BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONFEDERATED TRIBES OF COOS,
LOWER UMPQUA AND SIUSLAW
INDIANS OF OREGON,
Petitioner,

vs.

CITY OF COOS BAY,
Respondent.

LUBA No. 2002-016

FINAL OPINION
AND ORDER

Appeal from City of Coos Bay.

Brett V. Kenney, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were the Native American Program and Oregon Legal Services.

C. Randall Tosh, Coos Bay, filed the response brief and argued on behalf of respondent. With him on the brief was Corrigall, McClintock & Tosh, LLP.

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

AFFIRMED 07/17/2002

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

Petitioner appeals the city's denial of a request to vacate portions of two city streets.

STANDING

The city challenges petitioner's standing to appeal, arguing that petitioner appeared below only in the capacity of an agent of the parcel's owner, and not on its own behalf. *See Sorte v. City of Newport*, 25 Or LUBA 828, 830 (1993) (intervenor who appeared solely as agent for another did not "appear" on her own behalf and does not have standing before LUBA). The city cites to the letter from the parcel owner authorizing petitioner to request street vacations as evidence that petitioner's appearance before the city was only as an agent of the parcel owner. Record 32.

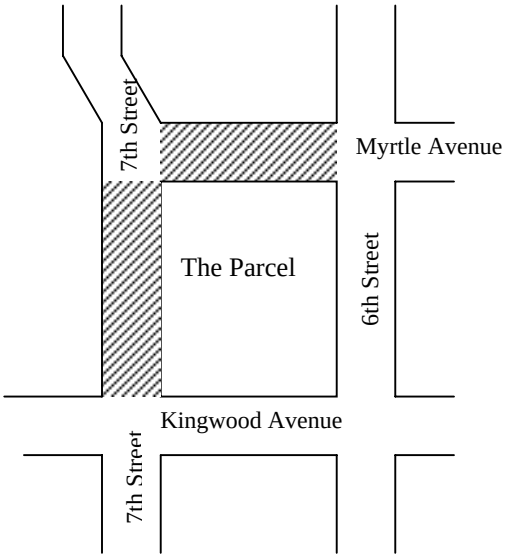
The letter at Record 32 does not purport to authorize petitioner to act as an agent of the parcel owner, and nothing else cited to us in the record suggests that petitioner's appearance was not on its own behalf. Petitioner filed the application leading to the challenged decision, and the persons who appeared as its representatives throughout the proceedings below clearly appeared on petitioner's behalf and not the parcel owner's. The city's challenge to petitioner's standing is without merit.

FACTS

Petitioner proposes development of a 26-lane bowling alley and recreation facility on two contiguous vacant city tax lots (the parcel), which total approximately two acres in size. The proposed development is a permitted use in the pertinent zone. The surrounding area is a mix of industrial, commercial and residential uses.

The subject parcel comprises a single city block, bordered by Sixth Street on the east, Seventh Street on the west, Myrtle Avenue on the north, and Kingwood Avenue on the south. Sixth Street and Kingwood Avenue are improved city streets, and currently provide access to the parcel. The portions of Seventh Street and Myrtle Avenue bordering the parcel are

unimproved rights-of-way, 60 feet in width. It is those unimproved portions of Seventh Street and Myrtle Avenue that petitioner proposes to vacate. The purpose of the road vacation is to enlarge the parcel so that the proposed development can be sited consistent with federal restrictions on development within a floodplain. Seventh Street is improved and open to traffic to the north and south of the section of Seventh Street that petitioner proposes to vacate. Myrtle Avenue is improved east of the portion of Myrtle Avenue that petitioner proposes to vacate. The following figure depicts the relevant area:



The city planning commission conducted a public hearing on December 11, 2001. The city water board submitted a letter stating that it did not oppose the vacation request, as long as a 30-foot easement is retained in the Myrtle Avenue right-of-way for any future water mains. The planning commission voted to recommend approval, on condition that a 30-foot easement for water mains was retained. On December 12, 2001, the following day, petitioner submitted a memorandum from the water board, stating that, after reviewing the proposed site plan, the water board did not require a water main easement. On December 13,

2001, the planning commission reduced its recommendation to writing, including the condition, among others, that the city retain an easement for future water mains.

On December 17, 2001, the city notified petitioner that a public hearing was scheduled before the city council on the following day, December 18, 2001. On that date, the city council conducted a hearing at which it heard testimony from petitioner's representatives and opponents. The city council then closed the hearing, and continued the proceeding for deliberations on January 2, 2002. After reconvening on that date, the city council deliberated and voted to deny the requested street vacation, on the grounds that petitioner had failed to establish that the proposed street vacation would not prejudice the public interest.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Coos Bay Land Development Ordinance (LDO) 5.18 governs road vacation proceedings within the city. In relevant part, LDO 5.18(4) requires that the planning commission conduct a public hearing on a road vacation petition in accordance with all provisions of LDO 5.3, which implements the requirements for public hearings set forth at ORS 197.763. Pursuant to LDO 5.18(6), the planning commission then forwards its recommendation to the city council, which reviews the record and takes action on the petition, based on criteria set forth in that provision.[1]

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[1]LDO 5.18(6) provides, in relevant part:

> "The Planning Commission shall make a recommendation to the City Council to approve, conditionally approve, or deny a request for vacation. The Council shall review the record and affirm, amend, or reverse the Commission recommendation, or remand the matter back for further consideration.
>
> "Actions of the Commission and the Council shall be taken only after adopting findings or statements of fact which substantiate ALL of the following conclusions:
>
> "1. Vacation initiated by private property owner:

Petitioner does not allege any error in the notice or proceedings before the planning commission. However, petitioner contends that the notice of the December 18, 2001 city council hearing consisted only of a list of agenda items, including a "Public Hearing and Enactment of an Ordinance Approving Street Vacations for Portions of Myrtle Avenue and 7th Street * * *." Supplemental Record 3. Petitioner contends that notice of the hearing before the city council must comply with, and fails to comply with, ORS 197.763(3)(b), (e), (f) and (j).[2] *But see Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 316 (1993) (the hearing notice content requirements of ORS 197.763(3) do not apply to

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"A. Consent of the affected property owners has been obtained.

"B. Notice has been duly given.

"C. The proposal does not conflict with the comprehensive plan or other ordinances.

"D. The public interest will not be prejudiced by the vacation."

[2]ORS 197.763(3) provides in relevant part:

"The notice provided by the jurisdiction shall:

"* * * * *

"(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

"* * * * *

"(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

"(f) Be mailed at least:

"(A) Twenty days before the evidentiary hearing; or

"(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing; [and]

"* * * * *

"(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

a non-evidentiary hearing before the governing body on appeal of a lower body's decision). According to petitioner, the city's failure to provide timely and adequate notice of the city council's December 18, 2001 hearing prejudiced petitioner's substantial rights, because petitioner was not informed of the applicable approval criteria, and was unable to participate effectively in the city council hearing. Further, petitioner contends that the notice provided was misleading, in that it suggests that the city council was going to approve the proposed vacation request. Finally, petitioner argues that, pursuant to LDO 5.18(6), the city council's review of the planning commission recommendation is on the record, and the city council therefore erred in conducting an evidentiary hearing on December 18, 2001. Petitioner submits that these procedural errors prejudiced its substantial rights to a full and fair hearing.[3]

The city concedes that it committed procedural error, at least in conducting a second evidentiary hearing before the city council. However, the city argues that, even presuming that any procedural error prejudiced petitioner's substantial rights, petitioner had an opportunity at the city council hearing to object to each of the procedural errors alleged in the first assignment of error, and failed to do so. In addition, the city disputes that any procedural error prejudiced petitioner's substantial rights. The city argues that petitioner was well aware of the applicable criteria at LDO 5.18(6), because the city's notice of the planning commission hearing listed those criteria. Record 87. According to the city, despite the allegedly defective notice of the city council hearing, petitioner appeared at the hearing with several representatives and experts and made an evidentiary presentation similar to the one it made to the planning commission. The city argues that petitioner has failed to demonstrate

[3]ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." The "substantial rights" referenced in ORS 197.835(9)(a)(B) include the right of the petitioner to an adequate opportunity to prepare and submit its case and to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

that allowing petitioner more time between hearings or providing a more adequate notice would have made any difference in its presentation. Similarly, the city contends that petitioner has failed to demonstrate that it was misled by the notice provided, or suffered prejudice to its substantial rights thereby, particularly given the plain language of LDO 5.18(6), which provides that the city council will review the planning commission's recommendation and affirm, amend, reverse or remand the planning commission's decision. Finally, the city argues, to the extent petitioner alleges prejudice from the city's acceptance of opposing testimony at the December 18, 2001 hearing, petitioner failed to request any opportunity for rebuttal or the opportunity to continue the proceeding to present additional evidence.

We need not decide whether the city committed procedural error as alleged, or that such errors prejudiced petitioner's substantial rights. 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). There is no dispute in the present case that petitioner's representatives, including the tribal administrator, tribal planning director, and its architect, appeared at the December 18, 2001 city council hearing and testified in support of the proposed road vacations. Record 28. At no time did petitioner's representatives object to any of the alleged procedural errors.

At oral argument, petitioner contended that its failure to object to the city's procedural error is excused by ORS 197.835, which provides in relevant part:

> "(3) Issues [that may be presented to LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.
>
> "(4) A petitioner may raise new issues to [LUBA] if:

> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or
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> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

It is not clear whether petitioner intends to invoke ORS 197.835(4)(a) or (b), or both. We do not see that either is of any assistance. Where ORS 197.835(4)(a) and (b) apply, they allow petitioner to raise new issues before LUBA, notwithstanding failure to comply with the "raise it or waive it" rule at ORS 197.763(1) and ORS 197.835(3). *See Mulford v. Town of Lakeview*, 36 Or LUBA 715, 718-19 (1999) (rejecting a waiver challenge to new issues raised before LUBA, because ORS 197.835(4)(a) and (b) apply). In other words, ORS 197.835(4) operates as a limited defense to a waiver challenge under ORS 197.763(1) and 197.835(3). The city does not argue that any issue in this case is waived for failure to comply with ORS 197.763(1). While the "raise it or waive it" requirement at ORS 197.763(1) has a similar purpose to the requirement that a party with an opportunity to object to a procedural error must do so in order to seek remand based on that error, the two requirements share no antecedents and otherwise have no relationship with each other. *See Murphy Citizens Advisory Comm.*, 25 Or LUBA at 317 n 6 (the "raise it or waive it" provisions of ORS 197.763(1) and 197.835(3) do not supersede the requirement that parties raise objections to procedural errors when it is possible to do so). Consistent with that view, in *Mulford* we denied a procedural assignment of error for failure to object below, notwithstanding our previous finding that ORS 197.835(4)(a) and (b) applied to allow petitioner to raise "new issues." 36 Or LUBA at 722. In short, even assuming the predicate conditions for application of ORS 197.835(4)(a) or (b) apply in this case, the statute does not

obviate the requirement that a party with an opportunity to object to a procedural error must do so in order to seek reversal or remand based on that error. Petitioner does not dispute that it had an opportunity to object, and did not.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The city's decision denied the vacation request because it concluded, for three reasons, that petitioner had failed to demonstrate that "the public interest will not be prejudiced by the vacation," as required by LDC 5.18(6)(1)(D). The three cited reasons are that (1) the rights-of-way might be needed for future traffic flow and access to the area; (2) the rights-of-way might be needed to place future water mains; and (3) once placed in trust, regaining the rights-of-way from the federal government would be difficult or impossible. Petitioner argues that the city's findings misconstrue the applicable law, are inadequate, and are not supported by substantial evidence.

A. Future Traffic Flow and Access

With respect to future traffic flow and access, the city's findings of fact note that the city recently denied a request to vacate the same portion of Myrtle Avenue at issue in this case, and a nearby portion of Seventh Street, on the grounds that the proposed vacation could create inconvenient access and traffic flow problems in the area for future development. The city finds that the vacation proposed in this case would similarly affect possible future traffic flow and access in the area. Based on those findings, the city concludes that petitioner failed to demonstrate that the public interest will not be prejudiced by the proposed vacation.[4]

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[4]The city's findings state, in relevant part:

> "9) In May 2000, Petition No. 2000-00047 was filed by Steve Plinski to vacate Myrtle Ave. north of 6th St. and a portion of North 7th St. north from its intersection with Myrtle Ave. for a distance of [225] feet.
>
> "10) Petition No. 2000-00047 was denied in part by the Planning Commission, based on a finding that 'the long term effect of vacating North 7th St. and Myrtle Ave. between

Petitioner first argues that the city appears to presume that all street vacations prejudice the public interest unless an applicant proves otherwise, thus placing a nonexistent burden on the applicant to overcome that presumption. Petitioner contends that this view of LDO 5.18(6)(1)(D) misconstrues that provision.

Further, petitioner argues that the city's findings fail to state what facts support its conclusion that the proposed vacation would affect possible future traffic flow and access, or explain why such impacts would prejudice the public interest. According to petitioner, the undisputed evidence in the record is that all property in the area would continue to have access if the rights-of-way were vacated as proposed. Petitioner also argues that the city

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> North 6th St. and North 7th St. has not been addressed. Vacation of these streets could create inconvenient access and traffic flow problems for future development.'
>
> "* * * * *
>
> "12) North 7th St. is an opened street from its intersection with Myrtle Ave. to the north and its intersection with Kingwood Ave. to the south. The only portion of North 7th which is not opened is the area proposed to be vacated. Myrtle Ave. is an opened street from 6th St. east to Highway 101.
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> "13) Vacation of North 7th St. between Myrtle Ave. and Kingwood would affect possible future traffic flow in the area to the north and south of the right-of-way proposed to be vacated. Vacation of Myrtle Ave. between North 6th St. and North 7th St. would affect potential access to the existing opened right-of-way on North 7th St. No evidence was submitted by the Petitioner which evaluated the potential effect on traffic flows or access resulting from the proposed vacation of a portion of North 7th St. and Myrtle Ave. set forth in the Petition.
>
> "* * * * *
>
> "16) Under [LDO 5.18(6)(1)], a petition for vacation initiated by a private property owner may not be granted unless the Petitioner can show that 'the public interest will not be prejudiced by the vacation.' The public interest may be prejudiced by a vacation in many ways, including the removal of actual or potential access by the general public or by abutting property owners, or the impeding of efficient development of the area. Likewise, the public interest may be prejudiced by long-term changes in the City's ability to promote efficient development by using right-of-way to locate municipal utilities.
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> "17) The proposed vacation [of] Myrtle Ave. between North 6th St. and North 7th St., and North 7th St. between Kingwood Ave. and Myrtle Ave. * * * will affect future traffic flows and access to the area. The Petitioner has failed to produce any evidence which addresses these future uses and which is critical to determine whether the public interest will be prejudiced by the vacation." Record 5-6.

erred in relying on its previous denial of an adjacent landowner's similar vacation request. Petitioner cites to evidence that that denial was based on concerns that the proposed vacation would adversely affect access and traffic flow for "future development" in the area. Petitioner argues that the parcel on which it proposes development is the only undeveloped site in the area and, given that petitioner has initiated its own vacation request, any concerns regarding access or traffic flow to support future development of *that* parcel are no longer a factor.

The city responds that its decision does not misconstrue LDO 5.18(6)(1)(D), or impose an impermissible burden on petitioner. According to the city, the applicant bears the burden of proof, in this case the burden of demonstrating that the public interest will not be prejudiced by the proposed vacation.[5] The city did not apply a presumption of prejudice; instead, the city argues, it found that petitioner had failed to carry its burden. We agree with the city that it did not misconstrue the applicable law or impose an impermissible burden on petitioner to establish compliance with LDO 5.18(6)(1)(D).

The city further argues that the challenged findings, including the key conclusion that petitioner failed to carry its burden, are adequate and supported by substantial evidence. According to the city, the proper question in vacating a public right-of-way under a "public interest" standard is whether the action is taken in the public interest or only for private benefit. The city argues that petitioner's only justification for the proposed vacation was to increase the size of the parcel in order to accommodate petitioner's proposed development, *i.e.*, a private benefit, and that petitioner failed to submit *any* evidence that related to whether

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[5]The city cites to LDO 5.3(6), which provides in pertinent part:

> "1. The burden of proof is on the proponent. The more drastic the change or the greater the impact of the proposal in the area, the greater the burden on the proponent.
>
> "2. The proposal must be supported by proof that it conforms to the applicable elements of the comprehensive plan and to applicable provisions of this ordinance, especially the specific criteria set forth for the particular type of decision under consideration."

the vacation would not prejudice the "public interest." In the face of that failure, the city's decision cites and relies on evidence suggesting that the proposed vacation would *not* be in the public interest, and concludes that petitioner failed to meet its burden of proof on that issue. In Findings 12 and 13, the city points out, the city council found that Seventh Street is open to the north and south of the subject parcel, and that the proposed vacation would "affect possible future traffic flow in the area to the north and south." *See* n 4. The city council similarly found that Myrtle Avenue is currently open from Sixth Street east to Highway 101, and that vacation of the proposed unopened portion of Myrtle Avenue would affect potential future access to the existing opened portion of Seventh Street. *Id.* In Findings 9 and 10, the city council found that a previous similar vacation request was denied in part to prevent "inconvenient access and traffic flow problems for future development." *Id.* We understand the city to argue that the city council found that approval of the instant vacation request would also cause access and traffic flow problems for future development.

In bringing an evidentiary challenge to a local government's denial, the petitioner must show that the evidence in the record demonstrates that the proposed use complies with applicable criteria as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 641-42 (1995). In other words, the petitioner must establish that the evidence is such that a reasonable trier of fact could only conclude that the proposal complies with applicable criteria. *Horizon Construction, Inc.*, 28 Or LUBA at 641.

With respect to findings, ORS 227.173(1) and (3) require the city to base approval or denial of a permit on standards and criteria set forth in the zoning ordinance, accompanied by a brief statement that explains the relevant criteria, states the facts relied upon, and explains the justification for the decision based on the criteria and facts set forth. Findings of noncompliance with applicable criteria must, at a minimum, suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application

will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Eddings v. Columbia County*, 36 Or LUBA 159, 162 (1999).

We agree with the city that petitioner has not demonstrated the city's decision is reversible on evidentiary grounds or for inadequate findings. Finding 16 states the city council's understanding of the "public interest" standard, specifically that the public interest may be prejudiced by a vacation in several ways, "including the removal of actual or potential access by the general public or by abutting property owners, or the impeding of efficient development of the area." Record 6. As relevant here, the city apparently views the public interest standard to be satisfied if the record shows that potential future development in the area will not require retention of the right-of-way, for reasons of either access or traffic flow. Petitioner makes no effort to demonstrate that that view of the LDO 5.18(6)(1)(D) "public interest" standard is reversible under the deferential standard of review we must apply to a governing body's interpretation of local land use regulations. ORS 197.829(1).[6] Under that interpretation, the city could find, and did find, that petitioner had failed to submit evidence demonstrating that the public interest standard is met, *i.e.*, evidence that the city will not need to retain the pertinent rights-of-way to accommodate future development.[7]

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[6]ORS 197.829(1) provides, in relevant part:

> "[LUBA] 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[.]"

[7]The public interest standard at LDO 5.18(6)(1)(D) is framed as a negative. Proving a negative is notoriously difficult. Arguably, an interpretation of LDO 5.18(6)(1)(D) that made it impossible under any circumstances to satisfy that standard might well be reversible under ORS 197.829(1). For example, a standard interpreted to require that a street vacation request must be denied if it would result in loss of the city's right-of-way is a standard that could never be satisfied. Be that as it may, the public interest standard as interpreted here does not present such problems. It is not obvious to us why petitioner could not satisfy the standard, as

That finding adequately explains the city's basis for denial and, given the state of the evidence in the record relating to the public interest standard, is not reversible on evidentiary grounds.

Petitioner's only arguments to the contrary are its assertions that the subject parcel is the only undeveloped property in the area, and that its current plans for developing that parcel do not require, in petitioner's opinion, retention or improvement of the disputed rights-of-way in order to provide access to the parcel or adequate traffic flow to serve the proposed development. Petitioner does not substantiate its assertion that its parcel is the only undeveloped property in the area, but even assuming that is the case, petitioner does not explain why the estimated access and traffic requirements of *currently* proposed development establish that potential future development in the area will not require that the right-of-way be improved, for reasons of either access or traffic flow. Petitioner or the property owner may ultimately develop the parcel very differently than is currently proposed. Similarly, currently developed properties in the area may be redeveloped. Those two possibilities aside, the city might reasonably conclude that it would prejudice the public interest to eliminate the possibility of connecting the two open portions of Seventh Street, and eliminate the possibility of connecting Myrtle Avenue to Seventh Street, even though all current and potential development in the area would be adequately served if those connections were never made.

In short, petitioner has failed to demonstrate either that the city's findings are inadequate or that the evidence is such that a reasonable trier of fact could only conclude that the proposed vacation satisfies LDO 5.18(6)(1)(D).

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interpreted, by submitting traffic counts and analyses of likely development scenarios demonstrating that potential future development in the area is unlikely to require that the city retain the pertinent rights-of-way.

B. The City's Other Reasons

We need not address petitioner's findings and evidentiary challenges to the city's remaining reasons for denial. To support denial of a land use application, the local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc.*, 28 Or LUBA at 635. We concluded above that petitioner failed to demonstrate error in one of the city's bases for denial. Therefore, no purpose would be served by addressing the challenges to the remaining bases.

The second and third assignments of error are denied.

The city's decision is affirmed.