BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TERRY CASTER,
Petitioner,

vs.

CITY OF SILVERTON,
Respondent,

and

GLEN HAMMER,
Intervenor-Respondent.

LUBA No. 2007-033

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of petitioner. With him on the brief was Kelley & Kelley.

Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of respondent.

Glen Hammer, Silverton, represented himself.

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

REMANDED 06/19/2007

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision that denies his request for conditional use approval to site cellular antennae on an existing water tower and to site related equipment underneath the tower.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to new issues raised in the city's response brief. The motion is allowed.

FACTS

An unused water tower is located on petitioner's property. That water tower is 130 feet tall and the tower legs that support the tower occupy a footprint of 28 feet by 28 feet. At one time the water tower was part of the city's municipal water system. However, before petitioner acquired the tower and property in 1992, it ceased to be used as part of the city's water system. The tower has not been used for any purpose for many years and apparently remains in place because it would cost approximately $180,000 to remove the tower. The property is zoned Residential Single Family (R-1). Petitioner sought city approval to site six cellular communication antennae on the tower, co-locate additional antennae at a later time, and construct an equipment shelter within the water tower footprint. The city denied petitioner's request, and petitioner appeals that city decision.

INTRODUCTION

Silverton Municipal Code (SMC) 18.60 identifies the uses that are allowed in the city's four residential zoning districts. The communication facilities that petitioner wishes to cite on the existing water tower require conditional use approval. SMC 18.60.050(H).[1]

[1] SMC 18.60.050 identifies a number of "[n]onresidential uses" that are "[p]ermitted," "[n]ot permitted," or require "[c]onditional use approval" in the city's residential zoning districts. With conditional use approval, SMC 18.60.050(H) allows the following use in all the city's residential zones: "Cellular communication antennas on existing structures and associated electronics facilities."

SMC 18.03.060.060 sets out eight "Review Criteria" for conditional use approval. Two of those eight criteria are relevant in this appeal. One of those criteria requires that the proposed conditional use be "consistent with the intended character of the base zone and the operating characteristics of the neighborhood." The other criterion requires that the proposed conditional use must be "compatible with existing or anticipated uses."[2] For simplicity, we will follow the parties' lead and refer to these criteria as Criterion 2 and Criterion 3. The city found that petitioner failed to demonstrate that the proposal complies with either Criterion 2 or Criterion 3. In his first six assignments of error, petitioner challenges those city findings.

In his seventh assignment of error, petitioner alleges the city further erred in applying Criterion 3 to the existing water tower, which is not the subject of his request for conditional use approval, rather than the communication facilities that petitioner seeks to site on the water tower and the property under the tower, which are the subject of his request for conditional use approval.

In his eighth assignment of error, petitioner challenges the city's finding that his application should be denied because it lacked certain information required by the SMC.

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[2] The relevant text of SMC 18.03.060.060 is set out below:

> "Requests for Conditional Uses will be approved if the review body finds that the applicant has shown that all of the following criteria have been met, either outright, or with conditions that bring of the proposal into compliance:
>
> "* * * * *
>
> "2. The proposed use is listed as a conditional use in the zoning district and is consistent with the intended character of the base zone and the operating characteristics of the neighborhood.
>
> "3. The proposed use will be compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks, and landscaping or the proposal calls for mitigation of difference in appearance or scale through such means as setbacks, screening, landscaping or other design features.
>
> "* * * * *[.]"

In his ninth assignment of error, petitioner challenges the city's finding that the water tower is a "terminated" nonconforming use, and for that reason cannot be used to site cellular communication antennae.

CITY RESPONSE TO ALL ASSIGNMENTS OF ERROR

The city advances the following argument in defense of the city's decision:

> "And by the way, [petitioner's] brief shows no prejudice to any substantial right for any alleged error in the consideration of their appeal. LUBA should not countenance any alleged 'error' that does not impact any substantial right of the parties. * * *" Respondent's Brief 10.

The only authorities that the city cites in support of the above argument are two decisions, one by the Court of Appeal and one by LUBA. *Hausam v. City of Salem*, 178 Or App 417, 37 P3d 1039 (2001); *DLCD v. Crook County*, 37 Or LUBA 39 (1999). Both of those decisions concerned ORS 197.835(9)(a)(B), which limits LUBA's authority to reverse or remand a land use decision for procedural error to instances where a *procedural* error "prejudiced the substantial rights of the petitioner[.]" The city makes no attempt to argue that petitioner's assignments of error allege procedural error, and those assignments of error do not allege procedural error. The above city response to all assignments of error is without merit.

EIGHTH ASSIGNMENT OF ERROR

We turn first to petitioner's eighth assignment of error, because issues presented in that assignment of error recur throughout the parties' arguments under the remaining assignments of error. SMC 18.02.200.040 requires that a land use application include certain supporting information.[3] After petitioner submitted his application in this matter, the

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[3] SMC 18.02.200.040 provides as follows:

> "A land use application shall consist of the following:
>
> "1. Explanation of intent, nature and proposed use of the development, pertinent background information and other information that may have a bearing in

planning staff requested in writing that petitioner submit additional information. Record 257-58. Petitioner apparently provided some but not all of the requested information. Notwithstanding petitioner's failure to provide all of the information the city requested, the city nevertheless proceeded to process the application and ultimately rendered a decision denying the application.

The city cited a number of reasons for its decision to deny petitioner's application. Among the cited reasons was the petitioner's failure to supply all of the information the city believes is required by SMC 18.02.200.040 and other unspecified SMC sections. The relevant city findings are set out below:

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determining the action to be taken, including submission of detailed findings where such are required by the provisions of this Code.

"2. Signed statement indicating that the property affected by the application is in the exclusive ownership or control of the applicant, or that the applicant has the consent of all partners in ownership of the affected property.

"3. Property description and assessor map parcel number(s).

"4. Additional information required by other sections of this Code because of the type of development proposal or the area involved.

"5. Duplication of the above information as required by the Planning Director.

"6. Submission of application fees as established by the City Council.

"7. A report documenting the results of any neighborhood meeting. The report shall contain:

"A. The dates and locations of all meetings where citizens were invited to discuss the applicant's proposal;

"B. The method(s) by which each meeting was publicized;

"C. The number of people who attended the meeting or otherwise contacted the applicant;

"D. A summary of the concerns, issues, and problems raised by neighbors;

"(1) A discussion of how the applicant has addressed or intends to address concerns, issues, and problems; and

"(2) A discussion of any concerns, issues, and problems the applicant is unable or unwilling to address and why."

"28. The Council affirms the Planning Commission finding that expressed concerns regarding the lack of information in the application regarding co-location of cellular facilities and information related to the sound study and determined the application was not consistent with the Revised Silverton Municipal Code 18.02.200.040 regarding application procedures and that adequate information was not provided to evaluate these impacts.

"29. The Council affirms the Planning Commission finding that also lacking was a landscape plan that met the standards established in the Revised Silverton Municipal Code for the detail needed for a landscape plan or amount of landscaping required per the Code.

"30. The Council affirms the Planning Commission finding that without adequate application materials, determinations based on the applicable criteria cannot be made and this decision making body is unwilling to apply staff recommended conditions of approval in order to obtain information that should have been submitted as part of the application." Record 16.

Petitioner's challenge to the above findings and the city's response to that challenge demonstrate that in some ways, both petitioner and the city misunderstand their duties and rights when a dispute arises regarding whether a conditional use permit application includes all the information that the SMC requires.

A. Incomplete Permit Applications

A city's and applicant's rights and obligations in processing land use permit applications are governed in large part by statute. ORS 227.178(1) generally requires that a city take final action on a permit application "within 120 days after the application is deemed complete." ORS 227.178(2) sets out a city's and a permit applicant's rights and duties in cases where a permit application may not be complete as submitted.[4] The first obligation

[4] ORS 227.178(2) provides:

> "If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee *shall notify the applicant in writing of exactly what information is missing* within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be *deemed complete* for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:

falls on the city to review a permit application, and if the city believes certain information is missing from the application, the city must "notify the applicant in writing of exactly what information is missing." As previously noted, the city provided such written notice to petitioner in this case.

After receiving such a notice from the city, an applicant has three options: (1) provide the requested information, (2) provide some of the requested information and written notice that the rest of the information will not be provided, or (3) provide written notice that "none of the missing information will be provided." As we noted earlier, the applicant provided only some of the information that the city requested. We cannot tell whether the applicant provided written notice that it would not provide the remaining information, so it is not clear whether petitioner completely fulfilled his obligation under ORS 227.178(2)(b). If petitioner did not provide the required written notice, the city had a right on the 181st day after the application was submitted to treat the application as "void." ORS 227.178(4).[5] Petitioner either provided the written notice that is required under ORS 227.178(2)(b) or the city

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"(a) All of the missing information;

"(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

"(c) Written notice from the applicant that none of the missing information will be provided." (Emphases added.)

[5] ORS 227.178(4) provides:

"On the 181st day after first being submitted, *the application is void* if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

"(a) All of the missing information;

"(b) Some of the missing information and written notice that no other information will be provided; or

"(c) Written notice that none of the missing information will be provided." (Emphasis added.)

elected to overlook that failure on petitioner's part, because the city proceeded to conduct hearings and review petitioner's application and made a decision on the permit application.

If petitioner gave notice that he would not provide all of the information in support of his application that the city requested, as required by ORS 227.178(2), his application was "deemed complete" when the city received that notice. If that is what happened in this case, the city erred by finding that the permit application can be denied because petitioner refused to provide the information that the city believes is required by SMC. *See* findings 28 and 29 above.

We note that it is risky for an applicant to refuse to provide information that a city requests to support a land use permit application. Such a refusal could easily lead the city to find that the applicant failed to carry his or her evidentiary burden to establish that all applicable approval criteria are met. An adequately explained finding that a permit applicant failed to carry his evidentiary burden is very difficult to successfully challenge on evidentiary grounds. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 163-164 (1985); *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982). That is particularly the case where, as here, the approval criteria impose extremely subjective legal standards. *Larmer Warehouse Co. v. City of Salem*, 43 Or LUBA 53, 61 (2002). But while the city had the option to (1) proceed to apply approval criteria, (2) consider whatever evidence petitioner submitted in support of the application and (3) adopt findings to explain why the city believes the submitted evidence is insufficient to demonstrate compliance with those criteria, the city did not have the option simply to cite petitioner's failure to provide some of the information that the city requested as a basis for denying a permit application. If the city's findings quoted above were not so brief, conclusory and unfocused on the relevant approval criteria, it might be possible to read the city's decision to find that petitioner failed to carry his evidentiary burden with regard to one or more approval criteria. However, the above

quoted findings have all those shortcomings. In view of those shortcomings, the fairest reading of the above-quoted findings is that they impermissibly deny the permit application based on petitioner's refusal to supply certain allegedly missing information that the city never specifically connects to any approval criterion.

Finally, even if petitioner in this case failed to provide the notice required by ORS 227.178(2)(b), the city elected to proceed with review of the permit application rather than treat the permit application as void under ORS 227.178(4). In that circumstance, the city may not thereafter simply cite an alleged failure on petitioner's part to provide requested information as a basis for denying a permit application. Having elected to proceed with the application notwithstanding petitioner's failure or refusal to provide the requested information, the city owes petitioner at least some explanation for why it believes petitioner's evidentiary submittal falls short of demonstrating the proposal complies with the relevant approval criteria. That explanation is missing in the above-quoted findings.

B. Failure to Carry Evidentiary Burden

As described above, ORS 227.178 provides a method for resolving disputes about whether a permit application includes required information. Once an application is deemed complete or the city proceeds as though the application is deemed complete, the city is obligated to review and make a decision on a permit application. The process established by ORS 227.178 is only indirectly related to the remaining permit review process that ultimately leads to a decision by the city regarding whether the permit applicant and other parties have produced an evidentiary record that enables the city to find that all applicable mandatory permit approval criteria are satisfied. Simply stated, a permit applicant may submit a complete application, in the sense it includes all of the information that relevant land use regulations require a permit applicant to submit, but that information and other evidence that is submitted during the evidentiary phase of a land use permit review may nevertheless be inadequate to demonstrate that all relevant approval criteria are met.

To the extent petitioner's petition for review can be read in places to suggest that a permit application that is complete when submitted or "deemed complete" under ORS 227.178 necessarily includes substantial evidence that all applicable approval criteria are satisfied, we reject the suggestion. While it is possible that a complete application will include all the evidence that is needed to demonstrate applicable criteria are satisfied, the statutory scheme provides for evidentiary hearings, either by right or through appeals, after the complete application is filed. ORS 227.175(3); 227.175(10). In the majority of cases, the evidence that is submitted during those hearings in support of or in opposition to the application will have an important bearing on whether the applicant is ultimately found to have successfully carried his or her evidentiary burden regarding the permit approval criteria. Otherwise those hearings would be a meaningless waste of time and effort.

C. The City's Duty to Impose Conditions of Approval

Finally, finding 30, quoted above, expresses the city's unwillingness to impose conditions of approval over petitioner's objection to obtain information that the city believes is necessary to approve the application. Petitioner and the city argue about the significance and meaning of that finding under this assignment of error and argue elsewhere in their briefs about the city's general obligation to impose conditions of approval, if such conditions would solve a perceived inadequacy in the permit application and allow the city to approve the disputed permit application. Petitioner goes so far as to argue that the city is legally obligated to impose conditions of approval, even if petitioner specifically objects to those conditions, if the city believes such conditions would allow the city to find that relevant approval criteria are satisfied.

SMC 18.03.060.060 certainly can be interpreted to impose an obligation on the city to consider and impose conditions of approval where conditions of approval would allow an application for conditional use approval to be granted under the relevant approval criteria.

See n 2. ORS 197.522 can be read to impose a similar obligation.[6] However, as we explained in *Oien v. City of Beaverton*, 46 Or LUBA 109, 126-27 (2003), even if ORS 197.522 applies generally, and is not limited in its application to circumstances where a building moratorium has been declared; that statute does not obligate a city to shoulder the obligation of developing conditions of approval and the evidentiary record that might be needed to impose such conditions of approval so that an inadequate permit application can be approved. Rather, where ORS 197.522 applies, the obligation to propose conditions of approval rests with the applicant. *Id*. The city of course can take the initiative to propose conditions of approval in the first instance if it wishes, as the city apparently tried to do here. But ORS 197.522 does not obligate the city to shoulder that burden. ORS 197.522 simply obligates the city to consider any such conditions proposed by the applicant and impose those conditions of approval if they would allow the city to find that relevant approval criteria are satisfied and approve the permit application. We do not interpret the similar language in SMC 18.03.060.060 to impose a broader obligation.

Under ORS 197.522 and SMC 18.03.060.060, the city may be required to consider conditions that petitioner proposes to address perceived deficiencies in his conditional use permit application and to impose such conditions and approve the application if they are sufficient to ensure that all relevant approval criteria are satisfied. But the city is not required under that state and local legislation to conduct an independent search for conditions of approval that would allow approval. We reject petitioner's arguments to the contrary.

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[6] ORS 197.522 appears with sections of ORS Chapter 197 that address building moratoria, and provides as follows:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

Similarly, we reject petitioner's arguments that the city is legally obligated to impose conditions of approval over petitioner's objections, if those conditions might allow the city to find that all approval criteria are satisfied. In support of that argument, petitioner relies in part on ORS 197.796. That statute allows a permit applicant to accept a condition of approval and thereafter challenge the condition of approval at LUBA or in circuit court, so long as the applicant raises an issue concerning the condition before the local government, as required by ORS 197.763(1). However, ORS 197.796 says nothing about the *city*'s legal obligations when faced with a permit applicant's objection to a proposed condition of approval. ORS 197.796 certainly does not obligate a city or county to impose a condition of approval over a permit applicant's objections. The statute simply provides a path for an applicant to challenge any conditions of approval that the city may elect to impose over an applicant's objections.

In conclusion, notwithstanding our disagreement with petitioner regarding some of the arguments petitioner presents under the eighth assignment of error and elsewhere in his brief, we agree with petitioner that the city erred by simply citing an alleged failure on petitioner's part to submit a complete application as an independent basis for denying the disputed conditional use permit application. Therefore, we sustain the eighth assignment of error.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

As we noted above, Criterion 2 requires that the proposed conditional use must be "consistent with the intended character of the base zone and the operating characteristics of the neighborhood." *See* n 2. Petitioner contends the city misconstrued Criterion 2 (first assignment of error), adopted inadequate findings to support its decision that the proposal violates Criterion 2 (second assignment of error) and adopted a decision regarding Criterion 2 that is not supported by substantial evidence (third assignment of error).

The city's decision is structured in a way that sometimes makes it difficult to be sure which criteria the city's numbered findings were adopted to address. But the city apparently relied on findings 24 and 26 to conclude that the proposed conditional use does not comply with Criterion 2. Those findings are set out below:

> "24. The City Council finds that the placement of cellular antennas on the existing water tower is a non-residential use and the introduction of a non-residential use into the neighborhood is not consistent with the operating characteristics of the base zone or the operating characteristics of the neighborhood." Record 16.

> "26. The City Council notes that [Criterion 2] requires that a conditional use 'is consistent with the intended character of the base zone and the operating characteristics of the neighborhood.' Information in the record, including testimony from residents in the neighborhood surrounding the water tower about how the neighborhood defines its operating characteristics, defines the area as containing primarily single family residential homes on individual lots with low levels of traffic, noise, or other impacts. Non-residential uses are not perceived to be part of the operating characteristics of the neighborhood." *Id.*[7]

As petitioner correctly points out, finding 24 misstates the "consistent with the *intended character* of the base zone" requirement of Criterion 2 as a requirement that the conditional use must be "consistent with the *operating characteristics* of the base zone." We understand petitioner to contend that "intended character" and "operating characteristics" are different things. Beyond that misstatement of the text of Criterion 2, finding 24 misconstrues Criterion 2 in another way. Finding 24 appears to take the position that *any* introduction of a non-residential use into the R-1 zone is not "consistent with the intended character of the base zone or the operating characteristics of the neighborhood." But SMC 18.60.050

[7] In its brief, the city cites to other findings that were not adopted to address Criterion 2, in an attempt respond to petitioner's arguments regarding the shortcoming of findings 24 and 26. Respondent's Brief 5. There are at least two problems with that attempt. First, the cited findings do not correct the shortcoming to findings 24 and 26 that we discuss below. Second, the city may not adopt a series of disjointed or loosely connected findings to address relevant approval criteria, as the city has done here, and then pick and choose among those findings in its response brief at LUBA in an attempt to construct an adequate decision after-the-fact. A petitioner at LUBA must assign error to the decision that the city adopted and cannot be expected to assign error to a cut and paste decision that the city's attorney constructs after the fact, and for the first time, in the response brief that is filed at LUBA.

expressly authorizes a number of non-residential uses in the city's residential zoning districts as permitted or conditional uses. The city's only expressed reason for denial in finding 24 is that petitioner's application is inconsistent with Criterion 2 simply because it proposes a non-residential use. That is an erroneously broad interpretation and application of Criterion 2. Properly interpreted, it is certainly possible that Criterion 2 could be applied to deny *a particular* proposed non-residential use, if the city can explain why that particular non-residential use would be inconsistent "with the intended character of the base zone and the operating characteristics of the neighborhood." But Criterion 2 may not be applied to deny conditional use approval simply because the use for which conditional use approval is requested is a non-residential use.

We are not sure what to make of finding 26. Unlike finding 24, finding 26 at least accurately quotes the text of Criterion 2. Reading finding 26 generously in the city's favor, the city agrees with the testimony of nearby residents that the operating characteristics of the neighborhood include "primarily single family residential homes on individual lots with low levels of traffic, noise, or other impacts." That is a pretty obscure explanation of what the city believes the operating characteristics of the neighborhood are. But even if we assume that explanation is sufficient to describe the "operating characteristics of the neighborhood," the city's only explanation for why it believes the proposed communication facilities are not consistent with those operating characteristics is the city's finding that "[n]on-residential uses are not perceived to be part of the operating characteristics of the neighborhood." The intended meaning of that finding is equally obscure. But whatever its intended meaning, the finding is simply inadequate to provide an explanation for why the city believes the proposed communication facilities are not "consistent with * * * operating characteristics of the neighborhood." The city's *perception* that the proposed conditional use is not "part of the operating characteristics of the neighborhood" has no obvious bearing on whether the proposed conditional use would be *consistent with* those operating characteristics. As

petitioner correctly argues, Criterion 2 requires *consistency* with the operating characteristics of the neighborhood; it does not require that the proposal be *part of* those characteristics. The city's findings need not be perfect. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21-23, 569 P2d 1063 (1977). But the city's findings must adequately interpret and apply Criterion 2 to the facts in a way that is consistent with the words of Criterion 2. Those findings must also provide a coherent explanation for why the city believes the proposal does or does not comply with Criterion 2. Findings 24 and 26 fall far short of those minimum requirements for adequate findings.

On remand, the city should first identify "the intended character of the [R-1] zone." Then the city should identify what it believes are "the operating characteristics of the neighborhood." In doing so, the city would be well advised to include any interpretations it believes are appropriate to clarify the scope and meaning of these very subjective and ambiguous concepts. Those interpretations must, of course, be consistent with the text of Criterion 2 and must not impose limitations that are inconsistent with the language of Criterion 2. Then the city must explain why it believes the proposed cellular antennae and related equipment either are or are not consistent with the intended character of the R-1 zone and the operating characteristics of the neighborhood. As we explain later in this opinion, the city must remain focused on the communication facilities that are the subject of petitioner's application for conditional use approval, and resist the urge to shift that focus to the water tower, which is not the subject of the application for conditional use approval.

For the reasons explained above, we agree with petitioner that the city misconstrued Criterion 2 and adopted inadequate findings to support its decision that the proposed conditional use violates Criterion 2. Therefore, petitioner's first and second assignments of error must be sustained. We need not and do not consider petitioner's evidentiary challenge in his third assignment of error. *DLCD v. Columbia County*, 16 Or LUBA 467, 471 (1988);

DLCD v. Columbia County, 15 Or LUBA 302, 305 (1987); *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986), *aff'd* 83 Or App 275, 730 P2d 628 (1987).

FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

As we explained earlier in this opinion, Criterion 3 requires that the city find:

> "The proposed [conditional] use will be compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks, and landscaping or the proposal calls for mitigation of difference in appearance or scale through such means as setbacks, screening, landscaping or other design features."

After quoting Criterion 3, the city adopted the following finding in support of its conclusion that the proposed communication facilities do not comply with Criterion 3:

> "25. * * * The [City] Council determines that mitigation measures could not adequately address the difference in size, scale and intensity and thus the cellular antenna use is not compatible with the residential character of the neighborhood in terms of the size, scale or intensity." Record 16.[8]

Petitioner advances a number of criticisms of the above finding; we agree with some of those criticisms and disagree with others.

Petitioner first argues that Criterion 3 must be applied by first asking whether the proposed conditional use as submitted "will be compatible with existing or anticipated uses." Petitioner faults the city for not asking and answering that question. Petitioner next argues that even if the proposal as submitted is found to be incompatible "with existing or anticipated uses," if "the proposal calls for any mitigation of differences then Criterion 3 *ipso facto* is met." Finally petitioner argues that finding 25 erroneously requires the proposal to be "compatible with the residential character of the neighborhood" rather than with the "existing or anticipated uses."

[8] We address petitioner's challenges to the city's finding number 26 below, under our discussion of the first through third assignments of error.

We reject petitioner's first argument, because if the city believes the proposal is incompatible with mitigation it implicitly found the proposal would be incompatible without mitigation.[9] We also reject petitioner's second argument. The requirement for mitigation is reasonably interpreted to mean mitigation that has the effect of making a proposed conditional use compatible with existing or anticipated uses, in cases where the proposed conditional use would be incompatible without that mitigation. Petitioner's argument is, essentially, that Criterion 3 must be interpreted to bind the city to find that a proposal that includes mitigation (no matter how ineffective or inadequate that mitigation) *ipso facto* complies with Criterion 3. That argument is without merit, and we reject it. Finally, petitioner's third argument (that the city misquotes Criterion 3) is technically correct, but petitioner's argument misses the real problem under Criterion 3. In the interest of facilitating resolution of the parties' dispute regarding Criterion 3 on remand we base our resolution of these assignments of error on the real problem.

The real problem with the city's findings regarding Criterion 3 is that Criterion 3 calls for a specific comparison to determine if a proposed conditional use will be "compatible with existing or anticipated uses." The obvious starting point in addressing Criterion 3 is to identify the "existing or anticipated uses." The findings do not do that. The next step is to describe those uses in the terms that Criterion 3 requires—that is "in terms of size, building scale and style, intensity, setbacks, and landscaping." The findings do not do that. The next step is to describe the proposed conditional use (the proposed antennae and supporting facilities) "in terms of size, building scale and style, intensity, setbacks, and landscaping." The findings do not do that. After those steps have been taken, the city will be in a position to compare the proposed conditional use and the existing and anticipated uses, in terms of their "size, building scale and style, intensity, setbacks, and landscaping," and explain why

[9] In addition, the city makes the finding that petitioner contends is lacking in finding 27, which we discuss under the seventh assignment of error.

the city finds them to be compatible or incompatible. Because the city performed none of the essential preliminary steps, it was not in a position to conduct the required ultimate analysis. On remand it must do so.

For the reasons explained above, we agree with petitioner that the city misconstrued Criterion 3 and adopted inadequate findings to support its decision that the proposed conditional use violates Criterion 3. Therefore, petitioner's fourth and fifth assignments of error must be sustained. We need not and do not consider petitioner's evidentiary challenge in his sixth assignment of error. *DLCD v. Columbia County*; 16 Or LUBA at 471; *DLCD v. Columbia County*, 15 Or LUBA at 305; *McNulty v. City of Lake Oswego, 14 Or LUBA at 373*.

SEVENTH ASSIGNMENT OF ERROR

In finding that the proposed conditional use does not comply with Criterion 3, *see* n 2, the city adopted an additional finding. That finding is set out below:

> "27. The Council affirms the Planning Commission finding that the cellular antenna *on this tower* is not compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks and landscaping and, in fact *the existing water tower is a non-conforming structure* and would not meet today's standards for the R-1 single family residential zone." Record 16 (emphases added).

Petitioner faults the above findings because they focus on the water tower (which is not the subject of petitioner's conditional use application) and not the antennae and related equipment (which are the subject of the conditional use application):

> "Given the minimal impact in terms of size, scale and intensity that the proposed use would itself present, and given Respondent's openly stated focus on the existing tower, it is clear that these findings do not represent a genuine application of [Criterion 3] to the proposed use. Respondent instead reviews the 60-year-old tower under the guise of evaluating a conditional use of it, and finds the tower not compatible with the neighborhood that the City placed it in." Petition for Review 18.

With one fairly significant caveat we generally agree with petitioner that the city's findings seem to be unduly distracted by or focused on the existing water tower and lose sight of the

fact that the conditional use application is only seeking approval of the antennae and related facilities, not the existing water tower. This is demonstrated most clearly by the city's complete failure to discuss the "size, building scale and style, intensity, setbacks, and landscaping" associated with the six proposed antennae and related facilities and apparent reliance on the size and scale of the water tower.

The caveat to our agreement with petitioner is that we do not agree with petitioner's suggestion that the city must completely ignore the existing water tower or ignore the fact that the proposed antennae will be attached to the existing water tower, and will not exist in an unattached state of suspended animation 130 feet above ground level. In applying Criteria 2 and 3 it is entirely appropriate for the city to recognize the reality that the requested antennae will be attached to the existing water tower and that the ancillary facilities will be located in the existing water tower's footprint. However, that recognition must not be taken so far as to convert conditional use review of the antennae and related facilities into conditional use review of the existing water tower. Finding 27 seems to make that conversion. On remand, the city must remain focused on the antennae and related facilities that are the proper subject of conditional use review, and must not allow the fact that those antennae will be attached to the water tower to convert its review of the antennae and related facilities under Criteria 2 and 3 into a review of the existing water tower. We recognize that the distinction that we are asking the city to draw is a fine one, but Criterion 3, as presently worded, requires that that distinction be maintained.

The seventh assignment of error is sustained.

NINTH AND TENTH ASSIGNMENTS OF ERROR

According to petitioner, the water tower is a nonconforming structure, solely because it intrudes two feet into a required 20-foot set back. Petitioner contends the city erroneously found that the water tower is a nonconforming situation for other reasons and erroneously relied on the nonconforming status of the water tower and the discontinuance of the water

tower's prior use as part of the city's water system as bases to deny the requested conditional use approval. We turn to the issues that petitioner raises under these assignments of error. Although we disagree with petitioner on one of those issues, we agree that the other issues he raises deserve a focused response in the city's findings that is missing in the challenged decision.

A. Failure to Announce Non-Conforming Situation Criteria

Citing ORS 197.763(5)(a) and 227.173, petitioner argues it was reversible error for the city to apply the SMC nonconforming situation criteria to deny his request, because those criteria were not announced at the beginning of the planning commission hearing.

ORS 227.173 requires that the city base its decision on applicable criteria in the city's "development ordinance," but does not specify how or when the city must make those criteria known to parties in a permit proceeding. However, petitioner is correct that ORS 197.763(5)(a) requires that the criteria that will be applied in a quasi-judicial land use proceeding be announced at the beginning of the evidentiary hearing.[10] Petitioner is also correct that the city failed to list its nonconforming situation criteria as applicable substantive standards before the planning commission hearing in this matter. But that error was a procedural error. As we noted earlier in this opinion, LUBA may only reverse or remand a land use decision for procedural error, if that error "prejudiced the substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B). Petitioner does not argue that his substantial rights were prejudiced by this failure on the city's part, and we do not see that they were. Petitioner had an opportunity to argue to the city council that it was error to apply the city's nonconforming situation criteria to deny his request for conditional use approval.

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[10] As relevant, ORS 197.763(5) provides:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria[.]"

B. SMC 18.60.050(H)

The city found that "[t]he water tower * * * is a nonconforming situation * * * and therefore cannot be used as the basis for a conditional use." Record 14.

As we explained earlier in this opinion, SMC 18.60.050(H) allows "[c]ellular communication antennas on *existing structures* and associated electronics facilities." A threshold question is whether, assuming the water tower is accurately characterized as a nonconforming situation, that fact has any bearing on whether the proposed cellular communication facilities could be sited on that "existing structure" under SMC 18.60.050(H). The city's finding essentially concludes that conditional use approval of the proposal is foreclosed by the water tower's status as a nonconforming situation; petitioner argues that its status as a nonconforming situation is irrelevant under SMC 18.60.050(H). According to petitioner the facilities that are allowed conditionally under SMC 18.60.050(H) can be sited on "existing structures." There is no dispute that the water tower is "existing," and it seems to fall within the SMC definition of "structure."[11] Petitioner argues that the city has no basis for reading the "existing structures" that are referred to in SMC 18.60.050(H) to exclude existing structures that may happen to be nonconforming situations.

Petitioner is correct that there is nothing in the language of SMC 18.60.050(H) that supports the above-quoted city finding. While the city may have some basis for reading that limitation into SMC 18.60.050(H), it makes no attempt to explain what that basis might be. On remand, if the city adheres to its position that a conditional use permit for the proposed cellular facilities is foreclosed under SMC 18.60.050(H), even if those facilities meet the relevant conditional use criteria, simply because the existing water tower structure is also a nonconforming situation, it must explain that position.

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[11] SMC 18.01.005 provides the following definition:

> "Structure: Anything constructed or built, an edifice or building of any kind, or any piece of work artificially built up or composed of parts jointed together in some definite manner."

C. Tower Height

One of the reasons given by the city for concluding that the existing water tower is a nonconforming structure is its height. Citing SMC 18.65.080, the city found that the water tower exceeds the 35-foot height limit imposed in the R-1 zone.

Petitioner points out that the 35-foot height limit imposed by SMC 18.65.080 provides "the maximum height of all dwellings shall be limited to 35 feet." Petitioner contends the water tower is not a dwelling. Petitioner argues SMC 18.55.020 imposes a 185-foot height limit for "towers," and the water tower complies with that height limit. We see no obvious flaws in petitioner's arguments. The water tower does not appear to be rendered nonconforming by virtue of its height. If the city maintains a contrary position on remand, it must better explain that position.

D. Public Building or Structure

Another reason given by the city for finding that the water tower is nonconforming is that it falls within the category of "public buildings or structures," which are not allowed in the R-1 zone. According to petitioner, while the water tower may have qualified as a public building or structure when it was first constructed by the city as part of the city water system, it has not been owned by the city or part of the water system for many years. The water tower has been privately owned, not publicly owned, for many years. Petitioner contends that it is therefore incorrect to view the water tower as a public building or structure.

We agree with petitioner that the city has not provided an adequate explanation for why it views the disputed water tower as a public building or structure. If the city maintains that position and believes the water tower's status as a public building or structure renders the water tower a nonconforming use or structure, it must provide a better explanation for that position.

E. Loss of Status as a Nonconforming Structure

SMC 18.03.090.40(1) sets out the circumstances in which the right to continue a nonconforming use may be terminated:

> "The nonconforming use of a building, structure, or land shall be deemed to have terminated if the building, structure, or land ceases to be occupied by a permitted or legally nonconforming use for any reason for a continuous period of one year. * * * "

Citing SMC 18.03.090.40(1) and the fact that the water tower has not been used for any purpose for many years, the city found that "[s]ince the use of the structure has been terminated, it can no longer be used as the basis for a new conditional use proposal." Record 14.

Petitioner offers two responses to the above finding. First, petitioner argues that SMC 18.01.005 defines "nonconforming use" to include "any use which lawfully existed on the effective date of this code." According to petitioner, the effective date of the SMC was April 17, 2006. Because the use of the water tower as a part of the city's water system had ceased long before that date, petitioner argues the water tower is not accurately viewed as part of a nonconforming use. Petitioner's argument is a bit obscure, but we understand petitioner to argue that the water tower was an "unused" nonconforming structure on April 17, 2006, not a nonconforming *use*, and that the water tower remains an "unused" nonconforming structure today.

On remand, if the city continues to believe the water tower is a nonconforming situation and that that status plays a role in applying the conditional use criteria at SMC 18.03.060.060, the city must respond to the above argument.

Petitioner next argues that the city fails to recognize that the SMC distinguishes between nonconforming *uses* and nonconforming *structures*. Even if the "use" of the water tower as part of the city's water system has been terminated under SMC 18.03.090.40(1), that does not mean the nonconforming water tower structure that has been left behind is also

terminated. In fact, petitioner contends that termination of nonconforming structures is governed by SMC 18.03.090.40(2), which provides as follows:

> "Nonconformance with any development standard or condition other than building setback, coverage, or height shall be deemed terminated if the building, structure, or land ceases for any reason to be occupied by a permitted or legally nonconforming use for a continuous period of one year."

Like many sections of the SMC, SMC 18.03.090.40(2) is awkwardly phrased. Petitioner reads SMC 18.03.090.40(2) as though it reads something like the following:

> "A structure that is nonconforming because it does not comply with any development standard or condition *other than building setback*, coverage, *or height* shall be deemed to lose its right to continue as a legal nonconforming structure if the building, structure, or land ceases for any reason to be occupied by a permitted or legally nonconforming use for a continuous period of one year."

The language quoted immediately above almost certainly expresses what the city meant when it adopted the language that actually appears at SMC 18.03.090.40(2) and we do not understand the city to interpret and apply SMC 18.03.090.40(2) differently. Petitioner appears to be correct that the SMC distinguishes between nonconforming uses and nonconforming structures. Even if the right to continue nonconforming use of the water tower as part of the city's municipal water system has been extinguished under SMC 18.03.090.40(1), it appears that the water tower is nonconforming solely because of its intrusion into the building setback. Under SMC 18.03.090.40(2), the water tower's right to continue as a nonconforming structure appears to be protected. If that is not the case, the city must explain why on remand.

The ninth and tenth assignments of error are sustained.

The city's decision is remanded.