BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD L. BROME, KAREN M. SCHWERDT, KRISTIN M. KENT, NORMAN R. FRASER, ROD R. EDEL, MICHAEL G. TAYLOR, ANDREA TAYLOR and EDWARD EPLEY Petitioners, vs. CITY OF CORVALLIS, Respondent, and OREGON STATE BOARD OF HIGHER EDUCATION, Intervenor-Respondent.	)	LUBA No. 98-193 FINAL OPINION AND ORDER

Appeal from City of Corvallis.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox, Coons & DuPriest, P.C.

James K. Brewer, Corvallis, filed a response brief and argued on behalf of respondent. With him on the brief was Scott Fewel.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a response brief and argued on behalf of intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 05/27/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the city's decision approving a modification to the Oregon State University Physical Development Plan (PDP) and a development plan for a hotel/conference facility.

MOTION TO INTERVENE

The Oregon State Board of Higher Education (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to two alleged new matters raised in the city's response brief: (1) whether petitioners waived their right to respond to evidence submitted by intervenor following the initial hearing before the city council; and (2) a dispute over the proper characterization of an argument in the petition for review.

The city and intervenor object to the proposed reply brief, arguing that neither issue is a "new matter" within the meaning of OAR 661-010-0039. We disagree with respect to the first matter. Whether a petitioner has waived the right to present an argument or assignment of error has long been recognized as a "new matter" within the meaning of OAR 661-010-0039, if raised for the first time in a response brief. Caine v. Tillamook County, 24 Or LUBA 627 (1993); Glisan Street Associates v. City of Portland, 24 Or LUBA 621, 622 (1993). However, we agree with the city and intervenor regarding the second matter. Disputes over the proper characterization of an argument in the petition for review are not the type of issues constituting "new matters" warranting a reply brief. See Dolan v. City of Tigard, 20 Or LUBA 411, 415 (1991) (arguments that the remedy petitioners seek is unclear,

or that petitioners failed to object to statutes, are not new matters that warrant the filing of a reply brief).

Petitioners' motion to file a reply brief is allowed, with the exception of the second alleged new issue discussed on page 5 of the reply brief.

FACTS

The subject property is an unimproved 3.5-acre parcel located on the southeast corner of the Oregon State University (OSU) campus. OSU facilities, including Parker Stadium, Gill Coliseum, the LaSells Stewart Center, and university housing, lie to the west and north of the parcel. The adjoining area to the northeast, east and south are beyond the boundaries of the OSU campus. Uses within this adjoining area are primarily residential, with the exception of one office building to the east. The subject property is currently used for parking for OSU events.

In June 1986, the city and OSU developed a document called the "OSU Plan" that was intended to resolve outstanding land use issues between the city and OSU. The OSU Plan included a revision of the OSU Physical Development Plan (PDP), which is a document containing maps detailing existing and future OSU facilities and development, and a narrative inventorying and identifying OSU's current and future land use needs. The PDP describes the subject property as "[r]eserved for parking." Record 257.

In July 1986, the city planning commission reviewed the OSU Plan and the PDP and approved proposals in the OSU Plan to rezone land on the OSU campus. In so doing, the planning commission recommended that the PDP be accepted as a support document to the city's comprehensive management plan (CMP). Respondent's Brief App-4, page 3. In October 1986 the city adopted ordinance 86-28, which amended the CMP designations of the OSU campus to correspond to the zoning changes. Ordinance 86-28 adopted, or appears to adopt, findings that state, in relevant part, that "[o]nce adopted, the Oregon State University

Plan will become a support document to the Corvallis Comprehensive Plan." Respondent's Brief App-1, pages 2, 6.[1]

In December 1986, the city also adopted ordinance 86-40, which amends section 216 of the city's Land Development Code (LDC) governing the OSU District. Provisions of Ordinance 86-40, codified at LDC 216.03.02, require that OSU submit the PDP to the city planning commission for review and approval under provisions for Conceptual Development Plan Review. Any subsequent changes in the PDP require review and approval of either the planning director or the planning commission. Further, the city must review any OSU development proposal to ensure that development is consistent with the PDP.

At some point not identified in the record, the CMP was amended as follows: "In 1986 the City adopted the 'Oregon State University Plan' which updated the Physical Development Plan for the main campus. This made the OSU Plan consistent with the Comprehensive Plan." CMP 12.1.f.

In 1998, intervenor and a commercial development company jointly filed an application with the city to develop on the subject property a privately owned and operated 156-room hotel/conference facility, with restaurant and lounge. The city treated the application as a major modification of the PDP. Major modifications require planning commission review and approval. The planning commission conducted hearings and, on August 19, 1998, voted to approve the PDP amendment and development plan to permit the proposed hotel/conference facility.

On appeal to the city council, the council conducted a de novo hearing. At the appellants' request, the city council allowed the record to remain open for seven days, until September 28, 1998, for petitioners to submit additional written testimony and evidence. Intervenor declined to waive its right to respond, and at intervenor's request, the city council

[1]Ordinance 86-28 adopts and incorporates the findings of fact in "Exhibit A." However, there appear to be two Exhibit As to Ordinance 86-28. Respondent's Brief App-1, pages 3-4 and pages 6-9.

allowed the record to remain open an additional seven days, until 5:00 p.m. on October 5, 1998, for intervenor to respond. The city council scheduled a further hearing on the matter for the evening of October 5, 1998. Petitioners submitted written evidence and argument on or before September 28, 1998. Intervenor then submitted written argument by 5:00 p.m. on October 5, 1998, along with additional evidence in the form of an exhibit describing how certain universities have provided overnight accommodations for conference attendees, and an exhibit consisting of a list of 56 universities with hotels located on campus.

At the October 5, 1998 hearing, the city council discussed some of the evidence that intervenor submitted prior to the hearing. Petitioners did not object to the city's consideration of that evidence or request an opportunity to respond to that evidence. The city council voted tentatively to deny the appeal, approving the planning commission's approval of the application. On October 19, 1998, the city council adopted the final written decision.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the city erred in accepting the evidence intervenor submitted on October 5, 1998, because that evidence was submitted in violation of the applicable procedures at ORS 197.763(6).[2] According to petitioners, the city's errors required it to

---

[2]ORS 197.763(6) provides in relevant part:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to [ORS 197.763(6)(b)] or leaving the record open for additional written evidence, arguments or testimony pursuant to [ORS 197.763(6)(c)].
>
> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

offer petitioners an opportunity to rebut the evidence that intervenor improperly submitted on October 5, 1998, and the city's failure to do so warrants remand. Tucker v. City of Adair Village, 31 Or LUBA 382, 389 (1996) (where the city accepts a memorandum from the applicant after the close of the evidentiary record in violation of ORS 197.763(6), the city is required to provide petitioners an opportunity to respond).

Petitioners contend that intervenor's October 5, 1998 submittal was pursuant to ORS 197.763(6)(e),[3] and thus that the city violated that provision by accepting into the record a response under that provision that was not limited to argument, but that instead contained new evidence. According to petitioners, the list of universities and discussion of one university's involvement with campus hotels included with intervenor's October 5, 1998 response consisted of "evidence," as that term is defined in ORS 197.763(9)(b), and thus intervenor's response was not confined to "argument," as that term is defined at

---

> "(c) If the hearings authority leaves the record open for additional written evidence, arguments, or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to [ORS 197.763(7)].
>
> "* * * * *
>
> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. * * *"

[3]The city acknowledges that the evidentiary hearing before the city council was not the initial evidentiary hearing and thus that the city was not obligated to honor any participant's request to hold the record open for additional testimony or evidence under ORS 197.763(6)(a). Wicks-Snodgrass v. City of Reedsport, 32 Or LUBA 292, 300, rev'd on other grounds 148 Or App 217, 939 P2d 625, rev den 326 Or 59, 944 P2d 949 (1997). However, the city explains that the city council conducted its proceedings pursuant all of the requirements of ORS 197.763, including the notice and declarations required by that provision. The city argues, and all parties to this appeal appear to agree, that once the city council allowed the record to remain open under ORS 197.763(6)(a), it was obligated to follow all of the requirements of that section. For purposes of this appeal, we accept the city's argument without deciding its merits.

ORS 197.763(9)(a).[4] Further, petitioners contend that the city relied in part on that improperly submitted evidence in making its decision.

Intervenor concedes that the two exhibits attached to its October 5, 1998 submittal contained some facts that were not already in the record. However, intervenor argues that its October 5, 1998 submission was not its final written argument made pursuant to ORS 197.763(6)(e). Intervenor contends that at the September 21, 1998 hearing intervenor sought and obtained permission to submit new evidence in order to respond to any evidence petitioners submitted on September 28, 1998. In other words, intervenor argues, the city kept the evidentiary record open through October 5, 1998 for intervenor to respond to the opponents' evidence submitted September 29, 1998, and intervenor properly exercised that right by submitted new evidence on October 5, 1998. Intervenor contends that, viewed in this procedural posture, petitioners were not denied the opportunity to respond to intervenor's new evidence, because they could have, but did not, request in writing to respond to that evidence pursuant to ORS 197.763(6)(c). Finally, intervenor argues that even if the new evidence constituted a violation of ORS 197.763(6)(e), any harm was de minimus given that much of the evidence intervenor submitted was already in the record in one form or another.

We agree with petitioners and intervenor that intervenor's October 5, 1998 response contained evidence as that term is defined at ORS 197.763(9)(b). We disagree with intervenor that at the September 21, 1998 hearing it invoked any provision of

---

[4]ORS 197.763(9) provides:

"For purposes of this section:

"(a) 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. "Argument" does not include facts.

"(b) 'Evidence' means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

ORS 197.763(6) that would have allowed intervenor to submit new evidence. The transcript of that hearing indicates that the city's mayor asked intervenor if it would like to waive an "additional seven days to respond," and that intervenor declined, stating that it "would not waive the additional opportunity to respond." Record 181. While intervenor's statement is ambiguous, it has legal significance only as an indication that intervenor has not waived its right to submit final written argument pursuant to ORS 197.763(6)(e). Even if intervenor intended its statement to request an opportunity to submit additional evidence under ORS 197.763(6)(c), intervenor's statement was not sufficient to invoke that provision, because it was not made in writing. Accordingly, we conclude that the argument and evidence intervenor submitted on October 5, 1998, was pursuant to ORS 197.763(6)(e). It follows from the foregoing that the evidentiary record closed September 29, 1998, and intervenor's submission of additional evidence on October 5, 1998, violated ORS 197.763(6)(e).

Even if a de minimus exception exists to a violation of ORS 197.763(6)(e), as intervenor suggests, we cannot say that the new evidence intervenor submitted on October 5, 1998 would fall within a de minimus exception. The evidence presented and the argument based on that evidence was directed at what seems to be the crucial issue of the challenged decision: whether hotel/conference facilities are customarily associated with universities. The city council considered intervenor's new evidence and associated argument, and ultimately agreed with intervenor. We cannot say that the final decision makers did not find intervenor's new evidence persuasive.

The city makes several similar responses, most of them resolved in our discussion above. However, one of the city's arguments requires separate discussion. The city argues that:

> "[b]ecause ORS 197.763(6)(e) only allows argument, and not facts, when the City accepted Intervenor's additional written testimony on the record, if Intervenor's additional written testimony contained more than final argument,

> then it would by its very nature be 'additional written evidence, arguments or testimony' submitted while the record was still open, under ORS 197.763(6)(c), and Petitioners would still be required to follow the specific procedures outlined in that section if Petitioners desired to respond. Petitioners did not do so. Accordingly, under the terms of ORS 197.763(6)(c), Petitioners had no further right to respond." Response to Petitioners' Brief 13.

In other words, the city argues that, even if intervenor's October 5, 1998 submitted new evidence in violation of ORS 197.763(6)(e), that violation essentially converted its submission into the "additional evidence, arguments or testimony" allowed under ORS 197.763(6)(c). If that is the case, petitioners were required, under ORS 197.763(6)(c), to request in writing an opportunity to respond to intervenor's additional evidence. Petitioners' failure to do so, the city argues, waives any right to challenge the city's error in accepting intervenor's additional evidence.

We understand to city to contend that ORS 197.763(6) has a reiterative component to it, such that if new evidence is submitted when the record is held open to the applicant under ORS 197.763(6)(e), the procedural posture essentially reverts to ORS 197.763(6)(c), and any person who wants to respond to that improperly submitted new evidence must submit a written request to reopen the record to make that response.

We have no occasion, here, to explain the procedural paths set out in ORS 197.763(6), but we disagree with the city that ORS 197.763(6)(c) provides the means for a petitioner to challenge a city's error in accepting evidence past the close of the evidentiary record. In our view, if the city commits procedural error by allowing the applicant to submit additional evidence into the record as part of its final argument under ORS 197.763(6)(e), then that error is subject to the same remedies, challenges, and analysis as other types of procedural errors.

Under that framework, petitioners are not required to make a written request to respond to the improperly submitted evidence, but on appeal to LUBA petitioners must, if the issue is raised by a party, demonstrate (1) that they objected to the procedural error

below, if there was opportunity to do so; and (2) that the city's error prejudiced their substantial rights. ORS 197.763(1); 197.835(9)(a)(B); Wicks-Snodgrass, 32 Or LUBA at 301 (citing Woodstock Neighborhood Assoc. v. City of Portland, 28 Or LUBA 146, 150-51 (1994). In the present case, the city and intervenor point out that petitioners did not object to intervenor's submission of evidence on October 5, 1998, during the course of the hearing on that date, or in the intervening weeks until the city issued its written opinion on October 29, 1998. However, we disagree that the foregoing circumstances afforded petitioners an opportunity to object to intervenor's violation of ORS 197.763(6)(e). The evidence was submitted prior to the October 5, 1998 hearing as part of intervenor's final argument, and neither the hearing nor the period until the city adopted the final written decision presented an opportunity for petitioners or other parties to testify or otherwise make objections known to the city council.

With respect to any prejudice to petitioners' substantial rights, petitioners assert that the city's error denied them an opportunity to respond to the improperly submitted additional evidence, and thus violated petitioners' substantial rights by depriving them of the opportunity to participate at a significant stage in the process. Tucker, 31 Or LUBA at 389. We agree. Once the applicant improperly submitted evidence into the record pursuant to ORS 197.763(6)(e), the city had two choices: it could reject that evidence, or it could offer an opportunity for other persons to respond to that evidence. Here, the city did neither. Accordingly, we conclude that the city committed procedural error that prejudiced petitioners' substantial rights.

The second assignment is error is sustained.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the city erred in accepting the evidence intervenor submitted on October 5, 1998, because that evidence constituted an ex parte communication, in violation of ORS 227.180(3).[5]

Petitioners argue that the present case is indistinguishable from Brown v. Union County, 32 Or LUBA 169 (1996). In Brown, the planning commission left the record open for seven days for additional written evidence. An opponent submitted written evidence within a seven day period allowed for that purpose. Eleven days later, after the evidentiary record had closed to all parties, the applicant telefaxed new evidence to the planning commission responding to the opponent's evidence. The planning commission reopened the record to accept the applicant's new evidence, but refused to allow any rebuttal or testimony regarding that evidence. LUBA noted that, pursuant to Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 834 P2d 523 (1992), failure to allow a party opportunity to rebut an ex parte communication is a substantive error for which petitioners need not demonstrate prejudice to any substantial rights. 32 Or LUBA at 171. Accordingly, LUBA rejected arguments that the petitioner's failure to demonstrate prejudice to his substantial rights precluded remand, and remanded the decision to the county to allow petitioner an opportunity to rebut the new evidence. Id. at 172.

---

[5]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."

The city responds that Brown is distinguishable, because the submission of evidence in that case occurred outside the context of any proceedings allowed under ORS 197.763(6). The city argues, and we agree, that intervenor's evidence was submitted into the record pursuant to one of the provisions of ORS 197.763(6) and that such submissions do not constitute "ex parte" communications within the meaning of ORS 227.180(3).[6]

The first assignment of error is denied.

THIRD AND FIFTH ASSIGNMENTS OF ERROR

Petitioners argue that the PDP is part of the city's comprehensive plan, and thus any modification to the PDP is a comprehensive plan amendment subject to review for compliance with the statewide planning goals and the requirements of OAR 660-012-0060(1), part of the Transportation Planning Rule (TPR).

The city and intervenor respond that petitioners have not established that the PDP is part of the city's comprehensive plan. Petitioners do not identify any ordinance or comprehensive plan provision that incorporates the PDP into the CMP, or adopts the PDP as an amendment to the CMP. Instead, petitioners infer that the PDP was so incorporated or adopted based on language in two documents: a tracking sheet from the Land Conservation and Development Commission (LCDC), and provision 12.1.f of the CMP. The LCDC tracking sheet summarizes an unidentified city action as a proposal to "[a]mend the Comprehensive Plan to incorporate an Oregon State University Plan" and adopt amendments to the OSU District chapter of the LDC. Petition for Review, Appendix 30. CMP 12.1.f finds that "[i]n 1986 the City adopted the 'Oregon State University Plan' which updated the Physical Development Plan for the main campus. This made the OSU Plan consistent with the Comprehensive Plan."

---

[6]In addition, the city notes that both Brown and Horizon Construction, Inc. were decided prior to 1995 amendments to ORS 197.763(6) that had the effect of expanding and clarifying the circumstances under which new evidence could be submitted into the record after the initial evidentiary hearing. HB 3065, 1995 Or Laws, Ch 595, sec. 2 (adding subsections (b) through (e) to ORS 197.763(6)).

The city and intervenor argue, and we agree, that neither the LCDC tracking sheet nor CMP 12.1.f demonstrate that the city incorporated the PDP into the CMP or adopted it as an amendment to the CMP. The record indicates that in 1986 the city planning commission reviewed the PDP for compliance with the CMP plan as part of a quasi-judicial proceeding, and ultimately approved the PDP. Although there is some indication that the city contemplated that the OSU Plan, including the PDP, would function as a "support document" to the CMP once the city had approved it, there is nothing in the record to indicate that the city ever "adopted" the OSU Plan in the sense of incorporating it into the CMP. Because the applicability of the statewide planning goals and OAR 660-012-0060(1) depend upon whether the city is amending its comprehensive plan or land use regulations, and petitioners have failed to establish that the challenged decision amends either the city's plan or land use regulations, petitioners arguments under these assignments of error do not provide a basis to reverse or remand the challenged decision. ORS 197.835(6), (7); OAR 660-012-0060(1).

The third and fifth assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city misconstrued the applicable law, and failed to make adequate findings supported by substantial evidence when it concluded that the proposed hotel/conference facility was a "civic use" allowed in the OSU District rather than a type of commercial use not allowed in that district.

Uses are organized under the LDC according to a three-tier hierarchy. The broadest level consists of categories of "use types" such as Residential, Civic, Commercial, Industrial, etc. Each zoning district, including the OSU District, lists certain categories of use types. Within each category for each zoning district are listed the use types allowed in that district. A given use type may or may not specify particular uses, or examples of uses, that are described within that use type. The OSU District lists Residential, Civic and Commercial as categories of use types allowed in that district. Within the OSU District "Civic" category are

listed a number of use types, including "University Services and Facilities." Within the OSU District Commercial category are listed three commercial use types, none of which include hotels, conference facilities or restaurants as uses described by those use types. The LDO describes such uses as falling under "Transient Habitation" or "Eating and Drinking Establishment" use types, which are classified at LDO 3.0.30.03 as belonging to the Commercial category.

In the challenged decision, the city considered whether the proposed use, a hotel/conference facility, must be classified within the Transient Habitation or Eating and Drinking Establishment use types, or whether it could be classified within the University Services and Facilities use type. LDO 3.0.30.02.1.b. defines "University Services and Facilities" as

> "Services and facilities customarily associated with a major university. Typical uses include housing facilities, classrooms, research facilities, recreational amenities and parking facilities."

The city council interpreted LDO 3.36.30.01.b.2 as allowing use types not listed in the OSU District, as long as those uses also fall within the definition of University Services and Facilities:

> "The City Council interprets [LDO] 3.36.30.01.b.2 as allowing certain use types specifically defined as commercial use types within the OSU District, so long as these uses also fall within the definition of University Services and Facilities, found in [LDO] Section 3.0.30.02.1. In this case, while 'Transient Habitation' and 'Eating and Drinking Establishments' are commercial use types, the City Council finds that they are also facilities and services customarily associated with major universities. The City Council further finds that these uses will further assist in meeting the OSU mission to promote education and dissemination of research information to the broader community." Record 30-31.

The city council then made a number of findings supporting its conclusion that the proposed hotel/conference facility fell within the University Services and Facilities use type because such facilities were "customarily associated" with major universities.[7]

Petitioners argue that the city's interpretation of LDO 3.36.30.01.b.2 is "clearly wrong" because it is contrary to LDC 2.510 and 3.0.10. ORS 197.829(1); Goose Hollow Foothill League v. City of Portland, 117 Or App 217, 843 P2d 992 (1992). LDC 2.510 prohibits "changes in uses specified by the underlying district, while LDC 3.0.10 provides that "[u]se types not specifically listed in a district cannot be established except as authorized in this Code and in accordance with Chapter 2.16 – Request for Interpretation." Petitioners contend that allowing a use belonging to a use type not allowed in the OSU District has the effect of changing the uses specified in the OSU District or establishing use types not listed in that district. Further petitioners argue that the city's treatment of a commercial use type as

---

[7]The city adopted the following relevant findings:

> "* * * A number of Commercial Uses that are not specifically identified as permitted in the OSU District (including Spectator Sports and Entertainment, and Eating and Drinking Establishments) have long been allowed in the OSU District as 'University Services and Facilities.' These include both Gill Coliseum and Parker Stadium in the former category and a number of privately franchised fast food restaurants in the OSU Memorial Union in the latter category.
>
> "* * * * *
>
> "* * * [OSU] is a Land Grant, Sea Grant, and Space Grant University. One of its primary functions as such is to disseminate information to the community and the broader education community through methods other than classroom teaching, such as seminars and conferences.
>
> "* * * The proposed hotel/conference facility would be located in close proximity to and be an integral part of the nearby LaSells Stewart and OSU Alumni Conference facilities, Gill Coliseum and Parker Stadium and other on-campus locations appropriate for seminars and conferences.
>
> "* * * The applicant submitted two separate lists identifying a number of other major universities that have hotel/conference facilities associated with them. The Council noted that these types of hotel/conference uses were consistent with some of their academic experiences in which they had attended educational and/or professional information sharing events and utilized conference facilities on these campuses." Record 29-30.

a civic use type is inconsistent with the description of civic use types found at LDC 3.0.30.02, which provides that civic use types "include the performance of utility, educational, recreational, cultural, protective, governmental, and other uses strongly vested with public or social importance."

The city responds that nothing in the LDC prohibits uses from being classified as belonging to more than one use type, and that the city's interpretation allowing unlisted commercial uses in the OSU District as long as those uses also fall within the University Services and Facilities use type is not clearly wrong. We agree. The city's determination that the proposed hotel/conference facility is customarily associated with universities and thus falls within the University Services and Facilities use type does not violate LDC 2.510 and 3.0.10. Those provisions prohibit establishing or changing uses allowed in a district, but do not by their terms prohibit a determination that a proposed use falls within more than one use type or category of use types.

With respect to petitioners' argument that the city's determination is inconsistent with the description of Civic Use Types at LDO 3.0.30.02, we agree with the city that uses falling within the University Services and Facilities use type are necessarily consistent with the description of Civic Use Types at LDO 3.0.30.02. Accordingly, we turn to petitioners' further argument that the city failed to adopt adequate findings supported by substantial evidence in concluding that the proposed use fell within the University Services and Facilities use type.

Petitioners challenge on several grounds the city's findings, quoted in a footnote above, that the hotel/conference facilities are "customarily associated" with major universities. First, petitioners argue that the city's findings improperly rely on the existence of uses such as sports and entertainment facilities and fast-food franchises in the OSU District, because such uses are dissimilar to the proposed hotel/conference facility. Petitioners argue that the sports and entertainment facilities and food franchises might

preexist the adoption of zoning in the city, suggesting that such uses are essentially nonconforming uses that would not be allowed under current OSU District zoning. Petitioners also argue that the sports and entertainment facilities and the building housing the food franchises are university owned facilities that exist primarily to provide services to students, unlike the proposed hotel/conference facility, which must cater to non-university related business in order to survive financially.

Second, petitioners argues that the city's erred in relying on the evidence intervenor submitted regarding hotel/conference facilities connected with other universities. Petitioners contend that except for three non-profit hotel/conference facilities, the record does not indicate when the hotels in the two lists intervenors submitted were built. Petitioners suggest that without evidence that the listed hotels were built long ago, the city cannot conclude that those hotels, and hence the hotel/conference facility proposed here, is "customarily associated" with universities.

Substantial evidence is evidence a reasonable person would rely upon in making a decision. Stewart v. City of Brookings, 31 Or LUBA 325, 330 (1996) (citations omitted). If there is substantial evidence in the whole record to support the local government's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Id. Where the evidence is conflicting, if a reasonable person could reach the decision the local government made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Id.

Findings are adequate if they suffice to (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995). We agree with the city that its findings adequately explain why the evidence relied upon demonstrates that hotel/conference facilities are "customarily associated" with universities. We also agree that a reasonable person could conclude, based on the evidence

in the record, that hotel/conference facilities are customarily associated with major universities, notwithstanding when those facilities were built.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend that the city failed to comply with LDC 3.36.30.02, which requires that proposed development with "[t]raffic and/or parking consequences" be evaluated under the Conditional Development criteria at LDC 2.3.30.04. Further, petitioners argue that the city's findings and conditions are inadequate to address the traffic and parking impacts created by the proposed hotel/conference facility.

According to petitioners, the city erred in addressing traffic and parking impacts under the provisions of LDC 2.5, Planned Development, rather than under LDC 2.3, Conditional Development. The city council found to the contrary, stating:

> "For development consistent with the OSU PDP, proposals are reviewed to address parking and traffic impacts though the Conditional Development process [at LDC 2.3]. For development not identified in the OSU PDP, proposals are reviewed as modifications to the OSU PDP through the Planned Development procedures (LDC Section 3.36.20 and LDC Chapter 2.5).
>
> "* * * The OSU/Hilton Garden Inn Proposal (PDM-98-14) is not identified in the adopted OSU PDP, and therefore is to be reviewed in accordance with the provisions of LDC Chapter 2.5." Record 31-32.

The city responds, and we agree, that the above-quoted finding contains an interpretation regarding the applicability of LDC 2.3 and 2.5 that petitioners have not attempted to demonstrate is "clearly wrong" or inconsistent with the terms, purpose or policy of those provisions. Accordingly, we affirm the city's interpretation. See Langford v. City of Eugene 126 Or App 52, 57, 867 P2d 535 (1994) (where the local interpretation consists of a decision about which of two or more arguably applicable approval criteria in its legislation applies to a particular use, the local interpretation will seldom be reversible under the Clark standard).

Petitioners also challenge under this assignment of error the adequacy of the conditions the city imposed regarding parking impacts. The city adopted findings address

the loss of parking spaces that the subject property currently provides, and imposed the following condition:

> "To address, on an interim basis, the unimproved vehicular parking spaces that will be displaced with construction of the hotel/conference facility, the applicant shall construct a gravel or improved parking lot in the general vicinity of the hotel/conference facility that is at least equal in square footage to the displaced area. * * * When the University Parking Plan is adopted by both the University and the City, these parking spaces shall be improved and/or relocated in accordance with the plan." Record 43-44.

Petitioners contend that this condition is inadequate to prevent impacts on off-street parking because it is based on the speculative possibility of relocating the existing parking lot elsewhere. We disagree. The quoted condition unambiguously imposes on the applicant the obligation to relocate the existing parking lot as a condition to constructing the approved hotel/conference facility. To build the facility the applicant must relocate the parking lot.

The sixth assignment of error is denied.

The city's decision is remanded.