

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUL 16 3 23 PM '85

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2
3 RAY SPRINGER,)
4) Petitioner,)
5) vs.)
6 BEND CITY COMMISSION,)
7) Respondent,)
8) and)
9 DAW FOREST PRODUCTS L.P.,)
10) Respondent-)
11) Intervenor.)

LUBA No. 85-027

FINAL OPINION
AND ORDER

12 Appeal from Bend City Commission.

13 Allen L. Johnson, Eugene, filed the petition for review and
14 argued the cause on behalf of petitioner. With him on the
brief were Sullivan, Josselson, Roberts, Johnson & Kloos.

15 Ronald L. Marceau, Bend, filed a response brief and argued
16 the cause on behalf of Respondent Bend City Commission. With
him on the brief were Gray, Fancher, Holmes & Hurley.

17 Robert S. Lovlien, Bend, filed a response brief and argued
18 the cause on behalf of Respondent-Intervenor Daw Forest
Products.

19 DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee;
participated in the decision.

20 AFFIRMED 07/16/85

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioner appeals the decision of the Bend City Commission
4 denying an application to dedicate a street.

5 FACTS

6 Petitioner and Deschutes County were co-applicants to
7 dedicate a street. The proposal would extend Urania Avenue
8 westerly from Second Street to Division Street through
9 petitioner's property.

10 Prior to 1980, Division Street was a private road. The
11 portion of Division Street relevant in this appeal was owned by
12 a private corporation, Brooks-Scanlon, Inc.¹ In April, 1980,
13 Brooks-Scanlon, Inc. conveyed the tract which includes Division
14 Street to the city. However, Brooks-Scanlon, Inc. did not
15 convey all of the property it owned along the length of
16 Division Street. The property description excluded a one foot
17 strip along the east side of Division Street adjacent to
18 petitioner's property.² The one foot strip now separates
19 petitioner's property from Division Street, and the present
20 owner, Daw Forest Products, objects to the Urania Avenue
21 extension. In addition, the deed was subject to the following:

22 "No access to or from said land on the east and west
23 side is permitted except Grantor, its successors and
24 assigns reserves two access points to any future
25 roadway from the west side of said land."³

26 Division Street is now a state highway. The city limits
are along the west boundary of petitioner's property which is

1 entirely within the city. The one foot strip and the portion
2 of Division Street relevant to this appeal are outside the city.

3 FIRST ASSIGNMENT OF ERROR

4 Petitioner alleges the decision is erroneous because the
5 county misconstrued the applicable law, exceeded its authority
6 and made improper findings in denying the application. The
7 principal target of petitioner's arguments is the city's
8 reliance on the deed restrictions and the lack of contiguity
9 between petitioner's property and Division Street as bases for
10 the decision. Petitioner says the deed restrictions may not be
11 relied on and that by honoring them the city has violated ORS
12 227.173(1).⁴ Petitioner also claims the one foot strip was
13 created in violation of state and county regulations
14 controlling partitions, and therefore cannot be a basis for the
15 decision.

16 It is significant that the city's decision does not depend
17 on these two factors as justification for the denial. The
18 city's order states:

19 "This matter is controlled by Ordinance No. NS-1349
20 which requires in Article III that a person desiring
21 to create a street shall make written application, pay
22 the appropriate filing fee and obtain the necessary
permits if access to a county road or state highway is
planned." (Emphasis supplied) Record 2.

23 The city found the petitioner had not obtained permits from
24 Deschutes County or the State Highway Division for access to
25 Division Street. This uncontested finding is by itself
26 sufficient to support the city's denial since it shows a

1 necessary criterion was not satisfied. Heilman v. City of
2 Roseburg, 39 Or App 71, 591 P2d 390 (1979). Marracci v. City
3 of Scappoose, 26 Or App 131, 552 P2d 552 (1976); Weyerhaeuser
4 v. Lane County, 7 Or LUBA 42 (1982).

5 In addition to basing the denial on the applicant's failure
6 to meet the permit requirement above described, the city also
7 relied on its comprehensive plan policies regarding arterial
8 streets. Division Street is designated as an arterial
9 street⁵ and the findings point out two policies in the plan
10 that the city deemed pertinent.⁶ These policies emphasize
11 that access to arterial streets should be limited. We note too
12 that Policy 3 of the Commercial Areas section of the plan
13 explains that access limitations and other traffic management
14 mechanisms should be used "to avoid problems associated with
15 strip development, i.e., congestion caused by turning
16 movements, too much access to the arterial street or highway."
17 Bend Area General Plan, Commercial Areas, Policy 3.

18 The city found Division Street was constructed as an
19 arterial street with as few connections as possible and that
20 the proposal would be contrary to the original concept of
21 Division Street because it would create an additional point of
22 access. The city also rejected the applicant's claim that
23 opening the street would not have a significant impact on
24 traffic flow. The city found the claim is not supported by any
25 traffic study.

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1 We accept the city's contention that the cited plan
2 policies are relevant to the proposal and that the policies
3 justify the action taken by the city.

4 Petitioner argues, however, the findings are unsupported by
5 substantial evidence because they fail to address other
6 evidence favoring the street extension. Petitioner points to a
7 statement in the record attributed to a state highway
8 department engineer that the connection would improve traffic
9 circulation. We reject petitioner's argument. There is
10 substantial evidence in the record to support the decision.
11 The city is not required by ORS 197.835(8)(a)(C) (substantial
12 evidence rule) to address contrary evidence in its findings.
13 Ash Creek Neighborhood Association v. City of Portland, ___ Or
14 LUBA ___ (1984) (LUBA No. 84-061, Slip Opinion dated November
15 2, 1984); Morse v. Clatsop County, ___ Or LUBA ___ (1984) (LUBA
16 No. 84-026, Slip Opinion dated August 30, 1984). Even if it
17 were required to address such evidence, the city's findings
18 that the conflicting evidence was unsupported by any traffic
19 study is sufficient explanation why such evidence was not
20 accepted.

21 We deny this assignment of error because the findings show
22 some of the applicable criteria were correctly considered by
23 the city and found not satisfied by the proposal.

24 THE SECOND AND THIRD ASSIGNMENTS OF ERROR

25 Petitioner challenges the decision as violating a variety
26 of constitutional, statutory and ordinance provisions. Again,

1 the city's recognition of the deed restrictions and the one
2 foot strip are the targets of these challenges. However, as we
3 have already stated the city's decision can be upheld on other
4 grounds. Despite petitioner's arguments, we do not construe
5 the city's order to treat either the deed restrictions or the
6 one foot strip as necessary bases for the decision. We
7 understand the county's order to refer to these matters by way
8 of explaining why the road approach permits for access to the
9 state highway were not obtained. Since the order places
10 reliance on criteria other than those petitioner claims were
11 improperly considered, the challenge to the decision must
12 fail. We therefore deny this assignment of error.

13 Affirmed.

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FOOTNOTES

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1 The portion of the private road not owned by
2 Brooks-Scanlon, Inc. was owned by a related corporation, Brooks
3 Resources, Inc.

2 We understand from the record that the grantors did not
3 convey the one foot strip as a device to control access to
4 Division Street. Record 69-71.

3 After commencement of the road dedication proceedings by
4 the city, petitioner filed with the circuit court a petition
5 for declaratory relief and a petition for an alternative writ
6 of mandamus. The petition requested a declaration that the
7 deed provisions restricting access have no effect and that an
8 alternative writ of mandamus requiring the state to approve the
9 proposed dedication. After commencement of this litigation,
10 the county withdrew as co-applicant in the city's road
11 dedication proceedings. The court proceedings are still
12 pending.

4 ORS 227.173(1) states:

"(1) Approval or denial of a discretionary permit
application shall be based on standards and
criteria, which shall be set forth in the
development ordinance and which shall relate
approval or denial of a discretionary permit
application to the development ordinance and to
the comprehensive plan for the area in which the
development would occur and to the development
ordinance and comprehensive plan for the city as
a whole."

5 An arterial street is defined in the city's subdivision
6 ordinance as "a restricted access street of substantial
7 continuity which is primarily a traffic artery for
8 intercommunication among large areas, and so designated by the
9 City of Bend.

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Policies 4 and 5 of the Commercial Areas section of the city's comprehensive plan state as follows:

"4. It is the intent of the plan to allow commercial development adjacent to arterials and highways, provided that the developments access onto frontage roads or interior roads, and that access onto the highway or arterial will be limited. Points of access will be encouraged that provide for adequate and safe entrances and exits and that favor right turns and merging over the use of signalization.

"5. The zoning and subdivision ordinances are intended to provide the city and county the tools to regulate the growth of the Bend area in a positive way. In the use of these tools, the city and county shall apply access control, dedication for wider streets, wider setbacks, street improvements, such as left turn refuges, medians, frontage roads, and reverse frontage to maintain a function of the collector, arterial and highway to improve traffic."