BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BOB BAKER, ELEANOR MARIE FALLON BERGHAGEN, CLANCY FISHER, SHEILA FISHER, FREDERICK GRIMES, HARRIET ELIZABETH HARVEY, RICHARD McEACHERN, ANNA MILLER, JAMES WEISBERG, YVONNE WEISBERG and DORIS WILCOX,
Petitioners,

vs.

CITY OF GARIBALDI,
Respondent,

and

JOSEPH L. TAYLOR,
Intervenor-Respondent.

LUBA No. 2004-154

FINAL OPINION
AND ORDER

Appeal from City of Garibaldi.

Barbara L. Johnston, Hillsboro, filed the petition for review. With her on the brief were Michael F. Sheehan, Ellen Johnson and Michelle Ryan. Michael F. Sheehan argued on behalf of petitioners.

No appearance by City of Garibaldi.

Kelly S. Hossaini, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash LLP.

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

REMANDED 05/23/2005

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

provisions of ORS 197.850.

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal the city's approval of a 44-lot residential planned unit development.

FACTS

Intervenor, the applicant below, owns a 7.15-acre parcel in the City of Garibaldi that is currently developed with a 44-unit mobile home park. The slopes on approximately 2.36 acres of the subject property exceed 20 percent, while the rest of the parcel has less steep slopes. In 2003, intervenor filed an application to develop a 47-lot residential planned unit development (PUD). The city denied that application because the Hillside Overlay Zone (HOZ), which the city determined applied, required larger minimum lot sizes than were proposed in the PUD. Intervenor did not pursue that application any further, and filed the current application for a 44-lot residential PUD in 2004. This new application, although similar to the 2003 application, does not propose any development in areas containing slopes of 20 percent or greater. The planning commission characterized the 2003 decision as interpreting the HOZ to apply to the entirety of parcels that contained any area with slopes in excess of 20 percent. The planning commission reversed the prior "interpretation" and found that the HOZ only applies to the part of any parcel with over twenty percent slopes rather than to the entire parcel. Based on this interpretation, the planning commission approved the application. Petitioners appealed the planning commission's decision to the city council, which affirmed the planning commission's approval. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Garibaldi Zoning Ordinance (GZO) 3.120 is the HOZ that provides in pertinent part:

> "(1) Purpose. The Hillside Overlay Zone applies to all areas of the city where the slope of the land is 20 percent or greater. The intent of the Zone is [to] establish special criteria and procedures for development in a way that the potential for property damage and adverse impacts on the natural environment are reduced, so that safe, orderly and beneficial development in the zone results. * * *

> "(2) Area Affected. Areas of land with a slope of more than 20 percent are identified on a map titled 'Slope, Garibaldi, Oregon' which is contained in the Comprehensive Plan of the City of Garibaldi. The boundaries of this overlay district are consistent with information available to the City on the slope of parcels within the City. Boundaries may be changed where the site specific survey information shows that the slope of a given parcel of land is less than 20 percent. Where such information is provided, the requirements of Hillside Overlay Zone are not applicable."[1]

As described briefly above, the city interpreted the HOZ to be applicable only to the portions of the parcel containing slopes over 20 percent as follows:

> "The City's Hillside Overlay Ordinance does not apply to the entire site. * * * The record includes an engineered survey showing all of the slopes over 20% on the site. No construction will occur within the Hillside Overlay Zone. A prior interpretation by the City Council that the Hillside Overlay Zone applies to the whole site was for a different application that was denied. The applicant filed a new application so any prior interpretations for a denied project do not apply under ORS 227.178(3) * * *." Record 2.

Petitioners' first assignment of error challenges the city's reversal of its prior interpretation.[2] Intervenor responds to each of those arguments. However, because we do not agree with the challenged decision's or the parties' characterization of the 2003 decision, as explained below, we need not reach those issues.

The challenged decision characterizes the 2003 decision as adopting an interpretation regarding the scope of applicability of the HOZ ordinance. The challenged decision and intervenor in his brief contend that the subject application involves a new and different application and proceeding and that the city is therefore not bound by the interpretation adopted in the 2003

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[1] Although the HOZ references an official map as part of the comprehensive plan, apparently no such map exists. Also, GZO 3.120(1) states that the HZO applies to slopes of "20 percent or greater" while GZO 3.120(2) states that the HOZ applies to slopes of "more than 20 percent." The two subsections are inconsistent as to slopes of precisely 20 percent. While we note the discrepancy, it does not affect our disposition of the first three assignments of error.

[2] Petitioners argue that the city's interpretation is prohibited by the law of the case. They also argue that the city is bound by its previous interpretation in the 2003 decision. Petition for Review 9 (citing *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998)).

decision. However, we do not see that the 2003 decision adopted any interpretation of GZO 3.120. With regard to the HOZ, the 2003 decision provides:

> "The parent zone is R-1 Residential within the Hillside Overlay Zone. Therefore, the underlying zone shall be the standards of the Hillside Overlay Zone. The minimum lot size allowed is 8,000 square feet per unit. Utilizing the Planned Unit Development standard of aggregated site density determined by gross land total divided by minimum lot size, the allowed density would permit 39 units.
>
> "The preliminary tentative plan for the Harbor View Estates planned unit development showed 47 units. The applicant submitted appeal stating that he did not want to submit a revised site design with only 39 units.
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> "* * * * *
>
> "The preliminary plan for the Harbor View Estates planned unit development fails to meet the requirements of applicable criteria as follows:
>
> "1. The tentative plan violates density standards of the underlying Hillside Overlay zone determined by the City of Garibaldi Zoning Ordinance.
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> "* * * * *." Record 42-43.

The 2003 decision merely assumed that the subject property was within the HOZ and therefore assumed that the overlay zone applied to the entire property.[3] As far as we are made aware, the 2003 application did not include a "site specific survey" nor did it propose to change the boundaries of the overlay zone, as the code provides for and as the subject application proposes. Accordingly, at least for purposes of petitioners' arguments in this assignment of error, it cannot be said that the 2003 decision provided an interpretation of how the HOZ must be applied. The city was therefore not constrained in any way by the 2003 decision.[4]

Petitioners argue that the city's interpretation misconstrues the applicable law on the merits. As discussed earlier, the city reinterpreted the HOZ to only apply to the specific areas with slopes

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[3] It may be that the planning commission, not the city council, adopted an interpretation of the ordinance during the 2003 proceedings. However, the challenged decision states that the previous interpretation is one of the city council. Record 2.

[4] We provide no opinion on whether the city would be constrained by the 2003 decision if that decision did contain an interpretation contrary to the one adopted in the challenged decision.

of 20 percent or greater, while petitioners argue that the HOZ should apply to all parcels that contain slopes of 20 percent or greater. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we will only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose or policy of the ordinance.[5]

Petitioners rely on the language of HOZ 3.120(2) that refers to "parcels" when describing the affected area of the HOZ. They contend that if any portion of a parcel of land contains slopes in excess of 20 percent, then the HOZ applies to the entire parcel. Intervenor, on the other hand, relies on the language of HOZ 3.120(1) and (2) that refers to "areas" where the slope is 20 percent or greater. The purpose of the HOZ, intervenor explains, is to protect development from hazards associated with development on steep slopes. They contend that it makes no sense, and does not further the purposes of the HOZ, to apply the HOZ to an entire parcel where only a small portion of the parcel is steep.

The HOZ is ambiguous as to what the proper interpretation should be regarding the area affected by the HOZ. While both the petitioners' and the city's interpretations appear defensible, we cannot say that the city's interpretation is inconsistent with the language, purpose or policy of the HOZ. Therefore, the city's interpretation that the HOZ may be applied only to the "areas" with slopes of 20 percent or more must be affirmed.

The first, second, and third assignments of error are denied.

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[5] ORS 197.829(1) provides, in relevant part:

> "[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:
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> "(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[.]"

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city's findings that the application complies with conditional use and PUD approval criteria are not supported by substantial evidence. GZO 6.020(5) requires that the "site's physical characteristics in terms of topography, soils and other pertinent considerations are appropriate for the intended use." GZO 10.040(1) provides that PUDs may only be established "on parcels of land which are suitable for the proposed development * * *." Petitioners argue that the city did not adequately account for problems with unstable fill, geological hazards and drainage problems. The city relied on a geotechnical report provided by intervenor's expert to find that there either are no such problems or that any such problems could be solved. The city's findings relying on the report state:

> "Conditions of approval include the applicant complying with all recommendations in the Geologic Hazard Report conditions of approval. * * * The applicant's expert evidence provided in its geotechnical report and expert testimony demonstrates that there are solutions to all soils and drainage issues affecting the site, and that these solutions are possible, likely and reasonably certain to succeed. Final engineering plans will be consistent with the recommendations in the geotechnical report." Record 3.

We recently addressed a similar issue in *Sisters Forest Planning Committee v. Deschutes County*, 48 Or LUBA ___ (LUBA No. 2004-073, October 13, 2004). In that case the petitioner challenged the county's inclusion of a condition of approval that the applicant implement all the recommendations contained in a letter from the applicant's fire prevention expert to approve a large tract forest dwelling. We rejected the petitioner's argument, finding that the letter was not "drafted so poorly that it may be inadequate to ensure compliance with an applicable approval standard it had been imposed to address." Slip op 12. Although the Court of Appeals affirmed our final opinion and order on all other matters, it reversed our opinion regarding conditions of approval based on the expert's letter:

> "In short, petitioner is correct that some of the recommendations in [the fire expert's] letter are too imprecise or hypothetical to serve as conditions of approval. Others, particularly when considered in light of the conditions contained in the county's administrative decision, are confusing or are not in apparent conformity

> with the county's own stated conditions or its ordinances. It may be that the applicant could implement [the fire expert's] recommendations in a manner consistent with the county's own stated conditions and its code. On its face, however, the county's decision is inadequate for the reasons described." *Sisters Forest Panning Committee v. Deschutes County*, 198 Or App 311, 319, ___ P3d ___ (2005).

As in *Sisters Forest Planning Committee*, the recommendations in the geotechnical report are too imprecise or hypothetical to serve as adequate conditions of approval. Although the city's decision reads as though the report contains its own conditions of approval section, it does not. The recommendations and suggestions are interspersed throughout the report.[6] Many of the recommendations suggest some future activity, but are unclear as to what that activity should be. For instance, regarding uncontrolled fill and buried soils, the report states:

> "Future settlement and additional compaction are probable, and this may damage future home foundations. * * * In addition, it is also possible that organic mucky peat soils may have been buried and are slowly settling. Future work should evaluate the degree of filling and soil burial. It will most likely be necessary to excavate and replace the fill with adequate materials, according to engineering specifications." Record 263.

Regarding optional building standards, the report states:

> "* * * consideration should be given to designing structures to meet the higher standards on a voluntary basis. * * * Thought should be given to the inadequacies of the prevailing design standards * * *." Record 265.

Finally, the executive summary states:

> "Damage to existing concrete foundations and retaining walls suggests that the fill was not adequately compacted or the subgrade properly prepared at the time of emplacement. Future settling is likely, and these materials require further investigation and possible excavation, replacement, and compaction. Drainage should be controlled and piped to the base along Whitney Creek, a small creek on the property, or into storm sewers." Record 254.

[6] It does not appear that the expert intended the report to take the place of conditions of approval from the city, but was meant to provide information and evidence about potential hazards.

The above are not discrete conditions of approval, they are suggestions for future study, possible future actions, considerations and thoughts, and potential alternatives. As such they are too imprecise or hypothetical to serve as adequate conditions of approval. On remand, the city should clearly state what the conditions of approval are and how they serve to meet the applicable approval criteria.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the conditions of approval improperly deferred discretionary decision making to a second stage without providing petitioners a right to participate and appeal. The conditions of approval that arguably improperly deferred discretionary decision making were based on the recommendations contained in the geotechnical report at issue in the fourth assignment of error. We sustained that assignment of error because the recommendations in the report were too imprecise or hypothetical to serve as conditions of approval, and the city will necessarily have to adopt new conditions of approval. Accordingly, it would serve no purpose to consider whether the inadequate recommendations improperly deferred decision making to later stage, especially where we cannot tell precisely what those recommendations entail.

We do not reach the fifth assignment of error.

EIGHTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred by considering a revised application submitted to the city the day before the city council hearing. According to petitioners, it was improper for the city to consider a revised application and to not allow sufficient time for a response. The revised plan either made substantial changes to the original application or added additional information not contained in the original application. Intervenor argues that the revised plan is not really a new application or preliminary plan, but merely additional *evidence* offered to demonstrate that the original preliminary plan can satisfy the concerns raised by petitioners below.

If we agreed that the revised plan were merely evidence, then we likely would agree with intervenor that the city council's consideration of the revised plan would not be in error. The hearing was an evidentiary hearing, the revised plan was submitted the day before the hearing, and petitioners could have asked for additional time to leave the record open to respond to the new evidence but did not. We do not, however, agree with intervenor that the city merely considered the revised plan evidence in support of the original preliminary plan. The city's decision indicates that the revised plan is considered the preliminary plan, or at least a component part of the preliminary plan.

> "Revised Plan Presented to City Council * * * is not a Substantial Revision. The revised plan submitted to the City Council is not substantially different than what was presented to the Planning Commission. The plan was revised primarily to address the concerns of the appellants and the Planning Commission's findings in terms of showing a public road, designating building envelopes and parking areas on some of the lots, and noting how the solar access ordinance does not apply. The same number of lots are proposed under both plans and the 20% slopes will not be built upon. Under section 11.050(4) GZO, an appeal of a Planning Commission hearing can be heard by the City Council de novo on the merits. Section 11.050(6) GZO allows additional evidence to be presented to City Council if it could not reasonably have been presented at the prior hearing or a hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action. The City Council issued notice that it would have a de novo hearing and accept new evidence. New evidence was presented at the City Council hearing only for the purpose of addressing the appellant's concerns." Record 4.

Although the city states that it is accepting the revised plan as new evidence, it is also clear that the city considered the revised plan as an actual revision to the application. The continued reference to the "revised plan" and the suggestion that it is merely a minor revision both support the conclusion that the city considers the revised plan more than mere evidence. Although the city does not believe the revision is substantial, it is clear that the revisions are necessary to bring the preliminary plan into compliance. While new evidence may be submitted at an appeal hearing, a new application may not, at least not without allowing all parties an adequate opportunity to review and respond to the new application. The hearing was an appeal of the preliminary plan approved by the planning commission. Absent explicit local ordinances so allowing, a local government may

not allow a revised application to be substituted for the appealed application unbeknownst to other parties.

The eighth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error challenges the city's decision that the PUD application meets the approval criteria of GZO 3.010(2) and (3). In reaching its decision that the approval criteria are satisfied, the city relied on information contained in the revised plan. In our disposition of the eighth assignment of error we held that the city could not rely on the revised plan. Because the decision relies on the revised plan to satisfy the approval criteria, it would serve no purpose for us to address whether the improperly submitted revised plan meets the applicable approval criteria.

We do not reach the sixth assignment of error.

SEVENTH ASSIGNMENT OF ERROR

Petitioners argue that the city misconstrued the applicable law by failing to require a traffic impact study (TIS). GZO 11.095(C) provides:

> "(C) When Required. A Traffic Impact Study may be required to be submitted to the City and ODOT with a land use application, when the following conditions apply:
>
> > "1. The development application involves one or more of the following actions:
> >
> > " * * * * *
> >
> > > "(c) The development shall cause any one or more of the following effects * * *
> > >
> > > > "(i) An increase in site traffic volume generation by 150 Average Daily Trips (ADT) or more * * *."

The application proposes to change the use on the subject property from a 44-lot mobile home park to a 44-lot residential PUD. Under the GZO, a residential lot produces 10 ADTs. GZO 11.095(B). Although the number of residential lots will remain the same, petitioners argue that the PUD will generate 210 additional ADTs because 23 of the current lots are empty. According to

petitioners, because 210 additional ADTs will be generated, intervenor was required to prepare a TIS.

Initially, intervenor argues that it is entirely within the city's discretion not to require a TIS because GZO 11.095(C) provides only that the city "may" require a TIS. Therefore, according to intervenor, even if the city could have required a TIS, it was free not to impose that requirement. While we are inclined to agree with intervenor's interpretation of GZO 11.095(C), that is not the reason the city gave for not requiring a TIS.

The city's findings state:

> "No traffic study is required because based on accepted standards of traffic engineering, trip calculations are based on the number of lots and the applicant is replacing 44 trailer spaces with 44 lots in the new development. There will be no change in the potential number of trips generated by this proposal over and above what has existed on the property in the past." Record 4.

We see no error in the city basing its calculation of any increase in ADTs on the potential use of the existing trailer lots and future lots rather than on a snapshot of the actual use at one distinct point in time. The fact that some of the trailer spaces are currently empty does not mean that they cannot be, or perhaps already have been, occupied. Accordingly, the city did not misconstrue GZO 11.095(C) by not requiring a TIS.

The seventh assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Petitioners argue that the city violated the federal Fair Housing Act, 42 USC §§3601-3631 and ORS 197.480 by approving the conversion of the mobile home park to a residential PUD. According to petitioners, these laws require the city to plan and zone for adequate housing opportunities for residents of mobile home/manufactured dwelling parks that are displaced when such parks close. Intervenor's response is that the issue was not raised below. We agree with

petitioners that the issue was sufficiently raised below in a letter stating, "City's Obligations Under the Fair Housing Act and Related Legislation." Record 51-52.[7]

While we express no opinion on whether the Fair Housing Act or ORS 197.480 could serve as a basis to deny a land use permit application that otherwise must be approved, the issue was raised below and not responded to by the city. On remand, the city should address this issue.

The ninth assignment of error is sustained.

TENTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in approving a PUD that fails the purpose section of GZO 10.020 which provides:

> "The purpose of this article is to provide a more desirable environment through the application of flexible and diversified land development standards following an overall comprehensive site development plan."

According to petitioners, the reduced lot sizes are not more desirable than those that would be required in the underlying zone.

Intervenor responds that the purpose statement is not an independent approval criterion, and the city was not required to find that the smaller lot sizes were more desirable. Whether a purpose statement is an approval criterion depends on the wording and context.

> "Purpose statements in land use regulations are often generally worded expressions of the motivation for adopting the regulation, or the goals or objectives that the local government hopes to achieve by adopting the regulation. Where a purpose statement is worded in that manner, it does not play a direct role in reviewing

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[7] Petitioners' attorney's letter provides:

> "**The City's Obligations Under the Fair Housing Act and Related Legislation**
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> "The City is a recipient of substantial federal funding. This funding brings with it, and the City has acknowledged, the obligation to affirmatively further the goals of Fair Housing for many generally low income populations, but especially for the low income disabled. As noted, the residents of the Biak Park have a disproportionately high level of disabled residents within the park. The City has an obligation not to take actions which have a disparate impact on this population, and to plan for adequate housing opportunities for this group. Goal 10 and 42 USC 3601 et seq. The City appears poised to do the former and has not done the latter, both of which could well have catastrophic impacts on an entire population of people."

> applications for permits under the land use regulations. * * * In other cases, however, purpose statements can impose additional affirmative duties upon the local government that must be fulfilled." *Freeland v. City of Bend*, 45 Or LUBA 125, 130 (2003).

GZO 10.020 is a generally worded expression of the basis and motivation for the PUD ordinance. The PUD regulations are clearly intended to ensure that PUD provide a more desirable environment than what is allowed in the underlying zone. Furthermore, petitioners make no effort to explain why they believe such a purpose statement becomes an approval criterion. The purpose statement does not impose any additional requirements upon the city in approving PUDs.

The tenth assignment of error is denied.

The city's decision is remanded.