

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

4
5 LORENE HUNT,
6 *Petitioner,*

04/04/19 PM12:08 LUBA

7
8 vs.

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

12
13 and

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

17
18 LUBA No. 2018-090

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 on behalf of
32 intervenor-respondent. With her on the brief was Timmons Law PC.

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

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37 REMANDED

04/04/2019

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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NATURE OF THE DECISION

Petitioner appeals a city council decision approving an adjustment to minimum lot size standards.

FACTS

The subject property is an undeveloped corner lot that is 7,475 square feet in size and zoned RL Low Density Residential (RL). The minimum lot size for a corner lot to qualify for development of a duplex in the RL zone is 4,500 square feet per dwelling unit, or 9,000 square feet total. Because the subject property is 7,475 square feet in size, it does not meet the minimum lot size requirement for a corner duplex. In order to develop the subject property with a duplex, intervenor-respondent (intervenor) applied for an adjustment to the minimum lot size standards for a corner duplex in the RL zone to 3,737 square feet for each dwelling unit. The planning commission approved the adjustment application, and petitioner appealed the decision to the city council. The city council approved the adjustment. This appeal followed.

FIRST ASSIGNMENT OF ERROR

As noted, for a corner duplex in the RL zone, the City of The Dalles Land Use Development Ordinance (LUDO) 10.5.010.060 requires a minimum lot size of 4,500 square feet “per dwelling unit.” Intervenor applied for an adjustment to reduce the minimum lot size to 3,737 square feet per dwelling unit.

1 LUDO 10.3.080.020 prohibits adjustments “[t]o allow an increase in
2 density in the RL zone.”¹ LUDO 10.2.030 defines “density” as “[t]he number of
3 dwelling units per acre.”²

4 The city council found that LUDO 10.3.080.020(B)(6) did not prohibit the
5 adjustment:

6 “[The interpretation proposed by [the petitioner]] of Section
7 10.3.080.020(B)(6) is inconsistent with other provisions of the
8 LUDO. Section 10.5.010.020(A)(2)(c) allows duplexes to be
9 constructed upon corner lots as an outright permitted use in the RL
10 zoning district. Under Section 10.2.010, the term ‘density’ is defined
11 as ‘the number of dwelling units per acre.’ Section 10.2.030 defines
12 a duplex dwelling as ‘two dwelling units on a single lot or
13 development site placed so that some structural parts are in

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.”

² In a previous appeal of a decision involving the same LUDO provisions, we explained that LUDO 10.5.010.010 sets out the purpose of the RL zoning district, and provides that the RL zone “implements the RL - Low Density Residential Comprehensive Plan designation, which allows for a range of zero to 6 single-family dwelling units per gross acre. The RL district is intended to provide low density family residential areas for present and future needs, together with a full range of urban services.” *Hunt v. City of The Dalles*, __ Or LUBA __ (LUBA No 2018-097, Dec 11, 2018) (slip op at 8), *aff’d*, 296 Or App 761, __ P3d __ (2019).

1 common.’ The duplex that was proposed by [intervenor] is
2 consistent with the type of use permitted outright in the RL zoning
3 district.

4 “Section 10.5.010.060 of the RL zoning district, which sets forth the
5 development standards for the district, includes a footnote which
6 sets out a formula used to determine how compliance with the
7 minimum density standard (not more than 10,000 net buildable
8 square feet per dwelling unit) is determined. The development site
9 consists of .17 acres, which is equivalent to 7,405.2 net buildable
10 square feet. Dividing the net buildable square feet (7,405.2) by the
11 minimum density footage standard of 10,000 yields a negative
12 number. As the Planning Director advised the City Council during
13 the hearing, applying the formula used to determine the minimum
14 number of dwelling units which an application must propose, is
15 often problematic in the case of single vacant lots. The Council finds
16 and concludes that the proposed adjustment includes two dwelling
17 units, which is consistent with the minimum number of units
18 typically provided in a duplex, and that the proposed adjustment
19 does not result in an increase in density associated with the proposed
20 use of the development site.” Record 8.

21 In her first assignment of error, petitioner argues that the city council’s findings
22 are inadequate to explain its conclusion that the adjustment does not “allow an
23 increase in density in the RL zone.”

24 The city council first noted that LUDO 10.5.010.020(A)(2)(c) allows
25 duplexes as outright permitted uses in the RL zone. The city council then noted
26 text that is included in an asterisked section at the end of LUDO 10.5.010.060
27 that applies to the “minimum density” standard included in that LUDO provision.
28 The minimum density standard in the RL zone for new subdivisions and planned
29 developments requires “[n]ot more than 10,000 net buildable sq. ft. per dwelling
30 unit.” The text in the asterisked section provides in relevant part that “this

1 standard is applicable to new subdivisions and planned developments, but does
2 not apply to infill development approved through the minor partition process.”
3 The asterisked language includes a formula for determining compliance with the
4 minimum density standard, where it applies:

5 “Compliance with this standard is measured by determining the
6 buildable square footage on a proposed development site (exclusive
7 of areas to be dedicated for public rights-of-way, constrained by
8 slopes of 25% or greater, wetlands, riparian corridors and
9 floodplain); then dividing by minimum density square footage
10 standard, and rounding down. For example, an RL site with 5
11 buildable acres would be required to provide at least 21 dwelling
12 units (217,800) buildable sq. ft./10,000 sq. ft. = 21.78, rounded
13 down to 21.” *Id.*

14 However, the city council’s findings go on to conclude that “applying the
15 formula used to determine the minimum number of dwelling units which an
16 application must propose, is often problematic in the case of single vacant lots”
17 because applying the formula “yields a negative number.” Record 8.
18 Accordingly, we understand the city council to have abandoned reliance on the
19 formula that applies when the city is evaluating whether a new subdivision or
20 planned developments satisfies the minimum density standard in LUDO
21 10.5.010.060.

22 The city council concluded that because the proposal includes two
23 dwelling units, and two dwelling units is consistent with the minimum number
24 of units typically provided in a duplex, “the proposed adjustment does not result

1 in an increase in density associated with the proposed use of the development
2 site.” Record 8.

3 We agree with petitioner that the city council’s findings are inadequate to
4 explain why LUDO 10.3.080.020(B)(6) does not prohibit the adjustment. First,
5 the city’s findings quoted above conclude that granting the adjustment will not
6 allow an increase in the density “associated with the proposed use of the
7 development site” because corner lot duplexes are allowed in the RL zone and
8 the adjustment will facilitate development of a corner lot duplex. The findings do
9 not explain why the fact that corner lot duplexes are permitted outright in the RL
10 zone by virtue of LUDO 10.5.010.020(A)(2)(c) is relevant to determining
11 whether an adjustment to the minimum lot size for a corner duplex does or does
12 not allow an increase in density in the RL zone for purposes of LUDO
13 10.3.080.020(B)(6).

14 Petitioner argued below that the adjustment should be denied because
15 LUDO 10.3.080.020(B)(6) prohibits an adjustment that will “increase [] density
16 *in the RL zone.*” (Emphasis added.) LUDO 10.3.080.020(B)(6) is not expressly
17 concerned with whether an adjustment will allow an increase in density on “a
18 proposed development site,” which is the standard that the city council applied.
19 Accordingly, the city’s conclusion that the adjustment will not allow an increase
20 in density “associated with the proposed use of the development site” does not
21 address the relevant language contained in LUDO 10.3.080.020(B)(6), which,

1 again, asks whether the adjustment will result in an increase in density *in the RL*
2 *zone*.³

3 Remand is required for the city to better explain its conclusion that the
4 adjustment will not “allow an increase in density in the RL Zone.” LUDO
5 10.3.080.020(B)(6).

6 The first assignment of error is sustained.

7 **SECOND ASSIGNMENT OF ERROR**

8 In her second assignment of error, we understand petitioner to argue that
9 the city’s decision is not supported by substantial evidence in the whole record
10 because in the recitals section of the challenged decision and in the background
11 section of the findings, the city’s decision refers to the subject property as
12 including “7,745” square feet, and the evidence in the record conclusively
13 establishes that the subject property includes “7,475” square feet. The city
14 responds, and we agree, that the evidence in the record establishes that the subject

³ In the petition for review, petitioner argues that the adjustment will allow an increase in density “in the RL zone” and that density must be calculated based on a formula that divides the square footage in an acre by the square footage of each duplex lot, which would result in a density of 11.7 dwelling units per acre. Petition for Review 15, n 4, 20. In the response brief, the city takes the position that “the correct interpretation of ‘development site’ for purposes of calculating density is to divide the total square footage of one acre (43,560) by the total square feet of the entire development site, which is 7,475 square [feet]” and that calculating density in this manner will result in a density of 5.8 dwelling units per acre. Response Brief 10. We express no opinion regarding the relevance of either the argument or calculation to the analysis required by LUDO 10.3.080.020(B)(6).

1 property includes 7,475 square feet. A typographical error in a few places in the
2 decision does not amount to reversible error or mean that the decision is not
3 supported by substantial evidence. ORS 197.835(9)(a)(C).

4 The second assignment of error is denied.

5 The city's decision is remanded.