

LAND USE
BOARD OF APPEALS

FEB 3 2 37 PM '89

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

3 LARRY N. SOKOL, DANIEL REIS,)
4 HANS vanWITZENBURG and ARTHUR)
5 BODE,)

6 Petitioners,)

7 vs.)

8 CITY OF LAKE OSWEGO,)

9 Respondent.)

LUBA No. 88-087

FINAL OPINION
AND ORDER

10 Appeal from City of Lake Oswego.

11 Larry N. Sokol, Portland, filed the petition for review and
12 argued on behalf of petitioners. With him on the brief was
13 Jolles, Sokol & Bernstein, P.C.

14 James M. Coleman, Lake Oswego, filed a response brief and
15 argued on behalf of respondent.

16 SHERTON, Referee; HOLSTUN, Chief Referee, participated in
17 the decision.

18 REMANDED

02/03/89

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS 197.850.
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26

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners appeal a Lake Oswego City Council (city
4 council) order approving (1) a three-lot major partition, (2) a
5 lot line adjustment, (3) application of a Planned Development
6 (PD) overlay district, (4) a variance from a parks and open
7 space development standard, and (5) a future streets plan.
8 Petitioners challenge only the approval of the variance from
9 the parks and open space development standard.

10 FACTS

11 The subject property is an undeveloped 1.3 acre parcel
12 owned by applicant Richard P. Waterman¹ and zoned R-15, a
13 residential zone with a 15,000 sq. ft. minimum lot area. The
14 property is located to the west of the intersection of
15 Highway 43 and Cherry Lane. There is a stream corridor in the
16 southeast corner of the property. The property is adjoined to
17 the north by a larger parcel containing one single family
18 residence.

19 The applicant initially requested a minor partition of the
20 property into three lots to be served by a private street.
21 After discussions with city staff, in which the staff strongly
22 recommended that a public street be created, the application
23 was changed to a request for a major partition to be served by
24 a public street.² A major partition is classified by the
25 City of Lake Oswego Development Code (LOC) as a major
26 development. LOC 49.140 and 49.145. The city's Parks and Open

1 Space development standard is applicable to all major
2 developments.³ Lake Oswego Development Standards
3 (LODS) 8.010.⁴

4 The proposed development includes (1) three lots 17,300,
5 12,635 and 16,617 sq. ft. in size,⁵ (2) 11,500 sq. ft.
6 dedicated for public road purposes, and (3) 6,400 sq. ft.
7 reserved as private open space to protect the stream corridor.
8 Record 193. A variance from compliance with the Parks and Open
9 Space standard was requested. The parties disagree on what the
10 Parks and Open Space standard requires in this instance.

11 The city's Development Review Board (review board) approved
12 the application on June 6, 1988. Petitioners appealed the
13 review board's decision to the city council. The city council
14 adopted its order denying the appeal and affirming the decision
15 of the review board on September 21, 1988. This appeal
16 followed.

17 FIRST ASSIGNMENT OF ERROR

18 "The City's variance approval process which applies
19 what the City calls 'guidelines' as opposed to
20 approval criteria is in violation of ORS 227.173(1)."

21 LOC 49.510, entitled "Variance Standards," provides as
22 follows:

23 "(1) The granting authority may grant a variance from
24 the development standards if it is established that:

25 "A. The request is necessary to prevent
26 unnecessary hardship; and,

"B. Development consistent with the request will
not be injurious to the neighborhood in
which the property is located or to property

1 established to be affected by the request;
2 and,

3 "C. The request is the minimum variance
4 necessary to make reasonable use of the
5 property; and,

6 "D. The request is not in conflict with the
7 Comprehensive Plan.

8 "(2) In evaluating whether a particular request is to
9 be granted, the granting authority shall consider the
10 following, together with any other relevant facts or
11 circumstances:

12 "A. Relevant factors to be considered in
13 determining whether a hardship exists
14 include:

15 "i. Physical circumstances related to the
16 piece of property involved.

17 "ii. Whether a reasonable use similar to
18 like properties can be made of the
19 property without the variance.

20 "iii. Whether the hardship was created by the
21 person requesting the variance.

22 "iv. The economic impact upon the person
23 requesting the variance if the request
24 is denied.

25 "B. Relevant factors to be considered in determining
26 whether development consistent with the request
is injurious include:

"i. An analysis of the physical impacts such
development will have, such as visual,
noise, traffic and the increased potential
for drainage, erosion and landslide hazards.

"ii. The perceptions of residents and owners of
property in the neighborhood concerning the
incremental impacts occurring as a result of
the proposed variance.

"C. A determination of whether the standards set
forth in subsection (1) are satisfied necessarily
involves the balancing of competing and
conflicting interests. The considerations listed

1 in subsection (2) A and B are not standards and
2 are not intended to be an exclusive list of
3 considerations. The considerations are to be
used as a guide in the granting authority's
deliberations.

4 "D. Prior variances allowed in the neighborhood shall
5 not be considered by the granting authority in
reaching its decision."

6 Petitioners contend a variance to the city's development
7 standards is a discretionary permit; and, therefore, under
8 ORS 227.173(1) the city is required to base approval or denial
9 of such a variance on standards and criteria set out in its
10 development ordinance.⁶ Petitioners argue that because the
11 city interprets the above-quoted provisions of LOC 49.510(2) as
12 "mere guidelines," which are advisory in nature and can be
13 "enforced or ignored by the City as it sees fit," the city does
14 not have mandatory approval standards or criteria for variances
15 from its development standards. Petition for Review 4.

16 Petitioners also argue this lack of variance standards
17 "conflicts with the procedural rights set forth in Fasano v.
18 Washington County Commission, 264 Or 574, 507 P2d 23 (1973)."
19 Petition for Review 5. Petitioners argue their rights to
20 present and rebut evidence were prejudiced by their inability
21 to determine the standards applicable to the variance
22 application.

23 Respondent agrees its approval criteria for variances from
24 its development standards must comply with ORS 227.173(1).
25 However, respondent contends that it does have mandatory
26 approval criteria for such variances, and that those criteria

1 are set out in paragraphs A-D of LOC 49.510(1). According to
2 respondent, it cannot approve a variance unless all four of
3 these criteria are met. Respondent also argues that
4 LOC 49.510(2)C makes absolutely clear that the "considerations"
5 listed in LOC 49.510(2)A and B are intended only to give
6 guidance to decision makers in determining whether the criteria
7 of LOC 49.510(1)A and B are met. Respondent argues that the
8 criteria of LOC 49.510(1) are clear enough to inform parties of
9 what must be established in order for a variance to be granted.

10 ORS 227.173(1) requires that standards and criteria for the
11 approval of a variance from the city's design standards be set
12 out in the city's development ordinance. We agree with the
13 city that its code sets out standards and criteria for the
14 approval of such variances at LOC 49,510(1) A through D. Under
15 the city's code, the application of these criteria is
16 mandatory. The city cannot approve a variance from its design
17 standards unless it determines that these four criteria are
18 met.⁷

19 On the other hand, LOC 49.510(2)A and B are non-exhaustive
20 lists of "relevant factors" the city is to consider in
21 determining whether the criteria of LOC 49.510(1)A and B are
22 satisfied. These "relevant factors" are not themselves
23 standards which mandate approval or denial of a variance
24 application. LOC 49.510(2)C. We find no error in including in
25 the code a list of factors the city considers relevant to
26 determining compliance with mandatory criteria.⁸

1 Furthermore, since the city's code does set out the
2 criteria for approval of variances to its design standards,
3 petitioners' rights to present and rebut evidence relevant to
4 these criteria were not prejudiced. Petitioners' specific
5 challenges to the interpretation and application of three of
6 these criteria are addressed under the second assignment of
7 error.

8 SECOND ASSIGNMENT OF ERROR

9 "The City's grant of the variance is contrary to the
10 applicable standards and law. The City's findings
11 that the applicant had met the criteria for a variance
under LOC 49.510(1) is not supported by substantial
evidence in the record."

12 A. Unnecessary Hardship

13 LOC 49.510(1)A sets out the following criterion for a
14 variance from the city's development standards:

15 "The [variance] request is necessary to prevent
16 unnecessary hardship * * * "

17 Petitioners argue that respondent has misconstrued this
18 standard in several respects. Petitioners first argue that the
19 "unnecessary hardship" which must be shown to obtain a variance
20 must arise out of conditions inherent in the land itself,
21 citing Erickson v. City of Portland, 9 Or App 256, 496 P2d 726
22 (1972), Lovell v. Independence Planning Comm., 37 Or App 3, 586
23 P2d 99 (1978); and Chou v. City of Keizer, 15 Or LUBA 420
24 (1987). Second, petitioners argue that conformance with the
25 city's code cannot itself constitute the "unnecessary hardship"
26 required for approval of a variance, citing Standard Supply Co.

1 v. Portland, 1 Or LUBA 259 (1980). Finally, petitioners argue
2 the "unnecessary hardship" standard requires that, without the
3 variance, the applicant's property would be virtually useless,
4 citing Erickson v. City of Portland, supra, and Standard Supply
5 Co. v. Portland, supra. Petitioners contend the city did not
6 find, and the applicant did not demonstrate, that denial of the
7 variance would preclude beneficial use of the property or that
8 there is a hardship based on conditions inherent in the land.

9 The city argues that land use law relating to variances is
10 not based on common law, but rather on the interpretation and
11 application of the specific local government ordinance
12 provisions applicable in a particular case. Cope v. City of
13 Cannon Beach, 15 Or LUBA 546 (1987). The city further argues
14 that the language of LOC 49.510 is different from the ordinance
15 language construed in all the cases cited by petitioners.
16 According to the city, the LOC does not contain language
17 requiring the establishment of exceptional or extraordinary
18 circumstances applicable to the subject property, as did the
19 ordinances at issue in Erickson v. City of Portland and Lovell
20 v. Independence Planning Comm. The city also argues the
21 language of the LOC, unlike the ordinance language at issue in
22 Standard Supply Co. v. Portland, does demonstrate an intent to
23 create a variance standard less restrictive than the
24 traditional "unnecessary hardship" test.

25 The city contends it made a specific policy choice to adopt
26 less restrictive variance criteria when its present development

1 code was adopted. According to the city, prior to the 1981
2 adoption of the current LOC Chapter 49, the use and development
3 of land in the city were governed by a zoning code and
4 subdivision code which contained variance criteria similar to
5 the traditional standards considered by the Court of Appeals in
6 Erickson v. City of Portland and Lovell v. Independence
7 Planning Comm.⁹ The city argues that legislative history of
8 the adoption of the 1981 development code, in the form of
9 minutes of city council meetings at which the draft code was
10 considered, demonstrates that the language ultimately adopted
11 as LOC 49.510(1) was intended to relax the traditional hardship
12 test.¹⁰

13 According to the city, because it did not adopt the
14 traditional hardship test in its code, and the code does not
15 specifically define "hardship," the city is guided by the
16 common dictionary definition of the term "hardship" as
17 "something that causes or entails suffering or privation."
18 Respondent's Brief 13.

19 The city also contends the record supports the city's
20 determination that requiring full compliance with the Parks and
21 Open Space standard would subject the applicant to an
22 unnecessary hardship because (1) the development application
23 was changed to a major partition (to which the Parks and Open
24 Space standard applies) because of the city's desire that a
25 public street be created to serve future development on an
26 adjacent lot; (2) additional public open space cannot be

1 provided without limiting the partition of the property to two
2 lots; and (3) the applicant is dedicating 11,500 sq. ft. for a
3 40 ft. public road right-of-way and building a 24 ft. public
4 street, at considerable cost.

5 We agree with the city that in interpreting the meaning of
6 code variance provisions it is the code language, rather than
7 appellate court or LUBA decisions interpreting traditional
8 variance standards, that controls. In a previous decision, we
9 observed:

10 "[W]e note land use law, including the law pertaining
11 to variance relief, is not a branch of common law, but
12 is rather based on particular statutes, ordinances and
13 rules enacted by legislative and administrative
14 bodies. Anderson v. Peden, 284 Or 313, 315, 587 P2d
15 59 (1978). Thus, in cases of this sort, the focus of
16 our inquiry must be on the actual language appearing
17 in the controlling enactment." Fisher v. City of
18 Gresham, 10 Or LUBA 283, 289, rev'd other grounds, 69
19 Or App 411, 685 P2d 486 (1984).

20 To date, no Oregon appellate court decision has limited, on
21 constitutional, statutory or other grounds, the scope of
22 discretion which may be exercised by local governments in
23 establishing standards for the approval of variances. Id. We
24 have held that the power to allow a variance is not strictly
25 limited to instances where relief is necessary to permit
26 beneficial use of the subject property. Morrison v. City of
Portland, 10 Or LUBA 12 (1983). Local government variance
standards which do not require a demonstration of "unnecessary
hardship" have been applied without judicial criticism. Fisher
v. City of Gresham, 69 Or App at 415-416; Atwood v. City of

1 Portland, 55 Or App 215, 637 P2d 1302 (1981), rev denied 292 Or
2 722 (1982); 1000 Friends v. Clack Co. Comm., 40 Or App 529,
3 595 P2d 1273 (1979).

4 Where local government variance standards do include the
5 traditional "unnecessary hardship" criterion without further
6 elaboration, both we and the appellate courts have required the
7 standard to be interpreted to require that (1) the subject
8 property be virtually useless without the variance; and (2) the
9 hardship arise from conditions inherent in the land which
10 distinguish it from other land in the neighborhood.¹¹

11 Erickson v. City of Portland, supra; Lovell v. Independence
12 Planning Comm., supra, Standard Supply Co. v. Portland, supra;
13 Chou v. City of Keizer, supra. In Standard Supply Co. v.
14 Portland, supra at 262, we rejected the city's more liberal
15 interpretation of "unnecessary hardship" in its variance
16 standards because we found no authority in the local
17 government's code to support a more liberal interpretation.

18 However, in this case we agree with the city that the
19 language of its code indicates that it did not intend to adopt
20 the traditional, strict interpretation of the term "unnecessary
21 hardship."¹² The code identifies "factors to be considered"
22 in determining whether an unnecessary hardship exists,
23 including "physical circumstances related to the piece of
24 property involved" and "whether a reasonable use similar to
25 like properties can be made of the property without the
26 variance." LOC 49.510(2)A.i and ii. These factors parallel,

1 but are more liberal than, the traditional elements of
2 "unnecessary hardship." The factors also include "economic
3 impact on the person requesting the variance if the request is
4 denied," which is not part of the traditional, strict
5 interpretation of "unnecessary hardship." LOC 49.510(2)A.iv.
6 Most importantly, the code provides that a determination of
7 whether the "unnecessary hardship" requirement of
8 LOC 49.510(1)A is satisfied "necessarily involves the balancing
9 of competing and conflicting interests" and the considerations
10 set out in LOC 49.510(2)A "are not standards and are not
11 intended to be an exclusive list of considerations," but are to
12 be used as a guide by the reviewing authority. LOC 49.510(2)C.

13 Reading LOC 49.510 in its entirety, we find that the city
14 clearly did not intend to adopt the traditional, strict
15 "unnecessary hardship" test. The city's interpretation of the
16 "unnecessary hardship" criterion of LOC 49.510(1)A not to
17 require a demonstration that (1) without the variance the
18 subject property would be virtually useless, and (2) the
19 hardship arises from conditions inherent in the land, is
20 reasonable and correct.¹³

21 The first subassignment of error is denied.

22 B. Minimum Variance Necessary for Reasonable Use

23 LOC 49.510(1)C sets out the following criterion for a
24 variance from the city's development standards:

25 "The request is the minimum variance necessary to make
26 reasonable use of the property * * * "

1 Petitioners argue this Board and the Oregon courts have
2 held that a variance must be the minimum variance necessary to
3 make beneficial use of the subject property, citing Erickson v.
4 City of Portland, supra, and Standard Supply Co. v. Portland,
5 supra. Petitioners argue that the city "did less than consider
6 whether the developer's request for a variance to the open
7 space standard in order to put in a three-lot development was
8 the minimal variance necessary to make use of the property."
9 Petition for Review 11. According to petitioners, the city
10 merely adopted the applicant's contention that a three-lot
11 partition was necessary in order to make reasonable use of the
12 property. Petitioners assert there is no evidence in the
13 record to show that three buildable lots are necessary to make
14 reasonable use of the property.

15 The city argues that the development review board decision
16 the city council relied on states that requiring additional
17 open space would severely limit development of the property.
18 Record 65-66. The city also argues there is evidence in the
19 record that (1) requiring the full 20% open space would result
20 in less than 45,000 square feet being available for
21 development, thereby limiting the development to two lots; and
22 (2) the loss of the third lot would make the development
23 economically unfeasible. Record 74, 176, 193.

24 The city also points out that the partial variance to the
25 Parks and Open Space standard results in preservation of the
26 stream corridor (11.6% of the property) as open space. The

1 city further argues that the applicant could meet the Parks and
2 Open Space standard by paying a \$3,870 acquisition fee in lieu
3 of providing the remainder of the required 20% open space. The
4 city argues the requested variance is the minimum which would
5 allow three lots to be created and not require payments by the
6 applicant in addition to the costs for dedication and
7 construction of the public street. According to the city, in
8 these circumstances, to apply LOC 49.510(1)C in a manner
9 resulting in less than three developable lots or a requirement
10 for an additional contribution for public improvements would be
11 unreasonable.

12 A premise underlying petitioners' argument concerning the
13 interpretation of LOC 49.510(1)C is that, based on the cited
14 LUBA and court variance cases, the city must require that a
15 variance be the minimum necessary to make some beneficial use
16 of the property. However, as we explained in the previous
17 subassignment of error, our inquiry must focus on the
18 particular city code provisions governing the appealed variance.

19 In this case, LOC 49.510 reflects an intent to depart from
20 the traditional, restrictive type of variance standards. In
21 the previous subassignment, we concluded that the city was not
22 required to interpret "unnecessary hardship" in LOC 49.510(1)A
23 to require that the property be virtually useless without the
24 requested variance. To require LOC 49.510(1)C to be
25 interpreted as petitioners urge would create an internal
26 conflict between these two standards.¹⁴ We conclude the

1 city's interpretation of "reasonable use" of the subject
2 property under LOC 49.510(1)C is reasonable and correct.

3 However, petitioners also allege the city's decision does
4 not demonstrate that the requested variance is the minimum
5 necessary to make "reasonable use" of the property. The only
6 findings explicitly addressing this criterion state:

7 "The applicant has provided 11.6% open space in
8 addition to right-of-way dedication for a public
9 street and future access for the adjacent parcel.
10 Staff supports the applicant's variance request and
11 agrees additional open space dedication will prevent a
12 reasonable use of the 1.3 acre site."¹⁵ Record 137

13 Other findings relevant to this criterion provide:

14 "The applicant initially requested a minor land
15 partition but staff's recommendation for construction
16 of a public street resulted in a major partition,
17 hence a major development. Considering the amount of
18 right-of-way dedication, future street access and
19 physical improvement of the new street, the
20 preservation of 11.6% open space is sufficient.
21 Requiring additional open space would * * * severely
22 limit the development of this parcel. * * * " Record
23 50-51, 65-66, 136.

24 To comply with LOC 49.510(1)C, the city's findings must
25 establish (1) what constitutes reasonable use of the property,
26 and (2) why the approved variance is the minimum necessary to
allow such use.¹⁶ See Fisher v. City of Gresham, 12 Or LUBA

at 192. Although the above-quoted findings include a
conclusionary statement that the standard is met, they are
inadequate because they fail to explain what the city considers
to be "reasonable use" of the property and why the variance
approved is the minimum variance required to allow the
"reasonable use."¹⁷ Rather, they simply state preservation

1 of 11.6% open space is "sufficient" in this instance and state
2 that providing additional open space would "severely limit the
3 development of" the parcel.

4 Under ORS 197.835(10)(b),¹⁸ even though the city's
5 findings are inadequate, we must uphold the city's
6 determination of compliance with LOC 49.510(1)C if "the parties
7 identify relevant evidence in the record which clearly supports
8 the decision." In this case, the evidence cited by the parties
9 does clearly support a finding that providing the full 20% open
10 space would result in there being only two developable lots on
11 the property. Record 176, 193. However, this evidence does
12 not clearly support a finding that the approved variance from
13 20% to 11.6% open space is the minimum necessary to prevent
14 loss of the third lot.¹⁹

15 In addition, the evidence does not clearly support a
16 finding that providing three developable lots is essential to
17 "reasonable use" of the property.²⁰ Interpreting and
18 applying the "reasonable use" standard requires an exercise of
19 considerable judgment by the city. We are therefore unable to
20 overlook the inadequacy of the city's findings by virtue of
21 ORS 197.835(10)(b). See Bright v. City of Yachats, ___ Or
22 LUBA ___ (LUBA No. 87-048, October 13, 1987), slip op 14.

23 This subassignment of error is sustained.

24 C. Injury to the Neighborhood

25 LOC 49.510(1)B sets out the following criterion for a
26 variance from the city's development standards:

1 "Development consistent with the request will not be
2 injurious to the neighborhood in which the property is
3 located or to property established to be affected by
4 the request * * * "

5 Petitioners challenge the adequacy of the city's finding of
6 compliance with this standard, arguing that a finding must
7 state the facts supporting the decision and explain how the
8 standards and facts result in the decision reached.
9 Petitioners claim the city's finding merely recites the
10 approval criteria. Petitioners further argue the city's
11 findings fail to address relevant issues of traffic safety,
12 noise and congestion raised by them in the proceeding before
13 the city.

14 Petitioners also contend that the city's finding of
15 compliance with this standard is not supported by substantial
16 evidence in the record. Petitioners cite evidence in the
17 record concerning traffic safety which they contend constitutes
18 substantial evidence that the proposed development will cause
19 traffic safety problems.

20 The city points to its findings that there will be public
21 benefits from the proposed development as supporting its
22 determination of compliance with LOC 49.510(1)B. Record 65.
23 The city also argues that petitioners' arguments concerning
24 traffic impacts, congestion and noise reveal that petitioners
25 misinterpret LOC 49.510(1)B. The city argues that this
26 standard only requires determination of the effects of the
granting of the variance from the Parks and Open Space standard

1 on the neighborhood, not of all effects of the proposed
2 development on the neighborhood. According to the city, the
3 only effect of granting the variance is either that 8.4% of the
4 subject site will not be required to be preserved as open space
5 or \$3,870 will not be paid to the city in lieu of providing
6 such open space. Respondent argues that the approval of this
7 variance, therefore, can have no measurable detrimental impact
8 on the neighborhood.

9 The parties disagree on the proper interpretation of
10 LOC 49.510(1)B. Petitioners contend that "development
11 consistent with the request will not be injurious to the
12 neighborhood" requires that the city consider the impacts of
13 the entire proposed development, i.e., three single family
14 dwellings with a public street to provide access to these
15 dwellings and the neighboring parcel. On the other hand, the
16 city argues this standard only requires consideration of the
17 incremental impacts on the neighborhood due to the variance
18 itself, i.e., preserving 11.6% versus 20% of the site as open
19 space,²¹ or forgoing \$3,870 for acquisition and development
20 of parks and scenic easements. LOC 39.100.

21 The wording of this standard is ambiguous. We find that
22 the city's interpretation of its standard is the more
23 reasonable. In many instances a requested variance might only
24 affect one portion or area of a large proposed development. In
25 such a situation, it would be unreasonable to interpret this
26 standard to require consideration of all impacts of the

1 development in deciding whether the variance should be
2 approved. This interpretation is supported by the city's
3 identification of the perceptions of neighborhood residents and
4 property owners concerning "the incremental impacts occurring
5 as a result of the proposed variance" as a relevant factor in
6 determining whether LOC 49.510(1)B is satisfied. (Emphasis
7 added.) LOC 49.510(2)B.ii.

8 Thus, we conclude that LOC 49.510(1)B requires the city to
9 determine that not providing an additional 8.4% of the proposed
10 development site as open space will not be injurious to the
11 neighborhood, and to explain the basis for that determination
12 in its findings.²² The only findings expressly addressing
13 LOC 49.510(1)B state:

14 "Staff believes the request to reduce the required 20%
15 open space will not be injurious to the neighborhood.
16 The applicant has proposed to construct a public
17 street and provide future access to the adjacent
18 parcel to the north, and is dedicating a sizeable
19 portion of the lot for that purpose." Record 136-137.

20 The city maintains the following finding, although
21 ostensibly addressing the application of the PD overlay, is
22 also relevant to compliance with LOC 49.510(1)B:

23 " * * * [T]he proposal would provide public benefit by
24 the requirement of installation of two street lights,
25 the obtainment of a City drainage easement over the
26 stream corridor, and the provision for future access
to the adjacent lot." Record 65.

Only the first sentence of the above-quoted findings
directly addresses the impacts on the neighborhood of not
providing the additional 8.4% open space. We agree with

1 petitioners that that sentence is impermissibly conclusionary.
2 It simply restates the criterion, and does not explain what, if
3 any, impacts the city believes not providing the additional
4 open space will have on the neighborhood and why the city
5 concludes those impacts will not be injurious. The remainder
6 of the findings quoted above describe other features of the
7 proposed development and conclude they will provide a "public
8 benefit." These findings may be relevant to the standards
9 governing approval of the partition or application of the PD
10 overlay, but they are not relevant to determining whether the
11 lack of additional open space will be injurious to the
12 neighborhood.

13 Since we find the city's findings inadequate for the
14 reasons stated above,²³ no useful purpose would be served by
15 reviewing petitioners' additional allegation that the findings
16 are not supported by substantial evidence. DLCD v. Columbia
17 County, ___ Or LUBA ___ (LUBA No. 87-109, March 15, 1988),
18 slip op 7; McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373
19 (1986).

20 This subassignment of error is sustained, in part.

21 The second assignment of error is sustained, in part.

22 THIRD ASSIGNMENT OF ERROR

23 "Inaccurate information on the lot sizes proposed for
24 the development was used by the Lake Oswego
25 Development Review Board in analyzing the developer's
26 plan. This inaccurate information prejudiced the
City's decision and the finding should be remanded for
reconsideration."

1 Petitioners assert that city staff provided inaccurate
2 information to the development review board regarding the size
3 of lots surrounding the proposed development. Petitioners
4 argue that the size of surrounding lots is relevant to
5 determining whether development consistent with the variance
6 will not be injurious to the neighborhood pursuant to
7 LOC 49.510(1)B. Petitioners argue that they were prejudiced
8 because (1) the misinformation damaged petitioners' credibility
9 before the review board, and (2) the review board relied on
10 this misinformation.

11 The city points out that at the hearing on petitioners'
12 appeal of the review board's decision, the city council allowed
13 petitioners to enter evidence into the record to correct the
14 misinformation given to the review board. The city argues the
15 city council accepted and considered petitioners' evidence, but
16 found it not to be relevant to conformance of the proposed
17 development with applicable criteria. The city denies that
18 petitioners were prejudiced by the misinformation on
19 surrounding lot sizes provided to the review board.

20 The findings adopted by the city council state:

21 " * * * During the appeal hearing the only inaccurate
22 information identified by appellants was the reference
23 to lot sizes in the Hallinan Woods subdivision. The
24 Council accepted Exhibit 23, a portion of the plat of
25 the Hallinan Woods subdivision along with a written
26 statement by Andy Paris that the lots shown on the
exhibit were in excess of 20,000 sq. ft. The lots
shown on the exhibit are not adjacent to the property
subject to this application and the closest shown
being more than 200' to the north and west of the
subject site. * * * The size of other lots located

1 more than 200' away from the site are not facts which
2 are relevant to the issue of compliance of the
3 application with an applicable criterion. The
4 inaccurate information submitted by staff was
5 corrected by appellants and the Council received the
6 correct information into the record. * * * "
7 Record 7.

8 The city council accepted and considered evidence submitted
9 by petitioners to correct the misinformation given to the
10 review board.²⁴ Petitioners do not argue that the city
11 council lacked authority to reverse or modify any aspect of the
12 review board's decision because of the review board's reliance
13 on misinformation. Any prejudice to petitioners due to the
14 review board's receipt of inaccurate figures regarding the size
15 of lots in the Hallinan Woods subdivision was eliminated by the
16 city council's acceptance of corrected information on appeal.
17 Cf. Slatter v. Wallowa County, ___ Or LUBA ___ (LUBA No.
18 87-105, April 15, 1988) slip op 9 (de novo review by county
19 commissioners of planning commission decision cured any
20 impropriety created by participation of a planning commission
21 member with a financial interest).

22 The third assignment of error is denied.

23 The city's decision is remanded.

FOOTNOTES

1
2 _____
3 1

4 The lot line adjustment also involves a small portion of an adjoining parcel.

5 _____
6 2

7 Under the Lake Oswego Development Code (LOC), a minor partition is defined as "[a] partition that does not include the creation of a street." LOC 49.015(33)(b). A major partition is defined as "[a] partition which includes creation of a street." LOC 49.015(33)(a). The proposed public street potentially would provide access for future development of the adjoining parcel to the north.

9
10 _____
11 3

12 The Parks and Open Space standard provides, in relevant part:

13 "[a]ll major residential development * * * shall provide open space or park land approved by the city in an aggregate amount equal to at least 20% of the gross land area of the development." LODS 8.020.1

14 We also note that LOC 49.140(1)H identifies a minor partition as a "minor development." Minor residential developments are not required to comply with the Parks and Open Space standard. Id.

15
16
17 _____
18 4

19 The Lake Oswego Development Standards are not codified as part of the LOC.

20 _____
21 5

22 Although the minimum lot area in the R-15 zone is 15,000 sq. ft., a smaller lot may be approved if the Planned Development Overlay district is applied to the property. The planned development overlay allows the minimum lot area requirement to be altered without a variance, so long as the density requirement of the underlying zone is met. LOC 48.475.3. The maximum density provision for the R-15 zone would potentially allow three dwellings on the subject property. LOC 48.205(1).

1 _____
6

2 ORS 227.173(1) provides:

3 "Approval or denial of a discretionary permit
4 application shall be based on standards and criteria,
5 which shall be set forth in the development ordinance
6 and which shall relate approval or denial of a
7 discretionary permit application to the development
8 ordinance and to the comprehensive plan for the area
9 in which the development would occur and to the
10 development ordinance and comprehensive plan for the
11 city as a whole."

8 _____
7

9 We also agree with the city that ORS 227.173(1) does not
10 require perfect standards, but rather standards that are clear
11 enough to inform the applicant and other parties of what must
12 be established during the application process. Lee v. City of
13 Portland, 57 Or App 798, 802, 646 P2d 662 (1982); Columbia
14 River Television v. Multnomah Co., 14 Or LUBA 179, 182 (1986).
15 However, we note that petitioners' argument under this
16 assignment of error is only that the city does not have
17 criteria for the approval of variances set out in its code.
18 Petitioners do not also argue that, if the provisions of
19 LOC 49.510(1)A-D are criteria, they are inadequate to inform
20 parties of what is required to obtain approval of a variance.

16 _____
8

17 We note the technique of providing both approval criteria
18 and relevant factors is similar to the legislature's and Land
19 Conservation and Development Commission's approach in providing
20 both mandatory "statewide planning goals" and nonmandatory
21 "guidelines." See ORS 197.015(8) and (9).

20 _____
9

21 Section 50.510 of the city's 1961 zoning code provided, in
22 relevant part:

23 "The Design Review Board may authorize variances from
24 the requirements of the zoning code where it can be
25 shown that, owing to special or unusual circumstances
26 related to a specific piece of property, the literal
27 interpretation of the zoning code would cause an undue
28 or unnecessary hardship. * * *

29 "In determining whether the literal interpretation of
30 the zoning code would cause an undue or unnecessary

1 hardship of sufficient degree to require the granting
2 of a variance, the Board will consider the following
3 criteria, together with all other relevant
4 circumstances:

5 "(1) Special and unusual conditions apply to the
6 property that do not apply generally to other
7 properties in the same zone or neighborhood,
8 which conditions are a result of lot size or
9 shape, topography, or other circumstances over
10 which the applicant has no control.

11 "(2) The variance is necessary for the
12 preservation of a property right of the applicant
13 substantially the same as is possessed by owners
14 of other property in the same zone or vicinity.

15 "(3) The variance is not materially in conflict
16 with the objectives of prevailing community or
17 neighborhood plans, nor injurious to the
18 neighborhood in which the property is located.

19 "(4) Without the variance as requested, the
20 property will be unsuited for the normal and
21 reasonable uses of property within the zone or
22 vicinity, as distinguished from the applicant's
23 personal needs or desires."

24 _____
25 10

26 The excerpts of minutes of the 1981 city council meetings
which the city cites as legislative history are not in the
record of the city's proceeding submitted to LUBA, but rather
are attached to the city's brief. Petitioners objected at oral
argument to the city's submission with its brief of material
not in the record, but have not filed a motion to strike the
material or a request for a reply brief. Neither has the city
expressly requested that we take official notice of these
documents. See Oregon Rules of Evidence 201 and 202. However,
we need not determine whether these documents are properly
before us in this case because, as explained in n 10, infra, we
do not rely on these documents in interpreting LOC 49.510(1)A.

We note the Court of Appeals has stated, in dicta, that it
may be we should be more influenced by a local government
interpretation of an ambiguous ordinance provision when "the
local interpretation is based on legislative history to which
the local entity has peculiar access." McCoy v. Linn County,
90 Or App 271, 276, 752 P2d 323 (1988). However, neither we
nor the court have determined whether LUBA may consider, as
legislative history, documents not subject to official notice

1 and not in the record of the appealed local government
2 decision. See ORS 197.830(11)(a).

3 11

4 We note that in all the cases cited, with the possible
5 exception of Standard Supply Co. v. Portland, supra, the local
6 government variance standards included a traditional
7 "exceptional or extraordinary circumstances or conditions
8 applying to the subject property but not generally applicable
9 to property in the vicinity" provision as well as an
10 "unnecessary hardship" provision. It is not entirely clear to
11 us that the traditional "unnecessary hardship" criterion alone
12 must be interpreted to require that the hardship result from
13 conditions inherent in the land not shared by other property.

9 12

10 We also agree with the city that its amendment of the
11 traditional, restrictive variance standards of the 1961 code to
12 substitute the more flexible provisions of the 1981 code
13 supports its liberal interpretation of the "unnecessary
14 hardship" provision in the 1981 code. See Morrison v. City of
15 Portland, 11 Or LUBA 246, 257-258, rev'd other grounds 70 Or
16 App 437, 689 P2d 1027 (1984).

17 However, in construing the provisions of the 1981 code, we
18 do not rely on the excerpts of minutes of city council meetings
19 concerning the draft 1981 code which the city submitted as
20 legislative history. Those minutes neither support nor argue
21 against the city's liberal interpretation of "unnecessary
22 hardship" as used in the 1981 code. The minutes indicate some
23 city council members felt that variance criteria should be
24 "fairly tight" or "restrictive in nature," while others thought
25 the then existing criteria were "a little too restrictive" or
26 "there should be some flexibility." Respondent's Brief
App-12. The minutes state it was the consensus of council
members that they were "willing to look at language that would
be less restrictive on the hardship question, but still
incorporates the requirement to prove or demonstrate
hardship." (Emphasis added.) Respondent's Brief App-14. The
quoted language does not establish that the council members
intended the language they eventually adopted to be "less
restrictive," only that they were willing to consider such a
possibility.

24 13

25 We note that to the extent petitioner raises a substantial
26 evidence challenge to the city's determination of compliance
with its "unnecessary hardship" standard, that challenge is

1 based only on there being no evidence in the record to support
2 a determination of compliance with petitioners' interpretation
3 of the "unnecessary hardship" standard. However, we do not
4 adopt the interpretation of that standard advocated by
5 petitioners. Petitioners do not allege the evidence in the
6 record is inadequate to support the city's determination of
7 compliance with the city's interpretation of the "unnecessary
8 hardship" criterion; and, therefore, their evidentiary
9 challenge must fail.

10 _____
11 14

12 We note that in Fisher v. City of Gresham, 69 Or App at
13 415, the court interpreted ordinance provisions requiring
14 variances to be necessary for "reasonable economic use" not to
15 require that property be shown to be incapable of any economic
16 use.

17 _____
18 15

19 These "findings" are found in the staff report of April 22,
20 1988. The city council's order states "the decision of the
21 Development Review Board set forth in Order SD 12-88/VAR
22 19-88/PD 5-88-557 is affirmed." Record 10. The parties agree
23 that this language has the effect of incorporating the cited
24 review board order into the city council's decision.
25 Furthermore, the review board incorporated the findings of the
26 April 22, 1988 staff report into its order, which makes them
27 part of the city's decision. Record 64.

28 _____
29 16

30 As a result of the requirements of LOC 49.510(1)C, a
31 variance could not be approved if the use possible without any
32 variance constitutes "reasonable use" of the property.
33 Therefore, if it is alleged in the proceedings below that such
34 use does constitute "reasonable use," the city must address in
35 its findings why the use allowable without a variance is not
36 "reasonable use."

37 _____
38 17

39 If the city is correct in interpreting its Parks and Open
40 Space standard to require the applicant either to dedicate an
41 additional 8.4% open space or to pay a \$3,870 acquisition fee,
42 then under LOC 49.510(1)C the city's decision would have to
43 demonstrate that payment of the additional fee, as well as
44 provision of additional open space, would prevent "reasonable
45 use" of the property. The city's decision does not establish
46 this.

1 We also note that petitioners did not assign as error the
2 city's interpretation of its Parks and Open Space standard as
3 allowing payment of a fee in lieu of providing the required
4 open space. However, the arguments in the petition for review
5 seem to be based on an assumption that compliance with this
6 standard may be achieved only by providing the required amount
7 of open space. We find it unnecessary to determine the correct
8 interpretation of this standard in resolving this subassignment
9 of error, as the city's findings are inadequate to demonstrate
10 compliance with LOC 49.510(1)C under either interpretation.
11

12 18

13 ORS 197.835(10)(b) provides:

14 "Whenever the findings are defective because of failure to
15 recite adequate facts or legal conclusions or failure to
16 adequately identify the standards or their relation to the
17 facts, but the parties identify relevant evidence in the
18 record which clearly supports the decision or a part of the
19 decision, the board shall affirm the decision or the part
20 of the decision supported by the record and remand the
21 remainder to the local government, with direction
22 indicating appropriate remedial action."
23

24 19

25 For instance, the site plan at Record 193 shows that Lots
26 1, 2 and 3 total 46,550 sq. ft. Under the R-15 zone with the
27 PD overlay it is necessary to have 45,000 sq. ft. to have three
28 developable lots. The evidence in the record does not explain
29 why the variance could not be minimized, while still retaining
30 three developable lots, by allocating an additional 1,550
31 sq. ft. to open space. Also, assuming the city's
32 interpretation of its Parks and Open Space standard is correct,
33 the evidence in the record does not explain why payment of part
34 or all of the \$3,870 acquisition fee should not be required
35 under LOC 49.510(1)C.
36

37 20

38 This evidence consists merely of a statement by a city
39 planner that "because of the right-of-way dedication for the
40 public street and future access, [the provision of 11.6% open
41 space with three developable lots] is a reasonable use of the
42 site," (Record 74) and an unsupported statement by the
43 applicant that limiting the parcel to two developable lots "is
44 not feasible." Record 176.
45
46

1

21

2 Assuming the 6400 sq. ft. shown on the site plan at Record
3 193 as open space constitutes the 11.6% referred to in the
4 findings, then the additional 8.4% open space which would be
5 required without the variance amounts to approximately an
6 additional 4600 sq. ft. However, we note that 6400 sq. ft.
7 appears to be only 9.9%, not 11.6%, of the gross area of 64,450
8 sq. ft. shown on the site plan.

6

22

7 If the city is correct in interpreting its Parks and Open
8 Space standard to allow the payment of a \$3,870 parks
9 acquisition fee in lieu of providing the 8.4% open space, then
10 the city's decision must also explain why not collecting that
11 fee will not be injurious to the neighborhood. We note that
12 the city's decision does not appear to do so. We offer this
13 comment as guidance to the city on remand, as petitioners have
14 not raised this issue in their argument, presumably because
15 they disagree with the city as to the correct interpretation of
16 the requirements of the Parks and Open Space standard.

12

23

13 Petitioners also attack the city's findings as inadequate
14 to demonstrate compliance with LOC 49.510(1)B because they do
15 not address traffic, congestion and noise impacts of the
16 proposed development. However, petitioners do not explain how
17 these issues relate to the effects of the variance on the
18 neighborhood. Whether or not an additional 8.4% open space is
19 provided will have not change whatever traffic, congestion and
20 noise impacts the proposed development may have.

18

24

19 We note that LOC 49.625(7) ("Appeals of Hearing Body
20 Actions to City Council") provides that the city council's
21 consideration of the hearing body's decision "shall be confined
22 to the record of the proceeding below," and "evidence not
23 contained in the record made before the hearing body may not be
24 presented in the hearing before the City Council." However,
25 petitioners do not assign as error the city's acceptance of
26 their evidence regarding lot sizes at the appeal hearing.

23

24

25

26