

1 BEFORE THE LAND USE BOARD OF APPEALS
2
3 OF THE STATE OF OREGON
4

5 LORENE HUNT,
6 *Petitioner,*

7
8 vs.

12/11/18 PM12:36 LUBA

9
10 CITY OF THE DALLES,
11 *Respondent,*

12 and

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14
15 JONATHAN BLUM,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-097

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of The Dalles.

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25 Sean T. Malone, Eugene, filed the petition for review and argued on behalf
26 of petitioner.

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28 Gene E. Parker, City Counsel, The Dalles, filed a response brief and argued
29 on behalf of respondent.

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31 Kristen A. Campbell, The Dalles, filed a response brief. With her on the
32 brief was Timmons Law PC.

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34 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
35 Member, participated in the decision.

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37 AFFIRMED

12/11/18

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

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MOTION TO INTERVENE

Jonathan Blum, the applicant below (intervenor), moves to intervene on the side of respondent. No party opposes the motion and it is allowed.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a minor partition and adjustment.

FACTS

The subject property is vacant land comprised of 8,778 square feet, designated Low Density Residential in the city’s comprehensive plan, and zoned Low Density Residential (RL). Intervenor applied for a minor partition to partition the property into two 4,389-square-foot lots with an adjustment of the minimum lot size of 5,000 to 4,389 square feet and adjustment of minimum lot width from 50 to 46 feet. Intervenor proposes new construction of single-family dwellings on the new lots. The planning commission conducted a hearing and approved the application. Other parties appealed the planning commission’s decision to the city council, which, after a *de novo* public hearing, denied the appeal and affirmed the planning commission’s approval by a city council resolution with attached findings of fact and conclusions of law. This appeal followed.

1 **ASSIGNMENT OF ERROR**

2 We start with an overview of the disputed provisions of the City of The
3 Dalles Land Use Development Ordinance (LUDO). LUDO 10.5.010.060
4 requires a minimum lot size of 5,000 square feet for single-family detached
5 dwellings in the RL zone. Because the minor partition would result in two lots
6 each smaller than 5,000 square feet, the minor partition required an adjustment
7 of the minimum lot size. LUDO 10.3.080.020 prohibits adjustments “[t]o allow
8 an increase in density in the RL zone.”¹ For the purposes of the LUDO, “density”
9 is defined as “[t]he number of dwelling units per acre.” LUDO 10.2.030.

10 The subject property was one lot in the Oak Grove Subdivision, an 18-lot
11 subdivision with lot sizes varying from 6,534 square feet to 24,394 square feet.
12 The density at the time of the original subdivision was 3.97 dwelling units per
13 gross acre. The city council found that the requested minor partition and
14 adjustment would result in a density of 4.19 to 4.53 dwelling units per gross acre
15 for the subdivision (depending on whether nonresidential uses within the original

¹ LUDO 10.3.080.020 provides, in part:

“A. Unless listed in subsection B of this section, all regulations in the LUDO may be modified using the adjustment review process.

“B. Adjustments are prohibited for the following items:

“* * * * *

“6. To allow an increase in density in the RL zone.”

1 subdivision are included in the calculation of gross acreage). Record 9.
2 Notwithstanding that increase in subdivision density, the city council determined
3 that approval of the adjustment would not violate LUDO 10.3.080.020(B)(6).
4 The city council observed that the city's comprehensive plan establishes a density
5 range of three to six dwelling units per gross acre in the RL zone and reasoned
6 that, since intervenor's proposal would establish a density within that range, the
7 adjustment is not prohibited because it does not allow an increase above the
8 density range allowed in the RL zone. Record 9.

9 In the sole assignment of error, petitioner argues that the city improperly
10 construed LUDO 10.3.080.020, 10.2.030, and 10.5.010.060 because the approval
11 allows an increase in density in the RL zone. Petitioner argues that because the
12 LUDO defines density as dwelling units per gross acre and requires a 5,000-
13 square-foot minimum lot size for a single-family detached dwelling in the RL
14 zone, the city's interpretation is expressly inconsistent with the text, context, and
15 purpose of the code. Petitioner argues that density must be calculated based on
16 the acreage of the subject property, not the acreage of the subdivision. Petitioner
17 asks that we reverse or, in the alternative, remand the city's decision.

18 We are required to affirm the city council's interpretation of its own
19 comprehensive plan and land use regulations if the interpretation is plausible and
20 not inconsistent with the express language, purpose, or policy of the
21 comprehensive plan or land use regulations. ORS 197.829(1); *Siporen v. City of*

1 *Medford*, 349 Or 247, 243 P3d 776 (2010).² As the Court of Appeals explained
2 in *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d 478 (2017):

3 “[T]he plausibility determination under ORS 197.829(1) is not
4 whether a local government’s code interpretation best comports with
5 principles of statutory construction. Rather, the issue is whether the
6 local government’s interpretation is plausible because it is not
7 expressly *inconsistent* with the text of the code provision or with
8 related policies that ‘provide the basis for’ or that are ‘implemented’
9 by the code provision, including any ordained statement of the
10 specific purpose of the code provision at issue.” (Emphasis in
11 original.)

12 We review the city council’s interpretation of “increase in density in the
13 RL zone” and “units per acre” under this highly deferential standard of review.
14 We are required to affirm the city’s plausible interpretation, even if petitioner
15 presents or we conceive a stronger interpretation. *See Mark Latham Excavation,*
16 *Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012) (“The

² ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 existence of a stronger or more logical interpretation does not render a weaker or
2 less logical interpretation ‘implausible’ under the *Siporen* standard.”).

3 The LUDO 10.3.080.020(B)(6) prohibition on adjustment “[t]o allow an
4 increase in density in the RL zone” does not specify what denominator should be
5 used to determine whether a proposed adjustment increases the density in the RL
6 zone, or explain how “density in the RL zone” is measured. Petitioner argues
7 that the proper denominator is the acreage of the subject property, and because
8 two dwellings on the 8,778-square foot subject property would result in more
9 than one dwelling per the 5,000 square foot minimum lot size, the adjustment
10 impermissibly increases the density allowed in the RL zone. The city council
11 interpreted LUDO 10.3.080.020(B)(6) differently, to use as the denominator the
12 gross acreage of the Oak Grove subdivision. Further, the city council interpreted
13 the phrase “increase in density in the RL zone” to mean an increase in the density
14 beyond the range allowed in the RL zone. Both city council interpretations are
15 consistent with the text of LUDO 10.3.080.020(B)(6), which does not specify the
16 denominator to be used, and which refers to the “density in the RL zone,” not to
17 the actual built density or the minimum lot size.

18 The city’s interpretation is not inconsistent with the purpose of either the
19 adjustment review process or LUDO residential density regulations. The purpose
20 of adjustment review is expressed in LUDO 10.3.080.010:

21 “The regulations of the LUDO are designed to implement the goals
22 and policies of the Comprehensive Plan. These regulations apply
23 city-wide, but because of the City’s diversity, some sites are difficult

1 to develop in compliance with the regulations. The adjustment
2 review process provides a mechanism by which the regulations in
3 the LUDO may be modified if the proposed development continues
4 to meet the intended purpose of those regulations. Adjustments may
5 also be used when strict application of the LUDO regulations would
6 preclude all use of a site. Adjustment reviews provide flexibility for
7 unusual situations and allow for alternative ways to meet the
8 purposes of the code, while allowing the LUDO to continue to
9 provide certainty and rapid processing for land use applications.”

10 Petitioner argues that LUDO regulations do not preclude development of
11 the subject property and therefore the adjustment is not consistent with the
12 purpose of adjustment review. However, the code does not require the property
13 be otherwise undevelopable before an adjustment may be allowed. Similarly,
14 petitioner argues that the size of the lot is not an “unusual situation.” Again, the
15 code does not require the property present an unusual situation before an
16 adjustment may be allowed. Instead, the adjustment process “provides a
17 mechanism by which the regulations in the LUDO may be modified if the
18 proposed development continues to meet the intended purpose of those
19 regulations.” An adjustment for intervenor’s minor partition is not inconsistent
20 with the purpose of the adjustment process.

21 LUDO 10.5.010.010 sets out the purpose of the RL zoning district and
22 provides that the RL zone “implements the RL - Low Density Residential
23 Comprehensive Plan designation, which allows for a range of zero to 6 single-
24 family dwelling units per gross acre. The RL district is intended to provide low
25 density family residential areas for present and future needs, together with a full
26 range of urban services.” The city’s interpretation is not inconsistent with the

1 purpose of the RL zone because the resulting density is within the density range
2 for the RL zone provided in the comprehensive plan and the “ordained statement
3 of the specific purpose” of the RL zone. *Kaplowitz*, 285 Or App at 775.

4 We agree with the city that the city’s comprehensive plan housing goal,
5 Goal 10, and its policies and implementing measures, provide further contextual
6 support for the city’s interpretation. One of the Goal 10 housing goals is to
7 “[p]romote the efficient use of vacant land by encouraging infill development
8 which is sensitive to existing neighborhoods, and by encouraging new
9 development which achieves the density allowed by the comprehensive plan.”
10 The Dalles Comprehensive Land Use Plan 41 (May 23, 2011). To achieve that
11 goal, the city’s comprehensive plan housing goal policies encourage “infill
12 development” and “new development which achieves the density allowed by the
13 comprehensive plan.” *Id.* at 42. The comprehensive plan designates residential
14 density districts “[t]o provide variety and flexibility in site design and densities,”
15 with a prescribed density range for the RL zone of three to six units per gross
16 acre. *Id.* at 43. The city’s interpretation is consistent with Goal 10 and the policies
17 and implementing measures because it interprets “density” and “acre” to allow
18 new infill development of vacant land to achieve a density that is allowed by the
19 comprehensive plan.

20 The city’s comprehensive plan Goal 10 implementing measures for single-
21 family residential uses provide that “[s]mall lots can accommodate single family
22 development ranging from 3,000 to 5,000 square feet in area.” *Id.* at 44. We agree

1 with the city that the city’s residential density regulations are intended to allow
2 development of single-family dwellings on lots ranging from 3,000 to 5,000
3 square feet, with a density range in the RL zone of three to six dwelling units per
4 acre. The city’s interpretation of the adjustment criteria is consistent with the
5 comprehensive plan housing policies that the RL zone and LUDO implements.

6 In the challenged decision, the city also appeared to conclude that the
7 minimum lot size in LUDO 10.5.010.060 does not apply to “infill development
8 approved through the minor partition process” based on an asterisk and footnote
9 in that provision. Petitioner argues that this finding is erroneous because the
10 footnote refers to a different standard that does not apply to infill development
11 approved through the minor partition process. In its response brief the city
12 concedes that the finding is erroneous. We conclude that error is not critical to
13 the city council’s interpretation or ultimate conclusions and, thus, the conceded
14 error provides no basis for reversal or remand.

15 The assignment of error is denied.

16 The city’s decision is affirmed.