

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

FRIENDS OF HISTORIC ALBANY,
Petitioner,

and

CAMRON SETTLEMIER,
Intervenor-Petitioner,

vs.

CITY OF ALBANY,
Respondent,

and

MARK SIEGNER,
Intervenor-Respondent.

LUBA No. 2020-078

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Carrie A. Richter filed a petition for review and argued on behalf of petitioner. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Camron Settlemier filed a petition for review and reply brief.

No appearance by City of Albany.

Bill Kloos filed the response brief and argued on behalf of intervenor-respondent.

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

3
4 REMANDED 05/04/2021

5
6 You are entitled to judicial review of this Order. Judicial review is
7 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner Friends of Historic Albany (FOHA) and intervenor-petitioner Settlemier challenge a city council historic review decision approving new construction of two three-story, mixed-use buildings within the Monteith National Register Historic Overlay District (Monteith District).

MOTION TO STRIKE

Intervenor-respondent Siegner (intervenor) moves to strike the following statement in Settlemier's reply brief: "There has been no new construction of this scale and no big buildings built next to houses in the Monteith or Hackleman Historic District Overlays since the inception of the historic districts." Reply Brief 3. Intervenor argues that we should strike that statement because it is unsupported by citations to the record. Settlemier responds to the motion to strike with citations to the record and quotations supporting the disputed statement.

Our review is limited to the local record. ORS 197.835(2)(a). We will generally disregard factual statements that are not supported by evidence in the record. Settlemier's responsive citations appear to support the disputed statement. The motion to strike is denied, and we will consider that statement for whatever it is worth to our review. However, we note that LUBA's role is generally not to find facts in the first instance but, rather, to review the city's decision and any challenges to its findings that are material to the satisfaction of applicable criteria.

1 **FACTS**

2 The subject property is vacant.¹ It is located on a corner and abuts
3 Calapooia Street to the west and Fourth Avenue to the south. The northern
4 property boundary abuts an alley that runs roughly east-west, parallel to Fourth
5 Avenue and Third Avenue, and connects to Calapooia Street and Washington
6 Street. The subject property is within and near the northern boundary of the
7 Monteith District. The Historic Downtown District is northeast of and partially
8 adjacent to the Monteith District.

9 The subject property is zoned Downtown Mixed Use (DMU), as is the
10 remainder of the northeastern corner of the Monteith District. “The DMU district
11 is intended for a mix of retail, services, institutions, offices, and housing that
12 supports businesses in and around the Historic Downtown District. Mixed uses
13 are encouraged both horizontally and vertically. High-density residential infill
14 and office employment are both encouraged.” Albany Development Code (ADC)
15 5.030(2). The proposed use is allowed in the DMU zone, subject to site plan
16 review. The site plan review was processed separately and is not challenged in
17 this appeal.

18 As explained in further detail below, new construction of structures over
19 100 square feet in a historic district requires historic review of exterior design to

¹ The new buildings will be sited on the same property where three contributing historic structures were demolished after our decision in *Niederer v. City of Albany*, 79 Or LUBA 305 (2019).

1 ensure that new structures are compatible with the character of the historic
2 district. ADC 7.230. Within the Monteith District, the city must find that the
3 historic review approval request meets the following criteria:

4 “(a) The development maintains any unifying development
5 patterns such as sidewalk and street tree location, setbacks,
6 building coverage, and orientation to the street.

7 “(b) The structure is of similar size and scale of surrounding
8 buildings, and as much as possible reflects the craftsmanship
9 of those buildings.

10 “(c) Building materials are reflective of and complementary to
11 existing buildings within the district.” ADC 7.270(1).

12 Intervenor requested historic review approval for new construction
13 consisting of two large, multi-story, mixed-use structures intended for
14 commercial uses on the first floor and two stories of residential uses, with two
15 small accessory structures for tenant storage. Each primary building (Building
16 One and Building Two) will be three stories, approximately 40 feet, 10 inches,
17 tall and nearly 58 feet wide, with a total building area of 6,732 square feet each.
18 Record 626-28. The primary buildings will be set back between two feet and
19 three feet, 6 inches from their respective front property lines. The structure
20 exteriors will be a mixture of siding types, including primarily Hardiplank
21 smooth-finish composite lap siding with wood trim and details and wood shingle
22 and stone masonry accents. The roof will be composite with metal awnings.
23 Balconies will have power-coated metal railing. Windows will be made of
24 composite materials with wood trim.

1 City planning staff recommended approval with conditions in a staff report
2 dated April 29, 2020. Record 620. The planning director referred the application
3 to the landmarks commission for review.² The landmarks commission denied the
4 application for noncompliance with ADC 7.270(1)(a) and (b). Intervenor
5 appealed that denial to the city council.

6 On June 24, 2020, the city council held a *de novo* public hearing on the
7 application. At the end of that hearing, the city council closed the public hearing,
8 deliberated, and orally tentatively approved the application and directed staff to
9 draft findings supporting the approval. On July 8, 2020, the city council issued
10 its final written decision approving the application and adopting the findings in
11 both a staff memo dated July 1, 2020, and the April 29, 2020 staff report. This
12 appeal followed.

13 **SETTLEMIER FIRST AND SECOND ASSIGNMENTS OF ERROR**

14 In their first assignment of error, Settlemier alleges that the city council
15 failed to follow applicable procedures in a manner that prejudiced their
16 substantial rights and that the city council's findings are inadequate.

² The landmarks commission conducts quasi-judicial public hearings on Type III planning applications affecting historic resources and acts as an advisory board to the city council on decisions that could affect historic resources. ADC 7.020.

1 **A. July 1, 2020 Staff Memo Containing Written Findings**

2 LUBA will reverse or remand a decision where the local government failed
3 “to follow the procedures applicable to the matter before it in a manner that
4 prejudiced the substantial rights” of the parties. ORS 197.835(9)(a)(B).
5 Settlemier argues that the July 1, 2020 staff memo provided to the city council
6 constitutes new evidence that the city council improperly allowed into the record
7 and relied upon without providing Settlemier an opportunity to respond.
8 Settlemier cites *former* ADC 1.490(12) (May 10, 2000), which governs quasi-
9 judicial procedures and provides: “If additional documents or evidence are
10 provided in support of an application, any party shall, upon request, be entitled
11 to a continuance of the hearing to allow for adequate preparation of rebuttal. Such
12 a continuance shall not be subject to the limitations of ORS 227.178.”³

13 Intervenor responds that the July 1, 2020 staff memo is not additional
14 material in support of the application but instead contains draft findings.
15 Intervenor disputes that Settlemier has any right to rebut findings prepared
16 between a tentative oral approval and final written decision, citing *Adler v. City*
17 *of Portland*, 24 Or LUBA 1 (1992). We agree with intervenor. In *Adler*, we
18 explained:

19 “An oral tentative decision typically will determine whether the

³ In January 2021, *former* ADC 1.490(12) (May 10, 2000) was renumbered as ADC 1.590(12). We refer to the version of the code that applied to the application in this appeal.

1 request for land use approval is denied, approved, or approved with
2 conditions. The oral tentative decision may include an exhaustive
3 explanation of the rationale underlying the decision, but often it will
4 not. Because land use decisions in this state must be supported by
5 written findings, it is standard procedure for local government
6 decision makers to make a tentative decision and direct staff or the
7 prevailing party to prepare a final written decision and supporting
8 findings for their review and adoption. As long as the decision
9 maker in fact adopts the written decision and supporting findings, it
10 does not matter that every aspect of the reasoning in support of the
11 decision may not have been previously articulated orally. Of course,
12 the legal adequacy of any such findings and the evidentiary support
13 for those findings may be challenged in an appeal to this Board.” 24
14 Or LUBA at 12-13.

15 ADC 1.490(12) applies to the evidence presented during a quasi-judicial
16 hearing. The July 1, 2020 staff memo is not a document or evidence provided in
17 support of the application. Instead, it is a document provided to the city council
18 in support of its final decision, which is typical, as explained in *Adler*. ADC
19 1.490(12) does not provide a substantial procedural right for a participant in a
20 quasi-judicial land use proceeding to challenge prepared findings or submit
21 rebuttal between a tentative oral decision and a final written decision.

22 Settlemier also argues that the city council adopted inconsistent findings,
23 based on differences between the April 29, 2020 staff report and the July 1, 2020
24 staff memo. Adequate findings must (1) identify the relevant approval standards,
25 (2) set out the facts relied upon, and (3) explain how those facts lead to the
26 conclusion that the approval standards are satisfied. *Heiller v. Josephine County*,
27 23 Or LUBA 551, 556 (1992). There are circumstances where adoption of
28 inconsistent findings warrants remand. *See, e.g., Larmer Warehouse Co. v. City*

1 of Salem, 43 Or LUBA 53, 59-60 (2002) (remanding a decision denying a zone
2 change where the city adopted as findings both a staff report that recommended
3 and provided the rationale for denying the zone change and an earlier staff report
4 that recommended and provided the rationale for approving the zone change).

5 The city's adopted and incorporated findings are not inconsistent. The
6 challenged July 8, 2020 decision adopts and attaches the proposed findings in the
7 July 1, 2020 staff memo and clearly states that it incorporates the April 29, 2020
8 staff report findings only "to the extent not inconsistent with the [July 1, 2020
9 findings]." Record 17, 21. Therefore, any inconsistency in the findings is
10 expressly resolved in favor of the July 8, 2020 decision and the findings in the
11 July 1, 2020 staff memo. Settlemier has not identified any inconsistency that is
12 not resolved by that qualified incorporation by reference. *Eola-Glen*
13 *Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672, 676-78 (1993) (a
14 general challenge that findings adopted to support the decision are internally
15 inconsistent provides no basis for reversal or remand where the petitioner fails to
16 explain why the alleged inconsistencies are not resolved by the designated
17 superseding findings).

18 Settlemier's first assignment of error is denied.

19 **B. Intervenor's June 24, 2020 New Elevation Drawings**

20 Any application for historic review approval for new construction must
21 include (1) a site plan showing, among other things, the location of the new
22 structures and building dimensions and (2) "[e]levations sufficient in detail to

1 show the general scale, bulk building materials, and architectural elements of the
2 structure.” ADC 7.260. Intervenor submitted a site plan and elevation drawings
3 of the two primary structures with the application for historic review approval.
4 Record 188, 195-96. The initial application materials did not include elevation
5 drawings depicting or a written narrative describing the height and exterior
6 design of the two accessory structures. Record 622-23. On June 24, 2020,
7 sometime before the city council hearing in the evening on that same day,
8 intervenor submitted new elevation drawings that depict the scale, building
9 materials, and architectural elements of all of the structures, including the two
10 accessory structures (new elevation drawings). Record 26-27, 91, 320. The new
11 elevation drawings were included in the staff presentation that was included in
12 the agenda packet for the June 24, 2020 hearing. Record 336-37. At the
13 conclusion of that hearing, the city council closed the record.

14 In their second assignment of error, Settlemier argues that they were not
15 aware of the new elevation drawings until after the public record was closed and,
16 therefore, they were unable to provide any responsive argument or evidence
17 regarding whether the accessory structures’ design details—which were reflected
18 for the first time in the new elevation drawings—satisfy the historic review
19 criteria with respect to scale, bulk building materials, and architectural elements.
20 Specifically, Settlemier asserts that the accessory structure craftsmanship and
21 building materials do not reflect and complement existing buildings within the
22 district, as required by ADC 7.270(1)(b) and (c).

1 Settlemier initially argues that the city committed procedural error by
2 approving an incomplete application. However, the issue raised by this
3 assignment of error is not whether the application satisfied submission
4 requirements or was incomplete at some point prior to the city's final decision.
5 Rather, the issue is whether the city's procedure violated Settlemier's right to
6 respond to supplemental material that intervenor submitted in support of the
7 application, which is a substantial right. Settlemier cites and their argument
8 implicates ADC 1.490(12), quoted above, and ORS 197.763, which govern the
9 conduct of quasi-judicial land use hearings before a local governing body on
10 application for a land use decision. ORS 197.763(4)(a) provides that "[a]ll
11 documents or evidence relied upon by the applicant shall be submitted to the local
12 government and be made available to the public." ORS 197.763(6)(a) provides:

13 "Prior to the conclusion of the initial evidentiary hearing, any
14 participant may request an opportunity to present additional
15 evidence, arguments or testimony regarding the application. The
16 local hearings authority shall grant such request by continuing the
17 public hearing pursuant to paragraph (b) of this subsection or
18 leaving the record open for additional written evidence, arguments
19 or testimony pursuant to paragraph (c) of this subsection."

20 Intervenor argues that Settlemier has waived this procedural assignment of
21 error because, according to intervenor, all parties were alerted to the new
22 elevation drawings at the June 24, 2020 hearing and no party objected or
23 requested a continuance at that hearing. Intervenor argues that their submitted

1 materials, including the new elevation drawings, provide an adequate level of
2 detail to satisfy ADC 7.260.

3 In their petition for review, Settlemier argues that the issue is not waived
4 that the city erred by failing to provide Settlemier an opportunity to respond to
5 new evidence that intervenor submitted on June 24, 2020. Settlemier points to a
6 letter from FOHA's attorney dated June 23, 2020, that was submitted into the
7 record and was before the city council at the June 24, 2020 hearing, in which
8 FOHA's attorney requested a continuance or open record period. Record 382
9 ("[P]lease continue this proceeding, leaving the record open to allow all parties
10 to respond, either because this is the initial hearing or because new evidence is
11 submitted during the hearing."). Intervenor does not acknowledge that request or
12 argue that, in order to preserve the issue raised in the second assignment of error,
13 Settlemier must have made a personal request for a continuance at the June 24,
14 2020 hearing, or that FOHA was required to reiterate its request or object at that
15 hearing. ORS 197.763(6)(a) provides that a request for an opportunity to respond
16 to new evidence may be made by "any participant" and must be made "[p]rior to
17 the conclusion of the initial evidentiary hearing."⁴ We conclude that those

⁴ During the city council hearing, the city attorney advised the city council that the landmarks commission hearing constituted the initial evidentiary hearing and, thus, the city council *could have* allowed a continuance or left the record open but was not *required* to do so. Record 316. However, intervenor does not contend that ORS 197.763 does not apply to the city council's *de novo* hearing in this matter.

1 requirements are satisfied and this procedural assignment of error was not
2 waived.

3 We agree with Settlemier that the city erred in not allowing a continuance
4 or open record period that would permit Settlemier to submit evidence and
5 argument in response to the new elevation drawings that were submitted to the
6 city on June 24, 2020. While the staff presentation and intervenor's presentation
7 at the public hearing may have alerted the parties to the existence and submission
8 of those new elevation drawings, it does not appear that those materials were
9 available to the public generally, or Settlemier specifically, before the record was
10 closed at the hearing. Those elevation drawings constitute new evidence to which
11 Settlemier had a right to respond. Remand is required for the city to reopen the
12 record and provide an opportunity for such response.

13 Settlemier's second assignment of error is sustained.

14 **ACCESSORY STRUCTURES**

15 **(Settlemier Fourth, Fifth, and Sixth Assignments of Error)**

16 Each accessory structure is over 100 square feet and, thus, subject to
17 historic review for new construction. ADC 7.230. Settlemier argues that the city
18 made inadequate findings by failing to find that the two accessory structures
19 satisfy ADC 7.270. With respect to the accessory structures, the city found:

20 "The plans include two small accessory structures for storage units
21 for project residences. * * * Plans for the accessory structure were
22 submitted with the original application, and supplemental materials
23 were submitted by the Applicant's architect on June 24 for the City

1 Council hearing. The June 24 plans showed elevations and finishing
2 details for both the primary and accessory buildings. The applicant
3 has represented, and the June 24 plans confirm, that the accessory
4 structures will be completed with the same building materials as the
5 primary structures [and] will be finished in the same detailing as the
6 primary structures. This matter is not directly related to the ‘unifying
7 development pattern’ that is at issue here. Nevertheless, the proposal
8 for the accessory structure details is approved as represented by the
9 Applicant.” Record 22.

10 Intervenor concedes, as they must, that the city’s findings with respect to
11 the accessory structures do not address ADC 7.270, let alone find that criteria is
12 satisfied. However, intervenor argues that the evidence in the record “clearly
13 supports” that the accessory structures satisfy ADC 7.270 with respect to size,
14 scale, building materials, and craftsmanship. ORS 197.835(11)(b);⁵ *see also*
15 *Choban v. Washington County*, 25 Or LUBA 572, *aff’d*, 124 Or App 213, 862
16 P2d 536 (1993) (applying ORS 197.835(11)(b)).

17 We have explained that ORS 197.835(11)(b) allows us to overlook minor
18 defects in local government findings when substantiating evidence makes the
19 local government’s decision obvious or inevitable. *Harcourt v. Marion County*,

⁵ ORS 197.835(11)(b) provides:

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

1 33 Or LUBA 400, 404 (1997). The challenged decision does not establish that
2 the city council determined that the accessory structures, as proposed, satisfy the
3 historic review criteria, and we decline to reach that conclusion under ORS
4 197.835(11)(b).

5 We agree with Settlemier that that the city's findings are inadequate with
6 respect to the accessory structure compliance with ADC 7.270. Remand is
7 required for the city to adopt findings regarding whether the accessory structures
8 satisfy ADC 7.270.

9 Settlemier's fourth, fifth, and sixth assignments of error are sustained, in
10 part.

11 **SETTLEMIER THIRD ASSIGNMENT OF ERROR**

12 Settlemier argues that the city's approval is inconsistent with the city's
13 comprehensive plan and the Guidelines for New Construction in Albany's
14 Residential Historic Districts and Neighborhoods (Guidelines). To the extent that
15 Settlemier argues that the city council's interpretation of ADC 7.270 is
16 inconsistent with policies and goals in its comprehensive plan, those arguments
17 either are underdeveloped for review or do not demonstrate error under the
18 applicable standard of review. We are required to affirm a local governing body's
19 interpretation of its own comprehensive plan or land use regulations if the
20 interpretation is not inconsistent with the express language, purpose, or policy of

1 the comprehensive plan or land use regulations. ORS 197.829(1);⁶ *Siporen v. City*
2 *of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)
3 standard).

4 The Guidelines provide that their purpose “is to help property owners and
5 contractors choose an appropriate approach when building in a historic district so
6 that projects satisfy the standards and review criteria in the [ADC] (Article 7,
7 Historic Overlay Districts)” and “to help property owners and others understand
8 the special features and characteristics of Albany’s historic structures and
9 incorporate that understanding into designs for new construction.” Record 174.
10 Settlemier points out that the April 29, 2020 staff report references and attaches
11 the Guidelines. Record 173-87. Differently, the city’s July 8, 2020 decision and

⁶ ORS 197.829(1) provides:

“[LUBA] 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:

- “(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.”

1 adopted July 1, 2020 findings do not reference the Guidelines. Both FOHA and
2 Settlemier rely on the Guidelines to support their arguments that ADC 7.270 is
3 not satisfied.

4 Intervenor argues, and we agree, that the city has not adopted the
5 Guidelines as approval standards, and no applicable approval standard expressly
6 or implicitly adopts the Guidelines as mandatory standards or requires findings
7 related to the Guidelines. Accordingly, any inconsistency between the city's
8 decision and the Guidelines provides no basis for remand. *See Nicita v. City of*
9 *Oregon City*, 78 Or LUBA 463, 473-76 (2018), *aff'd*, 296 Or App 762, 438 P3d
10 489, *rev den*, 365 Or 502 (2019) (noncompliance with unadopted guidelines
11 provides no basis for reversal or remand).

12 Settlemier's third assignment of error is denied.

13 **CRAFTSMANSHIP AND BUILDING MATERIALS**

14 **A. Craftsmanship (Settlemier Sixth Assignment of Error)**

15 ADC 7.270(1)(b) requires the city to find that new construction "as much
16 as possible reflects the craftsmanship" of "surrounding buildings." The city
17 found: "The proposed structures incorporate the following architectural elements
18 typical of Craftsman style buildings: overhanging eaves, eave brackets, shingles
19 in the roof faces, wood porch columns with brackets, and lap siding, which are
20 reflective of architectural details found throughout the district." Record 629.

21 Settlemier argues that the city's conclusion that the new construction "as
22 much as possible reflects the craftsmanship" of surrounding buildings

1 misinterprets ADC 7.270(1)(b) and is supported by inadequate findings.
2 Settlemier argues that the above-quoted finding is inadequate because it fails to
3 discuss how the listed architectural elements are “used in a consistent and
4 complimentary manner.” Settlemier Petition for Review 37. Settlemier points to
5 testimony in the record that criticizes the craftsmanship of the proposed
6 construction. Specifically, a historic preservation professional opined that other
7 historic, mixed-use structures in the Monteith District have roof styles that differ
8 from the proposed new construction design and that the building openings are
9 “not sympathetic to the historic district.” Record 380. Settlemier argues that the
10 city’s findings fail to address that evidence.

11 Intervenor responds, and we agree, that the record contains competing
12 evidence and argument regarding craftsmanship. Intervenor’s architect offered
13 their opinion that the design of the new structures reflects the craftsmanship of
14 surrounding buildings. The city was free to choose among that evidence to find
15 that ADC 7.270(1)(b) is satisfied.

16 Settlemier’s sixth assignment of error is denied, in part.

17 **B. Building Materials (Settlemier Seventh Assignment of Error)**

18 The city must find that “[b]uilding materials are reflective of and
19 complementary to existing buildings within the district.” ADC 7.270(1)(c).

20 Intervenor proposed a wood-framed structure with a mixture of siding
21 types, including primarily Hardiplank smooth-finish composite lap siding with
22 wood trim and details and shingle and masonry accents. The roof will be

1 composite with metal awnings, and balconies will have power-coated metal
2 railing. Windows will be made of composite materials with wood trim. Intervenor
3 explained that the design is not intended to mimic historic structures and, instead,
4 is intended to use “some timeless exterior detailing as well as meshing in some
5 more modern styling.” Record 199.

6 The city council found:

7 “The narrative and photographic record supporting this application
8 show that the building materials evident in the district are diverse.
9 The narrative supports compliance with this standard in the
10 following summary terms:

11 “These properties are representative of the district and zone.
12 As you can see from the photos, the neighboring properties
13 have different window types, siding types, and architectural
14 details. All adding in some way to enhance the diversity of
15 the district and zone. Some windows are vinyl, some are
16 wood, some have grids and some do not, some siding is wood,
17 some is HardiPlank, some is vinyl, shingles as well as stucco
18 are also both represented.’

19 “Based on all the evidence in the record, the materials proposed to
20 be used will be ‘reflective of and complimentary’ of the materials
21 already present in the district. Council concludes that the standard
22 in (1)(c) is met and additional conditions regarding materials are not
23 necessary.” Record 23.

24 Settlemier argues that the city council’s interpretation of ADC 7.270(1)(c)
25 is inconsistent with the purpose of that provision and that the city council’s
26 decision is not supported by substantial evidence. Settlemier argues that the city
27 erred by taking into account modern and non-contributing structures and
28 considering one modern apartment structure that is outside the historic district

1 that was included in a set of photographs that intervenor submitted as examples
2 of structures characteristic of the district. Record 665.

3 Settlemier argues that the Hardiplank smooth-finish composite lap siding
4 and aluminum and steel awnings proposed for the new structures are not
5 “reflective of and complementary to existing buildings within the district” and
6 that the record contains no evidence of comparable examples of the use of those
7 building materials for historic structures in the district. Settlemier points out that
8 the Guidelines explain that wood is the predominant building material in
9 Albany’s historic neighborhoods and that “[f]abricated wood siding such as T-1-
10 11, along with exposed concrete block, aluminum, and vinyl are not
11 recommended.” Record 648.

12 Intervenor responds, and we agree, that the city council’s interpretation of
13 ADC 7.270(1)(c) is consistent with the text, context, and purpose of that
14 provision and we must affirm it. ORS 197.829(1); *Siporen*, 349 Or 247.
15 Settlemier argues that the city erred in finding that ADC 7.270(1)(c) is satisfied
16 by considering building materials used in the district for modern and non-
17 contributing structures. However, the criterion does not require materials that are
18 reflective of and complementary to only existing historic buildings. ADC
19 7.270(1)(c) requires that building materials be “reflective of and complementary
20 to *existing buildings* within the district.” (Emphasis added.) Differently, ADC
21 7.270(2)(c), which governs historic review of new construction in the Historic
22 Downtown District, requires that building materials be “reflective of and

1 complementary to existing *historic* buildings within the district.” (Emphasis
2 added.) The city’s interpretation is consistent with the text and context of ADC
3 7.270(1)(c).

4 The city’s interpretation is also consistent with the purpose of that
5 provision, which is “to ensure that new structures over 100 square feet are
6 compatible with the character of that district.” ADC 7.230. As explained in the
7 challenged decision, the character of the district is mixed. It includes historic
8 residential structures, but it also includes commercial structures, both historic and
9 modern. The purpose of ADC 7.270(1)(c) is to ensure that the new structures are
10 compatible with the district as a whole, not only with reference to historic
11 structures.

12 Settlemier’s substantial evidence challenge derives from their argument
13 that the city misinterpreted ADC 7.270(1)(c). We reject it for the same reason.

14 In response to Settlemier’s findings challenge, intervenor responds that
15 Settlemier failed to challenge the April 29, 2020 staff report findings that ADC
16 7.270(1)(c) is satisfied, which the city council specifically incorporated into its
17 decision. Those findings explain how the building materials reflect and
18 complement existing buildings within the district. Record 630-31. For example,
19 they explain that wood window and door trim and composite roofing are common
20 in the district. Record 631. With respect to the more modern building materials,
21 such as brick, simulated stone veneer, composite window frames, and fiberboard
22 siding, the staff report explained that ADC 7.270(1)(c) does not confine new

1 construction to traditional building materials and that modern materials are
2 appropriate when they “are visually similar to the traditional material in
3 dimension, finish, and texture.” *Id.* The staff report concluded that the proposed
4 building materials are “reflective of and complementary to existing buildings
5 within the district.” We agree with intervenor that Settlemier failed to challenge
6 those findings. Accordingly, Settlemier’s findings challenge provides no basis
7 for remand.⁷

8 Settlemier’s seventh assignment of error is denied.

⁷ Settlemier’s seventh assignment of error does not specifically challenge a lack of findings that the building materials for the accessory structures satisfy ADC 7.270(1)(c). The April 29, 2020 staff report findings regarding building materials did not include an analysis of the accessory structures because intervenor had not yet submitted any evidence describing the accessory structure building materials. Elsewhere in this opinion, under Settlemier’s second, fourth, fifth, and sixth assignments of error, we remand for the city to reopen the record, accept responsive evidence and argument, and make findings regarding whether the accessory structures satisfy ADC 7.270. Although we note that, in the July 8, 2020 decision, the city found that the accessory structures will be constructed with similar building materials as the primary structures, we express no opinion in this decision regarding whether the accessory structures satisfy ADC 7.270(1)(c), and the city should address that criterion in the first instance. We do not understand Settlemier to contend that the new elevation drawing details with respect to the craftsmanship and building materials for the two primary structures constitute new evidence that was not included in the record and upon which the city relied in concluding that ADC 7.270(1)(b) and (c) are satisfied. Record 195-96 (initial elevation drawings); Record 26-27 (new elevation drawings).

1 **UNIFYING DEVELOPMENT PATTERNS**

2 As quoted above, ADC 7.270(1)(a) requires that the city find that “[t]he
3 development maintains any unifying development patterns such as sidewalk and
4 street tree location, setbacks, building coverage, and orientation to the street.”

5 **A. Setbacks (FOHA First Assignment of Error; Settlemier Fourth**
6 **Assignment of Error)**

7 FOHA argues that the city council’s interpretation of ADC 7.270(1)(a)
8 with respect to setbacks is inconsistent with the plain language of that provision
9 and its stated purpose and policy and is unsupported by adequate findings based
10 on substantial evidence in the whole record.

11 In the DMU zone, there is no minimum front setback for structures and the
12 maximum setback for mixed-use development is five feet. ADC Table 5.090-1.
13 The surrounding development is mixed with respect to structure sizes, uses, and
14 setbacks. The Guidelines provide that, “[i]f setbacks vary, a new building should
15 be located within the range of setbacks found on the block face on which the
16 building is to be located.” Record 639.

17 There are two existing structures along the Fourth Avenue block face and
18 one existing structure along the Calapooia Street block face. A commercial
19 structure on the corner of Fourth Avenue and Washington Street (State Farm
20 Building) has a zero setback to front property lines along both Fourth Avenue
21 and Washington Street. The front porch of an adjacent residential structure on
22 Fourth Avenue is set back one foot and the building front is set back

1 approximately seven feet from Fourth Avenue. The building front and front porch
2 of an adjacent residential structure on Calapooia Street is set back approximately
3 15 feet from Calapooia Street.

4 For Building One, which will be sited near the middle of the block on
5 Fourth Avenue, the city approved a variable setback from Fourth Avenue of two
6 feet to three and one-half feet for the street-facing front of that building.
7 Similarly, for Building Two, which will be sited on the corner of Calapooia Street
8 and Fourth Avenue, the city approved a variable setback from Calapooia Street
9 of two feet to three and one-half feet and zero setback from Fourth Avenue.

10 The city found that the setback for Building One on Fourth Avenue is
11 within the range of setbacks of the two other structures along Fourth Avenue on
12 that same block and, thus, that the setback maintains the unifying development
13 pattern.

14 With respect to Building Two, the April 29, 2020 staff report suggested a
15 condition of approval that Building Two be set back “no more than five feet
16 closer and not more than five feet farther” from Calapooia Street than the 15-foot
17 setback for the residential structure on the adjacent lot facing Calapooia Street.
18 However, the city council determined that no increased setback was required to
19 maintain a unifying development pattern because “[a] single existing building
20 does not establish a ‘unifying development pattern’ that must be maintained.”
21 Record 22.

1 ADC 7.230 provides: “The purpose of reviewing the exterior design of
2 new construction within an historic district is to ensure that new structures over
3 100 square feet are compatible with the character of that district.” The city
4 council found:

5 “‘Compatible’ does not mean ‘the same’. *Merriam Webster’s*
6 *Collegiate Dictionary*, Eleventh Edition, defines ‘compatible’ as
7 ‘(1) capable of existing together in harmony.’

8 “According to the [Guidelines], [‘a] new building should contribute
9 to that character by respecting the location, design, material, and
10 other character-defining features of historic buildings in the
11 neighborhood. This doesn’t necessarily mean building a replica of
12 the house across the street, or a house that tries to create a false
13 historic appearance. The first step in designing a new building that
14 works is to look for patterns in the existing buildings in the vicinity
15 of the site. Compatibility can be achieved through careful attention
16 to the following aspects of a building: orientation, site location, scale
17 and mass, proportions, height, roof shape, porches, rhythm of
18 window and door openings, materials, decorative finish details,
19 foundations, and garage location[.]’]” Record 622 (italics omitted).

20 FOHA argues that the city’s interpretation of “development pattern” is
21 inconsistent with the plain meaning of the term “pattern.” The term “pattern” is
22 not defined in the ADC. The plain meaning and dictionary definition of “pattern”
23 is, in part, “**1** : * * * something regarded as a normative example to be copied
24 * * * **4 a** : a representative instance : a typical example.” *Webster’s Third New*
25 *Int’l Dictionary* 1657 (unabridged ed 2002) (boldface in original).

26 With respect to Building Two, FOHA argues that a “development pattern”
27 can be established by one building and that the city’s interpretation that

1 recognizes a pattern only where more than one structure exists on a block is
2 implausible because allowing a lesser setback for new construction will ruin the
3 pattern established by the single existing historic residential structure on
4 Calapooia Street. FOHA argues that an interpretation that recognizes a pattern
5 even where only one structure exists on a block serves the purpose of historic
6 review, which, as quoted above, is to ensure that new structures are compatible
7 with the character of the district. ADC 7.230. FOHA argues that “[m]irroring
8 historic building setbacks in new construction helps to ensure overall design
9 compatibility within a historic district.” Petition for Review 11.

10 Intervenor responds that the maximum front yard setback for mixed-use
11 development in the DMU zone is five feet and the minimum is zero feet; thus,
12 FOHA’s argued interpretation that the new construction must match the 15-foot
13 setback of the existing residential building setback requests an outcome that
14 violates the underlying development standards that apply to the subject property.⁸
15 Intervenor observes that the underlying DMU zoning and the city’s decision on
16 historic review recognize that the subject property is in a mixed-use transition

⁸ ADC 7.000 provides, in part: “The regulations of the Historic Overlay District supplement the regulations of the underlying zoning district. * * * When the regulations and permitted uses of a zoning district conflict with those of the historic overlay district, the more restrictive standards apply.” FOHA does not contend that ADC 7.270(1)(a) provides a more restrictive setback standard than the DMU setback standards such that ADC 7.000 requires a greater setback. No party addresses whether a variance from the DMU setbacks could be required or obtained.

1 area between the commercial downtown area and residential areas. The historic
2 residential use of some property in the Monteith District, and mixed-use zoning
3 that allows commercial uses, has resulted in varied development patterns with
4 few unifying characteristics.

5 Intervenor points out that ADC 7.270(1)(a) does not prescribe a particular
6 geographic area that the city must consider in identifying “any unifying
7 development patterns” that must be maintained under that provision. Differently,
8 ADC 7.270(1)(b) requires that the city assess the size, scale, and craftsmanship
9 of new structures by comparison with “surrounding buildings.” Similarly, ADC
10 7.270(1)(c), defines a geographic scope and requires that the city assess building
11 materials for new structures in comparison with “existing buildings within the
12 district.” Intervenor argues, and we agree, that the text and context of ADC
13 7.270(1)(a) provide the city council discretion to limit its determination of
14 whether there exist “any unifying development patterns” to a review of
15 development on the same block front or to look more broadly. To the extent that
16 the Guidelines suggest reference to setbacks only on the immediate block, we
17 agree with intervenor that the Guidelines do not constitute mandatory criteria and
18 do not necessarily confine permissible city council interpretations of ADC
19 7.270(1)(a).

20 As intervenor points out, the city council found that the purpose of historic
21 review is to ensure compatibility, not to force mimicry of existing buildings. The
22 city’s interpretation that one existing residential building on the Calapooia Street

1 block front adjacent to the subject property does not create “any unifying
2 development patterns” that must be maintained is consistent with the text,
3 context, and purpose of ADC 7.270(1)(a). Thus, we must affirm that
4 interpretation under ORS 197.829(1).

5 FOHA also argues that the setback findings fail to explain how the
6 approved setbacks will maintain the unifying development pattern because
7 historic building setbacks in the district are larger. FOHA argues that the State
8 Farm Building is not a historic structure and the city should not have relied on it
9 in assessing the “unifying development pattern.”

10 While phrased as a findings challenge, that argument challenges the city
11 council’s interpretation that it may rely on a non-contributing structure in
12 assessing whether new structure setbacks are compatible with the existing
13 development and “maintain any unifying development patterns.” Intervenor
14 responds, and we agree, that ADC 7.270(1)(a) does not limit the city’s assessment
15 of unifying development patterns to only historic structures. Instead, that
16 criterion requires the city to assess *any* unifying development patterns, even if
17 those development patterns are established by non-historic structures.

18 We reject Settlemier’s argument with respect to setbacks for the same
19 reason that we reject FOHA’s setback argument.

20 FOHA’s first assignment of error is denied.

21 Settlemier’s fourth assignment of error is denied, in part.

1 **B. Building Coverage (Settlemier Fourth Assignment of Error)**

2 Settlemier argues that the city failed to consider or respond to testimony
3 regarding whether the new development maintains unifying development
4 patterns with respect to lot coverage. Intervenor responds by pointing to
5 unchallenged and incorporated findings in the April 29, 2020 staff report that
6 explain that the building coverage for the proposed development is within the
7 average range of structures within the subject block. Record 624-25.
8 Accordingly, Settlemier’s argument provides no basis for remand. *See Mackenzie*
9 *v. City of Portland*, 71 Or LUBA 155, 165-66 (2015) (arguments that findings
10 fail to address testimony regarding applicable approval criteria do not provide a
11 basis for reversal or remand where the petitioner does not challenge findings of
12 compliance with those criteria).

13 Settlemier’s fourth assignment of error is denied, in part.

14 **C. Sidewalks (Settlemier Fourth Assignment of Error)**

15 Settlemier argues that the approved sidewalk does not maintain the
16 established development pattern and that the city’s findings regarding the
17 sidewalk are inadequate. The city found that the development pattern for
18 sidewalks along Calapooia Street and Fourth Avenue includes curbs, gutters, a
19 six-foot landscape strip, and a five-foot sidewalk on each side of the street. As
20 shown in the site plan, the city approved “a paved walkway extension” from the
21 interior edge of the existing sidewalk to the front of each primary structure, which
22 will effectively widen the sidewalk between Calapooia Street and Fourth Avenue

1 and the front of the primary structures. Record 161. Settlemier argues that
2 approval will not maintain the established pattern of a five-foot wide paved
3 sidewalk.

4 Intervenor responds with examples of sidewalks in the district that are
5 similar to those that the city approved. However, intervenor does not identify any
6 findings that the proposed “walkway extensions” maintain a “unifying
7 development pattern.” We agree with Settlemier that the city’s findings are
8 inadequate.

9 Settlemier’s fourth assignment of error is sustained, in part.

10 **SIZE AND SCALE**

11 **(FOHA Second Assignment of Error; Settlemier Fifth Assignment of Error)**

12 ADC 7.270(1)(b) requires the city to find that “[t]he structure is of similar
13 size and scale of surrounding buildings, and as much as possible reflects the
14 craftsmanship of those buildings.” The city interpreted that provision as having
15 three parts: (1) size, (2) scale, and (3) craftsmanship.

16 The city noted that “‘similarity’ of ‘size and scale’ is inherently a
17 subjective issue of design.” Record 22. The findings explain that structure mass
18 and scale includes basic measurements such as width, height, and volume as well
19 as design characteristics that influence how a building is perceived from the street
20 or sidewalk. Buildings One and Two are each three stories tall; 57 feet, 10 inches
21 wide; and 43 feet, 6 inches deep, with a total building area of 6,732 square feet.
22 Compared with the abutting historic contributing single-family dwellings to the

1 north and east, the two primary structures are approximately twice as wide and
2 seven times as large. Intervenor proposed a combination of articulation
3 techniques designed to visually break up the mass of the structures and promote
4 a smaller sense of scale, including vertical and horizontal changes in materials,
5 color, and texture, as well as variations in the wall plane. The city council found
6 that the primary structures' designs "reflect a consideration of all buildings,
7 including mixed use buildings, in the surrounding couple[-]block area." *Id.* The
8 city council concluded that the size and scale of the buildings is sufficiently
9 similar to the surrounding buildings.

10 With respect to building height, the city council defined the "surrounding
11 buildings" broadly to include more than the immediately "abutting" residential
12 buildings and found that, "[w]hen the larger area is considered," the range in
13 building height varies greatly and that the proposed structures are "sufficiently
14 close to what is existing to be considered similar." Record 23.

15 FOHA first argues that the city council's interpretation of ADC
16 7.270(1)(b) is inconsistent with the plain language of that provision. FOHA
17 argues that "surrounding buildings" means only adjacent buildings and does not
18 include other buildings within a couple-block area. Intervenor responds, and we
19 agree, that the term "surrounding" is not necessarily synonymous with the term
20 "adjacent" and the city's interpretation must be affirmed under ORS 197.829(1).

21 FOHA and Settlemier also argue that the city's decision is not supported
22 by substantial evidence because the city improperly relied on intervenor's

1 evidence regarding height and scale, which includes photographs and narrative
2 statements but not numeric comparisons. Substantial evidence exists to support a
3 finding of fact when the record, viewed as a whole, would permit a reasonable
4 person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855
5 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262
6 (1988). We conclude that a reasonable person could rely on the qualitative
7 comparison information that intervenor provided and upon which the city relied
8 to conclude that the height and scale of the two primary structures is “of similar
9 size and scale of surrounding buildings.”

10 FOHA’s second assignment of error is denied.

11 Settlemier’s fifth assignment of error is denied, in part.

12 The city’s decision is remanded.