

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city limited land use decision
4 approving a subdivision and variance.

5 **FACTS**

6 Owners of a 10.2-acre parcel contiguous to the
7 Philomath city limits applied to the city for approval of a
8 47-lot subdivision. The application included two variance
9 requests, one to allow duplexes on two of the proposed lots,
10 and the other to decrease the minimum block sizes within the
11 subdivision. Although the subject parcel is outside the city
12 limits, it is under the city's jurisdiction and is subject
13 to city development standards pursuant to an Urban Growth
14 Management Agreement between the city and Benton County.

15 With the exception of the southwest corner, the subject
16 property is rectangular and fronts two streets. South 19th
17 Street borders the property to the west and Chapel Drive
18 borders it to the south. Both South 19th Street and Chapel
19 Drive are designated major collector streets. At the
20 southwest corner, at the intersection of South 19th Street
21 and Chapel Drive, is a 0.5-acre parcel with a single family
22 dwelling. That 0.5-acre parcel is not part of the proposed
23 subdivision. The subdivision includes two access streets
24 onto South 19th Street. No access is proposed to Chapel
25 Drive.

26 West of South 19th Street, a trucking business is

1 located near one of the two proposed access points. In
2 addition to that business, there are three residences west
3 of South 19th Street, each on an approximately one-acre
4 parcel. South of the property, across Chapel Drive, is a
5 56-acre farm zoned EFU. Philomath Middle School is east of
6 the site. North of the site is a bicycle/pedestrian way
7 beyond which is an approximately six-acre parcel owned by
8 the Clemens Foundation. The northwest and east boundaries
9 of the site border the city.

10 After a public hearing, the city planning commission
11 denied the duplex variance and approved the proposed
12 subdivision and block size variance. Petitioner appealed the
13 subdivision and block size variance approvals to the city
14 council. After a de novo public hearing, the city council
15 denied the appeal, adopted the planning commission staff
16 report and approved the subdivision and block size variance.

17 This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioner contends the city's findings of compliance
20 with Philomath Subdivision Ordinance (PSO) 5.100, the Street
21 Design Guidelines, are inadequate and not based on
22 substantial evidence because they do not adequately address
23 traffic safety issues.

24 PSO 5.100, which falls under the general category of
25 "Design Standards," states:

26 "Section 5.100. Streets. (1) General. The
27 location, width, and grade of streets shall be

1 considered in their relation to existing and
2 planned streets, topographical and drainage
3 conditions, public convenience and safety, the
4 proposed use of land to be served by the streets,
5 and full land utilization which will not result in
6 tracts of vacant inaccessible land. Locations and
7 standards shall be based on the provisions of the
8 Comprehensive Plan and other applicable City
9 policies. * * * * *

10 According to petitioner, PSO 5.100 requires an
11 evaluation of the traffic generated by the proposed
12 subdivision, and of existing traffic safety issues.
13 Petitioner cites to testimony regarding existing traffic
14 concerns on South 19th Street and the impact of additional
15 traffic from the proposed subdivision.

16 The city responds that petitioner has mischaracterized
17 the requirement of PSO 5.100 and that the street design
18 guidelines do not require an evaluation of traffic impacts.
19 Rather, the design guidelines relate to the location, width
20 and grade of new streets. The city contends that the only
21 relevance of the guidelines to existing streets is that the
22 city must give consideration to the relationship between new
23 and existing streets in determining the location, width or
24 grade of the new streets.

25 The city is correct. Petitioner's argument is based on
26 a misconstruction of PSO 5.100. That section does not
27 require an analysis of the traffic to be generated by the
28 subdivision, or of traffic safety concerns on surrounding
29 streets. Under PSO-5.100, public convenience and safety are
30 relevant only in the context of evaluating the location,

1 width and grade of streets within the subdivision.
2 Petitioner has not challenged the adequacy of the city's
3 findings on public convenience or safety with regard to the
4 location, width or grade of the streets within the
5 subdivision.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner contends the city's decision violates
9 Philomath Comprehensive Plan (PCP) Section IV, Urbanization,
10 Policy 9, and Section V, Public Facilities, Policy 1,
11 because the decision includes no findings on the impact of
12 the proposed subdivision on public schools.

13 The city did not make findings on the inapplicability
14 of these provisions. The city responds, however, that
15 neither of these comprehensive plan sections constitute
16 mandatory approval criteria for subdivision approval. The
17 city argues that its failure to make findings regarding the
18 inapplicability of those provisions is not a basis to remand
19 the decision, since the provisions' unambiguous language
20 clearly establishes their inapplicability to a subdivision
21 request.

22 This Board is required to defer to a local governing
23 body's interpretation of its own enactment, unless that
24 interpretation is contrary to the express words, purpose or
25 policy of the local enactment or to a state statute,
26 statewide planning goal or administrative rule which the

1 local enactment implements. ORS 197.829; Gage v. City of
2 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
3 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).¹

4 Generally, under Weeks v. City of Tillamook, 117 Or App
5 449, 453-54, 844 P2d 914 (1992), this Board is required to
6 review a governing body's interpretation of the local code
7 and may not interpret the local code in the first instance.
8 However, in some instances, where the inapplicability of a
9 provision is clear on its face or the challenge as to its
10 applicability is so untenable as to obviate the need for the
11 city's authoritative interpretation, a remand for such
12 purpose is unnecessary. Gage v. City of Portland, 123 Or
13 App 269, 275, 860 P2d 282 (1993), rev'd on other grounds,
14 319 Or 308, 877 P2d 1187 (1994); Towry v. Lincoln City, 26
15 Or LUBA 554 (1994); Terra v. City of Newport, 24 Or LUBA 438
16 (1993).

17 PCP Section IV, Urbanization, Policy 9 states:

18 "When considering annexation requests, the City of
19 Philomath should evaluate its ability to provide
20 services to areas proposed for annexation."

21 PCP Section V, Public Facilities and Services, General
22 Policy 1 states:

23 "Public facilities should be designed with

¹ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

1 sufficient capacity to meet the City's future
2 needs."

3 PCP Section IV, Policy 9 applies only to requests for
4 annexation. It is not an approval criterion for a
5 subdivision application. PCP Section V, Policy 1 states the
6 city's aspiration regarding the design of public facilities.
7 The challenged subdivision is not a public facility.²
8 Petitioner's arguments that PCP Section IV, Policy 9
9 requires an evaluation of the adequacy of schools, and that
10 PCP Section V, Policy 1 requires an evaluation of school
11 capacity, are untenable. No purpose would be served by
12 remanding this decision to the city for findings regarding
13 the applicability of these sections when their
14 inapplicability is clearly stated.

15 The second assignment of error is denied.

²Even if PCP Section V required an evaluation of the design of public facilities within a subdivision request, it would not apply here because schools are not among the public facilities over which the city has authority. PCP Section V begins:

"In order to accommodate future growth and development in Philomath, public facilities and services will need to be provided. Some of these facilities and services are the responsibility of the City; others, such as schools, postal service, electric power, telephone service, natural gas, and garbage collection are the responsibilities of other public or private entities.

This plan element is intended to provide policy direction for the provision of public facilities and services by the City, as well as to encourage City cooperation with other providers of facilities and services."

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner contends the city's approval of a variance
3 to the block size design standard of PSO 5.120(2) is based
4 on inadequate findings and no substantial evidence.

5 PSO 5.120(2) states:

6 "No block shall be less than 600 feet or more than
7 1,000 feet in length between street corner lines
8 unless it is adjacent to an arterial street or
9 unless the topography or the location of adjoining
10 streets justifies an exception. * * *"

11 The city granted a variance to PSO 5.120(2) to allow a
12 block of approximately 200 feet.³ Petitioner argues the
13 variance violates Philomath Zoning Ordinance (PZO) 22.010,
14 the zoning variance criteria. However, as the city's
15 decision shows, the applicable criteria for subdivision
16 variances are found in PSO 6.030. The city argues
17 petitioners' variance challenge must be denied because
18 petitioner has relied upon the incorrect variance procedure.

19 Petitioner's arguments rely upon the incorrect variance
20 criteria. The criteria for the two variance procedures are
21 similar, however, and to the extent her allegations of error
22 can be reconciled with the applicable criteria, we will
23 evaluate the merits of the arguments.

24 **A. PZO 22.020(a) and PSO 6.030(a)**

25 Petitioner argues the decision violates PZO 22.020(a)

³It is unclear why the city processed the request for a reduced block length as a variance request when PSO 5.120(2) allows an adjustment to the block length based on topography or the location of adjoining streets.

1 which states:

2 "The circumstances causing the need for the
3 variance are not of the applicant's making[.]"

4 PSO 6.030(a) includes a similar, but distinct, criterion:

5 "Exceptional or extraordinary circumstances apply
6 to the property which do not apply generally to
7 other properties in the same vicinity, and result
8 from lot size or shape, topography or other
9 circumstances over which the owners of property
10 since enactment of this Ordinance have had no
11 control. Project costs shall not be considered as
12 an exceptional or extraordinary circumstance."

13 Petitioner argues the circumstances necessitating the
14 variance are entirely of the developer's own making, based
15 on the developer's desired density of the development.

16 Petitioner's argument does not respond to PSO 6.030(a).
17 The city was not required to find that the need for the
18 variance was not of the applicant's making. The applicant
19 is proposing a density permitted by the residential zoning
20 of the property, and the city applied PSO 6.030(a) to
21 conclude that the location and existing surrounding
22 development justified a variance to the 600 foot block size
23 requirement. The record reflects that the city's findings
24 regarding the physical characteristics of the site and
25 surrounding development are factually based.

26 **B. PZO 22.020(c) and PSO 6.030(c)**

27 Petitioner also argues the variance violates PZO
28 22.020(c), which states:

29 "Granting the variance will not impair the use or
30 development of adjacent property."

1 PSO 6.030(c) states:

2 "The variance would not be materially detrimental
3 to the purpose of this ordinance, or to property
4 in the same vicinity in which the property is
5 located, or otherwise conflict with the objectives
6 of any City plan or policy."

7 These two provisions require a similar analysis of the
8 impacts of the requested variance on surrounding properties.
9 However, while petitioner makes numerous arguments that the
10 subdivision will impair the use of adjacent properties, she
11 makes no argument that these impacts will result from the
12 block size variance. Petitioner argues the subdivision will
13 adversely impact a trucking company across South 19th
14 Street, that a large lumber mill in the vicinity will cause
15 noise conflicts with subdivision residents, and that the
16 operational practices of the farm south of the property
17 conflict with residential uses. These impacts do not
18 relate to the block size variance. Petitioner has not
19 established the variance approval will create adverse
20 impacts under either PZO 22.010 or PSO 6.030.

21 **C. PZO 22.010**

22 Finally, citing PZO 22.010, petitioner argues the city
23 was required to determine that the variance is necessary to
24 "protect the best interest of the surrounding property or
25 vicinity."

26 PZO 22.010 is the description and purposes section of
27 the zoning variance provisions, and states:

28 "The Planning Commission may authorize variances

1 to the requirements of this ordinance where it can
2 be shown that, because of special and unusual
3 circumstances related to a specific lot, strict
4 application of the ordinance would cause an undue
5 or unnecessary hardship. In granting a variance,
6 the Planning Commission may attach conditions
7 which it find necessary to protect the best
8 interest of the surrounding property or vicinity
9 and otherwise achieve the purposes of this
10 ordinance."

11 The applicable subdivision variance section in Article
12 VI does not include a similar description and purpose
13 section.⁴ Petitioner has not provided a basis for our
14 review under PSO-6.030.

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 Petitioner challenges the adequacy of the condition of
18 approval requiring half-street improvements on the portions
19 of South 19th Street and Chapel Drive fronting the
20 subdivision. Petitioner argues that the extent of the
21 half-street improvements is not sufficiently detailed, and
22 that the improvements will not be sufficient, since the
23 developer is required to improve only the portions of the
24 streets fronting the property. This will leave unimproved
25 the west side of South 19th Street, the south side of Chapel
26 Drive and the intersection of South 19th and Chapel Drive.

⁴Moreover, petitioner misconstrues the language of PZO 22.010. Petitioner has taken out of context one phrase of the planning commission's authority to condition variances. In evaluating a variance request, the city is not required to find that the entire subdivision would protect the best interest of the surrounding properties.

1 Petitioner argues there is neither evidence in the record to
2 support the city's condition nor any explanation of why the
3 west side of South 19th Street should not benefit from the
4 development.

5 Petitioner characterizes these limited improvement
6 requirements as "inherently unfair and biased." However,
7 petitioner states no legal standard that the city's road
8 improvement condition violates.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.