

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 approving a 61-lot planned unit development (PUD) on 11.54
5 acres in the city's Low Density Residential (R-10) and
6 Medium Density Residential (R-4.5) zones.

7 **MOTION TO INTERVENE**

8 Matrix Development Corp. (intervenor), the applicant
9 below, moves to intervene on the side of the respondent.
10 There is no opposition to the motion, and it is allowed.

11 **FACTS**

12 Intervenor does not dispute petitioner's statement of
13 facts, except in minor particulars, and we adopt it in
14 relevant part:

15 "* * * The site consists of two relatively gently
16 sloping ridge tops, a smaller one on the west and
17 a larger one on the east. The ridge tops are
18 flanked by steep-sided stream-valley slopes.
19 There are also three unnamed tributaries of the
20 Willamette River on site. 4.81 of the 11.54 acres
21 are developmentally constrained due to the
22 presence of wetlands and riparian areas.

23 "The original proposal called for 69 units. It
24 was later reduced to 63 units, and by the time of
25 final approval, the total number of units was 61.
26 According to the findings, the development
27 includes shared outdoor recreation areas of at
28 least 26,500 square feet. This figure includes
29 8,000 square feet between lots, 10,500 square feet
30 in decks and patios, and an additional 8,000
31 square feet in the 4.81 acre open space of tract
32 3. The 8,000 square feet in the 4.81 acre open
33 space was based upon the location of a trail
34 through the open space connecting the developed

1 ridge tops.

2 "The trail was eliminated from the final proposal,
3 but staff found that 'the loss of square footage
4 along the trail would be offset by an increase in
5 the area near the cedar grove on the east ridge
6 that was created when [intervenor] reduced the
7 number of lots from 63 to 61.' Consequently, the
8 [city] relied upon the spaces between lots, decks
9 and patios, and open space near the cedar grove on
10 the east ridge, in finding compliance with the
11 shared outdoor recreation area requirements."
12 Petition for Review 2-3 (record citations
13 omitted).

14 On December 31, 1996, the city planning commission
15 approved the application, and both petitioner and intervenor
16 appealed to the city council. The city council denied both
17 appeals and, on May 1, 1997, approved a modified version of
18 the proposal earlier approved by the planning commission.

19 This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioner contends the city erred in concluding the
22 proposed development satisfies the city's Community
23 Development Code (CDC) 55.100(F). Because CDC 55.100(F)
24 refers to CDC 55.100(E) and the reference is important to
25 intervenor's response to petitioner's argument, we quote
26 both CDC 55.100(E) and (F):

27 "E. Private outdoor area.

28 "1. In addition to the requirements of
29 residential living, unit [sic] shall
30 have an outdoor private area (patio,
31 terrace, porch) of not less than 48
32 square feet in area;

1 "2. The outdoor space shall be oriented
2 towards the sun where possible; and,

3 "3. The area shall be screened or designed
4 to provide privacy for the users of the
5 space.

6 "F. Shared outdoor recreation areas.

7 "1. In addition to the requirements of
8 Subsection 'E,' usable outdoor
9 recreation space shall be provided in
10 residential developments for the shared
11 or common use of all the residents in
12 the following amounts:

13 "a. Studio up to and including two-
14 bedroom units: 200 square feet per
15 unit.

16 "b. Three or more bedroom units: 300
17 square feet per unit.

18 "2. The required recreation space may be
19 provided as follows:

20 "a. It may be all outdoor space; or,

21 "b. It may be part outdoor space and
22 part indoor space; for example, an
23 outdoor tennis court and indoor
24 recreation room; and,

25 "c. It may be all public or common
26 space; or,

27 "d. It may be part common space and part
28 private; for example, it could be an
29 outdoor tennis court, indoor
30 recreation room; and,

31 "e. Where balconies are added to units,
32 the balconies shall not be less than
33 48 square feet.

34 "3. The shared space shall be readily
35 observable to facilitate crime
36 prevention and safety."

1 The city first determined that 21,000 square feet are
2 required to meet CDC 55.100(F)(1).¹ The city based its
3 determination of compliance with CDC 55.100(F)(1) on the
4 following findings contained in the staff report:

5 "• Two (2) common areas between lots 28 and 29
6 and north of lots 26 and 27 contain 8,000
7 square feet.

8 "• Deck areas or outdoor patios of at least 100
9 square feet per unit contain 10,500 square
10 feet of usable space. * * *

11 "• 4.81 acres of open space in tract 3. * * *^[2]

12 "• A total of at least 26,500 square feet of
13 usable space is provided.

14 "The CDC requires that the outdoor space be
15 'usable.' The CDC does not define usable, but the
16 City Council finds it means accessible and that
17 areas proposed meet the requirements for shared
18 outdoor recreation areas." Record 6.

19 Petitioner acknowledges that the common areas and the

¹To obtain the figure of 21,000, the city multiplied 69 three-bedroom units by 300 square feet per unit. See CDC 55.100(F)(1)(b). As noted above, the number of units was reduced to 61 prior to the city council hearing; the finding reflects the earlier proposal of 69 units. Petitioner and intervenor agree that 18,300 square feet (61 units multiplied by 300 square feet/unit) are required to meet CDC 55.100(F)(1).

²As noted in our statement of facts, the staff report found that while the majority of the mentioned 4.81 acres was not accessible, a proposed trail over the 4.81 acres would provide about 8,000 square feet of accessible area along and adjacent to the trail. Record 937. The challenged decision finds that while the trail was omitted from intervenor's final proposal, the lost area was

"offset by an increase in the area near the cedar grove on the east ridge that was created when the applicant reduced the number of lots from 63 to 61. Staff found that there was parity in square footage [i.e., 8,000 square feet] and, therefore, CDC 55.100(F) would be met." Record 13.

1 area near the cedar grove together provide 16,000 square
2 feet of the 18,300 square feet required by CDC 55.100(F)(1),
3 but points out that an additional 2,300 square feet are
4 required. Petitioner notes that the requirement in CDC
5 55.100(F)(1) for shared outdoor recreation areas states the
6 space shall be provided in addition to the requirements of
7 CDC 55.100(E). Petitioner argues that the "outdoor private
8 area" (i.e., private decks and patios) provided to satisfy
9 the requirements of CDC 55.100(E) cannot also be included in
10 the area relied upon to calculate the amount of shared
11 outdoor recreation areas.

12 Intervenor responds that under CDC 55.100(F)(2), the
13 requirement for shared outdoor recreation area may be
14 satisfied by different kinds of space, including outdoor
15 space, indoor space, public or common space or private
16 space. Intervenor maintains that CDC 55.100(F)(1) may be
17 satisfied by the same type of space as is used to satisfy
18 CDC 55.100(E)(1). Intervenor adds that even if the space
19 used to satisfy CDC 55.100(E)(1) were excluded, "CDC
20 55.100(E)(1) requires only 2,928 square feet be provided by
21 this proposal."³ Response Brief 3. We understand
22 intervenor to say that because the proposed development
23 would create an excess of the "outdoor private area"
24 required by CDC 55.100(E)(1), that excess may be applied to

³The 2,928 square feet is calculated by multiplying the number of units (61) by the required "outdoor private area" (48 square feet) per unit.

1 satisfy the requirement for "usable outdoor recreation
2 space" under CDC 55.100(F)(1).

3 The balance of intervenor's argument is confusing:

4 "Petitioner * * * argues that the required outdoor
5 recreation space is not 'accessible or usable'.
6 * * * The CDC requires only that the outdoor
7 recreation space be 'usable', not accessible. The
8 CDC does not define 'usable'. 'Usable', in the
9 context of CDC Chapter 55, can mean an area
10 providing privacy, noise reduction (see CDC
11 55.100(D) or areas functioning as buffers (see CDC
12 55.100(C)). In fact, the City Council interpreted
13 'usable' as accessible and meeting the CDC's
14 requirements. (Rec. 6) The city's interpretation
15 is entitled to deference. ORS 197.829(1). The
16 record shows that the areas counted as open space
17 are [usable] since the decks and patios and two
18 open space areas are accessible." Response Brief
19 4.

20 The confusion apparently stems in part from obvious
21 contradictions in the CDC itself which are neither
22 recognized nor addressed by the challenged decision. CDC
23 55.100(E) and (F) establish two categories of outdoor areas:
24 "private" and "shared." The shared outdoor areas are to be
25 in addition to the private outdoor areas. The private
26 outdoor areas include patios, terraces and porches, which
27 are to be "screened or designed to provide privacy." The
28 shared outdoor areas include "part indoor" and "part
29 private" space, but are to be "usable outdoor recreation
30 space" for the "shared or common use of all residents."
31 Nevertheless, the shared outdoor areas may include balconies
32 of not less than 48 square feet.

33 It appears CDC 55.100(F) contains several errors,

1 perhaps attributable to word processing. An outdoor tennis
2 court and an indoor recreation room are used as examples of
3 both "outdoor and indoor space" and "part common space and
4 part private" space. These examples make no sense as
5 illustrations of common and private space; they do not both
6 fit within the general category of usable outdoor recreation
7 space. The reference to balconies is obscure and appears
8 misplaced. It may not be possible to reconcile the
9 provisions of CDC 55.100(F) among themselves or with CDC
10 55.100(E).

11 The challenged decision does not find that the proposed
12 patios and decks are accessible or shared. Even if we
13 follow intervenor's admonition and defer under ORS
14 197.829(1) to the city's interpretation of "usable" as
15 meaning "accessible" (notwithstanding intervenor's earlier
16 statement that "[t]he CDC requires only that the outdoor
17 recreation space be 'usable', not accessible"), we cannot
18 conclude that CDC 55.100(F)(1) is satisfied. The
19 interpretation does not make clear to whom the space must be
20 accessible. We doubt that under any colorable
21 interpretation the requirement for "usable outdoor
22 recreation space * * * for the shared or common use of all
23 the residents" could be satisfied by balconies or by private
24 patios and decks, which CDC 55.100(E) requires be "screened
25 or designed to provide privacy." We also doubt that under
26 any colorable interpretation, the requirement for private

1 outdoor areas that must be "screened or designed to provide
2 privacy for the users of the space" also could be "readily
3 observable to facilitate crime prevention and safety," as
4 CDC 55.100(F)(3) requires.

5 Finally, the decision does not explain how, as
6 intervenor contends, the kind of space that fits within the
7 category defined by CDC 55.100(E) can also satisfy CDC
8 55.100(F), such that excess "outdoor private areas" can be
9 carried over to satisfy a requirement for "usable outdoor
10 recreation space."

11 Confusion in the CDC does not justify confusion in the
12 challenged decision. No reasonable person could interpret
13 CDC 55.100(E) and (F) as the city has or as intervenor
14 contends it has. It may be necessary for the city to
15 recognize error in the drafting of these provisions to
16 provide a colorable interpretation for our review.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioner contends the challenged decision does not
20 contain adequate findings to address CDC 30.100(C) ("Wetland
21 and Riparian Transition Area"), which provides:

22 * * * * *

23 "1. The minimum width of the transition area will
24 be 25 feet from the wetland area or stream
25 edge, or to the top of the nearest clearly
26 defined bank, whichever is greater * * *.
27 Other site factors, such as topography,
28 hydrology, soils, or vegetation may require
29 this transition area be larger than the

1 minimum. A determination will be made by the
2 Planning Director as to the actual width of
3 the transition area based on staff's site
4 analysis.

5 "* * * * *" (Emphasis added.)

6 Intervenor answers that

7 "* * * the CDC expressly allows development to
8 occur within the transition area. In fact, the
9 incorporated staff report * * * states: 'The only
10 development in the transition area will be the
11 construction of a sanitary sewer line and the
12 connective trail.' This is consistent with the
13 evidence that the City Council relied upon that
14 the undisturbed buffer (the transition area) would
15 be in excess of twenty-five feet from all wetland
16 boundaries." Response Brief 6 (emphasis in
17 original).

18 The challenged decision finds:

19 "* * * CDC 30.100(C)(1) requires that the
20 transition area from the wetland area or stream
21 edge be a minimum of 25 feet and the Planning
22 Director has the discretion to increase the
23 transition area. [The] November 25, 1996 letter
24 [of the wetland scientist of intervenor's
25 engineering consultant] states that 'an
26 undisturbed buffer in excess of 25 feet would be
27 maintained from all wetland boundaries.' The City
28 Council finds that substantial evidence supports a
29 finding that this criterion is satisfied based, in
30 part on the staff's determination that this
31 section is satisfied, which the City Council
32 hereby incorporates by reference." Record 10.

33 We agree with intervenor that development, subject to
34 stated protections and limitations, is permitted in the
35 transition area. That does not mean the transition area can
36 be smaller than CDC 30.100(C)(1) requires. As petitioner
37 points out, the staff report does not discuss the dimensions

1 of the transition area at all. See Record 948-49. The
2 November 25, 1996 letter upon which the challenged decision
3 relies does not demonstrate that the minimum width of the
4 transition area will reach to the top of the nearest clearly
5 defined bank, if that is greater than 25 feet. We agree
6 with petitioner that both components of CDC 30.100(C)(1)
7 must be addressed.

8 The second assignment of error is sustained.

9 **THIRD ASSIGNMENT OF ERROR**

10 The challenged decision grants several variances,
11 including one to allow greater than 40 percent lot coverage
12 in the R-4.5 zone and greater than 35 percent lot coverage
13 in the R-10 zone. Petitioner contends the lot coverage
14 variance was permitted in violation of the criteria stated
15 in CDC 95.040 and that the decision is not supported by
16 substantial evidence.⁴ Petitioner correctly observes that

⁴CDC 95.040 provides:

"The Planning Commission shall approve, approve with conditions or deny the variance request based on findings of fact with respect to each of the following criteria:

- "1. Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, legally existing prior to the date of this ordinance, topography, or other circumstances over which the applicant has no control.
- "2. The variance is necessary and the minimum required for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity.

1 while CDC 24.010, which states the purpose of PUDs, supports
2 design flexibility, CDC 24.170(B) specifically preserves the
3 application of base zone lot coverage provisions.
4 Petitioner argues the lot coverage variance is based upon
5 intervenor's desire to place more units on the property than
6 can be accommodated within the requirements of the base
7 zones. Petitioner acknowledges the topography of the
8 subject property creates development constraints, but argues
9 these "do not mean the intervenor is automatically entitled
10 to a variance from each code provision which may reduce the
11 number of allowable units." Petition for Review 17.

12 It is not necessary to address each of petitioner's
13 arguments with respect to each of the variance criteria.
14 The challenged decision adopts the findings in the staff

"3. The authorization of the variance will not be materially detrimental to the public health, safety or welfare, to the purposes of this code, or to property in the zone or vicinity in which the property is located, or otherwise conflict with the policies of the West Linn Comprehensive Plan.

"4. The hardship is not self-imposed and the variance request is the minimum variance which would alleviate the hardship.

"5. The hardship does not arise from a violation of this ordinance.

"6. The [applicant's] proposal in all other respects conforms to and is consistent with all other regulatory requirements, adequate provision has been made for traffic circulation and open space and the variance has been considered by the effected departments including but not limited to: fire, police and other departments responsible for sewer, water and drainage."

1 report which, in turn, incorporates the findings in the
2 development application. Record 13, 649-50, 946. The
3 decision expressly finds that the topography ("rugged
4 terrain") of the site is a hardship; that the applicant has
5 a right, substantially the same as the right of owners of
6 other properties in the same zone or vicinity, to develop to
7 the maximum density allowed by the CDC; that permitting a
8 variance is consistent with the purpose of the PUD overlay;
9 and that the hardship which justifies a variance is not
10 self-imposed. We agree with intervenor that the city's
11 interpretation or inherent interpretation of CDC 95.040(1)-
12 (4) is well within its discretion. Alliance for Responsible
13 Land Use v. Deschutes Cty., 149 Or App 259, 266, ___ P2d ___
14 (1997); deBardelaben v. Tillamook County, 142 Or App 319,
15 922 P2d 683 (1996). In view of that interpretation, the
16 city's findings and its decision to grant a lot coverage
17 variance are supported by substantial evidence.

18 Intervenor contends petitioner did not raise the issue
19 of compliance with CDC 95.040(5) and (6) below and,
20 therefore, cannot raise this issue on appeal. ORS
21 197.835(3). Since petitioner does not demonstrate that he
22 did raise this issue below, we agree with intervenor that
23 the issue of compliance with CDC 95.040(5) and (6) was
24 waived.

25 The third assignment of error is denied.

26 The city's decision is remanded.