

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROGUE VALLEY MANOR,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MEDFORD,
10 *Respondent,*

11 and

12
13 BEAR CREEK CORPORATION, KOGAP
14 ENTERPRISES, INC., and ASANTE HEALTH SYSTEMS,
15 *Intervenors-Respondent.*

16
17 LUBA No. 98-204

18
19 Appeal from City of Medford.

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21 Gregory S. Hathaway, Portland, and Christopher P. Koback, Portland, filed the
22 petition for review. With them on the brief was Davis Wright Tremaine, LLP. Gregory S.
23 Hathaway argued on behalf of petitioner.

24
25 Eugene F. Hart, Jr., Medford, and Ronald L. Doyle, Medford, filed the response brief.
26 Ronald L. Doyle argued on behalf of respondent.

27
28 John R. Hassen, Medford, represented intervenors-respondent.

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30 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
31 participated in the decision.

32
33 REMANDED

06/21/2000

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city’s decision approving in part an amendment to an existing
4 planned unit development.

5 **MOTION TO INTERVENE**

6 Bear Creek Corporation, Kogap Enterprises, Inc., and Asante Health Systems move
7 to intervene on the side of respondent. There is no opposition to their motions and they are
8 allowed.

9 **FACTS**

10 Petitioner is a nonprofit organization that offers senior retirement housing, residential
11 living and health care facilities as part of a planned unit development (PUD) originally
12 approved in 1984. On February 26, 1998, petitioner filed an application with the city to
13 amend the PUD to add a variety of uses and services, including a hotel/conference center, a
14 restaurant, a nursing facility/Alzheimer’s care clinic, a tennis center, an administrative
15 building, and various mixed-use residential and retail uses.

16 Most of the proposed uses are permitted by right in the underlying zone;
17 nonpermitted uses are allowed within the PUD only if they comprise 20 percent or less of the
18 gross PUD area. For such nonpermitted uses, the City of Medford’s Land Development
19 Code (LDC) 10.235(C)(7) requires that the applicant demonstrate either that (1) the demand
20 for public facilities such as public streets created by nonpermitted uses is equivalent to or
21 less than the demand that would be created by permitted uses, or (2) the property can be
22 supplied by the time of development with public facilities adequate to support the proposed
23 nonpermitted uses.¹ The city determined, based on petitioner’s traffic study, that the

¹LDC 10.235(C)(7) provides:

“If the Preliminary PUD plan includes uses not allowed in the underlying zone pursuant to [LDC] 10.230(D)(9)(b), the applicant shall alternatively demonstrate that either: 1) demands

1 permitted uses allowed in the zone would generate 138 p.m. peak hour trips. Petitioner had
2 proposed three categories of nonpermitted uses. Categories 1 and 2 fell within the 138 p.m.
3 peak hour trip threshold; category 3 uses exceeded that threshold. To obtain approval of the
4 category 3 uses, petitioner proposed a condition of approval that allowed development of
5 those uses only if the city determines, in a future land use proceeding, that the transportation
6 system is adequate to accommodate those uses. However, the city planning commission
7 rejected that condition, and approved the category 1 and 2 nonpermitted uses, while denying
8 the category 3 nonpermitted uses.

9 In addition, petitioner proposed locating the Alzheimer’s clinic 20 feet from the
10 existing PUD boundary, consistent with the setback requirements in the underlying zone.
11 However, because the facility is proposed to be located within 100 feet of the PUD boundary,
12 it is subject to conditional use permit criteria at LDC 10.248. Based on expressed concerns
13 regarding impacts of the facility on neighboring residents, the planning commission imposed
14 a condition that the facility be located at least 99 feet from the PUD boundary.

15 Petitioner appealed the planning commission’s decision to the city council. After a
16 public hearing, the city council amended the planning commission’s condition relating to the
17 clinic by reducing the required setback from 99 feet to 50 feet. The city council affirmed the
18 planning commission’s decision to deny the category 3 nonpermitted uses that would exceed

for the Category ‘A’ public facilities listed below are equivalent or less than for one or more permitted use listed in the underlying zone, or 2) the property can be supplied by the time of development with the following Category ‘A’ public facilities which can be supplied in sufficient condition and capacity to support development of the proposed use:

“* * * * *

“d. Public streets.

“Determinations of compliance with this criterion shall be based upon standards of public facility adequacy as set forth in this Code and in goals and policies of the comprehensive plan which by their language and context function as approval criteria for comprehensive plan amendments, zone changes or new development. In instances where the Planning Commission determines that there is insufficient public facility capacity to support the development of a particular use, nothing in this criterion shall prevent the approval of early phases of a phased PUD which can be supplied with adequate public facilities.”

1 the 138 p.m. peak hour trip threshold.

2 This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner argues that the city’s decision to reject the proposed condition allowing
5 category 3 uses to be developed later is not supported by adequate findings or substantial
6 evidence. Petitioner contends that the evidence in the record demonstrates that the proposed
7 category 3 uses, as conditioned, meet the legal requirements of LDC 10.235(C)(7), and there
8 is no evidence in the record to the contrary. According to petitioner, the proposed condition
9 satisfies LDC 10.235(C)(7) because it ensures that no approved development will occur until
10 petitioner demonstrates, in a future proceeding, that adequate transportation facilities exist to
11 support that development.

12 Where an applicant challenges a denial of a land use approval on *evidentiary* grounds,
13 petitioner must show that the evidence in the record demonstrates that the proposed use
14 complies with applicable criteria as a matter of law. *Jurgenson v. Union County Court*, 42
15 Or App 505, 510, 600 P2d 1241 (1979); *Eddings v. Columbia County*, 36 Or LUBA 159, 162
16 (1999). While *findings* of noncompliance with applicable criteria need not be as exhaustive
17 or detailed as findings necessary to show compliance with such criteria, findings of
18 noncompliance must be sufficient to explain the local government’s conclusion that
19 applicable criteria are not met, and must suffice to inform the applicant either what steps are
20 necessary to obtain approval or that it is unlikely that the application will be approved.
21 *Eddings*, 36 Or LUBA at 162, *citing Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or
22 LUBA 351, 371 (1994).

23 In the present case, the city’s only findings with respect to its denial of the category 3
24 uses are as follows:

25 “Based on the response from the Oregon Department of Transportation
26 (ODOT), it has been determined that the Barnett Road interchange will go to
27 90 percent of capacity and drop to Level of Service ‘E’ * * * with the

1 proposed development. This would be in violation of the standards
2 established in the Oregon Highway Plan for highway operations. The
3 applicant has made revisions to the proposal in the context of this issue and
4 the requisite facilities adequacy finding. * * * [T]he applicant has proposed a
5 program of development equivalency and allocation of future facility capacity
6 which may be an acceptable method of allowing approval of the long-term
7 master plan. This has been a topic of much discussion within the community
8 and the applicant’s proposed conditions of approval are consistent with the
9 developing program to deal with the street capacity issue.

10 “* * * * *

11 “Decision: The Planning Commission did not approve any uses not allowed
12 in the underlying zone that would generate traffic beyond the 138 PM peak
13 hour trips. * * *” Record 102.

14 In its response brief, the city argues that the planning commission correctly denied
15 the category 3 uses because nothing in the city’s code allows development to be approved
16 pending future hearings that may or may not ever occur depending on whether affected
17 transportation facilities are improved to the point where they can support that development.
18 The city argues that the second alternative described in LDC 10.235(C)(7) allows the city to
19 approve development that exceeds the capacity of needed transportation facilities only where
20 there is currently available information regarding when and to what extent those facilities
21 will be improved, and the timing of development can be conditioned on those scheduled
22 improvements. In support of the foregoing interpretation, the city points to the last sentence
23 of LDC 10.235(C)(7), which states that if there is insufficient capacity to support all phases
24 of the proposed PUD, the city may nonetheless approve early phases that can be supplied
25 with adequate facilities. By implication, the city argues, it cannot approve PUD phases not
26 supported by sufficient public facilities. Because there is no evidence in the record that the
27 Barnett Road interchange will ever be improved to support the category 3 uses, the city
28 argues, it cannot approve those uses under the second alternative of LDC 10.235(C)(7).

29 Resolution of this assignment of error turns on the meaning of LDC 10.235(C)(7),
30 more specifically the second alternative allowing the city to approve nonpermitted uses if

1 “the property can be supplied by the time of development” with adequate public facilities.
2 LDC 10.235(C)(7) could be read, as petitioner urges, to allow development at some
3 unspecified point in the future, as long as that development is conditioned so that it cannot
4 proceed in the absence of necessary facility improvements. However, the code provision can
5 also be read, as the city urges in its response brief, to allow such development only if the
6 timing and extent of future improvements are known at the time of preliminary PUD
7 approval. The findings in the challenged decision provide no assistance on this point. The
8 decision suggests that petitioner’s proposed condition is consistent with the second
9 alternative of LDC 10.235(C)(7), but then, without further explanation, denies the proposed
10 category 3 uses. It is not clear from the city’s findings what the city understands the second
11 alternative of LDC 10.235(C)(7) to require.

12 The city may deny an application for land use approval that does not comply with
13 applicable criteria, and is not required to approve such applications even if conditions can be
14 imposed to modify the proposal so that it satisfies those criteria. *Shelter Resources, Inc. v.*
15 *City of Cannon Beach*, 27 Or LUBA 229, 241-42, *aff’d* 129 Or App 433, 879 P2d 1313
16 (1994); *Simonson v. Marion County*, 21 Or LUBA 313, 325 (1991); *but see* ORS 197.522
17 (statute adopted in 1999 providing that a local government may deny an application that is
18 inconsistent with applicable criteria “and that cannot be made consistent through the
19 imposition of reasonable conditions of approval.”). However, the city’s findings never
20 explain why LDC 10.235(C)(7) is not satisfied, if that indeed is the city’s conclusion. The
21 city’s findings also are not sufficient to inform petitioner either what steps are necessary to
22 obtain approval or that it is unlikely that the application will be approved. *Eddings*, 36 Or
23 LUBA at 162.

24 Where the challenged decision lacks a necessary interpretation of a local provision,
25 LUBA may but need not interpret that provision in the first instance. ORS 197.829(2); *Opp*
26 *v. City of Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den* 327 Or 620 (1998). Given the

1 ambiguity of LDC 10.235(C)(7), and the city's equivocal and inadequate findings with
2 respect to that criterion, it is more appropriate to remand the decision to the city to adopt

1 more adequate findings and any necessary interpretations. Because the city’s findings are
2 inadequate, there is no purpose served in addressing petitioner’s evidentiary challenges.

3 The first assignment of error is sustained, in part.

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioner argues that the city’s condition requiring a 50-foot setback for the
6 Alzheimer’s clinic is not supported by adequate findings or substantial evidence. According
7 to petitioner, there is no evidence in the record that any setback greater than the 20-foot
8 setback required by the code is necessary to mitigate any impacts or concerns. Further,
9 petitioner argues, the 50-foot setback ultimately imposed is arbitrary.

10 Pursuant to LDC 10.230(D)(9)(b), nonpermitted uses in the underlying zone located
11 within 100 feet of the PUD boundary are considered conditional uses subject to compliance
12 with conditional use permit criteria at LDC 10.248. LDC 10.248 allows approval if the city
13 finds one of the following:

14 “(1) The development proposal will cause no significant adverse impact on
15 the livability, value, or appropriate development of abutting property,
16 or the surrounding area when compared to the impacts of permitted
17 development that is not classified as conditional.

18 “(2) The development proposal is in the public interest, and although the
19 development proposal may cause some adverse impacts, conditions
20 have been imposed by the approving authority (Planning Commission)
21 to produce a balance between the conflicting interests.”

22 LDC 10.248 goes on to specify the kinds of conditions the city can impose, including the
23 establishment of special yard or open space requirements, and limits on the height, size or
24 location of buildings or structures.

25 In response to concerns expressed by adjacent residential landowners, the planning
26 commission imposed a 99-foot setback for the clinic. On appeal to the city council, the
27 council found in relevant part:

1 “3. The Alzheimer’s clinic and skilled nursing facility are in the public
2 interest for the following reasons and, therefore, can be approved
3 under [LDC] 10.248(2):

4 “a. There is an increasing demand for special Alzheimer’s care
5 facilities in the community due to the increasing age of the
6 population and the incidence of this disease.

7 “b. It is beneficial in the treatment of Alzheimer’s disease to have
8 a separate facility.

9 “4. Concerns regarding the Alzheimer’s clinic and skilled nursing facility
10 include the following:

11 “a. Loss of property value because [it is] commercial
12 development;

13 “b. Creates additional traffic impacts causing noise and safety
14 concerns and loss of quality of life;

15 “c. People with dementia potentially shouting obscenities and
16 potentially being unclothed.” Record 6.

17 The city then modified the setback condition from 99 feet to 50 feet and concluded:

18 “The City Council finds that the Alzheimer’s clinic and skilled nursing
19 facility are in the public interest, and, although they may cause some adverse
20 impacts, conditions have been imposed * * * to produce a balance between
21 the conflicting interests consistent with [LDC] 10.248(2).” Record 6.

22 The city responds, and we agree, that the record contains evidence based on which
23 the city could find that an additional setback beyond the code-mandated 20 feet was
24 appropriate to mitigate the identified adverse impacts. The city argues that a reasonable
25 person could conclude, based on that evidence, that the city could impose an additional
26 setback up to the maximum that could be imposed on such a conditional use under the code:
27 99 feet. If that is the case, the city argues, then the fact that the city imposed a lesser setback
28 is immaterial, because the 50-foot setback is within the maximum distance that the city could
29 impose as a setback, based on the evidence.

30 LDC 10.248(1) allows approval of a conditional use if there is no significant adverse
31 impact on abutting property. LDC 10.248(2) allows the city to approve a conditional use

1 notwithstanding such adverse impacts on other property if the proposed use is in the public
2 interest and conditions are imposed that balance the conflicting interests. Such balancing
3 inevitably entails judgment calls not susceptible to precise calculation. We agree with the

1 city that a reasonable person could conclude, based on the evidence presented, that a setback
2 of 50 feet was appropriate to balance the conflicting interests involved.

3 The second assignment of error is denied.

4 The city's decision is remanded.