

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JUSTIN SOARES, LINA SOARES
5 and LES WATTERS,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF CORVALLIS,
11 *Respondent.*

12 LUBA No. 2007-232

13
14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Corvallis.

19
20 Justin Soares, Corvallis, filed the petition for review and argued on his own behalf.
21 Lina Soares, Corvallis, and Les Watters, Portland, represented themselves.

22
23 David E. Coulombe, Corvallis, filed the response brief and argued on behalf of
24 respondent. With him on the brief was Fewel, Brewer & Coulombe.

25
26 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,
27 participated in the decision.

28
29 REMANDED

05/08/2008

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a tentative plat for a 10-lot subdivision.

MOTION TO FILE REPLY BRIEF

Lead petitioner Justin Soares (petitioner) moves to file a reply brief responding to an argument in the city’s response brief that certain issues were waived. There is no objection to the reply brief, and it is allowed.

FACTS

The subject property is a vacant 2.99-acre parcel with a long north-south axis that is located on a hillside sloping generally to the east. In places the slope exceeds 25 percent. Running along the entire eastern border of the subject property at the bottom of the slope is Brooklane Drive, a two-lane neighborhood collector street with a bike lane but no sidewalks on either side. A retaining wall runs along most of the eastern property boundary where the slope is steepest, separating the property from Brooklane Drive. The Marys River and Marys River Natural Areas lie to the east and southeast of the subject property, which generally drains toward the river and natural area. Access to the property is via Chintimi Avenue, which runs along the northern border of the property and intersects with Brooklane Drive, and SW Roth Street, which border the western border of the site.

TC2 Investments, LLC (the applicant) applied to the county for tentative subdivision plat approval to create 10 residential lots. The city’s code requires developers of property that abuts a public street that is not already improved to city standards to make full-width street improvements to city standards along the entire frontage. For a neighborhood collector, the city standards require a 66-foot right of way, two travel lanes, two bike lanes, curb and gutter, and, as relevant here, two five-foot sidewalks on both sides of the street separated from the curb by 12-foot planter strips. However, a 1995 study of the Brookline

1 Drive corridor recommended that when property abutting Brookline Drive is developed, a
2 sidewalk should be required only on one side of Brookline Drive, with a preference for the
3 east side, due to the difficulty and expense of constructing the sidewalk on the west side,
4 which would require building into a steep slope.

5 The applicant did not propose construction of sidewalks along the west side of
6 Brookline Drive, based on the preference stated in the 1995 study. The applicant also did not
7 propose to construct a sidewalk along the east side of Brookline Drive, as contemplated by
8 the 1995 study, because it would require obtaining additional right of way from the adjoining
9 property owners to the east. Instead, the applicant proposed resurfacing the existing
10 Brookline Drive travel and bike lanes, and dedicating right of way for a planter strip along a
11 portion of the eastern boundary of the property. In addition, the applicant proposed to make
12 full-width street improvements to the abutting portions of Chintimi and SW Roth Street.

13 City planning staff issued a report dated June 8, 2007, recommending that the
14 planning commission approve the proposed tentative subdivision plat, with conditions. The
15 planning commission held a public hearing on June 20, 2007, and, on July 18, 2007,
16 deliberated and voted to deny the application, in relevant part, due to the lack of proposed
17 sidewalks. The applicant appealed the planning commission decision to the city council.
18 The city council held a *de novo* hearing and, on September 17, 2007, voted to uphold the
19 appeal, approving the subdivision without requiring a sidewalk along the east side of
20 Brookline Drive. This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 The city council adopted findings supporting its decision, at Record 25-38. In
23 addition, the city council decision adopts (1) the findings in the June 8, 2007 staff report and
24 an August 24, 2007 staff memorandum that support approving the application; (2) “those
25 portions” of the minutes of the planning commission hearings and city council hearings that
26 demonstrate support for approving the tentative subdivision plat. Record 26. Petitioner

1 argues that the city erred in incorporating the findings in the staff report and staff
2 memorandum and those “portions” of the minutes that support the application.

3 **A. Staff Report and Staff Memorandum**

4 With respect to the staff report and memorandum, petitioner contends that the city
5 council appears to have incorporated only those portions of the staff report and memorandum
6 that support approving the application, which presumably means that the report and
7 memorandum include other findings that the city council rejected and did not incorporate.
8 Petitioner argues that the city has failed to sufficiently identify which portions of the staff
9 report and memorandum were adopted and which were rejected.

10 Both the staff report and memorandum recommended approval of the subdivision
11 application and essentially agreed with the applicant’s positions on the disputed issues before
12 the city council. As far as we can tell, the staff report, staff memorandum, and city council
13 findings all resolve those disputes in the applicant’s favor. Petitioner does not cite to any
14 findings in the staff report or memorandum to the contrary, or that recommend denial. This
15 is not a circumstance like that in *Ellis v. City of Bend*, 28 Or LUBA 332, 333 (1994), which
16 petitioner cites, where the governing body’s decision *denied* an application, based on broadly
17 incorporated findings in a lower body’s decision that *approved* an application. Petitioner has
18 not demonstrated that there is any inconsistency between the city council decision, the staff
19 report or memorandum.

20 Moreover, petitioner infers from the city council’s language adopting the staff report
21 and memorandum as findings that the city council intended to incorporate only *some* of the
22 findings in the report and memorandum, while rejecting others. While the findings can be
23 read to suggest that, the fairest reading is that the city council intended to incorporate the
24 staff report and memorandum findings in their entirety. In contrast, in purporting to
25 incorporate the minutes of hearings, as discussed below the city council clearly indicated that
26 it intended to adopt only “portions” of those minutes as findings. Accordingly, we conclude

1 that the city council incorporated the findings in the staff report and memorandum in their
2 entirety, and petitioner has identified no error in doing so.

3 **B. Minutes of Hearings**

4 Petitioner argues that the city erred in incorporating as findings “those portions” of
5 the minutes that support approval of the application. We agree. In *Gonzalez v. Lane County*,
6 24 Or LUBA 251, 259 (1992), we held that where the decision maker chooses to incorporate
7 all or portions of another document by reference into its findings, it must clearly (1) indicate
8 its intent to do so, and (2) identify the document or portions of the document so incorporated.
9 While the city council clearly intended to adopt portions of the minutes as findings, the city
10 council failed to adequately or clearly identify which portions. The limitation to “those
11 portions” of testimony “that demonstrate support” for approving the application is simply too
12 imprecise, and leaves the Board and the parties guessing which testimony or portions of
13 testimony are adopted as findings, and which are not. Therefore, the purported incorporation
14 of portions of the minutes is ineffective. *See Staus v. City of Corvallis*, 48 Or LUBA 254,
15 261 (2004) (adoption of unspecified testimony in the record “that support[s] approval” is
16 ineffective); *DLCD v. Douglas County*, 17 Or LUBA 466, 471 n 6 (1989) (a finding that
17 purports to incorporate only those portions of documents that are “consistent” with the
18 decision is inadequate).

19 However, as we explained in *Staus*, an ineffective incorporation of documents as
20 findings is not necessarily an independent basis for reversal or remand. *Id.* at 261. We
21 address petitioner’s challenges to the other adopted findings below, conclude that they are
22 inadequate in certain respects, and remand the city’s decision. However, we do not see that
23 the arguments under this assignment of error add anything to those bases for remand, or that
24 the city’s ineffective incorporation of unspecified portions of the minutes provides an
25 independent basis for reversal or remand.

26 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 City of Corvallis Land Development Code (LDC) 4.0.70.d.1 requires that where a
3 development site abuts an existing public street that is not already improved to city
4 standards, the street must be improved to city standards along the full frontage of the
5 property, concurrent with development. Half-street improvements are “generally not
6 acceptable,” but may be approved under certain circumstances.¹ City standards for collector
7 streets require sidewalks on both sides of the street separated from the curb by planter strips.
8 LDC 4.0.40; 4.0.70.i.6. As noted, the applicant proposed to improve the Brooklane Drive
9 vehicle lanes and bicycle lanes to city standards, but did not propose to construct sidewalks
10 on either side of Brooklane Drive. The city council found that the application satisfied
11 LDC 4.0.40 and 4.0.70, based in part on the 1995 Brooklane Drive-Nash Road Corridor
12 Study (BNCS).²

¹ LDC 4.0.70(d) provides, in relevant part:

“Development sites shall be provided with access from a public street improved to City standards in accordance with the following:

- “1. Where a development site abuts an existing public street not improved to City standards, the abutting street shall be improved to City standards along the full frontage of the property concurrent with development.
- “2. Half-street improvements, as opposed to full-width street improvements, are generally not acceptable. However, these may be approved by the Planning Commission or Director where essential to the reasonable development of the property. Approval for half-street improvements may be allowed when other standards required for street improvements are met and when the Planning Commission or the Director finds that it will be possible to obtain the dedication and/or improvement of the remainder of the street when the property on the other side of the half-street is developed.”

² The city council found, in relevant part:

“The City Council notes that a concern raised during the Planning Commission public hearing and in public testimony was pedestrian safety along Brooklane Drive. The Planning Commission found that the bicycle and pedestrian facility improvements proposed along Brooklane Drive did not meet the criteria for ‘safe and convenient pedestrian facilities,’ as required by LDC Section 4.0.40. The Council notes that the [BNCS] is a Council-approved set of standards for the development of this corridor and states that pedestrian facilities should be installed on the east side of Brooklane Drive, along with landscaping strips of varying

1 The BNCS, approved by the city council in 1995, evaluates three options for
2 improving Brooklane Drive in the area of the subject property. Option 2 proposes a city
3 standard street section, except for a single sidewalk on either the east or west sides, instead
4 of a sidewalk on both sides. City staff recommended option 2, with an expressed preference
5 for constructing the sidewalk on the east side. That preference was based on (1)
6 continuation of the recommended street section for the previous segment, which apparently
7 included a sidewalk only on the east side, and (2) the higher acquisition and construction
8 costs for a west side sidewalk compared to an east side sidewalk.

9 The city council found that the BNCS “is a Council-approved set of standards for the
10 development of this corridor,” and cited with apparent approval a councilor’s statement
11 asserting that the BNCS “should override general standards in the LDC.” Record 32.
12 Petitioner argues that the decision does not explain why the BNCS is a “Council-approved
13 set of standards” that can override the requirements of LDC 4.0.40 and 4.0.70. In any case,
14 petitioner argues, the BNCS recommends placing a single sidewalk on either the east or west
15 sides of Brooklane Drive, with a mere *preference* for the east side. The BNCS does not
16 require the single sidewalk on the east side, petitioner argues, and certainly does not provide
17 support for requiring no sidewalks at all along Brooklane Drive.

widths, such as would be allowed according to right-of-way dedications. Councilor York asserted that the [BNCS] applies specifically to this area, and as such, should override general standards in the LDC. * * * The Council notes that a survey of Brooklane Drive in the area adjacent to the proposed development found that there is not sufficient right-of-way to allow for construction of pedestrian facilities, especially a new sidewalk. The Council notes that LDC standards allow for the construction of half-street improvements rather than full-street improvements in certain circumstances. The Council notes that this case varies from that practice, but conforms to the Corridor Study, which recommends that a sidewalk not be placed on the west side of Brooklane Drive, adjacent to the subject property. * * * The Council finds that it is unreasonable for the City to require an applicant to gain right-of-way from other property owners in order to construct street improvements on the east side of the street. Councilors expressed concern that sidewalks will not be developed in conjunction with this proposal, but noted that when the properties on the eastern side of Brooklane Drive are developed or redeveloped, sidewalk and landscape strip rights-of-way would be more appropriately gained for the construction of pedestrian facilities as has been done in previous similar situations. Therefore, the Council finds that the pedestrian facilities included with the proposal conform to the adopted [BNCS] and comply with the criteria found in LDC Section 4.0.40.” Record 32.

1 The city responds, initially, that no issue was raised below whether the BNCS
2 constitutes a council-approved set of standards or whether the city could rely on the BNCS to
3 determine what improvements to Brooklane Drive the applicant must provide, and therefore
4 petitioner’s first argument under this assignment of error is waived. ORS 197.195(3)(c).³
5 Petitioner replies that they raised issues below regarding compliance with the applicable
6 LDC standards, and their challenge to the city’s reliance on the BNCS to override those LDC
7 standards is not a separate “issue” that must be separately raised. Petitioner also argues that
8 if the BNCS constitutes an approval standard, then the city’s failure to list the BNCS on the
9 notice of hearing as an approval criterion means that petitioner may raise new issues based
10 on that omitted “criterion,” under ORS 197.835(4)(a).⁴ In anticipation of that response, the
11 city argues that even if the BNCS is viewed as an omitted approval criterion for purposes of
12 ORS 197.835(4)(a), there was extensive discussion of the BNCS recommendations below
13 and LUBA should therefore find that the issue of whether the BNCS functions as a city
14 council-approved set of standards “could have been raised” during the proceedings below.

³ ORS 197.195 sets out the procedural requirements for a limited land use decision, such as the decision challenged in this appeal. ORS 197.195(3)(c) provides, in relevant part, that:

“The notice and procedures used by local government shall:

“* * * * *

“(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;

“(C) List, by commonly used citation, the applicable criteria for the decision[.]”

⁴ ORS 197.835(4) provides, in relevant part:

“A petitioner may raise new issues to [LUBA] if:

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

1 As far as we are made aware, the city first took the position that the BNCS functions
2 as a council-approved “set of standards” that can “override” the applicable LDC sidewalk
3 requirements in the city council findings adopted as part of the final decision. Although
4 there was discussion of the BNCS recommendations during the proceedings below, the city
5 has not established that a reasonable participant would have recognized from that discussion
6 that the city council intended to apply the BNCS recommendations as *ad-hoc* “standards” to
7 “override” the applicable LDC standards. We agree with petitioner that having raised issues
8 below regarding compliance with the LDC sidewalk standards, petitioner was not required to
9 anticipate that the city would respond to those issues by treating the BNCS recommendations
10 as “approval standards” that operate to trump application of those LDC standards. Further,
11 to the extent the city applied the BNCS recommendations as approval standards,
12 ORS 197.835(4)(a) would permit petitioner to raise issues regarding the city’s reliance on the
13 BNCS for the first time, because the city failed to list the BNCS as an approval criterion on
14 the notice of hearing. For the reasons set out above, we disagree with the city that the issue
15 “could have been raised” during the proceedings below, for purposes of ORS 197.835(4)(a).

16 On the merits, the city responds that LDC 4.0.70.j authorizes the city in “unusual
17 situations” to adopt “special design standards recommended by the City Engineer.”⁵
18 According to the city, LDC 4.0.70.j allows the city to grant a “variance” from applicable
19 standards that require particular street design elements, if the city engineer recommends a
20 different design to address an unusual situation. The city argues that its finding that the
21 BNCS is a “council-approved set of standards” that override the LDC sidewalk requirements
22 is a permissible exercise of the city’s authority under LDC 4.0.70.j.

⁵ LDC 4.0.70(j) is part of the code section addressing “Street Requirements,” and provides:

“Where standards do not exist to address unusual situations, the Planning Commission or Director may require as conditions of approval of [*sic*] special design standards recommended by the City Engineer.”

1 As petitioner notes, the city council findings do not mention LDC 4.0.70.j, and it is
2 not clear that the city council relied on that provision. Petitioner also argues that, even if the
3 city relied on LDC 4.0.70.j to justify using the BNCS recommendations to override the LDC
4 standards, LDC 4.0.70.j applies only “[w]here standards do not exist to address unusual
5 situations[.]” According to petitioner, applicable LDC standards do exist, and unambiguously
6 require sidewalks on both sides of Brooklane Drive. Petitioner argues that LDC 4.0.70.j does
7 not operate to allow the city to vary or waive LDC requirements, or to apply *ad-hoc* “special
8 design standards” in lieu of applicable LDC approval standards.

9 We agree with petitioner that remand is necessary for the city explain on what basis it
10 may apply the BNCS recommendations to “override” the applicable LDC standards. If the
11 city relies on LDC 4.0.70.j, it must address that provision in the first instance and explain
12 why it applies. As petitioner notes, it is not at all clear that the present circumstance is one
13 where “standards do not exist to address unusual situations.” Nor is it clear, even if
14 LDC 4.0.70.j applies, that it authorizes the city to grant a “variance” to applicable LDC
15 approval standards, as the city’s response brief contends. LDC 4.0.70.j does not state, at
16 least explicitly, that the city may grant a “variance” to applicable approval criteria, or that
17 street elements required by such criteria may be waived.

18 In the response brief, the city suggests a possible second basis for concluding that the
19 BNCS can “override” applicable LDC requirements. In the course of arguing that LUBA
20 should take official notice of the BNCS, the city notes that the city’s Transportation System
21 Plan (TSP), adopted in 1996, states that the BNCS identifies the scope of improvements that
22 are contemplated for Brooklane Drive, for purposes of a priority list of city-initiated
23 transportation projects.⁶ We understand the city to argue that the TSP incorporates the

⁶ The city cites to a section of the TSP stating that

“Recent development pressure in this area has elevated the need to upgrade this sub-standard collector street. The primary issue involves safety to pedestrians and bicyclists along this

1 BNCS as part of the TSP and that, because the TSP is part of the city comprehensive plan,
2 the BNCS is therefore also part of the comprehensive plan. If so, we understand the city to
3 argue, the city may apply the BNCS directly to override any contrary LDC standards.

4 The city’s decision does not take that approach, and there are at least two problems
5 with it. First, it is not clear to us that the discussion of the BNCS in the TSP is sufficient to
6 “incorporate” the BNCS into the TSP, such that the BNCS is considered part of the city’s
7 comprehensive plan. In addition, it is not clear that the TSP’s use of the BNCS to identify
8 proposed improvements for purposes of a list of *city-initiated* transportation projects
9 necessarily means that the BNCS identifies the scope of improvements that can be required
10 of an adjacent developer for purposes of LDC 4.0.40 and LDC 4.0.70, or that the BNCS or
11 TSP can be used to “override” requirements imposed by those provisions. While we do not
12 foreclose the possibility that, on remand, the city council could adopt a sustainable
13 interpretation of the TSP and LDC to that effect, as the decision and briefing now stands we
14 do not agree with the city that we can deny this assignment of error based on the
15 interpretation proffered in the city’s brief.

16 Finally, the city argues, apparently in the alternative, that LDC 4.0.70.d.2 allows the
17 city to approve half-street improvements under certain circumstances. *See* n 1. According to
18 the city, the finding quoted at n 2 relies on LDC 4.0.70.d.2 to approve the subdivision
19 without the required sidewalk on the east side of Brooklane Drive. The city found that it is
20 unreasonable to require the applicant to gain the right-of-way on the east side of the street
21 needed to construct full street improvements, and that the right-of-way may be more
22 appropriately obtained when properties on the eastern side of Brooklane Drive area
23 developed or redeveloped.

narrow, curved roadway. The [BNCS], adopted by the City Council in spring of 1995, identifies the scope of improvements for this project.” TSP 10.10.10.b.14, attached to the Response Brief at App 75.

1 The city is correct that LDC 4.0.70.d.2 authorizes the city to require this applicant to
2 construct only half-street improvements to Brooklane Drive instead of full-street
3 improvements, and thus not require this applicant to construct a sidewalk on the east side of
4 Brooklane Drive. Although the city technically required more than half-street
5 improvements, the city made the findings required by LDC 4.0.70.d.2, and petitioner does
6 not challenge those findings. However, LDC 4.0.70.d.2 provides only limited assistance to
7 the city. LDC 4.0.70.d.2 does not purport to authorize the city to waive required
8 improvements on both sides of Brooklane Drive. For purposes of waiving the sidewalk on
9 the west side of Brooklane Drive, adjacent to the subject property, the city appears to rely
10 entirely on the BNCS. As explained above, the city has not established that anything in the
11 city’s code or elsewhere authorizes the city to apply the recommendations in the BNCS to
12 override applicable LDC requirements. On remand, the city must either require compliance
13 with the sidewalk requirements of LDC 4.0.40 and LDC 4.0.70 or identify some basis in its
14 code or plan that authorizes it to waive or grant a variance to the LDC requirements for a
15 sidewalk on the west side of Brooklane Drive.

16 The second assignment of error is sustained.

17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioner contends that the city’s findings regarding stormwater drainage are
19 inadequate and not supported by substantial evidence.

20 **A. Purpose Statement at LDC 2.4.20**

21 LDC 2.4.30.04 provides in relevant part that “[r]equests for approval of a tentative
22 subdivision plat shall be reviewed to assure consistency with the purposes of this Code[.]”⁷
23 The city council found that the plat is consistent with the purposes of the city land division

⁷ In its response brief, the city argues that the “purposes of this Code” refers to the general code purpose statement at LDC 1.0.20, not the land division purpose statement at LDC 2.4.20. However, the city’s findings do not take that approach, and we do not consider that argument further. On remand, the city can determine if it agrees with that interpretation of LDC 2.4.30.04.

1 code, which are stated at LDC 2.4.20. The LDC 2.4.20 purpose section states that land
2 division review procedures are established for a number of purposes, including to
3 “[m]inimize negative effects of development upon the natural environment and to
4 incorporate natural features into the proposed development where possible.” LDC 2.4.20.b.
5 The staff report incorporated by the city council decision found that the proposed subdivision
6 plat is consistent with the purposes listed in LDC 2.4.20.

7 Petitioner argues first that the city’s findings addressing LDC 2.4.20 fail to discuss
8 stormwater drainage and are therefore inadequate. Petitioner acknowledges that the city
9 adopted extensive findings addressing stormwater drainage elsewhere in the decision,
10 addressing approval criteria specific to stormwater drainage. Record 314-17. However,
11 petitioner argues that the city should also address stormwater drainage under LDC 2.4.20.b
12 and show that the applicant’s stormwater drainage plans “[m]inimize negative effects of
13 development upon the natural environment[.]”

14 While the city’s findings addressing the purpose provisions of LDC 2.4.20 do not
15 specifically discuss stormwater drainage, we do not see that LDC 2.4.30.04 requires detailed
16 findings regarding specific development issues, when addressing whether the proposed
17 subdivision plat is consistent with the purposes of the city’s code. That is particularly the
18 case when the code includes specific approval standards for addressing stormwater drainage
19 issues and the city adopted extensive findings addressing those standards. Petitioner has not
20 demonstrated that the city’s findings under LDC 2.4.30.04 and 2.4.20 are inadequate.

21 **B. Findings Addressing Stormwater Drainage**

22 Next, petitioner challenges a statement in the city council findings that the proposed
23 stormwater drainage facilities “satisfy the criteria outlined in the Corvallis Stormwater

1 Master Plan[.]”⁸ Petitioner argues that neither the decision nor the record identify what those
2 “criteria” are or how the proposed facility complies with them.

3 The city responds that this statement and related staff findings refer to Appendix F of
4 the Corvallis Stormwater Master Plan, which revises and is part of the Corvallis Design
5 Criteria Manual. Appendix F is attached to the city’s brief. According to the city, Appendix
6 F includes a number of technical standards for design of stormwater facilities, including
7 detention facilities. The city notes that LDC 4.5.90.b.1 requires that development projects
8 above a certain size must “implement stormwater detention and/or retention measures as
9 specified in the Corvallis Design Criteria Manual.”⁹ Similarly, LDC 4.0.80.e requires that all

⁸ In addition to incorporated findings addressing stormwater drainage, the city council adopted the following findings:

“The City Council notes that concerns regarding the proposed detention pond and impacts to downstream properties were raised during public hearings and in written testimony. The Council notes that specific concerns were related to downstream property owners who had past drainage problems. The Council further notes that last year the City installed a new storm drain line to intercept much of the storm water that impacted downstream property owners. In addition, the storm drainage system proposed with the development will redirect the remaining downstream storm water into pipes that will outfall a considerable distance from the affected property. The Council notes that the proposal, as conditioned, will provide public storm drainage facilities, including pipes, water quality manholes, drainageways, swales, and detention ponds in compliance with the criteria noted above.

“The Council finds that, as conditioned, the proposed storm drainage facilities satisfy the criteria outlined in the Corvallis Stormwater Master Plan, and will be designed to capture runoff so that runoff rates from the site after development will not exceed the pre-developed conditions based on 2-year, 5-year, 10-year and 24-hour storm events. The Council finds persuasive the analysis and conclusions on pages 28-31 of the June 8, 2007 staff report to the Planning Commission that demonstrate downhill properties will not be negatively impacted by stormwater runoff.” Record 35 (emphasis added).

⁹ LDC 4.5.90 governs stormwater detention and retention measures, and requires in relevant part:

- “a. To reduce the risk of causing downstream properties to become flooded and to help maintain or restore the properly functioning conditions of receiving waters, new development, expansions to existing development, or redevelopment shall be required to provide stormwater detention and retention in accordance with ‘b’ of this section.
- “b. When detention and/or retention are required
 - “1. Development Projects that create impervious surfaces (roads, driveways, parking lots, walks, patios, and roofs) in excess of 25,000 square feet are

1 public utility installations “shall conform to the City’s adopted facilities master plans.” The
2 staff report incorporated into the city council’s decision evaluated the proposed stormwater
3 drainage plan and imposed conditions requiring that the proposed facilities be consistent with
4 the “criteria” in Appendix F. Record 316, Record 20 (Condition 22, quoted below at n 11,
5 requiring that detention facilities shall be designed consistent with criteria outlined in
6 Appendix F).

7 We understand the city to argue that the challenged city council finding that the
8 proposed stormwater facility satisfies the “criteria outlined in the Corvallis Stormwater
9 Master Plan” is essentially a finding that the proposed facility, as conditioned, complies with
10 applicable LDC standards and is not intended to suggest that the Appendix F or the Corvallis
11 Stormwater Master Plan include “criteria” in the sense of *approval standards* that must be
12 addressed in findings in order to approve a tentative subdivision plat application. According
13 to the city, pursuant to the conditions of approval, compliance with the technical engineering
14 standards in Appendix F will be reviewed by the city engineer as part of a subsequent “public
15 improvement plan review process.” The city contends that as part of tentative subdivision
16 plat review, the city is required only to evaluate compliance with the applicable LDC
17 standards, such as LDC 4.5.90.b and LDC 4.0.80.e, not the technical engineering standards
18 in Appendix F. While LDC standards require that stormwater drainage facilities conform to
19 the adopted master plans, the city argues, those master plans are not, in themselves, approval
20 criteria. Therefore, the city argues, to the extent the city council or staff found that the
21 proposed facility satisfies the “criteria” in the Corvallis Stormwater Master Plan or Appendix
22 F as part of tentative subdivision plat review, such findings are surplusage and not a basis for
23 reversal or remand.

required to implement stormwater detention and/or retention measures as specified in the Corvallis Design Criteria Manual. Detention facilities shall be designed to maximize stormwater infiltration.”

1 The exact role Appendix F and other city public facilities plans play in reviewing a
2 tentative subdivision plat application under the city’s review scheme is not clear to us.
3 Appendix F includes what appear to be technical engineering standards for designing
4 stormwater drainage facilities (which it calls “design criteria”) that are clearly
5 nondiscretionary or minimally discretionary in nature (e.g., the minimum pipe size for storm
6 drain mains is 12 inches). However, it also includes other “design criteria” that are clearly
7 subjective and discretionary (e.g., “[s]ufficient capacity shall be designed into the system to
8 account for future growth potential of the area served as identified in the Comprehensive
9 Plan”). By contrast, the LDC stormwater drainage standards that apply at the time of
10 tentative subdivision plat review, such as LDC 4.5.90.b and LDC 4.0.80.e, include few or no
11 actual “standards,” but instead simply refer to and require conformance with the city’s master
12 plans, apparently including Appendix F. The result is that, as a legal and practical matter,
13 tentative subdivision plat review appears to require that the city conduct at least *some*
14 evaluation into whether the proposed stormwater drainage facilities comply with the “design
15 criteria” in Appendix F and other applicable master plans. Accordingly, we reject the city’s
16 argument in its brief that the Appendix F “design criteria” are not meaningful approval
17 standards and therefore that the city’s finding that the proposed stormwater drainage facility
18 “satisfies” those design criteria is mere surplusage. The city council did not adopt that
19 position, and it seems to be contrary to the city’s review scheme, which relies almost
20 exclusively on the standards in Appendix F and other facility plans to approve proposed
21 stormwater drainage facilities.

22 LDC 2.4.30.01.a and .b require the applicant to submit a preliminary “utility plan”
23 and accompanying narrative that includes the proposed stormwater detention and drainage
24 facilities.¹⁰ It is difficult to imagine why the code requires such information as part of the

¹⁰ LDC 2.4.30.01.a.4.i requires that the tentative subdivision plat application shall include graphics that depict “[e]xisting and proposed utility systems including sanitary sewer, storm sewer, drainageways, and water,

1 tentative subdivision plat application if the city need not evaluate the proposed facilities
2 against some standard as part of tentative subdivision plat review. The applicant duly
3 submitted a utility plan and narrative, proposing that stormwater will be directed to an on-site
4 detention facility and then to a new storm drain line in Brooklane Drive, connecting to the
5 existing city system. The city engineer and then city staff reviewed the preliminary utility
6 plan and narrative. The city staff findings discuss the proposed storm drainage system at
7 length, and evaluate it against some of the Appendix F “design criteria.” Record 314-17.
8 However, the staff findings reach no conclusions regarding consistency with the Appendix F
9 design criteria, but instead simply impose conditions requiring that the applicant submit to
10 the city engineer plans and calculations sufficient to demonstrate that the proposed facility is
11 consistent with Appendix F and related design criteria.¹¹

12 As noted, in response to the petitioners’ arguments, the city council decision found
13 that “as conditioned, the proposed stormwater drainage facilities satisfy the criteria outlined
14 in the Corvallis Stormwater Master Plan.” However, the findings do not identify those
15 “criteria” or explain why they are satisfied. The findings assert that the stormwater drainage

where appropriate[.]” LDC 2.4.30.01.b.2 requires a written narrative that includes a “[s]tatement of improvements to be constructed or installed and date of their anticipated completion including * * * [p]rovisions for sewage disposal, storm drainage, and flood control[.]”

¹¹ Condition 22 provides:

“As part of the plans for public improvements the applicant shall provide engineered calculations for pre-development and post-development peak storm water run-off flows, and demonstrate that the storm drainage facilities are designed to match pre and post-development flows based on the 2-year, 5-year, and 10-year storm events. The detention facilities shall be designed consistent with criteria outlined in Appendix F of the City’s Storm Water Master Plan, and criteria established in the most recent version of the *King County, Washington, Surface Water Design Manual*. The water quality facilities shall be designed to remove 70 percent of the total suspended solids (TSS) entering the facility for a 0.9 inch 24-hr storm event * * *. As per King County criteria, if side slopes steeper than the standard 3H:1V are proposed, or if embankment heights exceed 6 feet, they shall be designed by a licensed geotechnical engineer. * * * If the proposed stormwater drainage facilities cannot be constructed to City of Corvallis and King County criteria, the applicant shall initiate a new application. The new application shall include alternate design solutions to accommodate the stormwater quality and detention requirements of the proposed development. * * * Comprehensive Plan Policies 4.12.9 and 4.12.10 listed above shall be considered when deviating from above-ground, open detention and water quality facilities.” Record 20.

1 system “will be designed to capture runoff so that runoff rates from the site after
2 development will not exceed the pre-developed conditions based on 2-year, 5-year, 10-year
3 and 24-hour storm events,” which is one of the Appendix F design criteria. However, as
4 Condition 22 suggests, the applicant apparently provided no calculations or evidence on that
5 point. Instead, the city appears to have completely deferred that demonstration to a later
6 review process involving only the applicant and the city engineer.

7 Accordingly, we agree with petitioner that remand is necessary for the city to adopt
8 findings explaining what role the design criteria in Appendix F and other master plans play
9 in reviewing a tentative subdivision plat application, pursuant to LDC 4.0.80.3.e and
10 LDC 4.5.90.b.1. Petitioner argues, and we agree, that if those “design criteria” apply to
11 tentative subdivision plat applications or include discretionary approval standards, the city
12 must address those standards at the time of tentative subdivision plat review approval. The
13 city may not defer consideration of applicable discretionary approval standards to a later
14 review process that does not offer notice and opportunity for public participation. *Rhyne v.*
15 *Multnomah County*, 23 Or LUBA 442, 447-48 (1992).¹²

¹² In *Rhyne*, we stated:

“Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988).” (footnotes omitted).

1 If on remand the city determines that some of the design criteria in Appendix F are
2 not approval standards for tentative subdivision plat approval, or that Appendix F includes
3 certain design criteria that are objective, nondiscretionary technical engineering standards,
4 the city should identify any such design criteria and explain why they need not be addressed
5 at the time of tentative subdivision plat approval.¹³

6 The third assignment of error is sustained, in part.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioner argues that the city failed to adequately address concerns raised below
9 regarding potential adverse effects of stormwater runoff on the significant wetland southeast
10 of the subject property.

11 As noted, LDC 2.4.30.04 provides a tentative subdivision plat “shall be reviewed to
12 assure consistency with the purposes of this Code[.]” The LDC 2.4.20 purpose section states
13 that land division review procedures are established, among other reasons, to “[m]inimize
14 negative effects of development upon the natural environment * * *.” LDC 2.4.20.b. In
15 response to concerns raised by the petitioners regarding the impact of stormwater runoff on
16 the nearby Marys River Natural Area, the city council found:

17 “The Council finds that the proposed detention pond, swale, and water quality
18 manholes will remove pollutants and protect the quality of water entering the
19 Marys River Natural Area, in compliance with the Corvallis Stormwater
20 Master Plan. * * * The Council further noted that concerns regarding wetland
21 protection will be specifically addressed at the time of development through
22 the 2006 LDC. * * * Per analysis and discussion, the Council finds that
23 water levels in the Marys River Natural Area and adjacent wetlands are not
24 expected to change significantly as a result of the proposed development.
25 * * *” Record 35.

¹³ Petitioner also cites *Rhyne* for the proposition that when a local government imposes a condition of approval to ensure compliance with applicable approval criteria, it must make a finding that compliance is “feasible.” While the present case does not require an extended discussion of *Rhyne*, we disagree with petitioner that *Rhyne* supports that broad proposition. Nothing in *Rhyne* imposes a general requirement that conditions of approval must be accompanied by findings that compliance with approval criteria is “feasible.”

1 Petitioner contends that the findings of compliance with the Corvallis Stormwater
2 Master Plan are inadequate, for the reasons set out in the third assignment of error. Further,
3 petitioner argues that the finding that “water levels in the Marys River Natural Area and
4 adjacent wetlands are not expected to change significantly as a result of the proposed
5 development” is not supported by substantial evidence, because the record includes no
6 evidence calculating the pre-and post-development stormwater flows from the subject
7 property, and the city essentially deferred consideration of that issue to a later review
8 process.

9 The first sentence of the above-quoted finding suffers from the same problem
10 described under the third assignment of error. The city council appeared to apply
11 unspecified provisions of the Corvallis Stormwater Master Plan as approval criteria, but
12 without identifying those criteria or explaining why the proposed development complies with
13 those criteria. The third sentence of the finding appears to rest on the city’s unsupported
14 conclusion that the proposed stormwater drainage facility will ensure that post-development
15 stormwater flows will not exceed pre-development flows, based on a future demonstration of
16 compliance with Appendix F design criteria. As explained above, the city has not cited any
17 evidence supporting that finding, and that demonstration was apparently deferred to a later
18 proceeding involving only the applicant and the city engineer.

19 The second sentence notes that “concerns regarding wetland protection will be
20 specifically addressed at the time of development through the 2006 LDC.” It is not clear
21 what standards are referred to or when they would apply. The city explains that this finding
22 refers to standards enacted in 2006, following submission of the present application, that
23 apply to “lot development.” Response Brief 30. However, the response brief also does not
24 identify the referenced LDC standards. If the second sentence of the quoted finding is
25 intended to suggest that future application of unidentified standards that govern development
26 of *individual* lots within the subdivision is sufficient to address the impacts of the entire

1 subdivision on a nearby wetland for purposes of LDC 2.4.30.04 and LDC 2.4.20.b, the
2 finding is inadequate. At a minimum, the city needs to make clearer in its findings what
3 standards governing lot development are sufficient to ensure that stormwater impacts of the
4 subdivision as a whole on the wetland are consistent with the code purpose to “[m]inimize
5 negative effects of development upon the natural environment[.]” Nothing cited to us in the
6 city’s incorporated findings, including the staff report, addresses impacts on the nearby
7 wetland. Remand is therefore necessary to adopt findings addressing the concerns the
8 petitioners raised under LDC 2.4.30.04 and LDC 2.4.20.b, regarding the impact of the
9 subdivision on the nearby Marys River Natural Area.

10 The fourth assignment of error is sustained.

11 The city’s decision is remanded.