

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

4 MARVIN DURHAM and  
5 MAY DASCH,  
6 *Petitioners,*  
7

8 vs.  
9

10 CITY OF PHILOMATH,  
11 *Respondent,*  
12

13 and  
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15 DEVELOPMENT BY DESIGN, LLC,  
16 *Intervenor-Respondent.*  
17

18 LUBA No. 2003-118  
19

20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from City of Philomath.  
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25 Marvin Durham, Philomath, and May Dasch, Philomath, filed the petition for review  
26 and argued on their own behalf.  
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28 James K. Brewer, Corvallis, filed a response brief and argued on behalf of  
29 respondent. With him on the brief was Fewel and Brewer.  
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31 Lawrence F. Cooley, Eugene, filed a response brief and argued on behalf of  
32 intervenor-respondent.  
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34 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
35 participated in the decision.  
36

37 AFFIRMED

11/20/2003  
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39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners challenge city site design approval for an office building to be located on a 12-acre parcel zoned Industrial Park (IP).

**MOTION TO INTERVENE**

Development by Design, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is located within the northwest corner of Lakeside Industrial Park. Lakeside Industrial Park includes 174 acres and was annexed to the city in 2002. It is currently developed with an abandoned lumber mill and a small structure that was formerly used by the city chamber of commerce. Oregon Highway 20 borders the industrial park to the south.

Development of the subject property will require an extension of 24<sup>th</sup> Avenue, which currently terminates at Oregon Highway 20. Intervenor proposes to construct a 45,800 square-foot, two-story office building and a 126-space parking lot. The property is not currently served by city sewer and water lines. However, it is anticipated that as development occurs within the industrial park, each new structure will connect to the city’s sewer and water systems.

Intervenor applied for site design approval pursuant to Philomath Zoning Ordinance (PZO) 15.030.<sup>1</sup> The planning commission approved the application, subject to conditions.

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<sup>1</sup> PZO 15.030 provides, in relevant part:

“The Planning Commission may approve the establishment of buildings and uses [allowed in the IP zone pursuant to PZO 15.020], if they meet the following criteria:

“(a) The location, size, design and operating characteristics (including noise and air pollution) of the proposed development will be compatible with and will not

1 Petitioners appealed the planning commission decision to the city council. After a hearing,  
2 the city council voted to deny the appeal and approved the proposed site design. This appeal  
3 followed.

4 **DECISION**

5 The petition for review includes three assignments of error, arguing that the city erred  
6 by: (1) failing to treat the proposed office building as Phase 1 of a multi-phased planned unit  
7 development (PUD); (2) failing to consider whether adequate public facilities are available to  
8 serve the proposed development or that additional necessary facilities will be made available  
9 by the time the industrial park is developed, as is required by ORS 197.752, Statewide  
10 Planning Goal 11 (Public Facilities), city comprehensive plan policies and PZO provisions;  
11 and (3) in concluding that the proposed extension of 24<sup>th</sup> Avenue will not “significantly  
12 affect a transportation facility” within the meaning of OAR 660-012-0060 (the  
13 Transportation Planning Rule or TPR).

14 The city’s and intervenor’s (together, respondents’) response is two-fold. First,  
15 respondents argue that none of petitioners’ assignments of error are based on criteria that  
16 apply to site design proceedings. Second, the city argues that petitioners failed to raise issues  
17 before the city regarding compliance with the criteria petitioners identify in their assignments  
18 of error and, therefore, petitioners waived the right to raise those issues for the first time  
19 before LUBA. ORS 197.763(1); 197.835(3).<sup>2</sup> We address the waiver response first.

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adversely affect the livability or appropriate development of abutting properties and  
the surrounding neighborhood.

“(b) The design and site plan of the proposed development will be as attractive as the  
nature of the use allows, considering the location and topography of the site, and the  
characteristics of the surrounding area.”

<sup>2</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] 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

1           **A.     Waiver**

2           During proceedings before the city, petitioners and others argued that the site design  
3 process failed to adequately consider the impact development of the industrial park would  
4 have on water quality and supply. Petitioner Durham’s appeal to the city council specifically  
5 identified those concerns as the basis for his appeal.<sup>3</sup> During the city council proceedings,  
6 petitioners and other opponents focused on those issues, calling for a water availability study  
7 before considering intervenor’s application. Petitioners have not identified any part of the  
8 local proceedings where they raised issues regarding the applicability of (1) the city’s PUD  
9 ordinance provisions; (2) statutory provisions, goal, city comprehensive plan policies or PZO  
10 provisions pertaining to public facility availability; or (3) the TPR. Therefore, any issues  
11 regarding the requirements of those provisions are waived. The first and third assignments of  
12 error are denied. The second assignment of error is denied in part.

13           **B.     Applicable Criteria**

14           The remaining issue before us is whether PZO 15.030 requires the city to adopt  
15 findings that the city’s water and sewer facilities are adequate to accommodate the proposed  
16 office building and the remainder of the development of the industrial park in order to

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sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) limits LUBA’s scope of review to issues that were “raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

<sup>3</sup> Petitioner Durham provided the following in response to a request for a “statement of the reasons for the appeal:”

“When the proposal for the Industrial park annexation was submitted to the Planning Commission \* \* \* in 2002, specific reference was made concerning the demand for water in the future development of this site. Neither water nor sewer are yet available to the property. The concerns, especially water supply, were expressed by many of us at the planning commission meeting of June 18, 2003 [pertaining to the site design application].

“The factors of water supply and quality, sewage disposal and capacity will increase with each phase of the development. To approve a site plan without addressing these issues (water and sewer) is a flawed procedure. To commit to major financial burdens without knowledge of the Marys River watershed conditions is a least a dangerous commitment by the city council and may well jeopardize the water system of the city.” Record 80-81.

1 approve intervenor's site design application. PZO 15.030(a), set out at n 1, could be read to  
2 require a demonstration that development of the subject property, as proposed, will not  
3 adversely affect water quality and quantity and thus will not adversely affect livability or the  
4 appropriate development of nearby property. However, the city did not adopt that  
5 interpretation, and certainly the text and context of PZO 15.030(a) do not compel such a  
6 reading. PZO 15.030(a) is directed at *site design*, that is, construction and placement of  
7 structures on a site, and not whether the use is appropriate for that site. Accordingly, the  
8 city's failure to adopt findings that address issues petitioners and others raised with respect to  
9 infrastructure does not provide a basis for reversal or remand. *Rouse v. Tillamook County*, 34  
10 Or LUBA 530, 536 (1998); *Collier v. Marion County*, 29 Or LUBA 462, 466 (1995).

11 The second assignment of error is denied.

12 The city's decision is affirmed.