BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY MCCOLLOUGH
and ACORN PARK COMMUNITY
FOR WELL BEING,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

HOUSING AND COMMUNITY
SERVICES AGENCY OF LANE COUNTY,
Intervenor-Respondent.

LUBA Nos. 2016-058/059/060/061/062/063

ORDER

MOTION TO INTERVENE

Housing and Community Services Agency of Lane County (intervenor), the applicant in these appeals, moves to intervene on the side of the respondent in each appeal. There is no opposition to the motion and it is allowed.

MOTION TO DISMISS

The decisions at issue in these consolidated appeals are six building permits for "The Oaks at 14th," a 54-unit residential apartment complex with six buildings. The subject property is a long, narrow tract 1.48 acres in size, that borders a street at each narrow end. On the west, the property borders a

cul-de-sac that ends W. 14th Avenue, a local street, and on the east the property borders Oak Patch Road, a major collector. In March 2015, intervenor sought a zoning classification decision from the city, to determine what kind of land use review and standards would apply to the proposed apartment complex, which will provide "Controlled Income and Rent Housing" for ex-convicts. Intervenor proposed to use 215 square feet of a 3,500-square-foot community building for office space for probation and parole staff to provide services to the residents. The city's March 30, 2015 decision concluded that the proposed apartment complex is a permitted use in the R-2 Medium Density zone that applies to the subject property, that the proposed probation and parole services to residents would be allowed as accessory to the residential use, but that providing probation and parole services to individuals who do not reside on the premises would require a conditional use permit.

Intervenor subsequently filed applications for building permits for the apartment complex, which includes the proposal to use 215 square feet of office space for probation and parole staff. On April 27, 2016, the city approved the six building permit applications. Shortly thereafter, petitioners appealed the decisions to LUBA, which were consolidated for review.

Intervenor moves to dismiss these appeals, arguing that the challenged building permits are excluded from LUBA's jurisdiction. LUBA has exclusive jurisdiction over appeals of a "land use decision," as defined by ORS

197.015(10)(a).[1] ORS 197.015(10)(b) includes several exclusions from the definition of "land use decision," including a local government decision that "approves or denies a building permit issued under clear and objective land use standards." ORS 197.015(10)(b)(B). Intervenor argues that the challenged building permit decisions were issued under standards that are clear and objective land use standards, and thus are excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(B).

Initially, both parties seek for LUBA to review extra-record evidence in connection with the motion to dismiss. We have considered extra-record evidence, even without a motion pursuant to ORS 197.835(2)(b) and OAR 661-010-0045, for the limited purpose of determining whether we have jurisdiction. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement*

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[1] LUBA has exclusive jurisdiction to review "land use decision[s]." ORS 197.825(1). ORS 197.015(10) defines "Land use decision" to include as relevant here:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

Comm., 16 Or LUBA 630, 631-33 (1988). Accordingly, we consider the proffered extra-record evidence for the limited purpose of determining jurisdiction.

In *Richmond Neighbors v. City of Portland*, 66 Or LUBA 464 (2012) we noted that under *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000), *rev den*, 331 Or 674, 21 P3d 96 (2001), a building permit does not qualify for the exception set out in ORS 197.015(10)(b)(B) if the applicable land use regulations are ambiguous and "can plausibly be interpreted in more than one way." 66 Or LUBA at 466.

Petitioners respond that the city applied land use standards that are ambiguous, unclear and subjective, and therefore the challenged building permit approvals are not subject to the exclusion at ORS 197.015(10)(b)(B). Much of petitioners' responses are couched in terms of the similar exclusion at ORS 197.015(10)(b)(A), which excludes from LUBA's jurisdiction local government decisions made under "land use standards that require interpretation or the exercise of legal or policy judgment." Intervenor does not invoke ORS 197.015(10)(b)(A). However, the operative language of the two exclusions overlaps significantly. For example, a building permit standard that is unclear would likely require interpretation and a building permit standard that was subjective or discretionary would likely require the exercise of legal or policy judgment. Accordingly, as appropriate we will relate petitioners'

responses to the language of the exclusion that intervenor invokes, ORS 197.015(10)(b)(B).

A. Conditional Use Permit

Petitioners argue that the city exercised "discretion" in deciding not to require a conditional use permit (CUP) to authorize the parole and probation office serving non-residents of the apartment complex. Petitioners note that the city's prior March 30, 2015 zoning verification determined that intervenor could not locate parole and probation offices serving non-residents in the Community Building without a CUP. Petitioners cite to a statement by the Lane County Parole and Probation Director at the January 29, 2015 neighborhood meeting for the proposal, suggesting that if on-site officers do not have a full case-load servicing residents, they will be given "other caseloads." Petitioners' Response to Motion to Dismiss, Exhibit 1 at 4. Petitioners also note the director's statement that the case load goal for each officer is 65 people. *Id.* Because the resident population is only 54 people, petitioner argues that even one parole and probation officer would not have a full case load based on the resident population, much less the two proposed officers.

Intervenor replies that the building permit applications do not propose any parole and probation services in excess of those verified in the March 30, 2015 zoning classification decision as accessory to the permitted residential use, *i.e.* services only to the resident population. Intervenor cites a letter from Lane County Parole and Probation clarifying that the officers stationed at the

subject property "will only serve individuals living at the project." Intervenor's Reply in Support of Motion to Dismiss, Exhibit A. Because the application did not propose anything more than was verified as a permitted use, intervenor argues, the city's decision to issue building permits for the same verified use was made under standards that are clear and do not require interpretation and that are objective and do not require the exercise of legal judgment, and thus the permit decisions are excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(B).

We agree with intervenor. The city's March 30, 2015 zoning classification decision was the decision that involved interpretation and legal judgment regarding the nature of the proposed use and whether it should be categorized as a permitted or conditionally permitted use. As far as we can tell or petitioners have established, the building permit applications proposed only what had been verified as a permitted use, and the city's decisions did not purport to approve more than what had been verified as a permitted use. Of course, it may happen that in practice the parole and probation office at the site will wind up serving more than the residents, but that is an enforcement issue. For purposes of LUBA's jurisdiction, a building permit decision that purports to approve only what has been previously classified as a permitted use in an unchallenged zoning classification decision does not involve subjective or discretionary determinations about the nature of the proposed use, or code interpretations regarding the nature of the proposed use. As far as the nature of

the proposed use, and whether it is properly classified as a permitted or conditional use in the R-2 zone, petitioners have not demonstrated that the standards the city applied fall outside the exclusion at ORS 197.015(10)(b)(B).

B. Site Plan Review

Petitioners next contend that the proposed development constitutes "needed housing" as defined at ORS 197.303(1), and that under the city's code proposals for needed housing need site plan review approval. According to petitioners, the city exercised legal judgment and interpreted the city's code to determine, implicitly, either that the proposed development does not constitute "needed housing," or that the proposed development need not obtain site plan review approval, notwithstanding code provisions that require such approval for needed housing.

EC 9.8430, part of the city's Site Review provisions, provides in relevant part:

> "Applicability. Site review provisions shall be applied when any of the following conditions exist:
>
> " * * * * *
>
> "(3) The application proposes needed housing, as defined by State statutes. Applications proposing needed housing shall be reviewed through the Type II site review procedures utilizing the criteria at EC 9.8445 Site Review Approval Criteria - Needed Housing unless the applicant specifically request in the application that the city apply the criteria at EC 9.8440 Site Review Approval Criteria - General.
>
> "In lieu of site review, an application that falls within (1), (2), or (3) above, may obtain approval through the Planned Unit

> Development process. No development permit shall be issued by the city prior to approval of the site review application, or the final planned unit development application."

Petitioners assert that under EC 9.8430, the proposed development for needed housing requires site plan review approval. Further, petitioners argue that the March 30, 2015 zoning verification decision did not address whether the proposed development was needed housing or would require site plan review approval under EC 9.8430. Record 458. Petitioners also note that in a post-decision e-mail, city staff explained why it interprets the relevant code provisions not to require site plan review approval in this case.[2] According to

[2] On May 3, 2016, city staff responded to petitioners' attorney and provided the following explanation for why site plan review approval was not necessary:

> "Based on our local code (EC Table 9.2740, Residential Zone Land Uses and Permit Requirements), Controlled Income Rent (CIR) projects are subject to either a PUD or multi-family standards (with a building permit only). In this case the applicant has elected to meet the multi-family standards through a building permit.
>
> "The applicant has not proposed a Site Review under Needed Housing provisions. While it technically qualifies as Needed Housing, the applicant has not proposed it as such and therefore a Site Review approval is not required under EC 9.8430(3). Generally speaking, the city's code provides for a clear and objective path for review of Needed Housing projects or under the discretionary General Criteria, at their choice. In this case, the subject property is not zoned with the Site Review overlay nor does the use specifically require Site Review in the table for allowed uses in EC 9.2740." Motion to Dismiss Exhibit B; Supplemental Record 4.

petitioners, that e-mail demonstrates that the standards the city applied are not clear and require interpretation.

Intervenor argues that the standards that govern whether site plan review is required in this case are clear and objective and do not require interpretation. Intervenor argues that the city's code provides that whether an application proposes "needed housing" is determined by the applicant's choice, citing EC 9.6010.[3] As the city's May 3, 2016 e-mail explained, the city has two separate tracks for development that involves needed housing: (1) a "Needed Housing" track that applies only standards intended to be clear and objective, as required by ORS 197.307(4), and (2) a "General Criteria" track that applies standards that may be discretionary, and are not necessarily clear and objective.

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[3] EC 9.6010 is entitled "Applications Proposing Needed Housing" and provides:

> "(1) As used in EC chapter 9.6000, the term "applications proposing needed housing" includes:
>
> > "(a) Applications that are proceeding (or have proceeded) under EC 9.8100, 9.8220, 9.8325, 9.8445, or 9.8520; or
> >
> > "(b) Applications for development permits for uses permitted outright in the subject zone if the applicant has demonstrated that the proposed housing is needed housing as defined by state statutes.
>
> "(2) The term does not include an application that could have proceeded under EC 9.8100, 9.8220, 9.8325, 9.8445, or 9.8520, *but the applicant elected to proceed under the discretionary approval process*." (Emphasis added.)

According to intervenor, the EC 9.8430 requirement for site plan review approval applies only to "applications proposing needed housing." Because intervenor chose not to proceed under a Needed Housing track, and the requirement for site plan review applies only to the Needed Housing track, intervenor argues that the city did not err in failing to require site plan review approval.

The code provisions governing whether site plan review approval is required for the proposed development are convoluted and arguably require some interpretation. The EC 9.8430(3) requirement for obtaining site plan review approval applies to "applications proposing needed housing, as defined by State statutes." No party disputes that the proposed apartment complex is needed housing as defined in ORS 197.303(1). On its face, then, EC 9.8430(3) appears to require that the proposed development obtain site plan review approval. However, EC 9.6010(2) provides that the phrase "applications proposing needed housing" does not include an application where the "applicant elected to proceed under the discretionary approval process." As explained in the city's May 3, 2016 e-mail quoted at n 2, the proposed use is categorized as "Controlled Income and Rent Housing" (CIR). Table 9.2740 provides that CIR development shall comply with the multiple-family standards in EC 9.5500 or be approved as a planned unit development (PUD). The city apparently understands Table 9.2740 to allow an applicant to choose between applying for CIR approval as a PUD, which has both discretionary and needed

housing tracks (EC 9.8320 and EC 9.8325, respectively), *or* as a third option applying for CIR approval under the general multiple-family standards at EC 9.5500. Because intervenor elected to proceed under EC 9.5500 without applying for a PUD under either the discretionary or needed housing tracks, the city believes that the application is not one that "proposes needed housing" for purposes of EC 9.8430(3), notwithstanding that the proposed use is "needed housing" as defined at ORS 197.303(1). Under this view, EC 9.8430(3) does not operate to require that intervenor obtain site plan review approval. The foregoing may well reflect a correct reading of the relevant code provisions, but the need for the explanation itself suggests that the relevant code provisions require some interpretation regarding whether or not EC 9.8430(3) applies.

In any case, even if the relevant code provisions are "clear" regarding the applicability of EC 9.8430(3) and require no interpretation on that point, there still remains the question of whether the general multiple-family standards at EC 9.5500, and any other standards the city applied, are clear and objective. As discussed below, we agree with petitioners that at least some of the general standards the city applied are not clear and objective for purposes of ORS 197.015(10)(b)(B).

C. General Development Standards

Petitioners argue that some of the general development standards that apply to all multiple-family development are ambiguous and require the exercise of judgment, and are thus are not clear and objective.

i. Public Access

EC 7.420(1)(c), in relevant part:

> "If a parcel has frontage on two or more streets of different street classifications, the access connection shall access the street with the lowest classification. The access connection can access the street with the higher classification if the applicant can demonstrate (1), (2) or (3):
>
> " * * * * *
>
> "2. *Physical conditions preclude locating the access connection on the street with the lower classification.* Such conditions may include, but are not limited to, topography, trees, existing buildings or other existing development on the subject property or adjacent property." (Emphasis added.)

The subject site has frontage on Oak Patch Road, a collector, and a cul-de-sac at the end of West 14th Avenue, a local street. Intervenor initially proposed taking access from West 14th Avenue, the lower classification, but later proposed taking access from the higher classification collector, arguing that access is "limited by existing conditions," namely that the cul-de-sac on West 14th Avenue was never developed, and the existence of a mature oak grove.

Petitioners argue, and we agree, that a standard that allows the city to modify access priorities based on whether access on the lower classified street is "precluded" by "physical conditions," with a set of non-exclusive examples of physical conditions that can preclude access, is a standard that is not "clear and objective." EC 7.420(1)(c) requires city staff to determine whether "physical conditions" are such that access to a lower classification street is

"precluded," a task that as that standard is worded requires some interpretation or the exercise of judgment, or both. Accordingly, EC 7.420(1)(c) is not clear and objective.

ii. Street Frontage

EC 9.5500(4)(b) provides, in relevant part:

> "* * * On development sites with less than 100 feet of public or private street frontage, at least 40 % of the site width shall be occupied by a building(s) placed within 10 feet of the minimum front yard setback line. Building projections and offsets with an offset interval of 10 feet or less meet this standard (excluding required yards). *"Site width," as used in this standard, shall not include areas of street frontage that have significant natural resources as mapped by the city, delineated wetlands, slopes greater than 15%, recorded easements, required fire lanes or other similar non-buildable areas, as determined by the planning director."* (Emphasis added.)

The subject site has only 49 feet of frontage along Oak Patch Road, where the access driveway and a sidewalk are proposed. No buildings are proposed within 10 feet of the front yard setback along the Oak Patch Road frontage, as required by EC 9.5500(4)(b). The last sentence of that code provision removes from the "site width," 40 percent of which must be occupied by a building, land with certain non-buildable features, including a catch-all provision: "similar non-buildable areas, as determined by the planning director." Although it is not clear, the city apparently exercised the catch-all provision to effectively reduce the "site width" to zero based on the access driveway and sidewalk, and thus waive the EC 9.5500(4)(b) requirement that a building occupy at least 40 percent of the site width within 10 feet of the front yard setback. Or perhaps

the city interpreted EC 9.5500(4)(b) in some way to avoid its requirements. Intervenor argued below that the site has no "frontage" on Oak Patch Road within the meaning of EC 9.5500(4)(b), and possibly the city agreed with that interpretation of the undefined term "frontage." Regardless, we agree with petitioners that because EC 9.5500(4)(b) cannot be applied in the present case without interpretation or the exercise of judgment, EC 9.5500(4)(b) is not clear and objective for purposes of ORS 197.015(10)(b)(B).

In addition, petitioners note that intervenor proposed, and the city apparently accepted, a calculation of frontage and site width at the cul-de-sac bordering the western portion of the property based on drawing a straight line across the cul-de-sac from one property border to the other, rather than measuring frontage by the circumference of the property line at the cul-de-sac. As noted, the term "frontage" is not defined, and there is apparently no code guidance on how to measure frontage where a property borders a cul-de-sac. We agree with petitioners that the city's choice to use a straight line rather than a circumferential approach to measure frontage represents an interpretation of the unclear language of EC 9.5500(4)(b), and for that additional reason EC 9.5500(4)(b) is not a clear and objective land use standard.

iii. Other Standards

Petitioners argue that a number of other general development standards applied are not clear and objective. However, we need not address those arguments, for purposes of resolving the jurisdictional dispute. We concluded

above that at least two of the applicable land use standards are not clear and objective, and for that reason the exception at ORS 197.015(10)(b)(B) does not apply to the challenged building permit decisions. Intervenor does not challenge LUBA's jurisdiction on any other basis. Accordingly, we deny the motion to dismiss.

RECORD OBJECTIONS

Petitioners and respondent conferred on June 24, 2016 regarding the contents of the record. On June 29, 2016, petitioners filed record objections. Respondent filed a response on July 13, 2016. We now address those objections.

A. Resolved Record Objections

Along with its response, respondent filed a supplemental record that addressed and sought to remedy petitioners' first, second and third record objections. As requested by petitioners, the supplemental record includes a site plan that was an attachment to an email dated January 13, 2016; an April 27, 2016 email from petitioners' counsel to planning staff; and a May 3, 2016 email from planning staff to petitioners' attorney. Accordingly, petitioners first, second and third record objections are sustained but remedied by the supplemental record.

B. Petitioners' Fourth Record Objection

Petitioners' fourth record objection provides in relevant part:

> "Comments on page 8 of the Record indicate that the City staff spent approximately 4.5 hours of time on February 22, 2016

> placing notes on the permit plans, and that the comments were 'copied o[n]t[o] plans.' These notes are not included in the record provided to LUBA, nor in the retained exhibits. These notes were specifically incorporated into the record or placed before, and not rejected by the final decision maker during the proceedings before the final decision maker on the permit and its properly part of the record."

Respondent responds that the city's current protocol allows for the city to accept digital building permit applications, and that the city contracts with a third party to conduct some plan review duties. Respondent states that in this case, an outside contractor made notes on its version of the electronic submittal, but the city does not have a system set up for contractors to add notes directly to the city's system. Respondent explains that the city staff took notes from the contractor and transferred them onto the city's electronic version of the submitted application. Respondent states that all of the notes referred to on page 8 were transferred by staff and appear on different plan sheets in the approved set of plans, which are part of the record.

We agree with respondent. Petitioners have not demonstrated that the notes (albeit in a different form) are not included in the record. Accordingly, petitioners' fourth record objection is denied.

C. Petitioners' Fifth Record Objection

Similar to petitioners' fourth record objection, their fifth record objection argues that Record 9 indicates that notes were made on or relating to building elevation plans. Record 9 is a portion of the print out of the city's electronic permit tracking system, and included an entry that provides:

> "2/23- Called Sara Bergsund and discussed need for more info for wall articulation. Please see issues on building elevation sheets. MJM[.]"

Petitioners argue that the referenced "notes" are not in the record provided to LUBA or on the building elevation sheets in the retained exhibits, but that they were placed before the final decision maker.

Respondent responds that city staff had communicated to the applicant that there was a need for more information on wall articulation, and in response, the applicant provided additional information on wall articulation, which is now shown on the approved set of plans. In addition to explaining the city's process and utilization of a third-party contractor, respondent states that all notes referred to at Record 9 of the record were transferred by staff and appear on different plan sheets in the approved set of the plan, which are part of the record.

For reasons explained above addressing petitioners' fourth record objection, petitioners also have not demonstrated that the record should include any "notes" in regard to the log on Record 9 addressing issues on building elevation sheets. Accordingly, this record objection is denied.

D. Petitioners' Sixth Record Objection

Petitioners argue that the retained exhibits contain 144 pages of permit plans that were printed from electronic files, contends that the plans are not "difficult-to-duplicate" under OAR 661-010-0025(2)(a) and therefore argues that the plans could be provided in electronic format to LUBA or that reduced

copies of some of the plans could be printed and provided to LUBA prior to oral argument.

Our rules do not require that oversize, difficult-to-duplicate plans be provided to LUBA in electronic format or provided in reduced size copies prior to oral argument. That does not mean that the parties cannot provide reduced size copies of relevant plans in the record as attachments to their brief in support of their argument. This record objection is denied.

E. Briefing Schedule

The record is settled as of the date of this order. The petition for review shall be due 21 days after the date of this order. The response briefs shall be due 42 days after the date of this order. The final opinion and order shall be due 77 days after the date of this order.

Dated this 1st day of September, 2016.

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Tod A. Bassham
Board Member