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, MARIBETH BONNETT,
and KATHLEEN O'BRIEN BLAIR
Petitioners,

vs.

CITY OF MCMINNVILLE,
Respondent.

LUBA No. 2012-025

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.

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

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

AFFIRMED 08/28/2012

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

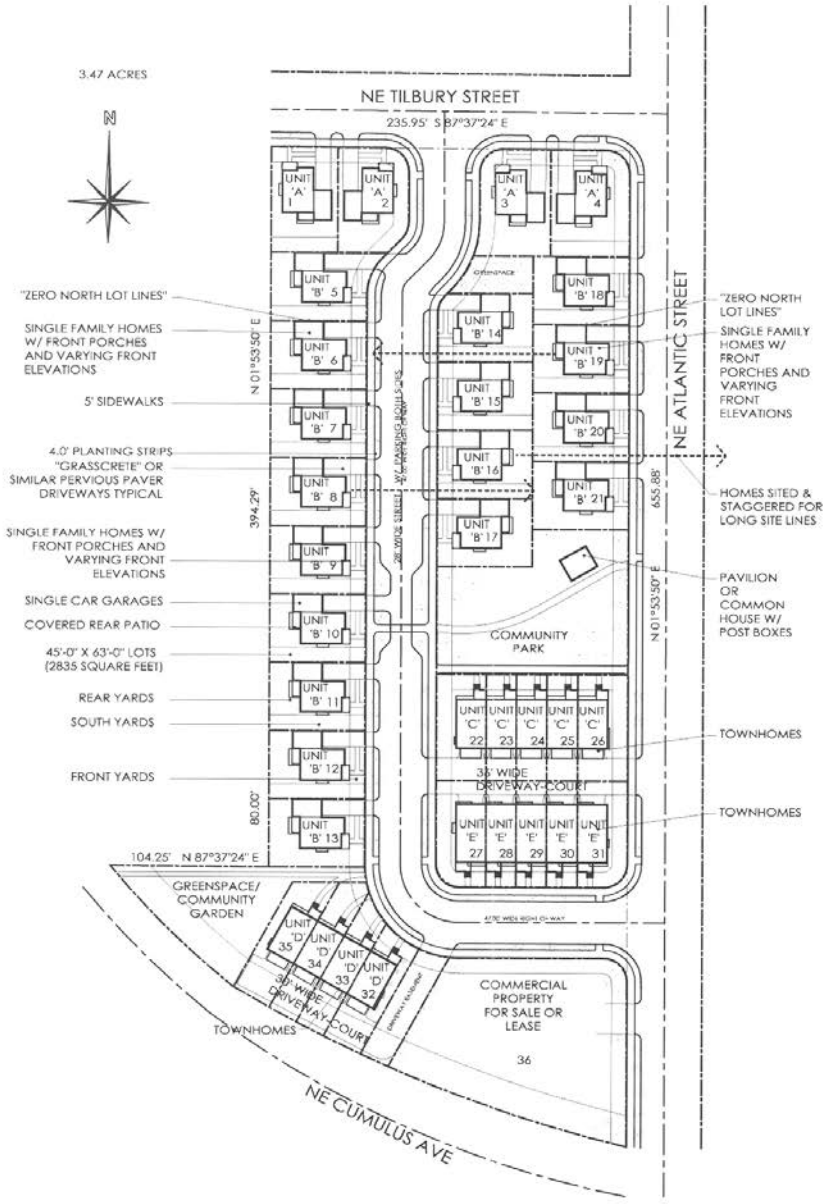
Petitioners appeal a city ordinance that approves requests for rezoning, planned development overlay, and subdivision approval and zoning ordinance requirement waivers. The decision concerns a proposed development that would include 21 single-family detached homes, 14 single-family attached dwellings and three open space parcels.

FACTS

The proposal that is at issue in this appeal is the same proposal that was the subject of *Rosenzweig v. City of McMinnville*, ___ Or LUBA ___ (LUBA No. 2011-076, December 29, 2011) (*Rosenzweig I*). In this appeal petitioners seek review of the city's decision following our remand in *Rosenzweig I*. As we did in *Rosenzweig I*, we include on the next page a map from the record that displays the proposal and makes it easier to describe petitioners' arguments and the relevant facts.

INTRODUCTION

In what is titled an "INTRODUCTION" to their assignments of error, petitioners request that LUBA remand the challenged decision due to some confusion about the date the application was submitted to the city and whether a city comprehensive plan policy was properly adopted, as well as allegations that the city has not been requiring exactions consistently with recent U.S. and Oregon Supreme Court decisions. Some of those arguments arise again under the assignments of error and are discussed below. Petitioners' requests for remand under the INTRODUCTION section of the brief are not sufficiently developed for review, and for that reason we deny those requests. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982).



PROPOSED DESIGN SITE PLAN

1"=100'

m.o.d aby design
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
503.472.9637

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

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FIRST ASSIGNMENT OF ERROR

The first assignment of error concerns McMinnville Zoning Ordinance (MZO) 17.74.020(C). MZO 17.74.020(C) is one of the criteria for comprehensive plan and zoning map amendments and requires that an applicant demonstrate "[u]tilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district." Petitioners contend the city's findings are inadequate to demonstrate that the proposal complies with MZO 17.74.020(C) with regard to water service.

A six-inch water main is located in NE Tilbury Street (Tilbury), which borders the subject property on the north. *See* map. A six-inch water main is located in NE Atlantic Street (Atlantic), which borders the subject property to the east. The applicant proposed to construct an eight-inch water main in the new right of way that would extend south from Tilbury through the property to connect in the southern part of the property with Atlantic Street, a short distance north of NE Cumulus Ave. (Cumulus). Water service to the proposed development would be provided by this new eight-inch water main.

There is a 12-inch water main in Cumulus, but as proposed the new proposed eight-inch water main would not have connected with the 12-inch water main in Cumulus. Petitioners took the position below that connecting a new eight-inch main to the existing six-inch water mains would result in a lowering of water pressure in the neighborhood and violate MZO 17.74.020(C). In *Rosenzweig I* we concluded that the city inadequately responded to that concern and remanded:

> "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 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 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." Slip op 17-18.

On remand the city adopted supplemental findings in which the city makes three points. First, under McMinnville Comprehensive Plan Policy 99.00, the city is required "to defer to McMinnville Water and Light's determination as to the requirements for and adequacy of water service." Record 10.[1] Second, unlike the decision that was before us in *Rosenzweig I*, in the decision before us in this appeal the city interpreted a message from McMinnville Water and Light that appears at *Rosenzweig I* Record 147-48 to say that McMinnville Water and Light will require that the proposed eight-inch main will be required to connect with the 12-inch water main in Cumulus.[2] Third, McMinnville Water and Light's

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[1] Plan Policy 99.00 provides in part:

> "An adequate level of urban services shall be provided prior to or concurrent with all proposed residential developments. Services shall include, but not be limited to:
>
> "* * * * *
>
> "4. Municipal water distribution facilities and adequate water supplies (as determined by City Water and Light)."

[2] The record in this appeal is made up of the record compiled by the city following our remand in *Rosenzweig I* and the record and supplemental record in *Rosenzweig I*. We cite to those records as Record, *Rosenzweig I* Record and *Rosenzweig I* Supplemental Record.

hydraulic model shows that with that connection to the 12-inch main, water flows in the area will improve. *Id* at 148.

Petitioners do not challenge the city's position regarding Plan Policy 99.00. Although the message at *Rosenzweig I* Record 147-48 could be clearer, we agree with the city's finding on remand that the message takes the position that McMinnville Water and Light will require the applicant to extend the new eight-inch main all the way from Tilbury to Cumulus.[3] Finally, we do not understand petitioners to challenge McMinnville Water and Light's position that if the new eight-inch main is connected with the 12-inch main in Cumulus the water pressure in the area will improve. We conclude that petitioners have not demonstrated that the city erred in finding that the proposal complies with MZO 17.74.020(C).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

MZO 17.51.030 governs city review of applications for planned development approval. Petitioners' arguments under the second assignment of error concern MZO 17.51.030(C), directly or indirectly, and the relevant text of MZO 17.51.030(C) is set out below:

> "The *[Planning] 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 *[Planning] Commissi*on shall need to determine that:
>
> "* * * * *
>
> "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[.]" (Emphasis added.)

[3] The city could have eliminated any doubt on this point by imposing the condition of approval that petitioners' believe the city should have imposed, or by having McMinnville Water and Light make it clearer how the new 8-inch main will be connected with the 12-inch main in NE Cumulus.

A. Failure to Refer the Matter to the Planning Commission.

The emphasized text in MZO 17.51.030(C) refers to the planning commission. The city council rendered the decision following our remand in *Rosenzweig I* without referring the matter to the planning commissions. Petitioners contend that was error.

For brevity we do not set out the complete text of MZO 17.51.030. MZO 17.51.030(A) sets out the required elements of a planned development preliminary plan. Petitioners are correct that MZO 17.51.030(B) and (C) make it clear that it is the planning commission that conducts the initial review and makes the initial decision on an application for planned development approval. And in fact the planning commission conducted the initial review and made the initial decision in this matter. It was that initial planning commission decision that was appealed to the city council and it was the city council's initial decision in this matter that led to our decision in *Rosenzweig I* and the remand to the city.

Petitioners apparently ask LUBA to read into MZO 17.51.030 a requirement that the same procedure that applies to city's initial review and approval of an application for planned development approval must be followed by the city when responding to a LUBA remand of that initial city decision. We decline to do so. As we explained in *Columbia County Citizens for Orderly Growth v. Columbia County*, 44 Or LUBA 438, 444 (2003):

> "As a general matter, the scope of proceedings on remand from LUBA is governed by the terms of the remand and any applicable local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required to repeat on remand the procedures applicable to the initial proceeding). A local government is entitled to limit its consideration on remand to correcting the deficiencies that were the basis for LUBA's remand. *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419, *rev'd on other grounds* 104 Or App 683 (1990). * * *."

The city apparently has not adopted procedures that specifically govern how the city goes about responding to a remand from LUBA. In that circumstance the city has a great deal of latitude in how it goes about responding to LUBA's remand, and it is certainly not required

to repeat the procedures that govern its initial decision, where those procedures do not dictate that they must be followed following a LUBA remand.

Subassignment of error A is denied.[4]

B. ORS 227.170 and MZO 17.72.080(B)

ORS 227.170 requires:

> "(1) The city council shall prescribe one or more procedures for the conduct of hearings on permits and zone changes.
>
> "(2) The city council shall prescribe one or more rules stating that all decisions made by the council on permits and zone changes will be *based on factual information*, including adopted comprehensive plans and land use regulations." (Emphasis added.)

MZO 17.72.080(B) similarly requires that site specific city land use decisions "must be based on upon testimony submitted."[5] Petitioners' argument under this assignment of error is as follows:

> "This was not done with this decision. The 'facts' the City is relying on in this decision are the City's own assertions and not based on any testimony submitted. * * *" Petition for Review 10.

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[4] In the middle of page 9 of the petition for review, petitioners appear to also argue that when the planning commission rendered its first decision in this matter it simply adopted proposed findings that were prepared by others and that on remand the city council should therefore be required to pass LUBA's remand on to the planning commission so the planning commission can adopt its own findings for city council review. That argument comes too late and in any event is without merit. *Neuberger v. City of Portland*, 288 Or 585, 590-91, 607 P2d 722 (1980); *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 1, 21, 569 P2d 1063 (1977); *Astoria Thunderbird v. City of Astoria*, 13 Or LUBA 154, 163 (1985).

[5] MZO 17.72.080(B) provides:

> "An application that is site specific (such as a zone change or annexation request) would call for a quasi-judicial hearing. The decisions made as a result of such hearings *must be based upon testimony submitted* and supported by Findings of Fact. An amendment that is site specific may be initiated by the City Council, the Planning Commission, the Citizens' Advisory Committee or by application of the property owner." (Emphasis added.)

Petitioners' claim that the city's decision is not based on factual information or testimony submitted at the hearings is not sufficiently developed for review and is rejected for that reason. *Deschutes Development v. Deschutes Cty*.

Subassignment of error B is denied.

C. Townhouse Development/ Evidence Concerning Noise and Air Pollution/Improper Shifting of Burden of Prof

Petitioners' subassignments of error C, D and E all concern MZO 17.51.030(C)(7), which as noted above requires the city to find that "[t]he 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[.]" In those subassignments of error, petitioners challenge the following findings, which are included in the supplemental findings the city adopted following our remand in *Rosenzweig I* to address MZO 17.51.030(C):

> "● While most of the property to the north is residentially zoned and in single-family use, there is a mixed pattern of zoning and development within the balance of the immediate area surrounding the subject site. South of the site, across Cumulus Avenue and Highway 18 are rural residential home sites; to the east are a card-lock gas facility and American Legion Hall, both of which are zoned for commercial use, and single-family housing; to the west are single-family homes, a church, and public sanitary sewer pump station.
>
> "● This site is proposed exclusively for single-family residential use that, at full build out, would be home for 35 families. Noise associated with such use would consist of that from vehicular traffic, gas powered lawn maintenance equipment, and conversation. Such noise is currently experienced in this neighborhood from existing residential development and commercial activity. The opponents submitted no evidence to indicate that such impact would be materially more significant than permissible development in the absence of the [planned development].
>
> "● There would be no appreciable increase in air pollution from this development, a negligible amount of which would come from residents' vehicles, gas powered lawn equipment and, during the time of subdivision's construction, from road building equipment and gas powered tools. The opponents submitted no evidence to indicate that

> such impact would be materially more significant than permissible development in absence of the [planned development].
>
> "* * * * *
>
> "Based on the above findings, the City concludes that the noise, air and water pollutants caused by this development are negligible and are consistent and typical with those that may be found on other such residential development in McMinnville. The proposed development would not have an adverse effect upon surrounding areas, public utilities, or the city as a whole." Record 12-13.

1. Townhouse Development

Petitioners' challenge under their subassignment of error C is directed at the first sentence of the second bulleted finding quoted above:

> "This site is proposed exclusively for single-family residential use that, at full build out, would be home for 35 families."

Petitioners contend the project includes 14 townhouses, which petitioners characterize as a multi-family residential use, not a single-family residential use. There is no dispute that the proposal includes 25 single-family detached dwellings, each of which will be occupied by single family. The 14 townhouses are located in the south and southeast parts of the property and are attached so that they make up three different residential buildings, one made up of four attached townhouse units and two made up of five attached townhouse units. *See* map. But each of the 14 townhouse units will be occupied by a single family. Even if those three buildings are correctly described as a multi-family use under the MZO, petitioners have not established that the city's characterization of the townhouse portion of the proposed development as "single-family residential use" is legally significant or a basis for remand.

Subassignment of error C is denied.

2. Evidence Concerning Noise and Air Pollution

Petitioners fault the city for finding that the noise and air pollution from the proposed development would be "negligible," no more significant than noise and air pollution caused by existing residential development in the neighborhood. According to petitioners, there is

no testimony or other evidence addressing the specific noise and air pollution generated by the proposed development, and the city's above-quoted findings are not supported by any evidence in the record.

Petitioners concede the property could be developed with as many as 26 single-family detached dwellings without planned development review and without having to consider the possibility of adverse effects from noise and air pollutants under MZO 17.51.030(C)(7). Petitioners contend the planned development review allows the city to approve 14 townhouses and 21 single-family detached dwellings (a total of 9 more dwelling units than without planned development approval). Petition for Review 11-12. It is the townhouses and added residential density that is the focus of petitioners concerns.[6]

Through planned development review, the city could be asked to approve a planned development that includes commercial or industrial development that in some cases could produce significant noise or air pollution. While a strictly residential development might be capable of producing more than insignificant noise or air pollution, we conclude that absent some believable evidence to the contrary, a reasonable decision maker could conclude that such is not the case for a development proposal such as the one at issue here. And we conclude a reasonable decision maker could reach such a conclusion, notwithstanding the lack of any empirical or testimonial evidence in the record about the noise or air pollution that will likely be generated by this particular proposed development.

In the findings quoted above, the city finds that the proposed planned development will include a total of 35 dwellings (21 single-family detached and 14 attached dwellings). The findings recognize that the dwellings in the proposed development will likely generate the limited noise and air pollution that is commonly associated with residential uses, some of

[6] The site is 3.47 acres in size, and the resulting density with 35 units is approximately 10 units per acre. Without the planned development, 26 units would result in approximately 7.5 units per acre.

which the city identifies specifically. The findings then note that the residential development proposed is similar to the single-family dwelling development that surrounds the proposal and, like residential development generally, the proposed development will produce "negligible" air and noise pollution and thus not violate MZO 17.51.030(C)(7). The city contends there is a great deal of evidence in the record from which the city could conclude that the proposed residential development is similar to the residential development that surrounds it. *Rosenzweig I* Record 451-52, 457-58, 461-65, 585-86, 588, 591-94, 609-23.

Unless presented with at least some evidence to the contrary, we conclude that a reasonable decision maker could assume that residential uses will generate "negligible" air and noise pollution of the nature identified in the above-quoted findings. From that assumption, we believe a reasonable decision maker could conclude that the residences proposed here will not produce noise and air pollution that will adversely affect surrounding properties or the city as a whole and thus would not violate the MZO 17.51.030(C)(7) "adversely affect" standard. The only differences that petitioners identify between the proposed residential development and the residential development that surrounds it that might call the city's assumptions into question is the higher density and the inclusion of attached townhouses with the detached single-family dwellings. Petitioners offered a significant amount of evidence about the possible ill effects of noise and air pollution in general. Record 117-197. But petitioners identify nothing in that evidence that suggests that townhouses or residential development at the density proposed here will generate more noise and air pollution than the residences that already exist in the area, which might implicate the MZO 17.51.030(C)(7) "adversely affect" standard for approval of planned developments.

Petitioners do argue in their brief, as they argued below, that

> "[T]he wall created by the three-story townhome units will act as a band shell or an amphitheater and magnif[y] and reflect[] the noise of an additional 75-100 children and their 35-50 parents, laughing, playing, yelling and screaming, home stereos, car stereos, car alarms, power mowers, power

> edgers, power leaf blowers, car horns, 8+ school buses per day idling and at least 5 years of continuous construction noise 6 days per week back into the existing neighborhood. It is the physical structure and placement of these monoliths that will increase the noise factor to the existing neighborhood not only well beyond the occupants' original expectation of standard R-1 zoning build out but well beyond even the impact of an R-4 density. Further, these buildings will tend to wall in the combustion products from gas vehicles, diesel busses and delivery vehicles and the above mentioned gas-powered tools, stacking the pollution into the new development and further into the existing neighborhood. Rec. 114." Petition for Review 14-15.

Petitioners' citation to Record 114 is to a document where petitioners made the same arguments to the city council that they make in their petition for review quoted above. The city could, and apparently did, dismiss petitioners' characterization of the two five-unit and one four-unit townhouse buildings as "monoliths" and their claim that those townhouses will act as "a band shell or an amphitheater" and petitioners' other speculation about the significance of the noise and air pollution that will be generated by the proposed townhouse units. We believe a reasonable decision maker could decide not to give any weight to such claims.

Under this assignment of error petitioners ask LUBA to remand the city's decision to require the applicant to produce evidence of how much air and noise pollution this particular proposed planned development will generate. Given the absence of any evidence to suspect the proposed residences will generate different noise and air pollution than any other residences in the city, other than the speculation quoted above, we decline to do so. We conclude the city reasonably concluded based on the record in this appeal that any noise and air pollution that is likely to be generated by the proposed residences will be negligible and will not violate MZO 17.51.030(C)(7).

Petitioners' subassignment of error D is denied.

3. Improper Shifting of Burden of Proof

Citing the last sentences in the second and third bulleted paragraphs of findings quoted above, petitioners contend the city improperly shifted the burden of proof from the

applicant to the petitioners. The city council adopted the decision it did regarding noise and air pollution based on inferences we conclude a reasonable decision maker could draw from the evidence in the record. Pointing out that petitioners presented no evidence to show that the additional development that is made possible by the planned development approval will generate noise and air pollution that violates MZO 17.51.030(C)(7) does not mean the city improperly shifted the burden of proof.

Petitioners' subassignment of error E is denied.

D. Failure to Address Relevant Issues

At page 15 of the petition for review, petitioners contend that the city "failed to address relevant issues" and that the city's decision should therefore be remanded. Petitioners contend the city accepted testimony from petitioners at the conclusion of its hearing on remand, but voted to approve the challenged decision and findings without first reviewing and analyzing that written testimony.

Accepting written testimony that may raise substantial issues at the end of a land use hearing, and then proceeding to adopt a final decision without considering that written testimony, is a risky approach to land use decision making, particularly where there is a high probability that the decision will be appealed to LUBA. But in their argument under this sub-assignment of error, petitioners neither identify any issues that they believe were raised by that testimony nor attempt to establish that the issues are relevant and warranted responsive findings that the city failed to provide. As we explained in *Rosenzweig I*:

> "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 * * *86 pages [of argument] 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." Slip op 9.

Petitioners' argument under their subassignment of error F in this appeal does not do any of the three things we pointed out in *Rosenzweig I* must be done to successfully argue to LUBA that a decision should be remanded for failure to address a relevant issue.

Subassignment of error F is denied.

E. Failure to Allow Additional Testimony on Remand

Petitioners contend the city erred by failing to reopen the evidentiary record to allow them to present additional testimonial evidence regarding MZO 17.51.030(C)(7). Petitioners contend they were prepared to testify about the negative noise and air pollution impacts they believe the proposal will have on nearby residences, some of whom are occupied by residents who have particular vulnerabilities to such pollution.

Petitioners do not claim that they were prevented from presenting testimonial evidence concerning MZO 17.51.030(C)(7) during the local evidentiary proceedings that led to *Rosenzweig I*. Neither do petitioners identify any requirement under the city's land use laws that the evidentiary opportunities that were provided in reaching an initial land use decision must be duplicated if LUBA remands that initial land use decision. In *Rosenzweig I* we concluded that the city's findings with regard to MZO 17.51.030(C)(7) were inadequate and remanded for the city to adopt adequate findings. Our remand neither required nor precluded a decision by the city to reopen its evidentiary record to allow additional testimonial evidence concerning MZO 17.51.030(C)(7). In that circumstance, the city was

not legally obligated to allow petitioners to strengthen their evidentiary presentation concerning MZO 17.51.030(C)(7) on remand. *Kaye v. Marion County*, 62 Or LUBA 57, 64 (2010); *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 208 (2001).

Under this subassignment of error, petitioners also suggest the city erred by making its decision to limit presentation of additional evidence on remand in an executive session. As the city correctly notes, the city is entitled to meet in executive session "[t]o consult with [legal] counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed." ORS 192.660(2)(h). That statutory right is broad enough to allow the city to consult with legal counsel in executive session to determine whether to limit the subjects on which the city will allow the presentation of additional evidence following a LUBA remand.

Subassignment of error G is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

To approve a zoning map amendment, the city must find that the "amendment is consistent with the goals and policies of the Comprehensive Plan[.]" MZO 17.74.020. 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."

The proposed development is more than a mile from the nearest schools. In our decision in *Rosenzweig I* we remanded because the city's findings were unclear whether the city believed Policy requires that residential development be located within a driving and walking distance of one mile.

On remand the city council did two things. First, the city council found Policy 105.00 has only been adopted by resolution and has never been legislatively adopted as part of the

city's comprehensive plan, making it irrelevant as an approval standard for residential development. Second, the city found that, even if Policy 105.00 had been properly adopted as part of the city's comprehensive plan, Policy 105.00 merely expresses a preference that residential development be located within one mile of a school; it does not impose a mandatory requirement for residential development.

Petitioners do not assign error to either of those findings and therefore this assignment of error provides no basis for remand. Petitioners instead argue that the copy of the city's comprehensive plan on the city's webpage is the only practical way for citizens of the city to access the city's comprehensive plan and the city's failure to ensure that the copy of the comprehensive plan that is available on the city's webpage is accurate constitutes a violation of Statewide Planning Goal 1 (Citizen Involvement).

We can sympathize with petitioners regarding the difficulty that is frequently encountered in locating the applicable versions of comprehensive plans and land use regulations and having confidence that the webpage version of those documents is an accurate copy of the officially adopted document. LUBA frequently encounters the same difficulty. But the decision that is before us in this appeal is the city's decision following our remand in *Rosenzweig I*. The city's failure to ensure that the online version of its comprehensive plan is an accurate representation of adopted legislation, and the possible Goal 1 implications of that failure, is beyond our scope of review in this appeal.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The new street that will extend south from Tilbury through the proposed development and connect in the southeastern portion of the property with Atlantic will be constructed to city standards with sidewalks. *See* map. As conditioned, the applicant will also be required to make half-street improvements to Atlantic and Tilbury along the property's frontage on those two streets, including a sidewalk on the west side of Atlantic and the south side of

Tilbury. A sidewalk will also be constructed on the property's southern boundary with Cumulus.

Petitioners contend that under MCP Policies 132.15, 132.24.00 and 132.26.05 the city should have also required that the applicants extend the sidewalk further west along Tilbury across properties developed with a church and single-family dwelling to connect with NE Pacific Avenue (Pacific) to the west, which is improved with sidewalks.[7] Petitioners contend that such a sidewalk will provide a direct pedestrian connection that will avoid the necessity for pedestrian traffic generated by the proposed development and existing neighborhood to travel out-of-direction to avoid the portion of Tilbury immediately west of the subject property, which will remain without a sidewalk unless the city requires the applicant to construct one. Petitioners also argue the sidewalk that is provided across the common area in the middle of the property violates the policies, because the open area doubles as a storm water retention site and the sidewalks will be underwater and unusable at times.

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[7] MCP Policies 132.15, 132.24.00(1) and (2) and 132.26.05 provide as follows:

"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."

Although much less clear, petitioners also appear to suggest that under those policies the city should require the applicant to provide full street improvements, which we assume would include a second travel lane and a sidewalk on the opposite sides of Tilbury and Atlantic and perhaps other streets. We agree with the city that our remand in *Rosenzweig I* was limited to petitioners' arguments concerning the missing sidewalk along Tilbury west of the property and the sidewalk across the open area and we limit our discussion to those issues.

Following our remand in *Rosenzweig I*, the city council found that the city's Transportation System Plan "identifies and prioritizes pedestrian corridors in need of sidewalks [and] Tilbury Street is not included in this list of priority sidewalks." Record 16. The city also found that as a condition of approval of the partition that created the two parcels to the west on the south side of Tilbury, the partition applicant was required to construct a sidewalk along NE Pacific Street and to sign a waiver of remonstrance against assessment for improvement of Tilbury in the future. Record 17. Such an improvement would result in sidewalks along Tilbury between Pacific and Atlantic. Although it did not do so expressly, the city council implicitly interpreted these three policies to not require the off-site improvements that petitioners argue they do. The city argues that the city's more limited interpretation of these policies is not inconsistent with the text of the policies, is plausible, and therefore subject to deference by LUBA on review under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). We agree with the city. We address each of petitioners' subassignments of error below.

A. MCP Policy 132.15

MCP Policy 132.15 requires that the proposed development must "provide pedestrian connections with adjacent neighborhoods." After noting that the proposal will be required to provide interior sidewalks and sidewalks along the entire perimeter of the property's road frontage, the city found "the proposed development, when completed, would provide

pedestrian and bikeway paths that would provide connection with adjacent neighborhoods." Record 17. Petitioners would interpret the words "adjacent neighborhoods' in MCP Policy 132.15 to include nearby neighborhoods that do not border the subject property. Even if such a broader construction of MCP Policy 132.15 is plausible, it is not the only plausible interpretation, and the less expansive interpretation adopted by the city is clearly plausible.

Subassignment of error A provides no basis for remand and is denied.

B. MCP Policy 134.24.00

MCP Policy 134.24.00 was set out earlier at n 7. On remand the city adopted the following findings addressing this policy:

> "The proposed development incorporates narrow traffic lanes within its interior street; the development is also required to comply with other City standards designed to accommodate safe travel for all users of the transportation system (adequate width sidewalks, curb ramps, clear vision areas at intersections). As such, Plan Policy 132.24.00 is satisfied." Record 18.

Petitioners concede that the proposed new interior street complies with MCP Policy 134.24.00 but argue that "the remaining streets do not and will not at the completion of this project." Petition for Review 23.

Petitioners apparently interpret MCP Policy 134.24.00 to require full improvements for all substandard streets that adjoin the proposed development and perhaps some streets that lie beyond. Petitioners contend those abutting streets are inadequate and that approving the proposed development without requiring that they be improved violates MCP Policy 134.24.00.

There are at least two problems with petitioners' arguments under this subassignment of error. First, although the subassignment of error is styled as a substantial evidence challenge, it is in fact a challenge to the city's interpretation of MCP Policy 134.24.00; petitioners would interpret that policy more broadly than the city does. It is clear from the decision that the city council does not interpret MCP Policy 134.24.00 to require that the

proposed development to make improvements to adjacent and nearby streets beyond the half street and sidewalk improvements the city required along the property's perimeter road frontage. As we have already noted, petitioners have not established that the city's more narrow interpretation is implausible. Second, some of the evidence petitioners cite to support their contention that adjoining streets present dangers to school children and other pedestrians, which make it necessary to interpet MCP Policy 134.24.00 to require additional improvements to those streets, is not included in the record. We do not consider that extra-record evidence. The evidence that is included in the record is evidence the city probably could have relied on to require additional improvements, but it is certainly not evidence that would require a reasonable decision maker to do so.

Subassigment of error B is denied.

C. Timing and Common Area Path

This subassignment of error also concerns MCP 132.24.00. *See* n 7.

1. Timing

Following our remand, the city adopted supplemental findings that include the following:

> "As a condition of approval, new public sidewalks are required along the entire perimeter of the subject site's southern, eastern, and northern edge. In addition, public sidewalks are required along both sides of the new public street that would extend through the subject site's midsection, connecting Tilbury Street to Atlantic Street. *The construction of these public sidewalks would happen incrementally at the time of each lot's improvement with a residence*." Record 16 (emphasis added).

Petitioners challenge the italicized finding, which they claim is inconsistent with condition of approval 11. Petitioners also argue that by virtue of the introduction to the supplemental

findings the italicized finding would apply in place of condition of approval 11.[8] Condition of approval 11 is set out in part below:

> "11. That the required public improvements shall be installed, at the applicant's expense, to the satisfaction of the responsible agency prior to the City's approval of the final subdivision plat. If the subdivision is to be phased, the public improvements necessary to serve each phase shall be installed, at the applicant's expense, prior to approval of the final plat for that phase." *Rosenzweig I* Record 470.

The applicant proposed a phased development, so under condition of approval 11 required public improvements must be installed at the time of final plat approval for each phase.

We would normally say petitioners' theory that the above quoted supplemental finding would control in the event of a conflict with a *condition of approval* is faulty from the beginning. The supplemental findings control in the case of a conflict with other *findings*, the supplemental findings do not state that they control in the event of a conflict with conditions of approval. But in this case the city has indiscriminately adopted documents that were prepared for other purposes as findings. Condition of approval 11 is included in the planning department staff report, which appears at *Rosenzweig I* Record 450-511. The city council adopted that entire staff report as findings.

Nevertheless, as the city points out, for purposes of the MCP Policies at issue in this assignment of error the relevant issue is whether the improvements will actually be constructed, and petitioners have not established that it is significant whether the improvements are installed at the time of final plat approval or at the time of home construction. Petitioners simply argue that if the improvements are made at the time of residential development, rather than at the time of final plat approval, "[t]his would make it

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[8] The introduction to the supplemental findings includes the following statement:

> "If there is a conflict between the supplemental findings and the original findings, the supplemental findings will prevail." Record 9.

decidedly unsafe during 'all phases of the project' * * *." Petition for Review 25. That argument is not sufficiently developed to establish that permitting the sidewalks to be constructed at the time houses are constructed, if indeed that is what the city has done in its supplemental findings, would result in a violation of MCP 132.24.00.

2. Common Area Path

The common open area that the pedestrian path crosses is also proposed to serve as a storm water detention area. According to petitioners, the path may be unusable by pedestrians when it is needed for storm water detention.[9] Petitioners contend that if the city proposes to rely in part on the path across the common area to provide the "safe and convenient" pedestrian transportation system and "pedestrian friendly environment" that is required by MCP 132.24.00, *see* n 7, "the City and LUBA must consider how much of the time this path would be unusable." Petition for Review 25. We do not agree that MCP 132.24.00 requires such an analysis for the proposed limited use of the common area as a storm water detention site.

Subassignment of error C is denied.

D. MCP Policy 132.26.05

This subassignment of error concerns MCP Policy 132.26.05, which requires that new development incorporate "[n]ew street connections, complete with appropriately planned pedestrian and bicycle features[.]" *See* n 7. The city adopted the following supplemental findings on remand to address MCP Policy 132.26.05:

> "The public street system planned for this subject project, consisting of improvements to the existing Atlantic Street and Tilbury Street rights-of-way, a new public street connecting to those streets, and, *where appropriate*, planned pedestrian and bicycle features provide for an interconnected local

[9] We see no reason why other sidewalks could not be used during this time to provide access to the residences. *See* map.

street system within the project boundary and neighborhood street network. Plan Policy 132.26.05 is satisfied." Record 18 (emphasis added.)

Petitioners infer from the city's use of the words "where appropriate" that the city substituted a "where appropriate" standard for the standard that is actually imposed by MCP Policy 132.26.05, which as we have already explained petitioners interpret to impose a much greater responsibility to correct existing neighborhood transportation problems than the city does. We do not draw the same inference, and the "where appropriate" word choice likely was intended to reflect the word "appropriately" in MCP Policy 132.26.05. That word choice provides no basis for remand.

Petitioners also object to the city's citation to the waiver of remonstrance that was required for the partition that created the parcels to the west on the south side of Tilbury in concluding that is unnecessary under the three MCP policies identified by petitioners under this assignment of error to require that the applicant construct improvements to Tilbury west of the subject property. We fail to see how it could possibly be error to take that waiver of remonstrance into consideration in applying the three MCP Policies.

Subassignment of error D is denied.

E. Misapplication of Court Precedent Regarding Exactions

In their last two subassignments of error under the fourth assignment of error, petitioners assign error to findings the city adopted, which overlap with other previously quoted findings, and are set forth in part below:

> "*By law, exactions placed on this development must be roughly proportional to the project's impact*. This project proposes the platting of 35 residential lots for a mix of single-family detached and single-family attached housing on some 3.47 acres of land. The subject site is located within an older residential neighborhood where streets are improved to rural standards and public sidewalks are generally lacking, except in those subdivisions built within the past two decades. The applicant for this project would be required to construct improvements to two existing public streets (Tilbury Street and Atlantic Street), to include public sidewalk, curb and gutter and travel lane. In addition, they would construct a new interior public street to City standards, and provide public sidewalk along Cumulus Avenue the length of their

> property. *These improvements are roughly proportional to the impact of the proposed development*." Record 17 (emphases added).

Petitioners assume the city's reference to "roughly proportional to the project's impact" is a reference to the rough proportionality standard adopted by the U.S. Supreme Court in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) for analyzing the propriety of exactions of real property. Petitioners contend that under the Oregon Supreme Court's recent decision in *West Linn Corporate Park v. City of West Linn*, 349 Or 58, 240 P3d 29 (2010), the *Dolan* rough proportionality limit on exactions would not apply to a condition of approval that merely requires the applicant to expend money and make off-site improvements.

Although petitioners do not really develop their argument, we understand petitioners to infer from the above-quoted findings that the city declined to require the applicant to construct the off-site improvements to Tilbury that petitioners believe are required by MCP Policies 132.15, 132.24.00 and 132.26.05, simply because the city incorrectly believed it was precluded from doing so by the *Dolan* rough proportionality limitation on exactions. We do not agree with that inference. The city simply found that the improvements it was requiring *are roughly proportional* to project impacts. The city did not find that the additional improvements petitioners favor *would not be roughly proportional*. The city interpreted the three MCP policies to be met, without the additional improvements that petitioners seek.

Petitioners also argue that even if the *Dolan* rough proportionality requirement does apply, the improvements that the city is requiring fall short of the types and levels of transportation system improvements that would be required to be roughly proportional to the likely impacts of the approved development. The *Dolan* rough proportionality requirement operates as a *limit* or ceiling on the city's authority to impose exactions. If a proposed exaction is less than the exaction that could be imposed under the *Dolan* rough proportionality limit, *Dolan* does not require that the exaction be increased so that it is

roughly proportional. The city's rough proportionality findings provide no basis for reversal or remand.

Subassignments of error E and F are denied.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In *Rosenzweig I,* LUBA concluded that the city's findings inadequately addressed MCP Transit Policies 92.00 and 118.00(7).[10] MCP Policy 92.00 encourages locating high density housing "along existing or potential public transit routes." MCP Policy 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." In remanding the city's initial decision we noted that the applicant proposed the following findings to address these policies:

> "In this area, Tilbury and Atlantic Streets are local streets in the City's Transportation System Plan. Cumulus Avenue is a frontage road which 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 the development will be able to request that the bus stop near or adjacent to the development, on Cumulus Avenue*." *Rosenzweig I* Record 85.

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[10] 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.
>
> "* * * * *."

We also noted that the above-quoted findings are clearly adequate to demonstrate that the proposal complies with MCP Policy 92.00:

> "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." *Rosenzweig* I, slip op at 33.

However, we concluded in *Rosenzweig I* that remand was nevertheless required, because the city council failed to adopt these proposed findings.

On remand, the city council adopted the proposed finding that it failed to adopt in support of its initial decision. Record 19. In this appeal of the city's decision on remand, petitioners do not challenge the first three sentences of the above-quoted findings and focus exclusively on the last sentence. Petitioners contend the nearest bus stop is .6 mile from the property and they dispute the finding that the residents will be successful in getting a stop adjacent to the property. But MCP Policies 92.00 and 118.00(7) do not require that there be a bus stop next to the proposed development. MCP 92.00 only encourages high density development "to locate along existing or potential public transit routes." There is no dispute that Cumulus is an existing transit route and MCP 92.00 does not require any particular proximity for transit stops. MCP Policy 118.00(7) encourages that development of "collector and arterial streets" include adequate "bus stop areas." The only road that the applicant proposes to develop is the new *local* internal road that will serve the proposed residences. That local street is not a collector or arterial. Petitioners' concern that Cumulus may not have a bus stop that is adequate to serve the proposed development therefore does not implicate MCP Policy 118.00(7), because the applicant does not propose to develop a collector or arterial.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error concerns MCP Policy 132.41.00(5). 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."[11] In *Rosenzweig I*, we remanded in part because the city failed to adopt any findings addressing MCP Policy 132.41.00(5). In remanding we explained:

> "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 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)." Slip op 34-35.

In its supplemental findings on remand the city included the following concerning MCP Policy 132.41.00(5).

> "The City Council has determined that MCP Policy 132.41.00(5) does apply in this situation. Further, the City finds that the neighborhood concerns such as safety, noise and aesthetics are adequately mitigated. The provision of sidewalks enhances pedestrian safety, as does the narrow street design which will reduce the speeds of vehicles, while the minimum 14' wide travel area will still ensure emergency vehicles access. The application stated, and conditions of approval will require, that landscaping will be provide for

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[11] 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."

> aesthetic enhancement. ([*Rosenzweig I*] Record at pages 97, 470-472, 609 and 610). Nothing more than normal residential noises such as vehicles, lawnmowers, and voices are anticipated and as such are not in need of mitigation. Therefore, the City concludes that the noise impacts of the development will be negligible, safety impacts are mitigated by the features discussed above, and aesthetic appeal will be enhance by landscaping. Street and sidewalk features and landscaping will be required by conditions of approval." Record 20.

In this appeal of the city's decision on remand, petitioners' only developed argument under MCP 132.41.00(5) concerns traffic safety issues that petitioners claim they raised below and the city failed to address in the above findings. Petitioners contend they raised traffic concerns at Record "37-38; 186; 303; 305; 306; 380-381; 426-429; 439, * * * 443; 444; [*Rosenzweig I*] Supp Rec 201-235." Petition for Review 38. Petitioners argue that some of the findings referenced above that the city relies on were prepared before they submitted their testimony so it is impossible that those findings *respond* to their traffic concerns.[12] Petitioners then argue "[t]he City's findings in no way reference any testimony by Petitioners and thus cannot possibly meet the test of mitigating neighborhood concerns." Petition for Review 38.

The city found that MCP 132.41.00(5) applies to this proposal. However, it is reasonably clear that the city does not interpret MCP 132.41.00(5) to require that an applicant mitigate every traffic problem in the neighborhood that any party may identify at some point during the local proceedings. The record in this appeal now includes the original record with 642 pages and a 217 page power point presentation, a supplemental record of 240 pages and the record compiled on remand with 218 pages. That is over 1300 pages of written material, many of them pages of minutes where there is testimony on a wide variety of different issues. Some of the testimony and other evidence that appears at the pages cited by petitioners above was directed at MCP Policies other than MCP 132.41.00(5). As far as we can tell *none* of the

[12] As the city correctly notes, the timing of the preparation of proposed findings is irrelevant, since findings can anticipate and address traffic issues.

testimony or other evidence was specifically directed at MCP 132.41.00(5). That testimony raises a number of general traffic, parking, pedestrian and bicycle safety issues, much of it directed at perceived inadequacies with Three Mile Lane, Cumulus, Tilbury and Atlantic.

As we concluded earlier in this opinion, and as we explained in *Rosenzweig I*, for a petitioner at LUBA to successfully argue at LUBA that a decision must be remanded solely because a decision maker failed to respond specifically to relevant issues, petitioners must first identify the issue, second demonstrate that the issue was adequately raised below and third establish that the issue is relevant in some way to an approval criterion. *Rosenzweig I*, slip op at 9. Petitioners have not adequately identified the issues that they believe warranted a specific response, they have not shown that any such issues were adequately raised and they make no attempt to explain how they believe those issues implicate MCP 132.41.00(5).

In its supplemental findings quoted above, the city council identifies roadway improvements along the perimeter of the property and the internal roadway improvements that the city found would be adequate to mitigate traffic safety and other concerns that might be generated by or aggravated by the proposed development. It is reasonably clear from the city council's findings that it does not interpret MCP 132.41.00(5) to require that this applicant correct or mitigate all of the many existing off-site transportation system inadequacies. Reduced to essentials, petitioners and the city simply disagree about the adequacy of the required mitigation. Petitioners have not demonstrated that the city erroneously interpreted or applied MCP 132.41.00(5), and petitioners have not adequately identified any relevant issues that were adequately presented so that a specific response was required in the city's findings addressing MCP 132.41.00(5).

In their remaining arguments under the sixth assignment of error, petitioners again attempt to argue that the challenged decision is inconsistent with Transportation Planning Rule (TPR) requirements. The TPR imposes a very regimented set of requirements that apply when a local government amends its land use regulations. The challenged decision

includes a land use regulation amendment. But in *Rosenzweig I* we concluded that petitioners failed to adequately raise any TPR issues in the initial city proceedings and for that reason had not preserved any TPR issues for LUBA review in *Rosenzweig I*. The TPR issues that petitioners attempt to raise under the sixth assignment of error are beyond the scope of our remand in *Rosenzweig I*, and for that reason they are not properly before us in this appeal of the city's decision on remand.

The sixth assignment of error is denied.

The city's decision is affirmed.