LAND USE
BOARD OF APPEALS
MAY 22 2 33 PM '89

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN MURRAY, Petitioner, vs. CITY OF BEAVERTON, Respondent, and DAVID LOVE, Intervenor-Respondent.	LUBA No. 89-008 FINAL OPINION AND ORDER

Appeal from the City of Beaverton.

William Dickas, Portland, filed a petition for review and argued on behalf of petitioner.

Pamela J. Beery, Beaverton, filed a response brief and argued on behalf of respondent.

Rodney C. Adams, Beaverton, file a response brief and argued on behalf of intervenor-respondent. With him on the brief was Thompson, Adams, DeBast and Ray.

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

REMANDED 05/22/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals the Beaverton City Council's decision granting design review approval for a 75 unit apartment development.

MOTIONS

A. Motion to Intervene

David C. Love, the applicant for development approval below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

B. Motion to Defer

On the day set for oral argument in this matter, petitioner filed a motion requesting that we defer our opinion pending a decision by the Washington County Circuit Court in an action brought by petitoner and his attorney against respondent. Petitioner's circuit court action alleges Public Meetings Law and planning and zoning violations concerning the land use decision at issue in this proceeding. In support of his motion, petitioner cites ORS 197.840(1)(d)[1] and an affidavit attached to the motion. In the affidavit, petitioner claims there is substantial overlap between the pending circuit court action and this appeal. However, the affidavit identifies only two alleged areas of overlap. First, petitioner's circuit court complaint alleges violation of the Oregon Public Meetings Law, ORS 192.610 to 192.690. Second, petitioner alleges in his

circuit court complaint, and in the third assignment of error in this proceeding, that the current zoning of the property was never validly adopted.

We find neither of the reasons given by petitioner sufficient to delay our decision in this matter.

Under his first assignment of error, petitioner expressly states he does not allege a violation of the Public Meetings Law in this proceeding.[2] Therefore, even if we had jurisdiction to do so,[3] it would be unnecessary for us to determine whether the county's decision violated Public Meetings Law requirements. Further, under our discussion of the third assignment of error, we find that petitioner's challenge to the validity of the existing zoning of the property is not properly before us in this review proceeding. Because we do not address in this opinion either of the issues petitioner claims overlap with his circuit court action, there is no reason for us to delay our decision.

The motion to defer is denied.[4]

FACTS

On August 17, 1988, intervenor-respondent (intervenor) submitted an application for development review for Forest Green Apartments (Forest Green), a proposed 75 unit apartment complex in the city's residential-duplex and multi-family (R-2) zone. Apartments are a permitted use in the R-2 zone.

Under the Beaverton Development Code (BDC), intervenor's

request was first reviewed by the Facilities Review Committee (Committee).[5] BDC Sec. 134.2(A)(1). The standards governing Committee review are set forth in BDC Sec. 136.[6]

On September 7, 1988, the Committee adopted an order specifying conditions of approval for Forest Green. Record 22-25. Under BDC Sec. 139 only the applicant is entitled to appeal the Committee's decision, and the applicant did not appeal the conditions of approval. As provided by BDC Sec. 140, the planning department prepared a report and recommendation on Forest Green for the Board of Design Review.[7] Following notice to surrounding property owners, the Board of Design Review conducted a public hearing on the proposal on October 13, 1988. The standards applied by the Board of Design Review are specified in BDC Sec. 141 and relate primarily to site and building design. BDC Sec. 143.2(B) requires:

> "[t]he Board shall include as part of its approval the final Committee decision relating to the application. In this regard, the Board may * * * refer an application back to the Facilities Review Committee for consideration."

The Board of Design Review approved intervenor's request on October 13, 1988, and on October 21, 1988 petitioner appealed that decision to the city council, as provided in BDC Sec. 144. BDC Sec. 144.3 provides in part:

> "Appeal of the Board's decision by an aggrieved person * * * may include the appeal of matters that are within the jurisdiction of the Board and the Committee. The Council shall hear such appeals de novo but limited to the specific issues raised by the

> notice of appeal with notice of such appeal hearing being given in the same manner as for the Board hearing on the matter."

On January 12, 1989, the city council adopted its decision denying petitioner's appeal and approving "Forest Green Apartments * * * subject to all of the conditions of the Board of Design Review and the Facilities Review Committee, which conditions are contained in the Planning Department staff report dated October 13, 1988 * * *." Record 6. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City (the Committee) erred by approving the application at a private meeting with the applicant and by not following its own procedures."

Petitioner argues that BDC Sec. 134.1(C) requires the Committee to approve bylaws and that Sec. VII of the Committee bylaws requires that meetings of the Committee be taped in their entirety. In addition, Sec. XII of the bylaws requires that the tapes be kept until appeal periods have elapsed.

Petitioner also argues that, except as provided by ORS 227.175(10), ORS 227.175(3) "requires that public hearings be held upon an application for a development permit." Petition for Review 4. Petitioner complains that under the BDC, the Committee's decision is rendered in private, without notice or an opportunity for persons other than the applicant to participate. Petitioner acknowledges that following the Committee's action on intervenor's request, the Board of Design Review was required to conduct a public hearing on the

request. However, petitioner argues the Board of Design Review has "no authority to review or reverse the decisions of the Committee," and the Committee's decision becomes final if there is no appeal of the Board of Design Review's decision to the city council. Petition for Review 4.

Finally, petitioner maintains that ORS 227.175(10) allows approval of a permit without a hearing only if opportunity to request a de novo appeal hearing is provided. However, petitioner suggests that no such opportunity was provided in this case because, under the BDC, the hearing before the city council is limited to issues raised in the notice of appeal. Petitioner argues the opportunity for a de novo hearing was lacking particulaly in this case because his ability to identify issues in his notice of appeal was hampered by the Committee's failure to make tapes of its proceedings as its bylaws require. According to petitioner, the conditions adopted by the Committee are cryptic and difficult to understand, and without the discussion of the conditions that would have been found on the tapes of the Committee meeting, "it [is] virtually impossible to know what decisions were made or why they were made." Petition for Review 9.

Respondent concedes that tapes of the Committee deliberations on Forest Green were not made. However, respondent argues that in all other respects the procedures followed in this case comply with applicable BDC and statutory requirements. Respondent also answers that petitioner's

argument that the city's decision violated procedural requirements imposed by ORS 227.175 and the Committee's bylaws should be rejected because petitioner fails to allege prejudice to his substantial rights.[8] Holder v. Josephine County, 14 Or LUBA 454, 460 (1986); Urquhart v. Lane County Council of Governments, 14 Or LUBA 335, 338, rev'd on other grounds, 80 Or App 176 (1986); Muller v. Polk County, ___ Or LUBA ___ (LUBA No. 88-018, June 29, 1988).

Although respondent is clearly correct that procedural error provides no basis for reversal or remand unless the procedural error results in prejudice to petitioner's substantial rights, we disagree with respondents that petitioner failed to allege prejudice to his substantial rights. Petitioner's allegations of prejudice are discussed under Section B below.

A. Compliance with Applicable Procedural Requirements

The city failed to follow applicable procedures when the Committee failed to tape and retain the tapes of its proceeding concerning intervenor's request, as required by its bylaws. However, before considering whether this error caused prejudice to petitioner's substantial rights, we consider whether the procedures followed by the city in this case also failed to comply with ORS 227.175, as alleged by petitioner.

ORS 227.165 allows the city governing body to delegate decision making authority on discretionary permit and zone change applications to one or more or hearings officers or

bodies. Under ORS 227.170, the city is required to "prescribe one or more procedures for the conduct of hearings on permits and zone changes." Under ORS 227.160 to 227.180, the city is granted significant discretion in its choice of procedures to follow in considering permit applications. See Constant v. City of Lake Oswego, 10 Or LUBA 193, 197 (1984); Beaverton v. Washington County, 7 Or LUBA 121, 127 (1983). However, with one exception, ORS 227.175(3) requires that a city decision maker hold at least one public hearing on a permit application. That exception is provided in ORS 227.175(10), which allows a city to render a decision on a permit without a hearing, provided notice of the decision is given and an opportunity provided to appeal to the planning commission or governing body. Under ORS 227.175(10), such "appeal shall be a de novo hearing."

The procedure adopted by the city and followed in this case is somewhat unusual in that part of the decision on a permit application is rendered initially by the Committee. The Committee decision is then subject to review in a public hearing before the Board of Design Review, but the Board of Design Review has no power to modify the Committee's decision. The Board of Design Review may, however, return the Committee's decision to the Committee for further consideration. BDC Sec. 143.2(B). Therefore, the city decision maker conducting the initial public hearing on the permit application, at which all issues concerning the permit may be raised, is itself powerless

to amend those portions of the intial decision which are made by the Committee.

We do not believe the hearing provided by the Board of Design Review is sufficient to satisfy the requirement in ORS 227.175(3) that a city decision maker hold at least one public hearing before rendering a decision on a permit application. We believe the public hearing required by ORS 227.175(3) must be conducted before a decision maker empowered to respond to the issues, legal argument and evidence submitted during that hearing. Here, the Board of Design Review could only return issues within the Committee's jurisdiction back to the Committee for further consideration and, therefore, petitioner had no right to present his case on those issues to the actual decision maker. However, the procedure followed by the city under the BDC is not inconsistent with ORS 227.175 if notice of the Design Review Board's decision is given and an opportunity for an appeal and a de novo hearing[9] before the city council is provided with regard to the issues the Board of Design Review cannot itself address in the permit decision.

If the city wishes to require an appellant to identify the bases of its appeal to the city council as part of the notice of appeal, rather than waiting until the hearing before the city council, we are cited nothing in ORS 227.175(10), or elsewhere for that matter, that precludes such a requirement. ORS 227.180(1) expressly empowers the city to prescribe procedures for appeals of decisions on permit applications to

the city council. We believe it is within the scope of ORS 227.170 and 227.180 for the city to require appellants to specify the bases for their appeals in their notices of appeal. Cf Smith v. Douglas County, 93 Or App 503, ___ P2d ___ (1988) (a county's failure to follow substantially identical ordinance provisions limiting governing body's scope of review on appeals, adopted under analogous statutory provisions of ORS ch 215, constituted substantive rather than procedural error).

As far as we can tell, petitioner was given a full and fair opportunity to present evidence to the city council and the city council considered the permit application anew, as they are required to do in a de novo hearing. Thus, in this case under the BDC, petitioner was given the right to appeal the Board of Design Review's decision to the city council and to have his appeal heard before the city council at a de novo hearing, as required by ORS 227.175(10).

In sum, we find nothing in the procedures the city followed in rendering its decision on the subject permit to conflict with the statutory requirements cited by petitioner.[10]

B. Prejudice to Petitioner's Substantial Rights

Petitioner's allegations of prejudice are not clearly stated as such. However, we understand petitioner to allege that because his appeal to the city council was limited to issues identified in the notice of appeal, and the Committee's failure to keep tapes of its meetings seriously interfered with his ability to prepare his notice of appeal, he was denied his

rights (1) to have a fair appeal to the city council under the BDC, and (2) to participate fully in a de novo appeal hearing on the merits of the permit application, as required by ORS 227.175(10).

We believe these allegations are sufficient to constitute an allegation of prejudice to petitioner's substantial rights under ORS 197.835(8)(a)(B). Those rights include "the rights to an adequate opportunity to prepare and submit [a] case and a full and fair hearing." Muller v. Polk County, supra, slip op at 6. However, we find these allegations to be without merit.

Petitioner does not claim he was unable to determine what standards controlled the city's decision.[11] Neither does petitioner claim that he was refused an opportunity to question fully the Committee's decision during the hearing held by the Board of Design Review. Petitioner cites no examples of issues he was precluded from raising in his notice of appeal to the city council because of an inability to understand the Committee's decision.

The burden to demonstrate compliance with all applicable legal requirements is the city's. Billington v. Polk County, 13 Or LUBA 125, 131 (1985); Bobitt v. Wallowa County, 10 Or LUBA 112, 115-117 (1984). In our view, any prejudice that may have resulted from the Committee's failure to tape the hearings was borne by the city and the applicant. To the extent the Committee's decision could not stand on its own as an adequate statement of applicable BDC standards and explanation of why

those standards were met, the burden remained on the Board of Design Review, and ultimately the city council, to ensure that the required evidentiary support was in the record of the city's proceedings and to adopt the required findings demonstrating compliance with applicable standards. We fail to see how petitioner could have been prejudiced by any absence of evidentiary support or explanation for the Committee's decision that might have been supplied by the missing tapes.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The project as proposed conflicts with the Beaverton Development Code."

Petitioner alleges the city's decision violates several BDC provisions. We address each alleged violation separately below.

A. Access

Petitioner's entire argument concerning the alleged access violation is as follows:

> "The project provides for a 'major access' through a future residential single family subdivision. * * * The only other access is directly onto a major arterial * * *. The Code prohibits access to multi-family developments over single family residential streets. [BDC Sec. 41.8]" Petition for Review 11.

In the staff report adopted by the city as findings in support of its decision, the city stated

> "[BDC Sec. 41.8] reads as follows: '41.8 Access. Access points shall minimize traffic congestion and avoid directing traffic into single family residential areas or local access streets. Whenever possible, access to public roads shall be made to serve more than one multi-family site.' As discussed above, this

development must access either through a single family area or a restricted access arterial street. It was the determination of the traffic engineer that the provision of temporary access onto the arterial and permanent access through the developing single family area to the south would be preferable to either providing permanent unrestricted access onto SW 125th or accessing the site through the existing single family residential area to the north. The new purchasers of property in the MacArthur Park Subdivision will be aware of the access to the north when they purchase their property. If access was provided through the northern existing subdivision, the impact of the additional traffic would be placed on existing homeowners who were not aware of the potential for the access when their homes were purchased. Additionally, less existing vegetation will be disturbed if the access is not connected through to the north." Record 29.

Petitioner misreads BDC Sec. 41.8. Petitioner reads BDC Sec. 41.8 to prohibit access to multi-family developments through single family residential areas. In fact, BDC Sec. 41.8 simply requires that the city "avoid" such access.[12] We interpret the BDC to require, where access to multi-family developments is provided through single family areas or onto local access streets, that the city explain why it is not reasonable to utilize other available access that would avoid such areas or streets. Petitioner makes no attempt to explain why the above-quoted findings are inadequate to explain why access through a single family residential area is appropriate for Forest Green.

This subassignment of error is denied.

B. Terminating a Street Without a Cul-de-sac

Petitioner contends the city's decision allows an existing street to be permanently terminated at a guard rail. According

to petitioner, the BDC requires that deadend residential streets be terminated in a cul-de-sac.[13]

Petitioner particularly takes issue with the following finding adopted by the city council:

> "* * * There is sufficient room for the fire trucks to turn around using existing driveways if necessary and they together with the dead-end street form a hammerhead-type figuration which is an acceptable alternative to the full cul-de-sac which has been used in other locations in the city with success. The fire department is represented on the Facilities Review Committee which found the proposed barricade to be adequate, as did the city traffic engineer. * * *" Record 5.

Petitioner argues there is nothing in the Committee's decision to support the above-quoted finding. Petitioner apparently believes the challenged finding is critical, but does not explain why.

We understand respondent and intervenor to argue the above finding is not critical to the city's decision allowing termination of a deadend street without a cul-de-sac. Respondent cites to other findings adopted by reference by the city council. Those findings explain that the standard prototypes required by BDC 222.1 (see n 13, supra) are not required in all circumstances. BDC Sec. 222.2 provides in part:

> "Alternate design variations from the standard prototypes may be considered for approval by the Facilities Review Committee if one of the following conditions is found present:
>
> "A. existing local conditions create unusal circumstances where standards must be exceeded, such as excessive or unstable slopes, mixed land uses are to utilize the same street or a bicycle path is needed, etc.;

"B. existing local conditions create unusal circumstances where standards must be reduced, such as reconstruction of a street in an existing neighborhood, for reduction of excessive cuts and fills, etc.;

"C. variation is necessary to the overall design objectives of a particular proposed development."

The city's findings explain:

"In the determination of the Facilities Review Committee, a variation from the provision of the Ordinance was called for because of unusal local conditions as has been discussed regarding the frontage on Southwest 125th and relationship of this project to the surrounding single family development. In addition, the cul-de-sac discussed is off-site from this development, and the Facilities Review Committee does not require off-site improvements from applicant unless they are necessary to serve the site i.e., the extension of utilities. Pursuant to the Beaverton Code the city makes traffic engineering decisions consistent with the Uniform Traffic Control Manual which specifically allows the barricade required by the Facilities Review Committee in this case." Record 31.[14]

Petitioner does not explain why these findings are not sufficient to comply with BDC Sec. 222.2 and, therefore, to explain why a cul-de-sac is not required as a condition of approval in this case. In view of petitioner's failure to explain why the finding he does challenge is critical to a determination not to require a cul-de-sac, we find no error. Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083, April 27, 1988) slip op 22-23; Bonner v. City of Portland, 11 Or LUBA 40, 65 (1984).

This subassignment of error is denied.

C. Minimum Spacing of Buildings

BDC Sec. 41.3(D) requires a minimum of 20 "feet between

principal buildings on the same parcel or in the same development." The city does not dispute that in two instances (between buildings four and five and between buildings one and seven) the stairways providing access to second floor apartments are closer than 20 feet. Petitioner argues BDC Sec. 41.3(D) is thereby violated.

Respondents argue that the attached stairways should not be viewed as part of the principle buildings. The city explains in its findings:

> "[The BDC] requires under Multi-Family R-2 zoning that 20 [feet] exist between buildings. Specifically, the requirement reads: 'Minimum spacing in feet between principle buildings on the same parcel or in the same development 20 [feet].' In all cases a minimum of 20 [feet] is provided between principle buildings on the lot. Some stairways are shown within this 20 [feet], however these are not considered to be principle buildings." (Emphasis in original). Record 29.

We understand the above-quoted finding to interpret the term "principle building" not to include attached stairways. The city goes on to explain in other findings that it does not consider the 20 feet between buildings required by BDC Sec. 41.3(D) to be a "yard" as the code defines that term. Record 3.

The 20 foot spacing requirement of BDC 41.3(D) is one of four subdivisions of BDC Sec. 41.3, which specifies "Minimum Yard setbacks in feet." (Emphasis added). The four subdivisions are "Front," "Side," "Rear" and "Other." BDC Sec. 41.3(A) to (D). BDC Sec. 41.3(D) is the "Other" category of yard setback. Contrary to the city's finding, we find BDC Sec. 41.3 clearly provides that the spacing requirement

of BDC Sec. 41.3(D) is a yard setback requirement. The terms "setback" and "yard" are defined in the BDC as follows:

> "Setback. The minimum allowable horizontal distance from a given point or line of reference to the nearest vertical wall or other element of a principle building or structure as defined herein. * * *" (Emphasis added). BDC Sec. 5.76.

> "Yard. A required open space on the same lot with a principle use unoccupied and unobstructed by any structure or portion of a structure from 30 inches above the ground level of the graded lot upward, provided, however, that fences, walls, poles, posts, other customary yard accessories, ornaments and furniture or other allowed accessory structures or uses may be permitted in any yard subject to height limitations and requirements limiting obstruction of visibility." (Emphasis added). BDC Sec. 5.91.

The BDC defines "structure" and "accessory structure" as follows:

> "Structure. Anything which is constructed, erected or built and located on or under the ground, or attached to something fixed to the ground." BDC Sec. 5.84.

> "Accessory Structure or Use. A structure or use incidental, appropriate and subordinate to the main structure or use." BDC Sec. 5.3

As far as we can tell from the above-quoted definitions in the BDC, exterior stairways either are accessory structures which need not observe the 20 foot spacing requirement or they are an element of the principle structure and, therefore, must not be closer than 20 feet to any part of an adjoining principle building.

The definition of principle building is not particularly helpful, "[a] structure within which is conducted the principle use of the lot." BDC Sec. 5.17. However, the principle use of

the property, the proposed apartment dwellings, will necessarily require use of the proposed stairway by occupants of second floor apartments.

The definition of setback requires that setback distance be measured from the nearest "vertical wall or other element of a principal building or strucutre * * *" BDC 5.76 Although we can envision reasons why the city might want to consider stairways as something other than part of the principal structure, the question that we must answer in this appeal is whether the BDC does so. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988). We believe the BDC, fairly read, suggests to the contrary that stairways are part of the principle building or structure they are attached to and used in conjunction with. This interpretation is also supported by BDC Sec. 73.1(B) which provides "[u]nroofed landings and stairs may project into required front and rear yards only. BDC Sec. 731(B) makes no provision for unroofed stairs and landings to project into "side" or "other" yards.

In the terms of the code requirement for setbacks, we conclude exterior stairways are an "element of a principle building or structure." Because the stairways between buildings four and five and buildings one and seven are closer than 20 feet, the separation required by BDC 41.3(D) is violated, and this subassignment of error must be sustained.

D. Petitioner's Arguments Incorporated By Reference

Petitioner incorporates by reference arguments he submitted

to the city on December 19, 1988. Petition for Review 13. Respondent incorporates by reference planning staff responses to those arguments. Intervenor's Brief 11; Respondent's Brief 9. We briefly discuss petitioner's incorporated arguments that are not addressed elsewhere in this opinion.[15]

1. Street Dedication

Petitioner contends the proposal does not provide dedicated streets developed to standards required under the BDC in violation of BDC Sec. 229 and 230.

Respondent adopted the following finding in response to petitioner's concern:

> "Item III - dedication of internal drives. The internal circulation drives and parking areas for this proposed development do not constitute 'streets' within the meaning of Section 5.83[16] of the Development Code, and therefore no dedication of them was required. The only public way affording access to this property is the abutting road, Southwest 125th. Dedication was required of the applicant along this street as a condition of approval * * *." Record 3.

Petitioner offers no additional argument in his brief to explain why this finding is not adequate to address his concern about street dedication. We will not develop an argument on the point for petitioner.

2. Setback

In addition to the 20 foot building separation requirement imposed by BDC Sec. 41.3(D) discussed supra, petitioner alleges BDC Sec. 41.3(C) concerning rear yard setback requirements is violated by the city's decision. In support of his argument, petitioner also refers to an "Ordinance Guideline Number 2"

issued by the city on January 19, 1979.

The city adopted the following finding concerning the rear yard setback issue:

> "The rear yard setbacks are at a minimum of 20 feet as reflected on the approved plans. The appellant has apparently misinterpreted the code on this subject. Section 5.53 of Ordinance 2050 states that a lot line abutting a street is defined as the front lot line which in this case would be the lot line abutting SW 125th. The rear lot line is a lot line opposite the front lot line which in this case would be the western property line. Section 5.76 (setbacks) states that the point of reference for the measurement of setbacks is the lot line. The setbacks along the project's rear yard range from 22' to 27' which exceeds the ordinance requirement of 20'." Record 28.

> "* * * Ordinance Guideline No. 2, to which appellant refers, is not applicable in this case because the property subject to this application is not on a corner lot; the ordinance guideline referred to addresses specifically the determination of setbacks on corner lots. Even if the ordinance guideline were applicable the Facilities Review Committee would have made a preliminary determination on whether the proposal met the ordinance requirements, exactly as it did in this case." Record 3.

Again, petitioner offers no argument in his brief to explain why these findings are not adequate to show BDC Sec. 41.3(C) is met.

3. Access onto SW 125th

Petitioner argues

> "the comprehensive plan states that private driveways 'should' not be given access to Southwest 125th. It also states that new residential construction on Southwest 125th 'should' be protected from traffic impact by setbacks or equivalent acoustic barriers." Record 37.

Petitioner contends the city arbitrarily ignored these plan requirements simply because they include the nonmandatory term

"should."

The city adopted the following findings in response to petitioner's complaint:

> "As to access onto 125th and the provision of acoustic barriers or setbacks along that street, Council finds that the general plan policies referred to by the applicant are not worded in a mandatory fashion. This interpretation by Council has been upheld by the Land Use Board of Appeals in a challenge brought by the appellant herein of a single family subdivision known as MacArthur Park. As noted above, if access is not provided onto 125th, it will be required to be provided through the existing single-family subdivision. In addition to undesirable traffic impacts, this would result in the destruction of natural vegetation which is important to retain both as a buffer between the proposed project and the neighborhood and to maintain the wooded character of the neighborhood. This property is designated as an Other Important Natural Resource on the City's General Plan and should be preserved to the extent possible pursuant to the Plan policies governing this designation, while still allowing full development. Council agrees with staff and the Board of Design Review, since no new evidence was presented to the contrary that the existing natural vegetation on the site a shown in the slides and which is to be retained by the applicant will provide any acoustic barrier which may be helpful to reduce the impact of the street on the residents of the project." Record 4-5.

Once again, petitioner offers no explanation for why these findings are insufficient to respond to the concern he expressed before the city council. In the absence of such legal argument, we are unable to agree that the cited plan standards are violated.

In summary, each of the arguments presented to the city council, which petitioner incorporates into his petition for review by reference, were addressed by the city findings. Without additional argument from petitioner as to why those

findings are inadequate, we find the city's responses adequate to show compliance with the cited code and plan provisions.

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

> "The city erred by refusing to consider whether the zoning for the project was validly adopted and by concluding it had no authority to change the zone."

Petitioner argues the city improperly refused to consider his argument that there was evidence that the zoning applied to the property was never "validly or lawfully adopted." Petition for Review 13. Petitioner explains that ORS 227.173(1) requires the city to render decisions on discretionary permits "based on standards and criteria which shall be set forth in the development ordinance * * *." Petitioner contends the city necessarily must consider his arguments concerning the validity of the city's adoption of the underlying zone.

Petitioner also argues the city was incorrectly advised that it could not amend the zone for the property at issue in this proceeding.[17]

Respondent explains that the subject property was zoned R-2 in 1978. Respondent submitted certified copies of the ordinance adopting these zoning map amendments as well as certified copies of the map that was adopted in 1978.[18] We find that the ordinance adopted by the city in 1978 in fact zoned the property R-2. Of course, this does not mean that there could not have been procedural or substantive

irregularities in the ordinance adopted by the city. However, petitioner may not in this proceeding challenge the validity of the adoption of an ordinance in 1978. City of Corvallis v. Benton County, ___ Or LUBA ___ (LUBA No. 87-115, March 21, 1988). See also, Urquhart v. Lane Council of Governments, 80 Or App 176, 180, 721 P2d 870 (1986). (LUBA may not, in reviewing a post acknowledgment plan amendment, review for good compliance parts of the plan that are neither amended nor affected by the post acknowledgment plan amendment).

At oral argument, petitioner argued he should be allowed during local proceedings to challenge "mapping" errors. We do not disagree with petitioner's position, but we do disagree with his characterization of the error he alleges as a "mapping" error. If, the ordinance adopted in 1978 had actually zoned the property industrial, but through a subsequent mapping error the zoning of the property were shown on current city zoning maps as R-2, that would raise a question of what the property is actually zoned, i.e., a question of what is the applicable law. ORS 197.835(8)(a)(D). The error alleged in petitioner's argument in this proceeding and before the city is quite different. Petitioner appears to contest the substance of, and procedure followed in adopting, the 1978 ordinance. Such allegations can only be made in an appeal challenging the adoption of the disputed ordinance, not in this appeal of a decision applying the zoning designation adopted by that ordinance. City of Corvallis v. Benton County, supra.

Finally, it is clear that the city has the power to change the zoning designation applied to the property. If we understand petitioner correctly, petitioner argues the city could have and should have initiated a zone change for the property and then applied the amended zoning designation to the permit application challenged in this proceeding. Petitioner offers no argument that would lead us to the conclusion that ORS 227.178(3) does not apply to the city's action on the subject permit application. Under that statute

> "if the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based on the standards and criteria that were applicable at the time the application was first submitted."

ORS 227.178(3) clearly bars the course of action petitioner proposed. See Kirpal Light Satsang v. Douglas County, 96 Or App 207, ___ P2d ___ (1989) (construing analogous provisions for county decisions on permits in ORS 218.428(3)).

The city properly rejected petitioner's request that it initiate a zone change for the subject property and attempt to apply the amended zone designation to the application challenged in this proceeding.

Finally, citing Dickas v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 88-091, March 31, 1989) and Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522, 746 P2d 728 (1987), respondent also argues that under the doctrine of

waiver petitioner's failure to offer any evidence below that Ordinance 2050 was illegally adopted should preclude petitioner from asserting that legal theory for the first time at LUBA.[19] The doctrine of waiver discussed in the opinions cited by respondent does not apply to bar substantive arguments that could have been but were not made to the local government. See ORS 197.825(3). The doctrine of waiver discussed in those cases would, however, apply in any subsequent appeal to this Board of the city's decision on remand in this matter. Under the doctrine, issues that could have been but were not asserted in this appeal proceeding are waived.

The third assignment of error is denied.

The city's decision is remanded.

FOOTNOTES

1

ORS 197.840(1)(d) provides LUBA may delay issuance of its final opinion when the Board finds "that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within 77 days."

2

In his petition for review, petitioner argues:

"Petitioner has brought an action against the City under ORS 192.610 ff. The complaint alleges, among other things, that the Committee violated the public meeting laws in this case. The action is still pending. The City moved to dismiss the action arguing that this Board has exclusive jurisdiction over the issue. The Court denied the motion. ORS 192.635 gives the Court exclusive jurisdiction over public meeting violations.

"Petitioner does not know if the City will request this Board to address the public meeting violations. Petitioner is not asking the Board to do so. Petitioner is merely asking this Board to rule that the City did not comply with ORS 227.175 or with its own procedures, either of which is grounds for reversal. * * *" (Emphasis added). Petition for Review 9.

3

ORS 192.680 vests exclusive jurisdiction to consider Public Meetings Law violations in the circuit court. ORS 192.680(3). The court is empowered to "order such equitable relief as it deems appropriate in the circumstances." ORS 192.680(1). A local government decision may not be voided by the circuit court, "if other equitable relief is available." Id.

4

Because we deny petitioner's motion to defer, we need not consider whether, as respondent and intervenor argue, petitioner's delay in filing the motion to defer provides a separate basis for denying the motion.

5

The Committee "consist[s] of the Planning Director, the

City Engineer, the Operations Director, the Police Chief, [and] the Fire Chief or their designates * * *." BDC 134.1(B).

[6] Those standards require the Committee to consider, in conjunction with applicable plan and BDC requirements, the adequacy of (1) public and private facilities, (2) transportation facilities, (3) dedication of property for public use, (4) circulation within the site, (5) maintenance of private common facilities, (6) proposed structures and facilities, (7) grading and contouring, (8) utility lines, and (9) structural design. The Committee is also empowered to adopt additional technical standards, subject to approval by the city council. BDC Sec. 137.

[7] According to the city, the Board of Design Review "is a body of citizens with expertise in architecture, engineering, landscape architecture or business." Respondent's Brief 7.

[8] ORS 197.835(8) provides in part:

"* * *[LUBA] shall reverse or remand the land use decision under review if the board finds:

"(a) The local government * * *:

"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"* * * * *."

[9] Hearing de novo is defined in Black's Law Dictionary as follows:

"Generally, a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing 'de novo' court hears matter as a court of original and not appellate jurisdiction. * * *" Black's Law Dictionary, 649 (5th ed 1979).

[10] We note petitioner does not claim he ever challenged the city's requirement that the bases for his appeal be specified in the notice of appeal from the Board of Design Review decision. As we have stated on numerous occasions, a petitioner must raise procedural questions below so that the local government is given an opportunity to respond to the alleged procedural error. Mason v. Linn County, 13 Or LUBA 1, 4 (1985); Meyer v. Portland, 7 Or LUBA 184, 190 (1983); Frey Development Company v. Marion County, 3 Or LUBA 45, 50 (1981).

Also, as explained in Section B below, petitioner offers no explanation for how his rights to a full de novo hearing were prejudiced by the procedure the city followed.

[11] In fact, petitioner argues, under the second assignment of error, infra, that several code sections were violated by the city's decision.

[12] BDC Sec. 41.8 also requires the approved access points to "minimize traffic congestion." However, petitioner does not argue the city failed to "minimize traffic congestion."

[13] Petitioner cites BDC 222.1 as a source of this requirement. However, BDC 222.1 simply states:

> "Residential streets standards shall be considered as minimum design requirements under ideal circumstances. All residential streets in the city shall be designed as one of the standard prototypes, except as provided in Section 222.2 and Section 222.3. Approval of the appropriate street prototype shall be by the Facilities Review Committee as part of the subdivision review process as provided in this Ordinance and shall be based on the following considerations:
>
> "A. Street function needed within the existing, proposed and future neighborhood and city circulation network;
>
> "B. Anticipated daily traffic volume;
>
> "C. Individual property access requirements;

"D. Topographic variations and other field conditions."

Apparently, the street prototypes referenced in Sec. 222.1 require the street at issue to be terminated in a cul-de-sac.

14 There is testimony in the record by the traffic engineer which petitioner does not challenge, discussing both the access and the cul-de-sac issues. Record 145-146.

15 We discourage the practice of incorporating by reference argument from documents submitted during local proceedings. OAR 661-10-030(3)(d) requires that assignments of error and argument in support of the assignments of error be set forth in the petition for review. Petitioner's incorporation of argument from his notice of appeal and written argument to the city council is particularly confusing here because he makes no attempt to exclude from the material incorporated overlapping arguments set forth elsewhere in the petition for review under separate assignments of error or other subassignments of this assignment of error. Because respondent and intervenor-respondent do not object, and simply incorporate by reference their responses below, we attempt to cull the arguments and responses from their respective incoporations.

16 BDC Sec. 5.83 defines street as follows:

"A public way which affords the principle means of access to abutting property."

17 It is not clear whether petitioner argues the zoning could be changed as part of the same proceeding that led to the decision in this appeal or whether he is arguing it should have been adopted as part of a separate proceeding while the proceeding leading to the decision in this appeal was held in abeyance. As explained infra, neither of petitioner's proposed courses of action was available to the city as a basis for denying respondent's permit approval request.

18 At oral argument in this matter, petitioner stated that he did not dispute that Ordinance 2050 (the ordinance that adopted

R-2 zoning for the property in 1978) adopted by reference a zoning map that shows the property zoned R-2. Petitioner clarified that his argument with regard to the validity of the 1978 zone changes was that no lawful procedure was followed to rezone the property from single famiy to multi-family.

The city requested that the Board take official notice of the zoning map adopted in 1978 and supplied a copy of that map to the Board on April 24, 1989. Our opinion in this matter was initially due to be issued on or before May 17, 1989. The parties granted the board an extension of the statutory deadline for our opinion to May 22, 1989. On May 17, 1989, we received a letter from petitioner objecting to our taking official notice of the zoning map adopted by the city in 1978.

Although petitioner objects to our taking official notice of the zoning map, he offers no reason why we should question whether it is, in fact, a copy of the zoning map adopted in 1978. As noted supra, petitioner conceded that to be the case at oral argument. We take official notice of the 1978 zoning map submitted by the city, and it is included as part of the record of our proceedings.

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19 Respondent does not argue that petitioner's argument is barred by ORS 197.762, which precludes raising issues in an appeal to LUBA in certain instances where notice is given that failure to raise an issue below will preclude appeal based on criteria included in the notice.