

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

3
4 HISTORICAL DEVELOPMENT ADVOCATES)
5 and JAMES MILLEGAN,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)
14)
15 and)
16)
17 BIEM & JAMES PROPERTIES III and)
18 MELVIN MARK PROPERTIES,)
19)
20 Intervenors-Respondent.)

LUBA No. 94-036
FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Portland.

24
25 Daniel H. Kearns, Portland, filed the petition for
26 review and argued on behalf of petitioners. With him on the
27 brief was Preston Gates & Ellis.

28
29 Ruth Spetter, Senior Deputy City Attorney, Portland,
30 filed a response brief and argued on behalf of respondent.

31
32 Richard H. Allan, Portland, filed a response brief and
33 argued on behalf of intervenors-respondent. With him on the
34 brief was Ball, Janik & Novack.

35
36 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,
37 Referee, participated in the decision.

38
39 REMANDED 08/23/94

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a city council decision not to
4 designate the Governor Building as a historical landmark.

5 **MOTION TO INTERVENE**

6 Biem & James Properties III and Melvin Mark Properties,
7 the applicants below, move to intervene on the side of
8 respondent in this appeal. There is no opposition to the
9 motion, and it is allowed.

10 **FACTS**

11 The Governor Building is a five-story building
12 constructed in 1906. The building is located in downtown
13 Portland and was nominated in 1984 for listing on the
14 National Register of Historic Places. However, that
15 application was withdrawn, and the Governor Building is not
16 listed as a National Historic Landmark.

17 The City of Portland maintains a Historic Resource
18 Inventory (the Inventory). The Inventory ranks properties
19 included on the Inventory as Rank I, II, III or unranked.
20 The Governor Building is identified on the Inventory as a
21 Rank II property.¹

¹Inclusion on the Inventory does not mean that a property either is or will be listed on the National Register or designated as a local historical landmark. The Inventory explains "[i]nventory ranks should * * * be viewed as predictors rather than guarantees of designation or listing." Inventory 9.

Rank II properties are described in the Inventory as follows:

1 The Inventory was first created for the Portland
2 Historical Landmarks Commission in 1984, to identify
3 historic and potentially historic structures. However, the
4 Inventory postdates acknowledgment of the city's
5 comprehensive plan and has not been adopted as part of the
6 comprehensive plan.²

7 As relevant in this appeal, including the Governor
8 Building as a Rank II structure on the Inventory is legally
9 significant due to Portland City Code (PCC) 33.222. PCC
10 33.222.020(C) invokes an automatic 150-day demolition delay
11 when a permit is requested to demolish ranked or unranked
12 properties identified on the Inventory. During that 150-day
13 demolition delay period, the city concurrently conducts
14 historical landmark designation review, pursuant to PCC
15 33.845, and demolition review, pursuant to PCC 33.222.040.

16 If historical landmark designation review results in
17 the property being designated a historical landmark, the
18 owner is notified as part of demolition review "of all
19 potential rehabilitation programs and benefits, and [the
20 city] may choose to pursue public or private acquisition and
21 restoration." PCC 33.222.040(D)(1). In this event, the
22 city may extend the demolition delay period an additional 90

"Properties which are of individual importance by virtue of architectural, historical, and environmental criteria. Secondary priority for landmark designation; eligible for National Register." Inventory 7.

²Moreover, the Inventory has not been adopted by the city council.

1 days, for a total of 240 days. PCC 33.222.040(E). Under
2 the PCC, the city ultimately lacks authority to deny a
3 request to demolish a structure, even if the structure is
4 designated as a historical landmark pursuant to PCC 33.222
5 and 33.845. The relevant PCC sections simply give the city
6 up to 240 days to (1) explain the options for saving the
7 structure, (2) attempt to persuade the applicant not to
8 demolish the structure, and (3) pursue public or private
9 acquisition of the structure.

10 If the city applies the landmark designation criteria
11 and determines not to designate the property as a historical
12 landmark, the demolition delay period expires, and a permit
13 may thereafter be issued allowing demolition of the
14 building. PCC 33.222.050(D)(2).

15 In the present case, the applicants sought a permit to
16 demolish the Governor Building. The Historical Landmarks
17 Commission applied the PCC 33.845.060 landmark criteria and
18 voted to designate the Governor Building as a historical
19 landmark. The applicant appealed, and the city council
20 reversed the Historical Landmarks Commission and determined
21 the Governor Building should not be designated as a
22 historical landmark. If the city council's decision is
23 affirmed by this Board, a permit for demolition of the
24 Governor Building may issue immediately pursuant to PCC
25 33.222.050(D)(2). If the city council's decision is
26 reversed or remanded, and the city ultimately determines to

1 designate the Governor Building as a historical landmark,
2 the demolition review process may be extended for an
3 additional 90 days to explore voluntary means to avoid
4 demolition. In the event those discussions are unsuccessful
5 and the demolition delay period expires, a permit for
6 demolition of the Governor Building may issue at that time.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioners argue the challenged decision violates
9 Statewide Planning Goal 5 (Open Spaces, Scenic and Historic
10 Areas, and Natural Resources) and the Land Conservation and
11 Development Commission (LCDC) rule implementing Goal 5 (Goal
12 5 rule). OAR Chapter 660, Division 16. However, there is
13 no dispute the city's comprehensive plan and land use
14 regulations were acknowledged in 1981 as complying with the
15 statewide planning goals. Therefore, the city and
16 intervenors (respondents) contend the city properly limited
17 its consideration to the relevant, acknowledged PCC
18 provisions and was not required to apply Goal 5 or the
19 Goal 5 rule. ORS 197.175(2)(d); Byrd v. Stringer, 295 Or
20 311, 666 P2d 1332 (1983); Oregon Worsted Company v. City of
21 Portland, 22 Or LUBA 452 (1991); Kola Tepee, Inc. v. Marion
22 County, 17 Or LUBA 910, 920, aff'd 99 Or App 481 (1989), rev
23 den 309 Or 441 (1990).

24 Petitioners recognize the statewide planning goals
25 generally do not apply directly to land development permit
26 decisions governed by acknowledged comprehensive plans and

1 land use regulations. However, petitioners contend Goal 5
2 and the Goal 5 rule apply in this case for three reasons,
3 and that the challenged decision is inconsistent with Goal 5
4 and the Goal 5 rule.

5 **A. ORS 197.829(4)**

6 The 1993 legislature enacted ORS 197.829 concerning
7 LUBA's scope of review. Or Laws 1993, ch 792, § 43. The
8 first three subsections of ORS 197.829 essentially codify
9 the portion of Clark v. Jackson County, 313 Or 508, 514-15,
10 836 P2d 710 (1992), which limits our scope of review
11 concerning local government interpretations of their
12 comprehensive plans and land use regulations. The fourth
13 subsection of ORS 197.829 expands LUBA's scope of review
14 concerning local government interpretations of comprehensive
15 plans and land use regulations where those provisions were
16 adopted to implement state statutes, statewide planning
17 goals or LCDC rules.

18 "The Land Use Board of Appeals shall affirm a
19 local government's interpretation of its
20 comprehensive plan and land use regulations,
21 unless [LUBA] determines that the local
22 government's interpretation:

23 * * * * *

24 "(4) Is contrary to a state statute, land use goal
25 or rule that the comprehensive plan provision
26 or land use regulation implements."³

³Presumably ORS 197.829(4) was adopted to address the possibility that, under Clark, local governments would be free to interpret acknowledged comprehensive plans and land use regulations in ways that are inconsistent

1 Petitioners contend the demolition delay and historical
2 landmark designation provisions applied by the city in the
3 challenged decision were adopted to implement Goal 5 and the
4 Goal 5 rule, and the city's interpretation and application
5 of these provisions is inconsistent with Goal 5 and the Goal
6 5 rule.⁴ For that reason, petitioners contend that under
7 ORS 197.829(4), LUBA is not bound to affirm the city's
8 "interpretation and decision," and the decision should be
9 remanded. Petition for Review 14.

10 To the extent petitioners suggest ORS 197.829(4)
11 authorizes LUBA to review permit "decisions" against Goal 5
12 simply because the comprehensive plan and land use
13 regulations that govern such permit "decisions" were adopted
14 to implement Goal 5, petitioners read ORS 197.829(4) too
15 broadly. Such a construction would make acknowledgment of
16 comprehensive plan and land use regulation provisions under
17 ORS 197.251 meaningless.⁵

with the statutes, rules and statewide planning goals such provisions were adopted to implement. See Cope v. City of Cannon Beach, 115 Or App 11, 18, 836 P2d 775 (1992), aff'd 317 Or 339 (1993).

⁴Among other things, petitioners contend the city has not conducted the kind of comprehensive inventory, conflicting use and ESEE analyses, and resource protection program development required by the Goal 5 rule.

⁵The Oregon appellate courts have not yet directly addressed and explained the manner in which this Board is to review local government interpretations of acknowledged plan and land use regulation provisions which were adopted to implement statutory, land use goal or rule provisions. However, a recent decision by the court of appeals makes it reasonably clear that our review is limited to determining whether "interpretations" of acknowledged plans and land use regulations are consistent with the statutes, land use goals and rules they implement, rather than being a plenary review of acknowledged plans and land use

1 ORS 197.829(4) is specifically limited to local
2 government "interpretations." Therefore, if a local
3 government is presented with a plan or land use regulation
4 provision that must be interpreted, and there is a
5 reasonable interpretation that is consistent with the "state
6 statute, land use goal or rule the comprehensive plan
7 provision or land use regulation implements," that
8 interpretation may not be rejected by the local government
9 in favor of an interpretation that is inconsistent with
10 those statutes, goals or rules.

11 However, petitioners identify no erroneous
12 interpretations which might be reversed under ORS
13 197.829(4). Petitioners suggest that because the PCC
14 demolition delay and landmark designation provisions are
15 subjective, any application of those provisions necessarily
16 involves interpretation. Petition for Review 21, n 9. If
17 petitioners' argument is that the subjective nature of the
18 demolition delay and landmark designation provisions
19 eliminates any obligation on petitioners' part to identify
20 the particular interpretation or interpretations they
21 believe are subject to reversal or remand under
22 ORS 197.829(4), we reject the suggestion. ORS 197.829(4)
23 was not adopted to allow LUBA to reconsider the propriety of
24 the original acknowledgment of comprehensive plans and land

regulations for consistency with those standards. See DLCD v. Fargo Interchange Service Dist., ___ Or App ___, ___ P2d ___ (August 10, 1994).

1 use regulations.⁶ Identification of an allegedly incorrect
2 interpretation of such acknowledged comprehensive plan or
3 land use regulation provisions is a condition precedent for
4 invoking review under ORS 197.829(4), and petitioners fail
5 to identify an allegedly incorrect interpretation.

6 This subassignment of error is denied.

7 **B. Periodic Review**

8 The city has had provisions in the PCC since 1975 for
9 designation of historic buildings and sites and for delaying
10 action on demolition permits for such sites and buildings.
11 See former PCC 33.120. Former PCC 33.120 was included in
12 the city land use regulations acknowledged by LCDC in 1981.
13 During 1990 and 1991, former PCC 33.120 was amended and
14 recodified at PCC 33.222 and 33.845.

15 We are somewhat uncertain exactly how former PCC 33.120
16 came to be codified at PCC 33.222 and 33.845.⁷ By Ordinance
17 No. 163608, the city adopted a comprehensive rewrite of its

⁶Petitioners' real quarrel is with the demolition delay and landmark designation provisions themselves. Petitioners contend those provisions are not adequate to protect historic resources in the manner required by Goal 5 and the Goal 5 rule. If that question were properly presented in this appeal, we might agree with petitioners on this point. Byrnes v. City of Hillsboro, 101 Or App 307, 790 P2d 552 (1990) ("it would be incompatible with [Goal 5's] preservation policy for the city to be powerless to deny any application to demolish, alter or move a historical site or structure"); see DLCD v. Yamhill County, 99 Or App 441, 446, 783 P2d 16 (1989) ("planning jurisdictions may not give property owners the ability to decide unilaterally whether resource sites will be included on Goal 5 inventories").

⁷The parties have not provided this Board with copies of relevant portions of the relevant ordinances.

1 comprehensive plan and land use regulations. We understand
2 the city to contend that Ordinance No. 163608 amended former
3 PCC 33.120 and recodified those provisions at PCC 33.222 and
4 33.845. PCC 33.220 and 33.845 were also amended by
5 Ordinances Nos. 163697 and 164184 in 1991. Based on
6 arguments presented in the petition for review and at oral
7 argument, we do not understand petitioners to dispute
8 respondents' position that the ordinances adopting PCC
9 33.222 and 33.845 in their present form were adopted as
10 postacknowledgment amendments to the city's acknowledged
11 PCC. ORS 197.610 to 197.625. Those ordinances were not
12 appealed to this Board, and respondents contend they are
13 deemed acknowledged pursuant to ORS 197.625.⁸

14 Petitioners argue that even though PCC 33.222 and
15 33.845 may have been adopted in their present form by
16 postacknowledgment amendments pursuant to ORS 197.610 to
17 197.625, they also were adopted by the city as part of its
18 periodic review effort begun in 1987. Therefore,
19 petitioners contend, those PCC provisions will not be deemed
20 acknowledged as complying with Goal 5 until periodic review
21 is complete. See Williams v. Clackamas County, ___ Or LUBA

⁸As relevant, ORS 197.625(1) provides as follows:

"If no notice of intent to appeal is filed within the 21-day
appeal period set out in ORS 197.830(8), the amendment to the
acknowledged comprehensive plan or land use regulation * * *
shall be considered acknowledged upon the expiration of the 21-
day period. * * *"

1 ____ (LUBA Nos. 93-046 and 93-058, August 11, 1994); 1000
2 Friends of Oregon v. City of Troutdale, 23 Or LUBA 219
3 (1992). Petitioners attach several documents to their
4 petition for review which they contend demonstrate the city
5 has not yet complied with the Department of Land
6 Conservation and Development's (DLCD's) 1987 periodic review
7 notice requiring the city to bring its comprehensive plan
8 and land use regulations into compliance with Goal 5 and the
9 Goal 5 rule.⁹

10 For purposes of this opinion, we assume without
11 deciding that had the relevant 1990 and 1991 ordinances been
12 adopted by the city to comply with the 1987 periodic review
13 order, those ordinances would not be deemed acknowledged
14 under ORS 197.625, even though no appeal of those ordinances
15 was filed with this Board. See n 8, supra. However,
16 petitioners do not demonstrate that such is the case. The
17 disputed PCC provisions were adopted in 1975, prior to
18 acknowledgment. They were included in the PCC acknowledged
19 by LCDC in 1981. They were amended after initial

⁹The city's December 15, 1993 final periodic review order, submitted under the prior statutory scheme for periodic review, states the city has not yet completed amendments to its comprehensive plan and land use regulations to comply with the requirements of Goal 5 and the Goal 5 rule concerning historic resources. In that final periodic review order, the city promises to complete such plan and land use regulation amendments pursuant to a work program submitted under the current statutory scheme for period review. ORS 197.628 to 197.644. Petition for Review Appendix D. On February 15, 1994, the city submitted four work programs to DLCD. In one of those work programs, the city proposes to update its historic sites inventories, perform ESEE analyses, and implement historic resource protection. Petition for Review Appendix E.

1 acknowledgment thorough postacknowledgment plan amendments
2 and apparently were not submitted by the city to LCDC as
3 part of its effort to amend its comprehensive plan and land
4 use regulations to comply with Goal 5 and the Goal 5 rule.
5 To the contrary, the final periodic review order identifies
6 a number of measures the city has considered and will
7 consider in the future to modify and supplement existing
8 plan and land use regulation provisions concerning historic
9 resources. There is nothing in either the final periodic
10 review order or the proposed work program to suggest the
11 existing provisions of PCC 33.222 or 33.845 were adopted to
12 comply with periodic review requirements. We therefore
13 agree with the city that the ordinances adopted by the city
14 in 1990 and 1991 recodifying and amending PCC 33.222 and
15 33.845 were acknowledged by operation of ORS 197.625 when
16 they were not appealed to this Board.

17 This subassignment of error is denied.

18 **C. Goal 2 Inventory**

19 Among other things, Goal 2 (Land Use Planning) requires
20 that comprehensive plans include inventories for applicable
21 statewide planning goals. A Goal 5 inventory adopted as
22 part of a comprehensive plan can only be amended by
23 following statutory postacknowledgment plan amendment
24 procedures. ORS 197.610 to 197.625. In amending such a
25 Goal 5 inventory, the local government is required to
26 demonstrate the amendment complies with the statewide

1 planning goals, including Goal 5. ORS 197.175(2)(a);
2 197.835(4).

3 The challenged decision applies the criteria found at
4 PCC 33.845.060 and determines the Governor Building does not
5 warrant designation as a historical landmark. Petitioners
6 contend the effect of this decision is to allow demolition
7 of the building, which effectively amends the Inventory to
8 delete a building that is listed as a Rank II structure. If
9 the Inventory had been adopted as part of the city's
10 comprehensive plan, as petitioners contend it should have
11 been, the city would be required to observe
12 postacknowledgment plan amendment procedures and to
13 demonstrate that its decision complies with Goal 5.
14 Petitioners argue the city should not be allowed to rely on
15 its failure to adopt the Inventory as part of its plan and
16 thereby avoid the requirements of Goal 5 with regard to the
17 Governor Building.

18 As respondents correctly note, the challenged decision
19 does not authorize demolition of the Governor Building. It
20 simply terminates the demolition delay process more quickly
21 than would otherwise be the case if the building had been
22 designated as a historical landmark. Although the Governor
23 Building may subsequently be demolished, the building
24 remains listed on the Inventory as a Rank II structure.

25 Even if the likelihood that the challenged decision
26 means the Governor Building ultimately may be demolished

1 could be viewed as a de facto amendment of the Inventory,
2 the Inventory is not part of the acknowledged comprehensive
3 plan or land use regulations. Petitioners' contention that
4 the Inventory should have been adopted as part of the plan
5 does not alter the fact that it was not. The challenged
6 decision is not a de facto plan amendment, and the city did
7 not err by failing to apply Goal 5.

8 This subassignment of error is denied.

9 The first assignment of error is denied.

10 **MOTION TO DISMISS SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 Petitioners' second and third assignments of error
12 concern the city's conduct of the local proceedings and
13 application of the demolition delay provisions of PCC 33.222
14 and the historical landmark designation review provisions of
15 PCC 33.845. Intervenors argue that because those PCC
16 provisions can result in, at most, a delay of an additional
17 90 days in issuance of a demolition permit, a decision in
18 this appeal would be without practical effect. Therefore,
19 intervenors argue, this appeal should be dismissed as moot.
20 Heiller v. Josephine County, 25 Or LUBA 555 (1993); Barr v.
21 City of Portland, 22 Or LUBA 504 (1991); Davis v. City of
22 Bandon, 19 Or LUBA 526 (1990); Oregon Waste Systems, Inc. v.
23 City of Portland, 18 Or LUBA 510, 514 (1989).

24 Ultimately, the procedures required by PCC 33.222 and
25 33.845 cannot lead to a decision by the city to deny the
26 requested permit to demolish the Governor Building.

1 However, that does not mean this appeal is moot. During the
2 additional 90-day delay that could result if the Governor
3 Building were designated a historical landmark under
4 PCC 33.845.060, the property owner could be convinced to
5 change its current plans to demolish the building or efforts
6 to purchase the building might be successful. This Board is
7 in no position to be certain those efforts would not be
8 successful. Therefore, the second and third assignments of
9 error are not moot.

10 The motion to dismiss is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 ORS 197.763(4) provides as follows:

13 "(a) All documents or evidence relied upon by the
14 applicant shall be submitted to the local
15 government and be made available to the
16 public at the time notice provided in
17 subsection (3) of this section is
18 provided."^[10]

19 "(b) "* * * If additional documents or evidence is
20 provided in support of an application, any
21 party shall be entitled to a continuance of
22 the hearing."

23 Petitioners contend new evidence in support of the
24 application was submitted after the deadline established by
25 ORS 197.763(4). Prior to the close of the December 29, 1993
26 public hearing before the city council, a consultant

¹⁰ORS 197.763(3)(f) states the required notice of a quasi-judicial land use hearing must be provided 20 days before the evidentiary hearing or 10 days before the first evidentiary hearing, if two or more evidentiary hearings are allowed.

1 representing petitioners stated new testimony had been
2 received by the city in support of the application, after
3 the time limit imposed by ORS 197.763(4)(a), and requested a
4 continuance to review the new evidence and formulate a
5 response. Petitioners contend the city erred by failing to
6 grant that request.¹¹

7 The city contends petitioners waived their right to a
8 continuance by failing to restate their request for a
9 continuance at two subsequent meetings of the city council
10 held for the purpose of considering and adopting a final
11 written decision and findings. We do not agree. The
12 evidentiary portion of the local proceedings in this matter
13 came to an end on December 29, 1993. The city council's
14 failure to respond to petitioners' request that the
15 evidentiary hearing be continued effectively denied that
16 request. There is no statutory requirement that petitioners
17 request reconsideration of a decision denying their request
18 for a continuance of the evidentiary portion of the local
19 hearings during public meetings scheduled for adoption of a
20 written decision and findings. Neither do we see that any
21 useful purpose would be furthered by imposing such a
22 requirement.

23 Intervenors contend there was really no new evidence in
24 support of the application presented after the notice of

¹¹Petitioners identify the written testimony appearing at Record 140,
141, 158, 168, 178, and 182.

1 public hearing was issued and, therefore, petitioners had no
2 right to a continuance under ORS 197.763(4)(a). See Reed v.
3 Clatsop County, 22 Or LUBA 548, 556 (1992). We do not
4 agree.

5 The testimony of John James at Record 140 does not
6 appear to add relevant evidence. Neither does the letter at
7 Record 158, which merely express support for the
8 application. However, the testimony of John Tess at Record
9 141 does appear to include new evidence. Mr. Tess presented
10 slides of certain buildings which he stated meet the
11 landmark designation criteria and presented opinion
12 testimony that the Governor Building does not satisfy those
13 criteria. Petitioners were entitled to a continuance to
14 address this testimony.

15 The opinions expressed in the December 28, 1993 letter
16 appearing at Record 168 do overlap somewhat with
17 representations presented in the application at Record 298-
18 304. However, we are unable to agree with intervenors that
19 the letter at Record 168 simply repeats those
20 representations without adding anything of substance the
21 city might have relied upon.

22 The December 27, 1993 letter at Record 178 expresses
23 concerns about earthquake vulnerability and the costs for
24 seismic upgrading of the building. Intervenors contend that
25 evidence is irrelevant to the criteria set out in
26 PCC 33.845.060. Intervenors may well be correct that the

1 concerns expressed at Record 178 are irrelevant. However,
2 we cannot be certain the city council was not influenced by
3 the evidence, and petitioners might have argued to the city
4 council that the concerns expressed in this letter are
5 irrelevant, had the requested continuance been granted.

6 Finally, in the December 22, 1993 letter at Record 182,
7 an architect takes the position that "the Governor Building
8 is not historic, it is just old." The letter expresses
9 reasons for that view and argues that preserving the
10 Governor Building and preventing construction of the
11 building proposed to replace the Governor Building will
12 frustrate a larger public purpose, "[t]hat of defining and
13 emphasizing the Morrison Bridgehead as a major gateway to
14 the City's core area." Record 182. Petitioners were
15 entitled to a continuance to respond to that letter.

16 The second assignment of error is sustained.

17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioners challenge the credibility of John Tess, the
19 building owner's historical expert. Petitioners contend the
20 testimony presented by Mr. Tess in the current proceedings
21 against designation of the Governor Building as a historical
22 landmark is inconsistent with his testimony in 1984 in
23 support of listing the Governor Building on the National
24 Register of Historic Places. Petitioners contend the city
25 failed to adequately explain that inconsistency, and Mr.
26 Tess's testimony therefore does not constitute substantial

1 evidence (i.e. evidence a reasonable person would rely on)
2 in support of the challenged decision. Because the city's
3 decision is not supported by substantial evidence,
4 petitioners contend the challenged decision must be
5 remanded. ORS 197.835(7)(a)(C).

6 Our resolution of the second assignment of error
7 necessitates a remand so that the city can reopen the
8 evidentiary hearing to allow petitioners to respond to
9 evidence submitted in support of the application after the
10 notice of the first public hearing was issued. We therefore
11 do not reach petitioners' third assignment of error.¹² In
12 adopting any findings that may be necessary because of the
13 reopening of the record, the city may also address in its
14 findings the issues raised by petitioners in the third
15 assignment of error.

16 The city's decision is remanded.

¹²Respondents offer a number of arguments why they contend the testimony given by Mr. Tess in the current proceeding is not inconsistent with the testimony he presented in 1984 addressing different criteria. We express no opinion here regarding the consistency or inconsistency of Mr. Tess's testimony during the two proceedings.