BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVE TOLER,
Petitioner,

vs.

CITY OF CAVE JUNCTION,
Respondent,

and

MANOR COMMUNITIES
DEVELOPMENT COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2006-154

FINAL OPINION
AND ORDER

Appeal from City of Cave Junction.

Dave Toler, Cave Junction, filed the petition for review and argued on his own behalf.

No appearance by City of Cave Junction.

Michael M. Reeder, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Arnold Gallagher Saydack Percell Roberts & Potter, PC.

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

AFFIRMED 12/15/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision approving a master planned development to construct an assisted living facility with 86 units in 43 duplexes, and a related central medical facility, on a 10-acre parcel zoned Employment and Industrial (EG-LI).

MOTION TO INTERVENE

Manor Communities Development Company, LLC (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

On August 22, 2005, the city adopted Ordinance 472, which amended the city code to include definitions for "medical facility," among other related definitions, and which added "medical facilities" to the list of outright permitted uses in the EG-LI zone. Shortly thereafter, intervenor filed an application for a master planned development on the subject property that includes 13 lots with 86 residential units in 43 duplexes, with a central general services building. The city approved the application as a "medical facility." Petitioner and others appealed the city's decision to LUBA. On November 14, 2005, after the appeal was filed, the city adopted Ordinance 477, which repealed Ordinance 472, and replaced it with language almost identical, except that the definition of "medical facility" was amended to specifically include "assisted residential facilities."

The city sought voluntary remand of its initial decision, which LUBA granted. *Fosmore v. City of Cave Junction*, ___ Or LUBA ___ (LUBA No. 2005-134, March 7, 2006). On remand, intervenor withdrew the application, and submitted a new, but nearly identical application. Under the application, the central facility is proposed to include doctor's offices, physical therapy capability, and a dining hall. Each of the duplex units is handicap accessible and is designed to allow for a live-in caregiver. On July 24, 2005, the city council voted to approve the application, with conditions. Condition of Approval 5

requires that the residential units shall be occupied by residents qualifying for care under a State of Oregon licensed private duty care-giving agency. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

The EG-LI provides for a number of industrial and commercial uses, but no residential uses. As noted, in 2005 the city adopted an ordinance that added "Medical facility" to the list of permitted uses in the EG-LI zone. As amended by Ordinance 477, City of Cave Junction Zoning Ordinance (CJZO) 17.08.537 defines "medical facility" as follows:

> "'Medical facility' means a prescribed physical structure or location, which provides or coordinates a range of supportive personal health services, *that may include assisted residential facilities*. A Medical Facility shall provide a minimum of two (2) or more, at the discretion of the Council, of the following services:
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> "A. Medication administration and supervision;
>
> "B. Medical assessment by qualified health care provider;
>
> "C. Assistance with treatment of health related issues by a qualified health care provider;
>
> "D. Coordination of Medical and Dental Care services;
>
> "E. Prescription of medication in accordance with Oregon State Law." Record 36 (emphasis added).

Petitioner argues that the proposed development will consist of 13 lots, 12 of which will be developed with residential duplexes accounting for approximately 90 percent of the project acreage. The only proposed "medical facility" will be a general services building that will include a dining hall and limited medical facilities that account for about five percent of the project acreage. According to petitioner, the proposed development is essentially a residential development, and residential use conflicts with the purpose and intent of the EG-LI zone. *See* CJZO 17.30.020 (the EG-LI zone "allows a wide range of employment opportunities without potential conflicts from interspersed residential uses"). Petitioner cites to a statement by a Department of Land Conservation and Development (DLCD)

representative that the proposal to "place residential uses in the industrial zone creat[es] the very conflicts the employment and industrial district seeks to avoid." Record 89-90. Petitioner contends that allowing what is essentially a senior housing project in the industrial zone jeopardizes the health and safety of seniors who would live alongside any industrial uses later sited in the zone.

Intervenor responds that to the extent petitioner is arguing that the scope of "medical facilities" as defined by code does not include "assisted residential facilities," petitioner's arguments are an impermissible collateral attack on Ordinance 477. We agree with intervenor that any inconsistency between the code definition of "medical facilities" and the purpose or text of the EG-LI zone cannot be challenged in this decision. For good or ill, "medical facilities" are allowed in the EG-LI zone, and those facilities may include "assisted residential facilities." However, we understand petitioner to also advance the argument that the proposed development does not in fact qualify as an "assisted residential facility" that is allowed as part of a "medical facility."

The code does not define "assisted residential facility" and nothing cited to us in the code or elsewhere informs us of the intended scope of that term. We understand petitioner to argue that that term must be read in context with the purpose of the EG-LI zone, which is intended in part to protect commercial and industrial uses from conflicts with "interspersed residential uses." Viewed in that context, petitioner argues, the scope of "assisted residential facility" that may be allowed as part of a "medical facility" must be interpreted narrowly to exclude the proposed development, which resembles a traditional residential development more than a medical facility of any kind.

Intervenor responds that the city council properly found that the proposed development qualifies as an "assisted residential facility." Intervenor points out that the city council added that language to the definition of "medical facility" with this specific proposal development in mind. According to intervenor, the facility as a whole meets the definition of

"medical facility," because it will provide or coordinate two or more of the types of medical care listed in CJZO 17.08.537. To further ensure that the facility qualifies as an "assisted residential facility" and "medical facility," intervenor argues that the city appropriately conditioned development on a requirement that residential units be occupied only by residents qualifying for care under state-licensed care-giving agencies.

We agree with intervenor that petitioner has not demonstrated that the city erred in concluding that the proposed development qualifies as an "assisted residential facility" and "medical facility." While the text and context of CJZO 17.08.537 give little indication of the city council's intent in adopting Ordinance 477, petitioner does not dispute intervenor's claim that the city council intended that ordinance to clarify that the very same development at issue here qualifies as an "assisted residential facility." Petitioner does not dispute that the proposed facility will provide or coordinate at least two of the types of medical care listed in CJZO 17.08.537.

Further, presumably to address concerns raised that the residential units may be occupied by persons not requiring assisted care, and thus convert the development into something other than an "assisted residential facility," the city imposed Condition 5. Petitioner argues that there is no evidence that Condition 5 can be met, citing statements attributed to a representative to the state agency that licenses assisted living and residential care facilities that (1) there is a moratorium on the development of assisted living facilities in the area of the state including the city, and (2) the agency is unaware of any proposal to license such a facility in the city. Record 80-81. However, condition 5 does not require that the facility itself be licensed as an assisted living or residential care facility, as those terms are used under state law. Rather, Condition 5 requires that the residents qualify for care "under a State of Oregon licensed private duty care-giving agency." Petitioner does not explain why that condition cannot be met, or why a facility that complies with Condition 5 does not qualify as an "assisted residential facility" for purposes of CJZO 17.08.537.

LUBA must defer to the city council's interpretation of local land use legislation that is consistent with the plain language, purpose and policy underlying that legislation. ORS 197.829(1).[1] For the foregoing reasons, we cannot say that the city council's view that the proposed development qualifies as an "assisted residential facility" and "medical facility" as defined by CJZO 17.08.537 is reversible under ORS 197.829(1).

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

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the location of one of the property boundaries between the subject property and an adjoining property is disputed, and may be challenged in court. Although petitioner does not explain why, we understand petitioner to contend that the city erred in approving the proposed development without resolving that boundary dispute or ensuring that its resolution would not affect lot sizes within the development.

Intervenor argues that petitioner waived this issue by failing to raise it below. ORS 197.763(1); 197.835(3). On the merits, intervenor disputes that petitioner has demonstrated that the city erred in approving the development without resolving any potential boundary dispute or ensuring that resolution of any dispute would not affect lot sizes.

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[1] ORS 197.829(1) provides:

> "[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; [or]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

Petitioner does not cite to any place in the record where any party raised this issue. Accordingly, it is waived.

The fourth assignment of error is denied.

The city's decision is affirmed.