BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALEX KRISHCHENKO,
Petitioner,

vs.

CITY OF CANBY,
Respondent,

and

RICHARD D. BALL and FLORENCE A. BALL,
Intervenors-Respondent.

LUBA No. 2006-037

FINAL OPINION
AND ORDER

Appeal from City of Canby.

Kenneth P. Dobson, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Dobson Law Firm, LLC.

John H. Kelley, City Attorney, Canby, filed a response brief and argued on behalf of respondent.

Mary W. Johnson, Oregon City, filed a response brief and argued on behalf of intervenors-respondent. With her on the brief was Mary Ebel Johnson, PC.

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

REMANDED 07/24/2006

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

Petitioner appeals a city council decision rejecting petitioner's request to modify a condition of approval in a previous decision approving a partition.

FACTS

Petitioner owns a lot in the Cedar Ridge subdivision, developed with a single family dwelling in the western portion of the lot. The lot is zoned Medium Density Residential (R-1.5), which imposes a 5,000-square foot minimum lot size for new lots. At the time petitioner purchased the lot, it was approximately 7,732 square feet in size. In 2002, petitioner acquired an undeveloped 4,800-square foot parcel that adjoins his backyard to the east. That 4,800-square foot parcel is not part of the Cedar Ridge subdivision. The 4,800-square foot parcel fronts onto SW 13th Avenue, a city arterial. Petitioner's original lot is located at the intersection of SW 13th Avenue and S. Cedar Loop, a private street in the Cedar Ridge subdivision, and is accessed by a driveway connecting to S. Cedar Loop. Shortly after acquiring the 4,800-square foot parcel, petitioner received city approval to combine the two properties into a single, 12,532-square foot lot.[1]

The city municipal code requires a minimum 300-foot access spacing requirement on city arterials. Immediately east of petitioner's property is a large tract developed with a church and parking lot. The parking lot accesses SW 13th Avenue over a small triangular-shaped parcel that is currently owned by the church. The short distance between the S. Cedar Loop/SW 13th Avenue intersection and the church parking lot access makes it impossible to provide access from petitioner's property to SW 13th Avenue in compliance with the 300-foot access spacing requirement.

[1] The record does not reflect how that combination of two lots into one was accomplished, other than references to a lot line adjustment.

In 2004, petitioner applied to the city to partition the 12,532-square foot lot into two parcels each approximately 6,275 square feet in size, as allowed under R-1.5 zoning. Proposed parcel 1 would include the existing dwelling, and use the existing access onto S. Cedar Loop. Proposed parcel 2 would include the eastern portion of the lot, and would access directly onto SW 13th Avenue. The city planning commission approved the partition, but denied petitioner's request that parcel 2 directly access SW 13th Avenue, pursuant to the code spacing requirement. The planning commission concluded that "access should be provided by another street or by a shared access agreement with neighboring properties." Record 67. Accordingly, the planning commission imposed a condition prohibiting direct access to SW 13th Avenue, and requiring petitioner to "provide proof of adequate alternate access" prior to final plat approval.

At the time of the 2004 planning commission decision, the city owned the adjoining triangular parcel over which the church accessed SW 13th Avenue. The city had acquired the triangular parcel from the church in 1984, in anticipation of road improvements that never transpired. Based on discussions with city staff, petitioner apparently hoped that he could provide "proof of adequate alternate access" by obtaining city permission to use the triangular parcel to access proposed parcel 2. However, that possibility was eliminated when the city subsequently deeded the triangular parcel back to the church in 2005. Petitioner attempted to obtain the church's permission to use the triangular parcel for access, but the church declined. Petitioner then filed a request to modify the partition condition of approval and allow proposed parcel 2 to access SW 13th Avenue directly, as an exception to the 300-foot spacing requirement.

Canby Municipal Code (CMC) 16.46.070 specifically allows an exception to the 300-foot spacing requirement where, among other things, the applicant demonstrates that a

"hardship" exists that is not "self-created."[2] Petitioner argued to the city that the city had created the "hardship" when it deeded the triangular parcel back to the church, eliminating any possibility of an alternative access. The planning commission denied the requested modification. Petitioner appealed the planning commission decision to the city council. The city council also denied the modification application, adopting findings concluding that hardship was self-created. This appeal followed.

FIRST ASSIGNMENT OF ERROR

As noted, CMC 16.46.070(C) prohibits an exception to the access spacing requirement where the "hardship is self-created." The city council concluded that, although proposed parcel 2 has no other alternative access than S.W. 13th Avenue, the "hardship" resulting from that lack of alternative access was created by petitioner's "desire to partition his property," not the city's action in deeding the triangular parcel to the church.[3] Petitioner challenges that finding.

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[2] CMC 16.46.070 provides:

> "A. An exception may be allowed from the access spacing standards on City facilities if the applicant can provide proof of unique or special conditions that make strict application of the provisions impractical. Applicants shall include proof that:
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> "1. Indirect or restricted access cannot be obtained;
>
> "2. No engineering or construction solutions can be reasonably applied to mitigate the condition; and
>
> "3. No alternative access is available from a street with a lower functional classification than the primary roadway.
>
> "B. The granting of the exception shall be in harmony with the purpose and intent of these regulations and shall not be considered until every feasible option for meeting access standards is explored.
>
> "C. No exception shall be granted where such hardship is self-created."

[3] The city council findings state, in relevant part:

> "16.46.070 A1, A2, A3. The Council finds, based on the applicant's application, staff report, and site/vicinity maps, that:

According to petitioner, the 2004 partition decision was premised on the assumption that "alternative access" was potentially available via the triangular parcel owned by the city, which petitioner understood to be a city public right-of-way. Because the city eliminated the possibility of that alternative access when it deeded the parcel to the church, petitioner contends that the hardship was therefore not "self-created."

In support, petitioner cites *Fisher v. City of Gresham*, 10 Or LUBA 283 (1984), in which LUBA upheld a city finding that the need for a variance to a street access spacing requirement was not a self-created hardship, where the requirement was imposed after the landowner acquired the property. LUBA agreed with the city that the landowner's actions in

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"1. Indirect or restricted access to the proposed new property cannot be obtained;

"2. No engineering or construction solutions can be reasonably applied to mitigate the condition; and

"3. No alternative access is available from a street with a lower functional classification than the primary roadway. This criterion is met."

"16.46.070 C. The Council finds, however, that the need for an access spacing exception was self-created by the applicant through the partition process. The applicant claims that the need for the hardship exception was created when the City of Canby sold a parcel of property to the [church] which is contiguous to applicant's property and the property of the Church. The Council finds, based on multiple references in the record of this application, that this property was never used as, or considered to be, public right of way.

"The City Council further finds that the City's access spacing exception standards were created in 2000, prior to any application regarding this partition and that therefore there is no reason to consider this property 'grandfathered' under old rules.

"The City Council further finds that the City's access spacing exception standards were created in order to avoid traffic safety hazards. By creating a tiered system of streets and individual spacing standards for each type of facility, the City acknowledged that different streets have different requirements and that, in general, a spacing standard of 300 feet was required on arterial streets in order to avoid unsafe conditions. The City's code allows exceptions from these standards 'if the applicant can provide proof of unique or special conditions that make strict application of the provisions impractical' (CMC 16.46.070A). The Council finds that the applicant has not demonstrated that such conditions exist, and that the hardship is self-created through the applicant's desire to partition his property. This criterion is not met. Therefore, the Council finds that the applicant's request for an access spacing exception is without merit.

"Without an exception to the City's access spacing standards, the proposed partition may not be approved and therefore the Council finds that the modification application 05-07 should be denied." Record 16.

configuring the site prior to imposition of the spacing requirement did not create the hardship. In the present case, petitioner argues that alternative access was potentially available when the partition was approved, and it was the city's subsequent action in deeding that potential access away that created the hardship, not petitioner's actions in creating the subject property and seeking a partition.

The city responds that *Fisher* is inapposite because in the present case the access spacing requirement was in effect before petitioner acquired either his original lot or the additional parcel, and long before petitioner reconfigured the property and sought a partition. The city also argues that petitioner erred to the extent he relied on the city-owned triangular parcel to provide access to SW 13th Avenue. As the city's finding explain, that triangular parcel was never part of a public right of way, and the city was under no obligation to allow petitioner access to it or across it, or to retain the parcel in city ownership.

Like the city, we do not think that *Fisher* is particularly on point. However, we agree with petitioner that the city's decision fails to adequately explain why the "hardship" in the present case is "self-created." The city found that the "applicant's desire to partition his property" created the "hardship." Although findings do not specifically describe the hardship, the city found that proposed parcel 2 has no alternative access other than SW 13th Avenue, and appears to treat that lack of access and the consequent inability to partition and develop parcel 2 as the hardship. We do not understand how petitioner's desire to partition his property consistent with the density of development allowed in the R-1.5 zone created the lack of alternative access to proposed parcel 2.

The findings do not suggest that there is any other partition configuration (or other historical factor under petitioner's control) that would have allowed a partition and development of proposed parcel 2 without an exception to the 300-foot spacing requirement. The city seems to fault petitioner for desiring to partition and develop land in accordance with applicable zoning, suggesting that petitioner should be content with owning a single

oversize lot. However, we do not understand how a desire to develop property at a density allowed by applicable zoning laws is a "self-created" hardship. If the mere desire to develop property at a density allowed under applicable zoning laws is a self-created hardship, then it is doubtful that any variance to development standards could ever be allowed under CMC 17.46.070 or similar variance standards.

The city further found that "[i]ndirect or restricted access to the proposed new property cannot be obtained," which presumably means that an easement or shared arrangement with neighboring property owners is not possible. The city also found that "[n]o engineering or construction solutions can be reasonably applied to mitigate" the lack of alternative access. The existing dwelling on petitioner's lot appears to be sited in a manner that renders it impracticable to share the existing driveway or create a flag lot or similar means of accessing parcel 2 over parcel 1. The only apparent basis for denying the modification request is the city council's belief that the hardship—lack of alternative access and hence inability to further partition and develop the lot—was created by petitioner. For the reasons explained above, the city's decision must be remanded to either provide an adequate explanation how petitioner's desire to partition the property created the lack of alternative access, cite some other sufficient basis to deny the modification application, or approve the application.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the planning commission denied his modification application in part based on concerns regarding "traffic levels on 13th Avenue in light of the upcoming road project." Record 42 (notice of planning commission decision). Petitioner contends that denial of the application based on concerns regarding future traffic levels on SW 13th Avenue is not supported by adequate findings or substantial evidence.

As the city points out, the challenged decision is that of the city council, not the planning commission. The city council did not deny the modification based on concerns regarding existing or future traffic levels, but rather because petitioner failed to demonstrate that the hardship was not "self-created." *See* n 3.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

One member of the planning commission is a bishop or elder of the church that adjoins the subject property. Petitioner challenged the participation of that planning commission member below, arguing that the member has a vested personal interest in the decision. The commission member declined to recuse himself, stating that he is not a church employee and has no financial link with the church. The commission member voted along with the other three members to deny the requested modification.

Petitioner argues that as a volunteer leader of the church the commission member has a duty to act in the best financial interest of the church, notwithstanding that the member is not an employee and has no financial link with the church. Therefore, petitioner argues, the commission member was precluded from participating under CMC 16.06.160, which prohibits a planning commission member with a "direct or substantial financial interest" in the matter from participating in the decision. Petitioner argues that due to the commission member's participation the city council decision must be reversed or at least remanded to the planning commission for a new hearing without the conflicted member.

The city responds, and we agree, that even if the commission member should not have participated in the planning commission decision, that procedural error does not provide a basis to reverse or remand the *city council's* decision. The planning commission adopted no written findings on the modification application. The city council conducted what appears to be an evidentiary hearing, adopted its own written order and findings, and was the final decision maker on the application. In such circumstances, the city council proceedings

may cure any prejudice to petitioner's substantial rights and provide petitioner with the impartial tribunal to which he is entitled. *See Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 432-33 (2004) (alleged bias by a planning commission member is not a basis to remand a decision of the county board of commissioners, when the board was the final decision maker and adopted its own order, findings, conclusions and reasons on appeal from the planning commission, and there is no indication that the record before the board was tainted by the alleged bias). In any case, we further agree with the city that petitioner has not established that the planning commission member had a "direct or substantial financial interest" in the modification proceeding.

The third assignment of error is denied.

INTERVENORS' RESPONSES

Intervenors' response to the first assignment of error includes an argument that the city council decision should be reversed because petitioner's local appeal to the city council was untimely, and thus the city council lacked jurisdiction to hear the appeal.[4] Intervenors also argue that LUBA should reverse the city council's decision, because the issue of access to SW 13th Avenue was litigated in the 2004 partition decision, and the doctrine of issue preclusion thus bars the city's reconsideration of that issue. Finally, intervenors argue that issues resolved in the 2004 partition decision, which was not appealed either to the city council or to LUBA, are outside LUBA's scope of review, and thus LUBA cannot reverse or remand under the first assignment of error.

Intervenors did not file a cross-petition for review, and none of the above arguments are styled as a cross-assignment of error. *See Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, 661 (2004) (explaining nature of a cross-petition for review and a cross-assignment of error). An argument that the challenged decision must be reversed based

[4] Intervenors' apparent theory is that if the local appeal was untimely, the city council decision must be reversed, and the planning commission denial becomes the city's final decision.

on alleged error is, in essence, an assignment of error or cross-assignment of error. However, we decline to address intervenors' first two arguments seeking reversal based on the alleged untimely local appeal and the city's alleged lack of authority to reconsider an issue decided in the 2004 partition decision. Intervenors do not identify any place in the record where those issues were raised during the proceedings below, and we do not see that they were. Therefore, those issues are waived. ORS 197.763(1).

The third argument—that the issue raised in petitioner's first assignment of error is beyond LUBA's scope of review—does not seek reversal or remand of the city's decision and cannot be characterized as cross-assignment of error. Such an argument concerns LUBA's scope for review, and may be raised for the first time before LUBA. Accordingly, we address it.

Citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), intervenors argue that petitioner's failure to appeal the 2004 partition decision and the condition prohibiting access onto SW 13th Avenue means that that issue is a final, resolved issue, and therefore one that LUBA cannot review.

The city's code includes a procedure by which an applicant may seek to modify conditions imposed in a final permit or development approval. Petitioner invoked that procedure, and argued to the city that the factual circumstances had changed and that the condition of approval prohibiting access onto SW 13th Avenue should be modified. The city did not consider in the 2004 partition decision whether to modify the condition of approval based on allegedly new circumstances, and it is difficult to understand how that issue could possibly have been raised or resolved in the 2004 decision. In any case, *Beck* stands for the principle that when LUBA remands a decision any resolved issues or issues that could have been raised and resolved on review cannot be relitigated or raised for the first time in subsequent appellate reviews of the *decision on remand*. We do not understand the principle in *Beck* to apply to review of separate decisions on different land use applications, however

those applications may be related. *See also Lawrence v. Clackamas County*, 40 Or LUBA 507, 518-19 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002) (Local land use proceedings do not have the preclusive and final effect of judicial proceedings where claim and issue preclusion are applied. If one proposal for development is denied, land use ordinances anticipate and allow for additional attempts for modified, or even the same, development).

Intervenors have not demonstrated that the issues raised in the first assignment of error are beyond LUBA's scope of review.

For the reasons set out in our discussion of petitioner's first assignment of error, the city's decision is remanded.