BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| ALLEN D. FECHTIG, | ) | |
| | ) | |
| Petitioner, | ) | LUBA Nos. 94-019 and 94-020 |
| | ) | |
| vs. | ) | FINAL OPINION |
| | ) | AND ORDER |
| CITY OF ALBANY, | ) | |
| | ) | |
| Respondent. | ) | |

Appeal from City of Albany.

Allen D. Fechtig, Albany, filed the petition for review and argued on his own behalf.

James V. B. Delapoer, Albany, filed the response brief and argued on behalf of respondent. With him on the brief was Long, Delapoer, Healy & McCann.

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

AFFIRMED (LUBA No. 94-019) 07/08/94
DISMISSED (LUBA NO. 94-020)

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a city decision granting a fill
4 permit.

5 **FACTS**

6 This is the second time approval of a fill permit for
7 the subject property has been appealed to this Board. The
8 subject property is vacant, zoned Residential Reserve (RR)
9 and is adjacent to petitioner's property. Fill was placed
10 on the subject property without first obtaining required
11 city approval. After the city issued a notice of violation,
12 a fill permit application for the subject property was
13 submitted to and approved by the city. In Fechtig v. City
14 of Albany, 24 Or LUBA 577 (1993), we granted the city's
15 motion for voluntary remand of the city's first decision
16 granting a permit for the disputed fill.

17 Following our remand, a new application for a fill
18 permit was submitted. The second fill permit application
19 was treated by the city as an application for a limited land
20 use decision.[1] ORS 197.015(12). The city gave notice of

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[1]ORS 197.015(12) defines "limited land use decision" as follows:

> "'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:
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> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.

1 the second fill permit application and invited written
2 comments.[2] Petitioner and others submitted written comments
3 on the application. Because the city processed the
4 application as a limited land use decision, it did not
5 provide a public hearing before making its decision on the
6 disputed fill permit application.[3] The city granted the
7 fill permit on January 18, 1994, and this appeal followed.

8 **PRELIMINARY MATTERS**

9 **A. Motion for Reversal**

10 The petition for review in this appeal was due May 6,
11 1994, and was filed on that date. The respondent's brief
12 was due May 27, 1994, and was filed on that date. Also, on
13 May 27, 1994, petitioner filed a motion for reversal in
14 which he raises arguments that are not included in the
15 petition for review.

16 Respondent objects that the motion for reversal is
17 essentially an attempt to supplement the petition for review
18 filed three weeks earlier. Respondent argues petitioner

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"(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[2]Petitioner was provided a copy of this notice. Record 26-29.

[3]The statutory procedures for adopting limited land use decisions are set out at ORS 197.195. Those procedures do not require that a local government provide a public hearing or an opportunity for a local appeal.

makes no attempt to explain why he could not have included these arguments in his petition for review.

We agree with respondent. Petitioner may not, by way of a motion for reversal, supplement the arguments made in the petition for review. The motion was filed three weeks after the petition for review was due, and on the same day the respondent's brief was due. Our rules do not permit the arguments contained in the petition for review to be supplemented in this manner. OAR 661-10-030(4) allows a petition for review to be "amended," with the Board's permission, to correct failures to comply with OAR 661-10-030(2) or (3) (governing specifications and content requirements for petitions for review). However, petitioner did not seek to file an amended petition for review. Even if he had, OAR 661-10-030(4) authorizes such amendments only to correct technical errors in the petition for review. OAR 661-10-030(4) does not provide a procedure for supplementing the petition for review in the way petitioner attempts to do here.

We do not consider petitioner's Motion for Reversal.

**B. Jurisdiction**

As explained in our April 15, 1994 order on respondent's motion to dismiss, if the decision challenged in this appeal is a limited land use decision, as the city contends, petitioner's notice of intent to appeal is governed by ORS 197.830(8). Fechtig v. City of Albany, ___

1 Or LUBA ___ (LUBA No. 94-019, Order on Motion to Dismiss,
2 April 15, 1994). If the challenged decision is a limited
3 land use decision, the notice of intent to appeal was not
4 timely filed, and this appeal must be dismissed. On the
5 other hand, if the challenged decision is a quasi-judicial
6 "land use decision," as petitioner contends, the notice of
7 intent to appeal is governed by ORS 197.830(3). If the
8 challenged decision is a quasi-judicial land use decision,
9 the notice of intent to appeal was timely filed, and we have
10 jurisdiction.[4]

11 The definition of "limited land use decision" is set
12 forth supra at n 1. Respondent relies on ORS
13 197.015(12)(b), which defines limited land use decisions as
14 including "[t]he approval or denial of an application based
15 on discretionary standards designed to regulate the physical
16 characteristics of a use permitted outright, including but
17 not limited to site review and design review." (Emphasis
18 added.)

19 There is no dispute that approval of the fill permit in
20 this case required the application of "discretionary

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[4]Both ORS 197.830(3) and 197.830(8) establish a 21 day deadline for filing a notice of intent to appeal. However, ORS 197.830(3) measures the 21 days from the date the petitioner received "actual notice" or "knew or should have known of the decision." Under ORS 197.830(8), the 21 days is measured from the "date the decision sought to be reviewed becomes final." ORS 197.830(3) applies where a local government is required to provide a public hearing or an opportunity for a local appeal prior to making a decision, as is the case with decisions on "permits" as that term is defined by ORS 227.160(2), but fails to do so.

1 standards." Therefore, the jurisdictional question turns on
2 whether those discretionary standards were "designed to
3 regulate the physical characteristics of a use permitted
4 outright." It is somewhat contradictory to describe uses as
5 "permitted outright" but nevertheless subject to
6 "discretionary standards designed to regulate the physical
7 characteristics of" such uses. We understand the uses
8 described by ORS 197.015(12)(b) to fall somewhere between
9 (1) outright permitted uses for which approval involves no
10 discretionary review; and (2) uses allowed subject to
11 application of discretionary approval standards that may
12 require denial of the use altogether (as opposed to
13 discretionary approval standards that only regulate the
14 use's physical characteristics). Decisions approving or
15 denying uses in the first category are neither land use
16 decisions nor limited land use decisions. ORS
17 197.015(10)(b)(A) (nondiscretionary decisions) and
18 197.015(10)(b)(B) (building permits issued under clear and
19 objective standards). Decisions approving or denying uses
20 in the second category are land use decisions under
21 ORS 197.015(10)(a) (decisions concerning the application of
22 discretionary land use standards).
23 Determining whether a particular use falls in the first
24 or second category or is a limited land use decision falling
25 somewhere between those categories is difficult. Local
26 governments wishing to utilize the statutory procedures for

1 limited land use decisions must make some initial effort to
2 identify in their plan or land use regulations which kinds
3 of uses they view as qualifying for approval as a limited
4 land use decision under ORS 197.015(12)(b). In doing so,
5 local governments must make clear that the discretionary
6 approval standards applied to that use may not be used to
7 deny approval of the use altogether, but rather may only be
8 applied to regulate that use's physical characteristics.
9 The City of Albany has not done so with regard to fill
10 permits.

11 The beginning point for determining whether the
12 relevant plan and land use regulation provisions allow a use
13 (in this case "fill") as a use permitted outright is the
14 relevant plan and code language. The Albany Development
15 Code (ADC) does not use the terminology used in
16 ORS 197.015(12)(b). ADC 3.050 establishes the following
17 classification of the uses permitted in the city's zoning
18 districts:

19 "A Use allowed without special conditions or
20 review procedures.

21 "S Use permitted that requires a site plan
22 approval prior to the development or
23 occupancy of the site or building.

24 "C Use permitted conditionally under the
25 provisions of [ADC] 2.17 - 2.190.

26 "PD Use permitted only through Planned
27 Development approval.

28 "* Use not permitted in the major zoning
29 district indicated."

1 Even if we assume that all uses in the RR zone designated
2 either "A" or "S" potentially qualify as a "use permitted
3 outright," ADC 3.050 does not identify "fill" as either an
4 "A" or "S" use.

5 Respondent contends that because a single family
6 dwelling is identified as an "A" use in the RR zone, and any
7 necessary fill could be approved in conjunction with such a
8 single family dwelling as a limited land use decision, the
9 same result should obtain here where only a permit for fill
10 is sought. Respondent's argument that approval of a permit
11 for a single family dwelling and necessary fill would
12 constitute a limited land use decision presents a question
13 that is not before us. The permit at issue in this appeal
14 is for fill only. Fill is not identified by the ADC as a
15 use falling within the definition of limited land use
16 decision provided in ORS 197.015(12)(b). Therefore, the
17 disputed decision approving a fill permit is not a limited
18 land use decision.

19 As noted earlier in this opinion, all parties agree the
20 challenged fill permit is subject to discretionary standards
21 in the ADC. The challenged decision therefore is a "land
22 use decision."[5] For the reasons explained in our order on

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[5]ORS 197.015(10)(a)(A)(iii) defines "land use decision" as including final local government decisions which concern application of "[a] land use regulation." Here, the decision concerns the application of the ADC, a land use regulation, and the exceptions in ORS 197.015(10)(b)(A) and (B) for certain nondiscretionary decisions, noted <u>supra</u> in the text, do not apply.

respondent's motion to dismiss, petitioner's notice of intent to appeal is therefore governed by ORS 197.830(3). The notice of intent to appeal is timely filed, and we deny the motion to dismiss.

**C. Other Issues**

Our conclusion that the challenged decision is a land use decision has two additional consequences. As respondent correctly points out, a party may forfeit its right to raise certain issues at LUBA by failing to raise those issues during local proceedings. ORS 197.835(2); see Pacific Rivers Council, Inc. v. Lane County, 26 Or LUBA 323 (1993); Wethers v. City of Portland, 21 Or LUBA 78, 92 (1991). However, ORS 197.835(2)(a) provides that where a local government "failed to follow the requirements of ORS 197.763," a petitioner at LUBA is not limited to issues raised before the local hearings body.

Because the city mistakenly believed it was adopting a limited land use decision (governed by the ORS 197.195 procedures for limited land use decisions), rather than a quasi-judicial land use decision (governed by the ORS 197.763 procedures for quasi-judicial land use decisions), the city "failed to follow the requirements of ORS 197.763." Therefore no issues petitioner wishes to raise at LUBA were waived because they were not raised below. Weuster v. Clackamas County, 25 Or LUBA 425, 427-30 (1993);

1 Nuenschwander v. City of Ashland, 20 Or LUBA 144, 157
2 (1990).

3 Finally, because the challenged decision is a land use
4 decision, rather than a limited land use decision, it is
5 also a "permit," as defined by statute.[6] The city's failure
6 to follow the statutory procedures of ORS 197.763 and
7 227.160 to 227.180, which govern approval of quasi-judicial
8 land use decisions and permits, also potentially provides a
9 basis for reversal or remand of the challenged decision,
10 provided petitioner's substantial rights were prejudiced by
11 that failure.[7] ORS 197.835(7)(a)(B); see Wissusik v.
12 Yamhill County, 20 Or LUBA 246, 252-53 (1990). However,
13 petitioner does not assign the city's failure to follow
14 statutory procedures concerning permits and quasi-judicial
15 land use decision making as error or argue that the city's
16 error in this regard prejudiced his substantial rights.[8] We

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[6]ORS 227.160(2) defines a "permit" as "discretionary approval of a proposed development of land * * *." ORS 227.160(2) also states that "permit" does not include a "limited land use decision as defined in ORS 197.015[(12)]."

[7]In making decisions on permits, the city is required to provide a hearing or an opportunity for appeal. ORS 227.175(3) and (10). Permits are, by definition, quasi-judicial land use decisions. Quasi-judicial land use decisions are subject to the statutory notice and hearing requirements of ORS 197.763.

[8]Petitioner does argue in his Motion for Reversal that the city's failure to follow statutory permit and quasi-judicial land use decision making procedures requires that we reverse or remand the challenged decision. As we have already explained, that motion was filed after the petition for review was due and, for that reason, we do not consider it.

therefore do not consider the city's failure to follow statutory permit approval and quasi-judicial land use decision making procedures further. We turn to petitioner's assignments of error.

**FIRST ASSIGNMENT OF ERROR**

ADC 18.04.035 defines "Drainageway" as follows:

> "'Drainageway:' A natural or man-made path with the specific function of transmitting natural stream water or storm runoff water from a point of higher elevation to a point of lower elevation."

ADC 18.04.040 limits grading operations in drainageways, as follows:

> "The following shall 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 a 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."

Petitioner contends the disputed fill is placed in a drainageway and the city erred by not adopting findings required by ADC 18.04.040(1) and (2) concerning adverse effects, beneficial purpose and amount of fill. Petitioner

1 argues the fill acts as a dam to back up floodwaters from
2 the Willamette River. Petitioner notes the city made the
3 applicant cut a two-foot wide channel in the disputed fill.
4 Petitioner argues this channel concentrates the downhill
5 flow from the southwest that would otherwise flow across the
6 drainageway occupied by the fill.

7 Many of petitioner's factual allegations under this
8 assignment of error and subsequent assignments of error rely
9 on documents attached to his brief which are not in the
10 record. We do not consider those factual allegations or the
11 extra-record material attached to petitioner's brief. See
12 Hammack & Associates, Inc. v. Washington County, 16 Or LUBA
13 75, 78 (1987).

14 A more fundamental problem with petitioner's argument
15 under this assignment of error is that the city adopted a
16 number of findings explaining why it believes the disputed
17 fill is not in a "drainageway," as that term is defined by
18 ADC 18.04.040. Record 3-5. The gist of those findings is
19 that although the fill is placed in a low area which
20 receives a great deal of water, particularly in periods of
21 heavy rainfall, it does not satisfy the part of the
22 definition requiring that it be a "path which has the
23 specific function of transmitting natural stream water or
24 storm run-off water * * *." ADC 18.04.035. The findings
25 cite a great deal of evidence in the record in support of

the city's ultimate conclusion that "the fill is not near or impacting a drainageway." Record 5.

Petitioner makes no specific attempt to challenge the adequacy of the city's findings that the area occupied by the disputed fill is not a drainageway. We conclude the findings are adequate. Petitioner effectively asks that this Board reweigh the evidence supporting those findings. We may not do so. 1000 Friends of Oregon v. Marion County, 116 Or App 584, 587-88, 842 P2d 441 (1992). The evidence the city relied upon is substantial evidence, i.e. evidence a reasonable person would rely upon to reach a conclusion that the subject property is not located in a drainageway. See Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

The first assignment of error is denied.

**SECOND AND THIRD ASSIGNMENTS OF ERROR**

Goal 7 (Flood Hazards & Hillsides) of the City of Albany Comprehensive Plan requires that the city "[p]rotect life and property from natural disasters and hazards." Goal 7, Policy 5 provides:

> "Ensure that development proposals in the flood fringe and adjacent to drainageways are consistent with Federal Emergency Management Agency (FEMA) and other applicable local regulations in order to minimize potential flood damage. Development proposals in areas subject to flooding may be reviewed according to the following criteria:
>
> "a. Proposed development activities shall not change the flow of surface water during flooding so as to endanger property in the area. Special engineering reports on the

changes in water flow and potential damage which may be caused as a result of proposed activities may be required. If necessary, local drainage shall be improved to control increased runoff that might increase the danger of flooding to other property.

"* * * * *"

Petitioner contends the city failed to adopt findings addressing the above requirement of Goal 7, Policy 5. Petitioner's argument is difficult to follow because it appears to be based largely on alleged negative impacts of allowing development within drainageways and the floodway. However, the city adopted findings explaining that while a portion of the disputed fill is located in the floodplain and in the floodway fringe, it is not located within a <u>drainageway</u> or <u>floodway</u>.

The city's findings addressing Goal 7, Policy 5 state, in relevant part, as follows:

"1. FEMA floodplain regulations have been incorporated into [the ADC]. There are no FEMA or local provisions that prohibit fill in the flood fringe (See ADC * * * 6.132).[9]

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[9]ADC 6.132(1) provides that "[n]o fill shall be permitted in the floodway * * *." The city adopted the following findings addressing ADC 6.132(1):

"1. According to [the relevant] Flood Boundary and Floodway Map * * * the proposed project is not in the floodway.

"2. Only a small portion of the project is in the flood fringe. The flood fringe at this point is approximately 3500 feet wide. The fill itself is 210 feet wide. This figures to be 6% of the width of the flood fringe. * * *"

"* * * * *

"4. The fill will not change the water flow during flooding so as to endanger property in the area because the amount of fill is minute compared to the size of the floodplain (See finding No. 2 under [ADC] 6.132(1)).[10] Both the pre- and post-fill drainage patterns on the site are undefined with no apparent path. Both before and after the fill, water tends to leave the surface through percolation. * * *

"* * * * *"

Petitioner clearly disagrees with the city's findings that the disputed fill poses no danger to adjoining properties, as well as the city's ultimate conclusion that Goal 7, Policy 5 is satisfied, but he makes no specific challenge to the city's findings or the rationale expressed in those findings. Although petitioner cites evidence in support of his position that the disputed fill may endanger property in the area, much of that evidence is not included in the record. There is evidence in the record, much of it specifically cited by the city in its findings, that supports the city's findings concerning Goal 7, Policy 5. While petitioner clearly disagrees with that evidence, we are unable to agree that it is evidence a reasonable person would not believe.

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[10]The referenced finding appears in n 9, _supra_.

The second and third assignments of error are denied.[11]

**FOURTH ASSIGNMENT OF ERROR**

> "The review of the fill permit violates Implementation Method 11 of Goal 7 of the Albany Comprehensive Plan."

Petitioner's argument under this assignment of error is based on a prior version of Goal 7, Implementation Method 11, which provided as follows:

> "Review development proposals in areas subject to flooding on the basis of adopted flood regulations <u>and whether benefits associated with the development would outweigh problems and hazards that could result</u>." (Emphasis added.)

Petitioner argues the city failed to adopt findings explaining the benefits and problems associated with the fill.

Respondent points out that Goal 7, Implementation Method 11 was amended. The amended version of Goal 7, Implementation Method 11 applies in this case, and the language emphasized above is not included in the amended version. Because petitioner's argument under this assignment of error depends on plan language that has been deleted, it provides no basis for reversal or remand.

The fourth assignment of error is denied.

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[11]Petitioner also contends the disputed fill is in excess of 12,000 cubic yards rather than the 3,000 cubic yards approved by the disputed decision. However, petitioner cites no evidence in the record supporting this contention.

**FIFTH ASSIGNMENT OF ERROR**

The Albany Comprehensive Plan states the city may not "take action which opposes a goal statement unless" the action "clearly supports another goal" and the city finds "the goal being supported takes precedence (in the particular case) over the goal being opposed." Albany Comprehensive Plan 2. Petitioner contends the city's decision violates plan Goal 7, and the city failed to make the findings required by the above quoted parts of the plan.

Petitioner fails in this appeal to demonstrate his premise that plan Goal 7 is violated. Therefore, the city was not required to adopt findings that another plan goal takes precedence.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

Petitioner alleges the challenged fill violates the civil law rule limiting the ability of upland owners to artificially alter discharge of surface waters onto adjoining properties. See Garbarino v. Van Cleave, 214 Or 554, 330 P2d 28 (1958); Wellman v. Kelley, 197 Or 553, 252 P2d 816 (1953); Rehfuss v. Weeks, 93 Or 25, 182 P 137 (1919).

The manner in which the disputed fill has altered the flow of surface water may improperly interfere with petitioner's property rights. If so, petitioner may have a cause of action against his neighbor in circuit court.

1 However, even if the disputed fill does interfere with
2 petitioner's property rights in some way, that would provide
3 no basis for reversal or remand of the <u>city's</u> decision under
4 our scope of review. ORS 197.835.
5 The sixth assignment of error is denied.
6 The city's decision is affirmed.