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

TONY NIETO and TORY NIETO,
*Petitioners*,

vs.

CITY OF TALENT,
*Respondent*,

and

VERNON J. DAVIS, MARY A. TSUI,
LAURIE E. CUDDY, and FOREST L. DAVIS,
*Intervenors-Respondents*.

LUBA No. 2020-100

FINAL OPINION
AND ORDER

Appeal from City of Talent.

Tommy A. Brooks filed the petition for review and argued on behalf of petitioners. Also on the brief was Cable Huston LLP.

No appearance by City of Talent.

Christian E. Hearn filed the response brief and argued on behalf of intervenors-respondents. Also on the brief was Davis Hearn Anderson & Turner PC.

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

REVERSED 03/10/2021

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**

Petitioners appeal a hearings officer decision denying their application for a subdivision.

**FACTS**

The subject property is 26.58 acres and is zoned Single Family – Low Density (RS-5). The property was annexed to the city in 1990. Record 188. It is a "peninsula" of incorporated territory bordered on the east, south, and west by unincorporated areas. It is bounded to the north by a 60-foot-wide railroad right-of-way owned by the Central Oregon & Pacific Railroad (COPR). The property is accessible only from the north, via Belmont Road, which is a one-block-long city right-of-way extending from Talent Avenue south to the railroad right-of-way. From there, the property is accessible via a private gravel road which crosses the railroad right-of-way pursuant to an easement from COPR.

In 2018, petitioners applied to subdivide the property into 49 lots for development with single-family dwellings. Petitioners' application proposes to improve the portion of Belmont Road north of the railroad right-of-way and extend Belmont Road to and through the subject property by (1) upgrading and converting the private railroad crossing to a public crossing and (2) improving and dedicating a public right-of-way over the gravel road south of the railroad.

In a staff report dated July 1, 2020, the planning department recommended that the planning commission approve the application.[1] On July 31, 2020, the planning commission denied the application, and petitioners appealed that decision to the hearings officer. On September 1, 2020, the hearings officer held a hearing and, on September 9, 2020, denied the application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners' assignment of error includes three subassignments of error that challenge the hearings officer's decision to deny their application. We begin with a fairly detailed description of the single standard that the hearings officer concluded was not met before turning to the assignment of error.

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[1] Petitioners submitted their subdivision application on March 23, 2018, and the application was deemed complete on May 9, 2018. The application proposed an "expedited land division" (ELD) under ORS 197.360(1). On July 6, 2018, the planning department denied the request for ELD review. Petitioners appealed the planning department's decision to a referee appointed to hear and decide ELD appeals in accordance with ORS 197.375. On September 5, 2018, the referee denied the appeal, upheld the planning department's decision, and remanded the application to the city for consideration through ordinary subdivision proceedings. Petitioners appealed the referee's decision to the Court of Appeals, which affirmed. *Nieto v. City of Talent*, 295 Or App 625, 436 P3d 82 (2019). On January 16, 2020, petitioners requested that the city proceed with the application on remand.

## A. Background

Talent Municipal Code (TMC) title 17 is the city's subdivision code. TMC 17.10.060(F) is one of the subdivision code's development and design standards for vehicular access and circulation. That standard provides:

> "When vehicle access is required for development, access shall be provided by one of the following methods (a minimum of 10 feet per lane is required). These methods are 'options' to the developer/subdivider.
>
> "1. Option 1. Access is from an existing or proposed alley or mid-block lane. If a property has access to an alley or lane, direct access to a public street is not permitted.
>
> "2. Option 2. Access is from a private street or driveway connected to an adjoining property that has direct access to a public street (i.e., shared driveway). A public access easement covering the driveway shall be recorded in this case to assure access to the closest public street for all users of the private street/drive.
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> "3. Option 3. Access is from a public street adjacent to the development parcel. If practicable, the owner/developer may be required to close or consolidate an existing access point as a condition of approving a new access. Street accesses shall comply with the access spacing standards in subsection (G) of this section.
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> "4. Subdivisions Fronting Onto an Arterial Street. New residential land divisions fronting onto an arterial street shall be required to provide alleys or secondary (local or collector) streets for access to individual lots.
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> "5. Double-Frontage Lots. When a lot has frontage onto two or more streets, access shall be provided first from the street with the lowest classification. For example, access shall be provided from a local street before a collector or arterial street. Except for corner lots, the creation of new double-

> frontage lots shall be prohibited in the residential district, unless topographic or physical constraints require the formation of such lots. When double-frontage lots are permitted in the residential district, a landscape buffer with trees and/or shrubs and ground cover not less than 10 feet wide shall be provided between the back yard fence/wall and the sidewalk or street; and maintenance shall be assured by the owner (e.g., through homeowners' association, etc.)."

The planning department concluded that petitioners' application satisfied TMC 17.10.060(F)(3) because each lot within the subdivision would front and take access from a public street. Record 312. The planning commission denied the application on different bases that are not at issue in this appeal.

On appeal of the planning commission's decision, the hearings officer denied the application on the single basis that the application failed to satisfy TMC 17.10.060(F). The hearings officer concluded that TMC 17.10.060(F) applied because petitioners' subdivision application proposed "development," including the extension of Belmont Road over the railroad right-of-way and to and through the subject property. Record 48-49. The hearings officer concluded that this standard was not met because petitioners proposed upgrading and converting the private railroad crossing to a public crossing but did not submit detailed proposals regarding the design and construction of the upgraded crossing; the acquisition of a rail-crossing permit from the Oregon Department of Transportation, which has approval jurisdiction over the rail crossing; the acquisition of a public right-of-way from COPR; and related funding. Record 49-50. The hearings officer rejected petitioners' proposal that the hearings officer

impose a condition of approval requiring petitioners and the city to negotiate a development agreement addressing those issues.

In their first assignment of error, petitioners include three subassignments of error: (1) that TMC 17.10.060(F) is not "clear and objective," as required by ORS 197.295 to ORS 197.314 (the Needed Housing Statutes); (2) that TMC 17.10.060(F) is not applicable because petitioners' subdivision application does not propose "development;" and (3) that the hearings officer's conclusion that TMC 17.10.060(F) was not met is not supported by substantial evidence, as required by ORS 197.835(9)(a)(C).[2] As we explain below, we agree with petitioners that TMC 17.10.060(F) it is not a "clear and objective standard[]" and, therefore, the city may not apply that provision to petitioners' application. Because our resolution of that subassignment of error is dispositive, we need not address petitioners' other subassignments of error which argue that the application does not propose "development" and that the hearings officer's decision is not supported by substantial evidence.

We proceed with a discussion of the Needed Housing Statutes.

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[2] Petitioners also argue that the city has failed to satisfy ORS 197.831, which places the burden on local governments to demonstrate, in an appeal before LUBA, that standards and conditions imposed on "needed housing" "are capable of being imposed only in a clear and objective manner." In *Home Builders Assoc. v. City of Eugene*, we discussed the genesis of the enactment of ORS 197.831. 41 Or LUBA 370, 377-83 (2002).

## B. The Needed Housing Statutes

The statutes that are set out at ORS 197.295 to ORS 197.314 are commonly referred to as the Needed Housing Statutes. With their initial enactment forty years ago this year, in 1981,[3] those statutes incorporated into law the "St. Helens Policy," which was adopted as a policy by the Land Conservation and Development Commission (LCDC) in 1979. *See Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26 (1986) (so explaining).[4]

ORS 197.307(1) provides, "The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern." ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government *may adopt and apply only clear and objective standards, conditions* and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

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[3] Or Laws 1981, ch 884, §§ 5-6.

[4] *See also* Testimony, Senate Environment and Land Use Committee, SB 419, June 10, 1981, Ex A (statement of F. Van Natta). The initial purpose behind the St. Helens Policy was to end local government attempts to exclude certain housing types that met lower, moderate or "least cost" housing needs. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 148 (1998).

"(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."[5] (Emphasis added).

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, we explained that approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We also noted that ORS 197.307(4) requires the standards and conditions that apply to needed housing to be *both* "clear" *and* "objective." *Id.* at 155-56 ("Dictionary definitions of 'clear' and 'objective' suggest that the kinds of standards frequently found in land use regulations lack the certainty of application required to qualify as 'clear' or 'objective.'"); *Id.* at 156 n 23 (quoting the dictionary definitions of "clear" and "objective").[6]

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[5] ORS 197.307(6) allows a local government to adopt an alternative approval process for applications for needed housing if the alternative approval process authorizes a density that is greater than the density authorized under the "clear and objective standards" described in ORS 197.307(4). There is no dispute that the city has not adopted such an alternative approval process.

[6] We note again here, as we noted in *Rogue Valley*, that the two words have different meanings. The dictionary includes the following definition for "clear":

> "**3 a :** easily understood **:** without obscurity or ambiguity * * * **:** thoroughly understood or comprehended * * * **:** easy to perceive or determine with certainty * * * **:** sharply distinguished **:** readily recognized **:** UNMISTAKABLE[.]" *Webster's Third New Int'l Dictionary* 419 (unabridged ed 2002).

### C. TMC 17.10.060(F)

Petitioners argue that TMC 17.10.060(F) is not "clear and objective" and, therefore, ORS 197.307(4) prohibits the city from applying that standard to their application. As a result, petitioners argue, the city's decision to deny the application was "[o]utside the scope of authority of the decision maker." ORS 197.828(2)(c)(A). In support of their argument, petitioners point to the fact that the planning department and the planning commission interpreted TMC 17.10.060(F) as addressing access and circulation *within* a proposed subdivision and concluded that the application satisfied the criterion, whereas the hearings officer interpreted that standard as addressing access *to and from* a proposed subdivision. Petitioners also point out that, while TMC 17.10.060(F) requires the *provision* of vehicle access, it does not specify the *timing* of that provision. Petitioners argue that, while the hearings officer interpreted TMC 17.10.060(F) to require access at the time of tentative subdivision plat approval, the standard could also be interpreted to require access to and from a subdivision only after the streets *within* the subdivision have been constructed. Because TMC

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The definition for "objective" includes the following:

> "**1** * * * **b** * * * (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 nature that rational minds agree in holding it real or true or valid[.]" *Id.* at 1556.

17.10.060(F) can be interpreted in multiple ways, petitioners argue that that standard is not "clear and objective." The city has not appeared in the appeal, and intervenors-respondents' response brief does not address or respond to petitioners' argument.

We agree with petitioners. In *Walter v. City of Eugene*, we concluded that a standard which required "[t]he street layout of [a] proposed [planned unit development (PUD) to] disperse motor vehicle traffic onto more than one public local street" was not "clear and objective." 73 Or LUBA 356, 360-64 (2016). Although the proposed PUD in that case abutted a right-of-way which connected with two public local streets located a short distance from the property, that right-of-way was improved to allow a connection with only one of the streets at the time of the application. *Id.* at 357. The petitioners argued that, while the standard could be interpreted to require *improved* connections with two public local streets at the time of the application, the standard could also be interpreted to require merely that the connections *exist* at the time of the application, regardless of whether both of them are improved. *Id.* at 361. We agreed with the petitioners that, because the term "disperse" was undefined, and because the purpose of the standard was not clear from its text, the standard was subject to multiple interpretations and was therefore ambiguous. *Id.* at 361-63. We explained that "[t]he multiple possible interpretations of the ambiguous language * * *, coupled with the lack of a clear purpose, allow[ed] the city to exercise significant discretion in choosing which interpretation it prefer[red] to serve one or more

unstated purposes." We noted that the city apparently chose the interpretation which it subjectively believed would best "balance or mitigate" the impacts of the development on the public street system and other developed properties in the vicinity. *Id.* at 363 (citing *Rogue Valley*, 35 Or LUBA at 158). We reversed the city's decision and ordered it to approve the application. *Id.* at 366.

Like the standard at issue in *Walter*, the purpose of TMC 17.10.060(F) is not clear from its plain text. It is not clear whether it applies to access and circulation within a proposed subdivision, as the planning department and the planning commission concluded, or whether it requires access to and from a proposed subdivision, as the hearings officer concluded. Moreover, it is not clear from the plain text whether the standard requires that such access be provided at the time of tentative plat approval or whether it requires merely that access eventually be provided through one of the five listed options, regardless of whether it exists at the time of tentative plat approval. Like the provision at issue in *Walter*, the multiple possible interpretations of TMC 17.10.060(F), coupled with the lack of a clear purpose, allowed the hearings officer to exercise significant subjectivity in choosing their preferred interpretation. That interpretation, which concluded that petitioners are required to demonstrate that access to and from a proposed subdivision exists at the time of tentative plat approval through detailed proposals regarding the design, construction, and funding of access improvements, appears designed to balance the impacts from the proposal on the subject property, adjoining properties, and the community.

*Rogue Valley*, 35 Or LUBA at 158. Accordingly, TMC 17.10.060(F) is not "clear and objective," and the city erred in applying it to deny petitioners' application for housing.

The first assignment of error is sustained.

**REMAINING ASSIGNMENTS OF ERROR**

In their second assignment of error, petitioners argue that the city's decision denying their application is inconsistent with the city's adopted Transportation Systems Plan (TSP), which identifies and includes several transportation improvements proposed by petitioners.[7] In their third assignment of error, petitioners argue that the hearings officer denied their application because petitioners stated their unwillingness to fully fund certain public infrastructure projects identified in the TSP, but the hearings officer failed to adopt findings regarding whether imposing a condition that required petitioners to fund and construct those infrastructure projects would be constitutional under *Nollan v. California Coastal Comm'n*, 483 US 825 (1987), and *Dolan v. City of Tigard*, 512 US 374 (1994), as required by *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595 (2013). In their fourth assignment of error, petitioners argue, similar to their first assignment of error, that TMC 17.10.060(F) "ha[s] the effect

[7] ORS 197.175(2)(d) requires the city to make decisions in compliance with its acknowledged comprehensive plan.

* * * of discouraging needed housing through unreasonable cost or delay," as prohibited by ORS 197.307(4)(b).

We sustained petitioners' first assignment of error and concluded that the city may not apply TMC 17.10.060(F) to petitioners' application because it is ambiguous and requires a subjective, value-laden analysis designed to mitigate impacts from the development. The hearings officer's single basis for denying the application was its failure to satisfy that TMC provision. Accordingly, we need not and do not reach the second, third, and fourth assignments of error that assert alternative bases for reversing or remanding the hearings officer's decision.

**DISPOSITION**

We have sustained petitioners' challenge to the hearings officer's sole basis for denial of the application. Petitioners ask LUBA to reverse the city's decision and order the city to approve the application. Petition for Review 37.

ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

The hearings officer denied petitioners' application on a basis that is barred by ORS 197.307(4), because the application is for approval of "housing" and the standard that the hearings officer found was not met is not "clear and objective."

The hearings officer's decision was therefore "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Parkview Terrace*, 70 Or LUBA at 57.

In *Parkview Terrace*, we reversed a city council decision denying site plan approval and a variance for a needed housing development. We concluded that all 10 of the reasons that the city council gave for denying the petitioner's applications were "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Id.* at 57-58. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's applications. We instructed that the city council's decision to approve the applications could include conditions of approval imposed by the urban area planning commission to which the petitioner had agreed. *Id.* at 58 (citing *Stewart v. City of Salem*, 58 Or LUBA 605, 622, *aff'd*, 231 Or App 356, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010)). Accordingly, here, the hearings officer's decision to approve the application may include conditions of approval imposed by the planning department to which petitioners have agreed.

The city's decision is reversed, and the city is ordered to approve petitioners' application.