BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY PENNOCK
and ROSE REX Z-ROMANO,
Petitioners,

vs.

CITY OF BANDON,
Respondent,

and

JEFF MCELRATH,
Intervenor-Respondent.

LUBA No. 2015-035

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Gary Pennock, Bandon, and Rose Rex Z-Romano, Bandon, filed the petition for review and argued on their own behalf.

Frederick J. Carleton, Bandon, filed a response brief and argued on behalf of respondent. With him on the brief were Shala McKenzie Kudlac and Carleton Law Office.

Mark C. Hoyt, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sherman, Sherman, Johnnie and Hoyt LLP.

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

RYAN, Board Member, dissenting.

REMANDED 11/17/15

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

Petitioners appeal a city council decision that approves a site plan and conditional use permit for a single family dwelling.

FACTS

Intervenor-Respondent McElrath (intervenor) applied for site plan and conditional use approval on November 24, 2014, to construct a single family dwelling on the subject property. The property is designated Controlled Development Area by the city's comprehensive plan and zoned Controlled Development 2 (CD-2). The property is also subject to a Shoreland Overlay and is located within the 100 year floodplain. The subject property consists of four discrete but contiguous lots, referred to collectively as tax lot 801 and individually as Lots 9, 10, 11, and 12 of Block 21 of the South Jetty neighborhood. The property is partially located within the Coquille River, with approximately 40 percent of the property considered not developable. The upland portion of the property is proposed for development. The city planning commission approved the application on February 26, 2015. Petitioners appealed to the city council, and on April 13, 2015, the city council upheld the planning commission's approval with additional conditions. This appeal followed.

A central issue in this appeal is whether the subject property must be served by the city's public sewer system. The city approved the proposal to use

a private septic system rather than require connection to the public sewer system. That issue is the focus of the third and fourth assignments of error.

FIRST ASSIGNMENT OF ERROR

Bandon Municipal Code (BMC) 17.24.060(C) provides in relevant part that "[i]n the CD-2 zone * * * minimum lot size shall be as follows: * * * Lot depth shall be ninety (90) feet." Planning staff found that the lots are 94 feet in depth. Record 290.

Petitioners argue that because parts of the lots are located within the river, the State of Oregon owns the submerged portions of the lots. Without the submerged portions of the lots, the lots do not satisfy the 90-foot depth requirement of BMC 17.24.060(C). Petitioners argue, that because intervenor only owns the upland portions of the lots, the city erroneously determined that the property complies with the BMC 17.24.060(C) 90-foot depth requirement.

Petitioners rely on ORS 274.025(1). ORS 274.025(1) provides:

> "The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and *which has not become vested in any person*, is vested in the state of Oregon. The State of Oregon is the owner of the submersible and submerged lands of such streams and lakes, and may use and dispose of the same as provided by law." (Emphasis added.)

We do not understand intervenor or the city (collectively respondents) to dispute that portions of the four lots are submerged lands. However, respondents reject petitioners' assertion that any part of the four lots are state-

owned, because *intervenor* owns the four platted lots, all of which are approximately 94 feet deep. Respondents contend the record includes a copy of a deed, dated May 1, 2012 and recorded on May 2, 2012, which conveys title to the four lots to intervenor. Supplemental Record 8-13. Respondents assert that under ORS 274.025(1) the State of Oregon only owns submersible and submerged lands that have "not become vested in any person," and accordingly, intervenor owns all of those 94-foot deep lots and they comply with BMC 17.24.060(C).

Petitioners neither address the emphasized language in ORS 274.025(1) nor offer a response to respondents' contention that, based on that language in ORS 274.025(1) and the deed that conveyed title to intervenor, intervenor is the owner of the entirety of the four lots, including the submerged portions of those lots. Therefore, petitioners' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Citing a civil engineering report that accompanied the application, petitioners contend the proposal will require fill. Record 341. Petitioners contend the city erred by approving fill in conjunction with development of the property.

BMC 17.76.130, entitled "Shoreland uses/activities matrix," is a matrix that indicates whether uses are permitted, not permitted or conditionally permitted on lands with comprehensive plan map designations that are subject to the Shoreland Overlay. The entry for "fill" indicates fill is allowed in the

Shoreland Overlay within Controlled Development designated areas, "subject to specific requirements of the CD-2 zone Chapter 17.24.110."[1] The city adopted the following finding to address BMC 17.76.130 and 17.24.110:

> "The subject property is located within Shorelands Management Unit No 2; Plan Designation is Controlled Development (CD); the requested use is Residential (which requires a Conditional Use Permit). Under this matrix, *fill is allowed in this area, except for the purpose of raising the property out of the floodplain*. * * *" Record 18 (emphasis added).

Notwithstanding BMC 17.24.110 and 17.76.130, which are part of the city's municipal code, petitioners argue a nearly identical matrix in the city's comprehensive plan controls. Petitioners contend that comprehensive plan matrix strictly prohibits fill in areas that are designated Controlled Development and subject to the Shoreland Overlay. Bandon Comprehensive Plan 49. [2] Citing *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975), petitioners contend the comprehensive plan, which regulates fill more stringently than the BMC 17.76.130 matrix, controls in case of a conflict with

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[1] BMC 17.24.110 states in relevant part:

> "Except as otherwise specifically permitted, no fill or other means shall be used to elevate any land within so as to remove it from the floodplain for purposes of development, construction, or improvement and/or to remove it from being subject to any regulations applicable to land within a floodplain."

[2] The comprehensive plan matrix in most cases is identical to the BMC 17.76.130 matrix. But for fill in the Controlled Development Areas in Shoreland Management Unit 2, the comprehensive plan matrix simply indicates that fill is "NP," or not permitted.

the Bandon Municipal Code. Respondents concede the proposal will remove some soil from the property and replace it with clean fill, but contend the proposal will not raise the elevation of the property and is therefore allowable under BMC 17.24.110 and 17.76.130.

ORS 197.835(3) governs appeals of a quasi-judicial land use decisions, such as the decision in this appeal. With certain statutory exceptions, under ORS 197.835(3) issues must have been raised below to preserve the right to raise the issue at LUBA.[3] The city contends that the issue raised in the second assignment of error was not raised below. Petitioners neither identify where the above issue was raised before the city nor claim that one of the statutory exceptions at ORS 197.835(4) apply.[4] Accordingly the issue presented in the

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[3] ORS 197.835(3) provides that in an appeal to LUBA "[i]ssues 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] ORS 197.835(4) provides:

> "A petitioner may raise new issues to [LUBA] if:
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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; or
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> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the

second assignment of error was waived. *Brockman v. Columbia County*, 62 Or LUBA 394, 398 (2011); *Williamson v. City of Salem*, 52 Or LUBA 615, 618-19 (2006); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995).

Even if petitioners had not waived the issue, the Bandon Comprehensive Plan defines "fill" narrowly. The zoning section of the Bandon Municipal Code does not define "fill." As defined by the Bandon Comprehensive Plan "fill" only qualifies as "fill," as that term is used in the Bandon Comprehensive Plan, if the fill creates new uplands or raises the elevation of land.[5] It does not appear to us that the comprehensive plan matrix, which presumably only forbids "fill" in the Shoreland Overlay if it will create uplands or raise the elevation of the property, and the BMC 17.76.130 matrix, which allows fill, provided it is not "for the purpose of raising the property out of the floodplain," are inconsistent as applied to the facts in this case.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The subject property is located in the South Jetty area of the city. That area of the city was initially developed with individual septic systems.

> proposed action did not reasonably describe the local government's final action."

[5] Bandon Comprehensive Plan 259 sets out the following definition of fill:

> "FILL: The placement by man of sand, sediment, or other material, usually in submerged lands or wetlands, to create new uplands or raise the elevation of land."

Primarily due to high groundwater in the area, many of those private septic systems failed. To eliminate the ensuing health hazard, the city sought and was awarded a grant from the U.S. Department of Agriculture Farmers Home Administration to provide a public sewer system in the South Jetty area. As relevant here, the federal government conditioned the grant on city agreement not to extend the sewer system to allow development of undeveloped properties in the South Jetty area outside the local improvement district.

To comply with the sewer funding condition, the city adopted Resolution No. 95-12. As relevant, Resolution 95-12 states "[t]he City of Bandon shall not provide sewer service to any new structures within the 100-year floodplain in the South Jetty area in order to control and/or restrict above ground development, except within the Local Improvement District boundaries." Supplemental Record 4. It is undisputed that the subject property is within the South Jetty area's 100-year floodplain and outside the Local Improvement District boundaries.[6] Petitioners contend that by approving the proposed development on a private septic system, the city decision is inconsistent with the above prohibition in Resolution 95-12.

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[6] The Local Improvement District is sometimes referred to as the sewer district. A map at Second Supplemental Record 1 shows the Local Improvement District Boundaries. The subject property lies north of 3rd St. West (Block 21, lots 9, 10, 11 and 12) and is adjacent to, but outside the Local Improvement District.

The city contends that because Resolution 95-12 is not a land use regulation, LUBA lacks jurisdiction to consider this assignment of error. However, there is no dispute that the site plan and conditional use permit approvals that are before us are land use decisions. LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). Even if Resolution 95-12 is not a land use decision or a land use regulation, a question we need not decide, there can be no question that it is "applicable law" in determining whether the city can or must require that the subject property connect to the sewer system. LUBA's scope of review under ORS 197.835(9) includes authority to determine whether the decision on review "[i]mproperly construed the applicable law [.]" ORS 197.835(9)(a)(D). Where LUBA has jurisdiction to review a land use decision, it also has jurisdiction to review challenges to that decision's construction of "applicable law," even if that "applicable law" is not a statewide planning goal, a comprehensive plan provision or a land use regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, (2000). We reject the city's jurisdictional challenge.

However, we agree with respondents on the merits. Resolution 95-12 is clearly concerned with extensions of the city's public sewer system outside the Local Improvement District in the South Jetty area's floodplain. Petitioners may be right that it makes little sense to repeat the mistakes that led to creation of the Local Improvement District and extension of public sewer system into the South Jetty area, by approving new septic systems in areas where the water

table is high. However, Resolution 95-12 is concerned with extensions of the public sewer system into the South Jetty floodplain outside the Local Improvement District, not approval of septic systems in that area.

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

BMC 17.92.040 sets out "[a]pproval standards for conditional uses." One of those approval standards, BMC 17.92.040(F), requires that:

> "All *required public facilitie*s and services have adequate capacity to serve the proposal, and *are available or can be made available* by the applicant[.]" (Emphases added.)

Petitioner argues the city council erred in finding the proposal complies with BMC 17.92.040(F).

As we have just explained, while the general area where the subject property is located is served by a public sewer system, pursuant to the condition of the federal funding that in part made construction of that public sewer system possible, and Resolution 95-12, the public sewer may not be extended to serve properties that are located outside the Local Improvement District that was created to provide local funding for the sewer system improvements. As already noted, the subject property is outside that Local Improvement District.

Despite the unavailability of public sewer facilities to serve the subject property, the city council adopted the planning commission's finding that the proposal could be approved because intervenor has received Oregon

Department of Environmental Quality (DEQ) approval to use a private septic system on the property.

> "Public facilities have adequate capacity to serve this request and are available to the subject property, *with the exception of sanitary sewer*. Sanitary sewer cannot be provided to the subject property, however, the applicant has secured a DEQ permit for onsite septic system, and therefore the **Planning Commission found** this criterion has been met." Record 20 (italics added; bold face in original).

Petitioner argues a private on-site septic system is not a public facility and that the city council erred in finding the private septic system is sufficient to comply with BMC 17.92.040(F).

The first sentence of the findings the city council adopted to address the BMC 17.92.040(F) requirement that all required public facilities must have capacity and be available or be made available appears to take the position that all required public facilities have capacity and are available, with the exception of sanitary sewer. While that first sentence admittedly does not include the word "required" in describing public facilities, BMC 17.92.040(F) is concerned only with "required" public facilities, so if connection to a public sanitary system is not required by city code or other authority, the findings would presumably just say so. Because the findings discuss a sanitary system as one of the public facilities subject to BMC 17.92.040(F), and because that standard is concerned only with required public facilities, the city apparently views sanitary sewer as a required public facility. Consistent with that view, the city council's decision includes a condition of approval that appears to treat public

sewer as a "required public facility" that is currently not available due to Resolution 95-12:

> "1. Should the City's public sewer system restriction be eliminated to allow such service to this property, Applicant must have the property connected to the sewer within ninety (90) days of the lifting or elimination of the restriction." Record 3.

The city council's decision goes on to describe condition 1 as requiring that the applicant connect to the public sewer system as soon as it becomes "available."[7] That condition would appear to view the public sewer system as a "required" public facility, because it "requires" that the property connect to public sewer system as soon as it is "available."

To summarize, the city council's decision, fairly read, appears to find that public sewer is a required public facility that is not currently available. The city council nevertheless approved the proposal to use a private septic system, rather than require that public sewer "be made available by the applicant." If public sewer service is a required public facility that is not available and cannot be made available consistent with Resolution 95-12, the correct disposition would appear to be a finding that the proposal does not comply with BMC

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[7] The city council's decision includes the following text:

> "Further, the Applicant shall enter into an agreement with the City as to the recording of a restriction as set forth in the Findings for maintenance of * * * riprap, in addition to the requirement for the connection to the public sewer system *when available*." Record 4 (emphasis added).

17.92.040(F). On the other hand, it is possible that there is nothing in the city's code or elsewhere that requires development to connect to the city's sanitary system, and that connection to city sanitary facilities, even if "available," is merely an option for land developers. That seems unlikely, but if so, the city council could almost certainly adopt a sustainable interpretation to the effect that using a private septic system does not violate BMC 17.92.040(F). However, the findings in the present case are confused, at the very least, on the question of whether public sewer is a required public facility, and the findings do not provide a reviewable interpretation that would explain why public sewer is not a required public facility.

The dissent suggests that, because the 1995 resolution precludes extending the public sewer facilities to the subject property, the city adopted an implied interpretation that the city views public sewer facilities in this area as something other than a "required" public facility. There is no such implied interpretation. To the contrary, as explained above, to the extent there is an implied interpretation, the findings the council actually adopted are much more consistent with an implied interpretation that public sewer facilities are a "required public facility" that is not "available" due to the city resolution that precludes extension of the public sewer system outside the sewer district. That implied interpretation logically should have led to a finding that the proposal does not comply with BMC 17.92.040(F). Yet without explanation, the city council found that the proposal complies with the BMC 17.92.040(F) public

facilities requirement because it will be connected to a private, on-site septic system.

Respondents suggest the city council agreed the proposed development could be served by a private septic system because it applied a comprehensive plan definition of "public facilities" that is broad enough to include private septic systems.[8] There are two problems with that argument. First, the city council makes absolutely no reference to the comprehensive plan definition of "public facilities," so there is no reason to believe the city council was relying on that definition in finding that the proposed private septic system is sufficient to comply with BMC 17.92.040. The second problem is that when the comprehensive plan uses the term "public facilities," it is reasonably clear that it is talking about publicly owned and operated facilities like the city's water and sewer systems, not privately owned and operated facilities on individual lots like the proposed private septic system. Under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), the city council is entitled to deference when it adopts interpretations of its comprehensive plan. We therefore do not foreclose the possibility that the city council *might* be able to explain why the comprehensive plan definition of

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[8] Bandon Comprehensive Plan 321 includes the following definition of public facilities:

> "Projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare."

"public facilities" should be used in applying BMC 17.92.040(F) and that the definition is broad enough to encompass private septic systems on individual lots. But to be entitled to that deference, the city council must first adopt a reviewable interpretation that effect. *Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011). It did not do so in the decision that is before us in this appeal. Remand is therefore required for the city council to explain how, consistent with BMC 17.92.040(F), the proposal can be approved based on a proposal to use a private septic system.

We note that there is one additional twist that may have some bearing on that question on remand. Respondents take the position, based on extra-record evidence, that the federal government has lifted its restriction on extending the public sewer system to serve properties outside the sewer district and that the city has adopted a new resolution that allows the subject property to be connected to the public sewer system. However, under ORS 197.835(3) our review is limited to the record unless one or more of the circumstances identified in ORS 197.835(4) applies.[9] Respondents do not argue that any of

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[9] ORS 197.835 provides in 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.
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> "(4) A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or

the circumstances identified in ORS 197.835(4) apply here, so that LUBA could consider the extra-record evidence they rely on. Neither have respondents asked that LUBA take official notice of the new resolution they claim the city has adopted. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239, 282-83 (2003). We therefore limit our review here to the record.

The third assignment of error is sustained.

FIFTH, SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

A. Introduction

These assignments of error all concern BMC 17.24.040, which sets out limits on uses in the CD-2 zone. More specifically these assignments of error all concern the BMC 17.24.040(C) requirement that the city "assess the possible presence of any geologic hazard." The relevant text of BMC 17.24.040(C) is set out below:

> "Plans shall be reviewed to assess the possible presence of any geologic hazard. If any part of the subject lot is in an area designated as a moderate or severe hazard area on the Bandon

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> 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; or
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> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

Bluff Inventory Natural Hazards Map or if any geologic hazard is suspected, the planning commission shall require a report to be supplied by the developer which satisfactorily evaluates the degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion. *The burden of proof is on the landowner to show that it is safe to build*.

"1. The following identifies the reports which may be required:

"a. **Soils Report**. * * *.

"b. **Geology Report**. This report shall include an adequate description, as defined by the city manager or designate, of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist currently registered in the state of Oregon.

"c. **Hydrology Report**. This report shall include an adequate description, as defined by the city manager or designate, of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.

"2. The planning commission may waive any of these reports if it decides that they are irrelevant to the site."

In their fifth assignment of error, petitioners contend the reports the applicant submitted to comply with BMC 17.24.040(C)(1) are missing the hydrology report that is required by BMC 17.24.040(C)(1)(c). In their sixth

assignment of error petitioners contend the applicant failed to establish "it is safe to build," as required by BMC 17.24.040(C). And petitioners' seventh assignment of error concerns the recommendations in the geology report required by BMC 17.24.040(C)(1)(b). We address those assignments of error in turn below.

B. The Hydrology Report (Fifth Assignment of Error)

Petitioners say the applicant failed to submit the hydrology report required by BMC 17.24.040(C)(1)(c). Petitioners apparently understand the "Summary of Conformance to Geotechnical Recommendations" that appears at Record 337-44 to constitute the applicant's sole attempt to comply with BMC 17.24.040(C)(1)(c) requirement for a hydrology report.[10] Petitioners contend that although that report includes a page addressing site drainage and a proposed drainage plan, it is not sufficient to constitute or include a hydrology report.

The city council's findings regarding the hydrology report are brief: "* * * Scott Kent PE, PhD [a professional civil engineer] submitted additional testimony regarding sea-level rise, floodplain requirements, and existing and

[10] Although petitioners do not explain why they think the document at Record 337-34 was the applicant's only attempt to comply with the BMC 17.24.040(C)(1)(c) requirement for a hydrology report, it may be because those pages of the record are identified as the "Civil Engineer Report" in the "Planning Commission Packet" that was prepared by planning staff. Record 280, 336. BMC 17.24.040(C)(1)(c) requires that the hydrology report be prepared by a "professional civil engineer."

proposed site drainage." Record 13.[11] Respondents concede that under BMC 17.24.040(C)(1), a hydrology report was required in this case. Intervenor-Respondent's Brief 19. The "Geological/Geotechnical Investigation of Proposed Residential Building Site" prepared by a professional geologist, which the applicant apparently submitted to comply with the BMC 17.24.040(C)(1)(b), appears at Record 317-335. That geological/geotechnical report includes a discussion of the site's hydrology. Record 318. That geological/geotechnical report also includes a number of recommendations. Record 323-24.

The civil engineer report that appears later at Record 337-44 explains how the recommendations of the geological/geotechnical report are incorporated into the construction proposal. It includes discussion of flooding danger, needed rip/rap repairs, sea level rise, foundation settlement, fill placement, seismic measures and site drainage. The civil engineer report at Record 337-44 is signed by civil engineer Scott Kent, who states at the end of the letter: "I hope this summary letter explains how we are incorporating the recommendations of the geotechnical report into the overall site and building design." Record 344.

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[11] Findings appearing immediately before the quoted finding make it clear that the civil engineer supplemented an earlier report by an engineering geologist to address geologic and erosion hazards on the subject property. Record 12.

It is fair to say the documents that appear at Record 317-335 and 337-344, are not written in precisely the "Geology Report" and "Hydrology Report" terminology of BMC 17.24.040(C)(1)(b) and (c). But together they appear to be an attempt to address the concerns set out in BMC 17.24.040(C)(1)(b) and (c). Without commenting on the adequacy of the hydrology discussion in the geological/geotechnical report, we reject petitioners' contention that the required hydrology report is missing from the application altogether. We note that petitioners do not assign significance to the fact that the hydrology discussion in the geological/geotechnical report was prepared by a professional geologist rather than a profession civil engineer. Even if they had, it appears that the professional civil engineer incorporated the recommendations of the geological/geotechnical report into his own recommendations. The civil engineer also testified regarding measures that mitigate concerns about flooding in areas of septic systems and erosion concerns regarding the rip/rap, which seem to have been the primary hydrology concerns.

Petitioners' fifth assignment of error is denied.

C. Safe to Build (Sixth Assignment of Error)

BMC 17.24.040(C), quoted earlier, places the burden of proof "on the landowner to show that it is safe to build." Petitioners assert that the applicant landowner in this case failed to demonstrate that it is safe to build on the proposed site.

To address BMC 17.24.040(C), the city found that

> "[Regarding soils] Scott Kent, PE, PhD, (registered civil engineer) submitted additional testimony regarding the type of foundation, soil content, proposed grading and fill, and corrective measures regarding the siting of the proposed structure. * * * [T]he submitted reports (completed by both an engineering geologist and a civil engineer) list specific recommendations and corrective measures to ensure it is safe to build and the civil engineer has incorporated those recommendations into the design and has stamped the proposal ensuring it is safe to build. **The Planning Commission found** the application met this criterion."
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> "[Regarding geology] Mr. Sonnevil made specific recommendations to mitigate some of the hazards that are evident with development of the subject property. Erosion was addressed with the recommendation the structure be constructed at least 15' from the top edge of the existing riprap, specific grade and fill (including compaction), proposed foundation methods, and maintenance recommendations for the existing riprap.
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> "One recommendation made by Mr. Sonnevil that was not addressed by the applicant was: elevating the structure higher than the minimum required by FEMA and the City of Bandon (for uncertainties in modeling floodwater elevations, sea level rise, and continuing bay front slope erosion). Because the applicant has met the minimum requirements, **The Planning Commission found** the application met this criterion." Record 12-13 (emphasis in original).

Petitioners argue that nowhere in the geology report does it conclude that it is safe to build on the proposed site. Petitioners note that the report lists serious hazards for this site including flooding, sea level rise, liquefaction, slope failure, amplification of seismic motions, and soil settlement. Petitioners point to the report's suggestion to obtain flood insurance and its disclaimer that "damage caused by, or associated with an extreme climatic event or seismic

ground shaking is borne by the property owner, and is an inherent risk of building on a low-lying site next to an estuary that is underlain by loose potentially liquefiable soils in a seismically active area [Record 326]" as evidence that the geologist who wrote the report does not consider that the site is safe to build on. Petitioners also point to the personal opinions of individuals from the city council and planning commission to support their contention that the site is unsafe for development.

Respondents argue that intervenor satisfied his burden, and that "there is substantial evidence in the record indicating the risks associated with building on the site are identified and managed through appropriate design and construction techniques." Intervenor's Brief 22. Respondents interpret "the code [to] simply require[] risks [to] be evaluated and managed." Intervenor's Brief 21. Respondents argue that there is no requirement that the geological report warrant that the property is safe to build on, nor do they consider petitioners' inferences to be based in fact or to demonstrate that the property is unsafe to build on. Respondents focus on the conclusion of the decision, which states:

> "Through testimony submitted by the applicant, the applicant and owners are aware of the potential hazards in this area and for this particular property. The applicant has secured a geo-technical report, completed by Mr. Ron Sonnevil, and has drafted development plans that address * * * Mr. Sonnevil's recommendations that will help mitigate and/or alleviate the hazards and to safeguard any development [on] the subject property." Record 7.

We agree with respondents that the code requires risks to be evaluated and managed to achieve safety, and that BMC 17.24.040(C) need not be interpreted to require that the reports conclusively determine that the site is completely safe to build on, in the sense that all risks associated with building on the property are entirely eliminated. It is clear that the city interprets the BMC 17.24.040(C) "safe to build" standard to be less demanding than petitioners and the words of the standard are sufficiently subjective to permit the less absolute safety standard the city council interprets BMC 17.24.040(C) to impose.

Petitioners' sixth assignment of error is denied.

D. Evaluation of Hazard and Recommended Precautions (Seventh Assignment of Error)

The sentence in BMC 17.24.040(C) that precedes the "safe to build" standard, was set out earlier and is set out in part again below:

> [I]f any geologic hazard is suspected, the planning commission shall require a report to be supplied by the developer which satisfactorily evaluates the degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion."

Petitioners actually present two separate, somewhat inconsistent, arguments under this assignment of error. The geological/geotechnical report recommended it would be prudent to elevate the ground floor of the proposed dwelling higher than the minimum one foot above the 100 year Base Flood Elevation (BFE). Petitioners contend that the planning commission and city

council adopted inconsistent findings on the question of whether to require the ground floor of the proposed dwelling higher than one foot above the 100 year BFE. Petitioners would resolve that inconsistency in favor of requiring that the ground level be elevated higher than the minimum required, with the result that the proposed dwelling will exceed the 28-foot height limit. Second, if the city council findings are read to reject that recommendation, petitioners contend it was error to do so.

1. Inconsistent Findings

The "Conclusions" section of the geological/geotechnical report includes the following conclusions:

> "2. By law the home must be constructed with the floor of the living area located at least one foot above the 100 year BFE. Although the home and contents could be protected through flood insurance, it would be prudent to elevate the structure higher than the minimum given uncertainties in modeling floodwater elevations at this complicated site.
>
> "* * * * *
>
> "4. Sea level rise in the next few decades may affect maximum flood levels at this site and could adversely impact the susceptibility of the bay front slope to erosion. In light of this it would be prudent to construct the home higher than the minimum elevation requirements imposed by FEMA and the City ordinance. Maintenance needs of the rip rap are expected to increase with rapidly rising sea level." Record 323.

The subsequent report by the civil engineer acknowledged the above statements, but concluded damage to the lowest floor in the event of the

National Academy of Sciences estimates for sea level rise for 2050 would be nonstructural, because "the owner will follow the current design practices."

The planning staff noted that the applicant elected not to follow the geological/geotechnical report suggestions that it would be prudent to raise the elevation of the ground floor above the minimum. The planning staff listed a number of the geological/geotechnical report conclusions that planning staff recommended the planning commission adopt as conditions of approval. Items 2 and 4, recommending that it would be prudent to further elevate the ground floor, were not among the items that planning staff included in the conclusions of the findings in the staff report and recommended the planning commission adopt as conditions of approval.

The planning commission adopted the following findings:

> "*The recommendations contained in the conclusions of the Sonnevil Report are to be adhered to*.
>
> "In addition to the adhering to the Sonnevil recommendations listed in the conclusions of the findings in the staff report, the Commission finds that based on the Sonnevil Report, the following particular points need to be addressed:
>
> "[five additional conditions are listed]." Record 159 (emphasis added).

The potential conflict arises in the italicized finding and the underlined finding, both of which appear almost directly after the staff report recommendation that the planning commission adopt some of the Sonnevil Report recommendations, but not items 2 and 4. The italicized sentence can be read to say that *all* of the Sonnevil Report recommendations are to be adhered

to, which would include items 2 and 4. But the very next finding seems to limit the Sonnevil recommendations to the ones listed in the staff report recommendations, which would exclude items 2 and 4. Excluding Sonnevil recommendations 2 and 4 is also consistent with findings the city council adopted specifically addressing BMC 17.24.040(C):

> "One recommendation made by Mr. Sonnevil that was not addressed by the applicant was: elevating the structure higher than the minimum required by FEMA and the City of Bandon (for uncertainties in modeling floodwater elevations, sea level rise, and continuing bay front slope erosion). Because the applicant has met the minimum requirements, **The Planning Commission found** the application met this criterion." Record 13 (boldface in original).

It is impossible to give effect to both of those findings if the italicized finding is read to require conformance with all of the Sonnevil Report recommendations. But while the italicized finding can be read to say "[All of t]he recommendations contained in the conclusions of the Sonnevil Report are to be adhered to," it does not expressly say that "all" of them are to be adhered to. That finding can be harmonized with the finding that follows by limiting it to require adherence to the conclusions in the Sonnevil Report that staff recommended. Read in that way, the arguably conflicting planning commission findings are not inconsistent.[12] Read in that way, the arguably conflicting

[12] The city council simply adopted the planning commission's findings on this point.

planning commission findings are consistent with the earlier finding regarding BMC 17.24.040(C).

We reject petitioners' first subassignment of error. The city council's findings can be read to be consistent and we do so here.

2. Error to Ignore Recommendation

Petitioners contend it was error for the planning commission and city council to ignore the recommendation that the lowest floor be elevated higher than the minimum required under federal and local law. Petitioners are simply incorrect that the city ignored the recommendation. Rather the applicant elected not to follow a recommended "prudent" course of action and gave a reason for doing so. And nothing in BMC 17.24.040(C) requires that the applicant or city accept and follow all the recommendations in the Sonnevil geological/geotechnical report. Petitioners have not shown the applicant's and city's failure to embrace the suggestions in conclusions two and four of the Sonnevil Report is reversible or remandable error.

The second subassignment of error is denied.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner Pennock contends that under BMC 17.24.040(C), as the owner of property within 250 feet of the subject property, he was entitled to notice of

the planning commission hearing in this matter.[13] Petitioner contends the city erred by failing to give him that written notice of hearing. Although he learned of the hearing before the record closed and submitted testimony, petitioner Pennock argues he had insufficient time to present his case with the result that his substantial rights were violated. Petitioner Pennock argues the city similarly failed to give him notice of the hearing at which the city council heard the appeal of the planning commission decision. Although he was permitted to participate in that hearing, petitioner Pennock objects that the hearing was not *de novo*.

Respondents argue, and we agree that petitioner Pennock had an opportunity to object to any alleged failure to give written notice prior to the close of the record following the final evidentiary hearing and failed to do so. Therefore Pennock waived his right to raise this issue under ORS 197.763(1). In addition, because the alleged error is a procedural error, petitioner was required to object below to preserve that procedural error for review at LUBA. Because he failed to do so, he may not raise that procedural error for the first time at LUBA. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 391-92 (2002); *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rem'd in part* 73 Or App 334, 698 P2d 529 (1985).

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[13] We assume petitioner meant to cite BMC 17.120.090(A)(4).

The eighth assignment of error is denied.

The city's decision is remanded in accordance with our resolution of the third assignment of error.

Ryan, Board Member, dissenting.

I disagree with the majority's resolution of the third assignment of error. For the reasons that follow, I would deny the assignment of error and affirm the decision.

BMC 17.92.040(F) provides in relevant part that one of the approval standards for the proposed dwelling is that "[a]ll required public facilities and services * * * are available or can be made available by the applicant[.]" The city council's decision explains that in 1994 a sewer district was created in order to allow the city to obtain federal grant funds to expand the city's sewer lines into the general area where the property is located, and the city's sewer lines were subsequently expanded to the property in the sewer district boundary. Record 6. The decision explains that the subject property

> "is not eligible to connect to the City's sanitary sewer system.
>
> "The authority regarding septic sewer to the subject property is the jurisdiction of the Department of Environmental Quality (DEQ). The applicant has secured approval from the DEQ for an onsite wastewater system." Record 6.

The city council's decision concludes that the approval standard is met:

> "Public facilities have adequate capacity to serve this request and are available to the subject property, with the exception of sanitary sewer. Sanitary sewer cannot be provided to the subject property, however, the applicant has secured a DEQ permit for onsite septic

> system, and therefore **the Planning Commission found** this criterion has been met." Record 20 (boldface in original).

In their third assignment of error, petitioners argue that the city improperly construed BMC 17.92.040(F) in approving the proposal with a septic system rather than sewer service. Petition for Review 13. According to petitioners, the phrase "required public facilities" requires the dwelling to be served by public sewer service. Petitioners cite no support in the BMC or anything else for their position that the phrase "required public facilities" includes public sewer service.

Notably, petitioners do not assign error to the city's decision on the basis that the city's findings are inadequate to explain why the city concluded that BMC 17.92.040(F) is satisfied. However, the majority sustains the assignment of error and remands the decision for the city council to provide better findings explaining why BMC 17.92.040(F) is satisfied in the absence of an interpretation of the provision or the phrase "required public facilities."

The findings adopted by the city council include the staff reports, and contain an implied interpretation of the phrase "required public facilities" that is more than adequate for review. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67, 942 P2d 836 (1997), *rev dismissed as improvidently allowed* 327 Or 555, 971 P2d 411 (1998); *see also Walker v. City of Sandy*, 62 Or LUBA 358, 364 (2010) (even if findings are insufficient to constitute an express interpretation of code language regarding pedestrian pathways, they are sufficient to constitute an implied interpretation of code

provision to reject the petitioner's contention that additional or more direct north/south pathways were required under the relevant code sections). That interpretation is that the phrase “required public facilities” includes public facilities that are “required” or, in other words, that “must” be provided to the property, and excludes public facilities that cannot be provided to the property. That interpretation is consistent with the position the city took during the proceedings below that the property cannot be connected to the public sewer system due to its location outside of the LID boundary, and that a septic system would satisfy BMC 17.92.040(F). Additionally, petitioners do not point to any provision of the BMC or the city’s comprehensive plan that *requires* the dwelling to connect to the public sewer system. Absent citation to any code or other provision that requires connection of the dwelling to the public sewer system, I would affirm the city’s interpretation of its code and deny the assignment of error.