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

JOE MEADE, ANGIE MEADE,
ANTHONY BILOTTI, CINDY BILOTTI,
PAUL SCHAFBUCH and KIMBERLY SCHAFBUCH,
Petitioners,

DEC29'09 PM12:26 LUBA

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2009-086

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis Wright Tremaine LLP.

Shane Abma, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

HOLSTUN, Board Member, concurring.

AFFIRMED

12/29/2009

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a 3-parcel partition.

MOTION TO STRIKE

Petitioners move to strike Appendix A to the city’s brief, which is a table entitled “Recommended Private Right-of-Way Tract Widths” that is a part of a city administrative rule entitled “TRN-8.06- Private Rights of Way.” The city responds with a request that LUBA take official notice of the administrative rule under Oregon Evidence Code 202(7) as an “enactment” of the city. We agree with the city that the administrative rule is subject to official notice under OEC 202(7). Petitioners’ motion to strike is denied.

FACTS

The subject property is a 27,363 square foot lot zoned Single Dwelling Residence 5,000 (R-5) located at the corner of N.E 28th Avenue and N.E. U.S. Grant Place in the city’s Grant Park neighborhood. The subject property currently contains a dwelling, garage, and tennis court. The applicant applied to partition the subject property into three parcels. Parcel 1 is proposed to contain 8,500 square feet and contain the existing residence and garage. Parcel 2 is proposed to be 7,540 square feet, and Parcel 3 is proposed to be 8,227 square feet. Access to each parcel is proposed directly from city streets. A 1,363 square foot “common green” tract is proposed to provide secondary access to parcels 1 and 2.

The city approved the partition application, and petitioners appealed that decision to LUBA.

FIRST ASSIGNMENT OF ERROR

Portland City Code 33.610.100(C) and (D) establishes minimum and maximum densities for lots in the R-5 zone, and the method of calculating those densities depends on whether a street is being created as part of a land division. PCC 33.610.100(B) provides:

“Generally. The method used to calculate density depends on whether a street is created as part of the land division. As used in this chapter, creation of a

1 street means a full street on the site, creating the first stage of a partial width
2 street on the site, or extending an existing street on to the site. * * *

3 It is undisputed that if a street is being created by the partition, then the minimum density
4 required of the land division is three parcels, and if no street is created, then the minimum
5 density required of the land division is four parcels and the partition application does not
6 meet the minimum density requirements.

7 The city determined that the partition application proposed creation of a street
8 because it found that the proposed common green is a “full street” as used in PCC
9 33.610.100(B), quoted above. The city found:

10 “* * * The proposal includes a Common Green Tract that adjoins both Parcels
11 1 and 2. ‘Common Green,’ ‘Street,’ and ‘Right of Way’ are defined in
12 Portland City Code Section 33.910 as follows:

13 “**Common Green.** A **street** that provides for pedestrian and
14 bicycle access, but not vehicle access, to abutting property and
15 generally provides a common area for use by residents. A
16 common green may function as a community yard. Hard and
17 soft landscape features may be included in a common green,
18 such as groundcover, trees, shrubs, surfaced paths, patios,
19 benches, or gazebos.’

20 “**Right of Way.** An area that allows for the passage of people
21 or goods. Right-of-way includes passageways such as
22 freeways, pedestrian connections, alleys, and all streets. A
23 right-of-way may be dedicated or deeded to the public for
24 public use and under the control of a public agency, or it may
25 be privately owned. A right-of-way that is not dedicated or
26 deeded to the public will be in a tract, or easement.’

27 “**Street.** A right-of-way that is intended for motor vehicle,
28 pedestrian or bicycle travel or for motor vehicle, bicycle or
29 pedestrian access to abutting property. For the purposes of this
30 Title, street does not include alleys, rail rights-of-way that do
31 not also allow for motor vehicle access, or the interstate
32 freeways and the Sunset Highway including their ramps.’

33 “Based on these definitions a common green is a subset of street that provides
34 for pedestrian and bicycle access. A common green can also serve as a
35 community yard.

1 “The proposed Common Green Tract will be at least 25 feet in width, wider
2 than the minimum 15’ width required of common greens by the City’s
3 Administrative Rule for Private Rights of Way. It is a new full street serving
4 Parcels 1 and 2. It is not a ‘trailing dedication of a partial width street’ or
5 ‘right of way dedication’ subject to the exclusion described in [PCC]
6 33.610.100(B).” Record 4-5 (bold in original).

7 In their first assignment of error, petitioners argue that the city misconstrued
8 applicable law and erred in concluding that the proposed common green is the “creation of a
9 street” under PCC 33.610.100(B). Petitioners first argue that the city erred in relying on
10 definitions of “street” and “right of way” found in the definitions chapter of PCC Title 33 to
11 determine that the proposed common green is a “full street on the site” under PCC
12 33.610.100(B). Petitioners argue that the term “full street” cannot be interpreted to include a
13 common green because the express language of PCC 33.610.100(B) and relevant context
14 does not support that position. According to petitioners, the language of the relevant
15 provision and its use of the term “full street,” rather than merely the defined term “street,”
16 indicates that not just any “street” as defined in PCC 33.910 that satisfies the applicable
17 minimum width standard qualifies as the “creation of a street” under PCC 33.610.100(B).
18 Petitioners maintain that if the city’s interpretation of “full street” can include any “street”
19 that meets the applicable minimum width standard, such as the proposed common green, then
20 a half-width common green could also qualify as a “partial width street” under PCC
21 33.610.100(B) that would permit the use of the lower density calculation, even though
22 according to petitioners a common green less than 15 feet wide is prohibited by the city’s
23 administrative rules governing private rights of way.

24 Citing *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994),
25 petitioners also argue that the term “full street” has a specific accepted meaning: “[i]t is a
26 fully improved street required to provide access to a site.” Petition for Review 13.

1 Petitioners argue that the city erred in ignoring the commonly accepted definition of the term
2 “full street” that was set forth in *Woodstock Neighborhood* and in other cases.¹

3 Finally, petitioners argue that the city’s interpretation of PCC 33.610.100(B) is
4 inconsistent with the purpose of the provision, which petitioners argue is “* * * recognition
5 that if the City requires a street as part of a land division, the street would consume property
6 that could otherwise be used for a lot. Thus, a developer would not fall below the minimum
7 density just because they were required to create a street to provide access to the new lots.”
8 Petition for Review 14.

9 We review the city’s interpretation to determine whether it is correct.² *McCoy v. Linn*
10 *County*, 90 Or App 271, 752 P2d 323 (1988). In this case, we agree that the city’s
11 interpretation of PCC 33.610.100(B) is correct. The city found that (1) because a “common
12 green” is a type of street as defined in PCC 33.910.030, and (2) because the specific common
13 green proposed in the land division at issue meets the recommended minimum width for a
14 private right of way, the proposed common green is a “full street” as that term is used in PCC
15 33.610.100(B). According to the city, a common green is a street, and a street is a “right of
16 way” that can be public or private. If a “right of way” is private, then administrative rules
17 adopted by the City’s Bureau of Development Services apply. Those administrative rules
18 indicate that a common green is recommended to be 15 feet wide and improved with a 5 foot
19 sidewalk. Appendix A to Respondent’s Response to Motion to Strike. Thus, according to

¹ The other cases cited by petitioners are *Bullock v. City of Ashland*, 57 Or LUBA 635 (2008), *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008), and *Piculell Group v. Clackamas County*, 30 Or LUBA 381, *rev and remanded*, 142 Or App 327, 922 P2d 1227 (1996). *Woodstock Neighborhood* concerned the design standards applicable to right of way widths. It did not concern PCC 33.610.100(B). The other cases cited by petitioner similarly did not concern PCC 33.610.100(B).

² The city responds initially by citing *Siporen v. City of Medford*, 231Or App 585, ___ P3d ___ (2009) and arguing that ORS 197.829(1) requires LUBA to defer to the city’s interpretation of its code because the city’s interpretation is “plausible.” However, LUBA is required to defer to the local government’s interpretation of its code when the interpretation is one from the legislative body of the local government. *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994). In the present appeal, the city’s legislative body, the city council, did not render the interpretation of the code that is at issue in this appeal.

1 the city, even under petitioners’ proffered definition of “full street” quoted above, the
2 proposed common green is a full street because it meets the city’s required width and will be
3 fully improved as required by the city administrative rule. The city points out that
4 petitioners’ argument essentially reads requirements into the PCC’s use of the phrase “full
5 street” that a “full street” must be paved and must provide the primary access to a lot. The
6 city contends that the definitions quoted in the decision are correctly interpreted to provide
7 otherwise.

8 Petitioners’ suggestion that *Woodstock Neighborhood* binds the city in its
9 interpretation of PCC 33.610.100(B) in the present appeal is unpersuasive. *Woodstock*
10 *Neighborhood* did not contain any interpretation of the phrase “full street” as used in PCC
11 33.610.100(B) or any similar predecessor code section addressing minimum and maximum
12 densities for a land division, and is therefore inapposite for purposes of the present appeal.

13 Moreover, the purpose statement for PCC Title 33 Chapter 610 does not support
14 petitioners’ interpretation quoted above. The purpose of PCC Title 33 Chapter 610 is found
15 at PCC 33.610.010, and provides:

16 “This chapter contains the density and lot dimension requirements for
17 approval of a Preliminary Plan for a land division in the RF through R5 zones.
18 These requirements ensure that lots are consistent with the desired character of
19 each zone while allowing lots to vary in size and shape provided the planned
20 intensity of each zone is respected. *This chapter works in conjunction with*
21 *other chapters of this Title to ensure that land divisions create lots that can*
22 *support appropriate uses and development.” (Emphasis added.)*

23 That statement does not support petitioners’ argument set out above, that the purpose of
24 requiring different minimum densities depending on whether a street is being created is to
25 avoid penalizing developers who are required to create a street as part of a land division.
26 Further, the purpose statement reinforces our view that the city’s reliance on terms that are
27 defined in PCC 33.910.030 to determine whether the application proposed the creation of a
28 “full street” is reasonable given that the purpose statement for PCC 33.610 recites that it is
29 intended to work with the other chapters in Title 33.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 In their second assignment of error, petitioners argue that even if the city’s
4 determination that the proposed common green is a “full street” is correct, the city’s
5 determination that the common green meets the applicable criteria for common greens found
6 at PCC 33.654.120(D) is not supported by substantial evidence in the record.³ ORS
7 197.835(9)(a)(C). Petitioners first point out that the proposed common green is only 7.5 feet

³ PCC 33.654.120(D) contains the approval standards for common greens:

“**Common green approval criteria and standards.** The purpose of the following standards is to allow streets designed to provide access for only pedestrians and bicycles to abutting properties. Common greens are also intended to serve as a common open space amenity for residents. The following approval criteria and standards apply to common greens:

“1. Right-of-way.

“a. Approval criteria.

“(1) The size of the common green right-of-way must be sufficient to accommodate expected users and uses. The size must take into consideration the characteristics of the site and vicinity, such as the pedestrian system, structures, natural features, and the community activities that may occur within the common green.

“(2) Generally, common greens should be dead-end streets. However, common greens may be through streets if a public pedestrian connection is provided directly abutting the common green, or in close proximity. See Figure 654-1. Common greens may also have frontage on more than one intersecting street, if the green is located at the corner of the intersecting streets. See Figure 654-2.

“(3) Where a common green abuts a public pedestrian connection, the green must include design features that distinguish the common green from the pedestrian connection, such as perimeter landscaping, low decorative fencing, or paving materials.

“(4) Where a common green is a through street, the design of the green should encourage through pedestrian and bicycle traffic to use nearby public pedestrian connections, rather than the common green.”

“* * * * *

“* * * * *”

1 wide in places, and argue that the common green does not meet the city’s required dimension
2 of at least 15 feet in width that is set out in the city’s administrative rules governing private
3 rights of way.

4 The city responds first that the city’s decision in one place inaccurately characterizes
5 the dimensional standards for common greens as “requirements,” when the dimensional
6 standards are recommendations. The city also explains that petitioners’ argument that the
7 common green is only 7.5 feet “wide” in places is incorrect because, according to the
8 decision, the “width” of the common green is measured along N.E. 28th Avenue and the depth
9 of the common green is measured from east to west.⁴ Record 13. Given that the dimensional
10 standards are recommendations, and that the decision takes the position that the “width” of
11 the common green is measured along N.E. 28th Avenue and petitioners do not challenge that
12 finding or otherwise explain why it is incorrect, we think the city properly relied on the
13 evidence in the record that the proposed common green meets all of the applicable criteria for
14 common greens. We also agree with the city that the city’s administrative rules indicate that
15 the required dimensions are recommendations. Petitioners point to nothing in the PCC
16 criteria governing common greens that requires specific dimensional standards to be met.

17 Petitioners also argue that the city improperly deferred a finding of compliance with
18 applicable criteria when it imposed a condition of approval that requires the final
19 configuration of the common green to be revised in order for Parcel 1 to meet setback
20 requirements. However, petitioners do not point to any applicable criteria governing
21 approval of common greens that the decision failed to find was satisfied. The city responds
22 that the city found that the proposal satisfies the relevant criteria set forth in PCC
23 33.654.120(D), which contain the approval criteria for common greens. Moreover, the city

⁴ The city explains that along N.E. 28th Avenue the width of the common green is approximately 25 feet in certain places and 70 feet in other places. The “depth” of the common green is 7.5 feet in places and approximately 30 feet in others.

1 explains, that revision of the common green to reduce its width in the northeast portion will
2 necessitate widening the common green in the southwest portion, in order for Parcel 1 to
3 maintain the lot size approved by the decision.

4 Finally, petitioners argue that under PCC 33.654.120(D)(1) the city failed to find who
5 the expected users are and what the expected uses of the common green will be. The city
6 responds that the city determined that the common green will serve two lots, and that the city
7 concluded that the common green will provide secondary access, and that the amount of
8 pedestrian use is “anticipated to be negligible.” Record 13. We think those findings are
9 sufficient to explain how the size of the proposed common green is sufficient to
10 accommodate the expected users and uses under PCC 33.654.120(D)(1).

11 The second assignment of error is denied.

12 The city’s decision is affirmed.

13 Holstun, Board Member, concurring.

14 Petitioners suggest at several points in their petition for review that the applicant in
15 this matter is proposing the common green solely to avoid having to comply with the
16 minimum density requirement that would otherwise require that the existing lot be divided
17 into four parcels. Apparently, given the size and location of the existing dwelling and garage
18 on the property, it would be difficult or impossible to divide the existing property into four
19 parcels without removing part or all of the existing dwelling or garage. Petitioners appear to
20 be correct that the common green that is the subject of this appeal serves no real need for
21 additional access, and was likely proposed solely to avoid the minimum density requirement
22 for a fourth parcel. The city’s minimum density standard and the PCC definitions of
23 “common green” and “street” are written in a way that effectively allows the minimum
24 density standard to be avoided if one is prepared to create a common green, without regard to
25 whether that common green is actually needed for access or other purposes. However, that
26 arguable loophole in the city’s minimum density standard does not mean the applicant is not

1 entitled to propose such a common green to avoid creating a fourth parcel. The applicant is
2 merely taking advantage of a loophole that the city is free to amend the PCC to eliminate, if it
3 wishes to do so.