

NATURE OF THE DECISION

Petitioner challenges city approval of a tentative plan for a 21-lot subdivision.

MOTION TO INTERVENE

Applicants Michael and Suzanne Lehne (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is currently developed with a single-family dwelling on 5.86 acres. One of the proposed lots includes the existing dwelling. The subject property is currently accessed, and will continue to be accessed, via a 41.25-foot wide and 180-foot long property stem that connects the property with SE 162nd Avenue. A proposed public street running east-west intersects with SE 162nd Avenue on the east and terminates with a cul-de-sac on the western end of the site. A north-south public street is proposed near the center of the site, and terminates with street stubs to the north and south to allow for future connections. The proposed public streets are to be 46 feet wide except where the main east-west street narrows to 41.25 feet on the property stem as it approaches SE 162nd Avenue. Along the site's frontage, SE 162nd Avenue is improved with approximately 20 feet of paving, but has no curbs or sidewalks. There is a ditch along SE 162nd Avenue that accommodates stormwater runoff.

Following initial submittal of the application, the city requested and the applicants provided a traffic impact study, preliminary storm drain calculations and a preliminary storm drainage capacity analysis for the ditch along SE 162nd Avenue.

The hearings official held a hearing and approved the subdivision on February 13, 2004. Petitioner appealed to the city council. Following a hearing held on March 25, 2004, the city

1 council voted to deny the appeal, adopted the hearings official’s findings and decision as its own and
2 added one condition that is not relevant here.¹ This appeal followed.

3 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

4 Petitioner’s first and fourth assignments of error challenge the city’s findings regarding
5 Portland City Code (PCC) 33.641.020. That criterion provides:

6 “The transportation system must be capable of safely supporting the proposed
7 development in addition to the existing uses in the area. Evaluation factors include:
8 street capacity and level-of-service; vehicle access and loading; on-street parking
9 impacts; the availability of transit service and facilities and connection to transit;
10 impacts on the immediate and adjacent neighborhoods; and safety for all modes.”

11 Petitioner does not challenge the adequacy of any proposed internal streets. Rather, she argues that
12 the city failed to address safety and connectivity for all traffic modes, including bicycle, pedestrian
13 and transit facilities, on the “essential supporting streets” external to the subdivision: SE 162nd
14 Avenue, Foster Road, Clatsop Street and Barbara Welch Road.² Petition for Review 8. Petitioner
15 asserts that neither the traffic impact study nor the challenged decision addresses or assesses sight
16 distances or other negative safety factors on any of these supporting streets.³ *Id.*

17 **A. Transportation System**

18 First, petitioner asserts that the “transportation system,” as that term is used in PCC
19 33.641.020, must include all streets that connect the development with outside amenities. The city
20 counters that the traffic study and the challenged decision address the streets and intersections most

¹ Because the city council adopted the hearings official’s findings, any reference in this opinion to the hearing official’s findings is also to the city council’s findings.

² Clatsop Street runs perpendicular to SE 162nd Avenue some distance to the south of the subject property. Southeast 162nd Avenue intersects with Foster Road, which runs generally east-west some distance north of the subject property. Barbara Welch Road runs generally north-south and connects Foster Road and Clatsop Street to the west of the subject property. Record 114.

³ The city asserts that petitioner waived the issue of sight distances by failing to raise it at the original evidentiary hearing before the hearings official. Petitioner makes no specific evidentiary or findings challenge directed at sight distances, and her mere mention of sight distances in support of her safety arguments is not improper.

1 immediately affected by the anticipated vehicle trips generated by the proposed subdivision and
2 asserts that no more is required.

3 The city’s findings do not explicitly address which streets or intersections must be
4 considered and analyzed as part of the “transportation system” under PCC 33.641.020. The city
5 engineer, the applicant’s engineer, the hearings official, and the city council studied the streets and
6 intersections most affected by the anticipated traffic: the new internal streets, SE 162nd Avenue, the
7 intersection with SE 162nd Avenue at the subdivision entrance and the intersection of SE 162nd
8 Avenue and Foster Road. The city chose not to assess the impacts on other streets and
9 intersections that were not near the subject property. We agree with the city that absent an
10 explanation why it was required to include traffic impacts further from the subject property,
11 petitioner has not established that the city erred in not requiring a traffic impact study of the impacts
12 on those more distant streets and intersections.

13 Second, petitioner argues that the city failed to address safety and connectivity for all traffic
14 modes because SE 162nd Avenue is designated a Neighborhood Collector, a City Bikeway and a
15 Major Emergency Response Street in the city’s transportation plan. Her argument regarding these
16 designations appears to be that SE 162nd Avenue, which currently has a paved width of only 22
17 feet, does not even meet the minimum requirements for the interior streets of the subdivision. We
18 assume that she is claiming that 162nd Avenue is so inadequate and substandard that it is unsafe for
19 travel by bicycle and pedestrian and that the street classifications require that SE 162nd Avenue be
20 upgraded before approval of any further development. We agree with the city that the street
21 classifications describe the desired function of the street and do not impose a mandatory approval
22 criterion. Petitioner has not pointed to a specific approval criterion that is violated in this regard.

23 Petitioner’s first assignment of error is denied.

24 **B. Safety for All Modes**

25 Petitioner does point to a specific approval criterion, however, in asserting that the findings
26 fail to address “safety for all modes” under PCC 33.641.020. Petition for Review 8. PCC

1 33.641.020 provides a list of factors for determining whether “[t]he transportation system [is]
2 capable of safely supporting the proposed development in addition to the existing uses in the area.”
3 One of those factors is “safety for all modes.” Petitioner argues that that factor must be considered
4 and that the city must address safety for bicycle and pedestrian traffic on SE 162nd Avenue.

5 The city argues that the record contains no evidence of problems with bicycling on SE
6 162nd, and that there is nothing for bicycles or pedestrians to connect to from the proposed
7 subdivision. Therefore, the city seems to conclude, it is not required to address safety for bicycle
8 and pedestrian traffic. The city argues that the PCC 33.641.020 factors “can be used” to evaluate
9 whether the criterion is satisfied. The city asserts that nothing requires that every factor be
10 addressed or that all factors to be given equal weight. Respondent’s Brief 6. We agree with the
11 city’s second contention but not its first.

12 If the city had provided an interpretation that all factors need not be considered, it is
13 possible that we would be bound to affirm that interpretation under the deferential standard of
14 review under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 69 P3d 759
15 (2003). However, the challenged decision does not include an interpretation addressing how to
16 apply these factors, and the city cannot adopt that interpretation for the first time in its brief.
17 *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46, 60-61 (1995), *aff’d* 139 Or
18 App 39, 911 P2d 350 (1996). Where the local government does not adopt an interpretation, this
19 Board may make its own interpretation in the first instance. ORS 197.829(2); *Thompson v. City*
20 *of St. Helens*, 30 Or LUBA 339, 345 (1996).

21 We look first to the text and context of the provision to be interpreted. *PGE v. Bureau of*
22 *Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). The list of factors in PCC
23 33.641.020 is prefaced by the language: “Evaluation factors include.” The text does not provide,
24 “evaluation factors *may* include” or “the city *may* consider the following factors.” If it did, we might
25 agree with the city that all factors need not be considered. However, when determining legislative
26 intent, we are not to insert what has been omitted or omit what has been inserted. *Id.* at 611; ORS

1 174.010. In the absence of the qualifying word “may”, the provision sets forth a list of evaluation
2 factors that are to be considered in determining whether the transportation system can safely
3 support the proposed development and the existing uses in the area. The list is not exclusive, but
4 factors specifically listed may not be excluded from consideration.

5 The context of the provision also supports that reading, at least with regard to this factor.
6 The criterion requires a determination that the transportation system can *safely* support the
7 proposed development. The “safety for all modes” factor is the only listed factor that expressly
8 addresses safety. That factor would therefore seem to be a necessary consideration in order to give
9 meaning to the overarching criterion itself, which addresses safety of the transportation system. We
10 conclude that the city is required to address all of the factors set forth in PCC 33.641.020.

11 This assignment of error is sustained.

12 **SECOND AND FIFTH ASSIGNMENTS OF ERROR**

13 The city’s code allows an applicant to propose mitigation measures as a means of satisfying
14 the traffic impact criterion in PCC 33.641.020. PCC 33.641.030 provides:

15
16 “The applicant may meet the criterion in Section 33.641.020, above, by including mitigation
17 measures as part of the land division proposal. Mitigation measures must be acceptable to
18 the City Engineer and may include providing transportation demand management measures,
19 an access management plan, constructing streets or bicycle, pedestrian, or transit facilities
20 on or off the site or other capital improvement projects such as traffic calming devices.”

21 Petitioner seems to be arguing that bicycle and pedestrian improvements to SE 162nd Avenue are
22 required in order to establish the proposed subdivision satisfies the “safety for all modes” factor
23 under PCC 33.641.020. The city explains, and we agree, that the language in PCC 33.641.030
24 providing for mitigation measures does not provide a separate, independent approval criterion.
25 Rather, an applicant may choose to propose mitigation onsite or offsite as a way to satisfy PCC
26 33.641.020. However, an applicant may also choose to attempt to satisfy the criterion without
27 including mitigation measures, through a traffic impact study or other relevant evidence that establish
28 that such mitigation measures are unnecessary. Finally, an applicant may propose a combination of
29 those options.

1 In this case, applicant supplied a traffic impact study and is required to provide street and
2 sidewalk improvements onsite as a means of satisfying PCC 33.641.020. When the city considers
3 all of the evaluation factors on remand, it may consider requiring additional mitigation, or it may
4 consider whether the PCC 33.641.020 criterion is satisfied without requiring mitigation measures,
5 based on the traffic impact study and consideration of all of the evaluation factors.

6 These assignments of error are denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 Petitioner argues that the city erred by failing to adopt findings of compliance with the
9 Transportation Planning Rule (TPR), OAR Chapter 660, Division 12, and several purpose
10 statements in PCC 33.654. We agree with the city and intervenor that neither the TPR nor the cited
11 purpose provisions are mandatory approval criteria that apply directly to the challenged subdivision
12 approval.

13 This assignment of error is denied.

14 **SIXTH ASSIGNMENT OF ERROR**

15 Petitioner challenges findings determining that the sewer system serving the proposed
16 subdivision satisfies the sanitary sewer disposal standards in PCC 33.652. Those standards
17 provide:

18 **“A. Availability of sanitary sewer.**

19 “1. The Bureau of Environmental Services [BES] has verified that
20 sewer facilities are available to serve the proposed development;
21

22 “* * * * *

23 **“B. Public sanitary sewage disposal.** Where public sewer facilities are
24 available to serve the proposed development, the Bureau of Environmental
25 Services has preliminarily approved the location, design, and capacity of the
26 proposed sanitary sewage disposal system. The approval is based on the
27 Sewer Design Manual; * * *”

1 Petitioner challenges the city’s finding regarding PCC 33.652.A.1, which provides: “The
2 sanitary sewer standards of 33.652 have been verified.”⁴ Petitioner argues that this finding states
3 only that the standards exist. The criterion requires that the “availability” of sewer facilities be
4 verified, not that the “standards” be verified. We do not read the city’s finding in the hypertechnical
5 way petitioner seems to. In any case, the challenged decision also found, “BES confirms that public
6 sanitary sewer service is available to serve the proposed development with an appropriate
7 extension.” Record 509. That finding is sufficient to establish compliance with PCC 33.652A.1.

8 In support of her argument that the sewer system is inadequate to serve the proposed
9 development, petitioner cites to the Pleasant Valley Concept Plan. The hearings official correctly
10 found that the subject property is not within the area covered by the Pleasant Valley Concept Plan
11 and that the plan does not apply. Record 509-10. Petitioner also cites to the 1999 Public
12 Facilities Plan, which provides: “Both the north and south collectors to the Lents Trunkline along
13 SE 21st Avenue as well as the collector near SE 23rd Avenue have capacity problems.” Record

⁴ The challenged decision provides,

“In response to concerns about public sanitary sewer capacity, BES confirms that public sanitary sewer service is available to serve the proposed development with an appropriate extension. The subject site is not part of the unincorporated area west of SE 162nd (Pleasant Valley), and therefore will not be served by the proposed pump station for Pleasant Valley. With regards to sanitary sewer capacity issues downstream, there are several BES capitol improvement projects intended to alleviate these problems. However, the current sanitary sewer capacity issues are not limiting development potential for the subject site.” Record 509-10.

“* * * * *

“The sanitary sewer standards of 33.652 have been verified. The nearest available public sanitary sewer is approximately 1000 feet to the north in SE 162nd Avenue. The public sewer must be extended within the public right-of-way to serve the proposed development. BES must receive approved public improvement plans for the sewer extension, and all fees and a financial guarantee before final plat approval. In addition, the existing house to remain on Lot 15 must be connected to the new public sewer, and the existing septic system must be decommissioned before issuing any building permits for the newly created lots.” Record 518 (parenthetical references in original omitted).

1 372. She contends that capacity issues with the Lents Trunk sewer make the proposed sewer
2 facilities inadequate.

3 First, the challenged decision specifically addresses this concern. The hearings official
4 found, “With regards to sanitary sewer capacity issues downstream, there are several BES capitol
5 improvement projects intended to alleviate these problems. However, the current sanitary sewer
6 capacity issues are not limiting development potential for the subject site.” Record 509-10. This
7 finding is supported by evidence in the record that the Lents Trunkline is located downstream and
8 some distance from the site, and that capacity problems are due to stormwater, not sanitary flow.
9 Record 617.

10 Second, all that PCC 33.652.B requires is that BES preliminarily approve “the location,
11 design, and capacity of the proposed sanitary sewage disposal system.” The standard does not
12 require of the decision maker an independent discretionary determination of adequacy of the city’s
13 sanitary sewer facilities. Petitioner has not offered an explanation why the findings of compliance
14 with PCC 33.652 are not supported by substantial evidence.

15 This assignment of error is denied.

16 **SEVENTH ASSIGNMENT OF ERROR**

17 Petitioner argues that the city’s findings that current and proposed stormwater facilities are
18 adequate to handle expected runoff from the proposed development are not supported by
19 substantial evidence. PCC 33.653.020.B.⁵ Specifically, she asserts that the ditch along SE 162nd
20 Avenue is inadequate to accommodate the expected increase in stormwater. This assertion is based
21 on neighbor testimony of past flooding and runoff problems along SE 162nd Avenue.

22 As the city notes, city staff, the hearings official and the city council devoted significant
23 attention to the stormwater issue. The applicant initially proposed to install a storm sewer, detention
24 pipe and water quality facility with eventual discharge to the ditch. In response to the city request

⁵ PCC 33.653.020.B provides: “The application must show that a stormwater management system can be designed that will provide adequate capacity for the expected amount of stormwater.”

1 that the applicant verify that the ditch had adequate capacity, the applicant obtained an expert
2 analysis of the ditch’s capacity. The resulting study concluded, “The ditch easily has enough
3 capacity to handle the additional flows from this development.” Record 239. BES agreed with the
4 analysis. Record 252. Based on testimony by BES, the hearing official found that “debris
5 accumulation [not capacity problems with the ditch itself] is the most likely cause for any overflow
6 that may be occurring.” Record 510.

7 The hearings official and the city council considered the expert testimony and the testimony
8 of the neighbors, imposed a condition requiring that the applicant meet the BES requirements for
9 public stormwater improvements, and concluded that the stormwater management criteria are
10 satisfied. We cannot say that a reasonable person could not have reached the decision the city did,
11 in view of all of the evidence before it. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33
12 Or LUBA 124, *aff’d* 149 Or App 417, 943 P2d 1106 *adhered to* 151 Or App 16, 949 P2d
13 1225 (1997), *rev den* 327 Or 83 (1998) (LUBA will defer to a local government’s choice between
14 conflicting evidence where a reasonable person could have reached the same decision based on all
15 of the evidence in the record). We, therefore, conclude that the city’s finding of compliance with the
16 stormwater criteria is supported by substantial evidence.

17 This assignment of error is denied.

18 The city’s decision is remanded.