

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a
4 comprehensive plan amendment and zone change application.

5 **MOTION TO INTERVENE**

6 Pacific Crest Partners, Inc. (intervenor), the
7 applicant below, moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 Intervenor requested approval from the city of a
12 comprehensive plan and zone change amendment, which changes
13 the plan and zoning designations on two contiguous parcels,
14 totaling approximately 1.1 acres, from Commercial
15 Professional (C-P) to Neighborhood Commercial (N-C); and
16 changes the plan and zoning designation on a third
17 contiguous parcel of approximately 1.0 acres from
18 Neighborhood Commercial (N-C) to Commercial Professional (C-
19 P). As intervenor describes the application, it is
20 essentially a "zoning exchange" between nearly identical
21 acreages.

22 The planning commission considered the application at a
23 hearing on December 18, 1995. Petitioner did not appear,
24 and did not submit any written testimony during that
25 hearing. There was some opposition testimony, but there was
26 no request to have the record left open following that

1 hearing. In accordance with city procedures, the planning
2 commission recommended to the city council that the
3 application be approved.

4 On January 23, 1996, the city council held a de novo
5 hearing on the application. The notice of the city council
6 hearing stated, in part, that

7 "any participant in the hearing may request that
8 the record remain open for at least seven days
9 after the hearing." Record 126.

10 This language is identical to that used in the notice for
11 the planning commission hearing. Record 188.

12 Petitioner did not attend the city council hearing, and
13 no opposition to the application was voiced during that
14 hearing. However, on the day of the hearing petitioner
15 submitted a letter, with exhibits, which was entered into
16 the record of the proceeding. In addition to expressing
17 concerns not raised here, petitioner's letter concludes, "I
18 request that the record for the application remain open for
19 seven days to admit [sic] more evidence * * *."
20 Supplemental Record 1. Petitioner's letter does not
21 identify what issues he sought to address or how those
22 issues might relate to the material submitted with his
23 letter.

24 The city council denied petitioner's request to have
25 the record left open, finding that no new evidence relevant
26 to the applicable approval criteria had been submitted
27 during the city council hearing. Record 78-79. The city

1 council then approved the application.

2 Petitioner appeals that approval.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner contends the city council was obligated to
5 leave the record open for seven days upon petitioner's
6 request. Petitioner argues the city's failure to leave the
7 record open violates ORS 197.763(6), petitioner's due
8 process rights, the city's comprehensive plan policy 2.2.1,
9 and the city's Community Development Code (CDC)
10 18.22.040(A)(1).¹ Plan policy 2.2.1 requires the city to
11 assure that citizens will be provided an opportunity to be
12 involved in all phases of the planning process, and CDC
13 18.22.040(A)(1) requires that zone change requests comply
14 with applicable comprehensive plan policies.

15 Petitioner acknowledges that the ORS 197.763(6)
16 requirement that the record remain open for seven days upon
17 request, applies only to the initial evidentiary hearing.

¹ORS 197.763(6) states, in part:

"(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence of testimony pursuant to paragraph (c) of this subsection.

** * * * *

"(c) If the hearing authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven days. * * *"

1 See ONRC v. Oregon City, 29 Or LUBA 90 (1995). However,
2 petitioner argues that it nonetheless should apply in this
3 case "because there was an express representation by [the
4 city] that the record would remain open upon request."
5 Petition for Review 8. (Emphasis in original.)

6 The wording of a local hearing notice cannot alter the
7 requirements of a state statute. ORS 197.763(6) obligates
8 the local government to leave the record open upon request
9 only after the initial evidentiary hearing. Language in a
10 local notice cannot create additional requirements under
11 that statute. The city council was not required to leave
12 the record open under ORS 197.763(6).

13 Petitioner further reasons that because the language of
14 the planning commission notice is identical to the language
15 of the city council notice, and because during the initial
16 planning commission hearing the planning commission would
17 have been obligated under ORS 197.763(6) to hold the record
18 open upon request, the city council should also be so
19 obligated.

20 While the language of the hearing notices is identical,
21 nothing in the notice language indicates an intent by the
22 city to impose the ORS 197.763(6) requirements after the
23 initial evidentiary hearing, and the notice language itself
24 does not create a requirement that the hearing body leave
25 the record open. Although the notice language certainly
26 alerts hearing participants to the opportunity to request

1 that the record remain open, it does not in itself guarantee
2 that in all instances that request will be granted. Rather,
3 the obligation to hold the record open comes from the
4 statute, and applies only to the initial evidentiary
5 hearing. The fact that the notice language is identical
6 does not create an additional requirement during a second
7 evidentiary hearing, which is not compelled by the notice
8 language. Under the language of the notice, the city
9 council during a second evidentiary hearing was entitled to
10 evaluate the merits of petitioner's request to have the
11 record remain open.

12 Petitioner argues he was deprived of his procedural due
13 process rights by the city's denial of his request to leave
14 the record open "because, in reliance on [the city's]
15 representation that such a request would be granted, he
16 failed to submit additional evidence showing non-compliance
17 with the approval criteria prior to the close of the
18 record." Petition for Review 8. Petitioner argues the
19 city's failure to leave the record open also violates the
20 city's comprehensive plan policy 2.1.1 and CDC
21 18.22.040(A)(1) because "stating that a participant will
22 have at least a week to submit written evidence, then
23 revoking that opportunity results in a failure to assure the
24 chance for public participation at the final stage of the
25 planning process." Id.

26 Petitioner has misconstrued the city's notice. The

1 language of the notice upon which petitioner relies does not
2 state or represent that the city would automatically grant a
3 request to have the record remain open following the city
4 council hearing. Nor has petitioner established that the
5 city "revoked" an opportunity that the city had guaranteed
6 him. Petitioner has also not established that the city
7 somehow precluded him from participating in the hearings
8 process, at either the planning commission or city council
9 levels, or that by the city's actions he was not able to
10 submit evidence and testimony prior to the close of the city
11 council hearing. Petitioner has established no violation of
12 any procedural due process rights, or any violation of the
13 city's public participation plan policy or CDC.

14 The first assignment of error is denied.

15 **ASSIGNMENTS OF ERROR TWO THROUGH SIX**

16 In five remaining assignments of error, petitioner
17 asserts the city misconstrued the law, made findings not
18 based on substantial evidence in the record and/or made
19 inadequate findings in numerous respects. To the extent
20 petitioner has not waived his right to raise these issues
21 under ORS 197.835(3) by failing to raise them before the
22 city, none of petitioner's allegations establish any basis
23 for remand or reversal of the city's decision. We do not
24 review them further. ORS 197.835(16).

25 Assignments of error two through six are denied.

26 The city's decision is affirmed.