BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PINNACLE ALLIANCE GROUP, LLC,
Petitioner,

vs.

CITY OF SISTERS,
Respondent,

and

MCKENZIE MEADOWS VILLAGE, LLC,
Intervenor-Respondent.

LUBA No. 2015-063

FINAL OPINION
AND ORDER

Appeal from City of Sisters.

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

Steven D. Bryant, City of Sisters City Attorney, Redmond, filed a response brief and argued on behalf of respondent.

Laurie Craghead and Laura Craska Cooper, Bend, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief was Brix Law LLP.

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

REMANDED 04/11/2016

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

The city planning commission approved a new site plan and a modification of a previously approved master plan to allow construction of a senior assisted living facility. Petitioner appealed that decision to the city council, which denied petitioner's local appeal and affirmed the planning commission decision. In this appeal, petitioner seeks review of that city council decision.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion is allowed.

FACTS

McKenzie Meadow Village (MMV) is a proposed multi-phase, primarily residential, mixed use development. A master plan for MMV and site plan for a portion of MMV were approved in 2010 (2010 master plan and site plan). This appeal concerns a 2015 modification of that master plan and a new site plan for a portion of phase 1 of MMV (2015 modified master plan and site plan). Shortly after the city issued the decision that is the subject of this appeal, the city approved an extension of the 2010 master plan approval for MMV, as modified in 2012. That extension decision is the subject of a second LUBA appeal. We discuss those 2010 and 2012 master plan decisions below.

On this date, we separately issue our decision in the second appeal that challenges the 2010/2012 master plan extension decision.

A. The Annexation and the Annexation Agreements

Pursuant to a December 3, 2009 Annexation Agreement, the city annexed thirty acres of land. Pursuant to the Annexation Agreement and a subsequent Amended Annexation Agreement, 6.3 acres of the 30 acres were to be designated for a "Senior Living Center." The requirement, as stated in the May 27, 2010 Amended Annexation Agreement, is set out below:

> "**Senior Living Center**: Owner shall designate no less than 6.3 acres of the Owner Property for the purpose of construction and operation of a Senior Living Center. The Center will provide senior (55 years old and older) assisted and independent living, and nonsenior assisted living options. The Senior Living Center (or a phase of it) shall be built in the first phase of construction. Except for the senior apartment complex and the medical facility, no other occupancy permits will be issued for any other development on the Owner Property until the Senior Assisted Living Center (or a phase of it) has received its occupancy permit." Record I, 295.[1]

To summarize and simplify the above, with two specified exceptions, the Amended Annexation Agreement requires that a *Senior Living Center (or a phase of it)* must be constructed as part of phase 1 on 6.3 acres of the 30 acres and receive occupancy permits before any other development on the 30 acres

[1] The county prepared a record that compiles documents more or less chronologically. That Record is labeled "Binder 1 of 2." We cite to that record as Record I. Record "Binder 2 of 2" is a large collection of documents submitted by petitioner's attorney below. We cite to that record as Record II.

may receive occupancy permits. Importantly, the Amended Annexation Agreement requires that the Senior Living Center must include three kinds of living options: *(1) assisted living for seniors (55 years old or older), (2) assisted living for nonseniors, and (3) independent living for seniors*.

B. 2010 Comprehensive Plan and Zoning Ordinance Amendments

On September 16, 2010, the city approved comprehensive plan and zoning map amendments for MMV. Record II, 19. A total of 6.3 acres is planned and zoned Multi-Family Residential (MFR). For purposes of this appeal the important part of the comprehensive plan and zoning map amendments is condition 3, which provides "[a]ll future uses of the property shall comply with the revised Annexation Agreement * * * dated May 27, 2010." Record I, 298.

Simply stated, the comprehensive plan and zoning map amendments carry forward the Amended Annexation Agreement requirement that MMV include a Senior Living Center that includes the three specified types of housing.

C. 2010 Master Plan and Tentative Subdivision Plan

The city approved a master plan and tentative subdivision plan for MMV at the same time it approved the comprehensive plan and zoning map amendments. As relevant here, the 2010 master plan for MMV calls for a ten-phase development. The 2010 master plan called for the following development in phase 1 of MMV:

- An 82-unit Senior Lodge, which is described as a "senior assisted and independent living facility[.]" Record II, 20, 80, 82-83.
- A 26-unit Affordable Senior Lodge. *Id*.
- 8 of 36 proposed Senior Cottages. *Id*.
- A 12-Unit Apartment that is not age restricted.[2] *Id*.

D. 2011 Site Plan

On September 8, 2011, the city approved a site plan for "an 82 room assisted living facility and a small maintenance building * * *." Record II, 110.

E. 2012 Modified Master Plan

As far as we can tell the changes adopted by the 2012 modified master plan have no bearing on this appeal, and no party argues otherwise. We therefore do not consider the 2012 modified master plan further.

F. The 2015 Modified Master Plan and Modified Site Plan

The development authorized by the 2010 master plan has not been constructed. The 2015 modified master plan that is the subject of this appeal only changes the 82-unit senior assisted and independent living facility that was approved by the 2010 master plan and site plan. As far as we can tell, and as far as the parties have informed us, the 2010 master plan is otherwise

[2] The remaining 28 Senior Cottages and a second 26-unit Affordable Senior Lodge were to be developed in later phases.

unaffected.[3] The 82-unit senior assisted and independent living facility is eliminated by the 2015 modified master plan, and city approves in its place a facility that will provide 45 units of assisted living and 12 memory care units along with an unexplained "Future Addition." Record 1, 422, 484.

FIRST ASSIGNMENT OF ERROR

Sisters Development Code (SDC) 4.1.500.C.1.d gives parties in quasi-judicial land use proceedings before the planning commission a right, which must be exercised prior to the close of the initial evidentiary hearing, to request an opportunity to present additional evidence. If such a request is timely made, the planning commission must (1) continue the hearing to allow the additional evidence to be submitted, or (2) hold the record open to receive the additional evidence.[4] The continuance or open record period required by SDC

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[3] The decision specifically states "[a]ll conditions of approval specified in previously approved applications * * *, not modified by this application, remain in effect." Record I, 26.

[4] SDC 4.1.500.C.1.d provides:

> "Before the conclusion of the initial evidentiary hearing, any participant may ask the Planning Commission for an opportunity to present additional relevant evidence or testimony that is within the scope of the hearing. The hearings body shall grant the request by scheduling a date to finish the hearing (a 'continuance') per paragraph 2 of this subsection, or by leaving the record open for additional written evidence or testimony per paragraph 3 of this subsection." *See* n 5.

4.1.500.C.1.d must be at least seven days in length. SDC 4.1.500.C.2 and .3.[5] These requirements of SCD 4.1.500.C are substantively identical to the ORS 197.763(6)(a) through (c) statutory requirements for quasi-judicial land use hearings.

Pursuant to the rights granted under ORS 197.763(6)(a) through (c) and SCD 4.1.500.C, prior to the close of the planning commission's initial June 18, 2015 hearing in this matter, petitioner requested that the hearing be continued to allow petitioner to submit additional evidence. Record 373. The planning commission denied the request. Record 384. All parties recognize that planning commission denial of petitioner's request was a procedural error.

Under ORS 197.835(9)(a)(B), LUBA is directed to reverse or remand a decision where it finds a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" Under ORS 197.835(9)(a)(B), reversal or remand is only required and appropriate if a procedural error resulted in prejudice to petitioner's substantial rights. The "substantial rights" of parties in quasi-

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[5] SDC 4.1.500.C provides in part:

> "2. If the Planning Commission grants a continuance, the completion of the hearing shall be continued to a date, time, and place at least seven days after the date of the first evidentiary hearing. * * *;
>
> "3. If the Planning Commission leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven days after the hearing. * * *[.]"

judicial land use proceedings, as referenced in ORS 197.835(9)(a)(B), are "the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioner appealed the planning commission's decision to the city council. On July 23, 2015, thirty-five days after the planning commission's June 18, 2015 hearing, the city council held a *de novo* public hearing on petitioner's appeal. Prior to and during that hearing, petitioner was permitted to submit additional evidence. Respondent and intervenor-respondent (respondents) contend that the city council's *de novo* hearing on July 23, 2015, at which petitioner was permitted to submit additional evidence, was adequate to ensure that petitioner's substantial rights to prepare and submit its case and to a full and fair hearing were not prejudiced, with the result that the planning commission's procedural error provides no basis for reversal or remand under ORS 197.835(9)(a)(B). We agree with respondents.

Petitioner argues that the right it is granted under SCD 4.1.500.C is a right to submit additional evidence to the initial decision maker, *the planning commission*, and the opportunity it was given on appeal to present additional evidence to the *city council* in its local appeal is not sufficient to avoid prejudice to its substantial rights. Petitioner goes on to argue that to conclude otherwise would improperly insert language into SCD 4.1.500.C, in

contravention of ORS 174.010.[6] Neither respondent nor intervenor-respondent specifically address those arguments.

Petitioner had 35 days to collect additional evidence after the planning commission's June 18, 2015 decision and submit it to the city council on July 23, 2015, and did so. Putting aside the different decision makers and the stage of the proceeding at which the additional evidence was submitted, the right that petitioner was given to submit additional evidence appears to have been at least as extensive as the right granted by SCD 4.1.500.C. While that evidence was submitted to the city council in a local appeal of the planning commission's decision rather than directly to the planning commission as the initial decision maker, petitioner does not explain why those differences result in prejudice to its substantial rights, other than to claim that they did. Without such an explanation, we conclude that petitioner has failed to demonstrate that the planning commission's procedural error resulted in prejudice to petitioner's substantial rights.

We also reject petitioner's ORS 174.010 argument. *See* n 6. Our conclusion that the planning commission's procedural error provides no basis for remand does not improperly insert missing text into SCD 4.1.500.C. That

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[6] ORS 174.010 provides, in part:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted[.]"

might arguably be the case if we concluded that the city council's action was sufficient *to comply with* SCD 4.1.500.C. But we do not conclude the city council complied with SCD 4.1.500.C. Rather, we conclude (1) the planning commission erroneously denied petitioner's rights under SCD 4.1.500.C, but (2) the city council's decision to grant petitioner a *de novo* evidentiary hearing as part of its appeal, where petitioner could and did present evidence was sufficient to avoid any prejudice to petitioner's rights under SCD 4.1.500.C.

Finally, petitioner also argues the city council erred by failing to adopt findings addressing the planning commission's violation of SCD 4.1.500.C and improperly construed SDC 4.1.800.H.1, which we understand petitioner to interpret to require the city council to remand the planning commission's decision to the planning commission so that the planning commission itself could correct its error.

We address petitioner's broader findings challenge under the second assignment of error. As respondent and intervenor-respondent (respondents) correctly point out, SDC 4.1.800.H.1 merely *authorizes* the city council to remand matters to the planning commission for correction of identified errors, it does not *require* the city council to do so. SDC 4.1.800.H.1 in no way prohibits the city council from attempting to correct planning commission errors or taking steps to avoid any prejudice that a planning commission error might cause if those steps were not taken.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner contends the two-page city council decision in this matter is not supported by adequate findings. As we explained in *Heiller v. Josephine Cou*nty, 23 Or LUBA 551, 556 (1992):

> "Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977); *Vizina v. Douglas County*, 17 Or LUBA 829, 835 (1989); *Bobitt v. Wallowa County*, 10 Or LUBA 112, 115 (1984). Additionally, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *White v. City of Oregon City*, 20 Or LUBA 470, 477 (1991); *Grover's Beaver Electric v. City of Klamath Falls*, 12 Or LUBA 61, 66 (1984)."

LUBA's rules require that the record include "[t]he final decision including any findings of fact and conclusions of law." OAR 661-010-0025(1)(a). Given the importance land use findings have assumed, following *Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County*, 280 Or at 21 and *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), it would seem that it should be almost automatic by now that the final decision that is the subject of an appeal, with all adopted findings, would be clearly identified and collected in a single place at the beginning of the record that is submitted to LUBA in the event of an appeal. Yet that frequently is not the case, and it is not the case here.

The 1666-page record in this appeal does not include a separate listing in the table of contents for the city council decision that is the subject of this appeal. But the two-page "Decision" that is signed by the mayor appears within several other listed record items. One of those is an item identified as "Email from Director Davenport to Mike Reed with signed decision for AP 15-02 attached[.]" Record I, 21-26. The two-page city council decision appears at Record I, 25-26. That two-page decision does not include anything that could be called findings. Nothing in that decision identifies the relevant approval criteria or explains why the city council found that those criteria are satisfied or addresses the issues raised by petitioner in its appeal of the planning commission decision. The two-page decision does include the following statement:

> "2. The findings of fact in this matter are located in the staff report, incorporated herein as Exhibit A." Record I, 25.

On the next page the decision lists "exhibits and conditions of approval[,]" which include the following:

> "1. Exhibit A – Staff Report[.]" Record I, 26.

None of the two-page city council decisions that appear in the record have a staff report attached, much less one that is labeled "Exhibit A." As a matter of fact, the only staff reports in the record that are labeled "Exhibit A" appear at Record II, 20-75 and 93-109. The first of those Exhibit A staff reports is the staff report for the 2010 master plan and the second is the staff report for the 2012 modified master plan. No party argues that the city council

intended to adopt either of those staff reports as findings for its 2015 decision, even though they are the only staff reports that are labeled "Exhibit A." We were advised at oral argument that while all parties before the city council were sent a copy of the two-page city council decision on the 2015 master plan modification and site plan, that decision did not include a copy of the referenced staff report.

To begin, it is clear from the quoted language in the city council's decision that the city council meant to adopt a staff report as the findings to support its decision. But which staff report did the city council intend to adopt? There appear to be two reasonable possibilities.[7] First, there is a 50-page staff report to the planning commission, dated June 18, 2015, that appears at Record I, 422-71.[8] Second, there is an undated 19-page staff report to the city council, which apparently was transmitted to the city council at or shortly before its July 23, 2015 hearing. Record I, 108-26. As noted earlier, neither of those staff reports is labeled "Exhibit A" and neither staff report is attached to, or even in particularly close proximity to, one of the two-page city council decisions in the record.

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[7] In arguing that there are four staff reports in the record, petitioner double counts the planning commission staff report in this matter, incorrectly identifies the Agenda Item Summary at Record I, 81 as a staff report, and overlooks the two staff reports for the 2010 and 2012 master plan modifications at Record II, 20-75 and 93-109.

[8] A color version of that same staff report to the planning commission also appears at Record I, 132-81.

In its petition for review, at several places petitioner speculates the city council may have intended to adopt the city council staff report as findings. Both respondent and intervenor-respondent contend that, to the contrary, it is clear that the city council intended to adopt the planning commission staff report that appears at Record I, 422-71 as its findings:

> "* * * While there are several other documents in the record labeled in various ways as a Staff Report, there is only one document that contains specific findings of fact relevant to this decision. [The planning commission staff report] is the only document that specifically address[es] the Code issues raised by this application and includes the staff response and findings." Respondent's Brief 8-9 (record citations omitted).

> "In the [planning commission staff report] all criteria for the current applications are addressed and found to be met or met with conditions of approval. Conditions of approval are then attached. No other staff report in the record includes all that. * * *." Intervenor-Respondent's Brief 11 (record citations omitted).

The standard that LUBA applies to determine if a local government has adequately incorporated documents as supporting findings was set out in *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992):

> "[W]e hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." (Footnote omitted.)

The city council satisfied the first *Gonzalez* requirement. The city council clearly indicated its intent to incorporate a staff report as findings. However, the city council decision falls considerably short on the second *Gonzalez* requirement. There are at least two staff reports that were prepared during the proceedings on the 2015 master plan modification and site plan, and it is not clear which one the city council intended to adopt. Respondents are correct that the June 18, 2015 planning commission staff report is the only one that comprehensively attempts to address the applicable approval criteria. But petitioner's local appeal was filed on July 2, 2015. Record I, 82-106. The city council staff report appears immediately after that appeal document in the record. Record I, 108-26. And that city council staff report is the only staff report that comprehensively attempts to address the issues that are raised in petitioner's local appeal.

It would seem to us that while the city council almost certainly would have wanted to adopt the planning commission staff report, for the reasons cited by respondents, the city council also certainly had good reason to want to adopt the city council staff report, to ensure that there were at least some findings specifically addressing the issues petitioner raised in its appeal to the city council. That is because petitioner's appeal was filed after the planning commission findings were prepared and it would be unusual for the planning commission staff report to have anticipated and addressed all the issues petitioner would later raise in its appeal.

We conclude the city council did not adequately identify which of those two staff reports it intended to incorporate as findings. Under the second *Gonzalez* requirement "a reasonable person reading the decision" must "be able both to identify and to request the opportunity to review the specific document thus incorporated." If forced to choose between the planning commission staff report and the city council staff report, we do not believe a reasonable person would be able to determine which of those staff reports were incorporated as findings. And as we have already suggested, either choice presents benefits and problems. If the planning commission staff report was intended, there are no findings specifically addressing the issues raised in petitioner's local appeal. If the city council staff report was intended, that problem is avoided, but there are no findings at all addressing the vast majority of the approval criteria.

Of course a third possibility, one which no party in this appeal suggests was intended by the city council, is that the city council intended to incorporate both the planning commission staff report and the city council staff report as its findings. That at least would have the virtue of adopting findings that attempt to address all approval criteria and all the issues specified in petitioner's local appeal statement. But the city council decision refers to the staff report in the singular, and, as noted, no party argues the city council intended to adopt both the planning commission and city council staff reports.

Finally, presumably relying on ORS 197.835(11)(b), intervenor-respondent suggests the city's reasoning for concluding applicable approval

criteria are satisfied and for rejecting petitioner's arguments in its local appeal of the planning commission decision can be gleaned from the planning commission findings, the city council findings, the minutes of the local proceedings and testimony to the city council from the applicant's attorney and others.[9] We reject the suggestion. ORS 197.835(11)(b) provides limited authority for LUBA to overlook minor discrepancies in findings. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368, 384 (2014); *Terra v. City of Newport*, 36 Or LUBA 582, 589-90 (1999); *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993). ORS 197.835(11)(b) does not authorize LUBA to overlook a city council total failure to adequately identify any findings in a case that presents the factual and legal complexities that are presented in this appeal.

The second assignment of error is sustained. On remand the city council will need to more clearly identify the "staff report," or the "staff reports," that it intended to adopt in support of its decision. In addition, as suggested below,

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[9] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

the city council may wish to consider whether it wants to adopt supplemental findings to further address the issues raised in the third and fourth assignments of error.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

According to petitioner the 82-unit assisted and independent living facility that was proposed in the 2010 master plan is now to be a 45-unit assisted care facility and 12 units of memory care under the approved 2015 master plan modification and site plan. In its third assignment of error, petitioner assumes the city council adopted the city council staff report to respond to issues that petitioner raised to the city council concerning whether the master plan modification complies with master plan modification approval criteria and requirements for impact studies.[10] In its fourth assignment of error petitioner contends the 2015 modified master plan is inconsistent with the Amended Annexation Agreement.

Our resolution of the second assignment of error requires that we remand, so that the city council can more clearly identify the findings it intended to adopt, which makes it unnecessary for LUBA to address petitioner's third and fourth assignments of error. We nevertheless discuss

[10] We agree with petitioner that in doing so petitioner does not concede that the city council adequately identified the city council findings as the findings it intended to adopt to support its decision.

those assignments of error below, to attempt to clarify some of the issues the city council may need to address on remand.

A. Amended Annexation Agreement (Fourth Assignment of Error)

As explained earlier, the comprehensive plan and zoning ordinance require that uses on the property be consistent with the Amended Annexation Agreement. The Amended Annexation Agreement in turn requires that a "Senior Living Center (or a phase of it) shall be built in the first phase of construction." Record I, 295. As we also explained earlier, under the Amended Annexation Agreement, the Senior Living Center must include three kinds of housing options (1) assisted living for seniors (55 years old or older), (2) assisted living for nonseniors, and (3) independent living for seniors. *Id*.

Petitioner argues "the Amended Annexation Agreement requires construction of a 'Senior Living Center' during Phase 1 of development of the property[.]" Petition for Review 28. Petitioner contends the applicant initially described the proposed 45 units as "Housing with Services" but later referred to those 45 units as "Assisted Living." We understand petitioner to contend it is not clear whether the 45 units proposed under the Modified Master Plan are to be Assisted Living or Housing with Services. Whether the 45 units are to be Housing with Services or Assisted Living, we understand petitioner to contend there is no evidence that those units will be something other than "assisted living," as the Amended Annexation Agreement uses that term, whereas the Amended Annexation Agreement requires that a Senior Living Center must

include at least some independent living for seniors. Finally, petitioner contends the Amended Annexation Agreement also specifies that a Senior Living Center must include some assisted living for nonseniors. Petitioner contends there is no indication that the Modified Master Plan and the site plan call for any assisted living for nonseniors in phase 1.

This assignment presents one issue that is easily disposed of and one issue that is more complicated. Turning to the easy issue first, we agree with the city that petitioner misreads the Amended Annexation Agreement. The Amended Annexation Agreement does not require that the Senior Living Center (in its entirety) must be constructed during the first phase. It only requires that the first phase must include *a phase of the Senior Living Center*, without specifying what must be included in such "a phase of the Senior Living Center." The proposed 45 units of senior assisted living and 12 units of Memory Care seem to qualify as assisted living for seniors and therefore would seem to qualify as a *phase* of the required Senior Living Center. Further, as far as we can tell, both before and after the master plan modification that is challenged in this appeal, the first phase of MMV is to include a 26-unit Affordable Senior Lodge and 8 of the 36 total number of proposed Senior Cottage Units proposed. Those units presumably qualify as independent living for seniors and would also seem to qualify as "a phase of the Senior Living Center." The city can confirm this in its findings on remand. Or if the city views the Amended Annexation Agreement requirement for a phase of the

Senior Living Center in the first phase of MMV differently, it may explain that different understanding and explain whether the proposed modification is consistent with or runs afoul of that requirement, as the city council understands it.

Moving on to the more difficult issue, it is exceedingly unclear to us what parts of the proposed 10-phase MMV were proposed to satisfy the Amended Annexation Agreement requirement that the MMV include a Senior Living Center, that includes (1) assisted living for seniors, (2) assisted living for nonseniors and (3) independent living for seniors. On remand, the city council should consider identifying those parts of the proposed MMV. The city council will then be in a position to explain why converting the 82-unit senior assisted and independent living facility into 45 units of Senior Assisted living or Housing With Services and 12 units of Memory Care does not render the Amended Master Plan inconsistent with the Amended Annexation Agreement. While it appears to us that such findings are possible, we reject respondents' arguments that such findings are not necessary.

We also reject petitioner's suggestion that the challenged decision must include conditions of approval that ensure that all necessary components of the required Senior Living Center will be constructed. We agree with respondents that such conditions of approval either were included in the 2010 master plan modification, as carried forward in the challenged decision, or should have been. The challenged decision only replaces the 82-unit senior assisted and

independent living facility with the proposed 45 units of Senior Assisted living or Housing with Services and 12 units of Memory Care. On remand, the city council may want to adopt findings that explain why that change in the 2010 master plan does not render the proposal inconsistent with the Amended Annexation Agreement Senior Living Center requirement.

B. SDC 4.1.700.A.7, SDC 4.56.800.D.1 and SDC 4.1.700.J. (Third Assignment of Error)

SDC 4.1.700.A.7 sets out application requirements for Type III applications and imposes the following requirement:

> "Type III. Include an impact study for all Type III applications. The impact study shall quantify/assess the effect of the development on public facilities and services. The study shall address, at a minimum, the transportation system, including pedestrian ways and bikeways, the drainage system, the parks system, the water system, the sewer system, and the noise impacts of the development. For each public facility system and type of impact, the study shall propose improvements necessary to meet City standards and to minimize the impact of the development on the public at large, public facilities systems, and affected private property users. In situations where this Code requires the dedication of real property to the City, the City shall either (1) include in the written decision evidence that shows that the required property dedication is roughly proportional to the projected impacts of the development on public facilities and services, or (2) delete the dedication as a condition of approval[.]"

Simply stated, for Type III applications, SDC 4.1.700.A.7 requires an impact study that considers the effect of the development on public facilities and services, and proposes "improvements necessary to meet City standards and to

minimize the impact of the development on the public at large, public facilities systems, and affected private property users."

Moving next to SDC 4.5.800.D.1, that SDC provision authorizes the planning director to approve minor modifications administratively, without a hearing. Petitioner contends that *major* modifications, such as the 2015 master plan modification, are different, and must be reviewed for compliance with SDC 4.1.700.J, as discussed below. SDC 4.5.800.D.1.a through .c identify modifications that qualify as a minor modification, and petitioner contends the modification in this case does not qualify as a minor modification.[11]

SDC 4.1.700.J authorizes major modifications of land use approvals. SDC 4.1.700.J.2 provides:

> "Unless otherwise specified in this Code and [the proposed modification] is not considered a minor modification, the grounds for filing a [major] modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A [major] modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties."

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[11] SDC 4.5.800.D.1.c provides:

> "The location of buildings, proposed streets, parking and landscaping or other site improvements shall be as proposed, or as modified through conditions of approval. Changes in the location or alignment of these features by 25 feet or less or other changes of similar magnitude may be approved administratively. Changes to locations approved as part of a land division shall be reviewed using Chapter 4.3 Land Divisions[.]"

As potentially relevant in this appeal, under SDC 4.1.700.J.2, a major modification to the 2010 Master Plan cannot (1) be "a substantially new proposa[l]," or (2) "have significant additional impacts on surrounding properties."

Petitioner asserts three subassignments of error under SDC 4.1.700.A.7, SDC 4.5.800.D.1 and SDC 4.1.700.J. We address those subassignments of error separately below.

1. Failure to Require an Impact Study

Petitioner contends the city erred by failing to require that the applicant submit an impact study, as required by SDC 4.1.700.A.7, to support the proposed Master Plan Modification. In the event the city council was relying on the city council staff report as findings to explain why an impact study was not required, petitioner contends the following finding is inadequate to explain why the applicant was not required to submit an impact study to support the 2015 master plan modification:

> "Requiring the applicant to perform new studies for impacts to transportation, utilities, drainage and parks is entirely unnecessary due to the minor adjustments in the location of a building and parking lots and consolidation of an entrance from 2 entrances to 1. It should be noted that there were no objections stated in the hearing from adjoining property owners that referenced adverse impacts arising from the modification." Record I, 118.

Petitioner argues the city cannot know the impacts of the proposed modification without the required impact study. Petitioner also contends that SDC 4.1.700.A.7 is also concerned with the capacity of the public facilities that

must serve the modified MMV and even if those public facilities were adequate in 2010 when the master plan was originally approved, petitioner contends the city cannot assume they remain adequate in 2015.

Respondents essentially argue that 2015 modified master plan simply replaces the 82 unit senior assisted and independent living facility with the proposed 45 units of Senior Assisted living or Housing With Services and 12 units of Memory Care. On the surface that seems to us to be a potentially sustainable response. The city now has the benefit of petitioner's arguments that the city cannot assume the fewer units will result in fewer or less intense public facility impacts. On remand the city will have an opportunity to adopt supplemental findings, including any interpretive supplemental findings it may want to adopt, to address petitioner's arguments. We also note that respondents' contention that the appealed modification that replaces an 82 unit facility with a 57 unit facility would have fewer rather than greater public facility impacts would be much stronger if there were some expert testimony to the effect that the impact study that was performed to support the 2010 master plan modification is adequate to support the 2015 master plan modification as well, given the nature of the modification.[12] Finally, as far as we can tell, the

[12] Intervenor-respondent cites to argument presented by the applicant's attorney below. Intervenor-Respondent's Brief 15-17. We do not believe testimony by the applicant's attorney, who as far as we know has no particular expertise in assessing the impacts assisted living facilities may have on public facilities, is substantial evidence that the modified proposal will have fewer

record in this appeal does not include the impact study that was prepared to support the 2010 master plan modification. If the city is relying on that impact study to excuse intervenor from preparing a new one, it would seem obvious that the 2010 impact study needs to be included in the record.

2. Failure to Approve as a Major Modification

Petitioner contends the city erred by failing to approve the proposed modification as a major modification. Respondents answer that although the applicant argued below that the proposal could be approved as a minor modification, planning staff disagreed because the location of buildings was changed by more than 25 feet. *See* n 11. Moreover, the 2015 modified master plan was reviewed and approved as a major modification. Record I, 426, 428, 430. Respondents appear to be correct. If so, on remand, the city council may adopt the planning staff's explanation that the proposed modification was reviewed and approved as a major modification.

3. The Proposal is a Substantially New Proposal

As explained above, under SDC 4.1.700.J.2, a major modification cannot be approved if it is "a substantially new proposal[.]" Petitioner argues that assuming the city council intended to rely on the city council staff report to find that the proposed modification is not "a substantially new proposal[,]" that

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impacts than the approved 2010 master plan proposal. *Weaver v. Linn County*, 40 Or LUBA 203, 209-10 (2001); *Wuester v. Clackamas County*, 25 Or LUBA 425, 437 (1993).

finding is inadequate because it simply concludes without explanation that the proposed modification "is not a new proposal[.]" Record I, 118.

We agree with petitioner that something more than that unexplained conclusion is required, but we disagree with petitioner's suggestion that the required comparison in determining whether the modified master plan is accurately viewed as "a substantially new proposal" requires a comparison of the 82-unit senior assisted and independent living facility with the proposed 45 units of Senior Assisted living or Housing with Services and 12 units of Memory Care. To us the correct comparison would appear to be a comparison of the 2010 master plan proposal, as a whole, and the 2015 master plan proposal, as a whole. The 2010 master plan approved a 10-phase, 30-acre mixed use development, which includes an 82-unit senior assisted and independent living facility on five of the 30 acres. The 2015 master plan proposes the same 10-phase, 30-acre mixed use development, but with 45 units of Senior Assisted living or Housing with Services and 12 units of Memory Care on the same five acres, instead of the 82-unit senior assisted and independent living facility. Based on that comparison, we tend to agree with respondents that the modified master plan is not "a substantially new proposal[,]" but on remand the city will have the opportunity to adopt findings that more adequately explain that position, along with any interpretations of the relevant SDC criteria it believes are appropriate.

We do not resolve the third and fourth assignments of error.

CONCLUSION

In accordance with our resolution of the second assignment of error, the city's decision is remanded to more adequately identify the findings that the city council wishes to adopt to support its decision.

The city's decision is remanded.