

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JOSEPH COTTER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2003-062

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Joseph Cotter, Eagle Creek, filed the petition for review and argued on his own behalf.

20
21 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed the response brief and argued
22 on behalf of respondent.

23
24 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
25 participated in the decision.

26
27 REMANDED 03/19/2004

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals an adjustment committee decision denying his appeal of an administrative decision approving an adjustment to the maximum size allowed for a sign.

MOTION TO FILE REPLY BRIEF

On February 19, 2004, the date of oral argument, petitioner filed a motion seeking permission to file a reply brief to address several alleged new matters in the response brief, which had been filed February 11, 2004. Petitioner’s motion was not accompanied by the proposed reply brief, as required by OAR 661-010-0039; the reply brief was filed several days later, on February 23, 2004.

The city opposes the motion, on the grounds that it was not accompanied by the proposed reply brief and, in any case, the motion is untimely. The city argues that filing a reply brief 12 days after the response brief was filed violates the OAR 661-010-0039 requirement to file the reply brief “as soon as possible after respondent’s brief is filed” and, further, filing the reply four days after oral argument deprives the city of any opportunity to respond.

We agree with the city that petitioner’s motion must be denied as untimely. LUBA’s expedited schedule of review provides only a limited window of time in which to file a reply brief. A reply brief filed 12 days after the response brief was filed, and four days after oral argument, is not filed “as soon as possible” after the filing of the respondent’s brief. Accepting the reply brief under these circumstances would prejudice the city’s substantial right to an adequate opportunity to present its position in this proceeding. The motion to file a reply brief is denied.

MOTION TO TAKE EVIDENCE

Petitioner moves to take evidence not in the record pursuant to OAR 661-010-0045.¹ The extra-record evidence petitioner wishes us to consider consists of (1) an affidavit from an applicant

¹ OAR 661-010-0045 provides, in relevant part:

1 for a different sign from the one at issue here, with attachments, and (2) an exchange of e-mails
2 between petitioner and a city planner. In addition, petitioner seeks to take the depositions of the
3 city attorney, the director of the city Bureau of Development Services, and two city planners.
4 According to petitioner, the proffered evidence and sought-after testimony would establish that the
5 city has in the past construed the term “image” in the code definition of “sign” to include
6 representational images but to exclude abstract images, an interpretation that petitioner advances in
7 the petition for review.

8 The city responds, and we agree, that petitioner has not established a basis to consider
9 evidence outside the record. A necessary condition for application of OAR 661-010-0045 is that
10 the proponent establish that there are “disputed factual allegations” between the parties. A dispute
11 regarding interpretation of the law or the legal conclusions to be drawn from undisputed facts does
12 not warrant taking extra-record evidence under OAR 661-010-0045. *Meredith v. Lincoln*
13 *County*, 44 Or LUBA 821, 827 (2003); *Jones v. Lane County*, 27 Or LUBA 654, 655 (1994).
14 Here, the pertinent dispute between the parties is over the scope and interpretation of the term
15 “image” in the city’s sign code, and the legal consequences that flow from different interpretations.
16 Further, we agree with the city that the fact petitioner wishes to establish—that city staff have in the
17 past interpreted “image” consistently with petitioner’s interpretation—has no discernible bearing on

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.”

1 the issues in this appeal, and thus petitioner has failed to establish that our consideration of extra-
2 record evidence “will affect the outcome of the review proceeding.” OAR 661-010-0045(2)(a).
3 The motion to take evidence is denied.

4 **FACTS**

5 The subject property is developed with a commercial building. In 2001, the property
6 owner and others applied to the city for a sign permit to allow a mural to be painted in the center of
7 three panels along one wall of the building. The city approved the permit for a 122-square foot
8 mural, and subsequently a 129-square foot mural was painted in the center panel.

9 In 2003, the property owner and others, including petitioner, applied for a sign permit to
10 include the existing mural and two new murals on either side of the existing mural, totaling 388
11 square feet. The proposed signs exceed the total amount of sign area allowed per building and the
12 maximum amount of area per sign, under the city’s sign code. Accordingly, the applicants
13 requested an adjustment under the criteria at Portland City Code (PCC) 32.38.030(C).²

14 A staff planner administratively approved the requested adjustment. Petitioner then
15 appealed the staff decision to the adjustment committee, challenging the constitutionality of the

² PCC 32.38.030(C) provides, in relevant part:

“Sign adjustments will be approved if the review body finds that the applicant has shown that the criteria of Paragraph C.1. or C.2, below are met.

- “1. Area enhancement. The applicant must meet criteria C.1.a. and b. and either C.1.c. or d.
 - “a. The adjustment for the proposed sign will not significantly increase or lead to street level sign clutter, to signs adversely dominating the visual image of the area, or to a sign which will be inconsistent with the objectives of a specific plan district or design district; and
 - “b. The sign will not create a traffic or safety hazard; and
 - “c. The adjustment will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark; or
 - “d. The adjustment will allow a sign that is more consistent with the architecture and development of the site.”

1 applicable sign regulations and the requirements for an adjustment. The adjustment committee held
2 hearings March 4, 2003, and March 18, 2003, and at the conclusion of the March 18, 2003
3 hearing voted to deny the appeal and uphold the staff decision approving the requested adjustments.
4 The committee adopted written findings on April 1, 2003. The committee's decision declines to
5 review petitioner's constitutional challenges to the city's sign code, as beyond the committee's
6 scope of review.

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 In reciting the facts leading up to the proposal, the challenged decision states the following:

10 "In 2001, the applicants applied for a Sign Permit to allow a sign to be painted on
11 the east wall of their commercial building located at the intersection of SE Foster
12 Road and SE 65th Avenue. The permit was approved for a 122 square-foot
13 painted sign, however, the final permit was not applied for, was not issued and is
14 thus void. Subsequently, a 129 square-foot sign was painted on the east wall
15 without the required permit; therefore, the existing painted wall sign is not legal."
16 Record 2-3.

17 Petitioner argues that the city's conclusion that the existing mural is not legal is incorrect and
18 not based on substantial evidence in the record. According to petitioner, there is no evidence
19 supporting the city's findings that the 2001 final permit "was not applied for, was not issued and is
20 thus void."

21 The city responds that the decision on appeal is an adjustment decision to allow a total of
22 388 square feet of sign area, an adjustment that would be necessary even if the existing mural had a
23 valid permit. Therefore, the city argues, the challenged statement that the 2001 final permit "was not
24 applied for, was not issued and is thus void" and the challenged conclusion that the existing mural is
25 illegal are irrelevant to the adjustment criteria and are mere surplusage. Because the challenged
26 findings are not critical to the city's decision, the city argues, any error in those findings or lack of
27 evidentiary support for those findings is not a basis for reversal or remand.

1 Like the city, we do not see that the challenged statements, even if erroneous or
2 unsupported by the record, are relevant to the applicable criteria or otherwise critical to the city's
3 decision. There is no dispute that even if the existing mural had a valid permit the applicants must
4 seek adjustments under the same criteria to approve the size of the other two murals and to exceed
5 the maximum sign area of the building, including the existing mural. As far as petitioner has
6 established, whether the existing mural has a valid permit plays no role under the applicable criteria
7 or the city's decision.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner argues that the city's sign code, specifically the code definition of "sign," is
11 unconstitutional on its face, and is inconsistent with comprehensive plan policies governing public art.

12 **A. Constitutional Issues**

13 Petitioner explains that prior to 1999, the city's sign code did not regulate public art such as
14 murals. In 1999, the Multnomah County Circuit Court ruled in *AK Media Group, Inc. v. City of*
15 *Portland*, No. 9801-00125 (*AK Media*), that the then-current definition of "sign" was inconsistent
16 with Article I, Section 8 of the Oregon Constitution, because it excluded public art such as wall
17 murals from regulation under the sign code, while imposing regulations on other signs such as
18 billboards.³ Following that decision, the city amended the code definition of "sign" to read as it
19 does today:

20 "Materials placed or constructed, or light projected, that (1) conveys a message or
21 image and (2) is used to inform or attract the attention of the public. Some examples
22 of 'signs' are materials or lights meeting the definition of the preceding sentence and
23 which are commonly referred to as signs, placards, A-boards, posters, billboards,
24 murals, diagrams, banners, flags, or projected slides, images or holograms. The
25 scope of the term 'sign' does not depend on the content of the message or image
26 conveyed."

³ A copy of the circuit court opinion is appended to the city's brief at Appendix 1-66.

1 Petitioner argues that subjecting public art such as wall murals to the size and other
2 regulations applicable to “signs” is inconsistent with Article I, section 8 of the Oregon Constitution,
3 for two reasons.⁴ First, petitioner argues that the term “image” in the definition of “sign” refers only
4 to representational images, not abstract images, and thus the definition of sign impermissibly
5 distinguishes between representational art and non-representational art. According to petitioner,
6 imposing regulations on one kind of speech and no regulations on other kinds of speech, based on
7 the difference in content, is inconsistent with Article I, section 8. *See Ackerley Communications,*
8 *Inc. v. Mult. Co.*, 72 Or App 617, 623-24, 696 P2d 1140 (1985), *rev dismissed* 303 Or 165,
9 734 P2d 885 (1987) (an ordinance that regulates and limits billboards with “commercial” content
10 but that allows without regulation billboards with “noncommercial” content violates Article 1, section
11 8). Therefore, petitioner argues, the city cannot impose the size regulation and other regulations
12 applicable to “signs” on representational art, a category that apparently includes the wall murals at
13 issue in the present case.

14 Second, petitioner contends that the city went too far in including public art within the scope
15 of “signs.” Petitioner recognizes that the circuit court found in *AK Media* that the former code
16 definition of “sign,” which excluded public art such as wall murals from regulation, violated Article I,
17 section 8. However, petitioner argues that the circuit court did not order the city to remedy that
18 violation by including public art within the category of “signs.” According to petitioner, while the
19 circuit court did rule that the plaintiff in that case was entitled to compel the city to choose between
20 “deregulating signs along with murals or regulating murals with signs,” the court expressly left open
21 the possibility that the city could “arrive at some other constitutional response.” *AK Media*, slip op
22 55, n 63. Petitioner contends that the city failed to recognize that it is possible (indeed
23 constitutionally required, in petitioner’s view) to regulate public art as something other than “signs,”
24 without relying on content-based distinctions. Petitioner argues that the production of public art

⁴ Article 1, section 8 of the Oregon Constitution provides that “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever[.]”

1 such as wall murals has essentially ground to a halt since 1999, under the current code definition,
2 and that the city’s choice to regulate wall murals as signs has so burdened a particular form of
3 speech, public art, that the code definition violates Article I, section 8. Citing to cases under the
4 Free Expression Clause of the First Amendment to the United States Constitution, petitioner argues
5 that the code definition (1) is not a “reasonable fit” with respect to and does not advance the city’s
6 “substantial interests,” (2) is impermissibly broad and vague, (3) impermissibly burdens speech by
7 muralists, and (4) fails to leave open ample alternative channels of communication.

8 As petitioner recognizes, his first and second arguments are somewhat in tension. Petitioner
9 first contends that the code definition does not go far enough, because it regulates representational
10 art but not abstract art, and thus makes a constitutionally infirm content-based distinction. Under
11 the second line of reasoning, the code definition goes too far in sweeping public art such as wall
12 murals into the regulations governing signs. According to petitioner, it is possible to distinguish
13 between wall murals and “signs” without reference to content. We understand petitioner’s first and
14 second arguments to be framed as alternatives.

15 The city disputes petitioner’s premise that the sign definition regulates representational
16 images but excludes abstract or non-representational images. According to the city, the term
17 “image” is not limited to representational images. We agree with the city that nothing in the sign
18 code drawn to our attention narrows the scope of the term “image” to exclude abstract or non-
19 representational images. Therefore, petitioner’s first argument does not provide a basis for reversal
20 or remand.

21 The gist of petitioner’s second line of argument is that there are content-neutral ways to
22 distinguish wall murals from “signs,” and that the city is required to adopt those ways in order to
23 avoid a host of constitutional difficulties allegedly caused by regulating wall murals as signs. We
24 understand petitioner to argue that if the view expressed in the city’s brief is correct—that the
25 definition of “sign” includes both representational and nonrepresentational images—then the scope
26 of speech regulated by the sign code is even broader and hence more susceptible to constitutional

1 infirmity than petitioner’s first argument would suggest. In addition, petitioner cites to
2 comprehensive plan policies that petitioner reads to encourage public art. According to petitioner,
3 in order to be consistent with the cited comprehensive plan policies the city cannot place the same
4 burdens on wall murals as it places on other types of graphic speech, such as commercial billboards.

5 Our initial difficulty with petitioner’s second argument is that petitioner fails to explain how
6 the city can distinguish public art such as wall murals from other types of signs in a content-neutral
7 manner. The closest petitioner comes is to assert that:

8 “The means to distinguish public art from signs is to ascertain who produced it, how
9 it was produced, the purpose, the use, whether it is original or unique to the artist,
10 and whether or not it is a commercial sign.” Petition for Review 27.

11 There are at least two problems with the approach petitioner suggests. First, it would appear to
12 require city officials to determine under various factors whether a proposed graphic is “art” or
13 something other than art. Something that otherwise might qualify as “art” based on “who produced
14 it, how it was produced, the purpose, [and] the use,” may not be “art,” under petitioner’s approach,
15 if it has a “commercial” purpose, or is not “original or unique.” That approach would seem to
16 distinguish between types of speech based on content, similar to the ordinance at issue in *Ackerley*,
17 which was constitutionally flawed because it distinguished between commercial and noncommercial
18 speech. Further, petitioner’s approach would appear to give city officials unlimited discretion in
19 deciding what graphics constitute “public art,” and were hence free from regulation, and what
20 graphics constitute something other than art, and were therefore subject to size and other
21 regulations. It is questionable whether an ordinance granting city officials such discretion to approve
22 or deny sign applications would be consistent with constitutional requirements. *See Desert*
23 *Outdoor Advertising Inc. v. City of Moreno Valley*, 103 F3d 814, 818 (9th Cir 1996), *cert.*
24 *den.* 522 US 912, 118 S Ct 294, 139 L Ed 2d 227 (1997) (subjective sign standards requiring a
25 determination that proposed signs will not be detrimental to the “aesthetic quality” of the community
26 grants city officials “unbridled discretion” to approve or deny speech, in violation of the federal First
27 Amendment).

1 In the absence of a content-neutral way of distinguishing wall murals from other signs, as the
2 circuit court noted, the city’s regulatory choice lies between deregulating signs altogether or
3 regulating murals along with signs. The city has chosen the latter course. As relevant here, the
4 effect of that choice is that wall murals are subject to the same size restrictions as other types of
5 signs, with larger sizes permitted under the city’s adjustment process. That choice may burden
6 graphic expression by wall muralists, but it does so only to the extent other types of constitutionally
7 protected expression are burdened. The breadth and even-handedness of the city’s sign regulation
8 is necessary in order to regulate signs in a manner consistent with Article I, section 8. Petitioner
9 does not argue, and we do not see that it is the case, that the only constitutionally permissible choice
10 for the city is to deregulate all signs, including murals. Nor do we see that the city comprehensive
11 plan policies cited by petitioner compel the city to favor public art over other types of expression,
12 even if such favoritism would pass constitutional muster. In short, petitioner’s second line of
13 argument fails to provide a basis for reversal or remand.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 Petitioner contends that the adjustment criteria the city applied in approving the size of the
17 proposed mural require the city to assess the content of the proposed sign and therefore application
18 of those criteria violate Article I, section 8, for the same reasons expressed under the second
19 assignment of error. In addition, petitioner argues that the city has failed to demonstrate that the
20 adjustment criteria can be imposed “only in a clear and objective manner,” pursuant to
21 ORS 197.831.⁵ Finally, petitioner contends that the city’s findings inadequately articulate why the
22 proposed mural meets the adjustment criteria.

⁵ ORS 197.831 provides:

“In a proceeding before [LUBA] or on judicial review from an order of the board that involves an ordinance required to contain clear and objective approval standards for a permit under ORS 197.307 and 227.175, the local government imposing the provisions of the ordinance shall

1 The applicable adjustment criteria are quoted above in footnote 2. Petitioner’s arguments
2 focus on PCC 32.38.030(C)(1)(c), which requires a finding that the adjustment “will allow a unique
3 sign of exceptional design or style which will enhance the area or which will be a visible landmark.”

4 The city’s findings with respect to PCC 32.28.030(C)(1)(c) state:

5 “The trio of signs will be complimentary in size and will enhance the building wall on
6 which they will be painted. This is because they will fit within existing, equal-size,
7 recessed panels that are currently featureless elements that appear as an
8 afterthought or as previous storefront windows that were filled in. The signs will
9 enhance the building wall and the area. This criterion is met.” Record 6.

10 We have rejected petitioner’s arguments under the second assignment of error that
11 regulation of wall murals under the city’s sign code, including imposition of size restrictions, is
12 unconstitutional because it requires the city to assess the content of the proposed mural. As a
13 consequence, if we agree with petitioner that the adjustment criteria are unconstitutional, it would
14 seem to follow that petitioner’s application must be denied, because the proposed mural
15 unquestionably exceeds the applicable size limitation. Be that as it may, we disagree with petitioner
16 that the adjustment criteria at PCC 32.38.030(C)(1)(c) require inquiry into the content of the
17 proposed sign, or that the city’s review in the present case inquired into the content of the proposed
18 sign.

19 First, as the city notes, PCC 32.38.010(C) requires that, notwithstanding any other code
20 provision, reviews of adjustment applications with respect to signs will be content-neutral, without
21 reference to message, category, subject, topic or viewpoint.⁶ Thus, even if the terms of
22 PCC 32.38.030(C)(1)(c) required inquiry into the content of a proposed sign, PCC 32.38.010(C)

demonstrate that the approval standards are capable of being imposed only in a clear and objective manner.”

⁶ PCC 32.38.010(C) provides:

“**Content-Neutral Administration of Land Use Reviews.** Notwithstanding any other provision of this Title or of related standards referenced in this Title, applications for adjustments, design review, and historic design review for signs will be reviewed only with respect to sign structure or placement, or with reference to copy only to the extent of color or typeface and excluding any reference to message, category, subject, topic or viewpoint.”

1 would apply to prohibit such inquiry. Second, while PCC 32.38.030(C)(1)(c) has subjective
2 elements in it (“unique sign of exceptional design or style”), we do not see that application of
3 PCC 32.38.030(C)(1)(c) necessarily requires that the city review the content of the sign and
4 approve or deny the sign based on content. In any case, even if review under
5 PCC 32.38.030(C)(1)(c) necessarily involves evaluation of the content of the sign, it is clear in the
6 present case that the city did not do so. The above-quoted findings focus, as PCC 32.38.010(C)
7 directs, on the structural setting and placement of the sign and, as portions of
8 PCC 32.38.030(C)(1)(c) direct, on whether it will “enhance the area.” The findings do not address
9 whether the sign is a “unique sign of exceptional design or style.” We discuss, below, petitioner’s
10 challenge to the adequacy of the city’s findings with respect to that aspect of
11 PCC 32.38.030(C)(1)(c).

12 As to ORS 197.831, we agree with the city that petitioner has not established that the sign
13 adjustment criteria are “required to contain clear and objective approval standards for a permit
14 under ORS 197.307 and 227.175,” within the meaning of that statute. Therefore, the fact that the
15 sign adjustment criteria include subjective elements has no bearing on resolution of this assignment of
16 error.

17 As to petitioner’s findings challenge, petitioner faults for the city for failing to address
18 whether the proposed mural is a “unique sign of exceptional design or style.” However, in the next
19 breath petitioner argues that if the city had addressed those considerations it would have evaluated
20 the content of the sign and thus committed error. Petitioner cannot have it both ways. Whether or
21 not the city would commit error in addressing whether the proposed mural is a “unique sign of
22 exceptional design or style,” a point we need not and do not decide, petitioner cannot obtain
23 remand based on the city’s failure to address certain considerations when petitioner also argues that
24 addressing those considerations would result in an unconstitutional decision. Petitioner has not
25 demonstrated any inadequacy in the city’s findings of compliance with PCC 32.38.030(C)(1)(c)
26 that provide a basis for reversal or remand.

1 The third assignment of error is denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 The city's initial administrative decision imposed a condition limiting lighting to a single
4 existing light over the existing panel. That condition was based on PCC 32.38.030(C)(1)(a), which
5 requires a finding that the proposed sign will not adversely dominate the "visual image of the area."
6 *See* n 2.⁷ Petitioner did not challenge that condition or the findings under PCC 32.38.030(C)(1)(a)
7 in filing the local appeal to the adjustment committee. The notice of the hearing before the
8 adjustment committee did not list lighting as a potential subject of the hearing. However, during the
9 hearing before the adjustment committee petitioner argued that the committee should remove the
10 condition and approve additional lights in order to make the mural a more "visible landmark" for
11 purposes of PCC 32.38.030(C)(1)(c).

12 During deliberations, three of the five adjustment committee members indicated that they
13 would approve additional lighting. However, one committee member changed his mind after the
14 committee chair voiced concern that the proposed mural faces residential property and the notice of
15 hearing said nothing about additional lights.⁸ The committee voted immediately after that exchange

⁷ The adjustment committee's decision adopts the following findings with respect to PCC 32.38.030(C)(1)(a):

"* * * [L]ighting of the signs could result in visually dominating the area at nighttime. Therefore, a condition is warranted that no additional lighting beyond what currently exists (the two-bulb spotlight above and aimed at the existing, middle, painted sign) or that which would have the effect of lighting the signs, is allowed on the east wall (i.e., a light above the door that accesses the second story residences/offices would be allowed)." Record 6.

⁸ The summary of the March 18, 2003 adjustment committee hearing states, in relevant part:

"[Committee Member Brockman]: We could amend the adjustment to change the lighting to acknowledge the mural. Uniform lighting would be good.

"[Committee Member Beardsley]: Allow lighting to be uniform.

"[Committee Member Davidson] The street is not a through street [so] it would be [all right].

"[Committee Chair Allen]: States concern, that the appeal did not request change in the conditions of approval.

"[Member Beardsley]: What about additionally enhancing the area?

1 to deny the appeal and uphold the administrative decision, including the condition limiting lighting of
2 the mural.

3 Although the issue of additional lighting had not been raised in the notice of appeal and
4 hence was not listed in the notice of hearing sent to adjoining property owners, petitioner argues that
5 the committee erred in refusing to consider that issue. According to petitioner, the proceeding
6 before the adjustment committee was a *de novo* hearing on a permit application for purposes of
7 ORS 227.175(10)(a)(E), which requires in relevant part that issues considered may not be limited
8 to legal issues that are specified in the local notice of appeal.⁹ Petitioner argues that
9 ORS 227.175(10)(a)(E) requires the city to consider the merits of petitioner’s argument that
10 additional lighting is warranted under PCC 32.38.030(C)(1)(c), and adopt findings resolving that
11 issue.

12 The city does not respond to petitioner’s procedural or findings challenge, but instead
13 argues on the merits that nothing in the adjustment criteria compels the city to approve additional

“[Chair Allen]: The trouble I have with that is the fact that it faces other properties. They got
legal notice and nothing was said about additional lights.

“[Member Brockman]: Agrees and changes mind.” Record 182.

⁹ORS 227.175(10)(a)(E) was adopted by the legislature in 1999 to overrule the Court of Appeals’ decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997). *Haug v. City of Newberg*, 42 Or LUBA 411, 418 n 7 (2002). In *Johns*, the court held that a local appellant seeking review of a city permit decision rendered without a hearing must identify the issues to be raised with the local appellate body in the local notice of appeal. ORS 227.175(10)(a)(E) provides:

“The *de novo* hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to [LUBA]. At the *de novo* hearing:

- “(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
- “(ii) The presentation of testimony, arguments and evidence *shall not be limited to issues raised in a notice of appeal*; and
- “(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.” (Emphasis added.)

1 lighting, and that the condition limiting lighting is warranted under PCC 32.38.030(C)(1)(a). That
2 may be, but petitioner appears to be correct that the adjustment committee felt that it could not or
3 should not consider the merits of petitioner’s argument, and the committee failed to adopt findings
4 addressing that issue. ORS 227.175 (10)(a)(E) allows issues to be raised even if those issues were
5 not specified in the notice of appeal, and further requires the city to consider all testimony and
6 evidence accepted at the hearing. In addition, where specific issues are raised below concerning
7 compliance with an approval criterion, the findings supporting the decision must respond to those
8 issues. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *Heiller v.*
9 *Josephine County*, 23 Or LUBA 551, 556 (1992). Accordingly, we agree with petitioner that
10 remand is necessary for the city to adopt findings addressing the issue raised below regarding
11 whether additional lighting is warranted under PCC 32.38.030(C)(1)(c) and, if so, whether that
12 additional lighting would be consistent with PCC 32.38.030(C)(1)(a).

13 The fourth assignment of error is sustained.

14 **FIFTH ASSIGNMENT OF ERROR**

15 Petitioner explains that, following the adjustment committee decision in this case, the
16 committee wrote a letter to the city council expressing concerns about the regulation of wall murals
17 under the city sign code. Petitioner contends that the adjustment committee letter has a bearing on
18 the present case and that the letter and the concerns expressed within the letter should be viewed as
19 part of the adjustment committee’s final decision with respect to the wall mural at issue here.
20 Accordingly, petitioner argues that the committee erred in failing to include the letter or the concerns
21 expressed in the letter in the findings supporting the challenged decision.

22 The city responds, and we agree, that the adjustment committee’s findings properly
23 addressed only the criteria applicable to the proposed mural. As far as petitioner has established,
24 the policy concerns expressed in the committee adjustment letter have no direct bearing on whether
25 the mural at issue in this case complies with the applicable adjustment criteria, and the city did not
26 err in not including that letter or the concerns expressed therein as part of the challenged decision.

- 1 The fifth assignment of error is denied.
- 2 The city's decision is remanded.