BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANDREW ESTROFF and DONALD LOWE,
Petitioners,

vs.

02/27/19 AM 10:46 LUBA

CITY OF DUNDEE,
Respondent,

and

SHANNON MCCAW and MATT MCCAW,
Intervenors-Respondents.

LUBA No. 2018-139

FINAL OPINION
AND ORDER

Appeal from City of Dundee.

John T. Bridges, Newberg, file the petition for review and argued on behalf of petitioners. With him on the brief was Brown, Tarlow, Bridges & Palmer, P.C.

Timothy V. Ramis, Lake Oswego, filed a joint response brief on behalf of respondent. With him on the brief was Jordan Ramis PC.

Daniel Kearns, Portland, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief was Reeve Kearns, PC.

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

AFFIRMED 02/27/2019

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a four-lot subdivision.

MOTIONS TO INTERVENE

Shannon McCaw and Matt McCaw (intervenors), the applicants below, move to intervene on the side of the respondent. No party opposes the motion and it is allowed.

FACTS

The subject property consists of two parcels zoned Single Family Residential (R-1), each developed with a dwelling. Intervenors originally applied to the City of Dundee (city) for a five-lot subdivision of the two parcels, along with adjustments to lot size and lot depth, and a variance to reduce the required street side yard setback. Subsequently, intervenors revised the application to propose only four lots, which eliminated the need for any adjustments or variances.

The minimum lot size in the R-1 zone is 9,000 square feet, unless the slope exceeds 11 percent, in which case each lot must exceed the minimum lot size plus at least 20 percent (in this case, 10,800 square feet). City of Dundee Municipal Code (DMC) Table 17.202.030, Exception (b) (Exception (b)).[1]

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[1] DMC Table 17.202.030 states in relevant part that the minimum lot area in the R-1 zone is 9,000 square feet, but provides an exception: "[w]here the slope

Intervenors submitted grading plans showing both existing and finished grades for each lot. For Lot 2, intervenors proposed grading that would reduce the slope over 65 percent of the lot to less than 10 percent. Based on the finished grading, intervenors took the position that DMC Table 17.202.030 did not operate to increase the minimum lot size, and therefore proposed a lot size of only 9,008 square feet for Lot 2.[2]

The planning commission considered the revised application at an August 15, 2018 hearing, and approved the application. Petitioners appealed the planning commission decision to the city council, arguing in relevant part that slope must be determined based on original, pre-development grades, and thus the minimum lot size applicable to Lot 2 is 10,800 square feet. The city council rejected that argument, interpreting its code to provide that slope for purposes of DMC Table 17.202.030 is based on finished or post-development grades. On November 8, 2018, the city council issued its final decision approving the application. This appeal followed.

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of the ground exceeds 11 percent in any direction over more than 60 percent of the lot, the area of the lot shall be increased as follows: 11-15% slope = min. lot area + 20%."

[2] Proposed lots 1, 3 and 4 are larger than 10,800 square feet in size, and so comply with DMC Table 17.202.030 regardless of whether slope is determined by pre-development or post-development grades.

ASSIGNMENT OF ERROR

In their single assignment of error, petitioners argue that the city council improperly construed Table 17.202.030, Exception (b), in interpreting the exception to apply based on the finished, rather than original, slope. Petitioners contend that, properly construed, the increased minimum lot size is triggered if *either* the original *or* the post-development slope exceeds 11 percent.

LUBA's review over petitioners' challenges to the city council's interpretation of Table 17.202.030 is subject to a deferential standard of review set out at ORS 197.829(1), which in relevant part requires LUBA to affirm a governing body's interpretation of a land use regulation, unless the interpretation is inconsistent with the express language or purpose of the regulation.[3] *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010)

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[3] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(LUBA must affirm a city council's code interpretation under ORS 197.829(1) unless the interpretation is "implausible"). Generally, a determination of whether a governing body's interpretation is "plausible" is guided by the interpretative principles ordinarily applied to the construction of ordinances under the framework set out in *Portland General Elec. Co. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (*PGE*), *as modified by State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). In the present case, petitioners argue that the city council's interpretation of Exception (b) is inconsistent with the express language and purpose of that code provision.

The city council adopted extensive findings addressing the interpretative issue.[4] The city council concluded that Exception (b) is ambiguous regarding

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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[4] The city council's findings state, in relevant part:

> "[Petitioners] argue that Lot 2 does not meet the code requirements because the Code refers to the pre-grading slope. [Counsel for petitioners] contends that consideration of the subject property post-grading is possible only if the City inserts the term 'as graded' into the Table. He contends that the Table is unambiguous and not subject to interpretation.
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> "Council asked numerous questions and carefully considered the arguments raised by [petitioners]. The discussion among the Mayor and Council was robust. It generally was agreed that there is no legislative history available so the original intent largely is unknowable. Some councilors expressed concern about impacts

the meaning of "slope," but that the context and historical application of that language favored an interpretation limiting "slope" to finished or post-development grades.[5] In particular, the city council noted testimony that the

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> on existing residents from additional density. Existing neighborhoods generally would prefer natural slopes to graded ones or retaining walls. Infill development needs to be protective of existing neighborhoods.
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> "Staff noted that Table 17.202.030 outlines the lot and development standards by zoning district. The code does not state existing or developed slope; however, the minimum lot size is applied to the developed lot and therefore, it is interpreted that the slope applies to the developed lot as well. In addition, staff reviewed previous subdivision approvals related to slope and minimum lot area. The Vineyard Estates subdivision (05-19) was approved in 2005 on a large site to the north of the proposed subdivision. Findings for the minimum lot area in relation to slope in Vineyard Estates and Graystone Ridge (06-32) subdivisions were based on the finished grade of the lot and not the existing grade. Further, the Planning Commission in the application before Council applied the lot size standard to the finished slope, *i.e.*, post-grading." Record 12.

[5] The findings continue:

> "Council finds that the Table, in isolation, is ambiguous. Professional staff and the Planning Commission consistently have applied it as not precluding an applicant from performing site preparation to reduce existing slopes, thus encouraging additional housing opportunities. Council understands that those interpretations are not subject to deference from LUBA[], but they provide evidence of the more plausible reading and are at a minimum evidence that the Table is not clear and unambiguous as the [petitioners] assert.

"Although the [petitioners] contend that it is impermissible to insert language, their argument depends on inserting words such as 'as existing' or 'with no site preparation.'

"In response to questions from council, Greg Reid, City Engineer, testified that under the Municipal Code and building/grading permit provisions [intervenors] may obtain by right a grading permit to reduce the slope. He stated he has no legal basis to preclude such action. Reading the Table as urged by the [petitioner] is inconsistent with those provisions. It would have no practical impact other than to encourage property owners to grade their property in advance so that the slope as it exists on the day a subdivision application is filed does not trigger the additional lot size. It is preferable to apply the Code so as to avoid such bifurcation.

"Reading the Code as it historically has been applied provides flexibility to address site conditions. Property owners may weigh the cost and feasibility of reducing the slope of their property against the benefits of smaller lot sizes and pursue approval of the better option.

"The historic reading also is more consistent with the context of the overall Code. It is in a section of the code dealing with development rather than preservation of natural features. The proposal is consistent with the density limits of the R-1 zone.

"Unless there is language to the contrary, the Code generally permits property owners to take lawful steps to modify their property to conform to the applicable development standards. For example, a property owner may consolidate lots or do a property line adjustment to enlarge an existing lot to meet the minimum lot size set forth in Table 'A' or provide other development opportunities. Similarly, it is common to impose conditions of approval to modify existing conditions to conform to Code standards for approval. In short, the Code generally and this Table

city code allows property owners at any time to obtain grading permits to reduce the slope of their property, prior to filing for subdivision or development applications. Finally, the city council noted that its interpretation is more consistent with the city's obligation under Statewide Planning Goal 10 (Housing) to meet housing needs through increased density.[6]

Petitioners first contend that because Table 17.202.030 does not contain any express qualification on the term "slope" that the city council's interpretation limiting that term to the finished or post-development grade inserts language into the code, contrary to ORS 174.010, which provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

ORS 174.010 applies to the judicial construction of a statute, not local government legislation. Nonetheless, the Court of Appeals has held that ORS 174.010 is also applicable in reviewing a local government's interpretation of

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> in particular are not intended to 'freeze' a property in its preexisting state." Record 13.

[6] The findings continue:

> "There currently exists few opportunities for housing so this interpretation is consistent with the City's efforts to meet density targets and meet an evident need for housing." Record 13.

its own code. *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210 n 2, 214 P3d 68 (2009).

The interpretative principles set out in ORS 174.010 are sometimes applied at the first level analysis of text and context under the *PGE* framework. *PGE*, 317 Or at 611. However, the injunction "not to insert what has been omitted" is a problematic tool for reviewing whether an adopted interpretation is consistent with the express language of the legislation being interpreted, which is the direct task LUBA must conduct under ORS 197.829(1)(a). Any interpretation of ambiguous language necessarily restates or paraphrases the understood meaning of the text using different words than found in the text. For example, petitioners' preferred interpretation, that "slope" means *both* the natural *and* the finished slope, can be viewed as "inserting what has been omitted." The intended meaning of "slope" as used in Table 17.202.030 is ambiguous, in that there are at least three possible constructions: (1) "slope" refers to the existing grade at the time of the application, (2) "slope" refers to either the existing or the post-development grade, or (3) "slope" refers to the post-development grade. As the city's findings note, adopting any of those interpretations arguably "inserts" language into the text. Petitioners' citation to ORS 174.010 is not particularly helpful in determining which meaning was intended and whether the city council's choice among those interpretations is plausible.

Petitioners next argue that the city's interpretation ignores relevant text and context. Petitioners note that text preceding Table 17.202.030 states that the Table "lists the general lot and development standards for each of the city's base zones. Specific development standards for access, parking, landscaping, and public improvements, among others, are located in DMC Division 17.300." Petitioners contend that the words "general lot" suggests that Table 17.202.030 refers broadly to lots in all their possible states, including native, pre-development and post-development. We do not understand the argument. The two words "general lot" do not exist as a separate semantic grouping, but both serve an adjectival function in a larger phrase "general lot and development standards," which are distinguished from "specific development standards." Petitioners have not demonstrated that the preliminary language to Table 17.202.030 helps to disambiguate the terms of Table 17.202.030 or undermine the city council's interpretation of the term "slope" as used in Table 17.202.030.

Third, petitioners argue that the city council's interpretation effectively nullifies the Exception (b) increase in minimum lot area, because as an engineering matter the slope of any steep property can be reduced below the 11 percent slope threshold, and thus applicants could entirely escape the requirements of Exception (b). However, the findings note that it is commonplace for property owners to adjust boundaries or take other steps to alter conditions on the ground before submitting development applications, in order to better achieve desired density or other benefits. Further, the city

observed that "[p]roperty owners may weigh the cost and feasibility of reducing the slope of their property against the benefits of smaller lot sizes and pursue approval of the better option." Record 13. That some property owners may be willing to undertake the financial and engineering burdens of reducing steep slopes in order to avoid the increased minimum area requirements of Exception (b) does not demonstrate that Exception (b) is nullified under the city's interpretation, or otherwise demonstrate that the city's interpretation is implausible.

Fourth, petitioners argue that the city's interpretation is inconsistent with DMC 17.103.020, which provides direction on how to interpret the code. DMC 17.103.020 states in relevant part that:

> "B. The provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law * * * the provisions of this code shall control.
>
> "C. Where a certain provision of this code conflicts with another provision of this code, the more restrictive provision shall apply."

Petitioners contend that the city erred in applying the least restrictive, rather than the most restrictive, interpretation of Exception (b), contrary to DMC 17.103.020(B) and (C). However, DMC 17.103.020(B) applies when the code imposes a greater restriction than some other provision of law; but petitioners do not identify what other provision of law imposes a lesser restriction as regards minimum lot area. DMC 17.103.020(C) applies when one code

provision conflicts with another; but again, petitioners do not identify any less restrictive code provision that conflicts with Exception (b).

Finally, petitioners argue that the city's interpretation is inconsistent with the context provided by language in the Dundee Comprehensive Plan (DCP), which refers to an advisory document entitled "Vision Statement." Petitioners cite to language in the Vision Statement that extols the "[p]reservation of views," and note that "[h]illsides remain lush green sentinels to be visually enjoyed by all." Petitioners contend that under the city's interpretation there will be additional residential density on hillsides, which will interfere with views to and from the city's "lush green sentinels."

The city and intervenors (collectively, respondents) note that the DCP itself states that the Vision Statement is not "legally binding," but instead only provides "guidance for further amendments to the Comprehensive Plan." Respondents also note that because the challenged decision is a limited land use decision, and because the city has not incorporated any DCP language as approval criteria, pursuant to ORS 197.195(1) no DCP language, much less the Vision Statement referenced in the DCP, can be applied as approval criteria.[7]

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[7] ORS 197.195(1) provides:

> "A limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to

We understand respondents to dispute that the Vision Statement constitutes relevant "context" for an interpretation of Exception (b), or to the extent the Vision Statement can be considered as context that petitioners have not demonstrated that that context, viewed against other contextual language cited in the city council's findings, renders the city council's interpretation of Exception (b) implausible.

We assume without deciding that the Vision Statement could potentially provide context for an interpretation of Exception (b), even without the city having incorporated it into its land use regulations as a standard. *See* n 7. However, even with that assumption, petitioners have not demonstrated that the context provided by any language in the Vision Statement undermines the plausibility of the city council's interpretation. The ultimate question under ORS 197.829(1)(a) is whether the city council's interpretation is inconsistent with the express language of Exception (b), read in context. As noted above, the text of Exception (b) is ambiguous regarding the meaning and scope of the term "slope," and that term could be read in at least three different ways. As a

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> limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision."

textual matter, each of those three different interpretations appears to be plausible. The city's findings cite context supporting the city's chosen interpretation, that "slope" refers to post-development grades. In particular, the findings note that the lot and development standards in Table 17.202.030 are all directed in one way or another at the property as developed, not the property as it existed on the date of the application or at some other period in time. That immediate context is far more compelling than any context cited by petitioners.

Finally, even if the city's chosen interpretation were less plausible than petitioners' preferred interpretation, the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). In short, petitioners have not demonstrated that the city council's interpretation of Table 17.202.030, Exception (b), is implausible, or inconsistent with the express language of that code provision, considered in context.

The assignment of error is denied.

The city's decision is affirmed.