BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

and

ROCKY YOUNGER and JANICE YOUNGER,
Intervenors-Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

HILLTOP PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2004-124

FINAL OPINION
AND ORDER

Appeal from the City of Oregon City.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine LLP.

James H. Bean, Portland, represented intervenors-petitioner.

Edward J. Sullivan, Portland filed a joint response brief and argued on behalf of respondent. With him on the brief were William K. Kabeiseman and Garvey Schubert and Barer.

Kelly Hossaini, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With her on the brief were Phillip E. Grillo and Miller Nash Wiener.

DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 09/01/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner appeals a city decision denying its site plan and design review and water resources application to construct a Wal-Mart store.

FACTS

The subject property is a 12.87-acre parcel zoned General Commercial in the City of Oregon City. Petitioner seeks to develop a 147,048-square foot commercial retail development, a Wal-Mart discount store, which is a permitted use in the zone. Petitioner applied for site plan and design review approval and a water resources approval, which the city denied.[1]

The application the city denied is petitioner's second application to develop the property. The first development proposal (the 2003 Application) also involved a site plan application to build a Wal-Mart store, but it included a comprehensive plan and zone change proposal to redesignate several residentially planned and zoned adjacent parcels to General Commercial to use for the store's parking. Petitioner filed those applications concurrently. City staff recommended denial of the plan and zone change application and approval of the site plan. At the city's request, petitioner agreed to bifurcate the applications so the city could consider the plan and zone change request before addressing the site plan. As part of the bifurcated process, the city conducted a hearing on the plan and zone change application but did not accept evidence regarding the site plan application. The city concluded that if the plan and zone change were approved, another hearing would be required for the site plan application. The planning commission denied the plan and zone change application and also denied the site plan application because it was contingent upon obtaining the plan and zone changes for parking. Petitioner appealed the denial to the city commission, and the city commission upheld the planning commission's denial.

[1] The water resources approval is not at issue in this appeal.

A few months after the city commission denied the first application, petitioner submitted a new application. The new application revised the parking plan, eliminating the need for the adjacent residentially planned and zoned parcels and adding multi-level parking. Petitioner also modified the building design to incorporate more of a "main street" theme. The city processed the application as a limited land use decision. The planning manager denied the application, and petitioner appealed the decision to the city commission, which upheld the planning manager's denial. This appeal followed.

REPLY BRIEF

Petitioner moves to file a reply brief. We agree that the reply brief responds to new matters raised in the joint response brief filed by intervenor-respondent (intervenor) and the city. The motion to file a reply brief is granted.

MOTION TO STRIKE

The city moves to strike portions of the petition for review that refer to material that is not in the record. In a prior motion to take evidence outside of the record, petitioner sought to introduce materials supporting its claim that the city was biased against the proposed development because the city had an interest in purchasing the property itself for municipal use. We denied that motion, finding that petitioner had not demonstrated that there was a reasonable basis to believe the city was biased. *Wal-Mart, Inc. v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2004-124, Order, May 4, 2005). Petitioner also requested to introduce a copy of the city's traffic impact study procedures in a record objection, and the request was denied. *Wal-Mart, Inc. v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2004-124, Order, November 4, 2004). We agree with the city that those materials should not be considered. Where improper references to extra-record material are interspersed throughout a brief, rather than attempt to strike those references, we merely disregard them. We will disregard any references in the petition for review to materials that are not in the record.

SECOND ASSIGNMENT OF ERROR

We address the second assignment of error first because it presents a threshold issue. One of the grounds the city relied upon to deny the application was that the application was substantially similar to the previous application that had been denied less than a year earlier. Oregon City Municipal Code (OCMC) 17.50.220 provides:

> "If the application is denied or withdrawn following the close of the public hearing, no reapplication for the same or substantially similar proposal may be made for one year following the date of final decision denying the permit."

If the city is correct that OCMC 17.50.220 prevents petitioner from applying for site plan approval, then our inquiry is complete and the decision must be affirmed regardless of the other assignments of error. The city did not err in denying the application based on OCMC 17.50.220 if (1) the 2003 application was denied "following the close of the public hearing" and (2) the new application is "the same or substantially similar" to the 2003 application.

A. Following a Public Hearing

The essential facts are not in dispute. While processing the 2003 application, the city bifurcated the comprehensive plan amendment and zone change application from the site plan application. The city held a public hearing and considered the comprehensive plan and zone change application first. The public hearing was limited to the plan and zone change application, and no testimony or evidence pertaining to the site plan application was accepted or considered. All parties understood that if the plan and zone change application was granted, a separate public hearing would be required for the site plan application. The parties dispute the legal effect of these facts.

Petitioner argues that there was only a public hearing on the plan and zone change application, and that there was no public hearing on the site plan application. Therefore, the new site plan application can be submitted because it was not previously denied "following the close of [a] public hearing." The city responds that the plan and zone change application was all part of one larger application and there was a public hearing. According to the city, the site plan application was therefore denied "following the close of the public hearing." The city's findings state:

> "* * * the [city] notes that all of the applications in the previous denial were consolidated and that OCMC 17.50.220 bars reapplication 'for the same or substantially similar proposal.' The [city] interprets that provision to focus on the 'proposal' that was denied in the previous proceeding, not simply on the application. Because the site plan and design review was part of a larger 'proposal' for the construction of a Wal-Mart store, and that 'proposal' was denied after a public hearing, the [city] concludes that OCMC 17.50.220 is applicable to this application." Record 9.

The city interpreted OCMC 17.50.220 to mean that if an application involving multiple required approvals is denied following the close of a public hearing regarding any of the required multiple approvals, then all of those multiple components of the application were denied "following the close of the public hearing" for purposes of the ordinance. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose, or policy of the ordinance.[2]

While OCMC 17.50.220 does not expressly address bifurcated applications, the language of the ordinance suggests that the subject matter of the new application that is barred must have been actually considered in the prior application that was denied or withdrawn. Furthermore, the underlying purpose and policy of the ordinance is to prevent serial reconsideration of the same development. As intervenor stated below:

> "* * * its apparent purpose is to prevent an applicant from submitting and resubmitting for a proposed development that has already been denied under

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[2] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

> substantially the same circumstances, thereby wasting City and community resources." Record 96.

We agree with intervenor's understanding of the purpose and policy of the ordinance. The purpose and policy is that once a proposal has been denied, the applicant must wait at least a year before getting another opportunity for approval of the same proposal.

In the present case, there is no dispute that there was no public hearing and no consideration of the 2003 site plan application. The city specifically limited the scope of the public hearing, and the city relied on this fact in rejecting petitioner's assertion that the staff report recommending site plan approval should be considered evidence that the impacts of the plan and zone change could be mitigated. Record 1352. The city specifically explained that it would not give much weight to the staff report because "[n]o public hearings have been held on either of those applications [site plan and water resources], and no evidence has been received from the public regarding the sufficiency of the staff report findings." *Id*. In other words, the 2003 site plan was not reviewed on the merits. The express language, purpose, and policy of OCMC 17.50.220 is to prevent serial consideration of the same or substantially similar proposals. That is not what occurred in the present case. There was never a public hearing on the 2003 site plan application even though there was a public hearing for the combined plan and zone change application. The city's interpretation is contrary to the express language, purpose, and policy of OCMC 17.50.220. Accordingly, OCMC 17.50.220 does not preclude reapplication for site plan approval.

B. Same or Substantially Similar Proposal

Even if we agreed with the city that the 2003 site plan application had been denied "following the close of the public hearing," the new application would still have to be for the "same or substantially similar proposal" as the 2003 application before the city could deny reapplication under OCMC 17.50.220. The city's findings state:

> "The City interprets OCMC 17.50.220 to focus on the use being proposed and the impacts on the City's citizens; not on the reason for denial of the previous proposal or what parts of the previous proposal might be missing from the second proposal. In this case, the City * * * finds that [petitioner] is the same party, the commercially

> zoned area included in the application is the same, the identity of the use as a Wal-Mart retail store is the same, the size and orientation of the building is nearly identical and the impacts on City infrastructure * * * are nearly identical." Record 8.

The city focuses on the identity of the applicant, the lot to be developed, and the size and orientation of the building in determining that the proposals are substantially similar. Those factors, however, hardly lead to a logical conclusion that two proposals are substantially similar. The same applicant could apply for a variety of uses that are vastly different. Similarly, the fact the property is substantially the same has no obvious bearing on whether the uses are the same or similar. Furthermore, the similar size and orientation of the building does not mean the uses are similar. The two proposals in this case involve different properties and different plan and zone classifications. The fact that both proposals involve Wal-Mart retail stores tends somewhat to indicate similar proposals, and there are certainly some similarities. For instance, we are inclined to agree with the city that minor appearance changes, such as incorporating a main street theme, are "cosmetic" and would not by themselves be sufficient to constitute a different proposal.

The city, however, ignores the most important difference between the two proposals – that the new application eliminates the request for a plan and zone change for adjacent parcels that were the *basis for denial* of the 2003 application. The reason for denial is a critical part of a proposal. For instance, had petitioner resubmitted the same plan and zone change application that would certainly seem to be the type of application that would be precluded under OCMC 17.50.220. The new proposal eliminates the reason the 2003 application was denied and seeks to proceed with a site plan that has never been independently reviewed. Not only is that a difference, it is a substantial difference.

Moving beyond the express language of the ordinance, once again the city's interpretation is inconsistent with the purpose and policy of the ordinance. As discussed earlier, the purpose and policy is to prevent serial reapplications of the same proposal and requiring the city to expend resources denying an application for the same reason time after time. In fact, petitioner's actions

appear to coincide with the purpose of the ordinance: after denial of its 2003 application, petitioner removed the offending provisions and resubmitted the application. The city's interpretation is inconsistent with the express language, purpose, and policy of OCMC 17.50.220. For the reasons discussed above, the city's form over substance interpretation does not survive review under ORS 197.829(1) and *Church*.

The second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

As discussed, the proposed development is a permitted use in the applicable commercial zone. Because the site is within the Metro urban growth boundary, and the challenged decision is a denial of an application based on discretionary standards designed to regulate the physical characteristics of an outright permitted use, the decision is a limited land use decision.[3] Limited land use decisions are not subject to the more rigorous procedural requirements of ORS 197.763 that apply to land use decisions. ORS 197.195(2). Under the limited land use decision statute and the OCMC provisions that implement the statute, the procedure for limited land use decisions involves the following steps: (1) the applicant submits an application; (2) the application is deemed complete; (3) notice is mailed to certain property owners; (4) those receiving notice have 14 days to submit comments on the application; and (5) the decision maker (in this case the planning manager) analyzes the application and the comments and renders a decision. ORS 197.195; OCMC 17.50.030(B).[4]

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[3] ORS 197.015(12) defines a "limited land use decision" as:

> "a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns * * * [t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[4] ORS 197.195(3)(c) provides in pertinent part:

> "The notice and procedures used by local government shall:

In the present case, petitioner submitted its application on February 18, 2004, and it was subsequently deemed complete. On March 29, 2004, the city mailed notices of the proposed site plan application and indicated that comments must be received "no later than the close of business on April 16, 2004." Record 1037. On the same day, city staff mailed transmittal memoranda to various agencies and consultants indicating that their comments were also due by April 16, 2004. On April 30, 2004, petitioner's representative met with the city to discuss the application, and subsequent to that meeting, petitioner attempted to submit additional information, but the city refused to accept that information. On June 2, 2004, the planning manager issued his decision denying the application in part because petitioner's traffic impact analysis (TIA) was inadequate to demonstrate compliance with the transportation standards.[5]

The planning manager's decision included a list of the relevant exhibits, including the comments received by the planning manager. Several documents from the city's traffic consultant, David Evans and Associates (DEA memos), and the Clackamas County Fire District and Public Works Department (fire district e-mail) were received well after the close of the 14-day comment period. The planning manager relied on these documents as the basis for determining that petitioner's TIA was inadequate to demonstrate compliance with the transportation standards. The issue under this assignment of error is what consequences, if any, flow from the city's decision to accept the DEA memos and fire district e-mail after the close of the 14-day comment period.

> "(A) Provide a 14-day comment period for submission of written comments prior to the decision;
>
> "* * * * *
>
> "(E) State the place, date, and time that comments are due;
>
> "(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost[.]"

[5] The planning manager also denied the application for reasons discussed in the second and fourth assignments of error.

Limited land use decisions provide a more streamlined process for making certain types of decisions, including site plan decisions. The streamlined process does not provide the general quasi-judicial protections that exist for land use decisions under ORS 197.763. For instance, ORS 197.195, unlike ORS 197.763, does not provide for staff reports, public hearings, opportunities to continue the hearing or leave the record open, opportunities for responding to additional evidence, or allowing the applicant final rebuttal.[6] There is nothing in ORS 197.195 that requires the local government to leave the record open to allow participants additional time to respond to evidence submitted during the 14-day comment period, as is provided for quasi-judicial land use decisions in ORS 197.763.

In *Johnston v. City of Albany*, 34 Or LUBA 32, 41 (1998) and *Azevedo v. City of Albany*, 29 Or LUBA 516, 520 (1995), we held that when a local government accepts evidence from the applicant after the close of the 14-day comment period, it violates ORS 197.195(3)(c)(F). Although both of those cases involved additional evidence submitted by the applicants, we see no reason why the same time limits should not also apply to others, and the statute provides no basis for concluding otherwise. The statute sets out an unambiguous rule: once the application is deemed complete and notices are mailed, a 14-day comment period is provided for submission of written comments. Following the close of the comment period, a decision is made based on evidence submitted in the application and the comments. This procedure is supported by the language of the statute. ORS 197.195(3)(c)(A) ("Provide a 14-day comment period for submission of written comments *prior to the decision*." (Emphasis added)). At the end of the 14-day comment period, the local government must render its decision without accepting or considering new evidence.

In the present case, the city clearly did not follow this procedure. There is no dispute that the city considered evidence from DEA and the fire district that was submitted after the 14-day

[6] While there was some discussion at oral argument regarding due process concerns involving limited land use decisions, no due process issue was raised below or in the briefs and we do not consider it further.

comment period expired.[7] The city argues, however, that even if comments in general must be received by the end of the 14-day period, the DEA memos and fire district e-mail could nonetheless be accepted because they were essentially staff comments. According to the city, the traffic engineers and fire district were performing staff functions as requested by the city. We need not address the issue of whether they are properly considered city staff, although we doubt that they are, because even if staff comments are permitted, staff submission of additional evidence after the 14-day comment period expires is not.[8] We have consistently held that staff analysis or comments cannot be accepted after the record is closed in quasi-judicial proceedings if they contain new evidence. *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001); *Wicks v. City of Reedsport*, 29 Or LUBA 8, 17 (1995). In the present case, there can be no doubt that the submissions from DEA and the fire district constituted new evidence. Therefore, even if DEA and the fire district could be considered staff, the city should not have accepted the new evidence without reopening the record to allow petitioner to respond.

Considering the DEA evidence submitted after the close of the 14-day comment period was procedural error. Procedural errors, however, only provide a basis for reversal or remand if they prejudice a party's substantial rights. ORS 197.835(9)(a)(B). If new evidence is submitted after the record has been closed in quasi-judicial proceedings, the local government must either: (1) reopen the record to allow other participants an opportunity to respond to the new evidence; or (2) reject the new evidence as untimely. *ODOT v. City of Mosier*, 36 Or LUBA 666, 683 (1999); *Brome v. City of Corvallis*, 36 Or LUBA 225, 234-35, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999). At least in the quasi-judicial context, the

[7] The city also accepted comments from other interested agencies, but specifically found that those comments were not evidence and did not rely on them in their decision. Those comments are not at issue in this appeal and we do not consider them further.

[8] For instance, the city asserts that under ORS 190.010 and ORS 279C.105 it can enter into contracts with other units of local government or private firms to perform staff functions. Even if that were sufficient to render DEA and the fire district "staff" the city provides no evidence that it actually entered into any such agreements.

failure to choose one of these options prejudices the substantial rights of the parties because it infringes on their right to a full and fair opportunity to present their case. *Id*. We see no reason why a different rule should apply in the limited land use decision making context. Once the city decided to deviate from its limited land use decision making procedures and accept and rely on new evidence in the DEA memos and fire district e-mail that was submitted after the comment period expired, the city was obligated to allow the parties an opportunity to present evidence to respond to that new evidence. The city committed procedural error that prejudiced petitioner's substantial rights when it failed to do so.

The city raises two arguments as to why it was permissible to accept the new evidence in this case: (1) petitioner is not entitled to respond to the new evidence because there is no "right of rebuttal" in the limited land use process and (2) the city would have made the same decision even if it had not relied on the new evidence.

A. Right of Rebuttal

The city argues that it acted properly because there is no right of rebuttal in the limited land use process. According to the city, if the disputed evidence had been submitted the day comments were due; *i.e*., in a timely manner, petitioner would not have been able to rebut that evidence. As discussed earlier, that may be true. That, however, is not what happened in the present case. The opportunity to respond to evidence submitted after the comment period has been closed is not simply a right of rebuttal; it is a remedial action that was required to keep the procedural error that the city committed from prejudicing petitioner's substantial rights.

The city argues that because the present case involves the limited land use process rather than the quasi-judicial land use process of ORS 197.763, remedies that would otherwise apply under ORS 197.763 are inapplicable in the limited land use arena. For instance, the city argues that because ORS 197.763 references a "record" and ORS 197.195 does not, there is no actual record in the limited land use arena. According to the city, a record is created only once the limited land use decision is appealed. We do not share the city's exceedingly narrow interpretation of the

statute. Although the procedures for developing the evidence that provides the basis for the decision are more abbreviated in the limited land use arena, they serve the same purpose. Under both ORS 197.763 and 197.195, parties have a certain amount of time to submit materials and then that period ends and the decision maker makes a decision based on those materials. It is immaterial whether it is referred to as the "close of the record" or the "end of the comment period." Similarly, once a local government commits a procedural error in allowing the evidence to be submitted after the comment period in the limited land use arena, we see no reason the remedy should be different than that provided in the quasi-judicial land use decision arena. Again, petitioner's right to respond to the new evidence submitted after the record was closed is a remedy to the city's procedural error, a remedy that must be provided to avoid prejudice to petitioner's substantial rights.

B. Same Decision

Finally, the city argues that even if it was error to accept the new evidence without allowing petitioner an opportunity to respond, the error is cured because the city would have reached the same decision with or without the disputed evidence. According to the city, because there is substantial evidence to support the city's decision without resort to the disputed evidence, any procedural error is harmless. The city again misconstrues the issue. The issue is not whether there is substantial evidence that the city could have relied on to support the decision independently of the disputed evidence. The issue is whether the city *relied* on evidence that it should not have accepted. Although the city attempts to minimize its reliance on the improperly accepted evidence, it is clear that both the planning manager and the city commission both relied heavily on such evidence. Record 10-12. When a local government relies on evidence not properly before it to render a decision, it violates the parties' substantial rights. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 429-30, (2004), *aff'd* ___ Or App ___, ___ P3d ___ (2005). The city attempts to distinguish *Nez Perce* on the basis that the evidence improperly relied upon in that case was not incorporated into the record while here the new evidence was in the record. We do not

see, however, that the difference between relying on evidence that is not in the record and relying on evidence that is improperly in the record should lead to a different result.

The city improperly accepted and relied upon new evidence that was submitted after the close of the record without reopening the record to allow petitioner an opportunity to respond to the new evidence.[9] The city committed a procedural error that prejudiced the substantial rights of petitioner.

The first assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city's refusal to provide it an opportunity to clarify or supplement its traffic impact analysis (TIA) in response to the city's conclusion that it was incomplete was procedural error that prejudiced its substantial rights. Petitioner also argues that the city's determination that the TIA does not demonstrate compliance with the applicable transportation standards is incorrect. Because we have decided that the record must be reopened and additional evidence likely will be submitted, we do not reach this assignment of error. *Azevedo*, 29 Or LUBA at 520.

We do not address the third assignment of error.

FOURTH ASSIGNMENT OF ERROR

As discussed earlier, the city also denied the application on alternative, individual grounds that were not based on the additional evidence that was submitted after the 14-day comment period expired. The city found the proposal fails to comply with OCMC 17.62.055(F)(2), which provides:

> "The main front elevation shall provide at least sixty percent windows or transparency at the pedestrian level. The side elevation shall provide at least thirty percent transparency."

[9] Although petitioner was provided an opportunity to make legal arguments regarding the improper evidence before the city commission, that is not a sufficient remedy. Once the city decided to deviate from limited land use decision procedures and accept evidence after the 14-day comment period expired, petitioner was entitled to submit additional evidence of its own to respond to that evidence.

The city found that OCMC 17.62.055(F)(2) was not satisfied because the proposed windows on the north, the side elevation, do not allow pedestrians to see into the building. The city also found the code was not satisfied because the windows on the west, the main front elevation, are not at pedestrian level.

A. North Elevation

Regarding the north elevation, the application proposed translucent glass block windows.[10] The city interpreted the code to require transparent windows that allow pedestrians to see into the building.[11]

> "Regarding the north elevation (a side elevation requiring 30% transparency), the [city] interprets the transparency requirement based on the purpose of the site plan and design review requirements as set forth in OCMC 17.62.055(A): to 'promote the design of an urban environment that is built to human scale and to encourage street fronts that create a pedestrian-conducive environment.' The [city] finds that simply 'allowing light to be transmitted through the material' (as alleged by [petitioner]) does not meet the transparency requirement. [Petitioner's] interpretation looks to the interior of the building, but the purpose of these regulations is on the exterior – the regulation focuses on the 'urban environment,' 'street fronts' and 'pedestrian conducive[ness].' The glass block wall provides no greater benefit to the streetscape than a concrete block wall. The [city] interprets the transparency requirement of OCMC 17.62.055(F)(2) to require the ability for pedestrians on the outside of a building to see into the building. Because [petitioner's] north elevation does not allow pedestrians outside of the building to have visual access in to the building, the [city] finds that the transparency requirement on the north elevation is not satisfied." Record 12.

Petitioner argues that the city misconstrued OCMC 17.62.055(F)(2) by interpreting it to require transparent rather than translucent windows. Initially, the response brief asserts that there is a significant distinction between the first sentence of OCMC 17.62.055(F)(2) that allows for "windows or transparency" and the second sentence that only mentions "transparency." According

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[10] "Translucent" is defined as "admitting and diffusing light so that objects beyond cannot be clearly distinguished: partly transparent." *Webster's Third Int'l Dictionary* 2429 (unabridged ed 1993).

[11] "Transparent" is defined as "having the property of transmitting light without appreciable scattering so that bodies lying beyond are entirely visible." *Webster's Third Int'l Dictionary* 2430 (unabridged ed 1993).

to respondents, even if petitioner is correct that translucent windows would satisfy the first sentence of OCMC 17.62.055(F)(2), which applies to front elevations, translucent windows do not satisfy the second sentence because it requires "transparency" side elevations. While we would perhaps be inclined to agree with this interpretation, that clearly is not the interpretation the city adopted below. The challenged decision makes no such distinction in its limited discussion of OCMC 17.62.055(F)(2). On the contrary, the decision treats the criterion as applying equally to both elevations except for the percentage of the elevation that must meet the requirement. Record 12-13. This view is consistent with the purported purpose of the code that it is geared towards the aesthetics of the structure as viewed from the pedestrians' views from the outside, rather than customers' views from inside. The decision clearly treats the requirement as applying to both elevations; *i.e.*, there must be windows or transparency on both sides that meets the required percentage and they must be at pedestrian level. That is the interpretation adopted by the city commission, and that is the interpretation on review.

The challenged decision also treats the requirement as a requirement for transparency.[12] We turn now to the city's conclusion, based on that interpretation, that translucent glass blocks do not satisfy OCMC 17.62.055(F)(2). The code specifically allows "windows or transparency." Presumably, windows can be something other than a transparency. Otherwise, there would be no need to list both terms. In other words, if all windows were transparencies, then the addition of the word "windows" would be superfluous. A window is commonly understood to include transparent

[12] The discussion of OCMC 17.62.055(F)(2) in the challenged decision provides, in part:

> "E. Transparency Requirements.
>
> "5. *The City Planning Manager Erred in Finding that the transparency requirements set forth in OCMC 17.62.055(F)(2) were not met.*
>
> Findings: The City Commission interprets the transparency requirement of OCMC 17.62.055(F)(2) consistent with City Planning Manager's interpretation." Record 12.

and translucent openings.[13] The windows proposed by petitioner are translucent openings in the wall of the building, and therefore within the dictionary definition of the word. Under the city's stated purpose for the code, the city could have adopted a code provision that does not allow translucent windows. However, the current code does allow for them. The city's interpretation to the contrary is inconsistent with the express language of the code.[14] The city's interpretation violates ORS 197.929(1) and *Church*.

B. West Elevation

The application proposes transparent windows on the west, or front, elevation. The city, however, also denied the application under OCMC 17.62.055(F)(2) because it found that the windows or transparency on the west (main front) elevation were not at pedestrian level. Petitioner argues that the city's decision is not supported by substantial evidence.[15] The city's findings state:

> "Regarding the west elevation (the front elevation, requiring 60% transparency), again the [city] focuses on the purpose of the regulations and notes that the purpose is to allow pedestrians visual access to the interior of the building. Because of the significant slope along Molalla, most of the west elevation is above pedestrian eye level on the east side of Molalla. The [city] finds that this is inadequate to meet the intent of the code. [Petitioner] suggests that the elevation inaccurately represents the view from the street and that the grading plan would result in a different elevation. [Petitioner] does not explain why one document should be considered any more reliable than the other; the city is required to determine whether the applicant has met its burden of showing that the criteria in the city's code have been

[13] "Window" is defined as "an opening in a wall of a building * * * to admit light usually through a transparent or translucent material." *Webster's Third Int'l Dictionary* 2620 (unabridged ed 1993).

[14] The city's suggestion that the criterion requires pedestrians to be able to see into the building is nowhere stated in the code, nor is it supported by the actual, stated purpose of the regulation.

[15] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

> met. The inconsistent drawings in the application make it difficult to tell which one should be relied on. The planning manager's reliance on the elevation was not wrong and the [city] agrees that, based on the elevation presented by [petitioner], this criterion was not met. Therefore, the application fails to provide the requisite amount of transparency on the west elevation as well." Record 12-13.

The only evidence submitted into the record regarding the west elevation for purposes of OCMC 17.62.055(F)(2) was submitted by petitioner. That evidence includes a detailed grading and drainage plan (grading plan), a rough sketch of the proposed building elevations, and a larger scale artist's sketch of the west elevation. Record 277, 290, 292. The planning manager's decision was apparently based upon the rough sketch that he believed showed the windows above pedestrian grade. Record 166. The planning manager's decision does not purport to have considered the grading plan. The city's final decision notes that petitioner explained that the grading plan shows the windows at pedestrian level. The decision, however, concludes that petitioner "does not explain why one document should be considered any more reliable than the other" and that the "inconsistent drawings in the application make it difficult to tell which one should be relied on." Record 13.

The city relies too much on a purported inconsistency and not at all on petitioner's explanation that the grading plan demonstrates compliance with the criterion. The proposed building elevations that the city relied on are of extremely rough scale. Record 290. We do not believe a reasonable person would conclude that those elevations demonstrate that the windows are not at pedestrian level. The more detailed sketch of the front view, which includes pedestrians, sidewalks, and automobiles, very clearly shows the windows to be at pedestrian level. Record 292. Although respondents are correct that the sketch does not show the entire extent of the west elevation, it certainly illustrates that the design easily meets the requirement for a substantial portion of the elevation with nothing to indicate that other portions do not meet the requirement. If this were all the evidence in the record, perhaps we would agree with the city. Petitioner, however, submitted a grading plan depicting the elevations that petitioner asserts conclusively demonstrates that the requirement is met. The city apparently did not consider the grading plan in its decision. Record

12-13. Furthermore, the city never disputed this claim and does not do so in the response brief. We are thus left with an undisputed claim that the windows are at pedestrian level. A finding that the windows are not at pedestrian level is not supported by substantial evidence when there is unrebutted evidence that the windows are at pedestrian level. The city's attempt to create an inconsistency with sketches of differing specificity does not eliminate that error.

Finally, the city states that petitioner "does not explain why one document should be considered any more reliable than the other." Record 13. In fact, petitioner did just that at the appeal hearing before the city commission, as the minutes demonstrate:

> "[Petitioner's counsel] concluded * * * with regards to the Molalla Avenue slope, there was a slight error in the elevation that you were shown by staff. If you look at the actual grading plan we submitted in the record, the grading plan actually demonstrates that it is more at street level. He had some graphics he could show during rebuttal that would show clearly there is not a slope or grading problem, and we can meet that transparency requirement." Supplemental Record 25.

Contrary to the city's findings, petitioner explained the reason for any perceived inconsistency in the rough elevation sketches and that the grading plan demonstrates that the windows are at pedestrian level. A decision that ignores unrebutted evidence demonstrating that an approval criterion is satisfied and compounds that error with an erroneous statement that an explanation of inconsistencies was never given is not supported by substantial evidence.

The fourth assignment of error is sustained.[16]

FIFTH ASSIGNMENT OF ERROR

Petitioner requests reconsideration of our previous order in which we denied its motion to take evidence outside of the record in order to establish that the city was biased because it already had plans to use the property for municipal purposes. We have considered petitioner's arguments, but we are not persuaded that a change of our opinion regarding the motion to take evidence

[16] Because we sustain the fourth assignment of error on the bases discussed in the opinion, we need not reach petitioner's alternative arguments that the city's decision was barred by equitable estoppel or required approval with conditions under ORS 197.522.

outside of the record is warranted. The renewed motion is denied for the reasons expressed in our prior order.

The fifth assignment of error is denied.

The city's decision is remanded.