BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ART BULLOCK,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent,

and

SAGE DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2007-218

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Art Bullock, Ashland, filed the petition for review and argued on his own behalf.

Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

Christian E. Hearn, Ashland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis, Hearn, Saladoff & Bridges, P.C

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

RYAN, Board Member, did not participate in the decision.

AFFIRMED 10/30/2008

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

Petitioner appeals a city decision granting final plan approval for a subdivision.

FACTS

The subject property is a 4.34-acre site with an existing residence, wetlands, and a mineral spring-fed pool. The disputed subdivision was approved under a section of the Ashland Land Use Ordinance (ALUO) entitled "Performance Standards Options." ALUO 18.88. Under ALUO 18.88, a subdivision first receives outline plan approval. ALUO 18.88.030(A). Intervenor received outline plan approval on January 2, 2007. Petitioner participated in the local proceedings that led to outline plan approval and did not appeal the outline plan approval decision. Intervenor subsequently applied for final plan approval under ALUO 18.88.030(B). The planning commission granted final plan approval over petitioner's objections, and petitioner appealed to the city council. The city council denied petitioner's appeal and approved the final plan on October 2, 2007. This appeal followed.

MOTION TO FILE REPLY BRIEF

Petitioner moves for an order allowing a reply brief to respond to new matters raised in the respondents' briefs. OAR 661-010-0039. Petitioner's proposed reply brief, which is attached to his motion, does not respond to new matters raised in the respondents' briefs. Instead, it embellishes on arguments made in the petition for review. The motion to allow a reply brief is denied.

MOTION TO STRIKE

Petitioner moves to strike Appendix B and Appendix C to intervenor's brief and portions of intervenor's brief in which intervenor asks LUBA to take official notice of the two Jackson County Circuit Court orders that appear as Appendix B and Appendix C. Those orders are not part of the record in this appeal and have nothing to do with the decision that is before us in this appeal. They apparently were attached to show LUBA that the circuit court

determined that petitioner's arguments in one of those matters warranted an award of attorney fees. Intervenor should not have attached those orders as appendices to its brief in this appeal. We grant petitioner's motion to strike.

FIRST ASSIGNMENT OF ERROR

Petitioner's first three assignments of error all concern a waiver of the right to remonstrate, if a local improvement district is formed to pay for street improvements to Laurel Street. Laurel Street is a nearby street that will be impacted by the disputed subdivision. ALUO 18.68.150 requires certain applicants to consent to participate in the cost of street improvements that will be required to serve new development and to waive their right to remonstrate against a local improvement district formed to fund those improvements.[1] As part of outline plan approval, the city imposed a condition of approval that requires intervenor to execute such an agreement and waiver. Outline plan (OP) Condition No. 36 states:

> "Applicant shall execute a document consistent with ALUO 18.68.150 agreeing to participate in their fair share of the costs associated with a future Local Improvement District for improvements to Laurel Street and to not remonstrate against such District. Nothing in this condition is intended to prohibit an owner/developer, their successors or assigns from exercising their rights to freedom of speech and expression by orally objecting to participating in the LID hearing or to take advantage of any protection afforded any party by City ordinances and resolutions." Record 31-32.

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[1] ALUO 18.68.150 provides:

> "Whenever a request is made for a building permit which involves new construction of a new residential unit and/or any request involving a planning action which would increase traffic flow on any street not fully improved, the applicant is required to legally agree to participate in the costs and to waive the rights of the owner of the subject property to remonstrate both with respect to the owners agreeing to participate in the costs of full street improvements and to not remonstrate to the formation of a local improvement district, to cover such improvements and costs thereof. Full street improvements shall include paving, curb, gutter, sidewalks, and the undergrounding of utilities. This requirement is a condition precedent to the issuance of a building permit or the granting of approval of a planning action and if the owner declines to so agree, then the building permit and/or planning action shall be denied. This shall not require paving of alleys, and shall not be construed as waiving property owners rights to present their views during a public hearing held by the City Council."

In the first assignment of error, petitioner argues that the city erred by granting final plan approval without first obtaining the executed waiver of remonstrance agreement that is referred to in OP Condition No. 36. According to petitioner, the city ignored OP Condition No. 36.

ALUO 18.88.030.B(5) sets out the approval criteria for final plan approval.

> "Criteria for Final Plan Approval. Final plan approval shall be granted upon finding of substantial conformance with the outline plan. Nothing in this provision shall limit reduction in the number of dwelling units or increased open space provided that, if this is done for one phase, the number of dwelling units shall not be transferred to another phase, nor the open space reduced below that permitted in the outline plan. This substantial conformance provision is intended solely to facilitate the minor modifications from one planning step to another. Substantial conformance shall exist when comparison of the outline plan with the final plan shows that:
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> "* * * * *
>
> "g. The development complies with the Street Standards."

Under ALUO 18.88.030.B(5), the overarching criterion for final plan approval is that the final plan be in "substantial conformance with the outline plan."

Contrary to petitioner's argument under the first assignment of error, the city did not ignore OP Condition No. 36. The city carried forward that condition in its final plan approval decision and added a deadline by which the document must be executed. Final plan (FP) Condition No. 8 states:

> "Applicant shall execute a document as consistent with ALUO 18.68.150 agreeing to participate in their fair share of costs associated with a future Local Improvement District for improvements to Laurel St. and to not remonstrate against such District *prior to signature of the final survey plat*. Nothing in this condition is intended to prohibit an owner/developer, their successors or assigns from exercising their rights to freedom of speech and expression by orally objecting or participating in the LID hearing or to take advantage of any protection afforded any party by City ordinances and resolutions." Record 9 (emphasis added).

Pursuant to FP Condition No. 8, the city will not sign the final survey plat until the remonstrance document is executed. We understand FP Condition No. 8 to provide that

intervenor's final subdivision plat will not be signed by the city and cannot be recorded to allow development to proceed until intervenor executes and delivers the remonstrance document required by ALUO 18.68.150.[2] ALOU 18.88.030.B(5) merely requires that the final plan be in substantial conformance with the outline plan. Both the outline plan and the final plan require the remonstrance document to be executed. There is nothing in OP Condition No. 36 that requires the remonstrance document to be executed before final plan approval. The final plan is in substantial conformance with the outline plan with regard to compliance with the waiver of remonstrance document required by ALUO 18.68.150.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the final plan must demonstrate "[t]hat the proposal complies with the Street Standards," as required by ALUO 18.88.030.B(5)(g). According to petitioner, one of the applicable street standards is ALUO 18.80.020.B(7), which requires that "[a]ll major means of access to a subdivision * * * shall be from existing streets fully improved to City standards." Petitioner argues that the waiver of remonstrance document should have been required prior to final plan approval because the improvements contemplated by the future local improvement district are necessary to improve all major means of access to city standards. Petitioner is wrong for at least two reasons.

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[2] The relationship between the Performance Standard Options section of the ALUO (ALUO 18.88) and the section of the ALUO that governs subdivisions generally (ALUO 18.80) is not as clear as it could be. Where a performance standards option development proposes to sell individual lots, which is the case here, ALUO 18.88.030(B)(4)(o) requires that an application for final plan approval must include "a final plat, similar to that required in [the] subdivision section of the [ALUO]." ALUO 18.80.050(H) sets out the final step in subdivision approval:

> "The subdivider shall, without delay, submit the final plat for signatures of other public officials required by law. Approval of the final plat is null and void if the plat is not recorded within 60 days after the date the last required signature has been obtained."

First, as discussed earlier, FP Condition No. 8 is sufficient to ensure that the remonstrance agreement will be executed before the subdivision plat can be recorded. Second, even if FP Condition No. 8 was insufficient for some reason, petitioner's argument that the improvements to Laurel Street are necessary to comply with the ALUO 18.80.020.B(7) requirement to improve all "major means of access" was rejected by the city in its outline plan approval decision. The city specifically found in its outline plan approval decision that Laurel Street is not a major means of access. While some of the traffic that will be generated by the proposed development will likely use Laurel Street, which is why the waiver of remonstrance document was required, the city specifically found that Laurel Street is not one of the "major means of access," within the meaning of ALUO 18.80.020.B(7). Record 16-17. Petitioner's ALUO 18.80.020.B(7) challenge under the second assignment of error amounts to a collateral attack on the outline plan approval decision, which was not appealed. Petitioner may not collaterally attack that outline plan decision in this appeal of the final plan approval decision. *Bauer v. City of Portland*, 38 Or LUBA 715, 725 (2000).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the city council violated Oregon constitutional requirements that legislative, judicial and executive powers remain separate, by unlawfully delegating the city council's quasi-judicial decision-making authority regarding the anticipated local improvement district and intervenor's waiver of remonstrance to planning staff. Petitioner characterizes planning staff as being part of the executive branch of city government. Petitioner's arguments under the third assignment of error are based on Article I, Section 21, Article III, Section 1 and Article IV, Section 1 of the Oregon Constitution.[3]

[3] The text of each of those sections of the Oregon Constitution is set out below:

As an initial matter, the only thing that FP Condition No. 8 arguably delegates to planning staff is the authority to receive an executed waiver of remonstrance document from intervenor as a precondition for signing the final plat. Petitioner's arguments under this assignment of error go considerably beyond that delegation and challenge the adequacy of the city's adopted system for establishing local improvement districts and the procedural safeguards that are provided under city laws when local improvement districts are formed and assessments are levied against benefitted properties. While petitioner is free to argue in this appeal that the city has inadequately ensured that intervenor will provide the waiver of remonstrance that is required by ALUO 18.68.150, petitioner is not free in this appeal to challenge the adequacy of the city laws and regulations that govern establishment of local improvement districts. If petitioner wishes to challenge the adequacy of the city laws and regulations that govern establishment of local improvement districts, he will need to file an appropriate action in an appropriate forum to do so.

The appellate court cases that petitioner relies on in this assignment of error are concerned almost exclusively with improper delegation of legislative authority by the state legislature to administrative agencies or to individuals. As the city points out, city

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"**Ex-post facto laws; laws impairing contracts; laws depending on authorization in order to take effect; laws submitted to electors.** No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested." Article I, Section 21.

"**Separation of powers.** The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Article III, Section 1.

"**Section 1. Legislative power; initiative and referendum.** (1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.* * *." Article IV, Section 1.

governments do not separate judicial, legislative and executive powers in the same way that the state and federal governments do. *MacPherson v. DAS*, 340 Or 117, 135, 130 P3d 308 (2006). None of the cases cited by petitioner support the only thesis that petitioner properly asserts under the third assignment of error—that the city council has improperly delegated to city planning staff the responsibility for receiving from intervenor the executed waiver of remonstrance that is required by ALUO 18.68.150 and FP Condition No. 8.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the final plan is not in "substantial conformance with the outline plan," as ALUO 18.88.030.B(5) requires, because intervenor did not obtain a determination by the Oregon Water Resources Department (OWRD) regarding whether an OWRD permit was needed for the development. The existing pool is fed by a natural mineral spring. OP Condition No. 34 is set out below:

> "That the Final Plan application include *a determination of whether a permit is needed from the Oregon Water Resources* (OWRD) to use the spring accessed by the wellhead which feeds the pool on Lot 18. If a permit is required, evidence of permit approval and issuance shall be submitted to the Planning Division prior to recording some form of conservation easement or deed restriction for the spring and wellhead, and prior to signature of the final survey plat." Record 31 (emphasis added).

Petitioner argues that OP Condition No. 34 requires that the determination regarding whether a permit is needed must be made *by* OWRD. The city, on the other hand, argues that the above-emphasized language in OP Condition No. 34 requires a determination regarding *whether* a permit is needed from OWRD, but that OP Condition No. 34 does not specify *who* must provide that determination.

The final plan application includes a memorandum from the applicant's landscape architect that explains that no permit will be required from OWRD. That conclusion is based on a conversation with the Jackson County Watermaster and ORS 537.545. Under ORS 537.545(1)(d), no OWRD permit is required for certain "exempt" uses, including ground

water for "[s]ingle or group domestic purposes in an amount not exceeding 15,000 gallons per day." Based upon a hydrogeologic assessment in the record, the subject well has a continuous flow of 20 gallons per hour, which is far below 15,000 gallons per day limit for exempt uses. Record 173. We agree with the city that OP Condition No. 34 does not require that the determination that is called for by the condition must be made by OWRD itself. We also agree with the city that the conclusion set out in the landscape architect's memorandum is evidence a reasonable person would believe to establish that the permit will not be required from OWRD. The final plan is in substantial conformance with OP Condition No. 34.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner's fifth assignment of error is based on OP Condition No. 15, which provides as follows:

> "That the wetland mitigation plan including a grading and planting plan shall be submitted with the Final Plan application. That an engineering analysis of the water flow and potential ponding, and any potential impacts to adjacent properties shall be submitted with the Final Plan application. The engineering analysis shall address the potential to meter excess runoff to the storm drain to prevent backup of water in the wetlands." Record 28.

Under ALUO 18.88.030.B(5), intervenor's final plan must be in "substantial conformance" with OP Condition No. 15. If petitioner's fifth assignment of error is based on any legal standard other than ALUO 18.88.030.B(5) and OP Condition No. 15, he does not identify what those legal standards might be. Petitioner reads a great deal into OP Condition No. 15, but that condition only requires two things, a wetland mitigation plan and an engineering analysis. The wetland mitigation plan is to include a grading and planting plan. The engineering analysis is to analyze (1) water flow and potential ponding, (2) potential impacts to adjacent properties, and (3) potential to meter excess runoff to the storm drain to prevent backup of water in the wetlands.

According to the city, the wetland mitigation plan and engineering analysis required by OP Condition No. 15 were submitted to the city:

> "In its application narrative responding to condition no. 15, the applicant refers to its submittal of the required plans and analysis of potential wetland impacts to the neighborhood. Rec. 145, see Rec. 170-71. The technical plans submitted with the application for Final Plan approval included: a Wetland Fill and Mitigation Proposal (Rec. 317), a Wetland Site Plan and Cross-Sections (Rec. 318), a Wetland Cross Sections and Grading Plan (Rec. 319), a Wetland Planting Plan (Rec. 320), a Wetland Erosion & Sediment Control Plan / Work Area Isolation Plan (Rec. 321) and Wetland Fill Plan (Rec. 322). These plans were prepared by Northwest Biological Consulting Habitat Restoration / Planning. The applicant also submitted an executive summary of the Compensatory Wetland Mitigation Plan. Rec. 168-169. In addition, the application included an overall Grading Plan (Rec. 309) and a Utility Plan, showing the plan for storm drains (Rec. 310), prepared by Thornton Engineering. Also, it included a Planting Plan (Rec. 323), Irrigation Plan (Rec. 324) and Detail Planting Plan (Rec. 325) prepared by KenCairn Sager Landscape Architects.
>
> "* * * With regard to drainage issues, the applicant's attorney explained that the submitted plans—prepared by a local, Oregon-licensed professional civil engineering firm—include a[n] engineered solution to handle wetland runoff. Rec. 39 (referencing record pages 319-323); Rec. 86. These plans include 'cut off drains' and other methods to ensure that there is no backup of water in the wetlands." Respondent's Brief 19-20.

We understand the city to argue that the above documents, collectively, are sufficient to provide a wetland mitigation plan that includes a grading and planting plan and an engineering analysis that analyzes (1) water flow and potential ponding, (2) potential impacts to adjacent properties, and (3) potential to meter excess runoff to the storm drain to prevent backup of water in the wetlands.

Petitioner's assignment of error is actually four subassignments of error. We set out the fifth assignment of error below:

> "Assignment of Error 5
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> "(5a) City erred in finding that [OP Condition No.] 15 requirements for an adequate engineering analysis and impact analysis to adjacent properties had been met.

> "(5b) City erred in not addressing in its findings the serious issues the [petitioner] raised about the inadequacies of the engineering analysis and impact analysis of unusual mineral hot spring water running onto Randy St and into storm drains.
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> "(5c) City erred in requiring [petitioner] to prove not only that applicant had not met its burden of proof, city required [petitioner] to produce contrary evidence.
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> "(5d) City erred in delegating discretionary authority across governmental branch lines for the engineering analysis and potential impacts analysis. * * *" Petition for Review 24-25.

We assume that subassignment of error 5d is a continuation of petitioner's theory that the city's reliance on planning staff to work with the applicant's representatives to develop solutions to identified problems constitutes an unconstitutional transfer of the city council's quasi-judicial authority to the planning staff. We rejected that theory under the third assignment of error, and we reject it here for the same reasons.

It appears undisputed from the record that highly mineralized water from the existing pool on the subject property historically has run off onto the adjoining roadways to the north and eventually into Bear Creek. Water from wetlands on the property similarly runs off onto adjoining properties. This situation has existed for many years. The documents identified by the city propose ways to manage this problem so as to maintain the existing wetlands and manage the flow of water off-site. In his arguments in support of subassignments of error 5(a) and 5(b), petitioner argues the city should have required additional engineering to solve water temperature, water quality and safety problems that have resulted from this longstanding problem with the spring-fed pool. The city council found that additional engineering was not needed to comply with OP Condition No. 15, and we agree with the city that a reasonable decision maker could have reached that conclusion based on the current record.

Most of the disagreement between the city and petitioner appears to be attributable to their very different views of the obligation that was imposed by OP Condition No. 15.

Petitioner appears to believe that OP Condition No. 15 requires that the applicant provide engineering plans that completely solve all the historic problems that can be attributed to the wetland and particularly the spring-fed pool on the subject property.[4] OP Condition No. 15 simply calls for a wetland mitigation plan and an engineering analysis that includes certain elements, without specifying what the outcome of that analysis must be. While it may be appropriate to read in an implied requirement that the required wetland mitigation plan actually result in mitigation and that the engineering analyses show how existing problems will be managed, OP Condition No. 15 simply does not require the kind of detailed and comprehensive solution for all existing problems that petitioner assumes it requires. In particular, we agree with the city that OP Condition No. 15 does not require that the applicant's engineer specifically address the "temperature, mineral content and algae production of the hot spring water." Respondent's Brief 20. OP Condition No. 15 says nothing about temperature, mineral content or algae. And we also agree with the city that the city council's choice to rely on the applicant's experts while noting that petitioner is a lay person who presented no professional evidence that the city council found to be credible, did not constitute an impermissible shifting of the burden of proof from the applicant to petitioner.

The fifth assignment of error is denied.

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[4] Petitioner argues:

> "Council should have required Final Plan to include engineering and impact analyses showing (1) the temperature of the hot spring water released into Bear Creek, (2) whether hot spring runoff would increase Bear Creek's temperature, and if so, as suspected, by how much, (3) whether the hot spring runoff would worsen or alleviate the DEQ-identified problems of too-high temperature in Bear Creek, (4) whether the high mineralized runoff water would affect ecology of the land where the storm drain empties (onto open land at the end of Glendower St., near [petitioner's] address) and the ecology of Bear Creek itself (where the storm drain water drains after being poured onto the land), and (5) under what conditions runoff would overflow the curb on the pedestrian walkway and continue to cause health problems (algae) and safety problems (slippery algae and frozen during cold spells) that have occurred for more than a half-century on Randy St." Petition for Review 27.

SIXTH ASSIGNMENT OF ERROR

Petitioner's sixth assignment of error also relies entirely on OP Condition No. 15, which is set out above. Petitioner's sixth assignment of error overlaps somewhat with his fifth assignment of error and is set out below:

"Assignment of Error 6

> "(6a) City erred in approving the Final Plan without the required utility plan and storm drain plan to prevent swimming pool overflow and leaks onto Randy Street or the pedestrian sidewalk while maintaining integrity of a standing-water wetland.
>
> "(6b) City erred in failing to address serious issues [petitioner] raised about the required utility plan and engineering analysis that would prevent the overflow and leaks of hot springs water from the swimming pool onto Randy St while simultaneously maintaining a continuous standing water wetland of hot spring water.
>
> "(6c) City erred in improperly delegating discretionary authority to staff and applicant regarding the required utility plan and storm drain plan. * * *" Petition for Review 27-28.

We reject subassignment of error 6c for the same reason we reject subassigment of error 5d.

As was the case under the fifth assignment of error, petitioner's remaining subassignments of error are based on a misunderstanding of OP Condition No. 15. Contrary to petitioner's suggestion in subassignment of error 6a, the record includes a utility plan that shows storm drains. Record 310. The record also includes applicant's engineer's analysis explaining how runoff from the wetland areas and pool on the property can be managed by grading the property to direct runoff toward Randy Street where it will be collected by proposed trench drains. Record 170-71. As petitioner's subassignment of error 6b suggests, the real dispute between petitioner and the city is about the *adequacy* of the proposal for managing runoff.

Petitioner does not believe that the trench drains will both prevent runoff into Randy Street and maintain the existing wetlands on the property. Apparently petitioner believes

that if the trench drains serve their intended purpose, the wetlands will be drained. However, petitioner makes no attempt to explain how his dispute about the efficacy of the utility and grading plans to eliminate the existing drainage onto Randy Street and maintain the existing wetlands supports a conclusion that the final plan is not in substantial compliance with OP Condition No. 15. Again, OP Condition No. 15 does not require that all existing problems that can be attributed to runoff from the existing pool must be completely eliminated or solved to petitioner's satisfaction. OP Condition No. 15 simply requires a wetland mitigation plan and an engineering analysis that addresses certain topics and, presumably, demonstrates how impacts on the wetlands will be mitigated and runoff will be managed. As far as we can tell, the required analyses are included and management proposals are included in the documents that the city identifies. Petitioner's contention that additional analysis is warranted does not establish that the final plan falls short of substantial compliance with OP Condition No. 15.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that intervenor did not comply with OP Condition No. 17 which states:

> "That the recommendations of the Ashland Tree Commission, with final approval by the Staff Advisor, be incorporated into the Tree Protection and Removal Plan." Record 28.

Intervenor submitted a proposed tree protection/removal plan that had been reviewed by the city's tree commission. Petitioner does not dispute that the tree commission's recommendations were incorporated into the tree protection/removal plan that appears at Record 316. The proposed subdivision includes a 20-foot wide access easement for a pathway between Randy Street and an extension of Drager Street in the middle of the proposed development. That access easement crosses proposed lot 18 and a proposed tree park and common open space. During final plan approval, intervenor made two changes to

the tree protection/removal plan that petitioner contends requires that the Ashland Tree Commission reapprove the tree protection/removal plan. First, the width of the pathway within the 20 foot easement that crosses proposed open space and tree park was reduced from ten feet to eight feet. Second, the path's surface was changed from a non-pervious to pervious surface. As a result of these changes the proposed pathway will be narrower. The pervious pathway also will allow water to percolate through the pathway, whereas water would not have been able to penetrate the non-pervious surface. Petitioner argues that intervenor was required to resubmit the tree protection/removal plan with these changes added for tree commission approval.

We agree with the city that OP Condition No. 17 does not require that intervenor resubmit the tree protection/removal plan to the tree commission for a second approval. OP Condition No. 17 merely requires that intervenor have incorporated the recommendations of the tree commission into the final plan and to have the final plan approved by staff. Both those things were done. As far as we can tell, making the path eight feet wide rather than 10 feet wide and making the path pervious rather than impervious could only improve tree protection. Petitioner offers no reason why either of those changes could possibly call into question the tree commission's agreement with the adequacy of the initial tree protection plan. Petitioner has not established that the final plan application is not in substantial conformance with OP Condition No. 17.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

The outline plan planning file includes all the evidence that was submitted in the city proceedings that led to approval of the outline plan. Under his eighth assignment of error, petitioner argues the city should have included the outline plan planning file in the local record that supports the final plan approval decision that is before LUBA in this appeal.

According to petitioner, it is not enough for the record in this appeal to include the outline plan decision itself.

Apparently, at the end of the public hearing regarding the challenged decision, petitioner stated that he wanted the record left open to submit additional evidence but also indicated that he would forego this request if the city council specifically incorporated the outline plan planning file into the record of the final plan decision by reference. The city council agreed to do so and voted to incorporate the outline plan planning file into the record by reference, and then closed the public hearing. Petitioner, however, proceeded to request that the record be left open for him to submit additional materials. After petitioner's request, the city council voted to reconsider its earlier decision to incorporate the outline plan materials. Although petitioner had an additional seven days to submit the outline plan materials had he so chosen, he did not submit the outline plan materials.

Petitioner earlier filed a record objection at LUBA, arguing that the outline plan planning file should be included in the record of this appeal of the city's final plan approval decision. We denied that record objection. *Bullock v. City of Ashland*, ___ Or LUBA ___ (LUBA No. 2007-218, Order January 29, 2008). We specifically found that it was not disputed that the outline plan planning file was not in fact placed before the city council during its deliberations regarding the application for final plan approval. In the circumstances presented in this case, we concluded that the city council was entitled to reconsider and reverse its earlier decision to incorporate the outline pan planning file by reference. To the extent petitioner is rearguing that record objection, his arguments are rejected for the same reasons expressed in our earlier order.

Petitioner also appears to argue that the city council must have considered the outline plan planning file in making its decision regarding the final plan and because the outline plan file was not actually included in the final plan record, the city council's consideration of the outline plan file means its final plan decision is based on extra-record evidence that

petitioner should have been given an opportunity to rebut. We understand petitioner to argue that the city council's failure to provide that opportunity for rebuttal prejudiced his substantial rights and requires that the city council's decision be remanded.

Other than suggesting it must have happened or might have happened, petitioner offers no reason to believe that evidence that is included in the outline plan planning file, but not included in the final plan record that the city filed with LUBA, was in fact considered or relied on by the city council in approving the final plan. Petitioner cites to nothing in the decision or the record that supports that suggestion.

Although it is not clear, petitioner also appears to argue that because the record that supports the outline plan decision includes evidence that is not included in the record that supports the final plan decision, it necessarily follows that the city's final plan decision is based in part on extra-record evidence.[5] The outline plan decision and the final plan decision, while related, are different decisions, and they are supported by separate records. We assume the city gave all parties an opportunity to rebut the evidence that was submitted for the record in reaching its outline plan decision, and that any ex parte contacts were disclosed and an opportunity for rebuttal of those ex parte contacts was provided prior to the city council's outline plan decision. So long as the city council does not rely on evidence that was included in the outline plan record in reaching its decision on the final plan, it is not obligated to provide a second opportunity to rebut the evidence in the outline plan planning file. The fact that the city council relied on evidence in the outline plan planning file to reach its decision on the outline plan does not mean the city council also relied on all that evidence in reaching its decision on the proposed final plan. Petitioner's arguments to the contrary are without merit.

[5] Petitioner refers to such extra-record evidence as "ex parte evidence" and "ex parte communications." Petition for Review 39.

The eighth assignment of error is denied.

The city's decision is affirmed.