland study the city relies
upon. According to petitioners, there are alternative
strategies included in the reports, and the city has failed to

1 identify which strategies it believes are appropriate and why.
2 According to petitioners, this is error.

3 The city first argues that petitioners failed to allege
4 they were prejudiced by failure to include the engineering
5 reports. In addition, the city argues petitioners failed to
6 make an objection about the omission before the local
7 government. See Dobaj v. Beaverton, 1 Or LUBA 237 (1981)
8 wherein we held a petitioner must raise all procedural errors
9 in the local forum before claiming error here.

10 We do not characterize petitioners' objection as
11 procedural; rather, petitioners' complaint of insufficient
12 evidence to support the city's decision is an allegation of
13 substantive error. See ORS 197.835(8)(a)(C). We, therefore,
14 will review the complaint.

15 The city argues in the alternative that there is
16 substantial evidence to support the council's findings. The
17 city says the substance of the report is in the record and that
18 the included materials furnish substantial evidence to support
19 the city's decision. See Record 88, 265, 347, 428, 431, 440 and
20 463. Respondent City adds that McCoy v. Marion County, 14 Or
21 LUBA 108 (1985) supports its claim that the council may rely on
22 expert testimony and planning staff reports.

23 The city goes on to affirm that the geological reports are
24 on file with the city and available to any one. Therefore,
25 according to the city, petitioners may easily know the
26 substance of the various engineering alternatives.²

1 The testimony given by the applicant's expert and
2 summarized in the minutes does not show compliance with the
3 city's plan. Mr. Maitland's responses to questions asked by
4 city council members are equivocal. He simply states that he
5 made several recommendations with respect to design and
6 development of the site. Mr. Maitland does not state the
7 project complies with the comprehensive plan. See Record 15,
8 88, 100 and 265. A statement of project feasibility, given in
9 unequivocal terms, is necessary to show compliance with
10 applicable criteria, in this case, Plan Guidelines 3.2.5 quoted
11 supra at p. 3. Margulis v. City of Portland, 4 Or LUBA 89
12 (1981).

13 The staff report, however, does provide a statement that
14 the project complies with the plan. At Record 347, the staff
15 summarizes the engineering evidence and states:

16 "Generally, the report indicates the soils and
17 sub-soil structure are suitable and stable for the
18 traditional flat shopping center design if engineered
19 appropriately." See also Record 463.

20 The difficulty with the materials cited by respondent is
21 that they do not clearly state what engineering recommendations
22 the city believes are appropriate to assure compliance with the
23 plan. The minutes and testimony discuss several alternatives,
24 and petitioners allege, and respondents do not deny, that the
25 engineering reports include alternative recommendations.³

26 In our view, it was the council's responsibility to (1)
decide which of the modifications it wishes to pursue or (2)

1 provide sufficient guidelines to control under what
2 circumstances particular alternatives will be utilized. The
3 council has taken neither action in this case.

4 We conclude the record is insufficient to support a finding
5 of compliance with paragraph 3.2.5 of the city's comprehensive
6 plan, and we sustain the first assignment of error. This error
7 requires a remand.

8 SECOND ASSIGNMENT OF ERROR

9 "The city erred where it delegated authority to staff
10 to review and grant approval of plans for Store F."

11 Petitioners argue the city decision improperly delegates
12 the power to review and grant detailed development plan
13 approval to the city's planning staff. In particular,
14 petitioners complain that detail development plan approval for
15 Building "F" is given to staff. This act, according to
16 petitioners, violates the city's plan providing for citizen
17 participation in all aspects of the land use planning process.

18 The city's approval required the applicant to submit
19 certain additional information about Building F as follows:

20 "2. The applicant shall submit for approval the
21 following prior to request for building permits on
22 Building F:

23 Detailed site plan of proposed development;

24 Detailed parking lot layout and internal
25 circulation;

26 Plan Compatibility Review of drive-throughs and
eating or drinking establishments;

Detailed utility plans for each development
proposed;

1 Architectural elevations of the proposed
2 structure;

3 Detail plans of slope plantings and program for
4 maintaining plantings in the adverse slope
conditions;

5 Detail of signs and locations." Respondent's
Brief at p. 17.

6 Petitioner asserts delegation of these issues for staff
7 decision at the building permit stage violates Code Sections
8 112.04.03-112.04.13 requiring public hearings by the planning
9 commission to consider proposed development plans. See Code
10 Section 105.03 and 112.04.07. According to petitioners, the
11 planning staff is not authorized to hold the hearings required
12 to grant approval of a development plan. See Code Section
13 112.04.07.

14 The city first argues that this error is procedural, and
15 petitioners have failed to allege or demonstrate any prejudice
16 from the error. We disagree. The issue is whether the city's
17 code empowers the planning department to issue approvals.⁴
18 The question is one of delegation of the city council's
19 authority to find an application in compliance with the city's
20 land use regulations. We will review petitioners' claim.

21 The city then states the city council gave detailed
22 development plan approval to Buildings A-E and Building F.
23 According to the city, it is within staff discretion to approve
24 minor modifications to an approved development plan for
25 Building F under Code Section 112.05.03.03. This code section

26

1 provides

2 "Any modification which is not within the description
3 of a major change as provided in Section 112.05.03.01
4 shall be considered a minor change, which may be
5 conditionally approved, or denied by the Director
6 following the review and recommendation of staff.

7 Appeals of the Director's decision concerning minor
8 modifications may be appealed to the Land Development
9 Hearings Board in accordance with the provisions of
10 Section 118."⁵

11 According to the city, all that is given to the staff under
12 the condition complained of is limited authority to review
13 proposed minor modifications. Because the detailed development
14 plan is approved in the city's order, the city contends that
15 the plan approval responsibility is not delegated to the
16 staff.

17 Further, according to the city, the staff's authority to
18 review plans for building applications is limited by the terms
19 of the city's order. The city concludes its code permits staff
20 to consider and approve design questions like the seven items
21 required by the final order, quoted supra at 7.

22 The council's approval of phase I of the development and
23 building application includes approval of the site plan, plan
24 elevations, general landscape plan, preliminary grading,
25 traffic, utilities, lighting and sign details. The city's
26 order granting development plan approval for the development
specifically grants approval only for Phase I. Phase I, as
originally applied for, includes Buildings A - E. Phase II,
not approved by the city's action, includes Building F and pads

1 (or site locations) for Buildings G - K.

2 While the city's order does not precisely say that this
3 first phase approval now includes Building F, the city makes
4 reference to Building F throughout its order. For example, at
5 Record 3 the city describes the basic design concept as
6 consisting of a "main complex of buildings (Buildings
7 A- F)...." The city's order mentions Building F in its
8 discussion of signs, noise attenuation and transportation. See
9 Record 10, 11, 13, and 17. In addition, the council's approval
10 of the Timberhill Shopping Center Plan Development excepts from
11 the approval "those portions of the plan generally known as the
12 'PAD' or 'Phase II' sites." Record 19. Given the remainder of
13 the city's order, and the fact that the city's order refers to
14 approvals of buildings but defers approval of sites for future
15 buildings, interpretation of the order to include detailed
16 development plan approval for Phase I including Building F is
17 reasonable. We therefore reject petitioners claim that the
18 city has delegated detail development plan approval to staff.

19 We also find the tasks delegated to staff are limited by
20 the city's order, and the limitation falls within code
21 provisions allowing staff approval of particular design and
22 construction tasks. For example, Section 209.02.02(b) of the
23 city code permits staff review of drive-in facilities,
24 including financial institutions and eating establishments.
25 See also Code Section 108.04.04. The utility plans and typical
26 architectural elevations were previously approved in the city's

1 order (See Record 4, 24 and 28) and we understand staff review
2 is limited to determining whether the elevations are consistent
3 with the "intent and character of the proposed development" as
4 approved by the city council. See Ordinance Section
5 112.05.01.01(c). Other conditions, including detail of slope
6 plantings and of sign locations are sufficiently limited, we
7 believe, to provide adequate guidance to staff. For example,
8 regarding plantings, the council noted it desired plantings of
9 "greater density and size" along the southern border of the
10 property. Record 7. This statement, along with additional
11 landscape findings in Record 6-8, do not call for the kind of
12 analysis reserved for quasi-judicial consideration under
13 Section 112.05.03 of the Code.

14 Similarly, Condition 8, Record 9-10, lists specific sign
15 requirements for the shopping center. The order provides for
16 the number of signs at specific locations, their height, style
17 and lighting. See Record 10-12.

18 We conclude this staff review is quite unlike the major
19 review called for in Plan Chapter 112 for approval of detail
20 plans and major modifications to detail plans. See Section
21 112.05.03.02.

22 The second assignment of error is denied.

23 The decision of the City of Corvallis is remanded.

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FOOTNOTES

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Respondent does not argue that use of the word "guidelines" in the introductory paragraph is a directory standard. See Downtown Community Assoc. v. City of Portland, 80 Or App 336 772 P2d 1258 (1986).

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The applicant argues that the reports are, indeed, part of the record. The applicant states that the reports were supplied with the application.

3
A record objection was filed including, among other things, a complaint the reports were not part of the record. However, the objection was withdrawn. Unless the applicant wishes to file an exception to the record, we no longer have an issue regarding the record before us. We note that ordinarily all materials submitted with the application are part of the record of the city's proceeding.

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Both engineering reports are appended to petitioners' brief. From the reports, it is not at all clear what recommendations the city believes are appropriate. For example,

"We recommend, therefore, that the proposed site layout be modified to reduce the required depths of cuts and engineered fills. These modifications could include terracing the site so that the uphill buildings (Pads A through E) are located at a modest depth below the existing ground surface and with terraced parking located around the structures and retained by modest retaining walls (4 to 6 feet high). We also recommend that the maximum practical slopes for the pavement be used to reduce the overall amount of fill required. Other possibilities include moving the buildings to the center of the site and terracing the parking around the buildings. Therefore, the parking behind the main series of structures could be located at a lower elevation along Rolling Green Drive and Forest Green Avenue. In general, we believe that a combination of terracing, relocation of the structures, maximizing pavement slopes, using steep access driveways, and the judicious use of retaining walls could be used to develop the property successfully." Appendix 3-3 of Petitioners; Brief.

1 "The grading plan for the area uphill (north) of the major
2 parking lot was not available at the time of the
3 preparation of this report. It is our understanding that
4 several isolated building pads are proposed for this area.
5 It is our opinion that several options are available for
6 construction within that portion of the property. These
7 options include: excavation of deeper cut slopes beyond
those recommended herein, construction of retaining walls
to support cut slopes, use of the proposed buildings as
retaining walls, and construction of the building pads at a
substantially higher elevation. Appendix 4-9 of
Petitioners' Brief.

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9 The applicant argues this issue is not ripe for review.
10 The applicant insists the approval for Building F, if delegated
11 to staff, is not final. Because approval of design for
Building F must come in the future, the applicant argues it
12 does not represent a "final land use decision" under
ORS 197.015(10) and is, therefore, not subject to our review.

13 We disagree. The land use decision on review includes the
14 delegation. The delegation is properly before us at this
time. The eventual approval or disapproval of a design for
Building F is not a subject for this appeal.

15 _____
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16 A major change in a plan development includes the following:

17 " 1. "Land Use;

18 " 2. Increase in dwelling unit density;

19 " 3. Decrease in dwelling unit density below that specified
in the Comprehensive Plan.

20 " 4. Ratio of number of different types of dwelling units;

21 " 5. Type of commercial or industrial structures;

22 " 6. Type and location of accessways and parking where
23 off-site traffic would be affected;

24 " 7. Increase in the floor area proposed for
25 non-residential use by more than ten (10) percent
where previously specified;

26 " 8. Reduction of more than ten (10) percent of the area

1 reserved for common open space and/or usable open
2 space where previously specified;

3 " 9. Increase in the total ground area proposed to be
4 covered by structures by more than five (5) percent
5 where previously specified;

6 "10. Reduction of specific setback requirements by more
7 than twenty-five (25) percent where previously
8 specified;

9 "11. Reduction of project amenities provided such
10 recreational facilities, screening, and/or landscaping
11 provisions by more than ten (10) percent where
12 previously specified; and

13 "12. Any other modification to specific requirements
14 established at the time of conceptual development plan
15 approval." City of Corvallis Land Development Code,
16 Section 112.05.03.01(a)(1-12).

17 A minor modification is any modification not included in
18 the above list. As discussed, the delegation to staff in the
19 condition challenged by petitioners does not involve
20 consideration of any of the 12 items under Section
21 112.05.03.01.
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