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LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

SAM McCRARY,)
)
Petitioner,)
)
vs.)
)
CITY OF TALENT,)
)
Respondent.)

LUBA No. 94-156

FINAL OPINION
AND ORDER

Appeal from City of Talent.

Sam McCrary, Talent, filed the petition for review and argued on his own behalf.

Matthew G. Fawcett, Medford, filed the response brief and argued on behalf of respondent.

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

REMANDED 03/20/95

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council order approving an
4 application for a subdivision.

5 **FACTS**

6 The subject property is an 8.58 acre parcel zoned Low
7 Density Residential (R-1-8). The property is bordered on
8 the north by commercial property, on the east and south by
9 parcels also zoned R-1-8, and on the west by a parcel zoned
10 Mobile Home.

11 The planning commission approved the proposal and
12 petitioner appealed to the city council. The city council
13 affirmed the decision of the planning commission with
14 certain modifications.¹ This appeal followed.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner asserts the challenged decision is erroneous
17 because it fails to protect an older farm house. However,

¹The city council added the following conditions of approval:

- "a. That a sight obscuring buffer of vegetation be installed, either of a minimum 2 gallon size site obscuring shrub or a 1" caliper tree, along the north border of the subdivision.
- "b. That the 10' pedestrian easement be paved.
- "c. That fences be provided, where appropriate, along the east and west boundaries of the subdivision and that said fences be of applicable size.
- "d. That the wetlands situation be studied and reported to the State of Oregon." Record _____.

1 petitioner fails to identify any applicable legal standard
2 which requires protection of the farm house. Petitioner
3 fails to establish a basis for reversal or remand of the
4 challenged decision. Deschutes Development Co. v. Deschutes
5 County, 5 Or LUBA 218, 220 (1982).

6 The second assignment of error is denied.

7 **FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

8 Petitioner argues the challenged decision fails to
9 establish compliance with certain City of Talent
10 Comprehensive Plan (plan) standards. Specifically,
11 petitioner contends the challenged decision fails to
12 establish compliance with the following plan provisions.
13 Plan Chapter V, Issue # 6.B provides that it is the city's
14 policy:

15 "To protect, manage and avoid urbanization and
16 destructive alterations of known wildlife habitats
17 and resource lands."

18 Plan Chapter V, Issue #1.B.2 provides:

19 "Parks and open spaces are important for Talent
20 residents and they shall be provided through:

21 "* * * * *

22 "2) Ensuring neighborhood parks within one-half
23 mile of each Talent resident in the amount of
24 four acres per 1,000 population."

25 Plan, Chapter V, Issue #5.B provides it is the policy of the
26 City of Talent to maintain:

27 "[a] balance of park and recreation facilities * *
28 * in accordance with recreation demand and need
29 based on the socio-economic characteristics of the

1 population."

2 In addition, petitioner contends the proposal violates
3 buffering provisions of Plan Chapter II, Issue 6 and Article
4 15, Section 19 and Article 8, Section 11 of the City of
5 Talent Zoning Ordinance (TZO).

6 The challenged decision contains neither an
7 interpretation of the applicability of these plan and TZO
8 provisions, nor a determination of whether they are
9 satisfied. The challenged decision was adopted by the city
10 governing body. It is well settled that while LUBA must
11 grant considerable deference to a local governing body's
12 interpretation of its own code (ORS 197.829; Gage v. City of
13 Portland, 319 Or 308, 860 P2d 282 (1993)); when reviewing a
14 governing body's decision, LUBA cannot interpret local
15 government ordinances in the first instance. Weeks v. City
16 of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992). This
17 is especially the case where, as here, the manner in which
18 the plan and TZO applies is not obvious. See Gage v. City
19 of Portland, 123 Or App 269, 274-75, 860 P2d 282, adhered to
20 125 Or App 119, rev'd on other grounds 319 Or 308 (1994);
21 see also Towry v. City of Lincoln City, 26 Or LUBA 554, 560
22 (1994); Terra v. City of Newport, 24 Or LUBA 438, 448
23 (1993). Therefore, the challenged decision must be remanded
24 for an interpretation concerning the applicability and scope
25 of the plan and TZO provisions cited by petitioner.

26 The first, third and fourth assignments of error are

1 sustained.

2 **FIFTH ASSIGNMENT OF ERROR**

3 As we understand it, petitioner argues the proposal
4 violates City of Talent Subdivision Ordinance (TSO) 422,
5 Section 1(b)(11) because the proposal authorizes a
6 cul-de-sac in excess of 500 feet.² Petitioner also argues
7 the proposal violates TSO 1(b)(9) because the decision fails
8 to demonstrate that a local street does not intersect with
9 an arterial street.³

10 The challenged decision contains no interpretation of
11 TSO 422 Section 1(a)(b) or (11) or TSO 1(b)(9). We note
12 that it does not appear the proposal authorizes a cul-de-sac
13 in excess of 500 feet. However, because the decision must
14 be remanded in any event, on remand, the city should explain
15 how the proposal complies with TSO 1(b) (a) and (11).

16 The fifth assignment of error is sustained.

17 **SIXTH ASSIGNMENT OF ERROR**

18 Petitioner asserts the city's findings are inadequate,
19 but does not explain what findings he believes are

²TSO 1(b)(11) provides:

"A cul-de-sac shall be as short as possible and shall in no event exceed 50 feet in length. All cul-de-sacs shall terminate in an approved turnaround."

³Petitioner also argues the city's notices of hearing failed to comply with ORS 197.763. However, petitioner does not establish that this procedural error caused prejudice to his substantial rights and we do not see that it did. Therefore, this argument provides no basis for reversal or remand of the challenged decision and we do not address it further. ORS 197.835(7)(a)(B).

1 inadequate or for what reason he believes this to be the
2 case. This assignment provides no additional basis for
3 reversal or remand of the challenged decision.

4 The sixth assignment of error is denied.

5 **SEVENTH ASSIGNMENT OF ERROR**

6 Under this assignment, petitioner contends the
7 challenged decision violates Statewide Planning Goal 5 (Open
8 Spaces, Scenic and Historic Areas, and Natural Resources).
9 However, the city's comprehensive plan and land use
10 regulations are acknowledged as being in compliance with the
11 statewide planning goals. Further, the challenged decision
12 does not amend the city's plan or land use regulations.
13 Therefore, the statewide planning goals do not apply to
14 the challenged decision, which simply approves a residential
15 subdivision on land zoned for residential uses. See Byrd
16 v. Stringer, 295 Or 311, 318-19, 666 P2d 1332 (1983).

17 The seventh assignment of error is denied.

18 **EIGHTH ASSIGNMENT OF ERROR**

19 As we understand it, petitioner argues the city's
20 subdivision ordinance does not comply with ORS 92.044.
21 However, ORS 92.044(1) states in pertinent part:

22 "The governing body of a county or a city shall,
23 by * * * ordinance, adopt standards and
24 procedures, * * * governing * * * the submission
25 and approval of tentative plans and plats of
26 subdivisions, tentative plans * * *.

27 "(a) Such standards may include * * *.

28 "* * * * *" (Emphasis supplied).

1 ORS 92.044(1)(a) does not require the city to adopt
2 particular standards, but rather suggests standards the city
3 may wish to adopt. Petitioner does not argue the city has
4 failed adopt subdivision standards under ORS 92.044, the
5 city clearly has done so. This assignment of error provides
6 no basis for reversal or remand of the challenged decision.

7 Petitioner's eighth assignment of error is denied.

8 The city's decision is remanded.