

1 Salem, filed a petition for review. Claudia L. Howells and Jon Christianson
2 argued on their own behalf.

3
4 Daniel B. Atchison, City Attorney, Salem, filed a joint response brief and
5 argued on behalf of respondent.

6
7 Keith J. Bauer, Salem, filed a joint response brief. With him on the brief
8 was Parks, Bauer, Sime, Winkler and Fernety, LLP. Edward J. Sullivan,
9 Portland, and Jonathan H. Bauer, Salem, argued on behalf of intervenor-
10 respondent.

11
12 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
13 Member, participated in the decision.

14
15 AFFIRMED 12/17/2014

16
17 You are entitled to judicial review of this Order. Judicial review is
18 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving the demolition of Howard Hall, a locally-designated historic building.

FACTS

Howard Hall is a one-story brick building constructed in 1923 as a dormitory for the Oregon School for the Blind (OSB). Howard Hall was part of the larger campus for the OSB school, which comprised nine buildings. In 1958, an addition was added to the west end of the structure. In 1989, the city designated Howard Hall a local landmark. In 2009, the Oregon legislature voted to close OSB and sell the property. The OSB campus, including Howard Hall, was decommissioned by the state and purchased by intervenor-respondent (intervenor) Salem Hospital. Intervenor subsequently demolished the other buildings of the OSB campus, and generally seeks to redevelop the former OSB campus with new buildings and parking areas for its adjoining medical facilities.¹

In April 2014, intervenor applied to the city for historic demolition review to allow the demolition of Howard Hall. In its place, intervenor proposed to construct a commemorative garden, which includes an outdoor therapy area, a playground directed at accommodating disabled children, and features designed to commemorate the history of the OSB.

¹ The city approved a site plan review and variance for re-development of the former OSB campus. That decision was separately appealed to LUBA, and the appeal is pending. *South Central Association of Neighbors v. City of Salem*, __ Or LUBA __ (LUBA No. 2014-083).

1 The city’s historic landmarks commission conducted a hearing on the
2 application, and issued a decision denying the application for noncompliance
3 with three of four criteria. The city council initiated a review of the historic
4 landmarks commission decision, and conducted a *de novo* evidentiary hearing
5 on the application. On August 11, 2014, the city council issued its decision
6 reversing the denial, and approving the application to demolish the building.
7 This appeal followed.

8 **INTRODUCTION**

9 Petitioner and two sets of intervenors-petitioners signed and filed
10 petitions for review, for a total of three petitions for review. Each petition for
11 review is substantively identical, raising five assignments of error based on the
12 four applicable criteria, discussed below. For convenience, we refer to
13 petitioner and intervenors-petitioners collectively as “petitioners,” and address
14 together the five assignments of error in each petition for review.

15 **FIRST ASSIGNMENT OF ERROR**

16 Salem Revised Code (SRC) 230.090 sets out the criteria to obtain a
17 permit to demolish a historic resource. Two stages of review are required. The
18 first stage requires a review by the city buildings official to determine if the
19 building or resource can be reasonably relocated. There is no dispute in the
20 present case that Howard Hall cannot be relocated without being destroyed.
21 The second stage requires review by the historic landmarks commission to
22 determine if the building or resource should be demolished, under four
23 standards.

24 The first standard, at SRC 230.090(d)(2)(A), requires a finding that
25 “[t]he value to the community of the proposed use of the property outweighs
26 the value of retaining the designated historic resource on the present site.” The

1 city council’s findings first address the value of retaining Howard Hall on the
2 site, and conclude in relevant part that Howard Hall was placed on the city’s
3 local historic inventory for its cultural significance as a dormitory for the OSB,
4 and not for its architectural significance. Record 2. Because the OSB campus
5 is decommissioned and Howard Hall is now privately owned and no longer
6 accessible to the public, the city concluded that the value of retaining Howard
7 Hall is not significant.

8 The findings then address the value of the proposed commemorative
9 garden, and its three elements: the outdoor therapy area, the playground, and
10 the commemorative features. The city council concluded that the cultural
11 significance of the site would be better served under the proposed
12 commemorative garden than would preservation of the structure, and that the
13 value of the proposed commemorative garden outweighs the value of
14 preserving the structure.

15 Under the first assignment of error, petitioners argue that the city council
16 findings are not supported by substantial evidence. Substantial evidence is
17 evidence that a reasonable person would rely upon in reaching a decision.
18 *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). In
19 reviewing a substantial evidence challenge, LUBA’s role is not to reweigh the
20 evidence, but rather to determine if a reasonable person, viewing the whole
21 record, could reach the conclusion that the decision maker reached. *1000*
22 *Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441
23 (1992).

24 Petitioners first argue that the city council failed to consider the value of
25 the historic architecture of Howard Hall. Elsewhere, petitioners assert that the
26 designation of Howard Hall was based not only on its association with the OSB

1 campus, as the city council found, but also on the significance of its
2 architecture and John Bennes, its architect. However, petitioners do not cite to
3 any support in the record for that assertion. We note that a copy of the 1989
4 historic designation is in the record. The “Statement of Significance” does not
5 discuss the architecture of Howard Hall, but only its association with the OSB.
6 Record 1102. Other portions of the designation describe Howard Hall’s
7 architecture, but nothing in the designation document cited to our attention
8 attributes historic significance to that architecture. The city council’s findings
9 on this point are supported by substantial evidence.

10 Second, petitioners challenge the findings describing the value of the
11 commemorative garden, arguing that the site is located next to a busy street and
12 is a poor location for a playground. Petitioners argue that there are better
13 locations for a playground in proximity to Salem Hospital. However, again,
14 petitioners cite to no evidence in the record supporting their assertion that the
15 site is a poor location for a playground or that better locations are available in
16 proximity to Salem Hospital. Even if the record included evidence on those
17 points, as intervenor notes, SRC 230.090(d)(2)(A) does not require the city to
18 evaluate the value of the proposed use of the site compared to the value of the
19 proposed use at alternative sites. Instead, it requires the city to determine
20 whether the “value to the community of the proposed use of the property
21 outweighs the value of retaining the designated historic resource on the present
22 site.” Petitioners also ignore findings that address and reject the contention that
23 the city must address whether the commemorative garden can be located
24 elsewhere. Record 6. Petitioners have not demonstrated that the city’s findings
25 under SRC 230.090(d)(2)(A) are not supported by substantial evidence.

26 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 SRC 230.090(d)(2)(B) requires a finding that:

3 “The designated historic resource is not capable of generating a
4 reasonable economic return and the demolition is economically
5 necessary.”

6 The city council relied on evidence that the cost of improvements necessary to
7 upgrade Howard Hall for re-use as an office building or similar use, including
8 installation of an HVAC system and seismic upgrades, would far exceed the
9 expected economic return.

10 Petitioners argue that the city council findings are not supported by
11 substantial evidence. Specifically, petitioners dispute the city’s reliance on
12 evidence that the cost of rehabilitating Howard Hall would cost as much as
13 \$5.5 million. Petitioners cite to conflicting evidence, specifically an e-mail
14 from an opponent stating that the “cost to make the building safe and functional
15 will be under \$1.0 million.” Record 42. In addition, petitioners cite to an e-
16 mail from a commercial realtor stating that he has a client who may be
17 interested in leasing Howard Hall for a school and who may be willing to pay
18 for rehabilitation, subject to negotiation. Record 1082.

19 However, petitioners must do more than cite to evidence that conflicts
20 with the evidence the city chose to rely upon. Petitioners must demonstrate
21 that, considering the evidence in the whole record, no reasonable person would
22 rely upon the evidence the city did, to conclude that Howard Hall is not capable
23 of generating a reasonable economic return. The city council relied upon
24 detailed studies at Record 1119-47 and Record 1264-68 to conclude that the
25 cost of rehabilitating Howard Hall would far exceed the reasonable economic
26 returns of leasing a rehabilitated building. A reasonable person could rely on
27 those detailed studies to so conclude, notwithstanding the conflicting evidence

1 cited by petitioners. The two e-mails that petitioners cite to are unsubstantiated
2 assertions that do not undermine the city council’s conclusion, based on the
3 applicant’s detailed studies, that a rehabilitated Howard Hall is not capable of
4 generating a reasonable economic return.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 SRC 230.090(d)(2)(C) requires a finding that “[t]he owner has made a
8 good faith effort to sell or relocate the designated resource.” As noted, there is
9 no dispute that Howard Hall cannot be relocated. Under this assignment of
10 error, petitioners challenge the city’s findings that intervenor made a “good
11 faith effort” to “sell” Howard Hall.

12 To satisfy SRC 230.090(d)(2)(C), intervenor issued a Request for
13 Proposals (RFP), seeking proposals to lease Howard Hall for beneficial use, but
14 received no responses. The city council concluded that conducting the RFP
15 process was sufficient to satisfy the requirement for a good faith effort to “sell”
16 Howard Hall:

17 “Because the resource is only the building (Howard Hall) and not
18 the surrounding or underlying land, the City lacked the authority
19 to require the applicant to ‘sell’ only the building (particularly
20 because it could not be moved), and therefore, under these
21 circumstances, the applicant complied with the criteria by making
22 a good faith effort to lease the resource. Therefore, the City
23 Council finds that this criterion has been met.” Record 4.

24 Under the third assignment of error, petitioners argue that intervenor
25 “never offered the building for sale, and its attempts to lease the property
26 through its RFP were not in good faith.” Rushing Petition for Review 14.
27 Petitioners suggest that the terms of the RFP would not have been acceptable to
28 a reasonable person, but cite to no support in the record for that assertion. In

1 addition, petitioners ignore findings that address and reject the contention that
2 the RFP was too restrictive to constitute a “good faith effort.” Record 5.
3 Petitioners have not demonstrated that the city council erred in concluding that
4 the RFP process represented a “good faith effort” to lease Howard Hall.

5 Petitioners also challenge the above-quoted finding that a good faith
6 effort to lease Howard Hall satisfies the requirement to make a good faith effort
7 to “sell” Howard Hall. Petitioners argue that “[o]wners sell parts of buildings,
8 or entire buildings, without selling the underlying land all the time.” Rushing
9 Petition for Review 14. Petitioners cite to no support in the record for that
10 assertion, but even assuming it is true, petitioners do not squarely confront the
11 city council’s finding that it lacked authority to require intervenor to attempt to
12 “sell” Howard Hall under the present circumstances, where only Howard Hall
13 and not the underlying land is a designated resource. The city council
14 interpreted SRC 230.090(d)(2)(C) to the effect that, under such circumstances,
15 a good faith effort to lease the resource is sufficient to satisfy the requirement
16 to make a good faith effort to “sell” the resource. Petitioners do not challenge
17 the city council’s interpretation, or attempt to demonstrate that that
18 interpretation is reversible under the deferential standard of review that LUBA
19 must apply to a governing body’s interpretation of its code provisions. ORS
20 197.829(1).²

² ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 Finally, petitioners challenge earlier findings noting that SRC
2 230.090(d)(2)(C) requires a good faith effort to “sell or relocate” the resource.
3 Those findings conclude that it is not necessary for an applicant to attempt to
4 *both* sell *and* relocate the resource. Record 4. Petitioners disagree, arguing
5 that the text and context of SRC 230.090(d)(2)(C) suggests that that standard
6 does require the applicant to demonstrate that it attempted to both sell *and*
7 relocate the resource. Intervenor defends the city’s interpretation, arguing that
8 SRC 230.090(d)(2)(C) is clearly framed in the disjunctive.

9 We need not address this dispute, because the city’s finding that SRC
10 230.090(d)(2)(C) does not require an applicant to attempt to both sell and
11 relocate the resource is essentially *dicta*. The city found, and there is no
12 dispute, that the “relocation” element of SRC 230.090(d)(2)(C) is satisfied or
13 obviated by the fact that Howard Hall cannot be relocated. As discussed
14 above, the city found that the requirement for a good faith effort to “sell”
15 Howard Hall is satisfied by good faith efforts to lease the resource, and we
16 have affirmed that finding. In other words, the city council essentially applied
17 both elements of SRC 230.090(d)(2)(C) conjunctively in this case. Thus, even
18 if the city erred in finding that the two elements can be applied disjunctively, as
19 petitioners argue, that error would be harmless error in the present case, and not

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 provide a basis for reversal or remand. Accordingly, we do not resolve the
2 parties' interpretational dispute on this point.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 SRC 230.090(d)(2)(D) requires a finding that “[n]o prudent and feasible
6 alternative exists to rehabilitate and reuse the designated resource in its present
7 location.”

8 The city's findings describe in some detail the RFP process and the
9 feasibility of rehabilitating Howard Hall for reuse at its present location.
10 Record 5-7. Petitioners argue that the findings are inadequate, because they
11 ignore substantial evidence that the building can be rehabilitated and reused.
12 Petitioners also argue that the historic landmarks commission correctly
13 concluded that SRC 230.090(d)(2)(D) is not met.

14 However, petitioners do not cite any evidence in the record that
15 undermines the city council's reliance on the evidence submitted to
16 demonstrate that no prudent or feasible alternative exists to rehabilitate and
17 reuse Howard Hall. Petitioners' mere disagreement with the city council's
18 findings, and petitioners' preference for the contrary conclusion reached by the
19 historic landmarks commission, does not provide a basis for reversal or
20 remand.

21 The fourth assignment of error is denied.

22 **FIFTH ASSIGNMENT OF ERROR**

23 Intervenor proposed that the commemorative garden, including the
24 playground, be open to the public. The city council found that “maintaining
25 public access” to the commemorative garden is a significant factor in

1 determining compliance with SRC 230.090(d)(2)(A). Record 2. Accordingly,
2 the city council imposed Condition 2:

3 “The property underneath Howard Hall—approximately 4,800
4 square feet—will be used as a Commemorative garden honoring
5 the contributions of the Oregon School for the Blind. The
6 Commemorative garden must be in substantial compliance with
7 the proposal submitted by the applicant. If substantial compliance
8 cannot be met, the applicant shall reapply for a modification of the
9 original decision. The applicant, or any future property owner,
10 may apply to the City Council to modify this condition of use.
11 Substantial compliance with the proposal submitted by the
12 applicant means:

13 “[a two-page list of specific design features, including] “Benches,
14 tables, and a rain shelter shall be provided for use by the public
15 within the commemorative garden.” Record 7.

16 Under the fifth assignment of error, petitioners argue that Condition 2 is
17 flawed because it requires only “substantial compliance” with the proposal,
18 which could offer intervenor significant latitude in redeveloping the site after
19 Howard Hall is demolished. Further, petitioners object to the language that
20 allows intervenor or any future property owner to seek future modifications to
21 Condition 2. Petitioners speculate that intervenor or a subsequent owner may
22 seek to modify Condition 2 to eliminate public access to the commemorative
23 garden, and notes that no condition in the decision requires that the garden and
24 playground be open to the public in perpetuity.

25 Intervenor responds, and we agree, that petitioners have not
26 demonstrated that Condition 2 is inadequate or insufficient. Condition 2 lists,
27 in considerable detail, the proposed elements that must be established on the
28 site in order to satisfy the requirement for “substantial compliance” with the
29 proposal submitted by the applicant. As delineated, Condition 2 leaves little
30 room for doubt or uncertainty about the scope of intervenor’s obligations.

1 Under Condition 2, if substantial compliance cannot be met, the applicant must
2 apply for modification of the original decision.

3 Condition 2 also provides that the applicant, or a future property owner,
4 may apply to the City Council to modify the requirements of Condition 2. As
5 petitioners note, this means that the requirements of Condition 2, including the
6 fairly implied requirement that the commemorative garden be open to the
7 public, may not be permanent or last in perpetuity. However, petitioners have
8 not cited any authority that prohibits the city from allowing a future property
9 owner to seek city council approval to modify a requirement of Condition 2, or
10 that requires the city to impose unalterable and perpetual requirements. Absent
11 some authority on that point, petitioners' arguments do not provide a basis for
12 reversal or remand.

13 The fifth assignment of error is denied.

14 The city's decision is affirmed.