

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NEIGHBORS 4 RESPONSIBLE GROWTH

5 and MONA LINSTROMBERG,

6 *Petitioners,*

7
8 vs.

9
10 CITY OF VENETA,

11 *Respondent,*

12 and

13
14 KAY LARSON,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2006-064

18
19 FINAL OPINION

20 AND ORDER

21
22
23 Appeal from the City of Veneta.

24
25 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
26 petitioners.

27
28 No appearance by City of Veneta.

29
30 Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-
31 respondent. With him on the brief was Law Office of Bill Kloos, PC.

32
33 HOLSTUN, Board Member, participated in the decision.

34
35 BASSHAM, Board Chair, did not participate in the decision.

36
37 AFFIRMED

07/31/2006

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

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

MOTION TO INTERVENE

Kay Larson, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The decision before us in this appeal is the city’s decision on remand in *Neighbors 4 Responsible Growth v. City of Veneta*, ___ Or LUBA ___ (LUBA No. 2005-109, February 23, 2006) (*N4RG I*). We set out the relevant facts in *N4RG I*:

“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 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 Eighth 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.

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.

* * * * *

“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

¹ Chapter 18.10 of the City of Veneta Municipal Code is entitled “Wetland Protection.”

1 the WPO uses that term. VMC 18.10.040(3) prohibits a number of uses in
2 locally significant wetlands. Among the uses VMC 18.10.040(3) prohibits in
3 locally significant wetlands are ‘[n]ew development or expansion of existing
4 development’ and ‘[f]illing, grading, and/or excavating wetland areas.’ VMC
5 18.10.040(3)(a) and (f). Because intervenor proposes new development and
6 fill in the wetlands, a variance is required. VMC 18.10.060 allows variances
7 to permit uses that would otherwise be prohibited by the WPO in three
8 circumstances. One of those circumstances is where ‘public need outweighs
9 the potential adverse impacts of development’ in the wetland.” Slip op at 11-
10 12 (record citation and footnote omitted).

11 The “public need” criterion is set out at VMC 18.10.060(3).² In *N4RG I*, before we
12 considered petitioners’ assignment of error, we noted our agreement with intervenor that
13 VMC 18.10.060(3) called for a subjective balancing of dissimilar considerations and that any
14 balance the city struck and adequately explained was due significant deference on review:

15 “Before turning to petitioner’s arguments, we note that we agree with
16 intervenor that the VMC 18.10.060(3) variance criterion is subjective and in
17 many cases will call for “a comparison of apples with oranges.” The city was
18 required to weigh apples and oranges in this case. Public need, in this case
19 employment opportunities and retail and commercial development, is quite
20 different from the potential adverse impacts from developing in wetlands.
21 The criterion is particularly subjective because, in addition to requiring that
22 dissimilar things be weighed, the criterion provides no guidance on how those
23 dissimilar things are to be weighed so that the city can determine which one
24 outweighs the other. Given the inherently subjective nature of the inquiry
25 required by this criterion, so long as the city engages in a meaningful and
26 complete comparison or weighing of the public need and the potential adverse
27 impacts, the balance the city strikes and the resulting decision is entitled to
28 significant deference on appeal to this Board.” Slip op at 13 (citation
29 omitted).

30 Although we agreed with intervenor that the city was entitled to significant deference
31 in applying VMC 18.10.060(3), we nevertheless sustained petitioners’ assignment of error in
32 *N4RG I*, for two reasons. First, we remanded for the city to explain the relevance, if any, that

² The complete text of VMC 18.10.060(3) is as follows:

“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.”

1 current market demand for commercial floor space or the lack of current market demand for
2 commercial floor space plays in assessing public need.

3 “It seems reasonably certain that the city and petitioner may have somewhat
4 different ideas about what the public need is in this case. Petitioner seems to
5 equate public need with current market demand for commercial floor space.
6 The city’s findings on the other hand can be read to suggest the city views
7 public need more broadly to encompass a public need for the city to realize
8 the commercial development ambitions expressed in its comprehensive plan
9 and to realize those ambitions in particular areas of the city that are already
10 zoned for commercial development and have advantages due to their
11 proximity to transportation facilities. Whatever the case, and without
12 expressing any view regarding the correctness of petitioner’s apparent
13 understanding of the meaning of public need, petitioner clearly raised an issue
14 that the city is obligated to address. *City of Wood Village v. Portland Metro*
15 *Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Norvell v. Portland Area*
16 *LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). That issue is whether there
17 is any current market demand for additional commercial space in Veneta. The
18 relevance of that issue in turn depends on how the city interprets VMC
19 18.10.060(3). If current market demand is the same thing as public need, the
20 city must identify evidence that shows there is a current market demand. All
21 of the evidence cited to us points in the opposite direction. If current market
22 demand is not a relevant consideration in applying VMC 18.10.060(3), the
23 city must explain why it interprets VMC 18.10.060(3) in that way. If current
24 market demand is only one of multiple relevant considerations under VMC
25 18.10.060(3), the city must explain why current market demand or any lack of
26 current market demand, along with other relevant considerations, leads the
27 city to conclude that there is a public need that outweighs the potential
28 adverse impacts of developing the disputed wetlands.” Slip op at 15-16.

29 Our second basis for sustaining petitioners’ assignment of error in *N4RG I* was the
30 inadequate consideration of potential adverse impacts of developing the wetlands:

31 “Some of the potential adverse impacts identified by petitioner * * * are the
32 same as or overlap with the ‘flooding’ and ‘degradation of water quality’
33 impacts the city has already identified and considered. But other potential
34 adverse impacts were clearly raised below and are not addressed in the city’s
35 findings. Moreover, the city’s findings focus almost entirely on how the city
36 believes flooding and degradation of water quality impacts will be reduced or
37 mitigated. The city’s findings do not take the final and required step of
38 weighing identified potential adverse impacts (as they may be mitigated)
39 against the identified public need and explaining how the public need
40 outweighs the mitigated potential adverse impacts of developing the wetlands.
41 On remand, the city must do a more complete analysis of the potential adverse
42 impacts of developing in the wetlands, along with any mitigation that will

1 reduce those impacts, and then weigh the mitigated impacts against the
2 identified public need to determine whether public need outweighs those
3 potential adverse impacts.” Slip op at 17-18.

4 On remand, the city council and planning commission met jointly and adopted new
5 findings to support its decision and again approved the disputed variance. The city did not
6 reopen the evidentiary record on remand, and its decision on remand is based on the same
7 evidentiary record as its decision in *N4RG I*.

8 **FIRST ASSIGNMENT OF ERROR**

9 Under their first assignment of error, petitioners allege the findings that the city
10 adopted in support of its decision on remand to address VMC 18.10.060(3) are not supported
11 by substantial evidence. Petitioners’ substantial evidence challenge is directed at city
12 findings addressing “public need,” and city findings addressing “potential adverse impacts of
13 development” that would be allowed by the variance.

14 **A. Public Need**

15 Our remand in *N4RG I* required that the city explain what role, if any, current market
16 demand plays in analyzing whether the proposed commercial development would satisfy a
17 “public need” that would outweigh the “potential adverse impacts” of that development. On
18 remand the city elaborated at length on its understanding of the “public need” side of the
19 analysis required by VMC 18.10.060(3).³

³ The city’s findings include the following:

“‘Public need’ in the meaning of VMC 18.10.060(3) is a reference to the general public interest of the City. If a proposal is in the public interest of the citizens of Veneta, then there is a need for it within the meaning of VMC 18.10.060(3). The public interest in a proposal may be more or less weighty; hence, the public need may be greater or lesser in the balancing that is required by the code in VMC 18.10.060(3).

“LUBA was correct in assuming that the City does not consider the current market demand in the way the opponents describe to be a mandatory factor in the public need determination. This is so because in many instances where fill is proposed, the concept of market demand, as petitioners describe it, may not even be an issue. For example, fill may be needed to develop a public facility, such as a school site, or a public road right of way shown on the Transportation System Plan. There could be no market demand in the sense suggested by

1 As we noted earlier, in *N4RG I* we speculated based on the city’s findings in its first
2 decision that the city “views public need more broadly to encompass a public need for the
3 city to realize the commercial development ambitions expressed in its comprehensive plan
4 and to realize those ambitions in particular areas of the city that are already zoned for
5 commercial development and have advantages due to their proximity to transportation
6 facilities.” Slip Op 15. Because the city was concerned on remand that LUBA might be
7 expecting the city to elaborate on what those “development ambitions” are, it adopted
8 additional findings to further clarify the scope and nature of those development ambitions.
9 Among other things, the city cited Veneta Comprehensive Plan (VCP) Economic
10 Development Policies 1, 4, 13 and 23 and adopted findings to explain how the city believes
11 the proposal will further those policies. Petitioners argue the city’s findings concerning VCP
12 Economic Development Policies 1, 4, and 13 are not supported by substantial evidence.⁴

13 Those findings are set out below:

14 “The proposed development implements [policy 1] by the nature of its
15 aesthetic design, highway visibility, excellent vehicle and pedestrian access,
16 and *diversity of proposed businesses*. Remand Record 6 (emphasis added.)
17 (VCP Economic Development Policy 1). [⁵]

18 “The proposed development will provide a *diversity of businesses* within the
19 development, and will add to the overall *diversity of businesses* in the Veneta

petitioners in that situation. If ‘market demand’ were to be a mandatory aspect in the public need analysis, then it would not be possible to justify fill for any use that does not have a market demand. The roads adjacent to the north and the west of the subject property could not have been constructed because there was no market demand for these roads in the meaning suggested by petitioners.” Remand Record 9.

⁴ Those three VCP Economic Development Policies are set out below:

- “1. Enhance Veneta’s role as the Fern Ridge commercial and service center.”
- “4. Encourage a diverse mix of unique and interesting shops.
- “13. Install utilities adjacent to employment sites so properties are ready to develop.”

⁵ Our references to the “Record” in this opinion are to the record in *N4RG I*. References to “Remand Record” are to the record compiled by the city following our remand in *N4RG I*.

1 Area.” Remand Record 6 (emphases added.) (VCP Economic Development
2 Policy 4).

3 “Utilities have been installed *adjacent to the site* in anticipation of future
4 commercial development as discussed * * * below.” Remand Record 6
5 (emphasis added). (VCP Economic Development Policy 13).

6 In response to the findings regarding Economic Development Policies 1 and 4,
7 petitioners argue the record does not show what types of businesses are planned for the
8 disputed development and, thus, there is no reason to believe the businesses will be any
9 different than the businesses already in the area. Therefore, petitioners argue there is not
10 substantial evidence that the businesses will be diverse or add to the diversity of city
11 businesses. In response to the finding concerning Economic Development Policy 13,
12 petitioners make two points. First, they contend there is no evidence “the proposed
13 development would provide office space or otherwise function as an ‘employment site.’”
14 Petition for Review 5. Second, they contend the record shows that utilities must be extended
15 across the bridge from Eighth and Broadway and therefore are not adjacent to the site.

16 Intervenor responds that but for the possible relevance of current market demand for
17 commercial floor space as a factor in the “public need” versus “potential adverse impact”
18 analysis required by VMC 18.10.060(3), the city explained its understanding of the concept
19 of public need in this case in *N4RG I*. Intervenor contends that the public need findings
20 identified by petitioners merely supplement those prior findings and are not critical to the
21 city’s decision concerning public need.

22 It is not clear whether the disputed findings are supported by substantial evidence.⁶
23 However, whether the findings are accurately characterized as mere surplusage or not, we
24 agree with intervenor that the findings do not appear to be a critical part of the city’s findings

⁶ As intervenor points out, the proposal will include four buildings to house four new businesses. While there are no guarantees, four new businesses could easily add to the city’s commercial diversity. Those businesses also will have employees and in that sense will be an employment site. While at least some utilities are not adjacent to the site, they are located a short distance south at the intersection of Eighth and Broadway and will be extended along Eighth from the south to the property.

1 that explain its understanding of the public need that would be served by the disputed
2 development. The city adopted a number of other unchallenged findings to explain why it
3 believes there is a public need to develop this site commercially. Remand Record 6-10.
4 Because petitioners do not make any attempt to show that the three public need findings they
5 identify are critical to the city’s decision, and it does not appear to us that they are,
6 petitioners’ substantial evidence challenge to those findings provides no basis for reversal or
7 remand. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334, 362-63 (2003);
8 *Griffith v. City of Milwaukie*, 19 Or LUBA 300, 304 (1990); *Cann v. City of Portland*, 14 Or
9 LUBA 254, 257, *aff’d* 80 Or App 246, 720 P2d 1348 (1986); *Bonner v. City of Portland*, 11
10 Or LUBA 40, 52-53 (1984).

11 **B. Potential Adverse Impacts of Development**

12 The city adopted the following findings to identify the nature of the wetlands that
13 would be lost under the proposal:⁷

14 “This characterization of the wetland values present is based upon the
15 evidence submitted by the applicant and the staff.

16 “The overall health and function of the wetlands on the site is moderate; they
17 have limited wetland value and function. See Application, [Record] 82,
18 quoting Satre Wetland Delineation Report.

19 “At the time the wetland inventory [was] done for the comprehensive plan in
20 1999, the larger wetland unit, of which this wetland was a part, was 14.4 acres
21 in size. Staff Report, [Record] 67. In the inventory this unit received a score
22 of 16 when applying the Oregon Freshwater Wetland Assessment
23 Methodology (OFWAM) and scored the highest possible (in terms of
24 function) in the areas of water quality, hydrologic control and enhancement
25 potential and scored as moderate in terms of wildlife habitat, fish habitat,
26 impact sensitivity, educational and aesthetic value. Recreational value had the
27 lowest possible functional score. The scoring scale is from 9 (highest
28 functioning) to 27 (lowest functioning). Hence the overall score of 16
29 confirms the moderate value overall. Staff Report [Record] at 67.

⁷ We have included the city’s citations to the evidence that supports the quoted findings because petitioners’ challenge the city’s reliance on some of that evidence.

1 “The wetlands proposed to be filled are the same wetlands filled for the recent
2 construction of Jack Kelley Drive to the north and Eighth Street to the west.
3 Testimony of wetland consultant Allen Martin [Record] 20.

4 “Water ponds on the site due to an altered drainage pattern caused by
5 improvements on three sides. On the south is the Oregon Pacific Railroad
6 with a raised roadbed. To the north is Jack Kelley Drive, which was
7 constructed recently by filling wetlands in this same wetland unit. To the
8 west is 8th Street, also recently constructed on wetlands in this same unit. As
9 a result of these improvements, water ponds in the wetland area at the
10 northwest corner of the site. See Staff Report [Record] 68; see also Site
11 Development Plan, which shows the improvements and raised elevations to
12 the south, north, and west, [Record] 76.

13 “An old apple orchard exists on the north part of the subject property,
14 including in the wetland area. Application, [Record] 82. The changed
15 hydrology of the site due to road construction has caused the apple orchard to
16 deteriorate. Larson testimony [Record] 20; Allen Martin testimony [Record]
17 21.

18 “A biological survey of the site was done by Nancy Holzhauser prior to
19 construction of Jack Kelly Drive. Her survey concluded the site is marginal
20 potential habitat for [Bradshaw’s] Lomatium and Wayside Aster, and none of
21 those plants was observed on site. Testimony of Wetland Consultant, Allen
22 Martin [Record] 21. Mr. Martin also surveyed the property and found none of
23 these plants. [Record] 21.

24 “Due to the construction of adjacent roads, the wetlands on site have lost their
25 natural connectivity with the wetlands to the west. The remaining connection
26 is by pipe under Eighth Street. Testimony of Wetland Consultant Allen
27 Martin [Record] 21. Water flowing to the west through the stormwater piping
28 under Eighth Street eventually goes into a canal and Fern Ridge Reservoir.
29 Testimony of Kay Larson [Record] 22.” Remand Record 10-11.

30 The city’s findings go on to discuss the opinions of Ethen Perkins, the opponents’
31 biological expert, in some detail. Remand Record 12-13. The city then adopted the
32 following summary discussion of the wetland values:

33 “The wetlands on site have a moderate overall value for their wetland
34 functions, based on the city’s 1999 wetland inventory. Since the time of that
35 survey, the wetland values may have been eroded, due to the fact that the
36 wetland on this site ha[s] been isolated, other than by pipes, from adjacent
37 wetlands downstream, due to filling that has been done to construct roads to
38 the north and the west. These wetlands still perform wetland functions to
39 some degree, by temporarily storing floodwaters and by providing initial

1 treatment of stormwater runoff from urban areas. There is no evidence that
2 threatened, endangered or rare plant or animal species are present in the
3 wetland areas on site.” Remand Record 14.

4 Petitioners first argue that the Satre Wetlands Delineation Report, the city’s Local
5 Wetland Inventory, and the Holzhauser Biological Assessment cannot be relied upon by the
6 city as substantial evidence to support its decision, because those documents are not included
7 in the city’s record in this matter.⁸ Petitioners also contend the city’s findings
8 mischaracterize the testimony of the applicant’s representative Martin, because while the city
9 found that Martin did not find any threatened or endangered plants on the site, the findings
10 do not acknowledge that Martin stated he was not asked to look for them.

11 Intervenor first notes that the three documents petitioners identify constitute only part
12 of the evidence the city relied on in this case. The city also relied on documents and
13 testimony submitted by its staff and the applicant’s experts. Moreover, one of the three
14 documents petitioners identify, the Local Wetlands Inventory, while not included in the
15 record, is part of the city’s comprehensive plan and therefore properly the subject of official
16 notice. Petitioners do not argue that either they or the city did not have access to the Local
17 Wetlands Inventory.

18 A wetland delineation map from the 1999 Satre Wetlands Delineation Report is
19 included in the record.⁹ Record 85. A part of that report is quoted in the application.¹⁰
20 Intervenor contends that petitioners have offered no reason to believe the Satre Wetlands
21 Delineation Report is not reliable and probative evidence and the parts of that report that the

⁸ The Satre Wetland Delineation Report and the Holzhauser Biological Assessment were prepared in conjunction with the construction of Jack Kelley Road.

⁹ The record includes a letter from the Oregon Division of State Lands (DSL) in which DSL concurs with the Satre Wetlands Delineation Report. Record 47-48.

¹⁰ The quoted language states “[t]he overall health and function of these wetlands can be described as moderate[.]” Record 82. The quoted part of the Satre Report also describes the site as having a history of disturbance.

1 city incorporated and relied on were not rendered something other than reliable and probative
2 evidence, simply because the entire report is not included in the record. We agree with
3 intervenor.

4 The applicant's wetland consultant, Martin, testified before the city council regarding
5 the possible presence of Bradshaw's Lomatium and Wayside Aster on the property. The
6 minutes of the July 5, 2005 hearing include the following:

7 "* * * Mr. Martin said a biological survey was done by Nancy Holzhauser
8 prior to construction of Jack Kelley Drive and she stated that she found the
9 property was marginal potential habitat for [Bradshaw's] Lomatium along the
10 northern portion of the project along the alignment of Jack Kelley Drive.
11 With respect to Wayside Aster she said the upland portion of the project area
12 was marginal and is covered with mixed conifer with some poison oak, which
13 is not typical habitat for those species of plants, and none of those plants was
14 observed.

15 "Len Goodwin said he wanted to know what may have changed since that
16 assessment. In response, Mr. Martin said he found no additional evidence of
17 those species; however, he was not asked to look for them." Record 21.

18 Intervenor frames petitioners' challenge to the city's indirect reliance on the
19 Holzhauser Biological Assessment as follows:

20 "The question is whether an expert like Mr. Martin can review a study done
21 previously by other experts and submit facts contained in the earlier study into
22 the current proceeding in oral testimony, which is subject to questions and
23 rebuttal, and have those facts be afforded weight as evidence. Intervenor
24 believes that the answer must be affirmative. Such evidence can amount to
25 substantial evidence, even if the original report is not in the record."
26 Intervenor-Respondent's Brief 12.

27 Again, we agree with intervenor. The city could reasonably accept as true Martin's
28 testimony regarding the findings in the Holzhauser Biological Assessment, even though the
29 assessment is not in the record. We also conclude the city could reasonably find, based on
30 Martin's testimony, that he found no evidence of Bradshaw's Lomatium or Wayside Aster
31 during his more recent examination of the property, even though he apparently was not
32 specifically asked to look for those plants.

1 In arguing that it was error for the city to rely on representations from staff and the
2 applicant’s expert concerning the Satre Wetlands Delineation Report and the Holzhauser
3 Biological Assessment, petitioners rely on our decision in *Friends of Douglas County v.*
4 *Douglas County*, 46 Or LUBA 757 (2004). We agree with intervenor that petitioners read
5 that case much too broadly. In that case the applicant sought exceptions to Statewide
6 Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and the question was whether
7 the disputed property was capable of supporting farm or forest uses. The county relied on a
8 staff report that summarized statements of an “area agriculturalist,” and a “consulting
9 forester” as those statements had been reported to county staff by the applicant. 46 Or
10 LUBA at 766. The county relied “heavily, if not exclusively” on these statements. We
11 concluded that “the probative value of second or third-hand expert testimony is simply too
12 low to bear the weight of providing the principal support for the county’s conclusions
13 regarding the capacity of the subject property for farm and forest uses.” *Id.*

14 In this case the Satre Wetlands Delineation Report was verified by DSL and portions
15 of the report are quoted in the application. The Holzhauser Biological Assessment, while
16 apparently of some importance to the city, does not seem to have been as important as the
17 direct testimony of Mr. Martin. As the intervenor correctly points out the city relied on a
18 great deal of evidence that had little or nothing to do with the Satre Wetlands Delineation
19 Report or the Holzhauser Biological Assessment.

20 Finally, we cannot say it was unreasonable for the city council to choose to believe
21 Mr. Martin rather than the opponents’ expert Ethen Perkins. The city relied in large part on
22 the fact that Mr. Perkins did not actually go onto the site, which the city found to render Mr.
23 Perkin’s positions about the possible value of the wetlands for plant and animal habit
24 hypothetical.

25 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 A local government is entitled to conduct its proceedings on remand and adopt a new
3 decision, *without* reopening the evidentiary record, so long as no additional evidence is
4 required to respond to LUBA’s remand. *Dimone v. City of Hillsboro*, 44 Or LUBA 698, 719
5 (2003); *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 209 (2001).
6 But if a local government applies new criteria, the evidentiary record must be reopened to
7 allow all parties an opportunity to respond to the new criteria. *Nicholson v. Clatsop County*,
8 32 Or LUBA 399, 413-14 (1997). Similarly, if a local government adopts a new
9 interpretation of law on remand that could not reasonably have been anticipated in the initial
10 proceeding, the local government may be obligated to reopen the evidentiary record. *McFall*
11 *v. City of Sherwood*, 46 Or LUBA 735, 747 (2004). If a local government considers new
12 evidence on remand, all parties must be given an opportunity to respond to that new
13 evidence. *DLCD v. Umatilla County*, 39 Or LUBA 715, 733 (2001). In their second
14 assignment of error, petitioners argue the city considered new criteria and new evidence and
15 committed procedural error that prejudiced their substantial rights by not reopening the
16 evidentiary record and allow petitioners an opportunity to respond.

17 Petitioners argue the city applied new criteria by relying in part on VCP Economic
18 Development Policies 4 and 13 in interpreting the meaning of “public need” in VMC
19 18.10.060(3) on remand.¹¹ In doing so without reopening the evidentiary record, petitioners
20 argue the city erred. Petitioners also argue the city erred by relying on the Satre Wetlands
21 Delineation Report, the city’s Local Wetland Inventory, and Holzhauser Biological
22 Assessment without reopening the record.

23 Turning first to petitioners’ evidentiary arguments, we have already explained that the
24 Local Wetland Inventory is part of the city’s comprehensive plan. The city did not err by

¹¹ In explaining its understanding of the meaning of the term “public need” in VMC 18.10.060(3), the city relied on VCP Economic Development Policy 1 in its decision in N4RG I and in its decision on remand.

1 relying on part of its comprehensive plan in this matter. With regard to the Satre Wetlands
2 Delineation Report and the Holzhauser Biological Assessment, we have already explained
3 that the city did not rely on these documents directly. Instead, the city relied on the
4 testimony of staff and the applicant's representative, which in turn cited and relied on these
5 documents. The staff testimony and the testimony of the applicant's representative were
6 already in the record in *N4RG I*. The city was not obligated to reopen the record on remand
7 before relying on such testimony in its proceedings on remand.

8 With regard to VCP Economic Development Policies 4 and 13, the city's reliance in
9 part on those policies to explain its understanding of the concept of "public need" in VMC
10 18.10.060(3) is not the same thing as applying new criteria. The city did not apply those
11 policies as new approval criteria. In both its original decision in *N4RG I* and its decision on
12 remand, the relevant approval criterion was VMC 18.10.060(3). Neither did the city's
13 citation to these policies amount to a new interpretation of VMC 18.10.060(3) that obligated
14 the city to reopen the evidentiary record. Petitioners make no attempt to explain how the
15 city's citation to those policies materially changed the interpretation the city had already
16 announced in *N4RG I*, and we have already concluded that it did not.

17 The second assignment of error is denied.

18 The city's decision is affirmed.