

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID HIMMELBERGER,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

ARNOLD ROCHLIN and GERALD GROSSNICKLE,
Intervenors-Respondents.

LUBA No. 2018-106

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christopher P. Koback, Portland, filed a petition for review and cross-response brief and argued on behalf of petitioner. With him on the brief was Hathaway Larson, LLP.

Michael J. Jeter, Assistant City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Arnold Rochlin and Gerald Grossnickle, Portland, filed a joint cross-petition for review and response brief on behalf of intervenors-respondents and Arnold Rochlin argued on his own behalf.

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

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AFFIRMED

05/01/2019

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

NATURE OF THE DECISION

Petitioner appeals a city hearings officer's decision denying his application for environmental review to develop a dwelling.

MOTIONS TO INTERVENE

Arnold Rochlin and Gerald Grossnickle (together, intervenors), filed a motion to intervene on the side of the respondent. No party opposes the motion and it is allowed.

REPLY BRIEFS

Petitioner filed a motion to file a reply brief. No party opposes the motion and it is allowed.

Intervenors filed a cross petition and moved to file a reply brief to respond to new matters raised in the response briefs that respond to their cross petitions. No party opposes the motion and it is allowed.

FACTS

The subject property is comprised of approximately two acres, is zoned Residential/Farm (RF), is entirely within an environmental conservation overlay, and is mapped within the Skyline West Conservation Plan. The property is forested and sloped and contains headwaters for Bronson Creek, including wetlands and intermittent creeks. Record 6. The property is currently undeveloped. Surrounding properties are forested and some are developed with single-family residences. Record 5.

1 Petitioner proposes to develop a single-family dwelling on the property.
2 One single-family dwelling is an outright permitted use in the RF zone, so long
3 as the entire development does not permanently disturb more than 5,000 square
4 feet within identified resource zones. The proposed house, driveway, and
5 landscaping would disturb more than 22,000 square feet and exceed the general
6 development standards for maximum disturbance area allowed, additional
7 temporary disturbance area, tree removal and replacement, and maximum front
8 or street setbacks. Further, the proposed stormwater outfall pipe will exceed the
9 standard maximum four-inch diameter. Accordingly, the proposed development
10 required environmental review.¹

11 As explained further under the assignments of error, to obtain
12 environmental review approval, petitioner must demonstrate that his proposed
13 development design will result in less detrimental environmental impacts,
14 relative to other development alternatives, and will minimize the loss of natural
15 environmental resources and values. The applicant, the city, and other parties
16 may identify practicable alternatives. In addition to minimizing impacts in the
17 disturbed areas, petitioner must demonstrate that the development will not result

¹ See Portland City Code (PCC) 33.430.250 (environmental review approval criteria); PCC 33.430.140 (general development standards); PCC 33.430.140(A), Table 430-1 (maximum disturbance area allowed); PCC 33.430.140(H) (temporary disturbance area); PCC 33.430.140(J) (tree removal and replacement standards); PCC 33.430.140(O) (maximum front or street setbacks); PCC 33.430.180(H) (stormwater outfalls).

1 in significant detrimental impacts to areas designed to be undisturbed by the
2 development or fish-bearing water bodies. *See generally* PCC 33.430.250(A), (E)
3 (set out later in this opinion).

4 In 2015, petitioner conferred with city planning staff at the Bureau of
5 Development Services (BDS) regarding his plans to develop a dwelling on the
6 subject property. Record 797. In January 2017, petitioner submitted an
7 environmental review application with three different alternative site plans. Due
8 to intervening concerns, including petitioner's health and lack of BDS support of
9 petitioner's proposed alternatives, petitioner developed and submitted three new
10 alternative proposals in July 2017. Record 227, 807–08. Petitioner's
11 environmental consultants studied the subject property and its environmental
12 resources. Record 228, 800. Petitioner's real estate broker, contractor, and
13 accountant provided cost estimates and market information for the various
14 alternatives. Record 11, 324–50. Petitioner concluded that certain alternatives did
15 not fit petitioner's needs and desired design characteristics, and that other
16 alternatives were not financially practicable.

17 The hearings officer accepted petitioner's conclusion that certain design
18 alternatives were not practicable or would result in unacceptable environmental
19 impacts. Accordingly, the hearings officer limited his review to four alternatives:
20 D-1 through D-4, which used the same house design situated on different sites on
21 the property. Record 28–29. With respect to those alternatives, petitioner
22 preferred alternative D-1.

1 The hearings officer accepted petitioner's argument that an alternative is
2 not practicable if the development costs exceed the resale value. Record 28.
3 Petitioner submitted financial analysis attempting to demonstrate that the
4 development costs for alternatives D-2, D-3, and D-4 would exceed the resale
5 value. The hearings officer concluded that petitioner's financial analysis was
6 inconsistent and inconclusive; thus, the hearings officer assumed that D-1
7 through D-4 were all practicable alternatives for purposes of environmental
8 review. The hearings officer found that the alternative D-1 will result in greater
9 fragmentation and impacts to wildlife habitat than other alternatives. In addition,
10 the hearings officer found that petitioner's stormwater management plan does not
11 contain sufficient information to demonstrate that the development would not
12 result in significant detrimental impacts on fish-bearing water bodies. The
13 hearings officer concluded that petitioner had failed to satisfy the applicable
14 environmental review criteria and denied petitioner's application. This appeal
15 followed.

16 As explained in further detail later in this decision, the city withdrew the
17 hearings officer's decision for reconsideration and issued a revised decision
18 denying the application. Petitioner filed an amended notice of intent to appeal.

1 **ASSIGNMENTS OF ERROR**

2 **A. Background**

3 We begin our analysis with an overview of the applicable environmental
4 review criteria. For all development on the subject property, PCC 33.430.250(E)
5 requires petitioner to demonstrate that:

6 “1. Proposed development minimizes the loss of resources and
7 functional values, consistent with allowing those uses
8 generally permitted or allowed in the base zone without a land
9 use review;

10 “2. Proposed development locations, designs, and construction
11 methods are less detrimental to identified resources and
12 functional values than other practicable and significantly
13 different alternatives; [and]

14 “3. There will be no significant detrimental impact on resources
15 and functional values in areas designated to be left
16 undisturbed[.]”

17 For public safety facilities, rights-of-way, driveways, walkways, outfalls,
18 and utilities, PCC 33.430.250(A)(1) requires petitioner to demonstrate that:

19 “a. Proposed development locations, designs, and construction
20 methods have the least significant detrimental impact to
21 identified resources and functional values of other practicable
22 and significantly different alternatives including alternatives
23 outside the resource area of the environmental zone; [and]

24 “b. There will be no significant detrimental impact on resources
25 and functional values in areas designated to be left
26 undisturbed[.]”

1 In addition, with respect to proposed “[r]ights-of-way, driveways, walkways,
2 outfalls, and utilities[,]” petitioner must demonstrate that “[t]here will be no
3 significant detrimental impact on water bodies for the migration, rearing, feeding,
4 or spawning of fish.” PCC 33.430.250(A)(3)(b).

5 The Skyline West Conservation Plan describes the natural resources and
6 functional values on the site:

7 “The site’s steep, upper basin location provides an important
8 biological link to downstream land and water resources. The site
9 also serves as a migratory link for mammals, birds and herptiles
10 along and across the ridgetop.

11 “* * * * *

12 “Though not inhabited by fish, the site’s creeks do exert a significant
13 influence on downstream water quality and fish production.
14 Bronson Creek feeds into the Tualatin river system, which supports
15 a variety of fish, including state-listed sensitive species * * *.”
16 Record 7.

17 Identified resources include “forest, wildlife habitat, sensitive fauna,
18 intermittent creeks and creek headwaters, palustrine wetlands, ground water, and
19 open space.” Record 6. Functional values on the subject property include “food,
20 water, cover, and territory for wildlife; groundwater recharge and discharge;
21 slope stabilization, sediment, and erosion control, microclimate amelioration; air
22 and water quality protection; and scenic values.” *Id.*

23 The hearings officer denied the application on multiple alternative bases.
24 The hearings officer determined that petitioner failed to demonstrate that the six

1 approval criteria quoted above were satisfied: PCC 33.430.250(A)(1)(a),
2 (A)(1)(b), (A)(3)(b), (E)(1), (E)(2), (E)(3).²

3 **B. Assignments of Error**

4 Petitioner raises three assignments of error. The first two assignments of
5 error challenge the hearings officer's conclusion that (A)(1)(a) and (E)(2) were
6 not satisfied. In the first assignment of error, petitioner argues that the hearings
7 officer misconstrued (A)(1)(a) and (E)(2) by comparing preferred alternative D-
8 1 with impacts of alternatives that petitioner argues the hearings officer found
9 impracticable. In the second assignment of error, petitioner argues that the
10 hearings officer erred in denying the proposal without finding that the proposed
11 development will result in significant detrimental impacts to identified resources
12 and functional values. In the third assignment of error, petitioner argues that the
13 hearings officer erred in finding petitioner failed to demonstrate that the proposed
14 development would not result in significant detrimental impacts on resources and
15 functional values in areas designed to be left undisturbed, as required by
16 (A)(1)(b) and (E)(3).

17 The city responds that petitioner failed to challenge the hearings officer's
18 conclusions that petitioner failed to satisfy (A)(3)(b) and (E)(1). We "will affirm
19 a decision denying an application as long as there is one valid basis for denial."

² We refer to those criteria in PCC 33.430.250 by their subsection designations.

1 *Hood River Valley Parks and Recreation District v. Hood River County*, 67 Or
2 LUBA 314, 328 (2013). We “must affirm a decision denying a permit
3 application, where the petitioner at LUBA fails to challenge one of several
4 independent bases for denial.” *Tri-River Investment Co. v. Clatsop County*, 37 Or
5 LUBA 195, 210 (1999), *aff’d*, 165 Or App 315, 995 P2d 598 (2001).

6 **C. Unchallenged Alternative Basis for Denial Under (A)(3)(b)**

7 Under (A)(1)(b) petitioner must demonstrate that “[t]here will be no
8 significant detrimental impact on resources and functional values in areas
9 designated to be left undisturbed.” The hearings officer concluded that petitioner
10 had not satisfied (A)(1)(b). The hearings officer’s findings state, in part:

11 “The project staging area will be located within the proposed
12 driveway alignment and future parking areas. As shown on the
13 applicants’ Construction Management Plan (Exhibit C.2) and in
14 their July 17, 2017 revised Environmental Review narrative (Exhibit
15 A.2), a 12-foot wide temporary access corridor will provide
16 vehicular access for construction equipment and material delivery
17 trucks. Construction equipment will be isolated along the proposed
18 driveway and allowed to park in the future guest parking area. The
19 material staging area will be immediately adjacent to the future
20 residence and garage.

21 “To mitigate and filter suspended sediment from runoff before
22 leaving the site, straw wattles will be placed along the southern edge
23 of the proposed driveway and guest parking areas. Additionally,
24 sediment fencing will be placed in specific areas along the down
25 slope perimeter of the disturbance limits. Straw wattles and bio bags
26 will be used in the roadside conveyance ditch near the construction
27 entrance to mitigate the transportation of sediment downstream
28 during construction. Likewise, permanent rock outfall protection
29 will be located at the inlet and outlet of the driveway culvert. The

1 new storm outfall from the site will share the rock pad at the
2 driveway culvert outfall.

3 “* * * * *

4 “[Portland Bureau of Environmental Services (BES)] reviewed the
5 applicants’ stormwater materials and determined that additional
6 information is required from the applicants to show approvable
7 stormwater management facilities and disturbance limits for this
8 project. BES argued (Exhibit H-35) that:

9 “(1) The applicants’ proposal to discharge excess runoff from the
10 greenroof to disconnected downspouts and splash blocks does
11 not comply with the stormwater management manual
12 (‘SWMM’), due to the slope of the site and the amount of
13 greenroof area; and

14 “(2) The proposed pervious pavement does not comply with the
15 SWMM, due to the slopes on the site and low infiltration
16 rates.” Record 36.

17 The hearings officer concluded that he had no authority to overturn BES’s
18 conclusion that the proposed development would not meet the stormwater
19 management standards. Record 37.

20 Under (A)(3)(b) petitioner must demonstrate that “[t]here will be no
21 significant detrimental impact on water bodies for the migration, rearing, feeding,
22 or spawning of fish.” The hearings officer concluded that petitioner had not
23 satisfied (A)(3)(b). The hearings officer’s findings state, in part:

24 “There are no water bodies within or near the development area. The
25 proposed construction management measures will prevent
26 detrimental erosion and sediment downstream from the project site
27 due to construction activities. However, the applicants have not
28 demonstrated they have met the approval criteria of A.1.b. ‘There
29 will be no significant detrimental impact on resources and functional

1 values in areas designated to be left undisturbed.’ The Stormwater
2 Management Plan provided by the applicants does not contain
3 sufficient information to determine that there will be no significant
4 detrimental impact on downstream water bodies caused by increased
5 stormwater runoff. *Therefore, this criterion is not met.*” Record 39
6 (emphasis in original).

7 Petitioner replies that, by challenging the findings under (A)(1)(b),
8 petitioner effectively challenged the findings under (A)(3)(b). Petitioner argues
9 that the hearings officer did not make any “independent findings” of
10 noncompliance under (A)(3)(b), but “merely found” that (A)(3)(b) was not
11 satisfied because (A)(1)(b) was not satisfied. Petitioner’s Reply Brief 2. We
12 disagree. In concluding that (A)(3)(b) was not satisfied, the hearings officer did
13 not solely rely on the findings and conclusion that (A)(1)(b) was not satisfied.
14 Instead, the hearings officer adopted independent findings and applied a different
15 substantive standard.

16 (A)(1)(b) requires an applicant to establish that the proposed development
17 will not result in significant detrimental impacts on resources and functional
18 values in areas of the subject property designated to be left undisturbed.
19 Differently, (A)(3)(b) requires the applicant to establish that the proposed
20 development will not result in significant detrimental impacts on water bodies for
21 the migration, rearing, feeding, or spawning of fish. It is undisputed that the
22 subject property does not contain any fish-bearing water bodies. However, the
23 property contains headwaters for Bronson Creek, which eventually meets the
24 Tualatin River, which is a fish-bearing water body. Record 7. The hearings

1 officer found that petitioner’s evidence did not provide sufficient information to
2 determine that (A)(3)(b) was satisfied. Specifically, petitioner’s proposed
3 development would result in an increase in impervious surfaces, the dwelling and
4 the driveway, and thus increase stormwater runoff. The hearings officer found
5 that petitioner’s stormwater plan did not demonstrate no detrimental impacts to
6 downstream fish-bearing waterbodies due to increased stormwater runoff. Even
7 though the hearings officer’s conclusion that (A)(3)(b) was not met was based on
8 the same evidence supporting the hearings officer’s conclusion that (A)(1)(b) was
9 not met, petitioner was still required to assign error to the alternative basis for
10 denial because those two subsections constitute separate approval criteria and the
11 hearings officer adopted separate findings for each criterion.

12 In his arguments under (A)(1)(b), petitioner argues that the hearings officer
13 failed to find that the development would result in *significant* detrimental impacts
14 to identified resources and functional values. Assuming for the sake of argument
15 that petitioner’s argument applies equally under (A)(3)(b), we reject it. The city
16 responds that the hearings officer implicitly found that the development will
17 result in significant detrimental impacts. In our view, the hearings officer’s denial
18 need not rely on an implicit finding. Instead, the issue turns on the burden of
19 proof.

20 Petitioner bears the burden of proof to establish that all applicable
21 environmental review approval criteria are satisfied. *See* PCC 33.430.250 (“An
22 environmental review application will be approved if the review body finds that

1 the applicant has shown that all of the applicable approval criteria are met.”). The
2 PCC does not contain a presumption of no significant detrimental impacts.
3 Instead, environmental review is triggered by certain development disturbance
4 thresholds. The environmental review framework includes an implicit
5 assumption that development under thresholds that do not require environmental
6 review will not result in significant detrimental environmental impacts—such as
7 total disturbance of less than 5,000 square feet or stormwater outfalls of four-inch
8 diameters or less. Conversely, development that exceeds those thresholds are
9 presumed to result in significant detrimental impacts to identified resources. It is
10 the applicant’s burden in environmental review to establish that the development
11 will *not* result in significant detrimental impacts. That is, the hearings officer was
12 not required to affirmatively find that the proposed development under
13 environmental review would result in significant detrimental impacts before
14 denying petitioner’s environmental review application. Rather, (A)(3)(b) is
15 phrased so that petitioner must positively prove a negative.

16 The hearings officer found that petitioner’s evidence, including
17 petitioner’s stormwater management plan, did not demonstrate that increased
18 stormwater runoff from the development would not result in significant
19 detrimental impacts downstream of the subject property; thus (A)(3)(b) was not
20 satisfied. Petitioner did not challenge that valid, independent basis for denial.
21 Accordingly, we must affirm the denial.

1 **D. Unchallenged Alternative Basis for Denial Under (E)(1)**

2 Under (E)(1) petitioner must demonstrate that the “[p]roposed
3 development minimizes the loss of resources and functional values, consistent
4 with allowing those uses generally permitted or allowed in the base zone without
5 a land use review.” The hearings officer’s original decision found that (E)(1) was
6 satisfied. After the notice of intent to appeal was filed and served in this appeal,
7 the city withdrew its decision for reconsideration. Record 4. The city attorney
8 requested clarification on the hearings officer’s decision on (E)(1) based on other
9 conflicting findings. The hearings officer reopened the record at petitioner’s
10 request to disclose the full extent of the communication between the hearings
11 officer and the city attorney and allowed the other parties an opportunity to
12 comment on the city attorney’s and hearings officer’s communications. During
13 that open record period, petitioner argued that the hearings officer should find
14 that (E)(1) is met and find that (A)(1)(a) and (E)(2) are met. The hearings officer
15 disagreed with petitioner and revised the findings, concluding that none of those
16 criteria were met. The city’s final decision on reconsideration found that (E)(1)
17 was not satisfied. Record 4.

18 Petitioner filed an amended notice of intent to appeal challenging the city’s
19 decision on reconsideration. In his petition for review, petitioner did not
20 challenge the hearings officer’s conclusion that (E)(1) was not met, even though
21 that issue was specifically disputed during the city proceeding on reconsideration.
22 In his reply brief, petitioner did not reply to the city’s argument that petitioner

1 had failed to assign error to the hearings officer’s conclusion that (E)(1) was not
2 met. At oral argument, petitioner argued for the first time that the hearings
3 officer’s findings regarding subsection (E)(1) respond to the criterion in
4 subsection (E)(2), which petitioner did challenge in his petition for review. We
5 understand petitioner to argue that by assigning error to the hearings officer’s
6 conclusion that (E)(2) was not met, petitioner effectively challenged the hearings
7 officer’s conclusion that (E)(1) was not met.

8 LUBA “shall not consider issues raised for the first time at oral argument.”
9 OAR 661-010-0040(1). While this rule is distinct from waiver of appealable
10 issues, the same policy pertains to both rules. “The requirement that an issue be
11 raised in the briefs prevents LUBA from deciding cases based on issues that the
12 parties have not had an adequate opportunity to respond to.” *Lowery v. City of*
13 *Keizer*, 48 Or LUBA 568, 585 (2005); *Ward v. City of Lake Oswego*, 21 Or
14 LUBA 470, 482 (1991) (consideration of issue raised for first time at oral
15 argument would violate purpose of LUBA’s rules to provide reasonable time to
16 prepare and submit case and provide full and fair hearing); *see also* ORS
17 197.835(3), ORS 197.195(3), ORS 197.763(1) (limiting LUBA’s scope of review
18 to issues raised in the local proceeding with sufficient detail and at a time in the
19 proceeding to afford the parties an adequate opportunity to respond).

20 (E)(1) is an independent approval criterion, an independent basis for
21 denial, and a distinct issue. Under (E)(1) petitioner must demonstrate that the
22 “[p]roposed development *minimizes* the loss of resources and functional values,

1 consistent with allowing those uses generally permitted or allowed in the base
2 zone without a land use review.” (Emphasis added.) While permitted uses may
3 result in the loss of environmental resources and functional values, petitioner
4 must design the development to minimize such losses. Under (E)(2) petitioner
5 must demonstrate that the “[p]roposed development locations, designs, and
6 construction methods are *less detrimental* to identified resources and functional
7 values than other practicable and significantly different alternatives.” (Emphasis
8 added.) While development may be detrimental to environmental resources and
9 functional values, petitioner must demonstrate that the selected design is less
10 detrimental than other practicable and significantly different alternatives.

11 (E)(1) and (E)(2) address related but distinct concerns: (1) consideration
12 of alternatives and selection of a less detrimental design and (2) minimization of
13 loss of resources and functional values. Identifying and selecting a design with
14 less detrimental impacts reduces detrimental impacts but does not necessarily
15 minimize environmental losses. Two examples help to demonstrate this
16 difference. Design A disturbs 300 square feet of identified habitat and design B
17 disturbs 500 square feet of identified habitat. Design A is *less detrimental* than
18 design B. However, design A may be modified to disturb only 100 square feet of
19 habitat to *minimize* the loss. Design C removes 30 trees and design D removes 20
20 trees. Design D is *less detrimental* than design C. However, design D could be
21 modified to remove 15 trees to *minimize* the loss.

22 With respect to (E)(1), the hearings officer reasoned:

1 “As discussed in the findings for the Zoning Code Approval Criteria
2 for 33.430.250.A.1.a and E.2 below, the Hearings Officer finds that
3 the applicant failed to sustain its burden of proving that the proposed
4 development minimizes the loss of resources and functional values
5 of the Environmental Conservation Zone, when compared to other
6 practicable alternatives. *Therefore, this criterion is not met.*” Record
7 27 (emphasis in original).

8 The hearings officer’s reference to the findings under (E)(2) and the phrase
9 “practicable alternatives” shows that he relied, in part, on his analysis under
10 (E)(2) in which the hearings officer considered design alternatives with less
11 detrimental impacts than petitioner’s preferred alternative D-1. However, the
12 quoted finding demonstrates that hearings officer also applied the (E)(1) standard
13 of minimizing loss of resources and functional values. Petitioner did not
14 challenge the hearings officer’s conclusion that (E)(1) was not met. Accordingly,
15 we must affirm the denial.

16 We affirm the hearings officer’s decision because petitioner did not
17 challenge all the alternative, independent bases for denial. We do not express any
18 opinion on the assignments of error that petitioner did raise, because even if
19 sustained, those assignment of error would provide no basis for reversal or
20 remand of the challenged denial.

21 **CROSS-PETITION FOR REVIEW**

22 Intervenors filed a cross-petition for review with three contingent cross-
23 assignment of error and seeking remand only if the Board remands on
24 assignments of error raised in petitioner’s petition for review. *See* OAR 661-010-

1 0030(7).³ We affirm the challenged decision. Accordingly, we do not address the
2 contingent cross-assignments of error in the cross-petition for review.

3 The city's decision is affirmed.

³ OAR 661-010-0030(7) provides, in part:

“Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such.”