BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRUCE PACKING COMPANY, INC.,
Petitioner,

vs.

CITY OF SILVERTON,
Respondent,

and

YAKIMA VALLEY FARM
WORKERS CLINIC,
Intervenor-Respondent.

LUBA No. 2003-047

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Wallace W. Lien, PC.

No appearance by City of Silverton.

Phillip E. Grillo, and Kelly S. Hossaini, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Miller Nash, LLP.

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

REMANDED 09/11/2003

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

Petitioner appeals a city decision rezoning a tract of land from Industrial Park (IP) to Commercial Business (C-3) to allow a medical clinic and associated parking.

REPLY BRIEF

Petitioner requests permission to file a 12-page reply brief, which exceeds the five-page limit prescribed by OAR 661-010-0039.[1] The reply brief responds to arguments in the response brief that (1) issues raised in six of the eight assignments of error in the petition for review were not raised below, as required by ORS 197.763(1), and therefore have been waived; and (2) the city adopted an interpretation of the criterion at issue in the second assignment of error that is entitled to deference under ORS 197.829(1).

Intervenor-respondent (intervenor) does not dispute that matters addressed in the reply brief are appropriate, but does object to the length of the reply brief, arguing that the waiver issues raised in the response brief do not warrant a 12-page reply brief. Intervenor argues that the reply brief should be rejected in its entirety, given its unwarranted length.

The reply brief includes five pages generally discussing the "raise it or waive it" rule, six pages applying petitioner's view of that rule to the six waiver challenges, and one page discussing the deference issue. As discussed below, the waiver issues raised in this case are pervasive and somewhat unusual, and petitioner argues that LUBA should adopt a relatively novel view of the waiver rule. Accordingly, we believe the additional length to the reply brief is warranted. The 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 reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

RESPONSE BRIEF

Petitioner moves to strike a portion of the response brief, at page 16, lines 23-25 and page 17, lines 1-2, that includes allegations of facts that are not based on the record.[2] Intervenor appears to concede that the record does not support the alleged facts. Accordingly, we do not consider the alleged facts cited on page 16, lines 23-25 and page 17, lines 1-2, in the response brief, in resolving the assignments of error presented in this case.

FACTS

The subject area consists of four lots or parcels, denominated as tax lots 2300, 2400, 2500, and 2600. Tax lots 2500 and 2600 are located at the intersection of North First Street and D Street. Tax lot 2500 is developed with a structure and accessory building that have previously been used as a cannery, a fire station and a veterinary clinic. Tax lots 2500 and 2600 are designated Industrial in the Silverton Comprehensive Plan (SCP) and zoned IP.[3] Bordering tax lots 2500 and 2500 on the east is a public alleyway running north-south. Tax lots 2400 and 2500 are east of the alley. Both are designated Single Family Residential and zoned for residential uses. Tax lot 2300 is developed with a single family dwelling.

Intervenor owns tax lots 2500, 2600, and 2400, while a third party owns tax lot 2300. Intervenor plans to remodel the existing building on tax lot 2500 into a 6,400 square foot medical clinic to provide pediatric services. The remodeled building will occupy portions of

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[2] That portion of the response brief responds to the issues raised in the eighth assignment of error, and reads:

> "* * * This revised text was filed with the City Recorder prior to the second reading on March 3, 2003. The agenda for the March 3, 2003 City Council meeting was prepared a week prior to the meeting. (R. at 19.) The revised ordinance was placed in the Council packets, and distributed to the Councilors and media one week prior to the meeting. The revised ordinance was available to the general public at that time. This process complies with the City's charter requirements."

[3] As discussed below in the second assignment of error, there is some dispute over the plan designation for tax lot 2500.

tax lots 2500 and 2600. Intervenor ultimately plans to locate 42 off-street parking spaces on the four tax lots.

Because a medical clinic is not allowed in the IP zone, intervenor filed the subject application to change the zoning of tax lots 2500 and 2600 from IP to C-3, which allows the proposed use.[4] The city planning commission conducted a hearing on the application on January 14, 2003, at the close of which it adopted a resolution recommending approval, supported by a number of findings. The city council then held a public hearing February 3, 2003. At the close of the hearing the city council ordered a first reading by title of a proposed ordinance approving the zone change, supported by the same findings adopted by the planning commission. The city council also directed staff to draft additional findings addressing issues raised at the February 3, 2003 hearing. On March 3, 2003, the city council met for a second reading and formal adoption of the ordinance. The ordinance presented to the city council on March 3, 2003 incorporated additional findings, 18 through 27, which were drafted by staff to address issues raised at the February 3, 2003 hearing. The revised ordinance was read for the second time by title only, and thereafter adopted by the city council.

This appeal followed.

EIGHTH ASSIGNMENT OF ERROR

Petitioner contends that the city violated Section 35(4) of the city's charter in adopting the revised ordinance, and that the city's error prejudiced its substantial rights.[5] Specifically, petitioner argues:

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[4] As discussed below in the first assignment of error, there is some dispute as to precisely what property was proposed for rezoning and affected by the challenged zone change.

[5] Section 35 of the city charter provides:

> "(1) Except as subsections (2) and (3) provide to the contrary, an ordinance shall, before enactment, be read fully and distinctly in open council meeting on two different days.

"Because the Ordinance differed significantly in its terms on March 3, 2003, as compared to the Ordinance before the Council for first reading on February 3, 2003, either it must be determined that what the Council actually adopted on March 3, 2003 was the original version of the Ordinance containing only the first 17 findings (since there was no amendment to approve the new language), or they adopted the revised Ordinance in violation of the Charter. Either way a remand is necessary.

Petitioner's substantial rights were prejudiced by Respondent's errors in adoption of the final decision. Petitioner has a right to rebut evidence placed before the local decision maker in a quasi-judicial proceeding. * * * [Citing cases].

"In this case, Respondent adopted 10 new findings, many of which contain evidence not in the record previously, after the local record was closed. Petitioner had no right at that time to challenge the findings or the purported evidence contained therein. In the [second, third and fifth] Assignments of Error, Petitioner has pointed out numerous significant problems with the adequacy of the new findings and with the recitation of facts therein that is not supported by any evidence whatsoever." Petition for Review 34-35.

"(2) Except as subsection (3) allows both readings by title only, an ordinance may be enacted at a single council meeting by unanimous vote of all council members present after being read first in full and then by title.

"(3) Any of the readings may be by title only if:

"(a) no council member present at the meeting requests that the ordinance be read in full, or

"(b) a copy of the ordinance is provided for each council member, three (3) copies are provided for public inspection in the office of the city recorder not later than one week before the first reading of the ordinance, and notice of the availability of copies is given by written posting at city hall or by publication in a newspaper of general circulation in the city not later than one week before the reading.

"(4) An ordinance:

"(a) enacted after being read by title only, under the provisions of subsection (3), shall have no legal effect if it differs from its terms as filed prior to the reading, unless each section incorporating such a difference is read fully and distinctly in open council meeting as finally amended prior to being approved by the council.

"(b) may be amended at the time of enactment if the ordinance as amended deals with the same general subject."

Intervenor has several responses. First, intervenor argues that petitioner had an opportunity to object to the alleged procedural error at the March 3, 2003 meeting and petitioner's failure to do so means that petitioner may not advance that procedural error as a basis for remand. *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).

Second, intervenor argues that petitioner misconstrues the requirements of Section 35(4). According to intervenor, Section 35(4) renders an ordinance read only by title of no legal effect only "if it differs from its terms as filed prior to the reading." Intervenor argues that Section 35(4)(a) is not concerned with revisions between the first and second readings of the ordinance, as petitioner suggests. Intervenor argues that Section 35(4)(a) is concerned only with revisions between the "filed" ordinance and the final ordinance. According to intervenor, only if post-filing revisions are made to the ordinance must the city read the amended ordinance in full, rather than by title. Intervenor argues that there is no suggestion in this case that the adopted ordinance differs from the ordinance filed with the city recorder pursuant to Section 35(3).

Finally, intervenor argues that even if the city violated Section 35(4)(a), and that violation is considered procedural error, that error did not prejudice petitioner's substantial rights. ORS 197.835(9)(a)(B). Intervenor argues that petitioner has no substantial right to comment on or rebut the findings adopted on March 3, 2003. Further, intervenor argues that petitioner has no procedural right to rebut new evidence that appears in the city's findings. We understand intervenor to argue that findings do not and cannot constitute "evidence" that can provide evidentiary support for a decision, and if adopted findings happen to include material factual statements that are not supported by the record, the remedy is appeal to LUBA and seek remand on evidentiary grounds. Under those circumstances, we understand intervenor to argue, the local government has not committed "procedural error" in failing to

offer petitioner to an opportunity for rebuttal; it has simply adopted findings that improperly rely on facts that are not in the record.

Petitioner responds to the waiver argument in its reply brief by pointing out that it has no obligation to object to procedural errors that arise after the close of the evidentiary record under the "raise it or waive it" rule at ORS 197.763(1).

We need not and do not resolve the parties' dispute regarding waiver and failure to object to the alleged procedural error.[6] We also need not resolve the parties' dispute over the proper interpretation of Section 35(4), although we tend to agree with intervenor that the charter provision is concerned with differences between the ordinance as filed under Section 35(3) and the ordinance read by title under Section 35(4)(a), not with differences between the ordinance subject to the first reading by title and the ordinance subject to the second reading by title, as petitioner argues.[7] We do not resolve these issues because we agree with intervenor that findings adopted as decisional text do not constitute "evidence" and that petitioner has no "substantial right" to rebut recitations of fact found in adopted findings.

As the above-quoted portion of the petition for review indicates, the gravamen of this assignment of error is petitioner's belief that some of the 10 new findings adopted March 3, 2003 include new evidence, and that petitioner is entitled to challenge that evidence and submit rebuttal evidence. We agree with intervenor that petitioner has no right to challenge

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[6] It is worth noting however that the "raise it or waive it" rule at ORS 197.763(1) and the requirement that a party object to a procedural error in order to seek remand based on that error, while overlapping, have different antecedents and independent bases. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *see also Murphy Citizens Advisory Comm.*, 25 Or LUBA 312, 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).

[7] If intervenor's view of Section 35(4)(a) is correct, then the focus of the procedural dispute between the parties shifts to whether the revised ordinance was "filed" with the city recorder in accordance with Section 35(3) and whether intervenor is correct that there are no differences between the filed ordinance and adopted ordinance. As noted above, petitioner has moved to strike intervenor's assertions to that effect as not supported by the record, from which it is reasonably clear that petitioner disputes those assertions. We granted that motion because intervenor does not cite us to any facts in the record that support the stricken assertions. Intervenor has not moved to take evidence outside the record to support those assertions, or articulated any other basis for us to resolve the parties' dispute on that point.

or rebut proposed findings. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560, 565 (2001) (absent local provisions to the contrary, there is no right under Oregon law for opponents to review or rebut proposed findings prior to their adoption); *Terraces Condo. Assoc. v. City of Portland*, 22 Or LUBA 151, 161 (1991), *aff'd* 110 Or App 471, 823 P2d 1004 (1992) (same). If adopted findings include factual assertions that are not supported by evidence in the record, then that lack of evidentiary support may be a basis for reversal or remand before LUBA. ORS 197.835(9)(a)(C).[8] We generally agree with intervenor that findings of fact are not themselves "evidence" that petitioners are entitled to rebut. Therefore, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The eighth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the rezoning application was improperly modified during the proceedings below, with the result that it is not clear what properties were proposed for rezoning and actually rezoned by the challenged decision.

According to petitioner, the zone change application contains references to the street address and tax lot information for tax lots 2500 and 2300, but does not otherwise reference tax lots 2400 and 2600. Petitioner notes that intervenor does not even own tax lot 2300. Petitioner argues that, at some point not shown in the record, the city decided to treat the application as a proposal to change the zoning of tax lots 2500 and 2600, and make no changes to the zoning of tax lot 2300. Petitioner contends that there is no authority for such informal modification of the application, and, given the confusion caused by the initial application and this informal modification, it is not clear what property was in fact proposed for a zone change and what property was affected by the city's decision.

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[8] We address, below, petitioner's assignments of error that challenge the evidentiary support for some of the city's findings adopted on March 3, 2003.

Intervenor responds that despite some confusing references in the original application, it was clear from the start and throughout the proceedings below that only tax lots 2500 and 2600 were proposed for rezoning. Intervenor notes that the notices of hearing before the planning commission and city council correctly identified the property affected as tax lots 2500 and 2600. Record Vol I 45, 80. Intervenor also notes that during the hearing before the planning commission, intervenor's representative requested that the record reflect the correct addresses for tax lots 2500 and 2600. Record Vol II 2. Intervenor argues, and we agree, that nothing identified in the city's code or elsewhere prohibits informal correction or modification of the application to accurately reflect the property that is to be rezoned. Further, to the extent the alleged error is procedural in nature, intervenor responds that petitioner has failed to establish any prejudice to its substantial rights. ORS 197.835(9)(a)(B). We agree.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city's zone change criteria at Silverton Zoning Code (SZC) 8.04 require, among other things, a finding that the proposed zone is consistent with the SCP.[9] The city adopted

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[9] SZC 8.04 provides:

"Approval of a zone change shall require that the findings of fact substantiate the following:

"A. The proposed zone is consistent with the Comprehensive Plan; and

"B. The uses which would be permitted in the proposed zone could be accommodated on the proposed site without exceeding its physical limitations; and

"C. Allowed uses in the proposed zone can be established in compliance with the development requirements in this Ordinance; and

"D. Adequate public facilities, services, and transportation networks are in place or are planned to be provided concurrently with the development of the property; and

"E. In the case of residential zone changes the proposal complies with the stated intent and purpose for the proposed zone; and

Finding 12, which concludes that the proposed C-3 zone is consistent with the SCP, because it is one of the zones listed in a comprehensive plan table that is deemed compatible with the industrial plan designation:

> "The proposed change to [C-3] is consistent with the [SCP]. Table 2-12 of the Urbanization Element of the [SCP] indicates that a C-3 zone designation is compatible with a Comp Plan designation of Industrial. As such, the redesignation to C-3 complies with [SZC] 8.04(A) * * *." Record Vol I 5.

Petitioner challenges the adequacy of that finding. According to petitioner, SZC 8.04(A) requires more than simply finding that the proposed C-3 zone is one of the zones that implement the industrial plan designation. According to petitioner, SZC 8.04(A) requires that the city examine the entire SCP and determine that the proposed zone is consistent with the entire SCP. In addition, petitioner argues that it raised issues below regarding whether the proposed zoning was consistent with Urbanization Element Policies 8 and 11.[10] Petitioner contends that the findings the city adopted in response to those arguments fail to demonstrate that the proposed zone is consistent with Policies 8 and 11.

Finally, petitioner cites to an indication in the SCP that the plan designation for the northern portion of tax lot 2500 is actually Public rather than Industrial, as the application

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> "F. In the case of non-residential zone changes:
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> > "1. The proposed change would mitigate a shortage in the inventory acreage in a certain zone classification; or, the proposed change is more suited to the location or topography of a parcel; and,
> >
> > "2. The proposed zone change does not create an intensity of use that is inconsistent with other uses in the vicinity."

[10] Urbanization Element Policies 8 and 11 provide, respectively:

> "8. Central Business District. The central business district (CBD) is the major commercial area in Silverton. Unless it can be shown that new commercial rezone proposals will not conflict with the downtown and competing major commercial activity outside the CBD they will be discouraged. This policy may be refined through the adoption of a separate downtown area plan."
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> "11. Linear Commercial Development. Linear (strip) commercial activity along major arterials will be discouraged. * * *"

and city presumed below. Petitioner speculates that the Public SCP designation may stem from when tax lot 2500 was used as a fire station. In any case, petitioner argues, the city erred in failing to address whether rezoning tax lot 2500 to C-3 is consistent with the Public designation for a portion of tax lot 2500. We address these arguments separately below.

A. Consistency with the Entire SCP

We disagree with petitioner that SZC 8.04(A) requires the city to engage in an open-ended and unfocused evaluation of the entire SCP. City staff presumably made an initial determination that the only SCP provision bearing on the proposed zone change was Table 2-12. With the exception of Urbanization Element Policies 8 and 11, no party below pointed out any SCP provisions that have any arguable bearing on the proposed zone change or that must be evaluated for consistency under SZC 8.04(A). Further, on appeal petitioner does not cite to any SCP language or provision that requires evaluation under SZC 8.04(A), other than Policies 8 and 11. Petitioner has not demonstrated that the city misconstrued SZC 8.04(A) or otherwise erred in adopting too narrow a focus of inquiry under that regulation. This subassignment of error is denied.

B. Urbanization Element Policy 8

In response to petitioner's arguments, the city adopted Finding 20, which addresses consistency with Urbanization Element Policy 8, quoted above. Finding 20 concludes that the proposed pediatric clinic will not compete with any businesses in the downtown central business district or other commercial areas, and therefore rezoning to allow the clinic is consistent with Policy 8.[11]

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[11] Finding 20 states, in relevant part:

> "* * * The proposed rezone and subsequent use of the property with a pediatric medical clinic will not conflict with businesses in the downtown [CBD] or with major commercial activity outside the downtown business core. Within the downtown core the majority of the businesses are retail and service oriented, or dining and entertainment businesses. However, there are some medical facilities located within the [CBD]. There are two dentist offices, one eye doctor's office, two general doctor's offices, and one medical clinic for low income

Petitioner argues that Finding 20 relies upon facts regarding existing businesses in the downtown central business district that are not supported by the record. Intervenor disagrees, but does not cite to any portion of the record that supports Finding 20. Instead, intervenor argues that Finding 20 is unnecessary, and thus the lack of evidence supporting it is not a basis for reversal or remand, because the city council implicitly determined, in Finding 12, that examination of Table 2-12 is sufficient to demonstrate compatibility between the C-3 zone and the SCP for purposes of SZC 8.04(A). Intervenor argues that this implicit interpretation of SZC 8.04(A) and Table 2-12 is consistent with the code and plan and subject to deference under ORS 197.829(1).

We disagree with intervenor that Finding 12, quoted above, includes an implicit interpretation of SZC 8.04(A) or Table 2-12, to the effect that an inquiry into consistency between the proposed zone and the SCP is limited to examining Table 2-12. Nothing in Finding 12 suggests that the city council adopted that narrow view. Further, the fact that the city council adopted Findings 20 and 21, which address and find consistency between the proposed use allowed under the C-3 zone and two SCP policies, strongly suggests that the city council does not share that view.

Intervenor does not cite to any evidence supporting the facts cited and relied upon in Finding 20, or offer any other basis to deny this subassignment of error. Without the assistance of the parties, we will not comb the record looking for evidence to support challenged findings. *See Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991)

> patients. It is determined that the rezone to allow for the proposed pediatric clinic will not conflict with any of these operations. * * * The main commercial activity areas which are outside the downtown core are the commercial businesses which are located along North First Street to the north of the proposed property. The businesses in this area range from a supermarket to a variety of retail businesses. Since none of these businesses are medical clinics there will be no conflict with the proposed use. The other major commercial activity area outside the [CBD] is in the area of Westfield Avenue and McClaine Street. This area is developed with a variety of commercial businesses which range from [a] gas station to supermarket and there are no medical facilities or clinics within this area so there will be no conflict with businesses in this activity area. * * *" Record Vol I 7-8.

(LUBA is not required to search the record looking for evidence with which the parties are presumably already familiar). Accordingly, we sustain this subassignment of error.

C. Urbanization Element Policy 11

Finding 21 concludes that the proposed clinic is not linear commercial development, and is thus consistent with Policy 11, quoted above.[12] Petitioner faults Finding 21 for, among other things, failing to explain how the proposed use is "different than typical commercial uses," or why it matters that the subject property is located on a corner and has frontage on two streets.

However, petitioner does not challenge the explanation or the express interpretation of Policy 11 in the emphasized portion of Finding 21, quoted in n 12, to the effect that Policy 11 is concerned with discouraging new commercial development on the fringes of the city, and therefore the proposed use is consistent with Policy 11 because it is located near the center of the city and will involve reconstruction of an existing building that has been in use for many years. Petitioner does not argue that that explanation, under that interpretation, is insufficient to demonstrate that the proposed zone is consistent with Policy 11, and we do not see that it is. This subassignment of error is denied.

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[12] Finding 21 states, in relevant part:

> "* * * The Council determined that the intent of this policy is to discourage commercial activities and that while the zone [would] change to Commercial Business that [the] use of the subject property would be for a medical clinic which is different than typical commercial uses. The Council further found that the proposed rezone and subsequent use of the property does not fall under the full definition of linear strip development since the property is a corner lot and has frontage along two streets. * * * *The intent of this policy is not to prohibit activity along arterials but to discourage new commercial activity which may develop in a haphazard form thereby leading to urban sprawl and degradation of the function of the street system. As noted this property is already developed with an existing building which has been used for many years * * *. The council finds that a key component of linear commercial development is that it traditionally occurs along the fringe of the community and involves new construction. The subject area proposed to be rezoned is in relative close proximity to the urban core and not along the fringe of the community.* * * *." Record Vol I 8-9 (emphasis added).

D. Public Designation

Petitioner argues that, based on a SCP map entitled "Future Land Use," it appears that a portion of tax lot 2500 is actually designated Public rather than Industrial, as the city and all the parties presumed during the proceedings below. According to petitioner, the erroneous assumption that tax lot 2500 is designated Industrial permeates the city's findings, and therefore remand is necessary to allow the city to adopt findings based on the correct plan designation.

Intervenor responds no issue was raised below regarding tax lot 2500's plan designation and therefore that issue is waived. On the merits, intervenor argues that whatever the "Future Land Use" map at SCP 2-4 indicates, the city's comprehensive plan map shows that the entirety of tax lot 2500 is designated Industrial.

We need not resolve intervenor's waiver argument, because we agree that the city's comprehensive plan map designates tax lot 2500 Industrial. It is not clear to us why the "Future Land Use" map at SCP 2-4 appears to indicate something different, or what that map is intended to depict. We note that there are a number of differences between the "Future Land Use" map and the comprehensive plan map provided to us by the city as part of this appeal. Whatever the explanation, petitioner offers no reason to question the comprehensive plan map provided by the city, and no reason why that map is insufficient to resolve all concerns over the SCP designation of tax lot 2500. This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

SZC 8.04(B) requires a finding that "[t]he uses which would be permitted in the proposed zone could be accommodated on the proposed site without exceeding its physical limitations." *See* n 9. Petitioner contends that SZC 8.04(B) requires that the city evaluate whether the subject property can accommodate *all* of the uses allowed in the C-3 zone, not just the proposed use. According to petitioner, the city's finding of compliance with

SZC 8.04(B) focuses exclusively on the proposed medical clinic use.[13] Even if the city's findings can be read more broadly, petitioner contends that there is no evidence supporting the statements in Finding 22 that the property will discharge stormwater into the municipal system, that there are no steep slopes, wetlands or other onsite natural features that require protection, and no cultural or historic resources in the area that affect development.

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[13] Findings 13 and 22 state, in relevant part:

> "13. * * * It is not anticipated that this redesignation to Commercial would exceed the physical limitation of any of the property in question. The applicant has submitted a site plan which shows that the existing building will be used for a medical clinic. The main building will have an addition onto it such that the building will essentially be doubled in size to approximately 6,400 square feet. From the site plan it appears that the proposed building addition can conform with building setbacks. The applicant is advised that any addition onto the building will be required to comply with the City's Design Review Ordinance where the specifics of the proposed building addition will be reviewed in greater detail. The site plan shows more than adequate parking to meet the need of the proposed use. The property is connected to the City's sanitary sewer system thereby ensuring that there will be no on-site septic system on the property. As such, the proposal complies with [SZC] 8.04(B). The proposed use of the property as a medical clinic is permitted within the C-3 zone designation. As noted the proposed building addition will be required to be reviewed for compliance with the City's Design Review Ordinance. As such, the proposal complies with [SZC] 8.04(C) * * *." Record Vol I 5.
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> "22. The Council determined that the applicant's proposed rezone and use of the property will not exceed the physical limitation of the land as was claimed by [petitioner's attorney]. The area proposed to be re-zoned is approximately 23,940 square feet and is developed with an existing 2,900 square foot office building and a detached 1,980-square foot accessory structure. It is not anticipated that this redesignation to C-3 would exceed the physical limitation of the area in question. The applicant has submitted a site plan which shows that the existing building will have an addition onto it such that the building will essentially be doubled in size to approximately 6,400 square feet. From the site plan it appears that the proposed building addition will conform with building setbacks. The site plan shows more than adequate parking to meet the need of the proposed use. The property is connected to the City's sanitary sewer system. The property is also connected to the City's water supply system. Storm water will be discharged into the City of Silverton's storm drainage system. The area to be rezoned does not have any steep slopes which might limit its development. The area to be rezoned does not have any wetlands on it which also might either limit any development potential or raise any concerns regarding natural resource protection. There are no cultural or historic resources on the area to be rezoned which might affect the development or use of the property thereby affecting its physical limitations. As such, the Council finds that the proposed rezone will not exceed the physical limitations of the land." Record Vol I 9.

Intervenor's only response is that petitioner failed to raise the issues presented in this assignment of error, and thus those issues are waived. ORS 197.763(1).[14] In the reply brief, petitioner argues that it raised below the general issue of whether the proposal complied with "each and every" criterion under SZC 8.04, with specific reference to SZC 8.04(B).[15] Further, petitioner contends that even if no specific issue was raised below, waiver under ORS 197.763(1) simply does not apply to arguments that adopted findings are inadequate or not supported by substantial evidence. Petitioner argues that because findings are typically adopted long after the close of the evidentiary record, parties have no opportunity to raise issues that findings are inadequate or not supported by substantial evidence. Petitioner

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

[15] Petitioner cites to a transcript of the testimony of petitioner's attorney at the February 3, 2003 hearing, found at Exhibit B to the petition for review. We quote relevant portions of that transcript.

> "* * * [M]y client feels that the applicant has failed to meet its burden of proof with regard to each and every criteri[on at SZC 8.04. Those criteria require] an analysis, not only of the property and the proposed use, but of the availability of City services and the—the fitting of those services to this need. For example, * * * [SZC 8.04(B)] requires you to consider the physical limitations of this site, and you need to identify them—what the physical limitations of the site are, and how the proposed use will affect those. One of the things that comes to mind is if you look at the plot plan that is attached to the application, it shows 42 parking spaces, I believe, that of those 42 parking spaces, 23 are on the R1 property. Now I've had this discussion with the staff, and we respectfully disagree with the staff. When I read [SZC 90.13] of your code, I read that to say that you can use other residential property to fulfill your requirements for residential parking. For example, for a hotel or a rooming house, something like that. But you cannot use residential property to fulfill the parking obligation of a commercial or industrial use. Otherwise, what you've done is to allow a clear-cut of 200 feet into the residential zone around every commercial and industrial use. * * * So I am saying that as a matter of law [SZC 90.13] does not allow you to serve a commercial or industrial use by parking in a residential zone. * * * [SZC 804(B)] requires an analysis of the proposed needs and the systems available for water, sewer, storm drains, sidewalks, street, police, fire—medical waste is an issue here that hasn't been addressed, and traffic." Exhibit B to the Petition for Review 4-5 (emphasis added).

contends that as a matter of law the raise it or waive rule can never apply to an adequacy and evidentiary challenge to findings adopted after the close of the record.

We disagree with petitioner's broad proposition. In *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993), we set out our view on how ORS 197.763(1) is applied to an assignment of error arguing that adopted findings are inadequate or not supported by substantial evidence.

> "The references in ORS 197.763(1) and 197.835(2) to 'issues' are references to issues concerning the substantive and procedural requirements that must be satisfied in rendering the challenged decision. Therefore, if a petitioner wishes to argue that a particular approval criterion or procedural requirement is not satisfied by a proposed land use action, the petitioner must raise the 'issue' of compliance with that criterion below. However, contrary to respondent's suggestion, a petitioner is *not* required to anticipate the actual findings a local government ultimately adopts in support of its final decision or question the adequacy of the evidence accepted into the record to support such findings.
>
> "In order to preserve the right to challenge at LUBA the adequacy of the adopted findings to address a relevant criterion or the evidentiary support for such findings, a petitioner must challenge the proposal's compliance with that criterion during the local proceedings. Once that is done, the petitioner may challenge the adequacy of the findings and the supporting evidence to demonstrate the proposal complies with the criterion. The particular findings ultimately adopted or evidence ultimately relied on by the decision maker need not be anticipated and specifically challenged during the local proceedings." (Emphasis in original.)

Thus, petitioner is mistaken that, as a categorical matter, ORS 197.763(1) does not apply to challenges to the adequacy of findings and supporting evidence. The critical considerations under *Lucier* and ORS 197.763(1) are whether issues were raised below regarding compliance with an approval criterion and, if so, whether those issues were "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[.]" We turn to those considerations.

A. Other Uses Allowed in the C-3 Zone

We do not see that any issue was raised at all below, much less raised with the requisite specificity, regarding whether SZC 8.04(B) requires the city to evaluate whether the subject property can accommodate *all* of the uses allowed in the C-3 zone, not just the proposed use. It is noteworthy that the initial staff report to the planning commission included Finding 11, which is identical to Finding 13, quoted above. Record 56. It is clear from that finding that at least city staff had taken the view that compliance with SZC 8.04(B) could be established by evaluating whether the proposed use could be accommodated on the proposed site without exceeding its physical limitations. That proposed finding was carried forward and ultimately adopted by the city council on February 3, 2003.[16] At no point below did petitioner or another party argue that SZC 8.04(B) requires evaluation of all uses allowed in the C-3 zone. Indeed, as the transcript quoted at n 15 indicates, petitioner's attorney discussed SZC 8.04(B) in terms that suggested the city need consider only the proposed use. ("[SZC 8.04(B)] requires you to consider the physical limitations of this site * * * and how the proposed use will affect those.")

B. Other Issues

Petitioner clearly raised an issue regarding compliance with SZC 8.04(B) in suggesting that tax lots 2500 and 2600 were too small to accommodate the required parking. The city adopted Finding 19 to address that issue. We address petitioner's challenge to that finding in the fourth assignment of error, below.

It is less clear that petitioner raised any other cognizable issues regarding compliance with SZC 8.04(B) or the physical limitations of the property. We disagree with petitioner that the broad statement that "the applicant has failed to meet its burden of proof with regard

[16] It is probable that the planning commission adopted Finding 11 in the staff report. However, the copy of the planning commission decision in the record before us is missing page 6 of that decision, which appears to include portions of Finding 9, all of Findings 10 and 11, and portions of Finding 12. See Record Vol I 48-49.

to each and every" criterion at SZC 8.04 is sufficient, in itself, to raise any discernible issue regarding compliance with SZC 8.04(B). The only other reference to SZC 8.04(B) to which we are directed in petitioner's testimony is the statement that that provision "requires you to consider the physical limitations" of the site and to "identify them[.]"[17] The city apparently responded to that nonspecific argument and, in Finding 22, explained that there were no storm drainage limitations, wetlands, steep slopes, natural resources, or historic and cultural resources on the property that might limit development.

Petitioner never contended below (and does not contend before us) that there is the slightest reason to believe the subject property has any physical limitations such as wetlands, steep slopes, etc. Nor does petitioner contend there is any reason to believe that the subject property is not served by the city stormwater system. Because no issues were raised below regarding these matters, the city was not required to adopt a responsive finding addressing such issues. In other words, if the city had adopted no findings whatsoever regarding the presence or absence of stormwater drainage, wetlands, steep slopes, etc., the city would not have committed reversible error. In that sense, the challenged finding that there are no storm drainage limitations, wetlands, steep slopes, natural resources, or historic and cultural resources on the property is simply surplusage. The lack of evidence supporting unnecessary or nonessential findings is not a basis for reversal or remand. *Cotter v. Clackamas County*, 36 Or LUBA 172, 180 (1999); *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76, 92 (1996); *Waite v. Marion County*, 16 Or LUBA 353, 361 (1987), *aff'd* 145 Or App 603, 930 P2d 903 (1997).

The third assignment of error is denied.

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[17] The last sentence of the testimony quoted at n 15 refers to SZC 8.04(B). However, petitioner asserts, and we agree, that the intended reference is to SZC 8.04(D), which requires a finding regarding the adequacy of public facilities.

FOURTH ASSIGNMENT OF ERROR

SZC 8.04(C) requires a finding that "[a]llowed uses in the proposed zone can be established in compliance with the development requirements in this Ordinance." Petitioner argues that that the city erred in (1) failing to consider whether *all* of the uses allowed in the C-3 zone, rather than simply the proposed use, can be established in compliance with local requirements and (2) concluding that the area rezoned can comply with applicable parking requirements, even if developed with the proposed medical clinic.

A. Uses Allowed in the C-3 Zone

Intervenor responds that no issue was raised below regarding whether SZC 8.04(C) requires consideration of all uses allowed in the zone, and thus that issue is waived. We agree, for the same reasons expressed above with respect to SZC 8.04(B). As explained, the only specific issue petitioner raised below under any provision of SZC 8.04 is the parking issue.

B. Parking Requirements

The city found that parking to serve the proposed medical clinic would be adequate, based on a site plan that showed 19 parking spaces on tax lots 2500 and 2600, the area rezoned to C-3, and an additional 21 spaces on tax lots 2300 and 2400, which are zoned for residential uses.

Petitioner explains that city parking standards require a minimum of 34 parking spaces to serve the proposed medical clinic. According to petitioner, it is clear that tax lots 2500 and 2600 are not large enough, once developed with the medical clinic, to provide the required 34 parking spaces. In response to petitioner's argument that the proposed rezone thus failed to comply with SZC 8.04(C), the city relied upon SZC 90.13 to allow intervenor to provide parking on tax lots 2300 and 2400.

SZC 90.13 provides:

> "Off-street parking and loading areas shall be provided on the same lot with the main building or structure or use except that automobile parking areas may be located on another lot *if such lot in an 'R' district is within 200 feet of the lot* containing the main building, structure or use, or in any other district the parking area may be located off the site of the main building, structure or use if it is within 500 feet of such site." (Emphasis added.)

Finding 19 states:

> "The Council determined that the issue of allowing vehicles to park on the two residential parcels, also owned by the applicant, on the east of the public alley is allowed as noted in [SZC] 90.13 (Off-street parking) of Ordinance 498. This section states that parking may be located on a parcel if it is within 200 feet of the use. The two parcels are within 14 and 47 feet of the area to be rezoned. Therefore, the medical clinic has the option of using a portion of each of these two parcels to satisfy their off-street parking needs as permitted within the City's Zone Code. The Council also declined to consider if this provision of the code should be updated. As such, the Council found that the issue raised relative to parking lacked merit." Record 7.

Petitioner argues that the city misconstrued SZC 90.13 to allow off-site commercial parking on residential-zoned lands.[18] According to petitioner, SZC 90.13 must be read in context to allow offsite parking only if both the subject property and the offsite parking lot are in the same zoning district or, at least, if the two lots are in different zoning districts, both zones must permit a parking lot in conjunction with that use. Otherwise, petitioner argues, SZC 90.13 effectively allows uses in residential zones that are prohibited in such zones. Petitioner argues that parking in conjunction with a commercial use is not among the uses allowed in any of the city's residential zones.

Intervenor responds that the city's interpretation of SZC 90.13 is consistent with the express language of that provision and must be affirmed under ORS 197.829(1) and *Church*

[18] Petitioner also argues that the city's interpretation of SZC 90.13 is not adequate for review, and urges us to interpret that provision in the first instance, pursuant to ORS 197.829(2). We decline to do so. The above-quoted finding adequately, if implicitly, sets forth the city's view that SZC 90.13 allows a parking lot serving a commercial use in a commercial zone to be located on a different lot in a residential zone, if the two lots are within the prescribed distances. We do not see that a more adequately expressed interpretation is necessary to perform our review function under ORS 197.829(1).

v. Grant County, 187 Or App 518, ___ P3d ___ (2003).[19] According to intervenor, whether the city's interpretation is inconsistent with other code provisions that form the *context* for SZC 90.13 is immaterial.

We disagree that the context of a code provision is immaterial to our review of an interpretation of that provision. As the Court of Appeals stated in *Church*, "[t]he legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, *the context of the provision*, and the purpose or policy behind the provisions." 187 Or App at 524 (emphasis added).

Turning to the text of SZC 90.13, that provision simply does not specify, one way or the other, whether a parking lot for a use allowed in one zone can be located offsite in a different zone that does not permit either the use or a parking lot in conjunction with that use. SZC 90.13 is silent on that issue. The city's interpretation is thus not necessarily "inconsistent" with the text of SZC 90.13.

Turning to context, SZC 50.01 through 50.09 set out uses and accessory uses that are permitted, not permitted, or conditionally permitted in the city's four residential zones.

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[19] ORS 197.829 provides, in relevant part:

> "(1) [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;
> >
> > "* * * * *
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

Parking is described twice. SZC 50.06 allows certain accessory uses, including "parking areas" for "residents of the dwelling," specifically a "parking area for not more than two motor vehicles for each dwelling unit on the same lot * * * to which it is accessory[.]" SZC 50.06(6) and (6)(b). Looking only at SZC 50.06, it would appear that petitioner is correct that the city's residential zones do not permit parking areas for non-residential uses.

However, SZC 50.03(2) allows as a primary use in all four residential zones "[p]ublic parking areas when developed as prescribed in [SZC] 90.00." The city's code defines "parking area, public" as "[a]n open area, building or structure, other than a private parking area, street, or alley used for the parking of automobiles and available for use by the public or by persons patronizing a particular building or establishment." SZC 2.01. In contrast, the code defines "parking area, private" as an area "used for the parking of the automobiles of residents and guests of a building." *Id.*

SZC 50.03(2) strongly supports the city's interpretation of SZC 90.13. Contrary to petitioner's view of the city's residential zones, it appears that a "public parking area" for use "by persons patronizing a particular building or establishment" is a permitted use in all residential zones, as long as that parking area is "developed as prescribed in [SZC] 90.00." The term "public parking area" would seem to include the proposed parking area for patrons of the proposed medical clinic. The express cross-reference to SZC 90.00, which governs off-street parking and includes SZC 90.13, is particularly significant. It supports the city's apparent view that SZC 90.13 permits offsite parking areas in a different zone than the primary use, at least where the zone in which the parking area is proposed allows such a parking area.

Viewing text and context together, the city's interpretation of SZC 90.13 is clearly not reversible under ORS 197.829(1).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

SZC 8.04(D) requires a finding that public facilities, services, and transportation networks are in place or are planned to be provided concurrently with the development of the property. Petitioner argues that there is no evidence supporting the city's findings of compliance with SZC 8.04(D), specifically the city's findings regarding transportation facilities, water system, and sanitary sewer.[20]

Intervenor responds that petitioner failed to raise any issue below regarding compliance with SZC 8.04(D), or whether the subject property is served with public facilities such as streets, water and sanitary sewer, and thus any such issues are waived, under ORS 197.763(1).

As noted, petitioner's attorney exhorted the city to conduct "an analysis of the proposed needs and the systems available for water, sewer, storm drains, sidewalks, street, police, fire," etc. *See* n 15. Petitioner raised no other issues under SZC 8.04(D), and at no point argued or even suggested that public facilities were not in place to serve the subject property. In an apparently voluntary response to that nonspecific exhortation, the city adopted Findings 14 and 23. Finding 14 was first set forth in the staff report, adopted by the

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[20] The city's findings addressing public facilities include Findings 4, 14 and 23. Finding 23 essentially repeats Finding 14, which states in relevant part:

> "There is an 8-inch water line on North First Street. Recently, the City of Silverton upgraded its water treatment plan and the system is designed to accommodate a population of 12,000. With a current population of 7,400 there is sufficient capacity within the City's water treatment system to handle the proposed use of the property. There is an 8-inch sanitary sewer line located along North First Street. Recently, the City's sanitary sewer treatment plant was upgraded and is designed to accommodate a population of 10,000. With a current population of 7,400 there is sufficient capacity to handle the proposed use of the property. North First Street is classified in the Silverton Transportation Plan as an arterial. This street has a right of way of 60 feet. It has a pavement width of 40 feet. * * * D Street is classified as a residential street. This street has recently been improved and there is a 30 foot wide paved street within a 40 foot wide right of way. * * * According to the ITE [Institute of Traffic Engineers] Trip Generation table the proposed use of the property within a medical clinic may have a potential of slightly more than 200 trips per day in and out of the property. According to the Silverton City Engineer this level of traffic will have only a minor impact on either D Street or First Street or the nearest intersection. * * *" Record Vol I 5-6.

planning commission and carried forward unchanged to the city council. Record 5-6, 49, 56-57. At no point did petitioner or any other party raise any issue regarding Finding 14. In any case, as explained above, in the absence of a specific issue being raised regarding compliance with SZC 8.04(D) and the presence of public facilities, the city was not required to adopt a responsive finding. The lack of evidence supporting isolated and unnecessary statements is not a basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In the case of "residential zone changes," SZC 8.04(E) requires a finding that "the proposal complies with the stated intent and purpose for the proposed zone." Petitioner argues that, given the confusion over whether the challenged decision rezoned tax lot 2300 raised in the first assignment of error, the city erred in failing to adopt findings addressing SZC 8.04(E).

The city's findings address SZC 8.04(F), which requires findings in the case of "non-residential zone changes." We address petitioner's challenges to those findings below. In resolving the first assignment of error, we concluded that despite some confusing references it is clear that the application sought only to rezone tax lots 2500 and 2600 from a nonresidential zone to another nonresidential zone, and that the challenged decision did not affect the zoning of tax lots 2300 and 2400. Given our conclusions on those points, petitioner's argument that the city erred in failing to address SZC 8.04(E), which applies only to "residential zone changes," is without merit.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

SZC 8.04(F)(1) requires a finding that the proposed rezone either (1) would mitigate a shortage in the city's inventory or (2) is more suited to the location or topography of the parcel than the existing zone. In addition, SZC 8.04(F)(2) requires a finding that the

proposed zone does not "create an intensity of use that is inconsistent with other uses in the vicinity." *See* n 9.

A. SZC 8.04(F)(1)

Petitioner argues first that it is clear which alternative under SZC 8.04(1) the city relied upon. According to petitioner, Finding 16 appears to conclude that the proposed rezone would mitigate a shortage in the city's commercial lands inventory, while Finding 24 appears to conclude that the proposed rezone is more suited to the location or topography of the parcel than the existing zone.[21] In any case, petitioner argues, neither finding adequately explains why the proposed rezone either mitigates a shortage in the city's inventory or is

[21] Findings 16 and 24 state, in relevant part:

> "16. The proposed change would help mitigate a shortage in the inventory of commercial acreage. The [SCP] indicates that during the 20 year planning period there will be a need for between 14.2 and 22.7 acres of land for commercial uses. Currently, there are approximately 21.7 acres in the commercial land inventory. This redesignation will add approximately 23,940 square feet to this inventory. This relatively small amount may not necessarily impact the overall future commercial land use[;] it will also aid in increasing this inventory by allowing for commercial uses on the subject site as an outright permitted use and not a use category which is inferred to be allowed. Therefore, the re-designation complies with [SZC] 8.04(F)(1) * * *." Record Vol I 6.
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> "24. The Council determined that the applicant's proposed rezone and use of the property is appropriate and more suited to the location of the proposed parcel. It also finds that it is not necessary for an analysis to determine if this zone change would mitigate any shortage within the C-3 zone designation inventory as was claimed by [petitioner's attorney]. The Council finds that a close reading of [SZC 8.04(F)(1)] indicates that the proposal would mitigate a shortage in the inventory acreage; or the proposed change is more suited to the location or topography of a parcel. The Council finds that the operative word in the criterion is the word 'or' and that it is not mandatory to take both parts of [SZC 8.04(F)(1)] into consideration. The Council finds that the location of the subject [property] is more suited to the development of a pediatric medical clinic in a C-3 zone than other properties of the same C-3. There are no other parcels which have an existing commercial office building which can be readily converted to a medical clinic and has ample off-street parking, and is already served by all city services. [Describing the property and surrounding area]. Given the proximity of commercial and residential uses the Council finds that the property is more suited to a commercial designation than an Industrial Park designation. The Council finds that the property is developed with an existing office building which can be readily converted to a medical clinic and that the historical uses occurring on site have been more commercial in character than industrial." Record Vol I 10.

more suited to the location or topography of the parcel than the existing zone. Moreover, petitioner argues that some of the facts recited in Finding 24 are not supported by the record.

The city council clearly adopted Findings 16 and 24 as alternatives. Therefore, the inadequacy of one finding does not warrant reversal or remand, if the alternative finding is adequate and supported by substantial evidence. We disagree with petitioner that Finding 24 is inadequate and not supported by substantial evidence. The gist of that finding is that because the subject property is developed with a building that can be converted to the proposed use allowed by the C-3 zone, has ample parking for the proposed use, and is primarily bordered by properties zoned for commercial and residential uses, the property is more suited for a commercial zoning district than for an industrial zoning district. That finding is adequate to explain why the proposed zone change "is more suited to the location" of the parcel than the existing zone. Petitioner argues that the record does not support the statements that there are no other parcels with an existing building and ample parking, and that former use of the subject property is properly characterized as commercial rather than industrial. However, the pertinent question under SZC 8.04(F)(1) is whether the proposed zone is more suited to the subject property than the existing zone, given its location and topography. We do not see that the existence or nonexistence of other parcels with existing buildings and parking, or the proper characterization of former uses on the subject property, have any bearing on that question. That a particular finding is not supported by substantial evidence provides a basis for remanding a challenged decision only if that finding is critical to demonstrating compliance with an applicable approval standard. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386, 390 (1993); *Terra v. City of Newport*, 24 Or LUBA 438, 442 (1993); *Cann v. City of Portland*, 14 Or LUBA 254, 257, *aff'd* 80 Or App 246, 720 P2d 1348 (1986). Therefore, the fact that Finding 16 is inadequate does not provide a basis for reversal or remand.

B. SZC 8.04(F)(2)

Findings 17 and 25 address SZC 8.04(F)(2), which requires a finding that the proposed zone does not "create an intensity of use that is inconsistent with other uses in the vicinity."[22] Petitioner argues that these findings are inadequate. Petitioner argues that the findings (1) fail to define the relevant "vicinity"; (2) rely on consistency between the C-3 zone and the "majority" of surrounding uses rather than on the obvious inconsistency between the proposed commercial uses and adjoining residential uses to the east; (3) merely "anticipate" no inconsistency between uses rather than adopt a definitive finding that the zone change "does not create" an intensity of use that is inconsistent with surrounding uses; (4) ignore the fact that traffic impacts from commercial uses are often more intense than industrial uses; and (5) rely on a fact not supported by the record, that the adjoining supermarket attracts a large volume of traffic.

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[22] Findings 17 and 25 state, in relevant part:

> "17. The proposed re-designation will not create an intensity of use that will be inconsistent with other uses in the immediate vicinity. While the uses to the east are residentially developed properties on lands designated R-1, the majority of surrounding uses are either in commercial [or] industrial use or are in zones which allow commercial or industrial uses. * * *. Considering that the majority of nearby properties are developed with existing commercial and industrial activities it is not anticipated that the re-designation from IP to C-3 will adversely impact the surrounding uses. The nearby Roth's supermarket attracts a large volume of traffic as does to a lesser extent [petitioner's meat-packing operation]. If anything, this re-designation has the potential to positively impact the surrounding uses by limiting the number of future uses which could be located on these lands. Since the property is developed with a building which is primarily designed to accommodate commercial activities and that the property has not historically been used for any industrial activity, it is anticipated that the proposed redesignation will not adversely impact any operation on the remaining industrial parcels along North First Street. * * * The C-3 zone designation is a natural stepping down from the IP zone and is compatible to the uses within the IP zone district. As such, the redesignation complies with the intent of [SZC 8.04(F)(2)]." Record Vol I 6-7.
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> "25. The Council determined that the applicant's proposed rezone and use of the property is appropriate and will not create an intensity of use as was claimed by [petitioner]. * * * The volume of traffic from the clinic will be spread out during the day and will not be clustered at any given time period. Therefore, the Council finds that the proposed rezone will not result in a more intensive use of the property." Record Vol I 10-11.

Intervenor responds, and we agree, that findings 17 and 25 are adequate and supported by substantial evidence. The findings address the immediate uses in the vicinity of the subject property. Petitioner does not explain why a more precise definition is necessary to show compliance with SZC 8.04(F)(2). Similarly, petitioner does not explain why it is error to give weight to the predominant commercial and industrial character of the surrounding vicinity. We do not see that the city's choice of words in "anticipating" no conflicts fails to adequately address the requirements of SZC 8.04(F)(2). The findings adequately explain why traffic impacts from the proposed use are not likely to create an intensity of use inconsistent with other uses in the vicinity.

As to the adjoining supermarket, petitioner does not seriously contend that whether that supermarket attracts a "large volume" of traffic or a lesser volume of traffic is critical to compliance with SZC 8.04(F)(2). Petitioner does not dispute that the traffic generated by the proposed commercial use will be less intense than the traffic generated by the supermarket. Instead, petitioner argues that the city must examine the cumulative traffic impacts of the supermarket and proposed clinic, and determine whether those cumulative impacts are too intense. However, petitioner does not explain why SZC 8.04(F)(2) requires a cumulative impacts analysis and we do not see that it does.

The seventh assignment of error is denied.

The city's decision is remanded.