BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN FREWING,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

GERTZ FINE HOMES and KEN GERTZ,
Intervenors-Respondents.

LUBA No. 2008-201

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

John Frewing, Tigard, filed the petition for review and argued on his own behalf.

Timothy V. Ramis, Portland, filed a response brief and represented respondent. With him on the brief was Jordan Schrader Ramis PC.

William L. Rasmussen, and Phillip E. Grillo, Portland, filed a response brief and argued on behalf of intervenors-respondents. With them on the brief was Miller Nash LLP.

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

AFFIRMED 05/08/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving a subdivision.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief addressing several waiver claims advanced in the response brief of intervenors-respondents Gertz Fine Homes and Ken Gertz (intervenors). There is no opposition to the reply brief and it is allowed.

MOTION TO STRIKE THE PETITION FOR REVIEW AND APPENDICES

A. Petition for Review

OAR 661-010-0030(4)(d) requires that the petition for review "[s]et forth each assignment of error under a separate heading," followed by argument in support of each assignment of error. The petition for review includes a paragraph labeled "Assignment of Error" generally asserting that the application fails to comply with unspecified local standards, followed by 40 pages of text alleging ten different kinds of "errors." The discussion of each alleged error is preceded by a short topical heading such as "scope of appeal" and "application processing," but those headings are otherwise not framed as assignments of error.[1] Intervenors argue that the petition for review fails to set forth recognizable assignments of error as required by OAR 661-010-0030(4)(d), and that petitioner's noncompliance with the rule makes it difficult to distill and respond to petitioner's arguments.

[1] An assignment of error generally consists of a sentence or short paragraph that briefly (1) identifies the finding, omission or aspect of the decision that is challenged and (2) cites one or more bases on which LUBA is urged to conclude that the decision is erroneous and the error warrants reversal or remand, e.g., "The hearings officer misconstrued the applicable law and adopted findings not supported by substantial evidence in finding that the proposed development is a permitted use in the EFU zone." An assignment of error is typically followed by supporting arguments that include discussion of the standard of review, the applicable law and the evidence in the record that has some bearing on that applicable law.

Although the lack of cognizable assignments of error does make it more difficult to read and respond to the petition for review, intervenors were able to offer meaningful responses to petitioner's arguments under each of the ten alleged errors. We cannot say that petitioner's noncompliance with the rule prejudiced intervenors' substantial rights or otherwise warrants striking the entire petition for review. OAR 661-010-0005.[2] It is reasonably clear that petitioner intended each of the ten alleged errors to constitute separate assignments of error, and we will treat them as such. However, it is fair to observe that petitioner's noncompliance with OAR 661-010-0030(4)(d) is somewhat self-penalizing, in that the Board cannot reverse or remand a decision based on assignments of error that we do not understand.

B. Appendices

Intervenors object to Appendices B, C, F and G attached to the petition for review. Appendix B is a five page, single-spaced set of arguments that apparently challenge a set of alternative findings the hearings officer adopted. Appendix C is a single page that lists 15 alleged criteria with comments by petitioner, in support of an argument in the petition for review. Intervenors argue that by placing six single-spaced pages of argument and analysis in appendices, petitioner has violated the rules governing petitions for review and effectively avoided the 50-page limit imposed by OAR 660-010-0030(2)(b). We agree with intervenors. If the argument and analysis in Appendices B and C were included in the main body of the petition for review and spaced and paginated as required by our rules, the petition would

[2] OAR 661-010-0005 provides, in relevant part:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. * * *"

considerably exceed 50 pages in length. Petitioner did not request permission to file an overlength brief, as required by OAR 660-010-0030(2)(b). Accordingly, we shall disregard Appendices B and C.

Appendix F is a partial transcript of a September 8, 2008 hearing in this matter, prepared by petitioner and interspersed with comments and explanations added by petitioner. Intervenors argue that the transcript should be stricken, or at least the Board should ignore anything that is not a direct quote. We agree that petitioner's comment and explanations belong in the main body of the petition for review, not in an appendix, and we shall disregard that portion of the transcript. We shall consider the portions of the transcript that are actually a transcript.

Appendix G is an underlined version of chapter 4 of the Washington County Clean Water Service (CWS) Design and Construction standards. Intervenors argue that the underlined version is prejudicial to intervenors and the underlining should be ignored. However, it is common practice, and very useful to the Board, for parties to highlight or otherwise draw attention to the pertinent sections of regulations and standards attached to a brief. We fail to see how intervenors could be prejudiced by such underlining. If intervenors wish to draw the Board's attention to different sections of the CWS standards, they were free to attach a copy of the standards to their brief with similar highlights or underlining. This objection is denied.

FACTS

The subject property is a 2.95-acre tract zoned Low Density Residential (R-4.5). Access to the property is from Edgewood Street, which borders it to the north. Pinewood Creek flows from northeast to southwest through the southern portion of the site, between steep wooded banks. Approximately the southern half of the property is designated as a significant habitat area, with the highest value centered on the creek and riparian area and lesser values on either side. Across Pinewood Creek a small portion of the property adjoins

McDonald Street. Intervenors propose to divide the tract into 12 residential lots, along with an open space tract that includes the creek and riparian area. Access to the subdivision is from Edgewood Street, via a proposed cul-de-sac to be called SW 90th Avenue.

The city processed intervenors' preliminary subdivision application under its Type II process, which requires notice and comment to nearby property owners and neighborhood groups. During the 14-day comment period, petitioner submitted written comments, including four e-mails. Following the comment period, the city planning director issued a decision approving the preliminary subdivision plat, with conditions. Intervenors appealed, challenging some of the conditions, but later withdrew their appeal. Petitioner also appealed the planning director's approval, listing as grounds for appeal the issues raised in his previously submitted e-mails.

On September 8, 2008, the city hearings officer conducted a hearing on petitioner's appeal, accepted testimony from petitioner and intervenors, and held the record open until October 6, 2008. On October 21, 2008, the hearings officer issued a decision denying petitioner's appeal, and affirmed the planning director's decision to approve the application with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The hearings officer found that, under the city's code, the issues that can be considered on appeal are limited to the issues raised in the notice of appeal, and therefore he was not required to address issues petitioner raised at the hearing. As a precaution, however, the hearings officer adopted alternative findings addressing the issues raised at the hearing.

Petitioner argues that the hearings officer's determination that his review was limited to the issues raised in petitioner's local notice of appeal is contrary to ORS 227.175(10)(a)(D) and (E), which provide that when conducting a hearing on a permit application "the presentation of testimony, arguments and evidence shall not be limited to

issues raised in a notice of appeal" and the hearings officer must "consider all relevant testimony, arguments and evidence that are accepted at the hearing."[3]

Intervenors respond in part that ORS 227.175(10)(a) applies only to hearings on an appeal of an initial decision on a *permit* application and the challenged decision is not permit, as ORS 227.160(2) defines that term.[4] According to intervenors, their application is for subdivision of land within an urban growth boundary, and is therefore an application for a

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[3] ORS 227.175(10)(a) provides, in relevant part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a *permit* without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
>
> "* * * * *
>
> "(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.
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> "(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:
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> "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
>
> "(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and
>
> "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing." (Emphases added.)

[4] ORS 227.160(2) provides:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
>
> "(a) A limited land use decision as defined in ORS 197.015[.]"

"limited land use decision," as that term is defined at ORS 197.015(12).[5] Intervenors note that the definition of "permit" at ORS 227.160(2) explicitly excludes limited land use decisions. See n 4. We agree with intervenors that a decision approving or denying their subdivision application is a limited land use decision, and therefore not a "permit" decision. We also agree that ORS 227.175(10)(a), including subsections (D) and (E), applies only to a hearing on an appeal of a permit decision, and therefore does not apply to a hearing on an appeal of a limited land use decision.

It is true that, as intervenors point out, the hearings officer found that intervenors had "forfeited" the right to use the process set out in ORS 197.195 for a limited land use decision, by not requesting that the application be processed according to those statutory procedures. Under the city's code an applicant for tentative subdivision approval may request that the application be processed under the ORS 197.195 procedures, otherwise the application is processed under the city's Type II procedures.[6] The Type II procedures require notice and a 14-day comment period, followed by an initial decision by the planning director that may be appealed to the hearings officer. TDC 18.390.040. The hearings officer ultimately concluded that because intervenors did not request that the application be

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[5] ORS 197.015(12)(A) defines "limited land use decision" to mean "a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns * * * [t]he approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1)."

[6] TDC 18.390.070.B provides:

> "A Limited Land Use Decision (LLD) shall be defined and may be used in the manner set forth in ORS 197.015(12), as may be amended from time to time, which is expressly adopted and incorporated by reference here.
>
> "1. Selection. An applicant for a permit who wishes to use an LLD procedure instead of the regular procedure type assigned to it, must request the use of the LLD at the time the application is filed, or forfeit his/her right to use it;
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> "2. Decision-making procedure. An LLD shall be reviewed in accordance with the procedures set forth in ORS 197.195, as may be amended from time to time, which are expressly adopted and incorporated by reference here. The City shall follow the review procedures applicable to the City's Type II procedures, as set forth in Section 18.390.040 except to the extent otherwise required by applicable state law."

processed under ORS 197.195 and the city instead applied the city's Type II procedure the city's decision on the application is not a "limited land use decision." Record 25. Intervenors argue, and we agree, that a decision approving or denying a tentative subdivision plat within an urban growth boundary is a "limited land use decision," as that term is defined by ORS 197.015(12)(A). regardless of what procedures the local government applies in making that decision. Because it is a limited land use decision, it is not a decision on a "permit," and ORS 227.175(10)(a) therefore does not govern. Accordingly, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Pursuant to ORS 227.178(2), city planning staff determined that the application was complete on February 12, 2008, approximately 89 days after the application was initially submitted.[7] Record 26, 524. Following the date the application was deemed complete,

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[7] ORS 227.178 provides, in relevant part:

> "(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:
>
> > "(a) All of the missing information;
> >
> > "(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
> >
> > "(c) Written notice from the applicant that none of the missing information will be provided.
>
> "* * * * *
>
> "(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:
>
> > "(a) All of the missing information;

however, the city requested and intervenors continued to submit additional information. Petitioner argues that because the city requested and intervenors continued to submit additional information, the application did not become complete until May 19, 2008, at the earliest, after the expiration of the 180-day period prescribed in ORS 227.178(4). Therefore, petitioner argues, the application became "void" under ORS 227.178(4) on the 181st day after the application was submitted, and the city erred in continuing to process intervenors' application after that date.

Intervenors respond, and we agree, that petitioner appears to confuse whether an application includes sufficient information to allow staff to begin review, and whether the application includes all the evidence needed to demonstrate compliance with all applicable approval criteria. It is not inconsistent with ORS 227.178 for the city to determine that the application includes all information necessary for review, but to allow or request that the applicant submit additional information believed necessary to satisfy the applicable approval standards. Further, as the hearings officer noted, submission of additional information after the application is deemed complete is expressly permitted by TDC 18.390.080.D.4 and does not affect the completeness determination. Record 26. Petitioner does not challenge that finding or explain why it is inconsistent with any code or statutory provision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error petitioner argues that the hearings officer erred in finding that code-required street, bikeway and pedestrian connections between Edgewood and McDonald streets are precluded by topographic and other constraints.

"(b) Some of the missing information and written notice that no other information will be provided; or

"(c) Written notice that none of the missing information will be provided."

A. Street Connection

TDC 18.810.030.H.2 requires that all local streets abutting development be "extended within the site to provided through circulation when not precluded by environmental or topographical constraints."[8] Similarly, TDC 18.810.040.B.1 provides that block perimeters shall not exceed 2,000 feet except where "street location is precluded by natural topography, wetlands, significant habitat areas or bodies of water, or pre-existing development."[9]

Petitioner challenges the hearings officer's finding that a street connection from Edgwood Street to McDonald Street is "precluded" by topography, wetlands, or significant habitat. With respect to topography, TDC 18.810.030.H.2 provides that "[l]and is considered topographically constrained if the slope is greater than 15% for a distance of 250 feet or more." The hearings officer found that the slope down to Pinewood Creek and rising up to McDonald Street is greater than 15% for a distance of 250 feet or more. Petitioner disputes

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[8] TDC 18.810.030.H provides:

> "1. Full street connections with spacing of no more than 530 feet between connections is required except where prevented by barriers such as topography, railroads, freeways, pre-existing developments, lease provisions, easements, covenants or other restrictions existing prior to May 1, 1995 which preclude street connections. A full street connection may also be exempted due to a regulated water feature if regulations would not permit construction.
>
> "2. All local neighborhood routes and collector streets which abut a development site shall be extended within the site to provide through circulation when not precluded by environmental or topographical constraints, existing development patterns or strict adherence to other standards in this code. A street connection or extension is considered precluded when it is not possible to redesign or reconfigure the street pattern to provide required extensions. Land is considered topographically constrained if the slope is greater than 15% for a distance of 250 feet or more. In the case of environmental or topographical constraints, the mere presence of a constraint is not sufficient to show that a street connection is not possible. The applicant must show why the constraint precludes some reasonable street connection."

[9] Petitioner also cites to provisions of the Transportation Planning Rule (TPR) at OAR chapter 660 division 12, and provisions of the city comprehensive plan and transportation system plan (TSP), apparently as context for the TDC connectivity requirements discussed in the text. To the extent petitioner asserts that any TPR, comprehensive plan or TSP provisions apply as approval criteria for the proposed subdivision, we agree with intervenors that petitioner has not established that any of the cited TPR, plan or TSP provisions are approval criteria.

that approach, arguing that TDC 18.810.030.H.2 contemplates a *continuous* slope greater than 15 percent for 250 feet or more. We do not understand petitioner to dispute that the slope on the northern bank of Pinewood Cree down to the creek and the slope up the southern bank from Pinewood Creek to McDonald Street (which can be visualized as the two arms of a "V") exceed 15 percent. We also do not understand petitioner to dispute that the combined distance to cross the northern bank and southern bank of Pinewood Creek is greater than 250 feet. We understand petitioner to argue that neither bank is 250 feet long and that the slope of the creek is not greater than 15 percent.

Intervenors respond, and we agree, that TDC 18.810.030.H.2 does not specify technical rules for measuring the required 250-foot difference, and petitioner has not demonstrated that his preferred method of including only continuous slopes greater than 15 percent for 250 feet or more is compelled by the language of that code provision.

With respect to environmental constraints, petitioner argues that, while a street extension to McDonald Street across the significant habitat area and the creek would destroy much of that habitat, it is possible to construct such a right of way and obtain approval under the applicable city and CWS standards. Therefore, petitioner contends, the applicant has not shown why any environmental constraint "precludes some reasonable street connection." TDC 18.810.030.H.2

The hearings officer found that a street extension across the creek and habitat area would require either extensive fill in the wetlands and habitat areas, or construction of a 200 to 250 foot long bridge. [10] We agree with intervenors that petitioner has not demonstrated

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[10] The hearings officer found:

> "The hearings officer finds that the natural topography, wetlands and significant habitat areas on the southern portion of the site prevent and preclude the extension and connection of SW 90th Avenue with SW McDonald Street, which is otherwise required for compliance with [TDC] standards. These constraints extend from east to west across the entire site. Construction of a street extension through this area would require extensive fill, which would impact the sensitive areas (wetlands, stream, habitat area, steep slopes and vegetated corridor)

that the hearings officer erred in finding that those environmental constraints preclude a "reasonable street connection." A "reasonable" street connection implies more than physical possibility, or the theoretical possibility of satisfying environmental standards that would apply to construction in riparian, wetland and habitat areas.

B. Bicycle and Pedestrian Connection

TDC 18.810.040.B.2 requires bicycle and pedestrian connections when a full street connection is exempted, "except where precluded by environmental or topographical constraints, existing development patterns, or strict adherence to other standards in the code."[11] Petitioner argues that even if a street connection is precluded due to topographic or environmental constraints, the hearings officer erred in finding that a bicycle or pedestrian connection is similarly precluded.

The hearings officer found that providing a bicycle/pedestrian path connecting the cul-de-sac to McDonald Street across the creek would require either significant fill or construction of 160-foot long bridge, and is therefore precluded for the same reasons as a street connection. Petitioner has not established that the hearings officer erred in so finding.

Petitioner argues, more forcefully, that the hearings officer erred in rejecting an alternative he proposed below, of providing a bicycle/pedestrian path that runs west along the riparian corridor within an existing sanitary sewer easement into a neighboring subdivision and thence to McDonald Street. The hearings officer rejected this alternative, finding that neither the city nor the applicant has the authority to unilaterally expand the scope of the

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> in this area, or the extension of a 200 to 250-foot long bridge across these sensitive areas. Therefore the hearings officer finds that this development complies with the express exceptions in TDC 18.810.040.B.1 and TDC 18.810.030.H." Record 36.

[11] TDC 18.810.040.B.2 provides:

> "Bicycle and pedestrian connections on public easements or right-of-ways shall be provided when full street connection is exempted by B.1 above. Spacing between connections shall be no more than 330 feet, except where precluded by environmental or topographical constraints, existing development patterns, or strict adherence to other standards in the code."

easement within the neighboring subdivision to allow public use of the sanitary sewer alignment as a bicycle/pedestrian connection. Petitioner does not appear to dispute that finding,[12] but argues that future expansion of the easement on the adjoining subdivision is not legally barred, and might occur someday, and therefore the city erred in not requiring the applicant to dedicate and construct a connection up to the property boundary, as required by TDC 18.810.030.F.2. However, as intervenors point out, TDC 18.810.030.F.2 provides that"[w]here necessary to give access or permit a satisfactory future division of adjoining land, *streets* shall be extended to the boundary lines of the tract to be developed * * *." Not only is the adjoining land to the west already fully divided, but TDC 18.810.030.F.2 concerns extension of streets, not bicycle/pedestrian connections. Petitioner cites no authority that would require stubbing a public bicycle/pedestrian path to the property boundary, based on the possibility that the adjoining owner of fully divided land might someday agree to expand the scope of easements necessary to connect the path to McDonald Street.

C. Adjustment to Connectivity Requirements

Finally, petitioner argued at the hearing, and the hearings officer apparently agreed, that an adjustment or variance to the block size and connectivity requirements of TDC 18.810.040.B and 18.810.030.H.1 is required to avoid the obligation to construct a street or path connection between Edgwood and McDonald Streets. However, the hearings officer found that the issue of whether an adjustment is required was not raised in the notice of appeal and is therefore beyond the scope of the appeal. Record 41. Petitioner argues on

[12] Petitioner states that the hearings officer ruled that "consideration of a path over property not part of [the subject property] is not properly within the scope of this proceeding, and Petitioner will abide by such findings, but maintains that a bike/pedestrian pathway over undeveloped adjacent land * * * is not barred by pre-existing development, remains one of a number of possibilities for connectivity and is not precluded by law." Petition for Review 19.

appeal to LUBA that the hearings officer erred in failing to require an adjustment or impose a condition requiring an adjustment.

Petitioner does not challenge the hearings officer's finding that the issue of whether an adjustment is required was not raised in the notice of appeal and is beyond the scope of the hearings officer's review.[13] In addition, it is not clear to us why the hearings officer agreed with petitioner that an adjustment is necessary. As intervenors point out, TDC 18.810.040.B and 18.810.030.H include express exceptions for connectivity requirements that the hearings found to apply. It is not clear why an adjustment is needed to forgo street or pathway connections that, the hearings officer found, the code does not require. In any case, petitioner's arguments regarding the need for adjustment do not provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

One of the issues raised in petitioner's notice of appeal is the applicability of TDC 18.775, governing sensitive lands, including significant habitat areas. Some of the proposed subdivision lots appear to be at least within the "lower value" or "moderate value" portions of the significant habitat area on the northern side of Pinebrook Creek, as designated on the city's significant habitat map. The hearings officer addressed that issue and found that TDC 18.775 does not require a permit for development within significant habitat areas and supplies no approval criteria for such permits.[14]

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[13] We note that, in Appendix B, which we have declined to consider, petitioner argues that the issue was raised in his testimony to the hearings officer, and was therefore within the hearings officer's scope of review. Appendix B-2. However, that argument is based apparently on petitioner's view, rejected above, that ORS 227.175(10)(a)(D) and (E) apply to require the hearings officer to consider issues that were not raised in the notice of appeal, but were raised at the hearing.

[14] The hearings officer's decision states, in relevant part:

> "* * * There is no dispute that this site contains significant fish and wildlife habitat areas designated on the City of Tigard 'Significant Habitat Areas Map.' * * * However, the Code

On appeal to LUBA, petitioner disputes the finding that TDC 18.775 does not provide any approval criteria for development within a significant habitat area. Petitioner notes that TDC 18.775.020.H provides that "[e]xcept as explicitly authorized by other provisions of this chapter, all other uses are prohibited on sensitive land areas." According to petitioner, nothing in TDC 18.775 explicitly authorizes development within any part of a significant habitat area, and therefore all development is prohibited in those areas, under TDC 18.775.020.H.

Intervenors respond that petitioner never cited TDC 18.775.020.H at any point below and never argued that all development is prohibited within significant habitat areas. As a result, intervenors argue, the issue advanced under the fourth assignment of error is waived, under ORS 197.763(1)[15] and 197.835(3).[16] On the merits, intervenors argue that petitioner's

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> does not require a permit to develop such areas. TDC 18.775.070.A provides 'an applicant, who wishes to develop within a sensitive area, as defined in Chapter 18.775, *must obtain a permit in certain situations* listed in this section.' (Emphasis added). Fish and wildlife habitat areas are not listed as a situation where a permit is required. Therefore the City was not required to discuss the presence of significant fish and wildlife habitat areas because the existence of such areas on the site does not introduce any relevant approval criteria." Record 30.

[15] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] 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."

Similarly, ORS 197.195(2)(c) requires that notice of an application for a limited land use decision must

> "[s]tate that issues which may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue."

[16] ORS 197.835(3) and (4) provide, in relevant part:

> "(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.
>
> "(4) A petitioner may raise new issues to the board if:

interpretation of TDC 18.775.020.H is inconsistent with other provisions of that chapter, which explicitly authorize development in sensitive lands such as wetlands and steep slope areas, which are present in the significant habitat area mapped on the property.

In the reply brief, petitioner concedes he did not argue below that development is prohibited in significant habitat areas, but contends that his failure to make that argument below is irrelevant. Petitioner explains that he argued below that the provisions of TDC 18.775 applied and that the city must address them. Petitioner argues that he could not anticipate how the applicant would justify development within significant habitat areas or how the hearings officer would address the provisions of TDC 18.775. According to petitioner, not until the final written argument did intervenors take the position, adopted in the hearings officer's decision, that TDC 18.775 did not require a permit for development within the significant habitat area and provided no approval standards for such development. Petitioner argues that he had no opportunity to challenge that position below and can therefore challenge it now before LUBA.

Although it is a close question, we agree with intervenors that the petitioner failed to raise below the issue that TDC 18.775.020.H effectively prohibits all development within significant habitat areas, and that issue is waived. As noted, petitioner did not cite TDC 18.775.020.H below or argue that it effectively prohibits development in significant habitat areas. Petitioner initially argued that the application proposes development within sensitive lands and therefore the city must apply TDC 18.775. Record 506. The planning director agreed, re-noticed the application, and adopted findings of compliance with TDC 18.775. Record 295-97. Before the hearings officer, petitioner argued that those findings are

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> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

inadequate because they fail to consider significant fish and wildlife habitat areas, one of the five types of sensitive lands listed in TDC 18.775.010. The hearings officer adopted findings explaining that TDC 18.775 does not require a permit for development within significant fish and wildlife habitat areas or provide any approval criteria for such development. On appeal to LUBA, petitioner does not challenge the merits of that conclusion, but instead advances a substantially different issue based on TDC 18.775.020.H, that development within significant habitat areas is prohibited outright. That issue is sufficiently different from the issues raised below under TDC 18.775 that we conclude the city and intervenors were not given fair notice of that issue and a fair opportunity to respond. Petitioner had multiple opportunities below to assert his current position that development is prohibited in significant habitat areas, but failed to do so. Nothing he argued below reasonably suggested his current interpretation that TDC 18.775.020.H effectively prohibits all development in significant habitat areas. Accordingly, that issue is waived. ORS197.763(1).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner contends that the hearings officer erred in failing to apply the site development review provisions at TDC 18.360 to the proposed subdivision.

The hearings officer found that TDC 18.360 is ambiguous with respect to whether the site development review provisions are intended to be applied to a subdivision application, but concluded that, based on text and context, those provisions do not apply.[17] In particular,

[17] The hearings officer's decision states, in relevant part:

> "The hearings officer finds that the Site Development Review standards of TDC 18.360 are not intended to apply to subdivisions, based on the text and context of the Code.
>
> "a. TDC 18.360.020.A provides 'Site development review shall be applicable to all new developments * * *'. 'Development,' as defined by TDC 18.120.030.A.57, includes '[d]ivision of land into two or more parcels, including partitions and subdivisions * * *.

the hearings officer found that the majority of the site development review approval criteria pertain to structures or buildings, and reasoned that because subdivision applications do not propose any structures or buildings the city did not intend the site development review provisions to apply to subdivisions. Further, the hearings officer reasoned that those site development review criteria that do not pertain to structures or buildings, such as tree protection and landscaping regulations, are fully addressed by the applicable subdivision approval criteria.

Petitioner disputes the finding that the majority of the site development review criteria apply to buildings. According to petitioner, many of the review criteria arguably apply to aspects of development that do not necessarily involve structures and buildings.[18] In any case, petitioner argues, even if only one site development review criterion applied to subdivisions, the city is required to apply it.

> "b. TDC 18.360.020.A goes on to provide exceptions for certain types of development, including, but not limited to, 'Single-family detached dwellings; Manufactured homes on individual lots; * * * [a]nd] Mobile home parks and mobile home subdivisions.' The Code expressly exempts Manufactured homes on individual lots and Mobile home parks and mobile home subdivisions. However the Code only provides an exemption for single-family detached dwellings. It does not provide a similar exemption for single-family detached subdivisions. This could indicate an intent to require Site Development Review of single-family detached subdivisions.
>
> "c. However, the majority of the approval criteria in TDC 18.360.090.A apply to the location and design of buildings. See, e.g., TDC 18.360.090.A,2, 3, 5, 6, 7, 9 and 10. Single-family detached residential subdivisions do not include buildings. Such subdivisions merely create lots on which buildings may be constructed in the future. Construction of such buildings on individual lots is exempt from site design review pursuant to TDC 18.360.020.A(1). Therefore the hearings officer [finds] that the Site Development Review standards of TDC 18.360 are not intended to apply to subdivisions, because a majority of the approval criteria are inapplicable. The remaining approval criteria in TDC 18.360.090.A are addressed by the subdivision approval criteria in TDC 18.430.040 and the 'other applicable ordinances and regulations' incorporated by reference, including the tree regulations of TDC 18.790, the Street and Utility Improvements Standards of TDC 18.810, the landscaping and screening standards of TDC 18.745, etc." Record 29.

[18] Petitioner gives the following examples of site development review standards that, in his view, would apply to a proposed subdivision: (1) locating buildings to preserve existing trees, (2) consideration of methods to reduce impacts to site hydrology, (3) screening for mechanical equipment, (4) demarcation of areas for crime prevention, and (5) consideration of convenient access to transit services. Petition for Review 25, n 43.

TDC 18.360 is certainly ambiguous with respect to whether it applies to a subdivision for single-family detached dwellings. As the hearings officer noted, TDC 18.360.020 exempts from review both "single-family detached dwellings" and "mobile home subdivisions," but does not include an express exemption for land divisions intended for single-family detached dwellings. Intervenors argue that the exemption for "single-family detached dwellings" is intended to include partitions or subdivisions for that type of dwelling, as well as building permits for single-family detached dwellings on individual lots. That may well have been the city's intent, but if so that intent is not clearly expressed.

Considering other context, we generally agree with the hearings officer that most if not all of TDC 18.360 provisions appear to be directed at the built environment in one form or another. For example, the purpose statement at TDC 18.360.010, under "Environmental Enhancement," lists three purposes, all of which involve the design or placement of buildings, structures, or improvements. And, although we agree with petitioner that it is irrelevant whether the "majority" or "minority" of site development review standards could be applied to subdivisions, it is fair to say that many if not the great majority of those standards are clearly directed at buildings, structures or other improvements, and further that none of those standards seem readily applicable to a decision that simply approves a tentative subdivision plat, as opposed to a decision that approves construction of buildings or structures of some kind. It is true that a few site review standards might be applied in a meaningful manner to a proposed subdivision, such as certain tree preservation requirements.[19] However, as the hearings officer found, all site review standards that could

[19] TDC 18.360.090.A.2 is a fairly typical site development review standard, at least portions of which petitioner argues are applicable to subdivisions:

"Relationship to the natural and physical environment:

"a. Buildings shall be:

arguably be applied to a subdivision involve matters that are fully addressed under the subdivision approval standards. For example, both TDC 18.360.090.A.2.b and the subdivision approval criteria subject development to the tree regulations at TDC 18.790. Petitioner does not identify any site development review standards that either clearly apply to a proposed subdivision or would not simply duplicate other subdivision standards, if applied. That context lends some support to the hearings officer's conclusion that the site review standards do not apply to a proposed subdivision.

Although it is a reasonably close question, petitioner has not established that considering text and context the hearings officer erred in concluding that the city did not intend to subject subdivision applications to the site development review standards in TDC 18.360.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in failing to apply comprehensive plan policies that were enacted after the date the application was submitted. This argument is based on petitioner's assertion, rejected above, that the application was not complete when submitted and did not become complete within 180 days. Petitioner reasons that the application is therefore not protected by the "goal-post rule" at ORS 227.178(3)(a), with the consequence that comprehensive plan amendments adopted after the date the application was

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"(1) Located to preserve existing trees, topography and natural drainage where possible based upon existing site conditions;

"(2) Located in areas not subject to ground slumping or sliding;

"(3) Located to provide adequate distance between adjoining buildings for adequate light, air circulation, and fire-fighting; and

"(4) Oriented with consideration for sun and wind.

"b. Trees shall be preserved to the extent possible. Replacement of trees is subject to the requirements of Chapter 18.790, Tree Removal."

submitted must be applied. However, for the reasons set forth above, the application was deemed complete within 180 days, and therefore ORS 227.178(3)(a) applies to require that "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

In addition, petitioner argues that the hearings officer erred in failing to apply a pre-existing comprehensive plan policy, Policy 3.4.2.c, which requires cluster type development in areas having important wildlife habitat as delineated on the city's "Fish and Wildlife Habitat Map."[20] Intervenors respond, and we agree, that because a decision on intervenors' application is a limited land use decision, under ORS 197.195(1) the city may apply Policy 3.4.2.c to approve or deny the application only if the city has incorporated Policy 3.4.2.c into its land use regulations.[21] No party argues that the city has incorporated Policy 3.4.2.c into its land use regulations.[22]

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

As noted, a subdivision application is subject to TDC 18.790, which regulates tree removal. TDC 18.790.030 requires the applicant to submit a "tree plan" identifying existing

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[20] It is not clear whether the "Fish and Wildlife Habitat Map" is the same thing as the "Significant Habitat Area Map."

[21] ORS 197.195(1) provides:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision."

[22] In addition, intervenors argue that no issue regarding Policy 3.4.2.c was raised below. Petitioner does not contend otherwise.

trees over a certain size and a program to either save those trees or mitigate for their removal.[23] TDC 18.790.030.A states that "[p]rotection is preferred over removal wherever possible."

A. Preference for Protection

Petitioner contends, first, that intervenors failed to submit any evidence directed at the TDC 18.790.030(A) "preference" for protection rather than removal, and the hearings

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[23] TDC 18.790.030 provides:

> "A. Tree plan required. A tree plan for the planting, removal and protection of trees prepared by a certified arborist shall be provided for any lot, parcel or combination of lots or parcels for which a development application for a subdivision, partition, site development review, planned development or conditional use is filed. Protection is preferred over removal wherever possible.
>
> "B. Plan requirements. The tree plan shall include the following:
>
> "1. Identification of the location, size and species of all existing trees including trees designated as significant by the city;
>
> "2. Identification of a program to save existing trees or mitigate tree removal over 12 inches in caliper. Mitigation must follow the replacement guidelines of Section 18.790.060D, in accordance with the following standards and shall be exclusive of trees required by other development code provisions for landscaping, streets and parking lots:
>
> "a. Retention of less than 25% of existing trees over 12 inches in caliper requires a mitigation program in accordance with Section 18.790.060D of no net loss of trees;
>
> "b. Retention of from 25% to 50% of existing trees over 12 inches in caliper requires that two-thirds of the trees to be removed be mitigated in accordance with Section 18.790.060D;
>
> "c. Retention of from 50% to 75% of existing trees over 12 inches in caliper requires that 50 percent of the trees to be removed be mitigated in accordance with Section 18.790.060D;
>
> "d. Retention of 75% or greater of existing trees over 12 inches in caliper requires no mitigation."
>
> "3. Identification of all trees which are proposed to be removed;
>
> "4. A protection program defining standards and methods that will be used by the applicant to protect trees during and after construction."

officer erred in failing to require intervenors to demonstrate that the tree plan "prefers" protection rather than removal. According to petitioner, the "preference" language in TDC 18.790.030(A) requires the applicant to submit a tree plan with at least two alternative street layouts or building envelopes, so that the hearings officer has some basis to conclude that the applicant has shown that the site plan "prefers" protection to removal.

The hearings officer rejected that view, finding that "[w]hether the applicant could save additional trees on the site by altering the layout of building envelopes, road improvements and utilities on the site is irrelevant." Record 42. The hearings officer cited our decision in *Miller v. City of Tigard*, 46 Or LUBA 536, 550 (2004), where we held that:

> "The ultimate standard that the [tree preservation ordinance] imposes is not a standard that requires protection of trees. Rather it is a standard that favors protection of trees but allows trees to be removed so long as any loss of more than 25 percent of large trees is mitigated."

Consistent with *Miller*, the hearings officer concluded that the "preference" to protect trees is implemented by the code-provided incentives to save the maximum number of trees, at TDC 18.790.040.

We agree that the "preference" language is a general statement of philosophy rather than a mandatory approval criterion, and that that language is implemented by the incentives, density bonuses etc., that are set out in TDC 18.790.040 and that function to encourage applicants to preserve trees rather than remove them. Nothing in TDC 18.790 suggests that the code requires an applicant to submit one or more alternative site plans so that the city can choose the alternative that preserves the most trees. As the hearings officer found, the choice to preserve or remove trees under TDC 17.890 is up to the applicant, subject to mitigation requirements.

B. Mitigation for Dead Trees

Petitioner also argues that the hearings officer erred in failing to require intervenors to mitigate for "hazardous" trees, which the code defines as a tree that "by reason of disease,

infestation, age, or other condition presents a known and immediate hazard to persons or to public or private property." According to petitioner, nothing in TDC 18.790 excludes hazardous trees from the set of "existing trees" that must be identified and, if removed for any reason, be subject to mitigation. Petitioner contends that replacing dead trees supports one of the policies identified in TDC 18.790.010, to "[e]ncourage the preservation, planting and replacement of trees in the City."

Intervenors respond that LUBA rejected a similar argument in *Miller*, and petitioner offers no reason to reach a different conclusion in the present case. In *Miller*, we found that the issue of whether hazardous trees must be included in the mitigation requirements was waived, for failure to raise the issue below. In a footnote, we commented:

> "Even if we were to reach this issue, we would agree with intervenor's response to petitioners' argument. Intervenor argues that, because these trees are to be removed because they are hazardous, rather than to accommodate development, they should be excluded from the tree count for purposes of computing the mitigation requirement. Intervenor bases this argument on several subsections of TDC Chapter 18.790, which differentiate between healthy and hazardous trees. *See, e.g.*, TDC 18.790.020(A)(3) (''Hazardous tree' means a tree which by reason of disease, infestation, age or other condition presents a known and immediate hazard to persons or to public or private property;' TDC 18.790.040(B) (allowing removal of a tree otherwise retained and protected under a tree plan if the tree either dies or requires removal as a hazardous tree); and TDC 18.790.050(D) (requirement for a tree removal permit is waived where the tree '[i]s a hazardous tree'). * * *" 46 Or LUBA at 546 n 7.

Although our above-quoted analysis of TDC 18.790 was *dicta*, we agree with intervenors that petitioner offers no reason in the present case to reach a different conclusion. While nothing in TDC 18.790 expressly excludes hazardous trees from the mitigation requirement, at the same time nothing expressly includes hazardous trees. However, as we noted in *Miller*, several TDC provisions authorize and encourage removal of hazardous trees. Petitioner's interpretation would provide a disincentive for applicants to identify hazardous trees for removal, to avoid increased mitigation requirements. The city's view seems more consistent with the policy to encourage removal of hazardous trees and is at least as

consistent with the text of TDC 18.790 as petitioner's preferred interpretation. Accordingly, petitioner's arguments on this issue provide no basis for reversal or remand.

C. Deferral

In a footnote attached to the seventh assignment of error, petitioner advances a different basis for reversal or remand than stated in the text, alleging that certain conditions of approval improperly defer consideration of discretionary approval criteria to a subsequent proceeding that does not provide for notice or opportunity for public participation. We decline to consider what is essentially a separate assignment of error or an independent basis for reversal or remand that is set out in a footnote.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner contends that the city failed to comply with ORS 92.044(1)(d), which provides that:

> "The procedures established by each ordinance or regulation shall provide for the coordination in the review of the tentative plan of any subdivision or partition with all affected city, county, state and federal agencies and all affected special districts."

According to petitioner, the city failed to adequately coordinate with itself regarding ownership of two tracts on the property, failed to adequately coordinate with CWS regarding stormwater design under CWS regulations, and finally failed to adequately coordinate with the Oregon Department of Fish and Wildlife (ODFW). According to petitioner, the hearings officer failed to adopt findings addressing comments submitted by CWS and ODFW, and therefore failed to adequately coordinate with those agencies.

Intervenors respond that no issue was raised below regarding ORS 92.044(1)(d), and therefore the issue raised in this assignment of error is waived. In any case, intervenors argue, the statute simply requires cities and counties to coordinate with affected entities in adopting land division regulations and procedures; ORS 92.044(1)(d) is not an approval

criterion that applies to approval of a preliminary subdivision plat. Intervenors also argue that the hearings officer was not required to adopt findings addressing the CWS and ODFW comments, because those comments did not pertain to any applicable city approval requirements.

We agree with all three responses. Petitioner does not contend that any issue was raised below regarding ORS 92.044(1)(d). Further, the statute is clearly directed at adoption of land use regulations and procedures, and does not impose any requirements with respect to particular land division decisions. There may be some applicable code requirement that imposes a coordination requirement or requires the hearings officer to adopt findings addressing all agency comments, but if so petitioner does not cite it.[24] Finally, petitioner does not explain why the hearing officer is required to adopt findings addressing comments that do not concern applicable approval criteria.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Petitioner contends that the hearings officer failed to adopt adequate findings with respect to three TDC code provisions.[25] Petitioner's arguments under this assignment of error are particularly hard to follow. However, we attempt to address each contention below.

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[24] Petitioner includes a footnote that discusses Statewide Planning Goal 2 (Land Use Planning) and various statutory definitions related to coordination. Even if we were to consider what is essentially a new sub-assignment of error presented in a footnote, intervenors argue, and we agree, that petitioner does not explain why Goal 2 applies to a subdivision application.

[25] TDC 18.390.050.E.2 provides:

> "Approval or denial of a Type II Administrative Appeal or Type III action shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards, and facts set forth[.]"

A. TDC 18.705.030.H and I

TDC 18.705.030.H and I concern access management. The planning director's findings addressing TDC 18.705.030.H and I are found at Record 290-91. Before the hearings officer, petitioner challenged the adequacy of those findings, criticizing the conclusion that "Based on the analysis above, the Access Egress and Circulation standards are met" as not constituting an adequate finding. The hearings officer rejected that challenge, noting that the conclusion sums up the previous page and a half of analysis and is not the entirety of the findings addressing TDC 18.705.030.H and I. Record 47. On appeal to LUBA, petitioner again alleges that the director's findings regarding TDC 18.705.030.H and I are inadequate, but does not explain why. Absent a more developed argument, this sub-assignment of error does not provide a basis for remand.

B. TDC 18.745.060

TDC 18.745.060 is a landscaping standard that sets out the requirements for re-vegetating disturbed land to control erosion.[26] The planning director found that the applicant

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[26] TDC 18.745.060 provides:

> "A. When re-vegetation is required. Where natural vegetation has been removed through grading in areas not affected by the landscaping requirements and that are not to be occupied by structures, such areas are to be replanted as set forth in this section to prevent erosion after construction activities are completed.
>
> "B. Preparation for re-vegetation. Topsoil removed from the surface in preparation for grading and construction is to be stored on or near the sites and protected from erosion while grading operations are underway; and
>
> "1. Such storage may not be located where it would cause suffocation of root systems of trees intended to be preserved; and
>
> "2. After completion of such grading, the topsoil is to be restored to exposed cut and fill embankments or building pads to provide a suitable base for seeding and planting.
>
> "C. Methods of re-vegetation.
>
> "* ** Acceptable methods of re-vegetation include hydro-mulching or the planting of rye grass, barley, or other seed with equivalent germination rates, and:

had submitted a grading plan that outlined erosion control measures, but did not provide specifics. However, the director found that the TDC 18.745.060 requirements "will be met," subject to conditions requiring the applicant to submit a revised site plan and an erosion control plan specifying re-vegetation methods. Record 296.[27] Petitioner challenged those findings as inadequate. The hearings officer rejected that challenge, concluding briefly that the findings as a whole are sufficient to address compliance with the revegetation requirements. Record 47.

On appeal to LUBA, petitioner again argues that the director's findings regarding TDC 18.745.060 are inadequate, and the hearings officer erred in affirming them. While the

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"a. Where lawn or turf grass is to be established, lawn grass seed or other appropriate landscape cover is to be sown at not less than four pounds to each 1,000 square feet of land area;

"b. Other re-vegetation methods offering equivalent protection may be approved by the approval authority;

"c. Plant materials are to be watered at intervals sufficient to ensure survival and growth; and

"d. The use of native plant materials is encouraged to reduce irrigation and maintenance demands."

[27] The director's decision states:

"Section 18.745.060 contains the provisions for re-vegetation where natural vegetation has been removed through grading. Such areas are to be re-planted as set forth in this section to prevent erosion after construction activities are completed.

"The applicant has provided a grading plan which outlines erosion control measures but gives no specifics on the methods of re-vegetation. The criterion is also not addressed within the narrative. All areas graded during subdivision development will need to be re-seeded and/or planted to ensure stabilization.

"FINDING: The Landscaping and Screening standards will be met, if the applicant complies with the conditions below.

"CONDITIONS: Prior to commencing site work, the applicant shall submit a revised site plan that indicates the type and location of proposed street trees * * * [and] prior to commencing site work, the applicant shall submit an erosion control plan that shows and describes methods for re-vegetation of disturbed areas. All areas graded during subdivision development will need to be re-seeded and/or planted to ensure stabilization." Record 294.

director's findings are brief, the re-vegetation requirements at TDC 18.745.060 are fairly simple and petitioner does not explain why a more detailed discussion is necessary. The applicant submitted a grading plan with an outline of erosion control measures that the planning director apparently believed was sufficient to demonstrate that there are erosion control measures that if implemented will achieve compliance with TDC 18.745.060, and the director accordingly conditioned approval on submission of an erosion control plan describing specific methods for re-vegetating disturbed areas. Petitioner does not explain why that approach is error. Absent a more developed argument, petitioner has not demonstrated that the city's findings regarding TDC 18.745.060 are inadequate.

C. TDC 18.810

TDC 18.810 concerns street and utility improvement standards. The planning director adopted five pages of findings addressing the requirements of TDC 18.810. Record 302-07. Nonetheless, petitioner argues that "[t]here are no findings at all identified for the Street and Utility Improvement Standards, TDC 18.810 (Rec 302-307)." Petition for Review 38. Like intervenors, we have no idea why petitioner cites to five pages of findings addressing TDC 18.810, but argues that there are no findings at all addressing TDC 18.810. Absent some kind of challenge to those findings, petitioner's arguments provide no basis for remand.

D. Other Findings Challenges

On page 39 of the petition for review, petitioner lists eight issues or standards that, petitioner alleges, the planning director's decision failed to address adequately. That list is accompanied by only the briefest argument in support. Intervenors argue that five of the issues on that list were not raised below and are thus waived. Petitioner does not respond to the waiver challenge, and we agree with intervenors that those issues are waived. With respect to the three issues not waived, intervenors note that petitioner challenges alleged inadequacies in the *planning director's* decision, and fails to mention, much less challenge,

the findings in the hearings officer's decision that addresses those issues. We agree with intervenors that, absent a challenge to the hearings officer's findings on those three unwaived issues, petitioner's arguments on page 39 do not provide a basis for remand.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in failing to provide a *de novo* hearing, as required by ORS 227.175(10)(a)(D), because with respect to three issues the hearings officer failed to conduct an independent review of the planning director's initial decision and instead impermissibly deferred to the planning director's decision.[28]

An initial problem for petitioner's argument is that we have already determined that the city's decision is a limited land use decision, and therefore ORS 227.175(10)(a)(D) does not govern. That problem aside, even if some applicable statute or code provision not cited to us required *de novo* review, petitioner had not established that the hearings officer failed to conduct a *de novo* review or improperly deferred to the planning director's decision rather than conduct an independent review. With respect to each of the three issues cited by petitioner, it appears to us that the hearings officer simply disagreed with petitioner's position, rather than refuse to conduct an independent review or impermissibly defer to the planning director's decision.

First, petitioner argued to the hearings officer that the city is required to apply and find compliance with CWS requirements. The hearings officer disagreed, finding that "the hearings officer has no authority to apply CWS regulations." Record 44. Petitioner is apparently of the opposite opinion, but we fail to see how the hearings officer's disagreement with petitioner on that point constitutes failure to provide a *de novo* review.

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[28] The hearings officer found that he "is required to conduct an independent review of the record and is not bound by the prior determination of the director on those issues raised in the Notice of Appeal. See *Lawrence v. Clackamas County*, 164 Or App 462, 469, 992 P2d 933 (1999)." Record 23.

Second, petitioner argued that the application is incomplete because it does not include a future street plan, and should be denied for that reason. The hearings officer found that the issue is beyond the scope of appeal and not raised during the written comments submitted below. Further, the hearings officer found that the requirement to submit a future street plan is a submittal requirement, not an approval criterion, and that the hearings officer has no authority to review the City's completeness determination or deny the application for failure to comply with the submittal requirement. Record 35. Petitioner apparently disagrees that the hearings officer lacks authority to review a completeness determination, but does not explain why. Whatever the merits of that issue, we fail to see that the hearings officer's disagreement with petitioner on that point constitutes failure to provide a *de novo* hearing.

Finally, petitioner argued that an adjustment is needed to block size and connectivity requirements, but the hearings officer found that that issue was not timely raised and therefore the hearings officer had no authority to impose a condition requiring intervenors to seek an adjustment. Again, petitioner has not explained why the hearings officer' resolution of that dispute constitutes a failure to provide a *de novo* hearing.

The tenth assignment of error is denied.

The city's decision is affirmed.