BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ASHLEY MANOR CARE CENTERS, INC.,
Petitioner,

vs.

CITY OF GRANTS PASS,
Respondent.

LUBA No. 99-199/200

FINAL OPINION
AND ORDER

Appeal from City of Grants Pass.

H. Andrew Clark, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gleaves, Swearingen, Larsen, Potter, Scott and Smith.

Allen L. Johnson, Eugene, filed the response brief. With him on the brief was Johnson and Sherton, PC.

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

REMANDED 06/23/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner, the applicant below, appeals the city's denial of its applications for a property line vacation and site design review.

FACTS

Petitioner owns two adjacent undeveloped .17-acre lots located in the Wagner Meadows Subdivision. A single-family dwelling is located on the lot adjacent to the subject property to the north. The other surrounding properties are currently undeveloped.

The property is zoned Residential-2 (R-2), which the city code characterizes as a "moderate density" residential zone. Grants Pass Development Code (GPDC) 12.026. Petitioner proposes to site a residential care facility for the care of persons with Alzheimer's Syndrome. Residential care facilities are permitted in the R-2 zone, provided the applicant establishes that (1) the facility is or will be licensed as a residential care facility with the State of Oregon and (2) the facility complies with certain site design standards. GPDC 14.521 and 14.522. The proposed 5,511-square foot residential facility would house up to 15 residents, with two attendants on-site per shift. Petitioner proposes one access for the proposed facility onto SW Anique Lane, a residential street. Five off-street parking spaces will be provided for staff and visitors, including one handicapped access space.

To comply with applicable setback requirements, petitioner applied for a property line vacation of the common lot line between the two lots. Property line vacations are governed by the provisions of GPDC 17.100 through 17.114. The city council is the only entity with the authority to approve a property line vacation, and must do so by ordinance. GPDC 17.031, 17.112. Petitioner submitted the property line vacation application in conjunction with its site design review application. The city hearings officer approved the site design application, with conditions, including a condition that the applicant obtain the requisite property line vacation. Neighbors of the proposed facility appealed the hearings

officer's decision to the planning commission, which also approved the application, with similar conditions. The neighbors appealed the planning commission's decision to the city council. The city council denied the property line vacation. Because the property line vacation application was denied, the city found that the applicant had failed to comply with all necessary criteria for site design, and denied that application as well.

Petitioner appealed the city's decision denying the site design review application in LUBA No. 99-199, and appealed the decision denying the property line vacation application in LUBA No. 99-200. These appeals have been consolidated for review.

FIRST ASSIGNMENT OF ERROR

Petitioner makes three arguments under this assignment of error relating to the city's interpretation and application of GPDC 17.100 through 17.114.[1] First, petitioner argues that

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[1]GPDC 17.100 through 17.114 govern property line vacations. They provide:

"17.100 Property Line Vacations

"17.101 Effect: A property line vacation shall act to remove the lot, parcel, or property lines separating the properties and consolidate them into a single authorized lot. Once recorded, the original property lines may not then be recovered except through a partition or subdivision.

"17.110 Petition for Property Line Vacation

"17.111 Submittal Requirements. Petitions for property line vacations shall be on a form provided by the Director, and shall contain the following:

"(1) Location: Location by street address and assessor's map and tax lot number.

"(2) Legal Description: A legal description of the property by metes and bounds, subdivision lot or partition parcel number, or similar description.

"(3) Existing Uses: General location and/or description of existing uses on each property.

"(4) Names: Name, address and telephone number of the property owner(s), applicant(s).

"(5) Signatures: Signatures of all property owners indicating their consent and approval to vacate the property lines.

the city's interpretation of its code to allow consideration of GPDC 17.010, a standard not expressly identified in GPDC 17.112, is "clearly wrong" and therefore reversible under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992) and ORS 197.829(1).[2] Second, petitioner argues that even if the city's interpretation is a permissible interpretation of the city code, the interpretation violates the statutory requirement that permit approval criteria "be set forth in the development ordinance." ORS 227.173(1). Third, petitioner argues that the city's failure to provide notice that GPDC 17.010 established decisional criteria applicable to the property line vacation application violates the statutory requirement that the notice of a quasi-judicial hearing list applicable approval criteria. ORS 197.763(3)(b). We address petitioner's arguments regarding compliance with ORS 227.173(1) before we turn to petitioner's remaining subassignments of error.

> "17.112 Criterion for Approval, Property Line Vacations. The City Council *may*, by ordinance, vacate the property lines *unless the resultant property configuration would create a substandard condition relative to the requirements of this Code*, such as plac[ing] two single family dwellings on one lot where only one single family dwelling per lot is allowed.
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> "17.114 Filing a Property Line Vacation Order. The Administrative Services Department shall file the approved vacation order with the County Recorder within 30 days of adoption." (Emphasis added.)

[2]GPDC 17.010 and 17.112 are set out at n 4 and n 1, respectively. ORS 197.829(1) provides, in relevant part:

> "The Land Use Board of Appeals 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:
>
> "(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;
>
> "* * * * *
>
> "(d) Is contrary to a state statute, land use goal or rule that the * * * land use regulation implements."

A. Compliance with ORS 227.173(1)

ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

The city council interpreted the word "may" in GPDC 17.112 to allow the city to consider other factors than those that are expressly stated in that provision in approving or denying property line vacations.[3] The council then turned to the development code and determined that GPDC 17.010 contained factors that the city should consider in deciding whether to approve or deny petitioner's property line vacation application.[4] Petitioner argues that the only sustainable interpretation of the provisions of GPDC 17.112 is that the city council would approve a property line vacation upon a showing that the resulting property

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

> "1. The use of the word 'may' in [GPDC 17.112] is significant because it indicates that the act of vacating a [property] line is discretionary. If the criterion contained the word 'shall' or 'will', however, then the Council would be limited to considering only whether or not approval of the [property] line vacation would create '…a substandard condition relative to the requirements of this code…'
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> "* * * * *
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> "3. As noted, use of the wor[d] 'may' in lieu of 'shall' or 'will' in the criterion implies that the Council has discretionary authority to consider other factors beyond the creation of substandard conditions." Record 6.

[4]Article 17 of the GPDC regulates land divisions and amendments to partitions and subdivisions. GPDC 17.010 provides the general purpose statement for the article. It provides, in relevant part:

> "The purpose of this [article] is to protect the public health, safety, welfare, and convenience and to provide a means to meet the goals of the Comprehensive Community Development Plan for the City of Grants Pass * * *. It provides procedures, standards, and criteria for the vacation and adjustment of property lines, and for the creation of lots and parcels which are consistent with state statutes and the standards of this Code, and with a consideration for future development. The intention is to create lots and parcels for which development permits and/or building permits can be issued without varying applicable site development standards, and for which urban services and necessary off-site improvements are provided."

configuration would not, in the words of GPDC 17.112 itself, "create a substandard condition relative to the requirements of [the] Code."

Petitioner argues that the interpretive discretion the city has to determine which criteria apply to a decision to approve or deny a permit is limited by ORS 227.173(1). Under that statute, the GPDC must set out what is required of an applicant to satisfy the relevant standards. Petitioner concedes that, if the development code set out an approval criterion that requires an applicant to demonstrate that a proposed property line vacation furthers the public health, safety, welfare and convenience, such a criterion would be permissible. However, here, petitioner argues, the only standard established in the code is contained in GPDC 17.112. According to petitioner, neither GPDC 17.112 itself nor any other code provision identifies GPDC 17.010 as a standard or criterion for approving or denying an application for a property line vacation. Petitioner argues that it is applying for a permitted use in a residential zone, and that the resulting reconfigured property will fully comply with all standards established in the code. Petitioner argues that the city's interpretation of "may" to allow the city to consider other factors that are not identified as standards or approval criteria, including GPDC 17.010, violates ORS 227.173(1).

The city responds that petitioner does not argue that the city's requirements are impermissibly vague or subjective. According to the city, GPDC 17.112 is clearly set forth, interpreted and applied.[5] As a result of the city's decision, the city argues that the applicant

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[5]The city's decision adopts the following findings to address GPDC 17.112:

> "1. The property is zoned R-2, which allows single-family and multiple-dwelling residential development. The Wagner Meadows Subdivision, however, was platted only for development of single-family homes.
>
> "2. The size of homes in the subdivision is planned to fall generally within the range of 1,400 to 1,800 square feet in size on lots of approximately 0.17 acres in size.
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> "3. A Residential Facility, as defined in Article 30 of the Development Code, is a permitted use in the R-2 zone.

"4. Lots 96 and 97 of the subdivision each contain 0.17 acres of land, or approximately 7,405 square feet of land, respectively. Individually, lots of this size are not large enough to construct a one-story structure over 5,500 square feet in size without one or more variances.

"5. Vacating the lot line between lots 96 and 97 would result in a lot size generally two times larger than any other lot in the subdivision.

"6. Vacating the lot line between lots 96 and 97 would result in a building size generally 3 times larger than any other building existing in or envisioned for the construction in the subdivision.

"7. The instant application pending for development of the properties is not relevant to the determination of whether or not the consolidation of the two lots may be granted. The size, scale and intensity of development permitted with a larger lot in an R-2 zoned area are disproportionate to the approved and intended land use of the land when originally subdivided." Record 6-7.

The city's conclusions regarding the application for a property line vacation are:

"A. The City Council has broad authority in deciding to approve or deny the [property] line vacation and is not limited to considering only if the vacation would '…create a substandard condition relative to the requirements of this code…'

"* * * * *

"C. A question intended by the Development Code to be considered is whether or not the act of vacating the lot line would adversely affect the public health, safety, welfare and convenience. Information on adverse [e]ffects on the health, safety, welfare and convenience of the community may be provided to the Council during the public hearing process that the Council must conduct.

"D. Another question intended by the Development Code to be considered is future development that may result by vacating a lot line.

"E. In this case, allowing the vacation of the lot line would result in a lot size that is out of scale and proportion with other lots in the subdivision by a general factor of 2.

"F. In this case, allowing the vacation of the lot line would result in a development that is out of scale and proportion with other development in the subdivision by a general factor of 3.

"G. The scale of the lot and the potential development of such a lot would not serve to improve or further the health, safety, welfare and convenience of the public.

"H. The doubling of a buildable lot in an R-2 zone permits development that is substantially greater in intensity and scope than is permitted on 0.17 acre lots. The scale of the lot and the potential development of such a lot would adversely affect the interests of the community by creating a substantially greater demand on transportation, utility and similar public infrastructure. The ultimate conclusion of

knows that its development proposals for the Wagner Meadows Subdivision must be similar in scale and have the same impacts as other dwellings within the subdivision. The city also argues that GPDC 17.010 contains "factors" or "considerations" that the city may weigh in its discretionary decision to approve or deny the property line vacation. The city distinguishes these "considerations" from approval "standards." Respondent's Brief 10.

ORS 227.173(1) requires that the city adopt standards governing the approval or denial of a "permit" as that term is defined in ORS 227.160(2).[6] The city is allowed latitude in adopting highly subjective approval criteria. *See Lee v. City of Portland*, 57 Or App 798, 646 P2d 662 (1982) (conditional use criterion requiring an applicant to demonstrate why the proposed development is consistent with public health, safety, convenience and welfare is not impermissibly vague). The city is also allowed considerable latitude in explaining what unclear standards require in particular cases. *BCT Partnership v. City of Portland*, 130 Or App 271, 881 P2d 176 (1994) (a code requirement that a proposed development comply with the city's undefined "short-term parking strategy" does not violate ORS 227.173(1) where the city interprets its plan and code to establish the elements of the short-term parking strategy and determines that the application complies with those elements). However, there is a difference between applying a mandatory but vague code standard, and interpreting GPDC 17.112 to require compliance with "factors" or "considerations" not identified in or reasonably suggested by GPDC 17.112.[7] Here, it is clear that the city interpreted its code to

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> the City Council is that the [property] line vacation therefore must be denied." Record 7-8.

[6]ORS 227.160(2) defines "permit" as a "discretionary approval of a proposed development of land, under * * * city legislation or regulation." There is some question as to whether a property line vacation could be considered "development" as that term is defined in ORS 227.215 ("'development' means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access") and used in ORS 227.160(2). However, neither party argues that the proposed action is not a permit and therefore we assume it is.

[7]As the Court of Appeals explained in *BCT Partnership*:

allow the subject application to be denied based on testimony directed at "factors" that are not set forth as standards or criteria. As a result, the city's application of its interpretation violates ORS 227.173(1).

Petitioner's second subassignment of error is sustained.

B. Interpretation of GPDC 17.010 and 17.112

According to the city, the city council interprets GPDC 17.112 to require more than the mechanical application of development code provisions. It requires the city council to determine whether the proposed vacation will protect "public health, safety, welfare, and convenience." In making this determination, the city council has to consider future uses of the property that could occur as a result of the vacation. The city argues that its interpretation of GPDC 17.112 to grant to the city council broad authority to consider both the proposed vacation and potential development occurring as a result of the vacation on the "public health, safety, welfare, and convenience" is supported by the code requirement that the *city council* adopt an ordinance approving the property line vacation. According to the city, the requirement that the resulting property configuration not create a "substandard condition relative to the requirements of [the] Code" is the outside limit of its authority. That is, the city could not approve an application for a property line vacation even if it found other relevant provisions of the code satisfied, if the resulting configuration would result in a

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> "We conclude that, if an ordinance contains provisions that can reasonably be interpreted and explained as embodying the standards and criteria applicable to the particular decision, it is specific enough to satisfy ORS 227.173. Further, it is specific enough to impart the knowledge for which *Lee v. City of Portland, supra*, and *Oswego Properties, Inc. v. City of Lake Oswego*, [108 Or App 113, 814 P2d 539 (1992)] call. If ordinance provisions can reasonably be interpreted as the applicable ones, the proponents and opponents of the permit can reasonably be expected to discern their potential significance." 130 Or App at 276.

GPDC 17.010 cannot be "interpreted and explained as embodying * * * standards and criteria applicable to" the challenged decision in this appeal. The parties could not reasonably have been expected to anticipate that the purpose statement of Article 17 of the GPDC would be applied as a "factor" or "consideration" that could form the basis for approval or denial of the property line vacation. The city used the permissive word "may" in GPDC 17.112 to allow consideration of factors including, "public health, safety, welfare, and convenience" and extrapolated from those factors consideration of potential scale of development and intensity of use. Neither one of those factors are remotely tied to GPDC standards or criteria.

substandard condition. The city argues that this interpretation of its code is within the realm of deference afforded by *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) (a governing body's interpretation of its land use regulations is entitled to great deference).

We need not decide whether the city's interpretation is subject to deference because, as the Court of Appeals stated in *Holland v. City of Cannon Beach*, 154 Or App 450, 458, 962 P2d 701, *rev den* 328 Or 115 (1998), the "*Clark* standard is not determinative" in cases like these. As the court said:

> "'Although the city may interpret its legislation, subject to the limited standard of review defined in *Clark*, neither its interpretation nor its legislation can be given effect if it is contrary to or necessitates the misapplication of a state statute. For example, a city could not circumvent ORS 227.178(3) by "interpreting" approval standards or criteria in its legislation as not being approval standards or criteria.'" *quoting Davenport v. City of Tigard*, 121 Or App 135, 140, 854 P2d 483 (1993) (citation omitted).

In *Holland*, the Court of Appeals determined that the city's interpretation of its code to apply standards on remand which it had previously found to be superseded, violated ORS 227.178(3), in that it applied an approval criterion that was not applicable at the time the application was first submitted. Here, we have already concluded that the city's interpretation and application of GPDC 17.112 as allowing it to consider unspecified "factors" in a decision to approve or deny a property line vacation violates ORS 227.173(1). Therefore, even if the city's interpretation, as a linguistic matter, falls within the scope of discretion afforded by *Clark*, that interpretation cannot be given effect, because it allows the city to approve or deny development based on standards or criteria not set forth in the city's code, in violation of ORS 227.173(1).

Petitioner's first and fourth subassignments of error are sustained.

C. Compliance with ORS 197.763(3)(b)

ORS 197.763(3)(b) provides that the notice of a quasi-judicial hearing must include a list of the "applicable criteria from the ordinance and [comprehensive] plan that apply to the application at issue." Petitioner explains that the city's hearing notice did not set out GPDC

17.010 as an applicable criterion and, therefore, petitioner had no notice of whether or how GPDC 17.010 would be applied. Petitioner argues that the city's reliance on an undisclosed code provision to support its denial of petitioner's application for a property line vacation requires reversal.

The city responds that ORS 197.763(3)(b) and case law addressing it do not require that contextual standards be included in the hearing notice. According to the city, it was sufficient for it to determine that GPDC 17.112 includes consideration of other provisions of the city's code, without specifically listing those other provisions.

ORS 197.763(1) provides that an issue that "may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government." However, if the local government's notice fails to list all applicable criteria a petitioner, in an appeal of the local government's decision, may raise new issues before LUBA related to the omitted criteria. ORS 197.830(3)(a).

Petitioner's petition for review presents several assignments of error pertaining to the applicability and satisfaction of GPDC 17.010, and the city does not argue that petitioner waived those issues by failing to raise them below. The issues raised in the assignments of error may result in reversal or remand of the city's decision, but the failure to list applicable criteria, in and of itself, does not provide a basis for reversal or remand.

The third subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argues that the city's findings are inadequate to establish how the property line vacation fails to satisfy GPDC 17.112. According to petitioner, the findings conclude that development that might occur as a result of the proposed property line vacation may be out of scale with the neighborhood, or may have disproportionate impact on transportation,

utilities or similar public infrastructure. However, petitioner argues, the findings do not conclude that what is actually being proposed would have such effects. Petitioner further argues that the facts that the city relied upon to conclude that the proposed property line vacation is inappropriate for the area are not relevant to any standards established in the development code. Petitioner contends that the city erred by failing to adopt findings addressing the one unarguably applicable criterion—that the proposed property line vacation not "create a substandard condition relative to the requirements of [the] Code." Petitioner argues that its proposed use is permitted in the R-2 zone, that the combined lots are greater than the minimum parcel size in the zone and that, with the sole exception of the setback standards, the proposed residential care facility complies with all applicable criteria.

The city responds that petitioner has not established that it is entitled to a property line vacation as a matter of right. Rather, the city argues, petitioner fails to challenge all of the findings supporting the city's decision, and by failing to challenge those findings, petitioner provides no basis for reversal or remand. According to the city, petitioner's arguments are merely a disagreement with the city's ultimate conclusion that the application fails to satisfy relevant standards, and that disagreement provides no basis for reversal or remand.

We disagree with the city that petitioner failed to adequately challenge the findings supporting the city's decision to deny the property line vacation. As explained above, ORS 227.173(1) requires that the city's decision be based on standards set forth in the city's development ordinance. Here, the city's decision is based on factors that do not constitute standards set forth in the GPDC. Inconsistency with what persons may have envisioned within a particular subdivision, where that vision is not tied to any code requirement, is an inadequate basis for denying a permit application for a property line vacation under the city's code and ORS 227.173(1).

The second and third assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR

According to petitioner, the residents of the proposed care facility fall under the protection of the Federal Fair Housing Act Amendments of 1988 (FHAA). Among other things, the FHAA prohibits discrimination in the sale or rental of housing to persons with handicaps. 42 USC § 3604(f)(1). Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 USC § 3604(f)(3)(B). Under the FHAA, a local government may not adopt special requirements that have the effect of limiting the ability of those persons covered by the act to live in a residence of their choice in the community. Petitioner argues that the city violated the FHAA by failing to adopt findings demonstrating that the denial of its applications does not result in discrimination against protected persons.

The city responds that the city's decision does not result in discrimination. The city contends that if the duty to provide accommodations under the FHAA is implicated, it is up to the applicant to notify the city that the approval of the residential care facility, as proposed, is the minimum necessary to accommodate the targeted residents of the home. Here, the city argues that its reasons for denying the proposed property line vacation have *nothing* to do with the property's resulting use as a residential care facility for Alzheimer's patients, and everything to do with the fact that any development on the combined lots is likely to be out of scale with the subdivision, and will result in additional impacts on public infrastructure. The city argues that petitioner has not demonstrated that it could not construct two dwellings similar in scale to existing dwellings in the subdivision to accommodate the same number of residents. Accordingly, the city argues that petitioner has not demonstrated that the city's decision discriminates against persons with Alzheimer's Syndrome.

We agree with the city that petitioner has not demonstrated that the proposed property line vacation and construction of a 5,511-square foot dwelling on the combined lots are the

minimum necessary accommodations to ensure adequate housing for persons who would occupy the proposed facility.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that because the city erred in its decision regarding the property line vacation, and because the denial of the property line vacation was the sole basis of denial of its site design review application, the city's denial of the site design review application must be reversed.

We agree with petitioner that both decisions must be remanded to allow the city to consider the applications in light of the applicable criteria in its development code.

The fifth assignment of error is sustained.

The city's decisions are remanded.