BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD J. WASSERBURG
and NAOMI WASSERBURG,
Petitioners,

vs.

CITY OF DUNES CITY,
Respondent,

and

RON MANN,
Intervenor-Respondent.

LUBA No. 2006-004

FINAL OPINION
AND ORDER

Appeal from City of Dunes City.

Holly H. Martin, Boring, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Martin Law Offices.

No appearance by City of Dunes City.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 06/13/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that grants preliminary approval for a planned unit development subdivision.

STANDING

Joyce Keener and Tom Cherones are listed as petitioners in the notice of intent to appeal. In the petition for review, petitioners concede that petitioners Keener and Cherones do not have standing. Accordingly, petitioners Keener and Cherones are dismissed as petitioners in this appeal.

FACTS

Intervenor, the applicant below, is one of the owners of the subject property. The property is zoned Residential R-1, which generally requires that new lots be at least one acre in size. The challenged city council decision grants three approvals: (1) preliminary subdivision approval to divide the 20.3-acre property into 19 lots, (2) planned unit development approval and (3) a zoning map amendment to add a "PUD" suffix for the property. The planned unit development approval allows intervenor to subdivide the property into lots of less than one acre, so long as the overall density of the PUD subdivision does not exceed "one family unit per acre." Dunes City Code (DCC) 156.194(A).

The property is located near Lake Woahink. Lake Woahink is a source of drinking water for many homes in Dunes City, and would supply drinking water to the proposed PUD subdivision. Concern about the potential impact of the proposed development on water quality in the lake appears to be the primary issue in this appeal. The planning commission held two public hearings on the proposal and recommended that the city council approve the request with specified conditions. The city council held three public hearings on the matter. At the end of the December 8, 2005 public hearing, the city council voted to approve the application with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error alleges two technical defects in the city's decision. First, petitioners allege that while the city undoubtedly intended to grant the required PUD subdistrict approval, the city council's written decision fails to do so. Second, petitioners allege the city's final written decision erroneously omits some findings that the city council orally adopted at its December 8, 2005 public hearing.

A. The PUC Zoning Map Suffix

Under the city's PUD procedure, when the city council grants preliminary and final PUD subdivision approval, a notation to that effect is made on the city's zoning map. DCC 156.185(C)(5).[1] Section III of the city council's final order in this matter is entitled "DECISION." Record 18. The relevant text that appears after that heading is set out below:

> "IT IS HEREBY ORDERED that the City Council of Dunes City approves with conditions the Woahink Ridge Planned Unit Development subdivision plan (PUD 01-05) based on the information in the staff report and the findings of fact stated in this document." *Id*.

Petitioners' first argument is based entirely on the lack of any express mention of the PUD approval or zoning map amendment in the above-quoted text. Based on that omission, petitioners allege the city failed to grant the PUD approval that must accompany a subdivision approval that is taking advantage of the PUD clustering provisions to propose lots of less than one acre.

Intervenor argues that when the decision is read as a whole it grants approval of what was requested in the application. That application included a request for PUD approval and a request for the resulting PUD zoning map suffix. We agree with intervenor. While the city

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[1] DCC 156.185(C)(5) provides:

> "Upon approval of the Order of Preliminary PUD Approval, the property so covered by the resolution shall be appropriately indicated on the Zoning Map. Following approval of a final Planned Unit Development application * * * the Zoning Map shall be modified accordingly."

council could have more clearly stated its intent in the final "Decision" section of its decision by including a reference to the PUD approval and the zoning map amendment, if the decision is viewed as a whole it is clear that the city council intended its decision to grant the three approvals that intervenor requested in his application.[2]

B. The Missing Findings

Petitioners contend that the minutes of the December 8, 2005 city council hearing show that the city council orally approved certain findings that were never included in the written decision that was signed by the mayor on December 16, 2005.

Intervenor responds:

> "LUBA reviews what the local government did put into the findings, not what it may have intended to put in but forgot. The question is, based on the findings that made it into the decision, are there any mandatory standards that were required to be addressed but were not, and for which the Petitioner has adequately preserved the issue. As noted by Petitioners, this question is the subject of their second assignment of error. [This part of the first assignment of error] includes no substantive arguments that are potentially a basis for remand." Intervenor-Respondent's Brief 6.

We agree with intervenor.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Introduction

Under this assignment of error, petitioners allege the city council erred by failing to adopt findings that explain why the proposed PUD subdivision complies with several comprehensive plan policies.[3]

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[2] As intervenor points out, Finding 1(A) of the city council's decision acknowledges that the applicant sought approval of a zone change. In addition, findings that begin at Record 13 and continue to Record 16 address DCC criteria for zoning map amendments and PUD approval and find that they are met. Those findings would be surplusage if the city council did not grant the requested PUD approval and zoning map amendment.

[3] The Dunes City Comprehensive Plan (DCCP) policies that petitioners allege the city improperly failed to address are as follows:

Intervenor responds:

> "Petitioners assume uncritically that all these plan policies apply to 'the decision' under review. This is not necessarily so. There are several decisions here—two 'land use decisions' and one 'limited land use decision.' There are two critical questions: (1) which decisions must comply with the standards in the plan, and (2) for the decisions that must comply, which plan policies are independent mandatory standards?" Intervenor-Respondent's Brief 7.

The above response and the arguments that follow that response in intervenor's brief unnecessarily complicate the analysis that is required to resolve this case. We turn to

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> "Policy A9. Dunes City shall provide for the orderly development and preservation of the land, control densities to prevent the need of extensive public services and remain commensurate with the carrying capacity of the land and water resources of the city." DCCP 5.
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> "Policy C4. Development will not exceed the level of use that can be accommodated without irreversible damage to or impairment of the natural resources or their quality." DCCP 9.
>
> "Policy E3. Waste discharges from future facilities shall not exceed the carrying capacity nor degrade the quality of the land, air and water resources." DCCP 10.
>
> "Policy B1. The city shall protect natural resources and encourage their wise management, proper development, and reuse. Areas possessing unique ecological, scenic, aesthetic, scientific, or education values shall be considered in the planning and zoning process." DCCP 7.
>
> "Policy B2. The city shall protect the waterways and geologic and wooded integrity of the area so that the community may proudly identify itself with trees, lakes, dunes and rivers." DCCP 7.
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> "Policy B9. Nonpoint pollution sources are a threat to the water quality of the city's lakes and streams. There shall be no direct urban run off into the city's lakes and streams. New construction and site development, including roads, shall provide a storm water management system consistent with sound engineering practice and the requirements of this policy. Owners of existing homes are to be encouraged to contain their run off as well. Site construction procedures shall not contribute to erosion into lakes and streams. DCCP 7-8.
>
> "Policy B5. Elements of the aquatic environment such as the lakes, marshes, mudflats, lagoons, riparian vegetation, and critical wildlife habitat and resources shall be considered in the planning and zoning process." DCCP 7.

Petitioners also cite a large number of additional DCCP provisions in their arguments under the second assignment of error, but we do not understand petitioners to argue that those provisions apply directly to the challenged decision or that the city council erred by failing to address these additional DCCP provisions.

intervenor's contention that there are three decisions in this case and that one of them is a limited land use decision.

As defined by ORS 197.015(13), limited land use decisions include decisions that approve subdivisions within an urban growth boundary.[4] The question of whether the city's tentative approval of the subdivision application in this case can be viewed in isolation as a limited land use decision is potentially significant because, if so, ORS 197.195(1) may shield that limited land use decision from direct application of comprehensive plan policies that might otherwise apply. [5] The disputed PUD subdivision is within the city's urban growth boundary. If the challenged decision simply granted tentative subdivision plan approval and if the city has not taken the required steps to "incorporate its comprehensive plan provisions into its land use regulations," the city would not be obligated to apply the cited plan policies,

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[4] As relevant, ORS 197.015(13) provides:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "(a) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[5] ORS 197.195(1) provides:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. * * * Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county 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 county or on appeal from that decision."

because ORS 197.195(1) would bar it from doing so.[6] *Paterson v. City of Bend*, 201 Or App 344, 351-52, 118 P3d 842 (2005).

We understand intervenor to argue that under ORS 197.195(1) LUBA should first analyze the tentative subdivision approval, without reference to any of the comprehensive plan policies cited by petitioners. Then, LUBA would consider whether any of the cited DCCP policies apply as approval standards to the PUD approval and zoning map amendment and, if so, whether the PUD approval and zoning map amendment are inconsistent with those DCCP policies. In performing this latter analysis, we understand intervenor to argue that LUBA should apply any relevant DCCP policies only to the aspects of the subdivision that required PUD approval.[7]

While it might be possible to analyze the city's decision in the way intervenor suggests, we decline to do so. The city adopted a single decision. That decision approves a subdivision that creates 19 lots that range in size from .52 acres to .84 acres, along with several common open space parcels. That subdivision could not have been approved, solely utilizing the city's subdivision ordinance. With the modifications made possible via the PUD approval, the proposal is now a blended proposal; it is both a subdivision and a PUD. A PUD is not among the types of development that qualifies as a "limited land use decision," as ORS 197.015(13) defines that term.

When statutory provisions for limited land use decisions were first adopted, they excluded limited land use decisions from LUBA's jurisdiction. ORS 197.015(10)(b)(C)

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[6] Petitioners argue the city has taken the steps required by ORS 197.195(1) to "incorporate its comprehensive plan provisions into its land use regulations." We need not and do not address that issue.

[7] The feature of the PUD approval that seems to be of most importance to petitioners is the ability to cluster lots and thereby reduce lot size so long as an overall residential density of one dwelling per acre is preserved with the resulting open space.

(1991).[8] Today, limited land use decisions are subject to LUBA's jurisdiction, but are reviewed under the more limited scope of review provided by ORS 197.195(1), and are subject to the more streamlined adoption procedures set out at ORS 197.195(2) through (5). However, the original definition of "limited land use decision" has not been amended in any material way since 1991, and the ORS 197.195(1) requirement that limited land use decisions must "be consistent with applicable provisions of city or county comprehensive plans and land use regulations" has not been changed. In *Bartels v. City of Portland*, 20 Or LUBA 303 (1990) we rejected arguments that LUBA lacked jurisdiction over a city decision that granted PUD approval, tentative subdivision plat approval, exemptions from solar access standards and variances:

> "[W]e have explained that the exception to our review jurisdiction created by ORS 197.015(10)(b)(B) [(1991)] is a relatively limited one. It is limited to urban partition and subdivision decisions which simply *apply* the *existing* standards governing such land divisions. The exception does not apply in cases where a subdivision or partition decision includes or requires plan or zone changes. * * * Neither does ORS 197.015(10)(b)(B) apply where a subdivision or partition requires modifications to or variances from the approval standards governing subdivisions and partitions. *See Hoffman v. City of Lake Oswego*, 20 Or LUBA 64, 66 (1990)." 20 Or LUBA at 307 (emphasis in original; footnote omitted).

Because the PUD approval modifies the minimum lot size requirement that would apply without the PUD approval and because a zoning map amendment was required, the challenged decision is not a "limited land use decision," as ORS 197.015(13) and 197.195(1) use that term. ORS 197.195(1) does not shield the challenged tentative subdivision approval decision from any applicable comprehensive plan provisions, even if the city has not taken the actions described in ORS 197.195(1) to "incorporate its comprehensive plan provisions into its land use regulations."

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[8] When it was originally adopted in 1991, ORS 197.015(10)(b)(C) excluded from the statutory definition of land use decision any decision "[w]hich is a limited land use decision[.]"

B. The DCCP Policies

As intervenor points out, the issue of whether particular comprehensive plan policies apply to a particular land use decision frequently requires a multi-faceted inquiry, at least where a local government's comprehensive plan and land use regulations simply call for land use decisions to be consistent with or to comply with the local government's comprehensive plan. That is the situation here, because both the city's subdivision regulations and the city's PUD approval criteria simply direct that decisions approving subdivisions or PUDs must comply with or be consistent with the comprehensive plan.[9] As we explained in *Save our Skyline v. City of Bend*, 48 Or LUBA 192, 209-10 (2004):

> "[L]ocal and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). Local governments and this Board have frequently considered the text and context of cited parts of comprehensive plans and concluded that the alleged comprehensive plan standard was not an applicable approval standard. *Stewart v. City of Brookings*, 31 Or LUBA 325, 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990). Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. *Bennett v. City of Dallas*, 17 Or LUBA at 456. Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required *consideration* that must be balanced with other relevant *considerations*. *See Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992) ('a balancing process that takes account of relative impacts of particular uses on particular [comprehensive plan] goals

[9] DCC 155.048(B) directs that in approving a subdivision the planning commission must find the subdivision "complies in all respects to applicable provisions of * * * city plans and policies[.]" DCC 155.049 imposes that same findings requirement on the city council when it approves a tentative subdivision plan. DCC 156.187(A)(1) applies to PUD decisions and requires that the city find "[t]he location, size, design, and uses [are] consistent with the comprehensive plan."

> and of the logical relevancy of particular goals to particular uses is a decisional necessity')." (Emphases in original).

Intervenor contends that the plan policies cited by petitioners either are not mandatory approval criteria or do not apply to decisions like the challenged decision. We tend to agree with intervenor that at least some of the cited plan policies are directed at city decisions to adopt or amend its comprehensive plan or land use regulations rather than site specific development approvals such as the decision at issue in this appeal. Policies A9, B1, B2 and B5 may well be this kind of plan policy and for that reason may not apply directly to the appealed decision. *See* n 3. But it is not clear to us why a decision to approve a PUD subdivision in relatively close proximity to a lake that is used as a domestic water supply need not consider Policies C4, E3 and B9, which are concerned with irreversible damage to natural resources, waste discharges that may exceed carrying capacity and potential nonpoint pollution threats to water quality.[10] *See* n 3. Petitioners clearly raised these policies below. The city makes no attempt in its decision to explain why it believes these policies do not apply in its decision. Remand is appropriate so that the county can either explain why it believes the cited policies do not apply or, if they apply, why the challenged PUD subdivision complies with those policies.

In a spirited attempt to defend the city's decision, intervenor argues the issue presented in this assignment of error is limited:

> "That issue, as stated at page 19 of the petition, is that the decision 'should have addressed the propriety [of] allowing the clustering of septic tanks on lots of less than one acre * * * in light of the restriction * * * to only development which is within the carrying capacity of the land and water and will not endanger the quality of Dunes City's drinking water * * *'[.]" Intervenor-Respondent's Brief 9.

Intervenor further argues that this specific issue was not raised below.

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[10] Intervenor contends that any threat to the nearby lake that might be posed by failing septic tanks and other activity on the proposed residential lots is not nonpoint pollution. Without a more developed argument in support of that position, we do not agree.

We reject those arguments. The precise scope of the "issues" petitioners raise under this assignment of error is not entirely clear. But it is not as limited as intervenor suggests. The second assignment of error raises a more general issue that the PUD subdivision is not consistent with a number of specified DCCP policies that were enacted to protect various aspects of the environment, including water quality. That issue was clearly raised below and therefore was preserved for review in this appeal. Record 70-75.

Intervenor also argues that because the PUD approval does not increase the number of lots that would be allowed in a conventional subdivision of one-acre lots, and therefore is not the kind of decision that "triggers the need to make discrete findings under any of the [cited] plan policies." Intervenor-Respondent's Brief 9. The premise that underlies this argument is that a conventional subdivision of one-acre lots would not be subject to review under the cited plan policies. As we have already noted, petitioners dispute that premise, arguing that the city has taken the actions required to incorporate the comprehensive plan policies into the city's land use regulations. However, even if we accept intervenor's premise, it does not necessarily follow that a subdivision with clustered lots will necessarily have the same impact on water quality as a conventional subdivision of one-acre lots. It could be that clustering residential development will *reduce* the environmental impacts of the subdivision, but that clustering could also *increase* the threat of such impacts. The primary impact that petitioners apparently fear is that placing septic drain fields on smaller lots might increase the chances that those drainfields will fail and threaten the lake's function as a domestic water source. There may well be reasons why such fears are unwarranted in this case, but we do not accept intervenor's rationale that maintaining the number of septic drainfields that could be allowed in a conventional subdivision necessarily renders the cited policies inapplicable.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

DCC 156.187(A) sets out a number of approval criteria that the city must "find * * * are met before it approves a Planned Unit Development." One of those criteria requires that the city find that the street system can safely accommodate traffic from the proposed PUD. DCC 156.187(A)(3).[11] In addressing DCC 156.187(A)(3) the city adopted the following finding:

> "In order to provide access to the development the applicant is proposing two streets: 1) extending Green Gate Road off of Canary Road to the site and 2) constructing a private street off of Green Gate Road Street. Canary Road is a county road and classified as a major collector. The plans indicate no lots will access Canary Road directly. The entire development will access Canary Road via one access point (Green Gate Road). This design will eliminate private driveways on Canary Road reducing traffic conflict points and congestion. * * *" Record 15.

Petitioners contend that issues were raised below about whether the traffic from the proposed PUD subdivision can be safely accommodated on Canary Road, which is an urban collector and provides access to the subdivision. Petitioners contend the above finding does not address that question and, for that reason, the city's decision must be remanded. We agree with petitioners that DCC 156.187(A)(3) requires that the city find that the traffic that will be generated by the proposed PUD subdivision can be safely accommodated by Canary Road and that the above finding and related findings cited by intervenor are not responsive to that issue. It may be, as intervenor suggests, that Canary Road has adequate capacity and can safely accommodate the additional traffic that will be generated by the proposed PUD subdivision. However, the city must adopt findings that address the traffic safety standard in DCC 156.187(A)(3) and explain why that is the case.

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[11] As relevant, DCC 156.187(A)(3) provides:

> "The location, design, size, and land use must be such that traffic generated by the development can be accommodated safely and without congestion on existing or planned streets * * *."

Intervenor alleges the Canary Road traffic safety issue was not adequately raised below and therefore was not preserved for review review by LUBA. Intervenor offers two waiver theories, and we address them separately below.

A. ORS 197.763(1) and 197.835(3) (Fair Notice Waiver)

ORS 197.763(1) requires that a party give the local government decision maker fair notice of an issue to preserve his or her right to raise that issue at LUBA. *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997); *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).[12] If a local government decision maker is not provided fair notice of an issue prior to the close of the evidentiary proceedings, that issue may not be raised at LUBA. ORS 197.835(3).[13] As the text of these two statutes makes clear, the petitioner at LUBA need not have personally raised the issue below to preserve his or her right to raise the issue in an appeal at LUBA, as long as someone adequately raises the issue. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111, 123, (2001); *Mitchell v. City of Medford*, 29 Or LUBA 158, 160 (1995); *Spiering v. Yamhill County*, 25 Or LUBA 695, 714 (1993).

Intervenor first argues that no one provided fair notice of the issue of whether Canary Road could safely accommodate traffic from the proposed PUD subdivision and that under ORS 197.763(1) and 197.835(3) LUBA should decline to consider that issue. We do not

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[12] 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."

[13] ORS 197.835(3) provides the following limit on LUBA's scope of review:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.

agree. Although petitioners apparently did not raise any issues concerning traffic, other participants did. Record 401-02.[14]

B. ORS 197.825(2)(a) (Exhaustion Waiver)

Under ORS 197.825(2)(a), a petitioner may not appeal to LUBA unless he or she has exhausted available local remedies. *Lyke v. Lane County*, 70 Or App 82, 85-86, 688 P2d 411 (1984).[15] In *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), the Court of Appeals construed the ORS 197.825(2)(a) exhaustion requirement, together with the raise it or waive it provisions of ORS 197.763(1) and 197.835(3), to hold that even though one or more parties may have given fair notice of an issue at some point during the local proceedings before the record closes, as required by ORS 197.763(1) and 197.835(3), that issue may not be preserved for LUBA review in some circumstances. In *Mile*s the Court of Appeals assumed an issue concerning whether the site in that case had the requisite street

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[14] The minutes of the September 8, 2005 city council meeting reflect the following testimony:

> "Long is opposed to any development due to the traffic concerns on Canary Road.' Record 401.
>
> "Riesenhuber said that traffic on Canary Road is now unbearable and he is not in favor of high density development without any additional police traffic control." Record 402.

In a partial transcript of the September 8, 2005 city council meeting petitioners set out Mr. Riesenhuber's testimony:

> "[I]t—all comes together in that the major problem that we are now finding on Canary Road is that the traffic has become unbearable. And now you keep adding more and more and more property and which is going to mean more and more and more traffic on Canary Road."
>
> "Dunes City provides no traffic control whatsoever. There are no police patrols or anything on Canary Road and it has become absolutely dangerous where we are.
>
> "And so I think that the Council needs to look very closely at allowing all of this high density development because you have no means of controlling the traffic and you are just basically driving us crazy." Petition for Review, Appendix B.

[15] ORS 197.825(2)(a) provides that LUBA's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

frontage was raised before the planning commission. But that issue was not among the four issues specified as the grounds for appeal to the city council. The court found that failure was a failure of the statutory exhaustion requirement.

> "[A] party may not raise an issue before LUBA when that party could have specified it as a ground for appeal before the local body, but did not do so. Here, that is what happened. Opponents' failure to raise the frontage issue in their appeal to the city council waived that issue and precluded them from raising it before LUBA." *Id*. at 510.

Intervenor argues that LUBA should apply the Court of Appeals' reasoning in *Miles* here and find that petitioners' failure to raise the Canary Road traffic safety issue *personally* during the proceedings below precludes them from raising that issue on appeal, even though others may have raised the issue.

There are at least two problems with intervenor's reliance on *Miles*. First, intervenor reads *Miles* to require that a petitioner at LUBA must have *personally* raised that issue in its notice of local appeal.[16] But there were no other local parties in *Miles* who raised the disputed issue during the local appeal. Therefore, we do not know whether the Court of Appeals in *Miles* would have held that the petitioner was barred from raising the street frontage issue, if other parties had also filed a local appeal and raised that issue. We do not read the language in the Court of Appeals' decision that is set out at n 16 to have decided a legal question that was not presented in the appeal.

The second problem with intervenor's reliance on *Miles* is even more fundamental. Intervenor recognizes that the petitioners in *Miles* had a right of appeal that called for the opponents to specify the basis for their appeal to the city council in a local notice of appeal, whereas the proceedings before the city council in this case were required in any event and

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[16] Intervenor finds that requirement in the wording of the first sentence in the quoted portion of the Court of Appeals decision:

> "[A] party may not raise an issue before LUBA when *that party* could have specified it as a ground for appeal before the local body, but did not do so." (Emphasis added.)

there was no need for a local appeal, no right of local appeal and therefore no local requirement that petitioners specify the bases for a local appeal. Intervenor argues "[t]hat difference is immaterial." Intervenor-Respondent's Brief 17.

We do not agree that the difference is immaterial. We understand intervenor to argue that the exhaustion requirement of ORS 197.825(2) should be applied in cases like the present one to require that a petitioner at LUBA must have personally raised an issue each time the local land use proceedings moved from one local decision making body to another, even if that move is not pursuant to a local appeal. That would be a significant extension of the holding in *Miles* that we doubt the Court of Appeals would find supportable under the ORS 197.825(2) requirement for exhaustion of local remedies. We decline intervenor's invitation to extend the holding in *Miles* in the two ways that would be necessary to find that petitioners waived their right to raise the Canary Road safety issue.

The third assignment of error is sustained.[17]

FOURTH ASSIGNMENT OF ERROR

Under DCC 156.191(A), a design team is required for a PUD.[18] For a residential PUD, the composition of that design team can be limited to "an architect, or a landscape

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[17] Petitioners also argue under the third assignment of error that the city was obligated to consider the Canary Road safety issue under the subdivision criteria set out at DCC 155.048(B)(2), which imposes a finding requirement on the planning commission, and DCC 155.049 which imposes the same finding requirement on the city council. That finding requirement is as follows:

> "The division of the property does not impede the future best use of the remainder of the property under the same ownership or adversely affect the safe and healthful development of such remainder or any adjoining land or access thereto."

Petitioners may be correct that DCC 155.048(B)(2) imposes essentially the same traffic safety obligation that is imposed under the PUD criterion DCC 156.187(A)(3). But petitioners simply rely on the same arguments they presented in support of their arguments under DCC 156.187(A)(3). Petitioners do not explain why the findings the city might be required to adopt to respond to DCC 155.048(B)(2), if it is interpreted in the way petitioners argue, would differ in any way from the findings the city must adopt to respond to DCC 156.187(A)(3). We therefore decline to consider this part of petitioners' third assignment of error.

[18] DCC 156.191(A) provides:

architect and an engineer or a land surveyor." DCC 156.191(C)(2). Petitioners contend the design team for the disputed PUD subdivision did not include either an architect or a landscape architect.

Petitioners also point out that DCC 156.185(A)(3) imposes informational requirements that are consistent with the requirement for a design team.[19] Petitioners contend that these informational requirements were not complied with. Petitioners contend that the design team and the information required by DCC 156.185(A)(3) are needed to allow the city and the applicant to demonstrate that a proposed PUD complies with the PUD approval criteria at DCC 156.187. Among those approval criteria are DCC 156.187(6) and (7) which require:

> "(6) The plan shall preserve the maximum number of evergreen trees and desirable natural plants (as defined in the Erosion Control Ordinance), given the limits of the area to be developed.

> "The talents of qualified professionals, working as a team, are required for the planning, development, and construction of a Planned Unit Development to ensure that the objectives of this subchapter may be most fully realized and appreciated by the community and that the project enables the most expeditious processing of PUDs by facilitating coordination and communication between the developer, the various professionals, the public agencies, and the Planning Commission. The composition of the design team shall include, but not be limited to, a qualified architect, a landscape architect, and an engineer or land surveyor, licensed by the state."

[19] DCC 156.185(A)(3) requires that a preliminary PUD development plan include the following:

> "(d) A preliminary landscaping plan depicting existing and proposed tree plantings, ground cover, screen planting and fences, and the like, and showing the location of existing trees in excess of 12 inches in diameter measured four feet from ground level which are proposed to be removed by the development.
>
> "(e) Architectural sketches or drawings and/or elevations clearly establishing the scale, character, and relationship of buildings, streets, ways, parking spaces or garages, and open spaces.
>
> "* * * * *
>
> "(i) A preliminary identification of lots which will posses solar access and trees which will shade lots."

> "(7) The location, design, size, and uses shall provide the maximum solar access to south-facing building walls and rooftops at noon on December 21. Application of this standard shall include but not be limited to the placement and orientation of structures, and the type and location of trees to be planted."

The city's findings addressing DCC 156.187(6) and (7) are as follows:

> "**RESPONSE:** As stated earlier, the applicant has proposed to preserve all evergreen trees except for those that need to be removed for the construction of dwellings and facilities such as streets. The private CC&Rs also prohibit any clear cutting of trees, shrubs or bushes on individual lots. Therefore the plans comply with [DCC 156.187(6)].
>
> "* * * * *
>
> "**RESPONSE:** As stated earlier, the subject site is covered with evergreen trees and slopes which make meeting the solar access standards difficult. Since no new trees are being proposed, the plans comply with [DCC 156.187(7)]." Record 16.

There is no explanation in the city's decision for why the city did not require that the applicant include an architect or landscape architect in his design team, as DCC 156.191 requires. Similarly, there is no explanation in the city's decision for why the city did not require the applicant to submit the information that DCC 156.185(A)(3)(d),(e) and (i) requires. Intervenor does not claim that petitioners failed to raise any issue about the absence of the required "architect or landscape architect" on the applicant's design team or the missing information. It might be possible to overlook the design team and evidentiary failures if we could tell that they were harmless or petitioners made no attempt to show why the failures may have legal significance. *Frewing v. City of Tigard*, 47 Or LUBA 331, 351-52 (2004). However, that does not appear to be the case here. *See Save Oregon's Cape Kiwanda v. Tillamook Cty*., 177 Or App 347, 362, 34 P3d 745 (2001) (absence of required geologic hazard report might deprive the county of a required element of decision-making). The above-quoted city findings do not demonstrate that the DCC 156.187(6) requirement to "preserve the maximum number of evergreen trees and desirable natural plants" is met. There are conflicting findings in the decision about the trees that remain on the property,

although it appears that most of the property was recently logged of all merchantable timber. The city's finding regarding DCC 156.187(7) that the site is covered with trees is apparently incorrect. Those findings do not explain why the DCC 156.187(7) requirement that the "location, design, size, and uses shall provide the maximum solar access to south-facing building walls and rooftops at noon on December 21" is met.

On remand the city must require that the applicant secure the design team required by DCC 156.191 and provide the information required by DCC 156.185(A)(3)(d),(e) and (i) so that it can adopt findings that demonstrate compliance with DCC 156.187(6) and (7). We do not mean to foreclose the possibility that the city may be able to explain why the requirements of DCC 156.191 and DCC 156.185(A)(3)(d), (e) and (i) need not be imposed here, but the city must either provide that explanation or require that the applicant comply with those requirements.

The fourth assignment of error is sustained

The city's decision is remanded.