BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH W. ANGEL, II,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
CITY OF PORTLAND,	)	
	)	
Respondent,	)	LUBA No. 90-108
	)	
and	)	FINAL OPINION
	)	AND ORDER
GARY MARSHEL, LOIS WAKELIN, RICHMOND NEIGHBORHOOD ASSOC., SUNNYSIDE NEIGHBORHOOD ASSOC., MT. TABOR NEIGHBORHOOD ASSOC., SOUTH TABOR NEIGHBORHOOD ASSOC., and LAURELHURST NEIGHBORHOOD ASSOC.,	)	
	)	
Intervenors-Respondent.	)	

Appeal from City of Portland.

Stephen Janik and Richard H. Allan, Portland, filed the petition for review and argued on behalf of petitioners. With them on the brief was Ball, Janik & Novack.

Ruth Spetter, Edward J. Sullivan and Vincent P. Salvi, Portland, filed a response brief on behalf of respondent and intervenors-respondent. Ruth Spetter argued on behalf of respondent. Edward J. Sullivan argued on behalf of intervenors-respondent Marshel and Wakelin. Vincent P. Salvi argued on behalf of intervenors-respondent Neighborhood Associations.

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

REMANDED 03/06/91

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

Petitioner appeals a decision of the Portland City Council denying his application to change the zoning of a 0.7 acre site from High Density Single Family Residential (R5) to General Commercial (C2).

MOTIONS TO INTERVENE

Gary Marshel, Lois Wakelin, Richmond Neighborhood Association, Sunnyside Neighborhood Association, Mt. Tabor Neighborhood Association, South Tabor Neighborhood Association and Laurelhurst Neighborhood Association move to intervene in this proceeding on the side of respondent. There is no opposition to the motions, and they are allowed.

OBJECTION TO RECORD

The table of contents of the record transmitted to the Board by respondent includes the item "Video (will be brought to hearing)." Petitioner, intervenors Marshel and Wakelin and intervenors neighborhood associations filed objections to the record. Intervenors neighborhood associations' objection 24 was:

> "All three of the videotapes must be made available: 1) short (approximately two minutes) tape, [Richmond Neighborhood Association] before City Council; 2) long version of that tape (approximately 2-3 hours); 3) Kittleson's tape." Intervenors' Objection to the Record 2.

On October 2, 1990, the Board received a supplemental record from respondent. During a telephone conference on

the record objections, respondent stated there were three videotapes in its file on this matter, and it would submit the three videotapes to the Board at the time of oral argument. Petitioner and intervenors advised the Board that the supplemental record satisfied their objections, with the following caveat noted in our order settling the record:

> "Intervenors neighborhood associations advise the Board they are not certain whether the three video tapes which respondent agreed to submit as part of the record, in response to intervenors' objection 24, include the tape identified by intervenors in their objection as "short (approximately two minutes) tape, RNA before City Council." * * * The parties agree that if respondent's video tapes do not include the tape in question, intervenors neighborhood associations will provide respondent and the other parties with copies of the tape, for submittal as part of the record, subject to verification by respondent of the identity of the tape so received." Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 90-108, Order Settling Record, October 10, 1990).

At oral argument in this appeal, respondent submitted the three videotapes contained in its file on this matter. Intervenors neighborhood associations submitted an additional tape, explaining that none of the three videotapes in the city's file was the "short" tape referred to above. Intervenors neighborhood associations further explained that the videotape they sought to submit was not a copy of the "short" tape shown to the city council, but rather a recreation of the "short" tape, made by editing the longer videotape in the record.

Petitioner objects to submittal of the recreated

"short" tape as part of the record, on the grounds that it is impossible to verify that its content is the same as that of the actual "short" tape shown to the city council.[1]

Under our Order Settling Record, if the three videotapes in respondent's file did not include the "short" tape, intervenors neighborhood associations were to provide the parties with copies of that tape and submit a copy of the tape to this Board. However, the videotape submitted by intervenors neighborhood associations is not a copy of the "short" tape. We agree with petitioner that intervenors neighborhood association have not established that the recreated videotape they wish to submit is identical to the original "short" tape.

Petitioner's objection is sustained. The videotape submitted by intervenors neighborhood associations is not included in the local record.

FACTS

Petitioner owns the subject property and applied for a zone change from R5 to C2 to allow construction of a fast food restaurant (with drive-through window) and accompanying parking lot. The property is designated General Commercial

---

[1]Petitioner also objected at oral argument to respondent's submittal of the videotapes from its file, other than the Kittleson tape, arguing the other two tapes had not been shown to the city council. However, petitioner's objection to the submittal of these videotapes is not timely. Petitioner did not object to the inclusion of these tapes in the record in his Objection to the Record, filed September 4, 1990. Further, the inclusion of these videotapes in the local record was memorialized in our October 10, 1990 Order Settling Record.

on the Portland Comprehensive Plan (plan) map. The property is located along SE 39th Ave., on the block south of SE Hawthorne Blvd. Three single family residential structures are currently located on the property.

On March 9, 1990, the city hearings officer issued a decision approving the proposed zone change, with conditions. Intervenors appealed that decision to the city council, which conducted a de novo review. The city council held public hearings on May 2 and 10, 1990. At a May 24, 1990 city council meeting, the mayor and council members made statements with regard to telephone contacts and site visits concerning the subject proposal,[2] adopted a tentative decision to grant the appeals and directed the planning department to prepare findings. On July 20, 1990, the planning department issued proposed findings. At a July 26, 1990 city council meeting concerning the proposed zone change, petitioner objected to the statements made by the mayor and council members at the May 24, 1990 meeting, and the city council adopted the challenged decision.

THIRD ASSIGNMENT OF ERROR

> "Ex parte contacts with a member of the City Council denied petitioner his right to rebut all evidence."

---

[2]These statements are the subject of the third through fifth assignments of error, infra.

FIFTH ASSIGNMENT OF ERROR

> "Petitioner was denied the right to rebut the evidence gathered and conclusions reached by City Council members through their field observations."

Petitioner contends that during the city council's deliberations on May 24, 1990, the mayor stated for the first time that he had received phone calls from many people concerning their personal experiences with regard to the location of the proposed zone change. Petitioner argues that the mayor failed to disclose the contents of these ex parte communications and that petitioner was not given the opportunity to rebut these ex parte communications, as is required by due process and ORS 227.180(3).[3]

Petitioner also contends that during the deliberations on May 24, 1990, four members of the city council disclosed for the first time that they had made personal observations

---

[3]ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

of the subject site, and had obtained from such observations evidence which they considered relevant to their decision on the proposed zone change. Petitioner argues that he was never given the opportunity to rebut this evidence, and that he was prejudiced by this denial of his right to rebuttal. Petitioner points out that the appealed decision itself states that "each city commissioner visited the site" (Record 44), and refers to "observations" by council members as evidence supporting denial of the proposed zone change. Record 43, 45, 49.

Petitioner contends he objected to the above described procedural errors in a letter submitted to the city council at its July 26, 1990 meeting, before the appealed decision was adopted. According to petitioner, under ORS 197.835(7)(a)(B),[4] this Board is authorized to either reverse or remand the city's decision because of these errors. However, petitioner contends that in this case, reversal is required:

---

[4]ORS 197.835(7) provides in relevant part:

"* * * the board shall reverse or remand the land use decision under review if the board finds:

"(a)The local government * * *:

"* * * * *

"Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"* * * * *."

> "* * * A remand is not capable of removing the prejudicial effect of ex parte contacts and personal observations that had such a significant effect on the City Council members that they referred to these as * * * reasons for their decision." Petitioner's Motion for Order of Reversal 5.

Petitioner argues he cannot receive on remand a fair and impartial decision from the city council, as is required by Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).

Respondents do not dispute that the mayor received ex parte contacts, the contents of which were not disclosed during the hearings below. Respondents also do not dispute that four members of the city council made personal observations of the site of the proposed zone change, and that they obtained from those observations evidence which they believed to be relevant. Additionally, respondents concede that petitioner was not given an opportunity to rebut the substance of the ex parte communications or the evidence obtained from personal site observations, and that petitioner objected to the lack of opportunity for rebuttal.[5] Thus, the parties are essentially in agreement that the city's failures to disclose and provide an

[5]Although respondents claim that petitioner could have raised his objections to the lack of rebuttal orally at the May 24, 1990 meeting, rather than waiting to submit his objections in writing at the next city council meeting concerning the proposed zone change, on July 26, 1990, respondents concede that petitioner made his objection known to the city council prior to its adoption of a final decision on the proposed zone change.

opportunity to rebut the substance of ex parte communications, and to provide an opportunity to rebut personal site observations, are procedural errors which would warrant rxeversal or remand,[6] if petitioner's substantial rights were prejudiced thereby.

Respondents argue, however, that petitioner has not demonstrated his substantial rights were prejudiced by these procedural errors. Respondents contend this Board has repeatedly held that the burden is on petitioners to demonstrate how they have been prejudiced by procedural errors. According to respondents, in Forest Park Estate v. Multnomah County, ___ Or LUBA ___ (LUBA No. 90-070, December 4, 1990), slip op 16, we declined to sustain petitioner's claim of prejudice because, although petitioner contended that its written and oral responses were impaired because a staff report was issued late, petitioner failed to "identify any ways in which its written and oral responses would have been different or more complete if the staff report had been available earlier." See also Apalategui v. Washington County, 14 Or LUBA 261, 267, aff'd in part, rev'd in part 80 Or App 508 (1986).

Respondents further argue that petitioner has similarly failed to demonstrate how his position would be improved if

---

[6]We note that ORS 197.835(10) provides that we may reverse or remand a land use decision due to ex parte contacts only if the city decision maker did not comply with ORS 227.180(3). In this case, the parties agree that the city failed to comply with ORS 227.180(3).

he had been given an opportunity to rebut the substance of the ex parte contacts and site observations. With regard to the ex parte contacts, respondents contend petitioner has failed to show that they were prejudicial to his position or that they influenced the vote of any council member other than the mayor. With regard to the site observations, respondents argue petitioner has failed to show that the city's decision would have been any different if petitioner had been given an opportunity to rebut the council members' site observations. Respondents argue that if petitioner needs to place additional evidence before this Board to substantiate that these "ex parte contacts or other procedural irregularities not shown in the record * * * would warrant reversal or remand," petitioner should have moved for an evidentiary hearing pursuant to ORS 197.830(13)(b).

Petitioner has a right to rebut evidence placed before the local decision maker in a quasi-judicial land use proceeding. Fasano v. Washington Co. Comm., supra; Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55, 59 (1981). This right extends to requiring disclosure of and opportunity to rebut the substance of ex parte communications to and personal site observations by the local decision maker. ORS 227.180(3); Jessel v. Lincoln County, 14 Or LUBA 376, 381(1986); Friends of Benton Cty v. Benton Cty, 3 Or LUBA 165, 173 (1981).

Respondents correctly state we have held that in order to obtain reversal or remand of an appealed decision, petitioners must demonstrate how their substantial rights have been prejudiced due to procedural errors. See, e.g., Holder v. Josephine Co., 14 Or LUBA 454, 460 (1986). However, where the right in question is that of rebutting evidence placed before the decision maker through ex parte contacts and site observations, an uncontroverted allegation that a party was provided no opportunity to rebut such evidence is sufficient to demonstrate prejudice to that party's substantial rights.[7] Petitioner makes such an allegation in this case.

Accordingly, we conclude that we must sustain the third and fifth assignments of error because respondent committed procedural errors which prejudiced petitioner's substantial rights. This requires us to remand the challenged decision for additional proceedings.[8] OAR 661-10-071(2)(c).

---

[7]Forest Park Estate v. Multnomah County, supra, is distinguishable from this case. In Forest Park Estate, a county staff report was made available to petitioner only four days before the hearing, rather than seven days before, as required by ORS 197.763(4)(b). The petitioner in that case did not claim that it had no opportunity to respond to the contents of the staff report, just that it was not given as much time to review and respond to the staff report as it was entitled to under the statute. In fact, the petitioner in Forest Park Estate submitted oral and written responses to the staff report at the hearing. In these circumstances, we found that in order to demonstrate prejudice, the petitioner must explain how its responses were impaired by the county's procedural error.

[8]Petitioner argues that reversal, rather than remand, is required, essentially on the basis that because the city council received ex parte contacts and made personal site observations, the city council cannot be an impartial tribunal in further proceedings on the proposed zone change.

FOURTH ASSIGNMENT OF ERROR

> "The City Council erred in taking official notice of disputed technical and scientific matters."

Petitioner argues:

> "* * * City Council members improperly took official notice of technical or scientific matters outside their expertise and used that 'evidence' as a basis for denying petitioner's rezoning request." Petition for Review 20.

According to petitioner, in a quasi-judicial proceeding, the city council members may only take official notice of judicially cognizable facts and general, technical, or scientific facts within their specialized knowledge. See ORS 183.450(4). Petitioner argues that judicially cognizable facts are limited to facts "not subject to reasonable dispute." ORS 40.065.

However, in a subsequent hearing on remand, the substance of the evidence obtained from ex parte contacts and site observations must be disclosed, and petitioner must be given an opportunity to rebut that evidence. This is sufficient to protect petitioner's substantial rights. In order to show that the city council cannot provide petitioner with the impartial tribunal to which he is entitled, petitioner must demonstrate that the city council is "incapable of making a decision based on the evidence and argument before [it]." Lovejoy v. City of Depoe Bay, 17 Or LUBA 51, 66 (1988); Oatfield Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766, 768 (1986); Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985). Petitioner does not establish this and, therefore, fails to provide any reason why remand of the decision is not appropriate.

Under ORS 197.835(9)(a), we are required, whenever possible, to decide all issues presented in an appeal when reversing or remanding a land use decision. The purpose of this requirement is to provide guidance to the local government making the decision, so that it may, if possible, correct all deficiencies in its decision without the need for repeated appeals to this Board. Standard Insurance Co. v. Washington County, 17 Or LUBA 647, 663, rev'd on other grounds 97 Or App 687 (1989). Therefore, we address the remaining assignments of error, to the extent that our consideration of them will provide necessary guidance to respondent for further proceedings after remand.

Petitioner contends that statements made by city council members during their deliberations, describing their personal site observations, indicate they took official notice of not only objective and undisputed facts, such as street width and number of lanes, but also subjective and disputed facts such as the extent of traffic congestion and safety problems at the site and the projected impacts of petitioner's proposed development on traffic. Petitioner further contends that during their site observations, city council members officially noticed facts which are not within their specialized knowledge as elected officials. According to petitioner, the city council's improper use of official notice was prejudicial to his rights because the city council members relied on their site observations in making the appealed decision. Record 43, 45, 49.

As we understand it, petitioner essentially argues that no weight can be given to certain types of evidence obtained and conclusions drawn by city council members from their site observations. The significant issue is not of what facts the city council members can take official notice, but rather what weight can be given to evidence obtained from individual city council member's site observations.

As explained under the third and fifth assignments of error, supra, we must remand this decision for further proceedings in part because the city did not provide petitioner with an opportunity to rebut the city council

member's site observations. On remand, the city council members will be required to disclose the results of their site observations, and provide petitioner an opportunity to rebut any information obtained during those site observations. If petitioner believes that council members misinterpreted their observations or drew unwarranted conclusions from their observations, petitioner will have an opportunity to present evidence and argument to convince the council members of their error. If a new decision of the city council which relies on evidence from site observations is appealed to this Board and challenged on substantial evidence grounds, we will review the evidentiary support for that decision, including evidence from site observations and rebuttal evidence, to determine whether it would be reasonable to rely upon it. See McNulty v. City of Lake Oswego, 15 Or LUBA 283, 289 (1987).

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The City acted without legal authority in applying two Comprehensive Plan Goals and two Comprehensive Plan Policies as criteria for denying petitioner's proposed zone change."

Petitioner contends the city improperly denied his zone change application for failure to comply with comprehensive plan goals 2 (Urban Development) and 3 (Neighborhoods) and policies 6.2 (Regional and City Traffic Patterns) and 8.20 (Noise Abatement Strategies). Petitioner argues that plan

policy 10.7(C), and identically worded Portland Community Code (PCC) 33.102.015, expressly provide that a rezoning request "will be approved" if three specified criteria are met.[9] According to petitioner, use of the mandatory term will indicates that plan provisions other than policy 10.7(C) are not intended to be approval criteria for zone changes.

Petitioner also argues in the alternative that even if plan provisions other than policy 10.7(C) are potentially applicable to zone change requests, the four specific policies and goals relied upon in the challenged decision as bases for denial are not approval standards for land use decisions. Petitioner maintains that whether a particular plan provision is an approval standard for a specific land use decision depends on both the wording and context of the provision. Grindstaff v. Curry County, 15 Or LUBA 100, 103-104 (1986).

Goal 2 provides:

> "Maintain Portland's role as the major regional employment, population and cultural center through public policies that encourage expanded opportunity for housing and jobs, while retaining the character of established residential neighborhoods and business centers."

Petitioner argues that because it contains no mandatory or prohibitory language, nothing in Goal 2 indicates it is an

[9]None of these three criteria refer to compliance with comprehensive plan provisions.

approval standard for quasi-judicial land use decisions. According to petitioner, its broad wording establishes "a general policy direction and [suggests] that the goal is to be implemented 'through public policies' rather than land use decisions." Petition for Review 11.

Goal 3 provides:

> "Preserve and reinforce the stability and diversity of the City's neighborhoods while allowing for increased density in order to attract and retain long-term residents and businesses and insure the City's residential quality and economic vitality."

Petitioner argues that this goal is also broadly worded, and provides no specific standards against which a requested zone change could be evaluated.

Policy 6.2 provides:

> "Create and maintain regional and City traffic patterns that protect the livability of Portland's established residential neighborhoods while improving access and mobility within commercial and industrial areas."

Petitioner argues this policy applies to regional and citywide traffic planning activities, and does not establish an approval standard regarding the traffic impacts of an individual rezoning proposal. According to petitioner, this interpretation of policy 6.2 is supported by the wording of policy 6.3, which <u>does</u> address project-specific land use decisions:

> "Land use planning and project development should be guided by the trafficways classifications, objectives and policies contained in the adopted

> Arterial Streets Classification Policy and in coordination with criteria established in the Facilities System Plan."
>
> Policy 8.20 provides:
>
> "Reduce and prevent excessive noise levels from one use which may impact another use through on-going noise monitoring and enforcement procedures."

Petitioner argues that, by its own terms, this policy applies only to noise monitoring and enforcement procedures with regard to existing uses. According to petitioner, nothing in the policy applies to decisions on zone change requests.

Respondent and intervenors (respondents) contend that noncompliance with the above quoted plan goals and policies was not a basis for denial of the subject zone change request. Respondents argue that the "conclusions" section of the city's decision states only that the proposed zone change fails to meet the approval criteria of PCC 33.102.015, and makes no reference to any plan provision as a basis for denial. Record 50. According to respondents, because they are not a basis of denial, the city findings addressing the above quoted plan provisions are mere surplusage, and cannot be a basis for reversal or remand of the city's decision.

The city's decision states the comprehensive plan includes "a set of goals and policies providing the basis on which evaluations can be made as to whether proposals for

land-use decisions comply with the Plan." (Emphasis added.) Record 48. The decision further states that "[a]ll goals and policies have been reviewed with regard to the present proposal, and the following are considered applicable." (Emphasis added.) Id. The decision goes on to explain why plan goals 2 and 3 and policies 6.2 and 8.20 are "not met" by the proposal. Record 49-50. Finally, although the "conclusions" section of the decision does not mention noncompliance with plan goals and policies, the "decision" section states that "based on the above findings and conclusions" the zone change is denied. Record 51. Considered together, these statements make it reasonably clear that noncompliance with plan goals 2 and 3 and policies 6.2 and 8.20 is a basis for the city's denial of the zone change.

However, we agree with petitioner that this basis for denial is in error, because plan goals 2 and 3 and policies 6.2 and 8.20 are not approval standards for zone changes.[10] Goals 2 and 3 are worded as broad standards establishing policy direction for the city in its comprehensive planning efforts. Policy 6.2 refers to regional and citywide traffic planning efforts, not individual quasi-judicial development approvals. Policy 8.20 is concerned only with the use of

[10]Because we agree with petitioner that these specific plan provisions are not approval standards for the subject zone change, we do not address petitioner's alternative argument that policy 10.7(C) and PCC 33.102.015 are the only approval standards for zone changes.

noise monitoring and enforcement procedures to reduce and prevent excessive noise levels from existing uses, it does nothing to prohibit the establishment of uses otherwise allowed under the plan and code.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The City erred by incorrectly and inconsistently construing the applicable criteria of approval."

PCC 33.102.015(1) provides in relevant part:

> "The proposed rezoning must be to the maximum Comprehensive Plan Map designation unless:
>
> "(a) Less intense residential densities * * * are planned and platted to allow for future redivision at full densities * * *, or
>
> "(b) Proof is provided that development at full intensity is not possible within five (5) years due to physical conditions * * *."

Petitioner argues that the proposed zone change as a matter of law complies with PCC 33.102.015(1), because the proposed C2 zoning is the maximum allowed by the plan. Petitioner argues that although the city found that C2 zoning is the maximum allowed by the plan (Record 41), it nevertheless improperly concluded that the proposed zone change is not consistent with PCC 33.102.015(1)(b). Record 42, 48.

Respondents do not dispute that the proposed zone change is to the maximum designation allowed by the comprehensive plan or that the city's decision incorrectly states that the proposal is inconsistent with PCC 33.102.015(1)(b). However, respondents contend the fact

that the proposed zone change is to the maximum designation allowed under the comprehensive plan makes PCC 33.102.015(1) inapplicable to the proposed zone change and, therefore, the city's incorrect determination is merely a procedural error. According to respondents, this assignment of error should be denied because petitioner does not demonstrate that his substantial rights were prejudiced by this procedural error, as required by ORS 197.835(8)(a)(B).

We do not agree with respondents that the city's incorrect determination of noncompliance with PCC 33.102.015(1)(b) is merely a procedural error. PCC 33.102.015(1) establishes an approval criterion for all zone changes -- that they be to the maximum designation allowed by the comprehensive plan (unless one of the two situations described in paragraph (a) or (b) exists). Because the proposed zone change is to the maximum designation allowed, it complies as a matter of law with PCC 33.102.015(1). In finding otherwise, the city misconstrued the applicable law. ORS 197.835(7)(a)(D).

The second assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

> "The City Council's finding that transportation services will not be adequate is not based on substantial evidence [in] the record as a whole."

The challenged decision concludes that the proposed

zone change fails to comply with PCC 33.102.015(2)[11] because transportation services are not adequate to serve the proposed use. Record 48, 50. Petitioner challenges the evidentiary support for this determination.

We determined under the third and fifth assignments of error, supra, that this decision must be remanded for further proceedings which will include the submittal of additional evidence. Therefore, any decision made by respondent after remand will be based on a different evidentiary record, and no purpose would be served by determining whether there is substantial evidence in the record of this decision to support the city's determination of noncompliance with PCC 33.102.015(2).

SEVENTH ASSIGNMENT OF ERROR

> "The City Council committed prejudicial error by reviewing only a small portion of the record in evaluating the proposal for traffic safety."

The city findings on traffic safety state:

---

[11]PCC 33.102.015(2) provides in relevant part:

> "[In order to approve a rezoning request, it] must be found that services, adequate to support the proposed * * * commercial use * * * are presently available or can be reasonably made available (consistent with the Comprehensive Plan Public Facilities Policies) by the time the use qualifies for a certificate of occupancy from the Bureau of Buildings. For the purposes of this requirement, services include:
>
> "* * * * *
>
> "Transportation capabilities[.]
>
> "* * * * *"

> "The City Council reviewed six sources of oral and written testimony in evaluating the proposal for traffic safety. Those sources are as follows, and are cited below * * *:
>
> "[Five documents and '[t]estimony of neighborhood associations and residents' are listed.]" Record 44.

Petitioner argues the above quoted findings indicate the city council failed to consider certain evidence which petitioner contends is relevant to traffic safety issues. Petitioner contends the city council's decision to ignore relevant evidence effectively denies him his rights under Fasano v. Washington Co. Comm., supra, to present and rebut evidence.

Respondents contend the above quoted finding means that the city council "relied upon these six sources in reaching its conclusion on impacts to traffic safety[, but] only after fully reviewing the entire record and all evidence." Respondent and Intervenors' Brief 42. Respondents argue that a plain reading of the entire decision shows that the city council did consider all evidence in the record. According to respondents, we should not assume the city council failed to consider all evidence in the record because it did not refer to all evidence in its findings. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 755, 765 (1988).

The parties do not dispute, and we agree, that the city council is required to consider and weigh all evidence

before it concerning traffic safety in making a determination on the adequacy of transportation services. See Younger v. City of Portland, 15 Or LUBA 210, 216-217, aff'd 86 Or App 211 (1987), rev'd on other grounds 305 Or 346 (1988). We also agree with respondents that the city is not required to refer to all evidence considered in its findings. Kellogg Lake Friends v. City of Milwaukie, supra. However, by specifically stating the city council "reviewed six [listed] sources of oral and written testimony in evaluating the proposal for traffic safety," the above quoted finding implies the city council did not review other, nonlisted evidence regarding traffic safety.

Because the city's findings make it unclear whether the city applied the correct scope of review in considering the traffic safety issue, and this decision must be remanded to the city for further proceedings in any case, we believe the most appropriate course is for the city to consider this issue on remand and clarify whether it considered all relevant evidence in reaching its decision.

The seventh assignment of error is sustained.

The city's decision is remanded.