

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

SUSAN HUNT, JON PEELE, CHRISTINE )  
CRAWELY, PATRICIA HALEY, CICI )  
BROWN, BENJAMIN STOTT and TIM )  
BRANDY, )  
Petitioners, )  
vs. )  
CITY OF ASHLAND, )  
Respondent, )  
and )  
MARGARET BROWN, DOUGLAS NEUMAN, )  
and PAUL HWOSCHINSKY, )  
Intervenors-Respondent. )

LUBA No. 98-166  
FINAL OPINION  
AND ORDER

Appeal from City of Ashland.  
Jon Peele, Ashland, filed the petition for review and argued on his own behalf.  
No appearance by City of Ashland.

John R. Hassen and William F. Wilson, Medford, filed the response brief and argued on behalf of intervenors-respondent. With them on the brief was Hornecker, Cowling, Hassen and Heysell.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 2/17/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of an outline plan for a 25-lot subdivision.<sup>1</sup>

4 **MOTION TO INTERVENE**

5 Margaret Brown, Douglas Neuman, and Paul Hwoschinsky (intervenors), the  
6 applicants below, move to intervene on the side of the city. There is no opposition to the  
7 motion, and it is allowed.

8 **FACTS**

9 Intervenors applied for approval of an outline plan for a 25-lot subdivision under the  
10 Performance Standards Options of Ashland Land Use Ordinance (ALUO) 18.88. ALUO  
11 18.88 allows development pursuant to more flexible design standards than are contained in  
12 the city's subdivision ordinance at ALUO 18.80.

13 The subject property is comprised of five tax lots zoned RR-.5-P, Low Density Rural  
14 Residential. A narrow unimproved road, Strawberry Lane, crosses the subject property east  
15 to west, connecting on the west side with Westwood Street, an improved street, and on the  
16 east side with Alnutt Street. Alnutt Street is a narrow unimproved street that continues north  
17 and east to connect with Nutley Street, an improved street where a city storm drainage  
18 system is located. Strawberry Lane continues eastward from its intersection with Alnutt  
19 Street down a steep hill to connect with paved collector streets.

20 Intervenors' application proposes to pave and improve Strawberry Lane from its  
21 intersection with Westwood Street through the development eastward to its intersection with  
22 Alnutt Street, but not to improve either Strawberry Lane or Alnutt beyond that point. The  
23 proposed development will generate an additional 230 average daily trips [ADTs]. Because

---

<sup>1</sup>Each of the petitioners in this appeal appears pro se. Although several other petitioners are part of this appeal, only petitioner Jon R. Peele signed the petition for review and thus only that petitioner presented argument to the Board. Accordingly, our opinion refers to "petitioner" rather than to "petitioners."

1 travel between the subject property to urban centers is shorter and more direct using the  
2 Strawberry Lane route than the Westwood Street route, 138 ADTs, or 60 percent, of the  
3 traffic generated by the proposed development will use the Strawberry Lane or Alnutt Street  
4 route rather than the Westwood Street route.

5 Intervenor's proposed storm drainage plan contemplates underground drainage pipes  
6 running from the development eastward and downhill along Strawberry Lane to its  
7 intersection with Alnutt Street. There are no underground drainage facilities or surface  
8 drainage ditches at the intersection of Strawberry Lane and Alnutt Street.

9 On May 12, 1998, the city planning commission approved intervenor's application  
10 under ALUO 18.88.030. On appeal to the city council, the council conducted a de novo  
11 review on June 16, 1998, during which it heard testimony from planning staff and the public.  
12 The council closed the public hearing for deliberations but was unable to reach a conclusion  
13 and directed planning staff to bring options regarding improvement of the Strawberry  
14 Lane/Alnutt Street area to the next meeting held July 7, 1998. At the meeting on July 7,  
15 1998, the city council accepted a "City Council Communication" from the planning director,  
16 recommending that the council impose an additional condition, Condition 21, requiring the  
17 applicants to provide secondary paved access from the intersection of Strawberry Lane and  
18 Alnutt Street to a paved collector street. The Council voted to deny the appeal, and approve  
19 the application with the addition of Condition 21.

20 This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner argues that the city's findings of compliance with ALUO  
23 18.88.030(A)(4)(b) with respect to access, drainage, and the impacts on the city's facilities  
24 are not supported by substantial evidence in the record. ALUO 18.88.030(A)(4)(b) requires  
25 findings

1 [t]hat adequate key City facilities can be provided including water, sewer,  
2 paved access to and through the development, electricity, urban storm  
3 drainage, police and fire protection and adequate transportation; and that the  
4 development will not cause a City facility to operate beyond capacity."  
5 (Emphases added.)

6 **A. First and Third Subassignments of Error: Primary Access**

7 Petitioner contends, first, that the city made a finding that the Westwood Street route  
8 will be the "primary" access for the proposed subdivision. Petitioner argues that the city's  
9 finding is not supported by substantial evidence in the record, given that the Strawberry Lane  
10 route is a shorter and more direct route to urban centers and most of the additional traffic  
11 generated by the subdivision will use the Strawberry Lane route. Because Strawberry Lane  
12 will, in effect, be the "primary" access, petitioner argues the city's finding of compliance with  
13 the requirement at ALUO 18.88.030(A)(4)(b) that there is "paved access to and through the  
14 development" is not supported by substantial evidence.

15 In addition, petitioner argues that provisions of the Transportation Element of the  
16 city's comprehensive plan and a definition in OAR 660-012-0005 require that access routes  
17 be "reasonably direct," and that the challenged decision violates these provisions by  
18 designating as "primary" access a route, the Westwood Street route, that is not reasonably  
19 direct.

20 The challenged finding states, in relevant part:

21 "Paved access to and through the development will be provided via Westwood  
22 Street. Alternate paved access will also be provided from the intersection of  
23 Strawberry Lane and Alnutt Street to a paved collector street." Record 10.

24 Intervenor's respond that the city did not make a finding that the Westwood Street  
25 route will be the "primary" access, and that even if a finding to that effect is inferred, ALUO  
26 18.88.030(A)(4)(b) does not require a finding that any particular road provides "primary"  
27 access, only that there is "paved access to and through the development." Intervenor's  
28 contend that there is substantial evidence in the record that Westwood Street provides "paved  
29 access to and through the development." Further, intervenors respond that the cited

1 provisions of the Transportation Element and the definition in OAR 660-012-0005 are not  
2 approval criteria applicable to the proposed subdivision.

3 Petitioner has not established that the cited provisions of the Transportation Element  
4 or the definition at OAR 660-012-0005, part of the Transportation Planning Rule, are  
5 approval criteria applicable to intervenors' request for approval under ALUO 18.88. The  
6 cited provisions of the Transportation Element are merely general statements that do not  
7 contain any indication that they constitute approval criteria.<sup>2</sup> Nor has petitioner established  
8 that any provision of the Transportation Planning Rule, much less the definition at OAR 660-  
9 012-0005, is applicable to intervenors' request.

10 We also agree with intervenors that the city did not make a finding that Westwood  
11 Street is the "primary" access route, and that ALUO 18.88.030(A)(4)(b) does not require  
12 such a finding.<sup>3</sup> The lack of substantial evidence to support a finding the city did not make  
13 and did not need to make is not a basis to reverse or remand the challenged decision. To the  
14 extent that petitioner challenges the findings the city did make regarding the role of  
15 Westwood Street in complying with ALUO 18.88.030(A)(4)(b), we conclude that those  
16 findings are supported by substantial evidence.

17 Petitioner's third subassignment of error is based entirely on the argument in the first  
18 subassignment of error that the city erred in designating the Westwood Street route the

---

<sup>2</sup>For example, the petition for review quotes the following statement from the Transportation Element at page 2: "[w]e must have a well-designed, integrated network that is convenient to use." Petition for Review 13. We discern nothing in such language that could conceivably constitute an approval criterion.

<sup>3</sup>At oral argument, petitioner argued that, while the terms of ALUO 18.88.030(A)(4)(b) do not refer to "primary" access or any similar concept, the context of ALUO 18.88.030(A)(4)(b) includes ALUO 18.80.020(B)(9), which requires that "[a]ll major means of access to a subdivision or major partition shall be from existing streets fully improved to City standards \* \* \* [.]". We understood petitioner to contend that we should infer that the "major means of access" concept in ALUO 18.80.020(B)(9) is equally applicable to the "paved access" requirement of ALUO 18.88.030(A)(4)(b). We are not certain that ALUO 18.80.020(B)(9), which appears in a different section of the ALUO, is correctly viewed as providing context for ALUO 18.88.030(A)(4)(b). Moreover, petitioner does not explain how he derives a "primary" access standard in 18.88.030(A)(4)(b) from the "major" access standard in 18.80.020(B)(9). In any event, petitioner's contextual argument is not adequately developed in the petition for review, and we do not consider it further. OAR 661-010-040(1); Deschutes Development v. Deschutes Cty, 5 Or LUBA 218, 220 (1982).

1 "primary" access for purposes of ALUO 18.88.030(4)(b), and is rejected for the reasons  
2 expressed above.

3 The first and third subassignments of error are denied.

4 **B. Second Subassignment of Error: Storm Drainage System**

5 With respect to the proposed storm drainage system, the challenged decision finds:

6 "Runoff into conventional curb and gutter systems within the new street will  
7 be directed to a new pipe system proposed to be installed from Hitt Road  
8 down to the intersection of Strawberry lane and Alnutt Street and connected to  
9 the existing city storm drainage system." Record 10.

10 Petitioner argues that the city's finding that the proposed storm drainage system will  
11 be "connected to the existing city storm drainage system" is not supported by substantial  
12 evidence, because the proposed drainage system stops at the intersection of Strawberry Lane  
13 and Alnutt Street, and does not connect to the city's drainage system in Nutley Street or any  
14 other drainage system. Accordingly, petitioner argues, the proposed drainage system does  
15 not comply with the requirement in ALUO 18.88.030(A)(4)(b) for adequate urban storm  
16 drainage, and the city's findings to that effect are not supported by substantial evidence.

17 Intervenors respond that Condition 21 of the challenged decision requires that the  
18 drainage system constructed to Alnutt Street be connected to the city's drainage system  
19 extending from Nutley Street. However, Condition 21 requires only that

20 "secondary paved access, providing through access for the development, be  
21 provided from the intersection of Strawberry and Alnutt to a paved collector  
22 street." Record 17.

23 We perceive nothing in Condition 21 that requires that the proposed storm drainage system  
24 be connected to the city's system in Nutley Street. At oral argument, intervenors contended  
25 that, whenever Alnutt Street is paved from Strawberry Lane to Nutley Street, drainage  
26 facilities will be included and connected as a matter of course. However, Condition 21 does  
27 not require that Alnutt Street be paved or improved; it merely requires that paved access be  
28 provided from the intersection of Strawberry Lane and Alnutt Street to a "paved collector

1 street," which could mean Nutley Street or other paved collector streets below Strawberry  
2 Lane. In any case, even if Condition 21 required the improvement of Alnutt Street, it does  
3 not require connection of the proposed drainage facilities to the city's system, and intervenors  
4 have not identified any basis in this record to conclude that such connections will be made as  
5 a matter of course.

6 Finally, intervenors argue that, even if no connection is made with the city's drainage  
7 system, there is substantial evidence in the record to support the city's finding of compliance  
8 with the ALUO 18.88.030(4)(b) for adequate urban storm drainage. Intervenors cite to  
9 testimony by the intervenors' civil engineer that he reviewed the "plans" and that there were  
10 "no problems" with the proposed water, sewer or storm drain systems. Record 25.  
11 Intervenors suggest this evidence constitutes substantial evidence regarding the adequacy of  
12 the proposed storm drainage system. However, the relevant "plan" referred to at Record 25  
13 is presumably the proposed drainage plan at Record 157. If so, that plan depicts the drainage  
14 system only on the subject property, and does not depict the terminus of the proposed  
15 drainage system at the intersection of Strawberry Lane and Alnutt Street, or otherwise  
16 indicate what happens to the runoff discharging from intervenors' storm pipe. See also  
17 Record 102 (staff report questioning where the runoff will go).

18 Substantial evidence is evidence a reasonable person would rely upon in making a  
19 decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475  
20 (1984). We agree with petitioner that there is not substantial evidence to support the city's  
21 finding that the proposed drainage system will be "connected to the existing city storm  
22 drainage system." Record 10. Because the decision treats connection of the new storm  
23 drainage pipes to be installed in Strawberry Lane to the city's system as necessary to provide  
24 an adequate urban storm drainage system, we further conclude that the city's finding of  
25 compliance with ALUO 18.88.030(4)(b) with respect to an adequate storm drainage system  
26 is also not supported by substantial evidence in the record.

1 The third subassignment of error is sustained.

2 **C. Fourth Subassignment of Error: Capacity**

3 Petitioner challenges the city's finding that the proposed storm drainage system and  
4 the proposed use of Strawberry Lane as an access route comply with the ALUO  
5 18.88.030(A)(4)(b) requirement that the development not cause a city facility to operate  
6 beyond capacity.

7 With respect to the capacity of Strawberry Lane, the challenged decision states that

8 "[t]he improvements to Strawberry Lane from [the development] and through  
9 its intersection with Alnutt Street will improve access to the area in the overall  
10 operation of the intersection, while still allowing the unimproved sections of  
11 Alnutt Street and Strawberry Lane to operate at an acceptable level of service.

12 "\* \* \* Alternate paved access will also be provided from the intersection of  
13 Strawberry Lane and Alnutt Street to a paved collector street. The paving of  
14 alternate access will eliminate the dangerous conditions presently existing in  
15 the lower Strawberry Lane area. \* \* \*

16 "\* \* \* The County uses 800 ADTs for unpaved roads. Even at maximum  
17 build out, the capacity on the street system would not be reached. Also, if the  
18 vehicle trips generated by the proposed development, 92 ADTs on Westwood  
19 and 138 ADTs on Strawberry Lane, are added to the present traffic counts, the  
20 additional vehicle trips are far below street capacity." Record 9-10.

21 Petitioner argues that there is no evidence in the record regarding the capacity of  
22 Strawberry Lane in its current narrow, unimproved condition, and thus that the city's findings  
23 regarding its capacity and that it will continue to operate at an acceptable level of service are  
24 not supported by substantial evidence.

25 The record indicates that Strawberry Lane in its current condition has a capacity of  
26 800 ADTs, and that the total traffic on Strawberry Lane including the additional traffic from  
27 the proposed subdivision does not exceed 323 ADTs. Record 85. Intervenors respond, and  
28 we agree, that the city's findings with respect to the capacity of Strawberry Lane are  
29 supported by substantial evidence in the record.



1           With respect to the proposed drainage system, petitioner repeats that the system ends  
2 at the Alnutt Street intersection and argue that collecting and then discharging water at that  
3 intersection, where no ditches or other drainage facilities exist, will cause the city's storm  
4 drainage facilities to operate beyond capacity. Intervenors repeat their argument, rejected  
5 above, that as part of Condition 21 the city's storm drainage system will be extended from  
6 Nutley Street to the intersection of Strawberry Lane/Alnutt Street. Further, intervenors  
7 reiterate that, even if the proposed drainage system is not connected the city's, the proposed  
8 system is adequate. We reject those same arguments here because there is no evidence that  
9 the system will be connected to the city's system, and because the decision appears to treat  
10 connection with its system as necessary for compliance with ALUO 18.88.030(4)(b). We  
11 agree with petitioner that, absent that connection or other means of addressing discharge  
12 from intervenors' system, the record lacks substantial evidence that the development will not  
13 cause the city's facilities to operate beyond capacity.

14           The fourth subassignment of error is sustained, in part.

15           **D. Fifth Subassignment of Error: Condition 21**

16           Petitioner contends that the imposition of Condition 21, which requires intervenors to  
17 provide paved access from the intersection of Strawberry Lane and Alnutt Street to a paved  
18 collector street, is inadequate to ensure that the proposed development meets the access  
19 requirements of ALUO 18.88.030(A)(4)(b). Petitioner argues that Condition 21 does not (1)  
20 specify what route the paved access will take from the intersection, (2) subject the resulting  
21 paved access to the city's standards with respect to width, sidewalks, drainage systems, etc.,  
22 or (3) demonstrate that improvements to Strawberry Lane/Alnutt Street can feasibly comply  
23 with the city's street standards. Petitioner argues that there is evidence in the record that any  
24 route from the intersection must traverse steep terrain, and no evidence in the record  
25 demonstrating that such routes can be built to city street standards. Accordingly, petitioner

1 contends, there is no evidence in the record that Condition 21 will ensure compliance with  
2 the requirement that there be "paved access to and through the development."

3 The challenged decision finds that

4 "[p]aved access to and through the development will be provided via  
5 Westwood Street. Alternate paved access will be provided from the  
6 intersection of Strawberry Lane and Alnutt Street to a paved collector street.  
7 The paving of alternate access will eliminate the dangerous conditions  
8 presently existing in the lower Strawberry Lane area. The development  
9 acknowledges responsibility for impacts on the downstream streets and the  
10 appropriateness of participation in the expense of improvement by providing  
11 for paved access to a collector street as required by Condition 21." Record  
12 10.

13 Intervenor's respond that in the above quoted passage the city found that the  
14 Westwood Street route provides "paved access to and through the development" and that the  
15 city found Condition 21 to serve a different purpose, to provide nonessential "secondary" or  
16 "alternate" paved access. Accordingly, intervenors argue, Condition 21 is not intended to  
17 and is not necessary to ensure compliance with ALUO 18.88.030(A)(4)(b), and petitioner's  
18 argument to the contrary provides no basis to reverse or remand the challenged decision.

19 We agree with intervenors that the city found that Westwood Street provides the  
20 "paved access to and through the development" required by ALUO 18.88.030(A)(4)(b), and  
21 that the decision does not appear to require the "alternate" paved access reflected in  
22 Condition 21 in order to comply with ALUO 18.88.030(A)(4)(b).<sup>4</sup> Moreover, even if  
23 Condition 21 is intended to satisfy ALUO 18.88.030(A)(4)(b), it is not clear, as petitioner  
24 contends, that ALUO 18.88.030(A)(4)(b) requires more than "paved access to and through  
25 the development." Petitioner's argument is premised on petitioner's view, discussed more  
26 fully in the third assignment of error below, that ALUO 18.88.030(A)(4)(b) requires that  
27 roads subject to that provision meet unspecified city street standards, and that the city

---

<sup>4</sup>Petitioner does not argue that Condition 21 requires secondary paved access in order to comply with the "through" requirement of ALUO 18.88.030(A)(4)(b).

1 misconstrued ALUO 18.88.030(A)(4)(b) to the contrary. However, as we determine below  
2 in discussing in the third assignment of error, ALUO 18.88.030(A)(4)(b) merely requires  
3 "paved access" to and through the development, and does not require compliance with any  
4 particular set of street standards. To the extent Condition 21 is intended to establish  
5 compliance with ALUO 18.88.030(A)(4)(b), there is substantial evidence in the record that it  
6 requires "paved access" to and through the development.

7 The fifth subassignment of error is denied.

8 The first assignment of error is sustained, in part.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner contends that the city erred in refusing to close the lower Strawberry Lane  
11 area to all traffic except for emergency travel. According to petitioner, closing Strawberry  
12 Lane is required to prevent that road from being used as the primary access to and from the  
13 subdivision and to prevent unsafe conditions. Petitioner objects that the city declined to  
14 impose a condition to that effect without any explanation or a reasonable basis for declining  
15 to do so.

16 Intervenor respond, and we agree, that there is no applicable legal standard that  
17 requires the city to have a reasonable basis for declining to impose a condition of approval  
18 proposed by a party to a local proceeding. Salem Golf Club v. City of Salem, 28 Or LUBA  
19 561, 572 (1995).

20 The second assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 Petitioner contends that the city misinterpreted ALUO 18.88.030(A)(4)(b) by limiting  
23 application of its "paved access" requirement to Westwood Street route. According to  
24 petitioner, ALUO 18.88.030(A)(4)(b) is not satisfied unless all accessways to and from a  
25 proposed development are shown to be "safe and adequate" and comply with the city's street  
26 standards. Petitioner repeats his arguments from the first assignment of error that there is not

1 substantial evidence in the record demonstrating that Strawberry Lane can be developed to  
2 comply with the city's streets standards and be made to be "safe and adequate."

3 The third assignment of error is a variant of the arguments presented, and rejected, in  
4 the fifth subassignment of the first assignment of error, discussed above. The essential  
5 problem with both sets of arguments is that petitioner has not established that ALUO  
6 18.88.030(A)(4)(b) requires more than what its terms appear to require: that there be paved  
7 access to and through the development. Petitioner has not adequately identified what obliges  
8 the city to ensure that the improvements mandated by Condition 21 satisfy any particular set  
9 of street standards. Petitioner makes an oblique reference to street standards in the  
10 subdivision provisions of ALUO Chapter 18.80, but does not explain why those standards  
11 apply to development approved under ALUO Chapter 18.88. Even if ALUO Chapter 18.80  
12 provides the pertinent street standards for any improvements constructed as a result of  
13 Condition 21, petitioner's specific argument under this assignment of error is that  
14 ALUO 18.88.030(A)(4)(b) itself imposes those standards on all access routes and thus the  
15 city misinterpreted ALUO 18.88.030(A)(4)(b) as imposing street standards only on the  
16 Westwood Street route.

17 Petitioner does not identify where in the challenged decision the city makes the  
18 interpretation to which petitioner objects. The city makes no express interpretations of  
19 ALUO 18.88.030(A)(4)(b) in the challenged decision, and any implicit interpretations of that  
20 provision are not readily discernible. Accordingly, to the extent it is necessary to resolve this  
21 assignment of error, we may make our own determination of whether the challenged decision  
22 is correct. ORS 197.829(2).<sup>5</sup> Doing so is appropriate, as the relevant facts are undisputed,

---

<sup>5</sup>ORS 197.829(2) provides:

"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

1 the matter presents a pure question of law, and the legal questions are adequately briefed by  
2 the parties. Miller v. Clackamas County, 31 Or LUBA 104, 106 (1996). We conclude that  
3 the plain text of ALUO 18.88.030(A)(4)(b) imposes no requirements that all access streets  
4 comply with any particular street standards. Such requirements may exist elsewhere in the  
5 city's code, but we cannot agree with petitioner that those requirements reside in  
6 ALUO 18.88.030(A)(4)(b). Accordingly, petitioner's argument to the contrary under this  
7 assignment of error presents no basis to reverse or remand the challenged decision.

8 The third assignment of error is denied.

#### 9 **FOURTH ASSIGNMENT OF ERROR**

10 Petitioner contends that the city committed a procedural error that prejudiced  
11 petitioner's substantial rights by accepting the planning staff recommendation to impose  
12 Condition 21 after the close of the public hearing without providing petitioner an opportunity  
13 to respond to that new "evidence." Petitioner argues that the planning staff recommendation  
14 constitutes new evidence impermissibly accepted after the record was closed, and that the  
15 city erred in not allowing petitioner to address the feasibility of Condition 21.

16 Petitioner cites Brown v. Union County, 32 Or LUBA 168 (1996) and Tucker v.  
17 Douglas County, 28 Or LUBA 134 (1994) for the proposition that whenever evidence is  
18 accepted after the close of record participants in the proceeding must be given an opportunity  
19 to address that new evidence. However, both of those cases involved submissions of  
20 evidence by proponents or opponents of the application, not staff recommendations. Staff  
21 communications with local decision makers are not considered ex parte contacts that require  
22 disclosure and an opportunity for rebuttal. Richards-Kreitzberg v. Marion County, 31 Or  
23 LUBA 540, 541 (1996). By the same reasoning, a staff recommendation regarding  
24 appropriate conditions of approval is not new "evidence" that might, if submitted by one of  
25 the parties, trigger an obligation to reopen the record for rebuttal.

26 The fourth assignment of error is denied.

1           The city's decision is remanded.