

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

3  
4 NELL LANGE-LUTTIG, THOMAS MARSAL  
5 and WALTON R. FISHER,  
6 *Petitioners,*

7  
8 and

9  
10 HENRY KANE,  
11 *Intervenor-Petitioner,*

12  
13 vs.

14  
15 CITY OF BEAVERTON,  
16 *Respondent.*

17  
18 LUBA No. 2000-045

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from City of Beaverton.

24  
25 Nell Lange-Luttig, Beaverton, and Henry Kane, Beaverton, filed a combined petition  
26 for review on behalf of petitioners and intervenor-petitioner. Henry Kane argued on his own  
27 behalf.

28  
29 Mark Pilliod, City Attorney, Beaverton, filed the response brief and argued on behalf  
30 of respondent.

31  
32 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
33 participated in the decision.

34  
35 AFFIRMED

11/09/2000

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal the city’s approval of a conditional use permit to expand a city park.

**MOTION TO INTERVENE**

Henry Kane (intervenor-petitioner) moves to intervene on the side of petitioners. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property is located in downtown Beaverton. The city is in the process of building a new municipal library. Nine separate land use decisions have been required for approval of the new library and related developments.<sup>1</sup> Expansion of City Park, which adjoins the new library site, is the final part of the new municipal library development. This appeal concerns only the City Park expansion.

City Park is an existing park operating as a conditional use, which encompasses an entire city block bordered by Watson Avenue on the west, Washington Avenue on the east, 4<sup>th</sup> Street on the north, and 5<sup>th</sup> Street on the south. The approved park expansion will expand the existing park one block to the east, from Washington Avenue to Hall Boulevard, and will partially close Washington Avenue between 4<sup>th</sup> Street and 5<sup>th</sup> Street. Watson Avenue on the west and Hall Boulevard on the east are the major one-way, north-south, arterial streets. Washington Avenue is an improved local street.

The portion of Washington Avenue between 4<sup>th</sup> Street and 5<sup>th</sup> Street connecting the two park blocks will be closed to private motor vehicles by removable bollards. Surface roadway improvements will remain to allow emergency and maintenance vehicles. Pedestrians and bicyclists will continue to have access to the surface improvements. Parking

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<sup>1</sup> Other approvals include the library use and structure, design review, a tree preservation plan, new parking lots, and a parking lot setback variance.

1 spaces for motor vehicles will be removed, but the road may be reopened for limited parking  
2 purposes under certain circumstances. Finally, all utilities located within the right-of-way  
3 will remain.

4 The Beaverton Planning Commission (planning commission) approved the  
5 application for the park expansion. Petitioners appealed the decision to the Beaverton City  
6 Council (city council), which denied the appeal and approved the planning commission  
7 decision. This appeal followed.

## 8 **MOTIONS TO STRIKE**

### 9 **A. Motion to Strike the Petition for Review**

10 The city moves to strike the petition for review in its entirety. According to the city,  
11 petitioners' disregard for the format prescribed in OAR 661-010-0030 is so egregious that  
12 the most appropriate remedy is to strike the entire petition for review. We agree with the city  
13 that the petition for review suffers from a multitude of flaws, including a failure to provide a  
14 statement of the case and a summary of petitioners' arguments. In addition, the petition for  
15 review does not include a copy of the challenged decision or excerpts of the relevant portions  
16 of the city's land use regulations. Nevertheless, we believe that the petition for review is  
17 sufficient to set out assignments of error to which the city can respond. Therefore, we deny  
18 the motion to strike the entire petition for review.

### 19 **B. Motion to Strike Portions of the Petition for Review**

20 In the alternative, the city moves to strike petitioners' summary of material facts.  
21 According to the city, the 27-page summary does not state facts, material or otherwise. The  
22 city contends that the summary of material facts is undeveloped argument that is unsupported  
23 by record citations or legal analysis.

24 We agree with the city that a majority of the summary of material facts appears to  
25 contest the factual underpinnings of the evidence the city relied upon rather than provide  
26 factual background for the challenged decision. To the extent that the summary contains

1 arguments that are not further developed in petitioners’ assignments of error, we shall  
2 disregard them. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999) (arguments  
3 contained in the summary of arguments but not assigned as error are addressed only if they  
4 are sufficiently developed for review); *Deschutes Development v. Deschutes Cty.*, 5 Or  
5 LUBA 218, 220 (1982).

6 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

7 Petitioners’ first and second assignments of error allege that the notices published by  
8 the city prior to the hearings before the city in this matter violate ORS 197.763(3).<sup>2</sup> Thus,  
9 petitioners argue, as a matter of law, the city’s decision must be reversed or remanded.  
10 According to petitioners, it is not necessary for petitioners to demonstrate that they were  
11 prejudiced by the city’s failure to adequately describe the decision to be made or the criteria  
12 upon which the decision would be based. Petitioners contend that any deficiency in the city’s  
13 process necessarily prejudices the parties to the decision.

14 Petitioners are mistaken. A procedural error provides a basis for reversal or remand  
15 only if the procedural error results in prejudice to petitioners’ substantial rights. ORS  
16 197.835(9)(a)(B); OAR 661-010-0071(2)(c); *Furler v. Curry County*, 24 Or LUBA 546, 550  
17 (1994).

18 ORS 197.763(3) provides, in pertinent part:

19 “The notice provided by the [local government] shall:

20 “(a) Explain the nature of the application and the proposed use or uses  
21 which could be authorized; [and]

22 “(b) List the applicable criteria from the ordinance and the plan that apply  
23 to the application at issue[.]”

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<sup>2</sup> Petitioners and intervenor-petitioner filed a combined petition for review and are referred to together as “petitioners.”

1 Petitioners argue that the notice does not adequately explain the nature of the application and  
2 the proposed uses that could be authorized, and also fails to list all the applicable criteria.  
3 The notice states that the appealed decision involves a use of the Washington Avenue right-  
4 of-way for public park amenities, including a fountain. The notice specifically states that  
5 Washington Avenue will be partially closed and access will be limited between 4<sup>th</sup> and 5<sup>th</sup>  
6 Streets. Record 366. The notice lists the applicable conditional use criteria. Record 367. The  
7 conditional use criteria require that an application comply with all applicable provisions of  
8 the ordinance and comprehensive plan. Beaverton Code (BC) 40.05.15.2.C(1) and (2).  
9 Although the staff report addresses the other applicable ordinance and plan provisions, the  
10 notice does not separately list these provisions.

11       ORS 197.763(3)(a) provides a “prospective requirement that the notice of the  
12 proposal apprise recipients of all uses that could be authorized by the final decision.” *Bigley*  
13 *v. City of Portland*, 168 Or App 508, 513, \_\_\_ P2d \_\_\_ (2000). Petitioners argue that the  
14 notice fails to adequately describe what the proposal to “partially close and limit access” to  
15 Washington Avenue consists of and fails to disclose that the decision will entail closing  
16 Washington Avenue to vehicular traffic.

17       Assuming without deciding that the notice does not adequately describe all the uses  
18 that could be authorized, petitioners have failed to establish that their substantial rights were  
19 prejudiced. Petitioners Marsal and Lange-Luttig appeared and testified before the planning  
20 commission. Intervenor-petitioner appeared and testified before the city council. The city  
21 argues that petitioners were well aware of all the proposed uses that were ultimately  
22 authorized by the decision and that petitioners participated in the hearings below. Petitioners  
23 argued at length about what they considered to be the biggest problem with the city’s park  
24 expansion concept, *i.e.* the idea that a partial closure of Washington Avenue could refer to  
25 prohibiting use by private motor vehicles rather than a general closure of a limited duration.  
26 We agree with the city that petitioners have not demonstrated that the city’s alleged failure to

1 comply with ORS 197.763(3)(a) misled petitioners regarding the uses that were ultimately  
2 approved or the limitations that were ultimately imposed such that their substantial rights to  
3 present their case below were prejudiced.

4 We next turn to petitioners' contention that the notice failed to adequately identify the  
5 applicable criteria. ORS 197.763(3)(b) requires a local government to identify in its notice  
6 the comprehensive plan and land use regulation criteria that the local government considers  
7 to be applicable to the subject application. *Eppich v. Clackamas County*, 26 Or LUBA 498,  
8 503 (1994). Petitioners argue that the notice fails to identify all the applicable criteria. The  
9 city responds that any defect did not prejudice petitioners' substantial rights because all of  
10 the applicable criteria were raised and addressed in the staff report and at the public hearing.  
11 Petitioners do not identify any applicable land use ordinance or comprehensive plan  
12 provisions that were not addressed by the city. Petitioners do not identify any ordinance or  
13 plan provisions that they were not able to address below. Petitioners have not established that  
14 any failure of the notice of hearing to list applicable comprehensive plan or land use  
15 regulation criteria prejudiced their substantial rights. *Turrell v. Harney County*, 34 Or LUBA  
16 423, 430-31 (1998).

17 The first and second assignments of error are denied.

### 18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioners argue that the city failed to state the applicable approval criteria at the  
20 commencement of the public hearing as required by ORS 197.763(5)(a). The city responds  
21 that although the mayor did not verbally identify the applicable approval criteria at the outset  
22 of the public hearing, the staff presentation that preceded public testimony did identify the  
23 applicable approval criteria.

24 ORS 197.763(5) provides, in pertinent part:

25 "At the commencement of a hearing under a comprehensive plan or land use  
26 regulation, a statement shall be made to those in attendance that:

1           “(a) Lists the applicable substantive criteria[.]”

2   When a local government lists the applicable substantive criteria, it is not sufficient to list a  
3   criterion that simply provides that the application must meet all applicable ordinance and  
4   plan provisions. The local government must identify which ordinance and plan provisions it  
5   considers to be applicable to the subject application. *Eppich*, 26 Or LUBA at 503. The record  
6   is not entirely clear as to what, if any, comprehensive plan provisions were addressed by the  
7   staff presentation prior to the taking of public testimony. Record 331-33. However, the  
8   burden is on petitioners to identify the comprehensive plan or land use regulation provisions  
9   they were prevented from addressing as a result of the city’s alleged violation of ORS  
10  197.763(5)(a).

11           The only comprehensive plan goal or policy identified in petitioners’ brief is  
12  Beaverton Comprehensive Plan (BCP) Goal 6 regarding traffic circulation.<sup>3</sup> However,  
13  intervenor-petitioner submitted a memorandum that included arguments regarding BCP Goal  
14  6. Record 316. Furthermore, the city addressed this argument in the findings and found the  
15  proposed development does not violate BCP Goal 6. Record 7. Any violation of ORS  
16  197.763(5)(a) that may have resulted by not specifically identifying Goal 6 as an approval  
17  criterion in the notice of hearing did not prejudice petitioners’ substantial rights.<sup>4</sup>

18           The third assignment of error is denied.

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<sup>3</sup> BCP Goal 6 provides:

“Provide a safe, coordinated, and economical transportation and circulation system to bring about the best relationships between places where people live, work, shop, and seek recreation.”

<sup>4</sup> The city’s failure to list the applicable approval criteria, as required by ORS 197.763(5)(a), means petitioners would be able to raise issues concerning those criteria as issues before LUBA even if no such issues were raised by petitioners during the proceedings below. *Eppich*, 26 Or LUBA at 504. However, petitioners have not identified any such approval criteria.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city violated ORS 197.763(4)(b) by accepting a consulting  
3 traffic engineer’s report less than seven days before the public hearing and by not granting a  
4 continuance of the hearing on its own motion.

5 ORS 197.763(4)(b) provides, in pertinent part:

6 “Any *staff report* used at the hearing shall be available at least seven days  
7 prior to the hearing. If additional documents or evidence are provided by any  
8 party, the local government may allow a continuance or leave the record open  
9 to allow the parties a reasonable opportunity to respond. \* \* \*” (Emphasis  
10 added.)

11 Contrary to petitioners’ assertion, the requirement that a staff report be available seven days  
12 prior to a hearing is a procedural requirement, and a procedural violation is not a basis for  
13 reversal or remand absent a showing that petitioners’ substantial rights were violated.  
14 *Simonds v. Hood River County*, 31 Or LUBA 305, 307 (1996). In any event, petitioners’  
15 argument fails because the report at issue was not a “staff report.” The report was a  
16 supplemental traffic report prepared by a consulting engineering firm. Record 270-73.  
17 Because the supplemental traffic report is not a “staff report,” it did not have to be made  
18 available seven days prior to the hearing pursuant to the first sentence of ORS 197.763(4)(b).

19 Although the supplemental traffic report did not have to be made available seven days  
20 prior to the hearing as a “staff report,” additional documents and evidence were certainly  
21 submitted into the record at the public hearing. Petitioners could have requested a  
22 continuance or requested that the record be left open to allow time to respond to new  
23 submissions. ORS 197.763(4)(b). However, petitioners did not request either a continuance  
24 or that the record be left open. The city is not required to provide a continuance unless a  
25 party requests the continuance. *ONRC v. City of Seaside*, 29 Or LUBA 39, 52 (1995). Having  
26 failed to request a continuance or that the record be left open, petitioners may not assert that  
27 the city erred by failing to continue the hearing or leave the record open.

28 The fourth assignment of error is denied.



1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners separate the fifth assignment of error into three subassignments. Although  
3 petitioners do not specify with any precision the approval criteria to which the  
4 subassignments of error relate, petitioners appear to mount a substantial evidence challenge  
5 to the city’s findings regarding impacts on the neighborhood that the proposed park  
6 expansion will cause.

7 **A. Traffic Congestion**

8 As we understand it, petitioners argue that the city’s decision that the characteristics  
9 of the proposed plan are reasonably compatible with and have a minimum impact on the  
10 livability and appropriate development of the neighborhood is not supported by substantial  
11 evidence. Petitioners’ primary argument appears to be that the city did not properly consider  
12 the cumulative effects of increased traffic congestion due to the park expansion.

13 BC 40.05.15.2.C(3) provides:

14 “That the location, size, design, and functional characteristics of the proposed  
15 use are such that it can be made reasonably compatible with and have a  
16 minimum impact on the livability and appropriate development of other  
17 properties in the surrounding neighborhood.”

18 Petitioners disagree with the traffic report prepared by the consulting traffic engineers  
19 that determines that the park expansion will not cause an impermissible increase in traffic.  
20 Record 103-12. Petitioners argue that there is already significant traffic congestion in the  
21 area and that additional traffic generated as a result of the proposed park expansion will only  
22 exacerbate the existing problem.

23 Substantial evidence is evidence a reasonable person could rely upon, and LUBA  
24 does not replicate the role of the decision maker in considering whether a land use decision is  
25 supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d  
26 262 (1988). Where the evidence in the record on review is conflicting such that a reasonable  
27 decision maker could reach different conclusions based on that evidence, the choice of which

1 evidence to believe and which conclusion to reach is for the local decision maker. *Id.* We  
2 conclude the traffic report is evidence a reasonable person could rely upon.<sup>5</sup>

3 Petitioners also allege that the findings are inadequate because they fail to address  
4 relevant issues raised by their notice of appeal. The only issue that petitioners allege the city  
5 failed to address is BCP 6.2.3(b).<sup>6</sup> Petitioners fail to explain how they believe the decision  
6 violates the policy. In any event, the staff report, which the challenged decision adopts,  
7 adequately addresses this issue. Record 24, 27.

8 Finally, petitioners argue that the narrowing of Hall Boulevard adversely affects  
9 traffic congestion and implicates an unspecified approval criterion. Even if petitioners had  
10 explained what approval criterion was implicated and how it was violated, the narrowing of  
11 Hall Boulevard is not part of the challenged decision. The decision to narrow Hall Boulevard  
12 was made in earlier decisions involving the development of the new municipal library. Any  
13 error in those decisions does not provide a basis for reversal or remand in the present case.

14 This subassignment of error is denied.

15 **B. The Decision Materially Increases Congestion**

16 In this subassignment of error, petitioners generally repeat arguments made elsewhere  
17 in their brief. In reviewing the challenged decision for substantial evidence, we may not  
18 reweigh evidence regarding traffic congestion. *1000 Friends of Oregon v. Marion County*,  
19 116 Or App 584, 588, 842 P2d 441 (1992). The choice between conflicting evidence belongs  
20 to the local decision maker, subject to review on appeal to determine whether a reasonable

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<sup>5</sup> Petitioners cite *Seto v. Tri-Met*, 21 Or LUBA 185, *aff'd* 311 Or 456, 814 P2d 1060 (1992) for the proposition that Beaverton currently experiences traffic congestion. Petitioners neither explain nor do we understand what the traffic situation described in a LUBA opinion from eight years ago has to do with the present decision.

<sup>6</sup> BCP 6.2.3(b) provides, “[d]esign streets to serve their anticipated function and intended uses as determined by the comprehensive plan.”

1 person would rely on that evidence. The traffic reports are evidence that a reasonable person  
2 could rely upon.

3 One new argument raised by petitioners that merits comment is that the city violated  
4 its road closure policy by not applying the correct ordinance.<sup>7</sup> Initially, the city’s road  
5 closure ordinance did not go into effect until well after the park expansion application was  
6 deemed complete. Even if the road closure ordinance had been in effect, the city specifically  
7 found that the challenged decision does not involve a road closure.

8 “\* \* \* Council finds that the Plan policy does not contain a definition of road  
9 closure. In this case regular through motor vehicle traffic and parking will be  
10 restricted. Other forms of travel, as well as emergency and maintenance  
11 vehicles will regularly use the street. \* \* \* The City is not precluded from  
12 allowing use of Washington Ave. for limited, public activities in the future.  
13 Council determines that the limitations on regular, public motor vehicle travel  
14 [do] not result in road closure under the terms of the Comprehensive Plan, but  
15 at most, partial closure. \* \* \*” Record 5.

16 The city council has significant discretion in how it interprets its road closure  
17 ordinance. ORS 197.829; *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992).  
18 We must affirm the city council’s interpretation of its own legislation unless we conclude  
19 that the interpretation is clearly wrong. *Goose Hollow Foothills League v. City of Portland*,  
20 117 Or App 211, 217, 843 P2d 992 (1992).

21 Petitioners do not explicitly address the city’s interpretation, other than to fault the  
22 city for not applying the road closure ordinance. Petitioners do not explain why the city’s  
23 interpretation that a partial closure is not subject to the road closure ordinance is incorrect—  
24 they simply express disagreement with the interpretation. Under the deferential standard that  
25 we are required to apply to the city’s interpretation of its road closure ordinance, we cannot  
26 say that the city’s interpretation is clearly wrong.

27 This subassignment of error is denied.

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<sup>7</sup> BC 6.02.075 provides the procedures and criteria for road closures.

1           **C.      Partial Closure**

2           In this subassignment of error, petitioners repeat arguments made elsewhere that the  
3 challenged decision is a complete road closure as opposed to a partial one. Petitioners again  
4 fail to explicitly address the city’s interpretation or explain why it is incorrect. Petitioners  
5 merely repeat their earlier disagreement with the city’s decision. As discussed earlier, the  
6 city’s interpretation is entitled to deference and is not clearly wrong.

7           This subassignment of error is denied.

8           The fifth assignment of error is denied.

9           **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

10          Petitioners argue that the city misconstrued the applicable law by not complying with  
11 state statutes for street vacations and the local road closure ordinance. Petitioners argue that a  
12 partial closure must only be for a limited time and does not include a limited closure for an  
13 indefinite time. Although petitioners’ view may be a plausible interpretation of the  
14 ordinance, as we have discussed, petitioners have not demonstrated that the city’s  
15 interpretation of its own ordinance provides any basis for reversal or remand.

16          The state statutes regarding street vacations are located at ORS 271.080 to 271.230.  
17 The city agrees that if the decision is intended to vacate Washington Avenue then the city  
18 would have to demonstrate compliance with the state statutes. However, as discussed above,  
19 the challenged decision is neither a vacation nor a permanent closure. Petitioners fail to  
20 demonstrate that the city was required to comply with ORS 271.080 to 271.230.

21          Although the title and description of the assignment of error give no such indication,  
22 petitioners appear to include a substantial evidence argument challenging the finding that the  
23 partial road closure will not create safety problems. The city argues, and we agree, that there  
24 is substantial evidence to support the city’s findings regarding safety. Petitioners also argue  
25 that the city should have required certain alternatives in the interests of safety. The city,

1 however, is under no obligation to impose a condition of approval suggested by a party to a  
2 local appeal. *Hunt v. City of Ashland*, 35 Or LUBA 467, 478 (1999).

3 Finally, petitioners argue that the city misconstrued certain comprehensive plan goals  
4 that were discussed in the final decision. BCP 6 seeks to provide a safe, coordinated and  
5 economical transportation and circulation system. BCP 7 seeks to retain and enhance the  
6 character and quality of established areas. The decision adequately discusses how the city  
7 struck a balance between these broadly stated goals. Record 7. Petitioners have failed to  
8 demonstrate that the city misinterpreted its own ordinance. ORS 197.829(1).

9 The sixth and seventh assignments of error are denied.

10 The city's decision is affirmed.