

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NORTHGREEN PROPERTY LLC,
5 *Petitioner,*

6
7 and

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9 MELISSA BROTZ and OAKWAY
10 NEIGHBORS' ASSOCIATION,
11 *Intervenors-Petitioners,*

12
13 vs.

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15 CITY OF EUGENE,
16 *Respondent,*

17
18 and

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20 NEW CINGULAR WIRELESS PCS, LLC,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2013-028

24
25 FINAL OPINION
26 AND ORDER

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28 Appeal from City of Eugene.

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30 Micheal M. Reeder, Eugene, filed a petition for review and argued on behalf of
31 petitioner. With him on the brief was Arnold Gallagher, PC.

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33 Bill Kloos, Eugene, filed a petition for review and argued on behalf of intervenors-
34 petitioners.

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36 Jerry Lidz, Assistant City Attorney, Eugene, filed a response brief on behalf of
37 respondent.

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39 Richard J. Busch, Issaquah, Washington, filed a response brief and argued on behalf
40 of intervenor-respondent.

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

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45 AFFIRMED

07/15/2013

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving tentative planned unit development and conditional use permit applications to site a cellular communications tower and ancillary facilities on property zoned Low Density Residential/Planned Unit Development (R-1/PD).

MOTION TO INTERVENE

New Cingular Wireless PCS, LLC (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion and it is granted.

FACTS

The challenged decision is the city’s decision on remand from *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA __ (March 5, 2012) (*Northgreen I*). We take the facts from *Northgreen I*:

“Intervenor submitted planned unit development and conditional use permit applications to site a 75-foot tall wireless communications tower on the northern part of a 58-acre private golf course, and also submitted a variance application to locate the ancillary facilities that house the equipment for the tower above ground. The subject property is zoned R-1/PD and is designated Parks and Open Space in the Metro Plan and the Willakenzie Area Plan. The Metro Plan is the comprehensive plan that governs the metropolitan area of the city, and the Willakenzie Area Plan is the applicable refinement plan for the area of the city in which the subject property is located. Petitioner’s 222-unit apartment building is located to the north of the golf course property, approximately 100 feet from the proposed cell tower. The golf course is surrounded by single family residential development on all sides.” *Northgreen I*, slip op 2-3.

In *Northgreen I*, we remanded the city’s decision to consider, as relevant here, whether the applications are consistent with the Eugene Springfield Area Metro Plan (Metro Plan) Policy E.4, which provides:

“Public and private facilities shall be designed and located in a manner that preserves and enhances desirable features of local and neighborhood areas and promotes their sense of identity.”

1 On remand the planning commission accepted new written evidence and argument,
2 and then held two public hearings to deliberate. At the conclusion of its second hearing, the
3 planning commission voted to approve the applications. This appeal followed.

4 **SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR**

5 Petitioner’s second, third and fourth assignments of error challenge the planning
6 commission’s interpretation of Policy E.4. We repeat Policy E.4:

7 “Public and private facilities shall be designed and located in a manner that
8 preserves and enhances desirable features of local and neighborhood areas and
9 promotes their sense of identity.”

10 Policy E.4 requires the city to determine the “desirable features of local and neighborhood
11 areas,” and then determine that the location and design of the cell tower (1) “preserves and
12 enhances” those desirable features and (2) “promotes [the] sense of identity [of the local and
13 neighborhood areas].”

14 The planning commission’s decision first discusses the context of Policy E.4,
15 including Metro Plan Policy G.1. Record 8. Metro Plan Policy G.1 requires in relevant part
16 that the city extend “key urban services and facilities in an orderly and efficient manner.”

17 The planning commission next looked to the “Neighborhood Design Element” of the
18 Willakenzie Area Plan (WAP), the applicable refinement plan for the area, as context to
19 determine the “desirable features” of the neighborhood. The Neighborhood Design Element
20 of the WAP describes the importance of several areas within the Willakenize Area and
21 includes policies and proposed actions for those areas.¹ The decision notes that the golf
22 course is shown on several maps contained in the Neighborhood Design element and that it is
23 designated as Parks and Open Space. The decision also notes that one of the listed goals in

¹ The areas include “Entrance Corridors; Neighborhood Gateways; Commercial Area Design; Willamette Greenway; Natural Resource Protection; Historic Preservation; and Gillespie Butte Site Development Standards.” Record 9.

1 the WAP is to “[p]rovide for the protection and enhancement of land designated park and
2 open space * * *.” Record 9.

3 The planning commission interpreted Policy E.4 to conclude that the golf course is
4 the predominant “desirable feature[]” of the local and neighborhood area:

5 “Evidence was provided during the remand proceedings from both parties to
6 identify the existing neighborhood character in regards to applying Policy E.4.
7 Opponents of the tower characterized the area as a quiet residential
8 neighborhood surrounding a golf course, while the applicant points to the
9 commercial uses on the golf course and existing neighborhood features such
10 as utility poles and ball field lights as part of the neighborhood character.

11 “The Planning Commission finds that all of these characteristics help to define
12 the neighborhood, but that the open space provided by the golf course is an
13 overarching, character defining element of the area. Protection of designated
14 open space areas is a defined goal in the WAP. If the golf course (as open
15 space) is given similar consideration as to Entrance Corridors, Neighborhood
16 Gateways and Commercial development, additional landscaping on and
17 around the golf course is a treatment that can be used to help ‘establish and
18 enhance’ the open space as a desirable feature of the neighborhood. The WAP
19 therefore provides context that landscaping can be used to protect and enhance
20 areas important to the neighborhood from a visual perspective.” Record 10.

21 The planning commission rejected petitioner’s argument that the proposal must preserve and
22 enhance every desirable feature of the neighborhood. Record 11. The planning commission
23 then concluded that the proposal “preserves and enhances” the golf course because it includes
24 conditions requiring landscaping to shield the cell tower from view, mitigate for any visual
25 impact, and “promote[] the[] sense of identity” of the golf course by locating the cell tower
26 along the boundary of the golf course near existing buildings. Record 11-12.

27 In its second, third, and fourth assignments of error, we understand petitioner to argue
28 that the planning commission’s interpretation misconstrues Policy E-4.² Petitioner argues

² In relevant part, LUBA is authorized by ORS 197.835(9)(a) to reverse or remand a decision if the local government:

“* * * * *

1 that Policy E.4 is not ambiguous and therefore, no interpretation of Policy E.4 is required that
2 requires the city to consider relevant context. We reject that argument. Policy E.4 can be
3 interpreted in multiple ways, as petitioner’s disagreement with the planning commission’s
4 interpretation indicates. Among other things, the undefined phrase “desirable features of the
5 local and neighborhood areas” can be interpreted in more than one way.

6 In its second and third assignments of error, petitioner argues that the planning
7 commission erred in applying Policy G.1 as an approval criterion to intervenor’s proposal,
8 and that it erred in relying on Policy G.1 as context for determining the “desirable features of
9 the local and neighborhood areas.” Petition for Review 18-19. In addition, petitioner argues
10 that the planning commission erred in failing to consider Metro Plan Policy G.7, which
11 petitioner argues provides more relevant context.³ In its fourth assignment of error, petitioner
12 argues that the planning commission erred in relying on WAP policies as context for
13 determining the desirable features of the neighborhood. According to petitioner, the WAP is
14 not relevant context for interpreting Policy E.4 because the WAP was adopted after Policy
15 E.4.

16 We review the planning commission’s interpretation of Policy E.4 and other relevant
17 provisions of the Metro Plan and WAP to determine whether it is correct. *Gage v. City of*

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- “(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
 - “(C) Made a decision not supported by substantial evidence in the whole record; [or]
 - “(D) Improperly construed the applicable law[.]”

Petitioner’s second assignment of error is nominally styled as a procedural challenge to the planning commission’s consideration of other Metro Plan policies and WAP policies, but its substance challenges the planning commission’s interpretation of Policy E-4 and we address the assignment of error in that context.

³ Public Facilities and Services Element, Policy G.7 provides:

“Service providers shall coordinate the provision of facilities and services to areas targeted by the cities for higher densities, infill, mixed uses, and nodal development.”

1 *Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). First, we do not understand the
2 planning commission to have applied Policy G.1 as an approval criterion, or otherwise
3 determined that intervenor’s proposal is consistent with Policy G.1. Rather, at most, the
4 decision considers Policy G.1 as context for determining compliance with Policy E.4.
5 Record 8. But the relevance of Policy G.1 and the decision’s discussion of it at Record 8 as
6 providing context for the planning commission’s interpretation of Policy E.4’s ambiguous
7 terms is not clear.⁴ We do not see any reference to Policy G.1 or to language in Policy G.1 in
8 the planning commission’s findings that determine the desirable features of the
9 neighborhood, at Record 10, or that determine that the cell tower design and location is
10 consistent with Policy E.4 at Record 11-12. Rather, the planning commission relied on

⁴ The decision includes the following language:

“Metro Plan Context

“The proper application of general Metro Plan policies to individual development applications requires careful evaluation of whether and how a particular policy applies and what it means in the context of a particular neighborhood area. It also requires that we look to the context provided by the local regulatory framework of the Metro Plan, refinement plans (in this case the Willakenzie Area Plan), and the Eugene Code regulations intended to implement those adopted land use plans. Interpreting the Metro Plan requires weighing the various components so applicable plan policies and code provisions can be applied in a practical manner to a variety of proposals.

“ * * * * *

“The Planning Commission finds that while Policy E.4 is the policy subject to additional consideration on remand, given the direction found in the Metro Plan, Policy E.4 should be interpreted in context with other requirements such as Policy G.1 (Public Facilities and Services Element) to extend key urban services and facilities in an orderly and efficient manner. It should not be used in isolation or at the expense of other relevant adopted plan provisions and policies (i.e. Policy G.1), or more detailed code provisions for example, that direct the provision of adequate urban infrastructure. Policy G.1 and its implementing provisions in the land use code are a key aspect of the City’s growth management objectives and promoting compact urban development as described in the Metro Plan.

“In making an independent application of Policy E.4, when interpreted in the context of the Metro Plan, the policy should be applied in general enough terms to apply to all ‘key urban services and facilities’ which include a variety of public and private facilities.” Record 8.

1 context provided by WAP goals and policies. At most, we think the planning commission’s
2 discussion of Policy G.1 is properly characterized as dicta.

3 However, even if the planning commission relied on Policy G.1 as context for
4 interpreting Policy E.4, petitioner has not demonstrated that Policy G.1 is not appropriate
5 context for interpreting Policy E.4. Policy G.1 is a policy of the Metro Plan’s “Public
6 Facilities and Services Element,” and Policy E.4 relates to the location and design of
7 “[p]ublic and private facilities.” It is reasonable for the planning commission to consider
8 context provided by Policy G.1 to interpret another Metro Plan policy that deals with the
9 same subject matter. We also agree with the city that the WAP provides relevant context for
10 interpreting Metro Plan Policy E.4 and that the city did not err in considering WAP policies.

11 Finally, petitioner has not explained why, even if the planning commission failed to
12 consider context provided by other Metro Plan policies, the planning commission’s
13 interpretation of Policy E.4 is not correct. Given the inherently subjective determination that
14 is required in applying Policy E.4, the planning commission’s interpretation of Policy E.4 and
15 its determination that the “desirable feature[]” of the neighborhood is the golf course is
16 correct.

17 The second, third and fourth assignments of error are denied.

18 **FIRST ASSIGNMENT OF ERROR**

19 In its first assignment of error, petitioner argues that the city’s decision that the
20 proposal is consistent with Policy E.4 is not supported by substantial evidence in the record
21 and that the findings are inadequate to explain its conclusion. In support of its argument,
22 petitioner selectively quotes only the first paragraph of the findings at Record 10 that are
23 quoted above in our resolution of the second, third, and fourth assignments of error, and
24 argues that the first paragraph contains the city’s only findings that explain why the city
25 concluded that the proposal is consistent with Policy E.4. According to petitioner, the
26 findings that it quotes are inadequate because the cell tower location and design are

1 inconsistent with Policy E.4. However, other than its unsupported assertion, petitioner does
2 not explain why the findings at Record 10 are inadequate to explain the planning
3 commission's conclusion, and does not acknowledge or otherwise challenge the remainder of
4 the findings at Record 10 or the findings at Record 11-12 that explain why the city concluded
5 that the proposal is consistent with Policy E.4. Absent a developed argument from petitioner
6 challenging those findings, petitioner's argument provides no basis for reversal or remand of
7 the decision.

8 Finally, petitioner argues that the decision is not supported by substantial evidence in
9 the record because "[i]t is almost a truism that cell phone towers are generally unsightly."
10 Petition for Review 6. That argument again ignores the planning commission's findings that
11 conclude that (1) the golf course is the "overarching" desirable feature of the neighborhood,
12 and that (2) siting the cell tower in the proposed location along the boundary of the golf
13 course, along with landscaping to mitigate the visual impact of the tower, means that the
14 proposal is consistent with Policy E.4. That argument also ignores the evidence in the record
15 regarding landscaping and visual mitigation of the cell tower's effect.

16 The first assignment of error is denied.

17 The city's decision is affirmed.