

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

3  
4                   D. SCOTT PETERSON,  
5                   *Petitioner,*

6  
7                   and

8  
9                   SHANNEN KNIGHT,  
10                  *Intervenor-Petitioner,*

11  
12                  vs.

13  
14                  CITY OF WEST LINN,  
15                  *Respondent,*

16  
17                  and

18  
19                  WEST LINN-WILSONVILLE SCHOOL DISTRICT,  
20                  *Intervenor-Respondent.*

21  
22                  LUBA No. 2021-107

23  
24                  FINAL OPINION  
25                  AND ORDER

26  
27                  Appeal from City of West Linn.

28  
29                  D. Scott Peterson filed a petition for review and reply brief and argued on  
30                  behalf of themselves.

31  
32                  Shannen Knight filed a petition for review and reply brief and argued on  
33                  behalf of themselves.

34  
35                  William A. Monahan filed a response brief on behalf of respondent. Also  
36                  on the brief was James D. Howsley and Jordan Ramis PC.  
37

1           Carrie A. Richter filed a response brief and argued on behalf of intervenor-  
2 respondent.

3  
4           RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board  
5 Member, participated in the decision.

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7                           AFFIRMED                           03/28/2022

8  
9           You are entitled to judicial review of this Order. Judicial review is  
10 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals the city council’s approval of a conditional use permit (CUP) to construct a middle school.<sup>1</sup>

**MOTIONS TO INTERVENE**

Shannen Knight (intervenor-petitioner) moves to intervene on the side of petitioner. West Linn-Wilsonville School District (the District) moves to intervene on the side of the city. The motions are unopposed and granted.

**FACTS**

The District seeks to develop a middle school on the subject property. The middle school is sized and designed to accommodate 850 students, and it

“includes a 110,972 square foot building with 25 classroom spaces, entry plazas, soft and hard surface play areas, a running track, turf athletic fields, outdoor learning areas including a greenhouse, separated bus/staff and parent drop off zones, on-site queuing space for buses/parents, walking trails, and habitat and tree canopy preservation areas.”<sup>2</sup> Record 12.

**A. The Application**

The vacant, 21.4-acre subject property is zoned Single-Family Residential Detached (R-10). Single-family residences border the subject property to the

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<sup>1</sup> The approval also includes design review, Tualatin River Greenway review, Flood Management Area review, variances, and lot consolidation review.

<sup>2</sup> The new middle school is intended to replace/relocate Athey Creek Middle School, which is currently located in unincorporated Clackamas County.

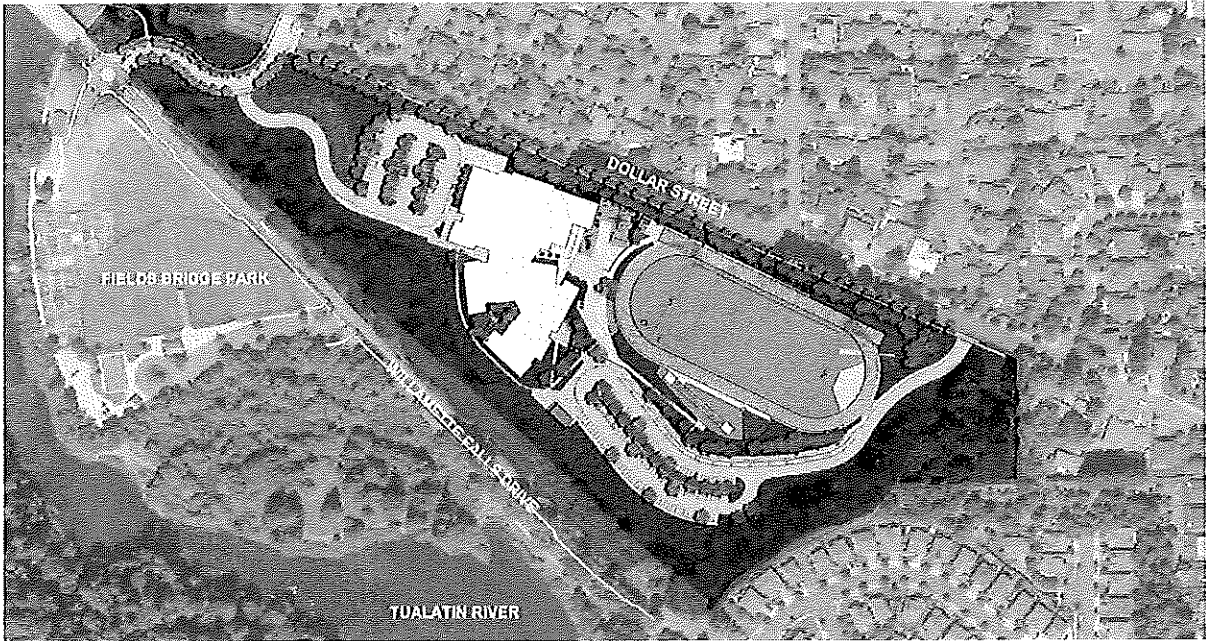
1 southeast. Willamette Falls Drive, designated a minor arterial street in the 2016  
2 West Linn Transportation System Plan (TSP), runs along the subject property's  
3 southwest border.<sup>3</sup> Fields Bridge Park is located on the opposite side of  
4 Willamette Falls Drive. Dollar Street, designated a local street in the TSP, runs  
5 along the subject property's northeastern border.<sup>4</sup> Dollar Street separates the  
6 subject property from nearby single-family residences. Some of these single-  
7 family residences are located along Brandon Place, a cul-de-sac originating at  
8 Dollar Street that is designated a local street in the TSP.

9       Although the subject property is almost triangular in shape, Dollar Street  
10 and Willamette Falls Drive do not intersect at the subject property. Development  
11 of the school will "include right-of-way improvements to Dollar Street and  
12 Willamette Falls Drive, and an extension of Brandon Place from Dollar Street to  
13 Willamette Falls Drive." Record 13. That extension is depicted in the upper left-  
14 hand corner of the site plan reproduced below.

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<sup>3</sup> An "arterial" street is "[a] street designated in the functional class system as providing the highest amount of connectivity and mostly uninterrupted traffic flow through an urban area." TSP at x.

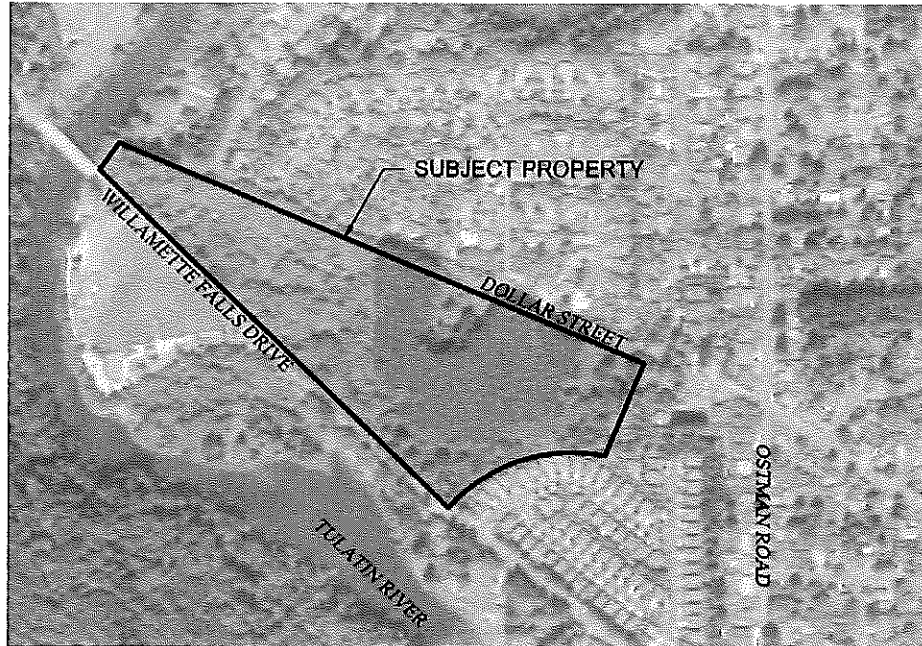
<sup>4</sup> The subject property's address is 840 and 945 Dollar Street. A "local" street is "[a] street designated in the functional class system that's primary purpose is to provide access to land use as opposed to enhancing mobility. These streets typically have low volumes and are very short in relation to collectors and arterials." TSP at xiii.



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2 Record 103.

3 An October 2020 traffic impact analysis (TIA) prepared by DKS  
4 Associates on behalf of the District “estimated that 40% of vehicle trips will  
5 travel to/from the site via Willamette Falls Drive east, 45% will come from the  
6 west of the Tualatin River, and the remaining 15% will come from the  
7 neighborhoods just to the east of Ostman Road or from the north side of I-205.”  
8 Record 1491. The location of Ostman Road in relation to the subject property is  
9 depicted in the image below.



1

2 Record 143. Ostman Road is designated a collector street in the TSP.<sup>5</sup> The 2020  
3 TIA’s 2023 no build scenario showed the Willamette Falls Drive/Ostman Road  
4 intersection performing below level of service (LOS) D at the midday peak (3:00  
5 pm to 5:00 pm) without construction of the school.<sup>6</sup> Record 1495. The 2020

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<sup>5</sup> A “collector” street is “[a] street designated in the functional class system that provides connectivity between local and neighborhood streets with the arterial streets serving the urban area. Usually shorter in distance than arterials, designed with lower traffic speeds and has more traffic control devices than the arterial classification.” TSP at xi.

<sup>6</sup> The 2020 TIA explains:

“Level of service (LOS): A ‘report card’ rating (A through F) based on the average delay experienced by vehicles at the intersection. LOS A, B, and C indicate conditions where traffic moves without significant delays over periods of peak hour travel demand. LOS D and E are progressively worse operating conditions. LOS F represents conditions whether average vehicle delay has become

1 TIA's 2023 build scenario showed the Willamette Falls Drive/Ostman Road  
2 intersection still performing below LOS D at the midday peak but with improved  
3 performance. In the 2023 no build scenario, the delay during the midday peak  
4 was reported as 40.9 seconds and, in the 2023 build scenario, it was reported as  
5 38.9 seconds. Record 1495-96. In April 2021, another transportation firm,  
6 Kittelson & Associates, sent a review of the 2020 TIA to the city and suggested  
7 that the city request an updated TIA addressing specific issues. Among other  
8 things, the review stated, "It does not appear that any existing local traffic was  
9 assumed to reroute to the new Brandon Place extension between Dollar Street  
10 and Willamette Falls Drive. Please clarify or update the analysis to reflect a likely  
11 rerouting of existing local traffic." Record 2667. Accordingly, a second TIA  
12 dated June 2021 was prepared by DKS Associates on behalf of the District.

13 The 2021 TIA addressed the rerouting issue as follows:

14 "Based on discussions with City staff and direction from the City's  
15 traffic consultant, an estimated 35 vehicle trips were assumed to  
16 reroute to Brandon Place from Ostman Road during the Midday  
17 peak hour, with 15 of those trips being added to Dollar Street. \* \* \*

18 "As shown, the operations at the proposed roundabout [where the  
19 Brandon Place extension would intersect with Willamette Falls  
20 Drive] remain unchanged even with an increase in 35 vehicle trips.  
21 However, the delay for the eastbound approach on Willamette Falls  
22 Drive at Ostman Road is significantly improved (-15 seconds of  
23 delay), allowing the intersection to meet the City LOS D standard."

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excessive and demand has exceeded capacity. This condition is typically evident in long queues and delays." Record 1484.

1 Record 2706-07.

2 **B. The City's Proceedings**

3 On July 7, 2021, the planning commission held its first hearing on the  
4 development application. The July 7, 2021 hearing was continued to August 4,  
5 2021. On August 4, 2021, the planning commission closed the public hearing and  
6 deliberated. Six members of the seven-member planning commission were  
7 present at this hearing, and they deadlocked on two motions, one to approve the  
8 application and one to deny it. A motion to postpone the vote until the next  
9 meeting was approved.

10 On August 18, 2021, the planning commission met with all seven members  
11 in attendance. The planning commission resumed deliberations and the  
12 development application was approved with a four-to-three vote. The planning  
13 commission approval included Condition of Approval 10, which required that,  
14 rather than provide general traffic access, the Brandon Place extension not be  
15 built as a through street. Record 763.

16 A neighborhood association appealed the planning commission decision to  
17 the city council. On October 4, 2021, the city council held a public hearing on  
18 the appeal. The mayor's participation was challenged, and the city council voted  
19 to consider the appeal without the mayor's participation. The four-member city  
20 council began deliberations on the appeal at its October 4, 2021 meeting and  
21 continued the meeting to October 7, 2021. On October 7, 2021, the city council  
22 continued deliberations and ultimately deadlocked with a two-to-two vote. West



1 Linn Community Development Code (CDC) 99.300(A)(1) provides, in part, “If  
2 no majority is in favor of any motion, then the previous decision shall be  
3 considered affirmed.” The city attorney explained that, based upon CDC  
4 99.300(A)(1), the planning commission decision approving the application  
5 would stand. On October 18, 2021, the city council adopted a decision approving  
6 the application, including the planning commission condition of approval that the  
7 Brandon Place extension “only be built for emergency vehicle access.” Record  
8 20. The city council also adopted findings that incorporate some of the planning  
9 commission’s findings, among other documents, and clarify that, “[i]f there is a  
10 conflict between these Findings and the Incorporated Findings, these findings  
11 shall control.” Record 12.

12 This appeal followed.

### 13 **STANDARD OF REVIEW**

14 Intervenor-petitioner’s second through fifth assignments of error assert  
15 that the decision violated applicable procedural requirements. We will remand  
16 the city’s decision if it “is flawed by procedural errors that prejudice the  
17 substantial rights of the petitioner(s).” OAR 661-010-0071(2)(c).

18 The first subassignment of error under petitioner’s first assignment of error  
19 is that the city improperly construed applicable law. We will remand a decision  
20 that “improperly construes the applicable law, but is not prohibited as a matter of  
21 law.” OAR 661-010-0071(2)(d).

1 Intervenor-petitioner’s first assignment of error, petitioner’s second  
2 assignment of error, and the second subassignment of error under petitioner’s  
3 first assignment of error are that the city council’s findings are inadequate and/or  
4 not supported by substantial evidence. We will remand a decision when “[t]he  
5 findings are insufficient to support the decision, except as provided in ORS  
6 197.835(11)(b).”<sup>7</sup> OAR 661-010-0071(2)(a). We will also remand a decision that  
7 is not supported by substantial evidence in the whole record. OAR 661-010-  
8 0071(2)(b).

9 **INTERVENOR-PETITIONER’S SECOND ASSIGNMENT OF ERROR**

10 Intervenor-petitioner’s second assignment of error is that the city erred by  
11 reopening the record to allow the District to comment on conditions of approval  
12 proposed by a planning commissioner during deliberations without providing a  
13 similar opportunity for other hearing participants to comment.

14 During deliberations, Councilor Baumgardner made a motion to approve  
15 the CUP subject to the following conditions of approval:

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<sup>7</sup> 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           (1)    The school capacity be reduced from 850 to 650 pupils;
- 2           (2)    The running track shown on the District’s site plan be  
3                removed and the school building be placed in the running  
4                track location; and
- 5           (3)    The option of using smaller school buses be explored. Record  
6                38.

7            After Councilor Baumgardner’s motion was seconded, the city attorney  
8            advised the city council to allow the District to comment on the proposed  
9            conditions. After being invited to comment, the District’s representative stated,  
10           “Good evening. As has been noted, these are large, significant changes, which  
11           were not previously discussed in any way. The District cannot be certain as to the  
12           impact of these changes, nor their acceptability. Thank you.” Audio Recording,  
13           West Linn City Council, Oct 7, 2021, at 2:19:55 (statement of District  
14           representative Remo Douglas).

15           *Former* ORS 197.763(7) (2019), *renumbered as* ORS 197.797(7) (2021),  
16           provides, “When a local governing body \* \* \* reopens a record to admit new  
17           evidence, arguments or testimony, any person may raise new issues which relate  
18           to the new evidence, arguments, testimony or criteria for decision-making *which*  
19           *apply to the matter at issue.*” (Emphasis added.) For purposes of *former* ORS  
20           197.763,

21           “(a) ‘Argument’ means assertions and analysis regarding the  
22                satisfaction or violation of legal standards or policy believed  
23                relevant by the proponent to a decision. ‘Argument’ does not  
24                include facts.

1           “(b) ‘Evidence’ means facts, documents, data or other information  
2           offered to demonstrate compliance or noncompliance with the  
3           standards believed by the proponent to be relevant to the  
4           decision.” *Former* ORS 197.763(9).

5   *Webster’s Third New Int’l Dictionary* defines “testimony” to include “an open  
6   acknowledgment.”<sup>8</sup> *Webster’s Third New Int’l Dictionary* 2362 (unabridged ed  
7   2002). We agree with the city that the District’s brief response that it did not have  
8   the ability to comment on the proposed conditions of approval is not new  
9   evidence or argument which applies to the matter at issue: the relationship  
10   between *the District’s* proposal and the applicable criteria. The District’s  
11   statement included no information offered to demonstrate compliance or  
12   noncompliance with standards, and it included no assertions or analysis. The  
13   conditions put forth by Councilor Baumgardner reflected a middle school with  
14   an enrollment reduction of approximately 25 percent, a school building in a  
15   different location, and no running track facility; in other words, a middle school  
16   that the District did not propose. We agree with the city that the District’s  
17   statement that it could not comment on those conditions did not apply to the  
18   matter at issue because they were not related to the application before the council.  
19   Accordingly, the city was not required to allow others to respond.

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<sup>8</sup> CDC 99.110(B)(2) provides that decision-makers may give consideration to “[f]actual oral testimony or written statements from the parties, neighborhood plans, other persons and other governmental agencies relevant to the” applicable standards of the CDC or other implementing ordinances, or mistakes or inconsistencies in the comprehensive plan or zoning map as it relates to the subject property.

1 Intervenor-petitioner's second assignment of error is denied.

2 **INTERVENOR-PETITIONER'S THIRD ASSIGNMENT OF ERROR**

3 Intervenor-petitioner's third assignment of error is that the city council  
4 committed a procedural error when it did not avoid a tie vote. The city council's  
5 final decision describes the city council's series of votes on the application as  
6 follows:

7 "Councilor Baumgardner made a motion to deny the appeal and  
8 approve the application with revised conditions. This motion was  
9 seconded by Councilor Bialostosky, the motion failed to receive any  
10 affirmative votes. Next, Councilor Jones moved to deny the appeal  
11 and approve the application with a modified series of conditions.  
12 This motion died for lack of a second. In the alternative, Councilor  
13 Bialostosky moved to uphold the appeal and deny this application.  
14 The motion was seconded by Councilor Baumgardner and resulted  
15 in a tied 2-2 vote. \* \* \* [C]onsistent with the CDC requirements,  
16 where a decision on appeal results in a tie, the Planning  
17 Commission's decision was affirmed." Record 7.

18 CDC 99.300 provides:

19 "A. \* \* \*

20 "1. A majority of the qualified voting members of the  
21 approval authority must vote affirmatively to affirm,  
22 affirm with conditions, or reverse or remand the  
23 decision. If no majority is in favor of any motion, then  
24 the previous decision shall be considered affirmed.

25 "B. Unless a decision be deferred, in the event of a tie, the  
26 decision which is the subject of appeal or review shall stand."

27 Intervenor-petitioner points out that, when a tie occurred at the August 4, 2021  
28 planning commission meeting, the commission continued the meeting and was

1 able to resolve the tie and obtain a four-to-three vote at the August 18, 2021  
2 meeting, at which all of the planning commissioners were present.

3 The city responds that the CDC

4 “operates differently in the event of a tie vote at the first level of  
5 decision making—here, the Planning Commission—than it does at  
6 the City Council. At the Planning Commission, a majority vote is  
7 required, and the Planning Commission acted accordingly. CDC  
8 99.300.A.1. Upon appeal to the City Council, ‘in the event of a tie,  
9 the decision which is the subject of appeal or review shall stand.’  
10 CDC 99.300.B.” City’s Response Brief 25.

11 The city council found:

12 “In consideration of the CDC language that provides procedures for  
13 quasi-judicial decision making in West Linn, the Council finds that  
14 since no majority was in favor of any motion made during Council  
15 deliberations, and since a tie occurred, both sections of CDC 99.300  
16 apply and the previous decision, the decision of the Planning  
17 Commission on August 18, 2021, which was the subject of the  
18 appeal, stands and is affirmed. The decision of the Planning  
19 Commission along with the conditions imposed by the Planning  
20 Commission affirmed and adopted by the City Council as its own.”  
21 Record 11.

22 In order to prevail on a claim of procedural error, a petitioner must identify  
23 the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560,  
24 563 (2006). Intervenor-petitioner has not identified any procedure that requires  
25 the four participating city councilors, when faced with a tie vote, to continue  
26 voting on the appeal or to take other action, such as including the mayor in the  
27 voting. Intervenor-petitioner has not established that CDC 99.300 required the  
28 city council to take any action other than the action it took.

1 Intervenor-petitioner's third assignment of error is denied.

2 **INTERVENOR-PETITIONER'S FOURTH AND FIFTH ASSIGNMENTS**  
3 **OF ERROR**

4 Intervenor-petitioner's fourth and fifth assignments of error are that the  
5 city committed procedural errors that prejudiced their substantial rights.  
6 Intervenor-petitioner argues that the city erred in allowing two planning  
7 commissioners, Carr and Erwin, to participate in the planning commission  
8 decision.<sup>9</sup> Intervenor-petitioner alleges that Carr failed to satisfy CDC 99.180(G),

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<sup>9</sup> Intervenor-petitioner argues that a procedural error in the proceedings before the planning commission requires remand because the city council vote ultimately ended in a tie and, therefore, by operation of the CDC, resulted in an approval of the planning commission vote. We have held that a procedural error at the planning commission level is not a basis for reversal or remand where the planning commission is not the final decision-maker. *Lord v. City of Oregon City*, 43 Or LUBA 361, 371-72 (2002), *aff'd*, 187 Or App 114, 66 P3d 1030, *rev den*, 335 Or 504 (2003) (rejection of evidence); *Crowley v. City of Bandon*, 41 Or LUBA 87, 104 (2001) (inadequate notice and untimely staff report); *Woods v. Grant County*, 36 Or LUBA 456, 471-72, *aff'd*, 164 Or App 177, 991 P2d 65 (1999) (inadequate notice); *Simonds v. Hood River County*, 31 Or LUBA 305, 307 (1996) (untimely staff report); *Jackman v. City of Tillamook*, 29 Or LUBA 391, 401 (1995) (improper adoption); *O'Rourke v. Union County*, 29 Or LUBA 303, 308 (1995) (rejection of evidence); *Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995) (undisclosed site visit); *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708, 713-14 (1992) (undisclosed site visit) *Heiller v. Josephine County*, 23 Or LUBA 551, 555 (1992) (rejection of evidence); *Burk v. Umatilla County*, 20 Or LUBA 54, 57-58 (1990) (improper participation); *Murphey v. City of Ashland*, 19 Or LUBA 182, 189-90, *aff'd*, 103 Or App 238, 796 P2d 402 (1990) (improper participation); *Slatter v. Wallowa County*, 16 Or LUBA 611, 617 (1988) (improper participation); *Fedde v. Portland*, 8 Or LUBA 220, 232-33 (1983), *aff'd*, 67 Or App 801, 680 P2d 20 (1984) (inadequate notice).

1 which we discuss below. Intervenor-petitioner alleges that Erwin was biased and  
2 that their participation prejudiced intervenor-petitioner’s right to a fair and  
3 impartial hearing. We address each argument below.

4 CDC 99.180(G) provides, “A member absent during the presentation of  
5 evidence in a hearing may not participate in the deliberations or decision unless  
6 the member has reviewed the evidence received.” After the application failed to  
7 receive a majority yes or no vote, the six members of the planning commission  
8 who were present at the August 4, 2021 meeting voted to postpone the vote until  
9 a later meeting. The planning commission returned to the application on August  
10 18, 2021, with the seventh member of the commission, Carr, in attendance.

11 Intervenor-petitioner argues that allowing the participation of Carr was a  
12 procedural error because, intervenor-petitioner maintains, Carr did not, prior to  
13 deliberating, review the evidence received.

14 Commissioner Carr stated at the August 18, 2021 meeting that they had  
15 reviewed the record, testimony, and reports. Commissioner Carr’s statement  
16 showed compliance with CDC 99.180(G)’s requirement that they review the  
17 evidence before participating in the deliberation or decision.<sup>10</sup> Intervenor-  
18 petitioner argues that the city attorney failed to confirm Carr’s compliance with

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However, because the parties do not dispute the relevance of potential procedural error at the planning commission level, we assume it is relevant for purposes of this opinion.

<sup>10</sup> Commissioner Carr’s questions during the proceedings do not establish that Commissioner Carr did not review the evidence received.



1 CDC 99.180(G) “before allowing him to continue with his vote” and that that  
2 failure by the city attorney was a procedural error. Intervenor-Petitioner’s  
3 Petition for Review 37. We disagree with intervenor-petitioner’s premise that an  
4 action or lack of action by the city attorney, who is not a decision-maker, can  
5 amount to a procedural error by the decision-maker. Accordingly, intervenor-  
6 petitioner has not established that the city committed any procedural error.

7 In their fifth assignment of error, intervenor-petitioner argues that the  
8 planning commission committed procedural error because it allowed a planning  
9 commissioner who had prejudged the application, Erwin, to participate in the  
10 decision.

11 The planning commission closed the public hearing on August 4, 2021.  
12 Record 5. At its August 18, 2021 meeting, where it continued deliberations, a  
13 member of the public challenged the impartiality of an unidentified planning  
14 commissioner, asserting that, during the August 4, 2021 hearing, the planning  
15 commissioner said that the application should be approved because voters  
16 approved a bond to finance the new middle school. The member of the public  
17 asserted that the planning commissioner’s statement was evidence of improper  
18 prejudice.

19 The city attorney explained to the planning commission that the normal  
20 process would involve questioning the specific commissioner whose impartiality  
21 was challenged, and they asked if any commissioners recalled making the alleged  
22 statement. Audio Recording, West Linn Planning Commission, Aug 18, 2021, at

1 17:18 (comments of City Attorney Tim Ramis). No planning commissioner  
2 reported that they had made the alleged statement. Lacking any identification by  
3 the challenger of the specific planning commissioner who made the alleged  
4 statement, the planning commissioners discussed the objection further and were  
5 polled for bias and prejudgment. Commissioner Erwin stated that they did not  
6 make a decision until after receiving the August 4, 2021 meeting packet and  
7 hearing the District’s presentation, rebuttal statements, and public comments, and  
8 that they had no bias and had made no prejudgment. Audio Recording, West Linn  
9 Planning Commission, Aug 18, 2021, at 21:13, 27:40 (comments of Planning  
10 Commissioner Scott Erwin).

11 As evidence of bias, intervenor-petitioner points to statements that  
12 Commissioner Erwin made (1) describing the quality of the city’s education  
13 system and their desire to maintain that high quality in the future, and (2) that,  
14 “while there is no need for capacity, we need schools years in the future.”<sup>11</sup>  
15 Intervenor-Petitioner’s Petition for Review 46.

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<sup>11</sup> According to intervenor-petitioner, at the August 18, 2021 meeting, Commissioner Erwin stated that, “[w]hile it is not the most perfect location, or the most centrally located location, we should keep in mind that it is necessary and will be more necessary in the coming years and it is as good of a spot for a middle school as can be found in the city of West Linn” and that, although they had not “fully digested the [TIAs],” they were “confident the [District] has made the best design for safety.” Intervenor-Petitioner’s Petition for Review 44. Those statements were, however, part of more extensive statements made by Commissioner Erwin, including the following response to another commissioner: “You expressed concern about 21 acres being small and I mean but by the design

1           The city maintains, and we agree, that intervenor-petitioner has not  
2 established that Erwin’s statements demonstrate that they were biased or that they  
3 prejudged the application. The city responds, and we agree, that, rather than  
4 demonstrating bias or prejudice, Commissioner Erwin’s comments “evidence  
5 an effort to apply the applicable land-use laws to a discrete set of facts and  
6 evidence.” City’s Response Brief 33.

7           In *Friends of Jacksonville v. City of Jacksonville*, the petitioner appealed a  
8 CUP authorizing construction of a church. 42 Or LUBA 137, *aff’d*, 183 Or App  
9 581, 54 P3d 636 (2002). The petitioner asked that three members of the city  
10 council recuse themselves because they were members of the church and, the  
11 petitioner believed, biased in favor of the application. On appeal to LUBA, the  
12 petitioner argued that two councilors’ membership in the church made their  
13 participation suspect. In addition, the petitioner contended that “the councilors’  
14 actions during the proceedings before the city demonstrate[d] that those  
15 councilors prejudged the application in favor of the church.” *Id.* at 140. Although  
16 one councilor had voted in favor of the church’s application each time it was  
17 before the council, she had stated during an election cycle that the only way for  
18 her to act on the application was to be honest, look at the issues, and follow her

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we saw there were adequate athletic facilities around the school adequate parking.” Intervenor-Petitioner’s Petition for Review 122. That statement was directed at the CUP approval criteria, which include a requirement that the site size and dimensions provide adequate area for the needs of the proposed use. CDC 60.070(1)(a).

1 conscience. She stated that the current church facilities were inadequate and that  
2 she was concerned about certain conditions of approval. However, when asked  
3 by the church’s attorney whether she believed she could make a decision on the  
4 application based on the facts and law before her, she stated that she could. *Id.* at  
5 143. We held that her actions did not show bias or prejudice.

6 Another councilor whose participation was challenged was a member of  
7 the church and married to a church employee. During a candidate forum, he stated  
8 that he did not feel the need to be objective and that “we [the church] would fight  
9 this even if we have to fight all the way to the Supreme Court.” *Id.* at 144. This  
10 councilor signed a petition supporting the application, which was submitted into  
11 the record before the city council, and he entered into the record before the city  
12 council a document explaining why he believed the criteria were met. We  
13 concluded:

14 “[T]he totality of the circumstances demonstrate that [this councilor]  
15 believed he was elected on a mandate to support the proposed siting  
16 of the church and that for him, the only question was what conditions  
17 were necessary to mitigate the impacts the church would cause. As  
18 a result, we agree with petitioner that absent evidence that [the  
19 councilor’s] participation was necessary in order for the council to  
20 reach a decision, [the councilor] should have recused himself from  
21 participating in the challenged decision.” *Id.* at 146.

22 “[A]ctual bias can be established, where prejudice has been alleged, by  
23 explicit statements, pledges, or commitments that the elected local official has  
24 prejudged the specific matter before the tribunal. It cannot be established  
25 circumstantially or internally except by necessary and indisputable implication.”

1 *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 609-10, 341 P3d 790  
2 (2014); *see also Niederer v. City of Albany*, 79 Or LUBA 305, 311 (2019) (“In  
3 order to prevail on a bias challenge, the petitioner must demonstrate that the  
4 challenged decisionmaker was actually biased[.]”). Intervenor-petitioner has not  
5 shown that Commissioner Erwin’s statements demonstrate bias, particularly in  
6 light of Erwin’s statement that that they could judge the application in an  
7 unbiased manner.

8 Intervenor-petitioner’s fourth and fifth assignments of error are denied.

9 **PETITIONER’S FIRST ASSIGNMENT OF ERROR AND**  
10 **INTERVENOR-PETITIONER’S FIRST ASSIGNMENT OF ERROR**

11 Petitioner’s first assignment of error is that “[t]he decision made by the  
12 City is in violation of [West Linn Comprehensive Plan (CP)] Goal 12 because it  
13 allows an intersection to fall below the City’s [LOS]. The City also fails to require  
14 mitigation of this issue, in violation of CDC 60.070.” Petitioner’s Petition for  
15 Review 4. Intervenor-petitioner’s first assignment of error is that the city  
16 council’s findings with respect to limiting access to Brandon Place are  
17 inadequate.

18 **A. Brandon Place Extension**

19 Because they overlap, we address intervenor-petitioner’s first assignment  
20 of error and the first subassignment of error under petitioner’s first assignment of  
21 error together. Intervenor-petitioner’s first assignment of error is that the city’s  
22 findings are inadequate because they do not explain how conditioning approval

1 on the District closing the Brandon Place extension to nonemergency through  
2 traffic is consistent with the criteria identified in the October 4, 2021 staff  
3 report.<sup>12</sup> Intervenor-Petitioner’s Petition for Review 18.

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<sup>12</sup> The October 4, 2021 staff report includes the following statement:

“The [Planning Commission] did not address additional criteria/policy related to the City’s connectivity goals, which have findings supporting the Brandon Place connection. \* \* \*

“\* \* \* \* \*

“If the Council upholds the [Planning Commission] approval and retains Condition of Approval 10, additional findings should be made to replace the findings adopted by the [Planning Commission] that conflict with the condition and support the Brandon Place connection and the City’s connectivity goals. These include:

“West Linn Comprehensive Plan Goal 12

- “1. Goal 1.b. Provide for connectivity within and between neighborhoods.....
- “2. Goal 3. Develop transportation facilities that are accessible to all members of the community and minimize out of direction travel
- “3. General Policies 8. Pursue an interconnected street system that provides connections both between and within developments..... An interconnected street system shall discourage closed end street systems and will serve to reduce travel distance....
- “4. Streets Policy 3. Establish a minimum intersection LOS standard and design all public facilities to meet or exceed that threshold.

- 
- “5. Streets Policy 9. Develop neighborhood and local street connections as identified in the TSP to provide adequate circulation in and out of the neighborhoods.
  - “6. Streets Policy 10. Limit the use of cul-de-sacs and closed street systems.

#### West Linn Transportation System Plan

- “7. TSP Figure 12 and Table 17 Project LSC-9 identifies this planned connection under the section explaining the importance of local street connectivity to the transportation network.

#### West Linn Community Development Code

- “8. CDC 60.070.C(6) Requiring street right-of-way to be dedicated and the street to be improved including all steps necessary to address future street improvements identified in the adopted Transportation System Plan.
- “9. CDC 60.070.C(7) Requiring participation in making the intersection improvement or improvements identified in the [TSP] when a traffic analysis (compiled as an element of a conditional use application for the property) indicates the application should contribute toward.
- “10. CDC 55.100.I(1) ...The City Engineer shall determine the appropriate level of street and traffic control improvements to be required, including any off-site street and traffic control improvements, based upon the transportation analysis submitted. The City Engineer’s determination of developer obligation, the extent of road improvement and City’s share... Streets shall be installed per Chapter 85 CDC standards...
- “11. CDC 85.200.A(1) ...The street system shall assure an adequate traffic or circulation system... To accomplish this, the emphasis should be upon a connected continuous pattern

1           Intervenor-petitioner lists 12 provisions from the CP, CDC, and TSP that  
2 staff recommended that the city council address if it retained the condition of  
3 approval limiting the use of the Brandon Place extension and argues that the city  
4 erred by not addressing those provisions. Intervenor-Petitioner’s Petition for  
5 Review 19-20. The city council is not, however, required to agree with staff that  
6 certain criteria should be addressed. Moreover, intervenor-petitioner only  
7 develops its argument that the city adopted inadequate findings with respect to  
8 four of the provisions identified by staff. We will not develop intervenor-  
9 petitioner’s argument for them, and we therefore address only the four policies  
10 for which intervenor-petitioner has developed their argument.

11           The connectivity provisions that intervenor-petitioner argues are  
12 inadequately addressed are found in CP Goal 12, General Policy 8 and Streets  
13 Policy 9. General Policy 8 is to “[p]ursue an interconnected street system that

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of local, collector, and arterial streets rather than discontinuous curvilinear streets and cul-de-sacs. Deviation from this pattern of connected streets should only be permitted in cases of extreme topographical challenges including excessive slopes (35 percent-plus), hazard areas, steep drainageways, wetlands, etc....

- “12. CDC 85.200.B(2) The recommended block size is 400 feet in length to encourage greater connectivity within the subdivision. Blocks shall not exceed 800 feet in length between street lines, except for blocks adjacent to arterial streets or unless topographical conditions or the layout of adjacent streets justifies a variation...” Record 714-15 (underscoring in original).



1 provides connections both between and within developments \* \* \*. An  
2 interconnected street system shall discourage closed-end street systems and will  
3 serve to reduce travel distance[.]” Streets Policy 9 is to “[d]evelop neighborhood  
4 and local connections as identified in the [TSP] to provide adequate circulation  
5 in and out of the neighborhoods.” Relatedly, petitioner argues in the first  
6 subassignment of error under their first assignment of error that the city cannot  
7 approve the CUP as conditioned because connectivity policies require that the  
8 Brandon Place extension be a through street.

9 Contrary to intervenor-petitioner’s argument, the findings do address  
10 compliance with these provisions or why they do not apply. The city council  
11 concluded that, “[a]lthough the [TSP] does call for the connection of Brandon  
12 [Place], both the [CP] and CDC confer significant discretion to the Planning  
13 Commission to determine the appropriate timing for conditioning development  
14 to require such connections.”<sup>13</sup> Record 18. We agree with the District that there  
15 is nothing in these policies that dictates the timing of improvements. District’s  
16 Response Brief 14. The city found that the timing of connectivity was subject to  
17 the city’s discretion and that it would not require connectivity at this time.  
18 Intervenor-petitioner does not address this finding, and the city’s conclusion that

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<sup>13</sup> The city council’s findings incorporate the October 4, 2021 staff report, among other documents, but, as explained above, they clarify that, “[i]f there is a conflict between these Findings and the Incorporated Findings, these findings shall control.” Record 12.

1 these policies do not require that the Brandon Place extension occur at this time  
2 resolves this element of the first subassignment of error under petitioner’s first  
3 assignment of error.

4 The LOS provisions discussed by intervenor-petitioner are found in CP  
5 Goal 12, Streets Policy 3 and Streets Action Measure 5. Streets Policy 3 is to  
6 “[e]stablish a minimum intersection [LOS] standard for the City of West Linn  
7 and design all public facilities to meet or exceed the standard.” Streets Action  
8 Measure 5 is to

9 “[e]stablish a tiered performance standard for the City street system  
10 to balance funding for roadway capacity. The general performance  
11 standard will apply at intersections during peak commute hours, and  
12 a LOS D condition will be the preferred minimum for all facilities.  
13 In the case of principle arterials (e.g., Highway 43), the intersection  
14 condition may degrade below the LOS D so long as the corridor  
15 condition does not degrade below LOS E.”

16 Intervenor-petitioner argues that the city’s findings are inadequate because the  
17 TIAs reviewed peak hours based on the anticipated start and end times of school  
18 and because the review of peak hour traffic showed an intersection operating at  
19 LOS E. Intervenor-petitioner argues:

20 “DKS states that their [TIA] assumes ‘peak hours of 3:10 pm to 4:10  
21 pm. School gets out at 3:45 pm. Thus, ‘testimony’ that states it is  
22 not during peak hours is not factual. The [TIA] proves traffic is  
23 indeed during peak afternoon school release times, and thus, the  
24 standard in the [CP] is not met.”<sup>14</sup> Intervenor-Petitioner’s Petition

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<sup>14</sup> The 2021 TIA states:

1 for Review 21-22.

2 Relatedly, petitioner argues in the first subassignment of error under their first  
3 assignment of error that the city council's conclusion that applicable CP policies  
4 are met is incorrect because the evidence in the record shows that approval of the  
5 application with the Brandon Place extension as a dead-end street results in  
6 failure to comply with the LOS D standard.

7 The city found:

8 "The [CP] allows for [LOS] D intersection conditions during the  
9 peak commute hours in the case of minor arterials, collectors, and  
10 neighborhood streets. As discussed in the testimony, the school  
11 afternoon peak occurs outside the normal peak commute hours on  
12 Willamette Falls Drive and Ostman Road. The District does not  
13 contribute traffic to the current failure experienced at Willamette  
14 Falls Drive and Ostman Road.

15 "As such, there is no mandatory trigger requiring the Brandon Place  
16 connection. Livability concerns raised by the neighbors along Dollar  
17 Street regarding the increase in diverted traffic, justify the  
18 connection be restricted for emergency vehicle access only." Record  
19 18.

20 First, we agree with the District that petitioner and intervenor-petitioner fail to  
21 recognize that the action measure refers to peak commute hours.<sup>15</sup> District's

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"The peak hours that were analyzed for this study were 8:00 am to 9:00 am (AM peak hour) and 3:10 pm to 4:10 pm (Midday peak hour); traffic counts were collected from 8 am – 10 am and 3 pm – 5 pm. The peak hours analyzed were based on the peak traffic volumes near the proposed site on Dollar Street." Record 2689.

<sup>15</sup> Petitioner did not challenge this finding in their petition for review. In their reply brief, petitioner argues for the first time that there is no evidence that school

1 Response Brief 15. The city council found that the LOS D provision does not  
2 apply because the school traffic peak is not the same as the normal peak commute  
3 hours. The standard is therefore not applicable. Furthermore, we agree with the  
4 District that the city found that the District was not required to improve  
5 conditions beyond the 2023 no build scenario.

6         Petitioner argues that Streets Action Measure 5 is not met because the CUP  
7 is conditioned on limiting the use of the Brandon Place extension, thereby  
8 preventing the Willamette Falls Drive/Ostman Road intersection from operating  
9 at LOS D. It is true that the District's traffic engineers reported LOS  
10 improvements if the Brandon Place extension is constructed as a through street.  
11 The District's TIAs found that the Willamette Falls Drive/Ostman Road  
12 intersection failed to meet LOS D in the 2023 no build scenario. That is, the  
13 District's TIAs showed that the Willamette Falls Drive/Ostman Road intersection  
14 will fail to meet LOS D in 2023 whether or not the school is built. In response to  
15 a comment from the city's third-party traffic expert, the 2021 TIA assumed that  
16 some existing traffic would reroute to the proposed Brandon Place extension.  
17 Record 2706-07, 2667. With the assumption that some existing traffic will  
18 reroute to the Brandon Place extension, the LOS of the Willamette Falls  
19 Drive/Ostman Road intersection improves from E in the 2023 no build scenario  
20 to LOS D in the 2023 build scenario. However, because the intersection fails in

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peak is not the same as the peak commute hours referenced in the findings. We do not consider challenges made for the first time in a reply brief.

1 the 2023 no build scenario, the city concluded that the District’s school operation  
2 did not cause the intersection failure and that the District was not required to  
3 improve peak commute time LOS from E to D.

4 We will remand a decision if the local government improperly construed  
5 the applicable law. ORS 197.835(9)(a)(D). We review the city council’s  
6 interpretation of its own regulations under ORS 197.829(1) and are required to  
7 affirm that interpretation so long as it is not inconsistent with the regulations’  
8 express language, purposes, or underlying policies. *Siporen v. City of Medford*,  
9 349 Or 247, 259, 243 P3d 776 (2010). As the District points out, CP Goal 12,  
10 General Policy 1(a), is to “[e]valuate land development projects to determine  
11 possible adverse traffic impacts and to ensure that all new development  
12 contributes a fair share toward on-site and off-site transportation system  
13 improvement remedies.” District’s Response Brief 16. Petitioner does not  
14 address the city’s finding that the LOS provision does not apply where an  
15 applicant’s proposed use does not cause the intersection’s failure to meet the  
16 preferred LOS. We agree with the District that petitioner has not identified a  
17 requirement for improvement of the intersection and, therefore, has not identified  
18 a basis for reversal or remand.

19 The first subassignment of error under petitioner’s first assignment of error  
20 and intervenor-petitioner’s first assignment of error are denied.

1           **B.     Willamette Falls Drive/Ostman Road Intersection**

2           The second subassignment of error under petitioner’s first assignment of  
3 error is that the CUP fails to comply with the mitigation requirements in CDC  
4 85.170(B)(2)(e)(1)(B) because no mitigation of the failure of the Willamette Falls  
5 Drive/Ostman Road intersection was required as a condition of approval. CDC  
6 55.125 provides, “Certain development proposals required that a [TIA] be  
7 provided which may result in modifications to the site plan or conditions of  
8 approval to address or minimize any adverse impacts created by the proposal.  
9 The purpose, applicability and standards of this analysis are found in CDC  
10 85.170(B)(2).” CDC 85.170(B)(2)(e)(1) provides:

11           “When a [TIA] is required, approval of the development proposal  
12 requires satisfaction of the following criteria:

13           “\* \* \* \* \*

14           “(B) If the proposed development *shall cause* one or more of the  
15 effects in subsection (B)(2) of this section, or other traffic  
16 hazard or negative impact to a transportation facility, the  
17 [TIA] includes mitigation measures that meet the City’s  
18 [LOS] and are satisfactory to the City Engineer, and [the  
19 Oregon Department of Transportation (ODOT)] when  
20 applicable[.]” (Emphasis added.)

21           The District responds that no party raised any issue during the proceedings before  
22 the planning commission regarding compliance with CDC 55.125 and CDC  
23 85.170(B)(2).

1           ORS 197.835(3) provides that “[i]ssues shall be limited to those raised by  
2 any participant before the local hearings body as provided by ORS 197.195 or  
3 [*former* ORS] 197.763, whichever is applicable.”

4           In their reply brief, petitioner cites “Rec. 714., *Also see* Rec. at 351, Pet.  
5 11.” We have reviewed the cited record pages, and we agree with the District that  
6 they do not show that the issue petitioner raises in the second subassignment of  
7 error under their first assignment of error was raised below. Record 351 contains  
8 comments from a resident on congestion in the area, but they do not address CDC  
9 55.125 or CDC 85.170(B)(2). Record 714 is a page of the October 4, 2021 staff  
10 report. It does not contain a reference to CDC 55.125 or CDC 85.170(B)(2). We  
11 agree with the District that petitioner has waived a challenge to the adequacy of  
12 the TIAs under these provisions.

13           Petitioner argues that a condition of approval requiring mitigation of the  
14 LOS at the Willamette Falls Drive/Ostman Road intersection is necessary yet  
15 missing. As explained above, this issue is waived. Furthermore, the city council  
16 found that the school did not cause a negative impact to the Willamette Falls  
17 Drive/Ostman Road intersection because the intersection fails to operate at LOS  
18 D or above during the peak commute hour independent of the school. We agree  
19 with the District that no mitigation was required.

20           The second subassignment of error under petitioner’s first assignment of  
21 error is denied.

1           Petitioner’s first assignment of error and intervenor-petitioner’s first  
2 assignment of error are denied.

3           **PETITIONER’S SECOND ASSIGNMENT OF ERROR**

4           Petitioner’s second assignment of error consists of eight subassignments  
5 of error. Each subassignment of error asserts that the city council’s findings that  
6 the criteria set out in CDC 60.070 are met are not supported by substantial  
7 evidence.

8           Adequate findings identify the relevant criteria, identify the evidence  
9 relied upon, and explain why the evidence leads to the conclusion that the criteria  
10 are or are not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).  
11 Where a petitioner does not explain why challenged findings are inadequate but,  
12 rather, disagrees with the conclusion reached in those findings, the petitioner’s  
13 challenge to the findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or  
14 LUBA 376, 380 (2007). Substantial evidence is evidence a reasonable person  
15 would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172,  
16 179, 855 P2d 608 (1993) (citing ORS 183.482(8)(c); *Younger v. City of Portland*,  
17 305 Or 346, 351-52, 752 P2d 262 (1988)). A decision may be supported by  
18 substantial evidence even if reasonable persons could draw different conclusions.  
19 *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). We do not reweigh the  
20 evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587-88,  
21 842 P2d 441 (1992).



1           **A.     CDC 60.070(A)(1)**

2           CDC 60.070(A)(1) requires that the site size and dimensions provide:

3           “a.     Adequate area for the needs of the proposed use; and

4           “b.     Adequate area for aesthetic design treatment to mitigate any  
5                 possible adverse effect from the use on surrounding  
6                 properties and uses.”

7           Opponents to the application argued that the subject property is too small for the  
8           school. The District plans to relocate an existing middle school population to the  
9           new physical school, and petitioner argues:

10           “The current location of Athey Creek has 5 baseball fields, 4 tennis  
11           courts, 4 basketball courts, 3 soccer fields, and a track and field  
12           facility. The relocation would only be able to provide a single track  
13           and field facility and 3 basketball courts. No findings were made to  
14           address this site inadequacy. Students will suffer due to these  
15           lacking facilities, and the City failed to address this concern at all.  
16           While there is no definite description of what it means to be an  
17           ‘adequate’ site, students and parents would agree that access to the  
18           same level of service should be available at the relocation site.”  
19           Petitioner’s Petition for Review 16-17 (citations omitted).

20           Petitioner concedes that “this school would technically ‘fit’ on this piece of  
21           property.” *Id.* at 16. However, petitioner contends that “[n]o findings were made  
22           as to why the District is choosing to squeeze so many students onto such a small  
23           footprint, and no rebuttal was offered to these points at the appeal proceedings.”

24           *Id.*

25           CDC 60.070(A)(1) does not require the city council to evaluate the  
26           District’s choice to locate the school on the subject property as opposed to  
27           another site. The city council found:

1 “The development site is 21.4 acres and supports a capacity of 850  
2 students. \* \* \*

3 “The school is similar in size, intensity, and type to Rosemont Ridge  
4 Middle School, located in West Linn. Rosemont Ridge Middle  
5 School has a site area of 20.61 acres and a learning space capacity  
6 for 713 students.” Record 12.

7 Petitioner does not acknowledge this finding or explain why it is inadequate to  
8 establish that the subject property has adequate area for the use. Petitioner  
9 therefore has not provided a basis for remand based on the city’s findings that the  
10 site has adequate area for the needs of the use.

11 CDC 60.070(A)(1) also requires consideration of whether the site has  
12 “[a]dequate area for aesthetic design treatment to mitigate any possible adverse  
13 effect from the use on surrounding properties and uses.” Petitioner argues that  
14 traffic is the largest impact requiring mitigation. Petitioner maintains that there is  
15 inadequate discussion of the design of the proposed roundabout where the  
16 Brandon Place extension would intersect with Willamette Falls Drive.  
17 Petitioner’s Petition for Review 19.<sup>16</sup>

18 ORS 197.835(3) provides, “Issues shall be limited to those raised by any  
19 participant before the local hearings body as provide by ORS 197.195 or [*former*  
20 ORS] 197.763, whichever is applicable.” The District argues that “[n]o party

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<sup>16</sup> Petitioner also argues that the findings of compliance with CDC 60.070(A)(4)’s requirement that there be adequate public facilities fail to adequately address the roundabout. We address that argument later in this opinion.

1 raised any specific or detailed challenges to the detail or design of the proposed  
2 ‘roundabout’ below.” District’s Response Brief 22. We agree with the District  
3 that petitioner’s argument that the record does not contain sufficient detail on the  
4 roundabout design was not preserved.

5 Petitioner also argues that the approval is not conditioned on provision of  
6 the roundabout. The roundabout is shown on the District’s site plan at Record  
7 2819, and the city council was entitled to rely on that plan. *Culligan v.*  
8 *Washington County*, 57 Or LUBA 395, 401-02 (2008) (where an applicant’s  
9 promise or statement concerning the nature of a development is found on the face  
10 of the plan that the decision approves, and where subsequent approvals must be  
11 consistent with that plan, a limiting condition of approval is not required).  
12 Further, the decision includes the following conditions of approval:

- 13 “1. Site Plans. With the exception of modifications required by  
14 these conditions, the project shall substantial conform to all  
15 Tentative Plan Sheets.
- 16 “\* \* \* \* \*
- 17 “7. Roundabout Pedestrian Safety. At the proposed roundabout at  
18 Brandon Place and Willamette Falls Drive the applicant will  
19 have appropriate marked pedestrian crossings.” Record 19.

20 The conditions of approval therefore reflect the inclusion of the roundabout.

21 The first subassignment of error under petitioner’s second assignment of  
22 error is denied.

1           **B.     CDC 60.070(A)(2)**

2           CDC 60.070(A)(2) provides, “The characteristics of the site are suitable  
3 for the proposed use considering size, shape, location, topography, and natural  
4 features.” Petitioner argues that the school will have large impacts on the  
5 neighborhood and that the fact “[t]hat a building can be built to house the number  
6 of students sought is not an adequate finding to show that this property is of  
7 suitable size.” Petitioner’s Petition for Review 21.

8           While petitioner disagrees with the city council’s conclusion that the site  
9 is suitable, petitioner does not establish, based on evidence in the record, that the  
10 city council failed to consider the criterion or that its findings are not supported  
11 by substantial evidence. The city council adopted detailed findings addressing  
12 the site characteristics that are compatible with the use. Record 12-13. For  
13 example, the city council found:

14           “The existing landscaping and topography of the site has been  
15 utilized to provide natural buffering. Tree retention on the site has  
16 been primarily focused along Willamette Falls Drive and along the  
17 eastern property line adjacent to neighboring homes.

18           “\* \* \* \* \*

19           “\* \* \* The orientation and massing of the building will fan along the  
20 hillside which will provide for views of the surrounding landscape  
21 from the interior of the building while breaking up the building  
22 massing to reduce the overall impact of the building on the site.” *Id.*

23 Although petitioner disagrees with the city council’s conclusion, they have not  
24 shown that the findings are not supported by substantial evidence or provided a  
25 basis for remand.

1           The second subassignment of error under petitioner’s second assignment  
2 of error is denied.

3           **C.     CDC 60.070(A)(3)**

4           CDC 60.070(A)(3) provides, “The granting of the proposal will produce a  
5 facility that provides an overall benefit to the City.” Petitioner argues that the  
6 city’s finding that the school will provide an overall benefit to the city is not  
7 supported by substantial evidence. The city council adopted almost two pages of  
8 findings addressing overall benefit to the city, independent of the findings it  
9 incorporated by reference. Record 15-16. The benefits identified by the city  
10 council include the following:

- 11           (1)    The existing middle school does not have adequate capacity.  
12                    The District’s Long Range Facility Plan shows that the new  
13                    school would accommodate projected growth. Record 15.
- 14           (2)    Students living within three attendance areas located almost  
15                    wholly within the city made up 61.5 percent of the existing  
16                    school’s population in the 2018-19 school year. Assuming  
17                    that the projected growth would continue to reflect 61.5  
18                    percent of students being West Linn residents, the increase in  
19                    capacity would serve city children. *Id.*
- 20           (3)    The subject property is more centrally located relative to  
21                    students and will provide opportunities to safely walk or bike  
22                    to the school. Record 16.
- 23           (4)    “[T]he [new school] will offer on-site facilities that are  
24                    available for public use during non-school hours, including  
25                    walking paths, playground, premium outdoor recreation  
26                    facilities, and indoor recreation and meeting spaces. The  
27                    facility includes emergency generator power capacity that  
28                    will be available to serve city residents in the event of an

1 emergency. The project will also include right-of[-]way  
2 improvements that will calm traffic and enhance pedestrian-  
3 focused connections to Fields Bridge Park.” *Id.*

4 Again, we understand that petitioner questions the overall benefit of the school  
5 to the community. The findings adopted by the city are, however, supported by  
6 substantial evidence that there is an overall benefit to the city.

7 The third subassignment of error under petitioner’s second assignment of  
8 error is denied.

9 **D. CDC 60.070(A)(4)**

10 CDC 60.070(A)(4) provides, “Adequate public facilities will be available  
11 to provide service to the property at the time of occupancy.” The fourth  
12 subassignment of error under petitioner’s second assignment of error is that city’s  
13 findings that this criterion is met are not supported by substantial evidence.

14 First, petitioner argues that the city’s finding that there is adequate road  
15 infrastructure is not supported by substantial evidence because the Willamette  
16 Falls Drive/Ostman Road intersection will fail to meet the LOS D standard.<sup>17</sup> The  
17 city’s findings are supported by substantial evidence, the TIAs. As we discussed

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<sup>17</sup> Petitioner argues:

“As discussed above, the road infrastructure around this property is not adequate to support this use. There is already substantial congestion on Willamette Falls Drive, at times, with the intersection of Willamette Falls Drive and Ostman Road failing to meet the city’s LOS standard without any mitigation of new traffic created by the school.” Petitioner’s Petition for Review 29.

1 in our resolution of petitioner’s first assignment of error, the city council found  
2 that mitigation by the District was not required because the TIAs showed that the  
3 school will not cause the failure of the intersection.

4 Second, petitioner argues that the findings do not include “enough  
5 discussion of this new roundabout (mini-roundabout?) to show that it will  
6 function to mitigate traffic.” Petitioner’s Petition for Review 29. Petitioner also  
7 argues that the findings may not rely on the TIAs because those studies do not  
8 adequately address the roundabout. The city council incorporated the following  
9 findings from the October 4, 2021 staff report:

10 “A TIA has been prepared and provided by DKS and Associates on  
11 behalf of the [District]. A supplemental memo addressing concerns  
12 raised by members of the community, prepared by DKS and  
13 Associates, has been provided. \* \* \* The City of West Linn  
14 Engineering and Public Works Department also reviewed the TIA  
15 provided by DKS and Associates. The City of West Linn hired a  
16 third party Engineering firm to peer review the TIA from DKS and  
17 Associates. That firm, Kittelson and Associates, produced a report  
18 with their findings and recommendations. \* \* \* Public comments  
19 were also submitted by a transportation planning/engineering firm  
20 \* \* \*. DKS revised the TIA based on feedback from the City,  
21 Kittelson and Associates, and public comment.” Record 713.

22 The TIAs and supplemental memo include a discussion of the benefits of  
23 roundabouts. Record 1498-99, 1548, 1563, 1579. We agree with the District that  
24 the city’s findings are adequate.

25 Third, petitioner asserts that evaluating the potential for congestion on  
26 Willamette Falls Drive requires consideration of impacts from the future tolling

1 of nearby I-205. Petitioner’s Petition for Review 31. The District responds that  
2 no issue was raised during the proceedings below regarding the potential for  
3 congestion on Willamette Falls Drive due to future I-205 tolling. Again, ORS  
4 197.835(3) provides that “[i]ssues shall be limited to those raised by any  
5 participant before the local hearings body as provided in ORS 197.195 or [*former*  
6 ORS] 197.763, whichever is applicable.” We agree with the District that  
7 petitioner does not identify where consideration of I-205 tolling as an element of  
8 complying with CDC 60.070(A)(4) was raised below. We conclude that the issue  
9 is waived. We note, however, that evidence in the record states that ODOT will  
10 be responsible for mitigating adverse impacts from the future tolling of I-205,  
11 providing substantial evidence that a potential future tolling impact does not have  
12 to be addressed in this decision. Record 35.

13 Fourth, petitioner argues that the city’s findings that there are adequate  
14 public facilities are inadequate because the pedestrian and bicycle infrastructure  
15 in the area is wanting and because the District is not required to provide  
16 improvements to that infrastructure. The city council found,

17 “based on the Incorporated Findings and the Application’s  
18 substantial evidence[,] that the frontage improvements along Dollar  
19 Street, Brandon Place, and Willamette Falls Drive associated with  
20 the development and the identification of Safe Routes to School  
21 improvements in the vicinity of the proposed school meet the  
22 relevant approval standards of CDC 92.010 as well provisions of the  
23 [TSP].” Record 16.



1           Petitioner argues that the findings are inadequate because the District has  
2 not committed to providing safe routes to schools.<sup>18</sup> According to petitioner,  
3 “[t]here are no findings to support that there is sufficient infrastructure to support  
4 a safe route to school, nor any condition that the lacking infrastructure be updated  
5 as part of the CUP approval.” Petitioner’s Petition for Review 32.

6           Petitioner does not identify a CDC provision that requires the city to  
7 commit to providing “safe routes to schools.” The city council found:

8           “The development will include right-of-way improvements to  
9 Dollar Street and Willamette Falls Drive, and an extension of  
10 Brandon Place from Dollar Street to Willamette Falls Drive. \* \* \*

11           “On-site Pedestrian pathways will connect the main school building  
12 with site facilities and surrounding pedestrian infrastructure,  
13 including Fields Bridge Park. On-site pathway facilities have been  
14 designed to meet the needs of the school, while also providing a path  
15 for use by the surrounding community.” Record 13.

16           The decision includes the following condition of approval:

17           “5.    Street Improvements. The [District] shall complete half-street  
18 improvements, including pavement improvements, curbs,  
19 planter strips, street trees, streetlights, sidewalks pedestrian  
20 crossings, cycle tracks where required, and street storm  
21 drainage for those portions of dollar Street and Willamette  
22 Falls Drive abutting the subject property. The [District] shall  
23 complete full street improvements on the extension of

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<sup>18</sup> Petitioner also argues that the District’s failure to commit to completing improvements violates CP Goal 12, Bicycles Policies 2(c), 3, and 5, and Pedestrians Policies 1(b) and (e). Petitioner’s Petition for Review 32. We address this argument above in our resolution of petitioner’s assignment of error that the CUP is not consistent with applicable CP policies.

1           Brandon Place. The City may partner with the [District] to  
2           fund additional improvements as part of the project.” Record  
3           19 (underscoring in original).

4           The city council found that, as proposed, adequate bicycle and pedestrian  
5           improvements were part of the development, and it conditioned its approval on  
6           the construction of street improvements. The city’s findings are adequate.

7           The fourth subassignment of error under petitioner’s second assignment of  
8           error is denied.

9           **E.    CDC 60.070(A)(6)**

10          CDC 60.070(A)(6) provides, “The supplementary requirements set forth  
11          in Chapters 52 to 55 CDC and CDC 92.010(E) are met, if applicable.” Petitioner  
12          argues that CDC 55.125 and 85.170 require that the TIAs include mitigation  
13          measures that meet the city’s LOS standards and are satisfactory to the City  
14          Engineer.

15          The District responds that “the record does not reflect that any party cited  
16          to or presented any argument raising shortcomings in the District’s TIAs with  
17          respect to compliance with [CDC] 55.125 and 85.170(B)(2), which petitioners  
18          believe, required mitigation measures to address reductions in intersection [LOS]  
19          generally.” District’s Response Brief 9. Although petitioner argues broadly in  
20          their reply brief that the subassignments of error set forth in their petition for  
21          review were supported by citations to the record, we have reviewed this  
22          subassignment of error in the petition for review, and there are no record  
23          citations. Absent any argument by petitioner that directs us to citations to the

1 record where the issue raised in this subassignment of error was raised during the  
2 proceedings below, we agree that the issue is waived.

3 Furthermore, the second subassignment of error under petitioner's first  
4 assignment of error is that the CUP fails to comply with the mitigation  
5 requirements in CDC 85.170(B)(2)(e)(1)(B) because no mitigation of the failure  
6 of the Willamette Falls Drive/Ostman Road intersection was required as a  
7 condition of approval. We agreed with the District above that the issue was  
8 waived and that mitigation is not required. This subassignment of error is denied  
9 for the same reasons.

10 The fifth subassignment of error under petitioner's second assignment of  
11 error is denied.

12 **F. CDC 60.070(A)(7)**

13 CDC 60.070(A)(7) provides, "The use will comply with the applicable  
14 policies of the [CP]." Petitioner argues that no findings were made *in the October*  
15 *4, 2021 staff report* concerning CP Goal 12 and that there is not substantial  
16 evidence to support the city council's findings that the policies of Goal 12 have  
17 been met.

18 The city council adopted its own findings addressing Goal 12. Record 18.  
19 Furthermore, in addition to the October 4, 2021 staff report, the city council  
20 incorporated findings from the District's July 28, 2021 final written argument.  
21 Record 11. Those findings also address Goal 12. Record 785. The findings rely

1 on the TIAs, which are evidence a reasonable person would rely on to conclude  
2 that the use complies with applicable policies of CP Goal 12.

3 Petitioner argued in its subassignment of error addressing 60.070(A)(4)  
4 that the District's failure to commit to completing improvements violates CP  
5 Goal 12, Bicycles Policies 2(c), 3, and 5, and Pedestrians Policies 1(b) and (e).  
6 Petitioner's Petition for Review 32. As we explained in our discussion of  
7 petitioner's challenge to compliance with CDC 60.070(A)(4), the city  
8 conditioned its approval of the CUP on the District's provision of infrastructure  
9 improvements. Petitioner does not address these conditions. For the same reasons  
10 we rejected petitioner's arguments above, we reject them here.

11 The sixth subassignment of error under petitioner's second assignment of  
12 error is denied.

13 **G. CDC 60.100**

14 CDC 60.100 provides:

15 "Schools and other government facilities that attract a regular and  
16 significant volume of users shall, to the greatest extent possible, be  
17 centrally located relative to the majority of the population that they  
18 will serve and be serviceable by sidewalks and bike routes/lanes.  
19 Police and fire stations shall meet these standards to the greatest  
20 extent possible but it is acknowledged that access to arterials  
21 remains a key locational determinant for those uses."

22 Petitioner argues that the record lacks substantial evidence that the school will be  
23 centrally located relative to the majority of the population it serves. Petitioner  
24 argues that Rosemont Ridge Middle School is more central relative to all of the

1 city and that the current location of Athey Creek Middle School is closer to its  
2 students. Petitioner argues that, because 77 percent of the District’s students have  
3 a choice of attending Rosemont Ridge, Athey Creek, or Meridian Creek Middle  
4 Schools, it is difficult to determine what is central.

5 The city council found:

6 “This provision does not require that a majority of the students live  
7 in West Linn, although the evidence submitted by the District  
8 suggests that is the case. The map *Middle School Residence-based*  
9 *2018-28 Enrollment Forecasts* shows the Athey Creek Middle  
10 School service boundary and illustrates that the school is located  
11 near the center and, as other findings explain, it will be easily  
12 accessed by students travelling by all modes.” Record 14-15 (italics  
13 in original).

14 The city council relied on maps provided by the District to conclude that the  
15 school is centrally located. That evidence is evidence a reasonable person would  
16 rely on to conclude that CDC 60.100 is met.

17 The seventh subassignment of error under petitioner’s second assignment  
18 of error is denied.

19 **H. CDC 60.070(A)(5)**

20 CDC 60.070(A)(5) provides, “The applicable requirements of the zone are  
21 met, except as modified by this chapter.” Petitioner’s subassignment of error  
22 addressing this criterion is derivative of the other subassignments of error  
23 described above, and it is denied for the reasons we deny the remainder of  
24 petitioner’s second assignment of error.

1           The eighth subassignment of error under petitioner's second assignment of  
2 error is denied.

3           Petitioner's second assignment of error is denied.

4           The city's decision is affirmed.