BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEBRA DORGAN, DON DORGAN, MARY SHELTON, GARY SHELTON, LAVERN MIEBACH, JUDY MIEBACH, TOM HAWKINS, CANDY HAWKINS, GORDON EVENSON, TIMOTHY MITCHELL, SHERI MITCHELL, ROBERT MOORE, HELEN MOORE, DARYL BAKER, VERNA BAKER, RUBY NIELSEN, TOM NIELSON, ROSIE NIELSON, R.W. McDANIEL, SANDY McDANIEL, LONNIE WELLS, RUTH WELLS, NEAL MADDY, ROSE ANNA MADDY, RAY MADDY, VELMA MADDY, ROBERT SKILES, LOIS SKILES, DONALD STACEY, BETTIE WILLIAMS, and ROBERT WILLIAMS,	LUBA No. 93-183
Petitioners,	FINAL OPINION AND ORDER
vs.	
CITY OF ALBANY,	
Respondent,	
and	
MAYFIELD DEVELOPMENT CORPORATION OF OREGON,	
Intervenor-Respondent.	

Appeal from City of Albany.

Debra L. Dorgan, Albany, filed the petition for review and argued on her own behalf.

No appearance by respondent.

Kris Jon Gorsuch, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld, Griggs, Gorsuch, Alexander & Emerick, P.C.

SHERTON, Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 03/24/94

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a city council resolution granting tentative plat approval for phase I, and "conceptual approval" for phases II through IV, of the Meadows at Oak Creek subdivision.[1]

MOTION TO INTERVENE

Mayfield Development Corporation of Oregon, 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

The subject 45 acre parcel is designated Urban Residential Reserve by the City of Albany Comprehensive Plan (plan) and is zoned Residential Single Family (RS-6.5).[2] The proposed subdivision would create 205 lots in four phases (phase I - 92 lots, phase II - 32 lots, phase III - 48 lots, phase IV - 33 lots).

The subject property is located between Highway 99E and the Calapooia River. Access to the subdivision is proposed to be from 53rd Avenue, a street that extends west from

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[1]The meaning and significance of "conceptual approval" are unclear. We are unable to find any reference to this term in the Albany Development Code (ADC), Article 11 (Land Divisions and Planned Developments).

[2]The RS-6.5 zone is "intended primarily for low density urban single family residential development * * * at 6-8 units per acre." ADC 3.020(3).

Highway 99E and adjoins the subject property to the south. A portion of the subject property is within the 100-year flood plain of the South Fork of Oak Creek, which runs through the eastern portion of the property. Between the proposed subdivision access and Highway 99E, 53rd Avenue crosses two bridges over forks of Oak Creek. The elevations of the bridges are approximately 2.1 to 2.5 ft. below the 100-year flood elevation. The approximately 1,000 ft. long section of 53rd Avenue between the two bridges ranges from 2.5 to 4.3 ft. below the 100-year flood elevation.

The surrounding properties are also zoned RS-6.5. Properties to the north and west are in farm use. The property to the east is vacant land within the floodplain and floodway of the South Fork of Oak Creek. Properties to the south, on the other side of 53rd Avenue, include single family dwellings on acreage tracts and vacant parcels. Most or all of the petitioners reside in the approximately 20 dwellings that currently obtain access from 53rd Avenue.

Intervenor filed a subdivision application on or about June 10, 1993. On July 13, 1993, intervenor filed a revised tentative plat for phase I of the proposed subdivision. On August 16, 1993, after holding a public hearing, the planning commission approved the subject application. Petitioners appealed the planning commission's decision to the city council. On October 13, 1993, after an additional public hearing and a de novo review, the city council

adopted the challenged decision.

FIRST ASSIGNMENT OF ERROR

Applications to divide land within the city's Floodplain District are subject to the standards of ADC 6.130, as well as those of ADC Article 11 (Land Divisions and Planned Developments). One of the floodplain standards provides:

> "Any new public or private street providing access to a residential development shall have a roadway crown elevation not lower than one foot below the 100-year flood elevation." (Emphasis added.) ADC 6.130(5).

There is no dispute the above quoted version of ADC 6.130(5) was adopted by the city on April 14, 1993.

Petitioners argue the above version of ADC 6.130(5), by virtue of applying only to "new" streets providing access to residential developments, reversed a long-standing city policy preventing development of property to which the only access is provided by existing roads that are more than one foot below the 100-year flood elevation. According to petitioners, that prior long-standing policy blocked subdivision or other development of the subject property, because the property's only access is from 53rd Avenue, portions of which are more than one foot below the 100-year flood elevation.

Petitioners further argue that the version of ADC 6.130(5) adopted on April 14, 1993 is not acknowledged

pursuant to ORS 197.625(1),[3] because the notice of proposed amendments to the acknowledged ADC required by ORS 197.610 was submitted to the Department of Land Conservation and Development (DLCD) only 44 days before the final city hearing on the amendments, rather than 45 days before the final hearing, as required by ORS 197.610(1) and OAR 660-18-010(7) and 660-18-020(1).[4] See Oregon City Leasing, Inc. v. Columbia County, 121 Or App 173, 177, 854 P2d 495 (1993) (failure to comply with procedures required by ORS 197.610 is a substantive error). Therefore, petitioners argue, because the above version of ADC 6.130(5) was not acknowledged when the subject subdivision application was filed, the acknowledged city regulations in effect prior to April 14, 1993 govern the application. ORS 227.178(3); Davenport v. City of Tigard, 121 Or App 135, 141, 854 P2d 483 (1993); Von Lubken v. Hood River County, 118 Or App 246, 249, 846 P2d 1178, rev den 316 Or 529

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[3]ORS 197.625(1) provides, in relevant part:

> "* * * An amendment to an acknowledged comprehensive plan or land use regulation is not acknowledged unless the adopted amendment has been submitted to [DLCD] as required by ORS 197.610 to 197.625 * * *."

[4]Petitioners support their contention with a copy of the notice of proposed postacknowledgment amendments submitted to DLCD. That notice states the final hearing on adoption of the proposed amendments is set for March 24, 1993, is stamped received by DLCD on February 8, 1993 and is marked by DLCD as "Days Notice -- 44." Petition for Review App. 1, pages 1-2. This document is not part of the local record submitted to the Board in this appeal.

(1993).

Intervenor argues that the final hearing on the disputed amendments to the acknowledged ADC was postponed in order to comply with the 45 day notice requirement, and actually took place on April 14, 1993, more than 45 days after DLCD received the notice in question.[5] Thus, according to intervenor, the city complied with ORS 197.610(1) and OAR 660-18-010(7) and 660-18-020(1) in adopting the current version of ADC 6.130(5), and the current version of ADC 6.130(5) was acknowledged under ORS 197.625(1) when the subject subdivision application was submitted.[6]

Our review is confined to the local record. ORS 197.830(13)(a). Petitioners' assertion that the city failed to comply with the postacknowledgment amendment notice requirements of ORS 197.610(1) and OAR 660-18-010(7) and 660-18-020(1), in adopting ADC 6.130(5) on April 14, 1993, is based solely on a document not in the record. Intervenor objects to our consideration of that document.

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[5]Intervenor supports its contention regarding when the final city hearing on the disputed amendments was held with the minutes of the city council's April 14, 1993 meeting. Intervenor's Brief App-2. These minutes are not part of the local record in this appeal.

[6]Intervenor also argues that 1993 amendments to ORS 197.625 make the version of ADC 6.130(5) adopted on April 14, 1993 applicable to the subject subdivision application even if the April 14, 1993 amendments were not acknowledged when the subdivision application was filed. Because we reject petitioners' assignment of error on other grounds, we do not address this argument.

Petitioners do not move for an evidentiary hearing pursuant to ORS 197.830(13)(b) or offer any other basis on which we might consider the document in question and, therefore, we do not consider it.[7] Horizon Construction, Inc. v. City of Newberg, 25 Or LUBA 656, 661-62 (1993).

The first assignment of error is denied.

SECOND, THIRD, FOURTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioners contend the city's findings are inadequate to demonstrate compliance with several applicable plan and ADC provisions, and that certain findings are not supported by substantial evidence in the record or are otherwise improper.

A. Plan Goal 14, Policy 2

Intervenor contends petitioners failed to raise any issue of compliance with this plan policy during the proceedings below. Intervenor argues that under ORS 197.763(1) and 197.835(2), issues that were not raised below may not be raised before LUBA.

The challenged decision is a "limited land use decision," as that term is defined in ORS 197.015(12).[8]

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[7]We will similarly disregard any other documents in the appendices to the petition for review that are not part of the local record and any references to such documents in the text of the petition for review, with the exception of excerpts from the city comprehensive plan and the ADC, of which we take official notice.

[8]ORS 197.015(12) provides in relevant part:

Accordingly, the decision is subject to ORS 197.195, rather than ORS 197.763. ORS 197.195(2). However, we recently explained that under ORS 197.195(3)(c)(B) and ORS 197.835(2),[9] the statutory principle of "raise it or waive it" applies to limited land use decisions in the same way that it applies to land use decisions. Matrix Development v. City of Tigard, ___ Or LUBA ___ (LUBA No. 93-147, February 28, 1994), slip op 18-19.

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
>
> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "* * * * *"

[9]ORS 197.195(3)(c)(B) provides that a local government's notice of a proposed limited land use decision must:

> "State that issues which may provide a basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]"

ORS 197.835(2) provides:

> "Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues [before LUBA] if:
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> "(a) The local government failed to follow the requirements of ORS 197.763; or
>
> "(b) The local government made a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

Petitioners do not respond to intervenor's waiver contention. Where a party contends an issue petitioners seek to raise before LUBA in an appeal challenging a limited land use decision was not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.195, petitioners may not raise the issue for the first time before LUBA. See Pacific Rivers Council v. Lane County, ___ Or LUBA ___ (LUBA No. 93-085, December 30, 1993), slip op 37; Broetje-McLaughlin v. Clackamas County, 22 Or LUBA 198, 206 (1991); Wethers v. City of Portland, 21 Or LUBA 78, 92 (1991). Accordingly, petitioners cannot raise the issue of compliance with plan Goal 14, Policy 2.

B. Plan Goal 12, Policy 3

1. Adequacy of Findings

Plan Goal 12, Policy 3 states:

> "As part of the development review process, evaluate the adequacy of transportation to, from, and within the site."

We understand petitioners to contend the city's findings do not demonstrate that transportation to and from the site via 53rd Avenue is adequate.

The city's decision identifies plan Goal 12, Policy 3 as an applicable standard. Record 22. The decision includes findings on "53rd Avenue." Record 23. It includes findings responding to issues raised below concerning access

from 53rd Avenue and the condition of 53rd Avenue. Record 15-17. The decision also includes additional findings on "53rd Avenue Improvements," and concludes that "the transportation system to, from and within the development is adequate." Record 11-12. Finally, the challenged decision contains conditions requiring certain improvements to 53rd Avenue. Record 28-29. Except possibly as discussed in section D, infra, petitioners do not explain why they believe the city's findings and conditions are inadequate to satisfy plan Goal 12, Policy 3.

This subassignment of error is denied.

2. Challenges to Specific Findings

The city findings addressing access to the proposed subdivision from 53rd Avenue during high water conditions include:

> "1. There is no official city policy requiring that a new [53rd Avenue] bridge span be constructed prior to the development of this subdivision. There is no Comprehensive Plan policy stating that all homes in Albany [must] be accessible, even in times of the 100-year flood. There is a requirement in the [ADC] that no new street have an elevation lower than one foot below the 100-year [flood] elevation. [H]owever, 53rd Avenue is not a new street. The proposed streets in the subdivision are all above the 100-year [flood] elevation.
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> "2. The City has a Comprehensive Plan Policy directing the review body 'to evaluate the adequacy of transportation to, from, and within the site as part of the development review process.'

"* * * * *" Record 15-16.

Petitioners argue the first finding quoted above is incorrect because it refers to the version of ADC 6.130(5) adopted April 14, 1993, discussed under the first assignment of error, which petitioners contend is inapplicable to the subject subdivision application. However, we reject petitioners' first assignment of error, supra. Therefore, petitioners' argument with regard to this finding fails.

Petitioners argue the second finding quoted above is merely a reference to plan Goal 12, Policy 3, rather than a finding of fact. Petitioners may be correct in this regard, but their point provides no basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

C. Other Plan and ADC Provisions

Petitioners argue the challenged decision fails to demonstrate compliance with the following plan and ADC provisions:[10]

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[10]The caption of one of petitioners' assignments of error also alleges a violation of ADC 11.180. However, no argument is provided regarding any violation of ADC 11.180 and, therefore, we do not address this issue. Additionally, the caption of another assignment of error states the city failed to comply with ORS 197.752 because "the proposed development site is not served by sufficient urban facilities and services in accordance with locally adopted development standards." Petition for Review 13. No additional argument regarding ORS 197.752 is provided.

ORS 197.752(1) states:

> "Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban

Goal 2, Policy 3
Goal 7
Goal 7, Policy 9
Goal 10, Policy 11
Goal 10, Implementing Method 7
Goal 11, Police and Fire Protection Services Policy 2(b)
ADC 12.120

Intervenor argues that these plan and ADC provisions either are not approval standards for the challenged decision or are satisfied by the city's findings.

The challenged decision does not address the above listed plan and ADC provisions.[11] This Board is required to defer to a local government's interpretation of its own enactment, unless that interpretation is contrary to the express words, policy or context of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Further, under Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on recon 125 Or App

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facilities and services in accordance with locally adopted development standards." (Emphasis added.)

We understand petitioners to contend ORS 197.752(1) is violated in that the city failed to comply with the plan and ADC provisions regarding provision of urban facilities and services cited in the text. If petitioners intend to assert violation of ORS 197.752(1) as an independent basis for reversal or remand of the challenged decision, their argument is insufficiently developed.

[11]Although some of the findings cited by intervenor appear to be relevant to the subject matter of the plan and ADC provisions listed in the text, supra, there is nothing in the decision indicating they were intended to relate to or demonstrate compliance with those provisions, or that the city concluded those provisions were satisfied.

119 (1993), and Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), this Board may only review a local government's interpretation of its comprehensive plan or code, and may not interpret the local government's plan or code in the first instance. Additionally, to be reviewable by LUBA, a local government's interpretation of its regulations must be provided in the challenged decision or the supporting findings, not in the brief of the local government or another party. Eskandarian v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-012, October 15, 1993), slip op 15; Miller v. Washington County, 25 Or LUBA 169, 179 (1993).

The plan and ADC provisions listed above are capable of more than one interpretation under the permissive scope of review standard of ORS 197.829 and Clark, supra. Thus, while we might be able to accept the interpretation of some or all of those provisions suggested by intervenor in its brief, if those interpretations were adopted by the city in a challenged decision, we must remand the decision to the city to interpret and apply these provisions in the first instance. See O'Mara v. Douglas County, 25 Or LUBA 25, 34, rev'd on other grounds, 121 Or App 113, rev'd 318 Or 72 (1993).

This subassignment of error is sustained.

D. Future Improvement Costs

Petitioners argue that even if the proposed subdivision

may be approved without requiring that all portions of 53rd Avenue be raised to no more than one foot below the 100-year flood elevation, the record shows the city realizes that costly improvements to raise the elevation of 53rd Avenue will likely be needed in the future, due to development in this area.[12] As owners of property along 53rd Avenue, petitioners are concerned about the size of their share of the costs to improve 53rd Avenue, if a local improvement district (LID) is formed in the future. Petitioners' "great fear is that development [of the proposed subdivision] will commence, then halt, with only a token number of [lots] sold and built," making petitioners' shares of future assessments to improve 53rd Avenue extremely large. Petition for Review 20.

Petitioners raised their concern regarding the cost of future improvements to 53rd Avenue below, and also their concern regarding the financial stability of W. Dale Dyer, intervenor's vice-president. Petitioners asked that the city require a $2,000,000 performance bond "to ensure * * * completion of the development to allow enough residences to share in the staggering cost of this future improvement, [when a LID] will surely be formed." Petition for Review 19. Petitioners argue the city has authority to

[12]Petitioners indicate the cost of such improvements was estimated to be $744,000 in 1981, and currently would be in the range of $1,000,000. Record 14, 37, 126.

require such a bond under ADC 12.040. Petitioners further argue the city misunderstood their request and failed to respond to their concern in the challenged decision. Petitioners specifically argue that a finding at Record 10 that Dyer is only a "minority shareholder" in intervenor is not supported by evidence in the record, and that a finding at Record 11 indicates the city mistakenly thought petitioners requested a $2,000,000 bond to guarantee completion of the relatively minor improvements to 53rd Avenue required as a condition of the challenged subdivision approval.

This Board can grant relief only if petitioners demonstrate that an applicable legal standard is violated by the challenged decision. Frankton Neigh. Assoc. v. Hood River County, 25 Or LUBA 386, 389 (1993); Weist v. Jackson County, 18 Or LUBA 627, 641 (1990); Lane School District 71 v. Lane County, 15 Or LUBA 150, 153 (1986). Petitioners' concern about their shares in the costs of future improvements to 53rd Avenue is understandable. However, petitioners have not demonstrated that this concern is relevant to compliance with any legal standard applicable to the challenged subdivision approval decision.

This subassignment of error is denied.

The second, third, fourth and sixth assignments of error are sustained, in part.

FIFTH ASSIGNMENT OF ERROR

With regard to storm drainage, ADC 12.530 provides, as relevant:

> "* * * The review body will approve a development request only where adequate provisions for storm and flood water run-off have been made as determined by the City Engineer. * * *"

Petitioners argue the challenged decision, particularly as indicated in supplemental finding 1 on Record 18, is not supported by substantial evidence demonstrating compliance with ADC 12.530.[13]

Intervenor cites another finding referring to the storm drainage system for the proposed subdivision. Record 21. Intervenor also cites a statement in the decision that "[f]inal plat approval will not be granted until Plans and Specifications have been submitted to the Public Works Engineering Division for the construction of all required

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[13]The finding referred to states:

> "Based on their analysis of the storm water runoff differential between existing and proposed uses, the project engineers have told planning staff that the Oak Creek Basin has the capacity to accommodate runoff from the proposed project.
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> "The City's Drainage Master Plan shows this property in the south fork of the Oak Creek Basin. According to Section 5.2.2 of the Plan, 'the major area of drainage complaints is located at the confluence of the west fork and middle fork of Oak Creek, just south of 53rd Avenue.' The proposed subdivision is located downstream on the north side of 53rd Avenue.
>
> "The City is proposing a revision to Condition[s] of Approval [21 through 25] to clarify what is required of the storm drainage plan." Record 18.

street, sanitary sewer, storm drainage, [and] waterline improvements * * *, and said plans and specifications are approved."[14] Record 161. However, intervenor cites no evidence in the record.

Although the decision includes findings regarding storm drainage, it does not specifically cite or address ADC 12.530. Intervenor does not contend ADC 12.530 is not an approval standard for the challenged decision.[15] Neither party cites any evidence in the record regarding compliance with ADC 12.530.

The fifth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Plan Goal 5, Historic & Archaeological Resources Policy 5 provides:

> "In cooperation with state agencies, determine the location of any known archaeological sites as information becomes available and protect available information to minimize vandalism of the site."

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[14]This statement is in a two-page document entitled "Permits Required for this Project and Other Information for the Applicant." Record 161-62. As best we can determine, the challenged decision adopts this document by reference. Record 10, finding 5.

[15]Even if intervenor did make such a contention, as explained in the text supra, the challenged decision would have to be remanded to the city to interpret ADC 12.530 in the first instance. In this regard, we note ADC Article 12 is entitled "Public Improvements," and ADC 12.045 (Relationship to Other [ADC] Articles) provides:

> "This article provides the public improvements standards to be used in conjunction with the procedural and design requirements contained in the articles on Land Divisions, Site Plan Review, and Manufactured Homes." (Emphasis added.)

Petitioners argue the challenged decision violates the above quoted plan policy because the city failed "to perform or require a study to be performed relating to possible archaeological sites within the proposed development area." Petition for Review 27. Petitioners contend there is evidence in the record that there might be Calapooia Indian sites on the subject property.

Intervenor argues the above policy is not applicable here because it refers only to "known" archaeological sites. Intervenor cites two findings that there are no identified historic or archaeological sites on the subject property. Record 13, 27. Intervenor also argues there is no evidence in the record that there are any historic or archaeological sites on the property.

We do not understand petitioners to argue there is proof in the record that there are archaeological sites on the subject property. Rather, petitioners argue the record indicates there is reason to think there might be such sites on the subject property. In these circumstances, according to petitioners, plan Goal 5, Historic & Archaeological Resources Policy 5 requires the city to require a study to determine whether there are any archaeological sites on the subject property, before approving development of the property.

The challenged decision does not specifically address plan Goal 5, Historic & Archaeological Resources Policy 5.

Thus, while we might be able to accept intervenor's interpretation of this policy as not applying in these circumstances, if that interpretation were adopted by the city as part of its decision, we must remand the decision to the city to interpret and apply this plan policy in the first instance. Gage v. City of Portland, supra; see O'Mara v. Douglas County, supra.

The seventh assignment of error is sustained.

The city's decision is remanded.