BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SADDLE BUTTE RESIDENTS' ASSOCIATION,
MARY R. DIEDRICH, RICHARD DIEDRICH,
ERNIE HOWELL, HARRY RUCHABER,
SHEILA LAWRENCE, JAY LAWRENCE,
JUDY CALDWELL, TROY FENNEL, MYRON MILLS,
SHARON LEE and NONA JOHNSON,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

L & H LUMBER COMPANY,
Intervenor-Respondent.

LUBA No. 2007-112

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was Goal One Coalition.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich & Aitken PC.

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

REMANDED 03/10/2008

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 decision by the county approving a planned development.

FACTS

The subject property is a 67-acre parcel that is zoned R-1 and R-2 and located within the Roseburg urban growth boundary. The property is currently developed as the site of a mobile home park containing 140 mobile homes. Intervenor applied to develop 30 acres of the property as a Planned Development (PD) with 133 "zero lot line" single family dwelling lots.[1] The planning commission voted to approve the proposed development, and petitioners appealed the decision to the board of county commissioners. The board of county commissioners declined to review the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

LUDO 5.200(2) provides that as part of the application process for a PD, the applicant must demonstrate that two of the following four criteria are satisfied:

> "a. The subject property contains significant landscape features or open space whose preservation requires planned development rather than conventional lot-by-lot development;
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> "b. Planned development of the subject property will promote increased energy conservation or use of renewable energy resources;
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> "c. The subject property contains natural hazards, the avoidance of which requires planned development of the property; or
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> "d. Planned development of the subject property will produce more efficient use of the land and provision of services than conventional lot-by-lot development."

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[1] Douglas County Land Use and Development Ordinance (LUDO) 1.090(2) defines "zero lot line dwelling" as:

> "A single-family detached dwelling or duplex where each unit is placed on its lot in such a manner that one wall is located on a lot line, hence, a setback of zero (0) feet on one side."

Petitioners argue that although the PD likely meets criterion (d), it does not meet any of the other three remaining criteria. Although it is not entirely clear, we understand petitioners to argue that the county misconstrued applicable law in finding that criterion (a) was satisfied, because the county did not explain why the PD is *required* in order to preserve the property's significant landscape features along Drain Creek or to preserve open space. Petitioners contend the current mobile home park development already preserves the creek and provides open space.

Intervenor responds that the proper comparison as set forth in criterion (a) is between a conventional subdivision and a PD, and that petitioners are incorrect in interpreting criterion (a) to require a comparison of the PD to the existing mobile home development. Intervenor explains that the proper comparison is whether a PD is required in order to preserve natural features and open space that would otherwise not be preserved in a conventional residential development. The county found that if the property was developed with a conventional subdivision, as allowed by the zoning, the development would significantly encroach into open space areas of the property. Therefore, the county reasoned, the PD is required to preserve those natural features.[2]

We agree with intervenor that the operative comparison is whether a PD is necessary to preserve more open space than would otherwise be preserved in a conventional subdivision, and that the amount of open space currently preserved by the mobile home development is not relevant in making that determination. Petitioners have not explained why the county's findings that the PD is required to preserve the natural features and open space on the property as compared to a conventional subdivision are inadequate.

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[2] The county found in relevant part:

> "The PD approval criteria * * * are intended to be compared to a conventional lot by lot development, not the present condition of a property, nor a utopian development. Lot by lot development is expressly mentioned in two criteria and is implicit in the other two. * * *" *See also* n 3. Record 65.

Petitioners next argue that the county misconstrued criterion (b) in comparing a PD to a conventional development when the relevant code provision is silent with regard to the baseline from which energy conservation will be increased. Petitioners point out that the proposed PD will increase traffic by approximately 300 trips per day compared to the existing mobile home development, and argue that that increase in traffic does not promote increased energy conservation.

Intervenor responds that the county appropriately compared the energy conservation from a conventional subdivision to a PD, based on the county's definition of "Planned Development."[3] The county found that the PD would promote increased energy conservation through centralizing recreational facilities, and that a conventional development would destroy most of the existing infrastructure, significantly encroach into open space and eliminate recreational opportunities, all of which would lead to more car trips out of the subdivision.[4] We agree with intervenor that the county did not err in comparing the energy

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[3] The LUDO 1.090(2) definition of Planned Development includes reference to a comparison with a conventional subdivision:

> "PLANNED DEVELOPMENT (PD): A unit of land planned for residential purposes as a single unit, processed under the PD overlay zone provided in this ordinance rather than an aggregate of individual lots, with design flexibility from traditional siting or land use regulations."

[4] The county found in relevant part:

> "* * * The proposed development will preserve and add to open space, promote energy conservation, and make more efficient use of the land than conventional subdivision development would allow. Staff Exhibit No. 9 further documents how the application met the criteria of LUDO 5.200.2." Record 64-65.

Staff Exhibit No. 9 provides in relevant part:

> "* * * The recreational buildings that are proposed in Phase 1 will increase onsite recreational opportunities thereby decreasing the need for automobile travel for the types of recreation that are proposed. * * * Development of a standard subdivision would require destruction of the majority of the existing infrastructure, significant encroachment into the open areas and would eliminate recreational opportunities within the development. All of these would require additional energy and other resources to be expended. * * *" Record 477.

consequences of planned versus conventional development under criterion (b), and that the county's findings under criterion (b) are adequate and supported by substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

During the proceedings before the planning commission, petitioners argued that Douglas County Comprehensive Plan (DCCP) Chapter 12 includes an inventory of existing mobile home parks in the county, pursuant to ORS 197.480.[5] Petitioners argue that the inventory identifies the existing Saddle Butte mobile home park as by far one of the largest parks in the county. Petitioners contend that the DCCP applies to the proposed removal of the existing mobile home park, and requires the county to conduct an analysis of how the proposed mobile home conversion affects the county's mobile home park inventory.

Intervenor responds that the city's comprehensive plan, not the DCCP, governs the subject property, under the terms of an urban growth management agreement (UGMA) between the county and the city of Roseburg. Under the UGMA, intervenor argues, the county has adopted the city's comprehensive plan as the applicable comprehensive plan within the urban growth area. Intervenor notes that the planning commission decision finds

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[5] ORS 197.480 provides, in relevant part:

> "(2) A city or county shall establish a projection of need for mobile home or manufactured dwelling parks based on:
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> "(a) Population projections;
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> "(b) Household income levels;
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> "(c) Housing market trends of the region; and
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> "(d) An inventory of mobile home or manufactured dwelling parks sited in areas planned and zoned or generally used for commercial, industrial or high density residential development.
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> "(3) The inventory required by subsection (2)(d) and subsection (4) of this section shall establish the need for areas to be planned and zoned to accommodate the potential displacement of the inventoried mobile home or manufactured dwelling parks."

at Record 13 that the application is subject to the "[p]olicies and provisions of the Roseburg Urban Area Comprehensive Plan," and argues that petitioners do not challenge that finding. Intervenor also argues that petitioners do not identify anything in DCCP Chapter 12 that applies as an approval standard to the proposed PD.

Section 1.1 of the UGMA states that the "Plan" for the urban growth area is the city comprehensive plan. Section 1.2 similarly states that the city comprehensive plan "shall establish the standards and procedures for review and action on * * * proposed land use actions[.]" We agree with intervenor that petitioners have not established that the DCCP applies to provide mandatory approval criteria with respect to the challenged PD. In addition, we agree with the county that petitioners do not identify any particular DCCP language, in Chapter 12 or elsewhere, that operates as an approval criterion. The fact that the DCCP includes an inventory of mobile home parks does not necessarily mean that the county must adopt findings explaining why the proposed PD complies or is consistent with that inventory. The inventory is just that, an inventory. Petitioners do not identify any obligation for the county to maintain a particular number or type of mobile home parks, for example. Absent a more focused argument, this assignment of error does not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners argue that the county erred in failing to address issues raised by petitioners regarding the proposal's compliance with the Fair Housing Act, 42 USC 3601 *et seq.* (FHA). Intervenor responds that petitioners failed to raise this issue prior to the close of the record of the proceedings before the planning commission, and under ORS 197.763(1) and ORS 197.835(3), petitioners are precluded from raising the issue for the first time before LUBA. At oral argument, petitioners conceded that the issue was waived.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners assert that the county erred in failing to require intervenor to obtain a conditional use permit for the development. Petitioners argue that LUDO Article 31 requires intervenor to obtain a conditional use permit. LUDO 3.31.020 allows zero lot line dwellings "as they may be *conditionally permitted* within the * * * R-2 [zone]." (Emphasis added.) Petitioners argue that the use of the phrase "conditionally permitted" means that the provisions of the LUDO Article 39 governing conditional uses apply to the proposed development.

Intervenor responds that petitioners are misreading the relevant code provisions. Intervenor explains that LUDO 3.13.075(1) states that the provisions of Article 31 apply to the proposed development. LUDO 3.13.075(1) allows zero lot line dwellings in the R-2 zone:

> "In the R-2 Zone, the following uses and activities are permitted subject to specified standards and the general provisions and exceptions set forth by this Ordinance.
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> " * * * * *
>
> "1. Zero lot line residential developments, *subject to provisions of Article 31*."

Intervenor points out that, in contrast, LUDO 3.13.100 lists buildings and uses that are permitted "subject to the provisions of * * * Article 39 [conditional use standards] [of the LUDO]." Intervenor also explains that LUDO 3.31.020 provides in relevant part that "[t]he provisions of this article are intended to serve as conditions required for approval of zero lot line residential developments, as they may be conditionally permitted within the RS, R-1, R-2 and R-3 zoning districts."

Other than the language cited above referring to zero lot line dwellings as being "conditionally permitted" in the R-2 zone, petitioners do not cite to any other provision of the

LUDO that makes the conditional use provisions of LUDO Article 39 applicable to the proposed zero lot line dwelling development. We agree with intervenor that the cited provisions make clear that the conditional use provisions of Article 39 do not apply to the proposed development.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, petitioners argue that "[t]he county erred by approving a [PUD] that does not demonstrate compliance with applicable street standards." Petition for Review 12. LUDO 3.31.150(6), part of the code provisions governing zero lot line development, provides:

> "It is the legislative intent of this provision of the Ordinance to provide zero lot line residential development with clear, unencumbered public street frontage and vehicular access to each unit. * * *"

Accordingly, LUDO 3.31.150(6) requires that each zero lot line parcel in the R-2 zone have 40 feet of frontage on a "public street."

We understand petitioners to argue that the county's findings regarding the development's compliance with LUDO 3.31.150(6) misconstrue applicable law and are inadequate. The county found:

> "* * * Concerning street frontage, the PD application proposes that all lots will front on existing private streets (as opposed to public streets required by LUDO 3.31.150.6). The Article 31 requirement that the proposed development shall front on public streets may be modified under the provisions of LUDO 5.100.3. The subdivision and zero lot line development may utilize private streets." Record 19-20.

LUDO 5.100.3 is part of the code provisions governing PD development, and provides in its entirety:

> "In the case of a conflict *between a provision of the underlying zone* and that of this chapter, the provisions of this chapter [standards governing Planned Developments] shall apply." (Emphasis added.)

Intervenor argues that LUDO 5.100(3) allows the city to modify or override the LUDO 3.31.150(6) requirement for public streets. The main problem with that response and the above finding is that LUDO 5.100(3) applies to conflicts between the underlying zone and the PD chapter. Here, it appears that the conflict arises between the provisions of Article 31 of the LUDO requiring public streets for zero lot line developments, and Chapter 5 of the LUDO governing PDs. The conflict is not between the provisions of the LUDO governing the R-2 zone and Chapter 5 of the LUDO.

Intervenor also argues that the county has authority to modify the requirement for public streets in a PD based on LUDO 5.250(6)(b), which allows the county to reduce street widths, and standards for internal traffic circulation. However, intervenor has not established that private or public ownership of the streets within the development has anything to do with street width or standards for internal traffic circulation.

Finally, intervenor argues that the land division chapter, LUDO 4.100(5)(b), provides that:

> "Each unit of land proposed to be created shall have access by way of a County road except as provided below:
>
> "* * * * *
>
> "(6) Access requirements, *roadway ownership* and improvement, as well as other street or road specifications, may be authorized as part of the review and approval of a PUD (Planned Unit Development) for either rural or urban areas. * * *" (Emphasis added.)

We understand intervenor to argue that LUDO 4.100(5)(b) authorizes the county to modify or waive the public street requirements of LUDO 3.31.150(6) when zero lot line development is proposed as part of a planned unit development. While that argument is plausible, it seems equally plausible that because LUDO 4.100(5)(b) does not refer to zero lot line development at all, it does not operate to allow waiver of the public street requirements of Article 31. Moreover, the county's decision did not cite LUDO 4.100(5)(b) as a basis to waive the public street requirements of LUDO 3.31.150(6); that argument appears for the first time in

the response brief. Accordingly, we believe remand is necessary for the county to adopt findings explaining under what basis, if any, the public street requirements of LUDO 3.31.150(6) may be modified or waived.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

In their sixth assignment of error, petitioners argue that the proposed development fails to comply with the provisions of the LUDO regarding open space. LUDO 5.250(4)(a) provides:

> "At least 50 percent of the acreage of the PD (excluding streets) must be open space *retained for common use by owners and residents of the development*. At least 25 percent of the total open space provided shall be private and at least 50 percent of the total open space provided shall be common. Not more than ½ of the common open space may be areas covered with water. Recreational facilities not part of a residential structure shall be considered open space." (Emphasis added.)

The county found, and there is no dispute, that total acreage of the PD excluding streets is 22 acres. Intervenor proposed a total of 15.02 acres of open space, with 7.56 acres of common open space and 7.46 acres of private open space. LUDO 5.050 defines "open space," as well as "common open space" and "private open space" as subdefinitions under the definition of "open space:"

> "OPEN SPACE: Land not covered by buildings or structures, except minor recreational structures. Open space does not include streets, driveways, parking lots, or loading areas. Landscaped roof areas devoted to recreational or leisure time activities, freely accessible to residents, may be counted as open space at a value of 50% of actual roof area devoted to these uses.
>
> "Common Open Space: Open space designed primarily for the leisure and recreational use of all PD residents, and owned and maintained in common through a homeowners' association.
>
> "Private Open Space: Open space located immediately adjacent to an individual dwelling unit, owned and maintained by the owner of the dwelling unit, and reserved exclusively for the use of the residents of the dwelling unit."

Petitioners argue that the emphasized clause in the above quoted language of LUDO 5.250.4(a) seems to require that 50 percent of the total acreage excluding streets, or 11 acres in the present case, be "retained for common use by owners and residents of the development." In other words, petitioners argue, at least 11 acres of the property must be retained for "common open space." We understand petitioners to argue that the subsequent requirement that at least 25 percent of the total open space be "private open space" is in addition to the 50 percent of total acreage excluding streets that must be "retained for common use."

The county found:

> "Open Space/acreage: Under LUDO 5.250.4(a), at least 50% of the acreage of the PD (excluding streets) must be open space. Streets within the 30 acre site occupy 8 acres. Of the remaining 22 acres, 50% (11 acres) must be open space. Of that 11 acres, at least 2.75 acres must be private open space and at least 5.5 acres must be common open space. No more than half of the common open space may be areas covered with water. The application exceeds the LUDO requirements by proposing 7.56 acres of common open space and 7.46 acres of private open space. The acreage covered by water in the Davis Creek drainage area is negligible." Record 16.

Intervenor argues that the county correctly interpreted the first sentence of LUDO 5.250.4(a) to require a minimum of 50 percent of the total acreage excluding streets be open space, including both common open space and private open space. According to intervenor, the phrase "retained for common use by owners and residents of the development" does not limit the required 50 percent of total acreage excluding streets to "common open space" as that term is defined in the code, but is rather a general phrase that refers to both types of open space. Intervenor cites to a staff memorandum at Record 226-27 that sets out the staff interpretation of LUDO 5.250.4(a) that the planning commission ultimately agreed with.

LUDO 5.250.4(a) is poorly drafted, but we agree with intervenor that the county correctly applied it. Petitioners' reading of that provision as requiring the PD to provide 50% common open space and an *additional* 25% private open space would render meaningless the second phrase of the second sentence requiring "at least 50 percent of the

total open space * * * be common." Moreover, the county's use of the defined term "common open space" in the second sentence demonstrates that the county knew how to refer to "common open space" when that was the meaning it intended. The county did not use the defined phrase "common open space" in the first sentence of LUDO 5.250.4(a), but instead used a different and much more ambiguous description. While the phrase "for common use by owners and residents of the development" found in the first sentence certainly could be read to refer only to "common open space" and to exclude "private open space," it can also be read in context to refer to open space that includes both types. Accordingly, petitioners have not demonstrated that the county erred in calculating the amount of required open space.

The sixth assignment of error is denied.

The county's decision is remanded.