BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGER R. WARREN, Petitioner, vs. CITY OF AURORA, Respondent, and RUDI KASEL and ANNETTE KASEL, Intervenors-Respondent.	LUBA No. 92-188
	FINAL OPINION AND ORDER

Appeal from City of Aurora.

Roger R. Warren, Aurora, filed the petition for review and argued on his own behalf.

Brendan Enright, Aurora City Attorney, Aurora; and James L. Murch, Salem, filed a response brief. James L. Murch argued on behalf of intervenors-respondent.

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

REMANDED 03/08/93

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 seeks review of a city decision granting preliminary plat and final plat approval for a 15 lot subdivision on a 6.7 acre parcel.

MOTIONS TO INTERVENE

Rudi Kasel and Annette Kasel, the applicants below, move to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

This is petitioner's second appeal of a city decision approving preliminary and final plats for a subdivision on the subject property described below. In our first decision, we addressed petitioner's consolidated appeals of separate city decisions approving the preliminary and final plats. Warren v. City of Aurora, _____ Or LUBA _____ (LUBA Nos. 91-141 and 92-005, July 23, 1992) (Warren I). In Warren I, we determined that for purposes of our jurisdiction and scope of review, the challenged city decision approving the preliminary subdivision plat was not a limited land use decision because the notice of intent to appeal was filed prior to the effective date of Oregon Laws 1991, chapter 817, which enacted ORS 197.015(12).[1] However,

[1]ORS 197.015(12)(a) provides the following constitutes a limited land use decision:

in Warren I, we also determined that the decision approving the final subdivision plat was a limited land use decision, for purposes of our jurisdiction and scope of review, because the notice of intent to appeal was filed after the effective date of that legislation. In Warren I, we remanded the challenged preliminary and final plat approval decisions on the basis that the city failed to identify applicable standards.

In Warren I, slip op at 2-3, we stated the following facts:

> "The subject property is located in the Single Family Residential Zone and is subject to the Historic Overlay Zone. The property is located within the City of Aurora's urban growth boundary and includes a portion of what is identified as Resource No. 2 on the Aurora Colony Historic Resources Inventory. At the time it was included on the Historic Resources Inventory, the subject property included an historically significant, but dilapidated barn. The barn has since been removed, and the property is presently vacant.
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> "The intervenors previously obtained approval for, and have developed, a residential subdivision on another portion of their property. The proposed subdivision would represent the second phase of that subdivision. There are a number of adjacent and nearby properties with significant historic structures. Petitioner is the owner of one such adjacent property and objects that the city's decision granting approval for the challenged subdivision fails to demonstrate compliance with a variety of statewide planning goal and city comprehensive plan and development code

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"The approval or denial of a subdivision or partition [within an urban growth boundary], as described in ORS chapter 92."

requirements." (Footnote omitted.)

After our remand in Warren I, the city did not conduct a hearing on the matter. Rather, on August 25, 1992 the city council met to decide how it wished to proceed, apparently determining that further public hearings were unnecessary. On August 28, 1992, the city mailed to petitioner the city's proposed response to our decision in Warren I (August 28, 1992 response). The August 28, 1992 response included various findings, but did not specifically identify the standards applicable to the approval of the preliminary and final plats. Remand Record 44, 32.[2] The city invited petitioner to send comments on the August 28, 1992 response to the city attorney before September 8, 1992, the date set for the city to formally adopt a decision responding to Warren I. On September 1, 1992, petitioner wrote a letter to the city requesting an extension of time to submit comments on the city's August 28, 1992 response, and an opportunity for a hearing at which petitioner could present evidence and argument addressing the standards he believed applied to the decision.

On September 3, 1992, the city sent petitioner a letter inviting written comments on proposed city findings before September 15, 1992, which was the new date scheduled for the

[2]In this opinion, we refer to the record on remand as "Remand Record" and the record from Warren I as "Original Record."

city to take final action on the subdivision proposal.[3] On September 14, 1992, petitioner submitted written comments concerning the city's proposed findings and objected to the city's failure to conduct a hearing and to identify applicable standards. Thereafter, on September 29, 1992, the city adopted a single decision approving both the preliminary and final subdivision plats, and a single findings document to support that decision. This appeal followed.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that under ORS 197.763 the city was required to conduct a hearing, based on adequate notice, to allow him an opportunity to be heard locally concerning the standards relevant to applications for preliminary and final subdivision plat approval.

Respondent and intervenor (respondents) contend ORS 197.763 does not apply to the challenged decision because it is a "limited land use decision," and ORS 197.763 applies only to certain "land use decisions."

This assignment of error turns on whether the city proceedings leading to the challenged decision are subject to the requirements of ORS 197.763. ORS 227.178(3) provides, in relevant part, as follows:

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[3]It is not clear from the record whether the proposed findings forwarded to petitioner with the September 3, 1992 letter were the same as those appended to the August 28, 1992 response.

> "* * * approval or denial of [permit] applications shall be based upon the standards and criteria that were applicable at the time the application was first submitted."[4]

Thus, the question is whether ORS 197.763 applied to the subject applications on the date they were first submitted below.

The application for preliminary plat approval was submitted on September 6, 1990.[5] Original Record 213. The application for final plat approval was submitted sometime before August 30, 1991.[6] See Original Record 34 (August 30, 1991 staff report describing intervenor's proposal for approval of the final plat). Both of these applications were submitted after ORS 197.763, which was enacted in 1989, became effective. Further, both of these applications were submitted before the effective date of Oregon Laws 1991, chapter 817, the legislation that created "limited land use decisions" and exempted limited land use decisions from the

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[4]At the time the applications for subdivision approval were filed with the city they qualified as an application for a "permit," as that term was defined in ORS 227.160(2) (1989).

[5]This application is actually termed an application for a "subdivision." However, the city treated it as an application for preliminary plat approval.

[6]There is no application for final plat approval in the record. It may be that the application for final plat approval is the application which initiated the preliminary approval process identified above at Original Record 213. However, in any case, whatever constitutes the application for final plat approval was submitted prior to August 30, 1991.

requirements of ORS 197.763.[7] Therefore, under ORS 227.178(3), the standards established by the 1991 legislation creating limited land use decisions, including the exemption for limited land use decisions from the requirements of ORS 197.763, do not apply to the applications that led to the decision challenged in this appeal.[8] We turn to petitioner's arguments that the city failed to observe the required statutory procedures on remand.

We have previously determined that where this Board remands a local decision on the basis that the local government failed to identify applicable standards, and

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[7]ORS 197.195 sets out certain procedures and standards governing local government approval of limited land use decisions. ORS 197.195(2) specifically provides that limited land use decisions are "not subject to the requirements of ORS 197.763 * * *."

[8]This result is not inconsistent with our decision in Warren I. In Warren I, respondents challenged our jurisdiction on the basis that the challenged preliminary and final subdivision plat decisions were exempt from our review under a now repealed exception to our jurisdiction for certain decisions concerning subdivisions within urban growth boundaries (urban subdivision exception). We rejected respondents' challenge to our jurisdiction, with regard to the final plat decision, because the urban subdivision exception to LUBA's jurisdiction had been repealed prior to the time the notice of intent to appeal the final plat decision was filed with LUBA. In rejecting this jurisdictional challenge, we also concluded that for purposes of determining our jurisdiction and scope of review, the challenged final plat decision constituted a "limited land use decision." That conclusion was based solely on the fact the notice of intent to appeal challenging the final plat decision was filed after the effective date of the 1991 legislation that repealed the urban subdivision exception to our jurisdiction and made certain urban subdivision decisions limited land use decisions. In Warren I, no issue was presented, and we did not consider, whether under ORS 227.178(3) the city proceedings leading to the challenged final plat decision were subject to the standards and procedures governing local government decisions on limited land use decisions.

ORS 197.763 is applicable to the local government proceedings, the local government is required to conduct an evidentiary hearing to allow a petitioner to present evidence and argument concerning the applicability, and proper interpretation, of the identified standards. Bradbury v. City of Independence, 22 Or LUBA 783, 785 (1991). In addition, ORS 197.763(3)(b) and (5)(a) require that prior to such a hearing, a local government must identify the standards applicable to the application. As far as we can tell from the record, the city did not identify the applicable standards prior to adopting the challenged decision on September 27, 1992. Further, there is no dispute that the city failed to provide petitioner with an opportunity for a hearing on remand to address any standards that might have been identified.[9]

We are required to reverse or remand the city's decision if the city failed to follow applicable procedures in a manner that prejudiced petitioner's substantial rights. ORS 197.828(2)(d). The substantial rights of parties referred to by ORS 197.828(2)(d) include the "rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." See Muller v. Polk County, 16 Or

[9]We note that even if the procedures and standards of ORS 197.195 for limited land use decisions applied to the city's proceedings rather than those of ORS 197.763, ORS 197.195(3)(c) requires that the city give petitioner notice identifying the applicable criteria and give petitioner 14 days to submit written comments on the proposal and the criteria, which was not done here.

LUBA 771, 775 (1988) (interpreting identical "substantial rights" language in ORS 197.835(7)(a)(B)). The city's failure to provide petitioner with adequate notice and a hearing, to which he is entitled under ORS 197.763, constitutes procedural error which prejudiced petitioner's substantial rights and, therefore, we must remand the challenged decision.[10]

Finally, in the petition for review, petitioner identifies various standards he believes are applicable to the challenged decision. On remand, the city should respond to petitioner's allegations that these standards are applicable to the challenged decision. If the city believes the standards petitioner identifies do not apply, then it should explain its interpretation of those standards and why the city believes they are inapplicable to the challenged preliminary and final plat approval decision. Terra v. City of Newport, _____ Or LUBA_____ (LUBA No. 92-068, January 22, 1993), slip op 12-13.

The third assignment of error is sustained.

The city's decision is remanded.

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[10]Because we remand on this basis, we decline to address the arguments contained in the first, second and fourth assignments of error, as it is improper for this Board to interpret the city's ordinances in the first instance. See Weeks v. City of Tillamook, 117 Or App 449, 453-54, ___ P2d ____ (1992).