BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK REAGAN and LINDA LORD,
Petitioners,

vs.

CITY OF OREGON CITY,
Respondent,

and

JAMES McKNIGHT,
Intervenor-Respondent.

LUBA No. 2000-125

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Mark Reagan, Oregon City and Linda Lord, Oregon City, filed the petition for review and argued on their own behalf.

No appearance by City of Oregon City.

Jill R. Long, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Foster, Pepper and Shefelman, LLP.

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

REMANDED 04/18/2001

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 decision that approves a variance.

MOTION TO INTERVENE

James A. McKnight, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioners filed a 50-page petition for review in this appeal. Intervenor filed a 21-page response brief. Petitioners move for permission to file a 40-page reply brief. Although the issues presented in this appeal do not warrant 90 pages of briefing by petitioners, and the reply brief clearly goes beyond responding to new issues raised in the response brief, intervenor does not object to the request.[1] Accordingly, we allow the reply brief.

FACTS

Intervenor and his adjoining neighbor to the east each own lots zoned R-10 Single-Family Dwelling District. In this opinion, we refer to intervenor's lot as Tax Lot (TL) 5400 and refer to his adjoining neighbor's lot as TL 5500. Both lots are developed with single-family residences. Prior to 1991, both lots had frontage on Charman Street to the north and Barclay Avenue to the south, although the developed driveway accesses for the

[1]OAR 661-010-0039 requires that "[a] reply brief shall be confined solely to new matters raised in the respondent's brief." Parts of petitioners' reply brief respond to arguments by intervenor that petitioners waived certain issues by failing to raise those issues during the proceedings below. A reply brief is appropriate to respond to such waiver arguments. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). The remaining parts of the reply brief are not "confined to new matters raised in the respondent's brief," within the meaning of OAR 661-010-0039. Although the scope of matters that are properly viewed as "new matters" is somewhat imprecise, the balance of the reply brief clearly exceeds responding to "new matters." *See D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 526-27, aff'd 165 Or App 1, 994 P2d 1205 (2000) (reply brief is not available to reply to arguments in respondent's brief that could have been anticipated or to embellish arguments made in the petition for review). These arguments in the reply all respond to arguments that petitioners could have anticipated in the petition for review and in many cases did anticipate and address in the petition for review. Much of the reply brief is the kind of argument that is properly reserved for oral argument.

houses on both lots are from Barclay Avenue to the south.

In 1991, intervenor purchased the back portion of TL 5500 with frontage on Charman Street. The lot lines between TL 5500 and TL 5400 were adjusted to add the back portion of TL 5500 to TL 5400. In 1998, intervenor initiated action to create a new parcel to be made up of the acquired property from TL 5500 and an additional portion of the rear of TL 5400 which, when added to the acquired property, would make the new parcel meet the 10,000 square foot minimum lot size in the R-10 zone.[2] The dwelling on the new parcel would be oriented toward and have driveway access to Charman Street. However, because the acquired portion of TL 5500 is only 80 feet deep and makes up the majority of the proposed parcel, the proposed new parcel would not satisfy the 100 foot minimum average lot depth requirement in the R-10 zone.

At the time of intervenor's pre-application conference in 1998, the proposed new parcel could be created with only 80 feet of depth, because Oregon City Municipal Code (OCMC) 16.28.080 (1994) provided that new parcels could be created through partitioning, notwithstanding minimum depth requirements in the zoning code, so long as the new parcel had at least 60 feet of depth.[3] During the August 5, 1998 pre-application conference, intervenor was told that legislative changes to the subdivision ordinance that were then being considered for adoption by the city would not affect intervenor's partition plans.

Contrary to the advice that intervenor received at the pre-application conference on August 5, 1998, OCMC 16.28.080 (1994) was repealed in October 1998. On April 20, 1999,

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[2]Since the new "lot" is to be created by partition, technically it would be a parcel rather than a lot. Although we refer to the new parcel as a parcel, the city commission frequently refers to the new parcel as a new lot.

[3]OCMC 16.28.080 (1994) provided as follows:

> "Width/depth requirements. New parcels created through the partitioning process shall be exempt from the minimum average width and depth requirements of the zoning code. The minimum width and/or depth of any new parcel created through the partitioning process shall not be less than sixty feet."

intervenor was told the information that was provided to him on August 5, 1998, was erroneous and that he would be required to seek a variance in order to create a new parcel with less than the required minimum of 100 feet of depth. Intervenor requested the variance, but it was denied by the planning commission on May 8, 2000. Intervenor appealed the planning commission's decision to the city commission, which reversed the planning commission on July 19, 2000, and granted the variance. In this appeal, petitioners challenge the city commission's decision to grant the variance.

FIRST ASSIGNMENT OF ERROR

Under their first assignment of error, petitioners allege a number of subassignments of error in which they argue the city misconstrued and violated applicable approval criteria, relied on improper considerations and made a decision that is not supported by substantial evidence.

A. Improper Waiver of Criteria

Petitioners correctly point out that certainty concerning the local approval criteria that will ultimately apply to a partition proposal cannot be achieved until a complete application for the partition is actually submitted. Under ORS 227.178(3), the approval criteria that are in effect on the date an application is submitted apply even if they are later amended before final action is taken on the permit application.[4] Moreover, petitioners are correct that any assurances that an applicant may receive from planning staff in a pre-application conference about what approval criteria may apply in the future cannot be anything more than an educated guess about what those criteria *will be* on the date a completed application for

[4]ORS 227.178(3) provides as follows:

> "If the application [for a permit, limited land use decision or zone change] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

permit or limited land use decision approval is submitted. OCMC 17.50.050(D) is consistent with this principle. OCMC 17.50.050(D) makes it clear that any mistaken advice that city staff may give in pre-applications conferences about applicable code requirements provides no basis for waiving such requirements:

> "Notwithstanding any representations by city staff at a pre-application conference, staff is not authorized to waive any requirements of this code, and any omission or failure by staff to recite to an applicant all relevant applicable land use requirements shall not constitute a waiver by the city of any standard or requirement."

Petitioners correctly point out that in granting the variance that is disputed in this appeal, the city relied in part on the ultimately incorrect advice that intervenor was given at the August 5, 1998 pre-application conference that his proposal to create a parcel with only 80 feet of depth would not be affected by subdivision ordinance amendments that were under consideration. However, petitioners erroneously argue that the city's reliance on that mistaken advice in the challenged decision violates OCMC 17.50.050(D). If we understand petitioners correctly, their argument under this subassignment of error is premised on their position that a variance is the same as, or indistinguishable from, the "authori[ty] to waive any requirements of this code" that is expressly prohibited under OCMC 17.50.050(D).

We reject the argument. Petitioners confuse relying on a pre-application conference mistake simply to waive or not apply the 100-foot lot depth requirement with considering a pre-application conference mistake as a relevant factor in applying the criteria that must be met to grant a variance. OCMC 17.50.050(D) prohibits the former; it does not expressly address the latter.[5]

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[5]The following city findings illustrate the distinction:

> "The applicant appropriately sought and relied on advice from the Planning Manager. While the inaccuracy of the Planning Manager's advice does not constitute a waiver of the new requirement, the City Commission interprets [the variance criteria] to mean that such inaccurate advice regarding a change in the OCMC can, and in this situation does, create an extraordinary circumstance that is not self-imposed by the applicant." Record 6.

Petitioners also allege that the record in this matter does not include substantial evidence that city planning staff in fact advised intervenor that the subdivision ordinance amendments that were pending at the time of the pre-application conference would not affect intervenor's partition plans. However, the planning staff report to the planning commission in this matter includes the following:

> "A pre-application conference was held on August 5, 1998 where the applicant was informed that the City was making some changes to the Subdivision Ordinance but was told the changes being proposed would not affect the partition request. Contrary to that statement, [OCMC] 16.28.080 (1994) was removed when the new subdivision ordinance was adopted in October of 1998 which automatically required all partitions and subdivisions to follow the dimensional standards of the underlying zone." Record 196.

Petitioners argue that the staff report is hearsay. However, the city commission is not required to apply the Oregon Rules of Evidence in its land use proceedings, and it committed no error in relying on the representations in the staff report. Moreover, given the lack of any contrary evidence, we conclude that the staff report is substantial evidence, *i.e.*, evidence a reasonable decision maker could rely upon, to support its finding that intervenor was erroneously advised that the legislative subdivision ordinance amendments would not affect his partition plans.

This subassignment of error is denied.

B. Variance Criteria

OCMC 17.60.020 establishes the relevant criteria that must be met to approve a variance.[6] Petitioners challenge the city commission's findings of compliance with each of the variance criteria.

As explained below, two of the variance criteria require that the applicant demonstrate that "extraordinary circumstances apply to the property" and that "applicant's circumstances are not self-imposed."

[6]OCMC 17.60.020 provides as follows:

> "A variance may be granted only in the event that all of the following conditions exist:

1. Extraordinary Circumstances Apply to the Property

The city found that intervenor established compliance with the second prong of OCMC 17.60.020(A), which requires that the applicant establish that "extraordinary circumstances apply to the property which do not apply to other properties in the surrounding area, but are unique to the applicant's site." The city's findings concerning OCMC 17.60.020(A) rely in large part on the erroneous advice that was given to the applicant during the pre-application conference about whether the subject property would be affected by the subdivision ordinance amendments.

Petitioners are correct that the traditional "extraordinary circumstances" variance criterion has generally been interpreted to require that the circumstances relate to some physical characteristic or aspect of property. *Lovell v. Independence Planning Comm.*, 37 Or App 3, 6, 586 P2d 99 (1978); *Erickson v. City of Portland*, 9 Or App 256, 262-63, 496 P2d 726 (1972); *Thompson v. Columbia County*, 17 Or LUBA 818, 826 (1989). As that criterion has traditionally been interpreted and applied, erroneous advice to a property owner about

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> "A. That the literal application of the provisions of this title would deprive the applicant of rights commonly enjoyed by other properties in the surrounding area under the provisions of this title; or extraordinary circumstances apply to the property which do not apply to other properties in the surrounding area, but are unique to the applicant's site;
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> "B. That the variance from the requirements is not likely to cause substantial damage to adjacent properties, by reducing light, air, safe access or other desirable or necessary qualities otherwise protected by this title;
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> "C. The applicant's circumstances are not self-imposed or merely constitute a monetary hardship or inconvenience. A self-imposed difficulty will be found if the applicant knew or should have known of the restriction at the time the site was purchased;
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> "D. No practical alternatives have been identified which would accomplish the same purposes and not require a variance;
>
> "E. That the variance requested is the minimum variance which would alleviate the hardship;
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> "F. That the variance conforms to the comprehensive plan and the intent of the ordinance being varied."

the approval criteria that might apply to a future request to partition property, resulting in frustration of a property owner's plans to partition his property, would not be sufficient to constitute extraordinary circumstances affecting the property. *Wentland v. City of Portland*, 22 Or LUBA 15, 25 (1991); *Patzkowski v. Klamath County*, 8 Or LUBA 64, 70 (1983).

The city clearly *could* have agreed with petitioners and interpreted OCMC 17.60.020(A), in context with the "non-waiver" provisions of OCMC 17.50.050(D), to preclude consideration of the kind of erroneous advice that was given to intervenor in the pre-application conference in this case. However, most of the cases that petitioners cite and rely upon to argue the city was legally required to do so predate the Oregon Supreme Court's decision in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), which established a highly deferential standard of review that must be applied in reviewing local governing body interpretations of local land use legislation. That deferential standard of review is now codified at ORS 197.829(1).[7] While it would be entirely appropriate for the city commission to follow the precedent stated in those cases, those cases are not binding on the city commission. *Robinson v. City of Silverton*, 37 Or LUBA 521, 527 (2000). Under the deferential standard of review that must be applied under ORS 197.829(1) and *Clark*, the question presented in this appeal is not whether the more traditional interpretation of the

[7]ORS 197.829(1) provides:

> "The Land Use Board of Appeals 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:
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> "(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; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

extraordinary circumstances criterion is correct or better than the interpretation that was adopted by the city commission. *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996). The question is whether the city commission's interpretation is reversibly wrong under ORS 197.829(1) and *Clark*. To be reversible under ORS 197.829(1) and *Clark*, the city commission's interpretation must be shown to be "clearly wrong," or "beyond all colorable defense." *deBardelaben*, 142 Or App at 324.

The city's interpretive findings concerning OCMC 17.60.020(A) are as follows:

> "To satisfy prong two, an applicant must demonstrate there are unique circumstances that apply to its property that do not apply to other properties in the surrounding area but are unique to the applicant's site. In the instance of this applicant's request, the City Commission interprets this prong as requiring that the unique circumstances somehow affect the property. Normally, this will relate to physical characteristics of the property, such as topography, existing development or similar characteristics. However, in very limited circumstances, other factors may be so intrinsically related to the property, such as the circumstances here, that those factors may be considered as relating to the property, and may amount to extraordinary circumstances.
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> "The applicant's property was severely and extraordinarily affected by the misleading and inaccurate information given to the applicant by the Planning Manager in August 1998 as explained above. The instructions given by the City Planning Manager regarding the property put the property in a position where it was no longer a viable candidate for a partition without a variance. The applicant met his burden of proof by showing that the property was the subject of and therefore affected by inaccurate and misleading guidance from the Planning Manager. No other property owner submitted his property for a pre-application conference and was told that the property could be partitioned so long as the property owner followed certain procedures only later to be told that the requirements had changed and a new more difficult application procedure would be needed. This unique sequence of events surrounding the applicant's partition process on this lot amounts to extraordinary circumstances affecting the property." Record 5.

Although it is a relatively close question, under the deferential standard of review that LUBA is required to apply under ORS 197.829(1) and *Clark*, we believe the city's interpretation must be sustained. The city's decision expressly recognizes that its interpretation and application of the extraordinary circumstances variance criterion in this case departs from the manner in which that criterion has generally been interpreted. The

city's interpretation of that criterion to allow consideration of erroneous planning staff advice about the criteria that may apply to property in the future is a significant expansion of the circumstances in which that criterion may be met. However, the question that we must answer under ORS 197.829(1) is whether that interpretation is inconsistent with the "express language" or "purpose" of OCMC 17.60.020(A). Under the Court of Appeals' formulation of the deference that is required on review of the city's interpretation, that interpretation must be "clearly wrong" or "beyond all colorable defense." Although the city's interpretation is at odds with the way that criterion has historically been interpreted, petitioners do not demonstrate that there is anything about the city commission's interpretation that is inconsistent with the express language or purpose of OCMC 17.60.020(A), or that it is clearly wrong or beyond all colorable defense. The extraordinary circumstances that the city commission relied upon technically relate to staff representations that in turn affected intervenor's ability to subdivide the subject property, rather than to the property itself. However, we conclude the city's broader interpretation of that language to find that the identified circumstances relate to the subject property does not go so far as to constitute an inconsistency with the express language of OCMC 17.60.020(A), within the meaning of ORS 197.829(1)(a). *See* n 7.

This subassignment of error is denied.

2. The Variance is not Likely to Cause Substantial Damage to Adjoining Properties

OCMC 17.60.020(B) requires that the city find the proposed variance "is not likely to cause substantial damage to adjacent properties, by reducing light, air, safe access or other desirable or necessary qualities otherwise protected by this title." *See* n 6. The city's findings addressing this criterion include the following:

> "* * * The applicant met his burden of proof [under OCMC 17.60.020(B)] by demonstrating that the variance will allow him to create a new lot with substantially the same minimum lot size as existing lots in the neighborhood. * * *

> "The Commission heard testimony in opposition from neighbors Mark Reagan and Linda Lord. Both neighbors feel the variance would cause damage to the neighborhood by not conforming to the quality and character of the lots in this 'older and more established' neighborhood. Mr. Reagan as an adjacent property owner specifically claimed that the development of a new lot would directly infringe upon his privacy. The Commission has duly considered this testimony and finds that the quality and privacy provided by the Rivercrest Neighborhood will not be damaged by this variance.
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> "Specifically, the applicant showed that the new lot will be of ample size and have ample setback so as to not infringe upon the privacy, light and air of neighborhood properties. The square footage of the new lot will actually exceed the minimum 10,000 square feet requirement of the R-10 zone. The Commission found further evidence that the lot would fit into the neighborhood by recognizing that a lot could be created without a variance in the same place if an additional twenty (20) foot lot depth were available. Even with another 20 feet in lot depth the impact on the adjacent properties would be practically the same. In fact, the impact upon the one adjacent property that was opposed to the variance request would be equal if not greater if a legal size lot with a one hundred (100) foot lot depth were to be created through a partition without a variance. The evidence in total demonstrates that the proposed lot is similar in quality and character to other lots in the neighborhood and therefore, will not cause substantial damage to adjacent properties.
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> "* * * * *
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> "The applicant volunteered to further ensure that no substantial damage will occur to the adjacent properties by subjecting development of the new lot to a condition of approval. As such, the approval of the variance appeal by the City Commission is conditioned on the applicant's new lot having a twenty (20) foot buffer between any new construction and any adjacent properties." Record 5-6.

Petitioners argue the above findings are not supported by substantial evidence and petitioner Reagan argues his privacy will be impacted by the new dwelling.[8] However, petitioners do not directly challenge the city's finding that the lot depth variance means the dwelling on the new parcel will actually be further from petitioner Reagan's existing

[8]Petitioner Reagan owns the lot that adjoins TL 5500 and the proposed new lot to the east. Like TL 5400 and TL 5500, petitioner Reagan's lot is developed with a single-family residence on the south side of the lot with access onto Barclay Avenue. The house on the proposed lot would adjoin the west side of petitioner Reagan's back yard.

dwelling than would potentially be the case if the new parcel were 100 feet deep. Petitioners also argue that the city's imposition of the condition requiring a 20-foot buffer from petitioner Reagan's west property line, rather than showing petitioner Reagan's lot will not be substantially damaged, is a tacit admission that the new dwelling will cause substantial damage to adjoining properties. We reject the argument.

The city's findings concerning 17.60.020(B) are adequate to demonstrate that the variance will not cause substantial damage to adjoining properties, and those findings are supported by substantial evidence. This subassignment of error is denied.

3. Applicant's Circumstances Must not be Self-Imposed and Must be More than Monetary Hardship or Inconvenience

OCMC 17.60.020(C) imposes the following requirement:

> "The applicant's circumstances are not self-imposed or merely constitute a monetary hardship or inconvenience. A self-imposed difficulty will be found if the applicant knew or should have known of the restriction at the time the site was purchased."

Although OCMC 17.60.020(C) is awkwardly written, it appears to impose a two-pronged requirement. It requires that an applicant show that his circumstances (1) are not self-imposed, and (2) do not merely constitute a monetary hardship or inconvenience.

In explaining its conclusion that the application meets the OCMC 17.60.020(C) requirement that the applicant's circumstances must not be self-imposed, the city relied on the erroneous advice that was given to the applicant in the pre-application conference. The city concluded that it was reasonable for the applicant to rely on that advice. For the same reasons we conclude above that the city commission's interpretation of OCMC 17.60.020(A) is not reversibly wrong under *Clark* and ORS 197.829(1), we conclude that the city commission's interpretation of the first prong of OCMC 17.60.020(C) is also not reversibly wrong.

However, the second prong of OCMC 17.60.020(C) requires that the city find that the applicant's circumstances do not "merely constitute a monetary hardship or inconvenience."

The city's findings do not address or interpret the second prong of OCMC 17.60.020(C). The requirement that variances be limited to situations where they are necessary to avoid hardship is a common one. In considering a differently worded "hardship" criterion, the Court of Appeals recently noted:

> "Websters' Third New Int'l Dictionary, 1033 (unabridged ed 1993) defines 'hardship' as entailing 'suffering or privation.' The facts of this case, as the hearings officer found them, aptly illustrate that a landowner can come within a condition set forth in [the variance criterion] and still come nowhere close to any related suffering or privation. [The property owner's] inability to place a pool house within the permitted setback area is the product of one of the conditions, *i.e.*, the characteristics of and improvements on the property. The consequence of that inability is that, instead of having a separate 114 square foot structure, [the property owner] and others whom he allows to use the pool must perform their ablutions in and navigate the 15-foot distance from his house to the pool. Like many consequences that might conceivably ensue from the existence of characteristics or improvements on property that are incompatible with the lawful placement of structures on it, that consequence does not come within the plain, natural and ordinary meaning of 'hardship.'
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> "* * * * *
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> "Variance law is largely embodied in local legislation, and its particulars of course vary from locality to locality. It nevertheless contains, if not constants, recurring themes. [T]he concept of 'hardship' is one of those themes. Another [theme] is that variances are an extraordinary remedy that 'should not be employed as a substitute for the normal legislative process of amending zoning regulations.' Against that background, the appearance of the term 'hardship' in the county's ordinance here cannot be regarded as a coincidence, independent of its traditional meaning * * *." *Kelley v. Clackamas County*, 158 Or App 159, 163-65, 973 P2d 916 (1999) (footnote omitted).

Given the city commission's very permissive interpretation of its other variance criteria, it may well be that the city commission similarly views the hardship criterion as imposing a substantially lighter burden than the dictionary definition of "hardship" would require. With the level of deference the city commission must be given under *Clark*, it may well be that the city could interpret the hardship criterion in OCMC 17.60.020(C) as being met because denial of the requested lot depth variance would mean that intervenor cannot use the property he acquired from TL 5500 together with some additional area from what was

formerly TL 5400 to create a third buildable parcel. However, unlike the city commission's findings addressing OCMC 17.60.020(A) and the first prong of OCMC 17.60.020(C), the city failed to adopt an interpretation of the second prong of OCMC 17.60.020(C) or to expressly address that prong of the criterion at all.

Intervenor's inability to further divide TL 5400 to create an additional parcel without a lot depth variance would appear to fall within the prohibition in OCMC 17.60.020(C) against granting variances to relieve a "monetary hardship or inconvenience." That inability would certainly not qualify as a "hardship" as that concept has been applied in considering variances. In any event, without contrary interpretive findings we will not assume the second prong of OCMC 17.60.020(C) is satisfied here. It is not appropriate for LUBA to assume that the city commission would exercise its discretion under *Clark* to interpret the second prong of OCMC 17.60.020(C) as being met in the circumstances presented in this case. It is equally possible that the city commission was simply unaware of the "hardship" criterion in the second prong of OCMC 17.60.020(C).

This subassignment of error is sustained in part.

4. Minimum Variance Required to Alleviate Hardship and no Practical Alternative Exists

We consider petitioners' assignments of error concerning OCMC 17.60.020(D) and (E) together. These criteria impose the following requirements:

> "D. No practical alternatives have been identified which would accomplish the same purposes and not require a variance;
>
> "E. That the variance requested is the minimum variance which would alleviate the hardship[.]"

The city commission's findings regarding the "practical alternatives" and "minimum variance" criteria are as follows:

> "There is no additional space available for the applicant to obtain more lot depth so that his new lot would meet the R-10 zone dimensional requirements. Therefore, no practical alternatives exist that would allow the creation of a new lot without a lot depth variance.

"* * * * *

> "The applicant has shown that the new lot will use all of the available space so that the lot depth variance is only twenty (20) feet less than the one hundred (100) feet requirement. This twenty (20) feet difference is the minimum variance from the dimensional requirements necessary to create the new lot." Record 6-7.

Petitioners and intervenor dispute whether it would be possible to extend the rear property line for the proposed parcel further south into TL 5500 without violating setback requirements measured from the swimming pool that is located on that property.[9] However, the record indicates a more fundamental problem with extending the rear property line of the new parcel further south into TL 5500. TL 5500 currently only contains 10,200 square feet. Extending the rear property line much more than an additional two feet to the south would result in TL 5500 having less than the 10,000 square feet required in the R-10 zone and could not be done without a separate variance for TL 5500. Petitioners suggest that it might be possible to (1) extend the rear property line of the new parcel south and (2) also adjust the property line between TL 5500 and TL 5400 in a way that would transfer property in other locations from TL 5400 to TL 5500, leaving TL 5500 with sufficient area and making the new parcel 100 feet deep. At the very least, petitioners argue, the needed variance could be reduced or "minim[ized]," as OCMC 17.60.020(E) requires.

The city commission's findings do not specifically address the issue that petitioners raise under these criteria. Intervenor argues that this is because petitioners never raised an issue below concerning the possibility of minimizing the needed variance or eliminating the need for the variance altogether by making the kinds of property line adjustments that

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[9]There is evidence in the record that the existing swimming pool on TL 5500 is located 20 feet from the rear property line on TL 5500 and the rear property line of the proposed new parcel. Petitioners argue the required setback is established by OCMC 17.54.010(F), which requires that swimming pools be setback three feet from side and rear property lines. Intervenor argues the required setback is established by OCMC 17.08.040, which requires that rear yards be 20 feet deep. Petitioners appear to be correct that the shared rear property line for the new lot and TL 5500 could be as close as three feet from the existing pool on TL 5500.

petitioners now suggest may be possible. Because they failed to raise such an issue below, intervenor argues the issue is waived. ORS 197.835(3).

Under ORS 197.835(3), issues must be raised with sufficient specificity to give the local decision maker and the other parties a fair opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). An issue is waived if it is not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue. *Craven v. Jackson County*, 29 Or LUBA 125, 132, *aff'd* 135 Or App 250, 898 P2d 809 (1995). Petitioners argue that intervenor confuses the requirement that they raise an "issue" below with a requirement that they must have raised the precise "argument" they attempt to raise at LUBA. *DLCD v. Tillamook County*, 34 Or LUBA 586, 590-91 (1998); *DLCD v. Curry County*, 33 Or LUBA 728, 733 (1997). Petitioners argue that they sufficiently raised the issue of compliance with these criteria at Record 29 and 249.

Record 29 includes a reference that "all five criteria must be met in order for the variance to be given." Record 249 includes a more specific reference to the alternatives and minimum variance criteria, but no issue is raised about whether it might be possible to reconfigure the proposed parcel and TL 5400 and TL 5500 in a way that would eliminate the need for the variance or minimize the magnitude of the variance needed.[10]

The distinction between "issues" and "arguments" does not lend itself to an easy or universally applicable formula. We agree with petitioners that ORS 197.835(3) does not require that they have made the *precise* argument below that they seek to make under these assignments of error. However, neither of the cases cited above hold that *any* argument can be advanced at LUBA so long as it has some bearing on an applicable approval criterion and general references to compliance with the criterion itself were made below. Fair notice of the issue to be raised on appeal is required under ORS 197.835(3) and *Boldt*. Here, the pages

[10]The only issues raised concerning these criteria are whether intervenor has a "legitimate hardship" or has other options to "finance home maintenance" without selling the proposed lot. Record 249.

in the record cited by petitioners do not include any suggestion that could possibly have led a reasonable person to believe that petitioners believed the proposed parcel could be reconfigured to eliminate the need for the variance or reduce the size of the variance needed. That being the case, the city commission cannot be faulted for failing to address the issue in its findings, and petitioners waived their right to raise the issue at LUBA under ORS 197.835(3).

These subassignments of error are denied.

5. Variance Conforms to the Comprehensive Plan and Intent of the Ordinance Being Varied

OCMC 17.60.020(F) requires that the city find "[t]hat the variance conforms to the comprehensive plan and the intent of the ordinance being varied." The city adopted the following findings:

> "The variance conforms to the Comprehensive Plan by adding a new lot in a way that promotes in-fill and higher density without sacrificing neighborhood quality and character. Further, the intent of the underlying R-10 zone will be met because the new lot will have the same quality and character as other lots in the neighborhood, as discussed above under [OCMC 17.60.020(B)]." Record 7.

The city commission found that the variance conforms to the comprehensive plan because it furthers plan in-fill and higher density goals in a way that does not sacrifice neighborhood quality. Petitioners disagree with that finding and cite other plan policies that they believe will not be furthered by the variance.

We have no reason to question the city commission's finding that approving the variance and allowing a new parcel to be created from TL 5400 and TL 5500 would promote in-fill and higher residential density. It is also relatively clear from the city commission's brief findings that it does not interpret OCMC 17.60.020(F) to require that a particular variance must further each and every comprehensive plan goal or policy. However, the fatal problem with the city's findings concerning this portion of OCMC 17.60.020(F) is that the findings do not identify *any* comprehensive plan provision that calls for higher residential

density or in-fill. There may well be such a plan provision, but the city's findings are inadequate to identify the plan provisions the city commission relied upon in finding compliance with this part of OCMC 17.60.020(F).

To address the additional requirement of OCMC 17.60.020(F) that the variance conform to the intent of the ordinance being varied (*i.e*. the 100-foot lot depth requirement), the city relied on its findings addressing OCMC 17.60.020(B). Petitioners make no direct attempt to explain why those findings are inadequate to show the variance conforms to the intent of the lot depth requirement. We conclude that they are.

This subassignment of error is sustained in part.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error petitioners allege the city commission improperly relied on (1) intervenor's poor health, (2) the city's failure to provide intervenor notice of the subdivision ordinance amendments in 1998, (3) the city's delay in completing intervenor's pre-application conferences to approve the variance, and (4) the city commissioners' desire to encourage in-fill, increase density and thereby increase property tax revenues.

Intervenor argues the disputed variance was not approved based on the factors petitioners cite. Rather, intervenor argues, the cited factors were considered in the process of interpreting and applying the criteria that govern approval of variances and such consideration of the cited factors is not error. We agree with intervenor.[11]

The second assignment of error is denied.

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[11]We did partially sustain petitioners' final subassignment of error under the first assignment of error where they argued that the city improperly relied on a desire to facilitate in-fill and increased density in concluding that the proposal complies with the OCMC 17.60.020(F) requirement that the variance conform to the comprehensive plan. However, the city's error under OCMC 17.60.020(F) was in failing to identify any comprehensive plan provisions that would be furthered by such in-fill and increased density. Assuming such plan provisions are identified on remand, it follows that it would be appropriate to rely on those considerations.

THIRD ASSIGNMENT OF ERROR

One city commissioner recused himself, stating he was "close friends with the parties." Record 22. He left the hearing room and did not participate in the contested case hearing before the city commission in this matter on June 21, 2000. However, at the July 19, 2000 city commission hearing at which the city commission adopted its written decision, that same city commissioner made the motion to adopt the final written decision that granted the variance. *Id*. Petitioners argue they were thereby denied the "impartial tribunal" that parties in quasi-judicial land use proceedings are entitled to under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).

We agree with petitioners that the city commissioner, having recused himself, should not have participated in the adoption of the final written decision. Nevertheless, we do not agree with petitioners that this error demonstrates that they were denied their right to an impartial tribunal. The city commissioner did not participate in the evidentiary hearing in this matter. Neither did he participate in the 4-0 vote to grant the variance at the conclusion of that hearing. In the circumstances presented in this case, his participation in the vote to adopt the final written decision was harmless error.[12]

Petitioners also cite comments by the mayor and another city commissioner as demonstrating that they had prejudged this matter. The cited comments come nowhere near demonstrating bias or prejudgment.[13] Finally, following oral argument, it was discovered that the city cannot find the audiotapes of the June 21, 2000 city commission hearing in this

[12]Even if it were not harmless error, the city's decision is being remanded for other reasons. We assume the city commissioner will not participate in any additional proceedings or decisions the city council may adopt on remand.

[13]One of the cited comments is a statement by one of the city commissioners at the beginning of the hearing where the commissioners were each considering whether to participate in the hearing or recuse themselves. The commissioner said "I hate everybody." Petition for Review Appendix E 2. The transcript indicates that statement was followed by laughter. *Id*. That comment is evidence of an attempt at humor; it does not demonstrate bias or prejudgment.

matter. In an April 2, 2001 letter to the Board, petitioners suggest that this development warrants a conclusion that the city has "defaulted on the issue of a biased tribunal." The record includes minutes of the June 21, 2000 hearing and petitioners have prepared and attached a partial transcript of that hearing to their petition for review. None of the arguments that petitioners make based on the minutes and partial transcript demonstrate bias or prejudgment. Neither do petitioners offer any reason to suspect that the missing tapes would change that result.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their final assignment of error, petitioners allege that in approving the disputed variance the city commission held intervenor to an unequal and lower standard and thereby violated Article I, section 20 of the Oregon Constitution.[14] Petitioners must do more than allege unequal treatment and favoritism on the part of the city commission to prevail in an assignment of error alleging violation of Article I, section 20. Petitioners' citations under this assignment of error, and elsewhere in the petition for review, to specific comments and reasoning by individual city commissioners that were adverse to petitioners' positions similarly are insufficient to demonstrate a violation of Article I, section 20.

The fourth assignment of error is denied.

The city's decision is remanded.

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[14]Article I, section 20 of the Oregon Constitution provides:

> "**Equality of privileges and immunities of citizens**. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."