

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

3
4 CHRIS NOBLE,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 95-033
10 CITY OF FAIRVIEW,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 VISIONARY HOMES, INC., THOMAS)
17 S. DINETTE and ERNEST BRAWLEY,)
18)
19 Intervenors-Respondent.)

20
21
22 Appeal from City of Fairview.

23
24 Neil S. Kagan, Gresham, filed the petition for review
25 and argued on behalf of petitioner.

26
27 No appearance by respondent.

28
29 Daniel Kearns, Portland, filed the response brief and
30 argued on behalf of intervenors-respondent. With him on the
31 brief was Preston Gates & Ellis.

32
33 GUSTAFSON, Referee; LIVINGSTON, Chief Referee,
34 participated in the decision.

35
36 REMANDED 11/13/95

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision on remand,
4 approving a subdivision and Significant Environmental
5 Concern (SEC) permit.¹

6 **MOTION TO INTERVENE**

7 Visionary Homes, Inc., Thomas S. Dinette and Ernest
8 Brawley (intervenors) move to intervene on the side of
9 respondent. There is no opposition to the motion, and it is
10 allowed.

11 **FACTS**

12 This is petitioner's second appeal of a city council
13 decision approving a 12-lot subdivision and SEC permit.²

¹Petitioner requests that we take official notice of the June 17, 1991 Flood Insurance Rate Map for the City of Fairview, published by the Federal Emergency Management Agency. There is no opposition to the request, and it is allowed.

²The city characterizes the application as one for a limited land use decision. Petitioner disputes the characterization, contending approval of the SEC permit is a land use decision. The Fairview Zoning Ordinance (FZO) Section 3.603 describes the SEC overlay district permit requirement as follows:

"All uses permitted under the provision of the underlying district are permitted on lands designated SEC; provided, however, that the location and design of any use, or charge [sic] or alteration of a use * * * shall be subject to an SEC permit."

The SEC permit approval appears to be a limited land use decision under ORS 197.015(12)(b), which defines a limited land use decision to include:

"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

1 The proposed subdivision is located at the west end of
2 Fairview Lake, in an area previously subjected to
3 unauthorized fill activity. The site currently has 0.05
4 acre of wetlands under the jurisdiction of the Division of
5 State Lands (DSL). DSL has been working with the applicant
6 to develop a mitigation plan to address the previous fill
7 activity and the on-site wetlands.

8 The proposed subdivision is the first phase of what is
9 planned as a multi-stage development. Access to the
10 subdivision will ultimately be via NE 223rd Avenue. For the
11 immediate future, however, access will be via Interlachen
12 Lane. Because of the anticipated future development, the
13 city required the street through the subdivision to be built
14 to "collector street" standards, even though this
15 development will serve only 12 single family dwellings.

16 The notice of the initial evidentiary hearing before
17 the planning commission did not satisfy several provisions
18 of ORS 197.763.³ Although petitioner did not receive

limited to site review and design review [on a site within an
urban growth boundary.]"

Petitioner does not establish how the characterization of the decisions is critical to our evaluation and, in fact, the characterization is academic. The city does not have (or, if it does, we do not have an updated code that includes) a limited land use process. The city processed the application, and we review it, as a land use decision.

³ORS 197.763 was amended by the 1995 legislature. Petitioner's allegations refer to the original version. Petitioner alleges the notice violated ORS 197.763(2)(a)(A) because it was not sent to petitioner; ORS 197.763(3)(a) because it contained no notice of the SEC permit; ORS 197.763(3)(b) because it did not list applicable criteria from the zoning and subdivision ordinances; ORS 197.763(3)(f)(A) because it was mailed less

1 written hearing notice, she appeared and testified at the
2 planning commission hearing, and appealed the planning
3 commission's approval of the application to the city
4 council.

5 After a hearing on the record, the city council upheld
6 the planning commission's approval of the application.
7 However, while the record reflects that the city council
8 relied on the planning commission's findings, it did not
9 adopt them or in any way incorporate them into its final
10 decision. Rather, the city council treated the minutes of
11 the hearing at which it had upheld the planning commission's
12 approval as its final decision.

13 On appeal to LUBA, petitioner assigned as error the
14 city's failure to adopt findings. She also raised numerous
15 issues challenging the planning commission's findings, only
16 some of which she had raised before the city. She cited the

than 20 days before the hearing; ORS 197.763(3)(h) because it did not state the application would be available for inspection; ORS 197.763(3)(i) because it stated the staff report would be available less than seven days before the hearing, and did not state it would be available for inspection; and ORS 197.763(4)(b) and 197.763(6) because it did not include a statement that parties had the right to request a continuance or that the record be left open. Petitioner also alleges the city violated ORS 197.763(5)(a) by failing to announce the applicable criteria at the commencement of the planning commission hearing. The city does not dispute the ORS 197.763 defects. We note that some of the allegations are not factually supported, though we agree the written notice and oral announcement violated former ORS 197.763. We note, however, that former ORS 197.763(4)(b) and 197.763(6) did not require that the notice of hearing include statements regarding the right to a continuance or right to request that the record be left open.

Petitioner also alleges several violations of ORS 197.195. The city did not process the application as a limited land use decision, and we do not address those alleged violations.

1 city's violation of several provisions of ORS 197.763 as her
2 authority to raise new issues for the first time on appeal.
3 Noble v. City of Fairview, ___ Or LUBA ___ (LUBA No. 93-194,
4 October 5, 1994) (Noble I).

5 After petitioner filed her petition for review the city
6 moved for voluntary remand "to permit the city to address
7 the allegations of error made by petitioner in her Petition
8 for Review." (Noble I, Motion for Voluntary Remand,
9 September 23, 1994). Petitioner did not object to that
10 motion. Accordingly, LUBA remanded the city's decision, to
11 allow the city to "conduct additional proceedings to address
12 all allegations of error contained in the petition for
13 review filed in this appeal." Noble I, slip op 1.

14 On remand, the city did not reopen the record.
15 Instead, on January 25, 1995, the city council adopted new
16 findings to address each of petitioner's allegations of
17 error. On February 14, 1995, petitioner appealed that
18 decision to LUBA. The same day, the city voluntarily
19 withdrew its decision, and thereafter provided public notice
20 of "Recall and Reconsideration of Decision on Subdivision
21 Remand (Blue Heron Shores Subdivision)," which stated as
22 follows:

23 "At a special meeting of January 25, 1995, the
24 City Council deliberated on the Blue Heron Shores
25 Subdivision application on remand from the Land
26 Use Board of Appeals. During this remand
27 proceeding, the City Council did not allow any new
28 evidence or argument to be submitted by any party,
29 nor did the Council permit any comments on the

1 proposed findings it considered at the January 25,
2 1995 meeting. At the conclusion of the meeting,
3 the City Council approved the subdivision
4 application.

5 "The City Council hereby notifies all interested
6 parties that it is recalling the January 25, 1995
7 decision for further consideration. In
8 particular, any interested party is invited to
9 submit written comments on the proposed findings
10 expressed in the findings which were under
11 consideration at the January 25, 1995 meeting.
12 Only written comments will be accepted, and all
13 such comments shall be limited to the proposed
14 interpretation of the following ordinances and
15 sections:

16 "Ordinance 10-1990 (Subdivision Ordinance);

17 "Ordinance 9-1990 (Zoning Ordinance) Sections
18 3.224, 3.60, and Article 4; and

19 "Ordinance 4-1990 (Special Flood Hazard Areas
20 Ordinance)[.]

21 "* * * The City Council will not accept or
22 consider any material received after this time nor
23 comments on any other issues.

24 "* * * * *" Remand Record 47. (Emphasis in
25 original.)

26 Petitioner's attorney submitted written comments,
27 objecting to the city's interpretation and application of
28 eight provisions of the city's subdivision and zoning
29 ordinances. In his comments he also objected to the city's
30 refusal to allow him to present his arguments orally.⁴

31 On March 15, 1995, the city council approved the

⁴In this appeal petitioner does not assign as error the city's refusal to allow oral argument or the city's decision not to reopen the record on remand.

1 application again, and adopted new findings. Petitioner
2 appeals that decision.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner assigns as error the city's failure to
5 address five standards petitioner alleges are applicable
6 under Fairview Subdivision Ordinance (FSO) 3.01(B), which
7 requires a subdivision application to comply with "The
8 City's Zoning Ordinance and all other applicable laws of
9 this City or appropriate agency or jurisdiction."

10 Petitioner acknowledges she did not raise any of the
11 five standards before the city, either during the initial
12 hearing or on remand. However, she argues she was not
13 required to raise those issues below because of the city's
14 ORS 197.763 violations during the initial evidentiary
15 hearing.⁵ Citing Beck v. City of Tillamook, 313 Or 148, 831
16 P2d 678 (1992) and Citizens for Responsible Growth v. City
17 of Seaside, 26 Or LUBA 458, 461-462 (1994), petitioner
18 contends the ORS 197.763 violations during the initial
19 planning commission hearing "taint the remand proceedings"
20 and "help to determine" this Board's scope of review in a
21 second appeal. Petition for Review 7. Petitioner reasons
22 that, so long as she could not have raised the issues in
23 Noble I, she may raise new issues for the first time in this

⁵Petitioner does not allege any prejudice as a result of the ORS 197.763 violations, but only that the violations allow her to raise new issues on appeal.

1 proceeding; she was under no obligation to raise them during
2 the remand proceeding.

3 Intervenors respond that petitioner extends Beck too
4 far, and that petitioner is precluded from raising new
5 issues which she could have, but did not, raise during the
6 remand proceeding. According to intervenors, the fact that
7 the city violated ORS 197.763 during the initial proceeding
8 is irrelevant on remand, since ORS 197.763 does not apply to
9 remand proceedings; and, because ORS 197.763 does not apply,
10 the requirements of ORS 197.835 cannot be excused by an
11 earlier violation of ORS 197.763.

12 Both parties dispute the extent to which ORS 197.835
13 applies on an appeal after a remand proceeding. ORS
14 197.835, in its present version, states, in relevant part:

15 "(3) Issues shall be limited to those raised by
16 any participant before the local hearings body as
17 provided by ORS 197.195 or 197.763, whichever is
18 applicable.

19 "(4) A petitioner may raise new issues to the
20 board if:

21 "* * * * *

22 "(b) The local government failed to follow
23 the requirements of ORS 197.763(3)(b)^[6],
24 in which case a petitioner may raise new
25 issues based upon applicable criteria
26 that were omitted from the notice.
27 However, the board may refuse to allow

⁶ORS 197.763(3)(b) requires that the written notice of hearing must
"list the applicable criteria from the ordinance and the plan that apply to
the application at issue."

1 new issues to be raised if it finds that
2 the issue could have been raised before
3 the local government * * *."

4 * * * * *

5 Petitioner's premise is that, since the proceedings on
6 remand are a continuation of the initial proceeding, a
7 violation of ORS 197.763 during the initial evidentiary
8 hearing follows the proceeding to its conclusion, and that
9 the requirement of ORS 197.835 that issues must be raised
10 below, is eliminated for the duration of the case.⁸ We
11 agree with intervenors' conclusion that this premise extends
12 Beck too far. The court's characterization in Beck that
13 remand proceedings and a subsequent LUBA appeal are "two
14 phases of the same case," simply does not compel the
15 conclusion that once any procedural error is committed, it
16 cannot be cured. Beck, 313 Or at 151. Nor does our
17 analysis in Citizens for Responsible Growth support such a
18 conclusion.

19 We do not agree with intervenors, however, that the

⁷ORS 197.835 was amended by the 1995 Oregon Legislature, and became effective September 11, 1995. Because this statute affects procedural, and not substantive, rights, we apply it immediately. See Antonaci v. Davis, 108 OR App 693, 816 P2d 1202 (1991); State v. Tucker, 90 Or App 506, 753 P2d 427 (1988).

⁸Petitioner's analysis is based, to some extent, on the pre-1995 statutory framework and on case law that was overturned by the amendments to ORS 197.835. Prior to the 1995 amendments to ORS 197.835, if the local government failed to provide notice of any applicable criteria, petitioners on appeal could raise any new issues, regardless of the whether the defective notice related to the issues appealed. See Wuester v. Clackamas County, 25 Or LUBA 425 (1993).

1 city's violation of ORS 197.763 is not relevant on remand,
2 or that the provision of ORS 197.835 that allows parties to
3 raise new issues on appeal in certain circumstances does not
4 apply to LUBA appeals after remand.

5 Intervenor is correct that, on remand, the ORS 197.763
6 procedural requirements for the conduct of an initial
7 evidentiary hearing are not required. Caine v. Tillamook
8 County, 25 Or LUBA 209 (1993); Wentland v. City of Portland,
9 23 Or LUBA 321 (1992). However, if the decision on remand
10 is appealed to LUBA, our scope of review is again dictated
11 by ORS 197.835. Accordingly, the necessary prerequisite of
12 ORS 197.763(3)(b), that parties are entitled to know the
13 criteria upon which the application is evaluated, also
14 continues. To the extent parties were not properly apprised
15 of the applicable criteria during the initial hearing, they
16 must be provided the information required by ORS
17 197.763(3)(b) on remand. So long as the parties to the
18 remand proceeding are apprised of the criteria, they must
19 raise all related issues during that proceeding in order to
20 raise them on a subsequent appeal to LUBA.

21 Petitioner raised numerous issues on appeal in Noble I.
22 While petitioner's initial challenge was that the city
23 council failed to adopt findings, she also identified the
24 planning commission findings, upon which the city council
25 relied, but did not adopt, prior to its initial decision.
26 She thoroughly challenged the merits of those findings,

1 along with other issues not identified in the decision.
2 Then, on remand, petitioner was provided written notice of
3 the criteria, and given the opportunity to comment on all
4 issues related to the city's subdivision ordinance, portions
5 of the zoning ordinance, and the Special Flood Hazard Areas
6 Ordinance (SFHAO).

7 Petitioner does not challenge the adequacy of the
8 city's notice on remand wherein it listed the applicable
9 criteria. Nor does petitioner argue she was unaware of the
10 scope of the criteria upon which the application was
11 evaluated. Petitioner did, in fact, provide written
12 comments regarding several provisions of the subdivision and
13 zoning ordinances in response to the city's notice.

14 The notice of the remand proceeding in this case
15 adequately apprised the parties of the applicable criteria.
16 Petitioner could have, but did not, raise the issues raised
17 in her first assignment of error during the remand
18 proceeding. Under ORS 197.835(3), she cannot raise them for
19 the first time on appeal.⁹

20 The first assignment of error is denied.

⁹Petitioner challenges the city's lack of findings on development standards relevant at the time of final plat approval, and DSL requirements for issuance of DSL permits, over which the city has no jurisdiction or authority. We note that, even if petitioner had not had the opportunity to raise issues regarding compliance with FSO 3.01 during the remand proceeding, and could raise them here for the first time, none of petitioners five challenges would merit remand or reversal. None are approval criteria for a preliminary subdivision plat, which is the subject of this application.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends the city misconstrued and violated
3 FSO 3.02(B), and that the record lacks evidence to support
4 the city's findings that the street rights-of-way and
5 surfaces within the proposed development are adequate to
6 accommodate anticipated traffic.

7 FSO 3.02(B) states:

8 "Street right-of-way and surfaces, including
9 curbs, gutters, and sidewalks, shall be adequate
10 to accommodate the type and volume of anticipated
11 traffic." Remand Record 7.

12 The city found the street through the proposed 12-lot
13 subdivision satisfies this requirement, stating, in part:

14 "The proposed subdivision street will eventually
15 be extended to NE 223rd Avenue with future
16 development. The street is intended to function
17 as a "collector street", which will serve the
18 future traffic circulation needs of the
19 neighborhood. In order to accomplish this
20 objective, the proposed street will require
21 construction based on a collector standard. The
22 proposed street right-of-way and surface
23 improvements * * * comply with the City's
24 collector street standard. Therefore, this
25 criterion is satisfied.

26 "The Petitioner argues that a finding of adequacy
27 requires an investigation of traffic sources,
28 types and volumes before it may conclude that the
29 proposed streets will be adequate. We disagree.
30 We find the 12-lot subdivision will generate
31 approximately 120 residential vehicle trips per
32 day (10 vehicle trips per day per dwelling.) A
33 collector street standard is more than adequate to
34 accommodate this level of traffic. Moreover,
35 because this street will likely serve future
36 phases of this development, a larger standard is
37 required. However, the adequacy of this street

1 must be evaluated in the context of applications
2 for any future phases for this development at the
3 time any such applications are received. In any
4 event, we find the internal streets proposed in
5 this development are adequate to handle the
6 traffic generated by this application, we cannot
7 and do not require more [sic]. Record 7.

8 Petitioner argues that the "reference to anticipated
9 traffic is open-ended," and that, accordingly, the "city is
10 not permitted to restrict its analysis of traffic
11 anticipated from the subdivision only." Petition for Review
12 16. According to petitioner, the city is also required to
13 evaluate the traffic anticipated from future development and
14 the type and volume of traffic on streets outside the
15 proposed subdivision.

16 Petitioner advances a much more demanding
17 interpretation of FSO 3.02(B) than does the city. However,
18 regardless of the potential merit of petitioner's
19 interpretation, under ORS 197.829 we are required to affirm
20 the governing body's interpretation of its own local
21 ordinances unless that interpretation is clearly wrong or
22 "beyond colorable defense." Zippel v. Josephine County,
23 128 Or App 458, 461, 876 P2d 854, rev den 320 Or 272 (1994);
24 See Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

25 Petitioner has not established the city's
26 interpretation of FSO 3.02(B) is clearly wrong, or beyond
27 colorable defense. The city's interpretation is within its

1 interpretive discretion, and we affirm it.¹⁰

2 Petitioner also challenges the evidentiary basis for
3 the city's interpretation. In particular, petitioner argues
4 there is no evidence in the record to support the city's
5 conclusion that the proposed 12 single family dwellings will
6 generate an average of 120 vehicle trips (or 10 trips per
7 dwelling) per day, or that the collector street for the
8 subdivision will be adequate to accommodate 120 trips per
9 day.

10 Intervenors' response brief does not respond to
11 petitioner's substantial evidence challenge. At oral
12 argument, intervenors responded that the calculation that 12
13 households will generate an average of 120 vehicles trips
14 were day is based on industry standards, whereby traffic
15 calculations are uniformly based on an average of 10 vehicle
16 trips per household per day. Intervenors acknowledge,
17 however, that the industry standards are not in the record.
18 Nor do intervenors direct us to any evidence in the record
19 to support either the city's calculation or its conclusion
20 that the anticipated 120 trips per day can be accommodated
21 by the proposed street.

¹⁰Petitioner's proposed interpretation would require the city to speculate the extent of future development and the amount of traffic to be generated by the as yet unplanned development, then require this proposal to accommodate that future development. While such an exercise might be profitable in a legislative context, the city is not obligated, or even permitted, to require such projections or exactions in the context of this quasi-judicial subdivision application.

1 It is incumbent upon the city to support its
2 conclusions with evidence. Neuman v. City of Albany, 28 Or
3 LUBA 337 (1994); Doob v. Josephine County, 27 Or LUBA 203
4 (1994). Because the city has not explained, based on
5 evidence in the record, how it reached its conclusion that
6 FSO 3.02(B) is satisfied, we must sustain petitioner's
7 challenge.

8 The second assignment of error is sustained, in part.

9 **THIRD ASSIGNMENT OF ERROR**

10 Petitioner contests the city's finding that FZO
11 3.609(K), governing fill and removal activities, is not an
12 applicable approval criterion. Petitioner contends that,
13 since the proposed development will require removal and fill
14 of 0.05 acres of jurisdictional wetland, FZO 3.609(K) is
15 applicable, and that the city's misconstruction and
16 violation of FZO 3.609(K) renders the findings insufficient
17 to establish compliance with all mandatory approval
18 criteria.

19 FZO 3.609(K) states:

20 "Extraction of aggregate and minerals, the
21 depositing of dredge spoils and similar activities
22 shall be conducted in a manner designed to
23 minimize adverse effects on water quality, fish
24 and wildlife, historical or archaeological
25 features, vegetation, erosion, stream flow, visual
26 quality, noise, and safety, and to guarantee
27 necessary reclamation."

28 The city determined FZO 3.609(K) was not applicable to
29 the proposed subdivision, based on the following finding:

1 "The proposed subdivision will not involve the
2 extraction of aggregate material or the depositing
3 of dredge spoils. Therefore, this criterion does
4 not apply. We reach this conclusion despite the
5 Petitioner's argument that normal construction
6 activities constitute "fill" within the meaning of
7 this section. We find that §3.609K was intended
8 to regulate traditional fill and removal
9 activities, not the relatively modest amount of
10 earth moving involved in construction of a
11 residential subdivision. Also, all earth moving
12 activities involved in this development shall be
13 subject to the applicable standards of the City's
14 Erosion Control Ordinance (Ordinance No. 3-1993)
15 as required by Condition 4E of the June 87, 1993
16 staff report. We find it is possible for this
17 development to comply with the standards of that
18 ordinance and that such compliance is a sufficient
19 basis for finding compliance with §3.609K."
20 Record 18.

21 Petitioner interprets FZO 3.609(K) differently than
22 does the city. Petitioner's disagreement with the city's
23 interpretation does not establish the city's interpretation
24 is clearly wrong, or beyond colorable defense. Rather, the
25 city's interpretation, that FZO §3.609(K) applies only to
26 the extraction of aggregate material or the depositing of
27 dredge spoil, is consistent with the language of the
28 ordinance, and we affirm it. ORS 197.829; Zippel, 128 Or
29 App 458 at 461; Clark, 313 Or 508.¹¹

30 The third assignment of error is denied.

31 **FOURTH ASSIGNMENT OF ERROR**

32 Petitioner contends the city's finding that wetland

¹¹Petitioner does not challenge the evidentiary support for the city's finding based on the city's interpretation of FZO 3.609(K).

1 habitat around Fairview Lake will be preserved misconstrues
2 and violates FZO 3.609(Q) and lacks evidentiary support in
3 the record.

4 FZO 3.609(Q) states, simply, that "the applicable
5 policies of the Comprehensive Plan shall be satisfied."
6 Petitioner's challenge relates to the Comprehensive Plan's
7 Natural Resources Policy.¹² The version of the policy in
8 effect when the application was filed states:

9 "Preserve riparian and wetland habitat around
10 Fairview Lake and along the Fairview Creek
11 channel."

12 Petitioner asserts the city ignored the fact that the
13 proposed development will fill 0.05 acres of jurisdictional
14 wetland. According to petitioner, "preserve" mandates that
15 what is there now must stay. While the "mitigation" plan
16 may enhance the existing wetland and increase the amount of
17 wetland on the site, it cannot disturb the 0.05 acres of
18 existing wetland.

19 The city did not accept petitioner's interpretation.

¹²That policy was amended March 11, 1993, but not acknowledged prior to the filing of this application. As amended, it states:

"To limit conflicting uses with identified resource areas to provide habitat for wildlife, to provide visual diversity, and to enhance water quality in a manner that will maintain the attractiveness and livability of the City."

The city found the application complies with both versions. Intervenors do not, however, dispute that the unamended version applies to this application. Since the amendment was adopted prior to November 3, 1993, the unamended version of the policy applies to this case. See ORS 197.625.

1 The city described the impacts of the applicant's proposed
2 mitigation plan as follows:

3 "The proposed mitigation plan can be expected to
4 raise the site's natural resource values by
5 enhancing and expanding the wetland area. The
6 implementation of this plan will provide more
7 wildlife habitat than presently exists; create a
8 greater visual diversity by adding a variety of
9 native vegetation (compared to the current reed
10 canary grass which dominates much of the site);
11 and continue to enhance water quality. The
12 resulting wetlands will provide an attractive open
13 space which should contribute to the livability of
14 Fairview. Record 21.

15 Specifically in response to the unamended Natural
16 Resource Policy, the city found, in part:

17 "We find this unamended version of the Natural
18 Resource Policy to be met by this application
19 because the applicant is proposing extensive
20 wetland mitigation[.] * * * We find that strict
21 adherence to this mitigation plan not only will
22 preserve the riparian and wetland habitat values
23 identified in the ESEE report, but will enhance
24 those resources beyond what is presently there."
25 Id.

26 The city's interpretation is not clearly wrong or
27 beyond colorable defense. We reject petitioner's
28 interpretation that "preserve riparian and wetland habitat"
29 precludes a mitigation plan which, in exchange for fill of a
30 modest amount of wetland, a larger area will be created and
31 the existing surrounding wetland enhanced. We affirm the
32 city's interpretation. ORS 197.829; Zippel, 128 Or App 458
33 at 461; Clark, 313 Or 508.

34 The fourth assignment of error is denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioner challenges the city's finding that the
3 proposed subdivision complies with SFHAO 10(d)(2), which
4 requires utility lines be located and constructed to
5 minimize flood damage. Petitioner contends the city failed
6 to find that utilities within streets will be located and
7 constructed to minimize flood damage.

8 Petitioner acknowledges she did not raise this issue on
9 remand before the city. Petitioner was provided the
10 opportunity to testify in writing regarding compliance with
11 the SFHAO during the remand proceedings. As discussed in
12 the first assignment of error, when petitioner was
13 explicitly provided the opportunity to raise issues
14 regarding compliance with this ordinance before the city,
15 but did not do so, she may not raise this issue for the
16 first time on appeal. ORS 197.835(3).

17 The fifth assignment of error is denied.

18 The city's decision is remanded.