

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 JAMES DUTCHUK, CASSANDRA DUTCHUK
5 and J.C. VAN VOORHEES,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF PRINEVILLE,
11 *Respondent,*
12

13 and
14

15 BARNES BUTTE PROPERTIES, LLC,
16 *Intervenor-Respondent.*
17

18 LUBA No. 99-134
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Prineville.
24

25 J.C. Van Voorhees, Prineville, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Van Voorhees and Larson.
27

28 No appearance by City of Prineville.
29

30 Laura Craska Cooper, Bend, filed the response brief and argued on behalf of
31 intervenor-respondent. With her on the brief was Ball Janik LLP.
32

33 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.
35

36 AFFIRMED

6/26/2000
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38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioners appeal a decision of the city council to approve a conditional use permit to site seven four-plexes in the city’s General Residential (R-2) zone.

MOTION TO INTERVENE

Barnes Butte Properties, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is located within the city limits of Prineville and contains approximately 2.6 acres. It is bordered on the north by the Loma Lista Subdivision, which is zoned Limited Residential (R-1), on the west by Jordan Lane, and on the south by the right-of-way for the realignment of Hudspeth Road. The areas to the north and west of the subject property are developed with single-family homes.

In 1994, Prineville Properties submitted an application for tentative subdivision plat approval for Addition 3 of the Pioneer Heights Subdivision (Addition 3). Addition 3 proposed lots for single-family development, and proposed the realignment of roads within and leading to the subdivision. The city approved the tentative subdivision plat, with conditions, including conditions regarding design and construction standards for the roads leading to the subdivision. At the time the challenged decision was made in this case, the final subdivision plat for Addition 3 had not yet been filed.

In 1999, intervenor filed an application for a conditional use permit to site an apartment complex consisting of seven four-plexes on the subject property. The apartment complex is designed with a single entrance, and the internal transportation system is located towards the center of the property. A children’s play area is proposed on the north border of the subject property. The entire property is to be fenced.

Petitioners Dutchuk own and reside on two lots bordering the subject property to the

1 north. At the planning commission hearings below, they testified that the apartment building
2 closest to their property interfered with their view and the quiet enjoyment of their residential
3 use. In addition, the Dutchuks expressed concern that the proposed apartment complex would
4 reduce the property values of the nearby single-family dwellings.

5 As a result of the opposition testimony, the planning commission amended the
6 proposed site plan by adopting a condition of approval to eliminate the proposed two-story
7 four-plex closest to the Dutchuk property. The planning commission approval was subject to
8 other conditions, including conditions that impose standards for the design and construction
9 of Hudspeth Road that differ from the standards that were imposed as a result of the Addition
10 3 tentative subdivision plat approval.

11 Both the applicant and opponents appealed the planning commission's decision to the
12 city council. On review, the city council determined that the planning commission erred by
13 failing to adopt findings supporting its condition of approval removing the disputed building
14 from the proposed site plan. The council deleted the planning commission's condition of
15 approval, and affirmed the remainder of the planning commission's decision.

16 This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR¹**

18 Prineville Land Development Ordinance (PLDO) 12.040(11) and (12) establish the
19 procedure the city council follows in land use appeals. They provide:

20 “(11) Appeal or review proceedings shall be conducted in open session by
21 the reviewing authority, and testimony and evidence shall be strictly
22 limited to those issues set forth in the petition for appeal or review
23 unless the hearing authority specifically provides otherwise. Only if
24 the hearing authority finds sufficient reasons related to an inadequate
25 record, or finds specific procedural errors, shall the hearing record be
26 reopened, and only if the hearing record is reopened shall any new
27 issues and evidence or testimony related to such issues be permitted.

¹A portion of petitioners' argument under the first assignment of error is combined with our discussion of the fourth assignment of error, below.

1 “(12) Following the hearing, the reviewing authority may uphold, overrule
2 or modify any decision or requirement, and shall set forth findings and
3 conclusions for such decision.”

4 The city’s decision consists of 18 pages summarizing the parties’ testimony, the
5 council’s deliberations and its resulting decision. In its decision, the council concluded that
6 the application for a conditional use permit satisfied all relevant criteria, and that the
7 planning commission’s condition of approval requiring the deletion of one of the proposed
8 four-plex buildings was not supported by findings.²

9 Petitioners contend that if the council determined that the planning commission erred
10 in failing to adopt findings to support the imposition of the condition, then the council should
11 have remanded the decision to the planning commission to adopt the needed findings.
12 Petitioners further argue that the council could only eliminate the planning commission’s
13 condition of approval based on a specific finding that there was insufficient evidence to

²The relevant portion of the council’s decision states:

“In summary, based on the proceedings before the Council, the discussions and findings set forth by individual Council members and by the Council by general consensus, the basis for the motion and the ultimate decision of the Council was as follows: (1) The Planning Commission record was adequate and sufficient upon which to make a decision relative to the subject appeals and the Council adopts that record as part of the Council’s overall record on the subject matter; (2) With the exception of Condition No. 1, the City Planning Commission’s Decision was based on adequate findings and conclusions found within the Commission’s hearing record primarily within the applicable City Planning Staff Reports adopted as the Commission’s Findings; (3) Said Findings establish the facts that the subject development proposal is in compliance with the applicable provisions of the City’s Comprehensive Plan and Land Use Ordinance No. 1057 and that the applicant has met the burden of proof of such compliance as set forth in the applicable City Planning Staff Reviews and Reports; and, (4) That there was no factual evidence submitted for the record which supported a finding of detrimental impacts on street capacities relative to increased traffic loads, water supplies, property values, or other opponent claims, but that there is evidence relative to the capacities of those systems and services to serve the proposed development.

“[The] Mayor asked for the vote on the motion to allow the project with the building back in that had been removed [in] condition no. 1. [Two council members and the Mayor voted in favor of the motion, two council members voted against the motion.] The motion passed three to two. Therefor, the Appeal by Dutchuks and Van Voorhees was denied, the Appeal by Barnes Butte Properties was upheld, and the Planning Commission’s decision of Approval was upheld but modified by deleting Condition No. 1 which eliminated one of the proposed seven 4-plex units.” Record 18.

1 support such a condition. Petitioners claim that the portion of the planning commission tape
2 where the commissioners discussed the disputed condition of approval is inaudible and, as a
3 result, the council could not conclude that the record of the planning commission's
4 proceedings was adequate.

5 Intervenor responds that the city council properly determined that the disputed
6 condition of approval was not supported by findings or evidence. Therefore, intervenor
7 contends, the council acted appropriately by eliminating the challenged condition of
8 approval. According to intervenor, there is nothing in the city's regulations that *requires* that
9 the council remand a decision to the planning commission, if the council finds all or part of
10 the decision deficient.

11 The council's decision clearly states that it believes the record created during the
12 planning commission's proceedings was "adequate and sufficient * * * to make a decision
13 relative to the subject appeals." Record 18. Even if the city council erred in its determination
14 that the record before the planning commission was adequate, it does not follow that the only
15 remedy available to the council was a remand to the planning commission for further
16 evidentiary proceedings. PLDO 12.040(11) allows the council to admit new evidence if it
17 finds the record is inadequate to address the issues raised in an appeal.

18 In addition, there is nothing in the city's code that requires the council to affirm a
19 decision by a lower body unless it adopts specific findings establishing that the decision
20 below is not supported by findings or substantial evidence. Fairly read, PLDO 12.040(12)
21 grants a reviewing body the power to analyze and reweigh the evidence before it, and reach a
22 conclusion that modifies or is different from that reached by the lower body, provided the
23 reviewing body's decision is supported by findings and substantial evidence.

24 It is reasonably clear from the decision that the council determined the allegations by
25 the opponents about adverse impacts resulting from an approval of the proposed
26 development were not credible. In addition, the council found that, except for the condition

1 of approval requiring the elimination of the northernmost building from the proposed site
2 plan, the planning commission's decision was supported by adequate findings and substantial
3 evidence. The council decided that the planning commission's condition of approval is not
4 supported by findings or substantial evidence, and deleted Condition No. 1. Petitioners have
5 not demonstrated that the city violated PLDO 12.040 or otherwise erred by doing so.

6 The first assignment of error is denied, in part.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioners argue that the conditions of approval governing approval of the Addition 3
9 tentative subdivision plat are standards that are applicable to the challenged conditional use
10 permit and, therefore, the city erred (1) by not treating that portion of the subject property
11 that was included in the Addition 3 subdivision as R-1 zoned land; and (2) by modifying the
12 road design and construction requirements imposed on a portion of the subject property as a
13 result of the tentative approval of the Addition 3 tentative subdivision plat.

14 For the purposes of our discussion under this assignment of error, the only significant
15 difference between the R-1 and R-2 zones is that the R-1 zone does not permit multi-family
16 residential development. A majority of the property contained within the Addition 3
17 subdivision is zoned R-1, and the tentative subdivision plat identifies R-1 as the zoning for
18 the entire platted property. However, it is undisputed that the portion of the subject property
19 that was included in the Addition 3 subdivision plat is designated R-2 on the city's zoning
20 map.

21 Petitioners contend that when intervenor acquired the subject property, it acceded to
22 the requirement that the portion of the subject property contained within the Addition 3
23 subdivision be treated as if it were zoned R-1. According to petitioners, because multi-family
24 residential use is prohibited in the R-1 zone, the city should not have approved multi-family
25 use on the Addition 3 subdivision property.

1 In addition, petitioners argue that both the city and the applicant were bound by the
2 design and construction requirements for Hudspeth Road that were imposed by the city's
3 approval of the Addition 3 tentative subdivision plat. Petitioners contend that the
4 modifications in the design and construction standards that are approved by the challenged
5 decision require a corresponding amendment to the Addition 3 tentative subdivision plat.

6 Intervenor responds that the 1994 subdivision approval was a tentative approval and
7 was valid for only a year. According to intervenor, a subsequent tentative subdivision plat
8 has been filed for Addition 3 that substantially complies with the conditions incorporated
9 into the city's approval of the challenged conditional use permit.

10 We find nothing in the 1994 tentative subdivision plat approval for Addition 3 that
11 limits intervenor to developing R-1 zone uses only. The property has been, and continues to
12 be, zoned for R-2 uses. In addition, we agree with intervenor that nothing in the city's code
13 requires that the city impose in this conditional use permit the same design requirements for
14 roads as were imposed in the 1997 approval of the Addition 3 tentative subdivision plat.

15 The second assignment of error is denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 PLDO 12.070(2) provides:

18 “* * * In the initial application stage, the proponent of an application * * * has
19 the burden of proof for the justification of approval thereof * * *. In any
20 review or appeal of a decision, the party appealing has the burden of proof
21 relative to declarations of errors in the decision being appealed.” (Emphasis
22 added.)

23 Petitioners argue that the planning commission and city council improperly shifted
24 the burden of proof to the opponents. According to petitioners, the city failed to make
25 findings that explicitly establish what the decision makers considered to be the necessary
26 burden of proof in this case. Petitioners contend that from the staff reports to both the
27 planning commission and city council it seems, at least implicitly, that the city council
28 required the *opponents* to establish that the appropriate standards had not been met, rather

1 than require the applicant to show that the standards *had* been met. Petitioners cite to a staff
2 report dated February 27, 1999, where the planning staff stated:

3 “Whereas the subject proposed development is found to be [in compliance]
4 with the applicable R-2 Zoning * * *, approval is recommended unless the
5 [Planning] Commission establishes clear and substantial findings that the
6 proposed development is not in the best public interest of the City and its
7 residents in general.” Record 420.

8 Petitioners argue that the staff report containing this statement was adopted by both the
9 planning commission and the city council as findings to support their decisions. Petitioners
10 contend that this language makes it clear that the decision makers improperly shifted the
11 burden of proof to the opponents.

12 Intervenor responds that it is clear from the record and the staff reports that all of the
13 parties involved in the proceedings below understood that it was the applicant’s burden to
14 demonstrate that all of the relevant criteria had been met. Intervenor cites to portions of the
15 record where the city attorney and petitioners themselves advised the city council that the
16 burden was on the applicant to show how its proposal complied with the code.

17 According to intervenor, the statement in the staff report relied upon by petitioners is
18 taken out of context. Intervenor explains that the staff report set out the relevant criteria and
19 determined that the applicant had satisfied them. The staff report therefore recommended that
20 the planning commission approve the conditional use application, based on the findings in
21 the staff report. The staff report goes on to advise the planning commission that, in the event
22 the commission determines one or more of the criteria is not satisfied, it is incumbent on the
23 planning commission to adopt findings explaining why it reached a conclusion that differed
24 from the findings and conclusions contained in the staff report.

25 We believe that the record is adequate to establish that the city council understood
26 that the applicant had the burden to demonstrate compliance with the applicable approval
27 criteria and, in its decision, determined that the applicant had done so.

28 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city council’s decision to remove the condition of approval
3 requiring the deletion of the disputed building is itself unsupported by findings and evidence.
4 Petitioners contend that the condition of approval is necessary for the council to satisfy
5 PLDO 6.030, which provides:

6 “GENERAL CONDITIONS: In addition to the standards and conditions set
7 forth in a specific Zone, this Article, this Ordinance and other applicable
8 local, county, state and/or federal regulations, additional conditions may be
9 imposed which are found to be necessary to avoid a detrimental impact on
10 adjoining properties, the general area or the City as a whole, and to otherwise
11 protect the general welfare and interests of the surrounding area, the City as a
12 whole and the general public. * * *”

13 According to petitioners, the record clearly establishes that the proposed use, and
14 more particularly the northernmost four-plex, will have a deleterious impact on adjacent and
15 nearby properties. Petitioners contend that the council must adopt findings that demonstrate
16 that, with the deletion of the disputed condition of approval, the proposed apartment complex
17 will not cause a detrimental impact.

18 The city council found “[t]hat there was no factual evidence submitted for the record
19 which supported a finding of detrimental impacts on street capacities relative to increased
20 traffic loads, water supplies, property values, or other opponent claims, but that there is
21 evidence relative to the capacities of those systems and services to serve the proposed
22 development.” *See* n 2. Petitioners do not challenge this finding, or identify evidence in the
23 record that would suggest a finding of detrimental impact on adjoining property.

24 In any case, although the city’s findings do not express an interpretation of PLDO
25 6.030 on this point, it is not clear that PLDO 6.030 obligates the city to impose conditions
26 necessary to avoid detrimental impacts. As intervenor points out, PLDO 6.030 is framed in
27 the permissive, and does not appear to require the city to impose conditions of approval to
28 avoid detrimental impacts even if such are found to exist.

29 The fourth assignment of error is denied.

1 The city's decision is affirmed.