IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Julie HULME,
Rob Handy, and H.M. Sustaita,
Petitioners,
v.
CITY OF EUGENE,
Respondent,
and
HOME BUILDERS ASSOCIATION
OF LANE COUNTY;
and Lombard Apartments, LLC,
Respondents.

Land Use Board of Appeals
2018118; A170513

Argued and submitted May 21, 2019.

Charles Woodward, IV, argued the cause for petitioners. Also on the brief was Sean Malone.

Lauren A. Sommers argued the cause and filed the brief for respondent City of Eugene.

Michael M. Reeder argued the cause and filed the brief for respondent Lombard Apartments, LLC.

No appearance for respondent Home Builders Association of Lane County.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

AOYAGI, J.

Reversed in part and remanded.

AOYAGI, J.

Petitioners seek judicial review of a final order of the Land Use Board of Appeals (LUBA). LUBA affirmed the City of Eugene's final land use decision approving, with conditions, a consolidated application for site review, adjustment review, and a Willamette River Greenway permit to construct a 94-unit apartment complex on a vacant lot between River Road and the Willamette River. In their sole assignment of error, petitioners challenge the city's net-density calculation for the proposed development, based on Eugene Code (EC) 9.2751, asserting that LUBA erred when it affirmed the inclusion of a leasing office, a maintenance building, and two internal parking circulation areas in the calculation. As explained below, we conclude that LUBA erred with respect to the leasing office—and therefore reverse in part and remand—but did not err with respect to the maintenance building and the parking areas.

FACTS

Both the historical facts (taken from LUBA's order) and the procedural facts are undisputed. We state the basic facts here and will provide more detailed facts, as needed, in connection with the relevant legal analyses.

The subject property is 3.59 acres and zoned Medium Density Residential (R-2) with one or more overlays. Under the Eugene Code, the maximum net density allowed in the R-2 zone is 28 dwelling units "per acre of land in actual residential use and reserved for the exclusive use of the residents in the development." EC 9.2751(1)(b) (quotation); EC tbl 9.2750 (number of units).

The proposed development is a 94-unit apartment complex, for which respondent developer applied for site review, adjustment review, and a Willamette River Greenway permit. After a public hearing, a city hearings official approved the application, with conditions. With respect to the number of units, the hearings official determined that the maximum permitted number of units was 94, given the net-density provisions for the zone, based on 3.38 acres of property. In making that calculation, the city "counted the entire 3.59-acre property and excluded only a 0.21-acre area

to be dedicated for the extension of Lombard Street." As relevant to this review proceeding, the 3.38 acres is planned to include a leasing office, a maintenance building, and two internal parking circulation areas.

Petitioners appealed to the Eugene Planning Commission, which affirmed the hearings official's decision, with modifications. Petitioners petitioned for review to LUBA, which affirmed the planning commission's decision. Petitioners now seek judicial review. They raise a single assignment of error, in which they challenge the net-density calculation for the proposed development, as they did in the city and LUBA proceedings. Specifically, petitioners argue that, under EC 9.2751(1)(b), LUBA erred in allowing land planned for a leasing office, a maintenance building, and two internal parking circulation areas to be included in the net-density calculation.

EC 9.2751

Petitioners' challenge turns on the correct construction of the Eugene Code, so we review LUBA's order to determine whether it is "unlawful in substance." ORS 197.850 (9)(a). We agree with petitioners—and respondents do not contest—that ordinary principles of statutory construction apply.[1] Thus, our goal is to discern the code drafters' intent, and our method of doing so is to examine "the text, context, and any helpful enactment history." *Sellwood-Moreland Improv. League v. City of Portland*, 262 Or App 9, 17, 324 P3d 549 (2014); *see also State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (describing ordinary principles of statutory construction); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993) (same). In this case, the parties have not identified any helpful enactment history, and we are unaware of any, so we rely on text and context.

[1] ORS 197.829(1) generally requires LUBA to affirm a local government's interpretation of its own comprehensive plan or land use regulation, unless it is inconsistent with the express language, purpose, or policy. *Siporen v. City of Medford*, 349 Or 247, 261-62, 243 P3d 776 (2010). However, that principle does not apply to the interpretations of a commission subordinate to the governing body. *See Sellwood-Moreland Improv. League v. City of Portland*, 262 Or App 9, 16-17, 324 P3d 549 (2014). Here, it is undisputed that the planning commission is a subordinate body to which no *Siporen* deference is owed.

EC 9.2750 and EC table 9.2750 set forth the City of Eugene's residential zone development standards. EC 9.2751 provides special development standards for table 9.2750. At issue in this case are EC 9.2751(1)(b) and (1)(c)(1), which state:

> "(b) For purposes of this section, 'net density' is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities.
>
> "(c) For purposes of calculating net density:
>
> "1. The acreage of land considered part of the residential use shall exclude public and private streets and alleys, public parks, and other public facilities."

With respect to the leasing office and the maintenance building, the fundamental disagreement between the parties is what it means for land to be "in actual residential use and reserved for the exclusive use of the residents in the development." EC 9.2751(1)(b). With respect to the internal parking circulation areas, the disputed issue is whether those areas qualify as "streets," such that they must be excluded from the calculation under EC 9.2751 (1)(c)(1).We consider each argument in turn, addressing the leasing office and the maintenance building together because they raise similar legal construction issues.

LEASING OFFICE AND MAINTENANCE BUILDING

Everyone agrees that the planned development includes a leasing office and a maintenance building. Indeed, the site plan shows two stand-alone buildings near the River Road entrance to the complex, the larger of which is identified as "Leasing Office," and the smaller of which is identified as "Maintenance/Bike Storage" (with a notation of 36 bike storage spaces). Without mention of specific buildings, the application also describes the planned development as including "leasing," "bicycle storage," and "maintenance storage." Beyond that, however, the record is silent as to the intended purposes of the buildings at issue. The only other information about them comes indirectly from

the LUBA proceedings. Before LUBA, petitioners argued, and the developer did not dispute, that the leasing office would permit nonresidents to "inquire and apply to lease an apartment."[2] As for the maintenance building, petitioners argued, and the developer did not dispute, that it would not be "reserved for the exclusive use of the residents," which, based on the parties' arguments, appears to refer to the fact that nonresident maintenance staff would use the building to perform maintenance work at the complex.

Notwithstanding the minimal information in the record about the leasing office and the maintenance building, we must construe EC 9.2751 and endeavor to apply it correctly based on the information that we have. In that regard, we are in the same position as the city and LUBA were. We focus on LUBA's order, because it is the order on review, but note that LUBA largely agreed with the city's analysis.

As to the leasing office and the maintenance building, LUBA began its discussion by noting the planning commission's focus on EC 9.2751(1)(c) as providing "a specific manner to calculate net density" and not containing "any references to resident-only exclusivity." LUBA then stated that it "disagree[d] with petitioners that EC 9.2751(1)(b) contains independent approval criteria." In LUBA's view, so long as areas are "not open to the public, but instead are spaces used exclusively to support the residential use of the property," they may be included in the "net density" calculation, even if they are "not in actual residential use (such as a dwelling) or reserved for the exclusive use of the residents (such as a common amenity area)." LUBA concluded that the leasing office and the maintenance building met that standard.

On review, petitioners argue that LUBA's construction of EC 9.2751 deprives the words "actual" and "exclusive" in paragraph (1)(b) of any meaning. In petitioners' view, "actual residential use" means that the only acreage that

[2] On review, respondent developer refers to the leasing office as "leasing/resident amenity building," but nothing in the record supports that description, and the hearings official, the planning commission, and LUBA all referred only to a "leasing office."

may be included in the net-density calculation is acreage on which a dwelling is built or, possibly, acreage otherwise reserved for the exclusive use of development residents. On the latter point, petitioners' position has not been entirely consistent, but, at least on review, they appear to acknowledge that some nondwelling acreage may be included in the calculation, so long as it is reserved for the "exclusive use" of the residents. *See* EC 9.2751(1)(b) (providing for inclusion of "common open space or recreation facilities" in the net-density calculation). As for exclusivity, petitioners deny that their construction of the code would require complete exclusion of the public from the apartment complex—such that residents could not, for example, have guests on the property or have food delivered to their apartments—asserting at oral argument that, notwithstanding their strict construction of the word "exclusive," guests and service providers would be allowed on the property because their use would be attributable to the residents who invited them.

As with statutory construction, the text of the code provision "is the starting point for interpretation and is the best evidence of the [lawmakers'] intent." *PGE*, 317 Or at 610. As a preliminary matter, we address the relationship between EC 9.2751(1)(b) and (1)(c)(1). We fully agree with LUBA that those two provisions must be read together and do not create "independent approval criteria." At the same time, we disagree with any suggestion that (1)(c)(1) is the controlling provision, as far as how to calculate net density, such that any use that does not fall under an express exclusion in (1)(c)(1) qualifies for inclusion under (1)(b). Such a view of EC 9.2751 would effectively read paragraph (1)(b) out of the code.

In construing statutes and, by analogy, code provisions, "where there are several provisions or particulars, such construction should be adopted as will give effect to all." ORS 174.010. Here, if the code drafters had intended "net density" as used in EC 9.2751(1)(b) to mean all land uses *except* those listed in subparagraph (1)(c)(1)—as respondent developer argues on review—they would not have needed to include paragraph (1)(b) at all. But they did include both provisions, and, as LUBA recognizes, paragraph (1)(b) provides the applicable *definition* of "net density." By contrast,

subparagraph (1)(c)(1) is one of several provisions that clarify finer points of the calculation. *See, e.g.*, EC 9.2751 (1)(c)(2)-(3) (regarding when to round up or down to the nearest whole number when calculating net density). We view subparagraph (1)(c)(1) as clarifying a particular point of significance to the code drafters, not as superseding the general definition of "net density" in paragraph (1)(b). That is, paragraph (1)(b) explains how to calculate net density generally, while subparagraph (1)(c)(1) identifies specific uses that can never satisfy the definition in paragraph (1)(b). Accordingly, we reject any construction of EC 9.2751(1) that treats it as providing for the inclusion of *all* permitted land uses in the net-density calculation *except* those expressly excluded under EC 9.2751(1)(c)(1).[3]

Having concluded that EC 9.2751(1)(b) must be given effect as the definition of "net density" for purposes of the code section at issue—and that it is not simply an inverse statement of subparagraph (1)(c)(1)—we must grapple with what it means for acreage to be "in actual residential use and reserved for the exclusive use of the residents in the development." None of those words are expressly defined in the Eugene Code, but they are words of common usage, so we understand them to have their "plain, natural, and ordinary meaning." *PGE*, 317 Or at 611. We therefore look to dictionaries of common usage, keeping in mind that, when a word has more than one common definition, we must "examine word usage in context to determine which among competing definitions is the one that the [lawmaking body] more likely intended." *Kohring v. Ballard*, 355 Or 297, 304, 325 P3d 717 (2014).

"Residential use" has two potential meanings of relevance here. The narrower definition of "residential" is

[3] In construing EC 9.2751(1) as it did, LUBA relied in part on its prior decision in *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014), *rev'd on other grounds*, 269 Or App 176, 344 P3d 503 (2015). The primary issue in that case was whether acreage encumbered by sewer and water line easements had to be excluded from the net-density calculation, as "other public facilities" under EC 9.2751(1)(c)(1), or whether the acreage could be included so long as there were no above-ground structures for the utilities. The proposition for which LUBA cited *Oakleigh-McClure Neighbors* in this case is not one that we reviewed in that case, and we express no opinion as to whether *Oakleigh-McClure Neighbors* is reconcilable with our decision in this case.

"used, serving, or designed as a residence or for occupation by residents." *Webster's Third New Int'l Dictionary* 1931 (unabridged ed 2002). A broader definition is "of, relating to, or connected with residence or residences." *Id.* Context leads us to conclude that the code drafters intended the broader meaning here. EC 9.2751(1)(b) identifies "common open space" and "recreation facilities" as specific examples of land "in actual residential use and reserved for the exclusive use of the residents in the development"—which fits with the broader definition of "residential" but not the narrower one. Similarly, EC 9.2751(1)(c)(1) provides that streets and alleys, public parks, and other public facilities are to be excluded from "[t]he acreage of land considered part of the residential use." If "residential" were intended to mean only dwellings, it would be entirely unnecessary to call out those specific examples, because they could never be mistaken for residential uses. We therefore understand "residential use," as used in EC 9.2751(1)(b), to mean a use of, relating to, or connected with residence or residences.

The next question is what "actual" means in "actual residential use." As used here, the relevant definitions are "existing in fact or reality : really acted or acting or carried out—contrasted with *ideal* and *hypothetical*," or "something that is actual or exists in fact : REALITY." *Webster's* at 22. In this context, we understand land in "actual residential use" to mean land that is in fact in residential use, as distinct from being hypothetically usable for residential use.

That leaves the phrase "reserved for the exclusive use of the residents in the development." EC 9.2751(1)(b). The most pertinent definition of "exclusive" is "excluding or having power to exclude (as by preventing entrance or debarring from possession, participation, or use)." *Webster's* at 793. Based on the dictionary definition alone, the phrase at issue would appear to refer to land that nonresidents are excluded from using altogether or that residents at least have the power to exclude them from using. At the same time, it is important to keep in mind that "dictionaries are only the starting point for our textual analysis," *State v. Clemente-Perez*, 357 Or 745, 765, 359 P3d 232 (2015), and that it is sometimes a mistake to adhere too literally to the dictionary meaning of words, *State v. Gonzalez-Valenzuela*, 358

Or 451, 462, 365 P3d 116 (2015). *See, e.g.*, *Kohring*, 355 Or at 305, 325 P3d 717 (departing from the dictionary definition of a word, because, in its statutory context, "it seems clear that the legislature did not intend the term to be understood literally").

In this context, construing "exclusive" in the literal sense would lead to an absurd result. Taken literally, for acreage to be included in the net-density calculation, no employee could work there, including in common areas of an apartment complex, unless the residents had the power to exclude them, and no guests could visit (even if invited by a resident), unless other residents had the power to exclude them. Such a result does not make sense in context.[4] Instead, in this context, we understand "reserved for the exclusive use of the residents in the development" to have a slightly looser meaning than the words literally suggest. We understand it to be intended primarily to differentiate between residents of the development and the general public. That is consistent with EC 9.2751(1)(c)(1), which excludes "public parks" and "other public facilities" from the net-density calculation, while EC 9.2751(1)(b) otherwise provides for the inclusion of "common open space" and "recreation facilities."[5]

To illustrate, "recreation facilities" are to be included in the net-density calculation under EC 9.2751(1)(b), while "public facilities" are to be excluded under EC 9.2751 (1)(c)(1). In context, we understand that to mean that a fitness center built on the grounds of an apartment complex for use by the complex residents is to be included in the net-density calculation, *even if* nonresident employees work in the building (as they almost certainly will) and *even if*

[4] We are unpersuaded by petitioners' attempt to allow for the presence of guests while advocating for a literal reading of "exclusive." Even if a guest is present at an apartment complex as an invitee of a resident, such that the guest's use may be viewed as a use by the resident, it is still a use by the nonresident as well. For example, if 10 residents and three nonresident guests were swimming in the apartment complex pool one day, we do not see how one could say, in the literal sense, that the pool was being used exclusively by residents.

[5] Notably, *all* streets and alleys, both public and private, are excluded from the net-density calculation under EC 9.2751(1)(c)(1). Regardless of the specific policy reasons for that unique treatment of streets and alleys, we do not view that variation in the city's approach as undermining its general intent to distinguish between land used by residents and land accessible to the general public.

nonresidents may enter the building as guests of residents (as a benefit to the residents), so long as the general public may not use the fitness center. Although there may be various ways to express that concept, we do so as follows. As used in EC 9.2751(1)(b), we understand land "reserved for the exclusive use of the residents in the development" to mean land that nonresidents are excluded from using, that residents have the power to exclude nonresidents from using, or that nonresidents use only incidentally by invitation of the residents (such as guests) or for the benefit of the residents (such as employees of the property manager).

With that construction in mind, we return to the leasing office at issue here. We conclude that the leasing office is not acreage "in actual residential use and reserved for the exclusive use of the residents in the development," EC 9.2751(1)(b), and that LUBA therefore erred in affirming its inclusion in the net-density calculation. The acreage may be in "actual residential use," in that a leasing office is fairly characterized as a use of, relating to, or connected with residence or residences. But it is not "reserved for the exclusive use of the residents." On the limited record that exists, the leasing office will be used by some combination of residents and nonresidents. Moreover, the nonresidents' use will be for their own benefit—such as to inquire about available apartments—not at the residents' invitation or for the residents' benefit.[6] The leasing office should not have been included in the net-density calculation.

We reach a different result as to the maintenance building. The maintenance building is in "residential use" in that it is a use of, relating to, or connected with residence or residences. To analogize, if a person had a tool shed in their back yard, one would not hesitate to say that the tool

[6] Respondent developer argues that "[w]ithout new leases there would be a dearth of residents in the complex, and eventually, over time, none at all." That argument seems to assume that an on-site leasing office is the only way to rent apartments. Regardless, the issue is not whether a leasing office is a permitted use on the property (it apparently is) but only whether its acreage qualifies for inclusion in the net-density calculation under EC 9.2751(1)(b) and (1)(c)(1). We are unpersuaded that a particular use having *any* arguable benefit to residents qualifies it for inclusion in the net-density calculation. Streets and alleys provide obvious benefits to residents, yet they are excluded.

shed was related to or connected with the residence. A maintenance building is the apartment-complex equivalent of a tool shed. As for exclusivity, the record is slim, but it is reasonable to infer that the maintenance building will be used to store maintenance equipment, to facilitate work by maintenance staff, and for resident bicycle storage. Those are nonpublic uses by the residents themselves (bicycle storage) or by persons acting for the direct benefit of the residents (maintenance of the apartment complex). To return to our prior example of a nonpublic fitness center on the complex grounds, the maintenance building is akin to a pump room for the swimming pool—it is an incidental use that facilitates the residents' use. LUBA did not err with respect to the maintenance building.

INTERNAL PARKING CIRCULATION AREAS

The remaining issue is the two internal parking circulation areas. Petitioners argue that they are "streets" under the code and therefore must be excluded from the net-density calculation, while respondents argue that they are "parking drives" under the code and therefore were properly included in the net-density calculation.[7]

It would be easier to describe the areas at issue by reference to the site plan, but the site plan would be illegible if reproduced here, so we must rely on words. The property is shaped similarly to the state of Nebraska. River Road runs north-south along the western side of the proposed development. Lombard Street will be extended so that it runs north-south through the center of the proposed development. And a bike path runs northwest-southeast along the eastern edge of the proposed development. One circulation area, which is essentially straight except for a small offshoot, runs east-west between River Road and Lombard Street. The other circulation area, which is horseshoe-shaped, connects to Lombard Street at two points and runs through the part of the complex that is east of Lombard Street. Thus, both internal parking circulation areas permit through traffic,

[7] Petitioners do not dispute that, if the internal parking circulation areas qualify as "parking drives," they were properly included in the net-density calculation. Because that underlying legal issue is undisputed, we do not consider it and express no opinion on it.

in that it would be physically possible for a motor vehicle to enter the complex from River Road and exit on Lombard Street (or vice versa) using the first parking area, or to enter the eastern half of the complex from one place on Lombard Street and exit at a different place on Lombard Street using the second parking area.

With that picture in mind, we turn to the Eugene Code. Under the code, "parking drives" are a type of "driveway." EC 9.5500(11)(b). "Driveways" (in general) and "parking drives" (in particular) "are private roadways for projects or portions of projects not served by streets." EC 9.5500 (11)(b). All "driveways" are to be designed to "provide vehicular access to parking and dwelling units," but they "do not provide primary pedestrian access to units," and they "are intended to be used primarily for vehicular circulation and dwelling access and should be visually distinct from streets." EC 9.5500(11)(b)(1). "Parking drives" are "driveways lined with *** parking spaces, garages, or any combination thereof along a significant portion of their length." EC 9.5500(11)(b)(2). For multi-family residential developments larger than 20 units, parking drives are to be designed "so as to permit no through-motor vehicle movements." *Id*. However, that restriction may be adjusted, EC 9.5500(11)(e), and, in this case, the developer requested and received an adjustment to allow through traffic on the internal parking circulation areas.

It is undisputed that the two internal circulation areas in dispute here will be lined with parking spaces "along a significant portion of their length," and the site plan shows that to be the case. Nonetheless, petitioners contend that they are actually "streets," as defined in EC 9.0500, and therefore should have been excluded from the net-density calculation. *See* EC 9.2751(1)(c)(1) (stating that, for purposes of calculating net density, "public and private streets" shall be excluded from "the acreage of land considered part of the residential use"). In relevant part, EC 9.0500 defines a "street" as "[a]n improved or unimproved public or private way, other than an alley, that is created *to provide ingress or egress for vehicular traffic to one or more lots or parcels*." (Emphasis added.)

LUBA ruled that the internal parking circulation areas are not streets, because they were "not created to provide ingress or egress for vehicular traffic to one or more lots or parcels," but, instead, "are designed primarily to provide vehicular circulation to parking spaces in the apartment complex" for residents and visitors and, therefore, are parking drives. Further, LUBA "agree[d] with the city that the adjustment to the parking area that allows internal traffic circulation from access points on both River Road and Lombard [Street] does not transform the parking drives into streets."

Petitioner argues that, because the internal parking circulation areas allow for through traffic, they are necessarily streets. We disagree. First, we note that a parking drive cannot also be a street, given the definitions of those terms. A parking drive is a type of "driveway"—*see* EC 9.5500(11)(b)(2) (defining "parking drives" as "driveways lined with *** parking spaces, garages, or any combination thereof along a significant portion of their length")—and part of the definition of a "driveway" is that it is for a project or portion of a project that is "not served by streets." EC 9.5500(11)(b). Thus, if a parking drive were a street, it would cease to be a parking drive, because the area would be served by a street.

The fact that parking drives and streets are mutually exclusive is critical because, for multiple-family residential developments containing up to 20 units, through-motor vehicle traffic is generally *permitted* on parking drives. *See* EC.95500(11)(b)(2). Thus, the code drafters clearly did not intend the mere existence of through-motor vehicle traffic to transform a parking drive into a street. Rather, the code contemplates that there will be some parking drives that *allow* through traffic and some parking drives that *do not allow* through traffic.

In this case, because the proposed development contains more than 20 units, the developer had to obtain an adjustment to allow through traffic. However, as explained, that has no bearing on whether the internal parking circulation areas are parking drives versus streets. Rather, what distinguishes a street from a parking drive is that streets

are "created to provide ingress or egress for vehicular traffic to one or more lots or parcels." EC 9.0500 (definition of street). On that point, petitioners have identified no error in LUBA's ruling that the internal parking circulation areas were "not created to provide ingress or egress for vehicular traffic to one or more lots or parcels" but, instead, "are designed primarily to provide vehicular circulation to parking spaces in the apartment complex" for residents and visitors. Because the internal parking circulation areas meet the definition of parking drives, and do not meet the definition of streets, LUBA did not err in affirming the inclusion of the acreage used for the internal parking circulation areas in the net-density calculation.

CONCLUSION

In sum, we conclude that LUBA's order is unlawful in substance in that it misconstrues EC 9.2751 with respect to the leasing office, but LUBA did not err with regard to the maintenance building or the internal parking circulation areas.

Reversed in part and remanded.