BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY MUNKHOFF and STAN BOWYER,
Petitioners,

vs.

CITY OF CASCADE LOCKS,
Respondent,

and

COLUMBIA CASCADE HOUSING CORPORATION,
Intervenor-Respondent.

LUBA No. 2007-040

FINAL OPINION
AND ORDER

Appeal from City of Cascade Locks.

Gary Munkhoff, Cascade Locks, filed the petition for review and argued on his own behalf. Stan Bowyer, Cascade Locks, represented himself.

Will Carey, Hood River, filed a joint response brief and argued on behalf of respondent. With him on the brief were Annala Carey Baker Thompson & VanKotten, Edward J. Sullivan, Carrie A. Richter and Garvey Schubert Barer.

Edward J. Sullivan and Carrie A. Richter, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With them on the brief were, Garvey Schubert Barer, Will Carey, and Annala Carey Baker Thompson & VanKotten.

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

REVERSED 08/02/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision approving site plan and variance requests for 30 units of residential housing and a community center.

REPLY BRIEF

Petitioner Munkhoff (petitioner) moves for permission to file a reply brief to respond to arguments made by respondent and intervenor-respondent (together, respondents) in their response brief. Respondents do not object to the motion, and it is granted.

MOTION TO STRIKE

Petitioner moves to strike from the response brief several portions of appendices that were attached to it, because, petitioner argues, those documents were not included in the record. OAR 661-010-0045. Specifically, petitioner moves to strike Appendix A, pages A-1 through A-14, Appendix B, pages B-1 through B-65, and Appendix D, pages D-1 and D-2.

Appendix A, pages A-1 through 11 contain a copy of the city's request for proposals to purchase the subject property, and Appendix A-12 through A-14 contain a copy of the resolution authorizing the sale of the subject property through a bidding process. Respondents concede petitioner's request to strike Appendix A, pages A-1 through A-11. However, respondents note that Appendix A-12 through A-14 are copies of Resolution No. 1084 that was adopted by the city council, and request that LUBA take official notice under ORS 40.090 of that resolution.[1] We grant petitioner's motion to strike Appendix A, pages

[1] ORS 40.090 provides in relevant part:

"Law judicially noticed is defined as:

" * * * * *

"(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.* * *"

A-1 through A-11. We take official notice of Resolution No. 1084 found at Appendix A-12 through A-14.

Petitioner also moves to strike "any and all arguments dependent on any of the materials not entered into the record properly * * *." Petitioner's Motion to Strike 3.[2] Where a brief filed at LUBA includes allegations that are not supported by the record, we disregard such allegations, but we do not strike such allegations from the brief. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff'd* 89 Or App 40, 747 P2d 373 (1987). We deny petitioner's motion to strike those arguments.[3]

Appendix B, page B-1 is a copy of Resolution No. 1092 authorizing the sale of the subject property to intervenor, and Appendix B, pages B-2 through B-65 are copies of intervenor's response to the city's request for proposals pursuant to Resolution No. 1084. Regarding Appendix B, respondents answer that Appendix B, page B-1 contains a copy of Resolution 1092, adopted by the city council. Respondents argue that LUBA may take official notice of Appendix B, pages B-2 through B-65 because LUBA may take official notice of exhibits incorporated by reference as findings of fact in local government enactments. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

While we agree with intervenor that LUBA may take official notice of exhibits incorporated by reference in local government enactments, Resolution No. 1092 does not incorporate by reference the materials found at B-2 through B-65. We grant petitioner's

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[2] Petitioner's motion contains the following description of pages, arguments and references that he argues should be stricken from the response brief:

> "References to Appendix A, B and D can be found in the [response brief] on page 2, lines 10, 11, 16 and 17. The corresponding statements that are not supported by record citations should also be stricken, specifically statements on lines 11 and 17. The explanation of Appendix A and B should also be stricken. They appear as footnotes 1 & 3 of the same page. On page 9, line 9 there is reference to Appendix B. The corresponding argument on lines 6-11 on page 9 and lines 1-3 on page 10 have no reference to the record and should be stricken.* * *" Petitioner's Motion to Strike 3.

[3] Petitioner also moves to strike respondents' arguments related to ORS 197.303 and 197.307, regarding "needed housing." For the same reason, we deny petitioner's motion to strike those arguments.

motion to strike Appendix B, pages B-2 through B-65. We take official notice of Appendix B, page B-1. *See* n 1.

Appendix D contains a copy of Resolution 1065, adopted by the city council. We deny petitioner's motion to strike Appendix D, pages D-1 and 2.

Petitioner also moves to strike as outside the record page 3, lines 3 and 4 of the response brief, a statement that intervenor could approach the city council seeking to acquire an additional one-half acre of the property from the city. We agree with respondents that there is support in the record for respondents' statement found in the record. Record II, 59.

Finally, petitioner moves to correct an incorrect reference to a date on page 9, line 3 of the response brief. Respondents have answered by amending their response brief to correct the incorrect reference to the date.

FACTS

Intervenor applied for site plan review approval and two variances.[4] Intervenor proposed to site 30 dwelling units contained in three duplex and six fourplex structures and a community center on an approximately 2.81-acre tract of land zoned Medium Density Residential (MDR).[5] Cascade Locks Community Development Code (CLCDC) 8-6.60. The planning commission held a hearing on the application. The planning commission voted to approve the site plan and variances. Petitioner and others appealed the planning commission's decision to the city council. The city council voted not to hear the appeal and declared the planning commission's decision as the city's final decision. This appeal followed.

[4] The variance requests were made to reduce the building rear yard setback and the parking lot setback.

[5] The property owned by intervenor includes approximately 2.257 acres, and the remaining .553 acres are owned by the city. Record II, 63.

FIRST AND FIFTH ASSIGNMENTS OF ERROR

In a portion of his first assignment of error, and in his fifth assignment of error, petitioner argues that the city erred in approving the proposed development because the development, as proposed, is prohibited in the MDR zone as a matter of law. Petitioner argues that intervenor's proposed development of a total of 30 duplex, triplex, and fourplex units contained in eleven separate buildings located on one lot is not permitted in the MDR zone.

Respondents first answer that the issue that the MDR zone only allows one dwelling per lot was raised for the first time in the petition for review and therefore ORS 197.835(3) precludes our consideration of that issue. Petitioner replies that the issue was raised in a letter at Record II, page 38, and points to a letter from intervenor to the planning commission found at Record II, page 31 that also raised the issue. We agree with petitioner that the record indicates that the issue regarding whether the MDR zone allows more than one structure per lot was raised below with sufficient specificity to allow the decision maker an adequate opportunity to respond. ORS 197.763(1). At a minimum, intervenor understood the issue well enough to attempt to rebut the argument in its submission to the planning commission found at Record II, 31.

Respondents next argue that the LUBA should defer to the city's interpretation of its code under ORS 197.829(1), which requires us to affirm a local government's interpretation of its land use regulations unless the interpretation is inconsistent with the express language of the land use regulation. As relevant here, the planning commission found:

> "The duplexes, triplexes, and fourplexes proposed are allowed as of right in the MDR zoning.* * *" Record II, 4.

That statement is a conclusion rather than an interpretation. In addition, the statement does not really address whether more than one duplex, triplex or fourplex can be sited on a single lot, even if such dwellings "are allowed as of right" in the MDR zone.

The city's findings regarding whether the proposed development is a permitted use in the MDR zone do not contain any interpretations or explanations of the relevant code language. Respondents offer an interpretation in the response brief, arguing that the definition of "Dwelling, duplex, triplex, fourplex" found at CLCDC 8-6.60.08.030 contemplates multiple buildings as permitted uses, as indicated by its use of the plural word "structures" rather than the singular word "structure." Respondents also argue that the dimensional requirements governing duplex, triplex and fourplex units in the MDR zone do not expressly prohibit the siting of multiple buildings on a single lot, because those requirements discuss dimensional requirements in terms of "units" rather than lots. Finally, respondents point to arguments made by intervenor in materials submitted to the city regarding intervenor's interpretation of the meaning of the relevant code provisions, and regarding the applicability of the "needed housing" statutes found at ORS 197.303 *et seq*.

Interpretations offered for the first time in a response brief are not interpretations made by the local government. Similarly, interpretations offered by an applicant, but not mentioned or adopted by the local government in the decision are not interpretations made by the local government. Respondents have not pointed to anything in the city's decision that embodies a reviewable interpretation of the relevant code provisions.

The lack of an express interpretation of the CLCDC might be less problematic if the city's decision could be read to imply the interpretation that respondents offer in their brief. *See Alliance for Responsible Land Use v. Deschutes County*, 149 Or App 259, 266-67, 942 P2d 836 (1997) (a local government's interpretation of a provision of its code can be inferred if the findings make clear how the local government applies that provision). However, we do not think the above-quoted findings come close to being an implied interpretation as to why the city believes the CLCDC allows more than one duplex, triplex and fourplex structure to be sited on a single lot in the MDR zone. As such, ORS 197.829(1) is not applicable to our review of the decision.

In the absence of a reviewable interpretation by the city, LUBA is authorized to interpret the CLCDC in the first instance. *See Doyle v. Coos County*, 49 Or LUBA 574, 582-83 (2005) (so stating); ORS 197.829(2).[6] We look first to the text and context of the provisions at issue. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). CLCDC 8-6.60.020 specifies that permitted uses in the MDR zone include "Dwelling, duplex, triplex and fourplex." CLCDC 8-6.08.030 defines "Dwelling, duplex, triplex, fourplex" as follows:

> "Residential structures that contain two, three, or four dwelling units *on one lot*." (emphasis added).

Thus, CLCDC 8-6.60.020 allows as a permitted use in the MDR zone "Dwelling, duplex, triplex, fourplex * * *," which is defined in CLCDC 8-6.08.030 as being residential structures that contain up to four dwelling units located "on one lot." The plainest reading of that language is that a duplex, triplex, or fourplex dwelling is allowed on one lot. Other residential use types defined in CLCDC 8-6.60.020(C) for multi-family dwelling dwellings and single-family attached and detached dwellings include similar language that clearly operates to allow only one such structure per lot. The limitation to "one lot" serves no obvious purpose if it is not intended to limit the number of structures per lot. The only textual reason to read the definition of "[d]welling, duplex, triplex, fourplex" differently from the other residential use types is that the definition refers to "[r]esidential structures" in the plural, as respondents point out. While the city might have intended use of the plural to reflect an intent to allow more than one duplex, triplex, or fourplex structure "on one lot," it seems more plausible to understand the use of the word "structures" rather than "structure" as simply reflecting the fact that the definition describes three different types of dwellings:

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[6] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

duplexes, triplexes and fourplexes. If the city intended the MDR zone to permit an *unlimited* number of residential duplex, triplex or fourplex structures on a single lot, unlike any other type of residential use allowed in the city, one would expect that intent to be more clearly expressed in the code.

Consideration of context tends to support our understanding of the relevant terms. CLCDC 8-6.60.040 specifies the dimensional requirements for "duplex, triplex and fourplex dwellings" as "[a] minimum of 4,000 square feet per unit." Respondents argue that that section does not explicitly prohibit siting multiple dwelling units on a single lot and only specifies the amount of land needed per each proposed unit, not per proposed structure. However, CLCDC 8-6.60.040 lends little support to the respondents' proffered interpretation. In our view, CLCDC 8-6.60.040 simply specifies that, for example, if a party desires to place a fourplex on a lot, a minimum lot size of 16,000 square feet is required (4,000 square feet per unit multiplied by the four units contained in a fourplex). It does not suggest that multiple structures are permitted on a single lot.

The definitions of front, rear and side setbacks at CLCDC 8-6.08.020, which all define setbacks with reference to the "main building," lend additional support to petitioner's reading of the CLCDC. Under the respondents' proffered interpretation of CLCDC 8-6.60.020, there is no "main building" that can be used to determine setbacks in the present case. The MDR zone allows "[a]ccessory buildings." We believe the reference in CLCDC to "main building" is to distinguish between accessory buildings and the buildings that house other permitted uses in the zone. That contextual language supports our view that the city did not intend the MDR zone to permit multiple residential structures on a single lot.

We conclude that the city erred in approving the proposed development, without requiring that the proposed structures be located on individual lots.[7] The first and fifth assignments of error are sustained.

Under OAR 661-010-0071(1)(c), we will reverse a local government's decision that is prohibited as a matter of law. We have held that the city's decision is erroneous as a matter of law. Therefore, the city's decision is reversed.[8]

[7] Petitioner also argues that the proposal is prohibited as a matter of law without the addition of a Planned Development Overlay Zone pursuant to CLCDC 8-6.140. Respondents answer that the option of seeking a planned development overlay is an alternative development option that is equal to allowing the proposed dwellings outright in the MDR zone. While we need not resolve this issue, we note that the Planned Development Overlay Zone provisions set forth at CLCDC 8-6.140 appear to allow greater development flexibility through density bonuses and other variations from the development standards.

[8] Because we sustain petitioner's first and fifth assignments of error and reverse the city's decision, it is unnecessary to consider petitioner's remaining assignments of error.