BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN FREWING,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

WINDWOOD CONSTRUCTION,
Intervenor-Respondent.

LUBA No. 2006-065

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

John Frewing, Tigard, filed the petition for review and argued on his own behalf.

Timothy V. Ramis, Portland, filed a response brief and Gary Firestone, Portland, argued on behalf of respondent. With him on the brief were Gary Firestone and Ramis Crew Corrigan, LLP.

Christopher P. Koback, Portland, filed a response brief and E. Michael Connors, Portland, argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine, LLP.

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

AFFIRMED 09/12/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision on remand from LUBA that adopts additional findings and condition supporting a residential subdivision.

MOTION TO TAKE EVIDENCE

In support of arguments under the fourth assignment of error, petitioner moves to take evidence not in the record pursuant to OAR 661-010-0045.[1] The fourth assignment of error alleges that the City of Tigard Mayor had indirect *ex parte* contacts and that the Mayor has a conflict of interest that precludes his participation in the proceedings on remand. In the motion, petitioner seeks to establish by means of depositions and subpoenas (1) the content of alleged *ex parte* contacts involving the Mayor and (2) information regarding city goals for obtaining open space, the remuneration paid the Mayor, and the importance of meeting open space goals to the political success of the Mayor.

As discussed further under the fourth assignment of error, petitioner has not established a sufficient basis to believe that any *ex parte* contact occurred, and thus has not established a basis to allow evidence outside the record to determine the content of such communications. With respect to the alleged conflict of interest, the facts petitioners allege fall far short of constituting a conflict of interest, and thus petitioner has not demonstrated a

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[1] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * ex parte contacts, * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions to Take Evidence:
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> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

basis to take evidence on that ground, either. Accordingly, the motion to take evidence is denied.

FACTS

The challenged decision is before us for the third time. In *Frewing v. City of Tigard*, 50 Or LUBA 226, *aff'd* 203 Or App 322, 127 P3d 681 (2005) (*Frewing II*), we remanded the city's subdivision approval on a very limited basis: On remand, the city was required to either explain why it is not possible to preserve 23 trees identified in footnote 16 of our opinion, or require that the tree plan be amended to preserve those trees.[2] We further stated:

> "In fulfilling their obligation to preserve trees if possible, the city and applicant are generally entitled to rely on the applicant's tree plan, which was prepared by a certified arborist in consultation with the applicant and the applicant's engineer, to identify the trees it is possible to preserve and the trees it is not possible to preserve. But if a real issue is raised about whether it is in fact possible to preserve particular trees that the tree plan slates for removal, some specific explanation for why those trees must be removed must be included in the city's findings. That findings obligation may in turn necessitate additional justification by the certified arborist. Neither the city nor the intervenor claim that no issue was raised about the trees petitioner identifies on page 15 of his petition for review. *See* n 16.
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> "However, we also caution that our remand does not obligate the city to provide petitioner another opportunity to identify additional trees that might be preserved. The city's obligation on remand is limited to the trees identified in n 16 of this opinion." *Id.* at 251-52.

On remand, the applicant, intervenor-respondent (intervenor), revised the tree plan and proposed to preserve all of the identified trees. The city council held a public hearing at which it accepted testimony from petitioner, among others, and voted to approve the application, with additional findings and a condition requiring intervenor to preserve the 23 identified trees. This appeal followed.

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[2] Preservation of trees was an issue pursuant to Tigard Community Development Code (CDC) 18.350.100(B)(3)(a)(1), which provides:

> "The streets, buildings and other site elements shall be designed and located to preserve the existing trees, topography and natural drainage to the greatest degree possible[.]"

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner contends that the revised tree plan is inconsistent with applicable code requirements. First, petitioner notes that the revised tree plan depicts a new feature, labeled "metal fence on steel posts" that appears to generally demarcate the areas where trees will be removed for development from areas where trees will be protected. Each of the 23 trees identified in *Frewing II* are in the area that will not be developed. However, petitioner observes that some trees in the protected area, including trees in close proximity to the protected trees, are marked for removal. Petitioner contends that it is unclear which trees will be protected and which removed. Further, petitioner argues that removal of trees in close proximity to the 23 identified trees presents a threat to those protected trees. Finally, petitioner notes that the text and tables of the tree plan were not modified to show preservation of the 23 trees. For these reasons, petitioner argues that the revised tree plan is insufficient to ensure protection of the 23 trees.

Intervenor explains that the "metal fence on steel posts" is not a tree protection/removal boundary *per se*, but simply a fence installed in compliance with the original conditions of subdivision approval, one that generally demarcates areas to be developed from areas that will remain undeveloped. It is clear from the revised tree plan, intervenor argues, which trees will be removed and which protected, on either side of that metal fence. With respect to tree plan text and tables, intervenor notes that the city addressed that issue in its findings, and concluded that with the newly imposed condition requiring protection of the 23 trees, there is no need to modify the text and tables. That condition unequivocally requires protection of the 23 trees, intervenor argues, and there is no reason to believe that those trees will not be protected.

We agree with intervenor. It is clear under the revised site plan and condition that the 23 trees will be protected. The city adopted findings concluding that the revised plan controlled the tree plan text and tables, and petitioner does not challenge those findings.

With respect to removal of trees in proximity to the 23 trees, petitioner does not explain why their removal threatens the protected trees, nor has petitioner demonstrated that any additional measures are necessary to protect the trees.

Petitioner next contends that 10 of the 23 identified trees are not identified by species in the tree inventory, as required by CDC 18.709.030.B.1. For example, petitioner argues that some trees are simply identified as "cedar" instead of "Western Red Cedar." The city addressed this issue, finding that petitioner raised it on appeal to LUBA in *Frewing I*, and did not prevail, and therefore that issue cannot be raised on remand. Petitioner disputes that finding, arguing that LUBA did not resolve the issue of species identification on its merits, and therefore that issue is still unresolved, and can be raised again on remand and in the current appeal proceeding.

Intervenor responds, and we agree, that the issue of species identification cannot be raised in this appeal, under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Intervenor argues that petitioner failed to raise this issue in his initial brief in *Frewing II*, and raised it only in a reply brief, which LUBA did not allow. 50 Or LUBA at 229. Petitioner apparently attempted to raise the issue again before the Court of Appeals, but that court affirmed LUBA's decision, including any contentions regarding the decision not to allow the reply brief and hence not to allow petitioner to belatedly raise the issue of species identification. We agree with intervenor that petitioner waived the issue by failing to raise it in his petition for review in *Frewing II*. *See DLCD v. Douglas County*, 37 Or LUBA 129, 143 (1999) (where the petitioner could have but did not challenge coordinated city population projections in its initial appeal before LUBA, petitioner waives the right to challenge those projections in its appeal of the decision on remand).

Finally, petitioner contends that there is no evidence that the revised tree plan was "prepared by a certified arborist" as required by CDC 18.790.030.A. Intervenor responds that the original tree plan was prepared by a certified arborist, and that there is no

requirement under either the city code or LUBA's remand that the revisions to the site plan to protect the 23 identified trees be prepared by a certified arborist. We agree with intervenor that petitioner has not established either that the code or our remand required that a certified arborist revise the tree plan to reflect that the 23 trees will be protected.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that sometime prior to the remand hearing, intervenor submitted to the city engineered drawings showing design changes from the conceptual development designs earlier approved by the city. Petitioner argues that these design changes are "significant changes" that trigger the requirement for a new application, under CDC 18.350.030.E. According to petitioner, the city must address this issue in the course of the remand hearing, and the city erred in failing to do so.

Intervenor responds that the city limited the remand proceedings to the issue of the 23 identified trees, and did not open those proceedings up to other issues. Moreover, intervenor argues that the engineered drawings are simply more detailed finished designs that the conditions of tentative subdivision approval required intervenor to submit. According to intervenor, it is not surprising that more detailed designs differ in some respects from conceptual designs. Intervenor argues that the city will determine in due course whether the submitted designs are consistent with the approved conceptual designs, and that there is no basis to require the city council to conduct that determination under the limited remand from *Frewing II*.

Again, we agree. As discussed under the fifth assignment of error, the city council limited the scope of the remand proceedings to the issue of the 23 identified trees. None of the alleged design changes cited by petitioner has anything to do with those trees. As intervenor explains, it is common for preliminary subdivision or planned development approvals to require applicants to submit more detailed or final grading or engineering plans,

in order to obtain final subdivision or planned development approval. Typically, the local government evaluates those plans to determine whether they are consistent with the approved preliminary or conceptual plans. That determination is usually an entirely separate decision process from the preliminary approval decision, and any decisions that may be required on remand of such tentative approvals from LUBA. Petitioner has demonstrated no basis to require the city to make such determinations in the course of the present remand hearing concerning its preliminary subdivision and planned development decision.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the city Mayor engaged in an indirect *ex parte* contact with the applicant, and moreover is barred from participating in the decision due to a direct financial conflict.

A. Ex Parte Contact

Petitioner argues that the record indicates that the Mayor engaged in an indirect *ex parte* contact with the applicant regarding possible donation of part of the subject property to the city for open space use. As evidence of the alleged *ex parte* contact, petitioner cites to a newspaper interview with the Mayor, in which the Mayor discussed the possibility that a portion of the subject property would be donated to the city as open space, and was quoted as saying that "free was a very good price." At the February 28, 2006 City Council meeting, petitioner asked the city council members to disclose any *ex parte* contacts. In response, the Mayor described the newspaper interview but stated that any information he received regarding potential donation of property came from communication with staff, and that the Mayor has had no contacts of any kind with intervenor or its representatives.[3]

[3] Petitioner cites to the following transcript of the February 26, 2006 city council meeting:

> "[Mayor]: I think [petitioner's request for disclosure of *ex parte* contacts] is directed primarily at me because I was the one quoted in the newspaper article and I did have [an

Petitioner cites to CDC 18.390.050.D.8, which provides that city council members shall not "communicate, directly or indirectly, with any party or representative of a party in connection with any issue involved in a hearing, except upon giving notice, and an opportunity to participate."[4] Further, petitioner notes, CDC 18.390.050.D.8, prohibits city

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interview with a reporter] and I did make a statement with regard to the potential for a portion of this parcel that was unbuildable being given to the city and that was based on a conversation I had I believe with our Community Development Director, Tom Coffee and he might want to confirm whether or not that was the case and that was I guess because they were having a discussion with regard to what would happen in the future with this piece of property because a portion of it was not buildable. But actually I think there was a misquote in the paper in regard to whether or not it had been donated or would be donated because to my knowledge nothing like that has been done yet—no donation has yet taken place. So in fact I don't know whether that actually meant that the property would change hands or that that portion of the property which was not buildable would be made available to the city to improve it so it could be used as open space, * * * because the only discussion I had was just on one brief occasion with a member of City of Tigard staff.

"As far as the principals of [this] development, I've never met or talked to any of them outside of public hearings we've had in this room, would not know them on the street, don't know them in any way. So far as whether the potential that property would be donated to the city biasing me in any way, the fact that I had on previous occasions approved this planned development before there was any mention or discussion or even thought that this might take place, I would think would show that even if I were to approve it tonight, I had approved it previously without any kind of promise or suggestion that this might take place, so I think that would draw into question as to whether or not that would be any type of inducement." Partial transcript of February 28, 2006 City Council Meeting, attached to the Petition for Review, Appendix D-2.

[4] CDC 18.390.050.D.8 provides:

"a. Members of the Review Authority shall not:

"(1) Communicate, directly or indirectly, with any party or representative of a party in connection with any issue involved in a hearing, except upon giving notice, and an opportunity for all parties to participate;

"(2) Take notice of any communication, report, or other materials outside the record prepared by the proponents or opponents in connection with the particular case unless the parties are afforded an opportunity to contest the materials so noticed;

"b. No decision or action of the Review Authority shall be invalid due to *ex parte* contacts or bias resulting from *ex parte* contacts with a member of the decision-making body if the member of the decision-making body receiving contact:

"(1) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

council member from taking "notice of any communication, report, or other materials outside the record prepared by proponents or opponents in connection with the particular case unless the parties are afforded an opportunity to contest the materials so noticed." Petitioner argues that the Mayor may have had "indirect" communication with intervenor via city staff, and that the city erred in not allowing petitioner to question the Mayor about his conversation with staff, and to rebut the substance of that conversation.

Communication with planning staff is not an *ex parte* communication. ORS 227.180(4); CDC 18.390.050.D.8.d. Here, planning staff apparently informed the Mayor that staff and intervenor had had discussions regarding donating a part of the subject property to the city as open space. It is unclear whether and to what extent ORS 227.180(4) and CDC 18.390.050.D.8.d would allow staff to convey to a decision maker information relevant to a pending land use matter that was gained outside the public hearing process. On the one hand, planning staff receive a great deal of information from, and have significant contacts with, applicants and the public outside the public hearing process, and in turn have significant contacts with governing body members on a wide range of subjects. It is inevitable that on occasion information obtained by staff outside the public hearing process that has some bearing on a land use matter before the governing body will be conveyed to governing body members outside the hearing process. We are aware of no cases suggesting that if staff convey such information to decision makers that such communication with staff is considered an indirect *ex parte* communication with the source of that information.

> "(2) Makes a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action shall be considered or taken on the subject to which the communication is related.
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> "* * * * *
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> "d. A communication between City staff and the Review Authority shall not be considered an *ex parte* contact."

On the other hand, it certainly seems inconsistent with the purpose of ORS 227.180 and CDC 18.390.050 D.8 to allow staff to convey to decision makers evidence critical to the decision that was gained outside the public hearing process from one of the parties to the decision, and shield disclosure of such evidence under the "staff communication" exception at ORS 227.180(4) and CDC 18.390.050 D.8.d.

However, we need not attempt to determine how broad or narrow the "staff communication" exception is, because we disagree with petitioner that any *ex parte* contact occurred at all in the present case. CDC 18.390.050 D.8.a.1 prohibits *ex parte* contacts with parties "in connection with any issue involved in a hearing." As noted, the only issue remanded by LUBA and considered at the remand hearing was whether to protect the 23 trees identified in our decision. Petitioner does not explain what connection a potential donation of land on the subject property to the city has to that issue.[5] As far as we are advised, that staff and intervenor have discussed donation of open space on the subject property has nothing to do with any approval criteria for the subdivision as a whole, much less the specific tree preservation criterion and the very limited issue to be resolved on remand from *Frewing II*. Because the substance of the communication has no discernible "connection with any issue involved in the hearing," that communication was not a direct or indirect *ex parte* contact that require disclosure or that obligated the city to offer petitioner an opportunity for rebuttal.[6]

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[5] As far as we can tell, none of the 23 trees are within the stream buffer or open space areas of the property that were presumably the subject of discussion between staff and intervenor.

[6] The city also argues, and we tend to agree, that even if the communication had some connection with any issue involved in the hearing and was otherwise an *ex parte* contact, the Mayor in fact disclosed the substance of that communication at the first opportunity. As far as petitioner has shown, petitioner did not request further disclosure or object to the adequacy of that disclosure below. Before LUBA, particularly in seeking to take evidence outside the record, petitioner appears to argue that the Mayor's disclosure was inadequate. However, it seems to us that the Mayor fully disclosed the substance of his communication with staff, *viz.*, he was informed that staff and intervenor had discussed donating the unbuildable portion of the subject property to the city. Perhaps influenced by his view that the Mayor is biased and has a conflict of interest, petitioner seeks to question the Mayor about a number of things, but as far as disclosure of the substance of the staff communication goes, petitioner has not demonstrated that there is anything more to disclose.

Although petitioner does not couch it this way, the real focus of his *ex parte* contact argument may be that the Major was "biased" or improperly influenced to approve the application on remand due to his knowledge that intervenor might donate the unbuildable portion of the property to the city, and thus cast his vote based not on the tree preservation criterion and evidence related to that criterion but rather in the hope that the city would obtain "free" open space.[7]

To the extent petitioner makes this argument, we reject it. As the Mayor noted in his disclosure, the Mayor twice voted to approve the subdivision application, including approval of the initial tree plan, before learning from staff that discussions regarding donation of land had occurred. That alone belies the suggestion that the Mayor's vote on remand was improperly based on matters extraneous to the tree preservation criterion and evidence related to that criterion.

B. Conflict of Interest

Petitioner also argues that the Mayor has a direct or substantial financial interest in the decision, and therefore has a "conflict of interest" that bars the Mayor's participation in the decision, under CDC 18.390.050.D.7.[8] Petitioner apparently reasons as follows: (1) one

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The city further argues that petitioner has not demonstrated that there is anything in the substance of the staff communication with the Mayor to rebut. Although we need not resolve that contention, we tend to agree. Petitioner does not explain what evidence he would (or could) submit to rebut the statement that staff and intervenor have discussed donating the unbuildable portion of the subject property to the city, much less what relation any evidentiary rebuttal to that statement would have to any issue involved in the remand hearing.

[7] The standard for determining actual bias is whether the decision maker "prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented [during quasi-judicial proceedings]." *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). A party alleging disqualifying bias must "show clearly that a public official is incapable of making a decision on the basis of evidence and argument [in the record]." *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985).

[8] CDC 18.390.050.D.7 provides, in relevant part:

> "Parties to a Type II Administrative Appeal hearing or Type III hearing are entitled to an impartial review authority as free from potential conflicts of interest and pre-hearing *ex parte* contacts as reasonably possible. It is recognized, however, that the public has a countervailing right of free access to public officials. Therefore:

of the goals of the city is to acquire open space, (2) city staff and intervenor have discussed donating open space to the city and such donation presumably will occur only if the application is approved; (3) city voters will be pleased if open space on the property is donated to the city, (4) if the city voters are pleased, then the Mayor will be re-elected in the next election, (5) if the Mayor is re-elected, he will retain the stipend and other emoluments he receives from the city. Therefore, petitioner concludes, the Mayor has a direct financial interest in the challenged decision, and is barred from participating in the PUD decision.

The city responds, and we agree, that the link between the challenged decision, the potential donation of open space, and the Mayor's chances of re-election are too remote to result in a potential or actual financial conflict of interest. Even if it were clear that the Mayor's vote on this land use matter might affect his re-election, we do not believe the Mayor's desire to please the voters combined with receipt of a stipend for continued service as an elected official constitutes a potential or actual financial conflict of interest.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural errors during the remand proceeding, and adopted inadequate findings.

A. Scope of Remand

First, petitioner argues that the city council failed to make an actual determination to limit the scope of the remand hearing to the issue of the 23 trees. According to petitioner, at

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"* * * * *

b. Any member of the Review Authority shall not participate in any proceeding or action in which any of the following has a direct or substantial financial interest: The member or member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, partner, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment. Any actual or potential interest shall be disclosed at the meeting of the Review Authority where the action is being taken[.]"

the hearing the city attorney advised the city council that the scope of the hearing was so limited, but the city council never actually decided to limit the hearing to the issue remanded by LUBA. Petitioner speculates that the city attorney may have misled the city council into believing that it had no choice but to accept a limited scope of remand.

The city cites to a portion of the remand hearing minutes where the Mayor advised petitioner that the only issue before the city council was the 23 trees. Record 155. The city argues that the Mayor, acting as chair of the council, rules on procedural issues such as the scope of hearing, subject to reversal by the council. According to the city, the Mayor ruled that the scope of hearing was limited, and the council accepted that ruling. We agree with the city that the city council effectively limited the scope of hearing. Petitioner's speculation that the city council may have misunderstood its authority to determine the scope of remand does not provide a basis for reversal or remand.

B. Staff Report

Second, petitioner argues that CDC 18.390.050.C.2.h requires that the notice of hearing include a statement that the staff report will be available at least seven days before the hearing.[9] City staff provided a staff report seven days before the remand hearing on February 28, 2006, at the conclusion of which the city council closed the record, deliberated, reached a tentative decision, and continued the matter until March 28, 2006 for adoption of findings and the final decision. At the March 28, 2006 meeting, staff presented proposed

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[9] CDC 18.390.050.C.2. implements ORS 197.763(3)(i) and provides, in relevant part:

> "Content of Notice. Notice of a Type II Administrative Appeal hearing or Type III hearing to be mailed, posted and published as provided in Subsection 1 above shall contain the following information:
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> "* * * * *
>
> "h. State that a copy of the staff report shall be available for inspection at no cost at least seven days prior to the hearing, and that a copy shall be provided at a reasonable cost[.]"

findings and conditions, including findings that respond to issues raised by petitioner. The city council voted to adopt those findings in support of its final decision.

Petitioner argues that that the proposed findings and condition constitute a staff report or supplemental staff report, and that the city violated CDC 18.390.050.C.2.h by failing to make that report available to the public at least seven days prior to the March 28, 2006 meeting. Relatedly, petitioner argues that the city erred in refusing to allow petitioner an opportunity to review and comment on the proposed findings prior to adopting the final decision.

The city responds, and we agree, that CDC 18.390.050.C.2.h is a notice provision that requires only that the notice include a statement that the staff report is available at least seven days prior to the "hearing." Petitioner does not explain why the March 28, 2006 meeting is a "hearing" or why CDC 18.390.050.C.2.h applies to it. Further, neither the code nor the statute it implements require the city to treat staff-generated proposed findings as a staff report or supplemental report and make those findings available to the public seven days prior to the meeting at which those findings are adopted as part of the final decision. Petitioner also cites no authority that requires the city to provide petitioner with an opportunity to review and comment on proposed findings prior to their adoption. *See Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560, 565 (2001) (absent local provisions to the contrary, there is no right under Oregon law for opponents to review or rebut proposed findings prior to their adoption).

C. Petitioner's challenges to the findings

Finally, petitioner offers the following critiques of the findings and condition adopted on remand.

1. Condition Requiring Preservation of the 23 Trees

Petitioner contends that the condition "impermissibly waives the requirements" of the tree preservation requirements of the Tigard Code. Petition for Review 18. However, we

cannot follow petitioner's argument. Petitioner complains that a "Tree Removal, Protection and Landscape Plan" dated November 19, 2004, fails to comply with various code requirements. Petitioner also complains that the revised tree plan does not identify all trees by species, and that the revised plan proposes to remove certain trees within the stream buffer zone at the west end of the property. What either plan has to do with the condition imposed on remand requiring preservation of the 23 trees, or with the 23 trees, or with any issue within the limited scope of remand, is not explained. Petitioner has not demonstrated any reversible error with respect to the condition requiring preservation of the 23 trees.

2. City Forester Standards

Petitioner argued below that the city should impose new standards adopted by the city forester rather than the city's tree preservation regulations, or amend city regulations to incorporate and apply the new standards. The city adopted findings on remand rejecting this argument as being outside the scope of remand. Petitioner asserts on appeal that the city should adopt and apply the new city forester standards, but does not explain why, much less why the city erred in rejecting that issue as being outside the narrow scope of remand.

3. New Fencing

As noted earlier, the revised tree plan depicted a new line described as a "metal fence on steel posts." Petitioner asked the city below to require the applicant to confirm the purpose of that fence. The city's findings reject that request as being outside the scope of remand. On appeal, petitioner argues that the purpose of the fence is not outside the scope of remand.

As discussed under the first assignment of error, the "metal fence on steel posts" apparently has only a tangential bearing, if any, on the issue of preserving the identified 23 trees. Because the fence was first depicted on the revised tree plan, it is at least arguable that petitioner was entitled to raise new issues regarding the fence. However, the only substantive issue petitioner raises regarding the fence we rejected under the first assignment

of error. Under this sub-assignment of error, petitioner advances no cognizable issue other than to complain that the city erred in finding that the purpose of the fence is outside the scope of remand. While that finding may have been technically incorrect, petitioner does not explain why any error in adopting that finding warrants reversal or remand.

4. Ex Parte Contacts

Finding No. 15 responds to petitioner's concerns regarding *ex parte* contacts and states that city council members had declared that they had no contacts with the applicant, and the applicant had declared no contacts with city council members. Petitioner argues that this finding is incorrect and inadequate for reasons set out under the fourth assignment of error. However, we rejected the arguments under the fourth assignment of error, and petitioner's challenge to the city's findings regarding *ex parte* contacts provides no basis for reversal or remand.

5. City Manager Statements

Finding No. 16 recites that "[t]he City Manager stated that there have been discussions between staff and the applicant on this issue [donating land], but that no Council member was involved or informed of the discussions." Record 6. Petitioner complains that this finding inaccurately states what the city manager actually said at the March 28, 2006 meeting, and further that it conflicts with the statement of the Mayor, in which he indicates that he learned of the discussions through staff.

As quoted in the transcript attached to the petition for review, the city manager stated that "[w]e have referred this particular donation to our Parks and Recreation Advisory Board. No action has been taken [with respect to donation], the city has not taken title in any way whatever, nothing has come to the City Council." Appendix D-2. Petitioner is correct that the finding that no city council member has been "involved or informed of the discussions" is broader than the city manager's statement that "nothing has come to the City Council," and appears to be somewhat inconsistent with the Mayor's statement. However, petitioner does

not explain why any inadequacy or inaccuracy in the city's finding that no city council member "was involved or informed of the discussions" warrants remand. We have already rejected petitioner's substantive arguments regarding *ex parte* contacts. Given that disposition, any mischaracterization of testimony or other inadequacy in the findings the city adopted to respond to petitioner's arguments regarding *ex parte* contacts is, at best, harmless error.

The fifth assignment of error is denied.

The city's decision is affirmed.