

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SUSAN GARRETT CROWLEY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HOOD RIVER,
10 *Respondent,*

11 and

12
13 MID-COLUMBIA HOUSING
14 AUTHORITY and COLUMBIA CASCADE
15 HOUSING CORPORATION,
16 *Intervenors-Respondents.*

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19 LUBA No. 2017-071

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21 FINAL OPINION
22 AND ORDER

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24 Appeal on remand from the Court of Appeals.

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26 Susan Garrett Crowley, Hood River, represented herself.

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28 Daniel Kearns, Portland, represented respondent.

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30 Jennifer M. Bragar, Portland, represented intervenors-respondents.

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32 BASSHAM, Board Member; ZAMUDIO, Board Member, participated in
33 the decision.

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35 RYAN, Board Chair, did not participate in this decision.

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37 REMANDED

01/24/2019

01/24/19 PM 1:53 LUBA

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving comprehensive plan
4 and zoning map amendments to allow a five-acre city park to be developed for
5 residential use.

6 **FACTS**

7 The present appeal is on remand from the Court of Appeals. *Crowley v.*
8 *City of Hood River*, 294 Or App 240, 430 P3d 1113 (2018). In the underlying
9 decision, LUBA affirmed the city’s decision to adopt comprehensive plan map
10 and zoning map amendments to land currently occupied by a city park,
11 Morrison Park, to allow for high-density residential development. *Crowley v.*
12 *City of Hood River*, __ Or LUBA __ (LUBA No 2017-071, Jan 19, 2018). In its
13 decision, the city council concluded that the proposal to effectively eliminate
14 Morrison Park as a city park is consistent with Hood River Comprehensive Plan
15 (HRCP) Goal 8, Policy 1, which states in relevant part that “[e]xisting parks
16 sites will be protected from incompatible uses.” *Id.* (slip op at 11-12). The city
17 council concluded that Goal 8, Policy 1 is ambiguous, and could be broadly
18 interpreted, as petitioner argued to the city, to effectively prohibit the city from
19 rezoning Morrison Park to allow for non-park uses. *Id.* However, the city
20 council rejected petitioner’s broad interpretation in favor of a narrower
21 interpretation, to the effect that Goal 8, Policy 1 requires only that the city
22 protect existing parks from incompatible uses on surrounding lands. *Id.* On

1 appeal to LUBA, we concluded that the city’s interpretation was not
2 inconsistent with the express language, purpose or policy underlying Goal 8,
3 Policy, or otherwise “implausible.” *Id.* (slip op at 16-18); ORS 197.829(1)¹;
4 *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). Accordingly, we
5 denied petitioner’s first assignment of error, and affirmed the city’s decision.
6 We also denied petitioner’s second assignment of error, which challenged the
7 city’s findings under two code rezoning standards. *Id.* (slip op at 19-30).

8 On appeal of our decision to the Court of Appeals, the court concluded
9 that LUBA’s decision was “unlawful in substance,” ORS 197.850(9)(a),
10 because LUBA affirmed the city’s interpretation of Goal 8, Policy 1. 290 Or
11 App 240, 241. According to the court, the city’s interpretation of Goal 8,

¹ 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;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 Policy 1, is not affirmable under ORS 197.829(1) because the city’s
2 interpretation does not “plausibly account for the text and context of the
3 policy.” *Id.* The court found its decision “obviates the need to address
4 petitioner’s second and third assignments of error” and accordingly reversed
5 and remanded LUBA’s decision.² *Id.*

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioner’s first assignment of error argued that the city council’s
8 interpretation of Goal 8, Policy 1, is not sustainable under ORS 197.829(1).
9 The court essentially agreed with that argument. Accordingly, the first
10 assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner’s second assignment of error challenged the city’s findings that
13 the city’s need for affordable housing justifies rezoning Morrison Park to allow
14 high-density residential development, under two code standards. LUBA denied
15 the second assignment of error. As far as we can tell, the court’s opinion does
16 not require us to revisit our disposition of petitioner’s second assignment of
17 error.

² Petitioner’s second assignment of error to the court addressed consistency with Statewide Planning Goal 2 (Land Use Planning). Petitioner’s third assignment of error to the court argued that LUBA erred in affirming the city’s reliance on Statewide Planning Goal 10 (Housing) to avoid the effect of comprehensive plan policies implementing Statewide Planning Goal 8 (Recreational Needs).

1 **DISPOSITION**

2 OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use
3 decision when “[t]he decision violates a provision of applicable law and is
4 prohibited as a matter of law.” OAR 661-010-0071(2)(d) provides that LUBA
5 shall remand a land use decision when “[t]he decision improperly construes the
6 applicable law, but is not prohibited as a matter of law.”

7 In its decision, the Court of Appeals rejected the city council’s narrow
8 interpretation of Goal 8, Policy 1, to the effect that the policy is concerned *only*
9 with protecting existing parks from incompatible uses *on surrounding*
10 *properties*. The court clearly determined that the policy is not concerned solely
11 with protecting parks from incompatible uses on surrounding lands. However,
12 the court did not adopt its own interpretation of Goal 8, Policy 1, and expressed
13 no opinion regarding the plausibility of petitioner’s broad interpretation of Goal
14 8, Policy 1.³ The court’s final disposition was “reverse and remand for further
15 proceedings.” 294 Or App at 249.

³ In a footnote, the court responded to arguments in a dissenting opinion that petitioner’s interpretation is implausible, stating in relevant part:

“We note that our opinion is limited to determining that the city’s interpretation narrowing the scope of Goal 8 Policy 1’s applicability to only incompatible uses near Morrison Park, and not in the park itself, is implausible and not entitled to deference, and we express no opinion as to the implausibility of petitioner’s proffered interpretation.” 294 Or App 240, 248-49 n 6.

1 As we understand the court's opinion, the appropriate disposition on
2 remand to LUBA is to remand the decision to the city for further proceedings,
3 specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1,
4 and apply that policy, as interpreted, to the application before it. Accordingly,
5 the city's decision is remanded. OAR 661-010-0071(2)(d).