BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK MURPHEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 89-123
CITY OF ASHLAND,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
MIKE MAHAR,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Ashland.

Mark Murphey, Ashland, filed a petition for review and argued on his own behalf.

Ronald L. Salter, Ashland, John R. Hassen and Daniel C. Thorndike, Medford, filed a joint response brief on behalf of respondent and intervenor-respondent. With them on the brief was Blackhurst, Hornecker, Hassen & Thorndike and Ervin B. Hogan. Ronald Salter argued on behalf of respondent. John R. Hassen argued on behalf of intervenor-respondent.

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

REMANDED 05/16/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Ashland City Council, (city council) approving a conditional use permit and a preliminary subdivision plat for a 92 unit multifamily housing complex.

MOTION TO INTERVENE

Mike Mahar filed a motion to intervene in this appeal on the side of respondent. There is no objection to the motion and it is allowed.

FACTS

The subject property is unimproved, consists of 11.8 acres, and is zoned Employment District (E-1).[1] Approximately 6.5 acres are proposed for a 92 unit multifamily residential housing complex, a conditional use in the E-1 zone. Ashland Land Use Ordinance (LUO) 18.40.040(J) and (N).[2] The remaining 5.3 acres are

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[1]The Ashland Land Use Ordinance 18.40.010 provides:

> "The purpose of [the E-1] district is to provide for a variety of uses such as office, retail, or manufacturing in an aesthetic environment and having a minimal impact on surrounding uses."

[2]LUO 18.40.040(J) and (N) provide:

> "The following uses and their accessory uses are permitted when authorized in accordance with the chapter on Conditional Use Permits:
>
> "* * * * *

proposed to remain unimproved. The part of the property proposed for the multifamily housing project has slopes between 15% and 25%. Record 15, 172, 231. The balance of the property is relatively flat. To the east of the subject property is vacant land zoned single family residential; to the north of the subject property are single family residences; to the west are mixed commercial and industrial uses; and to the south is a railroad right of way and 28 acre parcel owned by Southern Pacific Railroad.

On December 14, 1988, the planning commission voted to deny a proposal to develop the entire 11.8 acre property with 160 multifamily residential units. Planning commissioner Kennedy abstained from voting on that proposal on the basis that she was the real estate agent who sold the property to the applicant. Supp. Record 14, 16.

On May 10, 1989, the planning commission by a 5-4 vote, including the vote of commissioner Kennedy, approved the subject application for a conditional use permit for 92 multifamily units on 6.5 acres. While the subject application concerns the same property and applicant as were involved in the December 14, 1988 planning commission

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"(J) Residential uses, subject to all the requirements of the R-2 district.

"* * * * *

"(N) Residential Uses, subject to the requirements of the R-3 zone."

action, it is different in scope from the earlier proposal. Petitioner objected to commissioner Kennedy's vote on the subject application.

On May 31, 1989, petitioner raised a "point of order" regarding the propriety of Commissioner Kennedy's participation in the planning commission vote on the subject application. On June 14, 1989, the planning commission set aside petitioner's "point of order." Record 4. At this time, the planning director disclosed that he and Commissioner Kennedy met with the applicant in a pre-application conference regarding the subject application. Thereafter, the planning commission voted to adopt findings approving the subject application.

Petitioner appealed the decision of the planning commission to the city council. On August 5, 1989, the city gave notice of the hearing to be held before the city council concerning petitioner's appeal of the planning commission decision.

On August 15, 1989, the city council held a public hearing on petitioner's appeal. The parties characterize the city council's hearing as a "de novo hearing." The city council continued its August 15, 1989 hearing to August 29, 1989, to allow parties additional time to submit evidence. At the conclusion of the August 29, 1989 hearing, the city council denied petitioner's appeal and approved the subject application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The decision violated the due process rights of the petitioner under the 14th Amendment of the Constitution of the United States, as well as state and local laws governing conflict of interest, bias, ex-parte contacts, and impartiality."

EIGHTH ASSIGNMENT OF ERROR

> "The decision is flawed by legal and procedural errors that prejudice the substantial rights of the petitioner."

Petitioner's first argument concerns the propriety of planning commissioner Kennedy's vote on the subject application. Petitioner contends that vote was improper, and such a defect could not be cured by a de novo city council review of the decision of the planning commission. Petitioner's second argument concerns whether his substantial rights were prejudiced by the city's failure to provide notice that the city council would review the planning commission's decision on a "de novo" basis. We address petitioner's claims regarding the planning commission vote, and whether his substantial rights were prejudiced, separately below.

A. Alleged Planning Commission Errors

Petitioner contends we should reverse the city's decision because a tiebreaking vote was cast by a planning commissioner who should not have voted. According to petitioner, it was improper for planning commissioner Kennedy to vote on the subject application because she (1)

had a conflict of interest regarding the subject application; (2) had ex parte contacts with the applicants which should have been, but were not, disclosed; and (3) was biased in favor of approval of the subject application.[3] Petitioner also maintains it was error for the planning commission to refuse to consider petitioner's objections to commissioner Kennedy's participation. Petitioner argues he was unable to receive a fair hearing before either the planning commission or the city council due to these alleged errors.

Petitioner also argues the allegedly erroneous planning commission vote could not be cured by a de novo city council review because the city council had no authority to hear his appeal de novo.[4] According to petitioner, under LUO 18.108.180, in order to review an appeal on a de novo basis, the city is required to adopt a resolution to that effect. LUO 18.108.180 provides:

> "The planning Commission or City Council may initiate any Type I, II or III procedure by

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[3]Petitioner argues these alleged errors violated his constitutional rights under the United States Constitution to have a fair and impartial tribunal and to rebut the substance of commissioner Kennedy's ex parte contacts. 1000 Friends v. Wasco County Court, 304 Or 76, 742 P2d 39 (1987); Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973); Peterson v. City of Lake Oswego, 32 Or App 181, 574 P2d 326 (1978).

[4]As we understand it, applications for conditional use permits and subdivision plat approvals are processed by the planning department as a Type II procedure, with a hearing and decision by the planning commission, and appeal to the city council. LUO 18.104.020; 18.80.040(I)(1); 18.108.060.

resolution of the respected (sic) body."

Respondents argue planning commissioner Kennedy's participation in the planning commission vote on the subject application was proper, and was consistent with the advice of the city attorney in the matter. However, respondents argue even if commissioner Kennedy's participation was improper, it was a procedural error and caused no prejudice to petitioner's substantial rights, because the city council heard the matter de novo. ORS 197.835(7)(a)(B).[5]

Citing Columbia River People's Utility District v. City of Columbia City, 9 Or LUBA 198, 210 (1983), respondents contend:

> "Any claim of conflict of interest, bias or other irregularity related to the proceedings before the planning commission, and the participation of [Commissioner] Kennedy, was rendered moot, by the City Council's de novo review." Respondents' Brief 15.

Respondents are correct that if planning commissioner Kennedy's participation in the planning commission vote on

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[5]ORS 197.835(7)(a)(B) provides in relevant part:

> "* * * the board shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government * * *
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> "* * * * *
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner.
>
> "* * * * *"

the subject application was improper, due to bias, conflict of interest, or undisclosed ex parte contacts, proper de novo review by the city council would cure any such impropriety. Slatter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 87-105, April 15, 1988); see Pfahl v. City of Depoe Bay, ___ Or LUBA ___ (LUBA No. 87-100, July 18, 1988), slip op 12; see also, Fedde v. City of Portland, 8 Or LUBA 220, aff'd 67 Or App 801, 680 P2d 20 (1984).

We first determine whether it was error for the planning commission to determine it did not need to consider whether commissioner Kennedy's participation was improper because the commission's decision might be appealed and reviewed de novo by the city council. The minutes of the planning commission state:[6]

> "[It was] moved to approve the Findings for planning action 89-071 after discussion of the ex parte contact issue. [The commission] read from ORS 244.130 and 227.180 and summed up the questions to be: is there a conflict of interest and did [Commissioner] Kennedy have a duty to disclose any ex parte contacts? The Commission concluded that if there were any mistakes made by the Commission, they become irrelevant if the action is appealed to the City Council because the council would begin the public hearing as a new hearing. * * *" (Emphasis supplied.) Record 94.

We agree with petitioner that the planning commission erred in failing to consider whether commissioner Kennedy's

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[6]It is not disputed these planning commission minutes are those adopted by the commission. However, we note that the only planning commission minutes in the record are labeled "draft."

participation was improper solely on the basis that the commission's decision might be appealed. Under LUO 18.108.030(E), the decision of the planning commission is final unless appealed to the city council. The LUO does not specify whether the city council hears appeals of decisions of the planning commission on a de novo basis. We disagree with respondents' contention that LUO 18.108.102(F) demonstrates the city council will always conduct a de novo review of an appeal of a decision of the planning commission. LUO 18.108.102(F) provides:

> "The [city council] shall affirm, reject, or modify [a planning commission] decision within sixty days after the filing of [an] appeal."

We do not read LUO 18.108.102(F) as either prohibiting, or requiring, a "de novo" review. Neither LUO 18.108.102(F), nor any other LUO provision to which we are cited, prescribes the scope of the city council's review of an appeal of a decision of the planning commission. Additionally, the fact that the city council might hold a de novo hearing, does not necessarily mean that the council will hold a de novo hearing sufficiently broad in scope to cure the procedural errors alleged by petitioner.[7]

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[7]A de novo review can be of two types, and the planning commission was not in a position to predict which type, if any, the city council would hold if the matter were appealed. De novo review can mean an independent review of the challenged decision limited to the record established below. De novo review can also mean the reviewing body both independently reviews the decision below and considers new evidence. In some cases, a de novo review limited to the record alone will be sufficient to cure allegations

The city council has the authority to conduct either an evidentiary or on the record de novo review of planning commission decisions in circumstances where its ordinances are silent on the scope of review. Davis v. Nehalem, 4 Or LUBA 1 (1981). However, the planning commission had no basis for concluding any de novo review would be conducted by the city council. Accordingly, the planning commission erred in failing to consider the propriety of commissioner Kennedy's participation in the decision on the subject application. However, this error is procedural and, therefore, petitioner must establish the error caused prejudice to his substantial rights. ORS 197.835(7)(a)(B). Additionally, if the council held a proper de novo hearing, such a hearing would cure any prejudice due to Commissioner Kennedy's allegedly improper participation in the planning commission proceedings on the subject application.

As we understand it, petitioner's chief complaint is that the city council reviewed the disputed application anew and accepted new evidence, rather than reviewing the decision of the planning commission.[8] In fact, it is not

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that the decision makers below were tainted by bias, ex parte contacts, and the like. In other cases, however, a de novo review including the acceptance of new evidence may be necessary to cure alleged errors below.

[8]Petitioner does argue at one point in his brief that the city conducted an "appeal," as is evidenced by the language used in the city's order stating the following:

> "Therefore, based on our overall conclusions, and upon the proposal being subject to each of the conditions set by the

disputed that the city council conducted a de novo review of, and accepted additional evidence concerning, the subject application. Under these circumstances, where the city council held a de novo evidentiary hearing on the subject application, petitioner has not established the alleged improper participation of planning commissioner Kennedy resulted in prejudice to his substantial rights. Slatter v. Wallowa County, supra.

This subassignment of error is denied.

B. Prejudice to Petitioner's Substantial Rights

Petitioner argues that if the city council had the authority to hear the matter de novo, he was denied a fair opportunity to present evidence to the city council because he was given inadequate notice of the scope of the city council's review of his appeal. Petitioner argues the city erred by failing to give notice, before the city council's

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planning commission in its order, dated June 15, 1989, we deny the appeals of Planning Action 89-071." Record 11.

Petitioner contends that the significance of conducting an "appeal" is that the city was required to review the propriety of commissioner Kennedy's participation. We disagree with petitioner that conducting an "appeal" necessarily requires the city council to review commissioner Kennedy's participation. Petitioner's view incorrectly assumes a review initiated by an "appeal" cannot be de novo and requires the reviewing body to examine alleged errors below.

We are unaware of any provision in the LUO for city council remand of decisions of the planning commission. The council is limited by LUO 18.108.102(F) to affirming, rejecting, or modifying appealed decisions of the planning commission, as it did in this case. Additionally, as stated above, the city council had the authority to hear petitioner's appeal on a de novo basis, Davis v. Nehalem, supra, and a proper de novo review cures improprieties of the kind alleged regarding commissioner Kennedy. Slatter v. Wallowa County, supra.

first hearing on his appeal, that the city council would conduct a de novo evidentiary hearing on the subject application. Petitioner argues he was prepared at the first city council hearing only to address errors committed by the planning commission in its review of the application. Petitioner maintains he was not prepared, at the first city council hearing, to present evidence concerning the subject application. Petitioner claims intervenor-respondent did present evidence, and petitioner was unable to effectively rebut this evidence, because of the inadequate notice regarding the scope of the city council's review. Petitioner also argues that the procedures employed by the city council prejudiced his substantial rights because the methodology the city council utilized in conducting its hearings on petitioner's appeal was not "typical" for an appeal. Specifically, petitioner states the applicant was allowed to proceed first and, after the applicant had completed his presentation, petitioner was allowed to make his presentation. After petitioner concluded his presentation, the applicant was allowed to rebut petitioner's testimony and evidence.[9]

The city's August 5, 1989 notice of the August 15, 1989

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[9]Petitioner also argues his substantial rights were prejudiced by the city council's refusal to address whether planning commissioner Kennedy's participation was improper. However, we have determined supra, the city council adequately cured the alleged procedural irregularities involving Commissioner Kennedy's participation, by conducting an evidentiary de novo review.

city council hearing on the appeal stated:

> "NOTICE IS HEREBY GIVEN that a public hearing will be held before the Ashland City Council on Tuesday, August 15, 1989 at 7:30 P.M. in the Civic Center Council Chambers, 1175 E. Main Street regarding the following matter:
>
> > "Appeal from a decision of the Planning Commission approving Planning Action No. 89-095, a Site Review, for an apartment complex and industrial subdivision on Hersey Street, near Williamson way.
>
> "All interested persons are hereby invited to said public hearing to express their views either for or against the proposal. Written comments will also be received by the city recorder, Ashland City Hall, during business hours, until 5:00 P.M. on August 10, 1989." Supp. Record 10.

We note at the outset that under ORS 227.170, the city is required to prescribe the procedures for conducting appeals. See Muller v. Polk County, ___ Or LUBA ___ (LUBA No. 88-018, June 29, 1988), slip op 5. Under ORS 227.170, the city must adopt ordinances which, among other things, specify the scope of the city council's review on appeal, such that participants are afforded a meaningful opportunity to participate. The city has no ordinances specifying the city council's scope of review in appeals of planning commission decisions. Additionally, the city has no ordinances governing the procedures to be employed in conducting hearings on such appeals. We believe these deficiencies violate ORS 227.170. Muller v. Polk County, supra. However, as with other errors alleged in these

assignments of error, these deficiencies are errors of procedure, and petitioner must demonstrate how these errors caused prejudice to his substantial rights. ORS 197.835(7)(a)(B). See Muller v. Polk County, supra.

Respondents argue, and petitioner does not dispute, the city council continued its first hearing to allow the parties an opportunity to prepare, present, and rebut evidence at a second city council hearing. Furthermore, respondents contend, and petitioner does not dispute, that petitioner in fact submitted evidence and testimony at the second hearing before the city council.

We might agree with petitioner, that his substantial rights were prejudiced on the basis that he was not provided with notice regarding the scope of review on appeal, had the city council not continued its hearing to provide an opportunity for parties to submit evidence. However, petitioner does not explain how his substantial rights were prejudiced in view of the corrective measures the city took in response to petitioner's objections to the city council's procedures (e.g., continuing the hearing to afford a further opportunity to submit evidence). Petitioner does not explain why the city council's corrective action did not cure the stated defects in procedure, and we believe that in this case they did cure the identified defects.

In sum, we see no prejudice to petitioner's substantial rights. Because we conclude the procedural errors did not

cause prejudice to petitioner's substantial rights, the errors of procedure provide no basis for the Board to reverse or remand the city's decision.[10] ORS 197.835(7)(a)(B).

This subassignment of error is denied.

The first and eighth assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

> "The subdivision does not meet land use ordinance requirements and is thus not legal.
>
> "1. The subdivision plan does not meet legal requirements.
>
> "2. The extension of Williamson Way was predicated on the existence of an imaginary road that is not currently legal."

The appealed order approves both a subdivision plat and a conditional use permit.[11] In this assignment of error, petitioner challenges the city's approval of the plat and

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[10]Additionally, we do not believe petitioner's rights under the United States Constitution were violated. Petitioner did have an opportunity to rebut intervenor-respondent's evidence, and we see nothing in the conduct of the city council's proceedings to indicate the city council was not fair or impartial in reviewing the disputed application.

[11]Citing Seneca Sawmill Company v. Lane County, 6 Or LUBA 454 (1982) (Seneca), respondents suggest that this Board has no authority to review the challenge to the subdivision plat because petitioner did not specifically designate approval of the subdivision plat as error in his notice of intent to appeal. Respondents are incorrect. It is the number of decisions that is important, not the number of approvals included in a single decision. In Seneca, petitioner appealed two different county ordinances, and the Board correctly determined that separate LUBA appeals are required to challenge separate decisions. However, separate LUBA appeals are not required when challenging a single decision which grants multiple approval requests. In this case, petitioner appealed one city order which approved both a preliminary subdivision plat, and a conditional use permit. That entire city decision is before this Board.

conditional use permit, which together authorize an extension of Williamson Way, a cul-de-sac already in excess of 500 feet. Petitioner argues the proposed extension of Williamson Way violates LUO 18.80.020(B)(11), 18.100.030, and Chapter 18.108, because the city's decision results in further extending the existing Williamson Way cul-de-sac.[12]

LUO 18.80.020(B)(11) provides:

> "A cul-de-sac shall be as short as possible and shall have a maximum length of 500 feet. All cul-de-sacs shall terminate with a circular turnaround unless alternate designs for turning and reversing direction are approved by the planning commission."

LUO 18.08.700 defines a cul-de-sac as follows:

> "A short dead end street terminated by a vehicle turnaround."

Respondents argue the proposed extension of Williamson Way does not violate the LUO. Respondents contend LUO 18.80.020(B)(11) does not apply to the city's decision

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[12]Petitioner also states that Ashland Comprehensive Plan (plan) policy X-3(a) is an approval standard for the subject application, and the challenged decision is not in compliance with that plan policy. Policy X-3(a) states:

> "New street dedications should only take place after considering the total impact of the street on the surrounding area."

The plan states that this policy is specifically implemented by "Chapter 18.82 (Street & Greenway Dedication)." Accordingly, we believe that the approval standards related to this plan policy are contained in LUO chapter 18.82. Petitioner does not allege the city's decision violates LUO chapter 18.82. Plan policy X-3(a) is not in itself a mandatory approval standard for the appealed decision, and we may not reverse or remand the decision on the basis of it.

because the city did not authorize Williamson Way to become a cul-de-sac in excess of 500 feet. Rather, respondents argue, the city has simply authorized an extension of Williamson Way in contemplation of its future extension into the adjoining Southern Pacific Railroad property, pursuant to LUO 18.80.020(B)(5).

LUO 18.80.020(B)(5) provides:

> "Future extensions of streets: Where necessary to give access to or permit a satisfactory subdivision of adjoining land, streets shall extend to the boundary of the subdivision and the resulting dead end streets may be approved without a turnaround. Reserve strips and street plugs may be required to preserve the objectives of street extensions."

The city determined in its findings:

> "The development of this project will provide for the extension of Williamson Way to 23 acres of property owned by Southern Pacific Railroad, making that property available for eventual development for employment uses.
>
> "The extension of Williamson Way to the boundary of the applicants' property is not an illegal cul-de-sac or dead end. Such extensions are in accord with normal accepted land planning practices in anticipation of development of the adjacent property. Such street extensions are authorized by Section 18.80.020(B)(5) ALUO. There is no requirement in Ashland Ordinances that applicants extend Williamson Way beyond their property boundary." Record 2-3.

While a local interpretation of a city ordinance may be entitled to some deference, it is ultimately the responsibility of this Board to review the city's interpretation of LUO 18.80.020(B)(5), and determine whether

the city's interpretation is correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

Williamson Way, as it currently exists, is apparently a cul-de-sac in excess of 500 feet. Record 84. The city's decision allows the extension of Williamson Way pursuant to LUO 18.80.020(B)(5), as a dead end street providing access to the proposed subdivision, and future access to the adjoining Southern Pacific Railroad property.

The city's findings reflect an interpretation of LUO 18.80.020(B)(5) as authorizing creation of a dead end street capable of future extension, and in excess of 500 feet in size, provided such future extension will facilitate access to or permit satisfactory subdivision of, the adjoining Southern Pacific Railroad property, when it is developed. We believe this interpretation of LUO 18.80.020(B)(5) is correct.[13]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The decision is not in compliance with the comprehensive plan and ORS 197.712(2)(c)(d).

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[13]Petitioner points out, and respondents do not dispute, that the extension of Williamson Way contemplated by the challenged decision is not shown on the plan transportation map. However, nothing in the LUO sections to which we are cited requires the city to have each potential street extension shown on the plan transportation map.

"1. The decision contradicts Policy XII-1 of the Comprehensive Plan.

"2. The decision violates Policy IV-58 of the Comprehensive Plan.

"3. The decision violates Policy VI-2 of the Comprehensive Plan."

SEVENTH ASSIGNMENT OF ERROR

> "The decision is not in compliance with land use ordinances and findings are not supported by evidence in the whole record."

In these assignments of error, petitioner contends the city's findings do not establish the challenged decision is in compliance with comprehensive plan policies XII-1, IV-58, VI-2. Petitioner also argues there is not substantial evidence in the record to support the city's findings of compliance with policy XII-1. Additionally, petitioner argues the challenged decision violates LUO 18.104.040 regarding conditional use permits, and the findings of compliance with LUO 18.104.040 are not supported by substantial evidence.

We address separately below, (1) the adequacy of the city's findings regarding policies XII-1, IV-58 and VI-2, (2) the evidentiary support for the findings regarding policy XII-1, and (3) the adequacy of, and evidentiary support for, the city's findings regarding LUO 18.104.040.

A. Adequacy of Findings of Compliance with Plan

1. Policy XII-1

Policy XII-1 states:

> "The City shall strive to maintain at least a 5-year supply of land for any particular need in the city limits. The 5-year supply shall be determined by the rate of consumption necessitated in the projections made in this Comprehensive Plan."

Petitioner argues this policy is violated because the challenged decision authorizes removal of land zoned to satisfy the city's projected need for "employment land," as shown in plan Table XII-1 and XII-3.[14] Petitioner further contends that by authorizing use of land zoned for employment needs for another type of use, the city does not show it is "striv[ing] to maintain" employment land. Specifically, petitioner argues the projections contained in Table XII-1 and XII-3 of the plan estimate a need for 202 acres to provide a 20-year supply of employment land. Petitioner contends the identified need for employment land

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[14]Plan Table XII-1 (Estimated Land Needs) contains projections regarding quantities of land needed by the city for the twenty year comprehensive planning period. Table XII-1 lists acreage needed under two broad headings, "Housing Needs" and "Economic Activity Needs." There are two subheadings, "Commercial" and "Industrial," under "Economic Activity Needs." Plan Table XII-3 (Land Needed and Available in UGB) contains projections for "Commercial," "Industrial," and "Employment" land. An asterisk corresponding to the Table XII-3 category "Employment" refers to the following statement beneath the Table:

> "Zoned 'employment'; may be used for either commercial or industrial uses. Represents total demand for both commercial and industrial needs."

The city's findings and respondents have referred to the land needed to meet the city's "Economic Activity Needs" as "employment land," and we do the same for clarity.

can only be satisfied by land zoned E-1.[15] Petitioner contends it follows that if 202 acres of E-1 land is needed for 20 years, then for 5 years the "need" for E-1 land is 50 acres. Petitioner also argues it violates plan policy XII-1 to approve utilization of any E-1 zoned land for residential uses.

Respondents argue policy XII-1 is not an independent approval standard for conditional use permits and subdivisions. Respondents also contend that even if this policy is an independent approval standard, it is satisfied because the city properly considered employment, commercial and industrial zoned land, in determining whether there is an adequate supply of land to accommodate projected employment needs, and nothing in policy XII-1 makes it unlawful to use E-1 zoned land for residential uses.

To analyze respondents' claim that policy XII-1 is not an independent approval standard, it is necessary to understand the context of this policy in the plan. Plan Chapter XII, Policies and Implementation, contains a list of plan policies, and the particular mechanisms by which these plan policies are to be implemented. The plan explains the function of the list of policies as follows:

"The following is a list of all the policies that

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[15]Petitioner argues that this is the interpretation which the city has historically applied to this policy, and the one which the city recently applied in approving an annexation request. See Record 251.

> are included in the Comprehensive Plan, along with a description of what ordinances are used to implement the policies. * * *" Plan XII-1. (Emphasis supplied.)

Policy XII-1 is a listed policy. The plan text regarding policy XII-1 states this policy is implemented by two mechanisms, the policy itself and LUO chapter 18.108. We would agree with respondents that policy XII-1 is not an independent approval standard, were it not for the implementation statement which explicitly relies on the policy itself Where, as here, the plan specifies that a particular plan policy is itself an implementing measure, we conclude such policy applies as an independent approval criterion. See Miller v. City of Ashland, ___ Or LUBA ___ (LUBA No. 88-038, November 22, 1988), slip op 18.

With regard to whether there are adequate findings to establish policy XII-1 is satisfied, the city's findings state:

> "The opponents and proponents have provided differing statistics concerning the inventory of vacant lands for employment uses within the City. The inventory of vacant lands done by the planning staff indicates an adequate supply of employment lands. There are 50 acres of vacant lands designated for E-1 uses and 73.03 acres of land designated for commercial and industrial uses, making approximately 123 acres of land for all employment purposes." (Emphasis supplied.) Record 4.

The city's findings address compliance with the comprehensive plan in general, but do not specifically address compliance with policy XII-1. It is not clear how

the city interpreted policy XII-1 in making its decision. The above quoted findings do not indicate how many acres of land the city believes it needs to maintain a 5-year supply of land to satisfy projected employment needs, how that land may be zoned, or whether that land must currently be vacant.

The findings suggest at least two different interpretations of policy XII-1 could have been applied by the city. One possible interpretation is that policy XII-1 requires that a sufficient acreage of vacant E-1 zoned land to meet the city's 5-year employment land needs remains within the city limits after the challenged decision. Another possible interpretation is that policy XII-1 requires that a sufficient acreage of available commercial, industrial <u>and</u> E-1 zoned land to meet the city's projected 5-year need for employment land remains within the city limits after the challenged decision. Petitioner argues in favor of the former interpretation, respondents the latter.

The findings quoted above clearly state that there are "50 acres of <u>vacant</u> lands designated * * * E-1 * * *" in the city. (Emphasis added.) By contrast, the findings state there are "73.03 acres of land designated for commercial or industrial uses" in the city, "making approximately 123 acres of land for all employment purposes." We cannot tell from these findings whether the 73.03 acres zoned commercial and industrial are vacant or otherwise available to satisfy the city's need for a 5-year

supply of employment land. We, therefore, conclude that the interpretation of policy XII-1 applied by the city in making its decision is that an acreage of vacant E-1 zoned land sufficient to meet the city's 5-year projected need for employment land must remain within the city limits after the challenged decision. This is a correct interpretation of policy XII-1.[16] McCoy v. Linn County, supra.

There is no dispute that Policy XII-1 would be satisfied by finding that 50 vacant acres of E-1 zoned land will remain in the city after the challenged decision. However, petitioner contends that the city did not determine that 50 acres of vacant E-1 zoned land will remain after the challenged decision. In this regard, petitioner is incorrect.

Finally, we agree with respondents that there is nothing in policy XII-1 or the Tables XII-1 or XII-3, prohibiting the removal of E-1 zoned land from uses permitted outright in the E-1 zone, so long as the city's findings establish that the city has strived to maintain a five year supply of employment land. As we stated above, the city's findings here demonstrate the city will have 50 acres of vacant E-1 land after the challenged decision.

[16]We do not foreclose the possibility that there could be other correct interpretations of policy XII-1. However, it is for the city to interpret its plan in the first instance, and we decide in this opinion only the correctness of the interpretation of policy XII-1 which we conclude the city applied in making the challenged decision.

This is adequate to establish that the city has strived to maintain an adequate supply of employment land.

This subassignment of error is denied.

2. Policy IV-58

Policy IV-58 requires the city to:

> "Carefully examine all proposals for new major development or expansion of existing housing, commercial/industrial, or public facilities for impact directly or indirectly on noise pollution. Require mitigation to the extent possible, or, if major impacts cannot be mitigated, require project modification."

According to the plan, this policy is to be implemented through:

> "Chapters 18.72 (Site Review), 18.88 (Performance Standards); Zoning Map."

As we explained in Miller v. City of Ashland, supra, plan policies which the plan states are specifically implemented through particular sections of the LUO, do not constitute independent approval standards for land use actions. Accordingly, policy IV-58 is not an independent approval standard for the challenged decision, and the city's failure to show compliance with this standard is not error.

This subassignment of error is denied.

3. Policy VI-2

Policy VI-2 provides:

> "Using the following techniques, protect existing neighborhoods from incompatible development and encourage upgrading:

"(a) Do not allow deterioration of residential areas by incompatible uses and developments. Where such uses are planned for, clear findings of intent shall be made in advance of the area designation. Such findings shall give a clear rationale, explaining the relationship of the area for housing needs, transportation, open space, and any other pertinent Plan topics. Mixed uses often create a more interesting and exciting urban environment and should be considered as a development option wherever they will not disrupt an existing residential area.

"(b) Prevent inconsistent and disruptive designs in residential areas through use of a limited design review concept, in addition to using Historic Commission review as a part of the site review, conditional use permit, or variance approval process.

"(c) Develop programs and efforts for rehabilitation and preservation of existing neighborhoods, and prevent development which is incompatible and destructive."

The plan states this policy is implemented through LUO chapter 18.24 (Conditional uses allowed in R-2 zones); chapter 2.24 of the City Code (Ashland Historic Commission); and LUO chapter 18.72 (Site Review).[17]

Accordingly, policy VI-2 is not an independent approval standard for which separate findings are required. See Miller v. City of Ashland, supra.

This subassignment of error is denied.

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[17]Petitioner argues that policy VI-2 is implemented by LUO 18.104.040 (conditional use permit approval standards). We disagree. The plan explicitly states it is implemented through the particular LUO and city code provisions listed above.

B. Evidentiary Support for Findings of Compliance with Plan Policy XII-1

Petitioner argues the city's findings, that 50 acres of vacant E-1 zoned land remain, are not supported by substantial evidence in the whole record.

It is not disputed that respondents rely upon a study of E-1 lands to support the city's findings that 50 acres of vacant E-1 land will remain after the challenged decision. However, petitioner cites evidence in the record, including photographs of some of the sites in the study the city relies upon, which discredits the city's study.

Specifically, these photographs show that many of the lands relied upon in the city's study are not vacant. Instead, many of these sites have buildings on them. The buildings on these sites range from miniwarehouses, and other business enterprises, to residences. Petitioner also cites evidence that the city recently annexed 3.4 acres of E-1 land on the basis of findings that there was an inadequate supply of E-1 lands in the city limits. Record 95-96. Finally, petitioner cites testimony of the city planning director in which the director suggests that as much as half of the land the study indicates is vacant, may not, in fact, be vacant.

Under these circumstances, in order to rely upon the study to support its findings that 50 acres of vacant E-1 land remain after the city's decision, the city must explain why the study is reliable in light of the photographs and

other evidence cited by petitioner which strongly suggest that the study relied upon is inaccurate. Absent some explanation regarding the accuracy and reliability of the study, we believe the study does not constitute evidence upon which it is reasonable to depend to conclude there remain 50 acres of vacant E-1 land in the city after the challenged city decision.[18]

This subassignment of error is sustained.

C. Compliance With LUO 18.104.040

Petitioner argues the city's findings are inadequate to demonstrate compliance with LUO 18.104.040(B) and (C), and are not supported by substantial evidence.

1. LUO 18.104.040(B)

LUO 18.104.040(B) provides:

> "A conditional use permit shall be granted if the approval authority finds the proposal conforms to the following general criteria:
>
> "* * * * *
>
> "(B) The location, size, design and operating characteristics of the proposed development will be reasonably compatible with, and have minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood."

In interpreting a Linn County approval criterion

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[18]As we stated supra, the city may choose to adopt a different interpretation of policy XII-1 from the interpretation reflected in the city's findings. However, in either case, there must be substantial evidence to support the findings adopted.

similar to LUO 18.104.040(B),[19] the Court of Appeals determined the Linn County standard required the county to establish that there would be no adverse impact on both the liveability and the appropriate development of abutting properties and the surrounding neighborhood. McCoy v. Linn County, 90 Or App at 276. Additionally, the Court specifically approved the portions of our appealed determination regarding the essential elements of findings addressing the Linn County standard. In this regard, LUBA stated:

> "* * * to show that a proposed conditional use will not adversely affect the livability * * * of abutting properties and the surrounding neighborhood, the county must (1) identify the qualities or characteristics constituting the 'livability' of abutting properties and the surrounding neighborhood; and (2) establish that the proposed use will have no adverse effects on those qualities or characteristics. * * *" McCoy V. Linn County, 16 Or LUBA 295, 301-302 (1987).

Admittedly, the city's standard is not as strict as the Linn County standard, in that the city's standard requires the proposed development have no more than minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood. However, we

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[19]The approval criterion at issue in McCoy v. Linn County, 90 Or App at 276, provided:

> "Location, size, design and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood."

believe that the starting place for analyzing compliance with either standard is the same. The city must identify the qualities constituting the livability and appropriate development of the abutting properties and the surrounding neighborhood, and must determine whether the proposed use will have more than a minimal impact on those identified qualities.

The majority of the city's findings of compliance with LUO 18.104.040(B) state essentially that the proposed use satisfies this criterion because the proposed use is less intensive, or will have fewer impacts, than uses which are permitted outright in the E-1 zone. However, this begs the question. The city does not require application of this conditional use approval criterion to uses permitted outright in the E-1 zone. The city's findings fail to identify the existing qualities of livability and the appropriate development of abutting properties and the surrounding neighborhood, or the impacts of the proposal on those qualities.[20]

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[20]The city does state in one of its findings:

> "The architectural styles of the surrounding neighborhood are diverse, and therefore, it would not be practical for the applicants to design housing units which incorporate design elements of both the single family neighborhood and the surrounding employment development." Record 10.

However, identification of diverse architecture in the surrounding neighborhood is not the same as a determination identifying the qualities or characteristics constituting the "livability" of abutting properties and

We conclude that the city's findings are inadequate to demonstrate compliance with LUO 18.104.040(B).[21]

It would serve no purpose to review the evidentiary support for inadequate findings. Accordingly, we do not review the evidentiary support for the city's findings regarding LUO 18.104.040(B).

This subassignment of error is sustained.

2. <u>LUO 18.104.040(C)</u>

LUO 18.104.040(C) provides:

> "* * * * *
>
> "(C) In determining the above, consideration shall be given to the following:
>
> "(1) Harmony in scale, bulk, coverage, and density.
>
> "(2) The availability and capacity of public facilities and utilities.
>
> "(3) The generation of traffic and capacity of surrounding streets.

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the surrounding neighborhood; or establishing that the proposed use will have no more than a minimal effect on those qualities or characteristics.

[21]Additionally, we note petitioner identifies several alleged consequences of the proposed development which, according to petitioner, will violate LUO 18.104.040(B), because individually and cumulatively each will have more than a minimal impact on the "livability and appropriate development of abutting properties and the surrounding neighborhood." LUO 18.104.040(B). The city responded to petitioner's evidence of impact relating to traffic and architectural design of the proposed use. However, the city is required to respond to the other relevant issues raised by petitioner. <u>See</u> <u>Norvell v. Portland Area LGBC</u>, 43 Or App 849, 852-853, 604 P2d 896 (1979). Other relevant issues raised by petitioner include impact on views, privacy, inhibition of appropriate development of E-1 uses on the balance of the subject E-1 parcel, and adverse impact to neighboring cottage industries.

> "(4) Public safety and protection.
>
> "(5) Architectural and aesthetic compatibility with the surrounding area."

LUO 18.104.040(C) requires the city to consider certain factors in determining compliance with LUO 18.104.040(B). The city's findings demonstrate that the city considered the factors listed in LUO 18.104.040(C), and this is all that the city is required to do. See Roden Properties v. City of Salem, ___ Or LUBA ___ (LUBA No. 89-046, August 5, 1989), slip op 27 (once city identified relevant factor as an applicable consideration, city findings demonstrating that city gave consideration to the factor are adequate).

As we understand it, petitioner also argues that several of the city's findings, adopted to establish that the city considered the factors of LUO 18.104.040(C), are not supported by any evidence in the whole record. Petitioner claims that these findings, identified in the petition for review, are based on "speculation" or "conjecture."

Respondents, however, cite to various parts of the record which they claim establish that there is substantial evidence in the whole record to support the city's findings regarding LUO 18.104.040(C). The evidence cited by respondents appears to support the challenged findings, and petitioner does not explain why the evidence does not support those findings.

This subassignment of error is sustained, in part.

The third and seventh assignments of error are sustained, in part.

FOURTH ASSIGNMENT OF ERROR

> "The council's findings are not sufficient to support its decision."

FIFTH ASSIGNMENT OF ERROR

> "Council's findings are not supported by evidence in the whole record."

SIXTH ASSIGNMENT OF ERROR

> "Findings adopting by reference applicant's findings do not demonstrate compliance with the comprehensive plan."

In these assignments of error, petitioner challenges several of the city's findings of compliance with the comprehensive plan. However, petitioner does not identify specific policies in the plan which are violated by the findings, other than policy XII-1 discussed at length supra. It is petitioner's responsibility to establish a basis upon which we might grant relief, and petitioner has not done so in these assignments of error. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

Additionally, petitioner suggests the city may not incorporate by reference findings submitted by an applicant, and rely upon those findings in its decision. Petitioner is incorrect. There is nothing which prohibits a city, as a matter of law, from incorporating findings by reference. See Roden Properties v. City of Salem, supra, slip op at 6; Astoria Thunderbird v. City of Astoria, 13 Or LUBA 154, 162-

163 (1985).

The fourth, fifth and sixth assignments of error are denied.

The city's decision is remanded.