BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY BROWN, Petitioner, vs. CITY OF ONTARIO, Respondent, and RICHARD D. WETTSTEIN, Intervenor-Respondent.	LUBA No. 96-209 FINAL OPINION AND ORDER

Appeal from City of Ontario.

Gary Brown, Ontario, filed the petition for review and argued on his own behalf.

Michael W. Franell, City Attorney, Ontario, filed a response brief and argued on behalf of respondent.

Jeannette M. Launer, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Stoel Rives.

LIVINGSTON, Referee, participated in the decision.

AFFIRMED 05/01/97

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the city council that approves the tentative plan of a residential subdivision on county land to be annexed to the city pursuant to a development agreement.

MOTION TO INTERVENE

Richard D. Wettstein (intervenor), an applicant below, moves to intervene on the side of the respondent.[1] There is no opposition to the motion, and it is allowed.

FACTS

The subject property includes 10.41 acres located in the city's Urban Growth Area.[2] The north edge of the property borders Hunter Lane, and the east edge borders N.W. 19th. The proposed subdivision plan includes 35 residential lots to be developed in two phases of first 17 and then 18 lots. The area to be included in the first development phase is relatively flat. At least part of the area to be included in the second development phase is steeply sloped.

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[1]There were two applicants below. Only one intervened in this proceeding.

[2]The city's brief explains the Urban Growth Area is governed by an Urban Growth Area Joint Management Agreement (JMA), enacted by the city and by Malheur County, which gives the city "lead authority" to review all annexation requests. The JMA has not been furnished to us. We infer it also authorizes the city to review subdivision requests in areas to be annexed. Petitioner does not dispute the city's jurisdiction on the basis that the subject property is outside the city limits.

The city planning commission held a public hearing on May 30, 1996, and voted to recommend approval of the tentative plan. The city council held a public hearing on June 17, 1996, and remanded the application to the planning commission for reconsideration. The planning commission then held "special" public hearings on August 6 and August 27, 1996, and again voted to recommend approval of the tentative plan. The city council held public hearings on September 16 and September 23, 1996. Both intervenor and the opponents of the proposed subdivision submitted additional written evidence prior to October 1, 1996. Record 81-142. On or about October 1, 1996, the staff prepared a report to the city council that included additional evidence. Record 48-80. On October 4, 1996, intervenor and his wife submitted a letter that included argument addressing materials submitted after September 23, 1996. Record 47.

On October 7, 1996, the city council reviewed the materials submitted after September 23, 1996. The council did not invite additional public testimony, but deliberated and then approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner states the city "lacks jurisdiction" to approve the subject application because the north 30 feet of the proposed subdivision do not belong to the applicants. Petition for Review 3. We understand petitioner to contend

the applicants lack standing to apply for subdivision approval on land they do not own. Petitioner relies on Ontario City Code (OCC) 10B-02-10, which provides, in relevant part:

> "APPLICATION AND STANDING TO INITIATE. An application for a land use action may be initiated by the owner of the property involved or an authorized agent. Authorization to act as an agent shall be in writing and filed with the application. * * *"

Petitioner argues, in essence, that since the north 30 feet of the proposed subdivision belong to a neighbor opposed to the development, the applicants could not initiate an application to develop that portion of the property.

The city and intervenor (respondents) do not dispute that if the applicants do not own the north 30 feet of the proposed subdivision, the applicants do not have standing to initiate a development application that includes that portion of the property. However, respondents maintain that the applicants do own the north 30 feet of the proposed subdivision and, therefore, do have standing.

As a review body, we are authorized to reverse or remand a local government's land use decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(7)(a)(C). Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988). Substantial evidence is evidence upon which a reasonable person would rely in reaching a decision. City of Portland v. Bureau of Labor

and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). We will defer to the city's choice between conflicting evidence if a reasonable person could reach the city's decision. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995); McInnis v. City of Portland, 25 Or LUBA 376, 385 (1993).

The parties dispute the exact location of a 1/16 section line to the north of the subject property. The location of the section line is important because petitioner argues the south side of Hunter Lane presently follows the section line and, "[i]n order to correct past mistakes, the extended road needs to be shifted 30 feet to the south so that the middle of the road is on the actual section line." Petition for Review 5. According to petitioner, the south half of Hunter Road, included on the subdivision plat as part of the subject property, is actually the land of the property owner to the north.

Petitioner relies on a 1980 transportation plan map and an "official survey" done for a federally funded sewer project for the city, called "Outfall C." Petitioner contends:

> "The Outfall C project placed a sewer manhole precisely on the section line that identifies the property boundaries. This manhole, the key to this property boundary, is in direct east-west alignment with the southern edge of Hunter Lane and the actual location of the section line. This manhole is the most northerly manhole on the

applicant's property." Petition for Review 7.

Respondents answer that a professional surveyor trained to locate the property boundaries prepared the subdivision plan, and a "record of survey" was placed in the record. The city argues further that the plan drawings for the Outfall C sewer line in fact support a conclusion that the sewer manhole is not located on the 1/16th section line, but at "Engineering Station 13+51.7, which in layman's terms is 1,351.7 feet South of the North Section Line." Respondent Ontario's Brief 4. The city notes that were the section a "standard section" of 5,280 feet in length, the distance to the 1/16th section line would be 1,320 feet, not 1,351.7 feet. However the section involved is not a standard section, and thus there is a discrepancy of roughly 30 feet. The city's position is essentially consistent with the testimony of the applicants' surveyor before the city planning commission that there is a discrepancy of 27.5 feet. Record 596. The city attorney/planning director[3] testified before the city planning commission that the transportation and sewer maps, upon which petitioner depends, are based on aerial photographs and are not entirely reliable. Record 597.

Petitioner makes several other arguments about the evidence that do not merit discussion. Assuming the

[3]The city attorney is also the city planning director.

evidence on the location of the north boundary line is actually conflicting, which is not apparent, a reasonable person could reach the same conclusion as the city.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends procedural errors on the part of the city require remand.

A. Violation of ORS 197.763(6)(b)

Petitioner contends the city failed to provide opponents an opportunity to rebut evidence submitted by the applicants after the September 23, 1996 city council hearing and prior to the city's final decision on October 7, 1996. Petitioner complains it was not clear at the end of the September 23, 1996 hearing whether the hearing was being continued under ORS 197.763(6)(b) or whether the record was being left open for additional written evidence or testimony under ORS 197.763(c).[4]

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[4]ORS 197.763(6) provides, in relevant part:

"* * * * *

"(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence and testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence or testimony

The minutes of the September 23, 1996 city council meeting state:

> "There being no further proponent testimony and no further opponent testimony, the Mayor declared the hearing closed.
>
> "[The Mayor] stated the action was to leave the written record open for seven days from tonight's date and take final action one week from tonight, the first Council meeting in October would be October 7th." Record 159.

It was clear that the hearing was not being continued under ORS 197.763(6)(b), but that instead, the record was being left open for additional written evidence or testimony under ORS 197.763(c).

Next, petitioner contends that the attorney for the applicants submitted written comments only 45 minutes before the deadline, making it impossible for petitioner to

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> for the purpose of responding to the new written evidence.
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> "(c) If the hearings authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
>
> "* * * * *
>
> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence."

respond. However, petitioner acknowledges he did not file a written request with the city for an opportunity to respond to new evidence submitted during the period the record was left open. Under ORS 197.763(c), he was required to do so to protect his right to respond.

Finally, petitioner contends the city should have provided an opportunity to submit a written rebuttal to the comments of the applicants' attorney because the city accepted written argument from the applicant on October 4, 1996. However, the city acted in accordance with ORS 197.763(6)(e), which allows an applicant seven days after the record is closed to all other parties to submit final written arguments in support of the application.

This subassignment of error is denied.

B. Negotiations to Sell Lots

Petitioner contends the city violated ORS 92.016(1) in approving the proposed subdivision plan.[5] Petitioner notes the city mayor stated for the record at the June 17, 1997

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[5]ORS 92.016(1) provides:

> "No person shall sell any lot in any subdivision with respect to which approval is required by any ordinance or regulation adopted under ORS 92.044 and 92.048 until such approval is obtained. No person shall negotiate to sell any lot in a subdivision until a tentative plan has been approved."

"Negotiate" is defined by ORS 92.010(4) as follows:

> "'Negotiate' means any activity preliminary to the execution of a binding agreement for the sale of land in a subdivision or partition, including but not limited to advertising, solicitation and promotion of the sale of such land."

city council meeting that his wife had discussed the possible purchase of property in the subdivision with the applicants before deciding to make an offer on another piece of property.

Petitioner appeals the city's decision. We do not decide here whether the applicants violated ORS 92.016(1) in discussing the possible purchase of property in the subdivision with the mayor's wife prior to tentative plan approval. To the extent petitioner makes an argument related to improper bias on the mayor's part as a result of the discussion, see, e.g. 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 742 P2d 39 (1987), the argument is not sufficiently developed to permit review. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982). Petitioner does not demonstrate he was prejudiced as a result of the applicants' contact with the mayor's wife. We understand the mayor's disclosure to have been prompted by ORS 227.185(3).[6] It was not an admission of bias.

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[6]ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the

This subassignment of error is denied.

C. City's Failure to Consider All Alternatives

Petitioner contends the city erred in failing to consider the alternative of denial when it made its decision. According to petitioner, the planning commission and city council were under an obligation to discuss denial, as well as approval or approval with conditions, if the record supported denial.

We agree with petitioner that the planning commission and city council were under an obligation to consider denial if the record required denial. However, we understand both the planning commission and city council to have concluded the record supported approval. Therefore, neither body had an obligation to consider denial.

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the city violated ORS 92.090(2)(c) by failing to ensure the tentative plan complied with the OCC.[7] Petitioner makes three subassignments of error based

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substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[7]ORS 92.090(2)(c) requires, among other things, that a tentative plan for a subdivision comply with applicable local "regulations adopted under ORS 92.044 that are then in effect for the city or county within which the land described in the plan is situated."

on his contention that certain information required by OCC 10C-01-055 is missing from the tentative plan.[8]

As an initial point, we note that OCC 10C-01-055 permits information otherwise required with the tentative plan for a subdivision to be shown on the tentative plan or accompanying material. It also permits the planning official to approve the deletion of any item deemed by that official to be unnecessary.

Furthermore, as a general rule, the omission of information required by the local code from a development

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[8]OCC 10C-01-055 provides, in relevant part:

> "INFORMATION REQUIRED WITH THE TENTATIVE PLAN. The following information shall be shown on the tentative plan or accompanying material for a subdivision, or partition when applicable. The planning official or director of public works may approve the deletion of any item deemed by them to be unnecessary.
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> "* * * * *
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> "9. The location and direction of watercourses including all irrigation and drain ditches and the location of areas subject to flooding and duration of flood.
>
> "* * * * *
>
> "18. The location within the land development and in the adjoining streets and property of existing sewers, water mains, culverts, and drain or irrigation pipes and ditches.
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> "* * * * *
>
> "22. If lot areas are to be graded, a plan showing the nature of cuts and fills and information on the character of the soil.
>
> "* * * * *"

application is harmless procedural error if the required information is located elsewhere in the record. To obtain reversal or remand of the challenged decision on the basis of such an omission, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. Furler v. Curry County, 27 Or LUBA 497, 502 (1994).

A. Thayer Ditch

Thayer Ditch is a drainage or irrigation ditch that crosses the northwest corner of the subject property. It is shown on various maps of the area and is mentioned in deeds to an adjacent property. Record 123, 170-79, 226, 229, 231. During the city council's September 23, 1996 meeting, Thayer Ditch was the subject of extensive discussion between opponents and proponents of the proposed development and several city staff, including the planning director. Record 146-49.

Petitioner assigns error to the applicants' failure to show Thayer Ditch on the preliminary plan, as required by OCC 10C-01-055(9) and (18). However, there is enough information elsewhere in the record, including a map provided by an opponent at Record 231, to locate Thayer Ditch with sufficient specificity to satisfy

OCC 10C-01-055.[9]

This subassignment of error is denied.

B. Cuts and Fills

Petitioner contends the information submitted by the applicants does not satisfy OCC 10C-01-05(22), which, "[i]f lot areas are to be graded," requires "a plan showing the nature of cuts and fills and information on the character of the soil." When petitioner raised this issue below, the applicants' surveyor explained that the plans submitted include a tentative plan that shows lots with existing contour lines and a tentative grading and drainage plan that shows lots with future, post-grading contour lines. Record 485, 488. To determine the nature of cuts and fills, a person can "pick any point on the plans and subtract the differences to see the cut or fill at any point on the plans." Petition for Review 24 (transcript of surveyor testimony at August 6, 1996 planning commission meeting). The challenged decision finds the tentative grading and drainage plan "shows the nature of cuts and fills for lot areas to be graded." Record 5.

We reject petitioner's argument that the tentative grading and drainage plan was submitted to satisfy the

[9]Petitioner does not assign error to the city's conclusion that the lands of the proposed subdivision are not burdened by an easement, right-of-way or license for the Thayer Ditch. The conclusion relies in part on a report from an attorney retained by the applicants who so opined after investigating and analyzing the deeds and maps submitted by opponents. Record 124-38. See also Record 48-80, 146-49.

requirement in OCC 10C-01-05(7) that the tentative plan show contour lines. That requirement was addressed by the tentative plan itself. Record 485. The contour lines in the tentative grading and drainage plan describe the slopes that will exist after grading is completed.

Petitioner's other contentions address the level of detail that should be required in a plan showing "the nature of cuts and fills." Petitioner argues there must be some illustration of the actual nature of cuts and fills proposed for individual lots in the grading plan. Petitioner contends that certain lots to be developed in the second phase will, because of their slope, require grading that is not shown on the grading plan. Petitioner maintains that a retaining wall or other safety feature will be necessary for hillside lot stability, and this "reality on the ground" is not adequately illustrated in the grading plan. Petition for Review 25.

OCC chapter 10B-55 (Partitions and Subdivisions) requires the city planning commission to consider certain decision criteria "as appropriate." Although this subassignment of error specifically contends only that certain information required by OCC 10C-01-05(22) is missing from the preliminary plan, petitioner's arguments adequately raise the issue of whether there is adequate evidence in the materials submitted by the applicants to allow the city to determine compliance with the fourth decision criterion,

stated in OCC 10B-55-30(4): "The ability of all lots to be built upon as of right under the zoning currently governing the land."

The challenged decision finds that although it appears a few of the lots will be "very limited as to the size and shape of home that can be built," even these lots "appear to be 'buildable'" under the OCC. Record 5. Relying on a report furnished by an environmental consultant, which is at Record 411, the decision identifies the soil on the subject property as Owyhee silt loam.[10] It concludes the proposed street and lot designs meet the maximum grading standards allowed by the OCC. Id.

Petitioner does not dispute the city's finding, based on the tentative grading and drainage plan, that each lot "appears" buildable, notwithstanding the difficulties associated with development on certain lots. Record 5. We understand the city to have made a determination that it is feasible to comply with OCC 10B-55-30(4). The commentary of the applicants' engineer, which accompanies the preliminary plan, explains that "final grading and terracing [will be] left up to the prospective buyers to fit their individual home design." Record 478.

To the extent that petitioner contends that every

[10]The challenged decision mentions that the soil classification was disputed at the August 6, 1996 planning commission hearing, but petitioner does not dispute the soil classification in this appeal.

grading detail with respect to individual lots must be worked out at the time of the preliminary plan, we disagree. The city made a feasibility determination, supported by substantial evidence provided by the applicants' engineer. The city then deferred to a later date the actual adoption of technical solutions, on a lot-by-lot basis, to the grading problems posed by slope and soils concerning the construction of individual residences.[11] As we explained in a similar case:

> "The lack of a requirement for a complete technical solution at the tentative plan approval stage will likely not satisfy opponents who believe a satisfactory technical solution is not possible. On the other hand, the applicant frequently will be motivated to keep costs as low as possible until tentative plan approval is assured, and may not want to incur the costs of providing additional information where questions are raised concerning particular approval standards or site conditions. The city's obligation is to require sufficient information at the tentative plan approval stage to make the initial determination of feasibility. As long as the determination of feasibility is adequately explained and supported by substantial evidence, i.e. evidence a reasonable person would accept as adequate to support the decision, the city may properly defer final engineering review to its staff." Southwood Homeowners Assoc. v. City of Philomath, 21 Or LUBA 260, 272-73 (1991).

This subassignment of error is denied.

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[11]These technical requirements are found in OCC chapter 10C-30. With certain exceptions that do not apply here, OCC 10C-30-20 requires a permit before any grading is done.

C. Location of 500-Year Floodplain

Petitioner contends the information submitted by the applicants does not satisfy OCC 10C-01-05(9), which requires the preliminary plan show "[t]he location * * * of areas subject to flooding and duration of flood." Although there is no dispute that the subject property is not within the 100-year floodplain, petitioner contends part of the north end of the property is within the 500-year floodplain.

The challenged decision finds that no portion of the subject property is in the floodplain, according to the Federal Emergency Management Agency (FEMA). Record 6. That finding is supported by written testimony of the applicants' engineer which states the pertinent FEMA map shows the 500-year floodplain stops just north of the subject property.[12] Record 476. In addition, the city attorney/planning director testified before the planning commission that the city considers only the 100-year floodplain when evaluating proposals for residential development. Record 619. Since under OCC 10C-01-055 the "planning official" may approve the deletion from the preliminary plan of any item deemed by him to be unnecessary, the failure to delineate the 500-year floodplain on the subject property, assuming the 500-year floodplain is on the subject property, is no basis for remand.

[12]The FEMA map itself is not in the record.

This subassignment of error is denied.

The third assignment of error is denied.

The city's decision is affirmed.