

Nov 22 6 51 PM '80

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

3 DEBORAH MILLER and STEPHEN)
4 FABRICANT,)
5 Petitioners,)
6 and)
7 DAVID LANE,)
8 Intervenor-Petitioner,)
9 vs.)
10 CITY OF ASHLAND,)
11 Respondent,)
12 and)
13 PACIFIC NORTHWEST RAPTOR)
14 REHABILITATION CORP. and)
15 SOUTHERN OREGON STATE COLLEGE,)
16 Intervenors-Respondent.)

LUBA No. 88-038

FINAL OPINION
AND ORDER

15 Appeal from the City of Ashland.

16 Deborah Miller, Ashland, filed a petition for review and
17 argued on her own behalf.

18 Intervenor-petitioner David Lane argued on his own behalf.

19 Ronald L. Salter, Ashland, and Gregory S. Hathaway and
20 Virginia L. Gustafson, Portland, filed a joint response brief
21 on behalf of respondent City of Ashland and intervenor-
22 respondent Pacific Northwest Raptor Rehabilitation Corp. With
23 them on the brief was Hanna, Murphy, Jensen & Holloway. Ronald
24 L. Salter argued on behalf of respondent city. Gregory S.
25 Hathaway argued on behalf of intervenor-respondent Pacific
26 Northwest Raptor Rehabilitation Corp.

23 James M. Mattis, Eugene, filed a response brief and argued
24 on behalf of intervenor respondent Southern Oregon State
25 College.

1 SHERTON, Referee; HOLSTUN, Chief Referee; BAGG, Referee;
participated in the decision.

2 REMANDED

11/22/88

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

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1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners appeal an order of the Ashland City Council
4 approving a conditional use permit for a privately owned
5 natural history museum on the campus of Southern Oregon State
6 College.

7 MOTIONS TO INTERVENE

8 Motions to Intervene on the side of respondent City of
9 Ashland (city) were filed by Pacific Northwest Raptor
10 Rehabilitation Corp. (PNRRC) and Southern Oregon State College
11 (SOSC). There is no opposition to these motions and the
12 intervention is allowed.

13 FACTS

14 On January 7, 1988, intervenor-respondent PNRRC applied to
15 the city for a conditional use permit for a natural history
16 museum to be constructed on a 14 acre site leased from
17 intervenor-respondent SOSC. The subject site is designated
18 "Southern Oregon State College" on the Ashland Comprehensive
19 Plan (plan) map and is zoned "Southern Oregon State College"
20 (SO).

21 The Southern Plan for the 80s (SOSC plan), a plan for the
22 SOSC campus which has been adopted by the city as part of its
23 comprehensive plan, refers to the area in which the site as
24 located as the "north campus." Southern Plan 59. The SOSC
25 Plan depicts the area of the proposed museum site as vacant and
26 states that this area is to be

1 " * * * * retained as a land bank opportunity area for
2 addressing institutional program realignments, to
3 serve the Southern Oregon area. This area may also
4 serve emerging considerations for joint private and
5 institutional facilities in support of research and
6 development programs and community-area support
7 facilities, such as the new National Guard Armory." Id.

8 The purpose of the SO zoning district is " * * * * to provide
9 for the unique needs of SOSC as a State educational institution
10 functioning within the planning framework of the City." Land
11 Use Ordinance (LUO) 18.64.010. The SO zone provides that
12 outright permitted uses are those which are directly related to
13 SOSC's educational functions and are indicated on "the adopted
14 and City approved SOSC Comprehensive Plan." LUO 18.64.020.
15 The SO zone also provides that uses "not agreed upon in advance
16 by the City and SOSC in the SOSC Plan" and "any construction
17 over 40 feet in height" are conditional uses. LUO 18.64.030.A
18 and C.

19 The proposed natural history museum complex will have
20 approximately 120,000 square feet of floor space. It will
21 include a rotunda, theater, observation tower, library,
22 cafeteria, museum store, exhibit halls and curatorial and
23 office space. The complex will be over 40 feet in height.

24 Land to the west and south of the proposed museum site is
25 also part of the SOSC campus. To the west of the site are the
26 U.S. Fish and Wildlife Service Forensics Laboratory and Oregon
27 State National Guard Armory. To the south, across a railroad
28 right-of-way, are the SOSC playing fields and stadium. To the
29 east, across Walker Avenue, is the Ashland Middle School.

1 On March 9, 1988, the city planning commission approved the
2 conditional use permit with conditions. The following day,
3 because of a concern regarding the validity of the planning
4 commission's vote and in order to obtain clarification of the
5 conditions, PNRRC appealed the commission's decision to the
6 city council.

7 The city's mayor served in PNRRC's cabinet. Record 39.
8 However, the mayor publicly resigned from the cabinet
9 immediately prior to the city council's first scheduled hearing
10 on the appeal. At that April 5th hearing, the city attorney
11 stated the mayor had served on an advisory board of the
12 applicant's, not as an officer with management functions; and,
13 therefore, had no conflict of interest. Record 463.

14 The city council reset the de novo appeal hearing for April
15 26, 1988. At the close of the hearing the council vote on the
16 conditional use permit was tied at 3-3, after which the
17 deciding vote in favor of approving the conditional use permit
18 was cast by the mayor. A final written decision was adopted on
19 May 17, 1988, and this appeal followed.

20 FIRST ASSIGNMENT OF ERROR

21 "The decision maker who cast the deciding vote, having
22 been closely involved with the applicant's project,
23 with resulting 'ex parte contacts,' failed to perform
24 his statutory duty under ORS 227.180 to disclose
25 adequately the substance of the communication, or to
26 make public announcement of the content and of the
27 public's right to rebut the substance of the
28 communication."

26 Petitioners argue that the decision should be remanded

1 because the city's mayor had ex parte contacts as a member of
2 PNRRRC's cabinet and did not disclose the existence and
3 substance of these contacts as required by ORS 227.180(3).¹
4 Because of this failure, according to petitioners, the public
5 lost its right to know and rebut the content of the ex parte
6 communications, and the city's decision may have been made on
7 the basis of facts not in the record.

8 Petitioners contend that "a conclusive inference" that the
9 mayor was subject to ex parte communications must be drawn from
10 the fact that he served on PNRRRC's cabinet, the function of
11 which is described in literature submitted to the city by PNRRRC
12 as to "make the ultimate decisions regarding the facilities and
13 programs of the Museum." Record 33. Petitioners point to a
14 February, 1986 letter to PNRRRC signed by the mayor, inviting
15 PNRRRC to locate its proposed museum in Ashland. Record
16 153-156. Petitioner's conclude that "[f]or at least two years
17 it was inescapable that a large volume of communication between
18 the Mayor and the applicant took place." Petition for Review 6.

19 The city and PNRRRC (respondents) argue that neither
20 petitioners nor other opponents of the proposed museum raised
21 any objection to the city council regarding the adequacy of the
22 mayor's disclosure of his association with PNRRRC. Respondents
23 claim that petitioners' failure to raise this issue below
24 precludes them from raising it in this appeal, citing
25 ORS 197.762 and Mason v. Linn County, 13 Or LUBA 1, 4 (1985).

26 Respondents further argue the intent of ORS 227.180(3), to

1 make ex parte contacts known and to give the public the right
2 to rebut the substance of those contacts, has been satisfied in
3 this case. According to respondents, the essence of the
4 communications the mayor might have had with PNRRC during his
5 association with its cabinet is contained in the extensive
6 supporting documentation for the conditional use permit which
7 is in the record and which the public had an opportunity to
8 rebut.

9 Respondents point out that petitioners have not argued that
10 the mayor should have disqualified himself from participation
11 in the decision because of bias. However, respondents argue
12 that even if petitioners had done so, they have not met their
13 burden "to show clearly that the [mayor was] incapable of
14 making a decision on the basis of the evidence and argument."
15 Oatfield Ridge Residents Rights v. Clackamas Co., 14 Or LUBA
16 766, 768 (1986). Respondents also note that in Oatfield Ridge
17 Residents Rights v. Clackamas Co., 14 Or LUBA at 769, we held
18 that public involvement by a county commissioner as a board
19 member of an organization associated with a proposed
20 residential care facility was not grounds for disqualification.

21 We have held that where a party has the opportunity to
22 object to a procedural error before the local government, but
23 fails to do so, that error cannot be assigned as grounds for
24 reversal or remand of the local government's decision in an
25 appeal to LUBA. Mason v. Linn County, 13 Or LUBA 1, 4, aff'd
26 73 Or App 334, 698 P2d 529, rev den 299 Or 314 (1985);

1 Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No.
2 87-083, April 27, 1988), slip op 18. Where petitioners have
3 reason to believe ex parte contacts occurred, but fail to
4 inquire as to their nature and content before the local
5 government, petitioners are barred from making such an inquiry
6 during the course of our review proceedings. Younger v. City
7 of Portland, 15 Or LUBA 616, 617 (1987); Union Station Business
8 Community Assoc. v. City of Portland, 14 Or LUBA 556, 558-559
9 (1986).

10 In this case, the record shows the mayor did not disclose
11 the existence or substance of any ex parte contacts concerning
12 the conditional use permit application. Petitioners concede
13 they had knowledge of the mayor's former membership on PNRRC's
14 cabinet at the time of the city council hearings on the
15 proposed museum. Nevertheless, they did not object to the lack
16 of disclosure of any ex parte contacts by the mayor or demand
17 that the content of any such ex parte contacts be placed on the
18 record. In these circumstances, petitioners' failure to raise
19 the alleged procedural error below bars them from raising it in
20 this appeal.²

21 Even if petitioners were not barred from raising this issue
22 in their appeal, we would still deny this assignment of error.
23 Failure of a local official to disclose ex parte contacts on
24 the merits of the matter before him, as required by
25 ORS 227.180(3), can be grounds for invalidation of a local
26 government's decision. See ORS 197.835(12); 1000 Friends of

1 Oregon v. Wasco County Court, 14 Or LUBA at 327; Samuel v.
2 Board of Chiropractic Examiners, 77 Or App 53, 63, 712 P2d 132
3 (1985). However, petitioners must demonstrate, on the basis of
4 the record made before the local government or the record made
5 in an evidentiary hearing before this board, that such ex parte
6 contacts actually occurred.³ Younger v. City of Portland, 15
7 Or LUBA 210, 232, aff'd 86 Or App 211, 739 P2d 50 (1987), rev'd
8 other grounds 305 Or 346, 752 P2d 262 (1988). In this case,
9 petitioners have not done so. Rather, they have merely asked
10 that we infer such contacts must have taken place because of
11 the mayor's membership in PNRRC's cabinet.

12 The first assignment of error is denied.

13 SECOND ASSIGNMENT OF ERROR

14 "The respondent City erred in failing to consider
15 opponents' evidence offered in rebuttal of the
16 evidence it received and considered from the
17 applicant."

17 Petitioners argue that at the city council's April 26, 1988
18 hearing on the conditional use permit application, the mayor
19 rejected a rebuttal document offered by an opponent.⁴
20 Petitioners recognize that the City Recorder accepted a copy of
21 the document at the hearing and that the document is in the
22 record of the city council's proceeding. Record 288-295.
23 However, petitioners claim that because of the mayor's action
24 the city council members were not "allowed to consider [the
25 document] in reaching their decision." Petition for Review 7.
26 According to petitioners, this deprived them of their rights to

1 fairness and to "an even-handed chance to rebut" guaranteed by
2 the Fourteenth Amendment to the U.S. Constitution. Id.

3 While petitioners and respondents are in agreement as to
4 the basic events which occurred at the city council's April 26,
5 1988 hearing, respondents interpret them differently.
6 According to respondents:

7 "As an affidavit attached to Petitioner's own Petition
8 for Review attests, during the oral presentation of
9 another individual, and without permission from the
10 City Council, Patricia Lane began to distribute copies
11 of the report to the City Council. The Mayor noted
12 that she was out of order and requested that she
13 refrain from distributing the material, after which
14 she sat down." Respondents' Brief 11.

15 Respondents contend that neither Ms. Lane nor any other
16 opponent of the museum attempted to offer the report into
17 evidence in the proper manner or raised any objection to the
18 city council's failure to accept the report from Ms. Lane.
19 Furthermore, according to respondents, the opponents did submit
20 the report to the City Recorder at the close of the hearing,
21 and it was made part of the city council's record.

22 Respondents further argue petitioners may not raise this
23 issue in an appeal to LUBA when no objection to the mayor's
24 action was made at the city council's hearing. Respondents
25 also argue petitioners were not denied due process rights by
26 the council's refusal to allow an individual to disrupt its
27 proceedings by distributing materials during another
28 individual's testimony. According to respondents, the city
29 council received and considered all materials submitted to it;

1 and the opponents' report was accepted and is part of the
2 council's record.

3 We do not believe petitioners waived their right to assert
4 a violation of their constitutional rights in this appeal by
5 failing to do so before the city.⁵ However, we do not
6 believe the city council's action in refusing to accept the
7 rebuttal report from Ms. Lane denied petitioners any
8 constitutional right to a fair hearing and to rebuttal. All
9 the city council did was decline to allow one individual to
10 distribute material to the council during another individual's
11 presentation. There is no indication in the record or Ms.
12 Lane's affidavit that the city council was informed that the
13 document which Ms. Lane was attempting to distribute was
14 identical to the document to which Mr. Lane was referring in
15 his testimony or that Mr. Lane himself attempted to submit the
16 document to the city council as part of his testimony. In any
17 case, when the document was properly submitted to the city
18 recorder, it was accepted by the city and was made part of the
19 city council's record. The city council did not err in the
20 procedure it followed with regard to this matter.⁶

21 The second assignment of error is denied.

22 THIRD ASSIGNMENT OF ERROR

23 "The proposal is not in conformance with the
24 acknowledged Comprehensive Plan."

25 Before reviewing petitioners' charges that the city's
26 decision failed to comply with a number of specific plan goals

1 and policies, we will consider three general arguments made by
2 petitioners under this assignment.

3 A. Consideration of Conformance with Comprehensive Plan

4 Petitioners argue in several places under this assignment
5 that the city council erred because it "did not discuss during
6 its deliberations [sic], in any substantive manner, whether the
7 proposal was in conformance with the Comprehensive Plan."
8 Petition for Review 22. Petitioners cite us to the minutes of
9 the city council's deliberations following the close of its
10 April 26, 1988 hearing, Record 459-460, as proof that the
11 council did not discuss comprehensive plan conformance.

12 Respondents reply that the city's ordinance does not
13 require that the city council discuss, at a public hearing,
14 each aspect of its decision before adopting written findings.

15 We review, as the justification for the city's decision,
16 the final written order adopted by the city council, not
17 comments made by the council members during their
18 deliberation. Oatfield Ridge Residents Rights v. Clackamas
19 Co., 14 Or LUBA at 768-769; Citadel Corp. v. Tillamook County,
20 9 Or LUBA 61, 67 (1983), aff'd 66 Or App 965, 675 P2d 1114
21 (1984). Petitioners have not cited, nor are we aware of, any
22 legal requirement that the city's determination of conformance
23 with its plan policies be reflected in the minutes of the city
24 council's deliberations. See Kellogg Lake Friends v. City of
25 Milwaukie, ___ Or LUBA ___ (LUBA No. 88-022, June 24, 1988)
26 slip op 14-15.

1 This subassignment of error is denied.

2 B. Consideration of Conflicting Evidence

3 Petitioners argue the city council improperly ignored
4 conflicting evidence establishing a lack of conformance with
5 the comprehensive plan. Petitioners contend the city had a
6 duty to address contradictory evidence in its findings and
7 explain its choice between conflicting evidence, citing
8 Stephens v. Clackamas County, 8 Or LUBA 172, 176-177 (1983).

9 A local government is required to consider and weigh
10 evidence on both sides of the issues before it. Younger v.
11 City of Portland, 15 Or LUBA at 216-217. However, there is no
12 legal requirement that a local government address in its
13 findings conflicting evidence upon which it chooses not to
14 rely.⁷ Kellogg Lake Friends v. City of Milwaukie, supra,
15 slip op at 15; Ash Creek Neighborhood Ass'n. v. City of
16 Portland, 12 Or LUBA 230, 236-238 (1984).

17 This subassignment of error is denied.

18 C. Lack of Determination of Impacts

19 Petitioners argue that "[m]any of the elements of the
20 Comprehensive Plan require determining the degree of impact a
21 project would have in order to determine conformance with its
22 goals and policies." Petition for Review 14-15. Petitioners
23 then discuss conflicting evidence in the record with regard to
24 the number of visitors the proposed museum will attract, how
25 many of these will be new visitors and the timing of these
26 visits. According to petitioners, because the city council did

1 not make a determination on the projected numbers of visitors
2 and their impacts, it was impossible for the city to determine
3 whether the proposed museum conforms to "many elements of the
4 plan." Id.

5 Respondents reply that petitioners have not cited any plan
6 or ordinance provision which requires the city to establish the
7 exact number of visitors the proposed museum will attract.
8 Respondents also argue that a report by the Southern Oregon
9 Regional Services Institute (SORSI) clearly shows that the
10 museum is expected to attract 400,000 visits annually, half of
11 which will be by new visitors.⁸ Record 114. Respondents
12 maintain that even if the record contains conflicting evidence
13 on the number of visitors, the city was entitled to weigh the
14 evidence and to rely on the SORSI report in assessing the
15 proposed museum's impacts. Respondents also point out that the
16 city's order limits the museum to a maximum of 2,750 visitors
17 per day. According to petitioners, reliance on the SORSI
18 estimates and the limitation on the daily number of visitors
19 was sufficient basis for the city to assess the impacts of the
20 proposed museum.

21 We cannot grant relief unless petitioners show that an
22 applicable legal criterion has been violated by the city's
23 decision. Sellwood Harbor Condo Assoc. v. City of
24 Portland, ___ Or LUBA ___ (LUBA No. 87-079/080, April 1, 1988)
25 slip op 8; Lane County School District 71 v. Lane County, 15 Or
26 LUBA 150, 153 (1986). We agree with respondents that we are

1 required to deny this subassignment of error because
2 petitioners have not cited any applicable plan policies or
3 other legal standards which require the city to determine the
4 number of visitors to, or impacts of, the proposed museum.

5 This subassignment of error is denied.

6 D. Comprehensive Plan Goals and Policies

7 SOSC raises a general defense to petitioners' charges that
8 the city's decision fails to conform with a number of plan
9 goals and policies. It argues that the SOSC plan governs the
10 appropriateness of a proposed use of land zoned SO. According
11 to SOSC, when a proposed use conforms to the SOSC plan, the use
12 is inherently appropriate, regardless of how it "needs to be
13 conditioned." SOSC Brief 4. Both SOSC and Respondents point
14 out that petitioners have not assigned as error failure of the
15 decision to conform to the SOSC plan.

16 Respondents and SOSC are correct that petitioners have not
17 challenged the compliance of the city's decision with the SOSC
18 plan. However, neither respondents nor SOSC cite any language
19 in the general plan or the SOSC plan establishing that
20 otherwise applicable policies of the general plan are not
21 applicable to land designated and zoned SO.⁹ We therefore
22 proceed to consider petitioners' challenges to the decision's
23 compliance with specific goals and policies of the general plan.

24 1. Policy IV-45

25 "Carefully examine all proposals for new major
26 development * * * for impact (directly or indirectly)
on air pollution. Require mitigation to the extent

1 possible, or, if major impacts cannot be mitigated,
require project modification."

2 Petitioners assert that a proposed use which would attract
3 400,000 visits annually is undeniably a "major development."
4 Petitioners complain there is nothing in the record or findings
5 to show that the city addressed this policy. Petitioners
6 contend that the preliminary transportation impact analysis
7 submitted to the city council (Record 173-187) says nothing
8 about air pollution. Petitioners also argue that compliance
9 with this policy cannot be deferred to the city's site review
10 process because there is nothing in that process which "could
11 control the volume of automobile exhaust emissions." Petition
12 for Review 9.

13 Respondents argue there is evidence in the record that
14 museum-related traffic will not have a major adverse air
15 quality impact. Respondents also argue that Policy IV-45 is
16 satisfied because the city's approval is conditioned on
17 completion of a traffic impact and mitigation study which will
18 ensure the museum will not have major adverse air quality
19 impacts.¹⁰ Finally, respondents contend that this policy
20 will be addressed in the required site review process.

21 The city's findings state:

22 "Policies IV-45 and IV-49 concern air pollution and
23 alternative transportation modes, respectively. The
24 traffic study required by the planning commission will
25 address these issues since the flow of traffic and the
use of alternatives to the automobile has a direct
effect on air pollutants generated."¹¹ Record 219.

1 The city made no other findings concerning the impact of the
2 proposed museum on air pollution.

3 The city did not adopt findings showing compliance of the
4 proposed museum with Policy IV-45. Furthermore, it is unclear
5 whether the condition of approval requiring completion of a
6 traffic impact and mitigation study will ensure compliance with
7 Policy IV-45. The study is described as examining traffic
8 flows, street capacity, necessary street and mass transit
9 improvements and mitigation of traffic impacts. No mention is
10 made in the condition of examining or mitigating impacts on air
11 pollution.

12 However, the city's failure to demonstrate compliance of
13 the proposed use with Policy IV-45 in approving a conditional
14 use permit for the project is not error if Policy IV-45 is not
15 a regulatory policy applicable to conditional use permit
16 approvals. We conclude it is not.

17 Plan Chapter XIII, Policies and Implementation, sets out
18 each policy in the plan and the means by which it is intended
19 to be implemented. The plan explains the list as follows:

20 "The following is a listing of all the policies that
21 are included in the Comprehensive Plan, along with a
22 description of which ordinances are used to implement
23 the policies. Some policies, by their nature, are not
24 implemented, but represent ideas the City feels are
25 important enough to warrant a policy statement. Other
26 policies will require future action by the City. Some
27 policies are not implemented by law, but represent
28 guidance for Council and Planning Commission
29 decisions." Plan XIII-1.

30 According to this list, Policy IV-45 is to be implemented

1 through LUO "Chapter 18.72 (Site Review)." Plan XIII-10.

2 Both the city's decision and the LUO require the proposed
3 museum project to go through the site review process. Record
4 468; LUO 18.72.030.E.4. Thus, the plan requires Policy IV-45
5 to be applied to the city's decision on a site review permit
6 for the proposed museum.¹² Policy IV-45 is not applicable to
7 approval of the conditional use permit.

8 This subassignment of error is denied.

9 2. Policies IV-49 and IV-57

10 "Provide and encourage alternative forms of
11 transportation wherever feasible to allow people to
12 use other transportation modes in lieu of using the
13 automobile."

14 "Place increasing emphasis on bicycle routes, mass
15 transit, alternative forms of transport in the
16 downtown area and other actions to reduce vehicular
17 traffic."

18 Petitioners complain the city could not have found the
19 proposed museum project complied with these policies because
20 the preliminary traffic impact analysis submitted to the city
21 did not address alternative modes of transportation.

22 These policies state the city will encourage and emphasize
23 alternative modes of transportation in order to reduce
24 automobile use. The city's decision states these policies will
25 be addressed through the required traffic impact and mitigation
26 study. Record 219.

27 The required study is to place higher priority on mass
28 transit improvements than street improvements and to
29 investigate use of mass transit to mitigate traffic impacts

1 from the proposed use. The study will be used in the site
2 review process. Record 473. Petitioners do not explain why
3 requiring such a study is not sufficient to comply with these
4 policies.

5 This subassignment of error is denied.

6 3. Goal VII

7 "To ensure that the local economy grows and
8 diversifies in the number, type and size of businesses
9 and industries consistent with the local social needs,
public service capabilities, and the retention of a
high quality environment."

10 Petitioners point to statements in the introduction and
11 findings of the plan's Economy chapter suggesting the city's
12 economy is imbalanced due to a narrow manufacturing base. The
13 plan urges the city to diversify the manufacturing activity
14 within the urban area. Plan VII-1, VII-13. Because the
15 proposed museum would serve primarily tourists, petitioners
16 argue it would create jobs primarily in tourist-related
17 industries and would further imbalance the city's economy.
18 According to petitioners, this means that approval of the
19 museum is contrary to Goal VII.

20 Respondents reply that Goal VII does not discourage further
21 development of the city's tourism base. According to
22 respondents, there is substantial evidence in the record to
23 support the city's findings that the proposed museum will be an
24 economic asset to the community and will further retention of a
25 high quality economic environment. Respondents also point to
26 evidence that the museum will create nontourism-related jobs

1 and business opportunities.

2 The city's findings do not specifically address Goal VII.

3 The plan defines its "goals" and "policies" as follows:

4 "A goal statement is an attempt to illustrate what the
5 City is striving for, i.e., it sets City direction.
6 It has a direct effect on future planning as a city
7 cannot legally be in opposition to its own goals.
8 Programs should be directed towards achieving those
9 goals.

10 "Policies are statements supportive of the goals, as
11 they are to aid in achieving listed goals. They have
12 a strong effect on a city, because city decisions and
13 programs cannot directly contradict the policies.
14 * * * When decisions are being made, and policies are
15 directly or indirectly applicable to such decisions,
16 the policies must be followed * * * ." (Emphasis
17 added.) Plan II-3.

18 Under these definitions, goals determine the future planning
19 direction of the city. On the other hand, policies are
20 designed to carry out the goals and to be applied to individual
21 decisions. This interpretation is also supported by the
22 above-described Policies and Implementation chapter of the
23 plan. This chapter lists both goals and policies, and
24 indicates how each policy is to be implemented. However, there
25 are no entries in the "Implementation" column for any of the
26 goals. Thus, we do not believe that the plan Goals are
intended as regulatory provisions directly applicable to city
land use actions.

This subassignment of error is denied.

4. Policy VII-7

"The City shall not encourage economic growth, but
rather economic development of the local resources.

1 The City's policy is that economic development shall
2 always have as its primary purpose the better
3 utilization of local resources, both human and
4 natural. Economic development activities which will
5 cause growth beyond the long-term rate established in
6 this Plan shall be discouraged."

7 Petitioners argue that the city council heard conflicting
8 views on (1) whether the proposed museum would cause economic
9 growth or economic development;¹³ and (2) the effect the
10 proposed museum would have on the city's long-term growth
11 rate. Petitioners claim the city council did not address
12 either of these issues or assess the museum's effect on the
13 economy or the population growth rate and, therefore, did not
14 properly determine compliance with Policy VII-7.¹⁴ We
15 understand petitioners to contend that, with regard to the two
16 issues relevant to Policy VII-7 identified above, the city's
17 decision either (1) lacks findings; or (2) is based on
18 inadequate findings.

19 The city's findings on Policy VII-7 state:

20 " * * * The museum will develop local institutional
21 resources in a significant way since it is part of an
22 environmental sciences complex on the Southern Oregon
23 State College campus. The primary purpose of the
24 museum is education and interpretation using many
25 local people (both paid staff and volunteer docents)
26 and also using the local and regional environment.
27 Based on the experience of the Oregon Shakespeare
28 Festival in Ashland the growth that could occur as a
29 result of the proposed museum is entirely consistent
30 with the City's projected growth rate in its
31 acknowledged Comprehensive Plan." Record 220.

32 The findings quoted above adequately address and assess the
33 economic development versus economic growth issue. They

1 explain that the city believes the proposed museum will
2 encourage economic development of local resources because it
3 will develop local institutional resources by being part of a
4 SOSC environmental sciences complex, and will make use of local
5 human and environmental resources.

6 Furthermore, the findings clearly do address the issue of
7 the effect of the proposed museum on the long-term growth rate
8 established in the plan, by concluding that any growth that did
9 occur as a result of the museum would be consistent with the
10 plan's projected growth rate. Whether the findings adequately
11 assess (i.e., explain) the factual basis for this conclusion is
12 a closer question. The finding that the proposal is consistent
13 with the plan's projected growth rate is "based on the
14 experience of the Oregon Shakespeare Festival in Ashland."
15 Id. This statement is sufficient, although barely so, to
16 explain that the past relationship between visitation to the
17 Shakespeare Festival and the city's population growth rate was
18 the basis for the city's conclusion.¹⁵

19 This subassignment of error is denied.¹⁶

20 5. Policy VIII-11

21 "Efforts should be made to acquire a hilltop park
22 which has panoramic views of the valley, so the public
may enjoy this vista."

23 The city council found that the museum could help implement
24 the intent of this policy through the proposed observation deck
25 and interpretive facilities at the top of the rotunda. Record
26 220. Petitioners argue that an observation deck does not

1 equate to a hilltop park.

2 Respondents reply that this policy is not a mandatory
3 requirement for approval of the subject conditional use permit
4 and that the city's finding, in any case, was fully justified.

5 The plan states that this policy is to be implemented
6 through "City Council action" and a "Capital Improvements
7 Program." Plan XIII-21. We do not find that this policy is a
8 regulatory approval requirement for conditional use permits,
9 but rather merely encourages the city council to pursue a
10 particular objective. See Cornell Park Associates v.
11 Washington County, ___ Or LUBA ___ (LUBA No. 88-032, August 24,
12 1988), slip op 11; McCoy v. Tillamook County, 14 Or LUBA 108,
13 118 (1985). Therefore, even if the city were incorrect in
14 concluding the museum's observation deck would help implement
15 this policy, it would not be grounds for reversal or remand of
16 the city's decision.

17 This subassignment of error is denied.

18 6. Policy VIII-25

19 "Encourage, where possible, a system of corridors,
20 linear park routes and trails to connect the various
21 parts of the community, and to link the community to
22 areas outside the City. * * * "

23 The city found that the proposed museum's grounds would
24 enhance the city's parks and open space system and the bikeways
25 that pass by the museum site. Record 221. Petitioners argue
26 the city has misinterpreted this policy because the museum
27 grounds have nothing to do with developing a system of trails

1 to connect various parts of the community.

2 A plan provision that certain uses or activities be
3 encouraged states general objectives, not permit approval
4 criteria. Urquhart v. LCOG and City of Eugene, supra. Thus,
5 the city was not required to find compliance with Policy
6 VIII-25 in order to approve the subject conditional use permit,
7 and petitioners' argument provides us with no basis for
8 reversal or remand of the decision.

9 This subassignment of error is denied.

10 7. Policies VIII-28 and X-6 (a)-(d),(f),(g)

11 "Recognize the need for additional trails for
12 pedestrian and bicycle traffic and endeavor to provide
13 them throughout the City.

13 * * * * *

14 "Pedestrians and Bikeways

15 "(a) Pedestrian traffic should be separated from
16 auto traffic on streets and in parking lots.

17 "(b) Pedestrians should be separated from bicycle
18 traffic when possible, as the two are not
19 compatible on the same pathway.

20 "(c) Provide adequate pedestrian facilities in
21 conjunction with all new street improvement
22 projects and all new commercial, industrial
23 and residential developments.

24 "(d) Minimize conflicts between transportation
25 types, especially when those conflicts
26 create a particularly hazardous area.

23 * * * * *

24 "(f) Improve safety, convenience and efficiency
25 of existing bikeways.

26 "(g) Provide appropriate bicycle facilities in
conjunction with all new street improvement

1 projects and all new commercial, industrial
and residential developments."

2 Petitioners argue that approval of the proposed museum
3 violates the above-quoted policies. According to petitioners,
4 museum-related traffic, by using street capacity intended for
5 future development, would hasten the need to widen E. Main
6 Street to four lanes. Petitioners contend this would "negate
7 current and future bike paths and possibly sidewalks along much
8 of this street." Petition for Review 14.

9 The plan indicates that all of the above policies, with the
10 exception of Policy X-6(f), are to be implemented through the
11 site review process of LUO Chapter 18.72.¹⁷ Plan XIII-24,
12 XIII-34. Policy X-6(f) is to be implemented through the "Bike
13 Committee and Bike Plan." Plan XIII-34. None of these
14 policies are mandatory approval criteria for a conditional use
15 permit.

16 This subassignment of error is denied.

17 8. Policy IX-26

18 "In all new developments, discourage the pumping of
19 storm water drainage, including the use of sump pumps."

20 The city's findings state the depth of excavation for the
21 proposed museum has been limited to 10 to 15 feet by the
22 applicant in order to avoid excessive use of sump pumps.
23 Record 221. Petitioners contend that since there are wetlands
24 on the site, it is likely the museum will have to use sump
25 pumps and thus will not comply with Policy IX-26.

1 According to the plan, Policy IX-26 is to be implemented
2 through the city's site review and subdivision processes and
3 LUO Performance Standards and Physical Constraints chapters.
4 It is not an approval criterion for conditional use permits.¹⁸

5 This subassignment of error is denied.

6 9. Policy IX-32

7 "Assess the impact of large-scale proposed
8 developments and their effect on the schools which
9 they impact."

9 Petitioners argue that the city has not assessed the
10 traffic-related impacts of the proposed museum on Ashland
11 Middle School and Walker Elementary School. The basis for
12 petitioners' argument is a claim that the preliminary traffic
13 study in the record (1) was based on an unsupported assumption
14 that only 15% of the museum traffic would be on Walker Avenue;
15 and (2) did not address the traffic flow on Walker Avenue
16 during the school year. Petitioners, therefore, conclude that
17 compliance with Policy IX-32 could not have been determined.

18 The Ashland Middle School and Walker Elementary School are
19 located along Walker Avenue. The preliminary transportation
20 impact analysis in the record includes a "PM Peak Hour Trip
21 Distribution Pattern" map which shows 15% of the traffic to and
22 from the museum travelling on Walker Avenue. Record 182. The
23 record does not disclose the basis for this 15% projection.
24 However, the record shows the traffic impact analysis was
25 prepared by Wayne Kittelson, a traffic engineer with
26 considerable experience in conducting traffic impact analyses

1 for special event facilities. Record 190-191.

2 Petitioners do not question Kittelson's credentials as an
3 expert, nor do they identify evidence in the record indicating
4 that 15% is not a reasonable projection for the portion of the
5 museum traffic which will use Walker avenue. We are unaware of
6 any legal requirement that an expert witness must explain the
7 basis for all assumptions that underlie the expert's evidence.
8 See Hillsboro Neigh. Dev. Comm. v. City of Hillsboro, 15 Or
9 LUBA 426, 432 (1987). The substantial evidence standard of ORS
10 197.835(8)(a)(C) requires only that the expert's evidence be
11 such that it could be seen as adequate by a reasonable person.
12 Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777
13 (1976). In this case, in the absence of any conflicting
14 evidence, we think a reasonable decision maker could have
15 relied on the expert's projection as to the percentage of
16 museum traffic which would use Walker Avenue.

17 With regard to petitioners' claim that the preliminary
18 traffic impact analysis did not address the traffic flow on
19 Walker Avenue during the school year, it is clear that the
20 study and its conclusion that the museum-related traffic can be
21 accommodated by existing and planned roadways were based on an
22 analysis of peak traffic conditions. Record 175, 455. These
23 conditions were projected to occur in the month of August,
24 outside the school year. Record 176. Therefore, petitioners'
25 assertion is technically correct.

26 However, the findings on Policy IX-32 challenged by

1 petitioners list a number of reasons why the city believes
2 museum traffic will not adversely affect the schools. The
3 reasons include (1) there will be fewer visits to the museum on
4 weekdays and during the school year, (2) the opening time for
5 the museum can be later than that of the schools, and (3) the
6 museum can time events such as theater showings so as to
7 minimize traffic when the schools let out. Record 222.
8 Findings elsewhere in the decision, not challenged under this
9 assignment of error, address compatibility of the proposed
10 museum with the schools and conclude that the operating
11 characteristics of the museum will have minimal impact on the
12 schools. Record 471. In addition, the city has imposed a
13 condition requiring an extensive traffic impact and mitigation
14 study to be completed. Record 473, see footnote 10. This
15 study will examine museum traffic flows, the capacity of
16 surrounding streets and intersections, possible mitigation
17 techniques and will specifically report on ways to route
18 traffic away from Walker Avenue.

19 Thus, it makes no difference whether petitioners are
20 correct in asserting that the preliminary traffic impact report
21 in the record does not constitute an assessment of museum
22 traffic impacts on the nearby schools. Petitioners do not
23 explain how the city findings and condition of approval
24 described above fail to show that the city has carried out, or
25 has required to be carried out by condition, an adequate
26 assessment of the proposed museum's traffic impacts on the

1 nearby schools. Without argument from petitioners as to why
2 the city's findings and condition are inadequate to carry out
3 Policy IX-32, we are unable to sustain their claim. See Rogers
4 v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-059, November
5 10, 1988), slip op 8-9.

6 This subassignment of error is denied.

7 10. Transportation Chapter

8 According to petitioners, the plan Transportation chapter
9 contains 10 policies and 55 subpolicies, and the majority of
10 these apply to community-wide concerns. Petitioners argue
11 because the record lacks evidence on off-site traffic impacts
12 of the proposed museum, "compliance with the vast majority of
13 the Transportation section of the Comprehensive Plan was not
14 and could not have been determined." Petition for Review 21.

15 The city adopted findings specifically addressing at least
16 20 policies and subpolicies of the Transportation chapter.
17 Record 222-224. Petitioners have not identified which, if any,
18 of these findings they consider to be inadequate or unsupported
19 by substantial evidence. Petitioners have not identified to
20 which of the 55 subpolicies their argument regarding lack of
21 evidence on off-site impacts applies.

22 It is petitioners' responsibility to tell us the legal
23 basis upon which we may grant relief. We will not supply
24 petitioner with legal theories or make petitioners' case for
25 them. Deschutes Development v. Deschutes County, 5 Or LUBA
26 218, 220 (1982).

1 This subassignment of error is denied.

2 The third assignment of error is denied.

3 FIFTH ASSIGNMENT OF ERROR

4 "The decision of the Ashland City Council is
5 inconsistent with the requirements of Section 18.104
of the Ashland Municipal Code. (ORS 197.835[3])"

6 A. Use of Preliminary Plans

7 LUO Chapter 18.104, Conditional Use Permits, contains a
8 section 18.104.030 entitled "Plan Requirements." That section
9 provides as follows:

10 "Review of a conditional use permit shall be based
11 upon submission of detailed plans containing the same
12 information as required for site plan approval in
13 Section 18.72. However, a conditional use permit may
14 be reviewed based upon submission of preliminary or
conceptual plans provided that both the applicant and
approval authority agree to utilize the site plan
review procedures of Chapter 18.72 for final
development review."

15 Petitioners argue that under LUO 18.104.030, in order to
16 use preliminary plans for the conditional use permit review
17 process, (1) the applicant must make such a request at the time
18 of submitting the conditional use permit application; and (2)
19 the approving authority must agree to the use of preliminary
20 plans before it holds its hearing on the application.
21 Petitioners contend that neither of these actions occurred and,
22 therefore, PNRRC must submit the detailed plans required by LUO
23 18.72 in order to obtain a conditional use permit.

24 Respondents argue the record shows that at the
25 pre-application conference, which occurred the same day the
26

1 application was filed, the city and the applicant agreed that
2 the application would be reviewed based on conceptual plans,
3 and the site plan review process would be used for final
4 development review. Record 354-355. Respondents also point
5 out in the record a list of plan policies submitted by the
6 applicant as ones which would apply to the proposed museum in
7 the site review process, "as agreed by the City and the
8 applicant." Record 254. Finally, respondents and SOSC contend
9 that the city council's order satisfies LUO 18.104.030, because
10 it states the applicant requested use of that section's
11 preliminary plan review process, and the city council agreed to
12 it. Record 468.

13 The documents in the record to which we are cited by
14 respondents substantiate that both the applicant and the city
15 council had agreed to use the site plan review process of LUO
16 chapter 18.72 for final development review of the proposed
17 museum at or before the time the city council made its decision
18 approving the conditional use permit. We believe this is all
19 that LUO 18.104.030 requires.¹⁹ Therefore, approval of the
20 conditional use permit did not have to be based upon detailed
21 plans containing the same information as those required by LUO
22 chapter 18.72, but rather could be based on submission of
23 preliminary or conceptual plans.

24 This subassignment of error is denied.

25 B. Lack of Adequate Information

26 Petitioners argue that the applicant for a conditional use

1 permit needs to submit plans of sufficient detail to meet the
2 criteria of LUO 18.104.040. According to petitioners, if a
3 conditional use permit is approved, the approving authority
4 must find the criteria of LUO 18.104.040 are met and these
5 findings must be supported by substantial evidence in the
6 record. Petitioners contend adequate findings, based on
7 substantial evidence, were not made in this case because the
8 city's review was based on preliminary plans which did not
9 contain adequate information.

10 We agree with petitioners that, regardless of whether the
11 city's review of a conditional use permit application is based
12 on detailed or preliminary plans, the city cannot approve the
13 permit unless the record contains substantial evidence to
14 support findings that the approval criteria of LUO 18.104.040
15 are met. However, petitioners have not specified, under this
16 assignment of error, any alleged deficiencies in the record --
17 i.e., they have not identified any findings of compliance with
18 the criteria of LUO 18.104.040 which they allege are not
19 supported by substantial evidence in the record.²⁰ We will
20 not make petitioners' arguments for them. Deschutes
21 Development v. Deschutes County, supra.

22 This subassignment of error is denied.

23 The fifth assignment of error is denied.

24 FOURTH ASSIGNMENT OF ERROR

25 "The Approving Authority failed to adequately address
26 the requirements of Section 18.104.040 B of the
Ashland Municipal Code."

1 LUO 18.104.040.B provides the following approval criterion
2 for conditional use permits:

3 "The location, size, design and operating
4 characteristics of the proposed development are such
5 that the development will be reasonably compatible
6 with and have minimal impact on the livability and
7 appropriate development of abutting properties and the
8 surrounding neighborhood."

9 A. Interpretation of "Surrounding Neighborhood"

10 Petitioners contend the city erred in interpreting
11 "surrounding neighborhood," as used in LUO 18.104.040.B, to
12 mean "the area surrounding the Museum site." Record 470.
13 According to petitioners, this interpretation is contrary to
14 conclusions by the planning commission and museum proponents
15 that the "'neighborhood' for this project should rightly be the
16 entire City of Ashland." Record 246. Petitioners argue
17 because the city recognizes in its findings that the proposed
18 museum will have an economic impact on the entire city, it must
19 conclude that the "operating characteristics" of the museum
20 would impact the entire city and, therefore, must interpret
21 "surrounding neighborhood" to mean the entire city.

22 The city council recognized there was conflicting testimony
23 on how "surrounding neighborhood" should be defined and
24 explained its interpretation as follows:

25 " * * * We believe that the Conditional Use process is
26 intended to evaluate impacts on the local area, not on
the entire city. * * * While the Museum will have an
economic impact on the entire city, the size, design,
and operating characteristics impact only the
immediate surrounding area. Therefore, the Council
will define the neighborhood as the area surrounding

1 the Museum site. The neighborhood consists of the
2 College campus, the Middle School, Walker Elementary
3 School, the Forensics Lab and National Guard Armory to
the west, and the residential areas around Fordyce and
North Wightman Street to the north-west." Record 470.

4 The city council does not have to interpret "surrounding
5 neighborhood," to mean the entire city simply because the
6 planning commission would interpret it in that manner or
7 because the city council itself believes the proposed use would
8 have economic impacts on the entire city. It is reasonable for
9 the city to conclude that the size, design and operating
10 characteristics (e.g., opening and closing times, noise
11 generation, frequency of special events, etc.) of the proposed
12 museum would impact only the immediately surrounding area. We
13 find the city council's interpretation of "surrounding
14 neighborhood" to be reasonable and correct. McCoy v. Linn
15 County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

16 This subassignment of error is denied.

17 B. Consideration of the Entire SOSOC Campus

18 Petitioners point out that, although the city interpreted
19 "surrounding neighborhood" as the area immediately surrounding
20 the site, it defined that area to include the entire SOSOC
21 campus. According to petitioners, this resulted in the city's
22 addressing compatibility and impacts of the proposed museum
23 with structures on the campus approximately a mile away. If
24 the city's interpretation is correct, then petitioners contend
25 the city erred by addressing territory outside the immediately
26

1 surrounding area.

2 SOSC replies that the surrounding area should include the
3 entire SOSC campus because all areas of the campus are
4 connected, and the entire campus is a specially-zoned area with
5 its own unique characteristics.

6 Petitioners do not argue, under this subassignment, that
7 the city's decision fails to adequately address compatibility
8 of the proposed museum with those portions of the SOSC campus
9 which are part of the surrounding neighborhood. Rather,
10 petitioners argue the city has erred by addressing portions of
11 the SOSC campus which are not part of the surrounding
12 neighborhood.

13 We need not decide whether petitioners' position that not
14 all of the SOSC campus can be considered part of the
15 surrounding neighborhood is correct. Even if it were correct,
16 the city's findings addressing parts of the campus outside the
17 surrounding neighborhood would be mere surplusage, and their
18 inclusion in the decision would not be basis for reversal or
19 remand. Tournier v. City of Portland, ___ Or LUBA ___ (LUBA
20 No. 87-111, April 6, 1988), slip op 22; Cook v. City of Eugene,
21 15 Or LUBA 344, 352 (1987).

22 This subassignment of error is denied.

23 C. Forensics Lab and Armory

24 Petitioners argue the city's decision fails to comply with
25 LUO 18.104.040.B because it does not address the proposed
26 museum's compatibility with and impacts on the nearest

1 structures, the U.S. Fish & Wildlife Service Forensics
2 Laboratory and Oregon State National Guard Armory.

3 The city's findings specifically identify the Forensics Lab
4 and Armory as part of the surrounding neighborhood.²¹
5 Record 470. Nevertheless, the findings do not address whether
6 the location, size, design and operating characteristics of the
7 proposed museum will be reasonably compatible with and have
8 minimal impact on the livability and appropriate development of
9 these facilities.²²

10 This subassignment of error is sustained.

11 D. Schools

12 Petitioners argue that the city's findings regarding
13 compatibility with and impacts on the Ashland Middle School and
14 Walker Elementary School are inadequate because they rely on a
15 letter received from the school district. According to
16 petitioners, this letter does not support the findings because
17 it does not address the requirements of LUO 18.104.040.B.

18 Petitioners assert only that the school district letter
19 cannot be considered substantial evidence in support of the
20 challenged findings. However, the findings challenged by
21 petitioners rely not only on the letter from the school
22 district, but also on "data presented by Wayne Kittelson and
23 the Planning Staff" and on the traffic impacts and mitigation
24 study required by condition and its implementation through the
25 site review process. Record 471. Petitioners have not alleged
26 that this other evidence is not substantial or that reliance on

1 the condition is not adequate to achieve compliance with
2 LUO 18.104.040.B with regard to the schools.

3 This subassignment of error is denied.

4 E. Existing Structures and Probable Future Development

5 Petitioners argue "the Council had an obligation to
6 systematically inventory and review the proposal with all
7 existing structures and probable future developments in the
8 area." Petition for Review 26.

9 Respondents reply there is no plan or LUO provision which
10 requires such an inventory for review of a conditional use
11 permit application.

12 Petitioners fail to explain why LUO 18.104.040.B requires
13 such an inventory and review or to identify any other plan,
14 ordinance or regulation provision as the source of such
15 requirements. We will not speculate as to the legal basis for
16 petitioners' argument. Deschutes Development v. Deschutes
17 County, supra.

18 This subassignment of error is denied.

19 The fourth assignment of error is sustained in part.

20 SIXTH ASSIGNMENT OF ERROR

21 "The City Council failed to meet the criteria of
22 Section 18.104.040[.C] of the Ashland Municipal Code."

23 LUO 18.104.040.C provides:

24 "In determining the above [whether the conditional use
25 proposal complies with LUO 18.104.040.A and B],
consideration shall be given to the following:

26

- 1 "1) Harmony in scale, bulk, coverage and density.
- 2 "2) The availability and capacity of public
- 3 facilities and utilities.
- 4 "3) The generation of traffic and the capacity of
- 5 surrounding streets.
- 6 "4) Public safety and protection.
- 7 "5) Architectural and aesthetic compatibility with
- 8 the surrounding area."

9 We have a basic difficulty in responding to petitioners'
10 arguments and respondents' replies. The parties treat the five
11 considerations listed in LUO 18.104.040.C as independent
12 criteria which must be satisfied by a conditional use permit
13 proposal. In fact, they are not. What LUO 18.104.040.C
14 requires is that the five listed factors "be considered in
15 determining whether (1) a proposed development is consistent
16 with the comprehensive plan (LUO 18.104.040.A); and (2) its
17 "location, size, design and operating characteristics" will be
18 "reasonably compatible with and have minimal impact on the
19 livability and appropriate development of abutting properties
20 and the surrounding neighborhood" (LUO 18.104.040.B).

21 Thus, petitioners' arguments under this assignment of error
22 provide a possible basis for reversal or remand of the city's
23 decision only if, fairly read, they maintain that a
24 determination required by LUO 18.104.040.A or B is inadequate
25 because the city did not address one or more of the factors
26 required to be considered by LUO 18.104.040.C.

1 A. Harmony in Scale, Bulk, Coverage and Density

2 Petitioners argue that the city erred because it failed to
3 compare the proposed museum with existing and planned
4 structures in the immediate neighborhood. Specifically,
5 petitioners complain the Forensics Laboratory, National Guard
6 Armory, Ashland Middle School and residential housing were not
7 adequately compared with the proposed museum, with regard to
8 harmony in scale, bulk, coverage and density. Petitioners
9 assert the city's findings are impermissibly conclusory.²³

10 Respondents argue the city's findings are adequate. They
11 argue there is substantial evidence in the record as to the
12 character of the site and the campus area, the setbacks
13 required for the museum and those of surrounding structures,
14 the heights of various similar institutional facilities on
15 campus, and "the architectural design which will provide
16 harmony with nearby facilities." Respondents' Brief 37. They
17 also argue that the city's reliance on its site review process
18 is adequate to ensure compliance with LUO 18.104.040.C.

19 The city's findings appear to state that "harmony in scale,
20 bulk, coverage and density" between the proposed museum and the
21 surrounding neighborhood has been considered and will be
22 assured through (1) the height and setback conditions
23 imposed;²⁴ and (2) "final decisions on specific site usage"
24 made through the site review process.

25 We believe LUO 18.104.040.B and C(1), taken together,
26 require the city to show how the proposed museum "will be

1 reasonably compatible with and have minimal impact on" the
2 surrounding neighborhood, considering "harmony in scale, bulk,
3 coverage and density." This requires a comparison of the
4 proposed structure with other structures in the surrounding
5 neighborhood to determine compatibility and impacts. See
6 Margulis v. City of Portland, 4 Or LUBA 89, 95 (1981). We do
7 not find any such comparison concerning the structures in the
8 surrounding neighborhood cited by petitioners (Forensics Lab,
9 Armory, Ashland Middle School, residences) in the county's
10 findings.²⁵ The findings are, therefore, inadequate.²⁶

11 If the city had properly found, through a comparison of
12 scale, bulk, coverage and density, that it were feasible to
13 attain reasonable compatibility and minimal impacts between the
14 proposed museum and these surrounding structures and uses, it
15 would be proper for the city to rely on the imposition of
16 conditions to ensure the standard would be met. McCoy v. Linn
17 County, ___ Or LUBA ___ (LUBA No. 87-046, December 15, 1987),
18 slip op 7; Sigurdson v. Marion County, 9 Or LUBA 163, 176
19 (1983). However, in this case, the city did not carry out the
20 comparison necessary to establish the feasibility of compliance
21 with the standard.

22 Furthermore, if the city had properly determined that
23 reasonable compatibility of the proposed museum with the cited
24 neighboring uses were attainable, and that solutions to
25 technical compatibility problems were available, it could have
26 deferred determining a precise solution for each technical

1 problem to a later stage of its review process. This process
2 would be acceptable provided the standards applicable to that
3 later stage would require a solution to be implemented and
4 further provided interested parties received a full opportunity
5 to be heard before the decision became final. Storey v. City
6 of Stayton, 15 Or LUBA 165, 183 (1986); Meyer v. Portland, 67
7 Or App 274, 281-282, 678 P2d 741 (1984). However, in this
8 instance we need not decide whether the site review process
9 meets these substantive and procedural requirements as the city
10 never determined that compliance was attainable through
11 available technical solutions.

12 This subassignment of error is sustained.

13 B. Availability and Capacity of Public Facilities and
14 Utilities

15 The city found, on the basis of testimony by the public
16 works director, that sufficient capacity is available for
17 water, sewer, storm drainage, and electricity to serve the
18 proposed museum. Record 471. Petitioners argue that finding
19 is not supported by substantial evidence because the director
20 admitted in his testimony that he did not know whether an
21 existing water main was adequately sized.

22 All that LUO 18.104.040.C(2) requires is that the
23 availability and capacity of public facilities and utilities be
24 considered in determining compliance with LUO 18.104.040.A and
25 B. The city's finding shows it was considered. Petitioners do
26 not identify any additional determination required by

1 LUO 18.104.040.A or B based on availability and capacity of
2 public facilities and utilities. Petitioners, therefore, fail
3 to identify a basis for reversal or remand of the city's
4 decision.

5 This subassignment of error is denied.

6 C. Traffic Generation and Capacity of Surrounding Streets

7 The city found, on the basis of testimony by a traffic
8 engineer, considering existing and projected city traffic, that
9 "East Main Street, Walker Street, and Tolman Creek Road all
10 have sufficient capacity to accommodate the additional traffic
11 which [the proposed museum] would generate." Record 471. The
12 city also found that specific traffic improvements may be
13 required at the site of the proposed museum, and that the need
14 for such improvements can be dealt with through the site review
15 process. The city reasoned that under LUO 18.72.070.L, it has
16 the authority to require off-site traffic improvements when
17 necessary because of additional traffic generated by the use
18 that is the subject of the site review.

19 - Petitioners argue issues of traffic generation and capacity
20 remain unresolved, including (1) improvement of E. Main Street
21 and financing thereof; (2) impacts on the entire downtown area
22 and resolution of existing downtown parking and traffic
23 problems; and (3) improvements necessary to accommodate the
24 proposed museum, such as off-site traffic signals. Petitioners
25 also argue the record does not contain substantial evidence to
26 support a determination of compliance with LUO 18.104.040.C.

1 Finally, petitioners argue the city may not defer a
2 determination on the specific traffic improvements required to
3 the site review process because that process does not authorize
4 the city to require off-site traffic improvements.

5 All that LUO 18.104.040.C(3) requires is that traffic
6 generation and street capacity be considered in determining
7 compliance of the proposed museum with LUO 18.104.040.A and B.
8 The city's findings addressing LUO 18.104.040.B and C(3), and
9 certain plan policies, show traffic generation and street
10 capacity were considered. Record 222, 470-472. Petitioners do
11 not identify any determination required by LUO 18.104.040.A
12 or B as being based on no or inadequate consideration of these
13 factors. Petitioners, therefore, fail to identify a basis for
14 reversal or remand of the city's decision.

15 This subassignment of error is denied.

16 D. Public Safety and Protection

17 The city concluded, based on the location of the proposed
18 museum with respect to the fire and police station, and
19 testimony by staff and proponents, that "there is sufficient
20 public safety and protection in the City of Ashland."
21 Record 472.

22 Petitioners complain that the finding does not address the
23 impacts of the proposed museum on public safety or how such
24 impacts will be accommodated. Petitioners also argue that
25 public safety issues other than police and fire protection,
26 such as pedestrian safety, traffic safety, child protection and

1 air pollution, which were raised during the proceeding remain
2 unresolved.

3 All that LUO 18.104.040.C(4) requires is that public safety
4 and protection be considered in determining compliance with LUO
5 18.104.040.A and B. The city's finding shows it was
6 considered. Once again, petitioners do not identify any
7 determination required by LUO 18.104.040.A or B as being based
8 on inadequate or no consideration of public safety and
9 protection. Petitioners, therefore, fail to identify a basis
10 for reversal or remand of the city's decision.

11 This subassignment of error is denied.

12 E. Architectural and Aesthetic Compatibility with the
13 Surrounding Neighborhood

14 The city's findings on this factor state:

15 "The condition of the Planning Commission in requiring
16 a setback and height limit which would make the
17 buildings similar in scale to the campus of Southern
18 Oregon State College is adopted by the Council.
19 Furthermore, the requirement of the Site Review
20 Chapter to require compliance with Ashland's Site
21 Design and Use Guidelines is sufficient to insure that
22 the later procedure of review will insure reasonable
23 architectural compatibility with the surrounding
24 neighborhood. The Council concludes that the most
25 important neighborhood to consider are [sic] the
26 institutional uses which surround the site, any
residential areas are at a considerable distance, and
the architecture of this site will have a negligible
impact on their neighborhood." Record 472.

23 Petitioners argue that the city erred because it failed to
24 compare the proposed museum with existing structures in the
25 surrounding neighborhood, specifically the Forensics
26 Laboratory, National Guard Armory, Ashland Middle School and

1 residential housing, with regard to architectural and aesthetic
2 compatibility. Petitioners contend the city cannot rely on the
3 height and setback conditions (see footnote 24) because they
4 have nothing to do with architectural or aesthetic
5 compatibility.²⁷ Finally, petitioners argue that the city's
6 reliance on the site review process does not constitute the
7 required determination of architectural and aesthetic
8 compatibility. Petitioners also say the city's reliance is
9 misplaced in that there is no provision in the site review
10 process requiring architectural and aesthetic compatibility.

11 Respondents argue the city's findings are adequate.
12 Respondents also argue that there is substantial evidence in
13 the record from which the city council could determine that the
14 proposed museum is aesthetically and architecturally compatible
15 with the surrounding uses. SOSC also argues that the city's
16 reliance on its site review process is proper, as that process
17 "contains sufficient authority to allow for * * * architectural
18 compatibility to be decided at a later time when final plans
19 have been completed." Intervenor-respondent's Brief 11.

20 We believe LUO 18.104.040.B and C(5), taken together,
21 require the city to show how the proposed museum "will be
22 reasonably compatible with and have minimal impact on" the
23 surrounding neighborhood, considering "architectural and
24 aesthetic compatibility." This provision requires a
25 determination that such reasonable compatibility exists, based
26 on a comparison of the proposed structure with those in the

1 surrounding neighborhood.

2 With regard to the residential areas "around Fordyce and
3 North Wightman Street to the north-west," which the city
4 recognized as part of the museum's "surrounding neighborhood"
5 (Record 470), the city concluded that the architecture of the
6 proposed museum would have a negligible impact on these areas
7 because they are at a considerable distance. Record 472.
8 Petitioners have not explained why this finding is inadequate
9 to constitute the determination required by LUO 18.104.040.B
10 and C(5). Therefore, we must deny this subassignment of error
11 with regard to the neighboring residences.

12 However, we do not find in the county's findings any
13 determination on or comparison of architectural and aesthetic
14 compatibility concerning the other structures in the
15 surrounding neighborhood cited by petitioners (Forensics Lab,
16 Armory, Ashland Middle School). The findings are, therefore,
17 inadequate with regard to these structures.²⁸

18 We do not believe that the city's reliance on the height
19 and setback conditions or site review process remedies this
20 deficiency. The city provides no basis for concluding that
21 regulation of height and setback alone are sufficient to ensure
22 architectural and aesthetic compatibility. Also, the city's
23 deferral of the required determination of architectural and
24 aesthetic compatibility between the proposed museum and the
25 Forensics Lab, Armory and Middle School to its site review
26 process is misplaced. The Site Design and Use Process

1 Guidelines do not require reasonable architectural and
2 aesthetic compatibility between the proposed development and
3 neighboring structures as a mandatory standard for approval.²⁹

4 This subassignment of error is sustained in part.

5 The sixth assignment of error is sustained in part.

6 The city's decision is remanded.

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1 FOOTNOTES

2 1

3 ORS 227.180(3) provides:

4 "No decision or action of a planning commission or
5 city governing body shall be invalid due to ex parte
6 contact or bias resulting from ex parte contact with a
7 member of the decisionmaking body if the member of the
8 decisionmaking body receiving the contact:

9 "(a) Places on the record the substance of any
10 written or oral ex parte communications concerning the
11 decision or action; and

12 "(b) Has a public announcement of the content of
13 the communication and of the parties' right to rebut
14 the substance of the communication made at the first
15 hearing following the communication where action will
16 be considered or taken on the subject to which the
17 communication related."

18 2

19 We note, however, ORS 197.762, is not applicable in this
20 instance. ORS 197.762 requires, with regard to a proposed
21 development entirely within a UGB, that appellants raise issues
22 of compliance with relevant criteria before the local governing
23 body. ORS 197.762 also requires that local governing bodies
24 give written notice of this requirement to applicants,
25 appellants and other parties and state the requirement to raise
26 issues at the commencement of hearings on such a proposed
27 development.

28 We have previously held that ORS 197.762 does not apply
29 where the local governing body did not give petitioner the
30 required notice that failure to raise an issue precludes appeal
31 on that issue. City of Corvallis v. Benton County, ___ Or
32 LUBA ___ (LUBA No. 87-115, March 21, 1988) slip op 5-6; Cusma
33 v. City of Oregon City, ___ Or LUBA ___ (LUBA No. 87-093; March
34 16, 1988) slip op 19. In this case, respondents have not
35 argued that such notices were given to petitioners and the
36 notices and minutes of the local governing body hearings do not
37 indicate that they were. Record 387-392, 454, 463-464.

38 3

39 ORS 197.830(11)(c) provides, in relevant part:

40 //

1 "In the case of disputed allegations of * * * ex parte
2 contacts or other procedural irregularities not shown
3 in the record which, if proved, would warrant reversal
or remand, the board may take evidence and make
findings of fact on these allegations. * * * "

4 Petitioners did not request an evidentiary hearing.

5
4

6 An affidavit by Patricia Lane, attached to the petition for
7 review, states that while her husband, intervenor-petitioner
8 David Lane, was presenting his oral testimony to the council,
9 she approached the table where the council was seated and began
10 to hand out individual copies of the document which her husband
was referring to and displaying during his testimony. It was
11 at this point the mayor waved her away and said, "I hope you
don't have any more of this. You're interrupting!" According
12 to Ms. Lane, "I was so taken aback by the Mayor's behavior that
I simply sat down and did not hand out the remaining documents."

12
5

13 In Waite v. Marion County, ___ Or LUBA ___ (LUBA No.
87-069, December 23, 1987), slip op 19, we stated with regard
14 to this issue:

15 "It is not entirely clear whether a procedural error
16 that impinges upon a constitutional right need not be
raised below. Cf. Marbet v. Portland Gen. Elect., 277
17 Or 447, 561 P2d 154 (1977). But see, Saxon v. Div. of
State Lands, 31 Or App 511, 514, 570 P2d 1197 (1977);
Hughs v. Adult and Family Services, 58 Or App 478,
484, 648 P2d 1324 (1982)."

18 In Waite v. Marion County, as in this case, we note the
19 petitioners were not represented by legal counsel in the
20 proceedings before the local government. In such
21 circumstances, we will not consider petitioners to have waived
their right to argue before this Board that the procedure
followed by a local government violated their constitutional
rights.

22
6

23 In any case, we will reject claims of unconstitutionality
24 where they are unsupported by legal argument. Chemeketa
Industries Corp. v. City of Salem, 14 Or LUBA 159, 166 (1985);
25 Mobile Crushing Company v. Lane County, 11 Or LUBA 173 (1984).
We note that petitioners have not provided us with legal
26 argument as to how the guarantees of the Fourteenth Amendment

1 were violated by the procedure followed by the city council.

2

7

3 We do not suggest that a local government may ignore
4 evidence bearing upon issues relevant to applicable criteria.
5 Local governments are required to address in their findings
6 relevant issues which are raised by evidence presented to
7 them. See City of Wood Village v. Portland Metro Area LGBC,
8 48 Or App 79, 87, 616 P2d 528 (1980); Hillcrest Vineyard v. Bd.
9 of Comm. of Douglas Co., 45 Or App 285, 293, 608 P2d 201
10 (1980). To the extent petitioners argue that issues relevant
11 to specific plan policies were raised by the evidence and were
12 not addressed by the city in its decision, we address such
13 arguments under subsection D, infra, concerning the decision's
14 conformance with specific plan policies.

9

8

10 According to the SORSI study, half of the visits to the
11 museum will be from tourists attending the city's Shakespearean
12 Festival, the other half will be new visitors, including
13 educational groups.

13

9

14 We note that the plan describes its Southern Oregon State
15 College Map Designation as follows:

16 "These areas are designed to provide for the unique
17 needs of Southern Oregon State College. It is applied
18 to areas that are located within the mutually approved
19 SOSC boundary. It is implemented by the Land Use
20 Ordinance, but the actual rezoning of the property
21 cannot occur until it is actually owned by the
22 College." Plan II-7.

23 Nothing in this text suggests that the plan's policies are not
24 applicable to land designated Southern Oregon State College.

21

10

22 The city's order imposes the following condition:

23 "That a traffic impact and mitigation study be
24 completed, performed by a registered professional
25 transportation engineer. This report shall be a
26 requirement of the Site Review for this project. The
study shall examine the traffic flows that this
project will generate, the capacity of surrounding
streets and key intersections, the possible

1 mitigations, and the estimated costs of the
2 improvements. The study will place a higher priority
3 on mass transit improvements than on * * * other
4 street improvements. The study shall clearly
5 differentiate between existing traffic flows, future
6 expected traffic flows generated by other uses
7 contemplated in the Comprehensive Plan, and the
8 additional traffic generated by this use. The study
9 shall use the peak day approved in this Conditional
10 Use in the analysis. The study shall also investigate
11 the potential use of mass transit to mitigate traffic
12 impacts in the city caused by this use. The study
13 shall examine and report on ways to route traffic away
14 from Walker St. The applicants shall coordinate their
15 planning with Rogue Valley Transit District.
16 (Emphasis in original.) Record 473.

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12 A requirement for a traffic impact and mitigation study was
13 first imposed by the city planning commission as a condition of
14 its approval. Record 395. The city council incorporated the
15 requirement for such a study into its decision, with more
16 elaboration as to the nature and contents of the study. See
17 footnote 10. We assume that the city council in this finding
18 refers to the traffic study, as required by the city council's
19 final decision.

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13 We note that the provisions of LUO Chapter 18.72 do not
14 expressly require that impacts on air pollution be determined
15 and mitigated as part of the site review process. However, one
16 of the purposes of LUO Chapter 18.72 is "to minimize adverse
17 effects on surrounding property owners or the general public."
18 LUO 18.72.020. Furthermore, LUO 18.72.050.A provides that
19 compliance with applicable city ordinances (which include the
20 plan) is a criterion for site plan approval.

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1 some development. Economic development can be
2 directed to affect the economic health of an area
(place) or the people of the area." Plan VII-9.

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Petitioners also argue that certain facts in the record concerning the city's population and growth rate, combined with certain assumptions regarding in-migration rates and the relationship of visitors to in-migration rates, which apparently are not based on evidence in the record, lead to a conclusion that the proposed museum would cause at least a 75% increase in the city's population growth rate and, therefore, would be contrary to Policy VII-7. Petition for Review 10-11.

However, even if we were to overlook the fact that petitioners' calculations depend on unsupported assumptions, petitioners' argument that the facts could support a conclusion different from that reached by the city would not provide us with a basis for reversing or remanding the city's decision. What petitioners must show is that the city's findings are inadequate to demonstrate compliance with Policy VII-7 or that the city's determination of compliance is not supported by substantial evidence in the record.

15

Even if the quoted finding were considered technically inadequate for failure to recite adequate facts or to explain adequately the relationship between the facts and the conclusion, we would nevertheless deny this subassignment of error. ORS 197.835(10)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

In this case, respondents identified credible evidence in the record establishing that during the period of 1970-1987, during which attendance at the Shakespearean Festival quintupled, the population of the city increased only 29.7% (an average of 1.75% per year) and the percentage of increase due to in-migration (as opposed to natural increase) declined. Record 166, 265. Petitioners identified no conflicting

1 evidence in the record.

2 We believe this evidence clearly supports a finding that
3 during a period of five-fold increase in the number of visitors
4 to the Shakespearean Festival, the relative amount of
5 in-migration to the city declined and the city's growth rate
6 did not exceed that projected by the plan. Such a finding
7 would in turn support the city's conclusion that the proposed
8 museum would not cause growth at greater than the long-term
9 rate established in the plan.

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12 We also note that it is by no means clear that Policy VII-7
13 is a regulatory standard for the approval of conditional use
14 permits, rather than merely a statement of general planning
15 objectives. See Urquhart v. LCOG and City of Eugene, 14
16 Or LUBA 335, 347, rev'd other grounds 80 Or App 176, 721 P2d
17 870 (1986). However, respondents do not raise this issue.

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20 According to the plan, some of these policies are also
21 implemented through other chapters of the LUO, such as Parking
22 and Performance Standards (Policies X-6(a)-(d),(g)) and
23 Subdivisions (Policies X-6(c),(g)).

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26 In any case, we note Policy IX-26 does not prohibit the use
of sump pumps. Therefore, even if petitioners' contention were
correct, approval of the museum would not violate this policy.

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29 We note that even if LUO 18.104.030 were interpreted to
30 require that the applicant and the city council enter into such
31 an agreement before the city council's hearings on the matter,
32 as petitioners have urged, failure to do so until the time of
33 the decision would be a failure to follow applicable procedural
34 requirements. Therefore, in order to secure reversal or remand
35 of the decision under ORS 197.835(8)(A)(B), petitioners would
36 have to show us how this error prejudiced their substantial
rights. Petitioners have made no such claim.

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39 However, under our discussion of the Sixth Assignment of
40 Error, infra, we do consider petitioners' challenges to the
41 evidentiary support for specific findings of compliance with
42 the criteria of LUO 18.104.040.

1 21

2 In fact, the Forensics Lab and Armory appear to be the
3 structures which will be closest to the proposed museum, being
4 located immediately to the west of the site. Record 84, 353.

4 22

5 The Forensics Lab and Armory are located on the SOSC
6 campus. However, we cannot interpret the city's findings
7 concerning compatibility with and impacts on the SOSC campus as
8 including the Forensics Lab and Armory because (1) the finding
9 identifying the surrounding neighborhood lists the Forensics
10 Lab and Armory separately from the SOSC campus; and (2) the
11 findings concerning the SOSC campus refer only to "SOSC
12 structures on campus." Record 470.

9 Neither can we conclude under ORS 197.835(10)(b), see
10 footnote 15, supra, that the evidence in the record clearly
11 shows the proposed use will be reasonably compatible with and
12 have minimal impacts on the Forensics Lab and Armory. We,
therefore, may not overlook the city's failure to adopt
findings explaining the possible impacts on these facilities.

13 23

14 The city findings addressing LUO 18.104.040.C(1) state:

15 "The original proposal did not meet this
16 criteria[sic], in the opinion of the Planning
17 Commission. The Commission required a re-design of
18 the architecture, to comply with specific height and
19 setback requirements contained in their
20 recommendations. The Council concludes that these
21 height and setback requirements are sufficient to
22 assure harmony in scale, bulk, coverage and density.
23 The buildings would be of a scale similar to those of
24 the campus area. The setbacks from the street would
25 be significant, and vary with the height of the
26 structure. the lot coverage will be smalll, with a
building of 122,000 square feet on a site of 14 acres.

22 "The Site Review procedure (section 18.72 AMC)
23 contains sufficient authority to allow for a
24 compatible architecture to be decided at a later date,
25 when final plans have been completed. Therefore, the
26 Council is deferring to the Site Review procedure the
final decisions on specific site usage and
architectural compatibility." Record 471.

26 Petitioners also challenge the above findings because they

1 reference and rely on a planning commission action "which was
2 declared invalid by the Council during a previous action on the
3 matter." Petition for Review 32. Petitioners argue the city
4 council failed to make an independent finding on the
5 requirements of LUO 18.104.040.C(1).

6 The planning commission voted 5-4 to approve the
7 conditional use permit. Because of concern about the validity
8 of the vote of one of the commission members who voted to
9 approve the permit, the city council decided to treat the
10 planning commission vote as having been 4-4, with no
11 recommendation. Record 464-464.

12 The council did not commit error by referring to actions
13 of the planning commission in its findings, regardless of the
14 validity of the commission's actions. Furthermore, the council
15 did not rely on the validity of the planning commission
16 action. It simply concluded that certain conditions initially
17 adopted by the commission would be adequate to assure harmony
18 in scale, bulk, coverage and density, and incorporated those
19 conditions into its own decision. We find no error in this
20 regard.

21 24

22 These conditions state:

23 "3) That the height limit of the buildings on the
24 project shall not exceed 55 feet, with the exception
25 of the rotunda, which shall not exceed 70 feet.

26 "4) That the site review for the first phase include
27 a relocation of the building with a setback of 1.5
28 feet for each foot in height from East Main St., and
29 .75 feet for each foot in height from Walker St.,
30 implemented as a bulk plane setback of 33 degrees and
31 56 degrees respectively." Record 473.

32 25

33 There is a statement in the county's findings that the
34 proposed museum buildings would have a "scale similar to those
35 of the campus area." Record 471, see footnote 23. This
36 conclusory statement is not an adequate finding of
37 compatibility between the museum and the Forensics Lab and
38 Armory with regard to scale because it does not identify the
39 scale of any of these structures or explain why the city
40 concluded they are compatible.

1 26

2 Furthermore, although respondents argue only that there is
3 substantial evidence in the record to support the city's
4 decision, we note that the evidence to which respondents direct
5 our attention does not constitute evidence which, pursuant to
6 ORS 197.835(10)(b), clearly supports a decision that the
7 proposed museum will be reasonably compatible with and have
8 minimal impacts on the neighboring Forensics Lab, Armory,
9 Middle School and residences, considering scale, bulk, density
10 and coverage. The evidence to which they refer us consists
11 only of facts regarding the proposed museum itself, the Ashland
12 High School, Ashland Hills Inn, Oregon Shakespeare Festival and
13 either the entire SOSC campus or buildings on the SOSC campus
14 other than the Forensics Lab and Armory. Record 15, 227-229,
15 419.

16 27

17 Petitioners also challenge the city's reliance on the
18 height and setback conditions because the council "again used a
19 non-existent Planning Commission finding to support a position
20 of approval." Petition for Review 40. According to
21 petitioners, this means the city council failed to make an
22 independent finding on architectural compatibility. As
23 explained more fully under footnote 21, we conclude the city
24 council did not err by incorporating into its decision
25 conditions initially devised by the planning commission.

26 28

27 Furthermore, although respondents argue only that there is
28 substantial evidence in the record to support the city's
29 decision, we note that the evidence which the parties cite does
30 not constitute evidence which, pursuant to ORS 197.835(10)(b),
31 clearly supports a decision that the proposed museum will be
32 reasonably compatible with and have minimal impacts on the
33 neighboring Forensics Lab, Armory and Middle School, with
34 regard to architecture and aesthetics. The evidence to which
35 respondents refer does not address the architecture or
36 aesthetics of the Forensics Lab, Armory or Middle School or
37 make any comparison between those structures and the proposed
38 museum. Record 14, 148, 229, 239-241, 418. Petitioners, on
39 the other hand, refer us to an architect's testimony that the
40 proposed museum will not be architecturally or aesthetically
41 compatible with these other structures. Record 492-493.

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The Site Design and Use Guidelines adopted by Resolution 85-33 do not appear to be mandatory approval standards. See, Downtown Community Association v. City of Portland, 80 Or App 336, 722 P2d 1258, rev den 302 Or 86 (1986). The guidelines address only multi-family residential, commercial and employment and industrial development. We are not sure which of these categories the proposed use would fall within. Assuming the proposed use would be considered "commercial and employment," the only compatibility requirement imposed is that, whenever possible, "building materials and paint colors should be compatible with the surrounding area." Site Design and Use Guildelines, 23-24. This requirement is not sufficient to constitute consideration of architectural and aesthetic compatibility with the surrounding neighborhood, as required by LUO 18.104.B and (C)(5).