BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TONIA TWIGGER McCONNELL and TOM NEFF, Petitioners, vs. CITY OF WEST LINN, Respondent, and OTAK, INC., Intervenor-Respondent.	LUBA No. 88-111 FINAL OPINION AND ORDER

Appeal from the City of West Linn.

Tonia Twigger McConnell and Tom Neff, West Linn, filed the Petition for Review and argued on their own behalf.

Phillip E. Grillo, Portland, filed a response brief on behalf of respondent City of West Linn. With him on the brief was O'Donnell, Ramis, Elliott & Crew.

Allen L. Johnson, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Johnson & Kloos.

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

REMANDED * 03/13/89

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

*Date of issue changed to reflect accurate filing date.

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REMANDED 03/09/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal City of West Linn order ZC-88-04/ DR-88-18, which applies a Planned Unit Development (PUD) overlay zone to a 3.89 acre site and grants design review approval for a 66-unit apartment complex on the site.

MOTION TO INTERVENE

OTAK, Inc. (OTAK), and Group 2 Investors, an Oregon general partnership (Group 2), move to intervene on the side of respondent City of West Linn (city) in this appeal. The motion alleges that OTAK is the applicant for the zone change and design review which are the subjects of the appealed order. The motion also alleges that Group 2 is the owner of the property upon which the proposed apartment complex is to be built.

Petitioners object to intervention by OTAK on the ground that it represents Group 2, which petitioners contend should not be granted intervenor status. Petitioners object to intervention by Group 2 on the grounds that it is Group 3 Investors (Group 3), rather than Group 2, which is the owner of the subject property, and there is no evidence that the interested parties of Group 2 and Group 3 are the same.[1]

ORS 197.830(5)(b) and OAR 661-10-050(1) provide that the applicant who initiated the appealed action and any person who appeared before the local government may intervene in a review proceeding before this Board. OAR 661-10-050(2)(b) requires a

motion to intervene to state the facts which show the party is entitled to intervene.

In this case, the motion to intervene states that OTAK was the applicant for the land use actions which are the subject of the appealed order. This allegation is not contested by petitioners and is sufficient to establish OTAK's right to intervene. The motion does not, however, state that Group 2 was the applicant or appeared in the county proceeding. Therefore, the motion does not state facts which show that Group 2 is entitled to intervene. Ownership of property which is the subject of a LUBA appeal proceeding is not relevant to the standards for intervention set out in ORS 197.830(5)(b) and OAR 661-10-050(1).

The motion to intervene is granted with respect to OTAK and denied with respect to Group 2.

MOTION TO DISMISS

Intervenor-respondent OTAK (intervenor) argues that petitioner Neff's appeal should be dismissed because Neff failed to exhaust the administrative remedies available to him before the city, as required by ORS 197.825(2)(a).[2] According to intervenor, the initial decision in the appealed matter was made by the city planning commission, and Neff failed to seek review of that decision by the city council. West Linn Community Development Code (CDC) 99.240.B.1.[3] Intervenor argues that ORS 197.825(2)(a) requires that Neff be a party to an appeal of the planning commission's decision to

the city council, and is not satisfied by Neff's appearance as a witness before the city council.

Petitioners concede that, unlike petitioner McConnell, petitioner Neff did not sign the notice of review appealing the planning commission's decision to the city council. However, petitioners point out that petitioner Neff appeared before the city council and spoke in favor of the appeal. Record 11. Petitioners argue this appearance is sufficient to satisfy the requirements of ORS 197.825(2)(a).

ORS 197.825(2)(a) conditions our jurisdiction over an appeal on the exhaustion of all remedies available by right at the local government level. Under ORS 197.825(2)(a), review by this Board is authorized only after every opportunity provided at the local level for resolving land use disputes has been pursued. Lyke v. Lane County, 70 Or App 82, 85, 688 P2d 411 (1984). Both the Court of Appeals and this Board have stated that the legislative intent underlying ORS 197.825(2)(a) is that land use issues should be resolved by the responsible local government bodies whenever possible. Portland Audubon Society v. Clackamas Co., 77 Or App 277, 280-281, 712 P2d 839 (1984); Lyke v. Lane County, supra; Bright v. City of Yachats, ___ Or LUBA ___ (LUBA No. 87-048, October 13, 1987); Lyke v. Lane County, 11 Or LUBA 117, 120 (1984).

The Court of Appeals has also held that ORS 197.825(2)(a) does not require pursuit of local remedies when such pursuit is redundant and unlikely to serve any purpose. Colwell v.

Washington Co., 79 Or App 82, 91, 718 P2d 747, rev den 301 Or 338 (1986). Thus, in Colwell v. Washington Co., the court concluded ORS 197.825(2)(a) does not require petitioners to appeal a planning commission decision to the county board of commissioners when other statutory provisions require the board of commissioners to make the final decision on the subject matter irrespective of an appeal being filed. Similarly, in Portland Audubon Society v. Clackamas Co., 77 Or App at 281, the court concluded that ORS 197.825(2)(a) requires petitioners to go once to the highest local decision-maker available, but does not require petitioners to seek rehearing by that decision-maker. The court distinguished Colwell v. Washington Co. and Portland Audubon Society v. Clackamas Co. from Lyke v. Lane County, supra, "where the petitioners chose to bypass the county governing body and appeal directly to LUBA * * * ." Colwell v. Washington Co., 79 Or App at 92.

In a case where the petitioners did not appeal a planning commission decision to the city council, and it was unclear whether the planning commission was authorized to make a final decision, but the city council nevertheless heard argument and made the final decision on the merits of the proposal, we concluded petitioners had not failed to exhaust the available remedies at the local level. Alonis v. City of Garibaldi, 15 Or LUBA 82, 83 (1986). Also, we held that where a petitioner did not appear before the planning commission or appeal the planning commission's decision, but the city council reviewed

the planning commission's decision de novo, the petitioner's "single appearance * * * before the city council (the ultimate decisionmaker) satisfies the exhaustion requirement of ORS 197.825(2)(a)." Bright v. City of Yachats, supra, slip op 9.

The opinions of the Court of Appeals and this Board referred to above reflect an interpretation of the overriding purpose and intent of the exhaustion requirement of ORS 197.825(2)(a) to be that the final land use decision should be made by the highest level local decision-making body available before an appeal to this Board is pursued. That a petitioner may not himself have filed an appeal of a lower level local decision to require review by the higher level local decision-maker is not critical, so long as review by the higher authority occurs.[4] In this case, the final decision was made by the highest level local decision-maker possible, the city council, and petitioner Neff appeared before the city council. Therefore, petitioner Neff's appeal satisfies the exhaustion requirements of ORS 197.825(2)(a).

The motion to dismiss the appeal of petitioner Neff is denied.

FACTS

The subject property is composed of two contiguous parcels. The northern parcel, 3.03 acres, is zoned Single Family and Multi-Family Residential (R-2.1). The southern parcel, 0.86 acres, is zoned Single-Family Residential Detached

(R-10). State Highway 43 adjoins the property to the northeast. The property is adjoined, on the remaining sides, by other property zoned R-2.1 or R-10. The western portion of the property contains steep slopes in excess of 25%.

Intervenor requested application of a PUD overlay zone and design review approval for a 68-unit apartment complex. The planning commission approved the application of the PUD overlay and granted design review approval for a 66-unit apartment complex. The planning commission's decision was appealed to the city council by petitioner McConnell and the Greater Robinwood Neighborhood Association. The city council denied the appeal and approved application of the PUD zone and design review for a 66-unit apartment complex, subject to certain conditions. This appeal followed.

PRELIMINARY ISSUE

Intervenor and the city (respondents) claim that under ORS 197.762,[5] petitioners are precluded from raising in this appeal the issues addressed in their first through fourth and sixth assignments of error. Respondents argue petitioners failed to raise these issues in a proceeding before the city governing body which complied with the procedural requirements of ORS 197.762.

ORS 197.762 requires, for proposed developments entirely within urban growth boundaries (UGBs), that applicants and appellants raise issues of compliance with relevant criteria before the local governing body. The purpose of this

requirement is to insure that the governing body will have the opportunity to respond to and resolve such issues. ORS 197.762 accomplishes this by directing local governing bodies (1) to adopt a requirement that such issues be raised in their local appeal procedures; (2) to give written notice of this requirement and of the applicable criteria to applicants, appellants and others as required by law; and (3) to make a statement explaining this requirement to raise issues and describing the applicable criteria at the beginning of hearings on proposed developments within UGBs.

The written and oral notices required by the statute must include statements that failure to raise an issue or address a criterion precludes appeal based on that issue or criterion. ORS 197.762(1)(c)(D) and (2)(c). We have held that ORS 197.762 does not apply where the local governing body did not give the notice required by ORS 197.762(1)(c)(D) and (2)(c) that failure to raise an issue or address a criterion precludes appeal on that issue or criterion. City of Corvallis v. Benton County, ___ Or LUBA ___ (LUBA No. 87-115, March 21, 1988) slip op 6; see Cusma v. City of Oregon City, ___ Or LUBA ___ (LUBA No. 87-093; March 16, 1988) slip op 19.

In this case, respondents argue that the written notice required by ORS 197.762(1) was given in the published notice of the planning commission hearing. That notice included the following statement:

//

> "Failure to raise an issue in person or by letter precludes the raising of the issue at a subsequent time on appeal." Record 162.

Respondents also argue the oral notice required by ORS 197.762(2) was provided at the beginning of the planning commission hearing, in the following statement by the acting chairman of the planning commission:

> "For all those who wish to testify, please be aware that if you fail to raise an issue in person or by letter tonight you will be unable to raise that issue at any subsequent time of appeal." Record 55.

We cannot agree with respondents that these statements satisfied the notice requirements of ORS 197.762(1)(c)(D) and (2)(c). ORS 197.762 is specifically directed at proceedings before a local governing body. If its procedural requirements are complied with, it arguably precludes petitioners from raising issues before LUBA which they did not raise before the governing body. The written and oral notice required by ORS 197.762(1)(c)(D) must state that failure to raise an issue or criterion before the governing body precludes later appeal on that issue or criterion. The oral notice required by ORS 197.762(2) must be given at the commencement of the governing body's hearing.

The city notices cited by respondents do not satisfy these requirements. They state that failure to raise issues before the planning commission precludes later appeal on those issues. ORS 197.762 does not apply to proceedings before lower level local decision-making bodies, such as planning

commissions. It does not have the effect of precluding appellants from raising issues before a governing body which they did not raise before a planning commission. Furthermore, we are not aware of any CDC provision having such an effect.[6]

Thus, citizens receiving the city's written or oral notice concerning the necessity to raise issues at the planning commission hearing would mistakenly believe that if they failed to raise an issue before the planning commission, they could not appeal on that issue to the city council. Perhaps more importantly, someone appearing at the city council hearing who had missed the notices given concerning the planning commission hearing, would not be provided with the written or oral notices required by ORS 197.762.

Because the city did not give the notices required by ORS 197.762(1)(c)(D) and (2)(c), petitioners are not precluded from raising in this appeal issues which they did not raise before the city council.[7]

FIRST ASSIGNMENT OF ERROR

> "The City erred by allowing 66 units on the property. The City misapplied [CDC] Section 33.040(B), and made a decision not supported by substantial evidence in the record."

Subsection B of CDC 33.040 ("Computation of Net Acres") provides in relevant part:

> "B. Net acres, for land to be developed with other than detached single family dwellings, is computed by subtracting from the gross acres the following:

" * * * * *

"2. An allocation of twenty percent (20%) for public facilities or when a tentative plat has been developed, the total land area allocated for public facilities."

" * * * * *

Petitioners contend that the city applied the above quoted provision incorrectly in determining the net acreage and, consequently, the allowable number of multi-family units, on the subject site. Petitioners argue that under CDC 33.040.B.2, 20% of 3.89 acres (0.8 acres) should have been subtracted, rather than the 5% (0.2 acres) which was subtracted. Petitioners also argue that "public facilities," as used in CDC 33.040.B.2, include streets and sidewalks. Petitioners assert the city's findings establish that a total of 0.67 acres of the site will be used for streets and sidewalks. Thus, petitioners argue that, if the city deducted area allocated for public facilities based on a tentative plat, either (1) the city misinterpreted "public facilities" not to include streets and sidewalks, or (2) the city's finding that only 0.2 acres of the site will be used for public facilities is not supported by substantial evidence in the record.

Respondents argue that the proposed development qualifies under CDC 33.040.B.2 for calculation of decuction in acreage for public facilities based on a tentative plat, rather than by use of the across-the-board 20% reduction. Respondents argue the CDC requires submission of a tentative development plan as

part of an application for PUD approval, and intervenor's submittal included such a plan. Respondents also argue that the CDC distinguishes between public facilities and streets. Respondents further argue that the intervenor's use of 0.2 acres for public facilities in its net acreage calculation was reviewed and approved in two city staff reports which are in the record.

CDC 33.040.B.2 allows the total land area of a proposed multi-family residential development allocated for public facilities to be determined from a "tentative plat," when one has been developed. We find no reference to a "tentative plat" in CDC Chapter 24 ("Planned Unit Development"). However, approval of a PUD under that chapter does require submittal of a detailed "tentative development plan," including a site analysis, site plan, grading plan, landscape plan, and sign plan. CDC 24.140.C.1.[8] We believe the city can reasonably interpret "tentative plat" in CDC 33.040.B.2 to include a "tentative development plan" submitted under CDC 24.140.C.1. Because the record contains such a plan for the proposed development (Record 83-91), the city is entitled to base its calculation of the area allocated for public facilities on this plan, rather than on a presumed allocation of 20%.

The city's findings state that 0.2 acres of the site is allocated for public facilities.[9] Record 32. The findings also state that 27,250 square feet (0.63 acres) are allocated for "interior driveways" and 1800 square feet (0.04) acres for

"pedestrian walkways." Record 34. If, as petitioners argue, CDC 33.040.B.2 requires the land allocated for interior driveways to be included in the calculation of area devoted to public facilities, the city misinterpreted CDC 33.040.B.2 in finding that only 0.2 acres are allocated to public facilities. However, we do not agree with petitioners that "public facilities" in CDC 33.040.B.2 includes the interior driveways referred to in the city's finding.

The CDC defines "street" as:

> "A public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts or [sic] land, and the placement of utilities and including the terms, "road", "highway", "lane", "avenue", "alley", "place", "court", "way", "circle", "drive", or similar designations." CDC 2.030.

Private interior drives such as those planned for the proposed development are included in this definition of "street."[10] The CDC does not define "public facilities." However, under CDC 24.140.C.3.a, the required tentative development plan must be accompanied by the following:

> "A table showing the total number of acres, the distribution by use, the percentage designated for each dwelling type and for non-residential uses such as off-street parking, streets, parks, schools, open space, recreation area, commercial uses and public facilities." (Emphasis added.)

This provision indicates for purposes of tentative development plan preparation and PUD approval, streets are considered by the CDC to be a use separate from public facilities. Thus, the city did not err in interpreting CDC 33.040.B.2.

The evidence in the record to which we are cited in support of the finding that 0.2 acres of the proposed development are allocated to public facilities is the applicant's submittal and two city planning department staff reports.[11] Record 32, 76, 102. Substantial evidence is evidence a reasonable person would accept as sufficient to support the city's decision. Younger v. City of Portland, 306 Or 346, 360, 752 P2d 262 (1988). As we have stated in previous cases, a city is entitled to rely on its staff to furnish it with factual information. Grover's Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 64 (1984); Meyer v. City of Portland, 7 Or LUBA 184 (1983), aff'd 67 Or App 274, 678 P2d 741 (1984). In the absence of some further explanation by petitioners as to why the staff's calculation of 0.2 acres is in error, we believe the staff reports are substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City erred because they [sic] failed to address applicable comprehensive plan policies and provisions."

Petitioners contend that the city incorrectly concluded that its comprehensive plan does not apply to approval of the proposed development. Petitioners argue that ORS 197.175(2)(D) requires the city's land use decisions to comply with both its zoning ordinance and comprehensive plan. Petitioners argue there are numerous applicable plan policies which are not addressed in the city's findings.[12] Petitioners further

argue there was evidence in the record that should have led to consideration of these policies.

Respondents argue that CDC Chapter 24 ("Planned Unit Development") establishes a detailed and comprehensive set of standards for review of PUD applications. According to respondents, CDC 24.180 sets out extensive PUD approval standards, which include the provisions of nine other chapters of the CDC (CDC 24.180.B) and nine individual approval standards covering subjects such as relationship to natural and physical environment, buffering, privacy and noise, private outdoor areas, shared or private recreation areas, landscaping and open space, access and circulation, public transit and signs. Respondents argue that nowhere in the CDC is it suggested that comprehensive plan policies are applicable as independent PUD approval standards.

The city's decision clearly indicates the city believed that approval standards governing its decisions on PUD approval and design review were to be found only in the CDC, not in the comprehensive plan:

> " * * * The City Attorney's statement was correct in that the approval criteria for Planned Unit Developments, which is [sic] contained in Section 24.180 of the Development Code, does [sic] not specifically require review of the application within the context of the Comprehensive Plan. The City Attorney did, however, emphasize the point that since the Development Code is born out of the Comprehensive Plan and is the means by which we implement the Plan, then conformance with the Plan is implicit when we conform with the Development Code." Record 27.

Furthermore, the city's decision contains no findings

addressing compliance with its comprehensive plan.

We agree with respondents that CDC Chapter 24 establishes detailed and comprehensive procedures and standards for review of PUD applications. We also agree that there are detailed standards for PUD approval set out in CDC 24.180. However, CDC 24.020 ("Administration and Approval Process") contains the following relevant provision:

> "C. Action on the [PUD] application shall be as provided by the Administrative Procedures Chapter, 99.06(B) and the following:
>
> "1. Unless otherwise provided by this code, the Planning Commission shall hold a public hearing and approve, approve with conditions or deny the application based on findings related to the applicable criteria setforth [sic] in Section 99.110 and Section 24.180. (Emphasis added.)
>
> " * * * * * * "

CDC 99.110 ("The Decision Making Process of the Approval Authority") provides in relevant part:

> "A. The decision shall be based on proof by the applicant that the application fully complies with:
>
> "1. The applicable Comprehensive Plan policies and map designation;
>
> "2. The acknowledged West Linn Comprehensive Plan and ordinances; and
>
> "3. The applicable standards of any provision of this Code or other applicable implementing ordinance." (Emphasis added.)

Reading CDC 24.020, 24.180 and 99.110 together, it is clear that a PUD application is required to comply with applicable policies of the comprehensive plan. In determining that the

plan was not applicable to its decision, the city improperly construed the applicable law.

The second assignment of error is sustained.[13]

THIRD ASSIGNMENT OF ERROR

> "The City erred by determining compliance with [CDC] Section 33.060(A)(2), and the City's decision is not supported by substantial evidence in the record."

CDC 33.060.A.2 provides:

> "A. If there is no intervening street or natural topographic barrier between the PUD site and the adjoining property and the residential density is transferred on the site, the following limitations shall apply:
>
> " * * * * *
>
> "2. The onsite density within 100 feet of each property line shall not exceed the density on the adjoining property by more than twenty-five [sic] (25%)."

Petitioners contend the approved development includes nine units on the northwest edge of the property, which are within 100 feet of the property line, and adjoin land zoned R-10. Petitioners argue that the approved density along this property line exceeds the density allowed under CDC 33.060.A.2 by 2 to 7.47 units per acre. Petitioners argue the findings are inadequate because they do not demonstrate that the density of development along the northwest property line complies with CDC 33.060.A.2.

Respondents argue the following finding is unchallenged by petitioners and adequately explains the basis for the city's conclusion that the density along the northwest property line

complies with CDC 33.060.A.2:

> "No transition was needed on the north property line since a street serves as a buffer or transition area in conformance with [CDC[33.060(A)." Record 1.

According to respondents, the presence of an intervening street between a PUD and adjoining property excuses the application of the density limitation of CDC 33.060.A.2. Respondents argue the PUD site plan shows an interior access drive near the northwest property line. Respondents further argue that such an interior access drive meets the CDC 2.030 definition of "street" (quoted in full, supra) as "a public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts of land * * *." (Emphasis added.)[14]

We found under the first assignment of error that the interior drives of the PUD meet the CDC's definition of "street." The site plan shows that the interior drive along the northwest property line separates the proposed multi-family dwellings on the PUD site from the adjoining R-10 zoned property. Record 86. We believe it is reasonable and correct for the city to interpret "intervening street * * * between the PUD site and the adjoining property" in CDC 33.060.A as including the subject access drive and, therefore, to conclude that the transition density limitation imposed by CDC 33.060.A.2 does not apply. The city finding, quoted supra, adequately explains the basis for its determination of compliance with CDC 33.060.A with regard to the area along the

northwest property line, and is supported by substantial evidence in the site plan.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The City's decision violates [CDC] Section 24.180(C)(2), and is not supported by substantial evidence."

CDC 24.180.C.2 sets out the following standard for PUD approval:

> "The structures shall not be located in areas subject to slumping and sliding."

Petitioners point out that the record contains a written report by registered professional engineer Theodore Kyle stating the following with regard to compliance of the proposed development with CDC 24.180.C.2:

> "The building running along the 300-foot contour line will be located over fill that will be subject to slumping. The center structure located near the highway will be constructed over a fill that will plug the existing driveway. This fill could settle. The steep slope created by the cut along the west side of the development could slide in the future, especially when the ground cover has been removed during construction. This newly created slope could be susceptible to sliding." Record 140.

Petitioners argue the city's findings are inadequate because they do not determine that the proposed structures are not located on sites subject to sliding or slumping. Petitioners argue this determination must be made in the appealed decision, and cannot be postponed to a later date.

The decision contains the following findings relevant to

compliance with CDC 24.180.C.2:

> "The potential hazard areas of steep slopes have been left undeveloped and set aside as open space." Record 79.
>
> " * * * The Uniform Building Code allows the City's Chief Building Official to require that plans be prepared and stamped by a certified engineer to demonstrate that the site, foundation and/or structure is adequate. That provision will be made redundant, of course, by the developer's submittal of building and driveway plans which will be stamped by a certified engineer." Record 35.

The above-quoted findings do not state that the proposed PUD structures are not located in areas subject to slumping and sliding, as is required by CDC 24.180.C.2. Furthermore, the findings do not address the specific contentions by engineer Kyle that the "building running along the 300-foot contour line" and the "center structure near the highway" will be located over fill material subject to slumping.

The city must address in its findings relevant issues which are raised by evidence presented to it in its proceedings. City of Wood Village v. Portland Metro Area LGBC, 48 Or App 79, 87, 616 P2d 528 (1980); Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980); Loos v. Columbia County, ___ Or LUBA ___ (LUBA No. 87-103, April 1, 1988) slip op 17. We agree with petitioners that the city's findings are inadequate to demonstrate compliance with CDC 24.180.C.2.

The fourth assignment of error is sustained.

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FIFTH ASSIGNMENT OF ERROR

"The City erred in their [sic] decision that the development complies with [CDC] Section 24.180(G)(1). The City's decision is not supported by substantial evidence."

CDC 24.180.G.1 provides in relevant part:

"G. Shared or Private Recreation Areas.

"1. In addition to the requirements of [subsection E and F for private outdoor areas] usable recreation space shall be provided in residential developments for each unit or for the shared and common use of all the residents in the following amounts:

"a. Studio units up to and including two bedroom units; 200 square feet per unit.

" * * * * * * "

The city's findings relevant to compliance with CDC 24.180.G.1 state:

"The shared or private recreation area requirements are satisfied by the provision of the recreation building, the pool and the large acreage set aside for open space." Record 79.

" * * * [CDC 24.180.G.1] requires 200 square feet per unit (studio - two-bedroom units). With 66 units, the requirement would be 13,200 square feet. That amount can be satisfied by the large open area around and including the swimming pool. The square footage is approximately 14,200." Record 36.

Petitioners accept the city's determination that CDC 24.180.G.1 requires the proposed 66-unit development to include 13,200 square feet of shared or private recreation areas. However, petitioners argue the city's finding that the large open area around and including the proposed swimming pool contains approximately 14,200 square feet is not supported by

substantial evidence. Petitioners claim a mathematical calculation of the recreation space located in and around the pool and recreation building, based on the site plan, shows that the recreation space provided is between 2300 and 6600 square feet less than that required by CDC 24.180.G.1.

Respondents argue that the challenged finding is supported by the site plan for the PUD. They also assert that the first finding quoted above relies on other areas set aside for open space, in addition to the area around the swimming pool. Respondents argue that under CDC 24.180.G.2,[15] other open space areas, such as outside deck space on units above ground floor, qualifies as shared or private recreation space. We understand respondents to argue that even if the 14,200 square feet figure for the open space area around the pool is too high, there is sufficient other open space to ensure that the 13,200 square feet requirement of CDC 24.180.G.1 is satisfied.

The city planning department staff reports are evidence that (1) the open space area around and including the pool is 14,200 square feet; and (2) the recreation building, pool and area set aside for open space total at least 13,200 square feet in area. Record 36, 79. Petitioners do not identify any contrary evidence in the record. Rather, they ask us either to rely on their calculation of the size of the open space area around the pool, which is found in their brief rather than in the record, or to perform an independent calculation of the size of the open space area around and including the pool. We

decline to do so. Our review is confined to the record of the city proceeding. ORS 197.830(11)(a).

As we said under the first assignment of error, a city is entitled to rely on its staff to furnish it with factual information. Grover's Beaver Electric Plumbing v. Klamath Falls, supra; Meyer v. City of Portland, supra. We conclude the uncontroverted statements in the planning staff reports constitute substantial evidence in the record supporting the city's determination of compliance with CDC 24.180.G.1.[16]

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The City erred in its finding that the proposed development complies with [CDC] Section 24.120(C), and it's [sic] decision is not supported by substantial evidence."

Subsection C of CDC 24.120 ("Applicability of the Base Zone Provisions") provides:

> "Building height. The building height provisions shall apply."

The northern 3.03 acres of the site are zoned R-2.1. Record 84. The R-2.1 zoning district contains the following building height provision:

> "The maximum building height shall be:
>
> " * * * * *
>
> "b. Three and one-half stories or 45 feet for a garden apartment - medium rise unit." CDC 16.070.6.

The southern 0.86 acres of the site are zoned R-10. Id. The R-10 zoning district contains the following building height

provision:

> "The maximum building height shall be two and one-half stories or 35 feet except for steeply sloped lots in which case the provisions of Section 41.000 shall apply." CDC 11.070.6.

Petitioners argue that although muti-family dwellings may be built in an R-10 zone through application of a PUD overlay district, under CDC 24.120.C, the height limitation of the underlying R-10 zone still applies. Petitioners further argue that the city erred in approving a structure to be located on the R-10 portion of the site which does not comply with the height limitation of the R-10 zone.

Respondents point out that under CDC 24.100.A.1.a, application of the PUD overlay zone allows multi-family dwellings in the R-10 zone where other applicable standards are met. Respondents argue that this provision conflicts with the requirement of CDC 24.120.C that the building height limitation of the base zone apply. Respondents assert the city council resolved this conflict with the following finding:

> " * * * Since Planned Unit Developments allow multi-family housing and multi-family housing can go to a height of 3 1/2 stories or 45 feet, the proposal was considered to be in conformance with the code." Record 33.

Respondents argue the city's interpretation of these CDC provisions is reasonable and should be upheld.

We do not agree with respondents that there is a conflict between CDC 24.120.C and 24.100.A.1. The latter provides that if the PUD overlay is applied to the R-10 zone:

"In addition to the uses allowed outright in the underlying zone the following uses shall be allowed outright where all other applicable standards are met.

"a. * * * multiple family housing.

" * * * * * * " (Emphasis added.)

CDC 24.120 ("Applicability of the Base Zone Provisions") identifies some of the "other applicable standards" referred to in CDC 24.100.A.1. They include the building height provision of the underlying zone. CDC 24.120.C. Thus, although multi-family housing is permitted in the R-10 zone if a PUD overlay is applied, it must comply with the height limitaion of the R-10 zone.

In this case the site plan shows that Building A will be located on the R-10 zoned portion of the site. Record 86. The "Front Elevation" plan for Building A shows that it is three stories and has a height of "36' +/-." Record 87. The city does not explain why such a structure complies with the building height limitation applicable in the R-10 zone, and we must conclude that location of this building in the R-10 zone violates that district's building height provision.[17]

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

"The City's decision violates [CDC] Section 24.190, and is not supported by substantial evidence in the record."

A "site analysis" is part of the tentative development plan required for PUD approval. CDC 24.140.C.1.a. CDC 24.190.A.2 requires the site analysis to include:

" * * * a drawing at a suitable scale (in order of preference, 1" = 100' to 1" = 200') which shows:

" * * * * *

"h. The location of trees having a 6" caliper at 5 feet and where the site is heavily wooded, an aerial photograph at the same scale as the site analysis may be submitted and only those trees that will be affected by the proposed development need to be sited accurately."

Relevant PUD approval standards of CDC 24.180.C provide:

"1. The streets, buildings and other site elements shall be designed and located to preserve the existing trees * * * to the greatest degree possible.

" * * * * *

"5. Trees having a six (6) inch caliper at five (5) feet in height, shall be saved, where possible."

Findings concerning compliance with these standards provide:

"By clustering development the maximum retention of trees and vegetation is acheived. * * * " Record 79.

"All trees with a six-inch caliper at five feet in height shall be saved where possible." Id.

"[CDC 24.190.A.2.h] requires the submittal by the applicant to show the location of individual trees on the site plan or where the site is heavily treed, an aerial photograph may be submitted. The applicant submitted an aerial photograph in their [sic] application. " Record 32.

Petitioners assert there is no evidence in the record regarding the location of trees of 6" caliper on the subject property. Petitioners argue that under CDC 24.180.C.1, the city was required to rely on the location of these trees "as part of [its] decision-making criteria." Petitioners further argue that without establishing the location of "the five large

maple, fir and alder trees at the front of the property, and the oak grove at the back of the property," the city could not apply its approval standards. Petition for Review 12.

Respondents assert the applicant submitted an aerial photograph at the same scale as the site plan. Record 83 and 86. Respondents concede that 6" caliper trees were not sited accurately on these documents. However, respondents argue CDC 24.190.a.2.h was satisfied because a comparison of these two documents "shows generally the trees that will be removed by the development." Intervenor-Respondent's Brief 29. Respondents also argue, in the alternative, that failure to site 6" caliper trees on these documents was a procedural error, and claim petitioners have not shown prejudice to their substantial rights, as required by ORS 197.835(8)(a)(B).

Respondents further argue that any lack of required information on tree location is harmless because the decision is supported by adequate findings on approval criteria that make preservation of trees a factor. In particular, respondents argue CDC 24.180.C.5 does not require that all 6" caliper trees on the subject property be located, just that they be saved where possible. Respondents argue the finding on this criterion at Record 79 establishes this will be done.[18]

We agree with respondents that where a PUD site is heavily wooded, CDC 24.190.A.2.h allows an applicant to submit an aerial photograph instead of a drawing. However, such a photograph is required by this provision to indicate the

location of trees having a 6" inch caliper which would be affected by the proposed development. The aerial photograph submitted by the applicant in this case does not do so.

We have held that omission of required information from an application is harmless procedural error if the required information is located elsewhere in the record. Dougherty v. Tillamook County, 12 Or LUBA 20, 24 (1984); Families for Responsible Govt. v. Marion County, 6 Or LUBA 254, 277, rev on other grounds 65 Or App 8, 670 P2d 615 (1983). However, if the required information is not available elsewhere in the record, and is necessary for a determination of compliance with applicable approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. Hopper v. Clackamas County, ___ Or LUBA ___ (LUBA No. 87-007, May 22, 1987), slip op 7; Hershberger v. Clackamas County, ___ Or LUBA ___ (LUBA No. 87-008, May 1, 1987), slip op 10.

We have not been directed to any drawing, photograph or other document in the record which establishes the location of 6" caliper trees on this site. Knowledge of the location of 6" caliper trees on the site is required for the city to determine whether the tentative development plan for the proposed PUD is designed to preserve such trees as far as possible, as required by CDC 24.180.C.5. The omission of the information on the location of these trees, therefore, is not harmless error.

The seventh assignment of error is sustained.

The city's decision is remanded.

FOOTNOTES

[1] Petitioners attached evidence not in the record to their response to the motion to intervene, in support of their contention that Group 3 is the actual owner of the subject property. Because our ruling on the motion to intervene is based on other grounds, we need not and do not consider this extra-record evidence.

[2] Intervenor also moved to dismiss the appeal of petitioner Neff for failure to file a timely petition for review. However, intervenor withdrew this ground for dismissal at oral argument.

[3] CDC 99.240.B.1 provides:

"Any decision made by the Commission under Section 99.060(B) may be reviewed by the Council by:

> "1. The filing of a Notice of Review by any party to the decision within fourteen (14) days of the final decision; * * * "

[4] There are instances when it would obviously make no sense to require that a petitioner himself have filed an appeal to a higher level local decision-maker, such as when the decision of the lower level decision-maker was favorable to the petitioner, or when the higher level authority can and does review the decision on its own motion.

[5] ORS 197.762 provides as follows:

"The following shall apply to land use hearings on applications for development of property entirely within an urban growth boundary to be conducted by a local governing body:

"(1) An appeal procedure shall:

"(a) Require an applicant or appellant to raise any issue before the local governing body with sufficient

specificity so as to have afforded the governing body, and applicant, if appropriate, an adequate opportunity to respond to and resolve each issue.

"(b) Provide notice of the provisions of this section to:

"(A) The applicant; and

"(B) Other persons as otherwise provided by law.

"(c) The notice shall:

"(A) Describe in general terms the applicable criteria from the ordinance and the plan known to apply to the application at issue;

"(B) Set forth the street address or other easily understood geographical reference to the subject property;

"(C) State the date, time and location of the hearing;

"(D) State that failure to raise an issue in person or by letter precludes appeal and that failure to specify to which criterion the comment is directed precludes appeal based on that criterion; and

"(E) Be mailed at least 10 days before the hearing or administrative decision on the application.

"(2) At the commencement of a hearing, a statement shall be made to those in attendance that:

"(a) Describes the applicable substantive criteria;

"(b) Testimony and evidence must be directed toward the criteria described in paragraph (a) of this subsection; and

"(c) Failure to address a criterion precludes appeal based on that criterion."

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[6] CDC 99.240.B.1 provides that a decision by the planning commission may be reviewed by the city council upon the filing of a notice of review by any party to the decision. CDC 99.140 states that any person shall be considered a party for the purpose of having standing to appeal a planning commission decision if he or she appeared before the planning commission

either orally or in writing or, where testimony would have been repetitious, signed the sign-in sheet provided at the hearing. Neither of these sections says anything about any limitation on the issues a party may raise in an appeal to the city council. Furthermore, CDC 99.280 ("Type of Appeal or Review Hearing & Scope of Review") says only that appeals of planning commission decisions shall be limited to the grounds relied on in the notice of review. CDC 99.280.B.2. It says nothing about limiting such appeals to issues raised before the planning commission.

7

Therefore, we need not and do not determine whether the issues raised by petitioners in the first through fourth and sixth assignments of error were raised by them before the city council.

8

We note the CDC provisions dealing with subdivisions also make no mention of a "tentative plat," but do require submission of a "tentative plan" similar in detail required to the PUD "tentative development plan." CDC 87.030 and 87.040.

9

This finding is found in an October 11, 1988 city planning department staff report. That report, and an August 4, 1988 planning staff report, were incorporated by reference into the city council's findings. Record 2 and 4.

10

Petitioners characterize the interior drives of the proposed PUD as "streets" in their argument under this assignment of error. However, in oral argument regarding their third assignment of error, discussed infra, petitioners claimed the term "street," as used in the CDC, cannot be construed to include the interior drives of the proposed PUD. Petitioners base this argument on the city's "Street/Utility Design and Construction Standards" (Street Standards), adopted by Ordinance No. 1238. Petitioners argue the Street Standards provides that if there are inconsistencies between it and the CDC, the Street Standards controls. Petitioners further argue that under Street Standards 130.0103 the minimum right-of-way and paved width for a local street are 60 and 36 feet, respectively, and the minima for a cul-de-sac street are 50 and 32 feet. According to petitioners, the site plan shows the interior drives of the proposed PUD will be only 24 feet in width and, therefore, they cannot be considered "streets."

CDC 2.030 provides a broad, functional definition describing the types of surface routes which are considered a "street." In contrast, the definitions section in the Street Standards provides a structural definition of "street" as "[t]hat portion or portions of the right-of-way used for vehicular traffic, and includes areas two (2) feet behind the curb or two (2) feet beyond the edge of the shoulder." We do not find these definitions inconsistent, rather they are designed to serve different purposes. Furthermore, with regard to street width, the preemptive effect of the Street Standards document is that its standards for minimum allowable street width prevail over contrary provisions in CDC 93.030.B ("Right-of-way and Roadway Widths"). Thus, whereas Street Standards 130.0103 arguably provides a basis for claiming that the approved PUD interior drives do not meet applicable standards for street minimum widths (an issue not raised by petitioners), it does not provide a basis for claiming that these drives are not, in fact, "streets."

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[11] The only contrary evidence in the record cited by petitioners is the calculation of net acreage made by Theodore Kyle, an engineer residing in the vicinity of the proposed development. However, Kyle's deduction for public facilities was improperly based on an assumed figure of 20%, rather than on the tentative development plan. Record 150-151.

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[12] Petitioners specifically claim the following plan policies should have been addressed in the city's decision: Air Quality Specific Policies 1 and 4, Water Quality Specific Policy 10, Housing Specific Policy 4 and Fish and Wildlife Specific Policies 3, 4 and 5.

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[13] On remand, the city will have to determine which, if any, provisions of its plan establish regulatory criteria for PUD or design review approval, and will have to address those provisions in its findings. See, e.g., Miller v. City of Ashland, ___ Or LUBA ___ (LUBA No. 88-038, November 22, 1988), slip op 17-18, 23; Grindstaff v. Curry County, 15 Or LUBA 100, 103-104 (1986); McCoy v. Tillamook County, 14 Or LUBA 108, 110-111 (1985).

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[14] Respondents also argue that certain proposed amendments to CDC 33.060.A, if adopted, would "moot" this issue by removing

any doubt that the approved PUD is consistent with the density transition provisions of CDC 33.060.A. Intervenor attached a copy of these proposed amendments to its brief. Petitioners object to our consideration of these proposed amendments, and argue that possible future amendments to CDC 33.060.A are irrelevant to this appeal.

Since the proposed amendments to CDC 33.060.A have not been adopted by the city, they can have no bearing on this case. They are not standards applicable to the appealed decision. In addition, they are not in the record and are not legislative history of the adoption of the current CDC 33.060.A which could aid us in its interpretation. We, therefore, decline to consider the proposed amendments or respondents' arguments based thereon.

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15 CDC 24.180.G.2 provides in relevant part:

"The required recreation space may be provided as follows:

"a. It may be all outdoor space; or

"b. It may be part outdoor space and part indoor space; for example, an outdoor tennis court and indoor recreation room; and

"c. It may be all public or common space; or

"d. It may be part common space and part private; for example: it could be an outdoor tennis court, indoor recreation room and balconies on each unit; * * * "

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16 Of course, we would not conclude that a staff report or staff testimony constituted substantial evidence if it contained an obvious, material factual or mathematical error. However, if, as in this case, the error claimed to exist by petitioners is not obvious based on the record, we will not perform independent calculations which involve discretion and judgment or rely on calculations made by petitioners outside of the record.

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17 Respondents' arguments are based entirely on their contention that multi-family dwellings in the R-10 zone with a

PUD overlay need not comply with the height limitation of the R-10 zone. Respondents do not argue, in the alternative, that the multi-family structure proposed to be located in the R-10 zone does comply with that zone's building height limitation.

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[18] Respondents also point out the CDC contains a chapter 58, entitled "Tree Protection." Respondents contend that under this chapter, the applicant will need a tree cutting permit from the city in order to remove more than five trees from the site in a year. However, respondents do not explain how the existence of this requirement affects the application of CDC 24.180.C.5 and 24.190.A.2.h. We note that the approval criteria for tree cutting permits make no mention of preserving trees of 6" or greater caliper. CDC 58.080.