BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM WALTER,
and WALTER DEVELOPMENT COMPANY,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

LUBA No. 2016-024

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Law Office of Bill Kloos PC.

Anne C. Davies, Assistant City Attorney, Eugene, filed the response brief and argued on behalf of respondent.

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

REVERSED 06/30/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a planning commission decision denying an application for planned development approval of a ten-lot subdivision.

FACTS

The subject property is a 5.19-acre parcel zoned Low-Density Residential (R-1) with a planned unit development (PUD) overlay. The property is located to the south of and abuts West Amazon Drive, a local street with a sixty-foot right-of-way and an eighteen-foot paved width. Record 495. The public right of way of West Amazon Drive extends from its intersection with Fox Hollow Road, located to the west of the subject property, northeasterly where it intersects with Martin Street. However, the right-of-way is currently improved only from its intersection with Fox Hollow Road to a point approximately 1,000 feet northeast of the subject property, where the improved road ends and a gate blocks motor vehicle access. Under current conditions, the only improved street access from the property to the city's improved street system is via West Amazon Drive to Fox Hollow Road. In 2014, the city purchased the properties surrounding the unimproved portion of the West Amazon Drive right of way between the gate and Martin Street. According to the staff report, the city plans to maintain that land as a natural area and part of a trail system.

Petitioners applied to divide the subject property into ten lots, with one open space lot. Three of the lots would have direct access onto West Amazon Drive, and the remaining seven lots would access West Amazon Drive via a shared driveway. The hearings officer denied the application for noncompliance with Eugene Code (EC) 9.8325(6)(c), which requires that "the street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street * * *." Petitioners appealed the decision to the planning commission. The planning commission affirmed the decision and adopted the hearings officer's decision as its own. This appeal followed.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

A. The Needed Housing Statute

The application is for "needed housing" as that term is used in ORS 197.303(1).[1] Accordingly, ORS 197.307(4) requires that the city apply only

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[1] ORS 197.303(1) provides:

> "As used in ORS 197.307, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:
>
> "(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
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> "(b) Government assisted housing;
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> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;

"clear and objective standards" to the proposed PUD.[2] Relatedly, ORS 227.173(2) provides that for applications for permits:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), *rev den* 359 Or 594, we explained that approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community."

ORS 197.831 places the burden on the local government to demonstrate, before LUBA, that standards and conditions imposed on needed housing that

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> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
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> "(e) Housing for farmworkers."

[2] ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

are required to be clear and objective "are capable of being imposed only in a clear and objective manner."[3] By its terms, the statute applies to decisions that "impos[e] the provisions of the ordinance[]."

B. EC 9.8325(6)(c) - The 19-Lot Rule

EC 9.8325 provides the tentative PUD approval criteria for "needed housing," and is sometimes referred to as the "needed housing track."[4] As relevant here, EC 9.8325(6)(c) (the 19-Lot Rule) provides that the applicant must demonstrate that "[t]he PUD provides safe and adequate transportation systems through compliance with all of the following:

> "The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street * * * when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19."

As explained above, the paved portion of West Amazon Drive terminates approximately 1,000 feet to the northeast of the subject property, where it is

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[3] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

[4] ORS 197.307(6) allow a local government to provide for a development track for needed housing that does not have clear and objective standards, subject to several restrictions, including that the applicant has the option of proceeding under a clear and objective track.

blocked by a gate. The hearings officer's single basis for denying the application is that the hearings officer concluded that EC 9.8325(6)(c) was not met:

> "Here, where the 'layout' of the PUD relies on only one public street to disperse motor vehicle traffic, that traffic at a minimum must be able to go somewhere in two different directions that do not terminate in a dead end." Record 47.

The hearings officer also adopted the staff report, which concluded:

> "The proposal does not include any new streets within the PUD, and the unimproved segment of West Amazon Drive to the north precludes its use for dispersal of motor vehicle traffic onto more than one public local street. Yet, the applicant does not address the plain meaning of this requirement in consideration of the full text of the standard, except to assert that the unimproved street segment 'must be included in the analysis of the 19-Lot Rule' based on the definition of a street. *Their application materials do not address the fact that motor vehicles cannot actually use this unimproved right of way as a means of secondary access, and the reality that there is only one way in or out, where West Amazon Drive connects to Fox Hollow Road*. In other words, to satisfy this criterion, the proposal cannot simply rely on a line on a map." Record 45 (emphasis added).

In these findings, we understand the hearings officer to have concluded that the unimproved portion of West Amazon Drive does not qualify as a "public local street" within the meaning of EC 9.8325(6)(c). We also understand the hearings officer to have interpreted EC 9.8325(6)(c) as requiring the applicants to show that where access to a PUD is provided by a single public local street, a motor vehicle must be able to travel in either direction on that single street, and connect to other public streets. We understand the hearings officer to have

concluded that because the current paved portion of West Amazon Drive dead ends to the east, and does not currently connect to any public street in that direction, the proposed PUD does not "disperse motor vehicle traffic onto more than one public local street."

C. Second Assignment of Error

In their second assignment of error, petitioners argue that the 19-Lot Rule is not a "clear and objective standard[]" within the meaning of ORS 197.307(4), and therefore the city erred in applying it to petitioners' application. Petitioners seek reversal of the city's decision. ORS 197.835(10)(a)(A). Petition for Review 19, 49.

Petitioners argue that the number of different interpretations that the 19-Lot Rule is subject to render it so ambiguous as to allow the type of subjective, discretionary decision making that is prohibited under ORS 197.307(4). According to petitioners, the 19-Lot Rule can reasonably be interpreted in at least two ways:

> "Here there are two plausible interpretations: (1) Traffic must be able to leave the site in two directions on a 'public local street' as defined in the code, which includes an unimproved street; this is the 'get out' meaning; (2) Traffic must be able to leave the site in each direction and go around to the point of beginning; this is the 'go around' meaning; as explained by staff and the Hearings Official, it is the same as having 'secondary access.' As the Hearings Official said: 'Traffic at a minimum must be able to go somewhere in two different directions that do not terminate in a dead end.'" Petition for Review 24.

Petitioners' two arguably plausible interpretations are less than clear. The primary problem appears to be that the term "disperse" is not defined, and as used in the 19-Lot Rule it could have different meanings.[5] It could mean that dispersal is complete to two public local streets if West Amazon Drive (a local street) connects with the city's street system in both directions, without regard to whether West Amazon Drive is currently improved to allow such a connection today. We understand that to be petitioners' first interpretation—the "get out" meaning. But dispersal can also be interpreted to require that West Amazon Drive be currently improved sufficiently to actually provide an existing connection with the city's street system via Martin Street to the northeast, as well as the connection with the existing Fox Hollow Road to the west. That is petitioners' second meaning—the "go around" meaning.

As petitioners explain it, under the "get out" interpretation, the proposal satisfies the 19-Lot Rule because West Amazon Drive is a "public local street," while under the "go around" interpretation, which is the city's interpretation, the proposal does not satisfy the 19-Lot Rule. In such a circumstance, petitioners argue, the city cannot demonstrate that the 19-Lot Rule is "capable of being imposed only in a clear and objective manner" as required by ORS

[5] A secondary problem that the parties apparently do not recognize is that the 19-Lot Rule appears to apply only when the proposed PUD proposes a "street layout." The proposed PUD in this case proposes no new streets, only driveways that connect to existing streets. Since the parties do not address this point we do not address it further either.

197.831. In support, petitioners cite *Group B LLC v. City of Corvallis*, 72 Or LUBA74 (2015), *aff'd* 275 Or App 577, 366 P3d 847 (2015), *rev den* 359 Or 667 (2016). In *Group B*, we concluded that a condition of approval in a previous planned development approval that imposed a setback from a property line to the approved development was not "clear and objective" within the meaning of ORS 197.307(4) regarding whether additional development was allowed or precluded in the setback area, and that therefore the city was prohibited from applying the standard in a manner that prevented approval of an application for needed housing in the setback area.

The city concedes that the 19-Lot Rule contains some ambiguity, but argues that merely because it can be interpreted in more than one way does not mean it fails to be "clear and objective" as required by ORS 197.307(4). In support, the city cites *SE Neighbors v. City of Eugene*, 68 Or LUBA 51, *aff'd* 259 Or App 139, 314 P3d 1004 (2013), and *Rudell v. City of Bandon*, 64 Or LUBA 201, 208 (2011), *aff'd* 249 Or App 309, 275 P3d 1010 (2012). In *SE Neighbors*, we rejected an argument that EC 9.8325(5), a standard that prohibited grading on portions of a development site that meet or exceed 20 percent slope, was not "clear and objective," where the petitioner challenged the five-foot contour interval method that the city used to calculate whether portions of the site exceeded 20 percent slope. We concluded that the absence of language in the code provision requiring slope to be measured using five-foot contour intervals did not mean the provision was not clear and objective,

where the city's application form notified applicants that slope would be measured using five-foot contour intervals. In *Rudell*, we concluded that a city code provision that prohibited structures from being located on any "identified foredune" was "clear and objective," where the code defined the term "foredune" with reference to the "lee or reverse slope" of a dune, and the slope of a property is an objectively determinable fact.

We agree with petitioners that the 19-Lot Rule is not "clear" or "objective." *See Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 156 (quoting dictionary definitions of the words "clear" and "objective"). The 19-Lot Rule is much more similar to the standard at issue in *Group B* than the standards at issue in *SE Neighbors* and *Rudell*. As we have already noted, the biggest problem with the 19-Lot Rule is that the key term "disperse" is undefined and, because it is ambiguous when used in this context, it leads to very different results.

Further, although not always, where the purpose of a standard is clear from the text of the standard, that standard is more likely to be a "clear and objective" standard. A good example is EC 9.8325(5)'s slope standard, discussed above, the purpose of which is to prevent development on steep slopes.[6] Another example is EC 9.8325(9), which requires all proposed

[6] Petitioners move to strike a statement in the response brief that takes the position that EC 9.8325(5) is "* * * intentionally rigid to ensure adequate protections related to erosion and slope failure." Response Brief 21. Petitioners move to strike the statement and argue that the statement is not supported by

dwellings within a proposed PUD to be "within 1/4 mile radius (measured from any point along the perimeter of the development site) of an accessible recreation area or open space that is at least 1 acre in size and will be available to residents," the purpose of which is to ensure residents of a proposed PUD of proximate open space or recreation.

The 19-Lot Rule has been a part of various sections of the EC for many years. During the proceedings below, petitioners introduced a 1999 planning staff report from a multi-year code revision exercise that explained:

> "The '19 Lot Rule' is recommended for elimination due to the adoption of the Eugene Local Street Plan which incorporates a comprehensive set of requirements to address street connectivity. In general the street connectivity standards provide an effective tool for the City to acquire necessary right-of-way, including the appropriate alignment, as each land division application is submitted, *whereas the '19 Lot Rule' is intended to ensure that adequate street connections are already in place. However, this provision can severely impact the ability to develop infill parcels even though many sites can demonstrate compliance with the City's new connectivity requirements*. If there is interest to maintain the '19 Lot Rule,' staff recommends that it be revised to address existing deficiencies." Record 150-51 (italics and underlining added.)

When the code revision exercise concluded, the city decided to retain the 19-Lot Rule verbatim for applications under the needed housing track, but eliminated it altogether from the discretionary approval track when it adopted

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the record. We do not think that the city is required to support to demonstrate that the record supports the statement, when the language of the code standard is clear that it is intended to prohibit grading on slopes that exceed 20 percent. Petitioners' motion is denied.

the two-track system in 2001.[7] Record 457, 459. It is not clear from the legislative history included in the record why the city chose to retain the 19-Lot Rule for needed housing, without apparently "address[ing] existing deficiencies" as advised by the planning staff.

Whatever its purpose, the 19-Lot Rule and the city's interpretation of it appear designed to "balance or mitigate" the impacts of a proposed PUD on the public street system and other developed properties in the vicinity of the proposed PUD, a subjective exercise that is contrary to the needed housing statute. *Rogue Valley*, 35 Or LUBA at 158. The multiple possible interpretations of the ambiguous language in the 19-Lot Rule, coupled with the lack of a clear purpose, allow the city to exercise significant discretion in choosing which interpretation it prefers to serve one or more unstated purposes, in order to approve or deny needed housing development.

ORS 197.831 places the burden of proof on the city to demonstrate that the 19-Lot Rule is capable of being imposed "only in a clear and objective manner." For the reasons explained above, we agree with petitioners that the city has not demonstrated that the 19-Lot Rule is "capable of being imposed only in a clear and objective manner."

The second assignment of error is sustained.

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[7] The discretionary approval track includes a requirement that applications "comply with the provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable." EC 9.8320(5)(c).

D. Fourth Assignment of Error

EC 9.8325(3) requires petitioners to demonstrate that:

> "[t]he PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7)."

The city did not require a landscape buffer along the northern boundary of the property that is adjacent to West Amazon Drive, where three lots will take access directly from West Amazon Drive, or across the proposed driveway that will provide access from West Amazon Drive to seven of the lots. The city required a landscape buffer along the eastern, southern and western property boundaries. Petitioners did not want to provide a landscape buffer along the western boundary of the property that is separated from Fox Hollow Road by a 20-foot wide city-owned riding trail. During the proceedings below, petitioners argued that EC 9.8325(3) is not "clear and objective" and therefore the city could not apply it to petitioners' application. Record 345-46. The hearings officer rejected petitioners' argument. Record 40-41. Petitioners now make the argument at LUBA.

The crux of petitioners' challenge is that the city's application of EC 9.8325(3) to not require a landscape buffer on areas of the proposed PUD that provide direct access to a street is inconsistent with the express language of EC 9.8325(3), which does not provide any express exception at all to the buffer area requirement. We understand petitioners to argue that, properly interpreted, EC 9.8325(3) requires a buffer around the entire PUD perimeter, including the

access points. Because no PUD could possibly gain access under EC 9.8325(3) as petitioners interpret it, that standard is essentially a prohibition on needed housing and therefore contrary to the needed housing statute. In any case, petitioners argue, the city's contrary interpretation of EC 9.8325(3) to not require a buffer in places where PUD access is required demonstrates that EC 9.8325(3) is not clear and objective, and therefore the standard cannot be applied to require petitioners to provide any buffers at all.

We disagree with petitioners that the city's application of the landscape buffer requirement as not applying to proposed driveways and streets in a manner that would require the landscape buffer to block the streets or driveways renders EC 9.8325(3) something other than clear and objective. Petitioners cannot manufacture an interpretation of a standard under which all development would be precluded, and thereby argue that the standard prohibits needed housing, and then complain that the standard is not clear and objective when the city rejects their interpretation. The city applied EC 9.8325(3) in the only way it can reasonably be applied: to allow access to the PUD. To the extent EC 9.8325(3) requires any interpretation, it is more consistent with the needed housing statues for the city to reject an applicant's proffered interpretation that effectively prohibits needed housing because of a lack of access to a site, and instead apply the standard in a way that allows needed housing.

The fourth assignment of error is denied.

FIRST AND THIRD ASSIGNMENTS OF ERROR

In their first assignment of error, petitioners argue that the hearings officer improperly construed the 19-Lot Rule when he interpreted it to require that motor vehicle traffic be able to travel to both Fox Hollow Road and Martin Street on West Amazon Drive. Because we determine in our resolution of the second assignment of error above that the 19-Lot Rule is not "capable of being imposed only in a clear and objective manner," the city may not apply it to prohibit petitioners' proposed PUD. Accordingly, we need not resolve petitioners' first assignment of error. We do not reach the first assignment of error.

In their third assignment of error, petitioners argue that the city committed a procedural error that prejudiced their substantial rights when the city attorney advised the planning commission that in her opinion the planning commission lacked authority to address petitioners' argument that the 19-Lot Rule is not "clear and "objective" within the meaning of ORS 197.307(4). For the reasons set forth in the city's response brief, we reject petitioners' argument.

The third assignment of error is denied.

REMEDY

We have sustained petitioners' challenge to the city's single basis for denial of the application. Petitioners argue that LUBA should reverse the city's

decision and order the city to approve the application. Petition for Review 2, 19. The city does not argue that remand is the appropriate remedy.

ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

The question posed under ORS 197.835(10)(a)(A) is whether the city's decision to deny petitioners' application was "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" The city denied petitioners' application on a single basis, a basis that is barred by ORS 197.307(4), because the application is an application for approval of "needed housing" and the standard that the city found was not met under its interpretation is not "clear and objective." The city's decision was therefore "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" *Parkview Terrace Development, LLC v. City of Grants Pass*, 70 Or LUBA 37, 57 (2014).

The city's decision is reversed, and the city is ordered to approve petitioners' application.