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

NYLA JEBOUSEK, )  
 )  
Petitioner, ) LUBA No. 97-182  
 )  
vs. ) FINAL OPINION  
 ) AND ORDER  
CITY OF NEWPORT, )  
 )  
Respondent. )

On appeal from the City of Newport.

Nyla L. Jebousek, Springfield, filed the petition for review and argued on her own behalf.

Elizabeth A. Fetsch, Newport, filed the response brief and argued on behalf of respondent. With her on the brief was Minor & Boone.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 04/09/98

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

1 Per Curiam.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a lot-line  
4 adjustment.

5 **MOTION TO CONSOLIDATE**

6 Petitioner requests that we "consolidate" this appeal to  
7 allow review of a different city decision in addition to the  
8 challenged decision in this case.

9 In 1996, petitioner paid for a local appeal to the city  
10 council of a planning commission decision approving a lot-line  
11 adjustment. After the city council affirmed the planning  
12 commission, petitioner appealed the city council's decision to  
13 this Board. After we affirmed the city's decision, petitioner  
14 appealed to the Court of Appeals, where she prevailed on one  
15 ground. Jebousek v. City of Newport, 147 Or App 100, 935 P2d  
16 452 (1997) (reversing and remanding LUBA's decision). As a  
17 consequence of the Court of Appeals' remand, petitioner was  
18 awarded her costs on appeal to LUBA and the Court of Appeals.

19 The challenged decision in this appeal is the decision  
20 the city made on remand from this Board and the Court of  
21 Appeals. Apparently sometime after the city made the decision  
22 on remand challenged in this appeal, petitioner requested that  
23 the city refund the local appeal fees that she had paid to the  
24 city as part of the earlier appeal. In a letter dated  
25 December 4, 1997, the city refused that request.

1           Now petitioner moves that we "consolidate" the city's  
2 December 4, 1997 decision not to refund local appeal fees with  
3 our review of the city's decision, on remand, to again approve  
4 the lot-line adjustment. Petitioner has not appealed the  
5 city's December 4, 1997 decision, but argues that we may  
6 review it in the course of reviewing the present appeal  
7 because both decisions, as well as the decision remanded by  
8 the Court of Appeals, are part of the same overall  
9 proceedings.

10           The city responds that this Board lacks jurisdiction to  
11 review the December 4, 1997 decision not to refund local  
12 appeal fees because it is not a "land use decision" or  
13 "limited land use decision" over which LUBA has exclusive  
14 jurisdiction, pursuant to ORS 197.015(10).

15           We conclude that we lack jurisdiction to review the  
16 city's December 4, 1997 decision and hence any authority to  
17 consolidate review of that decision with the challenged  
18 decision in this case. Whether or not the December 4, 1997  
19 decision is a land use decision over which we have  
20 jurisdiction, the December 4, 1997 decision is a separate  
21 decision from the challenged decision, and must be appealed  
22 separately before it could be consolidated with the present  
23 appeal. There is no dispute that petitioner failed to appeal  
24 the December 4, 1997 decision within 21 days of the date it  
25 became final.

26           Petitioner's motion to consolidate is denied.

1   **FACTS**

2           The subject property is an undeveloped parcel in the  
3 city's Low Density Single-Family Residential (R-1) zone. The  
4 property borders a flag lot to the south and west, and a  
5 street to the north. The western half of the property is  
6 flat, but the eastern half drops down a slope of undetermined  
7 steepness. In December 1995, the owner of the subject  
8 property applied to the city for a lot-line adjustment with  
9 the flag lot that increased the east-west width of the subject  
10 property, thus increasing the portion of the property that is  
11 flat and enabling the owner to construct a wider home than  
12 otherwise possible on the flat area. After a local appeal,  
13 the city approved the lot-line adjustment in May 1996.

14           Petitioner appealed that decision to us, and we affirmed  
15 in a memorandum opinion.<sup>1</sup> In Jebousek v. City of Newport, 147  
16 Or App 100 (1997), the Court of Appeals reversed and remanded  
17 our decision because the city's original decision did not  
18 address petitioner's argument that the city was required to  
19 apply Goal 1, Policy 3 of the Natural Features component of  
20 the city's comprehensive plan (Goal 1, Policy 3). The text of  
21 Goal 1, Policy 3 provides:

22           "Where hazardous areas have not been specifically  
23 identified but there is a reason to believe that a  
24 potential does exist, a site specific investigation  
25 by a registered geologist or engineer shall be  
26 required prior to development."

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<sup>1</sup>Jebousek v. City of Newport, \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-107, October 29, 1996).

1 We remanded the decision to the city to give it an opportunity  
2 to interpret Goal 1, Policy 3 and to apply it or not apply it  
3 in a manner consistent with the city's interpretation.<sup>2</sup>

4 On remand, the city council interpreted the entirety of  
5 Goal 1, including Policy 3, as not constituting applicable  
6 approval standards, and again denied petitioner's appeal, thus  
7 approving the lot-line adjustment.

8 This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner argues that the city's interpretation that  
11 Goal 1, Policy 3 is not an applicable approval criterion is  
12 inconsistent with the express language, purpose and underlying  
13 policy of Goal 1, Policy 3. ORS 197.829(1)(a)-(c).<sup>3</sup>  
14 Petitioner argues that Goal 1, Policy 3 contains mandatory  
15 terms that demonstrate it is an approval criterion.

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<sup>2</sup>Jebousek v. City of Newport, \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-107, June 17, 1997).

<sup>3</sup>ORS 197.829(1) provides, in relevant part:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 The city rejected petitioner's argument below, stating:

2 "In general, the zoning ordinance implements the  
3 policies, goals and purposes of the Comprehensive  
4 Plan by adopting specific standards. While there  
5 may be specific standards and requirements stated in  
6 the provisions of the Comprehensive Plan, in  
7 general, the policies of the Comprehensive Plan are  
8 implemented by the creation of express standards and  
9 requirements in the zoning ordinance, or other  
10 ordinances, of the City. The Council hereby  
11 expressly determines that Goal 1 \* \* \* including  
12 Policies 1 through 7 thereof, are not, and do not  
13 create, approval standards.

14 The city responds to petitioner's similar argument on  
15 appeal by stating that its interpretation of Goal 1, Policy 3  
16 is a reasonable construction of that provision in its context,  
17 and thus not inconsistent with its express language, purpose  
18 or underlying policy. The city argues that the context of  
19 Goal 1, Policy 3 includes Goal 1 and the other policies of  
20 Goal 1, which state policies in broad, general terms. The  
21 city further notes that the city's Zoning Ordinance (ZO) 2-4-7  
22 implements Goal 1, Policy 3 and similar comprehensive plan  
23 policies by regulating development in geologic hazard areas,  
24 including requiring a site-specific investigation by a  
25 registered geologist or engineer.

26 We agree with the city that its interpretation of Goal 1,  
27 Policy 3 as not constituting an approval criterion is not  
28 inconsistent with its express language, purpose or underlying  
29 policy. The city's interpretation that Goal 1, Policy 3 is  
30 limited to establishing policies to guide the creation of  
31 standards in the zoning ordinance is not indefensible.  
32 deBardelaben v. Tillamook County, 142 Or App 319, 325, 922 P2d

1 683 (1996). Accordingly, we affirm the city's interpretation.  
2 ORS 197.839(1) (a) - (c).

3 Petitioner next argues that the city's interpretation  
4 constitutes a de facto repeal of Goal 1, Policy 3 under the  
5 guise of interpretation. Goose Hollow Neighborhood Assoc. v.  
6 City of Portland, 117 Or App 211, 218, 842 P2d 992 (1992). We  
7 disagree. The city determined that Goal 1, Policy 3 is a  
8 policy statement intended to guide the creation of specific  
9 standards in the city's zoning ordinance, much like the other  
10 policies stated in Goal 1. That determination is not a de  
11 facto repeal or amendment of Goal 1, Policy 3.

12 Petitioner next argues that the "interpretations" clause  
13 of the city's comprehensive plan prohibits the city from  
14 interpreting Goal 1, Policy 3 without first obtaining an  
15 interpretation from the city's planning commission.<sup>4</sup> The city

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<sup>4</sup>The city's comprehensive plan states, at page 288:

"Interpretations:

"It may become necessary from time to time to interpret the meaning of a word or phrase or the boundaries of a map. Whenever such a interpretation involves the use of factual, policy, or legal discretion, a public hearing before the Planning Commission consistent with the procedural requirements contained in Section 2-6-1 of the Zoning Ordinance (No. 1308, as amended) shall be held.

"A ruling for an interpretation shall be approved only if findings are presented that comply with the following:

"The interpretation does not change any conclusion, goal, policy, or implementation strategy.

"The interpretation is based on sound planning, engineering or legal principles.

"The interpretation is consistent with the Comprehensive Plan."

1 responds that petitioner failed to raise this issue before the  
2 city council, and has thus waived it, pursuant to  
3 ORS 197.763(1).<sup>5</sup> The city further responds that nothing in  
4 the "interpretations" clause of the city's plan prohibits the  
5 city council from interpreting the comprehensive plan.

6 Petitioner does not identify where in the record any  
7 participant raised the issue of the city council's authority  
8 to interpret its comprehensive plan. We have held that a  
9 petitioner's failure to raise certain issues are not subject  
10 to waiver under ORS 197.763 where petitioner had no  
11 opportunity to raise those issues. See Beck v. City of Happy  
12 Valley, 27 Or LUBA 631, 637 (1994) (petitioners could not raise  
13 and thus did not waive issues regarding a condition of  
14 approval that did not exist until the city council adopted the  
15 challenged decision). However, this appeal does not present  
16 similar circumstances.

17 We remanded the city's original decision in order to  
18 allow the city to interpret Goal 1, Policy 3 in the first  
19 instance. Petitioner attended the proceedings on remand  
20 before the city council, and knew or should have known by the

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<sup>5</sup>ORS 197.763(1) provides:

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

1 end of those proceedings that the city intended to comply with  
2 our directive to interpret Goal 1, Policy 3 without referring  
3 the matter to the planning commission. Petitioner thus had  
4 ample opportunity to raise the issue of the city council's  
5 authority to interpret Goal 1, Policy 3. Accordingly, we  
6 agree with the city that petitioner waived the issue of the  
7 city council's authority to interpret Goal 1, Policy 3. ORS  
8 197.763(1).

9 We need not reach the remainder of petitioner's arguments  
10 under this assignment of error, which challenge the city's  
11 alternative rationales why Goal 1, Policy 3 is not an approval  
12 criterion.

13 The first assignment of error is denied.

14 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

15 Petitioner challenges two of the city's findings, reached  
16 as alternative dispositions in case Goal 1, Policy 3 is  
17 determined to be an approval criterion.

18 In the second assignment of error, petitioner challenges  
19 the city's finding that there is no reason to believe the  
20 subject property has a potential for geologic hazard, and thus  
21 no need to require a site-specific geologic investigation.  
22 Petitioner argues that the city's finding that there is no

1 reason to believe a geologic hazard exists on the property is  
2 not supported by substantial evidence in the record.<sup>6</sup>

3 In the third assignment of error, petitioner challenges  
4 the city's alternative finding that no site-specific geologic  
5 investigation is necessary or feasible until development,  
6 rather than a lot-line adjustment, is proposed on the subject  
7 property. Petitioner argues that this determination  
8 misconstrues Goal 1, Policy 3, which requires a site-specific  
9 geologic investigation "prior to development."

10 Petitioner's arguments challenge the city's alternative  
11 rationales for denying petitioner's appeal. Our disposition  
12 of the first assignment of error, where we affirmed the city's  
13 determination that Goal 1, Policy 3 is not an approval  
14 criterion, is also dispositive of the second and third  
15 assignments of error.

16 The second and third assignments of error are denied.

17 The city's decision is affirmed.

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<sup>6</sup>Petitioner cites to the following passage in the staff report as the only evidence in the record with respect to the potential for geologic hazard on the subject property:

"Topography and Vegetation: The land is relatively flat except for the easterly half of the property, which drops off drastically. The undeveloped portions of the land contains some coastal vegetation." Record 21 (emphasis added).

Petitioner characterizes the emphasized portion of this statement as unrefuted evidence that the soil on the subject property is "geologically unstable." Petition for Review 9. In essence, petitioner posits the presumption that a steep slope is per se a geologic hazard, and argues that there is no evidence in the record contravening that presumption. We express no opinion on the merits of this argument.