BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALVIN K. PFAHL and BRENDA PFAHL,	)	
Petitioners,	)	LUBA No. 87-100
vs.	)	FINAL OPINION AND ORDER
CITY OF DEPOE BAY,	)	
Respondent.	)	

Appeal from City of Depoe Bay.

Dennis L. Bartoldus, Newport, filed the petition for review and argued on behalf of petitioners.

Evan P. Boone, Newport, filed a response brief and argued on behalf of respondent. With him on the brief was Minor, Beeson & Boone, P.C.

BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 07/18/88

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners seek reversal and remand of a decision denying final plat approval for "East Ridge," a nine lot subdivision.

FACTS

The property is owned by petitioners Alvin and Brenda Pfahl. It is 2.2 acres in size and is designated Residential under the Depoe Bay Comprehensive Plan. The zoning is Residential, R-2.

Tenative plan approval for a nine lot subdivision was granted by the Depoe Bay Planning Commission in November 1985, subject to certain conditions. Following tentative plan approval, work began on the subdivision. Petitioners' request for final plat approval was denied at the city council meeting of October 19, 1987. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City had no basis to deny final approval based on the grades of the roads. There is not substantial evidence in the record to support the decision."

Petitioners note the Depoe Bay Subdivision Ordinance (DBSO) requires only approximate road grades need be shown on a tentative plan. The ordinance requires "names, surfacing, direction of drainage and approximate grade of all streets within and abutting the subdivision." DBSO Sec. 2.040(1)(b)(14). Therefore, petitioners argue the city's denial of the final plat approval, based on deviation of the road grade from that shown in the tentative plan, was error.

A letter from the mayor of the city on November 5, 1987 recited a motion and vote made by the city council which in effect denied final plat approval. Record 1. The denial affirmed a previous decision by the planning commission denying final plat approval. That decision was expressed in a letter dated August 31, 1987, in which the planning commission stated

> "The denial results from a substantial deviation of the road grade as outlined in the tentative approval. The road plans were never submitted to the planning commission or the fire department for approval." Record 2.

The letter of the planning commission also cited that at a hearing almost two years earlier, on November 10, 1985, the planning commission understood Mr. Paeth, petitioners' engineer, to say that he would return to seek overall approval of the road system and the drainage system. The letter recites that he did not present plans for approval. The letter also states

> "Additionally the tentative plan showed a street design of one street with a cul-de-sac. What has been built is two separate streets with a turnaround and retaining wall between. This altered street plan was not submitted or approved by the Depoe Bay Planning Commission." Record 2.

Finally, the letter notes that "HGE," an engineering firm, found grades up to 32% on the road as built. The planning commission found "the substantial grade increase to be a potential threat to the health, safety and welfare of persons who would be responsible for the services to the subdivision, as well as anyone who chose to reside there." Record 3.

Petitioners' tentative plan map shows a maximum 28% grade on the westerly portion of the roadway and a 17% grade at the top of the road at its eastern end. The road as finally built has a considerably steeper grade, in excess of 32.5% at the top of the roadway. Record 2, 32-34, 58-59, 144, and maps submitted for preliminary final approval.

DBSO Section 2.040(5) requires that the final plat be in "substantial conformity" with the tentative plan. Without such conformity, the final plat cannot be approved. In this case, the road grade did not conform to the preliminary plan.

We are aware of petitioners' argument that petitioners' engineer claims the change in percentage of grade is not significant. However, the city's engineer testified that he considered changes in grade in excess of 1% to be substantial.[1] Record 34-35. The change in grade is sufficient reason for the city to deny the project as not being in "substantial conformity" with the tentative plan.

We are also mindful of petitioners' claim that the planning commission was well aware of the change in grade. The fact the planning commission was aware of the change does not mean the planning commission approved the changes. See the fourth assignment of error, infra.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City erred by (a) failing to adopt written findings of fact and/or (b) failing to set forth in sufficient detail the specific reasons or criteria the

City used in denying final approval to East Ridge Subdivision."

In this assignment of error, petitioners complain first that the city did not adopt written findings of fact. Petitioners acknowledge the record includes a letter sent to petitioners explaining the reason for the city denial, but the petitioners believe the letter does not set forth in sufficient detail why the final approval was denied and what steps need be taken to obtain final approval.

The letter from the city references the planning commission's decision to deny final plat approval. As quoted earlier, in part, the planning commission recommendation states that a substantial increase in grade of the roadway exists, and this increase is a potential threat to health, safety and welfare. Record 2-3.

The letter written by the planning commission and adopted by the city council is sufficient to constitute written findings. The letter of the planning commission clearly recites that the grade is dangerous and, further, not in conformity with the original tentative plan approval. Petitioners are correct that there is no direction about what acts need be taken to cure the defect, but we find such direction unnecessary. The reasons given for denial make clear that the road as built does not conform to the preliminary plan. Petitioners' course of action is obvious. They must change the road grade.[2] The city need not spell out in great

detail each possible route to take to obtain approval where the standards of approval are clear. Commonwealth Properties Inc. v. Washington Co., 35 Or App 387, 582 P2d 1384 (1978). We do not believe anything more is needed.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The City erred in denying final approval when it had no specifications for roads or public works within the City."

Petitioners complain the city has not adopted street standards for roads or public works. The city does not deny this claim. Petitioners claim failure to have street standards and specifications is a violation of ORS 227.173 requiring standards and criteria to be set forth in a development ordinance. We understand petitioner to argue that the city may not complain about the roadway not meeting standards when the city has no written standards.

We agree the city was obliged to adopt standards under the statute. It did not do so. However, in this case road grade requirements were set during the course of the tentative plan approval. Petitioners were well aware of the limits of the approval and were, therefore, obliged to follow them. We do not find the city's failure to adopt standards in its ordinance requires reversal or remand by us where road grade requirements were adopted as part of the tentative plan approval process, petitioners were aware of those requirements and petitioners did not appeal the tentative plan approval.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The City is estopped to deny final approval to the subdivision since it failed to timely notify Petitioners or their representative that the City believed there was a problem with the grades of the road."

Petitioners argue the city field inspector visited the site on a regular basis and was well aware of the status of improvements, including work on the roadway. Petitioners argue the field inspector had "implied and apparent authority to approve the roads." Petition for Review at 19. Even if he did not approve the road grades, petitioners argue

> "he had a duty to advise the land owners or their representatives prior to the time significant sums of money were spent on improvements, especially in light of the fact he admitted he approved all other aspects of roads (Record 39-41)." Id.

Petitioners cite Wiggins v. Barrett and Associates, 295 Or 679, 669 P2d 1132 (1983) for the proposition that the principal (in this case the city) is bound to a third person (the petitioners) for an act of an agent if the agent is clothed with apparent authority to act for the principal. Petitioners argue the field inspector had implied or apparent authority to approve the roads, and his failure to tell petitioners of defects in construction amounted to approval of the road as built.

Apparent authority to act may be created by a course of conduct by the principal toward his agent which, when reasonably interpreted, causes a third person to believe that

the principal agrees to have the agent act for him on a particular matter. See Jones v. Numley, 274 Or 591, 595, 547 P2d 616 (1976). We find no such circumstance here. Petitioners were responsible for complying with the requirements of the tentative plan. We are cited nothing in the record showing that the city superintendent representated himself as an expert in determining road grade, or that he indicated the grades met with his approval. See Record 38-39.

We note also the city was not in a position to inform the petitioners that the roadway did not meet tentative plan specifications. The city superintendent had no knowledge of the eventual road grade before the road was actually constructed. Further, there were no detailed street plans submitted showing any changes in design or grade. The city, or its agent, could hardly be charged with knowledge of the excessive grade under such circumstances.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "The City erred by violating its own procedural rules by allowing a City official to vote at the Planning Commission level when Ordinance No. 77 of the City of Depoe Bay prohibits voting by such a member."

Petitioners argue that an assistant city clerk, a member of the planning commission, voted on petitioners' proposal. City Ordinance No. 77 provides that not more than two members of the plannning commission may be city officials. If appointed by the council to the planning commission, the ordinance says they

must serve as ex-officio non-voting members. Petitioners allege that the assistant city clerk participated in the discussions, made the motion to deny final plat approval and voted to deny final plat approval. Petitioners complain their rights to due process were violated by this procedure.

The final decision in this case was made by the city council. Petitioner suggests, but does not explain how, a procedural error made at the planning commission level so controls the county commissioner's decision as to make it prejudicial to petitioners' substantial rights. Without a showing that petitioners' substantial rights were violated by this procedure, we find no basis for reversal or remand. ORS 197.875(8)(a)(B). See also Storey v. City of Stayton, 15 Or LUBA 165 (1986).

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The City erred in not making a determination on whether it would allow Mr. and Mrs. Pfahl to post security for the completion of final improvements in East Ridge Subdivision."

In this assignment of error, petitioners state they requested the city council accept a performance agreement in lieu of completing improvements to the subdivison. On August 17, 1987, the city council tabled the motion without action, according to petitioners. Petitioners complain that they are entitled to a decision on the request, as DBSO Section 3.170 clearly provides the city may accept a bond in

lieu of completion of improvements.

Respondent counters that this issue is beyond our consideration. The decision to accept a form of security in lieu of actual construction is not a land use decision, according to respondent. The city argues that even if it were a land use decision, the time to appeal the city's refusal expired.

We agree with respondent city. The decision to accept or not accept a particular bond is not a land use decision subject to our review as it is not a "final" decision or determination. ORS 197.015(10). Hemstreet v. Seaside Improvement Commission, ___ Or LUBA ___ LUBA No. 87-118 (1988). Furthermore, even if it were a final decision, it is not the decision appealed in this proceeding, and no notice of intent to appeal was filed within 21 days of the decision to table petitioners' request. The refusal to accept a bond, if the city indeed did so refuse, may be a matter for a circuit court proceeding to force such an acceptance. We note, in this regard, that the city's subdivision ordinance does not appear to require the city to accept a bond. DBSO Sec. 3.170 only provides a bond "may" be accepted in lieu of completion.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "The City erred by failing to overturn the Planning Commission decision because the Planning Commission failed to make a decision within the time specified by the Zoning Ordinance."

Petitioners complain that DBSO Section 2.040(7)(c) requires the planning commission approve or disapprove a decision within 45 days. The planning commission did not adopt the letter of August 31, 1987 denying final plat approval until September 17, 1987, well outside the 45 days allowed to make a decision.

Respondent argues that since the petitioners requested a continuance during the planning commission consideration, petitioners thereby waived the 45 day period. The city states that at the July 15, 1987, hearing, the petitioners requested a continuance to August 19, 1987. This act, according to the city, waived the 45 day period.

The city also argues that the decision to deny approval was made at the August 19, 1987 hearing. The city points out that its ordinance requires that a decision be made, not that formal findings of facts or conclusions be issued in writing within the 45 day period.

The ordinance states that the planning commission is to approve, disapprove for cause or postpone the decision if further information is required. The ordinance provides further that "in no case shall a decision be postponed longer than 45 days." We do not believe any such postponement over 45 days occurred. A continuance was agreed to. The city acted within the agreed continuance period. Agreement on the continuance waived the 45 day time period.

Further, even if the 45 day period were exceeded, the remedy is not reversal by this board. Petitioners' remedy is

to force the city to act through an appropriate court proceeding. LUBA has no jurisdiction to require the city to act under the terms of its ordinance.

Finally, any error in procedure occurred at the planning commission level. There is no claim (1) that the city council is under the same 45 day limit or (2) that the council exceeded the 45 day period during its consideration of the final plat. We believe any error which occurred at the planning commission level was cured by the city council proceeding. See Fedde v. City of Portland, 8 Or LUBA 220, 67 Or App 801, 680 P2d 20 (1984).

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "The City procedure was flawed because Council members failed to disclose ex parte contacts which they had relative to the hearing, thereby denying Petitioners an impartial and unbiased forum, and provide [sic] them with an opportunity to report information received as a result of ex parte contact."

Petitioners reargue a request for evidentiary hearing made to this Board earlier in the pendency of this proceeding. We adhere to our prior order denying the request for evidentiary hearing for the reasons stated in that order.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

> "The City erred in distributing material from the Planning Commission chairperson to the City Council at the hearing before the City Council without previously distributing a copy to the Petitioners, and in allowing the Planning Commission chairperson to appear and testify before the City Council."

Petitioners complain that moments before the city council meeting, the planning commission chairperson distributed a four page, single spaced memorandum to members of the council. This memorandum had not been given to petitioners earlier. Petitioners do not claim they were not allowed to see the document.

We understand petitioners to complain that this procedure was unfair and further to complain that the planning commission chairperson should not appear as an advocate before the city council.

We find no error. There is nothing in the county's ordinance scheme or state law to which we are cited making such an appearance or handout by a planning commission chairperson inappropriate. More importantly, there is no claim petitioners did not have the opportunity to review and comment upon the document during the course of the city council proceedings. Without a showing of prejudice to petitioners' substantial rights, we have no authority to reverse or remand the city's decision for this circumstance. ORS 197.835(8)(a)(B).

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

> "By denying final approval to East Ridge Subdivision when final approval should have been granted, the City has deprived Mr. and Mrs. Pfahl of the use of their property since the time of final denial."

Petitioners argue that the city has no basis to deny the final plat approval. With no basis to deny approval,

petitioners claim it follows the approval should have been granted. By not granting the approval, petitioners were denied their property in violation of the 14th Amendment of the United States Constitution, according to petitioners' argument.

We disagree. First, we find there was reason for the city to deny the requested final plat approval. Second, petitioners are not denied the use of their property. They are only denied their present request for a final plat approval. Petitioners do not demonstrate that the property as it is presently zoned, without subdivision approval, is without beneficial use. Dunn v. City of Redmond, 14 Or LUBA 303 Or 201, 735 P2d 609 (1987). Finally, there is nothing to stop the petitioners from proceeding to correct the defects found by the city and again requesting final plat approval.

The tenth assignment of error is denied.

The city's decision is affirmed.

FOOTNOTES

[1] Respondent notes that in portions of the road there is a change in grade from 17% to 32.6%.

[2] Petitioners may also seek an amendment of the tentative plan approval, but we express no view on the success of such action.