

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

RONALD L. MAREK and GEORGE B. HEILIG,  
*Petitioners,*

vs.

CITY OF CORVALLIS,  
*Respondent,*

and

OREGON STATE UNIVERSITY,  
*Intervenor-Respondent.*

LUBA Nos. 2019-108/109

FINAL OPINION  
AND ORDER

Appeal from City of Corvallis.

George B. Heilig and Ronald L. Marek, Corvallis, filed the petition for review and a reply brief and argued on their own behalf.

No appearance by City of Corvallis.

Steven P. Hultberg, Bend, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Zoe Lynn Powers and Radler, White, Parks & Alexander, LLP.

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

AFFIRMED

02/07/2020

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

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**NATURE OF THE DECISION**

In LUBA No. 2019-108, petitioners appeal a major modification to the approved planned development for the Oregon State University (OSU) campus. In LUBA No. 2019-109, petitioners appeal a city decision approving an amendment to the Corvallis Land Development Code section that regulates development on the OSU campus.

**MOTION TO INTERVENE**

Oregon State University (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion and it is allowed.

**MOTIONS TO STRIKE**

Intervenor moves to strike two items. First, intervenor moves to strike Appendix 69 attached to the petition for review because the appendix includes materials that are not part of the record of this appeal. LUBA’s review of a land use decision is confined to the record. ORS 197.835(2).

Petitioners concede that Appendix 69 is not part of the record, and describe Appendix 69 as “newspaper research.” Reply Brief 4. In their reply brief, petitioners ask LUBA to take official notice of Appendix 69. Under Oregon Evidence Code (OEC) 202(7) LUBA may take official notice of “[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this

1 state[.]” Petitioners have not demonstrated that Appendix 69 is any of those  
2 things. Intervenor’s motion to strike Appendix 69 is granted.

3 After petitioners filed their reply brief, intervenor moved to strike several  
4 sections of petitioners’ reply brief because the reply brief advances several new  
5 bases for reversal or remand. OAR 661-010-0039 provides in relevant part:

6 “A reply brief shall be confined to responses to arguments in the  
7 respondent’s brief, state agency brief, or amicus brief, but shall not  
8 include new assignments of error or advance new bases for reversal  
9 or remand.”

10 In their reply to intervenor’s response to the fourth assignment of error,  
11 petitioners “advance new bases for reversal or remand,” including (1) a new  
12 challenge to the adequacy of the city council’s findings, (2) a new assignment of  
13 error that argues that the city council improperly construed Corvallis Land  
14 Development Code (LDC) 1.2.80.01, which we set out and discuss later in this  
15 opinion, and (3) a new challenge to the evidentiary support for the city’s findings  
16 regarding LDC 1.2.80.01, none of which are included in the petition for review.  
17 OAR 661-010-0039 does not allow petitioners to include new assignments of  
18 error or advance new bases for reversal or remand. Accordingly, intervenor’s  
19 motion to strike those portions of the reply brief is granted, and the Board will  
20 not consider the reply brief beginning on page 2 line 8 and continuing through  
21 page 4 line 3.

1   **FACTS**

2           The LDC includes Chapter 3.36, which is titled “Oregon State University  
3   Zone.” LDC Chapter 3.36 regulates development of the OSU campus by  
4   implementing the provisions of the 2004-2015 Oregon State University Campus  
5   Master Plan, which was adopted by OSU in 2004 but is not a part of the LDC or  
6   the Corvallis Comprehensive Plan (CCP). LDC 3.36.10 describes the Campus  
7   Master Plan as “the blueprint for campus development over the next decade  
8   [2004-2015].”

9           LDC 3.36 divides the OSU campus into nine “sectors” identified as “A”  
10   through “J” (with no sector “I”), and allocates maximum building square footage  
11   and minimum open space to each sector. LDC 3.36.50. A major adjustment is  
12   required if OSU desires to develop more building square footage than the  
13   maximum allocated to a particular sector, or proposes development that results  
14   in a failure to satisfy the minimum open space allocation for a sector. LDC  
15   3.36.40.04(e) and (f). The city reviews an application for a major adjustment  
16   under the provisions of the LDC that apply to major modifications to a planned  
17   development. LDC 3.36..40.02(b)(1) and (2); LDC 2.5.60.03. A reallocation  
18   request also requires a text amendment to LDC 3.36.50.01(f), Table 3.36-2,

1 which allocates building square footage by sector, and LDC 3.36.50.02(c), Table  
2 3.36-3, which allocates minimum open space percentages for each sector.<sup>1</sup>

3 In 2019, OSU applied to (1) transfer 95,000 building square feet from  
4 Sector B to Sector D, with the goal of eventually developing 120,000 square feet  
5 of student housing in Sector D, and (2) transfer 10,000 square feet of open space  
6 from Sector D to Sector C. The planning commission held a hearing on the  
7 applications, and voted to recommend approval of the applications to the city  
8 council.

9 On July 1, 2019, the city council held a hearing on the applications and at  
10 the conclusion of the hearing, held the record open through July 5, 2019 for  
11 submittal of new evidence, through July 15, 2019 for rebuttal of new evidence  
12 submitted during the first open record period, and through July 22, 2019 for  
13 OSU's final argument. After OSU submitted its final argument, on July 29, 2019  
14 city staff provided a new staff report to the city council that responded to  
15 questions from city councilors that apparently arose during the July 1, 2019  
16 hearing. Record 137-48.

17 At its August 5, 2019 meeting, the city council tentatively voted to deny  
18 the applications. Planning staff subsequently prepared draft findings in support

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<sup>1</sup> Prior to the applications, Sector D was allocated a total of 431,506 square feet of building and required 61 percent minimum future open space. LDC 3.36.50.01 Table 3.36-2 and LDC 3.36.50.02 Table 3.36-3.

1 of the denial and those draft findings are included in the record at Record 113-  
2 31.

3 On August 19, 2019, the city council voted to reconsider its August 5  
4 tentative decision to deny the applications and voted to approve the applications.  
5 Record 7. At its meeting on September 16, 2019, the city council voted to adopt  
6 findings approving the applications, and on October 7, 2019, issued its written  
7 decisions approving the applications. *Id.* These appeals followed.

### 8 **FIRST ASSIGNMENT OF ERROR**

9 In their first assignment of error, petitioners argue that the city “exceeded  
10 its jurisdiction” in approving the applications because, according to petitioners,  
11 the public notices of the planning commission and city council hearings were  
12 deficient. Petition for Review 9 (citing ORS 197.835(9)(a)(A) and arguing that  
13 the notices were “inadequate, incomplete, and fatally defective”). Petitioners’  
14 main complaint is that the city’s notices fail to include a statement that housing  
15 could be developed on the OSU campus if the applications were approved. In  
16 another portion of their assignment of error, petitioners argue that the notices did  
17 not list six policies from the CCP that petitioners argue are applicable approval  
18 criteria, and that the failure to include those CCP policies in the notices  
19 “substantially prejudiced the rights of at least the adjacent neighborhood.”  
20 Petition for Review 14. We understand petitioners to argue that the city  
21 committed a procedural error in providing notices that failed to include those

1 CCP policies.<sup>2</sup> Finally, in this assignment of error, petitioners argue that the city’s  
2 failure to follow required notice procedures violated the due process clause of the  
3 14th Amendment of the U.S. Constitution, and the “due course of law” provisions  
4 of the Oregon Constitution. Petition for Review 16.

5 Intervenor responds, and we agree, that petitioners have not established  
6 that the city council exceeded its jurisdiction in approving the applications. ORS  
7 197.835(9)(a)(A) provides that LUBA shall reverse or remand a land use decision  
8 if LUBA finds that the local government “exceeded its jurisdiction.” We have  
9 held that a local government exceeded its jurisdiction where a local code  
10 provision unambiguously prohibited the local government from accepting an  
11 application, and the local government accepted the application and proceeded to  
12 make a decision on the application. *Hood River Valley Residents’ Committee v.*  
13 *Hood River County*, 77 Or LUBA 1, 5 (2018). We have also held that where an  
14 application becomes void on the 181st day because the applicant failed to take  
15 one of the steps enumerated in ORS 227.178(4)(a) through (c), a city exceeds its  
16 jurisdiction in approving a void application. *Painter v. City of Redmond*, 56 Or  
17 LUBA 311, 314-15 (2008); *see also Boora Architects v. Tillamook County*, 76  
18 Or LUBA 330, 344-45 (2017), *aff’d*, 291 Or App 537, 422 P3d 412 (2018) (the  
19 county exceeded its jurisdiction in approving a void application). Petitioners have

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<sup>2</sup> Petitioners cite LDC 2.0.50.04(b)(7), which requires the notice of a hearing on a quasi-judicial application to include “[a] list of Code and Comprehensive Plan criteria that apply to the decision[.]”



1 not explained why, even if we accept petitioners' premise that the notices of  
2 hearing were defective, a defective notice divests the city council of jurisdiction  
3 over the applications.

4 Moreover, we agree with intervenor that petitioners have not established  
5 that the notices were in fact defective. The notices identified 18 CCP policies that  
6 applied to the applications. Record 252, 254. In general, a local government's  
7 failure to list some of the applicable approval criteria in its notice does not  
8 provide a basis for reversal or remand of the decision, but may allow a party to  
9 raise issues - related to missing approval criteria - that were not raised prior to  
10 the conclusion of the initial evidentiary hearing. ORS 197.835(4). Moreover,  
11 petitioners have not established that the six additional CCP policies cited in the  
12 petition for review applied to the applications, or that any alleged defect in the  
13 notices prejudiced *petitioners'* substantial rights. ORS 197.835(9)(a)(B); *Fraleley*  
14 *v. Deschutes County*, 32 Or LUBA 27, 38, *aff'd*, 145 Or App 484, 930 P2d 902  
15 (1996), *rev den*, 325 Or 45 (1997) (petitioners cannot allege procedural error on  
16 behalf of others). Petitioners participated in the proceedings before the planning  
17 commission and the city council, and argued that six additional CCP policies  
18 applied to the applications. Record 11, 12, 13, 46, 48.

19 Finally, petitioners' arguments under the U.S. Constitution and the Oregon  
20 Constitution are insufficiently developed for our review. *Deschutes Development*  
21 *Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982) ("It is not our function to

1 supply petitioner with legal theories or to make petitioner’s case for petitioner.”)  
2 Accordingly, those arguments provide no basis for reversal or remand.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 LDC 3.36.40.05 provides that the Campus Master Plan “covers a 10- to  
6 12- year planning period.” LDC 3.36.40.05(d) provides that an update to the  
7 Campus Master Plan “will be required under the following conditions: \* \* \* d.  
8 the [Campus Master Plan] planning period has expired.” In their second  
9 assignment of error, petitioners argue that the Campus Master Plan has expired  
10 and accordingly, the city council improperly construed LDC 3.36.40.05 in failing  
11 to require an update to the Campus Master Plan.

12 Intervenor responds that petitioners failed to raise the issue raised in the  
13 second assignment of error prior to the close of the initial evidentiary hearing,  
14 and accordingly may not raise the issue for the first time at LUBA. ORS  
15 197.763(1); ORS 197.835(3). ORS 197.763(1) provides:

16 “An issue which may be the basis for an appeal to the Land Use  
17 Board of Appeals shall be raised not later than the close of the record  
18 at or following the final evidentiary hearing on the proposal before  
19 the local government. Such issues shall be raised and accompanied  
20 by statements or evidence sufficient to afford the governing body,  
21 planning commission, hearings body or hearings officer, and the  
22 parties an adequate opportunity to respond to each issue.”

23 In their petition for review section entitled “Preservation of Error,” petitioners  
24 state that “[t]he text of the CMP preserves the error.” Petition for Review 17. In

1 their reply brief, in response to intervenor’s argument, petitioners respond that  
2 the issue raised in the second assignment of error was raised by the city council  
3 during its deliberations, and by planning staff, citing Record 140; Reply Brief 1.

4 Intervenor responds first that a member of a decision-making body is not  
5 a participant in a local proceeding and accordingly, an issue raised by a member  
6 of a decision-making body is not raised by a participant. We agree. *Fleming v.*  
7 *City of Albany*, 54 Or LUBA 168, 173 (2007). Intervenor also responds that even  
8 if a city councilor could be a participant, the issue was not raised by the city  
9 councilor in compliance with the deadline in ORS 197.763(1) “not later than the  
10 close of the record at or following the final evidentiary hearing on the proposal  
11 before the local government.” We agree with intervenor.

12 Finally, while planning staff may be participants in a land use proceeding,  
13 the requirements of ORS 197.763(1) apply to planning staff as participants as  
14 equally as to members of the public. *Olstedt v. Clatsop County*, 62 Or LUBA  
15 131, 140 (2010) (“local government planning staff are considered ‘participants’  
16 in an ORS 197.763 hearing and, at least in some circumstances, can raise issues  
17 *for purposes of ORS 197.763(1)*”) (emphasis added)). Record 138-47 are the  
18 “Staff Response to City Council Questions” that were provided to the city council  
19 on July 29, 2019, after the record had closed, and a week after intervenor  
20 submitted its final written argument, on July 22, 2019. Any issue that was raised  
21 in the staff response was not raised prior to the close of the record before the city  
22 council. We agree with intervenor that the issue raised in the second assignment

1 of error was not raised prior to the close of the record, and may not be raised for  
2 the first time at LUBA. ORS 197.763(1); ORS 197.835(3).

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 In their third assignment of error, petitioners argue that there is not  
6 substantial evidence in the record to support the city’s conclusion that the  
7 proposal is compatible with respect to off-site parking impacts. ORS  
8 197.835(9)(a)(C). Although petitioners do not cite it, one of the applicable  
9 approval criteria requires an applicant to demonstrate compatibility of the  
10 proposal with respect to “[t]raffic and off-site parking impacts[.]” LDC  
11 2.5.40.04(a)(10).

12 Intervenor responds that petitioners failed to raise the issue raised in their  
13 third assignment of error in their appeal statement, and accordingly failed to  
14 exhaust that issue, as required by ORS 197.825(2)(a), as construed in *Miles v.*  
15 *City of Florence*, 190 Or App 500, 507, 79 P3d 382 (2003). On the merits,  
16 intervenor responds that the city council adopted findings that conclude that no  
17 specific development is proposed, and that when development is proposed in  
18 Sector D, the applicant will be required to comply with all applicable off-site  
19 parking standards. The city council also relied on a Transportation Impact Study  
20 (TIS), which addressed off-site parking impacts. Record 22, 23, 1205.

21 ORS 197.825(2)(a) provides that “[t]he jurisdiction of the board [i]s  
22 limited to those cases which the petitioner has exhausted all remedies available

1 by right before petitioning the board for review[.]” In *Miles*, the Court of Appeals  
2 held that “exhaustion principles traditionally require not only that an avenue of  
3 review be pursued, but also that the particular claims that form the basis for a  
4 challenge [at LUBA] be presented to the administrative or local government body  
5 whose review must be exhausted.” 190 Or App at 506. The court explained that

6 “a party does not exhaust his or her remedies ‘simply by stepping  
7 through the motions of the administrative process without affording  
8 the [administrative or local government body] an opportunity to rule  
9 on the substance of the dispute.” *Id.* (quoting *Mullenaux v. Dept. of*  
10 *Revenue*, 293 Or 536, 541, 651 P2d 724 (1982)).

11 Petitioners have not responded to intervenor’s *Miles* waiver/exhaustion  
12 argument.<sup>3</sup> Accordingly, we agree with intervenor that petitioners are precluded  
13 from raising the issue raised in the third assignment of error before LUBA.

14 Further, even if the *Miles* exhaustion/waiver doctrine did not preclude  
15 petitioners from raising the issue, petitioners do not address the TIS or attempt to  
16 explain why the TIS is not substantial evidence to support the city council’s  
17 finding that the proposal is compatible with respect to off-site parking impacts.  
18 Absent any developed argument regarding the city council’s findings or the TIS,  
19 we agree with intervenor that it was reasonable for the city council to rely on it  
20 to conclude that the proposal is compatible with respect to off-site parking

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<sup>3</sup> We have reviewed petitioner Marek’s appeal statement at Record 958-59, and we agree with intervenor that no issue regarding compatibility with respect to off-site parking impacts is raised.

1 impacts. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993);  
2 *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Petitioners’ fourth assignment of error is difficult to understand, in part  
6 because petitioners do not state a cognizable standard of review that we should  
7 apply to this assignment of error.<sup>4</sup> Petitioners argue that in the challenged  
8 decision, the city council failed to address the reasons why the original oral vote  
9 and decision on August 5, 2019 was “not correct.” Petition for Review 22.

10 The standard of review for a decision to amend a land use regulation is set  
11 out at ORS 197.835(7). In addition, ORS 197.835(9) authorizes LUBA to reverse  
12 or remand a decision in certain circumstances. Petitioners’ fourth assignment of  
13 error does not identify any basis under ORS 197.835(7) or (9) for LUBA to  
14 reverse or remand the decision.

15 The fourth assignment of error is denied.

16 **FIFTH, SEVENTH, AND EIGHTH ASSIGNMENTS OF ERROR**

17 LDC 1.2.80.01 is a background statement to the LDC section that governs  
18 text amendments to the LDC, and provides:

19 “This Code may be amended whenever the public necessity,

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<sup>4</sup> Petitioners cite ORS 197.829(1), which requires LUBA to affirm a local government’s interpretation of its comprehensive plan or land use regulation unless certain circumstances apply.

1 convenience, and general welfare require such amendment and  
2 where it conforms with the [CCP] and any other applicable  
3 policies.”

4 In these assignments of error, we understand petitioners to argue that the city’s  
5 conclusion that intervenor has demonstrated a public necessity to reallocate  
6 building square footage to Sector D to facilitate development of student housing  
7 under LDC 1.2.80.01 is not supported by substantial evidence in the record. ORS  
8 197.835(9)(a)(C).

9 In their fifth assignment of error, petitioners cite testimony in the record  
10 that developing graduate student housing in Sector D “is not affordable.” Petition  
11 for Review 23. In their seventh assignment of error, petitioners argue that there  
12 is evidence in the record that other locations on the OSU campus are better suited  
13 for development of graduate student housing, and that the city council failed to  
14 evaluate those other locations in determining that the public necessity required  
15 allocating more square footage to Sector D. In the eighth assignment of error,  
16 petitioners allege that the city council’s decision is not based on substantial  
17 evidence in the record where the decision relied on the 2019 Brailsford and  
18 Dunlavey Summary (Housing Summary) of a 2017 student housing report  
19 (Housing Report) to conclude that the public necessity standard in LDC  
20 1.20.80.01 was met. Petitioners argue that the data relied on to generate the  
21 Housing Study is outdated, and that the Housing Report “is not supported by  
22 substantial evidence in the whole record.” Petition for Review 27.

23 The city council found:

1            “[T]he applicant has demonstrated that there is an identified need  
2            for additional student housing on campus. The amendments, which  
3            provide for additional building allocation in Sector D meet this need  
4            and address the public necessity element.” Record 15.

5            Intervenor points to evidence in the record that supports the city council’s  
6            conclusion that a public necessity exists to reallocate square footage to Sector D  
7            in order to facilitate the future development of student housing. That evidence  
8            includes the Housing Summary at Record 327, the Housing Report at Record  
9            1181-86, as well as an Urbanization Study that the city has adopted as part of the  
10           CCP that recognized a need for additional student housing.<sup>5</sup>

11           Intervenor also responds to petitioner’s argument by pointing out that it is  
12           *the city’s decision* that must be supported by substantial evidence in the whole  
13           record, and argues that petitioners’ argument that the Housing Study “is not  
14           supported by substantial evidence in the whole record” provides no basis for  
15           reversal or remand. Finally, intervenor responds that petitioners point to no LDC  
16           or any other applicable approval criterion that requires the city to evaluate  
17           whether other areas on the OSU campus might be available for housing.

18           We agree with intervenor on all points. First, petitioners have not explained  
19           why any applicable approval criteria require the city to evaluate alternative sites  
20           on the OSU campus for student housing. Second, petitioners’ argument that the

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<sup>5</sup> Intervenor attaches portions of the Urbanization Study to its brief and requests that we take official notice of it. Response Brief 29 n 4. Petitioners do not object to intervenor’s request. Accordingly, we take official notice of the portions of the Urbanization Study attached to the response brief. OEC 202(7).



1 record includes testimony that graduate student housing is not affordable does  
2 not overcome the voluminous evidence that the city council relied on to conclude  
3 that there is a need for student housing. Record 327, 1181-86. We agree with  
4 intervenor that a reasonable person would rely on that evidence to conclude that  
5 there is a public necessity to reallocate square footage to Sector D to facilitate  
6 eventual development of student housing. *Dodd*, 317 Or 172; *Younger*, 305 Or  
7 346.

8 The fifth, seventh and eighth assignments of error are denied.

9 **SIXTH ASSIGNMENT OF ERROR**

10 Petitioners' sixth assignment of error is related to, but differs from, their  
11 third assignment of error. In their sixth assignment of error, petitioners argue that  
12 the city council failed to adopt findings that the proposal complies with  
13 unspecified parking standards that petitioners argue apply to development of the  
14 OSU campus. Intervenor responds, and we agree, that petitioners have failed to  
15 cite to or establish that the applications required the city to apply any parking  
16 standards to the proposed LDC text amendment and major modification  
17 applications.

18 In another portion of the sixth assignment of error, we understand  
19 petitioners to argue that the city should have applied LDC provisions that regulate  
20 and restrict development of Highly Protected Significant Vegetation (HPSV).  
21 Petitioners do not identify the applicable approval criteria that the city failed to  
22 apply, or otherwise explain why any approval criteria that regulate development

1 of property that includes a HPSV area apply to the proposals. Absent any  
2 developed argument, petitioners' argument provides no basis for reversal or  
3 remand of the decision. *Deschutes Development Co.*, 5 Or LUBA at 220.

4 The sixth assignment of error is denied.

5 **NINTH ASSIGNMENT OF ERROR**

6 Petitioners' ninth assignment of error is exceedingly difficult to follow.  
7 Petitioners cite, again, the operative language from LDC 1.2.80.01, which is  
8 quoted above. Petition for Review 31. Petitioners then argue that findings 9 and  
9 10 that the city adopted are inadequate to explain why the current allocation of  
10 building square footage to all sectors is not sufficient to facilitate the development  
11 of student housing. Petition for Review 32. Finally, we understand petitioners to  
12 argue that there is no evidence in the record to support a conclusion that the  
13 conditions of approval that the city imposed to mitigate impacts to transportation  
14 facilities from reallocating square footage to Sector D to facilitate future  
15 development of student housing will actually mitigate the effects.

16 Intervenor responds that petitioners did not raise the issue raised in the  
17 ninth assignment of error before the close of the record, and further did not raise  
18 the issue in their appeal statement, and accordingly, they are precluded under  
19 *Miles* from raising the issue at LUBA. Petitioners' statement of preservation  
20 regarding the issue raised in the ninth assignment of error is: "As set forth in  
21 Second Assignment of Error." Petition for Review 31. As we explain above, the  
22 statement of preservation included in the second assignment of error above is that

1 “[t]he text of the [Campus Master Plan] preserves the error.” Petition for Review  
2 17. That incorporated statement is insufficient to demonstrate where the issue  
3 raised in the ninth assignment of error was raised below prior to the close of the  
4 record. Petitioners have not otherwise responded to intervenor’s waiver  
5 arguments. Accordingly, we agree with intervenor that the issue was not raised  
6 before the close of the record and petitioners may not raise it for the first time at  
7 LUBA. ORS 197.763(1); ORS 197.835(3).<sup>6</sup>

8 The ninth assignment of error is denied.

9 **TENTH ASSIGNMENT OF ERROR**

10 The city’s application form includes a section entitled “Natural Features,”  
11 which in turn includes several categories under the separate headings “Natural  
12 Hazards Overlay” and “Natural Resources Overlay.” On the application  
13 submitted by intervenor the category “Significant Vegetation” is checked.  
14 Record 734. Some portion of Sector D includes “Non-Locally Protected  
15 Wetlands.” Record 12. Neither of the categories “Wetlands – Locally Protected”  
16 or “Wetlands – Non Locally Protected” are checked. Record 734.

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<sup>6</sup> We have reviewed petitioner Marek’s appeal statement at Record 958-59, and we agree with intervenor that no issue regarding transportation impacts was raised in the appeal statement. Accordingly, we also agree with intervenor that the issue was not raised in petitioners’ appeal statement, and under the *Miles* exhaustion/waiver doctrine, it is outside of LUBA’s scope of review. ORS 197.825(2)(a).

1           In their tenth assignment of error, we understand petitioners to argue that  
2 (1) the city committed a procedural error in accepting the applications because  
3 the applications failed to identify that Sector D includes Non-Locally Protected  
4 Wetlands, and (2) the city improperly construed CCP Policy 4.11.14 in failing to  
5 require intervenor to submit a wetland delineation with the application.<sup>7</sup> Petition  
6 for Review 32.

7           Intervenor responds that petitioners have not established that the city  
8 committed a procedural error in failing to require a wetland delineation with the  
9 application, and in addition petitioners have failed to establish that any procedural  
10 error that the city may have committed prejudiced their substantial rights. We  
11 agree. ORS 197.835(9)(a)(B) (LUBA may remand for procedural error that  
12 prejudices the substantial rights of the petitioner).

13           Moreover, the city council adopted extensive findings that responded to  
14 the issue after petitioners raised it below. Record 12-13. Those findings conclude

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<sup>7</sup> CCP Policy 4.11.14 provides:

“To resolve wetland issues as early as possible in the development application process on land with hydric soils, land with wetland vegetation, and/or land identified on a State or national wetland inventory, the City shall require a developer to submit, at the time of application, a wetland determination or delineation from a qualified consultant. This professional analysis shall be submitted concurrently to the City and to the Division of State Lands. The City shall request comment from the Division of State Lands on land development applications requiring a public hearing.”

1 that CCP 4.11.14 is not an approval criterion that applies to the applications, and  
2 that CCP 4.11.14 is implemented in LDC 4.13.80.02. The findings explain that  
3 when development is proposed in Sector D, the applicant will be required to  
4 notify regulatory authorities with jurisdiction over wetlands, and conclude that  
5 there is evidence in the record that intervenor has already notified state and  
6 federal permitting authorities as required by LDC 4.13.80.02. *Id.* Petitioners do  
7 not acknowledge or otherwise challenge these findings, or challenge the city  
8 council's interpretation of CCP 4.11.14 as inapplicable to the applications.  
9 Absent any challenge to the findings or that interpretation, petitioners' arguments  
10 do not provide a basis for reversal or remand.

11 The tenth assignment of error is denied.

12 The city's decision is affirmed.