BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES ROTEN and RANDI ROTEN,
Petitioners,

vs.

CITY OF TURNER,
Respondent,

and

WESTWOOD HEIGHTS, LLC,
Intervenor-Respondent.

LUBA No. 2018-094

FINAL OPINION
AND ORDER

Appeal from City of Turner.

Kevin T. Lafky, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief were Leslie D. Howell and Lafky & Lafky.

John H. Beckfield, City Attorney, Turner, filed a response brief and argued on behalf of respondent.

Edward H. Trompke, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Jordan Ramis PC.

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

REMANDED 02/07/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a 47-lot subdivision.

REPLY BRIEF

Petitioners move for permission to file a reply brief. There is no opposition to the motion and it is allowed.

FACTS

The subject property contains fifteen acres and is zoned Single Family Residential District (11,000 square foot minimum lot size) (R-1). Intervenor-respondent Westwood Heights, LLC (intervenor) applied to subdivide the property into 47 lots. The property is bounded to the west and north by existing subdivisions, to the east by vacant land owned by Marion County, and to the south by a reservoir, Franzen Reservoir, owned by the city of Salem. The application proposed the creation of several new public streets, including an extension of existing Oakwood Drive, which currently dead ends at the property boundary, to connect Solarian Drive to Riva Ridge Drive, both of which currently dead end at the property boundary. Petitioners' property is approximately 320 feet from the northern boundary of the subject property.

The city provided notice (Initial Notice) to petitioners and others of a May 16, 2018 city council hearing on the application. Record 280. The Initial Notice identified the City of Turner Land Use Development Code (TDC) 2.320 as the sole approval criterion. Petitioners appeared at the May 16, 2018 hearing and

provided oral and written testimony in opposition to the application. At the conclusion of the hearing, the city council closed the public hearing but left the record open until June 13, 2018 for written submissions. Record 206.

On June 1, 2018, the city mailed a "Mailed Notice of Subdivision Partition Plat" (Second Notice) to petitioners and others, which stated that the city council would hold a meeting to deliberate on the application on July 12, 2018, and that persons who wished to participate in the review of the application were required to submit written comments before 5:00 p.m. on June 13, 2018. Record 190-91. The Second Notice identified as applicable criteria TDC 2.320 to TDC 2.328.

Then on June 19, 2018, the city provided a "Revised Notice of Subdivision Partition Plat and Public Hearing" (Revised Notice) to petitioners and others, to be held on July 12, 2018. Record 165-66. The Revised Notice stated that written comment on the application would be accepted until July 9, 2018, and that the city council would "allow oral testimony from the public on this application" at the July 12, 2018 hearing. Record 165.

At the July 12, 2018 hearing, the city council accepted additional oral testimony.[1] At the conclusion of the hearing, the city council voted to approve the application. The city council subsequently adopted a written decision, including findings of fact. This appeal followed.

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[1] Petitioners did not appear at the July 12 hearing. Record 17-19.

FIRST ASSIGNMENT OF ERROR

ORS 197.195(3)(c)(C) requires that for limited land use decisions, the city's notice shall "[l]ist, by commonly used citation, the applicable criteria for the decision[.]" In their first assignment of error, we understand petitioners to argue that the city committed procedural error in sending an Initial Notice that failed to list all applicable approval criteria.[2]

The city and intervenor (together, respondents) respond, initially, that petitioners failed to preserve the issue presented in their first assignment of error prior to the close of the initial evidentiary hearing, and therefore they are precluded from raising it for the first time at LUBA. ORS 197.763(1); ORS 197.195(3)(c)(B). In the reply brief, petitioners rely on ORS 197.835(4)(a) and argue that because the Initial Notice failed to list TDC 2.328 as an applicable approval criterion, petitioners may raise the issue raised in the first assignment of error.[3]

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[2] Petitioners cite ORS 197.835(9)(a)(D) as the standard of review that applies to this assignment of error, but do not develop any argument that the city improperly construed the applicable law. Petition for Review 6. Petitioners also argue that "Petitioners' rights were prejudiced." Petition for Review 7. We treat the first assignment of error as presenting an argument that the city committed a procedural error that prejudiced petitioners' substantial rights. ORS 197.828(2)(d).

[3] ORS 197.835(4)(a) allows a party to raise new issues to LUBA if:

> "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

We reject petitioners' contention. First, we have long held that a party must preserve procedural error by entering an objection to the procedural error below, if there is an opportunity to do so. *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). Petitioners have not established that they did not have the opportunity to preserve their first assignment of error by raising the issue at the May 16, 2018 hearing, or at any time during the period that the record was left open after that hearing, or again at the July 12, 2018 hearing. We reject petitioners' reliance on ORS 197.835(4)(a) for the same reasons. However, we also conclude that petitioners' first assignment of error fails on the merits.

Petitioners' argument in their first assignment of error fails to acknowledge that the June 1, 2018 Second Notice lists the applicable approval criteria as: "Section[s] 2.320 to 2.328 of the [TDC][.]" Record 191-92. Accordingly, any error in the Initial Notice was cured by the Second Notice, which was mailed to petitioners during the open record period. The staff report for the May 16, 2018 hearing also listed TDC 2.328 as the applicable criterion and evaluated the application's compliance with those criteria. Record 253-60.

> a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

More importantly, petitioners have not established that an error in the Initial Notice prejudiced their substantial rights. Petitioners received the Second Notice, and submitted, through their counsel, comments on the application that addressed various provisions of TDC 2.328. Record 170-74.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue in various subassignments of error that the city's decision fails to address several provisions of the Turner Comprehensive Plan (TCP) that petitioners argue apply to intervenor's application.[4] In their petition for review, we understand petitioners to take the position that although petitioners failed to raise the issues raised in the second assignment of error in accordance with ORS 197.195(3), under ORS

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[4] ORS 197.195(1) provides:

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

197.835(4)(a), LUBA may consider the issues because the local government failed to list the cited TCP provisions in the Initial Notice or the Revised Notice. Petition for Review 8.

In *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991), the court explained that the purpose of the "raise it or waive it" requirement at ORS 197.763(1) is to provide "fair notice" of the issue to the decision maker and other parties, so they have an adequate opportunity to respond and address the issue. Although ORS 197.835(4)(a) allows a party to raise new issues if the notice of hearing failed to list as applicable criteria the criteria to which the issues relate, the right to raise new issues in ORS 197.835(4)(a) is a qualified right. LUBA may refuse to consider that issue if LUBA finds that notwithstanding the notice failure "the issues could have been raised before the local government[.]" *Id.*

The staff report dated July 5, 2018, which was prepared prior to the July 12, 2018 hearing states:

> "The city's comprehensive plan, zoning map and land-use development code set the context for what and where the Council can approve or deny regarding development. This project is for single-family houses in a currently single-family zoned parcel of land. Therefore it is an outright allowed use. The application, however, must still meet the eight criteria that are listed in the subdivision approval section of the code. These criteria are listed in the attached Findings of Fact." Record 128.

It is reasonably clear from the staff report that the city's planning staff took the position that only the eight criteria in TDC 2.328 applied to the application. Petitioners do not explain why they could not have taken issue with the staff

report, and argued that various TCP provisions apply as approval criteria. Accordingly, we conclude that the issues raised in this assignment of error regarding provisions of the TCP are not within our scope of review, because the issues could have been raised before the local government but were not.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The initial evidentiary hearing on the application was held on May 16, 2018, and at the conclusion of the hearing, the city closed the public hearing but left the record open for written submissions until June 13, 2018. On June 1, 2018, the city sent the Second Notice, which, as explained above, was notice of a hearing to be held on July 12, 2018, for purposes of deliberating on the application.

In written comments submitted on June 12, 2018, during the period that the record was left open following the initial evidentiary hearing on May 16, 2018, petitioners requested "the opportunity to provide additional submissions of written evidence, arguments, and/or testimony after the July 12 hearing and therefore request that the record be left open for seven days following the next hearing." Record 172.

At a regular city council meeting on June 14, 2018, the city administrator requested that the city council re-open the hearing on the application to accept additional oral testimony. The city council then voted to accept additional oral testimony at the previously noticed July 12, 2018 hearing. Record 167. On June

19, 2018, the city sent the Revised Notice to petitioners and others. At the conclusion of the July 12, 2018 hearing, the city closed the record, deliberated, and voted to approve the application.

In their third assignment of error, petitioners argue:

> "[A]t the close of testimony [at the July 12, 2018 hearing], the public was not given the opportunity to request the opportunity for additional written comments. Denial of this opportunity was in contravention of Oregon law and [the TDC]." Petition for Review 16.

Petitioners go on to argue that the July 12, 2018 meeting

> "was really a continuation of the initial evidentiary hearing since at the meeting on May 16, the Mayor closed the hearing, without any warning or reason, to public testimony prior to providing everyone present an opportunity to speak. This was highly inappropriate and violated Oregon statute and [the TDC]." *Id.*

Although their argument is not fully developed, we understand petitioners to argue that the city's failure to grant their June 12, 2018 request that the record be left open at the conclusion of the July 12, 2018 hearing violated ORS 197.763(6). ORS 197.763(6) provides, in part:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least

seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

"(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

We understand petitioners to argue that the July 12, 2018 hearing was "the initial evidentiary hearing" because it was a continuation of the initial evidentiary hearing held on May 16, 2018, and that, pursuant to ORS 197.763(6)(a), the city was required to grant petitioners' June 12, 2018 request to leave the record open for seven days after the July 12, 2018 hearing for submission of "written evidence, arguments and/or testimony." Record 172.

Respondents respond that even if the July 12, 2018 hearing was a continuation of the initial evidentiary hearing, it was nonetheless not "the initial evidentiary hearing," and petitioners' request submitted during the open record period in their June 12, 2018 letter was not a request to leave the record open that was submitted "[p]rior to the conclusion of the initial evidentiary hearing."

Therefore, respondents respond, ORS 197.763(6)(a) did not require the city to grant petitioners' request.

We have held that the requirements for continuances and open record periods in ORS 197.763(6)(a), (b) and (c) must be applied at the initial evidentiary hearing only, and are not required to be applied to subsequently continued hearings or open record periods. *Warren v. Josephine County*, 67 Or LUBA 74, 85-86 (2013). In the present case, even if we assume that the July 12, 2018 hearing was a continued hearing, petitioners' June 12, 2018 request to leave the record open was not made "[p]rior to the conclusion of the initial evidentiary hearing," a requirement under ORS 197.763(6)(a). Rather, it was made during the open record period. Accordingly, ORS 197.763(6)(a) did not require the city to grant petitioners' request and the city did not err in closing the record at the conclusion of the July 12, 2018 hearing.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

TDC 4.230 contains criteria that apply to development in the Hillside Development Overlay District (HDOD). The subject property is located in the HDOD. In their fourth assignment of error, petitioners argue that the city erred in failing to adopt findings regarding whether the application satisfies the provisions of TDC 4.230. Petitioners argue that ORS 197.835(4)(a) allows them to raise this issue for the first time on appeal to LUBA because TDC 4.230 is not

cited as an applicable criterion in any of the three notices sent by the city, any staff report, or in the decision. *See* n 3.

Respondents respond that the May 9, 2018 staff report confirmed that the subject property is in the HDOD, and included the following statement:

> "Because this area is in the [HDOD], development is allowed to have limited lengths of steeper grades." Record 257.

Respondents argue that, given the above statement in the May 9, 2018 staff report, ORS 197.835(4)(a) does not allow petitioners to raise the issue for the first time on appeal because petitioners could have raised the issue below.

We agree with petitioners that ORS 197.835(4)(a) allows them to raise the issue raised in the fourth assignment of error for the first time on appeal. There is no dispute that TDC 4.230, which includes thirteen subsections, was not cited as an applicable approval criterion in any of the three notices sent by the city, and was not cited in any staff report prepared by the city. Neither was any of the operative language of TDC 4.230 nor any of its subsections cited in a way that might alert the public that it was, in fact an applicable approval criterion. TDC 4.230 is an entirely separate section of the TDC from 2.328, and we do not think any citation to TDC 2.328 put petitioners on notice that TDC 4.230 could apply.

The city responds that the city determined that the "development site was determined to meet the requirements of the Hillside Development Overlay District." City's Response Brief 7. Intervenor responds that "[c]onsistent with longstanding City custom, compliance with the standards of the Hillside

Development Ordinance is managed during final engineering." Intervenor's Response Brief 25.

We disagree with the city that the city council's decision determined that the application meets the requirements of TDC 4.230. Nothing in the findings adopted in support of the decision, including the July 5, 2018 incorporated staff report, addresses the HDOD standards or otherwise adopts any interpretation of the provisions of TDC 4.230 to the effect that the standards do or do not apply at the tentative subdivision phase. Accordingly, remand is required for the city to address TDC 4.230 in the first instance, including if it chooses, intervenor's position that TDC 4.230 does not apply at the subdivision tentative plan approval stage.

Intervenor also responds that the requirements in TDC 4.230 are not "clear and objective on the face of the ordinance" as required by ORS 227.173(2), and accordingly, those subjective standards may not be applied to intervenor's application under ORS 197.307(4).[5] We understand intervenor to argue that even

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[5] ORS 227.173 applies to a decision on a "permit" and does not apply to the challenged decision, which is a limited land use decision. However, ORS 197.195(4) provides:

> "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."

if the city erred in failing to apply TDC 4.230, petitioners' assignment of error should fail because the TDC 4.230 standards are ones that the city may not apply at all to intervenor's application for "housing."

Intervenor did not present the argument presented in its response brief during the proceedings before the city, and the city council adopted no findings addressing the issue of whether the standards in TDC 4.230 are "clear and objective." On remand, the city can choose to address intervenor's arguments.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, we understand petitioners to argue that the findings the city adopted in support of the decision are inadequate to explain why the city concluded that the application met the applicable standards. However, the city adopted several pages of findings, and petitioners do not challenge any specific findings as inadequate. Absent any developed challenge to the city's findings, this assignment of error provides no basis for reversal or remand of the decision.

The fifth assignment of error is denied.

ORS 197.307(4) provides in relevant part:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing."

SIXTH ASSIGNMENT OF ERROR

TDC 2.328(2) requires an applicant to demonstrate that "[t]he proposed development and all adjoining land can be developed in accordance with this Code and City Ordinances." In their sixth assignment of error, we understand petitioners to argue, as they argued in their second assignment of error, that the city's decision does not address the TCP provisions cited in that assignment of error, or the HDOD standards cited in their fourth assignment of error.

Respondents respond that petitioners failed to preserve the issue and may not raise it for the first time in an appeal to LUBA. Petitioners argue, again, that ORS 197.835(4)(a) allows them to raise the issue at LUBA because the Initial Notice failed to list TDC 2.328 as an applicable approval criterion.

We agree with respondents that the issue raised in the sixth assignment of error was not preserved and petitioners may not raise it for the first time at LUBA. As noted above, the Second Notice listed "TDC 2.320 to 2.328" as the applicable approval criteria, and the staff reports also identified TDC 2.328(2) as an applicable approval criterion. Record 191-92, 253-60. The issue of compliance with TDC 2.328(2) "could have been raised" before the city. In addition, given the wording of TDC 2.328(2), the arguments under the sixth assignment of error are derivative of the arguments raised in the second and fourth assignments of error, and provide no independent basis for reversal or remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

TDC 2.328(3) requires an applicant to demonstrate that "[t]he proposed street plan is in conformance with City standards and provides the most economic, safe and efficient circulation of traffic in relation to the existing City street system." The city found that the criterion was met, and also imposed several conditions of approval to address concerns raised by opponents of the subdivision.[6] In their seventh assignment of error, petitioners argue that the city's finding that TDC 2.328(3) was met is not supported by substantial evidence in the record. ORS 197.828(2)(a).

Petitioners argue that evidence in the record shows that two streets that will serve the subdivision, Solarian Drive and Riva Ridge Drive, have only twenty feet of pavement width and only five feet of shoulder area and sharp curves in some areas. We understand petitioners to argue that these streets at their current width are unsafe for the additional traffic to be generated by the

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[6] These conditions include requiring intervenor to construct or pay for off-site improvements to both Solarian Drive and Riva Ridge Drive. Record 3 (for Riva Ridge Drive, installing protective guard rail a curve on Riva Ridge at its intersection with Solarian Drive, widening all of Riva Ridge Drive by five feet, striping it with edge fog lines, a five foot wide pedestrian shoulder line, and a center dividing line, widening the downhill curve by five feet; for Solarian Drive, installing 15 mph speed limit signs and safety signage, trimming trees, clearing areas around the street light, and at the city's discretion either closing Solarian Drive to through traffic or making it a one way street in the future).

subdivision. We also understand petitioners to argue that the city's estimates of increased traffic from the proposed subdivision are inaccurate.

Respondents respond that the city's decision is supported by evidence in the record regarding safety widths of low volume roads, that traffic counts were provided at three locations and support the city's conclusion that the existing streets have existing capacity to absorb the additional trips from the new subdivision, and that conditions of approval the city imposed further support a conclusion that TDC 2.328(3) is met.

We agree with respondents that substantial evidence in the record supports the city's decision. A reasonable person could conclude based on the evidence in the record that TDC 2.328(3) was met. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (substantial evidence is evidence a reasonable person would rely on in making a decision).[7]

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

TDC 2.328(4) requires an applicant to demonstrate that "[t]he proposed utility connections are available, adequate and provide the most efficient and

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[7] Because we agree with respondents that substantial evidence in the record supports the city's decision, we need not address intervenor's alternative response that TDC 2.328(3) is not "clear and objective" and that therefore the city may not apply the provision to intervenor's subdivision application, an argument that was not presented to the city during the proceedings below. Intervenor's Response Brief 35-36.

convenient connections to the existing utility systems and the proposed utilities can be extended in the future to accommodate future growth beyond the proposed land division." The city found that TDC 2.328(4) was met, and also imposed conditions of approval to mitigate for off-site impacts. In their eighth assignment of error, petitioners argue that the city's decision is not supported by substantial evidence in the record, and that the record lacks evidence to support a conclusion that the conditions of approval to mitigate for off-site impacts will work.

Respondents respond that the evidence in the record supports the city's conclusion, including the Overall Utility Plan and civil engineering plans that show connections to existing utilities and a stubbed utility to the property to the east owned by Marion County, a stormwater report, and the conditions of approval the city imposed. Record 357-91. Respondents also cite evidence in the record that the stormwater system will be constructed to reduce flows to a level significantly below the maximum.

We agree with respondents that substantial evidence in the record supports the city's conclusion that TDC 2.328(4) is met, including the evidence described above.[8]

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[8] Because we agree with respondents that substantial evidence in the record supports the city's decision, we need not address intervenor's alternative response that TDC 2.328(4) is not "clear and objective" and that therefore the city may not apply the provision to intervenor's subdivision application, an argument that was not presented to the city during the proceedings below. Intervenor's Response Brief 40-41.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

TDC 2.328(5) requires an applicant to demonstrate that "[s]pecial site features have been considered and utilized." The city found that there were no special site features identified on the site. Record 24. In their ninth assignment of error, petitioners argue that the city's conclusion that special site features were considered and utilized is not supported by substantial evidence in the record.

Respondents respond initially that petitioners failed to raise the issue during the proceedings below and are precluded from raising it for the first time on appeal. We understand petitioners to take the position that ORS 197.835(4)(a) allows them to raise the issue for the first time on appeal because the Initial Notice did not list TDC 2.328(5) as an approval criterion. Petition for Review 29-30 (referencing petitioners' preservation of issues section in the sixth assignment of error). For the reasons explained in our resolution of the sixth assignment of error, we agree with respondents that petitioners may not raise the issue raised in the ninth assignment of error for the first time on appeal. Both the Second Notice and multiple staff reports cited TDC 2.328(5), and we conclude that the issue could have been raised below.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

TDC 2.328(6) requires an applicant to demonstrate that "[d]rainage ways are protected and required drainage facilities are provided in conformance with

State erosion control regulations." The city found this criterion was met. In their tenth assignment of error, "[p]etitioners incorporate their seventh assignment of error here," and argue the city's conclusion that TDC 2.328(6) is met is not supported by substantial evidence in the record. Petition for Review 31. Petitioners' argument is undeveloped, and does not acknowledge or address the evidence in the record regarding the on-site storm water drainage system's design for excess capacity or the evidence regarding erosion control measures. Record 340-42. Absent a developed argument regarding TDC 2.238(6), we conclude that the city's decision is supported by substantial evidence in the record.

The tenth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

TDC 2.328(8) requires an applicant to demonstrate that "[p]otential adverse impacts have been mitigated to the maximum extent possible." The city found TDC 2.328(8) was met. In their eleventh assignment of error, "petitioners incorporate their third to tenth assignments of error here." Petition for Review 33. Accordingly, we understand this assignment of error to be entirely derivative of and dependent on petitioners' other assignments of error.

We denied above petitioners' third, fifth, sixth, seventh, eighth, ninth and tenth assignments of error. We sustained above petitioners' fourth assignment of error because we agreed with petitioners that the city erred in failing to address whether the provisions of HDOD 4.230 apply to the application. But sustaining the fourth assignment of error does not provide a basis for us to sustain the

eleventh assignment of error, which assigns error to the city's decision that pursuant to TDC 2.328(8), "[p]otential adverse impacts have been mitigated to the maximum extent possible," an entirely separate criterion from the HDOD standards in TDC 4.230.[9]

Absent a developed argument regarding why the city's finding that TDC 2.328(8) is met is not supported by substantial evidence, this assignment of error is denied.

The eleventh assignment of error is denied.

The city's decision is remanded.

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[9] Because we deny petitioners' assignment of error, we need not address intervenor's response that TDC 2.328(8) is not "clear and objective" and that therefore the city may not apply the provision to intervenor's subdivision application, an argument that was not presented to the city during the proceedings below. Intervenor's Response Brief 48-49.