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

DAVID BERGMANN, SHARON BERGMANN, SHANNON CHRISTOPHER, DEWAYNE CONNOR, BRENDA COX, SANDRA GEIGER, DEBRA GLEASON, RON GRISWOLD, AARON HORTON, ROBERT HUNTOON, JEFFREY JACOBS, EVA KLAAS, GERALD KLAAS, GLENN MILLER, KAREN O'REAR, KEVIN O'REAR, DENISE ORTEGA, VICTOR ORTEGA, LOREN RINGS, GEORGEANN RUDICEL, MARCO THORSON, BOB TOWNE, SARA TOWNE, and DENNIS TRIGLIA,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

BRETT KEMP, AGA KEMP, and
B K QUALITY CONSTRUCTION, LLC,
Intervenors-Respondents.

LUBA No. 2020-096

FINAL OPINION
AND ORDER

Appeal from City of Brookings.

Garrett K. West filed the petition for review and reply brief and argued on behalf of petitioners Denise Ortega and Victor Ortega. Petitioners David Bergmann, Sharon Bergmann, Shannon Christopher, Dewayne Connor, Brenda Cox, Sandra Geiger, Debra Gleason, Ron Griswold, Aaron Horton, Robert Huntoon, Jeffrey Jacobs, Eva Klaas, Gerald Klaas, Glenn Miller, Karen O'Rear, Kevin O'Rear, Loren Rings, Marco Thorson, Bob Towne, Sara Towne, and

Dennis Triglia filed the petition for review on their own behalf. Also on the brief was Jarvis, Dreyer, Glatte & Larsen, LLP.

No appearance by City of Brookings.

Michael M. Reeder filed the response brief and argued on behalf of intervenors-respondents.

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

RYAN, Board Member, concurring.

REMANDED 08/02/2021

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

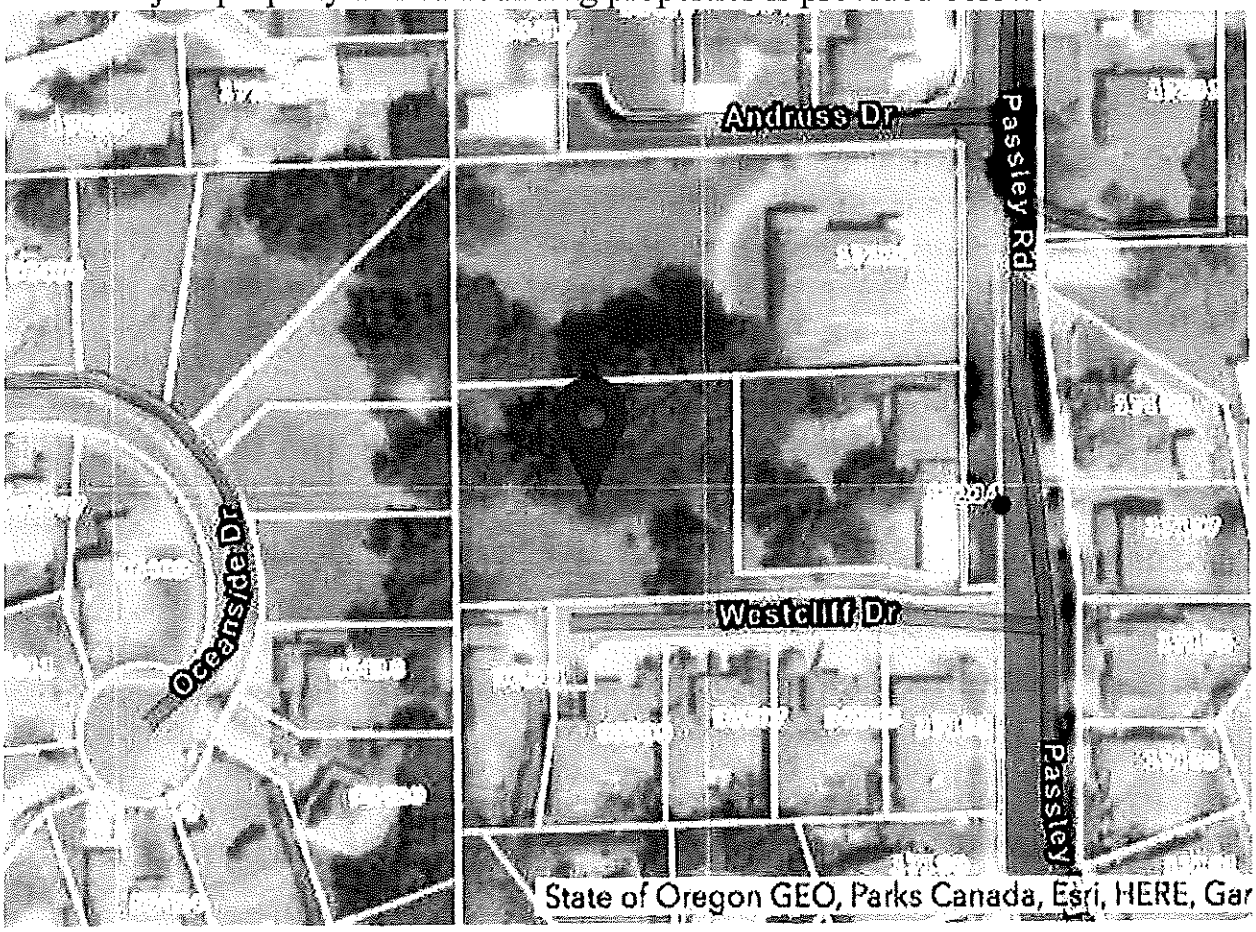
Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a conditional use permit (CUP) for the construction of a 14-unit residential care facility.

FACTS

The subject property is an undeveloped, 0.58-acre flag lot. An aerial view of the subject property and surrounding properties is provided below.



Record 27. The "flag pole" portion of the subject property connects to Passley Road and provides access to the rear or "flag" portion of the subject property. One residence is located north of the flag pole and east of the flag. West Cliff

Drive, a private road serving five residences in the West Cliff Subdivision, is located south of both the flag pole and the flag. Three residential lots in the Oceanside Estates Subdivision are located west of the flag. A church with a large open field is located north of the flag.

The subject property and the immediately surrounding area are zoned Single-Family Residential 6,000-square-foot minimum (R-1-6). Single-family dwellings are permitted uses in the R-1-6 zone. Brookings Municipal Code (BMC) 17.20.020(A). Churches are conditionally allowed in the R-1-6 zone. BMC 17.20.040(B).

Intervenors-respondents (intervenors) applied for a "[CUP] for assisted living," also describing the proposed use as "a residential care facility." Record 468, 490. Intervenors' proposed residential care facility includes a 9,588-square-foot building containing 14 bedrooms with individual bathrooms, a central kitchen, a dining room, a living room, a library, an office, a laundry room, and storage space. On-site parking is provided for six vehicles. The city processed intervenors' residential care facility application under the BMC provision authorizing hospitals, rest homes, and nursing homes as conditional uses in the R-1-6 zone.[1] Record 5.

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[1] The decision provides that the approval is "limited to a 14-bed maximum 'residential care facility' for seniors and adult individuals with disabilities, as that term is defined in state law." Record 8. "Residential facility" is defined in ORS 197.660(1) as

On July 7, 2020, the planning commission held a public hearing on the CUP. On July 13, 2020, the planning commission issued an order denying the CUP. Intervenors appealed the planning commission decision to the city council. On August 24, 2020, the city council held a *de novo* public hearing on the appeal. On August 31, 2020, the city council granted the appeal and approved the CUP.

This appeal followed.

MOTION TO STRIKE

On October 30, 2020, petitioners filed the petition for review, asserting five assignments of error. On November 20, 2020, intervenors filed the response brief, which, in addition to responding to petitioners' assignments of error, asserted a contingent cross-assignment of error. On November 25, 2020, petitioners Denise Ortega and Victor Ortega filed a motion to strike the cross-

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> "a residential care, residential training or residential treatment facility, as those terms are defined in ORS 443.400, that provides residential care alone or in conjunction with treatment or training or a combination thereof for six to fifteen individuals who need not be related. Staff persons required to meet licensing requirements shall not be counted in the number of facility residents, and need not be related to each other or to any resident of the residential facility."

ORS 443.400(6) defines "residential care" as "services such as supervision; protection; assistance while bathing, dressing, grooming or eating; management of money; transportation; recreation; and the providing of room and board."

ORS 197.667(2) provides, "A residential facility shall be a conditional use in any zone where multifamily residential uses are a conditional use." Multifamily dwellings are a conditional use in the R-1-6 zone. BMC 17.20.040(L).

assignment of error in the response brief. Our rules provide the manner in which an intervenor-respondent may assign error to aspects of a decision on appeal—filing a cross petition for review with contingent cross-assignments of error—and they expressly provide that cross-assignments of error may not be included in a response brief. OAR 661-010-0030(7); OAR 661-010-0035(3)(c). Intervenors did not dispute that the response brief contained a contingent cross-assignment of error in violation of our rules. Instead, intervenors argued that LUBA was required to excuse intervenors' non-compliance with our rules as a "reasonable accommodation" under the federal Fair Housing Amendments Act (FHAA). Because the FHAA makes it unlawful for entities, including state agencies, to refuse to make reasonable accommodations only "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling," and because LUBA does not engage in the sale or rental of dwellings or provide services or facilities in connection with such dwellings, we concluded that the FHAA's reasonable accommodation provision was inapplicable. 42 USC § 3604(f)(2) (2018). We therefore granted the Ortegas' motion to strike the cross-assignment of error in the response brief. *Bergmann v. City of Brookings*, ___ Or LUBA ___ (LUBA No 2020-096, Order, May 7, 2021).

FIRST ASSIGNMENT OF ERROR

ORS 227.180(3) provides:

"No decision or action of a * * * city governing body shall be invalid

due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

"(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and

"(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

"Ex parte communication" is not defined in the statute. In *Horizon Construction, Inc. v. City of Newberg*, we concluded that, under the definition of *ex parte* communication found in the Attorney General's Uniform and Model Rules of Procedure, the term means "an oral or written communication to an agency decision maker * * * not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding." 25 Or LUBA 656, 665 (1993). We have also said that "[a]n *ex parte* communication is a communication between a party and a decision-maker, made outside the hearing process, concerning a decision or action before the decision-maker." *Oregon Shores Conservation Coalition v. Coos County*, ___ Or LUBA ___, ___ (LUBA Nos 2019-137 /2020-006, Dec 22, 2020) (slip op at 10). "ORS 227.180(3) prohibits undisclosed *ex parte* communications, whether or not those communications in fact influence the city's original decision." *Opp v. City of Portland*, 38 Or LUBA 251, 264-65, *aff'd*, 171 Or App 417, 16 P3d 520 (2000), *rev den*, 332 Or 239 (2001).

A. City Councilor's Conversation with Planning Commissioner

Petitioners argue that "the City violated ORS 227.180 by not disclosing all *ex parte* contacts during the public hearing and by not permitting challenges or inquiries." Petition for Review 10-11. First, petitioners argue that a city councilor did not disclose an *ex parte* contact at the beginning of the city council's August 24, 2020 *de novo* hearing.

At the beginning of the city council's hearing, the mayor asked the council members whether they had any *ex parte* communications to disclose. Councilor Hedenskog disclosed, "I had a site visit earlier this week and I had contact with one planning commissioner. I discussed nothing of my own opinions of it, just listened to what he had to say." Audio Recording, City Council Meeting, August 24, 2020, at 20:53 (comments of Councilor Ron Hedenskog). After the public hearing was closed, Councilor Hedenskog, *sua sponte*, provided more information on the content of their discussion with the planning commissioner: "I did speak to one of the planning commissioners and the main concern that came out of the planning commission was the 15-foot road accessing this property and 'safety,' 'safety', 'safety' issues that are involved with the traffic and the narrow roads and all that kind of stuff."[2] *Id.* at 3:10:47. Petitioners argue that this was an *ex parte* contact that Councilor Hedenskog was required to disclose prior to the close of the record and, because the record was closed when

[2] The city did not reopen the record to allow further public inquiry or testimony after that statement.

the substance of the communication was revealed, petitioners had no opportunity to object and their substantial rights have been prejudiced.

We deny this subassignment of error. In *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012), *appeal dismissed*, 265 Or App 648, 337 P3d 146 (2014), the city councilors disclosed *ex parte* communications received by email. The mayor then advised the audience that they could rebut the disclosures. The petitioner did not request clarification of the substance of the email communications but argued at LUBA that the disclosures were inadequate. We explained:

> "The objective of ORS 227.180(3) is to ensure that the city makes its decision based on publicly disclosed evidence and testimony that is subject to rebuttal or the opportunity for rebuttal. *Opp v. City of Portland*, 38 Or LUBA 251, 265, *aff'd* 171 Or App 417, 422, 16 P3d 520 (2000), *rev denied* 332 Or 239, 28 P3d 1134 (2001). In *Horizon*[*Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 523 (1992),] the disclosure of the ex parte contact was made at a time where there was no meaningful opportunity to rebut the ex parte contact, since the record had closed and was never reopened. As such, the city in *Horizon* completely failed to comply with ORS 227.180(3) and failed to make a decision based on publicly disclosed evidence and testimony that was subject to rebuttal or the opportunity for rebuttal.
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> "This case is unlike *Horizon*. In the present case, the disclosures of the ex parte contacts at the September 1, 2011 hearing were made at the first opportunity to do so, and petitioner was given the opportunity to rebut the substance of the ex parte contact but completely failed to do so. Further, although the disclosures did not provide detail regarding the substance of the ex parte contacts and were arguably inadequate to comply with ORS 227.180(3), petitioners had the opportunity to object to the adequacy of the

> disclosures and request additional detail, but failed to do so. Petitioner does not dispute that it did not object to the adequacy of the disclosures during or after the September 1, 2011 hearing or otherwise request the opportunity to rebut the same. Having failed to do so, petitioner may not now assign error to the disclosures." *Housing Authority*, 65 Or LUBA at 310-11.

Similarly, here, Councilor Hedenskog disclosed the contact at the beginning of the August 24, 2020 meeting.[3] The mayor later asked if any members of the public wished to inquire further about the councilor disclosures and petitioners did not object to the adequacy of the disclosures or request additional detail concerning the planning commissioner contact.[4]

The first subassignment of error is denied.[5]

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[3] Petitioners quote the meeting minutes statement that "Councilor Hedenskog visited the site and had contact with a Planning Commissioner but no discussion on the matter" and assert that Councilor Hedenskog did not disclose the *ex parte* contact with the planning commissioner because they said that they did not discuss the subject matter of the appeal. Petition for Review 11. The audio of the hearing confirms intervenors' explanation that, despite the summary in the minutes, Councilor Hedenskog disclosed that they spoke with the planning commissioner about the subject matter of the appeal but did not share their *opinion*.

[4] Audio Recording, City Council Meeting, August 24, 2020, at 27:21 (comments of Mayor Jake Pieper).

[5] The parties do not argue and we do not address whether a communication between a city councilor and a planning commissioner is an *ex parte* communication.

B. Independent Review of Planning Files

Petitioners also argue that Councilor Hedenskog engaged in *ex parte* communication when they reviewed documents outside the record related to the land use history of the subject property and the private West Cliff Drive to the south. Councilor Hedenskog said early in the deliberations that they believed that the code requires a 20-foot width for the accessway, that they believed that a 20-foot width was appropriate based on their review of historical documents, and that they were going to urge the council to vote no. Audio Recording, City Council Meeting, August 24, 2020, at 3:11:11 (comments of Councilor Ron Hedenskog). Petitioners argue that their substantial rights were violated because (1) Councilor Hedenskog changed their vote to yes and it was only a three-to-two approval, and (2) the city council relied on Councilor Hedenskog's summary of their independent planning file review, quoted below, to approve the application and craft conditions.

Petitioners do not develop their argument regarding Councilor Hedenskog's change in position following deliberations and petitioners are not entitled to a given result. *Kopacek v. City of Garibaldi*, ___ Or LUBA ___, ___ (LUBA No 2020-094, Feb 11, 2021) (slip op at 7-8) (citing *Muller v. Polk County*, 16 Or LUBA 771 (1988)). We do not address this element of the subassignment of error further. We proceed to petitioners' argument that the city council improperly relied upon the planning file material to approve the application and craft conditions.

At the August 24, 2020 hearing, during deliberations and after the record was closed, Councilor Hedenskog explained:

> "I * * * got into Tony's office and started asking him questions. I wanted to see the file on West Cliff Drive. I wanted to see the Planning Commission notes. I wanted to see the map that was done.
>
> "And how in the dickens did this parcel to the north of West Cliff get a 15-foot access, flag lot, when the standard is 20 feet? * * * So, I pulled the file. Tony had them both out, he had them both earmarked so I could just go right through them and see. * * * [S]ure enough, the company that I had surveyed for did the map for the parcel to the north, [intervenors'] parcel.
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> "[I am] very familiar with that style of mapping. I looked it over, and it all made sense. The surveyor completely explained why it was a 15-foot flag lot, and the main reason was * * * because the house that is right there at the corner of Passley was—there was actually 20 feet between the building and the south property line. In fact, there still is to this day 20 feet between the building and the south property line. * * * [T]he planning commission allowed the 15-foot so that they would provide a 5-foot setback to that building from the property line. * * *
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> "My guess is that they allowed the 15 feet because, at that time, nobody visualized a large development going on that property, such as what [intervenors are] proposing, and they thought one house back there isn't going to cause a problem on a 15-foot flag lot." Audio Recording, City Council Meeting, August 24, 2020, at 3:13:43 (comments of Councilor Ron Hedenskog).

ORS 227.180(4) provides, "A communication between city staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section." We assume that "Tony" in the above quotation is "PWDS Director Tony Baron," Record 188, and we

assume that "PWDS" is the City of Brookings Public Works and Development Services Department. Record 1. Thus, there was no obligation for Councilor Hedenskog to place their communications with Tony on the record. However, petitioners do not argue that those communications had to be disclosed. Instead, petitioners argue that Councilor Hedenskog's review of the planning files was an *ex parte* contact that Councilor Hedenskog was required to disclose. Petition for Review 12.

In *Horizon*, the Court of Appeals explained:

> "ORS 227.180(3) does not simply establish a procedure by which a member of a deciding tribunal spreads a fact on the record. It requires that the disclosure be made at the earliest possible time. Implicit in that requirement is that the parties to the proceeding must be given the greatest possible opportunity to prepare for and to present the rebuttal that ORS 227.180(3)(b) requires that they be allowed to make. *The purpose of the statute is to protect the substantive rights of the parties to know the evidence that the deciding body may consider and to present and respond to evidence.*" 114 Or App at 253 (emphasis added).

In *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, *aff'd*, 196 Or App 787, 106 P3d 699 (2004), the petitioners argued that the county erred because the board of commissioners sought and considered new evidence after the record was closed, failed to fully disclose that information, and failed to provide an opportunity for petitioners to rebut that information.[6] After the hearing

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[6] Although *Nez Perce* concerned extra-record evidence, not *ex parte* contact, we agree with petitioners that it is instructive.

on a subdivision application, the board asked the planning director to conduct additional research relating to cultural resources. The planning director asked the state archaeologist to comment on the draft findings. The state archaeologist provided written comments and excerpts from a cultural resource protection guidebook. The planning director forwarded those materials to the board, which discussed them at a later meeting. We first noted that communications between county decision makers and staff are exempt from the *ex parte* disclosure requirement under ORS 215.442(4), the county analog to ORS 227.180(4). *Nez Perce*, 47 Or LUBA at 428; *see also Nehoda v. Coos County*, 29 Or LUBA 251, 257 (1995) (concluding that the chairman of a county board of commissioners was not required to disclose the contents of their conversation with a county code compliance officer). However, we explained that that does not mean that a decision maker may

> "rely on new evidence that is provided by planning staff, *after* the evidentiary record closes, without giving the parties a right to rebut that new evidence. Accepting such new evidence and relying on that new evidence without affording the parties a chance to rebut that new evidence could prejudice those parties' substantial right to rebut evidence and require remand." *Nez Perce*, 47 Or LUBA at 428 (emphasis in original; internal citations omitted).

We acknowledged the "potential difficulties in determining whether secret planning staff communications include new evidence for which an opportunity for rebuttal is required, or whether those communications simply assisted the decision maker in analyzing and determining the facts from the evidence that is

already in the record," and "related difficulties in determining whether the decision maker actually relied on such new evidence, and whether that reliance results in reversible error." *Id.* We concluded that the guidebook was not relied upon and that any associated error was harmless. *Id.* at 428-29. However, we concluded that the decision demonstrated that the board had relied on the state archaeologist's comments and that remand was required. *Id.* at 429-30.

First, we recognize a factual dispute between the parties regarding whether the evidence that Councilor Hedenskog referred to is, in fact, extra-record evidence. Petitioners argue that Councilor Hedenskog "read from papers not in evidence." Petition for Review 13. Intervenors respond that Councilor Hedenskog read from materials at Record 332 and 334, which are part of the city's 2003 final order approving the West Cliff Subdivision and creating the private West Cliff Drive south of the subject property.

While we understand petitioners to argue that Councilor Hedenskog impermissibly reviewed and then shared with the city council their review of the land use history of the subject property and the private West Cliff Drive, we cannot identify any "new evidence for which an opportunity for rebuttal is required." *Nez Perce*, 47 Or LUBA at 428. We will not develop petitioners' argument. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Petitioners have not identified new evidence that requires remand for an opportunity for rebuttal.

Moreover, even if we assume for purposes of this decision that petitioners adequately identified extra-record evidence, petitioners have not established that the city council actually relied on such new evidence. Petitioners argue that "[t]he record * * * indicates that the City relied on the ex parte contacts to approve the application and craft the conditions of approval." Petition for Review 17. Petitioners do not develop that argument. Petitioners do not establish impermissible reliance on extra-record evidence.

In their discussion of the flag pole/driveway access, the findings explain that, when the West Cliff Subdivision was approved in 2003, the property owner was required to improve half of the width of the private West Cliff Drive and that

> "[t]he findings of that approval make clear that the intention was that the other half of the street would be improved if and when the subject property was developed. However, the City failed to require the developer to dedicate West Cliff Drive to the City. Accordingly, West Cliff Drive remains a private road, is owned jointly by the property owners of the West Cliff Subdivision, and is maintained by the property owners." Record 4.

The findings go on to say that it would be inefficient and poor planning to require intervenors to develop a separate access along the flag pole. The findings state that the city council discussed the potential to condemn West Cliff Drive. *Id.* Ultimately, however, the council "considered and accept[ed] the expert testimony that the 15 ft driveway is adequate for the purposes of this development."[7] *Id.*

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[7] The city council did not approve a partition of the subject property in its decision. In their discussion of BMC 17.172.061(B)(2)(a), which requires that

1 The portion of the decision that petitioners identify as "contaminated" by
2 Councilor Hedenskog's summary to the city council of their independent

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rear lots have an accessway with a minimum width of 20 feet, the findings explain:

> "The subject parcel was partitioned in 1992 creating the flag lot with a driveway width less than 20 feet due to constraints to the North and South. At that time staff noted in the report to the planning Commission that the property owner attempted to obtain participation the adjacent owner to the south, now West Cliff Subdivision, to create a joint subdivision with a shared access where West Cliff Drive is currently located. That attempt failed. 'Staff[']s opinion at that time was that [intervenors] should not be penalized by the requirement of the [BMC] which tie[s] division of the lot totally to the desire of the neighbor to the South'. When partitioned the driveway was conveyed with ownership of the rear lot and to be an integral part of the rear lot as well as improved to a permanent, dust-free surface of asphaltic concrete or Portland cement." Record 6 (citations omitted).

Petitioners do not argue that BMC 17.172.061(B)(2)(a) is an approval criterion for the CUP. Moreover, the findings quoted above originated in the Planning Commission Staff Report dated July 7, 2020, which, we assume, could not have been influenced by Councilor Hedenskog's independent research. *See* Record 463. We also note that petitioner Denise Ortega submitted into the record the following comment on the planning history of the disputed accessway.

> "In regards to BMC 17.172.061 rear lot partitions and the 1992 planning commission staff finding at that time allowing the 15 foot ingress, it is highly doubtful that the planning commission staff at that time expected that there would be a CUP application for a 14 unit facility on this rear flag lot. This ingress does not meet the needs for this proposed commercial facility and to approve this could be potentially hazardous to all the area residents." Record 68.

research of the city planning files does not demonstrate impermissible reliance on extra-record evidence resulting in remandable error.

The second subassignment of error is denied.

The first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

BMC 17.92.100(E) provides:

> "Commercial service drives shall have a rectangular vision clearance area measured from the intersection of the face of the curb or pavement edge of the driveway and the face of the curb or pavement and the edge of the street. This rectangular area shall be calculated by measuring 25 feet along the street frontage and 10 feet along the drive. Two 'No Parking' signs, one on each side of the driveway, shall be installed at the point where the corner vision area ends adjacent to the back of the sidewalk or the edge of paving. Corner vison clearance requirements are found in BMC 17.128.040."

Petitioners' fourth assignment of error is that the city council erred because it did not address BMC 17.92.100(E).

Intervenors respond that BMC 17.92.100(E) applies to commercial service drives and is not applicable to its proposed residential use. BMC 17.08.030 defines "commercial service drive" as "an accessway for a shopping center containing four or more businesses having common parking areas." The flag pole is not an accessway for a shopping center. BMC 17.92.100(E) is not an applicable approval criterion and the findings were not required to address that provision. Accordingly, petitioners' argument under that provision provides no basis for remand.

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

BMC 17.136.050(C)(2) provides that, in order to grant a CUP, the decision maker must find that "[t]he site for the proposed use relates to streets and highways adequate in width and degree of improvement to handle the quantity and kind of vehicular traffic that would be generated by the proposed use." Petitioners' third assignment of error is that the city council's conclusion that the driveway, sited within the flag pole, will provide adequate access to the residential care facility is not supported by substantial evidence. LUBA will reverse or remand a land use decision if the local government "[m]ade a decision not supported by substantial evidence in the whole record." ORS 197.835(9)(C). Substantial evidence is evidence a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

Intervenors argue that the driveway is not a "street or highway" and, therefore, it is not subject to BMC 17.136.050(C)(2). The findings, however, address the driveway in their discussion of compliance with that criterion and intervenors did not file a cross petition for review assigning error to those findings. Accordingly, we accept for purposes of this decision that BMC 17.136.050(C)(2) does apply to the driveway.

A. BMC 17.172.061(B)

The flag pole contains the driveway and provides the point at which the subject property relates to the adjacent Passley Road. The findings explain that the fire chief

> "provided expert testimony that the 15 foot driveway width was adequate for emergency vehicles and reiterated that the fire code allows a reduction to 15 feet in driveway width if the building is equipped with a fire suppression system (sprinklers). * * *
>
> "* * * * *
>
> "* * * Council has considered and accepts the expert testimony that the 15 ft driveway is adequate for the purposes of this development."[8] Record 4.

Petitioners argue in part that this finding is not supported by substantial evidence because BMC 17.172.061(B)(2)(a) requires that the driveway be at least

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[8] The findings state:

> "The Council discussed that it would be inefficient and poor planning to require [intervenors] to develop a separate access along the panhandle mere feet from the existing private West Cliff Drive. One solution discussed by council involved combining the access from West Cliff Subdivision with the access along the panhandle of the subject property. This option would require [intervenors] to negotiate with those residents of West Cliff Drive for combined access. If such negotiations fail, the City could use its condemnation authority to condemn West Cliff Drive so that access to the subject property can be shared with the residents of West Cliff Subdivision. * * * It is not likely that [intervenors] could wait that long to complete the development. * * * Council has considered and accepts the expert testimony that the 15 ft driveway is adequate for the purposes of this development." Record 4.

20 feet in width.[9] Petition for Review 29. Petitioners do not argue that the 20-foot width required by BMC 17.172.061(B)(2)(a) provides the required baseline or even useful context for an adequacy determination under BMC 17.136.050(C)(2). Instead, petitioners argue that BMC 17.172.061(B)(2)(a) applies directly to the application.

Intervenors respond, and we agree, that BMC 17.172.061(B)(2)(a) applies to partitions and is not a CUP approval criterion. To the extent that the city erred in approving a partition for the subject property as a flag lot with an undersized driveway, that partition decision is final and not subject to collateral attack in this appeal.

B. BMC 17.170.100

Petitioners also argue that BMC 17.170.100 "applies to commercial developments like this one" and requires that commercial driveways and access connections providing two-way access be a minimum of 20 feet wide. Petitioners do not develop their argument that a residential care facility is a commercial

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[9] BMC 17.172.061(B) provides:

> "Provided the eligibility requirements are met, a partition may be approved subject to the following standards and criteria:
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> "* * * * *
>
> "2. Rear lot.
>
> "a. Accessway minimum width: 20 feet."

development for purposes of BMC 17.170.100 and that that provision is an applicable approval criterion.

C. BMC 17.136.050

Lastly, petitioners argue that the paved portion of the driveway will be only 12 feet wide and that the testimony of the fire chief is not substantial evidence that the proposed driveway is adequate to accommodate traffic generated by the use itself, as opposed to the limited purpose of providing emergency vehicle access. Petition for Review 29-30. We agree. BMC 17.136.050(C)(2) requires consideration of "the quantity and kind of vehicular traffic that would be generated by the proposed use." A reasonable person would not rely on testimony from a fire chief that a driveway is adequate for emergency vehicles to conclude that the driveway is able to accommodate general project traffic. We sustain this element of the third assignment of error.

The third assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

As explained above, BMC 17.136.050(C)(2) requires that the city find that "[t]he site for the proposed use relates to streets and highways adequate in width and degree of improvement to handle the quantity and kind of vehicular traffic that would be generated by the proposed use." Adequate findings identify the relevant criteria and the evidence relied upon, and explain how the evidence leads to the conclusion that the criteria are or are not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Petitioners' second assignment of error is that the

city council's findings of compliance with BMC 17.136.050(C)(2) with respect to streets and highways other than the driveway are inadequate and not supported by substantial evidence.

A. First Subassignment of Error

Petitioners' first subassigment of error is that the city council failed to make findings that Highway 101 and Dawson Road are "adequate in width and degree of improvement to handle the quantity and kind of vehicular traffic that would be generated by the proposed use." Opponents raised concerns below related to Highway 101 and Dawson Road, including that "[t]he Dawson Road entrance * * * [is] insufficient to handle the increased traffic to support emergency services and evacuations" and that "the residential Dawson tract is accessed from highway 101 by one steep, curved road. The increase of incoming and outgoing traffic from the facility will most assuredly cause congestion * * *." Record 93, 98. The city council did not adopt findings responding to the Highway 101 and Dawson Road concerns, despite the fact that BMC 17.136.050(C)(2) specifically references the relationship of the site to streets and highways. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92, 97 (2015) (citing *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989); *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330, 337 (2007); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 107-08 (1995)) (re-explaining that findings must address relevant issues that are adequately raised). The first subassignment of error is sustained.

B. Second Subassignment of Error

Petitioners' second subassignment of error is that the city council's finding that Passley Road is adequate in width and degree of improvement is not supported by substantial evidence. The driveway connects the subject property to Passley Road. In considering the potential impact of residential care facility traffic on adjoining property, as required by BMC 17.136.050(C)(3), the city council found:

> "There is clear evidence in the record that the traffic will not exceed the capacity of the streets or the access road. The testimony from the neighbors appears to be based only on speculation and fears of the worst case possible scenario. Fears regarding bad actor occupants can be addressed through the limitation to 14 beds, and the limit to occupants authorized by the [Department of Human Services (DHS)] license." Record 5.

Intervenors submitted testimony that,

> "[b]ecause of their disabilities, seniors in this home will be provided services to assist them with their activities of daily living needs. This will look like anywhere from 2 to 3 caregivers during the day and two at night on staggered shifts. There will be no large buses making regular visits for outings and by the very nature of the disabilities there is no need for access to public transportation. Any departures or travels, [due] to the nature of the disabilities, will be infrequent, and will be handled just like yours would, occasional trips to the doctor or visits to friends and family. This is not a nursing home or hospice care and will not have frequent ambulance or fire truck visits. Arrangements can also be made with local authorities to turn sirens off in the case of a rare visit.
>
> "This house will incur no more traffic than a large family household. This is an assisted living home for seniors with disabilities; therefore, our residents do not have cars and do not drive. * * *

"Secondly, as unfortunate as it is, many of the seniors do not have frequent visitors and their family's time and resource restrictions are the preceding factors as to why the seniors are in a [residential care facility] in the first place." Record 76.

The city council found:

"S. Passley Road has a paved travel surface with a 50 foot wide right-of-way with improvements in some areas. This street provides access to approximately 70 dwelling units.

"The Planning Commission's denial based on failure to satisfy [BMC 17.136.050(C)(2)] provides that the street width does not meet standards for commercial vehicles. This was based on testimony from neighbors who assumed that the project would generate 'commercial traffic.' [Intervenors] stated numerous times before the Planning Commission, orally and in writing, that no large delivery trucks or transit vehicles (buses) would be utilized. There will be an occasional emergency vehicle (ambulance) and occasional visitors, but only a reasonable number of visitors that would not exceed a number you might find at a neighbor's home while hav[ing] a birthday party or on holidays. The section of Passley Road at this particular location and to the south allows for parking on both sides of the street and is a public right of way. At the time this area was subdivided, the roadway was dedicated to the City and was developed to allow parking on both sides of the road for visitors to residents along this road.

"In terms of the ability of S. Passley Road to handle the traffic generated by the proposed residential care facility, Fire Chief Jim Watson has determined that S. Passley Road is adequate. The proposed facility is designed for the residential care of adult patients who do not drive. The primary traffic related impact would be from staff and visitors. Visitors would normally be scattered through-out the day rather than concentrated into one period. In conclusion, S. Passley Road is adequate to accommodate the level of traffic to be generated by the proposed development." Record 3-4.

This finding describes the anticipated scale and type of traffic anticipated and relies on substantial evidence—that is, evidence upon which a reasonable person would rely—to reach a conclusion that Passley Road is adequate for a 14-bed residential care facility. The second subassignment of error is denied.

The second assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

BMC 17.136.050(C)(3) provides that, in order to approve a CUP, the city must determine that

> "[t]he proposed use will have minimal adverse impact upon adjoining properties. In making this determination, the commission shall consider, but not be limited to, the proposed location of the improvements on the site, vehicular egress/ingress and internal circulation, pedestrian access, setbacks, height and bulk of buildings, walls and fences, landscaping, screening, exterior lighting and signing."

The city council found:

> "The impact on adjoining properties is the primary issue. Elderly adult residential care facilities are generally very quiet in nature and the day to day operation of the proposed facility will have some impact on adjoining properties as every development will have some impact on adjoining properties. There is one residence to the east, a church currently allowed under a CUP to the north with a large open field adjacent to [intervenors'] property, West Cliff Subdivision with five residential homes to the south and three residential lots in the Oceanside Estates Subdivision to the west.
>
> "There is clear evidence in the record that the traffic will not exceed the capacity of the streets or the access road. The testimony from the neighbors appears to be based only on speculation and fears of the worst case possible scenario. Fears regarding bad actor occupants

> can be addressed through the limitation to 14 beds, and the limit to occupants authorized by the DHS license. Testimony regarding the disturbance from visitors and ambulance calls appears to be overstated, as the bed limitation will necessarily keep that type of conflict to a minimum. This approval criterion must be interpreted in this case in the context of the federal Fair Housing limitations, which aims to facilitate development of group care facilities for the elderly population, and to curb local denials based on neighborhood fears of unlikely impacts. The proposed project will provide a landscaped buffer between the parking area and the adjoining properties as required by the [BMC]. Council finds [BMC 17.136.050(C)(3)] has been met." Record 4-5.

Petitioners' fifth assignment of error is that the city council failed to make findings addressing "adverse impact[s] on neighboring properties from pedestrian access, noise, drainage, and/or parking." Petition for Review 39.

A. Pedestrian Access

First, petitioners argue that the city did not make findings regarding the impact of the proposed development on adjoining properties from a lack of pedestrian access, even though pedestrian access is included in the BMC 17.136.050(C)(3) list of impacts to be considered. Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). We sustain this subassignment of error.

One opponent testified that they were

> "disabled and use[d] an electric scooter to walk [their] dog. The sidewalk availability in the Dawson tract leaves a lot to be desired and the intersection of Passley and Dawson Rd is the worst in the

> tract. No sidewalks on either side of the narrow street and there is a LOT of foot traffic in addition to vehicle traffic." Record 110.[10]

In its response, intervenors describe the sidewalk network and argue that that network is adequate. However, the *city council* did not make a finding that the sidewalk network is adequate to ensure that the project will have minimal adverse impacts on the pedestrian access enjoyed by adjoining properties.

The first subassignment of error is sustained.

B. Noise

Opponents also raised concerns regarding noise impacts as a result of emergency responder sirens, deliveries, trash removal services, landscape services, and staff, visitor, and emergency service traffic. Record 368, 370, 393, 476. Petitioners' second subassignment of error is that the city council did not make any findings as to the impact of noise on adjoining property. Although the city council found that "[e]lderly adult residential care facilities are generally very quiet in nature" and "not a noise generator," petitioners argue that a finding that *these types of facilities* are generally not a noise creator does not explain whether *this facility* will generate noise or impact adjoining properties. Record 4, 6. Findings must identify the criteria, the evidence relied upon, and explain how

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[10] Other opponents argued that locating a residential care facility on the subject property would pose dangers to its residents due to inadequate sidewalks and that ingress would be unsafe for pedestrian residents. Record 113, 349. Those arguments do not concern the impact of the proposed use on adjoining properties but, rather, the appropriateness of the site for the proposed users.

the evidence leads to the conclusion that the criteria are or are not met. *Heiller*, 23 Or LUBA at 556. The city council found that the testimony about disturbance from visitors and ambulance calls appeared to have been overstated and that the bed limitation will necessarily keep that type of conflict to a minimum. The conclusion section of the decision explains:

> "Residential care facilities are, by nature, not a noise generator. The traffic generated by the facilities will have an incremental increase in the noise around the general area; however, residential development on the parcel has the potential to generate more general noise than the proposed project will. The proposed project is designed to provide the required buffer between the parking area and the adjoining residential use." Record 6.

These findings are adequate to explain the basis for the city council's conclusion that the facility will not create noise problems.

The second subassignment of error is denied.

C. Drainage

Petitioners also argue that the city council did not make findings regarding whether drainage issues caused by the proposed use will have minimal impacts on adjoining properties. Opponents raised concerns that the use will lead to flooding of neighboring properties. One petitioner submitted testimony that their

> "12" storm drain becomes overloaded in heavy rains and clogged with debris. When the drain fills up, the excess water flows out the grate located on 5318 and flows downhill to my house and my neighbor at 5320. We have had crawl space flooding and standing surface water. My crawl space drain and gutters are connected to this 12" storm drain. My neighbor at 5320 (downhill property) has drains all over his yard in addition to gutters connected to this drain

> pipe. It is my opinion that this storm drain cannot handle the drainage needs of a commercial style building being added to the line and all the properties located downhill such as mine will be flooded as a result either from the overflowing grate or not being able to properly drain our own storm water into the drain system." Record 112.

The city council imposed a condition of approval requiring that intervenors

> "complete and submit drainage plans to the City Engineer for review and approval prior to any construction, including streets. Storm drainage design shall be in accordance with the City of Brookings Comprehensive Plan for Drainage. All drainage from the subject lot shall be engineered in a manner that protects all adjoining properties."

As petitioners point out, however, the findings do not address whether the project will cause drainage issues.

The third subassignment of error is sustained.

D. Parking

Lastly, petitioners argue that the city council did not make findings regarding whether a lack of on-street parking will impact adjoining properties. Specifically, petitioners argue that, although the decision indicates that the proposed development will "meet the number of spaces required by the [BMC], there are no findings as to whether the proposed development's parking spaces will meet the facility's entire parking needs, whether on-street parking will be used by residents, staff, and guests, or what impact it will have on adjoining properties." Petition for Review 43 (citation omitted). We agree with intervenors

that this argument was not developed with sufficient specificity to allow the city council to respond.

The city council found:

> "Residential care facilities parking requirements are one parking space per five residents. Unless otherwise provide, required parking and loading spaces shall not be located in a required front yard, but parking space may be located within a required side or rear yard.
>
> "Flag lot location will require off-street parking. For a 14 unit residential care facility a minimum of three on-site parking spaces for residents is required. The proposed development plans include five on-site parking spaces and one single car parking garage for a total of six parking spaces. As the proposed facility is designed for the residential care of adult patients who generally do not drive the remaining three parking spaces will be used and available for visitors and staff." Record 5.

Petitioners do not challenge this finding or otherwise argue that it is inadequate to address resident and staff parking.

BMC 17.136.050(C)(3) does not include on-street parking in its non-exclusive list of examples of potential impacts on adjoining properties. In addressing the adequacy of the adjacent Passley Road, the city council found that

> "[t]he section of Passley Road at this particular location and to the south allows for parking on both sides of the street and is a public right of way. At the time this area was subdivided, the roadway was dedicated to the City and was developed to allow parking on both sides of the road for visitors to residents along this road." Record 3.

Petitioners develop no argument that this finding fails to adequately address the use of on-street parking for visitors to residents of the residential care facility.

Where a party "disagrees with the [local government's] decision without attempting to demonstrate error in the [local government's] findings that interpret and apply [approval criteria, the party] fails to provide a basis for reversal or remand." *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 603 (2000) (citing *Just v. Linn County*, 32 Or LUBA 325, 334 (1997); *Mazeski v. Wasco County*, 28 Or LUBA 178, 188-89 (1994), *aff'd*, 133 Or App 258, 890 P2d 455 (1995); *Dougherty v. Tillamook County*, 12 Or LUBA 20, 34 (1984)). Petitioners do not address these findings of adequate parking.

The fourth subassignment of error is denied.

The fifth assignment of error is sustained, in part.

The city's decision is remanded.

Ryan, Board Member, concurring.

I agree with the resolution of this appeal, and I write separately only to emphasize that, unless the BMC prohibits it, which does not appear to be the case, the scope of the city's proceedings on remand may be expanded to address in more detail issues raised by intervenors during the proceedings before the planning commission and the city council regarding the applicability of the FHAA to the proposed development. *Schatz v. City of Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992) (explaining that, while not required to do so, a city may consider questions during its remand hearing that are beyond the scope of the remand). During the proceedings before the planning commission and the city council, intervenors argued that the FHAA required the city to make a reasonable

accommodation for any CUP approval criteria that applied to the proposed development but that the city found were not met. The city's findings regarding intervenors' FHAA arguments acknowledge that "[BMC 17.136.050(C)(3)] must be interpreted in this case in the context of the federal Fair Housing limitations, which aims to facilitate development of group care facilities for the elderly population, and to curb local denials based on neighborhood fears of unlikely impacts." Record 5. In my view, the city and the parties would benefit from more detailed findings addressing intervenors' arguments presented to the city council that the FHAA requires the city to make a reasonable accommodation for any approval criteria that the city council finds are not met.