

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's decision to restrict
4 vehicular access to the end of a city street.

5 **FACTS**

6 Austin Street is a residential dead-end street, which was
7 annexed into the city in 1981. Prior to annexation, in 1975
8 Klamath County granted a zone change to property that borders
9 the north end of Austin Street. That zone change included a
10 condition prohibiting vehicular access to the rezoned property
11 from Austin Street. The zone change decision, as conditioned,
12 was recorded in the Klamath County Deed Records. The property
13 was subsequently divided. Each of the divided parcels
14 obtained access from streets other than Austin. The property
15 now owned by petitioner ("petitioner's property"), which is
16 immediately north of the end of Austin Street, obtained access
17 from a narrow winding driveway from Avalon Street.

18 After petitioner's property was annexed into the city, a
19 local improvement district was created to improve Austin
20 Street.¹ Final design documents for the Austin Street
21 improvements, dated 1985, show an asphalt/concrete berm and a
22 wire fence at the end of Austin Street, separating the end of
23 the street from petitioner's property. However, at some point
24 not reflected in the record, access from Austin Street to

¹The then-owners of petitioner's property did not participate in that local improvement district.

1 petitioner's property was created and a gate installed. There
2 is no record of city approval of this access.

3 Petitioner purchased its property in 1987 and began
4 developing a retirement living facility. Petitioner explains
5 that its title report did not reflect the previous county
6 zoning or the condition prohibiting access from Austin Street.
7 In order to provide adequate access to its development from
8 Austin Street, petitioner first obtained an easement and then
9 purchased additional adjacent property. At some point not
10 reflected in the record, an unrestricted, ungated access was
11 created, allowing open access from Austin Street to
12 petitioner's property.

13 In late 1997, residents of Austin Street petitioned the
14 city to reinstate the 1975 condition restricting access to
15 Austin Street. Following public hearings, the planning
16 commission recommended to the city council that the access
17 prohibition be reinstated. After additional public hearings
18 before the city council, the city council accepted the
19 planning commission's recommendation and adopted the
20 challenged decision, which prohibits access from the end of
21 Austin Street, except for emergency vehicles. The city's
22 findings state, in relevant part:

23 "The recorded county land use restriction remains in
24 effect. There has been no formal action by the City
25 to open access onto Austin Street for Applegate
26 Estates. Current access is not consistent with
27 [Community Development Ordinance] CDO Section
28 14.050(1)." Record 3.

29 Petitioner appeals the city's decision.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner alleges that the city council improperly
3 relied upon the county zoning in making the challenged
4 decision. Petitioner asserts that, upon annexation and
5 adoption of city comprehensive plan and zoning designations,
6 previous county zoning became "null and void as a matter of
7 law" under ORS 215.130.² Petition for Review 4.

8 We agree with petitioner that under ORS 215.130(2)(a) the
9 previous county zoning was superseded by city zoning after the
10 subject area was annexed into the city and city designations
11 and zoning were applied to the area. However, neither the
12 city comprehensive plan designation or city zoning altered the
13 fact that upon annexation no road access existed from Austin
14 Street to petitioner's property. The fact of annexation alone
15 does not have the effect of reversing the previously imposed
16 county prohibition or of permitting access where none existed
17 before. ORS 215.130 does not preclude the city from
18 continuing the access restriction originally imposed by the
19 county.

20 The first assignment of error is denied.

²ORS 215.130 states, in relevant part:

"(2) An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

"(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise[.]"

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner asserts that the city's decision is legally
3 incorrect because petitioner has a "common law right of access
4 which can only be limited for health and safety reasons."
5 Petition for Review 4. Petitioner argues that the existing
6 access from Avalon Street is dangerous and hazardous at night,
7 is insufficient for public safety vehicles, and is inadequate
8 for the purpose for which the property is being used.³

9 As an initial point, we note that this Board does not
10 evaluate common law claims. Our authority is limited to
11 review of land use decisions. Thus, we consider petitioner's
12 second assignment of error to the extent petitioner's argument
13 can be understood to claim that the city's application of its
14 land development code deprives him of access to his property,
15 which the code allows, or that the existing Avalon access
16 violates a code provision. However, to the extent petitioner
17 claims a common law right independent of the challenged land
18 use decision, this review proceeding is not the proper forum
19 to advance that claim.

20 Petitioner acknowledges Austin Street does not constitute
21 petitioner's sole access. The city found, and petitioner does
22 not contest the city's finding, that when the property from
23 which petitioner's property was created was initially divided,

³The fire marshal testified that the access from Avalon is inadequate for emergency service vehicles. Accordingly, the challenged decision provides for a locked gate at the end of Austin Street to provide access for emergency vehicles.

1 Avalon provided the sole access to the property. While the
2 established access from Avalon might not be preferable to
3 petitioner, it nonetheless provides access to petitioner's
4 property. Thus, as a factual matter, we reject petitioner's
5 claim that the challenged decision denies petitioner access to
6 which it is entitled.

7 To the extent petitioner alleges that access from Avalon
8 Street violates a code provision, petitioner has not
9 identified any such provision. Petitioner's assertion that
10 Avalon is unsafe and "not adequate for the principal purpose
11 for which the property is utilized," which is consistent with
12 the property's zoning, does not establish a basis for relief.
13 Petition for Review 5.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 Finally, petitioner argues that the city improperly
17 construed CDO Section 14.050(1), which states:

18 "Each lot and parcel shall abut upon an improved
19 street for the entire length of the lot frontage. A
20 lot or parcel which abuts only the end of a public
21 street, not terminating in a cul de sac, shall not
22 be considered as having access, nor shall an alley
23 be considered as sufficient access."

24 Petitioner argues that, properly construed, CDO 14.050(1)
25 "is not a limitation on a right of access but rather a
26 provision to determine if appropriate access exists for
27 planning purposes." Petition for Review 6. Petitioner also
28 argues that because it has another, albeit insufficient,

1 access to its property, its access is not only to Austin
2 Street, and therefore CDO 14.050(1) does not apply.

3 In finding that access from Austin Street is inconsistent
4 with CDO 14.050(1), the city interpreted that provision by
5 stating:

6 "Section 14.050(1) of the City's Community
7 Development Ordinance does prohibit direct access at
8 the end of a street not terminating in a cul-de-
9 sac." Record 3.

10 While petitioner may disagree with the city's interpretation,
11 and may offer other plausible interpretations, we cannot say
12 that the city's interpretation is not consistent with the
13 text, policy or purpose of CDO 14.050(1) or "clearly wrong" as
14 a matter of law. Thus, we must defer to the city's
15 interpretation. ORS 197.829(1); Clark v. Jackson County, 313
16 Or 508, 836 P2d 710 (1992).

17 The third assignment of error is denied.

18 The city's decision is affirmed.