

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

3
4 FRED G. BAIDA,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MEDFORD,
10 *Respondent.*

11
12 LUBA No. 2003-002

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Medford.

18
19 Fred G. Baida, Grants Pass, filed the petition for review and argued on his own
20 behalf.

21
22 Sydnee B. Dreyer, Senior Assistant City Attorney, Medford, filed the response brief
23 and argued on behalf of respondent.

24
25 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
26 participated in the decision.

27
28 AFFIRMED

05/05/2003

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision that affirms the city planning commission’s approval of “the tentative plat for Hover Heights Industrial Park, a 20-lot subdivision on a 28.68-acre parcel * * *.” Record 12.

FACTS

The subject property is located south of Vilas Road (an existing east/west city arterial) and east of what the parties refer to as the old “Medco Haul Road” (Haul Road). The subject property is located at the southeast corner of the intersection of those two roads. This intersection is located approximately 600 feet west of the Crater Lake Highway (Highway 62), a congested major north/south arterial. Haul Road is an existing paved north/south roadway that was formerly used as a logging road. The city has for some time anticipated that Haul Road would be improved and upgraded to function as an arterial, and the North Medford Circulation Plan shows Haul Road as an existing arterial. At some point, the Oregon Department of Transportation purchased Haul Road. Haul Road is currently closed to the public.

ODOT has initiated a planning process that all parties seem to agree will likely lead to an ultimate decision to reconstruct Haul Road in this area as an expressway, to relieve traffic congestion on Highway 62. However, although ODOT’s plans to make Haul Road an expressway are well developed and some plans for the expressway and its intersection with Vilas Road have been prepared, the planned expressway is not yet included on the state or regional transportation systems plans and the city’s comprehensive plan does not show Haul Road as a state expressway. The city’s North Medford Circulation plan simply shows Haul Road as an existing city arterial. Record 94.

The application for the 20-lot industrial subdivision that is at issue in this appeal was received by the city on April 15, 2002. As proposed, the subdivision would have access to

1 Vilas Road to the north via Helicopter Way and to Haul Road to the west, via Enterprise
2 Drive.¹ During the planning commission proceedings, ODOT submitted a letter in which it
3 explained that the proposed subdivision might be affected by ODOT's plans to construct an
4 expressway along this section of Haul Road. The letter explains that (1) ODOT would not
5 permit access from Enterprise Drive access to Haul Road, (2) a major portion of the
6 subdivision along Haul Road might be acquired for the expressway, and (3) access to Vilas
7 Road to the north might be affected by improvements to the Vilas Road expressway
8 interchange.²

9 Petitioner owns and operates a business on property located west of the subject
10 property, directly across Haul Road. Petitioner submitted a September 12, 2002 letter to the
11 planning commission, in which he requested that the city postpone its decision on the
12 subdivision application.³ With that September 12, 2002 letter, petitioner provided the
13 planning commission with a copy of an August 23, 2002 letter he sent to a citizens advisory
14 committee and ODOT. In the August 23, 2002 letter, petitioner objected to ODOT's design
15 for the expressway. Petitioner expressed two concerns: (1) that ODOT's planned
16 intersection improvements would block his access to Vilas Road, and (2) that a portion of the

¹ Helicopter Way and Enterprise Drive are proposed new subdivision rights-of-way.

² As relevant, that letter explains:

“The Haul Road may become the Highway 62 Expressway through this area and the site plan shows Enterprise Drive connecting to it. ODOT will not permit public or private road approaches to this roadway, as the Haul Road is not dedicated for public use and is protected by access control along its entirety. Also, if the proposed plan to designate this roadway as an Expressway moves forward, the Vilas Road intersection will become an interchange. The right-of-way of the Expressway will most likely expand eastward and may impact a major portion of the subject property. Also, to assure safe operation of this interchange, the intersection of Helicopter Way with Vilas Road may need to be made right-in, right-out only.” Record 91.

³ Petitioner advises that the letter in the record is erroneously dated August 12, 2002.

1 eastern part of his property along Haul Road would be condemned for freeway
2 improvements.⁴

3 On September 26, 2002, the planning commission approved a tentative plat, which
4 was modified from the original proposal to eliminate the proposed Enterprise Drive access to
5 Haul Road. Record 76-101.⁵ Petitioner appealed the planning commission's decision to the
6 city council.

7 At the city council hearing on November 21, 2002, petitioner again requested that the
8 city delay approval of the requested subdivision until the expressway location was finally
9 approved. The city council affirmed the planning commission's decision, and petitioner
10 appealed to LUBA.

11 INTRODUCTION

12 Petitioner's appeal suffers from a fundamental problem. In the proceedings below,
13 the only request that petitioner ever clearly presented was a request that the city delay its
14 decision in this matter until ODOT made its final decision and selected a final design for
15 construction of the anticipated expressway. Petitioner's refreshingly up-front motive for that
16 request was to allow time for ODOT to consider whether the expressway should be located
17 (1) partially on petitioner's *developed* property and partially on the subject *undeveloped*
18 property or (2) entirely on the subject *undeveloped* property. Petitioner's concern is that if
19 the subject property is subdivided and developed industrially, ODOT will have an economic

⁴ Petitioner explained his second concern as follows:

“Taking [the eastern portion of my property] would adversely [a]ffect the income potential of my business and create costly consequences. The land directly to the east at Vilas and * * * Haul Road is unoccupied barren land and should be considered as a viable and less costly option.” Record 104.

The referenced “land directly to the east” is the subject property.

⁵ The proposed tentative plat appears at Record 95; the original proposed tentative plat appears at Record 144.

1 disincentive to locate the expressway on the subject property. Petitioner speculates that
2 under either of two likely scenarios the taxpayers will suffer if the subdivision is approved.
3 If the expressway is located entirely or partly on the subject property, subdivision approval
4 and industrial development may make it much more expensive for ODOT to acquire the part
5 of the subject property that would be needed for the expressway. Similarly, if the
6 expressway is located wholly or partially on his property, his property will be more
7 expensive to acquire compared to the subject property, provided the subject property remains
8 undeveloped.

9 The difficulty with petitioner's request to the city is that petitioner never cited any
10 authority for the city to delay its decision regarding the requested tentative subdivision
11 approval.⁶ Petitioner believes a final decision by ODOT may come quickly, but at the city
12 council hearing in this matter petitioner agreed that design approval for the project could take
13 as long as 15 years. Respondent's Brief Appendix 2.

14 **FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR**

15 Petitioner's first two assignments of error allege that the city's approval of the
16 subdivision violates two of the applicable approval criteria for tentative plat approval set out
17 at City of Medford Land Development Code (LDC) 10.270.⁷ Petitioner's fifth assignment of

⁶ We note that the city is not entitled to delay decisions on permit applications indefinitely. With certain exceptions, ORS 227.178(1) requires that the city "take final action on an application for a permit, limited land use decision or zone change, within 120 days after the application is deemed complete."

⁷ As relevant to the first and second assignments of error, LDC 10.270 provides:

"The approving authority * * * shall not approve any tentative plat unless it first finds that the proposed land division[,] together with the provisions for its design and improvement:

"1. Is consistent with the Comprehensive Plan, any other applicable specific plans thereto, and all applicable design standards set forth in Article IV and V;

"* * * * *

"4. [If the tentative plat i]ncludes the creation of streets, that such streets are laid out to conform, within the limits of the City of Medford and its Urban Growth Boundary,

1 error alleges a two-part error. First, petitioner alleges that the city’s decision violates OAR
2 660-012-0060(1).⁸ Petitioner also argues that this violation of OAR 660-012-0060(1) in turn
3 results in a violation of ORS 197.320(6).⁹

4 Respondent argues that because petitioner raised no issue below concerning LDC
5 10.270, OAR 660-012-0060(1) or ORS 197.320(6), the issues presented in the first, second
6 and fifth assignments of error are waived.

7 ORS 197.763(1) and ORS 197.835(3) require that a petitioner raise an issue below to
8 preserve his ability to raise that issue at LUBA. To preserve his right to present issues at
9 LUBA under ORS 197.763(1) and ORS 197.835(3), petitioner must give the city “fair
10 notice” of the alleged error, so that the city has a reasonable opportunity to recognize the

to the plats of land divisions already approved for adjoining property unless the approving authority determines it is in the public interest to modify the street pattern[.]”

⁸ OAR 660-012-0060(1) provides in part:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility; [or]
- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division[.]”

⁹ As relevant, ORS 197.320 provides:

“The Land Conservation and Development Commission shall issue an order requiring a local government, * * * to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:

“* * * * *

- “(6) A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation[.]”

1 alleged error and address the alleged error in its decision. *Boldt v. Clackamas County*, 107
2 Or App 619, 623, 813 P2d 1078 (1991).

3 Petitioner did not raise the issues that are presented in the first, second and fifth
4 assignments of error. The reasons that petitioner gave for asking that the city delay action in
5 this matter have been noted above. During the November 21, 2002 city council hearing in
6 this matter, petitioner was specifically asked to identify some legal basis for overturning the
7 planning commission's decision. Petitioner expressed the view that other proposed
8 development had been designed to avoid proposed rights of way, but he did not identify any
9 legal standards that would require such action in this case.¹⁰

10 Petitioner complains that respondent's waiver argument is a technical argument and
11 that he should not be required to raise the issue below since it is the city's responsibility to
12 know and apply the relevant law.

13 Petitioner is free to disagree with the statutory raise-it-or-waive-it requirement.
14 However, the legislature has determined that issues must be preserved in quasi-judicial land
15 use proceedings by raising them below, and LUBA is not free to ignore that requirement. In
16 this case, had petitioner raised the issues he presents in the first, second and third
17 assignments of error the city likely would have provided the explanations that the city

¹⁰ A partial transcript of the November 21, 2002 city council hearing is attached to Respondent's Brief. That transcript discloses the following discussion:

“[City Councilor]: [O]ur charge in this is [to] find out if the Planning Commission made an error of law and I no doubt understand your predicament, and partially agree with it, but I need to know what error of law did the Planning Commission make? I do understand, as you explained, it does not make good planning sense, but that is not something I can hang my hat on. Tell me what error of law did they make in doing this[.]”

“[Petitioner]: * * * I'm not an attorney and I didn't research the law under which it was approved. I do know of several projects that have been denied because they do stand in the footprint of proposed right of way and there must be some law that governs new development that will be placed in the footprint of proposed right of way. And I know that * * * in some cases they have, in many cases they have * * * redesigned projects around proposed right of ways, except this one.” Respondent's Brief Appendix 2.

1 includes in its brief in responding to these assignments of error on the merits.¹¹ Because the
2 petitioner did not raise the issues he presents in the first, second and fifth assignments of
3 error, the city was not given the opportunity to provide those explanations in its findings. As
4 a consequence, under ORS 197.763(1) and 197.825(3), petitioner may not present those legal
5 issues for the first time in this appeal.

6 The first, second and fifth assignments of error are denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 In addition to the land division criteria at LDC 10.270(1) and (4), *see* n 7, LDC
9 10.270 also imposes a land division criterion that requires that the city find that a proposed
10 subdivision “[w]ill not prevent development of the remainder of the property under the same
11 ownership, if any, or of adjoining land or of access thereto, in accordance with this
12 chapter[.]” LDC 10.270(2). Petitioner contends that the challenged decision violates LDC
13 10.270(2) because development of the disputed subdivision will put “enormous economic
14 pressure on ODOT” to locate the expressway on petitioner’s property and thereby prevent its
15 development. Petition for Review 5.

¹¹ Petitioner’s argument under the first assignment of error appears to be that the anticipated expressway is part of the city’s comprehensive plan and the city therefore was obligated under LDC 10.270(1) to require that the proposed subdivision be setback to accommodate the expressway. The city responds that although the city’s comprehensive plan designates Haul Road as an arterial, the comprehensive plan has not been amended to include the anticipated state expressway. Therefore, the city argues it “has no authority to require improvements, setbacks or access” to accommodate the potential state expressway. Respondent’s Brief 6-7.

Petitioner’s argument under the second assignment of error is that LDC 10.270(4) is violated because parts of streets within the subdivision may be taken in the future to construct the expressway or petitioner’s property may be taken instead to avoid having to take those subdivision rights-of-way. The city responds that because the expressway is not yet part of the city’s comprehensive plan, it has no authority to require that the subdivision streets be modified to accommodate the expressway, even if the final alignment and design could be anticipated at this time.

Petitioner’s argument under the fifth assignment of error is difficult to follow. The city responds that on its face OAR 660-012-0060(1) does not apply to subdivision approval decisions and that ORS 197.320(6), which concerns situations where there is a pattern or practice of improper local government decision making, is directed at LCDC and similarly has no bearing on the city’s tentative subdivision approval decision.

1 Respondent argues that while petitioner argued below that approval of the disputed
2 subdivision might have the effect of increasing the likelihood that his property would be
3 acquired for the expressway, petitioner did not identify LDC 10.270(2) below or argue that
4 the approval of the subdivision violated that criterion. Having failed to do so, respondent
5 argues that petitioner may not allege that approval of the disputed subdivision violates LDC
6 10.270(2) for the first time at LUBA. We agree with respondent.

7 We also agree with respondent's response to the third assignment of error on the
8 merits:

9 "In determining [under LDO 10.270(2)] whether the land division prevents
10 development, [the city] looks primarily at whether the tentative plat would
11 create a landlocked parcel. Additionally, in conjunction with [LDO]
12 10.270(4), [the city] requires that streets be laid out, where possible, to
13 connect to existing development and/or to allow for future development.

14 "* * * The fact that this application was approved does not prevent
15 development of Petitioner's property. While it may be that ODOT will
16 condemn Petitioner's property in the future for a possible expressway, this
17 potential for condemnation in the future is not the sort of factor the City
18 would consider to determine that the subject application prevents
19 development of adjoining property." Respondent's Brief 8-9.

20 The third assignment of error is denied.

21 **FOURTH ASSIGNMENT OF ERROR**

22 As noted earlier, the city required that the applicant eliminate the proposed Enterprise
23 Drive connection with Haul Road. Another internal road within the proposed subdivision,
24 Rotor Circle, is a short east/west cul-de-sac that extends a short distance west from
25 Helicopter Way and ends a short distance before it reaches Haul Road. The planning
26 commission required that the applicant provide an easement for a short pedestrian connection
27 between the end of Rotor Circle and Haul Road. Record 80. The city council eliminated that
28 requirement. Record 11. Petitioner argues these city actions regarding Enterprise Drive and
29 Rotor Circle, which he argues were taken in recognition the reality of the limited access

1 expressway, are inconsistent with the city's decision to refuse to delay approval of the
2 subdivision or to require that it be set back to accommodate the expressway.

3 Respondent argues, and we agree, that the challenged decision includes no
4 inconsistency that requires remand. The proposed connection of Enterprise Drive with Haul
5 Road was eliminated because ODOT stated that it has a current policy of not allowing new
6 road connections with Haul Road. *See* n 2. While this policy may well be related to
7 ODOT's future plans to upgrade Haul Road to an expressway, the city's decision that a
8 proposed street connection that ODOT would not approve should be eliminated is not
9 inconsistent with its decision not to delay subdivision approval indefinitely or to require that
10 the applicant anticipate and set the proposed subdivision back from the possible future
11 expressway.

12 With regard to the planning commission's requirement for an pedestrian access
13 easement to connect Rotor Circle with Haul Road, LDC 10.464(1) provides that such
14 accessways need not be required where the city determines that such a "separate accessway
15 is infeasible or inappropriate." The city council found "that the distance to the nearest street
16 providing access to the subdivision is minimal and, therefore, a pedestrian access connection
17 is not necessary." Record 11. Although the city council found that the accessway is "not
18 necessary" rather than "inappropriate," petitioner does not challenge the finding or argue that
19 the city's choice of words is legally significant. More importantly, for purposes of this
20 assignment of error, the finding does not suggest that the city council was relying in any way
21 on the likelihood of Haul Road becoming an expressway as its reason for eliminating the
22 required accessway. Petitioner's allegations that the decision is inconsistent and that it
23 should be remanded for that inconsistency are without merit.

24 The fourth assignment of error is denied.

25 The city's decision is affirmed.