BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAT PHILLIPS, AL PHILLIPS,
ROBBIN FREEDMAN,
and MATT FREEDMAN,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

TEEN CHALLENGE INTERNATIONAL
PACIFIC NORTHWEST CENTERS,
Intervenor-Respondent.

LUBA No. 2010-025

FINAL OPINION
AND ORDER

Appeal from Lane County.

Anne C. Davies, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Lane County.

Micheal M. Reeder, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Arnold, Gallagher, Percell, Roberts & Potter PC.

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

REMANDED 09/20/2010

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

Opinion by Holstun

NATURE OF THE DECISION

Petitioners appeal a county hearing official decision that grants permit approval for a group care home.

FACTS

The subject 5.38-acre property is located southwest of the City of Eugene, outside the city's urban growth boundary. The property is located in an area for which the county approved an exception to Statewide Planning Goal 3 (Agricultural Lands), and the property is zoned for rural residential development with a minimum lot/parcel size of five acres (RR5). The subject property is improved with a single family residence, a barn, an activity building, a stand-alone garage that has been converted to a multipurpose building, and a pavilion.[1]

In 1984, when the property included approximately 8 acres, the county granted intervenor's predecessor approval to operate a daycare facility for up to 24 children on the property. In 1994, the county granted approval for a private school with up to 25 students, in addition to the previously approved daycare facility. The private school approval apparently was never acted on, and sometime after 1994 the property was divided and the subject property was left with 5.38 acres.

Intervenor Teen Challenge International Pacific Northwest Centers (Teen Challenge) operates residential facilities for recovery from drug and alcohol addition. Teen Challenge purchased the property in 2007 and sought approval for a residential recovery facility for adolescent boys. That request was denied by the county. Teen Challenge subsequently sought county special use permit approval for a residential facility for women and their

[1] In addition, there are two sheds and a well/pumphouse on the property.

dependent children (Hanna House). It is the county hearing official's approval of that application that is before LUBA in this appeal.

As proposed, there could be a total of as many as 20 individuals (women plus dependent children) and, in addition, as many as seven staff, three of which would remain on-site over night. Before the maximum of 20 individuals could be housed on the property, the existing single family dwelling on the property would have to be expanded. That expansion was not proposed at the time of the application that led to the decision in this appeal. The county planning director denied the application, and Teen Challenge appealed that decision to the county hearing official. The county hearing official reversed the planning director's decision and granted special permit approval. This appeal followed.

INTRODUCTION

In the RR5 zone "one permanent single family dwelling" is permitted outright "on a lot of any size." Lane Code (LC) 16.290(2)(a). LC 16.090 defines "family" as follows:

> "Family. An individual or two or more persons related by blood or marriage or group of not more than five persons (excluding servants), who need not be related by blood or marriage, living together in a dwelling unit."

Like many land use regulations, the LC distinguishes between families (consisting of persons related by blood or marriage) and groups of individuals who live together in a single dwelling but are not related by blood or marriage. Under 16.290(2)(a) and LC 16.090, a family of six or more persons can legally occupy a dwelling in the RR5 zone as a permitted use, but six or more persons who are unrelated by blood or marriage may not occupy a dwelling in the RR5 zone as a permitted use. Such limitations on the number of unrelated residents that may occupy a dwelling have been upheld against constitutional challenges. *Belle Terre v. Boraas*, 416 US 1, 9, 39 L Ed 2d 797, 94 S Ct 1536 (1974).

Although the RR5 zone does not allow six or more persons who are unrelated by blood or marriage to occupy a single dwelling in the RR5 zone *as a permitted use*, under LC 16.290(4)(b), in the RR5 zone the planning director is authorized to approve a "group care

home" for 6 or more unrelated persons if those unrelated persons are handicapped and the director finds that certain special approval criteria are met.[2] Those special approval criteria appear at LC 16.290(5)(a) through (d), and are set out in the margin.[3] Thus, unlike six or more unrelated persons who are not handicapped, six or more unrelated persons who are handicapped may live together in a single dwelling, so long as the LC 16.290(5) special approval criteria are satisfied. Therefore, the LC *favors* six or more unrelated persons who are handicapped over six or more unrelated persons who are not handicapped.

Against this LC regulatory backdrop, we turn briefly to the Fair Housing Amendments Act of 1988 (FHAA):

"The FHAA makes it unlawful

> "'to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of

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[2] LC 16.290(4)(b) provides that the planning director may approve, among other things:

> "Not more than one group care home on a lot or parcel and in a dwelling, manufactured dwelling or duplex allowed by LC 16.290(2)(a) through (c) above. A 'group care home' is any home or institution maintained and operated for the care, boarding, housing or training of six or more physically, mentally or socially handicapped persons or delinquent or dependent persons by any person who is not the parent or guardian of and who is not related by blood, marriage or legal adoption to such persons. * * *."

[3] The LC 16.290(5) criteria are as follows:

> "(a) [The proposed use s]hall not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands;
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> "(b) Where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby lands;
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> "(c) The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available; and
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> "(d) The proposed use and development shall not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations."

> services or facilities in connection with such dwelling, because of a handicap.'

"*42 U.S.C. § 3604(f)(2)*. It defines discrimination to include

> "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.'" *City of Edmonds v. Washington State Building Code Council*, 18 F3d 802, 804 (9th Cir 1994), *aff'd sub nom, City of Edmonds v. Oxford House, Inc*., 514 US 725, 131 L Ed 2d 801, 115 SCt 1776 (1995).

Before it filed the application that led to the special use permit that is the subject of this appeal, Teen Challenge took the position that the county should not apply the above-quoted definition of "family." Teen Challenge requested that the county make a reasonable accommodation under the FHAA and approve the proposal to operate a residential facility for up to 20 recovering addicts as an outright permitted use. Record 2031-37. The county declined and took the position that the LC 16.290(4)(b) authority for Teen Challenge to seek a special use permit was the reasonable accommodation required under the FHAA. Thereafter, Teen Challenge submitted its application for special use permit approval, but maintained that under the FHAA a reasonable accommodation was warranted to allow the proposal to be approved as requested without requiring special use permit approval.[4]

An issue that petitioners raise a number of times throughout the petition for review is whether in applying the LC 16.290(5) special use permit criteria the hearing official concluded that the LC 16.290(5) criteria are not satisfied. We understand petitioners to contend that there is language in the hearing official's decision that suggests the hearing official believed that the proposal does not satisfy all of the LC 16.290(5) special use approval criteria but erroneously believed that the FHAA requires that the county extend in

[4] Teen Challenge apparently also took the position below that if the proposal did not comply with any of the LC 16.290(5) special use approval criteria, an accommodation under the FHAA was warranted to allow the proposal to be approved notwithstanding any such noncompliance with one or more of the LC 16.290(5) special use approval criteria. That probably explains the hearing official's many references to the FHAA.

this case *additional* "reasonable accommodations" to approve the proposal notwithstanding that it does not comply with all of the LC 16.290(5) special use approval criteria.

We agree with petitioners that the hearing official's decision in this regard is unclear about the role the FHAA played in this case, particularly so in some instances. However, we conclude that the hearing official's decision was based on his findings that the proposal complies with the LC 16.290(5) special use approval criteria. The hearing official did not find that the proposal does not comply with the LC 16.290(5) special use approval criteria or that additional "reasonable accommodations" are required by the FHAA in this case.

FIRST ASSIGNMENT OF ERROR

The existing single family dwelling on the subject property is approximately 1,914 square feet in size, and it has four bedrooms. That structure will be enlarged to accommodate as many as 20 residents. Teen Challenge provided a site plan that showed a 70-foot by 110-foot area around the existing 34-foot by 56-foot dwelling. Teen Challenge took the position that any expansion of the exiting dwelling would be confined to that 70-foot by 110-foot area. Petitioners took the position below that it is not possible to know if the proposal complies with the LC 16.290(5) special use permit criteria without knowing the actual size and scope of the proposed expansion. The hearing official disagreed:

> "The opponents have argued that the application of a special use permit for a group care home is incomplete, in the sense that insufficient information is present to address its impacts. I disagree. The applicant has defined the maximum number of full-time residents and has described the various activities that will occur on the subject property. Plans for the expansion of the group care home to accommodate the increase in 'students' and children must meet setback requirements as well as building code and sanitation regulations. If the maximum number of residents is known then water, sewerage, bedroom and other needs can be determined. The only unknown is the shape of the structure as it is expanded to add additional bedrooms. I fail to see how the neighbors are adversely affected by the shape of the group care home." Record 96.

Petitioners challenge the above findings and contend that the shape of the dwelling is not the only unknown. According to petitioners, the enlarged dwelling could "fall within 10

feet of the property line and * * * the existing easement."[5] Petition for Review 10. Because county approval of the dwelling expansion in the future will not be accompanied by additional public hearings, we understand petitioners to contend they have been denied a meaningful opportunity to ensure that the enlarged dwelling will comply with the LC 16.290(5) special use permit criteria.

The only specific complaints that the petitioners advance under this assignment of error are that the dwelling on the subject property could be expanded to be much larger and the dwelling could be closer to the southern property line than is the current dwelling.[6] However, petitioners have not established that the precise appearance, size and location of the expanded dwelling within the identified footprint must be known now to address the LC 16.290(5) special use permit criteria. As the hearing official pointed out in his findings, the operational characteristics of the proposal are known and the likely impacts of the proposal are more likely to be attributable to those operational characteristics than the design, size and location of the dwelling on the lot. To the extent the design, size and location of the dwelling on the property could have some bearing on the LC 16.290(5) special use permit criteria, the potential maximum footprint is known and since the challenged decision imposes no other limits on the architecture, size and location, petitioners could have assumed a large dwelling that occupies the entire 7,700 square feet will be built and argued that such an expanded dwelling would violate the LC 16.290(5) special use permit criteria. Petitioners made no such argument. Teen Challenge's failure to identify the precise size, design and location of the expanded dwelling does not provide a basis for remand.

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[5] The reference to the easement is an easement that crosses the subject property and then travels parallel to the property's southern property line on the parcel that adjoins the subject property to the south. That easement provides access to other parcels.

[6] The existing 34-foot by 56-foot dwelling is located 45 feet north of the southern property line. If the dwelling is expanded as far south as possible within the 7,700 square foot footprint, it would be ten feet from the southern property line. Record 816.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error petitioners contend the hearing official erred by assuming the proposed use is protected by the FHAA and concluding that the proposal qualifies as a group care home.[7]

A. Group Care Home

We do not understand petitioners to argue under this assignment of error that the residents of the proposed facility are not "handicapped" persons, as the LC 16.090 definition of Group Care Home requires. *See* n 7. Rather, petitioners argue the challenged decision authorizes "special events" that are of a different nature and extent than the events typically associated with group care homes and that those special events render the proposal something other than a group care home. Petitioners contend that the hearing official's response to this issue is set out in the following findings:

> "Special events—There is some confusion regarding what the 'special events' are regarding the applicant's proposal. Those in opposition have suggested that 'special events' were activities such as the 'United We Stand/FMCA' and the 'One Hope' gathering. The applicant's representative, however, has clarified that this term was intended to refer to birthday parties, student graduations, open houses, small luncheons and other similar activities that are associated with the program. The applicant's definition is not out of character [with] that which might occur with a large residential family. It is unclear from the record whether the activities identified by the opposition would need land use approval if associated with a residential use. If not, then they would not require land use approval if associated with the proposed group care home. If so, then they would." Record 100.

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[7] LC 16.090 provides the following definition:

> "Group Care Home. Any home or institution maintained and operated for the care, boarding, housing or training of six or more physically, mentally or socially handicapped persons or delinquent or dependent persons by any person who is not the parent or guardian of and who is not related by blood, marriage or legal adoption to such persons."

The above findings appear in the section of the hearing official's decision addressing the LC 16.290(5)(a) criterion that requires that the proposed use must "not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands." *See* n 3. Therefore, it is not at all clear that the above findings were adopted to address the issue presented in this assignment of error, *i.e.* whether the contemplated special events render the group care home something other than a group care home. However, for purposes of this opinion we do not question petitioners' contention that they were.

We readily agree with petitioners that the nature and extent of any special events that the challenged decision envisions for the future is somewhat unclear.[8] If Teen Challenge requested approval for any particular special activities or the challenged decision specifically approves any special activities, no one has called our attention to that request or approval. It appears that the "special activities" issue arose over the parties' disagreement about the scope and nature of past activities on the subject property and the potential impacts on neighboring properties if those activities are repeated in the future. It is reasonably clear that the challenged decision does not expressly authorize a repetition of those past activities in the future, and the hearing official specifically found that past illegal activities on the subject property are irrelevant in this proceeding. Record 97. We do not understand petitioners to challenge that finding.

Based on the above-quoted findings, we understand the challenged decision to determine that Teen Challenge clarified during the proceedings below that special events on the subject property may include "birthday parties, student graduations, open houses, small luncheons and other similar activities that are associated with the program." We also

[8] The parties disagree about the nature and extent of certain gatherings that have occurred on the property in the past. The hearing official mentions two of those gathering, the United We Stand/FMCA and One Hope gatherings.

understand the challenged decision to conclude that such special events are consistent with a group care home use and "not out of character [with] that which might occur with a large residential family." That conclusion seems reasonable to us, and petitioners offer no reason to question that conclusion. If Teen Challenge allows special events in the future that go beyond the clarified scope of special events and beyond what is appropriate for a group care home, an appropriate enforcement action could be initiated to terminate such improper events or impose appropriate sanctions. Nothing in the challenged decision authorizes special events that are out of character with a group care home.

B. FHAA

Petitioners assign error to the following hearing official finding:

> "* * * For purposes of this decision, it is assumed that the proposed use qualifies as a residential use protected by the FHA." Record 95.

Petitioner contends the county may not simply assume the proposal is protected by the FHAA.[9] However, petitioners' legal theory for challenging the above finding is based on petitioners' assumption that (1) the proposal includes special events that preclude approval of the proposal as a group care home and (2) the county relied on the FHAA to approve the disputed use notwithstanding that the proposed use does not qualify as a "group care home," within the meaning of LC 16.090 and 16.290(4)(b).

Both of petitioners' assumptions are erroneous. For the reasons explained above, we reject petitioners' contention that the challenged decision authorizes special events that make the proposal something other than a group care home. As explained in the introduction above, the hearing official did not rely on the FHAA to approve the proposal notwithstanding

[9] The above-quoted sentence is the conclusion of a paragraph where the hearing official explains why the residents of the proposed facility qualify as handicapped and are therefore protected by the FHAA. There does not appear to be any serious dispute that the residents of the proposed facility are entitled to protection under the FHAA. The parties dispute is whether Teen Challenge is entitled to and received additional "reasonable accommodations" under the FHAA beyond the accommodations already made by the county when it made the special use permit process available for approval of group care homes.

applicable LC special use permit requirements. The hearing official found that all applicable LC special use permit requirements are satisfied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The hearing official found that the availability of special use approval was the county's attempt to provide a reasonable accommodation for residential recovery facilities:

> "A local government discriminates if it refuses to make reasonable accommodations in its rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. I do not believe the Lane Code facially discriminates against persons protected by the FHA. Group care homes, which encompass care facilities such as proposed by the applicant, are allowed in the same residential district that allows single-family residences. The special use permit process is the county's approach for making a reasonable accommodation to its regulations and no discrimination will exist unless the application is denied or conditioned based upon factors that treat the applicant in a manner different from how an application for a single-family dwelling would be treated. Said another way, absent a showing that the application for a special use permit would be futile, the county must be allowed an opportunity to make a reasonable accommodation to its rules." Record 95 (footnotes omitted).

In the above findings, the hearing official appears to conclude that the special use permit for group care homes is the county's attempt to make reasonable accommodations under the FHAA for residential recovery facilities and therefore the hearing official must first determine whether the proposal satisfies the LC 16.290(5) special permit approval criteria before determining whether any additional accommodations are necessary under the FHAA. However, the hearing official then immediately adopts the following findings:

> "The opponents have questioned that the requested accommodation is an accommodation that is required by the women being housed at the Hanna House recovery center. To the contrary, the record indicates that the recovery houses need at least 12 'students' in order to economically support a sufficient number of staff, two of which (at a minimum) will live on the site. As part of the recovery program, the women are allowed to bring their children in order to not separate families and to provide a better environment for recovery. Allowing for a maximum of six children brings the total to 20 individuals who may reside at the facility. This is the number of individuals requested by the

> applicant for the special use permit for the proposed group home. The opponents argue a financial justification cannot provide the basis for a reasonable accommodation. While I would agree that a financial justification cannot be the sole basis of requiring a reasonable accommodation I do believe that it is a factor that must be taken into account." Record 95 (footnote omitted.)

Petitioners assign error to those findings and petitioners and Teen Challenge argue at length over the role that financial justification may play in a local government's obligation to grant a reasonable accommodation to deviate from land use regulation restrictions under the FHAA. The hearing official's findings invite that dispute unnecessarily, by suggesting that the financial impacts of limiting the number of residents at the proposed facility warrant a further FHAA reasonable accommodation beyond the LC authorization for special permits for group care homes.

Many of the cases that the parties rely on to dispute the role that financial justification can play in requiring a reasonable accommodation under the FHAA concern local laws that limit the number of unrelated persons who may occupy a residential recovery facility. *See Turning Point, Inc. v. City of Caldwell*, 74 F3d 941, 943 (9th Cir 1996) (no more than 12 residents); *Oxford House Inc. v. City of St. Louis*, 77 F3d 249, 252 (8th Cir 1996) (no more than 8 residents). And the hearing official for reasons that are not clear to us appears to have believed that some sort of additional accommodation was needed to allow up to 20 residents at Hanna House. But what the above quoted findings and the parties fail to appreciate is that the hearing official's decision in this matter is a decision to grant a special use permit for a "group care home," as that term is used in LC 16.290(4) and defined in LC 16.090. *See* ns 2 and 7. As the term "group care home" is used in LC 16.290(4) and defined in LC 16.090, there is no limit on the number of residents a group care home may have. Simply stated, no accommodation is needed for the number of residents, because under LC 16.290(4) and LC 16.090 the number of residents a group care home may house is not limited. The LC 16.290(5) approval criteria might *indirectly* require an applicant to limit the size of a

proposed facility to comply with those criteria. For example, the LC 16.290(5)(a) criterion requires that the proposed use must "not create significant adverse impacts on existing uses." But neither LC 16.090, which defines group care home, nor LC 16.290(4), which authorizes group care homes in the RR5 zone, impose any objective numerical limit on the number of residents.

At worst, the hearing official's findings quoted above suggest the hearing official may have mistakenly believed that an additional accommodation was needed to approve a group care home that proposes to house up to 20 persons. But as we have already explained, no such accommodation was legally required under the LC. Therefore, even if the hearing official's findings and the evidentiary record are inadequate to establish that such an accommodation is necessary—if such an accommodation were required to approve a group care home under the LC—the error was harmless and provides no basis for reversal or remand. *See Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287, 301-02 (2007) (where a subdivision approval standard was waived under Ballot Measure 37 any errors in a subsequent subdivision approval decision addressing the waived standard could provide no basis for remand).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The hearing official's decision sets out the LC 16.290(5)(a) standard, which requires that the proposal "not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped land." *See* n 3. Before turning to opponents' specific arguments about impacts, the hearing official adopted the following introductory findings:

> "The 'significance' of an impact must be determined in relation to the impacts associated with those uses permitted outright in the residential zone and, in this case, *in the context of the FHA.* The test is that the proposed use may not have an impact significantly greater than that which would be generated by uses permitted outright. In the present case, *this test may be read to mean that*

> *the proposed use may not have an impact significantly greater than that of a single-family residence of the same size*." Record 97 (footnote omitted; emphases added).[10]

In this assignment of error, petitioners allege two subassignments of error. First, petitioners allege that the "in the context of the FHA" language quoted above demonstrates that the hearing official improperly discounted impacts that can be expected from the proposed use based on his conclusions that the proposal is protected by the FHAA and that further accommodations must be granted in applying LC 16.290(5)(a). Second, petitioners challenge the interpretation adopted in the last emphasized sentence above, *i.e.*, that negative impacts must be significantly greater than the impacts of a similarly sized single-family residence before they are significant adverse impacts.

A. Context of the FHA

We are not sure what the hearing official meant when he found that determining the significance of the impacts of the proposal must be done "in the context of the FHA." But whatever the hearing official meant, we do not agree with petitioners that that finding supports a conclusion that the hearing official granted additional accommodations under the FHAA to overlook significant impacts of the proposed facility. Petitioners also set out part of the following findings in arguing that the hearing official improperly relied on the FHAA to discount or overlook significant impacts:

> "*The FHA does not cover individuals whose tenancy constitutes a direct threat to the health [or] safety of others or whose tenancy would result in substantial physical damage to the property of others.* Various opponents have made allegations regarding damage to their property (easement, livestock, etc.) from the use of the subject property by individuals associated with the group care home and about potential security threats. I believe these issues can be examined under the analysis required by Lane Code 16.290(5)(a) but, in summary, find that none of these allegations rise to the level where the proposed use would be excluded from the protection of the FHA." Petition for Review 25; Record 96 (emphasis added).

[10] The omitted footnote is a citation to *Orr v. City of Eugene*, 6 Or LUBA 206 (1982).

This finding appears in the beginning of the hearing official's decision, before he begins addressing the LC 16.290(5) special use permit approval criteria. Without indicating that they did so, petitioners omit the italicized first sentence in their quotation of the above findings. With that omission, petitioners' argument is plausible. With that sentence included, it is clear that in this paragraph the hearing official was rejecting one of the opponents' arguments that the proposed group care home did not qualify for potential protection under the FHAA because it fell within a statutory exception for threats to health or safety. If the entire paragraph is read together, it is clear that the hearing official was not relying on the FHAA to discount or overlook any significant impact that the proposal might have.

It cannot be disputed that the hearing official's repeated references in his decision to the FHAA create an ambiguity regarding whether he was applying the LC 16.290(5)(a) significant impact criterion and finding that the proposal complies with that criterion or finding that the proposal did not comply with that criterion and relying on the FHAA to grant an accommodation. But for the most part the hearing official's findings that address the project opponents' specific complaints about impacts are fairly read to reject opponents' contentions that likely future impacts will be significant, and reject those concerns on their merits without granting an additional accommodation under the FHAA.[11] The hearing official's findings concerning two other concerns are more ambiguous.

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[11] Some of those findings are set out below:

> In addressing alleged past zoning violations on the subject property, the hearing official found:
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> "* * * Regardless, alleged, actual or forecasted violations of the Lane Code are not relevant as to whether the group care home, as proposed by the applicant, is consistent with the applicable approval standards." Record 97.
>
> In addressing parking, the hearing official found:

The hearing official's initial findings addressing opponents' concerns about security and safety certainly can be read to say the hearing official believed that safety concerns amounted to a significant adverse impact such that the proposal does not comply with the LC 16.290(5)(a) standard so that an FHAA accommodation might be required to approve the proposal. Record 99 (third paragraph). But in the paragraph immediately after that paragraph, the hearing official adopted the following findings:

> "The incidents that have been reported are of a nature and frequency that might be normally associated with standard residential use and I do [not] believe that they rise to the level of either adversity or significance as to suggest that the proposed use is not consistent with Lane Code 16.290(5)(a). Nor do I believe that the behavior described would constitute 'a direct threat to the health and safety of others or whose tenancy would result in substantial damage to the property of others' so as to disqualify either the proposed use or the individuals involved with exclusion from the protection of the FHA." Record 99.

The above findings are somewhat problematic, not the least for the omission of the key word "not" in the first sentence. But when that sentence is read with the balance of the paragraph it is sufficiently clear that was an inadvertent omission and that the hearing official intended to find that the security/safety incidents were not significant. The continued

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> "In conclusion, parking appears to be adequate [for] the normal and anticipated needs of the proposed use and traffic generated by this use will not adversely affect the capacity or safety of Bailey Hill Road or Schnorenberg Lane." Record 98.
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> In addressing a dispute about the easement on the property, the hearing official found:
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> "The owners of adjacent properties that share an easement over the subject property have questioned whether the use of the easement is excessive and whether that access serves too many properties. Disputes regarding violation of easement restrictions or maintenance are generally of private concern and should be resolved in Circuit Court. There is no evidence that this is not the case at present." *Id*.
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> In addressing allegation of impacts on livestock on adjoining property, the hearing official found:
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> "The Freemans have spoken very passionately about their opposition to the proposed group care home. The magnitude with which they voice some of these concerns, however, appears to be out of proportion to the actual evidence in the record. Without expert testimony from a neutral individual or individuals who are familiar with Alpaca raising, I cannot conclude that the impacts complained of have or are likely to have resulted in increasing the number of still births in the Freemans' Alpaca herd." Record 99.

reference to the FHAA in the last sentence continues the ambiguity in the hearing official's decision that we have previously noted. However, we continue to believe that those references are most accurately read to express the hearing official's belief that a reasonable accommodation under the FHAA *would be required and warranted* if the proposal did not meet one of the applicable standards (here no significant impacts), not that a FHAA reasonable accommodation *is required* to waive or fail to apply a standard that the proposal does not satisfy.[12]

This subassignment of error is denied.

B. Comparison to Single Family Residence

Petitioners next challenge the hearing official's finding that the LC 16.290(5)(a) no significant impact standard may be interpreted "to mean that the proposed use may not have an impact significantly greater and different than that of a single-family residence of the same size." Record 97. Petitioners contend that the hearing official erroneously relied on *Orr v. City of Eugene*, 6 Or LUBA 206 (1982), a 28-year old LUBA opinion that addressed a different City of Eugene approval standard. *See* n 10.

We do not read the hearing official's decision to say that LC 16.290(5)(a) *must* be interpreted to require that impacts must be "significantly greater or different than that of a single-family residence of the same size," but rather that it *may* be interpreted in that way. Similarly, we do not read the citation to *Orr* to mean the hearing official believed that case

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[12] We reach the same conclusion about the hearing official's findings concerning the property value diminution. The ambiguity we have already mentioned appears in those findings too, but the hearing official adopted the following findings that we conclude show the hearing official found that the LC 16.290(5)(a) "no significant adverse impact" standard is met with regard to impacts on property values:

> "I believe that a case can be made that property values are adversely affected by the presence of a nearby group care facility but don't believe that there is sufficient information in the present record to determine whether the adverse impacts from the proposed group care home are significant. Also, I do not believe that the impacts from the proposed use, if operated as warranted by the applicant, rise beyond that of a normal residential use. * * *" Record 100.

Petitioners neither acknowledge nor challenge these findings.

compelled his interpretation. But we believe *Orr* lends some support for the hearing official's interpretation. The standard at issue in that case required that impacts be "minimal" which LUBA determined required a comparison of impacts. We agreed with the city in *Orr* that the comparison could be a comparison with impacts caused by development permitted outright in the zone rather than a comparison with the impacts of no development at all. Similarly, in this case, the LC 16.290(5)(a) standard requires that impacts must be "significant" and "adverse." While the hearing official's interpretation of LC 16.290(5)(a) is not entitled to any particular deference on review, *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995), it does not seem unreasonable to look to the impacts of a single family dwelling, which is permitted outright in the RR5 zone, to develop an idea of what types of impacts the enacting body may have had in mind when it adopted LC 16.290(5)(a) and the level of impact required to make such impacts adverse and significant.

This subassignment of error is denied.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In their final assignment of error, petitioners challenge the county's findings concerning LC 16.290(5)(c), which provides:

> "The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available[.]" *See* n 3.

A. Water

Petitioners challenge the hearing official's findings and the quality of the evidence the hearing official relied on to conclude that the proposal complies with LC 16.290(5)(c). We first set out some of the hearing official's findings before turning to petitioners' challenges.

"Several aquifer evaluations have been prepared for the subject property. The first study on record was conducted in 1988 in conjunction with a conditional use permit request for a day care center. The pump test conducted at that time demonstrated that the well on the subject property could support almost 150 students plus a single family dwelling at 2.5 gallons per minute. A more thorough aquifer evaluation was performed in 2001 as a part of the partitioning process of the subject property. The specific purpose of this test, which was generally conducted in accordance with the standards of [LC] 13.050(13)(c)(i), was to demonstrate that there was an adequate residential water supply for the partition without adversely affecting wells on adjacent properties or the underlying aquifer. While the well used in this pump test was located on a parcel adjacent to the subject property, this factor is not determinate in that Lane Manual 9.165(2) requires that water supply test wells be constructed in areas least likely * * * to produce a satisfactory water supply. The results of this test were affirmative.

"An expert hired by the opponents alleges that the earlier aquifer analyses were not adequate to meet the standard of Lane Code 16.290(5)(b) or (c). Specifically questioned was the age of the earlier test (1988) and whether the well tested in 2001 was served by the same aquifer as the well on the subject property. The opponents' expert also questioned the duration of the 2001 pump test and the methods used.

"As far as I can determine, the 2001 pump test conformed to all applicable requirements of Lane Code 13.050(13)(c)(i) except that no observation well was utilized. Based upon the information in the record, and the knowledge and experience of the aquifer by the expert relied upon by the applicant, it appears most likely that the well on the subject property and the well used in the 2001 aquifer evaluation are served by the same aquifer and that the aquifer is not characterized by poor transmissivity. As discussed below, the well logs in the area do not support a conclusion that the well usage has greatly diminished the capacity of the aquifer over the last 26 years. Allegations that the well used by the Twin Oaks Elementary School has gone dry was proven incorrect and at least one well in the area that had gone dry was replaced on the same property with a well that was more shallow and had a yield in excess of the average well capacity for the area. While there is some evidence in the record that the static water level of a few wells in the neighborhood has decreased, a greater weight of the evidence points to a conclusion that when individual wells 'go dry,' in this area it is because of the characteristics of a particular well rather than because of a limitation in the capacity of the aquifer.

"Logs of 43 wells within a square mile area around the subject property show that the average well capacity is over 35 gallons per minute. Seven of these wells drilled since 2001 have an average yield of almost 60 gallons per minute. While the new wells average about 30 feet deeper than the average of all the wells, they still indicate that there is no problem with the aquifer in this

area. Further, the applicant's well need only produce a nominal 1.7 gallons per minute to serve a conservative need of 2,400 gallons of water per day. Previous pump tests and the logs of nearby wells indicate that (1) this capacity exists and that (2) this amount of usage will not harm the aquifer in any way.

"The applicant is not required to prove beyond a reasonable doubt that the proposed use will not exceed the carrying capacity of the existing water supply resources or that they will not a create significant adverse impact on existing uses on adjacent and nearby lands that draw from the same aquifer. That is to say, it is not required to refute or explain all data or evidence that might be inconsistent with an ultimate conclusion that all applicable approval standards are met. The burden of proof carried by the applicant is one of a preponderance of the evidence. In the present case, the majority of relevant well data, pump tests, and the familiarity with the aquifer by the applicant's expert hydrologist support a conclusion that the applicant's well can support the proposed use without adversely affecting adjacent wells or adversely affecting the aquifer." Record 101-102 (underlining in original).

Petitioners identify a number of alleged inadequacies in the evidence the hearing official relied on that were identified by opponents' expert:

"(1) The initial pump test was performed in 1988. Significant changes could have occurred since that time as [a] result of the time elapsed, development and pumping that could impact the aquifer's response [to] the pumping of the well on the subject property.

"(2) The 2001 pump test was conducted on a well on a neighboring property. The information supplied provides no information regarding the specific location of that well. Further, the Team Challenge well and the well used in 2001 have significant, distinguishing features that render them incomparable for purposes of an aquifer study.

"(3) The 2001 pump test lasted only 4 hours, an [in]adequate study time to determine aquifer characteristics.

"(4) No barometric pressure or local precipitation data were reported during the periods preceding and during the pumping and recovery portions of the test.

"(5) Drawdown monitoring was performed at one-foot increments; precise measurements require .01 foot increments.

"(6) The first drawdown reading was taken 15 minutes into the test, creating significant question as to the validity of the aquifer test results.

> "(7) Perhaps most importantly, no observation well was used to monitor drawdowns during the test. The Lane Code standards require that aquifer tests employ observations wells. LC 13.050(13)(c)(i)." Petition for Review 28-29.

In addition to these questions regarding the quality of the evidence the hearing official ultimately relied on, petitioners also fault the hearing official for dismissing reports of nearby wells failing.

With regard to items 1, 3, and 4 above there is evidence in the record that a reasonable person would believe to conclude that the age of the 1988 test (Record 1967, 539, 937-38), the four-hour length of the 2001 pump test (Record 919, 939) and failure to record barometric pressure (Record 939) does not render the evidence the hearing official relied on unsubstantial. There is also evidence in the record that supports the hearing official's failure to assign great significance to allegations that some neighboring wells have failed. Record 539, 919, 938.

With regard to item 7 above, petitioners expert stated that the reason for employing an observation well is to identify "[t]he geometry of the potential cone of depression." Record 1682. There is evidence in the record that a single well on the property could not be pumped in a way that would cause a cone of depression that would cause neighboring wells to fail. Record 938.

With regard to the remaining criticisms, petitioners' expert simply criticized using one-foot increments (number 5), arguing that is "indicative of imprecise data." Record 1681. With regard to taking the first drawdown reading 15 minutes into the test (No. 6), petitioners' expert simply argued "[t]his inadequate level of precision leaves significant question as to the validity of the aquifer test results." Record 1681. Given the amount of data the hearing official had available and given that the data supports a conclusion that wells in the area produce at a level far above the 1.7 gallon per minute per day necessary to provide adequate water, we do not believe those criticisms are sufficient to show the hearing official's decision is not supported by substantial evidence. Finally, regarding petitioners' criticism of the

applicant's decision to rely in part on well data from a well on an adjoining property, given (1) the data concerning the productivity of other wells in the area, (2) evidence of the nature of the aquifer, and (3) the relatively small well production required top serve the proposal, we are not persuaded that the location of that well a mere 400 feet north of the property renders the data produced from that well unreliable in predicting whether a well on the subject property will perform adequately to serve the proposed use.

This subassignment of error is denied.

B. Sewage Disposal

Under LC 16.290(5)(c), the proposal must "not exceed the carrying capacity of the soil," and to ensure that this requirement is met there must be "factual information * * * about any existing or proposed sewer * * * systems for the site and the site's ability to provide on-site sewage disposal * * *." Among the findings adopted by the hearing official to demonstrate that the proposal has adequate area and soils for onsite sewerage disposal to serve the proposal are the following:

> "The existing sewage disposal system consists of two septic tanks of 1000 gallons and 1500 gallons, and 1485 feet of drain line installed at the time of construction of an addition to the daycare building in 1994 * * *. The 1485 lineal feet of drainfield will support 10 beds and based upon the size of the subject property and its soil types, the County Sanitarian believes it reasonable to conclude that an upgrade to accommodate up to 23 beds is possible." Record 101.

Petitioners argue that the above findings are not supported by substantial evidence:

> "The county sanitarian and hearing official confirmed that the length of drain line will accommodate 10 beds. The hearing official relied on a statement by the county sanitarian that he believed it reasonable to conclude that an upgrade to accommodate up to 23 beds is possible.
>
> "That supposition is not adequate to support a conclusion that the applicable approval standard is complied with or that the approval can be conditioned in such a way that the hearing official could make a determination that compliance is feasible. Petitioners identified in written testimony that the existing drainfield cannot be expanded due to lack of space. * * *" Petition for Review 32.

Petitioners explain that in testimony below, one of the petitioners gave a number of reasons why the existing drain-field cannot be expanded and gave reasons why other areas of the subject property could not be developed with a drain-field.[13] Petitioners contend that there is not substantial evidence that the subject property can accommodate a drain-field that is adequate for up to 20 residents, much less the replacement drain-field that is required by OAR 340-071-0150(4)(a)(C).[14]

We do not understand Teen Challenge to dispute that LC 16.290(5)(c) requires the county to establish that the site has suitable areas for the drain-field expansion that will be required to accommodate 20 students and a replacement drain-field, so for purposes of this opinion we assume without deciding that it does. There is evidence in the record that the existing drain-field will accommodate up to ten beds. The only other evidence identified by Teen Challenge is an e-mail message where a county planner takes the position that "[t]he property appears to have a great deal of drain line (1485', installed * * *), with the equivalent capacity of three four bedroom homes." Record 931. Although we do not understand petitioners to dispute that the county sanitarian believes it is possible to upgrade the existing

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[13] That testimony is set out below:

> "The question for the county has been, can [Teen Challenge] expand the size of the drain-field on 5 acres? The current drain-field cannot be enlarged due to lack of area: 1) the area to the north [of the existing drain-field] is bordered by the driveway, 2) the area to the west is nearly used with the current field, and then the area slopes off dramatically toward the property line, 3) the area to the east is the common driveway for three parcels of land/homes; 4) and the south is the property line.
>
> "[Teen Challenge] does not have room to expand the current drain-field; nor, according to the site plan checklist, has it identified a replacement area for their septic drain-field. The other areas are either on a slope, or would feed into a water collection pit that would interfere with collected underground run off water. The other areas is within 100 feet of the water supply/well." Record 676-77.

[14] A petitioner testified below:

> "[Teen Challenge] has not identified a replacement field and due to property lines, slope, driveways, a water collection pit and the well/water source, there is little if any place to put the replacement of the system if needed." Record 671.

septic system so that it will accommodate up to 23 beds, we have been unable to find any document or testimony where the county sanitarian took that position. Therefore, we have no way to know why the county sanitarian may believe that the concerns expressed below that the existing drain-field cannot be expanded to accommodate the planned number of residents are invalid. We also do not know whether the county sanitarian or hearing official agree that under LC 16.290(5)(c) Teen Challenge must establish that it is possible to site a replacement drain-field on the subject property, and, if so, where the replacement drain-field could be sited.

While the hearing official is entitled to rely on the expert opinion of the county sanitarian, where opponents have offered a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drain-field, we agree that more than an unexplained expression of belief that it will be possible is required. *Bartels v. City of Portland*, 20 Or LUBA 303, 308 (1990). There may well be adequate responses to all of the concerns expressed about the property's ability to accommodate the required drain-field expansion and any required replacement drain-field. But those responses are not present in the hearing official's decision or in any evidence in the record that has been brought to our attention. Remand is required so that the hearing official may explain why those concerns are not well taken.

We briefly note and reject two final arguments advanced by Teen Challenge. Teen Challenge first argues "the FHAA requires the County to find this criterion is met, especially in light of the fact that the previous [permits] approved for the daycare and the daycare and school were approved without stipulation or condition." Response Brief of Intervenor-Respondent 22-23. If the hearing official concludes on remand that the subject the proposal complies with the LC 16.290(5)(c) "carrying capacity" and "provide on-site sewage disposal" requirements, it will be unnecessary to consider whether to grant a reasonable accommodation under the FHAA. If not, the hearing official may consider whether the

county is nevertheless obligated to grant a reasonable accommodation under the FHAA and approve the proposal notwithstanding that the proposal does not comply with LC 16.290(5)(c), with regard to on-site sewage disposal. Until the county has had an opportunity to determine whether an FHAA accommodation is needed and warranted with regard to LC 16.290(5)(c), we believe it would be inappropriate for LUBA to consider the question.

Finally, Teen Challenge argues "[i]t is unreasonable to believe that a 5.38-acre parcel cannot accommodate the septic needs of up to 20 residents." Response Brief of Intervenor-Respondent 22. If Teen Challenge is arguing that LUBA may assume that the 5.38-acre subject property is an adequate area for the septic drain-field requirements for 20 residents as a matter of law, we do not agree. There are a number of structures and other improvements on the property, as well as a road that provides access to other properties. A significant area will be devoted to parking, and for that reason may not be available for drain-field development. The siting of septic drain-fields is subject to a number of limitations. Without more argument from Teen Challenge, on this evidentiary record, we cannot assume as a matter of law that the proposal complies with LC 16.290(5)(c).

This subassignment of error is sustained.

The fifth assignment of error is sustained in part.

The county's decision is remanded.