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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MARALEE SULLIVAN,)
)
Petitioner,)
)
vs.)
)
CITY OF ASHLAND,)
)
Respondent,)
)
and)
)
DONALD J. JOHNSON,)
)
Intervenor-Respondent.)

LUBA No. 94-034
FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Judith H. Uherbelau, Ashland, represented petitioner.

No appearance by respondent.

Daniel L. Harris, Ashland, represented intervenor-respondent.

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

AFFIRMED 02/22/95

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a
4 building permit for a dwelling.

5 **FACTS**

6 We take the facts from our previous decision in this
7 matter:

8 "The subject parcel is partially within the city
9 and partially within unincorporated Jackson
10 County. The portion within the city is zoned
11 Single Family Residential (R-1), and the portion
12 within the county is zoned Rural Residential
13 (RR-5). The proposed dwelling will be situated on
14 the portion of the parcel within the city.

15 "The city planning department approved the
16 disputed building permit and petitioner appealed
17 to the city planning commission. The planning
18 commission determined issuance of the building
19 permit is not a land use decision. Petitioner
20 appealed the planning commission's decision to the
21 city council. The city council agreed issuance of
22 the building permit is not a land use decision,
23 and affirmed the earlier decisions approving the
24 permit. * * *" Sullivan v. City of Ashland, 27
25 Or LUBA 411 (1994) (Sullivan I).

26 Among other things, we determined in Sullivan I that
27 Ashland Land Use Ordinance (LUO) 18.70.020(D) is ambiguous.
28 The court of appeals reversed and remanded LUBA's
29 determination in this regard, and directed LUBA to consider
30 petitioner's evidentiary arguments. Sullivan v. City of
31 Ashland, 130 Or App 480, 486, 882 P2d 633 (1994).
32 Specifically, the court of appeals stated:

33 "[Petitioner] also argues that the city's approval

1 of the building permit was not supported by
2 substantial evidence in several particulars.
3 Because LUBA did not reach and initially consider
4 those arguments, we remand for it to do so." Id.

5 Were it not for this point, the city's decision would have
6 been affirmed by the court of appeals.

7 **DECISION**

8 We act on the court's mandate based on its decision and
9 the parties' LUBA briefs. It is difficult to understand to
10 what evidentiary "particulars" the court refers.
11 Petitioner's substantial evidence argument in the fourth
12 assignment of error in the petition for review filed at LUBA
13 is unfocused and difficult to understand. Petitioner
14 argues:

15 "* * * A blanket statement that a nonconforming
16 lot would be unbuildable is not supported by the
17 record. "Further, the city argues that depth
18 requirements do not apply to this parcel of land
19 because it was created by a minor land partition.
20 Assuming it was created by a minor land
21 partition,⁴ the remainder of

22 "[LUO 18.20.040(C)] cited in the [challenged
23 decision] provides that the lot width shall not be
24 wider than its depth. From the plain language of
25 [LUO 18.20.040(C)], it is clear that the minor
26 partition exemption to that requirement does not
27 apply. The city goes on to argue that even if the
28 minor land partition is not relevant here, it will
29 interpret that section in a manner to allow the
30 approval of a building permit. * * *

31 "[Intervenor] has three acres to build on. By
32 building on what is basically a driveway to the
33 major part of the lot, applicant is accessing city
34 sewer and water without annexation. The purpose
35 of the land use ordinances should not be ignored
36 or petitioner's rights denied in allowing

1 applicant to obtain these services by building on
2 what, in most instances, would be access to a back
3 lot. There is no substantial evidence in the
4 record that supports the city's decision to ignore
5 the petitioner's solar rights in this case, or to
6 ignore other provisions required of the applicant.

7 _____
8 _____
9

10 "4 The only evidence in the record concerning
11 whether the lot was created by land partition are
12 documents found at [Record] pp. 27, 28 and 29.
13 Those documents are not on city of Ashland
14 letterhead, nor [sic] is there any other official
15 designation on these documents." Petition for
16 Review 12-13.

17 As far as we can tell, petitioner's only evidentiary
18 arguments are that (1) the challenged decision determines
19 the subject property is unbuildable and this determination
20 is not supported by the record, (2) the city's decision
21 ignores petitioner's solar access rights and the record does
22 not support ignoring those rights, and (3) the city's
23 determination that the subject property was created by a
24 minor partition is not supported by substantial evidence.
25 Taking the last issue first, the challenged decision
26 determines that even if the subject property were not
27 created by a minor land partition, the proposed single
28 family dwelling is permissible. Therefore, petitioner's
29 evidentiary challenge, even if meritorious, would not
30 provide a basis for reversal or remand, because the city
31 adopted alternative, unchallenged findings.

32 With regard to petitioner's first point, we cannot tell

1 with certainty to what findings petitioner refers. The
2 challenged decision includes the following comment:

3 "* * * We interpret [LUO 18.20.040(C)] to allow
4 development on existing lots if minimum setbacks
5 can be met. Under [petitioner's] argument, any
6 non-conforming lot would be unbuildable, even if
7 the proposed home complied with all setback
8 requirements." * * *" Record 10.

9 We do not understand the challenged decision to
10 determine intervenor's lots is unbuildable, and petitioner
11 fails to explain what findings she believes make such a
12 determination. As far as we can tell, the above quoted
13 findings do no more than determine the consequences of
14 agreeing with a position that petitioner advanced below, and
15 to disagree with her position. Under these circumstances,
16 the city does not, and need not, establish there is
17 evidentiary support in the record that the subject property
18 is unbuildable.

19 With regard to petitioner's assertion that the city's
20 decision ignores her solar access rights, and that the
21 record lacks evidence to support ignoring those rights, we
22 do not understand the findings in the challenged decision to
23 ignore petitioner's solar access rights at all. Rather, the
24 challenged decision contains detailed findings concerning
25 the city's solar access requirements and, on a pivotal issue
26 in this regard, the court of appeals sustained the city's
27 findings. Therefore, the challenged decision need not be
28 supported by substantial evidence justifying ignoring those

1 rights.

2 The city's decision is affirmed.