BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORMAN CARRIGG,
Petitioner,

vs.

CITY OF ENTERPRISE,
Respondent,

and

KIRK RICHARDSON
and CHAROLTTE RICHARDSON
Intervenors-Respondent.

LUBA No. 2004-128

FINAL OPINION
AND ORDER

Appeal from City of Enterprise.

Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dunn, Carney, Allen, Higgins and Tongue, LLP.

No appearance by City of Enterprise.

Steven P. Hultberg, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Perkins Coie, LLP.

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

AFFIRMED 12/28/2004

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

Petitioner appeals a city decision approving the location and design of a single-family dwelling.

MOTION TO INTERVENE

Kirk Richardson and Charlotte Richardson (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 60,984-square foot lot known as tax lot 200. Tax lot 200 is bordered on the north by Residence Street, a local street with a 34-foot right of way. Located across Residence Street to the north are tax lots 103 and 104, both improved with dwellings. The owners of tax lots 103 and 104 currently enjoy a panoramic view across tax lot 200 looking south, southwest and southeast at the Wallowa Mountains. The buildable area of tax lot 200 is effectively limited to the northeast corner of the lot, due to steep slopes on the southerly three-quarters of the lot, and a city water line easement that crosses the western half.

Intervenors applied to the city for a zoning permit to construct a single-family dwelling and detached garage on a 100-foot wide by 65-foot deep building envelope in the northeast corner of the property. The proposed location is directly south of the dwelling on tax lot 103, in which petitioner resides. Intervenors proposed a 2100-square foot single-level dwelling, with a 439-square foot daylight basement. The proposed dwelling features vaulted ceilings and a steeply pitched roof, the ridge of which will be approximately 25-28 feet above grade. If built and located as proposed, intervenors' dwelling will almost entirely block petitioner's view of the Wallowa mountains, and will partially block the view to the southeast from tax lot 104.

The city reviewed intervenors' application under its View Corridor Review regulations at Enterprise Land Use Ordinance (ELUO) 10.350.[1] Under ELUO 10.350, the city may require that roof height or slope be reduced, or that a structure be relocated on the site, unless doing so would reduce the proposed square footage, or make the development plan materially more expensive or materially different than the customary developments of similarly situated existing lots in the area.

The city planning commission approved the zoning permit under ELUO 10.350, with minor modifications. Petitioner then appealed the planning commission decision to the city council.

The city council conducted a *de novo* evidentiary hearing on July 7, 2004. During the staff report portion of the hearing, a city councilor, Hill, mentioned that he had driven up to the subject property just before the hearing and had an impression that the view of the Wallowa Mountains from petitioner's house was blocked by trees. Following that comment, petitioner presented his testimony, proposing several alternate locations and an alternate design with a lower roof pitch that would reduce the impact on his views to the south. At the end of the July 7, 2004 hearing, the city council closed the evidentiary record. The city council convened again on July 19, 2004 to deliberate. During deliberations Mayor Roberts and two other city councilors, Nuss and Shaw, each stated that they had visited the subject property. At the conclusion of deliberations, the city council voted 4-0 to instruct the city attorney to draft findings affirming the planning commission decision. Ten days later, on July 29, 2004, the city council convened to approve the findings and issue its final written decision. The city's final decision rejects petitioner's proposed alternatives, and approves the zoning permit, subject to conditions requiring intervenor to move the detached garage south and the dwelling itself to within five feet of the eastern property line.

This appeal followed.

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[1] We quote the text of ELUO 10.350 below, at n 6.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural error in failing to timely disclose the site visits of the decision makers and allow petitioner the opportunity to provide evidence rebutting any evidence that may have been obtained during those site visits. According to petitioner, failure to timely disclose the site visits of the mayor and councilors Nuss and Shaw is inconsistent with ORS 227.180(3), which requires that decision makers disclose the substance of *ex parte* communications and provide an opportunity to rebut such communications.[2] Citing to *Angel v. City of Portland*, 21 Or LUBA 1, 8-9 (1991) and *McNamara v. Union County*, 28 Or LUBA 396, 399 (1994), petitioner argues that an uncontroverted allegation that a party was provided no opportunity to rebut evidence of site observations is sufficient to demonstrate prejudice to that party's substantial rights, for purposes of ORS 197.835(9)(a)(B).[3]

Intervenors respond that (1) a site visit is not an *ex parte* contact subject to the requirements of ORS 227.180(3); (2) petitioner failed to object to the alleged procedural error

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[2] ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[3] ORS 197.835(9) provides, in relevant part:

> "* * * [LUBA] shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government or special district:
>
> "* * * * *
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

when he had an opportunity to do so; and (3) in any case, petitioner has not established that the alleged procedural error prejudiced petitioner's substantial rights. We address these responses in turn.

A. ORS 227.180(3)

Intervenors are correct that a site visit is not in itself an *ex parte* contact subject to ORS 227.180(3). *McNamara*, 28 Or LUBA at 398, n 1. As the term suggests, an *ex parte* contact involves a communication between a decision maker and a party or other interested person regarding the subject matter of a land use matter pending before the decision-maker. Therefore, ORS 227.180(3) and ORS 215.422(3), the statutory equivalent applicable to counties, do not govern site visits, at least those that do not also involve *ex parte* communications.

The procedural requirements governing site visits are imposed by case law, not statute.[4] However, the requirements to disclose and offer an opportunity to rebut site visits have a similar purpose to the purpose served by the requirements of the *ex parte* contact statutes: to ensure that land use decisions are based on information or evidence the decision makers receive within the public process, and are not based on information or evidence received outside the public process. *See Opp v. City of Portland*, 38 Or LUBA 251, 263-64, *aff'd* 171 Or App 417, 16 P3d 520 (2000) (ORS 227.180(3) is intended to ensure that land use decisions are based solely on publicly disclosed evidence and testimony that is subject to rebuttal or the opportunity for rebuttal). If such information or evidence is received outside the public process, whether from a site visit or an *ex parte* communication, the decision maker is obligated to make an adequate disclosure of the substance of the information during the public process, and provide an opportunity for participants to rebut that information. *Angel*, 21 Or LUBA at 8.

[4] The obligation that local government decision makers disclose site visits and allow an opportunity for rebuttal is based, ultimately, on *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). *Friends of Benton County v. Benton County*, 3 Or LUBA 165 (1981); *Concerned Property Owners of Rocky Point v. Klamath County*, 3 Or LUBA 182 (1981).

Intervenors do not dispute that the site visit disclosures of the mayor and councilors Nuss and Shaw during deliberations on July 19, 2004, were inadequate, and that the city did not provide petitioner an opportunity for rebuttal, as required by *Angel*. We turn then to intervenors' other arguments.

B. Opportunity to Object to Procedural Error

LUBA has long held that where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the resulting decision. *Mazeski v. Wasco County*, 26 Or LUBA 226, 232 (1993); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980). That limitation applies as well to allegations of procedural error based on a failure to disclose, or adequately disclose, a site visit, and provide an opportunity for rebuttal. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995).

Here, intervenors contend that petitioner could have objected to the disclosures at any time during the July 19, 2004 meeting or during the following ten days until the city council met to approve findings and sign its final decision, on July 29, 2004. Intervenors concede that the evidentiary record was closed on July 7, 2004, and that there was no public testimony accepted at either the July 19, 2004 or July 29, 2004 meetings. Nonetheless, intervenors argue that petitioner could have stood up and voiced an objection during either meeting, or written a letter to the city council between the meetings.

Intervenors further point out that Councilor Hill disclosed his site visit during the July 7, 2004 evidentiary hearing. While petitioner does not assign error with respect to Councilor Hill's disclosure, intervenors argue that had petitioner objected to the adequacy of that disclosure and requested rebuttal during the July 7, 2004 hearing, that would have put the other council members on notice that they should disclose any site visits and offer petitioner an opportunity to rebut their site visits.

Petitioner's failure to object to the adequacy of Councilor Hill's disclosure or request rebuttal during the July 7, 2004 evidentiary proceedings almost certainly waives any right to assign

error with respect to that disclosure. *Wicks*, 29 Or LUBA at 13. However, petitioner does not assign error with respect to Councilor Hill's disclosure, and we do not see that his failure to object to *that* disclosure excuses other decision makers from the obligation to make adequate disclosures of *their* site visits and offer an opportunity for rebuttal.

However, with respect to the disclosures of the mayor and councilors Nuss and Shaw during the July 19, 2004 deliberations, we agree with intervenors that petitioner had a reasonable opportunity to object to those disclosures following the July 19, 2004 deliberations and, therefore, following our reasoning in *Angel*, petitioner may not assign error to those site visits.

An understanding of the precise chronology in the present case and in *Angel* and similar cases is useful. In *Angel*, the city council closed the record on May 10, 1990, and conducted a meeting on May 24, 1990, to deliberate. During those deliberations, the mayor and council members disclosed for the first time that they had conducted a site visit of the subject property. At the end of that meeting, the council adopted a tentative decision, and ordered staff to draft findings. The city council convened again two months later, on July 26, 1990, to approve the staff findings and adopt the final decision. At that July 26, 1990 meeting, the petitioner filed a written objection to the May 24, 1990 disclosures and lack of opportunity for rebuttal, which the city council apparently ignored. We found that petitioner had satisfied the obligation to object to the city's procedural error, and remanded to require full disclosure and opportunity to rebut the substance of the personal site observations by the decision makers. 21 Or LUBA at 8-9.

The present case is nearly identical to *Angel*. The only pertinent difference is the ten-day period between the disclosure and adoption of the final decision in the present case, versus the two-month period in *Angel*. However, we do not see that a ten-day period to object is an inadequate opportunity. Petitioner offers no reason to believe that, had he entered a written or oral objection prior to or at the final July 29, 2004 meeting, the city council would not have addressed that objection.

At oral argument, petitioner cited to *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 543 (1992), for the proposition that a petitioner has no obligation to object to procedural error if the error occurs during the deliberative phase, after the close of all formal opportunities for public input in the decision. We understand petitioner to argue that because there was no formal opportunity for public input during the July 19, 2004 meeting or between the July 19, 2004 or July 29, 2004 meetings, petitioner was not obligated to enter an objection to the site visits that were first disclosed during the July 19, 2004 meeting.

In *Horizon Construction, Inc.*, the Court of Appeals held that a petitioner could assign error based on *ex parte* contacts, notwithstanding petitioner's failure to object to those *ex parte* contracts during the local proceedings, where the decision maker's disclosure of those *ex parte* contracts was untimely. As in the present case, the disclosure occurred during the governing body's deliberations, at a meeting in which no public participation was scheduled or provided. The court held:

> "ORS 227.180(3) does not simply establish a procedure by which a member of a deciding tribunal spreads a fact on the record. It requires that the disclosure be made at the earliest possible time. Implicit in that requirement is that the parties to the proceeding must be given the greatest possible opportunity to prepare for and to present the rebuttal that ORS 227.180(3)(b) requires that they be allowed to make. The purpose of the statute is to protect the substantive rights of the parties to know the evidence that the deciding body may consider and to present and respond to evidence.
>
> "* * * * *
>
> "Arguably, the city could have reopened and extended the proceedings, if an objection had been made [during deliberations] on December 17. However, we are unwilling to assume that that would have occurred, given that the meeting was not one at which either additions to the record or public participation, by way of objections or otherwise, were scheduled to be entertained. We are also not impressed by the city's argument that additional evidence and comment on other matters were in fact received at the meeting. Petitioner and the other proponents were utterly unprepared for the eventuality that a response would be necessary or could be made to the council member's belated disclosure." 114 Or App at 253-54 (footnote omitted).

Horizon Construction, Inc., of course, involved disclosure of *ex parte* contacts governed by ORS 227.180(3), not disclosure of site visits. We assume, without deciding, that the holding in *Horizon Construction, Inc.* is potentially relevant to disclosure of site visits after the evidentiary phase of a local proceeding has been closed. However, there is a critical factual distinction between the present circumstances and those in *Horizon Construction, Inc.* As we understand the facts recited in our underlying opinion, the disclosure in *Horizon Construction, Inc.* occurred during the final meeting on December 17, 1990, at the conclusion of which the city council adopted the final written decision. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159, 161 (1992). Under such circumstances, the Court of Appeals agreed with the petitioner that the supposed opportunity to object during that final meeting was "ephemeral." 114 Or App at 252-53. By contrast, in the present case, the disclosure was made at the July 19, 2004 meeting, which was not the final proceeding. In our view, petitioner had a reasonable temporal opportunity between the July 19, 2004 disclosure and the July 29, 2004 final meeting to lodge an objection and to request a full disclosure of observations at the site visits and an opportunity for rebuttal.

It is true that, as far as we know, there was no formal process for public input following the July 19, 2004 meeting in the present case. However, we do not see that the availability or unavailability of a formal process is dispositive. Nothing in the code or relevant statutes cited to us prohibited petitioner from lodging an objection prior to or during the July 29, 2004 final meeting, and, as noted, there is no reason to believe that the city council would not have considered petitioner's oral or written objection, if presented.

In short, assuming *Horizon Construction, Inc.* is instructive with respect to the obligation to object to site visits that are disclosed late in the local proceedings, at best it excuses petitioner from the obligation to lodge an objection during the proceeding in which the disclosure was first made, *i.e.*, the July 19, 2004 meeting. Because that was not the final proceeding, and petitioner had

10 days to object to the decision-makers' site visit disclosures but failed to do so, petitioner may not now seek reversal or remand based on those site visits.[5]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that the city failed to adopt adequate findings, supported by substantial evidence, in rejecting petitioner's proposed location and design alternatives under ELUO 10.350.[6]

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[5] Given the foregoing disposition of the first assignment of error, we do not address intervenors' other responses that petitioner failed to demonstrate prejudice to his substantial rights.

[6] ELUO 10.350 provides, in relevant part:

> "1. Whenever the use regulations of ARTICLE 3 require view corridor review, the City Recorder shall make a threshold determination as to whether full view corridor review is required. A full view corridor review shall be made, and the matter referred to the Commission, if the City Recorder finds:
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> "A. That the proposed building or structure will materially impact the views of the Wallowa Mountains from existing residences in the area, or from residences which might be constructed on vacant lots, in the area; and
>
> "B. After consideration of all factors, including topography and lot and street layout, view corridor review, and imposition of conditions which are possible under this section, might materially reduce or mitigate the impact upon adjacent residences or lots.
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> "* * * * *
>
> "4. In order to reduce the impact of the proposed building or structure upon views of the Wallowa Mountains from affected residences in the area the Commission may require that the development plan be altered in the following respects:
>
> "A. The height of the proposed building or structure may be limited to one story above the highest elevation immediately adjacent to the proposed building or structure (that is on the uphill side of the proposed building or structure) and the Commission may require alteration of roof height or reduction in the slope of the roof. No limitation on height shall be imposed in the event such height reduction makes it impossible for the applicant to construct a residence with the same square footage as that originally proposed by the applicant.
>
> "B. The Commission may require that the proposed building or structure, or a building or structure altered in accordance with subparagraph A above, be placed at a location on the site different than that proposed by the applicant. In making such determination, the Commission shall consider any negative impacts upon site development, including pedestrian access, access for offstreet parking, impact upon usable yard areas, impact upon views from

A. Alternative Locations

The city adopted findings explaining that, in its view, ELUO 10.350 authorizes the city to require only a limited range of alternative locations or designs, and that exercise of that authority in particular circumstances is discretionary, not mandatory.[7] The city then addressed petitioner's proposed alternative locations. The city first rejected as "not feasible" any proposal to locate a

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> the proposed residence, the customary manner of lot development in the area and the extent to which directing alternate building placement would reduce negative impact on views from affected residences. No alteration of building location shall be directed which makes it impossible for the applicant to construct a residence with the same square footage as that originally proposed by the applicant.
>
> "C. The Commission may reduce any required building setback if said reduction would permit building placement which materially reduces negative impact upon views from affected residences.
>
> "5. In making the determinations under this section, the Commission shall protect the right of the applicant to reasonably use his or her property for uses permitted outright in ARTICLE 3 and shall not require development plans which are materially more expensive or materially different than the customary developments of similarly situated existing lots in the area."

[7] The city council findings state, in relevant part:

> "The criteria permit the City to impose conditions and requirements to reduce the impact of a development upon views of the Wallowa Mountains from affected residences. Height may be limited to one story on the uphill side of the proposed structure and roof height may be limited. Alternate building locations may be directed.
>
> "The ordinance places a number of limits on such actions and conditions. First, subsection 5 directs that the criteria be administered to allow the applicant to make reasonable use of his property for the uses permitted outright and 'shall not require development plans which are materially more expensive or materially different than the customary developments of similarly situated existing lots in the area.' Second, the Commission or Council is to consider the effect of any required alteration of plans upon site development, views from the applicant's proposed dwelling, the customary manner of lot development in the area and the extent to which such alterations would reduce negative impacts upon affected residences. Third, no alteration can be imposed which would make it impossible to accommodate a residence of the same square footage as proposed by the applicant.
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> "In essence, the ordinance is clear that it will not impose what amounts to a scenic easement across undeveloped property. Measures to mitigate impact upon views must be consistent with full rights to develop property for outright uses of customary design.
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> "The view corridor review provisions grant authority to the reviewing body to impose conditions under the circumstances set forth above, but do not require that such conditions be imposed. Imposition of conditions is discretionary based upon the circumstances." Record 11-12.

dwelling on the western half of the property, where the city easement is located. Then city then rejected the alternative locations petitioner proposed in the middle of the subject property, as "not appropriate," because those locations would require the applicant to prepare an entirely different dwelling design, and would reduce the front-yard setback, placing the structure close to the street, contrary to the customary development pattern in the area.[8] The city concluded that "requiring an

[8] The city council findings state with respect to alternative locations:

> "Because of the easement to the rear of the west one half of the property, the Council concludes that it is not feasible to move the proposed dwelling to the west one half of tax lot 200. Even if this were done, the primary effect would be to shift the impact upon the views from tax lot 103 to tax lot 104.
>
> "The owners of tax lot 103 have proposed a structure with much smaller building profile located in the middle of tax lot 200. The north end of the structure would abut upon the south side of the Residence Street right-of-way, without a front yard set back. Elimination of the set back is the only way there would be room to shift the structures to the west. The owners of tax lot 103 assert that both tax lots would have a view of the mountains to either side of a dwelling so located; a copy of their illustrative sketch is attached as Exhibit 10.
>
> "The council has concluded that requiring such a relocation would not be appropriate for the following reasons:
>
> "(1) While the Council may reduce a required yard setback to assist in mitigating view impacts (ELUO 10.350(4)(C)), it would be highly undesirable to do so due to the fact that Residence Street is only 34 [feet] wide (as compared to a City standard of 60 [feet]) and it would be necessary to virtually eliminate the setback. This would result in the structures on the north and south side of Residence Street being very close together, contrary to the underlying policy behind the front yard set back.
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> "(2) It would not be possible to construct the applicants' dwelling design at that location. The applicants would have to prepare and submit an entirely different dwelling design."
>
> "(3) The owners of tax lot 103 have proposed a building location approximately 60 feet wide and 80 feet deep located immediately south of the Residence Street right of way, as shown on Exhibit 10. However, at that location only 55 feet of depth is available. It is not clear that the proposed dwelling, with its total square feet and the proposed garage could be constructed in this building envelope. Further, this proposal would force the construction onto an area immediately adjacent to the street right of way in a manner that is materially different than the customary single family dwelling layout in the area. The Council concludes and finds that a dwelling configured in the manner suggested by opponents would be materially different and far less desirable than a customary single family development in the area, contrary to the express limitations of the View Corridor Review Provisions." Record 12-14.

alternate building location is not a feasible or appropriate method in this instance to mitigate impact upon views * * *." Record 15.

Petitioner first argues that the city erred in finding in the above-quoted sentence that his proposed alternative locations are "not feasible." It is simply not credible, petitioner claims, to conclude that a 60,000-square foot parcel has only one feasible site for a single-family dwelling. However, as intervenors point out, the "not feasible" statement refers not to petitioner's proposed locations in the middle of the parcel, but to any proposal to locate a dwelling in the western half of the parcel, where the city easement runs. *See* n 8. It is not clear whether petitioner proposed any locations in the western half of the property, but even if that is the case, petitioner does not explain why the city erred in concluding that it is not feasible to build a dwelling within the city easement.

The city rejected petitioner's alternative locations in the middle of the parcel, not because of feasibility, but because it deemed those relocation proposals to be "not appropriate," for several reasons. *Id.* Petitioner disputes reasons 1 and 3, the city's findings that the alternative locations would intrude into the front-yard setback and force construction close to the street right-of-way. Petitioner argues that two of his proposed alternative locations are just as close to the Residence Street right-of-way as the applicants' proposed location. *Cf.* Record 74 to Record 57, 59. According to petitioner, only one of his proposed alternatives is closer to the current street right-of-way. Record 58. Petitioner also disputes the city's statement, in reason 3, that his alternative locations require a building envelope 80 feet deep.

Intervenors respond that reasons 1 and 3 quoted at n 8 refer to a different set of alternative locations proposed by petitioner that show the building envelope close or adjacent to the current right-of-way. Record 75-76. In any case, intervenors argue, if reasons 1 and 3 do not apply to the alternatives proposed at Record 57 and 59, reason 2 is a sufficient basis to reject those alternatives. Intervenors argue that reason 2 is based on the fact that petitioner's proposed building envelopes, including those at Record 57 and 59, are much smaller than that proposed by the applicants, which entails a significant redesign of the house. Intervenors argue that constructing a dwelling within

petitioner's smaller proposed envelopes would require loss of the daylight basement and integration of the detached garage into the house design, among other changes. Because petitioner does not challenge reason 2, or explain why it is not a sufficient basis to decline to require the applicants to locate the dwelling at petitioner's preferred location, intervenors argue that petitioner's challenges to reasons 1 and 3 do not provide a basis for reversal or remand.

Petitioner is correct that the alternative building envelopes proposed at Record 57 and 59 appear to be no closer to the current Residential Street right-of-way than the building envelope proposed by intervenors, although other proposed building envelopes at Record 75-76 are much closer, even adjacent to the right-of-way. Presumably, intervenors are correct that reasons 1 and 3 refer to the proposed locations at Record 75-76, rather than those at Record 57 and 59. If reasons 1 and 3 were the only basis for rejecting petitioner's alternative locations, we would likely agree with petitioner that remand for more adequate findings was necessary.

However, intervenors are correct that petitioner does not challenge reason 2, or dispute that the proposed alternative locations at Record 57-59 have significantly smaller building envelopes than that proposed by intervenors. As the city found, it would not be possible to construct intervenors' dwelling design at the locations proposed by petitioner, and intervenors would have to prepare an "entirely different dwelling design." That reason appears to be independent of reasons 1 and 3. Further, as discussed below, the city rejected petitioner's comparatively modest proposal to reduce the pitch of the roof because it would require intervenors to redesign a portion of the house. In applying ELUO 10.350(4)(A) and (B), the city council clearly gave considerable weight to the applicants' desire to build their preferred design, and viewed with disfavor any alternative that required the applicants to undergo the expense and burden of a significant redesign. Petitioner does not argue that that approach is inconsistent with ELUO 10.350(4)(B), or dispute the city council's general interpretation of ELUO 10.350, quoted above at n 7, that the city has only limited authority to require relocations or redesigns that significantly burden a property owner's right to build a use permitted outright. It is reasonably clear that the city council views reason 2 as a sufficient reason to

decline to require intervenors to prepare the "entirely different dwelling design" that would be required on petitioner's preferred locations. Consequently, we agree with intervenors that any error with respect to reasons 1 and 3 is not a basis for reversal or remand.

B. Roof Height

The city also addressed petitioner's proposal to lower the roof pitch and lower roof height from approximately 25 feet to 15 feet. The city declined to impose a condition to that effect under ELUO 10.350, after finding that it would provide only limited relief to petitioner, but would materially alter the "esthetics and nature of the applicants' house design," by reducing or eliminating the proposed vaulted ceilings.[9]

Based on those findings, the city concluded:

> "As to roof pitch, while the City has the power to require that the applicants reduce their roof pitch to 6/12 or even 4/12, it is the Council's decision not to do so. Such action would require a major alteration in design and would secure only an impaired view with limited esthetic value to the dwellings on tax lot 103 and 104. The Council concludes that the ability of the property owner to proceed with their desired design is of greater weight and importance than securing the limited view that could be accomplished by a reduction in roof pitch.

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[9] The city's findings state with respect to roof height:

> "a. The proposed dwelling will be approximately 25-28 feet above grade at the ridge top and is significantly higher than the average or median heights of the onsite constructed dwellings in the vicinity. It is equivalent in height to the two-story structures included in the survey. Of the eight dwellings in the survey one had a pitch steeper than the proposed dwelling and one had a pitch equivalent (8/12 as compared to the 9/12 of the proposed dwelling); the balance of the surveyed dwellings had roofs with a 4/12 pitch.
>
> "b. Reducing the roof pitch to 6/12 would preserve a view from the residence on tax lot 103 of approximately the upper one-half of the Wallowa Mountains, while looking directly over the top of the roof of the proposed dwelling. The esthetics of this limited view would be impaired by the existence of the roof adjacent to the view of the mountains. If roof pitch were reduced to 6/12, the esthetics and nature of the applicants' house design (which included vaulted ceilings) would be materially and detrimentally altered. This is counter to the general intent of the Land Use Ordinance (which has only very general dimensional standards) to allow property owners wide latitude to select the design they desire." Record 14-15.

> "The Council concludes that the view corridor review criteria were not intended to generally require construction of single story low roof pitch dwellings in view areas where views of the mountains from other residences might be affected.
>
> "* * * * *
>
> "For the reasons set forth above, the Council does affirm the decision of the Enterprise Planning Commission and does hereby make the following decision. The applicants' application for a zoning permit is approved as proposed, and the only conditions incident to a View Corridor Review are (1) that the garage be moved south to a point where the front thereof is flush with the front wall of the dwelling, adjacent to the garage, (2) the structure shall be located as far east as possible with a minimum 5 foot side yard set back, and (3) no alteration in building design and placement shall be made without the approval of the City." Record 15-16.

Petitioner argues that the city erred in finding that, under petitioner's proposed redesign, the "esthetics and nature of the applicants' house design (which included vaulted ceilings) would be materially and detrimentally altered." Record 15. According to petitioner, that finding misstates the relevant inquiry under ELUO 10.350(5), which is whether the alternative development plan is "materially different than the customary developments of similarly situated existing lots in the area." Petitioner cites to evidence that the median height of dwellings with a 4/12 roof pitch in the area is approximately 17 feet. According to petitioner, the 15-foot height he proposed is clearly "customary." Therefore, petitioner argues, the county erred in rejecting his alternative design as not "customary" for purposes of ELUO 10.350(5).

Intervenors respond, and we agree, that the city did not reject petitioner's alternative design because it is "materially different than the customary developments of similarly situated existing lots in the area" under ELUO 10.350(5). As intervenors point out, that language in ELUO 10.350(5) limits the authority of the city to impose redesigns that are materially different from customary development in the area; that language is not itself a standard under which to evaluate a redesign that is within the city's authority to impose. The city expressly found that it "has the power to require that the applicants reduce their roof pitch to 6/12 or even 4/12," and therefore the city was not concerned with the limits of its authority under ELUO 10.350(5), but rather with the exercise of its discretion under ELUO 10.350(4)(A). The finding that petitioner complains of is part of the city's

calculus under ELUO 10.350(4)(A), in which it balanced the benefit of improving petitioner's view of the mountains against the burden to the applicants. The city was not evaluating its authority to impose the redesign for purposes of ELUO 10.350(5). Petitioner has not demonstrated that the city erred in rejecting the proposed lower roof pitch and height.

The second assignment of error is denied.

The city's decision is affirmed.