BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STARKS LANDING, INC,
Petitioner,

vs.

CITY OF RIVERGROVE,
Respondent.

LUBA No. 2002-041

FINAL OPINION
AND ORDER

Appeal from City of Rivergrove.

P. Stephen Russell III, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Landye, Bennett and Blumstein, LLP.

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Preston, Gates and Ellis, LLP.

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

AFFIRMED 10/25/2002

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 city denial of two applications for tentative subdivision plat approval.

FACTS

The subject property is a 6.7-acre parcel adjacent to the Tualatin River, zoned for residential development.[1] The topography of the parcel effectively divides it into two halves. The southern half, adjacent to the river, consists of 3.5 acres that are located within the 100-year floodplain. The top of the riverbank is at an approximate elevation of 118 feet. The top of the riverbank is also the highest elevation on the southern half of the property. From the riverbank, the elevation drops northward to a low point of 113 feet, where there is a wetland. From the wetland the land rises steeply to the northern half of the property, above the floodplain. The southern half of the property is within the course of the Tualatin Saddle Overflow, a low-lying area that connects the Tualatin River and the Oswego Canal to the east. During the 1996 floods, waters from the Tualatin River flowed over the southern half of the property along the Tualatin Saddle Overflow to the Oswego Canal.

In 2000, intervenor filed two applications to subdivide the subject property. On the southern half, intervenor proposed six lots for single-family dwellings, accessed by means of an extension of an existing private street from the east, ending in a cul-de-sac. On the northern half, intervenor proposed 12 lots for single-family dwellings, accessed by means of a private street extending south from Childs Road, a public street. The city consolidated the two applications for processing.

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[1] The same property, under different development proposals, was at issue in *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998), and *Barnard Perkins Corp. v. City of Rivergrove*, 36 Or LUBA 218 (1999).

The city planning commission conducted a hearing and, on March 23, 2001, issued a decision denying the applications. The cited grounds for denial were that (1) the proposed private streets did not comply with applicable criteria; (2) petitioner failed to provide adequate evidence that flood flow depths and velocities across the property during flood events would not present a significant hazard to life or property; and (3) petitioner failed to identify the location of a required sewer pump station. Petitioner appealed the planning commission decision to the city council. After repeated extensions of time for negotiations, the city council issued a decision on March 11, 2002, upholding the planning commission denial, with adoption of additional findings. The city council findings included an additional basis for denial: that proposed excavations within the floodplain did not comply with a criterion requiring balancing of fill placed in the floodplain with an equal amount of soil removed above the "bankful stage." This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the record includes the information the city needs to determine whether the proposed development might present a significant hazard to life or property, pursuant to Rivergrove Land Development Ordinance (RLDO) 6.234.[2] Petitioner argues that the city erred by concluding otherwise.

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[2] RLDO 6.234 provides, in relevant part:

> "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.
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> "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.
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> "* * * * *
>
> "(b) The project shall not create any situations which contain significant hazard to life or property."

Petitioner explains that the southern half of the property is in a floodplain and therefore is within the city's flood hazard district, but it is not in a floodway. Petitioner argues that the city's Flood Insurance Rate Map (FIRM), adopted as part of its Flood Damage Prevention Ordinance (FDPO) in 1987, does not locate the subject property in any floodway in the city. That fact is significant, petitioner argues, because the city relied on testimony that the course of the Tualatin Saddle Overflow crossing the southern half of the property should be considered a floodway, and that it was omitted from the FIRM in error. Petitioner contends that the city's denial is partly based on the city's erroneous belief that the southern half of the property is correctly viewed as a floodway.

Petitioner concedes that the city's denial with respect to flood hazards was based on RLDO 6.234, a site design review criterion, rather than on any standard applicable to a floodway under the FDPO.[3] However, petitioner argues that the city cannot require

[3] The city's decision states, in pertinent part:

> "* * * RLDO 6.234(b) requires that 'the project shall not create any situations which contain significant hazard to life or property.' There is testimony in the record as well as letters from the Federal Emergency Management Agency (FEMA) indicating that during flood events, the depth and velocity of water on the property would be very hazardous and could threaten life and property. The applicant was asked to provide additional information in the form of a model of the flow through this area, but refused to do so. Because the applicant has not provided sufficient information to allow the Planning Commission to evaluate the threat to life and property, the application must be denied.
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> "The Planning Commission's conclusion is also supported by the discussion regarding the [FDPO] and the City's maps implementing that ordinance. The [FDPO] identifies certain maps as establishing areas of special flood hazard and floodways. * * *
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> "The City's [FIRM] does not show this property as located in a floodway. However, as explained [by FEMA], the studies on which the FIRM is based show a floodway crossing the property in what is called the Tualatin Saddle Overflow. Those studies identified this area as one that should have been included in the floodway but was apparently omitted in the final FIRM adopted by the City.
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> "Moreover, public testimony at the Planning Commission from residents who experienced the most recent drastic flood event, the 1996 flood, demonstrates that the area truly has increased velocities during flooding events. Aerial photographs taken during the 1996 floods * * * show a clear channel carrying a substantial volume of water across the proposed subdivision." Record 16-17.

petitioner to address flood hazards under RLDO 6.234(b), because flood hazards are comprehensively addressed under the FDPO. According to petitioner, the city's choice not to designate the subject property as a floodway on the FIRM means that the city has already determined that no significant flood hazards exist on the subject property. Consequently, petitioner argues, the city cannot apply RLDO 6.234(b) to require petitioner to submit additional information modeling the flow depth or velocity over the subject property.

In any case, petitioner argues, the requested information is already present in the record. Petitioner cites to information contained in a report (Righellis Report) that describes the average flow velocity during a 100-year flood, and that shows the depth of 100-year floodwaters at an elevation of 120 feet over the subject property. Petitioner contends that the Righellis Report shows a floodwater depth of three to three and one-half feet where the proposed housing will be located, during a 100-year flood event, and flow velocities of approximately .86 feet per second. According to petitioner, the city failed to address this uncontroverted evidence, but simply denied the applications for failure to present additional modeling of flow depth and velocities.

The city responds that it did not err in applying RLDO 6.234(b) to require petitioner to address flood hazards. We agree. That the subject property is not within a floodway or regulated as such under the FDPO does not mean that the city cannot consider flood hazards under other, applicable provisions that require that the proposed development pose no significant hazard to life and property. There is substantial evidence in the record that the subject property is within an area subject to flooding. The city is well within its authority under RLDO 6.234(b) to require petitioner to submit evidence demonstrating that development of the property will not present a significant hazard to life or property.

With respect to the Righellis Report, the city responds that it is undisputed that the report models depth and velocity in the Tualatin River channel, not in the Tualatin Saddle Overflow path across the subject property. According to the city, FEMA testified that the

overflow path must be modeled in order to determine the depth and velocity of flood flows through the saddle. Record 323. The city argues that it reasonably relied on that testimony to require modeling of the overflow path, and to reject petitioner's evidence based on the depth and velocity in the main channel.

We agree with the city. The FEMA testimony is substantial evidence on which the city may rely, to require petitioner to specifically model the flood depth and velocity over the subject property, for purposes of demonstrating compliance with RLDO 6.234(b). Although petitioner argues that equivalent information can be extrapolated from the Righellis Report, petitioner does not contend that the report provides the model that FEMA believed necessary. The city did not err in concluding that such modeling was necessary in order to determine whether the proposed development presented a significant hazard to life or property.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city's decision finds, as a second basis for denial, that petitioner failed to demonstrate that the proposed development complies with FDPO 5.2-4(1), which prohibits placing fill in the floodplain unless balanced with an equal amount of soil removed from the floodplain area that is above the "bankful stage."[4] Specifically, the city found that petitioner

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[4] FDPO 5.2-4(1) provides, in relevant part:

> "All development, excavation and fill in the areas of special flood hazard (*i.e.*, the floodplain) shall conform to the following balanced cut and fill standards:
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> "(i) No net fill in any floodplain is allowed. All fill placed in a floodplain shall be balanced with an equal amount of soil material removal;
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> "* * * * *
>
> "(iii) Any excavation below the bankful stage shall not count toward compensation for fill since these areas would be full of water in the winter and not available to hold storm water;
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> "(iv) Excavation to balance a fill shall be located on the same parcel as the fill unless it is not reasonable or practicable to do so. In such cases, the excavation shall be located

proposed several fills in the floodplain, balanced by cuts at an elevation of 115 feet. The city interpreted the term "bankful stage" for purposes of FDPO 5.2-4(1)(iii) to be equivalent to the top of the bank, which the city found to be at an elevation of 118 feet on the subject property. Because the proposed cuts are below the "bankful stage," the city found, they may not be used to balance fill placed in the floodplain, and therefore petitioner failed to establish compliance with FDPO 5.2-4(1)(i).

Petitioner contends that the city misconstrued the term "bankful stage." According to petitioner, the purpose of FDPO 5.2-4(1)(iii) is stated in that provision: to disallow cuts below the bankful stage, because such areas "would be full of water in the winter and not available to hold storm water." That purpose is not served by the city's interpretation, petitioner argues, because the record is clear that the proposed cuts are above the elevation inundated by non-storm winter water levels. Petitioner contends further that the city's interpretation has the effect of prohibiting any balancing cuts on the southern half of the property, and thus prohibits any fill on the southern half, with the result that the southern half of the property is rendered unbuildable.

As the city's findings explain, the FDPO was adopted to implement Title 3 of the Metro Urban Growth Management Functional Plan, which requires local governments to adopt certain standards related to water quality. Among those standards is a requirement that, like FDPO 5.2-4(1)(iii), disallows balancing fills with cuts in areas that will be filled with water in non-storm winter conditions. The city noted that Metro's model ordinance implementing Title 3 defines the term "bankful stage," with reference to a Department of State Lands administrative rule, as "the stage or elevation at which water overflows the natural banks of a stream or other waters of the state and begins to invade upland areas."

> in the same drainage basin and as close as possible to the fill site, so long as the proposed excavation and fill will not increase flood impacts for surrounding properties as determined through hydrologic and hydraulic impacts. In such cases, the excavation shall be located within the City of Rivergrove."

Record 10. The same model ordinance defines "top of bank" to mean the same as "bankful stage." The city concluded that "bankful stage" as used in FDPO 5.2-4(1)(iii) should correspond with these definitions, and therefore the bankful stage on the property is the same as the top of the river bank. Because the record was clear that the top of the bank on the property was at an elevation of 118 feet, the city concluded, petitioner's proposed excavations below that elevation may not compensate for the proposed fill in the floodplain.

The city argues that its interpretation of FDPO 5.2-4(1)(iii) is consistent with the purpose of the ordinance, and is well within its discretion under ORS 197.829(1).[5] The city argues that the general purpose of the FDPO, as described in the "Statement of Purpose" to that ordinance, is to "protect human life and health." FDPO 1.3(1) (Petition for Review App ii). The city further notes that the preamble to the ordinance that added FDPO 5.2-4(1)(iii) to the FDPO states that the purpose of the FDPO is in part to reduce risk to life and property, and to "maintain the functions and values of floodplains [by] allowing for the storage and conveyance of stream flows through their natural systems." Petition for Review App xiv. The same preamble states that the city strongly supports the floodplain balanced cuts and fill requirements of Title 3, and wishes to comply with those requirements. *Id.* The city submits that it is entirely consistent with these purposes to adopt an interpretation of FDPO 5.2-4(1)(iii) that is protective of life and property, and that corresponds to definitions in the Metro model ordinance implementing Title 3.

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[5] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

We agree with the city that its interpretation is within its discretion under ORS 197.829(1). It is true that, as applied to the facts here, the city's interpretation has the result of not allowing balancing cuts to be made below an elevation of 118 feet on the property, *i.e.*, on most if not all of the upland portion of the southern half of the property, because that portion of the property is below the elevation of the top of the bank. Under more usual circumstances, the upland portion of the property would be higher in elevation than the top of the bank. However, the unusual topographic facts of this case do not demonstrate that the city erred in equating "bankful stage" with the top of the bank.

With respect to petitioner's argument that the city's interpretation renders the southern half of the property unbuildable, petitioner neither cites to evidence supporting that contention nor explains why that contention demonstrates that the city's interpretation is erroneous. In any case, as was pointed out at oral argument, FDPO 5.2-4(1)(iv) allows excavations elsewhere within the city to balance fill on the subject property, under certain circumstances. Petitioner does not explain why FDPO 5.2-4(1)(iv) would not allow petitioner to satisfy the balanced cut and fill requirement, even if the city's interpretation effectively prohibits excavation on the subject property.

The second assignment of error is denied.

THIRD, FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

As additional bases for denial, the city' s decision concludes that the proposed private streets on the southern and northern halves of the property do not meet applicable city requirements. The challenged decision also faults petitioner's site plan for failing to show the specific location of a required sewer pump station. Finally, the decision notes that the emergency and fire service provider indicated that residential water sprinklers will be required if the city allows a narrow private street. Because the city rejected petitioner's proposed private streets, it noted but did not address a concern that water service to the property was not adequate to provide sprinklers.

Petitioner challenges these bases for denial in the third, fourth, fifth and sixth assignments of error. Petitioner's general argument with respect to each basis for denial is that in each case the city's concerns can be addressed by imposing conditions of approval. Petitioner contends that, pursuant to ORS 197.522, the city is required to impose reasonable conditions of approval to make the proposed development consistent with applicable criteria.[6] According to petitioner, where such conditions can be imposed, the city does not have the option of denying the application.

The city responds that petitioner's reliance on ORS 197.522 is misplaced, for two reasons. First, the city argues that ORS 197.522 is codified under, and relates exclusively to, statutory provisions regulating moratoria on development, at ORS 197.505 through 197.540. The city contends that ORS 197.522 has no application outside circumstances where a moratorium is in effect—circumstances that do not exist in the present case. Second, the city argues that even if ORS 197.522 does apply to the city's decision, the city found that it cannot adopt reasonable conditions that will make the application comply with the city's land use regulations.

We need not resolve these assignments of error. To support denial of a land use permit, the local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995). We concluded under the first and second assignments of error that the city did not err in requiring petitioner to submit additional evidence in order to establish compliance with

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[6] ORS 197.522 provides:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

RLDO 6.234(b), and that the city did not misconstrue the applicable law in rejecting petitioner's proposed excavations. Both are adequate bases for denial. Therefore, even if petitioner's view of ORS 197.522 is correct, and the city erred in denying the application based on noncompliance with standards that can be cured through reasonable conditions of approval, that error would not provide a basis for reversal or remand.

The city's decision is affirmed.