

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 HOLLIS LUNDEEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WALDPORT,
10 *Respondent,*

11
12 and

13
14 TIDEWATER DEVELOPMENT, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-046

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Waldport.

23
24 Hollis Lundeen, Waldport, filed the petition for review and argued on her
25 own behalf.

26
27 No appearance by City of Waldport.

28
29 Dennis L. Bartoldus, Newport, filed the response brief and argued on
30 behalf of intervenor-respondent.

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

34
35 RUDD, Board Member, did not participate in the decision.

36
37 REMANDED

10/24/2019

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 city council decision that approves a preliminary plan for a planned development.

FACTS

The subject property is 7.75 acres, vacant, located within the City of Waldport (city), and is zoned Residential R-1 for single-family dwellings. Surrounding land uses include single-family residential development and some undeveloped, residential-zoned property. Some of the subject property is comprised of steep slopes but much of the property slopes gently to the west. The proposed lots are primarily located on the more gently sloping areas. Most of the property that has steeper slopes is proposed for open space on a tract adjacent to the north and east boundaries of the planned development. A steep ravine runs along the north and a portion of the east boundaries.

Access to the subject property is proposed via an extension of Norwood Drive, an existing public right of way that currently dead ends before it reaches the property. Norwood Drive serves multiple existing residences. The proposed development would extend Norwood Drive across the open space tract and steep ravine and into a circular street system that would provide access to the new lots.

On March 8, 2018, the city council granted conditional preliminary plan approval to intervenor-respondent Tidewater Development, LLC (intervenor) for a 34-lot single-family residential planned development called Vista View

1 Planned Development (Vista View). The city council found that the proposed
2 development satisfies applicable Waldport Development Code (WDC)
3 provisions. The city council found that the subject property can be served by city
4 water and sewer. The city council imposed a condition of approval that requires
5 intervenor to coordinate with the city public works department on the design and
6 construction of water, sewer, and storm drainage facilities and submit final
7 engineering plans for review and approval prior to construction.

8 Petitioner appealed that approval, and we remanded for the city to make
9 further findings on WDC 16.60.030(C)(4), which requires that, during the
10 preliminary plan stage:

11 “In considering a development proposal, the planning commission
12 shall seek to determine that the development will not overload the
13 streets outside the planned development area; and that the proposed
14 utility and drainage facilities are adequate for the population
15 densities and type of development proposed and will not create a
16 drainage or pollution problem outside the planned area.”¹

¹ Planned development approval is a two-stage process under the WDC. A preliminary plan outlines the proposed development and is subject to a public hearing before the planning commission, which may reject the plan, approve it as submitted, or approve it with conditions. WDC 16.60.030; WDC 16.108.020(C). The planning commission’s decision may be appealed to the city council. WDC 16.108.020(C)(5); WDC 16.108.020(H). After preliminary plan approval, the applicant proceeds with more detailed planning and must submit a final plan to the city planner with certifications and proof of compliance with conditions imposed by the preliminary plan approval. If the city planner is satisfied that the certification requirements and conditions are met, then the final plan is reviewed by the planning commission, which will approve, disapprove, or postpone a decision to acquire further information. WDC 16.60.040(A).

1 We agreed with petitioner that the city’s findings failed to explain whether the
2 storm drainage facilities are adequate to serve the proposed development and that
3 the proposed development will not create a drainage or pollution problem outside
4 the planned area. *Lundeen v. City of Waldport*, ___ Or LUBA ___ (LUBA No
5 2018-030, Aug 20, 2018) (*Lundeen I*) (slip op at 18–19).

6 On January 28, 2019, the planning commission held a remand hearing and
7 accepted evidence and argument, including intervenor’s Stormwater Drainage
8 and Downstream Analysis, prepared by a professional engineer at Ironmark
9 Surveying and Engineering (Ironmark Report). Record 349–70. The planning
10 commission decided that the development will not create a drainage or pollution
11 problem outside the planned area and approved the preliminary plan. Petitioner
12 appealed the planning commission’s decision to the city council, which held a
13 public hearing and again approved the preliminary plan. This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 In the first assignment of error, petitioner challenges the city’s findings of
16 compliance with WDC 16.60.030(C)(4), quoted above. Petitioner makes a
17 variety of interwoven and overlapping arguments under the first assignment of
18 error. Petitioner raises several arguments that are outside the narrow scope of our
19 remand in *Lundeen I*. Those arguments are not properly before us in this appeal
20 and, thus, we do not address them further. As we understand them, the
21 petitioner’s drainage and pollution arguments fall into the following categories:

1 sewage pollution, highway storm water overflow, impervious area runoff and
2 pollution, and construction pollution.

3 **A. Sewage Pollution**

4 Petitioner asserts that sewage from the development will flow into an
5 existing stream and then into Alsea Bay, creating a pollution problem outside the
6 planned area. The challenged decision states that Vista View will be connected
7 to city sewer and water systems and no septic systems are planned as part of the
8 planned development. Record 8–9. Petitioner does not dispute those findings or
9 point to any evidence in the record supporting her factual assertions regarding
10 sewage pollution. We reject petitioner’s argument regarding sewage pollution.

11 **B. Highway Storm Water Overflow**

12 The subject property is uphill from Highway 101. We understand
13 petitioner to argue that the development will cause storm water drainage overflow
14 onto Highway 101 because the existing storm water infrastructure is inadequate
15 to handle increased storm water drainage from the development.

16 The city found that the Ironmark Report demonstrates that “the existing 30
17 inch in diameter culvert running beneath Highway 101 is sufficiently sized to
18 accommodate the storm water runoff of the [post] developed condition of the
19 entire contributing storm water basin * * *. In the event the culvert ever became
20 blocked, the storm water would flow north and be channeled by one of several
21 other ditch inlets and culverts beneath Highway 101 that drain to the bay.” Record
22 7–8, 349. The city’s findings also explain that the Oregon Department of

1 Transportation (ODOT) “stated that the proposed development should not
2 increase drainage to ODOT highway right-of-way.” Record 8, 428. Petitioner
3 does not challenge those findings. Accordingly, we reject petitioner’s argument
4 regarding Highway 101 storm water overflow.

5 **C. Impervious Area**

6 Petitioner argues, generally, that the combination of steep slopes and
7 impervious surfaces created by the development will increase storm water runoff
8 and will create a drainage problem outside the planned area. Petition for Review
9 25. Petitioner argues that “[g]round that is currently classified as pervious will
10 become impervious * * *, therefore increasing velocity flow.” Petition for
11 Review 47.

12 The city found that drainage facilities are adequate to serve the
13 development in its post-developed condition, which includes impervious
14 surfaces. Record 8. Petitioner does not challenge that finding or explain why the
15 city was not entitled to rely on the hydrological analysis in the Ironmark Report
16 to support that finding. Petitioner’s general argument regarding increased runoff
17 due to impervious surfaces provides no basis for reversal or remand.

18 **D. Construction Pollution**

19 Petitioner argues that the city’s findings fail to address construction and
20 development activities “such as excavation, grading, concrete, and asphalt.”
21 Petition for Review 46. Petitioner specifically argues that 300 feet of newly
22 constructed road that will provide the extension of Norwood Drive will be

1 constructed on a steep slope crossing the ravine and will result in drainage or
2 pollution problems outside the planned area. Petition for Review 31, 42.
3 Petitioner argues that intervenor’s evidence and the city’s findings fail to address
4 construction pollution and new road runoff related to the Norwood Drive
5 extension.

6 Intervenor responds that the extension of Norwood Drive is not part of the
7 planned development “as it is a public street not owned by the applicant.”
8 Intervenor’s Response Brief 13. The Norwood Drive extension is proposed as
9 part of the approved development and provides access to the proposed
10 development. Intervenor has not explained why WDC 16.60.030(C)(4) does not
11 apply to development activities that are necessary for the proposed development
12 and located within a public right of way. It is reasonable to presume, as petitioner
13 argues, that new road construction in an area of steep slopes may have an impact
14 on drainage and pollution outside the planned area. The city made no specific
15 findings with respect to that matter, and intervenor does not direct us to any
16 evidence that addresses the effect of road construction for the Norwood Drive
17 extension on drainage and pollution outside the planned area. Remand is
18 necessary for the city to make that determination.

19 With respect to construction and road runoff, intervenor generally
20 responds that intervenor must comply with Department of Environmental Quality
21 (DEQ) standards to control runoff during construction and city street standards.
22 Intervenor argues that the city “reasonably determined that offsite pollution

1 would not be a problem” and that the city is not required to respond in its findings
2 to “any number of hypothetical scenarios posed by the petitioner.” Intervenor’s
3 Response Brief 13. In so arguing, intervenor appears to rely on the city’s finding
4 that “[d]uring construction the applicant will need to comply with applicable
5 construction standards that require protection of onsite and offsite property. Any
6 special protections can be established during the engineer’s review of the plans.”
7 Record 8.

8 The city found, generally, that “the development has been designed to
9 avoid development on steep slopes,” which will reduce soil disturbance and “the
10 possibility of pollution.” Record 9. The city also found that the Ironmark Report
11 “demonstrates that there will be adequate natural drainage to eliminate or control
12 any sediment and if the engineers determine that any additional filtering is
13 necessary it can be accomplished as part of the engineering review.” *Id.* In
14 *Lundeen I*, we explained that the city must determine compliance with WDC
15 16.60.030(C)(4) during the preliminary plan stage. ___ Or LUBA at ___ (slip op
16 at 18). The city’s findings and Ironmark Report are limited to “post-developed”
17 conditions. The city’s findings are inadequate to address potential drainage and
18 pollution problems caused by construction activities. *See Heiller v. Josephine*
19 *County*, 23 Or LUBA 551, 556 (1992) (adequate findings set out the applicable
20 approval criteria and explain the facts relied upon to reach the conclusion whether
21 the applicable criteria are satisfied); *Space Age Fuel, Inc. v. Umatilla County*, 72
22 Or LUBA 92 (2015) (findings must address and respond to specific issues

1 relevant to compliance with applicable approval standards that were raised in the
2 proceedings below).

3 Intervenor does not argue that WDC 16.60.030(C)(4) does not regulate
4 construction activities. WDC 16.60.030(C)(4), requires the city to “seek to
5 determine that the development * * * will not create a drainage or pollution
6 problem outside the planned area.” Construction activities are part of “the
7 development.” *See* WDC 16.04.030 (“‘Development’ means any man-made
8 change or improvement involving buildings, structures, mining, dredging, filling,
9 grading, paving, excavation, drilling, partitioning or subdividing.”). We do not
10 think that the required city determination under that WDC 16.60.030(C)(4) is
11 limited to post-development impacts.

12 The city’s decision does not cite any specific DEQ construction discharge
13 and erosion control standards or city road construction and drainage standards. It
14 may be that compliance with other standards could be a basis for the city to
15 conclude that WDC 16.60.030(C)(4) will be satisfied. The problem is that the
16 city made no such findings. We agree with petitioner that the city’s findings
17 supporting its conclusion that WDC 16.60.030(C)(4) is satisfied are inadequate
18 with respect to drainage or pollution problems outside the planned area caused
19 by construction activities, including grading and paving for road construction.
20 Remand is necessary for the city to determine whether construction activities will
21 create a drainage or pollution problem outside the planned area.

22 The first assignment of error is sustained, in part.

1 **SECOND ASSIGNMENT OF ERROR**

2 In the second assignment of error, petitioner challenges the city’s notices
3 of hearings. Petitioner argues that the notice for the planning commission hearing
4 erroneously stated that the only issue on remand was storm drainage, and did not
5 include the issue of pollution, which was also an issue on remand pursuant to
6 LUBA’s final opinion and order in *Lundeen I*. The planning commission hearing
7 notice explained that “LUBA generally upheld the decision of the City but
8 remanded the case back to the City on one issue, that being to further address the
9 issue of storm drainage.” Record 429.

10 Similarly, petitioner argues that the original notice for the city council
11 hearing, dated February 19, 2019, included a misstatement that the only issue on
12 remand was storm drainage, stated an incorrect day of the week for the date of
13 the public hearing, and erroneously instructed testimony and correspondence
14 related to the appeal be directed to the planning commission. Specifically, the
15 notice of the city council hearing referred to “Monday, Mach [*sic*] 14, 2019.”
16 Supplemental Record (original notice of city council public hearing). The city
17 amended the notice to state the correct day and date and resent it on February 21,
18 2019. Record 302–303 (amended notice of city council public hearing)). The
19 hearing was held on Thursday, March 14, 2019. Petitioner pointed out notice
20 errors in written testimony submitted to the city council. Record 299.

21 Petitioner argues that the hearing notice errors affected her ability to attend
22 the city council hearing, along with “unknown” others who might have otherwise

1 participated in the local proceedings.² Petitioner contends that it is not possible
2 to identify interested individuals who did not attend due to the notice errors.
3 Petition for Review 53.

4 We understand petitioner to allege that the city committed procedural
5 errors in sending inaccurate notices of hearings. LUBA will remand a decision
6 based on procedural error if the board finds that the local government “[f]ailed to
7 follow the procedures applicable to the matter before it in a manner that
8 prejudiced the substantial rights of the petitioner.” ORS 197.835(9)(a)(B)
9 (emphasis added). Intervenor responds, and we agree, that petitioner has not
10 adequately alleged that her substantial rights were prejudiced by the errors in the
11 city’s notices. *See Deumling v. City of Salem*, 76 Or LUBA 99, 125 (2017)
12 (petitioner fails to allege a basis for reversal or remand when petitioner fails to
13 allege the procedural error prejudiced petitioner’s substantial rights).

14 Moreover, the procedural history of this case does not establish that
15 petitioner’s substantial rights were prejudiced. Petitioner attended the planning
16 commission hearing and testified regarding storm drainage and pollution. The

² Petitioner argues: “Petitioner, with the unknown possibility of others, who were confused by this error, or not able to attend because they thought the hearing was on Monday would have been able to attend the hearing had it been rescheduled and correctly re advertised * * *,” and “[t]he city negated the possibility of other public citizens [who] were not able to attend due to the error of date and days of the week, and which hearing body to respond to.” Petition for Review 51–52.

1 planning commission did not restrict her testimony to storm drainage. Petitioner
2 appears to contend that she did not attend the city council meeting because she
3 thought that it was on a Monday. See n 2. Petitioner does not explain how the
4 fact that she did not attend the city council meeting prejudiced her substantial
5 rights. Petitioner submitted written testimony that was accepted by the city
6 council, the final decision maker. The city council did not restrict or reject any
7 portion of petitioner's written testimony. The city's notices set forth the
8 applicable criteria and provide city contact information for inquiries regarding
9 the matter. We conclude that the notice errors incorrectly identifying the day of
10 the week and hearing body for written submissions did not prejudice petitioner's
11 substantial rights and provide no basis for reversal or remand.

12 Petitioner also speculates that unidentified other members of the public did
13 not participate in the local proceedings due to the errors in the notices of hearings.
14 See n 2. However, petitioner does not point to any evidence that any other
15 individual wished to participate but did not participate in the local proceedings
16 due to the errors in the city's notices. Petitioner has not established any prejudice
17 to the rights of individuals who are not a party to this appeal. More importantly,
18 intervenor responds that petitioner's arguments based on her assertion of
19 prejudice with respect to the rights of other individuals do not provide a basis for
20 reversal or remand. We agree. Petitioners cannot allege procedural error on
21 behalf of others. ORS 197.835(9)(a)(B); *Fraley v. Deschutes County*, 32 Or
22 LUBA 27, 38, *aff'd*, 145 Or App 484, 930 P2d 902 (1996), *rev den*, 325 Or 45

1 (1997); *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992). Petitioner's
2 second assignment of error provides no basis for reversal or remand.

3 The second assignment of error is denied.

4 The city's decision is remanded.