BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAGE EQUITIES, LLC
and GERRY ENGLER
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2015-047

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hathaway Koback and Connors LLP.

Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

REMANDED 09/29/2015

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 a city planner's decision denying their application to create two 2,684-square foot lots in a single-family residential zone.

MOTION FOR REPLY BRIEF

Petitioners move to file a reply brief to address two alleged "new matters" raised in the city's response brief, specifically arguments that (1) a finding that petitioners believe to support approval of the application should instead be understood as a finding that supports denial of the application, and (2) petitioners should have anticipated one of the bases for denial and proposed conditions to avoid denial.

The city opposes the reply brief, arguing that its contents do not reply to "new matters" raised in the city's brief. We disagree. An argument that an unchallenged finding states a basis for denial is a new matter that warrants a reply brief. In addition, an argument that petitioners should have proposed conditions to avoid denial warrants a reply to explain why petitioners believe they were not required to propose conditions to avoid denial. The reply brief is allowed.

MOTION TO TAKE EVIDENCE

Petitioners move for LUBA to consider evidence outside the record, consisting of two newspaper articles attached to the petition for review. The two articles describe two communications between a city commissioner and city planning staff regarding how the commissioner wished staff to process discretionary land use reviews in single-family residential zones. The city opposes the motion, but in the alternative requests that LUBA consider the two

communications directly, not only the newspaper articles regarding those communications. The two communications are attached to the city's response.

OAR 661-010-0045(1) provides that LUBA may "take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." Petitioners and the city dispute the meaning and import of the two communications, and whether those communications are evidence of "procedural irregularities" not shown in the record.

The petition for review includes one sub-assignment of error alleging that the city committed procedural error. However, that sub-assignment of error concerns tree preservation standards, and has nothing to do, as far as we can tell, with the disputed communications between the city commissioner and city planning bureau employees. Because the proffered newspaper articles and communications have no bearing on any procedural assignment of error in the petition for review or other basis to take evidence under OAR 661-010-0045(1), LUBA may not consider them for any purpose in this appeal. Both motions to take evidence are denied.

FACTS

The subject property is a 5,368-square-foot lot, with approximate dimensions of 50 feet wide by 100 feet deep. The property is currently developed with a single-family dwelling and a garage.

On January 10, 2014, petitioners filed an application with the city seeking to divide the property into two 25-foot-wide lots, with the intent of demolishing the existing dwelling and garage, and siting a detached dwelling on each 2,684-square foot lot. Each proposed dwelling is two stories in height,

1,665-square foot in size, with three bedrooms and 2.5 bathrooms. The property is zoned R2.5, which allows a lot to be created with a minimum width of 36 feet. However, the R2.5 zone also allows lots to be created with widths as narrow as 25 feet, if six standards are met. Portland City Code (PCC) 33.611.200(C). If one or more of the six standards are not met, then approval of lots less than 36 feet in width requires planned development review, which is subject to different standards and procedural requirements.

The application was deemed complete on July 9, 2014. However, planning staff signaled that staff did not believe the application demonstrated compliance with the PCC 33.611.200(C) criteria to approve lots less than 36 feet wide, and urged petitioners to file an application for planned development review. Petitioners disagreed that the application could not be approved under PCC 33.611.200(C), and extended the deadline to issue the city's decision, effectively placing the application on hold in order to prepare supplemental information.

From October 2014 through March 2015, petitioners submitted additional information, including a revised site plan, conceptual drawings of the proposed two-story dwellings, revised tree preservation plans, a revised narrative, and information regarding development on other narrow lots in the neighborhood. The revised site plan depicted a building footprint on each proposed lot, with a shared driveway between the two dwellings, and an outdoor area and one 9 x 20-foot parking area in the rear of each lot. Staff then requested turning diagrams showing how vehicles would maneuver to and from the shared driveway and the parking area on each lot. Staff also requested additional information on the width of other narrow lots that petitioners identified in the neighborhood.

On May 15, 2015, petitioners made their final submission to the city, but declined to provide a turning diagram showing how vehicles would maneuver between the driveway and parking areas, or further information regarding the width of other narrow lots in the neighborhood.

On May 26, 2015, city forestry staff notified the planner that a tree in the backyard that petitioners had identified as an American Holly tree and proposed to preserve was actually an English Holly tree, a nuisance tree that is not eligible for preservation under the city's tree preservation standards.

The next day, on May 27, 2015, planning staff issued a decision denying the proposed land division, on four grounds: (1) noncompliance with one of the six PCC 33.611.200(C) standards to create a lot less than 36 feet wide; (2) noncompliance with PCC 33.266.120(D) standards for parking space and shared driveways; (3) noncompliance with tree preservation standards, because petitioners' tree preservation plan proposed to preserve rather than remove a nuisance tree, and (4) noncompliance with a PCC 33.641 transportation impacts standard.

This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

PCC 33.611.200(C) sets out six standards for reducing minimum lot width below 36 feet, to potentially allow lots with a width of only 25 feet. There is no dispute that five of the six standards are met or are not applicable. However, the planner concluded that the application did not meet PCC 33.611.200(C)(2)(a), which provides that "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section[.]"[1]

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[1] PCC 33.611.200(C) provides, in relevant part:

PCC 33.611.200(A) identifies nine purposes for the R2.5 lot dimension regulations.[2] There is no dispute in this appeal that the proposed 25-foot wide

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"**Minimum lot width**. Each lot must meet one of the following regulations. Lots that do not meet these regulations may be requested through Planned Development Review. Adjustments to the regulations are prohibited.

"1. Each lot must be at least 36 feet wide; or

"2. Minimum lot width may be reduced below 36 feet, if all of the following are met:

"a. On balance, the proposed lots will have dimensions that are consistent with the purpose of this section[.]"

[2] PCC 33.611.200(A) states:

"The lot dimension regulations ensure that:

"[1] Each lot has enough room for a reasonably-sized attached or detached house;

"[2] Lots are of a size and shape that development on each lot can meet the development standards of the R2.5 zone;

"[3] Lots are not so large that they seem to be able to be further divided to exceed the maximum allowed density of the site in the future;

"[4] Each lot has room for at least a small, private outdoor area;

"[5] Lots are wide enough to allow development to orient toward the street;

"[6] Each lot has access for utilities and services;

"[7] Lots are not landlocked;

lots are consistent with, or at least not inconsistent with, five of the nine purposes identified in PCC 33.611.200(A). The planner expressly concluded that the proposed lots are inconsistent with purposes (1) and (2). As discussed below, there are equivocal findings regarding purposes (4) and (9). The planner ultimately concluded that "on balance, the applicant had not demonstrated that the proposal is consistent with the purpose of the lot dimension regulations." Record 14. Accordingly, the planner denied the land division for noncompliance with PCC 33.611.200(C)(a). We first address petitioners' arguments regarding the "balanc[ing]" required by PCC 33.611.200(C)(a), before turning to petitioners' challenges to the findings.

A. On Balance

Petitioners first argue that the planner misconstrued PCC 33.611.200(C)(a) to the effect that inconsistency with even one of the purposes described in PCC 33.611.200(A) results in noncompliance with PCC 33.611.200(C)(a). Petitioners contend that the phrase "on balance" instead requires the city to weigh and evaluate all nine purposes, and approve the application if the proposed lot size is consistent with at least a majority of the nine purposes. Inconsistency with one or two purposes, petitioners argue, is not a basis to conclude that the proposed lot size is, on balance, inconsistent with the purpose of the lot size regulations.

"[8] Lots don't narrow to an unworkable width close to the street; and

"[9] Lots are compatible with existing lots while also considering the purpose of this chapter[.]"

We agree with petitioners that the planner erred to the extent she interpreted PCC 33.611.200(C)(a) to allow denial based solely on a finding of inconsistency with one or two of the nine purposes identified at PCC 33.611.200(A), without considering consistency with all purposes. The phrase "on balance" clearly contemplates circumstances where a proposed lot may be consistent with some of the nine purposes and inconsistent with others. In that circumstance, the city must evaluate whether the proposed lot is, "on balance," consistent with the purposes identified in PCC 33.611.200(A), and adopt findings that explain how it balanced the different purposes. Those findings are missing in the challenged decision.

PCC 33.611.200(C)(a) is not necessarily resolved in the applicant's favor, as petitioners argue, if the city concludes that the proposal is consistent with a simple majority of the purposes.[3] The city argues, and we agree, that PCC 33.611.200(C)(a) does not state or necessarily imply that a proposed lot necessarily complies with PCC 33.611.200(C)(a) if it is consistent with the majority of the nine purposes identified in PCC 33.611.200(A). That said, PCC 33.611.200(C)(a) also does not suggest that any particular purpose is necessarily given more weight or importance than other purposes. We leave open the possibility that the city may be able to assign greater or lesser significance to some purposes in performing any required balancing, consistent with any guidance or direction as to how to perform that balancing that may be set out in the city's code, comprehensive plan or other land use planning

[3] For example a proposal might be barely consistent with five of the nine purposes and seriously inconsistent with four of the nine purposes. In that situation it might be possible to say the proposal is not, on balance, consistent with the nine purposes of PCC 33.611.200(A).

documents, but we agree with petitioners that the findings must explain why, in the circumstances, it is appropriate to do so.

In the present case, the city's findings do not engage in an express "balanc[ing]" or overall consideration of the different purposes. It is not clear whether the planner assigned greater significance to some purposes over others, but if so there is no reviewable explanation why in the circumstances it is appropriate to do so. As discussed below, the findings conclude that the proposed lots are inconsistent with purposes (1) and (2), without an attempt to weigh or balance the purposes that the proposed lots are consistent with, against those purposes that the proposed lots are found to be inconsistent with.

B. Purposes (1) and (2)

We turn next to petitioners' challenges to the findings regarding consistency with purposes (1) and (2).[4] PCC 33.611.200(A) states that the R2.5 lot dimension regulations are intended to ensure that (1) each lot has enough room for a "reasonably-sized attached or detached house[,]" and (2) lots are of a "size and shape that development on each lot can meet the development standards of the R2.5 zone[.]" *See* n 2. Petitioners argue that the findings regarding consistency with purposes (1) and (2) are inadequate and not supported by substantial evidence.

We agree with petitioners that the city's finding regarding consistency with purpose (1) is inadequate. Again, purpose (1) is to ensure that "[e]ach lot has enough room for a reasonably-sized attached or detached house." The only portion of the findings addressing purpose (1) is a single-sentence conclusory

[4] We also incorporate in this discussion the parties' arguments under the first sub-assignment of error to the third assignment of error.

finding that the applicants have not demonstrated that "each parcel has enough room for a reasonably sized detached house." Record 14. Nothing else in the findings explains that conclusion, or attempts to describe what the planner believes constitutes a "reasonably-sized" detached house. Petitioners submitted testimony that the proposed building footprint would accommodate a 1,665-square foot, three bedroom, and 2.5 bathroom house on each lot. Record 119. Petitioners also submitted real estate listings showing several dozen similarly-sized dwellings on smaller lots within 800 feet of the site. Record 99-111. The findings do not discuss that evidence, or any evidence, in concluding that the proposed lots do not provide enough room for a "reasonably-sized" detached house. The findings are therefore inadequate.

Purpose (2) is to ensure that "[l]ots are of a size and shape that development on each lot can meet the development standards of the R2.5 zone." The decision includes some findings addressing Purpose 2, but again those findings are inadequate.[5] The city's findings focus on the proposed

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

> "* * * [T]he applicant has not demonstrated that the parcels are of sufficient size to meet the standards of the R2.5 zone or that each parcel has enough room for a reasonably sized detached house. Specifically, the applicant has not provided information to show that the proposed shared driveway and on-site parking spaces and associated reciprocal access easements are of sufficient size.
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> "Parking in the R2.5 zone is required to comply with the following standard [quoting PCC 33.266.120(D) parking standards, which require in relevant part a minimum 9 x 18-foot parking area and a minimum driveway width of nine feet, *see* n 6].
>
> "BDS staff requested that the applicant provide turning diagrams to show that the proposed easement is sized to provide sufficient

parking and the shared driveway, and conclude that petitioners failed to submit turning diagrams or other evidence to demonstrate that vehicles can maneuver to and from the shared driveway and the nine by 20-foot parking area in the rear of each lot, without hitting a house or a car parked in the adjacent parking space. Without that evidence, the decision concludes, "the applicant has not met the burden to show that the proposed parcels can meet the R2.5 development standards" for parking areas and driveways. Record 14.

That conclusion is puzzling, because there is no dispute that the parking areas and driveway in fact meet or exceed the minimum sizes and widths specified in PCC 33.266.120(D).[6] The basis for the planner's concern that

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> space to access parking spaces and a shared driveway that meet these standards. Staff has concerns that there may not be sufficient area between the required parking space and the proposed house to maneuver a vehicle into the shared driveway without hitting an adjacent parked car or one of the houses. The applicant has declined to provide this information, and instead provided photos and case numbers for properties that the applicant states have a similar layout to the one being proposed. The applicant indicates that those materials should be sufficient to demonstrate the easement is adequately sized. However, the site plan (Exhibit C.1) provided by the applicant does not show that the easement area for this specific proposal is sufficient to provide access to the required parking spaces. Without this information, the applicant has not met the burden to show that the proposed parcels can meet the R2.5 development standards. Without resolving the parking, access, and easement requirements, it is also unclear that the outdoor area requirements can be met." Record 14.

[6] PCC 33.266.120(D) governs parking space sizes, and provides:

"1. A parking space must be at least 9 feet by 18 feet.

"2. The minimum driveway width on private property is 9 feet.

vehicles will not be able to maneuver between the driveway and the parking area is neither explained nor linked to a development standard. Petitioners testified that vehicles would simply drive from the driveway into each parking area, and then back out, and submitted examples of similar designs that the city has approved with shared driveways and parking areas in the rear of the lot. Record 120. The findings do not address that testimony, but simply state that the site plan "does not show that the easement area for this specific proposal is sufficient to provide access to the required parking spaces." Record 14. However, the site plan appears to show a relatively straightforward transition between the driveway and each parking area. Record 7. The findings do not identify or explain the basis for the perceived difficulty in accessing the parking areas, or explain why a "turning diagram" is necessary to determine whether the access to the parking areas "can meet the development standards of the R2.5 zone[.]"

C. Purpose (4): Small Private Outdoor Area

The decision finds that "[w]ithout resolving the parking, access, and easement requirements, it is also unclear if the outdoor area requirements can be met." Record 14. This finding is also puzzling, because as far as we are informed the city's code does not impose any minimum size requirements on

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"3. Shared driveways are allowed to extend across a property line onto abutting private properties if the following are met:

"a. The width of the shared driveway is at least 9 feet; and

"b. There is a recorded easement guaranteeing reciprocal access and maintenance for all affected properties."

outdoor areas. The finding presumably is referencing purpose (4) of PCC 33.611.200(A), which states that one purpose of the lot dimension regulations is to ensure that "[e]ach lot has room for at least a small, private outdoor area[.]" *See* n 2. We understand the above-quoted finding to reflect a concern that if the parking area or the driveway easement is altered or enlarged to address staff's concerns regarding vehicle maneuverability, then the outdoor area in the remainder of the rear portion of each lot may not be large enough to be consistent with purpose (4).

The site plan proposes an outdoor area on each lot that appears to be approximately 15 feet wide by 30 feet deep, consisting of a landscaped area and a hardscaped area, exclusive of the parking area and driveway easement. Record 7. The decision does not find that the proposed outdoor area is insufficient, or explain why altering or enlarging the parking area or driveway easement, in the event that became necessary to meet R2.5 development standards, would cause noncompliance with the "outdoor area requirements[.]" To the extent the decision relies on potential inconsistency with purpose (4) as a basis for denial, the findings are inadequate.

D. Purpose (9): Compatibility with Existing Lots

Purpose (9) is to ensure that "[l]ots are compatible with existing lots while also considering the purpose of this chapter[.]" PCC 33.611.010 sets out the purpose of the chapter governing the R2.5 zone. As relevant, PCC 33.611.010 states that one purpose of the R2.5 zone is to "ensure that lots are consistent with the desired character of the zone while allowing lots to vary in size and shape provided the planned intensity of the zone is respected."

The city's decision discusses purpose (9) at some length, but the findings are ultimately equivocal regarding whether the proposed lots are compatible

with existing lots or consistent with purpose (9). The concluding paragraphs state, in relevant part:

> "Overall, except for some 15-foot wide lots in the R1 zone to the east along SE 80th Avenue, which are allowed by right in that zone, the scale of the proposed parcels is narrower and the proposed development is narrower and taller than the general width and configuration of the nearby development in the R2.5 zone. Yet, while a departure from the form and scale of existing nearby lots and development, the proposal will provide opportunities for new housing, which is compatible with the noted policies of the neighborhood plans.
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> "*However*, the applicant has not demonstrated * * * [continuing on to find that the proposed lots are inconsistent with purposes (1) and (2), *see* findings quoted at n 5]" Record 14 (emphasis added).

Petitioners read the first paragraph to ultimately conclude that the proposed lots are compatible with existing lots and therefore consistent with purpose (9). In its response brief, the city argues that the above findings in fact conclude that the proposed lots are inconsistent with purpose (9).

We agree with petitioners that, read as a whole, the decision does not conclude that the proposed lots are incompatible with existing lots or inconsistent with purpose (9). The first paragraph quoted above observes that the proposed lots are narrower and proposed development narrower and taller than other development in the R2.5 area. The first paragraph goes on to state that the proposed lots are compatible with neighborhood policies. But the first paragraph does not draw any express conclusion regarding compatibility with existing lots or consistency with purpose (9). We note that the transition to the second paragraph, in which the planner concludes that the proposed lots are inconsistent with purposes (1) and (2), begins with "however." The logical connector "however" signals contrast or contradiction with the preceding

paragraph. That transition suggests that the planner ultimately concluded (without stating so) that the proposed lots are consistent with purpose (9), in contrast to the findings quoted at n 5, which expressly conclude that the proposed lots are inconsistent with purposes (1) and (2).

However, the findings on purpose (9) are equivocal, to say the least. For present purposes, we disagree with the city that the city's findings regarding consistency with purpose (9) provide a basis to deny the application.

E. Conclusion

For the above reasons, the city's conclusion that the proposed lots do not comply with PCC 33.611.200(C)(2)(A) are not supported by adequate findings. As explained further below, remand is necessary for the city to adopt more adequate findings addressing the requirement that "on balance" the proposed lots have dimensions that are consistent with the nine purposes set out in PCC 33.611.200(A).

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

A. PCC 33.630 Tree Preservation Requirements

PCC 33.630 requires preservation of a certain percentage of existing, qualified trees on a development site, with numerous exceptions, including an exception for "nuisance" trees. If the minimum preservation standards cannot be met, then certain kinds of mitigations are acceptable substitutes.

Petitioners initially submitted a tree preservation plan dated November 10, 2013, that in relevant part identified an English Holly in the front yard (tree 327), and recommended removal of the tree, because it is deemed a nuisance species, and therefore not eligible to meet the city's tree preservation requirements. Record 46. Petitioners later submitted a revised tree preservation

plan dated October 3, 2014, that identified an American Holly in the back yard (tree 345), and that recommended preservation of that tree, because American Holly is a native tree that qualifies for preservation. The revised plan also identified the front yard Holly (tree 327) as an American Holly, but still recommended removal. Record 57. A third revision, dated November 24, 2014, continued to identify both hollies as American Holly, and continued to recommend removal of tree 327 but retention of tree 345. Record 76.

Sometime later, the city forester conducted a site visit and, on May 26, 2015, sent an e-mail to the city planner stating that both of the hollies on the property are English Holly, and therefore not eligible for preservation. Record 172. The next day, May 27, 2015, the planner issued the decision denying the application, in part because petitioners proposed to preserve a nuisance tree, *i.e.*, the backyard holly, tree 345. The findings state:

> "The tree preservation standards cannot be satisfied by retaining a nuisance tree species, as the applicant has proposed. Therefore, the materials provided by the applicant do not demonstrate that the tree preservation regulations are met with an allowable tree species. Based on these factors, this criterion is not met." Record 15.

Under the second sub-assignment to the third assignment of error, petitioners challenge the above-quoted finding. Petitioners argue that the city erred in relying on the last-minute evidence from the city forester (to which petitioners had no chance to respond) to conclude that the tree preservation requirements of PCC 33.630 are not met. According to petitioners, even if the city forester is correct that the backyard holly tree that petitioners proposed for preservation is an English Holly and hence a nuisance tree, that simply means that that tree, along with the others on the site, must be removed, and petitioners will instead have to satisfy the requirements of PCC 33.630 via

mitigation or other measures, pursuant to PCC 33.630.200(D).[7] Petitioners argue that the city erred in failing to give petitioners a chance to respond to the city forester's e-mail, which raised the issue that the backyard holly tree proposed for retention was in fact a nuisance tree that did not qualify for retention. We understand petitioners to argue that given the timing of the city forester's e-mail prior to issuing its decision the city was obligated to give petitioners a reasonable opportunity to (1) respond to the city forester's evidence or (2) propose alternative measures or conditions sufficient to ensure compliance with the tree preservation standards.[8]

The city responds that it is the applicant's obligation to demonstrate compliance with approval criteria, and to propose conditions or measures

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[7] PCC 33.630.200(D) provides, in relevant part:

> "Where the minimum tree preservation standards of 33.630.100 cannot be fully met, as determined by evaluating the above criteria, * * * mitigation must be provided as needed to replace the functions of trees removed from the site. Options for mitigation may include preservation of smaller diameter or native trees, permanent preservation of trees within a tree preservation or environmental resource tract, tree planting, payment into the City's Tree Planting and Preservation Fund, or other options that are consistent with the purpose of this chapter."

[8] Petitioners cite ORS 197.522 for the proposition that the city itself was obligated to propose conditions of approval to ensure compliance with the tree preservation standards, rather than deny the application. However, we held in *Reeder v. Multnomah County*, 59 Or LUBA 240, 254-55 (2009), that ORS 197.522 applies only in the context of a declared or *de facto* moratorium. Further, we have held that where ORS 197.522 applies, the applicant, not the local government, has the ultimate obligation to propose conditions necessary to ensure compliance with approval criteria. *Oien v. City of Beaverton*, 46 Or LUBA 109, 126-127 (2003).

necessary to ensure consistency with approval criteria. The city also argues that petitioners had ample opportunity to recognize that the backyard holly proposed for retention was in fact an English Holly that did not qualify for retention, because petitioners' three tree preservation plans included conflicting information regarding whether the backyard holly was an English or American Holly.

Petitioners reply that, due to the last-minute timing of the forester's e-mail and the city's decision, the city gave petitioners no opportunity to propose any mitigation or alternative measures to comply with the tree preservation requirements.

We agree with petitioners that, under the present circumstances, the city erred in denying the application in part based on the city forester's May 26, 2015 e-mail, without providing petitioners a reasonable opportunity to respond to that e-mail or to propose conditions or alternative measures to ensure compliance with the tree preservation standards. Under *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973), if nothing else, petitioners are entitled to an opportunity to respond to new evidence. The city forester's conclusion that the backyard holly tree is actually an English Holly rather than an American Holly is evidence and, as far as the record reflects, it represents a new issue that was not raised at all until the day before the city issued its final decision.

The city suggests in its response brief that the issue of whether tree 345, the backyard holly, is an English or American Holly was raised by petitioners themselves, who presented conflicting tree preservation plans that first described tree 345 as an English Holly, then later described tree 345 as an American Holly. Response Brief 23, citing to Record 42. Given that

conflicting information, the city argues, petitioners should have been on notice that tree 345 may not quality for retention, and that they should propose mitigation or alternative measures to comply with the tree preservation standards.

However, the city has misidentified the relevant trees. The first tree preservation report identified only tree 327, in the front yard, as an English Holly. *Compare* Record 42 and 46 (first tree report) with Record 54 and 57 (second tree report) and Record 72 and 76 (third tree report). All three reports proposed to remove tree 327, the holly in the front yard. None of the three tree reports identified tree 345 proposed for retention as an English Holly. The three tree reports do not conflict on this point, and any differences between the three reports was not sufficient to put petitioners on notice of the need to propose conditions or alternative measures, in case they cannot rely on the proposed retention of tree 345 to satisfy the tree preservation requirements.

The city does not argue that the planner was under a pressing deadline to issue the decision, which might excuse the city's failure to make petitioner aware of the city forester's e-mail message before issuing the final decision, or identify any reason why the planner could not have forwarded the forester's e-mail to petitioners and offered them a reasonable opportunity to respond or propose mitigation or alternative measures or conditions to ensure compliance with PCC 33.630. Given the timing of the forester's e-mail and the city's decision, we agree with petitioners that the city committed a procedural error that prejudiced petitioners' substantial rights when it failed to provide petitioners with a reasonable opportunity to respond to the city forester's evidence and propose conditions or alternative means to satisfy PCC 33.630,

prior to denying the application for failure to demonstrate compliance with the tree preservation requirements.

B. On-Street Parking

PCC 33.641.020 requires in relevant part that the transportation system must be "capable of safely supporting the proposed development," based on evaluation of a number of factors, including "on-street parking impacts[.]" The City of Portland Bureau of Transportation (PBOT) reviewed the proposed site plan, and concluded that

> "[o]n-street parking will not be adversely impacted given the proposed shared driveway that will serve to access on-site parking areas at the rear of both proposed lots. This configuration will retain 17-ft of uninterrupted curb length along each parcel frontage which may accommodate one car along each parcel frontage. There appears to be an abundance of on-street parking spaces currently available along the shoulders of both sides of the street. To ensure the availability of on-street parking along the site's frontage, PBOT will recommend a condition of approval requiring the shared driveway as shown on the submittal plans. * * *" Record 163.

Nonetheless, the city planner found that PCC 33.641.020 is not satisfied, for the same reason that PCC 33.611.200(C)(2) is not met, because:

> "the applicant had not demonstrated that the widths of the parcels are sufficient to provide the required on-site parking or shared driveway. As such, the applicant has not demonstrated that the parking demand for the proposal will be satisfied on site or that the proposal will not have impacts to on-street parking. Accordingly, this criterion is not met." Record 16.

Petitioners challenge this derivative basis for denial, arguing that the proposed off-street parking and driveway meet the minimum code standards and, as PBOT concluded, the off-street parking would ensure that there are no adverse on-street parking impacts.

We sustained petitioners' challenges, under the first and second assignments of error, to the adequacy of the findings of noncompliance with PCC 33.611.200(C)(2), which will require remand to adopt more adequate findings. The findings of noncompliance with PCC 33.641.020 appear to be entirely derivative of those addressing PCC 33.611.200(C)(2). Because remand is necessary for the city to adopt more adequate findings addressing compliance with PCC 33.611.200(C)(2), remand is also necessary for the city to re-evaluate its derivative findings of noncompliance with the on-street parking impact standard at PCC 33.641.020.

C. Shared Driveway Easement

PCC 33.636.100 requires recordation of a maintenance agreement for the proposed 10-foot wide reciprocal easement for the shared driveway. In the city's decision, the planner noted that PCC 33.636.100 is typically satisfied with a condition requiring recordation of the maintenance agreement prior to final plat approval. However, again citing noncompliance with PCC 33.611.200(C)(2), the planner found that

> "the applicant has not demonstrated that the size of the easement as shown on the preliminary plat (Exhibit C.1) is sufficient to accommodate the space needed for the required driveway and parking spaces. Without confirming the easement area is sufficient, the required maintenance agreement for this easement cannot be provided, since that document must describe the maintenance responsibilities for the easement noted on the plat and the facilities within those areas. As such, this criterion is not met." Record 16.

Again, the above-quoted finding is entirely derivative of the findings of noncompliance with PCC 33.611.200(C)(2). Because we must remand the decision for more adequate findings addressing compliance with PCC

33.611.200(C)(2), remand is also necessary for the city to re-evaluate its derivative findings of noncompliance with the maintenance agreement requirement of PCC 33.636.100.

The third assignment of error is sustained.

DISPOSITION

We have sustained all of petitioners' challenges to the city's decision denying the proposed land division. Petitioners seek reversal of the decision pursuant to ORS 197.835(10)(a)(A),[9] arguing that the city's denial of its land division application is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances."[10]

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[9] ORS 197.835(10) provides, in relevant part:

> "(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; * * *
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> "* * * * *
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> "(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."

[10] Petitioners argue that the present case is similar to *Stewart v. City of Salem*, 231 Or App 356, 219 P3d 46 (2009), which affirmed LUBA's reversal under ORS 197.835(10)(a)(A) of a city decision denying an application to partition land to create three parcels. However, in *Stewart*, it was undisputed

Petitioners contend that the undisputed evidence in the record demonstrates that the application meets all of the approval standards or could, with conditions, meet those standards. Accordingly, petitioners argue, denial of the application is outside the range of discretion allowed the city under its plan and code, and therefore LUBA should reverse the decision and order the city to approve the application.

The city responds, and we agree, that petitioners have not established that reversal under ORS 197.835(10)(a)(A)—or reversal at all—is the appropriate disposition. In resolving the three assignments of error, we agreed with petitioners that the city's findings of noncompliance with several approval criteria were inadequate in several respects. However, our resolution of those findings challenges does not dictate or even suggest that the city could not deny the proposed land division, based on more adequate findings. Moreover, we sustained one sub-assignment of error to correct the city's procedural error in failing to provide petitioners with an opportunity to propose conditions or alternative measures to ensure compliance with tree preservation requirements. Correcting procedural error requires remand, not reversal. Moreover, petitioners must still demonstrate that whatever conditions or alternative

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that the land division application complied with all applicable approvals standards, but the city council denied the application because it believed the application should have been processed as a subdivision, notwithstanding that under the city's code the procedures, standards and conditions applicable to either a partition or subdivision application were identical. LUBA held under those circumstances that it was outside the scope of the city's discretion under its code to deny the partition application and force the applicant to submit a new, identical application for a subdivision. In the present case, it remains to be seen whether the application complies with all approval criteria, or can be conditioned to comply with all approval criteria.

measures they propose comply with the applicable tree preservation standards. If petitioners fail to do so, then the city could deny the application for that reason alone.

OAR 661-010-0071(2) provides that LUBA shall remand a land use decision where (1) the findings are insufficient to support the decision, (2) the decision is flawed by procedural errors that prejudice the substantial rights of the petitioner, or (3) the decision improperly construes the applicable law, but is not prohibited as a matter of law. All three bases apply here, and therefore remand is the appropriate disposition.

The city's decision is remanded.