

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

MIKE KNOELL,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

VENTURE PROPERTIES, INC.,
Intervenor-Respondent.

LUBA No. 2021-037

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Will Van Vactor filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by City of Bend.

Michael C. Robinson filed the response brief. Also on the brief were Garrett H. Stephenson and Schwabe, Williamson & Wyatt, P.C. Garrett H. Stephenson argued on behalf of intervenor-respondent.

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

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

AFFIRMED

08/20/2021

1
2 You are entitled to judicial review of this Order. Judicial review is
3 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city hearings officer decision approving a subdivision.

FACTS

The subject property is 4.4 acres and is zoned Residential Standard Density. Petitioner owns Tax Lot 101, which abuts the subject property to the west. Glen Vista Road abuts the subject property and Tax Lot 101 to the south. The westernmost portion of Tax Lot 101 lies outside both the city limits and the city's urban growth boundary. A Swalley Irrigation District canal runs through Tax Lot 101.

On March 4, 2020, intervenor applied for city approval to subdivide the subject property into 20 lots with an internal street and private alley to access the lots. On October 19, 2020, planning staff approved the application. On November 2, 2020, petitioner appealed the planning staff decision to the hearings officer. On November 30, 2020, the hearings officer held a public hearing. On February 17, 2021, the hearings officer approved the application. This appeal followed.

ASSIGNMENT OF ERROR

The challenged subdivision approval is for the development of housing. ORS 197.307(4) provides that a local government may "apply only clear and objective standards * * * regulating the development of housing." 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 (1) the property to be developed or (2) the adjoining properties or community.”
2 *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998),
3 *aff’d*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We have explained
4 that the term “clear” means “easily understood” and “without obscurity or
5 ambiguity,” and that the term “objective” means “existing independent of mind.”
6 *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10,
7 2021) (slip op at 9 n 6). ORS 227.173(2) provides: “When an ordinance
8 establishing approval standards is required under ORS 197.307 to provide only
9 clear and objective standards, the standards must be clear and objective on the
10 face of the ordinance.” We have explained that

11 “[t]he fact that some interpretation is required does not make a term
12 not clear and objective. Instead, a standard is not clear and objective
13 if it is capable of being applied in multiple ways in a manner that
14 allows the city to exercise significant discretion in choosing which
15 interpretation it prefers.” *Roberts v. City of Cannon Beach*, ___ Or
16 LUBA ___, ___ (LUBA No 2020-116, July 23, 2021) (slip op at
17 25).

18 In *Home Builders Assoc. v. City of Eugene*, we explained that

19 “the ultimate question under ORS 197.307[(4)] is whether the
20 *standard* is clear and objective, viewed in context. That the standard
21 may contain imprecise or ambiguous terms is a relevant and,
22 depending on the terms and their function in the standard, perhaps
23 sufficient, consideration in answering that ultimate question.
24 However, the existence of imprecise or ambiguous terms in a
25 standard does not *necessarily* resolve whether that standard violates
26 ORS 197.307[(4)].” 41 Or LUBA 370, 393 n 20 (2002) (emphases
27 in original).

1 BDC 4.3.300(E)(2) provides that the city may not approve a tentative
2 subdivision plan unless “[t]he proposal allows for the development of adjacent
3 property in accordance with the provisions of this code.” The hearings officer
4 concluded that BDC 4.3.300(E)(2) is not clear and objective because determining
5 whether a proposed subdivision allows development of adjacent property
6 “requires a ‘subjective, value-laden analysis,’ that is ‘designed to balance or
7 mitigate impacts of the development.’” Record 35 (quoting *Rogue Valley*, 35 Or
8 LUBA at 158).

9 Petitioner argues that the hearings officer erred in concluding that BDC
10 4.3.300(E)(2) is not clear and objective because, according to petitioner, the
11 terms “allows” and “development” and the phrase “in accordance with the
12 provisions of this code” are all clear and objective. In petitioner’s view, an
13 applicant for a subdivision may satisfy BDC 4.3.300(E)(2) by demonstrating that
14 adjacent property can be subdivided or partitioned.

15 Intervenor responds that the hearings officer did not err in concluding that
16 ORS 197.307(4) precludes application of BDC 4.3.300(E)(2) because all parts of
17 that provision are not clear and objective, including the terms “allows,”
18 “development,” and “accordance.” For the reasons explained below, we agree
19 with intervenor that BDC 4.3.300(E)(2) is not clear and objective and, thus, we
20 affirm the hearings officer’s decision.

1 **A. “Allows”**

2 Petitioner argues that the hearings officer erred in concluding that the term
3 “allows” in BDC 4.3.300(E)(2) is not clear and objective. Petitioner cites several
4 dictionaries for the proposition that the term “allow” means “to permit something
5 to happen” and argues that, in light of those definitions, BDC 4.3.300(E)(2) is
6 clear and objective.

7 Citing additional dictionary definitions, intervenor responds that the term
8 “allow” can have both active and permissive meanings. For example, while
9 “allow” could mean “to provide for,” it could also mean “to not prevent.”
10 Moreover, intervenor argues that BDC 4.3.300(E)(2) is not clear and objective
11 because it does not indicate what an applicant must do in order to demonstrate
12 that a proposal in fact “allows” development of adjacent property. For example,
13 intervenor explains that, as part of its application, intervenor provided a shadow
14 plat depicting how Tax Lot 101 could potentially be subdivided consistent with
15 BDC density requirements. In addition, intervenor provided evidence regarding
16 the feasibility of development within the Swalley Irrigation District’s canal
17 easement on Tax Lot 101. Intervenor argues that the term “allows” is unclear
18 because it does not indicate whether either or both of those steps is sufficient to
19 satisfy BDC 4.3.300(E)(2). We agree.

20 The term “allows” is unclear and ambiguous because it is subject to
21 multiple interpretations. For example, the hearings officer found that “BDC
22 4.3.300(E)(2) imposes an affirmative duty on an applicant, to ‘allow’

1 development of adjacent properties in accordance with the Code. It does not
2 merely require that an applicant develop in a way that does not ‘preclude’
3 development of adjacent properties.” Record 47. Intervenor correctly observes
4 that interpretation makes the phrase “allows for” equivalent to the phrase
5 “provides for.” The standard is not clear regarding what “allows” means or
6 requires of an applicant.

7 We have explained that one ambiguous term within a standard does not
8 render that standard unclear if the standard as a whole is clear. In determining
9 whether a standard is clear, notwithstanding one or more ambiguous terms, we
10 have looked to the purpose of the standard. *See, e.g., Roberts*, ____ Or LUBA at
11 ____ (slip op at 28) (“[W]e agree with the city that petitioners’ argument that the
12 term ‘buildable’ is not clear and objective isolates the term ‘building’ from the
13 context and purpose of the oceanfront setback.”); *Nieto*, ____ Or LUBA at ____
14 (slip op at 11-12) (explaining that multiple interpretations, coupled with the lack
15 of a clear purpose, allowed the decision maker to exercise significant subjectivity
16 in choosing their preferred interpretation) (citing *Walter v. City of Eugene*, 73 Or
17 LUBA 356, 363 (2016)); *Home Builders Assoc.*, 41 Or LUBA at 393 n 20.

18 The hearings officer found that the purposes of the BDC requirements for
19 subdivisions, partitions, replats, and property line adjustments, are, in part, to
20 ensure that a proposed development is undertaken in a manner that encourages
21 “efficient use of land resources” and to promote the “public health, safety and
22 general welfare through orderly and efficient urbanization.” Record 47 (quoting

1 BDC 4.3.100(A)(3), (4)). The hearings officer explained that the purposes of
2 BDC chapter 4.3 do not render BDC 4.3.300(E)(2) clear and objective because
3 the purposes themselves require value-laden analyses. The hearings officer
4 reasoned:

5 “BDC 4.3.300.E.2 and other provisions in the [BDC] generally
6 require development of lands within the City in a non-piecemeal
7 fashion: continuous streets and blocks, pedestrian and vehicular
8 flow from one subdivision to another, and utility stubs between
9 subdivisions. As presented by the parties, the evidence in the record
10 supports a determination that [intervenor] is essentially proposing
11 an ‘island’ of its own proposed subdivision and leaving it to the
12 owner of Tax Lot 101 to address the constraints of that property that
13 impact its future development. Without a clear and objective
14 standard that defines ‘allow development’ in the context of BDC
15 4.3.300.E.2, the Hearings Officer is not permitted to deny the
16 application on this basis, however.” *Id.*

17 The multiple interpretations of the term “allows,” coupled with the lack of
18 a clear purpose, “allows the city to exercise significant discretion in choosing
19 which interpretation it prefers to serve one or more unstated purposes.” *Walter*,
20 73 Or LUBA at 363. Accordingly, BDC 4.3.300(E)(2) is not clear and objective.
21 *See Legacy Development Group, Inc. v. City of The Dalles*, ___ Or LUBA ___,
22 ___ (LUBA No 2020-099, Feb 24, 2021) (slip op at 19-20) (concluding that a
23 locally codified definition did not save an unclear and subjective standard
24 because the definition was itself unclear and subjective).

1 **B. “Development”**

2 Petitioner also argues that BDC 4.3.300(E)(2) is clear and objective
3 because the BDC defines “development” as follows:

4 **“Development** means all improvements on a site, including
5 buildings, placement or replacement of manufactured or other
6 structures, parking and loading areas, landscaping, paved or
7 graveled areas, grading, and areas devoted to exterior display,
8 storage, or activities. Development includes improved open areas
9 such as plazas and walkways, but does not include natural geologic
10 forms or landscapes. *Development includes a partition and*
11 *subdivision.* For the purpose of flood standards, ‘development’ shall
12 also mean any manmade change to improved or unimproved real
13 estate, including but not limited to mining, dredging, filling,
14 grading, paving, excavation or drilling operations or storage of
15 equipment or materials located within the area of special flood
16 hazard.” BDC 1.2 (boldface in original; emphasis added).

17 Petitioner argues that BDC 4.3.300(E)(2) requires that proposed subdivisions
18 permit the partition, subdivision, and replatting of adjacent property because the
19 term “development” includes “partition and subdivision” and because BDC
20 4.3.300(E)(2) is part of BDC chapter 4.3, which governs “subdivisions,
21 partitions, replats and property line adjustments.” According to petitioner, that
22 reasoning renders BDC 4.3.300(E)(2) clear and objective because, in context, that
23 provision requires an applicant for a subdivision to demonstrate that adjacent
24 properties can be subdivided or partitioned.

25 The limitation that petitioner proffers is not supported by the BDC
26 definition of the term “development,” which includes subdivisions and partitions,
27 but which also includes many other types of development. As intervenor points

1 out, that definition “is inclusive of virtually any human-made changes to land.”
2 Response Brief 13-14. Nor are we persuaded that the fact that BDC 4.3.300(E)(2)
3 is part of BDC chapter 4.3 implicitly imposes that limitation. BDC 4.3.300(E)(2)
4 is part of BDC chapter 4.3 because it is a criterion that applies to partition and
5 subdivision applications. It does not follow that the term “development” in BDC
6 4.3.300(E)(2) refers only to partitions and subdivisions.

7 The BDC definition of “development” does not clearly specify the type or
8 intensity of “development” that a subdivision proposal must allow on adjacent
9 property in order to satisfy BDC 4.3.300(E)(2). Thus, BDC 4.3.300(E)(2) is
10 capable of being applied in multiple ways in a manner that allows the city to
11 exercise significant discretion in choosing which interpretation it prefers in
12 determining whether any subdivision proposal allows sufficient “development”
13 of adjacent property. Accordingly, BDC 4.3.300(E)(2) is not clear and objective.

14 **C. “In accordance with the provisions of this code”**

15 BDC 4.3.300(E)(2) requires that subdivision proposals “allow[] for the
16 development of adjacent property *in accordance with the provisions of this code.*”
17 (Emphasis added.) Intervenor argues that BDC 4.3.300(E)(2) is not clear and
18 objective because the phrase “in accordance with the provisions of this code”
19 does not specify which BDC provisions apply to the required level of
20 development.

21 Petitioner argues that BDC 4.3.300(E)(2) is clear and objective because
22 whether an adjacent property can be developed “in accordance with the

1 provisions of this code” refers only to the standards that apply to subdivisions,
2 partitions, or replats. We rejected that narrow interpretation above. Petitioner’s
3 argument here is derivative of that argument, and it fails for the same reason.

4 The hearings officer did not err in concluding that BDC 4.3.300(E)(2) is
5 not clear and objective and, thus, ORS 197.307(4) prohibits the county from
6 applying BDC 4.3.300(E)(2) to intevenor’s application.

7 The assignment of error is denied.

8 The city’s decision is affirmed.