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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. 96-045  
FINAL OPINION  
AND ORDER

Appeal from City of Albany.

Allen D. Fechtig, Albany, represented himself.

James Delapoer, Albany, represented respondent.

James H. Bean, Portland, represented intervenor-respondent.

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

DISMISSED 08/12/96

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

1 Hanna, Referee.

2 Petitioner appeals a fill permit issued by the city on  
3 January 5, 1996, which allows the excavation and relocation  
4 of approximately 26,000 cubic yards of soil in connection  
5 with the development of a subdivision. Intervenor-  
6 respondent (intervenor) moves to dismiss this appeal on the  
7 grounds that issuance of the fill permit is not a land use  
8 decision subject to LUBA jurisdiction.

9 Intervenor's tentative plat application for a 38-lot  
10 subdivision was conditionally approved by the city planning  
11 commission on October 30, 1995. At the same time, the  
12 planning commission approved intervenor's application for a  
13 planned development on one of the resulting subdivision  
14 lots, and also approved a portion of intervenor's  
15 application for a permit authorizing the grading and fill  
16 which would be necessary for the development of the  
17 subdivision site. The planning commission's approvals were  
18 affirmed by the city council on November 29, 1995.  
19 Petitioner appealed the city council's decision to LUBA, and  
20 the city's decision was affirmed by this Board. Fechtig v.  
21 City of Albany, \_\_\_ Or LUBA \_\_\_, (LUBA No. 95-256, August 1,  
22 1996). The present appeal involves petitioner's challenge  
23 to the fill permit which was issued to intervenor by the  
24 city building division on January 5, 1996 for development of  
25 the subdivision site.

26 **MOTION TO STRIKE**

1           On March 29, 1996, intervenor filed a request for  
2 permission to file a reply memorandum in support of his  
3 motion to dismiss (with reply memorandum attached) in order  
4 to address new issues raised by petitioner in his response  
5 to the motion.   Petitioner moves to strike intervenor's  
6 reply memorandum.   Although petitioner is correct that this  
7 Board's rules do not expressly provide for the filing of  
8 reply memoranda in support of motions, nor do the rules  
9 expressly prohibit this practice.   This Board may exercise  
10 its discretion to allow the filing of reply memoranda that  
11 address new issues raised in response memoranda.  
12 Intervenor's reply memorandum is accepted, and petitioner's  
13 motion to strike is denied.

14   **MOTION TO DISMISS**

15           The record indicates that the city's approval of the  
16 grade and fill aspects of intervenor's proposed subdivision  
17 involved two separate steps.   The city has adopted the  
18 regulations and procedures set forth in Appendix Chapter 70  
19 of the Uniform Building Code (UBC) as the applicable  
20 standards for excavation and grading projects within the  
21 city.   Accordingly, applications for grading permits are  
22 generally reviewed by the city building division for  
23 compliance with those standards, and fill permits are issued  
24 to applicants who demonstrate compliance with the UBC  
25 standards.   However, the city has adopted additional  
26 criteria which apply to grading operations in

1 "drainageways." Those criteria are set forth at Albany  
2 Municipal Code (AMC) 18.04.040:

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

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

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

20 Because intervenor's proposed development calls for  
21 grade and fill operations in a drainageway and on land  
22 adjacent to a drainageway, the provisions of AMC 18.04.040  
23 apply to intervenor's application. The record indicates  
24 that the planning commission applied the AMC 18.04.040  
25 criteria to the application submitted by intervenor, and  
26 determined that those criteria were met. That determination  
27 was affirmed by the city council in its decision of November  
28 29, 1995, and by this Board on August 1, 1996. The city  
29 council's December 4, 1995 notice of decision states, in  
30 relevant part:

31 "On November 29, 1995, the Albany City Council  
32 affirmed the decision of the planning commission  
33 to approve with conditions:

1           "\* \* \* \* \*

2           "Grading Permit F-0006-95:       Grading Permit  
3           application to cut and fill for construction of  
4           Cascade Heights Subdivision and Planned  
5           Development.   (Only that part of the grading  
6           permit application pertaining to drainageways  
7           (Albany Municipal Code 18.040) was approved. The  
8           remainder of the application is processed by the  
9           Building Division.)"

10          Thus, the building division was only responsible for  
11          ensuring that the intervenor's application was in compliance  
12          with the generally applicable UBC standards for excavation  
13          and grading.

14          The city argues that this appeal should be dismissed  
15          because the building division's issuance of the fill permit  
16          is specifically excluded from LUBA jurisdiction under ORS  
17          197.015(10)(b)(A).       That statute provides that the  
18          definition of "land use decision" does not include a  
19          decision of a local government "[w]hich is made under land  
20          use standards which do not require interpretation or the  
21          exercise of policy or legal judgment."       ORS  
22          197.015(10)(b)(A).   The city argues that the fill permit at  
23          issue in this appeal was issued by the building division  
24          under a procedure involving the application of the UBC  
25          criteria, which are "clear and objective" standards that do  
26          not require interpretation or the exercise of policy or  
27          legal judgment.   We agree.

28          The provisions of UBC Appendix Chapter 70 establish  
29          objective standards regulating the physical mechanics of

1 grading and excavation, such as the permissible steepness of  
2 fill slopes, minimum compaction requirements and necessary  
3 setback dimensions. Reply to Petitioner's Response to  
4 Motion to Dismiss, Exhibit 1, pp 999-1003. The only aspect  
5 of the grading permit authorization which required  
6 interpretation or the exercise of policy or legal judgment  
7 was the application of the AMC 18.040.04 criteria applicable  
8 to grading operations in drainageways. That analysis was  
9 undertaken by the city planning commission as part of a  
10 quasi-judicial process ultimately resulting in the December  
11 4, 1995 decision by the city council. Petitioner correctly  
12 appealed that decision to this Board in LUBA No. 95-256, and  
13 may not challenge the same decision in this appeal.

14 Petitioner has submitted a six-page response memorandum  
15 to the city's motion to dismiss alleging multiple instances  
16 of procedural error and general malfeasance by the city.  
17 However, only one paragraph of petitioner's response  
18 directly responds to the critical jurisdictional issue  
19 raised by the city's motion. Petitioner agrees that the  
20 permit at issue does not fit within the statutory definition  
21 of a land use decision, but apparently asserts that  
22 jurisdiction is proper because the decision is a "permit" as  
23 defined by ORS 227.160(2). However, the definition of  
24 "permit" refers only to "discretionary approval of a  
25 proposed development of land \* \* \*." As explained above,  
26 the approval at issue in this appeal was the result of a

1 non-discretionary determination by the building division  
2 that intervenor's application met certain objective  
3 standards.

4 Because we agree that there is no basis for LUBA  
5 jurisdiction over this appeal, we do not rule on  
6 petitioner's objections to the record and alternative  
7 motions.

8 The city's motion to dismiss is granted.