BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LLOYD W. McFALL and IRENE K. McFALL,
Petitioners,

vs.

CITY OF SHERWOOD,
Respondent.

LUBA No. 2003-101

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

Robert J. Custis, Portland, filed the petition for review. With him on the brief was Kent Custis, LLP. Douglas M. Bragg, Tualatin, argued on behalf of petitioners.

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Edward J. Sullivan and Garvey, Schubert, Barer, LLP.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

AFFIRMED 04/27/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

In *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003) (*McFall I*), we remanded a city decision that granted planned unit development (PUD) and preliminary subdivision plat approval for a 24-unit single family detached PUD subdivision. Following our remand, the city adopted a resolution that contains two additional findings in support of its earlier decision. In this appeal, petitioners challenge that resolution.

FACTS

Petitioners' first two assignments of error in *McFall I* concerned Sherwood Zoning and Community Development Code (SZCDC) 7.201.03(F), under which the city may require that an applicant for subdivision approval provide access to adjoining properties.[1] The relevant part of our decision in *McFall I* is set out below:

> "[SZCDC] 7.201.03 requires that the city adopt certain findings before it approves a preliminary subdivision plat. SZCDC 7.201.03(F) requires that the city find:
>
> > "'Adjoining land can either be developed independently or is provided access that will allow development in accordance with [the SZCDC].'
>
> "Petitioners asserted below, before both the planning commission and the city council, that [the Oregon Department of Transportation (ODOT)] has initiated action that may leave their property without the access to Highway 99W that the property currently has. Petitioners contend that such action by ODOT would leave their property undevelopable, unless and until they are able to obtain other access. Petitioners argue that given the current state of uncertainty regarding their continued right to access to [Highway] 99W in the future, SZCDC 7.201.03(F) requires that the disputed subdivision be amended to provide access to their property." 44 Or LUBA at 496-97 (footnote omitted).

[1] Our decision in *McFall I* mistakenly refers to the Sherwood Zoning and Community Development Code (SZCDC) as the Sherwood Community Development Code (SCDC). Where we quote from our decision in *McFall I* in this opinion, we have corrected those references so that all reference are to the SZCDC.

The subdivision applicant does not propose to extend access through the proposed subdivision south to petitioners' property. The city's finding in *McFall I* concerning SZCDC 7.201.03(F) was an unexplained conclusion that it was not necessary to require that the applicant provide access to petitioners' property because such access is "unfeasible." 44 Or LUBA at 497. We concluded that the city's finding regarding SZCDC 7.201.03(F) was inadequate to respond to petitioners' contention that ODOT's planned condemnation of their access to Highway 99W obligated the city to require that the subdivision applicant provide access through the proposed subdivision.

At the time of our decision in *McFall I*, petitioners also claimed that they owned a small triangular area (the disputed triangle) that was included in the subdivision proposal. Petitioners' claim was based on their alleged adverse possession of that disputed triangle, and petitioners' quiet title action was pending in the Washington County Circuit Court at the time of our decision in *McFall I*. In their fourth assignment of error in *McFall I*, petitioners alleged that the city was required to delay action on the proposed PUD, which proposed to dedicate much of the disputed triangle to the city. Petitioners contended that the city's failure to suspend its decision making until its adverse possession claim could be resolved violated their right to due process under the Fourteenth Amendment to the United States Constitution. We rejected that assignment of error:

> "We fail to see how the city's decision to proceed and issue a decision in this matter takes any property interest of petitioners. Petitioners apparently have not sought to enjoin city action on the subdivision application or to enjoin any action the applicants may take in the future pursuant to the subdivision and PUD approval. Even though petitioners have not sought such an injunction, assuming petitioners are successful in their adverse possession claim, we see no reason why the court could not grant appropriate relief to make petitioners the owners of the disputed property. Unless and until the circuit court decrees that petitioners own the disputed triangle, the city is entitled to review and make a decision on the applicant's subdivision application and in doing so assume that the applicant deed-holders are the fee owners of the subject property, including the triangle. Petitioners identify no legal authority that would obligate the city to suspend consideration of the applicant's subdivision and PUD application until petitioners' adverse possession claim is litigated and all appeals are exhausted, and we are aware of no such authority." 44 Or LUBA at 501-02.

The city council adopted its response to LUBA's remand in *McFall I* at its June 10, 2004 council meeting. At that meeting the city adopted additional findings in support of its earlier decision. In adopting those findings, the city council did not reopen the evidentiary record and did not provide an opportunity for legal argument or an evidentiary hearing. This appeal followed.

THIRD ASSIGNMENT OF ERROR

On remand, the city adopted the following findings:

> "Section 1. The City Council finds that the opponents of this PUD suggest that access to their property to the south should be provided from the PUD. However, the slopes on the south edge of the property exceed 30% and SZCDC 6.305.07 prohibits grades steeper than 12%. Although SZCDC 6.305.07 allows exemptions from the prohibition, the City declines to exercise its discretion in this case.
>
> "Section 2. The City Council finds that the opponents of this PUD suggest that access to their property to the south should be provided from the PUD under SZCDC 7.201.03(F). However, the evidence in the record clearly indicates that the opponents retain access to Highway 99W and that they can develop their property independently of this PUD. The City Council interprets SZCDC 7.201.03(F) not to apply in a circumstance where an adjoining property that currently has access faces the potential loss of that access in [the] future." Record 9-10.

The above-quoted findings express alternative bases for the city's conclusion that SZCDC 7.201.03(F) does not obligate the subdivision applicant to provide access through the subdivision to petitioners' property to the south. Under "Section 1," the city implicitly interprets SZCDC 7.201.03(F) not to require that a subdivision applicant provide access to adjoining property, where it would be infeasible to construct the access. The "Section 1" findings explain why the city believes constructing such access in this case is infeasible.

In its "Section 2" findings, the city interprets SZCDC 7.201.03(F) not to apply in cases where the property that would be benefited by requiring access pursuant to SZCDC 7.201.03(F) currently has access that would permit development. According to the city's interpretation, access through a proposed subdivision to such properties is not required under SZCDC 7.201.03(F) notwithstanding that the property that would be benefited faces potential loss of its existing access in

the future. The "Section 2" findings explain that petitioners' property currently has access to Highway 99.

A. SZCDC 7.201.03(F) Does Not Apply Where The Property to be Benefited Already Has Access

In *McFall I*, the city argued in its brief that SZCDC 7.201.03(F) does not apply because at the time the city's initial decision was rendered ODOT had not condemned petitioners' Highway 99 road frontage. We rejected that argument because it was based on an interpretation that the city council did not adopt:

> "The challenged decision does not adopt the interpretation of SZCDC 7.201.03(F) that the city relies on in its brief to defend the city's decision. Had the city council interpreted SZCDC 7.201.03(F) not to apply in a circumstance where an adjoining property that currently has access faces the potential loss of that access in future, we might well be required to defer to that interpretation under ORS 197.829(1). The only explanation the city provides in its findings for not requiring that the [subdivision] provide access to petitioners' adjoining property is its unexplained conclusion that extending access south from the subject property to petitioners' property is not feasible." 44 Or LUBA at 498 (footnote omitted).

The city's "Section 2" findings adopt the interpretation that the city presented in its brief in *McFall I*. Petitioners apparently challenge that interpretation. However, our review of that interpretation is governed by ORS 197.829(1).[2] Petitioners make no attempt to argue that the city's interpretation is inconsistent with the language of SZCDC 7.201.03(F), and we do not see that it is. It might be possible to argue that under ORS 197.829(1)(b) and (c) that the city's

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[2] Under ORS 197.829(1):

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

interpretation of SZCDC 7.201.03(F) on remand is inconsistent with the purpose and underlying policy of SZCDC 7.201.03(F). However, it is also possible to argue that the underlying purpose and policy do not encompass providing access to properties facing potential loss of access. Whatever the merits of those conflicting arguments, petitioners do not argue the city's interpretation should be reversed under ORS 197.829(1)(b) or (c).

Petitioners' challenge under this assignment of error appears to be based entirely on petitioners' disagreement with the city's characterization of their loss of access as a "potential loss." Petitioners contend that a cooperative agreement between the city and ODOT shows "that the taking of [petitioners'] access was not a mere potential problem, but something that had been planned and was part of the Meinecke Road Project, which the City of Sherwood was an active participant in." Petition for Review 12.

We do not agree with petitioners' apparent assumption that the city's interpretation of SZCDC 7.201.03(F) turns on the degree of likelihood that petitioners' will lose their access to Highway 99 in the future. As the records in *McFall I* and this appeal show, ODOT had already commenced steps that, if carried to a conclusion, would lead to ODOT's purchase or condemnation of petitioners' access, and the city was fully aware of that fact. The fact remains that on the date the city rendered its initial decision in *McFall I* and on June 10, 2004, when it rendered its decision on remand, petitioners had access to Highway 99.[3] Under the city's interpretation, the applicability of SZCDC 7.201.03(F) does not appear to depend on the certainty, or lack of certainty, that an adjoining property will retain existing access in the future. Rather, under the city's interpretation, the applicability of SZCDC 7.201.03(F) depends on the circumstances as they exist at the time of the city's decision to grant preliminary approval for a subdivision. It is undisputed that

[3] Petitioners' earlier motion that requested that we consider extra-record evidence pursuant to OAR 661-010-0045 did not claim that there is any evidence that ODOT has in fact condemned petitioners' access to Highway 99.

at the time of the city's June 10, 2004 decision on remand, petitioners' property still had access to Highway 99.

Because petitioners offer no basis for reversing the city's interpretation of SZCDC 7.201.03(F) under ORS 197.829(1), and we can see no reason for questioning the city's interpretation under ORS 197.829(1), we affirm that interpretation. As interpreted by the city, SZCDC 7.201.03(F) does not require that the city require that the disputed subdivision provide alternative access to petitioners' property. Accordingly, the third subassignment of error under the third assignment of error is denied.

B. Access to the Disputed Triangle

The disputed triangle is located at the top of a bluff, next to the disputed subdivision, and like the proposed subdivision is separated from the majority of petitioners' property by a steeply banked creek and wetlands.[4] The quiet title action we noted in our decision in *McFall I* has now been completed. The subdivision applicant deeded the disputed triangle to petitioners on October 6, 2003.[5] If we understand petitioners correctly, they contend that even if it is infeasible to construct a road south from the subdivision to provide access to petitioners' property south of the creek, the city was required under SZCDC 7.201.03(F) to require that the subdivision applicant provide access to the disputed triangle.

The city responds, and we agree, that the critical question in addressing this issue is who owned the disputed triangle when the city rendered its decision on June 10, 2003, not who subsequently took title to the disputed triangle on October 6, 2003. Therefore, even if the city might have been obligated to require that the PUD provide access to the disputed triangle when it

[4] It is this steeply banked creek and wetlands that led the city to state in its Section 1 findings that constructing a road to petitioners' property south of the creek was infeasible.

[5] That deed was one of the items of extra-record evidence that petitioners requested LUBA to consider in its motion that requested LUBA to consider evidence that is not in the record in this appeal under OAR 661-010-0045. We denied that request. However, we do not understand the city to dispute that the subdivision applicant deeded the disputed triangle to petitioners on October 6, 2003.

rendered its decision in June 10, 2003, had petitioners owned the disputed triangle on that date, it is undisputed that the subdivision applicant was the record owner of the disputed triangle on June 10, 2003. As we explained in *McFall I*, the city is not required to delay its proceeding or to speculate on who might prevail in the pending quiet title action. The city may assume that the record owner of the property included in the subdivision application is the true owner of the property. The city did not err in failing to require that the subdivision provide access to the disputed triangle.

The second subassignment of error under the third assignment of error is denied.

C. Infeasibility of Providing Access from the PUD South to Petitioners' Property

Petitioners argue that the city's "Section 1" findings are inadequate to demonstrate that it is infeasible to extend a road south from the proposed PUD to their property. Petitioners also argue that there is not substantial evidence in the record that would support such a finding and that the city should have provided an evidentiary hearing to receive evidence concerning the feasibility of providing access from the PUD south to petitioners' property.

We have already rejected petitioners' challenge to the city's interpretation of SZCDC 7.201.03(F). As interpreted by the city, SZCDC 7.201.03(F) does not require access from the subdivision to petitioners' property because petitioners currently have access onto Highway 99. Given that independent basis for concluding that SZCDC 7.201.03(F) does not require access to petitioners property from the PUD, even if we agreed with petitioners concerning the adequacy of the city infeasibility findings and the evidentiary support for those findings, a remand to require that the city conduct an evidentiary hearing and additional findings would serve no purpose. Accordingly, we do not consider the first subassignment of error under the third assignment of error.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Once a PUD receives preliminary development plan approval, an applicant must prepare a final development plan for city approval. SZCDC 2.202.03(A). Where a PUD includes a

subdivision, a final subdivision plat must be submitted for concurrent approval with the PUD final development plan. SZCDC 2.202.03(B). If the PUD final development plan includes changes that are not reflected in the preliminary development plan, the city must approve those changes. SZCDC 2.202.04(B) distinguishes between minor changes and major changes.

"Changes in Approved Plans

"1. Major Changes

> "Proposed major changes in a Final Development Plan shall be considered the same as a new petition, and shall be made in accordance with the procedures specified in Section 2.202.

"2. Minor Changes

> "Minor changes in a Final Development Plan may be approved by the Council without further public hearing or Commission review, provided that such changes do not increase densities, change boundaries or uses, or change the location or amount of land devoted to specific uses." SZCDC 2.202.04(B).

As previously noted, the approved preliminary development plan proposes to dedicate most of the disputed triangle to the city. Petitioners contend that the subdivision applicant's conveyance of the disputed triangle to petitioners constitutes a major change, because SZCDC 2.202.04(B)(2) specifically states that changes that "change boundaries" are not minor changes. Petitioners contend the city's preliminary development plan approval "should be rescinded, and the applicants [should be] required to submit a new application as they are required to do under [SZCDC 2.202.04(B)(1)]." Petition for Review 9.

The city provides two responses. First, the city contends that on June 10, 2003, when the city rendered its decision granting PUD preliminary development plan approval, the applicant owned the property that was included in the PUD. Because the change in ownership postdates the challenged decision, it could not have any effect on the city's preliminary development plan approval. Second, the city argues that SZCDC 2.202.04(B) applies at the time of *final* development plan approval, not at the time of *preliminary* development plan approval. The

challenged decision grants preliminary development plan approval, not final development plan approval. The city contends that while the conveyance of the disputed triangle may affect the city's review of the PUD *final* development plan when it is submitted in the future, the conveyance of the disputed triangle does not void the *preliminary* development plan approval.

We agree with both of the city's responses.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

On June 6, 2003, four days before the June 10, 2003 city council meeting and decision on remand, the city mailed a copy of the agenda to petitioners.[6] That was the only notice that the city gave petitioners in advance of its June 10, 2003 decision on remand. There was an error in the agenda. The top of the agenda states the city council meeting would be held on June 20, 2003. Supplemental Record 1. A footer at the bottom of the agenda indicates the city council meeting would be held on June 10, 2003. *Id*. As previously noted, the meeting was actually held on June 10, 2003. Petitioners did not attend the June 10, 2003 meeting. In their first assignment of error, petitioners contend that the city's misleading June 6, 2003 notice, which was provided only four days before the June 10, 2003 meeting and decision on remand, violates ORS 197.763(2). According to petitioners, that defective notice prejudiced petitioners' substantial rights and requires that the city's decision be remanded.

As noted earlier, the city did not provide an opportunity for an evidentiary hearing on June 10, 2003. Notwithstanding that choice by the city, if our decision in *McFall I* required that the city conduct an *evidentiary* hearing on remand, the city's notice of that hearing would have to comply with ORS 197.763(2).[7] *Hausam v. City of Salem*, 178 Or App 417, 422-23, 37 P3d 1039

[6] Although the record submitted by the city does not reflect this date of mailing, we do not understand the city to dispute petitioners' contention that the agenda was mailed to their attorney on June 6, 2003.

[7] The agenda that the city sent on June 6, 2003 clearly does not comply with ORS 197.763(2). Among other things, that statute requires that the notice of hearing be given at least 20 days before the evidentiary hearing to property owners within 100 feet of the property that is the subject of the notice. Petitioners own adjacent

(2001). If our decision in *McFall I* did not require that the city conduct an evidentiary hearing, ORS 197.763(2) does not apply, and it is much less clear whether the city's misleading notice, which was provided only four days before the meeting at which the city council adopted its decision on remand, provides a basis for reversal or remand.

Although our decision in *McFall I* could probably have been clearer, it did not require that the city conduct an evidentiary hearing on remand. In responding to petitioners' first two assignments of error in *McFall I*, our decision presented the city with at least three options. First, the city could adopt the interpretation that the city's attorney presented in its brief in *McFall I*. Adopting that legal interpretation would not necessarily require that the city provide an opportunity for a hearing to present evidence or legal argument. The city's "Section 2" findings select this option.

The city's second option would have been to provide an evidentiary hearing to accept evidence concerning the feasibility of extending a road from the PUD south to petitioners' property across the steep slopes, wetlands and creek that divide petitioners' property from the PUD. Following that evidentiary hearing, the city council could have adopted appropriate findings concerning the feasibility of extending the road. Although this is the option petitioners favor, it is not the option the city selected.

Finally, we agree with the city that our decision in *McFall I* gave the city the option of attempting to adopt better findings on remand, based on the existing evidentiary record, to explain why the city believes extending a road south from the PUD to petitioners' property is infeasible. Apparently that is what the city was attempting to accomplish in its "Section 1" findings, quoted earlier in this opinion. Although our *McFall I* decision states that we agreed with petitioners that the city's infeasibility finding "was not supported by substantial evidence in the record," the footnote that accompanies that statement makes it reasonably clear that the evidentiary problem we resolved in

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property and were given only four days prior notice. ORS 197.763(2) also sets out the required content of the notice, and the June 6, 2003 agenda does not meet the content requirements.

petitioners' favor was attributable to the lack of any citations to evidence of infeasibility in the decision itself or the city's brief, rather than LUBA's independent review of the evidentiary record. 44 Or LUBA at 499.

As we have already explained, the city interpreted SZCDC 7.201.03(F) not to apply in this case (option 1 above), because petitioners' property had access to Highway 99 on the date the decision on remand was adopted. As we explained in *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 208 (2001), adoption of a new interpretation of applicable law following a LUBA remand, may give rise to a right to present additional evidence or additional legal argument. However, the circumstances that may give rise to that right are relatively circumscribed. As the Court of Appeals explained in *Gutoski v. Lane County*, 155 Or App 369, 373-74, 963 P2d 145 (1998):

> "We * * * agree with LUBA that, in certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." *Id*. at 373-74 (emphasis in original; citations and footnote omitted).

Petitioners do not argue that the city's interpretation of SZCDC 7.201.03(F) significantly changed an existing interpretation or that it is an interpretation that petitioner could not have anticipated. Neither do petitioners argue that they could have presented relevant evidence following LUBA's remand to demonstrate that SZCDC 7.201.03(F), if interpreted in the way the city council ultimately interpreted SZCDC 7.201.03(F), nevertheless requires that access be extended south to

petitioners' property from the PUD.[8] Finally, petitioners do not argue that they had a right to a limited hearing to present legal argument on June 10, 2003, or what that legal argument might have included.

Based on our conclusion that the city was not obligated to provide either an evidentiary hearing or a more limited hearing for the purpose of allowing additional legal argument, it would appear to follow logically that the city's notice error in this case provides no basis for reversal or remand. In *Hausam*, 178 Or App at 423 n 5, the Court of Appeals specifically left open the question of what type of notice might be required in that circumstance:

> "We do not suggest that [the ORS 197.763] process applies when the matter on remand does not involve consideration of evidence but addresses only matters of law. We express no opinion on notice requirements to be applied under such circumstances."

It admittedly seems strange that petitioners might have no right to receive accurate prior notice of the city's proceedings on remand in this case, when petitioners' appeal to LUBA is the reason the city adopted the June 10, 2003 decision on remand. However, given the reasoning in the Court of Appeals' decision in *Hausam*, it seems unlikely the Court of Appeals would extend the full notice and other procedural requirements of ORS 197.763 to a case where no evidentiary hearing is required to respond to a LUBA remand and the local government elects in advance of that proceeding not to provide an evidentiary hearing on remand. In that circumstance, even if petitioners have a right to accurate notice of the proceedings on remand, they likely have no right to participate in those proceedings beyond a right to attend and observe the proceedings.

Our conclusion that ORS 197.763 does not apply to the city's proceedings on remand means that the source of any legal requirement for the timing and substance of the notice the city was legally obligated to provide to petitioners in advance of its June 10, 2003 meeting must be

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[8] As interpreted by the city, petitioners would have to present evidence that ODOT has acquired or condemned their access. That was not the case on June 10, 2003 and petitioners do not claim that is the case today.

found elsewhere. The city presumably remains obligated to ensure that its notices comply with whatever other notice requirements might apply under state or local law to the type of proceeding the city conducts on remand. For example, even where no public hearing is proposed, ORS 192.640 imposes certain minimum requirements for notices of regular and special public meetings and executive sessions. However, petitioners' argument regarding the defective notice is not based on ORS 192.640 or any other statutory or local authority. Rather, it is based entirely on their erroneous premise that ORS 197.763(2) applies and that the notice the city gave on June 6, 2003 does not comply with ORS 197.763(2). Petitioners are clearly correct that the agenda the city sent to petitioners on June 6, 2003 was insufficient to comply with ORS 197.763(2), but petitioners are incorrect in their premise that the agenda that the city mailed to petitioners on June 6, 2003 was required to comply with ORS 197.763(2).

Petitioners neither identify applicable legal requirements for the timing and substance of the notice of the city's proceedings on remand nor demonstrate that such legal requirements were violated by the agenda that the city sent to petitioners on June 6, 2003. Accordingly, the first assignment of error is denied.

The city's decision is affirmed.