BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT DELK and DOTTIE DELK,
Petitioners,

vs.

CITY OF SALEM,
Respondent,

and

AARON EASTMAN,
Intervenor-Respondent.

LUBA Nos. 2005-064 and 2005-145

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Norman R. Hill, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Martinis and Hill.

Richard D. Faus, Assistant City Attorney, Salem, filed a response brief and argued on behalf of respondent.

Wallace W. Lien, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Wallace W. Lien, PC.

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

LUBA No. 2005-064	DISMISSED	01/25/2005
LUBA No. 2005-145	REMANDED	

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

Petitioners appeal a city decision concerning a driveway permit and a separate city decision that grants a variance.

MOTION TO INTERVENE

Aaron Eastman (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

CONSOLIDATION

Under OAR 661-010-0055, LUBA:

> "* * * may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s)."

LUBA Nos. 2005-064 and 2005-145 seek review of closely related decisions. Briefs have been submitted in LUBA No. 2005-145, oral argument has been held, and that appeal is ready for a final opinion. We conclude that we do not have jurisdiction over LUBA No. 2005-064. To facilitate a complete resolution of these two appeals, we now consolidate these appeals on our own motion.

FACTS

LUBA No. 2005-064 and LUBA No. 2005-145 concern different phases of the same dispute. We describe the key facts that make up the entire dispute before turning to the jurisdictional issue presented in LUBA No. 2005-064.

A. Phase 1 – The CATC Appeal

Intervenor proposes to build a coffee kiosk, which is a permitted use in the Commercial Retail (CR) zone. The property where the kiosk would be built is located at the corner of Commercial and Owens Streets, S.E. in the City of Salem. From the parties' arguments it appears that the city could have immediately issued a building permit for the proposed kiosk, but for intervenor's proposal to (1) eliminate two existing driveway entrances and (2) widen two other

existing driveway entrance, one onto Owens Street and the other onto Commercial Street.[1] Intervenor applied for a building permit and a driveway permit. On February 11, 2005, petitioners, who own a coffee business across the street, wrote a letter to the city objecting to any issuance of building or driveway permits and stating that they intended to appeal any city decision to grant building permits to the Citizens Advisory Traffic Commission (CATC).[2] Record 10-11. On March 10, 2005, an assistant city traffic engineer responded to petitioners stating that the proposal complied with SRC requirements and that there was no reason to withhold the permit. Record 9. The assistant city traffic engineer's letter went on to state that petitioners had not provided a sufficient "basis for appeal." *Id*. The assistant city traffic engineer concluded his letter with the following paragraph:

> "If you feel our decision to grant driveway permits for the proposed development is legally incorrect, please provide a letter describing your justification within ten days. At this point, we do not have reasonable justification to hold or deny driveway permits to the applicant and we will be required to issue permits if legal justification is not provided." *Id*.

On March 15, 2005, petitioners wrote a second letter to the assistant city traffic engineer arguing that the driveway permit was improper because the proposed driveway on Owens Street did not meet the required 125-foot setback from the Owens Street/Commercial Street intersection and further requesting an appeal to the CATC. The matter was forwarded to the CATC. In a March 30, 2005 memorandum, the assistant city traffic engineer took the position that the proposed

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[1] Salem Revised Code (SRC) 80.020 provides:

> **"PERMIT: REQUIRED.** It shall be unlawful for any person to construct or install any service driveway across any sidewalk, parking strip, curb, or in or upon any part of any street without first obtaining a permit from the director of public works."

SRC 80.180 provides:

> "**DRIVEWAY PERMIT REQUIRED WITH BUILDING PERMIT**. No building permit shall be granted for the construction of any building along any street unless the required construction plans provide for construction of driveways."

[2] We discuss the CATC in more detail later in this opinion.

Owens Street driveway was 145 feet from the Owens Street/Commercial Street intersection and that the appeal should be denied. The March 30, 2005 memorandum concludes: "[s]taff recommends that driveway permits for the proposed development not be held up by the complainant." Record 5.

The CATC considered petitioners' appeal at an April 14, 2005 meeting. The only evidence in the record of the CATC's deliberations or its decision is the following:

> "Action. CATC approved staff recommendation. City will issue driveway permits as allowed by law." Supplemental Record 1.

On April 29, 2005, petitioners filed an appeal with LUBA (LUBA No. 2005-064). The notice of intent to appeal includes the following description of the appealed decision:

> "DENIAL OF APPEAL OF ISSUANCE OF DRIVEWAY PERMTIS FOR PROPOSED DEVELOPMENT AT 1096 COMMERCIAL STREET SE, SALEM, OREGON BY THE CITIZENS ADVISORY TRAFFIC COMMISSION AND STAFF" which became final on April 14, 2005 and which involves City Staff's approval of a driveway plan and building permits allowing access to City Streets in violation of Salem revised Code Chapter 77 and 80, as well as completing a limited land use decision without satisfying the necessary procedural requirements."

B. Phase 2 – The Director of Public Work's Variance Decision

Before the above noted LUBA appeal was filed, on April 20, 2005, the city apparently discovered that the proposed widened driveway entrance on Owens Street was closer than 125 feet to the Owens Street/Commercial Street intersection. The city apparently advised intervenor to seek a variance from the director of public works for that driveway entrance. Record II 55.[3] On May 23, 2005 intervenor filed a request for a variance. Record II 48-51. That variance request was filed under protest. Record II 45-48. In a June 27, 2005 letter, petitioners objected to the requested variance and stated that they would appeal any variance to the CATC. In a July 7, 2005 letter, petitioners' attorney sent a letter to the City of Salem City Attorney confirming that the city

[3] We cite the Record in the subsequent LUBA appeal of the director of public work's variance decision (LUBA No. 2005-145) as Record II.

had agreed to "provide * * * notice if it takes any action on the Dutch Bros. Coffee project at 1096 Commercial Street SE." Record II 40. Apparently the city processed the variance application as a limited land use decision. On July 14, 2005, the city provided notice to adjoining property owners of a right to submit comments on the proposed variance before the end of the day, August 1, 2005. That notice was not sent to petitioners' attorney until July 27, 2005. On July 28, 2005, petitioners' attorney submitted a letter opposing the variance request. On August 2, 2005, the assistant city traffic engineer requested that intervenor submit a mini traffic study to respond to concerns that were expressed about the Owens Street access. On September 1, 2005, intervenor submitted a mini traffic study. On September 20, 2005, the director of public works issued a written decision granting a variance to allow the Owens Street driveway to be located 96 feet from the Owens Street/Commercial Street intersection. Record II 5-7. On October 5, 2005, petitioners appealed that decision to LUBA (LUBA No. 2005-145).

LUBA NO. 2005-064

We first consider the parties' motions to dismiss LUBA No. 2005-064. Intervenor moves to dismiss LUBA No. 2005-064, arguing that petitioners failed to file a timely LUBA appeal to challenge the assistant city traffic engineer's March 10, 2005 letter. The city moves to dismiss the appeal, arguing that neither the March 10, 2005 letter nor the CATC decision is a "final" city decision in this matter and, therefore, the appeal is premature.[4] For the reasons explained below, while we do not agree with some of the city's argument, we agree that the decision that petitioners appeal in LUBA No. 2005-064 is not a "final" city decision. For that reason, LUBA No. 2005-064 must be dismissed.

There has been a great deal of confusion in this case. Part of that confusion can be attributed to the somewhat unusual process the city has adopted for approving driveway permits

[4] Under ORS 197.825(1), LUBA's jurisdiction is restricted to land use decisions and limited land use decisions. As defined by ORS 197.015(10)(a) and 197.015(12), both land use decisions and limited land use decisions must be "final" decisions.

and considering local appeals of those permits. However, an equal measure of confusion has resulted from the frequency with which the city has deviated from those procedures, and often no explanation appears in the record for why the city has deviated from its adopted procedures.

THE MARCH 10, 2005 ASSISTANT CITY TRAFFIC ENGINEER LETTER

As an initial point, we reject intervenor's argument that the March 10, 2005 assistant city traffic engineer letter was the city's final decision in this matter. The final paragraph of that letter, which was quoted earlier, makes it clear that petitioners had at least 10 days to convince the city traffic engineer not to approve the disputed driveway permit. Therefore, even if the assistant city traffic engineer has authority to make the decision to approve a driveway permit for the director of public works, he did not do so on in his March 10, 2005 letter. For that reason, intervenor's motion to dismiss is without merit.

THE CATC DECISION

We admit that it is less than clear to us exactly how the city's driveway permit approval process is supposed to work. As we have already noted, SRC 80.020 and 80.180 simply require driveways and require that an applicant obtain "a permit from the director of public works" to construct a driveway. *See* n 1. But in practice there are apparently two levels of review: (1) an initial city engineering staff review and (2) a decision by the city's director of public works or his designate to deny or approve the driveway permit. Once the driveway permit has been approved or denied by the director of public works, SRC 80.250 provides an opportunity for review by the CATC.[5] Although we need not and do not decide the question here, it is exceedingly unclear what decisions may be appealed to the CATC under SRC 80.250 and what the CATC is authorized to

[5] 80.250 provides:

> "**REVIEW BY CATC.** Any person aggrieved by the action of the director of public works and the enforcement of the provisions of SRC 80.200 to 80.240 may request a review by the Citizens Advisory Traffic Commission of said action. The Citizens Advisory Traffic Commission may vary the strict application of said provisions where it is shown that there is a denial of access to a public street or a showing of undue hardship."

do in the event of such an appeal. The only explicit power the CATC is given is to "vary the strict application of said provisions where it is shown that there is a denial of access to a public street or a showing of undue hardship." If that is all the CATC can do, then petitioners' appeal to the CATC was pointless from the beginning, because a variance from "strict application of [SRC 80.100 to 80.240]" was not what petitioners sought to achieve in that appeal. The city on the other hand cites SRC 5.030(a) and contends that CATC performs merely an advisory role.[6] However, SRC 5.030(b) expressly provides that the CATC "serves as an appeals body for vision clearance decisions by the director of public works under SRC 76.170." While this appeal does not concern a vision clearance decision, it is clear that CATC operates in more than advisory capacity when vision clearance decisions are appealed. More to the point in this appeal, while the precise scope of the CATC's authority on review of a director of public work's driveway permit decision under SRC 80.250 is not clear, at a minimum the CATC is authorized to "vary the strict application" of "SRC 80.200 to 80.240" in an "action by the director of public works." *See* n 5. The city's practice may be to treat CATC decisions as mere recommendations to the director of public works, but that is not consistent with the language of SRC 80.250, at least with regard to CATC decisions to vary strict application of SRC 80.200 to 80.240.

It is reasonably clear to us that had the director of public works made a decision to issue the driveway permit and had that director of public work's decision been properly appealed to the CATC, the city's decision would not become final until the CATC rendered its decision. But that is

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[6] SRC 5.030(a) provides:

> "The Citizens Advisory Traffic Commission shall be an advisory body, which functions to advise council, upon request of council, and the director of public works, as appropriate, on all matters related to traffic and parking control within the city's transportation system. The Citizens Advisory Traffic Commission shall hold hearings, investigate, and make reports and recommendations to the director of public works, on all matters before them. Controversial traffic issues, as determined by the Citizens Advisory Traffic Commission, shall be referred to council with the recommendation and report of the Citizens Advisory Traffic Commission within 30 days, unless additional time be granted. Recommendations shall be through the director of public works and city manager to the council."

not what happened here. The March 10, 2005 assistant city engineer's letter is not a decision to issue the driveway permit. At most it is an expression of intent to do so in the future if petitioners do not give him a reason not to do so within 10 days. The assistant city traffic engineer's decision to grant petitioners' request to appeal his intended action to the CATC was an appeal that is neither envisioned nor authorized by SRC 80.250, or any other SRC provision called to our attention. That unauthorized CATC decision does not purport to be a final decision to approve the driveway permit. At most it purports to allow the director of public works to do so at some time in the future. As we read SRC 80.250, had the director of public works actually issued the driveway permit in response to the CATC decision, that director of public work's decision to issue the driveway permit at least potentially would have been appealable to the CATC, notwithstanding that the CATC had already considered the assistant city traffic engineer's intent to issue that driveway permit. On the date petitioners filed their appeal in LUBA No. 2005-064, the city had not rendered a final decision on the disputed driveway permit.

Because the city had not yet issued a final decision on the driveway permit when petitioners filed their appeal in LUBA No. 2005-064, and because that is the decision that petitioners seek to challenge in that appeal, LUBA No. 2005-064 is dismissed.

LUBA NO. 2005-145

We turn next to petitioners' appeal of the director of public work's decision to grant a variance under SRC 80.170. The relevant facts have already been set out.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to respond to new issues raised in the response brief. The city's and intervenor's response briefs were filed on December 6, 2005 and December 7, 2005, respectively. The reply brief was not filed until December 30, 2005. Our rules require that a reply brief be filed "as soon as possible after resopondent's brief is filed." OAR 661-010-0039. Because the reply was mailed to respondents on a Friday and the following Monday was a holiday, respondents received the reply brief one day before oral argument at the earliest. Receiving the

reply brief a day before oral argument when the response briefs were submitted three weeks earlier prejudiced respondents' substantial rights. We therefore do not consider petitioners' reply brief.[7]

MOTION TO DISMISS

The city moves to dismiss this appeal arguing that the challenged decision is neither a "land use decision" nor a "limited land use decision." Although the decision was processed as a limited land use decision, and the decision states that any appeals must be made to the Land Use Board of Appeals, the city now argues that we do not have jurisdiction over the appeal. A "limited land use decision" is defined by ORS 197.015(12) as:

> "* * * a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "* * * * *
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

The city first argues that the challenged decision is merely an engineering decision and does not involve "discretionary standards designed to regulate the physical characteristics of a use permitted outright." We might be inclined to agree with the city if the decision solely involved driveways outside the context of the related development. The driveway variance, however, is inextricably linked with the proposed coffee kiosk development proposed for the property.[8] The driveway permits were eventually submitted and processed in conjunction with the building permit. A traffic study was requested and provided, and revisions were requested by staff. The effects of the proposed development were considered by the director of public works in deciding to allow the

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[7] We note, however, that the subjects of the reply brief: the nature of limited land use decisions and the adequacy of the city's notice – are topics that petitioners were entitled to and did address at oral argument. Although we do not consider the reply brief, we have considered petitioners' statements at oral argument.

[8] As we have already noted SRC 80.180 requires that the construction authorized by a building permit must include construction of driveways. *See* n 1.

variance. We believe it is clear that the driveways were not considered in a vacuum; rather they were considered as part of the proposed development.[9]

The city also argues that the driveways are not a "use permitted outright" because a permit is required. We do not agree. Merely because there are standards that must be met to obtain a driveway permit does not mean it is not a permitted use. For instance, in many zones single-family residences are allowed, but building permits are still required. That hardly means that single-family residences are not uses permitted outright. The proposed coffee kiosk is a permitted use, and driveways are permitted uses so long as certain safety standards are met. The fact that intervenor's property may not meet the minimum requirements does not make driveways uses that are not permitted outright. Therefore, the challenged decision meets the definition of a limited land use decision.[10] The city's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city lacked jurisdiction to grant the variance that is the subject of LUBA No. 2005-145 while LUBA No. 2005-064 was pending before LUBA. Intervenor argues that this argument was not preserved because petitioners failed to raise the issue below.[11]

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[9] The city assigns great weight to the fact that the SRC provisions governing driveway permits are in chapter 80 of the SRC, and argues that all land use regulations are located within chapters 110-161. Local governments often make land use or limited land use decisions without realizing that is what they are doing. The location of regulations in a local governments' code does not necessarily determine whether a decision that applies those regulations is a land use or limited land use decision. We note that chapter 63 of the city's code involves subdivisions, and decisions made under that chapter are certainly land use decisions. The city offers no reason to believe that SRC Chapter 80 was not adopted, in part, to comply with Statewide Planning Goal 12 (Transportation).

[10] The city also goes to great length arguing that limited land use decisions are not distinct decisions from land use decisions, but rather a subset of land use decisions. While that is an interesting issue, we need not address it here, as we believe the challenged decision also meets the definition of "land use decision."

[11] ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.195(3)(c)(B) provides:

Our review of limited land use decisions is generally restricted to issues raised before the local government unless, among other things, the local government did not satisfy the procedural requirements of ORS 197.195. *ONRC v. City of Oregon City*, 28 Or LUBA 263, 267 (1994).[12] One of the procedural requirements of ORS 197.195 is that the city provide notice of the proposed action to nearby property owners. The parties dispute whether the city provided the notice required by ORS 197.195(3) and whether petitioners were legally entitled to receive such notice. Petitioners also argue that, in any event, the city promised to provide notice to petitioners and then failed to do so until near the end of the comment period. We understand petitioners to contend that failure, by itself, should excuse their failure to raise the issue that is presented in the first assignment of error in the letter they hastily prepared and submitted before the comment period expired on August 1, 2005.

"* * * Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]"

[12] ORS 197.195(3) provides in pertinent part:

"A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.

"* * * * *

"(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given * * *

"(c) The notice and procedures used by local government shall:

"(A) Provide a 14-day period for submission of written comments prior to the decision;

"* * * * *

"(E) State the place, date and time that comments are due;

"(F) State that copies of all evidence relied upon by the applicant are available for review * * *[.]"

It appears that the city may have given notice to property owners shown on the assessment roll, as required by ORS 197.195(3)(b); and it appears that petitioners were not entitled to such notice, because they are not the property owners shown on the assessment roll. But the record is such that we cannot be sure. We also question whether the city is any position to assert waiver, when it failed to give notice of its variance proceedings as it promised. Given these notice uncertainties, and because we deny the first assignment of error in any event, we assume without deciding that petitioners did not waive the issue presented in the first assignment of error.

In *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989), we stated:

> "* * * Where jurisdiction is conferred upon an appellate review body, once appeal/judicial review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise. In this case, the statutes do not authorize the county to take further action on its decision while that decision is being reviewed by LUBA or the Court of Appeals. * * *" (Footnote omitted.)

According to petitioners, the variance decision was a further action taken by the city while the decision was being reviewed by LUBA. Respondents argue that the variance decision is a completely different, although related, decision that is not affected by the jurisdictional principle discussed in *Standard Insurance*.

We recently addressed the *Standard Insurance* jurisdictional principle in *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005). In an earlier decision involving the same property, the petitioners challenged a city decision rezoning the property. A central issue was whether the comprehensive plan map designation for the subject property was an overlay or the base zone. We agreed with the city that the comprehensive plan map designation was an overlay, but we remanded the decision based on inadequate findings regarding the Transportation Planning Rule (TPR). *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004). The petitioners appealed our decision regarding the comprehensive plan designation to the Court of Appeals, and while the appeal was pending before the Court of Appeals, the city conducted remand proceedings and issued a new decision

with additional findings addressing the TPR. The petitioners appealed the remand decision to LUBA and argued that under *Standard Insurance* that the city lacked jurisdiction to adopt the challenged decision.

After reviewing the underpinnings of *Standard Insurance*, we stated:

> "Turning to *Standard [Insurance]*, our conclusion in that case was based on a thorough analysis of the applicable statutes and case law. No changes in the statutory or judicial landscape over the intervening years brought to our attention calls our holding in *Standard [Insurance]* into question. We affirm its general holding that, absent statutory authority to the contrary, where jurisdiction over an appeal of a land use decision lies with an appellate court, the local government loses jurisdiction to modify that land use decision." 49 Or LUBA at 270.

The question therefore is whether a local government's action, while an appeal of a decision is pending before LUBA or the appellate courts, modifies the decision on appeal. The answer to that question is complicated in this appeal by the unusual manner in which the driveway permit was handled by the city. But as we have already concluded, the decision that petitioners attempted to appeal in LUBA No. 2005-064 (approval of a driveway permit) had not been adopted as a final city decision when petitioners filed their appeal in LUBA No. 2005-064. In fact, as far as we know the city has still not approved a driveway permit. The assistant city traffic engineer's tentative decision to approve the driveway permit without requiring a variance, although favorably reviewed by the CATC in the *ad hoc* appeal that the city provided, has now been abandoned. The decision that is before us in this appeal is not a city decision to approve a driveway permit or a modification of an earlier city decision to approve a driveway permit; rather it is a variance decision that presumably makes it possible for the director of public works to issue such a permit notwithstanding the proximity of the proposed Owens Street driveway entrance to the Owens Street/Commercial Street intersection. The city's variance decision does not run afoul of the jurisdictional principle discussed in *Rose, Staus* and *Standard Insurance*.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners raise four subassignments of error regarding alleged procedural errors made by the city. We need address only one of those subassignments of error, however, because it is dispositive. In their fourth subassignment of error, petitioners argue that the city erred by accepting and relying upon evidence that was submitted after the close of the comment period. As discussed earlier, the city's decision was a limited land use decision. Limited land use decisions are not subject to the more rigorous procedural requirements of ORS 197.763 that apply to land use decisions. ORS 197.195(2). Under the limited land use decision statute, the procedure for limited land use decisions includes the following steps: (1) the applicant submits an application; (2) the application is deemed complete; (3) notice is mailed to certain property owners; (4) those receiving notice have 14 days to submit comments on the application; and (5) the decision maker (in this case the director of public works) analyzes the application and the comments and renders a decision. ORS 197.195. *See* n 12.

In the present case, intervenor submitted his variance application on May 23, 2005, and apparently it was subsequently deemed complete. On July 14, 2005, the city provided notice to some property owners (but not petitioners) indicating that the comment period would expire August 1, 2005.[13] Nonetheless, after the August 1, 2005 comment period expired, the city requested a traffic study from intervenor, which intervenor submitted on September 1, 2005. Petitioners were not given an opportunity to review or comment upon the traffic study. The director of public works then issued his decision on September 20, 2005.

We recently confronted a similar set of circumstances where a local government accepted evidence after the close of the comment period without allowing other parties the opportunity to respond to the new evidence. In *Wal-Mart Stores, Inc. v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2004-124, September 1, 2005), *appeal pending*, we stated:

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[13] As discussed earlier, petitioners were not given notice until July 27, 2005, and they submitted comments in opposition to the variance the next day.

> "In *Johnston v. City of Albany*, 34 Or LUBA 32, 41 (1998) and *Azevedo v. City of Albany*, 29 Or LUBA 516, 520 (1995), we held that when a local government accepts evidence from the applicant after the close of the 14-day comment period, it violates ORS 197.195(3)(c)(F). * * * The statute sets out an unambiguous rule: once the application is deemed complete and notices are mailed, a 14-day comment period is provided for submission of written comments. Following the close of the comment period, a decision is made based on evidence submitted in the application and the comments. This procedure is supported by the language of the statute. ORS 197.195(3)(c)(A) ('Provide a 14-day comment period for submission of written comments *prior to the decision*.' (Emphasis added)). At the end of the 14-day comment period, the local government must render its decision without accepting or considering new evidence." Slip op 11-12.

In the present case, the city clearly did not follow this procedure. As in *Wal-Mart Stores*, *Johnston*, and *Azevado* the city accepted and relied upon evidence submitted after the close of the comment period. That was procedural error. As we stated in *Wal-Mart Stores*:

> "Procedural errors, however, only provide a basis for reversal or remand if they prejudice a party's substantial rights. ORS 197.835(9)(a)(B). If new evidence is submitted after the record has been closed in quasi-judicial proceedings, the local government must either: (1) reopen the record to allow other participants an opportunity to respond to the new evidence; or (2) reject the new evidence as untimely. *ODOT v. City of Mosier*, 36 Or LUBA 666, 683 (1999); *Brome v. City of Corvallis*, 36 Or LUBA 225, 234-35, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999). At least in the quasi-judicial context, the failure to choose one of these options prejudices the substantial rights of the parties because it infringes on their right to a full and fair opportunity to present their case. *Id*. We see no reason why a different rule should apply in the limited land use decision making context. Once the city decided to deviate from its limited land use decision making procedures and accept and rely on new evidence * * * the city was obligated to allow the parties an opportunity to present evidence to respond to that new evidence. The city committed procedural error that prejudiced petitioner's substantial rights when it failed to do so." Slip op 13.

The city characterizes this improper acceptance of evidence after the close of the comment period as harmless error by claiming that the director of public works did not rely on the traffic study in making his decision. The findings, however, do not support this claim. The decision states that the public works department specifically requested the traffic study, reviewed the traffic study,

and requested revisions to the site plan based upon that traffic study.[14] The city claims that because the director of public works did not change the proposed locations of the driveways after receiving the traffic study, he did not rely upon the traffic study in making his decision. We do not agree. While the director of public works may not have required revisions to the driveway locations, he certainly considered the traffic study in determining whether the resulting traffic impacts, including the driveways associated with the proposed driveways, would be safe and efficient – and therefore deserving of a variance.[15] Although the extent to which the director of public works relied upon the traffic study is unclear, it is clear that he considered the traffic study and made his decision based, at least in part, on that evidence. Therefore, petitioners' substantial rights were prejudiced by the city's failure to provide petitioners an opportunity to respond to that evidence.

The second assignment of error is sustained, in part.

THIRD AND FOUTH ASSIGNMENTS OF ERROR

In the third and fourth assignments of error, petitioners argue the city erred by not imposing boundary street dedication requirements and challenge the city's findings regarding the variance criteria. Because we sustain petitioners' second assignment of error and the record must be reopened and additional evidence will likely be submitted, we do not reach these assignments of error. *Azevado*, 29 Or LUBA at 520.

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[14] The city's findings state:

> "On September [20], 2005 the applicant submitted the mini traffic study as requested by Public Works. The traffic study is on file. After review of the traffic study Public Works requested revisions to the site plan. The requested provisions did not change the location of the driveway which is the subject of this variance." Record II 9.

[15] The city's findings state that the "existing peculiar, exceptional or extraordinary circumstances or conditions that justify the variance" include:

> "The driveway locations and circulation patterns for this development were extensively reviewed by city staff and the developer. City staff concludes, based on the evidence before staff, that *the proposed driveway is at the best possible location for safety and efficient traffic flow when considering the peculiar limitations of the site*." Record II 10 (Emphasis added).

We do not reach the third and fourth assignments of error.[16]

LUBA No. 2005-064 is dismissed. The city's decision is remanded in LUBA No. 2005-146.

[16] Petitioners will be free to raise any arguments concerning the boundary street requirements and the variance criteria on remand.