BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOUSING AUTHORITY OF JACKSON COUNTY,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

DAVID FROHNMAYER, MIRA FROHNMAYER,
GERALD PRINGLE, HARRIET PRINGLE,
CHRIS HILL and DEVON FINLEY.
Intervenors-Respondents.

LUBA No. 2011-089

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Seth King and Perkins Coie LLP.

John R. Huttl, Medford City Attorney, Medford, filed a response brief and argued on behalf of respondent.

Aaron T. Bals, Eugene, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief were William F. Gary and Harrang Long Gary Rudnick PC.

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

REMANDED 05/24/2012

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city council decision reversing a decision by the city's Site Plan and Architectural Review Committee to approve petitioner's application for multi-family housing.

REPLY BRIEFS

Petitioner moves for permission to file two reply briefs. According to petitioner, the reply briefs respond to "new matters" that petitioner argues are raised in respondent's and intervenors-respondents' (interevenors') briefs. OAR 661-010-0039 allows a reply brief limited to responding to new matters raised in a response brief. For the reasons set forth in each of petitioner's motions to file a reply brief, we agree with petitioner that the reply briefs respond to "new matters" raised in the respondent's and intervenors' briefs. The reply briefs are allowed, with one exception.

Petitioner's reply to the city's response brief includes as appendices 1 through 4 pages from a document entitled "Planning Commission Staff Report" that is dated August 26, 2005. The document is not part of the record of this appeal and respondent objects to its inclusion as an appendix to the reply brief. Absent any explanation from petitioner regarding why the document may be included as an attachment to the reply brief or considered by LUBA, we do not consider it.

FACTS

Petitioner owns a 5.96-acre property located at the northeast corner of Spring Street and Berkeley Way. A city park, Donahue-Frohnmayer Park, is located adjacent to the eastern boundary of the property and vacant land abuts the northern boundary. Single family residences are located to the south of the property across Spring Street.

In 1985 the city designated the subject property as Urban High Density Residential (UH) on the city's General Land Use Plan map that is part of the city's comprehensive plan,

in order to meet a need for additional UH-designated land that was identified in the comprehensive plan's housing element. At the time the property was designated UH on the city' General Land Use Plan map, the property was zoned SFR-4 (Single Family Residential – 4 dwelling units per gross acre), a zoning classification that implements the comprehensive plan map's Urban Residential (UR) designation. In 2005, the city approved a consolidated application to change to the zoning map designation of the subject property and other adjacent properties to MFR-20 (Multiple-Family Residential – 20 units per gross acre) and SFR-4 and to develop a planned unit development (PUD) on 29 total acres.[1] In 2010, the 2005 PUD approval was apparently terminated by the previous owner of the subject property.[2]

Medford Land Development Code (MLDC) 10.132 designates the city's Site Plan and Architectural Review (SPAC) committee as the approving authority for site plan and architectural review. MLDC 10.285 describes the site plan and architectural review process and explains when site plan and architectural review is required.[3] In March, 2011, petitioner

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[1] The MFR-20 zoning designation is one of the two zoning classifications that implement the UH plan designation. The other designation is MFR-30.

[2] Medford Land Development Code (MLDC) 10.245(B) provides that an approved PUD can be terminated as provided in that subsection.

[3] MLDC 10.285 provides:

> "Site Plan and Architectural Review is required of all projects which are not exempted from the Development Permit process as stated in Section 10.031, Exemptions to the Development Permit Requirement. Site Plan and Architectural Review applications shall be submitted to the Planning Department prior to the application for a building permit. The Site Plan and Architectural Review process is established in order to provide for review of the functional and aesthetic adequacy of development and to assure compliance with the standards and criteria set forth in this chapter for the development of property as applied to the improvement of individual lots or parcels of land as required by this code.
>
> "Site Plan and Architectural Review considers consistency in the aesthetic design, site planning and general placement of related facilities such as street improvements, off-street parking, loading and unloading areas, points of ingress and egress as related to bordering traffic flow patterns, the design, placement and arrangement of buildings as well as any other subjects included in the code which are essential to the best utilization of land in order to

sought site plan and architectural review for a 100-unit multi-family housing development on the subject 5.96 acre property. The application proposes fifteen two-story buildings that include four, eight, or ten units per building, set back approximately 20 feet from the property boundaries or abutting rights of way. The rear sides and porches of the units along Spring Street will face Spring Street. Parking for the units is proposed to be located in the interior of the subject property. The planning department recommended approval with conditions, and SPAC approved the application subject to conditions of approval.

SPAC's decision was appealed to the city council. After holding a hearing on the appeal, the city council voted to uphold the appeals and deny the application. Two weeks after its oral decision, the city council voted to adopt its written decision denying the application. This appeal followed.

FIRST AND THIRD ASSIGNMENTS OF ERROR

One of the two bases the city council set forth for denying the application is that SPAC erred in concluding that the subject property is zoned MFR-20.[4] In its first and third assignments of error, petitioner assigns error to the city council's denial of its application on that basis. The straightforward issue that is at the heart of these assignments of error is the zoning designation of petitioner's property. For the reasons discussed below, we agree with petitioner that the city council erred in concluding that the zoning designation of the property is not MFR-20.

> preserve the public safety and general welfare, and which will encourage development and use of lands in harmony with the character of the neighborhood within which the development is proposed."

[4] The city council found in relevant part "SPAC erred * * * when it concluded that applicant had MFR-20 zoning * * *." Record 9-10. We understand the city council to have concluded that the property is not zoned MFR-20 and that for that reason, petitioner's proposed multi-family housing development could not be approved because such a development is only allowed on land that is zoned for high density residential development.

LUBA is authorized to reverse or remand a decision if the local government "(C) [m]ade a decision not supported by substantial evidence in the whole record; [or] (D) [i]mproperly construed the applicable law[.]" ORS 197.835(9)(a)(C)-(D). Petitioner argues that the city council's conclusion that the property is not zoned MFR-20 misconstrues applicable law and is not supported by substantial evidence in the whole record. Petitioner explains that it is undisputed that the "City of Medford Zoning Map" that is a part of the MLDC shows the subject property is zoned MFR-20. Petitioner argues, and we agree, that there is no reason to believe the zoning of the subject property is something other than the MFR-20 zoning that is undisputedly shown on the city's official zoning map.[5]

On appeal, the city does not dispute that the City of Medford Zoning Map shows the property zoned MFR-20, but argues that "the zoning for this parcel on that map is either erroneous or in need of additional analysis as to its validity." City of Medford Response Brief 13. Rrespondents point to evidence and arguments in the record that we understand respondents to argue call into question the validity of the official zoning map designation of the subject property: (1) the 2005 Order that rezoned the property to MFR-20; (2) testimony by project opponents that the 2010 decision that terminated the PUD also terminated the rezoning that was approved in 2005; and (3) a Jackson County tax assessor's statement that shows the zoning of the property is SFR-4. However, none of the evidence and arguments cited by respondents is sufficient to call into question the validity of the official zoning map designation.

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[5] MLDC 10.301 provides:

> "The zoning districts established by this Code are officially identified and defined on the map entitled City of Medford Zoning Map which, together with the explanatory information contained thereon, is hereby made a part of this Code."

Petitioner requests that LUBA take official notice of the official City of Medford Zoning Map under Oregon Evidence Code 202(7). The motion is granted and we take official notice of the city's official zoning map.

First, the record includes the 2005 Order that re-zoned the subject property, which refers to and incorporates exhibits into the order. Those exhibits are not included in the record. But that 2005 Order identifies 11 tax lots and provides that zoning of those tax lots is "changed from SFR-6 to SFR-4 * * * and from SFR-4 to MFR-20 * * * zoning district." Record 351. Because other evidence in the record confirms that the subject property was previously zoned SFR-4 in 1985, and there is no evidence that it was ever zoned SFR-6, it would seem to follow that the subject property is one of the tax lots that the 2005 Order rezoned from SFR-4 to MFR-20. In addition, as already noted, MFR-20 zoning is consistent with the UH General Land Use Plan map designation, whereas the SFR-4 designation is not consistent with the UH General Land Use Plan map designation. *See* n 1. That also suggests that the 2005 decision rezoned the subject property from SFR-4 to MFR-20. That the included portion of the 2005 Order does not specify by tax lot number which tax lots were rezoned to SFR-4 and which tax lots are rezoned to MFR-20 does not mean that the order is ambiguous or that it calls into question the validity of the official zoning map designation of the property.[6]

Second, intervenors also suggest that even if the subject property was zoned MFR-20 in 2005, the 2010 decision that terminated the 2005 PUD approval had the legal effect of eliminating the MFR-20 zoning. Although it is unclear from the city council's decision, the city may have agreed with that suggestion. Assuming the city council did so, it erred. No party submitted a copy of the 2010 decision that terminated the 2005 PUD, so any argument

[6] The city council seems to have faulted petitioner for not ensuring that the record includes the complete file from the 2005 rezoning to more clearly establish that the subject property is zoned MFR-20. The city council's findings include the following:

> "* * * When asked where the final order on zoning made it evident that the subject 5.96 acre[s were] zoned SFR-4 [sic should be MFR-20], the Planning Director explained that other documents in the consolidated file reflected that. * * * Those documents were not in this record." Record 9.

that the PUD termination might have affected the 2005 rezoning is pure speculation. In addition, any contention that the PUD termination also had the legal effect of terminating the 2005 rezoning is inconsistent with MLDC 10.245(B)(1), which governs termination of PUDs where substantial development has not occurred, and MLDC 10.245(B)(2), which governs termination of PUDs where substantial development has occurred. Both MLDC 10.245(B)(1) and (2) provide that "[t]ermination of a PUD shall not affect other land use actions taken by the City which concern the PUD property." Intervenors' speculation about the possible legal effect of the 2010 decision terminating the PUD does not call into question the MFR-20 zoning shown on the official zoning map. Similarly, maps prepared by the *county* tax assessor that show the zoning of the property as SFR-4 do not call into question the MFR-20 zoning shown on the official zoning map where the county tax assessor has no jurisdiction over the zoning of the property.[7]

Accordingly, for the reasons set forth above we agree with petitioner that the city council erred in denying the application on the basis that the property is not zoned MFR-20.

The first and third assignments of error are sustained.

[7] Intervenors also suggest that the city failed to give the Department of Land Conservation and Development notice of the 2005 application for rezoning and that failure means the 2005 rezoning never took effect. However, under ORS 197.175(2)(d) and (e) the city must make land use decisions in accordance with (1) the city's acknowledged land use regulations, including the city's official zoning map, or (2) if subject to an unacknowledged but effective amendment, the amendment plus any applicable statewide planning goals. Accordingly, the city must make a decision on the site plan and architectural review application either (1) in compliance with the official zoning map designation that shows the property zoned MFR-20, or (2) in compliance with the unacknowledged 2005 order rezoning the property to MFR-20, with the additional obligation of considering compliance with any applicable statewide planning goals, presumably including Statewide Planning Goal 10 (Housing). In either case, the subject property is zoned MFR-20 for purposes of approving or denying petitioner's application for site plan and architectural review.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

As noted, MLDC 10.285 requires site plan and architectural review for petitioner's proposed development. MLDC 10.285 describes the procedure for SPAC's review, in relevant part:

> "Site Plan and Architectural Review is required of all projects which are not exempted from the Development Permit process as stated in Section 10.031, Exemptions to the Development Permit Requirement. Site Plan and Architectural Review applications shall be submitted to the Planning Department prior to the application for a building permit. The Site Plan and Architectural Review process is established in order to provide for review of the functional and aesthetic adequacy of development and to assure compliance with the standards and criteria set forth in this chapter for the development of property as applied to the improvement of individual lots or parcels of land as required by this code. * * *"

MLDC 10.290 provides the approval criteria for site plans:

> "The Site Plan and Architectural Commission shall approve a site plan and architectural review application if it can find that the proposed development conforms, or can be made to conform through the imposition of conditions, with the following criteria:
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> "(1) The proposed development is compatible with uses and development that exist on adjacent land, and
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> "(2) The proposed development complies with the applicable provisions of all city ordinances, or the Site Plan and Architectural Commission has approved (an) exception(s) as provided in MLDC Section 10.253."[8]

MLDC 10.291 allows SPAC to impose "conditions determined to be reasonably necessary to ensure compliance with the standards of the code and the criteria in [MLDC]* * * 10.290,

[8] ORS 197.307(4) provides in relevant part that the city may adopt and apply "only clear and objective standards, conditions and procedures regulating the development of needed housing * * *." Additionally, ORS 227.173(2) provides in relevant part that where an ordinance establishes such approval standards "the standards must be clear and objective on the face of the ordinance." No party argues before LUBA that the proposed development is "needed housing" as defined in ORS 197.303, and we do not consider the issue.

and to otherwise protect the health, safety and general welfare of the surrounding area and community as a whole. * * *"[9]

The second of the two bases for which the city council denied the application is that SPAC erred "when it concluded that applicant's proposed development with the single condition imposed was compatible with uses and development that exist on adjacent land[.]"

[9] MLDC 10.291 provides in its entirety:

> "In approving a site plan and architectural review application, the Site Plan and Architectural Commission may impose, in addition to those standards expressly specified in this code, conditions determined to be reasonably necessary to ensure compliance with the standards of the code and the criteria in Section 10.290, and to otherwise protect the health, safety and general welfare of the surrounding area and community as a whole. These conditions may include, but are not limited to the following:
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> "(1) Limiting the number, height, location and size of signs;
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> "(2) Requiring the installation of appropriate public facilities and services and dedication of land to accommodate public facilities when needed;
>
> "(3) Limiting the visibility of mechanical equipment through screening or other appropriate measures;
>
> "(4) Requiring the installation or modification of irrigated landscaping, walls, fences or other methods of screening and buffering;
>
> "(5) Limiting or altering the location, height, bulk, configuration or setback of buildings, structures and improvements.
>
> "(6) Requiring the improvement of an existing, dedicated alley which will be used for ingress or egress for a development;
>
> "(7) Controlling the number and location of parking and loading facilities, points of ingress and egress and providing for the internal circulation of motorized vehicles, bicycles, public transit and pedestrians;
>
> "(8) Requiring the retention of existing natural features;
>
> "(9) Modifying architectural design elements including exterior construction materials and their colors, roofline, fenestration and restricting openings in the exterior walls of structures;
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> "(10) Restricting the height, directional orientation and intensity of exterior lighting."

Record 9. In its second and fourth assignments of error, petitioner assigns error to that basis for denying the application.

A. Second Assignment of Error

In its second assignment of error, petitioner argues that the city erred when it considered the provisions of MLDC 10.285 as independently applicable approval criteria.[10] Petitioner argues that the only approval criteria for a site plan and architectural review application are found at MLDC 10.290, and that MLDC 10.285 is a purpose statement that is not an applicable approval criterion that an applicant must satisfy.

Respondents respond that although the first paragraph of MLDC 10.285 is accurately characterized as a purpose statement, the second paragraph of MLDC 10.285 informs what is meant by MLDC 10.290's requirement that the city determine that the proposed development is "compatible with uses and development that exist on adjacent land." *See* n 10. According to respondents, the factors set out in the second paragraph inform SPAC regarding factors that it may consider in determining whether a project is compatible under MLDC 10.290(1).

We agree with respondents that the factors set out in the second paragraph of MLDC 10.285, while not independent approval criteria, provide context for interpreting MLDC 10.290(1) and a project's "compatibil[ity] with existing adjacent land uses," and that the city did not err in considering the factors set out in MLDC 10.285.

The second assignment of error is denied.

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[10] The second paragraph of MLDC 10.285 provides in relevant part:

> "Site Plan and Architectural Review considers consistency in the aesthetic design, site planning and general placement of related facilities such as street improvements, off-street parking, loading and unloading areas, points of ingress and egress as related to bordering traffic flow patterns, the design, placement and arrangement of buildings as well as any other subjects included in the code which are essential to the best utilization of land in order to preserve the public safety and general welfare, and which will encourage development and use of lands in harmony with the character of the neighborhood within which the development is proposed."

B. Fourth Assignment of Error

As noted, the city council denied the application on the basis that SPAC erred "when it concluded that applicant's proposed development with the single condition imposed was compatible with uses and development that exist on adjacent land[.]"[11] In its fourth assignment of error, petitioner argues that the city council's findings are inadequate to explain why, under the city council's scope of review of SPAC decisions set out in MLDC 10.053, SPAC's decision that the project is compatible with uses and development on adjacent land is not supported by substantial evidence in the record, or why SPAC committed an error of law in concluding that the project satisfies MLDC 10.290.[12] Petitioner argues that the city council findings are inadequate because the findings do not explain the legal reasoning that led to the findings.

Intervenors first respond that the city council correctly concluded that the evidence in the record before SPAC did not support its decision. Intervenors' Brief 17. However, we cannot tell from the decision whether the city council reversed SPAC's decision because it determined that there was not substantial evidence to support SPAC's decision, or whether it determined that SPAC committed errors in law, or both. The section of the decision entitled "Facts" points to some evidence in the record regarding neighborhood concerns over potential increases in traffic congestion and delays in the surrounding neighborhood, and also describes evidence from the city's Public Works Department that appears to contradict that

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[11] The decision concludes "[a]s set forth above, when faced with an application to build 94,500 square feet of multi-family two-story units on 5.96 acres, an application that contrasts in almost every aspect that SPAC is to consider when determining compatibility with surrounding uses, SPAC erred when it determined that the proposed project was compatible after considering code required development standards, without imposing any conditions under [MLDC] 10.291." Record 8.

[12] MLDC 10.053 provides the city council's scope of review of SPAC decisions:

> "* * * [T]he city council * * * shall not re-examine issues of fact and shall limit its review to determining whether there is substantial evidence to support the findings of the tribunal which heard the matter, or to determining if errors in law were committed by such tribunal. * * *"

evidence.[13] The decision also notes that the applicant agreed to provide improved sidewalks adjacent to the property and notes that it did not propose to improve any sidewalks beyond the borders of its property. The decision also points out that the proposal includes direct access to the adjacent Donahue-Frohnmayer Park and that the buildings on the western edge of the property adjacent to the park would create a barrier to sunlight, breezes and panoramic views for people using the park. But the decision does not explain why the city council determined, if it did so, that the evidence that SPAC relied on to find that MLDC 10.290 is satisfied is not "substantial evidence" within the meaning of MLDC 10.053.

Similarly we cannot tell whether the city council reversed SPAC's decision because it concluded that SPAC committed "errors in law."[14] The city council's decision includes a section entitled "SPAC's Findings" that may be an attempt to identify "errors in law" that SPAC committed. Within the section, the decision quotes some of SPAC's findings regarding whether the buildings in the project are "compatible with uses and development that exist on adjacent land" under MLDC 10.290, and concludes that "* * * simply because a proposed design is not more incompatible with surrounding uses, and simply because a proposed design meets minimum code requirements for permitted uses within zones does not support the conclusion that the proposed design is therefore compatible and in harmony with uses and development on adjacent parcels." Record 7. However, any errors in law that

[13] Petitioner proposed two driveway entrances and exits to the development, from North Berkeley Way and from Spring Street. North Berkeley Way dead-ends just to the north of the northern property line, and Spring Street connects to Springbrook Road approximately 600 feet east of the property line.

[14] The city council adopted two sets of findings to support its decision. Record 2-10, 12-13. In the main findings document, at the beginning of the findings in a section entitled "Scope of Compatibility Considerations" the city concluded that MLDC 10.285 allows the city to consider the various factors set out in MLDC 10.285 to determine compatibility under MLDC 10.290, and that the city can also impose conditions that address compatibility issues not specifically mentioned in MLDC 10.285 or MLDC 10.291. Record 2-3. In the second set of findings, the city adopted proposed findings of fact submitted by intervenors that conclude that the proposed development fails to satisfy specific factors set out in MLDC 10.285. Record 12-13.

SPAC may have committed are not apparent from that section of the decision, which appears to identify inadequacies in SPAC's findings rather than errors in law.

In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008) (the findings must provide a coherent explanation for why the city believes the proposal does not comply with the criteria); *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 272 (2000). The city's findings do neither, and we agree with petitioner that the city's findings are inadequate.

The city's findings at Record 2-10 do not explain whether SPAC committed errors in law or clearly articulate the legal errors that SPAC committed.[15] The decision also does not explain whether or why the city council concluded that the evidence that SPAC relied on to approve the application was not "substantial evidence." On remand, the city council must explain its basis under MLDC 10.053 for concluding that SPAC erred in approving the application in a way that either informs petitioner what steps are necessary to obtain approval or that it is unlikely that the application will be approved.

The fourth assignment of error is sustained.

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[15] The city's findings at Record 12-13 may be adequate to explain why the city concluded that the project is inconsistent with some of the factors set out in MLDC 10.285. But as we explained above, MLDC 10.285 is not an independent approval criterion, and we do not understand the city to have concluded that the factors set out in MLDC 10.285 are the only relevant factors that SPAC can or should consider in determining whether MLDC 10.290(1) is satisfied. We understand the city to have concluded that MLDC 10.285 provides examples of factors that SPAC can consider and that MLDC 10.291 also provides factors that SPAC can consider.

FIFTH ASSIGNMENT OF ERROR/MOTION TO TAKE EVIDENCE

A. Introduction

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. ORS 227.180(3) provides:

> "No decision or action of a planning commission or 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:
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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(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."

On September 1, 2011 the city council held a hearing on intervenors' appeal of SPAC's decision. Seven members of the city council and the mayor were present at the hearing. Councilor Gordon was absent from the meeting. According to the minutes of the September 1 city council meeting and transcribed portions of it provided by petitioner, immediately after opening the public hearing on the appeal, all seven members of the city council who were present at the hearing, as well as the mayor, disclosed as ex parte contacts email communications they received regarding petitioner's proposed development.[16] Councilor

[16] The minutes state:

> "Councilmembers disclosed receipt of written communications from a large number of residents regarding this issue as forwarded via email from the City Manager's office and stated that they would be impartial." Record 21.

Kuntz additionally disclosed as an ex parte contact a conversation he had with one of the intervenors immediately prior to the hearing, and after that disclosure recused himself from participating in the decision and left the hearing.[17] At that point in the hearing, the mayor advised members of the audience that they could rebut the disclosed ex parte contacts during the hearing. Petitioner did not request clarification of the disclosed contacts during the hearing or otherwise raise an issue or attempt to rebut any of the disclosed contacts. At the conclusion of that hearing, the city council closed the hearing and deliberated. Six members of the city council participated in voting on the appeals - four members voted to uphold the appeals and reverse SPAC's decision, and two members voted to deny the appeals and uphold SPAC's decision. Mayor Wheeler participated in the hearing and deliberations, but did not vote on the appeals. Record 23-27.

At the next city council meeting on September 15, 2011, seven members of the city council, including councilor Gordon, and the mayor were present. No member of the city council or the mayor disclosed any ex parte contacts at the beginning of the September 15 meeting. Five members of the city council voted to approve a resolution overturning SPAC's decision and upholding intervenors' appeals. Councilors Gordon and Kuntz, as well as the mayor, were present at the meeting but did not vote on the resolution adopting the final written decision. Councilor Gordon signed the adopted resolution in his capacity as Council President. Record 10.

In its fifth assignment of error, petitioner argues that the city violated ORS 227.180(3) in several ways. First, petitioner argues, the city violated ORS 227.180(3) because although seven members of the city council and the mayor disclosed ex parte contacts in the form of email communications, the disclosure failed to properly identify the

[17] At the September 15, 2011 hearing Councilor Kuntz stated that he is a former employee of and consultant to petitioner.

number and "substance" of the contacts, as ORS 227.180(3) requires. Based on that failure, petitioner argues, the opportunity that petitioner was provided with to rebut the contacts was not a meaningful opportunity. Second, petitioner argues, petitioner was not given a meaningful opportunity to rebut the substance of councilor Kuntz's pre-hearing conversation with one of the intervenors because councilor Kuntz recused himself from participating in the appeal and left the hearing before petitioner was given the opportunity to rebut the contact. Third, petitioner argues, councilor Gordon completely failed to disclose at any time any ex parte contacts. According to petitioner, as demonstrated in attachments to a Motion to Take Evidence Outside the Record that we allow below, councilor Gordon received email communications regarding the appeals, but did not disclose those ex parte contacts at the beginning of the September 1 hearing because he was not present at the hearing, and did not disclose any ex parte contacts at the beginning of the September 15 meeting, the first meeting that he attended regarding the appeals. Fourth, petitioner argues, during the time between the city's oral decision on the appeals on September 1, and the date on which the city adopted its final written decision on the appeals on September 15, Mayor Wheeler engaged in ex parte contact by having a conversation with one of the intervenors regarding the appeals. Mayor Wheeler failed to disclose that ex parte contact.

Respondents answer first that the members of the city council adequately disclosed the substance of the ex parte contact email communications and that in any event, the emails that were received by members of the city council addressed issues that were already reflected in the record. Respondents also answer that petitioner was provided an opportunity to rebut the ex parte contact email communications, but failed to question any member of the city council about the contacts during either the September 1 hearing or the September 15 meeting. Accordingly, respondents answer, petitioner may not now challenge the ex parte contacts before LUBA.

B. Motion to Take Evidence Not in the Record

OAR 661-010-0045(1) provides:

> "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."

In support of its fifth assignment of error, petitioner filed a motion to take evidence not in the record and attached 42 e-mail messages that are not included in the record and that petitioner argues constitute the undisclosed ex parte contacts with city councilors that occurred in violation of ORS 227.180(1)(c). Respondents object to the motion, arguing that there are no disputed allegations of fact because the city acknowledges that ex parte communications occurred and takes the position that the substance of all of the ex parte communications were disclosed in the manner required by ORS 227.180(3)(a) and (b).

The basis for petitioner's motion to take evidence falls squarely within the non-inclusive list of permissible purposes for which the Board can consider such evidence: "disputed factual allegations concerning * * * ex parte contacts * * *." Although the city agrees that some ex parte contacts occurred, there remains a disputed allegation of fact regarding the number of contacts that occurred and the substance of the contacts, as well as whether the substance of those contacts were adequately disclosed. Where the alleged ex parte contact takes the form of a written document, LUBA's ability to consider the document may be necessary to resolve disputes over whether a disclosure of the contact was adequate. Additionally, the city does not respond to petitioner's argument that councilor Gordon and

Mayor Wheeler engaged in ex parte contacts that were never disclosed.[18] The motion to take evidence is granted.

B. September 1, 2011 Hearing Disclosures of Ex Parte Contacts

Petitioner argues that the September 1, 2011 hearing disclosures described above failed to satisfy ORS 227.180(3)(a). Citing *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 523 (1992), petitioner argues that the disclosures of the email communications were inadequate because the number and content of each email was not disclosed and therefore petitioner was not provided with a meaningful opportunity to rebut the substance of the contacts. With respect to councilor Kuntz's disclosure, petitioner argues that because councilor Kuntz recused himself from participating in the appeal and left the hearing before petitioner could rebut the ex parte contact that occurred between Kunze and one of the intervenors, petitioner was not provided with a meaningful opportunity to rebut the contact.

The objective of ORS 227.180(3) is to ensure that the city makes its decision based on publicly disclosed evidence and testimony that is subject to rebuttal or the opportunity for rebuttal. *Opp v. City of Portland*, 38 Or LUBA 251, 265, *aff'd* 171 Or App 417, 422, 16 P3d 520 (2000), *rev denied* 332 Or 239, 28 P3d 1134 (2001). In *Horizon* the disclosure of the ex parte contact was made at a time where there was no meaningful opportunity to rebut the ex parte contact, since the record had closed and was never reopened. As such, the city in *Horizon* completely failed to comply with ORS 227.180(3) and failed to make a decision based on publicly disclosed evidence and testimony that was subject to rebuttal or the opportunity for rebuttal.

[18] At oral argument, respondents also pointed out that councilor Gordon and Mayor Wheeler did not vote on the appeals at either the September 1 hearing or the September 15 meeting at which the final written decision was adopted.

This case is unlike *Horizon*. In the present case, the disclosures of the ex parte contacts at the September 1, 2011 hearing were made at the first opportunity to do so, and petitioner was given the opportunity to rebut the substance of the ex parte contact but completely failed to do so. Further, although the disclosures did not provide detail regarding the substance of the ex parte contacts and were arguably inadequate to comply with ORS 227.180(3), petitioners had the opportunity to object to the adequacy of the disclosures and request additional detail, but failed to do so. Petitioner does not dispute that it did not object to the adequacy of the disclosures during or after the September 1, 2011 hearing or otherwise request the opportunity to rebut the same. Having failed to do so, petitioner may not now assign error to the disclosures.

D. Other Ex Parte Contacts

We agree with petitioner, however, that the complete absence of any disclosure by mayor Wheeler of the ex parte contact that occurred when he had a conversation regarding the appeals with one of the intervenors during the time between the September 1 hearing and the September 15 meeting violates ORS 227.180(3). Exhibit 40 to petitioner's Motion to Take Evidence demonstrates that the mayor apparently talked to one of the intervenors after the September 1 oral decision on the appeals and before the September 15 meeting at which the final written decision was approved. Mayor Wheeler participated in the September 1 hearing on the appeals and deliberated with the other participating city councilors (although he apparently did not vote), and he is therefore a member of the "decision-making body" as that term is used in ORS 227.180(3). As such, he was obligated to disclose at the September 15 meeting the ex parte contact with one of the intervenors that occurred between the September 1 and September 15 meetings. Failure to do so violates ORS 227.180(3).

With respect to councilor Gordon's ex parte contacts, he was absent from the September 1 hearing and did not participate in the oral decision that was made at the conclusion that hearing. He also subsequently did not participate in the September 15 vote to

adopt the final written decision on the appeals. Accordingly, any failure on his part to disclose ex parte contacts in accordance with the statute is harmless error.

E. Remedy

Petitioner argues that based on the violations of ORS 227.180, petitioner is entitled to a complete (or "plenary") rehearing on its application. Petition for Review 35. However, although we agree with petitioner that the city violated the statute in failing to disclose certain ex parte contacts, we reject petitioner's suggestion that an entire rehearing on *its application* is the remedy that ORS 227.180(1)(c) requires. In *Opp*, the Court of Appeals explained:

> "[A]n adequate remedy is a remand that assures (1) that interested persons be made aware of the substance of the *ex parte* communication; (2) that they be afforded the opportunity to prepare and present evidentiary and rhetorical responses to the substance of the communication; and (3) that the deciding body reevaluate its original decision, and issue an appropriate new written decision, taking into account the evidence and argument in the original record viewed together with the evidence and argument presented on remand. Seldom, if ever, would it be likely that the substance of the improper communication would be so pervasive that it would affect all of the issues in the case, and only in those rare instances would a new presentation going to all of the issues-as distinct from a new evaluation of the original record with respect to the unaffected issues-be an essential part of the remedy or of the proceedings on remand." 171 Or App at 423.

An entire rehearing on petitioner's application, rather than on the appeals of SPAC's decision that led to the ex parte contacts, would not be an essential part of the remedy or the proceedings on remand. Moreover, even an entire rehearing on the appeals is not required to remedy the violation of ORS 227.180(3). Rather, an adequate remedy is a remand to the city that allows interested persons the opportunity to prepare and present evidence and argument in response to the substance of the conversation that Mayor Wheeler had with one of the intervenors between the September 1 and September 15 meetings, after which the city council should reevaluate its original decision and issue a new written decision, taking into

account the evidence and argument in the record and the evidence and argument presented on remand.

The fifth assignment of error is sustained, in part.

The city's decision is remanded.