BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GROUP B, LLC,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent.

LUBA No. 2015-019

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner.

David E. Coulombe, City Attorney, Corvallis, filed the response brief and argued on behalf of respondent. With him on the brief was Fewel, Brewer & Coulombe.

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

REVERSED 08/25/2015

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 a city council decision that denies its application for planned development approval for a 10-unit apartment building.

REPLY BRIEF

Petitioner moves to file a reply brief to two alleged new matters raised in the response brief: (1) waiver of an issue, and (2) the city's argument for why the city is not required to adopt findings addressing a code provision petitioner argued is dispositive and in need of findings. The city objects to the reply brief, arguing that it is not limited to new matters within the meaning of OAR 661-010-0039. The objection is not well-founded, and the reply brief is allowed.

FACTS

A key issue in this appeal is whether the needed housing statute at ORS 197.307 applies to the proposed multi-family development.

The subject property is a vacant 0.81-acre lot created in 2006 as part of the Coronado residential subdivision, known as "Tract B." At all relevant times since 1981, the majority of the area that consists of Tract B has been and remains zoned Planned Development (PD) RS-12 (Medium High-Density with a Planned Development Overlay). A multi-family dwelling is a primary permitted use in the (PD) RS-12 zone. Under the comprehensive plan designation that applies to Tract B, the minimum density is five dwelling units and the maximum density is ten units.

The planning and development history of the subject property and the surrounding properties is complex. In the beginning was a 17-acre parcel (the parent parcel) owned by the Elks Lodge. The area of Tract B is located in the southeast corner of that parent parcel. In 1981, the Elks obtained a zone

change from a low-density residential zone to PD (RS-12), and also obtained Detailed Development Plan (DDP) approval to construct a congregate care facility (a type of assisted living facility), known as The Regent Retirement Residence (The Regent), on the eastern third of the parent parcel. The area of the parent parcel subject to the 1981 DDP included what would later become Tract B. In part to address concerns regarding conflicts between The Regent facility and nearby residential development, the 1981 DDP included Condition 12, which limits the location of the congregate facility:

> "The building shall be set back from Elks Drive no less than 30 feet, no less than 135 feet from the south property line, and no less than 55 feet from the east property line. Other applicable setbacks are included on the site plan."

The requirement that The Regent building be set back "no less than 135 feet from the south property line" effectively prohibited The Regent building from being constructed within the area that now consists of Tract B.

In 1992, the parent parcel was partitioned into three parcels: Parcel 1 (7.76 acres) included the existing Elks Lodge, Parcel 3 (3.12 acres) included The Regent facility, and Parcel 2 (5.69 acres) included the vacant remainder of the parent parcel, including what later became Tract B. The 1992 partition effectively severed The Regent facility from the area that became Tract B. However, the majority of the Tract B area remained subject to the 1981 DDP, including Condition 12.

In 1998, as part of periodic review, Parcel 2 including the Tract B area was included in the city's inventory of buildable lands, pursuant to Statewide Planning Goal 10 (Housing).

In 2006, Parcel 2 of the 1992 partition was subdivided into the Coronado subdivision, which created 57 lots and Tract B. The 2006 subdivision created

NW Mirador Place, a cul-de-sac that ends adjacent to Tract B and provides access to Tract B, via a short flagpole. The decision also approved sanitary and water connections to serve Tract B. The 2006 decision removed the PD overlay from the 57 residential lots, but did not remove the PD overlay from Tract B. No development was proposed for Tract B. The staff report for the 2006 subdivision explains:

> "It is important to note that Tract 'B' contains the entire area of Tax Lot 200 [Parcel 2] that is zoned PD (RS-12). The applicant has chosen not to subdivide this portion of the parcel in order to avoid having to apply for a Major Modification to a Detailed Development Plan. The Detailed Development Plan that was approved for The Regent Congregate Care Facility (DC-81-2, PD-81-1), which was constructed on the parcel immediately north of the PD (RS-12) portion of Tax Lot 200, also applied to that portion of Tax Lot 200. Therefore, any development on this portion of Tax Lot 200 would require a land use approval through the Planned Development process." Record 2200.

The Coronado subdivision became final, and NW Mirador Place was constructed as approved.

At some point thereafter, petitioner acquired Tract B. In 2012, petitioner applied to the city for planned development approval for a two-story, 10-unit apartment building, similar to the building currently proposed. The planning commission denied that application.

In 2014, petitioner submitted the present application, with revisions to address the bases for the denial of the 2012 application. Petitioner argued in its application that, pursuant to ORS 197.307(4), the city cannot apply any standards or conditions that are not clear and objective. *See* n 1. The planning commission conducted a hearing and, on February 4, 2015, denied the present application on three grounds: (1) inconsistency with Condition 12 of the 1981

DDP, which the planning commission apparently understood to prohibit any building in the 135-foot area between The Regent building and Tract B's southern property line, (2) inconsistency with planned development standards at Corvallis Land Development Code (LDC) 2.5.40.04 that require that proposed development be compatible with surrounding development, under a number of different factors, and (3) inconsistency with cul-de-sac standards adopted after 2006 that the planning commission understood to prohibit NW Mirador Place from providing access to more than 18 dwelling units.

Petitioner appealed the planning commission decision to the city council, which conducted a *de novo* hearing. On April 6, 2015, the city council issued its decision denying the application. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner argues that the city erred in denying the proposed multi-family development based on standards and conditions that are not clear and objective, contrary to ORS 197.307(4). For the following reasons, we generally agree with petitioner.

ORS 197.307(4) provides that, with one exception, "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land[.]"[1] The sole exception is where a local government adopts an alternative

[1] ORS 197.307 provides, in relevant part:

> "(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans

as overlay zones with sufficient buildable land to satisfy that need.

"(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

"* * * * *

"(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

"(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

"(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

"(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

"(7) Subject to subsection (4) of this section, this section does not infringe on a local government's prerogative to:

approval process regulating, in whole or in part, appearance or aesthetics that are not clear and objective, if the applicant retains the option of proceeding under clear and objective standards.

Generally, approval standards are clear and objective if they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts[.]" *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999). Relatedly, ORS 227.173(2) provides that:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

Further, ORS 197.831 places the burden on the local government to demonstrate, before LUBA, that standards and conditions imposed on needed housing that are required to be clear and objective "are capable of being imposed only in a clear and objective manner."[2]

> "(a) Set approval standards under which a particular housing type is permitted outright;
>
> "(b) Impose special conditions upon approval of a specific development proposal; or
>
> "(c) Establish approval procedures."

[2] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and

A. The Proposed Multi-Family Development is Needed Housing

The city's decision does not take a clear position on whether the proposed development constitutes "needed housing" for purposes of ORS 197.307, but on appeal the city does not contend otherwise. Petitioner argues, and we agree, that the proposed multi-family development constitutes "needed housing" as that term is defined at ORS 197.303(1)(a),[3] and Tract B constitutes "buildable land" as that term is used in ORS 197.307.

Nonetheless, the city's decision articulates several reasons, amplified in the response brief, why the city believes that ORS 197.307(4) does not preclude the city from applying Condition 12 of the 1981 DDP and the planned development standards at LDC 2.5.40.04 requiring "compatibility."

We note, initially, that there is no possible dispute that the planned development standards at LDC 2.5.40.04 requiring "compatibility" with surrounding development, based on 14 factors, are not "clear and objective" approval standards. The LDC 2.5.40.04 compatibility standard requires "subjective, value-laden analyses that are designed to balance or mitigate impacts." *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 158. Under ORS 197.307(4), such standards generally cannot be applied to needed housing. As we understand the city's decision, the city believes that LDC 2.5.40.04 compatibility standard can be applied to proposed development of needed

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> procedures are capable of being imposed only in a clear and objective manner."

[3] ORS 197.303(1) defines "needed housing" in relevant part as "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least * * * [a]ttached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]"

housing on Tract B, notwithstanding ORS 197.307(4), because Tract B is subject to the 1981 DDP and Condition 12.

B. Condition 12

As noted, Condition 12 of the 1981 DDP provides:

> "The [Regent] building shall be set back from Elks Drive no less than 30 feet, no less than 135 feet from the south property line, and no less than 55 feet from the east property line. Other applicable setbacks are included on the site plan."

The city council found that Condition 12 is an approval standard for the proposed development, and that the applicant must either satisfy Condition 12 or demonstrate that a modification of Condition 12 is warranted under the compatibility standards at LDC 2.5.40.04. Record 21. The city council further interpreted Condition 12, implicitly, to effectively preclude construction of the proposed apartment building within the 135-foot "setback" described in Condition 12. The city council ultimately denied the application because petitioner could not satisfy Condition 12, and had not demonstrated that a modification to Condition 12 would satisfy the compatibility standards at LDC 2.5.40.04.

Petitioner argues that Condition 12 is not a "clear and objective" standard or condition within the meaning of ORS 197.307(4). Petitioner contends that, while it is clear that Condition 12 prohibits the location of The Regent building within 135 feet of the south property line, petitioner argues that it is far less clear that Condition 12 has the effect of prohibiting other development between The Regent building and the south property line of what is now Tract B, or that Condition 12 effectively converts the area between The Regent building and the south property line into an open space or buffer area in which no buildings may be constructed, as the city apparently interpreted

Condition 12. Petitioner argues that because Condition 12 is ambiguous on that point, and requires interpretation to apply it as the city has in the present case, the condition is not "clear and objective" and therefore cannot be applied as a basis to deny the proposed needed housing.

The city responds that the city council correctly interpreted Condition 12 to impose a setback area between The Regent building and the south property line of what is now Tract B, which effectively limits future use of Tract B to a buffer area, and therefore precludes construction of the proposed apartment building. The city argues that, under the city council's interpretation of Condition 12, approval and construction of the proposed apartment building would necessarily require a modification of Condition 12 and the 1981 DDP, or a nullification of the 1981 DDP as it applies to Tract B.

ORS 197.307(4) mandates that local governments apply only clear and objective "conditions" to needed housing on buildable land. The statute does not limit the scope of "conditions" to conditions that are imposed in the decision that approves needed housing. Neither does the statute exempt conditions that are imposed by earlier land use approvals that do not approve needed housing, such as the 1981 DDP. In addition, the city council interpreted the city development code to the effect that Condition 12 constitutes not only a condition, but an approval "standard." ORS 197.307(4) therefore governs the city's application of Condition 12, either as a condition or as an approval standard. Consequently, the city may apply Condition 12 to approve or deny the proposed needed housing only if and to the extent that Condition 12 is "clear and objective."

We agree with petitioner that Condition 12 is ambiguous and requires interpretation as applied to the proposed development. Condition 12

unambiguously prohibits the location of The Regent building within 135 feet of the south property line of what is now Tract B. However, Condition 12 is ambiguous regarding whether other development is similarly precluded within the area that is now Tract B. Condition 12 mentions no other development or buildings, and does not state, or necessarily imply, that no other building is allowed within 135 feet of the south property line. On the other hand, Condition 12 also does not state, or suggest, that other buildings can be constructed within that 135-foot wide area consistent with the apparent purpose of the condition, to buffer nearby single-family residences from The Regent building. Condition 12 is sufficiently ambiguous on these points that it can be interpreted to support either of two diametrically opposed conclusions, one where needed housing is allowed and one where it is prohibited. A condition that requires such interpretation, to determine whether proposed needed housing is allowed at all, is not a "clear and objective" standard or condition within the meaning of ORS 197.307(4). *See Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (a standard that is ambiguous, *i.e.*, capable of more than one plausible interpretation, is "unclear" and hence not a "clear and objective land use standard" for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B)).

The city argues, nonetheless, that ORS 197.307(4) does not preclude the city from applying Condition 12, as interpreted, as a basis to require petitioner to obtain a modification or nullification of the 1981 DDP, pursuant to the discretionary standards at LDC 2.5.40.04. We understand the city to argue that because petitioner proposes a new building in an area where the 1981 DDP approves no building, petitioner is necessarily seeking to redesign or modify the 1981 DDP. As noted, a request to modify the 1981 DDP is governed by the

discretionary planned development standards, at LDC 2.5.40.04, which require a determination that the modification is "compatible" with surrounding development with respect to 14 factors. Application of those discretionary standards is consistent with ORS 197.307(4), we understand the city to argue, because petitioner has essentially "opted" to pursue an alternative development process subject to discretionary standards, as authorized by ORS 197.307(6). *See* n 1. According to the city, petitioner has the option of either proceeding under the "clear and objective" 1981 DDP "standards," including Condition 12 as interpreted by the city council, or proceeding under the discretionary standards to modify the 1981 DDP, which are not clear and objective. Because petitioner has elected to proceed under the discretionary standards to modify the 1981 DDP, the city argues that application of those discretionary standards to approve or deny the proposed needed housing is authorized by ORS 197.307(6) and does not offend ORS 197.307(4).

Petitioner argues, and we agree, that at no relevant time since 1981, when Condition 12 and the PD overlay were first applied, has the city's land use legislation offered a "clear and objective" path for approval of needed housing on the area that is now Tract B. Petitioner's filing of an application for a Planned Development Major Modification was required by the city code to develop Tract B with the proposed needed housing, which is a permitted use in the PD (RS-12) zone, not an "option" that petitioner voluntarily exercised for purposes of ORS 197.307(6). Under ORS 197.307(6), a local government may impose unclear, subjective or discretionary standards and conditions on needed housing only if it offers a path that allows needed housing subject only to clear and objective standards and conditions. We understand the city to argue that the 1981 DDP (as interpreted) is itself clear and objective and that development

under the clear and objective 1981 DDP was thus an available option for purposes of ORS 197.307(6). We reject the argument. As discussed, Condition 12, the most salient aspect of the 1981 DDP, is ambiguous regarding whether the area of Tract B is developable at all, and is thus not a clear and objective standard or condition. Moreover, even if Condition 12 or the 1981 DDP explicitly and unambiguously prohibited any building in the area now comprising Tract B, we do not see that the 1981 DDP would constitute a "clear and objective" alternative "approval process" for needed housing within the meaning of ORS 197.307(6). Because the city has identified no clear and objective approval process for needed housing on Tract B that an applicant could choose, the city cannot rely on ORS 197.307(6) to authorize imposition of the subjective standards for modifying the DDP at LDC 2.5.40.04.

The city also suggests that petitioner is bound by the choices of its predecessor-in-interest in 1981, who chose to seek rezoning to PD (RS-12) and development of the eastern third of the parent parcel under the planned development process, in order to develop The Regent facility. Because the predecessor-in-interest chose to take advantage of the flexibility offered by the planned development process rather than pursue other options to develop The Regent facility, the city argues that it is consistent with ORS 197.307(4) and (6) to require petitioner to modify the 1981 DDP pursuant to the subjective criteria at LDC 2.5.40.04.

We disagree with the city. We might agree with the city if the 1981 DDP proposal had involved *needed housing*, and the applicant chose the Planned Development process to gain approval of that needed housing, in lieu of a clear and objective path to develop needed housing. Even though ORS 197.307(6) had not yet been adopted in 1981, we see no reason why the two-track

framework it embodies could not govern, and bind, current proposals for needed housing that seek to modify a prior approval for needed housing under a discretionary approval track that is otherwise consistent with ORS 197.307(6). However, the 1981 DDP did not propose or approve needed housing, and the choices the 1981 applicant made in gaining approval for The Regent do not force petitioner to accept a subjective approval track for needed housing, or otherwise provide a basis for the city to avoid its obligation under ORS 197.307(4) to apply only clear and objective standards and conditions to proposed needed housing on buildable land.

Finally, the city notes that ORS 197.307(7) authorizes the city to "[i]mpose special conditions upon approval of a specific development proposal" and "[e]stablish approval procedures." *See* n 1. We understand the city to argue that Condition 12 represents a "special condition" that was imposed on the 1981 DDP approval, and the city can thus apply Condition 12 as a means to effectively force petitioner to seek approval under the discretionary standards at LDC 2.5.40.04. However, as noted the 1981 DDP was not a "specific development proposal" for needed housing, so ORS 197.307(7) has no applicability in the present case. Further, ORS 197.307(7) does not purport to modify the terms of ORS 197.307(4), or authorize the city to impose unclear or subjective standards, conditions or procedures. Read in context, ORS 197.307(7) simply clarifies that local governments retain the authority to craft individualized conditions for specific needed housing proposals. However, such special conditions are still subject to overarching requirement at ORS 197.307(4) that conditions imposed must be "clear and objective." As discussed above, Condition 12 is not clear and objective.

In sum, Tract B is zoned PD (RS-12) and subject to the 1981 DDP, the city may apply any clear and objective planned development standards or conditions to the proposed needed housing. However, because the proposal is needed housing located on inventoried buildable lands, ORS 197.307(4) prohibits the city from applying any unclear or subjective standards or conditions to approve or deny the proposed needed housing. Because Condition 12 is ambiguous regarding whether any development (including needed housing) of Tract B is allowed at all, and is not clear and objective, the city cannot apply Condition 12 to prohibit the proposed needed housing, or as a vehicle to subject the proposal to subjective approval standards at LDC 2.5.40.04.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

As noted, NW Mirador Place was approved as part of the 2006 subdivision. As approved and constructed, NW Mirador Place is a cul-de-sac that terminates adjacent to Tract B, provides access to Tract B and to approximately 17 other lots in the Coronado subdivision, and also includes utilities stubbed to Tract B. One basis for denial in the city council's decision is noncompliance with LDC 4.0.60.c, which provides in relevant part:

> "Street network plans must provide for connectivity within the transportation system to the extent that, generally, both Local Connector and Local Streets will be created within a development. Identified traffic calming techniques, such as bulbed intersections, etc., can reduce traffic speeds and, where included, are to be constructed at the time of development. To further address traffic speeds and volumes on Local Connector and Local Streets, the *following street designs,* along with other designs intended to reduce traffic speeds and volumes, *shall be considered*:

> "1. Straight segments of Local Connector and Local Streets should be less than .25 mile in length, and include design features such as curves and T intersections.
>
> "2. *Cul-de-sacs should not exceed 600 ft. nor serve more than 18 dwelling units*.
>
> "3. Street designs that include traffic calming, where appropriate, are encouraged." (Emphasis added.)

The city council interpreted LDC 4.0.60.c.2 as a mandatory applicable approval criterion for the proposed housing, and concluded:

> "[T]he Council finds that the proposal does not comply with LDC Section 4.0.60.c as it would result in as many as 27 dwellings taking access from the NW Mirador Place cul-de-sac. Therefore, the Council concludes that the proposal is inconsistent with and fails to satisfy the criteria relating to traffic and off-site facilities." Record 17.

Petitioner argues under the third assignment of error that the city erred in applying LDC 4.0.60.c.2 to deny the proposed needed housing, because LDC 4.0.60.c.2 is not clear and objective. According to petitioner, LDC 4.0.60.c.2 is a highly discretionary standard that by its terms applies to the *design* of local streets, not to approval of development that is served by already designed, approved and constructed streets. Further, petitioner argues that LDC 4.0.60.c.2 is framed in inherently discretionary terms: it requires that the city "consider[]" street designs in at least three particulars. Street designs that include traffic calming are "encouraged." Straight streets "should" be no more than .25 mile in length, and "should" include curves and T intersections. Cul-de-sacs "should" not exceed 600 feet nor serve more than 18 dwelling units. Petitioner notes that LDC 1.6.30 defines the term "should" to mean "[e]xpressing what is desired, but not mandatory." When the code intends to express a mandatory

obligation, petitioner argues, it uses the word "shall," which LDC 1.6.30 defines as "[e]xpressing what is mandatory."

We agree with petitioner that LDC 4.0.60.c.2 is not a "clear and objective" standard, and therefore cannot be applied to deny needed housing, consistent with ORS 197.307(4). In order to apply LDC 4.0.60.c.2 to the proposal, the city council had to interpret that code provision in at least two ways. First, the city (implicitly) determined that LDC 4.0.60.c.2 applies not just to the design of proposed streets, but also to proposed development served by already designed, approved and constructed streets. Second, the city concluded that the terms of LDC 4.0.60.c.2 are *mandatory* approval standards that must be satisfied to approve development, not merely design features that "should" be considered (but need not be imposed). Record 22. The merits of the latter interpretation are somewhat dubious. Even with full deference accorded a governing body's interpretation of code provisions pursuant to ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), it is a tall order to interpret "should" as that term is defined at LDC 1.6.30 to mean a *mandatory* obligation, because LDC 1.6.30 expressly defines it as non-mandatory. In its response brief, the city argues that the modal auxiliary verb "should" modifies only the first clause of LDC 4.0.60.c.2 ("should not exceed 600 ft") and does not modify the second clause ("nor serve more than 18 dwelling units"). However, that reading does violence to the grammatical and semantic structure of LDC 4.0.60.c.2. "Should," as a modal auxiliary, clearly modifies the main verbs in both clauses ("exceed" and "serve"). As defined by LDC 1.6.30, "should" means "expressing what is desired." Read in light of that definition, LDC 4.0.60.c.2 expresses the desire that a cul-de-sac serve no

more than 18 dwelling units. As petitioner argues, such code language grants the city a considerable degree of discretion.

However, regardless of how LDC 4.0.60.c.2 is correctly interpreted, or what interpretations might survive review under ORS 197.829(1), the fact that the city had to interpret LDC 4.0.60.c.2 in order to determine (1) whether it applies at all to the proposed needed housing, and (2) whether it imposes mandatory approval standards, means that LDC 4.0.60.c.2 is not a clear standard for purposes of ORS 197.307(4). It is the city's burden to demonstrate that LDC 4.0.60.c.2 is a clear and objective approval standard. ORS 197.831. The city has not met that burden.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

As noted, Tract B was created in 2006 with a 27-foot wide, 40-foot long flagpole connecting the interior of Tract B to NW Mirador Place. After the 2006 subdivision was approved, the city adopted LDC 3.6.30, which requires a maximum 25-foot front yard setback. As applied to Tract B, LDC 3.6.30 would require that any proposed building be located in the 27-foot wide flagpole. Further, after 2006 the city also adopted LDC 4.10.60.01.b, which requires 40 percent of the street frontage to be occupied by a building. Again, as applied to Tract B, this would require that any proposed building be constructed in the flagpole. A staff report incorporated as findings concluded that residential development of any density on the site would be "nearly impossible" under LDC 3.6.30 and LDC 4.10.60.01.b, and recommended that a variance to those standards be allowed. Record 1552. Although it is not clear, the planning commission apparently did not approve a variance to LDC 3.6.30 and LDC 4.10.60.01.b.

Petitioner argued to the city council that because LDC 3.6.30 and 4.10.60.01.b. were adopted after the 2006 Coronado subdivision that created Tract B and NW Mirador Place, those standards do not apply to development of Tract B, pursuant to ORS 92.040(2), which provides that only laws in effect at the time an application is made for a subdivision inside an urban growth boundary "shall govern subsequent construction on the property" unless the applicant elects otherwise.[4]

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[4] ORS 92.040 provides, in relevant part:

> "(1) Before a plat of any subdivision or partition subject to review under ORS 92.044 may be made and recorded, the person proposing the subdivision or partition or authorized agent or representative of the person shall make an application in writing to the county or city having jurisdiction under ORS 92.042 for approval of the proposed subdivision or partition in accordance with procedures established by the applicable ordinance or regulation adopted under ORS 92.044. Each such application shall be accompanied by a tentative plan showing the general design of the proposed subdivision or partition. * * * [A]pproval by a city or county of [a tentative subdivision plan] shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition.
>
> "(2) After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern

The city council rejected that argument, concluding that ORS 92.040(2) did not preclude the city from applying post-2006 approval standards to the proposed construction on Tract B.[5]

On appeal, petitioner argues, and we agree, that the city erred in applying LDC 3.6.30 and 4.10.60.01.b to deny the proposed development of Tract B. As the Court of Appeals has explained, ORS 92.040(2) is intended "to ensure that the local government laws on which subdivision applications were predicated would be applied to subsequent development on subdivision lots unless developers elected otherwise." *Athletic Club of Bend, Inc. v. City of Bend,* 239

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subsequent construction on the property unless the applicant elects otherwise.

"(3) A local government may establish a time period during which decisions on land use applications under subsection (2) of this section apply. However, in no event shall the time period exceed 10 years, whether or not a time period is established by the local government."

[5] The city council findings state, in relevant part:

"* * * [T]he City Council finds that ORS 92.040 does not apply in this case because the applicant in [the 2006 subdivision] did not propose development on the subject site within the general design of the proposed development, the tentative plat decision did not create a 'lot' on the subject site and the approval of the subdivision did not therefore include consideration of development-related criteria on the site, traffic impacts associated with development, or any other applicable criteria. The Council finds the labeling of the subject site as a 'tract' to be consistent with the owner's express intent not to develop the site as part of the subdivision, but at a later time, as may be approved consistent with the standards and conditions of the Planned Development overlay or as a modification to the Planned Development * * *." Record 12.

Or App 89, 97, 243 P3d 824 (2010). In the present case, the 2006 subdivision created Tract B in its current configuration, with a short, narrow flagpole accessing NW Mirador Place. That configuration presumably complied with whatever maximum building setback and frontage requirements, if any, which were in effect in 2006. Under that configuration, it is clear that future development of Tract B, if any, would occur in the flag portion of Tract B. Although the 2006 subdivision applicant did not propose specific development of Tract B, Tract B was provided access, utilities and a configuration predicated on locating future development, if any, in the flag portion of the property.

Application of the post-2006 maximum building setback and frontage requirements at LDC 3.6.30 and 4.10.60.01.b would radically change the ballgame. As we understand it, application of LDC 3.6.30 and 4.10.60.01.b would compel any proposed building to be located in the narrow pole portion of the property (where a driveway and utilities must also be located), which the city's own findings state would make residential development of any density on the site "nearly impossible." Record 1552. A site that was configured and provided access and utilities in a manner that would allow the site to be developed in the future, presumably with the medium-density residential use for which it is planned and zoned, would become unbuildable for any residential use. In our view, the present case is one of the circumstances in which the legislature intended ORS 92.040(2) to operate, at least to the extent necessary to preserve the potential for future development of Tract B embodied in the configuration approved in the 2006 subdivision.

The city's arguments to the contrary are not persuasive. The city contends that petitioner fails to establish the conditions precedent for

application of ORS 92.040(2). According to the city, a developer can invoke ORS 92.040(2) only if (1) at the time of subdivision approval it complied with the ORS 92.040(1) requirement to provide a "tentative plan showing the general design of the proposed subdivision or partition[,]" (2) the tentative plan provides information on proposed development of the lots created, and (3) the subdivision approval evaluates proposed development of lots against the applicable criteria, in this case the planned development and other standards that applied to the 2006 subdivision application. However, the city argues, the 2006 subdivision applicant submitted a tentative plan that proposed no development of Tract B, and no development of Tract B was evaluated against the applicable criteria or approved in the 2006 decision.[6] Therefore, the city argues, ORS 92.040(2) does not apply to preclude application of post-2006 standards such as LDC 3.6.30 and 4.10.60.01.b.

We partially agree with the city. Because the 2006 subdivision applicant did not propose development of Tract B, and the city did not evaluate any development of Tract B against whatever criteria would be applied to proposed development of lots at the tentative plat stage, ORS 92.040(2) would not generally operate to shield future development of Tract B from application of new development standards adopted after 2006 that regulate development of Tract B. However, as explained above, the 2006 subdivision decision did make a significant decision regarding the general *location* of future development on

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[6] The city also emphasizes that the 2006 plat did not label Tract B as a "lot," and argues that Tract B is not a "lot." We do not see that labels matter in the present case. As a matter of law, a unit of land created by a subdivision is a "lot," no matter what the unit of land is labeled on the plat. *See* ORS 92.010(4) and (16) (definitions of "lot" and "subdivide land"). For what it is worth, Tract B is technically a "lot."

Tract B, namely, that any future development would occur in the *flag* portion of the site, consistent with whatever maximum building setbacks and frontage standards, if any, which were in effect in 2006. Tract B was clearly not configured with the expectation that future development would occur in the *pole* portion of the site. On the contrary, the pole portion of the site was presumably sized and configured to allow a driveway and utilities to access the interior of the site, where future development would occur. Because the 2006 decision accomplished that much, ORS 92.040(2) operates to preclude application of different or conflicting post-2006 development standards, specifically the new maximum building setback and frontage standards at LDC 3.6.30 and 4.10.60.01.b, because those standards would effectively compel development to be located in the pole portion of the site. Accordingly, we agree with petitioner that the city erred to the extent it denied petitioner's application for noncompliance with LDC 3.6.30 and 4.10.60.01.b.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

The fifth assignment of error is framed as an alternative challenge, if LUBA concludes that the city is not limited by ORS 197.307(4) or that LUBA agrees with the city that petitioner "opted" for application of discretionary standards for purposes of ORS 197.307(6). Because we did not reach the predicate conclusions, there is no need to address the alternative fifth assignment of error.

DISPOSITION

We have sustained petitioner's challenges to the city's bases for denial. Petitioner seeks reversal of the decision. The city does not argue that remand is the appropriate disposition if petitioner's assignments of error are sustained.

OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision if the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(2)(d) provides that LUBA shall remand a land use decision for further proceedings when the decision misconstrues the applicable law, but is not prohibited as a matter of law. As we understand the current posture of this case, the city has identified no valid basis to deny petitioner's application for needed housing. Accordingly, we believe that the city's decision to deny the application is "prohibited as a matter of law," and that reversal rather than remand is the appropriate disposition.

The city's decision is reversed.