BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA BAUER,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

MIKE W. OBRIST,
Intervenor-Respondent.

LUBA No. 2000-016

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Linda Bauer, Portland, filed the petition for review and argued on her own behalf.

Adrianne Brockman, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 07/31/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the city's approval of a preliminary plat for the Obrist Heights project, a 33-lot subdivision. The city council's order adopts and adds conditions to a city hearings officer's order approving the preliminary plat.[1]

MOTION TO INTERVENE

Mike W. Obrist (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 9.96-acre parcel located on top of a hill in the southeast portion of the city. The parcel is zoned Residential, 10,000 square-foot minimum (R-10). A small portion of the subject property is within an environmental conservation zone overlay. Adjacent to the north and northwest is the MacGregor Heights subdivision, consisting of 105 lots. MacGregor Heights is subject to a separate approved preliminary plat. Adjacent to the south is the Lexington Hills subdivision, consisting of 296 lots. The proposed subdivision will divide the parcel into 33 lots and two tracts. Tract A corresponds to the portion of the subject property that is subject to the environmental conservation zone overlay and will be retained as open space. Tract B will contain a storm water facility consisting of a detention pond.

As proposed, storm water from the northern portion of the subject property will drain into the detention pond on Tract B, and then be released from that pond at predevelopment rates, flowing through a pipe to a detention pond that is part of the approved MacGregor Heights subdivision to the northwest. Water will then be released from the MacGregor Heights detention pond at predevelopment rates into a natural drainage course within that

[1]Because the council adopted the hearings officer's order, we consider the findings and conclusions of the hearings officer to be part of the city council's decision.

subdivision running to the northwest.[2] That drainage course lies within an environmental protection zone overlay.[3] The drainage course continues northwest through tax lot 200, a small parcel adjacent to MacGregor Heights that is also subject to an environmental protection zone overlay. Storm water from the southern portion of the subject property will drain south into the detention pond and storm water facility of the Lexington Hills subdivision.

The hearings officer approved the preliminary plat, finding that, as conditioned, the storm water disposal system met all applicable criteria. Petitioner appealed the hearings officer's decision to the city council. The city council denied petitioner's appeal, and upheld the hearings officer's approval, adding conditions. This appeal followed.

INTRODUCTION

Petitioner's challenges to the city's approval center around the matter of storm water disposal. Fairly read, petitioner's brief asserts the city failed to follow its own code in that it did not prepare an environmental review or impact statement regarding storm water; failed to provide notice to the owner of tax lot 200, who will be impacted by storm water flowing over his property; failed to consider past water quality violations on the Lexington Hills subdivision, which will be subject to storm water diversion from this development; and failed to obtain necessary easements for drainage facilities. In other words, petitioner alleges the city failed to follow the applicable law (reviewable under ORS 197.835(8)) and committed

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[2]The parties inform us that water releases at "predevelopment rates" means that peak flow volume and levels will not increase downstream during a high storm event. Any flows in excess of predevelopment rates will be stored temporarily in one or both of the detention ponds. The net effect, we understand, is that after development more water will pass through the drainage course than before development, but over a longer period of time. Further, the peak flow rate at any given time in that drainage course will not exceed predevelopment peak flow rates.

[3]An environmental *conservation* zone overlay, such as that within the subject property, differs from an environmental *protection* zone overlay in that the latter protects "highly significant" natural resources, while the former protects only "significant" natural resources. Portland City Code (PCC) 33.430.040. As far as the parties can advise us, the differences between the two zones play no role in this case.

procedural errors (reviewable under ORS 197.835(9)(a)(B)). Petitioner's arguments suffer, however, from her failure to identify the specific city standards she believes are violated by this approval. In addition, she does not cite to facts developed before the city and included in the record that support her assertions.

FIRST ASSIGNMENT OF ERROR

Petitioner alleges the city erred in approving the proposed development because no environmental review was conducted regarding the impacts of storm water diversion onto adjacent lands subject to an environmental protection zone overlay. In referring to adjacent lands, we understand petitioner to refer to the MacGregor Heights subdivision and tax lot 200. Petitioner claims environmental review is needed because the applicant proposes development within an environmental zone overlay.

The city acknowledges that environmental review is necessary for the drainage detention facility within the neighboring MacGregor Heights subdivision, because that drainage facility is located within the environmental protection zone overlay. However, the city contends that no environmental review is required for the subject proposal, because no development is proposed within the environmental conservation zone overlay on the subject property. According to the city, any requirement for environmental review rests with the separate MacGregor Heights subdivision approval process, not the instant preliminary plat approval process for Obrist Heights. The city also argues that, to the extent environmental review is required under its code for impacts to offsite environmental protection zone overlays, there are no such impacts from the proposed development in this case, because that development is conditioned on release of storm water from the subject property at predevelopment rates.

Like petitioner, the city fails to inform us what code provisions govern the circumstances under which environmental review is required. However, the city's position finds support at PCC 33.430.080(D)(9)(a), which exempts from regulation under chapter

33.430 land divisions that do not propose building sites within five feet of the resource area of any environmental zone overlay. In addition, PCC 33.430.220 provides that "[e]nvironmental review is required for all development in an environmental zone overlay that does not meet the development standards of [PCC] 33.430.140 through .170 and for violations of this Chapter." By negative implication, environmental review is not required where no development is proposed in an environmental zone overlay. Petitioner does not assert that intervenor proposes development in an environmental zone overlay, either on the subject property or on other properties. Petitioner does not cite to us, and we cannot find, any code provisions that require environmental review for offsite impacts from the Obrist Heights subdivision under the present circumstances. We conclude that petitioner has failed to establish that the city violated its code in failing to require environmental review of the Obrist Heights subdivision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner asserts the city committed procedural error in approving the Obrist Heights preliminary plat without notifying the owner of tax lot 200 of the proposed storm water diversion.

Petitioner's complaint about failure to provide notice to a third party is an assertion of a procedural error. This Board has no authority to reverse or remand a land use decision without a showing that the alleged procedural error caused prejudice to petitioner's substantial rights. ORS 197.835(9)(a)(B). In other words, the alleged procedural error must affect *petitioner's* rights, not the rights of others. Petitioner's complaint about an alleged failure to notify a third party (who is not a party to this appeal) fails to state a claim upon which we may grant relief.[4]

[4]In any case, the city asserts, and petitioner does not dispute, that tax lot 200 is more than 400 feet from the subject property and thus outside the notification area for this type of development approval. Further, the city

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioner argues that the city erred in approving storm water diversions from the subject property to the Lexington Hills subdivision to the south, because the Lexington Hills subdivision is in violation of certain water quality standards. Petitioner asserts the storm water from the instant development will enter a documented, non-functioning system and thus should not be allowed.

Again, petitioner does not point to any provision of the city's code, or to another applicable standard, that requires denial of the proposed subdivision if offsite storm water systems have a history of water quality violations. In any case, the city argues, and petitioner does not dispute, that the Lexington Hills water quality violations are concerned with erosion control, not the functioning of the drainage system. *See* Record 266 (letter from the state Department of Environmental Quality discussing violation of erosion control requirements). Without citation to an approval standard that is arguably violated in the manner petitioner alleges, we have no basis to find fault with the city's action.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner asserts the city erred in failing to require sewer easements and water quality protection easements for all public drainage facilities on private property, by which petitioner apparently refers to tax lot 200. Again petitioner fails to cite us to any code provisions that would require such easements.

The city responds that no easements are required to approve the proposed subdivision because the storm water will be released into natural drainage courses at predevelopment rates. Again, the city does not cite an applicable criterion or otherwise explain what this

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asserts, and again petitioner does not dispute, that the owner of tax lot 200 appeared before the city council in this proceeding and, therefore, was not prevented from participating because of any lack of notice.

assertion has to do with an easement requirement. The city also argues that because this is a preliminary plat approval, any determinations regarding required easements are premature. According to the city, the final plat approval is the time for submittal of specific legal documents.

The hearings officer found that no easements or storm drainage reserves were required, and that required easements for utilities would be shown on the final plat. Record 67. The order also discusses existing drainage facilities, and storm sewers on Southeast 152nd Avenue and Southeast 154th Avenue. The order further provides that additional water quality facilities will be required to meet requirements of the Bureau of Environmental Services and the Site Development Section of the Office of Planning and Development Review. Record 72. *See also* the city council's conditions at Record 7-8. Petitioner neither cites to an approval criterion requiring easements at this stage of the approval process, nor provides any other reason to find fault with the hearings officer's conclusions regarding easements.[5]

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city erred in relying on testimony before the city council regarding an alleged existing easement on tax lot 200, because there is no substantial evidence in the record that such an easement in fact exists. Petitioner also argues the city erred because, even if the easement does exist, the existence of such an easement does not

[5]In her summary of argument, petitioner suggests that an adjacent property owner's land is taken by the city's recognition of the developer's use of property for storm water disposal. Petitioner bases this claim on her view that the city is permitting use of the land without the owner's consent. To the extent petitioner is attempting to articulate a claim of a taking of private property for public use under Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the United States Constitution, that claim is undeveloped. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Even if a developed takings argument was made, petitioner does not explain why she has standing to assert a takings challenge on behalf of another person.

excuse the city from notifying the property owner regarding a land use decision that affects land subject to that easement.

The city responds, and we agree, that petitioner has not established that the city's decision relies or is required to rely upon the existence of any easements on tax lot 200. With respect to notice to the owner of tax lot 200, as discussed earlier, we may only sustain an assertion of procedural error when petitioner shows prejudice to a substantial right of petitioner. ORS 197.835(9)(a)(B). Petitioner is not privileged to assert the rights of others as a basis to argue that a land use decision must be overturned. *Fraley v. Deschutes County*, 32 Or LUBA 27, 38 (1996); *Moore v. Clackamas County*, 29 Or LUBA 372, 379 (1995).

The fifth assignment of error is denied.

The city's decision is affirmed.