BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF CENTRAL POINT,
Respondent,

and

CENTRAL POINT FIRST, INC., BECCA CROFT,
JOSEPH R. THOMAS, DAVID M. PAINTER
and CAROL PUTMAN,
Intervenor-Respondents.

LUBA No. 2004-075

FINAL OPINION
AND ORDER

Appeal from City of Central Point.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine LLP.

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

Christine M. Cook, Portland, filed a joint response brief and argued on behalf of intervenor-respondents.

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

AFFIRMED 06/09/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Wal-Mart Stores Inc. appeals a city council decision that denies petitioner's application for site plan and tentative partition approval for a "203,091 square foot (combination) general merchandise-grocery store, a 10,200 square foot retail building and a 200 square foot coffee kiosk." Record 13.

REPLY BRIEF AND OVERLENGTH PETITION FOR REVIEW

Petitioner separately moves for permission to (1) file a petition for review that exceeds the OAR 661-010-0030(2)(b) 50-page limit by four pages and (2) file a reply brief. Both motions are granted.

FACTS

The subject 21.59-acre parcel is zoned Tourist and Office Professional (C-4), a zoning district that allows "community shopping centers." The city approved a master plan for a 206,000 square foot shopping center on the property in 1999, but that shopping center was not built.[1]

A. Home Depot and the Big Box Ordinance

The permit application that led to the decision that is the subject of this appeal was deemed to be complete on December 17, 2003. Before that application was filed, the city had encouraged Home Depot to locate a store in its C-4 zone. Once the city was unsuccessful in that effort and petitioner expressed interest in siting a store in the city, petitioner contends the city has been hostile to petitioner's expressed interest. Among other things, petitioner cites the city's failed effort to adopt what it refers to as a "big box" ordinance. *Naumes Properties, LLC v. City of Central*

[1] The remaining explanation of the relevant facts is quoted from *Walmart Stores, Inc. v. City of Central Point*, ___ Or LUBA ___ (LUBA No. 2004-075, Order, March 17, 2005) (hereafter our March Order). In our March Order, we denied petitioner's earlier motion requesting that LUBA consider extra-record evidence under ORS 197.835(2)(b) and OAR 661-010-0045. Although we quote from our March Order, we do not format the quoted part of our March Order as such, to avoid the awkward formatting style that would be required for the included footnotes. We have also deleted some record citations and corrected some typographical errors.

Point, 46 Or LUBA 304 (2004). Petitioner believes it was the real target of the big box ordinance, even though the ordinance did not take effect until after petitioner's application for site design approval was submitted and even though that ordinance was remanded by LUBA.[2]

When the planning director was communicating with Home Depot's agent, he took the position that a Home Depot store could be sited in the city's C-4 zone as a permitted use with site plan review. However, after Home Depot decided not to attempt to site a store in the city and petitioner filed its application, the planning director took the position that a large format store such as petitioner's was not a permitted use in the C-4 zone and required conditional use approval, in addition to site design review.[3]

B. The Procedings Before the Planning Commission

When petitioner's application came before the planning commission, two hearings were held. The first hearing was limited to two issues: (1) whether the proposed Wal-Mart store qualified as a "community shopping center," and (2) whether the proposal should be "treated as a conditional use under [the city's zoning ordinance] because it 'exhibits potentially adverse or hazardous characteristics not normally found in uses of similar type and size.'"[4] Record 699. Although it is somewhat unclear from the minutes of the planning commission's March 18, 2004 hearing, a majority of the planning commission apparently agreed with petitioner at the conclusion of its March 18, 2004 hearing that the proposal qualified as a community shopping center and did not require

---

[2]Wal-Mart relies in part on certain errors that led to that LUBA remand to support its position that the city is hostile to Wal-Mart. In particular, Wal-Mart cites the city council's decision to bypass the planning commission in adopting that big box ordinance. 46 Or LUBA at 306.

[3] According to Wal-Mart, the first time the planning director expressed this change in position directly to Wal-Mart was in the notice of the Planning Commission's hearings in this matter.

[4] Wal-Mart complains that the legal effect of this bifurcation of the hearings process before the planning commission is that it was effectively deprived of certain rights that it would otherwise have had under ORS 197.763 at the conclusion of the *initial* evidentiary hearing on this permit application, because the main hearing on the merits of its application was the second hearing before the planning commission.

conditional use approval.[5] Petitioner contends that the planning director continued to assert that the planning commission should require conditional use approval. The planning commission held its second public hearing on March 30, 2004 and voted at the conclusion of that hearing to grant the requested site plan approval without requiring conditional use approval. Record 270. The planning commission later adopted its written decision, Resolution 610, at an April 6, 2004 meeting. Resolution 610 was signed that same date.[6]

C. The Proceedings Before the City Council

Early in 2004, the city was aware that it might have trouble issuing a final decision on petitioner's application within the 120-day deadline established by ORS 227.178(1).[7] The city requested that petitioner waive the 120-day deadline, but petitioner refused.[8] As explained in the challenged decision, the city council realized that if it awaited a final decision by the planning commission and an appeal of that planning commission decision to the city council, it likely would not have time to schedule and conduct an appeal hearing and issue a written decision before the 120-day deadline expired on April 16, 2004. The city council therefore took action on March 25, 2004, five days before the planning commission adopted its oral decision and 12 days before the

---

[5] At least some of the planning commissioners had remaining questions about whether conditional use approval should be required.

[6] Wal-Mart complains that the planning director included as Exhibit B to the planning commission's decision a "Public Works Staff Report & Recommendations" that is inconsistent with the planning commission's oral decision. Record 140-46. The parties' dispute about the nature and propriety of Exhibit B is particularly acrimonious. Whatever the merits of that dispute, the planning commission adopted Resolution 610, which has the disputed Exhibit B attached.

[7] ORS 227.178(1) provides:

> "Except as provided in subsections (3) and (5) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete."

[8] Wal-Mart took the position that the statutory 120-day deadline for the city to issue its final decision in this matter would expire on April 16, 2004.

planning commission adopted its written decision, to schedule the matter for city council review on April 15, 2004.[9] The city council explained its action as follows:

> "WHEREAS, the City of Central Point is reviewing an application for development of the 'Proposed Retail Pear Blossom Plaza' on property at the northwest corner of East Pine Street and Hamrick Road within the City of Central Point; and
>
> "WHEREAS, the application was deemed complete on December 17, 2003, and under ORS 227.178, the City has 120 days in which to reach a final decision, which period expires on April 16, 2004, and the applicant has so far been unwilling to extend the 120 day period; and
>
> "WHEREAS, the City is currently undergoing a process to evaluate the East Pine Street Corridor, which process will likely result in pertinent information that could affect the City's decision on the Proposed Retail Pear Blossom Plaza application; and
>
> "WHEREAS, the results of the East Pine Street Corridor evaluation were not available for review by the Planning Commission until late March of 2004, resulting in the delay of Planning Commission consideration of this matter, and
>
> "WHEREAS, the lack of availability of the East Pine Street Corridor information until late March and the applicant's unwillingness to extend the 120 day deadline have presented the City with difficulty in meeting its obligations under ORS 227.178 to make a decision within the 120 days of when the application is deemed complete, and
>
> "WHEREAS, the City Council believes that the traffic information regarding the East Pine Street Corridor is important to the proper resolution of the application for development of the Proposed Retail Pear Blossom Plaza and, therefore, every effort should be made to allow the information to be considered by the Planning Commission; and

---

[9] Wal-Mart and the city disagree over whether Central Point Municipal Code (CPMC) 1.24.080 allows the city council to schedule a planning commission matter for a hearing before the city council before the planning commission has adopted its written decision. CPMC 1.24.080(A) provides:

> "Any party aggrieved by the action of city staff, the planning commission or city council may request review of such action by the council, or the council may on its own motion schedule any matter for review. In the case of a request for review, the same must be filed in writing with the city administrator no more than seven days after the date the city mails or delivers the decision being appealed from to the parties, and in the case of own-motion review, the council motion shall be made no later than the next regularly scheduled council meeting. Review shall be held at the earliest regularly scheduled council meeting that allows for compliance with the notice requirements."

"WHEREAS, in order to meet notice requirements for a city council review of the Panning Commission decision, the City Council must initiate this request for review of the Planning Commission decision prior to it being rendered by the Planning Commission; and

"WHEREAS, CPMC 1.24.080 allows the City Council to schedule any matter for review on its own motion, and does not limit such a motion to decisions that have already been made.

"NOW, THEREFORE, BE IT RESOLVED by the Central Point City Council as follows:

"Section 1. The Planning Commission's decision on the application for the Proposed Retail Pear Blossom Plaza is hereby called up for review by the Central Point City Council upon the Planning Commission's reaching a final decision.

"Section 2. The review of the Planning Commission's decision on the Proposed Retail Pear Blossom Plaza will occur at a special meeting of the City Council on Thursday April 15, 2004 * * *.

"Section 3. The City Council will not exercise its discretion to allow new evidence at the review hearing. Instead, the review will be limited to the existing record with an opportunity for all parties to submit arguments to the City Council. However, all criteria will be at issue." Record 48-49.

The city council held its hearing on April 15, 2004.[10] At the conclusion of that hearing, the city council adopted a written decision in which it reversed the planning commission decision and denied the requested site plan approval.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, petitioner argues that the city council knowingly violated its own procedural requirements to allow time for the city council to deny petitioner's application within the 120-day deadline imposed by ORS 227.178(1).[11] In doing so, petitioner contends, the city's

[10] Both petitioner and permit opponents separately appealed the planning commission's April 6, 2004 decision to the city council.

[11] Among other things ORS 227.178 imposes a requirement that a city act on a permit application within 120 days after a complete application for permit approval is submitted. *See* n 7. Where a city fails to comply with the 120-day deadline in ORS 227.178(1), ORS 227.179(1) authorizes a permit applicant to file a petition for a writ of mandamus. If a petition for writ of mandamus is filed, the city must (1) approve the application or (2)

decision runs afoul of ORS 197.835(10)(a)(B).[12] For that reason, petitioner contends the city's decision must be reversed under that statute. Alternatively, petitioner contends that LUBA should allow petitioner an opportunity seek and submit additional extra-record evidence to LUBA, pursuant to ORS 197.835(2)(b) and OAR 661-010-0045, to establish that the city was motivated by a desire to avoid the requirements of ORS 227.178.[13] Petitioner contends that extra-record evidence will show that the city took a number of actions to avoid the requirements of ORS 227.178.

Most of the arguments that petitioner advances under the first assignment of error were advanced in similar or identical form in its memoranda in support of its earlier motion to consider evidence outside the record. We rejected those arguments in our March Order. *See* n 1. With the exception of the discussion below, we see no reason to revisit our resolution of those previously advanced and rejected arguments.

---

demonstrate to the circuit court that approving the application would violate a "substantive provision of the local comprehensive plan or land use regulations." ORS 227.179(5).

[12]ORS 197.835(10)(a) provides as follows:

> "[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government *decision* is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or
>
> "(B) That the local government's *action* was for the purpose of avoiding the requirements of ORS 215.427 or 227.178." (Emphases added).

[13] As potentially relevant in this appeal, ORS 197.835(2)(b) provides:

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in [ORS 197.835](10)(a)(B) * * * or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. * * *"

LUBA's administrative rule implementing ORS 197.835(2)(b) appears at OAR 661-010-0045.

A. Text and Context

In our March Order, we described the city's literal interpretation of ORS 197.835(10)(a)(B) as follows:

> "[I]t is undisputed that the city issued its decision within 120 days after Wal-Mart's application was deemed complete. The city asks how its decision, which was rendered within 120-days after the application was deemed complete, could possibly be a decision that was taken for the purpose of 'avoiding the requirements' of ORS 227.178(1). The city contends that the actions it took to speed the city council review of the planning commission's decision were taken to *comply* with ORS 227.178(1), not to *avoid* that statute's requirement for a final decision within 120 days. If the city's position is stated in its most extreme form, the steps that the city takes to issue a final decision within 120 days and its purposes for doing so are irrelevant, so long as the decision is rendered within the statutorily required 120 days." Slip op 7-8 (emphases in original).

In our March Order we described petitioner's interpretive argument as follows:

> "* * * Wal-Mart appears to take the position that any city action to deviate from its local appeal procedures, to accelerate the local appeal process in order to allow time for the ultimate city review authority (in this case the city council) to review the decision of a lower decision maker and issue a final appealable decision within 120 days, constitutes an action that 'was [taken] for the purpose of avoiding the requirements of ORS * * * 227.178(1).' Stating Wal-Mart's position in its most extreme form, if a city council wishes to review a planning commission decision that it has substantive concerns about, ORS 197.835(10)(b)(B) does not allow the city council to deviate in any way from adopted local procedures, even if such deviation is necessary to expedite the local review schedule to reach a final decision within the statutory 120-day deadline." Slip op 8.

In our March Order we rejected both the city's and petitioner's interpretations, relying in part on our decision in *Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998), which in turn relied on the legislative history of amendments to ORS 197.835(10)(a) that were adopted in 1995. Our ultimate reasoning is set out below:

> "It is hard to believe that the legislature did not intend that the ORS 215.429 and 227.179 mandamus remedies would provide at least some motivation for cities and counties to issue decisions on applications for permits, limited land use decisions and zone changes within the ORS 215.427 and 227.178 deadlines. The statutory mandamus remedy is a potential consequence that cities and counties avoid by complying with the ORS 215.427 and 227.178 deadlines. However, there is a

> potential practical flaw in those statutes, which is addressed somewhat obliquely by ORS 197.835(10)[(a)](B). A timely decision on an application is worthless to an applicant if that timely decision is a *pro forma* denial rather than a timely decision on the merits of the application. Expanding slightly on * * * our decision in *Miller*, we conclude that if a city or county adopts a 'spurious, bad faith' denial of a 'permit, limited land use decision or zone change application' under ORS 215.427 or 227.178 for the purpose of avoiding one of the statutory consequences for failing to take timely action on an application, such a decision constitutes an 'action * * * for the purpose of avoiding the requirements of ORS 215.427 or 227.178,' within the meaning of ORS 197.835(10)[(a)](B)." Slip Op 10-11.

Before turning to the parties' arguments we emphasize and clarify the important parts of our above-stated interpretation of ORS 197.835(10)(a)(B).

First, reading ORS 197.835(10)(a)(B) together with ORS 227.178 and 227.179, it is clear that the legislature intended to provide the option of a mandamus remedy to the applicant, in part, as an incentive to cities to take the 120-day deadline seriously and take all appropriate steps to render a final decision within that deadline. While a city may not take procedural short-cuts that it knows or reasonably should know will prejudice one or more party's substantial rights and thereby provide a reasonably certain basis for an appeal to and remand by LUBA, we do not see anything in ORS 197.835(10)(a)(B) or ORS 227.178 that prohibits a city from expediting its local review process to meet the 120-day deadline, provided that expedited process does not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application.

Second, ORS 197.835(10)(a)(B) is intended to provide an applicant with a timely decision on the merits. That decision may be an approval, or it may be a denial. While an applicant's goal may be an approval, even a denial can be valuable, if it is timely and clearly identifies defects that may be corrected so that an amended application can then be approved. The reason a *pro forma* denial is worthless to an applicant is that, at best, it provides an applicant with an opportunity to seek a remand at LUBA, with the additional delay that such an appeal entails, rather than a final decision on the merits, from which the applicant can assess its chances for ultimate success. ORS 197.835(10)(a)(B) may not unambiguously require that the city's decision be a *real* decision that is

made in good faith, in the sense that the decision is supported by findings and is based on an evidentiary record that the city could reasonably believe are adequate to allow that decision to be defended in the event of an appeal to LUBA. But viewing ORS 197.835(10)(a)(B) in context, we believe that is what the legislature intended, and we interpret the statute to have that meaning. Given the discretion that the city council enjoys in interpreting and applying its land use legislation and weighing the evidence, we recognize that this may allow a city council to deny a permit that could also be approved if the relevant land use legislation were interpreted differently and the evidence were weighed differently. However, ORS 197.835(10)(a)(B) and 227.178(1) are intended to provide a permit applicant with a *timely* decision; they are not intended to guarantee an applicant a *favorable* decision.

Turning to petitioner's and intervenor-respondents' (respondents') textual and contextual disagreements with our reading of the statute, both petitioner and respondents argue that LUBA ignored the unambiguous text of ORS 197.835(10)(a)(B) and relevant statutory context. The parties argue that LUBA failed to apply the template that is required by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993).

1. Petitioner's Text and Context Argument

A critical part of petitioner's *PGE* template argument is raised for the first time in its brief on the merits in this appeal. That argument is based on the legislature's use of the word "decision" in ORS 197.835(10)(a)(A) and its use of the word "action" in ORS 197.835(10)(a)(B). *See* n 12. Petitioner contends the term "action" is broader than the term "decision," and includes actions the city may take before the final decision is rendered. Petitioner contends that our March 17, 2005 Order improperly limits the "actions" that might trigger a reversal under ORS 197.835(10)(a)(B) to a *final city decision* that is a "*pro forma*" or "spurious, bad faith" denial.

While we agree that our March 17, 2005 Order can be read to be limited in the way petitioner describes, it was not intended to be so limited. We now clarify that city "action[s]" that may justify a reversal under ORS 197.835(10)(a)(B) are not limited to the final decision itself or the

"action" of adopting the final decision. The main point in our March Order was that if it is the final city decision to deny the permit application that is alleged to be the "action" that "was [taken] for the purpose of avoiding the requirements of ORS * * * 227.178(1)," even a timely final decision that was rendered within the 120-day deadline may be such an "action" if the final decision is a "*pro forma*" or "spurious, bad faith" denial. We did not mean to suggest that intermediate actions could not also qualify as an action that "was [taken] for the purpose of avoiding the requirements of ORS * * * 227.178(1)." However, for the reasons explained later in this opinion, we do not agree that petitioner has identified any such actions.

Turning next to petitioner's contention that the text and context of ORS 197.835(10)(a)(B) dictate that *any* deviation by the city from its procedures to render a timely final decision within the 120-day deadline imposed by ORS 227.178(1) necessarily constitutes an "action [taken] to avoid the requirements of ORS * * * 227.178," we simply do not agree. The text and statutory context say nothing of the kind. As we explained in our March Order and explain again in this final opinion, those statutes do not unambiguously identify the kinds of action that may properly be considered an "action [taken] to avoid the requirements of * * * ORS 227.178."

2. Respondents' Argument

Respondents argue that our March Order recognizes that if ORS 197.835(10)(a)(B) and ORS 227.178(1) are read literally, the city took final action on petitioner's application within 120 days after the application was complete and it therefore simply could not have taken an "action [that] was for the purpose of avoiding the requirements of ORS * * * 227.178." Respondents dispute petitioner's textual and contextual analysis.

> "The antecedent for the term 'action' [in ORS 197.835(10)(a)(B)] is a 'local government decision.' The term 'action' does not apply to any and all actions taken by a local government, but is strictly limited by the statute to final local government decisions. The statute speaks only of a 'decision,' it is not addressed to nor does it cover any other actions. ORS 197.835(10)(a) only authorizes LUBA to reverse a 'decision' and subsection (B) uses the definite article 'the' in referring to the action. Therefore, the language in subsection (B) does not apply to any action, but only to

> the logical antecedent of the term 'action,' which based on the text of the statute can mean only 'decision.'" Respondents' Brief 9.

Respondents go on to point out that the reference in ORS 197.835(10)(a)(B) to ORS 227.178 provides further contextual support for their interpretation, since the command in ORS 227.178(1) is to take "final action on an application for a permit" within the required 120-days. We understand respondents to contend that the action referred to in ORS 197.835(10)(a)(B) must be to the same "final action" that is referred to in ORS 227.178(1), which is the city's final decision.

We do not find respondent's textual and contextual analysis adequate to support a conclusion that ORS 197.835(10)(a)(B) and 227.178(1) must be interpreted to require that the exclusive focus in applying those statutes must be the city's *final* action or *final* decision. Neither do we find it sufficient to read those statutes to require that if the city's final decision is rendered within 120 days after the application is complete, there can be no violation of ORS 197.835(10)(a)(B), no matter what actions the city may have taken to issue a timely final decision.

ORS 197.835(10)(a)(B) is directed at "the local government's action," it is not expressly limited to the local government's *final* action. Respondents' antecedent term and ORS 227.178(1) contextual argument is not a sufficient basis for the narrow and technical reading of ORS 197.835(10)(a)(B) that respondents support. As we concluded in our March Order, the precise nature of the timely "final action" that ORS 227.178(1) requires is ambiguous, as is the precise nature of the "action[s]" that ORS 197.835(10)(a)(B) makes reversible error. Specifically, those statutes do not unambiguously state that *only* the city's *final* action is to be considered under ORS 197.835(10)(a)(B) or that a final action of *any nature* that is rendered following *any schedule or procedure the city chooses* will satisfy ORS 227.178(1) and preclude reversal under ORS 197.835(10)(a)(B).

B. The City's Actions

Petitioner identifies a number of actions that it contends are sufficient to demonstrate that the city pre-judged its application and was simply trying to find ways to deny its application before the

120-day deadline expired. A related city motive, petitioner contends, was to keep petitioner from filing a petition for writ of review and putting the city in the position of having to (1) approve the application or (2) shoulder the burden of demonstrating that the proposal violates applicable substantive local land use legislation. *See* n 11. At the very least, petitioner contends, these actions raise a "reasonable basis" for suspecting that the city was motivated by an intent to deny the application without regard to the legal merits of the application. Therefore, petitioner argues, those actions justify its request to seek and present extra-record evidence of that improper motivation. The actions petitioner identifies have already been noted and we list them below before considering petitioner's argument:

1. The big box ordinance that petitioner contends was aimed at petitioner and was hurriedly adopted without following proper procedures.

2. The planning director's opposition to the project, which includes alleged different treatment of petitioner and Home Depot, and certain actions during the planning commission hearings that petitioner contends were improper. Petitioner contends that the planning director's actions and views can reasonably be assumed to be the same as the city council's.

3. The city's decision to await completion of a separate long-range traffic corridor study, which contributed to the city's difficulty in complying with the 120-day deadline.

4. The city council's delay until after the planning commission's oral decision to approve the application to call the planning commission's decision up for review before the planning commission's decision was reduced to writing and approved in written form.

5. The city's concession that it was trying to avoid violating the statutory 120-day deadline.

6. The final city council decision, which list multiple bases for denial.

We turn first to the fourth action listed above, which seems to us potentially to be the most troubling. As we have already explained, we do not believe a city necessarily violates ORS 197.835(10)(a)(B) by deviating from local procedures to issue final decision within the deadline imposed by ORS 227.178(1). We leave open the possibility that the city may violate ORS

197.835(10)(a)(B) if it knows or should have known that it was committing a procedural error that would lead to remand by LUBA, with the attendant delay that such an appeal would entail. However, as we have already noted, petitioner does not allege that such is the case here.

In its earlier memoranda, petitioner took the position that the city violated its code in calling the planning commission's decision up for review before it was reduced to writing. However, petitioner does not assign error to that action in its petition for review. Nevertheless, we assume without deciding that the city council's decision to schedule the planning commission decision for city council review, before that decision was reduced to writing and approved by the planning commission, is not authorized by CPMC 1.24.080(A) and was a procedural error. *See* n 9. The city explains that the city council scheduled the decision for hearing by the city council on its own motion to allow time for notice to be provided and all parties an opportunity to be heard by the city council. Petitioner specifically does not assert that action to expedite review by the city council prejudiced its substantial right to fully and fairly present its position on the merits of its application to the city council. Petition for Review 23 n 13. Instead, petitioner asserts "the City Council's actions deprived Petitioner of its right to file a mandamus action and defend the Planning Commission's unanimous decision in circuit court due to the City's failure to timely process the Application." *Id*. (citation omitted).

Petitioner's argument is circular. Petitioner has no right to file a mandamus action, unless and until the city fails to provide petitioner with its statutory right to a final decision within the 120-day deadline imposed by ORS 227.178(1). As relevant in this appeal, the only right petitioner has under ORS 227.178 is a right to a final decision on its permit application within 120 days. Petitioner's position apparently is that once the city found itself in the position of having to expedite the city council review process to reach a final decision within the 120-days required by ORS 227.178, the city's only option was to violate the ORS 227.178(1) deadline and thereby trigger petitioner's right to seek a mandamus remedy under ORS 227.179(1). As we have already indicated, that position is probably correct if the local review process cannot be expedited in a way

that does not violate one or more party's substantial right to a full and fair chance to participate before the city council. But that position is not correct where the expedited review does not deprive one or more parties of its substantial right to a full and fair chance to participate before the city council, and the city council adopts a *bona fide* final decision on the merits of the application, *i.e.*, a final decision that includes findings that address the relevant legal standards and is not a *pro forma* or spurious or bad faith denial of the application.

Turning to the other actions identified by petitioner, our assessment of those actions as a basis for authorizing an evidentiary hearing to allow discovery and accept extra-record evidence in our March Order included the following:

> "Wal-Mart does suggest in several places that the city decided to deny its application before Wal-Mart ever submitted its application. Even if one could speculate from the ill-fated big box ordinance and the city council's decision on March 25, 2004 to initiate review of the planning commission's decision that the city council was biased in this case, *that speculation does not come close to providing an adequate basis for authorizing an evidentiary hearing in this appeal*. While it appears the planning director in particular never viewed the application favorably, *there is simply nothing in the record that suggests the city decision makers (the planning commission and the city council) were motivated by anything other than their views about whether Wal-Mart's application complies with applicable city land use laws*." Slip op 12 (emphases added).

We agree with petitioner that the emphasized part of our March Order inaccurately states that there is *nothing* about the actions that petitioner has identified that could be interpreted to suggest that the city council was motivated by a bias against petitioner, rather than a belief that petitioner's proposed store is not consistent with relevant land use approval standards. The apparently different treatment Home Depot and petitioner received from the planning director and the city's council's hastily adopted big box ordinance in particular lend some support to petitioner's suspicion that the planning director and perhaps one or more city councilors harbor a bias against petitioner. However, while we agree that the possibility of improper bias on the part of the city council presents a closer question than the above language in our March Order suggests, we adhere to our ultimate conclusion in our March Order:

> "A request for permission to seek and present extra-record evidence under OAR 661-010-0045, particularly one that includes a request to depose the city council, can significantly slow LUBA's review and can easily be burdensome for local government decision makers if such requests are routinely allowed without a substantial showing that there is real reason to suspect that granting the request will lead to extra-record evidence of decision maker bias. The evidence and events cited by Wal-Mart, viewed individually or as a whole, do not in our view raise a significant question about the ability of the city council to render a decision in this case that is based on its view of the merits, as opposed to a bias against Wal-Mart. The cited evidence and events do not warrant an order that would allow petitioner to engage in discovery and present extra-record evidence that the challenged decision is a product of the city's council's bias rather than a product of the city's council's view concerning whether Wal-Mart's application complies with applicable local land use laws." Slip op 13.

We also note that the potential burden mentioned above would not fall solely on local governments. In the aftermath of a highly controversial land use application such as the one at issue in this case, allegations that the decision makers were biased or prejudged the application are frequently possible based on actions that are taken and things that are said over the course of the local proceedings. Fairly or unfairly, decision makers are frequently typecast as pro-development or anti-development; and, based on that typecasting, suspicions of pre-judgment are possible. However, unless a substantial showing is required before allowing the additional delay, expense and inconvenience that an evidentiary hearing at LUBA would entail, both permit approvals and permit denials could be routinely subject to lengthy delays while the parties are allowed to engage in discovery to attempt to identify improper motivation on the part of the decision maker. Such delays would be inconsistent with the overriding legislative policy concerning review of land use decisions. ORS 197.805.[14] Construing ORS 197.805 together with our ORS 197.835(2)(b) authority to allow evidentiary hearings, we conclude that it is appropriate to require that a petitioner who seeks

---

[14] ORS 198.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives."

an opportunity to present extra-record evidence to LUBA to show that a permit denial was the product of bias or prejudgment, rather than the application of relevant approval standards, must make a substantial showing to establish that there is a reasonable basis to believe that the search for extra-record evidence will lead to evidence of such bias or prejudgment. *Space Age Fuels Inc. v. City of Sherwood*, 40 Or LUBA 577, 581 (2001). *Compare Halverson Mason Corp. v. City of Depot Bay*, 39 Or LUBA 702, 708-10 (2001) (evidence of city councilor's active opposition to applicant sufficient to authorize submission of extra-record evidence). Although petitioner's showing in this case is considerably closer to the required substantial showing than our March Order suggests, we do not believe petitioner has made the substantial showing that is required to allow depositions and other discovery in an attempt to discover and prove improper motivation on the part of the city council.

Petitioner has not demonstrated that the city took one or more actions "for the purpose of avoiding the requirements of ORS * * * 227.178." We therefore reject petitioner's argument that the city's decision must be reversed under ORS 197.835(10)(a)(B). In addition, for the reasons set out above, petitioner's alternative request that LUBA authorize it to seek and present extra-record evidence to establish improper motivation on the part of the city council is denied.

The first assignment of error is denied.

SECOND THROUGH FIFTH ASSIGNMENTS OF ERROR

In its second assignment of error, petitioner challenges the city's finding that the proposal does not qualify as a "community shopping center," which is allowed in the C-4 zone. CPMC 17.44.020(B)(15). In its third assignment of error, petitioner challenges the city's finding that the proposed store will offer goods and services that are not expressly permitted in the C-4 zone and that the application could be denied on that basis or conditioned to prohibit offering such goods and services. In its fourth assignment of error, petitioner challenges the city's finding that the proposal requires conditional use approval and does not satisfy certain conditional use approval standards.

Finally, in its fifth assignment of error, petitioner challenges the city's application of its site plan approval standards to the application.

We turn first to petitioner's fourth assignment of error. For purposes of our discussion of the fourth assignment of error, we assume without deciding that the city erred in concluding that (1) the proposal does not qualify as a community shopping center and (2) petitioner proposes to offer goods or services that are not expressly permitted in the C-4 zone. Without regard to the correctness of those conclusions, the city concluded that the disputed proposal nevertheless requires conditional use approval. The application does not include a request for conditional use approval, and the city found that certain conditional use standards are not satisfied.

Under CPMC 17.44.030(A)(20), a use that is listed as a permitted use in the C-4 zone, without conditional use review, may nevertheless require such conditional use review. CPMC 17.44.030(A)(1) through (19) lists 19 specific uses that are allowed in the C-4 zone as conditional uses. A twentieth nonspecific use is listed under CPMC 17.44.030(A) is as follows:

> "20. Permitted uses that are referred to the planning commission by city staff because they were found to exhibit potentially adverse or hazardous characteristics not normally found in uses of a similar type and size."

In considering whether the proposal should be subject to review as a conditional use under CPMC 17.44.030(A)(20), the city council adopted the following findings:

> "The Planning Commission concluded that the application should be treated as [a] permitted use and rejected the City staff's recommendation to treat the [request as] a conditional use under CPMC 17.44.030.A.20. Based on the Council's review of the record, the Council disagrees and determines that the staff properly forwarded the application to the Planning Commission for treatment as a conditional use and concludes that the application exhibits potentially adverse or hazardous characteristics not normally found in uses of a similar type or size. In particular, the Council interprets CPMC 17.44.030.A.20 to apply when the location of a development presents potential adverse or hazardous characteristics, as demonstrated in this case.
>
> "The evidence in the record is clear that the site's location adjacent to Bear Creek and the Pine Street Interchange with Interstate 5 presents potential adverse impacts that simply would not be present if the development were located in another part of the City. In particular, the Council believes the testimony from the Oregon

> Department of Transportation * * *, the Oregon Department of Fish and Wildlife * * *, the Department of Environmental Quality * * *, the Rogue Valley Council of Governments * * * Water Resources Division, JRH Transportation Engineers and the Central Point Public Works Department, who all agree that the individual and cumulative impacts of the proposed super center exhibit adverse and hazardous characteristics upon traffic circulation and Bear Creek.
>
> "Accordingly, if the Council had not denied the application as presenting a use not allowed in the [C-4] zone, the Council would treat the application as an application for a conditional use." Record 17.

The city council's findings go on to cite several reasons why it would deny conditional use approval if conditional use approval had been requested. Record 18-22. Petitioner does not assign error to those findings, but rather maintains that the city committed legal error in finding that conditional use review is required under CPMC 17.44.030(A)(20).

> "The City Council's authority to convert a permitted use to a conditional use is limited under CPMC 17.44.030(A)(20) in three important respects. First, the inquiry under CPMC 17.44.030(A)(20) is limited to determining if the proposed use exhibits potentially adverse or hazardous characteristics, not whether the proposed site is the best suited location for the use. * * * CPMC 17.44.030(A)(20) applies only in circumstances in which the proposed use itself creates adverse or hazardous effects that are not otherwise normally found in other permitted uses.
>
> "Second, the City cannot use the size or intensity of the use as a basis for triggering CPMC 17.44.030(A)(20). CPMC 17.44.030(A)(20) is limited to 'potentially adverse or hazardous characteristics <u>not normally found in uses of a similar type and size</u>.' Therefore, the City cannot require an applicant to undergo conditional use review under CPMC 17.44.030(A)(20) simply because the impacts of the proposed use are greater due to size or intensity of the use.
>
> "Third, the types of adverse or hazardous characteristics addressed under CPMC 17.44.030(A)(20) are limited. These adverse or hazardous characteristics are limited to those that are 'harmful to persons living or working in the vicinity' based on 'odor, fumes, dust, smoke, cinders, dirt, refuse, water-carried waste, noise, vibration, illumination or glare, or are found to involve any hazard of fire or explosion.' * * * The City is not permitted to use CPMC 17.44.030(A)(20) as a means to require a more rigorous conditional use review to address impacts that are inherent in all developments." Petition for Review 44-45 (underscoring in original).

A. Improper Focus on the Site Rather than the Use

Petitioner contends a *permitted* use can only be submitted to the planning commission for review as a *conditional* use if that permitted use is "found to exhibit potentially adverse or hazardous characteristics not normally found in *uses* of a similar type and size." Petitioner's first and second arguments are closely related and we address them together. Petitioner first contends the city council improperly relies on characteristics of the subject property rather than "the proposed development itself." Petition for Review 45. Petitioner next emphasizes that the city may only elect to treat a permitted use as a conditional use where it finds that the use will "exhibit potentially adverse or hazardous characteristics not normally found in uses of a *similar type and size*." (Emphasis added.) Therefore, when properly focusing on the use itself, petitioner contends the city may not rely on the size or intensity of the use to find the use will "exhibit potentially adverse or hazardous characteristics."

Petitioner contends there is nothing about the proposed Wal-Mart store itself that exhibits potentially adverse or hazardous characteristics, and that the city council did not so find. Rather, petitioner contends that the city council erroneously based its "adverse or hazardous characteristics" finding on the proximity of the store and its large parking lot to Bear Creek and the feared impact of the store's traffic on the nearby Pine Street/I-5 Interchange.[15] Those are *site* and *neighborhood* characteristics rather than *use* characteristics and petitioner contends the city council erred in

---

[15] As respondents explain in their brief:

> "As noted in the City's Comprehensive Plan, 'Bear Creek is the primary water resource in Central Point.' The Plan also notes that 'most creek pollution comes from 'non-point sources.'' Because the development is located immediately adjacent to Bear Creek, the risk of adverse effects on Bear Creek is particularly high. As also noted in the City's Comprehensive Plan, the Interstate –5 freeway 'is very important to the City's economy. The Pine Street and Interstate-5 freeway interchange provides the only direct freeway access to Central Point.' Thus, to the extent the Wal-Mart proposal has the potential to affect the I-5 interchange, it has the potential to affect the economic lifeblood of the entire City. A Wal-Mart Super Center that was not adjacent to the City's only freeway interchange would have different characteristics that would not present the same potential for adverse effects on the City. Both Bear Creek and the I-5 interchange are very significant to the City and the Council found that the potential for impacts to those resources was significant enough to require treating Wal-Mart's application as a conditional use." Respondents' Brief 30-31.

considering these site-specific characteristics to convert a permitted community shopping center into a conditional use under CPMC 17.44.030(A)(20).

If the code interpretation question presented in this assignment of error is limited to the text of CPMC 17.44.030(A)(20), petitioner's reading of that text is entirely consistent with that text and the city's contrary construction of CPMC 17.44.030(A)(20) might not survive, even under the deferential standard of review that is required under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). Again, the text of CPMC 17.44.030(A)(20) is as follows:

> "20. Permitted uses that are referred to the planning commission by city staff because they [presumably the permitted uses] were found to exhibit potentially adverse or hazardous characteristics not normally found in [permitted] uses of a similar type and size."

The above text does not expressly prohibit treating a permitted use as a conditional use because the permitted use would exhibit potentially adverse or hazardous characteristics due to unique site characteristics, as opposed to potentially adverse or hazardous characteristics due to something unique about the proposed use itself. However, petitioner is correct that the above-quoted text lends no explicit support for the city's consideration of unique site characteristics and that text seems to call for a focus on the characteristics of the use itself.

As the Court of Appeals explained in *Church*, the deferential standard of review that is applied under ORS 197.829(1) is to be applied "consistent with the rules of construction announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)." 187 Or App at 524. Under *PGE* our first level of analysis is not limited to the text of CPMC 17.44.030(A)(20), but also includes relevant context. Although the parties do not cite it, we believe CPMC Chapter 17.76, the chapter of the CPMC that addresses conditional uses generally, is relevant context. CPMC 17.76.010 sets out the general purpose of conditional use permits:

> "In certain districts, conditional uses are permitted subject to the granting of a conditional use permit. Because of their unusual characteristics *or the special attributes of the area in which they are to be located*, conditional uses require special consideration so that they may be properly located with respect to the

objectives of the zoning title and their effect on surrounding properties." (Emphasis added).

CPMC 17.76.010 supports the city council's interpretation of CPMC 17.44.030(A)(20) to allow it to consider whether the proposed store, parking lot and related traffic may "exhibit potentially adverse or hazardous characteristics" when the special features of the subject property and its environs (Bear Creek and the Pine Street/I-5 Exchange) are considered. Given that nothing in the text of CPMC 17.44.030(A)(20) specifically prohibits that larger focus, we reject petitioner's argument that the special features of the subject property may not be considered in deciding whether a permitted use should be reviewed as a conditional use under CPMC 17.44.030(A)(20).

B. Limited Types of Potentially Adverse or Hazardous Characteristics

Petitioner's third argument is that the types of "potentially adverse or hazardous characteristics" that are cognizable under CPMC 17.44.030(A)(20) are limited and they do not include impacts attributable to storm water and traffic. In support of this argument, petitioner relies on CPMC 17.44.060(A). CPMC 17.44.060 sets out general requirements in the C-4 zoning district. One of those general requirements is CPMC 17.44.060(A), which specifically addresses permitted uses that are reviewed as conditional uses:

> "Uses that are normally permitted in the C-4 district but that are referred to the planning commission for further review, per Section 17.44.030(A)([20]), will be processed according to application procedures for conditional use permits. No use shall be permitted and no process, equipment or materials shall be used which are found by the planning commission to be harmful to persons living or working in the vicinity *by reason of odor, fumes, dust, smoke, cinders, dirt, refuse, water-carried waste, noise, vibration, illumination or glare, or are found to involve any hazard of fire or explosion*." (Emphasis added).

Petitioner reads the emphasized language above to impose a limit on the kinds of "potentially adverse or hazardous characteristics" that the city may rely on under CPMC 17.44.030(A)(20) to refer a permitted use to the planning commission for conditional use review.

Respondents answer, and we agree, that petitioner misreads CPMC 17.44.060(A). CPMC 17.44.060(A) identifies characteristics of a use that require *denial* of a permit altogether.

CPMC 17.44.060(A) does not define or limit the scope of characteristics that may be considered "potentially adverse or hazardous characteristics" and support a city decision to refer a permitted use to the planning commission for conditional use review under CPMC 17.44.030(A)(20).

The fourth assignment of error is denied. Because we deny the fourth assignment of error, one of the bases for the city council's denial of the disputed application is sustained. Because the city's decision to deny the application need only be supported by one adequate basis for denial, we do not consider petitioner's challenges to the remaining bases for denial that are challenged in the second, third and fifth assignments of error. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd* 195 Or App 762, 100 P3d 218 (2004); *Douglas v. Multnomah County*, 18 Or LUBA 607, 618-19 (1990); *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982).

The city's decision is affirmed.