BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANE GRELLER,
Petitioner,

vs.

CITY OF NEWBERG,
Respondent,

and

DEL BOCA VISTA, LLC, MICHAEL J. HANKS
and JOYCE HOWELL,
Intervenors-Respondents.

LUBA No. 2014-003

FINAL OPINION
AND ORDER

Appeal from City of Newberg.

Jane Greller, Newberg, filed the petition for review and argued on her own behalf.

No appearance by City of Newberg.

Andrew H. Stamp, Lake Oswego, filed a joint response brief and argued on behalf of intervenors-respondents Del Boca Vista, LLC and Michael J. Hanks.

Timothy V. Ramis, Lake Oswego, filed a joint response brief on behalf of intervenor-respondent Joyce Howell. With him on the brief was Jordan Ramis, P.C.

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

BASSHAM, Board Member, did not participate in the opinion.

AFFIRMED 04/22/2014

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

Petitioner appeals a city council decision approving a 44-lot subdivision.

MOTIONS TO INTERVENE

Del Boca Vista LLC and Michael J. Hanks, the applicants below, move to intervene on the side of respondent. Joyce Howell moves to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

The disputed 44-lot subdivision was approved initially by the planning commission, and following petitioner's local appeal of the planning commission's decision was approved by the city council. The subdivided property is designated Low Density Residential (LDR) on the Newberg Comprehensive Plan (NCP) map, and is zoned Low Density Residential R-1 on the city's zoning map, which is part of the Newberg Development Code (NDC). NDC 15.05.110.

JURISDICTION

In her petition for review, petitioner argues the challenged decision is a "land use decision" subject to LUBA's jurisdiction under ORS 197.825(1).[1] Intervenors acknowledge that ORS 197.825(1) gives LUBA jurisdiction over the challenged decision, but contend that the challenged decision is a "limited

[1] ORS 197.825(1) says, "* * * [LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government * * *."

land use decision" as defined in ORS 197.015(12).[2] We do not understand petitioner to dispute that the challenged decision qualifies as a limited land use decision. Because the challenged decision grants subdivision approval for a site that is located within an urban growth boundary, it falls within the ORS 197.015(12) definition of limited land use decision and we have jurisdiction to review it as such.

FIRST ASSIGNMENT OF ERROR

This assignment of error presents a relatively straightforward legal issue. We set out the critical comprehensive plan language that petitioner relies on, followed by relevant NDC language. We then turn to the parties' arguments.

A. The Newberg Comprehensive Plan Purpose Statements

In relevant part, NCP III.2.a through .c provide the following "summaries" of the NCP's three residential land use designations:

> **"a. Low Density Residential (LDR)**
>
> "The objective of this designation is to provide a wide range of housing types and styles, *while allowing for an overall density of up to 4.4 units per acre*.
>
> "* * * * *

---

[2] ORS 197.015(12) provides in relevant part:

> "'Limited land use decision:'
>
> "(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040(1)."

"**b. Medium Density Residential (MDR)**

"The objective of this designation is to provide a wide range of housing types and styles *while maintaining an overall density of up to 8.8 units per acre*.

"* * * * *

"**c. High Density Residential (HDR)**

"The objective of this designation is to provide multi-family housing of different types *while maintaining an overall density of up to 21.8 units to the acre*.

"* * * * *." Record 108-109 (emphases added).

B. The NDC Description and Purpose Statements for the Residential Zoning Districts

At the time of the disputed decision, the sections of the NDC that paralleled NCP III.2.a through NCP III.2.c and set out purpose statements for the Residential Zoning districts provided:

"NDC 15.304.010 Description and Purpose.

"The R-1 [LDR] district is intended for low density, urban single-family residential and planned unit development uses. * * *. *The R-1 district is intended to be consistent with the low density residential designation of the comprehensive plan*."

"NDC **15.306.010 Description and Purpose**.

"A. The purpose of this land use designation is to provide a wide range of housing types and styles, <u>while maintaining a maximum overall density of 8.8 units per gross residential acre</u>.

"B. * * * *The R-2 district is intended to be consistent with the medium density residential designation of the comprehensive plan*."

"NDC 15.308.010 Description and Purpose.

> "A. The purpose of this land use designation is to provide multifamily dwellings of different types and styles <u>while maintaining a maximum overall density of 21.8 units per gross residential acre</u>.
>
> "B. * * * *The R-3 district is intended to be consistent with the high density residential designation of the comprehensive plan*." (Underlining and italics added).

As relevant here, NDC 15.304.010 15.306.010 and 15.308.010 all state that they are "intended to be consistent" with the parallel NCP summaries for the Low, Medium and High Density NCP designations that each of zoning districts were adopted to implement. However, only NDC 15.306.010 and 15.308.010 carry forward the NCP "maximum overall density" language from the NCP. NDC 15.304.010 does not carry forward the NCP III.2.a "maximum overall density" language into the R-1 zoning district.

C. Limited Land Use Decisions

As we noted earlier, the challenged decision is a limited land use decision. ORS 197.195 sets a 1993 deadline for cities and counties to incorporate the standards from their comprehensive plans that apply to limited land use decisions into their land use regulations. ORS 197.195(1) states:

> "A limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgement amendment under ORS 197.610 to 197.625. *If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a*

> *decision by the city or county or on appeal from that decision*." (Emphases added).

As we noted earlier, while the NCP maximum density language for the NCP Medium Density and High Density designations is carried forward for the R-2 and R-3 zones, the NCP maximum density language for the Low Density designation is not carried forward in the R-1 zone.

D. The City's Decision

After quoting ORS 197.195(1) and emphasizing the same statutory language we emphasize above, the city council adopted the following findings to reject petitioner's argument that NCP III.2.a should be applied to the proposed subdivision to limit "overall density" to "4.4 units per acre."

> "*The criteria for approval of the subdivision are contained in Newberg Development Code Section 15.235.060. There is nothing in the language of these criteria, other criteria in the development code, or any other land use regulations to indicate that compliance with the Newberg Comprehensive Plan III.2.a is required for a limited land use decision*. <u>The language of the plan provision itself is aspirational ('the objective of this designation' and 'allowing for an overall density') rather than mandatory</u>. *Thus, regardless of whether the council were to find compliance or noncompliance with this policy, the city has not incorporated the provision cited above into its land use regulations and therefore it may not be used as a basis for the decision on this subdivision*." Record 15-16 (italics and underlining added.)

Although not entirely clear, we understand the city council to have concluded in the italicized findings that even if NCP III.2.a could be interpreted to impose a 4.4 units per acre minimum density standard on individual subdivision applications in the R-1 zone, NCP III.2.a has not been incorporated into the NDC or any other city land use regulation. The city found, for that reason, that NCP III.2.a cannot be applied here because the city decision approving the

challenged subdivision qualifies as a limited land use decision. In the underlined finding, the city appears to find that even if the minimum density language in NCP III.2.a had been incorporated into the NDC, it is "aspirational" and not written as a mandatory standard.

E. Petitioner's Argument

Although petitioner clearly disagrees with the city's finding that NCP III.2.a is not written as a mandatory standard, she never really directly attempts to address that interpretation or show why the city's interpretation that NCP III.2.a does not impose a mandatory standard, even if it applies directly, is reversible under the highly deferential standard of review that we must apply to the city council's interpretation of its comprehensive plan under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). For that reason alone, this assignment of error is denied.

Petitioner does dispute the city's finding that NCP III.2.a has not been incorporated into the NDC:

> "The [NDC] defines the description and purpose of each residential zone. While the R-1/LDR density is not denominated, 'the R-1 district is intended to be consistent with the low density residential designation of the comprehensive plan'. One can reasonably assume, since the R-2 and R-3 districts are denominated, that to be consistent with the low density residential designation of the comprehensive plan and placement on the plan and zone maps, that number would be 4.4." Petition for Review 6.

Petitioner goes on to quote the "consistent with the low density residential designation of the comprehensive plan" language in NDC 15.304.010 to argue that "[e]nough language is incorporated into [15.304.010] to warrant consideration of the density limitations in the NCP." *Id*. at 7.

The above argument is not clearly stated. However, we understand petitioner to argue that NDC 15.306.010 and NDC 15.308.010 expressly incorporate the corresponding 8.8 and 21.8 units per acre maximum density requirements from NCP III.2.b and NCP III.2.c for the R-2 and R-3 zones. Petitioner recognizes that NDC 15.304.010 does not expressly do so for the R-1 district, but we understand petitioner to contend the "consistent with the low density residential designation of the comprehensive plan" language in NDC 15.304.010 is sufficient to incorporate the NCP III.2.a "up to 4.4 units per acre" density limit.[3]

We do not agree. Even if the "overall density" limits set out in NCP III.2.a through .c are properly interpreted as "standards," the fact that the city included the "maximum overall density of [8.8 and 21.8 units] per gross residential acre" language in NDC 15.306.010 and NDC 15.308.010 while failing to include such language in NDC 15.304.010 shows that the city knows how to incorporate standards from its comprehensive plan into the NDC and suggests that the city either did not intend to carry forward the 4.4 unit density per acre language or mistakenly omitted that language when it adopted NDC 15.304.010. Whatever the explanation, we are not free to insert a density standard into NDC 15.304.010 that was omitted. ORS 174.010.[4] Moreover, in

---

[3] At oral argument, the attorney for intervenors Del Boca Vista LLC and Hanks stated he did not understand petitioner to make the argument we describe in this paragraph. While we agree petitioner's use of the word "denominated" is confusing and the larger argument is not clearly stated, it is adequately stated for purposes of our review.

[4] ORS 174.010 provides:

view of that omission from NDC 15.304.010, the language petitioner relies on, *i.e.*, that the R-1 zone is intended to be "consistent with the low density residential designation of the comprehensive plan" is not sufficient to incorporate the 4.4 unit density per acre density limit.

The first assignment of error is denied.[5]

SECOND ASSIGNMENT OF ERROR

Petitioner argues the city erred and violated OAR 660-012-0045(2)(f)(B) by failing to notify ODOT of the city's hearings on the subdivision application.[6] NDC 15.100.120 implements OAR 660-012-0045(2)(f)(B) by

---

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

[5] Our resolution of the first assignment of error makes it unnecessary for us to address other arguments made by intervenors in defense of the city's decision.

[6] OAR 660-012-0045(2) provides, in part:

> "Local governments shall adopt land use or subdivision ordinance regulations, consistent with applicable federal and state requirements, to protect transportation facilities, corridors and sites for their identified functions. Such regulations shall include:
>
> "* * * * *
>
> "(f) Regulations to provide notice to public agencies providing transportation facilities and services, MPOs, and ODOT of:
>
> "* * * * *
>
> "(B) Subdivision and partition applications[.]"

requiring the planning director, for applications going through Type II and Type III review, to "transmit a copy of the application * * * to each affected agency and city department for review and comment, including ODOT and others responsible for determining compliance with state and federal requirements." It is not disputed that the city failed to provide notice of the proposed subdivision to ODOT.

Intervenors argue that petitioner failed to adequately raise any issue concerning the notice required by OAR 660-012-0045(2)(f)(B) and NDC 15.100.120 during the city proceedings that led to the challenged decision. When LUBA reviews land use decisions or limited land use decisions, ORS 197.835(3) provides "[i]ssues shall be limited to those raised by any participant before the local hearings body * * *." ORS 197.763(1) requires issues to be "raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue." *Lett v. Yamhill County* 32 Or LUBA 98, 106-07 (1996); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993).

In response to intervenors' waiver argument, at oral argument, petitioner cited a number of pages of the record.[7] We have examined those pages and while a variety of traffic issues are raised on those pages of the record and other pages of the record, no issue is raised on those pages concerning the OAR 660-012-0045(2)(f)(B) and NDC 15.100.120 requirements for notice to ODOT. As we explained in *Savage v. City of Astoria*, ___ Or LUBA ___ (LUBA No. 2013-059, October 8, 2013), raising general traffic impact issues is not

[7] Petitioner cited Record 157, 211, 576, 585, 618, 640, 644, 865, 872.

sufficient to permit a petitioner at LUBA to later assign error to failures to comply with technical TPR requirements:

> "At best, the argument raises a generalized traffic issue, without citing the TPR or any of the substantive requirements of the TPR, and raising such a generalized traffic issue is not sufficient to preserve the technical TPR issues that petitioner raises in her assignment of error. *See Cornelius First v. City of Cornelius*, 52 Or LUBA 486, 495 (2006) (generalized arguments about lack of justification for commercial zoning are insufficient to raise an issue under Goal 9 (Economic Development) or the Goal 9 rule where neither Goal 9 nor the Goal 9 rule were cited and no issue was raised regarding the substantive requirements of Goal 9 or the Goal 9 rule); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995) (general argument that good farm land should not be used for a church insufficient to raise an issue under OAR 660-033-0120 which prohibits churches on high value farm land); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (no issue raised regarding the ORS 215.296 EFU zone standards where the statute was not cited and none of the operative terms of the statute were employed in petitioner's arguments below); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992) (general references to Goal 12 (Transportation) are insufficient to raise an issue under OAR 660-012-0060)." Slip op at 7.

Petitioner's second assignment of error is that the city failed to provide notice to ODOT of the city's hearing on the tentative subdivision approval under NDC 15.100.120, which the city presumably adopted to comply with OAR 660-012-0045(2)(f)(B). We agree with intervenors that raising general and specific traffic safety concerns, as petitioner and others did on the cited pages, is insufficient to preserve that issue for review.

The second assignment of error is denied.

The city's decision is affirmed.