

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

3
4 STEVEN SCHULKE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11
12 and

13
14 I & E CONSTRUCTION, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2024-038

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Salem.

23
24 Yasha Renner filed the petition for review and reply brief and argued on
25 behalf of petitioner. Also on the brief was Renner Law Firm, P.C.

26
27 Fred Wilson filed the joint respondent's and intervenor-respondent's brief
28 and argued on behalf of respondent.

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30 James D. Howsley filed the joint respondent's and intervenor-respondent's
31 brief and argued on behalf of intervenor-respondent. Also on the brief was Jordan
32 Ramis PC.

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

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

09/26/2024

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

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NATURE OF THE DECISION

Petitioner appeals a city council decision approving an adjustment to city tree planting and fence standards for a multiple family residential complex.

MOTION TO INTERVENE

I & E Construction, Inc., the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

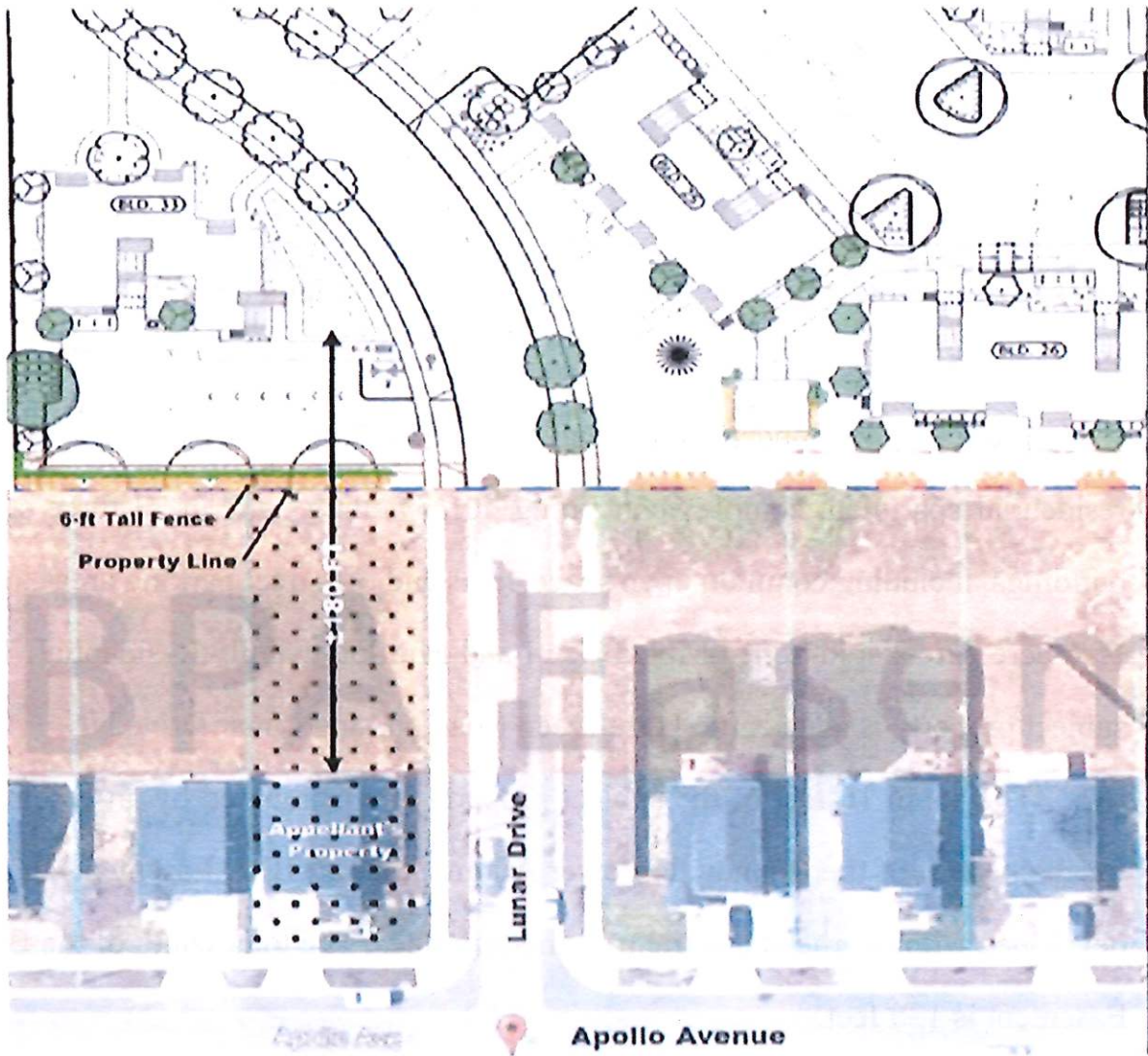
FACTS

Intervenor-respondent (intervenor) applied to construct a multiple family residential apartment complex containing 405 dwelling units in 33 three story buildings, including common open space areas and off-street parking areas, on a 15.6-acre parcel split-zoned Mixed Use-I and Multiple Family Residential. The subject property is adjacent to Hazelgreen Road NE and Lunar Drive NE.

The south 16 feet of the subject property is encumbered by an easement for the benefit of the Bonneville Power Administration (BPA Easement) that is developed with overhead electric transmission lines. The total width of the BPA Easement is 125 feet.

Properties to the south of the proposed apartments, including petitioner’s property, are zoned Single Family Residential (RS). Petitioner’s property is developed with a single-family dwelling, and the north 109 feet of petitioner’s property is encumbered by the BPA Easement. Proposed Building 33 is proposed to be sited approximately 180 feet north of petitioner’s dwelling, as shown on the

1 following depiction taken from the Joint Respondent's and Intervenor-
2 Respondent's Brief 7 (citing May 13, 2024 city council hearing video at 1:14:22):



3
4 Intervenor applied for an adjustment to Salem Revised Code (SRC)
5 702.020(b)(2)(B), which requires a combination of landscaping and screening for
6 multiple family developments that abut property that is zoned RS. Intervenor
7 proposed to plant low hedges along the property line instead of the required fence.

1 The city's planning administrator approved the adjustment, and petitioner
2 appealed that decision to the city council.

3 The city council held a hearing on the appeal. During the proceedings
4 before the city council, intervenor testified that its negotiations with BPA had
5 resulted in BPA's agreement to allow intervenor to construct a fence in the BPA
6 Easement. The city council denied the appeal and approved the adjustment. The
7 city council's decision adopted additional findings and added a condition of
8 approval that requires a fence along the subject property's south property line.
9 Record 11. Thus, the approved development proposal requires a fence that
10 complies with SRC 702.020(b)(2)(B), and proposes to plant low hedges in front
11 of the fence as well. This appeal followed.

12 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

13 As relevant here, SRC 702.020(b) provides that for multiple family
14 development projects that include 13 or more units:

15 “(2) Where a development site abuts property that is zoned
16 Residential Agricultural (RA) or Single Family Residential
17 (RS), a combination of landscaping and screening shall be
18 provided to buffer between the multiple family development
19 and the abutting RA or RS zoned property. The landscaping
20 and screening shall include the following:

21 “(A) A minimum of one tree, not less than 1.5 inches in
22 caliper, for every 30 linear feet of abutting property
23 width; and

24 “(B) A minimum six-foot tall, decorative, sight-obscuring
25 fence or wall. The fence or wall shall be constructed of
26 materials commonly used in the construction of fences

1 and walls, such as wood, stone, rock, brick, or other
2 durable materials. Chainlink fencing with slats shall be
3 not allowed to satisfy this standard.”

4 The subject property’s south boundary line is located in the BPA Easement and
5 it abuts RS-zoned property. Intervenor initially sought an adjustment to the
6 requirements in SRC 702.020(b)(2)(A) and (B) and proposed to plant low shrubs
7 instead of fencing. As explained above, later during the proceedings, intervenor
8 agreed to and the city council imposed a condition of approval that requires a
9 fence in compliance with SRC 702.020(b)(2)(B). Accordingly, no adjustment to
10 SRC 702.020(b)(2)(B) was approved.

11 SRC 250.005(d)(2) provides the standard for an adjustment:

12 “An application for a Class 2 adjustment shall be granted if all of
13 the following criteria are met:

14 “(A) *The purpose underlying the specific development standard*
15 *proposed for adjustment is:*

16 “(i) Clearly inapplicable to the proposed development; or

17 “(ii) Equally or better met by the proposed development.”
18 (Emphasis added.)

19 The city council approved an adjustment to SRC 702.020(b)(2)(A) that waives
20 the requirement to plant “[a] minimum of one tree, not less than 1.5 inches in
21 caliper, for every 30 linear feet of abutting property width.”¹

¹ The Joint Respondent’s and Intervenor-Respondent’s Brief takes the position that Record 225 and Record 226 demonstrate that “[i]n total there are twenty trees of five different species between the southernmost apartment

1 Petitioner’s first and second assignments of error challenge the city
2 council’s decision to approve the adjustment to SRC 702.020(b)(2)(A), and we
3 address the assignments of error together. In their first assignment of error,
4 petitioner argues that the city council’s decision to approve the adjustment “is not
5 in compliance with” SRC 702.020(b)(2)(A). Petition for Review 13 (citing ORS
6 197.835(8)). In their second assignment of error, petitioner argues that the city
7 council’s decision improperly construes SRC 702.020(b)(2). Petition for Review
8 18 (citing ORS 197.835(9)(a)(D)).²

9 The city council found:

10 “Development standards set forth in the zoning code, which include
11 requirements for maximum height, setbacks to abutting property
12 lines, and lot coverage, are intended to ensure that development of
13 private property or use of public rights-of-way does not adversely
14 impact the privacy of adjacent properties.

buildings and the abutting Single Family Residential zone.” Joint Respondent’s
and Intervenor-Respondent’s Brief 8.

² In a footnote, petitioner states:

“As discussed below, the record on appeal does not adequately
disclose the rationale for Respondent’s modified land use decision.”
Petition for Review 4 n 1.

In the petition for review, petitioner does not cite a statutory or other
requirement for adequate findings or otherwise develop a challenge to the city
council’s findings. Moreover, even if footnote 1 is intended to assign error to the
decision on the basis that the city council’s findings are inadequate, LUBA does
not address assignments of error raised in a footnote. *Frewing v. City of Tigard*,
59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n
19 (2008).

1 “In this case, there is an existing 125-foot-wide easement for a BPA
2 (Bonneville Power Administration) transmission line that extends
3 across the entire southern boundary of the property with a width of
4 approximately 16 feet on the subject property and 109 feet on the
5 abutting RS (Single Family Residential) zoned properties to the
6 south. No buildings or structures can occur within the easement,
7 including fencing. Trees and vegetation exceeding a height of five
8 feet are also not permitted in the easement area; therefore, the
9 applicant is requesting an Adjustment to the screening requirements
10 because it is not possible to provide the required buffering along the
11 southern property line in the easement area. The applicant proposes
12 to landscape the southern boundary with dense shrubs that will
13 provide a physical and visual barrier that will be maintained in
14 compliance with the requirements of the BPA easement. *The*
15 *proposed landscaping and the increased setback distance due to the*
16 *BPA easement provides screening and separation which meets the*
17 *intent of the code.*”³ Record 14 (emphasis added).

³ The city council adopted the city planning administrator’s findings, which found:

“SRC 702.020(b)(2) provides that where a development site abuts property that is zoned RS (Single Family Residential), a combination of landscaping and screening shall be provided to buffer between the multi-family development and the abutting RS zoned property. The landscaping shall include a minimum of one tree for every 30 linear feet of abutting property width and a minimum six-foot tall, decorative, sight-obscuring fence or wall. The applicant indicates that the reason for the request to reduce the tree planting and fencing is because of the existing 125-foot-wide easement for a BPA (Bonneville Power Administration) transmission line. The easement extends across the entire southern boundary of the property with a width of approximately 16 feet on the subject property and 109 feet on the abutting RS (Single Family Residential) zoned properties to the south. No buildings or structures can occur within the easement, including fencing. Trees and vegetation exceeding a height of five feet are also not permitted in

1 Implicit in the city council's finding is its conclusion that the purpose of SRC
2 702.020(b)(2) is to provide a buffer between multi-family development and
3 single family development, and that the fence, with low shrubs planted in front
4 of it, combined with the distant location of the closest apartment building to
5 petitioner's dwelling, approximately 60 feet north of the subject property's
6 boundary with petitioner's property, and approximately 180 feet from
7 petitioner's house, equally or better meets the purpose of SRC 702.020(b)(2) to
8 provide a buffer between development through a combination of screening and
9 landscaping.⁴

10 Petitioner proffers an alternative interpretation of the purpose of SRC
11 702.020(b)(2) that petitioner argues is correct. Petition for Review 22. Petitioner
12 first notes that the express purpose of SRC 702.020(b)(2) is "to buffer between
13 the multiple family development and the abutting RA or RS zoned property" with
14 "a combination of landscaping and screening[.]" Citing SRC 807.001, petitioner

the easement area; therefore, it is not possible to provide the required buffering along the southern property line in the easement area. The applicant proposes to landscape the southern boundary with dense shrubs that will provide a physical and visual barrier and will be maintained in compliance with the requirements of the BPA easement. The proposal equally or better meets the intent of this provision and is therefore in compliance with this criterion." Record 667-68.

⁴ As intervenor and the city point out, the setback of the building closest to petitioner's property is 53% more than the required minimum setback. Record 223.

1 argues that the landscaping required in SRC 702.020(b)(2)(A) serves both a
2 screening function and an aesthetic function.⁵ Petition for Review 21. We
3 understand petitioner to argue that an adjustment that eliminates the required
4 landscaping in SRC 702.020(b)(2)(A) does not “equally or better meet” the
5 purpose of the standard because it does not fulfill the aesthetic purpose of
6 landscaping that petitioner argues applies through SRC 807.001. Petitioner
7 further argues that laurel hedges planted in front of the fence do not equally or
8 better meet the underlying purpose of SRC 702.020(b)(2)(A) because they are
9 too short to provide any screening function and, petitioner argues, they are not
10 aesthetically pleasing as compared to trees a minimum of 1.5 inches in caliper.
11 Petition for Review 17.

12 We review the first and second assignments of error that challenge the city
13 council’s interpretation of SRC 702.020(b)(2) under the standard of review set
14 out in ORS 197.829. ORS 197.829 provides:

15 “(1) [LUBA] shall affirm a local government’s interpretation of its
16 comprehensive plan and land use regulations, unless the
17 board determines that the local government's interpretation:

18 “(a) Is inconsistent with the express language of the
19 comprehensive plan or land use regulation;

⁵ SRC 807.001 provides that “[t]he purpose of this chapter is to establish standards for required landscaping and screening under the UDC to improve the appearance and visual character of the community, promote compatibility between land uses, encourage the retention and utilization of existing vegetation, and preserve and enhance the livability of the City.”

- 1 “(b) Is inconsistent with the purpose for the comprehensive
2 plan or land use regulation;
- 3 “(c) Is inconsistent with the underlying policy that provides
4 the basis for the comprehensive plan or land use
5 regulation; or
- 6 “(d) Is contrary to a state statute, land use goal or rule that
7 the comprehensive plan provision or land use
8 regulation implements.”

9 The test under ORS 197.829(1) is not whether the interpretation is correct, or the
10 best or superior interpretation, but whether the governing body’s interpretation is
11 “plausible,” given its text and context. *Siporen v. City of Medford*, 349 Or 247,
12 259, 243 P3d 776 (2010). In light of the standard described in *Siporen*, deference
13 is owed under ORS 197.829(1) when (1) a governing body of a local government;
14 (2) makes an interpretation of its own land use policies; (3) that is plausible and
15 not inconsistent with the standards set out in the statute. The local government’s
16 interpretation must be explicit or implicit in the challenged decision. *Green v.*
17 *Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011).

18 Intervenor and the city (together, respondents) respond that petitioner has
19 not established that the city council’s interpretation that the purpose of SRC
20 702.020(b)(2) is to provide a buffer through a combination of landscaping and
21 screening, or that that purpose is not equally or better met by a much larger
22 setback, a screening fence, and low hedges in front of the screening fence, is
23 implausible. We agree. First, the adjustment criterion at SRC
24 250.005(d)(2)(A)(ii) allows the city to grant an adjustment if “the purpose

1 *underlying the specific development standard proposed for adjustment*” is
2 equally or better met by the proposal. The city council’s interpretation of SRC
3 702.020(b)(2)(A)’s purpose of providing buffering between multi-family and
4 single family development through a combination of increased distance,
5 landscaping, and screening, without regard to the purpose of a different provision
6 in the SRC that also addresses landscaping, is plausible and consistent with the
7 express language of SRC 250.005, which requires consideration of the “purpose
8 underlying the specific development standard proposed for adjustment.”
9 Petitioner does not develop any argument that the city council’s interpretation of
10 SRC 702.020(b)(2) is inconsistent with the express language of any provision of
11 the SRC or other standards identified in ORS 197.829(1).

12 The first and second assignments of error are denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 SRC 250.005(a)(2) includes several prohibitions on an adjustment,
15 including, as relevant to petitioner’s third assignment of error, an adjustment to
16 “[m]odify the applicability of any requirement under the UDC.”⁶ SRC
17 250.005(a)(2)(E). In their third assignment of error, petitioner argues that the city
18 council’s decision “is not in compliance with” SRC 250.005(a)(2)(E) because
19 pursuant to SRC 110.060, the city is prohibited from approving an adjustment to

⁶ The city’s Unified Development Code (UDC) is also referred to as the Salem Revised Code (SRC). SRC 110.001.

1 a development standard when a private easement restriction precludes
2 compliance with the standard. SRC 110.060 provides:

3 “(a) The UDC shall be applied independently of, and without
4 regard to, any private easement, covenant, condition,
5 restriction, or other legally enforceable interest in, or
6 obligation imposed on, the use or development of land.

7 “(b) The City does not enforce any easement, covenant, condition,
8 restriction, or other agreement between private parties, nor is
9 the UDC generally intended to abrogate, annul, or impair such
10 easements, covenants, conditions, restrictions, or agreements.
11 *In those instances where the UDC imposes a greater*
12 *restriction or higher standards than required by an easement,*
13 *covenant, condition, restriction, or other agreement between*
14 *private parties, or where the UDC otherwise conflicts with*
15 *those private party agreements, the UDC shall control.”*

16 Under SRC 110.060(b), then, if a standard in the SRC conflicts with a private
17 easement, the SRC standard controls.

18 Petitioner argues that pursuant to SRC 110.060, the requirements of SRC
19 702.020(b)(2) control over conflicting private restrictions imposed by the
20 existence of the BPA Easement, and further argues that SRC 250.005(a)(2)(E)
21 prohibits adjusting SRC 702.020(b)(2).

22 Respondents respond, and we agree, that nothing in SRC 110.060 prohibits
23 an adjustment to a standard that conflicts with a private easement. Rather, SRC
24 110.060 confirms that where such a conflict exists, the SRC provision controls.
25 But SRC 110.060 does not prohibit an adjustment of the SRC standard.

26 Similarly, SRC 250.005(a)(2)(E) prohibits the city from modifying “the
27 applicability” of SRC 702.020(b)(2) through an adjustment. However, intervenor

1 did not propose that SRC 702.020(b)(2) not apply *at all* to its application; rather,
2 it proposed a modified development that would equally or better meet the
3 buffering purpose of that standard.

4 Finally, as respondents point out, SRC 250.005(a)(2)(J) contemplates and
5 specifically allows the type of adjustment that intervenor sought here: “[A]n
6 adjustment shall not be granted to: * * * A design review guideline or design
7 review standard, *except Multiple Family Design Review Standards in SRC*
8 *Chapter 702, which may be adjusted[.]*” (Emphasis added). Petitioner does not
9 address this standard or otherwise explain why it is not dispositive.

10 The third assignment of error is denied.

11 The city’s decision is affirmed.