BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JCK ENTERPRISES, LLC,
and JCK RESTAURANTS, INC.,
Petitioners,

vs.

CITY OF COTTAGE GROVE,
Respondent,

and

JOHN DUFFIE and THOMAS
FOX PROPERTIES, LLC,
Intervenors-Respondents.

LUBA Nos. 2011-045, 2011-046, and 2011-047

FINAL OPINION
AND ORDER

Appeal from City of Cottage Grove.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was the law office of Bill Kloos, PC.

Sean D. Kelly, Cottage Grove, filed a response brief and argued on behalf of respondent. With him on the brief was Ackley Melendy and Kelly LLP.

Michael C. Robinson, Portland, filed a response brief on behalf of intervenors-respondents. With him on the brief was Roger A. Alfred and Perkins Coie LLP. Roger A. Alfred argued on behalf of intervenors-respondents.

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

REMANDED 09/13/2011

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal three city decisions approving three land use applications to facilitate the development of two restaurants on two adjoining lots: a conditional use permit to allow drive-through facilities for both restaurants, site design review for one restaurant, and a variance to locate a drive-through between a street and one of the proposed restaurants.

FACTS

The subject property consists of two vacant legal lots, tax lots 600 and 603, totaling .83 acres in size, located near an interchange on Interstate Highway 5 (I-5). Both lots are zoned Commercial Tourist (CT), which allows restaurants as a permitted use, and a drive-through facility for a commercial use as a conditional use. Tax lot 600 is located at the corner of Gateway Boulevard and Oswald West Avenue, and has access to Oswald West Avenue. Tax lot 603, to the north, has access to Gateway Boulevard, a minor arterial under the city's Transportation System Plan, which it shares with tax lot 600 under a reciprocal easement. The area including the subject lots includes several fast food restaurants, all with drive-through facilities.

Intervenors, the applicants below, submitted three related applications for a unified development consisting of a Jack in the Box restaurant with a drive-through facility on tax lot 600, and a yet-to-determined coffee shop with a drive-through facility on the adjoining tax lot 603. Conditional use applications were filed for the two proposed drive-through facilities. A site design application was filed for the Jack in the Box restaurant. The proposed site design for the Jack in the Box includes a drive-through between the restaurant and Oswald West Avenue. Because the Cottage Grove Development Code (CGDC) prohibits a street-side drive-through facility, intervenors applied for a variance to site the drive-through between the street and the restaurant. *See* Figure 1 at the end of this opinion (simplified version of proposal).

The city planning commission approved all three applications. Petitioners, who own a neighboring fast-food restaurant, appealed the decision to the city council. The city council conducted a hearing, and denied the appeals, approving the applications. These appeals followed.

FIRST ASSIGNMENT OF ERROR

CGDC 2.3.180.A provides that "[w]hen drive-up or drive-through uses and facilities are allowed, no driveways or queuing areas shall be located between the building and a street." Thus, the proposed drive-through facility for the Jack in the Box restaurant on tax lot 600 can be approved only through a variance.

Petitioners argue that the city council misconstrued the variance standards at CGDC 5.1.500.C, and adopted inadequate findings, unsupported by substantial evidence, in concluding that the proposed drive-through between the restaurant and Oswald West Avenue met the applicable variance criteria.

CGDC 5.1.100 sets out the purpose the city's variance standards:

> "This Chapter provides standards and procedures for variances, which are modifications to land use or development standards that are not otherwise permitted elsewhere in this Code as exceptions to code standards. This Code cannot provide standards to fit every potential development situation. The City's varied geography, and complexities of land development, requires flexibility. Chapter 5.1 provides that flexibility, while maintaining the purposes and intent of the Code."

The applicable variance criteria are set out in CGDC 5.1.500.C, which provides in relevant part:

> "The City shall approve, approve with conditions, or deny an application for a variance based on all of the following:

"a. Strict or literal interpretation and enforcement of the specified regulation would result in practical difficulty or necessary[1] physical hardship inconsistent with the objectives of this Code;

"b. Strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by owners or other properties classified in the same land use district;

"c. There are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply generally to other properties classified in the same land use district;

"d. The granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same lands use district;

"* * * * *

"g. The hardship is not self-imposed; and

"h. The variance requested is the minimum variance that would alleviate the hardship."

A. Prior LUBA Interpretations of Traditional Variance Standards

Initially, petitioners argue that the language of the above variance criteria closely tracks that of "traditional" variance standards, which the Oregon Courts and LUBA have long interpreted strictly to limit variances to truly extraordinary circumstances. For example, petitioners argue that the CGDO 5.1.500.C.a "practical difficulty" standard is identical to standards that LUBA has traditionally interpreted to be a demanding standard, requiring proof that a strict application of the development code would deny the property owner the benefits of ownership. *See Wentland v. City of Portland*, 22 Or LUBA 15, 25 (1991) (practical difficulty must be more than an obstruction to the personal desires of the landowner); *Pierron v. City of Eugene*, 8 Or LUBA 113, 126 (1983) (desire to use property

[1] The parties appear to agree that "necessary" is a typographic error, and should read "unnecessary." In its findings regarding CGDC 5.1.500.C(a), the city council addressed only the "practical difficulty" prong and did not appear to rely on the "necessary physical hardship" prong. We follow the parties in focusing on the "practical difficulty" language.

more profitably is not a "practical difficulty"). According to petitioners, these long-standing interpretations of traditional variance standards constrain a local government's interpretation of similarly worded local variance standards, and only where a local government has expressly adopted more flexible and differently worded variance criteria should LUBA grant the full deference otherwise due to a governing body's code interpretation under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *See Robinson v. City of Silverton*, 37 Or LUBA 521, 527 (2000) (prior LUBA interpretations of traditional variance standards are not relevant to interpretation of differently worded local variance standards).

We disagree with petitioners that the city's interpretation of the CGDO 5.1.500.C variance standards is constrained by long-standing judicial glosses of similar traditional variance standards. The principal authority petitioners cite on this point is *Kelley v. Clackamas County*, 158 Or App 159, 163, 973 P2d 916 (1999), where the Court of Appeals held that a code variance "hardship" standard has the meaning ascribed to it under traditional variance law. However, as the Court of Appeals emphasized in its opinion, *Kelley* involved a hearings officer's code interpretation, which is not entitled to any deference on review. *Id.* at 165. A governing body's interpretation of local variance standards is subject to deferential review under ORS 197.829(1) and *Clark*. *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996).

As we held in *Reagan v. City of Oregon City*, 39 Or LUBA 672, 681 (2001), it is entirely appropriate for local governments to follow LUBA precedent in interpreting variance code language, but that precedent is not binding on local governments, even for variance language that is similar or identical to "traditional" variance standards. The standards at issue in *Reagan* were similar to traditional standards, requiring a showing of "extraordinary circumstances," "hardship," "no practical alternatives," "minimum variance to alleviate the hardship," etc. Nonetheless, we held, the critical question under ORS

197.829(1) is whether the governing body's interpretation is consistent with the express language, purpose and policy underlying the code provision. As elaborated in *Siporen*, determining whether a governing body's interpretation is consistent with the express language of the code provision turns on whether the interpretation is "plausible," considering its text and context. We therefore evaluate petitioners' challenges to the city's interpretations under that deferential standard of review.

B. Practical Difficulty Inconsistent with Code Objectives

The first relevant variance criteria, at CGDC 5.1.500.C(a), requires a finding that: "[s]trict or literal interpretation and enforcement of the specified regulation would result in *practical difficulty * * * inconsistent with the objectives of this Code*." (Emphasis added.) Petitioners raise three challenges to the county's findings under CGDC 5.1.500.C(a).

a. Preponderance of the Evidence

Petitioners first argue that the city council erroneously applied a substantial evidence standard to itself in weighing the evidence in the record, instead of a preponderance of the evidence standard, citing *Lawrence v. Clackamas County*, 164 Or App 462, 992 P2d 933 (1999). However, as intervenor points out, *Lawrence* involved a non-conforming use determination under a statute that the Court interpreted to require that a rebuttable presumption set out in the statute be overcome by a preponderance of the evidence. *Id.* at 469. In the present case, petitioners cite no code language or other authority that imposes a requirement that the city's decision be supported by a preponderance of the evidence.

b. Inconsistent with "All" Code Objectives

The city's findings discuss one purpose statement set out in CGDC 2.3.150.A. encouraging building orientation toward the street, and two of seven objectives set out in CGDC 2.3.100 describing the purpose of Commercial Districts, and conclude that strict interpretation or enforcement of the prohibition on street-side drive-through facilities would result in "practical difficulties" inconsistent with the purpose statement and two code

objectives. We address petitioners' specific challenges to those findings below. In this sub-assignment of error, petitioners argue that the city's .285 batting average in discussing only two of the seven objectives at CGDC 2.3.100 is inadequate, and the city is obligated to evaluate whether the practical difficulty arising from strict interpretation or enforcement of the code would be inconsistent with *each* of the seven code objectives. Moreover, we understand petitioners to argue that CGDC 5.1.500.C(a) supports a variance only if enforcement of the code requirement subject to variance would be inconsistent with *all* applicable Commercial District code objectives; inconsistency with less than all code objectives would not suffice.

Intervenors respond, and we agree, that CGDC 5.1.500.C(a) does not express or necessarily imply a requirement that the city evaluate whether the practical difficulty arising from strict interpretation or enforcement of the code would be inconsistent with all applicable code objectives. Further, CGDC 5.1.500.C(a) does not state that a variance is warranted only if the city finds that code compliance would be inconsistent with every applicable objective. CGDC 5.1.500.C(a) is, at best, ambiguous on these points. The city council clearly understood CGDC 5.1.500.C(a) to support a variance if compliance with the code provision to be varied would be inconsistent with one or more of the relevant objectives. Petitioners do not explain why that view of CGDC 5.1.500.C(a) is erroneous or reversible under ORS 197.829(1), and we cannot say that it is.

c. Meaning of "Practical Difficulty"

Petitioners argue, based on LUBA opinions addressing similarly-worded "practical difficulty" variance standards, that the city's practical difficulty standard must be interpreted stringently, such that the "benefits of property ownership would be prevented by strict enforcement of zoning regulations." *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 60 (1987), citing *Erickson v. City of Portland*, 9 Or App 256, 496 P2d 726 (1972). Petitioners argue in the present case that the city erred in interpreting "practical

difficulty" to be anything that thwarts the applicant's preferred design or desire to maximize profitability, and to exist essentially whenever the applicant's preferred design conflicts with any code requirement. Petitioners contend that the city erred in assuming that the applicant has an unqualified right to develop two, freestanding restaurants on the two adjoining tax lots, and that the only "practical difficulties" in this case are a function of that desired development objective. According to petitioners, the city must consider other design alternatives that do not require a variance, such as putting a single restaurant on the two tax lots, or combining the Jack in the Box restaurant and the proposed coffee shop into a single building with a single drive-through. If any such alternative designs are possible, we understand petitioners to argue, then there is no "practical difficulty." Petitioners note that intervenors submitted six alternative designs for the two tax lots that the city found to be impractical, but argues that those alternatives are insufficient because they all feature two separate restaurants, each with a drive-through, and none proposed a single combined building or single restaurant on the two lots.

As explained above, pre-*Clark* cases interpreting "traditional" variance standards do not control the city's interpretation of similarly worded code variance standards. The city council's most direct interpretation of the practical difficulty standard states:

> "Regarding the choice of use, the City Council does not interpret the 'practical difficulty' standard to require that there be no reasonable use of the subject property without the requested variance. Rather, the City Council interprets that provision to require that it be extremely difficult to use the subject property for intervenors' proposed use without the requested variance." Record 23.

In short, the city council rejected petitioners' argument that the practical difficulty standard is met only if, absent a variance, the property would be essentially undevelopable for any use allowed in the zone. As evident in other findings set out below, the city council understood the practical difficulty standard to be met if there are circumstances governing the subject property (here, a corner lot, two legal lots with separate development rights, and a central

shared access) that make it "extremely difficult" to use the subject property for a proposed use otherwise allowed in the zone. The proposed use here is two separate restaurants on two lots, each with a drive-through. While that view of the practical difficulty standard may differ considerably from the "traditional" interpretation, we cannot say that the city council's interpretation is implausible or inconsistent with the express language, purpose or policy underlying CGDC 5.1.500.C(a). The code does not specify one way or the other whether the proposed use is the baseline for evaluating practical difficulty or what alternative uses or designs are relevant in that evaluation. Elsewhere in the findings, the city notes that CGDO 5.1.500 states that the purpose of the variance standards is to "provide[] flexibility, while maintaining the purposes and intent of the Code." The city's interpretation is consistent with that stated purpose. Under the city's interpretation, the applicant is entitled to take as a given the right to develop both lots with separate restaurants and drive-through facilities otherwise allowed outright or conditionally under the zone, and is not required to demonstrate the impracticality of developing the two lots with a single combined restaurant with a single conforming drive-through, or to forgo developing both lots with separate uses. Petitioners have not demonstrated that the city's more flexible interpretation is inconsistent with the express language or purpose of CGDC 5.1.500.C(a).

d. Practical Difficulty Inconsistent with the Objectives of this Code

Finally, petitioners argue that the city conducted the practical difficulty analysis backwards, by evaluating only whether *granting* the proposed variance to allow a drive-through between the restaurant and the street is *consistent* with the two Commercial-zone objectives the city considered. Instead, petitioners argue, CGDC 5.1.500.C(a) requires the city to consider whether "[s]trict or literal interpretation or enforcement of the specified regulation [*i.e.*, the prohibition on a street-side drive-through] would result in practical difficulty * * * inconsistent with the objectives of this Code." The focus of the analysis, petitioners argue, is whether *enforcing the code prohibition on a street-side drive-through*

would result in a practical difficulty inconsistent with the code objectives, not on whether granting the variance to allow a street-side drive-through is consistent with one or more objectives.

Petitioners are correct that the city's findings focus almost exclusively on whether the proposed variance is consistent with the three identified code objectives. The relevant findings state:

> "[CGDO] 2.3.150.A Commercial Districts – Building Orientation and Commercial Block Layout states that the purpose of this section is to orient buildings 'close to the streets to promote pedestrian-oriented development where walking is encouraged.' The building has been oriented to the principal street (Gateway), is 100% within the required build-to-line of 60' from this principal street, and is only 22' from Oswald West Avenue. A private sidewalk is proposed to connect the public sidewalk on Oswald to the front door of the building. While this pedestrian corridor crosses the drive-through aisle, it is clearly delineated as required elsewhere in the code with striping and will meet all ADA standards. This pedestrian corridor will make the building easily reachable from the public sidewalk, meeting the objective of the code as stated above.
>
> "Additionally, at least two of the purposes identified in [CGDO] 2.3.100 Commercial Districts – Purposes are satisfied with this variance. Allowing the variance would promote efficient use of land and urban services, by allowing two narrow commercial properties to be developed as one development site and limiting the number of additional curb cuts on Gateway Boulevard. Additionally the variance encourages pedestrian-oriented development by allowing the building to be located close to the lot's adjacent streets while still allowing drive-through uses. Alternatives reviewed by the applicant show that each of the proposed alternatives that meet the code either violate other sections of the code or make the building and development site less pedestrian-oriented." Record 22-23.

Aside from the last sentence in the above-quoted findings, the entire analysis focuses on whether the *proposed variance* is consistent with the three identified code objectives: (1) orienting buildings close to the street to promote pedestrian-oriented development; (2) promoting the efficient use of land and urban services, and (3) encouraging pedestrian-oriented development in commercial areas.

Intervenor responds that analyzing whether granting the proposed variance is consistent with code objectives is the mirror-reverse of analyzing whether enforcing the code requirement—denying the variance—is inconsistent with the code objectives, and that analysis of the former can substitute for analysis of the latter. However, that a variance may be consistent with some code objectives does not necessarily mean that enforcing the code and thus denying the variance would be *inconsistent* with those or other applicable code objectives, which is the particular inquiry that CGDC 5.1.500.C(a) demands. The two inquiries are not fungible.

The only language in the city's findings that comes close to the inquiry required by CGDC 5.100.C(a) is the final sentence that "[a]lternatives reviewed by the applicant show that each of the proposed alternatives *that meet the code* either violate other sections of the code or make the building and development site less pedestrian-oriented." (Emphasis added.) Petitioners raise no specific challenge to this language, or to the six alternatives intervenors submitted to demonstrate the practical difficulty of a conforming drive-through design. We note that the city does not identify how the alternatives that conform with the drive-through restriction "violate other sections of the code." Nor does the city explain how the alternatives are "less pedestrian oriented," which presumably refers to the CGDC 2.3.150.A purpose statement to orient buildings close to the street to promote pedestrian-oriented development, and the CGDC 2.3.100 purpose statement to encourage pedestrian-oriented development in commercial areas. The city seems to conclude that placing the drive-through between the Jack in the Box restaurant and the nearest street and sidewalk, Oswald West, with a striped pedestrian crosswalk across the drive-through to the restaurant, is more consistent with promoting and encouraging pedestrian-oriented development than placing the drive-through in a conforming location, with no drive-through between the restaurant and the street and sidewalk. On its face that is a curious conclusion. Some of the alternative designs in the record appear to show that placing the drive-through in a

conforming location could result in the restaurant being as close or closer to the street and sidewalk than the preferred design, and moreover those alternatives would provide direct sidewalk access to pedestrians without the need to walk across a drive-through lane to reach the restaurant. *Compare* Record 1784 (proposed) with Record 1785-86 (conforming alternatives). There may be other problems with those alternatives, but for purposes of evaluating whether enforcing the prohibition on a street-side drive-through would be inconsistent with pedestrian-access code objectives, the city's reasoning on this point is obscure to us.

Notwithstanding that petitioners offer no specific challenges to the last sentence of the above-quoted findings or the six identified alternatives, we agree with petitioners that remand is necessary to adopt more adequate findings regarding whether enforcement of the drive-through regulations would be inconsistent with one or more code objectives. Petitioners argue, correctly, that the city's findings focus almost exclusively on the wrong inquiry. The only finding that arguably focuses on the correct inquiry is a one-sentence statement that is conclusory and inadequate.

This sub-assignment of error is sustained, in part.

C. Privileges Enjoyed By Owners of Property in the Same Zoning District

CGDC 5.1.500.C(b) requires a finding that "[s]trict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by owners or other properties classified in the same land use district." The city found:

> "The privilege enjoyed by owners or other properties in the CT zoning district is the right to develop a drive-through as a conditional use in the CT zoning district. However, because of the fact that the Jack in the Box lot is on a corner lot and shares access with an adjacent tax lot, the lack of a variance to the 2.3.180.A provision prohibiting queuing areas between a building and a street would deprive this property owner of the same privileges enjoyed by others in the CT zone.
>
> "Other nearby restaurant uses have drive-through lanes that are located along road frontages between the building and the road, which is consistent with the

> auto-oriented nature of this location and the CT zoning district. The Burger King restaurant, located one block south on Gateway Boulevard, has its exit to the drive-through lane along Gateway Boulevard. The Arby's restaurant, located at 100 Gateway Boulevard, has its drive-through lane along Gateway Boulevard. The Taco Bell restaurant at the corner of Thornton and Row River Drive has a drive-through lane along both road frontages.
>
> "Consequently, the City Council finds that strict or literal interpretation and enforcement of this regulation would deprive the applicant of privileges enjoyed by owners or other properties classified in the same land use district and this criterion is satisfied." Record 23-24.

Petitioners argue that the focus of CGDC 5.1.500.C(b) is on what the zoning code allows other owners in the CT district to do, not on what other landowners in the CT zone have actually done in terms of a drive-through, because such existing drive-throughs might have been constructed in compliance with older versions of the code, by variance, or simply in violation of the code. We tend to agree with petitioners that findings describing existing drive-throughs constructed on nearby CT-zoned properties lend little support to the conclusion that requiring a conforming drive-through prohibition on tax lot 600 would deprive the applicant of privileges enjoyed by other owners in the CT zone. The proper question under CGDC 5.1.500.C(b), as petitioners argue, is what the CT zone allows other owners in the CT zone to construct on their property, not what has actually been constructed.

On this point, the city found that the pertinent "privilege" is the right to construct two restaurants on the two legal lots, each with drive-throughs. The city found that due to the corner lot and shared access, the applicant does not enjoy that same privilege. Petitioners repeat their argument that the applicant's inability to enjoy the privilege of constructing conforming drive-throughs is largely due to the applicant's desire to construct two restaurants in separate buildings on the two lots rather than a single restaurant or two restaurants in a single building. However, as explained above, the city reasonably interprets its code to take as a given the ability to develop both legal lots with restaurant uses allowed in the zone, and the applicant is not required to demonstrate that it is impractical to combine the two restaurants into a single building or develop both lots with only a single restaurant.

As explained above in discussing the practical difficulty variance standard, it is not clear to us that the city has adequately demonstrated that alternative two-restaurant designs with conforming drive-throughs violate the code or are otherwise impractical alternatives. However, if the city is able to demonstrate on remand that it is impractical to construct one or more of those two-restaurant alternatives with conforming drive-throughs without violating some other provision of the code, the CGDC 5.1.500.C(a) "practical difficulties" standard is met. In that circumstance, it would also follow that petitioners do not enjoy the same privileges shared by owners of other property in the CT zone, so that the CGDC 5.1.500.C(b) strict enforcement "would deprive the applicant of privileges enjoyed" by others standard is also met. Nevertheless, with that caveat, petitioners' particular arguments under this sub-assignment of error do not provide an additional basis for reversal or remand.

This sub-assignment of error is denied.

D. Exceptional or Extraordinary Circumstances that do not Generally Apply to Other Properties in the Same Zoning District

CGDC 5.1.500.C(c) requires a finding that "[t]here are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply generally to other properties classified in the same land use district." The city council found:

> "The exceptional circumstances or conditions applicable to this property not generally applicable to other properties are the facts that two tax lots share a single driveway to Gateway Boulevard, which is in turn serviced by a common and reciprocal easement separating the two lots. A second access on Gateway from the corner tax lot is not practical, because a new access would necessarily be located too close to meet access management standards (75' from corner) for arterial streets such as Gateway. Therefore the two tax lots are restricted to one entrance, and must have a joint access/easement. The location of the easement driveway means that it is not practical nor possible to locate a drive-through facility and stacking lane away from either of the streets on this corner lot." Record 24.

Petitioners challenge the conclusion that shared access serving two tax lots qualifies as an "exceptional or extraordinary circumstance." According to petitioners, the city's findings focus exclusively on the subject lots, and fail to conduct any basic fact-finding about

other tax lots in the CT zone, leaving the unsupported impression that it is unusual for adjoining lots in the CT zone to share access. On the contrary, petitioners argue, shared access between adjoining lots on an arterial is in fact city policy. Petitioners note that pursuant to CGDC 3.1.200.I(2) the city may require shared access "[f]or adjacent developments, where access onto an arterial is limited." The above-quoted finding discusses the fact that a second access for tax lot 160 onto Gateway Boulevard is prohibited, because it "would necessarily be located too close to meet access management standards (75' from corner) for arterial streets such as Gateway." *Id.*

Intervenors respond that petitioners' reliance on CGDC 3.1.200.I(2) is misplaced, because the city found elsewhere in its findings that Gateway Boulevard is a collector street. However, as explained in our resolution of the third assignment of error, the city erred in finding that Gateway Boulevard is a collector street, because the city's Transportation System Plan clearly identifies Gateway Boulevard as an arterial. Further, in the above-quoted finding the city council acknowledged that Gateway Boulevard is an arterial, and relied on access limitations applicable to arterials to conclude that the exceptional circumstances standard is met.

We agree with petitioners' initial argument that the above-quoted finding is inadequate, because it fails entirely to conduct any fact-finding regarding other tax lots in the CT district. For all the findings reflect, shared access between adjoining lots fronting an arterial is a common circumstance in the CT district, a distinct possibility given the preference for shared access set out in CGDC 3.1.200.I(2).[2] CGDC 5.1.500.C(c) requires the city to identify one or more exceptional or extraordinary circumstances applicable to the

[2] It may be that even if shared access between adjoining lots in the CT district is a common circumstance, that limitation may operate in concert with other conditions on the subject property so that the conditions viewed together are "exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply generally to other properties classified in the same land use district." However the city's findings do not show that such is the case here.

subject property *that do not generally apply to other property* in the CT zone. That necessarily requires some comparison between the subject property and other property in the CT zone. This subassignment of error is sustained, in part.[3]

E. Grant of Special Privileges

CGDC 5.1.500.C(d) requires a finding that "[t]he granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same land use district." The city's finding is a single sentence that simply refers to the "above-described exceptional circumstances that apply to this property that do not apply to other properties in the same zoning district[.]" Record 24. Petitioners argue, and we agree, that the city's reliance on its findings regarding the exceptional circumstances standard to demonstrate that the "special privileges" standard is met suffers from the same flaw described above: the only exceptional circumstance identified is shared access to an arterial, but the findings and the record do not show that that circumstance is not generally present in the CT zone. This sub-assignment of error is sustained.

F. Hardship Not Self-Imposed

CGDC 5.1.500.C(g) requires a finding that "[t]he hardship is not self-imposed." The city's finding on this standard states:

> "Two tax lots currently exist at this location. * * * The applicant has the right to develop each individual parcel separately. However, there is only one approved vehicular access point from Gateway Boulevard, on the northern tax lot, and there is unlikely to be a second approved access for the southern lot as such an access would be too close to the intersection. Consequently, the southern lot, at the corner of Gateway and Oswald, has no access to the principal arterial. A joint access easement between the two lots solves this problem, but restricts development of the southern lot to the southern half of that tax lot. The applicant has the right under the Development Code to apply for a conditional use permit for a drive-through use, and such uses are typical

[3] Petitioners repeat their arguments that the city is obligated to follow LUBA's prior interpretations of the "traditional" exceptional or extraordinary circumstances variance standard. We reject that argument for the reasons set out above.

> in this area. However, a drive-though is impossible without this variance. Hence the hardship is not self-imposed, but is rather imposed by the exceptional circumstances inherent to the particular parcel in question." Record 25.

Petitioners first contend that the city fails to adequately identify the alleged "hardship." Intervenor responds that the city's finding builds on its previous findings under the "practical difficulty" prong of CGDC 5.1.500.C(a), which the city identified as the fact that tax lot 600 is a corner lot and shares access with the adjoining lot, creating a "practical difficulty" in locating a drive-through and stacking lane on other than a street side of the proposed restaurant on tax lot 600. Record 22. In addition, intervenor cites to the city's finding under the CGDC 5.1.500.C(h) "minimum variance that would alleviate the hardship" standard, discussed below, in which the city equates the pertinent "hardship" with the "practical difficulty" identified under CGDC 5.1.500.C(a). Record 25.

We agree with intervenor that the city's findings as a whole adequately identify "[t]he "hardship" for purposes of CGDC 5.1.500.C(g), as equivalent to the "practical difficulty" identified under CGDC 5.1.500.C(a). Petitioners appear to argue that "[t]he hardship" as used in CGDC 5.1.500.C(g) cannot mean "practical difficulty," since CGDC 5.1.500.C(a) uses both the terms "practical difficulty" and "hardship." We understand petitioners to argue that the "hardship" as used in CGDC 5.1.500.C(g) instead must refer to the "[un]necessary physical hardship" prong of CGDC 5.1.500.C(a), and must be given the rigorous interpretation that LUBA has given the traditional hardship variance standard in several prior opinions.

As noted, CGDC 5.1.500.C(a) requires a finding that enforcement of the specified regulation "would result in practical difficulty or [un]necessary physical hardship" inconsistent with the objectives of the code. CGDC 5.1.500.C(a) is framed in the disjunctive, so it is evident that either "practical difficulty" or "[un]necessary physical hardship" is a qualifying circumstance for purposes of that provision. CGDC 5.1.500.C(g) and (h) refer simply to "[t]he hardship," without the qualifying terms used in CGDC

5.1.500.C(a). The use of the definitive article suggests that the "[t]he hardship" is already identified elsewhere, under other standards. If "[t]he hardship" equated only to the "[un]necessary physical hardship" prong of CGDC 5.1.500.C(a), that would be inconsistent with the disjunctive nature of CGDC 5.1.500.C(a). Given this context, it is reasonable to understand the unqualified term "[t]he hardship" as used in CGDC 5.1.500.C(g) and (h) to be an umbrella term that encompasses both the "practical difficulty" and "[un]necessary physical hardship" prongs of CGDC 5.1.500.C(a). In short, the city's interpretation, fairly implied in its findings, that the "[t]he hardship" as used in CGDC 5.1.500.C(g) and (h) is equivalent to or includes the "practical difficulty" identified in its findings under CGDC 5.1.500.C(a) is plausible and consistent with the text and context of the relevant language. That is an adequate identification of "[t]he hardship" for purposes of CGDC 5.1.500.C(g) and (h).

Petitioners next challenge the city's finding that the hardship is not "self-imposed." If the "hardship" is simply the inability to construct two drive-through restaurants on the two adjoining tax lots, petitioners argue, then the "hardship" stems solely from intervenors' design preference for two separate buildings, a hardship easily alleviated by constructing a single building. However, as noted above, the city equated the hardship with the previously identified "practical difficulty" resulting from the combination of a corner lot and shared access to the arterial, which the city found to constrain the location of the drive-through serving the Jack in the Box restaurant. Petitioners do not contend that intervenors created either of those circumstances, and have not demonstrated that the city erred in concluding that the identified hardship was not "self-imposed," for purposes of CGDC 5.1.500.C(g).

This subassignment of error is denied.

G. Minimum Variance that would Alleviate the Hardship

CGDC 5.1.500.C(h) requires a finding that the "[t]he variance requested is the minimum variance that would alleviate the hardship." The city found:

> "The variance requested is to allow a drive-through lane between the south side of the Jack in the Box restaurant and Oswald Avenue. This is the minimum variance that will alleviate the hardship identified in response to [CGDC] 5.1.500.C(a) above. No other variance is required for the development as proposed, and all other code requirements have been shown to be meet through SDR 1-10. The City Council finds that this criterion is satisfied." Record 25.

Petitioners repeat their arguments that the city has failed to identify a "hardship" for purposes of CGDC 5.1.100.C(g). We reject that argument for the reasons set out above. Petitioners then challenge the finding that the variance is the "minimum variance that would alleviate the hardship," since there are alternative development designs, such as combining the two restaurants into a single restaurant with one drive-through or constructing the Jack in the Box without a drive-through, that would require no variance at all. In addition, petitioners argue that the request for a variance to allow a street-side drive-through assumes that the shared access to Gateway Boulevard is fixed and immovable, due to minimum driveway separation requirements. However, petitioners argue that the city has the flexibility under its code to approve new driveway access to tax lot 600 less than the minimum 75 feet from the intersection applicable to an arterial. Because alternative access designs are possible that might eliminate the need for a variance, petitioners argue, the city's findings fail to establish that the requested variance is the "minimum variance that will alleviate the hardship."

Intervenors respond, and we agree, that the "minimum variance" standard in CGDC 5.1.100.C(g) presumes that a variance has been justified under other standards, and is concerned with the *extent* of the requested variance. CGDC 5.1.100.C(g) applies most easily to requested variances to setbacks or other numerical standards, where the city must evaluate whether a *lesser* variance than that requested will also alleviate the hardship. It is difficult to meaningfully apply CGDC 5.1.100.C(g) to a variance to a code *prohibition* on a street-side drive-through in the CT zone. Petitioners do not suggest that a narrower or shorter street-side drive-through would alleviate the identified hardship, but only suggest alternatives that

would allegedly eliminate the need for a street-side drive-through at all. Petitioners' arguments under this sub-assignment do not provide a basis for reversal or remand.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that for the reasons set out in the first assignment of error the variance to allow a street-side drive-through for the Jack in the Box restaurant is not warranted, and therefore the conditional use permit approval for the Jack in the Box restaurant must also be remanded, because it is dependent on the variance approval to avoid the necessity to satisfy the CGDC 2.3.180 prohibition on a street-side drive-through.

We agree with petitioners that because we have remanded the variance approval to the city for additional findings, the conditional use permit approval must also be remanded, notwithstanding that petitioners advance no independent challenges to the conditional use permit approval. However, we note that the bases for remand under the first assignment of error involve inadequate findings, and on remand if the city adopts more adequate findings again approving the variance, the city may also re-approve the conditional use permit.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In approving the site design application for the proposed Jack in the Box restaurant, the city concluded that the "throat" of the proposed shared access onto Gateway Boulevard complies with CGDC 3.1.200.L(1)(b). The "throat" of the driveway is the length of the driveway from the curb line to the first on-site conflict point. The site plan proposes a throat length of 40 feet. CGDC 3.1.200.L(1)(b) requires a throat length of 35 feet for a driveway on a commercial collector street, and a 55 foot throat length for a driveway on an arterial street.

The city's TSP designates Gateway Boulevard as an arterial street, as the city's findings recognize at various points. Intervenor initially proposed a variance to the 55 foot

minimum driveway throat length required by CGDC 3.1.200.L(1)(b). However, city staff took the position that Gateway is a collector street, at least for purposes of CGDC 3.1.200.L(1), and the city council ultimately adopted a finding that "Gateway is a minor arterial under the TSP, or a 'commercial collector' in the Development Code." Record 43. The city council then concluded that the proposed 40-foot driveway throat length complied with the 35-foot minimum applicable to collector streets. No variance to CGDC 3.1.200.L(1)(b) was granted.

The findings do not explain the basis for the conclusion that Gateway Boulevard's functional classification is both an arterial and a "commercial collector," or which CGDC code provision designates Gateway a "commercial collector." On appeal, intervenors offer two supporting rationales for the conclusion that Gateway is a "commercial collector" under the CGDC. First, intervenor cites to the general code definitions of "arterial" and "collector, minor/major," and argues that Gateway Boulevard better fits the definition of "collector" than it does the definition of "arterial," because it serves a commercial area.[4] Both code definitions refer to road standards in CGDC chapter 3.4.[5] Citing to those road standards, intervenors argue that Gateway Boulevard as presently constructed (two travel lanes, one center or turning lane, no parking) fits better within the road standards for a "commercial collector" than for an arterial.

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[4] CGDC 1.3.300 includes the following definitions:

> **"Arterial.** The highest order classification of streets; includes highways and other major streets with limited or no direct access from adjoining properties. Arterials are streets of considerable continuity which serve as traffic arteries for intercommunication among large areas. See standards under Section 3.4.1."

> **"Collector, minor/major.** Type of street that serves traffic within commercial, industrial, and residential neighborhood areas. Connects local neighborhood or district streets to the arterial network. Part of the street grid system. See standards under Section 3.4.1."

[5] The definitions cite to the standards in "Section 3.4.1." There is no CGDC 3.4.1 in the current code. CGDC Chapter 3.4 is entitled "Public Facilities." CGDC 3.4.100 is entitled "Transportation Standards," and includes standards for arterials and collectors.

Neither rationale is persuasive. Generally, it is a local government's TSP that designates the functional classification of existing roads within the local government's jurisdiction. There is no dispute that the TSP designates Gateway Boulevard a minor arterial. The city's TSP is part of the city's comprehensive plan, and to the extent there is any conflict between the TSP and the CGDC on this point, the CGDC must give way. *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975). But we see no necessary conflict. Nothing in the CGDC cited to us specifically designates Gateway Boulevard a collector of any kind. It is not clear what purpose the CGDC 1.3.300 definitions of "arterial" and "collector" serve, but we do not think those definitions can be applied consistently with *Baker* in approving a permit application to effectively redesignate the functional classification of an existing arterial so designated in the TSP. Further, while a case can be made that Gateway Boulevard better fits the CGDC 1.3.300 definition of "collector minor/major" than it does the CGDC 1.3.300 definition of "arterial," an equal case can be made for the opposite conclusion. Gateway appears to be a significant city street that connects several collectors and a large area of the city to the highway interchange. *See* TSP Figure 3.5 (Functional Classifications Map). Finally, both definitions refer to the road standards in CGDC chapter 3.4. Contrary to intervenors' argument, consideration of those road standards make it clear that Gateway Boulevard was constructed to meet arterial standards, which would make sense if only Gateway is an arterial. Table 3.4.100.F sets out standards for different types of arterials and collectors, with illustrative figures showing street sections. Gateway Boulevard as constructed fits the specifications for an arterial "3-Lane Boulevard" (two travel lanes, one center lane, no on-street parking), as illustrated in Figure 3.4.100.F(1). Gateway Boulevard does not fit the specifications for a "commercial area collector," as Figure 3.4.100.F(4) illustrates (two travel lanes, no center lane, on-street parking), or for any kind of collector.

In sum, the city has not established that Gateway Boulevard is properly viewed as a collector of any kind under the TSP or the CGDC. Accordingly, the city erred in approving

the proposed 40-foot driveway throat length without taking a variance to the 55-foot requirement in CGDC 3.1.200.L(1)(b).

The third assignment of error is sustained.

The city's decisions are remanded.

Figure 1