

WEST LINN CITY COUNCIL

ORDER

AP-16-01

IN THE MATTER OF AN APPEAL OF THE PLANNING COMMISSION'S APPROVAL OF A CONDITIONAL USE PERMIT, CLASS II DESIGN REVIEW, AND TWO CLASS II VARIANCES FOR THE REPLACEMENT OF SUNSET PRIMARY SCHOOL

I. Overview

West Linn-Wilsonville School District (Applicant), filed its application December 2, 2015. It was deemed incomplete on December 18, 2015, and deemed complete on February 1, 2016, following additional submittals. The approval criteria for the application are found in Community Development Code (CDC) Chapters 11, 38, 41, 42, 44, 46, 48, 52, 54, 55, 60, 75, 92, 96, and 99. The hearings were conducted pursuant to the provisions of CDC Chapter 99.

The Planning Commission (Commission) held the initial evidentiary hearing on March 16, 2016. The hearing commenced with a staff report presented by Darren Wyss, Associate Planner. Tim Woodley, Applicant, and B. Karina Ruiz, Dull Olson Weekes – IBI Group Architects, Inc., presented for the applicant. The initial hearing was continued to April 6, 2016, for additional written evidence and public testimony. At its April 6 hearing the Applicant offered to withdraw VAR-15-03, and the Commission approved the withdrawal of the variance. The Commission then closed the public testimony portion of the hearing, and continued the hearing to April 13, 2016, for written responses to new evidence and deliberations. The Commission heard public testimony from 15 individuals over the course of the first two meetings and accepted many written submissions.

After deliberations on April 13, 2016, a motion was made and seconded to deny the application. The motion failed. Then a motion was made by Commissioner Knight and seconded by Commissioner Myers to approve the applications with 12 conditions of approval and direct staff to prepare a Final Decision and Order. The motion passed with four votes in favor and two votes opposed. A Final Decision and Order was signed by the Planning Commission on April 14, 2016.

Carrie Hansen and Save Our Sunset Park (Appellant) filed an appeal of the Planning Commission's decision on April 28, 2016. The appeal hearing was held on May 23, 2016. The Appellant presented oral argument, followed by oral argument from the Applicant, and the public. The appeal hearing was continued to May 24, 2016, for Council questions and deliberation. Council closed the public hearing on May 24, 2016. Councilor Tan made a motion to deny the appeal AP-16-01 and uphold the Planning Commission's decision to approve CUP-15-03, DR-15-17, VAR-15-01 and VAR-15-02, and adopt the Planning Commission's findings and 12 conditions of approval. Councilor Frank seconded the motion. The motion failed. Councilor

Martin then made a motion to deny the appeal of AP-16-01, tentatively affirm the Planning Commission’s decision to approve the application for the Sunset Primary School Replacement, and adopt the Planning Commission’s findings and conditions of approval with modifications to the conditions of approval regarding the stormwater detention facility. The Council made a tentative decision on May 24, 2016, to deny the appeal of the Planning Commission’s decision and affirm it with additional conditions regarding the stormwater detention facility.

The Council adopted findings supporting its decision on June 2, 2016. The petitioners appealed the Council’s decision to the Land Use Board of Appeals (LUBA) on June 23, 2016. LUBA issued its final decision and order on January 12, 2017, which remanded the application to the City to obtain evidence that the modified storm drainage plan was “(1) submitted by a registered engineer and (2) supported by factual data” (Remand Issue).

On February 6, 2017, the City Council entered deliberations to discuss the remand process for the application. The City Attorney conducted the preliminary legal matters, including ex parte and bias disclosures. Councilor Cummings disclosed ex parte contacts and possible bases for bias challenges, and confirmed that she was not biased and could make a decision based on the evidence. Alice Richmond challenged Councilor Cummings for bias, and after rebuttal and further discussion, Councilor Cummings recused herself.

The Council then decided to reopen the record pursuant to CDC 99.280(C)(2) to admit evidence necessary to correct the factual error the Land Use Board of Appeals identified as the lack of “factual data submitted by a registered engineer or any other evidence in the record.” LUBA 2016-071, 11. This will allow the Council to determine whether the modified storm drainage plan meets the City’s code requirements. The Council also directed staff to “prepare an order with findings for our approval on February 13 that supports this remand process and reaffirms the Council’s decision on all criteria not subject to the remand.”

II. The Record

The record was finalized at the May 24, 2016 appeal hearing. The record includes the entire file for AP-16-01, CUP-15-03, DR-15-17, VAR-15-01 and VAR-15-02, evidence admitted in the course of Planning Commission and City Council review proceedings, as well as testimony taken at the May 23, 2016, and May 24, 2016, public hearings, as submitted to LUBA.

III. Procedural Issues and Scope of Review

The Council will hold a public hearing on remand on March 20, 2017, at 6:30 pm at which it will evaluate the evidence submitted by the March 6, 2017, deadline and accept oral testimony regarding the modified storm drainage plan. The Council will determine whether there is substantial evidence in the record to find that the modified storm drainage plan meets the CDC requirements.

The scope of the remand hearing is limited to the single remand ground identified by LUBA, which is to address the associated stormwater issue and “obtain evidence that the modified

storm drainage plan was “(1) submitted by a registered engineer and (2) supported by factual data.” LUBA 2016-071, 11.

IV. Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The applicant is the West Linn-Wilsonville School District.
- 3) The petitioner in the LUBA case is David Dodds and Save Our Sunset Park.
- 4) The remand proceedings must be completed within 120 days of receiving written notice from the applicant that it wishes to have the City begin the remand process.

V. Findings

99.300 PARTICIPATION BY MEMBERS OF APPROVAL AUTHORITY IN DECISION AND VOTING

A. The provisions of CDC 99.180 apply and, in addition:

1. A majority of the qualified voting members of the approval authority must vote affirmatively to affirm, affirm with conditions, or reverse or remand the decision. If no majority is in favor of any motion, then the previous decision shall be considered affirmed.

B. Unless a decision be deferred, in the event of a tie, the decision which is the subject of appeal or review shall stand.

The Council finds that LUBA identified very limited grounds for the remand of the City’s decision. Specifically, LUBA found that the City needed to reopen the record to obtain evidence that the modified storm drainage plan was “(1) submitted by a registered engineer and (2) supported by factual data.” LUBA 2016-071, 11. The other assignments of error were denied by LUBA. LUBA 2016-071, 16, 22 Therefore, the Council reaffirms its approval of the application with conditions on all criteria not subject to the remand proceedings.

99.280 TYPE OF APPEAL HEARING AND SCOPE OF REVIEW

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C. The Council may reopen the record to consider new evidence on a limited basis; specifically, if the Council determines that:

1. A procedural error was committed that prejudiced a party’s substantial rights, and reopening the record before the Council is the only means of correcting the error; or
2. A factual error occurred before the lower decision-making body through no fault of the requesting party, that is relevant to an approval criterion and material to the decision.

D. Except when limited reopening of the record is granted, pursuant to this section, the Council shall not re-examine issues of fact and shall limit its review to determine whether there is substantive evidence in the record to support the findings by the lower decision-


making body, or to determine if errors in law were committed by the City. Review shall be limited to the issues clearly identified in the notice of appeal. No issue may be raised on appeal that was not raised before the Planning Commission with sufficient specificity to enable the Commission and the parties to respond.

The applicant, through its February 13, 2017, email, attached as Exhibit A and incorporated by this reference, requests that the City Council reopen the record to correct the factual error that occurred before the Planning Commission. Reopening the record to obtain evidence that the modified storm drainage plan was "(1) submitted by a registered engineer and (2) supported by factual data," will correct the factual error because that information is relevant to approval criteria and material to the City's decision on the application. The material nature of the missing evidence is substantiated by LUBA's Final Opinion and Order sustaining the appellants' first and second assignments of error. LUBA 2016-071, 13. The factual error that occurred, the omission of the modified storm drainage plan into the record before the Planning Commission, was not due to any fault of the requesting party because the Planning Commission found that the original storm drainage plan met the approval criteria.

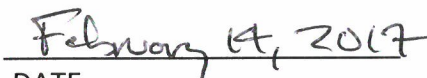
Finally, the Council finds that LUBA requested, through its Final Opinion and Order, that the City reopen the record to obtain evidence that the modified storm drainage plan was "(1) submitted by a registered engineer and (2) supported by factual data," because that information is relevant to approval criteria and material to the City's decision on the application. LUBA 2016-071, 11. The material nature of the missing evidence is substantiated by LUBA's Final Opinion and Order sustaining the appellants' first and second assignments of error. LUBA 2016-071, 13. The factual error that occurred, the omission of the modified storm drainage plan into the record before the Planning Commission, was not due to any fault of the requesting party. The Council finds that reopening the record to consider new evidence on the limited basis set forth above will allow the City to comply with LUBA's Order and correct the factual error that LUBA identified.

VI. Order

The Council orders that its June 2, 2016, decision approving the application with conditions is reaffirmed on all criteria not subject to the remand proceedings, and reopening the record to obtain evidence regarding the modified storm drainage plan.



RUSSELL AXELROD, MAYOR
WEST LINN CITY COUNCIL



DATE

EXHIBIT A

Thornton, Megan

From: Thomas McPherson <tmcpherson@mershanlaw.com>
Sent: Monday, February 13, 2017 11:28 AM
To: tim.ramis@jordanramis.com; Thornton, Megan
Cc: phennessy@rke-law.com; Peter Mersereau; Woodley, Tim
Subject: Sunset Primary - On Remand - LUBA Case No. 2016-071, Dodds et al v. City of West Linn et al

Tim:

In view of the vote of the City Council at its 2-6-2017 public meeting on the above-referenced matter, I am authorized to make the following request on behalf of the Applicant, West Linn-Wilsonville School District:

Pursuant to CDC 99.280(C), the School District hereby requests that the West Linn City Council reopen the record to receive into evidence the Amended Stormwater Management Plan, as certified by the school district's consulting engineers, and such other or further evidence, if any, as the City Council may deem necessary.

Thank you.

Tom
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Mersereau Shannon LLP
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