

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city council's design review
4 approval of an eight-unit apartment complex in the City's R-
5 2 zone.

6 **FACTS**

7 This is the second time this proposal has been before
8 LUBA. In Winkler v. City of Cottage Grove, 30 Or LUBA 351
9 (1996) (Winkler I), we remanded the city's approval because
10 the findings did not address applicable criteria relating to
11 open space as required by Cottage Grove Zoning Ordinance
12 (CGZO) 18.12.110. We also sustained petitioners' assignment
13 of error that there was not substantial evidence in the
14 record to support findings that the proposed development met
15 the applicable open space requirements. Winkler I at 357-
16 59.

17 On remand, the city council held a public hearing and
18 accepted new evidence into the record. The city council
19 then adopted supplemental findings in which it found that
20 the proposed development complies with CGZO requirements for
21 recreational area, open space and off-street parking spaces.
22 The city again issued design review approval for the
23 proposed apartment complex. This appeal followed.

24 **CONTENTS OF THE CHALLENGED DECISION**

25 As an initial matter, the parties dispute whether the
26 city council incorporated a March 26, 1996, staff report

1 into the challenged decision by reference. Petitioners
2 argue that no such document exists in this record, and so
3 such a document cannot have been incorporated into the
4 challenged decision. Petitioners' several arguments are
5 based on this initial assertion and so we address it first.

6 The supplemental findings, approved by the city council
7 and signed by the council president, state in relevant part
8 that:

9 "The Staff Report submitted to the City Council,
10 dated March 26, 1996 is hereby adopted as
11 Council's supplemental findings in support of the
12 Council's decision to approve [design review for
13 the proposed apartment complex]. Attached hereto
14 and by this reference incorporated herein [sic].
15 Said findings are as follows:

16 "[list of five findings]." Record 20.

17 Petitioners argue that since the record does not contain any
18 document entitled "staff report," the city's attempt to
19 incorporate a "staff report" fails. Petitioners also argue
20 that the city's listing of five specific findings limits the
21 scope of the incorporation to only the five listed findings.

22 The record contains two copies of a memo from the
23 planning director to the mayor and city council. The memo
24 summarizes our decision in Winkler I, and makes
25 recommendations to the council on how to proceed in response
26 to that decision. Record 16-19. The memo is dated March
27 26, 1996. The statement in the findings that "[t]he Staff
28 Report submitted to the City Council, dated March 26, 1996
29 is hereby adopted as Council's supplemental findings[, and

1 that it is attached hereto and by this reference
2 incorporated herein," is sufficient to allow a reasonable
3 person to understand that another document is incorporated
4 into the findings, and to identify the incorporated
5 document. Gonzalez v. Lane County, 24 Or LUBA 251, 258-59
6 (1992).

7 We disagree with petitioners' argument that the City
8 limited the scope of its incorporation of the staff report
9 to only five specific findings, by listing only those
10 findings immediately after stating that "[s]aid findings are
11 as follows." Such a limitation would make the clear
12 incorporation of the entire staff report unnecessary and
13 meaningless. Additionally, we discern no clear intent by
14 the city council to adopt only the five listed findings.
15 This is not a case like Ellis v. City of Bend, 28 Or LUBA
16 332 (1994), in which the challenged, one-page decision
17 incorporated "all of the findings in the hearings officer's
18 [decision] consistent with this finding by the Commission,
19 and reject[ed] those findings inconsistent with this
20 [finding]." Ellis, 28 Or LUBA 333. The decision now before
21 us clearly incorporates the entire staff report.
22 Consequently, we consider the staff report as part of the
23 challenged decision when addressing petitioners' specific
24 challenges.

25 **ASSIGNMENT OF ERROR**

26 Petitioners make one assignment of error, arguing

1 generally that the city's findings relating to recreational
2 space (CGZO 18.12.110), open space (CGZO 18.12.070(B)), and
3 off-street parking spaces (CGZO 18.12.130) are conclusory
4 and inadequate.¹

5 Petitioners divide their one assignment of error into
6 four subparts. We understand their first, third and fourth

¹The cited provisions provide as follows:

CGZO 18.12.110:

"An area or areas for usable open space and recreation purposes shall be provided in multiple-family developments. A minimum of two hundred square feet of recreation area shall be provided for each dwelling unit. The surface area of recreation buildings, including swimming pools and tennis courts, may be included in computing the minimum size of the area. Recreation areas shall not be less than thirty feet in any one dimension and not more than ten percent of the area greater than five percent in slope."

CGZO 18.12.070(B):

"For multiple-family residential structures the basic open space area required per 'room count' shall not be less than four hundred square feet. For each additional one-tenth of one percent by which the building and structural coverage of the lot, except for garages, is reduced, the basic open space area per 'room count' requirement may be reduced by one square foot. In no event shall the required open space area per 'room count' be less than two hundred square feet. 'Room count' means the number of bedrooms per dwelling unit multiplied by the number of dwelling units to be provided in a multiple family residential structure."

CGZO 18.12.130, in relevant part:

"Off-street parking requirements in an R-2 district shall be as follows:

"A. There shall be at least one and one-half permanently reserved parking spaces including garages or carports on the site for each dwelling unit. * * *"

1 subparts to be essentially that the findings in the
2 challenged decision do not adequately describe the
3 applicable criteria, identify the facts relied upon by the
4 city, or explain how those facts demonstrate compliance with
5 applicable criteria for recreational area, open space and
6 off-street parking. Petitioners specifically challenge only
7 the fourth and fifth findings listed in the challenged
8 decision on these grounds. The fourth and fifth findings
9 provide:

10 "4. The final approved site plan in satisfaction
11 of Sections 18.12.110, 18.12.070(b),
12 18.12.130 provides:

13 "*" A recreation lawn area of 30 feet by
14 53.5 feet or 1,605 square feet in area
15 with a slope of 0 to 5 percent which is
16 larger in area than the minimum required
17 (18.12.110).

18 "*" Other lawn areas are in excess of 2,000
19 square feet in area.

20 "*" In excess of 12,000 square feet of basic
21 open space, which is 3.75 time greater
22 than the minimum (3200 square feet)
23 required. By [sic] section 18.12.070[.]

24 "*" The modified site plan meets the
25 requirements of section 18.12.130 Off
26 Street Parking by providing 1.5 parking
27 spaces per auto, and exceeds the
28 Planning Commission[']s requirement to
29 provide one (1) visitor parking spaces
30 per each three (3) dwelling units by
31 providing four (4) such spaces instead
32 of 2.67 or three (3) that is strictly
33 required.

34 "5. For the reasons cited above, Council finds
35 the modified final approved site plan to be

1 in complete compliance with Sections
2 18.12.110, 18.12.070(B), and 18.12.130
3 respectively of the Cottage Grove Zoning
4 Ordinance." Record 30-31 (emphasis in
5 original).

6 We have already concluded that the challenged decision
7 properly incorporates the planning director's March 26, 1996
8 memo as the "staff report." The challenged decision also
9 incorporates by reference a site plan, which clearly
10 identifies the dimensions of the subject property, the
11 parking lot, the buildings and the areas on the subject
12 property that will not be developed with buildings or
13 parking lot.² Record 25. We need not determine the
14 adequacy of findings 4 and 5 standing alone, because when
15 viewed together with the staff report and site plan, the
16 challenged decision adequately describes the applicable
17 criteria, adequately demonstrates the facts relied on by the
18 city, and adequately explains how those facts show
19 compliance with the applicable criteria.

20 The staff report states:

²Finding 3 in the challenged decision states:

"The submitted modified site plan which resulted from application of Council and Planning Commission conditions of approval, namely the approval of an eight-unit apartment with a fifteen foot wide front yard setback, satisfies the minimum requirement of Section 18.12.110 of the CGZO. Said modified site plan is attached herein as Exhibit 'C' and by this reference incorporated herein." Record 20 (emphasis added).

Petitioners do not argue that the site plan was not incorporated into the challenged decision.

1 "The modified site plan which is the result of the
2 conditions of approval imposed by both City
3 Council and the Planning Commission provides in
4 excess of 3,450 square feet of usable lawn area,
5 12,809 square feet of open space, and a 15 foot
6 wide front yard. Section 18.12.110 requires an 8-
7 unit apartment development provide a minimum of
8 200 square feet of open space per dwelling unit
9 and recreation areas of not less than 30 feet in
10 any one dimension and not more than ten percent of
11 the area greater than five percent in slope. The
12 approved site plan design provides a recreation
13 lawn area that is 53.5 feet by 30 feet or 1,605
14 square feet in area with a slope of 0 to 5
15 percent. This is larger than the minimum required
16 by Section 18.12.110. In accordance with Section
17 18.12.070(B) of the Cottage Grove Zoning Ordinance
18 the minimum required open space is 200 square feet
19 per 'room count', in this case for an 8-unit
20 apartment house with two bedrooms per dwelling
21 unit the minimum required is sixteen (16) bedrooms
22 times 200 square feet or 3200 square feet. The
23 approved site plan provides in excess of 12,000
24 square feet of open space or about 3.75 times more
25 than the minimum required. In compliance with
26 section 18.12.130 of the Cottage Grove Zoning
27 Ordinance * * *, the modified site plan provides a
28 total of sixteen (16) parking spaces, or one (1)
29 more than required by ordinance * * * ." Record
30 17-18.

31 These statements adequately describe the applicable criteria
32 by citing the relevant code sections and summarizing their
33 requirements. In conjunction with the site plan, these
34 statements clearly identify the facts relied on by the city,
35 and explain how the city came to conclude that the proposed
36 development complies with the cited criteria. Heiller v.
37 Josephine County, 23 Or LUBA 551, 556 (1992).

38 Petitioners make a specific challenge to the city's
39 explanation of why the proposed apartment complex complies

1 with the off-street parking space requirements of CGZO
2 18.12.130. The finding at issue states:

3 "The modified site plan meets the requirements of
4 section 18.12.130 Off Street Parking by providing
5 1.5 parking spaces per auto, * * * ." Finding No.
6 4, Record 21 (first emphasis in original, second
7 emphasis added).

8 Petitioners point to the language we emphasize, and
9 argue that the finding addresses how many parking spaces
10 "per auto" the site plan calls for, but does not address the
11 applicable criterion, which requires "at least one and one
12 half * * * parking spaces * * * for each dwelling unit."
13 CGZO 18.12.130. (Emphasis added). The city argues that
14 petitioners waived this issue, because they did not raise it
15 during the proceedings leading up to our remand decision in
16 Winkler I. Beck v. City of Tillamook, 313 Or 148, 153, 831
17 P2d 678 (1992) ("when the record is reopened, parties may
18 raise new, unresolved issues that relate to new evidence.
19 The logical corollary is that parties may not raise old,
20 resolved issues again."); Mill Creek Glen Protection Assoc
21 v. Umatilla County, 88 Or App 522, 526-27, 746 P2d 728
22 (1987). However, we have also held that

23 "[u]nresolved issues, which may be considered in a
24 local government proceeding on remand, include * *
25 * issues that could not have raised in the first
26 appeal." Louisiana Pacific v. Umatilla County, 28
27 Or LUBA 32, 35 (1994) (footnote omitted).

28 The case at hand falls squarely into this circumstance.

29 The decision adopted on remand states that the
30 "modified site plan * * * resulted from application of

1 Council and Planning Commission conditions of approval."
2 Record 20. The staff report, which is also part of the
3 decision, clearly sets out conditions imposed on the
4 proposed apartment complex in the city's first approval, and
5 then concludes that certain of those conditions are
6 satisfied. Record 17-18. Such conclusions raise new issues
7 that could not have been raised in the first proceedings.
8 Petitioners did not waive this issue.

9 On the merits, however, we disagree with petitioners'
10 argument. We do not find the city's use of the word "auto"
11 instead of "dwelling unit" warrants a remand. The city
12 argues that the record "clearly supports" a finding that the
13 off-street parking space requirements are met. The city
14 points to the following statement in the staff report:

15 "In compliance with section 18.12.130 of the
16 [CGZO] * * * , the modified site plan provides a
17 total of sixteen (16) parking spaces, or one (1)
18 more space than required * * * ." Record 18.

19 The modified site plan referenced in this finding is a
20 diagram of the apartment complex as proposed and approved.
21 Record 25. It shows 16 spaces in an area labeled "parking,"
22 and states "Parking = 16 spaces." Id. CGZO 18.12.130
23 requires one and one half parking spaces per dwelling unit
24 in a multi-family complex and the proposed apartment complex
25 includes eight dwelling units. Simple arithmetic shows that
26 the code section at issue requires this eight-unit complex
27 to have 12 parking spaces. The portions of the record to

1 which we are directed show that the complex will have 16
2 parking spaces. We believe the record "clearly supports" a
3 finding of compliance with this criterion. ORS
4 197.835(11)(b).

5 In petitioners' second subpart, they argue that the
6 city failed to address an issue they raised during the local
7 proceedings, by failing to state or clearly decide whether,
8 under CGZO 18.12.110, the space used to satisfy the open
9 space requirement can also be used to satisfy the recreation
10 area requirement. Petitioners argued before the city
11 council that it should require the open space and recreation
12 areas to be separate areas. We understand the second part
13 of petitioners' argument to be that the proposed complex
14 does not meet the open space and recreation area
15 requirements if those areas are not allowed to overlap, and
16 that petitioners do not contend that the proposed complex
17 does not meet the criterion at issue if the required open
18 space and recreation area can overlap. Petitioners
19 essentially argue to us that the city did not address the
20 issue of overlap in that it failed to make a necessary
21 interpretation of the applicable code and, on that basis, we
22 should remand.

23 The city points to a discussion among some members of
24 the city council and the planning director as encompassing
25 the required interpretation, or at least as evidence of it.
26 We decline to accept a discussion in the minutes, which does

1 not include a decision by, or even a consensus among,
2 members of the decision-making body as an interpretation by
3 the local governing body. The city also argues that the
4 interpretation was implicitly made by the approval, and that
5 the code language is clear and unambiguous. The relevant
6 code language provides:

7 "An area or areas for usable open space and
8 recreation purposes shall be provided in multiple-
9 family developments. A minimum of two hundred
10 square feet of recreation area shall be provided
11 for each dwelling unit. The surface area of
12 recreation buildings, including swimming pools and
13 tennis courts, may be included in computing the
14 minimum size of the area. Recreation areas shall
15 not be less than thirty feet in any one dimension
16 and not more than ten percent of the area greater
17 than five percent in slope." CGZO 18.12.110
18 (emphasis supplied).

19 The emphasized language unambiguously allows "an area or
20 areas" to satisfy the requirements for "open space and
21 recreation." The remainder of the text of this provision
22 does not express or suggest a requirement that open space
23 and recreation areas be counted separately. Rather, the
24 code provision sets minimum square footage requirements and
25 minimum dimensions for "recreation areas," but not for open
26 space, suggesting that open space and recreation areas are
27 the same thing. The city's interpretation that CGZO
28 18.12.110 allows the required open space and recreation
29 areas to be considered in combination is inherent in the way
30 the city applied the criteria. Alliance For Responsible
31 Land Use v. Deschutes Cty, 149 Or App 259, ___ P2d ___

1 (1997).

2 The assignment of error is denied.

3 The challenged decision is affirmed.