BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BONNIE HEITSCH,
Petitioner,

vs.

CITY OF SALEM,
Respondent,

and

DAVE MOSS and PIONEER ALLEY LLC,
Intervenors-Respondents.

LUBA No. 2011-105

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Bonnie Heitsch, Salem, filed the petition for review and argued on her own behalf.

Daniel B. Atchison, Assistant City Attorney, Salem, filed a joint response brief and argued on behalf of respondent.

Alan M. Sorem, Salem, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief was Mark Shipman and Saalfeld Griggs PC.

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

REMANDED 04/18/2012

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city council decision that vacates a portion of an existing unimproved alley right-of-way.

FACTS

A map is included on the following page that shows the existing unimproved alley and the surrounding neighborhood. The lots and roadways in the northern part of the map are part of the Fairmont neighborhood. The lots and roadways in the southern part of the map are a part of the Candalaria neighborhood. As explained below, the map is somewhat confusing, but it would be difficult to describe the relevant facts without the map. The area that was vacated by the challenged decision is a small 12-foot wide and 56.06-foot long alley right-of-way that includes a total of 673 square feet. The vacated area is shown on the map as the east-west foot of an "L" shaped remnant alley that presently extends from Rural Avenue (which runs east-west) to the northwest corner of the Pioneer Cemetery, which is publicly owned. That alley used to extend along the north side of Pioneer Cemetery all the way east to Commercial Avenue, which lies east of the area shown on the map, but that portion of the alley was vacated a number of years ago leaving the remnant "L" shaped alley. The north-south portion of the "L" shaped unimproved alley was not vacated by the challenged decision.

As noted earlier, the map is confusing because the part of the map showing the area to be vacated at the northwest corner of Pioneer Cemetery has been enlarged and that enlargement has been superimposed over the private City View Cemetery that lies immediately west of the Pioneer Cemetery and a portion of the Candalaria neighborhood to the south, so that the map does not accurately depict the City View Cemetery or the western portion of the Candalaria neighborhood and gives the false impression that portions of two alley rights of way are being vacated.

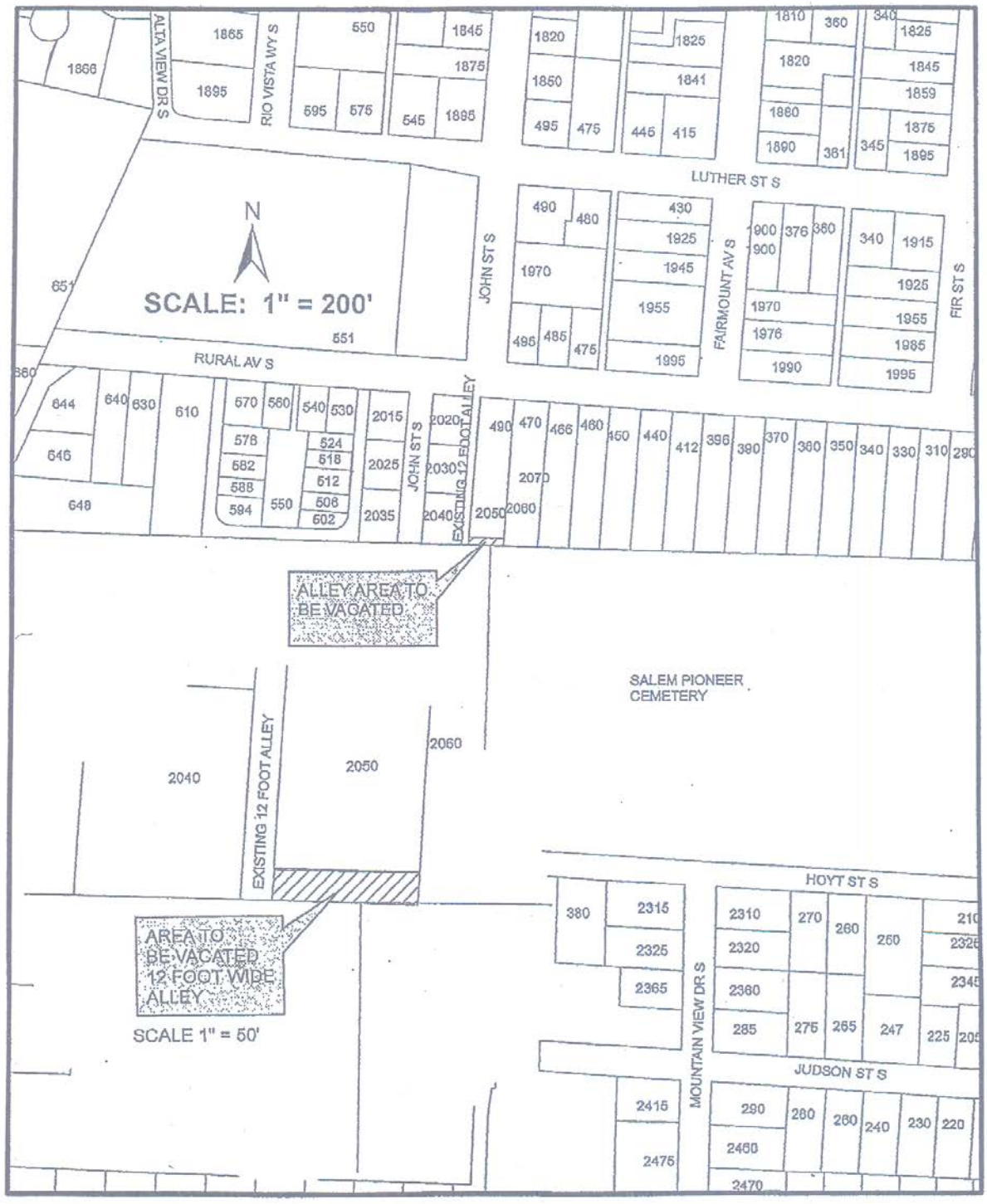

EXHIBIT MAP

COS 000060

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Intervenors have developed a residential planned unit development in the area of the "L" shaped alley. Access to the homes in the southern portion of the planned unit development, immediately north of the vacated portion of the alley, is provided by improvements in the north-south portion of John Street that extends south from Rural Avenue to the City View Cemetery. Improved access from John Street extends east along the northern edges of the cemeteries and crosses the vacated alley right-of-way. That improved access east from John Street is not shown on the map.

The Candalaria and Fairmount neighborhoods are separated by the City View and Pioneer Cemeteries, which extend approximately 3,000 feet from a bluff overlooking River Road to the west of the area shown on the map to Commercial Avenue, east of the area shown on the map. Commercial Avenue is a busy north-south arterial street that is auto oriented and not particularly pedestrian or bicycle friendly. There presently is no vehicular or pedestrian connection through either of the cemeteries to connect the Candalaria and Fairmount neighborhoods. North-south pedestrian, bicycle and vehicular traffic wishing to travel between the Candalaria and Fairmount neighborhoods must travel out-of-direction to Commercial Avenue to the east.

The city is currently preparing the Bike Walk Salem Plan, which the city plans to adopt as part of its Transportation System Plan (TSP), an element of the city's comprehensive plan. The draft Bike Walk Salem Plan identifies a need for a pedestrian connection at some unspecified place in this area to connect the Candalaria and Fairmount neighborhoods.[1] As currently proposed, the draft plan does not identify the "L" shaped alley as part of the needed pedestrian connection, but the "L" shaped alley is the only publicly owned land that is currently available to complete a pedestrian connection from Rural Avenue in the Fairmount neighborhood south through the publicly owned Pioneer Cemetery and ultimately connecting

[1] According to the parties, the Bike Walk Salem Plan has not yet been adopted by the city council.

with the Candalaria neighborhood to the south. Other options for such a north-south pedestrian connection likely would require acquisition of private property on the south side of Rural Avenue to provide access from Rural Avenue to the Pioneer Cemetery or a more significant acquisition of private property to locate the pedestrian connection across the privately owned City View Cemetery.

After intervenors requested that the city initiate vacation of the 673 square feet of right-of-way, in an April 11, 2011 report city staff recommended that the city council postpone a decision on whether to initiate vacation of the right-of-way until the pending update of the city's TSP is complete and it is known whether the remaining remnant alley right-of-way is needed for a pedestrian connection between the Candalaria and Fairmount neighborhoods. Record 225-28. At its April 11, 2011 meeting city council apparently rejected that recommendation and voted to initiate the vacation as requested.

The vacation proposal was considered by the city planning commission at its August 16, 2011 meeting. The staff report to the planning commission addressed TSP Policy 2.10, which establishes criteria for right-of-way vacations and ultimately recommended that the planning commission recommend that the city council approve the vacation with reservation of a public utility easement.[2] Record 148-53. At its August 16, 2011 meeting, the planning commission adopted the staff recommendation.

The vacation proposal was considered by the city council on September 26, 2011. The staff report to the city council was not available seven days before the city council meeting, as would be required if the challenged decision is a quasi-judicial land use decision subject to the city's Type IV quasi-judicial decision procedures. Salem Revised Code (SRC) 300.720(c). However we do not understand petitioner to dispute that the staff report was

[2] TSP Policy 2.10 is the subject of the first six subassignments of error under petitioner's first assignment of error and is set out and discussed below.

available on Friday September 23, 2011 on the city's website.[3] In that staff report city staff addresses TSP Policy 2.10 and recommends that the city council approve the vacation. The city council voted to approve the vacation at its September 26, 2011 meeting, and this appeal followed.

THE DECISION IS QUASI-JUDICIAL

A threshold issue in this appeal is whether the challenged vacation decision is quasi-judicial, as petitioner assumes throughout her petition for review, or legislative, as respondent and intervenors-respondents (respondents) argue. The primary significance of our resolution of that issue is the nature of the findings that must be adopted to support the decision and the procedure the city was required to following in adopting the decision.

Respondents assert that the city council's decision in this matter is a legislative decision rather than a quasi-judicial decision. The Oregon Supreme Court decision that set out the inquiry that is currently applied to determine whether a decision is properly viewed as quasi-judicial (an adjudication) or legislative is *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). That inquiry, as described by the Oregon Supreme Court, is set out below:

> "Generally, to characterize a process as adjudication presupposes that the process is bound to result in a decision and that the decision is bound to apply preexisting criteria to concrete facts. The latter test alone [applying preexisting criteria to concrete facts] proves too much; there are many laws that authorize the pursuit of one or more objectives stated in general terms without turning the choice of action into an adjudication. Thus a further consideration has been whether the action, even when the governing criteria leave much room for policy discretion, is directed at a closely circumscribed factual situation or a relatively small number of persons. The coincidence both of this factor and of preexisting criteria of judgment has led the court to

[3] Petitioner attached an affidavit to the petition for review to establish that the staff report was not available seven days before the city council's September 26, 2011 meeting. Respondents move to strike that affidavit. Because it does not appear to be disputed that the staff report was not available seven days before the September 26, 2011 city council meeting and because we do not understand petitioner to dispute that the staff report was available on the city's webpage three days before the September 26, 2011 city council meeting, we need not consider the affidavit in resolving this appeal, and it is unnecessary to rule on respondents' motion to strike.

> conclude that some land use laws and similar laws imply quasijudicial procedures for certain local government decisions * * *." *Id*. At 602-03.

As the Court of Appeals explained in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004), the three *Strawberry Hill* factors ((1) bound to result in a decision, (2) preexisting criteria, and (3) closely circumscribed factual situation or a relatively small number of persons) are more an analytical aid than a test:

> "Those three general criteria do not, however, describe a bright-line test. As we noted in *Estate of Gold v. City of Portland,* 87 Or App 45, 51, 740 P2d 812, *rev den,* 304 Or 405 (1987), *Strawberry Hill 4 Wheelers* 'contemplates a balancing of the various factors which militate for or against a quasi-judicial characterization and does not create [an] 'all or nothing' test[.]' (Citation omitted.) In particular, we noted that the criteria are applied in light of the reasons for their existence--*viz.*, 'the assurance of correct factual decisions' and 'the assurance of 'fair attention to individuals particularly affected.' *Estate of Gold,* 87 Or App at 51, (quoting *Strawberry Hill 4 Wheelers,* 287 Or at 604)."

As petitioner points out, intervenors requested that the city initiate this vacation and after the city council granted that request and initiated the vacation there is no suggestion that the city ever intended to stop short of a final decision on the requested vacation. Nevertheless, because the vacation in this appeal was initiated by the city council rather than by a petition of property owners, it would appear that the city council could have terminated the vacation process at any time and that the process was not "bound to result in a decision." *See Strawberry Hill*, 287 Or at 606 (suggesting that under the then-applicable statutes governing county road vacations a vacation initiated by the county might be terminated short of a final decision). That lack of any requirement that a city initiated vacation must necessarily must result in a decision on the merits appears to be similarly lacking under the existing statutes governing city vacations. The first *Strawberry Hill* factor suggests the decision is properly viewed as legislative.

The second *Strawberry Hill* factor is whether the city was required to "apply preexisting criteria to concrete facts." That factor suggests the challenged decision is

properly viewed as quasi-judicial. The city points out that the standards that the city was required to apply in approving the vacation may leave the city with a great deal of latitude in applying the standards. As we explain later in this opinion, the city appears to be correct in this contention. This is particularly the case since the city council is entitled to significant deference on review of any interpretations of city vacation standards that the city may adopt when it applies those standards. ORS 197.829(1); *Siporen v. city of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). However, that does not necessarily mean the challenged decision is not properly viewed as quasi-judicial. The Supreme Court clearly recognized in *Strawberry Hill* that preexisting criteria frequently permit a great deal of policy discretion. As the Supreme Court explained in the portion of the decision quoted above, that is the reason for the third Strawberry Hill factor—*i.e.*,"a closely circumscribed factual situation or a relatively small number of persons." 287 Or at 603.

The third *Strawberry Hill* factor strongly suggests the challenged decision is quasi-judicial. A large number of persons may have an interest in the larger related issue of the current lack of connectivity between the Candalaria and Fairmount neighborhoods and what if anything should be done about it. But the vacation is "directed at" 673 square feet of property with only a handful of adjoining property owners. We recognize that the Court of Appeals has explained that no single *Strawberry Hill* factors is, by itself, determinative. *Estate of Gold*, 87 Or App at 51. However, here the second factor supports a conclusion that the challenged decision is quasi-judicial and the third factor strongly suggests the same conclusion, since one can hardly imagine a more closely circumscribed factual situation or a smaller number of directly affected persons. We conclude that applying the *Strawberry Hill* factors as whole, the challenged city decision to vacate a very small remaining easement remnant is a quasi-judicial decision.

One immediate consequence of our conclusion that the challenged decision is quasi-judicial is that quasi-judicial land use decisions, unlike legislative land use decisions, must be

supported by adequate findings under *Fasano v. Washington County Commission*, 264 Or 574, 507 P2d 23 (1973) and its progeny, as well as relevant statutes.[4] To be adequate, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision * * *." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). That consequence is perhaps of less import than might appear at first blush, since the Court of Appeals has clearly signaled that given the complex regulatory backdrop for land use decision making (whether quasi-judicial or legislative), legislative land use decisions may well also need to be supported by adequate findings if they are to be successfully defended on appeal. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n6, 38 P3d 956 (2002). In any event, because we conclude the challenged decision is quasi-judicial, there can be no question that the city council's vacation decision must be supported by adequate findings.

A second consequence is that statutory and city procedures governing quasi-judicial land use decision making apply, and if the city failed to follow those procedures, any such procedural errors may provide a basis for reversal or remand if petitioner's substantial rights were thereby prejudiced and petitioner entered a timely objection to the procedural error.[5]

FIRST ASSIGNMENT OF ERROR

A. Introduction

Under her first assignment of error, petitioner includes eight subassignments of error in which she challenges the adequacy of the city's findings concerning comprehensive plan

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[4] For example, ORS 227.173(3) provides:

> "Approval or denial of a permit application or expedited land division 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."

[5] Under ORS 197.835(9), LUBA is to "reverse or remand [a] land use decision" where a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B).

policies and a statutory vacation standard. We first consider respondents' argument that the comprehensive plan policy that petitioner relies on primarily under the first assignment of error—TSP Policy 2.10—is advisory and nonmandatory, so that any inconsistencies the challenged decision may have with that policy are not a basis for reversal or remand.

The TSP Plan Implementation section provides in part:

> "The [TSP] provides the policy foundation for City decision makers, advisory bodies, and citizens. The goals and objectives, and policies of the [TSP] are to be considered in all decision-making processes mandated by State law, acknowledged plans, and land use regulations. * * *" TSP 17-1.

TSP Plan Implementation Policy 3.1 provides:

> "**Policy 3.1 Land Use Actions and Development Review**
>
> "The goals, objectives, policies, standards, and maps contained in [TSP], and its implementing ordinances, shall be considered and applied towards the review and approval of all land use actions and development applications. Applications need to contain findings that show how the proposed land use action or development is in conformity with the [TSP].

TSP Plan Implementation Policy 1.2, provides in part:

> **"Policy 1.2 Specific Guidance**
>
> "The [TSP] shall be used to:
>
> "* * * * *
>
> "6. Evaluate proposed petition- and City-initiated right-of-way vacations based upon the criteria set forth in Policy 2.10 of the Street System Element of the Plan." (Underlining added.)

There can be no serious argument that under the above language in the TSP, TSP Policy 2.10 must be used to evaluate all vacation proposals. TSP Policy 2.10 strongly suggests that the criteria set out in Policy 2.10 are more than advisory, nonmandatory considerations that the city council is free to ignore when vacating rights of way. Policy 2.10 is set out below

> "**Policy 2.10 Criteria for Evaluating Proposed Vacation of Rights-of-way**
>
> "Right-of-way vacations may be initiated by the City Council or by private citizen petition. Vacation of public rights-of-way in the city of Salem are

governed by State law (ORS Chapter 271) and SRC 76.130 to 76.144. The City shall use the following evaluation criteria in its consideration of a proposed right-of-way vacation:

"a. Is the right-of-way proposed for vacation actively used for transportation purposes? Many public rights-of-way, while platted, are either not open or not actively used by the public. Actively used rights-of-way may be considered for vacation conditioned upon the provision of nearby facilities for the existing users and if there is not a significant degradation in transportation services and accessibility in the surrounding neighborhood.

"b. Does the proposed vacation restrict the City's compliance with the State Transportation Planning Rule (TPR) and the [TSP] policies on transportation system connectivity? A proposed vacation *should* not limit, nor make more difficult, safe and convenient pedestrian and bicycle access to community activity centers such as schools, parks, shopping, and transit stops. Additionally, local street connectivity, traffic circulation, emergency vehicle access, and accessibility to transit service *should* be maintained within and between neighborhoods.

"c. Is the right-of-way proposed for vacation improved or unimproved to urban standards? While right-of-way in either condition may be vacated, an improved right-of-way is an indication of use and *should* be more closely scrutinized before recommended for vacation.

"d. Is the right-of-way proposed for vacation part of or near a planned transportation improvement? Rights-of-way that have the potential to be used for a future transportation project *should* not be vacated.

"e. Does the vacation of the right-of-way satisfy a compelling public need? Issues that address health and safety concerns may outweigh the transportation criteria listed above and *should* be given proper consideration." (Underlining and italics added.)

The city argues forcefully that because the word "should" is scattered liberally through the Policy 2.10(a) through (e) criteria those criteria are advisory and nonmandatory. We understand the city to contend that even if the disputed vacation is inconsistent with one or more of the Policy 2.10(a) through (e) criteria, inconsistency with such advisory, nonmandatory criteria provides no basis for reversal or remand. Respondents attempt to

bolster that argument by pointing out that the city is entitled to great deference in interpreting its own comprehensive plan under ORS 197.829(1) and *Siporen v. City of Medford*.

Respondents' contention that LUBA should defer to the city council's interpretation of its comprehensive plan can be dispatched quickly. City Council interpretations are not entitled to deference unless the city council has adopted an express or implied interpretation. The challenged city council decision never mentions Policy 2.10 and adopts no reviewable express or implied interpretation of any of the Policy 2.10(a) through (e) criteria. Without a reviewable interpretation by the city council, LUBA has nothing to defer to. *Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011).

ORS 197.175(2)(d) requires that individual quasi-judicial land use decisions must comply with the relevant acknowledged comprehensive plan, and local laws frequently impose a similar requirement that individual land use decisions must comply with the comprehensive plan. That of course begs the question of what parts of the comprehensive plan are relevant in the context of a particular land use decision. In addition, it is true as the city argues, that LUBA has held on many occasions that comprehensive plan policies that are worded as "shoulds" or in similar nonmandatory language generally do not operate independently as mandatory approval criteria, in the sense that an applicant must demonstrate that a proposal complies with or is consistent with all such nonmandatory comprehensive plan policies. *Wolfgram v. Douglas County*, 54 Or LUBA 54, 63 (2007); *Dimone v. City of Hillsboro*, 41 Or LUBA 167, 174 (2001); *Neuharth v. City of Salem*, 25 Or LUBA 267, 277-78 (1993); *McCoy v. Tillamook*, 14 Or LUBA 108, 118 (1985). But the meaning and function of comprehensive plan policies should not be judged in isolation. As we explained in *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 210 (2004), it is appropriate to view plan policies in context to determine whether there is contextual comprehensive plan language that expressly assigns a particular role to any disputed comprehensive plan policies. Here, there is TSP language that at least suggests that TSP Policy 2.10 is something more

than a collection of nonmandatory considerations that the city council is free to ignore, particularly the language of TSP Policy 1.2 which provides "right-of-way vacations [are to be] based upon the criteria set forth in Policy 2.10."

However, even if the criteria set out in Policy 2.10(a) through(e) are criteria that must be considered, that does not necessarily mean that each of those criteria are rigid, mandatory criteria in the sense a proposed vacation must be denied if it does not satisfy or comply with each of those criteria. The individual considerations in Policy 2.10(a) through (e) are in many cases worded as "shoulds," rather than "shalls." That wording likely would permit the city to adopt a sustainable interpretation that while the individual considerations in Policy 2.10(a) through (e) are mandatory considerations, vacations may be approved even if they are inconsistent with one or more of those considerations. However without such an interpretation, or some other city council interpretation to clarify the city council's view of the role and meaning of the Policy 2.10(a) through (e) criteria, we do not agree with respondents that the Policy 2.10(a) through (e) criteria are advisory, nonmandatory considerations that the city council was free to ignore.

In summary, we emphasize that just because the individual Policy 2.10(a) through (e) factors may not be independent mandatory approval standards, in the sense that a demonstration of compliance with each of those factors is required before a vacation request can be approved, that does not mean the Policy 2.10(a) through (e) factors are not a mandatory "consideration," in the sense the city is obligated at least to *consider* all of the Policy 2.10 factors and explain why the vacation is consistent with all those considerations or explain why the vacation should be approved even though one or more of the Policy 2.10(a) through (e) considerations might support a decision to deny the vacation. *Botham v. City of Eugene*, 51 Or LUBA 426, 440 (2006). The TSP language quoted above strongly suggests that the Policy 2.10(a) through (e) criteria at least fall into the category of mandatory *considerations* even if they are worded such that they need not be interpreted to apply as

independent *mandatory approval standards* that individual vacation decisions must comply with.

Finally, respondents point out that the Salem Area Comprehensive Plan (SACP) Section II(F)(7)-(9) defines the term "shall," which is not used in TSP 2.10(a) through (e), and the terms "should" and "may," which are used in TSP 2.10(a) through (e). But the parties do not really discuss the possible significance of those definitions in their entirety, and we are not sure what to make of them.[6] The definitions of "shall," "should" and "may" lend some support to some of respondents' arguments. But as the word "should" is defined, policies worded as "shoulds" impose the following obligation in the context of specific development proposals: "developers have the burden of either following the policy directive or showing good cause why they cannot comply." It would appear that obligation would apply to any vacations proposed by a developer. It is a bit less clear whether it necessarily would apply in the context of a city-initiated vacation where that city-initiated vacation was

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[6] SACP Section II(F)(7)-(9) provides as follows:

"7. **Should**

"The word 'should,' as used in the policy statements, is advisory. *However, where used in the context of setting policies applicable to specific development proposals, the developers have the burden of either following the policy directive or showing good cause why they cannot comply*.

"8. S**hall**

"The word 'shall,' as used in the policy statements, is mandatory. Where used in the context of setting policies to be implemented through ordinances or other governmental actions, the policy must be carried out in such ordinances or actions. When used in the context of setting policies applicable to specific development proposals, the developers have the burden of showing how their proposal conforms to such policy.

"9. **May**

"The word 'may,' as used in the policy statements, is advisory, and is used to highlight permissible alternatives. When used with 'only,' the words indicate a required course of action, excluding all other alternatives. For example 'may be approved only after reviewing a development plan' requires review of such a plan in the course of either approving or denying the proposal." (Emphasis added.)

requested by a developer, which appears to be the case here. The city may wish to address those definitions directly in its proceedings on remand.

Until the city council adopts a reviewable and supportable interpretation to the contrary, we conclude, based on the TSP language quoted and discussed above, that the Policy 2.10(a) through (e) criteria at least fall into the category of mandatory *considerations*, even if the city council can correctly interpret the Policy 2.10(a) through (e) criteria that are worded as "shoulds" consistently with the SACP definitions not to apply as independent *mandatory approval standards* that individual vacation decisions must comply with. As we note above, we leave it to the city council to determine whether the qualification for "specific development proposals" by developers applies here, so that any policies that are worded as "shoulds" must be followed unless "good cause" is shown why the proposal cannot comply.

B. Waiver

The city argues that if the challenged decision is properly viewed as quasi-judicial, petitioner waived any arguments regarding the comprehensive plan policies cited in the first assignment of error, with the exception of Policy 2.10(b), by not raising any issue with regard to those comprehensive plan policies before the city council. ORS 197.835(3).[7]

The August 16, 2011 staff report to the planning commission took the position that that the Policy 2.10(a) through (e) factors apply in this case as "evaluation criteria." Record 149. The September 26, 2011 staff report to the city council took the position that the Policy 2.10(a) through (e) factors are "criteria required for evaluating a proposed right-of-way vacation." Record 56. Those staff reports were sufficient to raise the issue that the city council was at least required to adopt findings that address those Policy 2.10(a) through (e) criteria and explain why the vacation is consistent with those criteria or why the vacation

[7] ORS 197.835(3) limits LUBA's scope of review and provides: "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

should be approved even though it may not be consistent with all those criteria. *See Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129, 136-40 (2001) (where application identifies a standard as an applicable approval criterion that is sufficient to raise the issue of whether the standard is an applicable approval criterion). We now turn to petitioner's eight subassignments of error.

C. Subassignments of Error

1. First and Second Subassignments of Error

TSP Policy 2.10(e), in part, poses the following question: "Does the vacation of the right-of-way satisfy a compelling public need?" That question is not worded as a "should." While TSP Policy 2.10(e) simply poses a question for the city to answer, it fairly suggests that an affirmative response to the question is anticipated for approval, even if an affirmative response may not be required in all circumstances. Consistent with our earlier explanation, we do not mean to foreclose city council interpretations on remand, but we have no reviewable interpretation of TSP Policy 2.10(e) in the decision that is before us in this appeal.

While the city council findings repeat some of the language of the TSP Policy 2.10(a) through (e) criteria, they do not appear to address the question posed by TSP Policy 2.10(e), explicitly or implicitly. The closest the city council comes is a part of finding 6 that states "and public interest will not be prejudiced if the Property is vacated." Record 2. We agree with petitioner that that finding is an answer to a different question; it is not an answer the question posed by TSP Policy 2.10(e): "Does the vacation of the right-of-way satisfy a compelling public need." Remand is required so that the city council can adopt findings addressing the question posed by TSP Policy 2.10(e).

In her second assignment of error, petitioner alleges there is not substantial evidence in the record to support an affirmative answer to the question posed by TSP Policy 2.10(e). Until the city council answers the question, that evidentiary challenge is premature, and we do not consider it.

The first subassignment of error is sustained. We do not consider the second subassignment of error.

2. Third and Fourth Subassignments of Error

TSP Policy 2.10(d) was set out earlier in this opinion and is set out again below:

> "Is the right-of-way proposed for vacation part of or near a planned transportation improvement? Rights-of-way that have the potential to be used for a future transportation project *should* not be vacated." (Emphasis added.)

The closest the city council comes to addressing TSP Policy 2.10(d) is the other part of finding 6, which finds "[t]he property is not needed for future roadway purposes." We understand petitioner to argue that TSP Policy 2.10(d) is concerned with "transportation improvements," which is a broader concept than "future roadway purposes." More to the point, the dispute below in part concerned the then-pending changes to the TSP (the Bike Walk Salem Plan) which may include recommendations that could create a potential for the vacated right-of-way to be used for a "future transportation project." While the final sentence of TSP Policy 2.10(d) is worded as a "should," for the reason already explained in this opinion we conclude remand is required so that the city council can adopt findings that expressly consider TSP Policy 2.10(d).

In her fourth subassignment of error petitioner contends there is not substantial evidence in the record to support a finding the vacated "alley is not needed for future transportation improvements or does not have the potential to be used for future transportation projects." Petition for Review 16-17. As was the case with her second subassignment of error, the fourth subassignment of error is premature. Until the city adopts adequate findings addressing TSP Policy 2.10(d), including any relevant interpretations of that criterion, petitioner's evidentiary challenge is premature.

The third subassignment of error is sustained. We do not consider the fourth subassignment of error.

3. Fifth and Sixth Subassignments of Error

Petitioner's fifth and sixth subassignments of error concern TSP Policy 2.10(b). TSP Policy 2.10(b) was set out earlier in this opinion and is set out again in part below.

> "Does the proposed vacation restrict the City's compliance with the State Transportation Planning Rule (TPR) and the [TSP] policies on transportation system connectivity? *A proposed vacation should not limit, nor make more difficult, safe and convenient pedestrian and bicycle access to community activity centers such as schools, parks, shopping, and transit stops*. (Underlining and italics added.)

As petitioner points out, the city council adopted findings 2 and 5, which may have been intended to address the italicized language in TSP Policy 2.10(b) quoted above, even though the findings do not specifically refer to TSP Policy 2.10(b). Finding 5 may also have been adopted to respond to the underlined language of TSP Policy 2.10(b) quoted above. Those findings are set out below:

> "(2) The proposed vacation will not degrade the transportation services or accessibility in the surrounding neighborhood. The right-of-way is not actively used for public transportation purposes." Record 2.

> "(5) The proposed vacation will in no way impair safe and convenient pedestrian, bicycle and vehicular circulation, or transportation system connectivity and complies with the 'Transportation Planning Rule,' OAR 660-012-0000 through OAR 660-012-0070." *Id.*

In her fifth subassignment of error petitioner contends that findings 2 and 5 are inadequate to address the part of TSP criterion 2.10(b) that states "[a] proposed vacation should not limit, nor make more difficult, safe and convenient pedestrian and bicycle access to community activity centers such as schools, parks, shopping, and transit stops." As petitioner points out, the barrier that the two cemeteries currently pose for pedestrian, bicycle and vehicular traffic, making travel between the Fairmount and Candalaria neighborhoods inconvenient and in some cases unsafe, was the topic of considerable testimony below. Again, recognizing that this part of TSP criterion 2.10(b) is worded as a "should not," we agree with petitioner that the city council's findings are conclusory, do not directly address

the issues raised about the difficulty of travel between the two neighborhoods, and therefore are inadequate to demonstrate that the city council considered this part of TSP Policy 2.10(b) in approving the disputed annexation.

Petitioner's sixth subassignment of error is unclear. It appears to be based on the first sentence of TSP Policy 2.10(b), which poses the following question: "Does the proposed vacation restrict the City's compliance with the State Transportation Planning Rule (TPR) and the [TSP] policies on transportation system connectivity?" In the first part of her argument petitioner appears to argue the challenged decision is inconsistent with the question posed by the first sentence of TSP Policy 2.10(b), but petitioner ultimately argues:

> "The City complied with the TPR by adopting the 2007 amendments that included the Policy 2.10 approval criteria. Continued compliance with the TPR requires the City to apply those mandatory criteria of Policy 2.10 when making a decision whether to vacate public right-of-way. The failure to do so is inconsistent with the TPR. * * *" Petition for Review 22.

We have already agreed elsewhere in this opinion that the decision must be remanded so that the city council can consider the Policy 2.10 criteria. If petitioner's sixth subassignment of error alleges an independent basis for remand, it does not do so with sufficient clarity for us to identify an independent basis for remand. We therefore deny the sixth subassignment of error.

The fifth subassignment of error is sustained. The sixth subassignment of error is denied.

4. Seventh Subassignment of Error

Citing a portion of SRC 76.140(d), which provides that "[a]ny action taken shall conform with the Salem Comprehensive Plan," petitioner contends the council's findings are inadequate to demonstrate that the vacation is consistent with TSP Transportation Connectivity and Circulation Policy 5, which provides:

> "The vehicle, transit, bicycle, and pedestrian circulation systems shall be designed to connect major population and employment centers in the Salem

> Urban Area, as well as provide access to local neighborhood residential, shopping, schools, and other activity centers."

Petitioner also argued below that the vacation was inconsistent with Salem Comprehensive Park System Master Plan connectivity policies and the Pioneer Cemetery Maintenance and Restoration and Master Plan policy favoring "use of the cemetery as a place to stroll, jog and walk dogs." Record 74. Petitioner argues that it was error for the city council to fail to adopt findings addressing TSP Transportation Connectivity and Circulation Policy 5 and the other policies she mentioned below.

Petitioner does not explain what additional requirements, if any, the above-noted policies add to TSP Policy 2.10(a) through (e), which as we explained in addressing the first subassignment of error TSP Policy 1.2(6) expressly requires the city to use to evaluate vacation proposals. Policy 2.10(a) through (e) seems to address similar, if not identical transportation concerns as those expressed in the policies cited in subassignment of error 7. In any event, the only basis petitioner cites for requiring the city to separately consider the policies she identified in this subassigment of error is SRC 76.140(d), which provides:

> **"(d)** *The council's action in granting a petition for vacation shall be by ordinance. The council's action denying a petition shall be by resolution*. Any action taken shall conform with the Salem Comprehensive Plan. (Underlining and italics added.)

In citing SRC 76.140(d) as authority for the city's obligation to address the plan policies cited in the seventh subassignment of error, petitioner only set out the underlined language of SRC 76.140(d) and she did not set out the italicized language in her petition for review. The italicized language of SRC 76.140(d) seems to say SRC 76.140(d) applies to actions on petitions for vacation. As we earlier explained, the challenged decision is a decision on a city-initiated vacation, not a vacation that was initiated by petition. The remaining subsections of SRC 76.140(d) and SRC 76.130 through 76.144 all seem to be addressing vacations that are initiated by petition.

Because petitioner partially set out SRC 76.140(d), and neither acknowledged nor made any attempt to confront the omitted language of SRC 76.140(d), which strongly suggests SRC 76.140(d) is limited to vacations that are initiated by petition, we do not consider petitioner's seventh subassignment of error further.

The seventh subassignment of error is denied.

The first assignment of error is sustained, in part.

5. Eighth Subassignment of Error

ORS 271.080 authorizes property owners to file a petition for vacation of a right-of-way. ORS 271.120 requires:

> "At the time fixed by the governing body for hearing the petition and any objections filed thereto or at any postponement or continuance of such matter, the governing body shall hear the petition and objections and shall determine whether the consent of the owners of the requisite area has been obtained, whether notice has been duly given and *whether the public interest will be prejudiced by the vacation of such plat or street* or parts thereof. If such matters are determined in favor of the petition the governing body shall by ordinance make such determination a matter of record and vacate such plat or street; otherwise it shall deny the petition. The governing body may, upon hearing, grant the petition in part and deny it in part, and make such reservations, or either, as appear to be for the public interest." (Emphasis added.)

As was the case with the seventh subassignment of error, petitioner only set out a portion of ORS 271.120 (the part italicized above) and argued the city council's finding that the public interest will not be prejudiced by the vacation is not supported by substantial evidence.

ORS 271.130 appears immediately after ORS 271.120 and ORS 271.130 expressly applies to vacations that are initiated by the governing body and does not expressly require a finding that the vacation will not prejudice the public interest. When the part of ORS 271.120 that petitioner did not set out or address in her petition for review is read in context with ORS 271.130, it is highly questionable that in approving a vacation that is initiated by the governing body, as is the case here, the city council is required to adopt an express

finding that the public interest will not be prejudiced by the vacation. Because petitioner neither acknowledges nor makes any attempt to confront that language in ORS 217.120 and 217.130, we do not consider the eighth subassignment of error further.

The eighth subassignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Earlier in this opinion we agreed with petitioner that the challenged decision is quasi-judicial, not legislative. This means that under ORS 197.763, which governs quasi-judicial land use decisions, the city was obligated to provide notice of hearing to property owners within 100 feet of the property. ORS 197.763(2)(a)(A). ORS 197.763(4)(b) requires that any staff report that is used at quasi-judicial land use hearings must be available "at least seven days prior to the hearing." And under ORS 227.173(10), the city was obligated to provide notice of its decision to all parties. Similar procedural requirements are imposed for quasi-judicial decisions under the SRC.

The city provided publication notice and posted notice in accordance with ORS 271.110. But the city did not provide advance written notice of its September 26, 2011 hearing in accordance with ORS 197.763(2)(a)(A). The city also contends that while petitioner and other persons were allowed to testify at the September 26, 2011 hearing, that hearing was not a "quasi-judicial land use hearing," within the meaning of ORS 197.763. As we have already noted, the staff report was made available on the city's website three days before the September 26, 2011 hearing, not seven days before that September 26, 2011 hearing. While petitioner was provided with written notice of the city council's final decision, other participants were not provided such notice of the final decision, as required by ORS 227.173(10).

Petitioner contends these procedural errors prejudiced her substantial rights and the substantial rights of other participants and therefore warrant remand for a new hearing in this matter. ORS 197.835(9).

As an initial matter, petitioner may not obtain reversal or remand based on allegations of prejudice to the substantial rights of others. *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002); *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000). Under ORS 197.835(9)(a)(B), the prejudice that is caused by the procedural error must be to "the substantial rights of petitioner." *See* n 6.

To assert a procedural error as a basis for remand at LUBA, petitioner must not only establish that the error prejudiced her substantial rights, petitioner must also establish that she objected to the procedural error below. *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd and rem'd on other grounds*, *Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). With regard to any shortcomings in the notice of planning commission and city council hearings, petitioner's substantial rights do not appear to have been prejudiced. Petitioner learned of both hearings and appeared and presented testimony.

The city's failure to make the staff report available seven days before the city council's September 26, 2011 hearing presents a bit closer question. There were some minor differences in those two staff reports that may have altered the arguments petitioner made before the city council. However, the primary concern petitioner expresses in her second assignment of error is that her altered arguments may result in allegations from the city or intervenor that petitioner waived issues below. We have already rejected respondents' waiver arguments. While the delayed availability of the staff report until three days before the September 26, 2011 no doubt made petitioner's job more difficult, the differences between the two staff reports is not dramatic, and petitioner's failure to secure a copy of the staff report from the city's website three days before the September 26, 2011 hearing was because she was away from the city on September 23, 2011, and did not have internet access, not because the city had not made the staff report available on September 23, 2011. Although it is a close question, we conclude that the city's failure to make the staff report

available seven days before the September 26, 2011 city council hearing did not prejudice petitioner's substantial rights.

The city's failure to provide a copy of its final decision on the disputed vacation to all participants at that hearing might well have substantially prejudiced the substantial rights any persons who wished to appeal that decision. But petitioner concedes that she was given notice of the city council's decision and filed a timely appeal to LUBA.

Finally, even if any of the city's procedural errors discussed above might have resulted in substantial prejudice to petitioner's substantial rights, petitioner never objected to those errors in a way that gave the city fair notice that petitioner believed the city was obligated to continue its hearing or take other appropriate steps to correct those procedural errors. For that additional reason, petitioner's second assignment of error provides no basis for reversal or remand. *Pliska v. Umatilla County*, 61 Or LUBA 429, 438, *aff'd* 240 Or App 238, 246 P3d 1146 (2010), *rev den* 350 Or 408 (2011): *Carrigg v. City of Enterprise*, 48 Or LUBA 328, 335 (2004); *Dobson v. City of Newport*, 47 Or LUBA 267, 277 (2004)

For the reasons set out above, we conclude the city's procedural errors in treating the disputed vacation as a legislative matter and failing to follow the statutory and SRC procedures that apply to quasi-judicial vacation decisions did not result in prejudice to petitioner's substantial rights and therefore provide no independent basis for remanding the city's decision.

The second assignment of error is denied.

The city's decision is remanded in accordance with our resolution of the first, third and fifth subassignments of error under the first assignment of error.