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

GARY LOCKWOOD and CONCERNED
RESIDENTS OF CROISAN-ILLAHEE
NEIGHBORHOOD
Petitioners,

vs.

CITY OF SALEM,
Respondent,

and

CHRIS PREISEL,
Intervenor-Respondent.

LUBA No. 2005-141

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Wallace W. Lien, Salem, filed the petition for review, and argued on behalf of petitioners. With him on the brief was Wallace W. Lien, PC.

Richard D. Faus, Assistant City Attorney, Salem, filed a joint response brief and argued on behalf of respondent. With him on the brief were Brian G. Moore and Saalfeld Griggs, PC.

Brian G. Moore, Salem, filed a joint response brief and argued on behalf of respondent and intervenor-respondent. With him on the brief were Richard D. Faus and Saalfeld Griggs, PC.

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

REMANDED 02/22/2006

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

Petitioners appeal a City of Salem Planning Commission decision that grants tentative subdivision plan approval and three variances.

FACTS

A. The City's Urban Growth Area

The area within the city' urban growth boundary (UGB) is divided into an Urban Service Area (USA) and an Urban Growth Area (UGA). The USA is the area of the city inside the UGB where the urban services needed to allow property to be developed for urban uses either are present or the city is committed to provide those urban services.[1] The UGA is the area outside the USA, but inside the UGB, where one or more of the urban services needed for development are not present and the city is not committed to provide those urban services. The subject property is an approximately 20 acre parcel within the City of Salem's UGA.

Under Salem Revised Code (SRC) 66.050(a), an applicant must obtain Urban Growth Area Development Permit (UGA Development Permit) prior to subdivision plat approval.[2] Within 60 days after a UGA Development Permit application is filed, the city's Development Review Committee is required to schedule a public hearing, and within 20 days after that hearing the Development Review Committee is required to issue a Preliminary Declaration, which lists the public facilities the applicant must provide. SRC 66.070(a) and (b). That

[1] The USA is sometimes also referred to as the Current Developed Area (CDA).

[2] SRC 66.050(a) provides:

> "Prior to subdivision plat approval for a residential or commercial subdivision, or application for a building permit for any development where no subdivision is contemplated, a developer shall first obtain an Urban Growth Area Development Permit if the development is within the Urban Growth Area (UGA), or is within the Urban Service Area (USA), but precedes city construction of required facilities that are shown in the adopted capital improvement plan, public facilities plan or comparable plan for the area of the development."

Preliminary Declaration can be appealed. SRC 66.070(c). SRC 66.070(d) provides that a Preliminary Declaration is valid for two years and may be extended twice for two years so that the Preliminary Declaration is potentially valid for up to six years.[3] Under SRC 66.070(e), where a Preliminary Declaration is necessary, an application for tentative subdivision plan approval is not complete without a Preliminary Declaration.[4]

After the Preliminary Declaration is issued, an applicant is required have a professional engineer design the improvements that are specified in the Preliminary Declaration. SRC 66.080(a).[5] Once the applicant's plans are approved by the director of public works and the applicant has executed an acceptable improvement agreement, the director of public works issues a UGA Development Permit. *Id.*, SRC 66.035(f).[6] As we explain in our discussion of the third assignment of error, the parties dispute whether a UGA

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[3] SRC 66.070(d) provides:

> "The Preliminary Declaration shall be valid for a period of two years following the date of the decision of the Development Review Committee under subsection (b) of this section. Two extensions of up to two years each may be granted by the director of public works upon good cause shown."

[4] SRC 66.070(e) provides:

> "No application for a tentative subdivision plan approval, planned unit development, manufactured dwelling park, or zone change shall be deemed complete without a copy of the Preliminary Declaration."

[5] SRC 66.080(a) provides, in part:

> "Upon issuance of a Preliminary Declaration the applicant shall cause a competent registered professional engineer to design the improvements required by the Preliminary Declaration. * * * Upon approval of the applicant's plans and the improvement agreement described in SRC 66.035(f), the director of public works shall issue a UGA Development Permit. Completion of the required improvements according to the approved plans and specifications shall be a condition of the permit."

[6] SRC 66.035(f) provides:

> "Should private funding and construction of any required facilities be proposed, such construction and funding shall be incorporated into an enforceable improvement agreement, secured by performance guarantees acceptable to the city prior to expenditure of any matching public funds."

Development Permit is required before tentative plan approval (petitioners' position) or whether a Preliminary Declaration is sufficient for tentative plan approval (respondents' position).

B. Intervenor's Preliminary Declaration

Intervenor's predecessor sought and received a Preliminary Declaration for the subject property on September 23, 1994. That Preliminary Declaration was amended on July 21, 1995. The amended Preliminary Declaration was appealed to the city council and affirmed with additional amendments on February 26, 1996. An appeal of that city council decision was dismissed by LUBA on October 29, 1997. That Preliminary Declaration set out the applicant's responsibilities for extending streets, water, sewer and storm drainage.

Extension of water to the subject property under the Preliminary Declaration will require development of a reservoir. Acquisition of the site necessary for development of that reservoir has been difficult. The city was forced to file a condemnation action to obtain access to the property for study. After the site was found to be satisfactory, a second condemnation action was required to obtain title to the property. When the tentative subdivision plan approval decision that is before us in this appeal was adopted, the city was still pursuing condemnation of the reservoir property.

On February 14, 2001, the city public works director granted an extension of the Preliminary Declaration to February 26, 2002. On December 31, 2001, citing delays attributable to the required condemnation of the reservoir site, the assistant public works director granted indefinite extensions for four Preliminary Declarations, including intevenor's.

C. Intervenor's Tentative Subdivision Plan Application

Following the indefinite extension of the Preliminary Declaration for the subject property, an application for tentative subdivision plan approval for the subject property was submitted by intervenor's predecessor approximately three years later, on December 28,

2004. That application was amended on May 12, 2005 to propose a total of 105 lots and request three variances. Under applicable SRC provisions: (1) double frontage lots in the proposed subdivision are required to be at least 120 feet deep, (2) maximum lot depth must be no more than 300 percent of average lot width and (3) street grades may not exceed 12 percent. The May 12, 2005 application sought variances from the 120 foot depth requirement for five lots, a variance to the maximum lot depth to width ratio for 7 lots and a maximum street grade variance for a portion of proposed Fern Drive which will have a grade of as much as 15 percent. The Planning Administrator administratively approved that tentative subdivision plan and the three variance requests on August 12, 2005. Petitioners appealed that decision to the planning commission on August 29, 2005. On September 9, 2005, intervenor submitted a revised tentative subdivision plan to revise the side lot lines for lots 34 through 47 and thereby make the variance to exceed the lot depth to width ratio unnecessary. At a public hearing on September 13, 2005, the planning commission affirmed the August 12, 2005 decision and granted tentative subdivision plan approval.

On September 23, 2005, petitioner's appealed the September 13, 2005 planning commission decision to LUBA. Petitioners also attempted to file a local appeal of that September 13, 2005 decision, but were informed by the city planning staff that there was no right to file a local appeal of that September 13, 2005 decision.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners assign error to the city's decision that the SRC provides no right of local appeal to challenge the September 13, 2005 planning commission decision in this matter.

We do not consider whether the city's or petitioners' understanding of the relevant SRC provisions is correct. Neither do we consider petitioners' contention that the city council, not planning staff, should render the city's decision concerning the availability or lack of availability of an appeal to the city council in this matter. The only decision that has

been appealed to LUBA is the September 13, 2005 planning commission decision that grants tentative subdivision plan approval and variances to certain SRC requirements. Petitioners have not separately appealed the city's subsequent decision that the SRC provides no right of local appeal to challenge that September 13, 2005 decision. Accordingly, that decision is not before us in this appeal. *See Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78, 83 (2004), *rev'd on other grounds* 198 Or App 311, 108 P3d 1175 (2005) (in an appeal of a land use decision, later decisions regarding refund of local appeal fee are not subject to challenge).

As we have explained on numerous occasions, where a petitioner files a LUBA appeal to challenge a local government's rejection of an attempted local appeal, the scope of review in the LUBA appeal is limited to determining whether the local government correctly rejected the local appeal. If the decision to reject the local appeal was correct, LUBA affirms the decision. On the other hand, if the decision to reject the local appeal was erroneous, LUBA remands the decision so that the local appellate body can review the underlying decision on the merits. In either case, LUBA does not review the underlying local government land use decision on the merits. *Robinson v. City of Silverton*, 39 Or LUBA 792, 796-97 (2001); *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565, 569-10 (1998); *Cummings v. Tillamook County*, 29 Or LUBA 550, 553 (1995)

A similar rule applies here. If petitioners believed the city erred in refusing its attempted local appeal, they could have appealed that decision to LUBA. Had petitioners done so, we would have considered that question and, if we agreed with petitioners, we would have remanded the city's decision so that the local appeal could go forward. But petitioners did not do so. They appealed only the September 13, 2005 planning commission decision, which the city contends is its final decision. In their appeal of that planning commission decision to LUBA, petitioners many not challenge the city's separate,

subsequent decision that there is no right of local appeal to challenge that September 13, 2005 decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As we explained earlier, after the tentative subdivision plan that required three variances was approved on August 12, 2005 and appealed to the planning commission, the applicant withdrew that proposal and submitted a tentative subdivision plan with minor revisions to the dimensions of several lots to make the variance to the maximum three to one lot depth to width ratio unnecessary.[7] Petitioners were advised of the amended tentative subdivision plan. Planning staff advised the planning commission that the tentative subdivision plan had been amended to eliminate the need for the variance to the maximum lot depth to width ratio.[8] Record 22. Respondents attach a partial transcript that makes it reasonably clear that it was the amended "two variance" tentative subdivision plan that the parties understood to be before the planning commission, and it was almost certainly that amended tentative subdivision plan that the planning commission voted to approve on September 13, 2005. Nevertheless, the planning commission's resolution, which apparently was signed by the planning commission chair at the conclusion of the September 13, 2005 public hearing, does two things. First it "adopts as its findings of fact the staff report(s) on this matter dated September 13, 2005 * * *." Record 19. The September 13, 2005 staff report recommends approval of the variance to the maximum three to one lot depth to width

[7] The challenged decision refers to the SRC standard as the "300 percent lot width to depth ratio." Record 33. SRC 63.145 actually states that lot depth shall be "not more than 300 percent of the average width between side lot lines. Therefore, expressed as a ratio, the standard requires a maximum lot depth to width ratio of three to one.

[8] It is difficult to read and compare the dimensions shown for lots 34 through 47 on the amended tentative subdivision plan and the prior tentative subdivision plan that was approved by the Planning Administrator. Record 227; 287. However, there appear to be minor differences in dimensions of those lots. As far as we can tell, with the exception of these minor changes in the dimensions of those lots, the two tentative subdivision plans are identical.

ratio.[9] Second, the planning commission's September 13, 2005 decision "affirm[s] the August 12, 2005 Administrative Decision and grant[s] approval of the Tentative Subdivision Plan." *Id*.

While the parties are generally in agreement with the course of events we describe in the foregoing paragraph, they have very different ideas about the legal significance and consequences of those events. Petitioners attempt to inflate a minor technical error into a procedural error of immense and prejudicial proportions. Respondents attempt to ignore the minor technical error and urge LUBA to follow suit. We reject petitioners' contention that the planning commission engaged in an underhanded "bait and switch" tactic to approve the previously withdrawn prior tentative subdivision plan rather than the amended tentative subdivision plan. Petition for Review 15. However, we also reject respondent's contention that the city's written decision can be ignored in favor of what the city probably intended to approve.

The differences in the dimensions of lots 34 through 47 that were included on the amended tentative subdivision plan, when compared to the prior subdivision plan, appear to be trivial. However, it is simply not accurate to say "[t]he application before the Planning Commission was the same as was before the Planning Administrator with the exception that it no longer included a variance request that was in fact contested by Petitioners." Respondents' Brief 18. Respondents repeat that statement several times, but the application in fact did change shortly before the planning commission's decision, albeit slightly, to make the third variance unnecessary. All parties apparently agree the planning commission intended to approve the amended tentative subdivision plan that only required two variances. Unfortunately, the written decision that was prepared for the planning commission chair's signature approved the prior tentative subdivision plan with three variances. The tentative

[9] The September 13, 2005 staff report also includes as an attachment the pre-amendment tentative subdivision plan that required three variances. Record 39.

subdivision that was actually approved by the city is the one the planning commission approved in its written decision—the pre-amendment tentative subdivision plan with three variances.

It would seem to be a relatively simple and straightforward exercise for the planning commission to adopt an amended resolution to clarify that is approving the amended tentative plan, rather than the tentative plan that the planning administrator approve. Similarly, it would seem to be a relatively simple and straightforward exercise for the supporting findings to be amended or supplemented to make it clear that no variance to the three to one lot depth to width ratio maximum is needed or approved for the amended tentative subdivision plan. However, both of those errors need to be corrected to approve the amended tentative subdivision plan without the third variance and to avoid potential questions about the approved boundaries of lots 34-47.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

As we explained in our recitation of the facts, a Preliminary Declaration is required as part of an application for tentative subdivision plan approval. That Preliminary Declaration forms the basis for subsequent engineering plans, improvement agreements and, ultimately, a UGA Development Permit. Under this assignment of error, petitioners advance two arguments. First, petitioners argue first that the Preliminary Declaration that the planning commission relied on in approving the disputed subdivision has expired. Second, petitioners argue that without regard to the continuing validity of the Preliminary Declaration, it was error for the city to grant tentative subdivision plan approval in advance of the city's approval of a UGA Development Permit.

A. The Preliminary Declaration

Petitioners argue that at the latest, the initial Preliminary Declaration became final on February 26, 1996, when the city council last amended it. Petitioners contend that the

amended Preliminary Declaration therefore expired two years later on February 26, 1998 when no extension of that Preliminary Declaration had been approved by the city. *See* n 3. Petitioners contend the city's actions on February 14, 2001 to extend the Preliminary Declaration to February 26, 2002 and its action on December 31, 2001 to extend the Preliminary Declaration indefinitely came too late.

Respondents answer that both the February 14, 2001 and the December 31, 2001 decisions to extend the Preliminary Declaration are in the record of this appeal. Record 40-41. No contemporaneous appeal of those decisions to the city council was filed and no contemporaneous appeal was filed to LUBA. Although petitioners have known of those decisions for some time, respondents point out that petitioners have not appealed those decisions to LUBA. Respondents contend that while the planning commission noted and relied on the December 31, 2001 decision that granted an indefinite extension of the Preliminary Declaration, that December 31, 2001 decision is not before LUBA in this appeal and cannot be collaterally attacked under this assignment of error.

As far as we can tell, both the February 14, 2001 and December 31, 2001 decisions were decisions that could have been appealed to the city council and on to LUBA if the city council's resolution of those appeals was unsatisfactory to petitioners. No such appeals were filed. We therefore agree with respondents, that this part of petitioners' third assignment of error is a collateral attack on those prior decisions and for that reason must be rejected. *ONRC v. City of Seaside*, 27 Or LUBA 679, 680-81 (1994); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987).

B. The UGA Development Permit

In support of their argument that a tentative subdivision plan cannot be approved until a UGA Development Permit has been issued, petitioners cite SRC 63.051(a)(6) and

63.051(b).[10] Petitioners also cite SRC 66.050(a), which requires that a UGA Development Permit be issued prior to subdivision plat approval. *See* n 2. Respondents contend that city practice is to require UGA Development Permits at the time of final subdivision plat approval and they cite other sections of the SRC that they contend are consistent with that practice.

Were we required to reach the merits of petitioners' arguments, we likely would agree with respondents that SRC 66.050(a), the only SRC provision that all parties cite in support of their respective positions, requires that an UGA Development Permit be issued prior to final subdivision *plat* approval rather than prior to tentative subdivision *plan* approval.[11] But SRC 63.051(a)(6) and 63.051(b), which petitioners cite in their brief, present a much closer question. SRC 663.051(a)(6) appears to establish a "requirement" that

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[10] SRC 63..051 provides in pertinent part:

> "**63.051. PURPOSES OF TENTATIVE PLAN REVIEW; REQUIREMENTS AND CONDITIONS.**
>
> "(a) The purpose of tentative plan review of a subdivision or partition is to insure that:
>
> "* * * * *
>
> "(6) If the tentative plan is for a subdivision subject to SRC 66.050(a), that a UGA Development Permit has been issued and will be complied with.
>
> "* * * * *
>
> "(b) Lack of compliance with the standards set forth in subsection (a) of this section shall be grounds for denial of tentative plan approval, or for the issuance of certain conditions necessary to more fully satisfy such considerations.

[11] SRC 63.030 includes the following relevant definitions:

> "'Tentative plan' means a preliminary diagram or drawing concerning a partition or subdivision." SRC 63.030(rr)
>
> "'Final plat' – See 'Plat.'" SRC 63.030(m).
>
> "'Plat' means a final map, diagram, drawing, replat, or other writing containing all the descriptions, locations, specifications, dedications, restrictions, provisions, and other information concerning a subdivision. Except where otherwise stated, the term 'plat' includes the term 'map.' " SRC 63.030(ff).

the UGA Development Permit be issued and SRC 63.051(b) appears to authorize the city to deny an application for tentative subdivision plan approval if that requirement is not met, although respondents correctly note SRC 63.051(b) would apparently also allow the city simply to impose a condition of approval to require the UGA Development Permit prior to final subdivision plat approval.

Respondents contend that petitioners' argument that a UGA Development Permit is a requirement for tentative subdivision plan approval is a new argument that was not raised below.[12] According to respondents, petitioners referred to the Preliminary Declaration and UGA Development Permit somewhat interchangeably. However, respondents contend the only issue that petitioners raised below with sufficient clarity for the city to recognize and respond to the issue was that the required Preliminary Declaration has expired, not that the Preliminary Declaration, if properly extended, was insufficient to allow approval of the tentative subdivision plan in the absence of a UGA Development Permit.

Petitioners contend that they raised this issue in a memorandum that appears at Record 219-25 and two letters that appear at Record 8-16 and 250-57. Specifically, petitioners argue that the issue was raised at Record 9-10, 221 and 251. The September 23, 2005 letter that appears at Record 8-16 is petitioners attempted appeal of the planning commission's September 13, 2005 decision. The issue is not raised in that letter. Even if it

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[12] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides that in an appeal of a land use decision or limited land use decision to LUBA:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

was, that letter postdates the close of the record and the final evidentiary hearing and therefore the issue would not have been timely raised. Section II of petitioners' September 13, 2005 memorandum is entitled "UGA Has Expired." Record 221. The argument that appears under that section takes the position that the city's indefinite extension of the Preliminary Declaration was improper and that the Preliminary Declaration has expired. There is no argument that a UGA Development Permit is required for tentative plan approval. Similarly, petitioners' August 29, 2005 letter is directed at the Preliminary Declaration and argues that it has expired. Record 251. The letter erroneously refers to the Preliminary Declaration as a UGA Development Permit. *Id*. The letter also cites SRC 66.080(c), which places the same two-year time limit on the validity of UGA Development Permits with provisions for two two-year extensions that SRC 66.070(d) places on Preliminary Declarations. *See* n 3. However, Record 251, like Record 8 and Record 221, simply does not show that petitioners raised the issue that they attempt to raise for the first time here. Nowhere on those pages of the record do petitioners argue that a UGA Development is required for tentative subdivision plan approval.[13] Because they did not raise that issue below, they may not raise that issue for the first time in this appeal.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error alleges that the findings the planning commission adopted in support of its decision are inconsistent and therefore the decision must be remanded. Petitioners' argument is based on their interpretation of the planning commission's decision to adopt petitioners' August 29, 2005 appeal statement as part of the planning commission's findings to support its decision. While we agree with petitioners that the city's decision could be clearer on this important point and that the record the city has

[13] Neither did petitioners cite SRC 63.051(a)(6) and 63.051(b) in their arguments to the city.

submitted in this appeal complicates the inquiry, we do not agree with petitioners that the planning commission's decision must be interpreted in that way.

The planning commission's one-page resolution approving the disputed subdivision appears at Record 26. In that one-page decision, as we have already noted, the planning commission "adopts as its findings of fact the staff report(s) on this matter dated September 13, 2005, herewith attached and by the reference incorporated herein." *Id*. Four pages later, beginning at Record 30, the referenced September 13, 2005 staff report appears. It is six pages long and concludes at Record 35. The staff report states the planning commission has two alternatives: "Affirm the August 12, 2005 Administrative Decision" or "Reverse or modify the August 12, 2005, Administrative Decision." The planning commission selected the first alternative. The September 13, 2005 staff report explains "[t]his alternative is supported by the Findings and Order of the tentative approval and the staff findings supplemented herein." Record 35. We understand the reference to the "Findings and Order of the tentative approval" to refer to the August 12, 2005 Administrative Decision itself, along with the findings adopted in support of that decision. At this point it is sufficiently clear that the planning commission's decision is supported by the findings included in the September 13, 2005 staff report and the findings that were included in the August 12, 2005 Administrative Decision itself.

The last page of the September 13, 2005 staff report lists four attachments:

"A. August 12, 2005, Findings and Order

"B. August 29, 2005 Appeal Letter

"C. Property Location and Preliminary Plan

"D. Public Works Director Letter Dated December 31, 2001[.]" Record 35.

Because the September 13, 2005 staff report does not expressly state why the four attachments are being provided to the planning commission, petitioners conclude the attachments, including their August 29, 2005 appeal letter were adopted as findings.

The planning commission rejected the arguments presented in petitioners' August 29, 2005 appeal letter. We agree with respondents that absent a clearer statement that the planning commission intended to take the unusual action of adopting arguments that the planning commission *rejected* to serve as findings in *support* of its decision, we decline to read the decision in that way. In setting out the planning commission's alternatives, the September 13, 2005 staff report is most reasonably read to say that the findings in the September 13, 2005 staff report and the findings in the August 12, 2005 Administrative Decision itself would constitute the findings in support of a planning commission decision to approve the disputed tentative subdivision plan. We reject petitioners' argument to the contrary.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

A. Introduction

SRC 63.332 sets out the criteria that must be satisfied to grant a variance.[14] Under their final assignment of error, petitioners allege that the planning commission's findings

[14] SRC 63.332 provides as follows:

> "(a) No variance shall be granted except upon a finding by the planning administrator that each of the following conditions is met:
>
> > "(1) There are special conditions inherent in the property (such as topography, location, configuration, physical difficulties in providing municipal services, relationship to existing or planned streets and highways, soil conditions, vegetation, etc.) which would make strict compliance with a requirement of SRC 63.115 to 63.295 an unreasonable hardship, deprive the property of a valuable natural resource, or have an adverse effect on the public health, safety, and welfare;

concerning these variance criteria are inadequate, misconstrue the applicable law and are not supported by substantial evidence. Petitioners challenge all three of the variances approved by the planning commission. However, as we have already explained in resolving the second assignment of error, the planning commission did not intend to approve a variance to the maximum lot depth to width ratio. Respondents do not attempt to defend that variance. Given that we remand the planning commission's decision so that it can take action on the amended tentative subdivision plan, which does not require a variance to the maximum lot depth to width ratio, petitioner's arguments concerning that variance under the fifth assignment of error provide no additional basis for remand. We limit our consideration under this final assignment of error to petitioner's challenge to the street grade variance and the variance to the minimum depth requirement for double frontage lots.

Petitioners assume under this assignment of error that the planning commission only intended to adopt the September 13, 2005 staff report. We conclude in our discussion of the fourth assignment of error above that in addition to the September 13, 2005 staff report, the planning commission also adopted the findings in the August 12, 2005 decision itself. Because petitioners limit their challenge to the findings in the September 132, 2005 staff

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> "(2) The variance is necessary for the proper development of the subdivision and the preservation of property rights and values;
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> "(3) There are no reasonably practical means whereby the considerations found under (1) or (2) above can be satisfied without the granting of the variance; and
>
> "(4) It is unlikely that the variance will have adverse effect on the public health, safety, and welfare, or on the comfort and convenience of owners and occupants of land within and surrounding the proposed subdivision or partition.
>
> "(b) Each specific variance shall be separately considered, and no variance shall be granted if, taken together with all other requested variances, the cumulative effect would be to subvert the purpose expressed in SRC 63.020.
>
> "* * * * *"

report, they do not specifically challenge the more lengthy findings in the August 12, 2005 decision itself.

We turn to petitioners' challenges to variances to the 120-foot minimum depth requirement for double frontage lots and the maximum street grade requirement.

B. The Lot Depth Variance

SRC 63.145(b) requires that double frontage lots have a minimum depth of 120 feet.[15] Intervenor first argues that although the planning commission approved a variance for lots 35 through 39, which are double frontage lots and are not 120 feet deep, that variance was unnecessary because SRC 63.145(b) itself allows the Planning Administrator to approve double frontage lots where "topographical or other physical conditions" make lots of less depth necessary. That interpretive argument is plausible, but it is not an interpretation that the planning commission adopted. For whatever reason, the planning commission considered a variance to be required and it approved the requested variance. We turn to the city's findings in support of the lot depth variance for the six double frontage lots.

1. Special Conditions Inherent in the Property – SRC 63.332(a)(1)

If the property has special conditions such as topography and those special conditions would make strict compliance with the lot depth requirement an unreasonable hardship, deprive the property of a valuable natural resource, or adversely affect pubic health, safety, and welfare, the first variance criterion is satisfied. The findings in the August 12, 2005 decision, which the planning commission adopted, recite the applicant's position and the staff's position:

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[15] SRC 63.145(b) is the source of both the three to one maximum lot depth to width ratio and the minimum depth for double frontage lots. The entire text of SRC 63.145(b) is as follows:

> "Depth. Each lot shall have an average depth between the front and rear lot lines of not less than 70 feet and not more than 300 percent of the average width between the side lot lines. Each double frontage lot shall have an average depth between the front and rear lot lines of not less than 120 feet unless a lesser depth is approved by the Planning Administrator where necessitated by unusual topographical or other physical conditions.

> **Applicant's Response:** Lots 35 through 39 do not conform to the minimum lot depth of 120 feet for double frontage lots. The subject property is steep parallel to River Road South. The proposed subdivision proposes to take access from River Road South at the northeast corner and then traverse westerly up the slope. The approximate grade of the proposed street is 12 percent, the maximum for a local street. The steep slope creates a special condition and a physical difficulty to the placement of the street in relation to the proposed lots. *Moving the street further up the slope will create lots that would be narrow and long, thereby not complying with [the three to one maximum lot depth to width ratio in] SRC 63.145(b).*
>
> **Staff Response:** The northern portion of the subject property is steep which creates a difficulty in the location of the proposed Fern Drive. The topography of the subject property and the abutting development limits the locations for streets and lot layout and lot configuration. The locations of the streets (existing and proposed) dictate lot sizes and lot configuration, therefore, creating lots that are less than 120 feet in depth. Staff concurs with the applicant's response." Record 278.

We understand the emphasized finding to take the position that the site's topography is such that moving Fern Drive further south to satisfy the 120-foot depth requirement on these four lots would result in lots located between Fern Drive and South River Road violating the 3 to 1 lot depth to width ratio. The finding does not explain whether the city believes forcing the applicant to swap one violation of SRC 63.145(b) for another would result in "an unreasonable hardship, deprive the property of a valuable natural resource, or have an adverse effect on the public health, safety, and welfare." However, we agree with the city that forcing an applicant to violate one lot dimension requirement to comply with another lot dimension requirement would have one of the proscribed results under SRC 63.332(a)(1).

A shift of Fern Drive to the south for its entire length could have the cited effect of making other lots that lie between Fern Drive and South River Road violate the three to one lot depth to width ratio. However, it is also possible that any such violations could be avoided by reducing the number of such lots and making them wider. In addition, there is no obvious reason why Fern Drive could not be shifted slightly to the south, where it passes lots 35 through 39 and thereby allow those lots to meet the 120 foot depth requirement. The

findings repeatedly cite to the property's admittedly steep topography along its northern border. However, the topography that the roadway would be required to cross if the roadway were shifted a short distance south in the area where it passes these five lots appears to be even more gentle than the topography the roadway crosses as it is now proposed. Record 227. There may be topographic or other reasons why such a slight southward relocation of Fern Drive is not possible, but respondents do not cite us to evidence in the record that demonstrates that such is the case, and the city's findings do not explain what those reasons might be.

In a similar vein the findings state:

> "The topography of the subject property and the abutting development limits the locations for streets and lot layout and lot configuration. The locations of the streets (existing and proposed) dictate lot sizes and lot configuration, therefore, creating lots that are less than 120 feet in depth." Record 278.

Again, while the applicant's experts do recommend minimizing cuts and fills in constructing Fern Drive in this steep area of the property, the evidence cited to us falls substantially short of explaining why the precise lot configuration and roadway locations shown on the tentative subdivision plan are necessary.

2. Necessary for Proper Development and Preservation of Property Rights and Values – SRC 63.332(a)(2)

The findings that appear at Record 278 offer essentially the same reasons for concluding that the SRC 63.332(a)(2) criterion is met. For the same reason they were inadequate to demonstrate compliance with SRC 63.332(a)(1) they are inadequate to demonstrate compliance with SRC 63.332(a)(2).

3. No Reasonable Practicable Means to Address the Considerations Found Under SRC 63.332(a)(1) and (2) Without Granting the Variance – SRC 63.332(a)(3)

The findings that appear at Record 278 offer essentially the same reasons for concluding that the SRC 63.332(a)(3) criterion is met. For the same reason they were

inadequate to demonstrate compliance with SRC 63.332(a)(1) and (2), they are inadequate to demonstrate compliance with SRC 63.332(a)(3).

4. Unlikely that Variance Will Adversely Affect Public Health, Safety, and Welfare – SRC 63.332(a)(4)

Among other findings, the city found that "[p]roposed lot[s] 35 through 39 will have adequate buildable area and exceed the 4,000 square foot minimum lot size." Record 279. The city found that this would be sufficient to ensure that the variance would comply with SRC 63.332(a)(4). Petitioners offer no reason to question that finding, and we agree that it is adequate.

C. The Street Grade Variance

SRC 63.225(b) requires that street grades not exceed 12 percent.[16] The city found that the proposed street grade variance for Fern Drive satisfied the SRC 63.332(a) variance criteria. We address those findings below.

1. Special Conditions Inherent in the Property – SRC 63.332(a)(1)

The findings in the August 12, 2005 decision, which the planning commission adopted, recite the applicant's position and the staff's position:

> "**Applicant's Response**: The property proposed for this development has some serious topographic features that run up from South River Road. Access must come from South River Road and to travers[e] up the site, street grades in excess of 12% must be constructed. The Applicant retained the services of Dan Redmond, P.E. a geotechnical engineer that provided input in the [preparation] of the Tentative plan for this project. Dan Redmond recommended that the street be designed to minimize the cuts and fills needed for the construction of the roadway.
>
> "The location of the street has been set to keep the cuts and fills to the minimum possible moving up the slope. This can only be achieved by the granting of the variance to allow street grades to exceed 12% slope.

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[16] SRC 63.225(b) provides:

> "Grade. All streets shall be designed with grades in accordance with City of Salem Public Works Street Design Standards. No street grade shall exceed 12 percent without a variance.

> "Failure to grant the variance will require street construction that will create excessive cuts and fills that will make driveway access to the adjoining lots difficult, expensive and increase safety hazards for access to the lots. In addition, the recommendations of our Geotechnical Engineer could not be followed.
>
> **Staff Response**: * * * The subject property has between 20 to 40 percent slopes with a small portion along South River Road over 60 percent. Without the increase in street grade, there would be substantial need for deep cuts and retaining walls that would constrain development of individual sites within the subject property, therefore creating a practical difficulty. To alleviate these potential constraints, the applicant is requesting a variance to the grade to exceed 12 percent on Fern Drive S. * * * The Director of Public Works approves the variance of street grades on Fern Drive S to a maximum of 15 percent.

Respondents point to evidence in the record that addresses the difficulties that must be overcome to construct Fern Drive. The Preliminary Declaration recommends against excessive cuts and fills in areas of steep slopes. Record 59. The geotechnical engineer report cites the following features of concern "1) the moderately steep sloping terrain located across the northerly portion of the subject site, [and] 4) the proposed construction of a paved access road extending to the south off of River Road South." Record 176. That report was prepared before planning for the project was completed. Record 173. The report states that it appears that the new road can be constructed "without the use of significant slope cuts and/or structural embankments fills." Record 176. The report goes on to recommend that any cuts and fills and retaining walls be constructed to certain design standards. Record 176-77, 179. Another geologic report similarly recommends that certain precautions be taken when developing in the steeper northern part of the property.

Petitioners do not specifically challenge the above-quoted findings. However, petitioners argue:

> "This variance similarly uses the wrong standard and does not address the complete approval criteria as stated above. In addition, the street grade is allowed only to avoid excavation and retaining walls that might limit the number of lots or the building envelopes within individual lots. Having excavation and retaining walls is not an 'unreasonable hardship' and by

> lowering the density, more land becomes available for building envelopes. This is nothing more than a self imposed condition that does not rise to the level of meeting the variance criteria." Petition for Review 27.

The above challenge expresses a theme that is repeated several times in petitioners' arguments under the fifth assignment of error. Petitioners suggest that the variances are solely to allow petitioner to maximize the number of lots in the proposed subdivision. While maximizing the number of lots is quite likely one of the applicant's considerations, we do not see that this consideration is necessarily inconsistent with the variance criteria, particularly SRC 63.332(a)(2) which requires that the variance be "necessary for the proper development of the subdivision and the preservation of property right and values." See n 14. In any event, the city's findings quoted above establish that Fern Drive must traverse very steep slopes to provide the connection through the subdivision with South River Road that is required by the city's transportation system plan. The findings admittedly do not provide a detailed explanation for why following the geologic experts' recommendations to minimize cut and fill necessarily results in a roadway that exceeds a 12 percent grade. But petitioners offer no reason to believe that Fern Drive can be constructed to minimize cuts and fills that might have a destabilizing effect in this steeper area of the property and at the same time comply with the 12 percent grade requirement in all instances. Without a more focused challenge to the above findings, we conclude that they are adequate to demonstrate that the street grade variance complies with SRC 63.332(a)(1).

2. The Remaining SRC 63.332(a) Variance Criteria

The city adopted findings addressing each of the remaining variance criteria for the street grade variance. Petitioners do not acknowledge or specifically challenge those findings. In the absence of such a challenge, we conclude that the city's findings are adequate.

D. Petitioners' General Misconstruction of Law Argument

Citing variance decisions by this Board and the Court of Appeals that predate ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), petitioners argue that the city has not applied its variance standards to impose a sufficiently rigorous standard.[17] While the challenged decision is not a decision by the city's governing body that would be entitled to some additional deference under *Clark* and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003), it is not at all clear that the holdings in those cases have any material bearing on how the city must interpret and apply its own variance criteria, which in some cases resemble traditional variance standards but in other cases do not. For example while the city may find that the special conditions criterion at SRC 63.332(a)(1) is satisfied if it will result in an "unreasonable hardship" (a traditional variance standard), that criterion can also be met if the city finds that special conditions "deprive the property of a valuable natural resource, or have an adverse effect on the public health, safety and welfare" (neither of which resemble traditional variance standards). Similarly, the criteria at SRC 63.332(a)(2) and (4) have no exact or reasonably similar analogues in the traditional variance standards that are discussed in the cases petitioners cite.

In addition, it is reasonably clear to us that the city in fact applied the SRC 63.332(a) criteria to impose stringent requirements. We do not agree that the city granted the disputed variances simply to accommodate the applicant's economic convenience, to avoid mere

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[17] ORS 197.829(1) provides:

> "[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[.]"

difficulty or to maximize development potential. The variances were granted to allow a roadway to traverse an extremely steep portion of the property to accommodate a street system connectivity goal in the city's transportation plan and at the same time provide reasonable and safe access to the lots that front the road. The variance decisions cited by petitioners provide no separate basis for reversal or remand.

E. Substantial Evidence Challenge

Petitioners conclude with several substantial evidence challenges, which we address separately below.

1. UGA Preliminary Declaration

Petitioners recast their arguments concerning the continuing validity of the Preliminary Declaration and the need for a UGA Development Permit as a substantial evidence challenge. We have already concluded that petitioners cannot challenge the continuing validity of the Preliminary Declaration in their appeal of this tentative subdivision plan approval. Their challenge regarding the need for a UGA Development Permit was waived. We reject petitioners attempt to reargue those issues as a substantial evidence challenge.

2. Slopes and Street Locations Drive Layout

Petitioners argue as follows:

> "The findings decree that the slopes on the property mandate certain street locations, and that the street locations mandate certain lot configurations and subdivision layout. Petitioners assert that there is no substantial evidence in this Record to support that finding. Petitioners believe that the developer could lower the density and so could meet all the development standards in the SRC. There is no evidence here to the contrary." Petition for Review 30.

In sustaining petitioners' challenge to the city's findings that a variance from the double frontage lot depth requirement is justified, we agreed with petitioners that the city's findings that existing site conditions dictate the precise street and lot configurations shown in the tentative subdivision plan are inadequate. We agree with petitioners that nothing in the

record cited to us supports that broad statement. To the extent the above is simply a reiteration of that earlier argument, we agree with petitioners. However, petitioners cite no evidence that supports their belief that lower density is all that is necessary to allow the proposal to comply with all SRC standards. We have already agreed with respondents that in following their geologic experts' advice to minimize cuts and fills, it is necessary to grant a variance to the 12 percent grade limitation so that the desired Fern Drive connection with South River Road can traverse the steep topography in the northern part of the property to connect with the existing street system to the south. It may be that the variance to the lot depth requirement for double frontage lots can be corrected by reducing density or reconfiguring lots, but it is not obvious to us that that is all that will be required. We therefore reject petitioners' contention that the evidentiary record establishes that reductions in density are all that is required to make variances unnecessary.

3. Unlikely that Adverse Affects will be Caused

Citing testimony concerning potential impacts of the proposed subdivision, petitioners argue that the city's findings that the variances are unlikely to cause adverse impacts are not supported by substantial evidence. Respondent argue:

> "The applicable variance criterion on this point is SRC 63.332(a)(4)—'It is unlikely that *the variance* will have adverse effect on the public health, safety and welfare….' * * * As demonstrated above in this Answer, engineering experts for both the City and the applicant reviewed the proposed street layout, approved its location, and indicated that extensive cuts and fills—as would be required by a different street location—would cause slope instability on the site. This street completes the Transportation System Plan for this area and alleviates congestion on roads in the vicinity, including the nearby, often used and sub-standard Cricket Lane, by providing a 30-foot right of way with curbs and sidewalks.
>
> "Petitioner Gary Lockwood specifically complains about Cricket Lane as needing improvement for ingress and egress. Mr. Lockwood's letter is among the documents cited by Petitioners as evidence of this variance's adverse effect on neighbors. * * * Those documents are actually submissions with general complaints *as to the subdivision as a whole*—not the variance specifically. Very little of the cited testimony concerns the street grade variance; to the extent it does concern the variance, it does not provide data to

support Petitioners' claim of likely adverse effect and does not controvert the substantial scientific data in the record supporting the proposed street location and the resulting need for a variance." Respondents' Brief 47-48 (emphases in respondents' brief; record citation omitted).

We agree with respondents and we reject petitioners' substantial evidence challenge to the city's adverse effects findings.

4. Variance is Necessary for Proper Development

Petitioners again argue that all that is necessary to develop the property without variances is to reduce development density and the number of lots. We have already rejected petitioners' challenge to the city's findings concerning the street grade variance. The city's reasoning in granting that variance concerns slope stability and functionality of the roadway. That reasoning has little or nothing to do with development density.

As we have already explained, we agree with petitioners that the city's findings are inadequate to explain why a variance to the 120-foot minimum lot depth is required for five of the double frontage lots. We also agree with petitioners that respondents have not identified substantial evidence in the record to support such a finding. That evidence may exist, but no one has called it to our attention.

5. Excavations and Retaining Walls Constrain Development

Petitioner argues:

"The findings to support a variance to the street grade [are] based solely on the concept that to require the affected street grade to comply with the SRC grade standard of 12 percent would necessitate additional excavation and retaining walls. While this may in fact be correct from an engineering standpoint, the findings carry that concept one step further and determine that the excavation and retaining walls would constrain the development on individual lots. There is absolutely no evidence to support this concept, and it flies in the face of why variances are necessary. If the excavation and retaining walls will cause building envelopes to move, the answer is to create bigger lots, not to vary the street standard." Petition for Review 31.

Respondents answer:

"Intervenor objects to Petitioner's characterization of the findings as granting the street grade variance 'based solely on the concept' of needing to avoid

> additional excavation and retaining walls. * * * That is part of the reason, but the findings clearly elaborate that the need to avoid cuts and fills is to maintain slope stability for public safety. [There is] substantial evidence in the record supporting such a finding and the resulting decision." Respondents' Brief 48.

We agree with respondents.

The fifth assignment of error is sustained with regard to petitioners' challenge to the variance for the 120-foot minimum lot depth requirement for double frontage lots. Otherwise, the fifth assignment of error is denied.

The city's decision is remanded in accordance with our resolution of the second and fifth assignments of error.