BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MEL STEWART,
Petitioner,

vs.

CITY OF SALEM,
Respondent.

LUBA No. 2009-009

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Mel Stewart, Salem, filed the petition for review and argued on his own behalf.

Daniel B. Atchison, Salem, filed the response brief and argued on behalf of respondent.

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

REVERSED 04/27/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the city's denial of his application for approval of a partition.

FACTS

The subject property is a .84-acre parcel zoned RS (Single-Family Residential). Hansen Avenue, a city collector street, borders the property to the south.

Petitioner applied to the city to divide the property into three parcels. The minimum parcel size in the RS zone is 4,000 square feet. Proposed parcels 1 and 2 border Hansen Avenue and would be approximately 6,700 square feet in size. Parcel 3 is a flag lot 21,350 square feet in size located on the north half of the parent parcel, accessed by a 20-foot wide driveway located between Parcels 1 and 2. Petitioner proposed that Parcels 1 and 2 would access Hansen Avenue via their own direct driveways.

The city deemed the partition application complete on September 23, 2008. On November 25, 2008, the city planning administrator approved the application, with conditions. On December 2, 2008, petitioner filed a timely appeal of the administrator's decision, challenging several conditions of approval. On December 8, 2008, the city council initiated its own review of the administrator's decision, pursuant to Salem Revised Code (SRC) 114.210, and scheduled a public hearing on January 5, 2009.[1]

---

[1] SRC 114.210 provides:

> "(a) Whether or not an appeal is filed pursuant to SRC 114.200, the council may by majority vote initiate review of a commission, administrator, or hearings officer decision; and the commission may initiate council review of a hearings officer final decision by resolution filed with the city recorder.
>
> "(b) Review under subsection (a) of this section shall be initiated prior to the adjournment of the first regular council meeting following council notification of the decision.
>
> "(c) Review shall proceed as provided for appeals in subsections (c) to (g) of SRC 114.200.

On December 10, 2008, petitioner wrote a letter to the city attorney requesting that the city identify the basis for the city council's review so that he could prepare an appropriate response. As far as the record reflects, the city did not respond to petitioner's request. At the January 5, 2009 hearing, city staff presented a staff report that addressed petitioner's appeal of the challenged conditions of approval, and recommended modifications to two conditions. The city council then gave petitioner ten minutes to testify, and petitioner spoke to the issues raised in his appeal. At the end of petitioner's testimony, a city councilor questioned petitioner regarding whether he intended to further divide Parcel 3 at some time in the future. Petitioner replied that he had not made a decision, but that it is something he might consider in the future. The city council then questioned the planning administrator, regarding the city's practice with respect to a partition that proposes a large parcel that could be further divided in the future. The planning administrator discussed SRC 63.065, which provides:

> "When it appears to the planning administrator, commission, or council that the area of a proposed partition is to be ultimately divided into four or more lots or parcels, the provisions of this chapter pertaining to subdivisions shall apply."

The planning administrator testified that he had discussed SRC 63.065 with staff and petitioner, and decided not to require that the application be processed as a subdivision, because there would be no substantive change or different improvements required under the subdivision standards or process. After further discussion, the city council closed the hearing and deliberated, ultimately voting to deny the partition application because Parcel 3 could be divided in the future and therefore the application should have been processed as a

---

> "(d) Unless subsequently discontinued, review shall replace filed or possible appeal of the decision below."

subdivision, pursuant to SRC 63.065. On January 12, 2009, the city council convened and adopted a final written decision denying the partition application.[2] This appeal followed.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioner argues that in denying the partition under SRC 63.065 the city misconstrued that code provision, exceeded its authority, and improperly acted with the purpose of avoiding the requirements of ORS 227.178. Petitioner requests that the city's denial be reversed for several reasons, including that the city's action was "for the purpose of avoiding the requirements of" ORS 227.178. ORS 197.835(10)(a)(B).[3]

---

[2] The city's final order states, in relevant part:

> "(d) The State mandated 120-day decision date for this decision is January 28, 2009.
>
> "(e) * * * The partition application proposes three lots, however proposed lot three is over three times the size of the other two proposed lots. The applicant's testimony indicated that proposed lot 3 was designed in such a way to add another lot in the future. Further, the applicant testified that he agreed that a division of proposed lot 3 might be considered in the future.
>
> "(f) Pursuant to SRC 63.065, the City Council finds that based on the testimony of the applicant, and a review of the proposed layout of the three lots, this partition application should have been processed as a subdivision, in compliance with the City's subdivision regulations.
>
> "NOW, THEREFORE, IT IS HEREBY ORDERED BY THE CITY COUNCIL OF THE CITY OF SALEM, OREGON:
>
> "Section 1. The Planning Administrator's decision approving Partition Case No. 08-22 is hereby rescinded, and the application denied. The Applicant may submit an application for a subdivision of the subject property, as provided by SRC 63.065." Record 2.

[3] ORS 197.835(10)(a) provides:

> "[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or
>
> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178."

Under ORS 227.178(1), the city was required to take final action on the partition application within 120 days of the date the application was deemed complete.[4] In addition, ORS 227.178(3)(a) provides that the city must approve or deny petitioner's application "based upon the standards and criteria that were applicable at the time the application was first submitted."

According to petitioner, the relevant application requirements and the approval criteria for both partitions and subdivisions of the subject property under SRC chapter 63 are substantively identical, and as required by SRC chapter 63 petitioner's application included all information required of a subdivision and in fact complied with all applicable subdivision approval standards. Petitioner contends that SRC 63.065 simply identifies a procedural route, and is not a "standard or criteria" within the meaning of ORS 227.178(3)(a) that can be a basis for approval or denial. Therefore, petitioner argues, the city misconstrued SRC 63.065 and exceeded its authority in denying the application and effectively forcing petitioner to file a new partition application subject to the SRC subdivision procedures and standards.

Petitioner also contends that

> "The denial of an application, in the eleventh hour, under SRC 63.065, after the applicant had submitted all information necessary for both a 'partition'

---

[4] ORS 227.178 provides, in relevant part:

> "(1) Except as provided in subsections (3) and (5) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.
>
> "* * * * *
>
> "(3)(a) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

> and a 'subdivision' at the time the application was deemed 'complete' serves no legitimate planning purpose, and the action was taken clearly for the purpose of avoiding its ORS 227.178 responsibilities." Petition for Review 23.

Elsewhere in the petition for review, petitioner argues:

> "The reason the City Council chose to flatly deny [petitioner's] 'partition' application, rather than re-process it as a 'subdivision' under SRC 63.065, is that the City recognized that it had simply waited too long to decide how to process [petitioner's] application. With the 120-day time limit running out under ORS 227.178, the City Council openly elected to deny [petitioner's] application, without justification in fact or law to avoid the effect of ORS 227.178, rather than to reprocess it. * * * ORS 197.835 provides LUBA with the authority to award a Petitioner attorney fees on two grounds, the second of which is: 'That the local government's action was for the purpose of avoiding the requirements of [ORS 227.178], *i.e.*, the oft mentioned '120-day rule.'" Petition for Review 28 (emphases omitted).[5]

A. ORS 197.763(1) Waiver

The city responds, initially, that petitioner waived all challenges to the city council's application of SRC 63.065 or any claim that a denial under SRC 63.065 would violate any provision of ORS 227.178 by failing to raise those challenges below. ORS 197.763(1); ORS 197.835(3).

We disagree. ORS 197.835(4) provides that a petitioner may raise new issues relating to applicable criteria that were omitted from the notice required by ORS 197.195 or 197.763, unless LUBA finds that the issue could have been raised before the local government.[6] Neither of the notices the city sent out mentioned SRC 63.065 at all, and

---

[5] For reasons not clear to us, the arguments quoted in the text appear at the end of the fifth assignment of error. As discussed below, the fifth assignment of error argues that SRC 63.065 is not "clear and objective" and, in petitioner's view, cannot be applied to deny the proposed partition under ORS 197.307(6), part of the needed housing statutes. The above-quoted arguments under ORS 197.835(10)(a) have no obvious bearing on the issue raised in the fifth assignment of error, but appear to have much to do with the issues raised under the third and fourth assignments of error. Accordingly, we address the quoted arguments in resolving the third and fourth assignments of error.

[6] ORS 197.835 provides, in relevant part:

> "(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.

clearly did not list SRC 63.065 as an applicable approval criterion or basis to approve or deny the partition application. Record 147, 193. Nor do we agree that the issue could have been raised during the city council hearing. The city did not respond to petitioner's written request to be informed of the basis for the city council's review and the issues to be addressed. As far as the record reflects, it was only late in the city council hearing, after petitioner testified, that SRC 63.065 was first mentioned, or any concern was raised regarding future division of Parcel 3. While the city council gave petitioner three minutes for rebuttal before closing the hearing and entering deliberations, it is difficult to fault petitioner for failing to recognize that the city council might deny the partition application under SRC 63.065, or for failing to advance legal challenges to denial under SRC 63.065 during rebuttal. Under these circumstances, we do not think petitioner had reasonable notice that the city might apply SRC 63.065 to deny the application, or that petitioner had a reasonable opportunity to raise issues regarding application of SRC 63.065.

B. Denial based on Standards and Criteria

On the merits, the city first argues that SRC 63.065 was in effect and "applicable at the time the application was first submitted," and is a "standard or criteria" for purposes of ORS 227.178(3) that can be the basis for approval or denial. We agree with the city that SRC 63.065 was potentially "applicable," but not that it constitutes a "standard" or "criterion" within the meaning of ORS 227.178(3). SRC 63.065 simply allows the city to require, in certain circumstances, that a partition application be subjected to the procedures and approval standards that apply to subdivisions, but SRC 63.065 does not itself constitute

---

"(4) A petitioner may raise new issues to the board if:

> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

an approval standard or a basis for approval or denial. Stated differently, all SRC 63.065 authorizes the city to do is to apply subdivision procedures and standards to the partition application. While any applicable subdivision standards would presumably constitute "standards and criteria" for purposes of ORS 227.178(3)," nothing in SRC 63.065 or elsewhere cited to our attention purports to authorize the city to summarily deny a partition application based solely on a determination under SRC 63.065 that the application is subject to subdivision procedures and standards.

In our view, once the city determined at the January 5, 2009 hearing that, pursuant to SRC 63.065, the "provisions of this chapter pertaining to subdivisions shall apply," the city's permissible options included review of petitioner's application for partition approval under whatever additional standards or requirements might apply to applications for subdivision approval. However, the city' permissible options did not include summarily denying petitioner's partition application based solely on SRC 63.065, and effectively forcing petitioner to re-submit that partition application and start the process all over again.[7] As explained, SRC 63.065 itself is not a "standard" or "criterion" on the basis of which an application can be approved or denied, consistent with ORS 227.178(3)(a).

Stated differently, nothing in the city's code or elsewhere authorized the city to deny the application based solely on the city's belated determination that the application must be reviewed under the subdivision procedures and standards. In our view, the city's most straightforward course, if not the course compelled by ORS 227.178(1) and (3), was for the city to identify whatever additional or different procedures and approval standards applied to

[7] It is worth noting, in this respect, that any delay in recognizing that SRC 63.065 might require review of petitioner's application under the subdivision procedures and standards appears to be due entirely to the city. The planning administrator initially determined that SRC 63.065 did not require that petitioner's application be reviewed under the subdivision procedures or standards, after consulting with staff and petitioner. As far as we can tell, petitioner did not dispute that Parcel 3 could be further divided. While the city council may be entitled under SRC 63.065 to take a different approach or to reverse the planning administrator's initial determination, it seems unfair, at least, to impose on petitioner the consequences for the city's last minute reversal of course.

the proposed partition under the SRC subdivision provisions, and apply any such additional or different standards to approve or deny the partition application. We discuss and resolve below the parties' dispute regarding whether the SRC Chapter 63 includes different or additional procedures and approval standards for partitions and subdivisions that would govern petitioner's proposal. For present purposes, the salient point is that, even if additional or different approval standards apply if the application is reviewed as a subdivision, the city made no effort during the proceedings below to identify, much less base its decision on, any such additional or different approval standards.

With respect to procedures, petitioner argues, and the city does not dispute, that the only procedural difference between partition and subdivision review is that for the latter the city conducts a "subdivision review conference" between the applicant, city staff and any persons entitled to notice of the application who choose to attend.[8] We are cited to no reason to believe, and it seems doubtful, that conducting a subdivision review conference in the present case would make any meaningful difference in whether or not the application would be approved, or under what conditions. Further, we held in *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472, 482 (2005), that nothing in ORS 227.178 prohibits a city from modifying or waiving procedural requirements in order to expedite the local review process to meet the 120-day deadline, as long as such an expedited process would not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application. No party in this appeal argues that expediting or even entirely waiving the requirement for a subdivision review conference in the present case would prejudice any parties' rights. Even if waiving the requirement for a subdivision review conference would prejudice one or more parties' substantial rights, the appropriate course for the city would have been to require that the subdivision review conference be held

[8] The subdivision review conference is not required by the city's code, but is required by supplemental procedures adopted by the planning administrator, pursuant to authority granted by SRC 63.042(d).

before rendering its decision. It is true that pursuing that course of action might have led to petitioner filing a petition for a writ of mandamus under ORS 227.179, but the city's desire to avoid that possibility does not provide a basis for summarily denying petitioner's partition application.

With respect to substantive subdivision standards, petitioner argues that the approval criteria that would apply to either partition or subdivision of the subject property are identical or nearly identical. Petitioner appears to be correct. SRC Chapter 63, entitled "subdivisions," governs both subdivisions and partitions. SRC 63.038 sets out the same application submittal requirements for both subdivisions and partitions, with minor differences that no party argues are applicable here. The general approval standards for subdivisions are set out in SRC 63.046 and those for partitions in SRC 63.047.[9] The first

---

[9] SRC 63.046(b) provides, in relevant part:

> "Before approval of a [subdivision] tentative plan the planning administrator shall make affirmative findings that:
>
> "(1) Approval does not impede the future use of the remainder of the property under the same ownership, or adversely affect the safe and healthful development of the remainder or any adjoining land or access thereto; and
>
> "(2) Provisions for water, sewer, streets, and storm drainage facilities comply with the city's public facility plan; and
>
> "(3) The tentative plan complies with all applicable provisions of this Code, including the Salem zoning ordinance, except as may be waived by variance granted as provided in this chapter; and
>
> "(4) The proposed subdivision provides safe and convenient bicycle and pedestrian access from within the subdivision to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development."

SRC 63.047(b) provides in relevant part:

> "* * * Before approval of a tentative plan, the planning administrator shall make affirmative findings that:
>
> "(1) Approval does not impede the future use of the remainder of the property under the same ownership, or adversely affect the safe and healthful development of the remainder or any adjoining land or access thereto; and

three standards in both code provisions are identical. SRC 63.046 includes an additional fourth standard for subdivisions, but no party argues that it would apply or make a meaningful difference in the present case.

SRC Chapter 63 includes a number of specific subdivision and partition standards, for internal roads or boundary improvements, for example. The city argues that at least three such specific standards would apply in the present case and would require additional review. The first is SRC 63.145(j), which requires that subdivisions or partitions that result in a lot or parcel one-half acre or larger must include tentative lot lines and other details for future division. However, it is undisputed that none of the proposed parcels exceed one-half acre in size.

The second standard the city cites is SRC 63.295 and Table 63-1, which applies to both partitions and subdivisions and establishes different width standards for accessways, depending on the number of lots served. The city argues that if three or more lots are served by the proposed access to Parcel 3 then the accessway must be 25 feet wide, not 20 feet wide as proposed. However, the city's argument is based on an understanding that the proposed accessway is an easement over Parcels 1 or 2. Instead, it is the pole of a flaglot that is part of Lot 3. *See* Record 31 (partition plat). As city staff noted at the January 5, 2009 hearing, parcels 1 and 2 have access directly to Hansen Avenue. Nothing cited to us in the record suggests that parcels 1 and 2 have an access easement over Parcel 3's flagpole. The city has not established that if Parcel 3 were further divided that the access strip must be wider than the proposed 20 feet.

> "(2) Provisions for water, sewer, streets, and storm drainage facilities comply with the city's public facility plan; and
>
> "(3) The tentative plan complies with all applicable provisions of this Code, including the Salem zoning ordinance, except as may be waived by variance granted as provided in this chapter."

The third standard the city cites is SRC 63.237(a), which authorizes the city to require half-street dedication and improvement of streets bounding a subdivision. The city concedes that Hansen Street adjoining the subject property is already fully developed to city collector street standards, but argues that "some pavement improvement could be warranted." Response Brief 16. However, SRC 63.238 also authorizes the city to require similar half-street dedication and improvements for a partition. The planning director did not require petitioner to make any improvements to Hansen Street under SRC 63.238, and testified that if reviewed as a subdivision no additional requirements or improvements would be warranted. The city has not established that, if reviewed under SRC 63.237, new or different boundary improvements would be required.

In any case, as explained above, even if the city had identified a substantive additional or different subdivision approval criteria that would apply to the partition application and require meaningful review, the city offers no reason why that identification and review could not have occurred following the January 5, 2009 city council hearing. Based on the transcripts attached to the petition for review, it appears that city staff advised the city council that the hearing could be continued to the following week to address issues raised at the hearing, consistent with the 120-day deadline, which did not expire for over three weeks.[10] For reasons that are not entirely clear, the city council declined that option

---

[10] The transcript states:

> "COUNCILOR NANKE: Yeah. Just a quick weigh-in in regards to the 120 day rules and what – what our timing is and – and would staff be able to come back with response to this. Mr. Stewart went through a lot of effort to – to provide us with written testimony and I –
>
> "MR. GROSS [Planning Administrator]: Yes.
>
> "COUNCILOR NANKE: -- I would like to understand the issues?
>
> "MR. GROSS: Yes. We can do that. The 120 day decision date is January 28th. So, if we came back next week on it there would still be time.
>
> "COUNCILOR NANKE: Okay.

and instead voted to summarily deny the partition application under SRC 63.065, rather than approve or deny the application based on applicable approval standards.

For the foregoing reasons, we agree with petitioner that the city exceeded its authority under SRC 63.065 and took action inconsistent with ORS 227.178(3)(a), in summarily denying the application based solely on that code provision.

C. ORS 197.835(10)(a)

Not only was the city's denial under SRC 63.065 inconsistent with ORS 227.178(3)(a), under the present circumstances it placed the city in a position where it is potentially vulnerable to a claim that its action was either "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," or "for the purpose of avoiding the requirements of ORS 215.427 or 227.178." ORS 197.835(10)(a)(A) and (B).

1. Subsection (B) of ORS 197.835(10)(a)

Petitioner argues that LUBA should reverse the city's decision and order the city to grant approval of the application under ORS 197.835(10)(a)(B), because the city's action was "for the purpose of avoiding the requirements" of ORS 227.178. ORS 227.178(1) requires that the city take final action on the application within 120 days of the date the application is deemed complete. If the city does not do so, ORS 227.179 grants the applicant the right to file a writ of mandamus with the circuit court to compel the city to approve the application or, in the alternative, to elect to proceed with application before the city after the

---

"MR. GROSS: If it goes on for too much longer we would need to ask the applicant for an extension, of course.

"COUNCILOR ROGERS: Councilor Sullivan?

"COUNCILOR SULLIVAN: Glen, if we wanted – or what additional conditions would be, if any, imposed on this if this was brought back as a subdivision.

"MR. GROSS: I'm not aware of any." Attachment 5 to the Petition for Review, page 42.

120 day deadline has expired.[11] In the latter circumstance, the local government must refund half of the application fees, unless the applicant agrees to an extension of time. ORS 227.178(8).

ORS 197.835(10)(a)(B) is intended to protect the rights of development applicants under the foregoing statutes, by discouraging local governments from denying an application for spurious or bad faith reasons prior to the 120th day, to avoid complying with the statutory requirements to approve or deny the application based on the applicable approval standards within the 120-day deadline. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 708 (2005); *Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998). Conversely, ORS 197.835(10)(a)(B) does not apply where the local government denial, timely or untimely, is based on the merits of the application, that is, on findings of noncompliance with applicable approval criteria. 49 Or LUBA at 707-08.

Petitioner contends that the city denied the application under SRC 63.065 in part because it recognized that time was running out under the 120-day deadline and there was not sufficient time to reprocess the application under the subdivision procedures and standards. Although it is close question, petitioner has not established on the present record

---

[11] ORS 227.179 provides in relevant part:

> "(1) Except when an applicant requests an extension under ORS 227.178(5), if the governing body of a city or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the applicant may file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval.
>
> "* * * * *
>
> "(4) If the governing body does not take final action on an application within 120 days of the date the application is deemed complete, the applicant may elect to proceed with the application according to the applicable provisions of the local comprehensive plan and land use regulations or to file a petition for a writ of mandamus under this section. If the applicant elects to proceed according to the local plan and regulations, the applicant may not file a petition for a writ of mandamus within 14 days after the governing body makes a preliminary decision, provided a final written decision is issued within 14 days of the preliminary decision."

that the city council chose to deny the application under SRC 63.065, rather than subject it to the subdivision procedures and standards, because it believed that there was insufficient time to do so or because it wished to avoid the requirements of ORS 227.178. The city council was clearly aware of the 120-day deadline, as the portion of the transcript quoted above indicates, but there is little or no indication in the record that the city council chose to deny the application under SRC 63.065 because it believed there was insufficient time to apply the subdivision procedures and standards. Indeed, in the above-quoted passage staff appeared to inform the city council that there *was* time for additional proceedings. As far as we can tell, the city council believed, erroneously, that once it determined under SRC 63.065 that the partition application is subject to the code subdivision provisions that the city's only option was to start over again, no matter at what point in the proceedings that determination was made, by denying the partition application and effectively requiring petitioner to file a new application that is processed from the beginning under the subdivision procedures and standards. As explained above, that is an erroneous application of SRC 63.065 and inconsistent with ORS 227.178(3)(a). However, there is no evidence that the city's erroneous view of its options represented a spurious or "bad faith" denial for the purpose of avoiding the requirements of the 120-day rule, as opposed to an honest misunderstanding of the applicable law. Accordingly, petitioner has not established that the circumstances warrant reversal under ORS 197.835(10)(a)(B).

2. Subsection (A) of ORS 197.835(10)(a)

ORS 197.835(10)(a)(A) authorizes LUBA to reverse the city's denial if petitioner establishes that the city's action was "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." Petitioner cites ORS 197.835(10)(a) in general, and advances arguments under subsection (B) of that statute, but does not specifically cite subsection (A). Nonetheless, petitioner has argued, and we have agreed, that SRC 63.065 does not authorize or provide a basis for the city to deny the

partition application and that the city therefore exceeded its authority under the SRC in denying the application based solely on that code provision. Petitioner also argued that it was not "within the City's range of discretion to deny the application," given that the application met the applicable standards for both a partition and a subdivision. Petition for Review 23-24. As explained above, petitioner appears to be correct that the application meets all applicable partition and subdivision requirements, or at least on appeal the city has not identified any applicable subdivision standards that would require any further review, and the city made no effort to identify any such standards below. As noted, the planning administrator testified that no additional improvements or conditions would be required under the applicable subdivision standards. In our view, petitioner's arguments on this point squarely invoke the authority granted LUBA under ORS 197.835(10)(a)(A), notwithstanding petitioner's failure to specifically cite that subsection. Accordingly, we will treat petitioner's arguments and request for reversal under ORS 197.835(10)(a) as encompassing subsection (A) as well as subsection (B).

For the reasons explained above, the city's denial of the partition application under SRC 63.065 was not authorized by that code provision or any other code provision cited to our attention. We conclude, therefore, based on the evidence in the record, that the city's denial was "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." ORS 197.835(10)(a)(A). Consequently, we must reverse the city's decision and order the city to approve the application.

The third and fourth assignments of error are sustained.

FIRST, SECOND, AND FIFTH THROUGH EIGHTH ASSIGNMENTS OF ERROR

Petitioner's first and second assignments of error are labeled "precautionary," and apparently are intended to correct perceived implications from statements in the decision that petitioner regards as misleading. Petitioner does not explain why any arguments in these

precautionary assignments of error would lead to reversal or remand, if sustained. Accordingly, we do not reach or resolve these assignments of error.

The gravamen of the fifth assignment of error is that petitioner's partition application constitutes an application for "needed housing" as defined at ORS 197.303(1), and therefore, pursuant to ORS 197.307(6), the city cannot apply any approval standards or procedures that are not "clear and objective."[12] Petitioner contends that SRC 63.065 is not "clear and objective." The city responds that petitioner cites no authority for the proposition that an application to partition or subdivide land is itself an application for "needed housing" and therefore subject to ORS 197.303 or 197.307, and that nothing in the definition of "needed housing" suggests that the needed housing statutes apply to applications for partition or subdivision of land, even if the ultimate purpose of the lots or parcels created is for housing. However, we need not and do not resolve the parties' dispute on this point, because we have

---

[12] ORS 197.303(1) provides:

> "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:
>
> "(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
>
> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

ORS 197.307(6) provides:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

already concluded that the city's decision must be reversed under ORS 197.835(10)(a)(A), and therefore no purpose would be served by resolving the fifth assignment of error.

The sixth, seventh and eighth assignments of error argue that the city's denial violated petitioner's rights under the Takings, Due Process, Free Speech, and Equal Protection Clauses of the U.S. Constitution, and similar provisions of the state constitution. We seriously question petitioner's claims that the circumstances in this case give rise to a constitutional violation. However, we need not and do not reach those arguments.

NINTH, TENTH AND ELEVENTH ASSIGNMENTS OF ERROR

Under the ninth, tenth and eleventh assignments of error petitioner challenges three conditions of approval that the planning administrator imposed on the partition, for the reasons stated in petitioner's appeal below to the city council. Petitioner requests that Condition 2 be eliminated, and that the wording of Conditions 1 and 3 be modified to more accurately reflect SRC requirements. Petitioner labels these assignments of error "precautionary," and states that they are "solely for the purpose of preserving the issue of the imposed 'conditions' of approval." Petition for Review 36.

We understand petitioner to argue that if pursuant to ORS 197.835(10)(a) LUBA reverses the city's decision and orders the city to grant approval of the application, then LUBA need not reach these assignments of error, but can "wait to see if the City resolves these issues when they grant [approval of the] application." *Id*.

The city responds generally that it is not within LUBA's scope of review to resolve petitioner's "precautionary" challenges to Conditions 1-3. We agree, although for a different reason. As noted, ORS 197.835(10)(a) requires that when LUBA concludes that a local government denied a development application under the circumstances listed in the statute LUBA must both (1) reverse the decision and (2) "order the local government to grant approval of [the] application for development[.]" The statute does not mention conditions of approval or specify what LUBA should do in circumstances where, as here, the local

government has initially imposed conditions of approval that the applicant either proposed or is willing to accept, as well as conditions of approval that the applicant has challenged in a local appeal and on appeal to LUBA. For that matter, it is unclear whether the term "application" as used in ORS 197.835(10)(a) refers to the application as submitted or the application as modified or amended during the proceedings below.

To our knowledge, the present case is the first decision we have reversed under ORS 197.835(10)(a), and we are aware of no guiding precedent. Because applicants often voluntarily revise or amend applications after submission, and ORS 197.835(10)(a) is intended to be generally protective of applicants, we do not think the legislature intended "application" to refer to the initial application as submitted. Where ORS 197.835(10)(a) applies, that might result in LUBA ordering the local government to approve a version of the proposed development that the applicant has abandoned and no longer wants. Instead, we believe that "application" refers to the application as proposed at the time of the local government's denial, including any conditions of approval that the applicant has proposed and the local government has accepted. Such applicant-proposed conditions can be understood to effectively modify or amend the application. Although it is a closer question, for the same reason we also believe that "application" includes any conditions of approval that the local government imposed in an initial decision and that the applicant has not objected to or attempted to appeal to the final decision maker.

However, we do not believe that the "application" includes conditions of approval that the applicant has objected to or attempted to appeal to the local government's final decision maker, such as Conditions 1-3, prior to the city's denial. Such conditions have never become attached to the "application" in any sense. Consequently, in the present case the city must grant approval of the application as proposed at the time of the city's denial, including any conditions of approval initially imposed that petitioner did not object to or

challenge in his local appeal, but not including Conditions 1-3.[13] Due to that disposition, it would serve no purpose to address the merits of petitioner's challenges to Conditions 1-3, under these assignments of error.

We do not reach the ninth, tenth and eleventh assignments of error.

CONCLUSION

For the reasons stated, above, the city's decision is reversed under ORS 197.835(10)(a)(A), and the city is ordered to approve the application.

[13] We do not mean to foreclose the possibility that, at the time the city grants approval of the application as required by ORS 197.835(10)(a) and this decision, the city and petitioner may agree to include modified versions of Conditions 1-3. With respect to Conditions 1 and 3, petitioner challenges only the specific wording of those conditions, and is apparently willing to accept the conditions with different wording. Whether and where any such mutually modified conditions could be challenged by third parties is not clear. However, as it now stands, Conditions 1-3 are not part of the "application" and therefore ORS 197.835(10)(a) does not authorize LUBA to order the city to impose those conditions, much less modified conditions, in granting approval.