

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 TOWNSHIP 13 HOMEOWNERS

4 ASSOCIATION, INC.,

5 *Petitioner,*

6 vs.

7 CITY OF WALDPOR, T

8 *Respondent.*

9 LUBA Nos. 2006-171 and 2006-172

10 FINAL OPINION

11 AND ORDER

12 Appeal from City of Waldport.

13 Dennis L. Bartoldus, Newport, filed the petition for review and argued on behalf of
14 petitioner.

15 Mark C. Hoyt, Salem, filed the response brief and argued on behalf of respondent.

16 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
17 participated in the decision.

18 REMANDED

19 01/18/2007

20 You are entitled to judicial review of this Order. Judicial review is governed by the
21 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioner appeals two decisions by the City of Waldport approving (1) an application to partition a 7.57-acre parcel into three parcels, and (2) an application to partition a 10.11-acre parcel into three parcels.

FACTS

The applicant owns two contiguous parcels of property that are located within the Waldport city limits, and adjacent to the Township 13 Subdivision. The applicant applied to partition one parcel, described as Tax Lot 702, into three parcels that would be .35, .36, and 6.76 acres in size. The applicant applied to partition the second parcel, described as Tax Lot 703, into three parcels that would be .34, .33, and 9.44 acres in size. The proposed access to the parcels to be created by the Tax Lot 702 partition is via an extension of S.E. Bird Drive, a private road running through the Township 13 Subdivision. On the proposed partition plat, that extension is labeled “Proposed Easement Road.” Record 151. The proposed access to the parcels to be created by the Tax Lot 703 partition is over a further extension of the proposed private easement road.

The planning commission held a hearing and voted to approve the applications. Petitioner, the homeowner’s association for the adjacent subdivision, appealed the planning commission’s decision to the city council. The city council held a hearing on the appeal and voted to deny the appeal and approve the applications. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city failed to correctly apply Waldport Development Code (WDC) Section 16.100.020(D) to the applications, and that its findings regarding the criteria set forth in that provision are inadequate and are not supported by substantial evidence in the record. WDC 16.100.020(D) provides:

“If it is determined that continuous partitioning of a tract of land may occur in subsequent years which may result in the need for a new road(s), utilities, or

1 stormwater drainage facilities to be constructed, thereby impacting city
2 services and surrounding property, the application shall be referred to the
3 planning commission for a determination as to whether the development
4 should be subject to the subdivision requirements of this article.”

5 WDC 16.100.020(D) requires the planning commission determine whether a proposed
6 partition should be treated as a subdivision proposal in certain circumstances.¹ After the
7 applicant indicated to city planning staff that future divisions of the two parent parcels are
8 planned, planning staff referred the application to the planning commission as required by
9 WDC 16.100.020(D). Record 88. The planning commission adopted the following finding
10 regarding this issue:

11 “The planning commission finds that it is possible that the subject tax lot[s]
12 could be divided into additional lots in the future. At this time, future
13 partitioning or land division would not necessarily result in the need for a new
14 road(s), utilities or stormwater drainage facilities, therefore, the partition
15 application is not subject to the subdivision requirements of [WDC].* * *”
16 Record 88.

17 The above-quoted planning commission finding does not explain how further division of the
18 subject parcels could avoid the need for a new road or roads, utilities, or storm water
19 drainage facilities, and we do not see how a future land division could avoid the need for
20 additional improvements such as new utilities and stormwater drainage facilities, and perhaps
21 new roads.

22 In its decision denying petitioner’s appeal and upholding the planning commission’s
23 decision, the city council acknowledged that petitioner challenged the planning
24 commission’s determination under WDC 16.100.020(D). Record 12, 14. However, the
25 council did not incorporate the planning commission’s finding and did not adopt any findings
26 to address petitioner’s challenge to the planning commission’s finding. The portion of the

¹ Although petitioner does not explain the legal significance of subjecting continuous partitions to subdivision requirements, we note that, WDC 16.100.040 lists certain additional design development requirements that apply only to subdivisions. There may well be other requirements that apply only to subdivisions that we are not aware of.

1 council’s decision that purports to address the issue does not address the issue in any way.
2 We agree with petitioner that the council’s finding is inadequate and is not supported by
3 substantial evidence in the record. The council apparently interprets WDC 16.100.020(D)
4 not to require that continuous or serial partitions be subject to subdivision requirements if the
5 continuous or serial partitions may result in parcels that do not need “new road(s), utilities or
6 stormwater drainage facilities to be constructed.” While it may be that the “proposed
7 easement road” shown on the two partitions before us in this appeal would allow future
8 partitions to create more lots without creating any additional new roads, it is not obvious to
9 us that any more lots could be created without additional utilities or stormwater drainage
10 facilities being constructed. The city’s explanation for why WDC 16.100.020(D) does not
11 require application of the city’s subdivision requirements is inadequate.

12 The first assignment of error is sustained.

13 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

14 In its second and fourth assignments of error, petitioner assigns error to the city’s
15 failure to require the applicant to submit certain information and analyses of the properties.
16 Petitioner argues that by failing to require the developer to submit certain information during
17 the preliminary approval stage of the application process, the city impermissibly deferred
18 application of relevant criteria to a time in the future when there will be no opportunity for
19 public hearing or comment.²

20 **A. Soils Analysis**

21 In its second assignment of error, petitioner argues that the city impermissibly failed
22 to require the developer to provide a detailed soils analysis of the subject properties as
23 required by WDC 16.96.030(D)(3).³ WDC 16.96.030(D) provides in relevant part:

² It is undisputed that no provision of the WDC provides for notice and an opportunity for petitioner or others to comment on the proposed development after the tentative plan stage of the approval process.

³ The decision does not list WDC 16.96.030(D)(3) as an applicable approval criterion.

1 “Standards. The following shall be required in identified hazard areas:

2 “* * * * *

3 “3. Weak foundation soils. In areas known to have weak foundation soils
4 for construction of buildings and roads, a detailed soils analysis shall
5 be made by a qualified soils expert. The analysis shall include
6 recommendations to overcome identified limitations prior to
7 development approval.”

8 The applicant did not provide a soils analysis, and nothing in the decision mentions the
9 requirement of a soils analysis or requires the applicant to provide a soils analysis at any
10 stage of the approval process. Petitioner introduced evidence during the proceedings below
11 that the parcels had undergone filling and grading activities during the previous decade, and
12 that the properties are suspected to have weak foundation soils. Record 124-29.

13 Respondent does not dispute that the subject property may have weak foundation
14 soils and that WDC 16.96.030(D)(3) applies. However, respondent answers that (1) WDC
15 16.96.030 requires the soils analysis to be provided prior to “final” development approval,
16 rather than during the tentative approval stage of the process, and (2) the geotechnical
17 analysis required by a condition of approval (discussed below) will necessarily include a
18 soils analysis.

19 Although WDC 16.96.030(D) does not specify at what point during the development
20 approval process the soils analysis is required, we are not persuaded by the city’s
21 rationalization, offered for the first time in its response brief, for not requiring the soils
22 analysis. We also tend to think that a more reasonable reading of that provision requires that
23 the soils analysis and any recommendations it produces be provided during the tentative plan
24 stage of development approval, when other parties will have an opportunity to comment, and
25 the tentative partition or subdivision plan can be amended if necessary to respond to the
26 recommendations in the soils analysis. We are also not convinced that the geotechnical
27 analysis will necessarily include a soils analysis. The geotechnical analysis will address

1 slopes on the property, and it is not clear that it will address weak foundational soil issues on
2 slopes less than 20% without the city’s explicit instruction to do so.

3 The city’s decision does not mention WDC 16.96.030(D)(3) anywhere, and the city
4 made no findings regarding the quality of the soils on the property and imposed no condition
5 of approval requiring the soils analysis. We agree with petitioner that the city erred in failing
6 to make any findings regarding the soils analysis required by WDC 16.96.030(D)(3).

7 **B. Geotechnical Analysis**

8 In its second assignment of error, and in a portion of its fourth assignment of error,
9 petitioner alleges that the city failed to require the applicant to submit a geotechnical analysis
10 during the tentative approval stage of the process, and that the city’s imposition of condition
11 of approval 6, which requires the geotechnical analysis to be submitted “prior to design and
12 construction of roads and utilities,” impermissibly deferred the city’s decision concerning
13 WDC 16.96.030(D)(4). WDC 16.96.030(D)(4) provides in relevant part:

14 “Standards. The following shall be required in identified hazard areas:

15 “ * * * * *

16 “4. Slopes greater than twenty (20) percent with weak foundation soils
17 and all slopes greater than thirty (30) percent. A site specified
18 geotechnical analysis by a qualified professional geologist or
19 engineering geologist is required. *The analysis*, which shall be
20 stamped by the professional geologist or certified engineering
21 geologist, *shall determine the suitability of the site for development*
22 and shall recommend specific measures which may be required to
23 safeguard life and property.” (Emphases added.)

24 WDC 16.96.030(D)(4) does not indicate when the geotechnical analysis is required. In its
25 decision, the council noted that a “site specific geotechnical analysis * * * is required.”
26 Record 14. However, rather than require the geotechnical analysis to be provided prior to
27 tentative plan approval, the city imposed a condition of approval (condition 6) requiring a
28 geotechnical analysis to be provided “prior to design and construction of roads and utilities.”
29 Record 15. Respondent, citing *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741

1 (1984), maintains that because the city found that all of the applicable approval criteria were
2 met, condition 6 is reasonable because the analysis required by WDC 16.96.030(D)(4) is
3 merely technical in nature.⁴

4 We disagree that the required geotechnical report is merely informational in nature.
5 WDC 16.96.030(D)(4) appears to be more than a merely an informational requirement. The
6 provision appears in the section of the WDC entitled “Natural Hazards,” in a subsection
7 headed “Standards.” WDC 16.96.030(D). The analysis required by WDC 16.96.030(D)(4) is
8 apparently how the city determines whether limitations imposed by weak foundation soils
9 can be “overcome,” *i.e.* whether the site can be rendered suitable for development. WDC
10 16.96.030(D) therefore includes a “suitability” substantive approval standard.

11 Second, the city did not make any findings regarding the steepness of slopes or
12 quality of soils on the properties, or the suitability of the properties for development. The
13 city can defer its determination of compliance with the standard set forth in WDC
14 16.96.030(D)(4) only under certain limited circumstances. The city can (1) weigh
15 conflicting evidence and determine that the evidence is sufficient to support a finding that the
16 criterion is met, or that feasible solutions to identified problems exist, and impose a condition
17 of approval; (2) deny the application because there is insufficient evidence to determine
18 compliance or the feasibility of compliance with an applicable criterion; or (3) defer a
19 determination of compliance to a later stage of approval, as long as that stage provides notice
20 and opportunity for a hearing. If no subsequent proceeding provides notice and an
21 opportunity for a hearing, then the city may not defer a determination of compliance with an
22 applicable criterion to that subsequent proceeding. *Rhyne v. Multnomah County*, 23 Or

⁴ In *Meyer*, the city found that the subject planned unit development application complied with the applicable approval criteria, based in part on information presented during the proceedings below, including a detailed geotechnical study of the area and extensive testimony by the city’s geotechnical engineer and its sanitary engineering experts regarding the proposed plan. The city imposed a condition of approval that required additional geotechnical studies of individual building sites. *Meyer*, 67 Or App at 281-82.

1 LUBA 442, 447-48 (1992); *see also Moreland v. City of Depoe Bay*, 48 Or LUBA 136, 153
2 (2004) (city errs in deferring a determination of compliance with approval criterion to a
3 subsequent review process that afforded no notice or opportunity for a hearing). Under
4 *Rhyne*, it was impermissible for the city to completely defer the analysis required by WDC
5 16.96.030(D)(4) to a later stage of the approval process where no notice or opportunity for
6 comment is provided.

7 **C. Partition Application Requirements**

8 In its fourth assignment of error, petitioner argues that the city impermissibly failed to
9 require the applicant to submit certain information required by WDC 16.100.050(B). WDC
10 16.100.050(B) provides in relevant part:

11 “Tentative plan requirements. The submitted tentative plan for a * * *
12 partition * * * shall contain all of the information listed in the applicable city
13 of Waldport application form.”

14 The application form contains a one-page attachment, which is signed by the applicant,
15 entitled “Information Required for a Land Division/Replat,” the first line of which states:

16 “For all land division or replat applications, the following minimum
17 information must be submitted for the application to be considered
18 complete[.]” Record 153.

19 The attachment lists the information required, which is generally consistent with the
20 “[g]eneral requirements and minimum standards of design development” set forth in WDC
21 16.100.040, including requirements for access, private roads, utilities, water service, sewer
22 service, drainage, and geologic hazards.⁵

⁵ Petitioner points out that the following information listed in the application form was not submitted by the applicant and does not appear on the submitted or approved tentative plan for the partitions as required by WDC 16.100.050(B):

“C. location of all proposed streets, a street cross-section showing proposed construction standards, profiles showing approximate grades of all streets, and whether they are proposed to be public or private streets

“* * * * *

1 The approved tentative plan does not show the location, width, depth, or direction of
2 flow of drainage channels, water or sewer lines, areas of geologic hazards, or a description of
3 the topography and vegetation. The plan shows the only road to the parcels as “proposed
4 easement road” but does not provide a cross-section drawing or profiles showing street
5 grades. The approved tentative plan also identifies a “problem area” in the northwest corner
6 of Tax Lot 702, although the nature of the “problem” is not specified. Record 161.

7 The city maintains that even if the tentative plan does not contain such information,
8 there is substantial evidence in the record supporting the city’s finding that all applicable
9 approval criteria have been met.⁶ However, WDC 16.100.050(B) is clear in requiring the
10 information listed in the application form to be included on the submitted tentative plan for
11 the partition, and the approved tentative plan fails to include the items listed in sections C, F,

“F. the location of water and sewer lines, septic system, well, and all existing and
 proposed easements

“* * * * *

“H. all wetlands, areas of geological hazard, streams and waterways, and areas subject to
 flood hazard

“I. description of the topography and vegetation * * *

“* * * * *

“K. width, depth and direction of flow of all drainage channels on or directly adjacent to
 the property, and tentative plans of disposal of additional storm water generated by
 developing the property

“L. if there are to be phases of development, the identification and sequence of each
 phase”

⁶ The city imposed the following conditions:

“3. Final engineering plans for street, water, sewer, and storm drainage improvements
 shall be reviewed and approved by both the City of Waldport Public Works
 Department and the Central Oregon Coast Fire & Rescue District. * * *

“* * * * *

“6. The applicant shall submit a site specified geotechnical analysis prior to design and
 construction of roads and utilities.” Record 15.

1 H, I, K, and L of the application form. It was error for the city to approve a tentative plan
2 that does not include the required information.

3 Accordingly, the second and fourth assignments of error are sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioner asserts that the city failed to make adequate findings regarding the private
6 roads for the new parcels. WDC 16.100.040(5)(c) provides:

7 “No private road shall be approved unless the Planning Commission is
8 satisfied that such road is not presently needed as a public street nor will it
9 ever be extended through to adjacent property or is necessary for public street
10 purposes in the normal growth of the area.”

11 The city’s findings regarding WDC 16.100.040(5)(c) do not appear to be responsive to the
12 criterion.⁷ The findings refer to a condition of approval imposed by the planning
13 commission in its decision that requires the applicant to provide documentation that the
14 parcels have the right to access and to run utilities through the Township 13 Subdivision.
15 The council’s findings merely add to that condition a requirement that access be determined
16 by a third party with competent jurisdiction. There is no finding regarding whether the
17 proposed private easement road on Tax Lots 702 and 703 is presently needed as a public
18 street, whether it will be extended to adjacent property or whether it is will be necessary for
19 public street purposes in the future due to growth in the area.

⁷ We set out the city’s findings below:

“The appellant stated that the [petitioner] does not have jurisdiction over Tax Lot 702 property and denies use of [petitioner’s] privately owned road for access to or from Tax Lot 702. The Findings and Conclusion of the Planning Commission include a condition of approval that ‘the applicant shall provide documentation that the subject properties have the legal right to provide access and utilities through the Township 13 Subdivision.’ * * * The City Council finds that by denying the appeal * * * the second condition of final approval for [the application] should be amended to read: ‘the applicant shall provide documentation that the subject properties have the legal right to provide access and utilities to the subject properties through the Township 13 Subdivision. The legal right to provide access and utilities to the subject properties through the Township 13 Subdivision shall be determined by a third party with competent jurisdiction, i.e., an Oregon court, to the satisfaction of the City.’” Record 13.

- 1 The third assignment of error is sustained.
- 2 The city's decisions are remanded.