

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 BARTLEY F. DAY, SCOTT CRESS,)
5 DANA CRESS, RICHARD LEONARD,)
6 MARGARET LEONARD, PETTER MOE,)
7 WILLIAM FLETCHER, MARILYN)
8 FLETCHER, TOM VALA, and JAN VALA,)

9)
10 Petitioners,)
11)
12 vs.)

LUBA No. 92-240

13)
14 CITY OF PORTLAND,)
15)
16 Respondent,)

FINAL OPINION
AND ORDER

17)
18 and)
19)
20 MICHAEL J. DALY,)
21)
22 Intervenor-Respondent.)

23
24
25 Appeal from City of Portland.
26

27 Bartley F. Day, Scott Cress, Dana Cress, Richard
28 Leonard, Margaret Leonard, Petter Moe, William Fletcher,
29 Marilyn Fletcher, Tom Vala, and Jan Vala, Portland, filed
30 the petition for review. Bartley F. Day and Richard Leonard
31 argued on their own behalf.
32

33 Ruth M. Spetter, Senior Deputy City Attorney, Portland,
34 filed a response brief and argued on behalf of respondent.
35

36 Michael J. Daly, Portland, filed a response brief and
37 argued on his own behalf.
38

39 HOLSTUN, Referee; SHERTON, Chief Referee, participated
40 in the decision.
41

42 AFFIRMED

06/16/93

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

1 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision granting approval
4 for a three lot subdivision.

5 **MOTION TO INTERVENE**

6 Michael J. Daly, the applicant below, moves to
7 intervene on the side of respondent in this appeal. There
8 is no opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject property is presently developed with a
11 single family residence that is the home of the applicant.
12 The proposed subdivision would create two new lots, which
13 would allow development of two additional single family
14 dwellings. Petitioner Day's home is located on a lot
15 adjoining the subject property to the south. A single
16 common private roadway currently provides access to both
17 petitioner Day's and the applicant's homes. As part of the
18 proposed subdivision, the applicant will widen and pave the
19 existing gravel private roadway and relocate the
20 intersection of that private roadway with S.W. Hillside
21 Drive slightly to the north.

22 Where the existing private roadway passes in front of
23 petitioner Day's home, it is located entirely on the
24 applicant's property, as is the existing laurel hedge which
25 screens petitioner Day's home from the existing private

1 roadway.¹ In providing the widened, paved private roadway
2 required by the city, at least part of the laurel hedge will
3 need to be removed, and the new paved private roadway will
4 pass only 12 feet from the front of petitioner Day's garage,
5 making it difficult or impossible to park a car in front of
6 his garage without having the car extend into the the new
7 private roadway.

8 **FIRST ASSIGNMENT OF ERROR**

9 The first and third assignments of error and
10 subassignment B under the fourth assignment of error all
11 concern Portland City Code (PCC) 34.60.010, which
12 establishes design standards for streets in a proposed
13 subdivision.

14 Under their first assignment of error, petitioners
15 contend that, contrary to a finding adopted by the city, no
16 easement exists across petitioner Day's property to provide
17 emergency vehicle access to the proposed subdivision via the
18 existing private roadway.² The challenged findings are as
19 follows:

20 "In addition, the existing [private roadway] -
21 easement provides a straight line access (without

¹Other portions of the existing private roadway, in particular the beginning of the roadway at its current intersection with S.W. Hillside Drive, are located entirely on petitioner Day's property.

²Although petitioners do not identify the approval criterion that the findings challenged under the first assignment of error were adopted to address, the findings appear in a portion of the decision addressing PCC 34.60.010.

1 any turn radius) onto the property to and from
2 S.W. Hillside Drive. This existing easement
3 access is just south of the proposed private
4 roadway access and will be retained. This
5 existing easement access merges with the proposed
6 private roadway approximately 25 feet into the
7 property. As a result, the easement has been and
8 will continue to be satisfactory for an alternate
9 access for fire and emergency vehicles. See,
10 [Applicant's] Rebuttal * * * at pages 4 - 5.^[3]
11 The applicant has satisfied the requirements of
12 adequate access for fire and emergency vehicles."
13 Record 16.

14 In addressing PCC 34.60.010, the city first adopts
15 findings that the proposed private roadway (which will be
16 located entirely on the applicant's property) will have to
17 be approved by the Fire Bureau. The challenged decision
18 includes a condition of approval requiring that the proposed
19 private roadway be constructed in accordance with an exhibit
20 submitted by the applicant and be approved by the "Bureau of
21 Buildings and the Fire Bureau." Record 16, 23. Except as
22 noted below under our discussion of the third assignment of
23 error, neither these findings, nor their evidentiary
24 support, are challenged by petitioners.

25 The problem with petitioners' argument under this
26 assignment of error is that they make no attempt to explain
27 why the disputed finding concerning the existing private
28 roadway entrance is critical to the challenged decision.

³In his rebuttal, the applicant first explains why the proposed relocated private roadway is within Fire Bureau standards and then points out that the existing private roadway entrance will be retained and that it also provides adequate access for fire vehicles.

1 Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984); see
2 also Neste Resins Corp. v. City of Eugene, 23 Or LUBA 55,
3 67-68 (1992); Schatz v. City of Jacksonville, 21 Or LUBA
4 149, 163-64 (1991); Moorefield v. City of Corvallis, 18 Or
5 LUBA 95, 119 (1989). It is the city's decision, not
6 individual findings, that must be supported by substantial
7 evidence. Sellwood Harbor Condo Assoc. v. City of Portland,
8 16 Or LUBA 505, 513-14 (1988); Bonner v. City of Portland,
9 supra, 11 Or LUBA at 52 n 10. We do not understand the city
10 to be relying on the existing private roadway intersection
11 with S.W. Hillside Drive to achieve compliance with
12 PCC 34.60.010. Petitioners do not challenge the adequacy of
13 the proposed private roadway to provide emergency vehicle
14 access under this assignment of error.⁴

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Citing PCC 33.110.220 (concerning the purpose of
18 setbacks) and PCC Chapter 33 Table 110-3, petitioners
19 contend the challenged decision violates applicable setback
20 requirements because the proposed private roadway will be
21 only 12 feet from petitioner Day's garage.

22 Respondent answers that the setback requirements of PCC
23 Chapter 33, Table 110-3 are measured from petitioner Day's

⁴Petitioners do challenge the adequacy of the proposed private roadway to provide emergency vehicle access under their third and fourth assignments of error, discussed infra.

1 lot line to the garage and, therefore, it is petitioner
2 Day's garage that violates the cited setback requirement,
3 regardless of whether the challenged subdivision is
4 approved. Respondent further contends the cited setback
5 requirement is not applicable to the proposed private
6 roadway included in the challenged subdivision. Respondent
7 argues that while petitioner Day's garage may remain where
8 it is, notwithstanding its violation of setback
9 requirements, petitioners may not assert that setback
10 violation as a basis for denying the applicant's proposal to
11 improve an existing roadway on his own property. We agree
12 with respondent.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 **A. Intersection Inside Curb Radius**

16 Petitioners contend the proposed private roadway
17 alignment will intersect with S.W. Hillside Drive north of
18 the existing private roadway intersection and that the new
19 more northerly intersection will have an inside curb radius
20 of approximately seven feet, far less than the 25 foot
21 inside radius petitioners contend is required by Code
22 Enforcement Policy B-1 of the Fire Bureau's Fire Prevention
23 Division Policy and Procedure Manual.

24 Respondent answers that the Fire Bureau's Fire
25 Prevention Division Policy and Procedure Manual does not
26 establish standards for approval of subdivision requests.

1 Moreover, respondent notes Code Enforcement Policy B-1 does
2 not purport to establish mandatory standards, but rather
3 imposes standards that are generally required "dependent on
4 the type and size of buildings involved."

5 Petitioners fail to identify any requirement that the
6 city must demonstrate compliance with the cited Fire Bureau
7 Code Enforcement Policy in approving the requested
8 subdivision. Accordingly, this portion of the third
9 assignment of error provides no basis for reversal or
10 remand.

11 **B. Intersection Angle**

12 As part of their argument under the third assignment of
13 error, petitioners include the following:

14 "The proposed intersection angle of the private
15 street with [S.W.] Hillside Drive does not meet
16 the standards of [PCC] 34.60.010(A)." Petition
17 for Review 8.

18 The third assignment of error itself only challenges roadway
19 width and inside curb radius and does not mention the angle
20 of intersection of the proposed private roadway and S.W.
21 Hillside Drive or PCC 34.60.010(A).

22 PCC 34.60.010(A) says nothing about intersection
23 angles. At oral argument, petitioner Day argued the
24 reference to PCC 34.60.010(A) in the petition for review
25 should have been to PCC 34.60.010(C). However, even if such
26 a last minute "correction" were permissible, petitioners do

1 not explain how they believe PCC 34.60.010(C) is violated.⁵

2 By citing the wrong code provision in their argument
3 and failing to include an allegation of violation of
4 PCC 34.60.010(C) in the assignment of error itself,
5 petitioners do not adequately allege error with regard to
6 intersection angle under PCC 34.60.010(C). Petitioners may
7 not fail to include an issue in their petition for review
8 and then raise that issue for the first time at oral
9 argument. See Bouman v. Jackson County, 23 Or LUBA 628, 656
10 (1992); Ward v. City of Lake Oswego, 21 Or LUBA 470, 482
11 (1991); Hale v. City of Beaverton, 21 Or LUBA 249 (1991);
12 Cecil v. City of Jacksonville, 19 Or LUBA 621 (1990). We
13 have explained that a petitioner's failure to identify an
14 alleged error in the assignment of error itself is not
15 necessarily fatal, where the error alleged is sufficiently
16 clear in the argument included in the petition for review.
17 See Heiller v. Josephine County, 23 Or LUBA 551, 554 (1992);
18 Silani v. Klamath County, 22 Or LUBA 735, 736 (1992);
19 Schoonover v. Klamath County, 16 Or LUBA 846, 853 n4 (1988).
20 However, here the undeveloped argument and erroneous
21 citation to PCC 34.60.010(A) are insufficient to allege
22 noncompliance with the intersection angle limitations of PCC

⁵PCC 34.60.010(C) imposes the following requirement:

"Streets shall be laid out to intersect at angles as near to right angles as practical except where topography requires a lesser angle, but in no case shall the acute angle be less than 80 degrees unless there is a special intersection design."

1 34.60.010(C). Accordingly, we do not consider this portion
2 of the third assignment of error.⁶

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Under this assignment of error, petitioners allege the
6 city improperly failed to make findings required by the PCC
7 and comprehensive plan prior to approval of the disputed
8 subdivision and improperly substituted conditions of
9 approval for the required findings.

10 **A. Storm Drainage**

11 As relevant, PCC 34.70.020(B) imposes the following
12 requirement:

13 "Storm sewers and drainageways: Storm sewers or
14 drainageways shall connect the Subdivision to
15 drainageways or storm sewers outside the
16 Subdivision. Drainageways may be required to
17 include on-site flood retention facilities, as
18 required by the City Engineer. * * * The design of
19 flood retention and stormwater treatment
20 facilities shall fulfill the requirements of the
21 City Engineer."

22 Petitioners argue "[t]here are no findings in the
23 record that the proposed storm drainage system could in fact

⁶Were a violation of PCC 34.60.010(C) properly alleged, the city's decision likely would have to be remanded because the issue of whether the intersection angle complies with PCC 34.60.010(C) was raised below, and that issue is not addressed in the city's findings. We are unable to tell from the documents cited by the parties whether the proposed intersection complies with PCC 34.60.010(C) or precisely what the proposed angle of intersection is. We note however, that even if the proposed intersection angle is less than 80 degrees, such an angle may be allowed under PCC 34.60.010(C) with "a special intersection design."

1 feasiably handle the storm water runoff from the subdivision
2 site," but petitioners do not explain why such findings are
3 required by PCC 34.70.020(B). Neither do petitioners offer
4 any explanation for why they believe the proposed storm
5 water drainage system might be infeasible. Petitioners
6 simply argue the city has attempted to "sidestep the
7 required findings, and replace those findings with
8 conditions." Petition for Review 9.

9 We agree with respondent that PCC 34.70.020(B) does not
10 impose a "findings" requirement with regard to stormwater
11 drainage system feasibility. PCC 34.70.020(B) simply
12 requires that storm sewers or drainageways "shall [be
13 connected] to drainageways or storm sewers outside the
14 Subdivision." We do not understand petitioners to contend
15 that such connection is infeasible, but rather that the
16 storm drainage system will be inadequate to "handle storm
17 water runoff from the subdivision site." Petition for
18 Review 9. As explained earlier in this opinion, allegations
19 that the city's decision lacks particular findings provides
20 no basis for remand, unless it is shown that the allegedly
21 missing findings are required. Bonner v. City of Portland,
22 supra. Petitioners fail to make such a showing here.⁷

⁷Petitioners also cite comprehensive plan Public Safety Fire Goal 11G, which provides that the city "[w]ill develop and maintain facilities that adequately respond to the fire protection needs of the city." We fail to see how this policy has any relevance to the allegedly missing findings with regard to storm water drainage feasibility.

1 This subassignment of error is denied.

2 **B. Minimum Street Width and Turn Radius**

3 Under this subassignment of error, petitioners allege
4 the city failed to make findings concerning street width and
5 turn radius required by the comprehensive plan goals and
6 policies and the PCC. Petitioners' entire argument under
7 this subassignment of error is as follows:

8 "There are no findings to support compliance with
9 these goals and policies. Condition B is an
10 attempt to sidestep required findings and defer
11 the discretionary decision to staff." Petition
12 for Review 10.

13 **1. Plan Policy 11.57**

14 Plan Fire Emergency Access Policy 11.57 provides as
15 follows:

16 "Require streets to be of high structural quality,
17 sufficient width, and keep maintained to insure
18 access of emergency and service equipment."

19 Respondent contends the above policy, which appears in
20 the Public Facilities and Services Element of the
21 comprehensive plan, is directed at how the city expends
22 funds for such facilities and services, not individual
23 subdivision approval decisions. The comprehensive plan
24 provides, in part, as follows:

25 "Public Facilities and Services is the eleventh
26 element in Portland's [Comprehensive] Plan. The
27 Public Facilities Goals and Policies guide how the
28 City spends money each year to maintain and
29 construct the physical facilities and public
30 services which are necessary to support the
31 implementation of the Land Use Policies and the
32 Comprehensive Plan Map. * * *" Comprehensive Plan

1 Goals and Policy Document 6.

2 As we have explained on numerous occasions, while land
3 use decisions must comply with the acknowledged
4 comprehensive plan, not all plan provisions are approval
5 standards for all land use decisions. See Stotter v. City
6 of Eugene, 18 Or LUBA 135, 146 (1989); Bennett v. City of
7 Dallas, 17 Or LUBA 450, 456, aff'd 96 Or App 645 (1989);
8 Miller v. City of Ashland, 17 Or LUBA 147, 167 (1988).
9 Petitioners fail to offer any explanation of why they
10 believe Plan Fire Emergency Access Policy 11.57 establishes
11 an approval criterion applicable to the challenged decision,
12 and, in the absence of such an explanation, we agree with
13 respondent that the allegations under this subassignment of
14 error provide no basis for reversal or remand.

15 This subassignment of error is denied.

16 **2. PCC 34.60.010(A) and Fire Bureau Code**
17 **Enforcement Policy B-1**

18 Under this portion of subassignment B, petitioners
19 repeat their arguments concerning Fire Bureau Code
20 Enforcement Policy B-1. We have already explained that the
21 code enforcement policy does not establish an applicable
22 approval standard, and we do not consider these arguments
23 further here.

24 PCC 34.60.010(A) provides as follows:

25 "Minimum right-of-way and roadway widths shall be
26 as shown on Figure 1 found at the end of this
27 Chapter. Widths in excess of these minimums may
28 be required where anticipated volumes or types of

1 traffic make such additional widths in the public
2 interest. Where conditions, particularly
3 topography or the size and shape of the tract,
4 make it impractical to otherwise provide buildable
5 sites, or where special design features of the
6 major land division make such widths unnecessary,
7 narrower rights-of-way and roadways may be
8 approved by the Hearings Officer with the
9 concurrence of the City Engineer. * * *

10 In considering the challenged subdivision's compliance
11 with PCC 34.60.010(A), the hearings officer adopted the
12 following finding:

13 "[A] private street [is] proposed with a 20-foot
14 right-of-way. A minimum paving width of 16 feet
15 will facilitate preservation of landscaping in the
16 right-of-way and eliminate unnecessary cutting
17 into the hillside. * * *

18 While the decision does go on to state that the private
19 roadway will have to be approved by the Fire Bureau and City
20 Engineer, and imposes a condition to that effect,
21 petitioners make no attempt to explain why the above quoted
22 finding is insufficient to allow deviation from the right-
23 of-way and roadway widths that otherwise would be required
24 by Figure 1, cited in PCC 34.60.010(A). Because PCC
25 34.60.010(A) explicitly permits such deviations, and
26 petitioners make no attempt to fault the rationale offered
27 by the city in allowing the narrower right-of-way and
28 roadway, petitioners' argument provides no basis for
29 reversal or remand.

30 This subassignment of error is denied.

1 **C. Access to Petitioner Day's Property**

2 The challenged decision includes a condition of
3 approval that "the design of the street must provide no
4 worse access to [petitioner] Day's garage than currently
5 exists." Record 23. Petitioners fault respondent for
6 failing to find that such "no worse" access is feasible.
7 Petitioners also contend the city improperly defers the
8 determination of such feasibility to a stage of the
9 development process where petitioners will have no
10 meaningful opportunity to contest that determination.

11 Once again, respondent contends there is no standard
12 requiring a finding that "no worse" access be provided or
13 that respondent find such access is feasible. Because
14 petitioners do not identify any provision in the
15 comprehensive plan or the PCC establishing a requirement for
16 "no worse access to [petitioner] Day's garage than currently
17 exists," the city's failure to demonstrate that such access
18 is feasible provides no basis for reversal or remand.

19 This subassignment of error is denied.

20 The fourth assignment of error is denied.

21 The city's decision is affirmed.