BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID DOUGLAS,
Petitioner,

vs.

CITY OF SALEM,
Respondent.

LUBA No. 2006-191

FINAL OPINION
AND ORDER

Appeal from City of Salem.

David Douglas, Salem, filed the petition for review and argued on his own behalf.

Richard D. Faus, Assistant City Attorney, Salem, filed the response brief and argued on behalf of respondent. With him on the brief was C. Randall Tosh.

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

REMANDED 03/27/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the city of Salem approving a tentative subdivision plan for a 15-lot subdivision.

FACTS

The applicant applied for tentative approval to subdivide a 2.97-acre parcel. The city's subdivision review committee approved the application with conditions. On its own motion, the city council held a *de novo* hearing to review the decision, and voted to approve the application with conditions. This appeal followed.

MOTION TO STRIKE

Respondent moves to strike certain material included as appendicies to the petition for review. Specifically, respondent moves to strike Appendices A-2 through A-8 and A-10, and to strike all references thereto from the body of the petition for review. Respondent argues that the materials included in Appendices A-2 through A-8 and A-10 should be stricken because they are not a part of the record, and are not subject to "official notice" under Oregon Evidence Code (OEC) Section 202, codified at ORS 40.090.[1] Petitioner

[1] OEC 202 provides:

"Law judicially noticed is defined as:

"(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

"(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

"(3) Rules of professional conduct for members of the Oregon State Bar.

"(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.

"(5) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

argues that the appendicies are necessary for the petitioner to show why the appealed decision does not comply with the applicable approval criteria and why there is not substantial evidence in the record to support the city's findings.

The material included in Appendices A-2 though A-8 and A-10 does not appear in the record, and petitioner does not argue otherwise.[2] Petitioner also does not argue that any of the material is subject to official notice under OEC 202. *See* n 1.

We grant respondent's motion to strike Appendices A-2 through A-8 and A-10. We will disregard arguments in the petition for review based on those appendices.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error generally asserts that the city erred in failing to require the applicant to submit certain information that must be submitted under Salem Revised Code (SRC) 63.038.

A. First Subassignment of Error

In his first subassignment of error, petitioner argues that the applicant failed to submit a preliminary title report in violation of SRC 63.038(a)(6).[3] Petitioner alleges that the lack

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"(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.

"(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

[2] Appendix A-1 is a copy of a page from respondent's response to petitioner's record objections, and Appendix A-9 is a map of the subject property and other property in the vicinity. Respondent does not move to strike these appendices.

[3] SRC 63.038(a)(6) provides in relevant part:

"A party proposing to subdivide * * * land shall file with the Planning Administrator:

" * * * * *

"(6) A current title report and deeds for the property."

of a preliminary title report means that there is not substantial evidence in the record that the applicant is the owner of the property.

The requirement of a preliminary title report is a submittal requirement. A failure to comply with a submittal requirement does not automatically require that the city reject the application if other evidence in the record can be relied on to find that applicable approval criteria are met. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004). Petitioner does not explain why the evidentiary support for any approval criterion is implicated by the lack of a preliminary title report. Moreover, there is evidence a reasonable person would believe that the applicant is the owner of the property.[4]

The first subassignment of error is denied.

B Second Subassignment of Error

In a portion of his second subassignment of error, petitioner argues that the city erred in approving the application because the tentative plan did not show the location of all existing buildings as required by SRC 63.038(b)(3)(H).[5] Respondent answers that the issue was not raised prior to the close of the final evidentiary hearing below, and petitioner is precluded by ORS 197.763(1) and ORS 197.835(3) from raising it for the first time in this appeal.

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[4] The evidence consists of a copy of a February, 2006 deed from the previous owners to the applicant. Record 256-60.

[5] SRC 63.038(b) provides in relevant part:

"The tentative plan map shall include the following:

"(3) The tentative plan shall include:

" * * * * *

" (H) Location, dimensions and use of all existing buildings * * * canals, ditches, waterways, detention facilities, sewage disposal systems, and wells on the subject property, indicating which will remain and which will be removed or decommissioned."

Petitioner has not identified any place in the record where this issue was raised. We agree with respondent that petitioner failed to raise this issue below, and petitioner is precluded by ORS 197.835(3) from raising the issue for the first time in his petition for review at LUBA.

In another portion of his second subassignment of error, petitioner argues that the city erred in approving the application because the tentative plan did not show the location of two existing wells on the property, as required by SRC 63.038(b)(3)(H). *See* n 5. Petitioner appears to argue that the applicant's failure to show the location of existing wells on the tentative plan precluded the city from finding that SRC 63.051(a)(7) is met.[6]

Respondent answers that although the wells are not shown on the tentative plan map, the city was aware of the existence and location of the wells and imposed a condition of approval requiring the existing wells to be identified on the final plat and abandoned according to state law. Given that condition, we understand the city to argue that any error in failing to identify the wells on the tentative plan map is harmless error. We agree with the city.

With regard to petitioner's arguments under SRC 63.051(a)(7) that the wells constitute a hazard that has not been alleviated, respondent contends that no such hazard

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[6] SRC 63.051(a)(7) provides:

> "(a) The purpose of tentative plan review of a subdivision or partition is to insure that:
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> " * * * * *
>
> "(7) Adequate measures have been planned to alleviate identified natural or fabricated hazards and limitations to development, as identified by the Planning Administrator, including, but not limited to, wetlands, unstable areas, and stream side setback. * * *"

Petitioner also cites a number of statutes, LUBA decision headnotes and a statement that is attributed to the Oregon Department of Environmental Quality. Petitioner apparently cites those authorities to bolster his SRC 63.051(a)(7) "natural hazards" argument.

issue was raised prior to the close of the final evidentiary hearing below, and petitioner is precluded from raising the issue for the first time on appeal to LUBA.

The only statement in the record regarding the wells related exclusively to the quality of the water from the wells and the use of that water by the house currently located on a portion of the subject property. Record 187. No concerns were raised in that statement regarding the wells creating a hazard or limitation on development of the property under SRC 63.051(a)(7) or any other provision of the SRC. That issue is waived.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner alleges that the city erred in approving the application because, he argues, the development is incompatible with the existing neighborhood. More specifically, petitioner argues that the lot sizes in the proposed subdivision are incompatible with the larger lot sizes of the lots that adjoin the subject property. Petitioner quotes various provisions of ORS Chapter 92, ORS Chapter 197, the SRC, the Polk County Comprehensive Plan, the West Salem Neighborhood Plan and some LUBA decision headnotes in support of his contention. Respondent answers that no applicable provision of the SRC contains a compatibility criterion or standard, which requires that the city find that the lot sizes proposed for the disputed subdivision are compatible with the lot sizes of adjoining lots. Respondent also argues that the other statutes and ordinances that petitioner cites do not establish a legal requirement for such a finding either.

The city did not find that the lot sizes in the disputed subdivision will be compatible with the lot sizes of the adjoining lots. However, if petitioner wishes to assign error to the city's failure to find that the proposed lot sizes are compatible with adjoining lot sizes, petitioner must establish that such a finding is legally required. Petitioner makes no attempt to explain why the statutes, SRC sections, comprehensive plan provisions and LUBA

decision headnotes apply or have any direct bearing on the disputed tentative subdivision plan approval decision. Some or all of them do not apply directly. Even if a case could be made that some of the cited authorities apply, petitioner makes no attempt to explain why he believes they require the city to find that the different lot sizes are compatible. Based on those failures by petitioner, we agree with respondent that petitioner's second assignment of error fails to state a basis for reversal or remand.

Finally, we note that in response to general concerns raised about compatibility of the proposed lot sizes with neighboring lot sizes, the city adopted the following findings:

> "Compatibility: The average lot size within the proposed subdivision is approximately 6051 square feet. The majority of the lots surrounding the subject property exceed 8,000 square feet in size. Therefore, the majority of the surrounding lots could be further divided into 4,000 square foot lots. The applicant is proposing lots that exceed the minimum lot size requirement of 4,000 square feet. Staff found that the proposed subdivision is compatible and minimizes any adverse impacts on the surrounding neighborhood by providing larger than the 4,000 square foot minimum lots, providing adequate circulation to Doaks Ferry Road, and by providing a stub [street] to the south for future development. * * *" Record 15.

Deciding whether a subdivision with lots that are smaller than the surrounding lots will be compatible with those surrounding lots calls for a highly subjective determination. Even if the city was legally required to make that determination, we believe the above findings are adequate to make that determination.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The third assignment of error includes three subassignments of error.

A. First Subassignment of Error

In his first subassignment of error, petitioner argues that the city erred in accepting an assessor's map that shows the subject property. Petitioner claims the assessor's map is inaccurate. Respondent argues that petitioner waived that issue because it was not raised

during the proceedings before the city. ORS 197.835(3). Petitioner has not responded to respondent's waiver argument. We agree with respondent that the issue is waived.

B. Second and Third Subassignments of Error

In his second and third subassignments of error, petitioner generally argues that the city erred in finding compliance with SRC 63.046(b)(1), which provides in relevant part:

> "Before approval of a tentative plan the planning administrator shall make affirmative findings that:
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> "(1) Approval does not * * * adversely affect the safe and healthful development of * * * any adjoining land or access thereto[.]"

Petitioner argues that the proposed development has the effect of cutting off access to the rear of his property for future development, and that the city erred when it did not require the applicant to provide a stub street for future access to the rear of petitioner's property from the new streets on the subject property.

The city adopted the following findings addressing SRC 63.046:

> "* * * The subject property is surrounded to the north, south, west and east by existing single family residential development. * * * There is no evidence that the proposed subdivision and subsequent development of newly created lots, will adversely affect public services to any surrounding properties. Approval of the proposed subdivision does not impede future use of the property, nor adversely affect the safe and healthful development of, or access to, any adjoining lands.
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> "The subject property will have direct access onto Doaks Ferry Road via a proposed interior local street. A cul-de-sac will be provided to the north and a stub street to the south for future development. The subject property will not have access to Wallace Road." Record 26.

The city was required to find that the proposed subdivision would not affect access to adjoining lands, and substantial evidence in the record indicates that petitioner's property and other adjoining lands have direct access onto Doaks Ferry Road or another arterial. Record 52, 54, 218, 262, Supplemental Record 5. We understand the city to interpret SRC 63.046(b)(1) not to require the proposed subdivision to provide petitioner with additional

access to the rear of his property when other access already exists. That interpretation is within the city's interpretive discretion.

Another provision of SRC governs street connectivity. SRC 63.225(p) provides in relevant part:

> "Applicants submitting preliminary development plans shall provide for local streets oriented to or connecting with existing or planned streets * * *. Applicants shall also provide for extension of local streets to adjoining major undeveloped properties and eventual connection with the existing street system."

The phrase "major undeveloped properties" is not defined in the SRC. Petitioner's property and the two properties to the north of it vary in size from .34 to .39 acres, and are all approximately 170 feet deep. All are developed with houses located at the mid point of the western edge of the property, with direct access onto Doaks Ferry Road. Supplemental Record 11. However, the property directly to the south is a larger much parcel and has a home located on its western edge, close to Doaks Ferry Road. Supplemental Record 11.

In response to the connectivity issue, the city adopted the following finding:

> "Tax Lots 7500, 7600, and 7700 are already developed to residential densities and are not considered 'major undeveloped properties.' These lots are 0.38, 0.39, and 0.34 acres respectively, and have lot depths of approximately 170 feet. The properties to the south vary in size from .53 to .95 acres and have lot depths in excess of 400 feet. The applicant is required to provide a stub street to the south for future development. However, the ability to divide lots 7500, 7600, or 7700 will not be affected with the approval of this subdivision. * * *." Record 26.

The city apparently determined that the three tax lots to the north of the subject property, including petitioner's property, are not "major undeveloped properties" as used in SRC 63.225(p), and that the property to the south of the subject property is a "major undeveloped property" requiring a future street connection. The city reasonably interpreted that provision of the SRC in such a manner and concluded that the location of existing development on petitioner's property and the other properties to the north and the smaller size of those properties meant that they were not "major undeveloped" properties, while the location of

existing development on the property to the south and its larger size meant it was a "major undeveloped" property, as used in SRC 63.225(p).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error includes three subassignments of error.

A. First Subassignment of Error

In his first subassignment of error, petitioner argues that the tentative plan does not provide for orderly future development of traffic patterns under SRC 63.051(a)(2). Respondent contends that this issue was not raised at any time during the proceedings below, and under ORS 197.835(3), petitioner cannot raise this issue for the first time in this appeal. We think that, fairly read, petitioner's arguments under this subassignment of error merely restate his arguments under the second and third subassignments of error under the third assignment of error, which we have previously denied. Thus, even if these issues are not waived, they provide no basis for reversal or remand.

B. Second Subassignment of Error

In his second subassignment of error, petitioner argues that the tentative plan does not consider the welfare of current or future residents, including children. Respondent answers, and we agree, that this issue was not raised at any time during the proceedings below. Under ORS 197.835(3), petitioner cannot raise this issue for the first time in this appeal. In addition, petitioner does not cite any applicable code or plan provision that requires findings that the tentative plan promotes the welfare of current or future residents.

C. Third Subassignment of Error

In a portion of his final subassignment of error under the fourth assignment of error, petitioner assigns error to the decision because the applicant did not submit a traffic estimate pursuant to SRC 63.038(a)(4). Respondent answers that this issue was not raised at any time during the proceedings below and under ORS 197.835(3) petitioner cannot raise this issue for

the first time in this appeal. We agree with respondent that petitioner waived this issue by failing to raise it below.

In another portion of the final subassignment under the fourth assignment of error, petitioner claims that the city erred in allowing a reduction in street width of a new street on the property from 60 feet to 50 feet under SRC 63.235(f). SRC 63.235(f) provides:

> "The planning administrator may designate where street standards may be reduced to accommodate projects affected by existing development or physical constraints.
>
> " * * * * *
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> "(2) For local streets, the street standards may be reduced to a 50 foot right of way * * * if the proposed street is a cul-de-sac * * * or the standard right-of-way width would result in lot depths of 80 feet or less."

Petitioner argues that the reduction was error because the reduction was applied to reduce the width of a street that is not a cul-de-sac.

The city found that a reduction in street width was allowed under SRC 63.235(f) because the proposed street is a cul-de-sac. Record 24. The definition of "cul-de-sac" found in SRC 63.030(j) does not "define" the term, but merely references the definition of "street," without explanation for the meaning of the reference.[7] However, if the definition of "cul-de-sac" was meant to be synonymous with "street," then SRC 63.235(f) would be a meaningless provision, because all "streets" would qualify for a reduction in width as "cul-de-sacs."

The approved tentative plan shows that the subdivision will be accessed by a new street called "Ullman Drive." Ullman Drive connects with Doaks Ferry Road, and travels

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[7] SRC 63.030(j) defines "Cul-de-sac" as: "See 'Street'." The term "Street" is defined in SRC 63.030(pp) as:

> "* * * a public or private way that is created to provide ingress or egress to one or more lots, parcels, areas, or tracts of land * * *. The term 'street' shall include such designations as * * * [list omitted]."

approximately 230 feet east to connect at a "T" intersection with another new street called "Ferguson Court." Ferguson Court runs north and south. At its north end it terminates in a cul-de-sac. Ferguson Court terminates at the south end of the property without a cul-de-sac or other turnaround facility. We believe Ferguson Court is properly viewed as a cul-de-sac. However, we do not think that Ullman Drive qualifies as a cul-de-sac in the ordinary, accepted meaning of the term.[8] Ullman Drive is a different street than Ferguson Court, which is the only cul-de-sac shown on the plan. The city erred in reducing the width of Ullman Drive, based on a finding that it is a cul-de-sac.

Respondent argues in the alternative that Ullman Drive qualifies for a reduction in width under SRC 63.235(f)(2), because the standard width would reduce lot depths to 80 feet or less. Respondent appears to be correct that if a 60-foot right of way is required for Ullman Drive, some combination of lots 1-4 and 13-15 would be reduced below 80 feet in depth.[9] The city therefore, apparently, could invoke SRC 63.235(f)(2) to allow the proposed 50-foot right of way for Ullman Drive. However, a reduction of width in the Ullman Drive right of way under SRC 63.235(f) is discretionary, in the sense the city is not obligated to grant a reduction to avoid reducing lot depths below 80 feet.[10] On remand the city can determine whether it wishes to do so here. *See Anderson v. Coos County*, 51 Or LUBA 454, 472 (2006) (LUBA will remand a decision where an alternative theory for affirming the decision does not appear in the challenged findings).

The fourth assignment of error is sustained, in part.

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[8] Webster's Third International Dictionary (Unabridged) 551 (1981) defines "cul-de-sac" as "2. * * * a street that is closed at one end but usu[ally] has a circular area for turning around at that end * * *."

[9] Lots 1-4 are exactly 80 feet in depth and the deepest lot on the north side of Ullman Drive is lot 15, which is 81.01 feet in depth. Therefore, enlarging the Ullman Drive right of way to 60 feet would require that some or all of lots 1-4 and 13-15 be reduced below 80 feet in depth.

[10] The minimum lot depth in the RS zone is 70 feet. *See* SRC 146.070(b). Therefore, it does not appear that a city decision requiring that Ullman Drive have a 60-foot right of way would require that lots 1-4 and 13-15 be reconfigured in any way, other than by reducing their depth from 80 feet to 70 feet.

The city's decision is remanded.