

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE DOOB, LISA BERGER,
5 RAYMOND EGBERT, RICHARD EGBERT,
6 KATHLEEN HOFFMAN and DOUG REINHART,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF GRANTS PASS,
12 *Respondent,*

13
14 and

15
16 CURTIS W. KRUSE, REDWOOD PROPERTY
17 INVESTMENT LLC, LEONARD LIVESAY,
18 LORRAINE LIVESAY and MAX HULL,
19 *Intervenors-Respondent.*

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21 LUBA No. 2004-043

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23 FINAL OPINION
24 AND ORDER

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26 Appeal from City of Grants Pass.

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28 Steve Doob, Merlin, Lisa Berger, Raymond Egbert, Richard Egbert, Kathleen Hoffman,
29 and Doug Reinhart, Grants Pass, represented themselves. Steve Doob filed the petition for review
30 and argued on his own behalf.

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32 No appearance by City of Grants Pass.

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34 Duane Wm. Schultz, Grants Pass, filed the response brief and argued on behalf of
35 intervenors-respondent.

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

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39 REMANDED 06/16/2004

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

NATURE OF THE DECISION

Petitioners appeal the city’s approval of a tentative plan for a 16-lot subdivision.

FACTS

The proposed subdivision is located outside city limits but inside the urban growth boundary of the City of Grants Pass. The 2.2-acre property consists of three tax lots and is zoned for residential development. The property is a long narrow rectangle on the corner of Willow Lane and Redwood Avenue, with the longer side fronting Willow Lane. Both Willow Lane and Redwood Avenue are substandard city roads. The tentative plan proposes access from Willow Lane, and the city required cash security for improvements to Willow Lane and Redwood Avenue in the future. The urban area planning commission approved the tentative plan, and petitioners appealed the decision to the city council. The city council affirmed the planning commission’s decision, and this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Grants Pass Development Code (GPDC) 17.413 provides the approval criteria for subdivisions. GPDC 17.413(3) provides:

“When one is required or proposed, the street layout conforms to the applicable requirements of the adopted street plans, meets the requirements of Article 27 and other applicable laws, and best balances needs for economy, safety, efficiency, and environmental compatibility.”

Because a street plan is proposed, the tentative plan must meet the requirements of GPDC Article 27. GPDC 27.110(1) provides:

“Where proposed development abuts on an existing substandard street or a future street as shown on the Official Street Map, the applicant is obligated to improve one-half (1/2) the street width for the distance the property abuts the street to the full standards contained in this Code. The improvements must be constructed or secured either prior to Final Plat or Map, if subdividing or partitioning, or prior to final Use and Occupancy Permit.

1 “Proposed subdivisions, major partitions, and private streets (serving 4 or more
2 dwelling units) shall be connected to an *existing City standard paved street.*”
3 (Emphasis added.)

4 Petitioners summarize their first two assignments of error by stating that they rest entirely
5 upon a violation of the second paragraph of GPDC 27.110(1). Petition for Review 5.¹ The parties
6 agree that both Redwood Avenue and Willow Lane are substandard streets under the city’s code
7 because they are not wide enough, do not contain bike lanes, and are not improved with curbs,
8 gutters, and sidewalks. The first paragraph of GPDC 27.110(1) requires an applicant to construct
9 or *secure* improvements to substandard streets that abut the subdivision.² Because no access is
10 proposed from Redwood Avenue, the parties agree that the requirement that intervenor post
11 security to pay for future of improvements to Redwood Avenue is sufficient under the first
12 paragraph of GPDC 27.110(1). The parties disagree as to the meaning and requirements of the
13 second paragraph of GPDC 27.110(1). Petitioners argue that the ordinance means what it says,
14 that the development must be connected to an *existing* street that meets city standards. According
15 to petitioners, because Willow Lane is not an existing city standard paved street, the tentative plan
16 cannot be approved as proposed. Intervenor responds that the city properly interpreted the code
17 to allow the necessary improvements to be made in the future as long as security for those
18 improvements is provided by intervenors.

19 The contested language of GPDC 27.110(1) is the requirement that subdivisions and private
20 streets serving four or more dwelling units connect to “an existing City standard paved street.” The
21 city interpreted GPDC 27.110(1) to allow intervenors to either make the required improvements in

¹ The first assignment of error alleges a violation of GPDC 27.110(1) because the *subdivision* is not connected to an existing city standard paved street, while the second assignment of error alleges that GPDC 27.110(1) is violated because the *private streets* are not connected to an existing city standard paved street. Resolution of both assignments of error depend on the propriety of the city’s interpretation of “existing city standard paved street.”

² The parties agree that intervenors secured the improvements by providing a cash deposit to the city.

1 conjunction with the development or to provide security for those improvements to be made in the
2 future.

3 “* * * the question in regard to public improvement is not whether they should be
4 required or installed but a question of timing of the improvements. [GPDC] 27.110
5 provides that [intervenors’] requirement to construct a City standard street can be
6 accomplished by either constructing the required improvements or providing
7 security for future installations.

8 “* * * The property abuts two public streets, Redwood Avenue and Willow Lane.
9 Both of the public streets are currently substandard in relation to sidewalks, curb
10 and gutter, and bike lanes. * * * In this case, the only option available to
11 [intervenors] in order for the subdivision to connect to a City standard paved street
12 is to construct the improvements along both of the public street frontages.
13 However, based on the recommendation of the City Engineer and Josephine
14 County Public Works Department, the applicant was required to post security for
15 the improvements including the payment of a cash security deposit to cover
16 [intervenors’] portion of the costs for constructing the improvements.” Record 16.³

17 Intervenors argue that we must affirm the city’s interpretation unless we determine that it is
18 “clearly wrong.” Response Brief 14. The Court of Appeals, however, has held that its “clearly
19 wrong” description of the deference due a local government interpretation is no longer accurate.
20 *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). Under ORS 197.829(1),
21 *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Church*, we must sustain a
22 local government’s interpretation of its own legislation unless that interpretation is: (1) inconsistent
23 with the express language of the plan or regulation; (2) inconsistent with the purpose of the plan or
24 regulation; (3) inconsistent with the underlying policy providing the basis for the plan or regulation;

³ At oral argument, intervenor argued for the first time that the city interpreted “existing City standard paved street” to only require that the street be paved rather than unpaved, and not to apply to requirements for minimum width, bike lanes, curbs, gutters, and sidewalks. However, that argument was not asserted in the brief or in the city’s findings. Furthermore, the city’s findings implicitly reject that interpretation by stating that “either construction of the remainder of public improvements, or security for future construction where construction is deemed to not be feasible, fulfills the requirement for *connection to a City standard paved street*.” Record 17 (emphasis added). If intervenor were correct then the connection requirement would already be met because Willow Lane is paved, but the city obviously did require the improvements to be made or secured. The city clearly did not adopt the interpretation urged by intervenor at oral argument.

1 or (4) contrary to a state statute, land use goal or rule that the comprehensive plan provision or land
2 use regulation implements.⁴

3 GPDC 27.110(1) is not a model of clarity, but it does appear to envision two different
4 circumstances where improved streets are required. In the first paragraph, GPDC 27.110(1)
5 provides that when proposed development abuts a substandard street that the improvements must
6 either be constructed at the time of development or secured for future construction. That is what
7 occurred for substandard Redwood Avenue. The second paragraph provides that in more limited
8 circumstances, namely larger developments (*i.e.* subdivisions, major partitions, and private streets
9 serving four or more dwelling units), the development must also be connected to an “existing city
10 standard paved street.” The city appears to have treated the requirement for a connection to an
11 “existing city standard paved street” in the same manner that it treated required improvements to
12 development that merely abuts substandard streets: that the requirement can be satisfied by offering
13 security to construct half-street improvements on Willow Lane at some future date. The problem
14 with this interpretation is that it transposes the allowance for future construction from the first
15 paragraph to the second paragraph. However, that alternative allowance for future improvements is
16 not provided for in the second paragraph. As the explicit language of the code provides, the
17 subdivision must be connected to “an *existing* City standard paved street.” The city’s interpretation

⁴ Under ORS 197.829(1):

“[LUBA] 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;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 would effectively read the word “existing” out of the second paragraph and read in an allowance for
2 deferred construction or improvement to city standards. In essence, the city interpreted the code to
3 provide for connection to “an existing *or future* City standard paved street.” Although the city has
4 discretion in interpreting its code, and there are certainly valid policy considerations expressed in the
5 decision for the interpretation the city adopted, the city may not interpret its code to say what it
6 does not say.

7 The first and second assignments of error are sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 GPDC 27.052 provides:

10 “Sidewalks. Pedestrian traffic shall be provided along public streets with standard
11 sidewalk construction. Along private streets, development shall provide for
12 pedestrian needs in a safe and functional manner.”

13 The decision requires that any private streets serving more than four dwelling units include a
14 sidewalk on one side of the street. Petitioners argue that the city did not ensure compliance with this
15 approval criterion because if any of the private streets serve four or fewer dwelling units then no
16 sidewalks will be provided, thereby, according to petitioners, violating GPDC 27.052. Intervenors
17 respond that the city adequately ensured compliance with the sidewalk requirements. The city’s
18 findings state:

19 “Provision of sidewalks on private streets is determined by the number of dwelling
20 units to be served by the private street. For private streets serving four units or less
21 the Code does not require the provision of a sidewalk along the private street.
22 When the number of units exceeds four, then the Code requires a sidewalk along
23 one side of the private street. * * * As the number of units increases the potential
24 for conflicts between vehicles and pedestrians increases. The Council finds that the
25 adopted standards for private streets are appropriate and adequately address safety
26 * * *.” Record 14.

27 Petitioners do not dispute that the code only requires sidewalks for private streets when
28 more than four units are served by the private street, but nonetheless argue that private streets
29 serving four or fewer units must be independently evaluated for safety and functionality, pursuant to
30 GPDC 27.052. We understand the city to have interpreted its code to the effect that safety and

1 functionality are provided for by requiring sidewalks for private streets serving more than four units,
2 and that due to the smaller number of conflicts that occur with fewer units, private streets serving
3 four or fewer units are safe and functional without sidewalks without further evaluation. That
4 interpretation is within the city's discretion under *Clark* and ORS 197.829(1).

5 The third assignment of error is denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 GPDC 27.053 provides:

8 ‘Bikeways. Bike paths and routes shall be provided as designated on the official
9 Bike Route Map. In newly developing areas, bike paths shall be provided within
10 the street section in lieu of on-street parking and shall be implemented at time of
11 development. In older established areas, bike paths shall be safely located, and
12 implemented with the least disturbance to the community, using designated state and
13 local funds, and volunteer resources.’

14 Petitioners argued below and again on appeal that the tentative subdivision plan does not
15 provide for bike lanes on the *private streets* and therefore violates GPDC 27.053. The city's
16 findings and intervenors' brief respond that bike lanes on the *public* streets (i.e. Redwood Avenue
17 and Willow Lane) are provided for by security for future improvements, but they do not make an
18 attempt to respond to petitioners' argument concerning *private* streets. Perhaps bike lanes are not
19 required, now or ever, on private streets. We do not know. Petitioners, however, raised the issue
20 regarding whether the approval criterion requires bike lanes on private streets, and the city is
21 obligated to explain how the criterion is satisfied or why it does not apply to private streets. If bike
22 lanes are required, petitioners would appear to be correct that GPDC 27.053 requires that they be
23 “implemented at the time of development” rather than deferred until a later date. On remand, the
24 city must address whether bike lanes are required on the private streets under GPDC 27.053.

25 The fourth assignment of error is sustained.

1 The city’s decision is remanded.⁵

⁵ We do not reverse the decision, as petitioners urge, because we cannot tell if the city’s approval is “prohibited as a matter of law.” OAR 661-010-0073(1)(c). It may be that there is a sustainable interpretation of GPDC 27.110(1) that would allow approval, or that other conditions can be imposed that would allow approval.