BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA LORD,
Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

JAMES McKNIGHT and DIANE McKNIGHT,
Intervenors-Respondent.

LUBA No. 2002-046

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

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

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Edward J. Sullivan and Preston, Gates and Ellis, LLP.

James McKnight and Diane McKnight, Oregon City, represented themselves.

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

AFFIRMED 12/16/2002

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

Petitioner appeals a city decision that grants a variance to a minimum lot depth requirement.

FACTS

This is the second time this matter has been before us. In *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001), we agreed with the petitioners that the city's findings were inadequate to demonstrate that the application complied with two of the variance approval criteria.[1] We set out the facts in some detail in our prior decision and do not repeat that detail here.

Prior to 1991, intervenors and their adjoining neighbor owned residentially zoned lots that have road frontage on the front (Barclay Avenue) and back (Charman Street). Both of those lots at that time were already developed with houses with access from Barclay Avenue. Intervenors acquired their neighbor's back yard via a lot line adjustment in 1991. With their neighbor's back yard added to their lot, intervenors' lot includes 23,800 square feet. Intervenors wish to partition their 23,800 square foot lot into two lots.[2] Lot 1 would be a 10,020 square foot lot made up of intervenors' back yard and the former back yard of their neighbor's lot that was acquired via the lot line adjustment in 1991. That 10,020 square foot lot would have road access via Charman Street. Intervenors' existing home would remain on Lot 2, a 13,780 square foot lot with access from Barclay Avenue.

The lots are in the city's R-10 zone, which has a 10,000 square foot minimum lot size. Both of the proposed lots exceed the 10,000 square foot minimum lot size. However,

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[1] The petitioner in this appeal was one of the two petitioners in *Reagan*. Intervenor-respondent James McKnight was the intervenor-respondent in *Reagan*. Intervenors-respondent in this appeal were the applicants below.

[2] Technically, the partition will result in "parcels" rather than "lots." However, the parties and the decision refer to the new parcels as lots, and we will do so as well.

new lots in the R-10 zone must have a minimum lot depth of 100 feet. Lot 2 would be more than 100 feet deep. Lot 1 would be 131 feet wide, but only 80 feet deep.

When intervenors initiated their efforts to partition their existing lot in 1998, the city's subdivision and partitioning ordinance included a provision that specifically allowed partitioning of new parcels that did not meet minimum lot depth requirements, provided the new parcels were at least 60 feet deep. Intervenors were told by city planning staff that proposed land use regulation amendments that were pending in 1998 would not affect their ability to create a parcel that was 80 feet deep.[3] In fact, the above-noted subdivision and partitioning ordinance provision that specifically allowed lots with less than the required minimum lot depth was repealed in 1998, before intervenors submitted a partition application. Thus approval of Lot 1 as proposed requires a variance to the minimum lot depth requirement. The city's first variance decision granting that lot depth variance was the subject of our decision in *Reagan*. The city's second decision granting that lot depth variance is the subject of this appeal.[4]

REPLY BRIEF

Under OAR 661-010-0039, a petitioner may seek permission to file a reply brief, which "shall be confined solely to new matters raised in the respondent's brief." Unless LUBA gives permission for a longer reply brief, it must be limited to five pages. Petitioner filed a 12-page reply brief.

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[3] Petitioner disputes the city's position that intervenors were misinformed about the possible impact of the 1998 legislation on their partition plans.

[4] The issues raised in the petition for review in the current appeal require that we refer frequently to the first variance decision and the first variance proceedings that led to our decision in *Reagan*. In an attempt to avoid confusion, we refer to the variance decision that is the subject of the current appeal as the current or second variance decision and refer to the local proceedings that followed our remand in *Reagan* as the remand proceedings.

Respondent requests that we reject the reply brief in its entirety, because it exceeds our rule's five-page limit, or, alternatively, that we strike pages 6-12. We reject both of those requests.

Respondent also argues that portions of the reply brief are not confined to new matters in the city's response brief and for that reason those portions should be stricken.[5] We agree with the city and do not consider those portions of the reply brief in this appeal. Otherwise, the reply brief is allowed.[6]

FIRST ASSIGNMENT OF ERROR

The zoning ordinance criteria that must be satisfied to approve a variance are set out at Oregon City Municipal Code (OCMC) 17.60.020.[7] In the first variance proceeding, the

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[5] The portions of the reply brief that are not limited to responding to new issues in the city's brief are page 4, line 23 through page 6, line 21; page 11, line 19 through page 11, line 25; and page 11, line 26 through page 12, line 19.

[6] Following the November 21, 2002 oral argument in this appeal, petitioner filed an objection to our November 19, 2002 order denying her request to postpone oral argument. That objection does not appear to include a request that petitioner be allowed an additional opportunity for oral argument or be allowed additional time to file an enhanced reply brief. To the extent petitioner makes those requests, they are denied. LUBA did its best in the November 19, 2002 order to (1) allow petitioner time to draft and file a reply brief, (2) allow respondent an opportunity to respond to that reply brief, and (3) maintain a schedule in this appeal that would allow LUBA to issue its final opinion on or before the deadline that is established by ORS 197.830(14). Although LUBA does not always meet its statutory deadline, it makes all reasonable attempts to do so in all appeals. Granting petitioner's requested postponement over the objections of respondent and intervenors-respondent would almost certainly have prevented LUBA from issuing its final opinion in this appeal on or before the December 16, 2002 statutory deadline. In our view, the circumstances presented in this appeal did not warrant granting the requested postponement.

[7] OCMC 17.60.020 provides as follows:

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

planning commission denied the requested variance, based on its findings that the request did not comply with three of the six variance criteria, OCMC 17.60.020(A), (B) and (C). Record I 165-70.[8] The planning commission did not consider the remaining three variance criteria at OCMC 17.60.020(D), (E) and (F) in its decision. Intervenors appealed the planning commission's decision to the city commission, which disagreed with the planning commission and found that the request did comply with OCMC 17.60.020(A), (B) and (C).[9] Rather than remand the planning commission's decision back to the planning commission to consider whether the request complied with OCMC 17.60.020(D), (E) and (F), the city commission considered those criteria too, and found that the request complied with those three criteria as well. Having concluded that the request satisfied all six criteria, the city commission approved the variance and that decision was appealed in *Reagan*.

OCMC 17.50.190(F) limits the city commission's scope of review in a local appeal.[10] We understand petitioner to argue that because the document that intervenors filed to initiate

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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."

[8] We refer to the record in *Reagan*, which is incorporated into the record in this appeal, as Record I. We refer to the record compiled by the city on remand as Record II.

[9] The city commission is the city's governing body.

[10] As relevant, OCMC 17.50.190(F) provides:

> "* * * Appeal hearings shall be conducted by the city commission [and] the decision shall be on the record and the issues under consideration shall be limited to those listed in the notice of appeal."

their appeal of the planning commission's decision in the first variance proceedings was limited to OCMC 17.60.020(A), (B) and (C), the city commission violated OCMC 17.50.190(F) by considering OCMC 17.60.020(D), (E) and (F) in its first variance decision and the city commission repeated that error by considering OCMC 17.60.020(F) in its decision following our remand in *Reagan*, which was based in part on that criterion.

The petitioners' petition for review in *Reagan* included four assignments of error. The first and second assignments of error included subassignments of error. None of those assignments of error or subassignments of error alleged that the city commission violated its scope of review under OCMC 17.50.190(F) by considering OCMC 17.60.020(D), (E) and (F).[11] Citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the city argues that because the petitioners in *Reagan* did not assign error based on the scope of review limit imposed by OCMC 17.50.190(F), petitioner may not do so now. We agree with the city.

As petitioner in this appeal correctly points out, the *Reagan* petitioners did include an argument that the city commission exceeded its scope of review under OCMC 17.50.190(F) in their *reply brief*. However, we reject petitioner's suggestion that a reply brief may be employed to expand the assignments of error that are included in the petition for review or provide additional bases for reversal or remand that are not included in the petition for review. As we noted in *Reagan*, the petitioners in that appeal filed a 50-page petition for review. In response to the intervenor's 21-page response brief, the petitioners filed a 40-page

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As petitioner correctly notes, the Court of Appeals interpreted similar Douglas County ordinance language as imposing a substantive limit on the board of county commissioners' authority to consider issues in a local appeal. *Smith v. Douglas County*, 93 Or App 503, 506-07, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989).

[11] The first assignment of error in *Reagan* challenged the city commission's findings concerning the six variance criteria at OCMC 17.60.020 on the merits, not on the basis that the city commission lacked authority to consider the variance criteria at OCMC 17.60.020(D), (E) and (F). That assignment of error included six separate subassignments of error that challenged the findings concerning each of the six criteria. Our decision in *Reagan* partially sustained the petitioners' subassignments of error concerning OCMC 17.60.020(C) and (F). We rejected the remaining subassignments of error concerning the OCMC 17.60.020 variance criteria.

reply brief. We allowed that lengthy reply brief because no party objected to it. However, we pointed out that under our rules a reply brief must be limited to responding to "new matters raised in the respondent's brief" and that the only parts of the *Reagan* petitioners' reply brief that were so limited were the *Reagan* petitioners' reply to the waiver arguments that were raised in the *Reagan* intervenor's brief. 39 Or LUBA at 674 n 1. Our unwillingness to conduct an unaided parsing of that 40-page reply brief to identify specifically the parts of the reply brief that inappropriately went beyond responding "to new matters raised in the respondent's brief" does not mean that additional legal theories for remand that the *Reagan* petitioners presented for the first time in their reply brief ripened into assignments of error or legal theories that were properly presented in that appeal. We did not consider the *Reagan* petitioners' OCMC 17.50.190(F) argument in their reply brief, because it went beyond the assignments of error in the petition for review in *Reagan*. Because petitioner's argument concerning OCMC 17.50.190(F) in this appeal was not included in the petition for review in *Reagan*, it was not presented in that appeal. Because it was not presented in that appeal, we did not consider the issue, and it was not one of the two bases for our remand in *Reagan*. Thus, because petitioner's OCMC 17.50.190(F) argument in this appeal could have been presented in the petition for review in *Reagan* but was not, it may not be raised in this appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 34 n 1 (1994).[12]

Finally, we also agree with the city that petitioner's OCMC 17.50.190(F) argument is without merit in any event, because the *Reagan* intervenor's local appeal specifically

[12] Petitioner suggests that the *Beck* waiver principle is limited to procedural issues. Petitioner cites no authority for that proposition, and we reject it. Petitioner also suggests that waiver under *Beck* cannot apply to constitutional issues. Although petitioner argues here and elsewhere in the petition for review that the city's alleged errors amount to violations of petitioner's constitutional rights, as we explain later in this opinion we do not see that petitioner's constitutional rights were violated by any of the errors petitioner alleges. Therefore, even if the *Beck* waiver principle might not apply to constitutional issues, that would not assist petitioner here because petitioner does not demonstrate that the alleged violation of OCMC 17.50.190(F) constitutes a violation of her constitutional rights.

requested that the "decision of the Planning Commission should be overturned and the Variance * * * should be granted." Record I 70. Although the appeal document at Record I 66-70 understandably only addresses the three variance criteria that the planning commission found were *not* met, the intervenor also attached his variance application, which does address the criteria at OCMC 17.60.020(D), (E) and (F).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

OCMC 17.50.190(E) sets out requirements for notices of local appeal hearings. Petitioner argues that the notice that preceded the city commission appeal hearing where it considered petitioner's appeal of the planning commission decision following LUBA's remand in *Reagan* did not fully comply with OCMC 17.50.190(E). According to petitioner, the notice did not specify the date of the planning commission decision, failed to list the name of the applicant, failed to list some of the local appellants, mistakenly identified one of the local appellants as the applicant, and failed to state the grounds for the local appeal of the planning commission's decision.

The city concedes that the disputed notice did not fully comply with OCMC 17.50.190(E). However, we agree with the city that the alleged defects constitute a procedural error. Such procedural errors provide a basis for reversal or remand, only if the error prejudiced petitioner's substantial rights. ORS 197.835(9)(a)(B); *Donnell v. Union County*, 39 Or LUBA 419, 422 (2001). Petitioner's substantial rights include the right to "prepare and submit [her] case and [to] a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). Petitioner neither alleges nor demonstrates that the city's deviations from the requirements of OCMC 17.50.190(E) in providing the disputed notice of local hearing had any effect on petitioner's ability to prepare and submit her case or her right to a full and fair hearing before the city commission following our remand in *Reagan*. As the city correctly argues, petitioner may not assert possible prejudice to the substantial rights of *other*

persons as a basis for reversal or remand. *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the city commission's decision that the variance request complies with the criteria set forth at OCMC 17.60.020(D), (E) and (F) was "made without due regard of the facts and circumstances, was arbitrary and capricious and is not valid." Petition for Review 9. We understand petitioner to contend that the city commission, in rendering its first and second decisions in this matter, violated its obligation to "examine evidence in [a] public hearing." *Id*. The precise nature of petitioner's argument is not clear, but we understand petitioner to contend that the city commission is obligated to identify each criterion and *verbally* explain in a public hearing (1) how it resolved legal and evidentiary issues and (2) why its resolution of the legal and evidentiary issues led the city commission to conclude that the variance criteria are met.[13] Petitioner cites a number of statutory and constitutional provisions for her position. However, most of those provisions apply to courts or state or federal agency decision making bodies, not to a city quasi-judicial decision maker. Just as importantly, none of those provisions imposes the requirement for oral deliberations and decision making that petitioner suggests they require. As the city correctly notes, it is the written decision that the city commission ultimately adopted that constitutes its decision in this matter. *Citadel Corp. v. Tillamook County*, 9 Or LUBA 61, 67 (1983). It is that written decision that is subject to LUBA's review on appeal, not the oral statements of individual city commissioners that were made during their deliberations below. *Barrick v. City of Salem*, 27 Or LUBA 417, 431 (1994).

[13] In this assignment of error, petitioner also identifies particular evidentiary challenges that were advanced by the *Reagan* petitioners or by the petitioner in this appeal and that petitioner does not believe were responded to in the local hearings in the manner that petitioner believes is required.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner alleges that certain documents were not provided to the planning commission at its August 27, 2001 meeting. The city contends that all the cited documents were in fact provided to the planning commission. The city also points out that petitioner does not claim that any of the disputed documents were not included in the record by the time the matter was presented to the city commission. Because the planning commission's decision was appealed to the city commission, and it is the city commission that rendered the final decision in this matter rather than the planning commission, none of the cited irregularities that petitioner alleges could provide a basis for reversal or remand even if petitioner's version of the handling of those documents is accurate. *Canfield v. Yamhill County*, 31 Or LUBA 25, 29 n 1 (1996); *Jackman v. City of Tillamook*, 29 Or LUBA 391, 401 (1995).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner alleges that the planning commission erred by refusing her an adequate opportunity to rebut certain testimony and that the city commission erred by reading a letter into the record and then refusing petitioner's request for an opportunity to rebut that letter.

A. Hall Testimony

OCMC 17.50.120(D)(1) requires a statement "[a]t the beginning of the initial public hearing at which any quasi-judicial application or appeal is reviewed[.]" That statement must include the following explanation of the order of testimony:

> "That the hearing will proceed in the following general order: staff report, applicant's presentation, testimony in favor of the application, testimony in opposition to the application, rebuttal, record closes, commission deliberation and decision[.]"

Petitioner contends that James Hall, who stated he was neither for nor against the requested variance, testified after the opponents' testimony and that he presented testimony in favor of the request, in violation of OCMC 17.50.120(D)(1). During the course of that testimony, Mr. Hall questioned whether petitioner lives in the same subdivision as intervenors. At the conclusion of that testimony, the city's attorney advised the planning commission that the opponents had requested that they be given an opportunity to rebut Mr. Hall's testimony, and that the planning commission could allow such rebuttal testimony, although it was not legally obligated under OCMC 17.50.120(D)(1) to do so. Record II 175. The planning commission chair stated he would allow the requested rebuttal, but said "I think we need to limit it to about two minutes if you can do it in that." *Id*. Petitioner stated "[t]hat should be enough[,]" and then presented her rebuttal. In the course of that rebuttal, petitioner stated "in fact, [I] would like an opportunity to keep the record open long enough to provide you with a copy of my deed and Mr. McKnight's deed so you can see we're in the same subdivision." *Id*. at 176.

Petitioner argues the city erred by limiting her to two minutes of oral rebuttal and erred by not later accepting her written rebuttal.

The city notes again that it is the city commission's decision that is the subject of this appeal rather than the planning commission's decision and any procedural error the planning commission might have committed in providing petitioner an opportunity for rebuttal could provide no basis for remand. On the merits, the city argues that petitioner agreed to the suggested two-minute time limit, and cannot now argue that two minutes was an insufficient amount of time for rebuttal. The city also argues that it was not obligated to grant a continuance or hold the record open to allow petitioner an opportunity to submit additional

written rebuttal. Finally, the city notes that petitioner fails to demonstrate that the evidence that petitioner wishes to rebut is relevant. We agree with all of the points the city makes.[14]

This subassignment of error is denied.

B. Leeson Letter

At the December 19, 2001 city commission hearing in this matter, one of the city commissioners asked if all the persons listed on the October 15, 2001 appeal of the planning commission's decision were still appellants. Petitioner indicated that "the only person she knew of who was not currently an appellant was Charles Leeson." Record II 25. The city commissioner then read a letter from Mr. Leeson, dated November 29, 2001.[15] Petitioner then stated:

> "[T]he last time she appeared before a City body, she felt that she was disrespected. She stated that she did not understand why Mr. Leeson made his statement, as she knew from her own personal knowledge (and Mark Reagan's knowledge) that Mr. Leeson did say at one time that he wanted to be part of the appeal. She indicated that Mr. Leeson had several opportunities to withdraw from the appeal before he wrote that letter." Record II 25.

Petitioner's attorney added the following:

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[14] Petitioner does assert that certain unspecified statements by Mr. Hall questioned her credibility. To the extent petitioner is suggesting that Mr. Hall's testimony had the effect of undermining the credibility of all her other testimony, she does not explain why that is the case or, even if it is the case, why she did not request additional time to orally rebut that testimony or make a clearer request for additional time to submit written rebuttal before the record closed, to reestablish her credibility.

[15] That letter states, in its entirety:

> "TO WHOM IT MAY CONCERN: NOVEMBER 29, 2001
>
> "MY NAME IS CHARLES LEESON. I AM NOT, AND HAVE NEVER BEEN OPPOSED TO THE GRANTING OF VR-99-07 FOR [INTERVENORS]. I RESENT THE FACT THAT MY NAME APPEARS, TYPED, ON THE APPEAL, AFTER I TOLD LINDA LORD NOT TO INCLUDE ME AS AN APPELLANT.
>
> "CHARLES LEESON
> "147 BARCLAY AVENUE
> "OREGON CITY" Record II 36.

> "[It is] regrettable that Mr. Leeson appeared to have changed his mind. She summarized [petitioner's] comments as saying that [petitioner] acted in good faith on the information that she had at the time and believed to be true. She observed that people changed their minds, and they had to honor that. She argued that no one would be so foolish as to willfully and knowingly falsify an appellant's name in a situation like this. She held that errors could be made in good faith and that people could change their minds. She expressed their regret for any problems that have arisen from Mr. Leeson * * * with respect to this matter." Record II 25.

One of the city commissioners then indicated that "he did not know the players in this appeal process, and therefore he was a neutral person in this matter." *Id*. He then stated "the more issues that were brought up, the more it muddied the situation" and he sought to return to consideration of the variance criteria. *Id*. Petitioner then repeated that the Leeson letter attacked her credibility and argued (1) she should be given an "equal opportunity to rebut with evidence," (2) the letter should be rejected, or (3) "she should be given an opportunity separate from this setting to address the issue." *Id*.

We do not believe it was reversible error for the city to accept the letter, because there does not appear to be any basis for it to have rejected the letter.[16] As far as we can tell, petitioner and her attorney were given adequate opportunity to rebut the substance of Mr. Leeson's short letter at the December 19, 2001 city commission hearing, including an opportunity to address any question that letter might have raised about petitioner's credibility. Finally, we do not agree that the city committed error by failing to provide an additional hearing for petitioner to have another opportunity to rebut that letter.

This subassignment of error is denied.

The fifth assignment of error is denied.

[16] As the city notes, the statements in that letter, even if they are all false, have no bearing on the substantive issues that were before the city commission on remand.

SIXTH ASSIGNMENT OF ERROR

Petitioner's precise argument under this assignment of error is not clear. Petitioner appears to argue that one or more of the city commissioners erroneously believed the city was legally required to limit its consideration on remand to the two issues that formed the basis of our remand in *Reagan*. The record demonstrates that the city commission was not under any misapprehension about whether it could expand the scope of review on remand beyond the two issues that were identified in our decision in *Reagan*, if it wished to.[17] Record II 250-51. The city commission was entitled to limit consideration on remand to the issues that resulted in the remand and was entitled to refuse to reconsider issues that had either been resolved in the city's favor in *Reagan* or that had not been raised in that appeal. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 78 (1999).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

OCMC 17.60.020(A) is set out in full above at n 7 and requires that the city find that "extraordinary circumstances apply to the property." In *Reagan*, we rejected the petitioners' argument that it was error for the city to find that the misinformation the intervenor received about his ability to rely on the subdivision and partitioning ordinance provisions that were in effect at the time of the pre-application conference in 1998 was sufficient to satisfy the extraordinary circumstances criterion in OCMC 17.60.020(A).

OCMC 17.60.020(C) is also set out in full above at n 7, and requires that the city find "[t]he applicant's circumstances are not self-imposed or merely constitute a monetary hardship or inconvenience." We explained the two-step inquiry required by OCMC 17.60.020(C) as follows:

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[17] At its May 16, 2001 meeting, the city's attorney specifically asked the city commission if it wished to "leave all issues open or did it want to limit it to the two remanded issues." Record II 250. The city commission indicated it wished to limit the remand proceedings to the two remand issues and voted to remand the matter to the planning commission to consider those two issues. Record II 250-51.

> "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." *Reagan*, 39 Or LUBA at 685.

In *Reagan*, we concluded that the city had adequately demonstrated that the first prong of OCMC 17.60.020(C) was satisfied, but failed to address the second prong. On remand the city cited the same misinformation regarding intervenors' ability to rely on the 1998 subdivision and partitioning ordinance in addressing the second prong of OCMC 17.60.020(C) that it had relied on in *Reagan* with regard to OCMC 17.60.020(A). The planning commission findings also use the term "extraordinary hardship" in some places rather than the OCMC 17.60.020(C) term "monetary hardship."[18] Petitioner argues the planning commission revisited the "extraordinary circumstances" criterion in OCMC 17.60.020(A), when it addressed OCMC 17.60.020(C), and the city commission erred by refusing to consider issues she raised to the city commission regarding OCMC 17.60.020(A) in her appeal of the planning commission's decision on remand.

The city commission's decision finds that it is clear when the planning commission's decision is viewed in context, that it "did not intend to re-open the decision on OCMC 17.60.020(A)." Record II 7. Based on that finding the city commission refused to consider

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[18] The planning commission findings on remand include the following:

> "The Planning Commission notes that practically any regulation of land has some negative financial impacts on the owner. For that reason, the Planning Commission does not interpret prong two of [OCMC 17.60.020(C)] to require that the applicant's extraordinary circumstances have no financial impact. Instead to meet prong two the applicant's circumstances must not be based solely on financial hardships and must not rise exclusively from monetary circumstances.
>
> "* * * * *
>
> "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 Planning Commission interprets this criterion 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 based on monetary consequences and therefore is not merely a monetary hardship or inconvenience." Record II 107-08.

petitioner's OCMC 17.60.020(A) arguments on remand. The city commission's decision accurately describes the planning commission decision, and the city commission did not err in refusing to consider petitioner's 17.60.020(A) arguments on remand.

The seventh assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Petitioner's ninth assignment of error is as follows:

> "Respondent violated Petitioner's constitutional rights to due process and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article One §§ 10 and 20 of the Oregon Constitution. Respondent did so by failing to comply with OCMC 16.40.050, 17.08.040, 17.50.070(B), 17.50.190, and 17.60.020; by failing to comply with ORS 183.415(10), 183.435, 18[3].450(3), 197.835(3) and 197.835(9)(a)(B); and by failing to provide the rights set forth in *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973)." Petition for Review 25.

We agree with the city that the only constitutional theory that is sufficiently developed to merit review is petitioner's claim that the city's decision violates Article 1, section 20, of the Oregon Constitution.[19] In support of that theory, petitioner alleges that the city failed to (1) limit the city commission's scope of review as required by OCMC 17.50.190(F); (2) provide a notice of local appeal on remand that fully complied with OCMC 17.50.190(E); (3) verbally resolve all legal and evidentiary issues in a public hearing as petitioner believes is required by ORS 183.415(10), 183.435, 183.450(3); (4) require that intervenors meet the burden of proof for a variance as required by various OCMC provisions; and (5) allow petitioner an adequate opportunity to rebut evidence.

With regard to points three through five, we do not agree that the city erred in the ways that petitioner alleges, and in this decision we reject petitioner's assignments of error

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[19] Article 1, section 20 provides:

> "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."

that more fully develop those arguments. With regard to point one, we conclude under the first assignment of error that the scope of local review issue is not properly presented in this appeal. With regard to the second point, under the second assignment of error we conclude that the notice defects did not prejudice petitioner's substantial rights. Petitioner's five arguments are insufficient to demonstrate that the city violated petitioner's rights under Article 1, section 20, in granting the disputed variance.

In addition, as the city argues, petitioner's Article 1, section 20 argument suffers from a more fundamental problem. The Oregon Supreme Court has described the analysis that is generally required under Article 1, section 20, as follows:

> "* * * An equal privileges analysis * * * requires us to determine: (1) whether the legislature had authority to act; (2) whether one class of persons receives privileges that the other does not; and (3) whether the disparate treatment had a rational basis. *See Seto v. Tri-County Metro. Transportation Dist*., 311 Or 456, 467, 814 P2d 1060 (1991) (stating issue as 'whether the legislature had authority to act and whether the classification has a rational basis')." *Crocker and Crocker*, 332 Or 42, 54, 22 P3d 759 (2001).

The court elaborated on the second step of the analysis as follows:

> "The equal privileges and immunities clause scrutinizes benefits in the form of privileges and immunities given to a particular class, rather than discrimination against a particular class:
>
> > "'The original target of this constitutional prohibition was the abuse of governmental authority to provide special privileges or immunities *for* favored individuals or classes, not discrimination *against* disfavored ones. *See State v. Savage*, 96 Or 53, 59, 184 P 567 (1920) (Article I, section 20, is "antithesis" of Fourteenth Amendment's equal protection clause). This perspective bears on the section's interpretation of what is a favored "class" under the section. A person who is denied what a favored class receives has standing to demand equal treatment, though this leaves an issue whether to strike down the special privilege or to extend it beyond the favored class.'" 332 Or at 54 (emphasis in original).

Although petitioner argues the city impermissibly *favored* intervenors in the local proceedings in this matter, she does not establish that such is the case. We conclude above

that the issue of whether the city impermissibly exceeded its scope of review under OCMC 17.50.190(F) in its first decision or in its decision on remand is not properly presented in this appeal. Even if it had, that error might well have been motivated by a desire to reach a final decision without further delays rather than by any improper intent to favor intervenors. We also conclude that the notice errors that petitioner alleges did not prejudice petitioner's substantial rights. We have no reason to believe the city would not similarly refuse to delay a local proceeding to repeat its notice of local appeal where it believed that no parties' substantial rights would be prejudiced. Finally, even if the city's review for compliance with all applicable variance criteria and the uncorrected notice shortcomings could be viewed as favoring intervenors, petitioner makes no attempt to show that she is a variance applicant who received less favorable treatment that would implicate Article 1, section 20, or that there are other such variance applicants who were not afforded the same "privileges" as intervenors.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

In the narrative that accompanied the initial variance application, intervenors included their version of the facts surrounding the 1998 pre-application conference.

> "When I bought the additional property, adjacent to my lot, in April 1991, from [the owner], he advised me to go to City Hall and satisfy myself that it would be a legal building site.
>
> "I went to the City and talked to [a city planner]. I showed [the planner] a sketch of my proposed building lot and she said it met all the parameters of a partition in the R-10 zone.
>
> "On August 5, 1998, when I received pre-application approval of my partition (file No. PA 98-78), I asked [the city planning director] to make a note on my file the deadline for filing for a 6 month extension. [The planning director] noted that it would be February 1999 and at that time she told me that the Planning Department was making some changes to the City Code but it wouldn't have any effect on my partition. I figured I would need the additional time to save the money for a survey and the partition fee." Record I 208.

As we have previously explained, the subdivision and partitioning ordinance provision that would have allowed creation of a lot with a depth of 80 feet, rather than the 100 feet required in the R-10 zone, was repealed in 1998. The city thereafter took the position that intervenors must seek a variance for the proposed Lot 1.

An April 10, 2000 planning staff report includes the following statement:

> "On August 5, 1998 the applicant was * * * informed by City Planning Staff that the new subdivision ordinance would not change previous partitioning rules described under [OCMC] 16.28.080 (1994) * * *. Nevertheless, this section was removed from the subdivision and partitioning ordinance when this title was adopted in October of 1998. Removal of this provision automatically required all partitions and subdivisions to follow lot dimension standards of the underlying zone." Record I 200.

As petitioner correctly notes, the minutes of the April 10, 2000 planning commission meeting suggest that the planner who made the above-quoted statement was relying on intervenors' version of what was said at the pre-application conference, rather than himself taking the position that intervenors were misinformed at the 1998 pre-application conference about the possible effect of proposed changes to the subdivision and partitioning ordinance.[20]

On remand petitioner prepared a letter to the former city planning director who intervenors contend misinformed them about the potential applicability of the subdivision and partitioning ordinance changes pending in 1998. Apparently the former planning director and petitioner agreed that petitioner would prepare the letter to memorialize a conversation they had about the former planning director's version of what was said at the 1998 pre-application conference. We quote a portion of that letter, as supplemented by the former planning director, below.

> "A short while before the August 5, 1998 pre-application meeting, Rich Carson told you a city official asked that you expedite the pre-application

[20] Those minutes include the following:

> "[Planning staff] replied that the applicant states that staff informed him that when Title 16 was to be passed, he could still complete his proposed partition. * * *" Record I 286.

> process for a friend. You learned later that friend was [intervenor] Jim McKnight. Relevant law was about to change since proposed Ordinance 98-1007 was to have its final hearing and vote at the City Commission meeting held the same day as the pre-application conference, August 5, 1998. Their decision would be effective October 1. Under the new law, the proposed partition would be required to meet the lot depth and width requirements of the R-10 zone. You and Mr. Carson discussed whether a pre-application process alone would be sufficient to vest the applicant with rights under the old ordinance. *[I] stated that the city would have to receive a land use application that was substantially complete <u>prior</u> to the effective date of [Ordinance 98-1007] in order to vest application rights under the previous ordinance, as was customary practice by the planning department.* Mr. Carson and you knew and followed the Oregon law that requires any land use proposal to be evaluated according to the criteria in place on the day the application was submitted." Record II 219.[21]

Based in large part on the direct conflict between intervenors' version of the 1998 pre-application conference and the planner's version, and the lack of clarity about whether the staff report really supports intervenors' version of what was said at the 1998 pre-application conference, petitioner argues that the city's decision to accept and rely on intervenors' version of what was said at the pre-application conference is not supported by substantial evidence.[22]

The city argues:

> "The question of what advice the applicant received at the August 5, 1998, conference is the crucial factual question in this appeal and only two people were present at that conference; this situation is a classic 'he said, she said' episode, with two distinctly different versions of what occurred. The City Commission chose to believe the applicant's version of that conversation and its conclusion is supported by the applicant's own testimony, which constitutes all the substantial evidence that the City requires. In Applicant's written statement accompanying the application, he explicitly says that [the former planning director] 'told me that the Planning Department was making

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[21] The emphasized language is the former planning director's handwritten addition to petitioner's letter, and the former planning director added the underline emphasis as well. Petitioner drafted the balance of the quoted language. The letter is signed by the former planning director to indicate that she agrees with the statements in the letter.

[22] Petitioner also cites and relies on other allegedly inaccurate statements that intervenors made during the local proceedings and communication difficulties that intervenor Jim McKnight suffers due to a stroke.

> some changes to the City Code but it wouldn't have any effect on my partition.' This is more than sufficient evidence for the [city c]ommission to rely on, especially when buttressed by [another city planner's] contention that this occurred." Respondent's Brief 27 (record citations omitted).

In reviewing a substantial evidence challenge to a land use decision, LUBA does not reweigh the evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). We must sustain the city commission's decision if we conclude that the evidence the city chose to believe is evidence a reasonable person would rely on. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). If we conclude that the evidence the city relied on, viewed in context with other evidence in the record, is evidence a reasonable person would rely on to reach the decision, it does not matter if LUBA might have reached a different conclusion based on the same evidence. *Douglas v. Multnomah County*, 18 Or LUBA 607, 617 (1990).

Applying the above-described standard of review to petitioner's substantial evidence challenge, although it is a close question, we conclude that the city commission's finding that intervenors were misinformed about the possible effect of the subdivision and partitioning ordinance changes on their partition plans is supported by substantial evidence.

The tenth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

OCMC 17.60.020(C) requires that the city find that "[t]he applicant's circumstances are not self-imposed or merely constitute a monetary hardship or inconvenience." *See* n 7. As previously noted, one of the bases for our remand in *Reagan* was for the city to determine whether the applicant's circumstances "merely constitute a monetary hardship or inconvenience." On remand, the city found that the applicant's circumstances are "not based

on monetary consequences and therefore [are] not merely a monetary hardship or inconvenience." Record II 108.[23]

Petitioner first argues that because *intervenors* took the position in *Reagan* that the city need not address the above-quoted portion of OCMC 17.60.020(C), the *city* is judicially estopped in this appeal from taking the position that the application complies with that portion of OCMC 17.60.020(C). We reject the argument.

Petitioner also argues that certain references in the local proceedings to financial impacts are sufficient to show that OCMC 17.60.020(C) is violated by the proposed variance. We reject that argument as well.

Finally, petitioner argues the city's findings regarding the OCMC 17.60.020(C) prohibition against granting variances to alleviate mere monetary hardships or inconvenience are inadequate. We do not agree. The findings explain that the city found that this requirement of OCMC 17.60.020(C) is met by the circumstances created by the misinformation from planning staff regarding the effect of the 1998 changes to the subdivision and partitioning ordinance, rather than, in the words of OCMC 17.60.020(C), "merely * * * a monetary hardship or inconvenience."

The eleventh assignment of error is denied.

TWELFTH ASSIGNMENT OF ERROR

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." In *Reagan*, we concluded that the decision challenged in that appeal adequately addressed the requirement that the variance conform to "the intent of the ordinance being varied."[24] With regard to the OCMC

[23] The relevant findings are set out at n 18.

[24] Therefore petitioner's arguments under the twelfth assignment of error concerning that part of OCMC 17.60.020(F) are not properly presented in this appeal.

17.60.020(F) requirement that the variance "conforms to the comprehensive plan," we noted that the city adopted the following finding:

> "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. * * *" Record I 7; 39 Or LUBA at 690.

In addressing the adequacy of that finding we concluded:

> "We have no reason to question the city commission's finding that approving the variance and allowing a new parcel to be created * * * 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)." 39 Or LUBA at 691 (emphasis added).[25]

On remand, the city adopted findings to respond to our remand in which it explains why it believes that granting a variance to the lot depth requirement in this case is consistent with the Growth and Urbanization and Housing Sections of the city's comprehensive plan. The city concluded that those policies encourage in-fill development like the development that would be facilitated by the disputed variance. Petitioner disputes that conclusion.[26]

The city also adopted an alternative theory for concluding that the variance complies with the OCMC 17.60.020(F) requirement that the variance "conforms to the comprehensive plan":

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[25] The emphasized language can be read to suggest that we meant that the city must find a specific plan provision that expressly "calls for higher residential density or in-fill." Despite that phrasing, the error we identified in *Reagan* under OCMC 17.60.020(F) was described in the last of the above-quoted sentences: "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)." 39 Or LUBA at 691.

[26] Petitioner repeats her prior contention that the planning commission and city commission are legally required to verbally discuss and resolve all evidentiary and legal issues in their hearings. We reject the argument here for the same reasons we rejected it in our disposition of the third assignment of error.

> "B. Alternatively, if the Growth and Urbanization and Housing Sections do not, in fact support policies encouraging in-fill and higher densities, then the [City] Commission still finds that the variance conforms to the Comprehensive Plan. There has been no Comprehensive Plan policy or provision identified that the variance violates. The arguments before both the Planning Commission and the City Commission focused only on whether the Comprehensive Plan encourages in-fill and higher density. Even if the Comprehensive Plan does not do so, no argument has been made that the Comprehensive Plan actively discourages in-fill or higher density. If the Commission is incorrect that the Comprehensive Plan encourages in-fill or higher density, then it is unable to locate any plan provision that is implicated by this provision. If that is the case, then the City interprets its ordinance, requiring conformation with the Comprehensive Plan, to be met when there is no policy that the variance violates." Record II 8.

Because we believe the city's alternative theory for finding compliance with OCMC 17.60.020(F) is adequate, we need not and do not address the question of whether the cited policies in fact support approving variances to achieve higher density or in-fill. The plan provisions that petitioner cites and relies on to support her position that granting the disputed variance to facilitate in-fill violates the comprehensive plan and the plan provisions that the city cites in support of its contrary position, at best, lend indirect support for the parties' respective positions. Given the absence of any identified comprehensive plan policy that expressly discourages or encourages lot depth variances to allow partitions in established neighborhoods for additional in-fill development, and the identification of numerous plan provisions that lend only indirect support for opposite conclusions about the permissibility of such variances, we believe the city commission's above-quoted alternative interpretation and application of its plan is within its interpretive discretion under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).

The twelfth assignment of error is denied.[27]

[27] Petitioner makes other arguments under this assignment of error that we reject without discussion.

EIGHTH ASSIGNMENT OF ERROR

Citing the following finding, petitioner argues the city commission improperly refused to consider specific comprehensive plan provisions that petitioner identified in her notice of local appeal following the planning commission's decision on remand:

> "The opponents also cite several specific Comprehensive Plan provisions, which they assert conflict with the variance. None of these specific criteria were raised before the Planning Commission and, thus, are not valid bases for appeal."[28] Record II 9.

The parties dispute whether the cited comprehensive plan provisions were sufficiently raised to merit review or specific discussion by the city commission.

Although the quoted city commission finding says what it says, it is far from clear to us that the city commission actually refused to consider the substance of the cited plan provisions. The disputed finding immediately follows the findings noted in our discussion of the twelfth assignment of error. Those findings take the position that the entire comprehensive plan was considered and that the challenged variance conforms to the comprehensive plan because it does not violate any part of that plan. Such a general finding might not suffice if the plan provisions that petitioner identified in her notice of local appeal were more clearly at odds with the variance that was approved by the city. However, the

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[28] The quoted finding appears to be referring to the following language in petitioner's notice of local appeal of the planning commission's decision on remand:

> "C. [The variance] is in direct conflict with several provisions of the Plan that are specifically relevant to the proposal:
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> "The Plan recognizes that 'housing supplies a personal identity to the neighborhood' and it defines buildable lots as 'sites…*not substandard in size*.' Rivercrest is 'one of the newer areas of the city which tends to emphasize larger concentrations of one housing type,' e.g. R-10. Oregon City's Housing Goal #2 is to 'encourage the maintenance of the existing residential housing stock through *appropriate zoning designations, considering existing patterns of development in established older neighborhoods*.' Goals 10 and 14 of the LCDC include 'preservation of older housing and residential neighborhoods.' The Comprehensive Plan map displaying development potential in Oregon City shows NO BUILDABLE PROPERTY IN RIVERCREST." Record II 92 (emphasis in original; citations to pages of the plan omitted).

plan provisions that are mentioned in petitioner's notice of local appeal on remand, which appear to be the subject of the above-quoted finding, at best *might* be interpreted broadly to be offended by the disputed variance. However, it is reasonably clear from the city commission's alternative finding addressing OCMC 17.60.020(F) that the city commission, viewing its comprehensive plan as a whole, does not interpret the plan to protect the affected neighborhood from a 20-foot lot depth variance for a lot that will in all other respects fully comply with the requirements of the R-10 zone. A second remand for the city commission to make that interpretation clearer in this case would serve no purpose.

The eighth assignment of error is denied.

The city's decision is affirmed.