

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

3  
4                   SOUTH CENTRAL ASSOCIATION OF NEIGHBORS,  
5                   *Petitioner,*

6  
7                   and

8  
9                   CURT FISHER, JON CHRISTENSON,  
10                  and TIMOTHY COWAN,  
11                  *Intervenors-Petitioners,*

12  
13                  vs.

14  
15                  CITY OF SALEM,  
16                  *Respondent,*

17  
18                  and

19  
20                  SALEM HOSPITAL,  
21                  *Intervenor-Respondent.*

22  
23                  LUBA No. 2014-083

24  
25                  FINAL OPINION  
26                  AND ORDER

27  
28                  Appeal from City of Salem.

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30                  Tyler P. Malstrom, Salem, filed a petition for review and argued on  
31                  behalf of petitioner.

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33                  Curt Fisher and Jon Christenson, Salem, filed a joint petition for review  
34                  and argued on their own behalf.

35  
36                  Tim Cowan, Salem, filed a petition for review and argued on his own  
37                  behalf.

38  
39                  Daniel B. Atchison, City Attorney, Salem, filed a joint response brief and

1 argued on behalf of respondent.  
2

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

8 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board  
9 Member, participated in the decision.  
10

11 REMANDED 12/31/2014  
12

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

**NATURE OF THE DECISION**

Petitioner appeals a hearings officer’s decision approving site plan review and a variance to construct new medical buildings and parking areas.

**MOTION TO FILE REPLY BRIEF**

Intervenor-petitioner Tim Cowan moves to file a reply brief to respond to arguments made in the response brief. OAR 661-010-0039 provides that a reply brief must be filed within seven days of the date the response brief is filed, and must be confined to “new matters” raised in a response brief. The city and intervenor-respondent Salem Hospital (the Hospital) move to strike the reply brief for two reasons: (1) the reply brief was filed 13 days after the response brief was filed, on the same day as oral argument, and (2) most of the reply does not address “new matters” raised in the response brief. In response, intervenor-petitioner submitted several post-oral argument pleadings that we consider to the extent necessary to decide whether to allow the reply brief.

Respondents’ motion to strike is granted. Filing the reply brief on the date of oral argument, six days after it was due, violated OAR 661-010-0039 and prejudiced the respondents’ substantial rights, by denying respondents reasonable opportunity to prepare and submit their cases, and a full and fair hearing. OAR 661-010-0005. In addition, with the exception of Part II.A of the reply brief addressing waiver challenges, we agree with respondents that the remainder of the reply is not limited to “new matters” raised in the response brief.<sup>1</sup> The reply brief is not allowed.

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<sup>1</sup> At oral argument, intervenor-petitioner read aloud portions of the reply brief. We will consider those oral statements that respond to waiver challenges.

1 **MOTION TO STRIKE**

2 The city and the Hospital move to strike an affidavit and documents that  
3 are attached to intervenor-petitioner Tim Cowan’s petition for review, arguing  
4 that the affidavit and documents are not in the record.

5 Intervenor-petitioner does not respond to the motion to strike. With  
6 exceptions not applicable here, LUBA’s evidentiary review is confined to the  
7 record before the local government. ORS 197.835(2)(a). The motion to strike  
8 is granted, and LUBA will not consider the affidavit or the attached documents  
9 for any purpose in this appeal.

10 **FACTS**

11 The subject property is a 8.42-acre parcel that is the former site of the  
12 Oregon School for the Blind.<sup>2</sup> The property is bounded on three sides by city  
13 streets, and on the north by Pringle Creek. Portions of the property are within  
14 the creek’s 100-year floodplain and a small portion within the creek’s  
15 floodway.

16 The parcel is zoned Public and Private Educational Services (PE), which  
17 allows medical centers, hospitals, and outpatient medical services as permitted  
18 uses. In May 2014, the Hospital applied to the city for site plan review to  
19 construct a new outpatient rehabilitation center, a hospitality house,  
20 maintenance structure, and parking for the new buildings, and for additional  
21 parking to serve existing buildings located on the nearby Hospital grounds.

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<sup>2</sup> The Hospital acquired the site in 2009, and removed all buildings except Howard Hall, which is a city-designated historic landmark. In a separate decision, the city approved the Hospital’s application to demolish Howard Hall and replace it with a commemorative garden. That decision was appealed to LUBA, and affirmed. *Rushing v. City of Salem*, \_\_ Or LUBA \_\_ (LUBA No. 2014-079), December 17, 2014.

1 The Hospital also applied for a code standard variance to allow removal of nine  
2 significant trees.

3 The city planning administrator provided notice of the application and a  
4 request for comments to persons entitled to notice, including petitioner, and  
5 petitioner provided comments. The planning administrator approved the site  
6 plan and the variance, and petitioner appealed the decision to a hearings  
7 officer, raising issues regarding compliance with parking maximums,  
8 transportation improvements, and the variance. The hearings officer conducted  
9 a *de novo* hearing on August 13, 2014, and subsequently issued the city's final  
10 decision approving the site plan review and variance. This appeal followed.

## 11 **INTRODUCTION**

12 The petition for review filed by petitioner South Central Association of  
13 Neighbors (SCAN) has five assignments of error. The first assignment of error  
14 has four sub-assignments. Intervenors-petitioners Curt Fisher and Jon  
15 Christenson (Fisher) filed a petition for review that is substantially similar to  
16 SCAN's, although it breaks the sub-assignments of error in SCAN's first  
17 assignment of error into five separate assignments of error, for a total of nine.  
18 We address these related assignments of error together, and for convenience  
19 refer to SCAN and the Fisher intervenor-petitioners collectively as  
20 "petitioners." Intervenor-petitioner Cowen's petition for review has three  
21 assignments of error that are unrelated to the other two petitions, and those  
22 assignments of error are addressed separately.

## 23 **FIRST ASSIGNMENT OF ERROR (SCAN)**

## 24 **FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR (FISHER)**

25 Petitioners argue that the city erred in approving too many off-street  
26 parking spaces on the property.

1 Salem Revised Code (SRC) 133.100(a) requires developers to provide  
2 for the minimum number of off-street parking spaces set out in Table 133-1 for  
3 various types of uses.<sup>3</sup> SRC 133.100(b) provides a formula for determining the  
4 maximum number of off-street parking spaces based on Table 133-1. The SRC  
5 therefore has both minimum and maximum off-street parking requirements.  
6 Under Table 133-1 and SRC 133.100(b), the maximum number of off-street  
7 parking spaces that could be approved on the subject property based on the  
8 proposed rehabilitation building and hospitality house is 189 spaces.

9 The Hospital proposed and the city approved 264 parking spaces on the  
10 subject 8.42-acre parcel, including 75 additional spaces to serve existing  
11 buildings constructed on other lots that are part of the Hospital campus, located  
12 east of the subject property. The Hospital argued, and the hearings officer  
13 agreed, that it is appropriate to determine the maximum number of parking  
14 spaces based on the total number of buildings and uses on the larger Salem

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<sup>3</sup> The SRC was re-codified after the application was submitted, and the recodification is known as the Unified Development Code (UDC). The hearings officer found that the UDC does not apply to the applications. Record 4. All SRC code provisions cited in this opinion are the former codification applied in the city's decision. SRC 133.100 is entitled "Off-Street Vehicle Parking Requirements," and provides in relevant part:

“(a) Except as otherwise provided in this zoning code, off-street parking spaces shall be provided in amounts not less than those set forth in Table 133-1.

“(b) Off-street parking spaces shall not exceed 2.5 times the amount required under Table 133-1 if such amount is 20 or less; and 1.75 times the amount required if such amount is more than 20.

“\* \* \* \* \*”

1 Hospital campus, which is under single ownership.<sup>4</sup> The hearings officer  
2 examined several contextual code provisions, and concluded based on that  
3 contextual analysis that the relevant “site” for purposes of calculating the  
4 maximum parking allowed on the subject property under SRC 133.100(b) is the  
5 entire Salem Hospital campus, which includes the subject property and a  
6 number of separate lots and buildings in common ownership.

7 Under these assignments of error, petitioners argue that the hearings  
8 officer misconstrued the applicable law in concluding that under the applicable  
9 SRC provisions the maximum number of parking spaces allowed on the subject

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<sup>4</sup> The hearings officer’s findings state:

“\* \* \* [T]he Hearings Officer finds that the better way to analyze the application is to view the property in its entirety. The hospital campus is under single ownership and SRC 133.070 states that land provided for off-street parking and loading areas shall be owned in fee title by the owner of the property served by the parking. SRC 133.050(a)(2) provides that parking areas may be located off the site of the main building or use if it is within 500 feet of the site. SRC 140.270 provides that where two or more separate lots are combined under single ownership to accommodate a single development, the entire combined area shall be considered a single lot. The Hearings Officer is convinced that the Salem Hospital—who owns the entire subject property and the adjacent parcels—should be given credit for the entire area of the Salem Hospital campus which would mean that their minimum off-street parking requirements for the campus is 2,340 and the maximum is 4,095. Therefore, the proposed number of parking spaces [for the entire campus] of 2,836, which includes the new 264 parking spaces, falls well within that range, and finds for the applicant on this basis for appeal. In addition, this allows for flexibility in parking for the various buildings on the campus.”  
Record 4.

1 property can be based on the entire Salem Hospital campus. For the reasons  
2 that follow, we generally agree with petitioners.

3 SRC chapter 133 sets out the standards for off-street parking, loading  
4 and driveways. SRC 133.050(b) provides that “[o]ff-street parking is  
5 incidental to the use which it serves.” SRC 133.050(a) provides that “[o]ff-  
6 street parking and loading areas shall be provided on the same lot with the  
7 main building or use,” with one relevant exception. The exception, at SRC  
8 133.050(a)(2), provides that “the parking area may be located off the site of the  
9 main building or use if it is within 500 feet of such site.” As noted above, SRC  
10 133.100 provides for minimum and maximum numbers of parking spaces,  
11 based on Table 133-1. Table 133-1 lists a number of use categories, for  
12 example, “Health Services,” which must provide one parking space per 350  
13 square feet of gross floor area, and “Hospitals,” which must provide one and  
14 one-half parking spaces per bed.

15 Taken together, the foregoing SRC provisions clearly link required  
16 parking to the particular building or use it serves and is incidental to, and  
17 require that such parking be provided on the same lot as that building or use,  
18 and on a different lot only if that different lot is within 500 feet of the site of  
19 the building or use that the parking serves. Nothing in the SRC chapter 133  
20 parking provisions suggests that multiple developed lots in common ownership  
21 can be aggregated into a single “lot” or “site” for purposes of locating parking  
22 or calculating the minimum or maximum number of parking required under the  
23 applicable SRC chapter 133 provisions.

24 The hearings officer’s conclusion that the entire Salem Hospital campus  
25 constitutes a single commonly-owned “lot” for purposes of the SRC parking  
26 provisions, and therefore parking for any of the buildings or uses on the

1 campus can be provided anywhere else on the campus, rests on context  
2 provided by two code provisions. The first is SRC 133.070, which requires  
3 that land for off-street parking must be either (1) owned in fee title by the  
4 owner of the property served by the parking, or (2) subject to a permanent  
5 easement. However, SRC 133.070 speaks only to ownership, and does not  
6 suggest that parking incidental to a building or use can be located on a different  
7 lot or site than the main building or use served, if that location would violate  
8 otherwise applicable requirements (such as the SRC 133.050(a)(2) “within 500  
9 feet” requirement).

10 The second contextual provision the hearings officer relied upon is SRC  
11 130.270, part of a code section entitled “Lot Standards.” SRC 130.270  
12 provides:

13 **“Buildings to be on a Lot.** Every building shall be entirely  
14 situated on a separate lot, except as allowed under the Unit  
15 Ownership Law (ORS 91.400, et seq.). *Where two or more*  
16 *separate lots are combined under a single ownership to*  
17 *accommodate a single development, the entire combined area*  
18 *shall be considered as a single lot for purposes of this zoning*  
19 *code.* Buildings which are attached at a common property line, but  
20 which otherwise meet all requirements of SRC Chapter 56 as  
21 separate buildings shall be considered as separate buildings for  
22 purposes of this section.” (Emphasis added).

23 The hearings officer apparently understands the second sentence in SRC  
24 130.270, emphasized above, to provide that where two or more contiguous lots  
25 are owned in common, any separate buildings or development on those  
26 separate lots are treated as a “single development,” and the commonly owned,  
27 contiguous lots are treated as a single “lot” for all zoning code purposes,  
28 including the off-street parking requirements of SRC chapter 133. However,

1 the full text and context of SRC 130.270 do not support such an expansive  
2 interpretation of the second sentence.

3 The three sentences of SRC 130.270 are concerned with the location of  
4 buildings on lots, which has consequences for setbacks and similar standards in  
5 SRC chapter 130. The first sentence states the general rule that each building  
6 shall be placed on a single lot, with an exception for condominiums. The  
7 second sentence, emphasized above, states another exception: “a single  
8 development” may be placed on more than one lot in common ownership, and  
9 if so the combined area is then treated as a single lot for purposes of other  
10 zoning standards. The circumstance the second sentence is addressing is a  
11 proposed “single development” that is constructed across a lot boundary onto  
12 two or more contiguous lots. That circumstance is refined in the third sentence,  
13 which provides that development consisting of separate buildings attached at a  
14 common property line may still be considered separate buildings. Viewed  
15 together, it is reasonably clear that the second sentence does not purport to state  
16 that separate buildings on separate lots constitute a “single development”  
17 simply because those lots and buildings happen to be under common  
18 ownership, or that the combined area of such separate lots constitute a single  
19 “lot.”

20 Although the various buildings and lots owned by the Salem Hospital are  
21 no doubt functionally interrelated, we are not cited to any basis in the city’s  
22 code to view the Salem Hospital campus as “a single development” for  
23 purposes of SRC 130.270 or any other code provision. Moreover, the practical  
24 effect of the hearings officer’s interpretation of SRC 130.270 is to carve a  
25 significant exception into the SRC 133.050 requirement that off-street parking  
26 areas be provided on the same lot with the “main building or use” that the

1 parking serves, or, if located on a separate lot, be provided within 500 feet of  
2 that main building or use. One apparent purpose of those provisions is to  
3 ensure that parking incidental to a building or use is located in reasonable  
4 proximity to the building or use served. Under the hearings officer's  
5 interpretation, off-street parking that is incidental to a building may be located  
6 at the opposite end of the Salem Hospital campus from that building, even if  
7 that parking is located a considerable distance from the building it nominally  
8 serves.

9 In sum, the hearings officer has not established that more than 189  
10 parking spaces may be allowed on the property consistent with all applicable  
11 code requirements. That is not to say that additional parking spaces to serve  
12 other buildings on the Salem Hospital campus cannot be approved on the  
13 subject property, only that such additional parking spaces must comply with the  
14 applicable requirements of SRC 133.100 and 133.050, including the  
15 requirement that parking located off the lot of the main building or use served  
16 must be located within 500 feet of the site of that building or use.

17 The first assignment of error (SCAN) and the first through fifth  
18 assignments of error (Fisher) are sustained.

19 **SECOND ASSIGNMENT OF ERROR (SCAN)**

20 **SIXTH ASSIGNMENT OF ERROR (FISHER)**

21 The parties agree that the challenged site plan review decision is a  
22 "limited land use decision" as defined at ORS 197.015(12). ORS 197.195(1)  
23 provides that:

24 "A limited land use decision shall be consistent with applicable  
25 provisions of city or county comprehensive plans and land use  
26 regulations. \* \* \* Within two years of September 29, 1991, cities  
27 and counties shall incorporate all comprehensive plan standards

1 applicable to limited land use decisions into their land use  
2 regulations. A decision to incorporate all, some, or none of the  
3 applicable comprehensive plan standards into land use regulations  
4 shall be undertaken as a post-acknowledgment amendment under  
5 ORS 197.610 to 197.625. If a city or county does not incorporate  
6 its comprehensive plan provisions into its land use regulations, the  
7 comprehensive plan provisions may not be used as a basis for a  
8 decision by the city or county or on appeal from that decision.”

9 Citing the first sentence of ORS 197.195(1), petitioners argue that the  
10 hearings officer’s approach in calculating the maximum number of off-street  
11 parking spaces based on the entire Salem Hospital campus is inconsistent with  
12 the Parking Management Element policies in the city’s Transportation System  
13 Plan (TSP).

14 The hearings officer rejected the argument below. The hearings officer  
15 found that the cited TSP policies cannot be applied directly as approval criteria  
16 to the challenged site plan review decision, because the last sentence of ORS  
17 197.195(1) provides that no comprehensive plan policies may be applied to a  
18 limited land use decision as approval criteria, unless the local government has  
19 incorporated such policies into its land use regulations, and the city has not  
20 incorporated the cited TSP policies into its land use regulations. Record 5.

21 On appeal, petitioners disagree that the TSP parking policies are  
22 inapplicable, arguing that SRC chapter 133 is the regulatory implementation of  
23 the TSP parking policies, and that implementation means that the TSP policies  
24 have been “incorporated” into the SRC with the meaning of ORS 197.195(1).

25 Assuming without deciding that SRC chapter 133 was adopted to  
26 implement the cited TSP policies, we disagree with petitioners that such  
27 implementation represents “incorporation” of the TSP policies into the SRC as  
28 approval criteria within the meaning of ORS 197.195(1). A decision to

1 “incorporate” comprehensive plan standards into a local government’s land use  
2 regulations as direct approval criteria must be adopted as a post-  
3 acknowledgment plan amendment, and that amendment must make clear what  
4 specific comprehensive plan policies apply to limited land use decisions as  
5 approval criteria. *Paterson v. City of Bend*, 49 Or LUBA 160, 167 (2005).  
6 Petitioners cite to no post-acknowledgment plan amendment that purports to  
7 specifically incorporate the TSP parking policies as direct approval criteria for  
8 limited land use decisions.

9 Petitioners also argue that the hearings officer’s interpretation of the  
10 SRC 133 standards to allow the additional parking spaces based on the entire  
11 Salem Hospital campus is inconsistent with the “intent” of the TSP parking  
12 policies. In addition, citing ORS 197.829(1)(d), petitioners argue that the  
13 hearings officer’s interpretation is contrary to the requirements of the  
14 Transportation Planning Rule (TPR) at OAR 660-012-0045(5), which  
15 petitioners assert the TSP parking policies implement.<sup>5</sup>

16 However, we need not resolve petitioners’ challenges to the hearings  
17 officer’s interpretation based on inconsistency with the “intent” of the TSP  
18 parking policies or the cited TPR provision. Based on the text and context of  
19 the SRC chapter 133 and related provisions, we have rejected the hearings  
20 officer’s interpretation that the number of parking spaces allowed on the  
21 subject property may be determined based on the entire Salem Hospital

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<sup>5</sup> ORS 197.829(1)(d) provides in relevant part that LUBA must affirm an interpretation of a land use regulation that implements a land use administrative rule such as OAR 660-012-0045, unless the interpretation is “contrary” to the rule.

1 campus. Accordingly, petitioners’ arguments under these assignments of error  
2 provide no additional basis for reversal or remand.

3 The second assignment of error (SCAN) and sixth assignment of error  
4 (Fisher) are denied.

5 **THIRD ASSIGNMENT OF ERROR (SCAN)**

6 **SEVENTH ASSIGNMENT OF ERROR (FISHER)**

7 The subject property is bounded on the south by Mission Street, a minor  
8 arterial without bike lanes. Petitioner SCAN argued below that the city’s TSP  
9 requires the Hospital to construct bike lanes on Mission Street. As noted  
10 above, the hearings officer rejected that argument, concluding that the TSP had  
11 not been incorporated into the city’s land use regulations as approval standards  
12 for limited land use decisions. Record 5. However, the hearings officer  
13 imposed a condition of approval that requires the Hospital to dedicate an  
14 additional 12 feet of right-of-way along Mission Street, in order to  
15 accommodate additional bicycle and pedestrian improvements when the city  
16 deems it appropriate to construct them. *Id.*

17 Under these assignments of error, petitioners again argue that the  
18 Hospital was required to construct bike lanes on Mission Street, but base that  
19 argument on SRC 77.150 rather than direct application of the TSP policies.  
20 SRC 77.150(a) requires that “[a]s a condition of issuance of any building  
21 permit for a development with under improved boundary streets, the boundary  
22 street shall be improved or deferred, and right-of-way for such street shall be  
23 dedicated,” as provided in SRC 77.150(c). SRC 77.150(2) defines “under  
24 improved street” to mean, in relevant part, any public street that lacks “bike  
25 lanes (where required).” Petitioners contend that the TSP requires bike lanes

1 on Mission Street, and that Mission Street is therefore an “under improved”  
2 street for purposes of ORS 77.150.

3 Respondents argue, initially, that no party raised any issue under SRC  
4 77.150 during the proceedings below, and therefore the issue of compliance  
5 with SRC 77.150 was waived. ORS 197.763(1).<sup>6</sup> Petitioners offer no response  
6 to respondents’ waiver challenge. We agree with respondents that raising the  
7 issue of compliance with the TSP provisions regarding bike lanes on minor  
8 arterials is insufficient to raise the issue raised here, that SRC 77.150 requires  
9 the Hospital to construct bike lanes on Mission Street. As the arguments were  
10 framed below, the hearings officer and the Hospital were led to believe that  
11 petitioners contended only that the TSP provisions applied directly. Further,  
12 respondents cite to portions of a staff report to the hearings officer addressing  
13 SRC 77.150 and concluding that Mission Street is not “under improved.”  
14 Record 107. Had petitioners challenged that conclusion below and made  
15 arguments to the contrary based on SRC 77.150, the hearings officer and the  
16 Hospital could have responded. However, petitioners have not demonstrated  
17 that the issue of whether SRC 77.150 requires bike lanes on Mission Street was  
18 raised below with the specificity required by ORS 197.763(1). This issue is  
19 waived.

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<sup>6</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 The third assignment of error (SCAN) and seventh assignment of error  
2 (Fisher) are denied.

3 **FOURTH ASSIGNMENT OF ERROR (SCAN)**

4 **EIGHTH ASSIGNMENT OF ERROR (FISHER)**

5 SRC 220.005(f)(3)(B) provides that site plan review shall be granted if  
6 “the transportation system provides for the safe, orderly and efficient  
7 circulation of traffic into and out of the proposed development, and the  
8 negative impacts to the transportation system are mitigated adequately.” The  
9 hearings officer addressed SRC 220.005(f)(3)(B) and imposed four minor  
10 conditions to improve circulation and address negative impacts, but generally  
11 rejected petitioner SCAN’s arguments below that more extensive transportation  
12 improvements were required to provide for the safe, orderly and efficient  
13 circulation of traffic.

14 On appeal to LUBA, petitioners make no particular arguments under  
15 SRC 220.005(f)(3)(B), but instead argue that the Bicycle System Element of  
16 the city’s TSP include plans for improving the bicycle facilities at the adjoining  
17 intersection of Mission and Winter Streets, and that the hearings officer erred  
18 in failing to require the Hospital to construct those improvements.

19 The hearings officer relied on the testimony of the city public works  
20 department and two transportation engineers to conclude that no additional  
21 circulation or transportation improvements were necessary to comply with SRC  
22 220.005(f)(3)(B). Record 5. The hearings officer specifically rejected  
23 petitioner SCAN’s argument that SRC 220.005(f)(3)(B) requires the Hospital  
24 to construct bicycle facility improvements referenced in the city’s TSP. *Id.*  
25 Petitioners have not established that the hearings officer erred in so concluding.  
26 SRC 220.005(f)(3)(B) does not reference the TSP or require site plan review

1 applicants to construct the bicycle facilities referenced in the TSP. Absent a  
2 more developed argument based on the requirements of SRC 220.005(f)(3)(B),  
3 petitioners' arguments under these assignments of error do not provide a basis  
4 for reversal or remand.

5 The fourth assignment of error (SCAN) and eighth assignment of error  
6 (Fisher) are denied.

7 **FIFTH ASSIGNMENT OF ERROR (SCAN)**

8 **NINTH ASSIGNMENT OF ERROR (FISHER)**

9 As noted, the city applied SRC 68.130(a) to approve a variance to a code  
10 requirement to preserve significant trees, to allow the Hospital to cut down nine  
11 significant trees. Petitioners argue that the variance was required in part to  
12 construct the additional parking for the Salem Hospital campus at issue in  
13 SCAN's first assignment of error and Fisher's first through fifth assignments of  
14 error. If LUBA finds that the additional parking is not authorized, petitioners  
15 argue, then the justification for the variance disappears and LUBA should also  
16 find that the variance is not authorized.

17 Respondents argue that the need for tree removal was also based on  
18 topographic and other constraints. However, respondents do not dispute that  
19 the variance was justified, in part, on the need to provide additional parking for  
20 the Salem Hospital campus. Remand under SCAN's first assignment of error  
21 and Fisher's first through fifth assignments of error may result in approval of  
22 fewer, or differently located, additional parking spaces, which may well alter  
23 the need to remove significant trees, require changes to the site plan, and  
24 reduce or increase the scope of the variance required. Therefore, we agree with  
25 petitioners that remand under SCAN's first assignment of error and Fisher's

1 first through fifth assignments of error requires remand under these  
2 assignments as well.

3 The fifth assignment of error (SCAN) and ninth assignment of error  
4 (Fisher) is sustained.

5 **FIRST ASSIGNMENT OF ERROR (COWAN)**

6 Intervenor-petitioner Cowan’s first assignment of error is brief and  
7 undeveloped:

8 “The decisions that Salem has emitted are unlawful because they  
9 neglect proper administration of the zoning code. Specifically, the  
10 layout presents a draft plan that causes an unnecessary cut and fill,  
11 including fill into the 100 year floodplain along Winter Street;  
12 without challenging the applicant to provide a plan that is  
13 considerate to significant, historic trees, established White Oaks  
14 and native Douglas Firs as big as five feet in diameter. A variance  
15 may not be consummated when the hardship is self-imposed.”  
16 Cowan Petition for Review 8.

17 Intervenor-petitioner appears to argue that (1) the site plan proposes  
18 unnecessary cut and fill in the floodplain, and (2) the variance to remove  
19 significant trees is inappropriate because the hardship is “self-imposed.”  
20 However, intervenor-petitioner cites to no applicable approval standards under  
21 the first assignment of error or, as far as we can tell, elsewhere in the petition  
22 for review, that govern cut and fill in the floodplain or require that a hardship  
23 not be “self-imposed.” We note that in the “Summary of Arguments” portion  
24 of the petition for review intervenor-petitioner cites to SRC chapter 245, which  
25 is a general code section governing variances. However, the hearings officer  
26 granted the variance to cut significant trees pursuant to SRC 68.130, which  
27 provides variance standards specifically for cutting significant trees. Nothing  
28 cited to us in SRC 68.130 requires that the applicant for a variance under that  
29 code provision demonstrate that the hardship is not self-imposed. Intervenor-

1 petitioner’s arguments under this assignment of error are undeveloped, and do  
2 not provide a basis for reversal or remand.

3 The first assignment of error (Cowan) is denied.

4 **SECOND ASSIGNMENT OF ERROR (COWAN)**

5 Intervenor-petitioner argues that “[a] true hardship has not been  
6 established, and as of this date, is self-induced by lack of good planning.”  
7 Cowan Petition for Review 8. Based on arguments made elsewhere in the  
8 petition for review, we understand intervenor-petitioner to contend that the  
9 hearings officer erred in rejecting an alternative site plan offered by opponents  
10 that arguably would have preserved more significant trees than the applicant’s  
11 proposed site plan, by “rotating” the rehabilitation building 12 degrees  
12 clockwise. If that is intervenor-petitioner’s argument, it is not sufficiently  
13 developed for review.

14 The hearings officer adopted findings noting and relying on testimony  
15 from the applicant’s planner that the alternative site plan offered by opponents,  
16 while it might preserve additional trees and reduce the scope of the required  
17 variance, causes conflicts with other code requirements, for example by  
18 relocating the rehabilitation building in a manner that causes development to  
19 extend into the floodway of Pringle Creek, where development is generally  
20 prohibited. Record 6.<sup>7</sup> For that reason and others, the hearings officer rejected  
21 arguments based on the alternative site plan and ultimately approved the site  
22 plan and the variance, concluding that all applicable standards are met.

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<sup>7</sup> The alternative site plan appears to show the northeastern corner of the rotated rehabilitation building touching a faint line that indicates the floodway boundary, and a relocated sidewalk that extends entirely into the floodway. Record 93.

1 Intervenor-petitioner offers no challenge to those findings that we can  
2 understand, and the arguments under this assignment of error do not provide a  
3 basis for reversal or remand.

4 The second assignment of error (Cowan) is denied.

5 **THIRD ASSIGNMENT OF ERROR (COWAN)**

6 Intervenor-petitioner’s third assignment of error states, in full:

7 “The new driveway onto Mission is both [*sic*] and dangerous.  
8 Since the Physical Therapy building is not ‘a complex,’ per the  
9 discussion in Mr. Pfeiffer’s testimony, the driveway should not be  
10 allowed. If for no other criteria, this should be a condition that  
11 approval is subject to the City of Salem public works, and  
12 ODOT.”

13 There is no argument supporting this assignment of error anywhere in the  
14 petition for review, and we do not understand it. As respondents note, the  
15 hearings officer approved the driveway onto Mission Street, finding that it  
16 complies with the SRC 220.005(f)(3)(C) requirement that driveways be  
17 designed to facilitate safe and efficient movement. Record 10-11.  
18 Cowan does not attempt to demonstrate that those findings are inadequate or  
19 unsupported by substantial evidence. The argument that the development is  
20 not a “complex” and therefore the driveway is not allowed is particularly  
21 obscure. Respondents speculate that intervenor-petitioner is referring to  
22 testimony by an opponent citing to UDC code provisions that were adopted  
23 after the Hospital submitted its application, and that the hearings officer  
24 concluded do not apply. We also do not understand the assertion that the  
25 driveway should be a condition of approval subject to the city’s public works  
26 department and ODOT. Intervenor-petitioner’s arguments are insufficiently  
27 developed for review.

28 The third assignment of error (Cowan) is denied.

1 The city's decision is remanded.