



**NATURE OF THE DECISION**

Petitioners appeal a city council decision that affirms a planning commission decision that grants planned unit development (PUD) and preliminary subdivision plat approval for a 24-unit single family detached PUD.

**MOTION TO INTERVENE**

Nancy J. Armour, one of the applicants and one of the owners of the subject property, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

**MOTION TO ALLOW REPLY BRIEF**

Petitioners move for permission to file a reply brief pursuant to OAR 661-010-0039. There is no objection to the motion, and it is allowed.

**FACTS**

The subject property includes 10.77 acres. A previously approved development, Millers Landing, adjoins the subject property to the west. Access to the subject property is to be provided by extending two existing roads from the Millers Landing development (Roellich Road and Wapato Street), which now end at the subject property's west property line. Roelich Road would be extended east into the upland part of the subject property. The extension of Roelich Road would travel a short distance east and then turn north and eventually turn west and connect with Wapato Street, forming a reverse "C" shaped loop through the upland part of the property. This loop street through the subject property is called "Street A." Record 11.

On the south, east and north sides of the developable upland part of the property are steep slopes. Those steep slopes descend to Cedar Creek and associated wetlands in the eastern and northern parts of the property and descend to a tributary of Cedar Creek along the south end of the property. On the north side of the property the slopes range from 40 to 60

1 percent, and on the south side of the property the slopes range from 30 to 40 percent. Record  
2 197. In some places where there have been landslides, the slopes exceed 100 percent. *Id.*

3 A majority of the subject property, 6.6 acres, is to be dedicated to the city. The area  
4 to be dedicated to the city includes the steeply sloped areas and wetland areas that adjoin the  
5 north, east and south sides of the developable upland area. Lots 1 through 16, which adjoin  
6 the north, west and south sides of Street A, are at the top of the slopes that drop steeply off to  
7 the wetlands below.

8 Petitioners own property located to the south of the steeply sloped southern part of  
9 the subject property. Petitioners' property has frontage on, and currently has access onto,  
10 State Highway 99W (Hwy 99W). However, petitioners have been advised by the Oregon  
11 Department of Transportation (ODOT) that they may lose that access to Hwy 99W in the  
12 future. One of the issues in this appeal is whether the city should have required that the  
13 disputed PUD be revised to provide access across the steep slopes in the southern part of the  
14 PUD that separate the subject property from petitioners' property. A second issue concerns a  
15 fence at the southern end of the subject property. Petitioners claim that they own a small  
16 triangular portion of the subject property that lies south of the fence but north of the southern  
17 property line described in the deed to the subject property (hereafter the disputed triangle).  
18 Part of the disputed triangle is to be dedicated to the city, and part of the disputed triangle is  
19 included in lot 12. Record 335.

20 The planning commission and city council both approved the disputed PUD, despite  
21 petitioners' objections regarding the disputed triangle and the absence of any reserved or  
22 dedicated land for access south from the PUD to petitioners' property. This appeal followed.

23 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

24 Sherwood Community Development Code (SCDC) 7.201.03 requires that the city  
25 adopt certain findings before it approves a preliminary subdivision plat. SCDC 7.201.03(F)  
26 requires that the city find:

1           “Adjoining land can either be developed independently or is provided access  
2           that will allow development in accordance with [the SCDC].”

3           Petitioners asserted below, before both the planning commission and the city council,  
4           that ODOT has initiated action that may leave their property without the access to Highway  
5           99W that the property current has.<sup>1</sup> Petitioners contend that such action by ODOT would  
6           leave their property undevelopable, unless and until they are able to obtain other access.<sup>2</sup>  
7           Petitioners argue that given the current state of uncertainty regarding their continued right to  
8           access to Hwy 99W in the future, SCDC 7.201.03(F) requires that the disputed subdivision  
9           be amended to provide access to their property.

10           The approved subdivision provides no access to petitioners’ adjoining property to the  
11           south. The city council adopted the following finding regarding SCDC 7.201.03(F):

12           “Twenty three of the lots would take access through Miller’s Landing  
13           development. \* \* \* Cedar Creek and associated wetland and floodplains  
14           make[] extending a road to the south and east unfeasible.” Record 147.

15           Petitioners argue in their first and second assignments of error that the above finding is  
16           inadequate to demonstrate that the PUD complies with SCDC 7.201.03(F) and that the city’s  
17           finding is unsupported by substantial evidence.

18           The above finding is not responsive to the central argument that petitioners advanced  
19           below, and the city does not contend otherwise. The city argues that notwithstanding that  
20           defect in the decision, petitioners’ first and second assignments of error provide no basis for  
21           reversal or remand. The city contends that the record clearly supports the city’s decision that  
22           it is not necessary to require that the applicant provide access to petitioners’ property.  
23           Therefore, the city argues, under ORS 197.835(11)(b) the first and second assignments of

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<sup>1</sup> The record supports petitioners’ contention in this regard, although the record does not establish that ODOT has actually taken petitioners’ access or how quickly that access may be taken in the future.

<sup>2</sup> Petitioners apparently read the SCDC 7.201.03 to require that the land adjoining a proposed subdivision must have access that will allow development of that adjoining land or, if not, a proposed subdivision must be configured to provide that access.

1 error should be denied.<sup>3</sup> In support of this argument, the city argues that the record clearly  
2 establishes that on the date of the challenged decision, petitioners had not been denied access  
3 from Hwy 99W, and they may never be denied such access. Simply stated, the city contends  
4 that ODOT’s initiation of discussions that petitioners fear may ultimately lead to their being  
5 denied the access to Hwy 99W that they will need to develop their property is insufficient to  
6 obligate the city to require that the applicants provide access to petitioners’ property under  
7 SCDC 7.201.03(F).

8 The challenged decision does not adopt the interpretation of SCDC 7.201.03(F) that  
9 the city relies on in its brief to defend the city’s decision. Had the city council interpreted  
10 SCDC 7.201.03(F) not to apply in a circumstance where an adjoining property that currently  
11 has access faces the potential loss of that access in future, we might well be required to defer  
12 to that interpretation under ORS 197.829(1).<sup>4</sup> The only explanation the city provides in its  
13 findings for not requiring that the PUD provide access to petitioners’ adjoining property is its

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<sup>3</sup> ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

<sup>4</sup> Under ORS 197.829(1):

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

As interpreted by the Court of Appeals, the standard of review in ORS 197.829(1) is highly deferential. *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996).

1 unexplained conclusion that extending access south from the subject property to petitioners'  
2 property is not feasible.

3 Petitioners argue there is no substantial evidence in the record to support the city's  
4 infeasibility finding.<sup>5</sup> The city cites no evidence in support of the infeasibility finding, and  
5 we agree with petitioners that the finding is not supported by substantial evidence in the  
6 record.<sup>6</sup>

7 The first and second assignments of error are sustained.<sup>7</sup>

### 8 **THIRD ASSIGNMENT OF ERROR**

9 Under their third assignment of error, petitioners allege the challenged decision  
10 should also be remanded because the mayor has a potential conflict of interest that was not  
11 properly resolved.<sup>8</sup>

12 We reject the third assignment of error for two reasons. First, the statement that  
13 petitioners believe establishes that the mayor has a potential conflict of interest does not

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<sup>5</sup> The city's infeasibility finding suggests that the city does not believe that SCDC 7.201.03(F) requires that a subdivision applicant reserve or dedicate land for access to an adjoining property if it would be infeasible to construct a roadway across such land. We note that although that commonsense interpretation might be inferred from the challenged decision, the decision does not expressly adopt that interpretation.

<sup>6</sup> It is obvious from the record that that extending road access from the subject property to petitioners' property to the south would require crossing exceedingly steep slopes. It may well be that the slopes and geological conditions along the southern part of the subject property make construction of a road infeasible. However, without some additional explanation from the city for why such a roadway extension would be infeasible, or clearer evidence in the record that such construction would be infeasible, we agree with petitioners that the finding is inadequate and is unsupported by substantial evidence.

<sup>7</sup> Petitioners also argue under the first two assignments of error that the city was obligated under SCDC 7.201.03(F) to require that the PUD provide access to disputed triangle that is the subject of petitioners adverse possession claim. However, petitioners do not develop an argument under the first and second assignments of error for requiring access to that property under SCDC 7.201.03(F) that differs from their argument concerning the balance of their property. We consider petitioners' additional arguments concerning the disputed triangle under the fourth assignment of error below.

<sup>8</sup> Under ORS 197.835(11)(a), LUBA is to resolve all issues when remanding a land use decision, to the extent it can do so within the 77-day deadline established for its final opinion under ORS 197.830(14). Therefore, although our resolution of the first and second assignments of error requires that we remand the city's decision in any event, we resolve petitioners' remaining assignments of error.

1 appear to do so.<sup>9</sup> Second, even if the statement could be understood to suggest there might  
2 be a potential conflict of interest, petitioners raised no issue regarding the adequacy of the  
3 mayor's disclosure and made no effort to question the mayor concerning the alleged potential  
4 conflict of interest. Accordingly, that issue is waived. ORS 197.763(1); ORS 197.835(3).

5 The third assignment of error is denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 As previously noted, petitioners and the applicants have a pending property  
8 ownership dispute concerning the disputed triangle. According to a title report that is  
9 included in the record, the applicants own the entire subject property, including the disputed  
10 triangle, pursuant to the last deed of record. Record 340-343. According to petitioners, they

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<sup>9</sup> Under the portion of the city council hearing devoted to *ex parte* declarations, the mayor stated:

[T]he man that owns the office building that I'm in the office building with, sold the property to the Claus family that is claiming an adverse interest in the Armour property and so although I don't believe it's anything, it may be a potential conflict of interest and so I wanted to declare that. \* \* \* I talked a little bit with the man that I own the building with just to see if he knew why there was a problem and he couldn't figure it out either. I know where the property is. I've been on the property before about five or six years ago. Other than that I have no other information on it. \* \* \* Record 50.

The "Claus family" appears to be a reference to petitioners' predecessor in interest. The "Armour property" is the subject property for which PUD approval was granted. The above appears to be a disclosure that the mayor is part owner of an office building with a person who sold the property that petitioners now own to petitioners' predecessor in interest. Viewed in context with the mayor's other statements, it is difficult to see how petitioners believe the mayor has a conflict of interest in this matter. We agree with the city's explanation of the mayor's statement:

"\* \* \* Putting aside for the moment the question of whether [the mayor] is 'in partnership' with the man that owns the building, the only action taken by that man occurred in the past; the person sold the property to one of the neighbors. There is simply no indication that a decision on the application after some other property had been sold would even have any financial impact the person who owns the building, much less [the mayor].

"\* \* \* \*"

A far better explanation for [the mayor's] disclosure is a public official taking pains to disclose any and all relationships that have anything to do with the property at issue and the parties to a transaction. [The mayor's] actions in this case exemplify what public officials should do; he went beyond the minimum required and placed any possible connections to the transaction on the public record. \* \* \*." Respondent's Brief 9-10.

1 own the disputed triangle because they and their predecessors in title have adversely  
2 possessed that property since 1959. There is a pending quiet title action in Washington  
3 County Circuit Court, with the applicants as named defendants, which presumably will  
4 resolve the dispute one way or the other. Record 160-163.

5 We understand petitioners to contend that the city's decision to take action on the  
6 applicants' PUD proposal, which provides for dedication of some of the disputed triangle to  
7 the city, constitutes a violation of their right to due process of law under the Fourteenth  
8 Amendment to the United States Constitution. We understand petitioners to argue that the  
9 city was obligated under the Fourteenth Amendment to delay action in this matter until the  
10 disputed ownership is resolved. We reject the argument.

11 The consent of the fee owner is required by statute to subdivide property. ORS  
12 92.075. There is no dispute that the applicants are the record owners of the subject property.  
13 Unless and until the Washington County Circuit Court issues a judgment to the contrary, we  
14 do not believe it was error for the city to assume, for purposes of the disputed subdivision  
15 and PUD application, that the applicants are the fee owners of the subject property.

16 We fail to see how the city's decision to proceed and issue a decision in this matter  
17 takes any property interest of petitioners. Petitioners apparently have not sought to enjoin  
18 city action on the subdivision application or to enjoin any action the applicants may take in  
19 the future pursuant to the subdivision and PUD approval. Even though petitioners have not  
20 sought such an injunction, assuming petitioners are successful in their adverse possession  
21 claim, we see no reason why the court could not grant appropriate relief to make petitioners  
22 the owners of the disputed property. Unless and until the circuit court decrees that  
23 petitioners own the disputed triangle, the city is entitled to review and make a decision on the  
24 applicant's subdivision application and in doing so assume that the applicant deed-holders  
25 are the fee owners of the subject property, including the triangle. Petitioners identify no  
26 legal authority that would obligate the city to suspend consideration of the applicant's

1 subdivision and PUD application until petitioners' adverse possession claim is litigated and  
2 all appeals are exhausted, and we are aware of no such authority.

3           Petitioners' fourth assignment of error is denied.

4           The city's decision is remanded.