BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MOLLY JACOBSEN and DANA JACOBSEN,
Petitioners,

vs.

CITY OF WINSTON,
Respondent,

and

DON JENKINS and JOELL JENKINS,
Intervenors-Respondent.

LUBA No. 2005-037

FINAL OPINION
AND ORDER

Appeal from City of Winston.

Molly Jacobsen and Dana Jacobsen, Winston, filed the petition for review and argued on their own behalf.

No appearance by City of Winston.

Corinne C. Sherton, Salem, filed the response brief and agued on behalf of intervenors-respondent. With her on the brief was Johnson and Sherton, PC.

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

REMANDED 04/19/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners challenge the city's approval of a comprehensive plan amendment and zone change to designate and rezone the subject property from R-M (Medium Density Residential) to A-O (Agriculture-Open Space), and approval of a conditional use permit authorizing development of a recreational vehicle park.

MOTION TO FILE REPLY BRIEF

On March 16, 2006, the date of oral argument, petitioners arrived with a partially completed reply brief.[1] Petitioners filed their motion for reply brief on March 17, 2006, one day after oral argument and nine days after the response brief was filed. Intervenors object, arguing that the reply brief is untimely.

Our rules provide that a request to file a reply brief must be filed, along with the proposed reply brief, "as soon as possible after respondent's brief is filed." OAR 661-010-0039.[2] Intervenors assert that

> "[f]iling a reply brief after oral argument has occurred prevents intervenors from addressing the contents of the reply brief at oral argument and prejudices intervenors' substantial right to an adequate opportunity to present their case." Intervenors' Response to Petitioner's Motion to Submit Reply Brief 2.

Intervenors cite *Cotter v. City of Portland*, 46 Or LUBA 612, 614 (2004). In that case, we held that accepting a reply brief that was filed 12 days after the response brief was filed and

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[1] Petitioners indicate that they believed that the Board's verbal instruction at oral argument that petitioners would be permitted to file a motion for a reply brief after oral argument was an indication that the motion would be granted. Such confusion is regrettable; however, before considering the merits of a reply brief, we must first determine, pursuant to our rules, whether to grant permission to file the reply brief.

[2] OAR 661-010-0039 provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. A reply brief shall have gray front and back covers."

four days after oral argument "would prejudice the city's substantial right to an adequate opportunity to present its position." *Id*. Petitioners in this case do not indicate why they were unable to file their reply brief before oral argument, which occurred eight days after intervenors' response brief was filed. We agree with intervenors that the reply brief was not filed "as soon as possible" after intervenors' response brief was filed, and our consideration of the reply brief in these circumstances would prejudice intervenors' substantial rights.

Petitioners' motion to file a reply brief is denied. [3]

FACTS

The subject property is a 3.5-acre parcel within the City of Winston urban growth boundary (UGB) and city limits. The property lies entirely within the floodway of the South Umpqua River, which borders the property to the north. Across the river to the north is an RV park owned by intervenors. The property is bordered on the east by a county road and rural dwellings located outside the city limits and outside the UGB. To the west is a 4.38-acre parcel zoned R-M and owned by petitioners. The property is bordered to the south by properties inside the UGB, but outside the city limits. Those properties are improved with single-family dwellings and a Pepsi bottling plant. At the time the subject application was filed, the site was developed with a 31-space mobile home park.

Sometime between June 24, 2004 and August 3, 2004, intervenors submitted an application for a comprehensive plan amendment and zone change to designate and rezone the subject property from R-M Medium Density Residential to A-O (Agriculture-Open Space), and an application for approval of a conditional use permit (CUP) authorizing development of a recreational vehicle park. The planning commission held consolidated hearings on the applications on August 25, 2004, October 13, 2004 and November 10, 2004.

[3] Intervenors also argue that the reply brief exceeds the five-page limit and that it is not confined to "new matters," pursuant to OAR 661-010-0039. Because we deny the motion because it was untimely filed, we need not address intervenors' other arguments.

The planning commission adopted one written decision approving all three applications on December 8, 2004.

On December 23, 2004, petitioners filed a local appeal of the planning commission decision. The city council held a public hearing on the appeal on January 18, 2005, at which petitioners appeared and testified.[4] Following petitioners' initial testimony, intervenors' representative argued that the appeal of the CUP was untimely filed, and requested that the city council reject the local appeal of the CUP. The city council did so, and proceeded to address only the comprehensive plan amendment and zone change requests. Petitioners testified again during this portion of the hearing and submitted a 19-page document. After closing the public hearing, the city council took an oral vote to approve the plan amendment and zone change. The final written decision was adopted February 7, 2005, and signed February 8, 2005.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city denied them a full and fair hearing in several respects. We will address each of those arguments in turn. We address petitioners' fifth subassignment of error first, because our resolution of other subassignments of error turns on our resolution of the fifth.

A. Fifth Subassignment of Error

Petitioners contend that the city council erred in denying their local appeal of the planning commission's decision approving the CUP. We first set out a detailed version of the facts related to this subassignment of error.

The planning commission's decision approving the comprehensive plan amendment, zone change and CUP was signed on December 8, 2004. Petitioners sought information from

[4] In fact, only petitioner Molly Jacobsen testified. However, for ease of reference, when referring to both petitioners or when referring to only petitioner Molly Jacobsen, we will use the term "petitioners."

the planning staff regarding the filing of a local appeal of that decision. Record 131. The city planner, responded with a letter, dated December 15, 2004, indicating that an appeal must be filed by 5:00 p.m. on Thursday, December 23, 2004. Record 79. All parties appear to agree that that advice was erroneous. *See* discussion of Winston Zoning Ordinance (WZO) 11.310 below.[5] Based on that erroneous information, petitioners filed their local appeal on December 23, 2004, one day late. During the local appeal hearing before the city council, the council determined that the local appeal of the CUP was untimely filed, and declined to address the merits of petitioners' appeal of the CUP.[6]

The timeline for filing a local appeal of a decision of the planning commission is governed by WZO 11.310.[7] It provides that a notice of review must be filed within 14 days

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[5] We understand the parties to agree that, pursuant to the WZO, the planning commission merely makes a recommendation to the city council regarding the comprehensive plan amendment and zone change proposals, whereas the planning commission's decision on the CUP is final if it is not appealed. Accordingly, the appeal deadline in question applies only to the CUP request. The planning commission's December 8, 2004 decision, however, addressed all three requests in one decision. Neither party raises any issue concerning whether the CUP approval could be bifurcated from the comprehensive plan amendment and zone change approvals to require a local appeal of only the portion of the planning commission's decision that approved the CUP. In any event, this issue is not raised, and we decline to raise it on our own.

[6] The minutes of the January 18, 2005 city council hearing provide, in relevant part:

> "* * * Even though Mrs. Jacobsen was incorrectly advised that the deadline was 15 days, Councilor McGinnis pointed out that Mrs. Jacobsen cited [WZO] 11.310 in a letter to the City Council, and thus it must be assumed that she had access to the [WZO] and had read it.
>
> "The Council determined that appeal [of the CUP decision] was not filed on a timely basis, and hence took no action on this matter. The decision of the Planning Commission on the Jenkins CUP stands as delivered." Record 48.

[7] WZO 11.310 provides, in relevant part:

> "Fifteen (15) days from the date of the written decision of the Planning Commission, the decision shall become effective, unless review is sought pursuant to this section.
>
> "1. Review of the decision of the Planning Commission:
>
> "a. Shall be made by the City Council upon any party filing a Notice of Review with the City Administrator within fourteen (14) days of the filing of the written decision sought to be reviewed. * * *
>
> "* * * * *."

of the date of a planning commission decision; if no notice of review is filed, the planning commission decision becomes final on the 15th day after the date of the planning commission's written decision.[8]

While petitioners do not use the term "estoppel," that is essentially the theory that they espouse in support of their fifth assignment of error.[9] Intervenors succinctly summarize petitioners' argument as follows:

> "Petitioners essentially contend the City is estopped from enforcing the 14-day appeal deadline established by WZO 11.310(1)(a) because they relied, to their detriment, on the information in the [planner's letter]." Respondents' Brief of Intervenors-Respondent 12.

Intervenors contend that estoppel does not apply in this situation because "estoppel cannot arise from an action of a local government official who purports to waive a mandatory standard." *Id*. at 13, citing *Bankus v. Brookings*, 252 Or 257, 260, 449 P2d 646 (1969); *Holdner v. Columbia County*, 123 Or App 48, 53, 858 P2d 901 (1993).[10] According to intervenors, the 14-day timeline for filing a local appeal of a planning commission decision is a mandatory standard, and the planner's December 15, 2004 letter, which purports to waive that mandatory standard, cannot provide a basis to estop the city from enforcing that timeline.

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[8] We do not understand petitioners to contend that the provision in fact requires that an appeal be submitted within 15 days. Rather they argue only that the planning staff's erroneous advice relieves them of the obligation to file the local appeal within 14 days, as required by WZO 11.310.

[9] The Oregon Supreme Court has described the elements of estoppel as follows:

> "To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it." *Oregon v. Portland Gen. Elec. Co*., 52 Or 502, 528, 95 P 722 (1908).

[10] Intervenors note that LUBA has questioned whether it can reverse or remand a challenged decision based on equitable estoppel principles. *See Sparks v. City of Bandon*, 30 Or LUBA 69, 73 (1995); *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993). For purposes of this opinion, we follow intervenors in assuming, without deciding, that LUBA could in some circumstances reverse or remand based on equitable estoppel principles.

We agree with intervenors that estoppel does not apply in this instance because the 14-day local appeal deadline is a mandatory standard. The code provides that the planning commission's decision becomes final on the 15th day, unless review is sought pursuant to WZO 11.310, which requires filing a notice of review within 14 days of "the filing of the written decision sought to be reviewed."

In *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993), a city planner provided a citizen with erroneous information regarding the date on which a local decision became final. Relying on that erroneous information, the petitioner filed a notice of intent to appeal (NITA) with LUBA. We dismissed the appeal, which was filed late based on the erroneous information, stating:

> "The fact that petitioner may have relied on erroneous information from a county planner is of no import. A participant in local land use proceedings must ascertain for itself, from the local code, what it must do to protect its rights." *Id*. at 728;

See also Columbia River Television v. Multnomah Co., 299 Or 325, 329, 702 P2d 1065 (1985); *Kamppi v. City of Salem*, 21 Or LUBA 498, 505 (1991); *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 708, 712, n 3 (1989).

In a subsequent case in which the petitioner failed to serve all interested and essential parties to the appeal with the NITA, as required by LUBA's rules, we dismissed the appeal for lack of jurisdiction based on the petitioner's failure to provide notice as required by then OAR 661-10-015(2).[11] *Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1997), *aff'd* 159 Or App 495, 977 P2d 435 (1999) . The petitioner asserted that he was not required to provide

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[11] The rule in effect provided:

> "Service of Notice: The [NITA] shall be served on the governing body, the governing body's legal counsel, and all persons identified in the [NITA] as required by subsection (3)(f) of this rule on or before the date the [NITA] is required to be filed."

Subsection (3)(f) required that the NITA list the name, address and telephone number of any person to whom the written notice of the land use decision was mailed, as shown in the governing body's records.

the notice because the city staff had advised him that further notice was not necessary, despite a letter from LUBA directing that he do so. In an order ruling on a request for attorney fees, we stated: "Petitioners are not relieved from compliance with LUBA's rules of procedure by an erroneous statement made by the city planning director." *Bruce v. City of Hillsboro*, ___ Or LUBA ___ (LUBA No. 96-153, Order on Petition for Attorney Fees, July 30, 1998) slip op 9.

While the above cases involve erroneous planning staff advice in the context of perfecting an appeal to LUBA, and do not directly apply estoppel principles, we believe that the same result is dictated in a circumstance, like this one, where planning staff provide erroneous information that leads to a failure to perfect a local appeal. *See, e.g., Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163, 171-72 (2004) (where a local filing requirement is a procedural requirement that is a mandatory prerequisite to a local appeal, *i.e.*, "jurisdictional," neither LUBA nor the local government may disregard that requirement). As we stated in *City of Grants Pass v. Josephine County*, "[a] participant in local land use proceedings must ascertain for itself, from the local code, what it must do to protect its rights." 25 Or LUBA at 728. The 14-day appeal deadline is a mandatory standard, and the planning staff's mistaken reading of that mandatory standard cannot provide a basis for excusing petitioners' failure to file their local appeal within the deadline set forth in the code. Accordingly, the city did not err in denying petitioners' local appeal as untimely.

Petitioners' fifth subassignment of error is denied.

B. First Subassignment of Error

Petitioners assert that petitioner Molly Jacobsen submitted a 12-page document after the close of the final planning commission hearing on the subject application on November 10, 2004, by handing the document to two planning commissioners. We understand petitioners to argue that the planning commission erred by not reopening the record in order

to include that document in the record of the proceedings. They also seem to argue that because the planning commission did not reject the document, it should have been presented to the city council as part of the record of the proceedings.

As intervenors' correctly point out, the document was not placed before the planning commission during the local proceedings. Petitioners cite to no legal authority that would require the planning commission to re-open the record after the planning commission closed the public hearing and after the record was closed. Accordingly, petitioners fail to demonstrate that the planning commission, or the city council, committed procedural error in this regard.

Petitioners' first subassignment of error is denied.

C. Second Subassignment of Error

During the January 18, 2005 city council hearing on the subject application, petitioner Molly Jacobsen submitted a 19-page document. Record 53-71. Near the end of the hearing, petitioners apparently requested that the city council delay rendering a decision on the subject application until the council members had an opportunity to review the 19-page document. The city council declined to delay the proceedings, and proceeded to take an oral vote. Petitioners assert that the city council erred in refusing to delay their decision, contending that the 19 pages were not considered.

Intervenors contend that no request was made by either party for additional time to rebut new evidence that was submitted at the hearing, and that petitioners cite no legal authority requiring the city council to delay rendering a decision based upon petitioners' request.

If the 19 pages presented by petitioners were new evidence that the city council clearly failed or refused to consider, then it is likely that such failure or refusal would be error that would provide a basis for reversal or remand. However, that is not the case here.

Petitioners conceded at oral argument that the document contained no new evidence.[12] Furthermore, the record reflects that the city council did, in fact, consider the letter that, according to petitioners, contained no new evidence. The city council's refusal to delay its consideration of the application does not provide a basis for reversal or remand.

Petitioners' second subassignment of error is denied.

D. Third Subassignment of Error

In their third subassignment of error, petitioners allege that two members of the planning commission were biased. Before LUBA are two determinations by the city council: (1) the approval of comprehensive plan and zoning map amendments, and (2) the dismissal of petitioners' local appeal as untimely of the planning commission's decision approving the CUP. With regard to the second determination, it is only the city's dismissal of petitioners' local appeal of the planning commission's decision on the CUP, that is before us, not the merits of the CUP approval. Because the city council's determination that petitioners' local appeal was untimely filed does not involve the merits of the planning commission's decision on the CUP, any alleged bias on the part of the planning commissioners does not provide a basis for reversal or remand.[13]

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[12] The minutes of the January 18, 2006 city council hearing provide:

> "Mr. Schofield pointed out that all of Mrs. Jacobsen's concerns had been heard by the Planning Commission during original testimony and that a number of the conditions placed on the Conditional Use Permit were in direct response to her input at those hearings. He believes that people had a fair and ample opportunity to submit testimony." Record 50.

[13] In a previous order in this case, we explained:

> "* * * As we have already noted, the city council denied the appeal of the conditional use permit as untimely filed. *See* n 6. If that ruling by the city council is correct, it would appear that petitioners failed to exhaust an available local remedy and LUBA would lack jurisdiction to review the planning commission's decision. *See* ORS 197.825(2)(a) (LUBA's jurisdiction '[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA]'). On the other hand, if that ruling by the city was erroneous, presumably a remand to the city council to provide the local appeal would be required. In either event, the merits of the planning commission decision would not be presented in this appeal, and any bias on the part of a member of the planning commission would not provide a basis for reversal or remand. Given that the parties do not make this

With regard to the *city council* decision on the plan amendment and zone change, in two previous orders we explained the required nexus with an allegedly biased lower level decision maker:

> "This Board has previously held that it is not enough that a lower-level decision maker was biased in some way; to warrant a reversal or remand of a decision a petitioner must show that the record before the final decision maker was somehow tainted by the bias of the lower level decision maker. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 432, *aff'd* 196 Or App 787, 106 P3d 699 (2004); *Utah Int'l v. Wallowa County*, 7 Or LUBA 77, 83 (1982) (it is necessary to show a 'fatal link' between the alleged lack of fairness at the planning commission level and the decision of the final decision maker). Petitioners have made no showing that any alleged bias by the planning commissioners in any way tainted the record reviewed by the city council or the decision of the council. Further, we do not see that the extra-record evidence that petitioners seek to introduce would demonstrate a reasonable basis to believe that the planning commissioners are biased in any event." *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2005-037, November 10, 2005) slip op 6-7.

We subsequently explained that last sentence further:

> "The extra-record evidence that petitioners seek to introduce relates to certain planning commission members' ownership of RV parks in the area and their interest in RV park standards generally. It is apparently petitioners' belief that because the planning commission members own or have interests in RV parks, they are somehow unable to render a neutral decision. We recently described the requirement for impartiality in quasi-judicial proceedings such as these as follows:
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> > 'As we have explained on many occasions, local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445-47 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001). To the contrary, local officials frequently are elected or appointed in part *because* they favor or oppose certain types

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argument, we do not decide it here. For purposes of resolving petitioners' renewed motion to take evidence, we have assumed that a demonstration of bias on the part of one or more planning commission members might provide a basis for reversal or remand." *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2005-037, Order, February 9, 2006) slip op 7 n 9.

> of development. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987); *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978). Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 (2005), *appeal pending*.

> "Petitioners provide no more than mere speculation that the planning commissioners were unable to, or in fact did not, render an unbiased decision. In short, the evidence petitioners seek to introduce does not provide a reasonable basis to believe that the planning commissioners' determination on the CUP was based on any prejudgment or that they did not reach the decision they reached by 'applying the relevant standards based on the evidence and argument presented.' *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993

> "Accordingly, petitioners' renewed motion to take evidence not in the record is denied." *Jacobsen v. City of Winston*, ___ Or LUBA ___ (LUBA No. 2005-037, Order, February 9, 2006) slip op 6-7 (footnotes omitted).[14]

We reiterate that with regard to the plan amendment and zone change, petitioners have not demonstrated that any alleged bias, even assuming petitioners demonstrated bias, tainted the record before the city council.

Petitioners' third subassignment of error is denied.

E. Fourth Subassignment of Error

Petitioners contend that the city's proceedings were conducted in a manner that was partial to intervenors in various respects. They contend that this partiality on the part of the city violated their constitutional right to a full and fair hearing and violated Statewide

[14] Following our February 9, 2006 order, petitioners filed a request for clarification of n 8 in that order, which provides: "To the extent petitioners allege that the commissioners have an actual pecuniary interest in the subject property, and have a direct conflict of interest that required recusal, we see no indication of that." We do not believe that our extensive discussion of this issue requires further clarification. Suffice it to say that petitioners, again, have not demonstrated that any planning commissioner had an actual pecuniary interest in the subject property.

Planning Goal 1 (Citizen Involvement). Petitioners list numerous events and circumstances that occurred at the administrative level, at the planning commission proceedings, and during the city council proceedings. Petitioners identify the following events: (1) the city accepted intervenors' application without the required fee, and petitioners on appeal were not given the same consideration, (2) the planning commission hearing was not scheduled during the months of April or October, as required per WZO 9.020, which provides that quasi-judicial comprehensive plan amendments be scheduled for hearing by the planning commission in April or October (3) intervenors were permitted to review proposed conditions, while petitioners did not learn of their existence until the hearing, (4) both the planning commission and the city council offered intervenors, but not petitioners, an opportunity to rebut testimony, (5) the city council allowed intervenors to present new evidence during the on-the-record hearing, while it refused to consider 19 pages presented by petitioners, and (6) public access to the ordinances "and assistance in interpreting them" was inadequate.

Intervenors argue that petitioners fail to adequately develop a legal argument concerning how the identified events violated her right to a full and fair hearing or Goal 1. In general, we agree with intervenors. *See Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982) (petitioners must not only allege facts supporting a claim, they must explain the basis on which LUBA might grant relief). In any event, we briefly outline intervenors' responses: (1) WZO 11.310, regarding local appeals, does not provide for waiver of appeal fees, and intervenors' application fee was not waived, but merely filed after the application itself was submitted to the city, (2) although the initial planning commission hearing was scheduled in August, it was continued to an October date, thus WZO 9.020 is satisfied,[15] (3) the proposed conditions of approval first appeared in a planning staff memorandum dated November 2, 2004, which was available to the public at that time, and

[15] Even assuming WZO 9.020 was violated, we fail to see how such a violation would demonstrate that the city was not impartial.

(4) a local governing body's offer to one party of an opportunity to rebut testimony does not demonstrate "impermissible preferential treatment." We agree with intervenors on these points.

Finally, we reject petitioners' argument that the city council demonstrated partiality in allowing intervenors to introduce new evidence during the council's on-the-record hearing and failed to consider petitioners' 19-page submission. First, we have already determined that the city did consider the 19 pages. *See* discussion of second subassignment of error above. Second, this alleged procedural error would provide a basis for reversal or remand only if petitioners demonstrated prejudice to a substantial right. Petitioners have not indicated how their substantial rights are prejudiced by this alleged error. Finally, we do not see how such a violation, even if proven, demonstrates a lack of impartiality or a violation of Goal 1.

In short, petitioners' fourth subassignment of error does not provide a basis to reverse or remand the challenged decision.

F. Sixth Subassignment of Error

Petitioners contend that one page of the CUP application, page 8, was not available to them prior to the January 18, 2005 city council hearing. We understand petitioners to contend that the omission of that page in the record prior to the January 18, 2005 hearing was a procedural error that prejudiced her rights by hindering her ability to fully address the "issue of suitability of the applicant's site compared to other sites." Amended Petition for Review 25.

Intervenors respond, first, that petitioners were aware of the missing page as early as January 20, 2005, and failed to object or request that the record be re-opened to allow them to respond to new evidence. Respondents' Brief of Intervenor-Respondent 15, citing *Brown v. City of Portland*, 33 Or LUBA 700 (1997); *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292, 301, *rev'd on other grounds* 148 Or App 217, 939 P2d 635 (1997); *Woodstock*

Neighborhood Assoc. v. City of Portland, 28 Or LUBA 146, 150-51 (1994) (where petitioners are aware that new evidence was submitted after the close of the record, but fail to object to the acceptance of the new evidence, they waive their right to raise the alleged procedural defect before LUBA). Intervenors also contend that, even if petitioners were not required to object, their substantial rights were not prejudiced because, "the testimony they claim they would have submitted had they been able to respond to 'page 8' is irrelevant to either the approval standards or the contents of 'page 8.'" Respondents' Brief of Intervenors-Respondent 15.

Even assuming, without deciding, that petitioners were not required to object to the city's consideration of page 8, petitioners' argument is flawed for several reasons. Page 8 of the CUP application addresses compliance with one of the CUP criteria that requires a demonstration that "the proposed use be compatible with surrounding permitted uses and the existing development pattern."[16] Petitioners contend, however, that the absence of page 8 adversely impacted their ability to address criteria applicable only to the approval of the plan amendment; *i.e.*, the "other available properties" criterion, WZO 9.021.2.d, and the public need criterion, WZO 9.021.2.c.[17] While page 8 identifies and describes several properties

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[16] WZO 7.005 provides:

> "A conditional use is an activity which is basically similar to the uses permitted in a particular zone, but which may not be entirely compatible with the permitted uses. Therefore, a conditional use must be reviewed by the Planning Commission to ensure that it is, or can be made to be compatible with the other permitted uses in the zone."

[17] WZO 9.021.2 requires that an application for a quasi-judicial amendment to the City of Winston Comprehensive Plan address the following requirements:

> "a. That the amendment complies with the Statewide Planning Goals * * *.
>
> "b. That the amendment complies with applicable polices of the Comprehensive Plan.
>
> "c. That there is a public need for a change of the kind in question.
>
> "d. That such need will be best served by changing the Plan designation of the particular piece of property in question as compared with other available property."

that surround the subject property, petitioners are mistaken if they believe that description is intervenors' attempt to demonstrate compliance with WZO 9.021.2.c or d. A description of those properties is provided on page 8 in order to demonstrate that the proposed use will be compatible with those surrounding permitted uses, in compliance with WZO 7.005, the applicable CUP criterion. Page 8 does not provide a description of the "other available properties" in an attempt to demonstrate that the public need for the proposed comprehensive plan amendment "will be best served by changing the Plan designation of the subject property as compared with other available property, pursuant to WZO 9.021.2.d."[18] We therefore agree with intervenors that the testimony petitioners claim they would have submitted is irrelevant to the approval standards that the information on page 8 addressed. Accordingly, even assuming that the city committed procedural error in the manner petitioners assert, their substantial rights were not prejudiced in the manner in which they allege.

Petitioners' sixth subassignment of error is denied.

G. Seventh Subassignment of Error

As discussed above, the CUP application requires a demonstration that the proposed development can be made "compatible with the other permitted uses in the zone." Petitioners' seventh subassignment of error alleges that the city's CUP process and its

[18] The challenged findings addressing the public need and alternative sites, which is found in intervenors' comprehensive plan amendment and zone change application and was therefore available to petitioners well before the January 18, 2005 hearing, provide, in relevant part:

> "The public need to change the Comprehensive Plan designation and zoning classification on the subject property will best serve the identified public need as compared with other available property in the City of Winston. This conclusion is based on the recognized public need to preserve the existing floodway and floodplain areas from encroachment, the fact that the subject property is located along a major tourist corridor and by the recognized public benefit resulting from the implementation of applicable Comprehensive Plan policies that are intended to facilitate continued tourist activities and the associated economic growth." Record 25-26

interpretation of the terms "zone" and "compatibility" somehow prejudice her right to a full and fair hearing.

Intervenors respond that this subassignment of error concerns the merits of the planning commission decision on the CUP application, which are not before us in this appeal. *See* discussion under the third subassignment of error. We agree. Petitioners' seventh subassignment of error is denied.

Petitioners' first assignment of error is denied in its entirety.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error provides: "Applicable criteria have not been addressed or are being misapplied." Petitioners identify various ways in which they believe the city misapplied certain criteria. We will address each of those arguments in turn.

A. First Subassignment of Error

The subject property is a 3.5-acre parcel. The A-O zone, the proposed zoning designation, requires a minimum lot size of 10 acres. WZO 4.010(3). Petitioners argue that the city should have required that intervenors obtain a variance to the minimum lot size requirement prior to approving the zone change. In their third assignment of error, petitioners argue that the findings are inadequate because they do not address petitioners' argument that a variance was required. For the reasons discussed below under our discussion of petitioners' first subassignment of error under the third assignment of error, we agree with petitioners that the findings are inadequate in this respect. Accordingly, we need not address this subassignment of error further.

B. Second Subassignment of Error

Housing Goal B, Policy 3 of the Winston Comprehensive Plan (WCP) provides: "Investigate additional development standards for Recreational Vehicle (RV) parks." WCP 39. Petitioners argue that the city failed to investigate additional development standards for RV parks. Intervenors argue that Housing Goal B, Policy 3 is not a mandatory approval

criterion applicable to approval of plan amendments, zone changes or conditional use permits, but is instead a directive to the city to undertake legislative planning efforts. We agree. Petitioners' second subassignment of error is denied.

C. Third and Fourth Subassignments of Error

Petitioners assert that, pursuant to statute and administrative rule, RV parks are intended to be used only for temporary living quarters. In their third subassignment of error, petitioners allege that the challenged decision fails to recognize these state standards. In their fourth subassignment of error, petitioners allege that the challenged decision violates Federal Emergency Management Agency (FEMA) regulations.

Intervenors respond that petitioners do not provide a basis for determining that any of the cited state or federal regulations are applicable to a plan amendment or zone change. We agree with intervenors. Petitioners' third and fourth subassignments of error are denied.

D. Fifth Subassignment of Error

WCP Housing Goal C, Policy 2 provides, in relevant part:

> "To locate future housing such that available land is both used efficiently and developed for a high degree of livability.
>
> "* * * * *
>
> "Provide buffer zones between residential areas and conflicting land uses (i.e., industrial, certain kinds of commercial, residential, etc.) to protect the overall livability of those areas." WCP 40.

Petitioners argue that the city failed to comply with this policy because it did not require a buffer zone between the subject property and petitioners' property. Intervenors contend that the policy provides that buffer zones are required between residential areas and "certain kinds of commercial" uses, which suggests that not *all* kinds of commercial activity are necessarily considered to be in conflict with residential areas. They assert that the city's

findings provide that the proposed RV park is compatible with surrounding residential areas. Record 25.[19]

We do not understand intervenors to argue that Policy 2 is not a mandatory approval criterion.[20] The challenged decision certainly does not contain findings that explain why it is not a mandatory approval criterion. Neither do we understand intervenors to argue that compliance with Policy 2 was not raised by petitioners below.[21] Rather, we understand intervenors to argue that the findings cited demonstrate compliance with that policy.

It appears that the city did not apply Policy 2 in its findings. We do not agree with intervenors that the findings it adopted regarding the compatibility standard are sufficient to demonstrate compliance with Policy 2. Vegetative screens are not necessarily sufficient to constitute "buffers" for purposes of Policy 2. Petitioners' fifth subassignment of error is sustained. On remand, the city must either establish that Policy 2 is not a mandatory approval criterion, or adopt findings demonstrating compliance with it.

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[19] The findings provide:

> "The subject site and surrounding area have some vegetative screening that provides a limited visual barrier for the dwellings located south of Winston Section Road and east of the subject property. The screening consists of mature trees, conifers, photinia and shrubbery. The property immediately north across the South Umpqua River is developed with a RV Park similar to the development being proposed by the applicant. The site is partially visible from the residential land to the west which has three dwellings located on it.
>
> "* * * The development site is partially screened from view of the residential uses south of Winston Section Road and east of the subject property. As a result, the subject property is ideally situated to accommodate recreational vehicle park development without having a negative impact on area residential uses." Record 25.

[20] Intervenors invite the Board to make its own determination whether the provisions that petitioners allege are violated are applicable mandatory approval criteria. Respondents' Brief of Intervenors-Respondent 16. However, they do not provide specific arguments explaining why the plan provisions or other provisions of law cited by petitioners are not mandatory approval criteria. We therefore decline intervenors' general invitation to make those determinations on our own.

[21] In fact, intervenors appear to concede that certain comprehensive plan provisions that were not listed in the notice may be raised by petitioners for the first time before this Board. Respondents' Brief of Intervenors-Respondent 16.

E. Sixth Subassignment of Error

Petitioners allege that the challenged decision violates WCP Land Use Goal A, which provides:

> "To ensure that the development of Winston is properly phased and orderly, such that urban sprawl is avoided and livability is enhanced." WCP 61.

Intervenors contend that petitioners' argument under this subassignment of error is essentially an argument that petitioners' policy choices "should be preferred to those of the City." More to the point, intervenors contend that petitioners do not explain how the policy is violated by the proposed plan amendment and zone change. We agree. Petitioners' sixth subassignment of error is denied.

F. Seventh Subassignment of Error

Petitioners assert that the challenged decision violates WCP Housing Goal A, Policy 1 and Housing Goal B, Policy 5. Housing Goal A, Policy 1 provides: "Encourage the quick replacement of all dilapidated or inadequate housing." Housing Goal B, Policy 5 provides: "Encourage an increase in the proportion of higher-end value housing in the mix of available housing stock * * *." WCP 39.

Intervenors argue that neither of these policies is a mandatory approval criterion for a plan map amendment or zone change. Intervenors are correct that policies that merely "encourage" certain actions are generally not considered to be mandatory approval criteria. *Bennett v. City of Dallas*, 96 Or App 645, 648-49, 773 P2d 1340 (1989); *McGowan v. City of Eugene*, 24 Or LUBA 540, 548 (1993); *Benjamin v. City of Ashland*, 20 Or LUBA 265, 267 (1990). Petitioners do not explain why that general rule should not apply in this instance. Accordingly, petitioners' seventh subassignment of error is denied.

G. Eighth Subassignment of Error

WCP Natural Features Goal B provides: "To prevent inappropriate development in natural hazard areas." WCP 9. Policies 2 and 3 of that Goal provide:

"2. Floodways shall be protected from encroachment by the provisions of the [WZO].

"3. Development within the 'flood fringe' shall be strongly discouraged and subject to the provisions of the City's 'Floodplain Ordinance.'" WCP 9.[22]

Intervenors summarize and respond to petitioners' arguments as follows:

> "Petitioners argue that the City misapplied the above quoted policies by using them to support a preference for having an RV park, rather than a mobile home park, on the subject parcel. Once again, petitioners simply advocate that their policy choices are better than those of the City * * *. Petitioners also argue that a plan map amendment and zone change cannot be based on determination that it is inappropriate to have a mobile home park in a floodway unless all development is prohibited in floodways. The City found that it is consistent with the above quoted Plan Natural Features Goal and Policies to favor the replacement of the existing manufactured home park and R-M zoning with an RV park and A-O zoning. Petitioners have not shown there is anything impermissible about that policy." Respondents' Brief of Intervenors-Respondent 21 (footnote and record citations omitted).

The findings specifically address these policies and are adequate to explain why the proposal is consistent with these policies.[23] Petitioners' eighth subassignment of error is denied.

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[22] WZO 1.020 provides the following definitions:

> "Floodway: The channel of river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface level elevation more than one (1) foot.
>
> "Floodway Fringe: That area which is outside of the floodway of the watercourse, but is subject to periodic inundation."

[23] The findings provide, in relevant part:

> "The subject property contains an existing 31-space mobile home park (Orchard Mobile Home Park). The park was established prior to zoning and prior to inclusion of the property into the City of Winston. A number of the mobile homes in the park were placed prior to the establishment of floodplain requirements governing location of structures in floodplain areas along streams in the City of Winston. Consequently, these homes are at substantial risk in the event of a 100 year flood event and the applicant desires to address that problem. Replacement of these permanent manufactured dwellings will eliminate the threat of flood damage.
>
> "* * * * *

H. Ninth Subassignment of Error

As far as we can tell, petitioners allege that the city erred in relying on its failure to enforce its ordinance or on the existence of non-conforming uses to justify the proposed zone change. We are unable to understand petitioners' argument. Petitioners' ninth subassignment of error is denied.

Petitioners' second assignment of error is sustained in part and denied in part.

THIRD ASSIGNMENT OF ERROR

The city council adopted as its findings intervenors' application for approval of the comprehensive plan amendment and zone change. In their second and third subassignments of error under this assignment of error, petitioners contend that the city erred in adopting as its final decision a document that was submitted by intervenors. In particular, petitioners argue that the document fails to explain how the evidence before the city council was weighed, and that failure indicates that the opposing evidence before the city council was not considered. Intervenors' respond:

> "It is well established that local government decisions may incorporate documents prepared by an applicant as findings. *DLCD v. Tillamook County*, 33 Or LUBA 323 (1997); *Lucier v. City of Medford*, 26 Or LUBA 213, 215 (1995). It is also well established that findings only have to set out the facts the decision maker relied on; they do not have to address conflicting evidence on which the decision maker did not choose to rely. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997); *Miller v. City of Ashland*, 17 Or LUBA 147, 158 (1988)." Respondents' Brief of Intervenors-Respondent 23-24.

The mere fact that the city adopted the application as its findings does not, in itself, demonstrate that the city failed to appropriately consider or weigh the evidence before it.

> "The proposal to rezone the subject property is a recognition of the need to minimize impacts on the floodplain areas along the South Umpqua River and will actually lessen the impacts on the identified floodplain area along the stream. The rezoning of the property and the approval of the recreational vehicle park will result in removal of all but one of the existing mobile homes on the site. The sites will then be used for temporary occupancy by recreational vehicles in conjunction with the recreational vehicle park. Recreational vehicles can be moved to avoid any threat of damage from rising flood waters." Record 15.

However, a local government's choice to adopt the application itself as findings might provide a basis for reversal or remand where a petitioner identifies how those findings are defective.

A. First Subassignment of Error

In their first subassignment under this assignment of error, petitioners allege ten ways in which they contend the challenged findings are inadequate. We first address petitioners' seventh and eighth allegations, arguing that the findings fail to respond to petitioners' argument that a variance was required .

1. Variance

Petitioners argue that the findings do not explain why a variance is not required. Intervenors refer to their response to the first subassignment of error of petitioners' second assignment of error, in which they explain that petitioners have not identified any legal standard that would require a variance in this instance.[24] While the analysis that intervenors provide in their response brief may be correct, petitioners' contention here is that they raised the variance issue during the local proceedings, and the findings fail to address it.

We acknowledge that findings are not necessarily required to address every issue raised during the local proceedings. *Mission Bottom Assoc. v. Marion County*, 32 Or LUBA 56, 64, *aff'd* 145 Or App 486, 930 P2d 897 (1996) (statute requiring an explanation of the justification for a decision on a permit application does not require the local government findings to respond to every argument raised or to discuss each of the facts that petitioners

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[24] Intervenors argue:

> "Minimum lot sizes generally apply to the creation of new lots or parcels. Once a parcel has been legally created, it remains a discrete lot or parcel unless vacated or further divided. ORS 92.017. WZO 3.051 (Criteria for Zone Change) does not require that each existing lot or parcel satisfy the minimum lot size standard of the new zoning district, but rather that the 'site' being rezoned be 'suitable to the proposed zone with respect to the public health, safety and welfare of the surrounding area.' * * * In conclusion, Petitioners have identified no legal standard that would prohibit the City from zoning the subject 3.5-acre parcel A-O without a variance." Respondents' Brief of Intervenors-Respondent 17.

would choose the decision to rely on). However, we have held that where relevant or legitimate issues are raised, the findings must address them. *Knight v. City of Eugene*, 41 Or LUBA 279, 293 (2002); *Bates v. City of Cascade Locks*, 38 Or LUBA 349, 354 (2000). The minutes of the January 18, 2006 city council hearing reflect that petitioners were provided a verbal explanation of the theory intervenors present in their response brief.[25] However, that explanation was provided by the planner, and there is no indication that the city council did, or would have, adopted that interpretation. Because the city council adopted intervenors' application as its findings, and that application was prepared before petitioners raised the issue regarding whether a variance should be required, those findings fail to address the variance issue. We agree with petitioners that the findings are inadequate in this respect, and conclude that remand is appropriate for the city council to make its own interpretation, in the first instance.

2. Remainder of Petitioners' First Subassignment of Error

Petitioners list numerous plan and code provisions that they assert the city failed to address. As intervenors note, many of those issues are addressed in other assignments of error. Some of the points raised are not raised with sufficient specificity to allow review.

We outline below petitioners' arguments challenging the adequacy of the challenged findings. Where relevant, we identify where the specific findings addressing the provision cited by petitioners can be found, provide a cross-reference to a pertinent discussion in this opinion, or provide a response to petitioners' contention that the findings are inadequate.

1) Petitioners allege that the findings do not explain how the proposed development will be compatible with the area, as required by WZO

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[25] The minutes provide:

> "Mrs. Jacobsen questioned the law concerning Agricultural Open Space requiring 10-acre minimum lot size. David Voss explained that the law regulates division of larger parcels of AO land into smaller parcels – minimum of 10 acres and does not apply to re-zoning to AO." Record 50.

9.021(2)(a)(iv).[26] Intervenors explain, correctly, that WZO 9.021(2)(a)(iv) applies only to Goal exceptions. No goal exception was sought or approved in the challenged decisions.

2) Petitioners allege that the findings do not explain how the proposed development is consistent with the comprehensive plan or the WZO 3.050 requirement for consistency with the specific purpose of the applicable zone classification. The challenged findings address consistency with the comprehensive plan. Record 22-24. The A-O zone does not provide a purpose statement, so WZO 3.050 is not applicable to a zone change to A-O.

3) Petitioners allege that the findings do not explain how the points of ingress and egress will be controlled, pursuant to WZO 3.052.5.[27] WZO 3.052.5 sets

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[26] WZO 9.021.2.a provides, in relevant part, that an application for quasi-judicial plan amendment must address the following requirements:

> "a. That the amendment complies with the Statewide Planning Goals adopted by the Land Conservation and Development Commission, pursuant to ORS 197.240, or as revised pursuant to ORS 197.245. If it appears that it is not possible to apply an appropriate goal to specific properties or situations, then the application shall set forth the proposed exception to such goal as provided in Statewide Planning Goal 2, Part II. Compelling reasons and facts shall be given why an exception should be adopted, including:
>
> "(i) Why the proposed use should be provided;
>
> "(ii) What alternative locations within the area could be used for the proposed use;
>
> "(iii) What are the long-term environmental, economic, social and energy consequences to the locality, the region or the State from not applying the goal or permitting the proposed use; and,
>
> "(iv) How the proposed use will be compatible with other adjacent uses."

[27] WZO 3.052 provides:

> "Reasonable conditions may be imposed, as are necessary to ensure the compatibility of a zone change to surrounding uses and as are necessary to fulfill the general and specific purposes of this Ordinance. Such conditions may include, but are not limited to, the following:

forth conditions that may be imposed on a zone change, including "control of points of vehicular ingress and egress. Petitioners do not explain why such a condition is needed in this case or how they believe the findings are required to address WZO 3.052.5. Petitioners' argument is insufficiently developed for review.

4) Petitioners again contend that the findings do not address how the proposal will conform with the comprehensive plan. *See* 2) above.

5) a) Petitioners argue that the findings do not explain how the proposed development complies with WCP Natural Features Goal B, policies 3 and 5 and "applicable state and federal environmental regulations." These issues are addressed in our discussion of the eighth, third and fourth subassignments to petitioners' second assignment of error above.

b) Petitioners argue that the findings do not explain how the proposed development is compatible with the environment or how it strengthens the economy, pursuant to WCP Economy Goal B, policy 2. The challenged decision addresses that policy at Record 23-24, and petitioners do not explain why those findings are defective.

"1. Special yards and spaces.

"2. Fences and walls.

"3. Special parking and/or loading provisions.

"4. Street dedication and improvements or bonds in lieu of improvements.

"5. Control of points of vehicular ingress and egress.

"6. Special provisions for signs.

"7. Lighting, landscaping and maintenance of grounds.

"8. Control of noise, vibration, odors or other similar nuisances."

c, d) Petitioners argue that the findings do not explain how the proposed development complies with WCP Housing Goals A and B. *See* discussion of the seventh subassignment of error of petitioners' second assignment of error above.

e) Petitioners argue that the findings do not explain how the proposed development complies with WCP Land Use Goal A. *See* discussion of the sixth subassignment of error of petitioners' second assignment of error above.

6) Petitioners argue that the findings do not explain how the proposed development will satisfy the stated purpose of the city's floodplain ordinance. Intervenors contend that the city is not required to approve a floodplain development permit in order to approve the challenged plan amendment and zone change. We agree. *See Lovinger v. Lane County*, ___ Or LUBA ___ (LUBA No. 2005-098, January 12, 2006) slip op 12 (failure to adopt findings of compliance with floodplain regulations does not provide a basis for reversal or remand where petitioners do not explain why compliance with floodplain ordinance was required in context of approval of a forest template dwelling).

9) While petitioners concede in this item that the city adopted findings addressing the public need for the proposed development, they question the city's conclusion that there is a public need based on the fact that the subject property lies within the floodplain. Regarding the city's conclusion that there is a public need based on tourism, they question the city's reliance on intervenors' statements rather than petitioners' testimony or other available information on this issue. Intervenors respond (1) that the city is not required to explain in the findings why it chose to rely on certain evidence rather than evidence presented by petitioners and (2) that the findings explain the public

need for the proposed development. Record 24-26. Petitioners do not explain how the city's findings on this issue are inadequate, and their mere disagreement with those findings or the city's policy choices does not provide a basis for reversal or remand. *See Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 610 (2000) (a petitioner's mere disagreement with local government findings or policy choices, without an explanation of how the challenged findings are inadequate or unsupported by substantial evidence, does not provide a basis for reversal or remand).

10) Petitioners argue that the findings do not address how WZO 9.021.2.d is complied with. *See* n 17. The findings address WZO 9.021.2.d at Record 25-26, and petitioners do not explain how those findings are inadequate.

The portion of petitioners' first subassignment of error challenging the absence of findings addressing the variance issue is sustained. The remainder of the first subassignment of error is denied. Petitioners' second and third subassignments of error are denied.

Petitioners' third assignment of error is sustained in part and denied in part.

The county's decision is remanded.