BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARCIE A. ROSENZWEIG,
LEROY E. HENDRICKSON,
LARRY CARPENTER,
ELISE CARPENTER, JEFF WIESE,
MARY SCHAFER, FRANK BROWN,
FRANK McLEOD, NADIA McLEOD,
PAM NICHOLIESEN, GARY NICHOLIESEN,
ROY BONNETT and MARIBETH BONNETT,
Petitioners,

vs.

CITY OF MCMINNVILLE,
Respondent,

and

MCMINNVILLE AREA HABITAT
FOR HUMANITY,
Intervenor-Respondent.

LUBA No. 2011-076

FINAL OPINION
AND ORDER

Appeal from City of McMinnville.

Marcie A. Rosenzweig, McMinnville, et al, filed the petition for review, and Marcie A. Rosenzweig argued on her own behalf.

William L. Rasmussen, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Jeffrey G. Condit and Miller Nash LLP.

Thomas C. Tankersley, McMinnville, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Catherine A. Wright and Drabkin, Tankersley & Wright, LLC.

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

REMANDED 12/29/2011

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that approves a zoning map amendment, planned development overlay and tentative subdivision plan.

MOTION TO INTERVENE

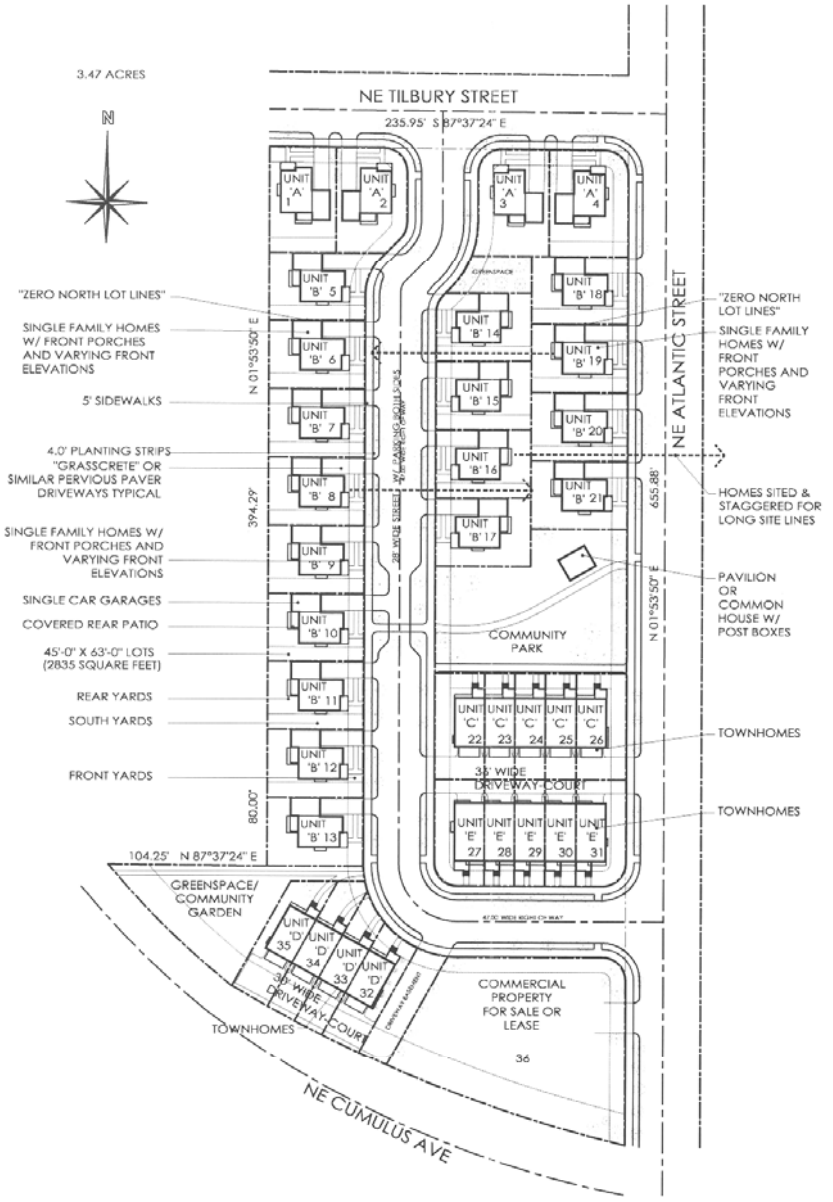
McMinnville Area Habitat for Humanity (Habitat) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 3.47-acre property located within the City of McMinnville. Pursuant to the disputed approvals, Habitat plans to construct single-family detached homes and townhouses, with three common open space areas that will be used for storm water detention.[1] As approved by the city, Habitat is authorized to construct 21 single family detached homes and 14 townhouse units. That development would result in an approximate density of 10 residential units per acre.

A map from the record is reproduced on the following page. As that map shows, the subject property is bounded by NE Tilbury Street (Tilbury) to the north, NE Atlantic Street (Atlantic) to the east and NE Cumulus Avenue (Cumulus) to the south. Most of the proposed residences would be accessed by a new road that would intersect with Tilbury and travel south through the approximate middle of the property and then turn east before it reaches Cumulus and connect with Atlantic a short distance north of Cumulus.

[1] Habitat originally sought commercial comprehensive plan map and zoning map designations for a portion of the property, but the application was amended to delete the proposed commercial development. As approved the area originally proposed for commercial development will be used for open space.



PROPOSED DESIGN SITE PLAN

1"=100'

m.o.daby design llc
4406 NE 12th Ave
Portland, OR 97211
www.modabydesign.net
phone: 503.475.6151
m.o.design@comcast.net

Habitat for Humanity
P.O. BOX 301
125 SE COWLS
MCMINNVILLE, OR 97128
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MCMINNVILLE HABITAT FOR HUMANITY ATLANTIC STREET COMMUNITY

ATLANTIC ST. @ TILBURY ST.
MCMINNVILLE, OR

ISSUED FOR:

APPROVAL	12.27.10

SHEET NO.

S2

"EXHIBIT F" 612

1

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues in the respondent's and Habitat's briefs. The motion is granted.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is actually a loosely connected series of subassignments of error. We address those subassignments of error in turn.

A. Findings are Inadequately Identified and Confusing

Under this sub-assignment of error, petitioners contend the city inadequately identified the findings it adopted in support of its decision and also argue that the adopted findings are inconsistent.

1. The Adopted Findings

We agree with petitioners that in some respects Ordinance 4941 is not clear about the documents that the city adopted as findings to support its decision. Ordinance 4941 itself is only two and one-half pages long, and includes almost no findings regarding the relevant approval criteria. It appears that the planning commission adopted only a single page of findings, as such. Record 474. However the city council did make the following attempt to adopt other documents in the record as its findings:

> "The Council * * * adopts the findings and conclusions of the Planning Commission, [the] staff report on file in the Planning Department, and the application filed by the McMinnville Area Habitat for Humanity." Record 8.

Findings of fact and conclusions of law serve a number of important functions. One of the most important of those functions is identifying relevant approval standards and supplying the decision maker's reasoning in support of its conclusions that those approval standards are or are not satisfied. Accordingly, it is important that a local government carefully and precisely identify any documents or portions of documents that it wishes to adopt by reference as the supporting findings for their decision. When a local government is not clear in identifying the documents that it wishes to adopt as its findings, it runs the risk

that findings that the local government wishes to rely on in the event of an appeal will not be considered by LUBA to be part of the local government's adopted rationale for its decision. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 106 (1992). Also, a lack of clarity in identifying documents that are adopted as findings in support of a decision can work an unfair disadvantage on petitioners, since petitioners must be able to determine what findings the local government adopted in order to identify any inadequate or unsupported findings and assign error to those findings. The test that LUBA applies where a local government adopts findings by reference was set out almost 20 yeas ago in *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992):

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." (Footnote omitted.)

Applying that test here, we conclude that the challenged decision and its supporting findings are located in the Record as follows:

1. Ordinance 4941. (Record 7-9)

2. The Planning Department Staff Report to the Planning Commission dated February 17, 2011 (which includes the one-page of Planning Commission findings located at Record 474). (Record 450-511).

3. The December 20, 2010 application submitted by Habitat. (Record 520-598).

4. Habitat's April 1, 2011 "Changes to the Application," and related materials. Record 348-374.

Ordinance 4941 is clearly part of the decision, and there does not appear to be any dispute among the parties that the February 17, 2011 staff report is the staff report the city

council intended to adopt by reference as findings.[2] Neither is there any dispute that the city council intended to adopt the entire December 20, 2010 application as findings. While not as clearly stated by the city council, we conclude that the above reference to the application is also sufficient under *Gonzalez* to express an intent on the part of the city council to adopt the April 1, 2011 change to the application, along with the materials that accompanied that change of application, as findings.

In its brief, respondent argues the city also adopted a June 10, 2011 five-part document that appears at Record 79-155 as findings. Respondent's Brief 2, 6. The city may have intended to adopt that five-part document as findings; but if it did, the above-quoted language in Ordinance 4941 is clearly inadequate to do so. The five-part document is not "the findings and conclusions of the Planning Commission," the "[planning department] staff report" or "the application." Respondent cites to the minutes of the June 28, 2011 city council meeting in this matter to support its contention that the June 10, 2011 five-part document was adopted as findings. Those minutes do refer to the June 10, 2011 five-part document. Record 20. However, it is the written decision (Ordinance 4941 quoted in part above) that determines what documents the city council adopted as findings. *See Allen v. Grant County*, 39 Or LUBA 232, 239 (2000) ("oral comments by members of the governing body are not part of the final written decision that LUBA reviews"); *Bruck v. Clackamas County*, 15 Or LUBA 540, 542 (1987) (same); *Citadel Corporation v. Tillamook County*, 9 Or LUBA 401, 404 (1983)(same). The city is entitled to rely on the June 10, 2011 five-part document for any evidentiary value that document may have, but the city may not rely on that document as findings in support of the challenged decision. The city's findings are limited to the documents we identify above.

This subassignment of error provides no basis for reversal or remand.

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[2] The city could have eliminated any uncertainty on this point by more clearly identifying which planning staff report it adopted as findings, for example by identifying the planning staff report by date.

2. Confusing Findings

Petitioners argue the findings adopted by the city are confusing in five different ways. Before turning to petitioners' specific arguments, we generally agree with petitioners that the practice of adopting entire documents that may have been prepared for other purposes or only in part as "findings" *can* result in findings that are confusing and internally inconsistent. This is particularly the case when applications change during the local proceedings and issues change or become more focused. That said, LUBA does not reverse or remand land use decisions simply because the findings are confusing. If we did, few decisions would survive on appeal. Petitioners must identify how any confusing findings warrant remand. For example, confusing findings may warrant remand where the confusing findings leave LUBA unable to understand the local government's rationale for concluding that one or more mandatory approval standards are satisfied. We turn to petitioners' specific findings challenges.

This subassignment of error is denied.

a. Findings Regarding the Commercial Area

Petitioners first point out that the December 20, 2010 application includes references to the proposed commercial area. The original proposal to adopt comprehensive plan and zoning map amendments to permit commercial development of a small portion of the subject property fronting Cumulus was later deleted from the application, as reflected in the April 10, 2011 document that was also adopted as findings. Record 350. All that happened in this case is that the originally proposed commercial area was deleted from the application that was approved by the city. The findings adequately explain the course of events that led to that amendment, and any internal inconsistency in the findings does not implicate any approval criteria as far as we can determine.

This subassignment of error is denied.

b. Failure to Address Issues

Petitioners next argue "[t]he findings address some goals and policies [in] the MCP that are not relevant and fail to address others." Petition for Review 14. We understand petitioners to contend the city's findings fail to adequately respond to issues it raised below concerning MCP goals and policies. However, petitioners only attempt to develop that argument is an unexplained citation to 86 pages of the record that make up a portion of petitioners' printed, single spaced arguments to the city. Record 264-347, 50-51.

If petitioners are suggesting in this subassignment of error that the city was legally obligated to adopt findings specifically addressing every argument that appears on those 86 pages and that it was reversible error for the city not to do so, we reject the suggestion. As petitioners correctly note, LUBA has consistently held "that when a relevant issue is adequately raised by testimony or other evidence in the record, that issue must be addressed in the decision maker's findings." *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989) (citing *Norvell v. Portland Metropolitan LGBC*, 43 Or App 849, 852-53, 604 P2d 896 (1979)); *see also Friends of Umatilla County*, 55 Or LUBA 333, 337 (2007); *Marcott Holdings, Inc. v. City of Tigard*; 30 Or LUBA 101, 107-08 (1995). However, as we pointed out in *Faye Wright Neighborhood Planning Council v. Salem*, 1 Or LUBA 246, 252 (1980), "not every assertion by a participant in a land use decision warrants a specific finding." A petitioner at LUBA must (1) identify the issue raised, (2) demonstrate that the issue was *adequately* raised and (3) establish that the issue is relevant in some way (usually by showing that the issue raises a question regarding an applicable approval standard). Petitioners' undeveloped reference to 86 pages of single-spaced argument is inadequate to (1) identify issues, (2) show that the issues were adequately raised or (3) establish that the issues are relevant.

This subassignment of error is denied.

c. Failure to Take Into Account Testimony that Postdated the Findings

Petitioners next contend that the city's findings "fail to take into account any written or oral testimony that may have refuted them because they were written by the applicant and incorporated as a whole by the staff prior to the public hearings." Petition for Review 14.

Petitioners are correct that one of the dangers of relying on findings that were prepared before a public hearing is held on an application for land use approval is that issues may be raised in the public hearing that were not anticipated in the findings and are therefore not addressed or are inadequately addressed. However, petitioners make no attempt to demonstrate that such is the case here, and for that reason their contention provides no basis for reversal or remand.

This subassignment of error is denied.

d. MZO 17.74.020(B)

McMinnville Zoning Ordinance (MZO) 17.74.020(B) requires that the city find that the proposed rezoning is "orderly and timely." *See* n 3. The original application included findings addressing MZO 17.74.020(B). Habitat later also took the position, based on language in the last two paragraphs of MZO 17.74.020, that MZO 17.74.020(B) is inapplicable to rezoning decisions to allow construction of needed housing, such as the housing proposed by Habitat. Record 354-55. That position appears to have been taken in the alternative, in addition to the applicant's position that the application complies with MZO 17.74.020(B). We understand petitioners to argue that taking these alternative positions results in inconsistent findings that warrant remand.

There is no error in taking alternative positions or adopting a decision that is based on alternative rationales. As land use regulations have become increasing complex, decisions that adopt alternative rationales to respond to that complexity have become increasingly common. We reject petitioners' argument that the city's alternative rationales warrant remand.

This subassignment of error is denied.

e. Inconsistent Minimum Lot Sizes

The planning department staff report in one place states the approved minimum single-family detached dwelling lot size is 3,500 square feet. As previously noted the staff report was adopted as findings. Elsewhere in the planning department staff report and the December 20, 2010 application, which was also adopted as findings, there is language calling for a minimum lot size range that would allow a substantially smaller minimum single-family detached dwelling lot size. Record 452, 527, 534, 566. Petitioners contend these inconsistent findings warrant remand.

Respondent answers that the references in the staff report to a 3,500 square foot minimum single family detached dwelling lot size were erroneous, and when the city council enacted Ordinance 4941 on July 12, 2011 it expressly stated that the minimum single-family detached dwelling lot size for the approved proposal is 2,835 square feet, which is consistent with the application. Record 8. With that correction, respondent contends, the earlier erroneous references to a 3,500 square foot minimum lot size can be overlooked and provide no basis for reversal or remand. We agree with respondent.

This subassignment of error is denied.

Subassignment of error A is denied.

B McMinnville Comprehensive Plan Volume I R-1 Density Limit

The McMinnville Comprehensive Plan (MCP) is divided into three volumes. Volume I provides background information. Volume II sets out "Goal and Policies." Volume III sets out "Implemention Ordinances." One of the MCP Volume III Implemention Ordinances is the MZO.

MZO 17.74.020 governs zoning map amendments and, among other things, requires that zoning map amendments must be "consistent with the goals and policies of the [MCP]."

MZO 17.74.020(A).[3] Under this subassignment of error, petitioners rely on text in Volume I of the MCP, rather than goals and policies in Volume II of the MCP, to argue that the MCP limits development density in the Three Mile Lane area to the density permitted in the Single-Family Residential (R-1) zone. The R-1 zone imposes a minimum lot area of 9,000 square feet, which results in a maximum residential density of just under five units per acre.[4] We understand petitioners to contend the disputed decision authorizes approximately 10 units per acre and therefore is inconsistent with MZO 17.74.020(A) and the MCP, which together limit residential density to approximately five dwelling units per acre.

The language that petitioners rely on from Volume I of the MCP is set out below:

"RESIDENTIAL LAND SUPPLY

"* * * * *

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[3] MZO 17.74.020 provides:

> "Comprehensive Plan Map Amendment and Zone Change - Review Criteria. An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:
>
> "A. The proposed amendment is consistent with the goals and policies of the Comprehensive Plan;
>
> "B. The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;
>
> "C. Utilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district.
>
> "When the proposed amendment concerns needed housing (as defined in the McMinnville Comprehensive Plan and state statute), criterion 'B' shall not apply to the rezoning of land designated for residential use on the plan map.
>
> "In addition, the housing policies of the McMinnville Comprehensive Plan shall be given added emphasis and the other policies contained in the plan shall not be used to: (l) exclude needed housing; (2) unnecessarily decrease densities; or (3) allow special conditions to be attached which would have the effect of discouraging needed housing through unreasonable cost or delay."

[4] 43,560 sq. ft. divided by 9,000 sq. ft. = 4.84 units per acre. That 4.84 density in the R-1 zone would be further reduced by the area required for roads and other supporting uses.

> "Of the buildable land within the *unincorporated* Urban Growth Boundary area, 72 acres are in the Three Mile Lane area. The Three Mile Lane area is restricted to an overall density equivalent to the R-1 zone based on potential traffic problems. Approximately 825 unincorporated buildable acres within the UGB are affected by the west side density policies which limit overall density to six dwelling units per acre based on a limited sewer line capacity (See Chapter VII, Sanitary Sewer System). Multiple-family dwellings will be permitted on these lands if the overall density of the development does not exceed the six dwelling unit per acre density limitation. Only 25 acres of *unincorporated* buildable land is not affected by either the west side density limitation or the density restriction affecting Three Mile Lane. This acreage was identified as Area 1 in previous studies of buildable lands within the UGB." MCP Volume I, page 188 (Emphases added.)

Respondent answers that petitioners misread the MZO and MCP under this subassignment of error and that the language petitioners quote from Volume I of the MCP does not have the regulatory effect that petitioners claim it does, for four reasons. We agree with respondent, but limit our consideration to three of those four reasons.

Respondent first contends, and we agree, that the MCP expressly makes the text of Volume I "background information," rather than "goals and policies." MZO 17.74.020(A) only requires that zoning map amendments be shown to be "consistent with the goals and policies of the [MCP]."[5] Respondent also contends that even if the cited text was mandatory, it applies to the "unincorporated" Three Mile Lane area, while the subject property is within the city of McMinnville corporate limits. Because the subject property is incorporated rather

[5] MCP Volume II page 1 states in part:

> "McMinnville's Comprehensive Plan has been divided into three interrelated volumes. Volume I, providing the background information, is both the narrative of and supporting documentation for the goals and policies developed by the community. It is a reference resource that can be used to interpret the intent of the goal and policy statements. Volume II contains the actual goal and policy statements. These statements are the culmination of the research, inventories, and projections of Volume I and reflect the directives expressed through the citizen involvement process in adopting the plan. All future land use decisions must conform to the applicable goals and policies of this volume. Volume III consists of the implementing ordinances and measures created to carry out the goals and policies of the plan. Principle among these are the comprehensive plan and zoning maps, the annexation, zoning and land division ordinances, and the planned development overlays placed on areas of special significance."

than unincorporated area, respondent contends the R-1 density limit does not apply. We agree with respondent.

Finally, as respondent points out, the text from Volume I imposes a density limit in the unincorporated Three Mile Lane area; it does not impose a density limit on individual lots or parcels within that area. Respondent contends that petitioners erroneously read the language in Volume I of the MCP to call for a parcel by parcel density limit rather than an overall limit in the Three Mile Lane unincorporated area. Again, we agree with respondent.

Subassignment of error B is denied.

C. Failure to Address Issues/MZO 17.74.020(C)

1. General Allegation of Failure to Address Issues

Petitioners first complain that the city failed to address the language from MCP Volume I discussed above. We have already determined that the MCP Volume 1 language is not a mandatory approval standard that the city was required to address. Petitioners then argue that they "made a point-by-point rebuttal of [Habitat's] assertions of compliance with self-defined 'relevant standards.'" Petition for Review 10. Without further developing that argument, petitioners simply cite to 78 pages of the record where their single-spaced arguments to the city appear. *Id*. (Record 50-61, 73-74, 247, 258, 290-347, 400-402, 420-22). We reject petitioners' undeveloped findings challenge here for the same reason we rejected their similar undeveloped findings challenge under subassignment of error (A)(2)(b), *supra*.

This subassignment of error is denied.

2. MZO 17.74.020(C)

MZO 17.74.020(C) requires that when amending the zoning map, the applicant or city must establish that "[u]tilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district." *See* n 3. As previously noted, the subject property is bordered by Tilbury to the north, Atlantic to the east

and Cumulus to the South. According to evidence in the record, with regard to water, there is a six inch water main in Tilbury, a six inch water main in Atlantic and a 12 inch water main in Cumulus. Record 148. According to evidence in the record, there is a 12 inch storm water line in Cumulus. Habitat proposed that some storm water would be retained on site but also proposed that some storm water would be transmitted to storm water lines in Atlantic and Tilbury. Water would be provided to the proposed homes by a new eight inch main that would be located in the new roadway that will be located in the middle of the property and connect with the existing six inch main in Tilbury and the existing six inch main in Atlantic.

Petitioners contend the city's findings are inadequate to establish that the proposal complies with MZO 17.74.020(C), with regard to water and storm water drainage. Petitioners cite to testimony that they presented below. Petition for Review 12, lines 2-3. We have examined that testimony. In that testimony, petitioners raise two issues. First, as noted, the applicant originally proposed to discharge storm water into storm water mains in Tilbury and Atlantic. According to petitioners there are no storm water mains in those streets, and the applicant does not have permission to discharge storm water into the storm water main in Cumulus, which is owned by the Oregon Department of Transportation (ODOT). Second, petitioners dispute whether the area is served by a looped water system and whether connecting an eight inch water main to six inch water mains in Tilbury and Atlantic, as Habitat proposes, will cause a drop in water pressure at properties in the vicinity of the subject property.

Respondent cites to the following findings:

> "Storm sewer and drainage facilities will be required as identified in the conditions of approval and it is feasible that Habitat will be able to incorporate such requirements into the development during the course of construction.
>
> "* * * * *

> "As previously noted, water lines are within Tilbury and Atlantic Streets, and a 12 [inch] water main line is located on the property, along Cumulus Avenue. Therefore, adequate water will be available to the Property." Record 92.

There are two problems with the above findings. First, they do not really respond directly to either of the two issues noted above. Second, even if they did, both statements come from the June 10, 2010 five-part document that we have already determined that the city council did not adopt as part of its findings.

a. Stormwater

The original application included findings that simply conclude that the application is consistent with MZO 17.74.020(C) because "all needed public facilities and services are already in place or will be extended to serve the proposed development." Record 586. As originally proposed, Habitat proposed to pipe at least some storm drainage from the property to storm water lines in Atlantic and Tilbury. Record 641. When it was discovered that there are no storm water lines in those streets, the planning department recommended and the city adopted conditions of approval to require that Habitat (1) construct storm water drainage facilities as part of the required improvements to Atlantic and Tilbury, and (2) secure any needed permits from ODOT for storm drainage that might flow into Cumulus. Those conditions also require Habitat to prepare more detailed storm drainage plans in the future and submit them to the city for approval.

There is no evidence in the record that has been called to our attention that would raise any question about whether the needed ODOT permit can be obtained or about whether the needed storm water drainage facilities can be designed and approved. And there is at least some evidence in the record that they can.[6] We conclude that the challenged decision adequately responds to the storm water issue petitioners raised under MZO 17.74.020(C).

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[6] The city Community Development Director states in a June 13, 2010 e-mail message:

> "The infrastructure needs, and required improvements, associated with this development are typical of other developments of this size. To my knowledge, there are no issues associated

b. Water

With regard to petitioners' contentions regarding the lack of a looped water system in the Three Mile Lane area and the potential pressure/flow impacts that connecting an eight inch water main to the existing six inch water mains in Tilbury and Atlantic, Habitat proposed and the city adopted the following finding:

> "An 8-inch water main is the current city standard and minimum. Attaching an 8-inch water main to an existing 6-inch water main will not [a]ffect water pressure in the area. Further, this neighborhood is part of an existing loop and is fed by water from both directions." Record 356.

The above findings are simply findings, and without substantial evidence to support those findings, they are inadequate to respond to the water service issues raised by petitioners. Respondent cites to an e-mail message from an engineer at McMinnville Water and Light. In that e-mail message, the engineer first identifies the water mains in the area and then states, "[t]he above mentioned water mains tie 'together' and thus are 'looped.'" Record 147. That statement seems adequate to establish that the water system in the vicinity is looped.

We are not water system engineers and are in no position to assess petitioners' contention that constructing an eight inch water main along the development's proposed internal roadway from the six inch water main in Tilbury Street to the six inch main in Atlantic Street would result in lowering water flows and pressure for other water system users in the area utilizing the six inch mains. The only evidence in the record that is called to our attention, again from the McMinnville Water and Light engineer, does not address that issue. Instead, the engineer states that under McMinnville Water and Light's policies, Habitat "would need to extend a water main from Tilbury to Cumulus Avenue." The

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with the infrastructure that cannot be solved by standard engineering practices, or that can't be build by standard engineering practices." Record 78.

engineer takes the position that if the applicant does that, hydraulic flows in the area from the existing six inch mains would actually improve.

The application appears to propose an eight inch water main that connects with six inch water mains in Tilbury and Atlantic. It also appears that the challenged decision approves that proposal. It appears that if the southern connection of the new eight inch water main is the 12 inch main in Cumulus, rather than the six inch main in NE Atlantic, petitioners' water flow concerns are resolved and in fact water flows and pressure will increase. However, we cannot be sure that McMinnville Water and Light's policies are such that Habitat will be required to build a new eight inch water main with a southern connection different than the one that was proposed to and approved by the city. On remand the city must clarify that such is the case. If it is not the case, the city must address petitioners' water pressure/flow issue and explain why those concerns do not require the city to find that MZO 17.74.020(C) is not satisfied.

Subassignment of error C is sustained, in part.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners challenge the city's approval of a planned development overlay.

A. Tradeoffs Beyond Mixture of Housing Types/Open Spaces

Petitioners first argue that the planned development that is authorized by the planned development overlay is little more than a conventional subdivision with single family dwellings and a few three-story town houses. Petitioners object that Habitat has been allowed increased density without having to provide the amenities that are the required tradeoff for increased density. However, all of petitioners' arguments in this regard are based on text from Volume I of the MCP, which we have already determined was not

adopted to be applied as mandatory approval standards for individual applications for development approval.

Petitioners also argue the approved green spaces/open spaces are inconsistent with the MCP:

> "[A]ll green spaces/open spaces within the proposed [planned development overlay] are used for storm water detention making them unavailable for use by the residents due to standing water October through May. This clearly violates Finding 4 of Volume I, and policies 72.00, 73.00, 75.00, and 76.00 of Volume II or the MCP related to [planned development overlays.]" Petition for Review 21 (record citations omitted).

Again, the cited finding in MCP Volume I does not have the regulatory effect that petitioners contend it does. Although petitioners cite no MZO or MCP requirement that planned development overlay decisions apply the MCP, ORS 197.175(2)(d) requires that the city's land use decisions comply with any mandatory requirements in the MCP. MCP Policies 72.00, 73.00, 75.00, and 76.00 therefore potentially apply as approval criteria.[7] However, although petitioners contend the city's decision authorizing the proposed green spaces/open spaces also to serve a storm water detention function "clearly violates" those policies, it is not clear to us how that decision violates those policies. Because petitioners make no

[7] MCP Policies 72.00, 73.00, 75.00, and 76.00 provide as follows:

> "72.00 Planned unit developments shall be encouraged as a favored form of residential development as long as social, economic and environmental savings will accrue to the residents of the development and the city.
>
> "73.00 Planned residential developments which offer a variety and mix of housing types and prices shall be encouraged."
>
> "75.00 Common open space in residential planned developments shall be designed to directly benefit the future residents of the developments. When the open space is not dedicated to or accepted by the City, a mechanism such as a homeowners association, assessment district, or escrow fund will be required to maintain the common area.
>
> "76.00 Parks, recreation facilities, and community centers within planned developments shall be located in areas readily accessible to all occupants."

attempt to explain why they believe the city's decision violates those policies, we reject this subassignment of error.

B. The Planned Development Overlay is a Guise to Circumvent the MZO

The thrust of petitioners' argument under this subassignment of error is that the approved planned development is not large enough to constitute a planned development and was only approved to increase density:

> "The scale of the development isn't large enough to provide amenities to the residents. The siting of the project isn't close enough to services and schools to make the trade-offs balance. The reason for applying the [planned development overlay] on this application was simply to increase the density beyond the underlying standards. * * *" Petition for Review 22.

However, petitioners cite no MCO or MZO requirement that a planned development must be of any particular minimum size. This subassignment of error provides no basis for reversal or remand.

This subassignment of error is denied.

C. Excess Density

MZO 17.51.010, the purpose statement for the planned development overlay section of the MZO, states in part: "The purpose of a planned development is to provide greater flexibility and greater freedom of design in the development of land than may be possible under strict interpretation of the provisions of the zoning ordinance." In other words, one of the purposes of planned developments is to allow an applicant to deviate from such things as minimum lot sizes and setbacks. However, MZO 17.51.020(D) limits the allowable density for a residential planned development: "Density for residential planned development shall be determined by the underlying zone designations." Petitioners contend MZO 17.51.020(D) should have been applied to the proposal and that if it had, "none of the included variances for lot sizes, setbacks, or road right-of-way would have been able to be included and the density would have been substantially less." Petition for Review 23.

As respondent points out, MZO 17.51.020(D) limits density, but it does not place limits on lot sizes, setbacks or rights-of-way. So long as the density permissible in the underlying zone is maintained, the MZO permits to the city to approve smaller lots and reduce the setbacks and rights-of-way requirements that would otherwise apply under the underlying zone. Respondent points out that the minimum density in the underlying R-4 zone is expressed in minimum lot area per unit, with a minimum lot area of 1,500 square feet for each unit with two bedrooms and 1,750 square feet for each unit with three bedrooms. An additional 500 square feet of lot area is required for each bedroom in excess of three. MZO 17.21.060. It appears that the 21 single-family dwellings could have as many as four bedrooms. The rest of the units would be three bedroom units. The average lot size is 2,535, which is well within the R-4 maximum density.

This subassignment of error is denied.

D. Findings Challenge

Finally, petitioners advance a findings challenge. Petitioners contend that the city's findings concerning MCP Policies 72.00, 73.00, 75.00, 76.00 and 77.00 are inadequate.[8] Petitioners also argue the city's findings are inadequate to demonstrate that the proposal complies with MZO 17.51.030(C).[9] The county adopted findings addressing all of these

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[8] MCP Policies 72.00, 73.00, 75.00, 76.00 are set out at n 7. MCP Policy 77.00 is set out below:

> "77.00 The internal traffic system in planned developments shall be designed to promote safe and efficient traffic flow and give full consideration to providing pedestrian and bicycle pathways."

[9] MZO 17.51.030(C) provides as follows

> "C. The Commission shall consider the preliminary development plan at a meeting at which time the findings of persons reviewing the proposal shall also be considered. In reviewing the plan, the Commission shall need to determine that:
>
> > "1. There are special physical conditions or objectives of a development which the proposal will satisfy to warrant a departure from the standard regulation requirements;

MCP Policies at Record 566-68. The county adopted findings addressing the seven MZO 17.51.030(C) criteria at 589-98. With two exceptions, petitioners make no direct effort to explain why they believe those findings are inadequate, and for that reason we reject the bulk of petitioners' findings challenge. We turn to the two exceptions.

First, under MZO 17.51.030(C)(4), the city must find that the proposed planned development "can be completed within a reasonable period of time[.]" *See* n 9. Habitat proposed that the planned development will be constructed in three phases over a five-year period. Record 596. The city imposed a condition of approval that adopts that proposed five-year phasing plan. Record 473. Petitioners argue there is testimony in the record that construction will take at least 10 years and argue there is "no finding that this is reasonable." Petition for Review 24. It is not clear whether petitioners are arguing that there is no finding that a five-year construction period is reasonable or that there is no finding that a ten-year construction period is reasonable. If it is the former, petitioners are wrong, since the city adopted the applicant's proposed finding that "[t]he proposed phasing is a reasonable period of time for the completion of the project of this size by a not for profit organization." Record 596. If it is the latter, the city did not approve a 10-year construction period, which makes a finding regarding the reasonableness of a 10-year construction period unnecessary.

> "2. Resulting development will not be inconsistent with the Comprehensive Plan objectives of the area;
>
> "3. The development shall be designed so as to provide for adequate access to and efficient provision of services to adjoining parcels;
>
> "4. The plan can be completed within a reasonable period of time;
>
> "5. The streets are adequate to support the anticipated traffic, and the development will not overload the streets outside the planned area;
>
> "6. Proposed utility and drainage facilities are adequate for the population densities and type of development proposed;
>
> "7. The noise, air, and water pollutants caused by the development do not have an adverse effect upon surrounding areas, public utilities, or the city as a whole[.]"

Second, MZO 17.51.030(C)(7) requires the city to find that "the noise, air, and water pollutants caused by the development do not have an adverse effect upon surrounding areas, public utilities, or the city as a whole[.]" *See* n 9. Petitioners contend that in its findings addressing MZO 17.51.030(C)(7) the city "impermissibly puts off the finding of compliance with this standard to a time outside the public process * * *." Petition for Review 25.

Respondent cites to the following city findings regarding MZO 17.51.030(C)(7):

> "**SUPPORTIVE FINDINGS OF FACT**: The provision of adequate noise, air and water pollutants caused by the development can be reviewed at the time of the submittal of a storm detention calculation by the applicant's Civil Engineer. A NPDES (National Pollutant Discharge Elimination System) permit must be obtained from the Department of Environmental Quality (DEQ) prior to construction activities occurring on the site.
>
> "**SUPPORTIVE CONCLUSION**: This Criterion can be met and can be ensured by conditions of approval for the concurrent Subdivision/Planned Development Overlay applications." Record 598.

Rewording the supportive findings of fact a bit, Habitat's proposed findings, which the city adopted, appear first to suggest that the MZO 17.51.030(C)(7) finding regarding potential adverse effects from water pollutants can be delayed until the applicant submits a storm water detention calculation in the future. Then the supportive findings of fact seem to suggest that the MZO 17.51.030(C)(7) finding regarding potential adverse effects from air and noise pollutants can either be delayed or assumed to be satisfied by the issuance of a NPDES permit. The water pollutant and noise and air pollutant finding required by MZO 17.51.030(C)(7) must be adopted at the time of planned development approval. It may be that the city can adopt findings that explain why these post public process requirements are sufficient to ensure that "the noise, air, and water pollutants caused by the development [will] not have an adverse effect upon surrounding areas, public utilities, or the city as a whole[.]" But that explanation is missing from the city's findings.

If the city wishes to defer the required finding required by MZO 17.51.030(C)(7) until after planned development approval, it must provide the public an opportunity to

participate in the future proceedings that will lead to the required finding. *See Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007) (county may postpone finding of compliance with conceptual plan approval until final master plan approval decision if final master plan approval process is infused with the same participatory rights as the conceptual plan approval step). Otherwise, the city must find that the proposal complies with MZO 17.51.030(C)(7) as part of the decision granting planned development approval.

The city's above-quoted supportive conclusion is similarly flawed. It does not identify the referenced "conditions of approval for the concurrent Subdivision/Planned Development Overlay applications" or explain why those conditions of approval are adequate to ensure that the proposal is consistent with MZO 17.51.030(C)(7).

Subassignment of error D is sustained in part.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners allege the city inadequately addressed the impacts that the proposal will have on the surrounding transportation system.

A. The Transportation Planning Rule

OAR chapter 660, division 12 is the transportation planning rule (TPR). The TPR requires that the city apply a regimented, sequential transportation planning analysis when amending an acknowledged comprehensive plan or land use regulation. OAR 660-012-0060(1) identifies the kinds of transportation impacts that can "significantly affect" a transportation facility, and requires that a local government determine if a proposed plan or land use regulation amendment will "significantly affect an existing or planned transportation facility." If the proposed amendment will have a significant affect on one or more transportation facilities, OAR 660-012-0060(1) requires that one or more of the mitigation measures set out in OAR 660-012-0060 be adopted.

At pages 27-30 of the petition for review, petitioners contend the city failed to conduct the planning analysis required by the TPR and suggest several ways in which the disputed development may affect transportation facilities. We need not and do not decide whether petitioners' TPR arguments are adequately developed to establish a basis for remand under the TPR. Respondent contends that although petitioners raised a number of transportation issues below, they never mentioned the TPR or argued that the analysis required under the TPR should be applied in approving the disputed proposal. Therefore, respondent argues, petitioners are precluded from arguing the city erred by failing to apply the TPR for the first time at LUBA. ORS 197.835(3); 197.763(1).[10]

We agree with respondent that the issue was not raised below. Raising a number of transportation issues without any specific reference to the regimented transportation planning analysis that is required under the TPR is not sufficient to preserve the right to assign error at LUBA based on the city's failure to apply the regimented transportation planning analysis that is required by the TPR.

This subassignment of error is denied.

B. MCP TSP Goals and Policies

This subassignment of error is actually a collection of arguments concerning the city's Transportation System Plan, and MCP Residential and Transportation Policies. Many

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[10] ORS 197.835(3) imposes the following limit on issues that may be raised in an appeal at LUBA:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.763(1) provides:

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

of those arguments are undeveloped or largely undeveloped. Some of the MCP Policies that petitioners rely on to make their arguments appear to be MCP Policies that were adopted to apply to the adoption, amendment and implementation of city plans, rather than MCP Policies that can be applied in any meaningful way to individual development proposals. Many of the Policies that appear to be directed at individual development proposal are written in hortatory language (rather than as standards that must be met) or are written in ways that make it difficult to determine how the Policies should be applied to an individual development proposal, such as the one at issue in this appeal. The parties have made our task even more difficult. Petitioners do not clearly state what they think the Goals and Policies require, leaving us to infer their interpretation of what the Policies require from their arguments. In most cases, the city's findings similarly fail to adopt an understandable interpretation of the Policies or an explanation of what the Policies require (or do not require) of the disputed proposal. In its brief, respondent sometimes attempts to supply the missing interpretations and to supply reasons why the Policies do not apply in the manner that petitioners suggest, but of course respondent's brief cannot substitute entirely for findings that provide the statutorily required "explanation of the justification" for the city's quasi-judicial rezoning and permit decision in this matter. ORS 227.173(3).[11] With these shortcomings in the parties' arguments in mind, we turn to the arguments that we have been able to discern from the petition for review.

1. The Transportation System Plan

On page 30 of the petition for review, petitioners quote two MCP Policies that the Transportation System Plan should be applied when adopting plans or making land use

[11] ORS 227.173(3) provides:

> "Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

decisions, including "review of land use actions and development actions." Petition for Review 30; MCP 132.62.00 and 132.62.20. Petitioners' entire argument under these policies is set out below:

> "In spite of a substantial weight of the evidence in testimony and materials presented by the petitioner, *supra*, the city failed to apply its own TSP methodology to the project application."

The above argument is insufficiently developed for review and for that reason provides no basis for reversal or remand. The "*supra*" reference may be a reference to the "testimony and materials" that petitioners identified earlier in their petition for review in advancing the TPR argument that we have already concluded petitioners waived, but we cannot be sure. Some of that testimony cites and relies on the TSP. However, that "*supra*" reference, without further development, is not sufficient to state a cognizable TSP argument under this subassignment of error. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

2. Policy 105.00

To approve a zoning map amendment, the applicant must demonstrate and the city must find that the "amendment is consistent with the goals and policies of the Comprehensive Plan[.]" MZO 17.74.020; *see* n 3. MCP Policy 105.00 provides as follows:

> "The City of McMinnville shall take into account driving and walking distances to schools when reviewing the design of future residential developments. Preferred design would make those distances less than one mile where possible."[12]

The disputed development is more than a mile from the nearest schools. Petitioners argue the decision should therefore be reversed.

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[12] The text of MCP Policy 105.00 as set out in the city's findings at Record 540 and in the petition for review is different from the text of MCP Policy 105.00 in the copy of MCP Volume II in LUBA's library and in the copy of MCP Volume II on the city's website. For purposes of this opinion, we have used the text as quoted by petitioners and the city.

The city adopted the following findings, after quoting the language of Policy 105.00:

> "Schools in the area are more than the one mile limit. Currently children of school age in this area are bused to the elementary, middle school and high school. This Policy is not being met at this time by the existing residential units in the area and cannot be met as a result of the proposed development of the property." Record 540.

It may be that because Policy 105.00 is worded as something the city must "take into account" rather than a mandatory standard, the city could interpret Policy 105.00 to require only that the city consider distance from schools and prefer any designs that would make walking distances less than one-mile where possible. It may also be that the city could conclude that no such design is possible in this case. It is even possible that the city found that the zoning map amendment is consistent with MCP Policy 105.00. However, it is also possible to read the city's findings to conclude that the county found that the zoning map amendment is inconsistent with MCP Policy 105.00, as petitioners apparently read those findings. Remand is required so that the city can better explain what Policy 105.00 requires and how the proposal is consistent with that interpretation of Policy 105.00.

This subassignment of error is sustained.

3. Bicycle and Pedestrian MCP Policies 81.00, 90.00, 118.00(6), 130.00, 132.00, 132.15, 132.24.00(1) and (2), 132.26.05, 132.43.05(2), (5), and (6).

As conditioned by the city, Habitat will be required to improve Atlantic and Tilbury, along the subject property's frontage on those streets. When those improvements are complete, there will be sidewalks along the improved portions of Atlantic and Tilbury that would facilitate bicycle and pedestrian travel. However, the portion of Tilbury west of the subject property, adjoining the property to the west that is owned by a church, is not improved with sidewalks and the challenged decision does not require that Habitat improve that section of Tilbury to city standards with sidewalks. Petitioners argue that failing to require improvement of that section of Tilbury with sidewalks violates MCP Policies 81.00,

90.00, 118.00(6), 130.00, 132.00, 132.15, 132.24.00(1) and (2), 132.26.05, 132.43.05(2), (5), and (6).[13]

[13] Those policies are set out below:

"81.00 Residential designs which incorporate pedestrian and bikeway paths to connect with activity areas such as schools, commercial facilities, parks, and other residential areas, shall be encouraged."

"90.00 Greater residential densities shall be encouraged along major and minor arterials with densities decreasing as distances increase from these larger traffic capacity roads."

"118.00 The City of McMinnville shall encourage development of roads that include the following design factors:

"* * * * *

"6. Installation of sidewalks on both sides of all streets and direct pedestrian connections to all buildings and shopping centers.

"* * * * *."

"130.00 The City of McMinnville shall encourage implementation of the Bicycle System Plan that connects residential areas to activity areas such as the downtown core, areas of work, schools, community facilities, and recreation facilities."

"132.00 The City of McMinnville shall encourage development of subdivision designs that include bike and foot paths that interconnect neighborhoods and lead to schools, parks, and other activity areas."

"132.15 The City of McMinnville shall require that all new residential developments such as subdivisions, planned unit developments, apartment and condominium complexes provide pedestrian connections with adjacent neighborhoods."

"132.24.00 The safety and convenience of all users of the transportation system including pedestrians, bicyclists, transit users, freight, and motor vehicle drivers shall be accommodated and balanced in all types of transportation and development projects and through all phases of a project so that even the most vulnerable McMinnville residents – children, elderly, and persons with disabilities – can travel safely within the public right-of-way. Examples of how the Complete Streets policy is implemented:

"1. Design and construct right-of-way improvements in compliance with ADA accessibility guidelines (see below).

"2. Incorporate features that create a pedestrian friendly environment[.]"

"132.26.05 New street connections, complete with appropriately planned pedestrian and bicycle features, shall be incorporated in all new developments consistent with the Local Street Connectivity map."

Respondent argues in its brief, that "the cited MCP policies say nothing about the street improvements advocated by Petitioners." Respondent's Brief 18. We tend to agree with respondent that the cited MCP Polices need not be interpreted to require off-site street improvements such as the improvement petitioners suggest they require. However, respondent does not argue this issue was not raised below and offers no explanation for why the city's findings do not reject petitioners' expansive reading of the policies. On remand, the city must either interpret those policies not to require the off-site improvements on Tilbury that petitioners argue they require, or impose an additional condition of approval to require those improvements. Petitioners' findings challenge under the Bicycle and Pedestrian MCP Policies is sustained.

Petitioners make two additional arguments under this subassignment of error. First, petitioners argue "[a]dditionally, the TSP shows the sidewalks and bikeways from the area of the development into the city center to be deficient, *supra*." We are not sure what petitioners mean by that argument. However, to the extent they intend to argue Habitat must be required to eliminate all transportation deficiencies between the subject property and the city center the argument is not sufficiently developed to merit review. Petitioners also argue that because the proposed open area also will be used for storm water detention, the path through

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"132.43.05 Encourage Safety Enhancements – In conjunction with residential street improvements, the City should encourage traffic and pedestrian safety improvements that may include, but are not limited to, the following safety and livability enhancements:

"* * * * *

"2. Painted or raised crosswalks (see also recommended crosswalk designation in Chapter 4),

"* * * * *

"5. Sidewalks and trails, and

"6. Dedicated bicycle lanes."

that open area will be under water and unusable much of the year, thus violating the cited MCP policies.

We doubt that any of the cited MCP Policies must be interpreted to preclude designating open space pathways through areas that will also function at times as storm water detention areas. However, because we are remanding for additional findings concerning other issues, we include this issue in the issues to be addressed on remand.

This subassignment of error is sustained.

4. MCP Off-Street Parking Policies

MZO 17.60.060(a)(1) and (2) require two off-street parking places for single-family and two-family dwellings and one and one-half parking spaces for multi-family dwellings. As proposed and approved, each single family dwelling and townhouse will have two off-street parking spaces. Depending on whether the proposed townhouses are characterized as two-family or multifamily dwellings, the proposal either complies with or exceeds the MZO requirement for off-street parking, and petitioners apparently concede as much. However, petitioners also cite three MCP Policies, the most demanding of which is MCP Policy 126.00.[14]

We understand the city to have interpreted MCP Policy 126.00 to be implemented by the city's adoption of off-street parking standards set out at MZO 17.60.060 and that compliance with MZO 17.60.060 establishes compliance with MCP Policy 126.00. That interpretation is entirely plausible, and we affirm it. ORS 197.829(1).

Petitioners speculate that the city applied MCP Policy 126.00 to a similar proposal in the past, based on concerns over off-street parking in the neighborhood, and that the city cannot be allowed to apply MCP Policy 126.00 inconsistently with that earlier proposal and

[14] MCP Policy 126.00 provides:

> "126.00 The City of McMinnville shall continue to require adequate off-street parking and loading facilities for future developments and land use changes."

Habitat's proposal. However, petitioners neither establish that the earlier denial was in fact based on MCP Policy 126.00 nor establish that the key fact here (the development proposal fully complies with MZO 17.60.060) was also the case with the prior proposal.

Petitioners' subassignment regarding off-street parking is denied.

5. MCP Transit Policies

Petitioners contend the city inadequately demonstrated that the approved development is consistent with MCP Transit Policies 92.00 and 118.00(7).[15] MCP 92.00 encourages locating high density housing "along existing or potential public transit routes." MCP 118.00(7) encourages the city to develop roads that accommodate "buses operating on collector and arterial streets by providing adequate radius curb return and bus stop areas."

Respondent contends that MCP 118.00(7) is directed at the city's planning and does not apply to Habitat's application. We agree. Respondent also argues that the following finding is sufficient to demonstrate that the proposal is consistent with MCP Policy 92:

> "In this area, Tilbury and Atlantic Streets are local streets in the City's Transportation System Plan. Cumulus Avenue is a frontage road with runs parallel to Hwy 18, both of which are under the jurisdiction of the Oregon Department of Transportation. Therefore, this Property is very close to high traffic capacity roads. As noted in the other materials submitted, it is also on a public transit route, with the City's east/west bus route traveling along Cumulus Avenue. Yamhill County transit area has confirmed that residents of

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[15] MCP Policies 92.00 and 118.00(7) are set out below:

> "92.00 High-density housing developments shall be encouraged to locate along existing or potential public transit routes.
>
> "118.00 The City of McMinnville shall encourage development of roads that include the following design factors:
>
> "* * * * *
>
> "7. Accommodation of buses operating on collector and arterial streets by providing adequate radius curb return and bus stop areas.
>
> "* * * * *.

> the development will be able to request that the bus stop near or adjacent to the development, on Cumulus Avenue."[16] Record 85.

MCP Policy 92.00 does not require that there be a bus stop at the subject property. MCP Policy 92.00 simply encourages high-density housing developments to locate along existing or potential public transit routes. The above finding is more than adequate to demonstrate compliance with such a plan policy. Unfortunately for the city, the above-quoted finding is included in the June 10, 2011 five-part document that the city failed to adopt as part of its findings when it adopted Ordinance 4941. The finding concerning MCP Policy 92.00 that was included in the application and adopted by the city does not appear to be responsive to MCP Policy 92.00.[17]

Petitioners' findings challenge under MCP Policy 92.00 is sustained. On remand the city can adopt the above-quoted finding to establish that the proposal is consistent with MCP Policy 92.00.

This subassignment of error is sustained.

6. Other Transportation Policies

We set out below petitioners' entire argument under what they refer to as "other transportation policies:"

> "The finding of compliance with 132.41.00(1) is addressed *supra*. The finding of compliance with 132.41.00(5) is not supported by substantial evidence in the whole record. Supp Rec 201-234.
>
> "The lack of an approval condition to bring all of Tilbury Street to City Standards violates policy 123.00." Petition for Review 35.

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[16] An e-mail message in the record from the Transit Manager for the Yamhill County Transit Area states that although there is presently no official stop at the subject property, bus riders may request that buses stop at the subject property. Record 152.

[17] Specifically, that finding does not include a finding that NE Cumulus Avenue is an existing transit street. That may be because there was no dispute below that NE Cumulus Avenue is an existing transit street, but we cannot assume that was the case.

Petitioners' reference to their prior arguments regarding MCP 132.41.00(1) and their one-sentence argument concerning MCP Policy 123.00 are undeveloped and obscure. Neither is sufficiently developed to merit review, and both arguments are rejected for that reason. *Deschutes Development*.

MCP Policy 132.41.00(5) establishes "[m]itigation of other neighborhood concerns such as safety, noise, and aesthetics" as a "high priority" "consideration" "[w]hen assessing the adequacy of local traffic circulation."[18] Although petitioners argue that the city's finding of compliance with MCP Policy 132.41.00(5) is not supported by substantial evidence, the real problem is that the city failed to adopt any findings concerning MCP Policy 132.41.00(5). Respondent points to findings that appear at Record 97. While there is a reference in those findings that required landscaping "will improve the aesthetic appeal of the roadways," the findings address other considerations under MCP Policy 132.41.00 but do not address "safety or noise under MCP Policy 132.41.00(5). *See* n 18. In any event, the finding at Record 97 is included in the June 10, 2011 five-part document that the city failed to adopt as findings when it adopted Ordinance 4941.

On remand the city may first want to address whether and how MCP Policy 132.41.00(5) applies to an application such as the one that is at issue in this appeal. If MCP

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[18] The text of MCP Policy 132.41.00(5) is set out below:

> "132.41.00 Residential Street Network – A safe and convenient network of residential streets should serve neighborhoods. When assessing the adequacy of local traffic circulation, the following considerations are of high priority:
>
> "1. Pedestrian circulation,
>
> "2. Enhancement of emergency vehicle access,
>
> "3. Reduction of emergency vehicle response times,
>
> "4. Reduction of speeds in neighborhoods, and
>
> "5. Mitigation of other neighborhood concerns such as safety, noise, and aesthetics.

Policy 132.41.00(5) applies in some way to the disputed application, the city must explain how MCP Policy 132.41.00(5) applies and whether the proposal is consistent with MCP Policy 132.41.00(5).

Petitioners' challenges under MCP policies 132.41.00(1) and 123.00 are denied. Petitioners' challenge under 132.41.00(5) is sustained.

The third assignment of error is sustained in part.

FOURTH ASSIGNMENT OF ERROR

Petitioners assert two unrelated subassignments of error under the fourth assignment of error. We address each in turn.

A. Improper Authorization of Replat Without Public Hearings

As noted earlier, as originally proposed, the comprehensive plan and zoning map designations for lot 36 in the southeastern corner of the proposal were to be changed to permit that lot to be developed commercially. That aspect of the proposal was withdrawn, and lot 36 was instead proposed and approved for open space use. In an April 22, 2011 letter to Habitat from the planning department, Habitat was advised to submit a revised tentative plan to reflect the changed proposal for lot 36.

Petitioners cite MZO 17.53.070(D), which sets out the requirements for a tentative subdivision plan which include, among other things, that the tentative plan include "[s]ites, if any, allocated for purposes other than single-family dwellings, such as multiple-family dwellings, parkland, open space common areas, etc." Petitioners also cite MZO 17.53.071 which requires, among other things, that a tentative plan for subdivision that will create 10 or more lots must be approved by the planning commission. Petitioners contend the city must have the "complete plat" before it and characterize the city's requirement for a revised tentative plan to reflect the changed application as authorizing a partial replatting outside the public process. Petition for Review 37.

Although the letter to Habitat could have been clearer, all it required was that Habitat submit a revised tentative plan to reflect the amendment to the application concerning lot 36 that was proposed by Habitat and approved by both the planning commission and city council. We fail to see how that requirement constitutes error and we do not agree with petitioners' characterization of that requirement as authorizing a replat that improperly excludes the public.

This subassignment of error is denied.

B. Half Street Improvements

Under MZO 17.53.101(H) half street improvements, while not generally acceptable, are allowed under some circumstances and if certain findings can be made.[19] Petitioners contend the city authorized half-street improvements without making the findings required by MZO 17.53.010(H).

Respondent responds in two ways. First, respondent argues that petitioners never raised any issue under MZO 17.53.010(H) and for that reason may not assign error to the city's failure to adopt findings under MZO 17.53.101(H). Second, respondent argues that it required more than half-street improvements in NE Atlantic Street and NE Tilbury Street, and so MZO 17.53.101(H) does not apply. In their reply brief, petitioners cite to testimony that refers to half-street improvements. Those general references to half-street improvements are not sufficient to raise the issue that petitioners seek to raise on appeal, *i.e.*, whether the city erred by failing to adopt the findings required by MZO 17.53.101(H). We agree with

[19] In their petition for review, petitioners actually cite MZO 17.51.010(H), a section of the MZO that does not exist. We assume petitioners meant to cite MZO 17.53.101(H), which provides:

> "Half streets. Half streets, while generally not acceptable, may be approved where essential to the reasonable development of the subdivision, when in conformity with other requirements of these regulations, and when the Planning Commission finds it will be practical to require the dedication of the other half when the adjoining property is subdivided. Whenever a half street is adjacent to a tract to be subdivided, the other half of the street shall be platted within such tract. Reserve strips and street plugs may be required to preserve the objectives of half streets."

respondent's waiver argument and therefore do not reach the question of whether MZO 17.53.101(H) applies, because petitioners failed to preserve that issue by raising it below. *See* n 10.

This subassignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under ORS 197.309, a city may not impose a condition of approval on a proposed residential development that has "the effect of establishing the sales price for a housing unit," or require that housing units or lots be sold to "any particular class or group of purchasers."[20] Petitioners argue the city's decision violates ORS 197.309.

Respondent and Habitat (together, respondents) answer, and we agree, that the challenged decision's conditions of approval do not have any of the proscribed effects in ORS 197.309. While Habitat proposes to develop the subject property for low and moderate income home owners and sell the proposed houses to low and moderate income home owners, the city's conditions of approval do not require that it do so. As respondent correctly

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[20] ORS 197.309 provides:

> "(1) Except as provided in subsection (2) of this section, a city, county or metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178, a requirement that has the effect of establishing the sales price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale to any particular class or group of purchasers.
>
> "(2) This section does not limit the authority of a city, county or metropolitan service district to:
>
> > "(a) Adopt or enforce a land use regulation, functional plan provision or condition of approval creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or condition designed to increase the supply of moderate or lower cost housing units; or
> >
> > "(b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295."

notes, "[s]hort of discrimination against a protected class in certain situations, private landowners have the right to sell their property as they please." Respondent's Brief 23.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Pursuant to ORS 197.835(12), LUBA may reverse or remand a quasi-judicial land use decision due to *ex parte* contacts or bias resulting from *ex parte* contacts if the member of a city decision making body that has the *ex parte* contact fails to make the disclosure required by ORS 227.180(3), and provide the opportunity for rebuttal required by that statute.[21] Petitioners argue that the challenged decision should be reversed or remanded because City Councilor Menke engaged in *ex parte* contacts that petitioners were denied an opportunity to rebut. Petitioners also argue that the record establishes that Councilor Menke, a former Habitat board member, has a conflict of interest and was biased in favor of Habitat. Petitioners further contend Councilor Menke committed the Class A misdemeanor of false swearing by falsely affirming that she reviewed the written record in this matter and listened to the recording of the June 14, 2011 city council public hearing.

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[21] ORS 197.835(12) provides:

> "[LUBA] may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body, only if the member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever is applicable."

ORS 215.422(3) applies to counties; ORS 227.180(3) applies to cities. ORS 227.180(3) provides:

> "No decision or action of a * * * city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

A. Ex Parte Contact

The planning commission decision in this matter was adopted on April 21, 2011. Petitioners' appeal of that decision was filed on May 9, 2011. The city council's public hearing to consider petitioners' appeal was held on June 14, 2011 and the record was held open until June 21, 2011 and closed on that date. Councilor Menke did not attend the June 14, 2011 city council public hearing on petitioners' appeal. The city council rendered its decision on June 28, 2011. Three city councilors voted to deny the appeal and approve the request. Councilor Menke voted with this group. Three city councilors voted to approve the appeal and deny the request. The mayor voted to break the tie and voted to deny the appeal and grant the requested rezoning, planned development overlay and tentative subdivision plan. The first reading of Ordinance 4941 was approved on June 28, 2011. The second reading was approved on July 12, 2011.

Early in the June 28, 2011 city council meeting, the mayor noted that Councilor Menke did not attend the June 14, 2011 public hearing and asked Council Menke to affirm that she had listened to the recording of that public hearing and had reviewed the material in the record. Councilor Menke affirmed that she has "reviewed all the tapes and written materials * * *." Supplemental Record 10; Petition for Review Appendix 161. The mayor then asked if any council members wished to make any *ex parte* contact disclosures. The partial transcript attached to the petition for review is generally consistent with the minutes that appear at Supplemental Record 11. We set out a portion of that transcript below:

> "Mayor: * * * Does any Councilor need to declare any conduct – uh, any contact – prior to this meeting with the applicant or any other party involved in this hearing or any other source of information outside of staff regarding the subject of this meeting? So, did you have any contact or any of the Councilors have any ex parte contact? Kellie [Menke]?
>
> "Menke: Yes, I do. Uh, prior to the hearing in June, I, uh, was at a meeting and introduced myself to the new Executive Director of Habitat for Humanity. It was basically just some introductory remarks, that was all.
>
> "Mayor: OK, and there was nothing discussed with regard to this application?

"Menke: It might have come up, just briefly in passing, that is all.

"Mayor: OK, how about any of the other Councilors? Paul? Kevin?

"Kevin Jeffries: Well, I just for the record, I did receive an email after the closing date for the record. Knowing that it was past the date, I didn't read it and forwarded it on [to] Rose [City Secretary]. I wouldn't necessarily call it an ex parte contact, but because it was sent to me after the date and I did send it on, there may be [garbled] that I did read it, but I simply forwarded it on.

"Mayor: OK. Paul?

"Paul May: I received the same – probably the same – email, and I just deleted it.

"Mayor: OK, thank you Paul. Anybody else? [pause] OK, hearing none, since we did have someone who did have ex parte, uh, a Councilor who did have an ex parte communication, what I'm going to have to do is I'm going to reopen the public hearing, but I'm reopening it solely for the purpose of permitting rebuttal on the substance of any communication that Councilor Menke had * * * and then also * * * with the two councilors who did not read the memo. Does anyone wish to rebut any of the communications that you heard the Councilors mention they received? [Pause, 4 seconds]

"OK, I will now open the public hearings [gavel]. I should have done that a little bit ago. Again, does anyone wish to rebut any of the testimony that was received or heard tonight by the Council? [Pause, 4 seconds]. If not, I'm going to close the public hearing again [gavel] * * *." Petition for Review Appendix 161-62.

Two weeks later, at the July 12, 2011 city council meeting, one of the petitioners asked the city council to reopen the public hearing in this matter to allow discussion of Councilor Menke's affirmation and *ex parte* contact. Supplemental Record 3; Petition for Review Appendix 165. The mayor refused to do so. *Id*. Citing *Horizon Construction, Inc. v. City of Newburg*, 114 Or App 249, 834 P2d 523 (1992), petitioners contend Councilor Menke's *ex parte* contact disclosure was inadequate. Petitioners also argue that the few seconds petitioners had to request an opportunity to examine Councilor Menke concerning her contact with the Habitat Director at the June 28, 2011 council meeting, before the mayor closed the hearing, was inadequate. We understand petitioners to argue that because they were not given an adequate opportunity to explore Councilor Menke's *ex parte* contacts at

the June 28, 2011 city council meeting, the city should have granted their later request to question Councilor Menke at the July 12, 2011 city council meeting.

Councilor Menke's disclosure came at the first meeting she attended in this matter. The disclosure is somewhat vague about precisely what may have been said about Habitat's application. If all that happened was a mention or acknowledgement of the pending applications, there would be nothing to rebut and such a mention or acknowledgment likely would not even qualify as an *ex parte* contact regarding any facts at issue that would give rise to a right of rebuttal. If the conversation went further, there could have been an *ex parte* contact that petitioners had a right to rebut. However, at the very least Councilor Menke's disclosure was sufficient to alert petitioners of the possibility of an *ex parte* contact with the Habitat Director and to obligate petitioners to ask for clarification about the nature of that contact. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368, 372 (1999).

This case is unlike *Horizon* where the *ex parte* contact disclosure was not made at the first opportunity to do so and where the public record had closed before the disclosure was made and was never reopened. Here Council Menke disclosed the contact and there was additional discussion with other councilors about other contacts. The mayor then asked if anyone wanted to rebut the contacts, and no one responded. Unlike *Horizon*, in this case the mayor actually reopened the public hearing. After reopening the hearing, the mayor asked for a second time if anyone wanted to rebut the contacts. Again no one requested a right of rebuttal or a right to further question Councilor Menke or the other councilors about the substance of the disclosed contacts. The city adequately disclosed the contacts, gave petitioners an adequate opportunity to rebut or explore those contacts on June 28, 2011, and therefore was not obligated to grant petitioners' belated request on July 12, 2011 to rebut Council Menke's contact with Habitat.

This subassignment of error is denied.

B. Conflict of Interest

Petitioners next argue that Councilor Menke has a conflict of interest in this matter and therefore should not have participated in the decision. However, Councilor Menke would only have a "conflict of interest," as ORS 244.020(1) defines that term, if the decision would result in a "pecuniary benefit" to Councilor Menke, her family or an associated business.[22] The closest petitioners come to alleging that Councilor Menke's vote in this matter resulted in pecuniary benefit to her, her family or a related business is to suggest her vote may have been a product of her desire to curry favor with Habitat and its members to benefit her accounting and financial planning practice. That speculation is exactly that, speculation. Moreover, any economic benefit Councilor Menke might indirectly realize by voting in ways that may curry favor with Habitat members is far too indirect to constitute a "pecuniary benefit," as that term is used in ORS 244.020(1).

This subassignment of error is denied.

C. Bias

Citing Councilor Menke's prior service as a Habitat board member and statements that petitioners argue show Councilor Menke only looked at the evidence in support of the application, petitioners contend Councilor Menke is biased and should not have participated in the decision.

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[22] ORS 244.020 defines "actual conflict of interest" and "potential conflict of interest" as follows:

> "'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated * * *." ORS 244.020(1).

> "'Potential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated * * *." ORS 244.020(12).

To establish that Councilor Menke is biased, petitioners must establish that Councilor Menke's action is this matter was a product of her positive or negative bias rather than a product of her independent view of the facts and law. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 (2005); *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). Any inferences that might be drawn from the fact that Councilor Menke previously served on the Habitat board fall substantially short of establishing bias in this matter. *See Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 165-66 (2009) (evidence of a strong emotional commitment by a decision maker to approve or to defeat an application for land use approval is generally required to demonstrate bias); *West v. City of Salem*, 61 Or LUBA 166, 172 (2010) (that a hearings officer is paid by a city is not sufficient to show the hearings officer is biased).

With regard to petitioners' claim that bias may be inferred from what petitioners characterize as Councilor Menke's mistakes about what the record shows, Councilor Menke's observation that petitioners may be unwilling to accept change in their neighborhood may or may not be supported by the record. And it is at least as likely that any erroneous statements Councilor Menke may have made about the proposed use of the lot that was originally proposed for commercial development and the likely length of time it will take to complete the project can be attributed to the very complicated and confusing record as opposed to any bias on her part. Regarding the issue of petitioners' willingness to change in their neighborhood, it is also very possible that Councilor Menke simply viewed the evidence differently than petitioners do, and drew different conclusions from the evidence.

Petitioners have not established that Councilor Menke's vote in this matter was a product of any bias in favor of Habitat. This subassignment of error is denied.

D. False Swearing

Citing the alleged misstatement regarding petitioners' unwillingness to accept change in their neighborhood, the proposed use of the lot originally proposed for commercial use

and the time that will be needed to complete the project, petitioners contend Councilor Menke is guilty of false swearing under ORS 162.0575(1). False Swearing is a Class A misdemeanor. ORS 162.075(2). "A person commits the crime of false swearing if the person makes a false *sworn statement* knowing it to be false." ORS 162.075(1) (emphasis added.) To constitute false swearing, the statement must be a "sworn statement" as defined in ORS 162.055(4), be false, and the person making the false statement must know it is false.[23]

There are a number of problems with petitioners' false swearing subassignment of error. As respondent correctly points out, LUBA's jurisdiction is limited to review of land use decisions and limited land use decisions. ORS 197.825(1). Adjudication of petitioners' allegations of false swearing under ORS 162.075(1) is not within LUBA's scope of review.

And even if LUBA could consider petitioners' allegations, we have already concluded that the statements concerning petitioners' unwillingness to accept change in their neighborhood, the proposed use of the lot originally proposed for commercial use and the time that will be needed to complete the project, assuming they are erroneous, could simply be mistakes based on a complicated record. Even if the statements are erroneous, there is certainly nothing in the record to support petitioners' suggestion that Councilor Menke knew they were erroneous when the statements were made. Finally, petitioners do not establish that Councilor Menke's statements were "sworn statements" as defined in ORS 162.055(4). *See* n 23. Petitioners do not argue that her statements at the June 28, 2011 meeting were given "under any form of oath or affirmation or by declaration under penalty of perjury as described in ORCP 1E."

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[23] ORS 162.055(4) provides:

> "'Sworn statement' means any statement that attests to the truth of what is stated and that is knowingly given under any form of oath or affirmation or by declaration under penalty of perjury as described in ORCP 1 E."

This subassignment of error is denied.

The sixth assignment of error is denied.

CONCLUSION

We sustain, or sustain in part, subassignments of error C(2) (under the first assignment of error), D (under the second assignment of error) and B(2), B(3), B(5) and B(6) under the third assignment of error. All other assignments of error and subassignments of error are denied.

The city's decision is remanded.