

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

3
4 MILTON ROBINSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SILVERTON,
10 *Respondent.*

11
12 LUBA No. 99-056

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Silverton.

18
19 Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Kelley and Kelley.

21
22 Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of
23 respondent.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
26 participated in the decision.

27
28 REMANDED 01/21/2000

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

32

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision granting preliminary plat approval, variances and
4 conditional use approval for a 31-lot subdivision.

5 **FACTS**

6 As first proposed, the disputed subdivision would have created 35 lots and required
7 27 variances. That proposal was redesigned. The approved subdivision creates 31 lots. Two
8 variances are granted. The first variance reduces the required minimum right of way for the
9 subdivision's internal streets from 60 feet to 50 feet. The required lot minimum width of 70
10 feet is reduced for one of the proposed lots by a second variance. The applicant proposes to
11 construct duplexes on five of the proposed lots. The challenged decision also grants
12 conditional use approval for those duplexes.

13 The planning commission approved the disputed proposal on January 19, 1999. The
14 planning commission's decision was appealed to the city council. On March 1, 1999, the
15 city council affirmed the planning commission's decision and adopted additional findings.
16 This appeal followed.

17 **PRELIMINARY ISSUES**

18 **A. Failure to Attach the Challenged Decision and Findings**

19 LUBA's rules require that "the challenged decision, including any adopted findings
20 of fact and conclusions of law" be attached to the petition for review. OAR 661-010-
21 0030(4)(e). It is not clear, in this appeal, which documents constitute the challenged decision
22 and findings. Based on the minutes that appear at Record 8b,¹ we conclude the challenged
23 decision is composed of the following documents: (a) the planning commission's January 19,

¹Some pages in the record are printed on both sides, but only have page numbers on one side. We follow the parties' convention of using the letter "b" to distinguish the unnumbered pages from the preceding numbered page.

1 1999 decision, which includes 18 numbered findings (Record 22-26); (b) a planning staff
2 memorandum with eight numbered findings (Record 16-18); and (c) supplemental findings
3 numbered 19 through 29 (Record 2-5). Items b and c were adopted by the city council on
4 appeal, on March 1, 1999.²

5 All of the copies of the petition for review that were filed and served in this appeal
6 attach item a as an appendix. Some, but not all, of the copies of the petition for review that
7 were filed and served in this matter also attach item c. None of the copies of the petition for
8 review that were filed and served in this matter include item b.

9 Apparently the copy of the petition for review that was served on respondent did not
10 include either item b or item c. Respondent takes the position that this appeal should be
11 dismissed based on this failure. Respondent reasons that since the copy of the decision that
12 is attached to the petition for review contains only the planning commission's January 19,
13 1999 decision, the notice of intent to appeal should have been filed within 21 days of January
14 19, 1999. ORS 197.830(8). Since the notice of intent to appeal was not filed until over two
15 months after that date, respondent argues this appeal should be dismissed.

16 There is no dispute that the decision challenged in this appeal is the city council's
17 March 1, 1999 decision, not the planning commission's January 19, 1999 decision.
18 Respondent does not contend that the notice of intent to appeal was untimely if that decision
19 is the appealed decision. The motion to dismiss is denied.

20 **B. Failure to Identify Where Issues Were Raised Below**

21 In appeals at LUBA "[i]ssues shall be limited to those raised by any participant
22 before the local hearings body as provided by ORS 197.195 or 197.763, whichever is

²The organization of the record contributes to the lack of clarity about what documents constitute the decision. It is not clear whether respondent takes the position in its brief that item b was adopted as part of the decision. We infer that position from the fact that respondent cites findings that are included in item b in support of its response to arguments presented in the petition for review and because the minutes that appear at Record 8b support such a position. Petitioner does not address the issue. Therefore, in this opinion, we assume all three documents constitute the challenged decision and findings.

1 applicable.” ORS 197.835(3).³ Respondent next argues that this appeal should be dismissed
2 because petitioner fails to identify in his petition for review where the issues that are asserted
3 in the petition for review were raised below.

4 We reject respondent’s argument for two reasons. First, there is no requirement that a
5 petitioner at LUBA must specify *in the petition for review* where the issues that are raised on
6 appeal were raised below. When issues are raised in a petition for review and one or more
7 parties thereafter take a position that issues raised in a petition for review were waived
8 because they were not raised below, petitioner is *then* obligated to respond to that allegation
9 of waiver. *Davenport v. City of Tigard*, 27 Or LUBA 243, 247 (1994); *Wethers v. City of*
10 *Portland*, 21 Or LUBA 78, 92 (1991). If a petitioner fails to do so, the issue is waived and
11 LUBA will not consider the issue. *Id.* There is no statutory or rule requirement that the
12 petition for review include a record reference identifying where every issue asserted in the
13 petition for review was raised below.

14 Respondent’s argument is also rejected because at oral argument petitioner identified
15 pages in the record where the issues that are asserted on appeal were raised below.

16 **C. Failure to Specify Relief Requested or Statutory Basis for Relief**

17 Respondent complains that petitioner failed to specify the relief he requests and the
18 statutory basis for any relief requested.

19 Taking the second complaint first, there is no statutory or rule requirement that the
20 petition for review specify the statutory basis for the relief requested. Therefore, petitioner’s
21 failure to do so is not error.

22 Turning to respondent’s first complaint, our rules require that petitioner specify the
23 relief requested. The petition for review in this matter does not specify the relief requested
24 as part of the “statement of the case,” as required by OAR 661-010-0030(4)(b)(A).

³ORS 197.195 establishes requirements for raising issues in proceedings concerning limited land use decisions, and ORS 197.763 establishes requirements for raising issues in quasi-judicial land use proceedings.

1 However, we fail to see how respondent’s substantial rights have been prejudiced by
2 petitioner’s failure to comply with OAR 661-010-0030(4)(b)(A). On the last page of the
3 petition for review petitioner states the city’s decision should be reversed or remanded. As
4 explained later in this opinion, we understand several assignments of error to assert that the
5 challenged decision should be reversed because it violates applicable law. Other
6 assignments of error assert that the challenged decision should be remanded because it is not
7 supported by adequate findings or substantial evidence.

8 Although the petition for review does not comply with OAR 661-010-0030(4)(b)(A),
9 we reject respondent’s argument that the challenged decision should be affirmed because
10 petitioner failed to specify the relief that is requested, in the manner that is required by OAR
11 661-010-0030(4)(b)(A).

12 **INTRODUCTION TO FIRST THROUGH EIGHTEENTH ASSIGNMENTS OF**
13 **ERROR**

14 The new streets proposed for the challenged subdivision apparently are considered
15 “minor streets” under Title 17 of the Silverton Municipal Code (SMC).⁴ The challenged
16 decision states that SMC 17.60.030(b) requires that minor streets have a minimum right of
17 way width of 60 feet.⁵ The challenged decision grants a variance, which authorizes
18 minimum rights of way of 50 feet for the internal streets. SMC 51(C) requires that lots in the
19 R-1 district be 70 feet wide. The challenged decision grants a second variance, allowing one
20 lot to be 63 feet wide.

21 SMC 17.24.010 authorizes the city to grant variances from requirements of Title 17
22 of the SMC. SMC 17.24.020 establishes the following approval criteria for granting
23 variances:

⁴We say apparently, because no party has supplied us with a copy of Title 17 of the SMC or SMC 17.60.030(b) to allow us to confirm that such is the case. For purposes of this opinion, we assume that they are.

⁵Although no party has quoted or otherwise provided the language of SMC 17.60.030(b), it is not disputed that SMC 17.60.030(b) requires a 60-foot right of way, so we assume that it does.

- 1 “The basic reason for granting a variance will be proof that:
- 2 “A. Special conditions or circumstances peculiar to the property under
3 consideration make a variance necessary;
- 4 “B. The variance is necessary for the proper development of the
5 subdivision and the preservation of property rights and values;
- 6 “C. The variance will not at present or hereafter be detrimental to the
7 public welfare, or injurious to other properties adjacent to or in the
8 vicinity of the proposed subdivision.”

9 Before turning to petitioner’s arguments, we briefly note two general arguments in the
10 parties’ briefs. The first is petitioner’s suggestion that in applying the above variance criteria
11 the city must be guided by appellate court and LUBA cases that concern traditional variance
12 criteria. The second is respondent’s argument that the city council’s interpretations of the
13 above criteria are entitled to deference under ORS 197.829(1) and *Clark v. Jackson County*,
14 313 Or 508, 836 P2d 710 (1992).

15 Petitioner cites a number of decisions by the Court of Appeals and this Board that
16 address traditional variance standards.⁶ *Lovell v. Independence Planning Comm.*, 37 Or App
17 3, 586 P2d 99 (1978); *Wentland v. City of Portland*, 22 Or LUBA 15, 24-26 (1991);
18 *Patzkowsky v. Klamath County*, 8 Or LUBA 64, 70 (1983). Those cases are of little or no
19 assistance in resolving the present appeal, because the variance criteria in SMC 17.24.020
20 are worded differently than the traditional variance criteria that were at issue in those
21 appeals. Petitioner does not acknowledge the difference in language or make any attempt to
22 explain why those cases remain relevant despite the fact that the criteria are worded
23 differently.

24 Respondent argues that the city is entitled to deference when it interprets SMC
25 provisions such as SMC 17.24.020, under ORS 197.829(1) and *Clark*. We agree with

⁶Although the wording of those traditional variance standards varies slightly, the two most commonly discussed standards require findings of “practical difficulties or unnecessary hardships,” and “exceptional or extraordinary circumstances or conditions applying to the land.”

1 respondent. *deBardelaben v. Tillamook County*, 142 Or App 319, 325-26, 922 P2d 683
2 (1996); *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324
3 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 *rev den* 320
4 Or 272 (1994). However, the city is only entitled to deference where it adopts an
5 interpretation. Where the city simply adopts findings of fact and conclusions of law that
6 express no discernable interpretation, we have no interpretation to defer to.

7 In the challenged decision, the city adopted no *express* interpretations of the above
8 SMC variance provisions. However, LUBA also must defer to any *implicit* interpretations
9 the city may have adopted, provided any such implicit interpretations are adequate for
10 review. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266, 942 P2d
11 836 (1997), *rev dismissed* 327 Or 555 (1998) (*quoting Weeks v. City of Tillamook*, 117 Or
12 App 449, 452-53 n 3, 844 P2d 914 (1992). An implicit interpretation is adequate for review
13 where the local government's unambiguous understanding of the meaning of local legislation
14 is inherent and discernible in the manner in which it applies that legislation. *Id.*; *see also*
15 *Bradbury v. City of Bandon*, 33 Or LUBA 664, 668 (1997) (an implied interpretation is not
16 adequate for review where LUBA cannot tell which of several conceivable interpretations the
17 governing body might have intended); *Moore v. Clackamas County*, 26 Or LUBA 40, 44
18 (1993) (same). To the extent the city adopted implicit interpretations of the above SMC
19 variance criteria in the challenged decision, and such interpretations are adequate for review,
20 we must defer to them.⁷

⁷We specifically reject the interpretation that respondent offers at pages 9-12 of its brief. Respondent suggests that SMC 17.24.020(A), (B) and (C) constitute disjunctive, nonexclusive reasons the city may rely on to grant variances. In other words, respondent argues variances may be granted for any of the three specified reasons or for any other reason the city may chose to identify. Without commenting on whether such an interpretation could survive, even under the highly deferential standard of review required by ORS 197.829(1) and *Clark*, that interpretation cannot be inferred from the challenged decision. To the contrary, the challenged decision appears to take the position that SMC 17.24.020(A), (B) and (C) establish the exclusive criteria for a variance and that all three criteria must be met.

1 We turn to petitioner’s first eighteen assignments of error, in which petitioner argues
2 the two variances were improperly granted.⁸ We address each variance request separately.

3 **FIRST THROUGH NINTH ASSIGNMENTS OF ERROR**

4 As relevant in this appeal, the disputed subdivision has two internal roads. The first
5 is an extension of Enstad Lane, an existing road in an adjoining subdivision to the south.
6 Enstad Lane is extended in a generally northerly direction through the subdivision to provide
7 access to lots on both sides of the extended road. The extension of Enstad Lane terminates in
8 a cul-de-sac in the northern part of the subdivision. A second new road, Johna Lane, will
9 extend from South Water Street, which adjoins the subject property on the west. Johna Lane
10 extends in an easterly direction, providing access to lots on both sides of the road and
11 connects with Enstad Lane in the middle of the subdivision. As previously noted, the
12 challenged decision grants a variance to allow a 50-foot right of way for both these internal
13 roads.

14 **A. SMC 17.24.020(A) (Special Conditions or Circumstances Make the**
15 **Variance Necessary)**

16 SMC 17.24.020(A) requires that the city find that “[s]pecial conditions or
17 circumstances peculiar to the property under consideration make a variance necessary[.]”
18 The city’s findings addressing this criterion for the right of way variance include the
19 following:

20 “* * * The purpose of the right of way is to allow for the proper design of the
21 street and for the location of necessary public utilities. The right of way
22 reduction will allow for the design and construction of a proposed 30 foot
23 wide paved curb to curb street, with curbs and standard 5 foot wide sidewalk
24 on both sides of the street. The reduction in right of way width will allow
25 sufficient area for utilities, sidewalks, and street trees to be located and not
26 interfere [with] the development of each lot. The proposal for a 50 foot right
27 of way is similar in size to the width of right of way located in the

⁸Petitioner challenges each variance based on each of the three criteria. Petitioner then assigns three separate errors under each criterion for each variance: (1) that the criterion is violated, (2) that the findings concerning that criterion are inadequate, and (3) that the findings are not supported by substantial evidence.

1 Cedarwoods Subdivision adjacent to the south. In addition, many of the
2 streets within the nearby neighborhood also have street [rights of way that are]
3 less than 60 feet. The average right of way of ten existing public streets (5
4 closest on the east side of South Water Street and 5 closest on the west side) is
5 45 feet. The reduction will allow for the development of the proposed
6 subdivision consistent with development in other subdivisions in the
7 community. *The unique condition, or circumstance peculiar to this property*
8 *is the shape of the property and the relatively narrow width of the section of*
9 *the property which has frontage along South Water Street. There is*
10 *approximately 230 feet of width in this part of the subdivision. In this width it*
11 *is proposed that there be a street with lots fronting on each side of the street.*
12 *If the street is not granted a variance the result is that the lots then must be*
13 *reduced in length to make up for this reduction. It is determined that*
14 *reducing the length of the lots (which average 90 feet) could result in building*
15 *location problems, and may also require granting variances to allow lots*
16 *under 7,000 square feet. The revised plan incorporates the understanding*
17 *that the Planning Commission did not want to reduce lots to less than 7,000*
18 *square feet. Therefore, the proposal complies with SMC 17.24.020(A) and*
19 *(B).” Record 23 (emphasis added).*

20 Because SMC 17.24.020(A) requires that the city find that “[s]pecial conditions or
21 circumstances peculiar to the property under consideration make a variance necessary,” the
22 portion of the above findings that explains that it will be possible to construct an adequate
23 street within a 50-foot right of way has no bearing on whether the criterion is met. Similarly,
24 the fact that other nearby roads have average right of way widths of 45 feet, even if true, is
25 not a relevant consideration under SMC 17.24.020(A).

26 In the findings emphasized above, the city explains that the applicant desires to locate
27 Johna Lane through the middle of a narrow section of the property where it will serve lots on
28 both sides of the road. Due to the dimensions of the property, without a reduced-width right
29 of way, the findings explain that “building location problems” “could result” and that
30 variances to allow lots of “less than 7,000 square feet” “may” be required. These findings
31 are not adequate to demonstrate that “[s]pecial conditions or circumstances peculiar to the
32 property under consideration make a variance necessary.”

33 In addressing SMC 17.24.020(A), it is not sufficient for the city to identify “special
34 conditions or circumstances peculiar to the property.” That is the first step in demonstrating

1 compliance with SMC 17.24.020(A). The second step requires the city to demonstrate that
2 any such conditions or circumstances “make a variance necessary.” The city never addresses
3 what is required to “make a variance necessary” under SMC 17.24.020(A), or adopts an
4 interpretation, express or implied, as to what “necessary” means.⁹

5 The findings do not attempt to explain why there will be building location problems
6 or why lot size variances might be required, and it is not obvious why there would be such
7 problems. Moreover, the findings are equivocal about *whether* there will be such building
8 location problems or a need for lot size variances. More importantly, it is not at all clear why
9 accommodating the required right of way width within the dimensional constraints posed by
10 the subject property could not be accomplished by redesigning the subdivision or eliminating
11 one or more lots. The findings do not explain why preserving the proposed configuration
12 and number of lots makes a variance “necessary,” within the meaning of SMC 17.24.020(A).

13 In addition, the findings discussed above apparently are directed only at Johna Lane.
14 Those findings are wholly inadequate to justify a variance for Enstad Lane, since only Johna
15 Lane is subject to the dimensional constraint that is discussed in the findings.

16 For the reasons explained above, we agree with petitioner that the city’s findings are
17 inadequate to demonstrate compliance with SMC 17.24.020(A). The second assignment of
18 error is therefore sustained.

19 **B. SMC 17.24.020(B) (Proper Development and Preservation of Property**
20 **Rights and Values)**

21 SMC 17.24.020(B) requires a finding that “[t]he variance is necessary for the proper
22 development of the subdivision and the preservation of property rights and values.” The city
23 relied in large part on the same findings that are quoted above in our discussion of SMC
24 17.24.020(A). Respondent identifies other findings that point out that the adjoining

⁹The dictionary definition of “necessary” is “that cannot be done without: that must be done or had: absolutely required.” Webster’s Third New International Dictionary 1511 (1981).

1 subdivision was granted a variance and that reducing the right of way for Enstad Lane will
2 allow it to “match up” with the existing Enstad Lane in the adjoining subdivision. Record 5.

3 There is no apparent reason why the subdivision cannot be designed to accommodate
4 the required 60-foot right of way, and the city’s findings are simply nonresponsive to the
5 criterion. The city’s findings make no attempt to identify what “property rights” or “property
6 values” are threatened by requiring a 60-foot right of way, or why a variance is “necessary”
7 to avoid the loss of such property rights or property values.

8 The fifth assignment of error is sustained.

9 **C. SMC 17.24.020(C) (Detriment to Public Welfare or Injury to Other**
10 **Properties)**

11 SMC 17.24.020(C) requires that the city find “[t]he variance will not at present or
12 hereafter be detrimental to the public welfare, or injurious to other properties adjacent to or
13 in the vicinity of the proposed subdivision.” The city’s finding addressing this criterion is as
14 follows:

15 “It is not anticipated that the reduction in right of way will be detrimental to
16 the public welfare or injurious to adjacent properties and so complies with the
17 criteria within SMC 17.24.020(C).” Record 23.

18 We have some difficulty seeing how reducing the required right of way from 60 feet
19 to 50 feet could violate SMC 17.24.020(C), since apparently the same road can be
20 constructed within the 50-foot right of way. Nevertheless, we agree with petitioner that the
21 above finding is simply an unexplained conclusion that makes no attempt to explain why the
22 criterion is met; it simply “anticipates” that it will be. Such an equivocal, conclusory finding
23 provides no basis for review and is inadequate to demonstrate compliance with SMC
24 17.24.020(C). *Heiller v. Josephine County*, 23 Or LUBA 551, 556-57 (1992); *McNulty v.*
25 *City of Lake Oswego*, 15 Or LUBA 16, 24 (1986).

26 The eighth assignment of error is sustained.

1 **D. Conclusion**

2 We agree with petitioner that the city’s findings are inadequate to demonstrate
3 compliance with SMC 17.24.020(A), (B) and (C), and, for that reason, we sustain the second,
4 fifth and eighth assignments of error. However, petitioner does not demonstrate that granting
5 the disputed variance violates those criteria as a matter of law. We therefore deny
6 petitioner’s first, fourth and seventh assignments of error. Because we conclude the city’s
7 findings are inadequate, we need not and do not consider petitioner’s substantial evidence
8 challenges under those criteria in the third, sixth and ninth assignments of error. *DLCD v.*
9 *Columbia County*, 16 Or LUBA 467, 471 (1988).

10 **TENTH THROUGH EIGHTEENTH ASSIGNMENTS OF ERROR**

11 Proposed lot 20 fronts on the east side of South Water Street. Proposed lot 20 is
12 created out of a narrow part of the subject property that lies between an adjoining subdivision
13 to the south and an existing parcel on South Water Street that extends into the subject
14 property. Proposed lot 21 is a “flag lot” located behind proposed lot 20 and is provided
15 access to South Water Street via an 18-foot wide access strip. Lots 22, 23, 24, 25 and 26 lie
16 behind lot 21 and those lots all have access to Enstad Lane.

17 **A. SMC 17.24.020(A) (Special Conditions or Circumstances Make the**
18 **Variance Necessary)**

19 As previously noted, SMC 17.24.020(A) requires that the city find that “[s]pecial
20 conditions or circumstances peculiar to the property under consideration make a variance
21 necessary[.]” The city’s findings addressing this criterion for the lot width variance include
22 the following:

23 “[T]he proposal seeks to reduce the [width] of one lot to be less than the
24 minimum R-1 [70-foot lot width] standard as required in [SMC 51(C)]. The
25 lot requested to be reduced is lot 20. This lot is constrained by the location of
26 the [existing parcel on] South Water Street and that this section of the
27 proposed subdivision has [only slightly more than 80 feet of] frontage along
28 South Water Street * * *. A lot of this width does not allow for the creation of
29 the flaglot identified as lot 21 located just to the east of lot 22. The city has

1 been seeking ways to encourage residential infill in an effort to reduce urban
2 sprawl. Because the subdivision could not be designed such that the variance
3 request to reduce the lot [width] would not be needed it can be shown that the
4 request complies with 17.24.020(A) and (B).” Record 23b.

5 The above findings apparently are based on an assumption that the variance is
6 necessary for lot 20 in order to allow lot 21 to be created as a flag lot.¹⁰ However, the
7 findings never explain why that is the case or why that would demonstrate compliance with
8 SMC 17.24.020(A) even if it is the case. The findings simply conclude, without explanation,
9 that lots 21 through 25 cannot be redesigned to provide access for lot 21 from Enstad Lane.
10 More importantly, the findings apparently assume that such a circumstance would make a
11 variance “necessary,” without explaining why. If the city believes a variance is “necessary,”
12 within the meaning of SMC 17.24.020(A), because it is needed to allow the applicant to
13 maximize the number of lots that may be subdivided from this dimensionally constrained
14 portion of the property, it must clearly express and explain that interpretation.

15 The eleventh assignment of error is sustained.

16 **B. SMC 17.24.020(B) (Proper Development and Preservation of Property**
17 **Rights and Values)**

18 As previously noted, SMC 17.24.020(B) requires a finding that “[t]he variance is
19 necessary for the proper development of the subdivision and the preservation of property
20 rights and values.” In addressing SMC 17.24.020(B), the city relied on the same findings
21 that are quoted above in our discussion of SMC 17.24.020(A).

22 The city’s findings are not responsive to the criterion. The city’s findings make no
23 attempt to identify what “property rights” or “property values” are threatened by requiring
24 that lot 20 meet the minimum 70-foot width requirement, even if that means that lots 21
25 through 26 must be reconfigured or the number of lots must be reduced.

26 The fourteenth assignment of error is sustained.

¹⁰The flagpole part of a flag lot apparently must be at least 18 feet wide.

1 **C. SMC 17.24.020(C) (Detriment to Public Welfare or Injury to Other**
2 **Properties)**

3 As previously noted, SMC 17.24.020(C) requires that the city find “[t]he variance
4 will not at present or hereafter be detrimental to the public welfare, or injurious to other
5 properties adjacent to or in the vicinity of the proposed subdivision.” The city adopted the
6 following relevant findings addressing this criterion:

7 “The proposed lot width will be slightly less than 63 feet wide, which is not
8 inconsistent with many of the lot [widths] within the community. This width,
9 while slightly less than the minimum frontage requirement, is still * * *
10 sufficient to allow for the placement of a single family dwelling and maintain
11 all required building setbacks. *With no adverse comments received from the*
12 *Silverton Fire District it does not appear that reducing the frontage of lot 20*
13 *less than the minimum 70 foot level will become detrimental to the public*
14 *welfare or injurious to adjacent properties and so 17.24.020(C) is satisfied.”*
15 Record 23b-24.

16 Petitioner only challenges the finding emphasized above and faults the city for not
17 addressing potential traffic impacts. Again, we have some difficulty seeing how reducing lot
18 width from 70 feet to 63 feet could “be detrimental to the public welfare, or injurious to other
19 properties adjacent to or in the vicinity of the proposed subdivision.” Without some
20 explanation by petitioner, we also cannot see how reducing lot width has any impact on
21 traffic. Petitioner does not challenge the findings that explain the 63-foot lot width is
22 common in the community and that it will not prevent compliance with all required setbacks.
23 We find those unchallenged reasons are sufficient to demonstrate that the variance to allow a
24 63-foot lot width complies with SMC 17.24.020(C), and we do not understand petitioner to
25 challenge the evidentiary support for those findings.

26 The sixteenth, seventeenth and eighteenth assignments of error are denied.

27 **D. Conclusion**

28 For the reasons explained above, the sixteenth, seventeenth and eighteenth
29 assignments of error are denied. As explained above, we agree with petitioner that the city’s
30 findings concerning the lot width variance are inadequate to demonstrate compliance with

1 SMC 17.24.020(A) and (B) and, for that reason, we sustain the eleventh and fourteenth
2 assignments of error. However, petitioner does not demonstrate that granting the disputed lot
3 width variance violates those criteria as a matter of law. We therefore deny petitioner’s tenth
4 and thirteenth assignments of error. Because we conclude the city’s findings are inadequate,
5 we need not and do not consider petitioner’s substantial evidence challenges under those
6 criteria in the twelfth and fifteenth assignments of error.

7 **INTRODUCTION TO NINETEENTH THROUGH THIRTIETH ASSIGNMENTS OF**
8 **ERROR**

9 These assignments of error challenge the city’s conditional use approval, which
10 allows five lots to be developed with duplexes. Duplexes are permitted in the R-1 zone as a
11 conditional use. SMC 50.01(2). The standards that must be met for conditional use approval
12 are set out at SMC 6.04, which provides in relevant part:

13 “The following criteria shall be used to review conditional use permit
14 applications:

15 “* * * * *

16 “B. The characteristics of the site are suitable for the proposed use
17 considering size, shape, location, topography and location of
18 improvements and natural features.

19 “C. The proposed use is timely, considering the adequacy of transportation
20 systems, public facilities and services.

21 “D. The proposed use, as conditioned, will not substantially limit, impair,
22 or preclude the use of adjacent properties in the same zone or
23 negatively affect the public health, safety, or welfare.

24 “E. The proposed use satisfies any applicable goals and policies of the
25 Comprehensive Plan which apply to the proposed use.”

26 The city found that the applicant’s request for conditional use approval for five
27 duplexes satisfied criteria B through E, and petitioner assigns error to those findings.¹¹

¹¹Petitioner repeats the approach he took under the first 18 assignments of error, making three assignments of error for each disputed criterion.

1 **NINTEENTH, TWENTIETH AND TWENTY-FIRST ASSIGNMENTS OF ERROR**

2 SMC 6.04(B) requires that the city demonstrate “[t]he characteristics of the site are
3 suitable for the proposed use considering size, shape, location, topography and location of
4 improvements and natural features.” The city adopted the following finding to address this
5 criterion:

6 “The Planning Commission found that because the application does contain
7 site specific site plans for each of the requested lots the proposal to locate a
8 duplex on lots 4, 16, 19, 27, and 31 will be consistent with building setback
9 requirements and so is consistent with the specific criteria found [in SMC]
10 6.04(B).” Record 24.

11 We agree with petitioner that the above finding is not responsive to the criterion. Even if
12 duplexes can be sited within building setbacks, that does not establish that “[t]he
13 characteristics of the site are suitable for the proposed use considering size, shape, location,
14 topography and location of improvements and natural features.”

15 The twentieth assignment of error is sustained. However, petitioner does not
16 demonstrate that SMC 6.04(B) is violated as a matter of law and for that reason the
17 nineteenth assignment of error is denied. Because we agree that the city’s findings
18 concerning SMC 6.04(B) are inadequate, we need not and do not consider petitioner’s
19 substantial evidence challenge concerning SMC 6.04(B) under the twenty-first assignment of
20 error.

21 **TWENTY-SECOND, TWENTY-THIRD AND TWENTY-FOURTH ASSIGNMENTS**
22 **OF ERROR**

23 SMC 6.04(C) requires that the city demonstrate that “[t]he proposed use is timely,
24 considering the adequacy of transportation systems, public facilities and services.”

25 The finding that cites SMC 6.04 and explicitly discusses the criteria in SMC 6.04
26 does not address or demonstrate compliance with SMC 6.04(C). As far as we can tell, the

1 city did not adopt findings to address SMC 6.04(C).¹² Accordingly, the twenty-third
2 assignment of error is sustained. However, petitioner does not demonstrate that SMC
3 6.04(C) is violated as a matter of law and for that reason the twenty-second assignment of
4 error is denied. Because we agree that the city’s findings concerning SMC 6.04(C) are
5 inadequate, we need not and do not consider petitioner’s substantial evidence challenge
6 concerning SMC 6.04(C) under the twenty-fourth assignment of error.

7 **TWENTY-FIFTH, TWENTY-SIXTH AND TWENTY-SEVENTH ASSIGNMENTS**
8 **OF ERROR**

9 SMC 6.04(D) requires that the city demonstrate that “[t]he proposed use, as
10 conditioned, will not substantially limit, impair, or preclude the use of adjacent properties in
11 the same zone or negatively affect the public health, safety, or welfare.” The city adopted
12 the following findings addressing SMC 6.04(D):

13 “Locating duplexes on the proposed corner lots should not preclude the use of
14 the adjacent properties. The two adjacent properties on South Water Street
15 already have existing dwellings located on each one so that a duplex should
16 not substantially limit or impair the use of these properties. Also, all of the
17 proposed lots within the subdivision are not developed so it is unlikely the
18 location of a duplex would preclude other lots from being developed. In
19 many communities, such as in Salem and Keizer, it is preferred to locate a
20 duplex on a corner lot. When a duplex is located on a corner with a design
21 which has one driveway accessing off one street and the second driveway off
22 the other street the result is to provide an infill opportunity while minimizing
23 the effect [of] placing a two-family dwelling in a single family neighborhood.
24 * * * Given that lots can all be served by public safety equipment it is not
25 anticipated that a duplex on each of the 5 approved corner lots * * * would
26 adversely affect the public health, safety or welfare and so complies with
27 [SMC 6.04(D)].” Record 24.

¹²Respondent faults petitioner for not challenging certain findings that were adopted elsewhere in the decision that address water and drainage facilities, identify requirements for fire hydrants in the subdivision and discuss interior streets. It is clear that some or all of those findings were adopted to address other criteria. We do not believe petitioner’s assignment of error can be summarily dismissed for failing to challenge the identified findings that address other criteria. *Peyton v. Washington County*, 95 Or App 37, 39, 767 P2d 470 (1989).

1 Although the ultimate conclusion of compliance with SMC 6.04(D) is somewhat
2 equivocal, we do not believe that is fatal in this case. Absent some focused argument to the
3 contrary, and there apparently was none before the city, we have some difficulty seeing how
4 placing a duplex among single family dwellings would “substantially limit, impair, or
5 preclude the use of adjacent properties in the same zone or negatively affect the public
6 health, safety, or welfare.” Apparently the city council had the same difficulty. The findings
7 explain that the lots with existing houses should not be impaired by placing a duplex next to
8 those houses. The findings also explain that in other cities locating duplexes on corner lots
9 allows them to be developed in a manner that makes them appear to be single family
10 dwellings.

11 We believe the above findings are adequate and that in view of their general,
12 observational nature, they are adequately supported by the evidentiary record. There was
13 specific testimony by staff in the local hearing before the planning commission that supports
14 the findings concerning the ability to design duplexes on corner lots so that they are visually
15 similar to single family dwellings. Record 92.

16 The twenty-fifth, twenty-sixth and twenty-seventh assignments of error are denied.

17 **TWENTY-EIGHTH, TWENTY-NINTH AND THIRTIETH ASSIGNMENTS OF**
18 **ERROR**

19 SMC 6.04(E) requires that the city demonstrate that “[t]he proposed use satisfies any
20 applicable goals and policies of the Comprehensive Plan which apply to the proposed use.”
21 Under these assignments of error petitioner argues the challenge decision violates certain
22 City of Silverton Comprehensive Plan (SCP) Goals.

23 **A. Public Facilities and Services**

24 Petitioner argues the city's findings fail to address the SCP Public Facilities and
25 Services Goal, which requires:

26 “Provide orderly and efficient public facilities and services to adequately meet
27 the needs of Silverton residents.”

1 Respondent argues that the challenged decision “explicitly found that the only applicable
2 [SCP] policies were those [that are discussed] in Finding 14.” Respondent’s Brief 25. We
3 have reviewed Finding 14 and it does not say what respondent says it does; it does not
4 explicitly find that the SCP policies discussed in finding 14 are the only applicable SCP
5 policies.

6 Respondent also argues petitioner waived this argument by failing to raise it below.
7 We have reviewed the pages in the record cited by petitioner and although the other SCP
8 provisions he raises under these assignments of error were raised below, the SCP Public
9 Facilities and Services Goal was not. Because petitioner did not raise the issue below, this
10 issue was waived.

11 This subassignment of error is denied.

12 **B. Natural Hazards**

13 Petitioner argues the city’s findings are inadequate to comply with the SCP Natural
14 Hazards Goal, which is to “[p]rotect life and property from natural disasters and hazards.”
15 More precisely, petitioner faults the city for failing to require compliance with SMC 83.04,
16 which we assume was adopted to implement this goal. SMC 83.04 provides:

17 “The Building Official shall review subdivision proposals and other proposed
18 new developments to assure that all such proposals are consistent with the
19 need to protect public facilities, utilities and structures from the potential for
20 damage from slope failure.”

21 While SMC 83.04 clearly imposes an obligation on the Building Official, we have
22 some question whether it imposes an approval criterion in this matter, with an attendant duty
23 to adopt findings. Petitioner makes no attempt to explain why he believes SMC 83.04
24 imposes an approval criterion.

25 Respondent argues that no issue was raised below concerning compliance with SMC
26 83.04. We have reviewed the pages in the record cited by petitioner at oral argument and
27 find no reference to SMC 83.04. Therefore this issue is waived.

1 This subassignment of error is denied.

2 **C. Open Space, Natural and Cultural Resources**

3 The SCP Open Space, Natural and Cultural Resources Goal is to:

4 “Conserve open spaces and preserve natural and cultural resources.”

5 Petitioner asserts that the goal and certain objectives and policies included under the goal are
6 violated by the challenged decision. The city adopted the following finding in response to
7 petitioner’s argument:

8 “The appellant contends that by allowing the storm drain to discharge into
9 Silver Creek, in the area of the Ludi swimming hole, [the subdivision] is in
10 violation of the Comprehensive Plan Open Space, Natural and Cultural
11 Resources Goal and Objectives #2 and #4, and that Policies #5 and #7 were
12 also not followed. The nature of the land use action before the City is one
13 which in accordance with ORS 227.173 is discretionary in nature and the
14 review criteria are found within the development ordinance within the zone
15 code and so the references to the comprehensive plan [are] lacking in
16 substance. * * *” Record 18b-19.¹³

17 Although the above finding certainly could be clearer, we understand the city council
18 to have found that the cited plan provisions have been implemented by requirements
19 contained in the zoning ordinance and therefore do not apply directly to the challenged
20 decision to approve the duplexes. Petitioner does not challenge that finding or make any
21 attempt to explain why the interpretation that is expressed in that finding is clearly wrong.
22 Accordingly, we defer to the city’s finding that the cited plan policies are not approval
23 criteria in this proceeding. *Huntzicker v. Washington County*, 141 Or App at 261; *see*
24 *Langford v. City of Eugene*, 126 Or App 52, 57, 867 P2d 535 (1994) (local interpretation
25 concerning which of two or more arguably applicable approval criteria applies will seldom
26 be reversible under the *Clark* standard).

¹³We note that the cited plan provisions are only potentially relevant because the city granted conditional use approval for the duplexes and thereby has an obligation to address SMC 6.04(E). We have some difficulty seeing how approving duplexes on five lots implicates the plan provisions cited under this subassignment of error. However, because the city does not raise this issue, we do not consider it.

1 This subassignment of error is denied.

2 **D. Air, Water, and Land Resources Quality**

3 The SCP Air, Water, and Land Resources Quality Goal is to:

4 “Maintain and improve the quality of the area’s air, water and land resources.”

5 The city adopted a finding similar to the one it adopted in response to petitioner’s
6 arguments concerning the SCP Open Space, Natural and Cultural Resources Goal. The city
7 concluded that this SCP Goal does not apply as an approval criterion. Petitioner offers no
8 basis for this Board to conclude that that interpretation of the SMC and SCP is clearly wrong.

9 This subassignment of error is denied.

10 The twenty-eighth, twenty-ninth and thirtieth assignments of error are denied.

11 **THIRTY-FIRST ASSIGNMENT OF ERROR**

12 Petitioner argues separately under this assignment of error that the plan provisions
13 that were discussed under the twenty-eighth, twenty-ninth and thirtieth assignments of error
14 are made approval criteria by SMC 6.04(E). The city rejected that argument, and we have
15 already sustained the city’s decision on that point. Therefore, this assignment of error
16 provides no separate basis for reversal or remand.

17 The thirty-first assignment of error is denied.

18 **CONCLUSION**

19 Because we sustain the second, fifth, eighth, eleventh, fourteenth, twentieth and
20 twenty-third assignments of error, the city’s decision is remanded.