BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BARNARD PERKINS CORP. and B.L. PERKINS,	)	
Petitioners,	)	
vs.	)	LUBA No. 98-145
CITY OF RIVERGROVE,	)	FINAL OPINION AND ORDER
Respondent.	)	

Appeal from City of Rivergrove.

Dean N. Alterman, Portland, filed the petition for review. With him on the brief was Kell, Alterman & Runstein.

Daniel Kearns, Portland, filed the response brief. With him on the brief was Reeve Kearns. Michael K. Collmeyer, Portland, argued on behalf of respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

AFFIRMED 05/26/99

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

Petitioners appeal a city council decision denying their application for approval to build a 60-unit condominium on 6.7 residentially-zoned acres, to cut trees and to grade and fill the property in conjunction with the project.[1]

FACTS

In January 1997, petitioners filed an application requesting approval for the disputed development. There followed a number of communications between the city and petitioners, as a result of which petitioners submitted additional fees and plans. On April 6, 1998, petitioners submitted a commitment to pay certain costs, and the city considered petitioners' application to be complete on that date.

The planning commission denied the application on July 6, 1998, and petitioners appealed the planning commission's decision to the city council. At the August 10, 1998 city council hearing in this matter, petitioners advised the city council that a petition for writ of mandamus had been filed that date in Clackamas County Circuit Court. In that petition for writ of mandamus, petitioners claimed that the application in this matter was complete on December 29, 1997, and that the city had failed to issue a final decision within 120 days

[1]The petition for review in this matter was filed on October 8, 1998. On October 21, 1998, this appeal was suspended at the request of respondent. In letters dated December 22, 1998, and December 23, 1998, petitioners' attorneys advised LUBA that they no longer represented petitioners. On December 29, 1998, LUBA issued an order reactivating the appeal. In a letter dated December 29, 1999, LUBA acknowledged receipt of the letters from petitioners' former attorneys. In that December 29, 1998 letter, LUBA advised petitioners and petitioners' former attorneys that while Mr. B. L. Perkins could represent himself in this appeal, Bernard Perkins Corp. must be represented by an attorney admitted to practice in Oregon. On April 20, 1998, three days before the date scheduled for oral argument in this matter, petitioner B.L. Perkins requested that oral argument be rescheduled to allow him to seek an attorney to represent him and Bernard Perkins Corp. in this matter. Respondent objected to the request, and the Board denied petitioner B.L. Perkins's request. Only respondent appeared at oral argument.

thereafter, as required by ORS 227.178.[2]

At the conclusion of the August 10, 1998 city council hearing in this matter, the city council issued its final written decision denying petitioners' application. Respondent moved to dismiss petitioners' mandamus proceeding, alleging that petitioners' application was not complete until April 6, 1998, and that the city's August 10, 1998 decision was issued within the 120-day deadline established by ORS 227.178.[3] On November 20, 1998, the Clackamas County Circuit Court granted respondent's motion to dismiss. The Circuit Court's decision was not appealed to the Court of Appeals.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city erred by failing to render its final decision within 120 days after the application was complete. Petitioners contend the city was without jurisdiction to deny petitioners' application after petitioners filed their mandamus proceeding under ORS 227.178. Petitioners also argue the city erred by not refunding one-half of petitioners' application fee, as required by ORS 227.178(7)(a), when a final decision is not rendered within the 120-day statutory deadline.

As was noted in the discussion of the facts above, the issue of whether the city's decision was rendered within 120 days after the application was complete, as required by ORS 227.178(1), was decided adversely to petitioners by the Clackamas County Circuit Court's decision in petitioners' separate mandamus proceeding. Accordingly, petitioner's first assignment of error is denied.

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[2]According to respondent, petitioners did not provide a signed copy of the petition for writ of mandamus, a signed order staying the local proceedings, or an order signed by a judge issuing an alternative writ of mandamus at the August 10, 1998 city council hearing.

[3]Respondent took the position in its motion to dismiss that the 120-day deadline was extended for fourteen days by petitioners' June 1, 1998 request that the record remain open for seven days and their subsequent right to final rebuttal. ORS 197.763(6)(d) and (e). The circuit court agreed that with these two seven-day extensions, the city's August 10, 1998 decision complied with the statutory 120-day deadline.

FOURTH ASSIGNMENT OF ERROR

A. Design Review

Design review was a component of the city's review in this matter. City of Rivergrove Land Development Ordinance (RLDO) 6.234 provides:

> "Requests for Development * * * which require Site Design Review shall be submitted along with adequate information to allow the design review to occur. This information shall include site plans, grading plans, architectural drawings and any other supporting materials which would be helpful in explaining the development proposal to the Planning Commission.
>
> "The Planning Commission may require changes in a proposed project to ensure that the following general design criteria are met to the maximum extent practical in a particular development proposal.
>
> "(a) The project shall contain a safe and efficient traffic circulation system which meets the needs of both pedestrians and automobiles.
>
> "(b) The project shall not create any situations which contain significant hazard to life or property.
>
> "(c) In an environmentally sensitive area, grading, filling, and diversion of drainage ways shall be minimized.
>
> "(d) Natural vegetation, specifically large trees[,] shall be preserved whenever practical.
>
> "(e) The proposed project shall meet the criteria established in the Policies of the Comprehensive Plan when appropriate." (Emphasis added.)

The city council denied petitioners' application, in part, because it found that significant changes would be required in the proposal to meet each of the five general design criteria set out above. Petitioners do not specifically challenge those findings. Rather, petitioners suggest that while RLDO 6.234 authorizes the city to require changes in their application for design review, it does not authorize the city to deny an application for failure to comply with one or more of the general design criteria.

Literally read, the above-emphasized language in RLDO 6.234 is a grant of authority to impose conditions and does not say anything about whether an application that fails to

meet the general design criteria can be denied. While the negative inference petitioners apparently read into that language may be plausible, we do not find that such an inference is required. The city council specifically rejected petitioners' interpretation of RLDO 6.234 and found that RLDO 6.234 does not limit the city's authority in the manner petitioners argue. The city's interpretation is clearly within the discretion it must be given on review by this Board. ORS 197.829(1); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[4]

B. Wetlands Setback

RLDO 5.070 requires, in part, that "[t]here shall be no new development within 25 feet of a wetland area identified by the U.S. Army Corps of Engineers." The Army Corps of Engineers had not identified wetland areas on the subject property prior to the date the disputed application was filed. However, during the permit review process, wetlands were identified on the subject property by petitioners' consultants using the Army Corps of Engineers' 1987 delineation manual. Record 354. The Army Corps of Engineers advised the city that the identified wetlands are subject to the Corps' jurisdiction. Record 221-22. Because the proposed development includes development within 25 feet of the identified wetlands, the city council denied the application.

Petitioners appear to argue that RLDO only applies in cases where the Army Corps of Engineers has "identified" a wetland prior to the date a permit application is submitted. The city council rejected that interpretation and concluded that the 25-foot setback required by RLDO 5.070 must be met where a wetland subject to the Army Corps of Engineers'

[4]We note that Court of Appeals' decision in Byrnes v. City of Hillsboro, 101 Or App 307, 311, 790 P2d 553 (1990), a case decided before Clark, strongly suggests that the Court of Appeals would deny petitioners' invitation to substitute their interpretation of RLDO 6.234 for the city council's interpretation, even without the deferential standard of review that must be applied to the city council's interpretation after Clark. The relevant code provision in Byrnes specifically provided that a permit to demolish a historic structure "shall not be denied outright." Byrnes, 101 Or App at 310. Notwithstanding that language, the Court of Appeals held that the city could deny a permit application.

jurisdiction is identified during the permitting process. That interpretation and application of RLDO 5.070 is within the city council's discretion under ORS 197.829 and Clark.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The city council also found that the application violates the setback requirements of RLDO 5.080. The essence of the dispute between petitioners and the city in interpreting and applying RLDO 5.080 is that petitioners argue the front and rear lot lines are determined solely by lot orientation, while the city council interpreted RLDO 5.080 to require that it consider building orientation as well. As interpreted by the city, six of the buildings violate the required rear lot line setback requirement.

We agree with the city that RLDO 5.080 does not clearly dictate how the rear and front property lines are to be identified. The city's interpretation is not clearly wrong. Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d 1051, rev den 324 Or 322, 927 P2d 598 (1996); Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854 (1994); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992).

The fifth assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR

Because we reject petitioners' fourth and fifth assignments of error, the city's findings that the disputed application violates RLDO 6.234, 5.070 and 5.080 express several separate and independent bases for denying the disputed proposal. Accordingly, the city's decision must be affirmed. Gionet v. City of Tualatin, 30 Or LUBA 96, 98 (1995); Duck Delivery Produce v. Deschutes County, 28 Or LUBA 614, 616 (1995); Douglas v. Multnomah County, 18 Or LUBA 607, 618-619 (1990); Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46 (1982). We therefore need not and do not consider petitioners' other

assignments of error, which challenge other reasons given by the city for denying the challenged application.

The city's decision is affirmed.