BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITIZENS FOR FLORENCE,	)	
Petitioner,	)	
vs.	)	
	)	LUBA No. 98-089
CITY OF FLORENCE,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
FRED MEYER/WESTWOOD, INC.	)	
Intervenor-Respondent.	)	

Appeal from City of Florence.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Florence.

Frank M. Parisi, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Parisi & Parisi, LLP.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 10/30/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the city's design review approval of a large retail store on a 12-acre parcel along Highway 101.

MOTION TO INTERVENE

Intervenor-respondent Fred Meyer/Westwood, Inc. (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 for permission to file a reply brief, and attaches to its motion the proposed reply brief. The motion explains that the reply brief is confined to a new matter raised in the response brief, whether petitioner had failed to raise the issue addressed in the second assignment of error and thus had waived that issue pursuant to ORS 197.763(1).

We agree with petitioner that the response brief raises a new matter, and that the reply brief responds only that new issue. OAR 661-10-039.

Petitioner's motion to file a reply brief is granted.

MOTION TO TAKE OFFICIAL NOTICE

On October 8, 1998, on the day oral argument was conducted in this case, intervenor filed a motion asking the Board to take official notice of a Bureau of Land Management (BLM) Environmental Assessment (EA) and Record of Decision (ROD), dated August 25, 1998, with respect to BLM-owned property adjacent to the property at issue in this appeal. Intervenor argues that, pursuant to OEC 201 or 202, the Board must take official notice of BLM's decision as reflected in the EA and ROD. Intervenor contends that the BLM decision has the effect of mooting petitioner's third assignment of error, which is directed at whether the city could potentially develop water wells on the BLM property.

LUBA is authorized to take official notice of judicially cognizable law, as defined in OEC 202. However, LUBA does not have authority to take official notice of adjudicative facts, as described in OEC 201. ODOT v. Clackamas County, 27 Or LUBA 141 (1994). OEC 202 provides in relevant part that:

> "Law judicially noticed is defined as:
>
> "(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state * * *.
>
> "(2) Public or private official acts of the legislature, executive and judicial departments of this state, the United States, and any other state * * *."

Intervenor argues that the BLM decision is either the "decisional" law of the United States under OEC 202(1) or an "official act" of a United States agency under OEC 202(2), and thus subject to official notice. However, intervenor does not explain and it is not apparent why the BLM decision is judicially cognizable law within the meaning of either OEC 202(1) or (2). The ROD contains a decision summary that describes the nature of the BLM decision. The summary states:

> "Based on the analysis documented in [the EA] and the Finding of No Significant Impact, it is my decision to approve a modified action * * *. The approved action would deny the application of Fred Meyer, Inc. (FM) for an easement for dune stabilization and the Citizens For Florence's application for an R&PP lease, but would allow BLM to 1) issue FM a perpetual easement authorizing FM to use physical means (grading/excavating) to facilitate planned development on adjoining private land and 2) issue the City of Florence a patent under the R&PP Act with conditions prohibiting vegetative dune stabilization and limiting development actions." ROD 1.

We see nothing in the summary that indicates the BLM decision constitutes anything resembling "decisional law" of the United States. On the contrary, it appears to be simply BLM's modified approval of various applications submitted to it.

Whether the BLM decision is an "official act" of an executive department of the United States within the meaning of OEC 202(2) is a closer question. The examples listed in the OEC commentary suggest that "official acts" mean something less than the universe of

agency actions. The examples indicate that typical official agency acts subject to notice are official rules and regulations or other enactments with the force of law.[1] The commentary does suggest, based on examples from other states, that OEC 202(2) might allow notice of a broader range of agency acts than rules, regulations and similar official enactments. However, we decline to follow that suggestion in the present case as inconsistent with our narrow scope of review under ORS 197.835(2). We find it significant that, although intervenor submits the BLM decision as something with the force of law, the arguments of both parties tend to focus on the factual implications of the decision. We conclude that the BLM decision is not law subject to official notice by this Board within the meaning of OEC 202(1) or (2).

Intervenor's motion to take official notice is denied.

FACTS

The subject property is a 12-acre undeveloped site located along Highway 101 near the northern boundary of the city. The subject property is zoned Highway District (HD), which allows retail commercial uses as a permitted use. The area to the west of the property contains an active sand dune that is managed by BLM and designated Open Space in the city's comprehensive plan. Other lands surrounding the subject property are zoned either HD or for other commercial uses.

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[1]The 1981 Conference Committee Commentary states:

> "The expanded scope of judicial notice under [OEC 202(2)] is best illustrated by considering the types of acts of Oregon governmental agencies a court has already been able to notice under [former] ORS 41.410(3). These include civil service commission rules, regulations and official acts of the Department of Higher Education, statutes and regulations of the State Board of Forestry, the statutory authority of the Superintendent and the rules and regulations of the Board of Control of the Oregon Fairview Home as to release of inmates, and rules of a state agency filed with the Secretary of State for compilation and publication, such as rules of the Public Utility Commission. Under the similar California provision, California courts have taken judicial notice of a wide variety of administrative and executive acts, including proceedings and reports of Congressional committees, records of the California State Board of Education and the records of a county planning commission." Conference Committee Commentary to OEC 202(2), reprinted in Oregon Rules of Court -- State 90 (West 1998) (citations omitted).

Intervenor applied to the city for design review approval of a 127,000-square foot commercial retail store on the subject property. The proposed development would generate approximately 8,000 gallons of sewage per day, equivalent to 25 to 30 single-family dwellings. The city planning commission approved the proposal October 29, 1997. Petitioner appealed the planning commission decision to the city council, which conducted a hearing February 4, 1998, on the record before the planning commission. The city council remanded the decision back to the planning commission to develop further findings regarding design review criteria and code requirements applicable to the HD zone. The planning commission conducted an evidentiary hearing on March 10, 1998, at which intervenor submitted a revised storm drainage report, revised traffic impact analysis, and revised elevation and landscaping plans. The city public works director submitted a memorandum on the city's wastewater treatment facilities. The planning commission then issued a decision recommending approval subject to conditions. The city council conducted further proceedings, allowing into the record a report on the proposed development's stormwater management plan, and on May 4, 1998, affirmed the planning commission's decision, with additional conditions.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law and made inadequate findings not supported by substantial evidence with respect to Florence Zoning Code (FZC) 10-16-4(E), which requires a finding that the "necessary utility systems and public facilities are available with sufficient capacity" to serve a proposed building or use within the HD zone.

Petitioner explains that the city has a combined stormwater/sewage collection system and that during heavy rain events the system can discharge untreated sewage into the Suislaw River. Petitioner notes that in April 1996 the city and the Department of Environmental

Quality (DEQ) signed an agreement called the Mutual Agreement and Order (MAO) in which the city conceded that it had allowed numerous unpermitted discharges of untreated sewage into the Suislaw River because the city's wastewater treatment facility

> "has reached and/or exceeded its hydraulic capacity. * * * The City of Florence is experiencing rapid growth, and any additional connections will increase the hydraulic loading to the [facility] and will likely result in additional violations of the Permit limits and water quality standards in the receiving stream." Record 393.

Petitioner argues that the city's findings are inadequate because the city did not find, using the terms of FZC 10-16-4(E), that public facilities are available with "sufficient capacity." Instead, the city found that the proposed store would not cause an "overloading" of the sewer system. Petitioner also contends that, given the city's current noncompliance with DEQ standards, there is no substantial evidence that the city's treatment facility presently has "sufficient capacity" available to meet the demand created by the proposed retail store.

The city found with respect to the capacity of the city's sewer facilities:

> "[T]he Public Works Director provided a memorandum of February 2, 1998 * * * explaining (a) the hydraulic design capacity of the City's plant (.95 million gallons per day), (b) the problems that have occurred in the past through infiltration into the collection system, * * * (f) the size of the daily loading that the Fred Meyer store will add to the City's system (the equivalent of 25-30 new homes), and finally, (g) the Director's conclusion that 'given the ongoing improvements to the wastewater system, reserve capacity in the collection system, and the plans to have an improved treatment plant on line during the year 2000, staff does not believe this additional loading, approximately equivalent to 25 to 30 new homes, would cause an overloading of the system.' The Council agrees with and adopts the Public Works Director's February 2, 1998 memorandum.
>
> "The Council also now finds against the claim that a moratorium on sanitary sewer hook-ups is required by law due to the pendency of a Clean Water Act lawsuit. The [MAO] entered into between the City and the Environmental Quality Commission is a binding agreement under which certain repairs to the City's treatment plant are required to be done on an established schedule, certain interim discharge limits are agreed to, certain penalties are agreed to, and certain previous violations are settled, in exchange for which the City is not required to impose a moratorium on sewage hook-ups. * * * <u>This Agreement provides authority to allow hook-up of new sewer loads even if</u>

there is some statistical chance that a raw sewage overflow might still occur * * *[.] Record 33-34 (emphasis added).

Intervenor responds, first, that the city may find compliance with a criterion using words different from the exact terms of a criterion as long as the result is a finding that is equivalent to the finding called for by the criterion. Tigard Sand and Gravel v. Clackamas County, ___ Or LUBA ___ (LUBA No. 96-182, April 9, 1997), slip op 4 n 1, aff'd 149 Or App 417, 943 P2d 1106, on recons 151 Or App 16, 949 P2d 1225 (1997), rev den 327 Or 83 (1998); O'Brien v. City of West Linn, 18 Or LUBA 665, 689 (1989). Intervenor contends that the city's finding that the proposed use would not "overload" the city's sewer system is the equivalent of a finding that the city's system has sufficient capacity. We disagree. Although a finding that the proposed use would not "overload" the city's system implies that there is excess capacity in that system, the city's findings appear to indicate that that excess capacity lies in the sewer collection system, without addressing the capacity of the city's sewer treatment system, which is also part of the city's sanitary sewer system. The city's finding that its sewer collection system will not be overloaded by the proposed use is not equivalent to a finding that its sanitary sewer system as a whole is "available with sufficient capacity."

Nonetheless, intervenor argues that the city's findings with respect to its treatment facility demonstrate compliance with FZC 10-16-4(E). Intervenor points to the city's finding that the MAO allows the city to discharge untreated sewage into the Suislaw River without requiring a moratorium on new sewer hook-ups, and argues that that finding is an implicit interpretation of FZC 10-16-4(E), to the effect that the city's treatment facility has "sufficient capacity" as long as the city operates the facility in compliance with the MAO. Intervenor contends that the city's implicit interpretation of FZC 10-16-4(E) should be accorded deference under ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

Intervenor is correct that a local government's decision may contain an implicit rather than an express interpretation of a local provision, and that LUBA must defer to that implicit interpretation unless it is inconsistent with the text, purpose or policy of applicable provisions, or "clearly wrong." Alliance for Responsible Land Use v. Deschutes County, 149 Or App 259, 267-68, 942 P2d 836 (1997), rev dismissed 327 Or 555 (1998). However, intervenor's argument ignores two antecedent inquiries: (1) whether the city has made an interpretation, even an implicit one, of FZC 10-16-4(E); and (2), if it has, whether that interpretation is adequate for review. ORS 197.829(2); Alliance, 149 Or App at 266-67. As the court in Alliance discussed, a local government's interpretation need not assume any particular form, as long as it "'suffices to identify and explain in writing the decisionmaker's understanding of the meaning of the local legislation.'" 149 Or App at 266 (quoting Weeks v. City of Tillamook, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992)). In Alliance, the local legislation required that before land is rezoned, the county must determine that the public need for a zone change will best be served by rezoning the subject property "as compared with other available property." 149 Or App at 262. The county compared the subject property with certain types of other properties in the city, but not with other types that might have been deemed "available." The court applied the Weeks standard, and found that

> "Given the nature of the provision and the nature of the county's order in this case, we do not believe that a separate 'express' interpretative statement about the meaning of the comparison requirement was necessary. The county's findings make clear what specific and general types of properties are being compared with the property in question, and they also make it clear what factors are being considered in making the comparisons. The practical effect of the findings is to give definition to the term 'other available property' and to every other term in [the local provision] that might call for interpretation, in the context of the facts of this case. The county's understanding of what [the local provision] means is inherent in the way that it applied the standard, and we conclude that its order expresses that understanding in a manner that satisfies the 'adequate articulation' test that Weeks and Larson [v. Wallowa County, 116 Or App 96, 840 P2d 1350 (1992)] establish for determining whether a reviewable interpretation has been made." 149 Or App at 266-67.

The county's interpretation in Alliance was adequate for review because the county's application of its standard clearly demonstrated the county's understanding of what types of properties the standard required comparisons for, and hence the meaning of that standard. The present case is considerably more problematic. The city's findings do not clearly demonstrate the city's understanding of the meaning of "sufficient capacity" as used in FZC 10-16-4(E). The city's findings might, as intervenor suggests, be read to express an understanding that the treatment facility has "sufficient capacity" as long as that facility is operated in compliance with the MAO, even if that means continued discharges of untreated sewage. However, that understanding is by no means "inherent" in the city's written findings and application of FZC 10-16-4(E). Those findings more plausibly and more forcefully suggest that the city understood that the MAO authorizes the city to allow land uses inconsistent with FZC 10-16-4(E), or that the existence of the MAO makes it unnecessary to comply with FZC 10-16-4(E) with respect to the capacity of the city's treatment facility.

Where we are unable to determine whether the local government implicitly interpreted a local provision, or which of several possible, implicit interpretations are intended in a local government's findings, the local government has failed to "adequately articulate" its understanding of local legislation, and thus the local government's interpretation is inadequate for our review. ORS 197.829(2). We conclude in the present case that, to the extent the city has made an implicit interpretation of FZC 10-16-4(E), that interpretation is not adequate for review. Accordingly, we may, but need not, make our own determination of whether the city's decision regarding FZC 10-16-04(E) is correct. Id.; Opp v. City of Portland, 153 Or App 10, 14, 955 P2d 768 (1998).

Exercise of the discretion granted us under ORS 197.829(2) is appropriate in this case. The relevant facts are undisputed, and we are presented with a pure question of law, which the parties have adequately discussed in their briefs. Miller v. Clackamas County, 31 Or LUBA 104, 106 (1996). None of the three interpretations identified above as being

arguably implicit in the city's findings give effect to the terms of FZC 10-16-4(E), requiring that public facilities be "available with sufficient capacity." Because nothing in the city's zoning ordinance defines the relevant terms of FZC 10-16-4(E), the commonly understood meaning of those terms apply. Sarti v. City of Lake Oswego, 106 Or App 594, 597, 809 P2d 701 (1991). Webster's Third New Int'l Dictionary (unabridged ed 1981) defines "capacity" in relevant part as

> "the power or ability to hold, receive, or accommodate * * *, the ability to absorb * * *, the ability to store, process, treat, manufacture: an instrumentality or facility for production: maximum processing, production, or output * * *." Id. at 330.

It is undisputed that the city's sewage treatment facility is currently incapable of storing and treating all of the city's sewage during peak flows, and thus must discharge untreated sewage into the Suislaw River. It is clear that the city's sewage facilities, particularly its treatment facility, does not have the ability to "hold, receive or accommodate" or "store, process [and] treat" the city's effluent, and thus that there are not public facilities "available with sufficient capacity." Accordingly, we conclude that the city incorrectly applied FZC 10-16-4(E). ORS 197.829(2).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred in failing to apply or find compliance with relevant provisions of the Transportation Planning Rule (TPR) at OAR 660-012-0045(3). Petitioner explains that the city has not adopted land use regulations implementing the TPR, and thus, pursuant to OAR 660-012-0055(4)(b),[2] the city must apply relevant provisions of

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[2]OAR 660-012-0055(4)(b) provides:

> "Affected cities and counties that do not have acknowledged plans and land use regulations as provided in subsection (a) of this section, shall apply relevant sections of this rule to land use decisions and limited land use decisions until land use regulations complying with this amended rule have been adopted."

OAR 660-012-0045(3), which generally requires the city to ensure that new development, including retail shopping centers, include facilities for bicycle and pedestrian access within the development and to "neighborhood activity centers" within one-half mile.[3]

Petitioner argues that the requirements of OAR 660-012-0045(3) are invoked here because the proposed retail store is located across Highway 101 and within one-half mile of a recently approved commercial shopping area, a factory outlet mall, which petitioner contends is a "neighborhood activity center." Petitioner argues that the challenged decision contains no analysis of bicycle and pedestrian access to the site or analysis of internal bicycle and

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[3]Petitioner identifies the following requirements of OAR 660-012-0045(3) as relevant:

> "(a) Bicycle parking facilities as part of * * * new retail, office and institutional developments * * *.
>
> "(b) On-site facilities shall be provided which accommodate safe and convenient pedestrian and bicycle access from within * * * shopping centers, and commercial districts to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development. * * *
>
> "(A) 'Neighborhood activity centers' includes, but is not limited to, existing or planned schools, parks, shopping areas, transit stops or employment centers.
>
> "* * * * *
>
> "(d) For purposes of subsection (b) 'safe and convenient' means bicycle and pedestrian routes, facilities and improvements which:
>
> "(A) Are reasonably free from hazards, particularly types or levels of automobile traffic which would interfere with or discourage pedestrian or cycle travel for short trips.
>
> "(B) Provide a reasonably direct route of travel between destinations such as between a transit stop and a store; and
>
> "(C) Meet travel needs of cyclists and pedestrians considering destination and length of trip; and considering that the optimum trip length of pedestrians is generally 1/4 to 1/2 mile.
>
> "(e) Internal pedestrian circulation within new office parks and commercial developments shall be provided through clustering of buildings, construction of accessways, walkways and similar techniques."

pedestrian circulation, parking, or other provisions to ensure safe and convenient bicycle and pedestrian access and use of the subject property.

Intervenor responds, first, that the issue of compliance with the TPR was never raised below, and thus, pursuant to ORS 197.763(1),[4] that issue is waived. In a reply, petitioner argues that the city failed to list the TPR as an applicable approval criterion as required by ORS 197.763(3)(b), and thus petitioner may raise the issue of compliance with the TPR for the first time on appeal, pursuant to ORS 197.835(4)(a). In the alternative, petitioner argues, while it did not raise the requirements of the TPR in general or OAR 660-012-0045(3) in particular, it did raise general issues of non-vehicular accessibility and traffic safety, and its testimony in that regard is sufficient to satisfy the specificity requirements of ORS 197.763(1).

ORS 197.835(4) provides in part:

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

> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 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[.] * * *"

At oral argument, intervenor responded that ORS 197.835(4) is inapplicable because ORS 197.763(3)(b) does not require the city to list the TPR or other non-local approval criteria in the notice, but only applicable criteria from its plan or land use ordinance. ODOT v. Clackamas County, 23 Or LUBA 370, 375 (1992) (the TPR is not part of the county's

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[4]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ordinances or plan and thus need not be listed as an applicable criterion). We agree with intervenor that our holding in ODOT v. Clackamas County controls the present case, and therefore that ORS 197.835(4) does not assist petitioner.

We further agree that petitioner's general concerns, raised below, regarding accessibility and traffic safety were not sufficient to raise the specific issue of whether the city was required to apply the TPR's bicycle and pedestrian access requirements. Petitioner submitted testimony that

> "Neither the applicant nor the planning staff has provided substantial evidence to support a finding that * * * vehicle and pedestrian access to the site can be safely and efficiently provided.
>
> "Section 10-16-4(D) of the Highway District criteria requires findings by the [city] that the site can be safely and efficiently accessed by vehicles and pedestrians. * * *
>
> "Although the [city] devoted considerable time to discussing traffic issues, it is apparent from the wording of the final Resolution that the [city] failed to make necessary findings demonstrating compliance with the above criteria or Statewide Transportation Goal 12." Record 649.

The quoted testimony contains no hint that the TPR applies to the challenged decision or that the TPR requires the city to make findings regarding bicycle and pedestrian access and safety. We conclude that petitioner's testimony was not sufficient to apprise the city and other parties of the issue raised in this assignment of error or allow an adequate opportunity to respond to that issue, and thus that issue is waived. ORS 197.763(1).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law by finding FZC 10-16-4(A) inapplicable to the proposed retail development. FZC 10-16-4(A) requires a finding that "[t]he operating characteristics and intensity of land use will be compatible with and will not adversely affect the development potential of adjacent properties." Petitioner explains that BLM manages an adjacent tract to the west zoned open space that the city has long

recognized as a potential well field for the city's future water supply. The city has submitted a lease application to BLM to determine whether it is possible to develop the parcel with wells.

With respect to FZC 10-16-4(A) and any adverse effects from the proposed retail store on adjacent development potential, the city found that

> "the City's acknowledged Comprehensive Plan's land use recommendation for this property is Open Space, and the current zoning map designation is Open Space. While the Council has contemplated the possible use of this and other nearby public lands for well field development * * * and such use might be considered under the conditional use permit provisions of the Open Space zoning district, the Council finds that the potential development of the well field on the BLM tract is too remote to be considered as potential development under this criteria due to: 1) the location of any City wells on BLM property would be subject to successful findings after performance of well field production capacity studies, such studies of which are not scheduled to be performed in the immediate future; 2) the 40 acre BLM tract is one of several public lands identified for potential well sites in this area; and (3) the City has another identified source of domestic water, that being Clear Lake, to address its immediate domestic water needs." Record 25.

Petitioner concedes that the city interpreted FZC 10-16-4(A) to exclude from consideration under that provision potential development that is remote in time and likelihood, and that that interpretation is entitled to deference under ORS 197.829(1) and Clark. Nonetheless, petitioner argues that the city's interpretation is inconsistent with the text, purpose, and policy of that provision and thus LUBA need not defer to that interpretation.

Petitioner argues that the text of FZC 10-16-4(A) and the ordinary meaning of "potential" do not limit the applicability of that provision to immediately foreseeable or likely development. Petitioner also contends that the city's interpretation of FZC 10-16-4(A) undermines the purpose of that provision, in that the city's reasoning would apply to development on any adjacent property, no matter how immediate or likely that development is, thus effectively rendering FZC 10-16-4(A) meaningless. Finally, petitioner argues that the city's interpretation of FZC 10-16-4(A) is inconsistent with policies in the Florence

Comprehensive Plan (FCP) that require the city to protect water recharge areas from contamination.

Intervenor responds, and we agree, that the city's interpretation is within the range of discretion afforded by ORS 197.829(1) and Clark. That the city interprets "potential development" more narrowly than petitioner would does not demonstrate that the city's interpretation of FZC 10-16-4(A) is inconsistent with the text of that provision. Nor has petitioner demonstrated that the city's interpretation of "potential development" would, if applied to other property, undermine the purpose of FZC 10-16-4(A) and render that provision meaningless. The city's reasoning why development on the BLM parcel is too remote or unlikely to invoke FZC 10-16-4(A) is specific to the BLM parcel, and does not readily apply to other types of properties zoned for development. Finally, Petitioner has not demonstrated that the city's interpretation of FZC 10-16-4(A) is inconsistent with FCP policies requiring protection of water recharge areas from contamination. FZC 10-16-4(A) by its terms is directed at ensuring that proposed development does not adversely affect potential development of adjacent properties; the city's interpretation merely narrows the scope of "potential development" to more immediate and likely possibilities than presented on the BLM parcel. The link, if any, between the city's interpretation of "potential development" and the FCP policy of protecting water recharge areas from contamination is too tenuous to allow us to find that that interpretation is "inconsistent" with the cited FCP policy.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the city failed to make adequate findings, supported by substantial evidence, that intervenor's proposed stormwater infiltration system will have sufficient capacity to accommodate the proposed development, as required by FZC 10-16-4(E), which requires that "necessary utility systems and public facilities are available with

sufficient capacity." Petitioner argues that the proposed stormwater infiltration system, which we understand will store and ultimately disperse stormwater on the subject property, does not have "sufficient capacity" because it will be built at too low an elevation, which may cause it to be inundated by groundwater during peak rain events.

Petitioner's argument turns on conflicting evidence regarding the height of groundwater on the subject property and whether the challenged decision adequately ensures that the proposed stormwater system will be built above the groundwater elevation. The city made four pages of findings with respect to the proposed stormwater system, in which it summarizes several groundwater surveys and reports on the height of the groundwater on the subject property and found:

> "The highest water surface elevation found on the site was at 82.5 above mean sea level. * * * The remaining issue was how to translate this water surface elevation into a condition. After some discussion, we revised Condition 25(a) to state that the minimum invert elevation of the [stormwater system] shall be placed not lower than 83.5 feet above mean sea level. This means that between the finished elevation of the store (approximately 92.5 feet mean sea level) and the pads (approximately 88 feet mean sea level) there is an extra stormwater holding area on-site, plus all of the storage of the infiltration chambers themselves. This is sufficient to contain a 100 year 24 hour event." Record 33.

Petitioner argues first that there is conflicting evidence in the record that the groundwater elevation might be as high as 86 feet above mean sea level, which undermines the city's finding that the groundwater elevation is only 82.5 feet above mean sea level. The city found the evidence petitioner cites to be "inconclusive on the issue of groundwater elevation due to the limited extent of on-site investigation work conducted as part of that study." Record 32. The city found persuasive the conclusions of a different study that found the groundwater elevation ranging from 79 to 82.5 feet above mean sea level.

Substantial evidence is evidence a reasonable person would rely upon in making a decision. Stewart v. City of Brookings, 31 Or LUBA 325, 330 (1996). If there is substantial evidence in the whole record to support the local government's decision, LUBA will defer to

it, notwithstanding that reasonable people could draw different conclusions from the evidence. Id. Where the evidence is conflicting, if a reasonable person could reach the decision the local government made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Id. We conclude that the city's findings with respect to groundwater elevation are supported by substantial evidence.

Petitioner argues next that the city erred in imposing Condition 25(a), which requires the applicant to raise the bottom of the stormwater system to 83.5 feet above mean sea level, without first determining that the system would work at that elevation or whether doing so would require fundamental changes to the design of the system or overstory structures. Petitioner argues that condition 25(a) thus impermissibly defers to the director of public works the authority to require changes to the infiltration system. Condition 25(a) states:

> "The invert (bottom) elevation of the infiltration system shall not be placed below 83.5 feet above mean sea level. The Director of Public Works may require the applicant to dig test pits and confirm groundwater level in any areas he deems necessary to confirm that inverts in the infiltration system in areas not covered by the applicant's survey are also located above the water table." Record 17.

Intervenor responds that the city did not, in imposing condition 25(a), improperly defer resolution of the groundwater elevation issue. Instead, intervenor argues that the city properly found compliance or feasibility of compliance with relevant approval criteria and then imposed conditions of approval to assure that those criteria are met at a later stage of review. Rhyne v. Multnomah County, 23 Or LUBA 442, 446-47 (1992). Intervenor states that the city found the infiltration system design would work, i.e. that compliance with FZC 16-10-4(E) was feasible, if the system were placed no lower than 83.5 feet above mean sea level, based on the conclusions of a March 31, 1998 study. Record 32. According to intervenor, condition 25(a) properly imposes conditions of approval to assure that compliance with FZC 16-10-4(E) is met. We agree with intervenor that the city has not, in imposing condition 25(a), improperly deferred a finding of compliance with FZC 10-16-4(E).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law and failed to require site design alternatives ensuring that the proposed development is as "attractive as the nature of the use and the setting will allow," as required by FZC 10-16-4(B). Petitioner contends that the design standard at FZC 10-16-4(B) must be guided by FCP policies and by a document called the Visual Management Plan (VMP). The VMP, adopted by the city in 1992, identifies the dune area behind the proposed retail store as one of eight designated scenic resources in the city. In particular, the VMP states that "[b]uyout of private property [e.g. the subject property] may be needed to ensure long-term visual quality in this area. [However, t]he viewshed can be adequately preserved through innovative site design." VMP 2. Accordingly, the VMP's recommendations with respect to this site include "[u]se site designs that offer partial unobstructed views of the dunes." Id.

Petitioner contends that the proposed development is inconsistent with the VMP because it locates a 600-foot wide store along the base of the dune thus blocking the view of the dune for the length of two football fields. Petitioner presented the city with three design alternatives, and submits there is no evidence or explanation in the record demonstrating why the proposed retail store could not be orientated on an east-west axis so as to better comply with the VMP guidelines.

The city's finding with respect to FZC 10-16-4(B) and the VMP state:

> "[Petitioner] argued that [intervenor's] site design and building style effectively blocks the travelers' view of the sand dune to the west. [Petitioner] argued that this was inconsistent with the City's [VMP] recommendations for this area of Florence. The Council finds to the contrary based on its [VMP] guidelines and recommendations. The site design offers partial unobstructed views of the dunes, the VMP recognizes that sand stabilization may be necessary to stop the advancing dune, and the City does not have the immediate financial ability to purchase the application property at this time to forever protect views of this scenic feature.

> "In regard to the 'setting' portion of this criterion, [petitioner] also submitted three conceptual site layout alternatives to demonstrate that options to [intervenor's] proposal may exist. While the Council concurs with [petitioner] that development of this site might be done differently, the Council fails to see how these examples demonstrate that [intervenor's] site layout does not comply with this criterion." Record 27-28

Thus, the city found compliance with the VMP guidelines and FZC 10-16-4(B). Nonetheless, petitioner argues that "[t]he city erred by not identifying what configurations of commercial site development would maximize the attractiveness of the setting in accordance with FZC 10-16-4(B)." Petition for Review 21. We understand petitioner to contend that the city's finding is inconsistent with FZC 10-16-4(B) and the VMP because other designs exist that are more attractive and better preserve scenic views than the design the city approved.

Intervenor responds, and we agree, that petitioner has not established that either FZC 10-16-4(B) or the VMP compel the city to consider alternative site designs, and choose the one that "maximizes" the attractiveness of the setting. Petitioner does not cite to any requirement or provide any explanation why the city is compelled to reject a design that the city found to comply with FZC 10-16-4(B) and the VMP in favor of other designs.

The fifth assignment of error is denied.

The city's decision is remanded.