BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PERRY B. WICKHAM,
Petitioner,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

CITY OF GRANTS PASS,
Respondent.

LUBA Nos. 2006-125 and 2006-147

FINAL OPINION
AND ORDER

Appeal from City of Grants Pass.

Perry B. Wickham, Grants Pass, Holger T. Sommer, Merlin, filed the petition for review and argued on their own behalf.

Timothy J. Sercombe, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Preston Gates & Ellis, LLP.

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

AFFIRMED 01/30/2007

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 that approves an application to divide an existing 1.59-acre parcel into two parcels. Petitioners also appeal a city decision that rejects an application to divide an adjoining 1.44-acre parcel into two parcels.

MOTION TO INTERVENE

Holger T. Sommer moves to intervene on the side of petitioner in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

Petitioner Wickham was the applicant below. Petitioner first sought and received city approval to partition his 1.44-acre parcel into two parcels and to partition his 1.59-acre parcel into to three parcels. The city granted preliminary partition plan approval for both applications, with conditions. Petitioner never sought final plat approval for those partitions.

Petitioner later submitted a new but substantially similar application to partition the 1.44-acre parcel into two parcels. Because that application was substantially similar to the application the city had already approved with conditions, the city rejected that application.

Petitioner also submitted a new application to partition the 1.59-acre parcel into two parcels. The city approved that application with conditions. Petitioners appeal both city decisions.[1]

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[1] Petitioners' objections regarding the city's approval of the 1.59-acre parcel partition focus on two conditions (conditions A(3) and A(4)). Those conditions are set out below:

> "A. The following shall be accomplished within eighteen months of the date this report is signed, prior to the issuance of a development permit, and prior to final plat approval. Otherwise, the approval shall expire:
>
> "* * * * *
>
> "3. Sign a Deferred Development Agreement and provide a cash deposit to the City of Grants Pass for future installation of storm drain, water, curb, gutter and sidewalk along the full frontage of Fruitdale Drive.

INTRODUCTION

A. Petitioners' Appeal of the City's Dismissal of the Proposed Partition of the 1.44-Acre Parcel

Although petitioners appealed the city's council's decision to reject their second application to partition the 1.44-acre parcel (LUBA No. 2006-147), they do not assign error to the *city council* decision that rejected the second proposed partition of the 1.44-acre parcel. Instead, petitioners argue that the conditions of approval that were imposed by the *community developer* director in his decision that approved the second application to partition the 1.44-acre parcel are improper. Because petitioners offer no basis for reversal or remand of the city council's decision to reject the second application, we affirm that decision and turn to petitioners' assignments of error, which challenge the city's decision concerning the partition of the 1.59-acre parcel (LUBA No. 2006-125).[2]

B. Petitioners' Assignments of Error

Our review of petitioners' assignments of error has been complicated by petitioners' failure to "[s]et forth each assignment of error under a separate heading" as required by OAR 661-010-0030(4)(d). Because there are no assignments of error, as such, it is necessary to distill the assignment of error from the arguments that appear under petitioners' four assignments of error. Another factor that has complicated our review is that petitioners' oral argument, particularly petitioner Wickham's oral argument, strayed significantly from the arguments that appear in the petition for review. At oral argument, petitioners may explain or clarify their assignments of error and the arguments that are included in the petition for review in support of those assignments of error. But petitioners may not expand upon their assignments of error or add new assignments of error at oral argument that are not included

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> "4. Sign a Service and Annexation Agreement and provide the required exhibits for parent tax lot 1402." Record 28.

[2] All citations to the Record in this opinion are to the record in LUBA No. 2006-125.

in their petition for review. *DLCD v. Douglas County*, 28 Or LUBA 242, 252 (1994); *Bouman v. Jackson County*, 23 Or LUBA 628, 656 (1992); *Ward v. City of Lake Oswego*, 21 Or LUBA 470, 482 (1991)

For each of petitioners' four assignments of error, we either quote or do our best to succinctly summarize the arguments that petitioners advance under each assignment of error, and the city's response to those arguments, before explaining our disposition of the parties' disputes.

SECOND ASSIGNMENT OF ERROR

A. The 1998 Intergovernmental Agreement

The city and Josephine County entered into an Intergovernmental Agreement (IGA) in 1998, which replaced an earlier IGA. Under the 1998 IGA, the city and county agree to take certain steps to cooperatively plan for, and regulate land use in, the "Urbanizing Area" or "UA" that lies inside the city's urban growth boundary but outside city limits.[3] The county transferred its land use planning and land use regulation authority in the Urbanizing Area to the city.[4] Pursuant to the IGA, the Grants Pass Development Code (GPDC) applies to properties in the UA. As relevant, IGA Section IV, provides:

> "2. As authorized by ORS 190.010(4) and ORS 215.170 it is hereby agreed the City shall exclusively apply the [GPDC], as has been adopted or as may be hereinafter be adopted or amended and maintained by the City of Grants Pass within the UA.

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[3] As defined by the IGA, the Urbanizing Area or "UA" is "[t]hat area within the Urban Growth Boundary that is not part of the City of Grants Pass." IGA Section II(8); Record 72.

[4] IGA Section III provides in relevant part:

> "1. The County hereby transfers and assigns to the City, and the City hereby accepts, all of the County's authority to provide and manage planning and building services and facility financing and development with the UA.
>
> "2. The City is hereby vested with the exclusive authority to exercise the County's legislative and quasi-judicial powers, rights and duties within the UA and to apply the [GPDC] as now or hereinafter adopted or amended by the City." Record 72.

> "3. All land uses within the UA (Category 1 and Category 2) shall be subject to the City's Land Use Regulations, Land Development Regulations including Development, Building and Utility standards and procedures, *except Category 1 developments shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule*." (Italics and underline emphases added). Record 73.

As IGA Section IV(3) suggests, the IGA distinguishes between Category 1 Development and Category 2 Development.[5] The emphasized language of IGA Section IV(3) provides an exception to the IGA's broad grant of authority to the city to exercise planning and land use regulation authority for the county in the Urbanizing Area and to apply the GPDC to development proposals. Under IGA Section IV(3), certain Category 1 Development may not be conditioned to require that the development applicant "execute an agreement for future annexation or * * * extend water."

B. Petitioners' Argument Under the Second Assignment of Error

Petitioners' argument under the second assignment of error occupies approximately one page and includes three paragraphs. The first paragraph recognizes that the county has transferred land use regulatory authority in the UA to the city. We quote the other two paragraphs below:

> "Obviously the IGA has been implemented into the GPDC. The IGA in Section II 4 and 5 clearly distinguishes two types of Developments, Category 1 and Category 2. Both [of the disputed] land use applications fall under Category 1. The GPDC does not make a distinction between Category 1 and Category 2 developments. This results in only one land use procedure which is based on Category 2 of the IGA, neglecting all the exceptions the County intended by implementing Category 1 developments.

[5] Under IGA Section II(4)(D) "[a] partition which does not create more than one new lot from a parent parcel within a ten year period and which is beyond 300 feet from the nearest water main" is considered Category I Development. There does not appear to be any dispute that appealed partitions qualify as Category I Development under IGA Section II(4)(D). Under IGA Section II(5), all development within the UA not classified as Category 1 Development is Category 2 Development.

> "The city erred when it applied its GPDC Article 17 'Category 2' procedure to a Category 1 development application, resulting in the appealed conditions." Petition for Review 7-8 (record and other citations omitted).[6]

C. The City's Response

If petitioners are limited to the arguments that are actually presented in their petition for review under the second assignment of error, the city contends the second assignment of error is not sufficiently developed to merit review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). We agree with the city. Generously read, petitioners' arguments under the second assignment of error fault the city because, unlike the IGA, the GPDC does not "make a distinction between Category 1 Development and Category 2 Development." Petitioners argue that the city's failure to distinguish between Category 1 and Category 2 Development in the GPDC means the city neglects "all the exceptions the County intended by implementing Category 1 [D]evelopments." According to petitioners, this led the county to apply what it characterizes as a "Category 2 procedure to a Category 1 [D]evelopment application."

The fact that the IGA distinguishes between Category 1 Development and Category 2 Development, while the GPDC does not, without more, provides no basis for reversal or remand of the partition decision that is before us in this appeal. As the city correctly notes, while the IGA undeniably distinguishes between Category 1 and Category 2 Development, petitioners' suggestion that the IGA requires that the GPDC include different *procedures* for Category 1 and Category 2 Development is not born out by anything petitioners cite in their argument under the second assignment of error. As we have discussed above, IGA Section IV(3) does prohibit forced annexation agreements and water line extensions for certain Category 1 Development. However, petitioners do not cite IGA Section IV(3) in the

[6] GPDC Article 17 set out the procedures that the city follows and the standards that it applies to approve partitions and subdivisions. The internal subsections of GPDC Article 17 refer to GPDC *Article* 17 as GPDC *Section* 17.

argument under the second assignment of error or make any argument under the second assignment of error to establish that their Category 1 Development is entitled to protection under IGA Section IV(3).[7]

Although it seems likely that petitioners intended to rely on IGA Section IV(3), their failure to cite that section or make any attempt to demonstrate why they believe it applies to protect their Category 1 Development from a condition that requires an annexation agreement leaves it to the city and LUBA to complete their argument before attempting to address it on the merits. The city attempts to do so and advances arguments in response to the legal arguments that it speculates petitioners may have intended to make. Even if we were to consider the two more developed arguments that the city speculates the petitioners may have intended to make, there are problems with both of those arguments. As the city correctly notes, even if GPDC Article 17 does not include the limited prohibition against requiring annexation agreements for Category 1 Development that is set out at IGA Section IV(3), the city's standards for reviewing and approving partitions are located in GPDC Article 17 and GPDC Article 17 requires an annexation agreement in the circumstances presented in this case. Any inconsistency between GPDC Article 17 and IGA Section IV(3) might provide a basis for requiring the city to amend GPDC Article 17 to be consistent with IGA Section IV(3), but it is questionable whether that inconsistency could provide a basis for ignoring the requirements in GPDC Article 17. The GPDC, unlike the IGA, is an acknowledged land use regulation. Under ORS 197.175(2)(d), the city must make its land use decisions and limited land use decisions "in compliance with * * * acknowledged * * * land use regulations."

Responding to an argument that IGA Section IV(3) might apply directly to the disputed partition decision is a bit more complicated. The city candidly concedes the

[7] The only place in the petition for review where IGA Section IV(3) is mentioned is in petitioners' description of the Nature of the Decision. Petition for Review 3.

existence of GPDC 28.017, although petitioners do not cite or rely on it.[8] The city argues that GPDC 28.017 does not require that the city apply IGA Section IV(3) directly because GPDC 28.017 was last amended before the city entered the 1998 IGA. We question whether the fact that GPDC 28.017 was last revised before the city entered the most recent IGA with the county necessarily means the city was not obligated under GPDC 28.017 to review the partition applications "in accordance with the provisions described in an intergovernmental agreement." But even if the city was obligated by GPDC 28.017 to consider IGA Section IV(3) and even if IGA Section IV(3) would preclude conditioning approval of the disputed partition on execution of an annexation agreement, that would simply mean that IGA Section IV(3) is arguably inconsistent with some requirements in the GPDC. We understand the city to contend the GPDC would control in that circumstance; petitioners do not present any focused argument on that question.[9] We decline to resolve that question on our own, in view of petitioners' failures to adequately raise the issue or present any argument on how it should be resolved.

Because petitioners' arguments under the second assignment of error are not sufficiently developed for review, the second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

As we have already noted, under the IGA the city has been given authority or jurisdiction to review and approve applications for development approval in the UA.

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[8] GPDC 28.017 provides:

> "Urban level development proposals outside the City limits and inside the Urban Growth Boundary shall be reviewed by the Director in accordance with the provisions described in an intergovernmental agreement between the City of Grants Pass and Josephine County for the joint management of the Grants Pass Urban Growth Boundary Area. Appropriate comments may be forwarded to the County for their consideration in deliberating on development proposals."

[9] We note that GPDC 28.017 requires that development in the UA "shall be reviewed by the Director in accordance with the provisions described in an intergovernmental agreement between the City of Grants Pass and Josephine County." See n 8. GPDC 28.017 does not expressly state that any conflict between approval standards in the GPDC and the IGA must be resolved in favor of the approval standards in the IGA.

Development approvals include requests for partition approval. The city's jurisdiction to consider applications for partition approval is set out at GPDC 17.020.[10] Under GPDC 17.020, the city has jurisdiction to consider and approve applications to partition lands located in the UA, but only if those lands "are under annexation agreement with the City." It is undisputed that at the time petitioner submitted his partition applications, both the 1.44-acre and the 1.59-acre parcels were located inside the UA, but neither parcel was subject to an annexation agreement with the city. Petitioners argue "[t]herefore GPDC Article 17 cannot apply." Petition for Review 7. Petitioners also argue:

> "The City tried to coerce the Applicant by conditioning the partition approval with the requirement of signing a service and annexation agreement so they would be able to impose, retroactively, GPDC Article 17.
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> "The City erred in imposing the condition A. (4) and A. (5), which in the City's opinion, would allow the City to process these partition applications under GPDC Article 17." Petition for Review 7.

The city responds that since the city is the only local government that could have jurisdiction to review and approve the disputed partitions and because GPDC 17.020 further limits its partition review and approval authority to lands that "are under annexation agreement with the City," if the city had not imposed condition A(4), *see* n 1, the city's only other option would have been to reject or deny petitioner's partition applications. The city appears to be correct.

Petitioners at oral argument seemed to suggest that the city could simply have interpreted GPDC 17.020 to allow it to approve the requested partitions without applying the

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[10] GPDC 17.020 provides:

> "The provisions of this section apply to all lands within the City of Grants Pass or within Grants Pass Urban Growth Boundary *which are under annexation agreement with the City*. Unless otherwise provided for in this Code, no property, land, interests in land, unit ownership, lots, or parcels shall be created prior to approval of a partition or subdivision. No property line vacation, property line adjustment, partition, or subdivision shall be made or recorded with the Josephine County Recorder without meeting the requirements of this section."

approval criteria in GPDC Article 17. That argument does not appear in the petition for review. Even if it did, we seriously question whether the city could have interpreted GPDC 17.020 in that manner. Certainly there is nothing in the language of GPDC 17.020 that compels such an interpretation.

GPDC 17.020 does not expressly allow the city to proceed with review of a proposal to partition land within the UA that is not already subject to an annexation agreement. However, the city argues, if the city's only other option would be to require that the applicant first execute an annexation agreement, it is reasonable for the city to interpret GPDC 17.020 to proceed with review under GPDC Article 17 and impose a condition of preliminary approval that an annexation agreement be executed before final partition plat approval. The city argues that the city council implicitly interpreted GPDC 17.020 in that manner and that such an interpretation is consistent with the underlying purpose of GPDC 17.020. ORS 197.829(1).[11]

We agree with the city that its implied interpretation of GPDC 17.020 is not reversible under ORS 197.829(1). While the interpretation is certainly not compelled by the language of GPDC 17.020, requiring that an annexation agreement be completed prior to final plat approval is not inconsistent with the text of GPDC 17.020 or its apparent underlying purpose. We assume that underlying purpose is to ensure that lands that receive

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[11] Under ORS 197.829(1), LUBA must affirm a governing body's interpretation of its own land use legislation unless the interpretation is:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(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."

city approval for partitions be within the city or capable of being annexed in the future. The condition is sufficient to accomplish that purpose.

Petitioners' first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under their third assignment of error, petitioners contend the city erred in relying on GPDC 28.014 in imposing condition A(4) to require that petitioner execute an annexation and service agreement before he can receive final partition plat approval.[12] Petitioners contend that GPDC 28.014 simply bars receipt of certain city services, including water and sewer, unless the property is annexed or a service and annexation agreement is approved. Petitioners contend the current application only seeks partition approval, and that petitioner does not seek extension of any city services at this time.

There is no serious dispute that when the new parcel that is created by the disputed partition of the 1.59-acre parcel is developed, it will be required to connect to the existing sewer line that is located in the Fruitdale Drive right of way that provides access to the parcels. Record 58. Under GPDC 28.014, a service and annexation agreement will be required before the city can allow that sewer connection. The issue presented under this assignment of error is whether the city must await that request to develop the new parcel before it can require the annexation and service agreement or whether it can impose condition of approval A(4) and require that agreement before the final partition plat can be approved.

We have no difficulty agreeing with petitioners that the city *could* adopt their interpretation of GPDC 28.014 to allow the city to approve the disputed partition, without

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[12] As relevant, GPDC 28.014 provides:

> "No property shall receive any city services, including water, sewer, police, and fire services, unless the property is either annexed to the City of Grants Pass, or the property owner has signed and duly executed a Service and Annexation Agreement with the City. The Service and Annexation Agreement shall be in a form approved by the City Manager."

condition A(4), and await a future proposal to develop the new lot before requiring an annexation and service agreement under GPDC 28.014. However, the relevant question in this appeal is whether the text or context of GPDC 28.014 compels that interpretation. We conclude that it does not.

Turning first to the text of GPDC 28.014 itself, the text clearly states that the service and annexation agreement must precede receipt of city services, but GPDC 28.014 does not say the city must await a request for approval of the actual development on a newly partitioned parcel before requiring the service and annexation agreement. GPDC 28.014 simply requires that the service and annexation agreement must come first in time. Therefore, the city's interpretation of GPDC 28.014 to require that the service and annexation agreement must be secured at the time the partition that creates a newly developable parcel is approved is not inconsistent with the text of GPDC 28.014.

Turning to context, as the city points out, there clearly are some instances where what is considered Category 1 Development and Category 2 Development under the IGA must execute a service and annexation agreement even though such Category 1 and 2 Development does not contemplate immediate physical development of parcels that would require extension of city services such as water or sewer. Respondent's Brief 16-18.[13] Given that context, the city argues that GPDC 28.014 need not necessarily be interpreted to prohibit the city from requiring that the service and annexation agreement be executed at the time the partition that creates the parcel that will ultimate require the city service is approved. We agree with the city. The city's interpretation and application of GPDC 28.014 to allow it to require a service and annexation agreement as a condition of final partition plat approval is not reversible under ORS 197.829(1).

[13] For example, a partition to divide a parcel into two lots that is within 300 feet of a water line is considered a Category 2 Development under IGA Section II(4)(D) and (5) and under IGA Section VI(2) would be required to execute a service and annexation agreement even if no new development was proposed for the new parcel at the time of the partition approval.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under their final assignment of error, petitioners contend the city erred by referring their appeal of the community development director's decisions concerning the partitions directly to the city council, thereby bypassing the Urban Area Planning Commission that would normally have considered any appeal of the community development director's Type I decision.

As the city explains:

> "The City divides its land use approval processes into categories. 'Type I' approvals are those made by City Staff. GPDC 2.032. 'Type II' processes begin with a hearings officer decision. 'Type III' decisions are made by the Planning Commission. And 'Type IV' decisions are made by the City Council. A Type IV-A procedure is a City Council decision without a Planning Commission decision recommendation; a Type IV-B process results in a City Council decision after a recommendation by the [Planning] Commission. GPDC Art. 2, Schedule 2-1; GPDC 2.060. 'Type V' processes result in a joint decision of the City Council and Board of County Commissioners. GPDC 2.020." Respondent's Brief 22.

The city concedes that under normal circumstances, a partition application is reviewed under a Type I-C procedure.[14] This notice and comment procedure results in an initial decision by the community development director. That decision can be appealed to the planning commission and the planning commission's decision can be appealed to the city council. However, the city points out that the GPDC specifically provides authority to deviate from the normal Type I-C procedure. After petitioner Wickham appealed his decision approving the disputed partitions with conditions, rather than allow that appeal to proceed as it normally would to the planning commission, the community development director relied on GPDC 2.020(3)(d) to refer the matter directly to the city council to

[14] The city's Type I procedure is broken down into a number of subcategories. GPDC 2.032. Under the city's Type I-C procedure, the Director renders a decision following a public comment period, without a public hearing. *Id.*

complete review under a Type IV procedure.[15] The city council adopted the following findings to explain why this matter was referred directly to the city council under GPDC 2.020:

> "Generally, the appeal of a Director's Decision would be heard by the Urban Area Planning Commission. However, [GPDC] 2.020 * * * allows the Director to refer any Type I, II, or III application to a Type IV review in cases where there is a compelling public interest. In this case, the Director deemed there to be compelling public interest in the City meeting the State-mandated 120-day decision deadline, and referred the appeal directly to the City Council (Type IV.) The 120-day deadline became an issue because of the requested Director's Interpretation, which is required to be issued prior to action on any affected application per [GPDC] 1.053[.] * * * Were the appeal to be heard by both the Planning Commission and City Council, the July 6th deadline would not have been met. Thus, the decision was made to send the appeal straight to the City Council." Record 24.

Petitioners do not challenge the above findings, except to argue "[the community development director] references GPDC Article 2.020 which addresses land use applications and review, not appeals." Petition for Review 10. That argument is not entirely clear. The city apparently understands petitioners to argue that the community development director can alter the procedure that will be applied to a development application, but cannot change that procedure once review of an application has begun and an initial community development director decision has been appealed locally. The city argues that under ORS 197.829(1), LUBA should defer to the city council's interpretation of GPDC 2.020(3) to allow the Community Development Director to change the type of review after an initial decision has been made and thereby refer a matter directly to the city council. The city contends the language of GPDC 2.020(3) need not be interpreted to limit the community development director's authority in the manner petitioners suggest. We agree with the city.

The fourth assignment of error is denied.

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[15] GPDC 2.020(3)(d) provides "[i]n special cases where there is a compelling public interest, [the Community Development Director may] refer any Type I, II, or III application to a Type IV-A or IV-B review."

The city's decisions are affirmed.