

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

JIM EAGLE-EYE and AMANDA LARSON,
Petitioners,

vs.

CITY OF VENETA,
Respondent,

and

JEROME POULIN,
Intervenor-Respondent.

LUBA No. 2019-070

FINAL OPINION
AND ORDER

Appeal from City of Veneta.

William H. Sherlock, Eugene, filed the petition for review and a reply brief, and argued on behalf of petitioners. With him on the brief was Zack P. Mittge and Hutchinson Cox.

No appearance by City of Veneta.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

AFFIRMED

01/07/2020

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

Petitioners appeal a city ordinance amending the Veneta Zoning and Floodplain Map to apply the Planned Development Subzone to the subject property, and approving a General Development Plan and Program for development of 233 units of senior housing and related tree removal.

FACTS

On February 12, 2019, intervenor applied for placement of the city’s Planned Development (/PD) subzone and approval of a development plan for a senior housing community on a 22.04-acre property zoned General Residential (GR). Record 1, 21, 145. As proposed, the senior housing community includes independent living, assisted living and memory care facilities in one building (the main building), as well as detached cottages.¹ The applicant’s proposal included a main building 460 feet in length, 220 feet in width, 3 stories tall, and 98,502 square feet. The applicant proposed the main building would be used to house 36 assisted living units, 24 memory care units, and 44 independent living units as well as a commercial kitchen, central dining room, and staff areas. Record 21, 1467. Recreational, activity and dining areas on site will serve all residents. Record 145, 1419.

¹ The cottages will consist of six duplex and nine single-family homes. Record 145.

1 On May 7, 2019, the planning commission conducted a public hearing on
2 the proposed map amendment and development plan and recommended approval
3 by the city council. On June 24, 2019, the city council held a public hearing on
4 the application and ultimately approved the applications and adopted findings
5 supporting its approval of the development plan. Record 1–2. This appeal
6 followed.

7 **ASSIGNMENT OF ERROR**

8 The single largest physical component of the project is the main building.
9 Record 1118, 1467. Petitioners’ sole assignment of error is that the city
10 misapplied applicable law and made a decision unsupported by adequate findings
11 or substantial reasons in determining that the main building is permitted under
12 the city’s zoning code. ORS 197.835(9)(a)(D), (C).

13 **A. “Residential Facility”**

14 In their first subassignment of error, petitioners argue that the use does not
15 qualify as a “residential facility” as defined in Veneta Land Development
16 Ordinance (VLDO) 13.02 because it will house more than 15 individuals. Petition
17 for Review 5. ORS 197.835(9)(a)(D).

18 ORS 197.763(1) and ORS 197.835(3) generally limit LUBA’s scope of
19 review to “issues” that were raised prior to the close of the final evidentiary
20 hearing before the local government.² The purpose of ORS 197.763(1) is to

² 197.763(1) provides:

1 prevent unfair surprise and provide the local government with “fair notice” in the
2 form of specificity sufficient “to afford the decisionmaker and the parties ‘an
3 adequate opportunity to respond to each issue’”. *Boldt v. Clackamas County*, 107
4 Or App 619, 622–23 813 P2d 1078 (1991) (quoting statute). Our rules in turn
5 require that “[e]ach assignment of error must demonstrate that the issue raised in
6 the assignment of error was preserved during the proceedings below.” OAR 661-
7 010-0030(4)(d).³ Intervenor argues that petitioners failed to preserve and
8 therefore have waived the issue presented in this subassignment of error. For the
9 reasons set forth below, we agree.

10 Petitioners argue for the first time on appeal that the city may not approve
11 the use as a “residential facility” because the VLDO 13.02 incorporates the

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity respond to each issue.”

197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

³ OAR 661-010-0030(4)(d) was adopted in 2014 in part to implement ORS 197.763(1) and ORS 197.835(3).

1 definition of “residential facility” set forth in ORS 197.660(1), and the proposed
2 use is not a “residential facility” as defined in that statute.⁴ Petition for Review 5.

3 In their statement of preservation, petitioners argue that this issue was
4 sufficiently raised by the following comment:

5 “This kind of building is more of an industrial building and should
6 not be built in a residential area, for the size alone. This area would
7 need to be rezoned for it to be allowed.” Record 1150.

8 As we explained in *Hale v. City of Beaverton*, 21 Or LUBA 249, 254
9 (1991):

10 “ORS 197.835(2) states that issues raised in an appeal before this
11 Board ‘shall be limited to those raised by any participant before the
12 local hearings body as provided by ORS 197.763.’ ORS 197.763(1)
13 requires that an issue which is raised in an appeal to this Board have
14 been raised prior to the close of the record in the proceeding before
15 below, with ‘sufficient specificity so as to afford the governing body
16 * * * and the parties an adequate opportunity to respond to [the]

⁴ VLDO 13.02 provides definitions in a table format and the table entry for “Residential Facility” is “Residential Facility with six (6) or more persons as defined by ORS 197.660.”

ORS 197.660(1) provides:

“‘Residential facility’ means a residential care, residential training or residential treatment facility, as those terms are defined in ORS 443.400, that provides residential care alone or in conjunction with treatment or training or a combination thereof for six to fifteen individuals who need not be related. Staff persons required to meet licensing requirements shall not be counted in the number of facility residents, and need not be related to each other or to any resident of the residential facility.”

1 issue.’

2 “The purpose of ORS 197.763(1) and 197.835(2) is to prevent unfair
3 surprise. If an issue is not raised in the local proceedings, a petitioner
4 may not surprise the local government and other parties by raising
5 that issue for the first time before this Board. However, ORS
6 197.763(1) does not require that arguments *identical* to those in the
7 petition for review have been presented during local proceedings.
8 What it requires is that the argument presented in the local
9 proceedings sufficiently raise the issue sought to be raised in the
10 petition for review, so that the local government and other parties
11 had a chance to respond to that issue in the local proceedings.” *Id.*
12 (emphasis in original; footnote omitted).

13 We held in *Hale* that although a statement in the record recognized the number
14 of housing units originally approved, the petitioner’s statement below
15 concentrated:

16 “on the difference between (1) the number of single family versus
17 multifamily housing units actually built in the PUD, and (2) the
18 numbers of single family versus multi-family housing units which
19 the developer’s information packets told prospective buyers would
20 be built in the PUD. * * * No mention is made in petitioner’s
21 statement of the ‘intent of the original PUD.’ This statement does
22 not raise the issues of consistency of the proposed modification with
23 the intent of the original PUD approval, or the propriety of [the]
24 city’s criteria for determining such consistency, sufficiently to have
25 allowed the other parties to respond to these issues in the
26 proceedings below. Accordingly, we conclude petitioner may not
27 raise these issues before this Board.” *Id.*, 21 Or LUBA at 255.

28 Petitioners’ statement to the planning commission that the proposed building was
29 similar to an industrial building and an inappropriate size, and that the area would
30 need to be rezoned, does not fairly raise any issue regarding whether the proposed
31 use meets the definition of “residential facility” in the VLDO.

1 ORS 197.835(4)(a) provides:

2 “A petitioner may raise new issues to the board if:

3 “(a) The local government failed to list the applicable criteria for
4 a decision under ORS 197.195(3)(c) or 197.763(3)(b), in
5 which case a petitioner may raise new issues based upon
6 applicable criteria that were omitted from the notice.
7 However, the board may refuse to allow new issues to be
8 raised if it finds the issue could have been raised before the
9 local government.”

10 Petitioners also argue that they may raise the issue of whether the
11 development is a residential facility because the city did not identify VLDO 13.02
12 as an applicable approval criterion.⁵

13 Petitioners do not establish that the city was required to list VLDO 13.02,
14 a section providing definitions, in its notices. Furthermore, ORS 197.835(4)(a)
15 gives LUBA the discretion to refuse to allow new issues to be raised if LUBA
16 finds that the issue could have been raised. In *Pilska v. Umatilla County*, 240 Or
17 App 238, 246 P3d 1146 (2010), *rev den*, 350 Or 408 (2011), for example, the
18 petitioner requested a continuance in advance of a hearing on remand and cited
19 ORS 197.763(6) as statutory authority for the requested continuance. The

⁵ The city’s notices listed Planned Development Subzone provisions VLDO 4.14(5) and (7) and LDO 8.10.090(5). Record 1238. VLDO 4.14(5) sets forth the required action and findings by the planning commission and city council. VLDO 4.14(7) sets out the development standards in the /PD subzone. VLDO 8.10.090(5) is described in the notice as “Approval Standards for Type C Permits.” Record 1689. We understand the reference to VLDO 8.10 to relate to proposed tree cutting. Record 1091.

1 applicant successfully argued to the local government that the petitioner was not
2 entitled to a continuance under the cited statute. On appeal to LUBA, the
3 petitioner argued for the first time that it was entitled to a continuance under a
4 local code provision. We held that the local government had not been given fair
5 notice of the claimed right to a continuance under the local code provision and
6 that the issue of a continuance under the local code could have easily been raised
7 by the petitioner. Accordingly, we declined to allow the new issue to be raised.
8 The court of appeals affirmed that decision. 240 Or App at 240.

9 Even assuming for purposes of this opinion only that VLDO 13.02 is an
10 applicable approval criterion, petitioners have not explained why the issue
11 presented in the first assignment of error could not have been raised prior to the
12 close of the initial evidentiary hearing, in order to give the city fair notice and a
13 chance to respond to the issue. For example, the staff report provided to the
14 planning commission stated, “The proposed Residential Facility contains
15 architectural elements that break up large expanses of uninterrupted building
16 surfaces or blank walls, providing moderate neighborhood livability and
17 compatibility.” Record 956. The staff report also stated, “In terms of the
18 Residential Facility, the applicant is proposing private patios on the 2nd and 3rd
19 floor Independent Living Units but not for the Assisted Living or Memory Care
20 Units.” Record 1029. The staff report also described the main building as a
21 “Residential Care Facility” when discussing a street orientation requirement,
22 stating that the “applicant proposes the Residential Care Facility be oriented

1 towards Hunter Road.” Record 1024-25. The staff reports that were available to
2 the public accepted intervenor’s premise that the proposed main building is an
3 allowed use in the residential zone, and petitioners have not explained why they
4 could not have raised the issue of whether the activity proposed to occur in the
5 main building is an allowed use in the residential zone prior to the close of the
6 initial evidentiary hearing.

7 The issue of whether the development is a “residential facility” as defined
8 in VLDO 13.02 is waived. Petitioners’ first subassignment of error is denied.

9 **B. Related Commercial Uses**

10 Permitted uses in residential zones combined with a /PD subzone include
11 residential uses of land and “[r]elated commercial uses which are designed to
12 serve the development of which they are a part, when approved by the Planning
13 Commission and City Council.” VLDO 4.14(9)(a), (b). In the remaining
14 subassignment of error, petitioners argue that the city improperly approved the
15 main building as a “related commercial use[] which [is] designed to serve the
16 development[.]”. Petition for Review 7. Intervenor responds, and we agree, that
17 the city did not adopt any findings that conclude that the main building is allowed
18 as a related commercial use. ORS 197.835(9)(a)(C).

19 The city council expressly adopted the staff report as findings. Record 1.
20 Petitioners direct us to the following finding from the staff report:

21 “The applicant is proposing residential use of land (residential
22 dwellings; cottages and duplexes) and related commercial uses
23 (Residential Facility/Congregate Housing). The applicant contends

1 that the main building (Residential Facility/Congregate Housing)
2 represents a commercial land use based on the public nature,
3 institutional licensing for assisted living and memory care,
4 commercial kitchen, central dining and staffing required to provide
5 care for senior residents within the building. Staff finds that the
6 proposed residential use of land and related commercial uses, as
7 approved by the Planning Commission are permitted land use in the
8 residential zone (General Residential zone) when combined with a
9 PD subzone.” Record 54.

10 Petitioners assert that this finding reflects the city council’s determination
11 that the main building is a “related commercial use.”⁶ Petition for Review 3, 6–
12 7.

13 Intervenor argued below that the main building was a “related commercial
14 use” in order to avoid compliance with design standards applicable to residential
15 uses, and argues in his response brief that the findings cited by petitioners merely
16 reflect the city’s acknowledgment of intervenor’s argument. Response Brief 24.

⁶ The first part of the finding explains that the *applicant contended* that a portion of the use was a related commercial use. The statement that “Staff finds that the proposed residential use of land and related commercial uses, as approved by the Planning Commission are permitted land use in the residential zone (General Residential zone) when combined with a PD subzone” may be read as a finding that the city council agreed that some portion of the proposed development was a related commercial use. The reference to the proposed residential use of land and related commercial use is, however, modified by the phrase “as approved by the Planning Commission” and the staff report also states: “The Sarto Village project is a proposed new senior housing community with Independent Living (ILF), Assisted Living) and Memory Care (MC) residents that will consist of a *Residential Care building* and detached (single and duplex) cottages. Record 145, (emphasis added).

1 As an alternative in the event the city determined that the building was in fact a
2 residential use, intervenor requested an exception to the residential design
3 standards. Record 29. The city determined that the use is residential and
4 concluded that an exception to the residential design standards was needed
5 because of the zoning of the site. Record 30. The city council found:

6 “The standards in [VLDO] 4.03(9) - General Residential Zoning
7 District, Residential Design Standards do apply to the Residential
8 Facility. Specifically, Section 4.03(9) states: ‘All residential
9 developments, including land divisions, individual dwelling units,
10 residential care homes and care facilities, and projects that are
11 subject to Site Plan Review or Planned Unit Development review,
12 as applicable, shall conform to the design standards in Section 5.29.”
13 Record 30 (underscoring in original).

14 The city council proceeded to state that:

15 “Public testimony at the Planning Commission hearing on May 7,
16 2019, indicated strong concern regarding the applicant’s proposed
17 building (Residential Facility) length and height, particularly the
18 building length which is four (4) times longer than the standard for
19 *residential land uses* (120-ft standard vs. +/- 475 feet proposed
20 length).” Record 30 (emphasis added).

21 The city council held that residential design standards applied to the main
22 building as a residential care facility. Record 31. The city noted that options
23 available to respond to the concerns of opponents included limiting “the length
24 of the proposed ‘Residential Facility’ building.” Record 32. Considering the
25 findings as a whole, the city council rejected the argument that the main building
26 is a “related commercial use” and instead, approved the main building as a

1 residential use. Accordingly, petitioners' subassignment of error is based on an
2 incorrect premise and provides no basis for remand.

3 Petitioners further argue the findings that the use is a "related commercial
4 use" are conclusory and inadequate. Petition for Review 5–6. Petitioners'
5 arguments are based on an incorrect premise, as explained directly above, and
6 fail for that reason. Further, contrary to petitioners' contention that the main
7 building will only serve its residents, the evidence in the record is that all
8 residents will have access to services provided in the building. Petition for
9 Review 7. "The project will include recreational, activity, and dining facilities
10 on-site for all residents." Record 1419. The project is designed "to provide a
11 cohesive property where residents can share and have safe pedestrian connections
12 among the buildings. This is primarily important for sharing the common central
13 building for dining and activities and central outdoor space within the proposed
14 development." Record 987.

15 These subassignments of error are denied.

16 The city's decision is affirmed.