

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

3
4 MARK AZEVEDO and KATHY COOK,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF ALBANY,
10 *Respondent,*

11
12 and

13
14 FRANK FABIAN,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-262

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from the City of Albany.

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24 Norman R. Hill, Salem, filed the petition for review and argued on behalf of
25 petitioners. With him on the brief was Martinis & Hill.

26
27 No appearance by the City of Albany.

28
29 Andrew J. Bean, Albany, filed the response brief and argued on behalf of intervenor-
30 respondent. With him on the brief was Weatherford, Thompson, Cowgill, Black & Schultz,
31 P.C.

32
33 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
34 participated in the decision.

35
36 REMANDED

09/19/2008

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a tentative plat for an 11-lot subdivision and a site plan to remove 129 trees to develop the subdivision.

REPLY BRIEF

Petitioners move to file a reply brief to respond to new matters raised in the response brief. No party objects to the reply brief, and it is allowed.

FACTS

The property is a 4.52-acre parcel zoned Residential Single Family (RS-10). Intervenor applied to subdivide the subject property into 11 lots ranging in size from 10,513 square feet to 27,678 square feet. Intervenor also applied for site plan review to remove 129 of the 337 trees on the property that are larger than 8 inches in diameter. The property contains steep slopes on its southwestern boundary. Access to the subdivision lots will be from Maier Lane on the north at its intersection with a new street (Fabian Way). Fabian Way ends in a cul-de-sac on the south side of the subdivision. See map attached as Appendix 1.

Maier Lane is a local street that is currently not constructed to city standards and dead-ends at the northeastern corner of the property. As part of the application, intervenor proposed to extend a local street known as Patrick Lane NW across property that intervenor also owns to the north of the subject property, with the result that Patrick Lane NW will intersect with Maier Lane at the northeastern corner of the subject property. Intervenor also agreed to widen Maier Lane from its current paved width of 13 feet to a width of 30 feet and to construct curb, gutter, and sidewalk improvements on the south side of Maier Lane fronting the subject property.

The planning commission denied the application, and intervenor appealed. The city council approved the application. This appeal followed.

1 **FIRST THROUGH THIRD ASSIGNMENTS OF ERROR**

2 In these assignments of error, petitioners challenge the city’s decision that the
3 subdivision satisfies Albany Development Code (ADC) 11.180(2), which provides that the
4 city may approve a tentative subdivision plat if:

5 “(2) Adjoining land can be developed or is provided access that will allow
6 its development in accordance with this Code.”

7 As relevant here, ADC 11.180(2) imposes two requirements: (1) adjoining developable land
8 must be provided access, and (2) that access must be sufficient to allow the adjoining land to
9 be developed in accordance with the ADC.

10 The four parcels to the east of the subject property are developed with single family
11 dwellings. The properties are accessed via a driveway over a private easement that runs
12 adjacent to the subject property’s eastern boundary and that connects those properties with
13 Maier Lane. The approved tentative plat includes a 40-foot wide access easement in the
14 southeast corner of the property, between Lot 6 and Lot 7, that connects the cul-de-sac to the
15 private driveway easement. The city found that the 40-foot easement was sufficient to ensure
16 future access for the development of those adjoining properties to the east as required by
17 ADC 11.180(2), and imposed a condition of approval requiring the access easement to be
18 “dedicated.”¹ Supplemental Record 20.

19 Petitioners argue that ADC 12.150 requires that the access provided must be a
20 dedicated “street,” and that the city erred in approving future access over a dedicated access
21 easement rather than a dedicated public street. ADC 12.150 provides:

22 “Future Extensions of Streets and Reserve Strips. Where it is necessary to
23 give access to or permit a future division of adjoining land, streets shall be
24 extended to the adjoining tract. A reserve strip across the end of a dedicated
25 street shall be deeded to the City. In addition, a barricade at the end of the

¹ Although it is not entirely clear, we presume the condition of approval requiring intervenor to “dedicate” the easement means that intervenor is required to dedicate the easement to the public for its use as a roadway.

1 street shall be installed and paid for by the property owners. It shall not be
2 removed until authorized by the City Engineer.”

3 As relevant here, ADC 12.150 appears to operate in concert with ADC 11.180(2) to require
4 that the “access” that is required by ADC 11.180(2) must be provided by a “street.”²
5 Although petitioners never really explain why, we understand them to argue that the 40-foot
6 dedicated access easement does not qualify as a “street,” and that the 40-foot easement will
7 not permit the adjoining properties to be “developed in accordance with the ADC.”³

8 Intervenor responds initially by arguing that ADC 12.150 is not a standard that
9 applies to the city’s review of the proposed subdivision because that section does not
10 specifically reference “land divisions.” As intervenor explains it, “[u]nless specifically
11 stated otherwise, the only review criteria for tentative plat approval are addressed at ADC
12 11.180.” Intervenor-respondent’s Brief 5.

13 We disagree. ADC Article 12 is entitled “Public Improvements,” and its overview
14 describes Article 12 as containing the standards “* * * for those public improvements which
15 relate to the development process.” ADC 12.000.⁴ ADC 12.045 provides:

² ADC 22.400 provides the following definition:

“Street. A public thoroughfare or right-of-way dedicated, deeded or condemned; other than an alley, which affords the principal means of access to abutting property, including avenue, place, way, drive, land, boulevard, highway, road, and other thoroughfares except as excluded in this Code. The word ‘street’ shall include all arterial highways, freeways, traffic collector streets, and local streets.”

³ Petitioners do cite ADC 12.090, which appears to limit use of easements for access, but petitioners agree that they waived their right to raise any issue under ADC 12.090.

⁴ ADC 22.400 defines “Development” as:

“Any manmade change to improved or unimproved real estate, including but not limited to construction, installation, or change of a building or other structure, *land division*, establishment or termination of a right of access, storage on the land, drilling and site alteration such as that due to land surface mining, dredging, paving, excavation, or clearing.” (Emphasis added.)

1 “Relationship to Other Development Code Articles. This article provides the
2 public improvements standards to be used in conjunction with the procedural
3 and design requirements contained in the articles on Land Divisions, * * *.”

4 While ADC 12.045’s reference to “procedural and design requirements” contained in Article
5 11 is somewhat ambiguous, the overall context of Article 12 makes clear that the standards
6 contained throughout that article are to be applied to public improvements, such as streets,
7 that are developed “in conjunction with” a land division approval.

8 The city found in relevant part:

9 “Four separate parcels of land adjoin the subdivision to the east. Each of the
10 parcels is developed with a single-family house. Each of the parcels is large
11 enough to be divided into smaller parcels, but the placement of the houses and
12 the steep slopes on the eastern area of the parcels restricts their potential for
13 further development. Access to these parcels is currently provided to Maier
14 Lane NW on private easements. The proposed subdivision will include a 40-
15 foot wide access easement from the cul-de-sac at the end of Fabian Way NW
16 to the east boundary of the subdivision. This access easement could be used
17 in the future by the adjoining parcels to allow some further development.
18 Additional access to Maier Lane NW would also most likely have to be
19 provided.

20 “ * * * * *

21 “An easement will be provided * * * for the parcel to the east so that it may be
22 divided in the future. It may be possible to use this easement for other parcels
23 to the east, or private access easements can be provided to Maier Lane NW.
24 * * *.” Supplemental Record 20.

25 The city council also adopted supplemental findings that purported to address petitioners’
26 argument that ADC 12.150 required that a dedicated street right of way be extended to the
27 adjoining properties to the east:

28 “It is impossible to determine what future improvements will be necessary to
29 allow development of adjoining land at some unknown time. The proposed
30 40-foot easement is acceptable to ensure future access for development of
31 adjoining property. This complies with and promotes city policies.” Record
32 26.

33 As noted earlier, ADC 11.180(2) requires the city to find that the land adjoining the
34 proposed subdivision “can be developed or is provided access that will allow its development

1 *in accordance with this Code.*” ADC 12.150 is part of the section of ADC Article 12 entitled
2 “Streets,” and requires that “[w]here it is necessary to give access to or permit a future
3 division of adjoining land, *streets* shall be extended to the adjoining tract.” As we have
4 already noted, ADC 12.150 appears to require that the access to adjoining developable
5 property that ADC 11.180(2) requires must be provided by a “street.” It is unclear to us
6 whether the 40-foot dedicated access easement constitutes a “dedicated public thoroughfare”
7 or in some other way qualifies as a “street.” *See* n 2. It is also unclear to us whether the 40-
8 foot dedicated access easement is sufficient to allow adjoining properties to be developed “in
9 accordance with this Code.” On remand, the city must provide a better explanation for why
10 the approved 40-foot easement (1) is consistent with the ADC 12.150 requirement for a
11 “street” extension and (2) satisfies the ADC 11.180(2) requirement that the required access to
12 adjoining developable land allow that land to be developed “in accordance with this Code.”

13 In a portion of the second assignment of error, and in the third assignment of error,
14 petitioners additionally argue that ADC 12.090 prohibits the city from allowing an access
15 easement rather than a street, and that the city erred in failing to address petitioners’
16 argument.⁵ Intervenor responds that petitioners are precluded from arguing that ADC 12.090
17 prohibits the city from allowing an easement for access because petitioners failed to raise any
18 issue below regarding ADC 12.090. ORS 197.763(1) and ORS 197.835(3). In the reply

⁵ ADC 12.090 provides:

“Creation of Access Easements. In general, the creation of access easements between property owners is discouraged. However, there are some instances where an access easement is the only viable method of providing access to a developable lot. The review body will approve an access easement where the applicant has demonstrated that all of the following criteria have been met:

- “(1) No more than two parcels or uses are to be served by the proposed access easement;
- “(2) There is insufficient room for a public right-of-way due to topography, lot configuration, or placement of existing buildings and,
- “(3) The City Engineer has determined that there is not a need for a public street in this location.”

1 brief, petitioners respond by explaining that their reference to ADC 12.090 was a
2 typographical error, and that they meant to refer to ADC 12.150. That response does not
3 refute intervenor’s assertion that petitioners are precluded from raising an issue under ADC
4 12.090. Accordingly, the issues raised in the first through third assignments of error
5 regarding ADC 12.090 are waived.

6 The first, second, and third assignments of error are sustained, in part.

7 **FOURTH THROUGH EIGHTH ASSIGNMENTS OF ERROR**

8 In these assignments of error, petitioners argue that the city’s findings regarding ADC
9 11.180(3) are inadequate and are not supported by substantial evidence in the record. ADC
10 11.180(3) requires the city to find:

11 “The proposed street plan affords the best economic, safe, and efficient
12 circulation of traffic possible under the circumstances.”

13 In their combined argument in support of these assignments of error, petitioners argue that
14 the city’s finding that ADC 11.180(3) is satisfied is not supported by substantial evidence in
15 the record because the streets in and adjacent to the proposed subdivision fail to comply with
16 ADC 12.060, which requires that streets within and adjacent to the subdivision and off-site
17 improvements be constructed to city standards. Specifically, petitioners argue that the
18 subdivision fails to meet ADC 12.190, which prohibits cul-de-sacs longer than 400 feet
19 unless the city engineer determines that there is no alternative, and ADC 12.122(1), which
20 generally requires local streets to have a 30-foot wide paved surface with curbs and gutters, a
21 6-foot landscape strip and a 5-foot sidewalk on each side, all within a 54-foot right-of-way.⁶

⁶ ADC 12.060 provides in relevant part:

“Streets (including alleys) within and adjacent to a development shall be improved in accordance with the standards in this Article. In addition, any new street or additional street width planned as a portion of an approved street plan shall be dedicated and improved in accordance with this Article.”

ADC 12.190 provides:

1 Petitioners point out that the proposed cul-de-sac is 450 feet long, and that the right-of-way
2 for Fabian Way is only 41 feet wide, and that there is no landscape strip or sidewalk on the
3 west side of that street.

4 As with its response to the first through third assignments of error, intervenor
5 responds initially that the provisions of ADC Article 12 cited by petitioners are not
6 applicable to the proposed subdivision. For the reasons set forth above, we reject
7 intervenor’s argument.

8 **A. Streets Within the Subdivision**

9 ADC 12.190 allows cul-de-sacs longer than 400 feet to be approved if the city
10 engineer determines that no other means is available for development of the property. The
11 city’s findings indicate that the city engineer made such a determination. Supplemental
12 Record 22. Petitioners argue that there is nothing in the record from the city engineer to

“Cul-de-sacs. The street pattern may include cul-de-sacs and bulbs only if connectivity and block length standards have been met. A cul-de-sac must be as short as possible and is not to exceed 400 feet. A cul-de-sac must terminate with a circular turnaround, except as provided in 12.130(3)(c). Dead-end streets longer than 400 feet may be approved by the City Engineer if no other means is available for development of the property.”

ADC 12.122 provides in relevant part:

“(1) Minor Local Streets. The minor local street design is intended to be the predominant street type in residential neighborhoods. A minor local street will have fewer than 1,000 average trips per day (ADT) when all future street connections are made. The standard design is a 30-foot wide paved surface with curb and gutter, a 6-foot landscape strip, and a 5-foot sidewalk on each side within a 54-foot right-of-way. There is a parallel 7-foot public utility easement dedicated on each side of the street. Parking is allowed on both sides of the street. * * *

“ * * * * *

“(6) Residential Street Design for Constrained Sites. There are instances where a development is proposed on land that has natural features that may constrain the standard local street design. Examples of such natural features include floodplains, steep slopes, drainageways, wetlands, riparian corridors, and tree groves. Through the subdivision or Planned Development review process, the City will consider a narrower street section that does not compromise the goals for street design in a great neighborhood. For example, the sidewalks may be placed curbside and parking may be removed from the street in order to narrow the street paving and preserve natural areas.”

1 support that finding. Intervenor responds, and we agree, that the staff report’s explanation
2 that the city engineer has made the required determination is sufficient. It is common for
3 planning staff to consult with other city departments and incorporate results and
4 recommendations from those consultations into a staff report that is provided to the decision
5 making body. In the absence of any evidence to the contrary, the statement in the staff report
6 that references and summarizes the city engineer’s determination is sufficient evidence to
7 support the city’s finding that ADC 12.190 is satisfied.

8 In response to petitioners’ argument that Fabian Way does not comply with ADC
9 12.122(1), intervenor points to ADC 12.122(6), which allows modifications to residential
10 street designs on constrained sites. *See* n 6. Intervenor explains that the city adopted a
11 finding that the steep slopes on the southwest boundary of the property preclude a normal
12 right of way width and approved a 41-foot right of way with sidewalks only on the east side
13 of the street.⁷ The evidence in the record indicates that the property contains steep slopes on
14 its southwestern side. We think the finding adopted by the city is adequate to explain why
15 the city determined that ADC 12.122(6) allowed modifications to the typical right-of-way
16 width and sidewalk requirements.

17 **B. Streets Adjacent to the Subdivision**

18 As noted, ADC 12.060 requires that streets adjacent to the proposed subdivision must
19 be improved to city street standards. *See* n 6. The city imposed a condition of approval
20 requiring intervenor to improve the portion of Maier Lane adjacent to the subject property to
21 a width of 30 feet and to install curbs, sidewalks and gutters on the south side of the street
22 adjacent to the subject property. The city also imposed a condition that requires intervenor

⁷ The city found in relevant part:

“ADC 12.122(6) allows alternative designs with a narrower street section for constrained sites. Steep slopes are one of the natural features identified as a site constraint. This site contains steep slopes that meet the ADC definition for a constrained site.” Supplemental Record 21.

1 to improve the portion of Maier Lane from the northwest corner of the subject property to its
2 intersection with Skyline Drive to a width of 20 feet. Petitioners argue that the proposed
3 street width for all of Maier Lane should be 30 feet and that curbs and sidewalks should be
4 installed on both sides of Maier Lane.

5 Intervenor responds that the proposed improvements of Maier Lane comply with
6 ADC 12.060 because the portion of Maier Lane adjacent to the proposed subdivision will
7 meet city standards, that intervenor cannot install curbs, sidewalks, and gutters on the north
8 side of Maier Lane because it does not own the property, and that intervenor was not actually
9 required to improve the portion of Maier Lane that is not adjacent to the subdivision but only
10 agreed to do so after concerns were raised by project opponents. Intervenor also notes that
11 its agreement to extend Patrick Lane south to Maier Lane creates a secondary access from
12 Maier Lane that would not exist but for that agreement. As such, intervenor contends, the
13 city correctly determined under ADC 11.180(3) that “[t]he proposed street plan affords the
14 best economic, safe, and efficient circulation of traffic possible under the circumstances.”
15 ADC 11.180(3). We agree with intervenor that the streets adjacent to the proposed
16 subdivision satisfy ADC 12.060 and that the city’s finding that ADC 11.180(3) is satisfied
17 are supported by substantial evidence in the record.

18 **C. Safety Concerns**

19 Finally, in the combined discussion under these assignments of error, petitioners
20 argue that the city erred in determining that the proposed street plan is “safe.” We
21 understand petitioners to argue that the city’s determination that the proposed street plan is
22 safe is not supported by substantial evidence in the record and that the city’s findings
23 regarding ADC 11.180(3) are inadequate to address safety concerns raised by petitioners and
24 project opponents regarding Maier Lane and Skyline Drive NW. Petitioners claim that the
25 overwhelming evidence they presented shows that Skyline Drive NW is unsafe in a number
26 of ways, including unsafe sight distances, hairpin turns, steep grades, and lack of guardrails,

1 and that the city erred in not relying on petitioners' traffic consultant's testimony regarding
2 safety issues on Skyline Drive NW. Petitioners also expressed concern that extending
3 Patrick Lane will create additional traffic on these streets and that that was not considered by
4 the city.

5 The city responded to the concerns expressed by adopting supplemental findings that
6 found that extending Patrick Lane NW will create an alternative access that will relieve
7 traffic pressure on Skyline Drive NW, and that extending Patrick Lane NW and improving it
8 to city standards provides safe and efficient traffic circulation. The city also found that
9 providing connectivity through that extension will address other safety concerns. Finally, the
10 city chose not to rely on petitioners' traffic consultant's evidence because it determined that
11 petitioners' expert made unsupported assumptions and did not rely on crash data. Record 26-
12 27.

13 Petitioners do not explain why the above-described findings are inadequate to address
14 petitioners' concerns. We think the city's findings are adequate to explain why the city
15 determined that ADC 11.180(3) is satisfied. In addition, the city explained why it was not
16 persuaded by petitioners' expert's testimony, and it is within the city's discretion to choose
17 not to rely on that testimony in reaching its conclusion. *Wal-Mart Stores, Inc. v. City of*
18 *Bend*, 52 Or LUBA 261, 277 (2006) (LUBA's role is not to substitute its judgment for the
19 decision maker's but rather is limited to determining whether the local decision maker's
20 decision to rely on some experts' testimony rather than others is reasonable, in view of all of
21 the evidence).

22 The fourth through eighth assignments of error are denied.

23 **NINTH THROUGH TWELFTH ASSIGNMENTS OF ERROR**

24 In these assignments of error, petitioners challenge the city's decision that the
25 subdivision satisfies ADC 11.180(4), which requires the city to find that:

26 "The location and design allows development to be conveniently served by
27 various public utilities."

1 Petitioners argue that the city erred in approving the proposed subdivision because the
2 proposal does not include a storm drain plan as required by ADC 12.530. Petitioners also
3 argue that any proposed storm drain plan must also meet city engineering standards,
4 including submission of a site plan showing existing and proposed drainage for the
5 development, proposed contours, the location of all proposed drainage facilities, and the
6 discharge location.

7 ADC 12.530 provides:

8 “General Provisions. The review body will approve a development request
9 only where adequate provisions for storm and flood water run-off have been
10 made as determined by the City Engineer. The storm water drainage system
11 must be separate and independent of any sanitary sewerage system. Where
12 possible, inlets should be provided so surface water is not carried across any
13 intersection or allowed to flood any street. *Surface water drainage patterns*
14 *and proposed storm drainage must be shown on every development proposal*
15 *plan. All proposed storm sewer plans and systems must be approved by the*
16 *City Engineer as part of the tentative plat or site plan review process.”*
17 (Emphasis added.)

18 Intervenor responds by initially arguing that petitioners are precluded from raising an issue
19 regarding lack of compliance with ADC 12.530 because the issue was not raised below.
20 Petitioners respond, and we agree, that the issue was raised at Supplemental Record 146.

21 Intervenor next responds that ADC 11.180(4) is the only review criterion applicable
22 to storm drainage, and that ADC 12.530 is not applicable to the proposed subdivision. We
23 rejected similar arguments under the previous assignments of error, we reject them here as
24 well.

25 The city found:

26 “The [City’s] Engineering Standards are not criteria for subdivision approval.
27 [ADC 11.180(4)] requires Applicant to show that the development can be
28 *conveniently served by various public utilities*, but does not require details of
29 all improvements.

30 “It is inappropriate to address all engineering issues at this stage of the
31 application, when no detailed engineering plan has yet been submitted. These
32 issues will be addressed when development approval is sought and city
33 engineers will review construction drawings.

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“The conditions of approval adopted by the City Council, as well as the requirements in the City’s Development Code and Engineering Standards, adequately address erosion and pollutant discharge and ensure compliance with City standards for purposes of this application.

“The City Council finds that this review criterion will be met when the conditions listed in the staff report and the conditions listed below are met.”
Record 28-29 (underscoring and emphasis in original).

The city then imposed the following condition of approval:

“Stormwater leaving the proposed development shall be piped for its entirety to West Thornton Lake Drive. Stormwater between West Thornton Lake Drive and West Thornton Lake shall be either piped or discharged to an open drainage system as directed and approved by the City Engineer. Exceptions may be provided for water quality facilities to be located between the proposed development and West Thornton Lake. Any exceptions must be approved by the City Engineer. The Applicant shall secure the approval of the pipe installation, installation of water quality facilities, and/or the installation of open drainage systems across those properties between the proposed development and West Thornton Lake and secure a public easement providing the City with the rights to maintain the storm drain system that is installed.

“The stormwater system * * * shall incorporate Best Management Practices for treating the stormwater quality prior to it being discharged into West Thornton Lake. The Best Management Practices shall be approved at the City Engineer’s discretion.” Record 29.

Intervenor does not argue that the tentative plat shows the proposed storm sewer plans and systems or that ADC 12.530 is met. Rather, intervenor argues that the conditions of approval are sufficient for the city to find that ADC 11.180(4) is met. As near as we can tell, the city appears to have attempted through the conditions of approval set forth above to identify what the applicant must do in lieu of submitting a storm drain plan for city approval. However, it appears to be undisputed that the tentative plat does not include a storm drain plan and that the city engineer did not approve a storm drain plan as part of the tentative plat approval process. To the extent the city interpreted ADC 12.530 as referring only to “engineering standards,” or to not require the tentative plat to show the proposed storm drainage plan, or

1 the city engineer to approve that plan, that interpretation is inconsistent with the text of ADC
2 12.530 and for that reason we reject it. We agree with petitioners that the city erred in
3 approving a tentative subdivision plat that does not show the proposed storm sewer plans and
4 systems and that the city engineer has not approved any such plans and systems as required
5 by ADC 12.530.

6 The ninth through twelfth assignments of error are sustained.

7 **THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR**

8 In these assignments of error, petitioners argue that the city erred in failing to respond
9 to petitioners' argument that Albany Comprehensive Plan (ACP) Goal 7, Implementation
10 Method 10, requires the city to increase minimum lot sizes in the subdivision because some
11 of the slopes on the subject property exceed 25%.⁸ In support of these assignments of error,
12 petitioners cite ADC 1.050, which provides in relevant part:

13 “* * * Since the City of Albany has a Comprehensive Plan and implementing
14 regulations which have been acknowledged by the State of Oregon as being in
15 compliance with statewide goals, any action taken in conformance with this
16 Code shall be deemed also in compliance with statewide goals and the
17 Comprehensive Plan. Unless stated otherwise within this Code, specific
18 findings demonstrating compliance with the Comprehensive Plan are not
19 required for land use application approval. *However, this provision shall not*
20 *relieve the proponent of the burden of responding to allegations that the*

⁸ ACP Goal 7 contains implementation methods for achieving Goal 7. Implementation Method 10 provides in relevant part that:

“Increase minimum lot sizes (or minimum lot area per unit) on hillside areas, allowing higher densities for cluster developments approved through Planned Development as outlined in the following table:

<u>Slope %</u>	<u>Standard Dev.</u>	<u>(RS 6.5 Lot)</u>	<u>PUD Devel.</u>	<u>(RS 6.5 Avg)</u>
13 to 20	1.25	8125	1.00	6500
21 to 25	1.50	9750	1.15	7475
26 to 30	2.00	13000	1.40	9100
31 & above	3.00	19500	2.00	13000

1 *development action requested is inconsistent with one or more*
2 *Comprehensive Plan policies.*” (Emphasis added.)

3 Petitioners argue that the last sentence of ADC 1.050, which is emphasized above, requires
4 that the city demonstrate that the application is consistent with the ACP goals and policies
5 that petitioners identified below. We understand petitioners to argue that findings
6 concerning those ACP goals and policies are required even if no other ADC provision
7 requires specific findings concerning the identified ACP goals and policies. Petitioners
8 argue that they provided evidence that the proposed subdivision violated ACP Goal 7,
9 Implementation Method 10, and that the city’s findings are insufficient to address
10 petitioners’ contention that the lot sizes for the proposed subdivision must be increased.

11 Intervenor responds initially that the argument in support of these assignments of
12 error contains a citation to a record page that does not exist in the record and that petitioners
13 did not adequately raise the issue below in a way that the city or the parties could address.
14 Petitioners respond in the reply brief by correcting the incorrect record citation with
15 Supplemental Record 85. We agree with petitioners that Supplemental Record 85 includes a
16 powerpoint slide that cites ACP Goal 7, Implementation Method 10 and states “Increase
17 Minimum Lot Sizes on Hillside Areas” that is sufficient to show that an issue was raised
18 regarding that ACP provision.

19 We understand intervenor to next respond that no provision of the ADC is implicated
20 by petitioners’ argument that the steep slopes require an increase in minimum lot sizes.
21 Finally, we understand intervenor to respond that ACP Goal 7, Implementation Method 10
22 appears to address lots that are zoned RS 6.5 rather than RS 10, the zoning on the subject
23 property, and is therefore inapplicable to the proposed subdivision.

24 We recently addressed ADC 1.050 in another appeal of a city decision approving a
25 subdivision. *North Albany Citizens in Action v. City of Albany*, __ Or LUBA __ (LUBA No.
26 2008-020, August 7, 2008). In that opinion, we rejected the petitioner’s attempt to rely on
27 ADC 1.050 to assign error to the city’s decision because that petitioner assigned the error for

1 the first time in a reply brief that was disallowed. *Id.* at slip op 6. We noted, however, that
2 “[h]ad petitioners assigned error to that failure on the city’s part, remand might be required to
3 have the city more specifically address the meaning of the last sentence of ADC 1.050.” *Id.*

4 In a footnote, we explained:

5 “It may be that the city interprets the last sentence of ADC 1.050 to require
6 that the city or applicant respond to allegations that an application for land use
7 approval is inconsistent with ACP goals or policies, but only requires the
8 applicant or city to apply any such ACP goals or policies directly and
9 demonstrate that the application is consistent with such ACP goals or policies
10 if the ADC specifically requires findings regarding those ACP goals or
11 policies.” *Id.*

12 Intervenor does not respond to petitioners’ argument that the last sentence of ADC 1.050
13 required the city to respond to petitioners’ allegation that the proposed subdivision does not
14 comply with ACP Goal 7, Implementation Method 10.

15 We agree with petitioners that the city erred in failing to respond to petitioners’
16 argument. However, we note that we do not decide the issue of whether the cited ACP
17 provision is an approval criterion that applies to the proposed subdivision; we decide only
18 that the city must, on remand, respond to petitioners’ allegation that the proposed subdivision
19 is inconsistent with ACP Goal 7, Implementation Method 10, as required by the last sentence
20 of ADC 1.050. We do not intend to foreclose the possibility that the city, on remand, may
21 interpret ADC 1.050 to require only a finding that the application is consistent with the cited
22 ACP Goal if the ADC specifically requires findings regarding that goal.

23 The thirteenth and fourteenth assignments of error are sustained.

24 **FIFTEENTH THROUGH SEVENTEENTH ASSIGNMENTS OF ERROR**

25 As noted, intervenor proposed to remove 129 of the 337 trees that are larger than 8
26 inches in diameter on the property in order to develop the subdivision. That proposal
27 required site plan review under ADC 9.200. In these assignments of error, petitioners argue
28 that the city’s findings that ADC 9.208(2) is satisfied are inadequate and are not supported by
29 substantial evidence in the record. ADC 9.208(2) provides in relevant part:

1 “For property where a site plan review, conditional use or land division
2 application has been approved or is currently under review, the Community
3 Development Director, City Forester, or his/her designee shall approve a site
4 plan review for tree felling when the applicant demonstrates that all of the
5 following review criteria are met:

6 “* * * * *

7 “(b) The proposed felling is consistent with State standards, City
8 ordinances, and the proposed felling does not negatively impact the
9 environmental quality of the area, including but not limited to: the
10 protection of nearby trees and windbreaks; wildlife; erosion; soil
11 retention and stability; volume of surface runoff and water quality of
12 streams; scenic quality, and geological sites.”

13 Petitioners argue that the city’s findings are inadequate and that the city erred in relying on
14 intervenor’s evidence instead of petitioners’ evidence regarding the negative impacts of the
15 tree removal. Specifically, petitioners argue that the city failed to consider the volume of
16 surface runoff, the effect of runoff on West Thornton Lake, the protection of nearby trees, the
17 quality of streams, scenic quality, and the development’s affect on wildlife.

18 The city adopted the findings set forth in the staff report that are found at
19 Supplemental Record 31-32, and also adopted supplemental findings that are found at Record
20 30 and 31. Those four pages of findings explain why the city believes intervenor’s tree
21 felling plan satisfies ADC 9.208(2)(b). Petitioners do not refer to or challenge any of those
22 findings in any way that explains why the findings are inadequate. As such, petitioners’
23 argument that the city’s findings are inadequate provides no basis for reversal or remand.

24 In these assignments of error petitioners also argue that the city erred in failing to rely
25 on evidence introduced by petitioners regarding the negative impacts of the tree felling plan.
26 The supplemental findings found at Record 31 explain that the city chose to rely on
27 intervenor’s expert in determining that the proposed development would not have significant
28 negative impacts on the environment. Those findings also explain why the city chose not to
29 rely on petitioners’ experts’ testimony. We think a reasonable decision maker could

1 conclude based on intervenor's expert's testimony that the tree removal will not result in
2 negative impacts to the environmental quality of the area.

3 The fifteenth through seventeenth assignments of error are denied.

4 The city's decision is remanded.

5

6

Appendix

