BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DONALD RHYNE, GERALDEAN RHYNE, CHARLES R. WISE and SADONA WISE, Petitioners, vs. MULTNOMAH COUNTY, Respondent, and CHARLES E. SWAN and DONALD L. TROTTER, Intervenors-Respondent.	LUBA No. 92-058 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Gregory J. Lutje, Portland, filed the petition for review. With him on the brief was Schwabe, Williamson & Wyatt. Steve Abel argued on behalf of petitioners.

John L. DuBay, Portland, filed a response brief and argued on behalf of respondent.

Charles E. Swan, Milwaukie, filed a response brief and argued on his own behalf.

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

REMANDED 07/10/92

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

Petitioners appeal a county decision granting approval for a 22 space manufactured housing development.

INTRODUCTION

The subject property includes approximately three acres and is zoned Urban Low Density Residential (LR-5). Approval of a Planned Development (PD) District overlay zoning designation is required to develop a manufactured home park in the LR-5 zoning district. Multnomah County Code (MCC) 11.15.6200 through 11.15.6226. The PD approval process permits the county to apply more flexible development standards than would otherwise apply to conventional residential development under the LR-5 base zoning requirements.

PD approval requires amendment of the county zoning map to apply a PD District overlay and approval of a Development Plan and Program. Approval is granted in two steps or stages. The first stage is preliminary approval of the PD District and Preliminary Development Plan and Program by the planning commission. In granting such preliminary approval, the planning commission is required to provide written notice to nearby property owners and to conduct a public hearing. This preliminary approval decision may be appealed to the board of county commissioners. The decision challenged in this appeal is such a first stage preliminary

approval decision.

Following preliminary PD approval, an applicant must file a Final Development Plan and Program within one year, unless the preliminary approval decision specifies a different time limit. MCC 11.15.6202(C). The Planning Director is required to issue a written decision on the Final Development Plan and Program within 20 business days after it is filed. MCC 11.15.6202(D)(1). The MCC does not require notice or a public hearing prior to the planning director's decision on the Final Development Plan and Program. The planning director's decision may be appealed to the planning commission, but under the MCC only the applicant has a right to appeal that decision. Once final approval is given to the Final Development Plan and Program, the zoning map is amended to apply a PD District designation to the property. MCC 11.15.6202(D)(3).

The decision challenged in this appeal is the board of county commissioners' decision affirming, with certain modifications, the planning commission's decision granting preliminary PD approval with conditions.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under the first assignment of error, petitioners argue the county failed to adopt findings supported by substantial evidence demonstrating compliance with certain comprehensive plan and MCC provisions imposing requirements concerning hazards on the subject property. Under the second

assignment of error, petitioners argue the conditions the county relies upon in granting preliminary PD approval improperly defer discretionary decision making to the second stage in the PD approval process, where only the applicant has a right to participate and appeal.

A. Evidence Concerning Hazards

Under MCC 11.15.6206(A)(5), one of the criteria for preliminary approval of the Development Plan and Program is MCC 11.15.6214(C), which provides as follows:

> "The Development Plan and Program shall be designed to provide freedom from hazards * * *."

Petitioners contend the county failed to adequately demonstrate compliance with MCC 11.15.6214(C).[1]

During the local proceedings, evidence was presented concerning past illegal dumping of a variety of waste materials on the subject property and the placement of fill covering such waste materials.[2] Petitioners contend this waste and fill pose hazards for any structures or other improvements that may be placed on such fill and waste and

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[1]Petitioners also argue the decision fails to demonstrate compliance with two comprehensive plan policies. We agree with respondent that one of those plan policies simply directs that conditions of approval be imposed in certain circumstances, and is not itself an approval criterion. Respondent also contends MCC 11.15.6214(C) implements the other plan policy cited by petitioner, Plan Policy 14. Petitioners do not argue Plan Policy 14 imposes any requirements that are not also imposed by MCC 11.15.6214(C). In this opinion, we refer to Plan Policy 14 and MCC 11.15.6214(C) as the hazard limitation standard.

[2]Apparently a gas company placing gas lines underground in the vicinity was given permission by a prior owner to place the fill on the property.

pose hazards for dwellings that may be placed near the waste materials.

There is also evidence in the record that at least some of the waste was removed and that waste is not now visible, because it either was removed or was covered with the fill. The Department of Environmental Quality apparently expressed no interest in investigating the site.

The county adopted the following findings addressing this issue:

> "* * * The record includes testimony from nearby residents claiming that a swale area in the northeast portion of the site was filled, and the fill may contain toxic or hazardous materials. The Board finds that conditions of approval will adequately address any potential safety or hazardous waste issues associated with former fill areas on the site. Condition #5 of this decision requires that fill areas for roads, buildings, or other facilities be tested for compaction and quality standards determined by a registered soils engineer and approved by the Building Official. Further, the Board reduced the project from 25-units to 22-units maximum. The additional space and separation between units afforded by this reduction in density can minimize the need to develop or place structures on or near filled areas [on] the northeast corner of the site.
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> "Appellants argued that soils testing should be required before approval of the PD. However, the Board [of Commissioners] finds that conditions may be attached to a PD approval * * * if necessary to satisfy the policies, purposes or standards of the Comprehensive Plan or Zoning Code." Record 14.

Condition 5, referenced in the above quoted findings, provides as follows:

> "All existing fill areas proposed for roads,

> building foundations or other facilities requiring a compacted base, shall be tested by a registered soils engineer and meet applicable soil compaction and environmental safety standards. The Building Official may require excavation and/or additional soils tests for stability, density or toxicity, to assure filled and other areas on the site are suitable and safe for placement of the structures or other site improvements." Record 20.

Petitioners argue the above findings and condition are inadequate to demonstrate compliance with the hazard limitation standard for essentially two reasons. First, the findings and condition focus on hazards that may be associated with construction of structures and improvements on the fill, but do not address the hazards that may be associated with constructing houses near the previously deposited waste material and fill. Second, petitioners contend the findings do not determine the hazard limitation standard is met, but rather improperly defer a decision concerning compliance with the standard to the second stage of the PD approval process, where petitioners have no right under the MCC to notice or an opportunity to participate.

B. Statutory Requirements for Discretionary Decision Making

By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local

proceedings and an opportunity for a public hearing.[3] ORS 197.763(2); 215.416; 227.175; see Flowers v. Klamath County, 98 Or App 384, 780 P2d 227, rev den 308 Or 592 (1989). When conducting a multi-stage approval process for discretionary permits, such as that provided by the county for PD approval, the county is required to assure that discretionary determinations concerning compliance with approval criteria occur during a stage where the statutory notice and public hearing requirements noted above are observed. Meyer v. City of Portland, 67 Or App 274, 280 n 3, 678 P2d 741, rev den 297 Or 82 (1984); Southwood Homeowners Assoc. v. City of Philomath, ___ Or LUBA ___ (LUBA No. 90-103, June 12, 1991); Bartles v. City of Portland, 20 Or LUBA 303, 310 (1990); Margulis v. City of Portland, 4 Or LUBA 89, 98 (1981). Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second

[3]More precisely, the statutes require either that a public hearing be provided before a decision on a permit is rendered, or if the decision is rendered without a public hearing, that notice of the decision and an opportunity to request a hearing through an appeal process be provided.

stage.[4] See Meyer v. City of Portland, supra; Bartles v. City of Portland, supra. In such circumstances, neither notice to adjoining property owners nor additional pubic hearings are statutorily required during the second stage. These principles are relatively simple and straightforward in the abstract, but, as this case demonstrates, may prove more complex in the context of specific permit approval requests.

Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary.[5] Second, if the local government

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[4]These conditions of approval may include conditions that specific technical solutions to identified development problems be submitted and reviewed and approved by the government's technical staff. Meyer v. City of Portland, supra, 67 Or App at 274 n 6. MCC 11.15.6208 specifically authorizes the county to impose conditions of approval to assure compliance with approval standards.

[5]In an appeal to this Board, such a finding would be subject to challenge and, in that event, we would determine whether the evidence in the record constitutes substantial evidence in support of the finding of compliance or feasibility of compliance, i.e. evidence a reasonable person would accept as sufficient to support the challenged finding. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666

determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage.[6] In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. Holland v. Lane County, 16 Or LUBA 583, 596-97 (1988).

C. The County's Findings

Respondent and intervenor-respondent (respondents) argue that we may read the challenged decision as implicitly

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P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976).

[6]The option to defer a portion of the discretionary decision making would not be available if the relevant local code precluded such action.

finding that the hazard limitation standard is met.[7] Respondents contend this is particularly appropriate since at most there is a potential rather than an actual hazard present on the property. Respondents argue the county thereafter simply imposed conditions of approval to assure that such compliance is achieved in granting second stage approval.

We do not agree, and the problem is more than the way the findings quoted above are worded. The evidentiary record shows that a legitimate issue concerning the potential existence of a hazard on the site was raised below. The hazard limitation standard requires that the development assure "freedom from hazards." While it is by no means certain that a hazard actually exists on the property, and the magnitude and nature of any hazard is equally uncertain, based on the present record the county is in no position to find there is no hazard present, and the county did not do so.

Whether the county found there are feasible solutions for any hazard that may exist is only a slightly closer question. We conclude it did not adopt such findings. Even if it had, we seriously question whether the record contains substantial evidence that would support such findings. The

[7]Intervenor-respondent also argues the evidence in the record is sufficient to establish there is no hazard on the site. As we make clear below, we do not agree with that view of the evidence.

evidence in the record concerning the nature of the waste deposited on the site, precisely where it is located, and how much waste may remain on the site, although sufficient to raise a significant issue about the existence of a hazard on the site, provides little basis for determining the nature and extent of the problem and how it may be resolved.

We conclude the county did not adopt findings establishing compliance with the hazard limitation standard and did not adopt adequate findings establishing that it is feasible to comply with that standard. Rather, the county deferred discretionary determinations concerning whether hazards exist and what modifications to the proposal may be necessary to comply with the hazard limitation standard. That approach is permissible only if the statutory notice and hearing requirements are observed in making these required discretionary determinations. However, as explained earlier, the MCC does not require that the county provide such notice and hearing in the second stage PD approval process. Neither does the challenged decision impose a condition requiring that the statutorily required notice and hearing precede second stage PD approval, where the required determination of compliance with the hazard limitation standard will be made.[8]

[8]Respondent advised the Board that its practice is to provide the same notice and hearing provided during the first stage proceedings during the second stage proceedings where discretionary determinations have been deferred to the second stage. However, the county may not rely on past

In summary, we agree with petitioners that in this case the county selected the third of the options described above but failed to assure that the statutorily required notice and hearing will be provided in determining, as part of the second stage PD decision, whether the hazard limitation standard is met. We therefore sustain the first and second assignments of error.

THIRD ASSIGNMENT OF ERROR

> "The findings of the county are inadequate to demonstrate compliance with MCC [11.15].6214(D) and comprehensive plan policy 24."

MCC 11.15.6214(D) imposes the following requirement:

> "The location and number of points of access to the site, the interior circulation patterns, the separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings, structures and uses shall be designed to maximize safety and convenience and be compatible with neighboring road systems, buildings, structures and uses."

As relevant in this appeal, plan policy 24 requires the following:

> "Site access will not cause dangerous intersections or traffic congestion, considering the roadway capacity, existing and projected traffic counts, speed limits and number of turning movements."

The record includes a memorandum from the county transportation division staff explaining that the proposal will generate less traffic than would a conventional

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practice. The required notice and hearing must be assured, either by the code or by a condition of approval in the first stage decision.

residential development permitted outright under the LR-5 zone. The memorandum explains that S.E. Ramona Street, the street providing access to the subject property, currently operates with an acceptable level of service and would continue to do if the proposal were approved. The memorandum also explains that "[i]n terms of overall safety," S.E. Ramona Street is not currently developed to full county standards. Record 259. The memorandum goes on to state that the subject proposal will have a relatively small impact on S.E. Ramona Street and upgrading of that street in the future should be accomplished by a local improvement district.

Based on this memorandum, the county adopted relatively detailed findings addressing the expected transportation impacts of the proposal and concluding that the existing transportation system serving the site is adequate. Petitioners do not specifically attack those findings, but rather assert the findings are inadequate to address "overall safety." Petitioners also cite White v. City of Oregon City, 20 Or LUBA 470 (1991) and Benjamin v. City of Ashland, 20 Or LUBA 265 (1990), as cases where this Board has remanded decisions for failure to adopt findings adequately addressing traffic impacts on the livability of the surrounding neighborhood.

As respondent correctly notes, the above quoted plan and code standards do not impose an "overall safety"

standard. Neither, for that matter, do the cases cited by petitioners. Both White v. City of Oregon City, and Benjamin v. City of Ashland, supra, involve code standards that specifically imposed requirements that the impacts of proposed development on the "character" and "livability" of surrounding properties be evaluated.[9] We fail to see how those cases lend any support to petitioners' argument that an "overall safety" standard is imposed by the MCC or plan policy 24.[10]

Absent a challenge to the county's findings that is more focused on the requirements imposed by the above quoted plan and code standards, we conclude that the findings are adequate and supported by substantial evidence.

The third assignment of error is denied.

The county's decision is remanded.

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[9]The standard in White required that the decision be based on "the suitability of the proposed development in relation to the character of the area." The standard in Benjamin required "minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood."

[10]Moreover, we believe petitioners misread the significance of the transportation staff's concern about S.E. Ramona Street. The concern is not that the street is now unsafe or will be rendered unsafe by the proposed development, but rather that at some point in the future it will need to be brought up to full county standards.