BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK DAVID, WILLIAM CHAPMAN,
MARK WAITS, DAVID SLANSKY, JOAN KRAHMER,
SUSAN TOMPKINS and JAMES LUBISCHER,
Petitioners,

and

DAN BLOOM,
Intervenor-Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

TUALITY HEALTHCARE,
and PACIFIC UNIVERSITY,
Intervenors-Respondents.

LUBA No. 2008-023

FINAL OPINION
AND ORDER

Appeal from the City of Hillsboro.

Mark David, William Chapman, Mark Waits, David Slansky, Joan Krahmer, Susan Tompkins and James Lubischer, Hillsboro, filed a petition for review. James Lubischer argued on his own behalf.

Dan Bloom, Hillsboro, filed a petition for review on his own behalf.

Pamela J. Beery, Portland, filed a joint response brief on behalf of respondent. With her on the brief were Beery, Elsner & Hammond, LLP, Phillip E. Grillo and Miller Nash LLP. Heather R. Martin, Portland, argued on behalf of respondent.

Phillip E. Grillo, Portland, filed a joint response brief and argued on behalf of intervenor-respondent Pacific University. With him on the brief were Miller Nash LLP, Pamela J. Beery and Beery, Elsner & Hammond, LLP.

David C. Noren, Hillsboro, filed a response brief and argued on behalf of intervenor-respondent Tuality Healthcare.

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

RYAN, Board Chair, did not participate in the decision.

AFFIRMED 07/31/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city council decision that grants Concept Development Plan approval.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues raised in the respondents' brief, pursuant to OAR 661-010-0039. The motion is allowed.

MOTION TO STRIKE

Petitioners attached appendices to the petition for review to provide evidentiary support for their arguments regarding the shadow that will or will not be cast by the four-story building that is approved by the disputed Concept Development Plan as compared to a five-story building that would be permitted by right. Petition for Review Appendices E1, E2, E3 and F. Respondents argue that LUBA review is limited to the evidentiary record that was prepared and transmitted to LUBA. ORS 197.835(2).[1] Respondents move to strike those appendices.

As far as we can tell, there is no reason why the evidence that is attached as appendices to petitioners' petition for review could not have been submitted to the city for inclusion in the record below. For whatever reason, it was not submitted as part of the record. Although we routinely take official notice of relevant applicable law, our authority to

[1] ORS 197.835(2) provides:

> "(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.
>
> "(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record."

expand on the evidentiary record that is submitted by the local government in a LUBA appeal is limited by ORS 197.835(2). *See* n 1. In performing our on the record review, we may not take official notice of extra-record evidence. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005). Respondent's motion to strike Petition for Review Appendices E1, E2, E3 and F is granted.

INTRODUCTION

Tuality Healthcare (Tuality) received initial approval for a concept development plan for its Hillsboro campus in 2001. That campus is located along the Westside Light Rail Line in downtown Hillsboro. That concept development plan was modified in 2005 and Pacific University relocated some of its health career programs onto Tuality's Hillsboro campus. The campus is located in a Station Community Commercial-Station Commercial (SCC-SC) district, which is one of several Station Community Planning Areas (SCPAs) that the city has adopted to "promote transit-supportive and pedestrian-sensitive mixed use developments in areas near light rail transit stations." Hillsboro Zoning Ordinance (HZO) Section 136.I.A.[2]

HZO Volume II (Sections 136 through 142) applies to SCPAs. HZO Sections 136 through 142 set out an intricate and exceedingly complex set of planning regulations and development review procedures for SCPAs. We set out relevant HZO provisions below in our discussion of the assignments of error. Those procedures generally set out a three-step development plan approval process. The first step is Concept Development Plan (CDP) review. As part of CDP review, the city may authorize Alternative Design Elements (ADEs), which are a type of variance. An ADE that was ultimately approved by the city to allow a proposed building (Building B) to be taller than would otherwise be allowed is at the heart of

[2] The HZO itself uses decimals to separate subsections. The challenged decision frequently uses parentheses so that HZO Section 136.I.A becomes HZO Section 136(I)(A). We generally use parentheses in code citations as well, but in this case the HZO citations are often lengthy and the decimal convention is slightly less confusing that the parenthetical convention. We have converted all citations in this opinion to the decimal convention. We also generally omit the word "Section" from our HZO citations in the balance of this opinion to make them shorter.

this appeal. The second step is Detailed Development Plan (DDP) approval. DDP approval may be sought concurrently with CDP approval. The third and final step is Final Development Plan (FDP) approval.

Tuality and Pacific University filed their application seeking CDP approval on August 31, 2007. As part of that CDP application, the applicants sought approval of three ADEs for Building B. Planning Commission hearings on the requested CDP were held on October 10, 2007 and October 24, 2007. On November 28, 2007, the planning commission adopted Resolution No. 1649-P. In that resolution, the planning commission approved two of the requested ADEs and denied the third. The denied ADE was needed to allow the four-story Building B to intrude into an area where the HZO would otherwise limit Building B to two stories.[3] On December 13, 2007, Tuality and Pacific University appealed the planning commission's CDP decision to the city council. At a January 8, 2008 partial de novo hearing, the city council received evidence in support of and in opposition to the third ADE. On January 15, 2008, the city council adopted Resolution 2239, which grants approval for the third ADE. Petitioners' notice of intent to appeal that resolution was filed with LUBA on February 4, 2008. In this appeal petitioners and intervenor-petitioner Bloom challenge the city council's approval of the CDP and the third ADE.

On October 24, 2007, the same date that the planning commission held its second hearing on the CDP, Pacific University filed its application for DDP approval for Building B. DDP approval follows a notice and comment procedure rather than a procedure that requires public hearings. On October 29, 2007, the city planning department sent notice seeking comments on the application for DDP approval for Building B. That notice was not sent to

[3] We refer to this limit as the 100-foot setback and we discuss that limit in some detail later in this opinion.

petitioners or intervenor-petitioner.[4] The deadline for submitting comments on the DDP expired on November 19, 2007, and neither petitioners nor intervenor-petitioners commented on the DDP application. On January 31, 2008, the city planning department mailed notice of its decision to approve Pacific University's application for DDP approval for Building B. The deadline for appealing the planning department's approval of the DDP to the planning commission expired on February 15, 2008. No appeal of the planning department's approval of the DDP was filed.

EXHAUSTION/COLLATRAL ATTACK/MOOTNESS

Before turning to petitioners' and intervenor-petitioner's assignments of error, we first consider respondents' exhaustion, collateral attack and mootness arguments. If we understand respondents correctly, they contend that petitioners' and intervenor-petitioner's failure to file a local appeal to challenge the planning director's contemporaneous DDP approval decision (1) constitutes a failure to exhaust administrative remedies as required by ORS 197.825(2)(a),[5] (2) renders this appeal of the CDP approval an improper collateral attack on that DDP decision, and (3) renders this appeal moot because regardless of the outcome of this appeal the city's approval of the DDP will stand independently of the CDP approval.

Turning first to respondents' argument that petitioners failed to exhaust administrative remedies, the decision that is before us in this appeal is city council Resolution 2239, which granted CDP approval and approved the disputed ADE. That resolution was adopted on January 15, 2008. As far as we can tell, there were no further local remedies to exhaust to challenge that city council resolution, and petitioners properly

[4] Petitioners and intervenor-petitioner apparently live outside the required notice area. We do not understand petitioners or intervenor-petitioners to argue that they were entitled to notice of the application for DDP approval.

[5] Under ORS 197.825(2)(a), LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

and timely filed their appeal of that resolution with LUBA on February 4, 2008. Respondents' exhaustion argument is without merit.

The record in this appeal does not include a copy of the DDP decision. Respondents attach what appears to be a partial copy of that decision to their brief. Respondents' Brief Appendix 3.[6] Because petitioners and intervenor-petitioner do not object to our consideration of a DDP decision that is not part the record in this appeal, we consider that DDP decision solely for purposes of considering respondents' collateral attack and mootness arguments.

The legal issue presented in this appeal is whether petitioners have demonstrated error in the city council's CDP decision. Among other things, that CDP decision applies relevant approval criteria from the HZO to approve an ADE that allows a four-story portion of Building B to intrude 32 feet into a 100-foot setback that, without the ADE, would require that the portion of Building B within the 100-foot setback be no taller than two stories. Respondents contend that the issue of whether the ADE to allow a four-story portion of Building B to intrude into the 100-foot setback complies with relevant HZO approval criteria could have been raised and decided and in fact was decided in the DDP decision. Therefore, respondents argue, this appeal is effectively an impermissible collateral attack of the DDP decision and is rendered moot by that decision. If the HZO actually required that an applicant for DDP approval again demonstrate that its CDP satisfies the HZO criteria that were applied and found to be satisfied when the CDP approval was first granted, we might agree with respondents. However, for the reasons explained below we are not convinced that the HZO requires such a redundant review process, and such a redundant review process was not required by the city in this case.

[6] The top of that decision indicates that it is made up of 70 pages. The copy of the DDP decision that is attached to respondent's brief omits pages 12-23. We do not know why respondents omitted those pages or what is on those pages.

In support of their collateral attack and mootness arguments, respondents rely principally on HZO 136.VII.B.6.f and 136 VII.B.7.d. HZO 136.VII.B.6.f provides that CDP approval is binding regarding only certain particulars, and ADE approvals are not one of the listed particulars.[7] HZO 136.VII.B.7.d requires that in approving a DDP, the planning director must find that a DDP "complies with all applicable requirements of Sections 136 through 142 of this Ordinance * * *."[8]

Turning first to HZO 136.VII.B.6.f, that section of the HZO simply makes certain "particulars" of CDP approval decisions binding, it does not expressly require that an applicant for DDP approval must again demonstrate that all other particulars of CDP approval comply with applicable legal standards when it seeks DDP approval. Neither does HZO 136.VII.B.6.f require that the city allow other parties to again raise issues that were raised and resolved as part of CDP approval or that could have been raised and resolved as part of CDP approval. HZO 136.VII.B.6.f simply authorizes the city to exercise its

---

[7] HZO 136 VII.B.6.f provides:

> "Concept Development Plan approval shall constitute approval in principle for the proposed phased development; provided, however, that Concept Development Plan approval shall be binding as to the following particulars:
>
> "(1) Minimum residential density, minimum floor area ratio and minimum usable open space for the project as a whole;
>
> "(2) Approximate location and type of permitted uses, and
>
> "(3) Consistency with the purposes identified in this section."

[8] HZO 136 VII.B.7.d provides:

> "The Planning Director shall approve an application for Detailed Development Plan approval only upon findings that:
>
> "(1) The Detailed Development Plan complies with all *applicable* requirements of Sections 136 through 142 of this Ordinance and other applicable provisions, including the provisions of applicable overlay zones; and
>
> "(2) If a Concept Development Plan has been approved, the Detailed Development Plan *conforms with the Concept Development Plan*, including conditions of approval attached thereto." (Emphases added.)

discretion to require that certain particulars of a previously approved CDP be changed if the city wishes to do so at the DDP stage.

Turning next to the HZO 136.VII.B.7.d.1 requirement that the planning director find that a proposed DDP "complies with all applicable requirements of Sections 136 through 142 of this Ordinance," that requirement of course begs the question of whether the Section 136 through Section 142 criteria that were applied and found to be satisfied by the CDP are "applicable" when granting DDP approval. Absent a clearer indication that under the first subsection of HZO 136.VII.B.7.d an applicant for DDP approval must duplicate or revisit CDP approval criteria during DDP approval, we will not read such a requirement into to the first subsection of HZO 136.VII.B.7.d. The second subsection of HZO 136.VII.B.7.d. requires that a DDP approval be consistent with a prior CDP approval. The second subsection of HZO 136 VII.B.7.d says nothing about having to reestablish that the prior CDP complies with the criteria that the city has already applied in approving the CDP. Finally, we note that the second subsection of HZO 136.VII.B.7.d does not expressly require that the CDP that the DDP must conform with must be a CDP that has not been appealed to LUBA and reversed or remanded to the city. However, that requirement is implicit. To the extent respondents argue that the applicant could proceed with a DDP notwithstanding that the CDP that the DDP relies on to comply with applicable legal standards has been reversed or remanded by LUBA, we reject the argument.

We also note that our view of the relationship of the CDP and DDP is entirely consistent with the way the city went about approving the DDP for Building B. It is true, as respondents note at page 6 of their brief, that the HZO 139.IV.H 100-foot setback is among the approval criteria listed in the DDP decision findings. Respondents' Brief Appendix 3, page 28. However, the only finding that we can locate in the DDP decision that addresses the HZO 139.IV.H 100-foot setback requirement is the following:

> "* * * As noted above, the applicant has received City Council approval to allow the four-story building section to extend into the southern 32 feet of the

100-foot restricted height setback area. * * *" Respondents' Brief Appendix 3, page 26.

The City Council approval that is referenced in the above finding is the CDP approval decision that is before us in this appeal. Perhaps even more importantly, the DDP decision does not list or apply the HZO Sections that govern approval of the ADE that was approved to allow the four-story portion of Building B to encroach into the HZO 139.IV.H 100-foot setback. As we explain later in this decision, HZO 136.VII.B.2 authorizes ADEs and HZO 136.VII.B.2.g expressly requires that an applicant for an ADE demonstrate that the ADE complies with the HZO 136.X.B.3 variance criteria. None of these criteria are mentioned or applied in the city's DDP decision.

For the reasons set out above, we reject respondents' contention that petitioners' and intervenor-petitioners' failure to file a local appeal of the city's DDP approval decision means they failed to exhaust administrative remedies, within the meaning of ORS 197.825(2)(a) or that their failure to appeal the DDP decision renders this appeal moot or a collateral attack on the DDP decision. We turn to the assignments of error.

INTRODUCTION TO FIRST THROUGH THIRD ASSIGNMENTS OF ERROR

As the discussion that follows makes clear, navigating and understanding the HZO Volume II regulations that apply in SCPA districts is not an easy task.

A. The 100-Foot Setback

The subject property is located on the north side of Washington Street, where the Westside Light Rail Line tracks are located. The adjoining property to the north is developed residentially. As previously noted, the subject property is located in the SCC-SC district, as is the property across Washington Street and the light rail line to the south. Within the SCC-SC district the maximum building height is five stories. HZO 137 Table 1.c. The adjoining district to the north of the subject property is within the Station Community Residential-Downtown Neighborhood Conservation (SCR-DNC) district. Within the SCR-DNC district

the maximum building height is "two stories or 35 feet, whichever is less." HZO 137 Table 1.j.

Under HZO 139.IV.H.1, the SCR-DNC two-story maximum building height limit is effectively projected for a distance of 100 feet onto any adjoining SCC-SC district.[9] Under HZO 139.IV.H.1, the southern part of the subject site along Washington Street and the light rail line remains subject to a five story maximum building height and the northern part of the site within 100 feet of the SCR-DNC district to the north is subject to a two-story maximum building height. We will follow the parties' lead and refer to the limitation that HZO 139.IV.H.1 projects on the SCC-SC zoned subject property as 100-foot setback. Within that 100-foot setback from the adjoining SCR-DNC district to the north, HZO 139.IV.H.1 requires observance of the SCR-DNC two-story maximum height limit rather than the SCC-SC five-story maximum height limit.

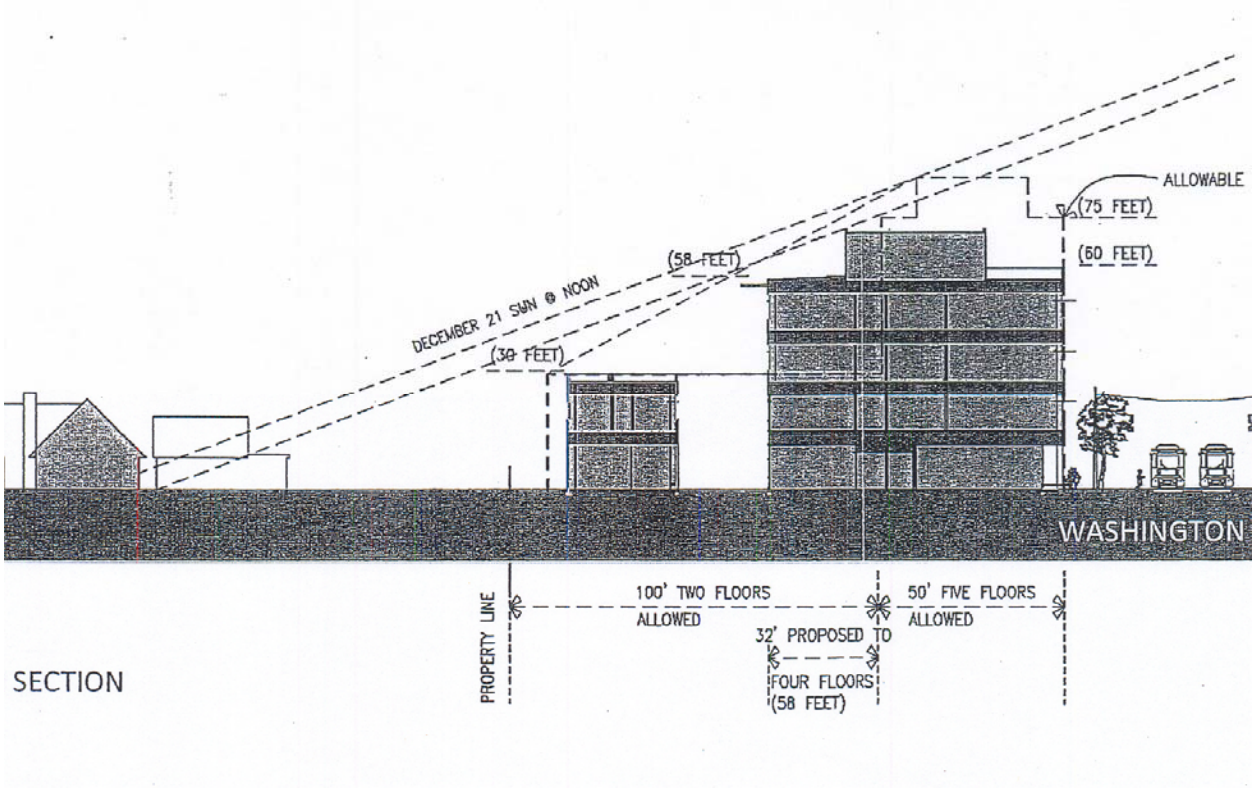
The proposed Building B can be visualized in simplified form as two boxes. The southernmost box is four stories high; the northernmost box (nearest the adjoining SCR-DNC district) is two stories high. The southernmost four-story box extends back 82 feet from Washington Street. The first fifty feet of that four-story box are located outside the 100-foot setback, where the maximum building height is five stories, and therefore that part of the four-story box complies with the applicable maximum building height limit. But approximately 32 feet of the four-story box extends northward into the 100-foot setback, before the two-story box begins. Drawings at Record 217 and 571 show the building design and the part of the four-story building that intrudes into the 100-foot, two-story setback. The drawing from Record 571 is reproduced below. In that drawing, north is to the left and the

---

[9] HZO 139.IV.H.1 provides:

> "On properties zoned * * * SCC-SC, * * * structures built within 100 feet of any shared property line with properties zoned * * * SCR-DNC shall be no greater height than the maximum height of the applicable adjacent residential zone."

northerly 32 feet (approximately the northerly 1/3 of the four-story box) intrudes into the 100-foot setback. To approve the building design for Building B that calls for the four-story portion of the building to intrude approximately 32 feet into the 100-foot setback that is imposed by HZO 139.IV.H.1, the applicant requested and the city council approved the ADE, pursuant to HZO 136.VII.B.2.e through g.



As we explain in more detail below, the city compared the impacts of the proposed four-story building that intrudes 32 feet into the 100-foot setback with the impacts of a hypothetical five story building that complied with the 100-foot setback. The hypothetical five-story (75-foot) building adjoining Washington Street is shown in the above diagram in dashed lines. The smaller box that sits atop the four-story box and the hypothetical five-story building is a shelter for roof-mounted equipment. Petitioners raise a legal question about that shelter for roof-mounted equipment in their fifth assignment of error below.

B. Variances – HZO 136.X

HZO Sections 107 and 108 set out variance provisions that apply within the city outside SCPA districts. Within SCPA districts, HZO 136.X sets out special variance standards that apply only within SCPAs. As we explain below, HZO 136.VII.B.2.e through g authorizes and place limits on ADEs, which are a special kind of variance that can be approved within SCPAs. The interaction between the HZO 136.X variance provisions and the HZO 136.VII.B.2.e through .g ADE provisions is at the heart of the first assignment of error.

We turn first to the HZO 136.X Variance standards and limitations. Subsection A of HZO 136.X sets out the "Purpose" of the Variances Section. Subsection B sets out the "Standards" for approval of Variances. We set the text of HZO 136.X.B in the margin for later reference, and describe the key features of that text below.[10]

---

[10] HZO 136.X.B provides:

"B. Standards

"1. * * * Variances to the provisions of Sections 137 through 142 shall be subject to the criteria listed below. * * *.

"* * * * *.

"3. A Variance may be granted to any development regulation or design standard contained in Sections 137 through 142, excluding those regulations listed in paragraph 5, below, provided the Planning Commission finds that by granting the Variance:

"a. The adjustment will equally or better meet the purposes of the Station Community Planning Area and of the regulation to be modified;

"b. The Variance or cumulative Variance adjustments results in a project which is still consistent with the overall purpose and intent of the district; and

"c. The Variance will not result in significant detrimental impacts to the environment or the natural, historic, cultural or scenic resources of the City.

"4. The Planning Commission may approve a Variance from the standards listed below if, in addition to the criteria listed in subsection (B) (3), the proposal meets the following criteria:

HZO 136.X.B.3 sets out three generally applicable criteria that apply when granting a variance in the SCPA districts.

Next, HZO 136.X.B.4 applies when granting certain specifically described variances or in certain specified circumstances. The standards set out in HZO 136.X.B.4 only apply

---

"* * * * *.

"b. Maximum height requirements. Variances to the height limit cited in Tables 1 of Section 137 may be permitted as provided in Section 137.X.B.3., upon a finding that the overall density of the project will increase, or is required to site a permitted use, and the increased height *does not conflict with the height limitations of the FAA or with specific height limits contained in Sections 139 through 142*.

"* * * * *.

"5. Variances under the following circumstances or from the specific development regulations and design standards cited shall not be granted:

"a. To allow a development project where the proposed residential density or floor area ratio is less than 90% of the minimum density of the district;

"b. To allow residential densities greater than specified for the district;

"c. To allow accessory industrial uses to exceed a combined thirty percent (30%) of the net developable area of the campus of a major institution in a SCRP District.

"d. To allow a development project with less than 85% of the minimum required usable open space;

"e. To the street and alley performance standards contained in Sections 137.XVI.B.1.;

"f. To allow surface parking or loading areas between a major pedestrian route and an adjacent building, except as specifically provided in Sections 137 through 142;

"g. To allow off-street surface parking lots, or commercial service or loading areas outside the public right-of-way to be located or temporarily located or expanded adjacent to, cater-cornered or across the street from a light rail station site;

"h. To the requirement for pedestrian-related office, service or retail uses on the ground floor of parking structures;

"i. To the minimum access requirements; and

"j. To the requirements of Section 138.XII.C., Streetscape Design Standards."

when the specified kinds of variance are proposed or when the specified circumstances exist. In this case petitioners argue the city is granting a variance to the maximum building height requirements imposed by HZO 139.IV.H.1 (the 100-foot setback discussed above) and, therefore, the city should have applied HZO 136.X.B.4.b. We understand petitioners to argue the 100-foot setback imposed by HZO 139.IV.H.1 is one of the "specific height limits contained in Sections 139 through 142," and HZO 136.X.B.4.b therefore prohibits variances to HZO 139.IV.H.1.

Finally, HZO 136.X.B.5 is similar in some respects to HZO 136.X.B.4, but simply prohibits certain specified variances. As we note below, there is a nearly identical list of prohibitions that applies to ADEs, which is set out at HZO 136.VII.B.2.f. *See* n 11.

C. ADEs – HZO 136.VII.B.2.e through .g

HZO 136.VII.B governs phased development within SCPA Commercial districts and therefore applies to phased development in the SCC-SC district and applies to the phased development of Tuality's campus. HZO 136.VII.B.2 sets out "General Provisions," which include a requirement for CDP approval. HZO 136.VII.B.2.e through .g specifically authorize and limit approval of ADEs and variances. The text of those subsections is set out in the margin and we briefly discuss the important features of the text below.[11]

---

[11] As relevant, HZO 136.VII.B.2 provides:

> "e. Except as provided in paragraph (f), below, an applicant for [CDP] approval may propose one or more [ADEs] for all and/or specific areas within the plan boundaries which supersede corresponding development regulations or design standards set forth in Sections 137 through 142. Such [ADEs] shall be clearly and specifically identified within the plan submittals, and shall include an explanation and/or drawings justifying and substantiating the need for a *variance* from the standards of Sections 137 through 142.
>
> "f. Notwithstanding paragraph (e), above, no [ADE] shall be allowed to replace the development regulations and design standards of Sections 137 through 142 that would propose to vary or make an exception from:
>
> "(1) The minimum floor area ratio;
>
> "(2) The minimum or maximum residential density;

HZO 136.VII.B.2.e authorizes ADEs, and makes it reasonably clear that ADEs are a special type of variance that can be requested as part of CDP approval.

HZO 136.VII.B.2.f prohibits certain kinds of ADEs. If the list of prohibited ADEs in HZO 136.VII.B.2.f is compared with the list of prohibited variances that is set out at HZO 136.X.B.5 they are similar and in some cases identical. *See* ns 10 and 11.[12]

> "(3) The minimum usable open space;
>
> "(4) The street and alley performance standards contained in Section 137.XVI;
>
> "(5) Any provision that would eliminate or effectively eliminate the required mix of residential, commercial and employment uses within the SCR-V District;
>
> "(6) To allow surface parking or loading areas between a major pedestrian route and an adjacent building, except as specifically provided in Sections 137 through 142;
>
> "(7) To allow off-street surface parking lots, or commercial service or loading areas outside the public right-of-way to be located or temporarily located or expanded adjacent to, cater-cornered or across the street from a light rail station site;
>
> "(8) The requirement for pedestrian-related office, service or retail uses on the ground floor of parking structures;
>
> "(9) The minimum access requirements;
>
> "(10) The requirements of Section 138.XII.C., Streetscape Design Standards; and
>
> "(11) To allow accessory industrial development to exceed a combined thirty percent (30%) of the net developable area of the campus of a major institution in a SCRP District.
>
> "g. The Planning Commission may authorize a proposed [ADE] only if it finds that the proposed [ADE] meets the criteria set forth in Section 136.X.B.3, *Variances* and the intent of the district.
>
> "h. Subsequent to [CDP] approval, an applicant may request additional *Variances* under the provisions of Section 136.X., *Variances*, except that the provisions of subparagraph (f) of this section shall apply; and no *Variance* to any condition of approval imposed by the Planning Commission shall be allowed except by action of the Planning Commission." (Italics added to emphasize the relationship between ADEs and variances.)

[12] The listed prohibited ADEs and variances are not in the same order. But the prohibited variances under HZO 136.X.5.c, .e, .f, .g, .h, and .j appear to be identical to the prohibited ADEs under HZO 136.VII.B.2.f.11, .4, .6, .7, .8, .9 and .10. The remaining prohibitions are similar but are not identical.

HZO 136.VII.B.2.g provides that the planning commission may approve an ADE "only if it finds that the proposed [ADE] meets the criteria set forth in Section 136.X.B.3, Variances and the intent of the district." HZO 136.VII.B.2.g expressly requires satisfaction of the HZO 136.X.B.3 variance criteria, but does not mention the HZO 136.X.B.4 or .5 variance criteria.

Finally, HZO 136.VII.B.2.h makes it clear that after an ADE has been approved as part of a CDP, an applicant is free to seek additional variances under HZO 136.X. Presumably in seeking any such post-CDP variances, any applicable criteria in HZO 136.X.B.4 would have to be satisfied and any applicable prohibitions in HZO 136.X.B.5 would apply.

In their first assignment of error, petitioners argue the city erroneously failed to apply the HZO 136.X.B.4.b "[m]aximum height requirements" variance criterion. In their second assignment of error petitioners challenge the city's findings regarding HZO 136.X.B.3.b and .c, which require that the city find that with the disputed ADE, the "project * * * is still consistent with the overall purpose and intent of the district," and that the ADE "will not result in significant detrimental impacts to the environment or the natural, historic, cultural or scenic resources of the City." In their third assignment of error, petitioners allege the city erroneously found that the disputed ADE will "equally or better meet the purposes of the Station Community Planning Area and of the regulation to be modified."

FIRST ASSIGNMENT OF ERROR

The key HZO subsections at issue in the first assignment of error are HZO 136.VII.B.2.e and .g. *See* n 11. HZO 136.VII.B.2.e specifically provides that an ADE may be proposed as part of an application for CDP approval to "supersede corresponding development regulations or design standards set forth in Sections 137 through 142." As we noted earlier, HZO 136.VII.B.2.g expressly provides that the planning commission may approve an ADE "only if it finds that the proposed [ADE] meets the criteria set forth in

[HZO] Section 136.X.B.3, Variances and the intent of the district." HZO 136.VII.B.2.g does not mention or expressly require that the HZO 136.X.B.4 or .5 variance criteria be applied to ADEs. In approving the ADE, the city applied only the HZO 136.X.B.3 variance criteria. Petitioners argue the city erred by not applying HZO 136.X.B.4.b:

> "Common sense tells us that an '[ADE]' is equivalent to a 'variance'. In addition, this is evident from the language of HZO 136.VII.B.2.e) * * * which specifically uses the word 'variance' when discussing '[ADEs].'
>
> "* * * * *
>
> "Petitioners submit that all provisions of HZO 136.X. VARIANCES are relevant, not just 136 X.B.3. This is because both the [ADE] provision, Section 136 VII.B.2.e and provision Section 136.VII.B.2.h refer to either a 'variance' or to 'variances.' * * * It is reasonable to conclude that Section 136 X. VARIANCES, should apply in toto. * * *" Petition for Review 6 (footnote omitted).

We have no difficulty agreeing with petitioners that the intended interaction between the HZO 136.X variance regulations and the HZO 136.VII.B.2.e through h ADE regulations could be more clearly stated in the HZO. That lack of clarity is increased by the city's frequent use of the term variance throughout HZO 136.VII.B.2.e through h without more clearly explaining how ADEs and variances are related. Nevertheless, we do not agree with petitioners' reading of HZO 136.X and HZO 136.VII.B.2.e through h. The text of HZO 136.VII.B.2.g admittedly does not expressly state that *only* the HZO 136.X.B.3 variance criteria apply to an ADE that is processed with a CDP or that the HZO 136.X.B.4 and .5 variance criteria *do not apply* to such ADEs. However, the fact that HZO 136.VII.B.2.g only mentions the HZO 136.X.B.3 variance criteria is at least some indication that only those variance criteria apply when approving an ADE as part of a CDP. In addition, as we have already noted, HZO 136.VII.B.2.f prohibits certain kinds of ADEs. The prohibited list of *ADEs* mirrors and in some cases is identical to the HZO 136.X.B.5 list of prohibited *variances*. We think it is highly unlikely that the body that enacted these provisions could have intended for both HZO 136.X.B.5 and HZO 136.VII.B.2.f to apply to ADEs that are

approved with a CDP. It is far more likely that the drafters intended the HZO 136.VII.B.2.f prohibitions on ADEs to apply in place of the HZO 136.X.B.5 prohibitions on variances. With that context, we also believe the city did not intend the HZO 136.X.B.4 criteria to apply to ADEs. Otherwise HZO 136.VII.B.2.g would have mentioned HZO 136.X.B.4, instead of only listing the HZO 136.X.B.3 criteria.

That leaves petitioners' point that it makes little or no sense to assume the city could have intended that an ADE could be allowed as part of a CDP to deviate from a maximum building height limit, whereas a variance from that same building height that was sought later following CDP approval under HZO 136.VII.B.2.f would afoul of the HZO 136.X.B.4.b prohibition against such variances.[13] There may or may not be an explanation for that difference in approval criteria that makes sense. But given the text of HZO 136.VII.B.2.g and the context provided by the nearly identical provisions in HZO 136.X.B.5 and HZO 136.VII.B.2.f, we agree with respondents that HZO 136.VII.B.2.e through .h establish a separate special process to allow deviations from the "development regulations or design standards set forth in Sections 137 through 142." With regard to *ADEs* that are approved with a CDP, the only HZO 136.X criteria that apply are the HZO 136.X.3 criteria that HZO 136.VII.B.2.g expressly requires the planning commission to apply. The HZO 136.X.4.b limit on *variances* to maximum building height requirements that would apply to any *variances* that are approved under HZO 136.X does not apply to *ADEs* that are approved under HZO 136.VII.B.2.e through .g with a CDP. We reject petitioners' argument to the contrary.

The first assignment of error is denied.

---

[13] We assume for purposes of this opinion that petitioners understanding that the 100-foot setback imposed by HZO 139.IV.H.1, *see* n 9, is one of the "specific height limits contained in Sections 139 through 142," within the meaning of HZO 136.X.B.4.b, *see* n 10, is correct. However, the meaning and scope of the HZO 136.X.B.4.b prohibition is not clear to us.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error petitioners challenge the city's findings regarding HZO 136.X.B.3.b and c. *See* n 10. Petitioners contend that the city's findings regarding these criteria are not supported by substantial evidence.

A. With the ADE, the Project is Still Consistent with the Overall Purpose and Intent of the SCC—SC District (HZO 136.X.B.3.b)

HZO 136.X.B.3.b requires that the city find that with the disputed ADE, the "project * * * is still consistent with the overall purpose and intent of the district." In this case, the relevant district is SCC-SC district. The purpose of the SCC-SC district is set out below:

> "The SCC-SC District may be applied to property generally located within 1,300 feet of a light rail station site that is identified for mixed use neighborhood commercial development. The SCC-SC District is intended to assure a mix of transit supportive retail, service, professional, community service, child care facilities, recreational and similar uses near, and within easy walking distance of, the light rail stations outside the [Central Business District]. More intense uses such as high density housing (both free-standing and in mixed use buildings), hotels and residential hotels are encouraged near the station. *Neighborhood commercial uses in the District are intended to be pedestrian-sensitive and compatible with the scale of surrounding residential development. However, where a District is adjacent to or bisected by an arterial street, neighborhood commercial uses may be auto-accommodating provided that the auto-accommodating uses are clustered in a node, as opposed to being extended along the arterial, and provided the amount and intensity of such development is limited so as not to adversely impact the nearby residential areas* or take on the look of strip development." HZO 136.II.C. (italics and underline emphasis added).

Petitioners argue that the HZO 136.X.B.3.b requirement that the project with the ADE remain "consistent with the overall purpose and intent of the [SCC-SC] district" requires that the "development [be] limited so as not to adversely impact the nearby residential areas."

Respondents answer that the requirement imposed by HZO 136.X.B.3.b is not as general or far-reaching as petitioners assume. The SCC-SC purpose language that petitioners

rely on is all directed at "neighborhood commercial uses." Respondents contend Tuality's proposed Building B is not a "neighborhood commercial use."[14]

It at least seems highly questionable that the Health Professions Campus Building B qualifies as a neighborhood commercial use. Petitioners make no attempt to show that it is a neighborhood commercial use. In the absence of any such argument, we agree with respondents that Building B is not a neighborhood commercial use. We agree with respondents that petitioners' arguments under this subassignment of error provide no basis for reversal or remand.

Subassignment of error A is denied.

B. No Significant Detrimental Impacts to the Environment or the Natural, Historic, Cultural or Scenic Resources of the City (HZO 136.X.B.3.c)

HZO 136.X.B.3.c requires that the city find that the ADE "will not result in significant detrimental impacts to the environment or the natural, historic, cultural or scenic resources of the City." Although petitioners identify no natural, or scenic resources that they believe are protected by HZO 136.X.B.3.c, the planning commission found that "[t]he residential neighborhood to the north is one of the City's recognized historic and cultural resources." Record 398.

---

[14] HZO 136.III.HH provides the following definition:

> "Neighborhood Commercial. Neighborhood commercial includes 'commercial uses' as defined in this subsection, provided they are small scale retail and service uses primarily serving nearby residential areas and neighborhood businesses and their employees. General office and other commercial uses which are not retail or service in nature are allowed on and above the second floor of a neighborhood commercial building. This term applies to the size and scale of a commercial use and is different from the C-4 Zone of the same name.
>
> "Neighborhood commercial uses are limited in size and intensity to promote a local orientation and to limit adverse impacts on nearby residential areas. The footprint of a single story, single tenant neighborhood commercial building shall not exceed 10,000 gross square feet. The building footprint of multi-storied single tenant neighborhood commercial buildings shall not exceed 20,000 gross square feet. A multi-tenant neighborhood commercial building containing at least two (2) stories of residential above the first floor has no limit on building footprint. Neighborhood commercial uses may be auto-accommodating and provide off-street parking behind the building, but the overall development is intended to be predominantly pedestrian-sensitive and compatible with the scale of surrounding residential development."

Petitioners identify eleven ways they believe the disputed ADE violates HZO 136.X.B.3.c.[15] With regard to the first three of those ways, which rely on additional traffic and parking spaces that will be generated by and needed for the additional 9,700 square feet of floor space the ADE will make possible, respondents argue petitioners waived those traffic issues by failing to raise any issue below concerning the additional parking or traffic that may be attributable to the ADE and the 9,700 square feet of additional floor space.

Under ORS 197.835(3), LUBA's scope of review is limited to issues that were "raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." ORS 197.763(1) applies here.[16] In determining whether

---

[15] Those allegedly significant detrimental impacts include:

"1) Increased traffic with resultant increase in traffic congestion. * * *

"2) Increased traffic with resultant increase in curbside parking. * * *

"3) Increased traffic compromises pedestrian safety. * * *

"4) Artificial light pollution. * * *

"5) Loss of privacy. * * *

"6) Loss of indirect light on cloudy days. * * *

"7) Loss of air 'open space. * * *

"8) Sound pollution from the mechanical penthouse. * * *

"9) Mass effect. * * *

"10) Longer period of shade. * * *

"11) Less sunlight, more shade. * * *" Petition for Review 9-12.

[16] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties *an adequate opportunity to respond to each issue*." (Emphasis added.)

a party's arguments are sufficient to preserve an issue for appeal to LUBA under these statutes, the Court of Appeals has explained that the statutes require "fair notice," not the "particularity that inheres in judicial preservation concepts." *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). What petitioners must have done to preserve the traffic issues they assert in this part of the second assignment of error is raise the issue sufficiently to give the city "and the parties an adequate opportunity to respond to" the issue. ORS 197.763(1). *See* n 16. Based on the citations to the record in the petition for review, we agree with respondents that the traffic issues petitioners assert under the second assignment of error were not raised before the city and therefore those issues are waived. While traffic was certainly a general concern below, the relatively small traffic and parking impact and resulting potential pedestrian safety issues that can properly be attributed to small additional amount of floor space made possible by the ADE was not raised in a way that was sufficient to put the city and parties on notice that potential traffic, parking and pedestrian safety impacts of the ADE needed to be addressed under HZO 136.X.B.3.c.

With regard to artificial light pollution, loss of privacy, sound pollution from the mechanical penthouse," and "loss of air 'open space'", respondents contend the following findings are sufficient to address those concerns and that the findings are supported by substantial evidence:

> "The applicant also pointed out at the hearing that as a result of several meetings and discussions with the neighborhood and with individual neighbors who live nearby, the design for Building B was further altered, to more fully accommodate neighborhood concerns. As a result of these meetings and discussions, several changes were made to Building B so that it would become even more compatible with surrounding residential development. For example, the design for Building B was altered to eliminate active open space on the second story roof garden on the north side of the building, thereby providing more privacy for nearby residents. The applicant committed to provide window coverings on the northern face of the building to further enhance privacy. The applicant moved the mechanical penthouse as far south as feasible, so that this mechanical equipment and height would be farther away from the neighborhood. This change in design not only reduces the height of the building, it provides more light and a better sun angle to the

> neighborhood—further enhancing compatibility. The applicant also removed the service drive on the northwest side of the building and redesigned its service functions to accommodate this change. The applicant also made a special effort to incorporate additional historic design elements into Building B, including the use of innovative arcade along the north side of the building. The applicant has proposed a deeper 15-foot setback along the northern portion of the site, to help create more separation and better scale between Building B and the nearby neighborhood structures. In short, where feasible, the applicant made changes to its design to accommodate specific neighborhood concerns, as long as it could do so without compromising its mission or the critical programmatic and functional aspects of its new building. These extra efforts significantly enhance the scale and neighborhood compatibility of the proposed alternative design. For all of the above reasons, the proposed building will be more compatible with the scale of surrounding residential development than a five-story building permitted by right. * * *" Record 41-43.

We agree with respondents.

The city also adopted findings responding to petitioners concerns about "mass effect," "longer period of shade," and "less sunlight, more shade." We address and reject petitioners' challenges to the adequacy of those findings in our discussion of the third assignment of error below. We reject them here for the same reason.

Subassignment of error B is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners allege the city erroneously found that the disputed ADE will "equally or better meet the purposes of the Station Community Planning Area and of the regulation to be modified." HZO 136.X.B.3.a. *See* n 10. Under this variance criterion, two purposes must be considered, the purpose of the Station Community Planning Area and the purpose of the regulation to be modified, which in this case is the HZO 139.IV.H.1 100-foot setback.

A. The Purpose of the Station Community Planning Area

According to petitioners the purpose of the Station Community Planning Area is set out at HZO 136.I, which provides in part:

> "A. Station Community Planning Areas (SCPA) are established to promote transit-supportive and pedestrian sensitive mixed use developments in areas near light rail transit stations. * * *.
>
> "B. Station Community Planning Areas consist of zoning districts which share a number of qualities and characteristics but are distinguished by differences in emphasis on primary uses and intensity of development. *The land use districts are designed to work together to result in a lively, prosperous mixed-use neighborhood providing an attractive place to live, work, shop and recreate with less reliance on the automobile than is typical elsewhere in the community*. * * *"

Instead of setting out the foregoing and explaining why the city believes the ADE equally or better meets the purposes of the Downtown SCPA, the challenged decision sets out the text of the SCC-SC zoning district which was set out earlier in our discussion of subassignment of error A under the second assignment of error. The city presumably did this because the subject property is located in the SCC-SC zoning district. The findings then proceed to explain why the city believes the disputed ADE equally or better meets the purposes of the SCC-SC zoning district. Record 35-43.

Petitioners point out that the above SCPA purpose statement provides that SCPA zoning or "land use districts are designed to work together to result in a lively, prosperous mixed-use neighborhood providing an attractive place to live, work, shop and recreate with less reliance on the automobile than is typical elsewhere in the community." Petitioners argue that the SCC-SC district is not the only zoning district in the Downtown SCPA and the city erred by not also considering the purpose of the adjoining SCR-DNC district to the north.

> "Respondent fails to address a key component in the SCPA purpose statement, which is that, 'The land use districts are designed to work together.' At R. 35-43, the findings section which addresses HZO 136.X.B.3.a, respondent fails to show how the 'alternative design-element' will equally or better meet the purposes of the Station Community Planning *Area* because they have failed to consider and address the purpose of the adjacent Downtown Neighborhood Conservation district." Petition for Review 14-15 (emphasis in original).

Respondents contend that there are four designated SCPA districts: Downtown, Fair Complex/Hawthorne Farm, Orenco, and Quatama/185th. Hillsboro Comprehensive Plan (HCP) Section 15(II). Pursuant to HCP Section 15(II)(C), these four comprehensive plan designations "shall be implemented through establishment of appropriate zoning districts." Because the subject property is located in the SCC-SC zoning district, and is not located in the SCR-DNC district, respondents contend the city properly limited its consideration to the SCC-SC district. Respondents also point out that the Downtown SCPA district includes four other zoning districts and if petitioner's theory is correct, the city would be required to consider the purposes of all six zoning districts in applying HZO 136.X.B.3.a, not just the purposes of the SCC-SC and SCR-DNC zoning districts.

We need not and do not consider whether the city should have considered both the SCC-SC and the SCR-DNC zoning districts when it applied HZO 136.X.B.3.a in this case (as petitioners argue), or whether the city properly limited its consideration to the purposes of the SCC-SC district (as the city argues) or whether neither of those interpretations is correct. Before the city council, the applicant took the position that the purposes of the SCC-SC district were the proper inquiry under HZO 136.X.B.3.a and respondents contend that no party below ever took the position that the purpose statement of the SCR-DNC zoning district was a relevant consideration under HZO 136.X.B.3.a. According to respondents, the issue presented under this subassignment of error was therefore waived under ORS 197.763(1) and 197.835(3). *See* n 16 and related text.

Petitioners have not responded to respondents' waiver defense. Therefore, we conclude that the issue raised under this subassignment of error is waived.

This subassignment of error is denied.

B. Purpose of the Regulation to be Modified

The second purpose that must be considered under HZO 136.X.B.3.a is the purpose of the regulation to be modified, which in this case is the HZO 139.IV.H.1 100-foot setback.

Under HZO 136.X.B.3.a, the ADE must "equally or better meet the purposes of" the HZO 139.IV.H.1 100-foot setback. The text of HZO 139.IV.H.1 was set out earlier at n 9 and is reproduced below:

> "On properties zoned * * * SCC-SC, * * * structures built within 100 feet of any shared property line with properties zoned * * * SCR-DNC shall be no greater height than the maximum height of the applicable adjacent residential zone."

Although it possible to speculate about what the purposes of the above 100-foot setback are, the text of HZO 139.IV.H.1 does not expressly identify the purposes of the 100-foot setback. The parties apparently agree that the HZO does not include a purpose statement that applies specifically to HZO 139.IV.H.1. In the challenged decision, the city acknowledged that some project opponents took the position that the 100-foot setback should be applied in a rigid and inflexible way and rejected that position:

> "The purpose of the 100-foot height setback in [HZO] 139.IV.H is not specifically described in the [HZO]. However, some residents who testified in opposition to the application asserted that the 100-foot height limitation was meant to be applied in a *rigid and inflexible way*, to strictly limit building height in SCPA districts bordering certain residential districts. *Ms. Deborah Raber, Project Manager with the Hillsboro Planning Department, conducted legislative research to investigate this assertion. Based on Ms. Raber's research contained in her January 8, 2008, supplemental staff report, which is referred to and adopted by reference here, and based on other testimony and evidence in the record, City Council finds that the 100-foot height limitation in Section 139 is a 'formulaic' provision that appears to be based on how the 100-foot height setback would apply to a typical 400-by-400-foot block structure in the City.* <u>This height limit may be varied, subject to the variance criteria in [HZO] 136.X.B.3</u>. Therefore, Council concludes that the height limit was not meant to be applied in a rigid and inflexible way, to strictly limit building height in the SCPA districts bordering certain residential districts." Record 43-45 (italics and underlining added).

Petitioners devote several pages of the petition for review to taking the city to task for adopting the italicized findings above. Petition for Review 18-22. From our review of the January 8, 2008 staff report, petitioners are correct that the planner identified no actual legislative history, and the planner's speculation that the 100-foot setback is formulaic and

based on an assumed 400 foot by 400 foot block is simply speculation on the part of the planner. Petitioners are correct that such post-enactment speculation by legislators or non-legislators is not legislative history. *DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984); *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26-28, 61 P3d 970 (2003).

However, it appears from the decision that the city understood opponents to be arguing that no variance or ADE could be approved under the HZO to deviate from the HZO 139.IV.H.1 100-foot setback and was relying at least in part on the purported legislative history to reject that position.[17] The city did not need any legislative history to reject that position. There is absolutely no support in the text of HZO 139.IV.H.1 or elsewhere that the 100-foot setback established by HZO 139.IV.H.1 is ineligible for variances or ADEs. As we have previously noted, the city knows how to identify HZO regulations that are ineligible for variances or ADEs. HZO 136.X.B.5; 136.VII.B.2.f. *See* ns 10 and 11. The HZO 139.IV.H.1 100-foot setback is not such a regulation.

Because the HZO includes no purpose statement for HZO 139.IV.H.1, the city correctly turned to HZO 137.X.A, which sets out the purposes for minimum and maximum building heights generally. In the petition for review, petitioners break the HZO 137.X.A statement of purposes down into four numbered purposes. Petition for Review 16. Numbering the minimum and maximum building height purposes makes them easier to discuss and we do the same below:

> "Minimum and maximum building height standards serve several purposes. [(1)] They promote a reasonable building scale and relationship of one structure to another. [(2)] They reflect the general building scale of transit-supportive commercial, residential, industrial, research park, and institutional development in the City's neighborhoods. [(3)] They help to create a

[17] The city also relied on the general purpose statement for minimum and maximum building heights to reject opponents "rigid and inflexible" position and ultimately conclude that the 100-foot setback need not be observed if the applicable variance criteria are met. We discuss that general purpose statement below.

> harmonious, pedestrian-sensitive visual setting which enhances the livability of a neighborhood. [(4)] They also help assure an adequate intensity of development that supports the City's and region's substantial investment in light rail transit." HZO 137.X.A.

Petitioners argue that purposes No. 1 and No. 2 apply to both minimum and maximum building heights, purpose No. 3 applies to maximum building heights and purpose No. 4 applies to minimum building heights. Petitioners are probably correct. But given the lack of any HZO purpose statement that directly applies to HZO 139.IV.H.1, we do not agree with petitioners that it was error for the city to consider all four purposes.

From the first three purposes listed above, petitioners synthesize the following, which they conclude is the purpose of HZO 139.IV.H.1:

> "[T]he purpose of HZO 139 IV.H is to protect the residential districts from the adverse effects of taller, disproportionate buildings of the station commercial districts, in order to help 'create a harmonious, pedestrian sensitive visual setting which enhances the livability of a neighborhood." Petition for Review 17.

While petitioners' synthesized purpose statement seems to us to be a reasonable one, based on the four purposes set out in HZO 137.X.A, the city did not adopt it. Instead, the city adopted findings in which it attempted to explain why it believed the disputed ADE is consistent with each of the four purposes set out in HZO 137.X.A, considered separately. To the extent petitioners argue the city erred by addressing the four purposes in HZO 137.X.A separately, and by not adopting petitioners' synthesized formulation of the purpose of the of HZO 139.IV.H.1 100-foot setback, we reject the argument. We turn to the city's findings.

1. Promote a Reasonable Building Scale and Relationship of One Structure to Another

The city's findings regarding this purpose are set out below:[18]

---

[18] We note that in identifying the findings regarding this purpose and the other three purposes, respondents unhelpfully cite to the entire city council decision.

> "The governing body's findings in this regard are set out at Rec. 35-53." Respondent's Brief 31.

> "Council finds that the proposed request equally or better promotes a reasonable building scale and relationship of this structure to other structures in the surrounding neighborhood. As explained above, a strict application of the 100-foot height setback on Block 8 would create a taller five-story structure that would be out of scale with the surrounding residential buildings. The applicant's proposed four-story, stair-step design is more in scale with the surrounding residential buildings, even though this lower facade would be slightly closer to some of the surrounding residential structures. The overall design of the shorter, four-story, stair-step-designed building improves the relationship of this structure to smaller structures in the surrounding residential neighborhood, because the proposed design improves the proposed mass, scale, and proportion of the building, relative to the surrounding residential structures. It also creates less shadow and allows more light into the residential structure in the surrounding residential area than the taller building permitted by right." Record 47.

Petitioners fail to appreciate what a subjective and value-laden inquiry is called for in determining whether the scale and relationship of one structure to another structure is reasonable. Petitioners also fail to appreciate that in reviewing evidentiary challenges to the city's decision, LUBA does not duplicate the role of the city. Specifically, LUBA does not independently weight and balance the evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). So long as LUBA can say a reasonable person could have arrived at the conclusion that the decision makers adopted based on the evidence, that decision is supported by substantial evidence even if another person could reasonably reach a different conclusion based on that same evidence. *Douglas v. Multnomah County*, 18

If the decision were longer or the relevant findings less obvious we likely would find that reference inadequate to direct us to the city's findings. Even less helpful is respondent's response to the evidentiary support in record in response to petitioners' many evidentiary challenges. Respondents simply cite to hundreds of pages of the record, without making any attempt identify particular evidence.

> "(See for example Rec. at 197-231, 217, 462-75, 571, 599-616, 671-702, 751-922, 137-49.)" Respondents' Brief 31-32.

We suspect respondents took this approach because an explicit response to petitioners' many evidentiary challenges are really not necessary and to respond explicitly to each would require a brief that is much longer than our 50-page limit. Nevertheless, record citations like the one above are little more than an invitation to LUBA to comb through the record to find supporting evidence. We simply do not have time to do unaided evidentiary searches of the record. We deny petitioners' evidentiary challenge, but it is based on more explicit references to the record elsewhere in the parties' briefs.

Or LUBA 607, 617-18 (1990). In this case the city effectively determined that the scale and relationship of the proposed four-story building to the residential buildings to the north is at least as reasonable as the taller five-story building that could be built on the subject site by right, even though that four-story building would 32 feet closer to the shared property line with the SCR-DNR district to the north. The drawing from Record 571 that appears earlier in this opinion and the drawing that appears at Record 217 demonstrate just how subjective that determination is. We recognize that petitioners assign great significance to the fact that the proposed four-story building will be 32 feet closer than the five-story building that would be permitted by right and little or no significance to the fact that the proposed four-story building will be shorter. However, given the nature of the standard and the relative differences between the proposed building and the building that could be built by right, we conclude the city's findings are adequate to explain why purpose No. 1 is equally or better met by the proposed building.

2. Reflect the General Building Scale of Transit-Supportive Commercial, Residential, Industrial, Research Park, and Institutional Development in the City's Neighborhoods

The city's findings regarding this purpose are set out below:

> "Council finds that the proposed request equally or better reflects the general building scale of transit-supportive uses in the City's neighborhoods, because the proposed design assures an adequate intensity of development in a shorter, four-story, stair step-designed building that is more compatible with the surrounding residential neighborhood, than the taller, five-story building would be." Record 47.

The city's findings concerning purpose No. 2 are similar to the findings concerning purpose No. 1 and we conclude they are adequate for the same reasons.

3. Help to Create a Harmonious, Pedestrian-Sensitive Visual Setting Which Enhances the Livability of a Neighborhood

The city's findings regarding this purpose are set out below:

> "Council also finds that the proposed request equally or better helps to create a harmonious, pedestrian-sensitive visual setting which enhances the livability

> of the surrounding residential and commercial neighborhood. This purpose is equally or better met by the proposed shorter, four-story, stair-step design, because it provides a more harmonious, pedestrian-sensitive, visual setting than a taller, five-story building would, as permitted by right. The shorter building allows more light to reach the surrounding residential neighborhood and casts less of a shadow into the residential area to the north, thereby creating a better visual setting than would be the case with a taller five-story building permitted by right. As explained above, the proposed building will be equally or more pedestrian-sensitive because the mix of uses and non-auto-oriented nature of the building would not change as a result of the request. The proposed building would be more pedestrian-sensitive because it improves the mass, scale, and proportion of the building, relative to other surrounding structures." Record 47.

This is the purpose that petitioners rely most heavily on and the purpose that appears to us to be the most relevant. Again, the city's reasoning is that as far as impacts on the livability of the neighborhood, a shorter building that is 32 feet closer is better than a taller building that is set back the required 100 feet. The city concluded that, comparatively, the shorter, closer building "improves the mass, scale, and proportion of the building, relative to other surrounding structures." Reasonable persons could disagree with the city regarding the validity of that reasoning, and the planning commission reasoned to a different conclusion. But based on the subjectivity of the applicable legal standard, and the drawings at Record 217 and 571, we cannot say that the city council's reasoning is erroneous.

4. Assure an Adequate Intensity of Development that Supports the City's and Region's Substantial Investment in Light Rail Transit

> "Council finds that the proposed request equally or better helps assure that an adequate intensity of development that supports light rail transit will be built on this block, because as explained above, without the requested alternative design element, Pacific University would not build the proposed building on this block, due to the lack of depth available outside the height setback, and the inefficiencies and programmatic problems that the 100-foot height setback creates on this particular block. Granting the proposed request helps assure that an adequate intensity of development will occur on this block to support light rail. Because of the unique constraints imposed by the 100-foot height setback on this particular block, the SCC-SC-zoned area outside the 100-foot height setback cannot reasonably accommodate a taller commercial building that would be permitted by right, and would thereby not help assure the City's and the region's substantial investment in light rail transit. In essence,

> because of the unique circumstances on this block, the 100-foot height setback does not assure that an adequate intensity of development will occur on this block adjacent to light rail. For all of these reasons, this criterion is therefore met." Record 47-48.

Although we agree with petitioners that this purpose is almost certainly a purpose that supports *minimum* building heights rather than *maximum* building heights, the city was faced with a situation where the regulation to be modified has no purpose statement. We do not agree that it was error for the city to address all the purposes specified for minimum and maximum building heights in HZO 137.X.A. At most these finding were unnecessary or represent harmless error.

5. Petitioners' Evidentiary Challenge

Finally, petitioners challenge the evidentiary support for the city's findings that the sunlight and shade impacts of the proposed building will be no less desirable than would be the case with the permitted five story building.

> "Respondent's findings are based on shadow lengths cast at one point in time, that being at noon on December 21st which is the winter solstice. The winter solstice is the shortest day of the year, when the sun's elevation is the lowest, and the longest shadows cast (if it is sunny). Applicant presented an elevation view which depicts a clear sky and a shining sun at noon on 12/21. It depicts the shadows cast from the four-story building * * *, and an approximately 92.5 foot 'five story' building, (which respondent finds is 'permitted by right'). In this view, the 'extra' shadow cast by the 92.5 foot 'five story' building is approximately 24 feet. That is the sum total of the applicant's evidence that the 'alternative design element' allows more natural light into the neighborhood. Respondent accepts this as substantial evidence which proves that a five-story building 'blocks more light', 'creates more shade,' and 'allow less light into the residential neighborhood to the north.' There is not substantial evidence to support the findings quoted above when the record is viewed as a whole." Petition for Review 32 (record citations omitted).

Petitioners' evidentiary challenge is twofold. First, petitioners argue the five-story building depicted on the drawings at Record 217 and 571 is actually taller than would be permitted under the HZO. We conclude below under the fifth assignment of error that

petitioners failed to raise this issue below and are therefore precluded from raising that issue in this appeal.

Petitioners' second point is that the drawing at Record 217 shows the sun at the winter solstice and that there is evidence in the record that a different shadow will be cast at different times of the year when the sun is higher in the sky and when there are clouds the shadows will be more diffuse or there may be no shadows at all.

The city was not required to determine the precise shadow/sunlight effects of the permitted and proposed buildings with mathematical precision for all times of the year. There is evidence a reasonable person would accept that the proposed building will cast less of a shadow than the allowed five-story building on December 21. A reasonable person could conclude from that evidence that the building made possible by the ADE will equally or better meet the purposes of the 100-foot setback with regard to shading and sunlight, notwithstanding that the precise shadow that will be cast by that building may vary over the year and will be less pronounced or cease to exist on cloudy days.

We reject petitioners' evidentiary challenge under the third assignment of error.[19]

Subassignment of error B is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

We are not sure we completely understand petitioners' fourth assignment of error. Petitioners allege the city erred by approving an ADE as part of a modification of Tuality's

---

[19] We note that petitioners also appear to assert a procedural assignment of error in footnote 14 on page 19 of the petition for review. That procedural assignment of error goes beyond the third assignment of error and we do not consider assignments of error that are asserted only in footnotes. *See* Confederated Tribes (Siletz) v. Employment Dept., 165 Or App 65, 81 n 8, 995 P2d 580 (2000) (Court of Appeals does not consider assignments of error that are raised only in footnotes).

Between pages 22 and 36 of the petition for review, petitioners also assign error to a number of findings that were not adopted to address the HZO 136.X.B.3.a requirement that an ADE must equally or better meet the purpose of the regulation to be modified. Petitioners offer no explanation for why they challenge those other findings under the third assignment of error, and we have ignored those challenges.

existing CDP. According to petitioners "[t]he Hillsboro Zoning Ordinance contains no process for 'modifying' a previously approved [CDP]." Petition for Review 38. We understand petitioners to contend that under the HZO, once CDP approval has been granted the approved CDP cannot thereafter be modified unless the applicant submits an entirely new application that is reviewed as though the existing CDP approval does not exist. Petitioners next argue that because CDP modifications are not authorized by HZO 136.VII.B.2.e and the disputed CDP was processed as a modification rather than a new application, the disputed ADE should not have been approved. Petitioners also argue the city erroneously did not require the applicant to submit a new Traffic Impact Report, as required by HZO 136.VII.A.5.f and 136.VII.B.5.c.2.a.[20]

We turn first to petitioners' initial argument that modifications of an existing CDP are not authorized. The HZO could be clearer, but we agree with respondents that petitioners' initial argument is without merit. Petitioners apparently rely on HZO 136.VII.B.2.a, which sets out the "General Provisions" of Development Review and does not expressly mention modifications of CDPs.[21] However, the preceding section of HZO 136.VII makes it reasonably clear that following Development Review approval, modifications are possible:

---

[20] HZO 136.VII.A.5.f requires that applications for development review in SCPA areas must include "A traffic analysis documenting the on- and off-site traffic impacts, mitigation and safety improvement requirements of the project[.]" HZO 136.VII.B.5.c.2.a requires that a CDP narrative statement must "include a copy of the full traffic impact report specified in [HZO] 137.XVI.B.2 for the full development of all phases of the Concept Development Plan" or a request that traffic analysis "be limited to the specific phase under review."

[21] HZO 136.VII.B.2 provides in relevant part:

> "General provisions.
>
> "a. Development Review shall be accomplished through the Concept Development process as provided in this subsection if:
>
> "1) the project or development is within the SCR-V District;
>
> "2) The project is a non-residential phased development over thirty (30)acres within any Station Community Planning Area; or

> "Section 133, Development Review, *or any amendment thereof*, and the provisions of this subsection shall apply to all uses permitted in a Station Community Planning Area except construction of detached single family, duplex and ancillary dwellings built on single lots in any district other than the SCR-OTC and SCR-DNC Districts. * * *"

We reject petitioners' argument that a CDP, once approved, may not thereafter be modified.

Petitioners next argument is based on an apparent oddity in the CDP process that we discussed under the first assignment of error above. That oddity is that under HZO 136.VII.B.2.e an ADE may be approved to deviate from the standards set out in HZO Sections 137 through 142 as part of a CDP approval whereas following CDP approval such deviations require approval of a *variance* which requires application of some criteria that do not apply to ADEs. *See* n 11.[22] Petitioners apparently believe that the failure of HZO 136.VII.B.2.e to mention approval of a CDP *modification* specifically means an ADE can only be approved as part of the initial approval of a CDP and not as part of a modification of a previously approved ADE. Again, the HZO is so complicated and in places is worded so imprecisely that this kind of argument is facially plausible. But we believe petitioners read

---

> "3) The applicant:
>
> > "i. Proposes to construct a commercial or industrial development project of any size over time and in more than one phase (a 'phased project');
> >
> > "ii. Proposes to develop land for the creation or expansion of a campus development; or
> >
> > "iii. Proposes to develop or expand a major institution or major institutional use.
>
> "If any of the above apply, the applicant shall file an application for Concept Development Plan approval for the entire area identified for development. The Plan shall encompass the entire parcel or contiguous parcel(s) proposed or available for current or ultimate development * * *."

[22] As relevant, HZO 136.VII.B.2.e provides "an applicant for Concept Development Plan approval may propose one or more alternative development or design elements for all and/or specific areas within the plan boundaries which supersede corresponding development regulations or design standards set forth in Sections 137 through 142. * * *"

far too much into the failure of the HZO to specifically recognize the possibility of a CDP modification every time the HZO discusses actions on CDP applications.

Petitioners' remaining argument is based on the city's alleged failure to require traffic impact information that is required by the HZO. *See* n 20. Respondents contend no party raised any issue below regarding these application requirements and that the issue is now waived under ORS 197.763(1) and 197.835(3). *See* n 16. Petitioners do not respond to respondents' waiver argument or identify where in the record this issue was raised. Therefore, this issue was waived. *Williamson v. City of Salem*, 52 Or LUBA 615, 618-19 (2006)

Petitioners' fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In petitioners' fifth and final assignment of error, they allege the five-story building that is depicted on the drawings at Record 217 and 571 is taller than would be permitted under the HZO in the SCC-SC district, and the city therefore erred by relying on that drawing to compare the shadow a five-story building that is permitted outright would cast with the shadow that would be cast by the proposed four-story building. Petitioner argues that the building shown on that drawing is approximately 92.5 feet tall if the roof-mounted mechanical equipment is included. Petitioners contend the roof-mounted mechanical equipment must be included in computing building height and the hypothetical five-story building that the city found could be permitted outside the 100-foot setback in fact exceeds the 75 foot maximum building height limit in the SCC-SC district.

Petitioners' argument is based on HZO 137.X.B.1 and 137.X.B.5. As relevant, HZO 137.X.B.1 provides the following definition of "story:"

> "* * * For all non-residential or mixed-use buildings and parking structures a 'story' shall be considered to be not greater than fifteen feet (15'). *The maximum height shall not include the roof structure above the ceiling of the top floor of the residential living space or the commercial, industrial, or*

> *institutional occupancy, provided the roof pitch does not exceed 12:12. * * *"* (Emphasis added.)

HZO 137.X.B.5 provides in relevant part:

> "* * * As specified in [HZO 137.X.B.1], above, a story is a numeric measurement used to determine the allowed overall exterior height of a building or structure, *including roof-mounted equipment* (other than permitted aerials and antennas) and parapet walls or screening materials. * * *" (Emphasis added.)

Petitioners argue that under HZO 137.X.B.1 the five-story commercial and institutional buildings that are permitted in the SCC-SC district outside the 100-foot setback may not exceed 75 feet. Petitioners argue that under HZO 137.X.B.5, the "roof-mounted equipment" shown on those two drawings must be counted and renders the displayed five-story building too tall.

Respondents offer two responses. First, respondents contend that petitioners fail to recognize that the last sentence of HZO 137.X.B.1, quoted above, provides "[t]he maximum height shall not include the roof structure above the ceiling of the top floor of the residential living space or the commercial, industrial, or institutional occupancy, provided the roof pitch does not exceed 12:12." Respondents contend that had petitioners raised this issue below, the city could have pointed out that the roof-mounted equipment will be housed under a roof structure that does not exceed a 12:12 pitch and therefore the roof-mounted equipment need not be considered in computing building height. Respondents also argue that petitioners waived this issue under ORS 197.763(1) and 197.835(3), because they did not raise the issue below.

In response to respondents' waiver argument, petitioners argue that issues were raised below concerning the shading that would result from a hypothetical five-story building verses the shading that can be expected from the proposed four-story building that encroaches into the 100-foot setback. Petitioners contend that the argument about whether the equipment shelter must be counted in computing building height is an extension of that

issue that is permissible under the Court of Appeals' holding in *Boldt*. We do not agree. Whether the roof-mounted equipment must be counted in computing building height is a separate issue that petitioners did not raise below, with the consequence that that issue is waived.[23]

The fifth assignment of error is denied.

INTERVENOR-PETITIONER'S FIRST ASSIGNMENT OF ERROR

Under his first assignment of error, intervenor-petitioner Bloom (hereafter Bloom) argues the city's findings concerning the variance criteria at HZO 136.X.B.3.a and .c are not supported by substantial evidence. As we have already explained, HZO 136.X.B.3.a requires that the city find the proposed ADE will "equally or better meet the purposes of the Station Community Planning Area and of the regulation to be modified." *See* n 10. HZO 136.X.B.3.c requires that the proposed ADE "will not result in significant detrimental impacts to the environment or the natural, historic, cultural or scenic resources of the city."

Bloom disputes the evidentiary support for the city's finding that the proposed four-story design will result in less shading and more sunlight for the adjoining SCR-DNC district than a five-story design that fully complied with the 100-foot setback. For the reasons explained in our resolution of subassignment B under petitioners third assignment of error, we reject Blooms evidentiary challenged.

Bloom's first assignment of error is denied.

INTERVENOR-PETITIONER'S SECOND ASSIGNMENT OF ERROR

Bloom's entire argument under the second assignment of error is set out below:

> "The respondents propose to violate the guarantee to all the citizens who petitioned to oppose the doubling the height limit, thereby ignoring their right by taking occupation of their guaranteed open space. This would violate HZO 139.IV.H.1." Intervenor-Petitioner's Petition for Review 9.

---

[23] At oral argument, petitioners identified the following pages in the record: Record 703, 637, 625, 623, 590, 585, 480, 479, 477, 476 and 145. In their petition for review, petitioners also identify Record 137. The issue presented in petitioners' fifth assignment of error is not raised in those pages of the record.

The above argument is insufficiently developed to allow review, and it is rejected for that reason. *Deschutes Development v. Deschutes Cty*., 5 Or LUBA 218, 220 (1982). As we have already explained HZO 139.IV.H.1 imposes the 100-foot setback. *See* n 9. To the extent the above can be construed to be an argument that the 100-foot setback required by HZO 139.IV.H.1 is inviolate or ineligible for variances or ADEs, we rejected that position above under our discussion of subassignment of error B under petitioners' first and third assignments of error, and we reject it here for the same reason.

Bloom's second assignment of error is denied.

INTERVENOR-PETITIONER'S THIRD ASSIGNMENT OF ERROR

Under his third assignment of error, Bloom argues:

> "The respondents attempt to construct a selective and convenient interpretation of the purpose of the height rules in the 100-ft. buffer. They ignore the all-important statement at the beginning of Section 139, Purpose A. …regulations and design standards .. as developed by the downtown station community advisory committee and the outcome of the workshops held during the SCPA process. This was extensive citizen involvement. It is no fault of the citizens (who oppose this violation of height constraints) that the specific language of their buffer related reasoning was not recorded. Citizens should have confidence that they could rely on the plain language of the regulation to help conserve the district * * *."[24] Petition for Review 10 (underlining in original).

Bloom goes on to argue that the citizens who participated in the SCPA planning process foresaw the possibility that special interests would want to build large buildings that would

[24] The HZO 139.II.A purpose statement that Bloom relies on is set out below:

> "These Downtown community-specific development regulations and design standards reflect the City's goals and objectives for the Downtown SCPA as described in the Hillsboro Comprehensive Plan, in the Downtown Station Community Plan as developed by the Downtown Station Community Planning Advisory Committee, and in the outcome of the workshops held during the SCPA process. Except as noted below, the purpose for each development regulation and design standard is as described in Sections 136 through 138. Where the regulations or standards of this Section specifically conflict with those contained in Section 136 through 138, the standards of this Section shall prevail."

impact historic and cultural resources and intended that regulations like the HZO 139.IV.H.1 100-foot setback be strictly applied as they are written.

Bloom's legal argument under this assignment of error is not entirely clear to us. Bloom appears to argue, based on the HZO 139.II.A purpose statement, that an ADE or variance that would allow a building that is taller than would otherwise be allowed by HZO 139.IV.H.1 100-foot setback cannot be consistent with the purpose of HZO 139.IV.H.1.

In our discussion of subassignment of error B under petitioners' third assignment of error we reject petitioners' challenge to the city's findings that the disputed ADE equally or better meets the purpose of HZO 139.IV.H.1. Bloom's argument under his third assignment of error does not change our conclusion regarding those findings.

Bloom's third assignment of error is denied.

INTERVENOR-PETITIONER'S FOURTH ASSIGNMENT OF ERROR

The city's findings include the following sentence:

> "Council notes that at the hearings some opponents asserted that the City could require the applicant to build the proposed classroom building underground. Council rejects this assertion. * * *" Record 105.

Bloom argues:

> "* * * This is a false statement and premise. I (Dan Bloom) simply stated that there were <u>unexplored design alternatives</u> by the respondents (that might do less harm to the surrounding neighbors) * * *.
>
> "It is simply not true that I asserted the City could <u>require</u> the respondent to build underground. In essence the City is rejecting an argument of their own construction – not mine." Intervenor-Petitioner's Petition for Review 11 (underlining in original).

Even if the challenged finding mischaracterizes Bloom's argument below, Bloom makes no attempt to establish that the mischaracterization had any particular bearing on the city's ultimate decision regarding a mandatory approval criterion. Absent such a showing, Bloom's challenge to the city's finding provides no basis for reversal or remand. *Carlson v.*

Benton County, 37 Or LUBA 897, 919 (2000); *Day v. City of Portland*, 25 Or LUBA 468, 472 (1993); *Bonner v. City of Portland*, 11 Or LUBA 40, 52 (1984).

Bloom's fourth assignment of error is denied.

INTERVENOR-PETITIONER'S FIFTH ASSIGNMENT OF ERROR

Under his fifth assignment of error, Bloom objects to discussions between Pacific University and the city concerning whether the proposal would go forward without the requested ADE. Bloom argues:

> "First of all, the relevancy of such a discussion is highly questionable. This subject matter however is highly revealing. The implication is that [if Pacific University is not allowed to build their building that they prefer] they will take their business elsewhere. This 'gun to the head' strategy is periodically witnessed before elected officials in the City of Hillsboro. * * * An unfortunate (for citizens) but all too familiar and effective technique." Intervenor-Petitioner's Petition for Review 12 (bracketed language in original).

Bloom goes on to state that his belief that any proposal that is brought to the city under the heading of "economic development" automatically receives city approval.

Bloom's suggestion under this assignment of error that the city approved the disputed ADE because the city is predisposed to economic development—rather than by applying and properly finding that relevant approval criteria are satisfied—is inadequately developed to provide a basis for reversal or remand. *Deschutes Development*.

INTERVENOR-PETITIONER'S SIXTH ASSIGNMENT OF ERROR

We set out below Bloom's argument under the sixth assignment of error:

> "Respondents' discussion and findings are not supported by substantial evidence in the <u>whole</u> record. Respondents like the scale and mass that further their business interest. The petitioner believes that the scale and mass is too much, too close, with interpretations of scale and mass being very subjective.
>
> "The petitioners' belief is supported by 95 citizens who signed a petition opposing the 4 stories in the 100-ft buffer zone and also supported by the plain language of the regulation. Remember the Planning Commission (most familiar with land use matters) voted unanimously to deny alternative height. City Council voted unanimously to approve. The preponderance of evidence

in the whole record is to deny." Intervenor-Petitioner's Petition for Review 13 (underlining in original; record citations omitted).

As we explain in our discussion of subassignment of error B under petitioners' third assignment of error, one of the purposes of the building height limit imposed within the 100-foot setback is to "promote a reasonable building scale and relationship of one structure to another." As we noted earlier in this opinion, whether a five-store building set 100 feet back from the SCR-DNC district is more consistent with that purpose than allowing a four-story building that is set 68 feet back from the SCR-DNC district calls for a subjective determination. Bloom himself recognizes in the above-quoted argument that the determination regarding whether the four-story building promotes a reasonable building scale and relationship of one structure to another is "very subjective." That the petitioners and planning commission reached one conclusion and the city council reached another does not mean the city council erred. Based on our review of the record, a reasonable decision maker could reach either conclusion.

Blooms sixth assignment of error is denied.

INTERVENOR-PETITIONER'S SEVENTH ASSIGNMENT OF ERROR

Under his final assignment of error, Bloom cites to a staff report that acknowledged receipt of ten letters of support for the proposed ADE. Record 161. Those letters are included in the record. Bloom contends that those letters of support are similarly worded form letters and are not entitled to any more weight than the 95 signatures on petitions that opposed the ADE. Record 507-23.

Expressions of support or opposition to a proposal, which do not reference or address the merits of whether the proposal complies with relevant approval criteria, are frequently included in the record of local land use proceedings. Such expression of support for or opposition to an application for land use permit approval almost never, in and of themselves, provide a legally sufficient basis for approving or denying the application. Unless they have some bearing on a relevant approval criterion, they are legally irrelevant. In resolving

arguments about the legal sufficiency of the city's decision we consider the city's findings and the parties' arguments. To the extent the adequacy of the evidentiary record is challenged, we consider the evidence that the parties call to our attention. The record in this appeal includes hundreds of pages. The letters that petitioners identify under the seventh assignment of error make up a very small part of that record. If the city cites or relies on the disputed letters in its decision in applying one or more approval criteria, Bloom does not identify where the city relied on those letters. Because Bloom does not establish that the city relied upon those letters in any way, Bloom's seventh assignment of error provides no basis for reversal or remand.

Bloom's seventh assignment of error is denied.

The city's decision is affirmed.