BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| ARNOLD ROCHLIN,<br><br>Petitioner,<br><br>vs.<br><br>CITY OF PORTLAND,<br><br>Respondent,<br><br>and<br><br>RYAN LAWRENCE,<br><br>Intervenor-Respondent. | LUBA No. 97-080<br><br>FINAL OPINION<br>AND ORDER |

Appeal from City of Portland.

Arnold Rochlin, Portland, filed the petition for review and argued on his own behalf.

Ruth M. Spetter, Senior Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Timothy J. Sercombe, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Preston Gates & Ellis.

HANNA, Board Member, participated in the decision.

AFFIRMED 04/29/98

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

Opinion by Hanna.

**NATURE OF THE DECISION**

Petitioner appeals the city's approval of a final planned unit development (PUD) plan and a final subdivision plat.

**MOTION TO INTERVENE**

Intervenor-respondent Ryan Lawrence (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE REPLY BRIEF**

Petitioner moves to file a reply brief, pursuant to OAR 661-10-039, which permits a reply brief confined to new matters raised in the response brief.[1] Petitioner alleges that the two response briefs raise new matters concerning standing, jurisdiction, scope of review, procedural prejudice, and disputes over facts and the content of the record.

Neither the city nor intervenor object to the reply brief. We agree that the response briefs raise the new matters alleged in petitioner's motion, and allow the motion.

**FACTS**

The subject property is a 15-acre parcel zoned RF-2 (two-acre residential) and located at the headwaters of Balch Creek

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[1]OAR 661-10-039 provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *."

in Northwest Portland. In October 1990, intervenor's predecessors submitted an application for a seven-lot residential subdivision including a six-lot PUD, and the city issued its preliminary approval on April 22, 1991.

Approximately two and one-half years later, on January 31, 1994, intervenor submitted his final development plan and subdivision for approval. The city conducted a "Type I" administrative review before the city planning director, and granted approval on July 31, 1995. Petitioner appealed to LUBA, and on March 6, 1996, the city voluntarily remanded pursuant to ORS 197.830(12)(b).[2] After consideration of petitioner's written comments on remand, the city planning director issued the challenged decision on April 7, 1997, approving intervenor's final development plan and subdivision plat.[3] This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioner argues that the city erred in approving the final development plan and subdivision plat, because the

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[2]Rochlin v. City of Portland, ___ Or LUBA ___ (LUBA No. 95-176, March 6, 1996).

[3]Petitioner notes that the city approved a version of the subdivision plat on July 10, 1996 in a separate decision. Petitioner appealed that decision, and the city voluntarily remanded it pursuant to ORS 197.830(12)(b). On remand, the city decided not to modify its approval, and accordingly we reinstated the appeal, pursuant to OAR 661-10-021. Rochlin v. City of Portland and Multnomah County, ___ Or LUBA ___ (LUBA No. 97-022, Order Reinstating Appeal, June 20, 1997). Shortly thereafter, we granted the city's motion to reverse its approval of the final subdivision plat. Rochlin v. City of Portland and Multnomah County, ___ Or LUBA ___ (LUBA No. 97-022, July 10, 1997). The subdivision plat at issue in LUBA No. 97-022 is not in this record. Except for arguments raised under the thirteenth assignment of error, the subdivision plat and decision at issue in LUBA No. 97-022 appear to have no significance to issues raised in the present appeal.

preliminary approval issued April 22, 1991, expired two years later, on April 22, 1993, well before intervenor applied for final approval on January 31, 1994.

Petitioner's argument turns on whether intervenor's application is governed by Portland Community Code (PCC) 34.20.060(A), which requires that a final subdivision plat be submitted to the city for approval within two years of tentative plat approval.[4] The city responds that PCC 34.20.060(A) governs only subdivision and partition applications, and does not govern combined PUD/subdivision applications. The city cites to former PCC 33.79.160, which provides that "[t]he combined PUD-subdivision application shall be subject to the review and appeal procedures of this Chapter, 33.79, not those of Title 34."[5] PCC 33.79.130

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[4]The 1989 version of PCC 34.20.060(A), in effect on the date of application, states:

> "Time limits: The Subdivision Plat or major partition map for major land division shall be submitted to the Bureau of Planning for approval within 2 years following the approval of the tentative plan, and shall incorporate any modifications required as a condition to approval of the tentative plan. * * *."

[5]Former PCC 33.79.160, in effect on the date of application, provides:

> "A subdivision plat may be approved concurrently with the approval of the PUD. To do so the applicant shall request tentative plat approval at the same time as the PUD preliminary plan approval. The combined PUD-subdivision application shall be subject to the review procedures of this Chapter, 33.79, not those of Title 34. The Hearings Officer shall require that all informational requirements of Sections 34.20.030 and 34.20.040 of the Subdivision Code be fulfilled unless information in the PUD application is sufficient to meet the intent of Title 34 requirements and to review the tentative plat application. Final plat approval shall be granted within the final development plan approval if all appropriate Title 34 requirements for the final plats are met."

permits intervenor to submit a final PUD development plan and subdivision plat within three years after preliminary approval. Accordingly, the city argues that intervenor was subject to the three-year time limit of PCC 33.79.130, not the two-year limit of PCC 34.20.060(A), and thus that intervenor timely submitted the final development plan.

Petitioner counters first that, by its terms, PCC 33.79.160 subjects combined PUD/subdivision applications only to the review procedures of chapter 33.79, and that, because the two-year time limit in PCC 34.20.060(A) is a "substantive" requirement, PCC 34.20.060(A) continues to govern time limits for combined PUD/subdivision applications. Petitioner cites to Forest Park Neigh. Assoc. v. City of Portland, 27 Or LUBA 215, 226-27, aff'd 129 Or App 641 (1994), for the proposition that the two-year time limit in the 1989 version of PCC 34.20.060(A) is a "substantive" requirement.

At issue in Forest Park Neigh. Assoc. was whether ORS 227.178(3) permitted the city to apply a newly-adopted three-year time limit to a PUD/subdivision application, or whether it was required to apply the two-year time limit of PCC 34.20.060(A) effective at the time of application. We held that requirements in PCC 34.20.060(A) to obtain an extension of time to file the final development plan constituted "substantive factors" for purposes of ORS 227.178(3), and thus that the two-year time limit in the 1989 version of PCC 34.20.060(A) applied rather than the

three-year time limit of the 1992 version. 27 Or LUBA at 227. We did not hold that the two-year time limit itself was a "substantive factor" for purposes of ORS 227.178(3). Even if we had, it does not follow that the two-year time limit is "substantive" as opposed to "procedural" for purposes of PCC 33.79.160, which was not at issue in Forest Park Neigh. Assoc.

PCC 33.79.160 distinguishes between "review procedures" subject to the chapter 33.79 and "informational" and other "appropriate Title 34 requirements" that remain subject to Title 34. Petitioner does not explain why the two-year time limit at PCC 34.20.060(A) is "informational" or substantive in nature, or otherwise why it is appropriate to apply the two-year time limit. Petitioner's reading of PCC 33.79.160 would require the applicant to submit the subdivision plat within two years, but the final PUD development plan within three years, which is inconsistent with the thrust of PCC 33.79.160 to allow the applicant to submit and process both documents together.

Second, petitioner cites to subsection (B) of PCC 34.20.060, which provides that the time during which a subdivision application is on appeal

> "shall not be counted as part of the allotted 2 or 3-year period in which an applicant must act on a tentative plan. This Section shall also apply to a combined PUD and Subdivision application. (Emphasis added).

Petitioner argues that the underlined sentence refers by

its terms to Section .060 of PCC 34.20, in other words, to both subsections (A) and (B), and thus in effect requires that PCC 34.20.060(A) and its two-year time limit apply to combined PUD/subdivision applications. The city rejected that interpretation below, arguing that the underlined sentence is intended to refer only to subsection B. We agree with the city's reading.[6] The reference to "3-year period" in the sentence preceding the language emphasized above has no meaning except as a reference to combined PUD/subdivision applications. Petitioner's reading would render the reference to "3-year period" meaningless, while the city's reading gives it a meaning consistent with the general theme pervading the sections of the city's code discussed above, that a combined PUD/subdivision application enjoys a longer time frame for completion than a subdivision alone.

Finally, petitioner takes issue with the city's alternative rationales for the three-year time limit, based on petitioner's failure to appeal the city's determination in 1993 that the three-year time limit applied to the present case, and a finding that intervenor had requested and received a one-year extension. However, we need not reach petitioner's arguments. We determined above that the city's primary justification in applying the three-year time limit, its

[6]Because city planning staff, rather than the city's legislative body, rendered the challenged decision, we owe no deference to the city's interpretation of its land use ordinance. Gage v. City of Portland, 319 Or 308, 317 (1994).

reading of PCC 33.79.160, is correct. It follows that the city's alleged errors in reaching its alternative justifications for the three-year time limit do not provide a basis to reverse or remand the decision.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Petitioner argues that, even if the three-year time limit of PCC 33.79.160 applies, intervenor failed to submit the final development plan and subdivision plat within the three-year period, i.e. before April 22, 1994. Petitioner notes that the final PUD plan and the subdivision plat approved in April 1997 contain notes and dates indicating that parts of the plan and plat were created or revised after April 22, 1994.

Petitioner does not appear to contest that intervenor submitted versions of the final development plan and the subdivision plat before April 22, 1994. There is substantial evidence in the record that intervenor submitted to the city before April 22, 1994, versions of the subdivision plat and the various essential components of the final development plan.[7] Rather, we understand petitioner to argue that intervenor must submit a final development plan and plat that conform to all the conditions of approval of the preliminary approval. Petitioner reasons that, because the city required

[7]Intervenor points out that the "final development plan" contains numerous components and separate documents. We follow the parties in referring to the "final development plan" as a single group of documents.

or accepted changes to the versions of the final plan and plat first submitted, those documents necessarily did not conform to all of the conditions of approval required by the preliminary approval. Petitioner contends that the three-year time limit at PCC 33.79.130 has no meaning if an applicant can submit nonconforming versions of the final development plan and subdivision plat just before the three-year period expires, and then modify them later in response to city review or public input.

The challenged decision rejected that argument below, stating that it is more reasonable to interpret PCC 33.79.130 not to preclude later modifications to the project in response to city review or public input. We also find petitioner's understanding of PCC 33.79.130 unreasonable. Nothing cited to us in the city's code or elsewhere suggests that the city is prohibited from allowing an applicant to modify a final development plan after submission, in order to conform the plan to the preliminary approval or to respond to staff review or other input.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Petitioner argues that the city erred in approving the final development plan without finding compliance with PCC provisions implementing two types of environmental overlay zones that affect the subject property.

Petitioner concedes that the two environmental overlay

zones did not apply to the subject property in 1990 when intervenor submitted the application for preliminary approval, and acknowledges that, pursuant to ORS 227.178(3), the entire application is governed by the standards in effect at the time the application for preliminary approval is submitted. However, petitioner cites Gage v. City of Portland, 24 Or LUBA 47 (1992), for the proposition that, where the final development plan differs from the preliminary approval in certain particulars, the final plan is governed by the city legislation in effect at the time the final development plan was submitted.

Gage does not support petitioner's position. Gage addressed whether a separate application to amend an approved final PUD plat was governed by city provisions in effect when the original PUD application was filed, or those in effect when the application to amend the PUD was filed. We concluded that, because the PUD amendment application was a separate and distinct application from the original PUD application, the

standards in effect when the PUD amendment application was filed apply. 24 Or LUBA at 50.

More to the point, ORS 227.178(3) requires that approval or denial of an application be based upon the standards applicable at the time the application is first submitted.[8] In Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 25 Or LUBA 601, 606-607, aff'd without opinion, 124 Or App 211 (1993), we held that differences between a preliminary PUD plan and a final PUD plan do not obviate ORS 227.178(3) where the modifications leave the preliminary approval "fundamentally intact."

Petitioner does not attempt to argue or demonstrate in this assignment of error that the modifications at issue are so significant as not to leave the preliminary approval "fundamentally intact." Accordingly, we conclude that the city committed no error in evaluating the final development plan under the standards and criteria in effect at the time the preliminary plan was submitted, rather than more contemporary standards.

The third assignment of error is denied.

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[8]ORS 227.178(3) provides:

> "If the application is complete when first submitted * * * approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

**FOURTH ASSIGNMENT OF ERROR**

Petitioner argues that the city erred in approving septic drainfields in a common area, contrary to PCC 33.79.130(g), which requires that deeds to property within the PUD shall stipulate that no "private structure of any type" be constructed in common areas. Petitioner contends that septic drainfields are "structures" within the meaning of PCC 33.79.130(g), and hence that the city's approval is contrary to that provision.

The term "structure" is defined twice in the city's ordinance. PCC 33.12.760 defines "structure" to mean "any object erected by art and fixed in or upon the ground composed of one or more pieces and designed for use or ornamentation." PCC 33.910.030 defines "structure" as

> "[a]ny object constructed in or on the ground. Structure includes buildings, decks, fences, towers, flag poles, signs and other similar objects. Structure does not include paved areas or vegetative landscaping materials."

Intervenor responds that PCC 33.79.130(g) merely requires that deeds to the property contain a covenant prohibiting the construction of private structures in common areas, and thus does not impose any limitation on construction of drainfields by the developer. Both intervenor and the city also disagree with petitioner that the meaning of "structure" extends to underground septic drainfields.

The challenged decision finds that the final plan complies with PCC 33.79.130(g), because intervenor submitted a

declaration of covenants stating, according to the decision, that "[d]eeds to the property will require that * * * no private structures (i.e. house or building) of any type shall be constructed in the common area." Record 631. The decision contains no explicit interpretation of PCC 33.79.130(g), but the city's finding is consistent with the view espoused by intervenor that PCC 33.79.130(g) requires only a deed covenant and does not provide an approval criterion with respect to drainfields built by the developer.

In the absence of the city's interpretation, we may make our own determination whether the city's decision with respect to PCC 33.79.130(g) is correct. ORS 197.829(2). We agree with intervenor that PCC 33.79.130(g), by its terms, requires only a deed covenant prohibiting private structures in common areas.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

Petitioner challenges the city's finding that the final PUD plan is in "substantial conformance with the approved preliminary development plan and any conditions therein," as required by PCC 33.79.140(c). Petitioner disagrees with the city's interpretation of "substantial conformance" and argues that the type and extent of modifications made to the final development plan are so significant as to render the final plan not substantially in conformance with the approved preliminary plan.

The challenged decision finds that the

> "proposed final development plan modifies the lot lines for the six PUD lots, arranges the building sites and drainfields differently than originally approved, and alters the course of the roadway, and therefore changes the lot coverage and building setbacks from those allowed in the preliminary approval" Record 625.

The decision goes on to define "substantial conformance" as "whether the final development plan is consistent with the core concerns of the preliminary approval," which the decision found to be the protection of Balch Creek and wildlife habitat on the property. Record 625. The decision notes that all of the modifications are directed at or have the effect of reducing the potential impacts on Balch Creek and environmentally sensitive areas, and that

> "the development is essentially the same with the same number of homesites, same access point to Cornell Road, limits to construction, 'extraordinary features' (i.e. a bridge instead of the usual culvert crossing of Balch Creek), clustering of proposed dwelling units, commonly owned open space (including the headwaters of Balch Creek), restrictions on construction within a specified distance of Balch Creek, a reduced size access road, specific identified building areas for the proposed homes, and mitigation and replacement of removed vegetation." Record 628.

The challenged decision buttresses its conclusion by analogizing to the distinction between "minor" and "major" amendments for purposes of PCC 33.79.180(a), a distinction that determines whether an application to amend a preliminary or final PUD plan is subject to administrative or quasi-

judicial procedures.[9] The decision finds that the modifications at issue here do not fit the examples or characteristics of major changes, and are more accurately characterized as minor changes. The decision treats minor changes as being consistent with substantial conformance, and concludes that the final development plan substantially conforms with the approved preliminary plan. Record 629.

Petitioner concedes that "substantial conformance" permits some alterations of the preliminary plat. However, petitioner construes "substantial conformance" to have a much narrower scope than determined by the decision. Petitioner's interpretation also relies on the distinction between minor and major amendments. Petitioner suggests that "substantial conformance" does not include changes to development plans that rise to the level of a minor amendment. That is, petitioner posits three categories of final development plans:

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[9]PCC 33.79.180(a) provides:

> "(1) Major changes. A major change to the development plan is one that may have a significant impact on the surrounding neighborhood or will cause a substantial change in the PUD, as approved. Major changes include, but are not limited to: an increase in the number of housing units; a change in the mix of single family and multi-unit structures; a change in access to the PUD, a significant change in the amount or location of streets or common parking areas; a reduction of approved open space; an increase in the amount of land utilized for non-residential uses; any change within 50 feet of the PUD perimeter; or any change that the Planning Director finds, based on a written statement of findings of fact, falls under the standards of this Subsection (a)(1).
>
> "(2) Minor changes. Minor changes are all other changes to the development plan which will have little or no effect on the neighborhood and conform to the intent of the preliminary plan approval."

those in substantial conformance with the preliminary plat, those with minor amendments, and those with major amendments. The challenged decision posits two categories, essentially stating that plans in substantial conformance with the preliminary plat include those that fit the definition of a minor amendment.

The difficulty with petitioner's analysis, as petitioner acknowledges, is that the definition of "minor" amendment covers every change that is less than "major." Petitioner does not suggest any principled means to distinguish a minor amendment and some lesser level of change that leaves the final development still in substantial conformance with the preliminary plat. In other words, the definitions of "minor" and "major" amendments at PCC 33.79.180(a) support the city's view that plans in "substantial conformance" include those that fit the definition of minor amendments. We are also persuaded by the definition of "major" amendment, which includes "substantial changes in the PUD as approved." PCC 33.79.180(a)(1). The terms "substantial change" and "substantial conformance" are reverse images of each other, suggesting a common border between the two concepts.

Petitioner next argues that the final development plan intervenor presented is, by definition, a "major" amendment and thus cannot be in substantial conformance with the preliminary plat. Petitioner notes that the definition of major amendment includes "reduction of approved open space."

PCC 33.79.180(a)(1). Petitioner argues that the final development plan increases the residential lots from six acres to 6.5 acres, and reasons that the approved open area must be correspondingly reduced in size.

The decision finds that the final development plan leaves approximately 6.084 acres of open space, and that the final plan conforms with the preliminary plan, which proposed "approximately six acres" for commonly owned open space. Record 626. Intervenor argues that this finding fatally undermines petitioner's argument that the final development plan is a major amendment to the preliminary plan. We agree.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

Petitioner argues that the decision makes no findings of compliance with respect to PCC 34.20.070(B)(1)(a), which requires that the final subdivision plat conform with the tentative subdivision plat. Petitioner also argues that PCC 34.20.070(B)(1)(a) requires absolute conformance, rather than substantial conformance, and because the final subdivision plat reflects different lot boundaries than the tentative plat, the application cannot comply with PCC 34.20.070(B)(1)(a).

The city responds that the provisions of PCC Title 34 do not apply to a combined PUD/subdivision application, except as required by the terms of PCC Title 33. PCC 33.79.160 requires that "[f]inal plat approval shall be granted with the final

development plan approval if all appropriate Title 34 requirements for final plats are met." The city's code does not specify the "appropriate Title 34 requirements" that an application for final approval of combined PUD/subdivision must satisfy. The city argues in the alternative that, even assuming that PCC 34.20.070(B)(1)(a) applies, it is implicit in a "tentative plat" that it is subject to revision, and hence the final plat may differ from the tentative plat in minor respects.

We agree with the city that construing PCC 34.20.070(B)(1)(a) to mandate the final plat's absolute conformance with the tentative plat is not required by the terms of PCC 34.20.070(B)(1)(a). Nor is such a reading consistent with the overall tenor of the review process for combined PUD/subdivision applications. As the city points out, PCC 33.79.160 contemplates that, when processing a combined PUD/subdivision application, the city should process the subdivision plat and the PUD preliminary plan approval together. Because the two documents are linked, changes to the PUD preliminary plan will often require concomitant changes to the tentative subdivision plat. Petitioner's reading of PCC 34.20.070(B)(1)(a) would frustrate that scheme by prohibiting changes to the PUD preliminary plan that require any changes to the tentative subdivision plat, for example, a slight lot-line adjustment. Nothing in PCC

34.20.070(B)(1)(a) or any other provision brought to our attention requires that result.

The sixth assignment of error is denied.

**SEVENTH ASSIGNMENT OF ERROR**

Petitioner argues that the city committed a procedural error in processing the application for final development plan and plat approval as a Type I procedure, which offers no opportunity for a hearing or local appeal, rather than as a Type II procedure, which offers opportunity for a hearing and local appeal. Petitioner contends that the challenged decision's analogy between "substantial conformance" and "minor" amendments, addressed in the fifth assignment of error, demonstrates that the changes between the preliminary and final development plans constitute "minor" amendments. Pursuant to PCC 33.269.440(B), minor plan amendments are subject to Type II procedures. Hence, petitioner argues that the city was required to process the instant application under Type II procedures.

Intervenor makes a number of responses. We need only address the last. Intervenor argues that even if petitioner is correct that the city committed a procedural error in processing the final development approval as a Type I rather than Type II proceeding, petitioner has not alleged any prejudice to his substantial rights. ORS 197.835(9)(a)(B).[10]

[10]ORS 197.835(9) provides, in material part:

We agree with intervenor that petitioner, who submitted 65 pages of commentary to the city, has not demonstrated that the city's procedural error, if any, in failing to afford him the opportunity for local appeal prejudiced petitioner's substantial rights.

The seventh assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR**

Petitioner contends that there is no evidence in the record to support the city's finding that the city attorney approved the declaration of covenants, conditions and restrictions (CC&Rs), as required by PCC 33.79.130(g). The decision states that the CC&R document is found at pages 500 through 518 of the record and has been approved by the city attorney. However, petitioner argues that he can find no evidence in the record that the city attorney reviewed or approved the CC&Rs.

Intervenor responds by citing to several places in the record where reference is made to city attorney's review and approval of the CC&Rs. Record 147, 149, 789. We agree with intervenor that there is substantial evidence in the record

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"* * * the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner."

that the city attorney's office reviewed and approved the CC&Rs.

Petitioner also asserts that page 12 of the CC&R at Record 500-518 is missing, that the city has failed repeatedly to address his attempts to draw attention to the missing page, and that the city's failure merits remand. The city responds that the complete text of the CC&Rs is at Record 14-27. We agree with the city that the missing page at record 500-518 provides no basis to remand the decision. Petitioner also directs our attention to a disclaimer in the CC&Rs found at Record 26 that the CC&Rs have not been "approved or disapproved by the city." Petitioner does not explain the significance of this statement or why it provides a basis for reversal or remand.

The eighth assignment of error is denied.

**NINTH ASSIGNMENT OF ERROR**

Petitioner contends that the challenged decision errs in approving a subdivision lot (lot 7) without approving a method of on-site sewage disposal for that lot, in violation of the condition 1 of the tentative plat approval that "each lot" of the subdivision shall provide a method of sewage disposal.

Lot 7 is not part of the six-lot PUD, but is a two-acre remainder portion of the subject property that contains part of the headwaters of Balch Creek. No housing is proposed for lot 7, which is reserved for unspecified "future sale or

development." Record 225. The challenged decision found that the preliminary plat condition of approval is met, stating:

> "A sewage disposal plan was not required for lot 7. The meaning of 'lot' in this condition is a lot that is proposed to be developed for residential use as part of the PUD. The purpose of the requirement was to assure that lots within the PUD could be arranged in substantially the manner approved. If Lot 7 is ever developed, it will require its own sanitary site disposal approval by operation of law." Record 632.

Petitioner argues that the decision's finding of compliance is contrary to the plain language of the condition that "each lot" provide a method of sewage disposal. In addition, petitioner contends that lot 7 is undevelopable because of geologic and environmental constraints. Accordingly, petitioner urges us to reverse the decision, because remand to approve a method of sanitary disposal on lot 7 would be futile.

The city responds that the challenged decision reasonably construes the sanitary disposal condition of approval to apply only to lots within the PUD, rather than to lot 7, where no residential use is proposed. We agree. The constraints that petitioner identifies as rendering remand futile also demonstrate how doubtful it is that the hearings officer intended condition 1 to require sewage disposal on an environmentally-sensitive lot for which no residential use is proposed.

The ninth assignment of error is denied.

**TENTH ASSIGNMENT OF ERROR**

Condition 4 of the tentative subdivision plat approval requires that the final subdivision plat meet the requirements of the fire marshal. The fire marshal subsequently approved the subdivision plat. Nonetheless, petitioner argues that the challenged decision errs in approving a road that does not comply with Fire Bureau policy guidelines with respect to road grade and width. Petitioner attaches a copy of the Fire Bureau's policy document to his petition for review.

The city and intervenor respond that the policy document cited by petitioner merely provides guidelines for Fire Bureau approvals of proposed roads, and by its terms does not require that the Fire Bureau, or the city, find compliance with those guidelines. Further, intervenor argues that the policy document petitioner cites states requirements for streets that serve other than one- and two-family residential units, and thus by its terms the policy document does not apply to the single-family residential lots approved here.

Condition 4 does not require that the final subdivision meet the requirements of the policy document, or any particular requirements of the fire marshal. In any case, we agree with respondents that the policy document by its terms does not apply to the instant subdivision plat, and merely provides guidelines.

The tenth assignment of error is denied.

**ELEVENTH ASSIGNMENT OF ERROR**

Condition 15 of the preliminary plan approval requires (1) that the applicant clean rubbish within and adjoining drainages on the property, and (2) that the applicant provide a maintenance easement and covenant of perpetual maintenance for a 50-foot riparian area. Petitioner argues that the final development plan does not comply with condition 15 in both respects.

**A. Within and Adjoining Drainages**

Petitioner argues that parts of the subject property are an old dump or landfill covered by soil, and that condition 15 requires removal not only of surface rubbish, but of rubbish "within" drainages, which petitioner construes to mean subsurface rubbish, apparently referring to the entire old dump. The challenged decision found that condition 15 "does not require removal of material below the surface." Record 635. Petitioner disputes this finding, arguing that condition 15 requires removal of all subsurface rubbish from the dump.

The city and intervenor respond that the decision reasonably construes condition 15 to require removal only of surface rubbish, particularly in light of condition 3, which requires that drainages remain in their natural topographic condition. We agree.

**B. Easement and Maintenance Agreement**

Condition 15 requires that the applicant provide a maintenance easement for a revegetated riparian area and that

conditions, covenants and restrictions of the PUD must provide for perpetual maintenance for the riparian area. The applicant submitted a document binding on PUD property owners that sets out obligations to maintain open space and the riparian easement. The decision finds that the document satisfies condition 15 with respect to easement and covenant requirements.

Petitioner disputes that finding, arguing that the maintenance covenant must be part of the CC&Rs rather than a separate document. Intervenor responds that condition 15 contemplates a separate easement document and does not prohibit the applicant from combining the maintenance covenant with the easement document, or require that the maintenance covenant be placed in the CC&Rs. We agree with intervenor that condition 15 does not prohibit the applicant from combining the easement and maintenance covenant in a document separate from the CC&Rs.

The eleventh assignment of error is denied.

**TWELTH ASSIGNMENT OF ERROR**

Petitioner contends that the city erred in approving the final development plan without finding compliance with parts e, f and g of condition 20 of the preliminary plan approval.

Condition 20 requires a separate concept plan to be submitted for final development review that shall display:

> "(e) A solar matrix, describing the solar design status of each lot;

"(f) Areas where development is restricted (i.e., sensitive or habitat areas protected by common ownership and/or deed restrictions); and

"(g) Location, quantity and type of trees or other vegetation to be planted as mitigation for vegetation lost to construction."

The decision finds with respect to condition 20(e) that solar envelopes are not shown on the concept map, because the PUD lots are steep and forested, referring apparently to exemptions from solar design requirements. At this point in the decision there is a typographic incontinuity, with an "h" appearing in the margin, followed by a citation to PCC 34.65.040, which sets out the pertinent exemptions from solar design requirements. The decision makes no findings with respect to conditions 20(f) and (g).

Petitioner argues that the decision improperly excuses compliance with condition 20(e), requiring a solar matrix describing the solar design status of each lot, based on exemptions at PCC 34.65.040. Petitioner contends that the decision maker had no authority to change conditions imposed by the hearings officer in the preliminary approval.

The city responds that the decision contains inadvertent typographic errors that left out part of the findings with respect to condition 20(e) and all of the findings with respect to conditions 20(f) and (g). Nonetheless, the city and intervenor argue that the lack of findings does not

provide a basis to reverse or remand the decision. ORS 197.835(11)(b).[11]

With respect to condition 20(e), intervenor notes that the concept plan describes the solar design status for each lot in note 6, by referring to the exemptions for steep and forested lots described in the findings. Record 803. The preliminary approval exempted the PUD from the on-site shade requirements pursuant to PCC 34.65.040(C). Record 304. We agree with intervenor that the record clearly supports a finding of compliance with condition 20(e).

With respect to conditions 20(f) and (g), the city notes that the concept plan shows both the areas where development is restricted and the location, quantity and type of trees to be planted as mitigation. Record 803. We agree with the city that the record clearly supports a finding of compliance with conditions 20(f) and (g). Accordingly, we affirm this part of the decision. ORS 197.835(11)(b).

The twelfth assignment of error is denied.

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[11]ORS 197.835(11)(b) states:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or part of the decision supported by the record and remand the remainder to the local government, with directions indicating appropriate remedial action."

**THIRTEENTH ASSIGNMENT OF ERROR**

Petitioner argues that the city unlawfully approved the subdivision plat after approval of a similar plat was reversed.

According to petitioner, the city approved the subdivision plat on July 31, 1995, and then voluntarily remanded that decision.[12] The city then approved the subdivision plat again, on July 10, 1996, and that decision was first voluntarily remanded, and then reversed pursuant to the city's motion.[13] The present proceeding is the decision on remand of the original July 31, 1995 decision. The decision does not address the subdivision plat approved July 10, 1996, which does not appear in this record.

We understand petitioner to argue that the reversal of the decision approving the subdivision plat on July 10, 1996, pursuant to the city's motion, necessarily determined that subdivision plat to be "prohibited as a matter of law" pursuant to OAR 661-10-071(1)(c). Petitioner explains that he cannot tell which subdivision plat the challenged decision approves, and posits the supposition that the decision inadvertently approves the July 10, 1996 plat instead of the July 31, 1995 plat. In that circumstance, petitioner

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[12]Rochlin v. City of Portland, ___ Or LUBA ___ (LUBA No. 95-176, March 6, 1996).

[13]Rochlin v. City of Portland and Multnomah County, ___ Or LUBA ___ (LUBA No. 97-022, July 10, 1997).

concludes, the city is precluded from approving the subdivision plat because it had previously been determined to be "prohibited as a matter of law." In any case, petitioner continues, the city should have placed the July 10, 1996 subdivision plat before the decision maker in order to resolve all issues involving the two plats.

The challenged decision indicates that it is a decision on remand stemming from the July 31, 1995 decision. Record 621. We disagree with petitioner that it is unclear which subdivision plat the challenged decision approves; nothing in the decision or the record directed to our attention suggests that any plat other than the one approved in the July 31, 1995 decision is at issue in the present proceeding. It follows that we need not address petitioner's argument that the reversal of the July 10, 1996 decision has the consequences petitioner asserts or necessarily precludes approval of the subdivision plat at issue in this appeal. We also reject petitioner's alternative argument that the city was required to submit the July 10, 1996 subdivision plat into the record of this proceeding in order to resolve all issues concerning the two plats. Petitioner cites no authority requiring the city to consider the July 10, 1996 subdivision plat.

The thirteenth assignment of error is denied.

The city's decision is affirmed.