BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

IAN MCELROY,	)	
	)	
Petitioner,	)	
	)	LUBA No. 98-151
vs.	)	
	)	FINAL OPINION
CITY OF CORVALLIS,	)	AND ORDER
	)	
Respondent.	)	

Appeal from City of Corvallis.

Richard D. Rodeman, Corvallis, filed the petition for review and argued on behalf of petitioner.

James K. Brewer, Corvallis, filed the response brief and argued on behalf of respondent. With him on the brief was Scott A. Fewel.

HOLSTUN, Board Chair.

AFFIRMED 04/29/99

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

Petitioner appeals the city's decision approving in part and denying in part his requests for modification of a planned development.

FACTS

The subject property is a 3.3-acre tract designated for Professional and Administrative Office uses, and subject to a Planned Development Overlay that requires any applicant for development to submit that application for evaluation under the city's Land Development Code (LDC) 2.5. Part of the subject property is bordered on the north by residences.

In 1995, petitioner applied for a planned development under LDC 2.5 for an office complex consisting of three buildings, A, B, and C. The elevations submitted as part of that application did not show any windows on the north side of Building C, although an accompanying narrative mentioned generous window treatment for Building C. The city approved the original development plan, with conditions, on February 7, 1996. Condition 21 of the 1996 approval required the development to maintain the grade that existed on the site prior to any construction.

In 1997, petitioner filed a request for modification of the 1996 approval, requesting that the city modify the exterior finish of the buildings and the roof pitch requirements. The planning commission (commission) approved one requested modification, and denied the other. However, the commission also expanded the review process to address the placement of windows on the north side of Building C, and a variety of landscaping, drainage, fill and floodplain issues. The commission allowed petitioner to place windows on the north side of Building C, but required landscaping modifications to screen the windows and required construction of a drainage swale between the buildings and abutting residential property lines to the north.

Both petitioner and opponents of the modification appealed the commission's decision to the city council. The city council conducted a public hearing on both appeals, and in January 1998 issued a decision that in relevant part prohibited petitioner from placing windows on the north side of Building C to avoid impacts on adjacent residences. The city council also affirmed grading requirements that were imposed by the commission, including construction of a gentle swale on the northern perimeter of the subject property where it abuts residential property. Petitioner did not appeal that decision to LUBA.

During the pendency of the first modification request before the commission and council, petitioner had obtained a grading permit and building permits for Buildings B and C. Petitioner constructed both buildings, placing windows on the north side of Building C, and added fill to alter the grade around each of the three building sites.

In May 1998, petitioner applied for additional modifications to the planned development, requesting two modifications: (1) eliminating roof overhangs; and (2) allowing windows on the north side of Building C, with modified grading and landscaping elements between Building C and the residence to the north. Petitioner also sought "clarifications" regarding grading profiles and certain landscaping issues for the site as a whole. The commission approved the modification for roof overhangs and the requested grading and landscaping elements on the north side of Building C, but denied the requested windows on the north side of Building C. In addition, the commission provided "clarification" regarding grading in other areas of the site, in the course of which it modified Condition 21A to require a grading profile no flatter than 3:1 in order to return the site to the preexisting grade as quickly as possible.

Petitioner appealed the commission's decision to the city council. The council conducted a de novo public hearing on August 17, 1998, and, at the conclusion of that hearing, deliberated and voted (1) to deny petitioner's appeal, thus affirming the commission's decision, and (2) to further modify Condition 21A as provided in a staff

memorandum dated August 7, 1998.[1] On the same date, the city issued a notice of disposition that stated that the city council had denied petitioner's appeal and that the council had adopted the findings and conclusions in a staff report dated August 10, 1998. Attached to the notice of disposition was a list of applicable conditions of approval; however, due to clerical error, the text of Condition 21A did not accurately reflect the amendments added by the city council's vote.

Petitioner appealed the city's decision to LUBA on September 4, 1998. The city withdrew the August 17, 1998 decision for reconsideration, pursuant to OAR 661-010-0021. On October 19, 1998, the city council met to deliberate on the reconsideration, but did not reopen the record or allow new testimony or evidence. Petitioner submitted a lengthy document that contained both new evidence and argument; however, the council declined to reopen the record to accept that document. At the conclusion of the October 19, 1998 deliberations, the council voted to deny petitioner's appeal and adopt the findings and conclusions in an October 12, 1998 staff report, and further to modify Condition 21A as provided in the August 7, 1998 staff memorandum. See n 1.

This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argues that the city exceeded its jurisdiction (first assignment), failed to follow applicable procedures (second assignment) and misconstrued the applicable law (third assignment) when it modified the 1996 planned development approval in ways that, according to petitioner, are contrary to the procedures and requirements of LDC 2.5.

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[1]As set out in the August 7, 1998 staff memorandum, Condition 21A provides:

> "As shown by the crosshatch shading on Attachment Z, fill slopes shall extend from up to 6-inches below finished floor grade of the buildings or courtyards toward the abutting property lines and shall not be any flatter than 3:1, thereby returning grades toward pre-construction ground elevation as quickly as possible and minimizing the amount of fill necessary to accommodate approved features." Record 163 (emphasis added to represent city council's modification to the version of Condition 21A imposed by the commission).

Petitioner combined his argument under these three assignments of error, and essentially makes a single argument in support of all three assignments. We follow petitioner in addressing these assignments of error together.

LDC 2.5.50.06, which governs major modifications of a detailed development plan approved under LDC 2.5, provides that:

> "(a) An applicant may petition for review of previously approved plans for purposes of modifying a Planned Development stating reasons for the change.
>
> "(b) Where the Director determines that the proposed change is a Major Modification from one or more of the review criteria listed above in [LDC] 2.5.50.04, a hearing shall be scheduled before the Planning Commission in accordance with Chapter 2.0 – Public Hearings.
>
> "(c) Upon finding that the petition is reasonable and valid, the Planning Commission may consider the redesign in whole or in part of any Detailed Development Plan.
>
> "(d) In reviewing the proposed modification, the Planning Commission shall follow the procedures herein required for Detailed Development Plan submittal and review. The Commission shall consider the review criteria in [LDC] 2.5.40.04 to determine whether to authorize a Major Modification." (Emphasis added).

Petitioner argues the city misinterpreted LDC 2.5.50.06(c) as allowing it to expand the scope of review to include modifications that the applicant does not request and that are not related to any modifications the applicant requests. According to petitioner, LDC 2.5.50.06(c) allows the city to "consider the redesign in whole or in part" of the original 1996 development plan only upon a finding that petitioner's request for modifications of that plan is "reasonable and valid." Consequently, petitioner argues, the city's ability to "consider the redesign" of the original plan is limited to those modifications requested in petitioner's application that the commission finds to be "reasonable and valid." In short, petitioner understands LDC 2.5.50.06(c) as allowing the city to consider redesign of the original plan in "whole" only where petitioner requests modification of the entire plan and the commission finds that that request is reasonable and valid. Conversely, petitioner argues, the city may

consider redesign of the plan "in part" where petitioner requests a partial modification, and then only to the extent of petitioner's requested modifications.

In the challenged decision, the city council adopted findings that state, in relevant part:

> "The ability of the Planning Commission to address issues not specifically requested by the applicant is identified in Section 2.5.50.06.c of the [LDC] which states that 'the Planning Commission may consider the redesign in whole or in part of any Detailed Development Plan.' The City Council finds that Planning Commission consideration of the grading issue is appropriate and in accordance with established provisions in [LDC] 2.5.50.06.c." Record 50.

Petitioner argues that the above-quoted finding, to the extent it constitutes an interpretation of LDC 2.5.50.06(c), is inadequate for review; or, if that interpretation is adequate for review, petitioner argues that it is contrary to the language of LDC 2.5.50.06(c) and thus "clearly wrong." ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 271, 843 P2d 992 (1992); see also Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d 1051 (1996) (an interpretation is clearly wrong when the reviewing body can say that no person could reasonably interpret the provision in the manner the local body did).

We disagree with petitioner that the above-quoted finding, so far as it goes, is inadequate for review. An interpretation is adequate for review where "it suffices to identify and explain in writing the decisionmaker's understanding of the meaning of the local legislation." Weeks v. City of Tillamook, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992). The city council's understanding of LDC 2.5.50.06(c), that it allows the planning commission to "address issues not specifically requested by the applicant," is plainly and unambiguously expressed in its finding. The city council expressly interpreted LDC 2.5.50.06(c) in a manner directly contrary to petitioner's view that LDC 2.5.50.06(c) limits the scope of the commission's review to modifications requested by the applicant.

It is true, as petitioner argues, that the challenged interpretation does not expressly consider the meaning of the first clause of LDC 2.5.50.06(c), or how the meaning of that first clause, considered in isolation, might narrow the meaning of the second clause. However, that argument is better framed as an argument that the challenged interpretation is "clearly wrong."

Petitioner contends that the challenged interpretation fails under the deferential review standard stated in ORS 197.829(1) and Goose Hollow Foothills League because no person could reasonably construe LDC 2.5.50.06(c) in its entirety as allowing the commission to address modifications beyond those requested by the applicant. We disagree. The limitation that petitioner reads into LDC 2.5.50.06(c) is not expressed in either of the two clauses of that provision. Neither is that limitation necessarily inferred from both clauses read together. A person could reasonably conclude that the second clause of LDC 2.5.50.06(c), read in context with the first clause, allows the planning commission to address modifications beyond those requested by the applicant.

The foregoing resolves petitioner's combined argument stated in the first, second and third assignments of error, with one possible exception. Interwoven with petitioner's challenge to the city's interpretation of LDC 2.5.50.06(c) is a challenge to the city's failure to adopt findings regarding whether petitioner's application is "reasonable and valid." Petitioner argues, for example, that a finding regarding whether an application for modification is "reasonable and valid" is a precondition to the city's authority to "consider the redesign" of the approved development plan. Petition for Review 11. To the extent this argument merely restates the interpretational issue, we reject it for the same reasons expressed above. However, petitioner could be understood to argue that, even if LDC 2.5.50.06(c) allows the city to address issues beyond those requested by an applicant, it has no authority to do so absent findings that some or all of the requested modifications are "reasonable and valid."

The city responds that petitioner failed to raise below any issues regarding whether LDC 2.5.50.06(c) requires a specific finding that one or more requested modifications are "reasonable and valid," and whether adoption of such a finding is a precondition to exercise of authority under that provision. Consequently, the city argues, petitioner waived the right to raise that issue before LUBA. ORS 197.835(3). Petitioner does not respond to this argument, or cite to portions of the record where this issue was raised below. Accordingly, we agree with the city that the issue is waived. Friends of Indian Ford v. Deschutes County, 31 Or LUBA 248, 255 (1996).

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city's findings regarding the disputed windows on the north side of Building C are inadequate and not supported by substantial evidence.

With respect to petitioner's request to install the disputed windows, the challenged decision states that:

> "The City Council finds that [petitioner submitted] a revised landscaping plan, revised grading plan, revised fence treatment and redundant operational interventions (window coverings and agreements with occupants and cleaning personnel to close the window coverings). The City Council finds that these measures are not sufficient to mitigate the impacts related to the size of the windows, the proximity of the adjacent residential structure, the need to protect the existing residential property from the light spillage, visual impacts of the new office structure which results in the need to protect the adjacent residential properties' privacy. The Council further finds that there is uncertainty that any landscaping plan could adequately buffer these impacts and that these factors in combination were sufficient to deny the request for windows. The Council thereby concludes that the most effective manner to ensure visual impacts related to compatibility criteria identified [at LDC] 2.5.40.04 is to prohibit the installation of windows in the north side of Building 'C'" Record 54-55.

Petitioner argues that the above-quoted finding is "too conclusory to allow adequate review, and do[es] not respond to the evidence presented by the applicant[.]" Petition for Review 14. The only other argument petitioner presents under this assignment of error is an

assertion that the city "perpetuates the error of interpretation that allowed the City to review the window issue in January 1998 (when Developer did not seek any modification at that time on windows)." Id. at 15.

LUBA has suggested that findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. Salem-Keizer School Dist. 24-J v. City of Salem, 27 Or LUBA 351, 371 (quoting Commonwealth Properties v. Washington County, 35 Or App 387, 400, 582 P2d 1384 (1978). However, findings of noncompliance must be adequate to explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. Id.

Where the petitioner challenges a county's denial of land use approval on evidentiary grounds, it is not sufficient for the petitioner to demonstrate that substantial evidence in the record would also support a finding of compliance with applicable criteria. In bringing an evidentiary challenge to a finding of noncompliance, the petitioner must show that the evidence in the record demonstrates that the proposed use complies with applicable criteria as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979); Horizon Construction, Inc. v. City of Newberg, 28 Or LUBA 632, 641-42 (1995). That is, petitioner must establish that the evidence is such that a reasonable trier of fact could draw no conclusion other than that the proposal complies with applicable criteria. Horizon Construction, 28 Or LUBA at 641.

Petitioner makes no attempt to explain why the above-quoted findings are inadequate under Salem-Keizer School Dist. 24-J, nor does petitioner argue that the evidence is such that a reasonable trier of fact could draw no conclusion other than that the requested windows comply with the compatibility criteria at LDC 2.5.40.04. Petitioner's final argument is either a collateral attack on the city's January 1998 decision to prohibit windows on the north side

of Building C, or wholly derivative of its arguments under the first three assignments of error. In either case, it provides no basis to reverse or remand the challenged decision.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner contends that the city's revision of Condition 21A "at this development stage" is an unconstitutional taking of property. Petition for Review 15.

Petitioner's argument under this assignment of error is particularly difficult to follow. After summarizing several state and federal takings cases, petitioner concludes that

> "The City of Corvallis did not have any 'nexus' or rational relationship between the land use decision being made (a denial of windows and approval of roof overhangs) to the conditions attempted to be imposed (related to drainage/landscaping/grading). * * * Recall that this condition was imposed at the end of the development process: first after Comp[rehensive] Plan, Development District, Subdivision approval, Planned Development Approval, and one modification to the [Planned Development]. The timing in the development process is too late, the absence of any nexus is there, and the City has failed to make any findings in support of the condition related to impacts of this particular development action [the second request for modifications] on the site. For these reasons, the Board must find that the revised condition #21 is unconstitutional." Petition for Review 18.

Among the items missing from petitioner's argument is any explanation as to what property or property interest the city might conceivably have "taken" by requiring petitioner to regrade part of the subject property. Even if petitioner has a constitutionally protected property right in the approved development plan, petitioner has not demonstrated that the approved development plan actually allows the grading that the city objects to. As the city points out, there is considerable evidence in the record that the development plan prohibits the grading that petitioner installed, and that Condition 21A merely "clarifies" what the development plan has required all along.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the city failed to follow applicable procedures in two respects. First, petitioner contends that, when the city withdrew and reconsidered its August 17, 1998 decision, it erred in reconsidering the withdrawn decision without conducting a public hearing or providing petitioner an opportunity to rebut the staff report dated October 12, 1998. Second, petitioner argues that the city erred by changing its position regarding landscape and grading issues without providing petitioner an opportunity to respond to that change in position.

A. Withdrawal for Reconsideration

In ONRC v. City of Seaside, 26 Or LUBA 645 (1994), we held that a local government may withdraw a decision for reconsideration under OAR 661-010-0021 and, absent local provisions to the contrary, limit its reconsideration to adoption of adequate findings. However, petitioner argues that in the present case the city went further than adoption of findings, but conducted a public meeting at which the city council deliberated over the merits of its August 17, 1998 decision and made a new final decision that differed substantively from its August 17, 1998 decision. Petitioner relies upon Tylka v. Clackamas County, 28 Or LUBA 417, 426 (1994), for the proposition that on withdrawing a decision for reconsideration under OAR 661-010-0021 the city must "follow any applicable requirements its own land use regulations impose" for making a new final decision. Consequently, petitioner argues, when the city chose to reconsider the merits of its August 17, 1998 decision and chose to consider "new evidence" in the form of the October 12, 1998 staff report, the city was required to conform to all applicable requirements in its code, including the requirements for a public hearing and an opportunity for petitioner to argue and present evidence.

As we noted in ONRC, no statutes or state administrative rules prescribe any particular process that must be followed when a local government withdraws a decision on

reconsideration. Further, as Tylka indicates, absent local provisions dictating the process on reconsideration, the local government must follow any applicable requirements in its own land use regulations. However, as our holdings in ONRC and Tylka demonstrate, where no local provisions dictate the process to be followed on reconsideration, it is up to the local government to determine how far back in the process it will take the decision on reconsideration.[2] Which local land use regulations are "applicable," therefore, depends upon what stage in the process the local government returns to on reconsideration. In other words, a local government may return a decision for reconsideration to the stage of an evidentiary hearing, in which case the procedures applicable to evidentiary hearings would apply. Similarly, a local government could return a decision for reconsideration to the stage of the decision maker's deliberations, based on the record previously compiled, in which case the procedures applicable to evidentiary hearings would not apply.

In the present case, it appears that the city chose to return to the deliberations stage, allowing it to consider a range of options regarding petitioner's local appeal of the commission's decision, based on the record compiled in the previous evidentiary hearing. Presumably, some portion of the city's land use regulations applied to the city's deliberations on reconsideration. However, because petitioner does not cite to any local provisions, it is difficult to determine what local provisions, if any, the city might have violated at that stage. Instead, petitioner argues that the October 12, 1998 staff report, which recommended that the city amend Condition 21A, is "evidence" that the city was required under unspecified code provisions to allow petitioner an opportunity to rebut.

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[2]For example, in ONRC the city limited its proceedings on reconsideration to the adoption of new findings. 26 Or LUBA at 645. In Tylka, the hearings officer did not conduct a new evidentiary hearing, but solicited findings from the applicant, who submitted proposed findings that the hearings officer eventually adopted as part of the decision on reconsideration. 28 Or LUBA at 422. We held in that circumstance that the county's regulations regarding ex parte communications applied to the hearings officer's decision on reconsideration, and that the communication between the hearings officer and the applicant violated those provisions. Id. at 427.

In Flynn v. Polk County, 17 Or LUBA 68, 71 (1989), we held that a staff memorandum submitted to the decision makers after the close of the evidentiary hearing did not trigger an obligation for the county to reopen the record for rebuttal, unless the communication infringes on a party's right to rebut evidence in the record. In the present case, petitioner has not established that Condition 21A or anything else in the October 12, 1998 staff report constitutes "evidence." Accordingly, we conclude that petitioner has not established that the city's refusal to provide him an opportunity to rebut the October 10, 1998 staff report or otherwise submit argument and evidence into the record during the October 19, 1998 deliberations is a basis for reversal or remand.

The first subassignment of error is denied.

B. Changing Interpretation

Petitioner also argues that the city erred in changing its interpretation during the course of the proceedings below without providing an opportunity for a hearing. We understand petitioner to contend that at some point city planning staff approved certain grading profiles, which petitioner relied upon in placing fill on the subject property. Petitioner argues that Condition 21A, which has the effect of requiring the removal of some fill to return part of the site to the preexisting grade, is inconsistent with the city's prior grading approvals.

However, petitioner does not point to any "interpretation" of a local provision that the city changed at some point in the proceedings below. Even if it is true that city planning staff approved certain grading profiles allowing petitioner to place fill on the subject property (something the city disputes), we fail to perceive any interpretation in that act, or any "reinterpretation" in the city's adoption of Condition 21A. Petitioner cites to Tenly Properties Corp. v. Washington County, ___ Or LUBA ___ (LUBA No. 97-110, April 15, 1998) for the proposition that when a local government interprets its code in order to impose a new condition on reconsideration, the local government must provide opportunity for a

hearing and chance for rebuttal. Petition for Review 20. Tenly Properties says nothing of the kind. However, where a local government adopts interpretations of local legislation after the evidentiary hearing is closed and after the opportunity for oral argument has concluded, the local government may, in limited circumstances, be required to allow the parties an opportunity to present additional argument or evidence concerning those interpretations. Gutoski v. Lane County, 155 Or App 369, 373-74, 963 P2d 145 (1998). In Gutoski, the Court of Appeals held that LUBA may consider remanding a local decision that denies an opportunity to present additional argument or evidence where (1) the local government makes an interpretation after the close of the initial evidentiary hearing that either significantly changes an existing interpretation or is beyond the range of interpretations that the parties could reasonably have anticipated at the time of the initial evidentiary hearing; and (2) the party seeking reversal demonstrates to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation. 155 Or App at 373-74. While Gutoski appears to supply the legal principle petitioner invokes, petitioner does not argue, and we do not perceive it to be the case, that the present case fits within the circumstances described in Gutoski.

Petitioner's argument under this subassignment of error fails to state a basis for reversal or remand.

The second subassignment of error is denied.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner contends that the city violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, when it failed to open the record to allow petitioner to respond to new evidence and the revised Condition 21A recommended in the October 12, 1998 staff report.

However, petitioner makes no effort to explain why the city's refusal to reopen the record violates either clause of the United States Constitution. Nor is the applicability of those constitutional provisions otherwise apparent. As the city points out, city planning staff recommended that the city council adopt revised Condition 21A prior to the initial evidentiary hearing. Petitioner had ample opportunity during that evidentiary hearing to respond to revised Condition 21A. Further, the city council voted at the conclusion of the initial evidentiary hearing to adopt revised Condition 21A, and only through a clerical error did the city's August 18, 1998 decision misstate the terms of that condition. Petitioner has failed to establish an arguable basis that the city denied him any process otherwise due, or that the city denied him the equal protection of the law.

The city's decision is affirmed.