BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WOODSTOCK NEIGHBORHOOD ASSOCIATION, Petitioner, vs. CITY OF PORTLAND, Respondent, and JOE VAN HAVERBEKE, Intervenor-Respondent.	LUBA No. 94-093 FINAL OPINION AND ORDER

Appeal from City of Portland.

Steven Moskowitz, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Moskowitz & Thomas.

Adrianne Brockman, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

Jeff Bachrach, Portland, represented intervenor-respondent.

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

REMANDED 10/11/94

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

Petitioner appeals a city council order approving the preliminary plat of a five-lot cluster subdivision.

MOTION TO INTERVENE

Joe Van Haverbeke, 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 property is vacant and 28,215 square feet in area. The property is designated Single Dwelling in the city comprehensive plan and zoned Single-Dwelling Residential (R5). The surrounding area is also zoned R5 and is in single-family residential use, with lots generally 5,000 square feet or greater in area.

The subject property is located on the east side of SE 48th Avenue, at SE Mitchell Street. Whereas most of the surrounding streets are fully improved, with pavement, curbs and sidewalks, the block of SE 48th Avenue adjoining the subject property, between SE Mitchell Street and SE Raymond Street to the north, is unimproved.[1] In addition, the SE Mitchell Street right-of-way, which extends from SE 49th Avenue west to the southeast corner of the subject property, is unimproved and is not proposed to be extended through the

[1]The developed portion of SE 48th Avenue south of the subject property is a 26-foot-wide street in a 50-foot right-of-way.

subject property to SE 48th Avenue.

On July 29, 1993, intervenor filed an application for a five-lot subdivision of the subject property. The initial preliminary plat proposed four lots with access onto SE 48th Avenue, including three standard lots and one flag lot, and a fifth lot in the southeast corner of the subject property with access from an interim road built in the undeveloped SE Mitchell Street right-of-way. Record 332. The lot sizes ranged from 5,001 to 5,100 square feet. Id. The initial proposal included dedication of 15 feet along the western edge of the subject property for right-of-way for SE 48th Avenue and construction of interim gravel road improvements within this right-of-way to connect to SE 48th Avenue to the south. Record 160, 332.

After public hearings, the city hearings officer approved the application, with conditions, on December 3, 1993. The hearings officer determined that relevant standards mandate a 50-foot right-of-way for SE 48th Avenue and, therefore, required intervenor to dedicate 25 feet along the western edge of the property for such right-of-way. Record 172. The hearings officer noted this would reduce the area of the property so that only four lots can be created and, therefore, limited the subdivision

approval to four lots.[2] Id. However, the hearings officer's decision allowed development to proceed based on construction of interim gravel road improvements (as opposed to full-street or half-street improvements) in the SE 48th Avenue and SE Mitchell Street rights-of-way.

Both petitioner and intervenor appealed the hearings officer's decision to the city council. Intervenor challenged the hearings officer's determination that a 50-foot right-of-way was required for SE 48th Avenue. Petitioner challenged the portions of the decision requiring only interim road improvements and allowing access via the unimproved SE Mitchell Street right-of-way.

On January 27, 1994, intervenor submitted a revised preliminary plat for a five-lot cluster subdivision, with lot sizes ranging from 4,750 to 5,351 square feet. Record 136-37. The revised preliminary plat still depicts one lot with access via the SE Mitchell Street right-of-way and three standard lots and one flag lot with access onto SE 48th Avenue. However, the revised plat is modified to show the flag lot sharing a common access drive with one of the standard lots, so that there are only three driveway entrances onto SE 48th Avenue. The city subsequently mailed notice that an evidentiary hearing on intervenor's and

[2]The decision also notes that the change of the preliminary plat to a four-lot subdivision with a 25-foot right-of-way dedication could be accomplished at the time of final plat approval. Id.

petitioner's appeals would be held on February 23, 1994. Record 129. The notice described intervenor's original proposal and stated that, as an alternative, intervenor proposed clustered housing, which is subject to Portland City Code (PCC) 33.216.030. Record 130. A copy of the revised preliminary plat was attached to the hearing notice. Record 131.

On February 22, 1994, intervenor submitted a second revised preliminary plat for a five-lot cluster subdivision, with lots ranging from 4,771 to 5,601 square feet. Record 107. The second revised preliminary plat depicts three standard lots and two flag lots, all with access onto SE 48th Avenue. However, each flag lot shares a common access drive with a standard lot, so there are only three driveway entrances onto SE 48th Avenue to serve all five lots.

After a de novo review of the hearings officer's decision, including an evidentiary hearing on February 23, 1994, the city council approved the proposed subdivision, as shown on the second revised preliminary plat, with conditions. The conditions imposed include (1) dedication of "sufficient land to create a 40-foot-wide right-of-way [for SE 48th Avenue, expanding] to a 50-foot right-of-way at the southern end of the site" (to match the existing 50-foot right-of-way for SE 48th Avenue south of the site); (2) dedication of a "five-foot wide public pedestrian

easement * * * along the SE 48th Avenue frontage;" and (3) construction of a 26-foot-wide street and sidewalks on both sides, in the SE 48th Avenue right-of-way and the pedestrian easement between SE Raymond and SE Mitchell Streets, prior to the issuance of building or occupancy permits, respectively. Record 24.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner contends the city failed to follow the procedures required by the PCC for review of cluster housing projects. Petitioner argues PCC 33.216.030.B provides that cluster housing projects are "subject to the subdivision review process." Petitioner further argues that PCC 34.80.020 and 34.30.015.B provide an application for a cluster housing project shall be processed as a major land division. According to petitioner, under PCC 34.20.050.B, the hearings officer is required to hold the initial public hearing, and make the initial decision on, a major land division. Petitioner also argues the city's Type III procedures are required for cluster housing projects, and those procedures require that mailed notice of the initial public hearing be sent to all properties within 400 feet of the subject site. PCC 33.730.030.E.1.

In this case, intervenor did not propose a cluster housing project until he submitted the revised preliminary plat on January 27, 1994, after the hearings officer's decision was appealed to the city council. Petitioner

complains the city failed to follow its required procedures because the hearings officer never held a hearing on intervenor's cluster housing proposal. Petitioner also argues that required procedures were not followed because notice of the city council hearing, the only hearing held on the cluster housing proposal, was not mailed to all properties within 400 feet of the site, but rather only to persons entitled to notice of a hearing on the appeals of the hearings officer's decision.

The city denies that the procedures it followed in reviewing intervenor's revised subdivision proposal were in error. However, the city argues that even if it did commit procedural errors in reviewing intervenor's revised proposal, such errors provide no basis for reversal or remand because (1) petitioner did not object to the alleged procedural errors below, and (2) petitioner's substantial rights were not prejudiced by the alleged procedural errors.

Both petitioner and the city agree that the errors alleged under these assignments of error are procedural in nature, and we accept that characterization. ORS 197.835(7)(a)(B) requires us to reverse or remand a challenged decision if a local government committed a procedural error "that prejudiced the substantial rights of the petitioner." However, we have also held repeatedly that where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that

error cannot be assigned as grounds for reversal or remand of a local government decision in an appeal to this Board. Mazeski v. Wasco County, 26 Or LUBA 226, 232 (1993); Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Dobaj v. Beaverton, 1 Or LUBA 237, 241 (1980).

Petitioner does not allege or demonstrate that it objected to the alleged procedural errors below. Certainly petitioner had an opportunity to do so during the city council proceeding. For that reason alone, we must deny these assignments of error. However, in addition, petitioner does not contend or demonstrate that its substantial rights were prejudiced by the alleged procedural errors.[3] We note that the notice of the city council hearing mailed to petitioner included a copy of the revised site plan and stated that the applicant proposed cluster housing subject to the requirements of PCC 33.216.030. Record 129-31. Therefore, petitioner had notice of intervenor's cluster housing proposal and had an opportunity

[3]At oral argument, petitioner contended its substantial rights were prejudiced because notice of the city council hearing on the cluster housing proposal was not mailed to all properties within 400 feet of the subject site. Petitioner conceded that it received mailed notice of the city council hearing, but argued that the substantial rights of a neighborhood association are prejudiced when required notice is not mailed to properties within its area. We have previously determined that failure to give required notice to persons other than petitioner does not prejudice a petitioner's substantial rights, so long as petitioner received the notice to which it is entitled. Versteeg v. City of Cave Junction, 17 Or LUBA 25, 28 (1988); Apaletegui v. Washington County, 14 Or LUBA 261, 267, rev'd in part on other grounds 80 Or App 508 (1986). We fail to see that a neighborhood association petitioner has any special substantial rights in this regard.

to present and rebut evidence regarding the proposal in the de novo evidentiary hearing before the city council. We fail to see how petitioner's substantial rights were prejudiced by the procedures followed by the city. This provides an independent basis for denying these assignments of error.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

The "General Explanation of City Council Hearings Process" attached to the notice of the city council hearing included the following description of the order of appearance and time allotment for various parties:

"Staff Report	10 minutes
"Appellant	10 minutes
"Supporters of Appellant	3 minutes each
"Principal Opponent	15 minutes
"Other Opponents	3 minutes each
"Appellant Rebuttal	5 minutes
"Council Discussion	as needed"

Record 133. Petitioner complains that although it was an appellant before the city council, the city council treated intervenor as the only appellant and relegated petitioner to the role of principal opponent.

Petitioner also argues that under Fasano v. Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973), it has a right to rebut evidence presented at the city council hearing. Petitioner further argues that where a petitioner was denied the opportunity to rebut evidence that is relevant to applicable approval standards, the petitioner's substantial rights have been prejudiced and the challenged decision must be remanded. Caine v. Tillamook County, 25 Or LUBA 209, 214 (1993); Angel v. City of Portland, 21 Or LUBA 1, 8 (1991).

Petitioner contends it was entitled to an opportunity to rebut testimony presented by intervenor during the "Appellant's Rebuttal" period, "to the extent [intervenor's testimony] constituted opposition to issues raised by [petitioner] in its appeal."[4] Petition for Review 5.

[4]As described above, petitioner's appeal challenged provisions of the hearings officer's decision allowing access to one lot via the unimproved

Petitioner states that it requested an opportunity for such rebuttal, but the request was denied. Petitioner describes the rebuttal testimony of intervenor, which petitioner claims it was entitled to rebut, as follows:

> 1. Intervenor's attorney "reiterated that [intervenor] preferred access via SE Mitchell." Petition for Review 6.
>
> 2. Intervenor's attorney's representation that intervenor "would not object to participating in an LID in order to make full street improvements." Id.
>
> 3. Intervenor's attorney "stated that a 40-foot right-of-way combined with a 26-foot street and parking on both sides would meet the City's design standards." Id.

Both intervenor and petitioner were "appellants" to the city council. Nevertheless, we do not see that petitioner's substantial rights were prejudiced simply because the city council's order of proceeding placed petitioner in the role assigned to "Principal Opponent." However, we agree with petitioner that under Fasano it has a substantial right to rebut evidence submitted by intervenor at the city council hearing. Therefore, if intervenor presented new evidence relevant to the applicable approval standards during the "Appellant's Rebuttal" period, and petitioner was denied an opportunity to rebut that evidence, petitioner's substantial rights were prejudiced.

The question we must decide is whether the three

SE Mitchell Street right-of-way and requiring interim gravel street improvements, rather than full-street improvements, to SE 48th Avenue.

statements by intervenor's attorney described above constitute such evidence. The first two statements described above simply repeat positions stated by intervenor's attorney during his initial presentation to the city council or expressed in intervenor's preferred preliminary plat. Record 9. Petitioner had an opportunity to respond to these positions during its presentation. The third statement described above is a conclusory opinion by intervenor's attorney that the improvements to SE 48th Avenue proposed by intervenor satisfy city standards. It is not new evidence, and petitioner had ample opportunity to comment on whether the proposed improvements to SE 48th Avenue satisfy applicable standards during its presentation to the city council. We therefore conclude petitioner was not denied an opportunity to rebut relevant evidence.

The third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

The challenged decision requires that SE 48th Avenue adjacent to the subject property be a 26-foot street in a 40-foot right-of-way (widening to 50 feet at the south end of the subject property, where it joins the existing 50-foot right-of-way for SE 48th Avenue). Record 24. The decision also requires that there be sidewalks on both sides of SE 48th Avenue. Id. There is no dispute that the decision approves parking on both sides of SE 48th Avenue. Additionally, the findings recognize that to satisfy the

street improvement requirements, intervenor must dedicate 15 feet of right-of-way along the western border of the subject property and provide an additional five-foot sidewalk easement to the east of the SE 48th Avenue right-of-way.[5] Record 30.

Petitioner contends that in approving a five-lot cluster subdivision with the above described street improvement requirements, the city misconstrued provisions of the PCC concerning street standards and the maximum density of cluster subdivisions.

A. Street Standards

The design standards of PCC chapter 34.60 apply to the proposed subdivision. PCC 34.60.010.A (Streets) provides, in relevant part:

> "Minimum right-of-way and roadway widths shall be as shown on Figure 1 found at the end of this Chapter. Widths in excess of these minimums may be required where anticipated volumes or types of traffic make such additional widths in the public interest. * * *"

As relevant here, Figure 1, referred to above, provides:

> "On parcels designated Single Dwelling on the Comprehensive Plan, the abutting streets will meet the following:
>
> "Right-of-Way Roadway Width Comp Plan On-Street Parking

[5]Thus, it can be inferred that the property adjoining the subject property to the west will be required to dedicate 25 feet for right-of-way for SE 48th Avenue, and that the required sidewalk on the west side of the street can be constructed within that right-of-way.

"Width Minimum	Minimum	Designation	Allowed
"50 feet	26 feet	R5	Two Sides
"40 feet	20 feet	R5	One Side"

Petitioner contends the city's decision to approve a 26-foot wide street with parking on both sides, but to require only a 40-foot right-of-way is inconsistent with Figure 1 above and, therefore, violates PCC 34.60.010.A. Petitioner also contends the decision is inconsistent with plan Public Facilities Policy 11.11, which provides:

> "Construct local service streets in accordance with existing and planned neighborhood land use patterns and accepted engineering standards."

Petitioner argues the hearings officer found, and the record shows, that 50-foot or 60-foot street rights-of-way are standard in the area of the subject property. Record 163, 212.

The city argues there is no evidence that a 50-foot right-of-way will be needed. The city also argues that requiring only a 40-foot right-of-way (with 15 feet to be dedicated by intervenor) is essential to compliance with the "minimum density" requirement of PCC 34.50.015.[6] The city

[6]As applicable to the R5 zone, PCC 34.50.015 provides:

> "[T]he minimum density for land divisions must be at least 90 percent of the maximum density allowed by [PCC] Title 33. This minimum density is not required where it is unfeasible due to constraints such as land hazards, topography, solar or tree preservation requirements, access limitations, or other similar constraints."

argues, in its brief, that in these circumstances the requirements and policies of PCC 34.60.010.A and PCC 34.50.015 can be balanced against each other, allowing the city to approve a 26-foot-wide street in a 40-foot right-of-way. The city also argues that plan Public Facilities Policy 11.11 requires consistency with "existing and planned neighborhood land use patterns," not street rights-of-way, and therefore does not have the effect claimed by petitioner.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of

---

The challenged decision addresses PCC 34.50.015 as follows:

> "The total site area is 28,215 square feet. The R5 zone requires 5,000-square-foot lots, which permits up to five lots on this site with the 40-foot right-of-way [for SE] 48th. Ninety percent of five lots is 4.5 lots. None of the types of physical constraints that would allow for a reduction in the minimum density standard is present on the subject site. The cluster subdivision, in conjunction with the access conditions and the placement of the sidewalk in an easement, enable the site to accommodate five lots in satisfaction of the minimum density standard in PCC 34.50.015." (Emphasis added.) Record 29-30.

With a requirement to dedicate 15 feet along the western edge of the property for right-of-way, the five lots approved by the city total 25,164 square feet. Record 44. Apparently, if intervenor were required to dedicate 25 feet along the western edge of the property for a 50-foot right-of-way, the remaining area of the subject property would be less than 25,000 square feet and would not allow the creation of five lots.

Portland, 319 Or 308, 316-17, ___ P2d ___ (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[7] Under Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), this Board is required to review a governing body's interpretation of a local enactment and may not interpret the local enactment in the first instance.[8]

---

[7]ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the supreme court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, ___ P2d ___ (1994).

[8]In Weeks v. City of Tillamook, supra, and Cope v. City of Cannon Beach, 115 Or App 11, 836 P2d 775 (1992), aff'd 317 Or 339 (1993), the court of appeals interpreted the Oregon Supreme Court's decision in Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), as both requiring increased deference to local government interpretations of local land use legislation and barring LUBA and the appellate courts from interpreting local land use legislation in the first instance.

> "* * * McCoy [v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988)] and its progenitors rested on the premise that the meaning of local legislation is a question of law to be resolved sequentially and independently by local decisionmakers and then by LUBA and the reviewing courts. The premise of Clark is that the meaning of local enactments, although still perhaps a question of law, is not one that reviewing bodies may decide independently; rather, with defined exceptions, LUBA and the courts are required to follow the local interpretations. * * *
>
> "By allocating interpretive authority between local governments and reviewing tribunals in that way, Clark also has the necessary effect of making a corresponding allocation of interpretive responsibility. After Clark, local governments may no more fail to articulate interpretations of their legislation that are necessary to their decisions than they may omit necessary findings of fact, and LUBA has no more authority on review to supply missing interpretations than it does to make findings [of fact] that the local government has failed to include in its decision." (Emphases in original; footnote omitted.) Weeks v. City of Tillamook, 117 Or App at 454.

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 local government's brief. Eskandarian v. City of Portland, 26 Or LUBA 98, 109 (1993); Miller v. Washington County, 25 Or LUBA 169, 179 (1993).

The challenged decision explains why the city believes allowing a 26-foot-wide street is consistent with PCC 34.010.A, Figure 1 (Record 30) and with plan Public Facilities Policy 11.11 (Record 29), and petitioner does not challenge these determinations. However, the challenged decision does not explain how the city interprets PCC 34.010.A, Figure 1 to allow a 40 foot right-of-way for the approved 26 foot street. Similarly, the challenged decision does not address why allowing a 40-foot right-of-way is consistent with plan Public Facilities Policy 11.11. The decision must be remanded for the city council to address these issues.

In Gage v. City of Portland, 319 Or 308, 312 n 4, ___ P2d ___ (1994), the Oregon Supreme Court clarified that the increased deference required under Clark only applies where the local decision maker is the governing body. The supreme court explicitly did not address the issue decided in Weeks and Cope, i.e., whether LUBA and the appellate courts retain authority under Clark, to interpret local land use legislation in the first instance. The supreme court's decision can be read as interpreting Clark as only addressing the situation where there is an interpretation by the local governing body to which deference is required, and not addressing the situation where there is an interpretational issue, but no local interpretation to which to defer. If that is the case, Weeks and Cope may read a limitation into LUBA's scope of review under Clark that is not justified by that decision. However, unless and until Weeks and Cope are overruled, we are bound by those decisions.

This subassignment of error is sustained.

B. Maximum Density

As noted in n 6, supra, PCC 34.50.015 provides that the minimum density for land divisions in the R5 zone is 90% of "the maximum density allowed by [PCC] Title 33." Petitioner argues that in determining the maximum density allowed in a cluster subdivision, the city must comply with the "maximum density" standard of PCC 33.216.030.C:

> "**Density.** The overall project may not exceed the density allowed by the base zone. In calculating the density, the area of the whole subdivision is included, except for public or private streets." Emphasis by petitioner.)

Petitioner contends the city misconstrued PCC 33.216.030.C by including the area occupied by the five-foot sidewalk easement required by the challenged decision in its calculation of the maximum allowable density. Petitioner argues that if a 50-foot street right-of-way were required, as petitioner believes is necessary, the required sidewalk would be located within the street right-of-way and would be excluded from the calculation of maximum allowable density under PCC 33.216.030.C. According to petitioner, allowing the sidewalk easement to be included in the density calculation because it is outside the 40-foot right-of-way required by the challenged decision is simply a subterfuge to allow intervenor to create five, rather than four, lots.

The city argues that PCC 33.910 defines "street" as:

> "The area within the right-of-way, such as roadways, parking strips and sidewalks." (Emphasis added.)

The city further argues that the PCC does not require that sidewalks be within street rights-of-way, noting that the PCC 34.70.020.E definition of "sidewalks" states:

> "* * * In those instances where a pedestrian circulation system is provided on easements or rights-of-way separated from streets, such pedestrian ways may be accepted in lieu of sidewalks along streets at the discretion of the Hearings Officer. Sidewalks whether along streets or in pedestrian ways shall be constructed and surfaced in accordance with the requirements of the City Engineer." (Emphases added.)

According to the city, because the sidewalk required by the challenged decision will be located in a pedestrian easement, rather than a street right-of-way, its area may be included in the density determination under PCC 33.216.030.C.

The challenged decision states that the standards of PCC chapter 33.216 for cluster housing are applicable. However, with regard to the density standard of PCC 33.216.030.C, the challenged decision contains only the following conclusory statement:

> "* * * Allowing a five-lot cluster subdivision is consistent with the density requirement in PCC 33.216.030(C)." Record 27.

We are required to give deference to the city council's interpretation of a PCC provision, but that interpretation must be expressed in the challenged decision, not simply in

the city's brief. Gage v. City of Portland, supra; Weeks v. City of Tillamook, supra; Eskandarian v. City of Portland, supra. Accordingly, the challenged decision must be remanded to the city council to explain its interpretation and application of PCC 33.216.030.C.[9]

This subassignment of error is sustained.

The fourth and fifth assignments of error are sustained.

The city's decision is remanded.

[9]We note that if, on remand, the city's response to the previous subassignment of error results in any change to the amount of land intervenor must dedicate for street right-of-way, that would also affect the calculation of the maximum density allowed under PCC 33.216.030.C.