BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUNE WICKS, PAULINE SKINNER, JIM LEWIS, BOBBY BECKLEY, JOHN THUT, and DeLAINE THUT, Petitioners, vs. CITY OF REEDSPORT, Respondent.	LUBA No. 94-139 FINAL OPINION AND ORDER

Appeal from City of Reedsport.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dole, Coalwell, Clark & White.

Stephen H. Miller, Reedsport, and Bill Kloos, Eugene, filed the response brief. With them on the brief was Johnson & Kloos. Bill Kloos argued on behalf of respondent.

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

REMANDED 03/08/95

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 decision approving a residential subdivision. The decision also approves variances to certain city right-of-way width, roadway width, sidewalk and street grade requirements.

FACTS

The proposed subdivision will create 13 lots from a 9.82-acre parcel zoned Single Family Residential (R-1). The Reedsport Comprehensive Plan (plan), at p. B-1, identifies the subject property as being in an area of greater than 20% slope. The subject property is adjoined by developed residential areas to the north and east. The city limits and urban growth boundary coincide with the southern and western boundaries of the subject property.

Three existing deadend streets, Maple Court, View Court and Bellevue Drive, will be extended to the south to serve the proposed subdivision. Two of the extended streets, Maple Court and View Court, are proposed to terminate in circular turn-arounds. The extension of Bellevue Drive is proposed to be a deadend. The three existing streets lack sidewalks and have substandard right-of-way and roadway widths. The proposed subdivision includes variances to allow (1) the rights-of-way and roadways of the three street extensions to be the same width as those of the existing streets, and (2) the three street extensions to be built

without sidewalks. Additional variances are proposed to increase the maximum allowable grade of View Court from 15% to 16%, and of Bellevue Drive from 15% to 18%.[1]

The city council initially approved the proposed subdivision on January 18, 1994. Petitioners appealed that decision to this Board. After the petition for review was filed, the city sought and obtained a voluntary remand of the challenged decision. Wicks v. City of Reedsport, ___ Or LUBA ___ (LUBA No. 94-016, April 11, 1994). On remand, the city council remanded the matter to the planning commission.

On May 31, 1994, the planning commission held an evidentiary hearing on the subject application, and left the record open for seven days for submission of additional evidence. On June 7, 1994, the planning commission reconvened, made decisions on whether evidence submitted during the seven-day period would be accepted into the record,[2] and adopted a decision and findings approving the proposed subdivision.

Pursuant to Reedsport Subdivision Ordinance (RSO) 13.E.6, the city council adopted a resolution

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[1]The challenged decision treats the variances for roadway width for Maple Court and View Court, and the variance for street grade on View Court, as "minor" variances. However, this distinction does not affect the issues raised in this appeal.

[2]Whether the planning commission erred by rejecting an "Exhibit QQ" is addressed under the fourth assignment of error, infra.

initiating an appeal of the planning commission's decision. Record II 23.[3] The resolution and the notice of the city council's July 11, 1994 appeal hearing both state the city council's review "shall be restricted to the record of the proceedings before the Planning Commission as identified in [RSO] 13.E.3."[4] Record II 23, 37. On July 12, 1994, the city council adopted the challenged decision.

FOURTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioners contend the challenged decision should be reversed or remanded because the city committed several procedural errors that prejudiced petitioners' substantial rights.[5] Petitioners also contend the city failed to adopt findings in support of the four "major" variances and the subdivision approval itself.

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[3]The local record submitted in LUBA No. 94-016 is incorporated into the record in this appeal, and is cited as "Record I." The local record complied after remand is cited as "Record II."

[4]Whether the city council erred by accepting new evidence at the appeal hearing is addressed under the fourth assignment of error, infra.

[5]Petitioners also make a general claim that the alleged procedural errors, particularly regarding notice of the planning commission's hearing and the applicant's refusal to allow petitioners access to the subject property, violated petitioners' "right to procedural due process under the Fourteenth Amendment of the U.S. Constitution." Petition for Review 20. However, petitioners do not support these claims with legal argument, and LUBA will not consider claims of constitutional violations that are not supported by legal argument. Perry v. Yamhill County, 26 Or LUBA 73, 77, aff'd 125 Or App 588 (1993); Joyce v. Multnomah County, 23 Or LUBA 116, 118, aff'd 114 Or App 244 (1992); Mobile Crushing Company v. Lane County, 11 Or LUBA 173, 182 (1984).

A. Notice of Planning Commission Hearing

Petitioners contend the notice of the planning commission's May 31, 1994 hearing failed to list all applicable criteria in the city's plan and ordinances, as required by either ORS 197.763(3)(b) or ORS 197.195(3)(c)(C).[6] Petitioners also contend that to the extent the challenged decision is a "limited" land use decision, the city's notice failed to state that objections to the proposal must be in writing, as required by ORS 197.195(3)(c)(B). Petitioners argue they were prejudiced by these alleged failures because they did not "attack the application on the basis of [unlisted] criteria [and did not] reduce all their objections to writing * * *." Petition for Review 21.

Under ORS 197.835(7)(a)(B), we are authorized to reverse or remand a local government decision on the basis of procedural errors only if those errors prejudiced petitioners' substantial rights.[7] Here, petitioners do not argue the subdivision violates any plan or ordinance

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[6]ORS 197.763(3) governs local government notice of quasi-judicial hearings on applications for "land use decisions," as defined in ORS 197.015(10). ORS 197.195(3)(c) governs local government notice of applications for "limited land use decisions," as defined in ORS 197.015(12).

[7]Local government failure to comply with the procedural requirements of ORS 197.763 or ORS 197.195, whichever is applicable, also means that petitioners can raise issues before LUBA regardless of whether they were raised below. ORS 197.830(10)(a); 197.835(2)(a); Barrick v. City of Salem, 27 Or LUBA 417 (1994). However, in this case, the city does not contend petitioners waived any issue by failing to raise it below.

criteria which they failed to raise below, because those criteria were not listed in the notice of planning commission hearing. Petitioners also fail to identify any instance in which the city failed to address their objections because they were not reduced to writing, and the city does not assert that any issues in the petition for review cannot be raised before LUBA because they were not raised in writing below. Because petitioners have not shown their substantial rights were prejudiced by the alleged errors, this subassignment of error provides no basis for reversal or remand.[8]

This subassignment of error is denied.

B. Site Visits by Planning Commission Members

Petitioners contend two members of the planning commission made site visits to the subject property, but did not disclose the substance of their observations on the record or provide petitioners an opportunity to rebut any evidence obtained from such site visits. The city does not dispute the site visits occurred, but argues petitioners failed to object to the adequacy of the planning commissioners' disclosures or request additional rebuttal opportunities.

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[8]As there is no basis for reversal or remand, and the city does not claim petitioners "waived" any issues pursuant to ORS 197.830(10) and 197.835(2), we do not determine whether ORS 197.763 or 197.195 applied to the city proceedings or whether the notice of the planning commission hearing in fact failed to comply with provisions of the applicable statute.

The fact that two planning commissioners visited the subject property was disclosed at the beginning of the May 31, 1994 hearing. Record II 111. During their subsequent presentation at that hearing, petitioners would have had an opportunity to rebut evidence obtained by the planning commissioners during their site visits. However, petitioners did not object to the adequacy of the commissioners' disclosure of what they observed during their site visits, but rather argued that petitioners should also be allowed to make a site visit. Record II 114. 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).

Additionally, we have repeatedly determined that de novo review by a higher level local decision maker may cure procedural errors that occurred in the proceedings before a lower level local decision maker. Murphey v. City of Ashland, 19 Or LUBA 182, 189-90, aff'd 103 Or App 238 (1990); Fedde v. City of Portland, 8 Or LUBA 220, 223 (1983), aff'd 67 Or App 801 (1984). Under RSO 13.E.5, the city council's review of the planning commission's decision is de novo, in that the city council may affirm, reverse or

modify the planning commission's decision as it sees fit. Further, because the city council's review was based on the record of the planning commission proceedings, and the two planning commission members never disclosed the substance of their site observations in the record, evidence regarding their site observations was never placed before the city council. Therefore, petitioners were not denied the opportunity to rebut any evidence that was actually placed before the final local decision maker.[9]

This subassignment of error is denied.

C. Failure to Adopt Exhibit FF as Findings

Petitioners contend the city gave them defective notice of the planning commission's decision, because the notice states the planning commission approved the proposed subdivision and "adopted findings and conditions as presented in Exhibits EE and FF." Record II 45. Petitioners argue the minutes of the planning commission's June 7, 1994 meeting, which were unavailable at the time of the city council's appeal hearing, show the planning commission did not adopt the findings and conditions in Exhibit FF in support of its approval of the subdivision and the four major variances. Record II 58. According to

[9]We note there is no claim here that the challenged decision relies on planning commission findings that in turn rely on the incompletely disclosed site visits by two of the planning commissioners. Compare Wilson Park Neigh. Assoc. v. City of Portland, 24 Or LUBA 98, 118 (1992), aff'd 117 Or App 620, rev den 316 Or 142 (1993).

petitioners, they were prejudiced because they justifiably relied on the notice of the planning commission decision in failing to raise these issues before the city council. Petitioners further argue that because the city council adopted the planning commission's findings, it also failed to adopt Exhibit FF, and therefore adopted no findings in support of the subdivision and the four major variances.

"Exhibit EE" is a staff report, dated May 9, 1994, that contains findings supporting the approved minor variance requests. Record II 139-44. "Exhibit FF" is a staff report, dated May 31 and June 7, 1994, that contains (1) findings supporting the approved subdivision and major variances, and (2) conditions of approval. Record II 68-84. The minutes of the planning commission's June 7, 1994 meeting, which apparently constitute the planning commission's decision, indicate the following motion was approved:

> "[T]o approve the [subdivision] proposal and related variance requests <u>including the staff approval and findings for minor variances</u> as presented in Exhibit EE and FF to the Planning Commission regarding * * * compliance with the [RSO]; Reedsport Zoning Ordinance [(RZO)]; and the Reedsport Comprehensive Plan." (Emphasis added.) Record II 58.

As we understand it, petitioners believe the language emphasized above means that only the staff report containing findings for the two minor variances (Exhibit EE) was actually adopted by the planning commission, and not the

other staff report containing findings for the subdivision and major variances and conditions of approval (Exhibit FF). However, we agree with the city that the above quoted motion means the planning commission adopted both Exhibits EE and FF. Therefore, the notice of the planning commission decision given to petitioners was correct.

Additionally, the city council decision states:

> "The Findings and Conditions of the Reedsport Planning Commission found in Exhibits EE and FF are hereby adopted except as they are modified by the Supplemental Findings and Conditions hereinafter set forth." (Emphasis added.) Record II 2.

Because, Exhibit FF includes findings supporting the four major variances and the subdivision approval itself, the city council did not fail to adopt findings supporting those approvals.

This subassignment of error is denied.

D. Rejection of Exhibit QQ

Petitioners argue the planning commission improperly refused to accept Exhibit QQ on grounds of irrelevancy.[10] Record II 54. Petitioners argue Exhibit QQ, which consists of a letter and map, contains evidence that lots in the proposed subdivision will generate 2 to 3 automobile trips per day, and that access to Highway 101, an arterial, should

[10]We note that petitioners objected to the exclusion of Exhibit QQ in a letter to the city council regarding the appeal. Record II 26. It was also the "consensus" of the city council that Exhibit QQ is not relevant. Record II 15.

be addressed. Petitioners argue Exhibit QQ is relevant to the following RSO street design standard:

> "Street Access Through Existing Subdivision - Whenever there is an existing, City-approved subdivision, access to streets within the subdivision from parcels outside of that subdivision shall not be allowed unless they have been planned, tie directly into arterial streets and are approved by the [Planning] Commission." RSO 11.B.15.

The city argues rejection of Exhibit QQ was not prejudicial to petitioners because Exhibit QQ contains non-expert opinion and is not material to the challenged decision.

As far as we can tell, RSO 11.B.15 could be applicable to the challenged decision, if parcels within the proposed subdivision will have access to streets within existing, city-approved subdivisions. However, RSO 11.B.15 is not interpreted or applied anywhere in the challenged decision. The contents of Exhibit QQ appear to have relevance to the application of RSO 11.B.15 and other access or street design approval standards. Therefore, in this case, the improper exclusion of Exhibit QQ was prejudicial error.[11]

This subassignment of error is sustained.

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[11]We leave open the possibility that improper exclusion of relevant evidence might not constitute prejudice to a party's substantial rights, where we can determine the improperly excluded evidence could not have affected the decision reached. See Woosley v. Marion County, 118 Or App 206, 211, 846 P2d 1170 (1993) (principle of harmless error applies to LUBA's review). However, this is not such a case.

E. Acceptance of New Evidence by City Council

Petitioners contend the city council accepted new evidence at its appeal hearing, contrary to statements in the notice of hearing that the hearing would be on the planning commission record. According to petitioners, such evidence includes a memo, dated June 23, 1994, from the chief of police concerning traffic accidents in the area of the proposed subdivision (Exhibit WW) and testimony by the city engineer regarding the adequacy of a six-inch sewer line to serve the proposed subdivision. Record II 34, 15. Petitioners argue the city council did not admit the new evidence pursuant to RSO 13.E.4.[12] Petitioners also argue their substantial rights were prejudiced by the submittal of this new evidence, because the city failed to provide any opportunity for rebuttal.

The city argues that although Exhibit WW is dated June 23, 1994, testimony by the planning director indicates Exhibit WW was actually submitted during the seven-day period that the planning commission record was kept open (May 31, 1994 to June 7, 1994). Record II 15. Therefore, according to the city, Exhibit WW is part of the planning commission's record. The city also argues the engineer's testimony that a six-inch sewer line is adequate to serve

[12]Under RSO 13.E.4, the city council may allow new evidence to be submitted at an appeal hearing, if the evidence "could not have been presented upon initial hearing and action," and after considering the five factors listed in RSO 13.E.4.a through e.

the proposed subdivision is not new evidence, but rather merely restates evidence already in the record.

At the planning commission's June 7, 1994 meeting, the planning director submitted for the record Exhibits MM through RR, which had been submitted during the seven-day period the record was held open, and the planning commission specifically accepted or rejected these exhibits. Record II 53-54. No mention was made of Exhibit WW which, as noted above, is dated June 23, 1994. Consequently, we agree with petitioners that Exhibit WW was not part of the planning commission record and should not have been accepted by the city council without complying with RSO 13.E.4 and providing petitioners an opportunity for rebuttal.

With regard to the testimony by the city engineer on the adequacy of a six-inch sewer line, we have reviewed the earlier evidence in the record cited by the parties. The only relevant statement identified is that sewer line "sizing is adequate." Record I 124. However, the parties cite nothing previously in the record identifying the size of the sewer line which the city engineer believed to be adequate. We therefore agree with petitioners that the city should have given them an opportunity to rebut the city engineer's testimony concerning the sewer line.

This subassignment of error is sustained.

The fourth and sixth assignments of error are

sustained, in part.[13]

SECOND AND THIRD ASSIGNMENTS OF ERROR

RSO 13.A.1 establishes the following approval standard for variances:

> "Exception[al] Circumstances - Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same vicinity, and result from tract size or shape, topography or other circumstances over which the owner of the property, since enactment of this ordinance, has had no control."

Petitioners challenge the city's interpretation of the above "exceptional circumstances" variance standard, as well as the process used by the city in interpreting that standard.

A. Process

Petitioners contend the city improperly announced its interpretation of RSO 13.A.1, particularly with regard to the meaning of the terms "vicinity" and "do not apply generally," for the first time in the challenged decision.[14] Petitioners argue this was improper under our decision in

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[13]Because we sustain subassignments of error that require the city, on remand, to accept additional evidence and rebuttal testimony regarding street, traffic and sewer service issues, we do not address the first and fifth assignments of error, which include challenges to the adequacy of the findings and evidence supporting the city's decision. However, the second and third assignments of error raise purely legal issues regarding the city's interpretation of one of its variance standards and, therefore, are addressed infra.

[14]In the second assignment of error, petitioners also contend the city's interpretations of two other variance standards, RSO 13.A.2 and .3, were not announced prior to the city's final decision. However, petitioners provide no argument regarding the interpretation of these other standards and, therefore, we do not address them further.

Heceta Water District v. Lane County, 24 Or LUBA 402 (1993).

Petitioners contend the city's new definition of the term "vicinity," as being the area generally bounded by "Longwood Drive on the northwest side, the city limits on the southerly side, and 22nd Street and its prolongation to the city limits on the easterly side," makes evidence from a much larger area relevant. Record II 3. Petitioners argue there was no indication during the evidentiary phase of the city proceedings that the city would interpret "vicinity" in this manner and, therefore, petitioners limited their evidence to circumstances applying to properties along Maple Court, View Court and Bellevue Drive. Petitioners further argue that if the record were reopened, they would also introduce quantitative evidence regarding the slopes, sidewalks, road widths and right-of-way widths along other streets in the "vicinity," as defined by the challenged decision.

Petitioners also contend the city council's new definition of "do not apply generally" as meaning "not shared with uniformity, or nearly so, by other properties in the vicinity," calls for an additional type of evidence that petitioners did not realize was relevant at the time of the evidentiary hearings below. According to petitioners, if the record were reopened, they would submit evidence that many other properties in the vicinity share with the subject property the circumstances of steep slopes, narrow roads and

narrow rights-of-way.

Martini v. OLCC, 110 Or App 508, 514, 823 P2d 1015 (1992), holds that under ORS ch 183, when a state agency changes an established interpretation of an administrative rule to a significant degree during the course of a contested case proceeding, the parties must be given an opportunity to present evidence (and argument) responsive to the new standard. See also McCann v. OLCC, 27 Or App 487, 492, 556 P2d 973, rev den 277 Or 99 (1977); Sunray Drive-in Dairy v. OLCC, 20 Or App 91, 95, 530 P2d 887 (1975). In Heceta Water District v. Lane County, supra, 24 Or LUBA at 419, we stated there may be some circumstances where relevant provisions of ORS ch 197 and 215 impose a similar requirement on local government interpretation of local regulations in quasi-judicial land use proceedings. However, we made it clear this would not be the case if there was no pre-existing "established" interpretation of the local regulation in question on which participants in the local proceeding might justifiably rely.

Petitioners do not demonstrate the definitions of the terms "vicinity" and "do not generally apply" adopted by the challenged decision are significantly different from previously adopted city interpretations of those terms, other than by making the bare contention that the decision contains "new" interpretations. Without a demonstration that the interpretations in the challenged decision are

significantly different from previously established city interpretations, petitioners' contention the city erred by adopting the disputed interpretations in its final decision must fail. If the interpretation of these terms was a matter of first impression for the city, participants should have realized that a variety of interpretations might be adopted, and should have presented their evidence accordingly.

This subassignment of error is denied.

B. Substance

Petitioners challenge the substance of the city's interpretation of RSO 13.A.1 only with regard to the circumstances which "do not apply generally" provision.[15] Petitioners contend "[t]he effect of the city's interpretation is to eviscerate the express language, the purpose, and the underlying policy of the ordinance." Petition for Review 15. Petitioners argue that under the plain language of RSO 13.A.1, it would be reasonable to find this "exceptional circumstances" standard satisfied if the subject property shared a peculiar circumstance with only a small percentage (e.g. 5%) of other properties in the

[15]Petitioners also note the boundaries of the "vicinity" defined by the city, as quoted in the text supra, comprise a triangle that does not close at its northeast corner, because Longwood Drive does not quite intersect 22nd Street. However, this small "gap" in the northeast corner of the triangle does not appear to create any significant uncertainty as to what properties the city considers to be in the same "vicinity" as the subject property.

vicinity. According to petitioners, under the city's interpretation of "do not apply generally" as meaning "not shared with uniformity, or nearly so, by other properties in the vicinity," the city can find this standard satisfied so long as not all, or nearly all, of the properties in the vicinity share the circumstance in question. Record II 3. In other words, the exceptional circumstances standard could be satisfied even if the circumstance in question is shared with a majority of (but less than "nearly all") other properties in the vicinity. Petitioners contend this interpretation is contrary to the express language of RSO 13.A.1, because "exceptional circumstances" must mean "a characteristic that most other properties do not have." (Emphasis in original.) Petition for Review 16.

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 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[16]

[16]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, 879 P2d 1309, rev den 320 Or 407 (1994).

The Court of Appeals has explained this means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "clearly wrong." Reeves v. Yamhill County, 132 Or App 263, 269, ___ P2d ___ (1994); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

Petitioners do not claim RSO 13.A.1 implements any state statute, statewide planning goal or administrative rule. Petitioners do contend RSO 13.A.1 is contrary to the purpose and policy of the RSO, but provide no citation to any provisions of the plan or RSO establishing what that purpose or policy is. However, we agree with petitioners that the city's interpretation of "do not apply generally" is contrary to the express language of RSO 13.A.1.

RSO 13.A.1 states that the "exceptional circumstances" necessary for a variance exist when "[e]xceptional or extraordinary circumstances apply to the [subject] property which do not apply generally to other properties in the same vicinity * * *." The RSO does not define the terms "exceptional" or "extraordinary." However, the dictionary definition of "exceptional" is "forming an exception; being out of the ordinary: uncommon, rare." Websters Third New International Dictionary 791 (1981). The dictionary definition of "extraordinary" is "beyond or greater than what is due, usual, expected, necessary, or essential:

special." Id. at 806. Under the city's interpretation, an exceptional or extraordinary circumstance exists so long as the circumstance does not apply uniformly to all, or nearly all, of the properties in the same vicinity.

In other words, under the city's interpretation, a circumstance which applies to a majority (but less than nearly all) of the properties in the vicinity, would qualify as an "exceptional" or "extraordinary" circumstance. Stated more starkly, the city interprets "exceptional" or "extraordinary" circumstances as including all circumstances that are not universal or nearly universal. Such an expansive construction of the terms "exceptional" and "extraordinary" is impermissible, even under the highly deferential standard of review imposed by Clark. Such an interpretation is "clearly wrong." Goose Hollow Foothills League v. City of Portland, supra.

This subassignment of error is sustained.

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

The city's decision is remanded.