BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VINCENT DONIVAN and
TIMOTHY DONIVAN,
Petitioners,

vs.

CITY OF LA GRANDE,
Respondent.

LUBA No. 2002-118

FINAL OPINION
AND ORDER

Appeal from City of La Grande.

D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of petitioners.

Jonel K. Ricker, La Grande, filed the response brief and argued on behalf of respondent. With him on the brief was Ricker and Roberson.

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

AFFIRMED 01/13/2003

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 denying their request for approval to partition their residentially zoned lot.

FACTS

Petitioners' lot is currently improved with a single-family dwelling. The proposed partition creates a flag lot with the flagpole portion of the lot providing access to North Fourth Street and the developable portion of the flag lot in the rear. A duplex would be constructed in what is now the rear portion of the existing .32-acre lot.

The existing lot is located in an older developed part of the city. The neighborhood is generally made up of square, rectangular and long rectangular blocks and a grid street system. Almost all of the proximate lots that make up the blocks in the neighborhood are square or rectangular.

The planning commission found that the proposal failed to satisfy two of the relevant approval criteria and denied the request. Petitioners appealed to the city council, which affirmed the planning commission's decision, and adopted the planning commission's findings as its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The city's review criteria for partitions are set out at City of La Grande Land Development Code (LDC) 4.2.002, which provides in relevant part:

> "The preliminary plat for a major or minor partition may be approved only if the reviewing authority shall find that it satisfies the following criteria:
>
> "A. The proposed preliminary plat is in conformance with the La Grande Comprehensive Plan.
>
> "* * * * *

> "F. The parcels are located and laid out to properly relate to adjoining or nearby lot or parcel lines, utilities, streets, bicycle and pedestrian facilities, or other existing or planned facilities[.]"

The city's findings explaining why the city concluded that the proposal is not consistent with the La Grande Comprehensive Plan [LGCP] are as follows:

> "The [LGCP] designates the subject property for Medium Density Residential development. Residential densities are to be between five (5) and ten (10) dwelling units per acre in this land use classification. Currently, there is one (1) dwelling unit on this 0.32 acre site, which converts to a density of about three (3) units per acre. If the Minor Land Partition is approved, there will be a total of three (3) dwelling units on the .32 acre site, which converts to about nine (9) units per acre. Consequently, the Partition will bring the property more into compliance with the density called for in the Comprehensive Plan.
>
> "However, Policy #8 of the [LGCP] Land Use Planning Chapter [hereafter Policy #8] provides that '*Compatibility of anticipated uses with surrounding area development will be evaluated in making planning related decisions.*' Judging by the testimony received from neighborhood residents during the May 28, 2002 Planning Commission meeting, the compatibility of a flag lot and rental units in the middle of this block is questionable." Record 5 (emphasis in original).

The first of the above-quoted paragraphs finds that the application is consistent with residential densities called for in the LGCP. However, the second paragraph seems to find that the proposal is not consistent with the Policy #8 "compatibility" requirement. Although the second paragraph is equivocal about whether the city found that petitioners failed to carry their burden concerning Policy #8, the "CONCLUSIONS" portion of the city's decision is not equivocal: "the partition does not comply with * * * Policy #8, which requires a finding that neighborhood compatibility will be maintained with new development." Record 19.

Citing *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973) and *Bennett v. City of Dallas*, 96 Or App 645, 773 P2d 1340 (1989), petitioners assert it was error for the city to apply Policy #8 as an approval standard. It is true that implementing land use regulations can make it unnecessary to directly apply comprehensive plans in individual quasi-judicial land use decisions. *Durig v. Washington County*, 35 Or LUBA 196, 202-03 (1998), *aff'd* 158 Or App 36, 969 P2d 401 (1999). However, that is by no means a universal

rule, as petitioners appear to argue. *Id*. As we explained in *Durig*, ORS 197.175 specifically requires that land use decisions must be "in compliance with the acknowledged [comprensive] plan and land use regulations." Whether Policy #8 applies as an approval criterion for the quasi-judicial land use decision at issue in this appeal must be determined from the language of the LGCP and LDC, and we owe deference to the city's explicit and implicit interpretations under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).

LDC 4.2.002(A) specifically requires that the city "shall find" that "[t]he proposed preliminary plat is in conformance with the La Grande Comprehensive Plan." While that reference admittedly does not specifically require that the city find that the proposal is in conformance with every aspect of the LGCP or Policy #8 specifically, it is entirely consistent with the city's decision to apply Policy #8. Moving to the language of Policy #8 itself and related language in the Land Use Planning section of the LGCP, petitioners cite language that might be read to suggest that the Land Use Planning section is not intended to be applied directly to individual quasi-judicial land use decisions. However, there is also language that is entirely consistent with the city council's implicit view to the contrary. For example, Objective 2 is "[t]o establish a land use planning process and policy framework as a basis for *all decisions and actions related to use of land* and to assure an adequate factual base for such decisions and actions." (Emphasis added.) That objective is followed by a number of individual policies. The language of Policy #8 itself is not inconsistent with the city's decision to apply it as an approval criterion here:

> "8. That compatibility of anticipated uses with surrounding area development will be evaluated in *making planning related decisions*." (Emphasis added.)

We conclude that the city was well within its discretion in applying LDC 4.2.002(A) and Policy #8 as it did in the disputed decision. To the extent the first assignment of error can be read to include an allegation that the city's decision is not supported by substantial

evidence, petitioners make no attempt to explain why the testimony of neighborhood opponents, which the city's findings cite in support of its compatibility finding, was insufficient to support the city's conclusion that petitioners failed to demonstrate compliance with the Policy #8 compatibility requirement.

Finally, we note two additional issues. First, petitioners point out, correctly, that Policy #8 only requires that compatibility "be evaluated," and suggest a finding that the proposal is incompatible therefore could not be relied on as a basis for denial. We reject the suggestion. It is clear that even if the city could read Policy #8 to impose a *pro forma* "consideration" obligation, it does not do so, and such an interpretation is certainly not dictated by the language of Policy #8.

Finally, we also note that the challenged decision appears to be a limited land use decision.[1] Petitioners do not argue that the city has failed to incorporate Policy #8 into the LDC or that application of Policy #8 is barred by ORS 197.195(1).[2] We therefore do not consider those issues.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

We understand petitioners to withdraw the third assignment of error based on the city's representation that the application was not denied based on inapplicable variance

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[1] As relevant, ORS 197.015(12) defines "limited land use decision" to include final decisions concerning sites located "within an urban growth boundary" that approve or deny a "partition."

[2] ORS 197.195(1) provides as follows:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision."

criteria. Because the city's decision denies the partition application and only a single valid basis for denial is required to support such a decision, we need not and do not consider petitioners' second assignment of error. *West v. Clackamas County*, 20 Or LUBA 433, 435 (1991)

The city's decision is affirmed.