BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LISA SHAPIRO and PETER ZUKIS,	)	
	)	
Petitioners,	)	LUBA No. 94-096
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF TALENT,	)	
	)	
Respondent.	)	

Appeal from City of Talent.

Lisa Shapiro and Peter Zukis, Talent, filed the petition for review. Lisa Shapiro argued on her own behalf.

Michael H. Arant, Medford, represented respondent.

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

REMANDED 01/20/95

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

Petitioners appeal an order of the city council approving a minor partition.

FACTS

The subject property is undeveloped and zoned Residential, Single Family, 8,000 (square foot) Minimum Lot Size (R-1-8). The subject property consists of a 0.5 acre rectangle, 65 feet wide and approximately 350 feet long. The narrow side of the rectangle adjoins Talent Avenue to the north. The proposal is to create a 45-foot by 152-foot parcel adjoining Talent Avenue (parcel 1) and a second, flag parcel with a "pole" 20 feet wide (parcel 2). Access to Talent Avenue from both parcels would be via the pole portion of parcel 2. A 50-foot easement for an existing irrigation canal crosses the body of parcel 2.

The planning commission denied the proposal. The applicant appealed the planning commission decision to the city council. The city council conducted a de novo evidentiary hearing on the appeal, reversed the planning commission and approved the proposal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue the city's notice of the first evidentiary hearing before the planning commission failed to list the standards applicable to the proposal, as required by ORS 197.763(3)(b). Petitioners are correct. This notice

defect means petitioners may raise issues before this Board even though such issues may not have been raised during the local proceedings. ORS 197.835(2). However, this procedural error provides no basis for reversal or remand of the challenged decision, because petitioners do not establish the error caused prejudice to their substantial rights. ORS 197.835(7)(a)(B).

Petitioners also argue the city failed to provide them an opportunity for a continuance to respond to new evidence. However, the city cites the following testimony of petitioners' attorney from the city council minutes:

> "[The attorney] indicated that Ms. Shapiro wished to advise the [City] Council of the difficulty she has encountered in gathering information in connection with this appeal. Under ORS 197.763(4)(a) and (b), Ms. Shapiro was entitled to review all documents relied upon by the applicant and any staff report to be used at the hearing. Although these provisions were not followed, Ms. Shapiro has elected to proceed with the hearing and does not request a continuance as is her right." Record 23.

This testimony makes it clear that petitioners affirmatively waived their right to request a continuance of the city council proceedings. Louisiana Pacific v. Umatilla County, 26 Or LUBA 247, 258 (1993); Newcomer v. Clackamas County, 16 Or LUBA 564, 567, rev'd on other grounds 92 Or App 174, modified 94 Or App 33 (1988). Because petitioners waived their right to a continuance, this argument provides no basis for reversal or remand of the challenged decision.

Petitioners also argue the city council erroneously

accepted the applicant's appeal of the planning commission decision. According to petitioners, the appeal of the planning commission decision was untimely.

If the city council accepted the applicant's appeal in violation of local regulations governing the time for filing such appeals, then petitioners may be correct that the city council lacked authority to consider the local appeal. See Century 21 Properties v. City of Tigard, 99 Or App 435, 437-439, 783 P2d 13 (1989), rev den 309 Or 334 (1990); Rochlin v. Multnomah County, 25 Or LUBA 637, 641 (1993).

The question of whether the city council erroneously accepted the local appeal turns on the interpretation of relevant provisions of the city's code. However, the challenged decision contains no interpretation of relevant city code provisions.[1] This is important because this Board must defer to a city council's interpretation of the city's own code. Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994); Watson v. Clackamas County 129 Or App 428, 879 P2d 1309, rev den 320 Or 407 (1994). In reviewing a challenged city council decision, this Board may not interpret the city's code in the first instance. Weeks v. City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992). Therefore, we must remand the challenged decision for an interpretation of the relevant local code provisions to

[1]In addition, we cannot ascertain from the record when the planning commission decision was orally adopted or when it was reduced to writing.

determine whether the applicant's local appeal was timely.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue the determination in the challenged decision that the subject property may not be further divided is erroneous because the decision fails to cite any standard or evidence establishing such to be the case.

Ordinance No. 422 (Subdivision and Partition Ordinance), Article II(2)(d) requires the following:

> "The preliminary [partition] map shall be submitted to the City Engineer, city staff, and city planners, who will check it with any development plans for the area. If the map conforms with the development plans, it may be administratively reviewed and approved by the planning staff if all of the following conditions are met:
>
> "(1) The proposed partition contains three (3) or fewer parcels which cannot be further divided.
>
> "* * * * *"

The city argues the city council relied upon the minor partition map (Record 18) to establish the subject property may not be further divided. However, we have examined the minor partition map cited by the city and do not see what the city believes establishes the subject property may not be further divided. The city must adopt findings explaining why it believes the subject property may not be further divided.

Petitioners contend the challenged decision fails to

address the following standards found in city Ordinance No. 423:[2] Article 3, Section 6; Article 15, Sections 3 and 8. Petitioners also argue the decision fails to address Ordinance No. 422, Article II, Section 2(b) and (c) and standards in the city's comprehensive plan, Chapter III, Housing, Residential Designations 1, Low Density Residential. Petitioners contend the above referenced city standards are applicable to the proposal and must be addressed.

The city simply responds that the minor partition map establishes the proposal complies with all of the above cited standards. However, the map does not establish such compliance.

Petitioners next argue the following findings are inadequate:

> "The future use for urban purposes of the remainder of the tract under the same ownership will not be impeded.
>
> "As shown on the Minor Partition map submitted by the applicant, Parcel 1 has an existing structure and sufficient area is provided for a structure to be built on Parcel 2." Record 5.

Petitioners contend the challenged decision erroneously

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[2]As far as we can tell, Ordinance No. 423 is the city's zoning ordinance and Ordinance No. 422 is the city's subdivision and partition ordinance. Our review of this decision in this regard is significantly hampered because the city did not forward its ordinances to the Board or explain in any manner how Ordinance No. 423 and Ordinance No. 422 work together. Petitioners did attach portions of these ordinances to their brief, but these attachments are incomplete and difficult to follow as the numbering systems in the two ordinances are similar.

fails to explain why it concludes there is sufficient area in parcel 2 for construction of a structure. Petitioners argue:

> "* * * a definition for 'sufficient area' would include facts and justification regarding setbacks, minimum yard requirements and turn-around, driveway and fire truck access movement. The codes for emergency vehicles were never addressed * * *. The proposed flag drive is more than 150 feet. * * * Talent's fire fighting vehicles measure twenty-five feet, six inches in length. It is unlikely the proposed turnaround is large enough to accommodate these vehicles especially if the four required parking spaces are occupied. * * *" Petition for Review 10.

Petitioners are correct that the challenged findings are conclusory. The city must explain why it believes there is "sufficient area" in parcel 2 for the construction of a structure.[3]

Petitioners also argue the challenged decision erroneously determines that flag lots are not subject to Ordinance No. 422, Article III, which we understand contains design standards for land divisions.

Ordinance No. 422, Article II(2)(f) provides a process for preliminary approval of "flag partitions." Ordinance No. 422, Article II(2)(f)(1) requires flag partitions to

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[3]Petitioners also argue the challenged decision determines there is a structure on parcel 1. Whether and the extent to which parcel 1 is already developed is arguably relevant to whether there is adequate buildable area for construction of a dwelling on parcel 2. On remand, the city should explain whether there is a dwelling on parcel one, and such determination must be supported by substantial evidence in the record.

comply with Ordinance No. 422, Article II(2)(e). Ordinance No. 422, Article II (2)(e)(5) provides the following requirement:

> "The partitioning is in accordance with the design standards of Article III."

The challenged decision simply concludes that only Ordinance No. 422, Article II(2)(f) applies, and by implication concludes that Ordinance No. 422, Article II(2)(e) does not. As far as we can tell, the challenged decision does not determine any of Article III's requirements have been met. While it is possible for the city council to be within its interpretative discretion under Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992), in interpreting Ordinance No. 422, Article II(2)(e) to mean that only certain "design standards" of Article III are applicable to a proposal to create a flag lot, it has not done so. The city's interpretation of Ordinance No. 422, Article II(2)(e) to mean that none of Article III applies is contrary to the express language of Article II(2)(e)(5) and, therefore, is clearly wrong. ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 238, 243, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 94, 840 P2d 1354 (1992).

Petitioners also contend the challenged decision fails to include a determination as required under Ordinance No. 422, Article II (2)(e)(2) that:

> "The partition does not cause undue harm to

adjacent property owners."

Petitioners are correct. Although the city determines notice was provided to abutting property owners, the challenged decision makes no determination concerning whether the proposal will cause undue harm to adjacent property owners, and this is error.

Next, petitioners contend the challenged decision improperly defers to the city engineer a determination concerning whether the proposal includes four parking spaces "situated in such a manner as to eliminate the necessity for backing out," as required by Ordinance No. 422, Article II(2)(f)(4).

In this regard, the challenged decision states:

> "The application indicates four parking spaces for Parcel 2, arranged in such a manner as to eliminate the necessity for backing out." Record 6.

As a condition of approval, the challenged decision requires the city engineer to approve the parking design and turnaround.

We have examined the proposed partition map and, while it appears to show four parking spaces, no turnaround space is evident. In addition, it is not obvious from the map that there will be no "necessity for backing out." Further, no party cites to any portion of the record where the partition application may be found, and we do not find any such application. The challenged decision does not

determine the proposal complies with Ordinance No. 422, Article II(2)(f)(4) or that compliance with Article II(2)(f)(4) is feasible. Rather, it defers a determination of compliance with Ordinance No. 422, Article II(2)(f)(4) to the city engineer, to be made in a process apparently not involving notice or hearing. This is improper. Compare McKay Creek Valley Assoc. v. Washington County, 24 Or LUBA 187, 198 (1992); with Bartels v. City of Portland, 20 Or LUBA 303, 310 (1990).

Petitioners also challenge the determination in the challenged decision that the pole portion of the flag lot will provide access to both proposed parcels. Petitioners allege that Ordinance No. 423, Article 1, Section 3, defines driveway as an access for a single parcel and argue that if an access serves more than one parcel it is a street. While not clear, we understand petitioners to allege the proposed driveway in the flag pole improperly serves two parcels rather than one.[4]

The city cites Ordinance No. 422, Article II, Section 2(f)(5), which establishes the following requirement for flag lots:

> "* * * culverts and curb cuts have been minimized through the use of common driveways."

[4]Petitioners do not dispute that the proposal is for both parcels to utilize the proposed flag pole for access purposes. Petition for Review 13.

The city contends the findings simply determine a common driveway will be utilized as required. We agree with the city that petitioners' allegation in this regard does not provide a basis for reversal or remand of the challenged decision. The findings simply acknowledge the flag pole will contain a common driveway.

The second assignment of error is sustained, in part.[5]

THIRD ASSIGNMENT OF ERROR

Petitioners contend the site plan is defective because it fails to include required information.

At the outset, we note that we have previously determined the omission of required information from an application constitutes harmless procedural error if the required information is located elsewhere in the record. Dougherty v. Tillamook County, 12 Or LUBA 20, 24 (1984); Families for Responsible Gov't. v. Marion County, 6 Or LUBA 254, 277 (1982), rev'd on other grounds 65 Or App 8 (1983). However, we have also stated that where the required information is not located elsewhere in the record and such information is necessary for a determination of compliance with relevant approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. Murphy CAC v. Josephine County, 25 Or LUBA 312,

[5]Under this assignment of error, petitioners also include arguments concerning application requirements and street frontage. We address these arguments under the third and fourth assignments of error, respectively.

324-25 (1993); McConnell v. City of West Linn, 17 Or LUBA 502, 525 (1989).

A. Ordinance No. 422, Article II(2)(f)(7)

Ordinance No. 422, Article II(2)(f)(7) requires the following information be included in the site plan:

> "(a) the location of all structures in the partition;
>
> "(b) the location of driveways, turnarounds, and parking spaces; and
>
> "(c) the location and type of screening."

The only evidence cited by the city is the minor partition map located at Record 18. The city is correct this map establishes the location and type of screening, shows parking spaces, structures and driveways.[6] However, that map does not establish the location of turnarounds.

This subassignment of error is sustained, in part.

B. Ordinance No. 422, Article II(2)(b)

Ordinance No. 422, Article II(2)(b) includes specific requirements for minor partition maps, as follows:

"* * * * *

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[6]The minor partition map lacks any sort of precision concerning the location of these aspects of the proposal. Therefore, the map may be insufficient to allow the city to conclude the proposal meets relevant standards cited under the second assignment of error. However, the site plan requirements in Ordinance No. 422, Article II(2)(f)(7) do not themselves require any particular level of precision. In this regard, we cannot tell if compliance with these site plan criteria is required to establish compliance with other standards. Because the challenged decision is being remanded in any event, the city can either require the requisite information or explain why it is not required by the city's ordinances.

"(6) The location, widths and purposes of all existing and proposed public and private easements for drainage.

"* * * * *

"(8) The number, dimensions (to the nearest .01 acre) and square footage of the proposed lots, and relationship to existing or proposed streets and utility easements.

"* * * * *

"(11) The approximate location of areas subject to inundation or storm water overflow, all areas covered by water, and the location, width and direction of flow of all water courses.

"(12) An indication of the direction and approximate degree of slope."

We are cited to nothing in the record containing the level of specificity required by the above cited requirements. It appears that the specific information required by the above quoted provisions may be necessary for the city to determine whether the proposal complies with other city standards identified under the second assignment of error. On remand, the city should either require the applicant to furnish this information or explain that the information is not required to establish the proposal's compliance with the relevant city ordinances.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Ordinance No. 423, Article 3, Section 6 requires a "front yard" and that such a front yard have a depth of 20

feet. Ordinance No. 423, Article 15, Section 3 includes various "Yard Requirements." Ordinance No. 423 also contains definitions of relevant terms such as driveway, yard and open space. Petitioners argue that under their understanding of the city's code, a pole portion of a flag lot cannot be considered a "front yard."

The challenged decision does not interpret the meaning of "front yard." As explained previously, this Board may not assume the city's council's interpretive responsibility. The city must interpret Ordinance No. 423's front yard requirements, determine whether the proposal complies with those requirements and explain why it does or does not do so.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners contend the city council was not impartial, and was biased in favor of approval of the application.

Petitioners' burden to establish the city council was biased is a heavy one. Petitioners must demonstrate the city council was incapable of making a fair decision in the matter considering all of the evidence and arguments presented. See 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 80-85, 742 P2d 39 (1987); Spiering v. Yamhill County, 25 Or LUBA 695, 702 (1993). Petitioners have not established bias here.

The fifth assignment of error is denied.

The city's decision is remanded.