

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

TUKWILA DEVELOPMENT, LLC,  
*Petitioner,*

vs.

CITY OF WOODBURN,  
*Respondent.*

LUBA No. 2021-058

FINAL OPINION  
AND ORDER

Appeal from City of Woodburn.

Kelly S. Hossaini filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Miller Nash LLP.

N. Robert Shields and McKenzie Granum filed the response brief. McKenzie Granum argued on behalf of respondent.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 11/05/2021

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

**NATURE OF THE DECISION**

Petitioner appeals a city council denial of its annexation and development applications.

**FACTS**

The 39-acre subject property is located within the city's urban growth boundary, north of the city's corporate boundary, northeast of the intersection of N Boones Ferry Road and Hazelnut Drive, and south of Crosby Road NE. The subject property is designated Urban Transition in the Marion County Comprehensive Plan, and it is designated Low Density Residential and Open Space and Parks in the Woodburn Comprehensive Plan (WCP).<sup>1</sup> Record 37, 1091.

The subject property contains a golf course and a former orchard but is otherwise vacant. "Residential subdivisions around the [golf course] have taken shape over the past two decades, including Goose Hollow at Tukwila, Tukwila Orchard Greens, and The Links at Tukwila, with the latest addition (The Links at Tukwila Phases IV and V) taking place around 2006." Record 1092. Petitioner

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<sup>1</sup> Woodburn Development Ordinance (WDO) 5.04.01(E) provides, "All land annexed to the City shall be designated consistent with the [WCP], unless an application to re-designate the property is approved as part of the annexation process." The staff report explains that, under WCP Policy Table 1, the default corresponding zoning districts are Residential Single Family and Public and Semi-Public. Record 37.

1 wishes to locate a residential community on approximately 18.58 acres of the  
2 subject property situated around the golf course.

3 Woodburn Development Ordinance (WDO) 4.01.07 provides:

4 “An applicant may request, in writing, to consolidate applications  
5 needed for a single development project. Under a consolidated  
6 review, all applications shall be processed following the procedures  
7 applicable for the highest type decision requested. It is the express  
8 policy of the City that development review not be segmented into  
9 discrete parts in a manner that precludes a comprehensive review of  
10 the entire development and its cumulative impacts.”

11 Pursuant to WDO 4.01.07, the city reviewed the following applications under a  
12 consolidated, Type IV review:

- 13 1. ANX 2020-01: Annexation of the subject property into the  
14 city;
- 15 2. ZC 2020-01: Zone change for the subject property to a  
16 combination of Residential Single Family and Public and  
17 Semi-Public;
- 18 3. PUD 2020-01: Consolidated application for review of a  
19 conceptual development plan and a detailed development  
20 plan for a Planned Unit Development (PUD) with 90 detached  
21 residential houses and approximately 22 acres of open space,  
22 including a golf course;
- 23 4. RCWOD 2020-01: Permit to allow development in certain  
24 areas that are within the Riparian Corridor and Wetland  
25 Overlay District;
- 26 5. SUB 2020-01: Tentative subdivision approval to create 90  
27 residential lots, open space tracts, and public streets; and

1           6.     PLA 2020-05: Property line adjustment to accommodate  
2                     rerouting some golf course path segments to align with new  
3                     segments on adjacent subdivision tracts.

4           “Type IV decisions involve the greatest amount of discretion and require  
5     evaluation of approval standards.” WDO 5.04(A). On March 11, 2021, the  
6     planning commission held a public hearing on the applications and recommended  
7     city council approval. On April 12, 2021, the city council conducted a *de novo*  
8     public hearing on the applications and made a tentative decision to deny the  
9     annexation application. Approval of the annexation was a prerequisite to  
10    approval of any of the remaining applications because, absent annexation, the  
11    city did not have jurisdiction to approve the remaining applications. On May 10,  
12    2021, the city council adopted findings denying the consolidated application  
13    package.

14           This appeal followed.

#### 15    **FIRST ASSIGNMENT OF ERROR**

16           Petitioner’s first assignment of error is that the city exceeded its  
17    jurisdiction in denying the annexation application. Petition for Review 14.  
18    Petitioner maintains that, although the applications were consolidated for  
19    processing purposes, each application remained subject to its own approval  
20    criteria and the city council improperly denied the annexation application based

1 on its determination that the proposed PUD did not meet the annexation criteria.<sup>2</sup>

2 Petition for Review 18.

3 We will “reverse or remand a decision involving the application of a plan  
4 or land use regulation provision if the decision is not in compliance with  
5 applicable provisions of the comprehensive plan or land use regulation.” ORS  
6 197.835(8). We will also reverse or remand a decision if the local government  
7 exceeded its jurisdiction or improperly construed the applicable law. ORS  
8 197.835(9)(a)(A), (D).

9 **A. Standard of Review**

10 We review the city council’s interpretation of its own regulations under  
11 ORS 197.829(1) and are required to affirm that interpretation so long as it is not  
12 inconsistent with the regulations’ express language, purposes, or underlying  
13 policies—that is, if it is plausible.<sup>3</sup> *Siporen v. City of Medford*, 349 Or 247, 259,

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<sup>2</sup> Petitioner argues:

“In the decision, the City denied the annexation application based on its determination that the PUD does not meet the annexation approval criteria. This is reversible error.

“Through the Decision, \* \* \* the city denied the annexation application, with the remaining applications in the consolidated bundle being denied as a consequence.” Petition for Review 18.

<sup>3</sup> ORS 197.829 provides:

1 243 P3d 776 (2010). According to the city, we must defer to the city council's  
2 interpretation of the WCP and WDO because the city considered and chose  
3 between or harmonized conflicting provisions. Response Brief 7. The city does  
4 not, however, identify the conflicting provisions that the city council chose  
5 between or harmonized. Rather, the city appears to argue that we must defer to  
6 the city council's determination of which elements of the WCP and WDO and  
7 which elements of the broader development proposal were relevant to the  
8 annexation. The findings do not explain the basis for any choices that the city

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“(1) [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.

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1 council may have made in evaluating the criteria. An interpretation first put  
2 forward in the response brief and not reflected in the decision is not an  
3 interpretation by the local decision maker and is not entitled to deference. *City of*  
4 *Albany v. Linn County*, 78 Or LUBA 1, 4-5 (2018).

5 **B. WDO 4.01.07**

6 Because the parties dispute the proper role of WDO 4.01.07 in the city  
7 council's review of the annexation application, we begin with a discussion of that  
8 code provision.

9 The "Standards and Criteria" section of the decision contains a subsection  
10 titled "Background." Record 14. Under "Background," the city council explains  
11 that it "*reviewed [the] annexation and development applications* package  
12 holistically per WDO [4.01.07 and that t]he proposal was a consolidated package  
13 as a land use Type IV review—a discretionary review—and all the applications  
14 other than for annexation were dependent on annexation." *Id.* (emphasis added).  
15 The city council expressly drew a distinction between the annexation and  
16 development applications. That distinction is consistent with the WDO definition  
17 of development as "[a] building or grading operation, making a material change  
18 in the use or appearance of a structure of land, dividing land into two or more  
19 parcels, partitioning or subdividing land, or the creation or termination of an  
20 access right" and the WDO description of "annexation" as the incorporation of  
21 "contiguous territory into the City in compliance with state requirements, [the  
22 WCP], and [the WDO]." WDO 1.02; WDO 5.04.01(A).

1       After distinguishing between annexation and development, the findings  
2 explain that petitioner's applications were reviewed holistically, but they do not  
3 define or expand on the term "holistically." The plain meaning of "holistic" is  
4 "emphasizing the organic or functional relation between parts and wholes."  
5 *Webster's Third New Int'l Dictionary* 1080 (unabridged ed 2002). The city  
6 council appears to have recognized the functional relationship between the  
7 annexation and development applications when it observed that it would not have  
8 jurisdiction over development applications if it did not approve the annexation  
9 application.

10       Petitioner argues generally that WDO 4.01.07 is a process provision and  
11 that it does not allow the city council to apply PUD criteria to an annexation  
12 application. The city argues that petitioner is improperly suggesting that the city  
13 council must consider the annexation application in a vacuum and that it may not  
14 consider information contained in other consolidated applications.

15       WDO section 4.01 is titled "Decision-Making Procedures," and it explains  
16 that it "provides *the review and decision-making procedures* by which all  
17 applications relating to the use of land authorized by ORS Chapters 92, 197 and  
18 227 are reviewed and decided, as well as legislative enactments initiated by the  
19 City Council." (Emphasis added.) WDO 4.01.07, quoted in full above, explains  
20 that "[i]t is the express policy of the City that development review not be  
21 segmented into discrete parts in a manner that precludes a comprehensive review  
22 of the entire development and its cumulative impacts." We agree with petitioner



1 that WDO 4.01.07 is a process provision and that it does not expand the  
2 applicable approval criteria. Each application is subject to the approval criteria  
3 identified in the WDO as applicable to that application. Further, because  
4 annexation is not development, evaluating the annexation application solely  
5 against the annexation criteria does not preclude a comprehensive review of the  
6 development applications and their cumulative impacts.

7 **C. WDO 5.04.01(C)(1)**

8 Annexations are governed by WDO 5.04.01. Pursuant to WDO  
9 5.04.01(C)(1), annexations must be in “[c]ompliance with applicable [WCP]  
10 goals and policies regarding annexation.” The Growth Management and  
11 Annexation element of the WCP identifies “Growth Management Goals and  
12 Policies” and “Annexation Goals and Policies.” The city council’s analysis of  
13 WDO 5.04.01(C)(1) cites two Growth Management Policies and two Annexation  
14 Policies.

15 The cited Growth Management Policies provide:

16 “G-1.4 The city shall assure the provision of major streets as  
17 shown in the Transportation Systems Plan [(TSP)]. The  
18 City shall hold development accountable for streets within  
19 and abutting the development. In addition, the policy of  
20 the city is to emphasize development outward in  
21 successive steps and phases that avoid unnecessary gaps  
22 in the development and improvement of the streets.

23 “\* \* \* \* \*

24 “G.-1.6 The City shall encourage high standards of design and  
25 flexibility that are enabled by the PUD zone.”

1 As petitioner points out, WDO 5.04.01(C)(1) requires that annexations comply  
2 with WCP goals and policies “*regarding annexation.*” (Emphasis added.) WCP  
3 Policies G-1.4 and G-1.6 are Growth Management Policies. They are not  
4 Annexation Policies. The findings provide no explanation for why those  
5 provisions are applicable to the annexation application, and we agree with  
6 petitioner that they are not. We also agree with petitioner that, by their language,  
7 WCP Policy G-1.4 concerns development generally and Policy G-1.6 concerns  
8 PUDs specifically. An annexation is not development or a PUD, so WCP Policies  
9 G-1.4 and G-1.6 do not apply to the annexation application for that reason as  
10 well.<sup>4</sup>

11 The Annexation Policies cited in the city council’s analysis of WDO  
12 5.04.01(C)(1) provide, in relevant part:

13 “G-2.1 For each proposed expansion of the City, Woodburn shall  
14 assess the proposal’s conformance with the City’s plans,

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<sup>4</sup> The WCP does not define “development” or “PUD.” As explained previously, the WDO defines “development” as “[a] building or grading operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, partitioning or subdividing land, or the creation or termination of an access right.” WDO 1.02. The WDO defines “PUD” as

“[a] type of land development which, as a single project, allows for mixed use and design flexibility that is based on a design which is in compliance with the [WCP], the uses allowed by underlying zoning, specified exceptions to zoning standards and applicable subdivision, condominium and homeowner association requirements of the [WDO].” *Id.*

1 and facility capacity and assess its impact on the  
2 community.

3 “G-2.2 Woodburn will achieve more efficient utilization of land  
4 within the City by:

5 “(a) Incorporating all of the territory within the City  
6 limits that will be of benefit to the City.”

7 WCP Policies G-2.1 and G-2.2 are applicable to annexations. However, the  
8 findings addressing those provisions focus on the impacts from the proposed  
9 PUD, as opposed to the impacts from the proposed annexation.

10 The city council concluded that the application failed to meet WCP  
11 Policies G-2.1 and G-2.2 “[b]ecause the application materials lacked necessary  
12 improvements for the boundary street at Hazelnut Drive” and, as a result, “the  
13 existing substandard improvements abutting the southwest perimeter of the  
14 subject property would have remained.” Record 16. Annexation criteria  
15 specifically referencing public facilities serving residential uses are set out in  
16 WDO 5.04.01(C)(2) and (3), and the findings with respect to those criteria are  
17 discussed below. Petitioner argues, and we agree, that the annexation criteria do  
18 not require boundary street improvements at the time of annexation. Instead,  
19 street improvements are required *upon development*. WDO 5.04.01(F)(1) and (3)  
20 provide, respectively, that “[s]treet dedication is required upon annexation” and  
21 that “[s]treet improvements are required upon development.” In turn, the PUD  
22 criteria provide that “[b]oundary and connecting streets shall use the street  
23 sections of Section 3.01.04.” WDO 3.09.06(C)(3). The city council erred in

1 applying the PUD criteria to the annexation application to conclude that the  
2 annexation criteria are not met.

3 The city council also concluded that WCP Policies G-2.1 and G-2.2 were  
4 not met “[b]ecause the proposed development included few open space tracts and  
5 provided too much passive open space that lacked enough active recreational  
6 improvements, and because the proposal also lacked a playground specifically.”  
7 Record 16. WDO 3.09.06(A) and (B) contain common area requirements for  
8 PUDs. However, the proposal, for purposes of WDO 5.04.01(C)(1), is the  
9 annexation, not the PUD. The city council findings do not explain how Policy G-  
10 2.2 is implicated by this annexation

11 The city council did not explain why the street and open space  
12 requirements for PUDs were relevant to the annexation criteria or how it  
13 considered, chose, and harmonized provisions. We agree with petitioner that  
14 nothing in the WDO, including the annexation criteria and consolidated  
15 application review process provided in WDO 4.01.07, requires or permits the city  
16 to simply import PUD criteria into its review of annexation applications and deny  
17 the latter on the basis that the former are not satisfied.

18 The first subassignment of error is sustained.

19 **D. WDO 5.04.01(C)(2)**

20 WDO 5.04.01(C)(2) provides:

21 “Territory to be annexed shall be contiguous to the City and shall  
22 either:

1       “a.   Link to planned public facilities with adequate capacity to  
2           existing and future development of the property as indicated  
3           by the [WCP]; or

4       “b.   Guarantee that public facilities have adequate capacity to  
5           serve existing and future development of the property.”

6   With respect to streets, the city council found that this criterion was not met for  
7   the same reason that that WCP Policies G-2.1 and G-2.2 were not met: “[b]ecause  
8   the application materials lacked necessary improvements for the boundary street  
9   at Hazelnut Drive, the existing substandard improvements abutting the southwest  
10   perimeter of the subject property would have remained.” Record 17. The city  
11   council concluded that “[t]he proposal failed to guarantee that the public facilities  
12   like sidewalks and street trees would have adequate capacity to serve the existing  
13   (golf course) and future development (the PUD) of the property.” *Id.*

14       Again, the annexation criteria include WDO 5.04.01(F)(3), which provides  
15   that street improvements are required upon development.<sup>5</sup> The WDO does not  
16   allow the imposition of conditions on annexation approvals, so the proposed

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<sup>5</sup> WDO 5.04.01(C)(3)(a)(4) requires applications for the annexation of land designated for residential and community uses to demonstrate that

“[t]he site is feasible for development and provides either:

“a)   Completion or extension of the arterial/collector street pattern  
      as depicted on the Woodburn Transportation System Plan; or

“b)   Connects existing stub streets, or other discontinuous streets,  
      with another public street.”

The city’s decision does not address that standard.

1 annexation could not have been conditioned on the provision of boundary street  
2 improvements at the time of development.<sup>6</sup> The PUD criteria set out in WDO  
3 3.09.06(C) govern streets and provide:

4 “1. A PUD shall conform to and, where possible, enhance  
5 existing or planned vehicle, pedestrian and bicycle networks,  
6 including connections and functionality. Note: See Figures 7-  
7 1 (Functional Classification Designations), 7-3 (Pedestrian  
8 Plan), and 7-4 (Bicycle Plan) of the [TSP].

9 “2. All streets shall be public.

10 “3. Boundary and connecting streets shall use the street sections  
11 of Section 3.01.04.

12 “4. Internal streets may use the street sections of Section 3.01.04,  
13 or the PUD may propose other street sections, provided that  
14 the streets:

15 “a. conform to the Oregon Fire Code (see Figures 3.04C  
16 and 3.04D)

17 “b. include sidewalks, and

18 “c. are constructed to the specifications of the Public  
19 Works Department.”

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<sup>6</sup> WDO 4.01.06(A) provides:

“All City decision-making bodies have the authority to impose conditions of approval reasonably related to impacts caused by the development or designed to ensure that all applicable approval standards are, or can be met, on Type II, III and IV decisions *except annexation*. All conditions of approval shall be clear and objective or if the condition requires discretion shall provide for a subsequent opportunity for a public hearing.” (Emphasis added.)

1 The WDO anticipates addressing sidewalks and boundary streets in development  
2 applications.

3 With respect to open space, the city council found that “[t]he proposed  
4 territory to be annexed was to be a [PUD] for which WDO Table 3.09A requires  
5 that 30% of gross site area be common area.” Record 17. The city council  
6 concluded that the proposed PUD did not provide adequate open space and that  
7 “both the public and residents of the future development would have lacked  
8 adequate facilities to engage in active recreation within their own neighborhood.”  
9 Record 18. The city council found, “Because the PUD proposal lacks sufficient  
10 common open space with needed enhanced public amenities, including, but not  
11 limited to a playground facility, and because [petitioner] has failed to propose  
12 adequate improvements for a boundary street to the development, [WDO  
13 5.04.01(C)(2)] has not been met.” *Id.* Again, we agree with petitioner that the city  
14 council may not import PUD criteria into its review of annexation criteria. The  
15 city council erred in doing so.

16 The second subassignment of error is sustained.

17 **E. WDO 5.04.01(C)(3)(a)(5)**

18 WDO 5.04.01(C)(3) provides, in part:

19 “Annexations shall show a demonstrated community need for  
20 additional territory and development based on the following  
21 considerations:

22 “a. Lands designated for residential and community uses should  
23 demonstrate substantial conformance to the following:

1                   \*\* \* \* \* \*

2                   “5)   Annexed [*sic*] fulfills a substantial unmet community  
3                   need, that has been identified by the City Council after  
4                   a public hearing. Examples of community needs  
5                   include park space and conservation of significant  
6                   natural or historic resources.”

7   This criterion requires a finding that the annexation meets a need for additional  
8   territory to be developed. In addressing this criterion, the city council focused on  
9   the “substantial need of the community of future residents of the 90 houses in the  
10   development within the territory to be annexed for active recreation including by  
11   children.” Record 18. The Parks and Recreation element of the WCP identifies  
12   “Open Space/Parks Goals and Policies.” The decision cites an Open Space/Parks  
13   Goal, which provides, in part, “It is the goal of the City to provide adequate parks,  
14   recreation facilities, and open space to maintain Woodburn’s livability and  
15   managed growth, and to provide social, economic and environmental benefits to  
16   individuals, families and the community.” WCP Goal L-1. The city council also  
17   cited an Open Space/Parks Policy, which provides, “Because recreation  
18   participation preferences and interests vary among employment, ethnic, social,  
19   and cultural groups, it is the policy of the City to ensure that parks, open spaces,  
20   facilities, and programs are developed to meet the diverse needs and interests of  
21   Woodburn’s population.” WCP Policy L-1.11. The city council concluded:

22               “The proposal, *a combination of annexation and development*,  
23               would have permitted unmanaged growth by failing to provide  
24               adequate open space and sufficient active recreation facilities for  
25               families, particularly for the needs of the future residents of the 90  
26               houses in the small lot development. For such reason, [WDO



1 5.04.01(C)(3)(a)(5)] has not been met.” Record 19 (emphasis  
2 added).

3 We agree with petitioner that the city council erred by denying the annexation  
4 application based on a finding that the proposed PUD failed to provide adequate  
5 open space and sufficient active recreation facilities.

6 According to petitioner, “[t]he question is whether the approximately 39-  
7 acre territory to be annexed fulfills a substantial unmet community need, not  
8 whether the PUD application fulfills such a need.” Petition for Review 30. The  
9 question left unanswered by the city council was whether the annexation of the  
10 property would fulfill a substantial unmet community need for land to be  
11 developed. The city should answer that question on remand.

12 The third subassignment of error is sustained.

13 **F. WDO 5.04.01(F)(3)**

14 As noted above, WDO 5.04.01(F) provides, in part:

15 “The timing of public improvements is as follows:

16 “\* \* \* \* \*

17 “3. Street improvements are required upon development.”

18 The city council found:

19 “The proposal was a consolidated package of applications including  
20 both annexation, [PUD], and preliminary subdivision. WDO 1.02  
21 defines ‘development’ as, ‘A building or grading operation, making  
22 a material change in the use or appearance of a structure or land,  
23 dividing land into two or more parcels, partitioning or subdividing  
24 land, or the creation or termination of an access right.’ \* \* \*

25 “The proposal involved subdivision, thereby creating lots, tracts,

1 and public rights-of-way (ROWs) changing access rights. It also  
2 would have set the stage for later grading and building permits.  
3 Therefore, the proposal met the definition and so was subject to  
4 street improvements through 3.01.01B, 3.01.02A, 3.01.03, & Figure  
5 3.01A.” Record 19.

6 WDO section 3.01 explains that its purpose “is to provide for safe and efficient  
7 streets within the City, and to implement the [WCP] and the [TSP]. The provision  
8 of streets is guided by the goals and policies of the [WCP], the TSP, and other  
9 sections of the [WDO].” The city council found that WDO section 3.01 applies  
10 to the annexation application because it was consolidated with a subdivision  
11 application. As we explained above, consolidation is for purposes of procedure,  
12 and it does not change the approval criteria applicable to a given application. The  
13 city council erred in applying street standards applicable to subdivision  
14 applications to the annexation application.

15 The fourth subassignment of error is sustained.

## 16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner’s second assignment of error is that “[t]he City improperly  
18 construed the applicable law, exceeded its authority, and made a decision without  
19 adequate findings or substantial evidence with respect to the eight reasons on  
20 which it denied the annexation application.” Petition for Review 33.

21 The “Findings” section of the decision contains eight discrete findings:

22 “A. Open space tracts were too few and provided too much  
23 passive open space by lacking enough active recreation  
24 improvements and enhanced public amenities.

25 “B. Lacked a playground.

1       “C.   Lacked application materials for required boundary street  
2       improvements for the portion of Hazelnut drive & Boones  
3       Ferry Road NE running along the Southwest corner of the  
4       development.

5       “D.   Lacked a second, northerly street connection to Boones Ferry  
6       Road NE (extending the proposed Trillium Avenue West to  
7       the road).

8       “E.   Had uncertainty about whether or not it would generate traffic  
9       along Olympic Street south of the development.

10      “F.   Removed the large tree along the road (Tree 12610).

11      “G.   Lacked cycling facilities on the local streets in addition to the  
12      proposed bicycle lane along the east side of the road.

13      “H.   Packed in flag lots too much with driveways that were too  
14      narrow.” Record 21.

15   The decision concludes, “Based on the above findings, particularly A-C, the city  
16   council *denies the consolidated applications* package.” *Id.* (emphasis added). In  
17   eight subassignments of error, petitioner challenges each of the above findings.

18       Adequate findings identify the relevant approval criteria and the evidence  
19   relied upon and explain how the evidence leads to the conclusion on whether the  
20   approval criteria are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556  
21   (1992). To the extent that the above findings are intended to respond to all six  
22   applications, they are inadequate because they do not identify the relevant  
23   approval criteria or to which of the six applications each finding relates. The  
24   parties appear to agree, however, that the findings relate to denial of the  
25   annexation application, and we address them in that context. Petition for Review  
26   34; Response Brief 21.

1 With respect to findings A through C, the city incorporates its response to  
2 the first assignment of error and argues that it was able to consider the proposed  
3 PUD, specifically the open space and boundary street, when evaluating the  
4 annexation application. Response Brief 24-25. We sustain petitioner's  
5 subassignments of error with respect to findings A through C for the reasons set  
6 forth in our resolution of the first assignment of error. Findings that the proposed  
7 PUD did not provide adequate open space or boundary street improvements do  
8 not suffice to deny the annexation application.<sup>7</sup>

9 The decision does not link findings D through H with an approval criterion.  
10 In its response, the city argues that those findings identify potential cumulative  
11 impacts if the annexation had been approved and that "a comprehensive review  
12 of the applications is both suitable and allowable for the City to consider a  
13 development's 'cumulative impacts.'" Response Brief 26. Again, WDO 4.01.07  
14 provides that "development review [shall] not be segmented into discrete parts in  
15 a manner that precludes a comprehensive review of the entire development and  
16 its cumulative impacts." The contention that findings D through H relate to  
17 cumulative impacts arose for the first time in the response brief, and it receives  
18 no deference. Furthermore, the concerns described in findings D through H

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<sup>7</sup> We agree with the city that it may rely on relevant materials submitted in one application as evidence in evaluating a different application and that it may resolve evidentiary conflicts between applications. We agree with petitioner, however, that the city cannot apply criteria applicable to one application to a different application.

1 would not result from annexation alone, and no potential cumulative impacts  
2 would result unless the PUD and subdivision applications were approved.  
3 Petitioner's subassignments of error with respect to findings D through H are  
4 sustained.

5 The second assignment of error is sustained.

## 6 **DISPOSITION**

7 Petitioner asks that we reverse the city's decision and order the city to  
8 approve the six applications. We will reverse a decision and order the local  
9 government to grant approval if the decision "is outside the range of discretion  
10 allowed the local government under its comprehensive plan and implementing  
11 ordinances." ORS 197.835(10)(a)(A).<sup>8</sup> ORS 197.835(10)(a) "requires reversal,  
12 and precludes remand, of a denial decision when LUBA determines on the basis  
13 of the record that the local government lacks the discretion to deny the  
14 development application." *Stewart v. City of Salem*, 231 Or App 356, 375, 219  
15 P3d 46 (2009), *rev den*, 348 Or 415 (2010).

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<sup>8</sup> ORS 197.835(10)(a), provides, in part:

"The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

"(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

1           In this case, the city council denied the annexation application based on its  
2   conclusion that the consolidated applications were inconsistent with certain WCP  
3   provisions and PUD criteria. We agree with petitioner that the city erred in  
4   denying the annexation application based on WCP provisions and PUD criteria  
5   that are not applicable to annexations. The city did not consider the annexation  
6   criteria apart from the inapplicable WCP provisions and PUD criteria. While we  
7   agree with petitioner that that was error, we cannot say that the annexation denial  
8   is outside the range of discretion allowed the city under the WCP and the WDO.  
9   Reversal with an order to approve is not an appropriate remedy for the city's  
10   errors. Instead, the city must consider the annexation application without  
11   applying inapplicable WCP provisions and PUD criteria.

12           Because the city denied the annexation application, the city did not reach  
13   the merits of the remaining consolidated applications. The city reasoned that the  
14   other consolidated applications depend on annexation, and it denied them on the  
15   basis that the annexation application was denied. Those applications require  
16   further review. We cannot say at this juncture that denial of those application is  
17   outside the range of discretion allowed the city under the WCP and the WDO.

18           The city's decision is remanded.