BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J. CONSER AND SONS, LLC,
Petitioner,

vs.

CITY OF MILLERSBURG,
Respondent.

LUBA No. 2015-065

FINAL OPINION
AND ORDER

Appeal from City of Millersburg.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioner. With him on the brief was Weatherford Thompson.

Wallace W. Lien, Salem, filed the response brief and argued on behalf of respondent.

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

REMANDED 01/28/2016

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 that denies petitioner's request for approval of a planned development subdivision.

FACTS

Petitioner's property includes 41.12 acres. Petitioner proposes to develop that property as a residential subdivision with single family dwellings on individual lots. The roads in the proposed subdivision take up 8.11 acres of the total 41.12 acres, and a proposed natural area, made up mostly of drainage ways, floodplains and wetlands, would make up 13.04 acres of the total 41.12 acres. The 13.04 acres are sometimes referred to as open space and sometimes are referred to as a natural area. The balance of the 41.12 acres (19.97 acres) would be included in the proposed lots.

The applicable zoning requires: (1) a minimum lot size of 10,000 square feet, (2) an 80-foot minimum lot width, and (3) a minimum rear yard setback of 20 feet.

Through the Millersburg Land Use Development Code (MLUDC) regulations for planned developments, petitioner sought approval for exceptions to those minimum lot size, lot width and rear yard setback requirements. Petitioner proposes 138 lots. Of those 138 lots, 66 lots would be between 5,000 and 6,000 square feet, 34 lots would be between 6,000 square

feet and 7,000 square feet, and 38 lots would between 7,000 and 12,000 square feet. Record 392.[1]

The city denied the request, concluding, among other things, that the proposed 13.04-acre natural area did not warrant the requested lot size, lot width and rear yard setback exceptions.

REPLY BRIEF

Petitioner moves for permission pursuant to OAR 661-010-0039 to file a reply brief to respond to new issues raised in the city's response brief. The motion is allowed.

INTRODUCTION

The subject property is zoned Rural Residential – Urban Conversion (RR-10-UC). MLUDC 4.113(3) sets out conditional uses that are allowed in that zone. One of those conditional uses is described as "Special Standards of Article 7." MLUDC 4.113(3)(h).

One of the Special Standards set out in MLUDC Article 7 is "Planned Development Area Standards – PD[.]" MLUDC 7.600. MLUDC 7.600 sets out the purpose of the city's planned development standards.[2] As is common with

---

[1] Only two of the 138 lots are larger than the 10,000 square foot minimum. Petitioner is therefore seeking exceptions for 136 of the 138 lots.

[2] MLUDC 7.600 provides, in part:

> The purpose of the Planned Development is to provide opportunities to create more desirable working or living environments by the application of new development standards

this type of land use regulation, the city's planned development standards provide regulatory flexibility in hopes of achieving superior development design.

The ten-page decision that is the subject of this appeal is more combative than is usually the case in LUBA appeals. Much of the decision is devoted to disputing density representations and average lot size calculations petitioner made below, as well as disputing petitioner's use of certain terminology. Bold typeface, all capital letters and in some cases increased font size is used for emphasis in the decision. It is exceedingly unclear in a number of cases whether the city's findings were intended as reasons for denial of the application or merely as expressions of disagreement with petitioner's reasoning regarding matters that do not implicate the approval criteria and therefore do not represent reasons for denial. As a result, portions of petitioner's 48-page petition for review challenge findings that have no real bearing on the city's basis for denial.

> applied under an approved plan and program that is professionally prepared. The PD Standards are intended to be used to encourage the application of new techniques and new technology to community development that can achieve economies in land development while providing building groupings, open spaces and circulation systems that enhance the working or living environment of the inhabitants. A Planned Development may be residential, commercial or industrial or a mixed combination of land uses. * * *"

While we generally follow petitioner's assignments of error in resolving this appeal, we combine some arguments that are stated under different assignments of error to reduce duplication. In a number of cases we do not address arguments that are directed at findings that do not concern approval criteria and have no bearing on the merits of this appeal. We resolve the bulk of the parties' arguments on the merits in our resolution of the fourth assignment of error below.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the city erred by faulting petitioner for arguing below that *conditional* uses are *permitted* uses if they can be approved with conditions that demonstrate the proposal complies with all relevant approval criteria. On one level, the parties' dispute on this point is purely semantic, but on another level it is a relatively important substantive dispute. And in its response brief, the city introduces an issue in this regard that is not raised in the appealed decision itself.

A. The Semantic Issue

The Urban Residential Zone lists both "Permitted Uses" and "Conditional Uses." So the city's findings that conditional uses are not permitted uses is technically correct. But petitioner never actually took the position below that conditional uses and permitted uses are the same thing. Petitioner's argument in this regard was more nuanced and we discuss that more nuanced argument next.

B. Conditions of Approval

The "permitted use" argument that petitioner made below was based on MLUDC 3.120 and 7.010(2). MLUDC 7.010(2) uses the word "permitted," in describing conditional uses.[3] MLUDC 3.120 provides that a land use decision under the MLUDC is to take one of three forms: (1) "Approval," (2) "Approval with Conditions," or (3) "Denial." With regard to the Denial option, MLUDC 3.120(3) provides:

> "(3) **Denial**. Denial means the review or hearings body found the approval criteria [were] not satisfied by the presented facts and could not be made to comply with attached conditions of approval." (Boldface in original.)

Petitioner argues that under MLUDC 3.120(3) the city may not deny its application unless it adopts findings that explain why conditions cannot be imposed to make the application satisfy the relevant criteria.[4]

---

[3] MLUDC 7.010(2) provides:

> "The **Conditional Use** procedures of **Section 2.500** shall be utilized to apply the Special Area Standards contained herein. A Conditional Use is a use of land or a structure that is normally appropriate in the zoning district where it is permitted, but due to the specific characteristics of the area additional development standards are required to safeguard the public health, safety and welfare." (Boldface in original.)

[4] Petitioner comes close to taking this position several times in the petition for review. Petitioner most clearly takes this position in the conclusion to the petition for review:

> "* * * MDC 3.120(3) requires the City to explain why the application did not meet the criteria and why conditions could not

Petitioner appears to be arguing that under MLUDC 3.120(3) the city is obligated to adopt findings explaining why the city cannot develop conditions that would allow the city to find that all approval criteria are satisfied and approve the application. If that is petitioner's argument, we reject it.

Since *Fasano v. Board of County Commissioners of Washington Co.*, 264 Or 574, 507 P2d 23 (1973), applicants in quasi-judicial land use proceedings have had the burden of demonstrating that a proposal complies with relevant approval criteria. That burden includes proposing any conditions of approval that might be necessary to make a proposal comply with those approval criteria. While it is not unusual for local governments to develop and impose conditions of approval that the local governments believe are necessary to allow the local governments to approve a proposal that would otherwise have to be denied, local governments do not have an obligation to do so, and have no obligation to adopt findings that explain why they cannot develop such conditions of approval for an applicant. MLUDC 3.120(3) does not impose such an obligation. The language "and could not be made to comply with attached conditions of approval" simply means the city is obligated to consider any conditions of approval the applicant may have proposed before denying the application. Petitioner identifies no conditions that the applicant proposed that the city failed to consider.

---

be imposed so that the application met the criteria." Petition for Review 47.

Finally, as the city points out in its brief, the obligation petitioner's reading of MLUDC 3.120(3) would impose on the city is impractical because taken to its logical conclusion it might obligate the city to entirely redesign the proposal into one that would have design and cost implications that would be wholly unacceptable to the applicant. Response Brief 36-37.

C. The City's New Argument

In responding to this assignment of error, and elsewhere in the city's response brief, the city takes the position that petitioner sought only planned development approval and did not seek review under the MLUDC conditional use standards or subdivision approval standards.

As far as we can tell, the only reason why the city never considered whether the proposal complies with conditional use and subdivision approval standards was because it denied the request for planned development approval, making it unnecessary to consider those conditional use and subdivision approval standards. *See* Record 3-4. Whatever the case, the challenged decision never takes the position that petitioner only sought approval of the planned development proposal, and we decline to consider that legal theory, since it appears for the first time in the city's response brief. *See Anderson v. Coos County*, 51 Or LUBA 454, 472 (2006) (declining to consider a position that was not adopted in the appealed decision).

The first assignment of error is denied.[5]

SECOND ASSIGNMENT OF ERROR

This assignment of error appears to be based on multiple misunderstandings. The applicant took the position below that it had demonstrated that its proposal complied with certain conditional use criteria and that the remaining conditional use criteria were inapplicable. There are findings in the appealed decision that can be read to suggest that the city mistakenly understood petitioner to take the position that the conditional use criteria do not apply at all. In its brief, the city compounds this apparent misunderstanding by arguing that petitioner never sought conditional use approval, an argument that we have already concluded is not properly presented in this appeal.

This assignment of error presents no basis for reversal or remand and for that reason is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner asserts that the city erred in concluding that petitioner improperly manipulated its density calculations for the proposal. The parties' differing views regarding density traces primarily to the parties' differing views

[5] Petitioner also challenges city findings regarding MLUDC 7.632(5)(b), which permits the city to approve planned developments with lots that do not meet the requirements of the underlying zone in certain circumstances. We consider petitioner's MLUDC 7.632(5)(b) challenges under the fourth assignment of error.

about the value of the 13.04 acres of proposed open space or natural area and whether that open space/natural area should be included in the calculation of density. But because density ultimately was not the basis for the city's denial, we limit our discussion of density.

Petitioner appears to be correct that if density is computed in the manner suggested by MLUDC 7.610(5), petitioner's proposal for 138 lots with open space is not any denser than would be the case if the property were subdivided entirely into the maximum number of 10,000 square foot lots, without any open space (143 lots).[6] That is because under MLUDC 7.610(5) open space may be included in the density calculation. *See* n 6.

However, petitioner did not seek approval for density in excess of the density that is possible under the RR-10-UC, and the city ultimately did not deny the proposal because it is too dense, at least it did not do so explicitly.

---

[6] MLUDC 7.610(5) provides as follows:

> **"Density.** Greater overall density than that specified for the Primary Zoning District may be allowed for an approved **PD Plan** based on the entire development design. Generally the density provision of the underlying District shall be used as a guideline for a deviation from the standard density. Areas used for public street right-of-way or private roadway intended to provide access to more than two (2) structures shall be excluded when determining the overall density of the development. *Water courses woodlands and open spaces may be included in determining the density of development*." (Emphasis added.)

Therefore, the parties' arguments under this assignment of error provide no basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

A. The Planned Development Lot Size, Width and Setback Requirements

We turn now to the Planned Development (PD) regulation that, as far as we can tell, formed the city's basis for denying the request for PD approval. MLUDC 7.610(6) provides as follows:

> "**Subdivision Lot Sizes**. Minimum area, width, depth and frontage requirements for subdivision lots in a PD Area shall be the same as the Primary District unless smaller lots are approved in accordance with the proposed plan and program."

Therefore, as a starting point, the lots in a PD must comply with the lot size, width and setback requirements in the underlying zone, here the RR-10-UC zone. Again, those minimums are 10,000 square foot lots, 80-foot lot width and 20-foot rear yard setback. Assuming the entire 33.01 acres that make up the part of the property that will not be devoted to roads that could be divided into 10,000 square foot lots, that area could be divided into 143 lots. Of course since 13.04 of those acres is made up mostly of drainage ways, floodplains and wetlands, achieving that number of developable lots might be difficult or costly.

MLUDC 7.632(5) sets out criteria for PD approval. MLUDC 7.632(5)(b) authorizes the city council to approve lots that are smaller than required by the

underlying zone, if those smaller lots are "warranted by the design and amenities incorporated in the proposed PD Development Plan."[7] Before turning to the city council's decision, it is worth noting that MLUDC 7.632(5) is a highly subjective standard. Reasonable decision makers obviously could have significantly different views regarding the merits of a proposed PD's "design and amenities[.]" And reasonable decision makers could also have significantly different views about whether proposed exceptions are of a nature and extent that is warranted by the proposed PD "design and amenities[.]"

B. The City's Decision

The precise scope and basis or bases for the city's decision is difficult to determine. However, it is reasonably clear that the city determined that 13.04 acres of open space, as proposed, does not qualify as a design or amenity under MLUDC 7.632(5) that warrants approval of 136 lots that are smaller than 10,000 square feet, many of them only slightly larger than half the required

---

[7] 7.632(5) provides in part:

> "(5) **Decision Criteria**. The recommendation of the Planning Commission and the decision by the City Council shall be based upon the following findings:
>
> "* * * * *
>
> "(b) That exceptions from the standards of the underlying Zoning District are warranted by the design and amenities incorporated in the proposed PD Development Plan." (Boldface in original.)

10,000 square feet. Petitioner's proposed PD was effectively a proposed tradeoff between as many as 143 10,000 square foot lots and 138 lots, many of which are between 5,000 square feet and 6,000 square feet, with 13.04 acres of dedicated open space.

It is fair to say the city flatly rejected petitioner's apparent position that the proposed open space constitutes either a design or amenity that "warrants" the requested exceptions to allow 136 lots that are smaller than required by the RR-10-UC zone.[8] Petitioner assigns error to a number of the city's findings,

---

[8] Those findings appear in a number of places in the decision, and three of them are set out below:

> "**THE APPLICANT HAS PRESENTED NO DESIGN OR AMENITIES – ONLY SMALLER LOTS, SMALLER LOT WIDTHS, SMALLER SETBACKS AND SMALLER HOUSES.**" Record 3.

> "*** * * THE SO-CALLED ASSET IS ACTUALLY A LIABILITY THAT MUST BE MAINTAINED AND PROTECTED. THE APPLICANT'S USE OF AN UNDEVLOPABLE AREA CONTAINING DRAINAGE WAYS, FLOOD PLAIN, WETLANDS AND RIPARIAN AREAS AS JUSTIFICATION FOR CREATING A RESIDENTIAL DEVELOPMENT WITH SMALLER LOTS THAT EXCEED THE CITY'S EXISTING URBAN RESIDENTIAL STANDARDS IS UNACCEPTABLE.**" Record 7.

> "**THERE ARE CONTINUAL MISSTATEMENTS OF THE NATURAL AREA STATUS. THE NATURAL AREA IS A LIABILITY RATHER THAN AN ASSET**[.]" Record 7 (all capital letters and boldface in original).

some of which we address separately below, although we do not treat those challenges as separate sub-assignments of error.

1. The Open Space Natural Area is not a Park

The city found fault with petitioner's reference to the proposed open space as "OPEN SPACE PARK." Record 390. Petitioner contends the city erred in finding that petitioner misrepresented the nature of the area. This is another semantic argument based on the parties' disagreement over the value of the proposed open space. Whether the proposal is accurately described as a "park" was not a basis for the city's denial of the proposal, and we therefore do not consider the issue further.

2. The City Erroneously Determined the Natural Area is a Liability Rather than an Asset

The city found that the proposed open space would be a liability rather than an asset. *See* n 8. Petitioner assigns error to this finding, arguing that there is no evidence in the record that open space is a liability and that, to the contrary, the record includes evidence that open space can be a community asset. Petition for Review 30. Petitioner also contends that the finding is inconsistent with the city's comprehensive plan and the MLUDC, which encourage preservation of open space.[9] We understand petitioner to contend

[9] Although petitioner does not identify these comprehensive plan provisions in its brief, the Millersburg Comprehensive Plan (MCP) does discuss the value of "Natural Vegetation Values[.]" MCP 9.200-23. And one of the PD development standards specifically calls for PDs to include "Open Space" that

that evidence and the comprehensive plan make it difficult to justify a flat and complete rejection of undeveloped open space as a design or amenity that could ever warrant an exception under MLUDC 7.632(5)(b).

We agree with petitioner on that point. If that is indeed the city's position, some better explanation would be required in the city's findings. However, we do not understand the city to have adopted such an extreme position. Rather, we understand the city to have found the proposed open space will pose liability problems and does not warrant the number and degree of exceptions requested. We ultimately decide the city's decision must be remanded for a better explanation of the types of changes that might be made in the proposed PD to make it approvable. But the city's description of the proposed open space as a "liability" is not itself reversible or remandable error.

3. Uncertainty About Impacts to the Natural Area

Petitioner assigns error to a number of findings that seem to express concern regarding uncertainty about proposed impacts to the open space. Petitioner contends the record shows that the only impacts to the wetlands will be road crossings and that the impact will be limited to .53 acres. Record 402. Petitioner contends that it proposes to remove invasive species, to plant native vegetation and offered to deed the open space to the city for park use.

---

is "adequate for the recreational and leisure use of the population occupying the development * * *." MLUDC 7.610(4)(b).

The city responds that the city's findings expressing uncertainty about open space impacts was not a basis for the city's denial. We agree with the city.

4. Open Space is not an Exchange for Smaller Lots

Some of the city's findings take issue with statements by petitioner that the proposed open space should be viewed as an "exchange" for approval of the requested smaller lots. Once again, while these findings are no doubt a byproduct of the parties' differing views regarding the value of the proposed open space and the magnitude of the requested exceptions, these findings were not directed at a relevant approval criterion and are not a basis for reversal or remand.

5. Petitioner Will Pay SDCs to Meet Park Obligations

Petitioner assigns error to city findings that the proposed open space is unsuitable for an active recreation park. Petitioner contends it will pay park systems development charges if the city does not want to take title to the property for park use.

Once again, while these findings may indirectly suggest PD modifications that might change the city's mind about the requested PD approval, they do not appear to have been directed at an approval standard and do not appear to have been adopted as a basis for the city's denial of the PD.

6. Uncertainty About Responsibility for the Open Space

The city adopted findings expressing uncertainty about who would be responsible for the proposed open space. Petitioner assigns error to those findings.

Once again, these findings may suggest clarifications that might make the proposed PD approvable, but they do not appear to have been directed at any of the relevant approval standards and do not appear to have been a basis for denying the PD application.

C. Failure to Advise of Changes that Might Make the Planned Development Approvable

Petitioner finally makes an argument that the challenged decision improperly leaves petitioner to guess what changes, if any, might make the proposal approvable in the conclusion of the petition for review. Petition for Review 47. Although it is a fairly close question, we agree with petitioner that the city's decision must be remanded to provide additional guidance on the kinds of changes that might lead to PD approval. As we explained in *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008) (citing *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)), a "local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved."

As we have already noted, we do not agree with petitioner's suggestion that it is the city's obligation to shoulder the burden of independently

developing conditions that would effectively redesign the proposal and make it approvable. Neither is the city obligated to tell petitioner exactly what must be changed to make the PD approvable. But the city's findings are almost entirely a critique and rebuttal of arguments petitioner made in support of its application, rather than a considered determination regarding the merits of the application and whether it satisfies the applicable approval criteria. The city's findings provide almost no guidance regarding the kinds of changes that might lead to an approvable PD. Admittedly the findings make it pretty clear that the city and petitioner have dramatically different views about the value of the proposed 13.04 acres of open space as an undeveloped natural area and the significance of the requested exceptions. Some of the findings that we have discussed above might be read to suggest that if the proposed open space included at least some areas that are suitable for active recreation, and perhaps if the open space were made more accessible for passive recreation, the city might view it as more of an amenity that would justify or warrant some exceptions for smaller lots. And it appears from some of the findings noted above that the city was concerned with the large number of lots for which exceptions were requested and the much smaller size of many of the proposed lots.

But we agree with petitioner that the way the findings are written, petitioner is largely left in the dark regarding the nature and extent of changes that must be made to justify exceptions to the RR-10-UC minimum lot size, lot

width and rear yard setback requirements. And while it seems clear that approval of exceptions for 136 of the proposed 138 lots is unlikely, at least for the degree of reductions proposed, the city's findings give no real indication regarding the nature and extent of exceptions that might be acceptable.

We reiterate that the city is not obligated to give the petitioner a detailed roadmap that guarantees PD approval, and that MLUDC 7.632(5)(b) is an exceedingly subjective standard that leaves the city with a great deal of discretion in deciding whether the requested "exceptions" "are warranted by the design and amenities[.]" But *Commonwealth Properties* and *Bridge Street Partners* require that the city give petitioner at least some minimal idea regarding what changes might lead to such approval. The city's findings in this case are not adequate to provide that minimal idea.

The fourth assignment of error is sustained in part.

FIFTH ASSIGNMENT OF ERROR

Petitioner's fifth assignment of error in large part takes the position that the summary findings the city adopted to summarize the findings that it had adopted earlier in its decision are insufficient to sustain its denial decision. To the extent petitioner assigns error to those findings, the assignment is undeveloped and provides no additional basis for remand.

However, the fifth assignment of error makes two unrelated points that we address briefly. First, petitioner contends the city failed to address most of the MLUDC 7.632(5) PD approval criteria. Petitioner is correct. But that is

because the city found the proposed exceptions were not warranted under MLUDC 7.632(5). While we conclude that finding requires further explanation, it was not error for the city to fail to consider all of the MLUDC 7.632(5) standards once it found one of them was not satisfied.

Second, petitioner again argues the city is obligated by MLUDC 3.120(3) to impose conditions and approve the proposal or explain why such conditions are not possible. We have already rejected that argument, and we reject it again here.

SIXTH ASSIGNMENT OF ERROR

We understand petitioner to make two arguments in its final assignment of error. First, petitioner argues that the city erred by concluding that it has unfettered discretion to deny the proposed PD and need not justify its decision with findings. That argument is based not on anything in the challenged decision, but rather is based on a sentence in a planning staff report that suggested the city council might be able to deny the proposed PD without adopting findings to justify such a decision.[10]

We are not sure what the disputed sentence means. But whatever it means, the city council did not adopt it. And we do not understand the city to

---

[10] The planning staff report included the following statement:

> "Denial of the Applicant's Planned Development Subdivision will require preparation of Findings for Denial although the City Council's Discretionary Powers may not require them." Record 27 (boldface omitted).

have adopted the position that it has unfettered "discretion" to deny the application. The city understood that it needed to base its decision on the relevant approval criteria. As we have already explained, we understand the city to have based its decision on a conclusion that the requested exceptions were not warranted by the undeveloped open space. While we have concluded the city needs to do a better job of explaining how petitioner might go about revising the proposal to make it approvable or that there is no way to make the proposal approvable, we reject petitioner's contention that the city adopted the position that it has unfettered discretion to deny the proposal and need not support its decision with findings.

Finally, petitioner contends that it pointed out to the city that the proposed PD with smaller lots and the proposal to protect the open space/natural area is consistent with many provisions of the comprehensive plan. But even if we accept that the proposed PD is consistent with parts of the comprehensive plan, petitioner makes no attempt to explain why that would make it error for the city to deny the requested exceptions if the city council concludes, as it did here, that under MLUDC 7.632(5)(b) the requested exceptions are not warranted by the "design and amenities" in the PD. That the PD may be consistent with some parts of the comprehensive plan does not necessarily establish that the PD "design and amenities" warrant or justify the requested exceptions. That the PD is consistent with parts of the comprehensive plan may have some bearing on the question of whether the

proposed exceptions are warranted by the PD, but it does not dictate an affirmative answer to that question.

The sixth assignment of error is denied.

CONCLUSION

The city's decision is remanded for the reason set out in our resolution of the fourth assignment of error. The city must adopt findings on remand that are sufficient to inform the applicant either of the nature and types of changes in the proposed PD that will be necessary to obtain approval or that it is unlikely that the PD can be approved for this property. [11]

The city's decision is remanded.

[11] The city's findings state "**THERE ARE FOUR AREAS WHERE THE APPLICATION IS IN NONCOMPLIANCE WITH THE MILLERSBURG LAND USE DEVELOPMENT CODE**[.]" However, the city's findings that the requested exceptions are not warranted by the proposed design and amenities, under MLUDC 7.632(5)(b), are the only ones that are sufficiently stated and developed to actually state a basis for the city's decision to deny the application.