

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS MAR 27 3 03 PM '89
OF THE STATE OF OREGON

HARRY S. KIEVAL,)
Petitioner,)
vs.)
CITY OF ASHLAND,)
Respondent,)
and)
ADROIT CONSTRUCTION CO., INC.,)
Intervenor-Respondent.)

LUBA No. 88-101
FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Ben Lombard, Jr., Ashland, filed the petition for review and argued on behalf of petitioner.

Ronald L. Salter, Ashland, filed a response brief and argued on behalf of respondent.

Robert G. Hunter, Medford, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Ferris & Hunter.

REMANDED 03/27/89

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Ashland (city) order granting
4 site review approval for a thirty-unit apartment complex.

5 MOTION TO INTERVENE

6 Adroit Construction Co., Inc., moves to intervene in this
7 proceeding on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 FACTS

10 Intervenor-respondent Adroit Construction Co., Inc.
11 (intervenor), the applicant below, proposes to build a
12 thirty-unit apartment complex on a 1.54 acre lot in the city's
13 Low Density Multiple-Family Residential (R-2) zone. The
14 subject parcel is L-shaped, and the majority of the parcel is
15 located in the interior of a residential block. The parcel's
16 only street access is to Park St., via a 25-foot "flag" strip
17 extending from the north end of the parcel.

18 The planning department issued notice that it preliminarily
19 approved intervenor's site review request. Petitioner and
20 others requested a public hearing on the site review be
21 conducted by the planning commission. The planning commission
22 granted site review approval on September 14, 1988. Petitioner
23 appealed the planning commission's decision to the city
24 council. The city council issued an order granting site review
25 approval on November 1, 1988. This appeal followed.

26 //

1 FIRST ASSIGNMENT OF ERROR

2 "The Ashland City Council erred in finding that
3 Applicant's proposal is for an apartment complex
4 consisting of two separate buildings, and thus is not
subject to the distance requirements of Ashland
Municipal Code 18.25.040.E(3)."

5 City of Ashland Zoning Ordinance (AZO) 18.25.040.E
6 provides, as relevant, with regard to distances between
7 buildings in the R-2 zone:

8 "(1) The distance between any principal building and
9 accessory building shall be a minimum of 10 feet.

10 " * * * * *

11 "(3) The distance between principal buildings shall be
12 at least one-half the sum of the height of both
13 buildings, provided, however, that in no case
14 shall the distance be less than 12 feet. This
requirement shall also apply to portions of the
same buildings separated from each other by a
court or other open space."

15 The AZO does not define "principal buildings." However,
16 AZO 18.08.750 defines "building" as follows:

17 "Structure or building. That which is built or
18 constructed; an edifice or building of any kind or any
19 piece of work artificially built up or composed of
20 parts joined together in some definite manner and
which requires location on, in, or above the ground or
which is attached to something having a location on,
in or above the ground."

21 Petitioner contends the above-quoted AZO definition of
22 "building" does not support the city's finding that the
23 proposed apartment complex consists of only two separate
24 buildings.¹ Petitioner argues that the proposed apartment
25 complex is composed of eight "principal buildings," seven
26 four-plexes and a duplex. Petitioner argues each of the eight

1 buildings constitutes a separate building, independent in all
2 major respects. Petitioner argues that the approved site plan
3 shows that each four-plex and duplex has its own common entry
4 way and private recreational area in the rear. Petitioner also
5 points out that each four-plex or duplex is "staggered from
6 those adjacent to it." Petition for Review 4. Petitioner
7 further argues the applicant itself "identified [its] proposed
8 apartment units as 'four-plexes', 'a duplex', and
9 'duplex/four-plex units'." Id.

10 Petitioner further argues that because the height of each
11 four-plex and duplex is 25 feet, under AZO 18.24.040.E(3), the
12 distances between the four-plexes, and between the four-plexes
13 and the duplex, must be 25 feet. Petitioner asserts that the
14 site plan in fact shows the required distance between these
15 "principal buildings," is not provided.

16 Intervenor argues that the word "principal" in the phrase
17 "principal buildings" in AZO 18.24.040.E(3) is merely an
18 adjective, used in its ordinary meaning to distinguish
19 "principal buildings" from buildings of a secondary nature,
20 such as storage sheds. Intervenor argues that use of the
21 adjective "principal" in AZO 18.24.040.E(3) does not require or
22 allow the city to recognize as separate buildings structures
23 which are sufficiently joined together to constitute one
24 "building," as defined in AZO 18.08.750.

25 The city and intervenor point out that the AZO defines a
26 "building" as being an edifice "composed of parts joined

1 together in some definite manner * * * ." (Emphasis added.)
2 AZO 18.08.750. In its findings, the city stated the proposed
3 apartment complex consists of two separate buildings, one
4 comprised of units 1-22 and the other comprised of units
5 23-30. The city and intervenor contend that the approved site
6 plan demonstrates that each of these two buildings is "joined
7 together in some definite manner," as required by the AZO
8 definition of "building." The city and intervenor argue that
9 AZO 18.24.040.E(3) was reasonably interpreted and properly
10 applied by the city, and that the city's finding that the
11 proposed apartment complex consists of only two buildings is
12 correct.

13 We agree with intervenor that the word "principal" in the
14 term "principal buildings" in AZO 18.24.040.E merely
15 distinguishes "principal buildings" from "accessory
16 buildings." This interpretation is supported by
17 AZO 18.24.040.E(1), which requires a minimum of ten feet
18 between "any principal building and accessory building." In
19 this case, any proposed buildings containing multi-family
20 dwelling units are "principal buildings."

21 We also agree with the city and intervenor that, where the
22 proposed dwelling units are structurally connected in some
23 definite manner, they constitute one "building" under
24 AZO 18.08.075. They do not constitute separate buildings
25 simply because they were referred to as "four-plexes" or
26 "duplexes" during the course of the city's proceeding, have

1 separate entry ways or recreation areas, or because their
2 frontages are staggered.

3 Examination of the "Plot Plan" and "Elevations" diagrams of
4 the approved site plan (Record Ex. B) shows that units 1-16 are
5 structurally joined with common or connecting walls and roofs.
6 Units 1-16 constitute one principal building. Units 17-22 are
7 similarly attached, and constitute a second principal
8 building. These two principal buildings are physically
9 separated from each other by an emergency vehicle turn around
10 area. Units 23-24, 25-28, and 29-30 are also structurally
11 attached by common or connecting walls and roofs. Units 23-24,
12 25-28, and 29-30 are connected by common stairways. They, too,
13 are "joined together in some definite manner." Units 23-30,
14 therefore, constitute a third principal building. This third
15 principal building is physically separated from the other two.

16 Thus, we conclude that the proposed apartment complex
17 consists of three principal buildings, not eight principal
18 buildings, as claimed by petitioner, or two buildings, as
19 stated in the city's finding. The city's finding is incorrect
20 because it concludes that units 1-22 constitute one building,
21 rather than two.² However, in this case, the city's error in
22 finding that units 1-22 constitute one building, rather than
23 two, is harmless. Petitioner does not contend that the
24 distance between the building comprised of units 1-16 and the
25 building comprised of units 17-22 is insufficient to satisfy
26 AZO 18.24.040.E(3).³ Without a showing that an applicable

1 approval criterion has been violated by the city's decision, we
2 cannot grant relief. Sellwood Harbor Condo Assoc. v. City of
3 Portland, ___ Or LUBA ___ (LUBA Nos. 87-079 and 87-080,
4 April 1, 1988), slip op 8; Lane County School District 71 v.
5 Lane County, 15 Or LUBA 150, 153 (1986).

6 The first assignment of error is denied.

7 SECOND ASSIGNMENT OF ERROR

8 "The Ashland City Council erred in failing to require
9 pedestrian access from the street to the apartment
complex by means of sidewalks."

10 AZO 18.72.100.D(4) provides the following site review
11 approval standard:

12 "Pedestrian access. All buildings shall provide
13 pedestrian access from the street to the building
14 frontage in at least one location. Such pedestrian
access shall minimize conflicts with automobiles by
such means as sidewalks."

15 Petitioner argues the above-quoted provision is mandatory,
16 rather than permissive, and requires the applicant to provide
17 pedestrian access between the proposed apartment complex and a
18 street by means of a sidewalk. Petitioner claims the approved
19 site plan shows that the only pedestrian access to a street is
20 via the driveway in the flag strip at the north end of the
21 property. Petitioner argues the Landscape Plan portion of the
22 site plan shows plantings along that driveway, but no
23 pedestrian sidewalk.

24 Intervenor argues the above-quoted ordinance provision
25 requires only that (1) pedestrian access to a street be
26 provided, and (2) conflicts between pedestrians and automobiles

1 be minimized; not that sidewalks be provided for pedestrian
2 access. Intervenor argues the site plan shows pedestrian
3 access to Park Street will be provided by the 25 feet wide flag
4 strip and that a driveway 20 feet in width will be constructed
5 within this strip, leaving room on either side which can be
6 used by pedestrians. According to intervenor, this is
7 sufficient to comply with AZO 18.72.100.D(4).

8 The failure of the approved site plan to include sidewalks
9 is not in itself a violation of AZO 18.72.100.D(4). We agree
10 with intervenor that AZO 18.72.100.D.4 requires that
11 (1) pedestrian access be provided, and (2) conflicts between
12 pedestrians and automobiles be minimized "by such means as
13 sidewalks," but does not make provision of sidewalks a
14 mandatory approval criterion.

15 Thus, the city's decision complies with the first
16 requirement because the approved site plan shows that
17 pedestrian access will be provided to Park St. via the 25 foot
18 wide flag strip. However, the city's decision fails to comply
19 with the second requirement because it provides no explanation
20 of how conflicts between pedestrians and automobiles using the
21 20 foot roadway to be constructed in the 25 foot flag strip
22 will be minimized.⁴ Nothing in the site plan approved by the
23 city suggests conflicts will not occur or provides measures for
24 minimizing pedestrian/automobile conflicts.

25 The second assignment of error is sustained.

26 The city's decision is remanded.

1 FOOTNOTES

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3 1

4 The challenged finding states:

5 " * * * the proposal is for an apartment complex
6 consisting of two separate buildings, with units 1-22
7 being structurally attached and being one structure
8 and units 23-30 constituting a second detached
9 structure. The Council believes this interpretation
10 is consistent with the definition of a structure found
11 in Chapter 18.08.750 of the Ashland Municipal Code.
12 * * * " Record 4.

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15 The city and intervenor conceded in oral argument that
16 units 1-16 and 17-22 constitute separate buildings.

17
18 3

19 At oral argument, petitioner conceded that the distance
20 between the unit 1-16 building and the unit 17-22 building is
21 adequate to comply with AZO 18.24.040.E(3). We also note that
22 petitioner does not contend that the distance between the unit
23 17-22 building and the unit 23-30 building is inadequate to
24 comply with AZO 18.24.040.E(3).

25
26 4

27 The city argues that it took steps to minimize conflicts
28 between pedestrians and automobiles by imposing the following
29 condition on the site review approval:

30 " * * * the applicant [must] attempt to attain
31 pedestrian access to Normal Street or Siskiyou Blvd
32 via an easement." Record 5.

33 The requirement of AZO 18.72.100.D(4) that "such"
34 pedestrian access minimize conflicts with automobiles refers to
35 the pedestrian access actually provided as part of the approved
36 site plan (i.e., access via the flag strip), not to possible
37 additional pedestrian access which might or might not be
38 provided in the future. For this reason, we do not believe
39 that the condition imposed by the city requiring intervenor "to
40 attempt to attain" other pedestrian access satisfies the
41 requirement of AZO 18.72.100.D(4) that conflicts be minimized
42 within the access provided for use of both pedestrians and
43 automobiles.