BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LEE CUTSFORTH and SUE CUTSFORTH,
Petitioners,

vs.

CITY OF ALBANY,
Respondent,

and

GLEN REA,
Intervenor-Respondent.

LUBA No. 2005-149

FINAL OPINION
AND ORDER

Appeal from City of Albany.

George B. Heilig, Corvallis, filed the petition for review and argued on behalf of petitioners. With him on the brief was Cable Huston Benedict Haagensen and Lloyd, LLP.

No appearance by City of Albany.

Todd Sadlo, Portland, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 01/13/2006

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a 66-lot residential subdivision on a 13.38-acre tract.

MOTION TO INTERVENE

Glen Rea (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition, and the motion is allowed.

FACTS

The subject tract consists of three tax lots zoned Residential Single Family (RS-5), including tax lot 900. Petitioners own tax lot 500, a one-acre parcel developed with a dwelling that is located adjacent to tax lot 900. Petitioner's property is a flag lot, served by a paved driveway across a 20-foot wide flagpole that extends south 739 feet to Hickory Street. The flagpole also provides access to tax lot 400, a half-acre parcel developed with a dwelling just north of petitioners' property, owned by the Millers. Tax lots 400 and 500 are zoned RS-5. Tax lots 400 and 500 share a 12-foot wide easement to the west, connecting to an approved but undeveloped subdivision to the west known as North Albany Village. That easement is currently blocked by a fence.

Intervenor applied to the city for a 66-lot subdivision of the subject tract, known as North Point II. The principal street in the proposed subdivision is North Point Drive, which extends north through tax lot 900. As initially proposed, the western portion of tax lot 900 would be subdivided into six lots, served by an extension from North Point Drive known as Turnberry Drive. The initially proposed plat depicted Turnberry Drive as a stub, ending at the intersection between tax lots 400, 500 and 900. *See* Figure 1, Appendix A. The stub would allow for future extension of Turnberry Drive onto tax lots 400 and 500, and construction of a cul-de-sac on those parcels to facilitate their redevelopment. However, after discussions with city staff, intervenor modified the plat to eliminate Turnberry Drive and to divide the western portion of tax lot 900 into seven lots with direct access to

North Pointe Drive. *See* Figure 2, Appendix A. Four of the seven lots are flag lots. The city planning commission approved the revised subdivision plat.

Petitioners appealed the planning commission decision to the city council, arguing that the revised plat fails to provide adequate access to their property and that the planning commission erred in approving four flag lots. During the open record period the Millers submitted a letter opposing any extension of Turnberry Drive onto their property. The city council conducted a hearing and voted to deny the appeal, approving the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Albany Development Code (ADC) 11.090(9) provides, in relevant part:

> "Flag lots are discouraged and allowed only when absolutely necessary to provide adequate access to buildable sites and only where the dedication and improvement of a public street cannot be provided. * * *"

Petitioners argue that the city misconstrued ADC 11.090(9) in concluding that flag lots are "absolutely necessary to provide adequate access" to buildable sites on tax lot 900 and that "dedication and improvement of a public street cannot be provided." According to petitioners, the fact that the initial subdivision plat provided for a public street, Turnberry Drive, accessing six lots on the western portion of tax lot 900 is irrefutable evidence that flag lots are not necessary to access the buildable areas of tax lot 900 and that a public street can be provided.

The city interpreted ADC 11.090(9) to allow flag lots where a code-compliant public street to serve buildable lots on the property cannot be constructed or completed within the foreseeable future.[1] Because a street stub is non-compliant, and there was no reasonable basis to expect that

[1] The city's findings state, in relevant part:

> "1.3 * * * The appellants argue that the earlier design is conclusive proof that a public street can be dedicated and improved at that location. To the contrary, a diagram showing a partially complete public street, although it may be evidence of feasibility, does not demonstrate conclusively that 'a public street [can or] cannot be provided,' or that the Planning Commission failed to comply with ADC 11.090(9) in approving a tentative plat that includes flag lots.

the stub of Turnberry Drive would ever be completed with a through-street or cul-de-sac, the city concluded that "dedication and improvement of a public street cannot be provided."[2]

> "1.4 [ADC 11.090(9)] does not prohibit flag lots[.] * * * The standard is necessity, coupled with the lack of public street. The City does not interpret the 'necessity' standard as being so rigid that no proposed flag lot could ever meet the test. The standard requires a closer review of proposed flag lots, review that has taken place in this case. In this case, relatively few flag lots are proposed as part of a larger development that otherwise meets all of the City's subdivision approval standards. The City's flag lot standard, in this case, allows reasonable use of flag lots to address lot depth and size issues that could only otherwise be addressed through wholesale changes to the plat that are unlikely to improve the overall proposal.
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> "* * * * *
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> "1.6 * * * [A] dead-end street without a turnaround would not be in conformance with ADC section 12.120, which requires that dead-end cul-de-sacs be designed with a turnaround of suitable roadway width and right-of-way. Reading [ADC] 11.090(9) consistently with section 12.120 and the subdivision approval standards of [ADC] 11.180 governing tentative plat approval, the City finds that, when determining whether a public street can or cannot be provided, the City must also consider whether or not it is reasonably foreseeable that the stub will be completed. A public street cannot 'be provided' if it is not reasonable to expect that the street will be completed as a code compliant public street in the reasonably foreseeable future. Streets should only be stubbed to the property line, without a turnaround, when there is some reasonable basis for believing the street will be completed to code in the foreseeable future." Record 21-22.

[2] The city's findings go on to state, as relevant:

> "1.8.3 The Cutsforth and Miller properties are not vacant; they are both developed with single-family homes. Even if a similar street stub had been proposed and required to the western boundary of the Cutsforth/Miller properties as part of North Albany Village, all or portions of the existing homes would need to be torn down in order to subdivide and redevelop either property. Neither the Cutsforths nor the Millers have indicated their willingness or plans to tear down their existing houses to accommodate future construction of a street through their properties.
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> "1.8.4 There is also no reasonable expectation of future cul-de-sac construction on the Cutsforth and Miller properties. A cul-de-sac at that location would be wasteful, wiping out potential buildable lots, wiping out pieces of both the Miller home and the Cutsforths' house and causing both of those structures to violate setbacks. Neither home is oriented to accommodate cul-de-sac construction. To do any kind of efficient redevelopment of the Cutsforth and Miller properties, both houses would have to be torn down and disposed of, significantly increasing development costs. * * * Neither of them have proposed to tear down their houses and partition or subdivide their properties jointly or separately. In order to complete a code-compliant cul-de-sac on the Cutsforth and Miller properties, both owners would need to sign an application. Considering the Miller letter, it does not seem likely that will happen any time soon.
>
> "* * * * *

Petitioners argue that the city council misconstrued ADC 11.090(9) to include a "reasonably foreseeable" test that is not found in the text of that provision. We understand petitioners to argue that ADC 11.090(9) categorically prohibits flag lots where any "public street" is possible, even a street that is noncompliant with ADC road standards and not likely ever to be made compliant.

ADC 11.090(9) does not specify whether the hypothetical "public street" must be compliant or can be made compliant. The city interpretation—that ADC 11.090(9) implicitly requires that the hypothetical "public street" be code-compliant or that it is reasonably foreseeable that it can be made compliant in the foreseeable future—is more plausible than petitioners' contrary interpretation of ADC 11.090(9). Because a non-compliant public street would almost always be theoretically possible, under petitioners' view of ADC 11.090(9) no flag lots could ever be approved. This would be contrary to ADC 11.090(9), which clearly contemplates at least some circumstances in which flag lots can be approved. Certainly, petitioners have not demonstrated that the city's interpretation of ADC 11.090(9) is inconsistent with its plain language, purpose or underlying policy. ORS 197.829(1).[3] Accordingly, we affirm that interpretation.

Petitioners do not challenge the city's findings under that interpretation, that the initially proposed stub is noncompliant and that it is not reasonably foreseeable that the stub would ever be

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> "1.10. For all of these reasons, in this case, a public street designed in conformance with city standards cannot be provided and it is not reasonable to expect proper completion of such a street in the future. The access flags proposed in this case are all required in order to provide adequate access to the identified buildable lots." Record 22-23.

[3] ORS 197.829(1) provides, in relevant part:

> "[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:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(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[.]"

completed as a through street or cul-de-sac on the adjoining properties. Petitioners do argue, however, that the city erred in relying on flag lots to maximize the number of lots created, and in considering the economic success of the proposed development. Petitioners' point is not clear to us. Petitioners cite us to findings addressing ADC 11.180(3), which requires that the "proposed street plan affords the best economic, safe, and efficient circulation of traffic possible under the circumstances." The decision finds that building a cul-de-sac on tax lot 900 or on the Cutsforth and Millers' parcels would not afford the "best economic, safe and efficient circulation of traffic possible," concluding in relevant part that given the costs of constructing cul-de-sacs "[t]he flag lot concept shown on the tentative plat has significant economic benefit for both the subdivision and [petitioners'] property when evaluated against the cul-de-sac concept, and for that reason is the superior layout under ADC 11.180(3)." Record 25. We do not see that the city approved the flag lots in an attempt to maximize the number of lots. The city certainly did not err in addressing economic considerations under ADC 11.180(3), because that standard requires such consideration.

Finally, petitioners argue that there are no findings or supporting evidence that it is "absolutely necessary" to create flag lots to provide access to buildable lots on tax lot 900. However, intervenor cites to a finding that "[w]ithout a flag, the [four] proposed lots cannot be reached from North Pointe Drive, and it is 'absolutely necessary' to allow the two flag accessways to provide adequate access to the four identified buildable lots." Record 21. Petitioners do not challenge that finding or explain why it is inadequate to satisfy ADC 11.090(9). Petitioners do not suggest any way to provide access to the buildable areas of tax lot 900 other than construction of Turnberry Drive. As discussed above, the city properly rejected that alternative under ADC 11.090(9).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ADC 11.180(2) provides that tentative plat approval requires a finding that:

"Adjoining land can be developed or is provided access that will allow its development in accordance with this Code."

Petitioners note that primary access to their parcel, tax lot 500, is via the 20-foot wide improved flagpole that connects their parcel to Hickory Street. According to petitioners, a 20-foot wide access does not meet the city's standards for roads necessary to support future redevelopment of their parcel at the densities allowed under the RS-5 zone. Because the proposed subdivision plat does not provide access to tax lot 500 that "allows its development in accordance" with the city's code, petitioners argue, the city cannot find compliance with ADC 11.180(2).

The city council noted that petitioners' property is already developed with a residential use allowed in the RS-5 zone, and provided with adequate legal access for that use. Further, the city council interpreted ADC 11.180(2) to require a subdivision applicant to provide access only to vacant, undeveloped parcels, not developed parcels where there is no showing that redevelopment is likely.[4]

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[4] The city council found, in relevant part:

> "* * * Although [petitioners'] property is of sufficient size to divide, the existing home on the site is situated on the lot in such a way as to preclude creation of new lots that would meet the dimensional standards of RS-5 zoning district in which it is located. * * * [N]umerous factors make redevelopment of the Cutsforth property unduly speculative and unlikely to occur within a reasonable timeframe. [ADC] 11.180(2) cannot reasonably be interpreted by the City to require that access be provided by the City or an applicant for development, for speculative future re-development of developed land. To support such a requirement, more information would need to be provided demonstrating that the 'adjoining land can be developed'—that there is a reasonable expectation that redevelopment of the property will take place within a reasonable timeframe—to justify third party construction of a third point of access to developed property that currently has two points of access.
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> "* * * The text and context of [ADC 11.180(2)] also support a conclusion that it applies only to undeveloped land, or at best to 'developed' land where there is a showing that redevelopment is imminent or likely. The phrase 'can be developed or is provided access that will allow its development' presupposes that the property is not already developed with suitable uses, as is the case here. The standard does not require that an applicant ensure that 'adjoining land can be developed or redeveloped or is provided access that will allow its development or redevelopment in accordance with this code.' Both the Cutsforth and Miller properties are currently developed as single-family residences, and both currently have adequate, legal residential access. [ADC 11.180(2)] does not require that the applicant provide access sufficient to accommodate speculative redevelopment scenarios for the developed Cutsforth and/or Miller properties. * * *" Record 27-28 (underline in original).

Petitioners do not explain why that interpretation is inconsistent with the express language, purpose or policy of ADC 11.180(2). As the city's findings note, ADC 11.180(2) requires a subdivision applicant to provide access that will allow *development*; it does not require that the applicant provide access necessary for *redevelopment* of a parcel that is already developed consistent with applicable zoning. Petitioners apparently interpret ADC 11.180(2) to implicitly require that the applicant ensure access both for development of vacant parcels *and* potential redevelopment of already developed parcels. While the city council might well be able to adopt a sustainable interpretation of ADC 11.180(2) to that effect, we cannot say that its interpretation to the contrary is reversible under ORS 197.829(1).

The second assignment of error is denied.

The city's decision is affirmed.

Appendix A

Figure 1. Initial Proposed Plat

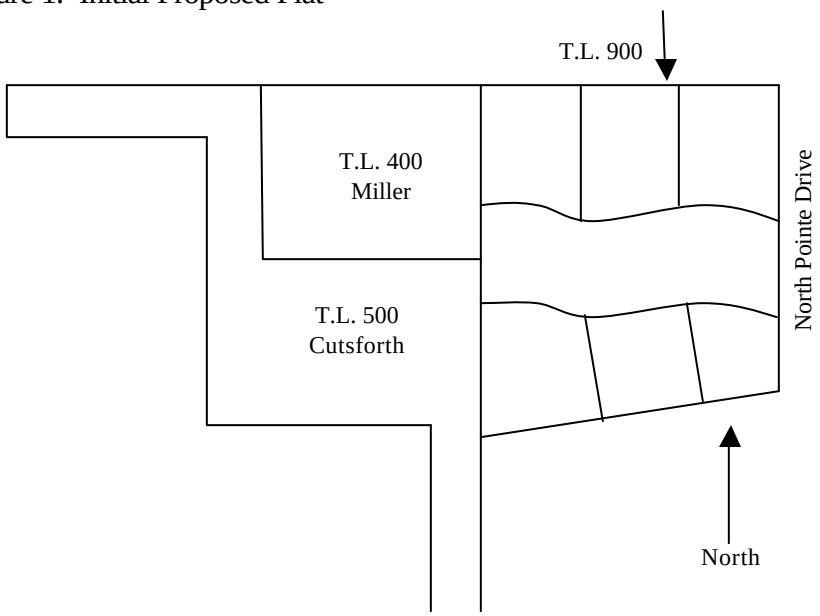

Figure 2. Approved Plat