BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS 4 RESPONSIBLE GROWTH,
Petitioner,

vs.

CITY OF VENETA,
Respondent,

and

KAY LARSON,
Intervenor-Respondent.

LUBA No. 2005-109

FINAL OPINION
AND ORDER

Appeal from City of Veneta.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Veneta.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 02/23/2006

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 appeals a decision that approves a variance to allow development within a wetland, under City of Veneta Municipal Code (VMC) Chapter 18.10.[1]

JURISDICTION

Although we generally set out the relevant facts at this point, intervenor raises a jurisdictional challenge that requires extensive discussion to resolve and has nothing to do with the facts that bear on petitioner's assignment of error. We therefore first address the jurisdictional challenge before setting out the facts and addressing petitioner's assignment of error.

Intervenor argues in her response brief that this appeal should be dismissed because petitioner did not appear before the city during the local proceedings in this matter, as required by ORS 197.830(2).[2] We previously rejected intervenor's August 12, 2005 motion to dismiss, in which she made some of the same arguments she makes again in her response brief. We review our disposition of the motion to dismiss before turning to intervenor's latest standing arguments and her motion to consider evidence outside the record, which was filed in conjunction with her response brief.

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[1] Chapter 18.10 of the City of Veneta Municipal Code is entitled "Wetland Protection."

[2] ORS 197.830(2) provides:

> "Except as provided in ORS 197.620 (1) and (2), a *person* may petition the board for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) *Appeared* before the local government, special district or state agency orally or in writing." (Emphases added.)

A. Intervenor's Prior Motion to Dismiss

In her August 12, 2005 motion to dismiss, intervenor argued that neither petitioner Mariner nor petitioner Neighbors for Responsible Growth (N4RG) made an "appearance" during the proceedings before the city, within the meaning of ORS 197.830(2). Because the petition for review had not yet been filed when intervenor filed her motion to dismiss, petitioners' position concerning whether they had complied with the appearance requirement was not yet known. Intervenor speculated that petitioners might assert a number of separate legal theories in support of their standing to bring this appeal. One of those potential theories was that another private organization, the Goal One Coalition, or its executive director Jim Just (Just), appeared on behalf of petitioners, through a June 30, 2005 letter.[3] The first paragraph of that letter is set out below:

> "The Goal One Coalition (Goal One) is a nonprofit organization whose mission is to provide assistance and support to Oregonians in matters affecting their communities. Goal One is appearing in these proceedings at the request of and on behalf of its membership residing in the Veneta area. This testimony is presented on behalf of Mona Linstromberg, [N4RG] and N4RG's membership in the Veneta and surrounding area, the Goal One Coalition, and Jim Just as an individual." Record 49.

That June 30, 2005 letter is signed "Jim Just" "Executive Director." Record 53.

In an August 15, 2005 response, petitioners argued that the motion to dismiss was premature, since the record had not yet been settled and the petition for review had not yet been filed. However, petitioners also argued that both petitioners had requested that Just submit the June 30, 2005 letter on their behalf and the letter constituted the statutorily required appearance for standing to appeal the city's decision to LUBA.

Intervenor responded on August 23, 2005 with a lengthy memorandum. In that memorandum, among other things, intervenor advanced two arguments. First, intervenor

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[3] We have some question whether the June 30, 2005 letter was submitted by Goal One or by Just the individual or by both. For ease of reference in this opinion, we assume the letter was submitted by Just, the individual, on behalf of the individuals and organizations cited in the letter.

argued that a private organization like N4RG must appear through an officer or member of N4RG or an attorney. According to intervenor, another private organization or a private individual who is neither an attorney nor an N4RG member cannot make an appearance for N4RG and thereby satisfy the ORS 197.830(2)(b) appearance requirement. Second, even if Just or Goal One potentially could make an appearance for N4RG, intervenor argued that neither Just nor Goal One had been authorized by petitioners Mariner or N4RG to make an appearance on their behalf. On August 24, 2005, intervenor filed a motion to strike all petitioners' allegations that Just or Goal One had authority to make an appearance on their behalf. Intervenor also filed a motion under ORS 197.835(2)(b) and OAR 661-010-0045(1), requesting that LUBA consider evidence outside the record to establish that Just lacked authority to appear on behalf of N4RG and its members.[4] Intervenor sought permission to engage in discovery to seek evidence that would prove that Just and Goal One lacked such authority. In support of that request to allow extra-record evidence, intervenor attached an affidavit signed by intervenor's attorney.[5]

On September 7, 2005 petitioners responded that because the June 30, 2005 letter states that it is being submitted on petitioners' behalf, the letter at least implies that petitioners authorized Just to submit the letter on petitioners' behalf. Three affidavits were attached to petitioners' response. One of those affidavits was signed by Monica

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[4]ORS 197.835(2)(b) provides, in relevant part:

> "In the case of disputed allegations of standing, * * * 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."

OAR 661-010-0045(1) includes nearly identical language providing that LUBA may consider evidence outside the record to resolve disputed allegations regarding standing.

[5] That affidavit includes the following statement:

> "[I]t seems implausible that the N4RG organization, which is a local group, would authorize and request a statewide organization like the Goal One Coalition to appear in its stead in a local proceeding. * * *" Affidavit of Bill Kloos in Support of Motion for Evidentiary Hearing 2.

Linstromberg (Linstromberg). In that affidavit, Linstromberg explains that she is a board member and treasurer of the Goal One Coalition and an executive officer and board member of N4RG. The affidavit explains that she sometimes works with Just to submit testimony on issues of importance to N4RG. She explains in the affidavit that she reviewed drafts of the letter and was the person who actually delivered the letter to the city on July 1, 2005.

In an order dated November 23, 2005, we agreed with intervenor that the June 30, 2005 letter was not sufficient to constitute an appearance for petitioner Mariner, for reasons that we need not discuss again here. However, we concluded that the June 30, 2005 letter did constitute an appearance for petitioner N4RG, and we denied intervenor's motion to dismiss. First, we rejected intervenor's contention that N4RG could only appear through an attorney or a member, board member or officer of N4RG. We concluded that N4RG could authorize Just or the Goal One Coalition to appear on its behalf. We then turned to the question of whether the record demonstrated that Just had such authority, and we concluded that it was unnecessary to go beyond the record to conclude that he had such authority.

> "We find it unnecessary to decide intervenor's motion to strike and motion to take extra-record evidence because we generally agree with intervenor that the question of whether Mr. Just made an appearance on behalf of N4RG in this case should be decided based on the record. However, we reject intervenor's argument that Mr. Just was obligated in this case to submit proof of his authority in order to make an appearance on behalf of N4RG. We cannot imagine that an attorney appearing on behalf of N4RG would first be required to prove that an attorney-client relationship actually existed between the attorney and N4RG, and we see no reason why such a requirement should be imposed on one individual person seeking to make an appearance for an artificial person. Unless some challenge is made and some reason presented to question a person's claim that he or she is appearing on behalf of another person, an allegation to that effect is sufficient, provided the allegation sufficiently identifies the person he or she is appearing for. Mr. Just clearly identified N4RG, alleged that he was appearing on its behalf, and no challenge was raised by any party or the city to that allegation during the local proceedings. N4RG 'appeared' during the local proceedings, within the meaning of ORS 197.830(2)." *Neighbors 4 Responsible Growth v. City of Veneta*, ___ Or LUBA ___ (LUBA No. 2005-109, Order, November 23, 2005), slip op 5.

B. The Response Brief

In her response brief, intervenor argues that N4RG lacks standing to bring this appeal for three reasons. First, intervenor reasserts her position that a private organization like N4RG must appear through an attorney or an officer, director or member of the organization. Second, intervenor criticizes the rationale in our November 23, 2005 order and reasserts her position that Just lacked authority to appear on N4RG's behalf. Third, intervenor contends that because N4RG incorporated as a nonprofit corporation on September 8, 2005, LUBA lacks jurisdiction because the pre-incorporation N4RG no longer exists and the post-incorporation N4RG did not appear before the city.[6]

With regard to intervenor's argument that N4RG must appear through an attorney or an officer, board member or member of the organization, we rejected that argument in our November 23, 2005 order, and we reject it again here for the same reason. We address intervenor's two remaining contentions separately below.

1. Authority to Appear on N4RG's Behalf

As intervenor correctly notes, it was probably not appropriate for LUBA to refuse to consider her contention that Just lacks authority to make an appearance for N4RG, based solely on her failure to object to Just's letter. That June 30, 2005 letter was received by the City on July 1, 2005, and the final hearing was held the next business day, July 5, 2005. The city rendered its decision to approve the application at the end of that hearing. Neither Just nor any other members of N4RG were at the July 5, 2005 hearing, so while it is possible that the successful permit applicant in this case could have challenged Just's authority to appear for petitioners at that hearing, such a challenge likely could not have been resolved at that hearing. We agree with intervenor that her opportunity to challenge Just's claim that he was appearing on behalf of N4RG was ephemeral, and that we should not have rejected her

[6] Intervenor also argued that N4RG's attorney did not have authority to file the Notice of Intent to Appeal or the Petition for Review in this matter. Intervenor subsequently withdrew that argument.

challenge at LUBA to Just's authority to appear on behalf of N4RG, solely on the basis that intervenor did not object to the June 30, 2005 letter. However, for two reasons, we continue to believe intervenor's claim that Just lacked authority to appear on behalf of N4RG should be rejected.

First, in at least one case, we have refused to entertain arguments by an intervenor-respondent that a petitioner lacked authority to file an appeal. As we explained in *Murphy Citizens Advisory Comm. v. Josephine County*, 33 Or LUBA 882, 885 (1997):

> "While petitioner has the burden of establishing standing, we decline to dismiss the appeal on the basis alleged. Intervenor cites no authority for the proposition that an internal vote prohibiting an unincorporated organization from pursuing an appeal affects that organization's standing before LUBA. Our records indicate that petitioner has vigorously pursued its appeal in the intervening two and a half years since that vote was allegedly taken. If the appeal is no longer authorized, it is for petitioner, not intervenor, to seek dismissal."

We believe that principle should apply equally to an argument that a purported local appearance by an individual on behalf of a private organization was not authorized. If the June 30, 2005 appearance by Just on behalf of N4RG was unauthorized, N4RG has had ample opportunity to disavow that appearance. Instead, it filed this appeal and has consistently resisted all of intervenor's attempts to have the appeal dismissed.[7]

Second, even if the general rule in *Murphy Citizens Advisory Comm*. should not be applied in this case, we do not believe intervenor has demonstrated that Just lacked authority or that further proceedings under OAR 661-010-0045 to allow a search for extra-record evidence is warranted in this case. LUBA's authority to consider extra-record evidence is discretionary, not mandatory. We do not believe intervenor has demonstrated any substantial

[7] Even if N4RG did not formally authorize that appearance in the manner required by its bylaws before the appearance was made, it presumably could easily correct that omission by properly authorizing the appearance after-the-fact. *See Metropolitan Service District v. Board of County Commissioners*, 1 Or LUBA 282 (1980) (where notice of intent to appeal was filed without authorization by governing body, governing body's after-the-fact ratification of the decision to file the appeal relates back to the date of filing).

reason to believe that our consideration of extra-record evidence in this case would lead to a conclusion that Just's appearance for N4RG was unauthorized.

We turn first to the June 30, 2005 letter itself. That letter clearly states that the letter is submitted "on behalf of" "N4RG." Record 49. Intervenor makes much of the fact that the letter does not also expressly state that it is being submitted "at the request of N4RG." We agree with petitioner that it is reasonable to infer that someone who claims to be submitting a letter "on behalf of" an organization has authority to do so, even if that person does not expressly state that they have such authority. Unless there is some reason to question Just's claim and the reasonable inference of authority, we continue to believe that the June 30, 2005 letter was sufficient to constitute an appearance by N4RG.

There is no other evidence in the record that the parties call to our attention that directly bears on the question of whether Just was authorized to appear for N4RG. Therefore, the only evidence in the record on that question is Just's claim that he was submitting the June 30, 2005 letter on N4RG's behalf and the reasonable inference that he was authorized to do so. Along with her motion to dismiss, intervenor filed a motion under OAR 661-010-0045 to allow her to seek and present evidence outside the record to establish that Just lacked that authority. However, to succeed in that request we believe that intervenor must do more than speculate that Just did not have authority to appear for N4RG. As we explained in *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005), there is some tension between the statutory requirement that LUBA resolve appeals quickly and the statutory authority for LUBA to delay an appeal and allow time for evidentiary hearings.[8] We ultimately concluded in *Wal-Mart Stores* that a party that requests LUBA to

[8] We earlier set out the relevant text of ORS 197.835(2)(b). *See* n 4. ORS 197.805 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."

consider extra-record evidence of bias or prejudgment must make a substantial showing that the search for relevant extra-record is warranted:

> "[U]nless 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. 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 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 Depoe 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). * * *" 49 Or LUBA at 490.

Although there is probably less reason for concern that parties will argue for the first time at LUBA that an attorney or individual lacked authority to appear on behalf of another person they claimed to represent, we believe it is appropriate to require a similar showing that there is some substantial reason to suspect that the party who made an appearance lacked authority to do so.

In addition to intervenor's reliance on Just's failure to expressly state that he was authorized to appear for N4RG, intervenor's attorney submitted an affidavit in which he states his belief that such authorization was "implausible." *See* n 5. These are not sufficient reasons to believe that an evidentiary hearing would lead to evidence that Just was not authorized to appear on behalf of N4RG.

Intervenor's most recent motion to consider extra-record evidence includes an affidavit signed by intervenor. In that affidavit she claims to have spoken to Mark Holman (Holman), who is a N4RG board member. According to intervenor, Holman told her "he had no knowledge of Mr. Just or his letter." Affidavit of Kay M. Larson in Support of Motion to

Take Evidence Relating to Standing 1. In opposing intervenor's request to consider evidence outside the record, petitioners submitted an affidavit signed by N4RG board member Holman. In that affidavit Holman explains that he in fact told intervenor that he had no knowledge of the Just letter. But Holman also states:

> "As I explained to [intervenor], I was not at the meetings where the issue was likely discussed. I did not state, nor did I intend to imply, that either the testimony or the appeal was not authorized. I simply responded that, having not been at the meetings, I had no knowledge of any authorizations." Affidavit of Mark Holman Regarding Standing 2.

Viewing the parties' affidavits and arguments, we do not believe that intervenor has shown that there is any reasonable likelihood that allowing additional discovery under OAR 6610-010-0045(2) would lead to evidence that Just lacked authority to appear on behalf of N4RG. We also believe the record is sufficient to establish that he possessed such authority.

2. Incorporation as a Nonprofit Corporation

Prior to September 8, 2005, N4RG was a private, unincorporated organization. On September 8, 2005, N4RG incorporated as a nonprofit corporation. Intervenor argues that any local appearance in this matter was made on behalf of the unincorporated N4RG and that private organization no longer exists. Intervenor argues that the nonprofit corporation N4RG, which did not exist until September 8, 2005, did not appear below. Accordingly, intervenor argues, this appeal must be dismissed.

Petitioner does not address this issue in the petition for review and does not respond to the argument in its January 20, 2006 memorandum. But at oral argument, petitioner argued that the relevant person in this matter is N4RG. That person was an unincorporated association until September 8, 2006 and a nonprofit corporation after that date. Petitioner argued that its bylaws have remained the same and have been provided to intervenor.

Petitioner contends that while the structure of N4RG may have changed, it remains the same "person," as that term is defined by ORS 197.015(19).[9]

While it is possible that N4RG began life anew as a nonprofit corporation, unencumbered by any of the legal rights and obligations of the private organization that existed before that date, intervenor offers no substantial reason to believe that is the case, and we understand petitioner to argue that it is not the case. We conclude that intervenor has not shown that a further evidentiary hearing on this question is warranted. We also conclude that while N4RG may have become a nonprofit corporation on September 8, 2005, that change does not mean it is not the same person that existed before that date.

For the reasons explained above, we conclude that petitioner N4RG appeared below. Because we conclude that N4RG "appeared" below, within the meaning of ORS 197.830(2), it follows that N4RG has standing to bring this appeal, and we have jurisdiction to consider its challenge to the city's decision on the merits.

FACTS

Intervenor submitted a consolidated application for (1) site plan review, (2) a conditional use permit, and (3) a variance under the city's Wetland Protection Ordinance (WPO). The only decision that is before us in this appeal is the city's decision to grant the variance.

The subject 3.87-acre property is located at the intersection of Jack Kelly Drive and Eighth Street. Jack Kelly Drive is an east-west frontage road for State Highway 126, located a short distance south of Highway 126. Eighth Street is a major north/south roadway connecting the western part of the city with Highway 126 to the north. Jack Kelly Drive is

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[9] ORS 197.015(19) sets out the following definition:

> "'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or *private organization of any kind*. The Land Conservation and Development Commission or its designee is considered a person for purposes of appeal under ORS chapters 195 and 197." (Emphasis added.)

the northern boundary of the property and Eighth Street is the western boundary of the property. Where they border the subject property, both Jack Kelly Drive and Eight Street are constructed on fill across wetlands. An approximately .88 acre area of wetlands remains along the north and west boundaries of the subject property. Record 24, 48.

Intervenor proposes to develop the property with over 40,000 square feet of commercial space and 137 parking spaces. As proposed, essentially the entire site would be developed, and the .88 acres of wetlands on the site would be filled for development. Record 32.

ASSIGNMENT OF ERROR

A. Introduction

The remaining .88-acre portion of wetlands was formerly connected to a larger area of wetlands to the north and west. Although Jack Kelly Drive and Eighth Street physically separate the .88-acre wetland on the property from wetlands to the north and west, the wetlands apparently retain a more limited connection through pipes that run under those roadways. There is no dispute that the .88-acre wetland on the property is a "locally significant wetland," as the WPO uses that term. VMC 18.10.040(3) prohibits a number of uses in locally significant wetlands. Among the uses VMC 18.10.040(3) prohibits in locally significant wetlands are "[n]ew development or expansion of existing development" and "[f]illing, grading, and/or excavating wetland areas." VMC 18.10.040(3)(a) and (f). Because intervenor proposes new development and fill in the wetlands, a variance is required. VMC 18.10.060 allows variances to permit uses that would otherwise be prohibited by the WPO in three circumstances. One of those circumstances is where "public need outweighs the potential adverse impacts of development" in the wetland.[10]

[10] The complete text of VMC 18.10.060(3) is as follows:

Before turning to petitioner's arguments, we note that we agree with intervenor that the VMC 18.10.060(3) variance criterion is subjective and in many cases will call for "a comparison of apples with oranges." Intervenor-respondent's Brief 15. The city was required to weigh apples and oranges in this case. Public need, in this case employment opportunities and retail and commercial development, is quite different from the potential adverse impacts from developing in wetlands. The criterion is particularly subjective because, in addition to requiring that dissimilar things be weighed, the criterion provides no guidance on how those dissimilar things are to be weighed so that the city can determine which one outweighs the other. Given the inherently subjective nature of the inquiry required by this criterion, so long as the city engages in a meaningful and complete comparison or weighing of the public need and the potential adverse impacts, the balance the city strikes and the resulting decision is entitled to significant deference on appeal to this Board.

We next consider petitioner's challenges to the adequacy of the city's findings concerning public need and potential adverse impacts.

B. Public Need

Intervenor first argues that petitioner's single assignment of error only alleges that the city's findings are inadequate and does not also allege that the city's decision is not supported by substantial evidence.[11] Although it would not change our resolution of petitioner's assignment of error, we do not agree. We have never applied the narrow, literal

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> "A variance may be granted in those instances where the planning commission and city council jointly determine that the public need outweighs the potential adverse impacts of development in or near a locally significant wetland resource site."

[11] Petitioner's assignment of error is as follows:

> "The findings do not demonstrate that the public need outweighs the potential adverse impacts of development, as required by the city's criteria for granting wetlands protection variances." Petition for Review 3.

reading of assignments of error that intervenor argues we should apply here. If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, as petitioner's argument in this case does, the fact that an assignment of error that challenges the adequacy of the city's findings does not expressly include a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error.

We first address petitioner's challenge to the city's finding that there is a public need for the entire approximately 40,000 square feet of commercial space proposed, because that amount of commercial space is needed to allow a project that will be sufficiently profitable to pay the costs of necessary public facility extensions and the fill that will be needed to elevate the site to the level of adjoining Jack Kelly Drive. Record 10-11. Petitioner dismisses this finding as merely showing a private financial need, not a *public* need. If 40,000 square feet of commercial space is needed to make it financially feasible to develop the property commercially, we do not agree with petitioner that such a need could not qualify as a public need, assuming the city adequately demonstrates that there is a public need for some level of commercial development on the property.

Turning next to petitioner's broader challenge, according to petitioner, the city's findings that set out the public need that the city then balanced against potential adverse impacts of developing the wetlands are as follows:

> "The public need for the development is for commercial and retail services in the Fern Ridge Area; and for employment opportunities within the City. Currently 80% of workers in Veneta commute outside of the City for employment." Record 11.

> "The proposal * * * is for a commercial and retail center to be located on an existing lot; and which will contribute to Veneta's development into the retail and service center for the Fern Ridge area and to develop a commercial employment base. The City has limited Highway Commerical area and such areas cannot be substituted for elsewhere in the City given the importance of highway visibility and the intent of the Highway Commercial zone." Record 11.

> "The * * * proposed retail and commercial center provides a facility within which locally-owned businesses can locate to provide a full spectrum of products and services for the community." Record 14.

> "[A] commercial and retail center meets the business needs of area residents and highway travelers; and makes use of lands available to encourage commercial development in Veneta." Record 15.

Petitioner apparently reads the above findings to express a public need for additional commercial development and the increased employment opportunities that such development would bring. Petitioner contends that the evidence in the record shows that a similar commercial shopping center located a short distance away on the north side of Highway 126 is nearly 28 percent vacant and struggling to attract new commercial tenants. Petitioner argued below that unless the city can show there is a current shortage of vacant commercial space, there can be no public need:

> "The applicant fails to identify any specific development for the subject property. The site plan merely shows that four generic buildings would be constructed. The commercial activities that would take place in these buildings is not identified or discussed. It is not explained why these commercial activities could not be accommodated in existing commercial buildings. * * *" Record 52.

It seems reasonably certain that the city and petitioner may have somewhat different ideas about what the public need is in this case. Petitioner seems to equate public need with current market demand for commercial floor space. The city's findings on the other hand can be read to suggest the city views public need more broadly to encompass a public need for the city to realize the commercial development ambitions expressed in its comprehensive plan and to realize those ambitions in particular areas of the city that are already zoned for commercial development and have advantages due to their proximity to transportation facilities. Whatever the case, and without expressing any view regarding the correctness of petitioner's apparent understanding of the meaning of public need, petitioner clearly raised an issue that the city is obligated to address. *City of Wood Village v. Portland Metro Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Norvell v. Portland Area LGBC*, 43 Or App

849, 853, 604 P2d 896 (1979). That issue is whether there is any current market demand for additional commercial space in Veneta. The relevance of that issue in turn depends on how the city interprets VMC 18.10.060(3). If current market demand is the same thing as public need, the city must identify evidence that shows there is a current market demand. All of the evidence cited to us points in the opposite direction. If current market demand is not a relevant consideration in applying VMC 18.10.060(3), the city must explain why it interprets VMC 18.10.060(3) in that way. If current market demand is only one of multiple relevant considerations under VMC 18.100.060(3), the city must explain why current market demand or any lack of current market demand, along with other relevant considerations, leads the city to conclude that there is a public need that outweighs the potential adverse impacts of developing the disputed wetlands.

C. Potential Adverse Impacts

The city adopted the following findings to identify potential adverse impacts of developing the wetlands on the site:

> "The request to fill locally significant wetlands holds the potential for the following adverse impacts:
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> "• Degradation of water quality
>
> "• Flooding
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> "The locally significant wetlands on the site have already been disconnected from the larger wetland area in this area of town by previous development. The applicant is proposing to mitigate the potential adverse impacts of the proposed development by purchasing wetland mitigation bank credits from the Amazon Creek Mitigation Bank. The Amazon Creek Mitigation Bank is located in the same watershed, provides a large area of [intact] wetlands, ensures monitoring by wetland specialists, and ensures the ongoing maintenance and protection of the wetlands.
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> "As a condition of approval applied to the site plan review * * * the applicant is required to submit a drainage plan designed for a 10-year storm event and including a component for water quality treatment. This condition of approval shall provide some onsite replacement for the hydrologic control

(flooding) and water quality treatment functions provided by wetlands." Record 16.

Petitioner argues the above findings are not sufficient to adequately identify all the potentially adverse impacts of developing the wetlands so that they can be weighed against the public need.

> "Other 'potential adverse impacts of development' – including offsite drainage interference, loss of urban runoff filtration, loss of sediment stabilization and phosphorus retention, loss of habitat for birds, amphibians, turtles, and other wetlands-related animals, loss of trees, shrubs, grasses, and other wetland-specific vegetation, including the potential for adverse effects to rare and endangered species – of which there is significant evidence in the record, Rec 34-37, are not even listed, let alone compared with or weighed against the asserted public needs. The wetlands ordinance itself lists the various functions and values of wetlands in general, including 'to protect and enhance local water quality; to preserve fish and wildlife habitat; to provide flood storage capacity, nutrient attenuation, and sediment trapping; and to preserve open space.' VMC 18.10.010(1). The ordinance's purpose statement asserts that 'significant wetlands are a community asset providing environmental, educational, recreational and aesthetic values, while contributing to long-term sustainable community development' and that 'the city has chosen to restrict filling, grading and excavation of wetlands for their protection.' VMC 18.10.010(2)." Petition for Review 7-8.

Some of the potential adverse impacts identified by petitioner above are the same as or overlap with the "flooding" and "degradation of water quality" impacts the city has already identified and considered. But other potential adverse impacts were clearly raised below and are not addressed in the city's findings. Moreover, the city's findings focus almost entirely on how the city believes flooding and degradation of water quality impacts will be reduced or mitigated. The city's findings do not take the final and required step of weighing identified potential adverse impacts (as they may be mitigated) against the identified public need and explaining how the public need outweighs the mitigated potential adverse impacts of developing the wetlands.[12] On remand, the city must do a more complete

[12] The city did adopt the following conclusory finding, which appears immediately after the findings concerning potential adverse impacts quoted above in the text:

analysis of the potential adverse impacts of developing in the wetlands, along with any mitigation that will reduce those impacts, and then weigh the mitigated impacts against the identified public need to determine whether public need outweighs those potential adverse impacts.

Petitioner's assignment of error is sustained.

The city's decision is remanded.

> "The public need for employment opportunities, and retail and commercial services outweighs the potential adverse impact of the proposed development as discussed above; and the potential adverse impacts shall be mitigated through the purchase of wetland mitigation bank credits from the Amazon Creek Mitigation Bank." Record 17.

Aside from the fact that the city's findings are inadequate to identify the public need and potential adverse impacts of developing the wetlands, the above finding is inadequate to explain why the city believes the public need outweighs the potential adverse impacts. More of an explanation of how public need and potential adverse impacts were weighed, and why public need outweighs adverse impacts, is required.