BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS TERRA, LESLIE TERRA, GARY F. EDMUNDSON, LEE MOORE, CAROL MOORE, JAMES L. KENNISON, AND MARJORIE L. WEESNER,	)	
Petitioners,	)	
and	)	
FRAN RECHT,	)	LUBA No. 98-036
Intervenor-Petitioner,	)	FINAL OPINION AND ORDER
vs.	)	
CITY OF NEWPORT,	)	
Respondent,	)	
and	)	
VISTA LAND CORP,	)	
Intervenor-Respondent.	)	

Appeal from City of Newport.

Corinne C. Sherton, Salem, filed a petition for review and argued on behalf of petitioners. With her on the brief was Johnson, Kloos & Sherton.

Elizabeth A. Fetsch, Newport, filed a response brief and argued on behalf of the respondent. With her on the briefs was Minor & Boone, P.C.

Douglas R. Holbrook, Newport, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Kurt Carstens and Litchfield & Carstens, LLP.

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

REMANDED 09/02/99

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 conditional use permit for development of a 101-unit hotel.

MOTION TO INTERVENE

Vista Land Corp. (intervenor), the applicant below, moves to intervene on the side of the city. Fran Recht (intervenor-petitioner) moves to intervene on the side of petitioners. There is no opposition to either motion, and they are allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief pursuant to OAR 661-010-0039, arguing that the response briefs raised two types of "new matters" within the meaning of that provision: (1) arguments that petitioners waived certain assignments of error; and (2) arguments that certain aspects of the challenged decision are not "land use decisions" and therefore not subject to LUBA's jurisdiction. We agree with petitioners that both types of issues are new matters raised in the response briefs that warrant a reply brief under OAR 661-010-0039.

Petitioners' motion to file a reply brief is allowed.

FACTS

The subject property is a vacant 8.53-acre parcel designated High Density Residential in the Newport Comprehensive Plan (NCP) and zoned High Density Multi-Family Residential (R-4). The property is bordered by Highway 101 on the east, an unimproved gravel road, NW 68th Street, on the north, and the Pacific Ocean to the west. South of the subject property are several parcels also zoned R-4, one of which is developed as a 42-unit time-share condominium. North of NW 68th Street is an area zoned Medium Density Single-Family Residential developed with single-family homes.

The subject property lies within an Ocean Shorelands Overlay Zone. Schooner Creek

runs through the northern portion of the property. There is a 1.2-acre wetland associated with the creek. Portions of the property adjoining Schooner Creek are designated as a Coastal High Hazard Area in the city's zoning ordinance, while other portions adjoining the creek are also within a Tsunami Hazard Area, as designated by the Oregon Department of Geology and Mineral Industry. Further, the entire subject property is located in an identified geologic hazard area of severe erosion, requiring a geologic report and the issuance of a geologic permit prior to any development. The southwestern portion of the property consists of a bluff that contains an active landslide area.

In June 1997, intervenor submitted an application for a conditional use permit to develop an 81-unit hotel building and five four-plex cabins for short-term rentals.[1] The hotel building would be located on the western portion of the property, with three cabins on the southeast corner and two cabins on the northeast corner. All access to the property is via NW 68th Street to Highway 101. The proposed hotel building has a 36,182 square foot footprint, 68 feet wide by 520 feet long, consisting of two wings. The southern wing includes a restaurant, lounge, meeting rooms, fitness center and eight penthouse guestrooms. The southern wing would be built at approximately the 54-foot elevation above sea level in an area formed by cutting into the bluff containing the active landslide area in the southwestern portion of the property. The northern wing will contain 73 guestrooms on three levels built on piers over land at an elevation of approximately 24 feet. The proposed application contemplates reducing the top of the bluff 25 to 30 feet in certain areas to provide for ocean views.

Concurrently with its conditional use permit application, intervenor requested a 10 foot variance from the 35 foot maximum building height allowed in the R-4 zone, to allow

[1]Intervenor also applied for a geologic permit for the subject property, which the city approved in a separate proceeding. The record of that proceeding was incorporated into the record of the challenged conditional use permit.

the hotel structure to reach 45-feet in height over grade. The city planning commission (commission) conducted consolidated proceedings on the permit and variance, and issued an order approving the permit but denying the variance. Petitioners appealed the permit approval to the city council. The city council conducted a review on the record of the commission and, on January 20, 1998, denied the appeal, thus affirming the commission's decision and approving the conditional use permit.

This appeal followed.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

Newport Zoning Ordinance (NZO) 2-5-3.015.A(4) requires that applicants for a Type I conditional use permit demonstrate that "[t]he proposed use is consistent with the overall development character of the neighborhood with regard to building size, height, color, material and form."

The city adopted several sets of findings addressing NZO 2-5-3.015.A(4):

> "The site is bordered by single-family residences to the north, the Schooner Landing time-share condominiums to the south, the Pacific Ocean to the west and U.S. Highway 101 to the east." Record 6.

> "There are other projects of similar densities existing in the R-4 zone. An example is the Valu-Inn. Sufficient evidence was submitted from applicants to determine that the hotel will be suitable for placement in an R-4 zone * * *" Record 18.

> "The Council finds that the purpose of the R-4 zoning district allows some limited commercial [uses]; and that the proposed project will be compatible with the adjoining residential districts and uses. * * *" Record 23.

> "The applicants * * * provided sufficient evidence to demonstrate [compliance with NZO 2-5-3.015.A(4)]. The Common Council determines that the proposed project design will be consistent with both the surrounding existing development including Schooner's Landing, Pacific Shores RV Park, neighboring residential area, various motels and commercial uses, and the Gallagher Industrial Park." Record 23.

> "Currently, the city does not have design criteria or guidelines in this zoning district in terms of color, material and form. Therefore, the building size and height are the main concern." Record 782.

Petitioners contend that these findings are inadequate to demonstrate compliance with NZO 2-5-3.015.A(4). According to petitioners, compliance with NZO 2-5-3.015.A(4) requires that the city (1) identify the neighborhood considered; (2) describe the overall development character of that neighborhood with regard to building size, height, color, material and form; and (3) explain why the proposed use is consistent with that overall development character.

Petitioners contend, first, that the city's findings do not identify the "neighborhood," but instead appears to consider adjoining uses as well as developments in any R-4 zone in the city as part of the relevant "neighborhood," regardless of proximity to the subject property. Second, petitioners argue that the city's findings fail to describe the overall development characteristics of any defined "neighborhood," with regard to "building size, height, color, material, and form." Third, petitioners argue that the city's findings are conclusory, because they do not explain why the facts regarding development characteristics of the neighborhood and the characteristics of the proposed use are "consistent." Finally, petitioners contend that the site plans and similar evidence depicting the characteristics of the proposed hotel are premised on a "National Park" style that requires a four-foot height variance, which the city did not grant. Accordingly, petitioners argue, the record does not contain sufficient evidence regarding the building size, height, color, material and form of the proposed hotel without that variance to allow the city to reach any conclusion regarding NZO 2-5-3.015.A(4).

Intervenor responds that the city's findings are adequate to demonstrate compliance with NZO 2-5-3.015.A(4). Even if they are not, intervenor argues, petitioners have affirmatively waived the right to object to any characteristics of the proposed hotel other than size. Further, intervenor contends that, regardless of any inadequacy in the city's findings, the record contains relevant evidence that "clearly supports" a finding of compliance with NZO 2-5-3.015.A(4). ORS 197.835(11)(b).

A. Affirmative Waiver

Intervenor's argument that petitioners have affirmatively waived any right to object to any characteristics of the proposed hotel, other than size, rests on petitioner Leslie Terra's comment that she thought the hotel was "rather nicely designed," just "too large and out of character[.]" Record 757. However, even if petitioner Terra's comment is sufficient to waive certain issues with respect to NZO 2-5-3.015.A(4), intervenor makes no attempt to demonstrate that the other petitioners in this appeal also affirmatively waived the right to raise those issues. Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 688 (1995) (without evidence that all of the petitioners have affirmatively waived an issue, the waiver of one petitioner is not a basis to deny an assignment of error).

B. Adequacy of the City's Findings

We agree with petitioners that the city's findings of compliance with NZO 2-5-3.015(A)(4) are inadequate. As petitioners point out, the city's findings fail to describe either the boundaries or the characteristics of the relevant "neighborhood," and apparently compare the proposed development with facilities in geographically distant parts of the city without explaining why those areas should be considered part of the relevant "neighborhood." Further, the city fails to make any findings regarding the character of the relevant neighborhood, with respect to "building size, height, color, material, and form," and does not explain why the absence of design criteria in the R-4 zone obviates the need to make such findings. Moreover, in large part because of the inadequacies described above, we agree with petitioners that the city's finding that the proposed hotel is "consistent" with the overall development character of the neighborhood is conclusory and inadequate. Adequate findings must identify the facts relied upon, and explain why those facts support a conclusion that applicable criteria are met. Harcourt v. Marion County, 33 Or LUBA 400, 407 (1997). The city's findings are insufficient on both counts.

With respect to petitioners final argument, that denial of the requested variance makes it impossible for the city to determine the characteristics of the proposed hotel, and thus whether those characteristics are consistent with the neighborhood, petitioners have not demonstrated that a four-foot change in building height would significantly change the characteristics of the proposed hotel in a manner that renders a finding of compliance with NZO 2-5-3.015.A(4) impossible, based on the existing site plans.

C. Evidence that Clearly Supports

Notwithstanding any inadequacy in the city's findings, intervenor argues that, based on pictures of the proposed development and adjoining development, LUBA can make its own determination whether the proposed hotel is consistent with the overall development character of the neighborhood. ORS 197.835(11)(b). We decline intervenor's invitation. LUBA has interpreted ORS 197.835(11)(b) narrowly as allowing the Board to affirm inadequate or nonexistent findings regarding an approval standard only where the evidence in the record renders a finding of compliance with that standard "obvious" or "inevitable." Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995). As we explained in that case, ORS 197.835(11)(b) authorizes LUBA to remedy minor oversights and imperfections in local findings, as a way to eliminate delays resulting from purely technical objections to the adequacy of findings, but it does not authorize us to weigh conflicting evidence or otherwise assume the responsibilities of the local government. Id. This narrow view of our authority under ORS 197.835(11)(b) is even more appropriate with respect to relatively subjective standards such as NZO 2-5-3.015.A(4). In the present case, the depictions intervenor cites to in the record falls far short of allowing this Board to conclude that a finding of compliance with NZO 2-5-3.015.A(4) is "obvious" or "inevitable."

The first assignment of error (petitioners) is sustained.

SECOND ASSIGNMENT OF ERROR (PETITIONERS)

NZO 2-5-3.015.A(1) requires that an applicant for a Type I conditional use permit demonstrate that "public facilities can adequately accommodate the proposed use." NZO 2-5-3.010 defines "public facilities" to include streets. Petitioners note that the only access to the proposed hotel is from Highway 101, via NW 68th Street. NW 68th Street is currently an unimproved gravel road, and the proposed hotel will add an average of 929 trips per day to NW 68th Street and its intersection with Highway 101. The city adopted the following findings regarding NZO 2-5-3.015.A(1):

> "[T]he developer will be required to enter into an agreement with ODOT [Oregon Department of Transportation] to construct access improvements at the intersection of NW 68th Street with U.S. Highway 101, including but not limited to a north-bound left turn lane and a south-bound right turn deceleration lane on U.S. Highway 101. ODOT rules will require the developer to make improvements as required, and the City of Newport will add a condition requiring compliance with ODOT requirements." Record 11.

> "* * * The City Engineer found that there is or will be adequate public facilities after the proposed improvements are made. * * * NW 68th Street will also be widened and paved. There will be a safer intersection made at NW 68th Street and Highway 101. * * * In addition, the applicants have demonstrated that through an agreement and plan review by ODOT and the City Engineer, the proposed improvement to NW 68th Street and to the intersection of NW 68th Street and Highway 101 will be adequate for traffic from the proposed development and the neighboring area." Record 21.

The challenged decision imposes the following condition:

> "The applicant shall enter into an agreement as required by [ODOT] respecting the design of, and access improvements to be made at, the intersection of NW 68th Street with U.S. Highway 101, and shall comply with such agreement and all ODOT and other applicable requirements." Record 59.

Petitioners argue that the city's found, essentially, that compliance with NZO 2-5-3.015.A(1) is feasible and adopted conditions designed to ensure that that standard will be satisfied. See Rhyne v. Multnomah County, 23 Or LUBA 442, 447-48 (1992) (where compliance with an approval criterion is at issue, the local government must (1) find either

that the criterion is satisfied or that feasible solutions exist and impose conditions as necessary; (2) deny the application; or (3) defer a determination of compliance with the criterion to a second stage of review that provides statutorily required notice and opportunity for a hearing). However, petitioners contend that the city's finding of feasibility is not supported by substantial evidence in the record. What is missing, petitioners argue, is data on the current traffic situation at the intersection and input from ODOT regarding whether it is feasible to improve the intersection to accommodate the proposed use, and whether ODOT is willing to enter into an agreement with the applicant to construct those improvements. According to petitioners, the only evidence supporting the city's findings regarding NZO 2-5-3.015.A(1), aside from the applicant's representation that it will make whatever improvements ODOT requires, is a memo from the city engineer stating that ODOT and the city will review all plans for improving the intersection and that the primary focus of those plans will be to ensure the safety of vehicles entering and leaving the highway. Record 372. Petitioners submit that no evidence in the record supports the city's finding that it is feasible to comply with NZO 2-5-3.015.A(1).

Intervenor responds that the city has no jurisdiction over the intersection and necessarily must rely on ODOT to specify and require the improvements necessary to ensure that the intersection can adequately accommodate the proposed use. Intervenor points out that ODOT required, in a previous application involving a more traffic-intensive proposal on the subject property, that the applicant improve the intersection with deceleration and turn lanes. Intervenor submits that the city appropriately required the applicant to enter into an agreement with ODOT regarding necessary improvements, including but not limited to the deceleration and turn lanes required in the previous application, and that it is absurd to suppose that ODOT will not exercise its responsibilities to ensure that the intersection as improved is safe and adequate.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). A reasonable person could conclude from the improvements ODOT required in the previous, more traffic-intensive application and reimposed as a minimum requirement in this application, that it is feasible to improve the intersection to adequately accommodate the proposed use. The city's finding that it is feasible to comply with NZO 2-5-3.015.A(1), as conditioned, is supported by substantial evidence.

The second assignment of error (petitioners) is denied.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the city's decision fails to demonstrate compliance with provisions of the Transportation Planning Rule (TPR), OAR 660-012-0045(3)(c) and (e), which require, respectively, that off-site road improvements include pedestrian and bicycle facilities and that new commercial development provide for internal pedestrian circulation.[2]

The challenged decision finds that:

> "Improvements to NW 68th Street made up to the point of ODOT jurisdiction will be in compliance with applicable [Land Conservation and Development Commission] rules, including OAR 660-012-0045(3)(c) – (e) by building a curb and sidewalk for pedestrian use. A similar walkway will follow the driveway to the buildings. On-site nature trails will serve as internal pedestrian circulation throughout the hotel grounds. * * * The improvements will provide for direct, safe access for bicycles and pedestrians." Record 80.

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[2]OAR 660-012-0045(3)(c) and (e) provide:

> "(c) Where off site road improvements are otherwise required as a condition of development approval, they shall include facilities accommodating convenient pedestrian and bicycle travel * * *
>
> "* * * * *
>
> "(e) Internal pedestrian circulation within new * * * commercial developments shall be provided through clustering of buildings, construction of accessways, walkways and similar techniques."

> "The proposed project and required improvements of NW 68th Street met the Transportation Planning Rule as set forth in OAR 660-012-0045. Both the street improvement and the hotel grounds have a preliminary design which address direct, safe access for pedestrian and bicycle travel." Record 84.

Petitioners argue that these findings are conclusory and not supported by substantial evidence. With respect to the walkways and similar facilities required by OAR 660-012-0045(3)(c) and (e), petitioners contend that the city's findings fail to demonstrate compliance with those requirements, because no site plan or other evidence in the record, or condition imposed by the decision, proposes or requires that those facilities be built. Similarly, petitioners argue that the challenged findings fail to demonstrate compliance with the language in OAR 660-012-0045(3)(e) requiring that internal pedestrian circulation be provided by, inter alia, "clustering of buildings." Petitioners argue that the city fails to explain how isolating two of the four-plexes on the north side of the creek, separated from the rest of the hotel complex by the creek and wetlands and not accessible by convenient pedestrian walkways, is consistent with that requirement.

Intervenor responds, first, that application of the TPR requirements does not render decisions that would not otherwise be "land use decisions" into decisions reviewable by LUBA. OAR 660-012-0000. We understand intervenor to contend that decisions regarding street improvements are not land use decisions, and thus the aspects of the challenged decision regarding pedestrian and bicycle facilities required by the TPR are not subject to LUBA's review. We disagree. The city's determinations regarding TPR requirements were not made as a separate decision, but as part of a conditional use approval that is unquestionably a land use decision.

Next, intervenor argues that petitioners waived the issues presented under this assignment, by failing to raise those issues below. ORS 197.763(1). Intervenor contends that no issue was raised below under OAR 660-012-0045(3)(c) or (e) regarding pedestrian facilities along NW 68th Street, or connecting NW 68th Street and the hotel, or the siting of the four-plexes. In a reply brief, petitioners respond that the city initially did not recognize

the applicability of the TPR requirements, and that neither the applicant, city staff nor any other party addressed or attempted to demonstrate compliance with OAR 660-012-0045(3)(c) or (e) prior to the close of the evidentiary record. Petitioners explain that they raised below the issue of whether the city must find compliance with the TPR, and note that the city addressed and adopted findings of compliance with the TPR only in the final decision. Under these circumstances, petitioners argue, they should be able to challenge the adequacy and evidentiary base for those findings before LUBA for the first time.

Particular findings ultimately adopted on by the decision maker need not be anticipated and specifically challenged during the local proceedings in order to preserve the right to challenge at LUBA the adequacy of findings to address a relevant criterion or the evidentiary support for such findings. Lucier v. City of Medford, 26 Or LUBA 213, 216 (1993). We agree with petitioners that ORS 197.763(1) does not preclude petitioners from challenging the adequacy of the city's findings to demonstrate compliance with OAR 660-012-0045(3)(c) or (e).

On the merits, intervenor argues that the findings and record adequately establish compliance with the requirements of OAR 660-012-0045(3)(c) and (e). With respect to the internal and external walkways required by OAR 660-012-0045(3)(c) and (e), intervenor argues that the above-quoted findings expressly condition approval on improving NW 68th Street and the driveway leading to the hotel comply with those requirements. With respect to the four plexes north of Schooner Creek, intervenor argues that those buildings will be linked to the rest of the complex via sidewalks running to NW 68th Street, then down that street, then over the bridge crossing Schooner Creek, and then up the driveway to the hotel complex.

It may be, as intervenor suggests, that the city intended the above-quoted findings to condition approval on building the pedestrian facilities that the city found are required by OAR 660-012-0045(3)(c) and (e), notwithstanding the lack of any express language to that

effect and the absence of a condition to that effect in the list of conditions appended to the challenged decision. However, if that was the city's intent, the challenged decision is inadequate to ensure that the required improvements will be constructed. Further, we agree with petitioners that the challenged findings fail to address whether siting the four-plexes on the north side of Schooner Creek is consistent with the OAR 660-012-0045(3)(e) requirement for provision of pedestrian circulation by clustering of buildings. Intervenor's argument, that the four-plexes will be connected, albeit circuitously, with the rest of the hotel complex, fails to explain why an internal pedestrian circulation plan requiring residents of the four-plexes north of the creek to leave and then re-enter the subject property in order to reach the hotel complex complies with OAR 660-012-0045(3)(e).

The third assignment of error (petitioners) is sustained.

FOURTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners argue that the challenged decision violates either NZO 2-4-7.020 or Goal 1, Policy 3 of the city's comprehensive plan in requiring widening and construction of parking spaces along NW 68th Street without also requiring a site-specific geologic report.

NZO 2-4-7.020 provides that a geologic permit is required for any human alteration within a geologic hazard area as defined in NZO 2-4-7.010. The decision notes that the "site" is located in an identified geologic hazard area. Intervenor submitted a geologic report that considered the subject property, but did not consider required off-site improvements to NW 68th Street. Petitioners argue that NZO 2-4-7.020 requires geologic study of off-site alterations within the geologic hazard area such as the proposed improvements to NW 68th Street.

In the alternative, petitioners argue that NCP Goal 1, Policy 3 requires that a site-specific geologic investigation regarding NW 68th Street be conducted prior to any improvements in that area. Goal 1, Policy 3 provides that "[w]here hazardous areas have not been specifically identified but there is reason to believe that a potential does exist, a site-

specific investigation by a registered geologist or engineer shall be required prior to development." Petitioners note that in Jebousek v. City of Newport, 155 Or App 365, 963 P2d 116 (1998), the Court of Appeals held that Goal 1, Policy 3 was a mandatory approval criterion that applicants for development must comply with if there is reason to believe a potential hazard exists. Petitioners argue that in the present case there was testimony that the required improvements to NW 68th Street could destabilize the northern bank of the existing road, creating a hazardous condition for adjoining residential properties.

Intervenor responds, first, that although the commission required the applicant to build parking spaces on NW 68th Street, the city council's decision does not require or condition approval on providing those parking spaces. Absent such a requirement, intervenor states, it will not build the disputed parking spaces, and thus petitioners' argument under this assignment of error does not provide a basis for reversal or remand. However, intervenor is mistaken. Condition 3(a) of the challenged decision requires that the applicant improve NW 68th Street, "to include as much parking as reasonably practicable at the westerly terminus" of that street. Record 59. Further, condition 3(e) requires the applicant to construct the hotel substantially in compliance with the site plan. The preliminary site plan approved by the challenged decision depicts a number of public parking spaces at the western end of NW 68th Street.

Intervenor next argues that petitioners failed to raise below an issue regarding the application of NZO 2-4-7.020 to the improvements on NW 68th Street. Petitioners acknowledge that the discussion of NZO 2-4-7.020 during the proceedings below centered on the geologic permit for the subject property. However, petitioners cite to three places in the record where they pointed out the geologic study does not consider off-site improvements, and argued that the proposed off-site improvements to NW 68th Street required geologic study. Petitioners submit that these arguments were sufficient to alert the city that they believed the applicant was required to, and had not, demonstrate that the

improvements to NW 68th Street complied with the geologic study requirements of NZO 2-4-7.020. We agree. Petitioners' arguments below were sufficient to apprise the decision maker and the parties below of the issue raised in this assignment of error, and allow an adequate opportunity to respond to that issue. ORS 197.763(1).

In its response brief, the city argues that the issues raised in this assignment of error regarding the required improvements to NW 68th Street are not within LUBA's jurisdiction, because they fall within the exception to the definition of "land use decision" at ORS 197.015(10)(b)(D). ORS 197.015(10)(b)(D) provides that the definition of "land use decision" subject to LUBA's exclusive jurisdiction does not include a decision "[w]hich determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility * * *." The city concedes that its decision approving the proposed hotel is a land use decision, but argues that LUBA's jurisdiction does not extend to discrete parts of that decision that otherwise meet the exclusion at ORS 197.015(10)(b)(D). We disagree. The city required as a condition of permit approval that the applicant make certain improvements to NW 68th Street, pursuant to land use regulations governing conditional use permits. Those conditions are part of the challenged land use decision, and any issues regarding those conditions may be challenged before LUBA, notwithstanding that, if the required improvements were made in a separate decision not involving permit approval, those improvements might fit within the exclusion at ORS 197.015(10)(b)(D).

On the merits, intervenor argues that improvements to NW 68th Street are subject to the city engineer's approval, and that "in the real world," the city engineer can be expected to require any geologic studies deemed necessary to ensure that those improvements are built in a manner that protects adjacent property. Response Brief 13. Intervenor is undoubtedly correct that the city engineer will exercise his duties responsibly, but that probability does not meet the city's obligation to find compliance with applicable criteria, including NZO 2-4-

7.020. We agree with petitioners that the city failed to address whether NZO 2-4-7.020 applies to the off-site improvements to NW 68th Street and whether a geologic study is required to address those improvements.[3]

The fourth assignment of error (petitioners) is sustained.

FIFTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the challenged decision fails to comply with NCP Policy 4, because it does not adopt findings, supported by substantial evidence, that the proposed development will provide adequate storm drainage facilities. Alternatively, petitioners argue that the city impermissibly deferred the issue of the adequacy of storm drainage to a later process that does not provide notice to or opportunity for input.

NCP Public Facilities General Policy 4 provides that:

> "[e]ssential public services should be available to a site or can be provided to a site with sufficient capacity to serve the property before it can receive development approval from the city. For purposes of this policy, essential services shall mean:
>
> "* * * * *
>
> "Storm Drainage."

Policy 4 also provides that

> "Development may be permitted for parcels without the essential services if:
>
> "The proposed development is consistent with the Comprehensive Plan; and
>
> "The property owner enters into an agreement, that runs with the land and is therefore binding upon future owners, that the property will connect to the essential service when it is reasonably available; and

[3]We need not and do not address petitioners' alternative argument under NCP Goal 1, Policy 3, or intervenor's response that, notwithstanding the Court of Appeals' decision in Jebousek, Goal 1, Policy 3 cannot be retroactively applied to the subject application without violating ORS 227.178(3).

> "The property owner signs an irrevocable consent to annex if outside the city limits and/or agrees to participate in a local improvement district for the essential service."

Petitioners argue that Policy 4 is worded similarly to Goal 1, Policy 3, the NCP provision at issue in Jebousek that the Court of Appeals held was a mandatory approval criterion potentially applicable to quasi-judicial decisions. Petitioners argued to the city council that Policy 4 is a mandatory approval criterion requiring a finding that adequate storm drainage services can be provided to the proposed hotel. Record 292-93, 583. However, the challenged decision failed to apply or find compliance with Policy 4, or address whether it is an approval criterion.

The city responds that, although petitioners raised the issue of compliance with Policy 4 to the city council, the specific arguments made below regarding the meaning of Policy 4 differ from the arguments made in this assignment of error. However, ORS 197.763(1) requires petitioners or other participants to raise an issue before the decision-maker; it does not limit the specific arguments regarding that issue to those made below. See DLCD v. Curry County, 33 Or LUBA 728, 733 (1997) (where the petitioner raised the issue of compliance with Goal 4, ORS 197.763 does not also require the petitioner to raise the specific arguments regarding how Goal 4 is applied that are made in the petition for review). Moreover, the city does not explain why waiver would apply to petitioners' primary argument under this assignment of error, that the city failed to address compliance with Policy 4, an issue that the city concedes was adequately raised below.

The city and intervenor join in arguing that Policy 4 is merely precatory and does not constitute a mandatory approval criterion. Unlike the policy language at issue in Jebousek, the respondents argue, Policy 4 does not use the mandatory term "shall." Instead, it merely states that services "should" or "can be" made available prior to development approval. Respondents also argue that unlike the policy at issue in Jebousek, Policy 4 has been implemented in the city's zoning ordinance. However, the city and intervenor point to

different ordinance provisions. The city cites NZO 2-4-7.040, which requires the city engineer to review and approve plans for streets, storm drainage, excavation, and vegetation removal. Intervenor cites to NZO 2-5-3.015(A), which requires the city to find that public facilities can adequately accommodate the proposed use. We understand respondents to argue that LUBA should interpret Policy 4 in the first instance, pursuant to ORS 197.829(2), as not constituting a mandatory approval criterion.[4]

Notwithstanding that Policy 4 uses the term "should" rather than the term "shall," when considered in context, the terms of Policy 4 appear to require the city to determine, at a minimum, that essential public services, including storm drainage, can be provided to the site before granting development approval. The fact that Policy 4 specifies an exception to its requirements supports the conclusion that it imposes a mandatory requirement.

Respondents' arguments that Policy 4 has been implemented in the zoning ordinance do not avail them. NZO 2-4-7.040 sets forth density guidelines for property within the flood hazard area based on the degree of slope. For property with slopes greater than 12 percent, NZO 2-4-7.040 imposes certain density limitations, and also requires that "[p]lans for streets, storm drainage, excavation, and vegetation removal shall be reviewed and approved by the City Engineer prior to any work being done on the subject property." Nothing in NZO 2-4-7.040 suggests that it implements the substance of Policy 4, nor does the city explain how the broad terms of Policy 4 are implemented by an ordinance that (1) is concerned with density and (2) is limited to property within flood hazard areas with slopes greater than 12 percent.[5]

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[4]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."

[5]Both the city and intervenor argue strenuously that the applicant should not have to supply final architectural or storm drainage plans in order to show compliance with Policy 4. We agree. Policy 4 requires a finding that essential public services, including storm drainage, can be provided to the subject property. That

Similarly, NZO 2-5-3.015(A) imposes criteria for conditional use permits, requiring a finding that "public facilities can adequately accommodate the proposed use." For purposes of that section, the term "public facilities" is defined at NZO 2-5-3.010 to mean "[s]anitary sewer, water, streets, and electricity." That definition does not include storm drainage. It may be, as intervenor suggests, that the city could interpret NZO 2-5-3.015(A) as including storm drainage within the scope of "public facilities," notwithstanding the definition at NZO 2-5-3.010. However, the city has not done so, and neither will we.

The fifth assignment of error (petitioners) is sustained.

SIXTH ASSIGNMENT OF ERROR (PETITIONERS)

FOURTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Petitioners argue, based on the approved preliminary site plan and testimony by the applicant's architect, that portions of the ocean bluff will be reduced from elevations that currently reach over 60 feet to approximately 30 feet in elevation, in order to open up views from the south wing. Petitioners contend that removal of significant portions of the bluff is inconsistent with the geologic setback provisions of NZO 2-4-7.015 and NCP Goal 2, Policy 9. In her fourth assignment of error, intervenor-petitioner makes substantially similar arguments.

A. NZO 2-4-7.015

NZO 2-4-7.015 requires that the city establish a "Geologic Setback Area" for areas of coastal erosion in geologic hazard areas such as the subject property. NZO 2-4-7.015 prescribes how to determine the appropriate setback; for areas of severe erosion, the setback must equal 2.75 feet of setback for each foot of bank height, as measured from the mean high water line or the base of the bank, whichever requires the greater setback. Pursuant to this requirement, the city imposed a setback for structures of 75 feet from the "top of the bank."

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showing must be based on substantial evidence, but nothing in Policy 4 suggests that the applicant must submit final, detailed plans in order to make that showing.

Record 81.[6] The hotel building, as proposed, is approximately 75 feet from a line identified on the site plan as the top of the bank. However, petitioners argue that the setback required by NZO 2-4-7.015 is not limited to structures, but should include excavation activities such as removing significant portions of the bluff that are inconsistent with the purpose of the setback: to protect against erosion.

According to petitioners, the NZO 2-4-7.015 setback requirement implements Statewide Planning Goal 17 (Coastal Shorelands) Implementation Requirement (IR) 5 ("[l]and use management practices and non-structural solutions to problems of erosion and flooding shall be preferred to structural solutions"); cf. NZO 2-4-7.015 ("The following coastal setbacks are required * * * in order to limit the need for structural solutions to coastal erosion"). Petitioners argue that the purpose of IR 5 and the setback requirement is to avoid having to use structural solutions for erosion problems (such as rip-rap or a seawall) by instead relying as much as possible on existing ocean bank material to protect new structures from erosion. That purpose is undermined, petitioners contend, by allowing the same ocean bank material needed to protect against erosion to be excavated and removed.

Intervenor responds, first, that petitioners have waived any objection to grading within the setback area by failing to raise that issue below. Petitioners reply by citing to testimony in the record where intervenor-petitioner argued that bluff removal should also be prohibited in the setback area, because removing a portion of the bluff takes away the protection the bluff is supposed to provide. Record 102. Further, petitioners argue, the city failed to list NZO 2-4-7.015 in the notice of hearing, and thus petitioners may raise issues

[6]It does not appear that the city used the formulas at NZO 2-4-7.015 to determine the size of the required setback. Instead, the city appears to have adopted the 75-foot setback based on a suggestion from the Department of Land Conservation and Development, which itself was based on an estimated one foot per year erosion rate times the 60-year expected life of the hotel, with an additional 15 feet added for a safety margin. Record 504. It is not clear what the setback would be if calculated pursuant to NZO 2-4-7.015. No party addresses this issue, and we express no opinion regarding it.

regarding that provisions before LUBA. ORS 197.835(4)(a). We agree with petitioners on both points.

On the merits, intervenor argues that NZO 2-4-7.020 contemplates grading within the geologic setback area provided that the applicant obtains a geologic permit. Intervenor notes that the geologic permit obtained in June 1997 approves the excavation needed in the southeastern slope of the bluff to site the south wing of the hotel. Intervenor argues that the 1997 geologic permit thus allows the bluff removal within the setback that the petitioners now complain about. However, it is not clear that the geologic permit, or the geologic report on which it is based, approves or considers bluff removal within the setback as distinguished from the slope cuts necessary to site the south wing. Petitioners point out that the author of the geologic report testified that he understood the bluff would remain intact, and that the excavation would occur east of the setback line, with the hotel rising above the bluff from a trench excavation behind the bluff. Record 233. Intervenor has not demonstrated that the geologic permit or report approves the bluff removal within the setback area that is depicted in the preliminary site plan.

Finally, intervenor argues that, while the purpose of the setback requirement is to provide a natural erosion buffer, it is erroneous to read the setback requirement as being concerned with bluff removal where the reduced size of the bluff remains above the "V-zone." Intervenor explains that the V-zone is the maximum height waves can reach, and that the V-zone governing the subject property is an elevation of 31 feet. We understand intervenor to argue that bluff material above the V-zone elevation serves no erosion control function and thus can be removed without undermining the purpose of the setback or Goal 17, IR 5.

We disagree with petitioners that either NZO 2-4-7.015 or Goal 17, IR 5 categorically prohibits excavation or grading within the setback area. However, we agree that excavation or grading within the setback area is inconsistent with Goal 17, IR 5 and hence NZO 2-4-

7.015 if it will increase the erosion rate. Because the geologic permit on which intervenor relies does not consider bluff removal within the setback zone and, more importantly, the impact of that bluff removal on erosion rates, we agree with petitioners that the city has no basis in this record to conclude that the proposed bluff removal is consistent with NZO 2-4-7.015.

This subassignment of error is sustained.

B. NCP Goal 2, Policy 9

NCP Goal 2, Policy 9 provides:

> "Excavations and fills shall be limited to those minimal areas where alteration is necessary to accommodate allowed development. Cleared areas, where vegetation is removed during construction, shall be revegetated or landscaped to prevent surface erosion and sedimentation of near shore ocean waters."

Petitioners argue that they raised the application of Goal 2, Policy 9 below, but the city council failed to respond to that issue. According to petitioners, the challenged decision fails to demonstrate compliance with Goal 2, Policy 9 because it fails to address how excavations and fills will be minimized to avoid erosion and sedimentation affecting the wetlands and creek, how disturbed areas will be revegetated, and, in particular, how bluff removal is consistent with Goal 2, Policy 9.

Intervenor responds, first, that petitioners have waived the right to raise issues regarding sedimentation, revegetation, or minimizing cuts and fills by failing to raise those issues below. However, we agree with petitioners that if Goal 2, Policy 9 is a mandatory approval criterion, then the city's failure to list that standard in the notice of hearing allows petitioners to raise issues regarding compliance with that standard. ORS 197.835(4)(a).

Second, intervenor argues that Goal 2, Policy 9 is not a mandatory approval criterion because it does not specifically require certain actions "prior to development," as does Goal 1, Policy 3, the standard at issue in Jebousek. Third, intervenor argues that even if Goal 2, Policy 9 applies, its sedimentation, revegetation and erosion requirements are concerned only

with "near shore ocean waters" and therefore the policy is not concerned with the creek and wetlands. Fourth, intervenor contends that, because part of the bluff is a slowly moving landslide, flattening the bluff and removing unstable material will reduce the potential for erosion and sedimentation and render revegetation more effective. We understand intervenor to argue that LUBA should make its own determination that bluff removal is consistent with Goal 2, Policy 9, pursuant to ORS 197.835(11)(b).

Goal 2, Policy 9 is couched in terms that appear to impose certain requirements in development approvals. That it does not require certain actions "prior to development," as does the policy at issue in Jebousek, is not determinative of whether it is a mandatory approval criterion by its terms. We conclude that Goal 2, Policy 9 is a mandatory approval criterion, and the city erred in failing to address its requirements. We also disagree with intervenor that Goal 2, Policy 9 is necessarily unconcerned with sedimentation and erosion affecting the creek and associated wetlands; the creek flows into "near shore ocean waters" and sedimentation in wetlands and the creek may impact those waters. Intervenor's arguments regarding the effect of bluff removal on erosion and sedimentation fail to identify evidence that "clearly supports" a finding of compliance with Goal 2, Policy 9. ORS 197.835(11)(b). Whether bluff removal is consistent with the requirements of Goal 2, Policy 9 is for the city to determine on remand.

Finally, intervenor argues that, to the extent petitioners argue that the bluff removal is invalid because it is not authorized by the geologic permit, that argument is beyond LUBA's review authority. Intervenor contends that if the permit does not authorize the bluff removal, petitioners can seek to enjoin the bluff removal in circuit court, and thus petitioners must seek a remedy in circuit court rather than before LUBA. However, petitioners' arguments under this assignment of error are directed at whether the city's decision is consistent with two applicable approval criteria; such arguments are within LUBA's review authority. That petitioners might be able to enjoin certain actions in circuit court on the grounds that those

actions are not authorized by the geologic permit does not provide a basis to deny this assignment of error.

The sixth assignment of error (petitioners) is sustained.

The fourth assignment of error (intervenor-petitioner) is sustained.

FIRST ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner argues that the city erred in approving the proposed use because the approved site plan was premised on a flood level that fails to take into account placement of fill that might have raised the flood level of the subject property. Intervenor-petitioner explains that, pursuant to NZO 2-4-6.025.D, the city required all buildings to be placed above the V-zone, the 31-foot elevation flood level established for the subject property in 1993. However, intervenor-petitioner argues, the 31-foot elevation flood level may be no longer valid, because sometime after 1993 the applicant placed fill within the V-zone pursuant to a permit allowing up to 500 yards of fill to be placed on the subject property, as part of a previously allowed project. Intervenor-petitioner argues that placing fill in the floodway can have the effect of increasing the flood elevation, and that NZO 2-4-6.025.C requires the applicant to provide certification by an engineer or architect that any fill placed in the V-zone did not result in any increase in flood elevation levels.[7]

The city addressed intervenor-petitioner's arguments below, and adopted findings stating that:

> "We find no credible evidence that the V-zone regulations have been violated in connection with the project. * * * The allegations of non-compliance arises from alleged fill occurring in connection with site grading. The City of Newport Planning Director has reviewed survey and benchmark information available to him, respecting the property before and after the alleged fill took place, and has found that there is no evidence of any net fill or of any violation. The applicant is expected to comply with the V-zone requirements,

[7]NZO 2-4-6.025.C prohibits any encroachments, including fill, within the V-zone "[u]nless certification by a registered professional engineer or architect is provided demonstrating that encroachments shall not result in any increase in flood levels during that occurrence of the base flood discharge."

and all other applicable requirements of law, in carrying out the project." Record 13-14.

Intervenor-petitioner challenges the city's findings that there has been no "net fill" as lacking evidentiary support in the record. According to intervenor-petitioner, the testimony from the planning director that the city relies upon says nothing regarding net fill, only that the director visited the site and could not see "where there has been substantial fill on the property." Record 357. The only other testimony from the planning director on this point occurred during the December 1, 1997 city council deliberations, when the planning director informed the council that "current pictures and old maps from the 1970s are almost identical." Record 105. Intervenor-petitioner contends that city erred in accepting new evidence from the planning director's testimony at December 1, 1997 hearing, both because it occurred during the city council's deliberations when there was no opportunity to object or rebut, but also because the city's council's review was on the record before the commission. Further, intervenor-petitioner argues that whatever surveys, maps or photos the planning director relied upon in forming his opinion are not identified in the record. Intervenor-petitioner also argues that the qualifications of the planning director to determine either that fill has occurred or the impact of that fill on flood levels has not been established.

Neither the city nor intervenor identifies other evidence supporting the city's findings regarding the alleged fill, or otherwise responds to this assignment of error. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd, 317 Or at 179. We agree with intervenor-petitioner that the city's findings regarding the alleged fill and compliance with the requirements of NZO 2-4-6.025.D are not supported by substantial evidence. Intervenor-petitioner cites to uncontroverted evidence in the record that a significant quantity of fill, perhaps 500 cubic yards or more, was placed in the V-zone. The planning director's testimony at best indicates his belief that whatever fill was placed was not substantial enough to significantly alter the topography of the subject property. However, that testimony, even

if all of it was properly before the city council, says nothing about the potential impact of the fill on flood elevation levels. A reasonable person could not conclude from the planning director's testimony that the alleged fill does not elevate the base flood level. Id.

The first assignment of error (intervenor-petitioner) is sustained.

SECOND ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner contends that the city erred in approving the proposed hotel without requiring that the applicant obtain all permits required by federal, state and local government agencies. Intervenor-petitioner relies on NZO 2-4-6.020.B(2), which for development within a flood hazard area requires the city to "[r]eview all development permits to require that all necessary permits have been obtained from those Federal, State, or local government agencies from which prior approval is required." Intervenor-petitioner notes that the proposed hotel will require permits from the Division of State Lands and the Corps of Engineers, among other agencies, but argues that the challenged decision fails to include any condition requiring that the applicant obtain these permits.

Neither intervenor nor the city responds to this assignment of error. We agree with intervenor-petitioner that NZO 2-4-6.020.B(2) requires the city to ensure that the applicant obtains all permits where prior approval by other entities or agencies is required. However, we are less certain that NZO 2-4-6.020.B applies to the conditional use permit decision challenged in this appeal or applies at the time permits for construction are required. The city may address that that issue on remand. The city failed to demonstrate compliance with NZO 2-4-6.020.B.

The second assignment of error (intervenor-petitioner) is sustained.

THIRD ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner argues that the challenged decision violates NZO 2-5-7.050.C, which requires that public access points be retained or replaced if sold, exchanged, or transferred. According to intervenor-petitioner, the western terminus of NW 68th Street has

long been a traditional public access point, where beachgoers would park and walk down to the beach. Intervenor-petitioner argues that the city failed to condition approval of the project on retaining traditional public beach access from NW 68th Street, particularly in failing to require the applicant to replace public parking that will be lost when the street is improved.

However, intervenor-petitioner does not explain why NZO 2-5-7.050.C is violated by failure to replace existing parking spaces on NW 68th Street. In any case, as noted above in our discussion of petitioners' fourth assignment of error, the city required the applicant to develop the property substantially in compliance with the site plan, which depicts public parking spaces at the western terminus of NW 68th Street. The city's failure to state that condition separately is not a basis for reversal or remand.

The third assignment of error (intervenor-petitioner) is denied.

FIFTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner argues that the city committed procedural errors that prejudiced her substantial rights when the city refused to allow intervenor-petitioner to submit written testimony during the council's public hearing on December 1, 1997. Intervenor-petitioner explains that the city council had previously determined, at a meeting November 21, 1997, that all written testimony from the parties must be submitted the week before the December 1, 1997 hearing. Despite notice of the November 21, 1997 meeting, intervenor-petitioner did not attend that meeting, and did not know about the deadline. At the December 1, 1997 hearing, she was allowed to testify orally as one of the appellants, but the city council rejected her written testimony. Intervenor-petitioner argues that under the circumstances the city was obligated to inform her prior to the December 1, 1997 hearing that written testimony would not be accepted.

The city responds, and we agree, that the city's error, if any, did not prejudice intervenor-petitioner's substantial rights. Intervenor-petitioner participated in the December

1, 1997 proceedings. Her inability to submit testimony in the form she preferred is not attributable to any city action, but rather to intervenor-petitioner's failure to attend the November 21, 1997 meeting or make inquiries with city staff or the parties as to the results of that meeting.

The fifth assignment of error (intervenor-petitioner) is denied.

SIXTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner contends that the city violated ORS 227.180(1) when it charged petitioners $900 and intervenor-petitioner $150 for conducting an appeal of the commission's decision before the city council.

ORS 227.180(1)(c) provides in part:

> "The amount of the [local appeal] fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparing a transcript."

Intervenor-argues that the appeal costs charged to petitioners and intervenor-petitioner were not reasonably related to the cost of the appeal process, because the costs of processing an appeal with multiple appellants is the same as processing an appeal with only one appellant.

The city makes a number of responses, but we address only its argument that intervenor-petitioner failed to object or raise any issues below regarding appeal fees or ORS 227.180(1)(c), and thus those issues are waived. ORS 197.763(1). Intervenor-petitioner does not cite to any place in the record where that issue was raised below. The issue raised under this assignment of error is waived.

The sixth assignment of error (intervenor-petitioner) is denied.

The city's decision is remanded.