BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

M & T PARTNERS, INC.,
PACIFIC REALTY ASSOCIATES, L.P.,
PACTRUST REALTY, INC.,
and SHARI REED,
Petitioners,

and

COSTCO WHOLESALE CORPORATION,
Intervenor-Petitioner,

vs.

CITY OF SALEM,
Respondent,

and

JOHN MILLER, LORI MEISNER,
and WILLIAM DALTON,
Intervenors-Respondents.

LUBA No. 2018-143

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Wendie L. Kellington, Lake Oswego, filed a petition for review and cross response brief and argued behalf of petitioners. With her on the briefs was Kellington Law Group, PC.

David J. Petersen, Portland, filed a petition for review and argued on behalf

of intervenor-petitioner. With him on the brief were Robert Koch and Tonkon Torp LLP.

Daniel B. Atchison, City Attorney, Salem, filed a response brief and argued on behalf of respondent.

Karl G. Anuta, Portland, filed a cross-petition for review and a response brief, and argued on behalf of intervenors-respondents. With him on the brief was Law Office of Karl G. Anuta P.C.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

REMANDED 08/14/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a city council decision denying an application for site plan review for a shopping center that includes a Costco store.

REPLY BRIEF

Petitioners and intervenor-petitioner filed a joint motion to file a reply brief. The city and intervenors-respondents oppose the motion to file a reply brief, and filed a motion to strike portions of the reply brief.

We agree with respondents that the reply brief merely provides surrebuttal to arguments raised in the response briefs, and not responses to "new matters" within the meaning of OAR 661-010-0039 (2017).[1] *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 19-20 (2007); *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, 353, *aff'd*, 258 Or App 534, 311 P3d 527 (2013). The motion to file a reply brief is denied.

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[1] This appeal was filed in 2018 and is therefore subject to LUBA's 2017 rules of procedure. OAR 661-010-0039 (2017) 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. A reply brief shall have gray front and back covers."

FACTS

Petitioners (together, PacTrust) applied for site plan review approval to develop a shopping center that includes a Costco store, a retail fueling station and four retail building on 23.4 acres. The subject property is located adjacent to Kuebler Boulevard S.E., 27th Avenue S.E., Boone Road S.E., and Battle Creek Road S.E. The property is designated Commercial in the comprehensive plan and zoned Commercial Retail (CR), pursuant to a 2007 city council decision that approved a change to the comprehensive plan designation from Residential to Commercial and the zoning from Residential Agriculture to CR (2007 Decision). The 2007 Decision included several conditions of approval that required off-site improvements to transportation facilities adjacent to or near the subject property. The 2007 Decision also included a condition of approval, Condition 14, which we set out and discuss later in this opinion.

After the 2007 Decision, PacTrust began implementing the conditions of approval that require improvements to the transportation system.[2] In 2016, the city issued a statement of partial satisfaction for the off-site transportation improvements. PacTrust states that to date it has expended $3.75 million in off-site transportation improvements. On June 5, 2018, PacTrust applied for site plan

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[2] These including expending money towards widening Battle Creek Rd S.E. and Boone Rd. S.E., contributing funds towards widening the eastbound lanes of Kuebler Blvd., and installing a right-in turn lane from Kuebler Blvd. westbound into the subject property. Record 3209, 622, 7088.

review approval for the shopping center. The planning director issued a decision approving the application with conditions. Opponents of the shopping center appealed, and the city council voted on November 13, 2018 to assume jurisdiction over the appeals. Record 5994. On December 10, 2018, the city council held a hearing on the appeals and at the conclusion, voted to deny the application.

The city council denied the application on two bases. First, the city council concluded that the tree preservation requirements in Salem Revised Code (SRC) 808.030 had not been met. Second, the city council concluded that the 2007 Decision prohibited a Costco store from being developed on the subject property because it concluded that the Costco store is a "regional facility." Record 19.

This appeal followed. We discuss both bases for denial in our resolution of the assignments of error.

INTRODUCTION

The posture of this appeal is somewhat unusual for the following reasons. First, the city council denied the application on two bases. One of bases for denial was based on a site review criterion, SRC 808.030. However, the other basis for denial was not based on any applicable site review criterion. Rather, the city council considered in the first instance whether the use proposed in the application is a use that is permitted on the site, which, as noted, is designated Commercial and zoned CR pursuant to the 2007 Decision.

The challenged decision is a limited land use decision, as all parties acknowledge. As defined in ORS 197.015(12), "limited land use decision":

> "[m]eans a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns * * * [t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics *of a use permitted outright*, including but not limited to site review and design review." (Emphasis added.)

Thus, when the city makes a limited land use decision, the question of whether a use is permitted outright is not generally at issue. Rather, the analysis and decision focus solely on whether the proposal satisfies the "discretionary standards designed to regulate the physical characteristics" of the permitted use. Accordingly, in making a limited land use decision the question of whether the use is permitted on the site is arguably not a question that the city council may consider.

The other reason that the posture of this appeal is unusual is that, in denying the application, the city council failed to adopt findings addressing an argument from PacTrust that PacTrust possesses a vested right to the city's approval of the shopping center, based on their expenditures on off-site transportation improvements and previous dedications of land as required by the 2007 Decision. If that argument is correct and PacTrust possesses a vested right to approval of the shopping center, then we understand PacTrust to argue that the city may not apply site plan review criteria in a manner that prevents development of the shopping center. We express no opinion here about that argument. However, as explained below, the city failed to adopt findings responding to

PacTrust's vested rights argument. Against that backdrop, we address the assignments of error.

FIRST ASSIGNMENT OF ERROR (PACTRUST)

As noted, the 2007 Decision approved a change in the plan designation for the subject property from Residential-Agriculture to Commercial, and the zoning designation of the property from Residential (RA) to CR. In the 2007 Decision the city also imposed Condition 14, which provides in relevant part:

> "The subject 18.4-acre property shall be developed with a retail shopping center. The maximum amount of gross leasable area (GLA) for the retail shopping center on the subject property shall be 240,000 GLA. If the subject property is developed in conjunction with the abutting 10.08 acre property (for simplicity referred to as a 10.0 acre property) currently owned by the Salem Clinic [], the total amount of retail GLA and medical/dental offices on the two properties shall not to exceed 299,000 GLA. As such, the total GLA for a shopping center and offices on the combined properties if developed together, shall not [ ] exceed 299,000 GLA. * * * The City shall have the right to enforce this condition through the enforcement procedures in its code or through a post acknowledgement plan amendment using required City and state procedures restoring the Residential plan designation and RA zone to the property." Record 668.

Condition 14 requires the property to be developed with "a retail shopping center." SRC 522.005(a) allows "retail sales" as a permitted use in the CR zone. SRC 111.001 defines "shopping center" as "a group of businesses falling primarily under the retail sales and service use category that form a centralized unit and that have a joint parking area available for use by patrons of any single business." Condition 14 also places limits on the GLA of the retail shopping

center of 240,000 square GLA, and on the total amount of GLA on the subject property and the adjacent property of 299,000 GLA. Record 668. Finally, Condition 14 allows the city to enforce a violation of the condition through a comprehensive plan amendment to restore the previous Residential plan designation and RA zoning. *Id.*

The city council found that PacTrust's application was inconsistent with the record of the 2007 Decision that includes alleged representations made by PacTrust in seeking the comprehensive plan amendment and rezone of the subject property.[3] We understand the city council to have concluded that PacTrust's

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[3] The city council found:

> "The Council finds that the record testimony and submittals of the applicant that the City Staff and Council relied on in its approval of Comprehensive Plan Change/Zone Change Case No. 06-06 represented a store that would not have a regional customer base, but rather would be a Community Shopping Center that would provide services for neighborhood residents as well as a market area of several southeast Salem neighborhoods. The Council further finds that the Costco proposed in this application, with a member base of around 80,000 at its present smaller Salem location, is basically a regional facility that draws customers from a great distance, and does not conform to the applicant's prior representations, that were the basis for the Findings made in support of the Comprehensive Plan Change/Zone Change Case No. 06-06, or the conditions attached to that approval.
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> "The Council finds that the applicant represented in the Comprehensive Plan Change/Zone Change Case No. 06-06 in statements by various representatives, that it was not proposing a development that would draw a substantial portion of its customers

alleged representations made during the proceedings that led to the 2007 Decision are akin to de facto conditions of approval that prohibit Costco's store. According to the city council, the 2007 Decision prohibits a "regional facility that draws customers from a great distance." Record 19.

In its first assignment of error, PacTrust argues that the city's decision improperly construes the 2007 Decision to add conditions of approval that were not included in the 2007 Decision, and therefore is an impermissible collateral attack on the 2007 Decision. PacTrust argues that because the challenged

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> from beyond the 'vicinity' chosen by the applicant that was the basis for its comprehensive plan change to commercial. Council relied on those representations in making its findings to approve that Rezone. The applicant, through Costco, invited Costco members to submit letters of support of their application to Council. Council received hundreds of letters from Costco members, some in support and some in opposition. Most of the comments came from Costco customers beyond Salem and beyond the vicinity chosen by the applicant. This testimony is evidence that the proposed development has a regional market area, which is inconsistent with both the representations made by the applicant in 2006/2007, which were the basis for [the] comprehensive plan change decision.
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> "Prior approval Conditions on the property are, pursuant to SRC 300.820(b), treated as a part of the [Salem Unified Development Code] UDC. As a part of the UDC, those Conditions constitute approval criteria that must be met - per SRC 220.005(f)(3)(A). A **specific** 'condition' of approval criteria is **not necessary** where an applicant's promise or statement 'is embodied or found on the face of the plan that the decision approves.' *Culligan v. Washington County*, [57 Or LUBA 395, 401 (2008)]." Record 19 (bold in original, footnote omitted).

decision is a limited land use decision, the city may require compliance with conditions of approval of the 2007 Decision, but may not construe the 2007 Decision in a manner that prohibits development that is allowed in the zone and otherwise conforms to applicable site review criteria and those conditions. For the reasons explained below, we agree with PacTrust that the city council improperly construed the 2007 Decision, but disagree with PacTrust that the city council's decision amounts to a collateral attack on the 2007 Decision.

We describe the 2007 Decision in more detail before turning to the parties' arguments. During the proceedings that led to the 2007 Decision, much of the testimony and evidence focused on whether the plan amendment and zone change application satisfied *former* SRC 64.090(b), Criterion 1, which required the city to determine that there was "[a] lack of appropriately designated suitable alternative sites within the vicinity for a proposed use." Record 671. In order to determine "the vicinity" and "the proposed use" for purposes of applying Criterion 1, in the 2007 Decision the city council looked to the Salem Area Comprehensive Plan (SACP)'s description of "community shopping and service facilities." Record 672-80; SACP IV, Urban Area Goals and Policies, Economy and Employment, G.4, Commercial Development 35. The SACP describes several types of commercial uses: "regional shopping facilities," "community and neighborhood shopping and service facilities," "convenience stores," "commercial offices," and "specialized shopping and service facilities." SACP

II, Definitions and Intent Statements, A.3.C.,V, Plan Map Designations, Commercial, 8-9.

The city council also relied on a 1987 city council resolution that defined the terms "regional retail and employment center" and "regional commercial retail center," which the city council found the resolution defined "to include, among other things, a development composed of '300,000 square feet or more of gross leasable space.'" Record 675. The city council concluded that because the application for the comprehensive plan amendment and zone changed proposed an eventual shopping center with less than 300,000 GLA, it was, by definition, not a "regional facility" within the meaning in the SACP. Record 675-76, 683. The city council found that "[b]ecause the proposal is for less than 300,000 square feet of gross leasable space and a specific condition of approval is included in this decision to [ensure] that this limitation is observed, is support for and evidence that the proposal is for a community not 'regional' center." Record 683. The city concluded that the "proposed use" was "the construction of a 'community shopping center' having not more than 240,000 square feet of [GLA] * * *." Record 672. The 2007 Decision's findings also explained that the applicant represented that the property would not be developed with either a "factory outlet" mall or a Wal-Mart store. Record 683, 694.

PacTrust argues that the city council's conclusion—that the record of the 2007 Decision and alleged representations made by PacTrust during the proceedings that led to the 2007 Decision prohibit a Costco store from being

developed on the subject property—improperly construes the 2007 Decision. PacTrust argues that a Costco store is an outright permitted use in the CR zone, which allows a "retail shopping center," and that nothing in the 2007 Decision, Condition 14 or any other conditions of approval prohibit the store, because the city council has already determined that it is a "retail shopping center" if it meets the size limitations in Condition 14.

In its response, the city first argues that city council's interpretation of Condition 14 and the 2007 Decision is entitled to deference under *Perry v. Yamhill County*, 26 Or LUBA 73, 80, *aff'd*, 125 Or App 588, 865 P2d 1344 (1993). The city argues that even if deference is not due under *Perry*, LUBA should conclude that the city council correctly interpreted Condition 14 and the 2007 Decision to prohibit a Costco store.

We reject the city's arguments for several reasons. First, we see nothing in the city council's findings that purports to interpret Condition 14. *See* n 3. Rather, any interpretational exercise that the city council engaged in appears to be an interpretation of statements in the findings that were adopted in support of the 2007 Decision, and interpretations of documents in the record of that proceeding.

Second, in *Perry*, LUBA concluded that the reasoning in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) extended to an interpretation of a prior land use decision because it was an interpretation of "the applicable law" within the meaning of *former* ORS 197.835(7)(a)(D), now ORS 197.835(9)(a)(D). 26 Or LUBA at 80. Subsequently, the legislature adopted ORS 197.829, which

became effective November 1, 1993, and which codified and modified *Clark* in part. *See Delta Property Co., LLC v. Lane County*, 271 Or App 612, 643, 352 P3d 86 (2015) ("ORS 197.829 is not a simple codification of the principles that had been articulated in the germinal Supreme Court case that preceded *Gage* [*v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994)], namely, *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Both subsections (1)(d) and (2) of the statute are not derived from Supreme Court case law.").

ORS 197.829 provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
> >
> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
> >
> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
> >
> > "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
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> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

In *Larsson v. City of Lake Oswego*, 26 Or LUBA 515, *aff'd*, 127 Or App 647, 651, 874 P2d 99 (1994), both LUBA and the Court of Appeals questioned whether *Perry* was correct in light of the subsequent adoption of ORS 197.829(1), but did not have to resolve that question. We now resolve it, and conclude that post-*Perry,* in enacting ORS 197.829(1), the legislature identified the two objects of interpretational deference: interpretations of "its comprehensive plan and land use regulations." Put another way, to the extent our holding in *Perry* was correct, it was superseded by ORS 197.829(1), and ORS 197.829(1) does not require LUBA to affirm a local government's interpretation of a prior land use decision.[4] ORS 197.829(1) requires LUBA to affirm a local government's interpretation "of its comprehensive plan and land use regulations." It does not require LUBA to affirm a local government's interpretation of findings adopted in support of a prior land use decision, or of conditions of approval attached to that prior land use decision. Rather, we review the local government's interpretation of a prior

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[4] *Clark* also described in various ways the types of decisions that were subject to the deferential standard of review identified in *Clark*, as the governing body's interpretation of "a local ordinance," "a local land use ordinance," "its own ordinance," "the county law," and "relevant ordinances, detailed above, [that] are part of its acknowledged comprehensive plan." 313 Or at 513-518. It is reasonably clear that the Supreme Court in *Clark* was referring to what the legislature later described in ORS 197.829(1) as "land use regulations," a term that was defined in ORS 197.015(11) when the Supreme Court decided *Clark* and when ORS 197.829 was first enacted.

land use decision to determine whether the local government "improperly construed the applicable law." ORS 197.835(9)(a)(D).

The city next argues that alleged representations made by PacTrust during the proceedings leading to the 2007 Decision provide context for the city council's interpretation of the 2007 Decision as prohibiting a Costco store, and are binding on PacTrust in seeking to develop the property. According to the city, it is entitled to rely on statements and representations made by an applicant without having memorialized each statement in a condition of approval. The city council's findings and the response brief cite *Culligan v. Washington County*, 57 Or LUBA 395, 401 (2008) in support of its argument. The response brief additionally cites *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016), *aff'd*, 285 Or App 764, 398 P3d 478 (2017).

The decisions that the city cites in support of its arguments are inapposite, because those decisions were local government approvals of a specific development proposal that did not include a condition of approval memorializing statements or representations made by the applicant. We concluded in that circumstance that statements or representations made by an applicant during the proceedings must be made binding in order to be enforceable, and that failure to impose a condition of approval memorializing those representations provided a basis for remand where the decision maker relied on those representations to find that applicable approval criteria were met.

In *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013), *aff'd*, 262 Or App 9, 324 P3d 549 (2014), we rejected an argument nearly identical to the city's argument here. In that case, in a prior zone change proceeding, the applicant described the zone change as one that would "facilitate re-development of * * * a multi-unit apartment building" that would include parking at one space per unit. 68 Or LUBA at 222. The site design review application submitted several years later proposed less parking than one space per unit, and the petitioners argued that the applicant's representation about the number of parking spaces made during the zone change proceeding was binding on the subsequent development proposal.

We concluded that voluntary descriptions by an applicant for a zone change of potential development that could be constructed if a zone change is granted are not binding on subsequent land use approvals to construct development otherwise allowed in the zone. *Id.* at 223. We also concluded, however, that the petitioners' argument—that representations made during the rezoning process are binding on subsequent development proposals—was not a collateral attack on the rezone decision. *Id.* at 223-24. Rather, we concluded that the petitioners were free to make those arguments, but where nothing in the applicable zone change criteria or the conditions of approval required the applicant to submit proposed plans or agree to a set number of parking spaces, and the decision maker did not rely on any conceptual plans or representations in approving the zone change, the arguments failed. *Id.*

Here, no specific development proposal was approved by the 2007 Decision, which approved only a plan amendment and zone change and limited future development pursuant to the restrictions in Condition 14. PacTrust did not make any representations that the shopping center would be developed with any particular store. Accordingly, voluntary descriptions, statements or representations made by PacTrust during the proceedings that led to the 2007 Decision are not binding on PacTrust, unless those statements are memorialized in conditions of approval.

Furthermore, we also agree with PacTrust that it did not make the type of unequivocal promises or representations that the city, in 2018, wished that PacTrust had made in 2007. PacTrust points to statements from the proceeding that led to the 2007 Decision that the tenants that PacTrust would seek were "retail, drug store and grocery," but that "[t]hose are the primary tenants - again you don't know who is going to show up until you get there." Record 677.

However, while we reject PacTrust's argument that the city's decision is a collateral attack on the 2007 Decision, neither did the city council properly construe the 2007 Decision. We agree with PacTrust that the city council improperly construed the 2007 Decision to find that a Costco store is prohibited, based on alleged representations made by PacTrust during the 2007 Decision proceedings that, as we conclude above, were open to interpretation at best. Nothing in the language of the 2007 Decision, the conditions of approval attached to the 2007 Decision, or the findings adopted in support of the 2007 Decision

prohibits a Costco store. Nothing in the statements and testimony provided by PacTrust represented that a Costco store would not be sited on the subject property. Further, Condition 14 embodies the totality of the limits that the city placed on future development on the property, and expressly limits only the type of future development to a "retail shopping center," and the size of future development to 299,000 square feet of GLA on the property. Record 668. The Costco store is a "shopping center" within the meaning of SRC 111.001, a "retail use" that is allowed in the CR zone, and PacTrust's proposal does not exceed either the 240,000 GLA limit for a store or the 299,000 GLA for the subject property.

PacTrust's first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR (PACTRUST)

In its second assignment of error, PacTrust argues that the city council failed to address an argument that PacTrust presented during the proceedings before it, and that remand is required in order for the city to address it. That argument is that PacTrust has acquired a "vested right" to approval of its proposal because of expenditures PacTrust made on off-site transportation improvements and land dedicated to the city as required by the 2007 Decision conditions. *See Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207, 221 (2000), *aff'd*, 176 Or App 213, 220-24, 31 P3d 458 (2001) (uses for which there are vested rights to develop or complete are "inchoate nonconforming uses"). We understand PacTrust to argue that because of its vested rights, the city may not

apply applicable site review approval criteria in a manner that would lead to denial of PacTrust's proposed site plan.

The city did not adopt any findings in the challenged denial responsive to PacTrust's vested rights argument. The city's only response in this appeal is that "an assertion of 'vested rights' is not helpful to petitioners." Response Brief 21. Absent any meaningful response, we agree with PacTrust that the city erred in failing to respond to PacTrust's argument that it has a vested right to an approval of its site plan review application. *Norvell v. Portland Metropolitan Area Local Government Boundary Com.*, 43 Or App 849, 853, 604 P2d 896 (1979) (adequate findings must generally address legitimate issues raised below regarding compliance with approval criteria); *Forster v. Polk County*, 22 Or LUBA 380, 383 (1991) (findings that fail to address relevant issues raised below are inadequate).

PacTrust also argues that LUBA should conclude that it has acquired a vested right to approval of its development. In light of our conclusion, it would be premature for us in the first instance to determine whether PacTrust has a vested right to approval of its application, and we do not reach that portion of PacTrust's second assignment of error.

PacTrust's second assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR (COSTCO)

ORS 227.180(3) provides:

"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:

"(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."

In Costco's first assignment of error, it argues that the city failed to comply with ORS 227.180(3) when a city councilor failed to disclose *ex parte* contacts that occurred when that councilor allegedly attended a neighborhood association meeting on August 9, 2018.

In an order dated April 30, 2019, we granted Costco's Motion to Take Evidence Not in the Record consisting of the minutes of an August 9, 2018 meeting of the South Gateway Neighborhood Association. *M & T Partners v. City of Salem*, __ Or LUBA __ (LUBA No. 2018-143, Order, April 30, 2019). The city responded to Costco's motion by arguing that the meeting minutes did not demonstrate that the city councilor was present at the meeting. The city did not take the position in its response that the city councilor was not present at the meeting, or otherwise move to take evidence to demonstrate that the city councilor was not present at the meeting. Based on the meeting minutes, we concluded that the minutes demonstrated that the city councilor was present at the meeting, and concluded that we would consider the minutes in resolving any

future assignments of error that alleged *ex parte* contacts that were not disclosed. *Id.* at (slip op at 8-9).

In its response brief filed June 11, 2019, the city responds to Costco's first assignment of error by referring to a contemporaneously filed Motion to Take Evidence Not in the Record, seeking to demonstrate that the city councilor was not present at the August 9, 2018 meeting. The evidence the city seeks to have us consider consists of declarations from the city councilor in question and the chair of the neighborhood association that held the meeting. The declarations state that the city councilor was not present at the meeting.

Costco responds that the city's motion should be denied as untimely filed. Costco views the city's motion to take evidence as a second, untimely response to Costco's motion to take evidence, which was filed on February 11, 2019 and which we resolved in our April 30, 2019 order.[5] Costco analogizes the city's actions to an attempt by the city to supplement the record long after it is settled and the briefs are filed, an effort that we have rejected because it would necessitate a delay in the appeal proceeding. *Root v. City of Medford*, 36 Or LUBA 778, 779 (1999) (LUBA will reject the city's effort to supplement the record after the briefs have been filed where allowing it would require giving the parties the opportunity to file a new or amended brief and delay review).

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[5] Under OAR 661-010-0045(3), respondents have 14 days to respond to the motion to take evidence outside of the record.

Costco's analogy to a belated attempt to supplement the record after briefing is inapposite. Neither the evidence that Costco sought to have LUBA consider and that we have considered, nor the evidence that the city now seeks to have LUBA consider, was ever included in the record.

Costco also argues that the city's motion fails to satisfy the requirements of OAR 661-010-0045(2) and should be denied for that reason.[6] The city's motion satisfies OAR 661-010-0045(2), and we also read the city's motion to take evidence that was filed contemporaneously with its response brief in context with the response brief, which explains that the city seeks to establish the fact that the city councilor in question was not present at the August 9, 2018 meeting and that therefore Costco's first assignment of error should be denied. Response Brief 22-23. The city's motion to take evidence is granted, and LUBA will consider the declarations that are attached to the motion.

Based on the declarations appended to the city's motion, we conclude that the city councilor in question was not present at the August 9, 2018 meeting and therefore, no *ex parte* contact could have occurred. Accordingly, Costco's first assignment of error provides no basis for reversal or remand of the decision.

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[6] OAR 661-010-0045(2) requires a motion to take evidence to include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding."

Costco's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (COSTCO)

As noted, the subject property includes eight Oregon white oak trees. SRC 808.030(a) prohibits the removal of listed protected trees, including Oregon white oak, without a removal permit. However, SRC 808.030(a)(2)(L) provides that a tree removal permit is not required "where the removal is necessary in connection with construction of a commercial or industrial facility." The application proposed the removal of the eight Oregon white oak trees without a removal permit.

In the application, PacTrust argued that removal of the trees without a tree permit was "necessary" within the meaning of SRC 808.030(a)(2)(L), in order to construct the proposed store in a manner that is consistent with 2007 Decision requirements for traffic circulation and off-site improvements, that would direct traffic away from residential streets to the south of the subject property, and away from Boone Road. As part of its application, PacTrust included four alternative concept plans in order to demonstrate that removal of the trees was necessary to implement a site layout that provided the site access, parking, and internal pedestrian and vehicle circulation required by the 2007 Decision. In particular, PacTrust argued that all of the concept plans would interfere with access into the shopping center from 27th Avenue S.E. or Kuebler Blvd., and would direct traffic onto Boone Rd. S.E.. PacTrust proposed to offset removal of the eight trees with

additional trees in excess of the 16 that are required by Condition 9 of the 2007 Decision. Record 6067.

The city council found that PacTrust had not established that removal of the eight Oregon white oaks trees is "necessary in connection with construction of" the Costco store. First, the city council found that the 2007 Decision included conditions of approval to mitigate the effects of the store on neighboring properties through building setbacks, landscaping and screening, and consequently that PacTrust's desire to provide additional mitigation did not demonstrate that removal of the trees is "necessary in connection with construction" of the store and parking areas.[7] Second, the city council found that the alternative concept plans provided by PacTrust "demonstrate that removal of

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[7] The city council found:

> "Although the applicant's proposed building orientation may provide additional mitigation to the potential adverse impacts on the surrounding property, it is not clear from the applicant's argument, and Council does not find, that it is 'necessary' to remove all the significant trees in order to provide additional mitigation. In this instance, the proposal has significant conditions of approval already mitigating potential adverse impacts on neighboring properties, and the applicant, on the facts of this case, did not meet its burden to show that it was necessary to remove all the significant trees to provide additional mitigation.
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> "Further, the applicant does not address or explain how the exterior wall of a building provides greater visual and/or sound mitigation than a design alterative which preserves existing significant trees." Record 21.

all the signficant trees is not necessary in order to construct a commercial facility on the property."[8] Third, the city council concluded that PacTrust's argument relied on a provision of the SRC that applies when a variance is sought, and that the city could not apply the variance criterion in the absence of a variance application.[9]

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[8] The city council found:

> "In addition to the proposed site plan configuration, the applicant has provided five alternative site plan configurations, each of which preserve all or some of the significant trees on the property and that allow for construction of a commercial facility. Each of the alternative plans presented by the applicant does come with potential drawbacks or limitations, however, these alternative plans demonstrate that removal of all the significant trees is not necessary in order to construct a commercial facility on the property." Record 21.

[9] The city council found:

> "If an applicant cannot demonstrate that an exception in SRC 808.030(a)(2) has been met, an application for a variance to the tree preservation requirements of SRC Chapter 808 may be requested to allow deviation from the requirements of this chapter where the deviation is reasonably necessary to permit the otherwise lawful development of a property. A tree variance shall be granted if either of the following criteria from SRC 808.045(d) is met[.] * * * The applicant appears to argue that the removal of significant trees is warranted based on the economical use variance criteria in SRC 808.045(d)(2). However, the applicant did not submit a Tree Regulation Variance application with the proposed development request, and did not address each of the applicable approval criteria, therefore, the City cannot apply the Economical Use Variance

In several subassignments of error under its second assignment of error, Costco challenges the city's findings that a tree removal permit was not required. Because the subassignments of error contain related and overlapping arguments, we address them together.[10]

Costco first argues that the only evidence in the record supports a conclusion that removal of the trees is necessary in order to construct the store. We reject that argument. The city cites evidence in the record, including the "NW Option," one of the alternative concept plans provided by Costco, in support of the city's conclusion that removal of the trees is not "necessary." Record 2137.

> approval criteria or grant a Tree Regulation Variance for this application.
>
> "Further, the applicant, based on its own alternative site plans, has shown that a variety of other configurations are available based on the applicant's desired square footage. In addition, the applicant has not identified any evidence in the record that demonstrates that less commercial space than the maximum permitted for the site is not economically viable." Record 21-22.

[10] The city moves for LUBA to take official notice of materials included in Appendix 1 to the city's Response Brief. Appendix 1 includes copies of Ordinances 13-2000, 36-05, and staff reports for those ordinances. PacTrust objects to the motion in part, and argues that Oregon Evidence Code 202(7) does not allow LUBA to take official notice of local legislative history such as the staff reports. We agree. *Byrnes v. City of Hillsboro*, 104 Or App 95, 98-99, 798 P2d 1119 (1990) ("[N]othing in the [Oregon Evidence] code allows judicial notice to be taken of local legislative history.").

The motion is granted in part, and we take official notice only of the ordinances included in Appendix 1.

The NW Option preserves entry into the store from both Kuebler Blvd. and 27th Avenue S.E. and allows construction of the commercial square footage desired by Costco. The evidence in the record does not compel the city to conclude that removal of the trees is "necessary."[11]

Costco next argues that the city's findings are inadequate to address Costco's argument that removal of the trees is necessary in order to provide safe and efficient parking and traffic circulation for the store, and that paving a surface area sufficient to provide the required parking for the size of the proposed store would eventually kill the trees anyway. However, we agree with the city that the city council's findings at Record 21, quoted at n 7-9, are adequate to explain the city council's decision that removal of the trees is not "necessary" to provide for adequate parking and circulation both on-site and off-site. Some of the conceptual plans provided demonstrate that the store can still be accessed from 27th Avenue S.E., which provides the required circulation to and from 27th Avenue S.E., while preserving the disputed trees.

Citing *Bemis v. City of Ashland*, 48 Or LUBA 42, 57 (2004), *aff'd*, 197 Or App 124, 107 P3d 83 (2005), Costco also argues that the city "change[d its]

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[11] LUBA's standard of review of a limited land use decision is set out at ORS 197.828. ORS 197.828(2)(a) provides that LUBA shall reverse or remand a limited land use decision if "[t]he decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision[.]"

interpretation of necessity without giving [Costco] an opportunity to address the reinterpretation[.]" Costco's Petition for Review 14-15. According to Costco, the city's planning staff proposed an interpretation of the word "necessary" during the proceeding that differed from the interpretation adopted by the city council. The city responds, and we agree, that the city council was entitled to interpret the word "necessary" as used in SRC 808.030 in a way that differs from the interpretation proposed by planning staff. Such an interpretation is not a "reinterpretation," and neither is it "the product of a design to act arbitrarily or inconsistently from case to case." *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873, *rev den*, 319 Or 150 (1994). Rather, it is within the purview of the city council's function to interpret the city's code in the first instance.[12]

Next, Costco argues that the city's conclusion—that removal of the trees is not "necessary"—is an impermissible collateral attack on the 2007 Decision. That is so, according to Costco, because during the proceedings that led to the 2007 Decision, PacTrust provided a conceptual diagram showing the shopping center layout if the comprehensive plan amendment and zone change were approved, that is almost exactly identical to the proposed site plan. Costco argues

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[12] Costco does not argue that the city failed to adopt a reviewable interpretation of SRC 808.030(a)(2)(L). Costco's Petition for Review 18-19. However, no party directs us to an express interpretation of that provision that the city council adopted in its findings.

that the city council failed to require the preservation of any white oak trees in the 2007 Decision and accordingly, may not require it now in this site plan review proceeding.

The city responds, and we agree, that the 2007 Decision considered different criteria and was not required to consider SRC 808.030(a)(2)(L), which applies only to site plan review, or any other site plan review criteria. The city's decision applying SRC 808.030(a)(2)(L) in this decision is not a collateral attack on the 2007 Decision.

Finally, Costco argues that the city's findings are inadequate and fail to address Costco's argument that the $3.75 million in off-site transportation improvements PacTrust has already spent entitle PacTrust to city approval of the shopping center. This argument is similar to PacTrust's second assignment of error. For the same reasons that we sustained PacTrust's second assignment of error, we agree with Costco that remand is required in order for the city to address Costco's argument that it is entitled to city approval of the shopping center.

Costco's second assignment of error is sustained, in part.

CROSS PETITION FOR REVIEW

In their cross petition for review, intervenors-respondents (intervenors) present a contingent cross-assignment of error. Intervenors' cross-assignment of error argues that the city council should have denied the application on the

additional basis that it fails to satisfy SRC 220.005(f)(3).[13] According to intervenors, the Traffic Impact Analysis (TIA) submitted by PacTrust is flawed, and the traffic impacts from the proposed shopping center cannot satisfy SRC 220.005(f)(3).

The city council did not apply SRC 220.005(f)(3) in the challenged decision, and LUBA does not have the authority to address the application's compliance with that SRC criterion in the first instance. On remand, the city may choose to address intervenors' arguments presented in the cross petition for review.

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[13] SRC 220.005(f)(3) provides:

> "Class 3 site plan review. An application for Class 3 site plan review shall be granted if:
>
> "(A) The application meets all applicable standards of the UDC;
>
> "(B) The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately;
>
> "(C) Parking areas and driveways are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians; and
>
> "(D) The proposed development will be adequately served with City water, sewer, stormwater facilities, and other utilities appropriate to the nature of the development."

We do not reach the cross-assignment of error.

DISPOSITION

Generally, only one valid basis is required for denial of an application, and where LUBA has affirmed one basis for denial, any error committed with respect to alternative or independent bases for denial would not provide a basis for reversal or remand. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004). While we conclude above that the city's denial of the application on the basis that it did not meet SRC 808.030(a)(2)(L) was a valid basis for denial if that issue was properly reached by the city, we also conclude that the city failed to address a threshold argument from PacTrust that it possesses a vested right to approval of the site plan based on expenditures on off-site transportation improvements and dedicated land. It is possible that, if PacTrust is correct, a point about which we express no opinion, the city may not be able to apply site review criteria that would prohibit approval of the application. Remand of the decision is required for the city to address that argument in the first instance. In addition, one of the two bases for the city council's denial of the application was its conclusion that the 2007 Decision prohibits a Costco store. For the reasons explained in our resolution of PacTrust's first assignment of error, that conclusion improperly construed the 2007 Decision, and is not a valid basis for denial of the application.

For the reasons explained above, the city's decision is remanded.