

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

THOMAS R. NICOLAI,)	
)	
Petitioner,)	LUBA No. 90-002
)	
vs.)	FINAL OPINION
)	AND ORDER
CITY OF PORTLAND,)	
)	
Respondent.)	

Appeal from City of Portland.

Thomas R. Nicolai, Portland, filed the petition for review and argued on his own behalf.

Peter A. Kasting, Portland, filed the response brief and argued on behalf of respondent.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED

04/30/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals City of Portland Ordinance No. 162603, which amends Title 34 (Subdivision and Partitioning Regulations) of the Portland City Code (PCC).

INTRODUCTION

The challenges in this appeal are solely directed at amendments to the PCC which affect the way the city reviews and approves "minor land divisions." As a preliminary matter, an understanding of the terminology utilized in the PCC to refer to various kinds of land divisions is necessary.

All divisions of land within the city of Portland are either "subdivisions" (creating four or more lots) or "partitions" (creating two or three lots). PCC 34.16.040; 34.16.100; 34.16.105. Partitions are further classified as "major partitions" (partitions that include creation of a new street) and "minor partitions" (partitions that do not create a new street). PCC 34.16.040.

All "subdivisions," "major partitions," and "minor partitions" are classified as either "minor land divisions" or "major land divisions." PCC 34.16.024. As noted above, this appeal concerns amendments to PCC provisions governing "minor land divisions," which include both "minor partitions" and those "subdivisions" that create ten or

fewer lots and do not create a new street.¹ All other land divisions, i.e., "major partitions," "subdivisions" of 10 or fewer lots that create a new street, and "subdivisions" of more than 10 lots whether they create a new street or not, are "major land divisions."

FACTS

In a related appeal, this Board remanded a city decision approving a minor land division under former PCC Title 34. Nicolai v. City of Portland, ___ Or LUBA ___ (LUBA NO. 89-053, October 10, 1989) (Nicolai I). Former PCC Title 34 required all applications for minor land divisions be found in compliance with the PCC 34.50.090 "principles of land suitability," and the comprehensive plan, as well as other PCC provisions. In Nicolai I, we determined (1) the city's decision was not made under clear and objective standards, (2) the decision involved the exercise of discretion, and (3) the city erred by failing to provide interested persons with notice of, and an opportunity to be heard regarding, the subject application for minor land division.

On remand, the city amended Title 34, deleting from PCC 34.30.030 a requirement that minor land divisions comply

¹PCC 34.16.024(B) defines "minor land division" as follows:

"A minor land division is any land division creating ten or fewer lots, which does not include the creation of a street, and which has not been determined to be a major land division under the provisions of Section 34.30.025 of this Title."

with the PCC 34.50.090 "principles of land suitability," and the comprehensive plan.²

This appeal followed the city's adoption of Ordinance No. 162603 amending PCC Title 34.

FIRST ASSIGNMENT OF ERROR

"The city acted in violation of its comprehensive plan and implementing subdivision ordinance by adopting amendments to minor land division review criteria that are not in compliance or consistent with its comprehensive plan or Sections 34.04.020, 34.50.010 and 34.50.090 of the Portland City Code."

Petitioner argues that, notwithstanding the amendments to Title 34 adopted by Ordinance No. 162603, all applications for minor land divisions remain subject to the PCC 34.50.090 "principles of land suitability."³ According

²Amended Title 34 requires that minor land divisions be consistent with the comprehensive plan map designation.

³The subdivision and partition regulations of Title 34 include PCC Chapter 34.50, "Principles of Acceptability." This chapter includes approval standards addressing various aspects of land divisions. PCC 34.50.090, one of the sections in this chapter, is entitled "Land Suitability." PCC 34.50.090. Like the parties, we refer, in this opinion, to the standards of PCC 34.50.090 as the "principles of land suitability." PCC 34.50.090, which was not amended by Ordinance No. 162603, provides:

"Land Suitability.

"No land shall be subdivided or partitioned which is found unsuitable for its intended use by the Hearings Officer by reason of flooding, inadequate drainage, susceptibility to mud or earth slides, or any other reason harmful to the health, safety or well-being of the proposed Subdivision or partition or of the community at large. However, the Hearings Officer may approve a Subdivision plat or a partition map if the subdivider or partitioner improves, or as provided in Chapter 34.40 of this Title, agrees to improve the land consistent with the standards of this and other titles of the City of Portland

to petitioner, if the "principles of land suitability" are approval criteria for applications for minor land divisions, then decisions on minor land divisions are discretionary, and the PCC, as amended, erroneously fails to provide for notice to, or an opportunity for, interested persons to be heard in connection with such applications. Nicolai I; ORS 227.175(3) and (10). Petitioner suggests that to interpret amended Title 34 so that the "principles of land

Code in order to make lots or parcels suitable for their intended uses. In determining the suitability of the land for Subdivision or partitioning, the Hearings Officer shall consider the objectives of this Title, including but not limited to the following:

- "(A) The danger of life and property due to the increased flood heights or velocities caused by fills, roads and intended land uses.
- "(B) The danger that intended structures and improvements may be swept onto other lands or downstream to the injury of others.
- "(C) The ability of water supply and sanitation systems to prevent disease, contamination and unsanitary conditions under flood conditions.
- "(D) The susceptibility of proposed land uses to flood damage and the effect of such damage on the individual owner.
- "(E) The importance of the services provided by the proposed land uses to the community.
- "(F) The safety and access to the property for emergency vehicles in times of flood.
- "(G) The costs of providing public services during and after flooding, including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, street lighting, and streets and bridges." (Emphasis supplied.)

suitability" no longer apply to minor land divisions would render the PCC internally inconsistent and, thus, would be incorrect.

Finally, petitioner contends that to the extent the disputed amendments have eliminated the former Title 34 requirement that minor land divisions comply with PCC 34.50.090, amended Title 34 is inconsistent with the city's comprehensive plan (plan).

We address each of petitioner's contentions below.

A. Continued Applicability of PCC 34.50.090.

Ordinance No. 162603 amended PCC 34.30.030(A) as follows (brackets indicate deletions and underlining indicates additions):

"In the case of a minor land division [which is a minor partition], it must be demonstrated that:

"(1) It is in conformance with the comprehensive plan map designation.

"[(2) It is in conformance with the principles of land suitability specified in Section 34.50.090 of this Title.]

"[3](2)It is in conformance with the design standards for lots and parcels specified in Section 34.60.030 of this Title.

"[4](3)The continuation of existing principal streets in surrounding areas will not be partially or fully blocked [or made impractical].

"[5](4)Access to adjacent property from streets, as required by City Code will not be partially or fully eliminated [or made impractical].

"[6](5)[Adequate required] Water, sanitary sewer or

approved subsurface disposal systems and drainage facilities, which meet City requirements are available or can be provided.

"[7](6)[The] All requirements of the City Engineer [has no objection] must be met."

Notwithstanding the deletion of the reference to PCC 34.50.090 in the amended PCC 34.30.030(A), petitioner contends the PCC 34.50.090 "principles of land suitability" continue to apply to minor land divisions by the express terms of PCC 34.50.090 and by operation of PCC 34.50.010. PCC 34.50.010 states in part:

"Conformance with Plans. A land division, whether by subdivision or partitioning shall conform to the Comprehensive Plan, * * * and shall conform to the principles of acceptability * * * established in this Title. * * *" (Emphasis supplied.)

PCC 34.50.090 provides in part:

"Land Suitability. No land shall be subdivided or partitioned which is found unsuitable for its intended use by the Hearings Officer by reason of flooding, inadequate drainage, susceptibility to mud or earth slides, or any other reason harmful to the health, safety or well being of the future residents or property owners of the proposed subdivision or partition or of the community at large.* * *" (Emphasis supplied.)

Petitioner contends a minor land division must be either a partition or a subdivision, depending on the numbers of parcels or lots created.⁴ Petitioner argues

⁴See Introduction, supra.

PCC 34.50.010 and 34.50.090 provide requirements applicable to all divisions of land, because approval will result in the creation of either a subdivision or partition. Petitioner argues PCC 34.50.090 applies to all divisions of land, including minor land divisions because (1) amended PCC 34.30.030(A) does not specifically state PCC 34.50.010 and 34.50.090 do not apply to minor land divisions, and (2) PCC 34.50.010 and 34.50.090 do not specifically state that they do not apply to minor land divisions.

Petitioner also suggests that interpreting the challenged amendment to PCC 34.30.030(A) as having the effect of eliminating the "principles of land suitability" as approval criteria applicable to minor land divisions is an incorrect interpretation of the challenged amendment, because it would conflict with PCC 34.04.020, the purpose section of the subdivision and partitioning regulations.⁵ Petitioner contends if minor divisions are not reviewed

⁵PCC 34.04.020 provides in part:

"Scope and Purpose. This Title is adopted for the purpose of protecting property values, furthering the health, safety and general welfare of the people of the community and to provide uniform standards for the subdivision and partitioning of land and the installation of related improvements in the City of Portland.

"It is the intent of this Title to moderate street congestion, secure safety from fire, flood, geological hazards, pollution and other dangers, to provide adequate light and air, to prevent overcrowding of land, and to facilitate adequate provisions for transportation, water supply, sewage disposal, drainage, education, recreation and other public services and facilities. * * *"

against the "principles of land suitability," then minor divisions cannot be regulated to achieve the aims of, or protect the values specified by, PCC 34.04.020.

The city argues that the deletion of the PCC 34.30.030(A)(2) requirement that minor land divisions comply with the "principles of land suitability," has the legal effect of rendering PCC 34.50.090 inapplicable to minor land divisions. According to the city, PCC 34.50.090 only applies to subdivisions and partitions which are not minor land divisions.

The city maintains that PCC 34.30.030(A) provides different standards and procedures for approval of those divisions of land which are classified as minor land divisions. The city argues that the PCC 34.50.090 standards and procedures do not apply to partitions or subdivisions which are not classified in the PCC as minor land divisions. Conversely, the city argues that the criteria applicable to divisions of land classified as subdivisions and partitions do not apply to minor land divisions, unless the minor land division regulations specifically require it.

Finally, the city argues petitioner has cited no authority prohibiting removal of the PCC 34.50.090 "principles of land suitability" as approval standards applicable to minor land divisions.

We are required to view the PCC as a whole, and in a way which does not produce absurd results. Byrnes v. City

of Hillsboro, ___ Or App ___ (CA A63163, April 18, 1990), slip op 3. In the challenged ordinance, the city specifically deleted the requirement that minor land divisions comply with the PCC 34.50.090 "principles of land suitability," in order to create clear and objective approval standards for minor land divisions. The city also changed the scope of PCC 34.30.030(A), from applying to minor land divisions which are also minor partitions, to applying to all minor land divisions. Approval of a minor land division is measured entirely against the standards contained in, and referred to by, PCC 34.30.030(A).⁶ The city has made a policy choice that land divisions which create no more than 10 lots or parcels, and do not create a street, may be classified and approved separately from other land divisions.

We agree with the city that the disputed amendments do create a discrete class of land division, styled minor land divisions.⁷ It is also evident that the city intended to

⁶Amended PCC 34.30.030(A)(2) provides a minor land division must conform to the design standards for "lots and parcels specified in Section 34.60.030 of this Title." Id. Additionally, a minor division, if it results in a subdivision, must be evidenced by a subdivision plat conforming to the requirements of PCC 34.20.060 and 34.20.070, and if the minor division results in a partition, certain information and procedures specified in PCC 34.30.020 are required. As we understand it, only those subdivision and partition regulations specifically referenced in the minor land division regulations apply to minor land divisions. See PCC 34.30.010 (The planning director is required to approve minor land divisions "in accordance with these regulations.")

⁷The city also argues that consistent with ORS 92.046(1), it has simply amended its code to provide different levels of review for different kinds

remove from its code the former requirement that minor land divisions comply with the "principles of land suitability."

We believe the city's failure to amend its references to subdivisions and partitions, in PCC 34.04.020, 34.50.010 and 34.50.090, to explicitly exempt minor land divisions governed by PCC 34.30.030(A) from the scope of these PCC

of partitions. As we understand the city's argument, a minor land division is considered under the PCC to be a discrete type of partition, but is not classified as either a partition or a subdivision under the amended PCC. ORS 92.046(1) provides:

"The governing body of a county or a city may, as provided in ORS 92.048, when reasonably necessary to accomplish the orderly development of the land within the jurisdiction of such county or city under ORS 92.042 and to promote the public health, safety and general welfare of the county or city, adopt regulations or ordinances governing approval, by the county or city of proposed partitions. Such regulations or ordinances shall be applicable throughout the area over which the county or city has jurisdiction under ORS 92.042, or over any portions thereof. Such ordinances or regulations may specify the classifications of such partitions which require approval under this section and may establish standards and procedures governing the approval of tentative plans for such partitions, The standards may include all, or less than all, of the same requirements as are provided or authorized for subdivisions under ORS 92.010 to 92.190 and may provide for different standards and procedures for different classifications of such partitions so long as the standards are no more stringent than are imposed by the city or county in connection with subdivisions." (Emphasis supplied.)

ORS 92.046(1) neither authorizes nor prohibits the city from adopting separate standards for divisions of land the city chooses to classify as minor land divisions. ORS 92.046(1) purports only to authorize provision of standards and procedures for different kinds of partitions. ORS 92.010(6) and (7) specifically define the terms partition and ORS 92.010(13) and (14) define the term subdivision, as these terms are used in ORS 92.010 to 92.190. As explained in the introduction to this opinion, under the PCC definition of minor land division, certain minor land divisions are also subdivisions, as that term is defined by ORS 92.010(13) and (14). Indeed, the amended PCC includes regulations applicable to minor land divisions that retain, and rely upon, the distinction between subdivisions and partitions for purposes of required plat information. PCC 34.30.030(C).

sections, produces an ambiguity in the scope of those PCC sections. Where a legislative enactment is ambiguous, we may examine the legislative history of the enactment to determine legislative intent. In this regard it is relevant that (1) the city recognizes minor land divisions as a discrete type of land division, and (2) the city specifically deleted from the PCC the requirement that these minor land divisions comply with the PCC 34.50.090 "principles of land suitability." We see nothing in amended PCC Title 34 to require the "principles of land suitability," specifically rejected as approval criteria for minor land divisions by the city, to continue apply to minor land divisions.⁸ Therefore, we believe it would frustrate the clear legislative intent of Ordinance 162603, and would produce an absurd result, to determine that the "principles of land suitability" remain as approval criteria for applications for minor land divisions.

In sum, we conclude it is a correct interpretation of the challenged PCC amendments that the city deleted the former PCC requirement that minor land divisions comply with the PCC 34.50.090 "principles of land suitability." Furthermore, we agree with the city that there is nothing in the PCC to prohibit the city from removing the former

⁸We do not see anything in PCC 34.04.040, the purpose statement for the city's subdivision and partitioning regulations, which prohibits the city from removing the "principles of land suitability" as criteria applicable to minor land divisions.

requirement that such divisions comply with the PCC 34.50.090 "principles of land suitability".

This subassignment of error is denied.

B. Compliance With the Comprehensive Plan

ORS 197.835(5) provides:

"The board shall reverse or remand an amendment to a land use regulation * * * if:

"(a) the regulation is not in compliance with the comprehensive plan.

"* * * * *"

Petitioner argues removal of the former PCC requirements that minor land divisions be in compliance with the city's comprehensive plan, and that such land divisions satisfy the "principles of land suitability," causes the PCC to be out of compliance with the city's plan. Specifically, petitioner argues approval of a minor land division without determining such minor division complies with the PCC 34.50.090 "principles of land suitability" and the requirements of the comprehensive plan, violates plan policy 8.13 and plan goal 11A.⁹ We address separately

⁹Petitioner also argues deletion of the "principles of land suitability" as approval criteria for minor land divisions violates Plan policy 10.10, which provides:

"Develop mechanisms for better enforcement of conditions required of individual projects in zone changes, conditional use and variance cases."

Petitioner argues that because the amended PCC authorizes minor divisions of land, to the maximum density authorized by the plan map designation, there will be an increased demand for variances from other

compliance with plan policy 8.3 and plan goal 11A.

1. Plan Policy 8.13

Plan policy 8.13 provides:

"Control the density of development in areas of natural hazards consistent with the provisions of the City's Building code, Chapter 70, the Flood Plain Ordinance and the subdivision ordinance." (Emphasis supplied.)

Petitioner also cites language from a document entitled "Environment Comprehensive Plan Support Document: (No. 8 of 11 Documents)" (plan support document) which provides in part:

"Natural hazards dictate restraint and careful assessment of remaining vacant land in Portland prior to development.

"Land is an increasingly limited resource in Portland. Little land suitable for residential development remains vacant. What vacant land does exist has often been passed over due to constraints such as slope, soils, lack of services or access." Plan support document 43.

"Restraint and careful assessment when dealing with areas of natural hazards, is assured through several regulatory check-points.

"Foremost among the devices to assure protection

provisions of the PCC because of adverse topographic and other natural conditions. Petitioner argues that the city should have made distinctions regarding properties on the west hills which may be subject to more severe topographic constraints than other property within the city.

The city contends there is no conflict between the disputed amendments and this policy. According to the city, the amended criteria applicable to minor divisions provide adequate enforcement controls. The city also contends to the extent there will be increased requests for variances resulting from the amendments, nothing in plan policy 10.10 purports to prevent or discourage potential future requests for variances or other land use approvals. We agree with the city.

of land elements and citizens, is Chapter 70, Excavation and Grading, of the Uniform Building Code. This chapter sets forth rules and regulations to control excavation, grading and earthwork construction, and is pertinent to areas in the city subject to landslide and/or earthquake damage, and including areas with drainage channels. It requires an applicant, in a specified time, to eliminate all identified hazards." Plan support document 45.

Petitioner argues these statements in the plan support document provide the rationale for plan policy 8.13, and as such are relevant in determining the scope of plan policy 8.13. Petitioner contends the "principles of land suitability" are the implementing measures specifically designed to control density in areas of natural hazards. Petitioner contends that eliminating such specific plan implementing measures is not in compliance with the plan.

Petitioner also contends that changing the requirement that all minor land divisions comply with the comprehensive plan to a requirement that all minor land divisions comply with the comprehensive plan map designation is inconsistent with the "careful assessment" approach for decisions affecting development in natural hazard areas articulated in the plan support documents quoted above. Petitioner argues the plan does not authorize the maximum development density allowed by the plan map designation without an initial determination of whether the land is suitable for the density proposed.

The city contends the disputed amendments are

consistent with plan policy 8.13. According to the city, plan policy 8.13 requires only that development in areas of natural hazards be "consistent with the provisions of the Uniform Building Code, Chapter 70, the Flood Plain Ordinance and the Subdivision Ordinance." According to the city, the PCC complies with this plan policy because the subdivision ordinance continues to apply to minor divisions, only with a lesser degree of review. The city argues nothing in this plan policy prohibits applying a lesser degree of review to minor land divisions. The city states plan policy 8.13 does not require application of the "principles of land suitability" to minor divisions. The city also argues there is no inconsistency with the plan in requiring compliance with the plan map designation, as opposed to plan policies, because the plan map designation is based on the policies in the plan. The city contends development density is controlled, as required by plan policy 8.13, by the plan map.

Additionally, the city maintains the plan support document upon which petitioner relies is not a part of the city's comprehensive plan, but rather provides "background information" and consequently does not limit the city's authority to amend PCC Title 34. Respondent's Brief 8. Specifically, the city contends the plan support document is merely:

"part of a series of reports that provide additional information about the elements of the

comprehensive plan. It does not establish goals or policies; it merely provides background information." Respondent's Brief 7-8.

Plan policy 8.13 states that the city will control the density of development in natural hazard areas through both the building code and the subdivision ordinance. It is not disputed the subdivision ordinance referred to in plan policy 8.13 is PCC Title 34, which has been amended, and which is at issue in this appeal. As far as we can tell, the only provisions in PCC Title 34 which control development in areas of natural hazards are the PCC 34.50.090 "principles of land suitability." We agreed with the city, infra, that its amendment to PCC 34.30.030(A)(2) deletes the PCC 34.50.090 "principles of land suitability" as an approval standard for minor land divisions. However, this deletion results in an apparent conflict with the requirement of plan policy 8.13 that development in natural hazard areas be controlled through the subdivision ordinance.¹⁰ Where there is an apparent conflict between a plan provision and an amended land use regulation, the city must explain in its findings why the amendment does not conflict with the plan provision. See Wyatt v. City of Cannon Beach, 10 Or LUBA 217 (1984). Other than asserting that there is no conflict, the city has not provided an

¹⁰We are aware of nothing in the plan map designation which controls development in natural hazard areas.

adequate explanation.¹¹ Without an explanation of how policy 8.13 is to be carried out in the absence of application of the PCC 34.50.090 "principles of land suitability," we cannot conclude that the disputed amendments are in compliance with plan policy 8.13.¹²

This subassignment of error is sustained.

2. Plan Goal 11A

Petitioner claims the disputed amendments violate plan goal 11A, which provides:

"Provide a timely, orderly and efficient arrangement of public facilities and services that support existing and planned land use patterns and densities."

¹¹The city's decision explains only that approximately 100 minor land divisions are approved annually, and it finds a need to process such applications expeditiously. In its brief, the city states, elimination of the "principles of land suitability" as approval criteria for all minor land divisions, is justified. In its brief, the city suggests it is within the city's legislative discretion to determine that certain classifications of land use decisions have a de minimis impact on the overall implementation of its plan and land use regulations, such that the city may properly subject such decisions to a less stringent level of review. We cannot tell, however, from the city's decision, the findings adopted in support of that decision, or the record submitted in this proceeding, that such is the circumstance here. Prior to the challenged amendment, plan policy 8.13 was implemented, in part, by application of PCC 34.50.090 to all land divisions. If the city now believes approximately 100 minor land divisions may be approved annually, without any consideration of the "principles of land suitability" in PCC 34.50.090, it must explain in its findings how that position is consistent with plan policy 8.13.

¹²Because we decide this subassignment on the basis of plan policy 8.13 itself, it is unnecessary to determine whether the plan support documents are a part of the city's comprehensive plan. However, regardless of whether the support documents are a part of the plan, the support documents may be consulted as an aid in determining the meaning of plan policies.

Petitioner argues the disputed Title 34 amendments violate this plan goal because minor land divisions will be authorized without first determining whether timely, orderly, and efficient public facilities and services can be provided to service the units of land created by the minor division. Petitioner also claims that the disputed amendments will encourage "serial partitions."

The city argues amended PCC 34.30.030(A)(5) authorizes approval of minor land divisions only if water, sewer and drainage systems and facilities "are available or can be provided." The city contends that PCC 34.30.030(A)(5) establishes the challenged ordinance amendments are in compliance with plan goal 11A. The city also argues that to the extent that serial partitions are encouraged, nothing in plan goal 11A prohibits them.

Petitioner does not explain, and it is not apparent, why amended PCC 34.30.030(A)(5) is not in compliance with plan goal 11A. Furthermore, we agree with the city that even if "serial partitions" are encouraged by the disputed amendments, nothing in plan goal 11A prohibits serial partitions.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSSIGNMENT OF ERROR

"The city misconstrued the applicable law and acted in violation of state statutes, State-wide Planning Goals 1 and 2, and its comprehensive plan

and implementing subdivision ordinance by amending minor land division review criteria without adequate findings in the record demonstrating (a) a factual basis or rationale for such amendments, (b) consideration of alternatives in light of objections raised or (c) reasoning or factual evidence as to how such amendments eliminate the exercise of discretion so as to make review criteria clear and objective."

FOURTH ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and acted in violation of ORS 227.175(10) and 227.180 by repealing minor land division notice and appeal rights without in fact establishing clear and objective standards which eliminate the exercise of discretion in such land use decisionmaking."

Under these assignments of error, petitioner makes two claims. First, petitioner contends that even without the requirements for reviewing a minor land division against the plan and the PCC "principles of land suitability," minor land divisions approved pursuant to amended PCC 34.30.030(A) are nevertheless discretionary approvals of proposed developments of land, i.e., "permits," as defined by ORS 227.160(2). Therefore, according to petitioner, the city must provide for notice and an opportunity for interested persons to be heard regarding such applications. ORS 227.175(3) and (10); 227.180.

Second, petitioner claims the city has not adequately explained in its findings the reasoning for the challenged amendments. We address each of these claims separately below.

A. Compliance with ORS 227.175(3) and (10)

Petitioner asserts that application of PCC 34.30.030(A)(1)-(6) involves the exercise of discretion, interpretation, and factual, policy or legal judgment. Petitioner specifically argues PCC 34.30.030(A)(3), (4) and (6) require such interpretation and judgment.¹³

The parties agree that the PCC does not require or provide for notice or a hearing before the city may make a final decision concerning a proposed minor land division. Therefore, if petitioner is correct that PCC 34.30.030(3), (4) or (6) are discretionary criteria, the PCC as amended, violates 227.175(3) and (10).¹⁴

¹³We do not consider whether PCC 34.30.030(1), (2) and (5) are discretionary criteria, because petitioner supplies no argument in his petition for review concerning them, save the assertion that all of the PCC 34.30.030 criteria are discretionary. LUBA will not create petitioner's argument. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982). Petitioner does suggest the following statement in the challenged ordinance demonstrates the discretionary nature of decisions regarding minor land divisions:

"The proposed amendments are supportive of [plan goal 11A] in that they require that public facilities, including access, sewer, water and streets, be sufficient to support the new building sites being created." Record 3.

However, we do not understand this statement to be an approval standard. It is simply a statement indicating how a particular plan goal is to be satisfied by the proposed PCC amendments. In order to determine whether application of the ordinance involves interpretation or the exercise of factual, policy or legal judgment, we look to the applicable approval standards themselves.

¹⁴In Doughton v. Douglas County, 88 Or App 198, 744 P2d 1299 (1987), the Court determined that local government permit decisions over which this Board has jurisdiction under former ORS 197.015(10)(b)(A) are also discretionary "permits" under ORS 215.402(4) for which notice and an

1. PCC 34.30.030(A)(3) and (4)

PCC 34.30.030(A)(3) provides:

"The continuation of existing principal streets in surrounding areas will not be partially or fully blocked."

PCC 34.30.030(A)(4) provides:

"Access to adjacent property from streets, as required by City will not be partially or fully eliminated."

Petitioner contends that PCC 34.30.030(A)(3) and (4) require interpretation and the exercise of judgment to determine whether a street is "partially blocked," and whether access is "partially eliminated."

The city argues that these determinations are merely mechanical, and involve no interpretation or judgment. The city argues:

"This criterion requires the Planning Director to verify that the continuation of existing principal streets in surrounding areas will not be partially or fully blocked. * * * A street is "fully" blocked if it is 100 percent blocked. A street is "partially" blocked if the blockage is anything less than 100 percent." Respondent's Brief 12-13.

The city applies the same argument to PCC 34.30.030(A)(4).

We agree with the city.

2. PCC 34.30.030(A)(6)

PCC 34.30.030(A)(6) provides:

opportunity to be heard are required. The language of ORS 215.402(4) and ORS 227.160(2), applicable to cities, is nearly identical.

"All requirements of the City Engineer must be met."

Petitioner argues this requirement is discretionary. Petitioner argues that one of the requirements of the city engineer is to determine whether "sufficient access" will result from the minor land division. Petitioner contends if the city engineer determines that the access is insufficient, that the terms of PCC 17.88.010 are relevant. PCC 17.88.010 provides in part:

"No single family * * * building shall be constructed * * * on property that does not have direct access by frontage or recorded easement with not less than ten feet width of right-of-way to a street used for vehicular traffic. If such street or any other street adjacent to the property used for vehicular access for said property does not have a standard full-width improvement, including sidewalks, the owner as a condition of obtaining a building permit, conditional use, zone change, land partition or variance, shall provide for such an improvement or a portion thereof as designated by the City Engineer, in accordance with the provisions elsewhere in this Title. Where, in the opinion of the City Engineer, it is not feasible to provide such a standard improvement, he may allow a temporary improvement appropriate for the circumstances * * *."

Petitioner contends the city engineer's determination under PCC 17.88.010 is discretionary. Petitioner suggests that the necessity for the city engineer to exercise judgment necessarily makes the planning director's decision under PCC 34.30.030(A)(6) discretionary as well.

The city does not dispute that the city engineer may

apply PCC 17.88.010 in the engineer's review of applications for minor land divisions. However, the city states PCC 17.88.010 is not acknowledged and is not a land use regulation. The city contends PCC 17.88.010 states requirements for the construction of streets. The city argues the city engineer is required to make the above quoted determinations regarding streets and the city planning director must find that the requirements of the City Engineer are met. According to the city, this process does not convert the planning director's decision on an application for a minor land division into a decision involving interpretation or the exercise of judgment.

The city argues:

"* * * [PCC 34.30.030(A)(6)] is really a condition of approval, or a simple requirement. If the City Engineer has imposed a requirement, the Planning Director must simply impose a condition that the requirement is met. The ordinance does not leave the Planning Director with any discretion in the matter." Respondent's Brief 15.¹⁵

¹⁵The city also argues the PCC 34.30.030(A)(6) requirement, that the planning director find that all of the requirements of the engineer are met, is analogous to a requirement that the planning director find that the city engineer has checked a box on a checklist to indicate the city engineer's approval of the proposed minor land division. The city states that a requirement that the director find that a particular box on a checklist is marked does not involve the exercise of discretion.

While it may be the case that a provision in an ordinance requiring the planning director find that a checklist is completed by certain city officials does not involve the exercise of discretion within the meaning of ORS 227.160(2), amended PCC 34.30.030(A)(6) does not simply require the planning director to find that certain boxes on a checklist are marked. It would be an incorrect interpretation, having no basis in the language of the PCC, to read PCC 34.30.030(A)(6) in this manner. Rather,

A city decision does not involve discretion, interpretation or the exercise of factual, policy or legal judgment where the applicable standards articulate objective criteria for deciding "when, whether, and how" each criterion is satisfied. See Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987) (interpreting whether a decision is discretionary under former ORS 197.015(10)(b)).

PCC 34.30.030(A)(6) does articulate criteria for deciding what the planning director is to do when the city engineer determines that the engineer's criteria are currently and unconditionally met. However, PCC 34.30.030(A)(6) provides no guidance regarding what the planning director is to do if the requirements of the city engineer are not met or if the planning director imposes conditions to assure the city engineer's requirements are met. While the city suggests in its brief that if the requirements of the city engineer are not currently met, the planning director may simply impose conditions that the

PCC 34.30.030(A)(6) requires the planning director to determine all of the requirements of the city engineer are met.

Additionally, while we do not specifically consider PCC 34.30.30(A)(5) concerning availability of water, sewer, and drainage systems and facilities because petitioner does not specifically argue that the standard imposed by that section requires discretionary decision making, the city offers similar interpretive arguments in defense of that section. We similarly question whether that section is properly interpreted to simply require that the planning director find that the appropriate city staff represent that the facilities and services are available or can be provided.

engineer's requirements be met, we note there are no standards to guide this latter determination. Specifically, there are no standards to guide the planning director in choosing between (1) denying the application for a minor land division because the requirements of the engineer are not met, or (2) determining it is feasible to satisfy the requirements of the city engineer and that conditions should be imposed by the planning director requiring the engineer's criteria to be met.¹⁶

We conclude the determination required of the planning director under PCC 34.30.030(A)(6), that the requirements of the city engineer be met, involves the exercise of factual, policy or legal judgment to determine under what circumstances meeting those requirements is feasible, and may be attained through the imposition of conditions. Thus, the city erred in failing to provide for notice to, and an

¹⁶The city notes it understands its ordinance may raise delegation issues e.g. whether the city planning director is required to make the initial determination regarding feasibility of the proposal to conform to the requirements of the city engineer; see Margulis v. City of Portland, 4 Or LUBA 89 (1981); and whether the planning director determination required by PCC 34.30.030(A)(6) is a "detailed technical matter" which may be left to be worked out between an applicant and the city engineer, Meyer v. City of Portland, 67 Or App 274, 282, n 6, 678 P2d 741, rev den 297 Or 82 (1984). The city's arguments concerning possible improper delegation of decisionmaking to the city engineer and other city staff relate to its offered interpretations of PCC 34.30.030(A)(5) and (6). We reject the city's interpretation of PCC 34.30.030(A)(6) and do not consider PCC 34.30.030(A)(5). See n 13, 15, supra. Petitioner does not allege or present argument in the petition for review that the city's decision improperly delegated decision making authority to the city engineer or other city staff, and we decline to address the city's delegation arguments in these circumstances.

opportunity for, interested persons to be heard under ORS 227.175(3) and (10).

This subassignment of error is sustained, in part, with regard to PCC 34.30.030(A)(6).

B. Adequacy of the Findings

Petitioner argues the findings supporting the challenged ordinance are inadequate (1) to explain the city's choices between competing policies, (2) to explain the city's rationale for its decision, and (3) to demonstrate an adequate factual base for the challenged ordinance. Lima v. Jackson County, 3 Or LUBA 78 (1981); Gruber v. Lincoln County, 2 Or LUBA 180 (1981).¹⁷

The city contends its findings are adequate to support the challenged ordinance. The city correctly states that Lima v. Jackson County, supra, and Gruber v. Lincoln County, supra, do not control the challenged ordinance. Both of those cases involved decisions to apply land use designations to specific properties. Specific properties are not involved in the adoption of the challenged ordinance.

¹⁷Petitioner also argues the city was required to adopt findings required for a quasi-judicial decision. Estate of Gold v. City of Portland, 87 Or App 45, 740 P2d 812 (1987).

In this case, however, the elements of quasi-judicial decision making are not present. Pre-existing criteria have not been applied to a concrete fact situation, and the city was not required to reach a decision. The city's adoption of Ordinance No. 162603 is correctly characterized as a legislative act.

The city also argues there is no requirement for:

"a legislative enactment to contain a discussion or explanation of why one policy option was chosen over all other possible options." Respondent's Brief 21.

The city contends that if such a requirement existed, the city has provided an adequate explanation of its rationale for adopting the challenged ordinance in the findings.

None of the authorities cited by petitioner demonstrate the city's legislative ordinance must be declared invalid for lack of adequate findings. With the exception of the findings required to explain the apparent conflict between the amended PCC and plan policy 8.13 discussed supra, we believe that the city's findings are adequate.

This subassignment of error is denied.

The second and fourth assignments of error are sustained in part.¹⁸

THIRD ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and acted arbitrarily and capriciously in violation of constitutional standards by approving amendments to minor land division review criteria without reasoned discussion or factual evidence regarding how such amendments eliminate the exercise of discretion so as to make review criteria clear and objective, and in disregard of evidence in the record showing such amended criteria to be

¹⁸The parties advance different theories on the applicability and effect of ORS 197.015(10)(b), which exempts certain subdivisions and partitions from our review authority. However, neither party contends ORS 197.015(10)(b) precludes our review of the challenged PCC amendments, and we do not see that it does.

discretionary."

In this assignment of error, petitioner contends the city's decision is "arbitrary and capricious," because the city disregarded "contrary facts and evidence in the record." Petition for Review 23. Petitioner bases his contention that the city's ordinance is arbitrary and capricious on the correctness of his first and second assignments of error.

The city argues its ordinance is not "arbitrary and capricious" based on (1) the city's belief that its ordinance is legally correct, and (2) the city's belief that its ordinance was a "straightforward response" to LUBA's remand of Nicolai I. Respondent's Brief 22.

We do not believe the city's decision adopting the challenged ordinance was "arbitrary and capricious." Although we sustain portions of petitioner's assignments of error above, there was room for differences in opinion on the correct courses of action for the city to take in response to our remand of Nicolai I. See Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5 (1958).

The third assignment of error is denied.

The city's decision is remanded.