BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WENDY SIPOREN, SHAREEN VOGEL,
CHRISTINE LACHNER and MEDFORD
CITIZENS FOR RESPONSIBLE DEVELOPMENT,
Petitioners,

vs.

CITY OF MEDFORD,
Respondent,

and

WAL-MART STORES, INC.,
Intervenor-Respondent.

LUBA No. 2006-124

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of petitioners.

John R. Huttl, Medford, filed a response brief and argued on behalf of respondent.

E. Michael Connors, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine LLP.

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

REMANDED 09/07/2007

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

Petitioners challenge a city resolution that was adopted in response to *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005) (*Wal-Mart I*). In *Wal-Mart I*, we remanded an earlier city resolution that denied intervenor Wal-Mart's application for site plan and architectural review for a retail store.

FACTS

The procedural twists and turns that this matter has taken do not make for easy reading. But most of the parties' arguments rely on and assign legal significance to a number of those twists and turns, making it necessary to describe them in some detail before turning to the parties' arguments. The city supplied a useful detailed statement of the facts in its response brief. Response Brief 4-13. The below summary of facts is largely taken from that more detailed summary.

A. The Site Plan and Architectural Commission (SPAC) Initial Decision

In 2004, SPAC approved Wal-Mart's application for site plan and architectural review for a 206,533 square foot retail store. Petitioners Siporen, Vogel and Lachner appeared before SPAC, as did another individual opponent (Mansfield) and South Gateway Partners (SGP). SPAC found that traffic issues had been adequately addressed by Wal-Mart's Traffic Impact Analysis (TIA). SPAC also found that compatibility issues had been adequately addressed.[1]

> "Regarding compatibility, SPAC adopted as its findings the applicable provisions of the staff report and Wal-Mart's application materials. That [staff] report in turn referred to exhibits. The findings and exhibits showed:

[1] Throughout this appeal the parties have distinguished between "compatibility issues" and "traffic issues." Although the precise scope of the issues included in each of those categories is not entirely clear to us, we will follow the parties' lead in generally referring to those general categories of issues.

> "Size and Footprint: Building size meets code requirements with respect to lot size. Use of neighboring property was for parking, a permitted use in the neighboring zone, and otherwise could be cured by lot line adjustment.
>
> "Orientation: Building entrance towards Center Drive was supported by the fact that a regional shopping center was located across Center Drive to the east, and a railroad right-of-way, fuel oil distribution center and vacant lots were located across South Pacific Highway to the west. Landscaping and building features would satisfy concerns over orientation.
>
> "Single Story: No provision of the Medford Land Development Code required a multiple story building, and the building height meets code requirements, given site size and setback requirements, an[d] was compatible when compared to surrounding development." Respondent's Brief 5.

B. The First City Council Decision

Petitioners Siporen, Mansfield and SGP appealed SPAC's decision to the city council. After an appeal hearing at which a number of compatibility and transportation issues were raised, the city council adopted Resolution 2004-116 in which it denied Wal-Mart's application. Resolution 2004-116 affirmed SPAC's decision on traffic issues, and rejected petitioners and SGP's traffic related arguments. However, the city council denied Wal-Mart's application, based on the city council's own findings that the proposed store would not be compatible with surrounding uses.

C. The First Round of LUBA Appeals (*Wal-Mart I*)

None of the petitioners in the present appeal filed an appeal with LUBA to challenge Resolution 2004-116. In response to Resolution 2004-116, Wal-Mart and SGP separately appealed Resolution 2004-116 to LUBA. Those separate appeals were consolidated for LUBA review. Petitioner Siporen intervened in the Wal-Mart appeal (LUBA No. 2004-095) on the side of the city but did not intervene in SGP's appeal (LUBA No. 2004-096). Wal-Mart intervened on the side of the city in LUBA No. 2004-096. Although petitioner Siporen intervened in LUBA No. 2004-095, she did not file a brief. In LUBA No. 2004-095 the city

and Wal-Mart briefed compatibility issues, and in LUBA No. 2004-096 SGP, Wal-Mart and the city briefed the transportation issues. The city offers the following description of LUBA's decision in *Wal-Mart I*:

> "On March 11, 2005, [LUBA] issued its final opinion and order in the two appeals, remanding each to the City. In the remand of LUBA [No.] 2004-095, [LUBA] upheld Wal-Mart's assignment of error, and instructed the City Council to conduct its review for compatibility under its limited role pursuant to Medford Code 10.053. In the remand of LUBA [No.] 2004-096, [LUBA] upheld SGP's assignments of errors, and instructed the city to make proper findings on the legal questions raised by SGP."[2] Respondent's Brief 8.

D. The City Council's November 17, 2005 Hearing

Following notice to SGP and Wal-Mart and publication of its meeting agenda in a newspaper, the city held a public hearing to consider LUBA's remand. At the meeting, petitioner Siporen argued that the city should allow her to participate as a party in the remand proceedings. The city took the position that because petitioner Siporen failed to file a brief in LUBA No. 2004-095, and did not intervene in LUBA No. 2004-096 at all, she no longer has standing to participate in this matter. Supplemental Record 6. At that November 17, 2005 public hearing, Wal-Mart proposed to the city that it be allowed to modify its application to address certain design concerns. Supplemental Record 8. Wal-Mart asked that its modified design be sent to the SPAC for review, but that SPAC's earlier findings regarding the compatibility of the proposal with regard to store size, footprint, its orientation to Center Drive and its single story design be affirmed by the city council. In making that proposal, Wal-Mart stipulated that the city could have more time to complete its review than would otherwise be the case under ORS 227.181. With regard to the traffic issues that

[2] We note here that the city's characterization that LUBA remanded LUBA No. 2004-095 and separately remanded LUBA No. 2004-096 is not accurate. LUBA remands land use decisions; LUBA does not remand the separate LUBA appeals that challenge those land use decision. In LUBA Nos. 2004-095 and 2004-096, LUBA remanded Resolution 2004-116. The city's apparent view is that this matter split into two discrete proceedings as a result of LUBA's decision in Nos. 2004-095 and 2004-096. As discussed below, in the city's view, anyone who did not appear in those LUBA appeals and file a brief on the merits is now without standing to participate further in the city proceedings on remand.

needed to be addressed on remand, Wal-Mart proposed that the city council remand those issues to SPAC for additional legal argument from SGP and Wal-Mart without any additional evidentiary hearings. SGP opposed that suggestion, arguing that additional evidentiary hearings before SPAC should be allowed.

E. Resolution 2005-270.

Two weeks after its November 17, 2005 hearing, the city council adopted Resolution 2005-270 to set out how the city intended to proceed to respond to LUBA's remand in *Wal-Mart I*. The city provides the following description of Resolution 2005-270:

> "On December 1, 2005, the City Council adopted Resolution 2005-270 reflecting [its agreement with Wal-Mart's proposal]. The City Council considered the remand from the two appeals.
>
> "After re-considering the compatibility question remanded from LUBA [No.] 2004-095, and pursuant to its limited role under Medford Code 10.053, the City Council affirmed SPAC's decision on Wal-Mart's application with respect to (a) size, (b) orientation to Center Drive, and (c) single-story construction. The Council relied on the April 2, 2004 staff report. That [staff] report in turn referred to exhibits. Those reports and exhibits list the facts to support the council's findings of compatibility on the above three issues.
>
> "However, with respect to the compatibility of the design elements of Wal-Mart's application, the Council then remanded the application to SPAC to consider the compatibility issues related to the proposed design modifications after notice and a public hearing on a revised application. Wal-Mart stipulated to this remand explaining it had a revised application incorporating the design modifications.
>
> "In considering the traffic questions remanded from LUBA [No.] 2004-096, the City Council remanded the matter to SPAC to take additional argument only from Wal-Mart, SGP and staff. The Council's remand to SPAC was to consider only the four legal questions raised by SGP in LUBA [No.] 2004-096.
>
> "No party appealed to [LUBA] from City Council Resolution 2005-270." Respondent's Brief 9.

F. SPAC's Decisions on Remand

The city provides the following description of the SPAC decisions on remand:

> "On February 21, 2006, SPAC considered, as two separate agenda items, Wal-Mart's remanded application. On agenda item 50.1, SPAC considered the remanded and revised plans. Because the original application's design elements had been significantly revised, the City published a new notice with respect to the public hearing on remand of the design elements.
>
> "Wal-Mart representatives appeared and described how the revised plans were compatible. Siporen, Vogel and [Citizens for Responsible Development (CRD)] appeared and argued the merits [of] Wal-Mart's revised design application. SPAC directed staff to prepare a final order of approval to be brought back to the meeting of March 17, 2006.
>
> On agenda item 50.2, SPAC continued the matter until March 3, 2006. On March 3, 2006, SPAC heard only legal argument from counsel for Wal-Mart, SGP and the City. Siporen appeared to speak but was denied standing. [An attorney] submitted a letter on behalf of CRD addressing standing and traffic issues. After considering arguments, SPAC ordered staff to prepare a final order for the meeting of March 17, 2006.
>
> "On March 17, 2006 SPAC's agenda listed items 20.3 and 20.4 as separate agenda items for final orders. Agenda item 20.3 was the final order approving the revised and remanded plans. Agenda item 20.4 was the final order approving the decision relating to traffic issues on Wal-Mart's application." Respondent's Brief 9-10.

G. The City Council's Decisions on Remand

SGP and petitioner CRD appealed the SPAC decisions to the city council. On June 1, 2006, the city council held separate appeal hearings on each of the two SPAC orders. Those orders were listed as separate agenda items and the city council took separate action on each item. On one agenda item, the city council voted to uphold SPAC's order that found the revised design compatible with surrounding uses. On the other agenda item, the council voted to uphold SPAC's order on the traffic issues identified by LUBA in *Wal-Mart I.* At its June 15, 2006 meeting the city council voted to approve Resolution 2006-141 (which affirmed SPAC's decision concerning building design compatibility) and separately voted to approve Resolution 2006-142 (which affirmed SPAC's remand decision concerning traffic issues). Resolutions 2006-141 and 2006-142 only have minor wording differences that serve to explain that Resolution 2006-141 is being adopted to resolve design issues and Resolution

2006-142 is being adopted to resolve traffic issues. Record 30, 79. Both resolutions are supported by the same six-page findings document. Record 80-85.

H. The Present Appeal Before LUBA (LUBA No. 2006-124)

SGP filed separate appeals at LUBA to challenge Resolution 2006-141 (LUBA No. 2006-112) and Resolution 2006-142 (LUBA No. 2006-113). Petitioners filed one appeal, and in their notice of intent to appeal they identify only Resolution 2006-141 (LUBA No. 2006-124). Petitioners moved to intervene in SGP's appeals. Although the city opposed that motion, LUBA allowed petitioners' motion to intervene in LUBA Nos. 2006-112 and 2006-113. However, on January 10, 2007, SGP moved to dismiss its appeals. On January 22, 2007, LUBA bifurcated LUBA No. 2006-124 from SGP's appeals and issued a final opinion and order on January 22, 2007 dismissing SGP's appeals. Petitioners did not oppose SGP's motion to dismiss and did not appeal LUBA's final opinion and order dismissing SGP's appeals to the Court of Appeals. On January 23, 2007, one day after LUBA dismissed SGP's appeals, petitioners filed their petition for review in LUBA No. 2006-124.

MOTION TO ALLOW REPLY BRIEF

Petitioners move for permission to file a reply brief to address respondent's argument about the legal effect of SGP's withdrawal of their appeals. Citing petitioners' concession that they anticipated SGP's action, Wal-Mart objects.

Under OAR 661-010-0039 a reply brief must be limited to "new matters raised in the respondent's brief." Given the timing of SGP's dismissal of its appeal one day before petitioners filed their petition for review and given the significance of the legal issues respondents raise, we believe a reply brief is appropriate.

Petitioners' motion for permission to file a reply brief is granted.

FIRST ASSIGNMENT OF ERROR

There are several key legal issues that permeate petitioners' arguments and respondent's and Wal-Mart's defense of the city's decision. We turn directly to those key legal issues before attempting to resolve petitioners' first assignment of error.

A. Petitioners' Failure to Appeal Resolution 2005-270.

As respondent and Wal-Mart (together respondents) correctly point out, a *final* city decision that applies city land use regulations is a "land use decision," as ORS 197.015(11)(a) defines that term.[3] Respondents are also correct that according to LUBA's rules a decision is "final" "when it is reduced to writing and bears the necessary signatures of the decision maker(s)." OAR 661-010-0010(3).[4] Resolution 2005-270 is (1) reduced to writing, (2) signed by the mayor, and (3) can be characterized as applying certain city land use regulations. Resolution 2005-270 set out the bifurcated and limited procedure that the city planned to follow to respond to LUBA's remand in *Wal-Mart I*. Respondents contend that if petitioners objected to that procedure, they should have immediately appealed Resolution 2005-270 to LUBA. Because petitioners failed to do so, respondents contend, they may not do so now in this appeal of Resolution 2006-141, which the city adopted to respond to design and compatibility issues.

Respondents recognize that several LUBA decisions have considered whether a local government decision that purports to render a *final* decision with regard to one aspect of a land use permit application, while at the same time *remanding* another aspect of the land use

---

[3] As defined by ORS 197.015(11)(a), a "land use decision" includes "[a] final decision or determination made by a local government * * * that concerns the adoption, amendment or application of" "[a] land use regulation." ORS 197.015(11)(a)(A)(iii).

[4] OAR 661-010-0010(3) provides the following definition:

> "'Final decision': A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

permit application for further proceedings before the local government, is a "final" decision within the meaning of ORS 197.015(11)(a). We have concluded that such partially final decisions are not "final," within the meaning of ORS 197.015(11)(a), until the local remand proceedings are complete and a final decision has been rendered to approve or deny the permit application. *Yun v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2007-003, April 24, 2007); *Bessling v. Douglas County*, 39 Or LUBA 177, 179-80 (2000); *Tylka v. Clackamas County*, 20 Or LUBA 296, 302 (1990). We applied that principle in *Riddle Farms, Inc. v. Polk County*, 41 Or LUBA 47, 49-50 (2001), where we dismissed an appeal of a county order that denied a permit applicant's motion to dismiss an opponent's local appeal. We dismissed that LUBA appeal, because the local appeal remained pending and the county had not yet rendered a final decision on the permit application. The decision at issue in *Gould v. Deschutes County*, 51 Or LUBA 493 (2006), is very similar to Resolution 2005-270. In that case, the petitioner appealed a board of county commissioners order that called up a hearings officer decision for review by the board of county commissioners. That board of county commissioners decision ruled on certain procedural issues and limited petitioner's presentation at a public hearing. Petitioner sought review of the rulings in the board of commissioners' order while the board of commissioners' review of the hearings officer decision remained pending. We dismissed the appeal:

> "* * * Nothing cited to us in the [board of commissioners'] order would preclude the county from changing its mind with respect to how the hearing is conducted, for example. Any errors procedural or otherwise that the county may have committed in issuing [the order] or in how it conducts the appeal before the commissioners must be challenged by appealing the county's final decision on the conditional use application. Accordingly, [this appeal] must be dismissed." *Gould*, 51 Or LUBA at 496.

Respondents argue that the above cases were wrongly decided and urge that we reconsider them. We have considered respondents' arguments, but we are not persuaded by those arguments.

Respondents first note that Resolution 2005-270 satisfies the requirements set out in the OAR 661-010-0010(3) definition of "final decision," and that ORS 197.015(11)(a) simply requires that a land use decision be "final" without defining that term. Therefore, respondents reason, OAR 661-010-0010(3) and ORS 197.015(11)(a) are not inconsistent and LUBA therefore may not disregard the definition of "final decision" in OAR 661-010-0010(3). Petitioners contend the above decisions improperly disregard or fail to apply the definition in OAR 661-010-0010(3).

We reject respondents' apparent thesis that OAR 661-010-0010(3) was adopted to provide a complete answer to whether a decision qualifies as a "final decision," as that term is used in ORS 197.015(11)(a). OAR 661-010-0010 expressly provides that the definitions set out in that rule apply in LUBA's rules.[5] OAR 661-010-0010(3) makes no claim to define statutory terms. LUBA's rules are concerned for the most part with *when* a decision becomes final, not with *whether* a decision is a "final decision," within the meaning of ORS 197.015(11)(a).[6] It may be that OAR 660-010-0010(3) is properly interpreted to establish minimum requirements for finality, in the sense that a land use decision will not satisfy the "finality" requirement in ORS 197.015(11)(a) until it is reduced to writing and bears the necessary signatures, as OAR 661-010-0010(3) requires. *But see Friends of the Creek v. Jackson County*, 165 Or App 138, 141, 995 P2d 1204 (2000) (finding it unnecessary for the court to decide if it agreed with LUBA that a land use decision must be "in the form of a written decision"). But that does not necessarily mean that *any* decision that is reduced to

[5] As relevant, OAR 661-010-0010 provides that the definitions apply "[*i]n these rules*, unless the context or subject mater requires otherwise[.]" (emphasis added).

[6] For example, OAR 661-010-0015(1)(a) requires that a notice of intent to appeal be filed with LUBA "on or before the 21st day after the date the decision sought to be reviewed becomes final * * * [.]"

writing and bears the necessary signatures by those facts alone is a "final decision," within the meaning of ORS 197.015(11)(a). We reject respondents' arguments to the contrary.[7]

Respondents next argue that LUBA appears to believe that only decisions that approve or deny an application for permit approval can be a final decision, within the meaning of ORS 197.015(11)(a). Respondents misstate LUBA's position. *Yun*, *Gould*, *Bessling*, *Tylka*, and *Riddell Farms* all concerned interlocutory decisions that were issued in response to a permit application. As a matter of fact, those cases involved applications for land use permit approval. But neither the Court of Appeals nor LUBA have ever said only final decisions issued in response to permit applications can be "final decisions" within the meaning of ORS 197.015(11)(a). *See Terraces Condo. Assn. v. City of Portland*, 110 Or App 471, 823 P2d 1004 (1992) (city decision interpreting land use regulation provision not to apply); *Wolfgram v Douglas County*, 52 Or LUBA 536 (2006) (Department of Environmental Quality land use compatibility statement is a land use decision); *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408 (2003), *aff'd* 193 Or App 151, 88 P3d 322 (2004) (city resolution raising land use appeal fees is a land use decision).

Respondents next argue that *Yun*, *Gould*, *Bessling*, *Tylka*, and *Riddell Farms* are inconsistent with *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001) and *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

In *City of Grants Pass*, Josephine County adopted an ordinance to amend its zoning map. But that ordinance included no findings regarding zoning map amendment approval criteria and simply referenced an earlier county decision that applied zoning ordinance

[7] Respondents cite *Columbia River Television v. Multnomah County*, 299 Or 325, 702 P2d 1065 (1985) for the proposition that local governments retain the right to approve a single application for approval of a land use permit by adopting several different and separately appealable land use decisions that address "different components of the application." Intervenor-Respondent's Brief 16. *Columbia River Television* lends no support for that proposition. *Columbia River Television* simply holds that a local government may adopt local legislation that has the effect of delaying the date a land use decision becomes final after the date it would otherwise be considered final under LUBA's rules.

criteria and approved the zone change. That earlier decision was reduced to writing and included a notice of right to appeal to LUBA. No party appealed that earlier decision to LUBA. In dismissing the appeal of the ordinance that was later adopted to amend the zoning map to conform to the earlier zoning map amendment, LUBA explained that the county decision to approve the zoning map amendment was made in the earlier unappealed decision.

The Josephine County Board of Commissioners' decision to approve the requested zoning map amendment is unlike the city council's decision in this to resolve certain issues in favor of Wal-Mart and remand other issues to SPAC for their consideration via Resolution 2005-270. The Josephine County Board of Commissioners' land use decision was complete when the first decision was adopted. The subsequent ordinance applied no land use standards and simply amended the zoning map to conform to the earlier land use decision. In the present appeal, the land use decision-making was just getting started when the city adopted Resolution 2005-270.[8] *City of Grants Pass* does not support respondents' position that Resolution 2005-270 is properly viewed as a final land use decision.

In *DLCD v. City of McMinnville*, the City of McMinnville adopted an amendment to the city's comprehensive plan residential land needs analysis in anticipation of a subsequent comprehensive plan amendment to amend the city's urban growth boundary. Respondents suggest that *DLCD v. City of McMinnville* supports their position that the city's decision on Wal-Mart's permit application can take the form of multiple decisions that are each separately appealable to LUBA. We rejected a similar argument in *Riddell Farms* that *DLCD v. City of McMinnville* supports the proposition that a land use permit application can be decided by multiple final decisions that are separately appealable to LUBA:

---

[8] In this respect Resolution 2005-270 is unlike the city decision that was rendered on remand in *Friends of Jacksonville v. City of Jacksonville*, 189 Or App 283, 293, 76 P3d 121 (2003). In that case the city council held a public hearing that was followed by a single written decision to approve a land use permit. There was no partial decision teamed with a remand for additional proceedings in *Friends of Jacksonville*.

> "*DLCD v. City of McMinnville* involved the City of McMinnville's periodic review of its urban growth boundary (UGB). As part of periodic review, the city is required to comply with ORS 197.296(3) through (5). ORS 197.296(3) requires a local government to conduct a buildable lands inventory and analysis. ORS 197.296(4) and (5) provide a local government with methods to amend its UGB and/or its comprehensive plan and ordinances if the buildable lands inventory indicates the UGB is insufficient to meet the identified need. The City of McMinnville conducted its buildable lands inventory and issued a final decision concerning the inventory before it initiated efforts to select the measures necessary to respond to the need identified by the inventory. The city adopted its buildable lands analysis as an amendment to its comprehensive plan. Another comprehensive plan amendment would be necessary to amend the UGB or otherwise proceed under ORS 197.296(4) or (5). Comprehensive plan amendments are land use decisions. ORS 197.015[(11)](a)(A)(ii). We held that there was no reason why the city could not adopt one land use decision under ORS 197.296(3) and another separate land use decision under ORS 197.296(4) and (5).
>
> "*DLCD v. City of McMinnville* is inapposite. The county's denial of the motion to dismiss in this case is part of the county's consideration of the farm stand proposal. The county's purported final decision is an interlocutory decision rather than the first step in a sequential land use process with multiple separate decisions." 41 Or LUBA at 50-51.

DLCD v. City of McMinnville simply recognizes that some complex planning projects, such as UGB amendments, which will necessitate at least one comprehensive plan amendment to amend the comprehensive plan map that displays the adopted UGB, may also require other comprehensive plan amendments to justify amending the UGB. In the case of *DLCD v. City of McMinnville*, the comprehensive plan buildable lands analysis needed to be adopted as part of the comprehensive plan to justify the UGB amendment. But the amendment to incorporate the buildable lands analysis would have legal effect and might be relied on in the future to justify other UGB amendments, even if the subsequent UGB amendment that was contemplated at the time the buildable lands analysis was adopted does not later come to pass. In that sense they were independent comprehensive plan amendments and there is no reason why they should not be viewed as separately appealable decisions. A comprehensive plan amendment has force and effect and is deemed acknowledged under

ORS 197.625(1) if it is not appealed to LUBA, even if another comprehensive plan amendment is contemplated later, but is not subsequently adopted.

However, the principle in play in *DLCD v. City of McMinnville* is different from the principle respondents espouse here. Respondents purport to break a single permit application into several legal issues, decide each of those legal issues with a separate decision, and assert that each of those separate decisions is a final decision that must be separately appealed to LUBA. But the city's decision to adopt Resolution 2005-270 did not have any permanent binding effect on the city. Traffic, compatibility and other design issues remained pending before the city and were yet to be decided following the adoption of Resolution 2005-270. We see no reason why the city could not have changed its mind at any time after it adopted Resolution 2005-270, before it adopted Resolutions 2006-141 and 2006-142, and taken a very different approach to respond to LUBA's remand. The city could also have ultimately denied Wal-Mart's application based on traffic issues, compatibility issues, or other issues raised by the modified application. In any of those events, any pending LUBA appeal of Resolution 2005-270 would almost certainly have been rendered moot. Because Resolution 2005-270 was an interlocutory decision that decided certain procedural issues and purported to resolve some but not all of the substantive issues posed by LUBA's remand in *Wal-Mart I*, we remain of the view that it was not a "final" decision, within the meaning of ORS 197.015(11)(a). Petitioners are free to challenge Resolution 2005-270 in this appeal if they filed a timely appeal of the city's final decision on Wal-Mart's permit application in this matter. [9] We next consider the legal consequence of petitioners' failure to appeal Resolution 2006-142.

[9] The city also points out that the Court of Appeals reviews LUBA decisions that affirm in part and remand in part and that the Court of Appeals in some circumstances reviews interlocutory trial court orders. We fail to see how either point has any material bearing on whether a city council decision that purports to resolve some issues regarding an application for permit approval and remand that application for SPAC to resolve other issues is a "final decision," within the meaning of ORS 197.015(11)(a).

B. The Legal Consequence of Petitioners' Failure to Appeal Resolution 2006-142

Respondents argue that petitioners may not challenge the city's resolution of traffic issues in Resolution 2006-142 because they chose to appeal only Resolution 2006-141 and chose to attempt to challenge Resolution 2006-142 only via their intervention in SGP's appeal of Resolution 2006-142. Now that that appeal has been dismissed, respondents contend Resolution 2006-142 is no longer before LUBA in this appeal and petitioners' challenge to any of the traffic issues resolved in Resolution 2006-142 cannot be considered by LUBA.

Petitioners agree with respondents that LUBA "lacks jurisdiction over the city's decision in Resolution 2006-142." Reply Brief 1. But petitioners argue they preserved their complaints about traffic issues by repeatedly raising those traffic-related complaints in the local proceedings that led to adoption of Resolution 2006-141. Both petitioners and respondents erroneously analyze the jurisdictional question.

There is but one city decision before us. That decision is the city's decision to approve Wal-Mart's permit application. That decision includes the city's resolution of compatibility, design and traffic issues, as well as the city's decisions regarding the procedures it followed during its remand proceedings. The only real question is whether petitioner filed a timely appeal of the city's *final* decision in this matter.

The analysis that we applied to reject respondents' arguments concerning petitioners' failure to appeal Resolution 2005-270 arguably applies to Resolutions 2006-141 and 2006-142 as well. For example, the city could have proceeded to decide what the parties refer to as the compatibility and design issues first and issued Resolution 2006-141 to resolve those issues in June 2006. Then the city could have turned to the remaining traffic issues and adopted Resolution 2006-142 to resolve the remaining traffic issues six months later in December 2006. If the city had proceeded in that way, it would be clear under *Yun, Gould, Bessling*, *Tylka,* and *Riddell Farms* that Resolution 2006-141 would not be the city's final

decision, and that the city's decision on Wal-Mart's application would become final when the city later issued Resolution 2006-142. In an appeal of Resolution 2006-142, petitioners would be able to challenge any interlocutory rulings in Resolutions 2005-270 and 2006-141. We turn to Resolutions 2006-141 and 2006-142.

As we have already noted, Resolutions 2006-141 and 2006-142 are nearly identical. The text of Resolution 2006-142 is set out below:

"RESOLUTION NO. 2006-142

"A RESOLUTION affirming the Site Plan and Architectural Commission's approval of plans for a 206,533 (previously 207,784) square foot retail commercial building on a 20.51-acre site, located on the west side of Center Drive and the east side of South Pacific Highway, approximately 400 feet north of Belknap Road, within a C-R (Regional Commercial) and I-G (General Industrial) zoning district. *(AC-03-182 Remand Traffic)*

"WHEREAS, the Site Plan and Architectural Commission's approval in this matter was appealed to the City Council; and

"WHEREAS, the City Council reviewed the applicable criteria and heard legal arguments on those conditions; now, therefore,

"BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MEDFORD, OREGON:

"1. The decision of the Site Plan and Architectural Commission's approval of the WalMart application is affirmed;

"2. As set forth in the accompanying Findings of Fact and Conclusions of law, this decision is based upon the record of the original application, the initial appeal of the approval thereof to the City Council, the Appeal to LUBA from the council's denial based on non-compatibility, the remand hearing and decision of the City council, the rehearing after revised plans and renewed public notice *and the reconsideration of traffic issues* by Site Plan and Architectural Commission, and the subsequent appeal to the City Council heard on June 1, 2006.

"PASSED by the Council and signed by me in authentication of its passage this 15 day of June, 2006.

ATTEST: Glenda Owens Gary Wheeler .

City Recorder Mayor" Record 55 (emphases added).

The only two differences between Resolutions 2006-141 and 2006-142 are as follows: (1) in Resolution 141, the above-emphasized reference to "(AC-03-182 Remand Traffic)" is changed to "(AC-03-182 Remand and Revision)," and (2) the emphasized reference to "and the reconsideration of traffic issues" is omitted from Resolution 2006-141. Resolutions 2006-141 and 2006-142 are otherwise identically worded, and both resolutions are supported by the same six-page findings document. Record 6-11; 56-61. That findings document addresses compatibility, design and traffic issues. Resolutions 2006-141 and 2006-142 were adopted at the same meeting on June 15, 2006. The city voted to approve Resolution 2006-141 and then immediately took up, and voted to adopt, Resolution 2006-142. Record 112. Assuming the minutes are accurate, it appears the city council adopted Resolution 2006-142 a few minutes *after* it adopted Resolution 2006-141. However, for all practical purposes, the city council adopted the two resolutions contemporaneously.

If Resolution 2006-141 and Resolution 2006-142 are properly viewed as separate and independent decisions, then petitioners' failure to appeal the latter would be fatal with respect to any challenges to the determinations made in Resolution 2006-142. *But see Dyke v. Clatsop County*, 97 Or App 70, 73, 775 P2d 331 (1989) (LUBA erred in concluding it lacked jurisdiction to consider challenges to a statewide planning goal exception, where a notice of intent to appeal identified only a conditional use permit to authorize a landfill on forest land and did not identify the separately approved exception that was necessary to grant the conditional use permit). However, Resolutions 2006-141 and 2006-142 are not really different decisions. The city's reasoning that led it to approve Wal-Mart's permit application is set out in a single findings document. Its decision to approve that permit application via two nearly identical resolutions is a purely artificial construct. It could just as easily have

adopted one resolution, and but for the two minor wording differences in Resolutions 2006-141 and 2006-142 noted above, it did adopt one resolution. As a matter of substance, there was but one city decision on Wal-Mart's permit application. Petitioners' notice of intent to appeal, which identified Resolution 2006-141 as the subject of their appeal, was sufficient to appeal the city's decision to approve Wal-Mart's permit application. Petitioners' failure to separately appeal Resolution 2006-142 does not preclude petitioners from raising traffic issues in this appeal.

C. The City's Decision to Deny Petitioners Standing to Participate in the City's Remand Proceedings

In deciding how to proceed following a LUBA remand, a local government must determine what issues must be resolved under the remand and how it will go about addressing those issues. Regardless of the issues that must be addressed on remand and the procedures that will be followed to address those issues, questions may arise concerning whether individual parties are entitled to participate in those remand proceedings. We address those questions separately below.

1. Issues and Procedures on Remand

In deciding what issues a local government wishes to consider following a LUBA remand, a local government is certainly entitled to limit the issues it will consider on remand to those issues that it *mus*t address to adequately respond to the LUBA remand, although the local government is also free to expand the issues it will consider on remand. A local government also enjoys considerable discretion in selecting the procedures it will follow on remand.

> "As a general matter, the scope of proceedings on remand from LUBA is governed by the terms of the remand and any applicable local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required to repeat on remand the procedures applicable to the initial proceeding). A local government is entitled to limit its consideration on remand to correcting the deficiencies that were the basis for LUBA's remand.

> *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419, *rev'd on other grounds* 104 Or App 683 (1990). Conversely, while not required to do so, a city may expand the scope of its remand hearing beyond the scope of the remand. *Schatz v. City of Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992)." *CCCOG v. Columbia County*, 44 Or LUBA 438, 444 (2003).

Although a local government is entitled to limit the issues it will consider on remand to those that must be addressed to respond to the remand, there are a variety of factors that may complicate a local government's job in distinguishing between issues that must be considered on remand and issues that are resolved or have been waived by virtue of prior local or appellate proceedings and no longer need be addressed in the remand proceedings. The procedures the local government elects to follow on remand may broaden the issues that must be addressed on remand. For example, if the local government holds additional evidentiary hearings, or even holds additional hearings to allow additional argument only, those hearings may have the effect of expanding the issues that must be addressed on remand. ORS 197.763(7).[10] Additionally, allowing an applicant to modify the proposal that led to the remand in the first place may raise issues concerning approval criteria that might otherwise be resolved or waived issues if the application had not been modified. But with the caveat that a local government may encounter difficulties in determining what issues it must address to adequately respond to a remand, a local government clearly has authority to limit its proceedings on remand to addressing those issues and may select the procedures it believes are most appropriate, provided those procedures do not improperly exclude any parties who are entitled to participate in those remand proceedings.

---

[10] ORS 197.763(7) provides:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

2. Parties on Remand

In an appeal of a quasi-judicial land use decision, a petitioner at LUBA may raise any issue that was raised and properly preserved during the local land use proceedings. ORS 197.835(3).[11] Under ORS 197.835(3), so long as an issue was raised by "any participant," the issue may be raised in an appeal to LUBA. *Kemp v. Union County*, 50 Or LUBA 61, 63 (2005); *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111, 123 (2001); *Spiering v. Yamhill County*, 25 Or LUBA 695, 714 (1993). A petitioner at LUBA need not have raised the issue himself or herself. Petitioners argue a similar rule applies in remand proceedings. The city may limit issues to the issues that must be addressed to respond to LUBA's remand in *Wal-Mart I*; however, if the city allows public hearings to address those issues, it may not bar persons from addressing those issues simply because they did not participate in *Wal-Mart I* or file a brief in that appeal.

As we have already noted, the city took the position at its November 17, 2005 hearing that petitioners lacked standing to participate in the city's proceedings following LUBA's remand. The city's cited reason for that position was the failure of some petitioners to intervene in *Wal-Mart I*, and the failure of petitioner Siporen to file a brief in *Wal-Mart I* after she intervened in Wal-Mart's appeal. If this were a case of civil litigation in a judicial court, petitioners' failure to remain active litigants at each level of appeal might well result in their loss of standing to participate further. But this is not a case of civil litigation in a judicial court. It is a quasi-judicial land use proceeding that is back before the City of Medford by virtue of LUBA's remand in *Wal-Mart I*. Petitioners' failure to file a brief or otherwise participate in *Wal-Mart I* is not a basis for denying them standing to participate in the city's proceedings on remand.

---

[11] ORS 197.835 sets out LUBA's scope of review, and subsection three of that statute provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

In *Lengkeek v. City of Tangent*, 52 Or LUBA 509, 512 (2006), we noted that the right of a local government to limit participation in remand proceedings was unclear:

> "As the parties note, in *Crowley v. City of Bandon*, 43 Or LUBA 79, 96 (2002), we stated that whether a local government 'may limit participation in the proceedings on remand to the parties in the original appeal is an open question.' We now answer that question, at least as it applies to the present circumstances. In this case, as we have already noted, the applicant modified his proposal and submitted additional documentation in support of that amended application. In such a case, while the city may limit legal argument and any evidentiary submittals on remand to argument and evidence that is relevant to the issues that must be resolved on remand, we do not believe the city may limit participation to the parties who participated in the first appeal.
>
> "Neither the parties to the first appeal nor other persons who for whatever reason did not participate in the first appeal have had an opportunity to comment on the modified application. As petitioners correctly point out, the city's own plan guarantees its citizens a right to do so. The city erred in limiting participation below to the parties in [the LUBA appeal]." (Footnote omitted.)

Wal-Mart correctly points out that at the time the city took the position that petitioners' failure to participate in *Wal-Mart I* meant they lacked standing to participate in the resulting remand proceedings, Wal-Mart had not yet modified its application. On that basis, Wal-Mart attempts to distinguish this case from our holding in *Lengkeek*.

It would needlessly further complicate this appeal if we were to explain why Wal-Mart's attempt to distinguish *Lengkeek* would not avoid a remand in this appeal. We therefore do not do so and instead extend our holding in *Lengkeek*. Even if the city had not allowed the application for permit approval that led to *Wal-Mart I* to be amended following remand, as we previously noted, this is a quasi-judicial land use proceeding in which the public has an interest in the ultimate outcome; it is not a case of civil litigation between private litigants. We now resolve any question we left unanswered in *Lengkeek* regarding whether a local government may deny standing to participate in public hearing following a LUBA remand, simply because a person did not participate in the LUBA appeal as party. We resolve that question in the negative. As this case demonstrates, a local government is

free to change its decision significantly following a LUBA remand. A person who was satisfied with a decision to deny Wal-Mart's application could easily object to a decision on remand to approve that application. That person may be limited in the issues he or she may raise in the city's remand proceedings to the issues that must be addressed to respond to LUBA's remand. But a party who otherwise has standing to participate in the city's land use public hearings under the city's land use legislations may not be denied standing to participate in those remand proceedings, simply because he or she failed to participate in the LUBA appeal.[12]

It may be that the city in this case could have simply adopted additional findings in response to our decision in *Wal-Mart I*. In that event, the city likely could have elected not to conduct any additional public hearings on remand or allow additional argument or evidence. But that is not what the city did in this case. Instead, it held a public hearing to allow Wal-Mart and SGP to present argument on the merits regarding how the city should respond on remand, and excluded petitioners from participating in that discussion.[13] Based on that limited argument, the city adopted Resolution 2005-270 to (1) allow Wal-Mart to modify its application, (2) eliminate certain compatibility issues from further consideration and (3) remand the matter for additional legal arguments before SPAC regarding transportation issues while denying petitioners a right participate in those legal arguments. In each of those three particulars, the city committed procedural error. First, while the city

---

[12] The city cites *Doob v. Josephine County*, 49 Or LUBA 724 (2005) for the proposition that LUBA denied a motion to intervene in that case "because the local rules prohibited parties from participating on remand if they did not participate in the [LUBA] appeal." The moving party in *Doob* did not challenge the local rules and, therefore, the question of whether a local government may so limit participation in remand hearings was not presented in *Doob*.

[13] There was some confusion below about whether the November 17, 2005 public hearing regarding how to respond to *Wal-Mart I* was actually a public hearing. The mayor purported to clarify that the November 17, 2005 hearing was "not a public hearing but an appeal hearing. Only the rep[resentative] of [SGP] and Wal-Mart have standing to speak on this issue." Supplemental Record 7. We understand the city to have taken the position that the November 17, 2005 public hearing was a public hearing, but that public hearing was limited to the parties in *Wal-Mart I* who filed a brief in that appeal.

was certainly free to allow Wal-Mart to amend it proposal, to do so through public hearings where petitioners were denied standing to participate was error. Second, again, while the city council is certainly free to change its mind, and determine that SPAC findings concerning the three compatibility issues are legally correct and supported by substantial evidence, it may not engage in a *quid pro quo* exchange with Wal-Mart in a public hearing at which petitioners are not allowed to participate. Finally, for reasons already explained, the city had no legal basis for denying petitioners a right to present legal argument to SPAC regarding transportation issues.

If the above identified procedural errors resulted in prejudice to petitioners' substantial rights, they provide a basis for remanding the city's decision. ORS 197.835(9)(a)(B).[14] In arguing that petitioners were not prejudiced by the city's actions, respondents offer essentially two legal theories. First, with regard to the error in not allowing petitioners to present legal arguments regarding traffic issues to SPAC and City Council, respondents argue that SGP was allowed to present legal argument on the traffic issues and petitioners had previously presented similar legal arguments. Second, respondents contend that petitioners were allowed to present argument and evidence concerning all compatibility issues.

D. Prejudice to Petitioners' Substantial Rights

As we explained in *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988):

> "Under ORS 197.835[(9)(a)(B)] the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing."

[14] ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where the decision maker:

> "Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

We reject respondents' first argument. The right that petitioners have is to "prepare and submit their case and a full and fair hearing." Petitioners' right is not preserved by allowing someone else to testify and assuming that petitioners would have nothing to add to that testimony.

Respondents' second argument presents only a slightly closer question. We have reviewed the record regarding the February 21, 2006 SPAC hearing on site design and compatibility, the March 3, 2006 SPAC hearing on traffic issues, and the June 1, 2006 city council hearing on appeals of the SPAC decisions. At or prior to those hearings petitioners submitted written testimony on a variety of topics. Record 506-36; 483-86; 169; 166-68; 163-65; 159-62. Respondents' correctly point out that some of that testimony addresses the compatibility issues that the city council removed from further consideration in Resolution 2005-270 and the traffic issues that Resolution 2005-270 determined petitioners lacked standing to address. However, it is also clear from the minutes of those hearings that the scope of remand proceedings that the city council adopted in Resolution 2005-270 was otherwise enforced. At each of those hearings, parties were advised of the limited scope of the remand proceedings adopted by Resolution 2005-270. At the February 21, 2006 SPAC meeting, immediately before petitioner Vogel testified, the minutes reflect that a SPAC commissioner "gave a reminder that the size of the building, footprint and orientation, and single-story structure could not be testified on today." Record 502. At the March 3, 2006 SPAC public hearing, the city attorney explained that only SPG and Wal-Mart had standing to present legal arguments concerning the traffic issues to SPAC. Record 477. Later in that hearing when petitioner Siporen objected to being denied standing, the city attorney advised petitioner Siporen that she did not have standing and that her failure to appeal Resolution 2005-270 precluded further argument on the question. Record 482. The city attorney advised "the city would not accept anything from persons who did not have standing." *Id.* At the June 1, 2006 city council hearing, the applicant's attorney argued to city council that it

should adhere to the limited scope of review it set out in Resolution 2005-270. Record 133. The city attorney agreed. *Id.*

Based on our review of the record, petitioners may have been given an "adequate opportunity to prepare" their case, but they were not give an adequate opportunity to "submit their case and a full and fair hearing." As far as we can tell, SPAC and the city council attempted to adhere to the limitation of the proceedings on remand, as set out in Resolution 2005-270, and repeatedly told petitioners that it was conducting such a limited remand hearing. Petitioners may have been allowed to submit written argument about traffic and compatibility issues, notwithstanding Resolution 2005-270. However, as petitioners argue under their second and third assignments of error, with the exception of a single conclusory finding in the city council's decision, there is no indication that that the issues petitioners raised in that written testimony were given any consideration by SPAC or the city council.[15] To the contrary, in the findings that the city council adopted in support of Resolutions 2006-141 and 2006-142, the city council expressly notes its adoption of Resolution 2005-270 and points out that "[t]he details and effects of that resolution were explained at the subsequent SPAC staff report and hearings on remand." Record 58. The findings go on to identify the issues that Resolution 2005-270 removed from further consideration and state "[b]ecause [petitioners] had notice of Resolution 2005-270, and did not appeal therefrom, CRD, Siporen, Vogel and Lachner are precluded from trying to argue those issues now." Record 59.

[15] While there is no indication in the record that SPAC considered petitioners' arguments that exceeded the scope set out in Resolution 2005-270, the applicant's attorney reviewed petitioners' February 21, 2006 written submittal and argued that six items were "not relevant" and that consideration of a seventh item was "precluded by the Land Use Board of Appeals decision." Record 502. The applicant's attorney went on to request "that [SPAC] review this document carefully to make sure only those portions of the document that are relevant to these proceedings [are] introduced into the record and anything not relevant not be introduced into the record." Record 503. Although SPAC apparently did not follow up on the applicant's attorney's request, and did not strike all or part of petitioners' February 21, 2006 submittal, there is no suggestion in the record or SPAC's findings that SPAC considered the portions of the February 21, 2006 submittal that the applicant's attorney objected to.

If SPAC and the city council had actually put aside Resolution 2005-270 and provided petitioners a full and fair hearing at which all of the compatibility and traffic issues they presented were considered, we almost certainly would find that there was no prejudice and therefore no basis for remanding the decision to the city to correct its errors in adopting Resolution 2005-270. However, for the reasons explained above, we cannot say that the city did so. That SPAC and the city council may not have gone through petitioners' written testimony and redacted or rejected testimony that exceeded the limitations set out in Resolution 2005-270, as Wal-Mart requested, does not mean petitioners were provided a fair opportunity to argue their case or a full and fair hearing. Similarly, the city council conclusory finding at the end of the proceedings that it would reach the same decision even if it were required to consider petitioners' arguments is not sufficient to overcome the city's consistent efforts to limit petitioners participation in the remand proceedings. Therefore, the city's procedural error in adopting Resolution 2005-270 prejudiced petitioners' substantial rights, and remand is required so that the county can take appropriate steps to correct that procedural error.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Our resolution of the first assignment of error requires that the city conduct additional proceedings on remand and makes it unnecessary to consider petitioners' second and third assignments of error, which challenge the adequacy of the city's findings. On remand the city will be required to conduct additional evidentiary proceedings to provide petitioners the substantial rights they were deprived in the city's remand proceedings, and the city presumably will be required to adopt new or supplemental findings at the conclusion of those proceedings.

The city's decision is remanded.