BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF TRANSPORTATION, Petitioner, and HOWARD W. HOUSTON, JR., Intervenor-Petitioner, vs. CITY OF MOSIER, Respondent, and SCENIC HIGHWAY ALLIANCE AND RON CARROLL, Intervenors-Respondent.	)	LUBA No. 97-251 FINAL ORDER AND OPINION

On remand from the Court of Appeals.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioner. With her on the brief was Hardy Myers, Attorney General, David Schuman, Deputy Attorney General and Michael Reynolds, Solicitor General.

Mark S. Womble, Hood River, filed a petition for review and argued on behalf of intervenor-petitioner.

Mark J. Mazeski, City Attorney, Mosier, filed a response brief and argued on behalf of respondent.

Daniel Kearns, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Reeve Kearns.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,

participated in the decision.

REMANDED 09/21/99

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals the city's determination that petitioner's use of its quarry road is an illegal nonconforming use.

MOTION TO FILE A REPLY BRIEF

In the initial appeal before LUBA, we did not address receipt of a reply brief by intervenor-petitioner (Houston). We do so now. Houston requests permission to file a reply brief. Intervenors-respondent (Alliance) objects to the request and the reply brief, arguing that the request failed to show that either the city or Alliance raised new issues that warrant a reply brief.

We treat Houston's request as a motion to file a reply brief. Houston's reply brief addresses the responses made in Alliance's response brief regarding the location of the quarries, whether the Department of Transportation (ODOT) or the city has the burden of proof, and addressing each of Alliance's responses to the assignments of error. In their response brief, Alliance claims that Houston waived the issue addressed in his second assignment of error because he did not raise it before the city during its proceedings.

Issues newly raised in a response brief warrant the submittal of a reply brief. The issue of waiver was initially raised in Alliance's response brief. Therefore, the portion of the reply brief addressing the waiver issue is allowed. None of the other arguments in the reply brief respond to new issues in the response briefs and, accordingly, we disregard them. Sanders v. Yamhill County, ___ Or LUBA ___ (LUBA No. 96-173, February 5, 1998).

FACTS

Petitioner owns 70 acres of land that it acquired by eminent domain in 1954 for a "quarry site, stock pile site, and for the construction and maintenance of a haul road, to be used in connection with the proper construction and maintenance of highways of the state highway system." Record 636. Two acres of the subject property lie within the Mosier city

limits, along its western edge. Approximately 12 acres of the subject property lie outside the Mosier city limits but within the city's urban growth boundary (UGB). Pursuant to a joint management agreement, Wasco County administers these 12 acres by applying the city's comprehensive plan designations and the "substantive" portions of the city's zoning code to development applications "affecting" the urban growth area. Record 274-276. The remaining 56 acres of the subject property are outside the Mosier city limits and outside the city's UGB. Wasco County has authority over this portion of the subject property.

The only road access to the property is a haul road that runs north through the two-acre portion of the property within the city limits and connects with a public highway in the city. The haul road is also the only access for Houston's adjacent quarry, which is located solely within Wasco County.

The city originally zoned the two-acre portion of the subject property within the city limits as agricultural, under which quarrying was a permitted use. In 1978, the city adopted an ordinance that designated part of the two acres as industrial. The remainder of the site retained the agricultural designation. However, under the 1978 provisions, mining became a conditional use in both zones.

By 1978, any quarrying operations on the two-acre portion within the city had ceased, however, petitioner and others continued to use the haul road crossing over the two acres after 1978 in order to access the main part of the quarry, the use of which is described below. In 1990, the city rezoned the agricultural portion of the two acres to residential. The residential zone prohibits aggregate extraction and processing. In 1996, the city adopted legislation to prohibit quarry operations in its industrial zone, thereby effectively prohibiting all quarry activities within the city limits, except those that are legal nonconforming uses.

In 1996, in anticipation of a substantial increase in activity in the part of the quarry located within the county, and thus an increase in truck traffic over the haul road, ODOT began discussions with the city and Wasco County regarding plans to renew extraction

activities. Petitioner entered into mediation with the city, during which time petitioner agreed not to extract or process any aggregate, and limited its use of the quarry and the haul road to hauling stockpiled material.

During the course of the mediation, the city challenged petitioner's authority to conduct quarry-related activities within that portion of the property located within city limits, as it was apparent that petitioner had completely ceased gravel extraction from that area. The city also questioned whether the haul road could continue to be used. Petitioner claimed that its use of the Mosier pit over the last 40 years constituted a valid nonconforming use; and therefore, the use of its entire 70 acres for quarrying activities and activities related to quarrying (crushing, asphalt batching, stockpiling, hauling, and storage and disposal of highway demolition debris) were permitted. The mediation was terminated.

After the mediation process faltered, the city initiated the subject action to determine the nature and extent of nonconforming rights, if any, petitioner has over property within the city limits. Over petitioner's objections, the city council held a quasi-judicial hearing on the matter. The city divided the use of the subject property into its component activities. In order to substantiate the nonconforming use of the property, the city required ODOT to show that each of the component activities (aggregate extraction, aggregate crushing, asphalt batching, aggregate transportation (hauling), and storage and disposal of highway demolition debris) existed on the property at the time of the restrictive zoning designation continued on the property after 1978. After receiving testimony, the city decided that petitioner had failed to show that the activities it had identified had continued within city limits. The city also concluded that petitioner had failed to show that uses accessory to the nonconforming use were retained after the quarry activities within the city had ceased.[1] The city decided that, because petitioner failed to show that the accessory use of the haul road could occur without

[1]With regard to the asphalt batching activities, the city determined that ODOT did not have a nonconforming use right in either the city or the county.

being connected to the main use, if the main nonconforming use had discontinued, the accessory uses were discontinued as well.

Because the nonconforming use had discontinued within the city, the city concluded that any new mining and quarry-related activities occurring within the city limits and attributable to ODOT, including use of the haul road for quarry-related activities in the county portion of the property, constitute a violation of its ordinances and therefore are subject to enforcement proceedings.

Petitioner appealed the city's decision regarding the loss of nonconforming use status of the haul road to LUBA. LUBA determined that the city did not have the authority under its land use ordinance to enforce its ordinance by adopting a land use decision. Instead, LUBA held that the city's ordinance limited its enforcement authority to actions in law and in equity filed in circuit court. The city appealed LUBA's decision, and the Court of Appeals reversed LUBA's holding. ODOT v. City of Mosier, 161 Or App 252, ___ P2d ___ (1999). The appeal is before us now to resolve those issues that we did not address in our initial decision in this matter.

FIRST ASSIGNMENT OF ERROR (ODOT)

ODOT argues that the burden of proving that the nonconforming use did not exist rested with the city, because the city initiated the action that resulted in the appealed decision. According to ODOT, the burden of proving compliance with the applicable standards falls to the entity requesting the change. Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973). Because the city failed to show that the nonconforming use had been discontinued, ODOT argues that the city's decision must be reversed.

The city argues that it initiated a quasi-judicial proceeding to determine whether it should commence enforcement proceedings against ODOT based on its alleged unlawful use of the haul road. The city claims that ODOT's response that it had a valid nonconforming

use is in the nature of an affirmative defense; and, therefore, ODOT must prove by substantial evidence in the whole record that the nonconforming use exists.

The Court of Appeals addressed this issue in Lane County v. Bessett, 46 Or App 319, 612 P2d 297 (1980). In Bessett, the county initiated an action in circuit court to enjoin Bessett from operating a quarry on his property. Bessett alleged that he had a valid nonconforming use and that the county could not require the closure of the quarry operation. The court determined that Bessett had the burden of proving that the existence of the nonconforming use before he could rely on the existence of such a nonconforming use as a justification for continuing the extraction activities. Id. at 323-24. We agree with the city and Alliance that ODOT has the burden of showing the nature and extent of the nonconforming use of the haul road.

ODOT's first assignment of error is denied.

SECOND AND THIRD ASSIGNMENT OF ERROR (ODOT)

SECOND ASSIGNMENT OF ERROR (HOUSTON)

Petitioner and Houston argue that the uses on the 68 acres located outside of the city constitutes a valid nonconforming use, and that the haul road, an accessory use to the subject property as a whole, is a legal use, whether it is located inside or outside of the city limits. Because the city did not determine that petitioner's use of the entire property had discontinued, petitioner argues that the city's decision must be reversed as a matter of law. Houston also argues that the urban growth management agreement between the city and the county grants the county authority to render decisions over developments which "affect" land within the urban growth boundary. Houston argues that the city's nonconforming use determination is beyond the city's authority to make, because it "affects" the use of that portion of the pit located within the UGB.

The city and Alliance respond that petitioner is trying to use the nonconforming use of the pit located within the UGB and in the county to justify the use of the haul road.

Alliance claims this reliance on the activity in the county is misplaced for two reasons. First, ODOT has not yet proved a nonconforming use on the county property, so it cannot bootstrap the use of the haul road as a legal nonconforming use when the main use is in question. Second, Alliance contends that the status of the use of ODOT's property outside city limits has no bearing on the city's determination that the nonconforming use within the city has ceased.

We believe that both the city and the county have the authority to make decisions over portions of the subject property which, in turn, may affect the use of property as a whole. However, their authority is circumscribed by the legal standards that govern the parcel, in whole or in part. With that in mind, we apply the relevant provisions to the facts in this case.

A. City jurisdiction over property located within the city

All of the parties agree that, to the extent the city is regulating use of the haul road to those uses that originate from the portion of the quarry within city limits, the city has the authority to determine (1) the nature and extent of the uses; and (2) whether those uses have discontinued, based on the city's interpretation of its plan and ordinances. Thus, the city could, and did, determine that ODOT's accessory use of the haul road for hauling gravel from the portion of the pit located within the city had discontinued. Neither petitioner nor Houston challenges that aspect of the city's decision. However, the city went further and concluded that all nonconforming use of the haul road ended with the cessation of use of the portion of the pit located within city limits. This is an erroneous conclusion. The cessation of extraction on the two-acre portion of the pit within city limits has no bearing on the nonconforming use status of other portions of the pit located outside the city. Neither does the cessation of extraction in the two-acre portion of the pit inside the city or lack of aggregate hauling related to that two-acre portion have any bearing on whether the haul road continues to be used in conjunction with aggregate mining and other ODOT operations

outside the city. In determining the existence of such an accessory use of the haul road, the city must look at the entirety of the nonconforming use on the property and decide if the evidence regarding the entirety of the nonconforming use of the haul road leads to a conclusion that the accessory use is no longer valid.

B. City's authority to determine uses for property located within the county

Fifty-six acres of the subject property is located within Wasco County's unincorporated area and thus is subject to Wasco County's jurisdiction. The city may consider whether ODOT has a nonconforming use right to use the portion of the access road that crosses city property in conjunction with that part of ODOT's operation that is located in the county. However, in doing so, the city may not—as it apparently did in this case—limit its analysis to ODOT's activities on the two-acre, city portion of ODOT's property. The city must consider whether ODOT has a nonconforming use right on the county portion of its property that includes a right to use the haul road, including the portion of the haul road that crosses the two acres located in the city.

In considering whether ODOT has nonconforming use rights on the county portion of its property that include road access across the city portion of its property, the city has two ways in which it may proceed. First, the city could require that ODOT seek and obtain a determination from the county concerning the scope and nature of any nonconforming use rights ODOT may have with regard to the portion of its operation located within the county. We see no reason why the city could not then defer to such a county nonconforming use determination, including any county determination concerning a right of access to the county portion of ODOT's property that might cross the city portion of ODOT's property. Alternatively, the city can make its own decision concerning the scope and nature of any nonconforming use rights ODOT may have with regard to the portion of its operation located

within the county.[2] In making such a determination, the city must apply the same statutory nonconforming use criteria the county would apply, ORS 215.130(5) through (10) rather than Mosier Zoning Ordinance (MZO) 6.1. ORS 215.130(5) through (10) establish the county's rights and obligation regarding the regulation of nonconforming uses. ORS 215.130(7) provides:

> "Any [nonconforming] use [as] described in [ORS 215.130(5)] may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

The applicability of ORS 215.130(5) through (10) is potentially significant. Because no one questions the city's apparent decision to view various aspects of ODOT's use of its property within the city as sub-uses under MZO 6.1(2), we do not consider the issue. However, we do not believe it is appropriate under ORS 215.130(5) through (10) to consider the disputed haul road as an "accessory use" that is separate and distinct from the other aspects of ODOT's overall operation. See Polk County v. Martin, 292 Or 69, 77-78, 636 P2d 752 (1981) (rock quarry use not abandoned where "rock was continuously stockpiled [and] sales were made from time to time" notwithstanding that there were "periods of time when no mining or crushing of rock occurred.") On remand, the city may require that ODOT describe the nature and extent of its nonconforming use for purposes of considering whether that use has been interrupted or abandoned under ORS 215.130(7). However, the city may not artificially segment ODOT's nonconforming use into independent sub-uses for purposes of considering whether ODOT has interrupted or abandoned its nonconforming use of the county portion of its property. The right to continue a nonconforming use at a particular level of intensity may be lost through discontinuance or abandonment. Hendgen v.

[2]Of course such a determination by the city would not be binding on the county, and the county would be entitled to consider that question itself and reach a different conclusion, provided the county's contrary conclusion were supported by substantial evidence. See Tektronix, Inc. v. City of Beaverton, 18 Or LUBA 473, 486 n 11 (1989) (conceptual designation of an arterial by a city where arterial is located within the county is not a binding decision on the county.)

Clackamas County, 115 Or App 117, 120, 836 P2d 1369 (1992). However, it is improper to artificially segment a multifaceted use such as ODOT's into sub-uses as the city has done here. For purposes of ORS 215.130(7), the only reason for the haul road is its use in conjunction with ODOT's other activities. As such, it not appropriately viewed as a separate use under ORS 215.130(5) through (10).

C. City's authority to determine uses within the urban growth area

The urban growth management agreement between the city and the county provides that the county has jurisdiction over applications that "affect" the urban growth area. [3] The

[3]The Wasco County-City of Mosier Urban Growth Area Joint Management Agreement provides, in part:

"II. General Comprehensive Plan Provisions

"A. Wasco County and the City of Mosier shall have joint input for land use decisions and actions affecting the Mosier urban growth area. Wasco County's responsibility over any land within this urban growth area shall be maintained until such land is annexed to the City.

"B. The Mosier urban growth area has been identified as urbanizable and is considered to be available over time for urban expansion. In order to promote consistency between the city's planning effort and Wasco County land use decisions and actions affecting the urban growth area, Wasco County shall incorporate that portion of the City of Mosier Comprehensive Plan which addresses the urban growth area into the Wasco County Comprehensive Plan.

"C. After the City of Mosier's Comprehensive Plan has been reviewed by the Wasco County Court, and after County concurrence with and approval of the Plan as to applicable statewide planning goals and adoption of the Plan for the urban growth area, all public sector actions which fall within the scope of the City of Mosier's Comprehensive Plan shall be consistent with the Plan.

"* * * * *"

"III. Zoning and Subdivision Ordinances

"A. The substantive, as opposed to procedural, portions of the City of Mosier Zoning and Subdivision Ordinances * * * shall be incorporated into and made a part of the Wasco County Zoning and Subdivision Ordinances.

"B. For the purposes of the Joint Management Agreement:

agreement also provides that Wasco County maintains responsibility over any land within this urban growth area until such land is annexed to the city. The agreement further provides that the county shall adopt the city's comprehensive plan policies which govern development within the urban growth area, and apply the policies as well as those provisions of the city zoning ordinance which apply to zone changes, conditional uses, variances, subdivisions, major partitions, minor partitions and building permits when making decisions about uses within the urban growth area.

Twelve acres of the subject property lie within the urban growth area. For those twelve acres, the city may either require that ODOT seek a county determination concerning any nonconforming use rights on that portion of its property or the city may make that determination itself. Again, such a determination by the city will not be binding on the county. See n 2. If the city elects to make its own determination, it must determine whether the terms of the agreement apply to determinations regarding the status of nonconforming uses. If it does, the city must determine the nature and extent of ODOT's nonconforming use at the time the use became nonconforming in the urban growth area by using the provisions of the joint management agreement.

"1. Substantive provisions of a zoning ordinance shall be those sections of the ordinance which establish outright uses, conditional uses, and zone requirements.

"2. Substantive provisions of a subdivision ordinance shall be those sections of the ordinance which establish design standards for required improvements.

"C. It is agreed that Wasco County will not exercise any right to waive conditions as authorized by either the City of Mosier Zoning and Subdivision Ordinance unless prior written approval to do so has been obtained from the City of Mosier.

"D. The above mentioned incorporated Ordinances shall only be applied to zone change, conditional use, variance, subdivision, major partition, minor partition and building permit requests affecting the City of Mosier urban growth area." Record 274-75.

If the joint management agreement does not apply to the nonconforming use determination, then the city must apply the county's regulations and ORS 215.130(5) through (10) to determine whether a nonconforming use exists on the twelve acres in the same manner as for the 56 acres outside its UGB. Once the parameters of the nonconforming use, if any, is established, the city can use the same process to determine whether ODOT has a nonconforming use right on the county portion of its property that includes access across the city portion of the haul road and, if so, whether that right has been interrupted or abandoned.

D. Conclusion

Because the city did not review the matter according to the foregoing analysis, we do not address Alliance's argument regarding the sufficiency of petitioner's evidence establishing the nonconforming use. ODOT's second and third assignments of error and Houston's second assignment of error are sustained, in part.

THIRD ASSIGNMENT OF ERROR (HOUSTON)

Houston argues that the city erred by failing to consider the use of the quarry road by ODOT's permittees and lessees. Alliance argues that the city could limit its consideration of nonconforming uses to those attributable to ODOT alone, and therefore, it need not consider the nonconforming use of the pit or haul road by parties other than petitioner.

The nature and extent of the nonconforming use do not depend on whether the entity performing the activity is a landowner, permittee or licensee, but on the nature and extent of the nonconforming activities themselves. In its proceedings on remand, the city must include an analysis of uses on the subject property that have continued by virtue of being carried out by ODOT, its lessees and permittees.[4]

Houston's third assignment of error is sustained.

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[4]However, the city does not have to consider the use of the haul road that is attributable to activities that are not subject to the nonconforming use determination (e.g., use of the quarry for target shooting), or use of the haul road that do not arise from the nonconforming use on the property (e.g., use of the haul road to haul rock from Houston's quarry.)

FIFTH ASSIGNMENT OF ERROR (HOUSTON)

A. Ex Parte Contacts

Houston argues that the members of the city council failed to comply with ORS 227.180(3), which requires the disclosure of the substance of ex parte communications and the parties' right to rebut the substance of such communications. In response, Alliance argues that the council members adequately disclosed their ex parte contacts at the commencement of the hearing, and Houston failed to object to the adequacy of the disclosures. Even if they had not orally disclosed their ex parte contacts, Alliance argues that by placing the contents of the mediation file into the record, all substantial ex parte contacts were disclosed.

We have 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 a local government decision in an appeal to this Board. Wicks v. City of Reedsport, 29 Or LUBA 8, 12-13 (1995); Mazeski v. Wasco County, 26 Or LUBA 226, 232 (1993). Here, the city council members disclosed the existence of numerous ex parte contacts. Thus, it became incumbent upon Houston to inquire further about the nature of the contacts. Houston did not do so. Having failed to inquire into the nature and substance of the ex parte contacts below, Houston may not claim now that the ex parte contact disclosures were inadequate.

B. Conflicts of Interest

Houston argues that two city council members live either adjacent to or in close proximity to the subject property. Therefore, Houston argues, a decision regarding the nonconforming use status of the property produced a pecuniary benefit to the council members, because their residential property values would rise if the nonconforming use were

discontinued.[5] Houston argues that the participation of these council members is improper because it constitutes an actual conflict of interest, and the decision, therefore, must be reversed.[6]

Alliance argues that in Mosier, all city residents are in close proximity to the disputed mining operations. Alliance also argues that the rule of necessity requires the participation of the council members. ORS 244.120(2)(b)(B).

ORS 244.120(2) provides:

"An elected public official * * * shall:

> "(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or
>
> "(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:
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> > "(A) * * * refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.
> >
> > "(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not participate as a public official in any discussion or debate on the issue out of which the actual conflict arises."

In this case, the council members did not disclose either a potential or actual conflict of interest based on the proximity of their residences to the subject property. While proximity of the residences alone need not automatically result in an actual conflict of interest, and thus need not require that the council members' recuse themselves from

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[5]Houston also argues that the council's volunteer attorney and experts were biased. The alleged bias of a non-decisionmaker does not provide a basis for reversal or remand. Knapp v. City of Jacksonville, 20 Or LUBA 189, 205 (1990).

[6]ORS 244.020(1) defines "Actual conflict of interest" as:

> "any action or any decision * * * by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person * * *."

participating in this matter, actual or potential conflict of interests must be disclosed and addressed by council members on remand.[7] See 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 80-85, 742 P2d 39 (1987) (business dealings between a county commissioner and chief petitioners for annexation did not constitute bias when the business dealings were unrelated to the matter before the county).

C. Bias

The nonconforming use determination was initiated by the Mosier city countil on September 3, 1997, after the council determined that it was not in the city's best interest to approve a modified settlement agreement between ODOT and the city that was negotiated over an 18-month long mediation process. At that meeting, one city council member commented that the information provided by ODOT during the mediation process was, in his opinion, insufficient to show ODOT's right to use the quarry property. Another council member agreed that ODOT needed to show that it had "grandfathered" rights to the quarry operations. ODOT v. City of Mosier, ___ Or LUBA ___ (LUBA No. 97-251, Order, July 15, 1998), slip op 3 n 2. Houston argues that this colloquy, along with comments made by other members of the city council at the September 3, 1997 meeting, show that the council prejudged the nonconforming use, and decided that the nonconforming use did not exist. As a result, Houston argues, the nonconforming use determination proceeding was a sham, because the real decision was made during the September 3, 1997 meeting.

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[7]In an order dated July 15, 1998, we determined that Houston's allegations regarding conflicts of interest did not warrant an evidentiary hearing to produce evidence of those conflicts. We based that decision in part on the provisions of ORS 244.130(2), which provide:

> "No decision or action of any public official or any board or commission on which the public official serves * * * shall be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest." (Emphasis added.)

Because we remand the decision for the city to address issues raised in other assignments of error, we now decide that council members who live adjacent to or in close proximity to the subject site must announce that fact publicly, and declare whether that proximity constitutes an actual or potential conflict of interest.

Alliance argues that the comments made by the city council members during the September 3, 1997 meeting were reflective of the council's opinion of the mediation record. Alliance contends that those comments do not prove that the council had prejudged the existence of the nonconforming use, because that particular issue had not been the object of the mediation. Alliance argues that the nonconforming use determination proceeding was the forum the city decided was the best avenue to address the nonconforming use status of the property. Alliance contends the minutes and other evidence from the meeting do not show that the city prejudged ODOT's evidence.

We agree with Alliance. Houston has the burden of showing the council's bias in a "clear and unmistakable manner." Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985). A decision made by the council arising out of mediation that preceeded a land use process does not show that the city was predisposed to deny the nonconforming use during the subsequent land use proceeding. See Beck v. City of Tillamook, 18 Or LUBA 587, 606 (1990) ("The fact that the city approved federal funds for intervenor's homeless shelter project does not disqualify the city council for bias."); St. Johns Neighborhood v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 97-015/020, January 15, 1998), slip op 13 (where city adopts 14 pages of supplemental findings, addressing over 30 plan policies and relevant sections of city code, petitioners fail to show that a commissioner had prejudged an application merely because he wrote two letters strongly supporting the developer's plan for the property).

Houston's fifth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR (HOUSTON)

The city decided that the provisions of ORS 197.763 governed its process to determine the nonconforming uses on the subject property. Record 1853. ORS 197.763(6) provides that if the hearings authority permits new evidence to be entered into the record, any

party may make a written request to respond to the new evidence. If the request is filed, it must be granted.[8] In addition, ORS 197.763(7) provides that when a local governing body

> "reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

If the hearings authority allows one or more party an opportunity to respond to evidence already in the record, but that party improperly submits new evidence during the course of that response, then the city must either reopen the record to allow other participants an opportunity to respond to that new evidence, or reject the new evidence as untimely. Brome v. City of Corvallis, ___ Or LUBA ____, (LUBA No. 98-193, May 27, 1999) slip op 10, appeal pending (A10673).

At the November 12, 1997 council deliberations, Houston objected to the inclusion of over 1,000 pages of materials entered into the record by opponents to the pit on October 29, 1997. Houston claims that the material included new evidence, which was improper,

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[8] 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.
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> "(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)]."

because at the time the material was submitted, the record was closed to new evidence. According to Houston, on October 15, 1997, the council closed the hearing to new testimony, but allowed ODOT two weeks to submit written evidence to respond to the issues raised during the hearing. The council then left the record open from October 29 to November 5, 1997, to allow the opponents an opportunity to comment on ODOT's submittal. Houston argues that the city's decision to accept new evidence from opponents resulted in substantial prejudice because neither he nor ODOT were able to comment on the new evidence.

Alliance responds that the information in the submittal constituted the record of the mediation. Alliance argues that at least three parties moved to include mediation materials into the record, and that the request was made to enter those materials during the October 15, 1997 public hearing. This response was also incorporated into the city's findings. The information from the mediation file, Alliance argues, was compiled over an 18-month period, and Houston had plenty of time to review the information prior to the close of ODOT's comment period.

A procedural error does not, of itself, justify reversal or remand. ORS 197.835(9)(a)(B) requires that to warrant reversal or remand, the failure to follow applicable procedures must "[prejudice] the substantial rights of the petitioner." We have described these "substantial rights" as the rights to an adequate opportunity to prepare and submit one's case and a full and fair hearing. Torgeson v. City of Canby, 19 Or LUBA 511, 520 (1990); Muller v. Polk County, 16 Or LUBA 771, 775 (1988). Houston has the burden of showing that the procedural error in accepting the mediation record resulted in prejudice to his substantial rights.

Houston argues that the evidence submitted on October 29, 1997, contained more than the mediation files, it contained new evidence. It is this new evidence that Houston argues should be subject to an opportunity for a response.

The minutes of the October 15, 1997 hearing do not reflect any particular request to include the mediation file into the record. Alliance cites to a letter by the city's special attorney to support its claim that more than one party requested that the mediation file be included in the record. However, the city's special attorney limited his request to include drafts of a proposed agreement between ODOT and the city, and minutes of the mediation proceedings. He did not request any evidence that may have been produced during the course of the mediation to be entered into the record.[9] The letter is also dated after the date the record was closed.

The record does not show that Houston had an opportunity to respond to the evidence improperly submitted after October 29, 1997. The minutes reflect a motion by Councilor Morris "to continue until October 29 additional testimony from ODOT, [to allow] opponent's rebuttal until November 5, and [to] reconvene for deliberation on November 12, 1997." Record 1678. At no time was there an opportunity for Houston to respond to the improperly submitted additional evidence.[10] This resulted in prejudice to his substantial rights.

Houston's sixth assignment of error is sustained.

CONCLUSION

In its proceedings on remand, the city council must analyze the use of the property as a whole according to the analysis provided above. In doing so, the city must allow the

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[9]The letter reads:

> "If it has not already been done, please submit into the Record for the ODOT non-conforming use hearing all minutes[,] both yours and Beak Consultant's[,] regarding all Mosier Rock Pit mediation meetings/hearings. Also, please submit all drafts of the 'Agreement' that was discussed during mediation." Record 69.

[10]In a typical hearing governed by ORS 197.763, the applicant is given the opportunity for final rebuttal, not the opponents. Here, the city stated that it intended to follow ORS 197.763, and identified ODOT as the chief "proponent" of the nonconforming use. Consequently, it is more logical to permit ODOT the opportunity for final rebuttal and argument.

parties an opportunity to inquire as to ex parte contacts and conflicts of interest, and permit Houston an opportunity to respond to the improper October 29, 1997 submittal.

The city's decision is remanded.