BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ERIC LANGFORD, TY HULING, and MILO DUDDEN, Petitioners, vs. CITY OF EUGENE, Respondent, and LANE COUNTY HOUSING AUTHORITY AND COMMUNITY SERVICES AGENCY, Intervenor-Respondent.	LUBA No. 93-090 FINAL OPINION AND ORDER

Appeal from City of Eugene.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox, Parrish & Coons, P.C.

Glenn Klein, Eugene, filed the response brief on behalf of respondent and intervenor-respondent. With him on the brief was Harrang Long Watkinson Laird & Rubenstein, P.C. Milo R. Mecham, Eugene, argued on behalf of respondent and intervenor-respondent.

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

REMANDED 10/06/93

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision granting conditional use approval for a controlled income and rent (CIR) housing project on a 2.6 acre property zoned R-1 Low-Density Residential District.

MOTION TO INTERVENE

Lane County Housing Authority and Community Services Agency, the applicant below, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is located in northeast Eugene, in an area known as the Willakenzie area. The comprehensive plan for this area includes the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) and the Willakenzie Area Plan.

Intervenor proposes to construct a total of 25 two-story dwelling units on the subject property. The proposal includes seven duplexes, one triplex, two fourplexes and a community building.

The subject property is located in Eugene School District 4-J, and the nearest schools are Willakenzie Elementary School, Monroe Middle School, and Sheldon High School. The city of Eugene provides fire and emergency medical services to the subject property.

Intervenor's proposal was approved by the city hearings official, and the hearings official's decision was affirmed on appeal to the planning commission.

INTRODUCTION TO ASSIGNMENTS OF ERROR

The Eugene Code (EC) provisions relating specifically to CIR housing are set out at EC 9.724. EC 9.724(3) provides as follows:

> "Criteria for hearings official approval. Applications for conditional use permits for controlled income housing shall be processed and scheduled for public hearings in the same manner as other conditional use permit applications, except the following shall substitute for the required [conditional use permit] criteria * * *:
>
> "(a) Public and private facilities are adequate to meet anticipated demand. These include, but are not limited to, local streets, schools, parks, and shopping.
>
> "(b) The proposed project is designed to:
>
> "1. Avoid unnecessary removal of attractive natural vegetation.
>
> "2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas.
>
> "3. Incorporate building materials, colors, and textures that are compatible with existing structures in the immediate area.
>
> "* * * * *
>
> "(c) The location conforms to the principles of dispersal as encompassed in the city's Housing Dispersal Policy Plan."

In their first and second assignments of error,

petitioners argue the city failed to demonstrate compliance with EC 9.724(3)(a), with regard to adequacy of fire and emergency medical services and schools. In their third assignment of error, petitioners contend the city failed to demonstrate the proposed project complies with the above quoted requirements of EC 9.724(3)(b). In their fourth assignment of error, petitioners argue the challenged decision violates the housing dispersal requirement of EC 9.724(3)(c). In their final assignment of error, petitioners contend the CIR approval process used by the city does not permit it to approve a project composed entirely of multi-family housing on a single parcel. Petitioners contend that those features of the proposal require Planned Unit Development approval, under EC 9.508 et seq.

FIRST ASSIGNMENT OF ERROR

Under EC 9.724(3)(a), emergency medical and fire facilities must be "adequate to meet anticipated demand." Petitioners contend that the Willakenzie Area Plan establishes that such facilities presently are not adequate to meet anticipated demand. The Willakenzie Area Plan states as follows:

> "Medical studies have shown that the critical period for emergency intervention in cases of cardiac and respiratory arrest is within the first four minutes. Based on information provided by L-COG, the combined response capability of Stations 1 and 9 is insufficient to provide a four-minute response capability over much of the Willakenzie

> area. Specifically, a study of 1986-87 emergency responses showed that in large portions of the Willakenzie area, response took more than four minutes 81 percent to 100 percent of the time under best conditions. With the growing population of the Willakenzie area, the problem of excessive response times is becoming and will continue to become worse." (Emphasis added.) Willakenzie Area Plan 115.

Petitioners include in the petition for review a copy of a map from the Willakenzie Area Plan which shows the subject property outside the four minute response zone. Petitioners contend this shows the subject property is not adequately served by emergency medical or fire response facilities. Moreover, petitioners argue there is no claim by the city that there is any present commitment to correct the current inadequacy of fire and emergency medical services in the Willakenzie area.

The city hearings official adopted the following findings:

> "Police, fire, and emergency vehicle service is available to the site. Response time is indicated at 3 to 5 minutes based on the time of day and traffic volume. It is recognized that there is a need to improve response times, particularly at certain times of the day, for the entire Willakenzie area. The present availability of these emergency services is adequate, however." Record 75.

The city planning commission added the following findings:

> "With respect to fire and medical emergency services, the appellants reference findings in the Willakenzie Plan * * *. [The hearings official] indicates that a three- to five-minute response time is available to the area subject to this

> request based on time of day and traffic volume. This information was provided by the Eugene Fire Marshal's Office and other administrative fire services personnel in response to submittal of the subject project. The four-minute response time is referenced in the background information of the Public Safety Element of the recently adopted Willakenzie Area Plan * * *. The policies on page 118 [of the Willakenzie Area Plan] provide direction for responding to emergency fire and medical services in the area. Two policies are provided. In both cases, neither make reference nor require that no additional development occur in the area without implementation of specific services." Record 7-8.

Respondent contends EC 9.724(3)(a) requires "adequacy," and that the four minute response time discussed in the Willakenzie Plan is not required for adequate emergency fire and medical services.

The problem with the above quoted findings and respondent's argument is that they correctly answer the wrong question and fail to address the requirement of EC 9.724(3)(a) directly. Respondent is correct that EC 9.724(3)(a) does not explicitly require that a four minute fire and medical emergency response time be available to the subject property. However, it does require that such services be "adequate." The findings simply conclude, without any explanation, that the anticipated three to five minute response time is adequate. There is no explanation given to contradict the above quoted plan language that for some types of emergencies, a four minute response is critical.

This Board has given local governments significant latitude in establishing the permissible parameters of subjective standards which require that public services be found to be "adequate." See Dickas v. City of Beaverton, 17 Or LUBA 578, 590 (1989). However, in view of the Willakenzie Plan language documenting the importance of a four minute emergency response time, more than a bare conclusion that the expected three to five minute response time is adequate is required.[1]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Under EC 9.724(3)(a), schools must be "adequate to meet anticipated demand." Petitioners contend the city's findings that schools are adequate to provide service to the disputed project are inadequate and unsupported by substantial evidence.

The applicant claimed that Willakenzie Elementary School has capacity to accommodate approximately 36 additional students. That claim was contradicted by opponents, and we are cited to no evidence in the record from the school district, or elsewhere, which supports that claim. Petitioners cite Metro Plan and Willakenzie Area

[1]Actually, as petitioners note, the Fire Marshal's office was somewhat equivocal about whether the three to five minute response time could be achieved, stating it was "possible, depending on traffic and time of day." Record 18. Moreover, petitioners cite evidence in the record that, in at least some instances, response times have significantly exceeded five minutes.

Plan language discussing school crowding problems and a memo documenting a conversation with the school district indicating that schools are full.

In its findings, the city relies on the applicant's claim that Willakenzie Elementary School has available capacity and language in the Metro Plan to the effect that the school district views its educational mission on a district-wide basis, and employs a variety of techniques to maximize use of facility capacity.[2] There are two problems with the city's findings. First, the finding that Willakenzie Elementary School has adequate capacity is not supported by substantial evidence. The applicant's claim is not sufficient to support that finding in the face of the evidence in the record contradicting the claim. Younger v. City of Portland, 305 Or 346, 356-57, 752 P2d 262 (1988). No doubt the school district could easily provide evidence sufficient to determine whether excess capacity at Willakenzie Elementary School exists or could be created, but such evidence is not presently in the record.

The more fundamental problem with the city's findings are their reliance on the school district's general policy of employing various techniques on a district-wide basis to maximize the use of its limited school facilities. We

[2]Those techniques include: adjusting attendance boundaries, double shifting, adding to existing facilities, portable classrooms, and bussing. Metro Plan III-G-4.

emphasize there is nothing wrong with employing such techniques to provide adequate school facilities. However, the city may not, in this quasi-judicial proceeding, simply cite this policy of the school district and assume that it will produce adequate schools for the proposed project. Burghart v. City of Mollala, ___ Or LUBA ___ (LUBA Nos. 92-209 and 92-208, March 11, 1993), slip op 5-10; Dickas v. City of Beaverton, supra. The city must specifically find that existing school facilities are adequate to serve the proposed project or that they can be made adequate by employing whatever techniques are available in this instance to maximize school facility capacity. That finding must be supported by sufficient evidence, supplied by the school district or some other sufficiently reliable source, to constitute evidence a reasonable person would rely on.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners contend the CIR project design is inadequate to comply with the requirements of EC 9.724(3)(b) (1), (2) and (3).

A. Removal of Attractive Natural Vegetation

Petitioners first contend the decision inadequately addresses whether the project avoids "unnecessary removal of attractive natural vegetation."

The hearings official found that the filbert orchard on the property, which will be removed in large part, does not

constitute natural vegetation. The hearings official further points out the project has been designed to avoid several trees on the site and concludes "[t]here is no other attractive natural vegetation on the site that will be removed." Record 76. Respondent cites staff testimony supporting these findings.

Because petitioners do not explain why the above findings are inadequate, we deny this subassignment of error.

B. Setbacks or Screening to Ensure Privacy

Petitioners next challenge the adequacy of the proposal to ensure privacy. Petitioners point out the proposed dwellings will be 25 feet tall and question the efficacy of the required six foot high fence to ensure privacy. Petitioners also note the decision limits use of non-deciduous screening vegetation and complain the city did not explain why it refused to require that the units be air-conditioned, which petitioners contend would enhance privacy by reducing noise levels.

The city adopted findings explaining that EC 9.724(3)(b)(2) requires "setbacks or screening." Those findings explain that in this case the setbacks proposed significantly exceed the minimum required setbacks. The findings suggest the additional setbacks alone could be sufficient to satisfy EC 9.724(3)(b)(2) and that EC 9.724(3)(b)(2) is certainly satisfied when other required

screening conditions, design features and building orientation are considered as well.

Petitioners do not directly attack the city's findings, and we find they are adequate to demonstrate compliance with EC 9.724(3)(b)(2).

This subassignment of error is denied.

C. Compatible Building Materials, Colors, and Textures

The project is bordered on the east and north by newer, more expensive homes. These homes are constructed of expensive, higher quality exterior building materials than those proposed for the disputed project. The project is also bordered on the south and west by older, less expensive homes with exterior building materials similar to those proposed for the project. Petitioners' argument under this subassignment of error focus on the disparity between the proposed project and the more expensive homes. However, the planning commission's decision considers all the adjoining properties and finds the project is compatible in a number of different ways if all the adjoining properties are considered, as EC 9.724(3)(b)(3) requires.

> "The findings of the Hearings Official note that adjacent development on all sides of the project involves houses with a variety and mixture of exterior siding material. Predominantly, wood is used for siding and painted with a variety of colors from earth tones to muted grays, blues, and cream colors. Many of the existing dwellings in the area have brick facades and the remainder have wood exteriors. The majority of the newer homes

> in the area have shake roofs. However, those residents along Bogart Lane have composition roof material. Dwelling units in the proposed development will include building materials, color, and texture that are similar to those of adjacent development. These include wood exterior to be painted or stained in earth tones and colors. The development will have composition shingles and roofs in a color that is consistent with the buildings in the surrounding development. These design features incorporate non-reflective roof and siding materials that include textures and colors that are compatible with adjacent development. The fact that the proposed development does not include brick facades, horizontal siding, or shake or tile roofs does not mean that the proposed is not compatible with building material, color, and texture as set forth by the criteria in Section 9.724(3)(b) of the Eugene Code. We agree with the Eugene Hearings Official * * * that the proposed development will be distinguishable as a housing project and that the appearance will be distinguishable from the adjacent surrounding neighborhood, yet it is compatible with respect to building materials, color, and texture." Record 7.

Again, petitioners offer no specific challenge to the city's findings, and we conclude they are adequate to explain that the requirements of EC 9.724(3)(b)(3) are satisfied by the proposed project.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

EC 9.724(3)(c) requires that the location of the proposed project conform to the city's principles of dispersal, as encompassed in the city's Housing Dispersal Policy Plan. Petitioners argue the Metro Plan includes a policy to disperse housing for all income levels and contend

that the project violates that policy.

Respondent points out the decision includes findings explaining how the challenged project complies with the five relevant implementing policies in the city's Housing Dispersal Policy Plan. Respondent contends that because petitioners fail to challenge these findings and, indeed, apparently concede they are satisfied, petitioners' challenge under this assignment of error is really a challenge of the policies themselves rather than their application in this case.

We agree with respondent.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue under this assignment of error that the R-1 zone does not permit development of 25 multi-family dwelling units on a single lot. Apparently, the subject property could be subdivided into a sufficient number of lots to construct the desired 25 dwelling units. However, even if such a subdivision were approved, EC 9.386 limits the permissible percentage of duplex, triplex and fourplex lots in subdivisions in the R-1 zone and requires that "[a]t least 50 percent of the lots must be for single family occupancy." Petitioners contend, and respondent does not dispute, that the desired 25 multi-family units could be approved under the city's PUD provisions, set out at EC 9.508 et seq. Petitioners contend approval of the single

lot, exclusively multi-family aspects of the proposed project requires PUD as well as CIR approval.

The city findings addressing this issue are as follows:

> "It is contended that the C.I.R. process addresses the issue of density but does not authorize the project's proposed single lot aspect and the development of an exclusively multi-family housing project. Section 9.384 of the Eugene Code contains the listing, in matrix form, of allowable uses in the residential districts. Under the general category of 'dwellings,' the use 'Controlled income and rent with increased density' is listed, similarly to other uses listed in this matrix. That listing indicates that this use can be located by conditional use permit in the RA and R-1 districts. The listing states that 'Standard 13' is applicable. The cited Standard 13 merely states that this use 'must conform to the standards and procedures in Section 9.724.'
>
> "Section 9.724 is entitled and deals exclusively with 'Conditional Use Permits for Controlled Income and Rent Housing.' The last sentence of Subsection (1) of E.C. 9.724 states:
>
> > "'A conditional use permit for CIR housing is not necessary unless the increased density provided for in Section 9.724 is required.'
>
> "It is argued by those opposed to the project that, based upon this language, the C.I.R. process is only one to allow an increase in density and where, as here, the project could be developed without an increase in density if it was not for the wish to develop on a single parcel multiple family dwellings, the proposal should be subject to * * * review [under] the planned unit development process.
>
> "[The city's] construction of the ordinance is that a controlled income and rent housing project is articulated as a use in the Eugene Code and is not merely a means to provide increased density.

> [T]he last sentence of E.C. 9.724(1), above quoted [means] that controlled income and rent housing, as that use is defined at E.C. 9.015, could be developed pursuant to planned unit development procedures if it would comply with the maximum density per gross acre allowed under E.C. 9.510(6)(a). The intent of the last sentence of E.C. 9.724(1) was to make it clear that a planned unit development that involved controlled income and rent housing was not going to be subject to the criteria and review of E.C. 9.724 unless an increase in density over that allowed by the planned unit development provisions was sought. [T]he language of EC 9.724 clearly indicates that only the criteria of that section are applicable." Record 71-72.

The city goes on to explain that there is significant overlap between the criteria governing PUD and CIR review, and that ORS 456.355 to 456.370 encourage assisted housing of the type at issue in this appeal. The city concludes that subjecting the project to review under both the PUD and CIR provisions would be more burdensome and, therefore, inconsistent with the statutory purpose of encouraging such housing.

On its face, the CIR provisions set out in EC 9.724 are, as petitioners argue, simply a density increasing provision for CIR housing, whatever form that housing may take -- single-family or multi-family. There is nothing in the wording or context of EC 9.724 permitting deviations from the requirements that otherwise apply under the applicable zoning district. If, for example, code provisions made it clear that CIR housing necessarily includes exclusively multi-family housing or necessarily

includes more multi-family housing than allowed under limitations imposed by the underlying zoning, we might agree that approval of increased density CIR housing under EC 9.724 would include approval of that aspect of the disputed project without PUD approval. Similarly, if the increased density CIR approval provisions contained language that either suggested such housing necessarily would be constructed on single parcels, without the need to subdivide or seek PUD approval, or suggested that additional approvals to deviate from the limits on developing single parcels that otherwise apply under the R-1 zone need not be obtained, we might agree with the city's interpretation. No such language exists in EC 9.724.

The city's reference to the fact CIR housing is listed in the matrix at EC 9.384 makes it clear that CIR housing with increased density is allowed in the R-1 zone, but says nothing about whether such increased density CIR housing must comply with other requirements of the CIR zone, or obtain any appropriate approvals necessary to deviate from those requirements. In this regard the definition of CIR housing is important. EC 9.015 defines CIR housing as follows:

> "A housing project sponsored by a public agency, a non-profit housing sponsor * * * to undertake, construct, or operate a controlled income and rent housing project."

This definition says nothing about how much multi-family

housing will be included in a CIR project or whether such a housing project will be developed on a single parcel or as part of a subdivision.

In short, we agree with petitioners that there is nothing in the EC provisions cited by the parties that suggests the CIR increased density approval process set out in EC 9.724 may authorize anything other than a CIR housing project with increased density. All other zoning limitations continue to apply, unless appropriate approvals are granted to deviate from those limitations. The policy arguments advanced by the city in favor of not requiring additional approvals for an increased density CIR project, beyond the approval envisioned under EC 9.724, might support amending EC 9.724 to so provide. However, they do not provide a basis for reading language into EC 9.724 that is simply not there. Under Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992), this Board is required to defer to a local government's interpretation of its own land use regulations unless that interpretation is inconsistent with the express language of those regulations or their apparent purpose or policy. Here, we conclude the city's interpretation, while perhaps consistent with the apparent policy of encouraging CIR housing, is clearly inconsistent with the express language of the EC. The city may be able to amend the EC to obtain the result it reached here, but it may not do so by way of interpretation. See Goose Hollow

Foothills League v. City of Portland, 177 Or App 211, 217, 843 P2d 992 (1992); compare Friends of the Metolius. v Jefferson County, ___ Or App ___, ___ P2d ___ (September 22, 1993).

The fifth assignment of error is sustained.

The city's decision is remanded.