



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city order denying his application  
4 for a minor partition and variance.

5 **MOTION TO INTERVENE**

6 Robert Briede moves to intervene on the side of  
7 respondent in this appeal proceeding. There is no objection  
8 to the motion, and it is allowed.

9 **FACTS**

10 The subject property is a 38,640 square foot parcel in  
11 the city's Residential 15,000 square foot minimum (R-15)  
12 zone. The southern boundary of the subject parcel abuts  
13 Lake Oswego. Other privately owned properties abut the  
14 parcel on its east and west boundaries, and the northern  
15 boundary of the property fronts Twin Point Road. The  
16 subject property is improved with a residence.

17 Petitioner applied for permission to partition the  
18 parcel into southern and northern parcels. The proposed  
19 southern parcel would abut the lake and consist of 15,460  
20 square feet. The proposed southern parcel includes an  
21 access easement which provides access to four parcels to the  
22 west of the subject property.

23 The proposed northern parcel would consist of 23,160  
24 square feet. The northern parcel would have no lake  
25 frontage, and would include the existing dwelling.  
26 Petitioner also applied for a variance from city street

1 frontage requirements because the southern parcel would not  
2 abut a public road. Access to the southern parcel would be  
3 provided by the private access easement which currently runs  
4 through the subject parcel and serves other parcels to the  
5 west.

6 The city's Design Review Board (DRB) approved  
7 petitioner's application for a partition and variance. A  
8 neighboring property owner appealed the DRB decision to the  
9 city council. The city council reversed the decision of the  
10 DRB and denied petitioner's application. This appeal  
11 followed.

12 **SECOND ASSIGNMENT OF ERROR**

13 "The city's findings that petitioner's application  
14 fails to satisfy the access variance criteria of  
15 LOC 49.510(1) misconstrue the applicable  
16 requirements, are inadequate and are not supported  
17 by substantial evidence in the record."

18 There is no dispute that under Lake Oswego Development  
19 Standards [LODS] 18.020, the proposed parcels are required  
20 to abut a public street for a width of at least 25 feet.  
21 This requirement must either be met or a variance must be  
22 approved before a partition of the subject parcel may be  
23 approved. In order to approve a variance to the LODS 18.020  
24 street frontage standard, the following variance criteria of  
25 Lake Oswego Code (LOC) 49.510(1) must be satisfied:

26 "(A) The request is necessary to prevent an  
27 unnecessary hardship;

28 "(B) Development consistent with the request will  
29 not be injurious to the neighborhood in which

1           the property is located or to property  
2           established to be affected by the request;

3           "(C) The request is the minimum variance necessary  
4           to make reasonable use of the property;

5           "(D) The request is not in conflict with the  
6           Comprehensive Plan."

7           The city determined LOC 49.510(1)(A) was not satisfied  
8   because:

9           "\* \* \* the applicant has not adequately  
10          demonstrated that the failure to grant a variance  
11          would create an unnecessary hardship. The mere  
12          fact that the current requirements of the Code  
13          prevent the applicant from obtaining the maximum  
14          density otherwise allowable under the zone is not  
15          an 'unnecessary' hardship, because those Zoning  
16          Code and Development Code Standards are designed  
17          to ensure that only parcels that do not result in  
18          negative impacts may be created." Record 17.

19          The city also determined LOC 49.510(1)(C) was not satisfied  
20   because:

21          "\* \* \* the Council has concluded the existing  
22          single family home is a reasonable use of this  
23          property based on the evidence submitted [to  
24          address] the unnecessary hardship criteria  
25          [LOC 49.510(1)(A)], the Council concludes that  
26          this variance exceeds the minimum variance  
27          necessary to make reasonable use of the property."  
28          Record 19.

29          We agree with the city that petitioner's single family  
30          residential use of the subject property is a reasonable use,  
31          and that a variance is not necessary to enable petitioner to  
32          put his property to reasonable use. That petitioner may not  
33          obtain the maximum use of the subject property possible  
34          under applicable density regulations in the absence of the

1 requested variance, is not the equivalent of establishing  
2 that petitioner does not have an existing reasonable use of  
3 the property. See Sokol v. City of Lake Oswego, 17 Or LUBA  
4 429, 442-44 (1989).

5 The second assignment of error is denied.<sup>1</sup>

6 **FOURTH ASSIGNMENT OF ERROR**

7 "The City of Lake Oswego violated ORS  
8 197.763(3)(j), ORS 197.763(7) and LOC 49.610(4) by  
9 failing to notify or allow petitioner the  
10 opportunity to respond to new evidence allowed  
11 into the record during the city council  
12 proceedings."

13 Petitioner argues an opponent of the proposal testified  
14 on a particular issue after the record was closed, and that  
15 opponent was acknowledged by the city council as follows:

16 "During the Council's deliberations at the  
17 November 18, 1991 hearing on this matter, [a city  
18 councillor] asked whether this access easement had  
19 previously been considered by the city to be an  
20 access easement or a private street, stating: '\* \*  
21 \* when the island was subdivided to create other  
22 parcels, what did the access road \* \* \* what was  
23 it called at that point?' Although the record had  
24 been closed to new testimony, [an opponent]  
25 responded, 'Private road.' The City acknowledged  
26 and accepted that testimony in [its] deliberations  
27 through [the mayor's] statement that, 'And of  
28 course [the opponent] would know that because he  
29 developed the area.'" Petition for Review 42.

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<sup>1</sup>There is no dispute that in order to approve the requested partition, a variance to the public street frontage requirement is required. We determine above the city properly denied that variance request. Accordingly, no purpose is served in resolving the first and third assignments of error under which petitioner challenges other bases for denial of the partition request.

1           The statement by the opponent referred to in the above  
2 dialogue goes to an issue raised under the first assignment  
3 of error. That issue is whether the area included within  
4 the access easement running through the subject property is  
5 properly determined to be a "private street" and, therefore,  
6 is properly excluded from the square footage calculation of  
7 the parcels resulting from the proposed partition. However,  
8 we sustain the challenged denial decision on a completely  
9 different basis, viz, that the city properly determined that  
10 a variance to the public street frontage requirements is not  
11 justified. Because the variance to the public street  
12 frontage requirements is a requisite for the proposed  
13 partition, we need not consider whether the city properly  
14 determined the partition also could not be approved because  
15 one of the resulting lots would be too small after  
16 subtracting the area of the access easement.

17           The fourth assignment of error is denied.

18           The city's decision is affirmed.