

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

3
4 LARRY ARNETT and RONDA ARNETT,)
5))
6 Petitioners,)
7) LUBA No. 96-215
8 vs.)
9) FINAL OPINION
10 CITY OF LAKE OSWEGO,)
11) AND ORDER
12 Respondent.)
13
14

15 Appeal from City of Lake Oswego.

16
17 Jeffrey L. Kleinman, Portland, filed the petition for
18 review and argued on behalf of petitioners.

19
20 Jeffrey G. Condit, City Attorney, Lake Oswego, filed
21 the response brief and argued on behalf of respondent.

22
23 HANNA, Chief Referee; LIVINGSTON, Referee, participated
24 in the decision.

25
26 AFFIRMED 07/17/97

27
28 You are entitled to judicial review of this Order.
29 Judicial review is governed by the provisions of ORS
30 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's approval of a 10-lot
4 planned development on a recently annexed 9.4-acre parcel
5 zoned residential R-15.¹

6 **FACTS**

7 We adopt petitioners' undisputed recitation of the
8 facts:

9 "Magid filed his development review application
10 for approval of the Skylands Heights Planned
11 Development on January 17, 1996. The proposed
12 development is located on a sloping site in the
13 'Skylands' area, newly annexed to the city. * * *

14 "Magid's application was heard by the city's
15 Development Review Commission on July 15, 1996,
16 and August 5, 1996. On August 19, 1996, the
17 Development Review Commission issued its findings,
18 Conclusions & Order approving the within
19 application with conditions.

20 "On September 3, 1996, petitioners filed their
21 Notice of Intent to Appeal the decision of the
22 Development Review Commission to respondent's City
23 Council. The City Council heard petitioners'
24 appeal on October 1, 1996, and voted to uphold the
25 appealed decision." Petition for Review 2 (record
26 citations omitted).

27 This appeal followed.

28 **FIRST ASSIGNMENT OF ERROR**

29 Petitioners argue that Lake Oswego Development Standard
30 (LODS) 15.025 requires that an erosion control plan be filed

¹The record indicates that the annexation is subject to ongoing litigation.

1 with the site development application and that the required
2 plan was not filed with the development application.
3 Petitioners argue also that the city did not make a finding
4 that it was feasible for the applicant to meet the erosion
5 control standard set forth in LODS 15.030. The city
6 responds that (1) petitioners did not provide statements or
7 evidence sufficient to afford the city an opportunity to
8 respond to this issue below; and (2) if LUBA concludes that
9 this argument was raised sufficiently below, LUBA must defer
10 to the city's interpretation that the erosion control
11 requirement is a standard of construction to be enforced
12 following approval rather than an approval standard.²

13 These arguments raise four closely related concerns:
14 (1) Did petitioner raise below the issue that under LODS
15 15.025, the erosion control plan must be submitted with the
16 application? (2) If petitioners did raise below the issue
17 of the required submission of the plan, must we defer to the
18 city's interpretation of its code that the plan need not be
19 submitted with the application? (3) Did petitioner raise
20 below the feasibility of complying with the erosion control
21 plan requirements set forth in LODS 15.030? and (4) If the
22 feasibility of compliance was raised below, under the city's
23 interpretation of LODS 15.030, must a feasibility

²Certain chapters of the LODS group standards for approval and standards for construction under separate headings. LODS Chapter 15 (Erosion Control Standard) does not have a separate heading for standards for construction.

1 determination be made?³

2 ORS 197.763(1) provides:

3 "An issue which may be the basis for an appeal to
4 the Land Use Board of Appeals shall be raised not
5 later than the close of the record at or following
6 the final evidentiary hearing on the proposal
7 before the local government. Such issues shall be
8 raised and accompanied by statements or evidence
9 sufficient to afford the governing body, planning
10 commission, hearings body or hearings officer, and
11 the parties an adequate opportunity to respond to
12 each issue."

13 Petitioners do not point to a place in the record where
14 they contended below that the plan must be submitted with
15 the application. Because petitioners did not provide
16 statements or evidence sufficient to afford the city an
17 opportunity to respond below to the issue of whether the
18 plan must be submitted with the application, the issue is
19 waived. Since petitioners did not raise the first concern
20 below, we do not consider the second concern. With respect
21 to the third concern, petitioners did contend below with
22 statements sufficient to allow the city to respond that the

³LODS 15.025 provides:

"An Erosion Control Plan shall be required as a condition of approval of any major or minor development involving the disturbance of more than 500 square feet of land surface or any land disturbance within 50 feet of any pond, stream, wetland or DNA. An Erosion Control Plan shall be filed with the site development application. No permit shall be issued prior to City Manager approval of an Erosion Control Plan."

In three subsections, LODS 15.030 sets forth erosion control plan requirements. They are the contents of the plan, construction standards and the use of technical guidebook.

1 feasibility of compliance with LODS 15.030 must be
2 determined prior to approval. Record 24-25. Consequently,
3 we reach the fourth concern, and determine if the city was
4 required to determine the feasibility of compliance with
5 LODS 15.030 before granting approval.

6 The city responds that LODS 15.030 is a construction
7 standard and not an approval standard. The city contends:

8 "A review of the erosion control plan requirements
9 in LODS 15.030, for example, shows that the
10 purpose of the plan is to control erosion during
11 construction under very specific criteria judged
12 by the City Engineer pursuant to the City of
13 Portland Erosion Control Handbook. LODS
14 15.030(3). A determination of feasibility would
15 therefore be pointless - not only is an erosion
16 control plan 'feasible' for every development that
17 disturbs over 500 feet of soil, it is mandatory."
18 Respondent's Brief 6 n2.

19 Both the staff report and the challenged decision
20 conclude that the erosion control plan must be submitted to
21 the city engineer for approval prior to commencement of
22 construction, and that the plan is not a criterion for the
23 city's approval of the application. The challenged decision
24 states:

25 "The criteria for approval of a development
26 subject to the Erosion Control Standard are
27 contained in LODS 15.020. Neither of these
28 criteria require the Council to make a finding
29 regarding the feasibility of the applicant's
30 Erosion Control Plan. LODS 15.025 requires an
31 Erosion Control Plan to be imposed as a condition
32 of approval of any major or minor development
33 involving disturbance of more than 500 square feet
34 of land surface or any land disturbance within 50
35 feet of any pond, stream wetland or DNA.

1 Condition B requires submission of a final Erosion
2 Control Plan prior to approval of final
3 construction plans. In a manner similar to the
4 format of LODS Sections 11 and 14, however, LODS
5 15.025 specifically places final approval of that
6 plan in the hands of the City Manager. Council is
7 not part of the review of an erosion control plan
8 and review of such Plan is not a criterion for
9 approval of the PD. The Council so construes the
10 Standard." Record 24.

11 This Board is required to defer to a local governing
12 body's interpretation of its own enactment, unless that
13 interpretation is contrary to the express words, purpose or
14 policy of the local enactment or to a state statute,
15 statewide planning goal or administrative rule which the
16 local enactment implements. ORS 197.829(1), Gage v. City of
17 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
18 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).
19 This means we must defer to a local governing body's
20 interpretation of its own enactments, unless that
21 interpretation is "indefensible" or "clearly wrong" or "so
22 wrong as to be beyond colorable defense." deBardelaben v.
23 Tillamook County, 142 Or App 319, 922 P2d 683 (1996); Zippel
24 v. Josephine County, 128 Or App 458, 461, 876 P2d 854
25 (1994); Goose Hollow Foothills League v. City of Portland,
26 117 Or App 211, 217, 843 P2d 992 (1992).

27 The city interpreted its code to mean that its erosion
28 control standard is not an approval standard for the planned
29 development, and that the city was not required to make a
30 feasibility finding. LODS 15.025 and LODS 15.030 provide

1 construction guidelines rather than standards for which
2 feasibility can be found.⁴ The city's interpretation is not
3 clearly wrong, and we defer to it.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners contend that there is no evidence that the
7 challenged decision meets the hillside protection approval
8 standards of LODS 16.020(2), (3) and (5). Those standards
9 state:

10 "2. Designs shall minimize cuts and fills.

11 "3 Cuts and fills shall conform to the minimum
12 requirements of LOC Chapter 45.

13 "* * * * *

14 "5. Cuts and Fills.

15 "On land with slopes in excess of 12 percent,
16 cuts and fills shall be regulated in
17 accordance with LOC Chapter 45, and as
18 follows:

19 "[list of four specific construction
20 standards.]"

21 The city responds that petitioners did not provide
22 statements or evidence sufficient to afford the city an
23 opportunity to respond to this issue below, and
24 alternatively that LODS chapters 16 and 46 together allow
25 the city to rely on the extensive engineering reports

⁴The approval standards are contained in LODS 15.020. Petitioners do not argue that the city was required to make findings of feasibility with this standard.

1 submitted to meet the Hillside Protection Standard.

2 Two documents identify issues raised by petitioners in
3 the proceedings below. The first is a memorandum submitted
4 to the Development Review Commission (commission) and the
5 second is petitioners notice of appeal to the city council.

6 At the commission hearing, petitioners argued that
7 making a finding that it is feasible to meet the erosion
8 control standard is necessary, and stated that the need to
9 make a feasibility determination also applied to hillside
10 protection. At the commission's request, petitioners'
11 representative agreed to provide a memorandum to the
12 commission describing their assertions "in detail." Record
13 97. Petitioners submitted a memorandum in response to this
14 request. After the commission approved the application,
15 petitioners appealed the approval to the city council.
16 However, the notice of intent to appeal to the city council
17 is substantially identical to the memorandum submitted to
18 the commission. Record 321. In their memorandum as well as
19 in the notice of intent to appeal the commission's decision
20 to the city council, petitioners stated that there was
21 insufficient evidence in the staff report to demonstrate
22 compliance with "hillside protection and erosion
23 requirements under LOC 16.005-.040." Record 61, 321. LOC
24 16.005 to 16.040 is the entire section of the code
25 addressing hillside protection standards comprising 6 pages,
26 and numerous sections and subsections. Petitioners did not

1 specify below which of these standards were not addressed,
2 and the city is not expected to guess.

3 Petitioners made general references during the
4 proceeding below alleging lack of compliance with local code
5 provisions. They were then explicitly asked to raise those
6 issues in more detail. Petitioners did not provide
7 statements or evidence sufficient to afford the city an
8 opportunity to respond below to their contention that the
9 challenged decision does not adequately address the cut and
10 fill requirements of LODS 16.020(2), (3) and (5). ORS
11 197.835(3) precludes petitioners from doing so for the first
12 time on appeal. Noble v. City of Fairview, 30 Or LUBA 180,
13 193 (1995); Friends of Neabeack Hill v. City of Philomath,
14 30 Or LUBA 46, 51 (1995); ONRC v. City of Seaside, 29 Or
15 LUBA 39, 57 (1995). Accordingly, this issue is waived.

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 LODS 11.020 sets forth standards of approval, and
19 provides in relevant part:

20 "3. Drainage Pattern Alteration. Development
21 shall be conducted in such a manner that
22 alterations of drainage patterns (streams,
23 ditches, swales and surface runoff) do not
24 adversely affect other properties."

25 Petitioners contend that the challenged decision and
26 the exhibits on which the decision relies "disclose nothing
27 with respect to the effects of alteration of drainage
28 ditches, in particular, upon other properties." Petition

1 for Review 17. The city responds that petitioners did not
2 provide statements or evidence sufficient to afford the city
3 an opportunity to respond to this issue below and,
4 alternatively, that there is sufficient evidence in the
5 record to support the finding.

6 As in the first two assignments of error, petitioners
7 argued below that the staff report incorrectly concluded
8 that compliance with the standard could be determined as
9 construction proceeded. During their appeal before the
10 council, petitioners disputed the staff report, arguing that
11 the city was required to make a determination of the
12 feasibility of meeting the standard before granting
13 approval.

14 The challenged decision describes petitioners'
15 substantive argument and responds:

16 "The appellants claim that there is inadequate
17 evidence to address off and on-site drainage
18 improvements, storm water quality and storm water
19 detention pursuant to LODS 11.005-11.040.

20 "Aside from making this statement, however, the
21 appellants' argument is unaccompanied by any
22 specific reasons or evidence as to why they
23 believe the applicant's drainage plan set forth in
24 Exhibits 7, 8, 15-17 and 20, or the staff analysis
25 of that plan are inadequate to demonstrate
26 compliance with the standards. The appellants
27 have failed to raise the issue with sufficient
28 statements and evidence to enable the City Council
29 to address the alleged deficiencies. The Council
30 will proceed with a general discussion of the
31 applicable criteria in the section explaining why
32 the Council believes the evidence in the record
33 demonstrates compliance." Record 18-19 (footnote
34 omitted).

1 As an initial point, a statement by a decision maker
2 that a petitioner has not raised an issue with sufficient
3 statements and evidence to enable it to respond does not
4 compel LUBA to reach the same conclusion. Nonetheless, in
5 this instance the challenged decision correctly points out
6 that petitioners' argument lacks the necessary specificity
7 and, further, identifies the evidence upon which the city
8 council relies.

9 Petitioners argued below the issue that there is
10 inadequate evidence to address offsite drainage
11 improvements, storm water quality and storm water detention
12 under LODS 11.005-11.040. The issue raised at LUBA is that
13 the city does not specify how the proposed ditches will
14 affect adjoining property. Petitioners' argument to the
15 city did not raise the issue they ask us now to decide.
16 Since petitioners did not raise this issue below, it is
17 waived.

18 The third assignment of error is denied.

19 The city's decision is affirmed.