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

W.B. NEELS,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent,)
)
and)
)
WILLIAM REED,)
)
Intervenor-Respondent.)

LUBA No. 98-084
FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Paul D. Schultz, Oregon City, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hibbard Caldwell & Schultz.

No appearance by respondent.

Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Miller Nash Wiener Hager & Carlsen.

HOLSTUN, Board Chair, participated in the decision.

AFFIRMED 03/11/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a 13-lot residential planned unit
4 development (PUD).

5 **MOTION TO INTERVENE**

6 William Reed (intervenor), the applicant below, moves to intervene on the side of
7 respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject 6.31-acre site is located in the Urban Low Density Residential (R-10)
10 zone. Intervenor proposes to construct separate assisted living dwellings on twelve of the 13
11 lots.¹ The twelve assisted living dwellings would each include "common kitchen facility,
12 laundry facility, living and dining rooms and other general living areas." Record 8. Up to
13 ten elderly residents would live in each dwelling along with a caregiver and the caregiver's
14 family.² An existing single-family dwelling on the remaining lot will be converted in the
15 future to a clubhouse and bed and breakfast facility. However, the challenged decision does
16 not grant approval for such use of the existing single-family dwelling. The hearings officer

¹The relevant Clackamas County Zoning and Development Ordinance (ZDO) and applicable state statutes and administrative rules include a number of overlapping definitions of terms applied to various group living arrangements. The residents of the proposed dwellings will need assistance in living and we use the term assisted living dwelling in this descriptive sense, without assigning any particular legal significance to the term.

²The applicant's attorney testified:

"* * * Each of these units is going to be set up like a single family home, and contrary to [petitioner's attorney's] testimony, the page that he does reference does show kitchens, dining rooms, eating facilities. The idea is that you will have a regular—and our concept is that the care giver and the care giver's family will live there with up to ten elderly individuals who need assisted living in a family-type setting to try to make it more of an amenity that is less institutional." Record 362.

"* * * They are going to be living—definitely ten of them are going, up to ten of them are going to be elderly and needing assisted care, and they are going to be living with care givers who are in the residence, and they are all going to be living as a single housekeeping unit. That is the concept." Record 364.

1 found such approval will require a separate conditional use application in the future.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner challenges the hearings officer's decision with regard to the existing
4 dwelling. As just noted, the hearings officer specifically found that any use of the existing
5 dwelling for a clubhouse or bed and breakfast facility would require that the applicant submit
6 a request for conditional use approval and demonstrate compliance with applicable
7 conditional use criteria. Petitioner fails to articulate any error in the hearings officer's
8 decision with regard to the existing dwelling.

9 The second assignment of error is denied.

10 **FIRST ASSIGNMENT OF ERROR**

11 ZDO 301.03(A) authorizes "[d]etached single-family dwelling units or residential
12 homes" as primary uses in the R-10 zone. The county hearings officer found that the
13 proposed twelve assisted living dwellings constitute twelve "detached single-family dwelling
14 units or residential homes," as the ZDO defines those terms. Petitioner argues the hearings
15 officer erroneously interpreted the ZDO in reaching that conclusion. In addition, petitioner
16 alleges the proposal constitutes a "nursing home" as the ZDO defines that term. Because
17 nursing homes require conditional use approval, petitioner alleges the hearings officer
18 erroneously approved the PUD without also requiring that the applicant secure conditional
19 use approval as a nursing home. For both of these reasons, petitioner alleges the challenged
20 decision should be remanded.

21 **A. Preliminary Issues**

22 **1. Preemptive Effect of State Law**

23 The hearings officer adopted the following findings:

24 "Even if the Hearings Officer has incorrectly found the proposed use to
25 qualify as a 'primary use' for purposes of ZDO 301.03(A), there remains the
26 separate question whether state law has nevertheless preempted or supplanted
27 any County land use criterion that would impose conditions upon the
28 proposed use or preclude its establishment altogether." Record 10.

1 The hearings officer then considers whether the disputed assisted living dwellings constitute
2 a "residential home" as defined by ORS 197.660(2) or a "residential facility," as defined by
3 ORS 197.660(1) and whether ORS 197.667 and 197.660 preempt the county's authority to
4 require conditional use approval for such facilities. Record 10-13.

5 Intervenor appears to argue that the hearings officer adopted an alternative finding
6 that state law would preempt the ZDO, even if the ZDO could be construed to require
7 conditional use approval for the disputed assisted care dwellings. Intervenor alleges that
8 petitioner's first assignment of error should be denied because petitioner failed to assign error
9 to that alternative finding.

10 If the hearings officer's decision found that state law would preempt any county
11 regulations requiring conditional use approval for the disputed assisted care dwellings, such a
12 finding might constitute an independent and alternative basis for the challenged decision. In
13 that event, petitioner's failure to challenge such a finding would require that we affirm the
14 county's decision on that basis alone. See DLCD v. Josephine County, 18 Or LUBA 798,
15 801-02 (1990) (inadequacy of findings to support an exception to resource goals provides no
16 basis for remand where findings that an exception is not required are not challenged).
17 However, the hearings officer's discussion concerning possible state law preemption is
18 unclear. The hearings officer never clearly states that state law would preempt the ZDO, if,
19 as petitioner alleges, the ZDO must be interpreted to require conditional use approval for the
20 proposed assisted care dwellings. Therefore, petitioner's failure to challenge the hearings
21 officer's preemption findings provides no basis for rejecting his first assignment of error.

22 **2. Failure to Challenge Findings of Compliance With PUD Approval**
23 **Criteria**

24 Intervenor points out that petitioner does not allege the county erred in its application
25 of the approval criteria governing PUD approval. Rather, petitioner's first assignment of
26 error is limited to challenging the hearings officer's determination concerning the nature of
27 the proposed dwellings. Intervenor alleges that petitioner's first assignment of error should

1 be rejected because the county was not obligated to consider the nature of the proposed
2 dwellings in approving the request for PUD approval. Intervenor goes on to point out that
3 there is nothing in the challenged decision that requires that the 12 lots be improved with the
4 proposed twelve assisted living dwellings. Those lots could just as easily be developed with
5 other kinds of single-family dwellings.³

6 The county has not appeared in this proceeding, and we therefore do not know
7 whether the county agrees with intervenor that the hearings officer could have treated the
8 questions raised below concerning the nature of the proposed dwellings as irrelevant to the
9 question of whether the application for PUD approval should be granted. More importantly,
10 even if the hearings officer was not required to include determinations in his decision that the
11 proposed dwellings (1) constitute detached single-family dwellings and residential homes
12 and (2) do not constitute a nursing home, it is clear that the hearings officer nevertheless
13 included such determinations in the challenged decision. In these circumstances, we reject
14 intervenor's suggestion that the portion of the hearings officer's decision challenged in the
15 first assignment of error can be ignored because it might not be a necessary part of the PUD
16 approval decision.

17 **B. The Proposed Dwellings are "Dwelling Units" and "Residential Homes"**

18 As noted earlier, single-family dwelling units and residential homes are allowed as
19 primary uses in the R-10 zone. ZDO 301.03(A). Nursing homes are also allowed in the R-
20 10 zone, but require conditional use approval, which in turn requires compliance with certain
21 approval criteria. ZDO 301.05(A)(9). For purposes of this appeal, the critical questions are
22 whether the proposed dwellings constitute "single-family dwelling units or residential

³Intervenor stated during the local proceedings that he intends to construct three assisted living dwellings initially and, depending on the success of these initial three units, the remaining lots could be developed with nine more assisted living dwellings or some other kind of dwellings.

1 homes" or whether each individual dwelling constitutes a "nursing home," as those terms are
2 defined by ZDO 202.

3 We first consider whether the hearings officer correctly concluded the proposed
4 dwellings constitute "single-family dwelling units or residential homes." The ZDO
5 definitions of those terms are circular, and extensive discussion of the definitions would
6 unnecessarily complicate this opinion. Under the ZDO, the critical inquiry is whether the ten
7 elderly individuals and the caregiver who would occupy each of the 12 proposed assisted
8 care dwellings constitute a "Housekeeping Unit," as that term is defined by ZDO 202. The
9 ZDO 202 definition of "Housekeeping Unit" is set forth below; the definitions of the other
10 key terms are set forth in the margin.⁴

11 "HOUSEKEEPING UNIT: A living arrangement within a dwelling unit in
12 which a common kitchen facility, laundry facility, living and dining rooms

⁴ZDO 202 includes the following definitions for "Dwelling Unit," "Residential Home" and "Family."

"DWELLING UNIT: A building or portion thereof with one (1) or more rooms designed for
occupancy by one (1) family for living purposes * * *." (Emphasis added.)

"RESIDENTIAL HOME: Any dwelling unit or residential building operated as a single
housekeeping unit for the purposes of providing food, shelter, personal services and care, as
defined in this ordinance, and when appropriate, a planned treatment or training program of
counseling, therapy, or other rehabilitative social services, for persons of similar or
compatible conditions [or] circumstances." (Emphases added.)

"FAMILY: Any one of the following groups shall be considered a family when living
together as a single 'housekeeping unit' (as defined in this Section) within a dwelling unit:

"* * * * *

"(c) Members of an * * * 'adult foster care home' or 'residential home', as defined in this
Section.

"* * * * *

"Or,

"* * * * *

"FAMILY: Any group which includes up to fifteen (15) adults or children, living together as
a single housekeeping unit within a dwelling unit (as defined in this section). * * *"
(Emphases added.)

1 and other general living areas of the dwelling, and the duties, rights and
2 obligations associated with the performance of domestic tasks and
3 management of household affairs, are shared by the residents by virtue of
4 legal relationship or mutual agreement. (Emphasis added.)

5 If the 10 elderly individuals and their caregiver, who will occupy each of the disputed
6 residential dwellings, constitute "housekeeping units," then those dwellings also constitute
7 "residential homes" as that term is defined by ZDO 202.⁵ Similarly, if they constitute
8 "housekeeping units" they are a "family" and the residential building is a "dwelling unit," as
9 those terms are defined by ZDO 202.⁶ We turn to the hearings officer's decision and the
10 petitioner's arguments that the proposed households do not constitute "housekeeping units"
11 under the definition quoted above.

12 The hearings officer found that the proposed residential buildings would constitute
13 "housekeeping units:"

14 "Applicant testified * * * that the individual homes will each have the
15 requisite 'common kitchen facility, laundry facility, living and dining rooms
16 and other general living areas.' Applicant also represented at the hearing that,
17 notwithstanding the ages and anticipated limited physical abilities of the
18 occupants of the homes, the residents will nonetheless be able to share the
19 'performance of domestic tasks and management of household affairs' by
20 'mutual agreement,' as the definitions of 'housekeeping unit' allows." Record
21 8-9.

22 Following his conclusion that the individual homes would constitute housekeeping units, the
23 hearings officer applied the definitions set out above and concluded each of the residential
24 buildings qualify as "dwelling units" and "residential homes."

⁵We do not understand petitioner to dispute that the challenged structures constitute "residential buildings" or that the residential buildings would be operated "for the purposes of providing food, shelter, personal services or care." Therefore, under the ZDO 202 definition of "Residential Home," see n 4, a "residential building" that is "operated as a single housekeeping unit" is a "residential home."

⁶As defined by ZDO 202 a "dwelling unit" must be designed for occupancy by a "family" which is defined to include a group of "up to fifteen * * * adults * * * living together as a single housekeeping unit" within a "dwelling unit."

1 It is undisputed that the proposed assisted care dwellings will be "residential
2 facilities" as that term is defined by ORS 443.400(6) and will be required to be licensed
3 under ORS 443.410. Under ORS 443.450, the Assistant Director for Senior and Disabled
4 Services is required to adopt rules governing such residential facilities. Petitioner argues that
5 the rules adopted pursuant to these authorities effectively preclude the proposed individual
6 homes from operating as "housekeeping units," because they would prevent the occupants
7 from performing the requisite "domestic tasks" or engaging in the requisite shared
8 "management of household affairs [under a] legal relationship or mutual agreement."⁷

9 The applicant candidly conceded below that the residents of these residential
10 buildings are not able to care for themselves in their own home and therefore require the kind
11 of assistance in living that will be provided in the proposed facility. However, the applicant
12 argued that the residents will not require the kind of "full service" care that is provided in the
13 conventional nursing home. Record 362. The applicant's representative explained that the
14 elderly individuals along with the caregiver and caregiver's family will live together in a way
15 that is less institutional and more a "family-type setting." Id.

16 Intervenor argues that there is nothing in the definition of "housekeeping unit" that
17 requires that every resident of a household participate "equivalently" in domestic tasks.

⁷Petitioner argues;

"* * * For example, OAR 411-055-0180 requires the facility to conduct an assessment of each resident's needs and plan responsive services. OAR 411-055-0210 requires the facility to provide three meals a day, seven days a week, with menus prepared seven days in advance. Food must be prepared in accordance with the Health Division Sanitation Rules. The facility is also required to provide laundry services; household services such as floor cleaning, bed making, etc.; transportation services; and the proper administration of medication. OAR 411-055-0151 requires each facility to be administered by a staff trained as prescribed by the Senior & Disabled Services Division under direction of a facility administrator who is accountable to the Division. Most importantly, pursuant to OAR 411-055-0151, delegation of the administrator's authority and responsibility to a resident is prohibited.

"In short, by statute and regulation, the facility, not the residents, [is] responsible for the performance of domestic tasks and the management of household affairs. Residents have only limited ability to have input into how their individual cases will be managed." Petition for Review 6.

1 Intervenor's Brief 9. Intervenor argues if such equivalency were required, even traditional
2 "families with elderly parents, mentally challenged children, or teenagers would [fail to
3 qualify as households]." Id. at 10.

4 We agree with intervenor that nothing in the definition of "housekeeping unit"
5 specifies that all "domestic tasks" or that all "management of household affairs" be shared
6 equally by the residents. The record also suggests that elderly residents of the proposed
7 facilities will share in some domestic tasks and management of household affairs, to the
8 extent that they are able to do so. The closer question is whether the high degree of central
9 management and planning required under the rules cited by petitioner, and apparently
10 envisioned by the proposal, are such that the assisted living dwellings could not operate as a
11 "housekeeping unit."⁸

12 We agree with the hearings officer's ultimate conclusion that the proposed assisted
13 living units qualify as "housekeeping units." The record demonstrates that the required
14 common facilities will be provided and a sharing of some "domestic tasks and management
15 of household affairs" among the elderly residents may in fact occur. The level of central
16 planning and provision of some household duties such as meal planning and preparation,
17 cleaning, laundry and medical needs is admittedly not exactly replicated in most other types
18 of single-family dwelling households. However, it is not unusual for one member of a
19 household to shoulder the bulk such responsibilities. Neither is it unusual for households to
20 hire a non-family member to perform many of these same tasks. In this case, the resident
21 caregiver apparently will be responsible for performing many of the domestic tasks and
22 managing household affairs through a "legal relationship or mutual agreement." The

⁸We emphasize that the relevant question in this appeal is whether the record shows that the proposed assisted living arrangement could operate as a "housekeeping unit," not whether the individual proposed assisted living units will operate in a manner that qualifies as a "housekeeping unit."

1 proposed assisted living dwellings therefore fall within the literal terms of the ZDO
2 definition of "housekeeping unit."

3 Finally, we note that the ZDO definitions of "housekeeping unit" and "residential
4 home" must be read together because the definition of "residential home" requires that such
5 homes be "operated as a single housekeeping unit." The definition of "residential home"
6 therefore provides relevant context for the definition of "housekeeping unit." PGE v. Bureau
7 of Labor and Industries, 317 Or 606, 610, 859 P2d 1143 (1993). Persons occupying
8 "residential homes," by definition, may require "a planned treatment or training program of
9 counseling, therapy, or other rehabilitative social services * * *." It is clearly envisioned that
10 "residential homes" may be occupied by persons who require a relatively high level of
11 supervision and assistance in day-to-day living and decision making.

12 For all of the above reasons, we do not agree with petitioner that the requirements for
13 central planning and decision making mean the correspondingly more limited obligation and
14 opportunity for the elderly residents of the proposed assisted residential units will have for
15 sharing in particular "domestic tasks and management of household affairs" make those units
16 something other than a "housekeeping unit" as defined by ZDO 202.

17 This subassignment of error is denied.

18 **C. The Proposed Assisted Living Dwellings are not Nursing Homes**

19 ZDO 202 defines "Nursing Home" as follows:

20 "NURSING HOME: A nursing, convalescent, or rest home facility licensed
21 by the State under ORS chapters 441 and 442, or facility licensed under ORS
22 [chapter] 443 as an assisted living facility, which provides, for a period
23 exceeding twenty-four (24) hours, the continuous services of licensed nursing
24 personnel to care for chronically ill or infirm patients, exclusive of those
25 patients related to the owner or facility administrator by blood or marriage.
26 Such nursing, convalescent, or rest home must provide nursing services to
27 those patients who, in the judgment of a physician, registered nurse, or facility
28 administrator, require medical, restorative, supportive, or preventive nursing
29 measures."

1 The parties do not dispute that the proposal qualifies as an "assisted living facility" that will
2 be licensed under ORS chapter 443. Therefore, the disputed assisted living dwellings
3 constitute nursing homes, if they will provide the "continuous services of licensed nursing
4 personnel" for periods that exceed 24 hours. The parties dispute whether the proposal will or
5 must provide continuous nursing services for more than 24 hours.

6 We do not agree with the hearings officer's resolution of the issue of whether the
7 disputed assisted living dwellings constitute "nursing homes," as defined above.⁹ In view of
8 the inadequacy of the hearings officer's explanation for why he concluded the challenged
9 assisted living dwellings do not require conditional use approval as "nursing homes" a
10 remand for such an explanation would normally be required. However, the material facts do
11 not appear to be disputed and we are presented with a straightforward question of law.
12 Miller v. Clackamas County, 31 Or LUBA 104, 106 (1996). Under ORS 197.829(2) we may
13 interpret the ZDO ourselves and affirm the county's decision, notwithstanding our
14 disagreement with his legal reasoning, or more accurately, his lack of reasoning. Friends of
15 Metolius v. Jefferson County, 31 Or LUBA 160, 163 (1996). For the reasons explained

⁹The hearings officer concluded that the proposed dwellings do not require conditional use approval as nursing homes. The hearings officer's basis for that conclusion is not at all clear. It may be that the hearings officer believes that if a particular dwelling falls within the definition of "dwelling unit" or "residential home" it cannot also be a "nursing home." If that was the hearings officer's legal theory it is not explained, and we are unable to agree with such a theory based on the arguments that have been presented to us in this appeal. Another difficulty with this legal theory is that there is language in the hearings officer's decision that suggests, to the contrary, that the hearings officer found that the proposed dwellings "could constitute a 'nursing home' as [defined by the ZDO]." Record 6.

The hearings officer's decision instead may be based on the hearings officer's view that if a particular dwelling qualifies as a permitted use in the R-10 zone, because it falls within the definition of "dwelling unit" or "residential home," then it could not also require conditional use approval—even if that dwelling also falls within the definition of "nursing home." The most obvious potential problem with such a theory is that it ignores the possibility that a nursing home, as defined in the ZDO, might be a more heavily regulated subset of "dwelling units" or residential homes," as those terms are defined in the ZDO. Without more of an explanation from the hearings officer and without the benefit of argument on the point from the parties or county, we are unable to agree with that reading of the ZDO, if in fact that is the way the hearings officer interpreted the relevant ZDO definitions.

1 below, we conclude that the proposed dwellings do not require conditional use approval,
2 because they are not "nursing homes" as the ZDO defines that term.

3 Petitioner concedes that nothing in ORS chapter 443 or OAR 411-055-0000 through
4 OAR 411-055-0300 require that assisted living facilities provide nursing care. Intervenor
5 argues that he does not intend to provide nursing care in the assisted care dwellings, and we
6 do not understand petitioner to question that intent on intervenor's part. Rather, petitioner
7 advances two arguments that the assisted care dwellings will constitute nursing homes,
8 notwithstanding intervenor's plans not to provide continuous nursing care in excess of 24
9 hours.

10 Petitioner's first argument is that the elderly residents inevitably will require
11 continuous nursing services in excess of 24 hours. Intervenor responds that under ORS
12 443.415(2) the proposed facility may not be operated in conjunction with a nursing home
13 unless the nursing home is separately licensed. More to the point, intervenor points out that
14 24 hour nursing care will not be provided and that if the elderly residents' health deteriorates
15 to a point where such nursing care is needed, they will be required to seek such care
16 elsewhere.¹⁰ We agree with intervenor, that so long as the assisted living dwellings do not
17 provide continuous nursing services in excess of 24 hours, they do not fall within the ZDO
18 definition of "nursing home" and we reject petitioner's argument that, as a matter of fact, the
19 proposed dwellings cannot be expected to operate in that matter.

20 Petitioner's second argument relies on the last sentence of the ZDO definition of
21 "nursing home," quoted above. If we understand petitioner correctly, he argues that this

¹⁰Intervenor argues:

"* * * The mere fact that some of the residents of Intervenor's facilities might from time to time require nursing services for more than 24 hours—equally likely to be the case for many of the neighbors of the PUD—does not * * * convert the Intervenor's proposed facilities into 'nursing homes.' If elderly residents need 24-hour care they will go [to] the hospital (or a nursing home) just like everyone else in the neighborhood." Intervenor's Brief 12-13.

1 sentence legally requires that intervenor's assisted living facility provide nursing services to
2 patients who need such nursing services, thereby making the assisted living facilities
3 "nursing homes," under the ZDO 202 definition. There are at least two flaws in petitioner's
4 argument.

5 First, as intervenor points out, the final sentence is not the substantive requirement
6 that petitioner assumes that it is.

7 "The fatal flaw with [petitioner's] analysis is that the operative phrase is not a
8 substantive requirement, it is part of a definition describing the type of facility
9 that qualifies as a 'nursing home.' It does not require facilities that house
10 persons that may need more than 24 hours of medical care to provide such
11 care and thereby convert all such facilities to 'nursing homes.' Rather it states
12 that to be a 'nursing home' within the meaning of the definition, a facility must
13 be the type of facility that provides 'nursing services to those patients who, in
14 the judgment of a physician, registered nurse, or facility administrator, require
15 remedial, restorative, supportive or preventative nursing measures."
16 Intervenor's Brief 12 (emphasis in original, footnote omitted).

17 A second flaw is that even if the quoted definitional language does have the substantive
18 effect that petitioner assumes that it does, it only requires that "nursing, convalescent, or rest
19 homes" provide the required nursing services. It does not require that "assisted living
20 facilities licensed under ORS chapter 443" do so.¹¹

21 Because the assisted living dwellings will not provide "continuous services of
22 licensed nursing personnel" for "[periods] exceeding twenty-four (24) hours," the assisted
23 living dwellings are not "nursing homes," as defined by ZDO 202; and the hearings officer
24 did not err in concluding that conditional use approval for the proposed assisted living
25 dwellings is unnecessary.

26 This subassignment of error is denied.

¹¹We do not understand petitioner to argue that the assisted living dwellings are "nursing, convalescent, or rest home [facilities] licensed by the State under ORS chapter 441 and 442 * * *." Rather all parties seem to agree the "assisted living facility" will be licensed under ORS chapter 443.

- 1 The first assignment of error is denied.¹²
- 2 The county's decision is affirmed.

¹²Intervenor also argues that if the ZDO must be interpreted in the manner petitioner alleges, the federal Fair Housing Amendments Act of 1988 preempt the ZDO. In view of our disposition of the first assignment of error, we do not reach that question.