

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE DOOB and LISA BERGER

5 *Petitioners,*

6
7 vs.

8
9 CITY OF GRANTS PASS,

10 *Respondent,*

11 and

12
13 KIRK CHAPMAN CONSTRUCTION, LLC

14 and EASTWOOD CHAPMAN, LLC,

15 *Intervenors-Respondent.*

16
17 LUBA No. 2004-120

18
19 FINAL OPINION

20 AND ORDER

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22
23 Appeal from City of Grants Pass.

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25 Steve Doob, Merlin, and Lisa Berger, Grants Pass, represented themselves. Steve
26 Doob filed the petition for review and argued on his own behalf.

27
28 No appearance by City of Grants Pass.

29
30 Ben Freudenberg, Grants Pass, filed the response brief and argued on behalf of
31 intervenors-respondent.

32
33 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
34 participated in the decision.

35
36 REMANDED

11/15/2004

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision that grants tentative approval for a 53-lot residential subdivision.

MOTION TO INTERVENE

Kirk Chapman Construction, L.L.C. and Eastwood Chapman, L.L.C. move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The subject 11.42-acre property is zoned for residential development and is located inside the City of Grants Pass UGB but outside city limits. The property includes a wetland. The property fronts on three county roads, Redwood Avenue, Hubbard Lane, and Elmer Nelson Lane. None of those county roads is constructed to city standards, and the proposed subdivision would have access onto all three of those roads.

The interior roads would be constructed to city standards at the time of development. As approved, the applicant will be required to construct half-street improvements to Elmer Nelson Lane and to pay a cash deposit and sign a deferred development agreement to facilitate construction of Redwood Avenue and Hubbard Lane to city standards at some unspecified date in the future.

FIRST ASSIGNMENT OF ERROR

The City of Grants Pass Development Code (GPDC) sets out several criteria that the city must apply when considering applications for tentative subdivision approval. One of those criteria is GPDC 17.413(3), which governs street layout:

“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.”

1 In their first assignment of error, petitioners argue:

2 “In his appeal of the [planning commission’s] approval, petitioner [Doob]
3 asserted that: ‘The street layout fails to best balance needs for economy,
4 safety, efficiency, and environmental compatibility.’ In its findings, the city
5 addresses petitioner’s claim, but not in a meaningful way. They describe
6 various facts about the street layout, but do not explain how those facts satisfy
7 the criterion. The criterion alludes to needs for economy, safety, efficiency,
8 and environmental compatibility, but those needs are not described and no
9 street layout alternatives addressing those needs are discussed. Presumably,
10 certain street layouts would favor one or the other of those needs; however, it
11 is impossible to tell from the findings if any alternative street layouts were
12 considered and, thus, if the one that was chosen best balances the economic,
13 safety, efficiency and environmental compatibility needs.” Petition for
14 Review 5.

15 There is nothing in the text of GPDC 17.413(3) that supports petitioners’ apparent
16 contention that GPDC 17.413(3) requires that one or more *alternative* street layouts
17 necessarily must be developed and evaluated in all cases. It may well be that in some cases a
18 number of alternatives are possible and those alternatives implicate the considerations listed
19 in GPDC 17.413(3) differently. While petitioners suggest that such might be the case here,
20 they do not identify what those alternatives might be.

21 In its decision, the planning commission’s findings identify a number of features that
22 have been incorporated into the proposed subdivision street system. Record 207-08.
23 Following petitioner Doob’s appeal, the city council first noted that petitioner “does not
24 provide detail on how the proposed street layout fails to balance the above needs.” Record
25 12. The city council then proceeded to identify a number of additional features of the
26 proposed street system that the city council found were adequate to address the identified
27 needs in GPDC 17.413(3). Record 12-13.

28 Apparently petitioners did not identify alternative street designs that they believe
29 better address the needs identified in GPDC 17.413(3). As we have already noted, GPDC
30 17.413(3) does not expressly require that the city or the applicant develop and evaluate

1 alternatives. Accordingly, we reject petitioner’s contention that the city’s failure to identify
2 and evaluate alternatives in the challenged decision necessarily requires remand.

3 Petitioners also appear to argue that it was reversible error for the city not to provide
4 an interpretation of or describe the GPDC 17.413(3) “needs for economy, safety, efficiency,
5 and environmental compatibility.” However, petitioners neither offer any reason why those
6 needs are ambiguous in ways that require a city interpretation nor explain why the findings
7 the city did adopt are inadequate to establish that the proposed street system best balances
8 those needs.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 GPDC 17.413(3), quoted above, requires that the proposed street plan must “meet[]
12 the requirements of Article 27.” GPDC 27.110(1) provides:

13 “Where proposed development abuts on an existing substandard street or a
14 future street as shown on the Official Street Map, the applicant is obligated to
15 improve one-half (½) the street width for the distance the property abuts the
16 street to the full standards contained in this Code. The improvements must be
17 constructed or secured either prior to Final Plat or Map, if subdividing or
18 partitioning, or prior to final Use and Occupancy Permit.

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

22 There is no dispute that all three streets that provide access to the proposed
23 subdivision are not currently constructed to city standards. In approving the subdivision at
24 issue in this appeal, the city required that the applicant make or secure the improvements
25 required by the first of the above quoted paragraphs of GPDC 27.110(1). We recently
26 considered a case in which the city approved a subdivision where the streets would not
27 connect to an *existing* city standard paved street. In that case, as the city has done in this
28 case, the city required that the abutting substandard streets be improved or secured in
29 accordance with the first paragraph of GPDC 27.110(1) to facilitate the improvement of the

1 abutting streets so that the subdivision would connect with a standard street in the future.
2 *Doob v. City of Grants Pass*, ___ Or LUBA ___ (LUBA No. 2004-043, June 16, 2004). But
3 the city did not require that the proposed subdivision connect to at least one “existing City
4 standard paved street.” We concluded that the city’s interpretation and application of GPDC
5 27.110(1) effectively wrote the second paragraph out of GPDC 27.110(1):

6 “GDC 27.110(1) is not a model of clarity, but it does appear to envision two
7 different circumstances where improved streets are required. In the first
8 paragraph, GPDC 27.110(1) provides that when proposed development abuts
9 a substandard street that the improvements must either be constructed at the
10 time of development [or] secured for future construction. That is what
11 occurred for substandard Redwood Avenue. The second paragraph provides
12 that in more limited circumstances, namely larger developments (*i.e.*
13 subdivisions, major partitions, and private streets serving four or more
14 dwelling units), the development must also be connected to an ‘existing city
15 standard paved street.’ The city appears to have treated the requirement for a
16 connection to an ‘existing city standard paved street’ in the same manner that
17 it treated required improvements to development that merely abuts
18 substandard streets: that the requirement can be satisfied by offering security
19 to construct half-street improvements on Willow Lane at some future date.
20 The problem with this interpretation is that it transposes the allowance for
21 future construction from the first paragraph to the second paragraph.
22 However, that alternative allowance for future improvements is not provided
23 for in the second paragraph. As the explicit language of the code provides, the
24 subdivision must be connected to ‘an existing City standard paved street.’
25 The city’s interpretation would effectively read the word ‘existing’ out of the
26 second paragraph and read in an allowance for deferred construction or
27 improvement to city standards. In essence, the city interpreted the code to
28 provide for connection to ‘an existing or future City standard paved street.’
29 Although the city has discretion in interpreting its code, and there are certainly
30 valid policy considerations expressed in the decision for the interpretation the
31 city adopted, the city may not interpret its code to say what it does not say.”
32 Slip op at 5.

33 We note that GPDC 27.110(1) apparently was amended on October 6, 2004, after the
34 application that led to the decision in this appeal was filed and after the city adopted the
35 appealed decision. That amendment may have been adopted in response to our June 16, 2004
36 decision in *Doob v. City of Grants Pass*. However, the prior version of GPDC 27.110(1),
37 which is set out in the text, applied in *Doob v. City of Grants Pass* and applies in this appeal.

1 ORS 227.178(3)(a) (“approval or denial of the application shall be based upon the standards
2 and criteria that were applicable at the time the application was first submitted”). The public
3 hearing before the city council in this appeal occurred on June 16, 2004, the same day we
4 issued our decision in *Doob v. City of Grants Pass*. Although that may explain why the city
5 repeated its error in this case, it does not excuse the error.

6 The second assignment of error is sustained.

7 **THIRD ASSIGNMENT OF ERROR**

8 In accordance with longstanding city/county practice in reviewing applications for
9 land use approval in areas within the UGB but outside the city limits, the city provided notice
10 to the Division of State Lands that it had received an application to subdivide land with
11 wetlands. Record 246. The applicant prepared a Wetland Determination and Delineation
12 Report, dated March 22, 2004. Record 247-60. A June 2, 2004 Wetland Delineation was
13 subsequently prepared. Record 35-77. On June 30, 2004, DSL concurred with the June 2,
14 2004 Wetland Delineation. According to the challenged decision, the applicant plans to
15 preserve 1.6 acres of the 1.85-acre wetland and deed that part of the wetland to the city.
16 Record 16. Deed restrictions will be imposed to limit uses on the lot that will abut the
17 wetland, and the applicant will be required to comply with DSL and Army Corps of Engineer
18 requirements. *Id.*

19 Under their third assignment of error, petitioners allege the city erred by neither
20 adopting a program to protect the 1.85-acre wetland nor applying the “safe harbor” provisions
21 of OAR 660-023-0100(4)(b) to protect that wetland. We first review the rules that petitioners
22 argue the city erroneously failed to apply in this case, before turning to the city’s decision.

23 OAR 660-023-0100 sets out planning requirements for wetlands under Statewide
24 Planning Goal 5 (Natural Resources, Scenic and Historic Resources, and Open Spaces).
25 Within urban growth boundaries, OAR 660-023-0100(3) requires:

1 “For areas inside urban growth boundaries (UGBs) and urban unincorporated
2 communities (UUCs), local governments shall:

3 “(a) Conduct a local wetlands inventory (LWI) using the standards and
4 procedures of OAR 141-086-0110 through 141-086-0240 and adopt
5 the LWI as part of the comprehensive plan or as a land use regulation;
6 and

7 “(b) Determine which wetlands on the LWI are ‘significant wetlands’ using
8 the criteria adopted by the Division of State Lands (DSL) pursuant to
9 ORS 197.279(3)(b) and adopt the list of significant wetlands as part of
10 the comprehensive plan or as a land use regulation.”

11 Once the wetlands within a UGB are inventoried, and “significant wetlands” on the inventory
12 are identified, OAR 660-023-0100(4) requires:

13 “For significant wetlands inside UGBs * * *, a local government shall:

14 “(a) Complete the Goal 5 process and adopt a program to achieve the goal
15 following the requirements of OAR 660-023-0040 and 660-023-0050;
16 or

17 “(b) Adopt a safe harbor ordinance to protect significant wetlands
18 consistent with this subsection, as follows:

19 “(A) The protection ordinance shall place restrictions on grading,
20 excavation, placement of fill, and vegetation removal other
21 than perimeter mowing and other cutting necessary for hazard
22 prevention; and

23 “(B) The ordinance shall include a variance procedure to consider
24 hardship variances, claims of map error verified by DSL, and
25 reduction or removal of the restrictions under paragraph (A) of
26 this subsection for any lands demonstrated to have been
27 rendered not buildable by application of the ordinance.”

28 The above rules were adopted and became effective in 1996. Prior to that date, in
29 1991, Josephine County initiated a study of wetlands, the Wetlands Resource Plan. The
30 Wetlands Resource Plan was completed in 1998 and adopted by the county and city in 1998.
31 The plan was subsequently amended and was acknowledged by the Land Conservation and
32 Development Commission (LCDC) in 1999.

1 Although the precise status of the disputed wetland is somewhat unclear, it is
2 undisputed that the Wetlands Resource Plan does not include the disputed wetland on a
3 LWI.¹ Neither has the city conducted the additional planning for the disputed wetland that is
4 required by OAR 660-023-0100(4)(b). Nevertheless, it also is undisputed that the Wetlands
5 Resource Plan was acknowledged by LCDC in 1999. In that circumstance, the acknowledged
6 comprehensive plan and land use regulations apply, and neither Goal 5 nor its implementing
7 rules apply directly to this application for subdivision approval. ORS 197.175(2)(d).
8 Although there are limited circumstances where the statewide planning goals may apply
9 directly to a permit or subdivision decision that is governed by an acknowledged
10 comprehensive plan and land use regulations, petitioners do not allege that any of those
11 circumstances exist here.²

12 Petitioners’ argument under the third assignment of error is effectively an argument
13 that the Wetland Resource Plan should not have been acknowledged in 1999 and, as a
14 consequence, that the Goal 5 rule should apply directly to this decision. That argument is an
15 impermissible *de facto* collateral challenge to the 1999 acknowledgment decision. *See*
16 *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996).

17 The third assignment of error is denied.

18 Because we sustain petitioners’ second assignment of error, the city’s decision is
19 remanded.

¹ A planning staff report in the record explains “[t]hese wetlands were neither included in the study area nor the wetlands plan, and therefore identified simply as ‘wetlands not covered by this plan’.” Record 86.

² For example LCDC may require that new or amended Goals be applied directly and it may order a local government with an acknowledged comprehensive plan and land use regulations to apply the goals directly. ORS 197.245; 197.320.