BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT McGOWAN and COETA McGOWAN, Petitioners, vs. CITY OF EUGENE, Respondent, and CUDDEBACK INVESTMENTS, Intervenor-Respondent.	LUBA No. 93-080 FINAL OPINION AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Gleaves, Swearingen, Larsen, Potter, Scott & Smith.

No appearance by respondent.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Johnson & Kloos.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 09/07/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the city planning commission giving tentative approval to the first phase of a planned unit development (PUD).

MOTION TO INTERVENE

Cuddeback Investments, the applicant below, filed a motion to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

This is the second time a city decision approving the proposed PUD has been appealed to this Board. In McGowan v. City of Eugene, 24 Or LUBA 540, 541 (1993) (McGowan I), this Board stated the following facts:

> "The subject property is a 14.5 acre portion of a 31.5 acre parcel zoned Residential (R-1). The entire 31.5 acre parcel is in a single ownership, and is within the city limits.
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> "[Intervenor] sought approval for a 17 unit PUD on the subject property. The city hearings official approved the request, and the planning commission affirmed that decision."

We remanded the decision challenged in McGowan I on the basis that compliance with Eugene Code (EC) 9.510(3) was not established. EC 9.510(3) provides:

> "Phasing. If approved at the time of tentative plan consideration, final plans may be submitted in phases. If tentative plans encompassing only a portion of a site under single ownership are

> submitted, they shall be accompanied by a statement and be sufficiently detailed to prove that the entire area can be developed and used in accordance with city standards, policies, plans, and ordinances." (Emphases supplied.)

In McGowan I, we determined that because the subject property is part of a larger parcel in a single ownership, not all of which is subject to the development proposal, the city erred in determining that a "statement" was not required under EC 9.510(3). We explained the following concerning the existence of a plausible interpretation of EC 9.510(3), for the purpose of establishing that the city's interpretation in McGowan I was wrong:

> "[T]here is at least one plausible interpretation of EC 9.510(3) that is consistent with its terms. Although we agree with intervenor that under EC 9.512(6) an applicant need not submit a specific proposal for development of the portion of the ownership not proposed for development, the applicant must submit sufficiently detailed information to demonstrate that the portion of the ownership for which development is not proposed will not be rendered undevelopable by the development for which tentative plan approval is requested. The city must then review that information and find the proposed partial development will not render the remainder of the ownership undevelopable. Presumably there will be a number of ways the remainder of the ownership could be developed, and the specificity of the information required by EC 9.512(6) accordingly may be more general." (Emphasis in original.) Id. at 544.

On remand, the city planning commission adopted the interpretation of EC 9.510(3) suggested above, and

reapproved the application.[1] This appeal followed.

ASSIGNMENT OF ERROR

> "The Eugene Planning Commission misconstrued the requirements of Eugene Code 9.510(3) and made a decision that was not supported by substantial evidence in the whole record."[2]

Petitioners allege EC 9.510(3) is unambiguous, and that the city's interpretation and application of EC 9.510(3) is wrong.

A. Ambiguity

In McGowan I, we remanded the city's decision on the basis that the meaning of EC 9.510(3) was unclear, allowing the city to interpret it in the first instance. In McGowan I, we offered a plausible interpretation of EC 9.510(3), but left open the possibility that other plausible interpretations could be adopted.[3] Therefore, we believe the issue of whether EC 9.510(3) is ambiguous was resolved in McGowan I. Because no appeal from McGowan I was taken to

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[1]In reapproving the application, the planning commission readopted its findings supporting the decision challenged in McGowan I. The decision challenged in McGowan I included the findings supporting the decision of the hearings officer (which decision was appealed to the planning commission), as well as the findings supporting the decision of the planning commission.

[2]Petitioners do not develop this argument that the challenged decision is not supported by substantial evidence, and we do not consider it further. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

[3]In this regard, petitioners offer an interpretation of EC 9.510(3) (more fully discussed below), that is different from the one we suggested in McGowan I.

the court of appeals, we conclude petitioners may not argue in this proceeding that EC 9.510(3) is unambiguous. Hearne v. Baker County, 89 Or App 282, 748 P2d 1016, rev den 305 Or 576, 746 P2d 728 (1987); Mill Creek Glen Protection Assoc. v. Umatilla County, 88 Or App 522, 746 P2d 728 (1987).

B. Interpretation and Application

The city adopted the interpretation of EC 9.510(3) that we offered as a possible interpretation in McGowan I. The city's findings state:

> "LUBA suggested a possible interpretation of [EC 9.510(3)] that would fit within the terms of the code, not require a detailed development proposal for the adjacent 17 acres, and yet allow a determination that the entire area could be developed. LUBA stated [the following possible interpretation of EC 9.510(3)]:
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> > "'[T]he applicant must submit sufficiently detailed information to demonstrate that the portion of the ownership for which development is not proposed will not be rendered undevelopable by the development for which tentative plan approval is requested. The city must then review that information and find the proposed partial development will not render the remainder of the ownership undevelopable. Presumably there will be a number of ways the remainder of the ownership could be developed, and the specificity of the information required by EC 9.512(6) accordingly may be more general.'
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> "In this continued proceeding, the Planning Commission applies the interpretation suggested by

LUBA. * * *" Remand Record 3-4.[4] (Emphasis in original.)

In addition, the city's findings determine compliance of the proposal with this interpretation of EC 9.510(3) as follows:

"1. The Applicant's Statement maps the 17-acre area that is in the same ownership and adjacent to the 14.5 acres in the proposed PUD.

"2. The Applicant's Statement explains why approval of the PUD will not preclude development of the adjacent 17 acres in the same ownership. Part B.1. of the Applicant's Statement considers developability from the standpoint of transportation and roads, sanitary and storm sewers, geology and natural hazards, parks and natural resources. Part B.2. of the Applicant's Statement demonstrates that when it is developed, the adjacent 17 acres can be developed as a logical continuation of the kind of development in Phase I of the PUD. Part B.3. states what should otherwise be clear. Any development of the adjacent 17 acres must be preceded by a submittal of, and review and approval of, an application for development approval under applicable city standards. The review conducted here does not approve any development or any particular approach to development of the adjacent 17 acres.

"3. Based on the Applicant's Statement, the staff memorandum, the testimony presented at the public hearing, and the complete record of this application, the Planning Commission concludes that development of Phase I of the PUD will not render the balance of the adjacent land in the same ownership

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[4]The local record in McGowan I, as well as the record developed during the local proceedings on remand, are both part of the record in this appeal proceeding. In this opinion, we refer only to the record developed on remand, and that record is referred to as "Remand Record."

> undevelopable when the required access is provided from City View Street.
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> "4. In support of this conclusion, the Planning Commission: (1) readopts its previous findings in support of this decision, as amended by these findings; (2) incorporates the Applicant's Statement as the findings of the Commission; and (3) incorporates supplemental findings, if any, that may be adopted following the public hearing to address issues raised at the hearing that are not adequately addressed above." Remand Record 4.

The applicant's statement provides the following information concerning the future developability of the adjacent 17 acre property owned by intervenor:

> "Extension of [a particular street] into the [subject 14.5 acres] will require annexation of additional property to the City that is not currently owned by [intervenor]. The [additional property not owned by intervenor] to be annexed is within the urban growth boundary, a minimum level of key urban services are available and annexation is otherwise consistent with adopted policies. The need to annex additional property in order to allow the 17 acres of the [intervenor's] property now within the City to develop is based upon the City's own requirements. The approved development plan makes the future [street] linkages required under [a condition in the challenged decision] possible by providing for the extension of Lasater Street and a new street tying to McLean Boulevard. Grades in the area of the connecting linkage are generally in the range of 10 percent or shallower, thus allowing flexibility in the exact configuration of the connection." Remand Record 47.

Petitioners contend that to comply with EC 9.510(3), the city must determine development of the adjacent 17 acres also owned by intervenor will not be contrary to any city

standard.[5] Petitioners argue the city's interpretation of EC 9.510(3) is erroneous because it does not require identification of all potentially applicable standards, proof that the disputed 17 acres can be developed, or proof that the property not owned by intervenor (referred to in the above quoted findings) can be annexed to the city.

Intervenor argues that in order to identify, apply and determine compliance with specific city standards, a specific development proposal must exist. Intervenor states there is no specific development proposal for the 17 acres. Intervenor contends we should defer to the city's interpretation of its own code that EC 9.510(3) simply requires a determination that there is nothing about the approval of the proposal development rendering the 17 acres undevelopable. Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992).

We agree with intervenor that the city's interpretation of EC 9.510(3) is not clearly contrary to the express words, policy or context of EC 9.510(3). Therefore, the city's interpretation is not clearly wrong, and we defer to it.[6] The findings quoted above adequately establish that nothing

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[5]However, petitioners do not cite any particular city standard which the city should have, but did not, address.

[6]Petitioners argue we should not defer to the city's interpretation because it was influenced by our suggestion in McGowan I that the interpretation is a plausible one. However, we do not see how this renders the interpretation one to which we should not defer.

about the proposed development on the subject 14.5 acres adversely affects the developability of the additional 17 acres that intervenor owns.

One further point merits comment. Concerning the annexation of the property not owned by intervenor, that property is within the urban growth boundary and apparently must be annexed to the city in order for the occurrence of certain street improvements associated with the eventual development of the additional 17 acres owned by intervenor. As intervenor points out, the Metropolitan Area General Plan, Policy 15 at II-B-6, states that "[u]ltimately, land within the urban growth boundary shall be annexed to a city and provided with the minimum level of urban services. * * *." Therefore, it is clear that the property not owned by intervenor within the urban growth boundary will eventually be annexed to the city. The only question is when that event will occur, and that question need not be answered in the approval of the proposed PUD on the adjacent 14.5 acres owned by intervenor.

Petitioners' assignment of error is denied.

The city's decision is affirmed.