BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

WILLAMETTE WEST HABITAT
FOR HUMANITY, INC.,
Intervenor-Respondent.

LUBA No. 2009-132

FINAL OPINION
AND ORDER

Appeal from Beaverton.

Henry Kane, Beaverton, filed a petition for review on his own behalf.

Alan Rappleyea, City Attorney, Beaverton, filed a joint response brief and argued on behalf of respondent. With him on the brief was Andrew H. Stamp.

Andrew H. Stamp, Lake Oswego, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Alan Rappleyea, City Attorney for Beaverton.

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

AFFIRMED 05/21/2010

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 city decision approving a preliminary plat for a five-lot subdivision.

FACTS

Intervenor filed five related applications with the city in furtherance of developing a five-lot subdivision. The five applications included preliminary subdivision plat approval, a variance, a flexible setback, a major adjustment, and a minor adjustment. The five applications were supported by a single application narrative, but the city assigned each application a separate file number, and the planning commission approved each application in a different decision with separate findings and orders.

Petitioner appealed the preliminary subdivision plat approval to the city council, but did not appeal the other four decisions. The city council denied petitioner's local appeal and affirmed the planning commission's approval of the preliminary subdivision plat. This appeal followed.

MOTION TO CONSIDER WRITTEN ORAL ARGUMENT

In a letter dated March 29, 2010, LUBA notified the parties that oral argument in this appeal would be held at 11:00 a.m. on May 6, 2010, at LUBA's offices in Salem. The March 29, 2010 letter states, in relevant part, that: "[i]f any party wishes to participate in oral argument via telephone conference, please notify the Board at least 14 days prior to oral argument to ensure availability of a conference line." After the close of business on May 5, 2010, the day before oral argument, petitioner sent a facsimile message to LUBA's offices stating in its entirety that "[a]ppellant requests the Board to hear [oral] argument by long distance telephone. The reason is that appellant cannot travel to and from Salem for oral argument."

OAR 661-010-0040(6) provides that LUBA "may conduct oral argument by telephone conference call." Generally, when LUBA receives a timely request to participate at oral argument by telephone, LUBA obtains a conference call number from the telephone company and advises the requesting party by letter how to call into the conference line in LUBA's hearing room. Petitioner's untimely request made this arrangement impossible, and petitioner did not contact LUBA by phone or other means prior to the scheduled start of oral argument at 11:00 a.m., to set up alternative means to participate in oral argument by telephone. LUBA staff called petitioner and gave him the option of placing a call to the hearing room telephone line so he could participate in oral argument. However, petitioner declined, apparently because his telephone plan does not allow long-distance calls from Beaverton to Salem. These efforts delayed oral argument by approximately 20 minutes. At that point, with the other parties present in the hearing room, the Board elected to commence oral argument, pursuant to OAR 661-010-0040(2).[1]

The day after oral argument petitioner filed a "Motion for Leave to File Written Argument, Petitioner's Written Oral Argument, and Endnote in Support of Motion." The motion apparently contains what petitioner would have said at oral argument had he participated. The city objects to petitioner's "written oral argument," and we agree with the city that petitioner has not established any basis under our rules to consider that written oral argument. Conducting oral argument by telephone is a convenience to the parties that the Board "may" allow, if a timely request is made and the party requesting telephonic conference complies with the procedures necessary to accomplish that participation. Petitioner failed in both respects. Under OAR 661-010-0040(2), petitioner failed to appear

[1] OAR 661-010-0040(2) provides in part:

> "If a party fails to appear at the time set for oral argument, the Board may deem the cause submitted without oral argument as to that party. A party's failure to so appear shall not preclude oral argument by other parties."

for oral argument and has not presented sufficient grounds for excusing that failure, or any other basis to consider his written oral argument. Therefore, petitioner's motion to submit written oral argument is denied.[2]

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city failed to comply with a Metro density requirement and a Beaverton Community Development Code (CDC) provision that establishes a minimum density of six lots for the proposed subdivision.

A. Metro Density Requirement

Petitioner argues that the city's decision does not comply with the density requirements of Metro's Urban Growth Management Functional Plan (UGMFP) 3.07.140.2, which is titled "Measures to Increase Development Capacity," and provides:

> "A city or county shall not approve a subdivision or development application that will result in a density below the minimum density for the zoning district."

Respondents first argue that petitioner did not raise any issue concerning the UGMFP 3.07.140.2 minimum density standard before the record closed below and is therefore precluded from raising the issue at LUBA. ORS 197.763(1); 197.835(3).[3] Respondents also

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[2] Even if we were to consider petitioner's written oral argument, as best we can tell the only thing the "written oral argument" adds is a partial response to respondents' waiver argument under the first assignment of error, and elaboration on petitioner's variance arguments under the second and third assignments of error. As our decision later explains, neither of those arguments provides a basis for reversal or remand. Therefore, even if we considered petitioner's "written oral argument" it would not affect our disposition of this appeal.

[3] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

argue that petitioner is precluded from raising the issue of compliance with UGMFP 3.07.140.2 because he failed to exhaust his remedies by raising the issue in the notice of appeal that he filed with the city council. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003).

We tend to agree with respondents that UGFMP 3.07.140.2 was not adequately raised below and was not raised in the local notice of appeal filed below.[4] However, even if petitioner had not waived the issue of compliance with UGFMP 3.07.140.2, his argument under this subassignment of error would not provide a basis for reversal or remand because he has not established that UGFMP 3.07.140.2 is an applicable approval criterion. Although a detailed explanation of the interplay between the Metro UGFMP and the CDC is not necessary, in essence Metro established density regulations and allowed local governments a specified period of time to implement the regulations by adopting them as part of local government land use regulations. If the regulations were not adopted as part of the local land use regulations within the allotted time, then and only then would the UGFMP apply directly to development applications. There is no dispute that the City of Beaverton complied with Metro regulations and implemented UGFMP 3.07.140.2 by adopting CDC 20.05, discussed below. Therefore, UGFMP 3.07.140.2 is not an applicable approval criterion.

This subassignment of error is denied.

B. CDC 20.05.60

Petitioner also argues that the city's decision violates the density requirements of CDC 20.05.60, which provides in pertinent part:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[4] Petitioner's "Written Oral Argument" includes a brief response to respondents' waiver challenges. Even if we were to consider that response, we would likely agree with respondents that petitioner has not established that the issue of compliance with UGFMP 3.07.140.2 was sufficiently raised below. In any case, we do not resolve the waiver challenges, because as explained we reject petitioner's arguments under UGFMP 3.07.140.2 on the merits.

> "New residential development in the RA, R10, R7, R5, R4, R3.5, R2, and R1 zoning districts must achieve at least the minimum density for the zoning district in which they are located. Projects proposed at less than the minimum density must demonstrate on a site plan or other means, how, in all aspects, future intensification of the site to the minimum density or greater can be achieved without an adjustment or variance. *If meeting the minimum density will require the submission and approval of an adjustment or variance application(s) above and beyond application(s) for adding new primary dwellings or land division of property, meeting minimum density shall not be required*." (Emphasis added.)

According to petitioner, the required density for the subject property is six lots, and therefore the city violated CDC 20.050.60 by approving a five-lot subdivision.

However, the city adopted findings that rely upon the above-emphasized exception to the density requirement:

> "The applicant proposed an alternate means of meeting the minimum density provisions. [CDC] 20.05.60 contains an exception to the minimum density requirements: if meeting the minimum density requires adjustment or variance applications, the minimum density requirement may be waived. The applicant stated in the written narrative that, due to the variance and adjustments needed for the project, the subdivision was not required to meet minimum density. Staff concurred with the applicant and further found that in order to create a sixth lot for detached housing, a second Major Adjustment application would need to be approved instead of the Minor Adjustment that was approved to allow narrower lots. The Planning Commission upheld staff's finding that the proposed development qualified for the minimum density exception." Record 142.

Petitioner neither acknowledges nor challenges these findings.[5] The CDC clearly allows less than the maximum density under certain circumstances. The city found that those circumstances exist, and petitioner does not challenge those findings. Therefore, petitioner's argument does not provide a basis for reversal or remand.

This subassignment of error is denied.

The first assignment of error is denied.

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[5] The city also adopted alternative findings that the minimum density requirement could be met with a duplex on one lot. Record 4-5. Petitioner also does not challenge the alternative findings.

SECOND AND THIRD ASSIGNMENTS OF ERROR

As explained above, the entire development included five related applications, resulting in five separate planning commission decisions, but petitioner chose to appeal to the city council only the planning commission's preliminary subdivision approval. In the second and third assignments of error, petitioner appears to challenge the findings and evidence supporting the planning commission's decision approving the variance application, which was not before the city council and is therefore not before LUBA. Any challenges to the variance decision have no bearing on this appeal. To the extent petitioner argues that the city was required to address the variance standards in approving the subdivision application, instead of in a separate variance decision, petitioner does not explain the basis for that argument. Therefore, petitioner's arguments under these assignments of error provide no basis for reversal or remand.

The second and third assignments of error are denied.

The city's decision is affirmed.