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

CHARLES A. GUNZEL III, ROBERT SANDSTRUM  
and CG & RS, LLC,  
*Petitioners,*

vs.

CITY OF SILVERTON,  
*Respondent.*

LUBA No. 2006-086

FINAL OPINION  
AND ORDER

Appeal from City of Silverton.

Michael J. Martinis, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief were Wesley A. Hill and Martinis & Hill.

Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of respondent.

RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

12/28/2006

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

**NATURE OF THE DECISION**

Petitioners appeal a decision by the City of Silverton approving their application for a subdivision, subject to multiple conditions, including (1) a condition limiting the maximum number of lots in the proposed subdivision to 10, and (2) a condition requiring petitioners to submit a new geologic survey of the subdivided property using laser imaging detection and ranging (LIDAR) technology.

**MOTION TO FILE A REPLY BRIEF**

Petitioners move to file a reply brief to address alleged new matters raised in respondent's brief, specifically to respond to arguments raised by respondent related to evidence heard after the record was closed and arguments raised by respondent regarding misconstruction of law. We agree with petitioners that a reply brief is warranted, and we grant the motion.

**MOTION TO SUPPLEMENT THE RECORD**

On August 25, 2006, the Board received the record in this appeal. No objections to the record were filed by petitioners. On October 25, 2006, one day prior to submitting its response brief, respondent transmitted a supplemental record to LUBA. The supplemental record consists of a signed copy of Resolution 06-07, which approved the subdivision application at issue in this appeal, and a copy of the meeting minutes from the May 8, 2006 city council meeting when the city council adopted Resolution 06-07.<sup>1</sup>

Petitioners object to the Supplemental Record for three reasons. First, petitioners argue that respondent has not adequately explained why the Supplemental Record should be accepted by LUBA when it was transmitted to LUBA after petitioners submitted their

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<sup>1</sup> The copy of Resolution 06-07 at Record 746 to 782 is stamped "COPY" and is not signed. The original record that LUBA received on August 25, 2006 also does not include the meeting minutes from the May 8, 2006 council meeting.

1 petition for review.<sup>2</sup> Second, petitioners claim that the information contained in the  
2 supplemental record is inaccurate. Third, petitioners point out, correctly, that the  
3 supplemental record is not in the format required by OAR 661-010-0025(4).

4 Petitioners included the same adopted version of Resolution 06-07 that respondent  
5 submitted as a Supplemental Record as an appendix to their petition for review. We will  
6 consider the version of Resolution 06-07 attached to the petition for review at Appendix 1  
7 through 38 as the final decision for purposes of this appeal. Respondent's late filed  
8 Supplemental Record is rejected.

9 **FACTS**

10 The subject property is a 6.72-acre parcel located west of Silver Creek and west of  
11 Anderson Drive and Edgewood Drive in the City of Silverton. The property is zoned single  
12 family residential (R-1). The entire property has slopes greater than 15%. Petitioners  
13 initially sought preliminary approval for a 20-lot subdivision. During the course of the  
14 proceedings on their application, petitioners amended their application to seek approval of 18  
15 lots, ranging in size from 10,620 square feet to 15,867 square feet, with average lot sizes of  
16 12,583 square feet.

17 The planning commission heard testimony on the application and ultimately voted to  
18 approve the subdivision, but included a condition of approval limiting the subdivision to a  
19 maximum of 10 lots. Petitioners appealed the approval to the city council, and at a hearing  
20 on May 1, 2006, the city council voted to deny the appeal and uphold the planning  
21 commission's decision denying the subdivision.<sup>3</sup> At a hearing on May 8, 2006, the city

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<sup>2</sup> Respondent's explanation for submitting the Supplemental Record is that it contains the resolution that was actually adopted and signed by the city at its May 8, 2006 meeting. Respondent offers no explanation for why the adopted version of Resolution 06-07 was not included in the record that was received by LUBA on August 25, 2006.

<sup>3</sup> The minutes of the planning commission hearing on the application make clear that the planning commission actually voted to approve the application with conditions. Record 690-694.

1 council reconsidered its decision and voted to approve the subdivision application, subject to  
2 certain conditions including conditions that limit the subdivision to a maximum of 10 lots,  
3 and require that the applicant submit a new geologic survey using LIDAR technology. This  
4 appeal followed.

5 **TENTH ASSIGNMENT OF ERROR**

6 We begin by addressing petitioners' tenth assignment of error. At the May 1, 2006  
7 city council meeting, the chief scientist with the Oregon Department of Geology and Mineral  
8 Industries (DOGAMI) made a presentation to the city council during its regularly scheduled  
9 meeting regarding steep slopes and landslides, that presentation included general geologic  
10 information on possible approaches for mapping landslide hazard areas, and possible  
11 ordinances addressing landslide hazards that a local government might want to consider  
12 adopting.<sup>4</sup> The DOGAMI presentation also contained information regarding LIDAR  
13 technology and its use in mapping landslide hazard areas in other jurisdictions. Petition for  
14 Review App. 41-49. The presentation occurred prior to the commencement of the public  
15 hearing on petitioners' subdivision application.

16 Later during the same meeting, the council held a public hearing on petitioners'  
17 appeal of the planning commission's conditional approval of their subdivision application.  
18 After the public hearing on petitioners' application was closed and during the council's  
19 deliberations, the council moved to include the information provided in the DOGAMI  
20 scientist's presentation in the record of petitioners' subdivision application.

21 Under ORS 197.835(9)(a)(B), LUBA may reverse or remand a local government's  
22 decision based on a claim of procedural error, if such error prejudiced the substantial rights  
23 of petitioners. Petitioners argue that it was error for respondent to allow such evidence into  
24 the record after the public hearing on their application had closed, without giving petitioners

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<sup>4</sup> The presenter noted that DOGAMI has not performed a detailed study of slope stability in the Silverton area. Petition for Review App. 41.

1 the opportunity to respond to such evidence, and that allowing such evidence into the record  
2 prejudiced petitioners' substantial rights because the council relied on the evidence to limit  
3 the subdivision to a maximum of 10 lots. Petition for Review 25-26. Respondent answers  
4 that petitioners were present during the deliberations, but did not object when the DOGAMI  
5 presentation was added to the record or ask for the council to extend the hearing or leave the  
6 record open in order to be able to respond to the DOGAMI presentation.

7         Following the Oregon Supreme Court's decision in *Fasano v. Washington Co.*  
8 *Comm.*, 264 Or 574, 507 P2d 23 (1973), participants in quasi-judicial land use proceedings  
9 generally have a right to rebut evidence that is placed before a decision maker. But we have  
10 held that in order assign error to a local government's procedural error, a party must have  
11 objected if there was an opportunity to make the objection. *Woodstock Neigh. Assoc. v. City*  
12 *of Portland*, 28 Or LUBA 146, 150-51 (1994). However, under the circumstances presented  
13 in this case, we do not think there was an opportunity for petitioners to object to the inclusion  
14 of the DOGAMI presentation in the record. It was reasonable for petitioners to think that  
15 because the public hearing on their subdivision application had closed, there was no more  
16 opportunity for them to rebut the DOGAMI presentation or to object to the city's decision to  
17 accept and consider it in resolving their appeal. *See Horizon Construction, Inc. v. City of*  
18 *Newberg*, 114 Or App 249, 254, 834 P2d 523 (1992) (petitioners are not required to object to  
19 procedural errors that occur at a stage in the proceedings where it is unlikely that the decision  
20 maker would entertain objections). We reject respondent's contention that in order to  
21 preserve its opportunity to respond to the new evidence, petitioners should have interrupted  
22 or disrupted the council's deliberations after the evidentiary record had nominally closed.

23         The city erred in accepting new information after the public evidentiary hearing had  
24 closed, without allowing petitioners an adequate opportunity to respond to the new evidence.  
25 *See Brome v. Corvallis*, 36 Or LUBA 225, 234-35 (1999) (city erred in accepting new  
26 evidence as part of the applicant's final written argument without offering other parties an

1 opportunity to respond to that new evidence). On remand, respondent must allow petitioners  
2 to respond to the DOGAMI presentation.

3 The tenth assignment of error is sustained.

4 **EIGHT AND NINTH ASSIGNMENTS OF ERROR**

5 In their eight and ninth assignments of error, petitioners object to respondent  
6 including a condition of approval requiring petitioners to provide respondent with a new  
7 geologic survey of the subject property using LIDAR technology. Petitioners contend that  
8 the LIDAR technology issue is an “infrared herring” being used by respondent as a way to  
9 make it more difficult to develop their property. On remand, petitioners will have the  
10 opportunity to respond to the DOGAMI presentation and information and, if they choose,  
11 present evidence to the city council about the appropriateness of applying LIDAR technology  
12 in this case and whether the city has authority to require that the applicant employ that  
13 technology to prepare a geologic survey of the property. The city will then have an  
14 opportunity to remove that condition or provide a reviewable explanation for why the  
15 condition was imposed. Therefore, we do not attempt to resolve these assignments of error  
16 here.

17 **SEVENTH ASSIGNMENT OF ERROR**

18 Petitioners contend that the city implicitly applied a “Hillside Development Overlay”  
19 standard to the subject property that had not been adopted at the time petitioners submitted  
20 their application. Petitioners’ argument is not sufficiently developed to allow us to decide  
21 the issue.

22 The seventh assignment of error is denied.

23 **FIRST THROUGH SIXTH ASSIGNMENTS OF ERROR**

24 **A. Introduction**

25 Petitioners discuss their first five assignments of error jointly in their brief. Because  
26 the sixth assignment of error is closely related to the first five, we discuss assignments of

1 error one through six together. The essence of petitioners' complaint in the first six  
2 assignments of error is that respondent failed to make adequate findings when it approved  
3 petitioners' application with a maximum of 10 lots, and that its decision to limit the number  
4 of lots to 10 is not supported by substantial evidence in the record.

5 Resolution 06-07 approved the subdivision application, subject to the following  
6 condition regarding final plat approval:

7 "1. The number of lots shall be determined by the detailed Geotechnical  
8 Report as described in Condition No. 33 and in no case shall exceed a  
9 maximum number of 10 lots." Petition for Review App. 22.

10 Silverton Municipal Code Section (SMC) 17.01.190 governs minimum lot sizes and number  
11 of lots.<sup>5</sup>

12 **B. Number of Lots**

13 SMC 17.01.190(C) allows the planning commission to reduce the allowed number of  
14 lots within a proposed subdivision under certain circumstances:

15 "The planning commission may require that the number of lots within a  
16 proposed subdivision be reduced *if the number of lots as is proposed is*  
17 *inconsistent with the density allowed in the zone.*" (Emphasis added).

18 The subject property is zoned R-1, which requires a minimum lot size of 7,000 square feet  
19 for interior lots and 8,000 square feet for corner lots. SMC 51.03(A) and (C).<sup>6</sup> The R-1 zone

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<sup>5</sup>As relevant, SMC 17.01.190 provides:

"(A) All proposed lots shall maintain minimum lot area and frontage requirements, as specified in the appropriate zone district.

"(B) If topography, drainage, or other conditions justify, the commission may require a greater area on any, or all, lots within the subdivision unless the developer provides adequate documentation from a registered engineer which supports the proposed lot size.

"(C) The planning commission may require that the number of lots within a proposed subdivision be reduced if the number of lots as is proposed is inconsistent with the density allowed in the zone."

<sup>6</sup> Neither party has identified any provision in the SMC that imposes a density limit that operates separately from the minimum lot size requirements set forth in SMC 51.03(A) and (C), and the density provisions of SMC

1 allows placement of one dwelling on an individual lot consistent with all applicable setbacks.  
2 SMC 51.02(A). Petitioners proposed 18 lots. In its findings, the city found that petitioners  
3 propose an overall density of 2.659 dwelling units per acre.<sup>7</sup>

4 The city erred in relying on SMC 17.01.190(C) to impose a 10-lot maximum. Under  
5 that section, quoted above, the city may reduce the allowed number of lots only if “the  
6 number of lots as proposed *is inconsistent with the density allowed in the zone.*” (Emphasis  
7 added). Since the number of proposed lots, 18, is consistent with the density allowed in the  
8 zone, it was error for the city to reduce the number of lots under SMC 17.01.190(C).<sup>8</sup>

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51.02(A). We note, however, that the city’s multi-family zones do impose density limits that operate separately from minimum lot sizes to limit the number of lots possible in those zones. We interpret SMC 51.03(A) and (C) and SMC 51.02(A) to mean that the density limit in the R-1 zone is the number of minimum lot sized lots allowed per acre of land. Thus, the density allowed in the R-1 zone appears to be 6.2 dwelling units per acre, or 41 dwelling units on petitioner’s 6.72-acre parcel. Since SMC 51.02(A) allows one dwelling unit per lot, it appears that the maximum number of lots allowed is 41.

<sup>7</sup> The city’s findings include the following:

“The single family residential (R-1) zoning district permits the division of property with a minimum lot size of 7,000 square feet for interior lots, and 8,000 square feet for corner lots. *There are 18 proposed single family lots within the proposed revised subdivision layout. The lots range in size from 10,620 square feet to 15,867 square feet, with an average lot size of 12,583 square feet, and with an overall density of 2.659 dwelling units per acre. \* \* \* The proposed lot sizes \* \* \* comply with the minimum lot size requirement of 8,000 square feet for a corner lot as specified in [the SMC]. The remaining interior lots comply with the minimum lot size requirement of 7,000 square feet for interior lots as noted in [SMC] \* \* \** The proposed lots comply with the provisions within [SMC] 17.01.190 \* \* \*.” Petition for Review App. 13 (Emphases added).

<sup>8</sup> We note that the 10-lot limit appears to have been an arbitrary limit chosen during the planning commission’s deliberations, rather than a limit the city is authorized to impose under SMC 17.01.190(C). The minutes from the April 25, 2006 planning commission meeting at which the 10-lot limit condition was first introduced contain the following summary:

“Conditions

“The Planning Commission reviewed the proposed conditions and requested the following revisions:

“#4, add ‘As determined by the City Engineer’

“Add, as Condition #1, that the maximum number of lots will be subject to a geotechnical report, but in no case will exceed a given number. *Commissioner Jenkins moved that the maximum number of lots shall be 15. The motion was seconded by Commissioner Matsler. The motion failed 4-2.\* \* \* Commissioner Madge motioned to limit the number of lots to 10.*

1           **C.     Size of Lots**

2           SMC 17.01.190(A) requires all proposed lots in a subdivision to maintain a minimum  
3 lot area and the frontage requirements specified in the appropriate zone district. *See* n. 5.  
4 SMC 17.01.190(B) allows the planning commission to require a greater lot size (or area)  
5 under certain circumstances. SMC 17.01.190(B) provides:

6           “[I]f topography, drainage, or other conditions justify, the [planning]  
7 commission may require a greater area on any, or all, lots within the  
8 subdivision, unless the developer provides adequate documentation from a  
9 registered engineer which supports the proposed lot size.”

10 Thus, the city may require that one or more lots be increased in size if certain conditions on  
11 the property justify requiring greater lot sizes. It appears that the city was concerned with the  
12 topography of the subject property, which is one of the bases upon which the city may  
13 require a *greater area* on any or all the lots within the subdivision under SMC 17.01.190(B)  
14 (Emphasis added). However, the city found that “a decrease in the *number of proposed lots*  
15 will afford the maximum opportunities to construct on the lots considering the constraints  
16 due to the severe topography.” Petition for Review App. 21. While relying on SMC  
17 17.01.190(B) to require that the number of lots be reduced will certainly have the ultimate  
18 effect of causing one or more lots to increase in size, imposing a 10-lot maximum does  
19 nothing to tell petitioners which lots the city believes must be increased in size under SMC  
20 17.01.190(B). The concern under SMC 17.01.190(B) is with the size of lots, not the number  
21 of lots. We agree with petitioners that the city erroneously relied on SMC 17.01.190(B) to  
22 limit the number of lots rather than requiring that particular lots be increased in size where  
23 the city believes increased sizes are warranted under SMC 17.01.190(B).

24           Beyond the city’s erroneous reading of SMC 17.01.190(B) to allow it to limit the  
25 number of lots, the city’s authority to require larger lots under SMC 17.01.190(B) is not

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Commissioner Rauch seconded and the motion passed 4-2.” Record 693-94 (Emphases added).

1 unlimited. If a developer provides adequate documentation from a registered engineer which  
2 supports the proposed lot sizes, then the city may not require greater lot sizes. In connection  
3 with their initial subdivision application, petitioners submitted a letter from a registered  
4 engineer whom petitioners had retained for the project, and a geotechnical survey of the  
5 property prepared in 1997 by that engineer (the 1997 report).<sup>9</sup> Record 24-41. After  
6 petitioners submitted their initial application, that engineer retired, and petitioners retained a  
7 new engineer as the geotechnical engineer on the project. The new engineer reviewed the  
8 1997 report and the 2005 update, made a site visit to the property, and reviewed petitioners'  
9 site plans, including the amended site plan. During the course of the proceedings, petitioners  
10 provided three letters from the registered engineer for the project. Record 158, 535-36, 567-  
11 68. The letters outlined the engineer's site visit to the subject property and his review of the  
12 1997 report and the underlying data collected in preparation of the 1997 report. In each  
13 letter, petitioners' engineer stated his opinion that the lots are sufficient in size and that the  
14 proposed lots are not so steep that houses could not be built on each lot. The engineer also  
15 opined that the proposed development would actually increase the stability of the slopes on  
16 the subject property. Record 158, 535, 567.

17 The city found that the documentation described above was not "adequate" as  
18 required by SMC 17.01.190(B), and adopted the following findings:

19 "It is the Planning Commission's finding and the City Council concurs that  
20 [the 1997 report] was for a substantially different development proposal that  
21 included a substantial amount of open space dedication and a street plan that  
22 did not include a switchback which requires a retaining wall of 20 to 22 feet.  
23 For this reason, the Planning Commission finds and the City Council concurs  
24 that the applicants have not provided adequate documentation from a

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<sup>9</sup> The 1997 report states that the engineer performed test hole excavations and collected, examined and tested soil samples. Record 26-41.

1 registered engineer which supports the proposed lot sizes.” Petition for  
2 Review App. 13-14.<sup>10</sup>

3 The above quoted findings do not explain why the documentation is inadequate to support  
4 the proposed lot sizes. Specifically, the above quoted findings do not explain why, even if  
5 the 1997 report was for a different proposal, the data collected through soil borings and site  
6 investigations in preparation of that report is unreliable when conditions on the subject  
7 property are the same today as they were in 1997.<sup>11</sup> The findings also do not explain (1) the  
8 relationship between open space dedication and the “topography, drainage, or other  
9 conditions on the property” that justify a requirement of greater lot sizes, or (2) the  
10 relationship between a site plan which requires a retaining wall with a switchback and the  
11 “topography, drainage, or other conditions on the property” that justify a requirement of  
12 greater lot sizes. *See* n. 10. While we agree with respondent that the city is entitled to  
13 exercise some discretion in determining what level of documentation is “adequate,” at a  
14 minimum, the city must explain why the documentation submitted by the applicant thus far is  
15 not adequate, so that the applicant can attempt to meet the requirements of SMC  
16 17.01.190(B).

17 The first through sixth assignments of error are sustained.

18 The city’s decision is remanded.

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<sup>10</sup> In their petition for review and at oral argument, petitioners disputed the accuracy of that finding, noting that the 1997 report did analyze a site plan that contemplated retaining walls and switchbacks. Petition for Review 15-16. We agree with petitioners that the city’s finding is inaccurate as to retaining walls. Record 26.

<sup>11</sup> In fact, the city found in a separate finding that “[the 1997 report] submitted as part of the record was performed with the appropriate methodology at the time.” Petition for Review App. 22.