BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

S. ST. HELENS LLC,
Petitioner,

vs.

CITY OF ST. HELENS,
Respondent.

LUBA No. 2014-067

FINAL OPINION
AND ORDER

Appeal from City of St. Helens.

Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of petitioner.

Timothy V. Ramis and Dan R. Olsen, Portland, filed a response brief. With them on the brief was Jordan Ramis PC. Dan R. Olsen argued on behalf of respondent.

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

AFFIRMED 01/16/2015

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

Petitioner appeals a city planning commission decision that denies its application for a sensitive lands permit to allow rock removal within a wetland protection zone.

FACTS

The subject property includes approximately 5 acres. A significant portion of the property is a camas basalt bluff that is between 35 and 50 feet higher than the grade of surrounding properties. A significant portion of the top of the bluff is relatively level. The subject property is zoned "Apartment Residential" (AR) or "General Residential" (R5). Most of the surrounding area is also zoned AR or R5. Both of those zones permit residential development, including duplexes. N. 12th Street runs north and south, along the western boundary of the property. St. Helens Middle School is located on a site that is zoned "Public Lands," directly across N. 12th Street to the west of the subject property. Other than the middle school, the surrounding properties are generally developed with dwellings, with both single family dwellings and apartment buildings located next to the subject property.

The subject property was platted into approximately 58-foot by 100-foot lots, with N. 11th Street platted through the middle of the property, when the original town plat was recorded in the middle of the nineteenth century. At one time, there was one single family dwelling on top of the bluff. However, that dwelling burned and the property is currently undeveloped. N. 11th Street, as platted, would have to traverse the basalt bluff, and was never constructed through the property. Although there was no proposal for residential development included in the application for the sensitive lands permit,

petitioner apparently plans to construct 48 duplex units on 24 of the existing lots on the property. The remaining lots would not be developed, and would be used for other purposes.

There were earlier proposals to develop the property. In 2005, a proposal to develop 20 attached single-family dwellings on the top of the bluff was denied because the proposed access road did not meet the city's minimum pavement width and maximum street grade requirements, although the applicant apparently stated the applicant "would meet the minimum pavement width of 24 feet and the maximum grade of 15%." Revised Record (hereafter Record) 973. Between 2006 and 2008, petitioner's predecessor proposed residential development that would have required removal of the bluff. Record 712; 1209. According to petitioner, that proposal failed because petitioner proposed to vacate the N. 11th Street right of way, and the neighbor consent necessary under the street vacation statute petitioner relied on could not obtained. According to petitioner, city planning staff did not oppose removal of the bluff at that time.

After five years of inactivity that petitioner attributes to the recent economic recession, petitioner purchased the property. Petitioner's proposal (hereafter the Proposal) was submitted in 2013. Under the Proposal, the portion of the basalt bluff above the surrounding grade would be entirely removed. In addition, up to 18 additional feet of rock below surrounding grade level would be extracted. According to the city, this would require removal of up to 58 vertical feet of rock.[1] After the rock is removed, petitioner proposes to

[1] After opposition to the Proposal surfaced, petitioner stated that the excavation below the existing surrounding grade might be limited to no more than nine feet.

add up to 18 feet of fill to achieve a more or less level, at-grade site for duplex development pursuant to a future application. Record 1254.[2] Under the Proposal, 500,000 cubic yards of rock would be removed from the property. *Id*. The removal process would take between 12 and 16 months and would require frequent blasting. The removed rock would be sold for approximately $7.5 million. Record 298.

There is an inventoried wetland in the southeast corner of the property, designated Wetland J-3, which has a 75-foot protection zone. St. Helens Municipal Code (SHMC) 17.40.015(1) and (3).[3] Because the Proposal would remove rock within the 75-foot protection zone for Wetland J-3, petitioner sought a sensitive lands permit to authorize the Proposal. SHMC 17.44.015(4)(a)(iii). The Proposal was initially approved by a city planner on July 8, 2013. However, the city planner issued an amended decision on July 23, 2013, in which he concluded, among other things, that due to the quantity and extent of rock removal proposed, the Proposal constituted "mining and/or quarrying" and "surface mining," which are not lawful uses in the AR and R5 zones. Record 1416. Petitioner appealed that decision to the planning commission.

During the appeal to the planning commission, petitioner also put forth a "Plan B," which would leave the basalt bluff intact within the 75-foot protection zone, but otherwise was the same as the original Proposal. The

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[2] The record includes graphics that display the site's existing topography, and the proposed excavation in stages. Record 77-89.

[3] The St. Helens Community Development Code is Title 17 of the St. Helens Municipal Code.

Proposal as originally submitted remained petitioner's preferred alternative. Record 28. The planning commission denied the application, ultimately concluding that the Proposal constitutes a use that is not allowed in the city's AR and R5 zones. Petitioner's appeal to LUBA followed.

INTRODUCTION

Before we turn to the parties' arguments about how certain ambiguous SHMC language should be interpreted, it is useful to have a general understanding of the planning commission's interpretation that is challenged in this appeal and petitioner's legal theory for why it believes the planning commission erred in denying the requested permit, and the key positions petitioner asserts in support of its legal theory. Our standard of review in this appeal is not the highly deferential standard of review required by ORS 197.829(1), *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). Rather our review is governed by ORS 197.835(9)(a)(D), and under that statute we must determine whether the planning commission "[i]mproperly construed the applicable law," "without according the deference required by *Clark*."[4] *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994).

We understand the city to have adopted sequential interpretations of the SHMC. First, the planning commission concluded the Proposal is correctly characterized as "natural mineral resources development," a use category that is allowed in the Heavy Industrial (HI), but is not allowed in the AR or R5 zones.

[4] ORS 197.835(9)(a)(D) requires that LUBA "reverse or remand a land use decision" if the "local government" "[i]mproperly construed the applicable law[.]"

Second, although the SHMC permits the city to approve uses that are not listed as permitted or conditional uses (unlisted uses), SHMC 17.32.040(3)(a) prohibits authorization of unlisted uses, "if the use is specifically listed in another zone." Because the Proposal qualifies as "natural mineral resources development" in the HI zone (a listed use), the planning commission found Proposal therefore cannot be approved in an AR or R5 zone.

Third, petitioner argued that the basalt rock to be removed by the Proposal does not qualify as "minerals," and for that reason the Proposal does not qualify as "mining," "surface mining" or "natural mineral resources development," as the SHMC uses those terms. In rejecting that argument, the planning commission interpreted the term "minerals," which is not defined in the SHMC, to include basalt rock. It is this interpretation of the undefined term "minerals" that is petitioner's focus in this appeal.

Fourth, the planning commission concluded that even if the Proposal is not correctly characterized as "natural mineral resources development," it is not among the uses permitted in the AR and R5 zoning districts, however the Proposal is characterized.

Finally, after adopting the above interpretations, the planning commission nevertheless proceeded to apply the unlisted use criteria, even though it had already found the Proposal could not be approved as an unlisted use because it is a listed use in the HI zone, and found that the Proposal also does not meet the unlisted use criteria.

In a nutshell, petitioner contends the Proposal is nothing more than the site preparation and grading that is necessary so that petitioner may later proceed to submit a proposal to develop the subject property with 48 duplex units. Petitioner also contends that the Proposal is *necessary* to develop the

property residentially. Therefore, petitioner argues, the Proposal is properly viewed as part of a future duplex development, which is a permitted use in the AR and R5 zones.

According to petitioner, the planning commission's error in this case was in failing to apply the sensitive lands permit criteria to approve its application as requested. Petitioner contends the planning commission erred by instead determining that the Proposal is a use that is separate and distinct from the anticipated future duplex development of the property. Petitioner contends the planning commission then compounded that error, when it proceeded to conclude that the Proposal is properly viewed as "natural mineral resources development." Petitioner contends that "natural mineral resources development" is limited to "mining" of "minerals" and that the basalt rock that would be extracted under the Proposal is not a "mineral." From that contention, petitioner reasons its proposed basalt rock extraction is therefore neither "mining," nor "surface mining," nor "natural mineral resources development," within the meaning of the SHMC. Finally, petitioner contends the planning commission further compounded its error by then proceeding to consider whether the Proposal could be approved as an "unlisted use." Petitioner also challenges some of the planning commission's findings addressing the "unlisted use" criteria, arguing the planning commission relied on questionable, non-expert testimony in doing so.

If we understand petitioner correctly, it contends the planning commission should have simply applied the sensitive lands permit approval criteria, which the planning commission never considered, and approved the Proposal, without considering whether the Proposal is allowed in the AR and R5 zones. Although the argument is not clearly stated and is not well

developed, we also understand petitioner to contend that even if the Proposal as originally submitted does not comply with the sensitive lands permit approval criteria for some reason, Plan B obviates the need for a sensitive lands permit altogether.

REPLY BRIEF

Petitioner filed a reply brief, to respond to new matters that petitioner contends are raised in the city's response brief. OAR 661-010-0039.[5] The allegedly new matters are a number of allegations of fact in the city's response brief that petitioner contends are not supported by the record, and two instances where the city argues petitioner waived its right to raise issues that are presented in the petition for review.[6] The city filed a motion to strike the reply brief. That motion drew a 15-page response from petitioner.

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[5] OAR 661-010-0039 provides, in part:

> "A reply brief may not be filed unless permission is obtained from the Board. * * * A reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief. * * *."

[6] Petitioner contends the following allegations in the city's response brief are not supported by the record: (1) "[t]he numerous platted lots are now consolidated into a smaller number of lots for land use purposes," Response Brief 3 (2) the former house on top of the bluff had "city water and sewer service," *Id*., (3) the superintendent of the middle school is "intimately familiar with the school building" and "is responsible for all school operations, including educational, extracurricular, and facility maintenance activities," *Id*. at 31, (4) "[t]he possibility that the school building was built on sand with proper techniques and materials to prevent surface cracking seems not to have occurred to Petitioner, and the conclusion that all buildings constructed on sand would settle with cracks in their foundations is not reasonable," *Id*., (5) "a prior owner had a 'preferred' development plan that appears to be consistent with the City Code," Reply Brief 2, and (6) "the applicant conceded that other

One of the disputed allegations of fact, *see* n 6, item 4, is a legal argument and does not, as petitioner contends, "introduce[] evidence that is not in the record." Reply Brief 1-2. Based on our disposition of this appeal, only two of the remaining disputed allegations are potentially relevant, and these disputed allegations easily could have been addressed at oral argument without a reply brief or the attendant briefing in support of and in opposition to the reply brief that has been filed by the parties in this appeal.[7] However, the city's allegations that two of the issues that petitioner raised in its petition for review were waived because they were not raised below do justify a reply brief to respond, at a minimum, to those waiver arguments. *Wetherell v. Douglas County*, 58 Or LUBA 638, 641 (2009); *Reagan v. City of Oregon City*, 39 Or LUBA 672, 674 n 1 (2001); *Caine v. Tillamook County*, 24 Or LUBA 627 (1993).

Because the reply brief was properly filed to respond to the city's waiver arguments, we elect not to attempt to determine whether all the challenged city allegations technically constitute "new matters," within the meaning of OAR 661-010-0039, because doing so would needlessly complicate an already complicated appeal. The reply brief is allowed, and we have considered the parties' arguments in support of and in opposition to the reply brief, to the

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development options may be possible." *Id*. The city argues petitioner waived its right to argue the planning commission lacks authority to consider whether the proposal qualifies as a use that may be allowed in the AR and R5 zones, and waived its right to challenge the planning commission's finding that Wetland 3-J qualifies as a "community facility."

[7] Those allegations concern whether the proposal to completely remove the existing basalt bluff and excavate up to 18 feet below the elevation of surrounding properties is necessary to develop the property residentially. *See* n 6, items 5 and 6.

extent they have a bearing on the merits of the arguments presented in the reply brief.

WAIVED ISSUES

The city contends that petitioner waived two issues by failing to raise them with sufficient specificity below. ORS 197.763(1); 197.835(3). One of those disputed issues goes to the heart of this appeal—whether the city lacks authority to independently characterize the Proposal and determine whether the Proposal is correctly characterized as an allowed use in the AR and R5 zones. The second issue is of less significance—whether petitioner raised any issue concerning the planning commission's finding that Wetland J-3 qualifies as a "community facility," within the meaning of SHMC 17.32.040(4)(e). In both cases the question of whether petitioner preserved the issue for review is sufficiently close, that we reject the city's contention that the issues were waived.

MOTION TO SUPPLEMENT AUTHORITIES

On December 30, 2014, the city filed a Motion to Supplement Authorities to call our attention to *Copeland Sand & Gravel v. Estate of Angeline Dillard*, 267 Or App 791, ___ P3d ___ (A154147, December 24, 2014). Petitioner does not object to the motion, and filed a response. The motion is granted, and we have considered each party's arguments regarding the significance of *Copeland Sand & Gravel*.

FIRST ASSIGNMENT OF ERROR

A. Planning Commission Erred by Recharacterizing Residential Development Site Grading and Excavation as a Separate Use

In this subassignment of error petitioner argues the planning commission "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D).

Petitioner argues the planning commission lacks authority to characterize its proposal to excavate rock from the site in preparation for residential development as a use that is different from the residential development use the Proposal would enable. In making that argument, petitioner also contends the city has allowed blasting and rock removal in conjunction with residential development in the past, without characterizing that blasting and rock removal as "mining" or "natural mineral resources development." Petitioner further argues that unless the Proposal is approved so that the basalt bluff can be removed, the site cannot be developed residentially.

1. Planning Commission Authority to Characterize the Use

Citing *Citizens Against LNG v. Coos County*, 63 Or LUBA 162, 172 (2011) and *Lamb v. Lane County*, 7 Or LUBA 137, 143 (1983), petitioner contends the city is not authorized to characterize temporary or accessory activities carried out in conjunction with permitted uses as separate, prohibited uses. The cited cases do stand for the proposition that some temporary or associated activity that is necessary to construct or operate a permitted use is allowable even where the temporary or associated activity is not specifically identified as a permitted use. But that of course begs the question of whether the Proposal is or must be characterized as such a temporary or accessory activity. Later in this opinion we address whether the planning commission correctly concluded that the Proposal is not a use that is authorized in the AR and R5 zones. The initial question which we address here is whether the planning commission lacks *authority* to question petitioner's *characterization* of the Proposal.

We agree with the city that it is not bound to agree with petitioner's characterization of the Proposal as mere site preparation that is necessary for

residential development. As the city points out, SHMC 17.12.020 prohibits use of property in violation of the SHMC.[8] The planning director cited SHMC 17.04.060 in concluding that the Proposal is not a permitted use in the AR and R5 zones.[9] Appeals of planning director decisions to the planning commission are *de novo*. SHMC 17.24.320. The planning commission was authorized on appeal of the planning director's decision on the Proposal to "approve, deny or approve with conditions." SHMC 17.24.090(3). We agree with the city that the planning commission had authority to reach its own conclusion about whether the Proposal is correctly viewed as a use, or part of a use, that is authorized in the AR and R5 zones.

2. The Proposal is Necessary to Allow Residential Development of the Property

As previously noted, "[d]uplex dwelling units" are among the "Uses Permitted Outright" in both the AR and R5 zones. SHMC 17.32.080(2)(a); 17.32.070(2)(a). An important part of petitioner's theory that the Proposal should be viewed as grading and excavation for a duplex development is that

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[8] SHMC 17.12.020 provides, in part:

> "No person shall erect, construct, alter, maintain or use any building or structure or shall use, divide or transfer any land in violation of this code or any amendment thereto."

[9] SHMC 17.04.060 provides:

> "A development shall be used only for a lawful use. A lawful use of a development is one that is not prohibited by law and for which the development is designed, arranged, and intended, or which is a continuing nonconforming use."

the Proposal is necessary for such residential development and that failure to approve the proposal will preclude residential use of the property:

> "There can be no argument that the 32 platted lots at issue are unbuildable in their present configuration unless the bluff is brought down to surrounding grade. Rec. 22-3; 85-90; 375-83; 693-7; 970-8. As the applicant's engineer Keith Whisenhunt testified, the only way to build on the platted lots is to excavate the bluff substantially down to grade. Rec. 89. He gave extensive testimony showing how streets built to code (10% grade max) or with variances (15% max) could not access the platted lots due to grade separation issues. Rec. 85-90; 693-7. Even a 'top-of-the-bluff' development scenario would require extensive blasting just to accommodate roads and utilities. Rec. 86. There was no *evidence* submitted to the contrary. In fact, staff conceded that some rock excavation is necessary for reasonable development to occur. Rec. 159.
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> "Nonetheless, Staff, who is a planner, not an engineer, seemed to speculate, without a shred of supporting evidence or design drawings, that a developer could stack a bunch of apartments up on the site to create an Alcatraz-like setting complete with a barbed-wire fence to keep the kids from falling off the cliff. Rec. 158. Even assuming such a design were marketable, the truth is that the existing ROW carves up the site in a manner that makes this option impossible. A similar townhouse-based design was reluctantly proposed by a previous applicant, and the Planning Commission denied it. Rec. 970-8. The city engineering standard has gotten stricter since that time. So any way one designs it, the north-facing access road is still going to be too steep to meet ADA requirements, city engineering standards, and winter safety requirements. Rec. 85-90; 375-83." Petition for Review 7-8 (emphasis in original).

Based on our review of the record in this appeal, there can be no question that any future development of the site is going to face challenges with the existing topography, including challenges in complying with maximum street grades and Americans with Disabilities Act (ADA)

requirements. If we understand petitioner's expert correctly, developing with N 11th Street and the existing lots as platted is particularly problematic, both in complying with maximum street grade requirements and matching the ultimate street grade with development grade of adjoining platted lots, so that the lots are actually accessible from N. 11th Street. Record 86.

But we do not agree with petitioner that the record in this case demonstrates that the Proposal is the *only* way the property can be developed residentially. We do not understand the city to dispute that some excavation and rock removal will be required to develop the property residentially. But that certainly does not mean that 500,000 cubic yards of rock must be removed, to a level up to 18 feet below the surface of the surrounding properties, and apparently well below the existing sewer lines. Moreover, although petitioner's experts suggested otherwise, we do not understand why the entire bluff must be removed to meet maximum street grades and ADA requirements, since at that point the grade of the site would match the surrounding properties so that N. 11th Street would be level, whereas under the SHMC streets can have a maximum grade of 10 percent, or 15 percent with a variance. And the excavation below the surrounding grade clearly is not needed to meet those requirements. That level of rock removal will require a great deal of blasting over 12 to 16 months and send thousands of ten-yard dump trucks to and from the site through the surrounding neighborhood and past the nearby school to remove the rock. Given that evidence, a reasonable decision maker could conclude that the Proposal significantly exceeds the amount of rock removal that must be allowed to residentially develop the site. As the city points out, in the only example of excavation in conjunction with residential development given by petitioner, 29,000 cubic yards of rock was removed, not 500,000

cubic yards. The city concedes that it might be possible to contend that removal of 29,000 cubic yards was a necessary component of the residential development that the city approved in petitioner's example, but disputes that the Proposal is correctly viewed as such.

While the city planner may not be an engineer, as petitioner argues, a reasonable decision maker could rely on the city planner to express a position concerning whether there may be feasible options for developing the site, which likely would require far less rock removal. The city planner did not suggest developing apartments in an "Alcatraz-like setting." Rather the planner stated apartments were "merely one example" of the type of development possible on the relatively flat areas on top of the bluff. Record 158. Presumably apartments were suggested as an option, to maximize density on the more easily developed, flatter portions of the top of the bluff. The planner also noted it is possible to transfer density from more difficult to develop areas to flatter, easier to develop areas. SHMC 17.56. Part of the property is subject to a planned development overlay, and that planned development overlay could be extended. The planned development overlay would permit reconfiguration of existing lots and rights of way to "facilitate development atop the rock outcrop given the unique features of the site." Record 156. Such development would likely require vacation of at least some of the existing N. 11th Street right of way and some or all of the existing lots, and apparently the site's previous owner encountered difficulty in securing the agreement of nearby property owners to vacate the N. 11th Street right of way in the past. But the record in this case simply does not come close to

establishing that the Proposal is the only way the property can be successfully developed residentially.[10]

3. Conclusion

We have no reason to believe the planning commission would not agree with petitioner that a more modest proposal to remove only as much rock as necessary to permit reasonable and functional access to the developable portions of the top of the bluff that complies with city street grade and ADA requirements, along with additional excavation and grading of the top of the bluff as necessary to permit utilities and residential construction, is properly viewed a part of such residential development rather than a basalt mine. But the Proposal goes considerably beyond what the city might be obligated to view as simply the grading and excavation necessary to permit residential development of the property. We reject petitioner's contentions to the contrary.

B. The City's Alternative Finding

The briefs in this appeal focus in large part on the planning commission's finding that the Proposal is correctly classified as "natural mineral resources development," which includes "all types of mineral recovery or mining." As noted above, because "natural mineral resources development" is allowed in the HI zone, but not allowed in the AR or R5 zone, the planning commission denied the sensitive lands permit. We address those arguments below at some length. But the planning commission also adopted an alternative finding that we address first.

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[10] The city points out that while the prior owner may have encountered difficulty in securing property owner consents for vacating the N. 11th Street right of way, there are other ways to vacate streets that do not require property owner consents. ORS 271.130.

> "In the alternative, assuming that the applicant's proposed blasting and removal of 400,000 to 500,000 cubic yards of camas basalt is not properly classified as natural mineral resources development within the scope of SHMC 17.32.140(2)(i), the Planning Commission has reviewed the lists of uses allowed in the R-5 and AR zones, and finds that the proposed blasting and extraction of rock and gravel is not on those lists." Record 10.

The above alternative finding is an adequate basis, by itself, for the planning commission to deny the Proposal, without regard to whether the planning commission correctly found the Proposal qualifies as "natural mineral resources development." The above alternative finding is that even if the Proposal is accurately characterized as rock removal that does not for some reason also qualify as "natural mineral resources development," rock removal of the volume and scope proposed in the Proposal is not a use that is allowed in the AR or R5 zone. The alternative finding is adequate and supported by substantial evidence, and requires that we affirm the city's decision.

Nevertheless, because the parties' dispute over whether the Proposal qualifies as "natural mineral resources development" could become important in the event of an appeal of our decision, we turn next to the parties' arguments regarding that question.

C. Petitioner's Proposal is Neither "Mining" nor "Natural Mineral Resources Development"

Petitioner's interpretive argument turns in large part on whether basalt rock is a "mineral," as the SHMC uses that term. Our job in deciding whether basalt rock is a "mineral" would be easy if the city had adopted a definition of the term as part of the SHMC, but it did not. As noted earlier, the planning commission rejected petitioner's narrow interpretation of "minerals," and concluded that basalt rock is a "mineral," as the SHMC uses that term.

Petitioner goes through an intricate text and context interpretive exercise, *PGE v. BOLI*, 317 Or 606, 610-12, 859 P2d 1143 (1993), which leads petitioner to conclude that, based on the relevant text and the evolution of SHMC language, "mining," as that term is used in the SHMC, is limited to extraction of "minerals." Through that same interpretive exercise, petitioner concludes that basalt rock is not a "mineral," so that removal of basalt rock could not be "mining." Before turning to petitioner's interpretive exercise, we note one potentially important guide for interpreting SHMC Title 17 that the parties do not address. While SHMC 17.16.010 does not include a definition for the key term "minerals," SHMC 17.16.010 does provide guidance on how to determine the meaning of terms that are used in the SHMC, but are not defined in 17.16.010:

> "Words used in this Development Code have their normal dictionary meaning unless they are listed below. Words listed below have the specific meaning stated, unless the context clearly indicates another meaning."

The dictionary definition of the term "rock" includes "minerals" and the dictionary definition of "minerals" appears to be broad enough to include rock.[11] The city also cites to a number of sources, including dictionary

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[11] The *Webster's Third New International Dictionary* (unabridged ed 2002) definition for "rock" includes the following:

> "**2 a :** extremely hard dense stone * * * **b** (1) **:** a large concreted mass of stony material : a large fixed stone (2) : stony material broken from such a mass **c** (1) : consolidated or unconsolidated solid mineral matter composed of one our usu. two or more minerals or partly of organic origin (as coal) that occurs naturally in large quantities or forms a considerable part of the earth's crust * * *[.]" *Id*. at 1965.

definitions of "rock," that define "rock" as including "minerals." Response Brief 23. These dictionary definitions support the city's interpretation that "minerals" include "rock" and therefore, under the SHMC, basalt rock is a mineral, removing that basalt rock is "natural mineral resources development," and the Proposal qualifies as "natural mineral resources development."

We set out below the text of the key terms "natural mineral resources development" and "mining," before turning to petitioner's arguments. "Natural mineral resources development" is not really a SHMC term; it is a shortened reference to a type of use that is permitted outright in the HI zone. That use is as follows:

> "Natural mineral resources development including necessary building, apparatus and appurtenances for *rock*, sand, gravel and mineral *dredging*, processing and stockpiling and *all types of mineral recovery or mining*, excluding smelters and ore reduction." SHMC 17.32.140(2)(i) (emphases added).

SHMC 17.16.010 defines the term "mining," as follows:

That same dictionary includes the following definition of "mineral:"

> "mineral * * * a solid homogeneous crystalline chemical element or compound (as diamond or quartz) that results from the inorganic process of nature and that has a characteristic crystal structure and chemical composition or range of compositions * * * **b :** any of various naturally occurring homogeneous or apparently homogenous and usu. but not necessarily solid substances (as ore, coal, asbestos, asphalt, borax, clay, fuller's earth, pigments, precious stones, rock phosphate, salt, soapstone, sulfur, building stone, cement rock, peat, sand, gravel, slate, salts extracted from river, lake, and ocean waters, petroleum, water, natural gas air, and gases extracted from the air) obtained for man's use usu. from the ground * * *." *Id*. at 1437.

> "'Mining and/or *quarrying*' means the extraction of *minerals* including: solids, such as coal and ores; liquids, such as crude petroleum; and gases, such as natural gases. The term also includes *quarrying*; well operation; milling, such as crushing, screening, washing and flotation; and other preparation customarily done at the mine site or as part of a mining activity. *See* '*surface mining*.'[12] (Emphases added.)

Petitioner contends that under the above text, "natural mineral resources development" is limited to "*mineral* recovery or mining," except in the context of "dredging," where it expressly includes "rock" removal. Petitioner reasons that this textual difference supports its theory that under the SHMC "minerals" do not include basalt rock, when the context is "mining" rather than "dredging." The city disputes this inference, arguing petitioner's understanding

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[12] Petitioner contends the SHMC 17.16.010 definition of "mining" incorporates the SHMC 17.16.010 definition of "surface mining," which in turn adopts the "ORS 517.755(14)(a) [sic, should be ORS 517.750(15)(a)]" definition of "Surface Mining:"

> "Surface Mining. As per ORS 517.755(14)(a):
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> "Surface Mining includes all or any part of the process of mining *minerals* by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than *5,000 cubic yards of minerals* are extracted or by which at least *one acre of land is affected within a period of 12 consecutive calendar months*, including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits (except those constructed for use as access roads)." (Emphases added.)

The statutory "surface mining" definition applies to the statutes governing "Mineral Exploration," "Reclamation of Mining Lands," and "Chemical Process Mining." ORS 517.702 through 517.989.

of the text would result in an inconsistency, with "natural mineral resources development" including rock removal when dredging, and excluding rock removal when mining. We understand the city to contend there is no reason to suspect that any difference in meaning in the term "natural mineral resources development" was intended in the mining and dredging contexts.

Turning to the SHMC term "mining," petitioner recognizes the term encompasses both "mining" and "quarrying." Petitioner contends however, the word "quarrying" "says nothing about the type of substance being removed." Petition for Review 15. According to petitioner, the term quarrying should be interpreted consistently with "mining" to exclude quarrying for rock. As the city points out, dictionary definitions of the term "quarry" are one way to determine the commonly understood meaning of undefined terms and show that quarries commonly remove rock for building purposes. Record 588; 622. *Webster's Third New International Dictionary* (unabridged ed 2002) includes the following definition of "quarry:"

> "**1 :** an open excavation usu. for obtaining building stone, slate, or limestone * * * **2 :** a source from which material may be extracted * * * **3 :** a large mass (as of stone or slate) fit for quarrying." *Id*. at 1860.

The SHMC linking of the term "quarrying" with the term "mining" supports the city's interpretation of "natural mineral resources development" to include removal of 500,000 cubic yards of rock for sale.

Petitioner next points out that the definition of "mining" states that "minerals" include three general categories: solids, liquids, and gases. But these general categories are followed by specific examples: "coal and ores," "crude petroleum" and "natural gases." In determining the meaning of text at the first level of analysis under *PGE*, it is appropriate to refer to "rules of

construction that bear directly on the interpretation of the statutory provision in context." *PGE*, 317 Or at 611. *Ejusdem generis* is a rule of statutory construction that "allows the general terms of an act to be modified and limited by the enumeration of specific examples" *State v. Hutchins*, 214 Or App 260, 267, 164 P3d 318, *rev den* 346 Or 590, 214 P3d 822 (2009) (quoting *State v. Tucker*, 28 Or App 29, 32, 558 P2d 1244 (1977). Applying that rule here, petitioner contends "[b]y calling out coal and ore as examples of solid minerals, the definition suggests that minerals are limited to a narrow category of precious and/or valuable substances, as opposed to mere rock or aggregate." Petition for Review 16. We agree with petitioner that applying the *Ejusdem generis* maxim in this case lends some support to petitioner's view that "mining" does not include extraction of rock.

Petitioner next looks to other related, defined terms in the SHMC that expressly do encompass rock. The term "excavation" separately lists "minerals" and "rock," suggesting that "minerals" do not include "rock."[13] And the term "grading" uses the much broader terms "land" and "earth" to avoid ambiguity about the breadth of the word grading's applicability.[14] We agree

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[13] SHMC 17.16.010 includes the following definition:

> "'Excavation' means removal or recovery by any means whatsoever of soil, rock, minerals, mineral substances, or organic substances other than vegetation, from water or land on or beneath the surface thereof, or beneath the land surface, whether exposed or submerged."

[14] SHMC 17.16.010 includes the following definition:

> "'Grading' means any stripping, gutting, filling, stockpiling of earth or land, including the land in its cut or filled condition."

with petitioner that these definitions, particularly the definition of "excavation," lends some support to petitioner's position that the word "minerals" in the SHMC should not be interpreted to include "rock."

Petitioner next argues:

> "[T]he definition of 'mining' speaks to the '*extraction*' of minerals, whereas the term 'excavation' uses a more generic term '*removal*' and the more broad phrase 'recovery by any means whatsoever.' The definition of 'surface mining' echoes this same vernacular, by discussing the '*removal* of overburden and the *extraction* of natural mineral deposits.' Thus, only valuable minerals are 'extracted' as part of a mining process, whereas less valuable rock sand and gravel and overburden get 'removed' or 'recovered' as part of an excavation. The use of different words must be deemed to be intentional. When the purpose of the removal of material is not to 'extract' minerals for the primary purpose of financial profit but rather to clear [a] site in preparation for development, it constitutes 'excavation' but not 'mining.'" Petition for Review 17 (emphases in original).

Although petitioner is putting an increasingly fine spin on the city's word choices in overlapping SHMC definitions, the above lends at least some support to petitioner's view that "mining" and "surface mining" should not be construed to encompass rock removal. We note however, as the city argues, while petitioner may in fact plan on developing the site for residential use at some time in the future, the city did not have an application for residential development before it, only an application for a sensitive lands permit to remove rock in the wetland protection zone. And whatever you call the basalt rock, it seems difficult to characterize the Proposal as something other than "'extract[ion]" for the primary purpose of financial profit" when the sale of the 500,000 cubic yards of rock is expected to return approximately $7.5 million.

Petitioner next focuses on the fact that the SHMC definition of "mining" refers the reader to the SHMC and statutory definition of "surface mining." *See* n 12. As petitioner correctly points out, both the SHMC definition of "mining" and the identical ORS 517.750(15) definition of "surface mining" refer to "minerals."[15] The ORS 517.750(7) definition of "minerals" is broad enough to include the rock the Proposal will remove, and that definition applies in ORS Chapter 517.[16] But for some reason, the city did not expressly adopt the ORS 517.750(7) definition of "minerals" when it adopted the ORS 517.750(15) definition of "surface mining" as part of the SHMC. Petitioner argues that omission should be presumed to be intentional and given effect. *Perlenfein and Perlenfein*, 316 Or 16, 22, 848 P2d 604 (1993). Petitioner argues that presumption is bolstered here by the city's failure to adopt the ORS 517.750(15)(b) exceptions to the ORS 517.750(15)(a) definition of "surface mining," which include an exemption for "[e]xcavations of sand, gravel, clay, rock or other similar materials conducted by the landowner or tenant for the

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[15] We note that the SHMC 17.16.010 definition of "mining" simply states "See surface mining" and the SHMC 17.16.010 definition of "Surface Mining" expressly refers to and sets out the text of the ORS 517.750(15) definition of "surface mining" as the SHMC 17.16.010 definition of surface mining. *See* n 12. Petitioner reads those two definitions together to incorporate the ORS 517.750(15) definition of "surface mining." The city does not dispute petitioner's incorporation theory, and for purposes of this opinion we assume petitioner is correct.

[16] ORS 517.750(7) provides:

> "'Minerals' includes soil, coal, clay, stone, sand, gravel, metallic ore and any other solid material or substance excavated for commercial, industrial or construction use from natural deposits situated within or upon lands in this state."

primary purpose of construction, reconstruction or maintenance of access roads on the same parcel or on an adjacent parcel that is under the same ownership as the parcel that is being excavated." Petitioner argues the city did not adopt that exemption because it did not need to, speculating that by failing to adopt the ORS 517.750(7) broad definition of "minerals," "surface mining," as that term is used in the SHMC, does not include excavation of "stone." *See* n 16.

Another possible inference is that the city intended the incorporated ORS 517.750(15)(a) definition of "surface mining" to be understood with the statutory definitions and exemptions that apply to that ORS 517.750(15)(a) definition, even if those definitions and exemptions are not expressly incorporated into the SHMC. Since the city did not expressly adopt its own definition of "minerals," both petitioner's inferences and the just-stated other possible inference are equally speculative.

Petitioner draws a similar inference from changes over time to the SHMC. In 1991, the SHMC included a broad definition of "Mining and/or Quarrying," which expressly included both "rock" and "minerals."[17] The definition paralleled the definitions in ORS 517.750 by broadly stating the substances that "mining" may extract and including an exception that would keep routine construction and road building from being treated as mining. But

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[17] That definition is set out below:

> "MINING and/or QUARRYING – premises from which any rock, sand, gravel, clay, mud, peat, or mineral is removed and or excavated for sale, as an industrial or commercial operation, and exclusive of excavating and grading from streets and roads and the process of grading a lot preparatory to the construction of a building for which a permit has been issued by a public agency." Petition for Review, Appendix 9.

since 1999, the SHMC definition of mining has referred only to "minerals," without the express reference to rock. And the exception to keep routine construction and road building from qualifying as mining is no longer in the SHMC. From these changes, petitioner infers the city intended that the term "mining" should not encompass removal of rock.

As with the city's adoption of the statutory term "surface mining" without expressly adopting the broad ORS 571.750(7) definition of minerals and the ORS 571.750(15)(b) exceptions for some construction activities, the inference petitioner draws is certainly one possible inference.

Finally, petitioner criticizes the city for adopting the following finding in rejecting petitioner's position that "natural mineral resources development" is limited to excavation of minerals and does not include removal of rock:

> "In other words, [under petitioner's interpretation of the SHMC] a diamond mine is a permitted use in the HI zone; however, a rock and gravel mine is not. Conversely, the applicant insists that rock and gravel can be blasted and extracted in the residential zones because that is not mining." Record 10.

Petitioner argues those findings are "essentially an 'absurd results' argument."

> "While that result does indeed seem to defy common sense to a certain degree, so does the alternative, which is to apply the definition of 'surface mining' and 'mining' to every excavation that proposes to move more than 5000 C.Y of any inorganic material (dirt, sand, gravel, rock, etc): because that would include virtually every commercial development and all one-acre or bigger subdivisions. It is equally absurd to think that land zoned for residential uses cannot be used for that purpose because the bedrock cannot be removed without engaging in the legal fiction that such excavations constitute 'mining.' * * *
>
> "Moreover, under *PGE v. BOLI/Gaines*, the 'absurd result' maxim the city seeks to implicitly invoke is relegated to the third level of analysis, and therefore, it only applies if text and context do not

> resolve the issue. *Young v. State*, 161 Or App 32, 38, 983 P2d 1044 (1999) (overruling *Dennehy v. City of Portland*, 87 Or App 33, 740 P2d 806 (1987). * * *" Petition for Review 25.

It is not at all clear to us that the city was attempting to invoke the "absurd results" maxim, since the city does not use those words. But it is clear from the city's decision that the city does not agree with petitioner that the scope and meaning of the term "natural mineral resources development" is clearly answered in petitioner's favor by a first level *PGE* analysis of the text and context. If the city is right about that, since there apparently is no relevant legislative history, invoking the "absurd results" maxim would not necessarily be error. Moreover, petitioner's contention that the city's interpretation is equally absurd relies on a position petitioner asserts throughout its petition for review—that the city's interpretation will necessarily preclude residential development of any appreciable size.[18] We believe that contention is questionable. For example, we believe it is questionable that the city would consider excavation and grading that actually is limited to the amount that is necessary to develop a residentially zoned site with houses as "surface mining," even if the amount of excavation or grading exceeds 5,000 square feet or affects more than one acre of land. More to the point in this case, we think it is entirely possible the city would view a less massive extraction of rock as a permissible accessory or necessary part of residential development, even if the "surface mining" thresholds were exceeded, so long as the proposed extraction could be shown to be truly limited to a scale that is necessary for residential

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[18] Petitioner bases that assertion on the definition of "surface mining," which applies where "more than 5,000 cubic yards of minerals are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months * * *. *See* n 12.

development. It is clear from this record that it was the scale and extent of the Proposal that the city concluded far exceeded that which is necessary to develop the site residentially. It is the scale of the Proposal that led the city to determine that the Proposal constitutes "natural mineral resources development."

Petitioner argues that "[t]here is nothing in the Code that allows the Planning Commission to draw lines between acceptable excavations and illegal mining activity based simply on the amount of rock taken or the duration of the temporary activity." Petition for Review 10. Petitioner is wrong about that. The subjectivity and ambiguity that often permeates comprehensive plans and land use regulations routinely calls for such exercises of judgment. And comprehensive plans and land use regulations are not alone in this regard. In *1000 Friends of Oregon v. Curry County*, 301 Or 447, 504-11, 724 P2d 268 (1986), the Oregon Supreme Court interpreted Statewide Planning Goal 14 (Urbanization) to preclude "urban" development of "rural" lands without first complying with Goal 14 or adopting an exception to Goal 14. The debate over where to draw the line between "urban" and "rural" development continues to this day, and calls for line drawing that is every bit as uncertain as the line drawing the city engaged in here. And in another context it is the exercise of those kinds of judgment that can convert a decision that would otherwise be unreviewable by LUBA into a land use decision that is reviewable by LUBA. ORS 197.015(10)(b)(A) and (B).[19]

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[19] Under ORS 197.015(10)(b)(A) and (B) the decisions that ORS 197.015(10)(a) define as a "land use decision" do not include local government decisions "that do not require interpretation or the exercise of policy or legal

D. Conclusion

Petitioner presents a thorough case for interpreting the term "natural mineral resources development" narrowly to include only "mining," and for interpreting the term "mining" to be limited to extraction of "minerals," and for interpreting the term "minerals" not to include common basalt rock. But we conclude that by interpreting "minerals" to include basalt rock, so that the Proposal to extract 500,000 cubic yards of basalt rock constitutes "mining" and "natural mineral resources development" as those terms are used in the SHMC, the planning commission did not "[i]mproperly construe[] the applicable law," within the meaning of ORS 197.835(9)(a)(D).

Petitioner's interpretation relies largely on context and SHMC history to support a narrow view of the undefined term "natural mineral resources development." That interpretation is based on petitioner's argument that the enactors of the current SHMC intended a narrow meaning of the term "minerals" that excludes rock, such that extractions of rock are not "mining" "surface mining" or "natural mineral resources development." Petitioner's interpretation is certainly not without some merit. But in the end we are not convinced the planning commission erroneously interpreted the "natural mineral resources development" use category to include the Proposal. Petitioner's arguments do not account very well for the SHMC's linking of the terms "mining" and "quarrying." Rock is commonly mined at quarries. The included reference to "quarrying" undercuts petitioner's narrow reading of the SHMC. Perhaps more importantly, petitioner's arguments rely heavily on the meaning of the undefined term "minerals" and attempt to find a narrow

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judgment," or a decision "[t]hat approves or denies a building permit issued under clear and objective land use standards[.]"

meaning for that term from context and SHMC amendments. Given the fact that the term "minerals" is defined in statutes that govern mining and is defined broadly in the statutes to include rock, it seems far more likely to us that if the city intended the term "mineral" to exclude rock, the city would have included a definition of the term "mineral" in the SHMC to make that intent clear. That is particularly the case here because, as we noted earlier in this opinion, SHMC 17.16.010 specifically directs that undefined terms in the SHMC "have their normal dictionary meaning[.]" Most of the dictionary definitions of "minerals" that have been called to our attention include "rock."

As petitioner points out, the Court of Appeals in *Copeland Sand & Gravel* cautioned about slavish reliance on dictionaries in searching for the meaning of a term like "mineral." But in *Copeland Sand & Gravel*, the Court of Appeals looked to dictionaries because the term "minerals" was undefined, a rule of contract interpretation calls for the "plain and ordinary meaning" of the undefined term and "dictionary definitions are one source of that [plain and ordinary] meaning." 267 Or App at 796. Here the SHMC 17.16.010 specifically directs that undefined terms in the SHMC "have their normal dictionary meaning * * *." Given that express direction in SHMC 17.16.010, consulting dictionary definitions to determine the meaning of the undefined term "minerals" in the SHMC is entirely appropriate. Petitioner's contextual and SHMC history arguments are certainly not so strong that they overcome the explicit SHMC 17.16.010 direction to give the undefined term "minerals" its "normal dictionary definition."

Finally, in *Copeland Sand & Gravel*, after cautioning about overreliance on dictionaries to discover the meaning of the term "minerals" in a "mineral" rights reservation in a deed, the court looked to a statutory definition of

"mineral" in the enabling statutes for the Oregon Department of Geology and Mineral Industries:

> "The dictionary definitions, however, are not focused on 'mineral' in the context of a reservation of rights. Indeed, [one] dictionary defines 'mineral' so broadly as to encompass everything that is neither animal nor vegetable, a meaning not even defendant proposes for this reservation of rights. * * *
>
> "More to the point, defendant also cites to an Oregon statutory definition of 'mineral' that applies in the context of mineral resources for the Department of Geology and Mineral Industries. Under ORS 516.010(4), a mineral 'includes any and all mineral products, metallic and nonmetallic, solid, liquid or gaseous, and mineral waters of all kinds.' Thus, defendant's proposal that its 'exclusive right to mine * * * minerals' includes large common rock such as basalt is also a plausible interpretation of the disputed text." 267 Or App at 796-97 (footnote omitted).

Petitioner is certainly correct that the city has not adopted the ORS 516.010(4) definition of "mineral," even though it could have. But neither did the city explicitly adopt the narrow definition that petitioner advocates. Once again, that is the problem. Just as the ORS 516.010(4) definition supported a broader understanding of the term "minerals" to include rock in *Copeland Sand & Gravel*, the ORS 516.010(4) definition supports the city's position here.

For all of the reasons set out above, we conclude petitioner has not established that the planning commission misconstrued the terms "natural mineral resources development," "mining," "surface mining," and "mineral" in the SHMC. Certainly there is nothing in the planning commission's interpretations that is inconsistent with the text of the SHMC. We therefore reject petitioner's argument that the planning commission misconstrued the applicable law.

The first assignment of error is denied.

SECOND THROUGH FIFTH ASSIGNMENTS OF ERROR

As we have already explained, rather than stop when it concluded that the Proposal qualifies as "natural mineral resources development," and deny petitioner's proposal on that basis, the planning commission continued and considered under SHMC 17.32.040 whether the Proposal could be approved as an unlisted use. Under SHMC 17.32.040(4) a use that is not listed as a permitted or conditional use in a zone may nevertheless be approved by the city if the approval standards set out at SHMC 17.32.040(4) are met. Those approval standards are set out below:

> "Approval Standards. Approval or denial of an unlisted use application by the director shall be based on findings that:
>
> "(a) The use is consistent with the comprehensive plan;
>
> "(b) The use is consistent with the intent and purpose of the applicable zoning district;
>
> "(c) The use is similar to and of the same general type as the uses listed in the zoning district;
>
> "(d) The use has similar intensity, density, and off-site impacts as the uses listed in the zoning district; and
>
> "(e) The use has similar impacts on the community facilities as the listed uses."

In its second assignment of error, petitioner argues it was error for the city to consider the unlisted use criteria, since petitioner never sought approval as an unlisted use. In its third assignment of error, petitioner contends the planning commission erred by applying the unlisted use criteria rather than the sensitive lands permit criteria, and erred by denying the application in part based on its unlisted use criteria findings. In its fourth assignment of error, petitioner alleges that in adopting its unlisted use criteria findings, the planning

commission relied on unreliable lay testimony about the possible impacts of blasting on the nearby school and residences. And finally, in its fifth assignment of error, petitioner argues the planning commission erred by relying on unreliable lay testimony about the possible impacts of blasting on Wetland J-3.

Petitioner's second assignment of error provides no basis for remand because even if the city erred by applying the unlisted use criteria, the only reason the planning commission did so was to see if there might be another basis for approving the Proposal that petitioner had not asserted. We fail to see how that could possibly be reversible error.

We also conclude that petitioner's remaining assignments of error provide no basis for reversal or remand. The city found that the Proposal is not "consistent with the intent and purpose of the" AR and R5 zoning districts, "is [not] similar to and of the same general type as the uses listed in" those zoning districts, and is not "similar to and of the same general type as the uses listed in" those zoning districts, and would not have "similar impacts on the community facilities as the listed uses" in those zoning districts. SHMC 17.32.040(4)(b), (c), (d) and (e). It is not clear to us that petitioner even disputes those findings. Petitioner does take the position that some of the opposition testimony overstates the impact the Proposal would have on nearby properties, particularly blasting impacts. And on the final page of the petition for review petitioner states "[t]he planning commission wrongly asserts that the J-3 wetland meets the definition of a 'community facility' as that term is used in SHMC 17.3.040(4)(a)." Petition for Review 50.

Petitioner's Wetland J-3 argument is not sufficiently developed for review. Petitioner must do more that state he believes the planning commission

was wrong in treating Wetland J-3 as a "community facility." *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982). However, even if the off-site impacts of the Proposal were overstated in some respects, and without regard to whether Wetland J-3 is accurately described as a "community facility," there is substantial evidence that the Proposal would have characteristics, which include blasting and significant related truck traffic, that make it unlike the uses allowed in the AR and R5 zones and make satisfying the SHMC 17.32.040(4)(b), (c), (d) and (e) standards problematic or impossible. We conclude the planning commission's findings are adequate to explain why it concluded the Proposal does not satisfy the SHMC 17.32.040(4) approval standards, and those findings are supported by evidence a reasonable decision maker could believe.

The second through fifth assignments of error are denied.

The city's decision is affirmed.