BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL WINKLER and MARTY WINKLER, Petitioners	)	LUBA No. 95-136
vs.	)	FINAL OPINION AND ORDER
CITY OF COTTAGE GROVE, Respondent.	)	

Appeal from City of Cottage Grove.

William C. Carpenter, Jr., and James L. Edmunson, Eugene, filed the petition for review. William C. Carpenter argued on behalf of petitioners.

Gary R. Ackley, City Attorney, Cottage Grove, filed the response brief and argued on behalf of respondent.

HANNA, Referee; LIVINGSTON, Chief Referee, participated in the decision.

REMANDED 02/06/96

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal a decision of the city council approving design review of an eight-unit apartment complex.

MOTION TO FILE REPLY BRIEF

On October 19, 1995, petitioners submitted a request to file a reply brief. A reply brief accompanied the request. As the basis for the request, petitioners cite a new issue the city raised in its brief. The new issue raised by the city and addressed by petitioners in their reply brief is LUBA's jurisdiction.

The city objects to petitioners' reply brief, arguing that the issue to which petitioners reply is not new.

When a contention that LUBA lacks jurisdiction is made for the first time in the city's brief, a reply brief concerning the subject of LUBA's jurisdiction is warranted. Shaffer v. City of Salem, 29 LUBA 592, 594, rev'd on other grounds, 137 Or App 538 (1995).

The jurisdictional issue petitioners addressed in their reply brief was in response to the issue raised for the first time in the city's response brief. Petitioners' motion to file a reply brief is allowed.

FACTS

On February 6, 1995, the applicant submitted an application for design review of an eight-apartment complex to be located in an R-2 zone. The R-2 zone is a medium-

density multiple-family residential district. The application included designations for future additional apartment units and parking.

On April 12, 1995, the planning commission voted to approve the proposed design, subject to conditions. On April 26, 1995, petitioners appealed that approval to the city council. On June 12, 1995 the city council voted to uphold the planning commission decision to approve the design. The city council affirmed the planning commission conclusion that the proposed use is an outright permitted use under Cottage Grove Municipal Code (CGMC) 18.12.020(L) as a "multiple-family residential" use.[1] The city relies on the term "multiple dwelling" as defined in CGMC 18.04.200 for the definition of "multiple-family residential" used in

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[1]CGMC 18.12.020 provides, in pertinent part:

> "Permitted buildings and uses in an R-2 district shall be as follows:
>
> "* * * * *
>
> "B. Duplex residential structures on lots of no less than 7,000 square feet in area.
>
> "1. Triplex residential structures on lots of no less than 12,000 square feet in area;
>
> "2. Four-plex residential structures on lots no less than 15,0000 square feet in area.
>
> "* * * * *
>
> "L. Multiple-family residential."

CGMC 18.12.020(L).[2]

The city council reduced its decision to writing on June 19, 1995. Petitioners filed their notice of intent to appeal with LUBA on July 6, 1995, 24 days after the city council hearing and 17 days after the challenged decision was signed.

PRELIMINARY ISSUES

A. Jurisdiction[3]

The city challenges LUBA's jurisdiction over this appeal on the basis that petitioners' notice of intent to appeal was untimely filed. The city argues that under its ordinances, its decision was final on June 12, 1995, when the decision was made, and not on June 19, 1995, when it was reduced to writing.[4] The city contends that a notice of

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[2]CGMC 18.04.200 provides:

> "'Multiple dwelling' means a building designed and used for occupancy by three or more families, all living independently of each other and having separate housekeeping facilities for each family."

[3]The city describes it's challenge to LUBA's jurisdiction as a challenge to petitioner's standing. The city raises an additional challenge to jurisdiction that we address below under technical violations of rules.

[4]To support its jurisdictional challenge, the city relies on CGZO 18.58.130(F), which states:

> "Action by city council. The city council, after review of the record of the planning commission action, may sustain, deny, modify, continue, table, refer back to the planning commission for further public testimony or require further consideration by the commission, on any request for which an appeal has been filed or has been considered by the council on its own motion.

intent to appeal was not filed with LUBA within 21 days of the city's final decision as required by OAR 661-10-015(1) and ORS 197.830(8).

Contrary to the city's argument, CGZO 18.58.130(F) does not state when the city's decision becomes final for purposes of appeal to LUBA. It merely describes when the city has made a final determination from which no local appeal is available. If CGZO 18.58.130(F) did purport to determine when a local decision could be appealed to LUBA as the city argues, that provision would be unenforceable since it is inconsistent with OAR 661-10-010(3). See City of Grants Pass v. Josephine County, 25 Or LUBA 722 (1993). OAR 661-10-010(3) defines a final decision and states: "a decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s) * * *."

The challenged decision was reduced to writing and signed and, therefore, became final on June 19, 1995. Accordingly, petitioners' appeal was timely filed.

B. Technical Violations of Rules

The city contends that petitioners made several technical violations of our rules.[5] The city argues that

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"The denial or approval by the city council of an appeal shall be final and conclusive." (Emphasis in original.)

[5]The city lists the following alleged omissions and errors in its brief:

these violations warrant dismissal of petitioners' appeal and award of the city's attorney fees because the violations impede a speedy resolution of this appeal as required by ORS 197.805. The city argues that it has limited resources and "[i]t is difficult for [the city] to prepare appropriate responses to assignments of error which are not properly presented." Respondent's Brief 13.

OAR 661-10-005 provides, in relevant part, "Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or a limited land use decision."

In its brief, the city addressed each of petitioners' assignments of error. The city fails to show how the alleged technical violations prejudiced its substantial rights in addressing any of those assignments of error. If there were technical violations, those violations do not

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1. The certificate of filing is missing from the [city's] copy of the Petition for Review.

2. The [city's] copy of the Petition for Review is not signed on the last page by the author.

3. The Petition for Review contains no correct statement of why LUBA has jurisdiction to hear this case.

4. The Petition for Review fails to state the relief requested in terms that LUBA is authorized to grant. (Petitioners' variously ask the city's decision to be reversed and remanded at the same time. * * *

5. The Petition for Review does not separate all assignments of error under separate headings, nor develop clear and concise supporting argument for each." Respondent's Brief 13. (Emphasis in original.)

warrant dismissal.

With regard to the city's attorney fee request, ORS 197.830(14)(b) states:

> "The board shall also award attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

ORS 197.830(14)(b) does not authorize LUBA to award attorney fees for technical violations of our rules. The city's request for attorney fees is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the city erroneously concluded that an apartment complex with more than four dwelling units is an outright allowed use in an R-2 zone. Petitioners contest the city's determination that the definition for "multiple dwelling" is also the definition for "multiple family residential." Petitioners contend that the city's interpretation of the R-2 zone leaves little distinction in the type of the apartments allowed between the R-2 zone (medium density) and the R-3 zone (high density).[6]

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[6]CGMC 18.12.010 provides:

> "The R-2 multiple-family residential district is intended to provide a quality environment for apartment dwellers."

CGMC 18.13.010 provides, in relevant part:

> "The R-3 high density multiple-family residential district is intended to provide a quality environment for apartment

Petitioners contend that "'[a]partments' are 'multiple dwellings' that include '3-plex' and '4-plex' residential buildings, and are expressly included in the R-2 zone as the only such 'multiple dwellings' listed among allowed uses." Petition for Review 16. Petitioners explain that the councilors discussed the need to include apartment complexes in the R-2 zone based on the purpose statement in CGMC 18.12.010, and that the description in the R-2 zone purpose statement that R-2 is a zone for apartment dwellers is addressed by allowing three-plex and four-plex residential buildings. Petitioners argue that interpretation of apartments was unnecessary.[7] Petitioners conclude that the city made an interpretation when no interpretation was necessary because the express terms of CGMO 18.12.020 are clear.

Instead of addressing the substance of petitioners' arguments, the city responds:

> "The city's decision in upholding the city Planning Commission decision based on its design review of the apartment building in question, falls squarely within the meaning of ORS 197.015(12)(b), and involved no interpretation of the meaning of its code which could reasonably

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> dwellers. The R-3 district should be located adjacent to highways, major arterials and collector streets. * * *"

[7]Petitioners note that the structure of the CGMC is such that, when a use is allowed in the primary zone, the use is cross-referenced when it is allowed in another zone. Petitioners point out that "multiple family dwelling" (CGMO 18.12.020(A)) is the primary use allowed in the R3 zone, but is not cross-referenced to the "multiple family residential use" in the R2 zone.

> bring it within the requirements of ORS 197.015(10)." Respondent's Brief 4.

The city argues that petitioners are attempting to transform a limited land use decision into a land use decision. The city describes the application as a design review application, apparently assuming that a decision that includes design review is automatically a limited land use decision. The city then describes its application of the "multiple dwellings" definition to "multiple family residential" as a "small variation," and argues that such a small variation cannot transform a limited land use decision into a land use decision.

Petitioners' and the city's arguments raise two issues: (1) whether the city's decision is a land use decision or a limited land use decision, and (2) whether the city was within its interpretive discretion when it determined the types of apartment uses allowed under CGMO 18.12.020. The city's decision is not a limited land use decision as defined in ORS 197.015(12)(b).[8] The city's reliance on its decision being a limited land use decision is misplaced and provides no defense to petitioner's argument. Regardless of which type of decision the city made, we apply ORS 197.829 to this assignment of error in which petitioners challenge

[8]If the city intended its action to be a limited land use decision, it did not follow the procedures set forth in ORS 197.195 necessary for making such a decision. Moreover, the city's determination had broader consequences than that allowed under ORS 197.015(12)(b).

the manner in which the city interpreted its code.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "so wrong as to be beyond colorable defense." Zippel v. Josephine County, 128 Or App 458, 876 P2d 854, rev den 320 Or 272 (1994). See also Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P 2d 992 (1992); Melton v. City of Cottage Grove, 28 Or LUBA 1 (1994), aff'd 131 Or App 626, 887 P2d 359 (1995).

The city interpreted its code to allow outright a specific type of apartment dwelling in the R-2 zone. The city's conclusion that one term in its code can be used to define a somewhat different term, is within its interpretive discretion, and is not so wrong as to be beyond colorable defense.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioners contend that the city erred when it did not

find whether the proposed apartment development satisfied the open space design requirements for a multiple-family residential development in an R-2 zone, based on the final approved design. In the alternative, petitioners contend that there is no substantial evidence to support a finding that the final approved apartment development satisfied the requirements for open space in an R-2 zone.

CGZO 18.12.110 provides:

> "An area or areas for usable open space and recreation purposes shall be provided in multiple-family developments. A minimum of two hundred square feet of recreation area shall be provided for each dwelling unit. The surface area of recreation buildings, including swimming pools and tennis courts, may be included in computing the minimum size of the area. Recreation areas shall not be less than thirty feet in any one dimension and not more than ten percent of the area greater than five percent in slope."

Petitioners argue that there is no finding to satisfy this standard. Petitioners state:

> "The staff comment that the lawn satisfies this requirement lacks specificity and is a mere conclusion; in any event, that comment was based upon the parking requirements as originally submitted, which were not ultimately approved.
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> "The additional parking requirement of the City for visitor parking spaces significantly changed the parking space requirements, and there is no finding that this new design * * * includes sufficient open space to meet the 1,600-square foot requirement with its 30-foot minimum size requirement.
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> "Also, the original design showed a front yard setback of 14.5 feet which was changed by City action in its final decision to a minimum of 15-

feet. This change, although small, substantially affects the area of available adjacent lawn areas. Until the City finds exactly what the area is in terms of square feet, it has not provided an order that is reviewable for substantial evidence." Petition for Review 21-22. (Emphasis in original.)

The city contends that:

"The record contains abundant and substantial evidence which the city used to support its decision that the proposed apartment building not only complied with the goals and specifications of a use permitted outright in the R-2 District, but also complied with the city's discretionary standards concerning design review. Revised Supplemental Staff Report, Rec. 89." Respondent's Brief 10.

Although the challenged decision purports to adopt the Revised Supplemental Staff Report (staff report), the decision sets forth the actual staff report findings that it adopts.[9] Our examination of the challenged decision does

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[9]The challenged decision states:

"The Staff Findings contained in the Revised Supplemental Staff Report DR 2-95 were adopted by the Commission as their findings and are listed below:

"PLANNING COMMISSION FINDINGS

[List of ten findings, none of which pertain to open space or recreation.]

"PLANNING COMMISSION CONDITIONS

[List of five conditions, none of which pertain to open space or recreation.]

"CITY COUNCIL FINDINGS ON THE APPEAL

[List of six findings, none of which pertain to open space or recreation.]"

not reveal any finding that can be construed as addressing the requirements of CGZO 18.12.110. Additionally, the 11-page staff report is self-described as "[a] discussion of the issues raised * * *." It contains a general discussion of the subject application and includes apparent objections to the proposal and staff responses to those objections. Record 89. If the staff report contains findings, we cannot locate them.

Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. Heiler v. Josephine County, 23 Or LUBA 551, 556 (1992); see also, Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA 829, 835 (1989). Additionally, findings must address and respond to specific issues, raised in the proceedings below, that are relevant to compliance with applicable approval standards. Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980); Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Skrepetos v. Jackson County, 29 Or LUBA 193, 208 (1995); McKenzie v. Multnomah County, 27 Or LUBA 523, 544-45 (1994). These assignments of error raise issues that neither the challenged decision nor the staff report addresses.

The second and third assignments of error are sustained.

The city's decision is remanded.