

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

3
4 STEVEN A. ANDERSON,
5 *Petitioner,*

6
7 and

8
9 E. M. EASTERLY,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF SALEM,
15 *Respondent,*

16
17 and

18
19 TRADEMARK ENTERPRISES, LLC,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2021-087

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Salem.

28
29 Steven A. Anderson filed a petition for review and reply brief and argued
30 on behalf of themselves.

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32 E. M. Easterly filed an intervenor-petitioner's brief and reply brief and
33 argued on behalf of themselves.

34
35 Thomas Cupani filed a joint response brief and argued on behalf of the
36 respondent. Also on the brief were Steve R. Elzingra and Daniel B. Atchison.
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1 Steve R. Elzinga filed a joint response brief and argued on behalf of the
2 intervenor-respondent.

3
4 RUDD, Board Member and RYAN, Board Member, participated in the
5 decision.

6
7 ZAMUDIO, Board Chair, did not participate in the decision.

8
9 AFFIRMED

04/21/2022

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

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NATURE OF THE DECISION

Petitioner appeals a city hearing officer’s decision approving a consolidated application for a tentative subdivision and adjustments.

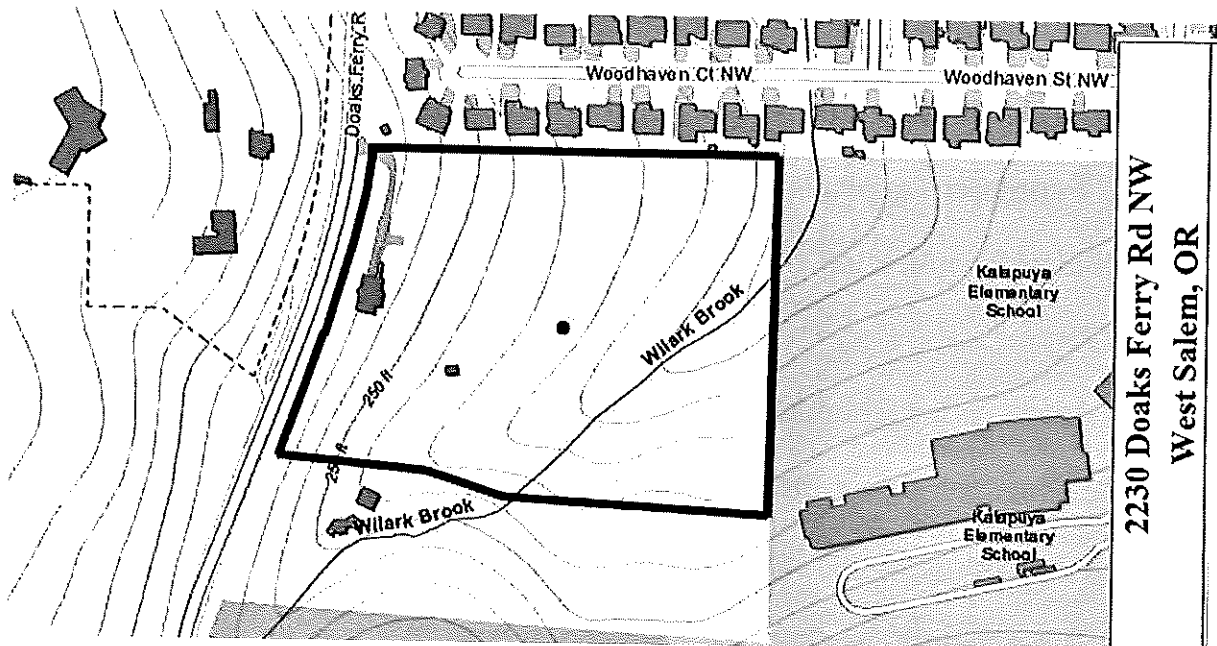
FACTS

Intervenor-respondent (applicant) sought city approval of a subdivision with 27 lots for single family residential development and one lot for a water quality detention facility, along

“ * * * with an alternative street standard to allow the grade of [a street] to exceed 12%, exceed the 600-foot maximum block length and to reduce the street width from 60-feet to 50-feet and a Class 2 Adjustments to exceed the maximum lot width to depth of 300 percent to 500 percent for Lot 12 and to allow Lot 3 to reduce the minimum lot depth for a double frontage lot from 120 feet to 112 feet, for property approximately nine acres in size and zoned RA (Residential Agriculture).” Record 15.

The nine-acre property proposed for subdivision (the subject property) is shown on the site plan below. The subject property and the properties to its south and east are zoned Residential Agriculture (RA). Properties to the north of the subject property are zoned Single Family Residential (RS). Properties located to the west are zoned RA and Polk County Suburban Residential. Record 16. Properties to the north of the subject property are developed with single family residences. The property to the east is developed with an elementary school.¹

¹ The parties do not discuss this, but the findings explain that Salem Revised Code (SRC) 265.015 provides that any RA land that is subdivided is



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2 Record 1314. Wilark Brook crosses part of the eastern portion of the subject
3 property at a northeast southwest angle.

4 On June 1, 2021, the planning administrator approved the application. On
5 June 15 and June 16, 2021, appeals of the planning administrator's approval were
6 filed by a watershed council and a neighborhood association.

7 On July 20, 2021, the planning commission held a public hearing on the
8 appeal and voted to approve the application by a six to three vote. Record 623.

9 On August 17, 2021, the planning commission met again, this time with three of
10 the commissioners that were in attendance at the July 20, 2021 absent. A planning
11 commissioner who, at the July 20, 2021 meeting, voted to deny the application,

automatically reclassified to an RS zone on the date the subdivision plat is recorded. Record 23. Because the zoning of the subject property will become RS if a subdivision plat is ultimately recorded, the city analyzed the subdivision for conformance with development code requirements applicable to RS zoning. Record 23-24.

1 made a motion to deny the application. The July 20, 2021 motion to deny the
2 application was approved by a majority of the planning commissioners in
3 attendance, with a vote of three to two. Record 433. On September 7, 2021, the
4 planning commission considered two sets of motions and findings, one to
5 approve the application and one to deny the application. Record 150. On
6 September 7, 2021, the planning commission voted five to one to approve the
7 appeal using the decision and findings from July 20, 2021.

8 This appeal followed.

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

11 **A. Standard of Review**

12 Petitioner’s third and intervenor-petitioner’s first assignments of error
13 assert that the city violated applicable procedural requirements. We will reverse
14 or remand the limited land use decision under review if we find that the local
15 government “committed a procedural error which prejudiced the substantial
16 rights of the” appellant.² ORS 197.828(2)(d).

17 **B. Petitioner’s Third Assignment of Error**

18 Petitioner’s third assignment of error is that the city failed to identify the
19 materials requested by and reviewed by the planning commissioners. Petitioner

² A local government decision approving a tentative subdivision plan, as described in ORS 92.040, for property within an urban growth boundary, is a limited land use decision. ORS 197.015(12)(a).

1 contends that a statement by the planning department that items submitted into
2 the record are “‘available upon request’ does not identify which of the required
3 ‘Summary of Record’ materials were received by Salem Planning Commission
4 members prior to the Planning Commission’s September 7, 2021, approval of
5 [the application].” Petitioner’s Petition for Review 46-47. We agree with
6 respondents that the city is not required to provide this information.³
7 Respondents’ Response Brief 35.

8 In order to prevail on a procedural assignment of error, petitioner must
9 identify the procedure they believe has been violated. *Stoloff v. City of Portland*,
10 51 Or LUBA 560, 563 (2006). SRC 300.1040(a) provides:

11 “Appeals shall be conducted in accordance with the procedures set
12 forth in this section.

13 “(a) *Appeal hearing.* Appeals shall be de novo. In a de novo
14 review, all issues of law and fact are heard anew, and
15 no issue of law or fact decided by the lower level
16 Review Authority is binding on the parties in the
17 hearing. New parties may participate, and any party
18 may present new evidence and legal argument by
19 written or oral testimony. *The record of the initial*
20 *proceeding shall be made a part of the record. For*
21 *purposes of this subsection, the record consists of:*

22 “(1) All staff reports, exhibits, materials, pleading,
23 memoranda, stipulations, and motions submitted
24 by any party and reviewed or considered in

³ The city and intervenor-respondent filed a joint response brief and we refer to them collectively as respondents.

1 reaching the original decision that is being
2 appealed.

3 “(2) An electronic recording or transcript of the
4 original hearing.” (Emphasis added.)

5 Petitioner argues that the city erred because the record at LUBA does not
6 include “evidence as to which of the SRC 300.1040(a)(1) materials were
7 requested by or actually received by Planning Commission members.”
8 Petitioner’s Petition for Review 47-48.

9 SRC 300.1040(a) details the contents of the record on appeal. The planning
10 commission’s findings include a “Summary of Record” stating:

11 “The following items are submitted to the record and *are available*
12 *upon request*. All materials submitted by the applicant, including
13 any applicable professional studies such as traffic impact analysis,
14 geologic assessments, and stormwater reports, any materials and
15 comments from public agencies, City departments, neighborhood
16 associations, and the public; and all documents referenced in this
17 report.”⁴ Record 15 (emphasis added).

18 Petitioner argues that the statement that items “are available upon request” fails
19 to make clear what items the planning commissioners requested but petitioner
20 does not identify any legal requirement that the city provide that information.

⁴ Petitioner contrasts the above “Summary of Record” with the description of the LUBA record contents at OAR 661-010-0025(1). OAR 661-010-0025 is a LUBA rule identifying minimal contents of a record submitted to LUBA as part of an appeal to LUBA. OAR 661-010-0025 does not inform what materials a local government is required to place before its local decision maker. OAR 661-010-0025 is not a procedure requiring that the findings identify the items requested by or actually received by the planning commission.

1 Petitioner does not identify a requirement that the city provide a “Summary of
2 Record” or, if required, establishing what a “Summary of Record” must include,
3 and SRC 300.1040(a) does not require the city to identify in its decision, or
4 elsewhere, items requested by or actually received by the planning commission.⁵

5 Petitioner’s third assignment of error is denied.

⁵ Embedded in petitioner’s third assignment of error is a request that we remand the city’s decision to require additional evidence related to the content of the record. We agree with respondents that this is an untimely objection to the record. Joint Response Brief 34. On October 26, 2021, we received the record from the city. On November 8, 2021, petitioner filed objections to the record. On November 23, 2021, intervenor-petitioner filed their objection to the record. On January 27, 2022, we issued an order settling the record. Generally, the record filed with LUBA must include all “materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.” OAR 661-010-0025(1)(b). As we explained in our January 27, 2022 order, “[t]he city is the custodian of the record. Absent some reason to question its representations, we generally defer to the custodian of the record. *Curl v. City of Bend*, 55 Or LUBA 719, 725 (2008).” *Anderson v. City of Salem*, ___ Or LUBA ___, ___ (LUBA No 2021-087, January 7, 2022) (slip op at 6). Our order settling the record accepted the city’s representations that an environmental assessment and email referenced in record documents were not part of the record before the local decisionmaker. Petitioner now maintains that the city had no basis to take that position, and that the city erred by not including all documents required by SRC 300.1040(a) in the record transmitted to LUBA. Petitioner did not, however, raise SRC 300.1040(a) in its record objections and may not raise it for the first time in the petition for review.

Furthermore, ORS 197.835(1) tasks LUBA with reviewing land use and limited land use decisions by local governments. Petitioner’s dissatisfaction with the city’s response to its record objections is not a basis for an assignment of an error in an appeal to LUBA.

1 **C. Intervenor-Petitioner’s First Assignment of Error**

2 Intervenor-petitioner’s first assignment of error is that the planning
3 commission did not follow procedures applicable to local land use appeals.⁶
4 Intervenor-Petitioner’s Brief 5. Intervenor-petitioner argues that, under
5 applicable procedures, the planning commission was the decision maker in this
6 case, but actions by staff and applicant interfered with its performance of that
7 duty.

8 **1. Intervenor-Petitioner’s First Subassignment of Error**

9 Intervenor-petitioner argues that the city erred because staff (1) failed to
10 advise the planning commission correctly and, (2) failed to forward documents
11 to the planning commission. First, intervenor-petitioner argues that city “staff
12 failed in their obligation to guide the [planning commission] regarding the
13 multiple SRC ‘waterway’ definitions and their relevance to the approval of [the
14 application.]” Intervenor-Petitioner’s Brief 7. Second, intervenor-petitioner
15 argues that city staff improperly controlled the information provided to the
16 planning commission. *Id.*

⁶ The table of contents included in intervenor-petitioner’s brief lists seven issues: “(1) Hearing Closed Prematurely;” (2) Evidence accepted after Hearing Closed;” (3) “New Evidence Challenged;” “(4) New Findings to Planning Commission;” “(5) Draft Findings Rejected;” “(6) Accept and Reject Packages with identical findings submitted to Planning commission;” and, “(7) ORS 227.180(a) not submitted to Planning Commission.” These headings do not correspond to headings in the body of the brief and we address the subassignments in intervenor-petitioner’s brief as the first through seventh subassignments.

1 Intervenor-Petitioner also argues that the city improperly shifted the
2 burden of proof. Intervenor-Petitioner’s Brief 9.

3 Intervenor-petitioner argues that as a result of staff failure to identify all
4 definitions of “waterway” in the SRC, the planning commission failed to evaluate
5 evidence equally. First, we agree with respondents that the definition of
6 “waterway” relied upon by the planning commission in applying the SRC is a
7 matter of code interpretation, not evidence. Respondents’ Response Brief 19.
8 Second, we agree with respondents that no procedural violation occurred;
9 intervenor-petitioner identifies no code provision requiring staff to direct the
10 planning commission to all definitions of a term in city ordinances. Respondents’
11 Response Brief 19. Third, intervenor-petitioner does not argue that they were not
12 able to present alternative definitions of “waterway” and we agree with
13 respondents that, contrary to intervenor-petitioner’s assertion, the planning
14 commission is not required to weigh all things equally. We agree with respondent
15 that weighing evidence is the job of the decision maker. “The city has discretion
16 to rely on the evidence it chooses in making its decision.” *SE Neighbors*
17 *Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51, 56, *aff’d*, 259 Or App
18 139, 314 P3d 1004 (2013) (that a petitioner desires the city to rely on different
19 evidence does not provide a basis for reversal or remand.)⁷

⁷ Furthermore, even if staff made an analytical error, petitioner has failed to develop an argument that an error by *staff* is a basis for finding procedural error by the planning commission. Intervenor-Petitioner’s Brief 6-7; *See Deschutes*

1 Intervenor-petitioner also argues that the planning commission erred in
2 allowing staff to serve as an evidence gatekeeper. A watershed council filed one
3 of the appeals to the planning commission. As part of its final written argument,
4 applicant submitted testimony and a map available on that watershed council's
5 website. On July 28, 2021, city staff determined that the map did or could
6 constitute new evidence and city staff informed intervenor that the city would
7 accept evidence responsive to the new map and applicant's map-related
8 testimony. Record 612-13. In response, an individual, not intervenor-petitioner,
9 submitted testimony that included information about their professional
10 credentials. City staff determined that the professional credential information was
11 outside the limited scope of evidence being accepted, and instructed the submitter
12 to redact that information from the submittal or submit testimony without that
13 information. Intervenor-petitioner argues that it was error for the city to allow
14 staff, rather than the planning commission, to evaluate the admissibility of the
15 evidence.

16 Again, prevailing on a claim of procedural error requires that an appellant
17 identify the procedure allegedly violated by the local government. *Stoloff*, 51 Or
18 LUBA at 563. We agree with respondents that intervenor-petitioner has not done

Development Company v. Deschutes County, 5 Or LUBA 218, 220 (1994)
(LUBA will not supply a legal basis for petitioner's argument). Throughout
intervenor-petitioner's first assignment of error, they allege failures by city staff
without identifying legal authority for the conclusion that a failure by staff, where
staff is not the final decision maker, is a basis for reversal or remand.

1 so. First, intervenor-petitioner argues that OAR 661-010-0025(1)(b) requires that
2 the planning commission, not staff, determine what evidence is received by the
3 planning commission. Intervenor-Petitioner’s Brief 9. OAR 661-010-0025(1)(b)
4 provides that the contents of the record at LUBA shall generally include “All
5 written testimony and all exhibits, maps, documents or other materials
6 specifically incorporated into the record and placed before, and not rejected by,
7 the final decision maker, during the course of the proceedings before the final
8 decision maker.” This rule applies to the administrative record the city is required
9 to file with LUBA and has no bearing on how local governments determine what
10 evidence they will accept. *See* n 5.

11 Second, intervenor-petitioner argues that the obligation of the planning
12 commission, rather than staff, to make the determination of whether to reject the
13 biographical information submitted is based in SRC 6.040(g). Intervenor-
14 Petitioner’s Brief 11. SRC 6.040(g) provides that the planning commission will:

15 “ * * * serve as the committee for citizen involvement as described
16 in statewide planning goal 1, responsible for assisting the council
17 with the development of a program that promotes and enhances
18 citizen involvement in land-use planning, assisting in the
19 implementation of the citizen involvement program, and evaluating
20 the process being used for citizen involvement.”

21 This provision does not set out rules governing how the planning commission
22 will manage the receipt of evidence. Respondents argue, and we agree, that
23 intervenor-petitioner has not identified a requirement in Statewide Planning Goal

1 1 (Citizen Involvement) restricting the city’s process for reviewing submittals.⁸
2 Respondents’ Response Brief 26. Intervenor-petitioner has not identified a
3 procedure prohibiting the planning commission’s evidence review process.

4 Furthermore, even if the planning commission should have received the
5 credential information for evaluation, intervenor-petitioner has not established
6 prejudice to *their* substantial rights as required by ORS 197.828(2)(d).⁹ First,
7 intervenor-petitioner was not the individual seeking to submit their credentials.
8 Second, intervenor-petitioner acknowledges that the credential testimony went
9 beyond the scope of the evidence being accepted at that stage of the proceeding
10 and was instead related to that individual’s July 20, 2021 testimony. Intervenor-
11 Petitioner’s Brief 9. Intervenor-petitioner argues that the credential evidence was
12 relevant because one of the planning commissioners stated during the July 20,
13 2021 hearing that the city had only one “professional report” before it.
14 Intervenor-Petitioner’s Brief n 4. The credential testimony therefore did not fall

⁸ Goal 1 is “To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.”

⁹ Although respondents do not raise the issue, we observe that intervenor-petitioner has not established procedural error based on prejudice to *their substantial* rights as a result of city staff instructing another individual to modify their testimony. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 507-08 (2016), *aff’d*, 284 Or App 314, 397 P3d 1007 (2017) (A person may not establish a basis for reversal or remand based upon prejudice to another’s substantial rights).

1 within the scope of new material (responses to the watershed council map and
2 applicant's comments on that map), that the planning commission was receiving.

3 Intervenor-petitioner also argues that a planning commissioner's
4 statements that there was only one professional report before the commission
5 "appear to raise the 'burden of proof issue' addressed in *Stahl v. Tillamook*
6 *County*, 43 Or LUBA 518 (2003)." Intervenor-Petitioner's Brief 9. *Stahl* does not
7 assist intervenor-petitioner. As we explained in *Stahl*,

8 "Intervenors are correct that, in the course of weighing conflicting
9 evidence, a local government is entitled to accept an applicant's
10 evidence as sufficient to demonstrate compliance with an approval
11 standard, and reject evidence to the contrary, as long as the contrary
12 evidence does not undermine the applicant's evidence to the point
13 where no reasonable person would rely on that evidence. Such an
14 evaluation of conflicting evidence does not represent a shift in the
15 burden of proof to the opponents. *Washington Co. Farm Bureau v.*
16 *Washington Co.*, 21 Or LUBA 51, 64 (1991), However, where the
17 local government expressly purports to shift the burden of proof
18 from the applicant to the opponents, and explicitly rejects the
19 opponents' evidence for failure to satisfy that burden, as here, it
20 becomes more difficult to conclude that the local government has
21 simply engaged in the evaluation of conflicting evidence." *Stahl* Or
22 LUBA at 527-28.

23 Intervenor-petitioner does not identify any shifting of the burden of proof in the
24 planning commission's findings. Respondents argue, and we agree, that the
25 planning commission did not shift the burden of proof. Response Brief 18.
26 Accordingly, intervenor-petitioner has not established a basis for reversal or
27 remand.

28 Intervenor-petitioner's first subassignment of error is denied.

1 **2. Intervenor-Petitioner’s Second Subassignment of Error**

2 Intervenor-petitioner’s second assignment of error is that the planning
3 commission failed to keep the record open for additional evidence as required by
4 *former* ORS 197.763 (2019), *renumbered as* 197.797 (2021).

5 *Former* ORS 197.763(6)(a) (2019) provided:

6 “Prior to the conclusion of the initial evidentiary hearing, any
7 participant may request an opportunity to present additional
8 evidence, arguments or testimony regarding the application. The
9 local hearings authority shall grant such request by continuing the
10 public hearing pursuant to paragraph (b) of this subsection or
11 leaving the record open for additional written evidence, arguments
12 or testimony pursuant to paragraph (c) of this subsection.”

13 The July 20, 2021 hearing was conducted using the Zoom video conference
14 platform. Intervenor-petitioner explains that they stated during their July 20,
15 2021 testimony that they hoped “there will be a strategy and mechanism where
16 [they] can submit” written testimony and, after the hearing was closed, used the
17 “raise hand” feature in the Zoom program to repeat their desire to submit written
18 testimony. Intervenor-Petitioner’s Brief 11-12. Intervenor-petitioner also
19 references a statement by another participant during the hearing, “ask[ing] that
20 two documents about the Goldcrest Study be put in the record.” Intervenor-
21 Petitioner’s Brief 12. Intervenor-petitioner maintains that the planning
22 commission president did not “invite[] or respond[] to previous indications
23 participants had requested the record remain open to submit written testimony[.]”
24 Intervenor-Petitioner’s Brief 13.

1 We agree with respondents that intervenor-petitioner’s expression of hope
2 that there would be a mechanism for submitting their written testimony, as well
3 as another’s request that documents related to a study be placed in the record
4 during their testimony, are not requests that the record be left open or the hearing
5 continued. Respondents’ Response Brief 27, *Jacobus v. Klamath County*, ___ Or
6 LUBA ___, ___ (LUBA No 2020-054, Dec 10, 2020) (slip op 6-7) (request to
7 reschedule a hearing is not a request to keep the record open or continue the
8 hearing.)

9 Intervenor-petitioner also explains that after the planning commission
10 president rejected their “raised hand” in the virtual proceeding, intervenor-
11 petitioner used the chat feature in the July 20, 2021 Zoom hearing to ask staff
12 how they could submit their written testimony and that staff responded that the
13 document could be sent to staff. Respondents maintain that it is impossible to
14 know with certainty why intervenor-petitioner used the “raise hand” feature or
15 what may have been said in online chat boxes, but in any event, the issue is not a
16 basis for reversal or remand, and is moot, because intervenor-petitioner’s written
17 testimony was added to the record. Intervenor-petitioner acknowledges that the
18 material was added to the record, but argues that the city erred in forwarding it to
19 the planning commission nine days after the hearing closed.

20 Intervenor-petitioner cites a staff email to the planning commission
21 providing the planning commission with additional documents to address
22 procedural errors at the July 20, 2021 hearing. Record 594. This email states that

1 the written testimony intervenor-petitioner wished to submit is attached to the
2 email, explains that the document was not distributed to the commission before,
3 and that the planning commission will consider the application again at the
4 August 17, 2021 meeting.

5 “Under ORS 197.835(9)(a)(B), LUBA is directed to reverse or
6 remand a decision where it finds a local government ‘[f]ailed to
7 follow the procedures applicable to the matter before it in a manner
8 that prejudiced the substantial rights of the petitioner[.]’ Under ORS
9 197.835(9)(a)(B), reversal or remand is only required and
10 appropriate if a procedural error resulted in prejudice to petitioner’s
11 substantial rights. The ‘substantial rights’ of parties in quasi-judicial
12 land use proceedings, as referenced in ORS 197.835(9)(a)(B), are
13 ‘the rights to an adequate opportunity to prepare and submit their
14 case and a full and fair hearing.’ *Muller v. Polk County*, 16 Or
15 LUBA 771, 775 (1988).” *Pinnacle Alliance Group, LLC v. City of*
16 *Sisters*, 73 Or LUBA 169, 174-75 (2016).

17 Similarly, we will reverse or remand a limited land use decision where the local
18 government action prejudices the substantial rights of petitioner. ORS
19 197.828(2)(d). We agree with respondents that intervenor-petitioner fails to
20 articulate any prejudice to their substantial rights. Respondents’ Response Brief
21 32. Intervenor-petitioner fails to explain why the late distribution of his written
22 testimony was not cured by the reopening of the record and subsequent votes by
23 the commission on whether to approve the application. Intervenor-petitioner
24 worked with the city’s counsel to establish a process for consideration of
25 additional evidence by the planning commission. Intervenor-petitioner raised
26 their concern that procedural errors occurred at the July 20, 2021 hearing and

1 agreed not “to forgo any future appeal on these procedural errors” if the city
2 distributed his submission to the planning commission for consideration and
3 accepted evidence from other parties concerning the map included with
4 applicant’s final argument materials. Record 612. The planning commission
5 acted in accordance with that agreement. We agree with respondents that
6 intervenor’s request to submit additional testimony was satisfied when the
7 additional testimony was received. Respondents’ Response Brief 29. Intervenor-
8 petitioner identified their desired remedy and there is no prejudice to their
9 substantial rights and no basis for reversal or remand. *See also Concerned*
10 *Citizens v. Jackson County*, 33 Or LUBA 70, 83 (1997) (in order to demonstrate
11 prejudice, a petitioner must explain “with some specificity what would have been
12 different or more complete” had the local government followed the correct
13 procedures).

14 Intervenor-petitioner’s second subassignment of error is denied.

15 **3. Intervenor-Petitioner’s Third Subassignment of Error**

16 Intervenor-petitioner’s third assignment of error is that time limits during
17 oral testimony during the July 20, 2021 hearing prejudiced their substantial
18 rights. Intervenor-Petitioner’s Brief 17. Intervenor-petitioner argues that time
19 limits on oral testimony prevented intervenor-petitioner from addressing a
20 stormwater map staff included as an attachment to the July 20, 2021 staff report.
21 Although their argument is not clear, intervenor-petitioner also appears to argue
22 that the time limits at the July 20, 2021 hearing did not provide adequate time for

1 intervenor-petitioner to address an applicant-proposed modification of a wetlands
2 condition of approval. Intervenor-Petitioner’s Brief 17. Intervenor-petitioner
3 does not establish prejudice to their substantial rights where they do not explain
4 what the time limits were, why information in the July 13, 2021 planning
5 commission packet could not be responded to in the written testimony they
6 submitted on July 20, 2021, when the applicant proposed modification of the
7 wetlands condition of approval became available for comment, or what new
8 evidence they would have submitted. *Jacobus v. Klamath County*, ___ Or LUBA
9 ___, ___ (LUBA No 2020-054, Dec 10, 2020) (slip op at 7-8) (holding that
10 petitioners did not show prejudice to their substantial rights where they do not
11 identify the new evidence admitted or the responsive evidence they would have
12 submitted.). As respondents respond, intervenor “has not identified any other
13 evidence or argument [they] would have submitted if [they] had the opportunity.”
14 Respondents’ Response Brief 31.

15 Intervenor-petitioner also states “The modified findings presented to
16 [planning commission] members for the August 17, 2021 meeting introduced
17 new evidence: (a) appellant’s surrebuttal documents challenging the applicant
18 representative’s watershed map [and] (b) the applicants’ written response
19 testimony. * * *” Intervenor-Petitioner’s Brief 17. Again, concerning (a),
20 intervenor-petitioner negotiated with the city for the reopening of the record to
21 accept testimony related to the watershed map and, concerning (b), the applicant
22 has the right of final written argument. ORS 197.797(6)(e). Intervenor-petitioner

1 has not shown prejudice to their substantial rights. Intervenor-petitioner identifies
2 no basis for reversal or remand.

3 Intervenor-petitioner's third subassignment of error is denied.

4 **4. Intervenor-Petitioner's Fourth Subassignment of Error**

5 Intervenor-petitioner's fourth subassignment of error is that the planning
6 commission's August 17, 2021 approval of the motion to deny the application
7 failed to comply with planning commission procedures requiring a motion to
8 reconsider the July 20, 2021 decision, and that the error should have been
9 corrected by staff. Intervenor-Petitioner's Brief 17. We agree with respondents
10 that intervenor-petitioner identifies no prejudice to their substantial rights based
11 upon the failure of the planning commission to adopt a motion to reconsider prior
12 to voting to deny the application on August 17, 2021, where the planning
13 commission voted again on September 7, 2021. Respondents' Response Brief 32-
14 33.

15 Intervenor-petitioner's fourth subassignment of error is denied.

16 **5. Intervenor-Petitioner's Fifth Subassignment of Error**

17 Intervenor-petitioner's fifth subassignment of error is that the public was
18 not afforded an opportunity to comment on a draft motion and findings to deny
19 the application prepared by city staff and considered by the planning commission
20 at its September 7, 2021 meeting. Intervenor-Petitioner's Brief 20. Intervenor-
21 petitioner identifies no procedure requiring that the public be allowed to comment
22 on draft findings. There is no general legal requirement that participants be

1 provided an opportunity to rebut proposed local government findings. Intervenor-
2 petitioner has not identified a procedural error resulting in prejudice to their
3 substantial rights because there is no right to review and comment on draft
4 findings. *Adler v. City of Portland*, 25 Or LUBA 546, 551 (1993).

5 Intervenor-petitioner's fifth subassignment of error is denied.

6 **6. Intervenor-Petitioner's Sixth Subassignment of Error**

7 Intervenor-petitioner's sixth subassignment of error is that the planning
8 commission erred because an *ex parte* communication that intervenor-petitioner
9 sent to one planning commissioner was not distributed to the remaining planning
10 commissioners. Intervenor-Petitioner's Brief 20-21. ORS 227.180(3)(a)
11 provides:

12 "No decision or action of a planning commission * * * shall be
13 invalid due to *ex parte* contact or bias resulting from *ex parte* contact
14 with a member of the decision-making body, if the member of the
15 decision-making body receiving the contact:

16 (a) Places on the record the substance of any written or oral
17 *ex parte* communications concerning the decision or
18 action[.]”¹⁰

19 Upon opening it and realizing intervenor-petitioner's email was an attempt at an
20 *ex parte* communication, the planning commissioner did not review the body of
21 the email, and forwarded it to staff for distribution. Video Recording, Salem

¹⁰ Although intervenor-petitioner cited ORS 227.180(a), we believe their intent was to cite ORS 227.180(3)(a).

1 Planning Commission, July 20, 2021, at 4:50 (comments of Planning
2 Commissioner Pollock). The city explains in their response brief that staff did
3 not forward the *ex parte* communication to the planning commission.¹¹

4 Respondents' Response Brief 33. We recently explained:

5 “Ex parte communication” is not defined in the statute. In *Horizon*
6 *Construction, Inc. v. City of Newberg*, we concluded that, under the
7 definition of *ex parte* communication found in the Attorney
8 General’s Uniform and Model Rules of Procedure, the term means
9 ‘an oral or written communication to an agency decision maker * * *
10 not made in the presence of all parties to the hearing, concerning a
11 fact in issue in the proceeding.’ 25 Or LUBA 656, 665 (1993). We
12 have also said that ‘[a]n *ex parte* communication is a communication
13 between a party and a decision-maker, made outside the hearing
14 process, concerning a decision or action before the decision-maker.’
15 *Oregon Shores Conservation Coalition v. Coos County*, ___ Or
16 LUBA ___, ___ (LUBA Nos 2019-137 /2020-006, Dec 22, 2020)
17 (slip op at 10). ‘ORS 227.180(3) prohibits undisclosed *ex parte*
18 communications, whether or not those communications in fact
19 influence the city’s original decision.’ *Opp v. City of Portland*, 38
20 Or LUBA 251, 264-65, *aff’d*, 171 Or App 417, 16 P3d 520 (2000),
21 *rev den*, 332 Or 239 (2001).” *Bergmann v. City of Brookings*, ___
22 Or LUBA ___, ___ (LUBA No. 2020-096, Aug 2, 2021) (slip op at
23 7.)

24 No *ex parte* contact occurred because the planning commissioner did not read the
25 communication. Moreover, intervenor-petitioner identifies no procedural
26 requirement that the planning commission accept and review their attempted *ex*

¹¹ The city also stated that the email was not forwarded to the planning commission in its response to record objections. *See Anderson*, ___ Or LUBA at ___ (slip op at 3).

1 *parte* communications, or that city staff distribute attempted *ex parte*
2 communications to members of the commission.

3 Intervenor-petitioner’s sixth subassignment of error is denied.

4 **7. Intervenor-Petitioner’s Seventh Subassignment of Error**

5 The entirety of intervenor-petitioner’s seventh subassignment of error is
6 “Moreover, *to the extent* that the staff introduced an alternative stormwater
7 masterplan map [Record 000145] to the PC, that new information is certainly
8 applicable to the findings offered in *Grahn v. City of Yamhill*, 76 Or LUBA 258
9 (2017), that is, the PC erred by not addressing the requirements of ORS
10 197.763(a)-(c).” Intervenor-Petitioner’s Brief 16 (emphasis added). Intervenor-
11 petitioner does not develop this assignment of error and we do not address it
12 further. *Deschutes Development Company v. Deschutes County*, 5 Or LUBA 218,
13 220 (1994).

14 Intervenor-petitioner’s seventh subassignment of error is denied.

15 Petitioner’s third assignment of error is denied. Intervenor-petitioner’s first
16 assignment of error is denied.

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

18 Petitioner argues, under three subassignments of error, that the city’s
19 decision lacks adequate conditions of approval and that the findings are

1 inadequate and not supported by substantial evidence.¹² ORS 197.828(2)(a)
2 provides that LUBA shall “reverse or remand a limited land use decision if:

3 “The decision is not supported by substantial evidence in the record.
4 The existence of evidence in the record supporting a different
5 decision shall not be grounds for reversal or remand if there is
6 evidence in the record to support the final decision[.]”

7 In *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348, 363-64 (2015), we
8 explained:

9 “* * * LUBA’s standard of review of evidentiary challenges to a
10 limited land use decision is not the same as the standard of review
11 of a land use decision. The language of ORS 197.828(2)(a), as
12 compared to ORS 197.835(9)(a)(C), does not include the phrase
13 ‘substantial evidence in the whole record.’ For limited land use
14 decisions, LUBA may not reverse or remand a limited land use
15 decision unless ‘the decision is not supported by substantial
16 evidence in the record.’ Under ORS 197.828(2)(a), determining
17 whether the decision is ‘supported by substantial evidence in the
18 record,’ LUBA may not remand a decision on the basis that there
19 exists evidence in the record supporting a different decision.

20 “The legislative history of the bill that was eventually codified at
21 ORS 197.828 also supports the conclusion that the legislature
22 intended LUBA’s standard of review of evidentiary challenges to
23 limited land use decisions to be different from, and likely less
24 rigorous than, the standard of review of challenges to land use
25 decisions. But the express language of ORS 197.828(2)(a) and the

¹² Petitioner describes its second assignment of error as the city’s findings
“* * * arbitrarily and inaccurately presented the findings and conclusions of the
applicant’s professional geological assessment report in this matter[.]” and that
the city failed to impose required conditions of approval. Petitioner’s Petition for
Review 34.

1 legislative history we have reviewed do not articulate how
2 substantial evidence review under ORS 197.828(2)(a) differs from
3 substantial evidence review under ORS 197.835(9)(a)(C).”

4 We concluded that a decision supported by substantial evidence in the whole
5 record necessarily met the less rigorous standard of substantial evidence in the
6 record. Similarly, if the planning commission’s decision is supported by the more
7 rigorous “substantial evidence in the whole record standard,” it necessarily will
8 meet the reduced standard applicable to limited land use decisions.

9 SRC 810 provides that applicants must provide professional reports
10 assessing the risk that proposed activities will adversely affect the stability and
11 slide susceptibility of the subject property and, in some cases, must obtain a
12 landslide hazard permit. Petitioner explains that applicant’s October 2020
13 Redmond Geotechnical Report includes a geotechnical investigation and
14 geologic hazard assessment fulfilling the SRC 810 submittal requirement.
15 Petitioner’s Petition for Review 36. Petitioner concedes that the “authors are
16 credible engineering experts in their fields.” *Id.* Petitioner argues, however, that
17 the planning commission failed to condition its approval on compliance with
18 SRC 810.020 (obtaining a landslide permit) and improperly relied on a
19 geotechnical report for a different proposal and general descriptions of the
20 geotechnical report’s conclusions in its findings. Petitioner’s Petition for Review
21 34, 41-42. The arguments under petitioners’ three subassignments of error are
22 intertwined and for organizational ease, we address the issues under the headings
23 of landslide hazard permit, scope of geotechnical reports, and site analysis.

1 **A. Landslide Hazard Permit**

2 SRC 810.020(a)(1)(D) provides that no person shall engage in a land
3 division in an area designated as moderate or high total landslide hazard risk,
4 except as provided in subsection (a)(2), without obtaining a landslide hazard
5 permit.¹³ Petitioner argues that the planning commission erred by not

¹³ SRC 810.020 provides:

“(a) Applicability.

“(1) Except as provided in subsection (a)(2) of this section, no person shall engage in any of the following activities in areas designated as moderate or high total landslide hazard risk without first obtaining a landslide hazard construction permit.

“* * *

“(D) Land division, planned unit development, or manufactured dwelling park; or

* * *

“(2) Exemptions. A landslide hazard construction permit is not required for the following:

“(A) Excavation and fill exceeding two feet in depth or 25 cubic yards of volume within a public right-of-way or public utility easement.

“(B) Activities otherwise identified in subsection (a)(1) of this section which must be undertaken immediately to prevent an imminent threat to public health or safety, or prevent imminent danger to public or private property; provided, however:

1 conditioning approval on obtaining a landslide hazard permit. Petitioner's
2 Petition for Review 34. Respondents counter that this issue was not raised below
3 and, in any event, the requirements for a tentative plan are set out at SRC
4 205.15(d) and a landslide hazard permit is not required at the subdivision
5 tentative plan stage.¹⁴ Response Brief 13-14.

-
- (i) The person undertaking such emergency activity shall notify the Director within one working day following the commencement of the activity.
 - (ii) If the Director determines that the activity, or any part thereof, is beyond the scope of allowed emergency activity, enforcement action may be taken.

¹⁴ SRC 205.015(d) provides:

“Approval criteria. A tentative phased subdivision plan shall be approved if all of the following criteria are met:

- “(1) The tentative phased subdivision plan meets all of the criteria for tentative subdivision plan approval set forth in SRC 205.010(d).*
- “(2) Connectivity for streets and City utilities between each phase ensures the orderly and efficient construction of required public improvements among all phases.*
- “(3) Each phase is substantially and functionally self-contained and self-sustaining with regard to required public improvements.*

1 Petitioner does not identify where this issue was raised below. ORS
2 197.835(3) provides, “Issues shall be limited to those raised by any participant
3 before the local hearings body as provide by ORS 197.195 or [former ORS]
4 197.763, whichever is applicable.” This issue is waived.¹⁵

“(4) Each phase is designed in such a manner that all phases support the infrastructure requirements for the phased subdivision as a whole.”

¹⁵ Petitioner does not explain why a landslide permit is necessarily required at the tentative subdivision plan stage. Respondents argue that SRC 205.015(d) sets out the approval criteria for a tentative subdivision and does not require a permit under SRC 810.020. Respondents’ Response Brief 14. Respondents do not explain when in the process a landslide hazard permit, if required, is obtained, but argues “a land use approval does not eliminate the need to get a permit later if those permits are required.” *Id.*

SRC 205.010(d) provides:

“*Criteria.* A tentative subdivision plan shall be approved if all of the following criteria are met:

“(1) The tentative subdivision plan complies with the standards of this chapter and with all applicable provisions of the UDC, including, but not limited to, the following:

“(A) Lot standards, including, but not limited to, standards for lot area, lot width and depth, lot frontage and designation of front and rear lot lines.

“(B) City infrastructure standards.

“(C) Any special development standards, including, but not limited to, floodplain development, special

setbacks, geological or geotechnical analysis, and vision clearance.

- “(2) The tentative subdivision plan does not impede the future use or development of the property or adjacent land.
- “(3) Development within the tentative subdivision plan can be adequately served by city infrastructure.
- “(4) The street system in and adjacent to the tentative subdivision plan conforms to the Salem Transportation System Plan.
- “(5) The street system in and adjacent to the tentative subdivision plan is designed so as to provide for the safe, orderly, and efficient circulation of traffic into, through, and out of the subdivision.
- “(6) The tentative subdivision plan provides safe and convenient bicycle and pedestrian access from within the subdivision to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development. For purposes of this criterion, neighborhood activity centers include, but are not limited to, existing or planned schools, parks, shopping areas, transit stops, or employment centers.
- “(7) The tentative subdivision plan mitigates impacts to the transportation system consistent with the approved traffic impact analysis, where applicable.
- “(8) The tentative subdivision plan takes into account the topography and vegetation of the site so the need for variances is minimized to the greatest extent practicable.
- “(9) The tentative subdivision plan takes into account the topography and vegetation of the site, such that the

1 This element of the assignment of error is denied.

2 **B. Project Evaluated in the Geotechnical Report**

3 Petitioner also argues that the geotechnical report is for a 29-lot
4 subdivision which was withdrawn and does not address the 27-lot subdivision
5 that was approved. Petitioner's Petition for Review 41. Substantial evidence is
6 evidence a reasonable person would rely upon to make a decision. *Dodd v. Hood*
7 *River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing ORS 183.482(8)(c);
8 *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)). The
9 geotechnical report describes the site as follows:

10 "The subject property consists of a 9.35-acre trapezoidal lot located
11 on the east side of Doaks Ferry Rd NW, about 0.2 miles south of the
12 intersection with Brush College Rd NW. The most of the site slopes
13 from Doaks Ferry Rd east towards Wilark Brook. The area SE of
14 the Brook slopes NW towards it or into a small tributary. From NE
15 of the site Wilark Brook runs SW and extends across the SE part of
16 the site into the lot to the south. About 150 ft north of the south
17 property line, a tributary branch runs west from Wilark Brook for

least disruption of the site, topography, and vegetation
will result from the reasonable development of the lots.

"(10) When the tentative subdivision plan requires an Urban
Growth Preliminary Declaration under SRC chapter
200, the tentative subdivision plan is designed in a
manner that ensures that the conditions requiring the
construction of on-site infrastructure in the Urban
Growth Preliminary Declaration will occur, and, if off-
site improvements are required in the Urban Growth
Preliminary Declaration, construction of any off-site
improvements is assured.

1 ~250 ft.” Record 1304 (internal references omitted).

2 The geotechnical report states:

3 “We understand that present plans are to develop the subject
4 property into new single-family residential lots. Based on a review
5 of the proposed site development plan(s) prepared by Multi/Tech
6 Engineering Services, Inc, we understand that the proposed new
7 residential development will consist of the construction of
8 approximately twenty-five (25) to thirty (30) new single-family
9 residential lots and/or home sites ranging in size from about 6,000
10 to 11,000 square feet (see Site Exploration Plan, Figure No. 2).”
11 Record 1265.

12 Petitioner does not explain why the geotechnical report, which states it
13 understands the project to include “25 to 30” residential lots, is not substantial
14 evidence, that is evidence a reasonable person would rely upon to conclude that
15 the subject is suitable for the 28 lot (27 single family residential and one water
16 detention facility lot) tentative subdivision approved. Petitioner’s Petition for
17 Review 41. We conclude that a reasonable decision maker would rely on the
18 report as substantial evidence for the proposed subdivision.

19 This element of the assignment or error is denied.

20 **C. Adequacy of the Geotechnical Report**

21 Petitioner also maintains that the geotechnical report is inadequate because
22 it does not include test sampling in the 50-foot riparian zone on the eastern part
23 of the property and therefore does not include comprehensive descriptions of the
24 site as required by SRC 810.030(b).¹⁶ We understand petitioner to argue that the

¹⁶ SRC 810.030 provides:

1 planning commission's decision is not supported by substantial evidence in the
2 record. ORS 197.828(2)(a). Respondents respond that the planning commission
3 found that sampling parts of the subject property was allowed and that the
4 geotechnical report therefore satisfies SRC 810.030(b). Respondents' Response
5 Brief 15-16.

“Geological assessments and geotechnical reports required under this chapter shall include the information required by this section.

“(a) *Geological assessment.* A geological assessment shall include information and data regarding the nature, distribution of underlying geology, and the physical and chemical properties of existing soils; an opinion as to stability of the site; and conclusions regarding the effect of geologic conditions on the proposed development. The geological assessment shall bear the stamp of a certified engineering geologist.

“(b) *Geotechnical report.* A geotechnical report shall include a comprehensive description of the site topography and geology; an opinion as to the adequacy of the proposed development from an engineering standpoint; an opinion as to the extent that instability on adjacent properties may adversely affect the project; a description of the field investigation and findings; conclusions regarding the effect of geologic conditions on the proposed development; and specific requirements for plan modification, corrective grading, and special techniques and systems to facilitate a safe and stable development. The report shall provide other recommendations, as necessary, commensurate with the project grading and development. The geotechnical report shall bear the stamp of a certified engineering geologist and geotechnical engineer.”

1 SRC 810.030 requires comprehensive discussion of the topography and
2 geology of the site. The planning commission concluded that the appellant “has
3 not submitted any conflicting expert testimony or demonstrated how the
4 geotechnical report fails to meet the standards for geotechnical reports.” Record
5 42. By accepting the findings of the report, the planning commission concluded
6 that sampling in all areas of the property was not required and ultimately
7 concluded that the geotechnical report supported approval. The planning
8 commission found that the applicant submitted a geotechnical report and “[a]s
9 required in SRC 810.030(a), the geological assessment includes information and
10 data regarding the nature, distribution of underlying geology and the physical and
11 chemical properties of existing soils; an opinion as to the stability of the site; and
12 conclusions regarding the effect of geologic conditions on the proposed
13 development.” Record 41-42.

14 The geotechnical report describes the topography as follows

15 “The natural slopes at the site are gentle having been sculpted by the
16 Missoula floods. They average 12% to 15%, except in the west area
17 along Doakes Ferry, and on the banks of the unnamed slough. Site
18 elevations range from a high of ~275 ft near the SW corner down to
19 just below 180 ft in Wilark Brook at the north site border. The
20 steepest slopes are up to 60% along Wilark Brook and its tributary.”
21 Record 1307 (internal references omitted).

22 The geotechnical report describes the site geology as “underlain by highly
23 weathered Basalt bedrock deposits and/or residual soils of the Columbia River
24 Basalt formation. A more detailed description of the site geology across and/or

1 beneath the site is presented in the Geologic Hazard Study in Appendix B.”

2 Record 1268. The geotechnical report also states:

3 “Published and unpublished geologic mapping by State and Federal
4 agencies show that most of the site is underlain by lava flows of the
5 Columbia River Basalt. Mapping by USGS identified the basalt
6 flows as part of the Winter Water basalt. Based on nearby exposures,
7 depth to bedrock is probably no more than 20 ft in the west end of
8 the site. The available geologic mapping suggests it could be 30 to
9 40 ft deep below the east end of the site. It appears to be deeper than
10 Wilark Brook (25+ ft). The top several feet of the basalt are usually
11 weathered to a hard to very hard clayey silt (laterite).” Record 1306
12 (internal references omitted).

13 The planning commission’s finding that the geotechnical report met the standards
14 for geotechnical reports is supported by substantial evidence in the record. ORS
15 197.828(2)(a).

16 With the understanding that the geotechnical report describes the geology
17 and topography of the eastern (including Wilark Brook) as well as western parts
18 of the subject property and considered a project of the scale proposed in this
19 application as required by the SRC, we discuss the findings and the underlying
20 evidence in the geotechnical report.

21 Petitioner argues that “SRC 205.010(d)(9) requires findings that state
22 approval will not adversely affect the environment, safe and healthful
23 development at this and adjacent sites, and adjoining lands” and that the planning
24 commission failed to adopt such findings. Petitioner’s Petition for Review 42.
25 We agree with respondents that SRC 205.010(d)(9) does not require those
26 findings. Respondents’ Response Brief 16. Rather, SRC 205.010(d)(9) provides

1 that the tentative subdivision plan shall “take[] into account the topography and
2 vegetation of the site, such that the least disruption of the site, topography, and
3 vegetation will result from the reasonable development of the lots.” The
4 planning commission adopted extensive findings that this criterion is met.
5 Record 47-49. Petitioner does not address these findings. Where a petitioner
6 does not explain why challenged findings are inadequate but, rather, disagrees
7 with the conclusion reached in those findings, the petitioner’s challenge to the
8 findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376, 380-
9 81 (2007).

10 Petitioner also argues that the planning commission’s findings that the site
11 is presently stable and suitable for the proposed development are insufficient
12 because, according to petitioner, they do “not address the totality of all clear and
13 objective information presented in the two documents within the Redmond
14 [R]eport.” Petitioner’s Petition for Review 35. Adequate findings identify the
15 relevant criteria, identify the evidence relied upon, and explain why the evidence
16 leads to the conclusion that the criteria are or are not met. *Heiller v. Josephine*
17 *County*, 23 Or LUBA 551, 556 (1992).

18 The planning commission found:

19 “City’s landslide hazard ordinance (SRC Chapter 810) establishes
20 standards and requirements for the development of land within areas
21 of identified landslide hazard susceptibility. According to the City’s
22 adopted landslide hazard susceptibility maps, there are areas on the
23 subject property assigned two, three and five landslide hazard
24 susceptibility points. The proposed subdivision adds three activity

1 points to the proposal, which results in a total of eight points.
2 Pursuant to SRC Chapter 810, Table 810-1E, the proposed
3 subdivision is classified as a moderate landslide risk and requires a
4 geologic assessment.

5 “A geotechnical report dated October 30, 2020, by Redmond and
6 Associates, was submitted with the subdivision application. *This*
7 *report states that the site is presently stable and suitable for the*
8 *proposed development and its associated site improvements.*”
9 Record 87 (emphasis added).

10 Petitioner concedes that the above finding that the subject property is stable
11 summarizes the primary opinion in the geological hazard report but argues that
12 the conclusion is incorrect.

13 First, petitioner argues that staff or the applicant did not “make it clear” to
14 the planning commission that the geological hazard report advises that additional
15 site-specific investigations should occur before “future activities in and near
16 Wilark Brook, its tributaries, are to be considered.” Petitioner’s Petition for
17 Review 35. Petitioner has not identified any legal requirement for staff or
18 applicant to emphasize future site specific investigations. Moreover, as
19 respondents observe, the geological hazard report is in the record and therefore
20 was available to the planning commission. Respondents’ Response Brief 15. The
21 planning commission’s findings require compliance with the geotechnical hazard
22 report and therefore incorporate the cautionary steps set out in that report.

23 Conclusions in the report include “The site has a low susceptibility to
24 landsliding under any natural geologic circumstance, in our opinion.” Record
25 1308. The report then recommends further action.

1 “Cuts, fills and pavements should be designed by a qualified
2 professional and reviewed by a geotechnical engineer. Foundations
3 and retaining walls should also be designed by a qualified engineer
4 to withstand forces from soil creep and lateral loads from
5 earthquakes. Given the thin loessal soils and shallow depth to the
6 stiff SILT this requirement should not be onerous.

7 “In our opinion, footing drains for new structures could be routed to
8 infiltration trenches, to diffusers downhill from structures or to the
9 creek. Neither option should have a measurable impact on the
10 ground water or drainage ways at the site because the volume of
11 water will be small. However, we recommend against infiltration of
12 large volumes of storm water into small volumes of the ground (i.e.,
13 disposal to drywells), particularly during intense rainfall events such
14 as those noted above. The soils do not have the capacity to take large
15 volumes of storm water. Infiltration trenches that diffuse the water
16 and storm water retention facilities have both been successfully
17 employed in the Missoula Flood deposits. Any such facilities should
18 be designed and constructed in consultation with the project
19 geotechnical engineer.

20 “In our opinion, development of the new and parcels as proposed
21 should not increase the potential for slope hazards on the site or
22 adjacent properties, given the above caveats. We repeat that it would
23 be prudent to conduct geotechnical investigations of any
24 infrastructure or structures that require deep fills, high cuts or
25 proximity to Wilark Brook.” Record 1308-09.

26 The planning commission found the subject property suitable for subdivision

27 *“conditioned on compliance with the geotechnical report, and*
28 *subsequent grading permits must be provided to, and reviewed and*
29 *approved by the city. Compliance with the applicable conditions,*
30 *assure safe development of the site. * * * Conditions of approval*
31 *both limit areas where excavation can be done and require*
32 *compliance with the recommendations of the geotechnical report.*
33 *The limitation on areas where excavation can be done significantly*
34 *limits excavation near steep slopes and will limit cuts and fills. If*
35 *substantial cuts and fills are required, or work proposed near steep*

1 *slopes, additional geotechnical investigation is required by the*
2 *conditions of approval.* That investigation will indicate whether the
3 work can safely proceed, and if it cannot, it will not. Accordingly,
4 the evidence in the record exclusively supports the conclusion and
5 finding that the site can be safely developed if the geotechnical
6 report is followed.” Record 42 (emphasis added.)

7 As shown by the above quote, the findings adopted by the planning commission
8 require compliance with the recommendations in the geological hazard reports
9 for additional protective measures. Petitioner’s assertion, that the planning
10 commission or its decision do not reflect planning commission awareness of the
11 limitations in the geotechnical report, ignore this condition.

12 Third, as we addressed above, petitioner argues that the area where testing
13 was performed is not representative of the riparian areas and that there is
14 reasonable doubt as to the stability of the eastern portion of the site. As explained
15 above, the planning commission found that the geotechnical report met the
16 standards for such reports. Record 42. The geotechnical report recommends
17 geotechnical investigations of any infrastructure or structures that require deep
18 fills, high cuts or proximity to Wilark Brook. Record 1309. Wilark Brook cuts
19 across the eastern portion of the property and four of the lots. Petitioner argues
20 that the two parts of the geotechnical report emphasize different aspects of the
21 site, with one part stating that the test sites on the western portion of the property
22 are representative of conditions at other locations on the property (Record 1286)
23 and another part of the report recommending further studies in proximity to
24 Wilark Brook without defining proximity (Record 1309). Petitioner’s Petition for

1 Review 39. Petitioner does not explain, however, why the requirement that future
2 investigation occur is not evidence a reasonable person would rely upon to
3 conclude that the test samples taken are sufficient. Recommendations from the
4 geotechnical report that the approval is conditioned upon include:

5 “that **Redmond Geotechnical Services, LLC** be retained to provide
6 construction monitoring and testing services during all earthwork
7 operations for the proposed new Doakes Ferry Road Subdivision
8 residential development. The purpose of our monitoring services
9 would be to confirm that the site conditions reported herein are as
10 anticipated, provide field recommendations as required based on the
11 actual conditions encountered, document the activities of the
12 grading contractor and assess his/her compliance with the project
13 specifications and recommendations. It is important that our
14 representative meet with the contractor prior to any site grading to
15 help establish a plan that will minimize costly over-excavation and
16 site preparation work. Of primary importance will be observations
17 made during site preparation and stripping, structural fill placement,
18 footing excavations and construction as well as retaining wall
19 backfill.” Record 1286 (emphasis in original).

20 We conclude that the findings that the site is stable and suitable for development
21 are supported by substantial evidence.

22 Contrary to petitioner’s argument, the report is not required to provide
23 “concrete, undisputable evidence.” Petitioner’s Petition for Review 41. The
24 applicant is required to demonstrate that all of the approval criteria are satisfied.¹⁷

¹⁷ As the Oregon Supreme Court has explained, “substantial evidence” is not the standard a trier of fact should apply to adopt factual findings. Rather, the Court held:

1 LUBA may reverse or remand a limited land use decision that is not supported
2 by “substantial evidence in the record.” ORS 197.828(2)(a). Petitioner argues that
3 the geological hazard report provides evidence that the site is not presently stable
4 and suitable for the proposed development but as explained above, the geological
5 hazard report both concluded that the site is stable and provides for additional
6 investigation. For the reasons set out above, we deny this assignment of error.

7 Petitioner’s second assignment of error also includes an assertion that the
8 county did not make findings as to compliance with Statewide Planning Goal 5
9 (Natural Resources, Scenic and Historic Resources and Open Space) because
10 “Slope stability, bank shifting after disturbance, sedimentation impacts to Wilark
11 Brook and its aquatic resources, onsite degradation of riparian habitat, impacts
12 on stream temperatures, downstream pollution of a water quality limited listed
13 salmonid stream (Gibson Creek) were not addressed in the adopted findings.”
14 Petitioner’s Petition for Review 43. We agree with respondents that this overlaps
15 with elements of petitioner’s first assignment of error and intervenor-petitioner’s

“Substantial evidence * * *’ is the standard by which a court reviews a county’s factual findings on a writ of review. See ORS 34.040(1)(c) (stating the standard of review for factual findings on a writ of review). It is not the standard by which the trier of fact makes a factual finding in the first place. The county’s job as the trier of fact was to decide by a preponderance of the evidence what the estimated cost of constructing the planned homes was.” *Friends of Yamhill County v. Board Of Commissioners*, 351 Or 219, 246-47, 264 P3d 1265 (2011).

1 second assignment of error. Respondents' Response Brief 14. For the reasons we
2 explain in our resolution of those assignments of error, petitioner has not
3 established that Goal 5 applies to the application and this element of the
4 assignment of error is denied. ORS 197.175(2)(d) (after acknowledgement, the
5 local government is required to apply the provisions of its acknowledged
6 comprehensive plan and land use regulations to applications and the goals do not
7 apply).

8 Petitioner's second assignment of error is denied.

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

11 **A. Background**

12 Goal 5 is "To protect natural resources and conserve scenic and historic
13 areas and open spaces." Goal 5 Guidelines direct:

14 "[l]ocal governments [to] adopt programs that will protect natural
15 resources and conserve scenic, historic, and open space resources
16 for present and future generations. These resources promote a
17 healthy environment and natural landscape that contributes to
18 Oregon's livability.

19 "[Resources to be inventoried include]

20 "a. Riparian corridors, including water and riparian areas
21 and fish habitat;

22 "b. Wetlands[.]"

23 Petitioner's first assignment of error and intervenor-petitioner's second
24 assignment of error concern Goal 5 and activity within riparian corridors on the

1 subject property. Although there are some variations in language and content, the
2 majority of petitioner’s first assignment of error and intervenor-petitioner’s
3 second assignment of error largely align. We start by explaining the positions of
4 petitioner and intervenor-petitioner, but because their assignments of error are
5 largely the same, for purposes of resolving this assignment of error, we then refer
6 to petitioner and intervenor-petitioner collectively as petitioners and address their
7 overlapping assignments of error together. Petitioner argues that the city
8 committed procedural error because it “has offered no cogent evidence that they
9 can ignore or supersede State laws and regulations such as OAR 660-023-0090
10 along any other Salem designated waterways.” Petitioner’s Petition for Review
11 11. Intervenor-Petitioner argues that the city made inadequate findings which do
12 not identify applicable criteria and are not supported by clear and objective
13 evidence. Intervenor-Petitioner’s Brief 22.

14 **B. Petitioner’s Introductory Arguments**

15 Petitioner’s first assignment differs from intervenor-petitioner’s in that it
16 includes an introduction with two arguments. We begin by addressing the
17 arguments in petitioner’s introduction.

18 First, as support for their position that activities and uses within the riparian
19 corridor are subject to Goal 5 compliance, petitioner referenced a statement by a
20 member of the planning staff at a June 1, 2021 planning commission workshop

21 “* * * regarding Middle Housing, Division 46, OAR 660-046-
22 0010.3.a.A.ii;

1 “If a Medium and Large City has not adopted land use
2 regulations pursuant to OAR 660-023-0090, it must apply a
3 100-foot setback to Middle Housing (i.e. Residential
4 Housing) development along a riparian corridor.

5 “[T]he City of Salem was not in compliance with this Division 46
6 requirement and OAR 660-023-0090 Goal 5 compliance.”
7 Petitioner’s Petition for Review 12.

8 Respondents counter that the cited OAR provision is not applicable because the
9 application is not for Middle Housing, defined in ORS 197.758 as meaning
10 duplexes, triplexes, quadplexes, cottage clusters and townhouses. Respondents’
11 Response Brief 7. We agree with respondents that the application is not for
12 middle housing and we do not address this argument further.

13 Petitioner also argues that the city allowance of fill in Wilark Brook’s
14 northern tributary is a procedural error because the city failed to provide Goal 5
15 protections to the tributary in the challenged decision.¹⁸ Petitioner’s Petition for
16 Review 11. The Land Conservation and Development Commission (LCDC) has
17 adopted regulations implementing Goal 5 at OAR 660-023-0090. OAR 660-023-

¹⁸ Petitioner argues that *tributaries* of Wilark Brook *should be* designated as Goal 5 resources because

“allow[ing] conflicting Goal 5 uses (siting building lots and removal of vegetation/trees within the 50-foot riparian corridor buffer area of Wilark Brook and siting building lots (lots 6 and 7) [Ref.00504] over Wilark Brook’s northern tributary, resulting in filling of this tributary, *does not ensure the protection of Goal 5 resources by the local government as required by OAR 660-023-0090.*” Petitioner’s Petition for Review 11 (emphases added).

1 0090(6)-(8) require local governments to analyze conflicting uses and create a
2 program to address which conflicting uses are prohibited, which are allowed, and
3 what types of mitigation are required where a conflicting use is allowed.¹⁹

¹⁹ OAR 660-023-0090(6)-(8) provides:

“(6) If a local government undertakes a Goal 5 periodic review task that concerns specific resource sites or specific Goal 5 plan or implementing measures, this action shall not by itself require a local government to conduct a new inventory of the affected Goal 5 resource category, or revise acknowledged plans or implementing measures for resource categories or sites that are not affected by the work task.

“(7) The director may exempt a local government from a work task for a resource category required under section (5) of this rule. The director shall consider the following factors in this decision:

“(a) Whether the plan and implementing ordinances for the resource category substantially comply with the requirements of this division; and

“(b) The resources of the local government or state agencies available for periodic review, as set forth in ORS 197.633(3)(g).

“(8) Local governments shall apply the requirements of this division to work tasks in periodic review work programs approved or amended under ORS 197.633(3)(g) after September 1, 1996. Local governments shall apply OAR 660, division 16, to work tasks in periodic review work programs approved before September 1, 1996, unless the local government chooses to apply this division to one or more resource categories, and provided:

“(a) The same division is applied to all work tasks concerning any particular resource category;

1 Respondents' Response Brief 6. Respondents argue that the city has met its Goal
2 5 obligations by adopting the tree and vegetation removal regulations in SRC
3 808.020 to 808.055, as well as other provisions.

4 We agree with respondents that Goal 5 and OAR 660-023-0090 do not
5 apply directly to this application. Respondents' Response Brief 6. ORS
6 197.175(2)(d) provides that after acknowledgement of the city's comprehensive
7 plan and land use regulations, the goals do not apply directly to land use decisions
8 such as the city's decision. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332
9 (1983). The city found:

10 "[The SRC] is enacted as part of Salem's acknowledged
11 Comprehensive Plan. Both Salem Comprehensive Plan and Revised
12 Code include and incorporate required implementing measures of
13 Goal 5 that provide required protections under the goal.
14 Accordingly, compliance with the [SRC], demonstrates compliance
15 with Goal 5. Compliance with the SRC, which was enacted pursuant
16 to the Salem Comprehensive Plan, which was enacted to implement
17 state land use planning goals, including Goal 5, demonstrates
18 compliance with Goal 5 requirements.

“(b) All the participating local governments agree to apply
this division for work tasks under the jurisdiction of
more than one local government; and

“(c) The local government provides written notice to the
department. If application of this division will extend the time
necessary to complete a work task, the director or the
commission may consider extending the time for completing
the work task as provided in OAR 660-025-0170.”

1 “Further, protection of resources, as generally required by Goal 5 is
2 established by the limitation of construction activities within the
3 Riparian Corridor, requirement of permits before any work is
4 performed with any Riparian Corridors, and limitation of
5 construction activities to specified building envelopes. Accordingly,
6 as approved and conditioned, the application provides require
7 protections of Goal 5.” Record 34-35.

8 Petitioners do not address these findings or indicate why they are insufficient.

9 We conclude that Goal 5 and the OAR do not apply directly to the application.

10 Respondents maintain that references throughout the briefs referring to

11 “tributaries” do so in error, and that the focus of the inquiry is Wilark Brook, the

12 waterway on the subject property that the planning commission determined was

13 protected by the city’s Goal 5 program. Respondents’ Response Brief 4-5. The

14 planning commission determined that SRC chapter 808 “Preservation of Trees

15 and Vegetation,” protected Goal 5 resources by limiting construction activities

16 within the riparian corridors of waterways. At the time the decision was made,

17 SRC 808.005 defined waterway as “any river, perennial stream, or creek within

18 the City as designated by the Director.” Although intervenor-petitioner argued in

19 a procedural assignment of error that planning staff should have directed the

20 planning commission to alternative definitions of waterway, neither petitioner

21 nor intervenor-petitioner have established that the planning commission was

22 required to address water sources other than the one designated waterway on the

23 property, Wilark Brook. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA

24 218, 220 (1982). We will not address petitioner’s argument that the planning

1 commission was required to apply its Goal 5 program to tributaries of Wilark
2 Brook further.

3 The introductory assignments of error are denied.

4 **C. Petitioners' First Subassignment of Error**

5 SRC 111.005 defines "riparian corridor," in part, as

6 "*** the area adjacent to a waterway, consisting of the area of
7 transition from an aquatic ecosystem to a terrestrial ecosystem. The
8 riparian corridor is measured:

9 (a) 50 feet horizontally from the top of bank on each side of a
10 waterway with less than 1,000 cubic feet per second average
11 annual stream flow [.] ***"

12 The planning commission found "The [SRC] has provisions for activity and use
13 within the riparian area, which is 50-feet from the top of bank of Wilark Brook,
14 and those standards and requirements do not limit structures to be built in the
15 area." Record 78-79. Petitioners argue that (1) Goal 5, the administrative rules,
16 or the city's comprehensive plan provisions implementing Goal 5, require that
17 the city protect riparian areas and the city has not done so; that (2) SRC provisions
18 implementing Goal 5 through the Willamette River Greenway Overlay (WRGO)
19 are not applicable to Wilark Brook and its tributaries and the city may not rely on
20 them; and (3) that if WRGO standards apply to Wilark Brook and its tributaries,
21 those standards are not met. They contend that until the city adopts regulations
22 protective of the riparian corridor associated with Wilark Brook and its
23 tributaries, the city may not approve this application. For the reasons explained

1 in our resolution of the introductory assignments of error, we address the riparian
2 corridor associated with Wilark Brook and not that associated with any tributary.

3 The planning commission concluded that the Tree and Vegetation
4 Removal provisions in SRC 808 protected the Wilark Brook riparian corridor.
5 Record 34. Petitioners argue that the planning commission improperly applied
6 criteria applicable to the WRGO, as opposed to Wilark Brook, or was required to
7 apply WRGO criteria and did not. Petitioners cite code language providing
8 “Development within the [WRGO] zone must comply with the development
9 standards applicable in the underlying zone and the development standards set
10 forth in this section.” SRC 600.025; Petitioner’s Petition for Review n 5.
11 Petitioners do not, however, identify where in the record the city applied the
12 WRGO to this application.

13 The planning commission found that the applicable Goal 5 protections are
14 in SRC chapter 808, “the proposal is not building within the waterway and the
15 [SRC] does not restrict development within the riparian area. Appropriate State
16 and Federal permits required for the applicant to obtain will address habitat of
17 Wilark Brook.” Record 39. Petitioners do not explain why this finding is error,
18 that is, why the planning commission cannot conclude that where the code does
19 not prohibit an activity, it is allowed. Where a petitioner does not explain why
20 challenged findings are inadequate but, rather, disagrees with the conclusion
21 reached in those findings, the petitioner’s challenge to the findings will not be
22 sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376, 380-81 (2007).

1 Lastly, petitioners argue that application does not comply with the WRGO.
2 Intervenor-Petitioner’s Brief 28. We agree with respondents that the petitioners
3 identify no authority for concluding that the WRGO applies to the subject
4 property. Respondents’ Response Brief 9. This element of the assignment of error
5 is denied.

6 Petitioners’ first subassignment of error is denied.

7 **D. Petitioners’ Second Subassignment of Error**

8 Petitioners’ second subassignment of error is that the city erred in
9 concluding that the SRC permits the removal of trees in the riparian corridor as
10 authorized in this decision.

11 Petitioners argue that the city has not identified evidence or code
12 provisions supporting the city’s position that the SRC can avoid Goal 5
13 protections in OAR 660-023-0090(6) and (8).²⁰ For the reasons we explained in
14 our resolution of the introductory and first subassignment of error, petitioner and
15 intervenor-petitioner have not developed an argument that compliance with Goal
16 5, or its implementing rule at OAR 660-023-0090, apply to this decision and for
17 the reasons set out in our resolution of the first subassignment of error, we do not
18 address this element of the second subassignment of error further.

²⁰ Petitioner and intervenor-petitioner argue that the city is considering updating its comprehensive plan to increase protections in these corridors but unadopted comprehensive plan policy proposals are not relevant in this appeal.

1 Petitioners cite a portion of the planning commission’s findings about tree
2 removal (Record 78) and argue that they do not cite underlying SRC provisions.
3 The failure to cite a relevant SRC provision is not a basis for assigning error.
4 Moreover, petitioners are wrong. As respondents’ point out, the planning
5 commission analyzed why it found that there were no reasonable design
6 alternatives. Respondents’ Response Brief 10. The planning commission found:

7 “SRC 808.035(d)(3), requires that trees and native vegetation
8 located in a Riparian Corridor not be removed, unless there are no
9 reasonable design alternatives that will enable preservation of trees
10 or native vegetation. * * *

11 “* * * Accordingly, the limited removal of native vegetation and
12 trees within the Riparian corridor is therefore allowable under the
13 terms and conditions of Salem Revised Code as reasonable
14 alternative designs allowing development of the property as zoned
15 do not exist.” Record 34.

16 The planning commission therefore cited an underlying SRC provision.

17 Petitioners also argue “* * * Absent ‘design alternative’ clarity, absent
18 actual decision-making evidence, the city is obliged to conform to the SACP
19 Natural Resource preservation policy requirements and the state Goal 5 riparian
20 corridor land use statute and administrative rules in order to determine whether
21 trees may be removed in any Salem riparian corridor.” Intervenor-Petitioner’s
22 Brief 33. Petitioners argue that without designs in the record, there is not evidence
23 in the record that reasonable designs, which avoid construction in the riparian
24 corridor, do not exist. The planning commission described the alternatives

25 “* * * *The proposed subdivision layout was redesigned on multiple*

1 *occasions, to modify the design to minimize impacts on the Riparian*
2 *Corridor.* As noted herein, impacts for Riparian Corridor are limited
3 to its outer edge, with less than 2.5% of the total Riparian area on
4 the site being impacted. The use of large lots, modified street
5 designs, and modified accesses, together with restriction
6 development activity to specific billing envelopes, results in a
7 comparably low-density development of the nine (9) acres site. The
8 site design modifications, and related adjustments, demonstrate that
9 no reasonable design alternatives for development of single-family
10 residences as called for by the zoning applicable to the property are
11 possible without the nominal impact to the Riparian Corridor.

12 “Even with all the design modifications and modifications to
13 standards to minimize impacts on the property and its features, the
14 density proposed is far less than allowed under the zoning.
15 Accordingly, the limited removal of native vegetation and trees
16 within the Riparian Corridor is therefore allowable under the terms
17 and conditions of Salem Revised Code as reasonable alternative
18 designs allowing development of the property as zoned do not
19 exist.” Record 34.

20 Petitioners do not address these findings and explain why the referenced
21 redesigns of the subdivision are insufficient to address the issue of reasonable
22 design alternatives and we will not address this element of the assignment of error
23 further.

24 Petitioners also argue that whether there are “no reasonable design
25 alternatives” must be determined by “clear or objective criteria.” Intervenor-
26 Petitioner’s Brief 32. Petitioners have not identified a requirement that “no
27 reasonable design alternatives” be based on “clear and objective criteria.”

28 Petitioners’ second subassignment of error is denied.

1 **E. Petitioners’ Third Subassignment of Error**

2 Petitioners argue that the decision allowing building footprints within the
3 riparian corridor fails to meet the comprehensive plan goal to “protect” and
4 “preserve natural areas.” Intervenor-Petitioner’s Brief 35. Petitioners have not
5 established that comprehensive plan goals are directly applicable to this
6 application and we will not address this element of the assignment of error
7 further.

8 Petitioners also argue that the planning commission failed to address the
9 definition of “buildable width” in SRC 111.01.²¹ Respondents maintain that this
10 issue was not raised below and is waived. Petitioners do not identify where this
11 issue was raised below. Intervenor-petitioner argues in their reply brief that
12 buildable width is an approval criterion that the city failed to identify, excusing
13 petitioners from raising the issue of buildable width below. ORS 197.835(4)(a)
14 (stating, in part, that “* * * the board may refuse to allow new issues to be raised
15 if it finds that the issue could have been raised before the local government[.]”).
16 The SRC provision addressing “buildable width” is a definition. Petitioners
17 provide no analysis explaining why the city was required to identify the definition

²¹ SRC 111.01 provides:

“*Buildable width* means the distance along the street right-of-way, exclusive of side setbacks, wetlands, and riparian corridors, that is sufficiently deep to accommodate a lot depth of 70 feet and meet setback requirements. Where a development fronts on a street which is curved, the buildable width shall be measured radial to the curve.”

1 as an approval criterion or why they were unable to raise this issue below. We
2 conclude that the issue is waived.

3 Petitioners' third subassignment of error is denied.

4 **F. Petitioners' Fourth Subassignment of Error**

5 Petitioners argue that the record does not contain "clear and objective
6 evidence that the requirements of SRC 205.030(a)(10) have been met." Petition
7 for Review 30.

8 SRC 205.030(a)(10) provides that an application to subdivide property
9 shall include a tentative plan map which includes "The location of any canals,
10 ditches, waterways, detention facilities, sewage disposal systems, and wells on
11 the subject property, indicating which will remain and which will be removed or
12 decommissioned[.]"

13 First, we agree with respondents that SRC 205.030(a)(10) is not an
14 approval criterion. Respondents' Response Brief 12. Rather, it is part of the
15 submittal requirements. We also agree with respondents that petitioners have not
16 identified any failure of the application to meet applicable criteria as the result of
17 some allegedly missing information and therefore has not established a basis for
18 remand. *Id.*; *Caster v. City of Silverton*, 54 Or LUBA 441, 452 (2007) (Denial of
19 an application based upon applicant's failure to provide application submittal
20 requirements set out in the code requires that the city explain why the evidence
21 submitted fails to demonstrate compliance with the relevant approval criteria.).

1 Furthermore, the applicants must establish by a preponderance of the
2 evidence that the approval criteria are met. Petitioners argue that the submitted

3 “* * * map does not label canals and ditches or ‘land features which
4 serve[] as a course for the transmission of surface water and
5 stormwater.’ Nor does the map identify the presence of flowing
6 water or the planned disposition of canals, ditches, or watercourses.”
7 Petitioner’s Petition for Review 30-31 (internal citations omitted).

8 Petitioners cite evidence submitted by the watershed council and a statement by
9 the council that the application failed to identify required tributaries and
10 waterways. Petitioner’s Petition for Review 31. The planning commission
11 identified evidence in the record that the required information had been
12 submitted. The planning commission found:

13 “SRC 205.030(a)(10) requires, as relevant to the appeal, the
14 application identify canals, ditches, and waterways on the property
15 indicating which will remain and which will be removed or
16 decommissioned. Similarly, SRC 205.030(a)(11) requires the
17 application to show topographic features on the subject property
18 ‘including but not limited to creeks, drainage ways as shown on the
19 most recent USGS maps, wetlands as shown on the local wetland
20 inventory, and flood plains.’ Finally because Applicant seeks an
21 adjustment, SRC 250.005(c)(2)(d) requires the application for an
22 adjustment to depict drainage patterns and courses.

23 “The application materials contain all the required information.
24 Applicant’s lot grading and tree conservation plan reflects the
25 topographic features on the site and depicts Wilark Brook and the
26 riparian corridor along Wilark Brook, as well as topographic
27 features to the west and east of Wilark Brook, which direct any
28 surface water on the site into low areas, ultimately passing it to
29 Wilark Brook. SRC 808.005 defines a waterway as ‘any river,
30 perennial stream or creek within the city as designated by the
31 Director.’ Only Wilark Brook has been designated as a waterway.

1 Accordingly, Applicant has depicted the only waterway on th
2 premises, and the topographic information provided by Applicant
3 reflects the topographic features which would direct water to low
4 points and to Wilark Brook. Thus the application identifies canals,
5 ditches, and waterways on the property indicating as required y SRC
6 205.030(a)(10).” Record 20.

7 Petitioners do not address the planning commission’s detailed findings
8 explaining why the map submitted by the applicant met the submittal
9 requirements. Record 20; *Knapp v. City of Corvallis*, 55 Or LUBA 376, 380-81
10 (2007).

11 Petitioners’ fourth subassignment of error is denied.

12 **G. Petitioners’ Fifth Subassignment of Error**

13 Petitioners argue that applicant’s geotechnical report does not address the
14 requirements of SRC 810.020(a)(D) and (f), which provide that a landslide
15 hazard permit is a necessary condition of approval and that no such condition has
16 been imposed. As we explained in our resolution of petitioner’s second
17 assignment of error, petitioners did not argue below that a landslide hazard permit
18 was required and this assignment of error has been waived.

19 Petitioners also argue that unidentified “parallel” provisions of SRC
20 chapter 65 have not been addressed. Intervenor-Petitioner’s Brief 42.
21 Respondents argue that petitioners did not argue to the planning commission that
22 SRC Chapter 65 provisions were applicable to the application and that the issue
23 may not be raised for the first time on appeal. Petitioners do not reply to the

1 waiver argument. We agree with respondents that petitioners have waived this
2 assignment of error.

3 For the reasons set out above, we conclude that the arguments under SRC
4 810.020 and SRC 65 are waived.

5 Petitioners' fifth subassignment of error is denied.

6 Petitioner's first assignment of error and intervenor-petitioner's second
7 assignment of error are denied.

8 The planning commission's decision is affirmed.