

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 SANTIAM WATER CONTROL DISTRICT,
5 *Petitioner,*

6
7 vs.

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9 CITY OF STAYTON,
10 *Respondent.*

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12 LUBA No. 2007-082

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14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Stayton.

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19 William M. Ganong, Klamath Falls, filed the petition for review and argued on behalf
20 of petitioner.

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22 Wallace W. Lien, Salem, filed the response brief and argued on behalf of respondent.
23 With him on the brief was Wallace W. Lien, P.C.

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

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28 AFFIRMED

07/09/2007

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

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NATURE OF THE DECISION

Petitioner appeals a city decision approving a comprehensive plan and zoning change.

FACTS

The city approved a comprehensive plan and zoning map amendment for the subject property from a split designation of Low Density Residential and Medium Density Residential to Commercial Retail. There is a pre-existing commercial nonconforming use of the property. The plan and zone change would bring the existing commercial use into compliance with the plan and code.

Petitioner provides water to various users and maintains an irrigation canal, the Salem Ditch, which runs through the city. According to petitioner, the Salem Ditch receives the overwhelming majority of stormwater discharge generated in the city. Petitioner asserts that the Salem Ditch does not have adequate capacity to handle all of the stormwater discharge produced by the city, and that during storm events the ditch overflows and floods adjoining lands. Petitioner objects to the proposed applications because it fears the approvals will lead to additional impervious surfaces which will increase the stormwater discharge into the already overburdened Salem Ditch. The planning commission recommended denial of the applications, but the city council approved the applications. This appeal followed.

WAIVER

Petitioner raised four assignments of error in the petition for review. The city argues that petitioner did not raise any of the issues that are raised in those assignments of error below, and therefore the issues are waived.¹ Petitioner submitted a letter in opposition to the

¹ ORS 197.835(3) provides:
“Issues [before LUBA] 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.”

ORS 197.763(1) provides:

1 application at Record 77, but that letter does not raise the issues petitioner raises in its
2 petition for review. While the letter expresses petitioner’s opposition to the applications and
3 expresses concern about stormwater discharge, the letter makes no attempt to relate that
4 concern to any applicable approval criteria or standards. The letter at Record 77 did not
5 afford the city an adequate opportunity to respond to the issues raised in the petition for
6 review.

7 At oral argument, petitioner argued that it was not necessary for petitioner to have
8 raised the issues below as long as someone else below raised the issues. Petitioner is correct,
9 *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111, 123 (2001). But petitioner
10 did not identify anyone else who raised the issues below or, more importantly, where in the
11 record those issues are raised. Petitioner also argues that because some assignments of error
12 challenge the adequacy of the findings, petitioner was not required to raise the issues below
13 because the findings had obviously not been adopted at the time of the public hearing. In
14 order to challenge the adequacy of adopted findings at LUBA, however, a petitioner must
15 have raised an issue below regarding the proposal’s compliance with the approval criteria
16 that the findings address. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993).
17 Petitioner has not established that it raised an issue regarding those approval criteria below.
18 Therefore, all of petitioner’s arguments are waived.

19 The city’s decision is affirmed.

“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.”