BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARGE DAVENPORT and BEVERLY SWINK, Petitioners,	
vs.	
CITY OF TIGARD, Respondent,	LUBA No. 93-191
and	FINAL OPINION AND ORDER
TRIAD TIGARD LIMITED PARTNERSHIP and ROSS WOODS, Intervenors-Respondent.	

Appeal from City of Tigard.

John A. Rankin, Tualatin, filed the petition for review and argued on behalf of petitioners.

Timothy V. Ramis and James M. Coleman, Portland, filed a response brief. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. James M. Coleman argued on behalf of respondent.

Steven L. Pfeiffer and Michael C. Robinson, Portland, filed a response brief. With them on the brief was Stoel, Rives, Boley, Jones & Grey. Michael C. Robinson argued on behalf of intervenors-respondent.

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

REMANDED 05/19/94

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 decision granting site development and planned development review approvals for a residential apartment complex.

MOTION TO INTERVENE

Triad Tigard Limited Partnership and Ross Woods, the applicants below, move to intervene on the side of respondent in this matter. There is no opposition to the motion, and it is allowed.

FACTS

The applicants propose to develop a 348 unit apartment complex on the subject 26.2 acre site. Petitioner Davenport challenged an earlier decision approving a nearly identical proposal in Davenport v. City of Tigard, 25 Or LUBA 67, aff'd 121 Or App 135 (1993) (Davenport I).[1] The challenged decision changes the original proposal at issue in Davenport I by moving the northernmost row of apartments and parking spaces slightly to the south. The decision explains this change "allows additional coniferous trees and vegetation to be preserved * * *." Record 9. In addition, the current proposal includes a total of 609 parking spaces,

[1]There have been other appeals concerning this project, but only our prior opinion in what we refer to as Davenport I has any direct bearing on this appeal.

52 fewer parking spaces than the proposal at issue in Davenport I.

Petitioner in Davenport I alleged six assignments of error. The first assignment of error raised a number of issues regarding Tigard Comprehensive Plan (TCP) and Tigard Community Development Code (TCDC) standards adopted to protect certain resources for which protection is required under Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources). The second assignment of error raised issues regarding TCP and TCDC provisions concerning physical limitations, natural hazards and wetlands. The third assignment of error alleged the city's decision violated a TCP policy regarding school capacity. In Davenport I, we rejected petitioner's first three assignments of error.

We sustained petitioner's fourth assignment of error in Davenport I, which alleged the challenged decision was improperly based on amended, but not yet acknowledged, TCP map amendments. We also sustained petitioner's fifth assignment of error, in which petitioner argued the city's findings did not adequately demonstrate the challenged decision complied with TCDC 18.80.120(A). Because the decision was remanded for other reasons, we did not consider petitioner's sixth assignment of error, which alleged a number of procedural errors.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners' first and second assignments of error comprise 21 pages of the petition for review. The assignments of error and the argument supporting those assignments of error are identical to the first two assignments of error which were rejected in Davenport I. Petitioners did not challenge this aspect of our decision in Davenport I before the court of appeals. Respondent and intervenors-respondent (respondents) contend the first two assignments of error in this appeal therefore ought to be barred by the "law of the case" or by "issue preclusion." See e.g. Portland Audubon Society v. Clackamas County, 14 Or LUBA 433, 436 (1986), aff'd 80 Or App 593 (1986) (law of the case); Nelson v. Clackamas County, 19 Or LUBA 131 (1990) (issue preclusion).

Neither law of the case nor issue preclusion applies in this appeal. Petitioner Swink was not a party in Davenport I. We therefore do not have the same parties in this appeal. More importantly, as respondents recognize, the decision challenged in this appeal is the product of a new application for development approval. While the development approved by the challenged decision differs in only relatively minor details, it is not the same as the development approved in Davenport I.

However, although neither law of the case nor issue preclusion applies in this appeal, petitioners make no

effort to explain why the same arguments rejected in Davenport I ought to be sustained in this appeal. Petitioners make no attempt to fault the legal analysis we applied in Davenport I to reject those assignments of error. With one exception, in Davenport I we rejected the same arguments petitioners make under the first and second assignments of error in this appeal, on the merits. We reject them here for the same reasons given in Davenport I.

Under the first assignment of error in this appeal, as under the first assignment of error in Davenport I, petitioners argue the city failed to demonstrate compliance with TCDC 18.120.180(A)(2)(b), which requires preservation of certain trees. Respondents argued in Davenport I that petitioners failed to raise an issue during the local proceedings concerning TCDC 18.120.180(A)(2)(b) and, for that reason, were barred by ORS 197.763(1) and 197.835(2) from doing so for the first time on appeal to LUBA. We agreed with respondent. Davenport I, 25 Or LUBA at 74. Respondents again contend that petitioners failed to raise any issue below concerning compliance with TCDC 18.120.180(A)(2)(b), and petitioners make no attempt to identify where in the record they raise the issue. We therefore do not consider that issue in this appeal. Wethers v. City of Portland, 21 Or LUBA 78, 92 (1991).

The first and second assignments of error are denied.

THIRD AND SIXTH ASSIGNMENTS OF ERROR

Petitioner Davenport submitted two documents into the record of the proceedings that led to the decision challenged in Davenport I. The first is an April 6, 1992 letter from an Oregon Department of Fish and Wildlife (ODFW) urban wildlife biologist (ODFW letter). The ODFW letter disagrees with and questions certain conclusions included in a wildlife habitat resources survey (Fishman Report) submitted by the applicants. The second is written testimony of Paul Whitney, a professional wildlife ecologist and biologist, dated April 6, 1992. That letter also criticizes certain aspects of the Fishman Report.

The city provided notice of the October 12, 1993 public hearing which preceded the decision challenged in this appeal. That notice stated that oral and written testimony could be submitted at the public hearing. Petitioners do not argue the notice provided by the city failed to comply with ORS 197.763(3) or that the city failed to provide the announcement required by ORS 197.763(5).[2] However,

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[2]ORS 197.763(3) includes a number of requirements for notice of quasi-judicial land use hearings, including the following:

"The notice provided by the jurisdiction shall:

"* * * * *

"(h) State that a copy of the application, all documents and evidence relied upon by the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

petitioners argue the city erroneously failed to give them notice that the two documents described above would not automatically become part of the record of the current proceeding without petitioners having to resubmit the documents. Petitioners complain that evidence submitted by the applicants in the prior proceedings is included in the record, and the city should have either included the disputed letters as part of the record in this proceeding or given petitioners notice that the letters must be resubmitted. Petitioners argue the city's failure to include the disputed letters in the record before the city council, and the city council's failure specifically to address issues raised in those documents concerning the Fishman Report, require that we remand the challenged decision.

In some circumstances, where a local government makes a decision after LUBA remands a previous local government decision, the record in an appeal to LUBA of the decision following remand includes the record of the previous local

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"* * * * *

"(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

As relevant, ORS 197.763(5) requires at the commencement of the public hearing on a quasi-judicial land use application that the city make a statement "that testimony and evidence must be directed toward the [applicable] criteria * * * in the plan or land use regulations which the person believes to apply to the decision * * *[.]"

proceedings, unless the local government explicitly provides otherwise. Murphy Citizens Advisory Comm. v. Josephine County, ___ Or LUBA ___ (LUBA No. 93-187, Order on Objection to Record, March 16, 1994) (proceedings on remand based on the same application that led to the initial decision remanded by LUBA). However, where the applicant submits a new application, as is the case here, a local government is under no obligation to include the record from an appeal of a prior application or to provide explicit notice that parties have to submit evidence from the previous record that they wish the local government to consider in reviewing the new application.

Respondents contend petitioners would have been aware that this proceeding concerned a new application if they looked at the documents submitted in support of the application. Moreover, petitioners concede they were told at the October 12, 1993 public hearing that the applicant submitted a new application. Respondents contend petitioners could have requested that the record be left open or that the hearing be continued. See ORS 197.763(4)(b) and (6). Respondents contend that had petitioners done so, they would have had time to confirm which documents were included in the record and could have submitted evidence from the prior record that they wished to include in the record of this proceeding, as the applicants did.

We agree with respondents that the city committed no error by failing to automatically include the entire local government record from Davenport I in the evidentiary record supporting the challenged decision. For the reasons explained below, we also agree with respondents that even if the city did err in this regard, the arguments submitted by petitioners in support of these assignments of error are not sufficiently developed to warrant reversal or remand.

Petitioners do not specifically identify any issues raised in the disputed letters that they believe the city's findings fail to respond to adequately. Neither do petitioners challenge the adequacy of any of the findings identified by intervenors addressing the Fishman Report and wildlife habitat issues under the relevant TCP provisions. In view of petitioners' failures to (1) identify the issues they believe the city failed to respond to, or (2) challenge the findings adopted by the city addressing the Fishman Report and wildlife habitat issues, we would reject these assignments of error even if we agreed with petitioners that the city committed error by not including the letters in the evidentiary record considered by the city council on remand. Petitioners must sufficiently develop their arguments to demonstrate the errors alleged. See Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

The third and sixth assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners allege "[t]he city failed to adopt an interpretation of the TCP Policy 6.1.1 that is consistent with the express language of the ordinance." Petition for Review 35.

TCP Policy 6.1.1 provides as follows:

> "The City Shall Provide an Opportunity for a Diversity of Housing Densities and Residential Types at Various Price and Rent Levels."

The city's findings addressing this policy are as follows:

> "[Policy 6.1.1] is satisfied because this proposed multi-family project adds to the housing diversity in a community that is predominantly developed with single-family residences at lower densities. This site has been designated for multi-family development by the Comprehensive Plan for some time.
>
> "[Petitioner] Swink testified that the area surrounding Summerfield and this site is saturated with apartments. The City Council finds that Policy 6.1.1 requires a diversity of housing opportunities throughout the City without consideration of a particular area. The presence of a number of apartment units at this location simply implements the City's density requirements. Moreover, the City Council rejects the argument that more apartments than single-family homes in a given area is contrary to City policy. The City Council finds that this policy is met." Record 19.

Petitioners' arguments under this assignment of error are difficult to understand. Petitioners appear to contend that existing development in the city currently exceeds required overall plan density. Even if petitioners are correct in this contention, we fail to see how that provides

any reason for reversing or remanding the city's interpretation and application of policy 6.1.1. The policy requires density and housing type diversity, it says nothing about overall housing density.

The above findings explain that policy 6.1.1 requires diversity of housing density and types. The findings explain the policy is met by the proposal because it adds higher density apartments to a predominantly lower density single family residential community. The findings are sufficient both to explain what is required by the policy and to explain why the policy is met.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

We remanded the city's decision in Davenport I, in part, because it was not clear whether the decision granted detailed development plan approval or conceptual development plan approval.[3] Although the challenged decision refers primarily to conceptual development plan approval, it still includes a single reference to detailed development plan approval. Record 4.

We agree with respondents that when the notices, decision and findings are read as a whole, it is

[3]Conceptual development plan approval is the second step in the city's three-step procedure for planned development approval. Detailed development plan approval is the final step. The TCDC approval standards for granting conceptual development plan approval are different and more extensive than the approval standards for detailed development plan approval.

sufficiently clear that the decision challenged in this appeal grants conceptual development plan approval. We accept intervenors' argument that the single reference at Record 4 to detailed development plan approval is properly viewed as a harmless mistake, in view of the clear understanding on all parties' part that the city was considering conceptual development plan approval.[4]

Petitioners also challenge the adequacy of the city's findings addressing TCDC 18.80.120, which establishes approval standards for conceptual development plan approval. However the findings petitioners quote and argue are "too conclusory" appear to be the same findings we concluded were inadequate in Davenport I. The findings adopted by the city in support of the challenged decision are much more extensive. Record 22-26. Petitioners make no attempt to challenge the adequacy of these findings.

The fifth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

TCDC 18.108.070(D) imposes vehicular access and egress requirements for multiple-family residential uses, as follows:

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[4]Intervenors include in their brief a partial transcript of the October 12, 1993 city council meeting where the city attorney stated that one of the reasons for our remand in Davenport I was lack of clarity about what kind of approval was granted. The city attorney stated the challenged decision grants conceptual development plan approval. Intervenors-Respondent's Brief 36.

"Vehicular access and egress for multiple-family residential uses shall not be less than the following:

"Dwelling Units	Min. No. of Driveways Required	Min. Access Required	Min. Pavement Sidewalks, Etc.
"1-2	1	10'	10'
"3-19	1	30'	24' if two-way, 15' if one-way: Curbs and 5' walkway required
"20-49	1 or 2	30' 30'	24' if two-way, 15' [if] one-way: Curbs and 5' [walkway] required
"50-100	2	30'	24': Curbs and 5' walkway required
"100+	for each 100 spaces	one additional	24' drive with 5' walkway or a public street"

The city adopted the following findings interpreting and applying TCDC 18.108.070(D):

"[TCDC] 18.108.070.D is ambiguous, but the City Council construes it to require two access points for the first 100 dwelling units and an additional access point for each 100 parking spaces over the number of parking spaces required to serve the first 100 units. This construction requires eight access points rather than the four proposed by Triad. * * *

"Council finds that the requirement for eight access points can be met with an appropriate condition. Council interprets TCDC Section

> 18.108.070.D to permit a driveway with two one-way drives on either side of a median to count as two access points as required under this code. Council believes this interpretation is a correct reading of the code language because the purpose of the language is to provide a specified number of continually open access points. A driveway with a center median providing traffic lanes of the appropriate width on either side meets this intent. Moreover, the Council finds that the section permits 15 foot one-way drives. Council believes that the intent of the code is met because 24 foot one-way drives would be confusing and dangerous. Therefore, the Council imposes condition of approval [22] to require the detailed development plan for this project to show eight access points, consisting of four driveways with medians and traffic lanes on either side of the median. * * *."[5] Record 28.

We consider the adequacy of these findings interpreting and applying TCDC 18.108.070(D) below.[6]

A. Number of Access Driveways Required

The first paragraph of the above quoted findings explains that while the applicant proposes only four access driveways, TCDC 18.108.070(D) requires a total of eight

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[5]Condition 22 provides as follows:

> "The site plan shall be amended at the detailed development plan stage to show four driveways with eight access points with each driveway consisting of a median with a minimum 15' wide one-way driveway on either side, at the [four driveway entrances]." Record 36.

[6]The city also adopted findings addressing the access variance standards in TCDC 18.108.150. However, neither respondent nor intervenors argue in their briefs that those findings provide an alternative basis for denying this assignment of error. Petitioners argue there was no access variance application before the city council and contended at oral argument that the city failed to give proper notice that an access variance would be considered. Accordingly, we do not consider the access variance findings.

access driveways for a project with the number of dwelling units and parking spaces proposed here.[7] No party disputes this part of the city's interpretation of TCDC 18.108.070(D).

B. Divided Access Driveways

The above findings then explain that where an access driveway is separated by a median where it provides access to the development, so that there is a one-way driveway on either side of the median, each one-way driveway counts as one of the required access points. This interpretation is within the city's interpretive discretion under ORS 197.829 and Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992).[8]

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[7]The city apparently interprets TCDC 18.108.070(D) to require two access driveways for the first 100 dwelling units and an additional six access driveways for the number of parking spaces proposed.

[8]ORS 197.829 codifies and modifies the standard of review announced by the Oregon Supreme Court in Clark v. Jackson County, supra. ORS 197.829 provides as follows:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulations; or

C. Pavement Width Required for Access Driveways

The final part of the city's interpretation and application of TCDC 18.108.070(D) concerns the minimum pavement width required for each access driveway. The city concludes each of the one-way access driveways may have a 15 foot pavement width rather than a 24 foot pavement width. The city offers two bases for that conclusion. First, TCDC 18.108.070(D) permits 15 foot one-way driveways. Second, 24 foot one-way driveways "would be confusing and dangerous." Record 28.

While the city is correct that TCDC 18.108.070(D) authorizes 15 foot one-way driveways, it only authorizes one-way driveways of that width for multiple-family residential developments with 3-19 units or 20-49 units.[9] TCDC 18.108.070(D) does not authorize one-way driveways with

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"(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[9]In their brief, intervenors rely in part on TCDC 18.108.060(B). That section is difficult to follow. It limits direct access onto certain streets but contains two apparently unrelated subsections that specify minimum widths for service drives for multi-family dwellings. Intervenors point out that TCDC 18.108.060(B)(2)(b) authorizes one-way service drives with 15 foot wide pavements.

We do not consider TCDC 18.108.060(B)(2)(b) further, since the city did not rely on that provision in its findings interpreting TCDC 18.108.070(D). In any event, we fail to see how TCDC 18.108.060(B)(2)(b) adds anything to the city's interpretation of TCDC 18.108.070(D), since TCDC 18.108.070(D) also explicitly allows one-way driveways with a minimum pavement width of 15 feet. The problem is that TCDC 18.108.070(D) only allows such 15 foot pavement widths for one-way driveways in developments with 3-19 units or 20-49 units.

a 15 foot pavement width for multiple-family residential developments with more than 100 units, such as the one proposed here. For such developments, TCDC 18.108.070(D) unambiguously requires a minimum pavement width of 24 feet.

The second reason given by the city for only requiring a 15 foot pavement width ("24 foot one-way drives would be confusing and dangerous") may be a sound reason for changing the requirement in TCDC 18.108.070(D) that access driveways serving multiple-family residential developments with more than 100 units be improved with a minimum pavement width of 24 feet. It does not provide a sufficient reason for ignoring that requirement. Von Lubken v. Hood River County, 104 Or App 683, 688, 803 P2d 750 (1990), on reconsideration 106 Or App 226, rev den 311 Or 349 (1991).

Recent court of appeals' decisions explain that LUBA may not reverse or remand a local government's interpretation of its own plan or land use regulations as erroneous, unless the city's interpretation is "clearly wrong." Friends of the Metolius v. Jefferson County, 123 Or App 256, ___ P2d ___ (1993); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992). This Board has had difficulty determining how wrong a local government interpretation must be before it becomes reversible as "clearly" wrong. See Weuster v. Clackamas County, 25 Or LUBA 425, 439 (1993); Langford v. City of

Eugene, ___ Or LUBA ___, (LUBA No. 93-090, October 6, 1993), rev'd 126 Or App 52 (1994).

However, whatever the ultimate parameters of the "clearly wrong" standard of review may be, the city's construction of the portion of TCDC 18.108.070(D) which applies to multiple-family developments with more than 100 units is, in our view, clearly wrong. TCDC 18.108.070(D) specifies a single minimum pavement width of 24 feet for driveways serving multiple-family developments with more than 100 units. The city nevertheless approves the required eight driveways with 15 foot pavement widths because TCDC 18.108.070(D) permits 15 foot pavement widths for multiple-family developments with fewer dwelling units and parking spaces than are proposed here and because it believes 24 foot wide one-way driveways "would be confusing and dangerous." Neither of those reasons provides a basis for ignoring the express requirement of TCDC 18.108.070(D) for multiple-family developments with the number of dwelling units and parking spaces proposed here. The city's interpretation of TCDC 18.108.070(D) is inconsistent with the express language of TCDC 18.108.070(D) and, therefore, must be rejected. ORS 197.829(1).

The seventh assignment of error is sustained.

The city's decision is remanded.