BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLEN D. FECHTIG, Petitioner, vs. CITY OF ALBANY, Respondent, and DUANE DRUSHELLA, Intervenor-Respondent.	LUBA No. 95-256 FINAL OPINION AND ORDER

Appeal from City of Albany.

Garry P. McMurry, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Garry P. McMurry & Associates.

No appearance by respondent.

James H. Bean, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Lindsay, Hart, Neil & Weigler.

HANNA, Referee; LIVINGSTON, Chief Referee, participated in the decision.

AFFIRMED 08/01/96

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

Hanna, Referee.

NATURE OF THE DECISION

Petitioners appeal the city's approval of two tentative subdivision plats, one for a single family subdivision and another for a planned development; an interim plan for a planned development; and a grading permit.

MOTION TO INTERVENE

Duane Drushella (intervenor), the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor applied for approval to develop a parcel with a 37-unit planned development (PD) on 14.7 acres and a single family subdivision of 38 lots on 31.8 acres.[1] On

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[1]The city code requires separate processes to approve an ordinary subdivision and a planned development subdivision. Albany Development Code (ADC) 11.160 sets forth the process for ordinary subdivisions, and states:

> "Explanation of Process. Partitions and subdivisions are reviewed at two stages. A tentative plat is reviewed primarily for design aspects, such as connections to existing and future streets, preservation of natural features, drainage and floodplain considerations, and compliance with other requirements of this Code. The tentative plat need not be prepared by a surveyor. The final plat is reviewed for conformance to the tentative plat as approved (with or without conditions) and applicable state or county laws or rules. * * *"

ADC 11.260 sets forth the process for planned developments, and states:

> "Procedure. A planned development is processed in three steps; tentative, interim and final approvals. The preliminary application is reviewed by staff as a Type I procedure. The

October 30, 1995, the planning commission adopted findings conditionally approving the applications. On petitioner's appeal, on November 29, 1995, the city council affirmed the planning commission approval, and imposed conditions on the applications for (1) M1-08-95, a tentative subdivision plat for a planned development; (2) M1-09-95, a tentative subdivision plat; (3) PD-02-95, an interim plan for a planned development; and (4) F-0006-95, a grading permit pertaining to drainageways.[2]

This appeal followed.[3]

FIRST AND SECOND ASSIGNMENTS OF ERROR

` The first five assignments of error address grading and filling proposed on the subject property affecting the other proposed applications. Albany Municipal Code (AMC) 18.04.040 states:

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interim application is reviewed by the Planning Commission under the Type III procedure. The final approval is reviewed through the Type I procedure."

[2]The notice of public hearing explains:

"F-0006-95: Grading permits are reviewed according to the Uniform Building Code Appendix Chapter 70, which contains clear and objective standards. Review of a grading permit application is a building permit, not a land use decision. However, the City of Albany has added subjective requirements pertaining to drainageways as review criteria for approval of a building permit application, and a decision based on the drainageway requirement is a land use decision." (Emphasis added.) Record 434.

[3]This appeal is before us for the third time. See Fechtig v. City of Albany, 24 Or LUBA 577 (1993); Fechtig v. City of Albany, 27 Or LUBA 480, 130 Or App 433 (1994), rev den 320 Or 507 (1995).

"The following standards shall also be adopted as part of the engineering standards:

"(1) Grading operations will not be permitted in open drainageways, nor on land adjacent to a drainageway, without detailed engineering calculations submitted by the applicant to the Building Official upon which the Building Official finds that such an operation will not adversely affect the existing and ultimate developments or land adjacent to drainageway.

"(2) Any grading operation which takes place in an open drainageway or on the land adjacent to the drainageway must be found by the Building Official to have some beneficial purpose and the amount thereof not greater than is necessary to achieve that purpose." (Emphasis added.)

Petitioner argues that the city misconstrued the criteria concerning fill in a drainage way.[4] The city interpreted its ordinance so that the AMC 18.04.040(1) language, "or land adjacent to drainageway" is read to parallel the reference in subsection (2), "on land adjacent to the drainageway." The challenged decision states:

"Mr. Fechtig has argued that Code Section 18.040(1) when it says, 'where the Building Official finds that such an operation will not adversely affect the existing and ultimate developments or land adjacent to drainageway' has some special meaning inconsistent with this decision. After careful consideration we conclude that the word 'or' in the above-referenced sentence is, in fact, a typographical error and that the proper word is not 'or' but rather 'on'.

[4]Petitioner does not state to which application this assignment of error pertains.

> The clear intent of the section in question is to insure that present development on or adjacent to a drainageway does not preclude or unreasonably limit subsequent development on other land adjacent to the drainageway. Even if the use of the word 'or' instead of 'on' was not accidental, we believe that the sentence only makes sense if it is understood only to require that the fill in the drainageway not preclude or adversely affect development on land adjacent to the drainageway. Accordingly, City Staff, in an explanatory handout distributed by the Building Division, has used the word 'on' rather than 'or' to clarify the section in question. (Emphasis added.) Record 419.

Petitioner argues that:

> "By inserting the word 'on' for the word 'or' the City and the Developers limit their analysis of the effects of the fill to the development on Developers' property and ignore the adverse effects on Petitioner's adjacent land, which also lies in the drainageway." Petition for Review 7.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "so wrong as to be beyond colorable defense." Zippel v. Josephine County, 128 Or App 458, 876 P2d 854, rev den 320 Or 272 (1994). See also Goose Hollow

Foothills League v. City of Portland, 117 Or App 211, 217, 843 P 2d 992 (1992); Melton v. City of Cottage Grove, 28 Or LUBA 1 (1994), aff'd 131 Or App 626, 887 P2d 359 (1995). Furthermore, we must read all components of an ordinance together in a manner which gives meaning to all of its parts. Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 797 (1989).

The parties do not dispute that the first phrase of AMC 18.04.040(1) requires the city to determine that grading operations will not take place in open drainageways. Petitioner's reading of the second phrase of AMC 18.04.040(1) requires the city to determine that the operation will not adversely affect: (1) existing development; (2) ultimate development; or (3) land adjacent to the drainageway. The city's reading of AMC 18.04.040(1) requires the city to determine that the operation will not affect: (1) existing development on land adjacent to the drainageway; or (2) ultimate developments on land adjacent to the drainageway. Under either reading, the city must consider whether grading operations adversely affect land adjacent to the drainageway. However, petitioner's reading of the first two factors does not explain what developments must be considered. The city's reading cures this

ambiguity.[5] We conclude that the city's interpretation of AMC 18.04.040, which excludes consideration of adjoining parcels, is not so wrong as to be beyond a colorable defense.

Petitioner complains also that the city failed to make a finding on the adverse effects of fill on petitioner's land, and points to evidence of adverse effects that he submitted. Intervenor responds that the city made the required finding, and identifies that finding in the decision, which states:

> "Our review of the record, which includes the staff report at pages 60 through 61, convinces us, and we so find, that detailed engineering calculations have been submitted by the applicant and approved by the Building Official to demonstrate that the grading operation will not adversely affect the existing and ultimate developments on land adjacent to the drainageway."[6] Record 420.

Petitioner has not demonstrated that the city failed to make the finding required by AMC 18.04.040.

The first and second assignments of error are denied.

THIRD AND FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city erred in two respects in applying AMC 18.04.040 to the issuance of the grading

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[5]Neither interpretation addresses whether "land adjacent to the drainageway" includes only the applicant's land or whether petitioner's adjoining parcels are included in that ambit.

[6]Intervenor contends that much of petitioner's argument is based on petitioner's prior cases pertaining to issues that are not before us here.

permit (F000695) when it: (1) found substantial evidence that the fill was for a beneficial purpose of making lots buildable; and (2) failed to find that the amount of fill it allowed is no greater than that needed for a beneficial purpose.

Intervenor responds that "AMC 18.04.040 regulates all grading operations--not simply fill. It is the entire 'Grading operation' that must provide 'some' benefit, not just the fill." (Emphasis in original.) Intervenor's Brief 14.

The record is replete with documentation addressing the grading and fill requirements of AMC 18.04.040. Record 159-60, 162-63, 246-47, 398, 418, 420. The grading permit review states:

> "The purpose of filling this area is to provide buildable lots within a proposed subdivision, which is [a] purpose which will benefit the purchasers of the lots and residences that will [be] built on them. The Building Official and City Engineer have reviewed the calculations and plans submitted by the applicants and have concluded that the proposed fill is the minimum amount needed to provide buildable lots.
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> "* * * * *
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> "The Building Official and City Engineer have concluded, based on the findings above, that the fill proposed in, and adjacent to, the referenced drainageway has some beneficial purpose and the amount of the fill is not greater than necessary for that purpose." Record 247.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by

substantial evidence in the whole record." ORS 197.835(7)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decisionmaker's conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992). If there is substantial evidence in the whole record to support the city's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the city made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995); Bottum v. Union County, 26 Or LUBA 407, 412 (1994); McInnis v. City of

Portland, 25 Or LUBA 376, 385 (1993).

The conclusions of the city building official and the city engineer are substantial evidence that the fill is for the beneficial purpose of making the subject property buildable, and that the amount of fill allowed to accomplish this beneficial purpose is no greater than necessary.

The third and fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues "[t]he city granted in excess of 5000 cubic yards on the Planned Development Site without an application for a fill permit, supported by data required by review criteria of the city Code." Petition for Review 14. Petitioner contends that the application submitted by intervenor is for approval to fill the area designated for the subdivision and not an application to fill the area designated for the planned development. In an apparent effort to refute the evidence relied on and the conclusions of the city in issuing the permit, petitioner refers generally to "massive fills above and below the floodplain line along the north side of the PD." Petition for Review 15.

We agree with intervenor that the application and the findings supporting the grading permit reference the entire subdivision tentative plat, including the PD portion of the subdivision. Accordingly, the approval of the grading permit did not exceed the scope of the application for that

approval.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner contends the city misconstrued ADC 11.180 and 12.150 for vehicle access on petitioner's neighboring property when it provided for only one, instead of two, access points.

The staff report, adopted as part of the challenged decision, sets forth criteria and describes how those criteria are met. As relevant to this assignment of error, it states:

> "(2) Adjoining land can be developed or is provided access that will allow its development in accordance with the Albany Development Code.
>
> "Findings of Fact
>
> "2.1 We interpret this criterion to require that adjoining land either have access, or be provided access, that will allow its development in accordance with the Development Code. 'In accordance with the Development Code' means in accordance with ADC 12.060: 'No development shall occur unless the development has frontage on or approved access to a public street currently open to traffic.'" (Emphasis in original.) Record 193.

The decision continues by describing numerous properties, several of which are owned by petitioner, and access to those properties.

Petitioner describes a hypothetical development scenario wherein one of his adjacent properties is divided into four lots with the frontage on the west side.

Petitioner contends that this configuration cannot meet various other code requirements unless two access points are available. Thus, he reasons the only logical alternative is to condition the subject approval to require two access points to his property so that it can be developed in the described configuration.

Intervenor points out that petitioner's scenario considers only one of petitioner's properties in relation to that of the subject property. It does not consider access that might be available from petitioner's other properties.

Petitioner's constrained conjecture concerning one possible development scenario does not provide a basis for a determination that the city's decision does not conform to the applicable criteria.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

The seventh through the eleventh assignments of error address groundwater collection and retention plans and systems.

In the seventh assignment of error, petitioner contends the city misconstrued its code criteria for approving a storm sewer plan and system when it found that "[t]he conceptual storm drainage systems has been approved by the City Engineer." Petitioner contends that although a conceptual plat is allowed by the code, ADC 12.530 does not provide for a conceptual storm drainage system.

The challenged decision states:

> "ADC 12.530 requires that all proposed storm sewer plans and systems be approved by the City Engineer as part of the tentative plat review process. The storm drain plan is shown on the 'Conceptual Utility Plan,' and in addition, the applicant's have submitted a 'Conceptual Storm Drain Plan,' prepared by K&D Engineering, Inc., revised September 25, 1995. These conceptual plans have been approved by the City Engineer." Record 200.

Intervenor responds that the procedural provisions, set forth in ADC 11.160 and 11.260, describe a multi-stage approval process in which the final plat may reflect changes as allowed by the city engineer. Moreover, the conditions of approval state, "Prior to plat approval, final design of public sanitary sewer, water, and storm drainage systems must be submitted for review and approved by the City engineer." Record 248.

Provisions of a zoning ordinance should be interpreted in a manner which gives meaning to all parts of the ordinance. 19th Street Project v. City of The Dalles, 20 Or LUBA 440 (1991); Kittleson v. Lane County, 20 Or LUBA 286 (1990); Kenton Neighborhood Assoc. v. City of Portland, supra.

Petitioner has not established the city's reading of the requirements of ADC 11.160, 11.260 and 12.530 together is beyond a colorable defense, and we defer to the city's interpretation. ORS 197.829(1).

The seventh assignment of error is denied.

EIGHTH, NINTH, TENTH AND ELEVENTH ASSIGNMENTS OF ERROR

Petitioner argues that (1) the city erred when it

failed to independently review calculations pertaining to water runoff as required by ADC 12.530; (2) the declaration that the city engineer did review the proposed system is not supported by substantial evidence; and (3) two findings addressing storm water runoff are irrelevant or not supported by substantial evidence.

The intervenor responds that (1) petitioner did not argue below that the city engineer did not independently review calculations at issue; (2) the record demonstrates that the city engineer properly reviewed the calculations; and (3) the city's findings pertaining to storm water runoff are supported by substantial evidence.

Before the planning commission, petitioner submitted his version of the proper storm water runoff calculations. However, because petitioner did not raise the issue of the city engineer's review below, we do not consider it here. Furthermore, even if the issue had been raised, as discussed in the third and fourth assignments of error, where, as here, the evidence is conflicting, if a reasonable person could reach the decision the city made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Mazeski v. Wasco County, supra.

The eighth, ninth, tenth and eleventh assignments of error are denied.

TWELFTH ASSIGNMENT OF ERROR

Petitioner makes nine subassignments of error challenging the substantial evidence pertaining to the planned development. Petitioner contends that the city failed to satisfy criteria in ADC 11.250 for "a high quality master plan" and "high quality performance requirements." Much of petitioner's argument is a description of evidence and testimony he submitted below critiquing the proposal.

Intervenor responds:

> "First, Petitioner did not raise this issue before the City with sufficient clarity to afford the City or the applicant an opportunity to respond.
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> "* * * * *
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> "Petitioner misstates the City's findings, misunderstands the City's code provisions relating to density calculations, and misunderstands the legal standard for determining substantial evidence." Record 31-32.

Much of petitioner's argument is based on hypothetical scenarios which are not based on facts in the record, and to which petitioner applies his own interpretation of the ADC. This reasoning does not demonstrate that the city failed to rely on substantial evidence when it made its findings and conclusions.

Because petitioner does not demonstrate that he raised these issues below with sufficient clarity to allow a response, we do not review them here. Furthermore, none of petitioner's disputes with the evidence in the record undermines the substantial evidence in the whole record upon

which the city relied on in making the challenged decision.

The twelfth assignment of error is denied.

THIRTEENTH ASSIGNMENT OF ERROR

Petitioners argue, "The City denied Petitioner and other objectors a full and fair hearing, contrary to Oregon law and the U.S. Constitution requiring procedural and substantive due process" Petition for Review 41.

A. Procedural Due Process

Petitioner contends first that a notice of inadequate application was not issued as required by ORS 215.428.[7] By the terms of the statute, the right to such notice is the applicant's right and not that of a potential objector.

Petitioner also describes an instance at the October 16, 1995 planning commission hearing in which, for the first time, two homeowner associations were proposed rather than one. Because of this change, petitioner requested a continuance, which request was denied. Petitioner now objects to this denial of his request. Petitioner neither describes how this alleged violation violates his constitutional due process rights nor explains any violation of ORS 197.763. Petitioner has failed to establish any such violations.

Petitioner next makes four separate arguments that we address as a whole. First, petitioner objects that

[7]It is actually the corollary provision, ORS 227.178 that applies to cities. ORS 215.428 applies only to counties.

opponents of the proposal were allowed only 90 minutes to present testimony, and petitioner, individually, only 13 minutes.[8] Second, petitioner argues that three critical points he made at the planning commission hearing are ignored in the findings and conclusions. Third, petitioner contends that the city council's decision to review the planning commission's decision on the record eliminated the opponents' opportunity to point out errors made by the planning commission. Fourth, petitioner alleges that the city staff urged the city council not to change the findings and conclusions.

The sum total of petitioner' argument that these allegations rise to the level of a constitutional violation is petitioner's statement:

> "Cumulatively, these irregular proceedings establish that the deal was done between the City and Developers prior to the October 16th Planning Commission hearing when Findings and Conclusions were carved in stone!" Petition for Review 46.

LUBA will not consider claims of a constitutional violation when the petitioner raising the claim does not make a legal argument sufficient for review of the claim. Sparks v. Tillamook County, ___ Or LUBA ___, (LUBA No. 95-141, January 19, 1996); Joyce v. Multnomah County, 23 Or

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[8]Intervenor explains in response that each side, proponents as well as opponents were allowed 90 minutes for oral testimony. Petitioner was allowed to use other opponents' unused time when the opponents did not use the full 90 minutes. The city did not impose a limit on written submissions, and petitioner submitted in excess of 100 pages of material.

LUBA 116 (1992); Cummins v. Washington County, 22 Or LUBA 129 (1991), aff'd 110 Or App 468 (1992).

This subassignment of error is denied.

B. Substantive Due Process

Petitioner's allegation is a recitation of arguments made in other assignments of error but couched here as a substantive due process violation. In summary:

> "Petitioner submits that the Planning Commission and City Council [a] biased and fatally flawed Staff Report with its blatant misrepresentation of review criteria and conclusory statement of facts." Petition for Review 47.

Petitioner's scant analysis and argument in support of this assignment of error does not merit discussion. Id.

This subassignment of error is denied.

The thirteenth assignment of error is denied.

The city's decision is affirmed.