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

ALLAN SANDLER,)
)
Petitioner,)
)
vs.)
)
CITY OF ASHLAND,)
)
Respondent,)
)
and)
)
FRED COX,)
)
Intervenor-Respondent.)

LUBA No. 91-025
FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Richard A. Stark, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Stark & Hammack, P.C.

No appearance by respondent.

John R. Hassen and Daniel C. Thorndike, Medford, filed the response brief. With them on the brief was Blackhurst, Hornecker, Hassen & Thorndike & Ervin B. Hogan. John R. Hassen argued on behalf of intervenor-respondent.

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

AFFIRMED 08/16/91

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision granting final plan
4 approval for a 17 lot subdivision.

5 **MOTION TO INTERVENE**

6 Fred Cox, the applicant below, moves to intervene on
7 the side of respondent. There is no objection to the
8 motion, and it is allowed.

9 **FACTS**

10 The subject property is bisected by a ravine and
11 includes floodplains and steep slopes. The property
12 includes approximately 5 acres and is located in the Single-
13 Family Residential (R-1-10) zoning district and within the
14 "P-Overlay Zone."¹ ALUO chapter 18.88, "PERFORMANCE
15 STANDARDS OPTIONS," permits flexibility in approval of
16 subdivisions and includes provisions allowing increased
17 density. ALUO chapter 18.88 includes procedures for
18 submission and approval of an outline plan. ALUO §
19 18.88.030.A. Under ALUO § 18.88.030.B.3, an applicant for
20 subdivision approval has 18 months following approval of an
21 outline plan to obtain approval of a final plan.

¹According to Ashland Land Use Ordinance (ALUO) § 18.88.080.A:

"The purpose of the P-overlay zone is to distinguish between those areas which have been largely developed under the subdivision code, and those areas which, due to the undeveloped nature of the property, topography, vegetation, or natural hazards, are more suitable for development under Performance Standards."

1 The challenged subdivision was granted outline plan
2 approval by the city planning commission on November 29,
3 1989. The planning commission's decision was appealed to
4 the city council. Following a public hearing on January 2,
5 1990, the city council granted outline plan approval. The
6 city's January 2, 1990 decision granting outline plan
7 approval was not appealed to this Board.

8 Approximately eight months later, on August 10, 1990,
9 intervenor requested final plan approval. The Ashland
10 Planning Department "preliminarily approved" the request for
11 final plan approval on August 22, 1990. Record 205. Public
12 hearings were held before the planning commission on October
13 9 and November 14, 1990. On December 11, 1990, the planning
14 commission adopted its decision granting final plan
15 approval. The planning commission's decision was appealed
16 to the city council. Following a public hearing on February
17 5, 1991, the city council adopted its decision granting
18 final plan approval on February 19, 1991. This appeal
19 followed.

20 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

21 Under the first two assignments of error petitioner
22 contends the challenged final plan approval violates
23 allegedly applicable approval criteria contained in the
24 Ashland Comprehensive Plan (ACP) and the ALUO.

25 **A. Lot Coverage**

26 ACP Soils and Slopes Policy IV-10 provides as follows:

1 "On steep slopes require lot coverage reductions
2 based upon slope percentages in the City's
3 implementing ordinances."

4 Prior to its repeal in July, 1989, ALUO § 18.68.100 required
5 a reduction in the building envelope of fifteen percent for
6 each five percent of lot slope in excess of twenty percent.²
7 For example, the building envelope area for a lot with
8 between 20 and 25% slopes would be reduced by 15%, the
9 building envelope area for a lot with between 25 and 30%
10 slopes would be reduced by 30%, and so on. Under ALUO §
11 18.68.100.B, in the R-1-10 zone, no development was
12 permitted on lots with slopes of 40% or more.

13 Petitioner contends the city's failure to adopt ALUO
14 standards to replace the now repealed requirements of ALUO
15 § 18.68.100 requires that ACP Soils and Slopes Policy IV-10
16 be applied directly to the challenged final plan approval.
17 Petitioner argues that the city's failure to do so requires
18 remand.

19 **B. Minimum Lot Size**

20 As shown on the outline plan and final plan for the
21 challenged subdivision, only two lots include at least

²ALUO § 18.88.020.A defines the term "building envelope" as follows:

"An area, within the property boundaries of a parcel, within
which a permitted structure can be placed."

As we understand it, the effect of ALUO § 18.68.100 was to require
reductions, based on the slope of the lot, in the otherwise permissible
building envelope.

1 10,000 square feet. Petitioner contends the city's failure
2 to require that the lots shown on the final plan include at
3 least 10,000 square feet violates ALUO § 18.88.080.B, which
4 provides as follows:

5 "All developments * * * in the P-overlay areas,
6 shall be processed under [ALUO chapter 18.88].
7 The minimum lot size for one unit shall be the
8 same as in the parent zone." (Emphasis added.)

9 There is no dispute that the R-1-10 parent zone
10 requires a minimum lot size of 10,000 square feet.
11 Intervenor argues the Performance Standards Options of ALUO
12 chapter 18.88 allow the creation of lots including less area
13 than would otherwise be required by the parent zone where,
14 as in the present case, overall density requirements are met
15 and the developer agrees to dedicate open space or
16 incorporate certain design features. Intervenor contends
17 the above emphasized limitation imposed by ALUO §
18 18.88.080.B simply was intended to preclude single lot
19 developments from obtaining lot size reductions under the
20 Performance Standards Options of ALUO chapter 18.88.³

21 **C. Scope of Review**

22 As a preliminary matter, intervenor contends that we
23 may not consider the merits of petitioner's first and second
24 assignments of error because the disputed ACP and ALUO

³Intervenor also argues, and the city found, that if ALUO § 18.88.080.B were applicable to the challenged subdivision, it would be met since it only requires that "one" lot be 10,000 square feet, and two of the 17 lots have more than 10,000 square feet.

1 standards are approval criteria applicable only to outline
2 plan approval. As noted earlier in this opinion, outline
3 plan approval was given on January 2, 1990, and no appeal
4 was taken from that decision. Intervenor contends those
5 criteria do not apply to final plan approval. According to
6 intervenor, the sole criterion for final plan approval is
7 whether the final plan is in substantial conformance with
8 the outline plan. Since petitioner's first two assignments
9 of error do not allege the final plan fails to substantially
10 conform to the outline plan, intervenor contends these
11 assignments of error present questions beyond our scope of
12 review and provide no basis for reversal or remand.

13 ALUO § 18.88.030.A.4. imposes a number of approval
14 criteria for outline plan approval. In addition to the
15 specific approval criteria listed in ALUO § 18.88.030.A.4,
16 ALUO § 18.88.030.A.4.h imposes a requirement that "all other
17 applicable City Ordinances will be met by the proposal." To
18 the extent the specific criteria do not require the city to
19 determine whether proposed lots sizes and building envelopes
20 satisfy all applicable criteria, ALUO § 18.88.030.A.4.h
21 does. Once an outline plan is approved, approval of the
22 final plan is governed by ALUO § 18.88.030.B.5, which
23 requires only that the final plan be in "substantial
24 conformance with the outline plan." ALUO § 18.88.030.B.5.a
25 through .g specify how to determine whether the final plan
26 is in substantial conformance with the outline plan.

1 We agree with intervenor that under ALUO §
2 18.88.030.A.4 the city was required to determine, in
3 granting outline plan approval, whether the proposed lot
4 sizes and building envelopes of the proposed lots comply
5 with applicable ALUO and ACP requirements. Those issues
6 were answered in the affirmative when the city approved the
7 outline plan on January 2, 1990. Because that decision was
8 not appealed, the only substantive question properly
9 presented in this appeal is whether the final plan is in
10 substantial conformance with the approved outline plan, as
11 required by ALUO § 18.88.030.B.5. See Hoffman v. City of
12 Lake Oswego, ___ Or LUBA ___ (LUBA No. 90-067, September 26,
13 1990), slip op 8-9; City of Oregon City v. Clackamas County,
14 17 Or LUBA 476, 485 (1989); Edwards Industries, Inc. v.
15 Board of Commissioners, 2 Or LUBA 91, 95-96 (1980).

16 The outline plan approved by the city council on
17 January 2, 1990 shows 17 lots and designates building
18 envelopes for the proposed lots.⁴ Petitioner's first two
19 assignments of error do not allege that the final plan fails
20 to comply with the "substantial conformance" standard
21 imposed by ALUO § 18.88.030.B.5, and the lot sizes and
22 building envelopes shown on the final plan appear to be

⁴Petitioner contends, erroneously, that the outline plan does not include contour lines, from which lot slopes could be computed, or show proposed building envelopes. The record includes the outline plan as an oversized exhibit. The outline plan includes contours, shows building envelopes, and shows the dimensions of the 17 proposed lots.

1 substantially the same as those shown on the outline plan.⁵

2 Because petitioner's first two assignments of error
3 allege nonconformance with criteria which do not apply to
4 final plan approval, they raise issues not properly
5 presented in this appeal.

6 The first and second assignments of error are denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 Petitioner argues under this assignment of error that
9 the proposed street providing access to the subdivision will
10 be constructed across the drainageway dividing the property.
11 Petitioner contends the challenged decision "should have
12 required compliance with the applicable Federal and State
13 Laws" concerning fill and removal within wetlands. Petition
14 for Review 15.

15 As explained above, approval of the final plan is
16 governed by ALUO § 18.88.030.B.5. Petitioner offers no
17 argument that the street approved in the final plan is not
18 substantially the same as was shown on the outline plan. In
19 addition, while intervenor concedes there is no explicit
20 condition in the challenged decision that applicable state
21 and federal wetland requirements be satisfied, neither is
22 there anything in the outline plan or final plan approvals

⁵The building envelopes for several lots were reduced on the final plan, in response to conditions imposed by the city at the time of outline plan approval that the building envelopes be reduced on lots with slopes in excess of 30% and that any slopes of more than 40% be excluded from the building envelopes.

1 that would excuse the applicant from complying with
2 applicable state and federal wetland requirements.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 The January 2, 1990 outline plan approval includes a
6 condition "[t]hat the slopes on driveways be limited to 15
7 percent or less which parallels the present street
8 standards." Record 260. Petitioner contends the challenged
9 decision fails to demonstrate compliance with this
10 condition.

11 The challenged condition does not require the city to
12 find, at the time of final plan approval, that driveways
13 with less than 15% slope either have been or can be
14 constructed. The condition simply imposes the requirement
15 that driveway slopes not exceed 15%. In its decision
16 granting final plan approval, the city explained that the
17 street and shared driveways shown on the final plan do not
18 exceed 15%. The city also explained in its findings that
19 approval of individual driveway grades when building permits
20 are issued in the future will assure compliance with the
21 condition.⁶ Record 8.

22 We agree with intervenor that there is nothing in the
23 quoted condition which imposes a requirement that the city

⁶The city specifically noted that testimony in the record suggesting that driveway grades might exceed 15% was based on existing grades and did not take into account finished roadway grades.

1 determine at the time of final plan approval that the
2 condition either has been or will be satisfied. Even if
3 such a requirement were imposed, the city's findings
4 adequately demonstrate that the condition is or will be met.

5 The fourth assignment of error is denied.

6 The city's decision is affirmed.