

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3  
4 OREGON NATURAL RESOURCES COUNCIL, )  
5 )  
6 Petitioner, )  
7 )  
8 and )  
9 )  
10 MARTHA LYNN GRAY, CITY OF )  
11 GEARHART, TINA STINNETT, and THE )  
12 CHINOOK TRIBE, ) LUBA No. 93-228  
13 )  
14 Intervenors-Petitioner, ) FINAL  
15 OPINION  
16 ) AND ORDER  
17 CITY OF SEASIDE, )  
18 )  
19 Respondent, )  
20 )  
21 and )  
22 )  
23 CASCADE TRUST and STEPHEN )  
24 WASSERBERGER, )  
25 )  
26 Intervenors-Respondent. )  
27  
28  
29 Appeal from City of Seaside.  
30  
31 Peggy Hennessy, Portland, filed a petition for review  
32 on behalf of petitioner. Peggy Hennessy and Lynn Matte  
33 argued on behalf of petitioner.  
34  
35 Bart A. Brush, Portland, filed a petition for review  
36 behalf of intervenor-petitioner The Chinook Tribe.  
37  
38 William R. Canessa, Seaside, represented intervenor  
39 petitioner City of Gearhart.  
40  
41 Tina Stinnett, Portland, represented herself.  
42  
43 No appearance by respondent.  
44  
45 Steven L. Pfeiffer and Michael C. Robinson, Portland

1 filed a response brief. With them on the brief was Stoel  
2 Rives Boley Jones & Gray. Michael C. Robinson argued on  
3 behalf of intervenor-respondent Cascade Trust.

4

5 Stephen Wasserberger, Portland, filed a response brief  
6 on his own behalf.

7

8 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,  
9 Referee, participated in the decision.

10

11

REMANDED

03/13/95

12

13

You are entitled to judicial review of this Order.  
14 Judicial review is governed by the provisions of ORS  
15 197.850.

1           Opinion by Holstun.

2   **NATURE OF THE DECISION**

3           Petitioner appeals two city council decisions. One  
4 decision grants final planned development approval for a 69-  
5 unit planned development on two separate upland areas. The  
6 other decision approves a bridge connecting the two upland  
7 areas.

8   **MOTIONS TO INTERVENE**

9           The City of Gearhart, Tina Stinnett and The Chinook  
10 Tribe move to intervene in this appeal on the side of  
11 petitioner. There is no objection to the motions, and they  
12 are allowed.

13          Cascade Trust and Stephen Wasserberger move to  
14 intervene on the side of respondent. There is no opposition  
15 to the motions, and they are allowed.<sup>1</sup>

16          Martha Lynn Gray moved to intervene on the side of  
17 petitioner when the initial notice of intent to appeal was  
18 filed in this matter. Under our rules, "status as an  
19 intervenor is recognized when the motion to intervene is  
20 filed, but the Board may deny that status any time prior to  
21 issuance of its final order." OAR 661-10-050(1). The city  
22 thereafter filed notice of withdrawal of its decision. OAR  
23 661-10-021. After the city adopted its decision on  
24 reconsideration, petitioner filed an amended notice of

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<sup>1</sup>Respondent did not file a brief. In this opinion we refer to intervenors-respondent collectively as "applicant."

1 intent to appeal. Thereafter, all intervenors except Martha  
2 Lynn Gray refiled their motions to intervene. Because  
3 Martha Lynn Gray did not refile a motion to intervene,  
4 intervenor-respondent Cascade Trust moves to deny her status  
5 as an intervenor.

6 OAR 661-10-050(2) provides, as relevant:

7 "In the interests of promoting timely resolution  
8 of appeals, a motion to intervene shall be filed  
9 as soon as is practicable after the notice of  
10 intent to appeal is filed pursuant to OAR 661-10-  
11 015, or the amended notice of intent to appeal is  
12 filed or original notice of intent to appeal is  
13 refiled pursuant to OAR 661-10-021. \* \* \*"

14 Our rule is not clear that a party who filed a motion  
15 to intervene before a decision is withdrawn for  
16 reconsideration must refile the motion to intervene or file a  
17 second motion to intervene if an amended notice of intent to  
18 appeal is filed or an amended notice of intent to appeal is  
19 filed after the decision on reconsideration is filed with  
20 LUBA. In view of that lack of clarity in our rule, we  
21 conclude a refiled or second motion to intervene is not  
22 necessary.

23 Martha Lynn Gray's motion to intervene is allowed and  
24 Intervenor-respondent Cascade Trust's motion to deny Marth  
25 Lynn Gray status as an intervenor is denied.

26 **FACTS**

27 The northern boundary of the City of Seaside and the  
28 southern boundary of the City of Gearhart coincide. The  
29 subject 20-acre property lies south of this common boundary,

1 west of U.S. Highway 101.<sup>2</sup> The property includes two upland  
2 areas separated by a portion of the Necanicum Estuary. The  
3 disputed bridge would connect the two upland areas,  
4 replacing what is referred to as "an old fill road." Two  
5 buildings containing 13 residential units are approved for  
6 the westerly upland area. Three buildings containing 56  
7 residential units are approved for the easterly upland area.  
8 In addition, a recreation building and caretaker's residence  
9 are approved on the easterly upland area. Access to the  
10 subject property will be via an entrance onto U.S. Highway  
11 101 from the easterly upland area.

12 The uplands portion of the property is planned and  
13 zoned for residential development. Other portions of the  
14 property are planned and zoned A-3 (Coastal Lakes and Fresh  
15 Water Wetlands) and A-1 (Aquatic Natural). The challenged  
16 decision applies a Planned Development (PD) designation to  
17 the comprehensive plan/zoning map for the subject property.

18 **FIRST AND NINTH ASSIGNMENTS OF ERROR (ONRC)**

19 The disputed bridge, as approved, will cross a portion  
20 of the subject property that is zoned A-3.<sup>3</sup> Petitioner

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<sup>2</sup>As explained later in this decision, petitioner contends a portion of the subject property is located north of the City of Seaside, within the City of Gearhart. Applicant disputes this contention.

<sup>3</sup>City of Seaside Zoning Ordinance (SZO) 3.142 provides the A-3 zone "shall be designated on the City of Seaside's Comprehensive Plan/Zone Map, and shall conform to the 1" to 400' map entitled 'Major Freshwater Wetlands' on file at the City of Seaside and hereby adopted by reference." The A-3 zone "Purpose" statement provides:

1 contends that, by definition, the A-3 zone is appropriate  
2 only if the marsh the bridge will cross is a freshwater  
3 marsh. Petitioner contends the Necanicum Estuary Plan,  
4 which is adopted as part of the Seaside Comprehensive Plan  
5 (SCP), shows the disputed marsh is a saltwater marsh.<sup>4</sup>  
6 Petitioner also cites other evidence in the record  
7 suggesting the marsh to be crossed by the disputed bridge is  
8 a saltwater, rather than a freshwater, marsh. Petitioner  
9 contends the marsh the bridge will cross is improperly zoned  
10 A-3 and should be zoned A-1 (Aquatic Natural) instead.<sup>5</sup>

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"The purpose of the Coastal Lake and Freshwater Wetlands Zone  
is to assure conservation of important shoreland and wetland  
biological habitats and conserve examples of different natural  
ecosystem types in the Seaside area to assure a diversity of  
species and ecological relations.

"\* \* \* \* \*

<sup>4</sup>SCP 13.0 concerns "Estuarine and Shorelands Resources" and includes the following:

"(Note: Necanicum Estuary Plan introductions and policies are  
incorporated into this Comprehensive Plan as a  
whole.)"

We note the reference above is to the Necanicum Estuary Plan "introductions and policies." Petitioner relies heavily on the maps and supporting inventory information included in the Necanicum Estuary Inventory included at Supp Rec 96-98 and 106-08. Assuming the Necanicum Estuary Inventory is part of the Necanicum Estuary Plan, it is not clear to us whether the above reference to "introductions and policies" is intended to include as part of the SCP the maps and supporting inventory information petitioner relies upon. For purposes of this opinion, we assume that it does.

<sup>5</sup>The A-1 purpose statement at SZO 3.121 provides:

"Purpose. To provide for aquatic areas which should be managed  
for resource protection, preservation and restoration. These  
areas may include areas of significant or extension salt

1 Petitioner contends the city erred by applying the standards  
2 applicable under the A-3 zone rather than those that would  
3 apply if the property were correctly zoned A-1.

4 Petitioner's argument under this assignment is based on  
5 its assumption that the SCP and SZO are in conflict. Where  
6 the comprehensive plan and zoning ordinance conflict, the  
7 comprehensive plan controls. Baker v. City of Milwaukie,  
8 271 Or 500, 514, 533 P2d 772 (1975). However, the City of  
9 Seaside has a combined comprehensive plan and zoning map.  
10 Therefore, the A-3 designation applied to the marsh the  
11 bridge will cross is both a "comprehensive plan" and a  
12 "zoning" map designation.<sup>6</sup>

13 Where a city has a combined comprehensive plan and  
14 zoning map, there can be no Baker comprehensive plan  
15 map/zoning map conflict.<sup>7</sup> At most, the evidence cited by  
16 petitioner suggests the marsh that will be crossed by the  
17 disputed bride is a saltwater marsh. Even if we assume the

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marshes or tide flats which because of a combination of factors, such as biological productivity and habitat value, play a vital role in the functioning of the estuarine ecosystem. \* \* \*

<sup>6</sup>We earlier took official notice of the official City of Seaside comprehensive plan and zoning map. Oregon Natural Resources Council v. City of Seaside, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-228, Order, December 22, 1994), slip op 2-4. SZO 1.3 provides the City of Seaside has a combined zoning and comprehensive plan map.

<sup>7</sup>In Baker, the zoning map applied a designation allowing 39 residential units per acre and the comprehensive plan designated the property for 17 residential units per acre. The zoning map was a separate document from the comprehensive plan and had not been updated after the comprehensive plan was amended to limit development of the subject property to 17 units per acre.

1 portions of the Necanicum Estuary Inventory cited by  
2 petitioner suggesting the marsh is a saltwater marsh are  
3 part of the SCP, this would suggest the property should not  
4 have been designated as A-3 on the combined comprehensive  
5 plan and zoning map. Nevertheless, the combined  
6 comprehensive plan and zoning map does designate the  
7 property A-3. That error, if it is error, should have been  
8 corrected prior to acknowledgment and may be a proper issue  
9 during periodic review. See Larson v. Wallowa County, 116  
10 Or App 96, 102, 840 P2d 1350 (1992); Urquhart v. Lane  
11 Council of Governments, 80 Or App 176, 721 P2d 870 (1986).  
12 However, because the combined comprehensive plan and zoning  
13 map designates the property A-3, there is no Baker conflict,  
14 and the city's application of the SZO provisions governing  
15 A-3 zoned property in approving a location for the bridge  
16 was not error.

17 The first and ninth assignments of error are denied.

18 **SECOND ASSIGNMENT OF ERROR (ONRC)**

19 On November 10, 1992, the city planning commission  
20 granted what it termed "conceptual approval" of CU 92-08, a  
21 conditional use permit "to bridge a wetland area \* \* \* with  
22 conditions." The city's November 17, 1992 letter describing  
23 the planning commission's decision goes on to explain:

24 "The condition is that since three potential  
25 bridge crossing sites were identified, the site  
26 chosen must be a coordinated effort among state  
27 agencies and the developer. A final bridge site  
28 and the pros and cons of all three sites will be

1 submitted to the Planning Commission with the  
2 final plan approval."<sup>8</sup> 3d Supp Rec 2.

3 The November 17, 1992 letter goes on to state that parties  
4 who participated orally or in writing in the planning  
5 commission hearing may appeal the decision to the city  
6 council.

7 Petitioner apparently did not participate in the  
8 planning commission hearing that led to the November 10,  
9 1992 planning commission decision, and did not receive a  
10 copy of the city's November 17, 1992 letter advising  
11 applicant and certain other persons of the planning  
12 commission's decision. Applicant appealed CU 92-08, but  
13 withdrew its appeal on December 15, 1992.

14 On March 2, 1994, nine days before the city council  
15 approved the planned development challenged in this appeal,  
16 the city extended the effective date of the approval granted  
17 by CU 92-08. The city council's March 11, 1994 decision  
18 challenged in this appeal includes the following condition  
19 of approval:

20 "8. The bridge location will be the north  
21 location, and the culvert will be removed and

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<sup>8</sup>We are uncertain what documents constitute the planning commission's November 10, 1992 decision. The November 17, 1992 letter includes the following reference:

"The findings adopted were those contained in the applicants [sic] supplemental findings of October 19, 1992 which were part of the conditional use application."

Findings, dated October 19, 1992, are included at 3d Supp Rec 6-8.

1                   the fill road will be removed.     No toxic  
2                   materials will be used on the  
3                   underpinnings."<sup>9</sup> Record 69.

4                 Petitioner contends the SZO contains no authority for  
5                 granting "conceptual" approval of conditional use permits.  
6                 According to petitioner, CU 92-08 did not become a final  
7                 decision until the final bridge location was approved in the  
8                 city's March 11, 1994 decision.     Petitioner contends the  
9                 city's approval of that bridge may, therefore, be challenged  
10               in this appeal and that the city erred by not demonstrating  
11               the bridge complies with the requirements of the A-1 zone.<sup>10</sup>

12               Applicant characterizes the city's decision making  
13               regarding CU 92-08 differently.     According to applicant, the  
14               planning commission's November 10, 1992 decision concerning  
15               CU 92-08 became final when applicant abandoned its local  
16               appeal of that decision on December 15, 1992.     Applicant  
17               contends the petitioner's notice of intent to appeal in this  
18               case was filed too late to challenge the city's decision in

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<sup>9</sup>The challenged decision also includes the following statement:

"\* \* \* A bridge will connect the two upland areas.     The bridge  
will replace an old fill road.     See Condition of Approval 8.  
The bridge's approval is a separate land use decision. \* \* \*"  
Record 6.

<sup>10</sup>Petitioner concludes its argument under this assignment of error, as follows:

"Therefore, Respondent's final decision, if intended as a final  
decision of the conditional use application, is insufficient  
because it fails to address the mandatory approval criteria for  
a bridge across a salt marsh." Petition for Review 19.

1 CU 92-08. Applicant also points out petitioner did not  
2 challenge the city's March 2, 1992 decision extending CU 92-  
3 08. Having failed to challenge CU 92-08, applicant contends  
4 petitioner may not challenge the city's approval of the  
5 disputed bridge in this proceeding.

6 We see no reason why the city could not grant  
7 conditional use approval for a bridge at multiple locations  
8 or approve a bridge to be constructed at an unspecified  
9 location within an identified area. In theory, if the city  
10 addressed all relevant approval criteria in approving  
11 multiple bridge locations or approving construction of a  
12 bridge anywhere within an identified area, there would be  
13 nothing improper in later approving a final bridge location  
14 without readdressing those approval criteria. However, the  
15 planning commission's November 10, 1992 decision does not  
16 appear to grant such a conditional use permit. As  
17 petitioner correctly points out, there is language in the  
18 November 17, 1992 letter itself, and there are statements of  
19 planning commission members set out in the petition for  
20 review, suggesting applicant was to demonstrate compliance  
21 with conditional use permit approval criteria when the final  
22 bridge location is selected as part of final planned  
23 development approval.

24 Petitioner's only substantive challenge under this  
25 assignment of error is that the city should have applied the  
26 A-1 District criteria, but did not. However, under the

1 first and ninth assignments of error, we conclude the A-3  
2 comprehensive plan/zoning map designation applies to the  
3 marsh the disputed bridge would cross. Therefore, even if  
4 petitioner is correct that the city's approval of the  
5 disputed bridge at the "northern location" can be challenged  
6 in this appeal for noncompliance with A-1 zoning  
7 requirements, such a challenge provides no basis for  
8 reversal or remand.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR (ONRC)**

11 SCP 13.1, Policy 4-B provides:

12 "Because of the potential damage storm water  
13 runoff can cause in estuaries, standards for storm  
14 water drainage systems shall provide for the use  
15 of natural drainage systems (streams, etc.)  
16 whenever possible and for the dispersion of storm  
17 water from parking lots and streets prior to  
18 entering the estuary. Storm water outfalls shall  
19 always be directed away from significant marshes  
20 and tide flats." (Emphasis added.)

21 Petitioner contends the above policy is violated because  
22 stormwater runoff from the proposed development will enter  
23 the estuary after passing through a bioswale.

24 The city's findings concerning Policy 4-B explain:

25 "[The] application proposes that stormwater runoff  
26 be connected to 'bioswales' and holding ponds  
27 outside of the marsh areas. The holding ponds  
28 contain stormwater runoff which is filtered  
29 through the soil. If the ponds overfill, the  
30 water drains into a bio-swale (a shallow, grass-  
31 lined ditch), which removes any additional  
32 particles. Drawings \* \* \* show that the storm  
33 sewer outfalls are outside of the wetland, or  
34 marsh, areas. \* \* \*

1        "The opponents argue that the development proposes  
2        to discharge stormwater directly into the marsh  
3        areas. The [City] Council rejects this argument  
4        because the outfalls and bioswales are outside of  
5        the A-1 and A-3 boundaries which delineate the  
6        marsh areas.

7        "The phrase 'directed away from' is undefined.  
8        [SCP] Goal 4's purposes are to achieve improved  
9        water quality in the estuary by improvement of  
10      wastewater discharge, the careful control of  
11      stormwater runoff and the prevention of erosion to  
12      upland areas. Moreover, Policy 4-B does not  
13      prohibit the ultimate discharge of stormwater into  
14      the estuary. Instead, the Policy calls for the  
15      direction of stormwater outfalls away from  
16      significant marshes and tide flats. In light of  
17      the context of [SCP] Goal 4 and the express  
18      language of Policy 4-B, the [City] Council finds  
19      that 'directed away from' means to divert or  
20      interrupt stormwater prior to its discharge into  
21      the estuary where the interruption provides for  
22      improvement of water quality. \* \* \*" Record 39-41.

23        The interpretation of Policy 4-B in the above findings  
24      is not "clearly wrong" or "beyond all colorable defense."  
25      Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992);  
26      Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d  
27      854, rev den 320 Or 272 (1994); Goose Hollow Foothills  
28      League v. City of Portland, 117 Or App 211, 843 P2d 992  
29      (1992); West v. Clackamas County, 116 Or App 89, 840 P2d  
30      1354 (1992); Cope v. City of Cannon Beach, 115 Or App 11,  
31      836 P2d 775 (1992), aff'd 317 Or 339 (1993). The findings  
32      are adequate to demonstrate Policy 4-B is satisfied.

33        The third assignment of error is denied.

1      **FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR (ONRC)**

2      **A.     Introduction**

3           Petitioner, at various stages in this appeal, provided  
4        the Board with a number of extra-record documents which it  
5        contends establish the planned development approved by the  
6        city in this matter is located partially on property owned  
7        by the Sons of Norway, which is located to the north of the  
8        property owned by applicant and outside the City of Seaside.

9        In resolving the fourth, fifth and sixth assignments of  
10      error, we limit our consideration to the record submitted by  
11      respondent.    The only issues we resolve under these  
12      assignments of error are (1) whether the record includes a  
13      "legal boundary survey," as required by the SZO; (2) whether  
14      the city erred by refusing to grant petitioner a  
15      continuance, after applicant submitted a new boundary survey  
16      shortly before the evidentiary record closed; and (3)  
17      whether the record includes substantial evidence that the  
18      planned development approved by the city is entirely within  
19      the City of Seaside.<sup>11</sup>

20      **B.     Requirement for a Legal Boundary Survey [Sixth  
21       Assignment of Error (ONRC)]**

22      SZO 3.112 establishes "General Standards and  
23      Requirements" for planned developments.    SZO 3.112(4)

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<sup>11</sup>We also consider petitioner's contention that the city failed to extend an opportunity to the City of Gearhart to participate in this matter, as required by the SCP.

1 establishes "General Information" requirements and lists ten  
2 separate items of information that are required. SZO  
3 3.112(4)(b) requires "[a] legal boundary survey."

4 Petitioner contends the application filed in this  
5 matter lacked the required "recorded" legal boundary survey.  
6 Petitioner argues applicant's engineer "conceded that he had  
7 not conducted an 'on the ground' survey at the time of the  
8 initial hearing on this matter." Petition for Review 24.

9 Applicant disputes petitioner's characterization of  
10 applicant's engineer's concession. According to applicant,  
11 the engineer stated:

12       " \* \* \* The boundary of this project has been  
13 established on paper but has not been physically  
14 monumented on the ground by the setting of  
15 monuments. Monuments will have to be set in the  
16 future for the platting of the units, but are not  
17 required to be set until that time. \* \* \* At this  
18 time traverses have been run to tie in existing  
19 monuments in the area, legal descriptions have  
20 been verified and location of the boundary has  
21 been calculated." Record 439.

22 Applicant identifies one drawing included in the  
23 original application, which shows the property boundaries  
24 and is signed by a registered professional land surveyor, as  
25 sufficient to satisfy the SZO 3.112(4)(b) requirement for "a  
26 legal boundary survey." Applicant points out SZO  
27 3.112(4)(b) does not require that the legal boundary survey  
28 be "recorded." Applicant also points out a second boundary  
29 survey, which apparently was later submitted to the county  
30 for recording, was also provided by applicant shortly before

1 the record closed.<sup>12</sup>

2 Petitioner fails to demonstrate why the documents  
3 identified by applicant are insufficient to satisfy the  
4 requirement of SZO 3.112(4)(b) for "a legal boundary  
5 survey."

6 The sixth assignment of error is denied.

7 **C. Refusal to Grant Continuance [Fourth Assignment of  
8 Error (ONRC)]**

9 The record includes a November 22, 1993 letter in which  
10 the author makes a number of allegations that the boundary  
11 shown for the subject property in the application documents  
12 is inaccurate. Among the contentions advanced in that  
13 letter, is the contention that development proposed along  
14 the northern boundary of the property, including the  
15 proposed bridge, would be located in part on property owned  
16 by the Sons of Norway which is located outside the City of  
17 Seaside. Record 292.

18 At its November 22, 1993 public hearing in this matter,  
19 the city council voted to keep the record in this matter  
20 open until December 1, 1993, for submission of additional  
21 written evidence. In a letter dated November 30, 1993,  
22 applicant submitted a nine-page letter "to respond to  
23 opposition testimony." Record 186. Attached to that letter  
24 is a letter, dated November 29, 1993, signed by applicant's

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<sup>12</sup>Petitioner challenges the manner in which this survey was allowed into the record under its fourth assignment of error, discussed below.

1 surveyor, which provides a detailed response to the boundary  
2 issues raised in the November 22, 1993 letter referenced  
3 above. The November 29, 1993 letter states, in part:

4 "In [Ms. Mancill's] letter she states that the  
5 wooden lathe set by me along the property line  
6 does not qualify as a legal boundary corner and  
7 that no boundary corners have been set. Contrary  
8 to Ms. Mancill's claim that no boundary corners  
9 have been set, it is shown on one of the drawings  
10 she submitted that a "5/8" Rebar + Yellow Plastic  
11 Cap Mead, LS 2259" has been found. This is one of  
12 the monuments which I have set along the northern  
13 boundary of this site. These monuments are shown  
14 on the survey which is attached. In light of  
15 recent testimony this survey has been submitted to  
16 the Clatsop County Surveyor's Office for recording  
17 in an effort to give the City Council a level of  
18 comfort on this issue. On this survey map I show  
19 the line of ownership along the estuary as claimed  
20 by the Division of State Lands, the Wetland  
21 Boundary as defined by RZA, and the acreages of  
22 the upland portions of the site. \* \* \*"<sup>13</sup>  
23 (Emphasis added.) Record 196-97.

24 Petitioner contends it was entitled to a continuance  
25 under ORS 197.763(4) to respond to the new boundary survey  
26 described above.<sup>14</sup> Petitioner argues the new boundary

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<sup>13</sup>The survey attached to the November 29, 1993 letter includes boundary information which was not included in the earlier documents submitted by applicant.

<sup>14</sup>ORS 197.763(4) provides, in part:

- "(a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public at the time notice provided in [ORS 197.763(3)] is provided.
- "(b) \* \* \* If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. \* \* \*"

1 survey constitutes "additional documents or evidence"  
2 submitted just before the evidentiary hearing closed, and  
3 long after the notice of public hearing required by ORS  
4 197.763(3) was provided. Petitioner contends it requested a  
5 continuance on December 1, 8 and 13, 1993, and argues the  
6 city improperly denied its request.<sup>15</sup>

7 Applicant offers several responses to petitioner's  
8 claim that the city improperly denied its request for a  
9 continuance.

10           **1. Failure to Request a Continuance Prior to**  
11           **the Close of the Evidentiary Hearing**

12           The city is not required to provide a continuance under  
13 ORS 197.763(4)(b) unless a party requests the continuance.  
14 Reed v. Clatsop County, 22 Or LUBA 548, 554 (1992).  
15 Applicant contends this assignment of error should be  
16 denied, because petitioner did not request a continuance  
17 before the evidentiary hearing closed on December 1, 1993.  
18 Petitioner's December 1, 1993 memorandum states:

19           "If the Applicant's submittal extends beyond  
20 rebuttal and offers new information in support of  
21 the application, ONRC respectfully requests a  
22 reasonable opportunity to respond. ORS 197.763."  
23 Record 121.

24           In the circumstances presented in this case, we believe  
25 the above request is sufficient to request a continuance to

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<sup>15</sup>In considering whether the city improperly denied petitioner's requests for a continuance, we initially note the city clearly did rely on the disputed survey. Record 60.

1 respond to "new information in support of the application."  
2 At the time petitioner's December 1, 1993 memorandum was  
3 written, petitioner had not yet seen applicant's submittal,  
4 which so far as we can tell may not have been received by  
5 the city until December 1, 1993, the day the record closed.  
6 Moreover, unlike a request under ORS 197.763(6) for the  
7 record to remain open, which must be made "before the  
8 conclusion of the initial evidentiary hearing," a party's  
9 request for a continuance under ORS 197.763(4)(b) if  
10 "additional documents or evidence is provided in support of  
11 the application" is not specifically required to be made  
12 before the evidentiary hearing closes. We do not believe a  
13 party is required to place the city on notice that it  
14 requests a continuance if such additional evidence is  
15 received by way of written submittals prior to the day the  
16 record closes. In this case, petitioner made it absolutely  
17 clear in letters dated December 8 and 13, 1993 that it  
18 considered the new boundary survey "additional documents or  
19 evidence \* \* \* provided in support of the application" and  
20 requested a continuance under ORS 197.763(4)(b). Supp Rec  
21 6-7, 8-9. In the circumstances presented in this case,  
22 petitioner's efforts to request a continuance were adequate.

23                   **2. New Survey Constitutes Rebuttal Evidence**

24                   Applicant next contends petitioner was not entitled to  
25 a continuance, because the new boundary survey was submitted  
26 to rebut evidence offered by opponents questioning the

1 boundary of the proposed project. Applicant contends,  
2 correctly, that like other parties in this quasi-judicial  
3 land use proceeding, it is entitled to present and rebut  
4 evidence. See Fasano v. Washington Co. Comm., 264 Or 574,  
5 588, 507 P2d 23 (1973). Applicant contends that where  
6 evidence submitted by an applicant is limited to evidence  
7 rebutting evidence submitted by another party, no right to a  
8 continuance arises under ORS 197.763(4)(b).

9 In Reed v. Clatsop County, 22 Or LUBA 548, 555-56  
10 (1992), we noted some of the problems local governments face  
11 in complying with the procedural requirements of ORS 197.763  
12 and ensuring that parties are provided procedural rights  
13 they may be entitled to independently of ORS 197.763,  
14 including the right to present and rebut evidence. Our  
15 discussion in Reed includes the following:

16 "Finally, we recognize intervenor's arguments that  
17 it is possible under a broad and literal reading  
18 of ORS 197.763(4)(b) to require that an applicant  
19 remain silent at the initial hearing and any  
20 continued hearings or risk introducing new  
21 evidence and causing a never ending succession of  
22 continuances. However, to the extent an applicant  
23 limits its presentation to presenting or  
24 discussing the evidence previously supplied  
25 pursuant to ORS 197.763(4)(a), and rebutting  
26 evidence presented by opponents, we question  
27 whether a right to a continuance would arise under  
28 ORS 197.763(4)(b)." Id. at 556.

29 To the extent the above language in Reed can be read to  
30 suggest an applicant, by way of rebuttal, may submit  
31 "additional documents or evidence \* \* \* in support of the

1 application" after the deadline established by ORS  
2 197.763(4)(a), without thereby giving parties to the  
3 proceeding a right to request a continuance under ORS  
4 197.763(4)(b), we reject the suggestion. There is no  
5 exception provided in ORS 197.763(4)(b) for "additional  
6 documents or evidence \* \* \* in support of the application"  
7 simply because such documents or evidence may also qualify  
8 as rebuttal evidence or because applicant has a right to  
9 submit such rebuttal evidence.

10 We agree with petitioner that the new survey  
11 constitutes "additional documents or evidence \* \* \* in  
12 support of the application." SZO 3.112(4)(b) requires a  
13 legal boundary survey. The new survey was submitted to  
14 bolster the original application when questions were raised  
15 about the actual boundary of the subject property. The  
16 issue of the actual boundary of the property is particularly  
17 legally significant here, because petitioner contends part  
18 of the project, as proposed, is located on property not  
19 owned by applicant and outside the city's jurisdiction.  
20 Applicant has a right to rebut that contention. However, if  
21 applicant's rebuttal includes "additional documents or  
22 evidence \* \* \* in support of the application,"  
23 ORS 197.763(4)(b) gives petitioner a right to a  
24 continuance.<sup>16</sup> The city erred in denying petitioner's

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<sup>16</sup>Because ORS 197.763(4)(b) does not specify what must occur during the required continuance, it may be that petitioner could be limited in the

1 request for a continuance.

2 The fourth assignment of error is sustained.

3           **D. Lack of Jurisdiction Over Subject Property [Fifth**  
4           **Assignment of Error (ONRC)]**

5           This assignment of error actually includes two  
6 assignments of error.

7           In Hoffman v. City of Seaside, 24 Or LUBA 183, 186  
8 (1992), we reversed a city ordinance rezoning property  
9 located outside the city's corporate limits, concluding the  
10 city lacked jurisdiction to do so. Petitioner contends the  
11 city similarly exceeds its jurisdiction when it approves a  
12 planned development located, in part, in the City of  
13 Gearhart.

14          The city addressed petitioner's argument under this  
15 assignment of error as follows:

16          "Finally, opponents argue that a portion of this  
17 site is within the boundary of the City of  
18 Gearhart and that the boundary of this application  
19 is incorrect. The Council notes that the  
20 Applicant's professional land surveyor submitted a  
21 letter on November 29, 1993 addressing the  
22 boundary issue. Mr. Meade concluded in that  
23 letter that the '[n]orthern property line of this  
24 project is also the northern limit of the City of  
25 Seaside's city limits.' The Council finds that  
26 Mr. Mead's letter is credible, substantial  
27 evidence that the boundary of the site has been  
28 adequately identified and that it is not within  
29 the City of Gearhart. The Council rejects  
30 contrary evidence." Record 60.

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continuance to legal argument based on the evidence petitioner already submitted and applicant's rebuttal evidence. However, we are not required to consider that issue here, and we do not do so.

1       The record contains conflicting evidence concerning the  
2 location of the northern boundary of applicant's property  
3 and the northern boundary of the City of Seaside. However,  
4 we agree with the city that the letter and survey submitted  
5 by Mr. Meade constitute substantial evidence (i.e. evidence  
6 a reasonable person would believe) that the subject property  
7 for which planned development approval is granted is located  
8 wholly within the City of Seaside.<sup>17</sup> See Douglas v.  
9 Multnomah County, 18 Or LUBA 607, 617 (1990) (and cases  
10 cited therein).

11       Petitioner finally contends the city improperly omitted  
12 the City of Gearhart as a participant in this matter, as it  
13 is required to do under SCP 13.1, Policy 8-A.<sup>18</sup>

14       However, applicant points out petitioner does not  
15 contend the city failed to provide notice to the City of  
16 Gearhart. The challenged decision explains how the City of

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<sup>17</sup>Presumably, a court of competent jurisdiction may ultimately disagree with the city about the location of the northern boundary of applicant's property and the city's northern boundary. We express no view concerning the legal consequences of such a decision.

<sup>18</sup>SCP 13.1, Policy 8-A provides:

"Since actions in the estuary extend beyond corporate boundaries, all jurisdictions on the estuary shall participate in the evaluation of the development proposals affecting the estuary. This may be carried out in the conditional use or subdivision permit process at the local level. The Oregon Department of Fish and Wildlife shall be used as a resource to evaluate the proposals."

1 Gearhart participated in the proceeding.<sup>19</sup> Applicant  
2 contends this is sufficient to comply with the  
3 "participation" requirement of SCP 13.1, Policy 8-A. We  
4 agree with applicant.

5 The fifth assignment of error is denied.

6 **SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR (ONRC)**

7 SCP 9.3.1 and 13.1, Policy 6-A require that the city  
8 consult and cooperate with governmental agencies to conserve  
9 and protect fish and wildlife habitat where a proposed  
10 development will impact or reduce habitat value.<sup>20</sup>  
11 Petitioner suggests SCP 9.3.1 and 13.1, Policy 6-A are  
12 violated by the challenged decision because the Oregon  
13 Department of Fish and Wildlife, United States Fish and  
14 Wildlife Service and National Marine Fisheries Service  
15 expressed concerns with the proposal and the challenged  
16 decision is in conflict with those concerns.

17 In Waugh v. Coos County, 26 Or LUBA 300, 314 (1993), we

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<sup>19</sup>The City of Gearhart's mayor submitted both oral and written testimony.

<sup>20</sup>SCP 9.3.1 and 13.1, Policy 6-A provide:

"Seaside will cooperate with governmental agencies to conserve and protect identified fish and wildlife habitat." SCP 9.3.1.

"Fish and wildlife habitat of the Necanicum Estuary System contribute a great deal to the environmental quality and the economy of the area. Actions that would reduce the habitat value of the estuary shall be carefully evaluated in this light. The Oregon Department of Fish and Wildlife shall be consulted whenever such actions are proposed in order to determine the impact." SCP 13.1, Policy 6-A.

1 explained the coordination obligation imposed by Statewide  
2 Planning Goal 2 (Land Use Planning) does not require that a  
3 local government "accede to every concern that may be  
4 expressed by [a state agency]." Neither do the plan  
5 policies cited by petitioner impose an obligation that the  
6 city agree with every concern a state agency representative  
7 may express. We reject petitioner's argument to the  
8 contrary.

9 However, we also explained in Waugh that the Goal 2  
10 coordination obligation does require that a local government  
11 "adopt findings responding to \* \* \* legitimate concerns."  
12 Waugh v. Coos County, 26 Or LUBA at 414. The cited plan  
13 provisions impose the same obligation.

14 Petitioner cites the following fifteen issues raised by  
15 governmental agencies:

- 16 "1. [T]hreat to multiple wildlife resources on  
17 the west bluff;
- 18 "2. [A]pplication of salt marsh review standards  
19 for the A-1 zone;
- 20 "3. [S]econdary impacts related to air, noise and  
21 water pollution;
- 22 "4. [B]ridge crossing will create a partial  
23 barrier for wildlife, shade native plants,  
24 and may encourage colonization of weedy  
25 plants;
- 26 "5. The wet spit provides critical nesting  
27 habitat for great blue herons and staging  
28 habitat for band-tailed pigeons. Development  
29 of the west spit will effectively eliminate  
30 riparian habitat functions for these species  
31 and severely compromise those functions for a

1                   large number of other species;

2        "6. [P]rotection of riparian resources ;

3        "7. [R]ecommended wildlife survey during the  
4                   nesting season;

5        "8. [W]est spit provides the last relatively  
6                   undisturbed site containing a wide variety of  
7                   productive habitat types in close proximity  
8                   to each other;

9        "9. Resource Capability Determination standards  
10                  should be applied;

11      "10. [R]ecommended limiting development to the  
12                  eastern parcel;

13      "11. Impact Assessment standards for salt marshes  
14                  should be applied;

15      "12. Removal of trees will increase the potential  
16                  for site abandonment by nesting heron;

17      "13. Inadequate stormwater treatment plan ;

18      "14. Inadequate deference to avoidance and  
19                  minimization as mitigation tools ; and

20      "15. Inadequate compensatory mitigation plan."  
21                  (Record citations omitted.) Petition for  
22                  Review 26-27.

23      **A. Issues not Sufficiently Raised to Warrant a  
24                  Specific Response in the Findings (Issues 1, 3, 8,  
25                  and 13 through 15)**

26      Issues 13 and 14 do not appear to have been raised at  
27      all, and petitioner does not cite where in the record issue  
28      15 was raised. Failure to raise those issues below  
29      precludes petitioner from raising the city's failure to  
30      address those issues in its findings. ORS 197.763(1);  
31      197.835(2). Issues 1 and 3 reflect statements that suggest

1 an issue, but are simply not sufficiently developed to  
2 require a specific response by the city. Issue 8 reflects a  
3 statement which does not express a position or issue, and  
4 the city was not required to respond to it.

5           **B. Issues for Which Applicant Identifies Adequate**  
6           **Responsive Findings (Issues 2, 9 and 11)**

7           Issues 2, 9 and 11 all are variations of the A-1 versus  
8 A-3 comprehensive plan/zoning map issue addressed, supra,  
9 under the first and ninth assignments of error. Applicant  
10 identifies findings which are adequate to respond to these  
11 issues.

12          **C. Issue Which are Adequately Identified by**  
13          **Petitioner and Adequately Raised Below to Require**  
14          **a Specific Response in the City's Findings**  
15          **(Issues 4 through 7, 10 and 12)**

16           **1. Issue 4**

17           Applicant cites no findings responding to the U.S. Fish  
18 and Wildlife Service's concerns about impacts that may be  
19 caused by the proposed bridge crossing. The conditions of  
20 approval applicant cites may provide the basis for an  
21 adequate response, but they are not an adequate response in  
22 and of themselves.

23           **2. Issue 5**

24           The findings cited by applicant are not an adequate to  
25 respond to the concerns expressed by the U.S. Fish and  
26 Wildlife Service that the development will eliminate the  
27 riparian habitat function now performed by the west upland  
28 area for great blue heron, band-tailed pigeons and other

1 species. We express no view concerning whether an adequate  
2 response to those concerns is possible, only that the  
3 findings cited by applicant do not supply that response.

4                   **3. Issue 6**

5                 At Record 1032, the Oregon Department of Fish and  
6 Wildlife (ODFW) expresses a number of recommendations  
7 concerning "Protection of Riparian Vegetation." The  
8 findings identified by applicant do not respond to those  
9 recommendations.

10                  **4. Issue 7**

11                 ODFW offers the following explanation for its  
12 recommendation that a nesting season survey should be  
13 conducted:

14                 "The Necanicum Estuary Inventory (NEI) report (map  
15 8-42) identifies this area as a green-backed heron  
16 nesting site. Visual observations and eggshell  
17 measurements made late last summer indicate the  
18 area is still being used by green herons. Since  
19 the timing of these observations occurred after  
20 the nesting season, no quantitative information is  
21 available on volume of use. A complete survey  
22 should be conducted during the nesting season."  
23 Record 1032.

24                 The challenged decision fails to address ODFW's concern  
25 and recommendation.

26                  **5. Issue 10**

27                 In its five-page, August 31, 1993 letter to the city  
28 planning commission concerning the challenged development,  
29 ODFW expressed a variety of concerns about the project's  
30 potential impacts on the environment. That letter cites

1 those concerns and then concludes with a recommendation that  
2 the city limit development to the eastern upland area.

3 The city was obligated to respond to that ODFW  
4 recommendation in its findings supporting its decision to  
5 allow development on the western upland area,  
6 notwithstanding ODFW's recommendation.

7 **6. Issue 12**

8 In its November 12, 1992 letter to the city planning  
9 commission, ODFW expressed a number of concerns that planned  
10 tree removal to accommodate the proposed development would  
11 increase the likelihood that heron will abandon the site as  
12 a nesting area.

13 The findings cited by applicant are inadequate to  
14 respond those concerns.

15 The seventh and eighth assignments of error are  
16 sustained, in part.

17 **TENTH ASSIGNMENT OF ERROR (ONRC)**

18 SZO 3.115(3) imposes the following requirement on  
19 planned developments:

20 "[T]he location, design, size and uses are such  
21 that traffic generated by the development, except  
22 in single family density, can be accommodated  
23 safely and without congestion on existing or  
24 planned arterial or collector streets and will, in  
25 the case of commercial developments, avoid  
26 traversing local streets."

27 Petitioner contends the challenged development violates  
28 SZO 3.115(3), because applicant provided no traffic  
29 analysis. Petitioner also contends, because the challenged

1 decision amends the SZO map and the proposal will  
2 "significantly affect traffic on Highway 101," the  
3 Transportation Planning Rule (TPR), OAR Chapter 660,  
4 Division 12 applies. Petitioner contends the single access  
5 point approved by the Oregon Department of Transportation  
6 (ODOT) violates the TPR.

7       **A. SZO 3.115(3)**

8       Applicant points out SZO 3.115(3) does not impose a  
9 requirement for a traffic analysis. Moreover, applicant  
10 notes a letter from ODOT concerning the proposal states:

11       "In concept, this office has no objections to this  
12 plan. The proposed mid-block access, with highway  
13 improvements, appears to adequately mitigate the  
14 increased traffic volumes and turning movements.  
15 With the planned mitigation, the proposed project  
16 should not adversely effect [sic] highway capacity  
17 and current level of service." Supp Rec 30.

18       Petitioner does not provide a basis for concluding the  
19 challenged decision violates SZO 3.115(3), and we therefore  
20 reject this subassignment of error.

21       **B. Transportation Planning Rule**

22       Petitioner does not cite the provisions of the TPR  
23 which it believes make the TPR applicable to the challenged  
24 decision. Neither does petitioner cite the TPR provisions  
25 it believes are violated by the challenged decision.

26       OAR 660-12-060(1) provides, as relevant:

27       "Amendments to functional plans, acknowledged  
28 comprehensive plans, and land use regulations  
29 which significantly affect a transportation  
30 facility shall assure that allowed land uses are

1           consistent with the identified function, capacity,  
2           and level of service of the facility. \* \* \*"  
3           (Emphasis added.)

4           Applicant first argues the TPR does not apply because  
5           while the SZO is a land use regulation, it is only amended  
6           by the challenged decision in the technical sense that the  
7           comprehensive plan/zoning map is amended to add a "PD"  
8           designation. We reject that argument because we are unable  
9           to determine whether the only legal significance of this  
10          amendment to the plan and zoning map is to add two letters  
11          to that map.<sup>21</sup>

12          However, under OAR 660-12-060(1), an amendment to an  
13          acknowledged land use regulation must demonstrate compliance  
14          with this TPR provision only if the amendment will  
15          "significantly affect a transportation facility." Whether  
16          such amendments "significantly affect a transportation  
17          facility," is governed by criteria in the TPR.  
18          OAR 660-12-060(2) explains:

19          A plan or land use regulation amendment  
20          significantly affects a transportation facility if  
21          it:

- 22          "(a) Changes the functional classification of an  
23           existing or planned transportation facility;
- 24          "(b) Changes standards implementing a functional  
25           classification system;

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<sup>21</sup>We do note that while an increase in permissible density was not granted in this case, a density bonus is permissible for planned developments in the R-2 zone.

1                 "(c) Allows types or levels of land uses which  
2                 would result in levels of travel or access  
3                 which are inconsistent with the functional  
4                 classification of a transportation facility;  
5                 or

6                 "(d) Would reduce the level of service of the  
7                 facility below the minimum acceptable level  
8                 identified in the TSP."

9                 The challenged decision is a quasi-judicial  
10         comprehensive plan and land use regulation amendment. In  
11         adopting such a decision, the city is obligated either to  
12         demonstrate compliance with the TPR or, alternatively,  
13         establish that the TPR does not apply. See Recht v. City of  
14         Depoe Bay, 24 Or LUBA 129, 134 (1992). The city attempted  
15         to take the latter approach in this matter:

16                 "[The proposal] will not have a significant impact  
17                 on U.S. Highway 101, the relevant transportation  
18                 facility. No local or county roads are affected  
19                 by this application. ODOT has submitted a letter  
20                 stating that the proposed development will not  
21                 adversely impact U.S. Highway 101's capacity, nor  
22                 will the proposed development alter the highway's  
23                 current level of service. \* \* \* The [City] Council  
24                 finds that the requirement of the transportation  
25                 planning rule has been complied with." Record 64.

26                 The above findings are brief, and the last sentence is  
27         somewhat confusing because it suggests the city concluded  
28         the TPR applies but is satisfied. However, reading the  
29         finding in context, it is reasonably clear the city takes  
30         the position in its findings that the TPR does not apply,  
31         because the city believes the challenged decision does not  
32         significantly affect a transportation facility.

33                 We have some difficulty determining the proper

1 resolution of this assignment of error. As noted earlier,  
2 petitioner makes no attempt to explain which part of OAR  
3 660-12-060(2) it is relying on in contending the challenged  
4 decision will significantly affect a transportation  
5 facility. Petitioner alleges the proposal will  
6 significantly affect a transportation facility, but makes no  
7 attempt to explain why, except to assert it will  
8 "significantly affect traffic on Highway 101." Petition for  
9 Review 31. However, petitioner does contend the city's  
10 findings are inadequate to explain why the TPR does not  
11 apply.

12 The city's findings also make no reference to  
13 OAR 660-12-060(2). OAR 660-12-060(2)(a) and (b) do not  
14 appear to apply here. Applicant contends the ODOT letter  
15 constitutes substantial evidence that the challenged  
16 decision does not significantly affect a transportation  
17 facility under OAR 660-12-060(2)(c) or (d). Applicant may  
18 well be correct that the proposal will not significantly  
19 affect a transportation facility, within the meaning of OAR  
20 660-12-060(2)(c) or (d), but the findings do not explain why  
21 the city believes that is the case.

22 We suspect from the ODOT testimony cited in the city's  
23 findings that the proposal will not result in a level of  
24 travel or access that is inconsistent with the functional  
25 classification of U.S. Highway 101. However, neither the  
26 findings nor the evidence to which we are cited provide the

1 facts necessary to make that determination. Moreover, it  
2 may be that there is no TSP identifying a minimum acceptable  
3 level of service or, if there is, it may be the proposal  
4 would not reduce the level of service below such minimum  
5 acceptable level. However, the above quoted findings are  
6 inadequate to explain why the challenged development will  
7 not significantly affect U.S. Highway 101, within the  
8 meaning of OAR 660-12-060(2)(c) or (d).

9 We conclude the city's findings are inadequate to  
10 explain why the challenged decision will not significantly  
11 affect a transportation facility, within the meaning of  
12 OAR 660-12-060(2).

13 The tenth assignment of error is sustained, in part.

14 **FIRST ASSIGNMENT OF ERROR (CHINOOK TRIBE)**

15 The challenged decision finds the proposal complies  
16 with SCP Policy 9.4(1). Intervenor-petitioner Chinook Tribe  
17 (hereafter intervenor-petitioner) contends that these  
18 findings are not supported by substantial evidence. SCP  
19 Policy 9.4(1) states:

20 "Sites in construction areas that have been  
21 identified as, or are found to have significant  
22 archaeological content, shall be protected from  
23 degradation and destruction." (Emphasis added.)

24 The city's findings concerning SCP Policy 9.4(1) are as  
25 follows:

26 "This area is not identified as containing  
27 significant archaeological content. The  
28 Applicant's archaeological consultant responded to  
29 testimony the site contained a likely burial area.

1       However, after extensive site investigation, the  
2       burial area has not been documented as containing  
3       significant content by either the archaeological  
4       consultant or the City. The [City] Council finds  
5       that this policy is met." Record 31.

6       We have reviewed the evidence cited by the parties.

7       There is conflicting evidence concerning archaeological  
8       significance of the subject property. However, we conclude  
9       the evidence supporting the city's finding that the site  
10      does not have "significant archaeological content" is  
11      evidence a reasonable person could believe. The evidence  
12      cited by petitioner is insufficient to allow us to conclude  
13      a reasonable person could not rely on the evidence submitted  
14      by applicant's consultant. Douglas v. Multnomah County,  
15      supra.

16       Intervenor-petitioner's first assignment of error is  
17      denied.

18      **SECOND ASSIGNMENT OF ERROR (CHINOOK TRIBE)**

19       ORS 358.920(1)(a) provides:

20       "A person may not knowingly and intentionally  
21       excavate, injure, destroy or alter an  
22       archaeological site or object or remove an  
23       archaeological object located on public or private  
24       lands in Oregon unless that activity is authorized  
25       by a permit issued under ORS 390.235."<sup>22</sup>

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<sup>22</sup>ORS 390.235(1)(a) provides:

"A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or remove from public lands any material of an archaeological historical,

1 ORS 358.920(6) provides:

2 "If human remains are encountered during  
3 excavations of an archaeological site on privately  
4 owned property, the person shall stop all  
5 excavations and report the find to the landowner,  
6 the state police, the State Historic Preservation  
7 Officer and the Commission on Indian Services.  
8 All funerary objects relating to the burial shall  
9 be delivered as required by ORS 358.940."

10 Indian burials are also protected under ORS 97.740 through  
11 97.760. ORS 97.745 provides:

12 "Except as provided in ORS 97.750, no person shall  
13 willfully remove, mutilate, deface, injure or  
14 destroy any cairn, burial, human remains, funerary  
15 object, sacred object or object of cultural  
16 patrimony of any native Indian. Persons  
17 disturbing native Indian cairns or burials through  
18 inadvertence, including by construction \* \* \*  
19 activity, shall at their own expense reinter the  
20 human remains or funerary object under the  
21 supervision of the appropriate Indian tribe."

22 The exception to the prohibitions and requirements of ORS  
23 97.745 provided by ORS 97.750 is as follows:

24 "(1) Any proposed excavation by a professional  
25 archaeologist of a native Indian cairn or  
26 burial shall be initiated only after prior  
27 written notification to the State Historic  
28 Preservation Officer and the state police, as  
29 defined in ORS 358.905, and with the prior  
30 written consent of the appropriate Indian  
31 tribe in the vicinity of the intended action.  
32 Failure of a tribe to respond to a request  
33 for permission within 30 days of its mailing  
34 shall be deemed consent. All associated  
35 material objects, funerary objects and human  
36 remains removed during such an excavation  
37 shall be reinterred at the archaeologist's

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prehistorical or anthropological nature without first obtaining  
a permit issued by the State Parks and Recreation Department.

1                   expense under the supervision of the Indian  
2                   tribe.

3         "(2) In order to determine the appropriate Indian  
4                   tribe under this section and ORS 97.745, a  
5                   professional archaeologist or other person  
6                   shall consult with the Commission on Indian  
7                   Services which shall designate the  
8                   appropriate tribe."

9                 Intervenor-petitioner argues the record includes  
10                evidence that the subject property is a Chinook Tribe  
11                ancestral burial ground. The city did not adopt findings  
12                specifically addressing the above statutory requirements and  
13                intervenor-petitioner contends the findings adopted by the  
14                city addressing SCP Policy 9.4(1) are insufficient to  
15                establish the subject property was not used in the past for  
16                Indian burials, and such findings would be contrary to the  
17                evidence in any event.<sup>23</sup> Intervenor-petitioner goes on to  
18                argue one of the conditions of approval imposed by the city  
19                is insufficient to ensure compliance with the above quoted  
20                statutory requirements:

21         "Archaeological considerations will be observed.  
22                A detailed archaeological probing of the site will  
23                be required, and construction will be stopped if  
24                significant artifacts are found, and the City  
25                Planning Department and State Historic  
26                Preservation Office will be notified." Record 63-  
27                64.

28                 Intervenor-petitioner contends the above condition is  
29                inconsistent with the requirements of ORS 358.920(6), if

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<sup>23</sup>The city's findings addressing SCP Policy 9.4(1) are quoted supra, under our discussion of intervenor-petitioner's first assignment of error.

1 human remains are uncovered. Intervenor-petitioner further  
2 contends the condition fails to require notification and  
3 consultation with the appropriate tribe under ORS 358.950 or  
4 that tribal consent be obtained, as required by ORS 97.750.

5 As an initial point, we see a distinction between  
6 whether the challenged decision is subject to and complies  
7 with the above quoted statutory requirements and whether  
8 applicant must comply with any applicable statutory  
9 requirements at the time of excavation and construction.  
10 Only the first question is presented in this appeal. We see  
11 nothing in the cited statutes imposing a requirement on the  
12 city to ensure no development permits authorized by the city  
13 could be acted on in a way that would violate the  
14 requirements imposed by the statutes. In all cases, the  
15 statutory requirements are imposed directly on the person  
16 altering the archaeological site or encountering  
17 archaeological artifacts. The cited statutes are not  
18 approval standards the city must address in approving the  
19 disputed planned development. The city has found the  
20 disputed development complies with SCP Policy 9.4(1) which,  
21 presumably, was adopted by the city to comply the Statewide  
22 Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and  
23 Natural Resources) requirements concerning cultural areas.  
24 We are aware of no general requirement that the city must,  
25 prior to approving the challenged planned development, find  
26 every potentially applicable federal or state statutory

1 requirement is satisfied.<sup>24</sup>

2        Although we conclude the city need not demonstrate in  
3 the challenged decision that the development authorized by  
4 the decision either complies with or will comply with the  
5 cited statutory requirements, the city may not approve the  
6 disputed planned development in a way that purports to  
7 obviate applicant's responsibility to comply with those  
8 statutes without demonstrating that (1) those statutes do not  
9 apply to the excavation or construction that may be carried  
10 out under the challenged decision, or (2) the statutory  
11 requirements have been met.

12       We do not understand the challenged decision to approve  
13 excavation or construction without regard to the above  
14 statutory requirements. To the contrary, the condition  
15 cited above directs that "[a]rchaeological considerations  
16 will be observed." The condition further directs that  
17 "detailed archaeological probing of the site will be  
18 required \* \* \*[.]" The additional directive in the  
19 condition that "construction will be stopped if significant  
20 artifacts are found, and the City Planning Department and  
21 State Historic Preservation Office will be notified" is only

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<sup>24</sup>Of course, the city may adopt comprehensive plan or land use regulations that impose such an obligation on the city. If the city does so, then the city would be required to either find that the statutory requirements are satisfied or that it will be feasible to satisfy those requirements. Intervenor-petitioner does not contend the SZO or SCP requires that the city demonstrate in this proceeding that the archaeological protection statutory provisions cited in the text are satisfied or can be satisfied by the challenged planned development.

1 inconsistent if the city intended this part of the directive  
2 to be exclusive and, thereby, eliminate any obligation on  
3 the part of applicant to comply with the requirements of ORS  
4 97.740 through 97.760, 358.920 through 97.750 that may apply  
5 to applicant at the time of excavation or construction. We  
6 do not read the condition to say that.

7 Intervenor-petitioner's second assignment of error is  
8 denied.

9 The city's decision is remanded.