

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

08/20/18 AM 11:06 LUBA

3
4 HOLLIS LUNDEEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WALDPORT,
10 *Respondent,*

11 and

12
13 TIDEWATER DEVELOPMENT, LLC,
14 *Intervenor-Respondent.*

15
16
17 LUBA No. 2018-030

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Waldport.

23
24 Hollis Lundeen, Waldport, filed a petition for review and argued on her
25 own behalf.

26
27 No appearance by City of Waldport.

28
29 Dennis L. Bartoldus, Newport, filed a response brief and argued on
30 behalf of intervenor-respondent.

31
32 ZAMUDIO Board Member; RYAN, Board Chair, participated in the
33 decision.

34
35 BASSHAM, Board Member, did not participate in the decision.

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37 REMANDED 08/20/2018

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

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NATURE OF THE DECISION

Petitioner appeals a city council decision that approves a preliminary plan for a planned development.

FACTS

The subject property is 7.75 acres, vacant, located within the City of Waldport (city), and is zoned Residential R-1 for single-family dwellings. Surrounding land uses include single-family residential development and some undeveloped, residential-zoned property. Access to the subject property is via an extension of Norwood Drive, an existing public right of way that currently dead-ends before it reaches the property. Norwood Drive serves multiple existing residences. The proposed development would extend Norwood Drive onto the subject property and into a circular street system that would provide access to the new lots. A future second access point is planned at the south end of the subject property and the proposed development includes a street stub to provide access to Kelsey Lane when the property to the south of the subject property is developed. Record 350.

A steep ravine runs along the north and a portion of the east boundaries. Some of the property is comprised of steep slopes but much of the property slopes gently to the west. The proposed extension of Norwood Drive onto the property travels across the ravine. The proposed lots are primarily located on the more gently sloping areas of the subject property. Record 359.

1 The city planning commission granted preliminary plan approval to
2 intervenor-respondent Tidewater Development, LLC (intervenor) for a 34-lot
3 single-family residential planned development on the subject property called
4 Vista View Planned Development (Vista View). Petitioner appealed the
5 planning commission's decision to the city council, which approved the
6 application with conditions. The city council found that the subject property
7 can be served by city water and sewer, and with electricity. Record 4. The city
8 council imposed a condition of approval that requires intervenor to coordinate
9 with the city public works department on the design and construction of water,
10 sewer, and storm drainage facilities and submit final engineering plans for
11 review and approval prior to construction. Record 8, 10. The city council found
12 that the proposed development satisfies applicable Waldport Development
13 Code (WDC) provisions. Record 9. This appeal followed. Petitioner argues that
14 the decision is not supported by adequate findings, the findings failed to
15 address all issues raised by opponents, and the city improperly deferred
16 discretionary decision making to the final plan process.¹

17 Planned development approval is a two-stage process under the WDC. A
18 preliminary plan outlines the proposed development and is subject to a public
19 hearing before the planning commission, which may reject the plan, approve it
20 as submitted, or approve it with conditions. WDC 16.60.030; WDC

¹ Petitioner failed to expressly set out the applicable standard of review for each assignment of error as required by OAR 661-010-0030(4)(d).

1 16.108.020(C). The planning commission’s decision may be appealed to the
2 city council. WDC 16.108.020(C)(5); WDC 16.108.020(H). After preliminary
3 plan approval, the applicant proceeds with more detailed planning and must
4 submit a final plan to the city planner with certifications and proof of
5 compliance with conditions imposed by the preliminary plan approval. If the
6 city planner is satisfied that the certification requirements and conditions are
7 met, then the final plan

8 “will be placed on the next practical scheduled meeting of the
9 Planning Commission for determination that all requirements have
10 been met. The Commission shall then approve, disapprove or,
11 when further information is required, postpone a decision on the
12 plat.” WDC 16.60.040(A).

13 We proceed to petitioner’s assignments of error, and address them
14 slightly out of order, beginning with the second assignment of error.

15 **SECOND ASSIGNMENT OF ERROR**

16 WDC 16.96.020 provides:

17 “Development guidelines shall apply to those areas of concern
18 delineated on the City of Waldport zoning map and in its
19 comprehensive plan and plan inventories or any area determined
20 potentially hazardous by the Planning Commission and shall also
21 apply to any property that has a 20% slope or greater.”

22 WDC 16.96.030(D)(4) requires a site-specific geotechnical analysis for
23 development on slopes greater than 20 percent:

24 “D. Standards. The following shall be required in identified
25 hazard areas:

26 “* * * * *

1 “4. Slopes greater than twenty (20) percent. A site
2 specified geotechnical analysis by an Oregon certified
3 engineering geologist is required. The analysis, which
4 shall be stamped by the Oregon certified engineering
5 geologist, shall determine the suitability of the site for
6 development and shall recommend specific measures
7 which may be required to safeguard life and
8 property.”

9 In its decision, the city listed WDC 16.96 as relevant criteria, and
10 intervenor does not dispute that it applies to the planned development. Record
11 5. Intervenor does, however, dispute that WDC 16.96 must be satisfied at the
12 preliminary planning stage. The city council did not determine whether WDC
13 16.96 was met but instead imposed a condition of approval to ensure future
14 compliance with that provision: “Geotechnical analyses shall be required where
15 development of both roads and lots are proposed on slopes greater than twenty
16 (20) percent.” Record 10.

17 In the second assignment of error petitioner argues that the city’s
18 decision violates applicable law by deferring geotechnical review to the final
19 plan process where no public testimony is allowed. See n 3. We understand the
20 second assignment of error to allege that the city improperly construed WDC
21 16.96 in failing to apply that provision and require a geotechnical analysis at
22 the preliminary plan stage.

23 By its terms, WDC 16.96.030(D)(4) requires a geotechnical analysis for
24 development on slopes greater than 20 percent. However, nothing in WDC
25 16.60, the chapter that governs planned developments, refers to WDC 16.96.

1 WDC 16.96 is in a separate chapter entitled "Development Guidelines." WDC
2 16.96.030(D)(4) requires the geotechnical analysis be performed and stamped
3 by an Oregon certified engineering geologist, and the geologist's analysis
4 "shall determine the suitability of the site for development and shall
5 recommend specific measures which may be required to safeguard life and
6 property." As far as we can tell, WDC 16.96 requires no decision by the city
7 except for a decision that an Oregon certified engineering geologist has
8 "determine[d] the suitability of the site for development" and "recommend[ed]
9 specific measures * * * to safeguard life and property." Petitioner has not
10 identified anything in the WDC that requires that determination to be made in
11 the preliminary plan stage. Therefore, we agree with intervenor that the city did
12 not err in imposing a condition of approval that requires WDC 16.96 to be met
13 prior to final plan approval.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 As pertinent to petitioner's third assignment of error, pursuant to WDC
17 16.60.030(C)(3), the city is required to make the following inquiries and
18 findings before approving a preliminary plan:

19 "C. Preliminary plan approval criteria. Approval by the
20 Planning Commission of a preliminary plan of a planned
21 development shall be based on findings that the following
22 criteria are satisfied:

23 " * * * * *

1 “3. The proposed development will provide the following
2 amenities or protections at a higher level than would
3 otherwise be provided under conventional land
4 development procedures: protection of significant
5 natural and cultural features and resources, such as
6 historical scientific and cultural resources, fish and
7 wildlife habitats, stream corridors, riparian areas, and
8 wetlands; maintenance, enhancement or establishment
9 of natural vegetation, especially indigenous plant
10 communities; protection of scenic and aesthetic
11 qualities; and creation of a high quality built
12 environment which harmonizes with the natural and
13 physical features of the site and includes design
14 features such as suitably located open space,
15 recreation facilities, and other public and common
16 facilities, and also includes pedestrian oriented
17 development which reduces reliance on automobile
18 travel, provision of solar access or similar measures
19 to promote energy conservation, or avoidance of risks
20 and costs associated with environmental hazards.”

21 The city found:

22 “The Planned Development ordinance allows a design that is
23 tailored to the property. Exceptions to residential and land division
24 standards are allowed in exchange for tradeoffs, which are
25 typically the establishment of open spaces, natural resources and
26 public benefits, *e.g.*, dedication of open space, preservation of
27 natural drainage ways, [and] public pedestrian facilities such as
28 trail connections.” Record 7.

29 Petitioner argues that the city’s findings do not explain how the proposed
30 planned development provides a “higher level” of amenities or protections.
31 Petition for Review 25. Petitioner asserts that the following issues were raised
32 but not addressed by the city’s findings: traffic impacts, cost burden, fisheries

1 protection, road improvement impacts, pedestrian impacts and safety, bald
2 eagle protection, greenspace “tradeoff,” and adequacy of park assessment fee.²

3 Intervenor responds that WDC 16.60.030(C)(3) provides examples of
4 consideration and that the code does not require that the city address every
5 factor in its findings approving a preliminary plan. Instead, in intervenor’s
6 view, the code requires a balancing of interests between the proposed planned
7 development and development under the traditional subdivision provisions of
8 the WDC. Intervenor’s Response Brief 15. For example, intervenor asserts that
9 the WDC allows subdivision of the property that could result in 56 buildable
10 lots, whereas based on constraints and concessions, the proposed planned
11 development includes only 34 buildable lots, along with open space and trails.
12 Intervenor argues that WDC 16.60.030 requires the city to balance interests,
13 such as those amenities and protections listed in WDC 16.60.030(C)(3), to
14 determine whether the proposed development provides an overall greater good
15 to the city than a conventional layout for the development under the WDC
16 subdivision regulations. Intervenor’s Response Brief 15. In intervenor’s view,

² Petitioner argues that bald eagle habitat is present near the subject property. The city found that any bald eagle habitat on or near the property is not relevant in applying WDC 16.60. Record 8. Petitioner does not assign error to that finding or identify any relevant criteria related to bald eagle habitat. Thus, that argument provides no basis for reversal or remand and we do not address it.

1 the list in WDC 16.60.030(C)(3) is a list of considerations and the city has
2 considerable flexibility in reviewing and approving a preliminary plan.

3 We agree with intervenor that WDC 16.60.030(C)(3) affords the
4 planning commission and the city council significant flexibility in approving a
5 planned development. WDC 16.60.010 provides, in part, that “[t]he purpose of
6 the planned development procedure is to encourage and promote creativity and
7 innovation in site planning, design and development through the application of
8 flexible land development standards,” and that “[a]pplication of the planned
9 development procedure is intended to [a]llow for and encourage development
10 designs which provide suitable recognition of the physical, topographic,
11 cultural, historical and natural resource values and constraints present on a
12 particular site.” *See also* WDC 16.60.020(H) (“Yards, setbacks, lot area, lot
13 coverage and similar dimensional requirements may be reduced, adjusted or
14 otherwise modified consistent with the design objectives of the proposed
15 development.”). The considerations in WDC 16.60.030(C)(3) are not
16 independent approval criteria, but a list of factors the city should consider.

17 The city did not expressly find that the proposed development will
18 provide the “amenities or protections at a higher level than would otherwise be
19 provided under conventional land development procedures.” WDC
20 16.60.030(C)(3). However, the findings in the decision are sufficient to explain
21 that the city weighed the considerations in WDC 16.60.030(C)(3) and found
22 that the preliminary plan satisfies that provision. For example, the approval

1 requires the drainage way and ravine along the northern portion of the eastern
2 boundary of the property be dedicated as open space with an easement for a
3 public nature trail. That condition protects open space and natural features and
4 enhances pedestrian access as well as scenic and aesthetic qualities. The
5 proposed design of the lots conforms to natural topographic constraints, which
6 minimizes risks associated with natural hazards. The city's findings are
7 adequate to explain why it concluded that WDC 16.60.030(C)(3) is met.

8 The third assignment of error is denied.

9 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

10 We address petitioner's first and fourth assignments of error together.
11 Petitioner challenges the city's conclusion that the preliminary plan complies
12 with WDC 16.60.030(C)(4), which provides:

13 "In considering a development proposal, the Planning Commission
14 shall seek to determine that the development will not overload the
15 streets outside the planned development area; and that the
16 proposed utility and drainage facilities are adequate for the
17 population densities and type of development proposed and will
18 not create a drainage or pollution problem outside the planned
19 area."

20 Petitioner challenges the city's decision that WDC 16.60.030(C)(4) is
21 satisfied with respect to streets, utilities, and storm drainage. The city council
22 found that water, sewer, and electricity "currently serve or are available to the
23 subject property" and that those utilities are adequate to serve the proposed
24 development. Record 4.

1 “The City Council finds the [WDC] and Planning Commission
2 Findings & Conclusions have measures in place to ensure that
3 adequate facilities will be design[ed], approved, and constructed.
4 The Planning Commission’s condition of approval #8 [Condition
5 8] requires the applicant to submit final engineering plans for
6 water, sewer, storm drainage, and streets to the City of Waldport
7 and other applicable agencies for review and approval prior to
8 construction.” Record 8.

9 Condition 8 provides:

10 “8. **Water, Sewer, Storm Drainage, and Other Utilities.** The
11 applicant shall coordinate with the City Public Works Department
12 on the design and construction of water, sewer, and storm drain
13 facilities. If the sewer connects to the existing pump station near
14 Highway 101, [then] the applicant shall provide required upgrades
15 to the pump station to accommodate the increased flows. Utility
16 easements shall be provided to the City as required by the Public
17 Works Director. All utilities shall be placed underground.

18 “Final engineering plans for water, sewer, and storm drainage, and
19 streets, shall be reviewed and approved by the City Public Works
20 Director. The developer shall be responsible for any costs incurred
21 by the City to have a professional registered engineer review and
22 approve the development plans. Final engineering plans for water
23 and the street shall also be reviewed by [Central Oregon Coast
24 Fire & Rescue District].” Record 10.

25 Petitioner argues that the city erred in imposing Condition 8 because,
26 according to petitioner, Condition 8 defers a conclusion as to whether WDC
27 16.60.030(C)(4) is met to a later stage that does not allow public participation.
28 We understand petitioner to argue that the city may defer that conclusion only
29 if it first finds that the proposed development could feasibly comply with WDC
30 16.60.030(C)(4). Petitioner cites *Meyer v. City of Portland*, 7 Or LUBA 184,
31 196 (1983), *aff’d*, 67 Or App 274, 678 P2 741, *rev den*, 297 Or 82 (1984) in

1 support of that position. Petition for Review 10–11. Petitioner further argues
2 that the city may not rely on future city staff and engineer review prior to final
3 plan approval because that process does not allow public participation.³

4 The Court of Appeals addressed both the feasibility and public
5 participation issues in *Meyer*, 67 Or App 274. Like this case, *Meyer* was
6 concerned with a city approval of a planned development and, like the subject
7 property in this case, the property in *Meyer* contained steep slopes. *Id.* at 276.
8 In rezoning the property to allow planned development, the city imposed
9 conditions of approval requiring the applicant to submit satisfactory evidence
10 that the development would not create geological hazards and that satisfactory
11 drainage would be provided. *Id.* at 278–79. In approving a conditional use
12 permit to construct the planned development, the city included a condition of
13 approval requiring geotechnical studies to verify that roads, drainage ways, and
14 building sites could be safely developed, including specified methods for storm
15 and groundwater disposal. *Id.* The approval required all storm and sanitary
16 sewers be constructed in accordance with the requirements of the city engineer.
17 *Id.* The petitioners challenged the city’s approval with respect to storm water
18 control and geotechnical review. *Id.* at 279–80. LUBA affirmed the approval,
19 reasoning that while the feasibility of the planned development must be shown

³ It is not clear to us whether public participation is permitted during the final plan review under WDC 16.60.040.

1 at the preliminary plan stage, technical matters that require expert evaluation
2 may be deferred to administrative review and approval. *Id.* at 280.

3 With respect to the required geotechnical information, LUBA held that
4 the city properly concluded, based on information in the record, including
5 geotechnical studies, that the project was geotechnically feasible and that
6 detailed geotechnical information for individual building sites was not required
7 at the preliminary plan stage. *Meyer*, 7 Or LUBA 184, 197. With respect to
8 storm water, we observed that it seemed probable that the developer would
9 need to improve the open channels or closed storm sewers to serve the
10 development. *Id.* at 197–99. The applicant relied on an engineering study in the
11 record that described existing inadequacies and provided a drainage control
12 plan. The expert testified that an effective storm drainage system was feasible
13 and a city engineer testified that applicant’s engineers had adequately
14 addressed drainage concerns. *Id.* at 199. We concluded that the evidence cited
15 was sufficient to show that it was feasible to control the storm water and that
16 detailed plans and precise solutions could be deferred to final plan approval. *Id.*

17 The Court of Appeals affirmed our decision and clarified the applicable
18 feasibility inquiry.

19 “[B]y ‘feasibility’ LUBA means more than feasibility from a
20 technical engineering perspective. It means that substantial
21 evidence supports findings that solutions to certain problems (for
22 example, landslide potential) posed by a project are possible,
23 likely and reasonably certain to succeed.”

1 *Meyer*, 67 Or App at 280 n 5 (internal citations omitted). With respect to
2 deferred review, the court explained that while the city council “must find that
3 solutions are available, detailed technical matters involved in selecting a
4 particular solution to each problem are left to be worked out between the
5 applicant and city’s experts during the second stage approval process for the
6 final plan.” *Id.* at 282 n 6. The court explained that the city is not required to
7 provide public hearing and participation in technical discussion and review
8 after the preliminary plan approval process. *Id.*

9 With that context, we turn to petitioner’s specific challenges regarding
10 streets, utilities, and storm drainage.

11 With respect to street loading, *i.e.*, traffic impacts, “[i]n considering a
12 development proposal, the Planning Commission shall seek to determine that
13 the development will not overload the streets outside the planned development
14 area[.]” WDC 16.60.030(C)(4). The city council found:

15 “Traffic data used in the evaluation of the application included
16 reliable and substantiated data. For example, the Institute of
17 Traffic Engineers (ITE) Trip Generation Report, 8th Edition was
18 researched to obtain average daily traffic data, *i.e.*, a single-family
19 house generates approximately 10 trips per day. The City Council
20 finds the proposed extension of Norwood Drive for the
21 development of the Vista View [planned development] is well
22 within the development rights of the property owner. The City
23 Council affirmed that the future extension of Norwood Drive was
24 in place at the time the Norwood Drive residence [*sic*] purchased
25 and developed lots along Norwood Drive.” Record 8.

26 Petitioner argues that those findings are inadequate to explain why the
27 city council determined that the proposed development will not “overload the

1 streets outside the planned development area,” specifically, Norwood Drive.
2 Petition for Review 30. Intervenor responds that the city’s findings are
3 adequate to explain why the city found that the development will not overload
4 Norwood Drive, based on the city’s calculation that Norwood Drive can
5 accommodate 1,000 trips per day. Intervenor’s Response Brief 20. Petitioner
6 acknowledges that a city staff report explained that the national standard for the
7 maximum daily capacity of a local street is 1,000 vehicles per day. However,
8 petitioner argues that the staff report cannot be treated as city council findings
9 because the city council did not adopt the staff report into its findings. Petition
10 for Review 32.

11 While petitioner is correct that the city council did not expressly adopt
12 the staff report into its findings, the city’s findings are adequate to explain why
13 the city concluded that WDC 16.60.030(C)(4) was met with regard to streets:
14 Norwood Drive has a capacity of 1,000 vehicle trips per day and the projected
15 trips are less than that. *See Sunnyside Neighborhood v. Clackamas County*, 280
16 Or 3, 21, 569 P2d 1063 (1977) (findings need not be perfect and do not require
17 “magic words”). The city council found that “[t]raffic data used in the
18 evaluation of the application included reliable and substantiated data.” Record
19 8. Petitioner does not challenge that finding. That finding, combined with
20 evidence in the record regarding traffic counts, is sufficient to support the city
21 council’s conclusion that the development will not overload the streets outside
22 the planned development area.

1 Petitioner next argues that Norwood Drive is not identified in the record
2 as a “local” street. Petition for Review 35. Petitioner further argues that
3 existing Norwood Drive is not built to current city standards for local streets
4 and, therefore, Norwood Drive cannot support 1,000 trips per day as the ITE
5 Manual suggests. “[A]ny assumption that Norwood can support 1,000 trips per
6 day is not supported by substantial evidence in the record.” Petition for Review
7 33.

8 The short answer is that the staff report identifies Norwood Drive as a
9 local street, and evidence in the record is that a local street can support 1,000
10 trips per day. That evidence does not distinguish between streets that are built
11 to current standards and streets that are not. Petitioner points to nothing in the
12 record (or the city’s adopted Transportation System Plan) that calls that
13 evidence into question. Absent any basis for calling that identification into
14 question, we reject petitioner’s argument.

15 In approving the preliminary plan, the city determined that streets within
16 the property would meet city street standards. The city determined that the
17 required street improvements, including the extension of Norwood Drive, will
18 result in a traffic situation that will not overload the streets outside the planned
19 development area. That determination is supported by substantial evidence in
20 the record.

21 With respect to utilities, we disagree with petitioner that the city deferred
22 determining whether the proposed sewer, water, and electricity are adequate to

1 serve the proposed development. The city decided that the development can be
2 served by existing electrical, water, and sewage facilities, as quoted above. The
3 city imposed Condition 8 in order to ensure that the final technical details of
4 the proposed water, sewer, and electricity services are reviewed by city
5 employees with expertise in those areas. The city’s decision includes adequate
6 feasibility findings with respect to utilities.

7 Our conclusion is different with respect to storm water drainage and
8 pollution. WDC 16.60.030(C)(4) requires the city to determine during the
9 preliminary plan stage that “the proposed facilities are adequate for the
10 population densities and type of development proposed *and will not create a*
11 *drainage or pollution problem outside the planned area.*” (Emphasis added.)

12 We agree with petitioner that the city’s findings fail to explain whether
13 the storm drainage facilities are adequate to serve the proposed development
14 and that the proposed development will not create a drainage or pollution
15 problem outside the planned area. Intervenor responds that the preliminary plan
16 shows a retention pond, and the storm water will be “channeled downhill in a
17 controlled pattern.” Intervenor’s Response Brief 9–10.⁴ However, the decision
18 does not contain any findings that the proposed development will not create a
19 drainage or pollution problem “outside the planned area.” WDC
20 16.60.030(C)(4). The findings do not address storm drainage at all or explain

⁴ The proposed plan map shows what is marked as a “Stormwater Facility Detention Pond” on the northern portion of the property.

1 how intervenor's proposed storm drainage plan is adequate to serve the
2 proposed development without creating a drainage or pollution problem off-
3 site. Accordingly, remand is required to allow the city to determine whether the
4 proposed storm drainage facilities are adequate to serve the proposed
5 development.

6 The first and fourth assignments of error are sustained in part and denied
7 in part.

8 The decision is remanded.