

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LOUISE-ANNETTE BURGESS,
5 WENDY KINCADE, SUSAN MORRE,
6 ANDREW PEARSON, MARGOT PEARSON,
7 CAROLYN VER LINDEN and DAVID S. WILSON,
8 *Petitioners,*
9

10 vs.
11

12 CITY OF CORVALLIS,
13 *Respondent.*
14

15 LUBA No. 2007-060
16

17 FINAL OPINION
18 AND ORDER
19

20 Appeal from City of Corvallis.
21

22 Anne C. Davies, Eugene, filed the petition for review and argued on behalf of
23 petitioners.
24

25 James K. Brewer, Corvallis, filed the response brief and argued on behalf of
26 respondent. With him on the brief was Fewel, Brewer & Coulombe.
27

28 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
29 participated in the decision.
30

31 REMANDED

01/02/2008

32
33 You are entitled to judicial review of this Order. Judicial review is governed by the
34 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision that grants a permit for exterior alterations to a historic movie theater.

FACTS

The Whiteside Theatre was constructed in downtown Corvallis in 1922 and is an example of Italian Renaissance architecture. When it was constructed, there was only one other theater in Oregon that was its equal. The building is significant both for its architecture and its history as one of the city’s and Oregon’s grandest theaters. The building was damaged by fire in 1927 and 1936, but was rebuilt and continued in operation as a theater. In 1989, the theater was listed as a historic resource on the city’s historical register. The theater ceased to operate in 2002.

The south and west facades of the building face sidewalks. The south facade of the building along Madison Avenue has always served as the entrance to the building and is embellished with a number of architectural details. The existing neon marquee on the south facade was added in the 1950s and replaced the original canopy. The west facade that faces NW Fourth Street is largely an unbroken brick wall, but also includes “three ground level doors, five windows, and a metal fire escape ladder,” as well as “[t]wo original lamps [that] hang above the paired exit doors.” Record 11. The west facade was used in the past to display large posters to advertise upcoming theater attractions.

Whiteside Partners, LLC (Whiteside), the current owner, wishes to convert the theater into several individual commercial uses, including a restaurant that would occupy the second floor. The decision that is the subject of this appeal makes possible a series of exterior alterations to the south and west facades of the building to, among other things, add doors and windows. Those exterior alterations, along with other proposed interior alterations, will make the desired conversion possible.

1 On the south facade, the 1950s marquee would be replaced with a replica of the
2 original 1920s marquee, and new storefront windows and doors would be added in place of
3 the existing display windows and doors. In addition, ground level doors would be added on
4 the south facade to provide access to the restaurant on the second floor. Canopies with
5 attached signs would also be added to the south facade for the new businesses and the
6 restaurant entrance.¹

7 The proposed alterations to the west facade include new storefront windows along the
8 sidewalk, along with new canopies with attached store signs. The existing original light

¹ A photograph showing the existing south facade appears at Record 987. A drawing of the proposed south facade appears at Record 984. The challenged decision includes the following more detailed description of the proposed south facade alterations:

“The proposed alterations to the southern exterior facade of the building include:

- “1. Removing the existing 1950’s neon marquee and replacing it with a replica of the original 1920’s marquee;
- “2. Replacing the non-original theater doors with new storefront windows and doors;
- “3. Installing windows where the original display windows were on the western end;
- “4. Installing entry doors where the original display windows were on the eastern end to provide access to the new restaurant on the second floor;
- “5. Installing a six-foot deep steel channel canopy over the new second floor entry doors;
- “6. Installing a 2’-6” x 8’ sign (for the new restaurant) attached to the face of the new steel channel canopy;
- “7. Adding two 2’ x 6’ signs (for the new businesses) below the new marquee;
- “8. Removing the existing non-original vertical wall mounted illuminated sign at the western corner and replacing it with a replica of the second 1920’s illuminated sign; and
- “9. Replacing the two garden boxes with replicas of the original 1920’s garden boxes.”
Record 11.

1 fixtures on the west facade would be relocated, and windows would be added for the second
2 floor restaurant. A new rooftop cornice would also be added to the west facade.²

3 The city's Historic Resource Commission (HRC) was created in 2006. It is an
4 appointed body with nine members. Whiteside submitted its application for approval of the
5 proposed alterations in 2006. The HRC conducted a public hearing on November 14, 2006
6 and continued that hearing until December 4, 2006. The HRC deliberated on December 4,
7 2006 and voted to deny the application. In a December 5, 2006 "Notice of Disposition," the
8 city advised parties that they had 12 days to appeal the HRC's decision. Record 354-55. It
9 appears from the Notice of Disposition, that the HRC relied on the minutes of the December
10 4, 2006 continued hearing for its written decision findings. Record 355. There is no written
11 HRC decision in this matter, beyond the December 4, 2006 minutes.

12 Whiteside appealed the HRC decision to the city council on December 15, 2006. In
13 that appeal, Whiteside specified three grounds for appeal.³ The city council held a public

² Pictures of the existing west facade appear at Record 988. A drawing of the proposed west facade appears at Record 985. The challenged decision includes the following more detailed description of the proposed west facade alterations:

"The proposed alterations to the western exterior facade of the building include:

- "1. Installing storefront windows and doors along the sidewalk;
- "2. Installing 5 six-foot deep steel channel canopies over the new storefront windows and entries;
- "3. Installing three 2'-6" x 8' signs (for the new businesses) attached to the face of the new canopies;
- "4. Installing a historical informational sign at eye level at the south corner;
- "5. Relocating two original exterior light fixtures;
- "6. Installing windows on the second floor; and
- "7. Installing a new optional rooftop cornice." Record 11-12.

³ Those three grounds for appeal were that the HRC (1) improperly relied on U.S. Secretary of Interior Standards for Preservation, (2) erroneously treated the west facade as a primary facade and erroneously applied

1 hearing on January 16, 2007 and closed the hearing and record on that date. The city council
2 deferred its deliberations until February 5, 2007. At its noon meeting on February 5, 2007,
3 the city council voted to overturn the HRC decision and approve the application. The city
4 council’s “Notice of Disposition,” “Conditions of Approval,” and “Findings” were signed on
5 February 20, 2007. Record 6-7 (notice of disposition); 8-9 (conditions of approval) 10-32
6 (findings). This appeal followed.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 In their first assignment of error, petitioners argue the city erred by rendering its own
9 decision in this matter on the merits of Whiteside’s application, instead of reviewing the
10 HRC decision for errors. In their second assignment of error, petitioners allege the city
11 council erred by not limiting its review to the three grounds for appeal that were specified in
12 Whiteside’s December 15, 2006 notice of local appeal. *See* n 3. For the reasons explained
13 below, we reject both assignments of error.

14 **A. The City Council Was Not Limited to Reviewing the HRC Decision (First**
15 **Assignment of Error)**

16 Land use regulations may limit the role of a local appellate body. Where the role of a
17 local appellate body is expressly limited under local land use law to reviewing appealed
18 decisions for errors of law or substantial evidence, a local appellate body decision that
19 exceeds that limited role will be reversed or remanded. *Wal-Mart Stores, Inc. v. City of*
20 *Medford*, 49 Or LUBA 52, 58 (2005). However, we agree with the city that the Corvallis
21 Land Development Code (LDC) does not limit the city council’s role in an appeal of an HRC
22 decision to reviewing the HRC decision for errors of law or substantial evidence.

23 The key LDC section in determining the appropriate role of the city council in
24 reviewing an HRC decision on appeal is LDC 2.19.30.01(c).⁴ LDC 2.19.30.01(c) directs that

special restrictions that apply only to primary facades, and (3) improperly based its decision on the proposed exterior alterations, in part, on proposed interior alterations, which are not the subject of the present application.

⁴ LDC 2.19.30.01(c) provides:

1 the city council must conduct a *de novo* public hearing as part of the appeal. In responding
2 to the issue raised in the first assignment of error, the city council adopted the following
3 findings:

4 “The City Council notes that [parties] urged the City Council to defer to the
5 decision by the [HRC]. The City Council notes that the City of Corvallis
6 relies upon volunteer advisory committees, boards and commissions to
7 perform essential government functions. The City Council notes that the
8 [HRC] is a relatively new commission, and the City Council appreciates the
9 work of the [HRC]. Nonetheless, the City Council notes that under the terms
10 of LDC 2.19.30.01(c), the Council’s decision is a *de novo* review of the
11 application, and is not limited to the grounds for the appeal. The City Council
12 stresses that under the terms of LDC 2.19.30.01(c), the Council is charged
13 with reviewing the application for a Historic Preservation Permit for
14 consistency with the relevant criteria, and the Council is not charged with
15 reviewing the decision of the [HRC] for errors.” Record 13.

16 Petitioners rely in large part on a number of contextual LDC sections that admittedly
17 say that the city council is to *review decisions* in the event of an appeal.⁵ Petitioners read
18 these LDC directives to review decisions as directives to the city council to review HRC
19 decisions for errors of law or for lack of evidentiary support. We understand petitioners to
20 read those HRC sections to preclude the city council from determining itself whether the
21 applications that led to those decisions comply with applicable approval standards, as a way
22 of determining whether the appealed lower body decision should be affirmed or reversed.

“All hearings on Appeals shall be held *de novo* (as a new public hearing). For any Appeal, the record of the decision made before the lower level of City hearing authority shall be part of the staff report on Appeal.”

⁵ Those sections include the following:

LDC 1.1.10.02(c) provides that the city council “[s]hall review decisions of the Planning Commission, Land Development Hearings Board, and Historic Resources Commission upon appeal[.]” LDC 2.19.30.02(d) similarly provides that “[a]ppeals of *decisions* of the Planning Commission, the Land Development Hearings Board, or the Historic Resources Commission *shall be reviewed by the City Council.*” (Emphases added.) LDC 2.19.20 sets out the “Purposes” of LDC Chapter 2.19, which is the “Appeals” chapter of the LDC. LDC 2.19.20(a) provides that one of the purposes of LDC Chapter 2.19 is to “[p]rovide an Appeal process wherein parties affected by land use decisions *may request review of such decisions.*” (Emphasis added.) LDC 2.19.30.01(a) provides “[e]very *decision* relating to * * * this Code * * * is subject to *review* by Appeal in accordance with the provisions of this Chapter.” (Emphases added).

1 The city, on the other hand, contends that those references to review of the decision on
2 appeal need not be interpreted as narrowly as petitioners interpret them. We understand the
3 city to argue that those LDC sections do not prevent the city from interpreting LDC
4 2.19.30.01(c) to allow the city council to apply the relevant approval criteria itself, to
5 determine whether appealed permits were properly approved or denied by the HRC.

6 Petitioners are correct that the requirement in LDC 2.19.30.01(c) that the city council
7 provide a *de novo* public hearing does not directly answer the question presented in the first
8 assignment of error. The parenthetical clarification in LDC 2.19.30.01(c) that a *de novo*
9 public hearing is “a new public hearing” does not really help very much either. Black’s Law
10 Dictionary defines “hearing de novo” as follows:

11 “1. A reviewing court’s decision of a matter anew, *giving no deference to a*
12 *lower court’s findings.* * * * 2. A new hearing of a matter, *conducted as if the*
13 *original hearing had not taken place.*” Black’s Law Dictionary 738 (8th ed.
14 2004) (emphases added).

15 Under that definition, giving no deference to the HRC’s findings and conducting the hearing
16 on appeal as if the HRC hearing had not taken place would seem to permit the city council to
17 make its own decision regarding whether the application complies with the relevant criteria,
18 as the city argues.

19 The question we must decide in this appeal is whether the city council’s interpretation
20 of LDC 2.19.30.01(c) to allow it to consider the application anew is reversible under ORS
21 197.829(1).⁶ In reviewing the city council’s interpretation of LDC 2.19.30.01(c) under ORS

⁶ The standard of review that LUBA applies in reviewing interpretations of local land use legislation is set out at ORS 197.829(1), which provides

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 197.829(1), it does not matter if petitioners’ interpretation is also possible. *See Wal-Mart*
2 *Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680, 699, *aff’d* 194 Or App 211, 95 P3d 269
3 (2004) (“city’s choice * * * between two admittedly less than compelling interpretations
4 does not violate the standard of review that [LUBA is] required to apply under ORS
5 197.829(1)”). Under ORS 197.829(1) we must affirm the city council’s interpretation unless
6 it is inconsistent with the text of LDC 2.19.30.01(c) or its underlying policy or purpose.

7 The text of LDC 2.19.30.01(c), and the dictionary definition of *de novo* hearing is
8 more consistent with the city council’s interpretation of LDC 2.19.30.01(c) than petitioners’
9 interpretation. Under petitioners’ interpretation, the city council would be required to
10 conduct a *de novo* hearing, and accept new evidence, and then be limited to reviewing an
11 HRC decision that was decided based on a more limited evidentiary record. That limited
12 scope of review seems somewhat inconsistent with the LDC 2.19.30.01(c) requirement for a
13 *de novo* hearing.

14 The text of the contextual LDC provisions that petitioners cite and rely on is not
15 necessarily inconsistent with the city council’s interpretation of LDC 2.19.30.01(c).
16 Although those LDC sections talk about reviewing appealed decisions, those LDC sections
17 do not expressly specify *how* the city council is to go about reviewing decisions on appeal.
18 The city council’s interpretation and application of LDC 2.19.30.01(c) is therefore not
19 inconsistent with the text of these contextual sections, even if petitioners’ view of the
20 contextual sections is possible. Neither is the city council’s interpretation of LDC
21 2.19.30.01(c) inconsistent with any identified underlying policy. The LDC 2.19.30.01(c)
22 requirement for a *de novo* hearing on appeal suggests an underlying policy of seeking a fresh

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 look on appeal, rather than the more limited look that petitioners advocate. We conclude
2 that, even if the more narrow interpretation of LDC 2.19.30.01(c) that petitioners advocate is
3 possible based on the language of the cited contextual LDC sections, the city council's
4 interpretation must be affirmed under ORS 197.829(1).

5 Before turning to petitioners' related second assignment of error, we briefly note and
6 discuss two other issues that petitioners raise under the first assignment of error. Petitioners
7 first contend the city council's interpretation of LDC 2.19.30.01(c) erroneously makes the
8 HRC an advisory body when it comes to Historic Preservation Permits, whereas the LDC
9 confers quasi-judicial decision making authority on the HRC.⁷ Petitioners' argument in this
10 regard mischaracterizes the city council's decision. The city council's interpretation of LDC
11 2.19.30.01(c) simply reserves to the city council the authority, in the event of an appeal of a
12 HRC Historic Preservation Permit decision, to apply the relevant approval criteria itself and
13 reach a different conclusion than the HRC. The city council's assumption of that role on
14 appeal does not make the HRC an advisory body. When HRC decisions on Historic
15 Preservation Permits are not appealed to the city council they are the final decisions of the
16 city. Reversing HRC decisions on appeal is clearly an expression of disagreement with the
17 HRC, but that action does not make the HRC an advisory body. We reject petitioners'
18 characterization to the contrary.

19 Petitioners also argue that the city council's interpretation of LDC 2.19.30.01(c) is
20 such a "new (and implausible) interpretation" that they were "entitled to notice of the
21 applicable scope of review before the city council decision was rendered in this matter."
22 Petition for Review 10. Petitioners do not cite any authority for or develop this argument
23 further.

⁷ Corvallis Municipal Code (CMC) 1.16.325(4) provides that for certain matters, including Historic Preservation Permits, the HRC is the city's initial quasi-judicial decision maker. CMC 1.16.325(5) sets out other matters in which the HRC acts in an "advice and assist" capacity.

1 In *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 200 (2001)
2 (citing *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998)), we observed that
3 where “new or changed interpretations of relevant criteria, * * * appear for the first time in
4 the final written decision, [and] could not reasonably have been anticipated and addressed by
5 the parties before the opportunities for evidentiary presentations and legal argument
6 concluded,” it may be necessary for the final decision maker to provide such an opportunity.
7 If petitioners are relying on the principle discussed in *Arlington Heights Homeowners*, that
8 reliance is misplaced. The interpretation the city council adopted in this case was both
9 foreseeable and foreseen, since petitioners argued the city council should interpret LDC
10 2.19.30.01(c) to impose a limited scope of review. The city council simply rejected
11 petitioners’ argument.

12 We agree with the city that the LDC sections that petitioners cite, *see* n 5, need not be
13 interpreted in the way petitioners suggest and do not provide sufficient textual support to
14 require that LDC 2.19.30.01(c) be interpreted in the way petitioners argue. The city
15 council’s interpretation and application of LDC 2.19.30.01(c) must be affirmed under ORS
16 197.829(1).

17 Petitioners’ first assignment of error is denied.

18 **B. The City Council Was Not Limited to the Issues Identified in the**
19 **December 15, 2006 Notice of Appeal**

20 Petitioners’ second assignment of error raises a related issue that the city council also
21 rejected in the above-quoted findings. Where a local government’s land use regulations
22 expressly require that the issues that a local appellate body may consider in a local appeal are
23 limited to the issues that are identified in a notice of local appeal, the issues that a local
24 appellate body considers in a local appeal must be so limited. *Smith v. Douglas County*, 93
25 Or App 503, 506-07, 763 P2d 169 (1988), *aff’d* 308 Or 191, 777 P2d 1377 (1989).

26 As relevant here, LDC 2.19.30.05 provides that appeals must be filed in writing and
27 must include a “[s]tatement of the specific grounds for the Appeal, stated in terms of specific

1 review criteria applicable to the case.” LDC 2.19.30.05(c). LDC 2.19.30.06(b) provides that
2 improperly filed local appeals *may* be dismissed.⁸ (Emphasis added.) There is no LDC
3 provision that specifically limits the city council’s scope of review in an appeal of an HRC
4 decision to the issues that are specified in the local notice of appeal. However, petitioners
5 argue that by requiring that persons who wish to appeal HRC decisions must identify the
6 “specific grounds for appeal,” the issues that the city council was permitted to consider on
7 appeal were limited to the three issues identified in Whiteside’s December 15, 2006 notice of
8 appeal. See n 3. In support of that argument, petitioners cite *Miles v. City of Florence*, 190
9 Or App 500, 510, 79 P3d 382 (2003) and *Ray v. Josephine County*, 51 Or LUBA 443, 449
10 (2006).

11 *Ray v. Josephine County* lends no support to petitioners’ argument. In *Ray*, we
12 concluded that to preserve issues for review by the board of county commissioners in that
13 case, the petitioners were required to raise those issues in their local notice of appeal. In
14 *Ray*, however, Josephine County’s land use regulations specifically provided that review by
15 the county commissioners was “strictly limited to the items specified in the statement of
16 appeal.” 51 Or LUBA at 447. There is no such express limit on the city council’s scope of
17 review in the LDC, and *Ray* therefore lends no support to petitioners’ argument under the
18 second assignment of error.

⁸ LDC 2.19.30.06 provides:

“a. The Director shall schedule a public hearing for complete and properly filed Appeals. Such hearing is to be held not later than 60 days after the receipt of the notice of Appeal. Incomplete or improperly filed Appeals shall be referred to the hearing authority for dismissal as noted in ‘b,’ below.

“* * * * *

“b. Appeals that are incomplete, filed late, or improperly filed *may be denied* by the hearing authority without further review.” (Emphasis added.)

1 The holding in *Miles* technically concerns the scope of review at LUBA, rather than
2 the scope of review of a local government appellate body considering a local appeal. *Miles*
3 concerned an appeal of a planning commission decision to the city council. In *Miles*, city
4 legislation required the local appellant to identify issues for appeal in the local notice of
5 appeal. In *Miles*, the city legislation did not specifically limit the city council’s review to the
6 issues that were specified in the notice of local appeal. The local appellant failed to specify
7 an issue, and the issue was not considered by the local appellate body. In that circumstance,
8 even though the issue petitioner sought to raise on appeal to LUBA was raised at an earlier
9 point in the city’s proceedings before the planning commission, the Court of Appeals held
10 that issue could not be raised at LUBA. 190 Or App at 508-09. The holding in *Miles* is
11 based on the ORS 197.825(2)(a) requirement that petitioners at LUBA must exhaust
12 available local remedies before appealing to LUBA. The holding in *Miles* therefore does not
13 assist petitioners in this appeal.

14 While *Miles* is technically not on point, in reaching and explaining the basis for its
15 holding in *Miles*, the Court of Appeals did observe that a local land use regulation
16 requirement that “issues for the local appeal be specified in advance” might operate by itself
17 to impose an “inherent” limitation on the issues that could be considered in the local appeal,
18 even without a specific requirement under local law that the local appellate body limit its
19 review to the issues specified in the local notice of appeal. 190 Or App at 509. However, the
20 Court of Appeals immediately qualified the scope of any such suggested *inherent* limitation
21 by noting that “[t]he circumstances in which the local appeal body may *sua sponte* reach an
22 issue that was not specified as required by an ordinance are unsettled.” *Id.* at 510 (citing and
23 relying on *Johns v. City of Lincoln City*, 146 Or App 594, 602 n 1, 933 P2d 978 (1997)). In
24 *Johns*, the Court of Appeals held that a *party* was precluded from raising issues in a local
25 appeal that were not specified in the notice of local appeal, but the Court of Appeals
26 specifically left open the question of whether such a local requirement that the notice of local

1 appeal specify the issues to be considered in the local appeal would operate to preclude the
2 *local appellate body itself* from raising issues *sua sponte*. 146 Or App at 602 n 1.

3 For the reasons explained in the two preceding paragraphs, *Miles* does not hold that a
4 requirement under local law that the issues to be considered in a local land use appeal must
5 be specified in the notice of local appeal has the legal effect of limiting the local appellate
6 body's authority to raise and consider issues *sua sponte* that are not specified in the notice of
7 local appeal. To the contrary, the question of the legal effect of such a provision on the local
8 appellate body's authority to raise and consider issues that go beyond the issues specified in
9 the notice of local appeal was specifically left open in *Johns* and was not addressed further in
10 *Miles*.

11 We decline to interpret the LDC 2.19.30.05(c) requirement that the local appeal of the
12 HRC decision must include the "specific grounds for the appeal" to limit the city council's
13 authority to consider issues that are not specified in the notice of local appeal. As the city
14 correctly points out, LDC 2.19.30.06(b) specifies an optional consequence for filing a notice
15 of local appeal that is incomplete because it fails to include specific grounds for appeal. *See*
16 n 8. In that circumstance, the city council "may" deny the appeal. If the city wished a local
17 appellant's failure to specify the specific grounds for appeal to have the consequence of
18 precluding the city council from raising issues on its own, it could have said so in LDC
19 2.19.30.06(b). Perhaps more importantly, the notice of local appeal requirement must be
20 read in context with the LDC 2.19.30.01(c) requirement for a *de novo* hearing on appeal.
21 The unqualified requirement for a *de novo* appeal hearing seems somewhat inconsistent with
22 a legislative intent that the city council could not consider issues beyond those specified in
23 the notice of local appeal. The city easily could have stated in LDC 2.19.30.01(c) that the
24 required *de novo* hearing must be limited to the grounds for appeal specified in the notice of
25 local appeal that is required by LDC 2.19.30.05(c). LDC 2.19.30.01(c) does not impose that
26 limit. Given the context in which LDC 2.19.30.05(c) appears, we believe it is unlikely the

1 Court of Appeals would find that LDC 2.19.30.05(c) inherently limits the city council's
2 authority to raise and consider issues in an appeal of HRC decision that are not specified in
3 the local notice of appeal.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Under their third assignment of error, petitioners contend the city council committed
7 legal error by failing to advise the parties that the city council would deliberate toward a final
8 decision in this matter at its noon meeting on February 5, 2007, rather than at its evening
9 meeting. According to petitioners, the hearings in this matter have been held in the evening
10 and petitioners reasonably assumed that deliberations would take place at the February 5,
11 2007 evening meeting.

12 Before the city council closed its January 16, 2007 public hearing in this matter, it
13 began to discuss how it would go about deliberating to a final decision in the appeal of the
14 HRC's decision in this matter.⁹ There was no request that the record be held open or that the
15 January 16, 2007 public hearing be continued. Under ORS 197.763(6)(e), the applicant is
16 entitled to submit "final written arguments in support of the application" within "seven days
17 after the record is closed to all parties."¹⁰ Before the city closed the evidentiary hearing on
18 January 16, 2007, the city council asked Whiteside if it waived its right to submit final legal
19 argument under ORS 197.763(6)(e). Whiteside waived its right to submit final legal

⁹Our resolution of the third assignment of error is based in part on our review of the digital recording of the last few minutes of the January 16, 2007 city council public hearing. Given the potential significance of what the parties were told at the conclusion of that public hearing, it seems strange that no party provided a transcript of that part of the public hearing.

¹⁰ ORS 197.763(6)(e) provides:

"Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence."

1 arguments. The city council then closed the January 16, 2007 public hearing, and the
2 evidentiary phase of the city council's consideration of the appeal of the HRC decision in
3 this matter came to an end. The city offers the following description of the events that
4 ensued after the January 16, 2007 public hearing was closed:

5 "According to the digital audio record of the January 16, 2007 [hearing], the
6 Mayor closed the public hearing at 4:59:12. The Mayor announced that
7 deliberations would take place on February 5, 2007. At 4:59:39, the City
8 Manager noted that people were beginning to leave and informed the Council
9 and the Public that the deliberations were likely to take place at the noon
10 meeting on February 5, 2007, rather than the night meeting. The City
11 Manager stated that there was a good chance the deliberations would be at
12 noon and said 'I didn't want the audience to be surprised in case that
13 happened.' Digital Audio record 4:59:39 – 5:00:19. * * *" Respondent's
14 Brief 14-15 (footnote omitted).¹¹

15 Based on our review of the last few minutes of the digital recording of the January 16, 2007
16 public hearing, the above description of what was said at the January 16, 2007 hearing is
17 accurate.

18 Petitioners point out that the city council was encouraged to ask questions of staff.
19 Staff prepared a memorandum that responded to those questions. While petitioners point out
20 that this exchange between the city council and staff occurred, they do not assign error to that
21 exchange. Even if they had, communications between the city land use decision makers and
22 planning staff are not considered *ex parte* contacts. *Crook v. Curry County*, 38 Or LUBA
23 677, 688 (2000), *aff'd* 172 Or App 71, 19 P3d 388 (2001); *Dickas v. City of Beaverton*, 16 Or
24 LUBA 574, 581, *aff'd* 92 Or App 168, 757 P2d 451 (1988). Petitioners' entire argument
25 under the third assignment of error is set out below:

26 "*** While the minutes of the January 16, 2007 meeting indicate that
27 deliberations would occur on February 5th, the time of those deliberations was
28 not provided. *See e.g.*, ORS 197.763 (where hearing is continued, notice of
29 time, date, and place certain must be provided).

¹¹ The time references in the quoted material are to the elapsed time from the beginning of the city council's January 16, 2007 meeting in hours, minutes and seconds.

1 “The failure to give notification of the time of the deliberations was important
2 because the challenged decision incorporated those deliberations as findings
3 supporting the challenged decision. Accordingly, petitioners were entitled to
4 adequate notice of when those deliberations were to occur.” Petition for
5 Review 13.

6 ORS 197.763(6)(b) requires that if a quasi-judicial land use hearing is continued, “the
7 hearing shall be continued to a date, time and place certain * * *.” That presumably is the
8 subsection that petitioners are relying on in arguing that the city council erred by failing to
9 advise petitioners of the time of the February 5, 2007 deliberations. However, ORS
10 197.763(6)(b) would only apply if the city council had continued the January 16, 2007
11 evidentiary hearing. As we have already explained, the city council closed the public hearing
12 on January 16, 2007. While the deliberations that took place on February 5, 2007 occurred
13 during a public meeting, the February 5, 2007 meeting was not a continued public hearing
14 that was subject to ORS 197.763(6)(b). Petitioners may have a legal right to be informed of
15 the date, time and place certain that the city council would deliberate and adopt its final
16 written decision, but that legal right is not provided by ORS 197.763(6)(b).

17 For purposes of this appeal, we will assume that the city had a legal obligation to tell
18 the parties the date and time at which it would deliberate and reach a final decision in this
19 matter. While the minutes do not show that this was done, as we explain above, the digital
20 recording does. That some petitioners may not have heard the city manager tell the city
21 council and those in attendance that those deliberations might occur at the noon city council
22 meeting on February 5, 2007 is not legally significant. The city manager’s discussion in this
23 regard is clear on the digital recording. If some petitioners chose to leave the January 16,
24 2007 meeting before the city manager advised that the final deliberations might occur at the
25 noon city council meeting on February 5, 2007, that also is not legally significant. All
26 persons who remained in attendance at the January 16, 2007 public hearing were told the
27 time and date that the deliberations would occur less than two minutes after the public
28 hearing was closed. Adequate notice was given of the time, date and place for final

1 deliberations to allow any interested petitioner to attend those deliberations on February 5,
2 2007 at the noon meeting if they wished.

3 Petitioners' third assignment of error is one page long, the city's response to that
4 assignment of error is two pages long. After the city's brief was filed, petitioners filed a
5 motion to consider extra-record evidence and filed affidavits in support of that motion. The
6 city objected to petitioners' motion to consider extra-record evidence and the proffered extra-
7 record evidence. The city also submitted its own extra-record rebuttal evidence and
8 requested that LUBA consider the city's rebuttal evidence if we allowed petitioners' motion.
9 Petitioners submitted an additional response, with additional extra-record evidence, to which
10 the city objected. The city followed with a request that LUBA take official notice of certain
11 facts, and petitioners objected to that motion.

12 The exchanges described in the above paragraph have generated a substantial pile of
13 paper. In those exchanges, the parties argue about whether petitioners adequately objected to
14 any error the city council may have committed in giving notice of the February 5, 2007
15 meeting and whether petitioners were prejudiced by any such error. The parties also disagree
16 about whether other city notices were adequate to cure any failure to provide adequate notice
17 at the conclusion of the January 16, 2007 public hearing. The parties also disagree about the
18 substance of communications between certain petitioners and a city councilor. The parties
19 offer a great deal of extra-record evidence in support of their arguments.

20 We conclude that it is unnecessary to consider the extra-record evidence that the
21 parties have provided, and we therefore deny petitioners' motion to consider extra-record
22 evidence and the city's request that LUBA take official notice. None of the extra-record
23 evidence alters the fact that the city manager provided adequate notice that the city council
24 would deliberate and reach a decision in this matter on February 5, 2007 at the noon city
25 council session. Therefore, there was no procedural error for petitioners to object to, and
26 there was no procedural error to prejudice petitioners' substantial rights. No matter which

1 accounting of the communications between the city council and one of the petitioners is
2 factual, it does not provide a basis for reversal or remand.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Under their fourth assignment of error, petitioners assert three subassignments of
6 error. We address those subassignments of error separately below. Before addressing the
7 fourth through twelfth assignments of error, the city offers a general response to the fourth
8 through twelfth assignments of error. We address that general response first.

9 **A. The City’s General Response to the Fourth Through Twelfth** 10 **Assignments of Error**

11 **1. Introduction**

12 Petitioners’ fourth through twelfth assignments of error generally concern subsections
13 of LDC Chapter 2.9. LDC Chapter 2.9 is entitled “Historic Preservation Provisions.” LDC
14 Chapter 2.9 is divided into 13 major sections, LDC 2.9.10 through LDC 2.9.130. Section
15 LDC 2.9.100 is entitled “Alteration or New Construction Activities Involving a Designated
16 Historic Resource.” LDC 2.9.100.04 is the subsection of LDC 2.9.100 that governs Historic
17 Preservation Permits for which the HRC is the decision maker. A different subsection of
18 LDC 2.9.100 applies to Historic Preservation Permits for which the Planning Director is the
19 decision maker. LDC 2.9.100.03. The HRC was the decision maker in this case, and there is
20 no dispute that LDC 2.9.100.04 applies in this case.

21 LDC 2.9.100.04 is divided into two subsections, LDC 2.9.100.04(a) and (b). LDC
22 2.9.100.04(a) sets out “Parameters” that the city applies to determine if alterations or new
23 construction require that the HRC issue a Historic Preservation Permit. LDC 2.9.100.04(b)
24 is entitled “Review Criteria.”¹²

¹² We quote and discuss parts of the LDC 2.9.100.04(b) review criteria later in this opinion in resolving the remaining assignments of error, most of which concern subsections of LDC 2.9.100.04(b). Because LDC

1 Or LUBA 46, 60-61 (1995), *aff'd* 139 Or App 39, 911 P2d 350 (1996). Second, the city
2 council did not treat LDC 2.9.100.04(b)(2) and (3) as though they were mere considerations.
3 To the contrary, the decision repeatedly refers to subsections of LDC 2.9.100.04(b)(3) as
4 criteria. Third, the interpretation is inconsistent with the structure and language of LDC
5 2.9.100.04(b). LDC 2.9.100.04(b) is entitled “Review Criteria.” See Appendix. The first
6 paragraph of LDC 2.9.100.04(b)(1) expressly provides that “Historic Preservation Permit
7 request[s] shall be evaluated against the review criteria listed below.” LDC 2.9.100.04(b)(3)
8 is entitled “Compatibility Criteria for Structures and Site Elements.” The city is correct that
9 LDC 2.9.100.04(b)(3) directs that “[c]ompatibility *considerations* shall include the items
10 listed in ‘a – n,’ below[.]” However, that single reference to considerations is not sufficient
11 to render the LDC 2.9.100.04(b)(3)(a) through (n) compatibility criteria into nonmandatory
12 considerations, particularly where the compatibility criteria themselves are generally written
13 as mandatory standards.¹³ Although LDC 2.9.100.04(b)(2) is not labeled as a review
14 criterion, it directs that the city make one of two alternative findings. Neither LDC
15 2.9.100.04(b)(2) nor 2.9.100.04(b)(3) are mere considerations. We reject the city’s argument
16 to the contrary.¹⁴

17 **B. First Subassignment of Error**

18 Petitioners’ first subassignment of error is based on the introductory paragraph of
19 LDC 2.9.100.04, which precedes LDC 2.9.100.04(b) and is not quoted in the Appendix. As
20 relevant, that paragraph provides:

21 *“Some exterior Alterations or New Construction involving a Designated*
22 *Historic Resource may be needed to ensure its continued use. Rehabilitation*

¹³ For example, LDC 2.9.100.04(b)(3)(a) directs in part that “Architectural features, such as balconies, porches, bay windows, dormers, or trim details on main facades shall be retained, restored, or designed to complement the primary structure and any existing surrounding comparable Designated Historic Resources.”

¹⁴ A much stronger case could be made that the considerations listed in LDC 2.9.100.04(b)(1) are merely considerations rather than approval criteria. See Appendix. However, petitioners do not challenge the city’s application of LDC 2.9.100.04(b)(1).

1 of a Designated Historic Resource includes an opportunity to make possible
2 an efficient contemporary use through such alterations and additions. A
3 Historic Preservation Permit request for any of the following Alteration or
4 New Construction activities shall be approved if the Alteration or New
5 Construction is in compliance with the associated definitions and review
6 criteria listed below. * * * (Italics and underlining added.)

7 Petitioners' first subassignment of error is that "[t]he challenged findings are
8 inadequate because they fail to determine that the proposed alterations to the Whiteside
9 Theater are 'needed to assure its continued use.'" Petition for Review 13. Although
10 petitioners make no attempt to explain why, they apparently view the italicized sentence
11 quoted above to require that all exterior alterations or new construction involving a
12 designated historic resource must be "needed to ensure [the designated historic resource's]
13 continued use."

14 An initial problem with this subassignment of error is that the italicized sentence does
15 not say that *all* exterior alterations or new construction involving a designated historic
16 resource must be needed to ensure the designated historic resource's continued use. It only
17 says that "*Some* exterior Alterations or New Construction involving a Designated Historic
18 resource" may be needed for that purpose. The italicized sentence does not preclude the
19 possibility that some other exterior alterations or new construction may be needed for other
20 purposes.

21 A second problem with this subassignment of error is that the final underlined
22 sentence makes it clear that the review criteria appear below the quoted paragraph. The first
23 sentence is clearly not among the city's review criteria for Historic Preservation Permits. It
24 is an observation about Historic Preservation Permits, and it is not something the city council
25 was required to address in its findings.

26 The first subassignment of error is denied.

1 **C. Second Subassignment of Error**

2 In one of its preliminary findings that appears in the HRC’s decision—before the
3 findings that address the LDC 2.9.100.04(b)(3) compatibility criteria—the city council found
4 that “[t]o the extent that the criteria are ambiguous,” it is appropriate to consider the purpose
5 of LDC Chapter 2.9. LDC 2.9.20(a) provides that one of the purposes of LDC Chapter 2.9 is
6 to “[i]mplement [the] historic and cultural resource policies of Comprehensive Plan Article 5,
7 Section 5.4. – Historical and Cultural Resources.” Comprehensive Plan Article 5, Section
8 5.4 includes the following policy:

9 “5.4.2 The City shall encourage property owners to preserve historic
10 structures in a state as close to their original construction as possible
11 while allowing the structure to be used in an economically viable
12 manner.”

13 After noting plan policy 5.4.2, the city council adopted the following finding:

14 “[T]he proposed exterior alteration preserves and restores the building’s south
15 facade which is the most historically significant, while allowing the structure
16 to be used in an economically viable manner, and finds that this is consistent
17 with Comprehensive Plan policy 5.4.2, and therefore with LDC 2.9.20(a).”
18 Record 16.

19 Petitioners contend the city’s first error in the above-quoted finding was in failing to
20 identify any ambiguity that might trigger a need to consider LDC 2.9.20(a) and policy 5.4.2.
21 Petitioners contend the city council’s consideration of plan policy 5.4.2 led it to
22 inappropriately rely on economic viability as a reason for granting the disputed Historic
23 Preservation Permit.

24 Even if we accept petitioners’ position that plan policy 5.4.2 is not a directly
25 applicable approval standard, it is difficult to see how city council’s consideration of that
26 policy in *approving* the disputed permit could constitute reversible error, so long as the city
27 council in fact also considered the applicable approval criteria and found that they are all
28 satisfied. Petitioners suggest that the city council may have inappropriately relied on plan
29 policy 5.4.2 to consider economic viability in a way that is inconsistent with one or more

1 approval criteria. But petitioners do not identify any criteria that they believe the city
2 erroneously found were satisfied based on plan policy 5.4.2 and a need to ensure
3 economically viable use of the property. Absent such a demonstration, we conclude the city
4 council’s finding regarding plan policy 5.4.2 was harmless error, if it was error at all.

5 The second subassignment of error is denied.

6 **D. Third Subassignment of Error**

7 LDC 2.9.100.04(b)(2) is set out in the Appendix, and provides as follows:

8 **“In general, the proposed Alteration or New Construction shall either:**

9 “a) Cause the Designated Historic Resource to more closely approximate
10 the original historic design or style, appearance, or material
11 composition of the resource relative to the applicable Period of
12 Significance; or

13 “b) Be compatible with the historic characteristics of the Designated
14 Historic Resource and/or District, as applicable, based on a
15 consideration of the historic design or style, appearance, or material
16 composition of the resource.”

17 **1. The City’s Findings**

18 The city council adopted findings concerning LDC 2.9.100.04(b)(2), which are set
19 out below:

20 “The City Council finds that the General Review Criteria in LDC Section
21 2.9.100.04(b)(1) were considered in reaching the decision that the proposed
22 alterations are compatible with the existing and surrounding comparable
23 Designated Historic Resources. The City Council finds that in general, the
24 proposed alterations to the south facade will cause the Whiteside Theater
25 Building to more closely approximate its original historical design, style and
26 appearance than it currently does, consistent with LDC 2.9.100.04(b)(2)(b).
27 The City Council finds that the applicant’s suggested condition of approval to
28 require the installation of garden boxes to closely resemble the original garden
29 boxes would comply with LDC Section 2.9.100.04(b)(2). The City Council
30 finds that, given the utilitarian nature of the west facade, and the survey’s
31 focus on the value of the south facade, the proposed changes to the west
32 facade are compatible with the historic characteristics of the Whiteside
33 Theater building, as applicable, based on the historic design, style and
34 appearance of the building and proposed alterations.” Record 22.

1 We agree with petitioners that the above findings are inadequate and that this
2 subassignment of error therefore must be sustained. But we will not attempt to summarize
3 and resolve all the competing interpretive arguments that petitioners and the city make in
4 their briefs. If the city council determines that it must consider those interpretive arguments
5 to adequately address LDC 2.9.100.04(b)(2) on remand, it may do so. We believe it would
6 be more useful to explain why the above findings are inadequate and then suggest how some
7 interpretations of LDC 2.9.100.04(b)(2) by the city on remand would likely facilitate
8 addressing that criterion.

9 Turning to the city’s findings quoted above, we do not understand the first sentence.
10 That sentence mentions the findings that the city adopted to address a different criterion,
11 LDC 2.9.100.04(b)(1). See Appendix. However, the first sentence makes no attempt to
12 explain how those findings have any direct or relevant bearing on whether the proposed
13 alterations and new construction comply with either subsection (a) or (b) of 2.9.100.04(b)(2).

14 The second finding concludes that the proposed changes to the south facade will
15 cause the theater “to more closely approximate its original historic design, style and
16 appearance than it currently does, consistent with LDC 2.9.100.04(b)(2)(b).” The city
17 council presumably meant to cite subsection (a) of LDC 2.9.100.04(b)(2) rather than
18 subsection (b). This finding is conclusory, but we are not sure petitioners dispute that many
19 of the south facade changes satisfy LDC 2.9.100.04(b)(2)(a). On remand that issue can be
20 clarified and, if so, the city can elaborate or identify any findings that it adopts elsewhere in
21 its decision that are adequate to demonstrate that the south facade improvements comply with
22 LDC 2.9.100.04(b)(2)(a).

23 The third sentence addresses the garden boxes. Although the city council does not
24 identify which subsection of LDC 2.9.100.04(b)(2) it believes replacing the garden boxes
25 complies with, it presumably is LDC 2.9.100.04(b)(2)(a). We do not understand petitioners
26 to challenge that finding.

1 The final sentence is the most problematic of the four. The proposed changes to the
2 west facade are extensive and will dramatically change the existing appearance of the west
3 facade. The city council’s final finding cites the existing utilitarian nature of the west facade
4 and the focus of the historic survey on the south facade and then simply concludes that the
5 west facade changes therefore comply with the requirement of LDC 2.9.100.04(b)(2) that the
6 improvements are “compatible with the historic characteristics of the [historic theater] based
7 on a consideration of the historic design or style, appearance, or material composition of the
8 resource.” Some additional explanation in the findings is going to be needed to support that
9 conclusion. The west facade improvements do not appear to be “compatible with the historic
10 characteristics of the” west facade of the Whiteside Theater. If the reference to the utilitarian
11 nature of the west facade means the city council believes the existing west facade can be
12 disregarded for purposes of LDC 2.9.100.04(b)(2), so that the proposed changes to the west
13 facade need only be compatible with the south facade, the city needs to more clearly state
14 and explain that position. The city will also need to explain how it can take that position
15 when it later finds that “both the west and south elevations maintain a high degree of historic
16 integrity as defined in LDC Chapter 1.6.” Record 22.

17 **2. Interpretive Issues**

18 To the extent our discussion above is not sufficient to identify some interpretive
19 issues the city council will likely want to address on remand, we briefly discuss some of the
20 more obvious interpretive issues here.

21 We tend to agree with the city’s argument in its brief that the correct focus under
22 LDC 2.9.100.04(b)(2) is on the proposed alteration or new construction itself. Those
23 alterations are described in some detail at ns 1 and 2 and in the related text above. The city
24 must determine whether the proposed changes will “cause the [theater] to more closely
25 approximate [its] original historic design or style, appearance, or material composition”
26 (thereby satisfying subsection (a) of LDC 2.9.100.04(b)(2)) or whether the proposed changes

1 will “[b]e compatible with the historic characteristics of the [theater], based on a
2 consideration of the historic design or style, appearance, or material composition of the
3 [theater]” (thereby satisfying subsection (b) of LDC 2.9.100.04(b)(2)). We are not sure
4 there is any disagreement on this point, although the parties phrase their arguments in ways
5 that make it difficult to be sure.

6 A second interpretive issue may arise in performing the analysis described in the
7 foregoing paragraph. It could be that the city must demonstrate that each and every item of
8 the proposed alterations and new construction at ns 1 and 2 must be shown to satisfy either
9 subsection (a) or subsection (b). Or it could be that logically grouped alterations or
10 proposals for new construction could be considered together to determine whether those
11 groups of alterations or groups of new construction satisfy subsection a or subsection b. The
12 city council seems to believe the latter approach is appropriate. Provided the groupings are
13 logical, we agree with the city.

14 We are not sure what to make of the “[i]n general” qualification at the beginning of
15 LDC 2.9.100.04(b)(2). It could mean a number of different things. Petitioners argue that it
16 means the proposal as a whole must comply with subsection (a) or (b). The city disagrees
17 with that position in its brief. We agree with the city that it need not be interpreted in that
18 way. Another interpretation that may be possible, and which does not seem to us to be very
19 different from petitioners’ interpretation, would likely make it possible for the city to
20 approve permit applications that might otherwise have to be denied. It might be that the city
21 could interpret the “in general” language to allow the city to approve a number of proposed
22 improvements to the theater even though some of those improvements satisfy neither
23 subsection (a) nor subsection (b) of LDC 2.9.100.04(b)(2). Under such an interpretation, the
24 city council could approve the proposal so long as the proposed improvements that comply
25 with subsections (a) or (b) of LDC 2.9.100.04(b)(2) sufficiently outweigh those that do not,

1 so that the proposed improvements viewed as a whole “generally” satisfy one or more of
2 those two subsections.

3 For the reasons explained above, the city’s findings regarding LDC 2.9.100.04(b)(2)
4 are inadequate.

5 The third subassignment of error is sustained.

6 The fourth assignment of error is sustained in part and denied in part.

7 **FIFTH ASSIGNMENT OF ERROR**

8 Petitioners’ fifth assignment of error is quoted below:

9 “Respondent erred in failing to distinguish between the terms ‘main’ facade
10 and ‘primary’ facade.” Petition for Review 20.

11 Petitioners’ fifth assignment of error implicates two of the LDC 2.9.100.04(b)(3)
12 compatibility criteria, LDC 2.9.100.04(b)(3)(a) (Facades) and LDC 2.9.100.04(b)(3)(h)
13 (Building Orientation). *See* Appendix. Those two subsections of LDC 2.9.100.04(b)(3)
14 provide as follows:

15 “a). Facades - Architectural features, such as balconies, porches, bay
16 windows, dormers, or trim details on *main facades* shall be retained,
17 restored, or designed to complement the primary structure and any
18 existing surrounding comparable Designated Historic Resources.
19 Particular attention should be paid to those facades facing street rights-
20 of-way. Architectural elements inconsistent with the Designated
21 Historic Resource’s existing building design or style shall be avoided.”
22 (Emphasis added.)

23 “h) Building Orientation - Building orientation shall be compatible with
24 existing development patterns on the Designated Historic Resource
25 site, if in existence and proposed in part to remain, and any existing
26 surrounding comparable Designated Historic Resources. In general,
27 Alteration or New Construction shall be sited so that the impact to
28 *primary facade(s)* of the Designated Historic Resource, if in existence
29 and proposed in part to remain, is minimized.” (Emphasis added.)

30 The first sentence of the LDC 2.9.100.04(b)(3)(a) facade criterion requires that
31 architectural features on “main facades” be retained. The last sentence of the LDC
32 2.9.100.04(b)(3)(h) building orientation criterion requires that alteration or new construction

1 be sited to minimize the impact on “primary facade(s).” The city council adopted the
2 following findings regarding the LDC 2.9.100.04(b)(3)(a) facade criterion:

3 “10. The City Council notes that the application was reviewed using the
4 criterion specifically related to ‘Facades’ found in [LDC]
5 2.9.100.04(b)(3)(a). The City Council notes that that both the west
6 and south elevations maintain a high degree of historic integrity as
7 defined in LDC Chapter 1.6. The City Council notes that there was
8 considerable testimony related to the treatment of the building facades
9 in this case.

10 “The City Council notes that the building’s most historically
11 significant facade is its architecturally embellished south facade. The
12 City Council notes that the south facade is the facade that displays the
13 Italian Renaissance architectural style and the facade that identifies the
14 building’s historic use as a theater. The City Council finds that,
15 although the west facade deserves ‘particular attention’ because it
16 faces a street right-of-way, it is not reflective of Italian Renaissance
17 architecture. The City Council notes that the building design
18 historically focused on the south facade. The city Council notes that
19 the west facade was utilitarian in nature, without rare or unusual
20 architectural design or style, or type of construction. The City Council
21 finds that the building’s main facade is the south facade. The City
22 Council finds that the proposed alterations to the west facade are
23 compatible with the Italian Renaissance architecture evident on the
24 south facade. The City Council finds that the proposed alterations to
25 the west facade are consistent with the requirement that ‘particular
26 attention’ should be paid to those facades facing street rights-of-way.
27 After considering the proposal as it impacts the west and south
28 facades, the City Council concludes that the proposal is consistent
29 with this criterion.” Record 22.

30 Although the reasoning that petitioners advance in support of their first argument is
31 difficult to follow, we understand petitioners to argue that the city erred by assuming the
32 theater could only have one “main facade.”

33 In its findings addressing the LDC 2.9.100.04(b)(3)(a) building orientation criterion,
34 the city council expressly considered whether a historic building might have more than one
35 *primary* facade. The city council concluded that historic buildings could have more than one

1 primary facade, but the Whiteside Theater is not such a building.¹⁵ We suspect the
2 parenthetical “s” at the end of “primary facade(s)” had something to do with the city
3 council’s interpretation that the LDC 2.9.100.04(b)(3)(h) building orientation criterion
4 anticipated buildings that might have more than one *primary* facade. The LDC
5 2.9.100.04(b)(3)(a) *main* facade criterion is not phrased in that way. Therefore, if the city
6 council had been asked to decide the question, and had determined that historic structures
7 only have one “main facade” within the meaning of LDC 2.9.100.04(b)(3)(a), it does not
8 seem likely that that interpretation would be reversible under ORS 197.829(1). However,
9 even if a historic building could have more than one main facade, petitioners make no
10 attempt to explain how they believe “main facades” and “primary facades” are different.¹⁶
11 Neither do they offer any reason to believe that the analysis that the city council applied to
12 conclude that the south facade is the Whiteside Theater’s only primary facade would not
13 have also led the city council to conclude that the south facade is the Whiteside Theater’s

¹⁵ The city council’s findings include the following:

“* * * The City Council finds that the most historically important elevation is the south elevation, in part because of the architecturally embellished entry. The City Council finds that the west facade is not reflective of Italian Renaissance architecture, and therefore does not constitute as high a degree of historical significance as the south facade. * * * The City Council notes that the term ‘primary facade(s)’ on its face is somewhat ambiguous. [T]he City Council agrees with opponents that the code language clearly anticipates the possibility that some Designated Historic Resources may have more than one ‘primary facade,’ depending on the nature of the resource. [A] Designated Historic Resource may have more than one building (perhaps each with a primary facade), or a single building could have been constructed and oriented in such a way that it presented more than one primary facade. The City Council notes that the Whiteside Theater was constructed so that the Theater entrance, marquee and significant ornamentation were all on the south facade. The Council concludes that the given the utilitarian nature of the Whiteside’s west facade, the Whiteside Theater has a single primary facade on the south.” Record 14-15.

¹⁶ The dictionary definitions of the two terms are similar:

“**main** * * * **1** : outstanding, conspicuous, or first in any respect : GREAT, PREEMINENT : PRINCIPAL * * *.” Webster’s Third New Intern’l Dictionary, 1362 (unabridged ed 1981).

“**primary** * * * **1 a** : first in order of time or development : INITIAL * * * **2 a** : first in rank or importance : CHIEF, PRINCIPAL * * *.” Webster’s Third New Intern’l Dictionary, 1800 (unabridged ed 1981).

1 only main facade. Absent such an effort on petitioners' part, we believe it is appropriate to
2 assume that the city council would have determined the west facade is not a main facade for
3 the same reason it concluded that it is not a primary facade. Petitioners do not challenge the
4 city council's primary facade findings.

5 Petitioners' final argument under the fifth assignment of error is quoted below:

6 "[T]he challenged decision fails to address the significance of each of the
7 three sentences addressing facades. * * * The second sentence requires that
8 particular attention be paid to facades facing street right-of-ways. And the
9 third sentence, unlike the first, addresses all facades, not just main facades or
10 facades facing street right-or-ways. The third sentence prohibits architectural
11 elements that are inconsistent with the historic resource's existing building
12 design or style. The challenged decision does not even address this last
13 sentence or how the proposed changes to the west facade might comply with
14 it." Petition for Review 23.

15 In the findings quoted in the text above, the city council found "that the proposed
16 alterations to the west facade are consistent with the requirement that 'particular attention'
17 should be paid to those facades facing street rights-of-way." Record 22. While conclusory,
18 the finding addresses the second sentence of LDC 2.9.100.04(b)(3)(a). Later in its decision,
19 the city council adopts several pages of findings addressing the west and south facades.
20 Absent a more developed argument from petitioners, we conclude those findings are
21 adequate to demonstrate that the city paid "particular attention" to the west facade. Finally,
22 in the findings quoted in the text above, the city council also found "that the proposed
23 alterations to the west facade are compatible with the Italian Renaissance architecture
24 evident on the south facade." Again, absent a more developed argument from petitioners, we
25 conclude that finding and the findings later in the decision that discuss the proposed
26 alterations are adequate to demonstrate the alterations are not "inconsistent with the
27 [theater's] existing building design or style * * *."

28 The fifth assignment of error is denied.

1 **SIXTH ASSIGNMENT OF ERROR**

2 Petitioners’ sixth assignment of error argues the city erred in concluding that the
3 proposal complies with the LDC 2.9.100.04(b)(3) criteria. See Appendix. After describing
4 the proposed changes to the west facade and what petitioners believe are the significant
5 historical features of the west facade, petitioners offer the following argument:

6 “* * * The proposed changes to the west facade are enormous. Removing
7 over 40% of the west wall will prohibit its historic use and will destroy its
8 building style as a theater.

9 “The challenged findings identify the relevant criteria to include: Facades,
10 Building Materials, Architectural Details, Pattern of Window and Door
11 Openings, and Differentiation. However, the challenged decision does not
12 separately address those criteria. That approach, in itself, would not be
13 sufficient to require remand, if it could be shown that the findings support the
14 conclusion that each of those separate criteria is satisfied. However, in this
15 case, the approach is used to gloss over the inadequacies of the proposed
16 changes as they relate to the stated relevant criteria.

17 “It is important to note that two of those listed criteria, Architectural Details
18 and Pattern of Window and Door Openings do not allow, in the compatibility
19 determination, consideration of surrounding comparable resources. Further,
20 as depicted in the drawings of the proposed changes to the west wall, the
21 alterations would change the orientation of the building, contrary to the
22 Orientation provision. The city failed to directly consider or analyze the
23 Orientation criterion.” Petition for Review 25 (underscoring in original;
24 footnote omitted).

25 The argument presented in the first two paragraphs quoted above is insufficiently
26 developed to permit review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218,
27 220 (1982). If petitioners believe the city failed to address or inadequately addressed the
28 Building Materials, Architectural Details, Pattern of Window and Door Openings, and
29 Differentiation criteria, they must make some attempt to explain why they believe that is the
30 case.

31 The last paragraph quoted above comes a bit closer, but is also inadequate to state a
32 basis for reversal or remand. Petitioners contend that the Architectural Details and Pattern of
33 Window and Door Openings criteria “do not allow * * * consideration of surrounding

1 comparable resources.” Those criteria are set out as subsections (c) and (g) of LDC
2 2.9.100.04(b)(3).¹⁷ While the required focus under LDC 2.9.100.04(b)(3)(c) and (g) is the
3 historic resource itself, here the theater, LDC 2.9.100.04(b)(3)(c) and (g) do not *prohibit*
4 considering other historic resources. So long as the proposed improvements are shown to be
5 compatible with the theater’s architectural details and window and door openings are shown
6 to be compatible with the theater’s window and door openings, it does not matter if the city
7 council also considered the proposed improvements compatibility with other historic
8 resources. We can infer from petitioners’ undeveloped argument that they believe that is the
9 case, but petitioners’ argument is simply not sufficiently developed.

10 Finally, petitioners’ contention that the city “did not directly consider or analyze the
11 Orientation criterion” is incorrect.¹⁸ The city council found that the orientation of the
12 building would not be changed and petitioners fail to challenge those findings. Record 30.

¹⁷ The text of those subsections is set out below:

- “c) Architectural Details - Retention and repair of existing character-defining elements of a structure, such as molding or trim, brackets, columns, cladding, ornamentation, and other finishing details and their design or style, materials, and dimensions, shall be considered by the property owner prior to replacement. Replacements for existing architectural elements or proposed new architectural elements shall be consistent with the resource’s design or style. If any previously existing architectural elements are restored, such features shall be consistent with the documented building design or style. Conjectural architectural details shall not be applied.”
- “g) Pattern of Window and Door Openings – To the extent possible window and door openings shall be compatible with the original features of the existing Designated Historic Resource, if in existence and proposed in part to remain, in form (size, proportion, detailing), materials, type, pattern, and placement of openings.”

¹⁸ The city adopted the following findings:

“The City Council notes that the proposal does not impact the physical orientation or position of the building on the lot. The City council notes that the proposed alterations to the west facade may impact the visual perception or [sic – probably should be of] orientation of the west elevation.” Record 30.

1 **SEVENTH ASSIGNMENT OF ERROR**

2 One of the bases for Whiteside’s appeal of the HRC decision denying its application
3 for the Historic Preservation Permit was that the HRC improperly relied on US Secretary of
4 Interior Standards for preservation. *See* n 3. In its decision, the city council adopted the
5 following findings in reaching its decision to approve the Historic Preservation Permit:

6 “[O]ne of the grounds provided for the appeal was the applicant’s perception
7 that the [HRC] used the Secretary of the Interior Standards as a basis for its
8 decision. The City Council finds that the Council decision was based on the
9 applicable review criteria found in LDC Chapter 2.9 and the related Corvallis
10 Comprehensive Plan provisions. The Council sees no need to refer to the
11 Secretary of the Interior Standards as a basis for its decision. The Council
12 notes that LDC 2.9.10 specifically states that the provisions in LDC 2.9 are
13 intended to ‘adequately implement the Secretary of Interior’s Standards for
14 Rehabilitation and the Secretary of Interior’s Standards for Preservation, since
15 they were used in the development of review criteria for Historic Preservation
16 Permit requests.’ The Council interprets this language to mean that the
17 provisions within LDC 2.9 fully implement the Secretary of Interior Standards
18 and therefore the Standards themselves are not relevant criteria.” Record 14.

19 In their seventh assignment of error petitioners allege the city council “erred in
20 ignoring the significance of the Secretary of Interior Standards.” Petition for Review 25.
21 Petitioners’ argument in support of the seventh assignment of error is set out below:

22 “While petitioners do not contend that the Secretary of Interior Standards are
23 themselves approval criteria, the standards do inform the city’s interpretation
24 of the code. The Secretary of Interior Standards were the basis for LDC 2.9
25 and the city’s historic preservation provisions, including those provisions
26 addressing alteration and new construction. Accordingly, the city can and
27 should review the Secretary of Interior Standards when interpreting its historic
28 preservation provisions. To the extent the city determined that it could not
29 consider the Secretary of Interior Standards in an interpretation of its code, it
30 erred.” Petition for Review 26.

31 The city disputes petitioners’ argument that the “Secretary of Interior Standards were
32 the basis for LDC 2.9.” According to the city “they were used in the development of review

1 criteria” and one of the stated purposes of LDC Chapter 2.9 is to “‘adequately’ implement
2 the Secretary of Interior’s Standards * * *.” Respondent’s Brief 34.¹⁹

3 Since petitioners and the city apparently agree that the Secretary of Interior Standards
4 do not apply directly, the only remaining questions are (1) must the city council consider
5 those standards in the event they provide relevant guidance in resolving ambiguities in the
6 text of LCD Chapter 2.9 and (2) did the city refuse to do so in this case? We conclude that
7 the city council could consider relevant Secretary of Interior Standards as context in
8 resolving ambiguities in LDC Chapter 2.9, since LDC Chapter 2.9 was adopted to implement
9 those standards. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d
10 1143 (1993) (text and context considered at first level of statutory interpretation). More
11 precisely, in resolving ambiguities in any LDC standard that can be identified as a standard
12 that was adopted to implement a Secretary of Interior Standard, we believe it would be
13 appropriate for the city council to consider the Secretary of Interior Standard for any
14 assistance it might provide in resolving the identified ambiguity.

15 However, under their seventh assignment of error, petitioners identify no ambiguity,
16 for which the Secretary of Interior Standards have some relevant bearing, where the city
17 council refused to consider the Secretary of Interior Standards. Therefore, the seventh
18 assignment of error provides no basis for reversal or remand.²⁰

¹⁹ LDC 2.9.20(a) through (i) sets out the purposes of LDC Chapter 2.9. The last of those stated purposes is LDC 2.9.20(1), which provides:

“Adequately implement the Secretary of the Interior’s Standards for Rehabilitation and the Secretary of Interior’s Standards for Preservation, since they were used in the development of review criteria for Historic Preservation Permit requests. The review criteria contained herein implement these standards in a manner that adequately protects Designated Historic Resources consistent with Secretary of the Interior’s Standards for Rehabilitation and the Secretary of Interior’s Standards for Preservation.” (Footnotes omitted.)

²⁰ In their eighth assignment of error, petitioners argue the city council should have considered one of the Secretary of Interior’s Standards in interpreting and applying LDC 2.9.100.04(b)(2)(a) to the proposed marquee and that had the city council done so, they would not have concluded that the proposed marquee complies with LDC 2.9.100.04(b)(2)(a). For the reasons explained below in our discussion of the eighth assignment of error, we do not agree.

1 **EIGHTH AND NINTH ASSIGNMENTS OF ERROR**

2 Under these assignments of error, petitioners argue the city council adopted an
3 erroneously short view of the “applicable Period of Significance” of the theater and
4 erroneously found that the proposed marquee satisfies LDC 2.9.100.04(b)(2).

5 As we explained in our discussion of the fourth assignment of error, LDC
6 2.9.100.04(b)(2) requires that the city find that the proposed improvements satisfy either
7 subsection (a) or subsection (b) of LDC 2.9.100.04(b)(2). We again set out the text of LDC
8 2.9.100.04(b)(2) below:

9 **“In general, the proposed Alteration or New Construction shall either:**

- 10 “a) Cause the Designated Historic Resource to more closely approximate
11 the original historic design or style, appearance, or material
12 composition of the resource relative to the applicable Period of
13 Significance; or
- 14 “b) Be compatible with the historic characteristics of the Designated
15 Historic Resource and/or District, as applicable, based on a
16 consideration of the historic design or style, appearance, or material
17 composition of the resource.”

18 The city council adopted the following findings in concluding that the proposal to
19 replace the 1950s era neon marquee with a marquee that closely approximates the original
20 marquee complies with LDC 2.9.100.04(b)(2):

21 “* * * [T]he existing 1950’s marquee is proposed to be replaced with a replica
22 of the original 1920’s marquee. The City Council notes that the existing
23 marquee is over fifty years old, and is located on a Designated Historic
24 Resource, therefore, the [existing] marquee is a historic element of the
25 Whiteside Theater building.[²¹] * * *

26 “* * * The City Council notes that the new marquee is proposed to be
27 constructed to closely resemble the appearance of the original marquee based
28 on historical photographs of the original marquee submitted by the applicant.
29 * * *

²¹ We added the word “existing” to this sentence to clarify our understanding that the city council found that the existing 1950s neon marquee is itself a historic element of the theater.

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“* * * * *

“The City Council finds that the design of the 1950’s marquee is inconsistent with the Italian Renaissance style. The City Council finds that replacing the 1950’s era marquee with a marquee that closely resembles the original marquee is consistent with the criterion in LDC * * * 2.9.100.04(b)(2). This criterion states that a proposed alteration shall cause the Designated Historic Resource to more closely approximate the original historic design or style, appearance, or material composition of the resource relative to the applicable Period of Significance. Though not explicitly stated in the building’s Statement of Significance, the City Council finds the Period of Significance was approximately 1922 to 1936, a period prior to the installation of the existing marquee. The city Council finds the new marquee causes the theater to more closely approximate the Italian Renaissance style of the building as a whole, and the proposed marquee more closely approximates the original design or style of the marquee.” Record 23.

Three of the above findings play a role in resolving the parties’ arguments under the eighth and ninth assignments of error: (1) the existing neon marquee is historic in its own right; (2) the proposed marquee is more consistent with the original marquee and the original Italian Renaissance style of the theater; and (3) the relevant Period of Significance is 1920 to 1936.

A close reading of LDC 2.9.100.04(b)(2)(a) shows that the city council correctly found that the proposed marquee complies with that subsection of LDC 2.9.100.04(b)(2). Again, under that subsection, the proposed marquee can be approved if it “more closely approximate[s] the *original historic design or style*, appearance, or material composition of the resource * * *.” Although the 1950s marquee is itself historic, as the city council recognized in the above quoted findings, there simply is no question that the proposed marquee more closely approximates the original marquee which in turn was part of the original historic Italian Renaissance design. Approval of the proposed marquee is therefore consistent with LDC 2.9.100.04(b)(2)(a).

In their ninth assignment of error, petitioners argue that the Period of Significance extends from the time the theater was constructed until as late as the present day. We tend to agree with petitioners, based on the LDC 1.6.30 definition of the term “Period of

1 Significance,” that the city council’s unexplained finding that the applicable Period of
2 Significance began in 1922 and ended in 1936 is questionable.²² But we agree with the city
3 that even if the Period of Significance extends until the present, the city’s findings are
4 adequate to demonstrate that the proposed marquee complies with LDC 2.9.100.04(b)(2)(a).
5 There does not appear to be any dispute that the Period of Significance began in 1922 when
6 the theater began. Therefore, in this case, there are only two relevant questions under LDC
7 2.9.100.04(b)(2)(a). First, what is the “original historic design or style?” Second, does the
8 proposed marquee or the existing marquee “more closely approximate” that style? The
9 answer to the first question is the Italian Renaissance architecture of the south facade. The
10 answer to the second question is the proposed marquee. Since there is no dispute about when
11 the Period of Significance began, the answers to those questions are unaffected by the end-
12 date of the Period of Significance. Therefore, even if the Period of Significance extends until
13 today, the proposed marquee more closely approximates the original Italian Renaissance
14 design or style and the city council’s finding regarding the end-date of the Period of
15 Significance is at most harmless error.

16 Finally, petitioners argue that the city council should have considered one of the
17 Secretary of Interior Standards for rehabilitation, which provides:

18 “(4) Most properties change over time; those changes that have acquired
19 historic significance in their own right shall be retained and
20 preserved.”

²² LDC 1.6.30 provides the following definition:

“Period of Significance - Period of Significance is the length of time when a property was associated with important events, activities, or persons, or attained the characteristics which qualify it for National Register of Historic Places listing and/or Local Register listing. Period of Significance usually begins with the date when significant activities or events began giving the property its Historic Significance; this is often a date of construction. Period of Significance usually ends with the date when the significant activities or events stopped giving the property its Historic Significance. For prehistoric properties, the Period of Significance is the broad span of time about which the site or district is likely to provide information; it is often the period associated with a particular cultural group.”

1 However, petitioners’ only argue the Secretary of Interior’s Standard is relevant in correctly
2 determining the Period of Significance, which we have already determined does not matter
3 when it comes to applying LDC 2.9.100.04(b)(2)(a) to the proposed marquee.

4 The eighth and ninth assignments of error are denied.

5 **TENTH ASSIGNMENT OF ERROR**

6 A new cornice is proposed for the west facade. The city’s findings addressing the
7 new cornice are set out below:

8 “[T]he applicants are proposing to install a simple cornice on the west
9 elevation roof line, designed to match the pattern and dimension of the
10 existing south elevation cornice. The cornice is proposed to be fabricated
11 from metal and painted a dark earth tone color and would resemble the
12 cornice on the Forest Temple Gallery building on SW Second Street in
13 Corvallis. [T]he applicant is proposing the cornice to compensate for the
14 ‘visual anomaly’ caused by the location of the second story windows, which
15 are lower than would be typical to avoid impacts to the interior ceiling. [T]he
16 cornice would tie-in with the existing cornice on the south elevation, and
17 would be of the same width, but would not include the ornamentation present
18 on the south cornice.

19 “[T]he materials of the cornice are reflective of, and complementary to, the
20 materials of the existing cornice. [T]he design of the proposed cornice
21 complements, and is consistent with the existing cornice and design of the
22 building. [T]he proposed cornice will be visually different from the existing
23 cornice because of its simplified style. The City Council therefore finds that
24 the proposed cornice complies with the Facades, Building Materials,
25 Architectural Details, and Differentiation criteria.” Record 26.

26 Petitioners argue the city council erred in concluding the proposal complies with the
27 compatibility criteria:

28 “* * * The City Council struggles in its findings to find a happy place
29 between differentiation, requiring changes to stand out as different from
30 original elements, and compatibility, requiring changes to reflect the
31 structure’s original historicity. There never was a cornice on the west
32 elevation. The reason given for adding the proposed west elevation cornice is
33 to fill the void that would occur due to the addition of the second story
34 windows. The findings make it clear that the cornice is being added merely to
35 avoid a visual anomaly that is created as a result of other changes that the
36 applicant proposes to the west facade. Neither are they intended to be
37 approved to allow the designated historic resource to fit in with the

1 surrounding area. The city’s justification for approving the proposed cornice
2 is based, at least in part, on its resemblance to a cornice on the ‘Forest Temple
3 gallery Building * * *.’ [T]he code only allows the city to consider whether
4 or how the proposed alterations are compatible with the Whiteside Theater
5 itself. * * *

6 “Further, LDC 2.9.100.04(b)(3)(c) precludes the addition of this cornice.
7 LDC 2.9.100.04(b)(3)(c): Architectural Details provides in relevant part:
8 ‘Conjectural architectural details shall not be applied.’ The term ‘conjectural’
9 is not defined in the [LDC]. Accordingly, the city’s first error was its failure
10 to determine the meaning of that term, and thus, the meaning of LDC
11 2.9.100.04(b)(3)(c).

12 “The term ‘conjectural’ appears to be a term of art, and the Webster’s
13 dictionary definition is less than helpful in defining this term as it applies in
14 the architectural setting or with regard to historic preservation. However, this
15 provision is taken from provisions in the Secretary of Interior Standards,
16 which is helpful in understanding its meaning. * * * 68 CFR 68.3(b)(3)
17 provides:

18 “Each property will be recognized as a physical record of its
19 time, place and use. Changes that create a false sense of
20 historical development, such as adding conjectural features or
21 elements from other historic properties, will not be
22 undertaken.’

23 “The proposal to add the west elevation cornice is a change that ‘creates a
24 false sense of historical development.’ There never was a cornice on the west
25 elevation, and its addition at this point is not representative of the historic
26 development of the Whiteside Theater. The city’s decision should be
27 remanded for an interpretation of the code and an explanation how the cornice
28 complies with the apparent prohibition set forth in LDC 2.9.100.04(b)(3)(c).”
29 Petition for Review 30-32 (footnote omitted).

30 LDC Chapter 2.9 was not written with ease of application in mind. It includes so
31 many subjective and ambiguously worded provisions that a decision maker faces an
32 exceedingly difficult task in applying its standards. In this case, the city findings quoted
33 above explain that the new cornice on the west facade is needed to avoid a visual anomaly
34 that will otherwise result due the placement of the second floor windows. The above
35 findings explain why the city concluded the proposed cornice satisfies the somewhat
36 inconsistent requirements that such a new cornice be compatible with the existing cornice on

1 the south facade, as LDC 2.9.100.04(b)(2)(b) requires, but also different from that existing
2 cornice so that it complies with the LDC 2.9.100.04(b)(3)(n) requirement for
3 “Differentiation.”²³ Petitioners do not really challenge the adequacy of those findings.
4 Although petitioners also fault the city and applicant for trying to make the new cornice look
5 like the cornice on a nearby building, we do not see that it is error to do that.

6 However, while we have some sympathy for the difficult task the city faces in
7 navigating LDC 2.9.100.04(b)(2) and the 2.9.100.04(b)(3) compatibility criteria, the city
8 council’s findings expressly state that the LDC 2.9.100.04(b)(3)(c) “Architectural Details”
9 criteria were applied to the west facade. We are not sure what a “conjectural architectural
10 detail” is. The city does not argue that no issue was raised concerning whether the cornice
11 proposed for the west facade violates the LDC 2.9.100.04(b)(3)(c) prohibition on
12 “conjectural architectural details,” and the city council’s decision does not address the issue.
13 We therefore agree with petitioners that the city council’s decision must be remanded so that
14 the city council can consider whether the cornice proposed for the west facade constitutes a
15 “conjectural architectural detail” If it is, it is prohibited by LDC 2.9.100.04(b)(3)(c).

16 The tenth assignment of error is sustained.

17 **ELEVENTH ASSIGNMENT OF ERROR**

18 In their eleventh assignment of error, petitioners allege the city erred in concluding
19 that the proposed canopies satisfy the relevant LDC 2.9.100.04(b)(3) compatibility criteria.

²³ LDC 2.9.100.04(b)(3)(n) provides:

“Differentiation - An Alteration or New Construction shall be differentiated from the portions of the site’s existing Designated Historic Resource(s) inside the applicable Period of Significance. However, it also shall be compatible with said Designated Historic Resource’s Historically Significant materials, design or style elements, features, size, scale, proportion, and massing to protect the Historic Integrity of the Designated Historic Resource and its environment. Therefore, the differentiation may be subtle and may be accomplished between the Historically Significant portions and the new construction with variations in wall or roof alignment, offsets, roof pitch, or roof height. Alternatively, differentiation may be accomplished by a visual change in surface, such as a molding strip or other element that acts as an interface between the Historically Significant and the new portions.”

1 Petitioners argue the theater never had canopies. In approving the canopies, petitioners
2 contend the city council erred by relying on the existence of canopies on (1) the nearby
3 historic Hotel Corvallis and (2) nearby buildings that are not historic. Petitioners argue:

4 “The city errs in its attempts to make the Whiteside Theater fit in with other
5 buildings in the area. Its function is to make the changes compatible with the
6 designated historic resource, i.e., the Whiteside Theater itself. To the extent it
7 did not do that, it erred.” Petition for Review 33.

8 The city council adopted the following findings in approving the disputed canopies:

9 “The City Council notes that the applicant is proposing to install an
10 approximately 6 foot deep by 14 foot wide steel canopy over the new entry
11 doors on the east side of the south [facade]. The City Council notes the
12 applicant is proposing to install 5, six-foot deep, steel-channel canopies over
13 the new store front windows and entries on the west facade. The canopies
14 would be attached to the building where there is currently, and was
15 historically, no significant architectural detail. The City Council notes that
16 the theater never had a canopy other than the marquee, so it is not possible to
17 compare the proposed canopies to existing or original canopies. As such, the
18 City Council notes that compatibility of the canopies must be based on the
19 canopies’ consistency with the Whiteside Theater building and surrounding
20 Designated Historic Resources.

21 “The City Council notes that the majority of the older buildings in the
22 downtown have canopies that extend over the sidewalks fronting the
23 buildings. This is due in large part to development standards of the Central
24 Business District. The steel canopy proposed on the south elevation would
25 have a strong horizontal appearance, similar to the proposed marquee. The
26 canopy would be similar in style and materials to the canopies on the Hotel
27 Corvallis, a downtown property built circa 1927, and listed on the Local and
28 National Registers.

29 “The City Council finds that, given the proposed style, materials, and size of
30 the canopies, and similarities to canopies on a nearby Designated Historic
31 Resource, the proposed canopies are appropriate for the Whiteside Theater.
32 The canopies are consistent with the design of the Whiteside Theater
33 Building, particularly the proposed marquee, and are consistent with canopies
34 on at least one nearby historic structure from the same era. Therefore, the
35 City Council finds that the canopy complies with the Facades, Building
36 Materials, and Architectural Details criteria in LDC Section
37 2.9.100.04(b)(3).” Record 24.

38 We agree with petitioners that the city cannot rely on the fact that nearby businesses
39 have canopies to approve the disputed canopies, if those businesses are not part of the city’s

1 designated Historic Resource. But as we have said before, we do not think the city commits
2 reversible error by pointing out that some of the proposed alterations are consistent with
3 features on nearby buildings. While the focus of the city’s decision must be on the Historic
4 Resource, that Historic Resource does not exist in a vacuum, and the city council is not
5 required to completely ignore the buildings around the Historic Resource.

6 It is clear from first of the above-quoted paragraphs that the city council recognized
7 that the canopies are not going to cause the theater to “more closely approximate the original
8 historic design or style,” as required by LDC 2.9.100.04(b)(2)(a), since the theater never had
9 canopies. The final sentence in the first paragraph makes it clear that the city is relying on
10 LDC 2.9.100.04(b)(2)(b) rather than (a).²⁴ Under LDC 2.9.100.04(b)(2)(b) the proposed
11 canopies must “[b]e compatible with the historic characteristics of the Designated Historic
12 Resource and/or District, based on a consideration of the historic design or style, appearance,
13 or material composition of the resource.”

14 In the first of the above-quoted paragraphs, the city finds that there are no significant
15 architectural details where the canopies are to be attached. In the second of the above-quoted
16 paragraphs, the city council finds that the “strong horizontal appearance” of the canopies is
17 consistent with that of the proposed marquee, which in turn resembles the original marquee.
18 In that second paragraph, the city also finds that the “style and materials” of the proposed
19 canopies are similar to the canopies on the historic Hotel Corvallis.²⁵ In the third paragraph
20 the city council restates these findings and concludes, based on “the proposed style,
21 materials, and size of the canopies and similarities to canopies on” the Hotel Corvallis, “[t]he

²⁴ LDC 2.9.100.04(b)(2) is set out in the Appendix and is quoted and discussed in our discussion of the third subassignment of error under the fourth assignment of error above.

²⁵ We see nothing improper in the city considering whether the canopies are compatible with the historic Corvallis Hotel. That hotel is part of the city’s Designated Historic Resource. That the theater and hotel are different kinds of buildings does not mean the canopies cannot be compatible. We also do not see that the fact that the Hotel is two blocks away precludes the comparison or mandates an explanation for why the canopies were considered.

1 canopies are consistent with the design of the Whiteside Theater, particularly the proposed
2 marquee” and therefore “the canopy complies with the Facades, Building Materials, and
3 Architectural Details criteria in LDC Section 2.9.100.04(b)(3).”

4 Without more of an argument from petitioners, we fail to see why the city council’s
5 findings concerning the proposed canopies are inadequate. The eleventh assignment of error
6 is denied.

7 **TWELFTH ASSIGNMENT OF ERROR**

8 The question presented under the twelfth assignment of error is whether Whiteside’s
9 proposed interior modifications are subject to Historic Preservation Permit review. By
10 “interior modifications,” we understand petitioners to refer to structural modifications to the
11 theater that do not themselves alter the exterior of the theater, and therefore are not listed at
12 ns 1 and 2, but will operate in concert with the exterior alterations listed in ns 1 and 2 to
13 effect a change in the use of the theater. The parties seem to agree which LDC sections are
14 relevant in answering that question; they simply read those sections to reach different
15 interpretive conclusions.

16 The logical starting point seems to be LDC 2.9.100.02, which provides:

17 “If an activity meets the definition for an Alteration or New Construction
18 involving a Designated Historic Resource, as outlined in Section 2.9.100.01
19 above, then one of the two types of Historic Preservation Permits (Director-
20 level or HRC-level) * * * is required.”

21 The LDC 2.9.100.01 definition of “Alteration or New Construction involving a Designated
22 Historic Resource” is set out below:

23 “An activity is considered an Alteration or New Construction involving a
24 Designated Historic Resource when: the activity is not an exempt activity,
25 * * * as defined in Section[] 2.9.70 * * * and the activity meets at least one of
26 the descriptions in ‘a’ through ‘c,’ below.

27 **a.** The activity alters the exterior appearance of a Designated Historic
28 Resource. Exterior appearance includes a resource’s facade, texture,
29 design or style, material, and/or fixtures;

1 **“b.** The activity involves a new addition to an existing Designated Historic
2 Resource or new freestanding construction on a Designated Historic
3 Resource property; and/or

4 **“c.** The activity involves installation of a Designated Historic Resource at
5 a new site location, following a Moving, if the new site is within the
6 City limits. If the new site of the Designated Historic Resource is
7 outside the City limits, no City evaluation of the resource’s installation
8 at that new site will occur because the City has no jurisdiction in such
9 locations.”

10 Finally, as relevant, LDC 2.9.70 provides the following exemption:

11 **“EXEMPTIONS FROM HISTORIC PRESERVATION PERMIT**
12 **REQUIREMENTS**

13 “The following changes to a Designated Historic Resource shall be exempt
14 from the requirement for a Historic Preservation Permit. * * *.

15 **“a. Interior Alterations** - Changes to the interior of a Designated Historic
16 Resource that do not alter the building exterior.”

17 In rejecting petitioners’ argument that Whiteside must seek and obtain a Historic
18 Preservation Permit for its proposed interior alterations, the city adopted the position that
19 “LDC 2.9.70(a) merely makes it clear that alterations to the exterior of a resource are not
20 exempt from the requirement for a Historic Preservation Permit and review just because
21 those alterations are required by exempt interior changes.” The city’s complete findings on
22 this issue are set out in the margin.²⁶ Petitioners respond that the city’s reading of LDC

²⁶ The city council’s complete findings on this issue are as follows:

“[M]uch of the testimony in opposition to the proposal focused on language from [LDC] 2.9.70(a), which provides an exemption from the code’s requirement for applications for Historic Preservation Permits when an owner of a Historic Resource undertakes ‘[c]hanges to the interior of a Designated Historic Resource that do not alter the building exterior.’ Testimony in opposition argued that this exemption must be read as requiring a permit and review of the interior alterations themselves if the changes to the interior of a Designated Historic Resource do alter the building exterior. The City Council disagrees. LDC 2.9.70(a) does not require a review and Historic Preservation Permit for changes to the interior of a resource if a building exterior is altered. LDC 2.9.70(a) merely makes it clear that alterations to the exterior of a resource are not exempt from the requirement for a Historic Preservation Permit and review just because those alterations are required by exempt interior changes. The City Council finds that nothing in LDC Chapter 2.9 requires a Historic Preservation Permit or review for a change to the interior of a resource.” Record 15.

1 2.9.70(a) is “nonsensical” and renders the exemption in LDC 2.9.70(a) “superfluous.”
2 Petition for Review 34. Petitioners argue that the only way LDC 2.9.70(a) can logically be
3 interpreted is that interior alterations that do alter the building exterior are not exempted. We
4 understand petitioners to argue that, but for the proposed interior alterations, the exterior
5 alterations would not be necessary and, for that reason, it is error to describe those interior
6 alterations as changes “that do not alter the building exterior.”

7 The city’s and petitioners’ interpretive arguments unnecessarily complicate the
8 interpretive question that must be answered to resolve the twelfth assignment of error by
9 focusing almost exclusively on the exemption provided by LDC 2.9.70(a) and ignoring or
10 paying only lip service to the role that LDC 2.9.100.01 plays in answering the question posed
11 under the twelfth assignment of error. Under LDC 2.9.100.01 the question is what activities
12 in Whiteside’s proposal qualify as “an Alteration or New Construction involving a
13 Designated Historic Resource?” Under LDC 2.9.100.01 only those activities that meet “at
14 least one of the descriptions in ‘a’ through ‘c,’ of [LDC 2.9.100.01]” require a Historic
15 Preservation Permit. The only one of those descriptions that petitioners even suggest might
16 apply in this case is description “a,” which provides:

17 “The activity alters the exterior appearance of a Designated Historic
18 Resource. Exterior appearance includes a resource’s facade, texture, design
19 or style, material, and/or fixtures[.]”

20 Reading the *exemption* in LDC 2.9.70(a) together with the LDC 2.9.100.01(a) *description* of
21 the activities that *must obtain* a Historic Preservation permit, LDC 2.9.70(a) simply makes it
22 clear that interior activities that do not themselves alter the exterior do not require Historic
23 Preservation Permits, whereas activities that do alter the exterior must receive approval via a
24 Historic Preservation Permit.²⁷ Although LDC 2.9.70(a), 2.9.100.01 and 2.9.100.02 are
25 awkwardly written, they are not particularly ambiguous.

²⁷ We therefore do not agree with the city council’s description of the purpose that is served by LDC 2.9.70(a). The purpose of LDC 2.9.70(a) is not to clarify the activities that must obtain a Historic Preservation

1 As far as we can tell, the lists of activities set out at ns 1 and 2 include every proposed
2 activity that “alters the exterior appearance” of the theater. As far as we can tell, the
3 activities that petitioners refer to as the “interior alterations” do not themselves alter “the
4 exterior appearance of a Designated Historic Resource.” For that reason, the interior
5 alterations do not require a Historic Preservation Permit under LDC 2.9.100.01 and LDC
6 2.9.100.02. We reject petitioners’ attempt to interpret LDC 2.9.70(a), 2.9.100.01 and
7 2.9.100.02 to reach a different conclusion.

8 Finally, as the city correctly points out, it is difficult to see how the city would go
9 about reviewing interior alterations that do not themselves alter the exterior of the building in
10 any event, since the criteria at LDC 2.9.100.04(b) all seem to be concerned with the exterior
11 appearance of historic structures, not the interior of historic structures that cannot be seen
12 from outside. To the extent LDC 2.9.70(a), 2.9.100.01 and 2.9.100.02 are ambiguous, that
13 context supports the city’s ultimate interpretive conclusion regarding whether LDC 2.9.70(a),
14 2.9.100.01 and 2.9.100.02 require a Historic Preservation Permit for the proposed interior
15 alterations.

16 The twelfth assignment of error is denied.

17 The city’s decision is remanded.

Permit; the purpose of LDC 2.9.70(a) is to identify activities that are exempt from the LDC 2.9.100.01 requirement for a Historic Preservation Permit. However, we agree with the city council’s ultimate interpretation that LDC 2.9.100.01 does not require a Historic Preservation Permit for interior alterations that do not themselves alter the exterior of the theater.

1 **Appendix**
2 **LDC 2.9.100.04(b)**

3 **“Review Criteria**

4 **“1. General -** The Alteration or New Construction Historic Preservation
5 Permit request shall be evaluated against the review criteria listed
6 below. These criteria are intended to ensure that the design or style of
7 the Alteration or New Construction is compatible with that of the
8 existing Designated Historic Resource, if in existence, and proposed in
9 part to remain, and with any existing surrounding comparable
10 Designated Historic Resources, if applicable. Consideration shall be
11 given to:

12 “a) Historic Significance and/or classification;

13 “b) Historic Integrity;

14 “c) Age;

15 “d) Architectural design or style;

16 “e) Condition of the subject Designated Historic Resource;

17 “f) Whether or not the Designated Historic Resource is a prime
18 example or one of the few remaining examples of a once
19 common architectural design or style, or type of construction;
20 and

21 “g) Whether or not the Designated Historic Resource is of a rare or
22 unusual architectural design or style, or type of construction.

23 **“2. In general, the proposed Alteration or New Construction shall**
24 **either:**

25 “a) Cause the Designated Historic Resource to more closely
26 approximate the original historic design or style, appearance,
27 or material composition of the resource relative to the
28 applicable Period of Significance; or

29 “b) Be compatible with the historic characteristics of the
30 Designated Historic Resource and/or District, as applicable,
31 based on a consideration of the historic design or style,
32 appearance, or material composition of the resource.

1 **“3. Compatibility Criteria for Structures and Site Elements -**

2 Compatibility considerations shall include the items listed in “a -n,”
3 below, as applicable, and relative to the applicable Period of
4 Significance. Alteration or New Construction shall complement the
5 architectural design or style of the primary resource, if in existence
6 and proposed in part to remain; and any existing surrounding
7 comparable Designated Historic Resources. Notwithstanding these
8 provisions and “a-n,” below, for Nonhistoric/Noncontributing
9 resources in a National Register of Historic Places Historic District or
10 resources within such Historic District that are not classified because
11 the nomination for the Historic District is silent on the issue,
12 Alteration or New Construction activities shall be evaluated for
13 compatibility with the architectural design or style of any existing
14 Historic/Contributing resource on the site or, where none exists,
15 against the attributes of the applicable Historic District’s Period of
16 Significance.

17 **“a) Facades -** Architectural features, such as balconies,
18 porches, bay windows, dormers, or trim details on main
19 facades shall be retained, restored, or designed to
20 complement the primary structure and any existing
21 surrounding comparable Designated Historic
22 Resources. Particular attention should be paid to those
23 facades facing street rights-of-way. Architectural
24 elements inconsistent with the Designated Historic
25 Resource’s existing building design or style shall be
26 avoided.

27 **“b) Building Materials -** Building materials shall be
28 reflective of, and complementary to, those found on the
29 existing primary Designated Historic Resource, if in
30 existence and proposed in part to remain, and any
31 existing surrounding comparable Designated Historic
32 Resources. Siding materials of vertical board, plywood,
33 cement stucco, aluminum, exposed concrete block, and
34 vinyl shall be avoided, unless documented as being
35 consistent with the original design or style, or structure
36 of the Designated Historic Resource.

37 **“c) Architectural Details -** Retention and repair of existing
38 character-defining elements of a structure, such as
39 molding or trim, brackets, columns, cladding,
40 ornamentation, and other finishing details and their
41 design or style, materials, and dimensions, shall be
42 considered by the property owner prior to replacement.
43 Replacements for existing architectural elements or

- 1 proposed new architectural elements shall be consistent
2 with the resource’s design or style. If any previously
3 existing architectural elements are restored, such
4 features shall be consistent with the documented
5 building design or style. Conjectural architectural
6 details shall not be applied.
- 7 “d) Scale and Proportion - * * * .
- 8 “e) Height - * * * .
- 9 “f) Roof Shape - * * * .
- 10 “g) Pattern of Window and Door Openings - To the extent
11 possible window and door openings shall be compatible
12 with the original features of the existing Designated
13 Historic Resource, if in existence and proposed in part
14 to remain, in form (size, proportion, detailing),
15 materials, type, pattern, and placement of openings.
- 16 “h) Building Orientation - Building orientation shall be
17 compatible with existing development patterns on the
18 Designated Historic Resource site, if in existence and
19 proposed in part to remain, and any existing
20 surrounding comparable Designated Historic
21 Resources. In general, Alteration or New Construction
22 shall be sited so that the impact to primary facade(s) of
23 the Designated Historic Resource, if in existence and
24 proposed in part to remain, is minimized.
- 25 “i) Site Development - * * * .
- 26 “j) Accessory Development/Structures - * * * .
- 27 “k) Garages - * * * .
- 28 “l) Chemical or Physical Treatments - * * * .
- 29 “m) Archeological Resources - * * * .
- 30 “n) Differentiation - An Alteration or New Construction
31 shall be differentiated from the portions of the site’s
32 existing Designated Historic Resource(s) inside the
33 applicable Period of Significance. However, it also
34 shall be compatible with said Designated Historic
35 Resource’s Historically Significant materials, design or
36 style elements, features, size, scale, proportion, and

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massing to protect the Historic Integrity of the Designated Historic Resource and its environment. Therefore, the differentiation may be subtle and may be accomplished between the Historically Significant portions and the new construction with variations in wall or roof alignment, offsets, roof pitch, or roof height. Alternatively, differentiation may be accomplished by a visual change in surface, such as a molding strip or other element that acts as an interface between the Historically Significant and the new portions.”