BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RON SHAFFER and LINDA JO SHAFFER,
Petitioners,

vs.

CITY OF HAPPY VALLEY,
Respondent.

LUBA No. 2002-159

FINAL OPINION
AND ORDER

Appeal from the City of Happy Valley.

Paul Norr, Portland, filed the petition for review and argued on behalf of petitioners.

Christopher A. Gilmore, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Beery and Elsner, LLP.

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

REMANDED 05/15/2003

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 a city council decision affirming, with modifications, a planning commission decision that approves a preliminary subdivision plat.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief, pursuant to OAR 661-010-0039.[1] The reply brief responds to four alleged "new matters" in the response brief: (1) an assertion that the city council's final decision consists of a different set of documents than petitioners identify in the petition for review; (2) a dispute regarding the applicable version of the city's Land Development Code (LDC) 2.07; (3) an assertion that petitioners waived certain issues by failing to raise them before the planning commission; and (4) an assertion that petitioners have not demonstrated that alleged procedural errors prejudiced their substantial rights. In support of the reply brief, petitioners' motion sets forth four reasons for allowing the reply brief.

The city objects that two of four reasons for allowing the reply brief are insufficient. It is not clear to us whether the city concedes that the other two reasons are sufficient, or the extent to which the city disputes that the reply brief is confined to "new matters" raised in the response brief. We conclude that the four matters addressed in the reply brief are "new matters" raised in the response brief and are properly addressed in a reply brief. The proposed reply brief is allowed.

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[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

FACTS

The subject property is a 4.26-acre parcel zoned Residential, 7,000 square foot minimum (R-7). Surrounding lands are generally developed with residential uses. The property is bordered on the north by two parcels, tax lot 1300 and tax lot 1201. Petitioners own tax lot 1201. A creek and associated wetlands run through both tax lot 1300 and 1201.

On June 18, 2002, the applicant applied for preliminary plat approval to subdivide the subject property into 19 residential lots. The proposed plat, known as Option A, proposed a cul-de-sac and several flag lots. Record 449. The application included a wetland delineation indicating that the subject property does not include wetlands, but that a portion of petitioner's adjoining property consists of wetlands and associated buffer areas.

The planning commission conducted a hearing on the application September 24, 2002. In response to concerns raised by staff, the applicant proposed an alternative plat (Option B) with 17 lots and a through street that enters the property from the west and connects with an existing street to the south. Record 304. A staff report recommended approval of Option B. Both options A and B featured a 24-foot wide easement in favor of tax lot 1300. At the hearing, petitioners opposed both Options A and B, arguing that the southern portion of tax lot 1201 was effectively landlocked by a creek on the property, and that neither plat offered access for future development of the southern portion of their property. On October 1, 2002, the planning commission issued a written decision approving Option B, with findings and conditions of approval. The findings state in relevant part that "based on best information [petitioner's property is] a wetland and thus undevelopable," and accordingly the planning commission did not require that the applicant provide access to petitioner's property. Record 232. The October 1, 2002 planning commission decision also incorporated the findings within the September 24, 2002 staff report.

Petitioners and others appealed the planning commission decision to the city council, which held a hearing November 5, 2002. A staff report dated November 5, 2002,

recommended that the city council deny the appeal. Record 62-66. At the hearing, petitioners presented a report from a wetlands expert, and disputed the planning commission finding that the southern portion of their property was undevelopable.[2] As reflected in the minutes of the city council hearing, the city council voted to "uphold the decision of the Planning Commission with the amendment of the plat for road access for the benefit of [petitioners]. * * * The motion passed with a unanimous vote." Record 21.

On November 12, 2002, city staff issued a "Notice of Decision," which is signed by the city development director. Record 4-9. The "Notice of Decision" states in relevant part that "the City Council formally approved the subject application based upon findings included within the Staff Report November 5, 2002, public testimony and deliberations of the City Council." Record 4. The notice also states that the decision involved approval of a "19-lot Subdivision." The notice further states that the city council decision "shall be deemed final" if no appeal is filed with LUBA before December 2, 2002. *Id.* Attached to the "Notice of Decision" is an unsigned five-page document entitled "Findings On Grounds for Appeal." It states, in relevant part:

"**DECISION OF THE CITY COUNCIL**

> "Based on the findings in the Staff Report to the Planning Commission dated October 8, 2002 and the Staff Report to the City Council dated November 5, 2002, the City Council voted unanimously to uphold the decision of the Planning Commission and deny the appeal with the following additions to the Conditions of Approval * * *: [setting forth two conditions that in relevant part require access easements for the benefit of tax lot 1201]." Record 8.

This appeal followed.

FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR

The issue raised in the first assignment of error, and a threshold issue for this appeal, is what documents in the record, if any, embody the city council's final decision on the

[2] The report was submitted to LUBA as a supplemental record, pursuant to the Board's Order on Record Objections, dated February 24, 2003.

application for preliminary plat approval. Petitioners' first, third and fourth assignments of error presume that the "Notice of Decision" issued November 12, 2002 and the attached findings are the city council's final decision. Assuming that to be the case, petitioners point out several problems. First, as far as the record shows, neither the "Notice of Decision" nor the attached findings with the two additional conditions were submitted to, reviewed by, signed, or adopted by the City Council. According to petitioners, neither document was before the city council during the November 5, 2002 hearing, or at any time thereafter, and those documents do not and cannot represent the city council's decision. Petitioners contend that the city council's oral decision clearly required changes to the planning commission's decision with respect to access to petitioner's property. However, petitioner argues, the city council did not review or adopt the wording of the two conditions that appear in the "Findings on Grounds for Appeal," and thus those conditions were never effectively adopted or imposed as part of the city's final decision.

According to petitioners, there appear to be no other documents in the record that could possibly constitute the city council's final decision. As a result, petitioners contend in the first assignment of error, the city council failed to adopt a written decision all, much less one that includes the required written findings of fact and conclusions of law.

Alternatively, petitioners argue in the third and fourth assignments of error that to the extent the November 12, 2002 "Notice of Decision" and attached findings constitute the city council's decision that decision is inadequate, because the findings fail to address issues raised and evidence submitted below regarding the extent of wetlands on petitioners' property, whether that property can be developed, and the alleged need to provide access to facilitate future development.

The city concedes that the November 12, 2002 "Notice of Decision" is *not* part of the city council's final decision. The city also appears to concede that the attached document

"Findings on Grounds for Appeal," which includes two additional conditions of approval requiring easements in favor of petitioners, is not part of the city council's decision.[3]

However, the city disputes that the city council failed to adopt a final written decision. According to the city, the city council's decision is embodied in (1) the planning commission decision, which also incorporates the September 24, 2002 staff report, and (2) the November 5, 2002 staff report that was before the city council during its proceedings on that date. The city points out that the city council's action on the appeal was to "uphold" the planning commission decision. Record 21. The city contends that to "uphold" the planning commission's decision is equivalent to "adopting" that decision as the city council's own. Further, the city argues that the city council necessarily "adopted" the November 5, 2002 staff report, as evidenced by the November 12, 2002 "Notice of Decision," which states that the city council decision was "based" on the staff report and that the staff report was available upon request. Record 4.

Based on its above-described position concerning the documents that make up the city council's final decision, the city argues that petitioners' assignments of error that challenge the November 12, 2002 "Notice of Decision" and attached findings must be denied. In addition, the city argues that the city's decision must be affirmed because petitioners direct no assignment of error to the city council's *actual* final decision, *i.e.*, the planning commission decision and the November 5, 2002 staff report. Finally, the city argues that the question of whether the city council properly adopted a written decision is a procedural question, and therefore petitioners' assignments of error directed to that question must be denied, because petitioners' fail to allege any prejudice to their substantial rights. ORS 197.828(1)(d).

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[3] The city suggests that petitioners are entitled to "address the enforceability of the conditions [attached to] the 'Notice of Decision," but that that question "is outside the scope of this proceeding." Response Brief 11.

Turning to the last argument first, we note that petitioners argue that the city council's failure to reduce its oral decision to a written decision, including the requirement that the preliminary plat be amended to provide "road access" to petitioners' property, leaves petitioners to guess about what document expresses the city council's final decision and where the conditions are that implement the city council's modification with respect to access. In our view, petitioners' substantial rights include the right to a final written decision from the city council on their appeal of the planning commission decision. Petitioners' allegations that the city council effectively failed to adopt a decision on their appeal are sufficient to allege prejudice to their substantial rights.

Turning to the question of what documents constitute the city's decision, the parties appear to agree, and we also agree, that the November 12, 2002 "Notice of Decision" and the attached "Findings on Grounds for Appeal" are *not* the city council's final decision. There is absolutely nothing in the record suggesting that the city council adopted those documents as its decision or otherwise incorporated them into its decision, and they were not signed or approved by the city council.[4] We disagree with the city that the November 5, 2002 staff report is part of the city council's decision. No document in the record that is attributable to the city council expresses an intent to adopt or incorporate the November 5, 2002 staff report as part of the city council's final decision.[5]

The question of what documents *do* constitute the city council's final written decision is more problematic. The city appears to take the position that the planning commission

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[4] OAR 661-010-0010(3) defines "final decision" for purposes of LUBA's jurisdiction as a decision that "is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

[5] The statement in the Notice of Decision that the city council approved the application "based upon findings included within" the November 5, 2002 staff report are not sufficient to indicate that the city council adopted the November 5, 2002 staff report. In any case, the city council did not sign the Notice of Decision or the November 5, 2002 staff report.

decision constitutes the city's final written decision, as evidenced by the city council's oral vote on November 5, 2003 to "uphold" the planning commission decision. We reject that suggestion, for two reasons. First, once the planning commission decision was appealed to the city council, the planning commission decision could not become (or become part of) the city's final decision on the application, absent city council action. The requisite city council action on petitioners' appeal must be in writing. *See Noble v. City of Fairview*, 27 Or LUBA 649, 650 n 2 (while the written city council minutes may possibly constitute the city's final decision, the city council's *oral* vote is not a final decision appealable to LUBA). The planning commission decision may become *part* of the city council's final written decision only if the city council incorporates or adopts the planning commission decision as part of the city council decision. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992) (a local government decision maker may choose to incorporate all or portions of another document by reference into its decision, if it clearly indicates its intent to do so and identifies the document or portions so incorporated).[6]

Second, it is worth noting that the city council's oral vote did not simply "uphold" the planning commission decision. Rather, the city council's vote appears to have *modified* the planning commission decision by requiring that the preliminary plat approved by the planning commission be amended to provide "road access" for the benefit of petitioners. Record 21. In a sense, the city council partially *reversed* the planning commission's conclusion that the preliminary plat need not provide access to petitioners' property. Thus, even if we assume that the planning commission decision is *part* of the city council's decision, the planning commission decision clearly is not the entire city council decision.

[6] In some cases, where the local code so provides, local appeal to the governing body may be discretionary and the governing body may decline to consider the local appeal. Under such code provisions, the arguable effect of a governing body's decision to decline to consider a local appeal is to render the lower body's decision the final decision on the application. However, the present case does not involve such code provisions.

In short, petitioners are correct that if the city council's action on petitioners' appeal was not reduced to writing, the city council has not adopted a final decision on petitioners' appeal and, relatedly, on the application itself.[7] However, for the following reasons we conclude that the city council did adopt a final written decision. The only document we are cited to in the record that was approved by and is attributable to the city council are the minutes of the November 5, 2002 city council hearing, at Record 19-21. The lack of a more formal written decision by the final decision maker does not necessarily mean that no final decision has been made, although any defects or inadequacies that flow from adopting a written decision in that form may be a basis for reversal or remand. *See Weeks v. City of Tillamook City*, 113 Or App 285, 289, 832 P2d 1246 (1992) (city council action reflected in written minutes may constitute a final land use decision). Given the scarcity of alternatives, we conclude that the written minutes of the November 5, 2002 city council hearing are the city council's final written decision in this matter. Because the city council adopted a final written decision, the first assignment of error, which argues that the city council did not adopt a final written decision, must be denied.

The third and fourth assignments of error challenge the adequacy of the city council's decision, assuming that it consists of the November 12, 2002 "Notice of Decision" and attached findings. As noted, the city argues that these assignments of error must be denied, because they challenge the wrong documents and fail to challenge the city's "actual" decision, which the city views as a combination of (1) the planning commission decision and (2) the November 5, 2002 staff report.

Given the difficulty of identifying the city council's decision in this case, we do not fault petitioners for failing to consider the possibility that the decision might consist of

[7] Petitioners' argument suggests that we lack jurisdiction over the challenged decision, which as relevant here is confined to *final* decisions. However, given our conclusion below that the city council adopted a final decision, we do not have occasion to comment further on that suggestion.

documents other than the November 12, 2002 Notice of Decision and attached findings. That failure is directly attributable to the city council's inadequate identification of the city council's decision on petitioners' appeal. Further, the gravamen of the third and fourth assignments of error is that the city council's decision, however embodied in whatever documents, does not adequately address the issues raised regarding development of and access to petitioners' property. Finally, we note that the city's response brief has no trouble applying petitioners' arguments under the third and fourth assignments of error to the documents that the city views as constituting the final written decision. We conclude under these circumstances that it would be inappropriate to summarily reject petitioners' third and fourth assignments of error.

As noted, the third and fourth assignments of error challenge the adequacy of the city's resolution of the issues that petitioners raised regarding development of and access to their property. The city argues, and we are inclined to agree, that a city council's decision that "upholds" a planning commission decision may be understood in context to "adopt" or "incorporate" the planning commission decision as part of the city council's decision. However, applying that understanding in the present case does not materially assist us. As explained above, the city council's decision appears to modify or partially reverse the planning commission's decision on the issue of access to petitioners' property. Thus, viewing the city council's decision as adopting the planning commission's decision does little to resolve these assignments of error.

More importantly, the city council's failure to adopt any written findings or conditions of approval regarding access to and potential development of petitioners' property makes the city council's rulings on these issues unclear. For example, it is arguable that the city council ruling to amend the preliminary plat to require "road access" for the benefit of petitioners' property means that the city council agreed with petitioners' evidence that part of their property was developable, and hence requires access appropriate for future residential

development. It is also arguable that the city council rejected that evidence, but nonetheless required provision of access to petitioners' property, for purposes other than future development. In this regard, petitioners point out that the requirement for "road access" is unclear. It could refer to an easement, which petitioners argue would not allow residential development of their property, or it could require dedication of a public right-of-way, which petitioners argue is necessary for residential development of their property.

As discussed above, the city council did not adopt the document that purports to address the issue of access and reduce the city council's ruling to conditions of approval. Nothing else in the record explains why the city council required provision of "road access" to petitioners' property, or what that requirement means. Under these circumstances, we believe the appropriate course is to remand the decision to the city to (1) adopt a document or documents that clearly sets out the city council's final decision and (2) adopt adequate findings addressing the issues petitioners raised regarding potential development of and access to their property.

The first assignment of error is denied. The third and fourth assignments of error are sustained.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that the city council's decision does not address criteria applicable to the proposed application for preliminary subdivision plat approval, at LDO 5.033(B)(1)(e)(ii), 5.033(D)(2)(e) and 5.033(D)(2)(h).[8]

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[8] LDO 5.033(B)(1)(e) provides, in relevant part:

> "* * * The preliminary subdivision plat or planned unit development shall specifically and clearly show the following features and information on the maps, drawings, application forms or attachments:
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> "* * * * *
>
> "(ii) * * * [L]ocal street access to the adjacent existing and potential development shall be shown. * * *

The city argues that the issues raised in the second assignment of error were either not raised during the proceedings below, and thus are waived pursuant to ORS 197.763(1) and 197.835(3), or were not raised until the proceedings before the city council, and thus are waived pursuant to LDO 13.01(B)(1). The city also argues that the city adopted adequate findings addressing these code provisions and, even if the findings are inadequate, the record includes evidence that "clearly supports" a finding of compliance with these provisions. We address the city's arguments in turn.

A. Waiver of Issues under LDO 5.033(B)(1)(e)(ii)

The city responds first that at no time during the proceedings below did petitioners or any other party raises issues under LDO 5.033(B)(1)(e)(ii). Therefore, the city argues, any issues under that code provision are waived. ORS 197.763(1); 197.835(3).[9] Petitioners

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LDO 5.033(D)(2) provides, in relevant part:

> "* * * The following specific criteria shall be utilized in approving or denying any application for subdivision. * * *
>
> "* * * * *
>
> "e. Adjoining land may be developed or provided access and services that will allow its future development.
>
> "* * * * *
>
> "h. The applicant demonstrates how connectivity is established between the proposed development, adjacent existing development and adjacent potential future developments. Where automobile connectivity cannot be established due to topographic or other constraints, pedestrians and/or bicycle connectivity will be considered."

[9] ORS 197.763 applies to the conduct of quasi-judicial land use hearings. The challenged decision is a "limited land use decision," as defined by ORS 197.015(12) and, as such, is not governed by the procedures at ORS 197.763. ORS 197.195(2). However, the city council hearing on petitioners' appeal was an evidentiary hearing, and therefore that hearing must "comply with the requirements of ORS 197.763." ORS 197.195(5). Consequently, the raise it or waive it principle at ORS 197.763(1) controls the city council's proceedings. ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] 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

provide no citation to where any issues under LDO 5.033(B)(1)(e)(ii) were raised below. Accordingly, we agree with the city that any such issues are waived.

B. Waiver of Issues under LDO 5.033(D)(2)(e) and 5.033(D)(2)(h)

The city concedes that petitioners raised issues regarding 5.033(D)(2)(e) and (h) in their appeal to the city council. Record 201-202. However, the city argues, petitioners failed to raise any issue regarding LDO 5.033(D)(2)(e) and 5.033(D)(2)(h) *before the planning commission*, and therefore are precluded from raising such issues before either the city council or LUBA, pursuant to LDO 13.01(B)(1). LDO 13.01(B)(1) provides:

> "Failure to raise an issue at a hearing, in person or by letter, or failure to provide sufficient specificity to afford the decision-making body and the parties an opportunity to respond to the issue, precludes appeal of a land use decision from the Planning Commission to the City Council, and from the City Council to [LUBA.]"

Petitioners raised issues regarding future development of their land and the question of access to their land before the planning commission. Record 263. However, petitioners apparently did not cite LDO 5.033(D)(2)(e) and 5.033(D)(2)(h) to the planning commission, in support of their position regarding development of and access to their land. Only in the appeal to the city council did petitioners cite those code provisions and advance arguments that those code provisions required the applicant to provide access to their property. Because those citations and arguments were raised prior to the close of the record following the "final evidentiary hearing" before the city council, the statutory raise it or waive principle does not bar petitioners from raising issues under those code provisions to LUBA. The question before us is whether LDO 13.01(B)(1) bars petitioners from raising such issues before the city council and, ultimately LUBA.

It is not clear to us that LDO 13.01(B)(1) is properly understood to bar petitioners from raising issues before the city council that were not raised before the planning

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> sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

commission, as the city's brief urges. Even if it does, it does not appear that the city council applied that view of LDO 13.01(B)(1) in this case. *See* Respondent's Brief 15, n 9 (quoting city council discussion of LDO 5.033(D)(2)(e) and 5.033(D)(2)(h)). More importantly, if LDO 13.01(B)(1) is understood to bar issues raised prior to the final evidentiary hearing before the city council, that preclusion is inconsistent with ORS 197.763(1). As discussed above, ORS 197.763(1) permits parties to raise issues prior to the close of the record at or following the final evidentiary hearing, which occurred in this case during the proceedings before the city council. Accordingly, we disagree with the city that LDO 13.01(B)(1) precludes petitioners from raising issues under LDO 5.033(D)(2)(e) and 5.033(D)(2)(h)) to LUBA.

C. Findings Addressing LDO 5.033(D)(2)(e) and 5.033(D)(2)(h)

The city next argues that the planning commission findings at Record 172 and the November 5, 2002 "Findings on Grounds for Appeal" adequately address LDO 5.033(D)(2)(e) and 5.033(D)(2)(h). However, the planning commission findings at Record 172 conclude in relevant part that no access is required. As discussed above, the city council modified or partially reversed that conclusion. As for the November 5, 2002 findings document, we have already concluded that the city council did not adopt that document and that it is not part of the city's final decision.

D. Evidence Clearly Supporting Compliance with LDO 5.033(D)(2)(e) and 5.033(D)(2)(h)

Finally, the city argues that the record is clear that petitioners' property contains wetlands and associated buffer areas and is "undevelopable." That being the case, the city argues, the question of access need not be considered under LDO 5.033(D)(2)(e) and 5.033(D)(2)(h), and any inadequacy in the city's findings addressing those provisions are not a basis for reversal or remand, pursuant to ORS 197.835(11)(b).[10]

[10] ORS 197.835(11)(b) provides:

We disagree. As noted above, petitioners submitted expert testimony that a portion of their property adjacent to the proposed subdivision is developable. The city council, for reasons that remain uncertain, required that the preliminary plat be amended to provide "road access" to petitioners' property. As far as we can tell from the decision before us, the city council may have done so because it agreed with petitioners that a portion of their property was developable and that access of some kind is required under LDO 5.033(D)(2)(e) and 5.033(D)(2)(h). We cannot say that the evidence in the record "clearly supports" a finding that petitioners' property is undevelopable and no access need be provided under LDO 5.033(D)(2)(e) and 5.033(D)(2)(h), as the city urges.

On the merits, we agree with petitioners that the city's findings regarding LDO 5.033(D)(2)(e) and 5.033(D)(2)(h) are inadequate. The only findings that arguably address LDO 5.033(D)(2)(e) are in the September 24, 2002 staff report, which suggests that that criterion is met because "[t]he property to the north is being provided access * * *." Record 274. The staff report does not address LDO 5.033(D)(2)(h).[11] The unexplained staff finding of compliance with LDO 5.033(D)(2)(e) based on provision of access suffers from the same flaws as the city council directive to provide "road access" to petitioners' property, discussed above.

The second assignment of error is sustained, in part.

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

[11] The city argues that the staff report "adopted" or "incorporated" the application, which contains findings addressing LDO 5.033(D)(2)(e) and 5.033(D)(2)(h). However, the staff report merely states that it recommends approval "[b]ased on the findings included in the development application * * *." Record 281. We question whether that statement is sufficient to "adopt" or "incorporate" by reference the findings in the application as part of the staff report. In any case, even if the findings in the application are considered, they find compliance with LDO 5.033(D)(2)(e) and 5.033(D)(2)(h) based on provision of access to the "abutting parcels to the north." Record 430. That finding is inexplicable, given that the applicant did not propose providing access to petitioners' property.

FIFTH ASSIGNMENT OF ERROR

In fifth assignment of error, petitioners also argue that, if the Notice of Decision is part of the city council's decision, it is inconsistent with the city council's oral vote, in that the Notice of Decision appears to approve the 19-lot subdivision shown as Option A rather than the 17-lot subdivision shown as Option B that was approved by the planning commission and by the city council's oral vote. However, this confusion is eliminated by the city's concession, discussed above, that the Notice of Decision and attached findings are not part of the city council's decision. The fifth assignment of error provides no basis for reversal or remand.

The city's decision is remanded.