BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J4J, A MISCELLANEOUS PAC FILED UNDER
COMMITTEE ID NO. 18077,
Petitioner,

vs.

CITY OF JEFFERSON,
Respondent,

and

HAMBY FAMILY LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2016-083

FINAL OPINION
AND ORDER

Appeal from City of Jefferson.

David E. Coulombe, Corvallis, filed the petition for review and argued on behalf of petitioners. With him on the brief was Fewel Brewer & Coulombe.

No appearance by the City of Jefferson.

John E. (Tre') Kennedy, Lebanon, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Morley Thomas Law Firm.

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

REMANDED 02/13/2017

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance that annexes a 14.76-acre territory into
4 the city and rezones the property to low density residential.

5 **MOTION TO FILE REPLY BRIEF**

6 Petitioner moves to extend the deadline to file a reply brief, which would
7 otherwise have been due no later than January 12, 2017, seven days prior to
8 January 19, 2017, the date of oral argument.[1] Petitioner also moves for
9 permission to file a reply brief that is eight pages in length, in excess of the five
10 pages allowed under OAR 661-010-0039.

11 The reply brief responds to seven alleged "new matters" raised in the
12 response brief. However, in our view, only Items II-A through II-C, and Item
13 III, which concern preservation or jurisdictional issues, constitute "new
14 matters" within the meaning of OAR 661-010-0039. Accordingly, the

---

[1] OAR 661-010-0039 provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

1 extended reply brief is allowed with respect to Items II-A through II-C, and
2 Item III, and otherwise denied.

3 **MOTION TO STRIKE**

4 Petitioner moves to strike Appendix 1 to the response brief, a copy of an
5 opinion letter by a circuit court judge, issued as part of a pending writ of
6 mandamus action filed against the city. The writ seeks to compel the city to
7 submit the annexation at issue in this appeal to the city voters, as required by
8 the city charter and code. As discussed below, the merits of that issue are
9 closely related to one of the issues raised in this appeal. The opinion letter
10 concludes that the city did not violate its charter in approving the annexation
11 without submitting it to the voters. Petitioner argues that LUBA should not
12 consider the opinion letter for any purpose, because the letter is not in the
13 record, and does not qualify as "decisional law" subject to official notice, under
14 Oregon Evidence Code (OEC) 202, because the opinion letter has not yet been
15 reduced to a final judgment.

16 We disagree with petitioner. The opinion letter is "decisional law" for
17 purposes of OEC 202, notwithstanding that the writ of review process has not
18 yet concluded in a final judgment. In any case, intervenor advises us that on
19 January 27, 2017, the circuit court entered a general judgment in the matter.
20 We shall consider the opinion letter and the parties' arguments based on the
21 letter, for what they are worth.

1 **MOTION TO TAKE EVIDENCE**

2 Petitioner moves to take evidence outside the record, pursuant to OAR
3 661-010-0045, consisting of six sets of documents and a request to depose five
4 present and former city councilors. OAR 661-010-0045(1) states the
5 permissible grounds for consideration of evidence outside the record.[2]
6 Petitioner's motion, however, does not mention OAR 661-010-0045(1), or
7 attempt to justify consideration of the proffered documents under any of the
8 grounds cited in the rule. Petitioner also does not address OAR 661-010-
9 0045(2)(c), which states the permissible grounds for ordering depositions.[3] In

---

[2] OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

[3] OAR 661-010-0045(2)(c) provides:

> "Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40)."

the absence of developed arguments demonstrating grounds under OAR 661-010-0045(1) and (2)(c) for LUBA to grant the motion to take evidence outside the record, the motion is denied.

FACTS

The city charter and development code require that a proposal to annex land into the city be referred to the city voters for approval. However, in March 2016 the state legislature passed, and the Governor signed, Senate Bill (SB) 1573, which became effective on March 15, 2016. SB 1573 provides that "[n]otwithstanding a contrary provision of the city charter or a city ordinance," where all owners of land in a territory petition the city for annexation, the city "shall annex the territory without submitting the proposal to the electors of the city," subject to four qualifications, including that the proposal complies with all other local requirements.

Intervenor owns a 14.76-acre parcel adjacent to the city's southeastern border. Intervenor's property is included in the city's urban growth boundary. The city voters had previously rejected intervenor's prior petition to annex the subject 14.76-acre property. Following the effective date of SB 1573, intervenor again petitioned the city to annex the property, seeking approval without an election pursuant to the statute. The annexation petition also sought related comprehensive plan map and zone map changes, to rezone the property from a county Urban Transition zone to the city Low Density Residential (R-1)

zone. The planning commission held an evidentiary hearing on June 2, 2016, and on July 7, 2016, voted to recommend approval.

On July 28, 2016, the city council held a *de novo* hearing on the application. The proposal to annex the property without an election generated considerable controversy. Several city councilors disclosed *ex parte* communications with constituents on the proposed annexation. The attorney for petitioner objected that the councilors failed to disclose the substance of the communications. The city council did not respond to the objection and proceeded to take public testimony in favor and in opposition to the annexation. After public testimony ended, the city attorney advised the city council on several matters, including that the city's decision was subject to the statutory requirement at ORS 227.178 to issue a final decision within 120 days of the date the application is deemed complete.

Intervenor's attorney and engineer then provided rebuttal. After the city attorney answered three questions from council members, the city council closed the hearing. The city council discussed a request by petitioner's attorney to either continue the hearing or hold the record open to allow participants to respond to new evidence submitted at the city council hearing. The city council declined the request, and scheduled a special meeting for August 4, 2016, in order for the city councilors to review the evidence and testimony submitted at the hearing, prior to the expiration of the 120-day period.

1 At the August 4, 2016 meeting, petitioner's attorney attempted to lodge
2 objections to several alleged procedural errors, but the attempt was rejected on
3 the grounds that the hearing portion of the proceeding had closed and no
4 further testimony was allowed. The council then proceeded to deliberations,
5 and voted 6-0 to approve the annexation and related comprehensive plan map
6 and zoning map changes, by adopting Ordinance 695. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner argues that several city council members failed to adequately
9 disclose *ex parte* communications, and that the city council committed
10 procedural error in accepting new evidence after the close of the evidentiary
11 record, without providing the participants an opportunity to respond.

12 **A. *Ex Parte* Communications**

13 ORS 227.180(3) provides that a city governing body's action on an
14 application for a permit or zone change is not invalidated by an *ex parte*
15 communication, if the member of the decision-making body receiving the
16 communication discloses the substance of the communication and announces
17 the parties' right to rebut the substance of the communication.[4] The

---

[4] ORS 197.830 provides in relevant part:

> "(3) No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

1 consolidated application and proceedings included an application for a zone

2 change, so ORS 227.180(3) applies.

3 At the city council hearing on July 28, 2016, several city councilors

4 stated that they had received *ex parte* communications.[5] Specifically, (1)

> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.
>
> "(4) A communication between city staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section."

[5] The minutes of the July 28, 2016 hearing state, in relevant part:

> "The Mayor * * * called upon Council to declare any conflicts of interest or ex-parte contacts if necessary. Councilor Vaughan announced she had attended the Planning Commission meeting, where the annexation subject was being addressed, and that she attended as a citizen seeking information and nothing she heard would prevent her from voting. Councilor Jones stated he also attended the Planning Commission meeting, as the liaison for the committee and remained unbiased on the subject matter as well. Councilor Beyerl commented that a few citizens had made contact with him to discuss the subject, but nothing discussed would prevent him from voting fairly. Councilor Myers noted he too received questions from members of the public about the annexation and that he has known the applicant for many years,

1 Councilors Vaughan and Jones reported that they had attended the planning
2 commission hearing on the application, and (2) Mayor McKenzie and
3 Councilors Beyerl, Myers and Day reported *ex parte* communications with
4 multiple unidentified persons. *Id*. However, petitioner argues that the Mayor
5 and none of the councilors disclosed the substance or content of the reported
6 communications. In addition, petitioner argues that Councilor Vaughan failed
7 to disclose communications the councilor received on social media regarding
8 the proposed annexation. As evidence of these undisclosed communications,
9 petitioner attaches to the petition for review a screenshot of a public social
10 media page.

11 **1. Waiver**

12 Intervenor responds initially that petitioner failed to preserve an
13 objection to the inadequacy of the disclosures during the July 28, 2016 hearing,
14 because as the minutes reflect petitioner merely "commented" that the
15 councilors failed to disclose the substance of the *ex parte* communications. *See*
16 n 5. Intervenor argues that in order to adequately preserve an issue for LUBA's

---

none of which would prevent him from voting. Councilor Day announced she had spoken with a couple of citizens about the matter as well, but remain unbiased. Mayor McKenzie indicated he had been approached by several citizens, but nothing was discussed that would cause any conflict of interest.

"David Coulombe, representing J4J, commented that, in all the Council's declarations, he didn't hear any substance of the ex-parte contacts." Record 102.

1 review under ORS 197.763(1), petitioner was required to raise the issue below
2 "accompanied by statements or evidence sufficient to afford the governing
3 body" and the parties "an adequate opportunity to respond to each issue."[6]
4 Intervenor argues that petitioner's mere "comment" that the substance of the *ex*
5 *parte* communications was not disclosed was insufficient to give the city and
6 parties fair notice that petitioner objected to the disclosures as inadequate. *See*
7 *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS
8 197.763(1) "requires no more than fair notice to adjudicators and opponents,
9 rather than the particularity that inheres in judicial preservation concepts").
10 We disagree with intervenor. A reasonable person could discern from
11 petitioner's statement to the effect that the substance of the *ex parte*
12 communications had not been disclosed that petitioner was raising an issue
13 regarding the adequacy of the disclosure, and that petitioner was requesting
14 disclosure of the substance of the communications. Preservation of the issue
15 for purposes of ORS 197.763(1) did not require a more forceful objection.

---

[6] ORS 197.763(1) provides:

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

2. Attendance at Planning Commission Hearing

With respect to Councilors Vaughan and Jones' disclosures that they had attended the June 2, 2016 planning commission hearing on the application, intervenor argues that attendance at the planning commission hearing does not constitute an *ex parte* contact for purposes of ORS 227.180(3). We agree with intervenor. The purpose of ORS 227.180(3) is to ensure that decisions on permits and zone changes are based only on evidence and arguments submitted as part of the public proceedings on the application. The June 2, 2016 planning commission hearing was a part of the proceedings on the proposed annexation, and the testimony and evidence submitted at that public hearing are the antithesis of *ex parte* communications.[7]

Petitioner speculates that the two councilors may have engaged in communications with other participants inside or outside the hearing room that were not testimony and evidence submitted as part of the planning commission hearing. Petitioner offers no basis for that speculation. An additional problem is that the parties inform us that Councilors Vaughan and Jones are no longer

---

[7] As petitioner pointed out at oral argument, the bulk of the record of the planning commission proceeding was not placed before the city council, the final decision-maker, or incorporated into the city council record, and therefore was not part of the record transmitted to LUBA. *See* OAR 661-010-0025(1). However, that does not alter our conclusion that, for purposes of ORS 227.180(3), the planning commission hearing was part of the proceedings on this land use application, and public testimony heard by the attending city councilors at the planning commission hearing is not "ex parte" to the city council proceeding within the meaning of ORS 227.180(3).

1 on the city council. As discussed below, the city's decision must be remanded
2 for more adequate disclosure of *ex parte* communications by Councilors Beyerl
3 and Myers, who remain on the council and would presumably vote on the
4 decision on remand. But no party has identified to us what purpose would be
5 served by requiring on remand that former councilors Vaughan and Jones make
6 further clarifications or disclosures, given that the former councilors will have
7 no role to play on remand.

8 **3. Inadequate Disclosures**

9 As noted, Councilors Beyerl and Myers each reported the existence of *ex*
10 *parte* communications with several persons regarding the application, but did
11 not identify the substance of those communications.[8] *See* n 5. Petitioner
12 argues that because these decision-makers failed entirely to disclose the
13 substance of the communications, or even the identity of the communicants, the
14 disclosures are inadequate to satisfy ORS 227.180(3).

15 Intervenor responds that there is no indication in the record that the
16 communications included factual assertions or arguments regarding compliance

---

[8] Mayor McKenzie and Councilor Day also reported *ex parte* communications, and also failed to disclose the content of the communications. However, Mayor McKenzie is no longer Mayor, and Councilor Day is no longer on the city council that would conduct the proceedings on remand. For the reasons discussed above with respect to Councilors Vaughn and Jones, we see no purpose in including within the scope of remand a requirement that the former Mayor and Councilor return to provide more adequate disclosure of any *ex parte* communications.

with applicable approval standards, or consisted of anything more than general expressions of support or opposition to the proposed annexation. *See Link v. City of Florence*, 58 Or LUBA 348, 353 (2009) (remand is not warranted to provide an opportunity to rebut *ex parte* communications that consist of general expressions of support for an annexation, where such communications have no bearing on applicable approval criteria or relate to issues material to approving or denying the application).

Intervenor is correct about the paucity of the record regarding the content of the communications, but that is because the two councilors disclosed absolutely nothing about the substance of the *ex parte* communications. In *Link*, the substance of the communications was in fact disclosed, and the only issue on appeal was whether remand was warranted to allow the petitioners to rebut general expressions of support for the application. In the present case, the substance of the communications is entirely unknown. Intervenor cannot rely upon the complete lack of details about the admitted communications to argue that the communications were incidental, harmless or immaterial. We agree with petitioner that the disclosures are inadequate for purposes of ORS 227.180(3), and that remand is necessary for the city to take corrective action, including, but not limited to, (1) disclosure of the substance of *ex parte* communications by current council members, (2) opportunity for participants to rebut the same, and (3) a new decision by the city council on the merits of the application.

1 **4. Communications on Social Media**

2 As noted, Councilor Vaughan engaged in a discussion with several
3 constituents on a social media page regarding the proposed annexation, the
4 relevant pages of which are attached to the petition for review.[9] The councilor
5 initiated the conversation by soliciting input on the annexation, which resulted
6 in at least 17 comments, to some of which the councilor replied. Petitioner
7 argues that the councilor failed to disclose these *ex parte* communications.

8 We agree with petitioner that Councilor Vaughan's social media
9 conversation with constituents regarding the annexation constituted *ex parte*
10 communications, which ORS 227.180(3) requires the councilor to disclose at
11 the next public hearing and offer an opportunity for participants to rebut.
12 However, as noted above, Councilor Vaughan is no longer on the city council,
13 and petitioner offers no reason to expand the scope of remand to require that
14 the former councilor return to disclose the substance of any *ex parte*
15 communications. Accordingly, petitioner's arguments on this point do not
16 provide an additional basis for reversal or remand.

---

[9] Intervenor agrees that it would be appropriate under OAR 661-010-0045 for LUBA to consider the attached material to resolve this sub-assignment of error. Response Brief 8.

1 **B. New Evidence**

2 Petitioner contends that the city erred in accepting and relying on new
3 evidence received after the close of the evidentiary record, without allowing
4 other parties the opportunity to review and respond.

5 **1. City Attorney's Letter**

6 After the close of the city council's evidentiary hearing, the councilors
7 discussed a letter from the city attorney, which apparently offered advice
8 regarding the cost of joining litigation over SB 1573. Record 106 ("Councilor
9 Vaughan spoke about potential costs of joining the lawsuit with Corvallis,
10 noting information from Attorney Ross Williamson indicating litigation could
11 easily cost upwards [of] $50K"). Petitioner argues that the city attorney's letter
12 constituted new evidence, and that it must have played a role in the city
13 council's deliberations. According to petitioner, the city council should have
14 placed the city attorney's letter in the record, and provided participants an
15 opportunity to respond to new evidence in the letter.

16 Intervenor responds that ORS 227.180(4) exempts communications
17 between legal counsel and the governing body from the disclosure and rebuttal
18 requirements of the statute. *Toth v. Curry County*, 22 Or LUBA 488, 491
19 (1991) (applying county analogue to ORS 227.180(4)). Intervenor also argues
20 that to the extent the city attorney's letter included "evidence" regarding the
21 costs of litigating SB 1573, petitioner has not established that any such

1 evidence would have anything to do with any applicable approval criteria for
2 the proposed annexation and plan and zoning amendments.
3 We agree with intervenor on both points. ORS 227.180(4) exempts staff
4 communications, including that of legal counsel to the governing body, from
5 the requirements of ORS 227.180(3). Further, petitioner cites no reason to
6 believe that the city attorney's letter to the city council concerned anything
7 other than the costs of the city joining in a lawsuit to challenge SB 1573.
8 Petitioner makes no attempt to establish that that subject matter has any
9 evidentiary relationship to the merits of the proposed annexation, or that the
10 city council relied on the city attorney's letter to decide whether the annexation
11 complies with applicable approval standards.
12 **2. June 20, 2016 Letter**
13 On June 20, 2016, intervenor's attorney sent a letter to the city attorney
14 regarding the annexation application, which was then pending before the
15 planning commission. The June 20, 2016 letter observes that many comments
16 submitted at the June 2, 2016 planning commission hearing concerned SB 1573
17 or speculation regarding the potential development of the property rather than
18 the merits of the proposed annexation, and requests the city attorney's "help in
19 assuring that the planning commission renders its decision based on the criteria
20 set forth by statute and the City Code, and not on other, irrelevant factors."
21 Petition for Review, Appendix 38.

Petitioner argues that the June 20, 2016 letter to the city attorney was never made part of the land use file on the application, and that petitioner obtained the letter only after filing a public records request with the city. According to petitioner, the city's failure to make the June 20, 2016 letter part of the land use file on the annexation application was a violation of ORS 197.763(4)(a), which provides that all "documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public."

Intervenor responds, and we agree, that the June 20, 2016 letter does not constitute "documents or evidence relied upon by the applicant" within the meaning of ORS 197.763(4)(a). The letter includes no evidentiary assertions, at least none aimed at applicable approval criteria. It is addressed to the city attorney, and there is no indication that it was ever placed before, or intended to be placed before, either the planning commission or city council, the decision-makers, or that it played any other role in the proceedings. Further, given that the letter does nothing more than ask the city attorney's help in ensuring the city's decision is based on the applicable approval standards, it is difficult to understand what there is in the letter that could be rebutted, even if placed in the record. Stated differently, even if ORS 197.763(4)(a) required the city to place the letter into the public record, we fail to see how the city's failure to do so could prejudice petitioner's substantial rights to respond to evidence submitted to the decision-maker. ORS 197.835(9)(a)(B) (LUBA shall

remand based on procedural error only if the error prejudiced the petitioner's substantial rights).

3. Annexation Application

On August 1, 2016, Councilor Vaughan sent an e-mail to city staff requesting a copy of the annexation application, which was apparently not included in the "packet" staff provided to the city councilors for the July 28, 2016 hearing. On August 2, 2016, city staff replied, attaching a copy of the annexation application. Supplemental Record 4.[10] Petitioner argues that the annexation application is "new evidence," and accordingly the city council should have disclosed receipt of the application at the following August 4, 2016 meeting, and re-opened the evidentiary record to allow petitioner an opportunity to respond to the annexation application.

The annexation application is found at Record 180-88, at the chronological beginning of the record. Although the application was not included in the packet staff supplied to city council members for the July 28, 2016 hearing, the city took the position, during resolution of record objections in this appeal, that the application was part of the city council record all along,

---

[10] The staff's e-mail also mentions that an "updated staff report and other information submitted by our attorney" would be sent to the council. *Id.* However, no updated staff report or information from the city's attorney is in the record, and there is no indication in the record or elsewhere cited to our attention that an updated staff report or other information was ever prepared or, if prepared, placed before the council.

1 and did not first enter the city council record after Councilor Vaughan
2 requested a copy. *J4J v. City of Jefferson*, __ Or LUBA __ (LUBA No. 2016-
3 083, Nov 3, 2016) (Order at 12). Petitioner took the contrary position that the
4 application entered the city council record only after the close of the
5 evidentiary record, in response to Councilor Vaughan's request, and thus its
6 placement at the chronological beginning of the record was out of order. We
7 rejected petitioner's argument that the application was chronologically
8 misplaced in the record, but had no occasion to resolve the parties' dispute
9 regarding how or when the application entered the city council record.
10 We conclude that the annexation application entered the city council
11 record for the first time after the close of the evidentiary record. That is
12 procedural error. Generally, if the governing body wants to consider
13 documents or evidence from a lower body's record, the governing body should
14 expressly incorporate the documents or evidence during the public proceeding
15 before the governing body, so all participants have some certainty regarding
16 what documents are being considered by the final decision maker.
17 That said, petitioner makes no attempt to demonstrate that the city's
18 procedural error prejudiced its substantial rights. ORS 197.835(9)(a)(B).
19 Petitioner identifies no factual statements in the annexation application that the
20 city council relied upon in its decision, and does not argue that the application
21 played any role at all in the city council's decision. Under these circumstances,

petitioner has not demonstrated that the city's procedural error warrants remand.

C. Opportunity to Respond to New Evidence

As noted, petitioner requested continuance of the July 28, 2016 hearing or that the city hold the record open, in order to allow petitioner to respond to evidence that intervenor submitted at the hearing. The city council rejected the request, based on advice from the city attorney that the city's decision on the annexation and zone change is subject to the 120-day deadline at ORS 227.178, which would require the city to issue its final decision by August 7, 2016. Accordingly, the city council scheduled a special meeting for August 4, 2016, in order to complete deliberations and reach a final decision prior to the August 7, 2016 deadline.

Petitioner argues that the city erred in rejecting its request for a continuance or to hold the record open to respond to evidence submitted at the July 28, 2016 hearing. According to petitioner, the city was obligated under ORS 197.763(6) or (7) to continue the hearing or open the record to allow petitioner an opportunity to respond to new evidence.[11] Further, petitioner

---

[11] ORS 197.763 provides, in relevant part:

> "(6) (a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this

1 argues that the decision was not subject to the 120-day deadline imposed by
2 ORS 227.178, the city's rationale for rejecting petitioner's request for a
3 continuance or an open record period. Even if the decision was subject to the
4 120-day deadline, we understand petitioner to argue that the city could have
5 left the record open for at least several days prior to the August 4, 2016
6 meeting for deliberations, to allow petitioner time to submit a response to new
7 evidence submitted at the July 28, 2016 hearing.

8 ORS 197.763(6)(a) provides a right to obtain a continuance or open
9 record period only if the request is made "[p]rior to the conclusion of the initial
10 evidentiary hearing[.]" Petitioner contends that the hearing before the city
11 council was the "initial evidentiary hearing" for purposes of ORS

---

subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

"* * * * *

"(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179, unless the continuance or extension is requested or agreed to by the applicant.

"* * * * *

"(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

197.763(6)(a), because it led directly to the city's final decision, and was a *de novo* evidentiary hearing that created a separate record, indeed, the only evidentiary record supporting the city's decision, since the bulk of the planning commission record was not placed before the city council or incorporated into the record before the city council.

We disagree with petitioner. The planning commission hearing was the initial evidentiary hearing on the application for purposes of ORS 197.763(6)(a), notwithstanding that it resulted in only a recommendation to the city council, and notwithstanding that the city council chose not to incorporate the bulk of the planning commission record into the city council record. Petitioner cites to *Stewart v. City of Salem*, 231 Or App 356, 363, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010), for the proposition that when a governing body conducts a second evidentiary hearing on a land use application following the initial evidentiary hearing before a lower body, the second evidentiary hearing must be conducted according to the requirements of ORS 197.763 for conducting a hearing on a land use decision, including the right to request a continuance or to hold the record open under ORS 197.763(6). However, *Stewart* stands for no such thing. *Stewart* involved an application for a partition, which is a limited land use decision subject to ORS 197.195. ORS 197.195 prescribes an initial administrative decision, with the possibility of a subsequent evidentiary hearing. ORS 197.195(5) provides that if the local government provides an evidentiary hearing—which would be the first and

1 only evidentiary hearing— the hearing must be conducted pursuant to ORS
2 197.763.[12] *Stewart* says nothing about a second evidentiary hearing on an
3 application for a land use decision.

4 Moreover, petitioner does not specifically identify any "new evidence"
5 that petitioner had no opportunity to respond to. We have examined the record
6 cites that petitioner provides: Record 78-86 (letter from intervenor's attorney
7 submitted at the hearing), 103 (minutes reflecting oral testimony of
8 intervenor's attorney and engineer), and 106 (rebuttal of intervenor's attorney
9 and engineer). For the most part the testimony at those record pages consists of
10 legal arguments regarding SB 1573. The only actual evidentiary testimony
11 regarding compliance with applicable approval criteria appears to be the oral
12 testimony of intervenor's engineer at the beginning of the public hearing, at
13 Record 103, in which he discusses the city's capacity to service development of
14 the subject property, a potential issue under the annexation criteria at City of

---

[12] ORS 197.195(5) provides, in relevant part:

> "A local government may provide for a hearing before the local government on appeal of a limited land use decision under this section. The hearing may be limited to the record developed pursuant to the initial hearing under subsection (3) of this section or may allow for the introduction of additional testimony or evidence. A hearing on appeal that allows the introduction of additional testimony or evidence shall comply with the requirements of ORS 197.763. * * *."

1 Jefferson Development Code (JDC) 12.76.020(B)(3).[13] For example, the
2 engineer stated that the city fire chief told him that the fire department had
3 sufficient capacity to support the property. Record 103.

4 However, petitioner makes no attempt to demonstrate that the engineer's
5 oral testimony regarding capacity is new evidence that petitioner had no
6 opportunity to rebut. Even if that evidence was new to the city council
7 proceedings, the engineer's testimony occurred at the beginning of the hearing,
8 before all other testimony. Petitioner and others had an opportunity to respond
9 to the engineer's testimony regarding capacity, and in fact did so. Record 104-
10 05. Intervenor's attorney and engineer also provided final argument in rebuttal,
11 Record 106, but if there was any new evidence stated in that rebuttal, petitioner
12 does not identify it.

13 Petitioner also argues that the city attorney provided new evidence in her
14 comments to the council regarding SB 1573, after the close of testimony.
15 Record 106. However, again, petitioner does not identify anything in the city
16 attorney's comments that constituted evidence, much less new evidence.
17 Petitioner's arguments regarding new evidence do not provide a basis for
18 reversal or remand.

---

[13] JDC 12.76.020(B)(3) is an annexation requirement requiring a finding that "[a]n adequate level of urban services and infrastructure is available, or will be made available without serious negative impact to existing portions of the City * * *." *See* n 15, below.

1 **D. Conclusion**

2 For the foregoing reasons, remand is necessary for the members of the
3 current city council to adequately disclose the content of any *ex parte*
4 communications and provide the parties with an opportunity to rebut the same.
5 We reject petitioner's other procedural arguments. As discussed under the
6 second assignment of error, remand is also necessary to adopt more adequate
7 findings, based on substantial evidence, in several particulars. At the
8 conclusion of evidentiary proceedings on remand, the city council should adopt
9 a new decision on the application based solely on the evidence submitted to the
10 city council.

11 The first assignment of error is sustained, in part.

12 **SECOND ASSIGNMENT OF ERROR**

13 In two sub-assignments of error under the second assignment of error,
14 petitioner argues that (1) the city erred in approving the proposed annexation in
15 the form of an ordinance rather than a resolution, and (2) the city's findings
16 regarding compliance with the annexation standards at JDC 12.76.020 are
17 inadequate and not supported by substantial evidence.

18 **A. Adoption by Resolution**

19 JDC 12.76.010 sets out the procedure for approving annexations.[14]
20 Under that procedure, the city council first conducts a hearing to determine

---

[14] JDC 12.76.010 provides, in relevant part:

"Except as provided in Section 12.76.015, all proposals to annex territory shall be considered under the following procedures and in compliance with Chapter 222 of the Oregon Revised Statutes (ORS) as enacted at the time of annexation:

"* * * * *

"B. The proposal must receive the approval of the areas being annexed by any of the following methods:

"* * * * *

"2. Consent petition of at least half of the land owners, representing more than half of the land area involved, and representing more than half of the total assessed value of all real property in the subject area. * * *

"* * * * *

"C. The proposal must receive the approval of the City of Jefferson through a Type C Hearing as provided in Section 12.72.050 subject to the following modifications:

"* * * * *

"3. Disposition of the application by the City Council shall initially be by resolution, rather than by ordinance.

"D. The proposal must receive the approval of the voters of the City of Jefferson as required by Section 3 of the Charter of the City of Jefferson. Upon approval of a resolution by the City Council, the annexation shall be placed before the voters of the City in the manner prescribed by the resolution, but no later than the next available primary or general election.

1 whether the annexation complies with the approval criteria at JDC 12.76.020
2 and other standards. If the annexation is deemed to comply with those
3 standards, the city council approves the annexation by resolution, and refers the
4 matter to the city voters for approval. If the voters approve, the last step is for
5 the city council to proclaim the annexation, which presumably entails adopting
6 an ordinance necessary to effect the annexation and associated zone changes.

7 The main focus of the first sub-assignment of error is on compliance
8 with JDC 12.76.010(C), which specifies that "[d]isposition of the application
9 by the City Council shall initially be by resolution, rather than by ordinance."
10 As noted, the city approved the annexation by ordinance rather than by
11 resolution. In effect, the city council conflated the first and third steps,
12 skipping the second step of referring the annexation for a vote, and approved
13 the annexation by ordinance. It is clear from the record that the reason the city
14 council proceeded in this manner was SB 1573, which the city believed
15 prohibited it from referring the annexation to the voters.

16 On appeal, petitioner argues that it raised the issue of noncompliance
17 with JDC 12.76.010(C) (Record 88), but the city council failed to adopt any
18 findings addressing this issue or explaining how the city complied with the
19 mandatory requirement of JDC 12.76.010(C) to approve the annexation via

---

> "E. When the requirements of Sections B, C, and D above have been met, the City Council shall proclaim the annexation in accordance with State law. * * *"

1 resolution. Petitioner also argues that there are no findings addressing
2 compliance with JDC 12.76.010(B), concerning the method of consent. *See* n
3 14.
4 Intervenor responds that the city's choice to approve the annexation via
5 an ordinance rather than via a resolution followed by an ordinance is at most
6 procedural error, and petitioner has failed to demonstrate that any procedural
7 error prejudiced petitioner's substantial rights. We agree with intervenor. JDC
8 12.76.010 sets out the procedures for an annexation. To obtain remand based
9 on procedural error, petitioner must demonstrate that the error prejudiced its
10 substantial rights. ORS 197.835(9)(a)(B). Petitioner makes no attempt to do
11 so, and it is difficult to see how approving the annexation in the form of an
12 ordinance rather than a resolution followed by an ordinance could, in itself,
13 prejudice petitioner's substantial rights. Petitioner cannot avoid the obligation
14 to demonstrate prejudice to its substantial rights, by couching its arguments as
15 a challenge to the absence of findings addressing a procedural issue.
16 With respect to JDC 12.76.010(B), petitioner appears to be correct that
17 the city adopted no findings that address JDC 12.76.010(B), which sets out
18 three means by which the applicant can demonstrate the consent of the majority
19 of electors or owners in the annexation territory. Intervenor does not respond
20 to petitioner's arguments regarding JDC 12.76.010(B). We note that JDC
21 12.76.010(B)(2) allows an annexation to be initiated by the consent of more
22 than half the owners and, in the present case, the record includes the consent of

1 the sole owner of the annexation territory. Record 181. Petitioner does not
2 argue that any issue regarding JDC 12.76.010(B) was raised below, which may
3 explain why the city adopted no findings addressing it. Indeed, it is difficult to
4 imagine what issue regarding JDC 12.76.010(B) could be raised, given the
5 undisputed fact that the only property owner in the territory provided consent.
6 If there is any basis to suspect that JDC 12.76.010(B)(2) was not complied
7 with, petitioner does not identify it.

8 Nonetheless, because the decision must be remanded for other reasons,
9 on remand the city should adopt findings explaining why JDC 12.76.010(B) is
10 or is not complied with.

11 **B. JDC 12.76.020 Annexation Approval Standards**

12 JDC 12.76.020(B) sets forth six annexation approval standards.[15]
13 Petitioner argues that the findings addressing five standards are inadequate and
14 are not supported by substantial evidence.

---

[15] JDC 12.76.020(B) provides, in relevant part:

> "Approval Criteria. The City shall only approve proposed annexations meeting the following criteria:
>
> "1. The land uses proposed in the territory to be annexed conform to the uses authorized in the Comprehensive Plan. If substantial changes in conditions have occurred which render the Comprehensive Plan inapplicable to the annexation, then the Comprehensive Plan must be amended before the annexation can be approved.

1 **1. JDC 12.76.020(B)(1): Substantial Changes**

2 JDC 12.76.020(B)(1) requires a finding that "[t]he land uses proposed in
3 the territory to be annexed conform to the uses authorized in the
4 Comprehensive Plan." The city adopted such a finding, which petitioner does
5 not challenge. But JDC 12.76.020(B)(1) also states that "[i]f substantial
6 changes in conditions have occurred which render the Comprehensive Plan
7 inapplicable to the annexation, then the Comprehensive Plan must be amended
8 before the annexation can be approved." *See* n 15. Petitioner argues that the
9 city's findings fail to address the possibility that there might have been

---

"2. The annexation does not result in an island or enclave of unincorporated territory surrounded on all sides by the City.

"3. An adequate level of urban services and infrastructure is available, or will be made available without serious negative impact to existing portions of the City, as further specified below[: defining terms].

"4. Sufficient planning and engineering data is available, and all necessary studies and reviews have been completed such that there are no unresolved issues. If there are significant unresolved issues or ongoing studies that could impact any of the annexation criteria, the annexation shall be delayed until the issue is resolved or the study is completed.

"5. The overall impact of the annexation will be positive on the physical, economic, political, financial and social environment of the City.

"6. The Planning Commission and City Council may consider, at their discretion, any other factors that affect the timeliness or wisdom of a proposed annexation."

1 “substantial changes in conditions” that render the Comprehensive Plan
2 inapplicable.

3 However, petitioner identifies no “substantial changes in conditions” that
4 the city should have considered. According to petitioner, issues were raised
5 below regarding substantial changes in condition, at Record 88. However, the
6 testimony at Record 88 does not claim that any substantial change in conditions
7 has occurred; it simply faults the applicant for “not demonstrat[ing] that there
8 are no substantial changes in conditions[.]” JDC 12.76.020(B)(1) is expressly
9 contingent and does not impose an affirmative obligation on the applicant to
10 prove that a contingency does not exist, or require the city to adopt findings
11 regarding contingencies that no party argued below or on appeal exist.

12 **2. JDC 12.76.020(B)(3): Adequate Levels of Urban**
13 **Services and Infrastructure are Available.**

14 JDC 12.76.020(B)(3) requires a finding that adequate levels of urban
15 services and infrastructure are available without serious negative impact to
16 existing portions of the city. *See* n 16. The code provision goes on to define
17 terms and elaborate on what the standard requires.[16]

---

[16] JDC 12.76.020(B)(3) continues:

> “a. ‘Adequate level’ is defined in the relevant adopted plans and ordinances.
>
> “b. ‘Urban services’ include police, fire protection, library, education, parks and recreation and other government provided services.

1 Petitioner argues that the city's findings of compliance with JDC 12.76.020(B)(3) are inadequate and not supported by substantial evidence in five respects.

a. Transportation Facilities

JDC 12.76.020(B)(3)(a) provides that "adequate level" means as "defined in the relevant adopted plans and ordinances." *See* n 16. The city's findings note that the three city streets abutting the property are fully improved to city standards. Record 23. With respect to capacity, the findings note that the city's Transportation System Plan (TSP) does not state capacities for city streets. However, the findings cite local street capacity figures found in the

---

> "c. 'Infrastructure' includes streets, sidewalks, water, sanitary sewer, stormwater drainage and other utilities.
>
> "d. 'Available' includes availability of sufficient capacity at central facilities and plants, and availability at or to the areas proposed for annexation.
>
> "e. 'Will be made available' means that the service or infrastructure will be available within a reasonable amount of time for existing developments and will be available prior to any additional development within the areas proposed for annexation.
>
> "f. If improvements to infrastructure are secured by a development agreement or other funding mechanism that will place the primary economic burden on the territory proposed for annexation, then infrastructure deficiencies will not be considered to be a 'serious negative impact to existing portions of the City.'"

1 TSPs of two nearby cities, and concludes that the "adequate level" standard is
2 met with respect to local streets because average daily traffic from development
3 of the annexation territory, distributed among three local streets, would be far
4 below the maximum capacity stated in the other two cities' TSPs. Record 23.

5 Petitioner argues that the other cities' TSPs cited and relied upon in the
6 findings are not in the record. While the city purported to take "notice" of
7 them, petitioner argues that city cannot take official notice of adjudicative facts
8 found in documents subject to official notice. Moreover, petitioner argues that
9 the city cited and relied upon this extra-record evidence for the first time in its
10 findings, which deprived petitioner the right to respond or rebut to extra-record
11 evidence the city relied upon.

12 Intervenor does not dispute petitioner's contention that the city erred in
13 relying upon extra-record evidence to support its findings regarding the
14 adequacy of street facilities, but argues that there is other evidence in the
15 record from intervenor's engineer that supports a conclusion that there are
16 adequate levels of street facilities.

17 The engineer's testimony intervenor refers to states only that "3 streets
18 were already stubbed in to adequately serve the property[.]" Record 103. The
19 city evidently did not feel that testimony was sufficient to establish that the
20 affected local streets had sufficient capacity, and did not even cite it, but
21 instead chose to rely solely upon an analysis of capacity based on extra-record

evidence. We agree with petitioner that remand is necessary for the city to adopt findings based on substantial evidence that is found in the record.

This sub-assignment of error is sustained.

b. Fire, Police, Library and Electrical Services

JDC 12.76.020(B)(3) defines "Urban services" to include police, fire protection, and library services, and "Infrastructure" to include utilities. The city adopted a finding that the city fire department "informed the applicant's engineer and staff that the Jefferson Fire Department has adequate resources to serve the subject property[.]" Record 23. Petitioner argues that the city's finding regarding adequacy of fire services is based solely on hearsay conversations with the fire department reported by staff and the applicant's engineer. Petitioner also argues that the findings fail to address testimony from a local doctor regarding inadequate fire protection and emergency response times caused by railroad tracks that intervene between responders and the annexation territory. Record 98-99, 173.

Land use proceedings are not governed by rules of evidence, and testimony relaying conversations with service providers regarding adequacy of services can be credible evidence even if the reported statements would constitute hearsay under the rules of evidence. Nonetheless, hearsay statements are not particularly strong evidence, and a reasonable decision maker could certainly choose not to rely on hearsay evidence that is countered by direct opposing testimony. The findings do not address the testimony regarding the

1 possibility of delayed response times due to the fact that the territory is
2 separated by railroad tracks from emergency responders. That appears to raise
3 a legitimate issue regarding compliance with JDC 12.76.020(B)(3), and we
4 agree with petitioner that the city erred in failing to adopt a finding addressing
5 that issue. *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989) (*citing*
6 *Norvell v. Portland Metropolitan LGBC*, 43 Or App 849, 852-53, 604 P2d 896
7 (1979)).

8 With respect to police and library services, the findings state that "[t]hese
9 service providers have verified that their systems have sufficient capacity[.]"
10 Record 23. Petitioner argues that there is no evidence in the record, even
11 hearsay, to support this finding. Intervenor does not cite to any evidence in the
12 record that supports the above-quoted finding. Accordingly, we agree with
13 petitioner that remand is necessary to adopt more adequate findings, supported
14 by substantial evidence, regarding the adequacy of police and library services.

15 With respect to electrical service, an engineer raised issues regarding the
16 adequacy of the current electrical substation to service the property without
17 impacting the existing portions of the city. Record 89. Petitioner argues that
18 no findings address this issue. Intervenor does not respond to this argument.
19 We agree with petitioner remand is necessary to adopt findings that address the
20 issue raised below regarding the adequacy of electrical service.

21 This sub-assignment of error is sustained in part.

3. JDC 12.76.020(B)(4): Significant Unresolved Issues

JDC 12.76.020(B)(4) requires a finding that "[s]ufficient planning and engineering data is available, and all necessary studies and reviews have been completed such that there are no unresolved issues." *See* n 15. The city found that (1) "there are no unresolved issues or studies to be completed which would require the delay of this annexation[,]" (2) the "[a]pplicant has no known pending planning or engineering studies or reviews[,]" and (3) the city's development code and comprehensive plan have no pending or required reviews. Record 24.

Petitioner challenges those findings, arguing that several parties asserted below that studies and data are required regarding traffic impacts, impacts on pedestrian and bicycle facilities, storm water drainage, flooding, electrical infrastructure, and emergency access. Record 89, 98-99, 173. According to petitioner, that the applicant had no pending planning or engineering studies on these points does nothing to establish compliance with this standard. Petitioner contends that JDC 12.76.020(B)(4) requires that "[s]ufficient planning and engineering data is available," and the absence of data cannot satisfy that standard.

Intervenor provides no response to this sub-assignment of error. We agree with petitioner that in the face of testimony that studies and data are required regarding a number of potential impacts, the city was required to adopt findings that address those alleged impacts, and determine whether

1 existing planning and engineering data, if any, are available to ensure that no
2 significant unresolved issues remain. The city findings on this point are
3 conclusory and inadequate.

4 Finally, petitioner disputes the city's apparent finding that the
5 development code and comprehensive plan require no review. According to
6 petitioner, the city failed to determine whether the proposed annexation
7 complies with any comprehensive plan provisions or Statewide Planning Goal
8 10 (Housing). With respect to the development code, petitioner argues that the
9 city effectively struck JDC 12.76.010(D) from its code. *See* Record 17
10 (planning commission report striking through the text of JDC 12.76.010(D)
11 with the notation "Superseded by passage of SB 1573 in the 2016 Legislative
12 Session"). Petitioner contends that the effect of SB 1573 on the city's
13 development code, and the pending litigation challenging SB 1573, is an
14 "unresolved issue" regarding the development code that should mandate delay
15 of the annexation approval, pursuant to JDC 12.76.020(B)(4).

16 However, the city found that the annexation and zone change are
17 consistent with the comprehensive plan, and petitioner does not identify any
18 applicable comprehensive plan provisions that the city should have reviewed,
19 but did not, in approving the annexation or zone change. Petitioner's
20 arguments regarding consistency with the comprehensive plan do not provide a
21 basis for reversal or remand.

1 The city adopted no findings regarding Goal 10, Housing, but petitioner
2 does not identify any potential issue under Goal 10 (or even argue that any
3 issue under Goal 10 was raised below). It is difficult to imagine what potential
4 issue under Goal 10 could arise from a proposal to annex residentially-
5 designated land and zone it for urban residential use. Absent a more developed
6 argument, petitioner's arguments regarding Goal 10 do not provide an
7 additional basis for remand.

8 This sub-assignment of error is sustained, in part.

9 **4. JDC 12.76.020(B)(5): Overall Impact**

10 JDC 12.76.020(B)(5) requires a finding that the "overall impacts of the
11 annexation will be positive on the physical, economic, political, financial and
12 social environment of the City." The city adopted six findings or reasons to
13 support its conclusion that this criterion is met, and a final summary
14 conclusion.[17]

---

[17] The city's findings state:

> "1. The current growth projections for the City of Jefferson estimate they will need approximately 1800 new homes in the next 15 years.
>
> "2. Annexation of the subject property will provide urbanized development opportunities that will provide the needed housing.
>
> "3. Annexation of the subject property will grow the City's tax base which will improve the City's economic and financial position.

1 Petitioner argues that the findings are not supported by substantial
2 evidence. Specifically, petitioner argues that there is no evidence in the record
3 that the annexation (or more precisely housing built in the annexed territory)
4 will (1) enhance the physical appearance of the area, (2) grow the city's tax
5 base, (3) allow city rules and ordinances to govern, and (4) provide housing for
6 younger generations. Intervenor responds that the city council relied on the
7 totality of evidence submitted during the hearing. However, intervenor does
8 not cite us to any evidence in the record that supports the four disputed

---

"4. Annexation will provide land for future housing that will allow the younger generations growing up in Jefferson an opportunity to live and remain in Jefferson.

"5. Annexation of the subject property will allow City rules and ordinances to govern and apply that will better the City's political control of the land.

"6. The annexation is extremely orderly in that it extends the existing City limits boundary adjacent to an area that was recently developed with single family homes to urban standards. This enhances the physical appears of the immediate area.

"*Finding*: The logical extension of the City into its UGB, as anticipated by the City's planning documents and the addition of tax revenue will have a positive impact on the physical, economic, political, financial and social environment of the City. Comments received by the representative of [petitioner] indicate that this criterion is not met, but point only to changes in the voter approved annexation process implemented by SB 1673—rather than to detrimental affects the annexation will have on the City." Record 25.

1 findings. It is true that the disputed findings are mostly of a nature that would
2 not require much in the way of evidentiary support. For example, it is almost a
3 given that annexations will increase a city's tax base. It is also not clear how
4 critical each finding or reason is to the city's ultimate conclusion that the
5 annexation will have a positive impact on the city. That conclusion
6 presumably requires a weighing of positive and negative impacts, and it may
7 well be that even if one or more of the cited reasons have no evidentiary
8 support, the city might still ultimately conclude that the net impact on the city
9 is positive. Nonetheless, because the decision must be remanded in any event,
10 on remand the city should ensure that its findings regarding JDC
11 12.76.020(B)(5) are adequate and supported by substantial evidence.
12 Petitioner also contends that the city's finding of a need for 1800 new
13 homes over the next 15 years is impermissibly based on a Portland State
14 University (PSU) study, rather than the city's own acknowledged buildable
15 lands inventory or projection of housing needs. Record 24 (*citing* a 2008 PSU
16 study). Petitioner is generally correct that Statewide Planning Goal 2 requires
17 that land use actions be based upon the city's acknowledged comprehensive
18 plan and land use regulations. *See 1000 Friends of Oregon v. City of Dundee*,
19 203 Or App 207, 216, 124 P3d 1249 (2005) (a planning decision based on a
20 study not incorporated into the comprehensive plan is not a planning decision
21 that is made on the basis of the comprehensive plan and acknowledged
22 planning documents, as is required by Goal 2). The city's findings do not cite

1 or appear to consider the city's acknowledged inventories or projections of
2 housing needs. To the extent the city relies on a projection of housing need to
3 establish that the annexation has a positive impact on the city under JDC
4 12.76.020(B)(5), we agree with petitioner that if the city's acknowledged
5 comprehensive plan includes a projection of housing need, the city must base
6 its decision on the projection found in its plan.

7 Petitioner also challenges statements in the city's final conclusion that
8 the "overall impacts" of the annexation are positive. The final paragraph states
9 that the annexation is a "logical extension" "anticipated by the City's planning
10 documents[.]" Petitioner argues that among the "planning documents"
11 referenced must be a document entitled City/County Urban Growth Boundary
12 and Policy Agreement (Agreement). Petitioner contends that the city failed to
13 consider the Agreement's requirements, citing to a portion of the Agreement at
14 Petition for Review, Appendix 43. However, petitioner does not identify
15 anything in the Agreement that governs an annexation of land from the UGB
16 into the city, and we see nothing at Appendix 43 indicating otherwise.

17 Finally, petitioner disputes the city's ultimate conclusion that net impacts
18 of the annexation are positive. According to petitioner, the city ignored the
19 negative economic, financial and social costs of applying SB 1573 to approve
20 the annexation without a vote of the citizens, over substantial citizen
21 opposition. However, petitioner does not explain why city approval without a

1 vote pursuant to SB 1573 is an "impact" of the *annexation* that must be
2 weighed under JDC 12.76.020(B)(5).

3 This sub-assignment of error is sustained, in part.

4 **5. JDC 12.76.020(B)(6): Any Other Factors**

5 JDC 12.76.020(B)(6) provides that the city council may consider, at its
6 discretion "any other factors that affect the timeliness or wisdom of a proposed
7 annexation." *See* n 15. The city found that no other factors affected the
8 timeliness or wisdom of the proposed annexation, and further concluded that
9 SB 1573 was "irrelevant" and not a factor that affected the timeliness or
10 wisdom of the annexation. Record 25. On appeal, petitioner argues that SB
11 1573 is a relevant factor for purposes of JDC 12.76.020(B)(6), and that the city
12 erred in ignoring "demands to delay the annexation to consider the
13 constitutional validity of SB 1573[.]" Petition for Review 40.

14 JDC 12.76.020(B)(6) expressly grants the city council "discretion" to
15 consider factors that affect the timeliness or wisdom of a proposed annexation,
16 and the city exercised that discretion, concluding that the controversy over SB
17 1573 should not delay consideration of the proposed annexation. The city's
18 grant of discretion under JDC 12.76.020(B)(6) appears to be broad, and
19 petitioner does not suggest what standard of review LUBA would apply to
20 avoid simply second-guessing the city's exercise of that broad discretion.
21 Accordingly, petitioner's arguments do not provide a basis for reversal or
22 remand.

1 This sub-assignment of error is denied.

2 The second assignment of error is sustained, in part.

3 **THIRD ASSIGNMENT OF ERROR**

4 In two sub-assignments of error, petitioner argues (1) that the city
5 committed procedural error in adopting a *de facto* amendment to the city's
6 development code without providing the required notice and procedure, and (2)
7 the city erred in approving the annexation pursuant to SB 1573, because the
8 statute is unconstitutional. For the reasons that follow, we reject petitioner's
9 first sub-assignment of error, and decline to reach petitioner's second
10 subassignment of error, alleging that SB 1573 is unconstitutional.

11 **A. *De Facto* Amendment**

12 As noted, JDC 12.76.10(D) and other local provisions require
13 annexations receive voter approval. *See* n 14. Pursuant to SB 1573, the city
14 did not refer the annexation to the voters, as required by the JDC. Petitioner
15 argues that the city's failure to apply the JDC requirements for voter approval
16 is a *de facto* amendment of the city's acknowledged development code,
17 effectively deleting JDC 12.76.10(D) and other code provisions. Petitioner
18 argues that the city committed a variety of procedural and substantive errors by
19 amending its development code without providing the notice and procedures
20 required by law.

21 The short answer is that the city did not amend its development to
22 effectively delete JDC 12.76.10(D) and other code provisions requiring that

1 city voters approve annexations. The city applied the plain language of SB
2 1573, which bars the city from referring the proposed annexation to the voters,
3 notwithstanding any contrary local ordinance or charter provision. Putting
4 aside the question of whether SB 1573 is unlawful or unconstitutional, the
5 city's application of SB 1573 in the present case simply does not "amend" JDC
6 12.76.10(D) or any other code provision. Petitioner's argument that the city
7 erred in failing to provide notice and procedures required of code amendments
8 does not provide a basis to reverse or remand the challenged decision.
9 This sub-assignment of error is denied.
10 **B. Constitutionality of SB 1573**
11 Section 3 of the city's charter provides in relevant part that "[u]nless
12 mandated by state law, annexation, delayed or otherwise, to the City of
13 Jefferson, may only be approved by a prior majority vote among the
14 electorate." Petitioner argues that the city charter was adopted by the city
15 voters pursuant to authority granted under the Oregon Constitution, and that SB
16 1573 is invalid because it conflicts with the city's exercise of home-rule
17 authority under the Oregon Constitution.
18 Intervenor responds that the question of whether SB 1573 is
19 unconstitutional is not within LUBA's scope of review. According to
20 intervenor, petitioner has filed a writ of mandamus in Marion County Circuit
21 Court, seeking to compel the city to refer the annexation at issue in this appeal

1 to the city voters, based on the same constitutional challenge presented in this
2 sub-assignment of error.[18]
3 As far as we can tell, intervenor is correct that the same constitutional
4 challenge presented in this appeal is at issue in the writ of mandamus
5 proceeding in circuit court.[19] Even if a constitutional challenge to a statute
6 would otherwise fall within our scope of review, a question we do not decide,
7 the fact that the issue is pending or has been resolved in another forum presents
8 the obvious possibility of inconsistent resolutions. The legislature has directed
9 that LUBA conduct its review in accordance with "sound principles of judicial
10 review." ORS 197.805. Exercising our review authority over petitioner's
11 constitutional challenge to the validity of SB 1573 would not be consistent
12 with sound principles of judicial review. *See DLCD v. Klamath County*, __ Or
13 LUBA __ (LUBA No. 2006-227, February 9, 2007, Order) (suspending a
14 LUBA appeal pending a final decision in related writ of review proceeding in

---

[18] Intervenor notes that on November 22, 2016, the circuit court has issued a letter ruling in the city's favor. The court cited the charter language quoted above, "[u]nless mandated by state law[,]" and concluded that the city "cannot infringe upon the electorate's right to vote on [an] annexation when its own Charter limits annexation votes to those situations that are permitted by state law." Response Brief, Appendix 1. Intervenor also advises us that on January 27, 2017, the circuit court reduced its opinion to a final judgment, dismissing the writ of review proceeding.

[19] Apparently, the same issue is also presented in a declaratory ruling action in Benton County Circuit Court (16CF17878), filed by the City of Corvallis, that presents a facial constitutional challenge to SB 1573.

circuit court); *Marion County Fire District #1 v. City of Keizer*, 65 Or LUBA 440 (2012) (LUBA will decline to exercise its review authority to resolve a challenge to an annexation that is closely related to a challenge to the same annexation pending before the circuit court in a writ of review proceeding).

Accordingly, we do not reach this sub-assignment of error.

The city's decision is remanded.