

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   ROCKBRIDGE CAPITAL,

5   *Petitioner,*

6  
7   vs.

8  
9                                   CITY OF EUGENE,

10   *Respondent,*

11  
12   and

13  
14                                   VALLEY HOSPITALITY LLC,

15   *Intervenor-Respondent.*

16  
17   LUBA No. 2016-104

18  
19   FINAL OPINION

20   AND ORDER

21  
22                                   Appeal from City of Eugene.

23  
24                                   E. Michael Connors, Portland, filed the petition for review and argued on  
25 behalf of petitioner. With him on the brief was Hathaway Koback Connors  
26 LLP.

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28                                   No appearance by the city of Eugene.

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30                                   Bill Kloos, Eugene, filed the response brief and argued on behalf of  
31 intervenor-respondent. With him on the brief was the Law Office of Bill Kloos  
32 PC.

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

36  
37                                   REMANDED

05/19/2017

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

**NATURE OF THE DECISION**

Petitioner appeals a decision by the city approving a site plan for a hotel.

**FACTS**

Intervenor applied for site plan review and other approvals to construct a 101-room hotel on its 2.2-acre property located adjacent to I-105 to the east, the Willamette River to the south, and petitioner’s property to the west. The hearings officer held a hearing on the application and denied the application. Intervenor appealed the hearings officer’s decision to the planning commission. The planning commission held a hearing on the appeal and approved the application. This appeal followed.

**FIRST AND FOURTH ASSIGNMENTS OF ERROR**

Eugene Code (EC) 7.280 and EC 9.2170(5)(d) together impose street tree planting requirements.<sup>1</sup> As relevant here, EC 7.280(1) provides:

“In order to create attractive and healthy neighborhood environments, no approval shall be granted for a development that involves the creation of a street unless the applicant has submitted and received approval of a street tree plan that ensures street trees will be planted and established in accordance with the standards and procedures provided for in this section and the adopted policies of the Urban Forest Management Plan. Street trees shall be planted in accordance with the approved street tree plan as each lot or area is developed, and shall be required on streets that abut

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<sup>1</sup> EC 9.2170(5)(d) contains landscape standards for commercial development, and provides that “[s]treet tree requirements are specified in EC 7.280 Street Tree Program - Policies, Standards, Procedure.”

1 the development as well as on new streets within the development  
2 site.”

3 During the proceedings before the hearings officer, intervenor argued that EC  
4 7.280 did not apply to its application because the application did not propose  
5 the “creation of a new street.” The hearings officer disagreed with intervenor  
6 and concluded that EC 7.280 subjects existing streets to the street tree  
7 standards. The hearings officer concluded that EC 7.280 was not satisfied  
8 because intervenor had not provided a street tree plan or any evidence to  
9 demonstrate compliance with the standards. Record 135.

10 The planning commission concluded that EC 7.280 did not apply to  
11 intervenor’s application because the application did not propose the creation of  
12 new streets, and consequently that the hearings officer erred in denying the  
13 application based on the lack of compliance with EC 7.280 and lack of a street  
14 tree plan. Record 5. Petitioner’s first and fourth assignments of error challenge  
15 the planning commission’s conclusion, and we address them here together.

16 **A. First Assignment of Error**

17 In its first assignment of error, petitioner argues that the planning  
18 commission exceeded its authority under EC 9.7655(3) in determining that the  
19 hearings officer erred when he concluded that EC 7.280 applies to intervenor’s  
20 application. EC 9.7655(3) governs appeals of the hearings officer’s decision to  
21 the planning commission and provides:

22 “The appeal shall include a statement of issues on appeal, be based  
23 on the record, and *be limited to the issues raised in the record that*  
24 *are set out in the filed statement of issues.* The appeal statement

1 shall explain specifically how and [sic] hearings official or historic  
2 review board failed to properly evaluate the application or make a  
3 decision consistent with applicable criteria. The basis of the  
4 appeal is limited to the issues raised during the review of the  
5 original application.” (Emphasis added).

6 Petitioner argues that intervenor’s “filed statement of issues” did not raise any  
7 issue regarding the interpretation of EC 7.280 or argue that the hearings officer  
8 erred in applying EC 7.280 to intervenor’s application because the application  
9 did not propose creation of a new street.

10 Intervenor responds that its filed statement of issues raised the issue that  
11 EC 7.280 did not apply to intervenor’s application. The relevant portion of  
12 intervenor’s filed statement of issues is located at Record 76-78. We have  
13 reviewed intervenor’s filed statement of issues, and we agree with petitioner  
14 that the statement of issues does not raise an issue that the hearings officer  
15 erred in concluding that EC 7.280 applies.

16 First, the statement of issues begins with the caption “First Issue: Street  
17 Trees: EC 9.2170(5)(d); EC 7.280(1) – Evidence in the record demonstrates  
18 that the street tree standard can be met, and the Planning Commission can  
19 conclude the standard is met with a condition of approval.” Record 76. The  
20 statement of issues continues by summarizing:

21 *“[o]ne issue, for which the Hearings Official disagreed with both*  
22 *the Applicant and City staff, was whether the adjacent freeway*  
23 *interchange constituted a street for which the proposal had to*  
24 *provide a street tree plan pursuant to EC 9.2170(5)(d). The*  
25 *Hearings Official concluded that the proposal requires such a plan*  
26 *and because the Applicant had not prepared one or provided any*

1 evidence regarding compliance with EC 2170(5)(d), the standard  
2 is not satisfied.” Record 76 (emphasis added).

3 We understand intervenor to argue that the italicized portion of the paragraph  
4 above raised the issue that the hearings officer erred in interpreting EC 7.280 to  
5 apply where no new street is created. However, that sentence is better  
6 described as a summary of an issue on which the hearings officer disagreed  
7 with intervenor’s position. When read in context with the next paragraph of the  
8 filed statement of issues, it is clear that intervenor did not challenge the merits  
9 of the hearings officer’s interpretation of EC 7.280 to apply where no street is  
10 created, but instead argued only that the hearings officer erred in concluding  
11 that intervenor had not demonstrated compliance with EC 7.280, under that  
12 interpretation.

13 Immediately after the summary of the issue with which the hearings  
14 officer disagreed, the filed statement of appeal continues:

15 “The Applicant contends that evidence exists in the record that  
16 demonstrates either that the proposal as designed already complies  
17 with the street tree standards or that the proposal can be  
18 conditioned to satisfy the street tree standards because the design  
19 allows for street trees to be planted consistent with the City’s  
20 street tree regulations. Consequently, the Planning Commissioners  
21 should conclude that the standard can be met through a condition  
22 of approval that requires the Applicant to prepare a street tree plan  
23 that complies with the City’s street tree regulations to be approved  
24 by the City before development can begin.” Record 76.

25 That paragraph takes the position that EC 7.280 is satisfied, and in so doing  
26 assumes that EC 7.280 applies. Read together, the two paragraphs and the page  
27 that follows do not present an alternative or precautionary argument that EC

1 7.280 does not apply, but if it applies, then it is satisfied. Read together, the  
2 two paragraphs (1) acknowledge that the hearings officer disagreed with  
3 intervenor's argument that EC 7.280 does not apply and that he proceeded to  
4 apply EC 7.280 and find that the evidence in the record did not demonstrate  
5 that EC 7.280 was met, and (2) take the position that the evidence in the record  
6 demonstrates that EC 7.280 either is met, or can be met through a condition of  
7 approval.

8 Accordingly, we agree with petitioner that the planning commission  
9 considered an issue that was not raised in the filed statement of appeal, and  
10 exceeded the authority in EC 9.7655(3) in addressing the issue.

11 The first assignment of error is sustained.

12 **B. Fourth Assignment of Error**

13 In its fourth assignment of error, petitioner argues that the planning  
14 commission improperly construed EC 7.280 to apply only to applications that  
15 propose creation of a new street, and hence be inapplicable to intervenor's  
16 application. Because we sustain petitioner's first assignment of error above  
17 and conclude that the issue of whether EC 7.280 applies to an application that  
18 does not propose creation of a new street was not properly before the planning  
19 commission, no purpose would be served in addressing that issue in this  
20 appeal. On remand the planning commission must determine whether,  
21 consistent with intervenor's filed appeal statement that took the position that  
22 evidence in the record demonstrates that EC 7.280 is met, the hearings officer

1 erred in determining that there is not sufficient evidence in the record to  
2 demonstrate that EC 7.280 is met. EC 9.7655(3). Accordingly, we do not  
3 consider petitioner’s fourth assignment of error.

4 **SECOND AND FIFTH ASSIGNMENTS OF ERROR**

5 EC 9.6792 is entitled “Stormwater Quality” and provides standards for  
6 treating stormwater runoff from impervious surfaces. As relevant here, EC  
7 9.6792(3)(d) provides:

8 “For development permit applications, stormwater quality  
9 facilities shall be selected from the Stormwater Management  
10 Manual and shall be based on the following priority order:  
11 infiltration, filtration, off-site stormwater quality management.

12 “1. If selecting a filtration treatment facility, the applicant shall  
13 submit a report that demonstrates at least one of the  
14 following development site conditions exist:

15 “a. Infiltration rates are less than 2 inches per hour;

16 “b. Bedrock is less than 5 feet below the ground surface;

17 “c. Groundwater elevations are less than 6 feet; or,

18 “d. Ground surface slopes are greater than 10%.

19 “2. If selecting off-site stormwater quality management by  
20 contributing to the public off-site stormwater quality  
21 facilities, through payment of a higher stormwater system  
22 development charge adopted as part of the City’s system  
23 development charge methodology, the applicant shall  
24 submit a report that demonstrates there is insufficient land  
25 area to construct an approved infiltration or filtration facility  
26 by setting forth the required size of the smallest infiltration  
27 or filtration facility needed for the development’s  
28 impervious surface area and a site plan demonstrating that  
29 an approved infiltration or filtration facility cannot be



1 located on the development site without reducing the size of  
2 the proposed development which is otherwise consistent  
3 with all other applicable lot and development standards.”

4 EC 9.6792(3)(d) prioritizes on-site “infiltration” and “filtration” stormwater  
5 treatment methods over off-site stormwater treatment, prioritizes “infiltration”  
6 methods over “filtration” methods, and requires a report that demonstrates that  
7 either infiltration or filtration cannot be used due to the size of the property  
8 before off-site storm water treatment via the public stormwater system can be  
9 approved.

10 The hearings officer concluded that intervenor had failed to submit the  
11 report required by EC 9.6792(3)(d)(2) and therefore that EC 9.6792(3)(d)(2)  
12 was not satisfied. In its appeal statement, intervenor argued that the hearings  
13 officer erred in concluding that EC 9.6792(3)(d)(2) applied to the application at  
14 all. Intervenor argued to the planning commission that it proposed to treat all  
15 stormwater runoff on-site, rather than off-site, through a combination of  
16 infiltration planter boxes and filtration planter boxes, as allowed by EC  
17 9.6792(3)(d)(1), and did not propose to send untreated stormwater runoff into  
18 the public stormwater treatment facilities.<sup>2</sup> The planning commission

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<sup>2</sup> As described in the city’s adopted Stormwater Management Manual, planter boxes collect and treat stormwater runoff from impervious surfaces by allowing pollutants to settle and filter out as the water percolates through the vegetation and soil, before infiltrating into the ground below (infiltration) or being piped to its downstream destination (filtration). Stormwater Management Manual Chapter 2.3.11.

1 concluded that the hearings officer erred in determining that the proposed  
2 development failed to satisfy EC 9.6792(3)(d)(2), and agreed with intervenor  
3 that the proposal demonstrated compliance with EC 9.6792(3)(d)(1).

4 Petitioner’s second and fifth assignments of error challenge that portion  
5 of the planning commission’s decision, and we address them together.

6 **A. Second Assignment of Error**

7 EC 9.7655(3) provides in relevant part that an appeal of a hearings  
8 officer’s decision to the planning commission is “limited to the issues raised in  
9 the record[.]” In its second assignment of error, petitioner argues that the  
10 planning commission erred in concluding that EC 9.6792(3)(d)(2) does not  
11 apply to the application because, according to petitioner, intervenor did not  
12 argue before the hearings officer that EC 9.6792(3)(d)(2) did not apply.  
13 According to petitioner, intervenor’s application listed both EC 9.6792(3)(d)  
14 (1) and (2) as applicable criteria and intervenor never took the position before  
15 the hearings officer that EC 9.6792(3)(d)(2) did not apply.

16 Intervenor responds, and we agree, that its application took the position  
17 that intervenor would meet the storm water quality management standards  
18 through on-site infiltration and filtration systems. Record 740-42. In other  
19 words, intervenor proposed to satisfy EC 9.6792(3)(d) by constructing an on-  
20 site filtration system that meets (d)(1). Although the application materials and  
21 the staff report did not expressly or in detail explain the alternative storm water  
22 quality treatment methods, the EC’s priority scheme for those treatment

1 methods, or the interplay between subsections (3)(d)(1) and (2), intervenor  
2 relied solely on on-site filtration under subsection (d)(1) to satisfy EC  
3 9.6792(3)(d), and did not propose any off-site filtration under subsection  
4 (d)(2). By implication, it is clear that intervenor did not believe that subsection  
5 (d)(2) applied. However, the hearings officer apparently believed that  
6 intervenor proposed off-site filtration and therefore intervenor was required to  
7 submit the report required by (d)(2). Under these circumstances, it is clear that  
8 the issue of whether subsection (d)(2) applied was “raised in the record” before  
9 the hearings officer.

10 The second assignment of error is denied.

11 **B. Fifth Assignment of Error**

12 In its fifth assignment of error, petitioner argues that the planning  
13 commission decision is not supported by substantial evidence in the record  
14 because the evidence in the record shows that intervenor proposes “off-site  
15 storm water management.” Petition for Review 33. According to petitioner,  
16 intervenor’s application itself takes the position that the development will  
17 discharge storm water to the public storm water system, and therefore EC  
18 9.6792(3)(d)(2) applies. Petitioner points to a statement in the application that  
19 intervenor will pay a SDC fee and discharge some storm water to the city’s  
20 storm water system because the size of the filtration planters cannot  
21 accommodate the flood control volume required by the city’s adopted  
22 Stormwater Management Manual. Record 740-42.

1           Intervenor responds that the statement petitioner points to does not take  
2 the position that intervenor is proposing to *treat* storm water off-site. Rather,  
3 the application takes the position in demonstrating compliance with EC 9.7691,  
4 the city’s storm water flood control standards, that all storm water will be  
5 treated on-site but that the size of the infiltration planter boxes is not sufficient  
6 to meet the city’s restrictions on the amount of water that is accepted into the  
7 infiltration planters in flood events and that therefore, intervenor will pay a  
8 SDC fee to discharge that excess treated water into the public system.

9           We disagree with petitioner that the planning commission’s decision that  
10 no off-site treatment of storm water pollution is proposed is not supported by  
11 substantial evidence in the record. The planning commission’s decision is  
12 supported by the storm water report at Record 799-856. Petitioner is conflating  
13 intervenor’s proposed method of meeting water *quantity* standards for flood  
14 control purposes, which are set out in EC 9.7691 and the city’s Stormwater  
15 Management Manual, with intervenor’s proposed method of meeting water  
16 *quality* standards, which are set out in EC 9.7692 and the city’s Stormwater  
17 Management Manual. Intervenor’s proposed method of treating storm water  
18 runoff on-site through infiltration and filtration planter boxes meets EC  
19 9.6792(3)(d)(1) and the city’s Stormwater Management Manual standards for  
20 treatment of runoff. But the size of the infiltration planter boxes is insufficient  
21 to accommodate the flood control volume specified in the Stormwater  
22 Management Manual in a flood event, and accordingly, intervenor must pay a

1 SDC fee for the potential for discharge of limited amounts of treated water into  
2 the storm water system. Record 740-42. Put another way, a limited amount of  
3 water from the development may be discharged into the city’s system in flood  
4 events, but all of the water that is discharged into the city’s storm water system  
5 will be treated on-site prior to entering the public system. The planning  
6 commission’s decision to that effect is supported by the storm water report in  
7 the record at Record 799-856.

8 The fifth assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 EC 9.7655(3) requires the planning commission’s review to “be based on  
11 the record.” EC 9.7655(2) provides in relevant part that “[n]o new evidence  
12 pertaining to appeal issues shall be accepted.” In its third assignment of error,  
13 petitioner argues that the planning commission committed a procedural error in  
14 accepting new evidence from intervenor and the city’s planning staff, and by  
15 not allowing petitioner the opportunity to rebut that evidence prejudiced  
16 petitioner’s substantial rights. ORS 197.835(9)(a)(B).<sup>3</sup>

17 First, petitioner argues that the planning commission accepted new  
18 evidence from intervenor, in the form of intervenor’s claim in its appeal  
19 statement that “the design of the property allows for additional trees to be

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<sup>3</sup> ORS 197.763(9) defines “evidence” as “facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”

1 placed, if necessary, in the landscaping strip along the eastern boundary of the  
2 property.” Petition for Review 21 (quoting Record 77). Intervenor responds,  
3 and we agree, that intervenor’s statement is not “evidence” but rather argument  
4 that takes the position that the evidence already in the record supports a  
5 determination that the street tree planting requirements are satisfied or can be  
6 met through conditions of approval.

7 Petitioner next argues that the planning commission accepted new  
8 evidence from the city’s planning staff that petitioner identifies as (1) a  
9 reference in the planning commission staff report to past interpretations and  
10 applications of EC 7.280, and (2) a statement that the city does not have  
11 jurisdiction over I-105 adjacent to the property because the transportation  
12 facility is owned by ODOT and Lane County. Record 50. Intervenor responds  
13 that the statements from the city’s planning staff are not evidence, but rather  
14 the planning staff’s analysis regarding whether EC 7.280 applies at all.

15 Although it is a closer question, petitioner has not established that the  
16 statements in the planning commission staff report are “evidence” as defined in  
17 ORS 197.763(9)(a), or pointed to any other applicable definition of “evidence.”  
18 First, the statements that summarize past interpretations of EC 7.280 are not  
19 “evidence,” but rather something closer to citation to authority. In addition,  
20 even if some of the statements qualify as “facts, documents, data or other  
21 information[,]” the planning staff appears to have offered them to demonstrate  
22 that the city does not have authority to apply EC 7.280 to the application, and

1 not to “demonstrate compliance or noncompliance with the standards believed  
2 by [intervenor] to be relevant to the decision.” Finally, in our resolution of the  
3 first assignment of error, we concluded that the planning commission must  
4 determine on remand whether the application complies with EC 7.280.  
5 Accordingly, any statements by planning staff that support a conclusion that  
6 EC 7.280 does not apply are harmless error, because for purposes of remand, it  
7 applies.

8 Finally, petitioner argues that the planning commission accepted as new  
9 evidence a statement by intervenor to the planning commission that the record  
10 includes a geotechnical report, notwithstanding a contradictory statement in  
11 intervenor’s initial application materials that the geotechnical report had not  
12 been submitted.<sup>4</sup> Record 80, 741. Intervenor responds, and we agree, that a  
13 clarification that the geotechnical report is in the record is not new evidence.

14 The third assignment of error is denied.

15 The city’s decision is remanded.

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<sup>4</sup> A geotechnical report is necessary because the application proposes use of some filtration planters, and EC 9.6792(3)(d)(1) requires intervenor to demonstrate that conditions exist that meet the requirements for reliance on filtration treatment set out in that code section.