BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GILLIAN HOLBROOK,
Petitioner,

vs.

CITY OF ROCKAWAY BEACH,
Respondent,

and

TAI DANG,
Intervenor-Respondent.

LUBA No. 2008-064

FINAL OPINION
AND ORDER

Appeal from City of Rockaway Beach.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Rockaway Beach.

Daniel Kearns, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Reeve Kearns, PC.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 01/15/2009

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 a decision approving a planned unit development (PUD) with two variances. One variance allows the PUD to be developed without required sidewalks. The other variance allows a longer cul-de-sac than would otherwise be permitted.

FACTS

The subject property is a 16.73-acre wedge-shaped tract that is split zoned for residential use and wetland protection. The southern half of the property consists of wetlands. West and north of the property lies residential development, part of the Nedonna Beach area. McMillan Creek separates the property from the residential development to the west. Riley Street borders the property on the north. The Port of Tillamook Railroad right of way and the Highway 101 right of way run side by side, along the long eastern boundary of the property.

Access to the property and the Nedonna Beach residential area from Highway 101 is complicated by the railroad right of way. The Nedonna Beach residential area has only one access to Highway 101, via Beach Drive some distance south of the subject property. Intervenor originally proposed a PUD with 47 lots on the northern half of the subject property. To provide access to those 47 lots an internal street would have extended south from Riley Street on the north through the proposed subdivision. After travelling some distance south, that street would have turned west, crossed over McMillan Creek via a proposed bridge, and connected with Western Street west of the property. The original proposal included no direct access to Highway 101. Intervenor also proposed a variance from subdivision code requirements that call for sidewalks on both sides of the internal street. Intervenor requested the variance to allow development with no sidewalks on either side of the internal street, consistent with existing development in the Nedonna Beach area, which has no sidewalks.

In response to early comments from planning staff, neighbors, and state permitting agencies, intervenor submitted a revised plat that eliminated the bridge crossing over McMillan Creek and the connection to Western Street. Instead, intervenor proposed a 50-lot PUD. Instead of the western extension across McMillan Creek, the internal road would travel east and terminate at a gated, emergency-only access to Highway 101 across the railroad. The revised plat required a second variance request, to permit a cul-de-sac longer than 400 feet.

The planning commission conducted several hearings on the revised application and on January 22, 2008, voted to approve the application and requested variances. Petitioner appealed the planning commission decision to the city council, arguing in part that (1) the railroad had not approved the proposed railroad crossing, and (2) the variances do not comply with applicable variance criteria.

The city council held a hearing and voted to approve the PUD and the requested variances. However, the city council decision simply incorporated the planning commission decision and did not include findings addressing the issues petitioner raised on appeal. Following petitioner's appeal to LUBA, the city withdrew the decision for reconsideration. After reconsideration, the city council adopted supplemental findings addressing petitioner's arguments. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the city's findings that it is feasible to obtain permission from the railroad and the Oregon Department of Transportation (ODOT) to construct the proposed emergency-only access road across the railroad to Highway 101. Relatedly, petitioner argues that the city erred in deferring the issue of whether the railroad and ODOT will grant permission for the crossing to a subsequent proceeding that does not provide an opportunity for public participation.

In response to petitioner's arguments below, the city council modified Condition 9 to provide:

> "The applicant shall work with the City, with the City acting as agent, to install a suitable access [to] US Highway 101. The applicant shall provide financially for the improvement. Prior to the final plat, the applicant shall provide to the City written authorization * * * from the Port of Tillamook Bay Rail Road to cross the railroad and from ODOT to construct a secondary emergency access route connection to Highway 101." Record D2.

The city also found:

> "The Council heard testimony, as did the Planning Commission, reporting on an on-site meeting among the City Engineer, the applicant and representatives of ODOT, Tillamook County and the Railroad concerning this secondary emergency access point. The result of that meeting was the concurrence of all entities with regulatory or proprietary control over this access that it is strongly recommended for public safety and is legally and politically feasible. On this basis, the Council agrees that it is feasible for the applicant to obtain the necessary permission from the Railroad and ODOT to construct the [access road] as a secondary emergency access. Again, to remove all doubt, the Council requires that the applicant obtain and document that permission for the secondary emergency access to US Highway 101 at the final PUD plan review by the Planning Commission under RBZO [Rockaway Beach Zoning Ordinance] 10.060." *Id*.

Further, the city found that:

> "* * * the City's review of the final PUD plan involves a public process in which [petitioner] can participate. Contrary to [petitioner's] assertions, the City's determination of compliance with this condition does not and will not involve the exercise of discretion and therefore will not trigger the land use decision making procedures of ORS 197.763 or ORS 227.175. The City's determination of compliance with this condition will be governed by non-discretionary, clear and objective criteria. In other words, either the applicant will obtain the necessary permit(s) and permission(s) to construct the [access road] prior to the final PUD plan review or he will not. If he does not, the subdivision will not receive final PUD plan approval. * * *" *Id*.

Petitioner acknowledges that, where proposed development requires a state agency permit or authorization, no finding is generally required that it is feasible to obtain the permit or authorization, as long as such a permit or authorization is not precluded as a matter of law, and the local government imposes a condition of approval assuring that the required permit

or authorization is obtained prior to final development approval. *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992). However, petitioner argues, that rule does not apply to circumstances where a necessary permit or authorization is required from a *private* landowner, such as the railroad. In such circumstances, petitioner argues, either the applicant must demonstrate that the necessary permit or authorization has been granted, or the local government must find based on substantial evidence that it is feasible to obtain the necessary permit or authorization. Petitioner disputes the city's finding that it is feasible to obtain the railroad's permission. According to petitioner, railroads generally disfavor new crossings, and at best the record reflects only silence from the Port of Tillamook Railroad as to whether it will permit the proposed crossing.

Further, petitioner contends that the city must assure that the issue of whether the applicant has obtained the railroad's authorization will be resolved by means of a public process or hearing at which petitioner and the public are entitled to participate. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (a local government must ensure that discretionary decision-making occurs in the public phase of a multi-phase land use approval process where the final phase does not guarantee a right of public participation). Petitioner disputes the city's findings that the planning commission review of the final PUD plat required by the city code, at which intervenor must submit proof of the railroad's authorization, will be a public evidentiary proceeding in which petitioner is entitled to participate.

Petitioner cites no reason why a different rule should be applied with respect to a private landowner versus a state landowner or permitting agency, when permission is necessary to provide required access for proposed development. In both instances, the overriding concern is to ensure that the proposed development will not go forward unless the required permit or authorization is obtained. That purpose is adequately served by imposing a condition of approval requiring that the applicant present evidence of the required

authorization prior to receiving final development approval. Petitioners do not explain what purpose would be served by requiring the applicant to demonstrate as part of the initial approval proceedings that the required authorization has already been obtained, or that it is "feasible" to obtain that authorization. Petitioner does not contend that there is any legal or other impediment to obtaining the railroad's permission, but merely speculates that the railroad might not grant that permission.

Accordingly, we extend the holding in *Bouman* to include circumstances where the permission of an adjoining private landowner is necessary to provide access to proposed development. In that circumstance, the applicant need not submit evidence that the adjoining landowner has granted permission or that it is feasible for the landowner to grant permission, as long as such permission is not precluded as a matter of law and the local government imposes conditions ensuring that permission will be obtained prior to final development approvals.

With respect to whether the final subdivision plat approval process must afford notice and opportunity for the public to participate under the present circumstances, it is not clear whether the city's code requires that the planning commission's review of the final plat application will provide notice and a public hearing or the opportunity to request a public hearing. In any case, even if it does not, petitioner has not established that determining whether Condition 9 is complied with requires a discretionary determination of compliance with an approval criterion. Condition 9 is not itself an approval criterion, and as the city's finding notes, the condition does not require the exercise of discretion. Either intervenor submits evidence of the railroad's authorization or he does not. Accordingly, Condition 9 does not represent a deferral of a discretionary determination of compliance with an approval criterion, and therefore the city is not obligated to ensure that the final plat review process in which the city determines whether Condition 9 is satisfied is a public process, with notice and opportunity for public participation.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The city's ordinances have two separate sets of variance criteria. The City of Rockaway Beach Zoning Ordinance (RBZO) Article 8 sets out variance criteria to be applied to requested variances from zoning ordinance requirements.[1] The City of Rockaway Beach Subdivision Ordinance (RBSO) is a separate ordinance. Section 48 of the RBSO provides a

[1] RBZO Article 8 provides, in relevant part:

"Section 8.010. Purpose.

(1) The purpose of a variance is to provide relief when a strict application of the zoning requirements would impose unusual practical difficulties or unnecessary physical hardships on the applicant. * * *

"* * * * *

"Section 8.020. Criteria.

"(1) Variances to a requirement of this chapter with respect to lot area and dimensions, setbacks, yard area, lot coverage, height of structures, vision clearance, fences and walls, and other quantitative requirements may be granted only if, on the basis of the application, investigation, and evidence submitted by the applicant, that all four expressly written findings are made:

"(a) That a strict or literal interpretation and enforcement of the specified requirement would result in practical difficulty or unnecessary hardship and would be inconsistent with the objectives of the Comprehensive Plan; and

"(b) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property which do not apply generally to other properties in the same zone; and

"(c) That the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity; and

"(d) That the granting of the variance would support policies contained within the Comprehensive Plan.

"Variances in accordance with this subsection should not ordinarily be granted if the special circumstances upon which the applicant relies are a result of the actions of the applicant or owner."

similar, but not identical set of variance requirements, to be used to vary RBSO requirements.[2]

As noted, intervenor requested variances from the RBSO requirements to provide sidewalks on both sides of the proposed street, and to exceed the 400 foot minimum length of the proposed cul-de-sac. The planning commission approved both variances. Petitioner appealed the planning commission decision, arguing that the decision failed to adequately address either the RBZO Article 8 standards or the RBSO Section 48 standards. Record 17-18. As noted, the city council initially affirmed the planning commission decision without adopting supplemental findings addressing petitioner's challenges. After reconsideration, the city council adopted findings that in relevant part approve both variances under the RBZO Article 8 standards. The city council decision does not address the RBSO Section 48 variance standards, or explain why the zoning ordinance variance standards govern a request to vary subdivision requirements, rather than the subdivision ordinance variance standards.

On appeal to LUBA, petitioner argues that the applicable variance standards are those in RBSO Section 48, and that the city council's supplemental findings are inadequate.

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[2] RBSO Section 48 provides:

> "Variances to the requirements of this ordinance may be granted where the following criteria are met:
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> "(1) Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same vicinity, and result from tract size or shape, topography or other circumstances over which the owners of property since enactment of this ordinance have had no control.
>
> "(2) The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same vicinity possess.
>
> "(3) The variance would not be materially detrimental to the purposes of this ordinance, or to property in the same vicinity in which the property is located, or otherwise conflict with the objectives of any City plan or policy.
>
> "(4) The variance requested is the minimum variance which would alleviate hardship."

Specifically, petitioner argues under the second assignment of error, challenging the sidewalk variance:

> "The city made an effort to address [RBSO 48] for the first time in its supplemental findings. App A-6-9. Without setting out those findings at any length here, we would point out they entirely fail to address the requirements of Section 48(4), that the 'variance requested is the minimum variance which would alleviate the hardship'" Petition for Review 18.

Petitioner makes an identical argument under the third assignment of error, challenging the cul-de-sac length variance.

Intervenor responds, initially, that petitioner's arguments under the second and third assignments of error do not appear to recognize that the city council's supplemental findings address the RBZO Article 8 standards instead of the RBSO Section 48 standards. Intervenor is correct that petitioner's arguments appear to presume that the city council intended to address the RBSO Section 48 variance standards, and simply failed to do so adequately. We understand intervenor to argue that petitioner's failure to expressly challenge the city's choice to apply the RBZO Article 8 standards means that petitioner is precluded from challenging the city's findings addressing RBZO Article 8.

However, we believe that petitioner's arguments under the second and third assignments of error are sufficient to challenge the city council's choice to apply RBZO Article 8 instead of the RBSO Section 48. Petitioner asserts that RBSO Section 48 provides the governing variance standards, and that the city council's findings are inadequate because they fail to address RBSO 48(4). Those assertions are sufficiently developed for us to resolve their merits, notwithstanding that petitioner apparently failed to appreciate that the city council's findings address RBZO Article 8 rather than RBSO Section 48.

On the merits, intervenor argues that the city council implicitly determined that RBZO Article 8 provides the applicable variance standards, not RBSO Section 48, and that

the city council's choice between two arguably applicable approval criteria should be affirmed under ORS 197.829(1).[3]

We disagree. As the text and context of RBZO Article 8 and RBSO Section 48 make clear, each set of variance standards is applied to vary the standards of the ordinance of which they are a part. Nothing in either ordinance suggests that the variance standards of the zoning ordinance govern a proposed variance from subdivision ordinance requirements, or vice versa. To the extent the city council implicitly interpreted the RBZO and RBSO to that effect, it is inconsistent with the express language of both ordinances, and cannot be affirmed under ORS 197.829(1).

As intervenor notes, petitioner does not challenge the omission or inadequacy of any findings directed at RBSO 48(1) through (3), and therefore we confine the remainder of our analysis to petitioner's contention that the city's findings do not address RBSO 48(4). Petitioner is, of course, correct on that point. The city council did not adopt any findings at all explaining why the requested variances are the "minimum variance which would alleviate hardship."

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[3] ORS 197.829 provides, in relevant part:

> "(1) [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;
> >
> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
> >
> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]
> >
> > "* * * * *
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

Intervenor argues that LUBA should exercise its discretion under ORS 197.829(2) to "infer the missing finding" of compliance with RBSO 48(4), using the city council's other findings regarding the similar "hardship" standard found under RBZO Article 8. Response Brief 19. However, ORS 197.829(2) is a more limited vehicle than intervenor supposes. ORS 197.829(2) permits LUBA, in the absence of a missing or inadequate interpretation of a local comprehensive plan or land use regulation, to interpret the local provision in the first instance. ORS 197.829(2) does not permit LUBA to supply missing findings of compliance with applicable approval criteria.

Intervenor may be correct that the same considerations that led the city to conclude that a variance was warranted under RBZO Article 8 may also suffice to support a conclusion that a variance is warranted under RBSO 48(4). However, we note that RBZO Article 8 does not require, as RBSO 48(4) does, a finding that the requested variance is the "minimum variance which would alleviate hardship." Thus, the findings directed at RBZO Article 8 do not address that particular issue, and we cannot say as a matter of law that the findings directed at RBZO Article 8 establish that the requested variances are warranted under RBSO 48(4), or whether lesser variances would suffice to "alleviate hardship."

In addition, it is not obvious what is meant by the requirement that the requested variance be the "minimum variance which would alleviate hardship." Petitioner argues for an interpretation and application of that language in the present case that would essentially preclude granting a complete variance to the RBSO sidewalk and cul-de-sac requirements, because the city could grant a lesser variance (*e.g.*, one sidewalk instead of two). Intervenor argues for a more lenient interpretation of RBSO 48(4) that would allow a complete variance from the sidewalk requirement. Because the meaning of RBSO 48(4) is not clear to us, and remand for additional findings is necessary in any event, we deem it more appropriate to

remand the decision to the city council to adopt findings addressing RBSO 48(4), along with any necessary interpretation of that criterion.[4]

The second and third assignments of error are sustained.

The city's decision is remanded.

[4] To be clear, because petitioner has not sufficiently challenged the city's failure to adopt findings addressing RBSO 48(1) through (3), on remand the city is not required *by our decision* to adopt findings addressing those standards. However, the city may choose to address RBSO 48(1) through (3) in the first instance, if it wishes. *Schatz v. City of Jacksonville*, 113 Or App 675, 681, 835 P2d 923 (1992) (absent remand instructions to the contrary, a local government may choose to expand the scope of remand proceedings to consider issues in addition to those that formed the basis for remand).