

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

3
4 CITY OF ALBANY,
5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent.*

07/03/18 AM 10:14 LUBA

11
12 LUBA No. 2018-029

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Linn County.

18
19 M. Sean Kidd, Albany, filed the petition for review and argued on behalf
20 of petitioner. With him on the brief was Delapoer Kidd, P.C.

21
22 Kevan J. McCulloch, Deputy County Attorney, Albany, filed a response
23 brief and argued on behalf of respondent.

24
25 RYAN, Board Chair; BASSHAM, Board Member, participated in the
26 decision.

27
28 REVERSED

07/03/2018

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving a variance, a partition, and a conditional use permit for a single-family dwelling.

FACTS

Petitioner has an established urban growth boundary (UGB), consistent with Statewide Planning Goal 14 (Urbanization). In 2017, the owners of a 1.98-acre parcel located at the southwest corner of Knox Butte Road and Scravel Hill Road applied to the county planning department to partition their existing parcel into a one-acre parcel and a .98-acre parcel. The property is located within petitioner's UGB but outside of the city limits, in the county's Urban Growth Area Zone (UGAZ). Linn County Code (LCC) Chapter 930. The property includes an existing dwelling, and the applicants proposed to construct a new home on the newly created one-acre parcel. The property and surrounding properties are served by on-site septic systems and wells, and no sewer or water lines are located within one-third of a mile of the property. Knox Butte Road and Scravel Hill Road are county roads that do not currently meet city road standards.

The property is zoned UGA-UGM-20, pursuant to the LCC. The UGA-UGM-20 zoning district requires a minimum parcel size of 20 acres.¹ The

¹ LCC 930.700(D) provides:

1 UGA-UGM-20 zoning district does not allow new dwellings as outright
2 permitted uses unless the dwelling is replacing an existing dwelling. LCC
3 930.710. Rather, one new single-family dwelling may be allowed as a
4 conditional use. LCC 930.720. Finally, the UGA-UGM-20 district provides
5 minimum parcel depth and width standards of 500 feet, and the two new
6 parcels would be approximately 179-feet wide and 231-feet deep. LCC
7 934.710(D).

8 The applicants sought a variance to the minimum acreage standard and
9 the minimum lot width and depth standards. The LCC includes general criteria
10 that apply to all variance applications, and also includes specific criteria for a
11 variance to the minimum size of a parcel in the UGA-UGM zoning district. *See*
12 n 1. LCC 938.340 provides:

13 “The Director may approve a variance to the minimum property
14 size of an authorized unit of land in the UGA–UGM zoning
15 district if:

16 “(A) the criteria of LCC 938.300 (B)(2) and (3) are met;

17 “(B) the proposal is consistent with the affected city’s
18 comprehensive plan; and

19 “(C) the City does not object to the Department’s approval of the
20 variance.”

“The UGA-UGM zoning district is composed of four zoning districts (UGM-2 ½, UGM-5, UGM-10, and UGM-20) which are distinguished only by their property size standards.”

1 Petitioner provided written comments to the planning director objecting to the
2 variance on the basis that the variance is inconsistent with the city's
3 comprehensive plan provisions. Record 157-58. The planning director issued a
4 decision denying the applications pursuant to LCC 938.340(B) and (C) after he
5 concluded that the variance was not consistent with the city's comprehensive
6 plan, and that the city objected to the variance.

7 The applicants appealed the decision to the county planning commission,
8 and petitioner provided additional and expanded comments to the planning
9 commission objecting to the variance on the basis that the variance is
10 inconsistent with the city's comprehensive plan. Record 149-53. The planning
11 commission approved the applications. Petitioner appealed that decision to the
12 board of county commissioners, which affirmed the planning commission's
13 decision and approved the applications with conditions. This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 A portion of petitioner's first assignment of error challenges the board of
16 county commissioners' conclusion that LCC 938.340(B) and (C) are satisfied.

17 **A. LCC 938.340(C)**

18 In a portion of the first assignment of error, petitioner argues that
19 petitioner's objection to the variance pursuant to LCC 938.340(C) prevents the
20 board of county commissioners from approving the variance. In essence, we
21 understand petitioner to argue, if petitioner objects to a proposed variance
22 pursuant to LCC 938.340(C), the county may not approve it. Petitioner also

1 argues that the decision includes no findings addressing LCC 938.340(C) or the
2 petitioner's objection to the variance.

3 The board of county commissioners concluded that LCC 938.340(B) and
4 (C) were met, but the findings adopted by the board of county commissioners
5 do not address LCC 938.340(C) or acknowledge petitioner's ongoing
6 objections to the variance during the proceedings below. Rather, the findings
7 address LCC 938.340(B), and conclude that the variance is consistent with
8 petitioner's comprehensive plan. Record 15-16.

9 The county does not dispute that the decision does not specifically
10 address LCC 938.340(C). However, in a portion of its response brief, the
11 county argues that "it is possible that the provisions of LCC 938.340 are not
12 applicable in this instance." Response Brief 11. In its response brief, the county
13 posits that LCC 938.340 applies only to decisions by the planning director, and
14 not to decisions that are made by the planning commission or the board of
15 county commissioners. The county relies on the language in LCC 938.340 that
16 provides that "[t]he Director may approve" a variance in support of its
17 argument. We understand the county to interpret LCC 938.340 for the first time
18 in the response brief as inapplicable to a decision on a variance application in
19 the UGA-UGM zone except when the decision is made by the community
20 development director.

21 We reject the county's argument. The county's interpretation put forth
22 for the first time in its response brief—that LCC 938.340 does not apply to a

1 decision by the board of county commissioners—is not reflected in the decision
2 and is therefore not an interpretation by the county. *See Munkhoff v. City of*
3 *Cascade Locks*, 54 Or LUBA 660, 666 (2007) (interpretations offered for the
4 first time in a response brief are not interpretations made by the local
5 government). Moreover, the board of commissioners applied the provisions of
6 LCC 938.340 and found that they were met. The county does not point to
7 anything in the LCC’s provisions governing appeals of director decisions to
8 indicate that the county intended that applicable criteria not apply in the event
9 of an appeal of a director decision to the planning commission or the board of
10 county commissioners.²

11 The county also responds that the board of county commissioners
12 impliedly interpreted LCC 938.340(C) as not allowing petitioner unfettered

² We note that the requirement for consistency with the city’s comprehensive plan that is found in LCC 938.340(B) is also found in other applicable LCC provisions, including LCC 933.260, which applied to the conditional use permit application. LCC 933.260 includes conditional use criteria for a proposed new dwelling in the UGAZ, as relevant here:

“(1) The proposed development is permitted and is consistent with the affected city’s comprehensive plan map designations and the future city zoning.

“ * * * * *

“(3) The affected city has reviewed the proposal and has not identified any substantial conflicts with its *Comprehensive Plan*, Facilities Plans or development standards.” (Emphasis in original).

1 discretion to object to a variance proposal on any grounds or no grounds at all.
2 Rather, the county argues that LCC 938.340(C) must be interpreted in context
3 with the requirement in LCC 938.340(B) that a variance be consistent with the
4 city’s comprehensive plan. The county argues that because the county
5 concluded that the variance is consistent with the city’s comprehensive plan
6 pursuant to LCC 938.340(B), the board of county commissioners found
7 petitioner’s objection pursuant to LCC 938.340(C) “unpersuasive.” Response
8 Brief 8-9.

9 If the county’s decision included the interpretation of LCC 938.340(B)
10 and (C) that the county puts forth in its brief, we would likely be required to
11 affirm the interpretation under ORS 197.829(1)(a) and *Siporen v. City of*
12 *Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Even without an explicit
13 interpretation, we think the county’s interpretation is the better one. In other
14 words, we disagree with petitioner that petitioner’s categorical objection to a
15 variance pursuant to LCC 938.340(C) would require the county to deny the
16 variance, absent any attempt by petitioner to explain the basis for its objection
17 to the city’s comprehensive plan or to another basis in the LCC for objecting.³

³ Our resolution of this issue makes it unnecessary to address the county’s alternative argument, raised for the first time in the response brief, that petitioner’s construction of LCC 938.340(C) as requiring the county to deny the variance if petitioner objects to it violates Article I, Section 21 of the Oregon Constitution. That provision is commonly referred to as the Non-Delegation Clause, and prohibits passing “any law, the taking effect of which

1 However, that is not what occurred here. Petitioner objected to the
2 variance on the basis that the variance is inconsistent with petitioner’s
3 comprehensive plan. We address that issue below.

4 **B. LCC 938.340(B)**

5 In another portion of the first assignment of error, petitioner argues that
6 the board of county commissioners’ conclusion that “the proposal is consistent
7 with the * * * city’s comprehensive plan” improperly construes the city’s
8 comprehensive plan, and argues that the proposed variance is not consistent
9 with the city’s comprehensive plan as a matter of law. Petitioner argues that the
10 proposed variance is inconsistent with Albany Comprehensive Plan (ACP),
11 Chapter 8: Urbanization, Goal 14 (ACP Chapter 8), including the background
12 summary for ACP Chapter 8 and several policies and implementation methods
13 for achieving those policies included in Chapter 8. As petitioner explained in
14 its appeal to the board of county commissioners:

15 “[T]he overarching policy direction regarding urbanization is to
16 discourage low-density sprawl and create a compact city that
17 allows for the efficient provision of urban services. This is
18 accomplished, in part, by minimizing the amount of development
19 in the urban fringe until urban services are available. Once these
20 services are available, there is greater development potential and
21 increased efficiencies in provision of services.” Record 64.

22 ACP Chapter 8, Policies 2 and 3 are to:

shall be made to depend on any authority, [e]xcept as provided in this
Constitution[.]”

1 “2. Discourage low-density sprawl development within the
2 unincorporated portion of the Urban Growth Boundary that
3 cannot be converted to urban uses when urban services
4 become available.

5 “3. Since the undeveloped portions of the urban fringe are in
6 transition from rural to urban uses, *development in these*
7 *areas shall occur in a manner consistent with the City of*
8 *Albany and Linn and Benton Counties’ Comprehensive*
9 *Plans and implementing ordinances.*” (Emphasis added).

10 According to petitioner, ACP Chapter 8 Policy 3 is implemented in part by
11 Albany Development Code (ADC) 12.480. Petitioner argues that the variance
12 to the 20-acre minimum parcel size to allow the applicants to partition their
13 property and develop a new dwelling could not occur in a manner consistent
14 with ADC 12.480 because ADC 12.480 prohibits development of a dwelling on
15 private septic systems where no public sewer is available within 300 feet of the
16 property “except for construction of one single-family dwelling *on an existing*
17 *lot of record or on a parcel no smaller than five acres created through the land*
18 *division process.* Any private on-site system allowed by this section must be
19 approved by the county.” (Emphasis added.) As explained above, the subject
20 property is served by on-site septic and a well and the proposed new dwelling
21 would also be served by on-site septic and a well. There are no sewer or water
22 services within one-third of a mile of the property. As petitioner explains it, the
23 property before partition is already less than five acres, and sewer services are
24 more than 300 feet away, and the proposed partition would create two even
25 smaller parcels without close proximity to sewer services. Accordingly, the

1 proposed variance and subsequent development would be inconsistent with
2 ADC 12.480 and ACP Policy 3.

3 The board of county commissioners did not consider or address
4 petitioner's arguments regarding ACP Chapter 8 Policies 2 and 3 and the ADC.
5 The board of county commissioners relied on ACP Chapter 8, Implementation
6 Method 3 and concluded that the proposed variance is consistent with the ACP.
7 ACP Chapter 8, Implementation Method 3 provides that one of the ways to
8 implement the policies in Chapter 8 is to:

9 "Ensure that Linn and Benton Counties' development regulations
10 discourage premature urban level development within the
11 unincorporated portion of the Urban Growth Boundary and
12 encourage development which occurs to meet the following
13 criteria:

14 "a. When land partitioning or subdivision occurs that will result
15 in parcels of less than five acres, an urban conversion plan
16 shall be submitted for City and County review. The urban
17 conversion plan shall demonstrate the potential division of
18 the property to urban densities and the desired location of
19 streets and points of access.

20 "b. When applicable, development shall meet City site
21 development standards pertaining to lot size, density,
22 setbacks, lot coverage, and height limitations.

23 "c. When parcel divisions or subdivisions occur that result in
24 parcels of less than five acres, an annexation agreement is
25 recorded for the property that provides for non-
26 remonstrance to annexation."

27 The board of county commissioners imposed a condition of approval that
28 requires the applicants to submit an urban conversion plan to petitioner and to

1 record an annexation agreement. The findings do not cite or rely on any other
2 ACP provisions except ACP Chapter 8 Implementation Method 3.⁴ However,

⁴ In its response brief, the county cites ACP Chapter 8, Policy 4 as support for the county's decision. ACP Chapter 8, Policy 4 is to allow the development of existing lots that are designated for residential use in some circumstances. The county does not explain why Policy 4, which applies to existing lots, has any bearing on the proposal, which involves creating a new lot. ACP Chapter 8, Policy 4 provides:

“Allow the development of *existing lots* designated for residential use on the Albany Comprehensive Plan within the unincorporated portion of the Urban Growth Boundary, subject to the following criteria:

- “a. Prior to development of a new residence on a lot that does not meet the designated minimum parcel size for that zone, an annexation agreement is recorded for the property that provides for non-remonstrance to annexation.
- “b. Prior to development of a new residence, which requires an urban level of services (such as sanitary sewer or city/service district water), an annexation agreement is recorded for the property that provides for non-remonstrance to annexation.
- “c. All applicable county development standards are met including on-site sewage disposal system approval and legal access to a public street.
- “d. An urban conversion plan is submitted for City and County review. The urban conversion plan shall demonstrate the potential division of the property to urban densities and the desired location of streets and points of access.
- “e. The property was not created illegally.” (Emphasis added).

1 the county responds that the board of county commissioners' conclusion
2 merely reconciles several conflicting ACP policies, and chooses to rely on the
3 more specific provision, Implementation Method 3, over more general
4 provisions, Policies 2 and 3.

5 To the extent the board of county commissioners engaged in
6 interpretation of the ACP, the county is not entitled to deference under ORS
7 197.829(1) and *Siporen*, 349 Or 247, when interpreting another jurisdiction's
8 land use law. *See Trademark Construction, Inc. v. Marion County*, 34 Or
9 LUBA 202, *aff'd* 155 Or App 84, 962 P2d 772 (1998) (concluding that a
10 county is not entitled to deference under *Gage v. City of Portland*, 319 Or 308,
11 877 P2d 1187 (1994) when interpreting another jurisdiction's land use laws).
12 Accordingly, we review any county interpretations of the ACP to determine
13 whether they are correct. *McCoy v. Linn County*, 90 Or App 271, 276, 752 P2d
14 323 (1988).

15 We agree with petitioner that the proposed variance is not consistent
16 with the ACP. As discussed above, the proposed variance to create two one-
17 acre parcels in a county UGAZ area that requires a 20-acre minimum parcel
18 size will have the effect of allowing the applicants to create parcels that cannot
19 satisfy at least one provision of the ADC, ADC 12.480. That is inconsistent
20 with ACP Chapter 8, Policy 3. In addition, allowing a variance to create an

1 additional one-acre parcel not connected to city sewer and water will not
2 “[d]iscourage low-density sprawl development within the unincorporated
3 portion of the Urban Growth Boundary that cannot be converted to urban uses
4 when urban services become available,” and that is inconsistent with ACP
5 Chapter 8, Policy 2. Implementation Method 3 may contemplate future
6 partitions or subdivisions in the UGB that result in parcels smaller than five
7 acres, but that does not automatically mean that the particular proposal at issue
8 is consistent with ACP policies that discourage development in the urban
9 fringe that will inhibit the orderly and efficient development of those lands.
10 Finally, allowing the variance that would enable the property to be partitioned
11 encourages, rather than discourages, “premature urban level development” in a
12 manner that is inconsistent with one of the stated purposes of ACP Chapter 8
13 Implementation Method 3 “to discourage premature urban level development
14 within the unincorporated portion of the Urban Growth Boundary[.]”⁵

⁵ In addition, we note that relevant context provided in the county’s own development code lends support to a conclusion that the variance to create two one-acre lots in a zone that requires a 20-acre minimum lot size is not consistent with ACP Chapter 8, which, as noted, requires the city to regulate density and land uses in the urban fringe in a way that minimizes development until those lands are annexed into the city.

LCC 933.700 sets out the purposes of the UGAZ, including the UGA-UGM-20 zone, and LCC 930.730 codifies the importance of both city review and county review of proposed development in that zone for compliance with the ACP. The essence of those LCC provisions is that land zoned UGA-UGM should be protected for future urban development by limiting low-density

1 **C. LCC 938.300(B)**

2 LCC 938.300(B) provides additional criteria for the variance, and the
3 board of county commissioners found those criteria were met.⁶ In a portion of
4 its first assignment of error, petitioner argues that the county’s conclusion is
5 not supported by substantial evidence in the record, and that the county’s
6 findings are inadequate to explain why the criteria in LCC 938.300(B) are met.
7 Because we determine above that the county improperly construed the ACP in
8 determining that the proposed variance is consistent with the ACP, we need not
9 reach this subassignment of error.

development in those areas, and that the city’s review for compliance with the ACP is vital to meeting the intent of the zone.

⁶ LCC 938.300(B) provides:

“(B) Decision criteria.

- “(1) A variance from a development standard as set forth in LCC 934 (Development Standards Code) is needed because conditions or circumstances or both exist on the land or structure involved that renders development impractical or impossible;
- “(2) Granting a variance from a development standard will not have a significant adverse affect on property, improvements, or public health or safety in the vicinity of the subject property; and
- “(3) Approval of the variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use.”

1 For the reasons set forth above, we agree with petitioner that the
2 proposed variance is not consistent with the city’s comprehensive plan.

3 The first assignment of error is sustained.

4 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

5 The county’s approval of the partition to create a new parcel, and of the
6 conditional use permit to allow a dwelling on a new parcel, are dependent on
7 the county’s approval of a variance to the minimum parcel size. Without a
8 variance, the LCC does not allow the applicants to partition the property.
9 Without a partition, the LCC does not allow the applicants to construct a
10 second dwelling. We sustained petitioner’s first assignment of error above that
11 challenged the county’s approval of a variance to the minimum parcel size,
12 because we concluded that the proposed variance is not consistent with the
13 ACP. Accordingly, we need not reach petitioner’s second and third
14 assignments of error that challenge the county’s approval of the conditional use
15 permit and the partition.

16 **DISPOSITION**

17 OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use
18 decision where the decision “violates a provision of applicable law and is
19 prohibited as a matter of law.” LCC 938.340(B) allows the county to approve a
20 variance to the minimum parcel size if the proposed variance is “consistent
21 with the * * * city’s comprehensive plan[.]” We determine above that the

- 1 proposed variance is inconsistent with the ACP. Accordingly, the variance is
- 2 “prohibited as a matter of law.”
- 3 The county's decision is reversed.