

NATURE OF THE DECISION

Petitioners appeal two city decisions that grant variances to allow construction of portions of several new roads within wetlands in two subdivisions.

MOTION TO INTERVENE

Ross Investments, Inc. (intervenor), the applicant in this matter, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

A map that was prepared from other maps in the record and attached to the petition for review shows the general location of Hunter Heights and Trinity Terrace, the two subdivisions that are at issue in this appeal. That map is a composite of maps from the city’s Transportation System Plan (TSP) showing planned road extensions and existing wetlands. We have added to the legend and added some street names and attached that map as an appendix to this opinion.¹ Hunter Heights is the smaller of the two subdivisions and is located in the center of the map. Trinity Terrace is the larger subdivision located to the southeast of Hunter Heights. As relevant in this appeal, the disputed variances allow construction of new roadways across wetlands.²

As the attached map shows, a large area of braided wetlands exists in this part of the city. Some of the existing roads have been built across wetlands. Other existing dead-end roads extend into the wetlands to provide access to upland areas. However, the existing road system generally passes around this large area of braided wetlands. The challenged decision finds that the disputed

¹ That map also shows a third subdivision that is not at issue in this appeal, Coven Estates. Other more detailed maps in the record show Pine Street, Trinity Street, Erdman Way and Jake Street crossing wetlands in different locations than indicated on the attached map and show additional proposed roads. Those more detailed maps show that the map we attach as an appendix is somewhat inaccurate in a number of other respects. However, we do not include those maps because a more precise and accurate understanding of the details of the proposed subdivisions is not necessary to understand the legal issues presented in this appeal.

² Both subdivisions were previously granted preliminary subdivision approval with a condition that the applicant seek and receive variances to construct the approved roads in the locations that the city prefers, which requires that wetlands be crossed in a number of circumstances.

1 variances are needed to allow construction of subdivision streets that will improve east-west and
2 north-south street and utility connectivity and provide a second emergency access for the Trinity
3 Terrace subdivision and internal lot access for that subdivision.³

4 We list and briefly describe the disputed roads that are authorized by the challenged
5 variances. As previously noted, because these roads are aligned such that they cross wetlands, the
6 disputed variances are required.

- 7 1. **Pine Street.** A portion of Pine Street, which is a new north-south road,
8 would be constructed to connect Hunter Heights with Hunter Road to the
9 north. When completed, Pine Street would provide a new north-south
10 connection between two existing major east-west roads in the city of
11 Venetia—Hunter Road to the north and East Bolton Road to the South.
- 12 2. **Trinity Street.** East Bolton Road would be extended eastward, in the
13 location where it now turns south, and would be renamed Trinity Street. If
14 other improvements shown on the city’s Transportation System Plan are
15 ultimately constructed, Trinity Street and East Bolton Road would provide a
16 new east-west route through this part of the city.
- 17 3. **Erdman Way.** A portion of Erdman Way, a new north-south road, would
18 be constructed in Trinity Terrace. If completed as shown on the city’s TSP,
19 Erdman Way would provide a new north-south route through this part of
20 the city connecting East Bolton Road to the south and Hunter Way to the
21 north.
- 22 4. **Crosswood Lane** (not shown on the attached map). Crosswood Lane
23 would be a new short north-south internal subdivision road within Trinity
24 Terrace, running between Trinity Street on the north and Jake Street on the
25 south. It would be located west of Erdman Way and east of the north-
26 south portion of East Bolton Road. Other internal north-south roads are
27 proposed between Trinity Street and Jake Street, but they do not cross
28 wetlands.
- 29 5. **Jake Street.** A portion of a new east-west street would be constructed
30 from a point east of East Bolton Road to a point east of Erdman Way. If
31 Jake Street is completed as shown on the TSP it would provide a new east-
32 west roadway through this part of the city connecting a planned southward

³ We use the term “connectivity” in this decision as roughly translating to the ability to travel over a more or less direct route from one point to another, *i.e.*, without a requirement for excessive out-of-direction travel.

1 extension of Baker Street on the east with an unnamed planned north-south
2 road immediately west of the north-south section of East Bolton Road.⁴

3 6. **Heavenly Lane** (not shown on the attached map). Heavenly Lane would
4 be a short new east-west internal subdivision road within Trinity Terrace
5 connecting Crosswood Lane with the north-south portion of East Bolton
6 Road.

7 The TSP generally calls for an extension of the adjoining grid system of roads into this
8 wetland area of the city (which could necessitate a significant number of wetland crossings) to
9 improve connectivity. However, the TSP also recognizes that wetland protection requirements in
10 the Veneta Municipal Code (VMC) prohibit new development within wetlands and may require
11 modification of the alignment shown for the proposed street system shown in the TSP.⁵

12 VMC Chapter 18.10 is entitled “Wetland Protection.” Since constructing a new road
13 through a locally significant wetland destroys at least some wetland functions and values, such
14 construction qualifies as “[n]ew development or expansion of existing development” and is
15 prohibited by VMC 18.10.040(3). Exceptions to the prohibition in VMC 18.10.040(3) are

⁴ Based on the map that appears at Record 123, it does not appear that Jake Street would connect with East Bolton Road at this time. It would be accessed from Trinity Street and Heavenly Lane to the north via the subdivisions new internal north-south roads.

⁵ The discussion of “New Streets” at page 3-10 of the TSP recognizes that there is some tension between the city’s goals of achieving improved connectivity and protecting wetlands:

“Map 9 shows general locations of where streets will go as those areas are developed. *The exact alignment of streets will be determined at the time of development.* Design and traffic issues will be addressed at the time of development. *Natural or cultural resources may require that streets be realigned, and in some cases, may prevent construction.* Where possible, the new streets will provide more connections to the existing street system. More connections mean that public safety is increased because emergency vehicles have more options for getting to a crisis location. More connections also mean shorter travel distances and less congestion because people will have choices about where to drive or walk and not be restricted to a particular street. The street plan focuses on connectivity. It also provides alternative routes to the state highways which will alleviate some of the burden on Territorial Highway and Highway 126 for local trips.” (Emphases added).

Map 10 from the TSP (attached as an appendix to this opinion), like Map 9 referenced in the above-quoted language from the TSP, includes a legend that largely repeats the TSP language emphasized above, which makes it clear that the proposed alignments for new roads in the TSP are conceptual and subject to change to avoid wetlands and more effectively serve development.

1 possible under the wetland protection variance provisions at VMC 18.10.060. VMC 18.10.060
2 authorizes a variance to allow development that would otherwise be prohibited in three
3 circumstances. As relevant here, VMC 18.10.060(3) provides:

4 “A variance may be granted in those instances where the planning commission and
5 city council jointly determine that the public need outweighs the potential adverse
6 impacts of development in or near a locally significant wetland resource site.”

7 The city at one point considered resolving the tension between the TSP proposal to improve
8 connectivity by extending a new road system grid through the wetlands and the VMC 18.10.040(3)
9 requirement for protection of wetlands from new development by granting a blanket variance for all
10 new roads proposed in the TSP. That more ambitious solution apparently has not yet been
11 adopted. To allow Hunter Heights and Trinity Terrace to proceed, variances were granted for the
12 roadways proposed in the disputed subdivisions. This appeal concerns those variances.

13 **FIRST ASSIGNMENT OF ERROR**

14 The city adopted the following findings to explain why it concluded that “the public need
15 outweighs the potential adverse impacts of development in or near a locally significant wetland
16 resource site” under VMC 18.10.060(3), with regard to the proposed extension of Pine Street
17 south from Hunter Road through Hunter Heights subdivision:

18 “The proposal is consistent with this criterion because the public need is for
19 connected street and public utility systems to serve the residents of the Hunter
20 Heights subdivision, surrounding areas, and City as a whole; and, potential adverse
21 impacts of development in or near a locally significant wetland resource site shall be
22 mitigated through the condition of approval that any activity in locally significant
23 wetlands shall conform to Division of State Lands (DSL) and Army Corps of
24 Engineers (ACE) permitting processes, standards and conditions which shall require
25 minimum impact to wetlands and where impact is unavoidable shall require
26 mitigation of any adverse impacts.

27 “There are approximately 0.76 acres of wetlands identified on the Hunter Heights
28 site. The subdivision will impact approximately 0.074 acres of an existing wetland
29 drainage way for the extension of Pine Street as required by the City of Venetia
30 Transportation Plan (TSP). The east half of the City, where Hunter Heights
31 subdivision is located, has extremely limited north-south connectivity. Improvement

1 of Pine Street in its entirety as shown on Map 9 of the TSP is necessary to provide
2 north-south connectivity to the east half of the City.” Record 33.

3 With regard to Trinity Terrace subdivision, the other challenged decision adopts a finding
4 that is substantively identical to the first paragraph of the Hunter Heights subdivision findings quoted
5 above. Record 21. The following additional Trinity Terrace subdivision findings follow that
6 paragraph:

7 “There are approximately 2.2 acres of wetlands identified on the Trinity Terrace
8 site. The subdivision will impact a total of approximately 0.19 acres of an existing
9 wetland drainage way for the extension of Trinity Street and Erdman Way and
10 associate public utilities as required by the City of Veneta [TSP] as shown on Map
11 9 of the TSP. Trinity Street is designated as a minor collector. Erdman Way is
12 designated as a local street which provides much need[ed] north-south connectivity
13 for the City.

14 “The Installation of Heavenly Lane is necessary to comply with the City of Veneta
15 Land Division Ordinance Section 4.03(6) which requires the development to
16 provide for the future development of adjacent properties. The installation of
17 Crosswood Lane is necessary to provide a second access for emergency vehicles in
18 order to serve an 81 lot subdivision.” Record 21.

19 The city adopts additional findings that further explain its position that the proposed roads will
20 increase connectivity and further other city policies. Record 21-29; 33-41.

21 Petitioners argue first that the “potential adverse impacts of development,” which under the
22 VMC must be outweighed by the identified public need, “are not even listed, let alone compared
23 with or weighed against the asserted public needs.” Petition for Review 5. Petitioners go on to
24 argue:

25 “Despite all the recognized benefits of wetlands, the potential destruction of either
26 wetlands in general or these wetlands in particular is not even analyzed in the city’s
27 findings in support of the variances. Such an omission is a fatal flaw, given that
28 weighing of the potential impacts of development is required by the variance
29 criterion.” *Id.*

30 With regard to the adequacy of the city’s public need findings, petitioners argue:

31 “As Petitioners pointed out in public testimony, the city made no showing that a
32 connected street and utility system requires crossing and destruction of the
33 significant wetlands areas. Rec 77-78, 85-86, 91. Petitioners do not dispute that a

1 connected street and utility system is desirable, but the findings do not go beyond
2 that generalization to indicate why these particular alignments and locations,
3 requiring destruction of these particular wetlands, are so unique and necessary as to
4 constitute a public need outweighing the impacts of the development.” Petition for
5 Review 6.

6 While VMC 18.10.060(3) does not necessarily require that the city approach the “public
7 need” and “potential adverse impacts of [wetland] development” questions in precisely the way
8 petitioners argue in the above-quoted paragraphs, we agree with petitioners that the city’s findings
9 are inadequate. As petitioners correctly point out, some of the roads for which the challenged
10 decisions approve variances are not included in the TSP and are not needed to improve
11 connectivity.⁶ For at least some of the roads that are justified on a need to improve connectivity,
12 petitioners identified alternative alignments that would not require crossing wetlands or would have
13 fewer impacts on wetlands. While VMC 18.10.060(3) does not expressly or directly impose a
14 requirement that impacts on wetlands be minimized, it does require a finding that “public need
15 outweighs the potential adverse impacts of development in or near a locally significant wetland
16 resource site.” It is hard to see how that finding can be made if there is an alternative alignment that
17 will both address a connectivity shortcoming and avoid crossing wetlands. If such alternatives exist,
18 as petitioners argue, it is hard to see how there could be a public need that outweighs the potential
19 adverse impacts of requiring that roads be aligned so that they cross wetlands.⁷ Without expressing
20 any view concerning whether adequate findings could be adopted to justify the approved
21 alignments, we agree with petitioners that the findings that the city adopted in support of the
22 challenged variances are inadequate to do so.

⁶ Crosswood Lane and Heavenly Lane are not shown as planned new roads in the TSP. They also do not appear to be justified based on a need for connectivity. Looking at the map that appears at Record 123, we do not understand why those roads are necessary to serve the public needs that are identified in the challenged decision (future development for adjacent properties and a second emergency access). Even if new roads are necessary to serve those public needs, it is not apparent why those new roads must cross wetlands to serve those public purposes.

⁷ Petitioners argue that alternatives that would avoid wetlands and meet public need exist for several of the alignments approved by the challenged decisions. Record 77-78, 85-86.

1 In summary, the city's first error was in not explaining, in light of the evidence and argument
2 provided by petitioners, why the approved roads could not be realigned to avoid the need to cross
3 wetlands and thereby avoid adversely impacting those wetlands. Assuming there is a connectivity
4 public need that cannot be met without crossing wetlands, the city's second error was in not
5 explaining why that public need outweighs the resulting adverse impacts to the wetland.

6 The first assignment of error is sustained.

7 **SECOND ASSIGNMENT OF ERROR**

8 Under their second assignment of error, petitioners allege that the first of the Hunter Heights
9 findings quoted above and the identical finding adopted by the city for the Trinity Terrace
10 subdivision improperly delegated the decision the city must make under VMC 18.10.060(3) to
11 DSL and ACE in their subsequent required permit approval of the disputed wetland development.

12 It is possible to read the city's decision as improperly delegating its decision making
13 responsibility under 18.10.060(3) to determine whether public need outweighs the adverse impacts
14 of developing wetlands. However, it is also possible to read the city's findings as relying on the
15 DSL and ACE permitting process to minimize the impacts of wetland development and to require
16 mitigation of adverse impacts. We read the city's findings to take the latter approach. As we
17 explained in sustaining the city's first assignment of error, the city's error was in inadequately
18 explaining why, even if all proposed roads meet a public need why they must cross wetlands to
19 satisfy the public need. And for proposed roads that must cross wetlands to satisfy the identified
20 public need, the city also erred by not adequately explaining why that public need outweighs the
21 potential adverse impacts to wetlands. If the city elects to attempt to correct these deficiencies on
22 remand, we see no reason why the city cannot recognize that DSL and the ACE will require
23 minimization of impacts to wetlands and require mitigation of any adverse impacts in determining
24 whether the public need that a road will serve outweighs the potential adverse impacts to affected
25 wetlands.

26 The second assignment of error is denied.

1 **INTERVENORS CROSS ASSIGNMENT OF ERROR**

2 Intervenor argues that even if the city’s findings that the disputed variances should be
3 approved are insufficient, the city’s decision should nevertheless be affirmed because the city
4 improperly applied its variance criteria to this application for needed housing. We treat this
5 argument as a cross assignment of error. *Copeland Sand & Gravel v. Jackson County*, ___ Or
6 LUBA ___ (LUBA No. 2003-193, April 1, 2004), slip op 14-15.

7 ORS 197.307(6) requires that “[a]ny approval standards * * * adopted by a local
8 government shall be clear and objective and may not have the effect, either in themselves or
9 cumulatively, of discouraging needed housing through unreasonable cost or delay.” For purposes of
10 this opinion, we assume that the housing that would be provided by Hunter Heights and Trinity
11 Terrace qualifies as “needed housing,” as that term is broadly defined by ORS 197.303. *See*
12 *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 147-49, *aff’d* 158 Or
13 App 1, 970 P2d 685, *rev den* 328 Or 594 (1999). We also assume that the variance standard at
14 VMC 18.10.060(3) is not “clear and objective” “approval standard[]” as ORS 197.307(6) uses
15 those terms. *Id.* at 153-58. However, even with those assumptions, intervenor’s argument is
16 unpersuasive. First, the “approval standard” that governed approval of intervenor’s application was
17 VMC 18.10.040(3), which prohibits new development in significant wetlands. There is nothing
18 unclear or subjective about that approval standard. Intervenor seeks a variance to the clear and
19 objective VMC 18.10.040(3) approval standard rather than have the city apply that standard.

20 If the city required that intervenor give up its right to propose a subdivision with roads that
21 avoid wetlands and thereby avoid any need to seek variances under unclear and subjective approval
22 standards, it is possible that the city committed legal error in doing so. However, even if the
23 preliminary subdivision approval decisions improperly imposed conditions that required that the
24 applicant seek the variances that are at issue in this appeal, those preliminary subdivision approval

1 decisions are not before us in this appeal. Those preliminary subdivision approval decisions cannot
2 be collaterally attacked in this appeal.⁸

3 For the reasons set out above, we reject intervenor's cross-assignment of error.

4 The city's decision is remanded.

⁸ We recognize the practical dilemma an applicant may face in appealing a local decision that approves a subdivision application with conditions that are objectionable. *But see* ORS 197.796 (applicant for land use decision, limited land use decision, expedited land use decision or permit may accept condition and later challenge the condition under that section of the statutes). Even if ORS 197.796 does not apply, it may be possible to file a precautionary appeal with LUBA and suspend the appeal while the applicant attempts satisfy the condition or to have the city remove the condition.

