BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ERNEST J. MAZOROL III, SHELLEY L. JOHNSON,
WILLIAM PFEIFFER, DONNA PFEIFFER,
and KEN COOPER,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

RICHARD K. RATHMELL, JR.,
and ABBY C. VOLUSE,
Intervenors-Respondents.

LUBA No. 2009-038

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Ernest J. Mazorol III and Shelley L. Johnson, Bend, filed the petition for review and argued on their own behalf. Ken Cooper, William Pfeiffer and Donna Pfeiffer, Bend, represented themselves.

Gary Firestone, Assistant City Attorney, Bend, filed the response brief and argued on behalf of respondent. With him on the brief was Mary A. Winters, City Attorney.

Richard K. Rathmell Jr. and Abby C. Voluse, Bend, filed the response brief and Richard K. Rathmell Jr. argued on his own behalf. Abby C. Voluse represented herself.

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

REMANDED 07/29/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a conditional use approval of an accessory dwelling.

FACTS

Intervenors-respondents (intervenors) applied for a conditional use permit (CUP) to add an accessory dwelling unit (ADU) to an existing single family dwelling in the city's Drake Park neighborhood. The Drake Park neighborhood is listed in the federal National Register of Historic Places, but it is not identified in the city's comprehensive plan inventory of historic sites. The applications were administratively approved, and petitioners appealed the administrative approval to the planning commission. The planning commission approved the applications over petitioners' objections, and petitioners appealed to the city council. The city council declined to hear petitioners' appeal of the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is that the city council "erred by not requiring a hearing on the appeal, at least for arguments." Petition for Review 3. The Bend Development Code (BDC) provides that the city council has discretion whether to consider such appeals from the planning commission. Petitioners argue that the city violated ORS 227.180 by not providing a hearing before the city council. Petitioners also argue that the fee charged by the city council to decide whether to hear petitioners' appeal was excessive and thereby violated ORS 227.180. We address each argument in turn.

A. Whether the City Council Was Required to Provide a Hearing

The initial decision approving the applications was an administrative approval by city staff. Petitioners appealed the administrative approval to the planning commission. The planning commission held a *de novo* hearing on the applications and approved them. Petitioners then appealed to the city council. BDC 4.1.1140.B provides:

"Before the Council:

> "1. Review of land use decisions by the City Council shall be discretionary. A decision by the City Council to not grant discretionary review of the appeal shall be the final determination of the City, and the appeal of the decision shall be to the Land Use Board of Appeals as provided by law. The City Council's decision whether to grant discretionary review shall be made without testimony or argument from persons interested in the appeal, except as specifically permitted by the City Council."

There does not appear to be any dispute that the city followed BDC 4.1.1140.B and that the BDC allows for discretionary review of land use decisions. However, petitioners argue that in declining review under BDC 4.1.1140.B the city is nonetheless required, pursuant to ORS 227.180(1)(a), to provide a hearing on the appeal. ORS 227.180(1) provides in part:

> "(a) A party aggrieved by the action of a hearings officer may appeal the action to the planning commission or council of the city, or both, however the council prescribes. The appellate authority on its own motion may review the action. The procedure for such an appeal or review shall be prescribed by the council, but shall:
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> > "(A) Not require that the appeal be filed within less than seven days after the date the governing body mails or delivers the decision of the hearings officer to the parties;
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> > "(B) *Require a hearing at least for argument*; and
> >
> > "(C) Require that upon appeal or review the appellate authority consider the record of the hearings officer's action. That record need not set forth evidence verbatim.
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> "(b) Notwithstanding paragraph (a) of this subsection, *the council may provide that the decision of a hearings officer or other decision-making authority in a proceeding for a discretionary permit or zone change is the final determination of the city*." (Emphases added.)

Apparently, the city's practice is for city staff to prepare a summary of the issues raised by the appellants and recommend whether the city council should hear the appeal. In this case, staff recommended against hearing the appeal at a city council meeting, and the city council agreed. According to petitioners, because the city council declined to hear their

appeal without conducting a hearing to allow petitioners an opportunity to argue about the issues petitioners sought to raise on appeal, the city violated ORS 227.180(1)(a)(B) which "[r]equire[s] a hearing at least for argument[.]"

The problem with petitioners' argument is that ORS 227.180(1)(b) provides that the decision of a "hearings officer or other decision-making authority" such as a planning commission may be the "final determination of the city." ORS 227.180(1)(b) does not specify or limit the manner in which the city council must go about making those decisions the city's "final determination." We do not believe it is inconsistent with the statute for the city to adopt procedures under which the city council may decline review and thereby make the planning commission's decision the city's final determination, without conducting the hearing required by ORS 227.180(1)(a)(B). In other words, the obligation to conduct a "hearing at least for argument" applies in circumstances where the city council conducts a review of the appealed decision. That obligation does not apply where the city council simply chooses to make the underlying decision the city's final determination. BDC 4.1.1140.B is therefore consistent with ORS 227.180(1)(a), and the city council did not violate the statute by failing to provide petitioners a "hearing at least for argument."

This subassignment of error is denied.

B. Whether the City's Appeal Fee Was Excessive

The city charged petitioners a fee of $1,620.32 to appeal the planning commission decision to the city council. Petitioners question whether that appeal fee is consistent with ORS 227.180(1)(c), which requires that appeal fees to the governing body be "reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal[.]"[1]

[1] ORS 227.180(1)(c) provides:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other

The city responds that the fee schedule was adopted in a prior resolution and that the proper time for challenging that fee schedule was when it was initially adopted. According to the city, any challenge to the fee schedule is an impermissible collateral attack on the resolution that adopted the fee schedule. Although none of the parties cite any cases regarding the appeal fee issue, the city's argument is consistent with prior LUBA decisions where we held that any challenge to a fee schedule must be a challenge to the decision adopting the fee schedule rather than the subsequent application of the appeal fee. *See Maxwell v. Lane County*, 39 Or LUBA 556, 574, *rev'd and rem'd on other grounds* 178 Or App 210, 35 P3d 1128 (2001) (so stating); *Cummings v. Tillamook County*, 30 Or LUBA 17, 25 (1995) (same).

In *Young v. Crook County*, 56 Or LUBA 704, *aff'd* 224 Or App 1, 197 P3d 48 (2008), however, we questioned the holdings of *Cummings* and *Maxwell*:

> "To the extent *Cummings* and *Maxwell* categorically reject the possibility of advancing an as-applied challenge under ORS 215.422(1)(c) to the local appeal fee imposed in a particular case, we question whether those cases were correctly decided. Neither *Cummings* nor *Maxwell* cites any authority for that conclusion. No authority that we are aware of renders quasi-judicial land use decisions immune from review under applicable statutes simply because those decisions apply local regulations or standards that were adopted in an earlier, unappealed decision. While local land use decisions rendered pursuant to acknowledged comprehensive plans and regulations are not reviewable for compliance with statewide planning goals and rules, that principle does not apply to arguments that land use decisions applying acknowledged regulations may be inconsistent with applicable state statutes. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992)." 56 Or LUBA at 716.[2]

> designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to $500. In lieu of a transcript prepared by the governing body and the fee therefore, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded."

[2] ORS 215.422(1)(c) is the county equivalent of ORS 227.180(1)(c) which applies to cities.

In *Young*, we did not ultimately reach the question of whether as-applied challenges to appeal fee schedules were permissible, because we held that even if such challenges were permissible, the petitioner had not established that the appeal fee was unreasonable or more than the average or actual cost of such appeals. *Id*. at 717. In the present appeal, we must reach that question. We believe our holdings in *Cummings* and *Maxwell* were incorrect for the reasons expressed in *Young* and quoted earlier. Furthermore, while the Court of Appeals' decision in *Young* did not specifically address whether as-applied challenges were permissible, the Court affirmed our resolution of how such as-applied challenges should be made and agreed that the petitioner had not met his burden to raise such a challenge. 224 Or App at 7-8. Presumably, if the Court believed as-applied challenges were categorically precluded it would not have considered the petitioner's arguments regarding our resolution of his as-applied challenge. Therefore, we now overrule those portions of our decisions in *Cummings* and *Maxwell* that hold that as-applied challenges to previously adopted appeal fee schedules are barred.

We explained in *Young* what a petitioner must do in an as-applied challenge to an appeal fee schedule:

> "[W]e believe that in the context of an as-applied challenge the initial burden rests on the local appellant to produce a *prima facie* case that the appeal fee that is charged pursuant to a previously adopted fee schedule is 'more than the average cost of such appeals or the actual cost of the appeal,' depending on which approach the county's fee schedule has taken. We do not believe that the county has that initial burden in an as-applied challenge, merely because the local appellant asserts below that the appeal fee charged the appellant is inconsistent with ORS 215.422(1)(c)." 56 Or LUBA at 717-18.

In *Young*, the petitioner merely alleged that the appeal fee was unreasonable and exceeded the average cost of such appeals or the actual cost of the appeal but did not produce any evidence in support of his allegation. *Id*. at 718. In the present appeal, we understand petitioners to question whether the fee of $1,620.23 is reasonable or represents the average cost of such appeals, but petitioners cite to no evidence on that point. Petitioners have

therefore not met their *prima facie* burden of demonstrating, in an as-applied challenge, that the appeals fee of $1,620.23 is itself unreasonable or not representative of the average cost of such appeals.

Petitioners' argument does not end there, however. Petitioners dispute that it costs "an average of $1,620.23 to summarily gavel up and down during a Bend City Council hearing." Petition for Review 5. Petitioners then point out that under BDC 4.1.1115(C) the city refunds 75 percent of the appeal fee if the city council declines to review the appeal, as long as the appellant does not file an appeal of the city's final decision to LUBA.[3] Petitioners argue that BDC 4.1.1115(C) is inconsistent with ORS 227.180(1)(c) in part because it "establish[es] financial disincentives to seek further review [by] LUBA." *Id.*

Although petitioners' arguments on this point are not well-developed, we understand petitioners to argue that the provision for refunding 75 percent of the appeal fee when the city council does not hear the appeal presumably reflects the lower cost to the city when the city council declines review of a planning commission decision, and thereby avoids the costs that would be incurred if an appeal hearing were scheduled and a city council decision on merits had to be prepared. If so, we understand petitioners to argue that retaining the entire appeal fee simply because petitioners appeal the city council's decision to LUBA after the city's appeal is complete constitutes an unreasonable fee that exceeds the actual or average cost of petitioners' local appeal, in violation of ORS 227.180(1)(c). In other words, petitioners argue that any costs the city incurs as a result of petitioner's LUBA appeal are incurred after the local appeal is complete and therefore cannot be part of the actual or average cost of the local appeal.

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[3] BDC 4.1.1115(C) provides:

> "If the City Council is the Hearings Body and the council declines review, 75% of the appeal fee will be refunded when City Council does not hear the appeal and when the appellant does not appeal the issue to the Land Use Board of Appeals."

The city has established what is essentially a two-tiered review system, which provides either (1) a summary decision not to review the appealed decision and to make the planning commission decision the city's final determination, or (2) a review with a hearing and a final city council decision on the merits of the appeal. Given the refund structure of BDC 4.1.1115(C), it *appears* that the city charges an upfront fee that presumably reflects the actual or average cost of a full city council hearing and review. If the city council declines review, however, the city refunds 75 percent of the fee. Arguably, that refund is intended to reflect the actual or average costs of an abbreviated procedure in which the city decides not to allow review of the planning commission's decision, which is presumably much less expensive than allowing review and conducting a public hearing. Because respondents do not contend otherwise, we will presume that to be the case for purposes of our analysis.

Such a two-tier appeal and fee structure is not necessarily inconsistent with ORS 227.180(1)(c). The difficulty, as petitioners point out, is that BDC 4.1.1115(C) goes on to provide that the city will retain 100 percent of the full upfront appeal fee even when the city council declines review, if the appellant appeals the city's decision to LUBA. We cannot see how an appeal of the underlying decision to LUBA has any bearing on the average or actual cost to the city of providing a local appeal.[4] ORS 227.180(1)(c) limits the maximum appeal fees the city may charge for a local appeal to the reasonable, actual or average cost of processing appeals to the city council.

Under these circumstances, we believe that petitioners have established a *prima facie* case that charging them the full appeal fee of $1,620.23 under BDC 4.1.1115(C) for the summary review provided, simply because he appealed the city's decision to LUBA, *may* constitute a violation of ORS 227.180(1)(c). Although we did not reach this point in *Young*

[4] If the intent of BDC 4.1.1115(C) is to recoup city costs for defending a LUBA appeal in addition to the costs of the local appeal, then that would likely constitute a violation of ORS 227.180(1)(c), which permits the city to recover only the reasonable or average costs of the local appeal, not the appeal to LUBA.

because the petitioner did not establish a *prima facie* case, we believe that once a *prima facie* case has been made, the burden shifts to the city to demonstrate that the appeal fee schedule complies with the statute.

The city council's decision does not include any findings on this point.[5] The city's response brief also provides no basis for us to conclude that the appeal fee charged petitioners is consistent with the statute. Accordingly, remand is necessary for the city to consider that question in the first instance.

On remand, the city must explain the reason for refunding 75 percent of the appeal fee when the city council declines review, and whether, as we assumed above, that refund is intended to reflect the lower actual or average cost where the city council declines review, as compared to cases where the city council allows review and conducts a hearing. That assumption of a two-tier cost approach may be incorrect, of course, but on the current record we have no basis to assume otherwise. However, if petitioners are correct that the 75 percent refund when the city declines review reflects its lower actual or average costs, as compared to cases where the city council accepts review and conducts a public hearing, then the city would likely violate the statute by declining review but charging petitioners the fee that reflects the higher average cost in cases where the city council accepts review, based on considerations that have nothing to do with the actual or average costs of providing a local appeal.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

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[5] It is possible that, notwithstanding opportunity to do so during the proceedings below, petitioner did not challenge imposition of the appeal fee or otherwise raise the issue below. The city, however, has not asserted waiver under ORS 197.763(1) or 197.835(3), and we do not consider that question.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the notice for the planning commission hearing was improper. First, petitioners argue that the notice was not sent to all property owners within 100 feet of the subject property as required by ORS 197.763(2)(a)(A). Secondly, petitioners argue that the notice did not list all of the applicable approval criteria. In particular, petitioners argue that the notice does not mention that the subject property is located within a historic district.

Even if petitioners are correct that the notice was not sent to all property owners within 100 feet of the subject property, that procedural error would not provide a basis for reversal or remand unless the error prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B).[6] Petitioners may not raise alleged prejudice to other people's substantial rights as a basis for reversal or remand. *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002); *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000). There is no dispute that petitioners received notice and appeared at the planning commission hearing and were able to present their case. As to the alleged failure to list the applicable criteria, petitioners make no attempt to explain how that alleged error prejudiced their substantial rights. Petitioners do not identify any city land use regulations that apply to the CUP/ADU application by virtue of the subject property's location within a federal historic district, which were not listed in the notice. In any case, the usual consequence for the procedural error of failing to list applicable criteria in the notice is that petitioners may assign error based on issues that were not raised below.[7] Petitioners' arguments do not provide a basis for reversal or remand.

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[6] ORS 197.835(9)(a) provides that LUBA shall reverse or remand a land use decision if the Board finds that the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

[7] ORS 197.835(4) provides:

"A petitioner may raise new issues to the board if:

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the planning commission "lacked jurisdiction to decide this matter." Petition for Review 7. According to petitioners, the Deschutes County Historical Landmarks Commission (HLC) should have made the decision regarding the CUP and ADU applications. Petitioners do not dispute that the planning commission generally has jurisdiction over CUP and ADU applications. However, petitioners argue that because the subject property is in a historic district that the HLC divests the planning commission of jurisdiction.

The city and intervenor explain that intervenor filed an application with the HLC seeking its approval under the city's historic preservation ordinance, the HLC reviewed and approved the appearance and design of the proposed accessory dwelling under the historic resource preservation ordinance, and that decision was not appealed. Intervenors then submitted the CUP and ADU applications to the city planning department for the city's land use approval, under the city's land use regulations. Respondents argue, and we agree, that that separate permitting process is consistent with the city's code and petitioners have not demonstrated that anything in the city's code vests jurisdiction over the CUP and ADU applications with the HLC.

The HLC's jurisdiction is established in Bend Code Chapter 10-17, Section 10.103:

> "(1) This ordinance [preservation of historic resources] shall be administered by the [HLC].

> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or
>
> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

> " * * * * *
>
> "(4) The [HLC] *shall serve as a land use decision making body on applications required by this ordinance* and as an advisory body to the City Council on city policy, ordinances, decisions, and on city projects that could affect the historic resources and their settings that are protected by this code." (Emphasis added.)

As the emphasized languages illustrates, the HLC has jurisdiction over applications required by the city's historic resources preservation ordinance. Nothing cited to us in that ordinance or elsewhere suggests that the HLC exercises jurisdiction over CUPs and ADUs that are subject to city land use regulations that are not part of the historic resources preservation ordinance.

Petitioners next argue that the city violated state law that requires the city "to establish a consolidated procedure for all permits or zone changes, which has never been implemented." Petition for Review 10. Although petitioners do not cite the state law to which they refer, presumably they mean ORS 227.175(2), which provides:

> "The governing body of the city shall establish a consolidated procedure by which *an applicant may apply at one time for all permits or zone changes needed for a development project.* The consolidated procedure shall be subject to the time limitations set out in ORS 227.178. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations." (Emphasis added.)

However, while ORS 227.175(2) requires the city to have a consolidated permit procedure available, it does not require applicants to use that procedure or prohibit applicants from submitting separate permit applications. There is no statutory requirement that an applicant must "apply at one time for all permits or zone changes needed for a development project" even though ORS 227.175(2) requires that the city make that option available.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that "[p]roper procedure was not followed throughout the evidentiary hearing process and as a result, [petitioners'] rights were substantially prejudiced." Petition for Review 11. Petitioners then provide seven pages of generalized complaints about the procedure that the city followed. As noted, ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" Although petitioners never explain which of their substantial rights were prejudiced, presumably they mean the right to an adequate opportunity to prepare and submit their case and a full and fair hearing. *See Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) (explaining what "substantial rights" are).

Petitioners' most focused argument is that the city prejudiced their substantial rights by reversing the burden of proof and requiring petitioners to demonstrate that the applications should be denied. According to petitioners, the planning commission improperly labeled petitioners the "proponents" and required them to proceed first when the proper procedure would have been to require the applicants to proceed first as proponents of the CUP and ADU applications.

Apparently, the planning commission was initially confused regarding which party spoke first under the city's procedures, and at the first hearing required petitioners to present their arguments before intervenors. However, the planning commission soon realized the potential error and allowed all parties several additional opportunities to submit and rebut evidence. More importantly, the planning commission clearly understood that the applicant retained the ultimate burden of demonstrating that the application complies with the approval criteria, as shown in its final decision. Petitioners do not cite to anything in the planning commission findings suggesting that the planning commission reversed the burden of proof or misunderstood which party had the burden of proof. As far as petitioners have

established, any procedural errors that may have occurred regarding order of presentation were remedied and there was no prejudice to petitioners' substantial rights.

Petitioners' remaining allegations are merely complaints about the city's procedure without any explanation of what substantial rights were affected or how such rights were prejudiced. We agree with the city that the remaining allegations do not demonstrate any procedural error, let alone prejudice to petitioners' substantial rights. For instance, petitioners complain that the staff report contains a recommendation for approval and provides draft findings. Petitioners, however, do not explain why that is error or how any alleged error affects their substantial rights. Petitioners also complain that the planning commission did not respond to or consider their public records request. Again, petitioners do not explain why that was a procedural error or how it prejudiced their substantial rights. Finally, petitioners complain that the staff person who worked on the applications and recommended approval at the administrative level was the same staff person who participated in the appeal to the planning commission. Once again, petitioners do not explain why that is a procedural error or how it prejudiced their substantial rights.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth assignment of error is difficult to follow. The assignment of error is that the city's "decision to approve the applications is not supported by substantial evidence in the whole record." Petition for Review 18. However, petitioners generally fail to identify the approval criteria at issue, identify the findings addressing those approval criteria, or explain why those findings are not supported by substantial evidence.[8]

The only specific approval criterion petitioners cite is BDC 4.4.400(A)(2), which is one of the approval criteria for CUPs:

[8] As a review body, 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).

> "Any negative impacts of the proposed use on adjacent properties and on the public can be mitigated through application of other Code standards, or other reasonable conditions of approval that include but are not limited to those listed in Section 4.4.400(C) below[.]"

The findings of the administrative approval decision, which are incorporated by the planning commission's decision, address BDC 4.4.400(C)(2). The decision states that the only four negative impacts identified by opponents are: (1) construction noise; (2) alley congestion; (3) solar access; and (4) undesirable tenants. Record 325. Petitioners do not acknowledge these or any other findings in challenging the city's decision. In fact, in their assignment of error, petitioners do not identify or discuss any specific negative impacts at all. Petitioners' primary objections appear to be that there are no existing ADUs in the vicinity of the subject property and that allowing an ADU in the neighborhood will, in some unspecified manner, conflict with the historic neighborhood. The administrative decision findings state:

> "Comments received in opposition to the proposed ADU suggest that the property is zoned 'single family' and further suggest that ADUs would be more correctly placed on other 'multi-family' zones. Rather than being site specific, the comments received indicate general opposition to allowing ADUs within the RS Zone (as prescribed in the [BDC]); the comments suggest that a zone change should apply. While Staff has considered the comments received, the current review can only apply the existing [BDC] to the application. Staff finds that the subject property is not zoned 'single-family' but rather Residential Urban Standard Density (RS). Within the RS zone, there are uses that are permitted outright and there are uses that can be permitted with Conditional Use Permit review. As detailed throughout this review, the ADU is conditionally permitted in the RS zone and the proposal can comply with the applicable development standards." Record 325-26 (footnote omitted).

Petitioners do not challenge those findings, do not allege any negative impacts that have not been mitigated, and do not explain how the city's decision is not supported by substantial evidence. Petitioners complain that there are five nearby homes that are on the city's inventory of historic resources, but petitioners make no attempt to explain how that circumstance is relevant to any approval criterion, or how it has any bearing on whether the city's decision is supported by substantial evidence. Petitioners also complain about the state

of the city's historic resources inventory. Again, however, petitioners make no attempt to explain how any problems with the city's inventory have any bearing on the challenged decision in general, let alone whether there is substantial evidence to support the city's finding that BDC 4.4.400(C)(2) is satisfied.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The challenged decision by the planning commission adopts the findings of the staff administrative approval. Petitioners argue that the planning commission erred by not addressing material issues raised at the evidentiary hearing and in adopting the staff decision. Petitioners list four "material issues" that they believe were not addressed. Petitioners, however, make no attempt to explain how those issues relate to any applicable city approval criteria.[9] The incorporated decision appears to address all of the applicable approval criteria, and the issues petitioners raise do not appear to have any bearing on those criteria. Absent some explanation from petitioners as to how the city's findings are inadequate regarding specific approval criteria, we cannot say that the findings are inadequate.

The sixth assignment of error is denied.

The city decision is remanded.

[9] Petitioners raise the following issues: (1) impact on all adjacent properties in the historic district; (2) compliance with state and federal laws regarding historic districts; (3) the applicant's assertion that ADUs are a common use in the area; and (4) whether ADUs are a conflicting use in the Drake Park neighborhood.