BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DARYL BECHTOLT,
Petitioner,

vs.

CITY OF ALBANY,
Respondent,

and

OREZONA BUILDING COMPANY, LLP,
Intervenor-Respondent.

LUBA No. 2008-098

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Kenneth P. Dobson, Lake Oswego, filed the petition for review and represented petitioner.

No appearance by the City of Albany.

Mark C. Hoyt and Melissa Seifer Briggs, Salem, represented intervenor-respondent.

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

RYAN, Board Member did not participate in the decision.

AFFIRMED 10/22/2008

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

Petitioner appeals a city decision that approves a variance and a partition.

MOTION TO INTERVENE

Orezona Building Company, LLP (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

The subject property is a 1.59-acre parcel located on the north side of Valley View Drive. The subject property has 150 feet of frontage on Valley View Drive NW (Valley View Drive) and is approximately 450 feet deep. The property is improved with a single family residence.

Intervenor proposed to divide the parcel into parcel 1 and parcel 2. Proposed parcel 2 would be nearly an acre in size and would have 150 feet of road frontage on Valley View Drive. Proposed parcel 1 would be to the rear of parcel 2, and would not have road frontage on Valley View Drive or any other street. Proposed parcel 1 would be approximately one-half acre in size. The existing dwelling is located on proposed parcel 1. Access to the existing dwelling on parcel 1 would be provided by the existing driveway that is located on an easement that travels north from Valley View Drive along the western edge of proposed parcels 1 and 2. The driveway on that easement currently provides access to two other properties, or a total of three properties. That driveway would also provide access to a future dwelling on parcel 2, when that dwelling is constructed. Once that happens, the driveway would provide access to a total of four properties.

FIRST ASSIGNMENT OF ERROR

Albany Development Code (ADC) 12.090 provides that only three parcels may be served by an access easement.[1] As just noted, if the existing access easement is allowed to serve both parcel 1 and parcel 2, it will serve a total of four parcels. The disputed variance was approved to allow the existing driveway access easement to serve four parcels.

The relevant criteria that govern approval of variances are set out at ADC 2.500.[2] One of those criteria requires the city to find that "[t]he requested variance is the minimum necessary to allow the proposed use of the site[.]" ADC 2.500(3). Petitioner points out that unlike parcel 1, parcel 2 has 150 feet of road frontage on Valley View Drive. We understand petitioner to argue that the minimum variance needed to allow residential development of proposed parcel 2 is no variance at all, since parcel 2 has 150 feet of frontage on Valley View Drive, and the city does not explain why parcel 2 could not be served by a separate driveway.

> "Specifically, there is no evidence in the record as to why the applicant could not gain access to Parcel 2 from the 150 feet of frontage along the public right-of-way on Valley View Drive without having to expand the use of the driveway easement beyond the express limitations of the development code." Petition for Review 5-6.

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[1] ADC 12.090(1) provides "[n]o more than two parcels or uses are to be served by [an] access easement[.]" The city interprets ADC 12.090(1) to allow an access easement to serve two parcels in addition to the parcel that is burdened by the easement, or a total three parcels.

[2] ADC 2.500 is set out below:

> "Review Criteria. [V]ariance requests will be approved if the review body finds that the applicant has shown that all of the following criteria have been met:
>
> "(1) The proposal will be consistent with the desired character of the area; and
>
> "(2) If more than one variance is being requested, the cumulative effect of the variances results in a project which is still consistent with the overall purpose of the zone; and
>
> "(3) The requested variance is the minimum necessary to allow the proposed use of the site; and
>
> "(4) Any impacts resulting from the variance are mitigated to the extent practical[.]"

The city adopted the following findings to address this criterion:[3]

> "For purposes of this review criterion, the proposed use of the site is a partition that creates two parcels that will share an existing driveway that is also currently used by three other properties. The existing house on Parcel 1 already uses the shared driveway. The proposed partition will create one more parcel, so the variance is the minimum necessary to accommodate the proposed use." Record 23.

Petitioner and the city are a bit like ships passing in the night. The key to their different conclusions under this particular criterion is that the city effectively takes the necessity for some sort of variance as a given (*i.e*, as part of the proposal) and applies ADC 2.500(3) only to require that the variance be no greater than necessary to allow the development as proposed. Petitioner, on the other hand, does not take the necessity for some sort of variance as a given, and would apply ADC 2.500(3) to deny the proposed variance if a house could be developed on the property without granting a variance. Both interpretations of ADC 2.500(3) are textually plausible if the text of ADC 2.500(3) is considered in isolation.

We deny the first assignment of error for two reasons. First, the city's interpretation has contextual support. ADC 2.500(1) and (2) appear to be the standards that govern whether some sort of variance can be approved. ADC 2.500(1) would bar approval of a variance if it would not "be consistent with the desired character of the area." *See* n 2. ADC 2.500(2) would bar approval of more than one variance if "the cumulative effect of the variances results in a project which is [not] consistent with the overall purpose of the zone. But the remaining criteria seem to assume that a variance of some sort is to be allowed. ADC 2.500(3) requires that a variance be "the minimum necessary." ADC 2.500(4) requires that the variance impacts be "mitigated to the extent practical." Given that context, the city's

[3] Our review in this case has been complicated because neither the city nor intervenor filed a brief, and petitioner frequently provides no assistance in locating the city's findings that address the criteria that are the subject of her assignments of error.

interpretation of ADC 2.500(3) is at least as plausible as petitioner's interpretation. The second reason we deny the first assignment of error is that petitioner neither acknowledges nor expressly challenges the city's interpretation; she simply offers her own interpretation of ADC 2.500(3).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error concerns ADC 2.500(1), which requires that "[t]he proposal will be consistent with the desired character of the area[.]" Petitioner argues:

> "[M]any neighbors, including petitioner, argued that the proposed partition was inconsistent with * * * both the historic character of the neighborhood and the [covenants, conditions and restrictions] CC&Rs, which expressly limit development in the subdivision to one house per acre.[4]
>
> "The City staff attempted to get around this requirement by stating at the hearing that the use is consistent with the 'desired character' of the neighborhood because granting a variance to expand the use of the easement would alleviate the cutting of trees to create a new driveway, which is apparently a concern of many of the residents. However, one of the conditions of approval for the variance was to widen the width of the roadway from its current width of 12-feet to 20 feet and to increase the overall size of the easement to by an additional 10 feet. This expansion of the existing roadway would necessarily involve the removal of just as many, if not more, trees than would have to be removed if a new driveway was installed. Accordingly, the City's argument that the expansion of the driveway is 'consistent' with the desired character of the neighborhood is nonsensical and not supported by substantial evidence in the record." Petition for Review 6.

Petitioner also argues that the city erroneously concluded that the CC&R requirement for one-acre minimum lot sizes has no relevance in determining whether a variance to allow

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[4] The CC&Rs for Countryman Acres appear at Record 65-68. The following language that appears at Record 65 is underlined:

> "No building shall be erected altered, placed, or permitted to remain on any one acre other than one detached single family dwelling not to exceed two stories in height and a private garage for not more than 3 cars."

Petitioner apparently relies on the above language for the proposition that the CC&Rs prohibit dividing any lot in Countryman Acres into lots that are not at least one acre in size.

four parcels to use an access easement is "consistent with the desired character of the area." Petitioner argues the city's conclusion about the relevance of the CC&R one-acre lot minimum is erroneous, because "City staff believed that approval of the partition application depended on obtaining a variance for the access to the site via the driveway." *Id.* Petitioner's arguments can be summarily stated as follows:

1. The partition is inconsistent with the one-acre character of the area.

2. The variance is inconsistent with the character of the area, because trees will be removed to widen the driveway.

3. The city erroneously determined that the CC&R requirement for one-acre minimum lot sizes is not relevant in determining whether a variance to allow four parcels to be served by the access easement is consistent with the "desired character of the area."

We take petitioner's third argument first. For purposes of this decision, we assume the CC&Rs (1) apply to the subject property and are enforceable and (2) prohibit lots of less than one acre. If so, and if those CC&Rs are enforced by a court, intervenor's attempt to partition and develop parcel 2 may well ultimately be barred, notwithstanding the city's approval of the partition and variance. But even if the CC&R one-acre minimum requirement has some bearing on the "desired character of the area," we fail to see how that has any relevance in determining whether allowing four parcels to use an existing access easement is "consistent" with that character. The variance regarding the *number* of parcels that can be served by the access easement and the *size* of those parcels has no relevant connection that is apparent to us. Petitioner argues that city staff believed the partition and variance were dependent on each other. Petitioner cites Record 75 in support of that contention. We find nothing on that page of the record that supports petitioner's argument that city staff believed or took the position that the variance and the partition are dependent on each other.

Turning next to petitioner's first argument, while the partition that allows the subject property to be divided into an approximately one-acre parcel and a parcel that is a little more

than one-half acre may not be consistent with the prevailing parcel sizes in the area, ADC 2.500(1) is not a *partition* criterion. ADC 2.500(1) is a *variance* criterion. Again, the decision to approve a variance so that four parcels may use an existing access easement has no apparent connection to the size of those lots.

Petitioner's second argument, that the variance approval as conditioned by the city will require that the access easement be wider and that the existing driveway itself also be widened, is accurate. The existing 40-foot access easement must be widened to 50 feet and the existing 12-foot driveway must be widened to 20 feet.[5] Record 7-8, 19. The city found that the wider easement would "allow more area to align the driveway in a way that saves as many trees as possible." Record 81. As conditioned, the widening of the existing roadway must be done "so as to minimize the impacts on trees, other vegetation, and site grading." Record 8. However, petitioner's contention that widening the existing driveway will have more of an impact on trees than constructing a new driveway through parcel 2 to serve a new dwelling on the property is not supported by any citation to record support and that contention seems highly suspect to us. The likely building site on parcel 2 is on the north (rear) side of parcel 2. Regarding the impact on trees that would result if a new driveway were required for parcel 2, the city found "[c]onstuction of a new driveway for the new parcel * * * would make it necessary to clear existing trees and vegetation over a strip of land approximately 30 feet wide." Record 80. The city's findings suggest that widening the existing driveway within a widened easement will require removal of far fewer trees than clearing a new 30-foot wide area from Valley View Drive to a building site at the rear of the property. Petitioner cites no evidence that would support a contrary conclusion. Therefore, if preserving as many existing trees as possible is part of the "desired character of the area," granting the variance is consistent with that character.

[5] The record shows that the existing driveway is to be widened primarily to allow better access for emergency vehicles.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is based on a misreading of our decisions in *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992) and *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006). Petitioner argues that at page 447 of our decision in *Rhyne*, LUBA held that a "local government must produce findings showing compliance with conditions of approval is feasible." Petition for Review 7. Our decision in *Rhyne* says no such thing. Petitioner is a bit closer to the mark in her description of LUBA's holding in *Butte Conservancy*, but that case does not support her third assignment of error either. In *Butte Conservancy* a mandatory planned unit development (PUD) approval criterion required secondary access for the PUD. The city imposed a condition of approval that required the applicant to provide the required secondary access across an undeveloped residential lot in an adjoining subdivision to connect with a roadway in that adjoining subdivision. Opponents argued the adjoining subdivision CC&Rs would not permit such a use of the undeveloped lot. The city did not address that issue. We held that where an issue is raised about the feasibility of relying on a condition of approval to ensure compliance with a mandatory approval criterion "the local government cannot simply ignore the issue." *Butte Conservancy*, 51 Or LUBA at 205.[6]

There are two reasons that *Butte Conservancy* lends no support to petitioner's third assignment of error. First, petitioner never identifies the conditions that she believes the city failed to demonstrate are feasible. Second, even if we overlook that failure, petitioner makes no attempt to demonstrate that any of those conditions of approval were imposed to ensure the partition or variance comply with a mandatory approval criterion or are necessary to

[6] On remand the city found that the CC&Rs would not prevent use of the undeveloped lot for secondary access and that even if they did, the city would use its authority to condemn the necessary secondary access before the planned unit development would be granted final approval. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550, 558-59 (2006).

ensure compliance with a mandatory approval criterion. Therefore, even if we were to assume that the conditions that are the subject of the third assignment of error are the conditions that require widening and improvement of the existing access easement if it is to serve four parcels, petitioner does not argue that those conditions were imposed to ensure compliance with any mandatory variance or partition approval criteria. Without that connection to a mandatory approval criterion, the parties' dispute about the legal effect of the CC&Rs is a private dispute that, if necessary, will be resolved by the circuit court. If petitioner is correct about the CC&Rs, parcel 2 will have to develop its own access onto Valley View Drive.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The septic drainfield that serves the existing dwelling on proposed parcel 1 is located in part on proposed parcel 2. The applicant proposes a "variable width private septic easement" on parcel 2 to address this situation.

ADC 1.050 requires that actions under the ADC must be consistent "with applicable state and federal laws." The Oregon Department of Environmental Quality (DEQ) has adopted administrative rules to regulate septic systems. OAR 340-071-0130(11) specifically authorizes easements for septic facilities that cross property lines. However, OAR 340-071-0220(1)(j) and Table 1 in that rule require that subsurface septic drain fields be set back ten feet from the property lines of adjoining properties that are not subject to the easement. The proposed variable width easement on parcel 2 is shown extending to the property line proposed parcel 2 will share with an adjoining subdivision lot to the east. Petitioner argues the applicant's failure to comply with the OAR 340-071-0220(1)(j) and Table 1 ten-foot setback requires remand.

The city adopted the following findings to address this issue:

> "[Petitioner's attorney] argued that [DEQ] regulations require that a septic system be located at least 10 feet from a property. He observed that the

> easement for the septic system on the partition plat was shown at a location not 10 feet from the east boundary of the property. *The plat shows an easement, not a septic system*. A septic system is not proposed with the Partition application. There is no apparent violation of DEQ standards." Record 23.

Petitioner neither acknowledges nor challenges the adequacy of the above-quoted findings as a response to the issue raised in this assignment of error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The subject property is in an area of the city that is subject to "Hillside Development" regulations. ADC 6.170 to 6.230. ADC 6.200 requires a geotechnical report:

> "Geotechnical Report Required. For any development subject to the applicability criterion in ADC 6.180, an applicant shall provide a *geologic and soils report* prepared and stamped by a certified engineering geologist or a licensed civil engineer, licensed in the specialty of geotechnical engineering with the State of Oregon.
>
> "The report must identify the following:
>
> "(1) All geologic and soils hazards and certify that the site, and each individual lot if land division is proposed, are suitable for the proposed development.
>
> "(2) Area(s) suitable for building and describe how slopes will be stabilized.
>
> "(3) *Suitable building footprint(s) for development on each lot*.
>
> "(4) Any requirements that must be met from the time construction begins to the time construction is completed." (Emphases added.)

In her fifth assignment of error, petitioner argues the city erred by accepting a geologic and soils report that is supported in part by soils information from "well log reports" from properties "1/3 to half mile from the subject property." Petitioner also argues the geologic and soils report is inadequate because it does not identify "suitable building footprints," as required by ADC 6.200(3).

A. Well Log Reports

The record includes a "Geologic Site Assessment" for the subject property. Record 89-98. That document states that the following sources of information were consulted to prepare the report:

> "● Review of United States Department of the Interior Geological Survey (USGS) online Quadrangle Map, 7/1/1986.
>
> "● Review of United States Department of the Interior Geological Survey (USGS) on-line aerial photograph, 7/30/2000.
>
> "● Site reconnaissance and hand-probing.
>
> "● Review of the Benton County area Web Soil Survey, United States Department of Agricultural * * * Natural Resources Conservation Service * * *, see Appendix A.
>
> "● Review of the USGS Geologic Map of Oregon, USGS 1991.
>
> "● Review of Oregon Department of Water Resources Well Logs, see Appendix A." Record 89-90.

Petitioner's objection is directed at the Oregon Department of Water Resources well logs mentioned in the last of the above-quoted entries. Petitioner's suggested but undeveloped argument seems to be that ADC 6.200 either prohibits use of well-logs from nearby properties noted in the last of the above-quoted entries as a source of soils information or requires that wells be drilled on-site to obtain soils information. ADC 6.200 does neither. Petitioner makes no attempt to explain why consulting published soils information, data from nearby wells and conducting "site reconnaissance and hand-probing" is insufficient to provide the soils data that is required to produce a "geologic and soils report" that complies with ADC 6.200. Absent such an attempt, we reject petitioner's contention that it was error for the city to allow the applicant's geologist to rely on well data from nearby wells.

B. Building Footprint(s)

After making a number of observations about the site, the geologic site assessment provides the following description of site conditions:

> "There are no adverse geologic or geotechnical site conditions that preclude residential development of the site. The only area not suitable for building pad construction is the south central portion below elevation 418 due to surface water drainage to this area. All other areas will require excavation to remove soft topsoil and roots, and proper control and routing of surface and near surface drainage. Depending on building pad placement, footing drains may be required. Excavation depths of 12- to 24-inches are expected in the building pad area to remove soft soil; however, the subgrade condition * * * should be verified at the time of building pad construction. On-site cut slopes and fill slopes and fill slopes, comprised of native soil, shall not exceed 5 feet in height, or an angle of 2:1 (horizontal:vertical) without geotechnical oversight." Record 90.

The city adopted the following findings to reject petitioner's argument that the geotechnical site assessment's failure to identify building footprints rendered it defective:

> "The 'Geotechnical Site Assessment' done by Branch Engineering, Inc., dated April 7, 2008, concludes that 'the only area not suitable for building pad construction is the south central portion below elevation 418 due to water drainage to this area.' ADC 6.220(2) does not require that a suitable building footprint be shown on the tentative plat. In some situations, this might be the best way to show where houses can be built on lots in a land division, but in this situation with the Orezona partition, the explanation in the report is sufficient to establish that a building footprint anywhere on the Parcel 2 above elevation 418 will be suitable in terms of the geotechnical investigation." Record 23.

As far as we can tell, the term "building footprint" is not a defined term and ADC 6.200 does not clearly state what purpose identifying building footprints serves. The above findings seem to say building footprints are one way to identify where houses can be built. Proposed parcel 1 is already developed. We understand the above findings to have concluded that the geotechnical site assessment is adequate to establish that a house can be built anywhere on parcel 2 above the 418 foot elevation. Petitioner neither acknowledges nor challenges the above-quoted findings. Absent such a challenge, we do not agree that the

city's decision must be remanded because the geotechnical site assessment does not identify individual building footprints.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The approval criteria for tentative subdivision and partition plat approval are set out at ADC 11.180. ADC 11.180(5) requires that the city find that "[a]ny special features of the site (such as topography, floodplains, wetlands, vegetation, historic sites) have been adequately considered and utilized." Petitioner argues the city erred by summarily dismissing neighbors concerns that the forest ravine on parcel 2 is home to "wildlife, such as turtles and salamanders." Petition for Review 11.

In response to contentions that the subject property is home to "[d]eer, raccoons, rabbit, salamanders, a turtle(s), and a ring-tailed cat," the county found that city's Goal 5 inventory of wildlife habitat does not include the subject property. In response to arguments that the city was obligated to consider the property's value as wildlife habitat even if it is not included on the city's Goal 5 inventory, the city adopted the following findings:

> "The City Council considered the testimony about wildlife at the public hearing and finds * * * that there may be salamanders, turtles, and/or a ring-tailed cat on the property is not supported by substantial evidence in the record. Even if there was evidence, there is no Development Code limitation on dividing property that may have the referenced wildlife on it. None of the referenced wildlife is threatened or endangered." Record 21.

ADC 11.180(5) requires that "special features of the site (such as topography, floodplains, wetlands, vegetation, historic sites) [must be] adequately considered and utilized." The first question, which petitioner does not really confront, is whether the potential presence of wildlife on the subject property qualifies as a special feature of the site. Wildlife is not among the listed examples of "special features" ("topography, floodplains, wetlands, vegetation, historic sites") that under ADC 11.180(5) must be "adequately considered and utilized." The above-quoted findings seem to take the position that unless the

site includes inventoried wildlife habitat, the ADC does not limit partitions based on the presence of wildlife. Petitioner does not acknowledge or challenge that finding. In addition, the city concluded that it was not persuaded by the neighbors' testimony that the subject property is home to salamanders, turtles or ring-tailed cats. Petitioner makes no attempt to show why a reasonable person could not have reached that conclusion. Absent a challenge to the above-quoted findings, they are adequate to establish that ADC 11.180(5) either does not apply or is satisfied here.

The sixth assignment of error is denied.

The city's decision is affirmed.