

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals City of Portland Ordinance No. 160820,
4 dated June 1, 1988, which adopts an exception to Statewide
5 Planning Goal 15 (Willamette River Greenway) and an amendment
6 to the city's comprehensive plan map to allow an addition to an
7 existing restaurant deck. The addition will encroach into the
8 city's Willamette River Greenway (greenway) setback.¹

9 FACTS

10 In 1979, prior to the adoption of the city's greenway
11 ordinance, the Tequilla Willie's restaurant was built on the
12 west side of the Willamette River, in the Johns Landing area,
13 across from Ross Island. The site is zoned General Commercial,
14 Design. Later in 1979, when the city adopted its greenway
15 ordinance, it applied the Willamette Scenic Development (WSD)
16 overlay zone to the site. The WSD zone requires a 25 foot
17 setback from the top of the bank for non river-dependent and
18 non river-related uses. Portland City Code (PCC)
19 33.77.092(A)(2). The greenway ordinance also established the
20 Willamette River Greenway Trail (greenway trail).
21 PCC 33.77.121. The greenway trail runs on the west, or
22 landward, side of the restaurant.

23 The 126 foot long restaurant was constructed on a spit
24 jutting out into the river. The bank of the spit to the south,
25 east and north of the restaurant rises steeply to about 16 feet
26 above river level and is riprapped with rock to prevent bank

1 erosion. In 1984, an outdoor deck capable of seating
2 approximately 70 people was added to the river side of the
3 restaurant. The restaurant and deck are built within two feet
4 of the top of the bank on the north and south sides, and within
5 six to ten feet of the top of the bank on the east side. The
6 bank area contains one tree and a few bushes. It is
7 inaccessible from land and generally unused.

8 On January 12, 1988, the restaurant operator filed two
9 applications with the city. One application was for a 12 by 46
10 foot extension of the existing restaurant deck. Record
11 200-214. This extension would eliminate all open space at the
12 top of the bank along a portion of the extended deck, but would
13 not disturb the one existing tree. The other application was
14 for a 120 foot long floating dock in the river adjacent to the
15 restaurant and an access ramp connecting the dock to the
16 restaurant deck. Record 215-223. Public access to the dock
17 was to be made available via an existing balcony on the north
18 side of the restaurant and the restaurant deck. Record 218.
19 The city treated these applications as consolidated
20 applications for a Goal 15 exception,² conditional use permit
21 and greenway permit.

22 On March 7, 1988, the city hearings officer adopted a
23 decision recommending approval of a modified deck/dock
24 proposal. The modified deck/dock would include a four foot
25 wide public observation deck, containing a one foot wide bench,
26 on the perimeter of the deck addition. The public observation

1 deck would be separated from the restaurant deck by a railing,
2 and would provide public access to the floating dock. Public
3 access to the observation deck from the greenway trail to the
4 west of the restaurant would be provided via a signed pathway.

5 Petitioner appealed the hearings officer's decision to the
6 city council. On May 31, 1988, the city council adopted an
7 order approving a Goal 15 exception, conditional use permit and
8 greenway permit for the modified version of the proposal. On
9 June 1, 1988, the city council adopted an ordinance amending
10 the city's plan and adopting the exception to Goal 15. The
11 conditions of the city council's order and ordinance specify
12 that a signed, four foot wide pathway shall be provided from
13 the existing greenway trail to connect with the public
14 observation deck. The conditions also require that the
15 observation deck be available to the public from 5AM to 10PM,
16 the hours the greenway trail is open to the public.

17 FIRST ASSIGNMENT OF ERROR

18 "Respondent violated Statewide Planning Goal 15 and
19 [Sections] 33.77.035 and 33.77.150 of the City Code
20 when it approved an exception to Goal 15 allowing an
encroachment into the Greenway setback area."

21 A. Protection of All Greenway Values

22 Petitioner points out that the Willamette River Greenway
23 was established to protect and preserve the natural, scenic,
24 historic and recreational qualities of lands along the
25 Willamette River. ORS 390.414(1). Petitioner argues that in
26 approving an exception to Goal 15 all greenway values must be

1 protected to the greatest possible extent, and a balance among
2 competing values achieved.

3 According to petitioner, one of the primary values to be
4 protected in the greenway is "a green way, or open stretch of
5 natural vegetation, along the river." Petition for Review 11.
6 Petitioner argues that the subject exception cannot be approved
7 because it would allow destruction of the only remaining open
8 space on the site. Petitioner argues that the total
9 elimination of open space cannot be justified by (1) the fact
10 that only a small amount of open space remains on the site, and
11 (2) the provision of a public observation deck.

12 Even if the complete destruction of one greenway value
13 (open space) could be justified by enhancement of another value
14 (public access), petitioner argues that sufficient
15 justification is lacking in this case. According to
16 petitioner, it requires more than a small improvement in one
17 value to justify the complete destruction of another greenway
18 value in order to carry out the policy of ORS 390.314(2)(b) "to
19 preserve all Greenway values to the 'greatest possible
20 degree.'" Petition for Review 13.

21 Petitioner concludes that allowing the complete destruction
22 of greenway open space violates PCC 33.77.035, Goal 15 and
23 ORS 390.314. Petitioner specifically claims that under
24 paragraph F.3.b(1) of Goal 15 an exception to the goal's
25 setback requirement should only be allowed if it provides for
26 "the maximum possible landscaped area, open space or vegetation

1 between the [use] and the river." Petitioner also points out
2 that PCC 33.77.150(A)(4) requires that exceptions to the
3 greenway setback requirement be based on a demonstration of
4 consistency with the policy of ORS 390.314.

5 The city replies that petitioner cites no law in support of
6 the alleged standard that the city must find a balance among
7 competing greenway values and cannot allow total elimination of
8 any one value. The city argues that ORS 390.314, Goal 15 and
9 the PCC all speak in terms of the preservation of certain
10 existing greenway qualities. According to the city, if a
11 particular greenway site does not have such qualities to begin
12 with, the city is not required by the statute, goal or code to
13 remedy that situation.

14 In this case, the city argues it found that the bank area
15 adjacent to the restaurant is severely modified, sparsely
16 vegetated and inaccessible to the public. Therefore, the city
17 argues it properly found the area has no natural or scenic
18 values and little, if any, greenway value. Record 13, 16, 20.
19 According to the city, the approved decrease in the amount of
20 non-greenway supportive open space is justified by the creation
21 of the very values and qualities currently missing from the
22 site, through the conditions of approval requiring landscaping
23 with native vegetation and provision of a public observation
24 deck.

25 Furthermore, the city argues that, in any case, the
26 approved exception will not eliminate all open space on the

1 site. The city points out that the existing deck and extension
2 will run less than half the length of the restaurant. Thus,
3 open space at the top of the bank will remain for over half the
4 length of the restaurant.

5 We address each of the code, goal and statutory provisions
6 petitioner argues is violated by the city's decision below.

7 1. PCC 33.77.035

8 PCC 33.77.035 sets out requirements for the adoption of
9 exceptions to Goal 15. Although petitioner alleges that the
10 city's exception to Goal 15 violates PCC 33.77.035 because it
11 allows the elimination of open space at the subject site,
12 petitioner offers no legal theory as to how or what provision
13 of PCC 33.77.035 is violated.³ We will not speculate as to
14 petitioner's legal theory. Deschutes Development v. Deschutes
15 Cty., 5 Or LUBA 218, 220 (1982).

16 2. Goal 15

17 The only provision of Goal 15 which petitioner argues is
18 violated by the approved exception is the greenway
19 compatibility review provision of paragraph F.3.b(1). That
20 goal provision states that local government review of
21 intensifications, changes of use or developments in the
22 greenway shall include findings:

23 " * * * that to the greatest possible degree:

24 (1) The intensification, change of use or development
25 will provide the maximum possible landscaped area, open
space or vegetation between the activity and the river;"

26 Paragraph F.3.b(1) of Goal 15 is a standard for approval of

1 permits for intensifications, changes of use or development in
2 the greenway which local governments are required to
3 incorporate into their land use regulations for greenway
4 compatibility review. Paragraph F.3.b(1) is not a standard for
5 approving an exception to the setback requirement of paragraph
6 C.3.k of Goal 15.⁴ Therefore, an alleged inconsistency with
7 paragraph F.3.b(1) provides no basis for reversal or remand of
8 such an exception.

9 3. ORS 390.314 and PCC 33.77.150(A)(4)

10 PCC 33.77.150(A) provides that the siting of uses which are
11 neither river-dependent nor river-related within the greenway
12 setback requires an exception to Goal 15. Paragraph (4) of
13 this subsection provides that a Goal 15 exception may only be
14 approved if it is demonstrated that "the use is consistent with
15 the Legislative findings and policy in ORS 390.314 * * * ."
16 Petitioner argues the following provisions of ORS 390.314 are
17 inconsistent with approval of an exception which eliminates
18 open space on a greenway site:

19 "(1) The legislative Assembly finds that, to protect
20 and preserve the natural, scenic and recreational
21 qualities of lands along the Willamette River, * * *
22 it is in the public interest to develop and maintain a
23 natural, scenic, historical and recreational greenway
24 upon lands along the Willamette River to be known as
25 the Willamette River Greenway.

26 " * * * * *

27 "(b) Recognizing the need of the people in this
28 state for existing residential, commercial and
29 agricultural use of lands along the Willamette
30 River, [the legislature] finds it necessary to
31 permit the continuation of existing uses of lands

1 that are included within such greenway; but, for
2 the benefit of the people of this state, also to
3 limit the intensification and change in the use
4 of such lands so that such uses shall remain, to
the greatest possible degree, compatible with the
preservation of the natural, scenic, historical
and recreational qualities of such lands."

5 We agree with the city that the above-quoted statutory
6 provisions are directed at preserving the existing natural,
7 scenic, historic and recreational qualities of lands within the
8 greenway. These provisions do not amount to a legislative
9 determination that all lands within the greenway possess all
10 these qualities. We see nothing inconsistent with these
11 statutory provisions in determining, as the city did in this
12 case, that (1) a particular site within the greenway lacks
13 these qualities and does not contribute to the greenway
14 environment; and (2) loss of part of the open space at such a
15 site is more than compensated for by (a) enhancement of the
16 natural and scenic qualities of the remainder of the open space
17 at the site through landscaping with native vegetation, and (b)
18 enhancement of the recreational qualities of the site through
19 provision of new public access to the site and to scenic views
20 across the river.

21 This subassignment of error is denied.

22 B. Significant Public Benefit

23 Petitioner argues that the adopted exception violates the
24 requirements of PCC 33.77.035(A) and 33.77.150(A)(3) for
25 providing a significant public benefit. According to
26 petitioner, these code provisions require that an independent

1 significant public benefit be provided by the requested use.
2 To hold otherwise, would mean allowing any use, no matter how
3 intrusive and unrelated to the greenway, to destroy certain
4 greenway values if there is an agreement to provide some public
5 access to or view of the river. Petitioner argues in this case
6 the requested use is a 12 by 46 foot private deck addition,
7 with access only through the restaurant. Petitioner maintains
8 the city was required, but failed, to find that this deck
9 addition, in itself, has a significant public benefit.

10 Petitioner also argues that the approved public access, as
11 a matter of law, cannot constitute a significant public benefit
12 because (1) the city in its findings describes the proposed
13 public viewpoint provided as "only a small improvement in the
14 greenway values of the site * * * " (Record 16); and (2) the
15 city could have required dedication and construction of a trail
16 connecting the existing greenway trail with the existing
17 balcony, as originally proposed, as a condition of approving
18 the permits for the floating dock. According to petitioner, a
19 significant public benefit must provide the public with a
20 considerable advantage by which to enjoy the greenway and
21 river.

22 The city replies that the proposed deck addition, in
23 itself, will provide a significant public benefit because it
24 will accommodate more restaurant patrons, who are themselves
25 members of the public. These additional patrons will be able
26 to sit and observe the greenway values of the site, i.e., views

1 of the river and Ross Island.

2 The city also argues that the proposed use includes an
3 observation deck with a bench running its length. This
4 observation deck will be connected to the greenway trail and
5 floating dock, and will be open to the public even when the
6 restaurant is closed. The observation deck will provide access
7 to views otherwise unavailable to the general public. The city
8 also points out that in exchange for approval of the deck
9 addition, a presently unvegetated, valueless open space on the
10 site will be landscaped with native plants and will henceforth
11 support greenway values. The city believes these facts support
12 its determination that the proposed use does provide a
13 significant public benefit.

14 The city also argues that without the deck addition there
15 would be no observation deck. The original proposal was for
16 the ramp from the floating dock to extend to the eating area on
17 the existing deck. Access to the dock, therefore, would have
18 been limited to restaurant hours and would have required
19 passing through the restaurant itself. According to the city,
20 no access to the greenway trail was required in conjunction
21 with approval of the dock because it is a permitted,
22 river-related greenway use.

23 PCC 33.77.035(A) states that the city "may adopt an
24 exception to Goal 15 when the proposed use * * * has
25 significant public benefit * * * ." PCC 33.77.150(A)(3) states
26 the following:

1 "(A) The siting of uses which are neither river
2 dependent nor river related within the Greenway
3 Setback shall require a Statewide Planning Goal 15
4 Exception as provided in 33.77.035 and 33.77.050 and
5 may be approved where reasons demonstrate the
6 following:

7 " * * * * *

8 "(3) The use will provide a significant public
9 benefit * * * "

10 Both of the above-quoted provisions allow the city to
11 consider the entire use proposed to be located within the
12 greenway setback area in determining whether a significant
13 public benefit is provided. In this case, that proposed use
14 includes the observation deck and pathway connecting to the
15 greenway trail, as well as the restaurant deck addition. The
16 city was not required to determine that the restaurant deck
17 addition alone would provide a significant public benefit.

18 We also disagree with petitioner's claim that the city
19 cannot consider the provision of public access to the
20 observation deck a "significant public benefit" if such access
21 could have been required as a condition of approval of some
22 other development. Nothing in the "significant public benefit"
23 provisions of PCC 33.77.035(A) or 33.77.150(a)(3) requires the
24 city to rule out all other means of obtaining the proposed
25 significant public benefit before approving an exception to
26 Goal 15.

27 In any case, the public dock access proposed as part of the
28 original floating dock proposal differed significantly from
29 that approved as part of the Goal 15 exception in that the

1 public would have had to pass through restaurant facilities to
2 reach the dock and would have had access only during restaurant
3 hours. Furthermore, petitioner has cited no authority in the
4 code allowing the city to require provision of public access as
5 a condition of approving the floating dock.⁵

6 The city's findings with regard to public benefits of the
7 proposed use include the following:

8 "The proposed deck [addition] would serve the public
9 interest by allowing an existing business to expand
10 its seating capacity, thus contributing to economic
11 development. It would also provide additional
12 opportunities for people to use and enjoy the river.
13 It should be noted that portions of the proposed deck
14 area will be freely open to the public whereas no
15 previous general public access has been possible. The
16 proposal is desirable to the public interest because
17 it contributes to economic development without
18 detriment to the natural or built environments."
19 Record 15.

20 " * * * the proposal does promote one aspect of the
21 Greenway: accessibility. In addition to construction
22 of the deck addition, the proposal calls for
23 construction of a public viewpoint that will be
24 separate from the private deck area. The observation
25 point will be accessible to the Greenway trail which
26 is located to the west of the existing building.
Although the public viewpoint represents only a small
improvement in the Greenway values of the site, it is
an improvement over existing current conditions which
do not offer any public access. The viewpoint will
provide the public with an observation point that will
afford views of Ross Island and, in particular, the
heron rookery located on the island." Record 16.

27 The finding expressly adopted to address the "significant
28 public benefit" standard states:

29 "The proposed deck [addition] will provide an
30 observation point that will be connected with the
31 existing Greenway trail located to the west of the
32 existing restaurant. Currently, the area between the
33 top of the bank and the existing structures is not

1 accessible to the public. The proposal will make that
2 area accessible and will afford the public views of
3 Ross Island to the east. The vantage point will be
especially beneficial in affording views of the heron
rookery located on the island." Record 19-20.

4 The above-quoted findings are sufficient to demonstrate
5 that the proposed use will produce a significant public
6 benefit. The statement in the findings at Record 16 that the
7 improvement in the greenway values of the site will be "small"
8 does not mean that the public benefit of the improvement cannot
9 be significant. The city has explained in its findings why the
10 present lack of greenway values on this site means that even a
11 small improvement is a significant public benefit.

12 This subassignment of error is denied.

13 C. "Exceptional" Nature of Goal Exception

14 Petitioner argues that the city's action does not comply
15 with the criterion that a goal exception must be "exceptional,"
16 citing 1000 Friends of Oregon v. LCDC, 69 Or App 717, 731, 688
17 P2d 103 (1984). Petitioner implies that this requirement that
18 an exception be "exceptional" comes from ORS 197.732 and Goal 2
19 and, because city code exception criteria incorporate the
20 requirements of statute and goal, the same "threshold for
21 exception approvals is required" under the code. Petition for
22 Review 15. According to petitioner, there is nothing
23 exceptional about this site or the proposed use.

24 1000 Friends of Oregon v. LCDC, supra, was an appeal of a
25 Land Conservation and Development Commission (LCDC) order
26 acknowledging the comprehensive plan and land use regulations

1 of Jefferson County pursuant to ORS 197.251. In that case 1000
2 Friends had challenged 15 exceptions to Goal 3 (Agricultural
3 Lands) for areas surrounding the City of Madras urban growth
4 boundary (UGB). After exhaustively reviewing the challenges to
5 the county's justification for each of these exceptions, the
6 court concluded it was required to reverse LCDC's approval of
7 exceptions for all of the areas. In dicta providing guidance
8 to the county and LCDC on remand, the court stated:

9 " * * * For the county to justify built upon or
10 committed exceptions, it will have to focus on
11 precise, probably disconnected, areas rather than
12 attempting to ring the UGB with exception areas. * * *
13 Our review of these exceptions has been hampered by
14 the limited information the county provided, the lack
15 of an evidentiary record, LCDC's ambiguous approval of
16 the exceptions and the failure of both the county and
17 LCDC clearly to distinguish the information relevant
18 to the needs exception from that relevant to the
19 committed exceptions. The county and LCDC on remand
20 should keep in mind that an exception must be just
21 that -- exceptional." (Emphasis added.) 1000 Friends
22 of Oregon v. LCDC, supra.

23 We believe the court's final comment emphasized above was
24 further advice to the county and LCDC not to attempt to
25 surround the Madras UGB with exception areas. In our opinion,
26 this dictum was not intended to establish a separate criterion
for the approval of a goal exception. In this case, it is
sufficient if the city's adopted exception complies with the
relevant standards found in statute, goal, administrative rule
and city code.

This subassignment of error is denied.

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1 D. Irrevocable Commitment

2 Petitioner's entire argument on this point is as follows:

3 " * * * The site is not irrevocably committed. There
4 is still some open space in the Greenway setback and
5 public access can be provided by the applicant's first
6 proposal, the dock." Petition for Review 15.

7 "Irrevocable commitment" is one of three alternative bases
8 for goal exceptions recognized and governed by statutory, goal,
9 administrative rule and city code requirements.⁶ See
10 ORS 197.732(1); Goal 2, Part II; OAR 660-04-020 through
11 660-04-028; PCC 33.77.035(A). Petitioner asserts that the
12 subject site is not irrevocably committed, but does not explain
13 how the city's determination of irrevocable commitment is
14 deficient.⁷ Without such an explanation from petitioner, we
15 are unable to sustain this subassignment of error.

16 This subassignment of error is denied.

17 The first assignment of error is denied.

18 SECOND ASSIGNMENT OF ERROR

19 "Respondent's finding that the deck extension with the
20 public viewpoint would provide a 'significant public
21 benefit' so as to allow an exception to Goal 15 is not
22 supported by substantial evidence in the whole record."

23 Petitioner argues that the city's essential finding that
24 the proposed use provides a significant public benefit (see
25 subassignment B of the first assignment of error, supra) is not
26 supported by substantial evidence in the whole record.
ORS 197.835(8)(a)(C). Petitioner contends that evidence it
submitted to the city (Record 38) demonstrates that the

1 proposed use will not produce a significant public benefit.
2 Petitioner argues that we must determine whether the city's
3 decision is reasonable in light of all the evidence in the
4 record, and the evidence it submitted so detracts from any
5 evidence supporting the city's decision as to render that
6 supporting evidence not substantial, citing Younger v. City of
7 Portland, 305 Or 346, 360, 752 P2d 262 (1988), Sane Orderly
8 Development v. Douglas County Bd Comm'rs, 2 Or LUBA 196, 206
9 (1981).

10 The city responds that "petitioner raises the same facts it
11 alleged in its earlier 'no significant public benefit'
12 arguments and the City, in denying this allegation, will rely
13 on its responses to that point throughout this brief."
14 Respondent's Brief 19.

15 When a substantial evidence challenge is made, we rely on
16 respondents to direct our attention to evidence in the record
17 that is sufficient to meet the challenge. City of Salem v.
18 Families for Responsible Govt, 64 Or App 238, 249, 668 P2d 395
19 (1983); Grindstaff v. Curry County, 15 Or LUBA 100, 109 (1986);
20 Bergstrom v. Klamath County, ___ Or LUBA ___ (LUBA No. 87-099,
21 February 25, 1988), slip op 12. In this case, rather than
22 providing us with specific citations to evidence in the record
23 in its response to the second assignment of error, respondent
24 has directed us to review "its responses to that point
25 throughout [its] brief." Respondent's Brief 19. In so doing,
26 respondent makes it difficult for both petitioner and the Board

1 to determine upon what evidence it relies and runs the risk
2 that we may overlook a citation in its brief to some relevant
3 evidence in the record.

4 We have reviewed the citations to the record found in the
5 sections of the city's response to the first assignment of
6 error entitled "the Proposed Deck Addition as Conditioned does
7 Provide a Public Benefit" and "the City's Decision to Allow the
8 Deck Addition Meets PCC 33.77.150(A)," at Respondent's Brief
9 10-15. The citations to the record in these sections are only
10 to findings of the city council and hearings officer.⁸ Thus,
11 these sections contain no citations to evidence in the
12 record.⁹ We conclude that respondent has not identified
13 evidence in the record sufficient to withstand petitioner's
14 challenge.

15 The second assignment of error is sustained.

16 The city's decision is remanded.

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FOOTNOTES

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On May 31, 1988, respondent City of Portland (city) issued an order approving a conditional use permit and greenway permit for the deck addition that is the subject of this appeal and also for an associated floating dock facility. Petitioner does not challenge the city's approval of these permits.

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The restaurant and deck are not considered to be river-dependent or river-related uses. The proposed deck extension, which would intrude into the greenway setback, therefore requires an exception to Goal 15.

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Petitioner's separate argument that the exception does not comply with the requirement of PCC 33.77.035(A) that the proposed use have significant public benefit is addressed in section B, infra.

4

If petitioner believes that the proposed development is inconsistent with paragraph F.3.b(1) of Goal 15, petitioner should have challenged the compliance of the approved greenway permit with the acknowledged PCC provisions adopted to implement paragraph F.3.b(1).

5

Petitioner claims that PCC 33.77.121 and 33.77.122 authorize the city to require dedication and construction of a pathway connecting the existing greenway trail to the floating dock via the existing restaurant balcony and deck. PCC 33.77.121 provides for establishment of the official greenway trail and states that public access to that trail and the river shall be considered in the issuance of all greenway permits. However, we note that PCC 33.77.122 only authorizes the city to require an easement or dedication of right-of-way, and/or construction and landscaping for that official greenway trail as a condition of approval of any change or intensification of land use. We offer no opinion as to whether other PCC provisions might authorize the city to require a pathway connecting to the official trail as a condition of approving the floating dock.

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The other two alternative bases are "physical development" and "reasons."

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We note that, in addition to finding the subject site is irrevocably committed under PCC 33.77.035(A)(2) (Record 15-16), the city determined that the proposed exception meets the alternative requirements for a "reasons" goal exception under PCC 33.77.035(A)(3). Record 16-18. Petitioner did not challenge the city's alternative basis for approving the exception. Thus, even if we agreed with petitioner that the site is not irrevocably committed, that would not provide a sufficient basis for reversing or remanding the city's decision.

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In fact, in the city's entire response to the first assignment of error, the only references to evidence in the record are to evidence concerning existing conditions on the site and the proposed floating dock facility. Record 126, 217-218.

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We note that, at Respondent's Brief 14-15, the city states with regard to provision of a significant public benefit "the Record indicates," followed by a list of allegedly supportive facts. However, the city does not indicate where in the record this evidence may be found. We will not search the record for such evidence.