

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVEN BUEL-McINTIRE
5 and CRYSTAL BUEL-McINTIRE,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF YACHATS,
11 *Respondent.*

12 LUBA No. 2011-012

13
14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Yachats.

19
20 Steven Buel-McIntire and Crystal Buel-McIntire, Eugene, filed the petition for
21 review. Steven Buel-McIntire argued on his own behalf.

22
23 Ross M. Williamson, Eugene, filed the response brief and argued on behalf of
24 respondent. With him on the brief was Local Government Law Group P.C.

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

28
29 REMANDED

07/01/2011

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

NATURE OF THE DECISION

Petitioners appeal a city council decision denying petitioners’ application for a conditional use permit to site a recreational vehicle (RV) for temporary living purposes on a lot in a residential zone.

MOTION TO TAKE EVIDENCE; MOTION TO STRIKE

The city moves to strike Appendix B to the petition for review, an affidavit of lead petitioner Steven Buel-McIntire, as a document not in the record. The affidavit supports petitioners’ arguments under the fifth assignment of error, alleging that the planning commission committed procedural error prejudicial to petitioners in erroneously informing lead petitioner that he had only three minutes to present oral testimony. The affidavit describes how petitioner’s testimony would have been different had the planning commission correctly informed petitioner that the three-minute limit did not apply to the applicant.

In response to the motion to strike, petitioners move to consider the affidavit under OAR 661-010-0045, arguing that the affidavit concerns “procedural irregularities” not shown in the record that, if proved, would result in reversal or remand of the challenged decision. OAR 661-010-0045(1).¹

The city responds that the challenged decision is not the planning commission decision, and petitioners do not explain why any procedural error committed by the planning commission was not cured by the public hearing before the city council, at which petitioners testified. We agree with the city that petitioners have not demonstrated that the alleged

¹ OAR 661-010-0045(1) provides, in relevant part:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *”

1 procedural error committed by the planning commission, if proved, would result in reversal
2 or remand of the challenged city council decision. The motion to take evidence under OAR
3 661-010-0045 is denied. Petitioners have offered no other basis in our rules or elsewhere for
4 LUBA to consider Affidavit B, and therefore the city’s motion to strike Affidavit B is
5 granted.

6 **FACTS**

7 The subject property is a vacant lot owned by petitioners and zoned R-2. The R-2
8 zone is intended to provide for medium density residential uses “and other compatible land
9 uses determined to be desirable and/or necessary.” Yachats Municipal Code (YMC)
10 9.16.010 (purpose statement for R-2 zone). The R-2 zone generally allows only residential
11 uses as permitted uses, including temporary occupation of an RV while constructing a single-
12 family dwelling. Among the conditional uses allowed in the R-2 zone is “Recreational
13 vehicle. See Chapter 9.68.” YMC 9.16.030(E). YMC 9.68.060 governs recreational
14 vehicles and provides in relevant part that a recreational vehicle may be “parked by an owner
15 on his or her own land for temporary living purposes” for up to 120 days per calendar year,
16 with no more than 90 consecutive days for any one stay.²

² YMC 9.68.060 provides in full:

“Recreational vehicles may be parked by an owner on his or her own land for temporary living purposes as follows:

- “A. The vehicle and the use on the owner’s lot must be approved as conditional use by the planning commission.
- “B. A renewable yearly parking permit is obtained from the city recorder. Fees are set by the city council.
- “C. The permit is effective for parking one hundred twenty (120) days per calendar year with no more than ninety (90) consecutive days for any one stay.
- “D. The vehicle must be hooked up to city sewer and water.
- “E. A lot owner may permit a visitor to park his or her recreational vehicle on the owner’s lot for dwelling purposes provided:

1 Petitioners applied for a conditional use permit to park an RV on their lot under YMC
2 9.68.060(A)-(D), up to 90 days per calendar year. The proposed RV would be hooked up to
3 city sewer and water, and used for petitioners to vacation on the property.

4 The planning commission held a hearing on the conditional use application and voted
5 to deny it as being inconsistent with the purpose of the R-2 zone. Petitioners appealed the
6 planning commission to the city council, which held a public hearing at which petitioners
7 testified. On January 18, 2011, the city council issued its written decision affirming the
8 planning commission's denial, based in part on the city council's interpretation of YMC
9 9.68.060(A)-(D), to the effect that it allowed a lot owner to occupy an RV on the lot for
10 temporary living purposes only if there is also a permanent dwelling on the lot. This appeal
11 followed.

12 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

13 Under the fourth assignment of error, and a portion of the fifth assignment of error,
14 petitioners argue that the city council's interpretation of YMC 9.68.060(A)-(D), if upheld,
15 amounts to a textual amendment to the city code, which can be accomplished only by means
16 of a legislative amendment process, not a quasi-judicial proceeding on a conditional use
17 application. Petitioners contend, therefore, that the city committed procedural error in failing
18 to follow the notice and procedures required of a legislative proceeding.

19 The city responds, and we agree, that the city's interpretation of its code does not
20 convert a quasi-judicial permit proceeding into a legislative proceeding subject to different
21 notice and procedural requirements. Petitioners' arguments under the fourth assignment of
22 error do not provide a basis for reversal or remand.

-
- “1. The duration of stay for parking and dwelling in the recreational vehicle does not exceed two weeks;
 - “2. Users of the recreational vehicle must use sanitation facilities within the lot owner's home.”

1 Under the fifth assignment of error, petitioners allege that the planning commission
2 committed several procedural errors. The city responds, and we agree, that petitioners have
3 not demonstrated that any alleged procedural errors committed by the planning commission
4 provide a basis for reversal or remand. The decision before us is the city council's decision.
5 The city council conducted a public hearing on petitioners' appeal of the planning
6 commission decision that appears to have cured any prejudice to petitioners' substantial
7 rights that might have occurred during the planning commission proceedings. For example,
8 petitioners argue that on October 19, 2010, the date of the hearing before the planning
9 commission, the planning commission closed the record, deliberated and voted to deny the
10 application, without giving petitioners the opportunity to submit final written argument
11 within seven days of the date the record closes, as required under ORS 197.763(6)(e).
12 Petitioners submitted final written argument within seven days of October 19, 2010, but
13 contend that the planning commission did not consider that final written argument before
14 issuing its written decision to deny the application. However, petitioners do not dispute that
15 their final written argument was included in the record to the city council, and that the city
16 council considered the arguments included therein in making the decision before us. The
17 city council conducted a *de novo* review of the application, as far as we can tell, and adopted
18 its own written findings supporting its decision. In these circumstances, it appears that any
19 alleged procedural error committed by the planning commission was cured by the
20 proceedings before the city council, and petitioners do not argue otherwise.

21 The only allegation of procedural error arguably directed at the city council
22 proceedings is an argument that the city failed to make a statement at the beginning of the
23 city council hearing that testimony, arguments and evidence must be directed toward the
24 listed criteria or criteria that the testifying party believes to apply to the decision, as required

1 by ORS 197.763(5)(b).³ However, as far as we can tell, the city council proceedings
2 included, in substance, the announcement required by ORS 197.763(5)(b). *See* Record 12
3 (minutes of the city council hearing reflecting the mayor’s request that participants relate
4 their “testimony to the criteria set forth in the Notice of Appeal and listed at the beginning of
5 this hearing”). Petitioners’ arguments under the fifth assignment of error do not provide a
6 basis for reversal or remand.

7 The fourth and fifth assignments of error are denied.

8 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

9 As noted, YMC 9.16.030(E) allows a “recreational vehicle” as a conditional use in
10 the R-2 zone, if it complies with YMC 9.68.⁴ In turn, YMC 9.68.060, entitled “recreational
11 vehicles, provides that “[r]ecreational vehicles may be parked by an owner on his or her own
12 land for temporary living purposes as follows[.]” *See* n 2. YMC 9.68.060(A) to (D) set out
13 four standards governing approval for a lot owner to park an RV on his or her land for
14 temporary living purposes, including a requirement that the “vehicle must be hooked up to
15 city sewer and water.” YMC 9.68.060(E) provides that “[a] lot owner may permit a visitor to
16 park his or her recreational vehicle on the owner’s lot for dwelling purposes[,] provided that
17 (1) the stay does not exceed two weeks and (2) the visitor uses the “sanitation facilities
18 within the lot owner’s home.”

³ ORS 197.763(5) provides, in relevant part:

“At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

“(a) Lists the applicable substantive criteria;

“(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision[.]”

⁴ As a conditional use, the application for an owner to park a recreational vehicle for temporary living purposes under YMC 9.16.030(E) is also subject to the conditional use standards at YMC 9.72. However, as discussed further below, YMC 9.72 appears to include no standards at all that govern such an application.

1 Petitioners argued to the city that their application to park an RV on their vacant lot
2 satisfied the applicable criteria at YMC 9.68.060(A) to (D). The planning commission did
3 not address the standards at YMC 9.68.060(A) to (D), but instead denied the application on
4 the grounds that the proposed use is not compatible with the surrounding single-family
5 neighborhood and would be detrimental to the community’s “visual character.” Record 72.
6 The apparent source of the “visual character” language is a comprehensive plan policy that
7 the city council later found to be inapplicable. Record 7. On appeal, the city council denied
8 the application on what appear to be three separate grounds. Petitioners challenge each of
9 those grounds, and we address them in turn.

10 **A. Inconsistency with the R-2 zone purpose statement at YMC 9.16.010**

11 The city council first found that the proposed use is inconsistent with the purpose
12 statement for the R-2 zone, at YMC 9.16.010, which states:

13 “This residential zone is intended to provide a quality environment for
14 medium density, urban, single-family residential uses and other compatible
15 land uses determined to be desirable and/or necessary. In an R-2 zone, the
16 following regulations shall apply.”

17 The city council concluded that the proposal to park a recreational vehicle on the subject lot
18 “does not adhere to the stated purpose of the R-2 zone.”⁵ Record 6. The city council found

⁵ The city council decision states, in relevant part:

“The City Council finds that the request (to park a recreational vehicle on their property for temporary living purposes) does not meet all applicable criteria cited in [YMC] Chapter 9.16 R-2 Residential Zone. A recreational vehicle is identified as a conditional use in the R-2 zone (YMC 9.16.030.E) in accordance with YMC Chapter 9.68 Recreational Vehicles. However, the City Council finds that the requested use does not adhere to the stated purpose of the R-2 zone (YMC 9.16.010), *i.e.*, ‘This residential zone is intended to provide a quality environment for medium density, urban single-family residential uses and other compatible land uses determined to be desirable and/or necessary.’ The temporary use of a recreational vehicle is not considered a single-family residential use and therefore does not provide a quality environment for medium density, urban single family residential use, nor is it a compatible land use that is desirable or necessary.

“The subject area is an established neighborhood consisting of single family dwellings. The temporary parking of a recreational vehicle on a vacant lot for temporary living purposes is not compatible with the established single-family residential neighborhood. The requested

1 that the temporary use of a recreational vehicle is not a single-family residential use, nor a
2 compatible use that is “desirable or necessary,” and therefore the proposed use is inconsistent
3 with the purpose of the R-2 zone.

4 Petitioners argue, and we agree, that the city council erred to the extent it concluded
5 that the parking of a recreational vehicle for temporary living purposes as conditionally
6 allowed in the R-2 zone under YMC 9.16.030(E) and YMC 9.68.060 is inherently
7 inconsistent with the purpose of the R-2 zone. Such a broad interpretation would read YMC
8 9.16.030(E) out of existence.

9 That problem aside, the city council does not explain in its findings why it believes
10 the R-2 purpose statement can be applied directly as an approval criterion for a conditionally
11 permitted use listed in the R-2 zone. Whether a zoning district purpose statement functions
12 as an approval criterion for individual permit requirements depends on the wording of the
13 specific provisions and their context. *Tylka v. Clackamas County*, 22 Or LUBA 166, 173
14 (1991). Absent some language to the contrary, a zoning district purpose statement that is a
15 general expression of the goals and objectives of the local government in adopting a land use
16 regulation does not play a role in reviewing permit applications. *Bridge Street Partners v.*
17 *City of Lafayette*, 56 Or LUBA 387, 392 (2008); *Renaissance Development v. City of Lake*
18 *Oswego*, 45 Or LUBA 312, 322-23 (2003). Nothing cited to us in the findings or the city’s
19 response brief identifies any language in YMC 9.16.010 or elsewhere that can be read to
20 render the R-2 purpose statement a mandatory approval criterion for permit applications. On
21 the contrary, YMC 9.16.010 itself states that “[i]n an R-2 zone, the following regulations
22 shall apply,” suggesting that the regulations that follow are the approval criteria for permitted
23 and conditionally permitted uses listed in the R-2 zone.

use would disrupt the character of the neighborhood, *i.e.*, the requested use would be the only lot in the neighborhood that is not used as a single family residential dwelling.” Record 6.

1 In its response brief, the city does not argue that YMC 9.16.010 is an approval
2 criterion or an independent basis to deny the proposed use, but instead argues that the
3 purpose statement at YMC 9.16.010 is “context” that the city council properly considered in
4 interpreting the ambiguous provisions of YMC 9.68.060. We address that interpretation
5 below. For present purposes, we agree with the city that the purpose statement at YMC
6 9.16.010 is context that can be considered in resolving any textual ambiguities in YMC
7 chapter 9.16 and, more remotely, YMC 9.68.060. However, to the extent the above-quoted
8 finding purports to constitute an independent basis to deny the proposed use under YMC
9 9.68.060, we agree with petitioners that the city has not established that the purpose
10 statement at YMC 9.16.010 is properly applied directly as a mandatory approval criterion.

11 **B. YMC 9.68.060**

12 The city’s primary basis for denying the conditional use application is its
13 interpretation that YMC 9.68.060 allows a lot owner to use his or her RV for temporary
14 living purposes only in conjunction with a permanent residential dwelling.⁶ The requirement
15 that a permanent dwelling exist on the owner’s lot is not explicitly stated in YMC 9.68.060,
16 but the city council found that it is an implied requirement, as evidenced by YMC
17 9.68.060(E)(2), which permits a lot owner to allow a visitor to park his or her RV on the

⁶ The city council found on this point:

“The City Council finds the intent of [YMC] 9.68.060 is to allow the use of recreational vehicles for temporary living purposes in conjunction with a permanent residential dwelling. Although not explicitly stated, provisions of YMC 9.68.060 imply that a permanent residential dwelling is necessary to satisfy all standards required in YMC 9.68.060. This is particularly evident in standard E.2 which states ‘A lot owner may permit a visitor to park his or her recreational vehicle on the owner’s lot for dwelling purposes provided: Users of the recreational vehicle must use sanitation facilities within the lot owner’s home.’ This clearly indicates that a home is needed to adhere to this standard. The applicant contended that this standard only applies to visitor, not the owner. However, there is no logic in allowing one person (the owner) to not use sanitation facilities within a home, and require another person (a visitor) to use sanitation facilities within a home.

“The City Council finds that a permanent home on the subject property is necessary to satisfy all provisions of YMC 9.68.060. The requested use cannot adhere to all provisions of YMC 0.68.060 because the subject property does not have a permanent home.” Record 6.

1 owner's lot only if the users of the RV use the "sanitation facilities within the lot owner's
2 home."

3 We repeat the relevant provisions of YMC 9.68.060:

4 "Recreational vehicles may be parked by an owner on his or her own land for
5 temporary living purposes as follows:

6 "A. The vehicle and the use on the owner's lot must be approved as
7 conditional use by the planning commission.

8 "B. A renewable yearly parking permit is obtained from the city recorder.
9 Fees are set by the city council.

10 "C. The permit is effective for parking one hundred twenty (120) days per
11 calendar year with no more than ninety (90) consecutive days for any
12 one stay.

13 "D. The vehicle must be hooked up to city sewer and water.

14 "E. A lot owner may permit a visitor to park his or her recreational vehicle
15 on the owner's lot for dwelling purposes provided:

16 "1. The duration of stay for parking and dwelling in the
17 recreational vehicle does not exceed two weeks;

18 "2. Users of the recreational vehicle must use sanitation facilities
19 within the lot owner's home."

20 Petitioners argue that the city misconstrues YMC 9.68.060 to imply a requirement
21 that a permanent dwelling must exist on the lot to allow a lot owner to park his or her RV on
22 the lot under YMC 9.68.060(A) to (D). While such a requirement is clearly implied under
23 YMC 9.68.060(E), petitioners argue, that provision expressly concerns a proposal to park a
24 *visitor's* RV on the owner's lot, not a proposal to park the *lot owner's* RV on the lot for
25 temporary living purposes. Petitioners contend that a proposal to park the lot owner's RV on
26 the lot for temporary living purposes is governed exclusively by YMC 9.68.060(A) to (D),
27 the text of which does not state or imply any requirement that there be a permanent dwelling
28 on the lot.

1 Petitioners also argue that the city erred in interpreting YMC 9.68.060 to allow an RV
2 to be used for temporary living purposes only in conjunction with a permanent residence,
3 because that interpretation renders an RV used in that manner an *accessory* use to the
4 permanent dwelling. Petitioners note that YMC 9.52.030(B) already expressly provides for
5 an RV to be used as an accessory use to a dwelling in all zones, including the R-2 zone.⁷

6 LUBA must affirm a governing body’s interpretation of a local code provision, unless
7 the interpretation is inconsistent with the express language, purpose or policy underlying the
8 provision. ORS 197.829(1).⁸ An interpretation is consistent with the express language of the
9 code provision being interpreted if, considering the text and relevant context, the

⁷ YMC 9.52.030(B) is part of a code section governing accessory uses, and provides, in relevant part:

“A single recreational vehicle or manufactured dwelling may be occupied *as a temporary accessory use to a dwelling* in excess of fourteen (14) days not to exceed thirty (30) days under the following conditions:

- “1. That the device comply with residential setback requirements;
- “2. That a sight-obscuring fence may be required to be provided to effectively screen the use from outside of the parcel upon which it is located;
- “3. That the water supply and sewerage disposal system be approved by the county sanitarian; or
- “4. That the indoor house plumbing be used;
- “5. That a building permit-recreational vehicle or manufactured dwelling placement permit certifying either subsection (B)(3) or (4) of this section be filed at the city office prior to locating the device, thus signifying compliance with the above provisions.” (Emphasis added.)

⁸ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 interpretation is “plausible.” *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
2 (2010). In determining whether a local government’s code interpretation is inconsistent with
3 the express language under ORS 197.829(1)(a), or “plausible,” we must apply statutory
4 construction principles in ORS 174.010 and ORS 174.020(2) that are based on the “express
5 language” of a provision. *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202,
6 209-10, 214 P3d 68 (2009). Where a local government’s interpretation of its code or
7 comprehensive plan is inconsistent with the express language of a code or plan provision,
8 LUBA is not required to affirm that interpretation under ORS 197.829(1)(a). *Columbia*
9 *Riverkeeper v. Clatsop County*, 238 Or App 439, 454, 243 P3d 82 (2010).

10 The city responds that the city council interpretation of YMC 9.68.060 is plausible.
11 According to the city, YMC 9.68.060 is ambiguous regarding whether a permanent dwelling
12 is required to park a lot owner’s RV on the lot under YMC 9.68.060(A) to (D), because such
13 a requirement is present in the provisions governing parking of a visitor’s RV under YMC
14 9.68.060(E)(2), suggesting that a similar requirement impliedly governs YMC 9.68.060 as a
15 whole. Given that ambiguity, the city argues, the city council considered relevant context,
16 including the R-2 zone purpose statement, and concluded that the proposed temporary
17 *recreational* use of the RV was not consistent with the purpose of the R-2 zone. In essence,
18 the city argues, the city council determined that the purpose of allowing a “recreational
19 vehicle” as a conditional use in the R-2 zone pursuant to YMC 9.16.030(E) and YMC
20 9.68.060(A) to (D) is to provide a dwelling owner with additional temporary living space,
21 not to allow a lot owner to camp out on his or her vacant lot, a use not expressly provided for
22 anywhere in the city. The city contends that the city council interpretation harmonizes all
23 relevant text and context, and is not inconsistent with the express language, purpose and
24 underlying policy of the interpreted provisions.

25 We agree with petitioners that the city council’s interpretation is inconsistent with the
26 express language of YMC 9.68.060(A) to (D) and not affirmable under ORS 197.829(1)(a).

1 YMC 9.68.060(A) to (D) constitute the substantive criteria—the only criteria, as far as the
2 city has established—that govern approval for a lot owner to park an RV for temporary
3 living purposes on his or her lot. YMC 9.68.060(A) to (D) includes no language at all
4 suggesting a requirement that a permanent dwelling exist on the lot. There is no ambiguous
5 language in YMC 9.68.060(A) to (D) to interpret on that point. A requirement for a visitor’s
6 RV to be in conjunction with a permanent dwelling is present or clearly implied in YMC
7 9.68.060(E)(2), but there is no dispute that YMC 9.68.060(E)(2) does not govern a proposal
8 to park a lot owner’s RV on the lot. The city clearly knows how to require that an RV be
9 used in conjunction with a dwelling, because it expressed just such a requirement in YMC
10 9.68.060(E)(2) and YMC 9.52.030(B). As noted above, YMC 9.52.030(B) allows an RV to
11 be occupied “as a temporary accessory use to a dwelling” under certain circumstances. It is
12 significant that, in drafting YMC 9.68.060(A) to (D) to authorize a lot owner to park his or
13 her RV on the lot for temporary living purposes, the city failed to express or even suggest a
14 requirement that the RV be used in conjunction with a permanent dwelling, while imposing
15 an express requirement to that effect in other code provisions. That may have been an
16 omission, but if so we do not believe that it is an omission that the city can correct by
17 interpretation.

18 ORS 174.010 provides in relevant part that in construing a statute, the construer must
19 not “insert what has been omitted.” As explained above, LUBA must apply the principle of
20 construction embodied in ORS 174.010 to review of a governing body’s code interpretation
21 for purposes of ORS 197.829(1). Simply, there is no language in YMC 9.68.060(A) to (D)
22 that states or implies a requirement that the lot owner have a permanent dwelling on the lot.
23 To infer such a requirement based on YMC 9.68.060(E)(2), or more generally from the R-2
24 zone purpose statement, inserts an approval criterion into YMC 9.68.060(A) to (D) that was
25 omitted, if it was ever intended.

1 **C. Conditional Use Standards**

2 The city council also concluded that the “requested use does not meet the provisions
3 of a conditional use permit application.” Record 7. The city’s findings on this point do not
4 cite to any applicable conditional use standards, but conclude generally that the proposed use
5 is not an “essential or desirable” use in the residential neighborhood, that the use would have
6 “detrimental effects” on the neighborhood, and further that the use would disrupt the “visual
7 character” and “normal day-to-day activity” in the neighborhood.⁹ Although not entirely
8 clear, the conclusion that the requested use does not satisfy the “provisions of a conditional
9 use permit application” appears to be a derivative conclusion, based on the city’s earlier
10 findings that the proposed use is not consistent with the YMC 9.16 R-2 purpose statement
11 and the YMC 9.68.060(A) to (D) recreational vehicle provisions. As explained above, the
12 city erred in denying the application based on the YMC 9.16 R-2 purpose statement and
13 YMC 9.68.060(A) to (D).

14 Petitioners argue, and we generally agree, that to the extent the city’s finding that the
15 application “does not meet the provisions of a conditional use permit application” is intended
16 to constitute an independent basis for denial, that finding is inadequate. Conditional uses
17 allowed in the R-2 zone are subject to applicable conditional use standards at YMC chapter

⁹ The city council’s findings state, in relevant part:

“A conditional use allows the city to consider uses that generally are not consistent with a particular zoning district, but which may be essential or desirable in specific circumstances. A conditional use permit can provide flexibility within a zoning ordinance. It also enables the city to control certain uses which could have detrimental effects on the community. Consideration of a conditional use permit is a discretionary act in which the hearing body has the ability to act or decide according to sound judgment.

“Based on findings that the proposed use does not satisfy all provisions of YMC 9.16 R-2 Residential nor YMC 9.68.060 Recreational Vehicles, the City Council finds the requested use of a recreational vehicle for temporary living purposes is not an essential or desirable use in the established single family neighborhood. The City Council finds the requested use would have detrimental effects on the neighborhood because it would be the only property in the neighborhood that is not used as a single-family residential use. The requested use would disrupt the visual character and the normal day-to-day activity of the established neighborhood.” Record 6-7.

1 9.72. YMC chapter 9.72 authorizes the planning commission to approve a conditional use
2 permit application, with or without conditions, or to deny the application, and includes a
3 number of specific approval standards for particular types of conditional uses. However,
4 YMC chapter 9.72 includes no specific standards that would appear to apply to a proposal to
5 park an RV for temporary living purposes under YMC 9.16.030(E) and YMC 9.68.060.
6 Further, YMC chapter 9.72 does not appear to provide any *generally* applicable conditional
7 use standards at all. Neither the decision on appeal nor the city’s response brief identifies
8 any applicable conditional use standards that could provide an independent basis to deny the
9 application under YMC 9.72.

10 The finding quoted at n 9 can be read to suggest that the city council believes that it
11 has the discretion to approve or deny a conditional use permit under YMC 9.72, based not on
12 identified approval standards, but rather on its “good judgment” and considerations such as
13 whether the use would cause “detrimental effects” on the neighborhood, or disrupt the
14 neighborhood’s “visual character” and “normal day-to-day activity.” The legal authorities
15 for the city council to apply these considerations are not identified, although presumably the
16 “visual character” language stems from the comprehensive plan policy that the city council
17 found to be inapplicable.

18 Petitioners argue that the city violated ORS 227.173(1) to the extent it denied the
19 conditional use permit based on considerations not authorized by the applicable approval
20 standards and criteria in the city’s code. ORS 227.173(1) provides that

21 “[a]pproval or denial of a discretionary permit decision shall be based on
22 standards and criteria, which shall be set forth in the development ordinance
23 and which shall relate approval or denial of a discretionary permit application
24 to the development ordinance and to the comprehensive plan for the area in
25 which the development would occur and to the development ordinance and
26 comprehensive plan for the city as a whole.”

27 *See Lee v. City of Portland*, 57 Or App 798, 801, 646 P2d 662 (1982) (ORS 227.173(1)
28 requires that development ordinances set forth reasonably clear standards for discretionary

1 permit applications and that those standards be the sole basis for determining whether the
2 application is approved). The city has latitude to identify applicable “standards and criteria”
3 in the general provisions of its development ordinance and comprehensive plan. *BCT*
4 *Partnership v. City of Portland*, 130 Or App 271, 273-74, 881 P2d 176 (1994). But those
5 “standards and criteria” must already exist in the development ordinance and comprehensive
6 plan for the city to identify them, the city may not manufacture standards and criteria in
7 ruling on an application for permit approval. We generally agree with petitioners that
8 nothing cited to us in YMC chapter 9.72 or elsewhere authorizes the city to approve or deny
9 a conditional use permit based on the considerations cited in the finding quoted at n 9.

10 **D. Conclusion**

11 A portion of the first and second assignments of error challenge the planning
12 commission decision, rather than the city council’s decision. We agree with the city that
13 those portions of the first and second assignment of error do not provide a basis to reverse or
14 remand the city council decision before us.

15 For the above reasons, the third assignment of error is sustained, and the first and
16 second assignments of error are sustained, in part.

17 Petitioners request that the decision be either reversed, or remanded to the city with
18 the “necessary guidance to arrive at a lawful decision.” Petition for Review 31. However,
19 petitioners have not demonstrated that reversal of the decision is the appropriate disposition
20 under OAR 661-010-0071(1)(c) (LUBA shall reverse a land use decision if the decision
21 violates a provision of applicable law and is prohibited as a matter of law). While we are not
22 aware of any basis under YMC for the city to deny the conditional use application on
23 remand, based on this record we cannot say that denial is prohibited as a matter of law.
24 Accordingly, remand is the correct disposition. OAR 661-010-0071(2)(d).

25 The city’s decision is remanded.