BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALAN MONTGOMERY,
Petitioner,

vs.

CITY OF DUNES CITY,
Respondent.

LUBA No. 2008-135

FINAL OPINION
AND ORDER

Appeal from City of Dunes City.

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

David N. Allen, Newport, filed the response brief and argued on behalf of respondent. With him on the brief was Macpherson, Gintner & Diaz.

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

REMANDED 01/07/2010

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 council decision that denies his request for preliminary subdivision plat approval.

FACTS

This has been a contentious appeal. Our recitation of the facts is limited to the facts that are necessary to set the groundwork for resolving petitioner's assignments of error and therefore does not present a complete picture of the proceedings below.

On October 1, 2007, petitioner submitted two applications—one application sought approval for a 20-lot subdivision, and the other application sought a variance from city block length standards to create a block that would be longer than allowed by city standards. Record 269-82.[1] A supporting 40-page narrative, dated September 5, 2007, accompanied those October 1, 2007 applications. Record 283-323. That supporting narrative referred to 12 Exhibits, Exhibits A through L. Record 285.[2] But the referenced Exhibits were not included in petitioner's initial October 1, 2007 application submittal.

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[1] The record in this matter includes the 445-page Record that was originally submitted by the city, a 139-page Supplemental Record, and an eight-page Amended Supplemental Record.

[2] The narrative included the following list of exhibits;

"Exhibit A: Application Form

"Exhibit B: Location Map

"Exhibit C: Assessment & Taxation Map

"Exhibit D: Zoning Map Excerpt

"Exhibit E: Comprehensive Plan Designation Map

"Exhibit F: FIRM map

"Exhibit G: Subdivision Plans

"Exhibit H: Aerial Photograph

On October 3, 2007, a number of Exhibits were submitted to the city. Supplemental Record 49-70. As we explain below, the city never gave these Exhibits to the city council.[3]

About a week after the first application narrative was submitted, petitioner submitted a *second* application narrative. Supplemental Record 71-136.[4] The first 43 pages of the second narrative largely replicate the first 40 pages of the first narrative, although the text is not identical in all places. The last page of the second narrative (Supplemental Record 114) addresses variance standards whereas the last page of the first narrative simply states "Need a variance to block length." Record 323. The second narrative also includes the same Exhibits that petitioner previously submitted separately on October 3, 2007. The city did not provide the second narrative to the city council.

On October 30, 2007, petitioner submitted an additional response concerning the city's variance criteria. Supplemental Record 137-38. The city never gave this response to the city council.

The planning commission held a hearing on the applications on June 24, 2008 and continued that hearing to a morning hearing on July 1, 2008. The planning commission recommended approval with conditions. The city council held a hearing on the evening of July 1, 2008. The city council ultimately denied the application for subdivision approval on

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"Exhibit I: Comprehensive Plan Resource Maps

"Exhibit J: RLID information

"Exhibit K: Draft CC&Rs

"Exhibit L: Legal Description." Record 285.

[3] Some of these exhibits are some of the exhibits that were referenced in the October 1, 2007 supporting narrative.

[4] Confusingly, the second narrative, like the first narrative, is dated September 5, 2007 and also calls itself a "narrative" rather than a "second" or "amended" narrative. To add to the confusion, the headers that begin on the second page of the second narrative are dated April 7, 2006. In this opinion we will simply refer to the narratives as the first and second narratives to distinguish the two.

July 22, 2008, finding that petitioner submitted insufficient evidence to demonstrate compliance with several preliminary subdivision plat approval standards. On that basis, the city council denied the application for subdivision plat approval, without addressing all preliminary subdivision plat approval standards and without considering the application for approval of a variance.

REPLY BRIEF

In response to petitioner's first assignment of error that the city's decision should be remanded because the city failed to provide to the city council certain relevant and material documents that petitioner submitted to the city, the city offers two defenses. First, the city argues that the city's failure to provide certain documents to the city council resulted in no prejudice to petitioner and constitutes harmless error, because similar documents were provided to the city council. Second, the city argues that in other cases the documents were not sufficiently material to the city's decision to warrant remand. Petitioner requests permission to file a reply brief to respond to those defenses.

Under OAR 661-010-0039 a petitioner may file a reply brief to respond to "new matters in the respondent's brief." We believe the defenses raised by the city are properly viewed as new matters that warrant allowing a reply brief. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff'd* 163 Or App 592, 988 P2d 422 (1999) (a reply brief is warranted to respond to arguments "that assignments of error should fail regardless of their merits, based on facts or authority not involved in those assignments"); *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000) (same).

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner contends the city erred by failing to provide to the city council certain evidence that petitioner submitted in support of his applications for subdivision and variance approval. A local government commits error by refusing to accept

relevant evidence that is presented to it during the evidentiary phase of its hearings on a land use application. *See Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 424, *aff'd* 196 Or App 787, 106 P3d 699 (2004) (county erred by rejecting relevant evidence without explaining why the evidence was rejected); *Silani v. Klamath County*, 22 Or LUBA 734, 740 (1992) (permit decision must be remanded where local government improperly rejected relevant evidence). We generally agree with petitioner that a local government similarly errs it if receives relevant evidence that is submitted in accordance with local law and then fails to provide that relevant evidence to the local decision maker.

On pages 9 and 10 of the petition for review, petitioner identifies ten documents that were not provided to the city council. However, in the argument in support of his first assignment of error, petitioner only provides an explanation for why he believes four of those documents "include evidence and argument that are relevant and material to standards that apply." Petition for Review 12. It appears highly unlikely that the other six documents are accurately characterized as including relevant evidence or could have had any material bearing on the decision that is before us in this appeal. Because petitioner offers no reason to believe those six documents include relevant or material evidence, in deciding the first assignment of error we limit our consideration to the four documents that petitioner contends include relevant and material evidence. Petition for Review 12-13.

A. Exhibits at Supplemental Record 49 through 70 and Supplemental Record 115-36.

As previously noted above, the Exhibits at Supplemental Record 49 through 70 were submitted to the city on October 3, 2007, but not given to the city council. Although those exhibits were also attached to the second application narrative (Supplemental Record 115-36), the second application narrative also was not given to the city council. The city contends that many of those Exhibits exist in similar form elsewhere in the record and it is unlikely that petitioner was prejudiced by the city's failure to provide those exhibits to the city council.

For many of the Exhibits, we tend to agree with the city that it is unlikely that the city's decision in this matter was affected by the city's failure to provide the Exhibits to the city council. For example, some of those Exhibits are comprehensive plan maps, zoning maps or assessor's maps that are included elsewhere in the record, albeit without the subject property marked on the map. Exhibits C, D, E and I. Other exhibits display general information at a very gross scale and are of such poor quality that it is unlikely that they provide information that could have possibly influenced the city council to decide this case differently than it did. Exhibits B and H. We also have a hard time seeing how petitioner could have been prejudiced by the city's failure to provide an early version of the subdivision proposal that was later revised by subdivision proposals that were placed before the city council. However, the significance of the city's failure to provide one of those Exhibits, Exhibit F, is not so easily dismissed. Exhibit F is a Flood Insurance Rate Map. According to petitioner, "[t]his map shows the base flood elevation * * * and is evidence in support of compliance with [Dunes City Code] DCC 155.4.3.110(E) and (F) and 155.4.3.130(B)(3)(j)."[5] Reply Brief 2. Petitioner suggests the city council would not have found that the applicant failed to provide base flood elevation information if Exhibit F had been given to the city council.[6]

Although the copy of Exhibit F that is included in LUBA's copy of the record is of such poor quality that we cannot be sure that it does show base flood elevation, we cannot say

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[5] DCC 155.4.3.110(E) requires that subdivisions be designed to minimize flood damage. DCC 155.4.3.110(F) requires a development with two or more lots must determine base flood elevation. *See* n 11. DCC 155.4.3.130(B)(3)(j) also requires identification of base flood elevation. *See* n 11.

[6] Finding 18 in the city's decision includes the following text:

> "[T]he preliminary plat also noted that 'no base flood elevation (BFE) has been determined for this property,' which is required in DCC 155.4.3.110(F) and DCC 155.4.3.130(B)(3)(j)." Record 8.

We discuss finding 18 later in this opinion.

the city's failure to provide Exhibit F was harmless error. In addition, the city's decision must be remanded in any event under the second assignment of error. On remand, the city must consider all of the Exhibits that appear at Supplemental Record 49 through 70 and Supplemental Record 115-36 before making its decision concerning petitioner's request for preliminary subdivision plat approval.

B. Petitioner's Second Application Narrative

As we have already noted, the second application narrative that petitioner submitted to the city was not given to the city council. According to petitioner the second application narrative "contained evidence that is material to the application because it expanded upon, corrected and/or replaced responses to applicable criteria as set out in the [first] narrative statement." Petition for Review 13 (record citation omitted). The second application narrative also addressed city variance criteria, whereas the first application narrative did not.

We have not attempted to compare the text on all 43 pages of the second application narrative with the text in the 40-page first application narrative. There are minor differences in the two versions of the narrative, but both versions of the narrative address applicable approval criteria. As previously noted, only the second application narrative addresses the variance criteria. While the city council did not make a decision concerning the variance, because it denied the application for subdivision, the city council may consider the variance application on remand if it finds the subdivision application complies with city preliminary subdivision approval criteria. While the differences in the balance of the two versions of the application narrative appear to be minor, we cannot say the city council's failure to consider the second application narrative was harmless error.

On remand the city council must consider petitioner's second application narrative before making a decision on petitioner's applications.

C. The October 30, 2007 Variance Response

As noted above, petitioner submitted an additional response concerning the city's variance criteria on October 30, 2007. Supplemental Record 137-38. That additional response was not given to the city council. The city contends that a similar document, which appears at Record 70-71, was given to the city council, making the city's failure to provide the earlier response a harmless error that did not prejudice petitioner's substantial rights.

While the documents that appear at Record 70-71 and Supplemental Record 137-38 are similar, there are differences. We are in no position to say that those differences could not have an influence on the city council's decision, if it makes a decision on petitioner's variance application on remand. On remand, if the city council changes its view of petitioner's application for subdivision approval, it must consider the October 30, 2007 variance response at Supplemental Record 137-38.

D. Memo From City Planner to Planning Secretary

On May 8, 2008 the city's contract planner sent a memorandum to the city planning secretary. Amended Supplemental Record 3-4. That memorandum provides a summary of the issues that the planner addresses in the staff report and the draft findings, which the planner had not completed editing for the planning commission. The memorandum was not provided to the city council. However, the edited findings and staff report that the planner ultimately provided to the planning commission were provided to the city council.

Unlike the other documents we discuss under the first assignment of error, the memorandum from the city planner to the city planning secretary is not evidence that was submitted by petitioner to the city in support of his applications. Given the nature of the document (a document that identifies issues that are discussed in another document that was given to the city council) and the lack of any legal theory put forth by petitioner that would obligate the city planner to provide the memorandum to the city council, we reject

petitioner's contention that it was error for the city to fail to provide the memorandum to the city council.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner challenges the findings that the city relied on to explain its bases for denying petitioner's application for preliminary subdivision plat approval. Petitioner advances two types of challenges. First, petitioner contends the findings are conclusory and inadequately explain the city's justification for its decision. Second, petitioner contends that the findings include erroneous interpretations of applicable law. We discuss those challenges separately below.

A. Inadequate Findings

The decision that is before us in this appeal is the city's denial of petitioner's application for preliminary subdivision plat approval. Since the subject property is located within the city's urban growth boundary, such a decision qualifies as a "limited land use decision." ORS 197.015(12)(a)(A).[7] Pursuant to ORS 197.195(4):

> "Approval or denial of a limited land use decision 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."

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[7] ORS 197.015(12) provides in part:

"'Limited land use decision':

"(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

"(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1)."

Our decision in *Bridge Street Partners v. City of Layfayette*, 56 Or LUBA 387, 394 (2008) generally describes the test that is applied when the adequacy of findings supporting a permit denial is challenged:

> "* * * In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 272 (2000). The findings must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. *Caster v. City of Silverton*, 54 Or LUBA 441, 457 (2007)."

As the Court of Appeals elaborated in *Commonwealth Properties*:

> "* * * In the case of a denial of tentative [subdivision] approval, [the] grounds [for denial] must be articulated in a manner sufficiently detailed to give a subdivider reasonably definite guides as to what it must do to obtain final plat approval, or inform the subdivider that it is unlikely that a subdivision will be approved." 35 Or App at 400.

We do not understand the Court of Appeals' *Commonwealth Properties* decision to require that a local government rewrite an application for subdivision approval or supply missing evidence so that the application can be approved. However, under *Commonwealth Properties* the local government's denial decision must be sufficiently detailed to give an applicant fair notice of what must be done to secure approval or give the applicant fair notice that it is unlikely the application can be approved. While the principles discussed in these cases were applied to permit decisions or arose before the statutes creating limited land use decisions were adopted, we see no reason why the same principles would not apply under ORS 197.195(4). With the above understanding of the standard that the city's findings must satisfy, we turn to petitioner's challenges of the city's findings.

The challenged decision includes the following conclusions:

> "1) Applicant did not submit required information, or submitted insufficient information, addressing one or more relevant standards or criteria.

"2) Further, this lack of information did not meet one or more relevant standards or criteria, as set out in findings 9-11 and 16-20 above." Record 9.

As petitioner correctly points out, findings 9-11 recite when evidence was submitted and do not articulate bases for denial. For that reason petitioner does not assign error to those findings, and we do not consider them further.

1. Finding 16 (DCC 155.3.1.2(E) Traffic Study)

DCC Section 155.3 sets out "Design Standards." DCC 155.3.1 sets out "Access and Circulation" standards, and DCC 155.3.4 sets out "Public Facilities" standards. DCC 155.3.4.1(A) provides that development must have "frontage or approved access to a public street, in conformance with the provisions of [DCC] 155.3.1 – Access and Circulation * * *." DCC 155.3.1.2(D) provides that the city "may require a traffic study prepared by a qualified professional to determine access, circulation and other transportation requirements.[8] The city adopted the following findings addressing the DCC 155.3.1.2(D) traffic study:

"16) Applicant did not submit a 'traffic study prepared by a qualified professional to determine access, circulation and other transportation requirements' in DCC 155.3.1.2 and 155.3.4.1, per DCC 155.3.1.2 (D) and as applicant had agreed. The assurance in applicant's Sept. 5, 2007 narrative statement that these standards will be met is insufficient to meet these standards." Record 8.

Petitioner contends that DCC 155.3.1.2(D) does not impose a requirement for a "traffic study," it merely gives the city the right to require a traffic study. Petitioner contends the city never required a traffic study under DCC 155.3.1.2(D). Petitioner contends the city erred in basing its denial of his subdivision application, in part, on petitioner's failure to provide a traffic study that the city never required petitioner to submit.

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[8]DCC 155.3.1.2(D) provides:

"The City or other agency with access jurisdiction may require a traffic study prepared by a qualified professional to determine access, circulation and other transportation requirements. (See [DCC] 155.3.4.1 - Transportation Standards.)"

The city offers two responses. First the city contends that the city did require petitioner to submit a traffic study under DCC 155.3.1.2(D), at an October 15, 2007 conference between petitioner and the city. However, the record indicates that at that October 15, 2007 conference the city took the position that "Increase is ADTs [Average Daily Trips] is still to be determined. Probably not an issue." Record 267. That is clearly not sufficient to invoke a requirement under DCC 155.3.1.2(D) that petitioner submit "a traffic study prepared by a qualified professional to determine access, circulation and other transportation requirements."

The city's second response presents a much closer question. The record includes an October 30, 2007 completeness letter from the city's planner to petitioner. That completeness letter does not mention a requirement for a traffic study under DCC 155.3.1.2(D). Record 262-63. However, the record also includes a March 25, 2008 letter from petitioner to the city in response to that completeness letter. That letter lists "Completeness Issues" and "Substantive Issues." DCC 155.3.1.2(D) is not mentioned in petitioner's letter as a completeness issue, but under Substantive Issues, DCC 155.3.1.2(D) is identified as an "Item" and under a column opposite that item, entitled "Responsible Party," is the following entry: "Traffic study to be submitted." Record 237. Other than that cryptic entry, there is no evidence in the record that the city ever invoked DCC 155.3.1.2(D) to require a traffic study. Although it is a very close question, we conclude that the petitioner's statement in a March 25, 2008 letter that it planned to submit a traffic study is neither substantial evidence that the city exercised its authority to require a traffic study under DCC 155.3.1.2(D) nor a sufficient basis for making it unnecessary for the city to take some action to invoke DCC 155.3.1.2(D) before denying petitioner's subdivision application for failure to provide a traffic study under DCC 155.3.1.2(D).

This subassignment of error is sustained.

2. Finding 17 (DCC 155.3.8.2 Traffic Study)

DCC 155.3.8.2 authorizes the city to require that an application for development approval include a traffic impact study to determine whether conditions need to be imposed to minimize impacts on transportation facilities, in seven specified circumstances.[9] In finding 17, which is set out below, the city based its decision to deny petitioner's application for preliminary subdivision plat approval, in part, on petitioner's failure to provide a traffic impact study under DCC 155.3.8.2.

> "17) Applicant did not submit sufficient information to determine whether a 'traffic impact study' per DCC 155.3.8 was needed. The assurance in applicant's Sept 5, 2007 narrative statement that such as study 'is not required' is insufficient to meet this standard." Record 8.

In its second application narrative, petitioner took the position that "[t]he proposal is for 19 new lots (18 buildable) which do not result in traffic that triggers any of the [seven

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[9] The complete text of DCC 155.3.8.2 is set out below:

> "When a Traffic Impact Study is Required. The City or other road authority with jurisdiction may require a Traffic Impact Study (TIS) as part of an application for development, a change in use, or a change in access. A TIS shall be required when a land use application involves one or more of the following actions:
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> "A. A change in zoning or a plan amendment designation;
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> "B. Any proposed development or land use action that a road authority states may have operational or safety concerns along its facility(ies);
>
> "C. An increase in site traffic volume generation by 300 Average Daily Trips (ADT) or more; or
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> "D. An increase in peak hour volume of a particular movement to and from the State highway by 20 percent or more; or
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> "E. An increase in use of adjacent streets by vehicles exceeding the 20,000 pound gross vehicle weights by 10 vehicles or more per day; or
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> "F. The location of the access driveway does not meet minimum sight distance requirements, or is located where vehicles entering or leaving the property are restricted, or such vehicles queue or hesitate on the State highway, creating a safety hazard; or
>
> "G. A change in internal traffic patterns that may cause safety problems, such as back up onto a street or greater potential for traffic accidents."

DCC 155.3.8.2 circumstances]. A TIA is not required." Supplemental Record 107. Petitioner contends that city planning staff never took issue with petitioner's position concerning the lack of need for a traffic impact study under DCC 155.3.8.2, and the planning commission specifically found that a traffic study should not be required. Supplemental Record 41.

Given the lack of any evidence that any of the circumstances set out in DCC 155.3.8.2 which would justify requiring a traffic impact study are present, and the lack of any suggestion that the city believed a traffic impact study should be required under DCC 155.3.8.2 prior to the city council's decision, petitioner contends it is not sufficient for the city council to fault petitioner for not submitting more evidence that a traffic impact study is not needed under DCC 155.3.8.2. Petitioner contends the city council should have cited some reason in its findings to suspect that one or more of the circumstances set out in DCC 155.3.8.2 justify requiring petitioner to submit a traffic impact study under DCC 155.3.8.2. We agree with petitioner. Since the city council's findings fail to do so, this subassignment of error is sustained.

3. Finding 18 (DCC 155.4.3.110(H) Surface Water Drainage)

Finding 18 concerns three DCC subsections. DCC 155.4.3.110(H) requires "adequate surface water drainage" to "reduce exposure to flood damage."[10] DCC 155.4.3.110(F) and DCC 155.4.3.130(B)(3)(j) require base flood elevation information.[11] Finding 18 is set out below:

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[10] The complete text of DCC 155.4.3.110(H) is set out below:

> "Need for Adequate Drainage. All subdivision and partition proposals shall have adequate surface water drainage provided to reduce exposure to flood damage. Water quality or quantity control improvements may be required."

[11] The text of those subsections of the DCC are set out below:

> "Determination of Base Flood Elevation. Where a development site consists of two or more lots, or is located in or near areas prone to inundation, and the base flood elevation has not

"18) Applicant did not submit sufficient information per DCC 155.4.3.110 (H) that the proposal will have 'adequate surface water drainage provided to reduce exposure to flood damage' or that 'water quality or quantity control improvements may be required.' The assurance in applicant's Sept 5, 2007 narrative statement will be met ('drainage swales are proposed along Montgomery road to address stormwater needs' and 'there is an existing drainage swale in Kiechle Arm Road') is insufficient to meet this standard. And the preliminary plat also noted that 'no base flood elevation (BFE) has been determined for this property,' which is required in DCC 155.4.3.110(F) and 155.4.3.130(B)(3)(j)." Record 8.

With regard to the city's findings concerning DCC 155.4.3.110(H), petitioner provides the following response:

"* * * There are two parts to this standard. Adequate drainage is required to reduce exposure to flood damage. In addition, water quantity or quality control improvements may be required. The first sentence focuses on reduction of the potential for flood damage. The later requirement adds a control perspective; the city may require some improvements related to water quantity or quality.

"The city's finding is the conclusionary, repetitive theme in the other city findings – that the applicant did not submit sufficient information to meet the standard. The city failed, however, to make any findings of fact about the drainage evidence that was submitted. The record shows that the applicant submitted and discussed a drainage plan to reduce exposure to flood damage, and there was no contrary evidence suggesting it was not adequate.

"The applicant explained its plan for surface water drainage. The plan proposed new drainage swales in connection with the proposed new road in the subdivision, Montgomery Road, and proposed using the existing swale adjacent to the existing Keichle Arm Road. This plan for surface water drainage was explained in the narrative of the applicant's engineer * * *. He specifically addressed roadside ditches. The engineer's narrative explained the topography of the site, the soil conditions based on test pit analysis, recommendations for roof drainage and siting of houses for good drainage, and the suitability of the soils on the site, which he said will be able to absorb

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been provided or is not available from another authoritative source, it shall be prepared by a qualified professional, as determined by the City." DCC 155.4.3.110(F).

"Identification of the base flood elevation for development greater than three lots or five acres, whichever is less. Evidence of contact with the Federal Emergency Management Agency to initiate a flood plain map amendment shall be required when development is proposed to modify a designated 100-year flood plain." DCC 155.4.3.130(B)(3)(j).

> and dissipate stormwater so that it won't enter the lake or the wetland. The Planning Commission discussed and understood the surface water drainage plan at its July 1, 2008 meeting. The Planning Commission imposed the following Condition 8 related to drainage in its recommendation of approval: 'Provide final storm water design data prior to final plat approval which maintains historical drainage flows.'
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> "The standard for surface water drainage in the code is not a stringent one. It is 'to reduce exposure to flood damage.' The applicant made a specific proposal how to meet this standard, as reflected in its narrative and discussed by its engineer. No contrary evidence was submitted. The Planning Commission understood the proposal, discussed it, and raised the bar a bit by conditioning what it wanted to see in connection with final plat. The Planning Commission wanted a design in connection with the final plat that would maintain historical drainage flows. The Planning Commission exercised its discretion to require improvements to regulate flow.
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> "The city [council] has an obligation to address the facts, not just summarily conclude that not enough information was submitted." Petition for Review 21-23.

We agree with petitioner regarding the city's findings concerning DCC 155.4.3.110(H). The city's findings are not "articulated in a manner sufficiently detailed to give a subdivider reasonably definite guides as to what it must do to obtain * * * plat approval, or inform the subdivider that it is unlikely that a subdivision will be approved." *Commonwealth Properties*, 35 Or App at 400.

With regard to the city's findings regarding base flood elevation, petitioner first notes that DCC 155.4.3.110(F) and DCC 155.4.3.130(B)(3)(j) are information requirements, not approval standards, and that the base flood elevation information required by those DCC provisions is contained in the record. Petitioner contends that the subdivision is being developed on a hill that is located well above the base flood elevation and outside the 500 year floodplain. Petitioner contends that the base flood elevation is off-site. With the possible exception of lot 20, which is not proposed for development and is to be further divided in the future, petitioner appears to be correct. On remand, the city must provide a more complete explanation for why it believes these base flood elevation informational

requirements are violated and why that lack of information implicates an approval standard and justifies denial of petitioner's application for preliminary plat approval.

This subassignment of error is sustained.

4. Finding 19 (DCC 155.4.3.130(B)(3)(g) Identify Method of Sewage Disposal, Surface Water Drainage, and Treatment)

Another of the DCC 155.4.3.130(B) preliminary plat information requirements is DCC 155.4.3.130(B)(3)(g), which requires an applicant for preliminary subdivision plat approval to identify "[t]he proposed method of sewage disposal, and method of surface water drainage and treatment if required." The city council adopted finding 19 to base its denial of petitioner's application for preliminary subdivision approval, in part, on DCC 155.4.3.130(B)(3)(g). Finding 19 is set out below:

> "19) Applicant did not submit sufficient information per DCC 155.4.3.130 (B)(3)(g) as to the 'method of surface water drainage and treatment if required.' The assurance in applicant's Sept 5, 2007 narrative statement that this standard will be met ('surface water will drain to road-side swales along Montgomery Road and Kiechle Arm Road'), and as shown in the preliminary plat, is insufficient to meet this standard. And applicant's further assurance that 'no treatment is necessary' for surface water drainage is also insufficient to meet his standard." Record 8.

Petitioner contends the above finding erroneously treats DCC 155.4.3.130(B)(3)(g) as an approval standard and makes no attempt to connect the claimed lack of information to an approval standard. That failure aside, petitioner also contends that his plan for surface water management was set out in some detail before the city, as described in connection with finding 18 above. Petitioner contends the city council's findings cannot simply claim a lack of information and ignore the information that was submitted and make no attempt to explain why the city thinks the information that petitioner submitted concerning surface water drainage is inadequate. We agree with petitioner.

This subassignment of error is sustained.

5. Finding 20 (DCC 155.4.3.130(B)(2)(l) and DCC 155.4.3.140(A)(6) Trees)

Finding 20 concerns DCC 155.4.3.130(B)(2)(l), an information requirement, and DCC 155.4.3.140(A)(6), a substantive requirement that subdivision applicants "maximize the preservation" of large existing conifers.[12] Finding 20 is set out below:

> "20) The planning staff's report, dated June 18, 2008, stated the preliminary plat did not delineate all applicable conifers as required by DCC 155.4.3.130 B(2)(1). This statement that planning staff 'observed approximately nine spruce and firs at the front of the lot which were not delineated on the preliminary plat and that construction of the road would also remove' is hereby incorporated into this finding. Accordingly, applicant did not submit sufficient information to meet the standard in DCC 155.4.3.140(A)(6) that 'development of the proposed partition or subdivision will maximize the preservation of existing conifers with a diameter of 8 inches or greater at 4 ½ feet above average grade, considering topography, soil conditions, solar orientation and other factors affection the sitting of dwellings on the parcels or lots to be created.'" Record 8-9.

The proposed preliminary plat that appears at Supplemental Record 42 through 44 shows stands of conifers and individual conifers. The staff report cited in the findings cites the existence of "nine spruces and firs" at the front of an unidentified lot and takes the position that those trees will be removed to construct the road.[13] From that alleged failure to

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[12] The text of those subsections of the DCC is set out below:

> "A tree coverage map. For properties containing less than 16 conifers per acre the map shall include the location of every conifer with a diameter greater than 8 inches at 4 ½ feet above average grade. For properties containing 16 or more conifers 8 inches or greater in diameter at 4 ½ above average grade per acre the map shall include the outline of those areas with stands of conifers or an aerial photograph with enough detail to show conifer stands[.]" DCC 155.4.3.130(B)(2)(l).
>
> "The development of the proposed partition or subdivision will maximize the preservation of existing conifers with a diameter of 8 inches or greater at 4 ½ feet above average grade, considering topography, soil conditions, solar orientation and other factors affecting the siting of dwellings on the parcels or lots to be created." DCC 155.4.3.140(A)(6).

[13] The text of the planning staff report cited in Finding 20 is set out below:

> "* * * The revised preliminary plat submitted in March 2008 includes the location of conifers as specified. There are two areas labeled 'Spruces and Firs' that the road alignment traverses.

identify those nine trees, the findings conclude that the DCC 155.4.3.140(A)(6) approval standard that "development of the proposed partition or subdivision will maximize the preservation of existing conifer with a diameter of 8 inches or greater at 4 ½ feet above average grade, considering topography, soil conditions, solar orientation and other factors affection the sitting of dwellings on the parcels or lots to be created" is violated.

As petitioner points out, there are a number of deficiencies in the city council's findings. First, DCC 155.4.3.140(A)(6) requires that the applicant "maximize the preservation of existing conifers with a diameter of 8 inches or greater at 4 ½ feet above average grade." The staff report does not expressly state that anyone confirmed that the referenced nine trees are of that size. Second, the staff report also does not identify on what lot the referenced nine trees are located. The preliminary plan that appears at Supplemental Record 43 shows six large conifers on lot 2, where proposed Montgomery Road connects with Clear Lake Road on the north. It does not appear as though those conifers are to be removed. That is at least some evidence that there may not be nine large conifers in the front of the subject property near Clear Creek Road. Finally, even if there are nine conifers that should have been noted on the preliminary plat, but are not, and those conifers will be removed during construction of proposed Montgomery Drive, it does not necessarily follow that the proposed preliminary plat violates DCC 155.4.3.140(A)(6). DCC 155.4.3.140(A)(6) does not require that petitioner preserve every large conifer on the property. DCC 155.4.3.140(A)(6) requires that petitioner "maximize the preservation of existing conifers with a diameter of 8 inches or greater at 4 ½ feet above average grade," considering a number of factors. Petitioner explained below that proposed Montgomery Drive follows the route of an existing drive, which is not vegetated, and in doing so minimizes the impact of roadway construction on trees and avoids the need to develop on steep slopes. Record 119.

In addition, the Planning Secretary and the Chairman of the Planning Commission observed approximately nine spruces and firs at the front of the lot which were not delineated on the preliminary plat and that construction of the road would also remove." Record 160.

We agree with petitioner that the city council's findings are inadequate to establish that petitioner did not provide the information required by DCC 155.4.3.130(B)(2)(l) and are inadequate to explain why the city council believes any informational shortcoming necessarily supports a conclusion that the proposed preliminary plat violates the DCC 155.4.3.140(A)(6) requirement to maximize preservation of large conifers.

This subassignment of error is sustained.

B. Erroneous Interpretations of Applicable Law

Petitioner assigns error to two city council interpretations of applicable law that apparently were not expressly relied upon by the city in denying his application, but will likely arise in the city's proceedings on remand. Petitioner asks that we consider his challenges to those interpretations to narrow the remaining issues in dispute. We do so below.

1. Needed Housing

ORS 197.307 imposes a number of limitations on local government regulation of "needed housing," as that term is defined in ORS 197.303. One of those limitations is that the approval standards that local governments apply to needed housing must be "clear and objective." ORS 197.307(6).[14] The ORS 197.303 definition of "needed housing" is set out below:

> "(1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:

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[14] The text of ORS 197.307(6) is set out below:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

"(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

"(b) Government assisted housing;

"(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and

"(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions.

"(2) *Subsection (1)(a) and (d) of this section shall not apply to:*

"(a) A city with a population of less than 2,500.

"(b) A county with a population of less than 15,000.

"* * * * *." (Underlining and italics added.)

The city council found that under ORS 197.303(2) it was not subject to the ORS 197.307(6) "clear and objective" standards requirement:

> "Dunes City has a population of less than 2,500, as projected in the city's comprehensive plan * * *, and further verified by 2007 population estimates from the Population Research Center at Portland State University. Therefore, per ORS 197.303(2)(a), clear and objective approval standards for needed housing do not apply; but rather, standards that are discretionary can apply." Record 8.

Petitioner contends the city misread the statute. We understand petitioner to argue that the language of ORS 197.303(1) underlined above applies prior to periodic review and that part of 197.303 applies to all local governments regardless of population size. We further understand petitioner to contend that the city's comprehensive plan identifies single family housing as a housing type that has been "determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels." Petitioner argues that the remaining part of ORS 197.303(1) quoted above simply adds an *additional* statutory requirement that the specified housing types must be included as needed housing, and exempts small cities from subsections (a) and (d) of that statutory mandate.

Petitioner contends that while that additional statutory mandate in ORS 197.303(1)(a) does not apply to petitioner, the underlined portion of the statute continues to apply after the first periodic review and as long as the city's comprehensive plan identifies single family housing as a needed housing type, the city is precluded by ORS 197.307(6) from applying approval standards that are not clear and objective.

Petitioner's interpretation of ORS 197.303 appears to be a possible reading of the statute. However, it is not the interpretation of the statute that the Court of Appeals adopted in *Shelter Resources, Inc. v. City of Cannon Beach*, 129 Or App 433, 879 P2d 1313 (1994), a decision that is not cited by either party in this appeal. *Shelter Resources* concerned a low-income housing proposal that the City of Cannon Beach rejected, based on comprehensive plan policies that were not clear and objective. The Court of Appeals rejected the petitioner's argument that the proposal was for needed housing under ORS 197.303(1)(b), which applies to small cities and makes "[g]overnment assisted housing" needed housing. 129 Or App at 438. The Court of Appeals also rejected an intervenor's argument based on the Court of Appeals' decision in *City of Happy Valley v. LCDC*, 66 Or App 795, 679 P2d 43 (1984), which intervenor interpreted as holding that, although ORS 197.303(1) exempts small cities from including some *types* of housing as needed housing, those small cities remained subject to the demands of ORS 197.307. The Court of Appeals squarely rejected that argument:

> "[Intervenor] describes *City of Happy Valley* as holding that 'even small cities exempted from certain 'needed housing' requirements by ORS 197.303 are still subject to the demands of ORS 197.307,' and are 'only exempt from the demands of ORS 197.303(1).' However, we understand *City of Happy Valley* to also hold that the provisions in ORS 197.307 that relate directly to 'needed housing,' as defined in ORS 197.303(1), are made inapplicable by ORS 197.303(2) to cities with populations under 2,500.
>
> "In this case, the provision of ORS 197.307 on which petitioners rely is subsection (6). It relates directly to 'needed housing' and, as such, it is inapplicable to the city. [Intervenor] makes no separate argument concerning the applicability to the city of the Goal 10 'needed housing' provisions, and we discern no basis for a different conclusion. * * *" *Shelter Resources, Inc.*, 129 Or App at 440 (footnote omitted).

Based on the Court of Appeals' decision in *Shelter Resources, Inc.*, we conclude that the city correctly interpreted ORS 197.303 and we reject petitioner's arguments to the contrary.

2. The City's Erosion Control Ordinance

The city adopted Ordinance No. 193 on August 19, 2007. That ordinance repealed the city's prior erosion control regulations and adopted new erosion control regulations. Those new erosion control regulations are codified at DCC Chapter 141, entitled "Erosion and Sediment Control." Ordinance No. 193 was appealed to LUBA. LUBA affirmed Ordinance No. 193 on July 23, 2008. *Martin v. City of Dunes City*, 57 Or LUBA 92 (2008). The city council decision that is before us in this appeal is dated July 22, 2008, one day before LUBA issued its decision in *Martin v. City of Dunes City*.

Ordinance No. 193 took effect on September 18, 2007, 30 days after the ordinance was adopted. Petitioner submitted his applications in this matter on October 1, 2007. Because petitioner's application was submitted 13 days after Ordinance No. 193 took effect, under ORS 227.178(3)(a), DCC Chapter 141, the new erosion control regulations apply to petitioner's applications.[15] In the decision that is before us in this appeal, the city council identified DCC Chapter 141 as an applicable standard for preliminary plat approval. Record 6. Petitioner contends that there was confusion below about whether his applications in this matter were subject to DCC Chapter 141, and petitioner argues the city erroneously determined that DCC Chapter 141 applies to his applications.

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[15] ORS 227.178(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, 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."

Amendments to acknowledged land use regulations that are appealed to LUBA become acknowledged on the date LUBA or the appellate courts affirm the decision. ORS 197.625(1)(b). Under ORS 197.625(3)(a), such amendments become effective as provided by local law, and the effective date is not suspended pending the LUBA appeals, but only if the amendment was "adopted in substantial compliance with ORS 197.610 * * *."[16] ORS 197.610 required that the city provide 45 days notice before the first hearing on Ordinance 193. Petitioner contends the city only provided DLCD 15 days notice before its initial public hearing on Ordinance No. 193 and that notice was therefore not in "substantial compliance" with ORS 197.610.[17]

As we have already noted, we affirmed Ordinance No. 193 in *Martin v. City of Dunes City*, 57 Or LUBA 92 (2008). In doing so we rejected a challenge to Ordinance No. 193 based on the late notice to DLCD. Ordinance No. 193 is now acknowledged. We believe our decision in *Martin v. City of Dunes City* had the legal effect of establishing that Ordinance 193 was adopted in substantial compliance with ORS 197.610, and petitioner may not attempt to argue that Ordinance 193 was not adopted in compliance with applicable procedures in this appeal. We reject petitioner's contention that Ordinance No. 193 was not in effect when he submitted his applications on October 1, 2007.

Petitioner next argues that DCC Chapter 141 applies to "land disturbance." Petitioner argues his request for preliminary plat approval will not disturb any land. Land disturbance

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[16] ORS 197.625(3)(a) provides:

> "Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in substantial compliance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845."

[17] The parties dispute whether LUBA can take official notice of the DLCD notices concerning Ordinance 193 that are attached to the petition for review to establish that the city did not give the 45 day notice required by ORS 197.610. Given our disposition of this subassignment of error we need not resolve that dispute.

will come later when roads and houses are constructed on the lots. We understand petitioner to contend the city's attempt to apply DCC Chapter 141 to his application for preliminary plat approval is premature.

DCC 141.002 is entitled "Applicability," and provides:

> "In all cases of *land disturbance* * * * the responsible party is responsible for preventing erosion and sediment transport and is subject to requirements and penalties listed in this Chapter. This ordinance pertains to planned land disturbance or to accidental transport of sediments across property lines.
>
> "Requirements of this section shall apply to activity on both privately and city held properties." (Emphasis added.)

DCC 141.003 provides definitions for the terms used in DCC Chapter 141. DCC 141.003 provides the following definition for "land disturbance:"

> "**Land disturbance:** Any activity that results in a change in the existing soil cover (both vegetative and non–vegetative and both temporary or permanent) and / or the existing soil topography. Land disturbing activities include, but are not limited to, demolition, construction, paving, clearing, and grubbing."

Petitioner argues that city approval of his preliminary subdivision plat will not cause a change in the existing soil cover and that preliminary plat approval is unlike any of the land disturbing activities listed in the last sentence of the definition. We understand petitioner to argue that following preliminary plat approval additional permits will be required before any land disturbance activity can proceed, and it is those additional permits that will be subject to DCC Chapter 141.

In its brief the city argues that the last sentence of the applicability section provides that DCC Chapter 141 applies to "planned land disturbance" and argues that an application for preliminary plat approval qualifies as a "planned land disturbance." The last sentence of the applicability section states "[t]his ordinance pertains to planned land disturbance or to accidental transport of sediments across property lines." That sentence might support the inference the city draws in its brief, but it might also be read simply to make it clear that both intentional and accidental land disturbance is subject to DCC Chapter 141.

We do not have a reviewable explanation from the city concerning why it believes DCC Chapter 141 applies to preliminary plat approval decisions. Where there is no local interpretation of local land use legislation to review, LUBA is authorized to interpret local land use legislation in the first instance. ORS 197.829(2); *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660, 666 (2007). While petitioner's view of the applicability of DCC Chapter 141 may be consistent with the text of DCC 141.002 and the DCC 141.003 definition of land disturbance, we are unprepared to say, based on the arguments presented in this appeal, that the city could not adopt a plausible contrary interpretation. The interpretive question is a sufficiently close one that we believe remand is appropriate so the city council can examine the text of DCC Chapter 141 and explain in the first instance why it believes DCC Chapter 141 can be interpreted to apply to applications for preliminary plat approval. *See OTCNA v. City of Cornelius*, 39 Or LUBA 62, 71-72 (2000) (where there is no local interpretation, the purpose of the legislation is not clear, and more than one interpretation is possible, LUBA will remand for the local government to interpret in the first instance). If petitioner believes the city's interpretation on remand is reversible under ORS 197.829(1), he may appeal the decision.

The second assignment of error is sustained in part.

The city's decision is remanded.