BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NAUMES PROPERTIES, LLC, SOUTH SALEM L.L.C.
and WAL-MART STORES, INC.,
Petitioners,

vs.

CITY OF CENTRAL POINT,
Respondent.

LUBA No. 2003-107

FINAL OPINION
AND ORDER

Appeal from City of Central Point.

E. Michael Connors, Portland, and Alan D. B. Harper, Medford, filed the petition for review. E. Michael Connors argued on behalf of petitioners. With them on the brief was Gregory S. Hathaway, Davis Wright Tremaine, LLP and Hornecker, Cowling, Hassen and Heysell, LLP.

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Edward J. Sullivan and Garvey, Schubert Barer, PC.

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

REMANDED 01/21/2004

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 decision amending the city's zoning code.

FACTS

Naumes Properties, LLC (Naumes) owns a 21.6-acre parcel in the City of Central Point. The property is zoned C-4, Tourist and Office Professional. Naumes has been attempting to develop the property with a large format retail business (big-box business) for some time. Most recently, Naumes has been working with Wal-Mart Stores, Inc. (Wal-Mart) to build a Wal-Mart Superstore on the property.[1] In response to the city's belief that an application for the Wal-Mart Superstore was imminent, the city instructed its staff to prepare an emergency ordinance to amend the zoning code to limit community shopping centers in the C-4 zone to a maximum of 80,000 square feet. At some unspecified time, the city sent notice of the proposed zoning code amendment to all owners of C-4 property in the city. That notice states only that the city planned to hold a public hearing on June 12, 2003, to consider the adoption of an ordinance to clarify and amend the language regarding permitted and conditional uses in the C-4 zone. Prior to the June 12, 2003 hearing, Wal-Mart submitted an application to develop the proposed superstore on the Naumes property.

The city conducted the initial public hearing on June 12, 2003. The city explained that, although the city planning commission would usually review the proposed amendment first, that the matter had been expedited to the city council due to the expected Wal-Mart application. The city then noted that because Wal-Mart had already submitted an application that the emergency no longer existed. The hearing was continued to June 26, 2003, at which the proposed amendment was approved without the emergency clause. This appeal followed.

---

[1] A Wal-Mart Superstore is larger and contains more amenities than standard Wal-Mart stores. The proposed superstore in this appeal is approximately 207,000 square feet.

STANDING

The city does not challenge the standing of petitioner Naumes, but the city does challenge the standing of petitioners Wal-Mart and South Salem LLC (South Salem) alleging that they did not appear below. Wal-Mart responds that its representative, Chuck Martinez, appeared at two public hearings in this matter and also met with city representatives in his capacity as Wal-Mart's representative. South Salem responds that its representative, John Batzer, submitted written testimony in his capacity as South Salem's representative.

When Chuck Martinez testified before the city council he stated that he represented several companies, including Wal-Mart. Record 18. This testimony was sufficient to constitute an appearance on behalf of Wal-Mart. Wal-Mart has standing to participate in this appeal.

The written testimony provided by John Batzer, however, does not mention that he represents South Salem in any capacity or that he is submitting the testimony on South Salem's behalf. Record 38. In fact, Batzer's testimony does not mention South Salem at all. Absent any other evidence, and none has been brought to our attention, a reasonable person would have no way of knowing from Batzer's letter that it was submitted on behalf of South Salem. South Salem has not established standing to participate in this appeal. Therefore South Salem is dismissed from this appeal.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief and to exceed the normal five-page limit for reply briefs pursuant to OAR 661-010-0039.[2] The reply brief responds to five alleged new matters in the response brief and explains that due to the many issues and their complexity, a reply

[2] OAR 661-010-0039 provides:

> "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. A reply brief shall not exceed five pages, exclusive of appendages, unless permission for a longer reply brief is given by the Board. * * *"

brief in excess of the five-page limit is warranted. The city objects to the reply brief regarding one of the alleged new matters and moves to strike that portion of the reply brief.

The disputed part of petitioners' reply brief concerns petitioners' discussion of whether alleged procedural errors by the city prejudiced petitioners' substantial rights. Generally, a reply brief is warranted to allow a petitioner to respond to an assertion in a response brief that a petitioner's substantial rights were not prejudiced by a procedural error. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536, 538 (2003). The city, however, asserts that a different result is mandated in the present appeal because petitioners argued in the petition for review that their substantial rights were prejudiced. Therefore, according to the city, that issue cannot be a new matter raised for the first time in the response brief.

The city relies on *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998), for the proposition that because petitioners raised the issue of prejudice to their substantial rights in the petition for review they are precluded from responding to that as a new matter raised in the response brief. In *Casey Jones*, we did not allow the petitioner to file a reply brief after the response brief challenged the petitioner's standing and our jurisdiction, because the petitioner devoted over 20 pages of the petition for review to arguments anticipating those challenges. The petition for review in the present appeal alleges a number of procedural errors and argues that those errors prejudiced petitioners' substantial rights. The response brief faults petitioners for failing to demonstrate that each individual procedural error prejudiced petitioners' substantial rights. The proposed reply brief responds to that assertion, and argues that it is appropriate to analyze the cumulative impact of the alleged procedural errors. Unlike the reply brief in *Casey Jones*, the reply brief proposed here does not simply elaborate on arguments in the petition for review that anticipate defenses in the response brief. The city's motion to strike is denied.

No party objects to the length of the reply brief. For the foregoing reasons, the reply brief is allowed.

SECOND ASSIGNMENT OF ERROR

Zoning code amendments are subject to Central Point Municipal Code (CPMC) 1.24.[3] CPMC 1.24.060 and 1.24.070 provide that all matters, including amendments to the comprehensive plan and CPMC, are subject to ORS 197.763 regarding notice and the conduct of hearings.[4] These requirements apply to both quasi-judicial and legislative amendments.[5]

There does not seem to be any dispute that the city did not comply with CPMC 1.24 or ORS 197.763. The city did not comply with the notice requirements in several ways. The city failed to notify property owners within 100 feet of C-4 zoned properties. ORS 197.763(2)(a)(A). The notice did not list the applicable criteria or the applicable chapter of the CPMC. ORS 197.763(3)(b). It is not clear that the notice was provided in a timely manner as the notice is not

---

[3] CPMC 17.88.030 provides:

> "Applications and review [of zoning code amendments] shall conform to the provisions of Chapter 1.24 of this code and applicable laws of the state. * * *"

[4] CPMC 1.24.060 and 1.24.070 provide as pertinent:

> "1.24.060 Notice requirements. Notice for all public hearings shall comply with ORS 197.763(2) and (3).
>
> "1.24.070 Conduct of public hearings * * *
>
> "A. * * * the * * * city council shall hold a public hearing on the application, acting as a quasi-judicial body and subject to all the procedural requirements in connection therewith. * * *
>
> "* * * * *
>
> "G. All public hearings under this chapter shall also conform with the provisions of ORS 197.763, and to the extent that any provision of this section shall be in conflict with said statute, the statutory provisions shall prevail."

[5] CPMC 1.24.020(D) provides:

> "The city council shall hold a public hearing and decide the following matters:
>
> "* * * * *
>
> "2. Amendments to the text and map of the zoning ordinance[.] * * *"

dated.[6] The city also did not comply with the conduct of hearing requirements. The city failed to identify the approval criteria. ORS 197.763(5)(a). The city did not notify participants that failure to raise issues below may prevent those issues from being raised before LUBA. ORS 197.763(5)(c). The city also failed to explain the right to request a continuance and allow the record to remain open for seven days. ORS 197.763(6).

The real dispute under this assignment of error is whether petitioners' substantial rights were prejudiced. Procedural errors will not serve as a basis for reversal or remand unless a petitioner's substantial rights are prejudiced. ORS 197.835(9)(a)(B). The substantial rights referenced in ORS 197.835(9)(a)(B) include an adequate opportunity to prepare and submit one's case and the right to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). The city argues that petitioners' substantial rights were not prejudiced. We do not agree.

In our view, the most serious of the several procedural errors committed by the city is the complete failure to mention the applicable criteria for an amendment to the CPMC.[7] Neither the notice, nor the staff report, nor the city's public discussion, nor the decision ever mentions the applicable criteria. It is not until the response brief was filed that any representative of the city mentions the applicable criteria. In *Latta v. City of Joseph*, 36 Or LUBA 708 (1999), we faced a less serious example of procedural errors involving the failure of a city to identify the relevant approval criteria. We stated:

> "We believe petitioners' right to a fair opportunity to present their case was substantially prejudiced by the city's failure to identify the relevant approval criteria. This is particularly the case in view of the confusion over what was being requested and how the city viewed the proposal. * * * The city's failure to identify the relevant

---

[6] As petitioners note, given that the staff memorandum to the city council asking direction on how to proceed regarding the ordinance is dated May 22, 2003, 21 days prior to the June 12, 2003 public hearing, it is unlikely the city complied with the 20-day mailing requirement of ORS 197.763.

[7] CPMC 17.88.010 provides:

> "This title may be amended by changing the boundaries of districts or by changing any other provision thereof, whenever the public necessity and convenience and the general welfare require such amendment, by following the procedure of this chapter."

> approval criteria added to the confusion during the local hearing and interfered with the ability of both the supporters and opponents of the application to present their cases." *Id*. at 712.

Unlike *Latta*, where the approval criteria were at least referenced in the staff report and addressed in the decision, the city in the present appeal never identified the approval criteria at all.

The city attempts to demonstrate that, contrary to the express language of the CPMC, CPMC 1.24 and ORS 197.763 do not apply to the present appeal. According to the city, because the challenged decision is a legislative decision, those ordinances and statutes do not apply. Given that the decision itself states that the decision was made "pursuant to the requirements set forth in CPMC Chapter 1.24," the city's counsel appears to take a different position than that taken by the city in its decision. Furthermore, CPMC 17.88.030 expressly provides that decisions regarding zoning code amendments "shall conform to the provisions of Chapter 1.24 of this code." *See* n 3. CPMC 1.24.010 also states that the purpose of the city's code is to establish a uniform procedure for legislative and quasi-judicial decisions, including "amendments to the text and map of the Comprehensive Plan, annexations, [and] amendments to the text and map of the zoning ordinance."[8] We reject the suggestion in the response brief that the requirements of CPMC Chapter 1.24 and ORS 197.763 do not apply to legislative decisions as well as quasi-judicial decisions.[9]

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

As discussed earlier in this opinion, the quasi-judicial procedures of CPMC Chapter 1.24 apply to zoning code amendments. CPMC 1.24.070(C) requires the city to prepare findings of fact

---

[8] CPMC 1.24.010 provides:

> "It shall be the purpose of this chapter to establish a uniform procedure for planning, zoning and land use decisions, including * * * amendments to the text and map of the zoning ordinance * * *."

[9] A local government is entitled to adopt local land use standards that are more stringent than the minimum state standards. *Kenagy v. Benton County*, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992).

that identify, among other things, the applicable criteria.[10] Petitioners argue that the city's findings are inadequate because they fail to adequately explain the basis for the city's approval of the zoning code amendment.[11] The city responds that findings are not required because this is a legislative

[10] CPMC 1.24.070(C) provides:

> "The planning commission or city council shall make findings of fact in connection with their decision on the applications, with said findings to include the applicable criteria and standards, the facts they find to be supported by substantial evidence, and conclusions describing how the facts either support or prevent allowance of the application, based upon the applicable standards and criteria. Such findings may be read into the record as part of a motion made at the time of the meeting, in support of the action taken, or the planning commission or council may direct that such findings be prepared in written form by the applicant or staff, to be presented at the next regularly scheduled meeting. Such findings shall be in written form and shall be attached as an exhibit to any resolution or ordinance passed relating to the application."

[11] The city's findings are as follows:

> "1. The City of Central Point ('City') is authorized under Oregon Revised Statute (ORS) Chapter 197 to prepare, adopt and revise comprehensive plans and implementing ordinances consistent with the Statewide Land Use Planning Goals.
>
> "2 The City has coordinated its planning efforts with the State in accordance with ORS 197.610(2) and OAR 660-018-0020 to assure compliance with goals and noticing requirements.
>
> "3. Pursuant to the authority granted by the City charter, the Oregon Revised Statutes, and the Oregon Administrative Rules, the City has determined that there are extenuating circumstances requiring an expedited review.
>
> "4. Pursuant to the requirements set forth in CPMC Chapter 1.24 and Chapter 17.96, the City has conducted the following duly advertised public hearing to consider the proposed amendments:
>
> "(a) City Council hearing on June 12th, 2003.
>
> "Now, therefore;
>
> "THE PEOPLE OF THE CITY OF CENTRAL POINT, OREGON, DO ORDAIN AS FOLLOWS:
>
> "Section 1. Section 17.44.020 of the Central Point Municipal Code is hereby amended to read as follows:
>
> "17.44.020 The following uses are permitted in the C-4 district:
>
> "* * * * *

decision rather than a quasi-judicial decision.[12] Finally, the city argues that even if findings are required and the requirement for findings was not waived by the city under CPMC 1.24.070(D)(6), the decision should be affirmed under ORS 197.835(11)(b) because there is evidence that "clearly supports" the decision.[13]

CPMC 1.24.070(C) provides that the city council "shall make findings of fact in connection with their decision on the application" that include the applicable criteria, the facts relied upon, and a conclusion describing how the facts relied upon support the decision. *See* n 10. According to petitioners, CPMC 1.24.070(C) clearly requires findings for both legislative and quasi-judicial decisions. According to the response brief, findings are only required for decisions involving

---

> "15. Community shopping centers, defined as a group of commercial establishments planned, developed, owned or managed as a unit, *with no individual unit having more than 80,000 square feet of floor space*, which may include any of the permitted uses in this section * * *"
>
> "Section 2. Section 17.44.030 of the Central Point Municipal Code is hereby amended to read as follows:
>
> "17.44.30 Conditional Uses
>
> "* * * * *
>
> "B. Uses other than those listed above may be permitted in a C-4 district when included as a component of a commercial, tourist, or office-professional planned unit development that consists predominantly of uses permitted in that zone, *which has no individual unit having more than 80,000 square feet of floor space*, and is planned and developed in accordance with Chapter 17.68. * * *" (Emphasized language is the amendment to the CPMC).

[12] The city also argues that even if findings are required that the city used its discretion to waive that requirement under CPMC 1.24.070(D)(6) which allows the presiding officer to "[w]aive, in his discretion, the application of any rule in this chapter where the circumstances of the hearing indicated that it would be expedient and proper to do so * * *". First of all, we agree with petitioners that the city did not implicitly waive the requirement for findings. Even if the city does have such discretion, which is questionable, it certainly did not exercise that discretion in the present case.

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

> "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."

"applications," and because legislative decisions such as the challenged decision do not involve applications, there is no requirement for findings. We need not decide this issue because even if findings are not required by the CPMC, the city has not demonstrated that the applicable criteria are satisfied.

The city is correct that there is no statutory requirement that all legislative decisions be supported by findings. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994) (and cases cited therein).[14] A respondent may be able to supply argument and citation to the record in its brief that are adequate to demonstrate compliance with the applicable approval criteria. *Id*. at 564. However, if we cannot perform our review function, a legislative decision that is not supported by adequate findings must be remanded. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).

The city attempts in its brief to demonstrate through legal argument that the decision satisfies the applicable criteria. The city also argues that the decision should be affirmed because the record "clearly supports" the decision.[15] As petitioners point out, the city's attempt to defend its decision is created almost entirely out of whole cloth. While our decision in *Redland/Viola/Fischer's Mill CPO* alludes to legal argument as well as citations to evidence in the record, that allusion pertains to legal argument *based on* evidence in the record.

> "* * * we explained that even where the challenged plan amendment is legislative, Goal 2 imposes an obligation that a local government explain why the amendment complies with applicable statewide planning goals. This explanation may be provided either in findings, or if not in findings, *somewhere in the record*

[14] Where there is a local code provision requiring that findings be adopted in support of legislative decision, as is arguably the case here, the adoption of inadequate findings can provide a basis for remand. *Andrews v. City of Brookings*, 27 Or LUBA 39, 43 (1994).

[15] The burden imposed upon a local government to demonstrate that a legislative decision satisfies the applicable approval criteria under the second option discussed in *Redland/Viola/Fischer's Mill CPO* is not as daunting as that required by ORS 197.835(11)(b). We will affirm a decision with inadequate findings pursuant to ORS 197.835(11)(b) only when the evidence in the record renders a finding of compliance with the applicable approval standards "obvious" or "inevitable." *Terra v. City of Newport*, 36 Or LUBA 582, 589-90 (1999). Therefore, if a legislative decision with inadequate findings cannot be affirmed by the process applicable solely to legislative findings, it certainly cannot be affirmed pursuant to ORS 197.835(11)(b).

> supporting the legislative plan amendment. Where the local government does not adopt findings explaining why the challenged legislative plan amendment complies with applicable goal requirements, we rely on respondents to provide argument and *citations to the record* to assist this Board in resolving allegations by petitioners that the challenged decision does not comply with the applicable statewide planning goals." *Von Lubken v. Hood River County*, 22 Or LUBA 307, 314 (1991) (emphasis added).[16]

In the present appeal, the city's legal arguments are almost entirely divorced from the record. The city's only citations to the record are to anti-Wal-Mart testimony from citizens. Respondents' Brief 13, 16. As petitioners point out, there is nothing in the record that bears on whether the "public necessity and convenience and the general welfare" require the proposed amendments for purposes of CPMC 17.88.010. In short, there is nothing in either the decision or the record that would allow the city to conclude that the applicable approval criteria are satisfied, or that would allow us to review that conclusion, even assuming an implicit conclusion to that effect was made. Had the city adopted a decision that incorporated the legal arguments crafted in the response brief and developed a record providing an adequate factual base for such a decision, perhaps our disposition would be different. However, the city did not do that, and it cannot create an affirmable legislative decision out of thin air in the response brief.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city did not demonstrate that CPMC 17.88.010 was satisfied.[17] Petitioners also argue that their constitutional right to equal protection was violated. Because we have already concluded that the city's decision must be remanded so that the city can adopt adequate findings, it would be premature to consider whether the city has demonstrated "the public

---

[16] Although *Von Lubken* involved a legislative plan amendment and compliance with the statewide planning goals, we see no reason that analysis should not apply equally to legislative zoning code amendments and to other applicable approval criteria. In sum, even if quasi-judicial findings are not required, we must have *something* from the decision or record to base our decision upon.

[17] CPMC requires the city to find that "the public necessity and convenience and the general welfare require such amendment." *See* n 7.

necessity and convenience and the general welfare" require the CPMC to be amended. Similarly, it is premature to consider petitioners' constitutional challenge.

We do not reach the fourth assignment of error.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city erred in bypassing the planning commission and proceeding directly to the city council for a decision on the amendment. CPMC 1.24.020(C) provides that "the planning commission shall review and make recommendations to the city council on those matters specified in subsection D of this section * * *." CPMC 1.24.020(D)(2) includes "[a]mendments to the text and map of the zoning ordinance." The city responds that while that is the normal procedure, nothing in the CPMC prevents the city council, the final decision maker for such amendments, from proceeding without a recommendation from the planning commission. As the city points out, CPMC 1.24.020(D) makes clear that the city council must hold a public hearing and make the final decision regarding amendments to the CPMC. *See* n 5. According to the city, there is nothing in the CPMC that makes city council adoption of a zoning ordinance amendment contingent upon receipt of a recommendation from the planning commission or even that the city council consider such a recommendation.

While the interpretation articulated in the response brief may be plausible, that interpretation was not made expressly or implicitly in the challenged decision below. Thus, we do not have a reviewable interpretation. We also decline to interpret the provision in the first instance. Because remand is required in any event, the city should interpret its ordinance in the first instance on remand to determine whether planning commission review is a necessary prerequisite to amending the zoning ordinance. *Davis v. City of Ashland*, 37 Or LUBA 224, 235 (1999).

The city's decision is remanded.