

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

3
4 ROBERT MCGOWAN and COETA MCGOWAN,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 CITY OF EUGENE,)
11)
12 Respondent,)
13)
14 and)
15)
16 CUDDEBACK INVESTMENTS,)
17)
18 Intervenor-Respondent.)

LUBA No. 92-187
FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Eugene.

22
23 Michael Farthing, Eugene, filed the petition for review
24 and argued on behalf of petitioners. With him on the brief
25 was Gleaves, Swearingen, Larsen & Potter.

26
27 No appearance by respondent.

28
29 Bill Kloos, Eugene, filed the response brief and argued
30 on behalf of intervenor-respondent. With him on the brief
31 was Johnson & Kloos.

32
33 KELLINGTON, Referee; HOLSTUN, Referee, participated in
34 the decision.

35
36 REMANDED 02/18/93

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the City of Eugene
4 Planning Commission giving tentative approval to the first
5 phase of a planned unit development (PUD).

6 **MOTION TO INTERVENE**

7 Cuddeback Investments moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject property is a 14.5 acre portion of a 31.5
12 acre parcel zoned Residential (R-1). The entire 31.5 acre
13 parcel is in a single ownership, and is within the city
14 limits.

15 The applicant, intervenor-respondent (intervenor),
16 sought approval for a 17 unit PUD on the subject property.
17 The city hearings official approved the request, and the
18 planning commission affirmed that decision. This appeal
19 followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 "The City of Eugene erred by failing to require
22 the applicant to submit a statement that proves or
23 demonstrates that the applicant's entire ownership
24 can be developed and used in accordance with city
25 standards, policies, plans and ordinances, which
26 statement is required by the city's PUD process."

27 Eugene Code (EC) 9.510(3) provides:

28 "Phasing. If approved at the time of tentative
29 plan consideration, final plans may be submitted

1 in phases. If tentative plans encompassing only a
2 portion of a site under single ownership are
3 submitted, they shall be accompanied by a
4 statement and be sufficiently detailed to prove
5 that the entire area can be developed and used in
6 accordance with city standards, policies, plans,
7 and ordinances." (Emphases supplied.)

8 The challenged decision tentatively approves a PUD
9 covering only a 14.5 acre portion of the 31.5 acre parcel.
10 Whereas a fairly detailed tentative development plan for the
11 development of the subject 14.5 acre portion of the parcel
12 was submitted below, only a schematic drawing was submitted
13 showing where development might occur on the balance of the
14 parcel. The challenged decision determines the proposal
15 complies with EC 9.510(3), as follows:

16 "First, it must be noted that it is questionable
17 whether there must be a finding of compliance with
18 this provision as part of tentative planned unit
19 development review. The section is most
20 reasonably read as a directive to the applicant,
21 and one that the staff could require compliance
22 with at the time of a tentative plan submittal.
23 In any event, if there was an absence of a plan,
24 it is of doubtful relevancy here. It is suggested
25 that it bears upon the present application, in
26 that it is contended that part of the property
27 owned by the applicant extends further to the
28 south * * * and slopes to the south, and that
29 there may be a question as to the capability of
30 providing public services to this other property.
31 If there is such an issue, that will have to be
32 addressed at such time as tentative approval is
33 sought for that property. It is not an issue that
34 must be determined here. * * *"¹ Record 132-33.

¹The decision goes on to state:

1 The issue under this assignment of error is whether the
2 city correctly interpreted EC 9.510(3) as not requiring the
3 submission of a "statement * * * to prove that the entire
4 area can be developed and used in accordance with city
5 standards, policies, plans, and ordinances" at the time of
6 the submission of the tentative PUD plan. Petitioners argue
7 the city's interpretation of EC 9.510(3) is inconsistent
8 with its express terms. Petitioners contend the applicant
9 is required to provide a sufficiently detailed statement
10 showing that development of the entire 31.5 acre parcel is
11 not prevented by virtue of the particular PUD development
12 proposed for the 14.5 acre portion.

13 Intervenor argues that EC 9.510(3) does not require a
14 detailed statement showing the balance of the property can
15 be developed in a manner consistent with city requirements.
16 Intervenor states:

17 "The code interpretation urged by petitioners is
18 one that leads to absurd results. They believe
19 that an applicant for development approval must
20 prove, in connection with its application, that

"The evidence presented by the representative of the applicant at the hearing was that the remainder of property said to be in the ownership of the applicant here, is not in his sole ownership or under his developmental control, therefore, the requirement of EC 9.510(3) is not applicable." Record 133.

The property referred to in the above quoted finding is located outside the city limits, and is not under the same ownership as the subject property and the 31.5 acre parcel of which it is a part. There is no question in this appeal that EC 9.510(3) applies due to the fact that the challenged decision approves development on a 14.5 acre portion of a 31.5 acre parcel under a single ownership.

1 all adjacent land in the same ownership can be
2 developed in accordance with city standards. This
3 would be a burden that no applicant could meet and
4 which the city could not find has been met -- not
5 in any case. One cannot find that all approval
6 standards for a development will be complied with
7 until a detailed development proposal is in hand.
8 There is no detailed development proposal for the
9 adjacent land. * * *" Intervenor's Brief 5.

10 Alternatively, intervenor argues it provided a
11 schematic drawing of the potential layout for the
12 development of the entire 31.5 acre parcel. In this regard,
13 intervenor does not argue the schematic drawing it submitted
14 establishes that the "entire [31.5 acre parcel] can be
15 developed in accord with" city requirements as provided by
16 EC 9.510(3). Rather, it contends petitioners failed to
17 establish how the schematic drawing is inadequate to show
18 the entire area can be developed consistent with city
19 requirements.

20 This Board must defer to a local government's
21 interpretation of its own ordinances, unless the challenged
22 interpretation is contrary to the express words, policy or
23 context of such ordinances. Clark v. Jackson County, 313 Or
24 508, 836 P2d 710 (1992). However, we believe the
25 interpretation of the EC adopted by the city, that the
26 "statement" referred to in EC 9.510(3) is not required, is
27 "clearly contrary" to the express terms of EC 9.510(3). EC
28 9.510(3) clearly requires the statement. Further, we do not
29 agree with intervenor that interpreting EC 9.510(3)
30 according to its express terms necessarily leads to absurd

1 results. Recognizing that this Board has no authority to
2 interpret EC 9.510 in the first instance, see Weeks v. City
3 of Tillamook, 117 Or App 449, ___ P2d ___ (1992), there is
4 at least one plausible interpretation of EC 9.510(3) that is
5 consistent with its terms. Although we agree with
6 intervenor that under EC 9.512(6) an applicant need not
7 submit a specific proposal for development of the portion of
8 the ownership not proposed for development, the applicant
9 must submit sufficiently detailed information to demonstrate
10 that the portion of the ownership for which development is
11 not proposed will not be rendered undevelopable by the
12 development for which tentative plan approval is requested.
13 The city must then review that information and find the
14 proposed partial development will not render the remainder
15 of the ownership undevelopable. Presumably there will be a
16 number of ways the remainder of the ownership could be
17 developed, and the specificity of the information required
18 by EC 9.512(6) accordingly may be more general. The fact
19 that there is such a plausible and consistent interpretation
20 lends further weight to our determination that the
21 interpretation adopted by the city is clearly wrong.

22 Finally, the burden of establishing compliance with
23 EC 9.510(3) is the applicant's. It is not petitioners'
24 burden to show how EC 9.510(3) is not met. Forest Park
25 Estate v. Multnomah County, 20 Or LUBA 319, 341 (1990).

26 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 "The City of Eugene erred by finding the applicant
3 had demonstrated the proposed development will be
4 consistent with the applicable refinement plan."

5 **THIRD ASSIGNMENT OF ERROR**

6 "The City of Eugene erred by finding the proposed
7 development is consistent with the Metropolitan
8 Area General Plan."

9 Petitioners argue the proposed PUD is inconsistent with
10 several plan and implementing ordinance standards. We
11 address the proposal's compliance with these standards
12 separately below.

13 **A. Consistency with the Purposes of the South Hills**
14 **Study**

15 EC 9.512(6)(a) requires that the proposal be:

16 "* * * consistent with related policies and
17 development standards in applicable, adopted
18 neighborhood refinement plans and special area
19 studies."

20 There is no dispute that a document entitled the "South
21 Hills Study" is a special area study with which the proposal
22 must be consistent. The South Hills Study provides, in
23 relevant part, as follows:

24 "That all vacant property above an elevation of
25 901' be preserved from an intensive level of
26 development, subject to the following exceptions:

27 "* * * * *

28 "Development under [PUD] procedures when it can be
29 demonstrated that proposed development is
30 consistent with the purposes of this section."

31 The "purposes" of the referenced section of the South Hills

1 Study include the following:

2 "1. To [e]nsure preservation of those areas most
3 visibly a part of the entire community;

4 "2. To protect areas of high biological value in
5 order to provide for the continued health of
6 native wildlife and vegetation;

7 "3. To [e]nsure provision of recreational areas
8 in close proximity to major concentrations of
9 population;

10 "4. To provide connective trails between major
11 recreational areas;

12 "5. To provide connective passageways for
13 wildlife between biological preserves;

14 "6. To contribute to Eugene's evergreen forest
15 edge; and

16 "7. To provide an open space area as a buffer
17 between the intensive level of urban
18 development occurring within the urban
19 service area and the rural level of
20 development occurring outside the urban
21 service area." South Hills Study, Exhibit A.

22 Petitioners assert the county's findings are inadequate
23 to establish that the proposal is consistent with these
24 purposes. Petitioners argue that some of the city's
25 findings concerning the proposal's consistency with these
26 purposes are conclusory. However, we consider only
27 petitioners' focused challenges to the proposal's
28 consistency with South Hills Study policies 1, 2 and 5,
29 quoted above. The remainder of petitioners' challenges
30 amount to no more than a disagreement with the ultimate
31 conclusions reached by the city, rather than the legal

1 correctness of those determinations, and we do not consider
2 them further. Deschutes Development v. Deschutes County, 5
3 Or LUBA 218, 220 (1982).

4 In Bennett v. City of Dallas, 96 Or App 645, 648-49,
5 773 P2d 1340 (1989), the Court of Appeals observed that
6 language in a city zoning ordinance generally requiring that
7 proposals be consistent with a comprehensive plan, does not
8 transform general plan language into mandatory approval
9 standards. Here, EC 9.512(6)(a) requires that the proposed
10 PUD be "consistent" with policies and development standards
11 in applicable special area studies. We do not believe that
12 this general requirement transforms otherwise nonmandatory
13 standards into approval standards.

14 The city correctly determined that it is difficult to
15 apply the general South Hills Study purpose statements
16 quoted above as mandatory standards applicable to the
17 proposal. Record 121. It is not clear whether purpose
18 statements 1, 2 and 5 specifically challenged by petitioners
19 are mandatory standards and, if so, how they should be
20 applied. However, assuming they are mandatory standards, we
21 believe the findings of the proposed PUD's consistency with
22 polices 1, 2 and 5 are adequate to establish the proposed
23 PUD is consistent with those expressed purposes of the South
24 Hills Study.

25 The city determined that:

26 "* * * the area of [the] site most visibly a part
27 of the community, that along the east ridgeline,

1 will be preserved. This area has been designated
2 as unbuildable and will even be unavailable to
3 respective property owners for landscaping, as it
4 will be subject to a conservation easement that
5 will prevent tree cutting in this area. The
6 western side of the ridge is in less direct view
7 of the entire community." Record 122.

8 This finding is adequate to establish the proposal is
9 consistent with the first South Hills Study purpose.

10 Concerning the proposal's consistency with the second
11 and fifth purposes, the challenged decision determines:

12 "The South Hills Study does include a purpose 'to
13 provide connective passageways for wildlife
14 between important biological preserves.' That
15 purpose statement must be viewed in its proper
16 context. It describes one of the functions of the
17 ridgeline park system in the South Hills Study
18 which was viewed as a continuous park/open space
19 system that correspond with the ridgeline which
20 defined the urban boundary. The ridgeline
21 defining the urban growth boundary is located some
22 distance south of the subject property and the
23 evidence before the Hearings Official showed that
24 this property was clearly not included in any
25 ridgeline park proposal. Therefore, it is not
26 part of any continuous system. The evidence
27 presented to the Hearings official did indicate
28 that there are deer on the property. However,
29 deer are found throughout the south hills of
30 Eugene and there was no evidence that this site
31 provided any exceptional habitat values. The
32 Metropolitan Natural Resources Special Study does
33 not assign any significant biological value to
34 this property. Finally, the appeal indicates that
35 deer are observed passing to and from existing
36 development through this site. An existing, urban
37 neighborhood cannot be considered an important
38 biological preserve requiring protection of
39 connective passageways for wildlife." Record 12.

40 "There is no evidence that this site could serve
41 as a connective passageway between biological

1 preserves. No biological preserves were
2 identified." Record 123.

3 These finding are adequate to establish the proposal is
4 consistent with the second and fifth South Hills Study
5 purposes.

6 This subassignment of error is denied.

7 **B. Other Provisions of the South Hills Study**

8 In addition to the purposes quoted above, the South
9 Hills Study contains nine "development standards."
10 Petitioners argue the proposal fails to demonstrate
11 compliance with those development standards. However, some
12 of those development standards "encourage" certain
13 development methodologies and characteristics. In this
14 regard, the city determined such standards, prefaced by the
15 word "encourage," are not mandatory approval standards, but
16 rather:

17 "[direct] the city to 'encourage' development in a
18 certain way. * * *" Record 9.

19 This determination is not contrary to the words used by
20 the development standards in the South Hills Study, and we
21 defer to it. Clark v. Jackson County, supra. Further, this
22 interpretation is consistent with the determinations of this
23 Board and the Court of Appeals concerning the proper
24 interpretation and application of such "encourage"
25 standards. See Bennett v. City of Dallas, supra; Benjamin
26 v. City of Ashland, 20 Or LUBA 265 (1990). Specifically,
27 we have repeatedly stated that in the absence of more than a

1 general requirement that plan standards be satisfied, a plan
2 provision simply stating that a city is to "encourage"
3 "clustering" and "the preservation of open space," does not
4 constitute a mandatory approval standard. Bennett v. City
5 of Dallas, supra; Benjamin v. City of Ashland, supra.
6 Accordingly, petitioners' allegations that the challenged
7 decision fails to demonstrate compliance with these
8 "encourage" standards, provide no basis for reversal or
9 remand of the challenged decision.

10 We turn to the other development standards in the South
11 Hills Study challenged by petitioners that are not prefaced
12 by the term "encourage."

13 Development Standard 3 requires the following:

14 "That adequate review of both onsite and offsite
15 impact of any development by a qualified
16 engineering geologist occur under [certain] soil
17 conditions."

18 Development Standard 6 provides:

19 "That all proposed road locations be reviewed to
20 [e]nsure minimum grade disturbance and minimum cut
21 and fill, particularly in those areas most visible
22 due to slope, topographic, or other conditions."

23 Petitioners do not argue that an engineering review did
24 not occur, as required by Development Standard 3.
25 Petitioners argue that the geotechnical review should be
26 supplemented because of problems petitioners foresee with
27 the extension of Lasater Street into the PUD.

28 Intervenor cites extensive findings in the challenged
29 decision addressing petitioners' concerns associated with

1 Development Standards 3 and 6. The findings determine (1)
2 the geotechnical investigation occurred, (2) the
3 investigation addressed the proposed extension of Lasater
4 Street, and (3) the investigation addressed the feasibility
5 of developing the 14.5 acres. The findings note that 34
6 sites were studied on the property and that these studies
7 resulted in an investigation "adequate to characterize the
8 site and make recommendations regarding its development."
9 Record 50. Further, the findings determine the approval of
10 an extension of Lasater Street, rather than its termination
11 in a cul-de-sac, was responsive to the recommendations of
12 intervenor's geotechnical experts and was designed to reduce
13 the amount of cut and fill required to develop the property.
14 Record 5. The findings determine that through the
15 conditions of approval imposed on the project, "the
16 visibility of this extension of Lasater [Street] * * * will
17 be minimized." Record 126.

18 We agree with intervenor that the challenged findings
19 are adequate to establish compliance with Development
20 Standards 3 and 6.

21 Development Standard 5 provides as follows:

22 "That developments be reviewed in terms of scale,
23 bulk and height to [e]nsure that development
24 blends with rather than dominates the natural
25 characteristics of the south hills area."

26 The challenged decision includes the following findings
27 of compliance with this standard:

1 "This [PUD] will involve a development of
2 single-family homes in accordance with the
3 standards of [residential] zoning districts. This
4 includes the standards for height, setback,
5 parking and coverage. With the low density of the
6 development and the large parking lots proposed,
7 the single family homes will blend into and be
8 compatible with the environment.

9 "The applicant has requested a height modification
10 for the five lots located on the downhill side of
11 Lasater Boulevard extension. These lots are on
12 the lower portion of a slope that faces primarily
13 to the west, towards presently undeveloped land,
14 and not directly oriented toward the city. The
15 location of these single-family residences on
16 these lots, which range in size from in excess of
17 1/2 acre to over an acre in size, will be
18 compatible with the natural environment and not
19 dominate the setting." Record 126.

20 These findings are adequate to establish compliance
21 with Development Standard 5.

22 Development Standard 7 provides:

23 "[PUD] review shall be based on a recognition of
24 both public and private interests. In areas of
25 significant conflict (e.g., locating development
26 in a highly visible area as opposed to a less
27 visible area or in an area of significant
28 vegetation as opposed to a relatively open area)
29 which could be resolved through the use of an
30 alternative development plan, primacy shall be
31 given to the public interest in any
32 determinations."

33 Petitioners contend the city adopted no findings of
34 compliance with this standard. Alternatively, petitioners
35 argue that if findings were adopted, they are inadequate.

36 The city adopted findings of compliance with
37 Development Standard 7. Record 8-9; 126-27. Petitioners

1 offer little explanation of why they believe the findings
2 are inadequate short of disagreeing with the ultimate
3 conclusion of compliance. We believe the city's findings of
4 compliance with Development Policy 7 are adequate.

5 This subassignment of error is denied.

6 **C. Metropolitan Area General Plan**

7 Petitioners contend the challenged decision fails to
8 demonstrate compliance with Policies 21, 23 and 34 of the
9 Metropolitan Area General Plan (Metro Plan).²

10 EC 9.512(6)(b) requires an applicant for tentative
11 approval of a PUD to establish the proposed PUD is
12 consistent with the Metro Plan. However, for the reasons
13 explained below, the specific plan policies to which
14 petitioners refer are not mandatory approval standards
15 applicable to individual development applications.

16 Policies 21 and 23 are policies to "encourage"
17 particular dwelling densities and housing mixtures. They
18 are not mandatory approval standards. That the city may
19 have adopted inadequate findings to establish compliance

²We explained the significance of the Metro Plan in Stotter v. City of Eugene, 18 Or LUBA 135, 138 n 1 (1989):

"The Metro Plan is the general comprehensive plan for Eugene, Springfield, and the adjacent urbanizable portions of Lane County. It was acknowledged in August, 1982. Amendments to the Metro Plan require the consent of Eugene, Springfield and Lane County. The Metro Plan is general in scope. More specific application of plan policies occur[s] through neighborhood plans and special area studies which address issues unique to a specific geographic area. * * *."

1 with Policies 21 and 23 provides no basis for reversal or
2 remand of the challenged decision. Bennett v. City of
3 Dallas, supra, Benjamin v. City of Ashland, supra.

4 Policy 34 provides as follows:

5 "In newly developing areas, techniques such as
6 planned unit developments shall be employed to
7 achieve density assumptions of the [Metro Plan].
8 The cities shall review the provisions of their
9 residential zoning ordinances and make changes, as
10 necessary, to further development of single and
11 multiple family housing units in the number and
12 density anticipated by the Plan."

13 The challenged decision determines Policy 34 is a
14 standard to guide local governments subject to the Metro
15 Plan in the development of their individual local land use
16 regulations, not an approval standard applicable to
17 individual development applications. Record 128. This
18 interpretation is not clearly contrary to the express words
19 of the Metro Plan, and we defer to it. Clark v. Jackson
20 County, supra. Consequently, whether the city adopted
21 findings of compliance with Metro Plan Policy 34, provides
22 no basis for reversal or remand of the challenged decision.

23 This subassignment of error is denied.

24 The second and third assignments of error are denied.

25 The city's decision is remanded.