

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 approving variances to the lot depth standard and setback
5 requirements in the city's R-7 Single-Family Residential
6 zone.

7 **MOTION TO INTERVENE**

8 Hayden Bros., Inc. (intervenor), the applicant below,
9 moves to intervene on the side of the respondent. There is
10 no opposition to the motion, and it is allowed.

11 **FACTS**

12 The subject property, comprising approximately 1.8
13 acres, is located south of East Baseline Road, west of N.E.
14 53rd Avenue and east of Dawson Creek. The site is zoned R-7
15 Single-Family Residential. East Baseline Road is a county
16 road classified as a minor arterial on the county
17 transportation plan map and as a major collector on the
18 city's transportation plan map.

19 Intervenor wishes to subdivide the property. The
20 proposed Hayden Woods subdivision would consist of eight
21 lots, with access provided by a public street, S.E. 50th
22 Avenue, along the eastern property line. As shown on a map
23 at Record 61, the proposed common driveway is shaped like a
24 capital "T" whose head is to the west and whose base
25 connects to S.E. 50th Avenue. The lots are numbered
26 counterclockwise around the "T". Thus lot 1 is at the

1 northeast and lot 8 is at the southeast. Lots 5, 6 and 7
2 are flag lots. Lot 8 is at the corner of the common
3 driveway and S.E. 50th Avenue.

4 Due to access restrictions on East Baseline Road, which
5 is adjacent to the proposed subdivision on the north, lots 1
6 through 4 would access either S.E. 50th Avenue or the
7 proposed common driveway (the "T"), which would be to the
8 south. Lots 5, 6, 7 and 8 would access the common driveway,
9 which would be to the north. Variances are required in
10 order permit measurement of the front, rear and side yards
11 based on an orientation of the houses on the lots toward the
12 common driveway rather than either East Baseline Road or
13 S.E. 50th Avenue.

14 After the city planning and zoning hearings board
15 approved the requested variances to the lot depth standard
16 and setback requirements on November 7, 1996, petitioner
17 appealed to the city council, which conducted a hearing on
18 the record. Nevertheless, petitioner presented additional
19 evidence at the city council hearing, including evidence
20 that an alternative to the proposed plan could be adopted
21 without a variance.¹ The council then upheld the decision
22 to approve the variances and adopted the findings of the
23 planning and zoning hearings board.

¹It is not clear that this evidence was accepted or considered by the city council. The city council specifically rejected petitioner's request for a de novo hearing. Record 17.

1 This appeal followed.

2 **STANDARD OF REVIEW**

3 The challenged decision was made by the city governing
4 body. This Board is required to defer to a local governing
5 body's interpretation of its own enactment, unless that
6 interpretation is contrary to the express words, purpose or
7 policy of the local enactment or to a state statute,
8 statewide planning goal or administrative rule which the
9 local enactment implements. Gage v. City of Portland, 319
10 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson
11 County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means
12 we must defer to a local governing body's interpretation of
13 its own enactments, unless that interpretation is
14 "indefensible" or "clearly wrong" or "so wrong as to be
15 beyond colorable defense." deBardelaben v. Tillamook
16 County, 142 Or App 319, 922 P2d 683 (1996); Zippel v.
17 Josephine County, 128 Or App 458, 461, 876 P2d 854 (1994);
18 Goose Hollow Foothills League v. City of Portland, 117 Or
19 App 211, 217, 843 P2d 992 (1992).

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioner contends the proposed variances were granted
22 in violation of Hillsboro Zoning Code (HZC) 106 and 107,
23 which provide:

24 "Section 106. Authorization to Grant or Deny
25 Variances. The hearings board may authorize
26 variances from the requirements of this ordinance
27 where it can be shown that, owing to special and
28 unusual circumstances related to a specific piece

1 of property, the literal interpretation of this
2 ordinance would cause an undue or unnecessary
3 hardship; except that no variance shall be granted
4 to allow the use of property for purposes not
5 authorized within the zone in which the proposed
6 use would be located. In granting a variance, the
7 board may attach conditions which it finds
8 necessary to protect the best interests of the
9 surrounding property or neighborhood and to
10 otherwise achieve the purposes of this ordinance.

11 "Section 107. Conditions for Granting a Variance.
12 No variance shall be granted unless it can be
13 shown that all of the following conditions exist:

14 "(1) Exceptional or extraordinary conditions apply
15 to the property that do not apply generally
16 to other properties in the same zone or
17 vicinity, which conditions are a result of
18 lot size or shape, topography, or other
19 circumstances over which the applicant has no
20 control.

21 "(2) The variance is necessary for the
22 preservation of a property right of the
23 applicant substantially the same as is
24 possessed by owners of other property in the
25 same zone or vicinity.

26 "(3) The authorization of the variance shall not
27 be materially detrimental to the purposes of
28 this Ordinance, be injurious to property in
29 the zone or vicinity in which the property is
30 located, or be otherwise detrimental to the
31 objectives of any city development plan or
32 policy.

33 "(4) The variance requested is the minimum
34 variance from the provisions and standards of
35 this ordinance which will alleviate the
36 hardship."

37 **A. HZC 106**

38 Petitioner contends that HZC 106 is an approval
39 standard that was not adequately addressed during the

1 proceedings below and is not addressed at all in the
2 challenged decision. Intervenor responds that consideration
3 of HZC 106 is beyond the scope of our review under
4 ORS 197.835(3), which limits issues to those raised by any
5 participant below before the local hearings body.²
6 Petitioner maintains first, that it did raise below the
7 issue of undue or unnecessary hardship; and second, that
8 since the county did not give notice that HZC 106 was an
9 applicable criterion, ORS 197.835(4)(b) permits petitioner
10 to raise new arguments based on that criterion.³

11 Petitioner does not demonstrate through references to
12 the record that it specifically raised below the issue of
13 undue or unnecessary hardship owing to special or unusual

²ORS 197.835(3) provides: "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

³ORS 197.835(4) provides, in relevant part:

"A petitioner may raise new issues to the board if:

"* * * * *

"(b) The local government failed to follow the requirements of ORS 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or

"* * * * *"

1 circumstances specific to the subject property.⁴ However,
2 there is no dispute that the county's notice did not mention
3 HZC 106, or that ORS 197.763(3)(b) requires such mention if
4 indeed HZC 106 is a relevant criterion. Under
5 ORS 197.835(4)(b) a petitioner may raise new issues before
6 this Board if "[t]he local government failed to follow the
7 requirements of ORS 197.763(3)(b), in which case a
8 petitioner may raise new issues based upon applicable
9 criteria that were omitted from the notice."
10 ORS 197.835(4)(b) allows this Board to "refuse to allow new
11 issues to be raised if [we find] that the issue could have
12 been raised before the local government."

13 This is not a case like DeBates v. Yamhill County, ___
14 Or LUBA ___ (LUBA No. 96-100, January 3, 1997), where a
15 petitioner can plausibly contend it was not informed of the
16 existence or possible applicability of a relevant code
17 provision. HZC 106 to 111 are collected in a separate
18 chapter of the HZC entitled "Variances." When petitioner
19 appealed the challenged variances from the planning and
20 zoning hearings board to the city council, it quoted all of
21 HZC 107 without reference to HZC 106, which directly
22 precedes HZC 107 on the same page of the HZC. Petitioner
23 does not contend it was unaware of the existence of HZC 106.

⁴HZO 107(2) also addresses the issue of whether the variance is necessary, and petitioner did discuss the application of this standard below.

1 Under these circumstances, we conclude petitioner could have
2 raised issues arising out of the application of HZC 106
3 before the local government. ORS 197.835(4)(b) makes it
4 appropriate to refuse to allow petitioner to raise those
5 issues at LUBA.⁵

6 **B. HZC 107(1)**

7 Petitioner contends the findings do not identify any
8 "real" exceptional or extraordinary circumstances sufficient
9 to satisfy HZC 107(1). Petition for Review 3. The findings
10 with respect to HZC 107(1) state:

11 "1. We find that the proposed site is small in
12 size and that it fronts on a major arterial
13 (Baseline Road) where access limitations will
14 be imposed by Washington County. We further
15 find that there is a lack of access on other
16 places on the lot because of its location and
17 size. We further find that the parcel is
18 abutted by a planned unit development on the
19 east and is close to a flood plain area on
20 the west with only one intervening property.
21 We find that these are exceptional and
22 extraordinary conditions on this parcel over
23 which the applicant has no control.
24 Accordingly, we conclude that Subsection 1 of
25 Section 107 of the City's Zoning Ordinance is
26 satisfied." Record 28.

27 Intervenor argues the city's "treatment" of HZC 107 is
28 not "clearly wrong" and argues that under ORS 197.829(1), it
29 deserves "appropriate judicial respect." Intervenor's Brief

⁵HZC 106 and HZC 107 overlap to some degree. To the extent certain issues arising out of HZC 106 also arise out of HZC 107, they can be raised, as petitioner did challenge below the city's application of HZC 107.

1 5-6. We understand intervenor to argue these findings are
2 an interpretation of HZC 107(1) as it applies to the facts
3 presented. We agree with intervenor. Petitioner does not
4 dispute these facts, but argues the city's interpretation of
5 HZC 107(1) is contrary to the express words and purpose of
6 the ordinance. Petitioner states:

7 "With respect to parcel size and arterial
8 frontage, there are scores of parcels in Hillsboro
9 fronting on arterials like Baseline Road, which
10 have access restrictions. They are in no sense,
11 [rare] or uncommon. There are many parcels in the
12 area close to the same size as the applicant's.
13 With respect to the other two 'extraordinary'
14 circumstances, it is difficult to understand what
15 the existence of a planned unit development to the
16 east, or a floodplain that doesn't even adjoin the
17 parcel to the west, has to do with the subject
18 property. In any event, nearby floodplains and
19 planned unit developments are not exceptional or
20 extraordinary in any normal sense of the word."
21 Petition for Review 4.

22 Although we might interpret HZC 107(1) differently from
23 the city, we do not find the city's interpretation of HZC
24 107(1) to be indefensible. deBardelaben, 142 Or App at 325.

25 This subassignment of error is denied.

26 **C. HZC 107(2)**

27 Petitioner next contends HZC 107(2) is not satisfied
28 because the proposed variance is not necessary. The
29 challenged decision finds:

30 "2. We find that other properties in the area
31 have access to Baseline Road. However, the
32 nature of Baseline Road, another intersecting
33 road on the north line of Baseline Road and
34 the presence of an existing planned unit

1 development to the east make it difficult or
2 impossible for this particular property to
3 have appropriate street access. We find that
4 other properties in the area have the
5 appropriate access and that such access is a
6 property right that is possessed by other
7 owners of similar property in the same zone
8 or vicinity. Accordingly, we find and
9 conclude that Subsection 2 of Section 107 of
10 the City's Zoning Ordinance is satisfied."
11 Record 28-29.

12 Petitioner accepts the interpretation of "property
13 right" to include "appropriate access," but argues there is
14 no evidence in the record to support the conclusion that the
15 proposed lot configuration is necessitated by any access
16 restriction. Intervenor replies that, read together, the
17 findings explain why access restrictions necessitate the
18 proposed lot configurations. The first, second and third
19 findings⁶ conclude that appropriate access is impossible
20 without a variance because of (1) the nature of Baseline
21 Road as a major arterial where access limitations will be
22 imposed by Washington County; (2) the location and size of
23 the subject property; (3) the presence of an existing
24 planned unit development to the east; and (4) the failure of
25 the "westerly" boundary of the parcel to line up with N.E.

⁶The third finding provides, in material part:

- "1. * * * Lacking the variance, the property could not be fully developed because of limitations of access onto Baseline Road. We further find that access onto Baseline Road is problematic because the westerly boundary of the parcel does not line up with N.E. 49th Avenue, which is located to the north of Baseline Road. * * *"

1 49th Avenue, which is located to the north of Baseline Road.
2 Petitioner does not dispute any of these facts, but contends
3 that the property could be developed with appropriate access
4 without a variance. Petitioner's contention is based in
5 part on the alternative plan that it presented for the first
6 time to the city council at the city council's on-the-record
7 hearing.

8 Findings must (1) identify the relevant approval
9 standards, (2) set out the facts which are believed and
10 relied upon, and (3) explain how those facts lead to the
11 decision on compliance with the approval standards.
12 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
13 21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or
14 LUBA 829, 835 (1989). We agree with intervenor that the
15 findings are sufficient to explain why the city concludes a
16 variance is required to provide appropriate access, which
17 the city finds to be a property right possessed by owners of
18 other property in the same vicinity. As we explain below,
19 the city was not required to address petitioner's
20 alternative plan in the findings.

21 This subassignment of error is denied.

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 Petitioner contends the challenged decision is not
25 supported by substantial evidence in the record. We
26 understand intervenor to acknowledge there is little or no

1 evidence presented in the application and staff report.⁷
2 However, in our discussion of the first assignment of error,
3 we concluded the challenged decision adequately identified
4 the facts relied upon to justify the conclusion that a
5 variance is required to provide adequate access to the
6 subject property. Petitioner does not challenge those
7 facts, although it disagrees with the conclusions the city
8 drew from those facts.

9 As a review body, we are authorized to reverse or
10 remand a local government's land use decision if it is "not
11 supported by substantial evidence in the whole record."
12 ORS 197.835(9)(a)(C). Younger v. City of Portland, 305 Or
13 346, 358-60, 752 P2d 262 (1988). Substantial evidence is
14 evidence upon which a reasonable person would rely in
15 reaching a decision. City of Portland v. Bureau of Labor
16 and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v.
17 Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339

⁷Intervenor contended at oral argument that the necessary evidence was presented during the evidentiary hearing before the city's planning and zoning hearings board, at which intervenor's engineer testified concerning alternative access. For reasons that are unclear, intervenor never mentioned at oral argument the engineer's testimony before the city council. Record 7-8.

Intervenor has not provided transcripts of the relevant portions of the tapes of the hearings below and has not identified which portions of the tapes contain the city engineer's testimony. We decline intervenor's invitation to listen to all of the tapes of the local hearings, as it is not our job to search the record for evidence with which the parties presumably are familiar. Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991).

1 (1991). We will defer to the city's choice between
2 conflicting evidence if a reasonable person could reach the
3 city's decision. Mazeski v. Wasco County, 28 Or LUBA 178,
4 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995);
5 McInnis v. City of Portland, 25 Or LUBA 376, 385 (1993).

6 We find the city's conclusion that appropriate access
7 is difficult or impossible without a variance to be
8 supported by substantial evidence. To the extent we are
9 cited to conflicting evidence, we defer to the city's choice
10 of evidence.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Findings must address and respond to specific issues,
14 raised in the proceedings below, that are relevant to
15 compliance with applicable approval standards. Hillcrest
16 Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293,
17 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or
18 App 849, 853, 604 P2d 896 (1979). Petitioner contended
19 before the city council that the subject property could be
20 developed with the same number of lots without a variance.
21 Petitioner now argues that because the challenged decision
22 does not discuss or even acknowledge petitioner's evidence
23 and argument, a remand is required.

24 We understand petitioner's frustration that the
25 findings ultimately adopted were those first adopted by the
26 city planning and zoning board, well before the city council

1 hearing. However, the challenged decision addresses each of
2 the issues raised by petitioner in its local appeal notice
3 at Record 21-23, which are essentially the criteria stated
4 in HZC 107. Petitioner does not demonstrate that its
5 arguments before the city council raised additional issues.
6 There is no legal requirement that a local government
7 address in its findings conflicting evidence upon which it
8 chooses not to rely. Miller v. City of Ashland, 17 Or LUBA
9 147, 158 (1988). The failure of the findings to address the
10 conflicting evidence petitioner presented to the city is,
11 therefore, no basis for remand.

12 The third assignment of error is denied.

13 The city's decision is affirmed.