

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROBERT STRICKLIN and
5 PAUL VAN DER VELDT,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF ASTORIA,
11 *Respondent,*

12
13 and

14
15 JON ENGLUND and
16 ENGLUND MARINE SUPPLY CO.,
17 *Intervenor-Respondents.*

18
19 LUBA Nos. 2007-192 and 2007-193

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Astoria.

25
26 William K. Kabeiseman, Portland, filed the petition for review and argued on behalf
27 of petitioners. With him on the brief were Edward J. Sullivan, Carrie A. Richter and Garvey
28 Schubert Barer PC.

29
30 No appearance by City of Astoria.

31
32 Steve C. Morasch, Vancouver, filed the response brief and argued on behalf of
33 intervenor-respondents. With him on the brief was Schwabe, Williamson & Wyatt, PC.

34
35 RYAN, Board Chair; HOLSTUN Board Member; BASSHAM, Board Member,
36 participated in the decision.

37
38 REMANDED

05/08/2008

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

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal city approval of two variances and a conditional use application to
4 develop two mixed-use residential and commercial buildings.

5 **FACTS**

6 Intervenor-respondents (intervenor) propose to build a mixed-use condominium
7 consisting of two separate buildings on property located adjacent to and in the Columbia
8 River in downtown Astoria. The site is zoned Aquatic Two-A (A-2A). A small portion of
9 the building site is upland of the Columbia River, and the majority remainder of the site is
10 submerged land located in the river.¹ In order to place buildings on the submerged portion of
11 the site, intervenor must build a piling field and decking over the submerged portion of the
12 site to support the buildings.

13 The A-2A zoning regulations conditionally allow intervenor to build a 28-foot high
14 mixed-use building with entirely residential use on floors that are above the ground level,
15 provided that 75% of the ground floor is in “tourist-oriented” commercial use. Astoria
16 Development Code (ADC) 2.565(8) and 2.560(10)-(14).² Residential uses are allowed in the

¹ In order to build on the submerged portion of the site, which intervenor does not own, intervenor must lease the submerged land from the owner, the Oregon Department of State Lands (DSL).

² ADC 2.565(8) designates the following uses listed in ADC 2.560(10) though (14) as “tourist-oriented” uses:

- “10. Eating and drinking establishment open to the general public which provides significant visual access to the waterfront.
- “11. Hotel, motel, inn, bed and breakfast which provides significant visual access to the waterfront.
- “12. Tourist-oriented retail sales establishment which provides significant visual access to the waterfront.
- “13. Indoor amusement, entertainment, and/or recreation establishment which provides significant visual access to the waterfront.
- “14. Professional, business and medical office.”

1 A-2A zone as a conditional use. ADC 2.560(15). Consequently, intervenor sought a
2 conditional use permit for the project.

3 Intervenor also sought a variance from the 28-foot height limit to allow the
4 construction of two buildings, one 35-feet tall and one 45-feet tall, and a variance to allow
5 100% residential development on all floors. The planning commission approved the height
6 variance. The planning commission also approved a modified version of the use variance to
7 allow any commercial uses, rather than “tourist-oriented” commercial uses, and to eliminate
8 the requirement that 75% of the ground floor space be commercial uses. Instead, the
9 planning commission’s decision required commercial uses only on the south facing portions
10 of the ground floors that face the city’s River Walk. The planning commission denied the
11 conditional use permit application based on its concerns about encouraging public access to
12 the waterfront. The decisions were appealed to the city council, which reversed the planning
13 commission’s decision denying the conditional use permit and upheld its decision approving
14 the variances. This appeal followed.

15 **MOTION TO FILE REPLY BRIEF**

16 Petitioners move to file a reply brief. There is no opposition to the motion, and it is
17 granted.

ADC 2.565(8) provides in relevant part:

“Residences are permitted where they are part of a mixed-use development that also includes some of the tourist-oriented uses listed in Section 2.560 (10 through 14), under the following conditions:

“* * * * *

“b. Multi-Story Structure, shall conform to one of the following options:

- “1) The residence shall constitute no more than 50% of the total project's gross floor area.
- “2 A multi-story structure which maintains at least 75% of the ground floor or street level space for tourist-oriented uses as listed above, may devote 100% of the upper floors to residences.”

1 **FIRST ASSIGNMENT OF ERROR**

2 The city granted a variance to the 28-foot height limit under the general variance
3 criteria of ADC 12.030.³ In the first assignment of error, petitioners argue that the city erred

³ ADC 12.030 provides in relevant part:

“Variances to a requirement of this Code, with respect to lot area and dimensions, setbacks, yard area, lot coverage, height of structures, vision clearance, and other quantitative requirements may be granted only if, on the basis of the application, investigation and evidence submitted by the applicant, findings are made based on the four factors listed below.
* * *

“A. The granting authority may grant a variance from the requirements of this chapter, if on the basis of the application, investigation, and the evidence submitted by the applicant, all four (4) of the following expressly written findings are made:

“1. The request is necessary to prevent unnecessary hardship; and

“* * * * *

“3. The request is necessary to make reasonable use of the property; and

“* * * * *

“B. In evaluating whether a particular request is to be granted, the granting authority shall consider the following, together with any other relevant facts or circumstances.

“1. Relevant factors to be considered in determining whether a hardship exists include:

“a. Physical circumstances related to the property involved;

“b. Whether a reasonable use, similar to like properties, can be made of the property without the variance;

“c. Whether the hardship was created by the person requesting the variance;

“d. The economic impact upon the person requesting the variance if the request is denied.

“* * * * *

“3. A determination of whether the standards set forth in Section 12.030(A) are satisfied necessarily involves the balancing of competing and conflicting interests. The considerations listed in Section 12.030(B) (1) & (2) are not standards and are not intended to be an exclusive list of considerations. The considerations are to be used as a guide in the granting authority’s deliberations.

“* * * * *

1 in finding that ADC 12.030(A)(1) and 12.030(A)(3) were met in granting the height
2 variance.

3 **A. Whether There Is An Unnecessary Hardship**

4 ADC 12.030(A)(1) requires that the request for the variance must be “* * * necessary
5 to prevent unnecessary hardship.” See n 3. In order to determine whether an unnecessary
6 hardship exists, ADC 12.030(B)(1) requires the city to consider four relevant factors set forth
7 in ADC 12.030(B)(1) (a-d) as well as “any other relevant factors or circumstances.” *Id.*
8 ADC 12.030(B)(3) explains that determining whether there is an unnecessary hardship
9 “involves the balancing of competing and conflicting interests” and that the factors to be
10 considered in ADC 12.030(B)(1) are not approval standards and “are not intended to be an
11 exclusive list of considerations.” *Id.*

12 The city’s findings regarding why the height variance is necessary to prevent an
13 unnecessary hardship state:

14 “The applicant is proposing to increase the height and eliminate the
15 commercial uses. Development over the water is extremely costly. * * * *To*
16 *construct a building 28’ high the full width of the property would be allowed*
17 *outright. This would be a hardship on the city as there would no longer be*
18 *any access to the river. The construction of taller buildings with larger view*
19 *corridors and public space reduces this hardship. Without the variance a*
20 *development could occur that would block the citizens from any access to the*
21 *waterfront.*

22 “* * * The applicant has advised that cost for this construction over water
23 will be approximately \$150 per square foot for almost \$8 million for less than
24 two acres of development. * * * With the cost to build over water, it is not
25 feasible to construct to only 28’ as the majority of the cost is in the piling and
26 decking to support any structure. * * * *To deny a height variance would*
27 *reduce the economic feasibility of any construction on this site and therefore*
28 *may eliminate any viable use by the applicant. While the amount of profit*
29 *benefited from a project is not a factor for consideration, the ability to do a*
30 *project at all is a factor. A 28’ high building probably could not be built that*

“C. No variance may be granted which will permit a use not permitted in the applicable zone or which will increase the allowable residential density in any zone with the exception of individual lot size reduction.”

1 would be cost effective. *Therefore, it would be an economic hardship to deny*
2 *the height variance.*” Record 77-78 (emphases added).

3 The city found that two hardships justify the height variance: (1) a hardship on the
4 city from the potential loss of river views and access to adjacent public property if a building
5 covered the full width of the property; and (2) a hardship on the applicant if the variance
6 were denied. We address each alleged hardship in turn.

7 **1. Hardship to the City**

8 ADC 12.030(A)(1) uses the phrase “unnecessary hardship.” The city justified the
9 height variance in part based on a hardship to the city. Petitioners argue that the city’s
10 interpretation of the code as allowing the city to justify a variance based on a hardship to the
11 city is inconsistent with the text and context of ADC 12.030(A)(1) and (2), and the stated
12 purpose of the variance provisions of the ADC. Petitioners also argue that, even if a hardship
13 on the city could serve as a legitimate basis for granting a variance, in this case there is no
14 unnecessary hardship on the city. Intervenor responds that the city properly justified the
15 height variance based on its determination that denial of the variance would be both a
16 hardship to the city and a hardship to the applicant.

17 We assume without deciding that ADC 12.030(A)(1) can be construed to justify
18 granting a variance based on a hardship to the city. However, we agree with petitioners that
19 in this appeal, the city’s findings fail to demonstrate any unnecessary hardship to the city.
20 The term “unnecessary hardship” is not defined in the ADC, and the city provides no express
21 or implied interpretation of that term that is adequate for review. ORS 197.829(2). In
22 construing the term, we give words their plain, ordinary, and natural meanings.
23 “Unnecessary” is defined as “not necessary,” and “necessary” is defined as “[an] item[] that
24 cannot be done without: things that must be had (as for the preservation and reasonable
25 enjoyment of life)[.]” *Webster’s Third New Int’l Dictionary*, 1510 (1981). “Hardship” is
26 defined as “suffering, privation; * * * a particular instance or type of suffering or
27 privation[.]” *Id.* at 1033.

1 The alleged hardship to the city is that if the applicant were to construct a 28-foot
2 high single building, the public could not view or gain access to the river and adjacent public
3 tidelands. We agree with petitioners that the city has not demonstrated that the impacts of
4 constructing a 28-foot high building consistent with the city’s zoning ordinance will cause
5 the city or its citizens suffering or privation. Failure to provide views of the river and access
6 to public spaces is not an unnecessary hardship on the city, particularly when the city
7 controls through its zoning and development regulations the manner in which properties such
8 as the subject site may be developed.⁴ While a development that would provide river views
9 and access to the river could be considered a benefit to the city, the inability to obtain such a
10 benefit hardly constitutes suffering or privation. As petitioners point out, such an
11 interpretation would make the potential bases for granting a variance almost limitless. If the
12 city believes failure to achieve unobstructed river views and access to the river in this
13 location is undesirable, the city is free to amend its code to ensure that such river views and
14 access are achieved and preserved. But the city improperly justified the height variance
15 based on its determination that inability to obtain river views would be an unnecessary
16 hardship to the city.

17 **2. Hardship to the Applicant**

18 The city also found that denial of the height variance would result in a hardship to the
19 applicant. As noted, building over the river will require expensive pilings and decking to be
20 constructed. The city found that it may not be economically feasible to construct a single
21 building 28 feet high:

22 “* * * To deny a height variance would reduce the economic feasibility of any
23 construction on this site and therefore *may eliminate* any viable use by the
24 applicant. While the amount of profit benefited from a project is not a factor
25 for consideration, the ability to do a project at all is a factor. A 28’ high
26 building probably could not be built that would be cost effective. Therefore,

⁴ Other waterfront zones, such as the A-2 zone, contain height limits of 45 feet. ADC 2.540(5).

1 it would be an economic hardship to deny the height variance.” Record 78
2 (emphasis added).

3 Petitioners argue that the city’s findings are inadequate to explain why the cost of building
4 over the water creates an unnecessary hardship that justifies a variance, and that, at most, the
5 findings demonstrate an economic inconvenience in building over the water. Petitioners also
6 argue that the city’s findings are inadequate because they do not discuss the factors listed in
7 ADC 12.030(B)(1)(a) through (d). *See* n 3. Finally, petitioners also argue that there is not
8 substantial evidence in the record to support the city’s finding that the variance is necessary
9 to prevent an unnecessary hardship. Intervenor explains that the city found that the variance
10 was necessary to prevent an unnecessary hardship to the applicant due to the economic
11 infeasibility of constructing buildings on the site without the variance.

12 We agree with petitioners that the city’s findings that the applicant could not build on
13 the property without the height variance are not supported by, and are in fact contradicted by,
14 evidence in the record. When intervenor applied for the conditional use and variances,
15 intervenor submitted two separate site plans: one set of plans depicting a building 28 feet
16 high covering the width of the property, and a second set depicting two buildings with a
17 public space between them. Record 758-59. As intervenor concedes, both designs include
18 approximately the same number of condominium units and, presumably, would offer a
19 similar rate of return per unit. The only economic difficulty with the single building design
20 cited in the findings is the cost of construction over the submerged portion of the site.
21 However, as far as the record establishes both designs will require the same expensive
22 pilings and decking. Intervenor’s application noted that the single building proposal could
23 be built but that “design creativity and quality of construction would potentially be highly
24 compromised * * *.” Record 766. Design creativity and quality of construction are factors
25 largely under intervenor’s control, and there is no explanation for why it is economically
26 infeasible to construct one or more buildings that conform to the applicable code
27 requirements. An applicant’s desire for a more creative design than that which could be built

1 without a variance does not fall within the plain, ordinary or natural meaning of
2 “unnecessary hardship.”

3 The city’s findings that the high cost of piling and deckings justify the variance
4 because without the variance the project is not feasible are not supported by the evidence in
5 the record, where intervenor concedes that an alternative single-building condominium may
6 be built that would also require the same, or similar, expensive pilings and deckings. The
7 evidence indicates that the project could be built within the existing zoning regulations and
8 without the variances, but that it would not be the applicant’s preferred design.

9 **B. Reasonable Use of the Property**

10 ADC 12.030(A)(3) requires that the city find that the variance request is “necessary
11 to make reasonable use of the property.” As noted, the ADC does not define the term
12 “necessary,” but the dictionary defines the term as: “items that cannot be done without:
13 things that must be had (as for the preservation and reasonable enjoyment of life)[.]”
14 *Webster’s Third New Int’l Dictionary*, 1510. The city’s findings regarding ADC
15 12.030(A)(3) state in relevant part:

16 “As noted above, to construct on the water is expensive. The additional
17 height makes a project financially feasible. The height variance is necessary
18 to make reasonable use of the property.” Record 84.

19 For the reasons discussed above, given the evidence in the record that a single-building
20 project could be built, the city’s findings do not demonstrate that the variance is necessary to
21 make reasonable use of the property. Apparently, the applicant can make reasonable use of
22 the property by building a single, lower-height building across the entire width of the
23 property. The fact that construction of either design is expensive due to building over the
24 water does not mean that the single building design is not a reasonable use and that
25 applicant’s preferred proposal for the property is “necessary.”

26 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. The City Erred by Granting a Variance that Completely Eliminates the**
3 **Requirement for “Tourist-Oriented” Commercial Uses**

4 In the second assignment of error, petitioners challenge the city’s grant of a variance
5 to the requirement in ADC 2.565(8) that 75% of the ground floor area in a mixed-use
6 building must be maintained for “tourist-oriented uses.” *See n 2.* Although intervenor
7 requested a variance to allow the buildings to be entirely residential, the variance that the city
8 granted requires intervenor to provide an unspecified percentage of general “commercial”
9 uses on the ground floor portions of the buildings that face the city’s River Walk. The
10 variance entirely eliminated the requirement for the type of “tourist-oriented” commercial
11 uses set forth in ADC 2.568(8) and ADC 2.565(10) through (14).

12 Petitioners first argue that ADC 12.010 and ADC 12.030 do not allow the city to
13 completely eliminate the requirement for “tourist-oriented uses” that are described in ADC
14 2.560(10) through (14). ADC 12.010 states that “no variance shall be granted to allow the
15 use of property for a purpose not authorized within the zone.” ADC 12.030 allows a
16 variance only to “lot area and dimensions, setbacks, yard area, lot coverage, height of
17 structures, vision clearance, and other quantitative requirements,” not to uses allowed in the
18 zone. *See n 3.* Petitioners argue that the requirement for “tourist-oriented” commercial uses
19 is a non-quantitative use requirement that, pursuant to ADC 12.010, cannot be the subject of
20 a variance.

21 Citing *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), intervenor
22 initially responds by arguing that petitioners waived that issue because petitioners failed to
23 raise the issue in their local notice of appeal and thus, failed to exhaust their remedies before
24 the local governing body as required by ORS 197.825(2)(a) and *Miles*. Petitioners first
25 dispute that *Miles* applies to the present appeal, arguing that the fact that the city’s code
26 allows a *de novo* hearing where new evidence and testimony may be presented means that

1 the city does not intend to limit appeal issues to those specified in the notice of appeal.⁵ In
2 *Miles*, the court reviewed a city code provision that required the appellants to file a written
3 statement specifying the specific errors in the decision and the grounds for those errors. The
4 court held that even where a city’s code does not specifically state that the issues on appeal
5 are limited to those specified in the notice of appeal, such a limit may be inherent in a
6 requirement that the issues for appeal must be identified in the appeal statement. 190 Or App
7 at 509-10. We think it is reasonably clear that ADC 9.040(D) is intended to limit the issues
8 on appeal to those presented in the request for appeal. *See* n 5. We disagree with petitioners
9 that in allowing a hearing on appeal where new *evidence and testimony* may be raised, the
10 city also intends to allow new issues to be raised that were not specified in the statement of
11 appeal as required by ADC 9.040(D).

12 Petitioners next rely on ORS 197.835(4) to argue that they are allowed to raise the
13 issue at LUBA because those specific ADC provisions were never identified by the city as

⁵ ADC 9.040(D) provides:

“Contents of Appeal.

“A request for appeal of a Commission or Committee decision shall contain:

- “1. An identification of the decision sought to be reviewed, including the date of the decision.
- “2. A statement of the interest of the person seeking review and that he was a party to the initial proceedings.
- “3. The specific grounds relied upon for the review, including a statement that the criteria against which review is being requested were addressed at the Commission or Committee hearing.”

ADC 9.040(F) provides:

“Review Consisting of Additional Evidence or De Novo Review.

- “1. The reviewing body may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing.
- “2. Hearings on appeal, either de novo or limited to additional evidence on specific issues, shall be conducted in accordance with the requirements of Section 9.030.”

1 applicable approval criteria. Although the city generally listed Article 12 as an applicable
2 approval criterion, it did not specifically list each subsection of Article 12. Record 760.

3 ORS 197.835(3) and (4) provide in relevant part:

4 “(3) Issues shall be limited to those raised by any participant before the
5 local hearings body as provided by ORS 197.195 or 197.763,
6 whichever is applicable.

7 “(4) A petitioner may raise new issues to the board if:

8 “(a) The local government failed to list the applicable criteria for a
9 decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which
10 case a petitioner may raise new issues based upon applicable
11 criteria that were omitted from the notice. However, the board
12 may refuse to allow new issues to be raised if it finds that the
13 issue could have been raised before the local government;
14 * * *.”

15 For purposes of deciding this subassignment of error, we assume without deciding that ORS
16 197.835(4)(a) could apply in an appropriate circumstance to excuse a party from failing to
17 identify an issue in the local notice of appeal, when required under local code and under the
18 reasoning in *Miles*.

19 ORS 197.835(4)(a) provides that LUBA may refuse to allow “new issues” to be
20 raised if LUBA “finds that the issue could have been raised before the local government.”
21 The issue petitioners seek to raise in this subassignment of error is whether the city can
22 approve a variance to entirely eliminate the ADC 2.565(8) requirement that 75 percent of the
23 ground floor area in a mixed-use building must be maintained for “tourist-oriented uses.”
24 That issue is based on petitioners’ interpretation of ADC 12.010 and 12.030. The notice that
25 preceded the planning commission’s decision listed ADC Article 12 as an approval criterion,
26 and did not separately list ADC 12.010 and 12.030. However, Article 12 is made up of only
27 three sections, 12.010 (Purpose), 12.020 (Conditions) and 12.030 (General Criteria). Article
28 12 occupies less than two pages of the ADC. The city’s failure to separately list those
29 sections is not a “fail[ure] to list the applicable criteria” within the meaning of ORS
30 197.835(4)(a).

1 Even if the city’s notice were defective in not separately listing ADC 12.010 and
2 12.030, the planning commission’s order approving the variance contained the following
3 statement:

4 “* * * While a variance cannot be granted for a use (see Section 12.010), the
5 variance would be from a percentage and from a ‘development standard’
6 which further limited the uses allowed. * * *.” Record 683.

7 The planning commission’s decision clearly applied ADC 12.010, and also clearly applied
8 the ADC 12.030 variance criteria. Thus, petitioners were provided with notice of the city’s
9 position that the city believed that it was not granting a variance from a “use,” but was
10 instead granting a variance from a “development standard,” one of the allowed bases for a
11 variance in ADC 12.010. Further, the issue was *in fact* raised before the local government,
12 even though it was not specified as a ground for appeal in the request for appeal. Record 219
13 (letter from petitioner Stricklin’s attorney raising the issue). *See Van Dyke v. Yamhill*
14 *County*, 35 Or LUBA 676, 686-87 (1999) (a party’s testimony during the local proceedings
15 that reveals her knowledge of the existence and possible applicability of the challenged
16 provisions means that the issue “could have been raised” within the meaning of ORS
17 197.835(4)(a)). The issue is therefore not a “new issue” that falls within LUBA’s scope of
18 review pursuant to ORS 197.835(4)(a).

19 This subassignment of error is denied.

20 **B. Unnecessary Hardship**

21 Petitioners next maintain that the city misconstrued its code and adopted inadequate
22 findings to support the variance from the 75% ground floor commercial use requirement. As
23 with the height variance, petitioners argue that the city erred in justifying the variance based
24 on a hardship to the city. Petitioners also argue that the findings do not identify any hardship
25 to the applicant from which the variance will provide relief under ADC 12.030(A)(1), and
26 that to the extent the findings identify an economic inconvenience to the applicant, that is not
27 a permissible basis for approving the variance.

1 Intervenor responds by arguing that the city considered the four factors set forth in
2 ADC 12.030(B)(1) and concluded that a hardship on the city would result if the project was
3 not built with river views and public access, and a hardship on the applicant would result
4 from the inability to construct a financially feasible project on the property. Response Brief
5 26-27.

6 The city found:

7 “* * * it is understandable that with ‘tourist-oriented’ uses and a 75% ground
8 floor requirement, it may be hard to get the occupancy needed to make the
9 project feasible. One of the problems associated with ground floor
10 commercial uses in residential buildings such as this project is that the rental
11 rate for the space is based on the value of the overall project, thus making it a
12 high rate commercial space. By keeping the rental rate at a market value to
13 other commercial spaces in the Downtown area or along the waterfront, it
14 could be competitive and draw from a broader market. In considering a
15 variance, a compromise is to require that the ground level façade facing the
16 RiverTrail be commercial and not residential, with no specific percentage.
17 This would allow smaller commercial spaces while keeping the interactive
18 business fronts. Also, rather than require ‘tourist-oriented’ uses, the variance
19 would be for zero percent tourist-oriented uses and therefore, the commercial
20 uses could be any of the more stringent allowable outright or conditional uses
21 in the A-2A or S-2A Zones. The building will be located over the water and
22 is limited to the more stringent zone uses. While a variance cannot be granted
23 for a use (see Section 12.010), the variance would be from a percentage and
24 from a ‘development standard’ which further limited the uses allowed.
25 *However, with the approval of this variance, the broader range of uses at a*
26 *lesser percentage may make the project feasible.* The size of each space could
27 be narrower allowing for residential use directly behind the commercial space,
28 only reducing the residential space by a small percentage.

29 “The public open space boardwalk area may be calculated toward the
30 percentage of tourist-oriented use of the ground floor as this area is open to
31 the public and not gated. However, projects in the past have included some
32 use within the buildings while adding some percentage from the outdoor
33 public space area. The calculation of the area cannot be completed until the
34 actual square footage of the site development is determined. Once the issues
35 with the DSL lease and building size and orientation are decided, a better
36 calculation of tourist-oriented use provided with this project can be
37 determined. However, as noted above, a definite percentage may not be
38 necessary for this site.

39 “ * * * * *

1 “The applicant proposes to construct two separate buildings at a higher height
2 to allow some view corridors and public access to the River. Providing the
3 public access on both sides of the building with usable storefront space only
4 on the south elevation is economically more feasible and would provide more
5 viewing opportunities for the public. The residential units fronting the central
6 courtyard will be available as work/live units also.

7 *“The elimination of all commercial uses to allow 100% residential does not
8 appear to be an absolute detriment to construction on the site. The amount of
9 commercial space and the limit on the type of use required could reduce the
10 marketability of the commercial spaces. However, with the right location and
11 a reasonable rental rate, there is still a need for some commercial spaces.
12 Other properties along the waterfront have improved their buildings for
13 commercial uses. Recognizing that the percentage of required tourist-
14 oriented commercial space could be high, reducing the requirement to just the
15 south elevation façade and allowing other than tourist-oriented uses, should
16 allow a project to be built that is feasible.”* Record 76, 78-79 (emphases
17 added).

18 As explained above in our discussion of the first assignment of error, we do not think
19 that failing to gain views of the river and access to public spaces qualifies as an unnecessary
20 hardship to the city. To the extent the above quoted findings rely on that basis for justifying
21 the variance, we reject that argument.

22 We also agree with petitioners that the city’s findings are inadequate to identify the
23 “unnecessary hardship” faced by the applicant in complying with the requirement that 75%
24 of the ground floor space be commercial. First, we cannot tell exactly what factors the city
25 relied on as the basis for justifying the original variance request. As we understand it, the
26 applicant argued to the city that there is an oversupply of commercial retail space in the area
27 and that the project’s commercial space would be more expensive to rent, and thus would not
28 be rented, because the cost to construct the buildings for residential use are higher than for
29 purely commercial use. We understand this argument to be an argument that requiring
30 commercial space would be economically inconvenient for the project, which, as we noted in
31 the first assignment of error, does not amount to an “unnecessary hardship.”

32 Additionally, it is not clear from the record whether the applicant argued to the city
33 that the project would be infeasible to build *at all* if any commercial space was required.

1 However, to the extent the applicant made that argument, the city appears to have rejected it
2 in determining that the requirement for at least some amount of ground floor commercial
3 space “does not appear to be an absolute detriment to construction on the site.” We agree
4 with petitioners that the findings are inadequate to identify the hardship to the applicant on
5 which the variance request is justified.

6 Petitioners also argue that the findings are inadequate to demonstrate why the
7 variance from the 75% tourist-oriented commercial use requirement is “necessary to make
8 reasonable use of the property.” ADC 12.030(A)(3). Intervenor responds that the city found
9 that the variance from the 75% tourist-oriented commercial use requirement is necessary to
10 make the project financially feasible. As explained above, it appears that the city rejected
11 that argument when it determined that requiring at least some commercial uses on the ground
12 floor would not make the project financially infeasible.

13 In our resolution of the first assignment of error, we rejected the city’s bases for
14 granting the height variance. We do not know whether, on remand, intervenor may propose
15 a single-building project at the height allowed by the ADC and continue to seek a variance
16 from the 75% “tourist-oriented” uses standard set forth in ADC 2.565(8) in order to
17 maximize the number of residential units in that single building project. As such, it is
18 premature for us to decide whether a variance from the requirement for 75% tourist-
19 commercial uses is “necessary to make reasonable use of the property.”

20 The second assignment of error is sustained, in part.

21 **THIRD ASSIGNMENT OF ERROR**

22 ADC 12.030(C) states that “no variance may be granted * * * which will increase the
23 allowable residential density in any zone with the exception of individual lot size reduction.”
24 See n 3. Petitioners argue that the city failed to address this approval criterion and that
25 because the proposal will increase density on the subject property by allowing more
26 condominiums than would be allowed without the variance, ADC 12.030(C) is violated.

1 As in the second assignment of error, intervenor argues that petitioners waived this
2 argument by not raising it in their local notice of appeal. Petitioners do not dispute that the
3 issue was not raised in their notice of appeal, but respond that ORS 197.853(4)(a) allows
4 them to raise the issue. For the same reasons explained in the second assignment of error, we
5 agree with intervenor that petitioners are precluded from raising the issue for the first time on
6 appeal to LUBA. ORS 197.835(3).

7 The third assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 In addition to granting the two variances, the city approved a conditional use permit
10 to allow the mixed use development. Petitioners argue that because the conditional use
11 permit was based on the city's approval of the variances, the conditional use permit must be
12 reversed or remanded as well. We agree with petitioners that the proposed conditional use
13 approved by the city approved a proposal that is dependent on approval of the variances.
14 Because we have determined that the city erred in approving the variances, it follows that the
15 city also erred in approving the conditional use permit.

16 The fourth assignment of error is sustained.

17 **CONCLUSION**

18 Petitioners argue that the variances cannot be obtained as a matter of law, and
19 therefore the city's decisions should be reversed. Based on this record, we cannot say, as a
20 matter of law, that the city could not adopt findings consistent with our decision that might
21 justify one or all of the variances and the conditional use permit. Therefore, remand is the
22 appropriate relief.

23 The city's decisions are remanded.