

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MICHAEL HOFFMAN,)
)
) Petitioner,)
) and)
)
)
 KAREN BLAKE, LISA JACKSON and)
 GREG MEADORS,)
)
) Intervenor-Petitioner,)
) vs.)
)
)
) CITY OF LAKE OSWEGO,)
)
) Respondent,)
)
) and)
)
) JEFFREY FRANK and CAROLE FRANK,)
)
)
) Intervenor-Respondent.)

LUBA No. 90-067
)
 FINAL OPINION
 AND ORDER

Appeal from City of Lake Oswego.

A. Richard Vial, Portland, filed the petition for review and argued on behalf of petitioner and intervenor-petitioner. With him on the brief was Hagen, Dye, Vial & Hirschy, P.C.

John H. Hammond, Jr., Lake Oswego, filed a response brief and argued on behalf of respondent.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 09/26/90

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS
197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge an order adopted by the Lake Oswego City Council approving "Westlake '89," the sixth phase of the Westlake Planned Unit Development (PUD). The city council's decision affirms a decision of the Lake Oswego Development Review Board which approves (1) a subdivision and minor land partition, (2) a 204 lot planned development, and (3) several modifications to the Residential High Density (R-5) zone setback requirements.

MOTIONS TO INTERVENE

Karen Blake, Lisa Jackson and Greg Meadors move to intervene on the side of petitioner. Jeffrey Frank and Carole Frank move to intervene in this proceeding on the side of respondent. There are no objections to the motions, and they are allowed.

JURISDICTION

Although the city's decision includes both a partition and preliminary subdivision approval for a 204 lot PUD, no party questions our jurisdiction in this matter.¹ See ORS 197.015(10)(b)(B); Meadowbrook Development v. City of

¹Our review jurisdiction is limited to land use decisions. ORS 197.825. As amended by the 1989 legislature, ORS 197.015(10)(b)(B) provides that the statutory definition of "land use decision" does not include a decision

"[w]hich approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92 located within an urban growth boundary where the decision is consistent with land use standards[.]"

Seaside, ___ Or LUBA ___ (LUBA No. 90-060, September 18, 1990); Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-034, June 11, 1990). However, the city's decision does more than simply grant approval of a partition and subdivision; it grants planned unit development approval. In addition, the city's decision grants modifications of setbacks that would otherwise be required by the Lake Oswego Code. For these reasons, the city's decision does not appear to fall within the exception provided by ORS 197.015(10)(b)(B).

FACTS

The Westlake PUD is a "major development" under the Lake Oswego Code (LOC). LOC 49.140; 49.145. Major developments may be developed in phases, with prior or concurrent approval of an Overall Development Plan and Schedule (ODPS).² LOC 49.150; 49.405(2). LOC 49.405(1)

²According to LOC 49.410, the purpose of an ODPS is to:

- "(1) Assure that the proposed development, considered as a whole, will conform to the Comprehensive Plan and Development Standards,
- "(2) Assure that individual phases will be properly coordinated with each other and can be designed to meet the Development Standards,
- "(3) Provide preliminary approval of the land uses, maximum potential intensities, arrangement of uses, open space and resource conservation and provision of public services of the proposed development, and
- "(4) Provide the developer a reliable assurance of the City's expectations for the overall project as a basis for detailed planning and investment."

provides:

"Development permits for individual phases within a major development shall be approved and conditioned in accordance with the ODPS. Development permits for each phase shall assure that the development plans conform to the ODPS, as well as the Comprehensive Plan and Development Standards."

Under LOC 49.420(2), an application for ODPS approval must include:

"* * * * *

"c. Maps and narrative indicating types and location of land uses to be provided including park and open space sites or other reserved land.

"d. General layout of streets, utilities and drainage management measures including areas reserved for water improvements.

"e. General layout or siting of public transit, bicycle and pedestrian circulation.

"f. Maps and/or narrative showing off-site improvements necessary to serve the proposed development to occur in each phase.

"* * * * *."

Under LOC 49.430, the planning commission may approve an ODPS only if it finds the ODPS

"* * * will satisfy the requirements of LOC 49.615,^[3] and,

³Among the approval criteria included in LOC 49.615 are conformance with (1) the city's comprehensive plan, (2) statutory and code requirements, (3) applicable development standards, and (4) applicable future street plans.

"* * * * *

"(2) Provides for land uses and intensities that are consistent with the provisions of the Comprehensive Plan, * * * and with the planned capacities of public facilities,

"* * * * *."

An approved ODPS must consist of the following documents:

"(1) A site plan showing location and type of all land uses proposed, approximate acreage and approximate number of units or square footage of uses.

"(2) A general utility plan showing streets, utilities, drainage management measures, bike and pedestrian ways and transit locations.

"(3) A statement acknowledging need for off-site improvements as required.

"(4) A schedule of the overall phasing and development to occur within each phase.

"* * * * *." LOC 49.435.

The ODPS for the Westlake PUD was approved in March, 1981.⁴ The ODPS was amended several times after 1981. The record indicates the ODPS was last amended in 1985. Record 1019-1023. As noted above, the decision challenged in this proceeding approves the sixth phase of the Westlake PUD.

⁴The March, 1981 approval of the PUD used the term "Final Development Plan and Program." Apparently the LOC was amended sometime after March, 1981 to substitute the term "Overall Development Plan and Schedule" for the term "Final Development Plan and Program," and to codify the procedures for ODPS approval at LOC 49.400 to 49.440. Subsequent amendments to the 1981 "Final Development Plan and Program" for the Westlake PUD use the terminology "Overall Development Plan and Schedule." To avoid confusion, we use the term ODPS throughout this opinion.

The development review board granted approval on October 6, 1989. The development review board's decision was appealed to the city council, which denied the appeal and granted approval on May 1, 1990.

FIRST ASSIGNMENT OF ERROR

"The city council misconstrued the applicable law, and its decision is not supported by substantial evidence in the whole record because the applicant's proposal fails to identify or provide for adequate school capacity, as required by the applicable law."

Lake Oswego Comprehensive Plan (LOCP) General Policy III, Specific Policy 4 provides in part:

"New development shall be served by an urban level of service of the following:

"* * * * *

"(j) Schools.

"Services shall be available or committed prior to approval of development."

In their first assignment of error, petitioner and intervenors-petitioner (petitioners) contend the city failed to demonstrate that approval of Westlake '89 is consistent with the above LOCP standard concerning school services.⁵

⁵Petitioners also contend the city's decision violates statewide planning goal provisions requiring that local governments plan for school facilities. See Statewide Planning Goal 11 (Public Facilities and Services). Petitioners similarly cite statewide planning goal requirements requiring that local governments plan for transportation facilities under their second assignment of error, discussed infra. See Statewide Planning Goal 12 (Transportation). However, as the city's plan and land use regulations have been acknowledged by the Land Conservation and Development Commission, the statewide planning goals apply only to city decisions

Petitioners contend schools are inadequate to provide an urban level of service for Westlake '89.

The city found that existing and committed school facilities would be adequate to provide an urban level of service for Westlake '89, relying on testimony from the school district that short and long term plans could be implemented to avoid unacceptable crowding at the elementary school that would serve Westlake '89. However, the city also adopted the following findings:

"The comprehensive plan policies and standards regarding schools were applied and relevant findings were adopted when the Westlake PUD Master Plan was approved in 1981. The Master Plan allowed for the development to occur in multiple phases, with a potential total density of 1,527 residential units. In 1984, the Master Plan was modified and incorporated into an Overall Development Plan and Schedule ('ODPS'), pursuant to LOC 49.400-440. The project is developing on schedule and in accordance with the ODPS. There are no significant changed circumstances which affect the analysis of conformance with the city's law that occurred at the time of adoption and amendment of the overall master plan.

"Because all issues regarding school capacity and service availability and the impacts of the entire Westlake PUD, including the phase covered by Westlake '89, were addressed and resolved at the time the Master Plan was approved, and there are no significant changed circumstances, the school issues do not need to be, and cannot be, revisited

amending the acknowledged comprehensive plan or land use regulations or adopting new comprehensive plan or land use regulation provisions, not to decisions that simply apply the comprehensive plan and land use regulations. ORS 197.835(6); Byrd v. Stringer, 295 Or 311, 313, 666 P2d 1332 (1983); Sellwood Harbor Condo. Assoc. v. City of Portland, 16 Or LUBA 505, 511-512 (1988).

at this time. The only essential finding regarding schools that needs to be made in reviewing Westlake '89 is that the proposed 204 lots are within the density limitation provided for in the Westlake PUD Master Plan." Record 30-31.

Petitioners do not challenge the city's findings that, in approving the ODPS for the proposed Westlake PUD in 1981, the city found that the proposed PUD complied with comprehensive plan policies and standards governing school services. Neither do petitioners challenge the city's finding that the residential density proposed for Westlake '89 is less than originally approved for this phase of the Westlake PUD and that development of the Westlake PUD is proceeding according to the schedule set forth in the ODPS.⁶ Rather, petitioners contend the record does not support the city finding, quoted above, that there have been no significant changes in circumstances. Petitioners contend circumstances have changed since the city's 1981 decision and schools are no longer adequate to provide the required urban level of service for Westlake '89.

⁶Section 9 of the ODPS establishes a completion schedule for the Westlake PUD and states that construction will commence "on approximately May 1, 1981" and "commencement of construction on each successive phase will begin within 18 months of the commencement of construction on the previous phase." Section 9 also provides for up to two one year extensions of these deadlines. Record 1390. Any additional extensions to the Westlake PUD completion schedule would be treated as a major amendment to the ODPS, and would require a new ODPS application and approval. Id.; LOC 49.440. Although there appears to have been some question whether the Westlake PUD was developing according to the approved schedule during the local proceedings regarding Westlake '89, the city ultimately found that it was, and that finding is not challenged in this appeal.

LOC 49.405(1) requires that approval of each phase of a PUD "conform to the ODPS, as well as the Comprehensive Plan and Development Standards." However, we do not believe that LOC 49.405(1) necessarily requires that all comprehensive plan policies be reapplied each time a new phase of a PUD is approved. We agree with the city that where comprehensive plan compliance issues have been fully resolved for a PUD in approving an ODPS under LOC 49.400 to 49.440, those comprehensive plan issues need not be reconsidered in approving individual phases of the PUD.⁷

In Edwards Industries, Inc. v. Board of Commissioners, 2 Or LUBA 91 (1980), we reached the same conclusion interpreting a similar Washington County PUD approval procedure. In Edwards, initial approval of an "outline master plan" was granted subject to a condition that development be phased to allow adjoining roadways to be improved to provide adequate capacity. The decision approving the outline master plan was not appealed. Two years later, a request for subdivision plat approval for one of the approved phases was turned down solely on the basis of concerns over impacts on the road system adjoining the

⁷Section 1 of the Westlake ODPS provides the ODPS "shall be the sole basis for evaluation of all phases of the Westlake development on any issues that it addresses." Record 1381. Section 10 of the ODPS provides approval of development phases "may be granted subject to conditions that are consistent with and intended to carry out the terms and intent of this plan and program and the applicable city ordinances and regulations which govern matters not controlled by this plan and program." (Emphasis added.) Record 1391.

PUD. We concluded that under the county's PUD approval procedures, the submission of the preliminary plat in accordance with the outline master plan could not be used as a vehicle to reopen the issue of impacts on external roadways which was decided in the approval of the outline master plan. Id. at 96.⁸

Westlake '89 will have less of an impact on the city's school system than would development at the full density approved in 1981. In the circumstances presented in this case, we conclude the city properly concluded it need not, in approving Westlake '89, revisit the issue of adequacy of schools to serve the Westlake PUD decided in 1981.

Petitioners' only complaint is that circumstances have changed and that even if schools were found to be adequate in 1981 to serve the approved PUD, such is no longer the case. However, even if petitioners are correct in this contention, that would not of itself provide a basis for denying the requested approval for Westlake '89, and we

⁸Similarly, in City of Oregon City v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-098, February 22, 1989), slip op 11, we explained that under the county's design review procedures, it was not necessary that the county reconsider "issues of compliance with applicable plan, [land use regulation requirements] or prior conditions of approval" in granting design review approval for a proposed development, "provided that compliance with the applicable requirements or conditions of approval was resolved in another final, appealable decision." See also Headley v. Jackson County, ___ Or LUBA ___ (LUBA No. 89-144, April 19, 1990) (under county zoning ordinance, resolution of intent to rezone, rather than subsequent decision to amend the zoning map in accordance with the resolution of intent to rezone, is the stage at which the county applies statewide planning goals, comprehensive plan and code standards).

disagree with petitioners that this result is somehow antithetical to sound land use planning.

Despite the city's suggestion to the contrary in its findings quoted above, nothing in the LOC provides that decisions made at the time of ODPS approval concerning the adequacy of schools to serve the entire PUD may be reconsidered if the factual circumstances change before the final phase of the PUD anticipated in the ODPS is approved. As the statement of purpose in LOC 49.410 makes clear (see n 2 supra), the ODPS is designed both to assure the entire project is considered in determining compliance with the comprehensive plan and to provide the developer with certainty concerning the city's expectations regarding the overall project. Where the impact on public services of the entire PUD has been addressed and relevant plan policies found to be complied with in approval of the ODPS, we agree with respondent and intervenors-respondent (respondents) that it would be inconsistent with the purpose expressed in LOC 49.410 to require approval of each developmental phase to readdress plan public services policies, where the requested phase approval is consistent with the type and intensity of development envisioned by the approved ODPS. Under the procedures adopted by the city, as long as a PUD phase is consistent with the ODPS and remains on the approved time schedule, there is no requirement that the factual predicates underlying the original ODPS approval be

reexamined when the anticipated phases are approved.

It may be, as petitioners argue, that the above interpretation of LOC 49.400 to 49.440 could require the city to approve later phases of a PUD that would otherwise be denied under the cited school services policy. However, the possibility that such approvals would be required is limited in three significant ways. First, we see nothing in the LOC that would preclude the city from requiring in an ODPS that approval of later phases of a PUD consider school services availability in light of any changes in circumstances following ODPS approval. The ODPS for the Westlake PUD simply does not do so. Second, LOC 49.435(4) requires a phasing schedule. By establishing a shorter phasing schedule, the city can minimize the chance that the factual assumptions and findings underlying the ODPS approval will become outdated before the PUD is fully developed.⁹ Finally, ORS 197.520(2) provides the city may adopt a moratorium where such action is "justified by demonstration of a need to prevent a shortage of key

⁹We note that it is not at all uncommon for land use approvals such as conditional use permits, preliminary subdivision approvals, etc. to require that the approval granted be acted upon within a specified time. As long as the required implementing action is taken within the time specified, the original approval generally remains valid, absent some overriding change in local, state or federal law, even if the factual circumstances upon which the original approval was based change. As noted earlier in this opinion, were the Westlake PUD not developing according to the completion schedule specified in the ODPS, a new ODPS would be required and petitioners' allegations concerning adequacy of schools presumably would have to be addressed by the city in approving a new ODPS. See n 6, supra.

facilities as defined in the statewide planning goals which would otherwise occur during the effective period of the moratorium."¹⁰

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The city council misconstrued the applicable law and its decision is not supported by substantial evidence in the whole record because the adjacent streets and intersections are not adequate to accommodate the traffic impact generated from the proposed development, in violation of the Lake Oswego Comprehensive Plan."

LOCP General Transportation Policy IV requires that:

"The City will develop a residential neighborhood streets system adequate to handle expected volume, but at a minimum necessary scale to preserve the quiet, privacy and safety of neighborhood living."

In addition, LOCP General Transportation Policy I, Specific Policy 1.F requires that the city develop a transportation system which

"include[s] procedures for approving increases in planned land use intensity only when a detailed traffic analysis shows that existing streets and intersections will accommodate the projected traffic increases or when improvements necessary to accommodate those increases can be constructed without exceeding the capacity of any element of the City's coordinated transportation system."

The city received testimony from the city's and the applicant's traffic engineers in which the engineers

¹⁰We do not understand petitioners to contend the city erred by failing to adopt a moratorium under ORS 197.520.

analyzed previous traffic studies concerning the impacts of the Westlake PUD on the surrounding transportation system. Petitioners contend the city erred by not requiring that new traffic studies be submitted in support of the Westlake '89 application.

As in the case of the adequacy of schools issue, the city, in addition to finding the disputed plan policies are satisfied by Westlake '89, also found the traffic impact issue had been fully addressed in the 1981 ODPS approval. The city found:

"The 204 lots proposed for Westlake '89 are significantly less than the 331 units the site is allowed to accommodate pursuant to the * * * ODPS. The traffic impacts of 331 units were already considered and addressed as part of the ODPS. Although the applicant has submitted a new traffic report, he was not legally required to do so. The project as a whole is developing in a manner that is consistent with the master plan approvals. * * *"
Record 34.

As was the case under the first assignment of error, petitioners do not challenge the above quoted findings, other than to argue that conditions have changed and that development of the Westlake PUD, with other development in the area, has adversely impacted the transportation system in the area. However, for the reasons explained in our discussion of the first assignment of error, we reject that argument as a basis for requiring the city to demonstrate as part of its decision that Westlake '89 complies with the cited plan policies.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

"The city council misconstrued the applicable law and its decision is not supported by substantial evidence in the whole record because this development would destroy a distinctive natural area and an essential wetland in violation of the Lake Oswego Comprehensive Plan."

Petitioners contend the city failed to demonstrate that Westlake '89 will protect "essential wetlands" and "distinctive natural areas" located on the property proposed for development.

A. Essential Wetlands

The LOCP and LOC provisions cited by petitioners do not require that "wetlands" be protected. They only require that "essential wetlands" be protected. LOCP 50-51; LOC 4.005 to 4.040. Although respondents do not dispute the evidence cited by petitioners that the Westlake '89 site includes "wetlands," respondents contend the city found that the site includes no "essential wetlands," and the record contains substantial evidence to support that finding.

Under LOC 4.015(2), "essential wetlands" are wetlands which are either designated as such on the city's hydrology map or determined to be such after application of the criteria in LOC 4.035. In finding that the site includes no "essential wetlands" the city relied on an August 4, 1989 letter from the Oregon Division of State Lands (DSL) in which a staff person in DSL's Environmental Permits Section

discussed the city's criteria for designating "essential wetlands" and explained why, in his view, the wetlands on the property do not qualify as "essential wetlands." While the evidence cited by petitioners does establish the presence of "wetlands" on the property, that evidence does not establish the existence of "essential wetlands."

Petitioners do not explain why the city's findings concerning the lack of "essential wetlands" on the property are inadequate or why the DSL letter is not substantial evidence in support of the city's finding that there are no "essential wetlands" on the property. We conclude the findings concerning "essential wetlands" are adequate and supported by substantial evidence.

This subassignment of error is denied.

B. Distinctive Natural Areas

The LOCP provides that "distinctive natural areas" are to be preserved as part of development approval. LOCP 32. Apparently relying on a suggestion in a July 10, 1989 letter from the Army Corps of Engineers that wetlands alterations on the property may have impacted "a nearby oak/ash woodland," petitioners contend that the city failed to adopt findings supported by substantial evidence that distinctive natural areas on the property are protected. Record 1227.

The city found that although the Kruse Oak/Ash Forest is identified as a distinctive natural area in the LOCP, neither the Kruse Oak/Ash Forest nor any other distinctive

natural area is located on the Westlake '89 property.¹¹ The city's findings go on to state:

"The forest is not on the Westlake '89 site and the applicant is not required to reassess impacts on the Kruse Oak/Ash Forest. Nonetheless, the applicant provided evidence demonstrating that the storm drainage system for the entire Westlake PUD, including Westlake '89, has been designed to avoid and therefore help preserve the Kruse Oak/Ash Forest. There is no persuasive or substantial evidence in the record to support the allegation that Westlake '89 will somehow damage the Kruse Oak/Ash Forest. There was no substantial evidence introduced contradicting the applicant's testimony that the storm drainage system would be designed to avoid damage to the Kruse Oak/Ash Forest and that there would be no other damage to the [distinctive natural area].

"In conclusion, Westlake '89 is consistent with the Distinctive Natural Area policies because there are no [distinctive natural areas] on the site and the proposal will not have any significant impacts on the Kruse Oak/Ash Forest. Record 45.

Petitioners do not challenge the above quoted findings or explain why the evidence cited in those findings is inadequate to constitute substantial evidence to support the findings.

This subassignment of error is denied.

The third assignment of error is denied.

¹¹The only distinctive natural area identified in the 1981 Westlake PUD approval was the Kruse Oak/Ash Forest area. Record 1396. The findings adopted in support of the 1981 PUD approval indicate that all distinctive natural areas within the Westlake PUD were protected by designating those areas "Open Space." Record 1425.

FOURTH ASSIGNMENT OF ERROR

"The city council improperly interfered with the Development Review Board's hearing procedure."

In an August 19, 1989 memorandum to the development review board and planning commission (before the development review board rendered its decision in this matter), the city council provided those bodies with its interpretation of comprehensive plan policies regarding school capacities. Record 1829. The city council's interpretation was based on factual determinations set forth in an attachment to the August 19, 1989 memorandum. The city council purported to reconcile the statutory obligations imposed under ORS 197.505 to 197.540, concerning adoption of moratoria, with city obligations under the school related plan policies which had resulted in recent denials of requests for development approval based on inadequate school facilities. The city council concluded the current facts regarding adequacy of school facilities in the city would not support a moratorium under ORS 197.505 to 197.540 and stated:

"The Comprehensive Plan policies, with regard to school capacity, will be satisfied unless the Council in the future declares a moratorium. Because facts will change over time, so may the conclusions concerning Comprehensive Plan compliance and the current lack of the factual preconditions for the enactment of a moratorium. * * * Record 1830.

Petitioners contend that by providing the development review board with the above described memorandum while the development review board was considering the request at

issue in this appeal, the city council improperly interfered with the development review board's decision making responsibility.

Respondents contend that the city council's action at most constituted procedural error, and because petitioners received a full and fair hearing before the city council in this matter, petitioners do not allege, nor could they allege, any prejudice to their substantial rights caused by the city council's August 19, 1989 memorandum.

We agree with respondents. In our view, the city council's memorandum was simply an attempt by the ultimate city decision maker to resolve what it viewed as conflicting provisions in its comprehensive plan and statutory requirements concerning moratoria in order to provide guidance and achieve consistent decision making. Viewed in this way, it is in the nature of a declaratory ruling that would not be followed if the factual assumptions changed. The city council made it clear in the memorandum that the factual assumptions upon which its conclusions were based were subject to change, and petitioners do not contend that they were denied an opportunity to convince the city council that their view of the relationship between the school plan policies and statutory moratorium requirements is incorrect or that a different conclusion is warranted based on the facts in this case.

In view of our resolution of the first assignment of

error, we express no opinion concerning the correctness of the conclusion reached in the city council's August 19, 1989 memorandum. However, we do not believe the city council's provision of the memorandum to the development review board in this case constitutes error. See Cherry Lane, Inc., North v. Jackson County, 14 Or LUBA 84, 86 (1985); Sills v. Josephine County, 9 Or LUBA 122, 130 (1983). Even if the city council's action did constitute error, we agree with respondents that it would be procedural error, and there is no prejudice shown in this case. See Sunburst II Homeowners v. City of West Linn, 101 Or App 458, 461, ___ P2d ___, rev den 310 Or 243 (1990); Mason v. Linn County, 13 Or LUBA 1, 4-5 (1984), aff'd in part, rev'd in part on other grounds 73 Or App 334, rev den 299 Or 314 (1985); Colwell v. City of Portland, 1 Or LUBA 74 (1980).

The fourth assignment of error is denied.

The city's decision is affirmed.