BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACK BREEN III, MARCI WOODRUFF,
MARY JANE MUNGER and
ANTHONY ALPERT,
Petitioners,

vs.

CITY OF SALEM,
Respondent,

and

GRANADA LAND COMPANY,
Intervenor-Respondent.

LUBA No. 99-157

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Jack Breen III, Salem, filed the petition for review and argued on his own behalf.

Paul A. Lee, Assistant City Attorney, Salem, and Mark D. Shipman, Salem, filed a joint response brief on behalf of respondent and intervenor-respondent. With them on the brief was Saalfeld, Griggs, Gorsuch, Alexander and Emerick. Paul A. Lee argued on behalf of respondent and Kris Jon Gorsuch argued on behalf of intervenor-respondent.

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

REMANDED 04/27/2000

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 issuance of a "preliminary declaration" determining what public facilities a landowner must construct in order to develop a 92-acre tract as a residential subdivision.

FACTS

Salem Revised Code (SRC) chapter 66 establishes an Urban Service Area (USA), defined as that portion of the city where required urban facilities are in place or are fully committed. The territory lying between the USA and the city's urban growth boundary is known as the Urban Growth Area (UGA). SRC 66.030 prohibits development outside the USA unless a "UGA Development Permit" is obtained.

The procedure for obtaining a UGA Development Permit is a two-stage process. After the city receives an application for a UGA Development Permit, the city's Development Review Committee (DRC) first conducts a public hearing and issues a Preliminary Declaration (declaration). SRC 66.070.[1] The declaration evaluates the

[1]SRC 66.070 provides:

> "(a) The Development Review Committee shall review each application submitted to it and shall, within 60 days of filing of the application, schedule a public meeting to discuss the development requirements which will be imposed. Notice of such meeting shall be given to the applicant, the planning commission, affected neighborhood organizations and all persons owning land within 250 feet of the property on which development is proposed. Hearing procedures shall be as provided in SRC Chapter 114.
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> "(b) Within 20 days following the meeting the Development Review Committee shall issue a Preliminary Declaration stating the extent and location of all public facilities which the developer must provide as conditions of the permit. Any person who appeared at the meeting or submitted documentary evidence shall be mailed a copy of the Preliminary Declaration and may appeal such declaration to the council by filing written notice of appeal with the city recorder, together with an appeal fee as prescribed by resolution of the council, within fifteen (15) city business days of mailing of the declaration.

availability and adequacy of certain off-site public facilities (water, sewer, storm drainage, transportation and parks) pursuant to criteria at SRC 66.100 through 66.125, and determines "the extent and location of all public facilities which the developer must provide as conditions of the permit." SRC 66.070(b).[2] Any person who appeared before the DRC may appeal the declaration to the city council within 15 days of the date it is mailed.

The second stage is issuance of the UGA Development Permit itself. SRC 66.080.[3] After the declaration is issued, the applicant must design and submit to the city director of public works plans to construct the improvements specified in the declaration. Upon

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> "(c) The appeal, review and hearing procedure contained in SRC Chapter 114 shall apply to appeals of the Preliminary Declaration. On appeal, council may affirm, reverse or modify the decision of the Development Review Committee.
>
> "(d) The Preliminary Declaration shall be valid for a period of two years following the date of the decision of the Development Review Committee under subsection (b) of this section. Two extensions of up to two years each may be granted by the director of public works upon good cause shown."

[2]The criteria at SRC 66.100 through 66.125 sometimes refer to "linking" facilities and "abutting" facilities, the difference being, apparently, that "linking facilities" are those off-site facilities necessary to link the subject property with adequate facilities within or connected to the USA, while "abutting" facilities are those within 260 feet of the subject property frontage necessary to connect more distant properties to the city's infrastructure. *See* Figure 66-1 (attached to SRC chapter 66).

[3]SRC 66.080 provides:

> "(a) Upon issuance of a Preliminary Declaration the applicant shall cause a competent registered professional engineer to design the improvements required by the Preliminary Declaration. Such plans shall be drawn to the specifications of the director of public works and submitted for his approval in accordance with the provisions and fees stated in Chapters 72, 73 and 77. Upon approval of the applicant's plans and the improvement agreement described in SRC 66.035, the director of public works shall issue a UGA Development Permit. Completion of the required improvements according to the approved plans and specifications shall be a condition of the permit.
>
> "(b) Issuance of a UGA Development Permit shall not relieve the applicant of the obligation to obtain other permits required by this code, or of the obligation to proceed through the subdivision or partitioning review and approval process specified in SRC chapter 63.
>
> "(c) The UGA Development Permit shall be valid for a period of two years following the date of the issuance of the Development Permit by the director of public works. Two extensions of up to two years each may be granted by the director of public works upon good cause shown."

approval of those plans and an improvement agreement, the director issues the UGA Development Permit, conditioned on completion of the improvements required by the

declaration. Issuance of the UGA Development Permit does not relieve the applicant of the obligation to obtain other permits or necessary approvals, such as subdivision approval.

The subject property is a vacant, irregularly shaped 92-acre tract that is bordered on the east by the USA. Eola Drive, a two-lane minor arterial running east-west, bisects the northern half of the tract. Doaks Ferry Road, a two-lane major arterial running generally north-south, borders part of the western periphery of the tract. Gehlar Road is a local street that follows the north and northwestern border of the subject property to intersect with Eola Drive. An existing 18-inch storm drain is located along Eola Drive, and a 12-inch storm drain is located along Gehlar Road.

On March 26, 1999, intervenor filed an application for a UGA Development Permit for the subject property, proposing to develop a residential subdivision with an average density of 6.5 dwellings per acre. Pursuant to SRC 66.070, the DRC held a public meeting and issued a preliminary declaration on June 30, 1999. Petitioners appealed that decision to the city council, pursuant to SRC 66.070(c). The city council conducted a hearing on the appeal, and on September 13, 1999, issued a resolution affirming the DRC's issuance of the declaration. The city council adopted as findings of fact two staff reports dated August 23, 1999, and September 7, 1999.

This appeal followed.

PRELIMINARY MATTERS

A. Jurisdiction

Intervenor-respondent (intervenor) objects to the Board's jurisdiction, arguing that the challenged decision is not a land use decision as defined by ORS 197.015(10)(a).[4] Intervenor argues that

[4]As relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.825(1). ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "The UGA preliminary declaration is not a development (land use) approval; it only addresses those facility requirements necessary to link the subject property to adequate facilities, and boundary requirements abutting the property (SRC 66.141). More importantly, the UGA permit process ([SRC] Chapter 66) does *not* address land use issues, such as location, layout, design, zoning, setbacks, or easements of the future subdivision. It is strictly concerned with the off-site infrastructure analysis and in no way deals with land use issues." Response Brief 1 (emphasis in original).

Petitioners reply, and we agree, that the challenged decision is a land use decision under the statutory definition, because it is a final decision made by a local government that concerns the application of a land use regulation. Intervenor does not dispute that SRC chapter 66 is a "land use regulation," or that the decision concerns the application of SRC chapter 66. [5] The fact that, pursuant to other provisions of its code, the city may make other decisions (such as tentative subdivision approval) that may also be land use decisions does not mean that the decision challenged here is not a land use decision under the statutory definition. We conclude that we have jurisdiction.

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> > "(i) The goals;
> >
> > "(ii) A comprehensive plan provision;
> >
> > "(iii) A land use regulation; or
> >
> > "(iv) A new land use regulation[.]"

[5]ORS 197.015(11) provides:

> "'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

As petitioners point out, SRC 66.010 states that one purpose of SRC chapter 66 is to "insure compliance with the urban growth policies of the Salem Area Comprehensive Plan[.]"

B. Challenged Decision

The parties disagree over what documents are incorporated into the challenged decision in this case. The city council's decision challenged in this case is a one-page document, Resolution No. 99-125, that in relevant part states:

> "Section 1. Findings. The council hereby adopts as findings of fact those staff reports dated August [23], 1999 and September 7, 1999, which reports are incorporated herein by this reference.
>
> "Section 2. Order. The council hereby affirms the Preliminary Declaration for UGA Permit No. 99-5 issued by the [DRC] attached hereto as Attachment A." Record 7.

Attached to the resolution is the declaration, dated June 30, 1999, along with three exhibits to the declaration. Exhibit A is a memorandum from the Department of Public Works dated June 18, 1999. Exhibit B is a memorandum from the Department of Community Services dated May 27, 1999. Exhibit C is a site map. We understand the parties to dispute whether the challenged decision adopts or incorporates the June 18 and May 27, 1999 memoranda that are attached to the declaration at Record 8-11.

In *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992), we stated that

> "if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated."

In a footnote, we commented:

> "Stating in the decision that a particular document is 'incorporated by reference as findings' is certainly the clearest way of expressing such an intent. However, no particular language is required, so long as the words employed establish that the local government decision maker intends to adopt the contents of another document as a statement of what it believes to be the relevant facts upon which its decision is based." *Id.* at n 5.

Applying the foregoing principles, it is reasonably clear that the city's decision includes both Resolution No. 99-125 and the June 30, 1999 declaration.[6] Although it is less clear, we also conclude the city adopted the three exhibits that are attached to the June 30, 1999 declaration as Exhibits A through C, *i.e.*, the June 18, 1999 and May 27, 1999 memoranda and the site map. The resolution and the incorporated documents appear in sequential order at pages 7 through 26 of the record. Petitioners apparently understood that the decision included all of these documents, because they are attached to and identified as the challenged decision in the petition for review. Petition for Review Appendix A.

In addition to the decision and findings that appear at pages 7 through 26 of the record, Resolution No. 99-125 specifically adopts the August 23, 1999 and September 7, 1999 staff reports. Those staff reports appear at pages 32-38 and 85-86 of the record. We have some question whether the language in Resolution No. 99-125 also expresses an intent to adopt the attachments to those staff reports, in addition to the staff reports themselves.[7] However, we need not and do not consider that question in resolving this appeal. With this understanding of the challenged decision and the findings adopted by the city in support of its decision, we turn to petitioners' assignments of error.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioners challenge the city's determination that the city need not specify in the declaration adequate park facilities or a fee in lieu of park facilities, as required by SRC 66.125.

SRC 66.125 provides:

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[6]The resolution expressly affirms the June 30, 1999 declaration and states that the declaration is included as "Attachment A" to the resolution. We conclude that language is sufficient to express an intent on the part of the city council to adopt the June 30, 1999 declaration as its own.

[7]One of the documents that is attached to the August 23, 1999 staff report is a letter *opposing* the application.

> "The Development Review Committee shall specify such park facilities, or fee in lieu of park facilities, consistent with a Parks Master Plan and standards that council shall, by ordinance, enact. *Until a Parks Master Plan is adopted, the Development Review Committee shall specify park facilities, or fee in lieu of park facilities, adequate to serve the development based upon the Park and Recreation Technical Study adopted under SRC 64.230*." (Emphasis added.)

The declaration states with respect to SRC 66.125: "Because this application was filed prior to the effective date of the Comprehensive Park System Master Plan, there are no park or fee in lieu of park facilities required." Record 11. The September 7, 1999 staff report explains that the application was received March 30, 1999, but that the city's new Park System Master Plan, which requires developers to provide park facilities consistent with the plan's standards, was not effective until April 26, 1999. With respect to the second sentence of SRC 66.125, the staff report states:

> "SRC [66.125] stipulates that until a Parks Master Plan is adopted, the [DRC] shall specify park facilities, or fee in lieu of park facilities, adequate to serve the development based upon the Park and Recreation Technical Study (1978) adopted under SRC 64.23.
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> "Based upon the 1978 Park and Recreation Technical Study there are no park requirements, as stated in exhibit B of the preliminary declaration, for this application." Record 33.

Exhibit B of the declaration is a memorandum dated May 27, 1999, from the city Department of Community Services to the DRC, addressing what park facilities are required under SRC chapter 66 to develop the subject property:

> "1. City Council adopted the Comprehensive Park System Master Plan on April 26, 1999. Under the provisions of [chapter] SRC 66 the developer is responsible to provide those park facilities that have not already been provided by the public consistent with the standards specified by the Parks Master Plan. However, since ordinances take effect on the thirtieth day after their adoption and since this application was submitted within 30 days after the adoption of the Parks Master Plan, it is exempt from the provisions of the Parks Master Plan. * * *
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> "* * * * *
>
> "3. The subject property is located within Planning Unit No. 31 which lists a deficiency of 3.3 acres (page 28, 1978 Technical Study) needed

by 1990. The recommendation for filling neighborhood park needs for the west community, Neighborhood Planning Unit No. 31, is stated as: 'Look into agreement with Salem Academy for joint development of a 5+ acre park.'

"4. The subject parcel is approximately .5 of a mile from the Salem Academy School site and thereby within the half mile service radius standard for a neighborhood park, adopted in the 1978 Technical Study. The approximately 4 acre Salem Academy site, although substandard in size (5 acre minimum neighborhood park standard) and facility development, could serve the park needs of the service area, providing, however, unlimited public access were agreed to by the owners.

"5. Since the adoption of the 1978 Technical Study no park land has been acquired within this Planning Unit nor has any agreement with Salem Academy been exercised as stated above. This document does not address development costs or a methodology for computation.

"6. It is anticipated that Systems Development Charges will be collected at their respective adopted levels as permits for dwelling units are issued. No other requirement is anticipated at this time." Record 25.

Petitioners argue that these findings are inadequate because they fail to specify those park facilities or fees in lieu of such facilities adequate to serve the development based on the 1978 technical study, or explain why no such facilities need be specified. To the extent the city relies upon the Salem Academy site as a potential park facility "adequate to serve the development," petitioners argue that the city's reliance is misplaced. Petitioners cite to evidence that the site is only 4 acres in size, less than the minimum 5-acre size. Petitioners also cite to evidence that Salem Academy no longer owns the site, and that a portion of the site has been developed since 1978. Further, petitioners note that the Salem Academy site is approximately one mile distant from the subject property by vehicle, bike or foot. Finally, petitioners argue that there is no evidence the Salem Academy site is "adequate to serve the development," given the identified deficiency of parks in the area, and the fact that the city has not acquired any additional park land in the area since 1978.

Intervenor responds that the city's findings conclude that the 1978 study imposes no park requirements for this application because (1) the Salem Academy site is adequate to

serve the development, and (2) system development charges (SDCs) incurred when building permits are approved will suffice to pay for any parks necessary to serve the development. Further, intervenor cites to various comments made by city council members during deliberations below, to argue that the city council adopted an interpretation of SRC 66.125 to the effect that SDCs constitute a "fee in lieu of" the parks facilities required by that provision.

However, oral comments by individual city council members are not "findings" and cannot constitute a reviewable interpretation of a local provision. *See Hale v. City of Beaverton*, 21 Or LUBA 249, 258 (1991) (the subject of LUBA's review is the final written decision adopted by the city, not oral comments made by individual decision makers); *Bruck v. Clackamas County*, 15 Or LUBA 540, 542 (1987) (same).

We agree with petitioners that the city's findings are inadequate to explain why the requirements of SRC 66.125 are met. The May 27, 1999 memorandum states that the Salem Academy site "could serve the park needs of the service area," but does not address the issues petitioners raised below regarding the inadequacy of that site to rectify the parks deficiency identified in the 1978 technical study or to serve the proposed development of this property. Record 25. Further, the memorandum states that "[i]t is anticipated that Systems Development Charges will be collected at their respective adopted levels as permits for dwelling units are issued," and that "no other requirement is anticipated at this time." *Id*. However, the memorandum does not explain why the collection of SDCs when approving future building permit applications has anything to do with the city's obligation under SRC 66.125 to specify parks facilities or fee in lieu thereof adequate to serve the development. Nor does the memorandum determine that SDCs collected at the time of building permit approval will suffice to pay for parks adequate to serve the development.

It may be, as intervenor suggests, that the city can interpret SRC 66.125 to allow SDCs to constitute a "fee in lieu" of any park facilities necessary to serve the proposed

development.[8] However, the findings before us do not take that position or provide an adequate explanation of why the application complies with SRC 66.125. Because the city's findings with respect to SRC 66.125 are inadequate, we need not resolve petitioners' evidentiary challenges to those findings. *DLCD v. Columbia County*, 16 Or LUBA 467, 471 (1988); *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986).

The first, second and third assignments of error are sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioners argue that the city failed to make adequate findings regarding storm drainage improvements required by SRC 66.115. Further, petitioners contend that the city erred in effectively deferring findings of compliance with SRC 66.115 to later stages of development.

SRC 66.115 provides that:

> "The Development Review Committee shall require that the proposed development be linked to existing adequate facilities by the construction of storm drain lines, open channels, and detention facilities which are necessary to connect to such existing drainage facilities. Specific location, size, and capacity of such facilities will be determined with reference to any one or a combination of the following: (1) the Stormwater Management Plan or, upon adoption, a superseding Stormwater Master Plan or (2) specific engineering capacity studies approved by the director of public works. With respect to facilities not shown in the applicable Management or Master Plan, but necessary to link to adequate facilities, the location, size, and capacity of such facilities to be constructed or linked to shall be determined by the Development Review Committee. * * * Design, construction, and material

[8]In support of that interpretation, intervenor cites to SRC 66.010(c), which states that

> "The required public facilities which serve growth should be paid for by growth through System Development Charges (SDCs). * * * As a component to the adoption of this revised Chapter 66 urban growth management program, the SDCs under SRC Chapter 41 were substantially increased in order to fund growth's share of these required facilities."

However, if the city adopts the interpretation suggested by intervenor, it must explain why that interpretation is consistent with SRC 41.097, which provides that SDCs are "separate from and in addition to any applicable tax, assessment, charge, fee in lieu of assessment, or fee otherwise provided by law or imposed as a condition of development."

> standards shall be as specified by the director of public works for the construction of all such public storm drainage facilities in the city."

The declaration states with respect to SRC 66.115 that "[n]o linking storm drainage improvements are required for the development." Record 10. The September 7, 1999 staff report incorporated into the challenged decision addresses SRC 66.115 as follows:

> "SRC 66.115 specifically requires that the City identify any 'linking' facilities in the Declaration. There are no 'linking' drainage improvements required at this time because none are identified in the Stormwater Management Plan, nor have detailed engineering studies been done which would identify any need for such improvements (although they may be required during development approvals)." Record 36.

> "Storm drainage is covered in SRC 66.115, and it requires the [DRC] to follow either '(1) the Stormwater Management Plan, or (2) specific engineering capacity studies approved by the director of public works.' [T]here is an existing public drainage system immediately abutting this development in a couple of locations, and more detailed requirements for improvements will likely follow as the actual engineering designs are submitted and reviewed." Record 37 (emphasis omitted).

Intervenor responds that the city properly found compliance with SRC 66.115, based on findings that two storm drainage lines currently exist adjacent to the subject property, and thus that no "linking" facilities were required. Intervenor argues that nothing more is required to comply with SRC 66.115.

It is not clear to us what SRC 66.115 requires. The basic mandate, it appears, is that "the proposed development be linked to existing adequate facilities[.]" The decision determines that no linking facilities are required, apparently because existing drainage facilities abut the property. However, there is no finding that those facilities are "adequate." Indeed, the findings contemplate that "more detailed requirements for improvements will likely follow[.]" It may be, as intervenor suggests, that the existing facilities are in fact adequate, and that the improvements mentioned are on-site, internal improvements, not the off-site improvements subject to SRC 66.115. However, absent adequate findings that clarify the city's understanding on these points, we cannot determine whether petitioners are

correct that the city improperly deferred to a later stage of development a finding of compliance with SRC 66.115.

The fourth and fifth assignments of error are sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in failing to coordinate stormwater drainage issues with Polk County, as required by the Salem Area Comprehensive Plan (SACP). The Regional Procedures and Policies section of the SACP contains a Storm Drainage Policy providing that "[t]he Cities and Counties shall coordinate the management of storm water." Petitioners contend that an unincorporated portion of Polk County is adjacent to the subject property and that, as shown on a topographical map, water draining from the crest on the property may drain eastward toward that unincorporated portion.

The September 7, 1999 staff report states with respect to city-county coordination:

> "The coordination referred to in the [SACP] took place during the development of the Sector Plan and again during the development of the Stormwater Management Plan, and continues today with the development of the Stormwater Master Plan. Since the entire drainage course in and below this development proposal all the way to the Willamette River is within the city limits and legally a part of the City's drainage system, the county has no jurisdiction, control, or legal interest in it." Record 36.

Petitioners do not challenge the city's finding that the entire drainage course of the property is within city limits, or identify any other error in the city's finding.

The sixth assignment of error is denied.

SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

Petitioners argue that the city failed to adopt adequate findings supported by substantial evidence with respect to the street improvements required by SRC 66.100. Petitioners also contend that the city erred in deferring a determination of compliance with SRC 66.100 until the applicant submits an application for subdivision plat approval.

SRC 66.100 requires in relevant part that:

> "(a) The [DRC] shall require that the proposed development be linked by construction of and improvements to public streets which shall extend from the development to an adequate street or streets by the shortest preplanned routes available. Specific locations and classifications of such linking streets shall be based upon the street network adopted in the TSP, and as further specified in any Transportation Impact Analysis (TIA) prepared by public works staff during the adoption of the USA or its amendments. Development proposals for which the public works standards require preparation of an individual TIA may be required to provide more than one linking street or other improvements to accommodate traffic volumes generated by the proposal.
>
> "(b) For purposes of this section, an adequate street is defined as the nearest point on a collector or arterial street which has, at a minimum, a 34 foot wide turnpike improvement within a 60 foot wide right-of-way."

In addressing SRC 66.100, the city found that "[n]o linking street facility improvements will be required of the development." Record 9. The city notes that Eola Drive has a 20-foot turnpike section, with a right of way of 60 to 64 feet, and that the current standard for a minor arterial such as Eola Drive is a 48-foot wide improvement within a 72-foot right of way. With respect to Doaks Ferry Road, the city found that it has a 22-foot turnpike section within an 80-foot right of way, and that the current standard for a major arterial is a 72-foot wide improvement within a 96-foot right of way. The city then required the applicant to provide various right of way dedications and partial street improvements on Eola Drive, Doaks Ferry Road and Gehlar Road. Finally, the declaration noted that the applicant may be required to submit a TIA as a requirement of development, which would be expected to address the realignment of Gehlar Road at its intersection with Eola Drive, the provision of adequate sight distance at that intersection, and provision of left turn lanes at that intersection.

Petitioners argue that the city failed to identify the requisite "linking" facilities. Further, petitioners contend that the city should have required the applicant to submit a TIA in order to determine what traffic impacts the development will cause, and thus what

improvements are necessary to accommodate those impacts. Finally, petitioners argue that the city failed to distinguish between the improvements required pursuant to issuance of the declaration and those that will be required as a condition of subdivision approval.

We agree with intervenor that the city correctly found that no linking streets are required, because the subject property is adjacent to the USA and, therefore, the only streets requiring consideration under SRC 66.100 are abutting streets. With respect to the TIA, we agree with intervenor that SRC 66.100 makes provision of a TIA discretionary and petitioners have not established that the city erred in exercising its discretion not to require a TIA at this stage of development. Finally, we agree with intervenor that petitioners' argument that the city failed to distinguish between improvements required at this stage of development and those to be required as part of subdivision approval is not developed sufficiently for review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Petitioners fail to explain why the city must distinguish the two sets of improvements.

The seventh and eighth assignments of error are denied.[9]

NINTH ASSIGNMENT OF ERROR

Petitioners allege that the city committed a number of procedural errors that cumulatively prejudiced petitioners' substantial rights. Petitioners argue that (1) the city published an outdated version of SRC chapter 66 on its web site, which one petitioner relied upon to her detriment in preparing oral and written testimony; (2) the city violated ORS 197.763(6)(c) and SRC 114.140 by leaving the record open for additional written testimony for only four days rather than the required seven days, which forced petitioners to expedite their preparation of testimony; and (3) the city allowed city staff to submit new

[9]Resolution of the seventh and eighth assignments of error on these bases makes it unnecessary to consider intervenor's alternative argument that petitioners failed to raise below, and thus waived, the issues raised in those assignments.

evidence into the record after the record was closed, without allowing petitioners an opportunity to respond, as provided by ORS 197.763(6)(c).[10]

Intervenor responds, and we agree, that none of the alleged procedural errors provide a basis for reversal or remand. With respect to the outdated information on the city's web site, petitioners do not identify any provision of law that requires the city to maintain current information on its web site. With respect to the four-day period for additional written testimony, petitioners do not allege that they were unable to provide adequate written testimony within the time specified; that petitioners had to expedite preparation of testimony does not establish prejudice to petitioners' substantial rights.

Finally, petitioners object to the submission of the September 7, 1999 staff report, which the city council adopted as part of its findings, arguing that it contains new evidence and that petitioners should have been given an opportunity to respond to that new evidence pursuant to ORS 197.763(6)(c) and SRC 114.140, which implements the statute. Intervenor responds, and we agree, that ORS 197.763(6)(c) and the identical provisions of SRC 114.140 apply only to the initial evidentiary hearing, and not to the proceedings before the city council in this case. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292, 300, *rev'd and rem'd on other grounds*, 148 Or App 217, 939 P2d 625, *rev den* 326 Or 59 (1997). We also agree with intervenor that petitioners have not identified anything in the September 7, 1999 staff report that constitutes new evidence.

The ninth assignment of error is denied.

The city's decision is remanded.

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[10]Petitioners also allege that the city committed several other procedural errors. However, petitioners make no attempt to demonstrate that any of these alleged errors prejudiced petitioners' substantial rights, and thus those allegations provide no basis for reversal or remand. We reject them without further discussion.