BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC,
NORMAN KING, PETE BEDARD,
MICHAEL MONICAL, CAROL ELSWORTH,
MARK ELSWORTH, SHANNON VROMAN,
JENNE HENDERSON, LAMONT KING,
THOMAS J. SIEBEN, GWEN L. SIEBEN,
SCOTT GERBER, JAN GERBER, JACK NORBY,
THOM HOLDER, GARY HITESMAN,
REBECCA WALTERS and DARRYL WALTERS,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

CITY OF LAKE OSWEGO AND LAKE OSWEGO -
TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
Intervenors-Respondents.

LUBA Nos. 2013-021 and 2013-022

WILLIAM J. MORE, CARL L. EDWARDS, LINA S. EDWARDS,
CURT SOMMER and ROBERT STOWELL,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

CITY OF LAKE OSWEGO AND LAKE OSWEGO -
TIGARD WATER PARTNERSHIP and CITY OF TIGARD,
Intervenors-Respondents.

LUBA No. 2013-023

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

Andrew H. Stamp, Lake Oswego, filed a petition for review and argued on behalf of petitioners STOP *et al*.

Peggy Hennessy, Portland, filed a petition for review and argued on behalf of petitioners More, *et al*. With her on the brief was Reeves Kahn Hennessy & Elkins.

Christopher D. Crean, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery Elsner & Hammond LLP.

Edward J. Sullivan, Portland, filed a response brief and argued on behalf of intervenor-respondent City of Lake Oswego. With him on the brief were Carrie A. Richter and Garvey Schubert and Barer PC.

Damien R. Hall, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent City of Tigard. With him on the brief were Timothy V. Ramis and Jordan Ramis PC.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 11/22/2013

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal two city council decisions that approve conditional use permits and design review for (1) an expansion to a water treatment plant and (2) a new pipeline.

MOTION TO FILE REPLY BRIEFS

Petitioners STOP *et al*. in LUBA No. 2013-021/022 move to file a reply brief pursuant to OAR 661-010-0039, to respond to new matters raised in the response briefs regarding jurisdiction, waiver, mootness, and standing. There is no opposition, and the reply brief is allowed.

Petitioners More *et al* in LUBA No. 2013-023 move to file a reply brief to respond to three arguments made in the response briefs. Respondents move to strike the More reply brief, arguing that the three arguments it responds to are not "new matters" raised in the response briefs that warrant a reply brief under OAR 661-010-0039. We agree with respondents that the More reply brief does not respond to "new matters" within the meaning of OAR 661-010-0039. The More petitioners' motion to file a reply brief is denied.

FACTS

The City of Lake Oswego holds senior and junior water rights to Clackamas River water allowing it to withdraw up to 38 million gallons per day (mgd). In 1967, Lake Oswego constructed a water treatment plant (WTP) in what is now the City of West Linn (the city), which takes water from the Clackamas River via a 27-inch raw water pipe under the Willamette River to the WTP for treatment. From the WTP, finished water is transmitted through pipes beneath Mapleton Drive to Highway 43, then beneath Highway 43 to Lake Oswego. The current capacity of the WTP is 16 mgd.

In 1984, the city, Lake Oswego, and the South Fork Water Board entered into an intergovernmental agreement for an emergency water system intertie that connects the water systems of the three entities. The intertie agreement requires that in an emergency Lake

Oswego must provide the city with the maximum feasible quantity of water, so long as it is not detrimental to Lake Oswego's water system.

By 2007, Lake Oswego's water needs were approaching the WTP's capacity of 16 mgd. Lake Oswego and the City of Tigard entered into a partnership, the Lake Oswego/Tigard or LOT partnership, to develop and share Lake Oswego's water rights. In June 2012, LOT filed two applications with the city. The first, AP-12-02, requested conditional use permit and design review approval to expand the existing WTP to allow it to process up to 38 mgd. The second, AP-12-03, requested conditional use permit and design review approval to install (1) 3,800 linear feet of new 42-inch diameter raw water pipe from the Clackamas River intake to the WTP, and (2) 7,050 linear feet of new 48-inch diameter finished water pipe from the WTP to the Lake Oswego city limits, to be placed in trenches within the rights of way of Mapleton Drive and Highway 43.

A. Raw Water Pipeline

The 3,800 linear foot raw water pipe would be installed under the Willamette River by means of a horizontal directional drill method. The pipe enters the ground at a hole drilled on a lot owned by the Oregon Parks and Recreation Department (OPRD), located at the end of Mapleton Drive. The hole is drilled down at an approximate 45 degree angle, passing under another OPRD-owned lot and Mary S. Young Park, leveling out at an approximate depth of 100 feet below the elevation of the initial drilling site, approximately 60 feet below the water surface of the Willamette River, and approximately 30 feet below the bottom of the river at its deepest point. On the other side of the river the pipe rises up to the surface at Meldrum Bar State Park. Portions of the two OPRD lots and portions of Mary S. Young Park are zoned Water Resource Area (WRA) to protect wetlands and riparian areas. The initial drill site for the pipe is outside these WRA zones, but the pipe will pass under portions zoned WRA at a closest depth of approximately 34 feet below the surface.

Once the hole is drilled to sufficient width, the hole is filled with Bentonite drilling mud, also known as drilling fluid, which is intended to keep the bore hole open until the pipe is installed. The pipe is then pulled in sections through the hole and grouted in place.

B. Finished Water Pipeline

The 7,050 linear feet of finished water pipeline will be laid in an open trench proceeding from the WTP west on Mapleton Drive to Highway 43, then north along Highway 43 to the Lake Oswego city limits. The first phase, down Mapleton Drive, will occur during daylight hours, last approximately four months, and involve laying approximately 50 feet of pipeline per day. Mapleton Drive, and the pipeline route, pass over two culverted creeks, Trillium Creek and Heron Creek, that are designated WRA.

Construction of the second phase, down Highway 43, will occur only during nighttime hours between 8 p.m. to 5 a.m. and last for approximately five months. There are approximately 24 commercial driveways along this stretch of Highway 43. Based on conditions of approval, the project must allow full access to all commercial driveways outside of construction hours. Two businesses are open within a portion of the nighttime construction hours, and by condition must have full access while open.

C. Procedural Background

The city processed the two applications together. The city planning commission conducted hearings on the two applications and, on November 26, 2012, issued a decision denying the applications for failure to comply with four conditional use standards. LOT appealed to the city council, which conducted a public hearing on the appeal on January 14, 2013, which was continued to January 15, 2013. At the beginning of the hearing, the Mayor and three participating councilors stated that they had placed into the record all e-mails that constituted *ex parte* contacts. The record was left open for additional written testimony until January 22, 2013. In an effort to prevent further *ex parte* contacts via e-mail, the city set up a filter on the Council's e-mail addresses.

When the council reconvened on January 28, 2013, the Mayor and all councilors stated that they had not received any further *ex parte* contacts. The council closed the record to public testimony, and entered into deliberations. The Mayor and one councilor expressed support for the two applications; Councilors Jones and Tam expressed opposition. Councilor Jones cited as one consideration influencing his position the testimony that seven neighborhood associations opposed the project, in addition to the Robinwood neighborhood association, which is the neighborhood in which the project is located. Councilor Jones suggested that staff develop additional conditions of approval that would address his concerns, and that would allow him to vote in favor of the proposal.

The Mayor then related that he had called the chairpersons of two of the neighborhood associations supposedly in opposition. According to the Mayor, one chairperson sent him the minutes of the association indicating only that the association was opposed until there was better dialogue between LOT and neighborhood associations. The Mayor then related that the second chairperson had never heard of the LOT project and did not have an opinion about it.

Councilor Carson asked the city attorney to address whether the two conversations the Mayor had related constituted undisclosed *ex parte* contacts. After a colloquy regarding whether those contacts had already been disclosed and the substance placed into the record, the city attorney determined that the contacts had not been disclosed until the Mayor did so during deliberations at the January 28, 2013 hearing. The council decided to re-open the record until February 4, 2013, to allow all parties an opportunity to respond in writing to the substance of the communications disclosed by the Mayor at the hearing, after which the applicant would have until February 8, 2013 to respond to any new testimony. The council also directed staff to draft the additional conditions of approval suggested by Councilor Jones, to be considered when the council reconvened on February 11, 2013 for further deliberations and a vote.

During the open comment period, several parties objected that the Mayor's disclosure at the January 28, 2013 meeting was inadequate, and asked for more information. In addition, several parties requested that the Mayor be disqualified from voting on the LOT project due to his alleged impartiality.

During the weekend of February 9-10, 2013, after the close of the open comment period and applicant response, Councilor Jones worked with staff to draft five new conditions of approval, in addition to those previously drafted by staff in response to the council's request on January 28, 2013.

On February 11, 2013, the city council reconvened, and its members declared several *ex parte* contacts that had occurred since the January 28, 2013 meeting. However, the Mayor did not respond to the requests for additional information regarding the substance and circumstances of the two contacts with the neighborhood association representatives, or disclose anything further of the substance of those contacts. The city council did not address the challenges to the Mayor's qualifications to vote.

Councilor Jones presented the five new conditions of approval to the council. Based on those conditions and the other conditions drafted by staff, the city council voted 4-0 to approve the two applications. These appeals followed.

INTRODUCTION

We first address the assignments of error alleging bias and procedural error, which are the first, second and third assignments of error in the petition for review filed by petitioners More, *et al*., and the fifth assignment of error in the petition for review filed by petitioners STOP, *et al.* For the reasons explained below, we remand to the city for additional proceedings to correct certain procedural errors. Given that disposition, LUBA would not typically go on to review assignments of error that challenge the merits of the decisions. However, the bases for remand under the sustained procedural assignments of error are limited, and as far as we can tell do not directly involve the merits, with the possible

exception of STOP's fourth assignment of error, which we also sustain. Accordingly, we deem it more consistent with the purpose of LUBA's review at ORS 197.805—that time is of the essence in reaching final decisions in matters involving land use and that decisions be made consistently with sound principles governing judicial review—to resolve the non-procedural assignments of error, and bring these appeals closer to finality.

FIRST ASSIGNMENT OF ERROR (MORE)

As explained above, during deliberations at the January 28, 2013 hearing the Mayor disclosed extra-record conversations he had with two neighborhood association representatives.[1] The city attorney advised the city council to re-open the record to allow participants to respond to the substance of the disclosures.

In their first assignment of error, petitioners More *et al.* argue that the Mayor failed to adequately disclose the substance of *ex parte* communications and the city accordingly failed to provide petitioners a meaningful opportunity to rebut the substance of those communications, as ORS 227.180(3) requires.[2]

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[1] The Mayor stated:

> "As I said early on, this is a quasi-judicial hearing, and decisions must be based on applicable approval criteria. That's the goal. It's not always, I think, the case. I think I have heard tonight some decision criteria which are not in the code. I've also heard a lot of assumptions. And one of the things that this body and the Planning Commission should be very attuned to is information, where it comes from, how it's processed, and is it applicable. For example, I heard several times, and it is in throughout the literature, that LOT is opposed by seven neighborhood associations; and the assumption I heard tonight was that they were against this because it was bad for the community. I didn't make that assumption. I called them. I called two of them. The first one I called said 'well, we have some minutes on that. I'll send them to you.' What the minutes said was that they opposed LOT until there was a better dialogue between Lake Oswego, Tigard, and the neighborhood associations. They were keying on something else that was said, that there are some problems with the way this issue has been handled. And that's a problem. The other neighborhood association I called, I asked the neighborhood association president what the impact was, or what they heard. And he said, 'Well, I can't send you minutes because we haven't had a meeting since last June or July' and I said, what about LOT? And he said, 'Never heard of it.' That neighborhood association didn't have an opinion about LOT. And that should be bothersome to us." West Linn's Response Brief at 5 (partial transcript of January 28, 2013 video, at 01:27:15).

[2] ORS 227.180(3) provides:

Petitioners note that four participants submitted written requests for a more adequate disclosure, including ten specific questions.[3] However, petitioners argue that the Mayor never responded to these questions or explained why no response was necessary. Petitioners contend that the Mayor's failure to identify the two neighborhood representatives he spoke with, the neighborhood associations involved, or more details about the conversations, made it difficult for participants to provide a meaningful rebuttal to the disclosure on January 28, 2013. According to petitioners, without such information, petitioners could not contact the two persons to confirm the substance of the conversation or determine their authority to speak on behalf of the neighborhood association involved.

> "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 received the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[3] Petitioners summarize the 10 questions on page 20 of the More petition for review:

1. With whom (by name) did these conversations occur?
2. When did the conversations occur, how and where?
3. Who initiated the conversations?
4. What confirmation existed indicating that those speaking with the Mayor represented a neighborhood group?
5. What persons were included in any such group?
6. What were the specifics of the conversations—who said what?
7. What was the sequence of questions, answers and comments?
8. At any point, did the Mayor inform the other participants that such conversations were *ex parte* contacts, improperly occurring while the Council was actively considering land use appeals on the very topic to which the conversations related?
9. Were the group representatives asked to submit their comments to the record in some documented form?
10. Were any written communications or emails provided to or from these groups or their representative? If so, where are the copies available for public review?

The city's findings on this point state that the Mayor's disclosure was "sufficient," that providing an opportunity for rebuttal fully complies with ORS 227.180(3), and that the statute "does not provide for cross-examination."[4] The findings also note that at least one participant (Froode) was able to respond to the substance of the communication without the additional information requested by other participants. Confusingly, the city's finding that the Mayor's disclosure was "sufficient" appears to be referring to a different set of *ex parte* contacts that occurred over the weekend of February 2-3, 2013, not the contacts that were disclosed at the January 28, 2013 hearing. *See* Record 366 (Mayor's email dated February 5, 2013). Nonetheless, it is reasonably clear that the city considered the Mayor's January 28, 2013 disclosure to be sufficient and implicitly rejected the participants' requests for additional information.

Citing *Link v. City of Florence*, 58 Or LUBA 348 (2009), the city responds initially that even if the Mayor's disclosures were inadequate or a violation of ORS 227.180(3) occurred, remand under ORS 227.180(3) is not warranted, because nothing in the applicable

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[4] The findings state, in relevant part:

> "The substance of the contact was placed in the record* and rebuttal was offered in the 7 day period.** This fully meets the legal standard. The law does not provide for cross-examination. If anyone wished to challenge the Mayor's statements that he did not believe that 7 neighborhood associations opposed the project, they could do so, as Mr. Froode did." Record 183 (* and ** indicate footnotes omitted).

In the first of the omitted footnotes, the findings state:

> "The Mayor, according to his statement in the record of this case, said that he spoke with two people—One was concerned that 'LOT treat WL citizens right' and the other 'knew nothing about LOT.' Mayor Kovash email dated February 5, 2013. That is sufficient." Record 183, n 1.

In the second of the omitted footnotes, the findings comment on the Froode response:

> "Mr. Froode took advantage of this opportunity in his email of February 4, 2013 to say that one of the supposed opposition neighborhood associations did not, in fact, oppose and that those who did, did so 'in one form or another' (such as, perhaps, to urge further discussions). Moreover, he suggests that not all such associations 'had quorums or are active' as well. The Mayor's point appears to be well-taken." Record 183, n 2.

approval criteria require the city to base its decision on how many neighborhood associations support or oppose the application.

In *Link*, a city councilor belatedly disclosed conversations with persons who expressed general support for the challenged annexation. The city failed to provide an opportunity to rebut the substance of those conversations. However, we held that to the extent general expressions of support or opposition not linked to approval criteria can be considered *ex parte* contacts, the failure to provide opportunity to rebut such general expressions of support or opposition does not provide a basis for remand, because such general expressions include no factual or legal assertions that could possibly be rebutted. *Id.* at 354.

The present case is distinguishable. As discussed below, one of the applicable approval criteria, Community Development Code (CDC) 60.070A(3), requires a finding that the facility meets the overall needs of the community." At the January 28, 2013 hearing Councilor Jones was prepared to vote against the project, based in part on testimony that seven neighborhood associations opposed it. The Mayor cited his conversations with two association representatives to dispute that testimony. Both the councilor and the Mayor apparently considered the number of neighborhood associations in opposition to the proposal to be a relevant consideration under CDC 60.070(A)(3). In its findings, the city council appeared to resolve that factual dispute in favor of the Mayor. *See* n 4 ("The Mayor's point appears to be well-taken"). Unlike the circumstances in *Link*, the *ex parte* contacts at issue in the present case involve disputed facts that, for whatever reason, the final decision makers appeared to consider to be relevant to the approval criteria.

The city next responds that the city fully complied with ORS 227.180(3), because the Mayor adequately disclosed the substance of the communications at the January 28, 2013 hearing, and the city provided an opportunity for the parties to respond to the substance of those disclosures. According to the city, the Mayor adequately disclosed the substance of the

communications with the two unidentified neighborhood association representatives, *i.e.* that two associations did not oppose the project, and no further information is necessary to allow a meaningful response. The city notes, as do the findings, that at least one participant was able to respond to the substance of the communications, even without additional information. The e-mail from Froode states that, after the Mayor's disclosure, he investigated for himself, and concluded that eight of 11 neighborhood associations oppose the project. Record 368.

We disagree with the city that it fully complied with ORS 227.180(3). While the city is correct that ORS 227.180(3) does not require cross-examination, it does require more than a *pro forma* opportunity to rebut a disclosure. In our view, to provide a meaningful opportunity for rebuttal, the city or the decision-maker at issue must (1) consider objections that the initial disclosure was inadequate, and (2) make some response to specific requests for additional information or clarifications that are reasonably necessary for participants to develop rebuttal to material factual and legal assertions in the initial disclosure.

In the present case, at least some of the 10 questions or requests for additional information that participants submitted appear to fall into that category. In particular, the absence of information identifying the neighborhood association representatives that the Mayor spoke with, and which associations they represented, made it difficult for participants to gather the information needed to rebut the Mayor's claim that two of seven neighborhood associations allegedly in opposition to the proposal in fact did not oppose the project. The absence of such information meant that the best one participant could do was to conduct his own survey of 11 neighborhood associations.

The city does not identify any deadline or practical impediment that would have prevented the Mayor from considering the 10 specific questions submitted, and answering at least those questions that may be necessary for participants to develop rebuttal to the disputed fact asserted in his initial disclosure. We conclude that remand is necessary for the Mayor to

do so, after which the city must provide a reasonable opportunity for participants to rebut the disclosure in light of that additional information.

The first assignment of error (More) is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR (MORE)

Under the second assignment of error, petitioners argue that the Mayor's actions to independently obtain evidence in support of approval, as described in their first assignment of error, demonstrate that the Mayor is biased in favor of the proposal. Under the third assignment of error, petitioners argue that city committed procedural error prejudicial to petitioners' substantial rights, by failing to address challenges made to the Mayor's impartiality, under the procedures set forth at CDC 99.180(B).[5]

As an initial matter, we understand the city to argue that LUBA should first resolve petitioners' second assignment of error, which directly alleges that the Mayor was biased under controlling LUBA precedent, and if LUBA denies the second assignment of error, the

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[5] CDC 99.180 provides, in relevant part:

> "B. Challenges to Impartiality.
>
> > "1. An affected party or a member of a hearing body may challenge the qualification of a member of the hearing body to participate in the hearing and decision. The challenge shall state the facts relied upon by the challenger relating to a person's bias, pre-judgment, personal interest, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner.
> >
> > "2. The challenged person shall have an opportunity to respond orally to the challenge. The challenge shall be incorporated into the record of the hearing.
> >
> > "3. Any challenge shall require that the hearing body vote on the challenge pursuant to subsection E of this section.
>
> "* * * * *
>
> "E. Abstention or disqualification. Disqualification for reasons other than the member's own judgment may be ordered by a majority of the members of a hearing body present and voting. The member who is the subject of the motion for disqualification may not vote on the motion but shall be allowed to participate in the deliberation of the hearing body on that motion."

third assignment of error based on violation of CDC 99.180(B) should be denied, as moot or harmless error. However, for two reasons, we believe it is more appropriate to resolve the procedural challenge and, for the reasons explained below, remand for the city to apply CDC 99.180(B).

First, the standards that the city council might apply in deciding the impartiality challenge under CDC 99.180(B) may not necessarily be the same standards that LUBA would apply in directly addressing a bias claim under LUBA precedent. The city council, for example, might decide that a member should be disqualified in circumstances where LUBA would not find reversible bias. Second, CDC 99.180 allows a challenged member to abstain from participation and voting. One possibility is that, on remand, the Mayor could choose to abstain from participating in the proceedings on remand, which would make it unnecessary for the city council, or LUBA, to resolve the bias challenges. For these reasons, we deem it more appropriate to resolve More's third assignment of error, and not to reach More's second assignment of error.

Turning to the third assignment of error, CDC 99.180 sets out the process for resolving challenges to a member's impartiality. CDC 99.180(B)(2) provides that the challenged member "shall" have an opportunity to respond to the challenge. CDC 99.180(B)(3) provides that "[a]ny challenge shall require that the hearing body vote on the challenge pursuant to subsection E of this section." As defined at CDC 02.010(A), "shall" is mandatory. Despite these mandatory terms, the city council conducted no proceedings under CDC 99.180(B), adopted no findings addressing the challenge to the Mayor's impartiality, and adopted no findings explaining why no proceedings under CDC 99.180(B) are required. The council neither provided the Mayor an opportunity to respond orally to the challenge, nor voted on the challenge.

The city argues in its response brief that despite the mandatory language in CDC 99.180(B)(3), the code does not *require* the city council to vote on the impartiality challenge.

According to the city, CDC 99.180(B)(3) requires that the vote be conducted "pursuant to" CDC 99.180(E). That subsection in turn states that disqualification for reasons other than the member's own judgment "may" be ordered by a majority of the hearings body present and voting, but that the member "may" not vote. The city argues that use of the word "may" in the first sentence of CDC 99.180(E) means that the city has the discretion to vote on an impartiality challenge, or not, as it sees fit, and therefore CDC 99.180(B)(3) does not require the city to vote or take any action on an impartiality challenge.

We disagree with the city's interpretation of CDC 99.180(B) and (E). CDC 99.180(E) twice uses the auxiliary word "may," in both instances in the sense of "permitted to." *See* CDC 02.010(A) (defining "may" to mean permissive). Under the first sentence, a majority of the hearings body is permitted to ("may") disqualify a member. Read in isolation, the first sentence could be read as the city argues to grant the city council the unfettered discretion to vote on a bias challenge, or to ignore the challenge, as the council sees fit. However, that broad reading of CDC 99.180(E) is simply inconsistent with the rest of CDC 99.180. The second sentence of CDC 99.180(E) provides that the challenged member is *not* permitted to vote ("may not vote") on the motion. This use of the word "may" in the second sentence of CDC 99.180(E) is clearly speaking to authority or permission, not to the exercise of discretion. Presumably, the word "may" in the first sentence of CDC 99.180(E) is also speaking to authority or permission, not the exercise of discretion.

Whatever ambiguity remains in CDC 99.180(E) is eliminated by CDC 99.180(B)(3), which unambiguously *requires* the city council to vote on a bias challenge. Read together, it is clear that CDC 99.180(E) simply sets out the process for conducting the vote on a member's impartiality; it does not prescribe whether that vote is *required*. It is CDC 99.180(B)(3) that expressly prescribes when a vote is required, and it expressly "requires" a vote on any challenge made under CDC 99.180(B). Read as a whole, CDC 99.180(B)(3) and

(E) cannot be understood to grant the city council the unfettered discretion to ignore an otherwise validly submitted challenge to a member's partiality, as the city argues in its brief.

The city next argues that the city council's failure to vote on the impartiality challenge does not warrant remand, because that failure did not prejudice the petitioners' substantial rights. *See* ORS 197.835(9)(a)(B) (LUBA may remand if the local government failed to following applicable procedures in a manner that prejudiced the substantial rights of the petitioner).

Petitioners allege in the petition for review that due to the city council's failure to act on the challenges, the city council allowed what could be a biased decision maker to participate in deliberations and the vote at the February 11, 2013 hearing, which prejudiced petitioners' substantial right to have a decision by impartial decision makers.

The city responds that there is no evidence that the city council, had it considered and voted on the impartiality challenge, would have disqualified the Mayor. Further, the city argues that petitioners have not established that the Mayor's participation in deliberations or the vote influenced any other councilor. Absent such a showing, the city argues that petitioners have not demonstrated that any procedural error violated their substantial rights.

The "substantial right" protected by the process at CDC 99.180(B) is the right to an impartial decision maker, a right that is protected by allowing participants to challenge the impartiality of decision makers, and requiring the hearings body to resolve that challenge. The city effectively denied petitioners the ability to challenge the Mayor's impartiality during the proceedings below. We agree with petitioners that the city's failure to comply with CDC 99.180(B) prejudiced their substantial rights, regardless of whether the Mayor would have been disqualified had the city acted on the challenge, and regardless of whether the Mayor's participation influenced other decision makers.

The third assignment of error (More) is sustained. We do not reach petitioners' second assignment of error.

FIFTH ASSIGNMENT OF ERROR (STOP)

In their fifth assignment of error, petitioners STOP argue that Councilor Jones engaged in undisclosed *ex parte* contacts with the applicant. Petitioners allege that that city staff discussed with the applicant the five conditions that Councilor Jones drafted over the weekend of February 9-10, 2013, the applicant agreed to those conditions, and then staff conveyed to Councilor Jones the information that the applicant agreed to the five conditions. Petitioners argue that conveyance of that information to Councilor Jones constituted an *ex parte* contact between the applicant and Councilor Jones, via staff, that the councilor was required to disclose, but did not.

Petitioners' allegations are not based on anything in the record. In an earlier round of pleadings, petitioners moved this Board to order, pursuant to OAR 661-010-0045, depositions of staff and Councilor Jones to gain the evidence needed to support the fifth assignment of error. In support of that motion, petitioners submitted an affidavit of one petitioner and a newspaper article. In an order dated September 25, 2013, LUBA denied the motion to take evidence under OAR 661-010-0045, concluding that even if petitioners' allegations are true, which the city does not concede and which seems doubtful, the alleged conduct does not constitute an *ex parte* contact that must be disclosed under ORS 227.180(3). *STOP v. City of West Linn*, __ Or LUBA __ (LUBA No. 2013-021/022/023, Order, September 25, 2013), For reasons set out in that order, petitioners' arguments under the fifth assignment of error do not provide a basis for remand.

The fifth assignment of error (STOP) is denied.

FOURTH ASSIGNMENT OF ERROR (MORE)

CDC 60.070(A)(3) is a conditional use permit standard that requires a finding that "[t]he granting of the proposal will provide a facility that is consistent with the overall needs of the community."

The planning commission found that the proposed pipeline was not "consistent with the overall needs of the community," based on its understanding that the "community" referred to is the citizens of the City of West Linn, and that "overall needs of the community" required a demonstration that the project would provide net long-term benefits to the citizens of West Linn. The planning commission agreed with opponents that the pipeline would primarily benefit the citizens of Tigard and Lake Oswego, and that given the negative impacts of construction would not create a net benefit for the citizens of West Linn.

The city council disagreed in part, instead interpreting "community" to mean more than the citizens of West Linn. The city's code does not define "community," but CDC 2.010 directs the city to use *Webster's Third New Int'l Dictionary* to obtain the meaning of undefined terms. Accordingly, the city consulted the dictionary, and based on the broad definitions therein concluded that "community" as used in CDC 60.070(A)(3) is not limited to the citizens of West Linn.[6] The city council also noted that the city must consider the "overall" needs of the community, which does not suggest a limited scope of consideration. As discussed below under More's fifth assignment of error, the city council then applied that interpretation to conclude that the project complies with CDC 60.070(A)(3) because it will confer several benefits on the City of West Linn, as well as Tigard and Lake Oswego.

Petitioners argue that the city's interpretation of "community" is inconsistent with the express language, purpose and policy underlying CDC 60.070(A)(3), and therefore that interpretation cannot be affirmed, notwithstanding the deferential standard of review that applies to a governing body's interpretation of local legislation under ORS 197.829(1) and

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[6] The city's findings state, in relevant part:

> "* * * The 'overall' needs of the community must look at what is in the best interest of the City of West Linn as a whole. Considering the term 'community' in the context of 'overall,' this term does not suggest that a use must be exclusive and cannot serve the needs of West Linn while also serving the needs of Lake Oswego and Tigard, in addition to those of West Linn." Record 199.

Siporen v. City of Medford, 349 Or 247, 255, 243 P3d 776 (2010).[7] According to petitioners, the planning commission correctly interpreted CDC 60.070(A)(3) to limit "community" to the citizens of West Linn. The city council's more expansive interpretation is inconsistent with the text of CDC 60.070(A)(3), petitioners argue, because it essentially re-arranges the text so that it reads "consistent with the needs of the *overall* community." Further, petitioners argue that the city council's interpretation is inconsistent with the "guidelines, requirements and spirit" of the city's comprehensive plan, because it allows the city to approve development that primarily benefits non-citizens of the city, to the detriment of the citizens. More Petition for Review 42.

Respondents argue, and we agree, that petitioners have not established that the city council's interpretation is reversible under ORS 197.825(1) and *Siporen*. The city council's interpretation does not re-arrange the text of CDC 60.070(A)(3), but simply noted that "overall needs" does not suggest a limited meaning to "community." The city council's interpretation that "community" is not limited to the citizens of West Linn is consistent with the broad dictionary definition that the CDC requires the city to consult when interpreting undefined terms, and is not consistent with any text or context cited to us. As to the purposes or policies underlying CDC 60.070(A)(3), petitioners do not identify any comprehensive plan or land use regulation text that embodies the purpose or policy underlying CDC 60.070(A)(3). Arguments that the city council's interpretation is inconsistent with the

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[7] ORS 197.825(1) provides in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

"spirit" of the comprehensive plan are insufficient to demonstrate that the interpretation is reversible under ORS 197.825(1)(b) or (c).

The fourth assignment of error (More) is denied.

FIFTH ASSIGNMENT OF ERROR (MORE)

Petitioners argue that the city's finding under CDC 60.070(A)(3) that the pipeline is "consistent with the overall needs of the community" is not supported by substantial evidence.[8]

The city's finding of compliance with CDC 60.070(A)(3) is based in part on certain benefits that the city council found the pipeline would bring to West Linn.[9] Specifically, the

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[8] Petitioners More also argue under this assignment of error that the city council's findings of compliance with CDC 60.070(A)(3) are inadequate, because they do not address conflicting evidence regarding impacts of construction on businesses along Highway 43. We resolve that argument under Petitioners STOP's fourth assignment of error, *infra*, which concerns an identical argument under CDC 60.070(A)(1).

[9] The city council's findings state, in relevant part:

> "* * * The new pipelines and plant enhance the existing interconnectivity between West Linn's water systems and Lake Oswego's water system with facilities that will be seismically secure. This is critical because, as the Water System Master Plan explains, the City of West Linn has a deficiency in its emergency supply capability. Expanding and securing the intertie with Lake Oswego is the preferred means of meeting West Linn's need for emergency water as described in the Water System Master Plan. If it was possible for West Linn to obtain the necessary development permits to install a new parallel transmission main across the river, which is the next best Water System Master Plan option, the cost for West Linn would be about $11.6 million and would provide far less redundancy and reliability. The Council finds that the provision of 4 mgd through the intertie that is available until at least 2041 is a benefit that will last for 25 years or more, and it should be considered as an asset that helps to meet a need of the West Linn community for emergency water. The intertie gives West Linn access to water from a system designed to be much more reliable than the system in place today. Condition of Approval 17 requires amending the existing intergovernmental agreement between West Linn and Lake Oswego to ensure that it cannot be terminated without mutual written consent of all parties. Condition of Approval 10 requires the applicant to provide a new pipeline and a third intertie pump so that the intertie can be used to maximum capacity.
>
> "Further, the $5 million dollar fee for use of right-of-way within the city was not part of the proposal that the Planning Commission considered. This fee can be used for water system improvements to meet needs identified in the Water System Master Plan. These water system improvements will benefit the entire City of West Linn, including both residents and businesses. * * * To aid in meeting the needs of the Water System Master Plan, the applicant is also conveying its 24-inch transmission line along Highway 43, and other abandoned lines as required by Conditions of Approval 5 and 19.

city council concluded that the proposed pipeline benefits the City of West Linn, because (1) it would give the city access to a reliable and seismically secure emergency water connection, and save the city $11.6 million otherwise required to upgrade the city's emergency water supply via a similar new transmission line across the Willamette River, and (2) as a condition of approval, Lake Oswego would agree to modify the existing intergovernmental agreement between the cities to make the city's access to emergency water more secure.[10] Petitioners argue that the city's findings on these benefits are not supported by substantial evidence.

A. Savings of $11.6 Million

The city's findings state that an upgraded intertie system such as that represented by the Project is the preferred alternative under the city's Water System Master Plan (WSMP) to upgrading the city's emergency water supply. *See* n 9. The findings go on to state that the "next best Water System Master Plan option, [costing] $11.6 million," is to construct a "new parallel transmission main across the river." *Id.* However, petitioners argue that these findings are not supported by substantial evidence, because the WSMP does not in fact consider as an alternative emergency water supply a new parallel transmission main across the Willamette River at a cost of $11.6 million, and thus the purported savings of $11.6 million are illusory.

Respondents argue that petitioners are mistaken, and in fact Solution Approach B discussed in the WSMP, which is to build a back-up transmission supply line from the South Fork Water Board at a cost of $8 million, is the "next best" option referenced in the findings. Respondents cite to a letter from the author of the WSMP explaining that Solution Approach B involves a new transmission line crossing the Willamette River, and updates the cost in

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> "For the reasons stated above, the City Council finds that with additional conditions, the pipelines will be consistent with the 'overall needs of the community.'" Record 199-200.

[10] Petitioners also challenge the city's reliance on a $5 million fee paid to the city for water system improvements. We address that challenge below under STOP's first assignment of error, which also challenges the $5 million fee, on different grounds.

2012 dollars to $11.6 million. Record 321. We agree with respondents that the city's findings regarding potential savings from the "next best" WSMP option appear to be supported by substantial evidence.

B. Intergovernmental Agreement

The city imposed condition of approval 17, requiring that the intergovernmental agreement between the city and Lake Oswego be modified in three particulars, among them to provide that the agreement cannot be terminated without mutual written consent of all parties. Petitioners argue that the current intergovernmental agreement between the city, Lake Oswego and the South Fork Water Board already provides everything required by condition of approval 17, so the city will gain no new rights or benefits under the agreement, which undercuts the city's conclusion that the proposal complies with CDC 60.070(A)(3). In addition, petitioners argue that there is no evidence in the record that the South Fork Water Board, which is also a party to the current agreement, will agree to the modifications.

Respondents argue that one of the required modifications effectively locks in the quantity of water guaranteed to the City of West Linn, four mgd, to meet the city's emergency supply requirements. According to respondents, the current agreement includes no such guarantee, and thus condition of approval 17 provides a new benefit to the city. As to the future agreement of the South Fork Water Board to the modifications, respondents argue that no evidence is necessary on that point. If the Board does not agree, then condition of approval 17 will not be satisfied, and the project will not proceed. We agree with respondents that petitioners have not established that the city's findings regarding condition of approval 17 are not supported by substantial evidence.

The fifth assignment of error (More) is denied.

FIRST ASSIGNMENT OF ERROR (STOP)

The city's findings also identify as a benefit for purposes of CDC 60.070(A)(3) the payment of a one-time "community impact fee" of $5 million, to be used for water system

improvements. Condition 16 requires payment of the $5 million fee, in lieu of a franchise fee or other licensing fee.[11] Both sets of petitioners challenge the $5 million fee, but from different perspectives. Petitioners STOP argue, in their first assignment of error, that the $5 million fee is prohibited as a matter of law. Petitioners More argue, in part of their fifth assignment of error, that the city's findings that the $5 million fee is a benefit to the city are not supported by substantial evidence.

A. The city lacks legal authority to impose a community impact fee

Petitioners STOP argue that the city lacks legal authority to impose an *ad hoc* "community impact fee" in lieu of a franchise or other licensing fee. According to petitioners, the city's code limits the ability of the city to regulate use of a city right of way, including fees, to those set by ordinance, franchise, license, or permit. West Linn Municipal Code (WLMC) 9.030.[12] Petitioners argue that the city has adopted no ordinance that allows it to impose a "community impact fee," and the city does not claim that it granted LOT a franchise, license or permit to use city right of way. Petitioners contend that the city's decision grants LOT a *de facto* perpetual franchise to use city right of way, and the "community impact fee" is, in essence, a franchise fee. However, if so, petitioners argue that the franchise is inconsistent with state statutes, which among other things limit a franchise to 20 years. *See* ORS 221.460. According to petitioners, the only lawful means for the city to

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[11] Condition 16 states:

> "Community Impact Fee. The applicant shall enter into an intergovernmental agreement with West Linn in lieu of a franchise fee or other licensing fee for the use of public streets in West Linn. That agreement shall require a one-time payment of $5 million to be used for West Linn water system improvements to meet the overall needs of the community." Record 249.

[12] WLMC 9.030 provides:

> "The City has jurisdiction to control public rights of way within the City and may regulate the use of rights of way by ordinance, franchise, license, permit or any combination thereof."

impose a "community impact fee" is to adopt an ordinance that so authorizes, or to convey or lease the right of way to LOT.

The city responds, initially, that no party raised below the issue that the city lacked the legal authority to impose the "community impact fee" in lieu of a franchise or other licensing fee, and that issue is waived under ORS 197.763(1).[13] According to the city, most comments below directed at the $5 million fee were that the city was not charging LOT enough for the right to use the city's streets, not that the city lacked authority to charge LOT any fee at all. On the merits, the city argues that it is a home rule city, and has broad powers under its charter. According to the city, neither WLMC 9.030 nor any other authority cited by petitioners prohibits the city from requiring that an applicant/local government enter into an intergovernmental agreement with the city requiring payment of a fee for the use of a city right of way.

In the reply brief, petitioners STOP argue that opponents raised several challenges to the $5 million fee, including arguments that the "franchise" violated the 20 year term of ORS 221.460. Record 1581. Petitioners argue that, having raised some issues below regarding the fee, petitioners are now entitled to raise new legal arguments at LUBA, specifically the argument that the city lacks legal authority to require the community impact fee.

Petitioners are correct that while the "issue" must be raised with sufficient specificity below, ORS 197.763(1) does not limit the "arguments" on appeal regarding that "issue" to the exact same arguments made below. However, the "issues/arguments" distinction is notoriously difficult to apply. The ultimate test is whether the "issue" was raised below with

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[13] ORS 197.763(1) provides:

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

sufficient specificity that the governing body and the parties have an adequate opportunity to respond to the issue. In the present case, the issue is whether the city has the legal authority to require the applicant to enter into an intergovernmental agreement to pay a one-time "community impact fee" for the use of city right of way for a pipeline. While some challenges to the fee were made below, the only one that comes close to the issue raised in this appeal is the argument that, as a fee for a "franchise," the fee violates the 20 year term of ORS 221.460. However, in our view that argument did not give the city and the parties fair notice of the issue raised in this assignment of error: that the city lacks *any* legal authority to impose the $5 million fee, and therefore the city cannot consider that fee a "benefit" for purposes of CDC 60.070(A)(3). We agree with the city that that issue is waived.

B. The community impact fee cannot be considered in determining whether the facility meets the overall needs of the community

As noted, CDC 60.070(A)(3) requires a finding that the "facility" meets the overall needs of the community. Petitioners STOP also argue under their first assignment of error that the city misinterpreted CDC 60.070(A)(3) in finding that the $5 million fee is a benefit that meets the overall needs of the community. According to petitioners, it is the "facility" itself that must meet the overall needs of the community, not fees associated with the facility.

However, we see no error in determining that a facility will meet the overall needs of the community based in part on the revenue or fees to be derived from the facility.

C. The $5 million fee is not enough of a benefit

As part of their fifth assignment of error, petitioners More argue that the city's finding that the one-time community impact fee will benefit the city for purposes of the CDC 60.070(A)(3) analysis is not supported by substantial evidence. According to petitioners, the city could gain much more revenue in the long run if the city charged LOT an annual fee of some kind to use the city right-of-way in perpetuity. Petitioners STOP make a similar

argument, that the city could gain more revenue in the long run if it leased the right of way to LOT for the maximum 99 year period, based on a fair-market value of the right-of-way.

It is not clear to us that Condition 16 necessarily forecloses the city from also charging LOT other types of otherwise applicable fees related to use of the city right-of-way, as petitioners More suppose. But even if that is the case, petitioners' argument that the city might gain more money in the long run does not demonstrate that the $5 million fee cannot be considered a benefit to the city for purposes of CDC 60.070(A)(3), or that the city's findings on this point are not supported by substantial evidence.

The first assignment of error (STOP) is denied.

SECOND ASSIGNMENT OF ERROR (STOP)

STOP's second assignment of error challenges the findings and evidence regarding drilling for the proposed raw water pipe underneath the portions of the state park and OPRD-owned lots that are designated WRA to protect wetlands and riparian areas.

CDC 32.050 sets out the approval criteria for development within a WRA. CDC 32.050(C) requires that "[d]evelopment shall be conducted in a manner that will minimize adverse impacts on water resource areas." Further, CDC 32.050(C) requires that "[i]f any portion of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan as specified in CDC 32.070 designed to restore disturbed areas[.]"[14]

[14] CDC 32.050(C) provides:

> "Development shall be conducted in a manner that will minimize adverse impact on water resource areas. Alternatives which avoid all adverse environmental impacts associated with the proposed action shall be considered first. For unavoidable adverse environmental impacts, alternatives that reduce or minimize these impacts shall be selected. If any portion of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan as specified in CDC 32.070 designed to restore disturbed areas, either existing prior to development or disturbed as a result of the development project, to a healthy natural state."

As noted, the applicant proposed horizontal directional drilling, where the drill is inserted into a seven-foot deep hole in the ground outside the WRA area, and the drill proceeds down and horizontally under the WRA area at a considerable depth from the surface and the bottom of water features such as wetlands or the river. The city concluded that the proposed drilling did not constitute the "permanent disturbance" of any portion of the WRA area, and thus did not require that the applicant prepare a mitigation plan under CDC 32.070.[15]

Petitioners argue that the city misinterpreted CDC 32.050 to apply the "minimize adverse impacts" and mitigate "permanent disturbances" standards only to disturbances to the *surface* of WRAs. Petitioners contend that sub-surface drilling, no matter how deep underground, may still constitute a "permanent disturbance" for purposes of CDC 32.050(C). According to petitioners, the soil underneath a wetland may perform a water purification function involving groundwater flows, and any disturbance of such soils might disturb the wetland qualities protected by WRAs.

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[15] The city's findings state, in relevant part:

> "The applicant's proposal avoids impacts to the Willamette River and WRAs in Mary S. Young Park by tunneling beneath these areas. The record contains a technical memorandum prepared by ecologists which demonstrates that the HDD that will occur 65 feet below grade when it travels under the ordinary high watermark of the Willamette River and approximately 7 feet below grade, the shallowest depth of the bore, when it approaches the HDD staging area in the northern OPRD property—well outside of all WRAs. Therefore, the HDD boring phase of the project will not disturb the soils, wetlands, and vegetation associated with nearby WRAs." Record 187.
>
> "* * * The evidence in the record establishes that using HDD construction methods well below (34 to roughly 60 feet) a WRA will have no effect on the resources protected by the WRA. Protected WRAs include the drainage channel, creek, wetlands, and the required setback and transition areas that exist above ground while the wetland component of a WRA can extend below ground to a depth that is 'inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.' This [CDC 2.030] definition provides a limit upon which to measure the below-ground extent of wetlands and therefore, WRAs. The applicant's plans demonstrate that their RWP alignment avoids WRAs by going around (beneath) them and containing impacts to WRAs * * *. Therefore, the maximum disturbance limitations contained in Chapter 32 do not apply." Record 188.

Further, petitioners argue that the applicant's technical memorandum discusses the possibility of "hydrofracture" during drilling, which can occur if the drilling fluid pumped into the hole to keep it open exceeds the pressure of the surrounding soil or bedrock, allowing drilling fluid to leak into the ground. The technical memorandum concluded that there is

> "a very low likelihood of hydrofacture occurrence. Measures will be in place to monitor and limit the extent of hydrofracture leakage should hydrofracture occur. Drilling fluids are comprised of non-toxic substance, most of which is water. Therefore, no impacts to groundwater resources are anticipated from the project." Record 8413.

However, petitioners argue that the possibility of hydrofracture demonstrates that the drilling could disturb groundwater and possibly the water resource areas.[16]

Lake Oswego responds, and we agree, that the city did not interpret CDC 32.050 to apply only to disturbances to the "surface" of water resource areas, as petitioners claim. Fairly read, the findings consider potential impacts to the soils, water column and vegetation that constitute a wetland, not just the surface of the wetland, and conclude based on expert testimony that the drilling would occur at such depths below protected wetlands (34 to 60 feet) that no impact on the wetland as a whole is expected. Petitioners cite no evidence to the contrary.

Petitioners also argue that the disturbance standard applies to the entire property on which WRA areas are located, not just the WRA area itself. Petitioners note that CDC 32.020 states that chapter 32 "applies to *properties* upon which a natural drainageway, wetland, riparian corridor and/or associated transition and setback area, is located."

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[16] Lake Oswego also argues that no issues were raised below regarding the water purification function of soils under a WRA or the impact of hydrofracture on groundwater and wetlands, and that petitioners' speculations on those points are waived and, in any case, not supported by anything in the record. Petitioners reply that general issues regarding disturbances in WRAs were raised below, and the technical memorandum itself discusses hydrofracture. While we tend to agree with Lake Oswego that petitioners' two concerns regarding water purification function of soils and the potential impact of hydrofracture on groundwater and wetlands were not developed below, the main thrust of this assignment of error is a challenge to the city's purported interpretation that the disturbance standard applies only to the surface of WRA resources. Lake Oswego does not argue that that interpretative issue was waived.

(Emphasis added.) Because surface drilling is proposed on portions of the OPRD lots that are outside the WRA areas, petitioners argue, the city should have applied the disturbance standard and required the applicant to comply with mitigation requirements.

Lake Oswego argues, and we agree, that petitioners have not demonstrated that the disturbance and mitigation requirements apply to portions of the OPRD lots that are located outside the WRA areas. Petitioners' interpretation would subject all development on any portion of a property that includes a WRA, even if the development is distant from the WRA and would not affect it in any way. Other than the reference to "properties" in CDC 32.020, petitioners cite nothing in the text or context of CDC chapter 32 that supports petitioners' interpretation.

The second assignment of error (STOP) is denied.

THIRD ASSIGNMENT OF ERROR (STOP)

As noted, the finished water pipeline from the WTP to the Lake Oswego city limits will be placed in a trench within the city right-of-way in Mapleton Drive. Two creeks, protected as WRAs, cross underneath Mapleton Drive in culverts. For Trillium Creek, the applicant proposed tunneling the finished water pipe underneath the culvert. For Heron Creek, the applicant proposed tunneling the water pipe over the culvert. The city concluded that the pipeline would not "disturb" either creek, because all trenches and tunnels will be completely located within areas already disturbed by the pavement of Mapleton Drive and the culverting of the two creeks. The city concluded, therefore, that the mitigation requirements of CDC 32.070 did not apply.

In the third assignment of error, petitioners argue that the city misinterpreted the applicable law in concluding that no mitigation is required when new development is placed in an already disturbed area of a WRA. According to petitioners, CDC 32.050(C) provides that if "any portion of the water quality resource area is proposed to be permanently

disturbed," the mitigation requirements of CDC 32.070 apply, and there is no exception for development within portions of WRAs that are already disturbed.

Lake Oswego responds that the city reasonably concluded that no "disturbance" occurs within the meaning of CDC 32.050(C) when a pipeline is placed beneath a paved road, which crosses over a culverted creek. The city found that the pipeline would be placed entirely within paved areas of the Mapleton Drive right of way, and that "[t]here will be no impacts on adjacent storm drainage channels, streamside vegetation, and water quality or water quantity as a result of the proposed pipeline installation." Record 240. Petitioners do not dispute either finding. Implicit in those findings, Lake Oswego argues, is the city's view that "disturbance" does not include physical changes that result in no impacts at all on the protected resource, the two creeks. Because there are no impacts, Lake Oswego argues, there is simply nothing to mitigate, and therefore no reason to apply the mitigation requirements of CDC 32.050(F).

Petitioners have not established that the city council's apparent interpretation of CDC 32.050(C), to the effect that no "disturbance" occurs and hence no mitigation is required when physical changes result in no impacts at all on the protected resource, is reversible under the deferential standard of review we must apply to a governing body's code interpretations, under ORS 197.829(1). That interpretation is consistent with the text and apparent purpose of CDC 32.050(C), which is to avoid or minimize adverse impacts on water resource areas, and require mitigation to restore permanently disturbed areas to a healthy natural state. Because the pipeline will have no impacts at all, and because the affected area is already disturbed by the existing paved area, the city did not err in concluding that no mitigation is required under CDC 32.050(C).

The third assignment of error (STOP) is denied.

FOURTH ASSIGNMENT OF ERROR (STOP)

CDC 60.070(A)(1) requires a finding that there is "adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses. The city council interpreted CDC 60.070(A)(1) together with CDC 60.070(A)(3) to require that "adequate measures [are] taken to mitigate for the possible adverse effects of the installation of the utility on surrounding properties and uses." Record 192.

As noted, the finished water pipeline will be laid in a trench along Highway 43, proceeding at approximately 50 feet per day for five months. To mitigate impacts on adjacent businesses, LOT proposed and the city accepted a number of conditions, the primary one of which is to limit all construction and lane closures to nighttime hours between 8 p.m. and 5 a.m. The project must provide full access to the 43 commercial driveways outside of construction hours, and at least one access point for businesses that are open into a portion of the night-time construction period.

During the city council hearings, opponents to the project submitted testimony from Michael Wilkerson, Ph.D., entitled the "West Linn Business Impact Report" (Report). Record 1308-20. The 14-page Report examined a study of impacts of road construction projects on adjacent businesses in a small city in Oregon, which similarly involved a condition limiting construction to night-time hours, as well as studies involving projects in Texas and Florida. The Report distinguished between impacts on "destination" businesses, such as a medical office, where customers are not likely to be deterred by construction delays or inconvenience, and "impulse" businesses, such as fast food restaurants, which are more dependent on customers driving by and more sensitive to impacts of construction on access. The Report cited significant decreases in traffic counts for impulse businesses, for example a 63.9% decrease in traffic counts reported for a fast food restaurant. Record 1317. The Report concluded that the mitigation proposed by LOT would not prevent significant adverse impacts on businesses along Highway 43.

In response, LOT objected that Wilkerson's credentials were not identified, although LOT agreed that he works as an economist. LOT further objected that the Report revised traffic counts for the project prepared by LOT's traffic engineers, and argued that Wilkerson has no expertise in traffic calculations. LOT also disputed that the studies discussed in the Report involved comparable projects, subject to comparable mitigation. According to LOT, the project in Oregon did not similarly involve requirements to provide access at all times.

As a final response, LOT proposed two additional mitigations, including new access signage and a new condition requiring that LOT implement a "Shop Local" marketing plan, to offset loss of business caused by construction.

The city's findings list three pages of mitigation measures proposed in LOT's construction mitigation plan, and concluded that those measures, enforced in conditions of approval, are effective means of minimizing negative impacts to surrounding residents and businesses. Record 193-95. The council agreed with a peer reviewer's comment that the proposed measures equal and in some cases exceed mitigation measures typically provided for projects of similar size and scope. However, the findings then discussed and imposed additional measures needed to address concerns raised by opponents. With respect to impacts on businesses, the city accepted the two new conditions proposed by LOT.[17] The city council ultimately concluded that "reasonable measures have been taken to mitigate the identified adverse effects, and that with the conditions of approval the proposal will

[17] The city's findings state, in relevant part:

> "In addition, the applicant has proposed a business promotion plan to help keep the Robinwood Business district 'Open for Business' during construction. This includes not only keeping all lanes of traffic and all accesses onto Highway 43 open during the business hours of 5 am to 8 pm, but also providing custom signage to help guide customers to businesses that are open during construction hours. Although the City Council finds that this plan is a good start, retaining consistency with the overall business community requires an enhanced 'Shop Local' Marketing Plan that must be distributed to the Chair of the Robinwood Neighborhood Association, all businesses located along Highway 43 within the Robinwood neighborhood boundaries, and the City Manager. Condition 18 is imposed to accomplish this objective. * * *" Record 196.

adequately 'mitigate any possible adverse effect from the use on surrounding properties and uses.'" Record 196-97. However, the findings do not explicitly address the Report.

Petitioners argue that the city's findings are inadequate, because they do not address the issues raised in the Report. Petitioners argue that, while the city can choose which evidence to believe, if there is conflicting, believable evidence in the record that creates an issue as to whether or not there is compliance with applicable approval criteria, the city is required to adopt findings addressing that issue. *Norvell v. Metro Area LGBC*, 43 Or App 849, 604 P2d 896 (1979).

Lake Oswego responds that the city's findings adequately address mitigation of impacts on businesses, and the city was not obligated to adopt additional findings addressing the Report. According to Lake Oswego, the city council interpreted the applicable criteria to require mitigation to offset impacts, but not to require that impacts be eliminated or reduced to zero. According to Lake Oswego, even if the city found the Report credible and its comparisons with other projects apt, at best the Report is some evidence that notwithstanding the measures initially proposed by LOT, there will still be some economic impacts on businesses during construction. The Report did not address the two additional measures identified by LOT and adopted by the city to further reduce impacts. Nor did the Report identify or recommend any additional measures that could offset remaining adverse economic impacts. We understand Lake Oswego to argue that because the focus of CDC 60.070(A)(3) and CDC 60.070(A)(1), as interpreted by the city council, is on whether adequate measures have been identified to mitigate adverse impacts, and not on economic impacts that remain after mitigation, the city was under no obligation to address the Report or its contention that proposed mitigation would not prevent significant economic impacts.

We agree with Lake Oswego that, as interpreted by the city council, compliance with CDC 60.070(A)(3) and CDC 60.070(A)(1) appears to be a matter of whether adequate measures have been identified to mitigate possible adverse impacts on surrounding uses, not

whether measures can eliminate all impacts. However, even under that interpretation, we agree with petitioners that the city's findings should have addressed the main issue raised in the Report. As we understand it, the Report constitutes the only evidence in the record that attempts to quantify the economic impacts of construction on surrounding businesses. The Report asserts, based on comparative studies, that those economic impacts may be severe, even if under initially proposed mitigation measures such as limiting construction to night-time hours. In our view, that is an issue that is potentially relevant under CDC 60.070(A)(3) and CDC 60.070(A)(1), even under the city council's apparent interpretation that those standards do not require elimination of all impacts. If severe economic impacts are likely to remain even after all identified mitigation measures are applied, as the Report asserts, then that might well be a meaningful consideration in determining whether proposed mitigation is "adequate" for purposes of CDC 60.070(A)(3) and CDC 60.070(A)(1). We do not know, however, because the city's findings do not discuss the Report or the issue it raised.

It may well be that the city council, had it expressly considered the Report, would have found it discreditable or inapposite, for the reasons LOT argued below. But again, we do not know, because no findings address the Report or the issue it raises. As the findings and record stand, we agree with petitioners that the Report raises a potentially significant issue regarding compliance with CDC 60.070(A)(3) and CDC 60.070(A)(1). Therefore, remand is necessary for the city to adopt findings that either address the Report and the issue it raises, or explains why no further consideration of the Report or issue is necessary.

Finally, Lake Oswego argues that even if the city's findings are inadequate, LUBA may deny this assignment of error pursuant to ORS 197.835(11)(b), which provides that LUBA may affirm a decision notwithstanding inadequate findings, where the parties identify evidence in the record that "clearly supports" the decision. The city argues that for the reasons it argued below, the Report is not credible evidence and that the record includes substantial evidence that impacts to businesses will be negligible. However, as noted, the

Report is apparently the only evidence in the record that attempts to quantify economic impacts of construction. Lake Oswego does not cite to any evidence indicating that economic impacts after mitigation will be negligible. In any case, even if such evidence were cited, the ORS 197.835(11)(b) "clearly supports" standard is not met where LUBA must weigh conflicting evidence or resolve disputes over the credibility of experts.

The fourth assignment of error (STOP) is sustained.

SIXTH ASSIGNMENT OF ERROR (STOP)

STOP's sixth assignment of error incorporates by reference the five assignments of error in More's petition for review. Both petitions for review are 50 pages, the maximum allowed under OAR 661-010-0030(2)(b) without permission of the Board. For the reasons explained in *STOP v. City of West Linn*, __ Or LUBA __ (LUBA No. 2013-021/022/023, Order, September 25, 2013), LUBA will ignore incorporations of assignments of error in other briefs that cause the incorporating brief to exceed the maximum page limits. Therefore, STOP's sixth assignment of error does not provide a basis for reversal or remand.

The city's decision is remanded.