

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's approval of (1) a zone
4 change from Residential 2 (R-2) to R-2 PD, a planned
5 development subzone; (2) conditional approval of a staged
6 residential general development plan; and (3) conditional
7 approval of phase 4 of a subdivision tentative plan.¹

8 **MOTION TO INTERVENE**

9 R. Tim Cornelius (intervenor), the applicant below,
10 moves to intervene in this proceeding on the side of
11 respondent. There is no objection to the motion, and it is
12 allowed.

13 **FACTS**

14 The subject property is a 22-acre parcel within the
15 city limits of the City of Adair Village. On April 2, 1995,
16 intervenor submitted an application to the city. The city
17 planning commission and the city council agreed to joint
18 public hearings to consider the application. On May 2,
19 1995, the city issued a hearing notice in which it described
20 the proposed action:

21 * * * * *

22 "The applicant, Tim Cornelius, is requesting a PD
23 Sub-zone for the subject property changing the
24 zone from Residential Zone R-2 to Residential Sub-
25 zone R-2-PD, Planned Development.

¹The actual scope of the city's decision is the subject of the third and tenth assignments of error.

1 "* * * * *

2 "The Adair Village Comprehensive Plan and the
3 Adair Village Land Development Ordinance,
4 primarily Sections 4.510 to 4.522, provide the
5 applicable criteria for evaluation." Record 84.

6 On May 22, 1995 and June 5, 1995, the planning
7 commission and the city council held joint public hearings
8 to consider the application. On June 26, 1995, the planning
9 commission recommended approval of the proposal, which was
10 followed by city council approval on June 29, 1995. During
11 its June 29, 1995, meeting, the city council requested that
12 several changes be made to the recommended findings and
13 conditions of approval, and then adopted the decision. The
14 amended findings and conditions of approval were dated July
15 3, 1995. The notice of decision, mailed on July 3, 1995,
16 states in relevant part:

17 "This notice is to inform you that the Adair
18 Village City Council has approved a request for a
19 zone change from Residential Zone R-2 to R-2-PD, A
20 Planned Development Sub-zone * * *.

21 "* * * * *

22 "* * * The decision contains conditions of
23 approval, approval of a staged development
24 program, approval for a subdivision tentative plan
25 for the first stage, Phase 4, and requires
26 resubmittal for subsequent stages of development
27 for review and approval by the city." Record 13.

28 At its July 3, 1995 meeting, the city council also
29 heard the first reading of Ordinance 95/96 #1, the ordinance
30 that purports to implement the June 29, 1995 decision. The
31 mayor signed the Findings of Fact; Conclusions of Law and

1 Order for Ordinance 95/96 #1 on July 17, 1995. Then, after
2 a second reading of Ordinance 95/96 #1 on August 7, 1995,
3 the city council adopted that ordinance. The record does
4 not indicate that any notice of decision was mailed after
5 Ordinance 95/96 #1 was finally adopted on August 7, 1995.

6 On July 19, 1995, petitioners filed a notice of intent
7 to appeal with LUBA. The notice of intent to appeal states
8 the challenged decision was made on June 29, 1995.

9 **THIRD AND TENTH ASSIGNMENTS OF ERROR**

10 Petitioners argue that the city failed to follow the
11 statutory sequence for making its decision, and in making
12 the decision, relied on material not in the record.

13 To consider any of petitioners' assignments of error,
14 we must determine first which of the city's several decision
15 points is the subject of this appeal. Petitioners' notice
16 of intent to appeal identifies the city council's June 29,
17 1995 decision, for which notice was sent on July 3, 1995.
18 However, the bases of these assignments of error appears to
19 be that after the initial decision was made, the city
20 considered the decision further, and that the appealed
21 decision somehow incorporates those subsequent city actions.

22 The city responds that the final decision which is the
23 subject of this appeal is the ordinance adopting the zone
24 change, first read on July 17, 1995 and finally adopted and
25 signed on August 7, 1995. The city further contends that it
26 followed a legal sequence of events and that petitioners

1 were premature in filing their notice of intent to appeal.

2 ORS 197.615(2)(a) states:

3 "Not later than five working days after the final
4 decision, the local government also shall mail or
5 otherwise submit notice to persons who:

6 "(A) Participated in the proceedings leading to
7 the adoption of the amendment to the
8 comprehensive plan or land use regulation or
9 the new land use regulation; and

10 "(B) Requested of the local government in writing
11 that they be given such notice." (Emphasis
12 added.)

13 The city's only notice of decision, dated July 3, 1995,
14 followed the adoption of the findings, conclusion and order
15 on June 29, 1996. That is the only decision challenged in
16 this appeal. The July 3, 1995 notice neither identifies
17 ordinance 95/96 #1, nor purports to be a notice of the
18 decision approving that ordinance.²

19 Since petitioners appeal the June 29, 1995 decision,
20 only actions preceding that decision are relevant to our
21 review. As we understand petitioners' arguments, all of the
22 allegations of error raised in these assignments of error
23 relate to the city's actions following the June 29, 1995
24 decision. Accordingly, the third and tenth assignments of

²Had petitioners delayed filing a notice of intent to appeal until the ordinance was signed by the mayor, the notice of intent to appeal would not have been filed within 21 days of the city's only notice of decision.

1 error are denied.³

2 **FIRST, SECOND AND TWELFTH ASSIGNMENTS OF ERROR**

3 Petitioners contend that the hearing notice did not
4 meet the requirements of ORS 197.763(3) because it did not
5 describe the subdivision aspect of the proposal and,
6 therefore, did not adequately explain the nature of the
7 proposal. Petitioners contend also that the challenged
8 decision is materially different from the proposal described
9 in the hearing notice to the extent that the notice did not
10 reasonably describe the challenged decision as required by
11 ORS 197.763(3). Petitioners set forth a list, without
12 discussion, of alleged omissions.

13 The city responds summarily that it met the
14 requirements of ORS 197.763. The city contends also that
15 during the May 22, 1995 proceeding, all but one of the
16 petitioners testified and that a subsequent proceeding was
17 held on June 5, 1995.⁴

18 ORS 197.763(3)(a) and (b) state:

19 "The notice provided by the jurisdiction shall:

³The record indicates that the city has not yet provided notice of the ordinance approved on July 17, 1995, and adopted and signed on August 7, 1995, as required by ORS 197.615(2). Hence, the time for appealing that decision has not yet commenced. That ordinance is not the subject of this appeal, and we do not consider it here.

⁴The city does not explain this contention. However, we understand it to anticipate an argument by petitioners that their substantial rights were prejudiced by the city's violation of ORS 197.763(3). However, petitioners do not make this argument.

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

4 "(b) List the applicable criteria from the
5 ordinance and the plan that apply to the
6 application at issue[.]"

7 The city's notice of hearing describes only a proposed
8 zone change, and does not mention either the request for a
9 general development plan or a tentative plan for a
10 subdivision. Neither does it adequately identify the
11 criteria to be applied to the decision as required by ORS
12 197.763(3). Therefore, we agree with petitioners that the
13 city's notice violates ORS 197.763(3).

14 Petitioners have not, however, established any basis
15 for relief based on these violations. If a local government
16 fails to meet the requirements of ORS 197.763(3), under ORS
17 197.835(4), petitioners may raise new issues at LUBA even
18 though the issues may not have been raised below.⁵

⁵ORS 197.835(4) states:

"A petitioner may raise new issues to the board if:

** * * * *

"(b) The local government failed to follow the requirements of
ORS 197.763 (3)(b), in which case a petitioner may raise
new issues based upon applicable criteria that were
omitted from the notice. However, the board may refuse to
allow new issues to be raised if it finds that the issue
could have been raised before the local government; or

"(c) The local government made a land use decision or limited
land use decision which is different from the proposal
described in the notice to such a degree that the notice

1 Petitioners do not attempt to raise any new issues based on
2 these violations. Under ORS 197.835(9)(a)(B), such a
3 procedural error is not a basis for reversal or remand
4 unless petitioners' establish that the error caused
5 prejudice to their substantial rights. ONRC v. City of
6 Oregon City, 29 Or LUBA 90, 97 (1995). Because petitioners
7 have not attempted to make a showing that their substantial
8 rights were prejudiced by the city's violation of ORS
9 197.763(3), petitioners have not justified reversal or
10 remand on that basis.

11 Petitioners also contend that the city violated the
12 testimonial requirements of ORS 197.763(5), substantially
13 prejudicing the rights of petitioners.

14 ORS 197.763(5) states:

15 "(5) At the commencement of a hearing under a
16 comprehensive plan or land use regulation, a
17 statement shall be made to those in attendance
18 that:

19 "(a) Lists the applicable substantive criteria;

20 "(b) States that testimony and evidence must be
21 directed toward the criteria described in
22 paragraph (a) of this subsection or other
23 criteria in the plan or land use regulation
24 which the person believes to apply to the
25 decision; and

26 "(c) States that failure to raise an issue
27 accompanied by statements or evidence
28 sufficient to afford the decision maker and
29 the parties an opportunity to respond to the

of the proposed action did not reasonably describe the
local government's final action."

1 issue precludes appeal to the board based on
2 that issue."

3 Petitioners do not provide any argument to support this
4 assignment of error. In particular, petitioners do not make
5 any showing that they were prejudiced by any failure of the
6 city to comply with ORS 197.763(5).

7 The first, second and twelfth assignments of error are
8 denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 Petitioners complain that the city council engaged in
11 discussions with intervenor on June 20, 1995, after the
12 record closed following the June 5, 1995 hearing, but before
13 a decision was adopted on June 29, 1995. Petitioners assert
14 that through those discussions the city accepted new
15 testimony into the record to which petitioners did not have
16 an opportunity to respond. Petitioners point to a
17 memorandum from intervenor to the city described "Issues for
18 Deliberation * * * Suggestions dated June 19, 1995." Record
19 35. The memorandum states in relevant part:

20 "* * * * *

21 "1. **Newton Road** closure. The PD can be achieved
22 either way although street alignments may have to
23 change in future phases.

24 "* * * * *

25 "2. **Wetlands** delineation and resolution of
26 mitigating measures. Again, this is achievable in
27 several ways. The approved method may alter the
28 arrangement and number of potential lots.

1 "* * * * *

2 3. **Carr Ave.** extension or other secondary access
3 from the City. This issue will take some
4 additional time. Ultimate build-out of the PD may
5 be contingent upon achieving the additional access
6 or other improvements.

7 "* * * * *" Id.

8 It is this communication that petitioners suggest was
9 conveyed to the city council. The city responds that a June
10 20, 1995 meeting between the planning commission and the
11 city council did not include intervenor, and that no new
12 information was admitted into the record as a result of that
13 meeting.

14 Statements in the city council minutes of June 26,
15 1995, are a verbatim recitation of the material quoted above
16 from intervenor's June 19, 1995 memorandum. Record 30.
17 While it is unclear that intervenor attended the June 20,
18 1995 meeting or spoke directly to any city council member,
19 it is clear that intervenor's written statement was conveyed
20 directly to the city council. The city is required to
21 provide petitioners an opportunity to respond to such
22 material. ORS 197.763(6); See Azevedo v. City of Albany, 20
23 Or LUBA 516, 520 (1995).

24 The fourth assignment of error is sustained.

25 **FIFTH ASSIGNMENT OF ERROR**

26 Petitioners contend that the city failed to follow
27 Adair Village Land Development Ordinance (ADC) 4.513 and
28 4.515 when it held joint planning commission and city

1 council hearings instead of the two-step process set forth
2 in the code. Petitioners argue that the city's failure to
3 have two separate hearings processes deprived them of having
4 two bodies deliberate and eliminated a customary interval
5 between hearings in which they could have analyzed the
6 complete plans. Petitioners do not cite to any requirement
7 in the ADC to support this argument.

8 The city responds that:

9 "Joint Hearing #1 took place on May 22, 1995 (R-
10 59-66), Joint Hearing #2 took place on June 5,
11 1995 (R-42-44), the Planning Commission took
12 action to recommend approval on June 26, 1995 (R-
13 25-27), and the City Council voted to approve the
14 application on June 29, 1995 (R-18-20)." City's
15 Brief 10.

16 The city contends that its code requires only that the
17 planning commission provide a recommendation to the city
18 council before the city council takes final action.

19 ADC 4.513 sets forth a process by which the planning
20 commission may review a preliminary development plan
21 informally and recommend "either preliminary approval in
22 principle, with or without modifications, or denial". ADC
23 4.514 requires that after receiving preliminary approval in
24 principle, the applicant prepare a general development plan
25 and program. ADC 4.515 describes action that can be taken
26 on the general development plan and program. It states:

27 "(1) Planning Commission Action. The Planning
28 Commission, after public hearing in
29 accordance with the provisions of Article 9,
30 may recommend approval of the General

1 Development Plan and Program and the PD Sub-
2 zone with or without modifications.

3 "(2) City Council Action. After receiving the
4 recommendation from the Planning Commission,
5 the City Council shall hold a hearing on the
6 General Development Plan and Program, in
7 accordance with the provisions of Article 9.
8 The City Council shall either approve the
9 application, with or without modifications,
10 or deny it.

11 "* * * * *" (Emphasis added.)

12 Nothing in ADC Article 4 precludes the city from
13 conducting joint hearings before each body acts individually
14 under ADC 4.515. Petitioners have neither established that
15 the city violated a requirement of ADC 4.513 or 4.515, nor
16 identified any other procedural hearings requirement which
17 the city violated.

18 The fifth assignment of error is denied.

19 **SIXTH ASSIGNMENT OF ERROR**

20 Petitioners contend that the city failed to follow
21 Adair Village Land Division Ordinance (LDO) 2.01 and 3.08(5)
22 when the city council approved the tentative plan for the
23 subdivision following the required planning commission
24 approval.

25 LDO 2.01 requires an applicant to submit a letter of
26 intent describing a proposed subdivision.⁶ The planning

⁶Although LDO 2.01 regulates all types of land divisions, this appeal pertains to a land division for a subdivision. Consequently, we describe the scope of the ordinance only with respect to subdivisions.

1 commission may then make a recommendation that an
2 application for a tentative plan for a subdivision be
3 submitted. If such an application is submitted, under LDO
4 3.08 the planning commission must make a final decision on
5 the tentative plan for the subdivision. LDO 3.08 describes
6 the role of the planning commission in making a final
7 decision on the tentative plan for the subdivision, and in
8 making the tentative plan a final plat for the subdivision.

9 Petitioners' summary argument does not explain their
10 reasoning, and we will not attempt to develop petitioners'
11 argument for them. Petitioners have not established that
12 the city violated a requirement of LDO 2.01 and 3.08(5) when
13 the city council approved the tentative plan for the
14 subdivision in addition to the planning commission approval.

15 The sixth assignment of error is denied.

16 **SEVENTH ASSIGNMENT OF ERROR**

17 Petitioners argue that the city failed to include the
18 challenged decision in the record, as ordered by this Board.

19 A record objection must be addressed as set forth in
20 OAR 661-10-026. Petitioners did not file an objection to
21 the supplemental record submitted by the county. Moreover,
22 the city did include the challenged decision in the record
23 at Record 21.⁷

24 The seventh assignment of error is denied.

⁷The July 17/August 7, 1995 decision is also found in the record at Record 9

1 **EIGHTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city did not make findings
3 on the application of specific comprehensive plan and code
4 provisions. Petitioners raise four general issues, which we
5 address in three subassignments of error.

6 **A. Application of ADC 4.518-1**

7 Petitioners object that the ADC 4.518-1 requirement
8 that each stage of a phased development be substantially
9 complete within itself was not addressed in the challenged
10 decision, and that proposed stage IV is not complete within
11 itself.

12 Petitioners have overlooked the language in ADC 4.518-1
13 that substantial completion is all that is required. In
14 addition, although petitioners describe this as an
15 interpretive issue, they provide no argument or analysis to
16 support this contention. Petitioners merely refer to
17 neighbors' statements in the record that are tangentially
18 related to this argument.⁸ If the city has indeed made an
19 interpretation of ADC 4.518-1 as opposed to merely applying

⁸Of the seven page submission relied on by petitioners, the only statements that can be construed to support this argument are:

"* * * there appears to be no direct connection to the current City of Adair (other than by a proposed footbridge). Without any additional connection there will be two different cities, two different feelings of community." Record 52.

"The stages of development. The maps should be changed in order to be honest about the way in which the development will likely occur (phase IV is phase I)." Record 54.

1 the provision, petitioners have not provided us with any
2 basis to find that such an interpretation is clearly wrong.

3 **B. General Comprehensive Plan Criteria**

4 In one subsection of this assignment of error,
5 petitioners set forth from the comprehensive plan two
6 general goals and objectives and two administrative policies
7 and recommendations, which they state the city should have
8 addressed in the challenged decision. In a another
9 subsection of this assignment of error, petitioners argue
10 that the city did not address three additional comprehensive
11 plan provisions.

12 Petitioners do not contend that the notice of hearing
13 stated that any of these provisions were applicable
14 criteria. Neither do petitioners attempt to cite to any
15 place in the record in which they raised the applicability
16 of these provisions.

17 LUBA will not consider issues that petitioners have not
18 established were raised before the local government. See
19 ORS 197.835(3); Boldt v. Clackamas County, 107 Or App 619,
20 813 P2d 1078 (1991); and Craven v. Jackson County, 29 Or
21 LUBA 125, 132, aff'd 135 Or App 250, rev den 321 Or 512
22 (1995).

23 **C. Zoning Considerations**

24 Petitioners quote ADC 3.020(1), which states:

25 "A sub-zone may be established in combination with
26 a basic zone. The sub-zone shall establish
27 additional requirements, standards and procedures

1 for the use and development of property in the
2 basic one. * * *

3 Petitioners then quote three other development code
4 provisions that apply to the basic zone. Petitioners next
5 refer to the challenged decision, which they allege restates
6 the above language as a conclusory finding. See Record 21.
7 However, that portion of the challenged decision sets forth
8 the criteria to be applied to the application; it is not a
9 finding of compliance.

10 Petitioners then state that they and others "voiced
11 strong objections to the interrelationships between the
12 existing properties and the proposed development." Petition
13 for Review 15. They mention omissions in the challenged
14 decision pertaining to natural features that should have
15 been addressed. Petitioners neither provide argument to
16 support this assignment of error, nor make any citation to
17 the record to show they raised the applicability of these
18 criteria below.

19 Again, we will not consider issues that petitioners
20 have not established were raised before the local
21 government. See ORS 197.835(3).

22 The eighth assignment of error is denied.

23 **NINTH ASSIGNMENT OF ERROR**

24 Petitioners contend first that the challenged decision
25 is not supported by substantial evidence, because the June
26 26, 1995 staff report, which is said to contain the
27 findings, is not in the challenged decision. We find the

1 challenged decision, including findings and conditions of
2 approval, dated June 29, 1995, at Record 21-24.

3 Petitioners contend next that the city erred in
4 applying its land use regulations when it included as a
5 condition the closure of a private road that is governed by
6 private easements.

7 The challenged decision states:

8 "The proposed Heritage Glen PD General Development
9 Plan and Program submitted by the applicant/Owner
10 is accepted conditionally subject to resubmittal
11 and approval of the following deferred issues for
12 subsequent stages of development:

13 "1. Newton Road closure or integration into the
14 Heritage Glen Plan.

15 "* * * * *" Record 23.

16 Petitioners' argument provides no legal basis for
17 reversal or remand of the challenged decision.

18 The ninth assignment of error is denied.

19 **ELEVENTH ASSIGNMENT OF ERROR**

20 Petitioners object that the city violated the open
21 meetings law, ORS 192.610 to 192.690, when it held an
22 executive session on August 7, 1995 with intervenor. ORS
23 192.680 provides for enforcement of the provisions of ORS
24 192.610 to 192.690 by the circuit court for the county in
25 which the governing body ordinarily meets. Not only does
26 petitioners' argument relate to a meeting that postdates the
27 challenged decision, LUBA has no jurisdiction to enforce the
28 provisions of ORS 192.610 to 192.690.

- 1 The eleventh assignment of error is denied.
- 2 The city's June 29, 1995 decision is remanded.