BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALEX KRISHCHENKO,
Petitioner,

vs.

CITY OF CANBY,
Respondent.

LUBA No. 2006-173

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 the response brief and argued on behalf of respondent.

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

AFFIRMED 01/05/2007

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 decision on remand denying petitioner's application for an exception or variance to an access spacing standard and to modify a previous partition approval.

FACTS

We repeat the relevant facts from our earlier decision in *Krishchenko v. City of Canby*, (*Krishchenko I*) __ Or LUBA __ (LUBA No. 2006-037, July 24, 2006):

> "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.
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> "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.
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> "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. * * * 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.
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> "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." Slip op 2-3 (footnote omitted).

The city council denied the exception request, under a city code standard prohibiting a variance when the "hardship is self-created."[1] The city concluded in relevant part that the "applicant's desire to partition his property" created the "hardship." *Id.* at 4. Petitioner appealed the city's denial to LUBA, arguing in part that the city's finding on that point was

[1] Canby Municipal Code (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;
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> "2. No engineering or construction solutions can be reasonably applied to mitigate the condition; and
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> "3. No alternative access is available from a street with a lower functional classification than the primary roadway.
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> "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.
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> "C. No exception shall be granted where such hardship is self-created."

inadequate. We agreed, remanding for the city to adopt more adequate findings explaining why the hardship is self-created. We denied all other assignments of error.

On remand, the city council adopted additional findings, concluding that petitioner's decision to consolidate the two lots created the hardship, and again denied the exception request. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In *Krishchenko I*, we found inexplicable the city's apparent conclusion that petitioner's desire to partition the subject property is a "self-created" hardship. We observed that, "[i]f 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." *Krishchenko I*, slip op 7.

The city's findings on remand first identify the specific "hardship" as the "inability to comply with the 300 foot access standard." Record 8. The city then identifies petitioner's 2002 consolidation of the two existing parcels into a single lot as the act that "created" the hardship.[2] According to the city, the intended purpose of that consolidation was to enlarge

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

> "[T]he applicant originally owned a single lot, approximately 7,732 square feet in size in the Cedar Ridge subdivision with a developed single family dwelling in the western portion of the lot. In 2002, the applicant acquired an undeveloped 4,800-square foot parcel that adjoins his backyard to the east. The 4,800-square foot parcel fronts on SW 13th Avenue, a city arterial. The applicable zoning for both of these properties is Medium Density Residential (R-1.5), which has a 5,000-square foot minimum lot size for new lots. Shortly after acquiring the 4,800-square foot parcel, the applicant applied for and received city approval to combine the two properties into a single, 12,532-square foot lot. Testimony in the record of this proceeding suggests that the applicant's stated reason for seeking lot consolidation was in order to enlarge his back yard. Had the applicant left the second lot as a separate lot, it may have been entitled to access via SW 13th either by right under common law or through an exception as the hardship of obtaining access would not have been self-created. However, the Council finds that by consolidating lots such that the entire lot fronted onto S Cedar Loop eliminated any expectation of obtaining common law access onto SW 13th then or at anytime in the future." Record 8-9.

the backyard of petitioner's original lot, and that consolidation had the effect of eliminating any expectation that any part of the combined lot would obtain access onto SW 13th Avenue.

Petitioner argues that the city's rationale for denial on remand is simply a variant of the position LUBA rejected in *Krishchenko I*, that petitioner's desire to partition the lot consistent with the density of development allowed in the R-1.5 zone created the hardship. Petitioner contends that it is the city's R-1.5 density requirements that created the hardship, by making it possible to partition the existing 12,253-square foot property into two parcels. According to petitioner, the city has twice approved variances to access spacing requirements to facilitate partitions where the city had applied a higher density zoning to the parent parcel. Petitioner submits that the same reasoning and result should apply in the present case. Petitioner also repeats his arguments made in *Krishchenko I* that it was the city's decision to sell the adjoining triangular parcel right-of-way to the church that eliminated that potential access and thus created the need to rely on SW 13th Avenue for access.

The city's code does not define the relevant terms or inform the circumstances under which a variance request must be denied because the "hardship is self-created." The city has considerable discretion in interpreting its variance code provisions, and LUBA must defer to that interpretation if it is consistent with the plain language, purpose and underlying policy. ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003); *see also deBardelaben v. Tillamook County*, 142 Or App 319, 922 P2d 683 (1996) (that a governing body's interpretation of local variance criteria is inconsistent with general principles of variance law is not a basis to reject the interpretation).

The city apparently understands a "self-created" hardship to exist for purposes of CMC 17.46.070(C) when the applicant for a variance has taken an action in the past that is inconsistent with proposed development of the property that requires a variance. We cannot say that that view of CMC 17.46.070(C) is inconsistent with the text, purpose or policy underlying that code provision, and petitioner does not argue otherwise. Under that view, the

city concluded, petitioner's choice in 2002 to consolidate the two lots to enlarge his existing backyard was inconsistent with, and had the effect of abandoning, any expectation under common law or the city's variance procedures to obtain future access to SW 13th Avenue that petitioner may have had prior to consolidation.

Petitioner appears to dispute the city's finding that, but for consolidation, the lot acquired in 2002 may have been entitled to access via SW 13th either by right under common law or through a variance. We understand petitioner to argue that any access to SW 13th Avenue would have required an exception to the street spacing requirement, and thus consolidation of petitioner's two lots did not necessarily affect potential access or otherwise create the difficulty of access that is the relevant hardship. Petitioner may be correct that a hypothetical attempt to obtain access to SW 13th Avenue prior to lot consolidation would have required at least an exception to the street spacing requirements. However, the point of the city's reasoning seems to be that there would have been no self-created hardship in that case because petitioner would have done nothing at that point inconsistent with obtaining access to SW 13th Avenue.

With respect to petitioner's remaining arguments, contrary to petitioner's characterization, the city's findings on remand do not simply reiterate its earlier conclusion that it is petitioner's desire to partition the lot consistent with the density of development allowed in the R-1.5 zone that creates the hardship. As explained, the city identified a different action by petitioner that, it concluded, created the hardship. Unlike the city's earlier rationale, the rationale articulated in the present case is focused on a specific action by petitioner, not merely a general desire to develop property that all variance applicants presumably share.

Petitioner cites to two city actions that, in petitioner's view, are the actual causes of the hardship: application of the R-1.5 zoning to the property and the decision to sell the adjoining triangle of land to the church. However, as the city points out, both R-1.5 zoning

and the access spacing requirements were in place prior to petitioner's 2002 acquisition of the vacant lot adjoining his original property. As far as we can tell, that fact alone distinguishes the present case from the two city variance decisions briefly cited by petitioner.

With respect to the adjoining triangular parcel, the city adopted a finding on remand explaining that at no time did the city represent to petitioner that access was available over that adjoining parcel.[3] Petitioner does not challenge that finding. If the city gave petitioner no reason to expect that it would grant permission to use the triangular parcel for access, it is difficult to understand why the sale of that parcel to the church "created" the hardship. Even if city actions were partly responsible for reducing the available options for access, petitioner does not explain why such actions compel the city to grant the requested variance, given the city's conclusion, affirmed above, that petitioner initially created the hardship by consolidating the two lots.

For these reasons, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand. The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The city council adopted on remand alternative findings that purport to deny the requested variance based on alleged traffic concerns along SW 13th Avenue, and to deny the

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

> "* * * During the hearing before the City Council, the applicant claimed that the City assured him that access would be available on land owned by the City. There is nothing in the record to show that the City made any statements during the first proceeding or subsequently that it would provide access to the applicant on city-owned property or that some other solution for providing access would be available. To the contrary, condition 6 to the original partition approval makes clear that alternate access shall be required and does not identify any alternatives that may be available to satisfy this requirement. The triangle of land was intended to provide a future road extension that turned out to be unnecessary and was thus sold back to the neighboring church property. It was never intended, nor suggested that this area would provide any right of access to the applicant. Thus, there is no basis to the applicant's claim that the City somehow induced the applicant into believing that access over City property would be available." Record 9.

requested modification of the partition approval based on minor review standards requiring adequate access facilities.[4]

Petitioner argues that LUBA's remand was limited to a single issue, and that the city council erred in adopting alternative reasons to deny the application based on alleged traffic concerns, without affording petitioner a hearing or opportunity to submit argument or evidence regarding such traffic concerns. Under the third assignment of error, petitioner argues that even if no new evidentiary hearing was required on remand, the city's findings regarding traffic concerns on SW 13th Avenue are not supported by substantial evidence.

We need not and do not resolve these assignments of error, because they challenge only the city's alternative bases for denial of the requested variance and modification. Generally, LUBA will affirm a local government's decision to deny a land use application if any one of the bases for denial is affirmed. In that circumstance, no purpose is served by addressing challenges to alternative or other bases for denial. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd* 195 Or App 762, 100 P3d 218 (2004), *rev den* 338 Or 17 (2005); *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368, 378

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

> "* * * the Council places significance on the permissive term 'may' in the exception standards and concludes that even if all of the exception criteria were met, the City would have discretion to refuse to grant an exception. In this case, the City exercises that discretion because of the significant safety concerns associated with SW 13th Avenue, especially when coupled with road expansion and new development that will occur in the future. * * *
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> "* * * * *
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> "Finally, even though division of a 12,000 square foot parcel may be permitted pursuant to R-1.5 zoning, it is not automatically allowed unless all of the applicable review criteria are met. Minor review criteri[a] 16.60.030(C), (D), and (E) require that access facilities be adequate, safe and not unduly hinder the use of adjacent properties. The Planning Commission found that these criteria could be satisfied only through imposing a condition that adequate alternative access is obtained. The applicant has failed to carry his burden of showing the exception to the access spacing criteria are satisfied. Thus, the partition is still in place consistent with the Planning Commission's decision, City File No. MLP 04-03. Development on the partitioned lot can occur when the applicant or subsequent owner can show that adequate and safe access can be secured that complies with the City's access spacing requirements." Record 9-10.

(1999); *Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff'd* 102 Or App 123, 792 P2d 117 (1990). We affirmed above the city's main rationale for denial. Accordingly, we do not reach the second and third assignments of error.

The city's decision is affirmed.