BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIM WEISKIND and TOM WEISKIND,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

MARILYN MOHR, HANS WITTIG,
MARISKA DOVER, DENNIS DOVER,
MICHELE PACHOUD, SHARON DANIELSON,
JAYME HICKS, MAGI HICKS,
RIVER ROAD COMMUNITY ORGANIZATION and
EUGENE TREE FOUNDATION,
Intervenor-Respondents.

LUBA No. 2006-109

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was the Law Office of Bill Kloos, PC.

No appearance by City of Eugene.

Jannett Wilson, Eugene, filed the response brief and argued on behalf of intervenor-respondents. With her on the brief was the Goal One Coalition.

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

AFFIRMED 10/30/2006

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 hearings official's decision that denies their application for tentative subdivision approval.

MOTION TO INTERVENE

Marilyn Mohr, Hans Wittig, Mariska Dover, Dennis Dover, Michele Pachoud, Sharon Danielson, Jayme Hicks, Magi Hicks, River Road Community Organization, and Eugene Tree Foundation move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The decision before us in this appeal is the city hearings official's decision following a local appeal of a city planning director decision that approved petitioners' request for tentative subdivision plan approval. The hearings official's decision sets out the following description of the property and the proposed subdivision:

> "The subject property is a 1.19 acre parcel located north of North Park Avenue, west of Horn Lane and east of Rossmore Street. The property is currently developed with a single family dwelling * * *. The property is zoned Low Density Residential (R-1), which permits a net housing density of up to 14 units per acre. The applicant proposes to subdivide the property into eight lots, accessed via a private road, tentatively named Ty Way. The applicant proposes to relocate the existing dwelling to a lot located in the northwest corner of the property. The remaining lots are to be developed with single-family dwellings.
>
> "The subject property is located in an established residential area, and most of the nearby dwellings are situated on larger lots. Neighboring properties to the west are downslope of the subject property, which has a crescent shaped elevated area traversing the center of the property from north to south. * * * According to testimony from the neighbors, the northwest corner of the property is a swale that is subject to ponding during storm events. The swale is [a] tributary to a larger natural drainage located to the north of the subject property. The drainage area to the north as been largely filled to accommodate nearby development.

> "According to evidence provided by the applicant, 26 trees with a greater than eight-inch dbh [diameter at breast height] are located on the property. The applicant's tree preservation plan proposes to retain six of those trees in accordance with city tree preservation standard, although the applicant contends that other trees may be preserved despite development on the lots on which they are located. The planning director's decision requires that two trees be planted to replace each of the 20 large diameter tress proposed for removal." Record 9 (citation omitted).

SECOND ASSIGNMENT OF ERROR

The general Eugene Code (EC) criteria for tentative subdivision plan approval appear at EC 9.8515. Under EC 9.8515(5), an applicant for subdivision approval must establish that the proposed subdivision will not result in an unreasonable risk of flood and will provide adequate drainage.[1] As we noted above, the western part of the subject property formerly was part of a drainage that conveyed water north, from the subject property and from adjoining properties to the west. Due to development around the subject property, that natural drainage way no longer functions as it did in the past and the northwest corner of the property is frequently covered with standing water. The residential development that would follow subdivision of the subject property will contribute a significant amount of additional stormwater runoff from roofs, driveways, streets and other impervious surfaces.

To correct the existing drainage problem and to accommodate the additional drainage that development of the property would generate, the applicant proposed two drywells along the west side of Ty Way. As originally proposed by petitioners, the two drywells in Ty Way would be four feet deep. Petitioners engineer Goebel took the position that those drywells

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[1] The criteria for approval of a subdivision are set out at EC 9.8515. One of those criteria is EC 9.8515(5), which, as relevant, requires:

> "The proposed subdivision will:
>
> "a. Not result in unreasonable risk of * * * flood, * * * or other public health and safety concerns;
>
> "b. Provide adequate * * * drainage, and other public utilities.

would be adequate to accommodate runoff from "up to 10-year storm events." Record 14. That proposal was later modified before the hearings officer:

> "In his appeal, Goebel requests approval of a 3-foot deep drywell along the western boundary of the property to accommodate storm water runoff from the subject property and [adjoining lots to the west], and requests that the two drywells depicted on the site plan * * * be constructed to a three foot depth. According to Goebel, the revised storm water drainage proposal will accommodate storm water from 5-year flood events, the public work standard for public drainage systems. Goebel asserts that runoff from other storm events would pond on Ty Way and Rossmore Street to the west. Goebel contends that this drainage proposal will substantially improve the drainage along the western boundary, which commonly has up to two feet of standing water during 10-year storm events." Record 14-15.

The hearings official noted that subdivision opponents presented two arguments in opposition to petitioners' proposal for accommodating subdivision stormwater runoff. First, opponents took the position that the proposed drywells are considered stormwater injection systems and the Oregon Department of Environmental Qualify (DEQ) prohibits stormwater injection systems within 500 feet of domestic drinking water wells. Opponents contended there was at least one such well within 500 feet of the proposed drywells. Second, opponents contended that under DEQ rules, a drywell that accepts runoff from streets and driveways must be at least 10 feet above the seasonal high groundwater level. DEQ apparently confirmed the opponents' contention. Record 15. City public works staff acknowledged that DEQ might not approve the proposed drywells and accordingly, "recommended that the existing provisions of Condition 12 be retained in the event the drywells are not approved." *Id.*[2]

[2] Condition 12 provided as follows:

> "The applicant shall designate the area starting at the 390 contour line for Lots 5 and 6, to the western property boundary as a no disturb area. This no disturb area shall be shown on the final site plan, and shall include a note stating that 'No building, structure, fill, or other material shall be placed or located on or in the no disturb area'." Record 253.

The hearings officer went on to conclude that petitioners had not carried their burden regarding the EC 9.8515(5) adequate drainage standard:

> "The Hearings Official concludes that the applicant has not met his burden to demonstrate that EC 9.8515(5) is met or that it is feasible to meet the standard with the imposition of conditions of approval. As the evidence shows, drainage is a significant issue, and the construction of additional impervious surfaces that will encompass over half of the subject parcel will likely add to the drainage problem. In addition, the evidence shows that the existing drainage area to the northwest is currently inadequate to address ponding, even though the applicant has removed a significant amount of solid waste that filled the area. The applicant has not demonstrated that drywells are a feasible alternative in light of testimony that shows that DEQ is unlikely to approve them, nor has the applicant demonstrated that alternatives are available that will satisfy the standard." Record 15 (footnote omitted).[3]

Citing *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368, 377 (1999); *Welch v. City of Portland*, 28 Or LUBA 439, 447 (1994); *Kay v. Marion County*, 23 Or LUBA 452, 474-75 (1992); and *Moorefield v. City of Corvallis*, 18 Or LUBA 95, 108-09 (1989), petitioners contend the hearings official erred in adopting the above findings, because those findings demonstrate that the hearings official substituted state agency standards (which the city has not adopted) for the EC 9.8515(5) adequate drainage standard (which is the relevant standard that the city has adopted).

We do not agree. The cited cases generally stand for the proposition that a local government many not fail to make a finding that is required by local law and substitute a condition of approval that the applicant seek and receive a state agency permit that is governed by different standards. That is not what happened here. The subject property already has a serious drainage problem.[4] The proposed subdivision will introduce a great

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[3] In the omitted footnote, the hearings official noted that petitioners' engineer Goebel submitted a letter on May 15, 2006 that responded to this issue. However, the hearings official concluded that that letter included new evidence and was submitted after the May 10, 2006 deadline for rebuttal evidence. The hearings official declined to consider that new evidence. Record 9.

[4] The water that now accumulates at the northwest portion of the subject property, in part, comes from the adjoining property to the west rather than the subject property. It appears that the third drywell proposed by petitioners was proposed in large part to accommodate this off-site drainage.

deal of impervious surface that will significantly exacerbate that problem if nothing is done to address that additional stormwater. Petitioners' proposed solution to address the existing and additional stormwater drainage needs relies on the drywells. Even if we were to assume those drywells can be constructed as proposed, it is not clear to us whether the hearings official agreed with Goebel that the proposed drywells would result in adequate drainage, as required by EC 9.8515(5). In any event, it is clear is that the hearings official concluded, based on the testimony that was presented to her, that petitioners had not adequately demonstrated that DEQ can approve the proposed drywells. The hearings official also found that petitioners failed to demonstrate that there were adequate alternative ways of disposing of stormwater, if it turns out that DEQ cannot approve the proposed drywells. The hearings official did not substitute DEQ standards for city standards. The hearings official merely concluded that petitioners had not demonstrated that it is feasible to meet the EC 9.8515(5) adequate drainage standard with the facilities it proposes to construct.

It is possible that the hearings official may have imposed a higher evidentiary burden on petitioners to establish that the disputed drywells can be approved under DEQ's administrative rules than is appropriate. *See Wetherell v. Douglas County*, 44 Or LUBA 745, 764 (2003) (where local government finds a local approval criterion will be met if certain conditions are met, and those conditions require a state agency permit, the evidentiary record need only establish that the state agency permit is not precluded as a matter of law); *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992) (same). However, petitioners do not make that argument, and even if they did, the evidence cited by the hearings official suggests that the proposed drywells may well be prohibited by applicable DEQ rules.

The second assignment of error is denied.

CONCLUSION

Because we deny petitioners' second assignment of error, and because the findings that petitioners challenge under the second assignment of error express an adequate reason to

support the hearings official's decision to deny the disputed subdivision application, the hearings official's decision must be affirmed. The hearings official adopted two other reasons for denying the disputed subdivision application. We might also consider those assignments of error, even though our resolution of the second assignment of error makes such consideration unnecessary, if our resolution of those assignments of error might serve some useful purpose. However, we do not do so here. Petitioners' challenge under the first assignment of error raises interpretive questions that do not appear to have been raised below before the hearings official. There is some question in our mind about how those interpretive questions should be resolved. Also, it is not clear that those interpretive questions necessarily will have to be resolved if petitioners elect to pursue this matter further to correct the shortcomings the hearings official identified under the EC 9.8515(5) adequate drainage standard.

Under their third assignment of error petitioners appear to challenge the adequacy of the hearings official's findings to explain her reasons for concluding that the proposal does not comply with EC 9.8515(7), which requires protection of natural features and trees.[5] However, given our disposition of the second assignment of error, it is not necessary to resolve that challenge on the merits. It will suffice to observe that if an issue regarding the adequacy of the proposed subdivision to protect significant trees is presented in an amended application, the hearings official should take care to ensure that she reviews petitioners' proposal, and does not limit her review to the planning director's findings regarding that proposal. Also, if the hearings official again finds the proposal lacking under EC 9.8515(7), her findings must provide an adequate explanation for why the proposal is lacking, so that

[5] EC 9.8515(7) requires the city to find:

> "The proposed subdivision is designed and sited such that roads, infrastructure, utilities, and future development of proposed lots will minimize impacts to the natural environment[.]" Regarding trees, EC 9.8515(7)(b) requires that the subdivision "be designed and sited to preserve significant trees to the greatest degree attainable or feasible[.]"

petitioners are provided a sufficient basis for understanding the basis for her decision and how to go about correcting the application. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994).

The city's decision is affirmed.