

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 OREGON NATURAL RESOURCES COUNCIL,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 95-085
10 CITY OF OREGON CITY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 RONALD BROWN, RAY BARTEL, and)
17 PHILLIP BROWN,)
18)
19 Intervenors-Respondent.)

20
21
22 Appeal from City of Oregon City.

23
24 Peggy Hennessy and Lyn Mattei, Portland, filed the
25 petition for review and argued on behalf of petitioner.
26 With them on the brief were Reeves, Kahn & Eder, and NW
27 Environmental Advocates.

28
29 Daniel Kearns, Portland, filed a response brief and
30 argued on behalf of respondent. With him on the brief was
31 Preston, Gates & Ellis.

32
33 James H. Bean and Thomas H. Cutler, Portland, filed a
34 response brief and argued on behalf of intervenors-
35 respondent. With them on the brief was Lindsay, Hart, Neil
36 & Weigler.

37
38 HANNA, Referee; LIVINGSTON, Chief Referee, participated
39 in the decision.

40
41 AFFIRMED 12/21/95

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city commission decision on
4 remand, modifying a previously approved final development
5 plan for a residential planned development (PD).

6 **MOTION TO INTERVENE**

7 Ronald Johnson, Ray Bartel and Phillip Brown
8 (intervenors), the applicants below, move to intervene in
9 this proceeding on the side of respondent. There is no
10 opposition to the motion, and it is allowed.

11 **FACTS**

12 This is petitioner's second appeal of a city commission
13 decision approving a modified application for a PD. On June
14 3, 1992, the city approved intervenors' final development
15 plan for a PD in Newell Creek Canyon, consisting of 214
16 apartment units. Newell Creek runs through the subject
17 property.

18 In January 1994, intervenors filed an application to
19 modify the approved PD final development plan to reduce the
20 maximum number of apartment units from 214 to 125, and alter
21 certain conditions imposed as part of the 1992 approval. On
22 July 20, 1994 the city approved the proposed modification.
23 Petitioner appealed that approval to LUBA.

24 In Oregon Natural Resources Council v. City of Oregon
25 City, 29 Or LUBA 90 (1995) (ONRC I), we sustained the city's
26 approval in part and remanded it in part. One issue in that

1 appeal was the applicability of OCMC 17.49 to the modified
2 application. OCMC 17.49 was adopted after the original PD
3 was approved but before the modification application was
4 submitted.¹ We concluded that any OCMC standard applicable
5 to a new application for a PD is applicable to a modified
6 application for a PD. ONRC I at 105. Specifically, we
7 concluded that the city must determine on remand if OCMC
8 17.49 applies to the subject PD and, if it applies, the
9 extent to which it applies. ONRC I at 108. In rejecting
10 the city's conclusion that only Newell Creek itself is
11 protected under OCMC 17.49, we found that the city must
12 determine if drainageways on the subject property are
13 tributaries of Newell Creek, and consequently subject to
14 protection under OCMC 17.49. Id. at 108.

15 On remand, the city did not reopen the record. Rather,
16 as described by the city in its remand hearing minutes:

17 "On March 27, 1995, the City provided notice to
18 all parties of the record that revised findings
19 were available for review and comment. The City
20 accepted written comments, but no new evidence,
21 until the close of business on April 7, 1995."
22 Record 18.

23 The city prepared proposed revised findings which it

¹On August 18, 1993, the city amended its comprehensive plan and land use regulations to protect specified water resources. Among the specified water resources to be protected is Newell Creek and its tributaries. With the enactment of Ordinance No. 93-1007, the city amended its comprehensive plan to add a section entitled "Water Resources Text, Goals and Policies." With the enactment of Ordinance No. 93-1008, the city amended the Oregon Municipal Code (OCMC) to add Chapter 17.49, entitled "WR Water Resources Overlay District."

1 provided to petitioner before the city commission hearing.
2 Prior to the hearing, petitioner's attorney submitted
3 written comments, objecting to the city's interpretation and
4 application of OCMC 17.49 in its proposed revised findings.

5 The April 19, 1995 hearing at which the challenged
6 decision was adopted was open to the public. At that
7 hearing, the city commission discussed written comments it
8 received in response to its proposed revised findings and
9 accepted oral comments from petitioner's representative, but
10 declined to accept any new evidence. During that hearing
11 petitioner requested that the city reopen the record because
12 previously the commission had only looked at whether OCMC
13 17.49 applies, not how it applies. Record 20. The
14 commission rejected the request to reopen the record. In
15 its decision, the city stated:

16 "According to OCMC 17.49.030(A), the protections
17 of [OCMC 17.49] apply to land subject to a
18 development permit 'within 100 feet of a water
19 area, water course or wetland, as shown on the
20 water resources inventory or the city or county.'
21 OCMC 17.49.020 defines 'water course' to include,
22 among other things 'seasonal tributaries.' * * *
23 Upon inspection of the Inventory Map, we agree
24 with ONRC and conclude it is the city's official
25 inventory of wetland resources and applies in this
26 matter. We note that one of the map's inventoried
27 water resources is 'Newell Creek and Tributaries.'

28 "We find that many of the operative expressions in
29 the above-referenced Inventory Map and code
30 sections are ambiguous and in need of
31 interpretation. Toward that end, we interpret the
32 Inventory Map's reference 'Newell Creek and
33 Tributaries' to mean the main channel of Newell
34 Creek and those tributaries actually illustrated

1 on the Inventory Map. Consistent with chapter
2 17.49's definition of 'water course,' we interpret
3 the Inventory Map as illustrating all of the
4 'water courses' associated with the Newell Creek
5 drainage that are protected under [OCMC 17.49].
6 Likewise, we conclude that any features and
7 tributaries that are not illustrated on the
8 Inventory Map are not 'water courses' within the
9 meaning of OCMC 17.49.020 and thus are not subject
10 to [OCMC 17.49]." Record 9-10.

11 In its decision, the city set forth seven objections
12 made by petitioner and responded in detail to each of those
13 objections, adopted revised findings and approved the
14 application again.² Record 15-17. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioner contends that the city erred "in limiting
17 the proceeding to the existing record and failing to provide
18 a public hearing when reviewing the application under a
19 previously excluded criterion." Petition for Review 1-2.
20 Petitioner points out that in ONRC I, LUBA found that
21 compliance with OCMC 17.49 is an approval criterion for the
22 modification application. Petitioner contends that as an
23 approval criterion, the notice required under ORS 197.763(3)
24 for the remand hearing should have listed OCMC 17.49, and
25 that failure to list that criterion prejudiced petitioner's
26 substantial rights.³ Petitioner further contends that the

²The findings also address six objections of another witness concerning the application of OCMC 17.49 to the proposal.

³ORS 197.763(3) provides, in relevant part:

1 commission members did not have a staff report that included
2 an evaluation of the application of the criteria in OCMC
3 17.49 before them, nor did the commission members seriously
4 consider the evidence on such application because it was
5 deemed inapplicable. Petition for Review 5.

6 Citing Beck v. Tillamook County, 313 Or 148, 831 P2d
7 678 (1992), the city responds that LUBA decided this issue
8 when we stated:

9 Petitioner also fails to establish that it was
10 prejudiced by the city's failure to list
11 provisions of [OCMC 17.49] as applicable criteria
12 for the subject PD modification application. ONRC
13 I at 98.

14 In addition to arguing that LUBA has decided the issue,
15 in seven specific findings, the city addressed petitioner's
16 comments pertaining to the proposed revised findings. In
17 response to petitioner's request to the city for an
18 evidentiary hearing, the findings state "ONRC has had ample
19 opportunity to submit evidence and argument regarding [OCMC
20 17.49], and in fact at many points during the prior local
21 proceeding, ONRC submitted extensive testimony and evidence
22 regarding [OCMC 17.49]." The city's position is

"The notice provided by the jurisdiction shall:

"(a) Explain the nature of the application and the
proposed use or uses which could be authorized;

"(b) List the applicable criteria;

"* * * * *"

1 demonstrated, inter alia, at ONRC I Record 27, 35, 46-51 and
2 233. In response to petitioner's interpretation that
3 "Newell Creek and its tributaries" includes protection of
4 two intermittent drainageways, the city rejects petitioner's
5 analysis, and describes its own analysis of the various OCMC
6 17.49 provisions. Responding to petitioner's contention
7 that comprehensive plan provisions should be used to
8 interpret OCMC 17.49, the city describes its application of
9 OCMC 17.49 and its methodology for developing that
10 application. The city addresses petitioner's contention
11 that more than one map was adopted as part of OCMC 17.49 as
12 a scrivener's error. To petitioner's contention that there
13 is significant wildlife habitat in Newell Creek Canyon that
14 should be protected, the city rejected petitioner's apparent
15 contention that OCMC 17.49 should be applied in a manner so
16 as to protect those resources. In its final response to
17 petitioner's comments, the city applied the Clackamas County
18 Water Resources Inventory to the site and concludes that
19 there were no such protected resources within 100 feet of
20 the development site.

21 Although petitioner now contends that it did not have
22 an opportunity or the appropriate attention of the governing
23 body to argue the application of OCMC 17.49, the record
24 clearly demonstrates that petitioner made its arguments and
25 the city considered them. We confirm our conclusion in ONRC
26 I that petitioner has had ample opportunity to present its

1 contentions to the city with respect to OCMC 17.49.
2 Petitioner was not prejudiced by the city's decision not to
3 accept new evidence on remand.⁴

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner contends that ONRC I required the city to
7 accept additional evidence and in failing to do so made a
8 decision that is not supported by substantial evidence in
9 the record. Petitioner relies on our statement in ONRC I
10 that "neither the findings nor the evidence are adequate to
11 establish that such streams or intermittent drainageways on
12 the subject property are not tributaries of Newell Creek
13 [29 Or LUBA at 108]." Petition for Review 7. (Emphasis
14 added in Petition for Review.)

15 The city responds that LUBA merely said the evidence in
16 ONRC I was inadequate to support the findings in ONRC I.
17 The city argues that the findings of the challenged decision
18 provide the interpretation that was missing from the
19 findings in ONRC I.

20 We agree with the city that our conclusion in ONRC I
21 was that the evidence to which we were cited was inadequate
22 to support those findings. That conclusion, however, did

⁴We also reject petitioner's argument that the city violated ORS 197.763 by failing to provide notice of the applicability of OCMC 17.49. ORS 197.763 does not require, on remand, that the city provide notice of the applicable criteria. See Sanchez v. Clatsop County, 29 Or LUBA 26, 30 (1995).

1 not require the city to accept new evidence on remand. It
2 is sufficient that the city adopt new findings that are
3 supported by substantial evidence already in the record.

4 Petitioner does not go further in this assignment of
5 error to explain how the challenged decision is not
6 supported by substantial evidence other than to argue that
7 the city should have accepted new evidence. The evidence in
8 the record supports the challenged decision.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner argues that the city misconstrued OCMC 17.49
12 and made findings not supported by substantial evidence when
13 it determined that two intermittent drainageways are not
14 tributaries of Newell Creek and consequently are not subject
15 to protection under OCMC 17.49. Petitioner describes three
16 alternate theories advanced by the city as the basis for its
17 conclusion that those drainageways are not protected under
18 OCMC 17.49. Petitioner then provides its own interpretation
19 of OCMC 17.49 to refute the city's reasoning.

20 Intervenors quote extensively from the record to
21 support their contention that the city considered ample
22 evidence provided by intervenors' and petitioner's experts,
23 and that the city's findings are based on substantial
24 evidence.

25 The city describes petitioner's argument as a challenge
26 to the city's interpretation of the applicability and

1 substantive requirements of OCMC 17.49. It points to the
2 extensive findings in which the city concluded that the
3 intermittent drainageways are not protected under OCMC
4 17.49. The city also points to the comments submitted by
5 petitioner and another witness in which they described the
6 history of OCMC 17.49 and the meaning of its provisions.
7 See Record 14-17. The city argues that under ORS 197.829
8 its interpretation of its ordinance must be affirmed.

9 This Board is required to defer to a local governing
10 body's interpretation of its own enactment, unless that
11 interpretation is contrary to the express words, purpose or
12 policy of the local enactment or to a state statute,
13 statewide planning goal or administrative rule which the
14 local enactment implements. ORS 197.829; Gage v. City of
15 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
16 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).
17 This means we must defer to a local government's
18 interpretation of its own enactments, unless that
19 interpretation is "so wrong as to be beyond colorable
20 defense." Zippel v. Josephine County, 128 Or App 458, 876
21 P2d 854, rev den 320 Or 272 (1994). See also Goose Hollow
22 Foothills League v. City of Portland, 117 Or App 211, 217,
23 843 P 2d 992 (1992).

24 The city's findings include a thorough interpretation
25 of OCMC 17.49, and we defer to that interpretation. The
26 city's findings, based on that interpretation, are supported

1 by substantial evidence.

2 The third assignment of error is denied.

3 The city's decision is affirmed.