BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUNE WICKS-SNODGRASS, PAULINE SKINNER, JIM LEWIS, and BOBBY BECKLEY,	)	
Petitioners,	)	LUBA No. 95-240
vs.	)	FINAL OPINION AND ORDER
CITY OF REEDSPORT,	)	
Respondent.	)	

Appeal from City of Reedsport.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dole Coalwell & Clark.

Bill Kloos, Eugene, filed the response brief and argued on behalf of respondent. With him on the brief was Johnson, Kloos & Sherton, and Stephen H. Miller, City Attorney, Reedsport.

HANNA, Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 01/16/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a residential subdivision. The decision also approves variances to certain city right-of-way width, roadway width, and sidewalk requirements.

FACTS

On July 12, 1994, the city approved a tentative plan for a 13-lot subdivision with related variances to roadway width, right-of-way width, sidewalk and street grade requirements. LUBA remanded that decision on March 8, 1995. Wicks v. City of Reedsport, 29 Or LUBA 8 (1995) (Wicks). We described the proposal as follows:

> "The proposed subdivision will create 13 lots from a 9.82-acre parcel zoned Single Family Residential (R-1). The Reedsport Comprehensive Plan (plan), at p. B-1, identifies the subject property as being in an area of greater than 20% slope. The subject property is adjoined by developed residential areas to the north and east. The city limits and urban growth boundary coincide with the southern and western boundaries of the subject property.
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> "Three existing deadend streets, Maple Court, View Court and Bellevue Drive, will be extended to the south to serve the proposed subdivision. Two of the extended streets, Maple Court and View Court, are proposed to terminate in circular turn-arounds. The extension of Bellevue Drive is proposed to be a deadend. The three existing streets lack sidewalks and have substandard right-of-way and roadway widths. The proposed subdivision includes variances to allow (1) the rights-of-way and roadways of the three street extensions to be the same width as those of the existing streets, and (2) the three street

extensions to be built without sidewalks." Wicks, 29 Or LUBA at 10.

After remand, the city amended its subdivision ordinance in a manner which changed some of the criteria applicable to the proposed subdivision. On June 6, 1995, the applicants withdrew their initial application and submitted a new application under the amended ordinance, making essentially the same proposal as in the first application. On July 18, 1995, the planning commission approved the preliminary plat and the three variances. On August 3, 1995, petitioners Wicks-Snodgrass, Skinner and Lewis appealed the planning commission decision to the city council. The city notified the three appellants that the city council would hear the appeal on September 11, 1995, but did not provide written notice of the city council hearing to other opponents who had objected to the application before the planning commission, but had not appealed.

On September 11, 1995, the city council heard the appeal. The council accepted new evidence at that proceeding, and also left the record open to allow the opponents seven days after the hearing to submit new information. The council also allowed an additional seven-day period for the applicant to respond to that new information. Record 32. On October 9, 1995, the city council voted to tentatively approve the application, and directed that draft findings be prepared. On November 6,

1995, the city council adopted the challenged decision. This appeal followed.

PRELIMINARY ISSUE

On March 18, 1996, we denied the city's motion to dismiss this appeal. Wicks-Snodgrass v. City of Reedsport, ___ Or LUBA ___ (LUBA No. 95-240, Order on Motion to Dismiss, March 18, 1996). For purposes of that order, and based solely upon the representations of the parties at that time, we assumed that the challenged decision was a limited land use decision. Petitioners now contend that the challenged decision is a land use decision under the Reedsport Subdivision Ordinance (RSO). Petitioners argue that the applicable provisions of the RSO classify tentative subdivision approvals and the types of variances at issue as land use decisions. Because the city made a land use decision, petitioners argue, the procedural requirements of ORS 197.763 apply.

The city responds that the entire decision is a limited land use decision as defined by ORS 197.015(12), which provides:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
>
> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not

limited to site review and design review."

The city is correct that the decision at issue in this appeal, a tentative subdivision plan approval for a site within the UGB, clearly falls within the range of decisions which local governments are entitled to process as limited land use decisions under the applicable statutes. However, in Gensman v. City of Tigard, 29 Or LUBA 505 (1995), we held that if a city intends to process limited land use decisions differently from land use decisions, ORS 197.195(3)(c)(I) requires that it must make that intent clear in the initial notice.[1] If the city fails to do so, it must provide all of

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[1]The procedural requirements for limited land use decisions are set forth in ORS 197.195(3)(c), which provides:

> "(3) A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.
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> "* * * * *
>
> "(c) The notice and procedures used by local government shall:
>
> "(A) Provide a 14-day period for submission of written comments prior to the decision;
>
> "(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;
>
> "(C) List, by commonly used citation, the applicable criteria for the decision;
>
> "(D) Set forth the street address or other easily understood geographical reference to the subject property;

the ORS 197.763 procedural safeguards. Id. at 512.

Nothing in the June 6, 1995 hearing notice indicates that the city intended to process the application as a limited land use decision. In that notice, the city notified all owners of property within 200 feet of the proposed subdivision of the initial public hearing, and invited their oral testimony regarding the application. Record 209-211. These are standard notice procedures for a quasi-judicial land use decision under ORS 197.763 and the applicable local ordinance.[2]

> "(E) State the place, date and time that comments are due;
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> "(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;
>
> "(G) Include the name and phone number of a local government contact person;
>
> "(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and
>
> "(I) Briefly summarize the local decision making process for the limited land use decision being made."

[2]RSO 13(J) provides:

> "PROCEDURES FOR LAND USE DECISIONS: Decisions on the following actions under this Ordinance shall be conducted as land use decisions: tentative subdivision plans. The Planning Commission shall be the deliberating body, and shall conduct the land use decision acting in a quasi-judicial capacity. A public hearing shall be required for all land use decisions. Notice of the public hearing and procedures for the public hearing shall meet all requirements for quasi-judicial decision, as set forth in ORS 197.763."

Instead of following the procedures for a limited land use decision set forth in ORS 197.195(3), the city elected to process intervenor's application as a land use decision under the procedures established in ORS 197.763 and RSO 13(J). As a result, the city must provide all of the procedural safeguards required for land use decisions. Sparks v. City of Bandon, 30 Or LUBA 69, 70 n1 (1995); Gensman v. City of Tigard, supra, 29 Or LUBA at 512.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city failed to follow applicable procedures in four respects, to the prejudice of petitioners' substantial rights. Petitioners contend:

> "Respondent failed to give notice of the evidentiary hearing before the city council to petitioners Bobby Beckley, John Thut, and DeLaine Thut.[3]
>
> "Respondent accepted evidence in support of the application without allowing petitioners to respond.
>
> "Respondent accepted evidence in support of the application after the close of the evidentiary record.
>
> "Respondent's notice of the initial evidentiary hearing was defective." Petition for Review 7.

[3]John Thut and DeLaine Thut were inadvertently included as petitioners in the notice of intent to appeal. Their names were not removed from this appeal until after the petition for review and respondent's brief were filed. As a result, the briefs include references to those individuals as petitioners. However, we do not consider any reference or argument pertaining to John Thut and DeLaine Thut.

A. No Notice of Evidentiary Hearing

After the planning commission approval of the challenged decision, petitioners Wicks-Snodgrass, Skinner and Lewis appealed the decision to the city council. The city provided notice of the September 11, 1995 city council appeal hearing to petitioners Wicks-Snodgrass, Skinner and Lewis but did not provide notice of that hearing to petitioner Beckley. Beckley appeared before the planning commission in opposition to the application, but did not appeal its decision. Petitioners argue that Beckley was entitled to notice as a party to the proceeding and as an owner of property within the specified distance from the development under ORS 197.763(2) and Reedsport Zoning Ordinance (RZO) 12.030.[4] Additionally, petitioners contend

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[4]RZO 12.030 provides, in relevant part:

> "Notice of public hearings shall be given by the City Recorder in the following manner, except where statutory requirements are given and then the statutory requirements shall be followed:
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> "* * * * *
>
> "2. Notice shall also be presented in written form not less than 20 days before the evidentiary hearings or 10 days before the first evidentiary hearing, if two or more evidentiary hearings are allowed to the owners of property within 200 [feet] of the exterior boundaries of the property involved where the site is wholly or partially within the City Limits and/or Urban Growth Boundary."

ORS 197.763(2)(a) requires

> "Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property

that "the evidentiary phase of the appeal hearing required new notice as a new proceeding." Petition for Review 8.

The city does not dispute Beckley's claim that she lives within the area for which notice is required. Rather, the city contends that the notice requirements for a land use decision do not apply in this proceeding, because the challenged decision was a limited land use decision. We reject the city's arguments based on our determination that petitioners are entitled to all of the procedural safeguards required by ORS 197.763. We conclude that Beckley was entitled to notice of the appeal hearing before the city council pursuant to ORS 197.763(2).[5]

The city further argues that even if Beckley was entitled to notice of the city council hearing, remand is

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> on the most recent property tax assessment roll where such property is located:
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> "(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;
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> "(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or
>
> "(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone."

[5]Indeed, it appears from the record that the city intended to notify Beckley of the hearing, but inadvertently failed to do so. The first page of the city's final decision incorrectly states that "[p]roper notice was provided to interested parties, and parties living within 200 feet of the proposed development by written letter * * *." Record 3. Also, the minutes from the September 11, 1995 city council hearing indicate that the city considered and passed a motion to allow all persons who had appeared before the planning commission to appear before the city council as parties to the appeal. Record 24.

unwarranted because the lack of notice did not prejudice Beckley's substantial rights. Under ORS 197.835(9)(a)(B), LUBA may reverse or remand a local decision based on a local government's failure to comply with applicable notice requirements only if the defect prejudices a petitioner's substantial rights. Thomas v. Wasco County, 30 Or LUBA 142 (1995). The city argues that Beckley's substantial rights were not prejudiced because the challenged decision did not rely on any new evidence received at the hearing, or during the 14-day period when the record was held open after the hearing, to comply with an approval standard.

We disagree. Even if the city were correct that the challenged decision did not rely on new evidence received at the city council hearing or during the 14-day period after the hearing, Beckley's substantial rights were prejudiced by the fact that the city's failure to provide her with notice effectively denied Beckley of her right to participate in the hearing process. The city accepted new evidence at the September 11, 1995 hearing. Because Beckley did not receive notice of the hearing, she was denied the opportunity to present new oral or written evidence either at the hearing or while the record was left open after the hearing. In Thomas, we noted that "[i]f the county's procedural error deprived petitioner of the opportunity to participate in the process, his substantial rights were violated." Id. at 145. We conclude that the city's failure to provide Beckley with the notice of the city council hearing to which she was

entitled deprived her of the opportunity to participate in the process before the city, thereby violating her substantial rights.

This subassignment of error is sustained.

B. No Opportunity for Rebuttal

After the September 11, 1995 hearing, the city council left the record open for two consecutive seven-day periods, until September 29, 1995. Record 32. The opponents of the application were permitted to submit new evidence during the first seven-day period, and the applicant was allowed a second seven-day period to respond to any new evidence submitted by the opponents. During the first 7-day period, the opponents submitted several pages of written materials and photographs opposing the proposal and objecting to the proceedings before the city. Record 33-51. During the second 7-day period, the city engineer submitted a one-page supplementary report, with two exhibits, directly responding to four issues raised by the opponents. Record 52-54. Petitioners contend that:

> "Petitioner Wicks-Snodgrass submitted new evidence during the first 7-day period and requested an opportunity to respond to new evidence that may be submitted by the applicant during the second 7-day period. * * * [S]ubstantial new evidence was submitted in support of the application by the city engineer during the second 7-day period. * * * Petitioner Wicks-Snodgrass had a right to an opportunity to rebut the new evidence by having the record re-opened." Petition for Review 10.

Petitioners do not specifically explain why the city engineer's supplemental report amounts to "substantial new

evidence" not already in the record. Petitioners rely on ORS 197.763(6)(c) to support their argument that Wicks-Snodgrass has a right to reopen the record and submit rebuttal evidence. Without analysis, petitioners also refer to ONRC v. City of Seaside, 29 Or LUBA 39, 53-54 (1995).

The city responds, and we agree, that the provisions of ORS 197.763(6)(c) only apply to an "initial evidentiary hearing," which in this case was held before the planning commission. That statute does not require the city council to reopen the record for rebuttal upon the request of a participant in a subsequent evidentiary hearing. See ONRC v. City of Oregon City, supra, 29 Or LUBA at 96 (applying substantially similar provisions of ORS 197.763(6) (1993 Edition)).

This subassignment of error is denied.

C. Evidence Submitted After the Record Closed

At the September 11, 1995 hearing, the city council decided that the record would be closed on September 29, 1995. Record 32. Thus, the October 9, 1995 meeting of the city council was to be for deliberation only, without oral testimony by the parties or introduction of new evidence. Record 32, 56. At the October 9, 1995 meeting, the city engineer responded to various questions posed by council members regarding the proposed subdivision and its effects on traffic, sewer systems, and water drainage. Record 13-17. Petitioners contend that the statements of the city engineer amount to new evidence that was impermissibly

accepted by the city after the record was closed, and that the city's failure to allow petitioners an opportunity to rebut the new evidence prejudiced their substantial rights.[6]

The city responds, and we agree, that petitioners waived their right to object to this alleged procedural defect because they were present at the October 9, 1995 city council meeting and did not object to the acceptance of the city engineer's testimony. This Board has repeatedly held that where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to this Board. Woodstock Neighborhood Assoc. v. City of Portland, 28 Or LUBA 146, 150-51 (1994).

Petitioners rely upon Wicks, in which this Board remanded the city's first approval of the same proposed subdivision. One basis for remand in Wicks was that the city council accepted new evidence in the form of oral testimony from the city engineer and did not allow petitioners an opportunity to rebut that testimony. Wicks, 29 Or LUBA at 16-17. However, we note that the petitioners

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[6]A local government is not required to allow petitioners to rebut city staff summaries of evidence that is already in the record. McInnis v. City of Portland, 25 Or LUBA 376, 380 (1993). Petitioners do not specifically indicate which of the city engineer's statements go beyond a restatement of evidence that is already in the record. In the absence of some direction in this regard from petitioners, LUBA will not compare the entire record against the statements of the engineer to determine whether or not those statements include new evidence.

in Wicks objected to the receipt of new evidence by the city council. Id. at 16. Petitioners made no such objection at the October 9, 1995 proceeding; absent such an objection, petitioners have no grounds for reversal or remand.

This subassignment of error is denied.

D. Defective Hearing Notice

Petitioners contend that they were prejudiced because the hearing notice failed to identify Reedsport Comprehensive Plan (RCP) Water Policy 3, as an applicable criterion. We address petitioners' contention in our discussion of the second assignment of error.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the findings are deficient because the challenged decision does not comply with RCP Water Policy 3, which states: "Water meter boxes shall be required in all new residential development." Petitioners argue that the comprehensive plan requirement for water meter boxes can only be enforced by the imposition of a condition of approval, and that the city impermissibly failed to impose this requirement as a condition of approval.[7]

The city responds that petitioners have waived this issue because they failed to raise it during the local

[7]Petitioners do not explain why this ministerial requirement cannot be enforced without a condition of approval.

proceedings. However, RCP Water Policy 3 was not identified in the city's hearing notice as an approval criterion. Where petitioners contend a decision fails to address an applicable approval criterion that was not identified in the local government's hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(4)(b).[8] O'Mara v. Douglas County, 25 Or LUBA 25, 32-34 (1993), rev'd on other grounds, 121 Or App 113, rev'g Court of Appeals, aff'g LUBA 318 Or 72 (1993). In O'Mara, the challenged decision did not include an interpretation from the county regarding whether the local code provision at issue was an applicable approval standard; as a result, LUBA was required to remand for a local interpretation on that issue under Weeks v. Tillamook County, 117 Or App 449, 844 P2d 914 (1992). However, under

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

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

"(b) The local government failed to follow the requirements of ORS 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government * * *."

the 1995 amendments to ORS 197.829(2), if a local government fails to interpret a provision of its comprehensive plan, this Board may make its own determination of whether the local government decision is correct.

The city argues that RCP Water Policy 3 does not apply to subdivision approval:

> "The subdividing process relates to the division of land, not the construction of residences. This policy may have some import as a directive to the City in its adoption of standards or procedures relating to the issuance of building permits. But its consideration in the subdividing process would be premature." Respondent's Brief 17.

We agree. The RCP policy regarding installation of water meter boxes does not establish approval criteria applicable to the subject application.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city impermissibly deferred its determination of compliance with applicable criteria for the proposed turnaround at the end of Bellevue Drive. Petitioners contend that the proposed turnaround will be inadequate for emergency vehicle and private use, and that the city deferred determination of compliance on this issue by requiring the turnaround design to be approved by the city engineer, with no notice or opportunity for hearing on the engineer's decision regarding the design. The condition challenged by petitioners provides:

> "The developer shall provide an adequate turn-around at the end of Bellevue in the vicinity of

> Lot 13, for emergency and private vehicle turnaround. (Review and approval of turn around shall be coordinated and approved by City Engineer who will seek input from emergency service agencies i.e. hospital and fire department.)" Record 91. (Emphasis in original.)

It is well established that a local government may demonstrate compliance with an approval criterion by first determining that the proposal will comply with the criterion, if certain conditions are imposed, and then relying on the imposition of those conditions to ensure compliance. Eppich v. Clackamas County, 26 Or LUBA 498, 507 (1994). The technical design specifications involved with those conditions may then be determined by city staff without opportunity for public comment:

> "Where a local government's initial proceedings satisfy any state and local requirements for notice and hearing, conditions imposed in this manner to ensure compliance with applicable standards may include conditions requiring that specific technical solutions to identified development problems be submitted to, and reviewed and approved by, the local government's planning and engineering staff, in a proceeding without notice and hearing." Id. (Citing Meyer v. City of Portland, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984)).

Having determined that the proposal will comply with the applicable traffic and safety criteria so long as an adequate turnaround is provided, the city did not err when it assigned the review and approval of the design specifications for the turnaround to the city engineer.

In the alternative, petitioners argue that the turnaround requirement makes Bellevue Drive a cul-de-sac

that does not meet cul-de-sac criteria. Petitioners rely on RSO 3, which defines cul-de-sac as "[a] short street having one end open to traffic and being terminated by a vehicle turnaround."

The city responds that the tentative plat for Bellevue Drive does not create a cul-de-sac because

> "[t]he plat shows that Bellevue does not terminate in a vehicle turnaround. The street is platted along the eastern edge of the plat to the southern boundary of the plat, at which point it stubs out, so that it may be extended in the future to serve additional land. * * * It is not a cul-de-sac because it does not end in a vehicle turnaround. In contrast, the other streets on the plat are cul-de-sacs because they do end in vehicle turnarounds." Respondent's Brief 18.

While the city is correct that the plat does not show a turnaround at the end of Bellevue Drive, one of the conditions of approval requires that the developer shall provide a turnaround at the end of Bellevue Drive that will be coordinated and approved by the city engineer. Record 91. Once that condition is met, Bellevue Drive will fall within the definition of a cul-de-sac because it will be a street having one end open to traffic and the other end terminated with a vehicle turnaround. Contrary to the city's assertion, the findings expressly state that Bellevue Drive will not be extended to serve additional development in the future. Record 87.

Under the city's decision, Bellevue Drive falls within the definition of a cul-de-sac. RSO 11(B)(9) requires that a cul-de-sac shall have a maximum length of 550 feet, and

shall end in a circular turnaround. RSO 11(B)(2) establishes criteria regarding the minimum right-of-way and roadway widths for the radius of a turnaround. Petitioners are correct that the tentative plat for Bellevue Drive does not meet these criteria.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that three variances granted by the city do not comply with the variance criteria of RSO 13(A). The variances allowed (1) reduction of the required right-of-way width from 50 feet to 30 feet for Maple Court, View Court and Bellevue Drive; (2) elimination of the sidewalk requirement for both sides of the street on Maple Court, View Court and Bellevue Drive; and (3) reduction of the required street width from 32 feet to 16 feet for Bellevue Drive. RSO 13(A) provides:

> A. VARIANCE APPLICATION: The Commission may authorize variances to requirements of this ordinance. Application for a variance shall be made by a petition of the developer, stating fully the grounds of the application and the facts relied upon by the petitioner. The petition shall be filed with the tentative plan. A variance may be granted only in the event that all of the following circumstances are considered:
>
> 1. Exceptional Circumstances: Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same vicinity, and result from tract size or shape, topography or other circumstances over which the owner of the property, since enactment of this

ordinance, has had no control.

2. Preservation of Property Right: The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same vicinity possess.

3. Not Detrimental: The variance would not be materially detrimental to the purposes of this ordinance, or to property in the same vicinity in which the property is located, or otherwise conflict with the objectives of any applicable laws or regulations.

4. Minimum: The variance requested is the minimum variance which would alleviate the hardship. (Emphasis added.)

The city responds:

"The principal thrust of petitioners' argument erroneously assumes that the process stated in the RSO for approval of variances requires findings of compliance with specific standards. It does not. The RSO allows variances to be granted provided four circumstances are 'considered.'" Respondent's Brief 19.

The city is correct that RSO 13(A) only requires that the city "consider" the four circumstances set forth in that ordinance. We note that the city specifically amended that section of its subdivision ordinance in 1995 to achieve this result.[9] The findings adopted by the planning commission address each of the four elements set forth in RSO 13(A) with respect to each proposed variance. Record 87-90.

[9]Prior to February 6, 1995, the same provision of RSO 13(A) required that "[a] variance may be granted only in the event that all of the following circumstances exist: * * *." (Emphasis added.)

Nothing more is required under that ordinance.

Additionally, petitioners argue that the city's decision does not comply with the Reedsport Comprehensive Plan (RCP) because the sidewalk requirement is part of the RCP.[10] Thus, petitioners argue, the sidewalk requirement is not subject to the subdivision ordinance variance provisions, and "[t]here is no provision for exempting a proposal from the requirements of the comprehensive plan, other than through amending the plan." Petitioner's Brief 15.[11]

The city responds that the RCP transportation policy is implemented through the subdivision ordinance, and "[t]he subdivision ordinance also requires sidewalks, but it also allows for variances from the sidewalk requirement based on consideration of the factors listed in the ordinance." Respondent's Brief 20. The city's argument is irrelevant. The comprehensive plan expressly requires that new subdivisions shall have sidewalks. The city may not use the variance procedures of its subdivision ordinance to grant an exception to its comprehensive plan. Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

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[10]RCP Transportation Policy 1 states:

> "New subdivisions or planned unit developments shall have sidewalks and adequate street patterns to facilitate easy movement of both cars and pedestrians."

[11]Contrary to the city's assertion, petitioners raised this issue below. Record 117.

The fourth assignment of error is sustained, in part.

The city's decision is remanded.