IN THE COURT OF APPEALS OF THE
STATE OF OREGON

ROCKBRIDGE CAPITAL,
*Petitioner,*

*v.*

CITY OF EUGENE
and Valley Hospitality, LLC,
*Respondents.*

Land Use Board of Appeals
2016104; A165111

Argued and submitted July 25, 2017.

E. Michael Connors argued the cause for petitioner. With him on the brief was Hathaway Koback Connors LLP.

Bill Kloos argued the cause for respondent Valley Hospitality, LLC. With him on the brief was Law Office of Bill Kloos, PC.

Emily N. Jerome waived appearance for respondent City of Eugene.

Before Egan, Presiding Judge, and DeHoog, Judge, and James, Judge.

EGAN, P. J.

Affirmed.

**EGAN, P. J.**

Petitioner seeks review of a final order of the Land Use Board of Appeals (LUBA) that remands to the City of Eugene (the city) its decision approving a site plan for a hotel. Petitioner raises three assignments of error. We reject petitioner's third assignment of error without discussion and write to address only the first and second assignments of error. On review to determine whether LUBA's order is "unlawful in substance," ORS 197.850(9)(a), we affirm.

This case relates to the city planning commission's approval of a site plan for the construction of a hotel near Valley River Center in Eugene. The relevant facts are primarily procedural. Valley Hospitality LLC (Valley) applied for site plan review and other approvals to construct the proposed 101-room hotel on its property. That property is 2.2 acres in size, and is located adjacent to petitioner's property. After holding a hearing on the application, a hearings officer denied it. Valley appealed to the city planning commission, which held a hearing and then approved the application. Petitioner then appealed to LUBA which rejected a number of petitioner's arguments but sustained one assignment of error and remanded the case to the city.

On review, in its first assignment of error, petitioner contends that LUBA erred when it failed to reverse the planning commission's decision and, instead, remanded the decision to the city. Our consideration of that issue requires some additional discussion of the proceedings before the city and LUBA.

Two of petitioner's assignments of error before LUBA related to the street tree planting requirements under Eugene Code (EC) 7.280(1), which 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 the development as well as on new streets within the development site."

During the proceedings before the hearings officer Valley argued that, because its application did not propose the "creation of a street," EC 7.280 did not apply to the application. The hearings officer disagreed with Valley and, instead, concluded that existing streets were subject to the street tree standards of EC 7.280. That is, contrary to Valley's contention, the hearings officer concluded that EC 7.280 applied to the application. Furthermore, the hearings officer determined that Valley had not satisfied the requirements of EC 7.280. Valley appealed the hearings officer's decision to the planning commission. On appeal, the planning commission concluded that, contrary to the hearings officer's decision, because the application did not propose the creation of new streets, EC 7.280 did not apply to Valley's application. As noted, the planning commission approved Valley's application.

Before LUBA, petitioner argued that the planning commission had exceeded its authority under EC 9.7655(3). Under that provision, which governs appeals of a hearings officer's decision to the planning commission, the "appeal shall include a statement of issues on appeal, be based on the record, and *be limited to the issues raised in the record that are set out in the filed statement of issues*." (Emphasis added.) Thus, generally, for an issue to be properly before the planning commission on appeal from the decision of a hearings officer, the issue must have been raised in the filed statement of issues.

LUBA agreed with petitioner that the planning commission had exceeded its authority when it decided that the hearings officer erred in concluding that EC 7.280 applied. In its order, LUBA explained that, with respect to the street tree planting standards, Valley took the position in its filed statement of issues that the requirements of EC 7.280 were satisfied or could be satisfied through a condition of approval; Valley did not, however, argue to the planning commission that EC 7.280 did not apply. Accordingly, LUBA agreed with petitioner that the planning commission improperly considered an issue—whether EC 7.280 applied

at all—that was not raised in the statement of issues and sustained petitioner's assignment of error.[1] In light of that conclusion, LUBA explained that, on remand, "the planning commission must determine whether, consistent with [Valley's] filed appeal statement that took the position that evidence in the record demonstrates that EC 7.280 is met, the hearings officer erred in determining that there is not sufficient evidence in the record to demonstrate that EC 7.280 is met." In other words, with respect to the street tree planting standards, LUBA remanded for the planning commission to consider the issue that Valley had actually raised in its filed statement of issues.

As noted, on review, petitioner contends that, in light of its conclusion that the planning commission had exceeded its authority under EC 9.7655(3) by considering an issue that was not raised by Valley in its filed statement of issues, LUBA was required to reverse (rather than remand) the planning commission's decision approving Valley's application. The appropriate disposition of the city's land use decision by LUBA is a legal question. *See* *Willamette Oaks, LLC v. City of Eugene*, 248 Or App 212, 226, 273 P3d 219 (2012).

Under OAR 661-010-0071(1), LUBA

> "shall reverse a land use decision when:
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> "(a) The governing body exceeded its jurisdiction;
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> "(b) The decision is unconstitutional; or
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> "(c) The decision violates a provision of applicable law and is prohibited as a matter of law."

OAR 661-010-0071(2) provides that LUBA

> "shall remand a land use decision for further proceedings when:
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> "(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);

[1] Before LUBA, petitioner also contended that the planning commission improperly concluded that EC 7.280 applies only to applications that propose creation of a new street, and hence, was inapplicable to Valley's application. In light of its conclusion that that issue was not properly before the planning commission, LUBA did not consider that argument.

"(b) The decision is not supported by substantial evidence in the whole record;

"(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s);

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law; or

"(e) All parties stipulate in writing to remand."

Here, petitioner asserts that LUBA's decision to remand, rather than reverse, the planning commission's approval of Valley's application is inconsistent with our decision in *Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd*, 308 Or 191, 777 P2d 1377 (1989).[2] However, we disagree with petitioner's reading of *Smith* and conclude that our reasoning in that case did not preclude LUBA from remanding here.

In *Smith*, the county planning commission had voted to approve a conditional use permit to allow an existing rural residence to be used as a church. 93 Or App at 505. That decision was appealed to the Douglas County Board of Commissioners. The board considered only one of the seven errors raised on appeal and concluded that the planning commission did not err. However, the board also considered an issue that had not been raised in the notice of review and, based on it consideration of that issue, reversed the planning commission's decision and denied the permit.

On appeal, LUBA held that the board's consideration of an issue not raised in the notice of review violated a county ordinance that limited the board's review to issues identified in that notice. *Id.* "LUBA also held, however, that

[2] We reject petitioner's contention that LUBA improperly remanded the case to the planning commission because Valley did not ask for a remand. We note that it was petitioner, not Valley, that appealed the planning commission's decision to LUBA; Valley's position was that the decision should be affirmed. In any event, LUBA's decision to reverse or remand is not limited to the disposition requested by the parties, but is based on "what the nature of the assigned and established error demands." *McKay Creek Valley Assn. v. Washington County*, 114 Or App 95, 99, 834 P2d 482, *adh'd to as modified on recons*, 116 Or App 299, 841 P2d 651 (1992), *rev den*, 317 Or 396 (1993); *see* OAR 661-010-0071 (setting forth circumstances under which LUBA "shall reverse" or "shall remand"). We agree with Valley that LUBA's ability to grant the relief it deemed proper in light of the nature of the error was not constrained by the disposition requested by the parties.

the Board's error *** was a procedural error, rather than a substantive error, and that, therefore, on remand, the Board could consider [the issue that had not been raised in the notice of review] if adequate notice were provided to the parties." *Id.* at 506. We explained that LUBA erred in that respect:

> "LUBA characterized the Board's action as a failure to follow adopted appeal procedures and, as such, held that it was a procedural error. The propriety of the Board's action, however, does not concern how the Board exercised its authority but, rather, whether the Board had authority to do what it did. In considering the compatibility issue, the Board exceeded its scope of authority as defined in its ordinance and, consequently, acted inconsistently with its land use regulation."

*Id.* at 506-07. Under those circumstances, we held that LUBA "erred in holding that the Board [could] consider the [issue that had not been raised in the notice of the review] on remand." Instead, in light of the county ordinance, the board could not reverse the approval of the permit on that ground. In other words, the board's decision denying the permit on that ground violated a provision of applicable law and was prohibited as a matter of law. *Id.*; *see* OAR 661-010-0071.

The second issue that we addressed in *Smith* was whether LUBA erred in remanding the case for the board to consider "the assignments of error alleged in the opponent's notice of review which were not addressed by the Board in its order denying the permit." *Id.* The petitioner asserted that the case should not have been remanded for the board to consider those issues and that LUBA should have simply reversed the board's decision and directed the board to approve the permit. We rejected the petitioner's argument, holding that LUBA properly remanded the case for the board to consider and dispose of the issues that had been raised in the notice of review but that the board had not considered in its original decision.

Turning back to the circumstances of this case, as in *Smith*, under EC 9.7655(3), the planning commission exceeded its authority when it approved Valley's application based on an issue that Valley had not raised in its filed statement of issues. That is, the planning commission

exceeded its authority when it concluded that the street tree standards did not apply. And, as in *Smith*, LUBA could not remand the case for the planning commission to again consider whether those standards applied. That issue was not properly before the planning commission, and the planning commission could not base its decision on that issue.

However, petitioner is incorrect in its assertion that, in light of *Smith*, LUBA erred in remanding this case to the planning commission. *Smith* does not stand for the proposition that, in all instances where a local decision exceeds the permitted scope of review, LUBA may not remand the case to the local decision-maker. To the contrary, as described above, in *Smith*, we affirmed LUBA's decision to remand the case for the local decision-maker to consider and decide issues that had been properly raised under the local ordinance. Here, too, LUBA remanded for the planning commission to consider the issue—whether Valley could meet the street tree standard—that had been raised in the filed statement of issues and was, therefore, properly before the commission. And, unlike in *Smith*, in which a reversal was proper because the issue in question had never been raised and simply could not be considered by the local decision-maker, here, although there is an issue relating to the street tree standard (the applicability of that standard) that cannot be considered, there remains an issue concerning the same standard that was properly before the planning commission and remains to be addressed.[3] Thus, a remand is proper in this case; the planning commission's failure to decide the case on grounds that were properly before it can be addressed on remand and the planning commission's decision is not prohibited as a matter of law. *See* OAR 661-010-0071. Accordingly, we reject petitioner's contention that LUBA erred in remanding the case to the planning commission.

We turn to petitioner's second assignment of error. In that assignment, petitioner contends that LUBA erred in concluding that Valley had adequately preserved before the

[3] As Valley correctly points out, petitioner does not assert that the proposed hotel use is prohibited as a matter of law or that the planning commission's decision could not be corrected on remand.

hearings officer an argument regarding storm water quality standards. Specifically, in petitioner's view, Valley failed to adequately raise before the hearings officer the issue of whether the storm water quality standards in EC 9.6792 (3)(d)(2) applied to its application.

The Eugene Code provides standards for treating storm water runoff from impervious surfaces. As relevant, under EC 9.6792(3)(d),

> "[f]or development permit applications, stormwater quality facilities shall be selected from the Stormwater Management Manual and shall be based on the following order: infiltration, filtration, off-site stormwater quality management.
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> "1. If selecting a filtration treatment facility, the applicant shall submit a report that demonstrates at least one of the following development site conditions exist:
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> "a. Infiltration rates are less than 2 inches per hour;
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> "b. Bedrock is less than 5 feet below the ground surface;
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> "c. Groundwater elevations are less than 6 feet; or,
>
> "d. Ground surface slopes are greater than 10%.
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> "2. If selecting off-site stormwater quality management by contributing to the public off-site stormwater quality facilities, through payment of a higher stormwater system development charge adopted as part of the City's system development charge methodology, the applicant shall submit a report that demonstrates there is insufficient land area to construct an approved infiltration or filtration facility by setting forth the required size of the smallest infiltration or filtration facility needed for the development's impervious surface area and a site plan demonstrating that an approved infiltration or filtration facility cannot be located on the development site without reducing the size of the proposed development which is otherwise consistent with all other applicable lot and development standards."

Thus, on-site treatment of storm water—"infiltration" and "filtration"—are prioritized over off-site storm water quality management. Furthermore, "[*i*]*f selecting off-site stormwater quality management*," an applicant must submit a report

that demonstrates that neither infiltration nor filtration can be used instead. EC 9.6792(3)(d)(2) (emphasis added). The requirement to submit such a report applies *only* if an applicant selects off-site storm water quality management instead of infiltration or filtration. Where an applicant proposes to manage storm water quality through infiltration or filtration systems, the requirements of EC 9.6792(3)(d)(2) do not apply.

Here, the hearings officer concluded that Valley had failed to submit a report that satisfied EC 9.6792(3)(d)(2) and, thus, that the requirements of EC 9.6792 had not been met. On appeal to the planning commission, Valley asserted that it had proposed to address storm water quality by treating storm water runoff on site and that, therefore, the hearings officer erred in applying EC 9.6792(3)(d)(2) to the application. Although petitioner argued to the planning commission that that issue of whether EC 9.6792(3)(d)(2) applied had not been raised before the hearings officer and, therefore, could not be addressed on appeal, the planning commission observed that Valley had proposed, in its application materials, to manage storm water quality on site. The planning commission, therefore, determined that the issue was properly before it. And, on the merits of the issue, the planning commission agreed with Valley that EC 9.6792 (3)(d)(2) did not apply "because all stormwater will be treated on-site and subsection (d)(2) only applies where stormwater quality will be managed off-site."

Before LUBA, petitioner asserted that the planning commission erred in considering whether EC 9.6792(3)(d)(2) applied to Valley's application because, according to petitioner, Valley had failed to raise that issue before the hearings officer. LUBA rejected petitioner's contention, explaining that Valley's application "took the position that [Valley] would meet the storm water quality management standards through on-site infiltration and filtration systems."[4]

[4] We note that, on appeal to LUBA, petitioner asserted that the planning commission's decision that no off-site treatment of storm water pollution was proposed was not supported by substantial evidence in the record. LUBA rejected that contention, observing that petitioner was "conflating [Valley's] proposed method of meeting water *quantity* standards for flood control purposes, which are set out in EC 9.7691 and the city's Stormwater Management Manual, with

According to LUBA, because Valley "relied solely on on-site filtration under subsection (d)(1) to satisfy EC 9.6792 (3)(d), and did not propose any off-site filtration under subsection (d)(2)," by "implication, it is clear that [Valley] did not believe that subsection (d)(2) applied." Accordingly, LUBA concluded that the issue of whether EC 9.6792(3)(d)(2) applied was raised before the hearings officer and properly considered by the planning commission.

As noted, on review, petitioner asserts that LUBA erred in concluding that Valley adequately preserved its argument that the standards in EC 9.6792(3)(d)(2) did not apply to its application. We find petitioner's contention entirely unpersuasive.

EC 9.7655(3) provides that an appeal of a hearings officer's decision to the planning commission is "limited to issues raised in the record" and the "basis of the appeal is limited to the issues raised during the review of the original application." Under that provision, for an issue to be considered by the planning commission, the issue must have first been presented to the hearings officer. *Willamette Oaks, LLC v. City of Eugene*, 245 Or App 47, 56, 261 P3d 85 (2011), *rev den*, 351 Or 586 (2012).

For purposes of our review, it is undisputed that, in its application, Valley proposed to meet storm water quality management standards through on-site systems under EC 9.6792(3)(d)(1) and did not propose any off-site storm water quality management. Under the plain text of the code provision, on-site infiltration and filtration are preferred over off-site storm water quality management. Furthermore, if an applicant selects on-site filtration, it must submit a report that meets the requirements of EC 9.6792(3)(d)(1). Only "[i]f selecting off-site stormwater quality management" must an applicant submit a report that meets the requirements of EC 9.6792(3)(d)(2). Although Valley did not specifically state to the hearings officer that the requirements of

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[Valley's] proposed method of meeting water *quality* standards, which are set out in EC 9.7692 and the city's Stormwater Management Manual" and that Valley's "proposed method of treating storm water runoff on-site *** meets EC 9.6792 (3)(d)(1)." (Emphases in original.) The determination that, in its application, Valley relied solely on on-site filtration under EC 9.7692(3)(d)(1) and did not propose off-site stormwater quality management is not at issue on review.

EC 9.6792(3)(d)(2) did not apply, we agree with LUBA that that assertion was implicit in Valley's proposal to implement on-site filtration systems under EC 9.6792(3)(d)(1). By its terms, EC 9.6792(3)(d)(2) applies only to applicants that select off-site water quality management. When it proposed on-site water quality management, and *not* off-site water quality management, it was clear that Valley took the position that it had to meet only the requirements of EC 9.6792(3)(d)(1) and not (3)(d)(2). Thus, LUBA did not err in concluding that Valley adequately preserved the issue before the hearings officer.

In light of the foregoing, we conclude that LUBA's order is not "unlawful in substance." ORS 197.850(9)(a).

Affirmed.