BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTH ALBANY CITIZENS IN ACTION,
DIRK OLSEN and MERLE ANDERSON,
*Petitioners,*

vs.

CITY OF ALBANY,
*Respondent,*

and

BYRON HENDRICKS,
*Intervenor-Respondent.*

LUBA No. 2008-020

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Edward F. Schultz and Joel D. Kalberer, Albany, filed the petition for review and Joel D. Kalberer argued on behalf of petitioners. With them on the brief was Weatherford, Thompson, Cowgill, Black, & Schultz, P.C.

No appearance by City of Albany.

Brian G. Moore, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld Griggs, PC.

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

BASSHAM, Board Member, did not participate in the decision.

REMANDED 08/07/2008

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioners appeal a city decision approving a 78-lot subdivision.

**REPLY BRIEF**

Petitioners move to file a reply brief to respond to new matters they allege were raised by intervenor in the response brief. OAR 661-010-0039. Petitioners' motion identifies two new matters that petitioners allege were raised by intervenor for the first time in the response brief: (1) an argument that petitioners are precluded from raising certain issues set forth in the eleventh subassignment of error under the first assignment of error for the first time before LUBA under ORS 197.763(1), and (2) arguments that comprehensive plan provisions cited in the first assignment of error and the eighth assignment of error are not applicable approval criteria. The reply brief itself also responds to a third "new matter" that was allegedly raised by intervenor in response to the fifth subassignment of error under the first assignment of error and in response to the ninth assignment of error. Reply Brief pages 2-4.

Intervenor moves to strike the reply brief. Intervenor first argues that no waiver argument was asserted under ORS 197.763(1) in response to the eleventh subassignment of error under the first assignment of error, so that there is nothing to reply to. However, petitioners do not allege that intervenor is raising an ORS 197.763(1) waiver issue. Rather, petitioners maintain that the reply brief responds to an argument intervenor makes in the response brief that petitioners' traffic expert conceded a disputed point during the proceedings below, such that petitioners affirmatively waived the issue. A reply brief to respond to that argument is proper. Accordingly, page 1 and lines 1 and 2 of page 2 of the reply brief are allowed.

Next, intervenor argues that its response to the fifth subassignment of error under the first assignment of error, and to the ninth assignment of error does not raise a "new matter"

but is a direct response to their allegation of prejudice from an alleged procedural error committed by the city. In his response, intervenor alleged that petitioners had failed to establish that an alleged procedural error prejudiced their substantial rights and argued that those assignments of error should be denied. When a petition for review alleges a local government committed multiple procedural errors that prejudiced substantial rights, and the response brief faults the petition for review for failing to demonstrate that each procedural error prejudiced substantial rights, a reply brief is warranted to respond to that assertion. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004). Lines 3 through 25 of page 2, pages 3 and 4, and lines 1 through 3 of page 5 of the reply brief are allowed.

Finally, intervenor objects that its response to the first assignment of error and the eighth assignment of error does not raise a new matter, and points out that the city specifically adopted findings in response to the arguments made below by petitioners that certain comprehensive plan goals and policies applied to the application. Thus, intervenor argues, petitioners should have anticipated intervenor's response to their assignments of error and challenged those findings. We agree with intervenor. Lines 4 through 16 of page 5, of the reply brief are not allowed.

**FACTS**

Intervenor applied to subdivide a 24.2-acre parcel of land located in the city of Albany into 78 lots. The property is bounded by East Thornton Lake to the north, railroad tracks to the south, North Albany Road to the east, and Green Acres Lane to the west. Access to the subdivision is proposed directly from North Albany Road onto a new street running through the subdivision, Lakeview Drive. State Highway 20 intersects with North Albany Road approximately one-half mile south of the entrance to the proposed subdivision.

The city's planning commission approved the subdivision, and petitioners appealed the approval to the city council. Record 637. The city council held public hearings on the proposed subdivision on October 10, 2007, November 5, 2007, December 10, 2007, and

December 12, 2007. At the conclusion of the December 12, 2007 hearing, the council voted to approve the application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

**A. Introduction**

In their first assignment of error, petitioners argue that the city's findings are inadequate to demonstrate compliance with Albany Development Code (ADC) Section 11.180(3), which provides in relevant part:

> "Tentative Plat Review Criteria. Approval of a tentative subdivision or partition plat will be granted if the review body finds that the applicant has met all of the following criteria which apply to the development:
>
> " * * * * *
>
> "(3) The proposed street plan affords the best economic, safe, and efficient circulation of traffic possible under the circumstances."

In some of the twelve subassignments of error under this assignment of error, petitioners argue that the findings are inadequate because the city failed to find compliance with certain provisions of the Albany Comprehensive Plan (ACP), the Albany Transportation Systems Plan (TSP), which is incorporated into the ACP, and city engineering design standards set forth in the city's Traffic Impact Study (TIS) Guidelines. Record 605-617. Most of petitioners' arguments set forth in the first assignment of error and subassignments of error are premised on their argument that the ACP and the TSP, as well as the TIS Guidelines, contain measurable standards regarding acceptable levels of services for identified transportation facilities, and therefore those provisions are approval criteria that must be applied in addition to ADC 11.180(3). Thus, petitioners argue, the city erred in failing to analyze whether the proposal meets those ACP and TSP provisions, as well as TIS Guidelines.

In support of their contention, petitioners cite ADC 1.040(3), which provides that the ADC shall be "liberally construed to give maximum effect to the purposes [of the ADC] set

forth in [ADC] 1.020," and ADC 1.020(7), which provides that one of the general purposes of the ADC is to "[p]rovide for review and approval of the relationship between land uses and traffic circulation in order to minimize congestion, with particular emphasis on not exceeding the planned capacity of residential streets." Petitioners also argue that "ADC 1.050 * * * requires that all land actions comply with the [ACP]." Petition for Review 10.

Intervenor responds that multiple provisions of the ADC make clear that the goals and policies of the ACP do not generally apply directly to a land use application. Intervenor cites ADC 2.020(2), which provides:

> "The review criteria have been derived from and are based on the [ACP]. Reviews against the goals and policies of the [ACP] are not required *unless specifically stated*. Fulfillment of all requirements and review criteria means the proposal is in conformance with the [ACP]." (Emphasis added.)

Intervenor also cites the text of ADC 1.050, which provides in relevant part:

> "* * * Since the City of Albany has a Comprehensive Plan and implementing regulations which have been acknowledged by the State of Oregon as being in compliance with statewide goals, any action taken in conformance with this Code shall be deemed also in compliance with statewide goals and the Comprehensive Plan. Unless stated otherwise within this Code, specific findings demonstrating compliance with the Comprehensive Plan are not required for land use application approval. *However, this provision shall not relieve the proponent of the burden of responding to allegations that the development action requested is inconsistent with one or more Comprehensive Plan policies.*" (Emphasis added).

In response to petitioners' arguments below that various comprehensive plan goals and policies must be applied directly to the application as approval standards, the city first set out the text of ADC 2.020(2) and 1.050, which are quoted above, and then adopted the following conclusion based on those sections:

> "Accordingly, Council concludes that because the applications meet the applicable Development Code review criteria, the application is consistent with Comprehensive Plan goals and policies." Record 40.

For the first time in a portion of the reply brief that we do not allow, petitioners argue that the last sentence of ADC 1.050, which is emphasized above, requires that the city

demonstrate that the application is consistent with the ACP goals and policies they identified below. We understand petitioners to argue that findings concerning those ACP goals and policies are required even if no other ADC provision requires specific findings concerning the identified ACP goals and policies. However, in their petition for review, petitioners do not assign error to the city's finding quoted above, or otherwise attempt to explain why that finding is inadequate to meet the requirement of the last sentence of ADC 1.050, that the city "*respond[] to allegations that the development action requested is inconsistent with one or more Comprehensive Plan policies.*" Admittedly, the above quoted finding does not appear to specifically address the meaning of the last sentence of ADC 1.050 and instead seems to rely entirely on the other language in ADC 2.020(2) and 1.050. But the finding clearly rejects petitioners' contention that findings directly addressing the ACP goals and policies they identified were required in this case. Had petitioners assigned error to that failure on the city's part, remand might be required to have the city more specifically address the meaning of the last sentence of ADC 1.050.[1] However, petitioners did not assign error to that finding in their petition for review and we reject their attempt to do so for the first time in their reply brief.

Finally, intervenor responds that ADC 11.180(3) is the only approval criterion applicable to the proposed subdivision, and that the provisions of the ACP and the TSP, as well as city TIS Guidelines, are not criteria that must be applied when granting tentative plat approval under ADC 11.180(3). Intervenor explains that ADC 11.180(3) affords the city the discretion to determine whether, based on all of the evidence in the record, the criterion is met. Intervenor points out that the city expressly found that the TIS Guidelines cited by

[1] It may be that the city interprets the last sentence of ADC 1.050 to require that the city or applicant respond to allegations that an application for land use approval is inconsistent with ACP goals or policies, but only requires the applicant or city to apply any such ACP goals or policies directly and demonstrate that the application is consistent with such ACP goals or policies, if the ADC specifically requires findings regarding those ACP goals or policies.

petitioners are not applicable "standards," but are merely guidelines and engineering standards for road construction for the city to consider in determining whether the standard set forth in ADC 11.180(3) is satisfied, and that the city's interpretation of its code is entitled to deference under ORS 197.829(1) unless it is inconsistent with the text and context of the ADC.[2]

We agree with intervenor that to the extent petitioners argue in the first assignment of error or any subassignments of error that provisions of the ACP, the TSP, or the TIS Guidelines are approval criteria that apply directly to the city's evaluation of the proposed tentative plat, they are mistaken. ADC 1.050 and ADC 2.020(2) make clear that, *unless specifically stated in the ADC*, goals and policies of the ACP do not apply directly to review of the proposed subdivision. We are not persuaded by petitioners' reference to ADC 1.020(7) and 1.040(3) to support their assertion that the ACP and the TSP must be applied directly to the proposed subdivision. Those provisions are general provisions taken from the "overview" section of the ADC. In addition, we agree with the city's determination that the TIS Guidelines are not applicable approval criteria but are merely guidelines. *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 340, 722 P2d 1258 (1986).

However, although the ACP and the TSP provisions regarding acceptable levels of service for transportation facilities and the TIS Guidelines need not be applied directly as approval criteria, those provisions are not entirely irrelevant, because, as both parties

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[2] The city found:

> "* * * The City has Traffic Impact Study Guidelines (the 'Guidelines'). The Council regards the performance standards contained within the guidelines as just that – guidelines. They have not been incorporated into the [ADC] but are rather part of the Engineering Design Standards, and as such can be modified at the discretion of the City Engineer. The Guidelines may be used to help demonstrate compliance or non-compliance with ADC 11.180(3), however, they are not mandatory threshold standards that must be met for approval of a subdivision application. The Council deems the relevant criterion for whether a subdivision may be approved on the basis of traffic to be ADC 11.180(3).
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> "The Council finds in this case that the TIA, prepared by the applicant, does satisfy the Guidelines. * * *" Record 25.

correctly note, the applicable standard set forth in ADC 11.180(3) is highly subjective. The provisions of the ACP and the TSP regarding levels of service, traffic volume, and accident data, to name a few, are relevant considerations for the city in determining whether a proposal meets ADC 11.180(3), and studies and analyses regarding a proposal's compliance with those provisions can be evidence to support a city determination that the approval criterion is met or is not met.

**B. Fifth Subassignment of Error**

We turn first to petitioners' fifth subassignment of error. After the close of the final city council hearing on December 12, 2007, the city's traffic engineer submitted a memorandum into the record and testified regarding various aspects of the applicant's proposal. Record 82-88. In their fifth subassignment of error, and in a portion of their ninth assignment of error, petitioners argue that the memorandum contained new evidence regarding accident data, and thus the city committed a procedural error that prejudiced their substantial rights when the city accepted the memorandum into the record after the public hearing had closed, without giving petitioners an opportunity to respond to that evidence. ORS 197.835(9)(a)(B).

As relevant, the memorandum includes a discussion regarding a dispute between the applicant and petitioners as to an alleged ambiguity in the applicant's transportation impact analysis (TIA) about which road segments the accident data included in the TIA covered. The memorandum states in pertinent part:

> "A review of Albany's accident data for the period between 2002 and 2006 did not show any accidents occurring on [the segment of North Albany Road between Highway 20 and Hickory Street]. Because Albany's accident data base does not show any accidents as having occurred on this segment during the analysis period, staff does not believe that the ambiguity over the extent of the ODOT crash report is significant." Record 85-86.

The city found:

> "3.6 The council finds that the proposed plan affords the best safe circulation of traffic possible under the circumstances for the following reasons:
>
> "a. The accidents per million miles traveled * * * for the segment of North Albany roadway impacted by this application will be 0.3 APM, well below the city's TIA Guideline of 1.0 and well below the state's APM for similar roadways of 2.26. *The City's accident data between 2002 and 2006 shows no accidents on this segment of North Albany Road between the proposed site entrance and the intersection of North Albany Road and Highway 20. * * *"* Record 26 (underlining in original, italics added.).

Petitioners argue that there is no evidence in the record regarding the city's accident data other than that found in the memorandum at Record 82-88, which no party disputes was introduced after the hearing and record were closed. Petitioners argue that the only evidence in the record prior to that point regarding accident data was furnished by the applicant based on ODOT accident data, and that they were prejudiced by the city's acceptance of new evidence regarding the city's accident data after the close of the record without an opportunity to respond to that evidence.

Intervenor first responds by arguing that the city did not rely in its findings on city crash data, but only on ODOT crash data. Intervenor also responds by asserting that the memorandum did not introduce new "evidence" as defined in ORS 197.763(8)(b).[3] Finally, intervenor cites *Dickas v. City of Beaverton*, 16 Or LUBA 574, 581, *aff'd* 92 Or App 168, 172-73, 757 P2d 451 (1988) in support of its contention that the city traffic engineer's introduction of the memorandum after the close of the record was not error.

*Dickas* stands for the proposition that post-hearing communication between staff and the governing body is not considered *ex parte* contact for purposes of ORS 215.422(4). However, petitioners do not allege that improper *ex parte* contact occurred that warrants

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[3] ORS 197.763(8)(b) provides that evidence means:

> "* * * facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

remand. Rather, petitioners allege that post-hearing communication between staff and the governing body resulted in new evidence being accepted into the record after the close of the hearing that was not allowed without providing an opportunity for rebuttal, in violation of ORS 197.763(4)(b).

We agree with petitioners that the memorandum contained new evidence, and that the city erred in accepting new evidence into the record after the close of the public hearing and relying on that evidence in its findings, without giving petitioners and others an opportunity to respond to that new evidence. *Ploeg v. Tillamook County*, 50 Or LUBA 608, 617 (2005). The above quoted findings make clear that, contrary to intervenor's assertion, the city in fact relied not on ODOT accident data, but rather on the city's accident data that was furnished in the memorandum. Accident data is evidence that is relevant to a determination as to whether the proposed traffic plan is "safe," and the city relied on the accident data supplied for the first time in the post-hearing memorandum in determining that the proposed traffic plan is "safe" under ADC 11.180(3). The city's decision to accept new evidence into the record, without providing an opportunity for rebuttal, and then rely on that evidence in reaching its decision that ADC 11.180(3) is satisfied prejudiced petitioners' substantial rights, and it requires remand to open the evidentiary record and allow an opportunity to respond to that new evidence. *Id*. at 618. Accordingly, we sustain the fifth subassignment of error, and a portion of the ninth assignment of error.

Generally, where LUBA sustains a procedural assignment of error that requires remand to reopen the evidentiary record, and the reopening of the record could result in the adoption of new or revised findings regarding an approval criterion, LUBA does not proceed further to address other assignments of error that challenge the existing record and findings regarding that approval criterion. The first, second, third, fourth, sixth, eighth, ninth, tenth, and twelfth subassignments of error contain challenges to the city's findings regarding ADC 11.180(3). Thus, except for our rejection of petitioners' argument that the ACP, the TSP,

and city engineering standards are directly applicable approval criteria, we do not consider those subassignments of error further.

The remaining subassignments of error challenge the decision's findings concerning other applicable provisions of the ADC, and we resolve those challenges below.

**C. Seventh Subassignment of Error**

In their seventh subassignment of error, petitioners argue that the proposed development violates ADC 12.060 and ADC 12.110. ADC 12.060 requires that streets be interconnected "to reduce travel distance, provide multiple travel routes, and promote use of alternative modes," and ADC 12.110 requires in relevant part that the location of streets must conform to an approved transportation master plan or recorded subdivision plat. The TSP calls for an east-west local street through the subdivision. Petitioners argue that the proposal violates ADC 12.060 because the single street running through the proposed subdivision, Lakeview Avenue, does not connect with Green Acres Lane, an east-west local street located to the east of the subject property. Petitioners also argue that the proposal fails to comply with ADC 12.110 because Lakeview Avenue is not an east-west local street, since it will not connect with Green Acres Lane.

The plat indicates that Lakeview Avenue is required to be constructed and extended to the subdivision's eastern boundary where Green Acres Lane now ends. However, the city required that Lakeview Avenue will be closed at that point with an emergency gate and provide access to emergency vehicles, pedestrians, and bicycles only because Green Acres Lane is not adequately improved to handle the additional traffic that the subdivision would produce. Record 24-25. Intervenor responds that the construction of Lakeview Avenue as a through street that is ready to open and connect to Green Acres Lane in the future when Green Acres Lane is improved satisfies ADC 12.060 and 12.110.

We agree with intervenor that the construction of Lakeview Avenue through to its connection with Green Acres Lane satisfies the requirements of ADC 12.060 and 12.110,

nothwithstanding that the decision prohibits general use of the connection between those two streets until adjoining streets can be improved to handle the additional traffic from the subdivision.

The seventh subassignment of error is denied.

**D. Eleventh Subassignment of Error**

In their eleventh subassignment of error, petitioners argue that the proposal violates ADC 12.160.[4] Jones Avenue is an existing east-west roadway that intersects with North Albany Road south of the proposed Lakeview Avenue/North Albany Road intersection. Jones Avenue does not extend east of North Albany Road. From its intersection with North Albany Road, Jones Avenue travels east a short distance and then travels north a short distance before again turning west. We understand petitioners to argue that because the proposed Lakeview Avenue/North Albany Road intersection is located less than 300 feet north of the existing Jones Avenue intersection it violates the last sentence of ADC 12.160.

Intervenor responds that the city correctly found that ADC 12.160 did not prevent Lakeview Avenue from being located as proposed because Jones Avenue is not a "street," but rather is a private easement. In responding to this issue, the city adopted the following findings:

> "'Jones Avenue,' as it exists today in accessing North Albany Road, is not a 'street' as defined in the Albany Development Code. The tax assessor's map in the record shows that it is an easement. It is not dedicated to the public. It is not a right-of-way. Accordingly, ADC 12.160 does not require Lakeview Avenue * * * to be 300 feet away from the easement called 'Jones Avenue.'

[4] ADC 12.160 provides as follows:

> "Street Alignment. As far as practical, streets shall be dedicated and constructed in alignment with existing streets by continuing the centerlines thereof. Arterial and collector streets shall have continuous alignments without offset or staggered intersections. In no case shall the staggering of streets be designed where jogs of less than 300 feet are created as measured from the centerline of any intersection involving an arterial or collector street."

> "The tax assessor's map also shows the existing terminus of Jones Avenue right-of-way north and west of the easement access to North Albany Road. The North Albany Local Street Plan shows that terminus extending easterly to the alignment of the intersection of the proposed subdivision's access onto North Albany Road. The location of the existing Jones easement access onto North Albany Road is not consistent with the [TSP].
>
> "The alignment of the subdivision's proposed access complies with ADC 12.160 and facilitates the city's [TSP]." Record 30.

We understand the city to have found that the prohibition in the last paragraph of ADC 12.160 does not apply to "easement" intersections with arterials and collectors, such as the Jones Avenue/North Albany Road intersection. The city found that ADC 12.160 only prohibits "street" intersections with arterials and collectors that are offset less than 300 feet. While portions of Jones Avenue south of West Thornton Lake Road apparently occupy dedicated right of way and apparently qualify as a street, the record indicates that the portion of Jones Road where it intersects with North Albany Road is an easement rather than a dedicated right of way. Record 318, Third Supplemental Record 6-7. We also understand the city to have found that the city's TSP calls for extending the northerly east-west section of Jones Avenue in the future to the east to intersect with North Albany Drive in the location of the proposed Lakeview Avenue/North Albany Road intersection rather than at the current location. Petition for Review Appendix 33-34. For those reasons, the city found that the proposal does not violate ADC 12.160. We defer to the city's interpretation and application of ADC 12.160.

The first assignment of error is sustained, in part.

**NINTH ASSIGNMENT OF ERROR**

In our discussion of the fifth subassignment of error under the first assignment of error, we concluded that the city erred in allowing new evidence regarding the city's accident data to be included in the record after the close of the public hearing, without giving petitioners an opportunity to respond. Petitioners' ninth assignment of error contains one argument that is identical to the argument that we addressed in the fifth subassignment of

error under the first assignment of error, and accordingly a portion of the ninth assignment of error is sustained.

In another portion of the ninth assignment of error, petitioners argue that the city committed a procedural error that prejudiced their substantial rights by limiting petitioner Olsen's presentation during the December 10, 2007 hearing. Record 270. According to the parties, at the November 5, 2007 hearing, petitioners' attorney, the applicant's attorney, and the city's attorney thought they had agreed on the scope of each side's presentations during the November 5, 2007 hearing, at the next hearing on December 10, 2007, and the final hearing on December 12, 2007. However, as it turns out, petitioners apparently had a different understanding about what they would be allowed to present at the December 10, 2007 hearing.

Petitioners argue that at the November 5, 2007 hearing, the city agreed to allow petitioners to present a final summary of their arguments against the application at the December 10, 2007 hearing, and that when the city council stopped petitioner Olsen from completing his presentation during the December 10, 2007 hearing, he was prejudiced by his inability to submit a final summary of all of petitioners' arguments against the applications. The only argument petitioners make to support their contention relies on a paragraph from the transcript of the December 10, 2007 hearing in which the city's attorney describes what he refers to as "classic rebuttal:"

> "* * * classic rebuttal is not new evidence. Classic rebuttal is argument to tell you what *the applicant* thinks you should make of the evidence that you have heard over the course of all of the hearings and so it is for that purpose." Record 252 (emphasis added.)

According to the transcript located at Record 250-252, the parties agreed that the applicant would present new evidence at the November 5, 2007 hearing; that the petitioners would present "responsive" testimony evidence that was limited to responding to the applicant's new evidence at the December 10, 2007 hearing, and that the applicant would

present its final non-evidentiary "rebuttal" argument under ORS 197.763(6)(e) at the final hearing on December 12, 2007.[5] The language quoted above in which the city's attorney describes his view of what "classic rebuttal" means does not assist petitioners. The city's

[5] A portion of the transcript of that hearing is found at Record 250-251:

> "[City Attorney]:
>
> "At the last hearing, technical information was offered by the opponents, which was completely appropriate. They had every right to present an additional traffic survey and other new information. But it was new information. The applicant requested and was granted the right to have time to look at that information, so they could respond thoughtfully and provide you whatever responsive information they thought was appropriate. Similarly, however, the opponents should have a right if new evidence is submitted tonight and I understand that it will be, they should have the right to consider that new evidence and have time to respond in the same manner that the applicants had time to respond. What happens is after you have rebuttal, if there's new evidence in rebuttal, then you have what's called sur-rebuttal. And then if new evidence is permitted or allowed and comes in in sur-rebuttal, you actually have what's called sur-surrebuttal. And it could go on ad nauseum. Fortunately, the attorneys representing both sides have worked together at least to help us on the procedural issues. Because one of the obstacles that we're up against as a local government is that we have 120-day time clock that's imposed by the state of Oregon. It's not something that's in Albany's ordinance, it's imposed by the state of Oregon. And if we don't make a final decision, including all local appeals, within that 120-day time clock, the burden basically shifts to the City to prove that the application is unlawful or unconstitutional. But it basically means in simple language is that if we blow 120-day time limit, the applicant generally wins. And so each time when the proceedings are going to require more time, we request an extension of that time clock from the applicant. The applicant's the only one who legally has the authority to give us that extension. And as these hearings have gone on, the applicant at each stage has granted the necessary extra time and I think I appreciate that and it gives both sides full opportunity to present what they need to. *I'm advised by the attorneys for both parties that they have agreed on a procedure which would be essentially as follows. Tonight the applicant will present their essentially rebuttal evidence and my understanding is that it's essentially going to be just that. It's going to be new evidence. The opponents have requested and opportunity through their attorney, Mr. Schultz, I understand, to have time to consider that evidence. So the schedule would be tonight, you would hear only the applicant's new evidence. The opponents would then have an opportunity to submit responsive evidence. And I emphasize that's responsive. And each time, it's kind of like when a pendulum swings, each time it's a diminishing arc. We narrow the issues. So what should happen tonight is the applicants, in rebuttal, should be talking about the new evidence that came up at the last hearing. Similarly the opponents at the next hearing should be talking only about the new information that the applicants present. So we narrow that arc of the pendulum. So on December 10th, the opponents will have an opportunity to respond. You have two Council meetings in December. December 10 and December 12. On December 12, then the applicants will prepare their rebuttal argument. That'll be the last word, and at that meeting we anticipate that the Council would debate the issue and you would decide what you want to direct staff to do with regard to this application.* If your decision is to direct that the subdivision be approved, you will direct us to prepare findings for approval to submit to you for consideration at the following meeting. If your decision is to deny, you will direct us to prepare denial findings for your next meeting." Record 250-251 (Emphasis added.).

attorney appears to have been responding to a question from some party at the hearing and to have accurately described what ORS 197.763(6)(e) allows – the *applicant* is allowed to submit final non-evidentiary legal argument.[6]

Petitioners have not demonstrated that the city committed any procedural error under ORS 197.763(6), or any other applicable provision of the ADC, in limiting petitioners' testimony at the December 10, 2007 to testimony (legal argument and evidence) that responded to the new evidence submitted by the applicant at the previous hearing. ORS 197.763(6)(e) provides the applicant with the opportunity to submit final legal argument; it does not provide any other party with that opportunity. Accordingly, this portion of the ninth assignment of error provides no basis for reversal or remand of the decision.

The ninth assignment of error is sustained, in part.

**SECOND ASSIGNMENT OF ERROR**

In their second assignment of error, petitioners argue that site plan review was required under ADC 2.630 and 12.100(4), and that the city erred in failing to apply the site plan review criteria.[7] In response to petitioners' argument below, the city adopted findings

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[6] ORS 197.763(6)(e) provides:

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

[7] ADC 2.630 provides:

> "When Site Plan Review is Required. In general, a Site Plan Review covers all proposed exterior alterations included in the development proposal, but does not cover portions of the existing development that are not being modified. An exception to this is parking areas, where any proposed change to the parking lot will result in the entire parking area being reviewed. Site Plan Review is required in all of the following instances:
>
> "(1) New development.
>
> "(2) Building expansions of 500 square feet or more, or any expansion that results in a reduction of parking spaces.
>
> "(3) Parking area expansions of 1,000 square feet or more.

that reviewed the relevant provisions of the ADC and concluded that "[s]ite plan review is not required for subdivisions."[8]

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"(4) Any development listed in Articles 3, 4, and 5 that specifically requires Site Plan Review."

ADC 12.100(4) provides:

"Access to Public Streets. With the exceptions noted in Section 1.070, the location and improvement of an access point onto a public street shall be included in the review of a development proposal. In addition, the following specific requirements shall apply to all access points, curb cuts, and driveways:

" * * * * *

"(4) The location, width, and number of accesses to a public street may be limited for developments which are subject to site plan review provisions of this Code. All development that proposes access to an arterial street is subject to site plan review procedures and the design requirements of 12.230."

[8] The city found:

"1. **Issue**: [Petitioners] * * * believe[] that Site Plan Review is required for the proposed subdivision and that the subdivision does not meet some Site Plan Review Criteria.

"* * * * *

"* * * ADC 2.600 says the purpose of Site Plan Review is:

'Purpose. Site Plan Review is intended to promote functional, safe, and attractive developments, which maximize compatibility with surrounding developments and uses and with the natural environment. Site Plan Review mitigates potential land use conflicts resulting from proposed development through specific conditions attached by the review body. Site Plan Review is not intended to evaluate the proposed use or the structural design of the proposal. Rather, the review focuses on the layout of a proposed development, including building placement, setbacks, parking areas, external storage areas, open areas, and landscaping.'

"This purpose statement says the review focuses on 'the layout of a proposed development, including building placement, setbacks, parking areas, external storage areas, open areas, and landscaping.' At the time a subdivision tentative plat is submitted for review, there are no buildings, setbacks, parking areas, external storage areas, open areas (in terms of lot coverage) or landscaping proposed.

"Site Plan Review is not required for subdivisions. Subdivisions are regulated in an entirely separate section of the ADC – Article 11. ADC 11.180 lists the review criteria for a Subdivision Tentative Plat. The review criteria do not include the Site Plan Review criteria, but do cover many of the same criteria as Site Plan Review. The overview of the Subdivision regulations in ADC 11.000 says in part '[t]his article establishes the standards and procedures for property line adjustments, partitions, subdivisions, planned developments, and condominiums.'

Intervenor responds that the city's interpretation of ADC 2.630 as not applying to subdivision applications is entitled to deference under ORS 197.829(1), and that the city's interpretation is not inconsistent with the text and context of the ADC. We agree with intervenor that the city's interpretation that site plan review is not required for a subdivision is supported by the text and context of the relevant ADC provisions.

The second assignment of error is denied.

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"ADC 11.030 specifies which other Development Code regulations apply to subdivisions:

> "'Relationship to Other Local Regulations. All proposed development governed by this article must meet the applicable on-site improvements of Article 9 (i.e., off-street parking, landscaping, buffering and screening) and the applicable environmental standards of Article 6 - Special Purpose Districts (i.e., floodplain, hillsides, wetlands, and Willamette Greenway).'

"This section does not list Article 2 or Site Plan Review as a requirement.

"City Staff indicate that only once in the last 15 years has the City used the Site Plan Review criteria as part of a subdivision review (File SD-01-02/SP-12-02), and it was done in that case only because the applicant requested it. The applicant for that subdivision asked that staff do a Site Plan Review for the subdivision in case someone reviewing the report thought the subdivision required it. Staff agreed to do the Site Plan Review, but noted that the Development Code does not require it.

"The authors of the Development Code intended that subdivisions be reviewed based on the review criteria and other requirements listed in Article 11. They did not intend to require Site Plan Review for subdivisions. This is further evidenced by the number of times site plan review and land division/tentative plat are mentioned as alternative applications—not concurrent applications. *See* e.g. ADC 12.380, 12.440, 12.500, and 12.530.

"The City has never required site plan review for a subdivision. For the reasons stated above, the Council interprets the Development Code as not requiring site plan review for subdivision applications. For that reason, the Council also interprets ADC 12.100(4) as not applying in this case. ADC 12.100(4) states '[t]he location, width, and number of accesses to a public street may be limited for developments which are subject to site plan review provisions of this Code. All development that proposes access to an arterial street is subject to site plan review procedures and the design requirements of 12.230.' The Council interprets this section as applying to developments that propose private access(es) from an arterial street. The subject development does not propose private access to North Albany Road. The subject development provides a new public right-of-way and street improvement from which private driveway accesses will be taken for the proposed residential lots. The location, width, and design of the new public street are part of the subdivision application review. The Council finds Site Plan Review therefore unnecessary and inapplicable." Record 36-38 (underlining in original, italics omitted).

**THIRD ASSIGNMENT OF ERROR**

In their third assignment of error, petitioners argue that the decision violates ADC 11.090(3), which provides in relevant part:

> "Lot and Block Arrangements. In any single-family residential land division, lots and blocks shall conform to the following standards in addition to the provisions of Article 3:
>
> " * * * * *
>
> "(3) Double frontage lots shall be avoided except where necessary to provide separation of residential developments from streets of collector and arterial street status or to overcome specific disadvantages of topography and/or orientation. * * *"

The city approved eight lots with double frontage. The city found that the property's location between a lake and wooded area on the north and a wooded area on the south made approval of the double frontage lots necessary.[9]

Petitioners argue that wooded areas are not topographical features, and that the city erred in determining that the property's location between a lake and a wooded area justified the city's approval of double frontage lots. Intervenor responds that the city was correct in determining that the double frontage lots were necessary to overcome both topographical features and orientation of the property. Intervenor points out that the property is located between a lake and two wooded areas that are identified as wildlife habitat in the ACP, and

[9]The city found:

> "ADC 11.090(3) says that double frontage lots shall be avoided 'except where necessary to overcome specific disadvantages of topography.' The * * * property is located between a lake and wooded area on the north and a railroad track and wooded area on the south. These are topographic features of the property. The applicant intends to set the lots back from the lake so that the subdivision does not encroach on the Open Space-zoned property along the lake. The applicant will provide a conservation easement along the south boundary of the subdivision to preserve an area of natural vegetation and wildlife. This restricts the width of property left for lots and streets. The Council deems it appropriate pursuant to its discretion under ADC 11.090(3) to allow double frontage lots in this situation to overcome the specific disadvantages of the topographic features of the property." Record 39.

that those features create a narrow corridor of developable property.[10] Intervenor also points out that utilizing double frontage lots allows the subdivision lots to meet lot depth standards. We agree with intervenor that the city did not err in approving eight double frontage lots under ADC 11.090(3).

The third assignment of error is denied.

**FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

In their fourth assignment of error, petitioners argue that the city erred in allowing 36 of the subdivision lots to be under the minimum lot sizes allowed in the R-6.5 and R-10 zones.[11] The city allowed those lots pursuant to ADC 3.200, which provides:

> "Lot Size Variation Within a Land Division. Up to 50% of the total number of detached single-family lots in a land division may have lot sizes up to 30 percent smaller than the standard permitted in any zone provided that the average lot size for lots in the development is at least the standard required in the zone after application of all density bonuses. No reduction in the minimum lot size is permitted for lots created for attached housing units. In such cases, the recorded plat shall indicate that the larger lots may not be further divided or deed restrictions shall be established indicating the same."

Petitioners dispute the city's interpretation of ADC 3.200, and argue that smaller lots are allowed under ADC 3.200 only in the event density bonuses are sought and awarded.

Intervenor responds that the city interpreted ADC 3.200 as allowing a reduction of lot sizes even where density bonuses are not being used, and that the city's interpretation of

[10] As noted, the lots are set back from the open-space zoned property along the lake, and intervenor is providing a conservation easement along the south boundary of the property. Record 39.

[11] A portion of the property is zoned RS-6.5 and the remaining portion is zoned RS-10. Record 38. Although the ADC does not impose a "minimum lot size" as such, the RS-6.5 zone provides for a density of 6 to 8 units per acre, and the RS-10 zone provides for a density of 3 to 4 units per acre. ADC 3.020(2)-(3). It is the approximate 6,500 and 10,000 square foot lots that are possible with those density limitations that are subject to variation under ADC 3.200, so long as those smaller lots are offset by larger lots and the overall density limit is preserved.

ADC 3.200 is consistent with the text and context of the relevant provisions of the ADC.[12] Petitioners do not explain why the city's interpretation of ADC 3.200 is inconsistent with the text and context of the ADC. We agree with intervenor that the city correctly interpreted ADC 3.200 to allow a reduction in minimum lot sizes even where density bonuses are not sought.

In their fifth assignment of error, petitioners argue that even if the city properly allowed a reduction in sizes of lots under ADC 3.200, the average lot size of the lots in the RS 6.5 zone is below the 6,500 square feet allowed by the density limit in that zone because the city's lot size calculation is wrong. Intervenor responds that this issue was not raised below, and therefore it is waived under ORS 197.763(1) and 197.835(3). Petitioners have not responded to intervenor's waiver argument. Accordingly, the issue is waived.

The fourth and fifth assignments of error are denied.

**SIXTH ASSIGNMENT OF ERROR**

In their sixth assignment of error, petitioners argue that "[t]he City approved the original noncompliant plat and not the revised (still noncompliant) plat submitted by the Applicant." Petition for Review 30. Petitioners argue that the plat attached to the city's

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[12] The city found:

> "The Council interprets ADC 3.200 as allowing up to 50 percent of the total number of lots in a land division to have lot sizes up to 30 percent smaller than the standards permitted in any zone so long as the average lot size for lots in the development is at least the standard required in the zone. Council does not require density bonuses as a prerequisite to this standard. If density bonuses have been applied, Council will require the average lot size to still be consistent with the standard in the zone. However, that does not mean that 50 percent of the lots can be 30 percent smaller only if density bonuses have been granted.
>
> "The [ADC] provisions * * * indicate that development should occur at 6 to 8 units per acre in the RS 6.5 Zoning District and 3 to 4 units per acre in the RS 10 Zoning District. * * * The proposed development is well within that density.
>
> "This subdivision has no more than 50 percent of its lots 30 percent smaller than the standard permitted in the zone, and the average lot size is still consistent with the standard in the zone. Accordingly, the council finds that the density of the proposed subdivision complies with the [ADC]." Record 38.

notice of decision, found at Record 10, that is stamped "Approved by City Council on 1/9/08," shows lots that do not comply with the city's lot depth requirements.

Intervenor responds that the council approved the tentative plat submitted on October 10, 2007, subject to conditions imposed by the city's final decision, including a requirement that the final plat show lot depth. Petitioners do not explain why the city cannot approve a tentative plat that shows lots that do not comply with the lot depth requirements, so long as that approval is conditioned on submittal of a final plat that shows lots that do comply with lot depth requirements. As such, this assignment of error does not provide a basis for reversal or remand of the decision.

The sixth assignment of error is denied.

**SEVENTH ASSIGNMENT OF ERROR**

In their seventh assignment of error, petitioners argue that the city erred in approving the proposed storm water detention system. ADC 11.180(4) requires that in order to approve a tentative subdivision plan, the city must determine that "[t]he location and design allows development to be conveniently served by various public utilities." Additionally, ADC 12.530 allows approval of the subdivision only "where adequate provisions for storm and flood water run-off have been made as determined by the City Engineer." The city found in relevant part:

> "City engineering staff reviewed the subdivision's storm drainage plan as well as the plans for the water quality treatment structure and basin. Engineering staff concluded that the proposed water quality basin will treat 90 percent of the annual storm water runoff and that the proposed storm drainage system will meet the City's standards for drainage management practices and construction. * * *
>
> "* * * * *
>
> "* * * The Council finds that the evidence demonstrates that the drainage plan, including water quality treatment facilities, is designed in a manner satisfying the City's standards. * * *"

> "Because the applicant has provided a drainage plan that treats stormwater prior to discharge into East Thornton lake, the design of the facilities incorporate Best Management Practices, and city engineering staff reviewed and approved the design of these facilities, the Council concludes that the proposed plan allowed the property to be conveniently served by stormwater public utilities." Record 32.

Petitioners argue that the city engineer's determination that the proposed storm drain system (a manhole filter and storm water basin system) that will treat 90% of the storm drainage annually does not meet the requirement of ADC 12.530 that the applicant make "adequate provision for storm and flood water runoff, because "[n]inety percent is less than the 100% required for storm drainage under ADC 12.530 and City Engineering Standards." Petition for Review 32. Petitioners also argue that the findings are inadequate because the proposed storm drainage basin plan did not account for all impervious surfaces, including driveways and rooftops.

Intervenor responds that there is no basis in the text of ADC 12.530, or any other provision cited by petitioners, for concluding that treatment of 100% of storm drainage is required. Intervenor also responds that the storm drainage plan accounts for driveways and other impervious surfaces and provides citations to the record supporting its response. Record 100, 107.

We agree with intervenor that ADC 12.530 does not say what petitioners argue it says regarding the level of storm drainage treatment. The only requirement in that section is that the storm drainage plan is "adequate." Petitioners do not explain why the city's findings quoted above, and additional findings found at Record 31 and 32, are inadequate to demonstrate compliance with ADC 12.530.

The seventh assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR**

In the eighth assignment of error, petitioners argue that the city erred in failing to provide a conservation setback to protect western pond turtles. ADC 11.180(5) allows the

city to approve the subdivision only if "[a]ny special features of the site (such as topography, floodplains, wetlands, vegetation, historic sites) have been adequately considered and utilized." Petitioners argue that the comprehensive plan identifies the property as vegetation and/or wildlife habitat, and that the city erred in disregarding substantial evidence in the record indicating that there are western pond turtles on the property. Petitioners argue that ACP Chapter 1, Goal 5, Implementation Method 2 required the city to mitigate the adverse impacts of the subdivision on western pond turtles.[13]

Intervenor responds that the city found, based on evidence from the applicant's wildlife expert and an official from the Oregon Department of Fish and Wildlife (ODFW), both of whom visited the site, that the property does not contain western pond turtle habitat or western pond turtles. The city explained that it found the applicant's evidence to be more credible than petitioners' because one of petitioners' experts did not visit the site and the other did not observe turtles or nests on the property when visiting the site. The city also concluded that even if habitat was present, the design of the subdivision would not negatively impact that habitat. Record 34-35.

We are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must

[13] ACP Chapter 1, Goal 5, Implementation Method 2 provides:

> "Recognize the importance of vegetation for sustaining wildlife habitat and, where possible, mitigate adverse impacts through design modifications. Especially consider the impacts on wildlife habitat when reviewing development in floodplains and vegetated hillside areas."

consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). We agree with intervenor that petitioners have not demonstrated that the city's reliance on the applicant's experts rather than petitioners' experts was unreasonable in light of all of the evidence in the record.

In response to petitioners' argument that ACP Chapter 1, Goal 5, Implementation Policy 2 applies directly to the application, in our resolution of the first assignment of error, we rejected petitioners' argument that the ACP goals and policies that they identified apply to the application.

The eighth assignment of error is denied.

The city's decision is remanded.