

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WILLIAM F. GHENA,
5 *Petitioner,*

6
7 and

8
9 HOLGER T. SOMMER,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF GRANTS PASS,
15 *Respondent,*

16
17 and

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19 COPELAND PAVING, INC.,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2005-072

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Grants Pass.

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29 William F. Ghena, Grants Pass, filed a joint petition for review and argued on his own
30 behalf.

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32 Holger T. Sommer, Merlin, filed a joint petition for review and argued on his own behalf.

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34 No appearance by respondent.

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36 James R. Dole, Grants Pass, filed the response brief and argued on behalf of intervenor-
37 respondent. With him on the brief was Cable, Dole & Sorenson.

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39 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
40 participated in the decision.

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42 AFFIRMED

11/10/2005

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

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NATURE OF THE DECISION

Petitioner appeals the city’s tentative subdivision approval.

MOTIONS TO INTERVENE

Holger T. Sommer (intervenor-petitioner), an opponent below, moves to intervene on the side of petitioner.¹ Copeland Paving, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition the motions and they are granted.

REPLY BRIEF

Intervenor-petitioner moves to file a reply brief. There is no opposition to the motion and it is granted.

FACTS

The subject property is an 11.34-acre parcel zoned R-1-8 (Low Density Residential) located inside the City of Grants Pass urban growth boundary (UGB) just west of city limits. The western boundary of the property is also the boundary of the UGB. The tentative subdivision proposes a 39-lot subdivision with access to Relocated Upper River Road (River Road). A prior tentative subdivision proposal for the property was denied because of safety concerns with the prior proposed access to River Road. The present application proposes a new access to River Road farther to the west. The new access, however, involves extending Ford Street, an internal road, across a parcel west of the subject property to connect to River Road. The parcel to be crossed by Ford Street is outside the UGB in Josephine County. The urban area planning commission approved the proposal and opponents appealed the decision to the city council. The city council denied the appeal and approved the tentative subdivision. This appeal followed.

¹ Petitioner and intervenor-petitioner filed a joint petition for review, and we will refer to them in this opinion collectively as petitioners.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the city erred in approving flag lots, but without applying or
3 demonstrating compliance with Grants Pass Development Code (DC) 17.520(1).² Intervenor
4 argues that compliance with DC 17.520(1) was not raised below and is therefore waived.³
5 Petitioners reply that the city planning staff and the local appellant raised the issue. Petitioners first
6 cite the staff report as evidence that the issue was raised. Record 131. The staff report discusses
7 the approval criteria for subdivisions found at DC 17.413; however, it does not mention, let alone
8 discuss, DC 17.520(1). The staff report discusses, without citing, the standard setting forth the
9 maximum length of the flag pole regarding lot 5, DC 17.520(2), but does not raise the issue or
10 discuss whether a “street cannot reasonably or practically be created to serve the properties.”⁴
11 Petitioners also cite the appeal document that opponents filed to appeal the planning commission
12 decision to the city council. Record 152. Again, the document discusses the length of the flag lots
13 but makes no mention of DC 17.520(1) or any argument that a street could be “reasonably or
14 practically constructed to serve the properties.”

15 In order to preserve the right before LUBA to challenge the adequacy of findings
16 addressing an approval criterion and the supporting evidence, a petitioner must demonstrate that an
17 issue was raised below concerning the proposal’s compliance with that criterion “accompanied by
18 statements or evidence sufficient to afford the governing body” and other parties an adequate

² DC 17.520(1) provides that flag lots shall not be approved unless “[a] street cannot reasonably or practically be created to serve the properties.”

³ ORS 197.835(3) provides that in a LUBA appeal:
“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or ORS 197.763, whichever is applicable.”

⁴ DC 17.520(2) provides:
“The flag pole shall be at least the minimum width allowed in the appropriate zone. The maximum length for a flag pole shall be twice the width of the lot, or twice the length of the lot, whichever dimension is less.”

1 opportunity to respond. ORS 197.763(1); *Bruce Packing Company v. City of Silverton*, 45 Or
2 LUBA 334, 352, *aff'd* 191 Or App 305, 82 P3d 653 (2003). While an issue regarding the length
3 of the flag pole was raised below, the issue of compliance with DC 17.520(1), the issue in this
4 assignment of error, was not identified or mentioned. The issue is therefore waived.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioners argue that DC 17.413(3) is not satisfied with regard to lot 39.⁵ Intervenor
8 argues that this issue was also not raised below and is therefore waived. Assuming without deciding
9 that the issue was raised below, the issue is not sufficiently developed for our review. *See*
10 *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982) (it is not LUBA's
11 function to supply a petitioner with legal theories or to make petitioner's case for petitioner).
12 Petitioners' entire argument under this assignment of error consists of three short sentences, and it is
13 extremely difficult to ascertain the basis for petitioners' assignment of error.⁶ Even assuming we
14 correctly understand petitioners' assignment of error, there is no development or argument to
15 support it.⁷ We will not construct support for an assignment of error on our own.⁸

⁵ DC 17.413(3) provides:

“When one is required or proposed, the street layout conforms to the applicable requirements of the adopted street plans, meets the requirements of Article 27 and other applicable laws, and best balances the needs for economy, safety, efficiency and environmental compatibility.”

⁶ Petitioners' entire argument in support of the second assignment of error provides:

“[DC 17.413(3)] refers to ‘Article 27 and other applicable law.’ After the imposed condition is implemented Tax lot 39 will reduce lot 39 below minimum lot size standards (Record 34) violating [DC 17.413(3)]. The application does not meet a substantial criterion of the City's development Code the decision must be remanded or reversed.” Petition for Review 4.

Our best guess, from an extensive review of the record, is that petitioners mean to argue that the relocation of Ford Street to the north of where originally proposed would reduce lot 39 below minimum lot size requirements.

⁷ Intervenor's apparent complete misunderstanding of petitioners' argument illustrates why it would be unfair to address the assignment of error based on our understanding of the issue petitioners are attempting to present. *See* Intervenor-respondent's Brief 4.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners argue that the proposal does not satisfy DC 17.413, *see* n 5, regarding the traffic
4 impact analysis (TIA) submitted in support of the application. According to petitioners, because the
5 applicant merely edited the data from the TIA that was submitted in support of the prior application
6 that was denied, the TIA is insufficient to support the present application.

7 We will affirm a local government’s decision if it is supported by substantial evidence.⁹ The
8 city’s findings state:

9 “The applicant has submitted a revised [TIA] * * *. The TIA analyzes the new
10 construction to Upper River Road through Tax Lot 902 to the west. The
11 conclusions of the TIA are that sight distance greatly increases to the west at the
12 new location, but that removal and maintenance of vegetation must be accomplished
13 to the east in order to provide for adequate site distance in this direction. The
14 conditions below require the provision of agreements or deed restrictions that will
15 ensure that vegetation and fences are restricted within the sight distance easement
16 recommended by the TIA and subsequent letters from the traffic Engineer.” Record
17 36.

18 As the findings explain, the TIA was revised to analyze the new intersection with River
19 Road. Petitioners appear to complain that no new traffic data were collected for the new
20 intersection, but as intervenor points out, the traffic engineers considered the data they already
21 collected to remain valid and merely revised the analysis of that data with respect to the new

⁸ Even were we to address the assignment of error, the city appears to have relocated the eastern terminus of Ford Street to align with a vacant lot to the east. There is no indication in the record that the relocated street will reduce lot 39 below minimum requirements.

⁹ As a review body, we are authorized to reverse or remand the challenged decision if it is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider 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).

1 intersection. Petitioners fail to demonstrate that no reasonable person could have relied on the
2 evidence the city council relied on to find the approval criterion satisfied.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the proposal violates DC 27.110.¹⁰ Again, we have great difficulty
6 understanding petitioners’ assignment of error. Petitioners’ entire argument under this assignment of
7 error is also only a few sentences long and is poorly developed. As best we can tell, petitioners
8 argue that the decision violates DC 27.110(1) because the subdivision connects to a county road
9 that does not meet city standards. That appears to be intervenor’s understanding of the assignment
10 of error as well.

11 As discussed earlier, the proposed subdivision will access River Road via Ford Street,
12 which will cross a parcel in Josephine County. The southern edge of the proposed subdivision will
13 abut River Road inside the UGB, but no access to River Road is proposed in this area. The only
14 access to River Road is outside the UGB from Ford Street. The decision requires Ford Street,
15 inside and outside the UGB, to be constructed to city standards and requires that the Ford Street
16 intersection with River Road be improved to city standards. Further, the decision requires the
17 applicant to obtain county approval for the transportation improvements outside the UGB. The
18 city’s decision also requires that River Road be improved where it abuts the proposed subdivision.
19 This is all DC 27.110(1) requires. If petitioners are arguing that other portions of River Road,

¹⁰ Although the text of the petition for review does not indicate what provision of DC 27.110 the decision violates, petitioners quote DC 27.110(1) in a footnote. We therefore assume petitioners argue that the decision violates DC 27.110(1), which provides:

“Abutting streets. Where proposed development abuts a future street as shown on the Official Street Map or an existing street that does not meet City street standards as set forth in Article 27 and related construction and design standards, the applicant shall improve such street to such standards for one half (1/2) the street width for the distance the proposed development abuts the street. The improvements shall be constructed or secured, in accordance with City requirements, either prior to Final Plat or Map, if subdividing or partitioning, or prior to final Use and Occupancy Permit for other developments.”

1 outside the UGB which do not abut the proposed subdivision, are not improved to city standards,
2 that also does not violate DC 27.110(1).

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the city violated the coordination requirement of OAR 660-012-
6 0015(5), Goal 2 (Land Use Planning), and ORS 197.015(5).¹¹ Goal 2 requires that comprehensive
7 plans be coordinated with the plans of affected governmental units. Comprehensive plans are
8 coordinated “when the needs of all levels of governments have been considered and accommodated
9 as much as possible.” *Brown v. Coos County*, 31 Or LUBA 142, 145 (1996). The Goal 2
10 coordination requirement applies when comprehensive plans and land use regulations are being
11 adopted or amended, not when a local government applies the plan and land use regulations to grant
12 tentative subdivision approval. ORS 197.015(5) merely defines “coordinated” for the purposes of
13 coordinating comprehensive plans. OAR 660-012-0015(5) only applies to the preparation of
14 TSPs. The challenged decision does not affect the city’s TSP. Therefore, the city was not required
15 to satisfy any coordination requirement.

16 The fifth assignment of error is denied.

17 **SIXTH ASSIGNMENT OF ERROR**

18 Petitioners’ sixth assignment of error is similar to their fifth, in that they argue the city
19 violated its coordination requirements by not coordinating with the county and the Oregon Division

¹¹ OAR 660-012-0015(5) provides:

“The preparation of TSPs [transportation system plans] shall be coordinated with affected state and federal agencies, local governments, special districts, and providers of transportation services.”

ORS 197.015(5) merely defines “coordinated” for purposes of coordinating comprehensive plans. It provides, in part:

“A [comprehensive] plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.”

1 of State Lands regarding the wetlands on the property. Petitioners cite the same three authorities as
2 in the fifth assignment of error. As with the fifth assignment of error, those coordination
3 requirements do not apply to approvals of tentative subdivisions. The other citation provided by
4 petitioners is to OAR 660-021-0020, which concerns authority to establish urban reserve areas.
5 As the response brief explains, petitioners fail to make any plausible argument as to how this rule
6 applies to wetlands. At oral argument, petitioners explained that they identified the wrong division
7 of OAR Chapter 660 in the petition for review, citing OAR 660-021-0020 instead of OAR 660-
8 031-0020.

9 In this case, the petition for review provides no analysis of the cited rule or argument
10 explaining how it is violated. There was therefore no way that intervenor could have anticipated that
11 petitioners were making a challenge under OAR 660, division 31. In fact, it appears that intervenor
12 attempted, as best it could, to respond to what it presumed was petitioners' argument under the
13 provision cited, OAR 661-021-0020. Even if we were to allow petitioners, in essence, to raise a
14 new assignment of error at oral argument, petitioners do not explain how OAR 661-031-0020 is
15 applicable, and we do not see that it is.

16 The sixth assignment of error is denied.

17 **SEVENTH ASSIGNMENT OF ERROR**

18 Petitioners argue that the city violated the notice requirements of ORS 197.763(2)(a)
19 because the city did not provide notice to nearby property owners (the Mitchells). Petitioners do
20 not explain what notice the Mitchells were allegedly due and did not receive. Petitioners, however,
21 cite the portion of the record showing the notice list for the planning commission hearing. As
22 intervenor points out, the Mitchells did receive notice of the city council hearing. Record 160. Even
23 if the Mitchells had not received required notice, the failure to send notice of a hearing to persons
24 other than petitioner does not prejudice the substantial rights of petitioner. *Forest Park Estate v.*
25 *Multnomah County*, 20 Or LUBA 319, 333 (1990).

26 The seventh assignment of error is denied.

1 **EIGHTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city imposed an “excessive number of conditions” in order to
3 render the application approvable and that the “conditions basically redesign the applicant’s
4 proposal.” Petition for Review 7. According to petitioners, ORS 197.522 does not require the city
5 to develop conditions of approval “that would render the proposed development compliant with
6 applicable criteria.” Petition for Review 7.¹² The correctness of that interpretation of ORS
7 197.522 has yet to be determined by this Board, and we are not called upon to make that
8 determination here. There is certainly nothing in ORS 197.522 that *prevents* the city from imposing
9 conditions of approval “to make the proposed activity consistent with the plan and applicable
10 regulations.” We reject petitioners’ argument to the contrary.

11 The eighth assignment of error is denied.

12 The city’s decision is affirmed.

¹² ORS 197.522 provides:

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”