BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHIRLEY L. MANNENBACH, Petitioner, vs. CITY OF DALLAS, Respondent.	LUBA No. 92-183 FINAL OPINION AND ORDER

Appeal from City of Dallas.

Shirley L. Mannenbach, Dallas, filed the petition for review. Wallace W. Lien, Salem, argued on behalf of petitioner.

Scott A. Fewel and Holly Doremus, Corvallis, filed the response brief. Scott A. Fewel argued on behalf of respondent. With them on the brief was Eickelberg & Fewel.

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

AFFIRMED 03/31/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving partition of an approximately 47 acre property into three parcels and a 52 lot mobile home subdivision on one of the parcels.[1]

FACTS

The subject property was annexed to the city in 1990. It is designated Residential Single Family (R) on the Comprehensive Plan map and is zoned Residential Agriculture (RA). The subject parcel on which the proposed mobile home subdivision is to be located consists of 27.54 acres and is currently vacant.

The planning commission approved the proposal, and petitioner appealed to the city council. At the request of the applicant, the city council remanded the decision to the planning commission. The planning commission reapproved the request, and the matter was again appealed to the city council. After a de novo hearing, the city council approved the applicant's proposal, and this appeal followed.

MOTION TO STRIKE

One of the issues under the second assignment of error has to do with the number of approved mobile home subdivision lots within the city. In responding to

[1]In this appeal, petitioner challenges only the city's approval of the 52 lot mobile home subdivision.

arguments in the petition for review that the city incorrectly determined the number of approved mobile home subdivision lots within the city, respondent stated the following:

> "The 100 lot development referred to was never developed as a mobile home subdivision. Instead, it became the Meadow Creek Mobile Home Park, which as a mobile home park falls outside the 10% cap on mobile home subdivision lots. The other two subdivisions referred to in the [comprehensive plan] are Angor and Terry Estates, which together currently include a total of 95 approved lots." (Emphasis in original.) Respondent's Brief 10.

Petitioner moves to strike this statement in respondent's brief, and argues there is no evidence in the record to establish that the 100 lot development referred to in the statement was or was not developed in any particular way.

LUBA has previously determined that although it will not grant a motion to strike portions of a brief, based on allegations that the disputed portions are inaccurate or without factual support, it will disregard any such inaccurate or unsupported assertions. Hammack & Assoc. v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40 (1987). Once a party challenges the accuracy or evidentiary support for allegations in another party's brief, this Board expects such other party to establish the accuracy of the disputed allegations or to identify factual support in the record for those allegations, either in a reply brief or at oral argument. Id.

Respondent cites nothing in the record to support the first two sentences quoted above concerning the ultimate disposition of the 100 lot development, and we disregard those allegations. However, there is evidence in the record to support the final sentence quoted above, and consequently, we may consider it.

Petitioner's motion to strike is denied.

FIRST ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the city failed to adopt findings concerning public safety.[2] However, the city identifies several findings in the challenged decision addressing public safety, and petitioner does not explain what is wrong with those findings.

This assignment of error provides no basis for reversal or remand of the challenged decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The decision [violates] Section IV of the Dallas Comprehensive Plan and City Ordinances Nos. 1402 and 1403 * * * as (a) the decision allows penetration of a main arterial street into an identifiable neighborhood; (b) the decision allows the developer to exceed the city's 10% mobile home

[2]While the caption for this assignment of error identifies the problem as one of substantial evidence, the text of the assignment is concerned with the adequacy of the findings supporting the challenged decision. Petitioner's undeveloped assertion in the assignment of error that the record lacks substantial evidence to support the challenged decision, provides no basis for the Board to reverse or remand the challenged decision. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

> ceiling, and (c) the decision allows leapfrogging over expansive vacant land to the city's outer fringes."

A. Identifiable Neighborhood/Arterial Penetration Standard

Standards in the city's Mobile Home Subdivision Ordinance No. 1402 (MHSO) and comprehensive plan provide that "Arterial streets should never penetrate identifiable neighborhoods * * *." MHSO Section 3, page 3; Comprehensive Plan VII-3. Comprehensive Plan IV-11 provides:

> "Residential areas should be planned and developed on the concept of identifiable neighborhoods."

There is no dispute that the proposed development is on one side of West Ellendale Avenue (West Ellendale), and the residential development in which petitioner resides is on the other side of West Ellendale. There is also no dispute that West Ellendale is an arterial street. The city determined the proposed development constitutes an "identifiable neighborhood," distinct from the neighborhood in which petitioner resides on the other side of West Ellendale.

Petitioner argues the city improperly determined that the proposed development is a discrete "identifiable neighborhood." In petitioner's view, the proposed development will be a part of the existing "identifiable neighborhood," located across West Ellendale. As such, petitioner argues that West Ellendale will "penetrate" the identifiable neighborhood which, after the proposed

subdivision is developed, will be on both sides of that arterial.

The city's interpretation that the proposed 52 unit mobile home subdivision to be located on one side of West Ellendale is an "identifiable neighborhood," is not "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, ___ P2d ___ (1992). Accordingly, we defer to that interpretation. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). Under this interpretation, the proposed subdivision and the identifiable neighborhood it will comprise, will be bordered by West Ellendale, rather than penetrated by it. Therefore, the challenged decision does not violate MHSO Section 3, page 3.

This subassignment of error is denied.

B. 10% Standard

MHSO 15(3) provides the following requirement applicable to mobile home subdivisions:

> "Maximum number of lots for mobile home subdivisions in the City of Dallas shall not exceed 10% of the number of lots developed with conventional single family dwellings."

The challenged decision determines the following:

> "* * * The City of Dallas records indicate that there are currently 2412 single-family dwellings in Dallas. Therefore, the limit on the number of mobile home subdivision lots would be 241. Currently, the City has approved 71 lots in the Angor subdivision and 24 lots in Terry Estates for a total of 95 approved mobile home subdivision

> lots. Neither of these mobile home subdivisions are under construction at this time. The proposed [subdivision] includes 52 lots, bringing the total approved lots to 147, well below the 241 allowable [under] the mobile home subdivision ordinance and Comprehensive Plan. * * *" Record 10.

Petitioner challenges the evidentiary support for the city's determination of the number of existing mobile home subdivision lots within the city.[3] Petitioner relies on information contained in the comprehensive plan to dispute the city's determination in this regard.[4] Specifically, petitioner contends there are currently 196 approved mobile home subdivision lots in the city, based on data found in the comprehensive plan at V-2, which provides:

> "[T]he Planning Commission has twice approved plans for a 100-lot mobile home subdivision in a 92 acre PUD in West Dallas, but, due to a lack of demand, the development has never been finalized. Presently, there are two mobile home subdivisions approved, which would add an additional 96 spaces for mobile homes to the City's existing number. * * *"

The city points out the comprehensive plan is dated November, 1987. The city argues the cited comprehensive plan provision indicates that the planning commission

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[3]There is no dispute that there are approximately 2400 conventional single family dwellings in the City of Dallas.

[4]Petitioner also argues the city erroneously failed to consider the number of mobile home park spaces, and individual lots occupied by mobile homes, within the city. However, MHSO 15(3) applies only to mobile home subdivision lots, not mobile home park spaces or other lots upon which a mobile home may happen to be situated. Accordingly, that there may be additional mobile home park spaces, or individual lots occupied by mobile homes, provides no basis for reversal or remand of the city's decision.

approved a 100 lot mobile home subdivision, but the development has never been finalized.[5] The city contends this statement in the plan does not establish that there is currently a valid city approval for a 100 lot mobile home subdivision.

The city cites evidence in the record that there are currently 95 approved mobile home subdivision lots within the city. Record 138-39. The quoted statement in the comprehensive plan does not so undermine the evidence in the record concerning the number of mobile home subdivision lots within the city that a reasonable decision maker would not rely upon the city's evidence. There is substantial evidence in the record to support the city's determination concerning the number of approved mobile home subdivision lots. See Smith v. Lane County, ___ Or LUBA _____ (LUBA No. 92-206, March 2, 1993); Angel v. City of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992); Younger v. City of Portland, 305 Or 346, 359, 752 P2d 262 (1988) (relating to substantial evidence to support a land use decision).

This subassignment of error is denied.

C. Leapfrogging

Petitioner argues the challenged decision permits

[5]In our disposition of petitioner's motion to strike, we indicated there was no evidence to establish with any certainty the current status of this 100 lot development. However, the statement in the comprehensive plan, standing alone, does not establish that the development is currently approved as a 100 lot mobile home subdivision.

impermissible "leapfrogging" of development, i.e. passing over undeveloped land nearer to the city core. However, petitioner cites no mandatory approval standard which prohibits "leapfrogging." Accordingly, even if the proposed development does constitute "leapfrogging," this subassignment of error provides no basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The planning commission, city staff and city council did not follow correct statutory procedure in making the decision, thereby putting the petitioner at a disadvantage."

Petitioner argues that a posted notice for one of the local hearings was not "readable from the roadway and for one to read the signs would have required trespassing on the developer's property."[6] Petition for Review 12. Petitioner also argues that under ORS 197.763, nearby property owners were entitled to, but some did not receive, written notice of the city's hearings. Petitioner also contends the notices that were mailed to some of the nearby property

[6]Petitioner does not identify to which hearing she refers. However, the evidence she cites for the proposition that the notice was inadequately posted is a letter dated June 22, 1992. During the planning commission's June 9, 1992 public hearing, the planning commission decided to leave the record open until June 23, 1993. Accordingly, we presume the inadequately posted notice to which petitioner refers in this assignment of error relates to the June 9, 1992 planning commission hearing.

owners were inadequate because they were not mailed 20 days before the public hearing, as provided by ORS 197.763. Petitioner further argues that the city erred by failing to adequately list the standards applicable to the proposal in its notices of hearing and failing to provide required notice of the local procedures to be employed in the conduct of the city's hearings. Finally, petitioner complains that the subject application for mobile home subdivision approval did not contain information concerning easement location and other similar information.

Respondent points out that under ORS 197.015(12)(a), the challenged decision is a limited land use decision and ORS 197.763 does not apply to limited land use decisions. ORS 197.195(2). However, even if ORS 197.763 does apply to the local proceedings, respondent states the city council heard the matter de novo, and that any errors in the planning commission's conduct of its proceedings were cured by the subsequent de novo city council proceedings.

Respondent cites a portion of the record which establishes that the city did provide a statement of the procedure to be employed during the proceedings below. Record 105. Respondent also argues that petitioner attended all planning commission and city council hearings, and that any error in the notice of the time and place of those hearings could not have caused prejudice to her substantial rights.

Respondent also points out that under ORS 197.763(3)(f)(B), where more than two evidentiary hearings are held, notice of the first hearing need only be provided ten days before the first hearing. Respondent therefore contends that the notice of the June 9, 1992 planning commission hearing was required to have been mailed on May 30, 1992, 10 days before the June 9, 1992 hearing. Respondent cites evidence in the record that the notice was in fact mailed on May 29, 1992, consistent with ORS 197.763(3)(f)(B).

Finally, respondent contends that if the notices of hearing failed to identify the applicable criteria adequately, petitioner's remedy is that she may raise those issues for the first time in an appeal to this Board. Neuenschwander v. City of Ashland, 20 Or LUBA 144, 157 (1990). However, respondent maintains that petitioner has not raised any issue in this appeal concerning criteria that were not listed in the local notices of hearing.

The errors alleged by petitioner are procedural in nature. ORS 197.828(2)(d) provides that this Board may reverse or remand a limited land use decision where:

> "The local government committed a procedural error which prejudiced the substantial rights of the petitioner."

We believe the substantial rights referred to in ORS 197.828(2)(d) are the same as those referred to in ORS 197.835(7)(a)(B). Warren v. City of Aurora, _____ Or

LUBA ____ (LUBA No. 92-188, March 8, 1993), slip op 8. Those rights are the right to an adequate opportunity to prepare and submit one's case and to a full and fair hearing. Mueller v. Polk County, 16 Or LUBA 771, 775 (1988). Petitioner fails to establish that any of the alleged errors prejudiced her ability to prepare and submit her case or denied her a fair hearing.

In summary, we agree with respondent that either it committed no error, or if it did, petitioner fails to establish that her substantial rights were prejudiced by the errors alleged.

The third assignment of error is denied.

The city's decision is affirmed.