BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE CITY OF ALBANY,
Petitioner,

vs.

LINN COUNTY,
Respondent.

LUBA No. 2019-034

FINAL OPINION
AND ORDER

Appeal from Linn County.

M. Sean Kidd, Albany, filed the petition for review and argued on behalf of petitioner. With him on the brief was Delapoer Kidd, P.C.

Kevan J. McCulloch, Deputy County Attorney, Albany, filed the response brief and argued on behalf of respondent.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REVERSED 6/13/2019

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

Opinion by Rudd.

NATURE OF DECISION

The city appeals a decision of the county board of commissioners approving concurrent applications to (1) authorize a variance to a 20-acre minimum lot size for lots created from a 16.7-acre property, (2) enable the partition of the 16.7-acre property into two lots with sizes established by the variance, and (3) issue conditional use permits (CUP) authorizing a dwelling on each of the new lots.[1]

FACTS

Applicants own a 16.7-acre property (the subject property) in the county. In the early eighties, the county zoned the subject property Urban Growth Area-Urban Growth Management 20 (UGA-UGM-20), a zone conditionally allowing one single-family dwelling per lot. In July 2018, applicants sought permission to develop two single-family dwellings on the subject property.

Because the UGA-UGM-20 zone only allows one single-family dwelling per lot, the applicants needed to obtain approval to partition the subject property into two lots. Applicants applied to split the subject property into one 11.7-acre lot and one 5-acre lot. Because the minimum lot size in the UGA-UGM-20 zone is 20 acres, applicants sought a variance to the minimum-lot-size standard.

---

[1] The decision also approved the modification of an access easement through an access review application but none of petitioner's assignments of error relate to the access review.

Because applicants planned to construct two single-family dwellings on the subject property, two CUPs were required. Applicants submitted concurrent applications to the county seeking the required partition, variance and CUP approvals (collectively applicants' proposal). The city disagrees with the county's decision approving applicants' proposal and this appeal followed.[2]

BACKGROUND

Pursuant to ORS 195.025, counties are responsible for coordinating all planning activities within the county "to assure an integrated comprehensive plan for the entire area of the county." ORS 195.025(1). Although the subject property is outside the city limits, it is located within the city's urban growth boundary and designated Urban Growth Area (UGA). Petition for Review, App 42. Areas within the UGA are intended for future urban expansion, requiring the county and city to establish a structure for working together to facilitate the future transfer of land use management authority over properties within the UGA from the county to the city. *Id.* at 46, 64.

In 1988, the county and the city entered into an Urban Growth Boundary Management Agreement (Agreement) "to establish a joint management procedure * * * for the implementation of the Albany Urban Growth Boundary

---

[2] The appeal was filed after January 1, 2019, and falls under LUBA's amended rules, OAR 661-010-0039 (2019). Accordingly, the city is permitted to file a reply brief to respond to arguments in the respondent's brief. The county filed a response to the city's reply brief on May 15, 2019. Our rules do not allow for a response to a reply brief, and we disregard the county's response.

and plan for the Albany fringe." Petition for Review, App 42. The existence of the Agreement is referenced in a policies section of the county code at Linn County Code (LCC) 905.600 *et seq*. LCC 905.610 provides in part that "[i]n order to identify, manage, and amend urban growth boundaries, the cities and counties have entered into urban growth boundary management agreements (on file in the planning department.)" LCC 905.610(A). LCC 905.610(D) explains that "[t]he cities' right to review and comment on county land use decisions within the planning area is secured within the UGB management agreement."

Pursuant to the Agreement, comprehensive plan amendments within the urban fringe must be initiated at the city. Petition for Review, App 42.[3] The city provides the county notice of the comprehensive plan amendment request and if possible, joint city-county hearings are held. *Id.* If the city and county are unable to reach concurrence on a comprehensive plan amendment request, the request is denied. *Id.* at 43.

Maps identifying areas with a UGM zoning district designation are attached to the Agreement. *Id.* at 48-49. Modifications to the zoning of these areas may be made only upon "written concurrence of both the City and County and through the zone amendment process." *Id.* at 43.

---

[3] "The urban fringe is defined as the area situated inside the Albany Urban Growth Boundary and outside the Albany City limits." Petition for Review, App 42.

The Agreement also provides that the county shall notify the city "and request review and recommendation on [certain] proposed development and planning actions within the urban fringe * * *." *Id.* at 44. Unlike the general discussion of the county agreements with cities set forth in LCC 905.610(B), which omits variances from the list of land use decisions the cities will provide comment on, the Agreement provides that city input on variances will be designated "recommendation[s]." *Id.*

The county maintains that it has had wide discretion over variances within the UGA-UGM zones since the 1980s. Response 19. The city maintains that, since the adoption of the original Agreement, the county has substantially amended the LCC approval process for variances in the UGA-UGM zones and that the LCC approval process for a variance is inconsistent with the city's role in that process contemplated by the Agreement. Petition for Review 32.

STANDARD OF REVIEW

The applicable approval criteria in this case involve the county board of commissioners' interpretation of both county and city land use provisions. The city argues that its interpretation of city land use provisions provided to the county during the proceedings on the applications is subject to the deferential standard of review at ORS 197.829(1). Petition for Review 7. The county disagrees. Response Brief 8. It is therefore helpful to set out the applicable standard of review at the outset.

The county board of commissioners made the final decision in this matter.

> "[W]hen a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed * * * unless the interpretation is inconsistent with *all* of the 'express language' that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations." *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (emphasis in original).

Thus, we will review the county board of commissioners' interpretation of its own regulations under ORS 197.829(1) and affirm it, so long as that definition is not inconsistent with the express language of the regulation or its underlying purposes and policies. However, we do not review the county's interpretation of city regulations under ORS 197.829(1) and instead review them for legal correctness.

We addressed county approval of a different variance in the UGA-UGM-20 zone in *City of Albany v. Linn County*, __ Or LUBA __ (LUBA No 2018-029, July 3, 2018). In that case, the county approved a variance necessary to create two one-acre lots through a partition of a two-acre lot. As discussed below, some of the applicable county code provisions require the county to evaluate the consistency of the applicant's proposal with city comprehensive plan provisions. We reviewed any county interpretations of the Albany Comprehensive Plan (ACP) to determine whether they were correct, holding that:

> "[t]o the extent the board of county commissioners engaged in interpretation of the ACP, the county is not entitled to deference under ORS 197.829(1) and *Siporen*, 349 Or 247, when interpreting another jurisdiction's land use law." *Id.* at ___ (slip op at 12).

County interpretation of non-county law such as that of the city is not afforded deference; rather the question is whether the county properly construed applicable law. ORS 197.835(9)(a)(D). In reviewing the county's interpretation of another jurisdiction's laws, we will consider the text, context and legislative history of the law at issue in order to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009).

The city provided the county with the city's interpretation of applicable ACP provisions. Although the city council is the enacting legislature for the ACP, the city is not the decisionmaker in this matter. We agree with the county that when the city is a participant in a land use proceeding before the county, LUBA does not review the city's provided interpretation of ACP provisions under the deferential standard of review set out in ORS 197.829(1), as interpreted in *Siporen*. Rather, deference is given to a decisionmaker when that decisionmaker is the governing body interpreting its own code. *Gage v. City of Portland*, 319 Or 308, 317 (1994).

FIRST ASSIGNMENT OF ERROR

The city's first assignment of error raises numerous challenges to the decision based on a variety of intermingled code standards. The common issue raised throughout the first assignment of error is whether the county properly approved the variance to the minimum lot size required. Our discussion of the first assignment of error is organized by LCC provision.

A. LCC 938.300(B)(1)

The county's hearing notice identified LCC 938.340 as containing applicable variance approval criteria. LCC 938.340 is titled "Decision criteria for UGA-UGM minimum property size" and expressly references LCC 938.300(B)(2) and (B)(3).[4] Petition for Review 17. LCC 938.300 contains general variance criteria. The county's findings address LCC 938.300(B)(2) and (3). Record 31-36. The county's findings do not address LCC 938.300(B)(1).[5] The city argues that each of the variance criteria in LCC 938.300(B) apply and the county was required but failed to address LCC 938.300(B)(1). Petition for Review 16.

The county responds initially that the city did not raise compliance with LCC 938.300(B)(1) below and has waived the issue. Response 6.

---

[4] LCC 938.340 sets forth:

> "Decision criteria for UGA–UGM minimum property size
>
> "The Director may approve a variance to the minimum property size of an authorized unit of land in the UGA–UGM zoning district if:
>
> "(A) the criteria of LCC 938.300 (B) (2) and (3) are met; and
>
> "(B) the proposal is consistent with the affected city's comprehensive plan."

[5] LCC 938.300(B)(1) requires that the county find that "[a] variance from a development standard as set forth in LCC 934 (Development Standards Code) is needed because conditions or circumstances or both exist on the land or structure involved that renders development impractical or impossible."

The city acknowledges that it did not challenge compliance with LCC 938.300(B)(1) specifically, but asserts that its challenge to the variance under LCC Chapter 938 was sufficient to preserve the issue. Reply Brief 3. In support of its position, the city cites *Milne v. City of Canby*, 46 Or LUBA 213, 220 n 6 (2004). We held in *Milne* that an issue was adequately preserved where the petitioner "did not make the precise legal arguments below that they advance[d] on appeal" but had argued below that certain land could not be included in the UGB under an exception. *Id.* We agree that the issue of eligibility for a variance based on satisfying LCC 938.300(B)(1) has been preserved by the city's challenges that the property was not eligible for a variance to lot size.

The city cites *Sparks v. City of Independence*, 2 Or LUBA 215, 220-221 (1981) and *Fisher v. City of Gresham*, 10 Or LUBA 283, 289, *rev'd on other grounds*, 69 Or App 411, 685 P2d 486 (1984), for the proposition that "[a] local government must consider all of its variance criteria, including the specific criteria and any general variance criteria and standards that may be found in the local government's land use regulations." Petition for Review 17 (emphasis omitted). These cases are inapposite. In *Sparks*, petitioners argued that a general code provision authorizing variances to code standards authorized the city to vary the variance approval criteria. We rejected that position. In *Fisher*, we held that the local decision had to identify relevant provisions in the comprehensive plan. Neither of these cases address the scope of approval criteria when the subject

code has specified particular sections of variance approval criteria applicable in one particular zone, like LCC 938.340 does.

The city does not explain why LCC 938.300(B)(1) is an applicable approval criterion, given the express language of LCC 938.340 that refers only to meeting "the criteria of LCC 933.300(B)(2) and (3)[.]" Petition for Review 17; LCC 938.340(A).

This subassignment of error is denied.

LCC 938.300(B)(1) does, however, assist in our resolution of another of the city's challenges. The city also argues in its first assignment of error that the county's approval of the requested variance is an improper rezoning of the subject property. Petition for Review 8.

The county's comprehensive plan and the LCC recognize four UGA-UGM zones (UGM-2 ½, UGM-5, UGM-10 and UGM-20), "distinguished only by their property size." LCC 930.700(D). The subject property is zoned UGA-UGM-20, and the UGA-UGM-20 zone has a minimum lot size of 20 acres. Petition for Review 8. The city argues that approving a variance that has the effect of allowing a 5-acre lot and an 11.7-acre lot rezones the UGA-UGM-20 zoned property to UGA-UGM-5. Petition for Review at 9-10.

The city argues that a variance should not be used as a substitute for rezoning. In *Kelley v. Clackamas County*, 158 Or App 159, 163-164, 973 P2d 916 (1999), the Court of Appeals reversed LUBA's decision and concluded that a hearings officer properly denied a variance where a property owner sought to

build a pool house in his front yard in violation of established setback requirements. Although the variance request was due to the physical characteristics and improvements on the property, it was not a hardship for people to have to change or shower in the residence on site rather than in a pool house. The court opined that "variances are an extraordinary remedy that 'should not be employed as a substitute for the normal legislative process of amending zoning regulations." *Id.* (citing *Lovell v. Independence Planning Comm.*, 37 Or App 3, 7, 586 P2d 99 (1978)). In *Lovell*, an applicant sought to combine the rear portion of two existing lots to create a third lot. The code required a showing that strict application of the zoning ordinance would cause "practical difficulties or unnecessary hardships because of exceptional or extraordinary circumstances or conditions affecting the applicant's property." *Id.* at 6. The city council affirmed the planning commission approval of the variance to lot size. The court of appeals reversed the approval and held "if the city believes the lot size that would be left after the proposed partitioning is sufficient for R-1 residential areas, then it should change the zoning restrictions to reflect that belief. Variances should not be employed as a substitute for the normal legislative process of amending zoning regulations." *Id.* at 7.

The equivalent hardship or practical difficulty criteria in the LCC is found in LCC 938.300(B)(1), which provides that the variance from a development standard set forth in LCC 934 "is needed because conditions or circumstances or both exist on the land or structure involved that renders development impractical

or impossible." As discussed above, LCC 938.300(B)(1) does not apply to this application and the county's findings do not address LCC 938.300(B)(1).

LCC 938.100 severely restricts the availability of variances to lot size in the county generally.[6] Pursuant to LCC 938.300(B)(1), in those limited cases where a variance to lot size is available, LCC 938.100 notwithstanding, development must be impractical or impossible without the variance.[7] Nonetheless, LCC 938.340 sets forth variance criteria in a code section separately addressing variances to reduce the minimum lot size in a UGA-UGM zone. The language of LCC 938.340 expressly requires that LCC 938.300(B)(2) and (3) "are met." LCC 938.340(A). LCC 938.340 fails to mention LCC 938.300(B)(1). Thus, it appears that in adopting LCC 938.340, the county made an express decision not to apply, in the UGA-UGM zones, the type of stringent variance criteria that the Court of Appeals held in *Lovell* prevented improperly substituting a variance for a rezone. As the county points out, LCC 930.700(C) explains that

---

[6] LCC 938.100 generally prohibits variances from the minimum lot or parcel size of any district unless the property is in the Rural Reserve Zone and meets certain conditions.

[7] LCC 938.300 (A) provides:

> "Except as provided in LCC 938.100, a variance may be granted from the standards regulating property development as set forth in LCC 934 (Development Standards Code) if on the basis of the application, investigation, testimony and evidence submitted, the findings and conclusions show that all of the criteria in subsection (B) have been met."

"UGA-UGM zoning allows limited low-density and moderate-scale uses until more intensive urban-scale land use activity occurs in conjunction with city annexation or delayed annexation." Response 11. Given that the code expressly allows a reduction in the lot size in this zone, and the code expressly requires LCC 938.300(B)(2) and (3), but not (B)(1) (by omission) to be met, we reject the city's argument that this application in fact amounts to an impermissible rezone of the subject property.

This subassignment of error is denied.

B. LCC 938.340(C)/LCC 930.700(E)

We proceed to the question of whether the applicable approval criteria were met. As mentioned above, LCC 938.340 contains criteria for property size variances in the UGA-UGM zone. The petition for review includes a discussion of LCC 938.340(C). Petition for Review 15.

Prior to May 2018, LCC 938.340 included subsection (C), requiring that as part of approving a variance to lot size in a UGA-UGM zone, the county determine that "the City does not object to the Department's approval of the variance." Petition for Review 25. In May 2018, the county provided public notice of a land use hearing to amend LCC Chapters 920, 930, 934 and 938 "to comply with Senate Bill 1051 (2017), House Bill 4031 (2018), and Oregon Revised Statutes (ORS) relating to the establishment of accessory dwelling units in the Urban Growth Area-Rural Residential (UGA-RR) zoning district." Petition for Review, App 39. The package of amendments included deletion of LCC

938.340(C). The county adopted the amendment on June 5, 2018. Petition for Review App 37. In a footnote, the city argues that the county did not properly amend its code to remove LCC 938.340(C). Petition for Review 25-26 n 3.

The 2018 LCC code amendment is not the subject of this appeal and may not be collaterally attacked in this appeal, and in particular in a footnote. LUBA generally does not consider arguments in footnotes that set out a different legal theory than that presented in the assignment of error itself. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 *n* 19, *aff'd*, 223 Or App 761, 197 P3d 1152 (2008), *rev den*, 346 Or 10 (2009). Because the county amended its code to delete LCC 938.340(C) before the application was submitted, LCC 938.340(C)'s requirement that the county determine that the city does not object to the variance is not applicable to this application. ORS 215.427(3)(a).

The language formerly in LCC 938.340 is, however, somewhat consistent with the language in LCC 930.700(E).[8] LCC 930.700(E) provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density

---

[8] The county findings embed the county's discussion of LCC 930.700(E) in its discussion of compliance with variance criteria LCC 938.340(B)(2) ("Granting a variance from a development standard will not have a significant adverse affect on property, improvements, or public health in the vicinity of the subject property[.]") Record 26-28. The county's decision also discusses whether LCC 930.700(E) bars the partition because it bars the variance. Record 13.

of another UGA-UGM zoning district *without prior review and approval by the affected city* and Linn County." (Emphasis added.) The city asserts that the county's decision erred in finding that LCC 930.700(E) is not applicable to the variance review. Petition for Review 13.

The county provided a number of explanations for why LCC 930.700(E) did not require city approval of the variance. The county began its discussion of LCC 930.700(E) as follows:

> "[The county] interprets [the LCC 930.700(E)] statement of purpose language to simply indicate that a land use review and approval is required to change the zoning density, by changing the zoning designation, of property in the UGA-UGM zoning districts. The application before the board is not to change the zoning designation of the subject property, but rather for County approval of a variance to the minimum parcel size of the affected zoning district for the creation of two parcels, as is permitted in County Code." Record 13.

The county posited that LCC 930.700(E) may be read to only provide that a five-acre parcel can be "created in the UGA-UGM-20 zone if the County conducts the proper land use review, and makes the proper findings for approval. This is precisely what the Board of County Commissioners for Linn County has done in this instance." Record 13.

The findings also state:

> "These applications are clearly consistent with LCC 930.700(E). The applicant is not applying for a zone amendment to change the zoning of the property. The applicant is applying for a partition, a variance to the parcel size, and conditional use permits for one dwelling on each of two parcels. Development allowed outright and permitted conditionally in the UGA-UGM-20 zoning district will

still apply to the development of the proposed parcels." Record 27.

The county also found that "[t]he language contained in LCC 930.700(E) is not applicable to this review because the applicant is not proposing to change the density of the zoning district." Record 28. Lastly, because a conditional use permit is required in the UGA-UMA zones and not in the UGA-RR-5 zone, the county concluded that there is no change in density. Record 11. The county found that if the county were treating this property the same as property in the UGA-RR-5 zone, dwellings would be allowed outright. Record 28.

In order for LUBA to affirm the county's interpretation, the interpretation must be consistent with the express language, purpose and policy underlying the provision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015). The city argues that the county's interpretation of LCC 930.700(E) is inconsistent with the express language of LCC 930.700(E) because it disregards the language requiring city approval of a density interchange. We agree. "[T]he standard that LUBA must apply in reviewing a governing body's interpretation is whether the interpretation is inconsistent with the express language, purpose and underlying policy of that provision.[] As interpreted by the Oregon Supreme Court, the shorthand question under ORS 197.829(1)(a)-(c) is whether the governing body's interpretation is 'plausible." *Siporen v. City of Medford* [citation omitted]. If so LUBA must affirm that interpretation." *Stevens v. City of Island City*, 71 Or LUBA 275, 282-83 (2015) (footnote omitted). The county's interpretation is inconsistent with the express language of LCC 930.700(E), because it interprets

the provision as restricting the interchange of density only if a zoning map amendment is proposed.[9] Record 13, 27. The county's interpretation that the provision only applies to interchanges of density occurring through a zone change improperly inserts what has been omitted. ORS 174.010. The language of LCC 930.700(E) does not limit its application according to the means by which the interchange of density occurs.

The county's findings also suggest that LCC 930.700(E) only applies where the county changes the underlying density of the zoning district, presumably through a text amendment to the LCC. Record 28. The county's findings do not explain this interpretation. Again, the county may not insert what is omitted, in this case a limitation that the change be accomplished through a zone code text amendment. ORS 174.010. LCC 930.700(E) does not address changing the density of a zoning district. Rather, it addresses interchanging densities within the different zones in the UGA-UGM district. Further, the county does not explain why one might ever amend the code text to provide that UGA-UGM-20 zoned lots have the 5-acre minimum lot size of the UGA-UGM-5 zone. The county's finding that LCC 930.700(E) means the county is required to apply the appropriate process is conclusory and unhelpful; it simply requires the county

---

[9] ORS 174.010 provides that it is improper to insert what has been omitted when interpreting code.

make the appropriate findings. *Seaton v. Josephine County*, 47 Or LUBA 178 (2004) (conclusory findings insufficient.)

The county finding that LCC 930.700(E) is met because the same development restrictions will continue to apply does not respond to the criterion because it does not address whether approving the variance approves an interchange in the density. Record 27. One single-family dwelling is conditionally allowed on each lot in the UGA-UGM-20 zone and the UGA-UGM-5 zone. The county's findings do not explain how LCC 930.700(E) will ever apply if "interchanging densities" in the UGA-UGM zone simply relates to the number of dwellings per lot, and all the UGA-UGM zones already allow the same number of dwellings per lot.

Lastly, the county's finding that this is not an impermissible change because a dwelling requires a CUP in the UGA-UGM-20 zone and is allowed outright in the UGA-RR-5 zone is nonresponsive. LCC 938.700(E) relates to changes in density within the UGA-UMA zone. UGA-RR-5 is not a UGA-UMA zone and references to uses allowed outright in the UGA-RR-5 are irrelevant. The difference between the permitting process for a single-family dwelling on a lot in the UGA-RR and UGA-UGM context has no bearing on whether the application before the county interchanged densities within the UGA-UGM zones.

ORS 197.829(2) provides that "[i]f a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such

interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct." As set forth above, the county interpretation fails to adequately explain why this provision is not applicable or met in this case. Further, neither party provided a definition of "density" as used in LCC 930.700(E). We therefore evaluate whether the challenged decision approves an interchange of density.

The term "density" is not defined generally in the LCC. Absent the county providing a definition of density leading to a different result, it is appropriate to give words their ordinary meaning. No deference is due an interpretation that alters the common definition of operative words in a code. *Friends of Eugene v. City of Eugene*, 196 Or App 771, 778 n 2, 103 P3d 643 (2004); *Jacqua v. City of Springfield*, 193 Or App 573, 581 n3, 91 P3d 817 (2004). LCC 920.100(A) provides that a term not defined in the code "shall have its ordinary accepted meaning within the context in which it has been used. The most current edition of *Webster's New Collegiate Dictionary* shall be considered the source of accepted meanings." We do not have access to *Webster's New Collegiate Dictionary.* Standard definitions of density include "**2 b:** the distribution of a quantity * * * per unit usu[ally] of space (as area * * *)." *Webster's Third New Int'l Dictionary* 602 (unabridged ed 2002).

The city argues that in the UGA-UGM zoning districts, "density" is equivalent to parcel size.[10] Petition for Review 13. The county does not dispute that understanding of the term density or provide an alternative definition.

---

[10] The city argues that:

> "The County determined that it would not be interchanging densities because a variance does not amend the zoning district applied to the subject property. The County's determination is in error. While LCC 930.700(E) could also apply to a zone change request, it is not worded such that it is limited to that application. It specifically states that the 'density' of one UGA-UGM zoning district *is not interchangeable with the 'density' of another UGA-UGM zoning district without review and approval by the affected city and Linn County. In this case the affected city is the City of Albany and Albany does not approve of the change in density. As the LCC states, the only difference between the 4 UGA-UGM zones is the minimum parcel size. The variance is only seeking to change the minimum parcel size to a size that is allowed in other zones which is, in effect, a de facto rezoning and will certainly increase the density allowed currently.*" Petition for Review 11-12 (original emphases omitted; emphasis added).

The city also argues that:

> "The County's findings state that the Board found that LCC 930.700(E) was not applicable to the review because they were not changing the density of the zoning district. This finding was in error. The code section is not provided as a criterion applicable only to a zone change request. It is provided within the statements of purpose of all UGA-UGM zones. As stated in LCC 930.700(D), *the only difference between all four of the UGA-UGM zones is the minimum parcel size or 'density.' Consequently, this section of the Code is directly applicable and has not been satisfied as described above.*" Petition for Review 13 (emphasis added).

The UGA-UGM zones are differentiated by number reflecting the minimum lot sizes of 2.5 acres, 5 acres, 10 acres and 20 acres. The only variable in the UGA-UGM zones is lot size. If density between different UGA-UGM zones may be interchanged as LCC 930.700(E) indicates is possible, it appears parcel size must be a part of the determination of density as the variable unit of area in the zone.

We understand the core of the city's argument to be that because the only difference between the UGA-UGM districts is their 2.5, 5, 10 and 20-acre lot sizes, interchanging minimum lot size between any of these zones changes a property's density and city approval is required by LCC 930.700(E). Given that the only variable between the UGA-UGM zones is parcel size, manipulation of parcel size must be a part of any interchanging of density between those zones. This interpretation is consistent with the dictionary definition of density as the quantity or number per unit of area. Density in the UGA-UGM-20 zone is one lot per 20-acre unit of area. Density in the UGA-UGM-5 zone is one lot per 5-acre unit of area. Accordingly, for purposes of this decision, we accept the city's premise that interchanging "density" in LCC 930.700(E) is equivalent to interchanging minimum lot or parcel size. The city maintains that the county is not entitled to allow a property owner to pick their own density, or interchange density, without city consent. Petition for Review 10. We agree. If the county action interchanges density, LCC 930.700(E) requires both city and county approval. The county may not ignore the language in LCC 930.700(E) requiring *city* approval.

The county found that "[d]epending on one's interpretation of this criterion, the creation of a five-acre parcel in the UGA-UGM-20 zoning district requires either a zone amendment to a five-acre zone, or simply a variance to the property development standard of 20 acres." Record 27. The county argues in its response brief that to require city consent is constitutionally questionable. Response 17. The county also argues that city consent should not be required in a quasi-judicial setting where a final decision is required. *Id.* The county does not develop these arguments in a manner that we may address them. *Deschutes Development Company v. Deschutes County*, 5 Or LUBA 218 (1982). Neither the county findings nor response brief develop the unconstitutionality argument in any way. The county asserts generally, without citation to any legal authority, that city concurrence is appropriate in the context of a zone amendment because it is legislative in nature. Response 17. The county's distinction between legislative and quasi-judicial actions ignores the fact that the county's findings appear to concede that city consent could be required in the case of an owner-requested, property-specific zone amendment, and such amendments are quasi-judicial actions. The county also fails to explain why a final decision, denying the application, may not be reached if the city objects.

We agree with the city that the decision allowing a variance to minimum lot size in the UGA-UGM-20 zone in this case constitutes an "interchange[] with the density of another UGA-UGM zoning district." LCC 930.700(E). The decision allows the applicants to create one 11.7-acre lot and one 5-acre lot in the

UGA-UGM-20 zone interchanging the allowed minimum density in UGA-UGM-20 zone with the allowed minimum density of the UGA-UGM-10 and UGA-UGM-5 zones. While LCC 938.340 permits the county to adopt that change by a variance instead of a zone change, LCC 930.700(E) prohibits the county from approving such a change in density without city review and approval.

For the reasons set forth above, this subassignment of error is sustained.

C. LCC 938.340(A)/LCC 938.300(B)(2)

LCC 938.340 provides that:

> "The Director may approve a variance to the minimum property size of an authorized unit of land in the UGA-UGM zoning district if:
>
> "(A) the criteria of LCC 938.300 (B) (2) and (3) are met; and
>
> "(B) the proposal is consistent with the affected city's comprehensive plan."

LCC 938.300(B)(2) is therefore an applicable variance approval criterion pursuant to LCC 938.340. LCC 938.300(B)(2) requires that the county find that "[g]ranting a variance from a development standard will not have a significant adverse affect on property, improvements or public health or safety in the vicinity of the subject property." Petition for Review 20. The county found that granting the variance would not have a significant adverse effect. The city disagrees that LCC 938.300(B)(2) is met and argues that the county's allowing denser development will cause the problems associated with "urban sprawl including underutilization of services, higher costs of service and the need for additional

land to accommodate growth" as well as the potential loss of productive resource lands. Petition for Review 20-21. We understand the city to argue that substantial evidence in the record does not support the county's conclusion that LCC 938.300(B)(2) is met.

"[W]hen specific issues are raised that are relevant to compliance with an approval criterion, the county's findings must address and respond to those issues." *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998). The county responded to the city's criticisms.

> "The Board [found] that the City's comments do not adequately address this criterion because the City fails to identify any specific adverse impacts on property, improvements, or public health or safety in the vicinity of the subject property. The Board [found] the City's arguments regarding this criterion to be conclusionary and lacking specific facts and supporting analysis and evidence to show how the proposed variance would have adverse effects on property, improvements, or public health or safety in the vicinity of the subject property. To the contrary, the Board has found that the proposed variance application complies with applicable provisions and policies within the City and County's Comprehensive Plans, and applicable criteria contained in County Code, which are in place to ensure that future development can be converted to urban use when urban services become available and to mitigate potential adverse impacts to property, improvements, or public health or safety in the vicinity of the subject property." Record 29.

The county found that:

> "The minimum width and depth standard in the UGA-UGM-20 zoning district is 500 feet. Based on the tentative map submitted as part of the application, each proposed parcel meets the minimum width standard of 500 feet and the minimum depth standard of 500 feet for new parcels in the UGA-UGM zoning district. The parcels

> would each contain an individual septic system. The application states the parcels would share a well located on tax lot 101 under a shared well agreement." Record 26.
>
> "The Board [found] that both the Albany Rural Fire District and the Linn County Sheriff's Office have not identified as [sic] adverse effects as a result of the variance to the minimum lot size standard.
>
> "* * * The Board conclude[d] that compliance with building code requirements ensures construction meets established health and safety standards and mitigates potential adverse effects to the property. The Linn County Building Official was notified of the proposed application and did not submit comments identifying any adverse effect on property, improvements, or public health or safety in the vicinity of the subject property as a result of the proposed variance.* * *" Record 27.

We agree with the county that the evidence in the whole record supports its conclusion that the standard is met. "If there is substantial evidence in the whole record to support the [government's] decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence." *Rouse*, 34 Or LUBA at 534. The county concluded that in a quasi-judicial application, it is necessary to look at property-specific evidence and that the general, largely philosophical objections the city made were not sufficient to deny the application. Record 29. In the context of the subject property, the county made property-specific findings that the standard was met. The county relied on the lack of adverse impact reported by the Building Official and Sheriff, Fire and Road Departments. Response 22. The county found that each new parcel would meet minimum width, depth and setback standards. Record 28. The county also found neither the zoning district nor the Agreement prohibited development of

property prior to annexation. The county's findings adequately explain its conclusion that granting the lot size variance will not have a significant adverse effect on property, improvements or public health or safety in the vicinity of the subject property.

This subassignment of error is denied.

D. LCC 938.340(A)/LCC 938.300(B)(3)

LCC 938.300(B)(3) applies to the variance application through LCC 938.340(A). The city challenges the county's determination that LCC 938.300(B)(3) is met. Petition for Review 23. LCC 938.300(B)(3) requires the county determine that "[a]pproval of the variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use." We understand the city to argue that the county's interpretation of the phrase "normal development" improperly construes LCC 938.300(B)(3). The county found:

> "[B]ased on the surrounding land use pattern and the uses permitted in the UGA-UGM zones, [] the proposed residential use is 'normal development' of the subject property. The Board interprets this criterion to state that the property will be developed in a manner that includes development that is 'normal' for the proposed residential use. The Board further interprets this criterion as ensuring that the approved parcel sizes can support normal development associated with the proposed dwellings, such as installation of a septic system, a driveway, any potential accessory buildings, and that the property will comply with required development standards. The Board finds that the development of the proposed dwellings will include provision of the normal development associated with the residential use, and will be made to comply with the property development

> standards contained within Linn County Code, such as structural setback standards, lot coverage requirements, and height limitations." Record 30-31.

The city argues that the phrase "normal development" means development that preserves the land for annexation and development. Record 162. The city argues uses allowed in the zone are normal and as applied in this zone, one house with one CUP on the subject property is normal use.[11]

The city maintains that "normal development" of the property means one single-family residence. The city argues that the proper interpretation of LCC 933.300(B)(3) is that the property is undevelopable without the variance. The city concludes that the application fails to meet this criterion because one single-family residence could, with a CUP, be developed on the subject property without the need for a variance. Petition for Review 23.

The county rejected the narrow application of the code set forth by the city. Response 24; Record 27. The county interpreted the phrase "normal

---

[11] The city also argues that LCC 933.200 was a purpose and intent statement applicable to the zone and should be considered in determining the meaning of "normal." Petition for Review 24. LCC 933.200(A) provides that:

> "All uses permitted conditionally are declared to be possessing such unique and special characteristics as to make impractical their being included as outright uses in any of the various zoning districts. Therefore, the location and operation of conditional uses are subject to review and issuance of a conditional use permit."

It was within county discretion to conclude that the LCC 933.200 conditional use code purpose statement was not an applicable review criterion for a variance.

development" to mean development consistent with the remainder of the county's development standards. The county's interpretation of its code is not inconsistent with the express language or the plain, ordinary meaning of the word "normal."

The county interpreted its code to require that the approved parcel sizes can support normal development such as "installation of a septic system, drilling of a well, construction of a driveway, and the accommodation of potential accessory buildings." Response 25. The county concluded that applicant's proposal was consistent with normal development given that the resulting lots were large enough to support "installation of a septic system, construction of accessory buildings, putting in a driveway, and drilling a well." Record 31. The county also concluded that it would not be necessary to approve additional variances such as to a setback to enable development to occur. *Id.* The county found that normal development was not preservation for annexation and development, but rather development consistent with "the surrounding land use pattern and the uses permitted in the UGA-UGM zones" and the standard was met in this case. Record 30. The county interpreted that phrase to mean that the development needs to meet general development standards. The county's interpretation is not inconsistent with the language of the code or inconsistent with the purposes or policies underpinning the regulations and thus we must affirm it.

This subassignment of error is denied.

E. LCC 938.340(B)

LCC 938.340(B) requires that the county determine that the lot size variance is consistent with the city's comprehensive plan. The county determined that the variance is consistent with the city's comprehensive plan. Record 32-36. As discussed previously, neither the county's nor the city's interpretation of the city comprehensive plan is entitled to deference in the context of county board review of a city comprehensive plan provision. Instead, we review the county board of commissioners' decision to determine whether it is correct. *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994).

The city argues in part that the variance is inconsistent with City of Albany Comprehensive Plan Policy 3, which provides: "[s]ince the undeveloped portions of the urban fringe are in transition from rural to urban uses, development in these areas shall occur in a manner consistent with the City of Albany and Linn and Benton Counties' Comprehensive Plans and implementing ordinances." Petition for Review 27.

According to the city, "the overarching policy direction regarding urbanization is to discourage low-density sprawl and create a compact city that allows for the efficient provision of urban services. This is accomplished, in part, by minimizing the amount of development in the urban fringe until urban services are available." Petition for Review 28. The city argues that:

> "The County has put in place various zoning districts in the urban fringe, including the UGA-UGM-20 zone, within which the subject property is located. The zone requires a minimum parcel size of 20

> acres, which, consistent with the County code and the City comprehensive plan, regulates densities and land uses in the urban fringe in a way that minimizes development until those lands are annexed into the City." *Id.*

The county considered maps of the proposed partition and septic system placement and photographs and concluded that the application would not result in an urban level of development. Response 30. The county found that the city's comments "fail[ed] to identify what obstacles would be created in realizing future development of the subject property."[12] Record 34.

The county determination that the proposed variance does not allow an urban level of development and is consistent with the city's comprehensive plan is correct.

This subassignment of error is denied.

SECOND AND THIRD ASSIGNMENT OF ERROR

The second and third assignments of error challenge the county's approval of a partition of the subject property into two lots, and two CUPs for two new dwellings. Both approvals are contingent upon the variance. We have sustained a portion of the first assignment of error challenging approval of the variance, and therefore do not reach the second and third assignments of error.

---

[12] The city's comprehensive plan is in part implemented through the LCC. In *City of Albany v. Linn County*, __ Or LUBA __ (LUBA No 2018-029, July 3, 2018), we held that a variance allowing the creation of two one-acre lots was inconsistent with the city's comprehensive plan because the city's code included a provision prohibiting development of lots smaller than 5 acres in UGA-UGM zones.

DISPOSITION

OAR 661-010-0071(1)(c) provides that LUBA will reverse a decision when the decision is "prohibited as a matter of law." The county's code calls for city review and approval of variance proposals that interchange densities in the UGA-UGM-20 zones. We have concluded above that the variance application proposes an "interchange[] with the density of another UGA-UGM zoning district," and that LCC 930.700(E) requires the review and approval of the city of the variance. Based on the posture of this appeal and the city's arguments in the petition for review, it is clear that the city did not approve the variance, and accordingly, LCC 930.700(E) prohibits the variance as a matter of law.

The county's decision is reversed.