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

BILLY L. DEAL, MARY JO J. DEAL,)
RON EMMONS, ANNELLA M. EMMONS,)
JACQUIE BOEDIGHEIMER,)
DEBBIE BANKER, AL ESCELARA,)
JANE ESCELARA, BILL FORD,)
MARTY KROUGH, HELEO SNACHES,)
CHRISTI SHERROW, BILL SMITH,)
LAURA STEVENS, RAY TREVINO,)
VERN WEBER, DENNIS WOLF)
and LOIS WOLF,)

Petitioners,)

vs.)

CITY OF HERMISTON,)

Respondent,)

and)

HERITAGE DEVELOPMENT JOINT)
VENTURE,)

Intervenor-Respondent.)

Appeal from City of Hermiston.

Gregory S. Hathaway, Timothy R. Volpert, and E. Michael Connors, Portland, filed the petition for review. With them on the brief was Davis Wright Tremaine. E. Michael Connors argued on behalf of petitioners.

No appearance by respondent.

Mark D. Whitlow and Ty K. Wyman filed the response brief. Ty K. Wyman argued on behalf of intervenor-respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 08/06/98

You are entitled to judicial review of this Order.

LUBA No. 97-238
FINAL OPINION
AND ORDER

1 Judicial review is governed by the provisions of ORS 197.850.

2

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's approval of an application
4 for a multi-family development.

5 **MOTION TO INTERVENE**

6 Heritage Development Joint Venture (Heritage), the
7 applicant below, moves to intervene on the side of the city.
8 There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property consists of 15 lots comprising the
11 bulk of the Sunnyvale Heights subdivision.¹ The property lies
12 between Eighth Street to the west and Ninth Street to the
13 east, with the A Line Canal to the south. Evelyn Avenue,
14 which is platted but not built, runs west from Ninth Street
15 through the subject property to State Highway 395. Five of
16 the lots are north of Evelyn Avenue, while 10 are to the
17 south. Each of the 15 lots are zoned R3, which permits multi-
18 family dwellings.

19 In May or June of 1997, Heritage acquired the subject
20 property, obtained permits to build townhomes on four lots,
21 and commenced construction. Heritage posted advertising signs

¹The record does not reflect when the Sunnyvale Heights Subdivision was approved. In December 1996, Heritage's predecessor in interest, Hooley, sought and obtained a replat of a portion of the original subdivision, creating eight lots where five existed before. The city approved the replat in April 1997. In obtaining the replat, Hooley represented to the city that he intended to build single family dwellings on the lots he owned. However, it does not appear Hooley ever sought or obtained permits to build single family or other types of dwellings in the subdivision.

1 indicating that it planned to build townhomes and multi-family
2 dwellings on all 15 lots, for a total of 79 dwelling units.
3 After learning the extent of Heritage's plans, the city
4 advised Heritage that it considered the proposed development a
5 "major development" that must comply with Hermiston Zoning
6 Ordinance (HZO) 20. Accordingly, the city requested that
7 Heritage submit an application for a major development,
8 including a site plan. Heritage submitted its development
9 application, including a partial site plan covering four lots.
10 The city deemed the application complete, but insufficient, on
11 July 28, 1997.

12 The city planning commission conducted a hearing
13 September 10, 1997 and approved the application, with
14 conditions that Heritage improve Evelyn Avenue from Eighth
15 Street to Highway 395, and improve a nearby one-lane bridge
16 over the A Line Canal to accommodate two lanes of travel.
17 Heritage appealed to the city council the condition that it
18 improve the A Line Canal bridge.² The council conducted a
19 hearing and on October 27, 1997 approved the application with
20 modified conditions. The challenged decision eliminates the
21 condition that Heritage improve the A Line Canal bridge, but
22 requires Heritage to enter into an irrevocable consent
23 agreement to pay its share of improving the bridge, if

²Opponents of the application, including petitioners, separately
appealed the planning commission's approval. As part of the challenged
decision, the city council denied the opponents' appeals.

1 improvements are made. The decision also requires Heritage to
2 improve Evelyn Avenue to Highway 395, but only if the Oregon
3 Department of Transportation (ODOT) permits a connection
4 between Evelyn Avenue and Highway 395, and adds a new
5 condition that Heritage submit a site plan for the lots north
6 of Evelyn Avenue.

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners argue that the city failed to make adequate
10 findings of fact, based on substantial evidence, that the
11 proposed development complies with the requirements of HZO 20.
12 Petitioners contend that provisions of HZO 20, read together,
13 require the applicant for a major development to submit
14 "adequate information" regarding potential traffic impacts
15 from the applicant's development.³ Petitioners argue that,

³HZO 20 states, in relevant part:

"1. * * * The policies of the City of Hermiston are as follows:

"1.1 Adequate information must be presented with each development to assure zoning regulatory standards are upheld, coordinate traffic flow and street patterns and assure existing public and private utilities are not damaged or infringed upon by development.

** * * * *

"1.3 To foster and promote the logical extension of public improvements in an economical manner over a long term.

"1.4 To empower the conditioning of the right to build or change uses of property with requirements to construct necessary public improvements.

" * * * * *

"5. Development Requirements. The following requirements shall pertain to all development falling under [HZO 20]:

"5.1 The applicant shall complete a building permit application as provided by the City and a site plan. The site plan shall be drawn to scale and show all existing and proposed structures and their exterior dimensions; all streets, alleys and other public right-of-way; existing and proposed utility lines and/or easements; building setbacks; location of utilities and proposed connection routes; off-street parking; curb cut and sidewalk locations and dimensions and drainage plan. When required in a conditional use permit or in a major development, the City may require the applicant to supply landscape plans, screening, lighting, fire flow and similar requirements.

" * * * * *

"5.3 The applicant shall be required to participate in a future improvement district to construct and dedicate all public facilities, such as water, wastewater, drainage, curb, gutter, sidewalk and street right-of-way adjacent to the development in conformance with city standards and provide easements or deeds to the city for all such public facilities. However, where it is determined that delaying the design and construction of any or all such facilities is not appropriate and logical, or causes an adverse impact on surrounding properties, the City may require the developer to construct and dedicate all such improvements as a condition of development.

"5.4 Where it has been determined that the extension of public facilities is required, all costs related to such extension shall be borne by the developer.

* * *

"5.5 Where such improvement installed by a developer shall benefit other properties, a mutually agreeable settlement shall be arrived at between the City and the developer prior to installing the improvements. This agreement shall identify the benefiting properties, actual costs to be charged and method of repayment to the developer. * * *

"5.6 The developer shall provide proof of review and approval by all affected and/or county agencies, such as [ODOT] or County Planning Department.

1 despite the city's specific request for an analysis of the
2 development's potential impact on nearby transportation
3 facilities, Heritage failed to provide any such information,
4 and that, as a result of the lack of information, the city
5 could not and did not make adequate findings of compliance
6 with HZO 20.

7 The city's findings state, in relevant part:

8 "1. Heritage intends to develop Sunnyvale Heights
9 Subdivision. The subdivision has a maximum
10 density of 79 units.

11 "2. Heritage's Sunnyvale Heights project is a major
12 development due to the number of units and
13 potential impacts on neighboring properties.
14 As such, it must comply with [HZO 20].

15 ** * * * *

16 "4. As a major development, Heritage must make
17 certain on- and off-site improvements as a
18 condition of receiving building permits and
19 certificates of occupancy.

20 "5. There is not enough evidence to determine what
21 impact the Sunnyvale Heights Subdivision as
22 well as the neighboring properties will have
23 on the 'A' Line Canal bridge." Record 23-24
24 (emphasis added).

25 Based on these findings, the decision goes on to reject
26 the condition imposed by the planning commission that Heritage
27 fully improve the A Line Canal bridge, but imposes a condition
28 that Heritage enter into an irrevocable consent agreement

"6. Final Approval. No final approval or certificate of
occupancy will be issued by the City until such time as
the applicant has complied with all requirements and
shall not be issued if there is any major variance from
the site plan." (Emphasis added.)

1 requiring that, should the A Line Canal bridge ever be
2 improved, Heritage will contribute in an amount equal to the
3 development's impact on the area.

4 Much of the parties' contentions are framed in terms of
5 whether HZO 20 requires Heritage to submit a traffic impact
6 analysis as a mandatory approval criterion. Heritage disputes
7 that any provision of HZO 20 requires it to submit a traffic
8 analysis, or makes submission of a traffic analysis an
9 approval criterion requiring findings and support in the
10 record. Heritage acknowledges that HZO 20 may require an
11 applicant to submit "adequate information," but argues that a
12 code requirement to submit information is not itself an
13 approval standard, citing Keudell v. Union County, 19 Or LUBA
14 394, 399 (1990).

15 However, we also understand petitioners to contend that,
16 even if submission of a traffic impact analysis is not itself
17 an approval criterion under HZO 20, without a traffic impact
18 analysis of some kind there is no substantial evidence to
19 support the city's determination that Heritage has complied
20 with HZO 20(5). That is, petitioners cite to HZO 20(5.3) and
21 (5.4) as requiring the city to determine whether the proposed
22 development causes an "adverse impact" on surrounding
23 properties, and whether the proposed development requires an
24 "extension of public facilities." Petitioners argue that no
25 such determinations can be made in this case, or if made
26 implicitly, cannot be supported by substantial evidence,

1 absent some evidence in the record regarding how much traffic
2 the development will generate and hence the impact on
3 surrounding properties and public facilities, particularly the
4 A Line Canal bridge. As the city's findings acknowledge and
5 Heritage conceded below at Record 51, there is no evidence in
6 the record regarding how much traffic the 79 units of the
7 development will generate, or the capacity of adjacent
8 transportation facilities to absorb that traffic.

9 Heritage does not address this aspect of petitioners'
10 challenge. The challenged decision contains no express
11 findings directed at HZO 20(5.3) or (5.4), no determinations
12 regarding the impacts of the proposed development on
13 surrounding properties and public facilities such as the A
14 Line Canal bridge, and no interpretations regarding what the
15 city believes HZO 20(5.3) and (5.4) require. The decision
16 acknowledges "potential impacts on neighboring properties,"
17 but finds there is insufficient information regarding
18 potential traffic impacts, and essentially sidesteps the issue
19 by imposing a condition that ensures Heritage will pay its
20 fair share of future improvements, if any are made.

21 We agree with petitioners that HZO 20(5.3) and (5.4)
22 appear to require a determination whether the proposed
23 development will have adverse impacts on surrounding
24 properties or require the extension of public facilities. It
25 is difficult to imagine how either determination could be made
26 with respect to a 79-unit residential development, or, if

1 made, be supported by substantial evidence, in the absence of
2 information regarding potential traffic impacts. The city may
3 properly grant approval based on a finding that compliance
4 with an applicable approval criterion is feasible, accompanied
5 by imposition of conditions necessary to ensure that the
6 standard is satisfied. Burghardt v. City of Molalla, 29 Or
7 LUBA 223, 236 (1995). However, the city makes no findings
8 here with respect to HZO 20(5.3) or (5.4), or to any specific
9 provision of HZO 20, and the condition it imposes is
10 responsive to only one potential traffic impact, and thus
11 cannot assure that the relevant standards are satisfied. We
12 conclude that, given the absence of any evidence on traffic
13 impacts, the absence of findings regarding HZO 20(5) and the
14 absence of an explanation how the approval, as conditioned,
15 satisfies the requirements of HZO 20(5), the city's findings
16 are inadequate and lack substantial evidence.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioners argue that the city misconstrued HZO 20(5.6)
20 and made a decision not supported by substantial evidence when
21 it approved the application without finding that Heritage had
22 provided proof of review and approval by ODOT.

23 The challenged decision cites a letter from ODOT that
24 objected to a condition of the planning commission that
25 Heritage connect Evelyn Avenue to Highway 395. To address

1 ODOT's concerns, the city council deleted that condition and
2 imposed the following condition in its stead:

3 "If an access/connection permit is issued by [ODOT],
4 Heritage shall fully improve E. Evelyn Avenue from
5 S.E. 8th Street to Highway 395 South. (This
6 condition adequately addresses ODOT's concerns
7 raised above)." Record 24.

8 Petitioners contend that this condition fails to satisfy
9 the requirements of HZO 20(5.6) that affected agencies such as
10 ODOT approve the development. According to petitioners, the
11 condition still requires the connection between Evelyn Avenue
12 and Highway 395, a connection ODOT has not approved, but that
13 condition is itself conditioned on a requirement that Heritage
14 obtain a permit from ODOT to make the connection. Petitioners
15 submit that conditioning approval on future issuance of an
16 ODOT permit violates the "prior approval" requirements of HZO
17 20(5.6) and (6), and is not supported by substantial evidence
18 because no approval exists in the record.

19 Heritage responds that the challenged decision expressly
20 finds that the condition satisfies ODOT's only stated concern
21 with the project, which necessarily entails that ODOT's letter
22 raising that concern is evidence of ODOT's approval, as long
23 as the city's approval is not conditioned on a connection
24 between Evelyn Avenue and Highway 395. Heritage argues that,
25 while the challenged decision requires it to apply for an ODOT
26 permit, given ODOT's expressed opposition to the connection,
27 the contingent condition the city placed on its approval
28 effectively ensures that the project satisfies ODOT. Heritage

1 submits that there is evidence in the record of ODOT's
2 approval, and that the city's contingent condition is
3 sufficient to satisfy the requirements of HZO 20(5.6).

4 We agree with Heritage that ODOT's letter, which requests
5 that the city not condition the project on connection between
6 Evelyn Avenue and Highway 395, is evidence that ODOT approves
7 the project as long as its concern is addressed. The city's
8 finding that its contingent condition adequately addresses
9 ODOT's concerns is thus an indirect but adequate means of
10 finding that HZO 20(5.6) is satisfied.⁴ We conclude that the
11 city has not misconstrued HZO 20(5.6) and the city's finding
12 that its contingent condition adequately addresses ODOT's
13 concerns is supported by substantial evidence.⁵

14 The second assignment of error is denied.

15 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

16 In the third assignment of error, petitioners argue that
17 the city erred in approving the development without a complete
18 site plan, as required by HZO 20(5.1), and that the city's
19 finding that Heritage's incomplete site plan complies with
20 that provision is not supported by substantial evidence. In
21 the fourth assignment of error, petitioners argue that the

⁴To the extent the city's finding is not adequate, we agree with Heritage that the record clearly supports a finding that ODOT has approved the project, as contingently conditioned. ORS 197.835(11)(b).

⁵Petitioners do not assign error to the contingent condition itself as failing to ensure compliance with any mandatory approval criterion. Thus, to the extent the condition is related to any other approval criterion, we do not address how the contingent nature of the condition could ensure compliance.

1 city impermissibly deferred determining whether Heritage's
2 complete site plan complies with HZO 20(5) to a second stage
3 of review that does not afford petitioners notice and an
4 opportunity to be heard.

5 Petitioners explain that Heritage submitted site plans
6 for only four of the 15 lots in the subdivision, but sought
7 and obtained approval for multi-family development on all 15
8 lots. HZO 20(5.1) requires the applicant to submit a site
9 plan that shows "all existing and proposed structures and
10 their exterior dimensions." The city's finding No. 3 states
11 that Heritage's site plan complies with HZO 20, but that
12 finding is contradicted by condition No. 6, which conditions
13 approval of the application on Heritage's submission of a site
14 plan for the north side of Evelyn Avenue. Petitioners argue
15 that a complete site plan is a mandatory requirement, and that
16 absent a complete site plan, the city could not have made the
17 necessary determination whether or not the proposed
18 development complies with the provisions of HZO 20(5).

19 Heritage responds that submission of a complete site plan
20 is an application requirement only and not an approval
21 criterion as such. To the extent it is an approval criterion
22 or necessary to satisfy an approval criterion, Heritage argues
23 that the city's condition requiring Heritage to submit
24 complete site plans is sufficient to satisfy HZO 20(5.1).
25 Heritage argues that the city need only find that a site plan
26 is feasible and then condition approval on subsequent

1 submission of the plan. Although the city made no findings of
2 such feasibility, Heritage argues we may nonetheless infer the
3 feasibility of a site plan from the record and affirm the
4 decision based on ORS 197.835(11)(b).

5 We agree with petitioners that HZO 20(5.1) requires a
6 complete site plan of proposed buildings on the 15 lots, and
7 that the absence of a complete site plan prevents the city
8 from determining, as it must, that the proposed development
9 complies with the requirements of HZO 20(5). The city's
10 finding that the incomplete site plan submitted to it complies
11 with HZO 20(5.1) is not supported by substantial evidence in
12 the record.

13 Heritage does not direct us to any evidence in the record
14 clearly supporting a finding that the incomplete site plan
15 complies with HZO 20(5.1) or evidence that allows the city (or
16 us) to determine compliance of the entire proposed development
17 with HZO 20(5). We decline Heritage's suggestion that we may
18 infer from the record that submission of a complete site plan
19 is feasible. Heritage presumably refers to a doctrine rooted
20 in cases such as Meyer v. City of Portland, 67 Or App 274, 678
21 P2d 741, rev den 297 Or 82 (1984), and Rhyne v. Multnomah
22 County, 23 Or LUBA 442, 449 (1992), which allow a local
23 government to defer findings of compliance with approval
24 criteria to a second stage review without notice or
25 opportunity for hearing, as long as the local government finds
26 that compliance with the criterion is feasible. However,

1 Heritage does not explain how that doctrine is applicable to
2 the present case. The issue here is not whether it is
3 feasible for Heritage to submit a complete site plan, but
4 whether it is feasible for the 79-unit major development
5 proposed by Heritage to comply with the requirements of HZO
6 20(5). The city cannot make that determination in the absence
7 of a complete site plan, nor do we see how the record could
8 "clearly support" such a determination. See Tenly Properties
9 Corp. v. Washington County, ___ Or LUBA ___ (LUBA No. 97-110,
10 April 15, 1998), slip op 15-16 (where the applicant fails to
11 submit plans for a proposed turnaround facility, the county
12 cannot defer to a second stage of review without notice or
13 opportunity for a hearing a determination that the turnaround
14 facility is adequate).

15 Petitioners also cite to Meyer and Rhyne and similar
16 cases to support their argument, in the fourth assignment of
17 error, that the city impermissibly deferred a finding of
18 compliance with the requirements of HZO 20(5) to a second
19 stage of review that does not afford notice or opportunity to
20 be heard, without making a finding that compliance is
21 feasible.

22 Heritage repeats its arguments made with respect to the
23 third assignment of error, adding only a threshold argument
24 that petitioners fail to cite in the record where any
25 participant raised the issue of the city's impermissible

1 deferral. Heritage contends that petitioners have thus waived
2 that issue pursuant to ORS 197.835(3).

3 ORS 197.835(3) does not require petitioners to raise
4 issues regarding aspects of a condition of approval that were
5 not imposed until the governing body adopted the final
6 decision. See Beck v. City of Happy Valley, 27 Or LUBA 631,
7 637 (1994). Because the city did not impose the condition
8 deferring a determination respecting the complete site plan
9 until the final written decision, petitioners had no
10 opportunity to raise issues regarding any aspect of that
11 condition. Petitioners have not waived the issue presented in
12 the fourth assignment of error.

13 On the merits of the fourth assignment of error, we agree
14 with petitioners that the city's approval of the entire 15-lot
15 development, conditioned on submission of a complete site
16 plan, impermissibly defers a finding of compliance with
17 relevant provisions of HZO 20(5) to a second stage of review
18 without notice or opportunity to be heard, and without a
19 finding that compliance is feasible. As indicated above, we
20 do not understand how the city can make a competent
21 determination that the entire 15-lot development complies with
22 applicable criteria, or that compliance is feasible, on the
23 basis of a partial site plan.

24 The third and fourth assignments of error are sustained.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the record lacks substantial
3 evidence that the proposed development complies with the off-
4 street parking requirements imposed by HZO 18(1). HZO 18(1)
5 requires that a proposed multi-family dwelling development
6 provide two off-street parking spaces per unit for every unit
7 with three or more bedrooms, and 1.5 off-street parking spaces
8 for units with less than three bedrooms. Petitioners contend
9 that the site plan submitted by Heritage does not show the
10 number of bedrooms per multi-family unit or the number of off-
11 street parking spaces being provided for each unit.
12 Petitioners assert that there is no evidence in the record
13 regarding off-street parking.

14 Heritage responds that Heritage's representative
15 testified to the city council that "two parking spaces will be
16 provided per unit." Record 207. Heritage argues that this
17 testimony is un rebutted, and suffices to provide substantial
18 evidence that it will provide two parking spaces for each of
19 the 79 units in the development, which satisfies the
20 requirements of HZO 18(1).

21 We disagree with Heritage that the cited testimony is
22 substantial evidence supporting a finding of compliance with
23 HZO 18(1). As an initial matter, we note that the city makes
24 no findings whatsoever regarding compliance with HZO 18(1).
25 Although petitioners challenge the absence of evidence
26 supporting findings of compliance with HZO 18(1) rather than

1 the absence of those findings, the latter is a predicate to
2 the former. Where findings are absent or inadequate, we may
3 affirm the decision only if the parties identify evidence in
4 the record that "clearly supports" the city's decision. ORS
5 197.835(11)(b). However, in the absence of a complete site
6 plan, we cannot say that an oral comment that Heritage will
7 provide two parking spaces per unit is sufficient to establish
8 compliance with the off-street parking requirement, much less
9 demonstrate that the record "clearly supports" such a finding.

10 The fifth assignment of error is sustained.

11 The city's decision is remanded.