BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

NORTHWEST POLYGON COMPANY,
Intervenor-Respondent.

LUBA No. 99-175

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Henry Kane, Beaverton, filed the petition for review and argued on his own behalf.

Mark E. Pilliod, City Attorney, Beaverton, and Jack L. Orchard, Portland, filed the joint response brief. With them on the brief was Ball Janik, LLP. Mark E. Pilliod argued on behalf of respondent. Jack L. Orchard argued on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 06/12/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a limited land use decision approving a design review application for a multi-family residential/commercial development in the city's Station Area-Medium Density Residential (SA-MDR) zone.

MOTION TO INTERVENE

Polygon Northwest Company, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The 19-acre subject property is located on the northwest corner of the intersection of Tualatin Valley Highway and S.W. Millikan Boulevard. It is bordered on the north by a portion of Tualatin Hills Nature Park, a public park, and the Beaverton Creek Corridor. On the other side of the Beaverton Creek Corridor lies another property owned by intervenor (Aspen Woods).[1] The property is bordered on the west by wetlands and St. Mary's Home for Boys.

The subject property is currently undeveloped. Intervenor proposes to site 201 townhouse and "carriage flat"-style residential units and a 5,000-square foot commercial pad on the property (the "Magnolia Green" development).[2] SA-MDR zoning permits the type of mixed development that is proposed, provided the development complies with certain site design review standards.

The city's Board of Design Review (BDR) reviewed the application and approved it, with conditions. Petitioner appealed the BDR's decision to the city council, which held a *de*

[1]Intervenor submitted a separate development proposal for the Aspen Woods property in 1999, which the city denied.

[2]Intervenor also submitted a tree preservation plan in conjunction with its site design review application. The city's approval of this plan is not challenged by petitioner.

novo hearing on the appeal. At the council hearing, the mayor allowed intervenor 45 minutes to make its initial presentation and unlimited time for rebuttal. Petitioner was allowed 30 minutes to present his initial opposition testimony. Other opponents were allowed three minutes each to present their testimony. The council did not limit the submittal of written testimony.

After the hearing, the city council adopted its decision, denying petitioner's appeal, and affirming the BDR decision. This appeal followed.[3]

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner claims that the city council's decision to allow intervenor 45 minutes to make its presentation, while allowing petitioner only 30 minutes for his testimony, and limiting the testimony of other opponents to only three minutes per person, violated his and the other opponents' rights to equal protection and due process under the United States and Oregon Constitutions. According to petitioner, it is the city's usual practice to allow non-applicant witnesses at a land use hearing five minutes per person to present oral testimony.

Petitioner also argues that the mayor failed to inform petitioner of his right to present surrebuttal testimony if, in its rebuttal arguments, intervenor presented new testimony or evidence.[4] Petitioner argues that the disparity in presentation time, coupled with the mayor's failure to inform petitioner of his surrebuttal rights, amounted to constitutionally unequal treatment against opponents of the Magnolia Green development, and bias in favor of intervenor on the part of the city council.

The city and intervenor respond that petitioner's constitutional arguments are not

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[3]On June 1, 2000, two weeks after oral argument, petitioner submitted a memorandum containing additional arguments in support of his assignments of error. The memorandum was not submitted at the request of the Board and, therefore, we do not consider it.

[4]The Beaverton Development Code (BDC) 2.11.020.g.6.h provides:

> "The presiding officer shall * * * allow the opponent or other interested party to rebut the new evidence or testimony offered by proponent's rebuttal."

developed, and therefore should be denied.[5] On the merits, respondents argue that even if the city erred in providing the applicant more time to present its oral testimony, petitioner has not demonstrated that he was substantially prejudiced by the error. Respondents note that at the city council hearing petitioner relinquished a substantial portion of his time to present oral testimony to the other opponents, and that the council allowed an opportunity to submit unlimited written testimony and petitioner took full advantage of that opportunity.

With regard to the mayor's failure to inform petitioner of his surrebuttal rights, respondents contend that the required procedures are established in the code, and that the code was available to petitioner prior to the appeal hearing. Respondents contend that any argument that error was committed as a result of the mayor's omission similarly fails because petitioner has not shown that intervenor presented new evidence or testimony in its rebuttal that warranted an opportunity for surrebuttal.

In his petition for review, petitioner argues that the city's "deliberate discrimination against petitioner and other Magnolia Green opponents is similar to discrimination declared unconstitutional" in other cases. Petition for Review 15. Petitioner then cites a number of cases to support his contention that the city's process in this case violates his and others' constitutional rights to equal protection and due process.[6]

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[5]The city and intervenor filed a joint response brief. For ease of reference, we refer to them jointly as "respondents."

[6]*E.g.*, *Lindsey v. Normet*, 405 US 56, 92 S Ct 862, 31 L Ed 2d 36 (1972) (declaring Oregon's double-bond prerequisite for appealing an FED action unconstitutional); *Hussey v. City of Portland*, 64 F3d 1260, 1267 (9th Cir 1995) (city's subsidies for installing sewer connections upon receipt of a consent to annexation held a violation of the equal protection clause); *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 695 P2d 25 (1985) (imposing unemployment compensation tax on independent religious schools while exempting church-related schools contravenes Oregon Constitution); *State v. Clark*, 291 Or 231, 239, 630 P2d 810 (1981) (a criminal defendant does not have the right to choose between a preliminary hearing and a grand jury review of the evidence to support charges brought against him); *Baillie v. State Board of Higher Educ.*, 79 Or App 705, 719 P2d 1330 (1986) (automatically denying in-state tuition to bona fide residents who receive support from non-resident paying parents is unconstitutional); *Hewitt v. SAIF*, 54 Or App 398, 635 P2d 384 (1981), *aff'd* 294 Or 33, 653 P2d 970 (1982) (unemployment compensation rules which awarded compensation to female partners of deceased workers, but not to male partners of deceased workers, held unconstitutional under the equal protection clause); *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) ("Under ORS 197.835(8)(a)(B), * * * the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are

In its findings, the city provided the following reason for establishing the disparate time limits:

> "As to [petitioner's] challenge to the differing time limitations for the Applicant and [petitioner], the Council reserved more time for the party having the burden of proof than parties objecting to the application. In this case, the Applicant was provided 45 minutes for its initial presentation, [petitioner] 30 minutes. [Petitioner] chose to use approximately 10 minutes of his allotted time and allocated the balance to a series of witnesses affiliated with the 'Make Our Park Whole' Committee. In addition, several other witnesses affiliated with the 'Make Our Park Whole' Committee testified during that portion of the public comment period assigned to persons opposed to the application. * * * The Council finds that [petitioner] was provided ample opportunity to justify his appeal and, in fact, utilized several non-Appellant parties to argue his case and submit evidence on his behalf. Furthermore, the Council finds that [petitioner] submitted considerable written documentation in an attempt to buttress his oral presentation. Accordingly, the Council finds that not only have the customary procedures been followed in this case but that [petitioner] has had ample opportunity to present evidence and argument in support of his appeal." Record 2.

Petitioner's arguments do not explain in what ways the cases he cites are similar to the situation before us, and we do not see that they are. While there has been disparate treatment, we believe that the city's rationale for establishing different time limitations is reasonable, especially where petitioner was given unlimited opportunity to present written evidence in support of his appeal.[7] Petitioner has not established that the city's action in this case constitutes a violation of the Equal Protection and Due Process clauses of the United States Constitution or analogous provisions of the Oregon Constitution.

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the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing."); *Lewis v. Dept. of Rev.*, 9 OTR 85 (1981) (statutory provision granting property tax exemptions to widows of veterans, but not to widowers, held unconstitutional).

[7]That is not to say that a disparity in the time allowed parties for oral testimony could not result in reversible error. There may be circumstances where the city's process may result in a violation of the procedural rights articulated in *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973) ("Parties at the hearing before the [local] governing body are entitled to * * * an opportunity to present and rebut evidence"). For example, a situation where one party is allowed to present a large quantity of new evidence at the commencement of the hearing, while opposing parties are allowed only limited time to review and rebut that evidence, could violate the procedural rights that are extended to parties in quasi-judicial land use proceedings under *Fasano*. However, petitioner does not demonstrate that this case presents such a situation.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city's notice of hearing before the BDR and the city council was defective because it did not list applicable comprehensive plan standards. According to petitioner, the notice merely established that the application would be "reviewed for compliance with the Comprehensive Plan," but failed to list the particular plan policies that would be considered. Record 1525. Petitioner argues that the failure to list applicable comprehensive plan policies in the appeal hearing notice requires reversal.

Respondents answer that the city council determined that the site design review process itself is intended to implement the relevant comprehensive plan policies. In addition, respondents contend that, because this is a limited land use decision, only those comprehensive plan provisions specifically incorporated into the BDC's review criteria are standards that must be addressed in the decision. ORS 197.195(1).[8] In this case, the design review criteria only incorporate comprehensive plan policies relating to significant natural resource sites listed in the city's comprehensive plan inventory. BDC 40.10.15.2.C.2.c. The subject property does not contain any significant natural resources sites; therefore, respondents argue, no comprehensive plan policies apply as decisional criteria. In any event, respondents argue that petitioner has not established how this procedural error prejudiced petitioner's substantial rights.

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[8]ORS 197.195(1) provides in relevant part:

> "A 'limited land use decision' shall be consistent with applicable provisions of city * * * comprehensive plans and land use regulations. * * * Within two years of September 29, 1991, cities * * * shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. * * * If a city * * * does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city * * * or on appeal from that decision."

The failure to list applicable plan provisions in the city's notice of hearing is a procedural error. Under ORS 197.835(9)(a)(B), we are authorized to reverse or remand a local government decision on the basis of procedural errors only if those errors prejudiced petitioner's substantial rights. Here, petitioner does not argue that he failed to raise issues regarding any applicable comprehensive plan policies because those policies were not listed in the notice of city council hearing. Nor do respondents assert that any issues in the petition for review cannot be raised before LUBA because they were not raised below. Because petitioner has not shown that his substantial rights were prejudiced by the alleged error, this assignment of error provides no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 12 (1995) (petitioners' failure to identify particular plan and ordinance policies that were not raised below because of the city's failure to list all applicable decisional criteria precludes reversal or remand).[9]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

BDC 10.10.3 provides:

> "This ordinance is designed to regulate the division of land and to classify, designate and regulate the location and use of buildings, structures, and land for agricultural, residential, commercial, industrial, or other uses in appropriate places, and for said purposes to divide the City of Beaverton into districts of such number, shape, and area as may be deemed best suited to carry out these regulations and provide for their enforcement; to encourage the most appropriate use of lands; to conserve and preserve natural resources; to conserve and stabilize the value of property, to provide adequate open spaces for light and air and prevention of fires; to prevent undue concentrations of population; to lessen congestion of streets; to facilitate

[9]In his sixth assignment of error, petitioner argues that the city erred in failing to address or demonstrate compliance with Comprehensive Plan Policies 7.4.2.a-j and 7.4.2.n-q. We address those arguments later in this opinion. However, petitioner raised compliance with these comprehensive plan policies as an issue before the BDR and city council. Therefore, petitioner cannot claim that the city's failure to include references to these particular plan policies in its notice of hearing independently provides a basis for reversal or remand. *Furler v. Curry County*, 27 Or LUBA 546, 550 (1994) (where a party is able to fully participate in proceedings before the local government, notwithstanding the local government's failure to provide complete notice, petitioner fails to establish that the local government's error resulted in prejudice to his substantial rights).

> adequate provisions for essential urban services such as transportation and streets, water supply, sewage and storm drainage systems, schools, parks, libraries and other public service requirements; and to promote the public health, safety and general welfare."

The city adopted the following finding to address petitioner's argument that BDC 10.10.3 is an applicable decisional criterion:

> "Section 10.10.3 is an aspirational statement relating to the entire Development Code. It is not a Design Review decision-making criterion. Furthermore, the Council finds that [petitioner] has submitted no specific evidence relating to this Code section or how the Magnolia Green Design Review application would fail to conserve or preserve natural resources in light of the planning and zoning designations for the site." Record 8-9.

Petitioner argues that the city "committed reversible error by refusing to consider Development Code criteria on the theory they were merely 'aspirational' and 'not a Design Review decision-making criterion.'" Petition for Review 18. Petitioner argues that BDC 50.30.1.E.2 requires the city to ensure that the application complies with all applicable statutory and ordinance requirements, and that the city cannot avoid adopting findings addressing compliance by concluding that certain applicable regulations are aspirational or precatory.[10]

BDC 50.30.1.E.2 pertains to the responsibility of the city planning commission to render decisions addressing all applicable criteria. Petitioner does not explain why this or any other provision of the code requires that the BDR or the city council, on appeal of BDR decisions, apply standards applicable to the planning commission's decision making responsibility. In any event, the city reviewed BDC 10.10.3 and determined that it did not apply directly as an approval criterion to this application. The city's interpretation is consistent with the express language of BDC 10.10.3 and is not clearly wrong. Therefore, we

[10]In the petition for review, petitioner refers to BDC 130.5B as the source for the requirement that the proposal comply with all statutory and ordinance requirements. However, respondents explain that petitioner's reference is to an earlier version of the BDC, and that the proper reference in the current code is to BDC 50.30.1.E.2.

defer to it. ORS 197.829(1); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992).

The fourth assignment of error is denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioner makes a variety of arguments under these two assignments of error. To the extent we understand them, petitioner's arguments fall into four categories. First, petitioner alleges that the city council's decision fails to comply with ORS 197.195(4), because the decision does not set out the standards and criteria the city determined were applicable to the challenged application. Second, petitioner argues that the city council erred by rejecting the evidence and arguments presented to the council during its proceedings regarding a proposed development on the neighboring Aspen Woods property, a proposal that the city eventually denied. Petitioner contends that the evidence contained in the record of those proceedings is directly relevant to the subject application. Third, petitioner argues that the city failed to adopt findings addressing Comprehensive Plan Policies 7.4.2.a-j and 7.4.2.n-q, policies that petitioner contends are applicable to the city's decision in this case. Fourth, petitioner argues that the city misconstrued the applicable law and adopted findings not supported by substantial evidence when it concluded that the proposed development would not cause an adverse impact on stormwater drainage onto adjacent property. We address each argument in turn.

A. Compliance with ORS 197.195(4)

Petitioner argues that the city's decision fails to comply with ORS 197.195(4) because the city's decision does not set out the relevant approval criteria or adopt findings addressing them.[11] Petitioner contends that the city's decision consists of a (sometimes

[11]ORS 197.195(4) provides that:

> "Approval or denial of a limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision,

inaccurate) summary of petitioner's arguments before the city council, and the city council's response to those arguments. Petitioner argues that this format fails to satisfy ORS 197.195(4).

Respondents explain that the city's decision specifically incorporates by reference three documents: (1) the BDR decision and order approving the proposed site design; (2) the August 26, 1999 staff report, which includes the facilities committee's recommendations; and (3) a September 27, 1999 staff memorandum addressing the specific allegations contained in petitioner's appeal to the city council.[12] Respondents argue that these documents contain a list of all applicable criteria, and adopt findings addressing them. According to respondents, the city council's findings in its decision supplement and complement these documents. Respondents argue that, as a whole, the findings satisfy ORS 197.195(4)'s requirement that limited land use decisions be "based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision."

The city's decision and findings contain 12 pages. On the first page of the decision, the city council incorporates the documents identified by respondents. Those documents, totaling 54 pages, contain findings addressing the criteria the city found relevant to the decision. We agree with respondents that the city's decision, which includes those documents specifically incorporated by reference, complies with ORS 197.195(4).

B. Rejection of Aspen Woods Evidence

Throughout the proceedings before the city, petitioner argued that the testimony and evidence regarding intervenor's Aspen Woods development were relevant and directly applicable to the Magnolia Green application. Petitioner contends that the two developments

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states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

[12]The city council's order actually refers to a staff report dated August 16, 1999. However, there is no staff report in the record that contains that date, and respondents' record citations at oral argument are to the August 26, 1999 staff report. We assume the council's reference to an August 16, 1999 staff report in its final written order is a typographical error.

are almost identical because they both (1) have the same owner; (2) propose residential development; (3) border Beaverton Creek and Tualatin Hills Nature Park; (4) slope toward Beaverton Creek; and (5) have the same zoning designations. As a result, petitioner argues that the city erred by not applying the same review standards, by failing to consider the evidence contained within the Aspen Woods files, and by failing to reach the same conclusions regarding compliance with applicable standards.

Respondents answer that the city addressed this argument below by pointing out that the two properties and the developments proposed for them differ from one another in several significant respects: (1) the properties are of differing sizes and propose different development densities; (2) the Aspen Woods property is bordered on three sides by Tualatin Hills Nature Park, while Magnolia Green borders only the Beaverton Creek Corridor portion of the park; (3) Magnolia Green is bordered by two major roads, while Aspen Woods is bordered by S.W. Millikan Boulevard only; (4) Aspen Woods contains significant trees and vegetation, while Magnolia Green has only a few trees and marginal vegetation; and (5) Magnolia Green's stormwater drainage plan is significantly better than Aspen Woods' proposed stormwater drainage plan. Respondents contend that the city is required to judge each development proposal independently, and to determine whether each development proposal satisfies the relevant criteria. According to respondents, most of petitioner's evidence regarding Aspen Woods was not relevant to the Magnolia Green development proposal or to the decisional criteria the city applied. To the extent petitioner and other opponents presented evidence derived from the Aspen Woods record that was relevant to the Magnolia Green application, respondents contend the city considered that evidence, but determined that intervenor's evidence and testimony were more credible.

In reviewing the evidence the city relied upon in making its decision, LUBA may not substitute its judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based

on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

We agree with respondents that the city is obliged to make its decision only on criteria applicable to a particular development proposal for a particular property. The city's decision adequately explains why it considers the attributes of the subject property to be different from the Aspen Woods property, and why certain policies that petitioner argues are applicable to both properties are not. Finally, the city's decision summarizes the relevant evidence, and while different decision makers could reach a different conclusion based on the evidence, the choice between conflicting substantial evidence lies with the city. We conclude that the city's findings regarding the relevancy of the Aspen Woods evidence are adequate and supported by substantial evidence.

C. Applicability of Comprehensive Plan Policies 7.4.2.a-j and 7.4.2.n-q

Petitioner argues that the city council's decision fails to address Comprehensive Plan Policies 7.4.2.a-j and 7.4.2.n-q.

The August 26, 1999 staff report, adopted by reference by the city council, contains findings addressing these comprehensive plan policies. Record 1724-31. The findings explain that the site is identified on the city's Significant Tree Inventory as Grove 38, but that the site is not identified on the county's Natural Resources Inventory of significant or important natural resources. Only those two categories of resources must comply with Comprehensive Plan Policies 7.4.2.a-j and 7.4.2.n-q. Nevertheless, because the background inventory information in the inventory was somewhat imprecise, staff reviewed and adopted findings addressing 7.4.2.a-j and 7.4.2.n-q. Petitioner does not contest either the adequacy of those findings or the evidence on which those findings are based. Petitioner's assertions provide no basis for reversal or remand.

D. Compliance with BDC 40.10.15.3.C.1.g

The city's facilities review committee (committee) is composed of the planning director, the city engineer, the public works director, the police chief, the fire chief or their designates. BDC 40.10.10.3.B. The committee has the authority to review any plans for development and to "approve, conditionally approve, reject, or recommend [approval, conditional approval or rejection]" of the application to the BDR. BDC 40.10.10.3.A. The BDR may not delete or amend the committee's recommendations regarding technical requirements or conditions set forth in state law or city code "without first receiving a full report on the legal and technical implications of changing the requirement." BDC 40.10.15.3.A.2.d.

In this case, the committee adopted a number of technical recommendations and conditions to address storm water drainage to ensure that the drainage from the subject property would not add contaminants from the runoff to Beaverton Creek. Those recommendations and conditions were adopted without amendment by both the BDR and the city council. By adopting the conditions and recommendations of the committee, the city council determined that the proposed development satisfies BDC 40.10.15.3.C, which provides, in relevant part:

> "To ensure that the stated purposes of the Design Review process are met, the [BDR] shall be governed by the standards of this section as it evaluates and renders a decision or recommendation on a proposed development. The standards to govern decisions are:
>
> "1. Technical Standards
>
> "* * * * *
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> "g. That the grading and contouring of the site takes place and site surface drainage and on-site storage of surface waters facilities are constructed so there is no *adverse [e]ffect* on neighboring properties, public right-of-way or the public storm drainage system; and that said site development work will take place in accordance with the City site development code[.]" (Emphasis added.)

As we understand petitioner's arguments, petitioner alleges that the city's findings that the proposed development satisfies BDC 40.10.15.3.C.1.g misconstrue the applicable law. According to petitioner, the city found that "negligible adverse effect" equals "no adverse effect." Petitioner contends that in making this finding the city council amended BDC 40.10.15.3.C.1.g in the guise of interpreting it.

To address BDC 40.10.15.3.C.1.g, the city adopted the following findings:

> "[Petitioner]'s contention, as well as those presented by several witnesses, is that any amount of pollutant or storm discharge constitutes an 'adverse impact.' The Council finds in this instance that the 'adverse impact' to both the [Tualatin Hills] Nature Park and Beaverton Creek is negligible, at best. The [Tualatin Hills] Nature Park is surrounded by development uses already generating 'adverse impacts.' The Region 2040 plan proceeds on the assumption that development densities will be increased as will intensity of development. To interpret the 'adverse impact' standard in the way [petitioner] and other witnesses urge, would be to negate the planning and zoning decisions made for the Magnolia Green property. In effect, this would place the Magnolia Green site in a moratorium-type mode until a technology is developed to prevent any increases in stormwater runoff or prevent any pollutants from entering the Beaverton Creek watershed or prevent any form of human activity from occurring on the property which could possibly impact the [Tualatin Hills] Nature Park.
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> "The Council finds that such an extreme definition has never been utilized by the City and that BDR has consistently and correctly applied a rational balancing test to this standard. That test involves the consideration of the planning and zoning for a particular piece of property and whether a particular form of use will materially compromise uses on adjacent properties. In essence, property owners need to assure the level of co-existence envisioned by the planning and zoning decisions.
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> "[Petitioner] and other witnesses were repeatedly asked during both the BDR and City Council proceedings on Magnolia Green to identify what development uses would not generate adverse effects on the [Tualatin Hills] Nature Park or Beaverton Creek. None were identified other than the suggestion that the Magnolia Green site should be left in an undeveloped state or as a 'park.' The Council specifically finds that the [Tualatin Hills] Nature Park, itself, creates adverse effects to the surrounding natural environment. * * *" Record 6.

We agree with petitioner that to the extent the city interpreted its "no adverse effect" standard to be met if there is "only a negligible adverse effect," that interpretation would be

inconsistent with the express language of the provision. ORS 197.829(1)(a); *Goose Hollow Foothills League*, 117 Or App at 217; *West Hill & Island Neighbors v. Multnomah Co.*, 68 Or App 782, 787, 683 P2d 1032 (1984). However, we believe that the second paragraph of the findings clarifies the city's view of what is protected against adverse effects. The second paragraph makes it reasonably clear that the city interprets BDC 40.10.15.3.C.1.g to require a determination of whether the impacts arising from a proposed development are such that the effect of those impacts will *materially compromise uses on adjacent properties*. In other words, what BDC 40.10.15.3.C.1.g prohibits is adverse effects on uses on neighboring properties, and not lesser impacts such as negligible increases in pollutants flowing to the properties, that do not adversely affect those uses. If the impacts rise to such a level, then the city considers that these impacts "adversely affect" adjacent properties. So understood, we cannot say that the city's interpretation is clearly wrong or beyond colorable defense. *Goose Hollow Foothills League*, 117 Or App at 217; *deBardelaben v. Tillamook County*, 142 Or App 319, 922 P2d 683 (1996).

The fifth and sixth assignments of error are denied.

The city's decision is affirmed.