BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

ARTHUR C. PICULELL LIVING TRUST,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

LUBA No. 2019-067

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and the reply brief and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed the response brief and argued on behalf of respondent.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 11/19/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving a tentative planned unit development.

FACTS

The subject property is comprised of approximately 15.47 acres zoned R-1 Low Density Residential, with Planned Development and Water Resources Conservation overlays. Petitioner applied for a tentative planned unit development (PUD) to create a 36-lot residential subdivision, with private streets serving the subdivision. The hearings officer approved the application and imposed 16 conditions of approval. As relevant in this appeal, one of the conditions of approval prohibited development on one of the proposed lots (Lot 36) that petitioner and the city agree is above 900 feet in elevation. Another condition of approval required a deed restriction on 21 of the proposed lots that requires a portion of each of the 21 lots to be maintained as common open space, as petitioner proposed on the original proposed site plan.

Petitioner appealed the hearings officer's decision to the planning commission. In its appeal, petitioner challenged three of the conditions of approval. One of those challenged conditions of approval is not relevant to this appeal. The planning commission adopted findings affirming the hearings officer's decision to impose the other two conditions of approval. This appeal followed.

INTRODUCTION

We briefly describe the local regulatory and statutory legal backdrop of the city's decision before turning to petitioner's two assignments of error.

A. South Hills Study

The subject property is located south of the downtown area of the city. In 1974, the city adopted Resolution 2295, a resolution that adopted the South Hills Study (SHS) as a refinement plan to the city comprehensive plan. Resolution 2295 states that "the policies adopted by this Resolution are applicable to that area identified in the study as being south of 18th Avenue, above an elevation of 500 feet." Response Brief App 2. The SHS studied and offered recommendations with respect to over 8,000 acres of land around the southern perimeter of the city, including some lands then located in the county outside the city limits. In 1974, the subject property was located in the county outside city limits. The subject property was annexed into the city in 1996. Petitioner's central argument in this appeal is that "the SHS does not apply to the subject property" because "the city never affirmatively applied the SHS to this site after the 1996 annexation." Petition for Review 3-4.

B. Needed Housing

ORS 197.307(4) requires local governments to apply only "clear and objective" development standards, conditions and procedures to applications to develop needed housing. The City of Eugene has adopted a two-track system for needed housing applications, as authorized by ORS 197.307(6). For each type of

development application that involves needed housing, the Eugene Code (EC) provides for a "general" approval process that includes some discretionary or unclear or subjective standards, and a "needed housing" approval process that includes only clear and objective standards. *See Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002) (discussing the city's two-track system). The PUD "needed housing" approval process is set out in EC 9.8325. Petitioner submitted its application under the needed housing track.

Against that backdrop, we address the assignments of error.

FIRST ASSIGNMENT OF ERROR

One of the needed housing track PUD approval standards provides that "for any PUD located within or partially within the boundaries of the South Hills Study * * * no development shall occur on land above an elevation of 900 feet[.]" EC 9.8325(12)(a).[1] During the proceedings before the hearings officer, petitioner argued that the subject property is not located "within * * * the boundaries of the [SHS]" within the meaning of EC 9.8325(12)(a). That is so, petitioner argued, because the city had not demonstrated that the city had ever taken affirmative

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[1] A different standard in EC 9.8325(2) requires the city to determine whether the "proposed land uses and densities within the PUD are consistent with the land use designation(s) shown on the Metro Plan Land Use Diagram, as refined in any applicable refinement plan." The hearings officer found that the proposed densities were consistent with the densities in the SHS. Petitioner did not challenge that finding to the planning commission and does not challenge that finding here.

action to make the SHS applicable to the subject property after it was annexed into the city in 1996. The hearings officer concluded that the subject property is within the boundary of the SHS, and that it became subject to the SHS when it was annexed. Record 26-27.

The planning commission affirmed that conclusion. Record 6. However, the planning commission also concluded that whether the subject property was subjected to the SHS at the time of annexation or at another time was not particularly relevant. The planning commission concluded that the phrase "within * * * the boundaries of the [SHS]" in EC 9.8325(12)(a) requires the city to determine whether the subject property is located within the boundaries of the SHS that are described in Resolution 2295, or in other words, whether the subject property is in "that area south of 18th Avenue, above an elevation of 500 feet." The planning commission concluded that the subject property is located south of 18th Avenue and that proposed Lot 36 is located above 900 feet, and that therefore EC 9.8325(12)(a) prohibited development of that portion of the property.[2] Record 7. The planning commission imposed Condition 13, which

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[2] The planning commission found:

> "The Planning Commission finds that the boundaries of the South Hills Study include all properties located south of 18th Avenue and above 500 feet in elevation; therefore, it is located within the boundaries of the South Hills Study." Record 7.

requires "the final site plans shall include a statement that no development may occur on any land above the 900-foot elevation." Record 21.

A. EC 9.8325(12) does not violate ORS 197.307(4)

In a portion of its first assignment of error, petitioner argues that EC 9.8325(12)(a) is not a "clear and objective standard[]" within the meaning of ORS 197.307(4) and therefore the city erred in applying it to prohibit development on Lot 36. Petitioner argues that the phrase "within * * * the boundaries" is not "clear" because the hearings officer's conclusion that the subject property is "within * * * the boundaries of the [SHS]" was based on different reasoning than the planning commission's reasoning. Petitioner argues that the hearings officer concluded that the subject property is within the boundaries of the SHS because annexation subjected it to the SHS at the time of annexation. Petitioner argues that the planning commission reached a different conclusion about *why* the subject property is within the boundaries of the SHS, relying on the plain language of Resolution 2295. From those different rationales and conclusions, petitioner reasons, the phrase "within * * * the boundaries" is unclear.

First, we disagree with petitioner that the hearings officer and the planning commission reached different conclusions about whether the property is "within * * * the boundaries of the [SHS]." Rather, the hearings officer's finding that petitioner focuses on addressed both EC 9.8325(2) and 9.8325(12)(a) in response to petitioner's argument that the policies of the SHS do not apply to the property

under EC 9.8325(2). The planning commission's findings, on the other hand, evaluated the express language of EC 9.8325(12) and determined that the subject property is within the boundaries described in Resolution 2295 and therefore, EC 9.8325(12)(a) prohibited development on portions of the property above 900 feet in elevation. We do not think the different rationales relied on by the hearings officer and the planning commission require a conclusion that EC 9.8325(12) is not "clear."

Second, EC 9.8325(12) is similar to the standards that we evaluated in *SE Neighbors v. City of Eugene*, 68 Or LUBA 51, *aff'd*, 259 Or App 139, 314 P3d 1004 (2013), and *Rudell v. City of Bandon*, 64 Or LUBA 201, 208 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012). In *SE Neighbors*, the standard at issue prohibited grading on portions of a development site that met or exceeded 20 percent slope. The petitioner challenged the five-foot contour interval method that the city used to calculate whether portions of the site exceeded 20 percent slope. We rejected the petitioner's argument that the standard was not "clear and objective." We concluded that the absence of language in the code provision requiring slope to be measured using five-foot contour intervals did not mean the provision was not clear and objective, where the city's application form notified applicants that slope would be measured using five-foot contour intervals.

In *Rudell*, a city code provision that prohibited structures from being located on any "identified foredune." We concluded that the code provision was "clear and objective," where the code defined the term "foredune" with reference

to the "lee or reverse slope" of a dune, and the slope of a property is an objectively determinable fact.

Further, we have held that where the purpose of a standard is clear from the text of the standard, that standard is more likely to be a "clear and objective" standard. *Walter v. City of Eugene*, 73 Or LUBA 356, 362, *aff'd*, 281 Or App 461, 383 P3d 1009 (2016). Here, the purpose of the EC 9.8325(12)(a) standard is to limit development on property located within the boundary of the SHS that is above 900 feet in elevation. We do not think that the language "within * * * the boundary of the [SHS]" in EC 9.8325(12) can reasonably be interpreted in more than one way, and the city has established that EC 9.8325(12) is capable of being imposed "only in a clear and objective manner" as required by ORS 197.831.[3]

B. Condition 13 is Clear

ORS 197.307(4) requires a local government to apply only clear and objective conditions to proposed needed housing. In another portion of its

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[3] 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 procedures are capable of being imposed only in a clear and objective manner."

assignment of error, petitioner argues that Condition 13 is not "clear."[4] Condition 13 provides:

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[4] We note that ORS 197.307(4) requires the standards and conditions that apply to needed housing to be *both* "clear" and "objective." *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 157-58 (1998), *aff'd*, 158 Or App 1, 970 P2d 685 (1999) (quoting the dictionary definitions of "clear" and "objective," and concluding that "clear and objective" standards for purposes of the needed housing statutes include numerical and similar clear standards, but do not include standards that require subjective, value-laden analyses designed to balance or mitigate impacts of the development on the property to be developed or the adjoining properties).

We note again here, as we noted in *Rogue Valley*, that the two words are not synonyms for each other, and in fact have different meanings. *Webster's Third New International Dictionary* 419 (unabridged ed 2002) includes the following definition for "clear":

> "3a: [e]asily understood: without obscurity or ambiguity: thoroughly understood or comprehended: easy to perceive or determine with certainty: sharply distinguished: readily recognized: unmistakable."

The definition for "objective" includes the following:

> "1b (2): existing independent of mind: relating to an object as it is in itself or as distinguished from consciousness or the subject: (3): belonging to nature or the sensible world: publicly or intersubjectively observable or verifiable esp. by scientific methods: independent of what is personal or private in our apprehension and feelings: of such a nature that rational minds agree in holding it real or true or valid." *Webster's* at 1556.

In the present appeal, petitioner does not argue that Condition 13 is not "objective." Accordingly, we do not address that issue.

"The final site plans shall include a statement that no development may occur on any land above the 900-foot elevation." Record 21.

Petitioner argues that the condition is not "clear" because petitioner argued for the planning commission to adopt a condition with different wording that would have provided "[t]his tentative planned unit development approval does not authorize the development of a dwelling on Lot 36." Record 375. According to petitioner, it is not clear whether the condition prohibits development of Lot 36 in perpetuity, even under modified future land use regulations that do not prohibit development above 900-foot elevation. The city responds, and we agree, that Condition 13 is clear. It requires the final site plan to include a statement that no development may occur on any land above 900-foot elevation. The final site plan may be able to be modified through a modification procedure in the event a future land use regulation allows development on Lot 36, but that is not an issue that the city is required to address in Condition 13, and failing to address future hypothetical changes to a land use regulation does not render a condition unclear.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

EC 9.8325(12)(c) provides that:

"[F]or any PUD located within or partially within the boundaries of the South Hills Study * * * :

" * * * * *

"(c) Development shall cluster buildings in an arrangement that results in at least 40% of the development site being retained in 3 or fewer contiguous common open space areas. For

> purposes of this section, the term contiguous open space means open space that is uninterrupted by buildings, structures, streets, or other improvements."

EC 9.0500 defines "Common Open Space" as "[a]n area for the use or enjoyment of all residents of a development site, excluding parking areas, streets, and other areas designed for motor vehicle circulation or storage. Common open space may include areas that provide for the preservation or enhancement of natural resource habitats."

In its application, petitioner proposed to satisfy EC 9.8235(12)(c)'s open space requirement by designating portions of 21 of the proposed lots as "common open space." During the proceedings before the hearings officer, petitioner argued that EC 9.8325(12)(c) was not "clear and objective" because the city's planning staff took the position that petitioner's proposed designation of portions of 21 lots as open space for visual enjoyment, but without providing physical access for residents to the property, did not satisfy EC 9.8325(12)(c). The hearings officer rejected petitioner's argument, concluding that the standard is capable of being applied in a clear and objective manner. The hearings officer also concluded that the proposed designation satisfied EC 9.8325(12)(c) because the designated open space would provide "an area for the * * * enjoyment" of the residents, consistent with the EC 9.0500 definition of "common open space." Record 53-54. The hearings officer imposed a condition of approval requiring the dedication to be shown on the final site plan. The planning commission affirmed the hearings officer's decision and imposed condition 14. Record 21.

In its second assignment of error petitioner first argues that EC 9.8325(12)(c) is not "clear and objective" because of the language "within * * * the boundary of the [SHS]" that we addressed in our resolution of the first assignment of error. For the same reasons explained above, we reject that argument here as well.

Petitioner next argues that EC 9.8325(12)(c) is not "clear and objective" because the city's planning staff interpreted the phrase "use or enjoyment" in the definition of "common open space" in EC 9.0500 as a conjunctive connector that requires both physical access to and dedication of petitioner's property, while the hearings officer and the planning commission concluded that the standard could be satisfied by only an open space dedication for visual enjoyment without physical access.

The city responds, and we agree, that the standard is clear, and requires an area either for the use *or* for the enjoyment of the residents. In other words, the standard employs the word "or" as a connector in its more ordinary exclusive, "either/or" usage. Although the disjunctive word "or" can in some circumstances be an inclusive connector and in others an exclusive connector depending on its context, the fact that the city's planning staff proposed a different interpretation of the standard — that interpreted the word "or" as an inclusive connector — does not make the standard unclear, especially when read in context with the purpose of the provision. The purpose of the open space requirement is to cluster development to provide open space that is uninterrupted by improvements. Such

open space may include areas that preserve or enhance natural resources. The purpose of the open space requirement is served by open space areas that are not physically accessible by all residents. *See Walter*, 73 Or LUBA at 362 ("[W]here the purpose of a standard is clear from the text of the standard, that standard is more likely to be a 'clear and objective' standard."). Finally, determining whether the proposed development site plan results in "at least 40% of the development site being retained in 3 or fewer contiguous common open space areas" is not a subjective, value-laden exercise.

The second assignment of error is denied.

The city's decision is affirmed.