

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's limited land use decision
4 approving the site plan for a manufactured home park.

5 **MOTION TO INTERVENE**

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

9 **FACTS**

10 The subject property is a 51.18-acre parcel zoned RS-
11 6.5 (Residential Single Family), on the northeastern edge of
12 the city. It is bordered on the east by Clover Ridge Road,
13 a two-lane road with 40 feet of right-of-way and
14 approximately 20 feet of pavement. The primary access route
15 to Clover Ridge Road is Knox Butte Road, which intersects
16 with Clover Ridge Road approximately 2,000 feet south of the
17 site. Clover Ridge Road is designated a collector street on
18 the city's master street plan.

19 Truax Creek borders the property on the north, an
20 unnamed tributary borders the property on the northwest, and
21 another unnamed tributary flows northwest through the
22 property to Truax Creek. Portions of the property within
23 the banks of the unnamed creeks and of Truax Creek are
24 within the 100-year flood plain. Intervenor's application
25 for site plan review of a 229-space manufactured home park
26 was reviewed pursuant to the city's limited land use

1 procedures, without a public hearing. Petitioners submitted
2 written comments on three occasions. Record 51, 70, 103.
3 The city planning staff approved the application with
4 conditions, and petitioners brought this appeal.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioners contend the process used by the city was
7 not in accord with its land use regulations, because
8 manufactured home parks in flood plain districts must be
9 reviewed by a public hearing process rather than a limited
10 land use decision process. Petitioners identify Albany
11 Development Code (ADC) 6.131, which provides in relevant
12 part:

13 "Manufactured home parks and manufactured home
14 subdivisions proposed in the floodplain district
15 shall be reviewed by the Planning Division.
16 Notwithstanding other provisions of this code, all
17 manufactured home park and subdivision
18 applications which contain land within the
19 floodplain district shall be processed under a
20 Type III [public hearing] process."

21 Petitioners contend the decision should be reversed,
22 citing ORS 197.828(2)(b).¹ However, petitioners do not

¹ORS 197.828(2) provides:

"The board shall reverse or remand a limited land use decision
if:

- "(a) The decision is not supported by substantial
evidence in the record. The existence of evidence
in the record supporting a different decision
shall not be grounds for reversal or remand if
there is evidence in the record to support the
final decision;

1 identify any substantive standards or criteria, in ADC 6.131
2 or elsewhere, that are applicable to a mobile home park
3 application because it contains land within the floodplain
4 district. They thus fail to establish, as required by ORS
5 197.828(2)(b), that the decision (as opposed to the
6 procedure employed in reaching the decision) does not comply
7 with applicable provisions of the land use regulations. We
8 therefore review the allegation of procedural error pursuant
9 to ORS 197.828(2)(d).

10 No party raised the applicability of ADC 6.131 during
11 the city's proceedings. Neither the city's notice nor its
12 decision identifies ADC 6.131 as an applicable procedure or
13 standard, or refers to the provision in any way. Citing ORS
14 197.835(3), the city contends petitioners have waived this
15 issue by failing to raise it below.²

"(b) The decision does not comply with applicable
provisions of the land use regulations;

"(c) The decision is:

"(A) Outside the scope of authority of the
decision maker; or

"(B) Unconstitutional; or

"(d) The local government committed a procedural error
which prejudiced the substantial rights of the
petitioner. "

²ORS 197.835(3) provides:

"Issues shall be limited to those raised by any participant
before the local hearings body as provided by ORS 197.195 or
197.763, whichever is applicable."

1 Petitioners may raise new issues before this board
2 pursuant to ORS 197.835(4)(a) if the city failed to follow
3 the requirements of ORS 197.195 for limited land use
4 decisions.³ ORS 197.195(3)(a) requires a local government
5 in making a limited land use decision to follow the
6 applicable procedures in its acknowledged comprehensive plan
7 and land use regulations.⁴ If ADC 6.131 establishes a
8 public hearing as the applicable procedure, the city's
9 failure to follow that procedure allows petitioners to raise
10 the issue before LUBA pursuant to ORS 197.835(4)(a). We
11 must therefore consider whether ADC 6.131 is applicable in
12 order to determine if it may be raised as a basis for
13 procedural error.

14 Although the findings do not recite facts, analysis or

³ORS 197.835(4) provides in relevant part:

"A petitioner may raise new issues to the board if:

"(a) The local government failed to follow the requirements of
ORS 197.195;

"* * * * *"

Respondent cites only 197.835(3) as the basis for waiver. We do not decide whether, independent of ORS 197.835(3) and notwithstanding ORS 197.835(4), petitioners are prohibited from raising for the first time on appeal a procedural objection that they had the opportunity to raise below. See Mazeski v. Wasco County, 26 Or LUBA 226, 232 (1993), and cases cited therein.

⁴ORS 197.195(3)(a) provides:

"In making a limited land use decision, the local government shall follow the applicable procedures contained within its acknowledged comprehensive plan and land use regulations and other applicable legal requirements."

1 legal conclusions concerning the applicability of ADC 6.131,
2 we may nevertheless affirm if the parties identify relevant
3 evidence in the record which clearly supports the decision.
4 ORS 197.835(11)(b).⁵ Respondent contends that ADC 6.131
5 and the other flood plain provisions of the ADC, which are
6 set forth at ADC 6.070 through 6.160, are limited in their
7 applicability by ADC 6.080, which states in part:

8 "Lands to Which These Regulations Apply. These
9 regulations apply to areas within the City of
10 Albany that are subject to inundation from a 100-
11 year flood."

12 Respondent argues that the flood plain regulations do not
13 apply unless the application proposes "development" within
14 the flood plain. Respondent then asserts that "[t]he
15 application in question does not involve any lots which
16 contain land within the flood plain nor did it involve any
17 development, of any other type, of lands within the flood
18 plain." Response Brief 3. Respondent's assertion has
19 some support in the record. Although the findings do not

⁵ORS 197.835(11)(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."

1 specifically address ADC 6.131, the decision does address
2 the applicability of flood plain regulations generally, in a
3 finding concerning site plan review standard ADC 8.070(2).⁶

4 The finding states in part:

5 "The main channel of Truax Creek along the
6 northern boundary of the subject property is
7 mapped as having a 100-year flood plain * * *.
8 The FEMA map does not delineate the flood plain
9 for lesser drainages, and so the applicant's
10 engineer also calculated the 100-year flood plain
11 for the two tributaries of Truax Creek crossing
12 the subject property. Both studies concluded that
13 the 100-year flood is contained within the banks
14 of these channels. Therefore residential lots
15 that are developed adjacent to the channels will
16 not encroach into the flood plain and are not
17 subject to flood plain regulations." Record 22.

18 Petitioners point out that this application is for a
19 manufactured home park, not residential lots. However, the
20 application and decision both refer to "lots," which we
21 understand to be manufactured home placement lots within the
22 park, not subdivision lots. The decision also discusses the
23 need for a right-of-way dedication to assure that occupants
24 of the lots do not extend any development into the flood
25 plain that would interfere with maintenance of open drainage
26 areas. The findings state:

27 "An easement would grant a right of access for
28 maintenance activities, but it would not be a

⁶ADC 8.070(2) requires that:

"Any special features of the site (such as topography, hazards, vegetation wildlife habitat, archeological sites, historic sites, etc.) have been adequately considered and utilized."

1 sufficient deterrent to minimizing damage because
2 residents of the park would be prone to occupying
3 the entire lot even to the channel banks if lots
4 are configured to the middle of the channels as
5 proposed on the applicant's site plan. To
6 adequately reserve an area along the channel for
7 maintenance purposes only, it is appropriate to
8 dedicate a right of way and to reconfigure the
9 lots so that there is an adequate area away from
10 the channel for each home site. The dimensions of
11 the dedication are stated in the conditions of
12 approval." Record 18.

13 The condition of approval states:

14 "Dedicate a public storm water maintenance right
15 of way which extends ten feet beyond the top-of-
16 bank or 100-year flood line, whichever is greater,
17 in order to provide maintenance access to the
18 existing drainage ways across the site." Record
19 22, 36.

20 The city's finding that "residential lots * * * are not
21 subject to flood plain regulations" is thus supported by
22 substantial evidence, and in turn supports respondent's
23 contention that no development is proposed in the flood
24 plain. However, the application and findings identify areas
25 of fill to raise a lot above the floodplain and to construct
26 a road crossing the unnamed creek. Record 22, 23. The
27 findings also identify grading of the banks of the three
28 creeks pursuant to a fill permit. It is therefore not clear
29 from the record that no development is proposed within the
30 flood plain, as respondent contends.

31 Accepting arguendo respondent's interpretation of ADC
32 6.080 as limiting the applicability of ADC 6.131 to
33 applications involving development within the flood plain,

1 evidence in the record does not "clearly support" a decision
2 that this application does not propose development in the
3 flood plain. We therefore cannot affirm the city's
4 decision pursuant to ORS 197.835(11)(b).

5 We are unable to determine on this record whether the
6 city followed applicable procedures contained in its land
7 use regulations, as required by ORS 197.195(3)(a). We must
8 therefore remand the decision if the alleged procedural
9 error prejudiced petitioners' substantial rights. ORS
10 197.828(2)(d).

11 We conclude petitioners have established no such
12 prejudice. Petitioners identify no substantive standard
13 that they might have addressed differently in a hearing than
14 in their written comments, nor do they contend that the
15 mechanism employed by the city (submission of written
16 comments concerning the application) prevented them from
17 raising substantive issues they could have raised in a
18 hearing. They do not contend that any information relied
19 upon by the city in making its decision is susceptible to
20 credibility challenges for which a hearing may be better
21 suited than written comments. Nor do they contend generally
22 that they were unable to prepare and present their case or
23 to rebut evidence. Because petitioners do not explain how
24 the city's failure to conduct a hearing (if one is required
25 by ADC 6.131) has prejudiced their substantial rights, there
26 is no basis for reversal or remand pursuant to ORS

1 197.828(2)(d).

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioners contend the city failed to follow
5 applicable procedures in three other particulars. First,
6 the notice failed to include the statements required by ADC
7 1.330(4)(b) and ORS 197.195(3)(c)(B).⁷ The notice did

⁷ORS 197.195(3)(c) provides:

"The notice and procedures used by local government shall:

- "(A) Provide a 14-day period for submission of written comments prior to the decision;
- "(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;
- "(C) List, by commonly used citation, the applicable criteria for the decision;
- "(D) Set forth the street address or other easily understood geographical reference to the subject property;
- "(E) State the place, date and time that comments are due;
- "(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;
- "(G) Include the name and phone number of a local government contact person;
- "(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

1 state,

2 "The City's decision may be appealed to the state
3 Land Use Board of Appeals within twenty-one (21)
4 days after it becomes final. In order to be able
5 to appeal, you must have raised an issue in
6 writing prior to the expiration of the comment
7 period." Record 106.

8 Petitioners do not assert that the defective notice
9 prejudiced their substantial rights below. Neither do they
10 identify any issue that they wish to raise before this board
11 but are unable to raise because of ORS 197.835(3). The
12 city's failure to provide notice that issues that may
13 provide the basis for an appeal must be raised in writing,
14 and that issues must be raised with sufficient specificity
15 to enable the local decision maker to respond, therefore did
16 not prejudice petitioners' substantial rights. See Wicks v.
17 City of Reedsport, 29 Or LUBA 8, 12 (1995) (failure to
18 provide notice that comments must be in writing).

19 Petitioners also contend the city committed procedural
20 error by accepting an application that did not contain all
21 that is required for mobile home park applications by

"(I) Briefly summarize the local decision making process
for the limited land use decision being made."

ADC 1.330(4)(b) restates the requirement of ORS 197.195(3)(c)(B).

Respondent points out that 197.195(3)(c)(B) requires that the notice state that comments that may form the basis for an appeal must be in writing; respondent argues that the specificity requirement goes to the local government's procedures, not its notice. While the language is ambiguous, we conclude that the notice must state the specificity requirement, either pursuant to 197.195(3)(c)(B) or (I).

1 various provisions of the ADC. Petitioners do not explain
2 how any of the application requirements relate to approval
3 criteria for the mobile home park, nor do they assert that
4 the decision does not comply with approval standards.
5 Omission of required information from an application is a
6 procedural error that does not prejudice petitioners'
7 substantial rights if the information is not necessary to
8 determine compliance with applicable approval standards.
9 See ONRC v. City of Oregon City, 28 Or LUBA 263, 272 (1994).
10 Petitioners only assert that the record "does not set forth
11 these matters and petitioners are therefore informed and
12 believe that the application failed to comply." Petition
13 for Review 5. Because petitioners do not show how the
14 omitted information is necessary to determine compliance
15 with any approval standards, they do not establish prejudice
16 to their substantial rights.

17 This assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioners contend that the city's findings of
20 compliance with ADC 8.070(1) misconstrue applicable law and
21 are unsupported by substantial evidence.⁸ The findings are

⁸ADC 8.070 provides in relevant part:

"Review Criteria. A site plan approval will be granted if the review body finds that the applicant has met all of the following criteria which are applicable to the proposed development:

1 based in large part on conditions that the applicant improve
2 Clover Ridge Road with a partial street improvement adjacent
3 to the site, and construct off-site turn refuges on Clover
4 Ridge Road and on Knox Butte Road at its intersection with
5 Clover Ridge Road. Petitioners contend the decision should
6 require a full street improvement of Clover Ridge Road to
7 collector standards, both adjacent to the subject property
8 and off-site as far as Knox Butte Road.

9 ADC 12.060 provides in part, "Streets (including
10 alleys) within and adjacent to a development shall be
11 improved in accordance with the standards of this Article."
12 ADC 12.120 establishes a minimum 60-foot right-of-way width
13 and 36-foot roadway width for collector streets.
14 Petitioners contend that "[the] specified improvements are
15 not in compliance with ADC 12.120. The City's decision does
16 not provide any reasoning or justification for that
17 departure." Petition for Review 7.

18 Respondent argues that ADC 12.120 is not applicable to
19 existing streets, but that ADC 12.200 specifically
20 authorizes partial street improvements for existing streets.
21 ADC 12.200 provides in relevant part:

22 "Street Abutting New Development. Sections of
23 existing streets not meeting city standards which
24 directly abut new development shall be constructed

"(1) Public facilities can accommodate the proposed
development.

** * * * *

1 partial width to the appropriate city standard by
2 the developer provided that a partial street
3 improvement is determined by the city engineer to
4 be adequate to handle the projected traffic loads.
5 * * *

6 Neither ADC 12.120 nor ADC 12.200 is identified in the
7 city's notice or decision as an approval standard.
8 Petitioners' argument is essentially that the approval
9 standard in ADC 8.070(1) -- "[p]ublic facilities can
10 accommodate the proposed development" -- must be construed
11 as requiring full-street improvements to the standards of
12 ADC 12.120. We agree with respondent that, because ADC
13 12.200 authorizes partial street improvements, the city may
14 conclude that "public facilities can accommodate the
15 development" even though those facilities do not meet the
16 standards of ADC 12.120. The city's findings explain that
17 the partial street frontage improvements and various off-
18 site improvements will

19 "provide the minimum improvement to maintain the
20 safety of vehicular traffic to and from the
21 subject site. With this level of improvements,
22 Clover Ridge Road will be adequate to accommodate
23 the proposed manufactured home park." Record 15.

24 That finding adequately explains why the application
25 complies with the requirement of ADC 8.070(1) that "[p]ublic
26 facilities can accommodate the proposed development."

27 As respondent notes, there are other findings, prepared
28 to demonstrate constitutionally-mandated proportionality,
29 that also provide reasoning and justification for not
30 requiring the applicant to dedicate and improve a full

1 collector street on Clover Ridge Road. Record 14-15. The
2 city has adequately explained why road facilities can
3 accommodate the proposed development if the conditions for
4 partial street and off-site improvements are met.

5 The third assignment of error is denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 Petitioners contend that the city's findings concerning
8 wetlands are not supported by substantial evidence, because
9 the applicant's wetlands delineation states that it is
10 subject to confirmation by state and federal agencies that
11 regulate wetlands delineations, and the record does not
12 include such confirmations. Petitioners do not explain how
13 such confirmations relate to any approval standard. At
14 most, the lack of such confirmations appears to go to the
15 weight of the delineation evidence offered by the applicant,
16 and provides no basis for reversal or remand pursuant to ORS
17 197.828(2)(a).

18 The fourth assignment of error is denied.

19 The city's decision is affirmed.