

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

3
4 FRIENDS OF CANEMAH and PAUL EDGAR,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF OREGON CITY,
10 *Respondent,*

05/31/18 PM 2:21 LUBA

11 and

12
13 ARIA TOUCH, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2017-133

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from City of Oregon City.

22
23 James J. Nicita, Oregon City, filed the petition for review and argued on
24 behalf of petitioners.
25

26
27 William K. Kabeiseman, Portland, filed a joint response brief and argued
28 on behalf of respondent. With him on the brief were Carrie Richter, Bateman
29 Seidel, and Cable Huston LLC.
30

31 Tommy A. Brooks, Portland, filed a joint response brief and argued on
32 behalf of intervenor-respondent. With him on the brief were Cable Huston
33 LLC, Carrie Richter, and Bateman Seidel.
34

35 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board
36 Member, participated in the decision.
37

38 AFFIRMED

05/31/2018

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

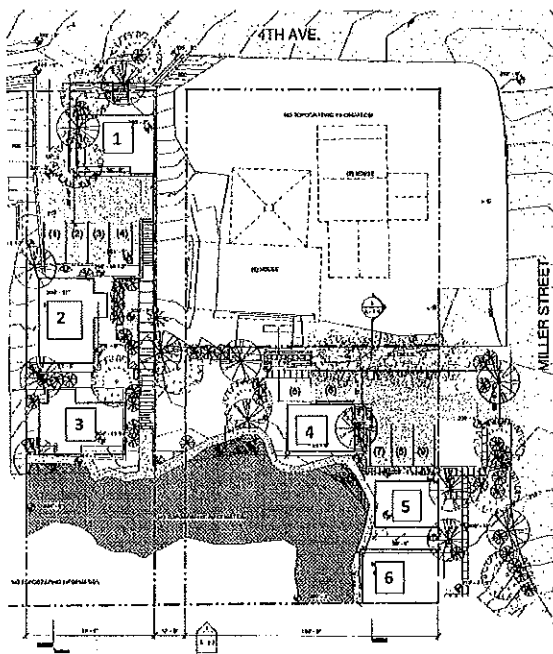
Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city commission decision that denies their appeal of a city historic review board (HRB) decision that approves five cottage style homes in the Canemah Historic District in Oregon City.

FACTS

A drawing that shows the subject property is included below:



Proposed Layout:

MD 17-01 - MD 17-06; Cottage Homes

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8

The five cottage style dwellings at issue in this appeal are numbered 1 and 3-6. Dwelling number 2 was eliminated from the proposal during the

1 proceedings below. The subject property is made up of three parcels, so that
2 more than one dwelling will be located on two of the parcels.¹ The parcels are
3 in the Canemah Historic District and adjoin an existing developed historic
4 property that occupies the southwest quadrant of Miller Street and Fourth
5 Avenue. Proposed parking for the dwellings is shown by numbers in
6 parentheses on the drawing, for example parking spaces (1), (2), (3) and (4)
7 would be located behind dwelling number 1, south of Fourth Avenue. Those
8 proposed parking spaces are one of the issues in this appeal. Another of the
9 issues in this appeal concerns the HRB's decision to eliminate setback
10 requirements for at least two dwellings (dwellings 5 and 6) to avoid
11 development in wetland areas located in the southern part of the property (the
12 darkened area on the above drawing). Another issue is whether the grading
13 proposed to site dwelling 1 is "excessive."

14 Because the subject property is in an historic overlay district, it was
15 subject to review under Oregon City Municipal Code (OCMC) 17.40. As
16 relevant here, new construction in a historic overlay district requires a
17 "certificate of appropriateness." OCMC 17.40.060. Where a proposal is issued
18 a certificate of appropriateness, it is eligible for "historic preservation
19 incentives." OCMC 17.40.065(B). Historic preservation incentives can include
20 adjustment of dimensional standards, such as setbacks. The HRB approved a

¹ There are references to four parcels in some places in the record, but it appears that the subject property is made up of three parcels.

1 certificate of appropriateness for the proposal and in doing so also approved
2 historic preservation incentives. As already noted, the historic preservation
3 incentives included a waiver of setback requirements for dwellings 5 and 6.

4 Petitioners appealed that HRB decision to the city commission, which is
5 Oregon City's governing body. The city commission held an on-the-record
6 hearing to consider that appeal, limited to the issues set out in petitioners' local
7 appeal of the HRB decision. The city commission denied the appeal and
8 affirmed the HRB decision. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioners' first assignment of error includes two related subassignments
11 of error. We address those subassignments of error separately below.

12 **A. Kosinski Letter**

13 Under OCMC 17.59.190 (D)(2), a person who wishes to appeal a Type
14 III decision, such as the HRB decision in this matter, must have "participated
15 either orally or in writing" before the HRB.² Christine Kosinski (Kosinski)

² As relevant, OCMC 17.59.190 (D)(2) provides:

"Standing to Appeal. The following rules prescribe who has standing to appeal:

"* * * * *

"2. For Type III and IV decisions, only those persons or recognized neighborhood associations who have participated either orally or in writing have standing to appeal the decision of the planning commission or historic review board, as applicable. Grounds for appeal are limited

1 submitted a letter dated November 15, 2017 to the city commission. The city
2 commission rejected that letter based on a finding that Kosinski “did not
3 participate in the proceedings before the HRB[.]” Record 3.³ It is undisputed
4 that Kosinski did participate before the HRB and that the reason the city gave
5 for rejecting the letter was erroneous. Petitioners assign error to the city
6 commission’s erroneous rejection of the November 15, 2017 Kosinski letter.

7 The city commission’s rejection of the Kosinski letter was a procedural
8 error. Under ORS 197.840(9)(a)(B) a procedural error may be a basis for
9 remand where it “prejudiced the substantial rights of the petitioner.”⁴ The
10 substantial rights of petitioners that are protected by ORS 197.835(9)(a)(B)
11 include “an adequate opportunity to prepare and submit their case and a full
12 and fair hearing.” *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

to those issues raised either orally or in writing before the
close of the public record. No new evidence shall be
allowed.”

³ The “Supplemental Record” that LUBA received on February 28, 2018 is more accurately described as a “Replacement Record” or “Amended Record,” since it was submitted to replace the record that LUBA received on February 5, 2018 in its entirety. All “Record” citations in this opinion are to the “Supplemental Record” that LUBA received on February 28, 2018.

⁴ ORS 197.835(9)(a)(B) requires LUBA to reverse or remand a land use decision if a local government:

“Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

1 Respondent and intervenor-respondent (respondents) first argue
2 petitioners had an opportunity to object to the city's rejection of the Kosinski
3 letter and failed to do so. Although not explicitly required by statute, LUBA
4 has long held that where a party has an opportunity to object to a procedural
5 error and fails to do so, it may not assign error at LUBA based on the
6 procedural error. *ODFW v. Crook County*, 72 Or LUBA 316, 327 (2015);
7 *Mason v. Linn County*, 13 Or LUBA 1, 4, (1984), *aff'd in part, rev'd and*
8 *remanded on other grounds* 73 Or App 334, 698 P2d 529, *rev den* 299 Or 314
9 (1985); *Meyer v. City of Portland*, 7 Or LUBA 184, 190 (1983), *aff'd* 67 Or
10 App 274, 678 P2d 741, *rev den* 297 Or 82 (1984); *Dobaj v. Beaverton*, 1 Or
11 LUBA 237, 241 (1980). While petitioners may have had an opportunity to
12 object to the city's rejection of the Kosinski letter, the opportunity to object
13 assumes petitioners had some reason to believe the letter was being erroneously
14 rejected. Petitioners contend they had no reason to question the city's finding
15 that Kosinski did not participate before the HRB. We agree with petitioners.

16 Respondents next argue that while Kosinski's substantial rights may
17 have been prejudiced by the city's rejection of her November 15, 2017 letter,
18 Kosinski is not a party to this appeal and petitioners have not established that
19 the city's erroneous rejection of the Kosinski letter resulted in any prejudice to
20 *petitioners'* substantial rights. Respondents are correct that petitioners must
21 establish that their substantial rights were prejudiced by the city's erroneous
22 rejection of the Kosinski letter, before remand under ORS 197.835(9)(a)(B) is

1 appropriate. *Bauer v. City of Portland*, 38 Or LUBA 432, 438-39 (2000);
2 *Moore v. Clackamas County*, 29 Or LUBA 372, 379 (1995). Respondents point
3 out that because the city commission's hearing was limited to the evidentiary
4 record compiled by the HRB, petitioners were not entitled to rely on any new
5 evidence that may have been included in the Kosinski letter. Respondents
6 argue the city commission's review was limited to the legal issues that were
7 identified in petitioners' September 12, 2017 local appeal, which are set out at
8 Record 885-89. Respondents contend that petitioners neither identify any legal
9 arguments that were included in the Kosinski letter nor explain why petitioners
10 could not themselves have raised any such legal arguments. We agree with
11 respondents that because petitioners could themselves have raised any legal
12 arguments that might have been included in the Kosinski letter, petitioners'
13 substantial rights were not prejudiced by the city commission's erroneous
14 rejection of the Kosinski letter. *See Fraley v. Deschutes County*, 32 Or LUBA
15 27, 38, *aff'd* 145 Or App 484, 930 P2d 902 (1996), *rev den* 325 Or 45 (1997)
16 (reaching the same conclusion based on nearly identical facts).

17 Because the city commission's erroneous rejection of the Kosinski letter
18 was a procedural error, and because petitioners have not established that
19 procedural error resulted in prejudice to *petitioners'* substantial rights, that
20 procedural error provides no basis for remand.

21 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 As noted above, the proposal is for cottage housing.⁵ OCMC 17.62 sets
3 out the standards and procedures for “Site Plan and Design Review.” The
4 specific standards for site plan and design review of proposals for cottage
5 housing appear at OCMC 17.62.59. Those standards call for a Type II review,
6 with the community development director as the decision maker and set out a
7 variety of substantive standards.⁶ OCMC 17.62.59(A) provides “[w]here there
8 is a conflict between these standards [meaning the OCMC 17.62.59 cottage
9 housing standards] and the standards in other chapters, the Cottage Housing
10 standards shall apply.” Petitioners speculate that there may be conflicts
11 between the OCMC 17.62.59 cottage housing standards and the OCMC 17.40
12 historic district overlay standards the HRB applied in approving a certificate of
13 appropriateness and in approving historic preservation incentives to permit

⁵ OCMC 17.04.260 defines cottage housing as follows:

“Cottage housing’ means two or more single-family structures on a single lot; allowed in single-family and two-family dwelling districts. Cottage housing provides an option that preserves the privacy and personal space of a detached house in a smaller and less costly unit. Cottages provide a way to trade quantity of space for quality of space.”

⁶ The primary differences between Type II and Type III review is that Type II review does not include a hearing by right and the community development director is the decision maker. Under Type III review the initial decision maker is the planning commission or HRB and a quasi-judicial hearing is required by right. For both Type II and Type III review, the initial decision is appealable to the city commission. OCMC Table 17.50.030 n 2.

1 reduced setbacks. Based on that potential for conflict and the OCMC
2 17.62.59(A) requirement that OCMC 17.62 standards prevail in cases of
3 conflict, petitioners argue under their second assignment of error the HRB
4 lacked jurisdiction to approve the proposal under OCMC 17.40 and its Type III
5 procedure, and that jurisdiction to approve the proposal lies with the
6 community development director under OCMC 17.62.59.

7 The city commission recognized the OCMC 17.62.59 cottage housing
8 standards vs. OCMC 17.40 historic district standards issue, and adopted the
9 following findings to address this issue:

10 “Site Plan and Design Review-Cottage Housing Requirements

11 “The Historic Review Board review of this proposal is the first
12 step in the development process. The applicant’s next step will be
13 to apply for and receive approval for Cottage Housing through the
14 Type II Site Plan and Design Review process (OCMC 17.62.059-
15 Cottage Housing), including lot consolidation. Conformance with
16 the criteria for Cottage Housing, a permitted use in the underlying
17 zone, will be reviewed and conditions may be placed on the
18 proposal, at time of Site Plan and Design Review. The Historic
19 Review Board’s review of this proposal is confined to the criteria
20 found in OCMC 17.40-Historic Overlay.” Record 4.

21 Petitioners neither acknowledge nor assign error to the above findings.
22 Those findings explain that the challenged city commission decision is
23 concerned solely with OCMC 17.40 standards that govern certificates of
24 appropriateness and historic preservation incentives. The applicant will be
25 required to seek site plan and design review approval later, and at that time the
26 special standards that govern site plan and design review approval of cottage

1 housing in OCMC 17.62.059 will apply.⁷ If any conflicts between the OCMC
2 17.62.059 cottage housing standards and the OCMC 17.40 historic district
3 standards are identified, those conflicts will be resolved at the time of site plan
4 and design review. If any conflicts are resolved in a way that necessitates a new
5 or modified decision by the HRB, there is no reason why site plan and design
6 review approval cannot be conditioned to require any additional HRB review
7 that may be necessary.

8 Petitioners' apparent but largely undeveloped theory appears to be that
9 site plan and design review of cottage housing under OCMC 17.62.059 is so
10 incompatible with HRB review for a certificate of appropriateness and historic
11 preservation incentives that community development director Type II review
12 under OCMC 17.62.059 entirely displaces HRB review under OCMC 17.40 for
13 a certificate of appropriateness and historic preservation incentives. The city on
14 the other hand takes the position that both reviews are possible and required.
15 Based on the arguments presented in this appeal, we cannot say the city's
16 finding that both reviews are possible and required is implausible, and we
17 therefore are required to defer to the city commission's interpretation that both

⁷ One of the conditions attached to the HRB decision, which was affirmed by the city commission, provides:

- “1. The property shall obtain all necessary permits *including but not limited to Site Plan and Design Review*, and Geologic Hazards Review by the Planning Division, a right-of-way permit from the Development Services Division, and all necessary permits from the Building Division.” Record 57.

1 reviews are possible and required, under ORS 197.829(1) and *Siporen v. City*
2 *of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 The third assignment of error is presented as two subassignments of
6 error. We address those subassignments of error separately below.

7 **A. Historic Preservation Incentives to Allow Zero Setbacks**

8 Eligibility for historic preservation incentives is governed by OCMC
9 17.40.065(B).⁸ “New construction” is eligible for historic preservation
10 incentives. The city commission approved historic preservation incentives to
11 allow proposed dwellings 5 and 6 to be constructed with zero setback from
12 Miller Street, rather than the setback that would otherwise be required, to avoid
13 construction in the wetlands to the west of the proposed building sites for
14 dwellings 5 and 6.

15 In their first subassignment of error, petitioners argue the proposed
16 cottage dwellings are not “new construction,” as OCMC 17.04.815 defines that

⁸ OCMC 17.40.065(B) provides:

“Eligibility for Historic Preservation Incentives. All exterior alterations of designated structures and new construction in historic and conservation districts are eligible for historic preservation incentives if the exterior alteration or new construction has received a certificate of appropriateness from the Historic Review Board per OCMC 17.50.110(c).”

1 term.⁹ As petitioners read that definition, the “new construction” that is
2 eligible for historic preservation incentives under OCMC 17.40.065(B) is
3 limited to new construction on parcels that are already developed with historic
4 structures. Petitioners contend that construction on vacant parcels like the
5 subject parcels does not qualify as that kind of “new construction” and does not
6 qualify for OCMC 17.40.065(B) historic preservation incentives. And even if
7 the proposed dwellings do qualify for OCMC 17.40.065(B) historic
8 preservation incentives, petitioners contend those incentives are not
9 permissible to avoid development in wetlands. Finally, petitioners contend the
10 city commission’s findings are inadequate because they do not identify the
11 applicable setbacks that dwellings 5 and 6 will not comply with.

12 Under OCMC 17.50.190(C)(4), petitioners were required to specify in
13 their notice of appeal the issues that formed the basis for their appeal of the
14 HRB decision to the city commission.¹⁰ If petitioners failed to raise an issue

⁹ As relevant, OCMC 17.04.815 provides:

“For the purposes of Chapter 17.40, new construction means an additional new building or structure separate from the existing building mass that is larger than two hundred square feet on all properties located within a Historic Overlay District. Any building addition that is thirty percent or more in area (be it individual or cumulative) of the original structure shall be considered new construction.”

¹⁰ OCMC 17.50.190(C) provides in relevant part:

“The following must be included as part of the notice of appeal:

1 about whether the proposed dwellings qualify as “new construction” or whether
2 historic resource incentives are available to avoid wetland development in their
3 notice of local appeal, those issues are waived under *Miles v. City of Florence*,
4 190 Or App 500, 509-10, 79 P3d 382 (2003). Also, under ORS 197.835(3) and
5 197.763(1), issues may not be raised at LUBA, unless they were raised prior to
6 the close of the record following the final evidentiary hearing.¹¹ Respondents
7 argue that the issue that the proposal is *not eligible* for historic preservation
8 incentives because the proposed dwellings are not “new construction” as
9 defined by OCMC 17.04.815 and such incentives are *not* available to avoid
10 development in wetlands were not listed as a grounds for appeal in the local

“* * * * *

“4. A statement of the specific grounds for the appeal[.]”

¹¹ ORS 197.835(3) provides:

“Issues 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.”

197.763(1) provides;

“An issue which may be the basis for an appeal to the Land Use Board of Appeals 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 appeal as required by OCMC 17.50.190(C)(4). Record 885-89; *see* n 10.
2 Further, respondents argue those issues were not raised prior to the close of the
3 final evidentiary hearing, as required by ORS 197.835(3) and 197.763(1).

4 Petitioners respond that the *issue* of whether the proposal *should be*
5 granted historic preservation incentives was raised. Record 887. Petitioners
6 argue the position taken in the petition for review that the proposal is ineligible
7 for historic preservation incentives is simply a different *argument* under that
8 more general *issue*.

9 We have acknowledged that the issues/argument distinction is a difficult
10 one to draw in some cases. *See STOP Tigard Oswego Project, LLC v. City of*
11 *West Linn*, 68 Or LUBA 360, 382 (2013). But we agree with respondents that
12 the issue that the proposed dwellings do not qualify on the merits for a historic
13 preservation incentive under OCMC 17.40.065 (the issue that petitioners raised
14 below) is a different issue from whether the proposed development is even
15 eligible to be considered for an award of historic preservation incentives under
16 OCMC 17.40.065. And the issue petitioners raised (that the proposal does not
17 qualify on the merits) was insufficient to give the city commission fair notice of
18 that latter issue (that the proposal is ineligible for consideration for an historic
19 preservation incentive under OCMC 17.40.065). *See STOP Tigard Oswego*
20 *Project*, 68 Or LUBA at 382-83 (argument that disputed fee exceeds 20-year
21 term limit is inadequate to give fair notice of the issue of whether the city lacks
22 authority to impose a fee).

1 Regarding petitioners’ contention that the findings fail to identify the
2 setback that would be required without the historic preservation incentives to
3 allow the zero setback, respondents argue the contention is factually incorrect,
4 because the decision does identify the 15-foot setback. Record 9. And
5 respondents argue that in any event, petitioners fail to explain why failure to
6 identify the distance of a setback that is not required by virtue of the historic
7 preservation incentives is remandable error. We agree with respondents on both
8 points.

9 Subassignment of error A is denied.

10 **B. Design Guidelines**

11 In this subassignment of error, petitioners argue the city commission
12 erred in applying the HRB’s Guidelines for New Construction in Oregon City
13 Historic Districts (Historic Guidelines). We turn first to the parties’
14 disagreement about the legal status of the Historic Guidelines.

15 **1. Legal Status of the Guidelines**

16 Petitioners appear to contend that each individual Historic Guideline
17 must be treated as a mandatory approval criterion.¹² Respondents on the other
18 hand appear to argue the Historic Guidelines are merely non-mandatory
19 *guidance*, with which the proposal must be generally *compatible*.¹³ The legal

¹² Petitioners set out language from the comprehensive plan at pages 13-17 of the petition for review that they contend supports their position.

¹³ Respondents rely on the following language from the Historic Guidelines:

1 status of the Historic Guidelines is far from obvious, but for the reasons set out
2 below, we do not agree completely with either petitioners or respondents.

3 The starting point for determining the legal status of the Historic
4 Guidelines is OCMC 17.40.060(F), which sets out the “criteria” for approval of
5 “new structures in an historic or conservation district”:

6 “For construction of new structures in an historic or conservation
7 district, or on an historic site, the *criteria* to be used by the board
8 in reaching its decision on the certificate of appropriateness shall
9 include the following:

- 10 “1. The purpose of the historic conservation district as set forth
11 in Section 17.40.010;
- 12 “2. The provisions of the city comprehensive plan;
- 13 “3. The economic effect of the new proposed structure on the
14 historic value of the district or historic site;
- 15 “4. The effect of the proposed new structure on the historic
16 value of the district or historic site;
- 17 “5. The general compatibility of the exterior design,
18 arrangement, proportion, detail, scale, color, texture and

“These guidelines are not mandatory standards adopted by the City Commission. In order to have any development approved, the development must be shown to comply with the adopted historic review standards found in the Oregon City Municipal Code. These guidelines were adopted by the [HRB], the body who performs the initial review of development in historic districts, and are intended to provide supplemental information and additional guidance about how the HRB interprets the standards in the code. Although complying with these guidelines does not guarantee approval of any development, the guidelines should assist anyone who is seeking approval.” Record 1770.

1 materials proposed to be used in the construction of the new
2 building or structure;

3 “6. Economic, social, environmental and energy consequences;

4 “7. *Design guidelines adopted by the historic review board.*”
5 (Emphases added.)

6 The first criterion, (purpose of the historic conservation district) is not
7 really written in a way that is easily applied as a permit approval criterion.¹⁴

8 The second criterion, (provisions of the city comprehensive plan) is equally

¹⁴ OCMC 17.40.010 provides in part:

“It is declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to:

“A. Effect and accomplish the protection, enhancement and perpetuation of such improvements and of districts which represent or reflect elements of the city’s cultural, social, economic, political and architectural history;

“B. Safeguard the city's historic, aesthetic and cultural heritage as embodied and reflected in such improvements and districts;

“C. Complement any National Register Historic districts designated in the city;

“D. Stabilize and improve property values in such districts;

“E. Foster civic pride in the beauty and noble accomplishments of the past[.]”

1 problematic.¹⁵ Criteria 3 and 4 require inquiries (economic effect and effect on
2 historic value) but do not set out what would normally be considered a standard
3 or criterion that must be met. Criterion 5 requires “general compatibility” and
4 criterion 6 calls for an economic, social, environmental and energy
5 consequences inquiry without specifying how the result of that inquiry is to be
6 applied. And finally, criterion 7 is the “Design Guidelines adopted by the
7 historic review board.”

8 This is not the appropriate forum for a broad review of the nominal
9 “criteria” that are set out at OCMC 17.40.060. But if the city adopted OCMC
10 17.40.060(F) to comply with the ORS 227.173(1) requirement that permit
11 decisions be governed by “standards and criteria,” the city may wish to
12 consider revising the “criteria” at OCMC 17.40.060 so that they are worded
13 more like “criteria” that can be applied to review a permit application.

14 Turning to the seventh criterion, OCMC 17.40.060(F)(7) refers to the
15 Historic Guidelines as “guidelines.” The word “guidelines” has a particular
16 meaning in land use parlance. ORS 197.015(9); *Downtown Comm. Assoc. v.*
17 *City of Portland*, 80 Or App 336, 722 P2d 1258, *rev den* 302 Or 86 (1986).¹⁶

¹⁵ According to the city’s website, it has six comprehensive plan documents, an overarching comprehensive plan, four area-specific plans and a transportation systems plan. The overarching comprehensive plan is 148 pages long and includes language that could be applied as permit approval criteria and language that would be extremely difficult or impossible to apply as permit approval criteria.

¹⁶ ORS 197.015(9) provides:

1 Where a criterion or standard is clearly relegated to the status of a guideline, it
2 is non-mandatory, regardless of whether the guideline is worded in mandatory
3 terms. 80 Or App at 341.

4 The language in the Historic Guidelines themselves, which was adopted
5 by the HRB rather than the city commission, is consistent with the ORS
6 197.015(9) definition of “guidelines” that relegates guidelines to advisory
7 status. But OCMC 17.40.060(F), which was adopted by the city commission,
8 refers to the seven criteria as criteria and those criteria were presumably
9 adopted to comply with the ORS 227.173(1) requirement that permit decisions
10 be governed by approval criteria. As the statute uses the term “criteria,” they
11 certainly may be, and frequently are, mandatory requirements. Apparently, the
12 resolution the city commission adopted to support the Historic Guidelines also
13 refers to the Historic Guidelines as “standards.” Petition for Review 20. The
14 city commission’s intended legal status of the Historic Guidelines is not clear.
15 The Historic Guidelines, like the other “criteria” adopted by the city
16 commission, are frequently not written in a way that makes them easy to apply

“‘Guidelines’ means suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.”

1 as mandatory approval criteria. In that circumstance, where it is not clear
2 whether the enacting body intended comprehensive plan or land use regulation
3 provisions to be mandatory approval criteria, LUBA applies “a case-by-case
4 inquiry, examining the wording and context of the particular plan and land use
5 regulation provisions.” *Eskandarian v. City of Portland*, 26 Or LUBA 98, 104
6 (1993) (citing *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff’d* 96 Or
7 App 645, 773 P2d 1340 (1989)). With this understanding of how to determine
8 the legal status of the Historic Guidelines, we turn to the Historic Guidelines
9 cited by petitioners.

10 2. Characteristics of the Vernacular Style

11 The first two Historic Guidelines cited by petitioners are not Historic
12 Guidelines at all. Rather they are two of nine site characteristics of the
13 Vernacular architectural style set out at page 26 of the Historic Guidelines:

14 “CHARACTERISTICS OF THE [VERNACULAR] STYLE

15 “Site

16 “* * * * *

17 “■ Lots range from 50x100 to 100x100 and contain a single
18 house.

19 “* * * * *

20 “■ Garages: Not found historically; *informal graveled or paved*
21 *parking next to street or along house*; New garages to be
22 located along side or behind house. Where topography is a
23 concern, locate garage offset from building primary façade,

1 close to street with direct access.” Record 1793 (Emphasis
2 added).¹⁷

3 This context suggests the cited characteristics are merely a description of
4 the Canemah Historic District and are not mandatory approval criteria. As
5 respondents correctly argue, the first characteristic is simply a description of
6 the lots in the existing Canemah Historic District. The text of that
7 “characteristic” does not mandate that new dwellings must all be located on
8 their own 50x100 to 100x100 lot. Similarly, the second “characteristic” states
9 garages have not historically been provided but then states new garages may be
10 allowed with certain limitations. The disputed proposal does not include
11 garages at all; it proposes parking spaces. The second characteristic identifies
12 where parking spaces have been provided in the past but says nothing about
13 where new parking spaces must be located.

14 The Vernacular architectural style characteristics cited by petitioners
15 provide no basis for remand.

16 3. Character Guidelines

17 Character Historic Guidelines are set out at pages 33 through 52 of the
18 Historic Guidelines. Record 1800-19. The Character Guidelines are broken
19 down into four broad categories: “Site,” “Building Form,” “Design
20 Composition,” and “Public Improvements, Utilities.” Each of the categories

¹⁷ Petitioners quote the first characteristic in its entirety, but only quote the emphasized language of the second characteristic.

1 sets out two columns, one identified as “PRINCIPLE—GOOD EXAMPLE”
2 and one identified as “NOT ALLOWED.” Petitioner identifies three items in
3 the “NOT ALLOWED” column. We will assume the activities and features
4 listed in the “NOT ALLOWED” column are prohibited, based on the relatively
5 clear text and the context provided by the other column, which merely lists
6 good examples.

7 **a. Extensive Grading**

8 In the NOT ALLOWED column on page 34 of the Historic Guidelines,
9 the following is identified as not allowed:

10 “Extensive regrading of lot to raise or lower the main level of a
11 house. Tall walls to alter the natural topography for building siting
12 or yard leveling purposes.” Record 1801.

13 The city commission adopted the following findings in response to petitioners’
14 argument below that the proposed grading is “extensive”:

15 “The New Construction Guidelines prohibit ‘extensive regrading
16 of the lot.’ Appellants raise a particular concern with regard to
17 House 1, which will be lower in elevation than the adjacent homes
18 as a result of grading. As the applicant points out, the regrading
19 will not be extensive. Rather, it is necessary along the north
20 portion of the property to make the property accessible to vehicles.
21 Moreover, the proposed site grading will serve to lower House #1,
22 making it appear shorter and serve to elevate the prominence of
23 the contributing structures on both sides.” Record 7.

24 Petitioners fault the city for not adopting an express interpretation of the
25 term “extensive.” Petitioners contend the decision lacks findings about what
26 might constitute “extensive regrading” at this site or precisely how much
27 grading will occur.

1 We do not fault the city commission for failing to adopt an express
2 interpretation of the common term “extensive.” The most relevant dictionary
3 definition of “extensive” is “large in amount * * * or extent * * * considerable
4 in number.” *Webster's Third New Int'l Dictionary* 805 (unabridged ed 2002).
5 The findings explain that the city commission concluded that because the
6 proposed grading was only the amount necessary to allow vehicle access to the
7 propose parking and the lowering of dwelling 1 would elevate the prominence
8 of the adjoining historic structures on the adjoining properties the proposed
9 regrading is not extensive.

10 The prohibition against “extensive regrading of the lot” is subjective.
11 The city commission’s findings adequately explain why the city commission
12 concluded the proposed regrading is not extensive, and those findings are
13 supported by substantial evidence in the record.

14 **b. Orientation/Spacing**

15 Petitioners next cite examples of orientation and spacing that are not
16 allowed:

17 “Primary building side facing the interior or side lot line[.]”

18 “Irregularly spaced buildings within a regularly spaced
19 neighborhood context, or regularly spaced buildings within a[n]
20 irregularly spaced neighborhood context[.]”

21 “Crowded building sites from too large of building or too small of
22 lot dimension[.]”

23 “Houses spaced tightly together, or disrupting the neighborhood
24 rhythm[.]”

1 “Spacing that diminishes the historic quality of existing historic
2 resources[.]” Record 1803.

3 Petitioners argue the city failed to adopt any findings addressing these
4 Historic Guidelines. Respondents contend the reason the city adopted no
5 findings regarding these Historic Guidelines is that petitioners raised no issue
6 below concerning these Historic Guidelines and therefore petitioners’
7 arguments concerning these Historic Guidelines are “not within LUBA’s scope
8 of review for this proceeding.” Response Brief 13. We understand respondents
9 to argue that petitioners’ arguments under these Historic Guidelines have been
10 waived under *Miles* 190 Or App 509-10, because they are not included in the
11 notice of local appeal, and have been waived under ORS 197.835(3), because
12 they were not raised prior to the close of the evidentiary record. *See* n 11 and
13 related text. Petitioners have not replied to respondents’ waiver argument.
14 Accordingly, petitioners’ arguments concerning these Historic Guidelines are
15 waived. *Brockman v. Columbia County*, 62 Or LUBA 394, 398 (2011);
16 *Williamson v. City of Salem*, 52 Or LUBA 615, 618-19 (2006); *Cox v. Yamhill*
17 *County*, 29 Or LUBA 263, 266 (1995).

18 Subassignment of error B is denied.

19 The third assignment of error is denied.

20 The city’s decision is affirmed.