BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY P. SPERBER,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA No. 2009-005

FINAL OPINION
AND ORDER

Appeal from Coos County.

Timothy P. Sperber, Coquille, filed the petition for review and argued on his own behalf.

No appearance by Coos County.

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

AFFIRMED 04/14/2009

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 county decision that denies his request for a variance from county road standards.

FACTS

A. Petitioner's Proposal

Petitioner owns approximately 63 acres of property located on the eastern edge of the City of Coquille. The property is located inside the city's urban growth boundary (UGB) but outside city limits. The property is roughly rectangular, approximately 2,350 feet east to west and approximately 1,200 feet north to south. The property includes a number of drainages and includes some fairly steep terrain. The southeastern one-third of the property has some slopes that range from 13 percent to 18 percent and the remaining two-thirds of the property has slopes that range from 21 percent to 44 percent. The city's buildable land assessment designates portions of petitioner's property "less suitable," and other portions "least suitable."[1] Petitioner wishes to divide his property into a number of parcels for residential development. Petitioner intends to accomplish that division of his property via a

[1] The city's buildable lands assessment explains:

> "To determine the carrying capacity of the vacant lands within the City, the following classifications of buildable lands will be used:
>
> > "Suitable: Land that is physically capable of accommodating development at a maximum utilization level, with public services readily available.
> >
> > "Less Suitable: Land having some physical constraints and/or limitations on availability of public services. While this land is capable of being developed, the constraints will result in higher development costs.
> >
> > "Least Suitable: Lands having some severe development constraints related to the physical carrying capacity, which will result in higher development costs than other lands.
>
> "These definitions recognize that any parcel of land has some development potential if the appropriate development safeguards are taken and the resulting capital expenditures are made." Prior Record 48.

series of partitions.[2] Access to the property is provided at the property's southeast corner, from Shelly Lane. Shelly Lane is a Coos County collector road. That access must traverse an existing 50-foot wide private access easement a short distance to connect the southeast corner of petitioner's property with Shelly Lane. The new roads that will be required to provide access to the anticipated parcels will have to negotiate the property's rugged terrain and in some cases cross stream ravines.

B. Petitioner's First Round of Appeals

In a prior set of appeals, petitioner challenged two county decisions. One of those decisions denied petitioner's request to rezone the property from Rural Residential-5 (RR-5) to Urban Residential (UR-2). The minimum parcel size in the RR-5 zone is five acres. The minimum parcel size in the UR-2 zone without public water and sewer service is one acre. However, due to the development constraints on the property, as recognized by the city's buildable lands inventory, only 29 parcels of slightly more than two-acres each would currently be possible under UR-2 zoning. We remanded the county's first rezoning decision. *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-046, June 23, 2008). Following our remand the county approved petitioner's request for UR-2 zoning, and that rezoning decision was not appealed and is now final.

At the same time petitioner was seeking to rezone the property, he was seeking partition approvals and variances. The second decision that petitioner appealed in his first round of appeals was the county's denial of his request for a variance from the urban road standards that apply to development of new roads within the UGB. Under the urban road standards for residential streets, petitioner would be required to construct a 28-foot wide travel surface on a 50-foot right of way. Coos County Zoning and Land Development

[2] As defined by ORS 92.010(8) a partition of land "means to divide land to create not more than three parcels of land within a calendar year[.]"

Ordinance (CCZLDO) Table 7.3.[3] Petitioner sought the first variance so that the new roads that will be necessary to provide access to the proposed parcels can be constructed with the minimum travel surface width that is required of a rural road. CCZLDO Table 7.2. Under those rural road standards for "[o]ther minor roads and streets," a 20-foot all weather travel surface on a 60-foot right of way is required, rather than the 28-foot wide surface that is required for urban residential roads under CCZLDO Table 7.3. Petitioner sought the variance to allow him to construct 20-foot wide travel surfaces rather than the 28-foot wide travel surfaces that are required under CCZLDO Table 7.3 in urban areas. In addition, under CCZLDO Table 7.2, where a proposed road will serve no more than three parcels, the minimum travel surface width may be reduced to 12 feet and the required right of way can be reduced to 50 feet. Petitioner seeks approval to reduce the roadway width to 12 feet where the road would serve three or fewer parcels. We remanded the county's first variance decision, which denied petitioner's request, because the county applied the wrong variance standards. *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-072, August 28, 2008).

C. Petitioner's Second Round of Appeals

The county approved petitioner's first partition application on October 14, 2008. That decision was not appealed. Thereafter, the county approved petitioner's second partition application with conditions. Petitioner appealed the county's decision regarding his second partition to LUBA. On April 10, 2009 we remanded that decision. *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-227).

Applying the correct variance standards, the county denied petitioner's requested variance for a second time on December 17, 2008. The county's second variance decision is the subject of this appeal.

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[3] According to CCZLDO Table 7.3 footnote 2, that travel surface only has to be paved if public water and sewer is going to be provided. Petitioner does not propose to provide either public water or public sewer.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Petitioner filed a motion in which he requests that LUBA consider certain evidence that is not included in the record in support of his assignments of error that the county treated petitioner's variance application differently and less favorably than it treated similar applications. The county has not appeared to defend its decision, and therefore has not responded to the motion to take evidence outside of the record.

Petitioner first asks that we consider a chart that he prepared to demonstrate that the county treated the partition application that was the subject of our decision in *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-227, April 10, 2009) less favorably than certain other partition applications that were submitted by others. We fail to see how that chart in the other appeal concerning petitioner's *partition* application has anything to do with the county's second decision concerning petitioner's *variance* application. Petitioner's motion concerning the chart is denied.

Petitioner next asks that we consider an October 9, 2008 planning department staff report concerning an unrelated application submitted by Ken Cullin and Connie Cullin for a partition and variances to road construction curve standards. We will consider the staff report in our resolution of petitioner's challenge under his fifth assignment of error in this appeal, that the county's different treatment of his variance application violates petitioner's right to equal privileges and immunities under Article I, section 20 of the Oregon Constitution.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR

A. Introduction

As we have already noted, the county has adopted different road standards for rural areas outside UGBs and for unincorporated urban areas located inside UGBs. CCZLDO Table 7.2 appears in CCZLDO Article 7.2 (Rural Road Standards); Table 7.3 appears at CCZLDO Article 7.3 (Urban Road Standards (City UGB's)). Also, as previously noted,

Table 7.3 requires a minimum 28-foot wide travel surface in urban areas, whereas Table 7.2 only requires a minimum 20-foot wide travel surface in rural areas, which can be reduced further to a 12-foot wide travel surface where three or fewer lots are served. Petitioner contends that while a 28-foot wide travel surface may be justified where urban residential densities are expected, a 28-foot wide travel surface is unwarranted and unjustified where areas within the UGB will be developed at what are *de facto* rural densities, due to development constraints.

Putting aside the county's acknowledged land use regulations, petitioner's arguments have some practical appeal, particularly with regard to very short roadways that will serve three or fewer lots and must cross challenging terrain. Petitioner makes a point throughout the petition for review that it makes little sense to allow rural lots that are located just outside the UGB to be served by roads with a 12-foot wide travel surface, while requiring urban lots that are similarly sized and located on challenging terrain that will likely limit ultimate development densities to be served by a road with a 28-foot wide travel surface, simply because they are located on the other side of the UGB. Throughout the petition for review, petitioner faults the county for adopting an unnecessarily blunt instrument by adopting a "one size fits all" residential roadway standard for the unincorporated urban areas that are subject to the county's Table 7.3.

On the other hand, the county emphasizes a point that petitioner fails to recognize or de-emphasizes. That point is that lands that are located within a UGB are expected to be developed to meet urban needs, here the need for housing. While the two-acre parcels petitioner anticipates creating in the future are relatively low density development, the housing that will be constructed on those parcels is housing that is needed to meet the city's identified housing needs. The city (and by extension the county) has a legitimate interest in ensuring that the roads and other services that are provided in conjunction with such housing meet the urban street standards that the county's land use regulations impose in urban areas.

In addition, unlike the rural parcels to which he compares his proposed parcels, the parcels that petitioner is in the process of creating now could easily be redeveloped with higher densities in the future.[4]

However, we must put aside the petitioner's and county's apparent policy dispute about what kind of roadways *should* be provided to relatively low density development on constrained urban land. The minimum travel surface width that petitioner must provide is controlled by the acknowledged CCZLDO. We have already explained that Table 7.3 requires that the travel surface on petitioner's roads be at least 28 feet wide. The only way petitioner can construct roads to the more narrow 20-foot and 12-foot rural standard is to demonstrate that he qualifies for a variance under CCZLDO Article 5.3. We now turn to that question.

B. CCZLDO Article 5.3

CCZLDO 5.3.100 explains the general purpose of variances in Coos County:

> "Practical difficulty and unnecessary physical hardship may result from the size, shape, or dimensions of a site or the location of existing structures thereon, geographic, topographic or other physical conditions on the site or in the immediate vicinity, or, from population density, street location, or traffic conditions in the immediate vicinity. Variances may be granted to overcome unnecessary physical hardships or practical difficulties. The authority to grant variances does not extend to use regulations."

CCZLDO 5.3.150 prohibits approval of variances for self-inflicted hardships.[5] In his first assignment of error petitioner challenges the county's findings that petitioner's claimed hardship is self-inflicted.

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[4] On page 30 of the petition for review petitioner recognizes that a planned unit development (PUD) might be proposed in the future for one or more of the parcels he is in the process of creating. Petitioner contends "[i]f that ever comes about, the County or City can simply require, if warranted, that the roads must be widened as a condition of approval of the PUD." The City or County almost certainly would require that a future PUD be served by paved roads, rather than the unpaved roads petitioner appears to be proposing. It is certainly within the county's discretion to require that the full 28-foot wide travel surface must be provided now.

[5] CCZLDO 5.3.150 provides:

CCZLDO 5.3.350 sets out the approval criteria for variances, and provides in part:

"No variance may be granted by the Planning Director unless, on the basis of the application, investigation, and evidence submitted;

"1. Both findings 'A' and 'B' below are made:

"A. i. that a strict or literal implementation and enforcement of the specified requirement would result in unnecessary physical hardship and would be inconsistent with the objectives of this Ordinance; or

"ii. that there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district; or

"iii. that strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges legally enjoyed by the owners of other properties * * * in the same zoning district;

"B. that the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity."

The county found that petitioner did not satisfy any of the subsections of CCZLDO 5.3.350(1)(A) or the 5.3.350(1)(B) criterion. In his second assignment of error, petitioner challenges the county's findings that granting the disputed variance will "be detrimental to the public health, safety or welfare or be materially injurious to properties or improvements in the near vicinity."

"A variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant or owner or previous owners, including but not limited to:

"♦ self-created hardship

"♦ willful or accidental violations

"♦ manufactured hardships

"This does not mean that a variance can not be granted for other reasons."

Finally, in order to prevail in this appeal, petitioner must establish that he satisfies at least one of the three subsections of CCZLDO 5.3.350(1)(A). Petitioner contends that he adequately demonstrated to the county that his application qualifies under subsections (i) and (ii) of CCZLDO 5.3.350(1)(A). We turn first to petitioner's arguments under CCZLDO 5.3.350(1)(A)(i) and (ii).

C. Unnecessary Physical Hardship [CCZLDO 5.3.350(1)(A)(i) (Fourth Assignment of Error)]

The county found that petitioner failed to establish that requiring him to construct roads with the minimum 28-foot travel width required by CCZLDO Table 7.3 would (1) result in a unnecessary physical hardship and (2) be inconsistent with the objectives of the CCZLDO. Regarding the "unnecessary physical hardship" prong of the CCZLDO 5.3.350(1)(A)(i) criterion, the county adopted the following findings:

> "The term 'unnecessary physical hardship' is not defined by the CCZLDO. When the term is not defined, the County applies the plain * * * ordinary, and natural meaning. According to the Oregon Land Use Board of Appeals, when the plain meaning is used: 'Unnecessary' is defined as 'not necessary,' and 'necessary' is defined as '[an] item[] that cannot be done without: things that must be had (as for the preservation and reasonable enjoyment of life[.]' *Webster's Third New Int'l Dictionary*, 1510 (1981). 'Hardship' is defined as 'suffering, privation; a particular instance or type of suffering or privation[.]' *Id*. at 1033. *Moore v. Columbia County*, [___ Or LUBA ___ (LUBA No. 2008-057, July 28, 2008)]. The fact that it may be more difficult or expensive to meet the requirement will result in inconvenience rather than suffering or privation, and therefore be insufficient to meet the definition of 'unnecessary hardship.' *Moore v. Columbia County*, * * *." Record 11.[6]

To simplify a little, we understand the county to have found that petitioner must show that complying with the required 28-foot wide minimum travel surface will cause petitioner "suffering and privation" and that such suffering and privation is not necessary. The county

[6] The record in this appeal includes the record that was compiled in petitioner's appeal of the county's first variance decision. In this opinion we cite to that record as "Prior Record." We cite to the record that the county compiled on remand as "Record."

also adopted the view that it is not necessarily sufficient to show that complying with the Table 7.3 28-foot minimum width will be "difficult or expensive."

After the county adopted the above interpretive findings, the county found that petitioner failed to demonstrate that requiring compliance with Table 7.3 will result in an unnecessary hardship, and gave two reasons for its conclusion—additional cost and technical infeasibility.

1. Additional Cost

The county acknowledged petitioner's contention that it would cost $300,000 more to construct the anticipated 5,400 feet of roads that will be required to serve petitioner's planned parcels if the 28-foot wide minimum travel surface is required. The county found that

> "The fact that it may be more difficult or expensive to meet the urban road standards will result in an inconvenience, not suffering or privation. Therefore, [petitioner's] argument that cost creates an unnecessary hardship fails." Record 12.

Petitioner appears to understand the county to have adopted an absolute view that additional expense can never result in an unnecessary hardship. We do not understand the county to have adopted such an absolute position. Our decision in *Moore v. Columbia County*, which the county cites and relies on in its findings, certainly does not adopt such an absolute position. The question in *Moore* was whether forcing the applicant to construct his desired two story garage in areas of the lot that satisfied setback requirements rather than in a side yard that required a variance from the setback would result in an unnecessary hardship, simply because it would be more expensive to construct the two-story garage in those areas of the lot. The record in *Moore* did not disclose how much more expensive it would be to construct the two-story garage in those areas of the lot.

We understand the county to have found that the estimated $300,000 additional cost to construct a 28-foot wide travel surface for the roads that will provide access to petitioner's

parcels did not constitute an unnecessary hardship. Certainly the additional $300,000 cost to construct the required 5,400 feet of road with the 28-foot wide minimum travel surface is not an insignificant additional expense.[7] By requiring that petitioner incur the additional $300,000 expense, the resulting road serving those parcels would be the full 28 feet wide and presumably provide wider and safer access to the proposed parcels.[8] Based on this record, we are in no position to second-guess the county's conclusion that requiring petitioner to adhere to 28-foot wide minimum travel surface and incur that additional expense will not result in an unnecessary hardship.

2. Technically Infeasible

The county also acknowledged that petitioner took the position that constructing the anticipated roads with the 28-foot wide minimum travel surface would be "technically infeasible." Record 12. The county found that petitioner failed to provide "engineering reports" or other evidence that established it was in fact infeasible to construct roads that comply with the 28-foot wide minimum travel surface. The county also appears to have mistakenly understood petitioner to propose roadways that do not comply with the Table 7.3 requirement that roads not exceed a 16 percent grade.

Petitioner responds that "[y]ou don't need an engineer to make those calculations" and "this is not rocket science." Petition for Review 37, 38. Petitioner also faults county findings that appear to be based on a misunderstanding that petitioner is also seeking a variance from the 16 percent maximum grade limitation imposed by Table 7.3.

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[7] Petitioner does not identify any place in the record where there was an attempt to estimate what percentage of the anticipated total cost of the roads the $300,000 of additional expense represents. However, we assume the cost of constructing 5,400 feet of road across the terrain petitioner describes will be significant.

[8] A point that petitioner makes throughout his petition for review is that if you allow on-street parking to occupy 8 feet of the travel surface that is provided by a 28-foot wide travel surface for parking on each side of the road, the usable travel lane that is left is only 12-feet wide. Petitioner proposes to prohibit parking on either side of his proposed 20-foot and 12-foot travel surfaces. We note petitioner's point, but we do not agree that this necessarily means the travel surfaces he proposes are just as good as the minimum width travel surface required by Table 7.3.

Any confusion the county may have had about the maximum proposed street grades does not appear to undercut the county's central reasoning under the unnecessary hardship criterion. That central reasoning is that petitioner failed to provide sufficient evidence to establish that constructing the proposed roads in accordance with the 28-foot minimum travel surface requirement is either technically infeasible or so expensive that it would result in an unnecessary hardship. We conclude the county's findings regarding the unnecessary hardship prong of CCZLDO 5.3.350(1)(A)(i) are adequate and supported by substantial evidence in the record.

The second prong of the CCZLDO 5.3.350(1)(A)(i) criterion is that a variance from the 28-foot minimum travel surface requirement must not "be inconsistent with the objectives of this Ordinance." The reference to "this Ordinance" is a reference to the CCZLDO, and the CCZLDO was adopted to implement the Coos County Comprehensive Plan (CCCP). We understand the county to have found that by extension the requested variance must not be inconsistent with the objectives of the CCCP. In its findings, the county emphasizes public safety objectives and concerns about the ability of public safety vehicles to access the parcels of the roads are built with the requested narrower width. Petitioner emphasizes CCZLDO and Coos County Transportation System Plan objectives to avoid requiring unnecessarily costly roads.

The county's findings regarding the second prong of CCZLDO 5.3.350(1)(A)(i) are not necessary to support its decision under CCZLDO 5.3.350(1)(A)(i), since we have already concluded the county's findings regarding the first prong are adequate and supported by substantial evidence. In any event, the objectives of the CCZLDO and CCCP emphasize both the public safety concerns cited by the county and the avoidance of unnecessary expense concerns cited by petitioner. Application of a standard like the second prong of CCZLDO 5.3.350(1)(A)(i) necessarily requires the county to identify the objectives that it

wishes to emphasize in the standard. We are in no position to second-guess the county on its selection of which objectives it wishes to emphasize.

Petitioner's challenges to the county's findings regarding CCZLDO 5.3.350(1)(A)(i) are not sufficient to demonstrate that his requested variance complies with that variance criterion. We reject petitioner's arguments to the contrary.

Petitioner's fourth assignment of error is denied.

D. Exceptional or Extraordinary Circumstances Apply to the Property [CCZLDO 5.3.350(1)(A)(ii) (Third Assignment of Error)]

This criterion requires that the county find "that there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district[.]" The county found that petitioner failed to demonstrate the presence of such circumstances or conditions on the property. Petitioner challenges those findings and their evidentiary support. Petitioner first challenges the following findings:

> "The subject property has been rezoned to an urban density and the applicants have the burden to establish why the urban standards should not apply to them but do apply to other county urban-zoned properties. The applica[nt] has listed out [variance] applications on page 62 of the record as their evidence; however, they have failed to explain why they used those applications. Only one of the applicants was actually in the UR zoning district and they applied for a variance that was denied because it did not me[e]t the criteria." Record 15.

We assume the county meant to cite Prior Record page 68. On that page of the Prior Record, petitioner identified six other county variance decisions in support of his argument that the county approved those variances and discriminated against him by denying his variance application. We address those arguments under petitioner's fifth assignment of error below. However, we make one fairly important point here. As far as we can tell, while petitioner claimed that the six variance decisions he listed on Prior Record 68 were approvals that demonstrated the county was discriminating against him, petitioner did not provide the county with copies of those decisions. After the record closed, the county planning staff

apparently reviewed the six variance decisions that petitioner identified, and the last sentence quoted above was based on that review.[9] Petitioner disputes the accuracy of the statement and alleges the county committed error by considering evidence (the six variance decisions identified by petitioner) after the evidentiary record closed and by failing to give petitioner an opportunity to comment on that "evidence."[10]

We question whether the six variance decisions are accurately characterized as "evidence." Even if they are, we do not see that the county's review of the six variance decisions that petitioner identified, after the evidentiary hearing closed, is error. Petitioner cited those six variance decisions to respond to planning staff's position that petitioner was seeking special treatment. Presumably the county looked at those decisions to determine whether there were factual differences in those cases that might explain the different results and show that petitioner was seeking special treatment. That inquiry has nothing to do with whether there are "exceptional or extraordinary circumstances" on petitioner's property. Unless those six variance decisions had some bearing on a relevant approval criterion, which petitioner does not establish, the county's consideration of those variance decisions provides no basis for reversal or remand.

Petitioner also disputes the county's characterization in the above-quoted findings that the 2.19 acre parcels that he proposes are "urban density." We do not see that the county's characterization provides a basis for remand.

Petitioner next challenges the following findings:

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[9] Petitioner alleges that is the case and we assume that it is. The six variance decisions are not included in either the Prior Record or the Record.

[10] Petitioner argues:

> "Except as was inappropriately added too the record after the remand hearing, there is no evidence in the record that the 'one' application for variance was denied. Petitioner stands by his claim that the County denied the Sperbers' road variance request while approving six others." Petition for Review 23.

> "LUBA has found, 'steepness of the incline is not an exceptional or extraordinary circumstance that does not apply to other property in the vicinity.' *Georgeff v. Curry County*, 40 Or LUBA 101 (2001). Surrounding properties have a similar steepness of incline. The subject property has steep slopes in which special measures may need to [be] done to ensure compliance with the road standards but there is no evidence to show they are exceptional or extraordinary conditions. The development may cost the applicant more money but they have not provided any documentation to show they are exceptional or extraordinary conditions." Record 15.

Petitioner first contends that the county reads LUBA's decision in *Georgeff* too broadly. Petitioner is probably correct about that. We did not mean to suggest in *Georgeff* that steep terrain could never be an exceptional or extraordinary circumstance. But the county is certainly free to construe the CCZLDO 5.3.350(1)(A)(ii) criterion not to encompass the steep slopes on petitioner's property, where surrounding urban properties also have steep slopes. Such an interpretation is within the county's discretion under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). Petitioner also points out the county's finding that surrounding properties have steep slopes is not really responsive to the CCZLDO 5.3.350(1)(A)(ii) criterion which requires that the property not share its "exceptional or extraordinary circumstances" with "other properties in the same zoning district." But in pointing out the county's error, petitioner overlooks his failure to demonstrate that other UR-2 zoned properties do not have steep slopes like his property.[11] It was petitioner's burden to demonstrate that there are "exceptional or extraordinary circumstances" that are not present on "other properties in the same zoning district," and as far as we can tell petitioner did not do so. We see no reversible error in the above findings.

Finally, petitioner challenges the following findings:

> "LUBA has found that the exceptional or extraordinary circumstances standard is not satisfied 'simply because the particular intensity of use the

[11] Petitioner does point out that a nearby property, which is now located in the City of Coquille, was granted planned unit development approval and a variance to road construction standards due to steep slopes. Like the county, we fail to see what a city variance decision has to do with the county's variance decision in this case, and that city decision does not demonstrate that the county is discriminating against petitioner.

> applicant proposes would otherwise be frustrated.' *Wentland v. City of Portland,* 22 Or LUBA 15 (1991). The applicants would like to be able to develop this property with up to 29 lots; however, due to some of the topographical issues of this property that may not be possible. More land may have to be dedicated to ensure that roads are safely built and are up to urban standards as required. LUBA has also determined that the fact that property is regulated in ways that reduce the amount of land that me be developable does not, by itself, justify a variance under the traditional 'practical difficulties or unnecessary hardship' and 'exceptional or extraordinary circumstances or conditions' variance standards. *Corbett/Terwillger Neigh. Assoc. v. City of Portland*, 19 Or LUBA (1990)." Record 15-16.

Petitioner contends that he is not seeking a variance to increase the intensity of development on the property. As far as we can tell, petitioner is correct. We agree with petitioner that the findings quoted immediately above have very little bearing on the relevant question under the CCZLDO 5.3.350(1)(A)(ii) "exceptional or extraordinary circumstances" criterion. But the county's previously quoted findings, at their core, are adequate to express the county's position that the challenging topography on petitioner's property does not amount to exceptional or extraordinary circumstances. Petitioner believes that the steep slopes will add significant expense and pose engineering challenges that warrant a finding of "exceptional or extraordinary circumstances." The county simply arrived at a different conclusion. Based on the record before us, reasonable persons could disagree on that question. Petitioner's disagreement with the county over how that question should be answered provides no basis for reversal or remand. *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990).

Petitioner's third assignment of error is denied.

E. Conclusion

Based on our resolution of petitioner's third and fourth assignments of error above, petitioner has not established that his proposed variance complies with at least one of the three criteria set out at CCZLDO 5.3.350(1)(A). Because petitioner's requested variance must comply with at least one of those criteria, his application must be denied. *See Jurgenson v. Union County Court*, 42 Or App 505, 600 P2d 1241 (1979) (to support a denial,

a local government need only establish the existence of one adequate basis for denial); *Goffic v. Jackson County*, 23 Or LUBA 1, 3-4 (1992) (same). Therefore it is not necessary for us to consider petitioner's challenge to the county's findings that petitioner also failed to demonstrate that his variance application is precluded by CCZLDO 5.3.150 (first assignment of error) and that the variance application does not satisfy the CCZLDO 5.3.350(1)(B) criterion (second assignment of error).

Petitioner third and fourth assignments of error are denied. We do not consider petitioner's first and second assignments of error.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the final decision "inappropriately relies on objectionable evidence." Petition for Review 48. Petitioner also argues under the fifth assignment of error that the county violated Article I, section 20 of the Oregon Constitution by treating his variance application differently than the six other variance applications identified on the list that appears at Prior Record 68 and the additional variance decision that is the subject of petitioner's motion to consider extra-record evidence.

A. Allegedly Objectionable Evidence

As we explained above in our discussion of petitioner's third assignment of error, the county did not commit error by reviewing the six variance decisions that were cited by petitioner after the close of the remand hearing in this matter.

Petitioner also argues that the county erred by not allowing petitioner to rebut the challenged decision itself. Petitioner apparently believes there are inaccuracies in the decision and that he should have been given the opportunity to present argument concerning those alleged inaccuracies to the board of county commissioners. Petitioner cites *Adler v. City of Portland*, 25 Or LUBA 546 (1993) in support of his position. *Adler* lends no support to petitioner's argument here. In *Adler*, we held that there is no right to rebut proposed findings. Similarly petitioner had no right to rebut the challenged decision before it was

adopted. Petitioner's remedy regarding any errors in the decision that was ultimately adopted by the board of county commissioners was to appeal to LUBA. Petitioner has taken advantage of that remedy. Petitioner's arguments under this subassignment of error do not provide a basis for reversal or remand.

This subassignment of error is denied.

B. Article I, Section 20

Petitioner argues that the county violated Article I, section 20 of the Oregon Constitution, which provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens."

Petitioner's entire constitutional argument is that his variance application was denied, whereas other allegedly similar variance applications were approved.

Arbitrary application of facially neutral laws could implicate Article I, section 20. *In re Gatti*, 330 Or 517, 534, 8 P3d 966 (2000) (citing *State v. Clark,* 291 Or 231, 239, 630 P2d 810 (1981)). However, demonstrating that the county denied petitioner's variance application while approving others falls far short of making out a meritorious Article I, section 20 claim. That is particularly the case where there are factual differences in those applications that could easily explain the different results.

As we have already noted, petitioner identified six county decisions that petitioner contends grant approval of variance applications. Prior Record 68. However, as far as we can tell, none of those variance decisions was provided to the county. Petitioner simply identifies each decision by date, file number, tax lot number, zoning and the applicant's last name. *Id*. According to petitioner, two of the identified applications concerned UR-2-zoned properties, but the other four had rural zoning designations and the properties were not located inside a UGB. No additional information is provided concerning those applications. In his testimony to the board of county commissioners petitioner stated as follows:

> "Staff contends that other applicants had to improve roads to urban standards, and concludes that granting the requested variance would give the applicant's favorable treatment over other County residents and developers. * * *
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> "The Planning Department's internet site lists Administrative Decisions made during the past 21 months. Aside from the instant decision, the site lists seven decisions pertaining to road width variances. The Planning Director approved six and denied one. The six approved variances all concerned topographical or physical constraints that could have been overcome if enough money was spent, but they were nevertheless approved. The one denied variance concerned reduction in road width from 28 feet to 20 feet in an urban district. This road ran straight for a few hundred feet on land without any topographical or physical constraints. It is obvious that this applicant was merely seeking to save some money. The Planning Director could have found that the variance did not meet any of the applicable criteria, but simply found that the purported 'hardship' was self-inflicted and denied the variance." Prior Record 137.

Petitioner did not carry his burden to demonstrate that the allegedly similar six variance decisions are sufficiently similar to the variance at issue in this appeal to support a conclusion that the county's decision denying his variance was arbitrary and amounted to discrimination against petitioner that results in a denial of equal privileges and immunities in violation of Article I, section 20 of the Oregon Constitution.

The only variance decision that petitioner has actually provided to LUBA is the one that is the subject of petitioner's motion to consider extra-record evidence. That variance application accompanied a request to partition an approximately 14-acre RR-5 zoned parcel into a 9-acre parcel and a 5-acre parcel. The variance allowed a substandard road to serve dwellings on those two parcels. As we have already noted, petitioner anticipates up to 29 parcels and dwellings on his property. Additionally, the extra-record variance applied to land that was not located inside a UGB and was zoned RR-5, a zoning district that would not have permitted further divisions of the 5-acre and 9-acre parcels. Petitioner has not

established that he was treated differently from similarly situated applicants. Petitioner's claim that the county's action violates Article 1, section 20 is without merit.[12]

This subassignment of error is denied.

The fifth assignment of error is denied.

The county's decision is affirmed.

[12] Petitioner also states that the county discriminated against him in his related partition application. That partition decision is not before us in this appeal and does not provide any support for his arguments. In any event, in petitioner's appeal of the partition approval, we rejected his similar Article 1, section 20 claim for essentially the same reason we deny that claim in this appeal.