

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 OREGON NATURAL RESOURCES COUNCIL,)

5 and SHA SPADY,)

6)

7 Petitioners,)

8)

9 vs.)

10)

11 CITY OF OREGON CITY,)

12)

13 Respondent,)

14)

15 and)

16)

17 NEWELL CREEK DEVELOPMENT COMPANY,)

18)

19 Intervenor-Respondent.)

LUBA No. 94-086

FINAL OPINION
AND ORDER

20

21

22 Appeal from City of Oregon City.

23

24 Stuart A. Sugarman, Portland, filed the petition for

25 review and argued on behalf of petitioners.

26

27 Daniel Kearns, Portland, filed a response brief and

28 argued on behalf of respondent. With him on the brief was

29 Preston Gates & Ellis.

30

31 James H. Bean, Portland, filed a response brief and

32 argued on behalf of intervenor-respondent. With him on the

33 brief was Lindsay, Hart, Neil & Weigler.

34

35 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,

36 Referee, participated in the decision.

37

38 REMANDED 11/14/94

39

40 You are entitled to judicial review of this Order.

41 Judicial review is governed by the provisions of ORS

42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city commission decision approving
4 a preliminary plat for a 55-lot single-family residential
5 subdivision.¹

6 **MOTION TO INTERVENE**

7 Newell Creek Development Company, the applicant below,
8 moves to intervene in this appeal on the side of respondent.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property is undeveloped and 29.8 acres in
12 size. Approximately 25 acres are designated Low Density
13 Residential on the city's comprehensive plan map and zoned
14 Single-Family Residential, 10,000 sq. ft. minimum lot size
15 (R-10). Approximately 4 acres are designated Commercial and
16 zoned General Commercial (C). The property is also subject
17 to the Unstable Slopes Overlay District (US). The property
18 is located in a portion of the city known as Newell Creek
19 Canyon. This area is characterized by steep slopes, is
20 largely undisturbed and, for the most part, is heavily
21 wooded.

22 After several public hearings on intervenor's
23 subdivision application, the planning commission adopted an
24 order denying the application, based on concerns about slope

¹The city commission is the governing body of the City of Oregon City.

1 stability. Intervenor appealed the planning commission's
2 decision to the city commission. After an on-the-record
3 review limited to the issue raised in intervenor's appeal,
4 the city commission adopted the challenged decision
5 approving intervenor's application.

6 **PRELIMINARY ISSUES**

7 **A. Standing/Exhaustion**

8 Intervenor contends petitioners have standing to appeal
9 only aspects of the challenged decision related to geologic
10 concerns, because those were the only issues appealed to the
11 city commission. Intervenor argues petitioners could have
12 appealed the planning commission's decision to the city
13 commission on other issues, but failed to do so.

14 Although intervenor couches its argument in terms of
15 "standing," there is no dispute that petitioners appeared
16 before the city during its proceedings, as required by
17 ORS 197.830(2)(b). To the extent intervenor contends
18 petitioners have not "exhausted all remedies available
19 before petitioning [LUBA] for review," as required by
20 ORS 197.825(2)(a), we disagree. The purpose of the
21 exhaustion requirement is to assure that the challenged
22 decision is reviewed by the highest level local decision
23 making body the local code makes available, before an appeal
24 to this Board is pursued. Moody v. Deschutes County, 22
25 Or LUBA 567, 569 (1992); McConnell v. City of West Linn, 17
26 Or LUBA 502 (1989). Here petitioners were the prevailing

1 parties after the initial local decision on the application.
2 A local appeal of that initial decision was filed by another
3 party to the proceeding, and petitioners participated in the
4 local appeal proceedings. Petitioners did not fail to
5 exhaust available local administrative remedies simply
6 because they did not file a separate local appeal of the
7 planning commission decision.² Choban v. Washington County,
8 25 Or LUBA 572 (1993).

9 Finally, although a local government is free to adopt
10 local code provisions narrowing the scope of review in local
11 appeal proceedings, as the city apparently has done, such
12 local code provisions do not have the legal effect of
13 limiting LUBA's scope of review. Choban, supra, 25 Or LUBA
14 at 581 n 11; Davenport v. City of Tigard, 25 Or LUBA 67, 70
15 (1993), aff'd 121 Or App 135 (1993); Tice v. Josephine
16 County, 21 Or LUBA 371, 376 (1991).

17 Therefore, we reject intervenor's contention that
18 petitioners lack standing to raise certain issues in this
19 appeal because they failed to bring an appeal to the city
20 commission regarding those issues.

21 **B. Waiver of Issues**

22 The city argues petitioners are precluded from raising
23 certain issues in this appeal because they failed to raise

²Although a local government is free to adopt local code provisions narrowing the scope of review in local appeal proceedings, as apparently was the case here, such local code provisions do not similarly limit LUBA's scope of review.

1 them during the proceedings below, as required by
2 ORS 197.195(3)(c)(B) and 197.835(2).

3 The challenged decision approving a preliminary plat
4 for a subdivision with the Portland Metropolitan Area Urban
5 Growth Boundary (UGB) is a "limited land use decision," as
6 defined in ORS 197.015(12)(a). In Barrick v. City of Salem,
7 27 Or LUBA 417, 424-26 (1994), we determined statutory
8 waiver requirements apply to limited land use decisions the
9 same way they apply to land use decisions. Therefore, our
10 review of limited land use decisions is limited to issues
11 raised below, unless (1) the local government did not
12 satisfy the procedural requirements of ORS 197.195, or
13 (2) the limited land use decision adopted differs
14 significantly from the proposal described in the local
15 notice of proposed action.

16 ORS 197.195(3)(b) requires a local government to
17 provide written notice of a proposed action to owners of
18 certain property and to recognized community or neighborhood
19 organizations. ORS 197.195(3)(c)(C) requires the city's
20 notice to "[l]ist, by commonly used citation, the applicable
21 criteria for the decision." The only notice to which we are
22 cited is the city's notice of the initial public hearing
23 before the planning commission.³ With regard to applicable

³Although not cited by the parties, the notice of the city commission hearing is at Record 57. That notice cannot satisfy the requirements of ORS 197.195(3), because the city council's review was on-the-record and limited to the issues raised in intervenor's appeal. In any case, the

1 criteria, that notice states:

2 "Criteria: Set forth in Title 16 of the City
3 Code. A full listing of applicable criteria and
4 standards will be set forth in the staff report,
5 which is available to the public at City Hall
6 seven days prior to the hearing." Record 310.

7 A statement that a list of applicable criteria will be
8 available at City Hall seven days prior to the hearing does
9 not satisfy the requirements of ORS 197.195(3)(b) and
10 (c)(C). See Murphy Citizens Advisory Comm. v. Josephine
11 County, 25 Or LUBA 312, 317 (1993). Consequently,
12 petitioners may raise issues in this appeal, regardless of
13 whether those issues were raised before the city below.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners contend the provisions of the US overlay
16 zone (Oregon City Municipal Code (OCMC) Chapter 17.44) apply
17 to any "development" or "development permits" in areas
18 subject to the overlay. Petitioners argue OCMC 17.04.025
19 defines "development" as including "any short plat,
20 partition, subdivision or planned unit development that is
21 created under the city's land division or zoning
22 regulations."⁴ According to petitioners, the challenged
23 decision fails to comply with OCMC 17.44.040.F(2)(a) to (c)

notice of the city commission hearing suffers the same deficiency as the
notice of the planning commission hearing, with regard to identifying
applicable criteria.

⁴Petitioners also contend city subdivision preliminary plat approval is
a "permit," as that term is defined in ORS 227.160(2). However, the
statutory definition of "permit" specifically excludes limited land use
decisions. ORS 227.160(2)(a).

1 because intervenor's application does not include
2 engineering geology or soil engineering reports which
3 demonstrate the engineering feasibility of the proposed
4 development and set out design criteria for certain
5 corrective measures. Petitioners also argue the decision
6 fails to include findings showing the requirements of
7 OCMC 17.44.040.F(2)(a) to (c) are met, as required by
8 ORS 227.173(2).⁵

9 Respondents argue OCMC 17.44.040 applies only to the
10 approval of building permits, not subdivision preliminary
11 plats. Respondents also argue that even if OCMC 17.44.040
12 applies, it is only a requirement that certain information
13 be in an application, not an approval standard. According
14 to respondents, if OCMC 17.44.040 is only a requirement for
15 information, failure to comply with it does not provide a
16 basis for reversal or remand, because petitioners fail to
17 demonstrate the missing information is necessary to a
18 determination of compliance with any approval standard.
19 Finally, respondents argue any failure to include the
20 information required by OCMC 17.44.040 in the application is
21 harmless, because such information can be found in a number
22 of different documents in the record.

⁵Because city limited land use decisions are not "permits," with one exception such decisions are not subject to the requirements of ORS 227.160 to 227.180. ORS 197.195(2) makes the requirement of ORS 227.173(2), for a statement of findings identifying the applicable criteria, setting out the facts relied on and explaining the basis for the decision, applicable to city limited land use decisions.

1 OCMC 17.44.040 provides, in relevant part:

2 "Development Permit -- Application -- Information.
3 The following shall be required [for] all building
4 permits in those areas designated as US * * *:

5 * * * * *

6 "F. The engineering geology or soil engineering
7 report shall discuss the engineering
8 feasibility of proposed development and
9 include findings and conclusions for:

10 * * * * *

11 "2. Design criteria for corrective measures,
12 including:

13 "a. Expected total differential
14 settlement,

15 "b. Bearing capacity,

16 "c. Provisions to minimize the effect of
17 expansive soils,

18 * * * * *

19 In resolving this assignment of error, a threshold
20 issue is whether the above provisions of OCMC 17.44.040
21 apply to a city decision approving a subdivision preliminary
22 plat on property subject to the US overlay district. In
23 determining whether and how OCMC 17.44.040 applies, we are
24 required to defer to the city commission's interpretation of
25 its own enactment, unless that interpretation is contrary to
26 the express words, purpose or policy of the local enactment
27 or to a state statute, statewide planning goal or
28 administrative rule which the local enactment implements.
29 ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17,

1 ____ P2d ____ (1994); Clark v. Jackson County, 313 Or 508,
2 514-15, 836 P2d 710 (1992).⁶ Furthermore, under Weeks v.
3 City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914
4 (1992), we are required to review the city commission's
5 interpretation of OCMC 17.44.040 and may not interpret
6 OCMC 17.44.040 in the first instance. Finally, to be
7 reviewable, the city commission's interpretation of
8 OCMC 17.44.040 must be expressed in the challenged decision,
9 not in its response brief. Eskandarian v. City of Portland,
10 26 Or LUBA 98, 109 (1993); Miller v. Washington County, 25
11 Or LUBA 169, 179 (1993).

12 The challenged decision does not specifically interpret
13 or apply OCMC 17.44.040.F. It does however contain several
14 statements regarding the general applicability of
15 OCMC Chapter 17.44 to the subject application. These
16 include:

17 " * * * Development of the site is therefore
18 subject to the provisions of [OCMC] Chapter 17.44
19 * * *." Record 5.

20 "[T]he constraints imposed by [OCMC] Chapter 17.44
21 are applicable to this development." Record 6.

22 "[W]here construction on steep slopes cannot
23 reasonably be avoided, construction * * * is
24 required to comply with the standards set forth
25 under [OCMC Chapter 17.44]. Since the purpose of

⁶ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the supreme court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, ____ P2d ____ (1994).

1 that [chapter] is to provide appropriate
2 safeguards for construction impacting property
3 located in the [US] overlay district, adherence to
4 the requirements of that chapter is sufficient to
5 meet the standards imposed by [plan] Natural
6 Resource Policy No. 10." Record 11.

7 "[OCMC] Chapter 17.44 has been found to be
8 applicable to this development. The conditions of
9 approval imposed upon the applicant by this
10 approval require compliance with the standards
11 imposed under [OCMC] Chapter 17.44."⁷ Record 16.

12 In addition, the findings discuss how the authors of the
13 geological reports in the record satisfy the requirement of
14 OCMC 17.44.040.E that the geological report required by
15 OCMC 17.44.040.F be prepared by a "civil engineer licensed
16 in the state who is experienced and knowledgeable in
17 engineering geology or soil engineering * * *."
18 Record 16-17.

19 The above findings are unclear as to whether the city
20 commission interprets OCMC Chapter 17.44, and particularly
21 OCMC 17.44.040.F, as being applicable to development of the
22 subject property only at the building permit or other
23 subsequent stage, as respondents argue, or as applicable to
24 the challenged decision and satisfied by the conditions of

⁷The "conditions of approval" do not explicitly refer to OCMC Chapter 17.44. One relevant condition of approval provides:

"During the final engineering, all lots shall be reviewed to ensure their feasibility. If any lot is questionable, a detailed analysis shall be required to ensure buildability. Only lots that are buildable shall be platted. Lots with slopes greater than 25 percent shall require a geotechnical report prior to issuing a building permit." Record 47.

1 approval imposed. While we might agree with, or be able to
2 defer to, the interpretation expressed in the city's brief
3 that OCMC 17.44.040.F applies to development in the US
4 overlay district only at the stage of building permit
5 approval, such an interpretation must be expressed in the
6 decision itself. Eskandarian v. City of Portland, supra.
7 Additionally, if OCMC Chapter 17.44 is applicable at the
8 subdivision preliminary plat approval stage, we cannot tell
9 from the challenged decision whether the city commission
10 interprets OCMC 17.44.040.F to be simply a requirement for
11 information in the application or to impose substantive
12 standards concerning design criteria for corrective measures
13 in areas of unstable slopes.

14 Because the challenged decision does not contain an
15 interpretation of OCMC 17.44.040.F adequate for review, the
16 decision must be remanded. The first assignment of error is
17 sustained.

18 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

19 The OCMC provisions governing approval of preliminary
20 subdivision plats require submission of a "development
21 impact statement" (DIS). OCMC 16.12.050. Petitioners
22 contend intervenor's DIS does not satisfy the requirements
23 of OCMC 16.12.070 and 16.12.080 for the contents of a DIS
24 with regard to hydrological/geological considerations and
25 vegetation/ animal life considerations, respectively.

26 Respondents argue OCMC 16.12.070 and 16.12.080 are not

1 themselves approval criteria for subdivision preliminary
2 plats, and contend petitioners fail to demonstrate that
3 allegedly missing information required by OCMC 16.12.070 and
4 16.12.080 is required to determine compliance with approval
5 criteria. Alternatively, respondents argue the information
6 petitioners contend is required to be in the DIS by
7 OCMC 16.12.070 and 16.12.080 can be found in other documents
8 in the record. According to respondents, the errors alleged
9 by petitioners under these assignments are procedural in
10 nature and do not provide a basis for remand, because
11 petitioners fail to demonstrate their substantial rights
12 were prejudiced by the alleged errors.

13 OCMC Chapter 16.12 (Preliminary Approval Procedure)
14 governs the approval of subdivision preliminary plats.
15 OCMC 16.12.020.B requires subdivision preliminary plats to
16 conform to the city's subdivision and zoning regulations.
17 OCMC 16.12.190.D states the city may approve a subdivision
18 preliminary plat if it "meets the criteria established by
19 this chapter and is in accordance with the provisions of the
20 city zoning ordinance * * *." (Emphasis added.) However,
21 nothing in OCMC Chapter 16.12 specifies which provisions of
22 that chapter the city considers to be approval criteria for
23 subdivision preliminary plats.

24 OCMC 16.12.030 and 16.12.050.A require a subdivision
25 applicant to submit five copies of its DIS at least 30 days
26 prior to consideration by the planning commission. Under

1 OCMC 16.12.050.A, the DIS shall be reviewed by planning
2 department staff, all affected government agencies and the
3 general public, and these entities must be given at least 15
4 days to comment on the complete DIS. After the comment
5 period has expired, the planning department staff is
6 required to prepare a written analysis of the DIS and all
7 comments. OCMC 16.12.050.B. The staff then transmits a
8 copy of the DIS and staff analysis to the applicant and the
9 planning commission. Id. OCMC 16.12.060 to 16.12.130 set
10 out detailed requirements for the content of the DIS --
11 including hydrological, geological, vegetation, animal life,
12 atmospheric, school, coordination, transportation and public
13 facilities and services considerations.

14 We have held that the omission of required information
15 from an application can be a harmless procedural error if
16 the required information is located elsewhere in the record
17 or is not necessary to determine compliance with applicable
18 approval standards. McConnell v. City of West Linn, 17
19 Or LUBA 502, 525 (1989); Hershberger v. Clackamas County, 15
20 Or LUBA 401, 408-09 (1987); Dougherty v. Tillamook County,
21 12 Or LUBA 20, 24 (1984). A threshold issue in resolving
22 these assignments of error is whether (1) the DIS content
23 requirements of OCMC 16.12.070 and 16.12.080 are a type of
24 application information requirement akin to those described

1 above;⁸ or (2) the DIS submittal, review and analysis
2 process gives participants in that process a substantive
3 right to have a DIS submitted that satisfies the content
4 requirements of OCMC 16.12.070 and 16.12.080.

5 The challenged decision does not interpret the relevant
6 OCMC provisions regarding this issue. Although the
7 challenged decision includes findings under the headings
8 "Hydrological/Geographical [sic] Considerations" and
9 "Vegetation and Animal Life Considerations" (Record 18-21),
10 these findings simply summarize the contents of the record.
11 They do not address or interpret the requirements of
12 OCMC 16.12.070 or 16.12.080.

13 Under ORS 197.829, Gage, supra, and Clark, supra, the
14 city commission has considerable discretion in interpreting
15 the role of the DIS process created under OCMC Chapter 16.12
16 and, specifically, the DIS content requirements of
17 OCMC 16.12.070 and 16.12.080. It is the city commission
18 that must resolve the ambiguity regarding the interpretation
19 of OCMC 16.12.070 and 16.12.080 in the first instance.
20 Weeks v. City of Tillamook, supra.

21 The second and third assignments of error are
22 sustained.

23 The city's decision is remanded.

⁸If this is the case, petitioners' arguments do not establish a basis for reversal or remand, because they fail to identify approval standards to which the allegedly missing information is crucial.