BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VICKIE CROWLEY, DON WISWELL
and MARRIETTA WISWELL,
Petitioners,

vs.

CITY OF BANDON,
Respondent,

and

MICHAEL JOHNSON,
Intervenor-Respondent.

LUBA No. 2001-145

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Vickie Crowley, San Ramon, California, filed the petition for review and argued on her own behalf.

Frederick J. Carleton, City Attorney, Bandon, filed a joint response brief and argued on behalf of respondent.

Robert S. Miller III, Bandon, filed a joint response brief and argued on behalf of intervenor-respondent.

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

REMANDED 11/27/2001

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 approval of an application to expand an existing single-family dwelling on an oceanfront lot zoned Controlled Development (CD-1).

MOTION TO INTERVENE

Michael Johnson (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners move for leave to file a reply brief, pursuant to OAR 661-010-0039, to respond to three alleged new matters raised in the response brief. There is no opposition to the motion, and it is allowed.

MOTION TO STRIKE

Intervenor moves to strike two factual assertions in the petition for review, arguing that those assertions are not supported by the record.[1] In addition, intervenor moves to strike Appendix 15-16 attached the petition for review, arguing that those two pages consist of minutes of an unrelated city council proceeding that are not in the record of this appeal or otherwise subject to the Board's notice.[2] Finally, intervenor moves to strike Appendix 17-18, which are portions of Ordinance 1336, arguing that petitioners failed to raise an issue regarding Ordinance 1336 and the ordinance is not relevant to the city's decision.

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[1]The disputed factual assertions are two sentences in the petition for review, at page 3, lines 1-3, and page 8, lines 7-8, that suggest that the existing home on the subject property was specifically built and designed to protect scenic views.

[2]The appendix attached to the petition for review is labeled (and referred to in the parties' briefs) as the "supplemental record." There is no supplemental record in this case. To avoid confusion, we refer to the attachments to the petition for review as an appendix.

Petitioners concede that the disputed factual assertions are not supported in the record. With respect to the disputed minutes, petitioners argue that the minutes embody a city council decision and thus are local law subject to official notice.

With exceptions not relevant here, LUBA's review is confined to the record before the local government. LUBA may take official notice of local government law embodied in an "ordinance, comprehensive plan or enactment" of any county or city. Oregon Evidence Code 202(7). Because the disputed minutes at Appendix 15-16 are not in the record and do not constitute law subject to official notice, we may not consider them. By the same reasoning, we may take official notice of the portions of Ordinance 1336 at Appendix 17-18. Intervenor's motion to strike is granted with respect to the disputed factual assertions and Appendix 15-16, denied with respect to Appendix 17-18.

FACTS

The subject property is a 16,000 square foot lot bordered on the east by Beach Loop Drive and on the west by the Pacific Ocean. The eastern third of the property consists of a flat-topped bluff, while the western two-thirds slopes down to the beach. In 1974, a flat-roofed two-bedroom house was built into and below the grade of the bluff, with its western wall roughly in line with the current bluff line. The only structure on the property on top of the bluff and visible from Beach Loop Drive is a small garage. Petitioners own property across Beach Loop Drive from the subject property.

The CD-1 zone is designed to preserve scenic and unique qualities of the city's oceanfront by controlling the nature and scale of development.[3] A single-family dwelling is

[3]Bandon Zoning Ordinance (BZO) 17.20.010 describes the purpose of the CD-1 zone:

> "The purpose of the CD-1 zone is to recognize the scenic and unique qualities of Bandon's ocean front and nearby areas and to maintain these qualities as much as possible by carefully controlling the nature and scale of future development in this zone. It is intended that a mix of uses would be permitted, including residential, tourist commercial and recreational. Future development is to be controlled in order to enhance and protect the area's unique qualities."

permitted in the CD-1 zone, provided it meets certain code requirements.[4] Part of the subject property is also within a Shoreland Overlay zone, which allows new residences or expansions of existing residences as a conditional use.

On March 2, 2001, intervenor applied for approval of a 2,000 square foot addition to the existing house, to be built above the bluff on top of the existing house. The main level of the proposed addition contains a kitchen, dining and living area, master bedroom and bath. A second level in a tower above the main level consists of two rooms. The roof line of the proposed main level is 17 feet in height, while the second level is 21 feet tall.

The city processed the application as a limited land use decision pursuant to BZO 17.20.040(B)(1) and ORS 197.195. The city mailed notice of the application to petitioners on April 13, 2001, requesting written comments and stating that the matter has been set before a hearings officer for review on April 27, 2001. Petitioners reviewed the application and submitted written comments on April 24, 2001. City planning staff then rescheduled the matter to a planning commission meeting on May 24, 2001, and provided notice to that effect to petitioners on May 9, 2001. The notice requested comments by May 18, 2001. A staff report recommending approval was made available May 17, 2001.

Petitioners submitted written comments May 18, 2001. Petitioners also appeared at the May 24, 2001 planning commission meeting and submitted written testimony that the proposed development would destroy the scenic values that the CD-1 and Shoreland Overlay zones were designed to protect. The planning commission approved the application on May 31, 2001. Petitioners appealed to the city council, which held a hearing July 16, 2001. On

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[4]BZO 17.20.020 provides, in relevant part:

> "In the CD-1 zone, the following uses are permitted outright provided that the use promotes the purpose of the zone and all other requirements of this title are met:
>
> "A. Single-family dwelling, or manufactured dwelling * * *."

August 7, 2001, the city council affirmed the planning commission decision. This appeal followed.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Petitioners argue that the city failed to address comprehensive plan provisions implementing Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) in approving the proposed residential addition. According to petitioners, the city is required to undertake an analysis under Goal 5 and its comprehensive plan provisions implementing that goal in order to approve the proposed development.

Intervenor responds, and we agree, that petitioners do not explain why either Goal 5 or any city comprehensive plan provisions are approval criteria applicable to the proposed development. Intervenor asserts, and petitioners do not dispute, that the city's comprehensive plan and land use regulations are acknowledged to comply with Goal 5.[5] Nothing in the comprehensive plan provisions cited to us suggests they constitute applicable approval criteria in a quasi-judicial land use or limited land use decision. Petitioners do not identify any applicable code provisions requiring that the proposed development be consistent with the comprehensive plan or otherwise rendering plan provisions applicable criteria.

Under the third assignment of error, petitioners argue that the city interpreted BZO 17.20, which governs uses in the CD-1 zone, in a manner that is inconsistent with the city's comprehensive plan provisions implementing Goal 5.[6] Petitioners argue that the provisions

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[5]Petitioners assert that the city is currently in periodic review and is considering amendments to its Goal 5 inventory and the Goal 5 provisions of its comprehensive plan. However, petitioners do not explain why those circumstances have any bearing on what criteria apply in the present case.

[6]BZO 17.20.040 provides in relevant part:

> "B. All new uses or structures or major exterior alterations of existing structures in the CD-1 zone shall comply with the following:

of BZO 17.20 do not adequately protect scenic views and that, in order to comply with Goal 5, the city must interpret BZO 17.20 to provide adequate protection of scenic views.

Pursuant to ORS 197.829(1), we must affirm a local government's interpretation of a local provision unless the interpretation is inconsistent with the express language, purpose or underlying policy of the provision, or is contrary to the statute or land use goal or rule that the provision implements.[7] The only "interpretation" petitioners identify is the city's

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> "1. The developer shall be required to gain approval from the planning commission during a plan review in public session regarding the design and siting of new structure(s) and all other requirements of this title. The approval or denial of a proposed land use resulting from this review will occur as a limited land use decision * * *;
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> "2. Siting of structures should minimize negative impact on the ocean views of existing structures on abutting lots. Protection of views from vacant building sites should also be taken into consideration. Where topography permits, new structures should be built in line with other existing structures and not extend further out into those viewscapes.
>
> "* * * * *
>
> "* * * * *
>
> "G. All homes in the CD-1 zone * * * shall utilize at least eight of the following design features: [listing 14 features]."

In addition, BZO 17.20.070 imposes a 20-foot front yard setback, and a five-foot side yard setback in the CD-1 zone, while BZO 17.20.090 imposes a maximum height of 24 feet for structures west of Beach Loop Drive.

[7]ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

conclusion that the BZO 17.20 "requirements for architectural features, height, inline view and setbacks have been satisfied by the applicant." Record 11; *see* n 6. In other words, the "interpretation" petitioners challenge under this assignment of error is the city's conclusion that the proposed development complies with the requirements of BZO 17.20. In essence, petitioners' argument is that the requirements of BZO 17.20 are insufficient to implement the comprehensive plan policies regarding scenic views and Goal 5. However, in challenging an interpretation under ORS 197.829, petitioners may not collaterally attack the sufficiency of acknowledged land use regulations to implement the goals the regulations are intended to implement. *See Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996) (a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d), where it contends that acknowledged local land use legislation does not comply with the goal or rule). The same rationale applies to a collateral attack on the sufficiency of BZO 17.20 to implement the Goal 5 provisions of the city's comprehensive plan. To the extent the above-quoted finding contains an "interpretation" of BZO 17.20, petitioners have not demonstrated that their interpretational challenge is anything other than an impermissible collateral attack on the city's acknowledged code.

For the foregoing reasons, the first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the city failed to address whether the proposed development "promotes the purpose of the [CD-1] zone," as required by BZO 17.20.020. *See* n 4. Further, petitioners contend that the city erred in concluding that the proposed development is consistent with siting requirements of BZO 17.20.040(B)(2) and the height requirements of BZO 17.20.090. *See* n 6.

A. BZO 17.20.020

BZO 17.20.020 allows a single-family dwelling in the CD-1 zone as an outright permitted use "provided that the use promotes the purpose of the zone." Petitioners contend

that BZO 17.20.020 requires the city to consider whether the proposed development promotes the purpose of the CD-1 zone and, if not, the city may reject the proposal. However, petitioners argue, the city failed to address BZO 17.20.020 and whether the proposed development promotes the purpose of the zone.

Intervenor responds that BZO 17.20.020 simply lists the permitted uses in the zone and does not require the city to consider whether a particular proposal does, in fact, promote the purpose of the zone. According to intervenor, the fact that BZO 17.20.020 lists a set of permitted uses indicates, without more, that those uses promote the purpose of the zone.

Intervenor's reading of BZO 17.20.020 reduces the modifying clause "provided that the use promotes the purpose of the zone" to surplusage. The statement "X provided that Y" generally means that X is conditioned on Y. *See Webster's Third New International Dictionary*, 1827 (unabridged 1981) (defining "provided" to mean "on condition that," "with the understanding," "if only"). Thus, absent some textual or contextual indications to the contrary, BZO 17.20.020 would seem to allow certain uses in the CD-1 zone subject to the requirement that the proposed use promotes the purpose of the zone. The purpose of the CD-1 zone is described at BZO 17.20.010. The city's findings neither address BZO 17.20.020 nor determine whether the proposed development promotes the purpose of the CD-1 zone. Neither do the city's findings interpret BZO 17.20.020 or explain why no inquiry under that code provision is necessary. We agree with petitioners that remand is necessary so that the city can either explain why BZO 17.20.020 does not impose a requirement that the proposed use promote the purpose of the zone, or adopt findings addressing that requirement.

B. BZO 17.20.040(B)(2)

BZO 17.20.040(B)(2) requires that siting of structures in the CD-1 zone should "minimize negative impact on the ocean views of existing structures on abutting lots" and that "new structures should be built in line with other existing structures and not extend further out into those viewscapes." *See* n 6. The challenged decision concludes that the

proposed structure "is in line with the structures on abutting properties." Record 10. Petitioners argue that because the proposed structure is considerably taller than the structures to the north and south, it does not comply with BZO 17.20.040(B)(2).

Intervenor responds that the height of structures is governed by BZO 17.20.090, and that BZO 17.20.040(B)(2) is concerned with the *siting* of structures to protect views from abutting properties, not the *height* of structures. According to intervenor, petitioners' properties do not abut the subject property, and evidence in the record supports the city's conclusion that the proposed structure is "in line" with existing structures to the north and south on abutting lots.[8] We agree with intervenor that BZO 17.20.040(B)(2) governs the siting of the proposed structure, not the height of that structure, and that petitioners' challenges to the city's finding of compliance with BZO 17.20.040(B)(2) do not demonstrate a basis for reversal or remand.

C. BZO 17.20.090

Petitioners contend that the city erred in finding that the proposed structure complies with BZO 17.20.090, which limits the height of the proposed structure to 24 feet, because the western wall of the structure is 31.5 feet in height, measured from the existing below-grade foundation.

The city measured the structure's height based on the average elevation of each side in relation to the native grade, consistent with the pertinent definitions of "height of building or structure" and "grade" at BZO 17.04.030. The city found that the average elevation of each side, including the west side as measured from the native grade below the bluff, was 23.5 feet, and therefore within the 24-foot height restriction. Record 47.

[8]Petitioners do not contend that their properties are "abutting lots" for purposes of BZO 17.20.040(B)(2). However petitioners do argue under the third assignment of error that in order to properly implement Goal 5, BZO 17.20.040(B)(2) must be understood to protect views from other than abutting lots. As discussed above, that argument is in essence a collateral attack on the sufficiency of the city's code to implement Goal 5.

Intervenor responds that petitioners failed to raise an issue regarding height calculations during the proceedings below, and thus that issue is waived. ORS 197.763(1).[9] In the alternative, intervenor argues that the record demonstrates that the proposed structure complies with the code height restriction. Petitioners do not respond to intervenor's waiver argument, or cite to evidence in the record indicating that this issue was raised below. Therefore, that issue is waived.

The second assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioners challenge the city's conclusion that the proposed structure is not within the Shoreland Overlay zone.

Petitioners explain that a new structure or an addition to an existing structure within the overlay zone is a conditional use, subject to conditional use criteria at BZO 17.92. BZO 17.76.030. According to petitioners, the city's comprehensive plan indicates that the eastern boundary of the overlay zone in this portion of the city follows "the top edge of the bluff." Petition for Review, Appendix 7. During the proceedings below, city planning staff apparently took the position that the west wall of the existing structure was proximate to the top edge of the bluff. However, staff concluded that the proposed construction would take place eastward of the top edge of the bluff and outside the overlay zone, and therefore the requirements of the zone did not apply. The city council accepted this view:

> "* * * Although portions of the subject property are located in the Shoreland Overlay zone, the portion of the property upon which the remodel would take

[9]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

> place is landward of the top of the bluff, and therefore [the applicant is] not required to obtain a Conditional Use Permit." Record 10.

Petitioners challenge this conclusion on several legal and evidentiary grounds. We reject petitioners' legal grounds without extended discussion.[10] With respect to petitioners' evidentiary challenge, we understand petitioners to argue the "top edge of the bluff" has both vertical and horizontal dimensions, and because the existing dwelling is built *into* the bluff and 10 feet *below* the top of the bluff, a portion of the existing structure is therefore within the overlay zone. Because the proposed addition will be built on top of the existing structure, including the western foundation, petitioners argue, a portion of the addition is also within the overlay zone. Further, petitioners note that the site plan proposes a bay window and a large deck that appear to extend westward of the west wall of the addition and, presumably, the west wall of the existing foundation. Record 86. Thus, petitioners argue that even if the city correctly located the zoning boundary in relation to the west wall of the existing and proposed structures, the applicant proposes structures that extend into the overlay zone.

Intervenor responds that the city correctly found that the existing and proposed structures are outside the overlay zone. According to intervenor, the city's zoning map indicates that the overlay zoning boundary is considerably westward of the existing structure, perhaps not even on the subject property at all.

We cannot tell, from this record, where the overlay zoning boundary is or how the city determined that the existing and proposed structures are outside that boundary. The portion of the zoning map to which intervenor cites us does not clearly demarcate the zoning

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[10]Petitioners cite to BZO 17.104.010, which states that where a zone boundary divides a single parcel into two zones, the entire parcel shall be placed in the zone that accounts for the greater area of the parcel, by means of a zoning boundary adjustment or zone change. Even if BZO 17.104.010 applies to *overlay* zoning boundaries, which seems doubtful, that would only suggest that the entire parcel *should* be in the Shoreland Overlay zone. Petitioners do not explain why that provision has any effect on where the Shoreland Overlay zone is *presently* located. In addition, petitioners advance a number of policy arguments based on Goal 17, to the effect that the protections of the overlay zone should extend beyond the zone boundaries. However, nothing cited to us in the applicable law supports that view.

boundary. Based on the parties' descriptions of the bluff, it appears that the eastern flat portion of the bluff transitions into a slope somewhere near the western wall of the existing structure. Nothing in the decision or record cited to us indicates where the "top edge" of the bluff is located, or where the existing structure is located relative to the "top edge" of the bluff and therefore the zoning boundary. Further, nothing in the city's decision appears to address whether the proposed bay window and deck extend into the overlay zone, as petitioners allege. For these reasons, we agree with petitioners that the city's conclusion that the proposed addition is not within the overlay zone is not supported by substantial evidence.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in approving the proposed development, because the city failed to require intervenor to remove the kitchen in the existing dwelling, with the result that, according to petitioners, the entire structure will constitute a "duplex" under the city's code rather than a single-family dwelling. Petitioners note that a duplex is a conditional use in the CD-1 zone, and argue that the city thus erred in processing and approving the proposed development as a permitted use.

Petitioners' view that the entire structure will constitute a "duplex" unless the city requires that the older kitchen be removed is based on a definition of "dwelling unit" in a 1994 codification of the city's zoning ordinance. Petitioners concede that under the city's code as applied in this case, the entire structure is not a "duplex" as that term is defined at BZO 17.04.030.[11] However, petitioners contend that the codification of the zoning ordinance applied in this case "has not been adopted by the Council through a public hearing

[11]Although the parties provide no assistance on this point, as far as we can tell the BZO applied in this case is a 2000 codification of previously adopted ordinances, including the 1994 ordinance cited by petitioners as well as 1996, 1997 and 1999 ordinances that apparently amended portions of the 1994 ordinance. Possibly the 1994 definition that petitioners rely upon was deleted by subsequent ordinances and replaced by the current set of definitions. That definition does not appear in the 2000 codification.

process or acknowledged by LCDC [Land Conservation and Development Commission]." Petition for Review 32. We understand petitioners to contend that the city must therefore apply the 1994 codification of the code, under which petitioners assert the proposed development constitutes a duplex.

Intervenor responds, and we agree, that petitioners have not demonstrated that the city approved development in a manner contrary to the applicable zoning ordinance. Petitioners provide no substantiation for their claim that the city council has not adopted the pertinent terms of the BZO applied in this case, or that the cited definition from the 1994 codification is still applicable. There is no dispute that under the BZO applied in this case, the proposed development is not a duplex.

The fifth assignment of error is denied.

SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

Petitioners contend that the city erroneously identified the city's action on intervenor's application for plan review under BZO chapter 17.20 as a limited land use decision, as defined at ORS 197.015(12)(b).[12] In the alternative, petitioners argue that if the challenged decision is correctly characterized as a limited land use decision, the city erred in failing to apply certain comprehensive plan policies and in failing to follow the statutory and code procedures for a limited land use decision.

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[12]ORS 197.015(12) provides in relevant part:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "* * * * *
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> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

A. Limited Land Use Decision

Under the sixth assignment of error, petitioners argue that the challenged decision is not a limited land use decision because it does not involve "a use permitted outright." ORS 197.015(12)(b). Under BZO 17.20.020, petitioners argue, a single-family dwelling is "permitted outright" only if the city finds that it "promotes the purpose of the zone," that is, if the dwelling "maintains" the "scenic and unique qualities" of the city's oceanfront. BZO 17.20.010; 17.20.020. Similarly, petitioners argue that, because a portion of the proposed development is within the Shoreland Overlay zone, it is a conditional use and thus not a use permitted outright.[13]

As discussed above, remand is necessary for the city to (1) address the applicability of and if necessary adopt findings of compliance with BZO 17.20.020 and (2) substantiate the city's conclusion that the proposed development is outside the Shoreland Overlay zone and thus is not a conditional use subject to conditional use criteria at BZO 17.92. In this posture we cannot resolve whether the city's decision is a limited land use decision.[14]

Nonetheless, we deny the sixth assignment of error because petitioners make no effort to explain why the city's error, if any, in characterizing the challenged decision as a limited land use decision is itself a basis for reversal or remand. An erroneous characterization of a decision as a limited land use decision may result in reversal or remand where, for example, the decision is properly characterized as a "permit" under ORS 215.402(4) or 227.160(2) and the local government fails to provide the hearing and other procedures required in issuing a

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[13]Petitioners also argue under this assignment of error that the proposed development is not for an outright permitted use because the development constitutes a duplex, a conditional use in the CD-1 zone. We reject that argument for the reasons expressed above, in discussing the fifth assignment of error.

[14]We note that whether a decision is properly characterized as a limited land use decision under ORS 197.015(12)(b) generally depends on whether and how the local government's regulations categorize the proposed use, and whether the local government can *deny* the proposed use under its regulations, as opposed to simply *regulate* the physical characteristics of the use. *Fechtig v. City of Albany*, 27 Or LUBA 480, 485, *aff'd* 130 Or App 433, 882 P2d 138 (1994). However, in the current posture of this case, we need not and cannot determine whether the challenged decision is a limited land use decision.

permit under those statutes. However, in such a case, the petitioner must assign error to the local government's failure to provide the hearing and other procedures in order to obtain reversal or remand. *Fechtig*, 130 Or App at 436-37. In the present case, petitioners do not assign error to the city's failure to follow the procedures applicable to a permit. Nor do petitioners allege in this assignment of error any other basis to reverse or remand the challenged decision, even assuming the city improperly characterized it as a limited land use decision.

B. ORS 197.195

Petitioners contend that if the challenged decision is a limited land use decision, the city erred in failing to apply its comprehensive plan in approving the proposed development, pursuant to the first sentence of ORS 197.195(1).[15]

As noted above, it is not clear whether the challenged decision is or should be properly characterized as a limited land use decision. Notwithstanding that uncertainty, we resolve this assignment of error because the city treated the decision as a limited land use decision, and to clarify matters on remand. Intervenor responds, and we agree, that petitioners' argument ignores the last sentence of ORS 197.195(1), which clearly states that the city's comprehensive plan does *not* apply to limited land use decisions if the city has not incorporated the plan into its land use regulations. Petitioners do not contend that the city has incorporated its comprehensive plan into its land use regulations.

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[15]ORS 197.195(1) provides, in relevant part:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. * * * Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. *If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision*." (Emphasis added.)

C. ORS 197.195(3) and BZO 17.120.070

Finally, petitioners contend that if the challenged decision is a limited land use decision, the city failed to comply with the procedures specified for such decisions at ORS 197.195(3) and BZO 17.120.070. Again, we resolve this assignment of error notwithstanding uncertainty as to the proper characterization of the decision, because the city treated it as a limited land use decision, and to clarify matters on remand.

ORS 197.195(3) prescribes certain procedures that the city must follow in making a limited land use decision, specifically notice and a 14-day comment period.[16] BZO 17.120.070 provides additional procedural requirements, specifically that the staff report, if one is prepared, be available throughout the 14-day comment period.[17] Petitioners contend that the notice provided in this case violated ORS 197.195(3)(c)(C) and (I) because

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[16]ORS 197.195(3)(c) provides in relevant part:

> "The notice and procedures used by local government shall:
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> "(A) Provide a 14-day period for submission of written comments prior to the decision;
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> "* * * * *
>
> "(C) List, by commonly used citation, the applicable criteria for the decision;
>
> "* * * * *
>
> "(I) Briefly summarize the local decision making process for the limited land use decision being made."

[17]BZO 17.120.070 provides in relevant part:

> "Written notice for a public land use review or limited land use decision shall be provided to, where applicable, owners of property within one hundred (100) feet of the entire contiguous site[.]
>
> "A. This notice shall be mailed fourteen (14) days in advance of the meeting at which the review is to occur. This notice provides a fourteen (14) day comment period as specified in ORS 197.195(3)(c)(A).
>
> "* * * * *
>
> "C. The application and staff report (if one is prepared) are to be available throughout the comment period for review and copies shall be available at cost."

it failed to set forth the applicable criteria and summarize the decision making process. Further, petitioners argue that the staff report was not available during most of the 14-day comment period, and was only made available on May 17, 2001, seven days before the planning commission's May 24, 2001 meeting. Petitioners contend that these procedural errors prejudiced their substantial rights, because without a listing of criteria and without the benefit of the staff report during most of the comment period, petitioners were limited in preparing their comments. ORS 197.835(9)(a)(B).

Intervenor responds, and we agree, that petitioners have not demonstrated that the city's procedural errors prejudiced petitioners' substantial rights. Petitioners submitted and the city accepted three sets of written comments to the planning commission, the last of which was submitted seven days after the staff report became available. The staff report clearly identifies BZO 17.20 as applicable criteria. Petitioners' written comments contain discussions of zoning ordinance and comprehensive plan provisions that petitioners believed applied to the proposed use, including the code provisions governing the CD-1 zone. In addition, petitioners' appeal document to the city council and their written and oral testimony to the city council contain extensive discussion of applicable criteria, including BZO 17.20. Whatever prejudice to petitioners' substantial rights that might have occurred before the planning commission was cured by the opportunity to present testimony directed at the applicable criteria before the city council. *See Murphey v. City of Ashland*, 19 Or LUBA 182, 189-90 (1990) (city council review of planning commission decision may cure procedural errors by planning commission).

The sixth, seventh and eighth assignments of error are denied.

NINTH ASSIGNMENT OF ERROR

Petitioners argue that the city's decision fails to address a number of issues discussed above in the foregoing assignments of error. As far we can tell, this assignment of error is entirely duplicative of earlier assignments of error. Accordingly, it is denied.

TENTH ASSIGNMENT OF ERROR

BZO 17.120.130 sets forth the hearing procedures applicable to the hearing conducted before the city council in this case. BZO 17.120.130(E) and (G) allow the proponent to conduct his or her case first, followed by the opponent. BZO 17.120.130(J) then provides that the city shall "[a]llow first the proponent and then the opponents to offer rebuttal evidence and testimony."

Petitioners contend that the city failed to offer petitioners an opportunity for rebuttal during the proceedings before the city council. However, petitioners do not allege that they requested an opportunity for rebuttal, or objected to the city's failure to comply with BZO 17.120.130(J). It is well-established that where a party has an opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226, 232 (1993); *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980).

The tenth assignment of error is denied.

The city's decision is remanded.