BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J.T. SMITH COMPANIES,
MATRIX DEVELOPMENT CO., and
RENAISSANCE CUSTOM HOMES, LLC,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent.

LUBA No. 2006-123

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

Roger A. Alfred, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Michael C. Robinson and Perkins Coie LLP.

William Monahan, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Timothy V. Ramis and Ramis Crew Corrigan, LLP.

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

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 06/05/2007

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

Petitioners appeal a legislative decision establishing new design standards for single-family dwellings.

FACTS

After conducting a three-year review and dozens of hearings, on June 12, 2006, the city council voted to approve Ordinance 1538, which imposes new design standards for single-family dwellings in the city's residential zones. In relevant part, Ordinance 1538 redefines the method for measuring the height of single-family residences, limits the size of single-family residences to a maximum floor area ratio (FAR) of .45, and requires architectural projections or recessions on the sides of single-family dwellings at regular intervals.

The new FAR standard limits the percentage of total lot size that can be built as habitable space, with exceptions for attached and detached garages, detached accessory dwelling units and other accessory structures.[1]

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[1] Ordinance 1538 adopts the following definition of Floor Area Ratio, and imposes that ratio in the city's residential zones:

> "Floor Area Ratio (FAR). The FAR is that percentage of the total lot size that can be built as habitable space. A FAR of .45 means that the square footage of the lot is multiplied by .45 to yield the total habitable square footage of the house including accessory dwelling units. For example, on a 10,000 square foot lot, a FAR of .45 will allow a 4,500 square foot house (10,000 X .45 = 4,500).
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> "The FAR does not include or apply to attached garages. The FAR does not apply to detached garages, accessory dwelling units and accessory structures except that these detached structures may not individually exceed the height or square footage of the principal dwelling.
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> "The FAR does not include basement areas that average less than 50% of the basement perimeter exposed above grade. Uninhabitable space such as crawl spaces, attics, and spaces designed under the Flood Management Area Permit program to allow the passage of flood waters area also exempt." Record 11.

The recitals for Ordinance 1538 include a statement that "there is a trend to larger single-family homes and although in many areas that trend has no ill effect, in other areas, particularly the older neighborhoods, the new homes are too big for their surroundings in that they dwarf adjacent homes resulting in loss of privacy, loss of views and a streetscape that is visually disrupted and discordant[.]" Record 7. However, the city adopted no findings as part of or in the course of adopting Ordinance 1538. Petitioners, who own developable residential land in the city, appealed Ordinance 1538 to LUBA.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city failed to adopt required or necessary findings to demonstrate that the adopted FAR requirement is consistent with Statewide Planning Goal 10 (Housing) and related administrative rule requirements.

Petitioners acknowledge that there are no statutory or applicable local requirements that the city's legislative land use decision be supported by findings. However, petitioners argue that the city is required to adopt findings addressing the residential mix and density standards of OAR 660-007, the Metropolitan Housing Rule, and the city failed to do so.

Even if OAR 660-007 does not apply, petitioners argue that in order for LUBA to perform its review function, there must be "enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). According to petitioners, there is nothing in the record that demonstrates that the challenged amendments are consistent with Goal 10. On the contrary, petitioners argue, for the reasons set out below the challenged amendments are inconsistent with Goal 10 requirements.

A. Metropolitan Housing Rule

The Metropolitan Housing Rule, at OAR 660-007, establishes regional residential density and mix standards to measure Goal 10 compliance for cities and counties within the

Metro urban growth boundary. In general, local governments within the Metro urban growth boundary must "designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing." OAR 660-007-0030. Pursuant to OAR 660-007-0035(2), the city of West Linn must "provide for an overall density of eight or more dwelling units per net buildable acre."

OAR 660-007-0060(1) provides that the residential mix and density provisions in the rule are applicable at the time of periodic review.[2] OAR 660-007-0060(2) provides that for comprehensive plan and land use regulations adopted outside of periodic review pursuant to OAR 660-018, the local jurisdiction must either "[d]emonstrate through findings that the mix and density standards in this Division are met by the amendment," or "[m]ake a commitment through the findings associated with the amendment that the jurisdiction will comply" with the rule "through subsequent plan amendments."

Petitioners argue that the challenged land use regulation amendment is a post-acknowledgment plan amendment adopted pursuant to OAR 660-018, and therefore the city was required to demonstrate, through the adoption of findings, that the mix and density standards in the rule are met by the amendment, or at least make a commitment through those

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[2] OAR 660-007-0060 provides:

> "(1) The new construction mix and minimum residential density standards of OAR 660-007-0030 through 660-007-0037 shall be applicable at each periodic review. During each periodic review local government shall prepare findings regarding the cumulative effects of all plan and zone changes affecting residential use. The jurisdiction's buildable lands inventory (updated pursuant to OAR 660-007-0045) shall be a supporting document to the local jurisdiction's periodic review order.
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> "(2) For plan and land use regulation amendments which are subject to OAR 660, Division 18, the local jurisdiction shall either:
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> > "(a) Demonstrate through findings that the mix and density standards in this Division are met by the amendment; or
> >
> > "(b) Make a commitment through the findings associated with the amendment that the jurisdiction will comply with provisions of this Division for mix or density through subsequent plan amendments."

findings that the city will comply with those standards through future amendments. In either case, petitioners argue, the rule requires the adoption of findings. Because the city did not adopt any findings, petitioners argue, the decision must be remanded for that reason alone.

The city responds, and we agree, that OAR 660-007-0060(2) does not govern adoption of the challenged ordinance, and therefore the rule imposes no findings obligation in the present case. OAR 660-007-0060(2) does not specify which post-acknowledgment plan amendments must comply with the construction mix and density standards in OAR 660-007, but it seems relatively clear that the rule applies only to plan and land use regulation amendments that are either intended to comply with OAR 660-007 or those that adopt amendments that implicate or impact the local government's compliance with the construction mix and density standards. Where one of those two circumstances exist, the local government must adopt the findings required by the rule. However, petitioners do not explain why either circumstance is present here.

Petitioners make no effort to establish that the ordinance implicates or impacts the city's obligation to "designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing." OAR 660-007-0030. Nor do petitioners explain how the ordinance implicates or impacts the city's obligation to "provide for an overall density of eight or more dwelling units per net buildable acre" under OAR 660-007-0035(2). The closest petitioners come is to argue, in discussing Goal 10, that to satisfy market preferences for larger homes developers may opt to comply with the new FAR requirement by increasing residential lot sizes in new subdivisions, "thereby lowering the number of residences per acre." Petition for Review 5. To the extent petitioners advance a similar argument for purposes of OAR 660-007-0060(2), we disagree that the rule is triggered by an ordinance that imposes a FAR requirement on single-family residences. OAR 660-007-0035(2) requires certain cities including the city of West Linn to "provide for an overall density of eight or more dwelling units per net buildable

acre." That standard applies to all types of housing units, averaged over the entire city. It is reasonably clear under OAR 660-007 that the density standards are accomplished by adoption of comprehensive plan designations and zoning districts that collectively allow for residential development across the city that meets the overall target density. The challenged ordinance does not amend any city regulations governing density in the city's residential zones. The FAR requirement applies only to single-family residences, not to the multiple-family dwellings that presumably are the principal means by which cities comply with the obligation to provide for an *overall* density of eight or more dwelling units per net buildable acre. Further, petitioners cite to no evidence supporting their speculation that developers will respond to the FAR requirement by increasing lot sizes for single-family dwellings in new subdivisions. As discussed below, the city cites to evidence suggesting that will not occur. For these reasons, we disagree with petitioners that the ordinance triggers the findings obligations under OAR 660-007-0060(2). Accordingly, the city's failure to adopt findings addressing those rule requirements was not error.

B. Goal 10

Goal 10 provides in relevant part:

> "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

Petitioners argue that

> "the city's decision violates Goal 10 and its implementing rules by increasing the cost of housing, providing for inefficient use of land within the Metropolitan Portland area, and by reducing the flexibility of housing location, type, and density. The Ordinance will increase the cost of housing because the more the city limits the kind and size of housing, the more difficult it is for builders to achieve efficient and economic construction. The Ordinance will encourage the inefficient use of land by increasing the amount of land that is consumed by single-family housing, because the Ordinance artificially limits the size of residences in relation to lots below the level expected by the marketplace. As a result, in order to construct a residence of a

> size that is large enough to meet market demands, builders will need to increase the size of each lot, thereby lowering the number of residences per acre. This effect, spread over the course of the city and its future urbanizable area, significantly increases the amount of land consumed by single-family residences and lowers the overall density of the city. Finally, the Ordinance will reduce flexibility of housing location, type, and density by artificially limiting the size of single-family residences and by compelling architectural recessions and projections on the sides of single-family residences, producing neighborhoods of uniformly sized structures that lack variety." Petition for Review 4-5.

Petitioners contend that nothing in the record addresses these potential unintended consequences of the amendments, or demonstrates that the amendments are consistent with Goal 10. Remand is required, petitioners argue, for the city to adopt findings addressing Goal 10.

The city responds that the 1,000-plus page record of the lengthy proceedings below includes sufficient "accessible material * * * to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth*, 179 Or App at 16 n 6. The city argues that there are over 20 staff reports and staff memoranda in the record, detailing the long evolution of the proposed amendments and addressing the many issues raised regarding them. According to the city, the record contradicts petitioners' claims that the amendments are inconsistent with Goal 10.

At no point during the proceedings below did the city appear to recognize that Goal 10 might apply to the challenged amendments. *See* Record 962 (September 11, 2003 staff report concluding that no statewide planning goals apply to the amendments). If any participant below, including petitioners, argued to the city that Goal 10 applies to the amendments or that the amendments were inconsistent with Goal 10, no party has cited to the place in the record where that issue was raised.[3] Not surprisingly, none of the staff reports

[3] Because the city's proceedings were legislative, there is no statutory "raise it or waive it" obligation as there is for quasi-judicial proceedings, under ORS 197.763(1). Nonetheless, it is difficult to fault the city for failing to address the Goal 10 issues raised in petitioners' brief, when an early staff report took the position that

the city cites to us directly addresses consistency with Goal 10. However, there was certainly discussion of the impacts that the FAR and other amendments might have on future residential construction in the city, including a 2004 staff report that rejected concerns raised by petitioners that the FAR standard would not allow house sizes that match consumer preferences. Staff analyzed lot and single family dwelling sizes, and concluded that the .45 FAR standard would have little if any impact on future lot size and construction patterns. According to staff, even on a small 5,000 square foot lot a dwelling that complies with the .45 FAR "would meet contemporary spatial needs."[4]

Goal 10 and other statewide planning goals do not apply, and no participant questioned that position or made any argument to the city that Goal 10 applies to the challenged amendments.

[4] The May 3, 2004 staff report to the planning commission states, in relevant part:

> "Staff conducted an analysis of City GIS data by various neighborhoods. These neighborhoods and subdivisions are shown on subsequent pages and were selected to reflect diverse development patterns and different eras. Predictably, the largest and most expensive homes are on large lots. Thanks to lot sizes as big as 75,000 square feet, the homes in newly platted Le Chevalier subdivision, some as large as 13,369 square feet, had a mean average FAR of just .23. Cascade Terrace, platted in 1993, had a similar situation and although the lots were smaller in the 20,000 to 25,000 square foot range, the average FAR was .20.
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> "Many of the older neighborhoods in West Linn were an eclectic mix of lot and home sizes. * * *
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> "It was only when staff looked at some of the Planned Unit Developments (PUD) built in the last five years, such as Tanner Stonegate and Carriage Meadows near the corner of Rosemont Road and Carriage Way that a contemporary trend emerged. The lots were relatively standardized and small at 5,000 to 7,500 square feet. In spite of the modest lot size, the homes in Carriage Meadows ranged from 2,200 to 2,500 square feet, for an average FAR of .39. Tanner Stonegate PUD had an average FAR of .47.
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> "So, whereas older neighborhoods are characterized by larger lots and smaller homes, the newer subdivisions have smaller lots and bigger homes. High land costs are driving the development community to squeeze the most number of lots out of an acre and, at the same time, keep the lots big enough to fit a 2,000 to 3,000 square foot house with a two-car garage. At an earlier hearing, the Planning Commission heard testimony along these lines wherein a builder explained that banks will not loan on a project unless there is a high correlation between the price of the lot and the price/size of the home that can be built on that lot. Staff assumes that this trend will continue.
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> "* * * * *
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> "[Another staff study of average home size relative to lot size] confirms what was found in the other study, that small lots sizes below 5,000 square feet see smaller homes averaging

Petitioners do not challenge that staff report, and cite to no evidence whatsoever that is to the contrary. We agree with the city that, with respect to the FAR requirement, petitioners have not established that the requirement is inconsistent with Goal 10 or that remand is necessary to adopt findings addressing compliance with Goal 10.

Petitioners do not challenge the height restrictions imposed by the ordinance. With respect to the requirement for architectural features, petitioners contend that that requirement will produce dwellings "that lack variety," and thus reduce "flexibility of housing location, type and density," contrary to Goal 10. However, petitioners do not explain how a requirement to place architectural features on dwellings is likely to reduce "flexibility of housing location, type, and density" within the meaning of Goal 10. As far as we are informed, that requirement is intended to and is likely to increase architectural variety. Petitioners have not established that that requirement is inconsistent with Goal 10 or that remand is necessary to adopt findings addressing compliance with Goal 10.

Finally, petitioners argue that findings are necessary to address how the ordinance will affect unincorporated areas inside the urban growth boundary that the city relies upon to meet identified Goal 10 housing needs, citing *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 152-53 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999).

> 1,795 square feet; larger lots see larger homes. The interesting fact is that once the lot size reaches 8,000 to 9,999 square feet, the home sizes plateaus at about 2,600 to 2,700 square feet. It is only when lots exceed 20,000 square feet that home size jumps up to an average 3,229 square feet. Across the board, the average home in West Linn is 2,562 square feet.
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> "What does this mean for us in terms of appropriate FARs? It seems that an FAR of .45 will give builders on small 5,000 square foot lots enough room for a 2,250 square foot house. A house that size would meet contemporary spatial needs as evidenced by both the neighborhood/subdivision study and [the study of average home and lot size]. At the same time, concerns that FARs would unfairly limit large homes at the other end of the spectrum are addressed by a FAR of .45, which would guarantee a 9,000 square foot house on a 20,000 square foot lot. None of the homes in Le Chevalier would have been limited by such an FAR.
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> "Although there was considerable discussion about a sliding scale of FARs, staff would encourage using a single number, such as .45, so that the process is simplified for the public, homeowners and builders as well as staff. Again, this single FAR approach works so long as it does not unduly restrict house size in all zones and at the same time avoids inappropriately sized homes. An FAR of .45 accomplishes that." Record 676-77.

Petitioners' argument presumes that the challenged ordinance negatively affects the supply of buildable residential land within the incorporated area of the city. For the reasons set out above, petitioners have not established that the challenged amendments are inconsistent with the city's Goal 10 obligations to maintain an adequate supply of buildable residential land, or that remand is necessary to adopt findings addressing compliance with Goal 10.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the city's decision must be remanded to adopt findings demonstrating compliance with city comprehensive plan. Petitioners note that in a September 11, 2003 staff report planning staff identified two applicable comprehensive plan policies requiring that new housing be "compatible with the existing neighborhood through appropriate design and scale," and concluded that the amendments are consistent with and implement those policies. Record 962-63. However, petitioners argue that the city adopted no findings, and that the staff report fails to explain why the amendments are consistent with those two identified plan policies. In addition, petitioners argue that the city failed to consider whether the amendments are consistent with comprehensive plan Housing Goal 3 and Housing Policy 5.

The city responds that petitioners have not established any obligation to adopt findings, and that the record adequately supports the staff conclusion that the challenged amendments are consistent with and implement the plan policies that require new housing to be "compatible with the existing neighborhood through appropriate design and scale." We agree with city.

Turning to the two additional plan provisions cited by petitioners, Housing Goal 3 states that the city's goal is to "[e]ncourage the development of affordable housing for West Linn residents of all income levels." Petitioners contend that by limiting the size of housing and requiring architectural features, the challenged amendments will increase the cost of housing and decrease its supply, which will ultimately discourage the development of

affordable housing contrary to Housing Goal 3. We rejected similar arguments above as speculative. In addition, the city argues that FAR requirements are intended in part to preserve existing neighborhoods of smaller, more affordable homes. We agree with the city that petitioners have not established that the challenged amendments are inconsistent with Housing Goal 3 or that remand is necessary to adopt findings addressing that comprehensive plan goal.

Housing Policy 5 requires the city to "[a]llow for flexibility in lot design, size, and building placement to promote housing variety and protection of natural resources." However, the amendments do not impose any limits on lot design, lot size or building placement, and petitioners do not explain why the challenged amendments have any impact on lot design, lot size or building placement that the city was required to consider.

The second assignment of error is denied.

The city's decision is affirmed.