

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LLYNORE D. BARRICK and)
5 GREGORY L. BARRICK,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF SALEM,)
12)
13 Respondent,)
14)
15 and)
16)
17 J. L. GWYN and WES TORAN,)
18)
19 Intervenors-Respondent.)

LUBA No. 94-013
FINAL OPINION
AND ORDER

20
21
22 Appeal from City of Salem.

23
24 Llynore D. Barrick, Salem, filed the petition for
25 review and argued on her own behalf.

26
27 No appearance by respondent.

28
29 Wallace W. Lien, Salem, filed the response brief. Mark
30 Shipman argued on behalf of intervenors-respondent.

31
32 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
33 Referee, participated in the decision.

34
35 REMANDED 06/24/94

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving a
4 tentative subdivision plat.

5 **MOTIONS TO INTERVENE**

6 J. L. Gwyn and Wes Toran move to intervene on the side
7 of respondent in this appeal proceeding. There is no
8 objection to the motions, and they are allowed.

9 **FACTS**

10 The subject property consists of 9.33 acres and is
11 zoned Residential (RS). A creek runs through the subject
12 property. The proposal is to subdivide the subject property
13 into 37 lots. The planning department approved the proposal
14 and petitioners appealed to the city council. The city
15 council affirmed the planning department's decision, and
16 this appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioners argue the challenged decision is erroneous
19 because the subdivision application, plat map and street
20 profile map failed to include certain information required
21 by Salem Revised Code (SRC) 63.040 et seq.

22 **A. Waiver**

23 Intervenors argue petitioners failed to raise this
24 issue below, and under ORS 197.835(2) are precluded from
25 raising it for the first time at LUBA.

26 The challenged decision approves a tentative

1 subdivision plat within the Salem Urban Growth Boundary.
2 Therefore, the challenged decision is a "limited land use
3 decision." ORS 197.015(12)(a). We have not previously
4 determined whether our review of limited land use decisions
5 is limited to issues that were sufficiently raised during
6 the proceedings below.¹ The relevant statutes governing
7 limited land use decisions and this Board's scope of review
8 are ambiguous on this issue.

9 **1. Background of Relevant Statutory Provisions**

10 ORS 197.763 was enacted in 1989. It establishes a
11 number of procedural requirements for local government
12 quasi-judicial hearings on applications for land use
13 decisions.² For instance, it requires that a notice of

¹We did address this issue, and reached the same conclusion as is expressed in this opinion, in Matrix Development v. City of Tigard, ___ Or LUBA ___ (February 28, 1994). However, our opinion in Matrix Development was subsequently vacated by the court of appeals, based on a stipulation of the parties, and is not published.

²As relevant here, ORS 197.015(10)(a)(A) defines "land use decision" as:

"A final decision or determination made by a local government
* * * that concerns the adoption, amendment or application of:

"(i) The [statewide planning] goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

ORS 197.015(10)(b) establishes certain exceptions to the definition of "land use decision." One of these provides that a limited land use decision is not a land use decision. ORS 197.015(10)(b)(C).

1 hearing explaining the nature of the proposed use and
2 listing applicable approval criteria from the local
3 government comprehensive plan and land use regulations be
4 mailed to owners of certain neighboring property at least 20
5 days before the local government's evidentiary hearing.³
6 ORS 197.763(3)(a), (b) and (f). It also requires that all
7 evidence relied on by the applicant be submitted to the
8 local government and made available to the public by the
9 time the hearing notice is provided. ORS 197.763(4)(a). If
10 additional evidence is subsequently entered in support of
11 the application, any party is entitled to a continuance.
12 ORS 197.763(4)(b). Staff reports must be made available at
13 least seven days before the hearing. Id. If requested to
14 do so by a party, the local government must leave the record
15 open for at least seven days after the evidentiary hearing.
16 ORS 197.763(6).

17 With regard to the requirement to raise issues below,
18 ORS 197.763(1) provides:

19 "An issue which may be the basis for an appeal to
20 [LUBA] shall be raised not later than the close of
21 the record at or following the final evidentiary
22 hearing on the proposal before the local
23 government. Such issues shall be raised with
24 sufficient specificity so as to afford the [local
25 government decision maker], and the parties an
26 adequate opportunity to respond to each issue."

³In 1991, the statute was amended to require this notice of the local government hearing also be mailed to recognized neighborhood or community organizations. Or Laws 1991, ch 817, § 31.

1 The hearing notice provided to neighboring property owners
2 is required to include, among other things, a statement that
3 "failure of an issue to be raised in a hearing * * * or
4 failure to provide sufficient specificity to afford the
5 decision maker an opportunity to respond to the issue
6 precludes appeal to [LUBA] based on that issue."
7 ORS 197.763(3)(e). A similar statement must be made "at the
8 commencement" of a hearing governed by ORS 197.763.
9 ORS 197.763(5)(c).

10 At the same time, the statutory provision governing the
11 filing of petitions for review with LUBA was amended to
12 read:

13 "A petition for review of the land use decision
14 and supporting brief shall be filed with [LUBA] as
15 required by [LUBA rule]. Issues shall be limited
16 to those raised by any participant before the
17 local hearings body as provided in ORS 197.763.
18 * * *" ORS 197.830(10) (1989).

19 The statutory provisions governing LUBA's scope of review
20 were similarly amended to include the following provision:

21 "Issues [raised before LUBA] shall be limited to
22 those raised by any participant before the local
23 hearings body as provided in ORS 197.763. * * *"
24 ORS 197.835(2) (1989).

25 However, the following identically worded provisions
26 qualifying the limitation on raising new issues before LUBA
27 were also added to these statutes:

28 "* * * A petitioner may raise new issues [before
29 LUBA] if:

30 "(a) The local government failed to follow the

1 requirements of ORS 197.763; or

2 "(b) The local government made a land use decision
3 which is different from the proposal
4 described in the notice to such a degree that
5 the notice of the proposed action did not
6 reasonably describe the local government's
7 final action." ORS 197.830(10) (1989);
8 197.835(2) (1989).

9 These statutory provisions represent a quid pro quo,
10 whereby local governments are required to give broader and
11 more detailed notice of quasi-judicial land use hearings and
12 make evidence and staff reports available in advance of such
13 hearings, in exchange for participants being required to
14 raise an issue during the local proceedings in order to be
15 able to raise that issue before LUBA. 1000 Friends of
16 Oregon v. Benton County, 20 Or LUBA 7, 10 (1990).

17 In 1991, the legislature created a new category of
18 decision subject to LUBA review -- "limited land use
19 decisions." Or Laws 1991, ch 817. ORS 197.015(12) defines
20 "limited land use decision," in relevant part, as:

21 "[A] final decision or determination made by a
22 local government pertaining to a site within an
23 urban growth boundary which concerns:

24 "(a) The approval or denial of a subdivision or
25 partition, as described in ORS chapter 92.

26 "* * * * *"

27 A limited land use decision is not a land use decision and
28 is not subject to the requirements of ORS 197.763.
29 ORS 197.015(10)(b)(C); 197.195(2).

30 The 1991 legislation also enacted ORS 197.195,

1 establishing requirements for local government procedures
2 for making limited land use decisions. There is no
3 requirement that a public hearing be held on an application
4 for a limited land use decision.⁴ Rather, the statute
5 requires that the local government provide written notice of
6 a 14 day period for submission of written comments on the
7 application for a limited land use decision to owners of
8 certain neighboring property and to recognized neighborhood
9 or community organizations. ORS 197.195(3)(b) and (c)(A).
10 The notice must list the approval criteria applicable to the
11 limited land use decision. ORS 197.195(3)(c)(C). All
12 evidence relied on by the applicant must be available for
13 review during the period for submission of written comments.
14 ORS 197.195(3)(c)(F).

15 ORS 197.195 does not require local governments to
16 provide a local appeal of limited land use decisions made in
17 the above described manner. However, ORS 197.195(3)(a)
18 provides:

19 "In making a limited land use decision, the local
20 government shall follow the applicable procedures
21 contained within its acknowledged comprehensive
22 plan and land use regulations and other applicable
23 legal requirements."

24 With regard to requiring that issues concerning a

⁴Limited land use decisions are excluded from the definitions of "permit" in ORS 215.402(4) and ORS 227.160(2). Consequently, the requirements for local government actions on permit applications set out in ORS 215.402 to 215.422 and ORS 227.160 to 227.180 do not apply to limited land use decisions.

1 limited land use decision be raised below, the written
2 notice of the 14 day period for submission of written
3 comments must:

4 "State that issues which may provide a basis for
5 an appeal to [LUBA] shall be raised in writing
6 prior to the expiration of the comment period.
7 Issues shall be raised with sufficient specificity
8 to enable the decision maker to respond to the
9 issue[.]" ORS 197.195(3)(c)(B).

10 The 1991 legislation also added the following references to
11 limited land use decisions to the LUBA petition for review
12 and scope of review statutory sections described above:

13 "A petition for review of the land use decision or
14 limited land use decision and supporting brief
15 shall be filed with [LUBA] as required by [LUBA
16 rule]. Issues shall be limited to those raised by
17 any participant before the local hearings body as
18 provided in ORS 197.763. A petitioner may raise
19 new issues [before LUBA] if:

20 "(a) The local government failed to follow the
21 requirements of ORS 197.763; or

22 "(b) The local government made a land use decision
23 or limited land use decision which is
24 different from the proposal described in the
25 notice to such a degree that the notice of
26 the proposed action did not reasonably
27 describe the local government's final
28 action." (Provisions added in 1991
29 emphasized.) ORS 197.830(10).

30 "Issues [raised before LUBA] shall be limited to
31 those raised by any participant before the local
32 hearings body as provided in ORS 197.763. A
33 petitioner may raise new issues [before LUBA] if:

34 "(a) The local government failed to follow the
35 requirements of ORS 197.763; or

36 "(b) The local government made a land use decision

1 or limited land use decision which is
2 different from the proposal described in the
3 notice to such a degree that the notice of
4 the proposed action did not reasonably
5 describe the local government's final
6 action." (Provisions added in 1991
7 emphasized.) ORS 197.835(2).

8 **2. Applicability of Waiver to Limited Land Use**
9 **Decisions**

10 The operative provisions of ORS 197.830(10) and
11 197.835(2) state "[i]ssues shall be limited to those raised
12 by any participant before the local hearings body as
13 provided by ORS 197.763." (Emphasis added.) Because
14 ORS 197.763 is inapplicable to local limited land use
15 decision proceedings, the quoted limitation to LUBA's scope
16 of review could be interpreted as not applying to limited
17 land use decisions. Additionally, both ORS 197.830(10)(a)
18 and 197.835(2)(a) provide that new issues may be raised
19 before LUBA if "[t]he local government failed to follow the
20 requirements of ORS 197.763." This would likely almost
21 always be true in the case of limited land use decisions,
22 for which local government procedures are not required to
23 comply with ORS 197.763.

24 On the other hand, there are explicit indications in
25 the statutes that the legislature intended to limit LUBA's
26 review to issues that were raised during the local
27 government proceedings on limited land use decisions.
28 ORS 197.195(3)(c)(B) requires the local government notice of
29 the required 14 day period for submission of written

1 comments to include a statement that "issues which may
2 provide the basis for an appeal to [LUBA] shall be raised in
3 writing prior to expiration of the comment period." The
4 first sentence of ORS 197.830(10) was amended to indicate
5 that subsection applies to petitions for review challenging
6 both land use decisions and limited land use decisions. In
7 addition, the 1991 legislation creating limited land use
8 decisions also amended the exception to the statutory waiver
9 provisions found in ORS 197.830(10)(b) and 197.835(2)(b) to
10 allow new issues to be raised before LUBA if:

11 "[t]he local government made a land use decision
12 or limited land use decision which is different
13 from the proposal described in the notice to such
14 a degree that the notice of the proposed action
15 did not reasonably describe the local government's
16 final action." (Emphasis added.)

17 There would be no need to include limited land use decisions
18 in this exception to the waiver provisions if the waiver
19 provisions did not apply to limited land use decisions to
20 begin with.

21 As best we can determine, the 1991 limited land use
22 decision legislation was intended to relieve local
23 governments from having to comply with the complex
24 procedural requirements applicable to quasi-judicial "land
25 use decisions" and "permits," when making certain decisions
26 on allowing permitted uses within urban growth boundaries.
27 To that end, ORS 197.195(2) exempts limited land use
28 decisions from the procedural requirements applicable to

1 quasi-judicial "land use decisions" and "permits," and
2 ORS 197.195(3) establishes a simpler set of procedural
3 requirements for limited land use decisions.

4 There is no indication the legislature intended to
5 relieve participants in the limited land use decision making
6 process of the requirement that they raise issues below.
7 ORS 197.195(3) retains the basic elements of the "quid pro
8 quo" described above with regard to ORS 197.763. The local
9 government is required to mail written notice of a proposed
10 limited land use decision to owners of certain neighboring
11 properties and recognized neighborhood associations.
12 ORS 197.195(3)(b). That notice must list the approval
13 criteria applicable to the decision and state that issues
14 which may provide a basis for appeal to LUBA must be raised
15 below. ORS 197.195(3)(c)(B) and (C). All evidence relied
16 upon by the applicant is required to be available for review
17 during the required 14 day comment period.
18 ORS 197.195(3)(c)(F). Thus, as with ORS 197.763, in return
19 for following the procedures required by ORS 197.195, the
20 local government gains the benefit of participants being
21 required to raise issues below in order to raise them in an
22 appeal to LUBA.

23 As originally proposed, the limited land use decision
24 legislation did not include amendments to the preexisting
25 provisions of ORS 197.805 to 197.855 governing appeals
26 before LUBA. Amendments to integrate the new limited land

1 use decision provisions with these preexisting statutory
2 provisions appear to have been added to the limited land use
3 decision legislation hurriedly, late in the legislative
4 process.⁵ We believe the fact that amendments were made to
5 ORS 197.830(10) and 197.835(2) to include references to
6 limited land use decisions supports a conclusion that the
7 limitation of our review to issues raised below is intended
8 to apply to limited land use decisions subject to
9 ORS 197.195, as well as to land use decisions subject to
10 ORS 197.763. On the other hand, we also believe the
11 legislature intended that the waiver requirement be
12 conditioned on compliance with the procedures required by
13 ORS 197.195.

14 In conclusion, we will apply the statutory waiver
15 requirements to limited land use decisions the same way we
16 apply them to land use decisions. Our review of limited
17 land use decisions will be limited to issues that were
18 raised below unless (1) the local government did not satisfy
19 the procedural requirements of ORS 197.195,⁶ or (2) the
20 limited land use decision adopted differs significantly from

⁵The parties do not cite, and we have been unable to find, anything in the legislative history of Oregon Laws 1991, chapter 817, to shed light on the legislature's intent with regard to the application of a waiver requirement to our review of limited land use decisions.

⁶In this regard, we note that the procedural safeguards required by ORS 197.763 are generally parallel to, but exceed, those required by ORS 197.195. Therefore, if the procedures required by the local code are designed to comply with ORS 197.763, compliance with those procedures generally will also establish compliance with ORS 197.195.

1 what was described in the local government's notice of
2 proposed action.

3 **3. Identification of Issues Raised Below**

4 As we state above, petitioners argue the challenged
5 decision is erroneous because the subdivision application,
6 plat map and street profile map fail to include certain
7 information required by Salem Revised Code (SRC) 63.040 et
8 seq. In order to raise those issues here, petitioners must
9 establish the issues were raised below with "sufficient
10 specificity."

11 We see no meaningful difference between the
12 ORS 197.195(3)(c)(B) requirement that an issue be raised
13 below "with sufficient specificity to enable the [local]
14 decision maker to respond to the issue" and the
15 ORS 197.763(1) requirement that an issue be raised below
16 "with sufficient specificity so as to afford the [local
17 decision maker] an adequate opportunity to respond to each
18 issue." With regard to the scope of the specificity
19 requirement of ORS 197.763(1), we have stated:

20 * * * ORS 197.763(1) does not require that
21 arguments identical to those in the petition for
22 review have been presented during local
23 proceedings, but rather that 'argument presented
24 in the local proceedings sufficiently raise the
25 issue sought to be raised in the petition for
26 review, so that the local government and other
27 parties had a chance to respond to that issue.'
28 Hale v. City of Beaverton, 21 Or LUBA 249, 254
29 (1991); Boldt v. Clackamas County, 21 Or LUBA 40,
30 46 (1991). The Court of Appeals affirmed our
31 interpretation of the ORS 197.763(1) 'sufficient

1 specificity' requirement, stating '* * * the
2 statute requires no more than fair notice to
3 adjudicators and opponents, rather than the
4 particularity that inheres in judicial
5 preservation concepts.' Boldt v. Clackamas
6 County, 107 Or App 619, 623, 813 P2d 1078 (1991)."
7 DLCD v. Coos County, 25 Or LUBA 158, 167 (1993).
8 (Emphasis in original.)

9 Petitioners cite documents and testimony in the local
10 record concerning alleged traffic, wildlife and other
11 impacts associated with the proposal. However, subject to
12 two exceptions discussed below, petitioners cite nothing in
13 the record that would advise a reasonable decision maker
14 that an issue was being raised concerning the adequacy of
15 the subdivision application, plat map or street profile map.
16 Therefore, we conclude petitioner waived all these issues
17 except for the two identified below.

18 The issues raised below can be identified from
19 testimony that an opponent was not aware of the existence of
20 a detention basin plan and from the following testimony:

21 "Also, the submitted plot plan does not show the
22 driveways and easements of adjacent property
23 owners. In fact, there are three driveways [at]
24 varying angles and topography entering Harritt
25 within 100' of the proposed access by the
26 subdivision. * * * The safe and orderly flow of
27 traffic would be further complicated by this
28 situation." Record 98.

29 Based on the above, we conclude issues were sufficiently
30 raised in the proceedings below concerning the lack of (1) a
31 detention basin plan, and (2) information regarding
32 driveways and easements.

1 **B. Merits of Issues Raised Below**

2 LUBA has previously determined omission of required
3 information from an application is harmless procedural error
4 if the required information is located somewhere in the
5 record. Dougherty v. Tillamook County, 12 Or LUBA 20, 24
6 (1984); Families for Responsible Gov't. v. Marion County, 6
7 Or LUBA 254, 277, rev'd on other grounds 65 Or App 8, 670
8 P2d 615 (1983). However, if the required information is not
9 available in the record, and is necessary for a
10 determination of compliance with applicable approval
11 standards, then such an error is not harmless and warrants
12 reversal or remand of the challenged decision. Murphy
13 Citizens Advisory Comm. v. Josephine County, 25 Or LUBA 312,
14 324-25 (1993); McConnell v. City of West Linn, 17 Or
15 LUBA 502, 525 (1989); Hopper v. Clackamas County, 15 Or LUBA
16 413, 418 (1987); Hershberger v. Clackamas County, 15 Or LUBA
17 401, 408-09 (1987).

18 Regarding the existence of a detention basin plan,
19 intervenor acknowledges no such document exists in the
20 record.⁷ However, intervenor argues the city interpreted
21 its code to allow this document to be submitted at some
22 later point in the process. See Record 78.

⁷SRC 63.040(e)(7) (Tentative Plan of a Subdivision) requires the following to be included in the subdivision plan documents:

"The location, size and use of all contemplated and existing public areas, including easements and detention facilities within the proposed subdivision."

1 Petitioners contend the detention basin plan is
2 necessary to enable the city to establish compliance with
3 Salem Area Comprehensive Plan (SACP), section M, Scenic,
4 Historic Areas, Natural Resources and Hazards policies. We
5 determine below the challenged decision fails to establish
6 compliance with those policies. Therefore, on remand, the
7 city should either explain why a detention basin plan is not
8 required to establish compliance with applicable plan
9 policies, or should require the applicant to submit such a
10 detention basin plan.

11 Concerning the location of driveways and easements of
12 adjacent property owners, petitioners do not establish the
13 lack of information on the tentative plat relates to any
14 applicable approval standard, and we are not aware that it
15 is. Therefore, this issue provides no basis for reversal or
16 remand of the challenged decision.

17 The first assignment of error is sustained, in part.

18 **SECOND ASSIGNMENT OF ERROR**

19 Under this assignment of error, petitioners contend the
20 challenged decision does not comply with SACP Scenic,
21 Historic Areas, Natural Resources and Hazards, policies 3,
22 5, 6 and 11 (hereafter plan policies).

23 **A. Waiver**

24 Intervenors contend petitioners failed to raise any
25 issue during the local proceedings concerning the proposal's

1 compliance with plan policy 3.⁸ Therefore, intervenor
2 contends petitioners waived this issue, and may not raise it
3 in an appeal to LUBA.

4 Petitioners cite documents and testimony in the record
5 identifying natural, ecological and scenic qualities
6 associated with the subject property that they allege may be
7 destroyed by the proposal. While plan policy 3 was never
8 cited by number during the local proceedings, we believe the
9 portions of the record petitioners cite are adequate to put
10 a reasonable decision maker on notice that an issue was
11 raised concerning the requirements of plan policy 3.
12 Therefore, petitioners have not waived the right to raise an
13 issue before this Board concerning plan policy 3.

14 **B. Merits**

15 Petitioners argue the findings supporting the
16 challenged decision are inadequate to establish compliance
17 with plan policies 3, 5, 6 and 11.⁹

⁸Plan policy 3 provides as follows:

"Identified areas of significant architectural, archeological, natural, ecological, historic or other scenic values, which have been so designated and approved by the appropriate governing body, shall be protected for future generations. Where no conflicting uses have been identified, such resources shall be managed to preserve their original character. When conflicting uses are identified, resources shall be protected by acquisition or by plans which limit the intensity of development and promote conservation of the resources."

⁹Plan policy 5 is quoted in the text infra. Plan policies 6 and 11 provide as follows:

1 On their face, it appears that plan policies 3, 6 and
2 11 are applicable to the proposal. However, intervenor
3 argues those plan policies are not mandatory approval
4 standards, but rather aspirational statements of policy.
5 The challenged decision does not include an interpretation
6 of the SACP with regard to whether plan policies 3, 6 and 11
7 are mandatory standards applicable to the proposal. It is
8 well established that this Board lacks authority to
9 interpret those policies in the first instance. Weeks v.
10 City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).
11 On remand, the city must interpret these policies and apply
12 them to the proposal if it determines they are applicable
13 approval standards. In the absence of an interpretation by
14 the city, we cannot determine these policies are
15 inapplicable. Gage v. City of Portland, 123 Or App 269, 860
16 P2d 282, on reconsideration 125 Or App 119 (1993),
17 rev allowed 318 Or 478 (1994).

18 The challenged decision contains a discussion of the

"6. Identified significant wildlife habitats shall be protected and managed in accordance with State wildlife management practices. The importance of riparian vegetation shall be considered during the development review process."

"11. Salem urban area wetlands shall be identified, inventoried, and documented as to their significance as a resource. Such activities shall be coordinated among the jurisdictions. Appropriate comprehensive plan policies and development regulations shall be adopted by the next periodic review. In the interim, development in areas identified as wetlands shall be permitted only to the extent granted by State and Federal regulatory agencies."

1 proposal's compliance with plan policy 5. Plan policy 5
2 provides as follows:

3 "Waterways shall be protected, preserved, and
4 maintained as drainage courses and scenic,
5 recreation, and natural resources. These
6 characteristics shall be considered during the
7 development review process. Public access to
8 waterways for maintenance purposes should be
9 provided."

10 The challenged decision contains findings purporting to
11 address this standard. Record 11. However, the findings
12 simply discuss city and Division of State Lands (DSL)
13 requirements concerning wetlands. The findings state DSL
14 was provided with adequate notice of the proposal, and that
15 DSL will, at some point, require a fill permit. The city's
16 findings of compliance with plan policy 5 are not responsive
17 to that policy.

18 The second assignment of error is sustained.

19 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

20 Petitioners argue the challenged decision lacks
21 findings of compliance with three comprehensive plan
22 policies. However, intervenors cite findings in the
23 challenged decision determining the three comprehensive plan
24 standards are satisfied. Petitioners do not explain why the
25 findings cited by intervenors are inadequate, and we do not
26 see that they are.

27 The third and fourth assignments of error are denied.

28 **FIFTH ASSIGNMENT OF ERROR**

29 Petitioners argue the challenged decision does not

1 reflect the oral comments of the decision makers during the
2 local proceedings. However, it is well established that
3 LUBA reviews the local government's final written order.
4 That the final written order may not accurately reflect oral
5 comments made by the local decision maker during its
6 deliberations provides no basis for reversal or remand of
7 the challenged decision. Derry v. Douglas County, 26 Or
8 LUBA 25 (1993).

9 The fifth assignment of error is denied.

10 The city's decision is remanded.