BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ART BULLOCK, PHILIP LANG and
COLIN SWALES,
Petitioners,

vs.

CITY OF ASHLAND,
Respondent,

and

RAYMOND J. KISTLER,
Intervenor-Respondent.

LUBA No. 2007-113

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Art Bullock, Philip C. Lang, and Colin Swales, Ashland, filed the petition for review and Art Bullock argued on his own behalf.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

Christian E. Hearn, Ashland, represented intervenor-respondent.

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

REMANDED 06/03/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge a city decision granting site approval for a two-story building, a variance to a city front yard setback requirement, and an exception to the city's sidewalk standards.

MOTION TO FILE REPLY BRIEF

Petitioners move the Board for permission to file a reply brief. The city objects on the basis that the reply brief was not timely filed. OAR 661-010-0039 provides that the reply brief must be filed "as soon as possible after respondent's brief is filed." The city's respondent's brief was filed on March 18, 2008. The reply brief was not filed until April 7, 2008.[1] The reply brief was not filed "as soon as possible" after the city's response brief was filed. Therefore, petitioners' motion to file a reply brief is denied.[2]

MOTION TO STRIKE

Petitioners move to strike numerous portions of the city's brief. According to petitioners, the city's brief "misrepresented cited pages or asserted 'facts' without any evidence showing the 'facts' were in the record." Motion to Strike 3. Petitioners move to strike 26 passages from the city's brief on this basis.

Generally, LUBA does not grant motions to strike portions of briefs. Instead, we disregard any contested, relevant allegations of fact, where the party alleging those facts fails to identify evidence in the record that supports such allegations of fact. *Rivera v. City of Bandon*, 38 Or LUBA 736, 744 (2000). In the present case, petitioners appear to challenge

[1] Although petitioners claim to have filed the reply brief on April 7, 2008, by first class mail, LUBA did not receive the reply brief until April 21, 2008. Oral argument in this appeal was held on May 1, 2008.

[2] Even if petitioners' reply brief had been timely filed, the majority of the proposed reply brief does not address new matters raised in the city's response brief, but instead embellishes on arguments made in the petition for review. Therefore, even if the reply had been timely, it would have likely been rejected for failing to respond to new matters as required by OAR 661-010-0039.

many statements in the city's brief with which they disagree, and move to strike several allegations of fact in the city's brief that are not taken word-for-word from the record. These are not appropriate reasons for striking portions of the city's brief. In resolving this appeal, we will disregard any contested relevant allegations of fact in the city's brief that are not supported by the record.

Petitioners' motion to strike is denied.

FACTS

Some of the facts in this appeal are not particularly complicated. Intervenor proposes to construct a two-story office building with a sculpture studio on a .135-acre lot located on the corner of an arterial street and neighborhood street in an employment zoning district. The city granted intervenor a variance to the front yard setback standards to allow a setback of ten feet instead of the 20 feet generally required along arterials. The city also granted intervenor an exception to the sidewalk standards to allow a curbside sidewalk rather than a parkrow sidewalk, as would be required on the neighborhood street frontage of the property.[3]

The procedural facts involved in this appeal are more complicated, if ultimately not particularly important. The planning commission originally approved the application over petitioners' objections. Although petitioners did not appeal the planning commission's decision to the city council, they urged the city council to review the matter on its own motion. The city council then "called up" the planning commission's decision on its own motion, and held a public hearing to review the planning commission's decision. After the hearing, the city council voted to affirm the planning commission's decision. Before that decision was reduced to writing and became final, however, the city council became unsure about its authority to "call up" decisions on its own motion. The city council apparently

[3] A parkrow sidewalk is a sidewalk that is set back from the edge of the street to provide an unpaved area between the street and sidewalk, usually for trees, grass or other plantings. In this case the sidewalk would have to be set back seven feet from the street.

decided it did not have authority to "call up" such decisions and, instead of adopting a decision affirming the planning commission decision, the city council voted to discontinue its review of the planning commission decision by withdrawing its decision to "call up" the matter. City staff prepared a final written decision to this effect that was signed by the mayor. In addition to deciding that the city council did not have authority to "call up" the planning commission's decision, the decision went on to address the application on the merits and stated that in the event the city council did have jurisdiction it would approve the application. In this opinion, we refer to this city council decision as the initial decision. City staff then discovered that the initial decision did not accurately reflect the intent of the city council. The initial decision was scheduled to be reconsidered by the city council, but before that reconsideration could occur, petitioners appealed the initial decision to LUBA. After petitioners appealed the initial decision to LUBA, the city withdrew the initial decision for reconsideration pursuant to our rules. Upon reconsideration, the city council found that it did have the authority to call up planning commission decisions and the city council affirmed the planning commission's decision. In this opinion we refer to this decision as the city council's decision on reconsideration. This appeal followed, and as we explain later, the only decision that is before us in this appeal is the city council's decision on reconsideration.

FOURTH ASSIGNMENT OF ERROR

When the city issued its decision on reconsideration, it determined that it had authority to call up a planning commission decision for city council review on its own motion. Ashland Land Use Ordinance (ALUO) 18.108.070 provides in part:

"18.108.070 Effective Date of Decision and Appeals

"A. Ministerial actions * * *

"B. Actions subject to appeal:

"1. Staff Permit Decision. * * *

"2. Type I Planning Actions. * * *

"3. Type II Planning Actions. * * *

"4. Type III Planning Actions. * * *

"5. *The City Council may call up any planning action for a public hearing and decision upon motion and majority vote,* provided such vote takes place in the required time period, as outlined below." (Emphasis added.)

The city originally exercised its authority under ALUO 18.108.070(B)(5) to call up the planning commission decision within the applicable time period. As noted earlier in this opinion, during deliberations on the application, the city council became uncertain about whether it had such authority because of the unclear relationship between ALUO 18.108.070(B)(5) and ALUO 18.108.110. ALUO 18.108.110 describes appeals to council.[4]

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[4] ALUO 18.108.110 provides:

"A. Appeals of Type I decisions for which a hearing has been held, of Type II decisions or of Type III decisions described in section 18.108.060.A.1 and 2 shall be initiated by a notice of appeal filed with the City Administrator. The standard Appeal Fee shall be required as part of the notice. Failure to pay the Appeal Fee at the time the appeal is filed is a jurisdictional defect.

"1. The appeal shall be filed prior to the effective date of the decision of the Commission.

"2. The notice shall include the appellant's name, address, a reference to the decision sought to be reviewed, a statement as to how the appellant qualifies as a party, the date of the decision being appealed, and the specific grounds for which the decision should be reversed or modified, based on the applicable criteria or procedural irregularity.

"3. The notice of appeal, together with notice of the date, time and place of the hearing on the appeal by the Council shall be mailed to the parties at least 20 days prior to the hearing.

"4. The appeal shall be a de novo evidentiary hearing.

"5. The Council may affirm, reverse or modify the decision and may approve or deny the request, or grant approval with conditions. The Council shall make findings and conclusions, and make a decision based on the record before it as justification for its action. The Council shall cause copies of a final order to be sent to all parties participating in the appeal.

"B. Appeals may only be filed by parties to the planning action. 'Parties' shall be defined as the following:

The city council was confused about whether it was required to comply with all the requirements of ALUO 18.108.110. This confusion is what led the city council to conclude in its initial decision that it did not have authority to call up the planning commission's decision. As noted earlier, after this initial decision was appealed to LUBA, the city withdrew the initial decision for reconsideration. On reconsideration the city council changed its mind about whether it had authority to call up the planning commission decision and the city council explicitly interpreted the ALUO to allow the city council to call up a planning commission decision under ALUO 18.108.070(B)(5) without complying with the requirements of ALUO 18.108.110.

In this assignment of error, petitioners appear to challenge the city's interpretation of the ALUO in both the city's earlier decision – the initial decision that was appealed to LUBA but later withdrawn for reconsideration – and the city council's decision on reconsideration, which is the subject of this appeal. Petitioners do not explain how LUBA's scope of review can extend to consider challenges to the city council's initial decision in this appeal of the city council's decision on reconsideration. The only errors that petitioners may allege are those the city may have made in its decision on reconsideration. The city's decision on reconsideration states:

> "The Council finds and determines that ALUO 18.108.070(B)(5) is an independent source of appeal authority and that the appeal requirements and other restrictions in ALUO 18.108.110(A) simply do not apply to the Council. By way of explanation, certain of the 'appeal' requirements in ALUO 18.108.110(A) simply do not make sense when applied to the Council calling

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> "1. The applicant.
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> "2. Persons who participated in the public hearing, either orally or in writing. Failure to participate in the public hearing, either orally or in writing, precludes the right of appeal to the Council.
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> "3. *The Council, by majority vote.*
>
> "4. Persons who were entitled to receive notice of the action but did not receive notice due to error." (Emphasis added.)

> up a decision, e.g. specifying error will invite allegations of prejudgment. In addition, the provisions of 18.108.110(A) requiring the Council to make a decision on the appeal do not make sense if the Council is the appellant. Accordingly, the Council finds and determines that the Council has complied with the Code requirement to hear this appeal, as the Council by majority vote, within the appeal period called the decision up for hearing." Record 4.

Petitioners argue that the city misinterprets the ALUO in determining that ALUO 18.108.070(B)(5) is an independent source of appeal authority. According to petitioners, ALUO 18.108.070(B)(5) is the explanation for how the city council is to satisfy ALUO 18.108.110(A)(2) to initiate its own appeal. Petitioners also argue that the city council's decision is not entitled to any deference.

Petitioners are mistaken. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose, or policy of the ordinance.[5] We believe this is precisely the type of interpretation for which ORS 197.829(1) deference is appropriate. LUBA will not substitute its judgment for the city council's interpretation of the ALUO on procedural matters, such as how the city council may initiate its own appeal of a planning commission decision, unless the city council's interpretation is inconsistent with the express language, purpose, or policy of ALUO 18.108.110 and ALUO 18.108.070(B)(5). We see nothing in the express language, purpose, or policy of ALUO 18.108.110 and ALUO 18.108.070(B)(5) that is inconsistent with the city

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[5] 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;
>
> "(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[.]"

council interpreting ALUO 18.108.070(B)(5) to provide an independent basis for calling up planning commission decisions for city council review. In fact, we believe that is the most straightforward reading of the ALUO.

The fourth assignment of error is denied.

FIFTH THROUGH NINTH ASSIGNMENTS OF ERROR

Petitioners' fifth through ninth assignments of error all challenge aspects of the city's initial decision that petitioners appealed to LUBA and was later withdrawn by the city for reconsideration. As we explained in resolving the fourth assignment of error, the only land use decision that is before LUBA in this appeal is the city's decision on reconsideration. Petitioners have not explained how any of the alleged errors in the city's initial decision could provide a basis for reversal or remand of the city's decision on reconsideration, and we do not see that they do.

The fifth through ninth assignments of error are denied.[6]

FIRST AND SECOND ASSIGNMENTS OF ERROR

The property is located at the corner of an arterial and a neighborhood street. Pursuant to ALUO 18.68.050, the "front yards for properties abutting all arterial streets shall be no less than twenty (20) feet * * *." The applicant was granted a variance to ALUO 18.68.050 to allow a setback of ten feet instead. ALUO 18.100.020 sets out the applicable approval criteria and allows a variance to be approved if the following circumstances are shown to exist:

> "A. That there are unique or unusual circumstances which apply to this site which do not typically apply elsewhere.

[6] Petitioners' first through third assignments of error include challenges to the decision that is before us in this appeal but also allege that the city committed errors in decisions other than the city council decision on reconsideration. For the reasons explained in our disposition of the fourth through ninth assignments of error, we reject arguments that are directed at any decision other than the decision on reconsideration.

> "B. That the proposal's benefits will be greater than any negative impacts on the development of the adjacent uses; and will further the purpose and intent of this ordinance and the Comprehensive Plan of the City.
>
> "C. That the circumstances or conditions have not been willfully or purposely self-imposed."

Petitioners' arguments are difficult to follow, but essentially petitioners seem to argue that the city did not demonstrate that ALUO 18.100.020(A) and (C) are satisfied. We address each subsection in turn.

A. Unique or Unusual Circumstances

ALUO 18.100.020(A) requires that there be "unique or unusual circumstances which apply to this site which do not typically apply elsewhere." The city's findings state:

> "The unique or unusual circumstances which apply to the site are the surrounding historic development pattern, the corner lot location, the bend in N. Main St., the configuration of the lot, (specifically the shallow depth) and access to the site. The proposed variance to permit a ten-foot setback from N. Main St. matches the façade line in the vicinity. The average distance to the historic front façade lines in this area is approximately ten feet. The subject property is a highly visible location on one of the main gateways in the City and the prominence is accentuated by the location on a corner lot and the bend in N. Main St. From the perspective of traveling south on N. Main St., the side of the building facing Glenn St. will be visible. The site has short depth for a commercially zoned piece of property. There are commercial and employment zoned properties throughout [the city] that allow similar mixed-use types of development, and these areas have been configured with adequate depth and area to accommodate parking on site. Additionally, alley systems and shared driveway systems are in place in these same commercial and employment zoned developments that provide vehicle access and back-up areas outside of the individual lots and building envelopes. There is 50 feet available between the back of the building and the rear (east) property line. The building footprint can not be moved closer to the back (east) property line because the parking area and landscape buffer are at the minimum dimensions. The parking is required to be behind or to the side of the building. Finally, the safest access to the site is from Glenn St. Glenn St. has lower traffic volumes and better visibility than N. Main St." Record 8.

The city's findings for this requirement essentially identify five unique or unusual circumstances: (1) compatibility with nearby setbacks, (2) visibility due to a bend in the road, (3) corner lot location, (4) side street access, and (5) lot configuration and depth. Initially,

petitioners argue that many of these circumstances do not concern the subject property itself but instead concern the surrounding area. According to petitioners, off-site circumstances cannot serve as a basis for a variance under ALUO 18.100.020 because off-site circumstances do not "apply to this site." We agree with the city, however, that there is no reason that off-site characteristics cannot "apply to this site." The language of ALUO 18.100.020 does not restrict the unique or unusual circumstances explicitly to the characteristics of the subject property itself.

We generally agree with petitioners that the city's findings are inadequate to establish that side street access and lot configuration and depth constitute "unique and unusual circumstances" that could justify a variance in this case. However, we agree with the city that compatibility with nearby setbacks could constitute a "unique and unusual circumstance." Specifically, if the 20-foot setback that is required under ALUO 18.68.050 would result in a building that is out of alignment with the historic facade in the area, that misalignment in concert with the site's visibility and corner lot location could constitute a "unique or unusual circumstance," within the meaning of ALUO 18.100.020. We understand the city to have found that such is the case here.

Because the subject property is in a historic district, the application also must meet the historic design standards.[7] In findings addressing those standards, the city discussed whether the historic façade line would be maintained with a ten-foot setback and whether "adjacent" means only buildings immediately adjacent to the subject property are to be considered. The city's findings state:

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[7] Although the decision does not identify the specific design standards it considering, it appears that the city was referencing Historic District Design Standard IV-C-4 which provides:

> "Maintain the historic façade lines of streetscapes by locating front walls of new buildings in the same plane as the facades of adjacent buildings.
>
> "Avoid violating the existing setback pattern by placing new buildings in front or behind the historic façade line."

> "* * * The assertion by opponents that the Council is obligated to define the historic façade line in reference to any specific map or date is expressly rejected. The streetscape in this block includes a mix of buildings considered both historic and non-historic, all of which have a mix of setbacks. As such, the historic façade line in this streetscape is ill defined. The Council finds that the façade line encompassing all structures in this streetscape meets the intent of the site design standards by avoiding violation of an existing setback pattern. * * * Similarly, the attempt to define the façade line solely by reference to building immediately adjacent to the subject property is expressly rejected. The reliance upon an interpretation of the word 'adjacent' in other parts of the Code, in prior findings, is not binding in this section which requires a broader analysis. *The Council incorporates the findings in the May 1, 2007 Council Communication authored by the Planning Director in support of this finding*. * * *" Record 7.

Petitioners argue that the only three historic buildings in the near vicinity all have setbacks of over twenty feet. Petitioners also argue that the city erred by not identifying the historic buildings that it considered to establish the historic facade line and that the city appears to have erred by considering historic and non-historic buildings that do not share a property line with the subject property.

The findings quoted above in the text are clearly inadequate. The findings reject petitioners' contention that only "immediately adjacent" buildings may be considered without explaining what buildings the city believes are "adjacent." Similarly, the findings seem to say any buildings in the area may be considered in establishing the "historic facade line," whether those buildings are historic or not. The findings not only do not explain how the city came up with a ten-foot historic facade line, they conclude that the historic facade line in this area is "ill defined."

But the findings quoted above in the text are not the only findings the city council adopted. The above-quoted findings also expressly adopt other findings by reference, specifically a "May 1, 2007 Council Communication authored by the Planning Director." That document appears at Record 332-38. In that document, the planning director provides an analysis for why the requested 10-foot setback in this case is consistent with the historic facade line. Record 335-36. Petitioners neither acknowledge nor challenge the planning

director's analysis. Absent such a challenge, we reject petitioners' contentions that the city inadequately or incorrectly established that the historic facade line in this area is 10 feet.

This subassignment of error is denied.

B. Self-imposed Circumstances

ALUO 18.100.020(C) requires that "the circumstances or conditions have not been willfully or purposely self-imposed." The city's findings state:

> "* * * the City Council finds and determines that the ALUO variance criteria require that the circumstances or conditions causing the hardship be willfully or purposely self-imposed. The mere general desire to develop the property that all applicants share, is not sufficient for willful self-imposition. An affirmative action by the applicant * * * which occurred in the past * * * which is inconsistent with or creates the circumstances or conditions is required. In this case, the unusual characteristics of the site, being the surrounding historic development pattern, the corner location, the bend in N. Main St., the configuration of the lot (shallow depth) and access to the site have not been created by an affirmative action of the applicant. Therefore, the circumstances contributing to the request for a variance are not self-imposed." Record 9.

Petitioners' primary challenge to the city's findings that the unique or unusual circumstances are not self-imposed is that a prior owner of the property conveyed a strip of land to the Oregon Department of Transportation (ODOT) for road widening on North Main Street. According to petitioners, this means that the lot configuration is a circumstance that was self-imposed. The lot configuration and property boundary along North Main Street is not the only unique and unusual circumstance that the city relied upon. The city's findings concerning lot configuration as a unique or unusual circumstance are not critical to the city's decision concerning this criterion. A required setback that is not compatible with the existing façade line in the vicinity constitutes a unique or unusual circumstance. The existing configuration of the historic façade line and the fact that the 20-foot arterial setback would be incompatible with that façade line is not a circumstance that is self-imposed.

This subassignment of error is denied.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

The subject property is located on the corner of an arterial street, North Main Street, and a neighborhood street, Glenn Street. There is already a curbside sidewalk along the North Main Street frontage, but no sidewalk along the approximately 50-foot length of the Glenn Street frontage. The applicable sidewalk standards for the Glenn Street frontage call for a parkrow sidewalk, which requires a seven-foot wide strip of landscaping between the curb and sidewalk. The city granted the applicant an exception to the street standards to allow a curbside sidewalk along the Glenn Street frontage. Petitioners argue that the city improperly granted the exception.

Initially, the city argues that petitioners failed to preserve the issue below and it is therefore waived. ORS 197.763(1); ORS 197.835(3). Petitioners argue that they raised the issue of parkrow sidewalks at the January 9, 2007, and May 1, 2007, public hearings. At the January 9, 2007 hearing, petitioners argued that the parkrow sidewalks should be required. That was sufficient to raise the issue.

ALUO 18.88.050(F) provides that an exception to street standards may be granted if all of the following circumstances are found to exist:

> "A. There is demonstrable difficulty in meeting the specific requirements of this chapter due to a unique or unusual aspect of the site or proposed use of the site;
>
> "B. The variance will result in equal or superior transportation facilities and connectivity;
>
> "C. The variance is the minimum necessary to alleviate the difficulty; and
>
> "D. The variance is consistent with the stated Purpose and Intent of the Performance Standards options Chapter."

The city findings state that the applicant satisfied all four requirements under ALUO 18.88.050(F):

> "The City Council finds and determines that the proposed development meets the approval criteria for an Exception to the Street Standards to install a

> curbside sidewalk on the Glenn St. property frontage. There is demonstrable difficulty in meeting the specific requirements of this chapter due to the combination of several physical characteristics of the site and existing sidewalk system on Glenn St. – the length of the property frontage on Glenn St., the location of the driveway and the existing curbside sidewalk on Glenn St. adjacent to the property to the east. * * * A curbside sidewalk is in place on N. Main St. and the corner of N. Main St. and Glenn St. The opportunity for a parkrow on the Glenn St. frontage is limited to approximately 50 feet in length between the wheelchair ramp at the corner and the proposed driveway apron near the eastern property line. A transition from a curbside sidewalk to a sidewalk with a parkrow uses approximately ten lineal feet. One transition would need to be installed from the corner and another transition to the curbside before the driveway. * * * After the transitions to and from the curbside sidewalk would be installed, there would be a relatively short length of parkrow installed on the Glenn St. property frontage. * * * The curbside sidewalk will provide a more direct route from the corner of N. Main St. and Glenn St. to the existing curb sidewalk adjacent to the property. * * *" Record 7.

Petitioners challenge the city's findings on a number of the requirements of ALUO 18.88.050, but we need only address ALUO 18.88.050(F)(A), which is dispositive. ALUO 18.88.050(F)(A) requires the city to demonstrate that there is a "demonstrable difficulty in meeting" the specific sidewalk requirement. The reasons listed by the city include the existence of a curbside sidewalk on the North Main Street Frontage of the property, the existence of a curbside sidewalk on the adjacent property on the Glenn Street frontage, the fact that the transitions from curbside to parkrow sidewalks will take up a portion of the Glenn Street frontage leaving only a short section of parkrow sidewalk, and a curbside sidewalk would provide a more direct route between the frontages on the property. We agree with the city that all of those factors may support a conclusion that little benefit will result by requiring a small segment of parkrow sidewalk between two much larger segments of curbside sidewalks. But the applicable approval standard is "demonstrable difficulty" not whether the regulation to be avoided by the exception will produce little benefit in this case. The requirement imposed by ALUO 18.88.050(F)(A) is that there must be a demonstrable *difficulty in meeting the requirement*. All of the reasons cited by the city that demonstrate that a parkrow sidewalk in this case will produce little benefit. But none of those reasons

demonstrate that it would be "demonstrabl[y] difficult" to install a parkrow sidewalk. The city has identified no "demonstrable difficulty" in constructing the parkrow sidewalk. Because the city does not demonstrate that there is a "demonstrable difficulty" under ALUO 18.88.050(F)(A), the exception to the street standards should not have been approved.

The third assignment of error is sustained.

The city's decision is remanded.