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

CARL KOPACEK,
Petitioner,

vs.

CITY OF GARIBALDI,
Respondent,

and

COASTAL HOUSING SOLUTIONS, LLC,
Intervenor-Respondent.

LUBA No. 2020-094

FINAL OPINION
AND ORDER

Appeal from City of Garibaldi.

Tyler D. Smith filed the petition for review and argued on behalf of petitioner. Also on the brief was Tyler Smith & Associates, P.C.

No appearance by City of Garibaldi.

Jennie Bricker filed the response brief and argued on behalf of intervenor-respondent. Also on the brief were Sarah Stauffer Curtiss, Max Yoklic, Land Shore Water Legal Services, LLC, and Stoel Rives, LLP.

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

REMANDED 02/11/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a city council approval of a conditional use permit for a multi-family residential development.

MOTION TO INTERVENE

Coastal Housing Solutions, LLC (intervenor), moves to intervene on the side of the city. The motion is unopposed and is granted.

FACTS

The subject property is 3.62 acres in size, slopes to the north, and is developed with a single-family home, accessory building, manufactured home, and billboard. It is zoned Medium Density Residential (R-1) and Commercial (C-1), with the Hillside overlay zone applied to the sloped portion.

On January 29, 2020, intervenor applied for a conditional use permit (CUP) to develop a multi-family residential complex on the subject property. As proposed, the complex is anchored by 66 apartment units in six separate buildings and has five parking areas with 95 spaces, four trash enclosures, open space, and an enclosed recreation area. On May 13, 2020, the planning commission held a public hearing on the CUP. The record was left open and the hearing was continued to June 10, 2020. At the conclusion of the hearing on June 10, 2020, the planning commission voted to deny the application. On June 26, 2020, intervenor appealed the planning commission's decision to the city council. On July 21, 2020, the city council held a public hearing on the appeal.

After closing the July 21, 2020 public hearing, Mayor Riggs asked for a vote on whether to remand the decision to the planning commission. Garibaldi Municipal Code (GMC) 18.210.050(C) provides, in part, that "[a] member who represents personal interest at a hearing may do so only by abstaining from voting on the proposal" and "[a] member absent during the presentation of evidence in a hearing may not participate in the deliberations or final decision regarding the matter of the hearing unless the member has reviewed the evidence received." Intervenor was represented by a member of the city council, Councilor Daniels, before both the planning commission and city council, and Councilor Daniels recused himself from the vote because his role as intervenor's representative created a conflict of interest. Additionally, Councilor Cavitt abstained from voting because, although she was present at the July 21, 2020 hearing, she had only recently become a council member and had not reviewed the record prior to the vote. The vote on the motion to remand the decision to the planning commission was two in favor (Riggs and Elmore), one opposed (Hall), and two abstaining (Cavitt and Daniels).[1]

Subsequent to the July 21, 2020 hearing, Councilor Daniels was recalled and replaced on the city council by Councilor Forsman. At an August 24, 2020 special city council meeting, Mayor Riggs announced that Councilor Cavitt was

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[1] The record is unclear as to what action the planning commission would be expected to take on remand.

required to vote at the July hearing because GMC 2.05.070(D) only allows a council member to abstain due to declared conflicts of interest.[2] Following some discussion among the city council, Councilor Forsman made a motion, which was seconded, to approve the CUP. The CUP was approved by a three-to-two vote with Mayor Riggs and Councilors Elmore and Forsman voting to approve and Councilors Cavitt and Hall voting to deny the CUP.

This appeal followed.

FOURTH ASSIGNMENT OF ERROR

Petitioner asserts three subassignments of error related to the city council's decision to vote on the application at its August 24, 2020 special meeting rather than rely on the result of the vote at its July 21, 2020 meeting. ORS 197.835(9)(a)(B) provides that LUBA "shall reverse or remand the land use decision under review if the board finds" that "[t]he local government or special district" "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." Petitioner argues that Councilor Cavitt was required to abstain from the July vote and that the GMC does not allow for a revote under the facts of this case. Petitioner also argues that

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[2] GMC 2.05.070(D) provides:

> "Voting Required. When a questioned is called, every present member of council shall vote either yes or no, except for declared conflicts of interest under applicable law. If any member declines to vote, and the result of such action would create a tie, that member's vote shall be counted as a no."

the city has adopted Roberts Rules of Order into its code and that, under those rules, any objection to Councilor Cavitt's decision to abstain from voting at the July meeting had to be made at the July meeting. According to petitioner, any action by the city council to conduct a second vote on whether to remand the CUP decision to the planning commission had to occur at the same meeting as the initial vote. Alternatively, petitioner argues that Councilor Forsman should not have participated in the August 24, 2020 vote. Petitioner maintains that they suffered prejudice to their substantial rights because, rather than remanding the planning commission's decision consistent with the July vote, the city council's August vote approved the CUP. The three subassignments of error are denied.

With respect to the first subassignment of error, petitioner argues:

> "A remand to the Planning Commission, is [a] substantively different result for Petitioner Kopace[]k than an approval by the City Council, and thus substantively affects Petitioner's rights. Therefore, pursuant to ORS 197.835(9)(a)(B), LUBA must reverse and remand the decision of the Garibaldi City Council." Petition for Review 30.

With respect to the second subassignment of error, petitioner argues:

> "Had the proper procedures been followed, the Application would have been remanded to the Planning Commission for further development of the findings. Moreover, Council Member Forsman—who replaced Council Member Daniels ([intervenor's] Representative) on the City Council—would not have improperly partaken in the new, improper vote, leading to a 2-2 tie." Petition for Review 32-33.

With respect to the third subassignment of error, petitioner argues:

> "[T]he concept of a revote would suggest that only those who partook in the original vote would be voting, requiring that Council Member Forsman abstain. Had this occurred, the vote would have been 2-2 and the Planning Commission's original decision would have stood. This impaired Petitioner's substantial rights pursuant to ORS 197.835(9)(a)(B) and merits reversal and remand." Petition for Review 33-34.

In each of the three subassignments of error, petitioner argues that their substantial rights were prejudiced and that reversal or remand is appropriate because, had the alleged procedural errors not occurred, the planning commission's decision denying the application would have stood or the matter would have been remanded to the planning commission but, in either case, intervenor's application would not have been approved. A party is not, however, entitled to a certain result.

In *Muller v. Polk County*, the petitioners argued that, because the board of commissioners did not initiate review within the time specified by the notice of appeal rights, they were entitled to the planning commission's decision. 16 Or LUBA 771, 772-73 (1988). We explained:

> "[T]he 'substantial rights' of parties in land use proceedings do not include a right to a particular result. Under [ORS 197.835(9)(a)(B)], as under OAR 661-10-005, we believe the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Id.* at 775 (citation omitted).[3]

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[3] OAR 661-010-0005 provides, in part, that our rules are intended "to promote the speediest practicable review of land use decisions * * * while affording all

There is no argument in the petition for review that petitioner was not allowed an adequate opportunity to prepare and submit their case or was denied a full and fair hearing. Petitioner has not alleged or established any prejudice to their substantial rights. Absent any showing of prejudice to their substantial rights, petitioner has not established any basis for reversal or remand.

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

ORS 227.173(3) provides:

> "Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

Petitioner's first assignment of error is that the city council failed to make adequate findings because it did not identify the facts relied upon in rendering the decision and explain the justification for the decision based on the criteria, standards, and facts. We agree with petitioner.

Although the city council's decision recites evidence and argument, it does not contain findings identifying the relevant criteria and the facts relied upon and explaining why the criteria, as applied to the facts, lead to the city council's

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interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing."

decision. The decision therefore fails to comply with ORS 227.173(3). Intervenor argues:

> "[T]he City's decision was thorough and sufficient when viewed in the context of the entire record, including the findings made by the Planning Commission and the staff report prepared for the Planning Commission, which formed the basis for the appeal to City Council." Response Brief 5-6.

The city council's decision contains a "summary of the facts and testimony found to be relevant to th[e] decision." Record 2. The first 22 pages of the city council's decision describe the property, the project, and the proceedings before the planning commission. The remainder of the city council's decision describes the proceedings before the city council. Neither the section of the city council's decision describing the planning commission proceedings nor the section describing the city council proceedings includes an analysis of all applicable criteria.

The city council's decision overturned the planning commission's denial of the CUP:

> "It is ORDERED by the Garibaldi City Council that Case File #CU-2020-01, previously denied by the Garibaldi Planning Commission, be APPROVED by overturning the Garibaldi Planning Commission decision, as a majority of the Council did not find that the application as presented failed to meet the applicable GMC and Comprehensive Plan standards * * *." Record 38.

The city council does not set forth how the planning commission's decision is to be modified or identify specific elements of the planning commission's evaluation of the criteria with which the city council disagrees. The city council's

decision states, after a list conditions of approval, "The Planning Commission adopts the findings of fact and conditions listed above and in the Planning Commission's June 10, 2020 decision." Record 40. However, as petitioner explains, the planning commission did not approve the application or adopt findings or conditions.

Intervenor argues that the city council incorporated the planning commission's decision and the staff report into its final decision. Although intervenor does not tell us that this is the case and we have not compared them word for word, the first 22 pages of the city council's final order may be a cut-and-paste of a portion of the planning commission's decision. As we explained, the city council's decision, including the summary of the planning commission proceedings, does not contain findings addressing the applicable criteria. To the extent intervenor argues that the planning commission's June 10, 2020 decision is incorporated into the city council's decision by reference, intervenor is incorrect.

In *Gonzalez v. Lane County*, we explained:

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." 24 Or LUBA 251, 259 (1992) (footnote omitted).

Nothing in the city council's decision incorporates the planning commission's June 10, 2020 decision. Similarly, the city council failed to incorporate the staff report into its final decision. The city council's decision states, "Staff believes findings can be established indicating the Conditional Use is in compliance with the Development Code criteria," but the decision does not adopt staff findings or state that any findings in the staff report have been incorporated by reference. Record 38. The summary of the planning commission proceedings contained in the first section of the city council's decision and in the planning commission's decision reflects the existence of a staff report and staff findings. For example, the summary and the planning commission's decision describe a commissioner questioning whether there was a need to amend the staff report to correct an error related to the location of the Hillside overlay zone and a staff member responding that there was no need to revise the findings because, if the project were approved, engineering reports would still be required and the city could require more information at the building permit stage. Record 10. These statements recognize the existence of the staff report and the findings contained therein but do not identify the documents as part of the city council's decision.

The final decision does not clearly indicate an intent to incorporate other documents and a reasonable person would not be able to review the city council's decision and determine that the planning commission's June 10, 2020 decision and the March 12, 2020 staff report are part of the city council's September 1, 2020 decision.

We agree with petitioner both that the city council's decision lacks the requisite findings and that the city council did not incorporate the planning commission's decision or the staff report into its final decision. Remand is required for the city to adopt a decision that sets out the applicable criteria, states the facts relied upon in rendering the decision, and "explains the justification for the decision based on the criteria, standards and facts set forth." ORS 227.173(3).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

GMC 18.110.010(D) requires that a minimum of 25 percent of the lot area in the R-1 zone be devoted to natural open space or landscaping. In the C-1 zone, a minimum of 20 percent of the lot area is required to be devoted to natural open space or landscaping for family-oriented developments, and 10 percent of the lot area is required to be devoted to natural open space or landscaping for senior citizen/adult handicapped housing. *Id.* A fenced playground is required for all family-oriented development. *Id.* Petitioner argues that, even assuming that the city's findings are adequate to constitute a reviewable decision, the CUP does not comply with GMC 18.110.010(D).

Intervenor argues that petitioner did not raise compliance with GMC 18.110.010(D) below and that the issue is waived under ORS 197.835(3), which limits LUBA's review to issues "raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." An issue must be raised with sufficient specificity to permit the parties and the

decision maker an opportunity to respond. ORS 197.763(1);[4] *Boldt v. Clackamas County*, 21 Or LUBA 40, 46-47, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991).

Petitioner replies that the issue of compliance with GMC 18.110.010(D) was raised prior to the close of the evidentiary hearing by a member of the planning commission and a city staff member responding to that commissioner's inquiries. Reply Brief 3. The discussion between the planning commissioner and the staff member that petitioner cites to establish preservation of this issue occurred during the public hearing before the planning commission as part of the staff review of the application for compliance with applicable criteria. The commissioner asked the staff member how the staff member determined that the standard was met because it appeared to the commissioner that the entire site was being developed. The staff member expressed their opinion that more than 20 percent of the lot area was devoted to landscaping and that compliance could be guaranteed through a condition of approval. Record 11.

In *Fleming v. City of Albany*, the

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[4] 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."

> "[i]ntervenor argue[d] that statements made by a city councilor after the close of the hearings d[id] not satisfy the ORS 197.835(3) requirement that issues LUBA may consider must be 'raised by any participant before the local hearings body' or the ORS 197.763(1) requirement that such issues be raised 'not later than the close of the record at or following the final evidentiary hearing.' We agree[d] with both contentions. A member of the decision-making body is not a 'participant before the local hearings body.'" 54 Or LUBA 168, 172-73 (2007).

Although the facts in this case differ from those in *Fleming* in that the planning commissioner's inquiry here occurred before the close of the final evidentiary hearing, our holding in *Fleming* that a member of the decision-making body is not a participant did not depend on the timing of the statements made by the city councilor. Further, we also held in *Fleming* that a passage in a staff report explaining why staff agreed to use in its analysis a figure requested by the intervenor did not serve to preserve a challenge to the use of that figure. *Id.* at 173-75. Similarly, here, the explanation by staff at the planning commission hearing for why they believed GMC 18.110.010(D) was satisfied did not preserve a challenge to that conclusion.

We have also held that, when only one point of view regarding compliance with a standard is raised, an alternative point of view may not be raised for the first time at LUBA. *Boucot v. City of Corvallis*, 56 Or LUBA 662, 674 (2008). In *Boucot,* the petitioners argued that the city erred in its approval of conceptual and detailed development plans and a tentative subdivision plat for a 45-lot subdivision when it determined that a drainageway was not a natural drainageway. *Id.* The city responded that the issue was waived because it was not

raised below with sufficient specificity for the city to address the issue. *Id.* The petitioners responded with record citations establishing that the city itself had raised the issue of whether the drainageway was natural. *Id.* We rejected that response:

> "In the staff report to the planning commission, staff discusses the applicable criteria and explains why the east drainage is a natural drainageway and why the west drainage is not a natural drainageway. The staff report does not consider alternative points of view or conflicting evidence in making the determination that the west drainage is not a natural drainageway. As far as we are directed, the only position taken by the applicant, staff, or opponents below was that the west drainageway was not a natural drainageway. That is not sufficient to raise the issue below. The issue is waived." *Id.*

Similarly, here, only one view—the planning staff's opinion described above—was presented in response to the planning commissioner's question. The issue that petitioner seeks to raise in this appeal was not raised with sufficient specificity to permit intervenor and the city council an opportunity to respond.

Petitioner also argues that, although they did not cite GMC 18.110.010(D), they raised the issue of open space in two letters to the planning commission. Record 398-406. Petitioner does not direct us to any specific language in these pages sufficient to preserve the issue, and we find none. This issue has been waived.

GMC 18.80.050 governs the Hillside overlay zone. Petitioner argues that there is not substantial evidence to support a conclusion that GMC 18.80.050(G)'s requirement that "[t]he total amount of the lot on which structures

and other impervious surfaces may be constructed shall not exceed 40 percent" is satisfied and that the findings do not explain how that development coverage standard is met. Intervenor responds that its submittals addressed GMC 18.10.050(G) and that the challenge is premature because approval is conditioned on the submission of engineering plans "provid[ing] sufficient information to comply with provisions in the Hillside Overlay Zone." Record 40.

Substantial evidence is evidence a reasonable person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)). The decision suggests that the 40 percent restriction is met if two parking spots are removed. Record 17. Although Condition J removes two parking spots, we have not been directed to any calculation in the record showing that the removal of two parking spaces is sufficient to ensure that the 40 percent restriction is met. Record 40. We agree with petitioner that there is not substantial evidence to support a conclusion that this standard is satisfied or will be satisfied by conditions of approval.

We also agree with petitioner that the findings are inadequate. Findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The findings do not explain the basis for concluding that the 40 percent standard is met.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

GMC 18.185.020(A) provides that approval of a CUP requires findings that "[t]he proposed use is consistent with the policies of the comprehensive plan." Petitioner's third assignment of error is that the application does not comply with the comprehensive plan and that, "in the Final Order, the City Council appears to have included and—to the extent it was adopted, if at all—adopted an erroneous legal conclusion, supplied to it by [intervenor's] attorney, as part of its decision to approve the Application." Petition for Review 16. As we explained in our resolution of the first assignment of error, the decision describes testimony in favor of and opposed to the application but does not explain the city council's conclusion. Because the decision is being remanded for the adoption of adequate findings, on remand, the city council may address petitioner's argument related to GMC 18.185.020(A). We do not reach or resolve the third assignment of error.

The city's decision is remanded.