

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

3
4 JANE GRELLER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF NEWBERG,
10 *Respondent.*

11
12 LUBA No. 2013-099

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Newberg.

18
19 Jane Greller, Newberg, filed the petition for review and argued on her
20 own behalf.

21
22 Samuel R. Justice, McMinnville, filed the response brief and argued on
23 behalf of respondent. With him on the brief was Haugeberg, Rueter, Gowell,
24 Fredricks & Higgins, PC.

25
26 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
27 Member, participated in the decision.

28
29 AFFIRMED 03/11/2014

30
31 You are entitled to judicial review of this Order. Judicial review is
32 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals Ordinance 2013-2763 (hereafter Ordinance 2763) that amends Title 15 of the Newberg Municipal Code (NMC).¹

INTRODUCTION

Although Ordinance 2763 adopts some amendments to the Development Code, it is more accurately described as a housekeeping ordinance that reorganizes and introduces new tables to display previously adopted Development Code requirements. The recitals in the challenged ordinance are set out below:

- “1. Newberg has had a zoning ordinance since the 1950s. The list of uses allowed in each zone is in need of update to reflect current uses, to better organize the uses, and to comply with several state laws.
- “2. The Newberg Planning Commission has recommended changes to modernize the zoning lists.
- “3. Organizing the uses into a single table would make the Development code more useful by showing exactly which zones particular uses are allowed in.
- “4. Replacing the long lists of individual allowed uses with more general categories will help modernize the code and help to categorize uses that may not fit into a specific use definition.” Record 7.

Petitioner contends that the challenged ordinance introduces density and lot size standards into the Development Code that are inconsistent with the Newberg Comprehensive Plan (NCP).

¹ NMC Title 15 is the city’s Development Code/Zoning Ordinance.

1 **ASSIGNMENT OF ERROR**

2 Petitioner’s challenges are to minimum and maximum lot areas and
3 density limits in the Development Code for the R-1 Low Density Residential,
4 R-2 Medium Density Residential and R-3 High Density Residential Districts.
5 Petitioner’s arguments are broken down into two subassignments of error.

6 **A. Zoning District Purpose Statements**

7 **1. The Prior Residential Zoning District Purpose**
8 **Statements**

9 Prior to adoption of Ordinance 2763, the R-1, R-2 and R-3 purpose
10 statements were codified at NMC 15.304.010, 15.306.010 and 15.308.010. As
11 relevant here, the prior R-1 purpose statement at NMC 15.304.010 did not
12 specify any “maximum overall density” to be maintained. The prior R-2
13 purpose statement called for “maintaining a maximum overall density of 8.8
14 units per gross residential acre.” The prior R-3 purpose statement at NMC
15 15.308.010 called for “maintaining a maximum overall density of 21.8 units per
16 gross residential acre.”²

² NMC 15.304.010 provided in part:

“The R-1 low density residential district is intended for low density, urban single-family residential and planned unit development uses. * * * The R-1 district is intended to be consistent with the low density residential designation of the comprehensive plan.”

NMC 15.306.010 provided in part:

“A. The purpose of this land use designation is to provide a wide range of housing types and styles, *while maintaining a maximum overall density of 8.8 units per gross residential acre.*”

1 **2. The Ordinance 2763 Residential Zoning District Purpose**
2 **Statements**

3 Ordinance 2763 repealed NMC 15.304.010, 15.306.010 and 15.308.010.
4 In their place, Ordinance 2763 adopted new purpose statements that are
5 codified at NMC 15.302.032(A), (B) and (C). As relevant here, the new R-1
6 District purpose statement calls for “an average overall density of 4.4 units per
7 gross buildable acre in the district;” the new R-2 District purpose statement
8 calls for “an average overall density of 9 units per gross buildable acre in the
9 district;” and the new R-3 District purpose statement calls for “an average
10 overall density of 16.5 units per gross buildable acre in the district.”³

“B. * * * The R-2 District is intended to be consistent with the medium density residential designation of the comprehensive plan.” (Emphasis added.)

NMC 15.308.010 provided in part:

“A. The purpose of this land use designation is to provide multifamily dwellings of different types and styles *while maintaining a maximum overall density of 21.8 units per gross residential acre.* (Emphasis added.)

“B. * * * The R-3 district is intended to be consistent with the high density residential designation of the comprehensive plan.”

³ NMC 15.302.032 provides in part:

“A. R-1 Low Density Residential District.

“1. The purpose of this land use designation is to provide for low density urban single-family residential uses at an *average overall density of 4.4 units per gross buildable acre in the district.* * * *

“* * * * *

1 **3. Petitioner’s Contention that the New Residential Zone**
2 **Purpose Statements are Inconsistent with the**
3 **Corresponding NCP Residential Classifications**

4 The city’s Development Code is a “land use regulation,” as that term is
5 defined by ORS 197.015(11). Under ORS 197.175(2)(b), the city’s land use
6 regulations must be adopted “to implement [the city’s] comprehensive plan[.]”
7 Because it is a land use regulation, the Development Code must be consistent
8 with the NCP. ORS 197.835(7). Petitioner contends the new R-1, R-2 and R-3
9 district purpose statements are inconsistent with descriptions of the NCP Low
10 Density, Medium Density and High Density Residential designations that the
11 R-1, R-2 and R-3 Districts were adopted to be consistent with. The NCP
12 describes the Low Density Residential plan designation as “allowing for an
13 overall density of *up to* 4.4 units per acre” the Medium Density Residential
14 designation as “maintaining an overall density of *up to* 8.8 units per acre” and
15 the High Density designation as “maintaining an overall density of *up to* 21.8

“B. R-2 Medium Density Residential District.

“1. The purpose of this land use designation is to provide a wide range of dwelling types and styles at an *average overall density of nine units per gross buildable acre in the district.*

“* * * * *

“C. R-3 High Density Residential District.

“1. The purpose of this land use designation is to provide multifamily dwellings of different types and styles at *an average overall density of 16.5 units per gross buildable acre in the district.*” (Emphases added.)

1 units to the acre.”⁴ (Emphases added.) Petitioner points out the new purpose
2 statements call for “average overall densit[ies]” of 4.4, 9 and 16.5 units “per
3 gross buildable acre.” Petitioner argues:

⁴ The NCP Residential Plan Classification descriptions are set out in part below:

“III. PLAN CLASSIFICATIONS

“For the purpose of evaluating and eventually implementing the proposed Comprehensive Plan, descriptions of land use classifications are essential. Explanations of the map designations are as follows:

“* * * * *

“2. Residential Land Use

“Residential land is divided into three categories. Density rather than housing type is generally the most important development criteria used to classify residential areas. * * *

“The following is a summary of the three residential land use categories:

“a. Low Density Residential (LDR)

“The objective of this designation is to provide a wide range of housing types and styles, while allowing for *an overall density of up to 4.4 units per acre.* * * *

“* * * * *

“b. Medium Density Residential (MDR)

“The objective of this designation is to provide a wide range of housing types and styles while maintaining *an overall density of up to 8.8 units per acre.* * * *

“* * * * *

1 “‘Up to’ does not have the same meaning as ‘average overall.’
2 ‘Up to’ establishes a maximum.” Petition for Review 5.

3 Petitioner has not established that the new purpose statement is
4 inconsistent with the NCP. The NCP language that petitioner relies on calls for
5 “overall densit[ies] of up to” the specified densities, whereas the new purpose
6 statements call for “average overall densities” of the specified densities.
7 Petitioner does not argue that the reference to “average overall densities” in the
8 NMC is inconsistent with the reference to “overall densit[ies] in the NCP
9 Residential Classification descriptions. Rather, petitioner’s argument is that
10 the failure to include the “up to” language renders the revised purpose
11 statements inconsistent with the NCP because the NCP Residential
12 Classification descriptions are expressed as maximum densities, whereas the
13 new NMC Residential District purpose statements are expressed as targets.

14 We need not resolve whether expressing desired densities as maximums
15 in the NCP Residential Classification descriptions and as targets in the NMC
16 Residential District purpose statement would create a comprehensive plan/land
17 use regulation inconsistency that would require remand if the NCP Residential
18 Classification descriptions were the only relevant NCP language in making that
19 determination. That is because the NCP in different places expresses desired
20 densities as both maximums and targets. Petitioner relies on a part of the NCP

“c. High Density Residential (HDR)

“The objective of this designation is to provide multi-family housing of different types while maintaining an *overall density of up to 21.8 units to the acre.* * * *” NCP 59-61

“* * * * *”

1 that describes the NCP Residential Classifications. But the disputed language
2 in the new NMC Residential District purpose statements appears to have been
3 drawn directly from the NCP Housing Density Policies, which provide in
4 relevant part:

5 **“1. Density Policies**

6 “a. Density rather than housing type shall be the most
7 important development criteria and shall be used to
8 classify different types of residential areas on the
9 plan.

10 “b. Target densities shall be as follows:

	Units Per
<u>Classification</u>	<u>Gross Acre*</u>
Urban Low Density	4.4
Urban Medium Density	9
Urban High Density	16.5

16 “*Includes a 25 percent allowance for streets, walkways and other
17 right-of-ways, utilities, small open spaces, preservation of
18 resources, and similar features.”

19 The values (4.4, 9, and 16.5) and the areas for measurement of density (gross
20 buildable acres) are identical in the NCP Housing Density Policy and the new
21 NMC Residential district purpose statements. The NCP Housing Density
22 Policy is expressed as “target densities,” whereas the purpose statements are
23 expressed as “average overall densities.” But there is no reason to believe the
24 NCP Housing Density Policy target densities are anything other than average
25 or overall densities. The new NMC Residential District purpose statements are
26 consistent with the NCP Housing Density Policy, and petitioner makes no
27 attempt to argue that they are not. Petitioner’s argument is limited to arguing
28 the new Residential District purpose statements are inconsistent with the NCP
29 Residential Classification descriptions.

1 If there is any inconsistency in expressing desired densities as targets in
2 one part of the NCP and as maximums in another part of the NCP that is an
3 internal consistency problem in the NCP that predated Ordinance 2763, and it
4 is not a product of Ordinance 2763. Because the new NMC Residential District
5 purpose statements are consistent with the NCP Housing Density Policies,
6 which presumably are the part of the NCP that actually establishes the NCP
7 policy concerning housing density, those purpose statements are consistent
8 with the NCP, notwithstanding that they are worded differently than the NCP
9 Residential Classification descriptions that petitioner relies on.⁵

10 Subassignment of error A is denied.

11 **B. Minimum and Maximum Lot Sizes**

12 Ordinance 2763 adopts a table to display the uses that are allowed in all
13 of the city's zoning districts. Record 67-70. For single family dwellings, the
14 table includes the following note: "Subject to density limits of 15.405.010(B)."
15 NMC 15.405.010(B), as adopted by Ordinance 2763, appears to set minimum
16 lot sizes at 5,000 square feet in the R-1 district, 3,000 square feet in the R-2
17 district and 1,500 square feet in the R-3 district. An acre includes 43,560
18 square feet. Petitioner divides 43,560 square feet by the minimum lot sizes for
19 new lots in the residential zoning districts and contends these minimum lot
20 sizes permit a maximum density of 8.7 units per acre in the R-1 district, 14.5
21 units per acre in the R-2 district, and 29 units per acre in the R-3 district.
22 Petitioner contends these maximum densities exceed the maximum overall

⁵ The record includes a helpful table that explains and shows the relationship between gross buildable acres and net buildable acres and Target Densities and Maximum Densities. Record 111.

1 densities set out in the NCP Residential Classification descriptions for the Low
2 Density, Medium Density and High Density Classifications, which are 4.4, 8.8
3 and 21.8. *See* n 3.

4 As we have already explained, the NCP establishes residential target
5 densities for units per gross acre. For Low Density Residential the target
6 density is 4.4 units; for Medium Density Residential the target density is 9
7 units and for High Density Residential the target is 16.5 units. Taking the
8 target density for Low Density Residential as an example, if none of the land
9 subject to the Low Density designation was already developed and in the future
10 all that vacant land was uniformly developed with lots of 5,000 square feet and
11 no land was used for streets, utilities or open space, the resulting density would
12 be approximately 8.7 units per acre rather than the target 4.4 units per acre.
13 But some land within the Low Density Classification will be used for streets,
14 utilities and open space as new lots are divided and developed in the future.
15 And some land within the Low Density Classification may already have been
16 developed with larger lot sizes. Moreover, it cannot be assumed, as petitioner's
17 argument assumes, that all vacant land in the NCP Residential Classifications
18 will be developed with lots that are no larger than the 5,000 square foot
19 minimum lot size. Petitioner has not established that the minimum lot sizes set
20 out for the R-1, R-2 and R-3 residential zoning districts are inconsistent with
21 the NCP.

22 Petitioner's argument under this subassignment of error also fails for a
23 second reason. The minimum and maximum lot sizes set out in NMC
24 15.405.010(B) were not adopted by Ordinance 2763. They were adopted by a

1 different ordinance in October, 2010. Extra Record Evidence 163-64.⁶ The
2 October, 2010 ordinance was not appealed. Ordinance 2763 simply recodifies
3 and displays those minimum and maximum lot sizes somewhat differently in
4 the amended Development Code.⁷ Therefore, petitioner may not challenge
5 those minimum and maximum lot sizes in this appeal.

6 Subassignment of error B is denied.

7 The city's decision is affirmed.

⁶ The parties agreed that LUBA could consider certain extra-record evidence that is included with the record in this appeal in a separate binder.

⁷ Actually the text of NMC 15.405.010(B) that is adopted by Ordinance 2763 and the text of NMC 151.565 where the minimum and maximum lot sizes was codified in 2010 when it was first adopted is nearly identical. Record 76-77; Extra Record Evidence 163-64.