LUBA 2022 [stamp, partly illegible]

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

BOTTS MARSH, LLC,
Petitioner,

vs.

CITY OF WHEELER,
Respondent,

and

OREGON COAST ALLIANCE,
Intervenor-Respondent.

LUBA No. 2022-002

FINAL OPINION
AND ORDER

Appeal from City of Wheeler.

Jennie Bricker filed a petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Sarah Stauffer Curtis.

Carrie A. Richter filed a response brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram.

Sean T. Malone filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 05/11/2022

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council limited land use decision denying a design
4 review application for a building on property zoned Industrial and Water Related
5 Commercial.

6 **FACTS**

7 The subject property is comprised of two parcels, with a .45-acre parcel
8 zoned Industrial (I) and a 1.72-acre parcel zoned Water Related Commercial
9 (WRC). The subject property is located west of Highway 101 and east of the
10 Nehalem River. To the south is vacant land, and to the north is property located
11 outside of the city limits. The property is accessed via Hemlock Street, south of
12 its intersection with Highway 101.

13 Petitioner submitted a design review application for a building for the
14 processing, storage, and retail sales of fish and shellfish. Wheeler Zoning
15 Ordinance (WZO) 2.020(7) provides that "retail/wholesale fish and shellfish
16 sales" is a permitted use in the WRC zone, and WZO 3.020(7) provides that
17 "seafood processing" is a permitted use in the I zone. The decision explains:

18 "The project is in two distinct parts. An 8,780 square foot fish
19 processing and warehousing facility will be located entirely on
20 Industrial zoned portion of the site. Fish and shellfish will be cold-
21 stored and shipped from this site along with some limited
22 processing. Attached to this structure, and located entirely within the
23 WRC zoned portion of the site, will be a 1,500 square foot retail
24 market. This part of the structure includes a second floor to be used
25 as an office and for storage.

1 "The Industrial side will feature a gray, vertical metal building along
2 with a metal roof. Two bay doors will be located on the east side of
3 the building (facing the parking lot) to receive/ship the product. The
4 retail portion of the site will feature the same metal structure on the
5 first floor, with a second floor finished in wood siding. This second
6 floor runs perpendicular to the ground floor and includes large
7 windows with views of the Nehalem River. The roof on the
8 commercial side matches the industrial roof." Record 5.

9 The maximum height of the building is 24 feet, which is the maximum height
10 allowed in the WRC and I zones.

11 The city manager and city planner prepared a staff report that evaluated
12 the building's compliance with the design review criteria in WZO 11.050, and
13 recommended approval of the application. Record 101-117. The planning
14 commission held a hearing on the application and at the conclusion, continued
15 the hearing and kept the record open for new evidence and rebuttal. At the
16 conclusion of the continued hearing, the planning commission voted three in
17 favor and three opposed, with one planning commissioner abstaining after
18 declaring that they had a conflict of interest. We understand the parties to agree
19 that a tie vote is the equivalent of denial by the planning commission.

20 Petitioner appealed the planning commission's decision to the city council,
21 which held a de novo hearing on the application.[1] The city planner provided a
22 staff report that recommended approval of the application. At the conclusion of
23 the hearing, the city council voted three to two to deny the application. At its

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[1] As far as the record shows, the planning commission did not adopt findings in support of its decision.

December 15, 2021 meeting, the city council adopted a written decision including findings. The decision concludes that petitioner's application failed to satisfy five of the design review criteria, which we discuss later in this opinion. This appeal followed.

FIRST AND PORTION OF FIFTH ASSIGNMENTS OF ERROR

In its first assignment of error, and in a portion of its fifth assignment of error, petitioner argues that the planning commission and city council committed procedural errors that prejudiced its substantial right to a full and fair hearing, and violated its right to due process under the 14th Amendment to the United States Constitution and under Article I, Section 18 of the Oregon Constitution. We address these assignments of error together.

A. First Assignment of Error

LUBA will reverse or remand a limited land use decision if "[t]he local government committed a procedural error which prejudiced the substantial rights of the petitioner." ORS 197.828(2)(d). The substantial rights referred to in ORS 197.828(2)(d) are the same as those referred to in ORS 197.835(9)(a)(B). *Warren v. City of Aurora*, 25 Or LUBA 11, 16 (1993). Those rights are the right to an adequate opportunity to prepare and submit one's case and to a full and fair hearing. *Mueller v. Polk County*, 16 Or LUBA 771, 775 (1988). In order to establish a procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006).

1. Planning Commissioner Bias

Although petitioner's arguments are difficult to follow, we understand petitioner to argue that the planning commission committed procedural error that prejudiced its substantial rights because a planning commissioner who was biased participated in the discussion of the proposal, which, petitioner alleges, the planning commission bylaws prohibit.[2]

The city responds that the challenged decision is a decision by the city council, and the city council's de novo hearing procedure on appeal cured any prejudice to petitioner's substantial rights by the participation of a biased commissioner. We agree. *Burk v. Umatilla County,* 20 Or LUBA 54, 57-58 (1990); *Murphey v. City of Ashland,* 19 Or LUBA 182, 189-90, *aff'd,* 103 Or App 238, 796 P2d 402 (1990); *Slatter v. Wallowa County,* 16 Or LUBA 611, 617 (1988). Even assuming for purposes of this opinion only that a biased planning commissioner participated in the discussion of the proposal, but later abstained from voting, such participation does not establish procedural error, where the city council held a de novo hearing on petitioner's application.

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[2] The city disputes that the version of the bylaws adopted in 1995 and cited by petitioner at petition for review 18 and Exhibit B applies. The city moves for LUBA to take official notice of Ordinance 2019-01, which the city argues repealed the 1995 bylaws. Respondent City's Brief n 6. Because we conclude that any planning commission error does not establish a basis for reversal or remand, we need not resolve this issue. The city's motion is denied, as moot.

2. City Council Procedure

The arguments here are difficult to follow and largely undeveloped. However, we understand petitioner to argue that the city council committed a procedural error in adopting findings that do not reflect the city council's deliberations on petitioner's proposal and do not reflect the reasons why the three city councilors who voted to deny the application did so. Petitioner attaches a transcript of the city council hearings to its petition for review, and argues that the transcript evidences that councilors Glowa, Taylor, and Kemp expressed doubt about whether the building's use for fish processing and retail sales are "water related" uses, which, as noted, are permitted outright in the WRC and I zones. Petition for Review App Exh C 47-49. Those three councilors later voted to deny the application, and the city planner subsequently prepared draft findings that the city council considered and adopted at a later hearing.

Petitioner argues that the city committed procedural error in "creating justifications for denial after the fact that gave [p]etitioner no opportunity to respond" and that error prejudiced petitioner's right to a full and fair hearing. Petition for Review 21. However, petitioner identifies no procedure allegedly violated.[3]

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[3] Petitioner includes an argument that we understand may allege that an undisclosed ex parte contact may have occurred after the city council voted to deny the application and closed the hearing. Petitioner's argument is not developed, and we will not develop a petitioner's argument for them. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

1 The city responds that whether seafood processing should be a permitted
2 use on the property is not relevant to the design review criteria. The city also
3 responds, and we agree, that there is no requirement in state law that the findings
4 reflect the decision maker's deliberations and petitioner identifies no requirement
5 in the WZO either. Statements made by individual decision makers expressing
6 erroneous interpretations of law or legally improper reasons for adopting a land
7 use decision provide no basis for reversal or remand unless such statements are
8 adopted in the final written decision or findings supporting the written decision.
9 *R/C Pilots Association v. Marion County*, 33 Or LUBA 532, 536 (1997); *Waker*
10 *Associates, Inc. v. Clackamas County*, 21 Or LUBA 588, 591 (1991).
11 The first assignment of error is denied.
12 **B. Portion of Fifth Assignment of Error**
13 LUBA will reverse a local government limited land use decision if "the
14 decision is * * * unconstitutional." ORS 197.828(2)(c)(B); *See also* OAR 661-
15 010-0071(1)(b). In its fifth assignment of error, petitioner argues that the
16 procedure the city followed violated petitioner's right to due process under the
17 14th Amendment to the United States Constitution. Initially, petitioner cites
18 *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) in support of
19 its argument. However, as the city correctly points out, in *1000 Friends of Oregon*
20 *v. Wasco Co. Court*, 304 Or 76, 80-81, 742 P2d 39 (1987), the Supreme Court
21 clarified that the right to present and rebut evidence and argument discussed in
22 *Fasano* does not derive from the United States or Oregon constitutions. In other

1 words, the rights guaranteed to a participant in a land use proceeding because of
2 the court's decision in *Fasano* are not constitutional rights. Absent any other
3 developed argument as to why the city's procedures violated its due process
4 rights under the United States and Oregon constitutions, petitioner's arguments
5 under this portion of the fifth assignment of error provide no basis for reversal or
6 remand of the decision.

7 The first assignment of error is denied.

8 The fifth assignment of error is denied, in part.

9 **SECOND AND PORTION OF FIFTH ASSIGNMENTS OF ERROR**

10 **A. Standard of Review**

11 The challenged decision denies petitioner's application for design review
12 for a building on its property. The decision concluded that petitioner's application
13 failed to satisfy five design review criteria: WZO 11.050(4)(a)(6), WZO
14 11.050(4)(b)(1), 11.050(4)(b)(2), 11.050(4)(b)(3), and 11.050(4)(b)(5). Where a
15 local government denies a land use application on multiple grounds, LUBA will
16 affirm the decision on appeal if at least one basis for denial survives all
17 challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266,
18 *aff'd*, 195 Or App 762, 100 P3d 218 (2004), *rev den* 338 Or 17, 107 P3d 27
19 (2005).

20 ORS 215.416(9) contains language applicable to permits and expedited
21 land divisions, stating

22 "Approval or denial of a permit or expedited land division shall be

> based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."[4]

"Permit" does not include "[a] limited and use decision as defined in ORS 197.015." ORS 215.402(4)(a). Findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994) (citing *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)). However, findings of noncompliance must be adequate to explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Salem-Keizer School Dist. 24-J*, 27 Or LUBA at 371.

Our decision in *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008) is instructive in its general description of the test that is applied when the adequacy of findings supporting a permit denial is challenged. As we explained in *Bridge Street Partners*, an appeal of a denial of an application for a planned unit development

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[4] This is the same language found in 197.195(4), set out below, that is applicable to limited land use decisions.

> "In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 272 (2000). The findings must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. *Caster v. City of Silverton*, 54 Or LUBA 441, 457 (2007)." 56 Or LUBA at 394.

As petitioner correctly notes, the challenged decision is a "limited land use decision," which ORS 197.015(12)(a)(B) defines in relevant part to mean

> "* * * a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "* * * * *
>
> "(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

Pursuant to ORS 197.195(4):

> "Approval or denial of a limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

We have held that the same principles articulated by the court in *Commonwealth Properties*, that is, that findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that approval is unlikely, apply to limited land use decisions under ORS 197.195(4). *Montgomery v. City of Dunes*

1 *City*, 60 Or LUBA 274, 282-83, *rev and rem on other grounds*, 236 Or App 194,
2 236 P3d 750 (2010).

3 In *Commonwealth Properties*, the Court of Appeals reviewed a county
4 decision that denied an application for a tentative subdivision plat. The county's
5 decision was based in part on a conclusion that the proposed subdivision design
6 did not comply with broadly worded, subjective comprehensive plan policies
7 that, in part, required "the distinctive natural features (of a site) will be retained
8 and incorporated into all developments." *Commonwealth Properties*, 35 Or App
9 387, 398-99 (quoting policy statement No. 30 of the Washington County
10 Comprehensive Framework Plan). The county found the application failed to
11 meet the applicable policy because:

12 "'a. Approximately 13% of the trees over 8 caliper would be
13 removed by the roads;

14 "'b. Assuming that 35% of any lot would be cleared for a house
15 and driveway, a total of half of the vegetation on the site could
16 be expected to be removed;

17 "'c. The road crossing of the drainageway requires a fill of about
18 9 feet;

19 "'d. Cuts for roads range up to 7 feet;

20 "'e. Slopes on roads range up to 20% in two locations;

21 "'f. 'Flag lots' have been created with 50 foot road frontage,
22 making land use and preservation of trees inefficient.'" *Id.* at
23 398.

The applicant challenged the county's decision, arguing that the decision did not satisfy *Former* ORS 215.416(6) (1987), *renumbered as* ORS 215.416(9) (1991).

The Court agreed with the applicant that the county's decision did not adequately explain why the applicant failed to meet relevant approval criteria because in the final decision denying the application, the county did not indicate why it chose the measurements for achieving compliance with the subjective approval criteria that it chose, or what figures would be acceptable to the county. As the court explained:

> "Nowhere did the commission indicate why it chose trees of 8-inch caliper, lot clearance of 35 percent or road cuts of over 7 feet as the standards by which compliance with the policy involved here was to be measured. * * * More importantly, nowhere did it indicate what figures, if any, would be acceptable.
>
> "* * * * *
>
> "The two-step procedure required for final approval of proposed subdivision plats provides a mechanism for the application of these principles [articulated by the courts in *Sun Ray Dairy v. OLCC*, 16 Or App 63, 71, 517 P2d 289 (1973), *McCann v. OLCC*, 27 Or App 487, 493-94, 556 P2d 973 (1976), and *Marbet v. Portland Gen. Elect.*, 277 Or 447, 460, 561 P2d 154 (1977)]. Because the considerations involved in the approval of a proposed subdivision plat are complex and are inextricably intertwined with the broadly worded policies enunciated in the county comprehensive plan, it is necessary for the county, at some time, to announce to a subdivider both which plan policies will govern the granting of such approval *and specifically how those policies will be applicable to the project in question. We assume that in many instances planning authorities will communicate, at least preliminarily, much of this information to subdividers on an informal basis prior to the hearing on tentative approval. In any event, such information must be provided to a*

1 *subdivider at the time at which the county acts on the request for*
2 *tentative approval of the proposed plat.* The grounds for the decision
3 at that time will serve as the standards by which the planning
4 authority later acts to grant or to deny final approval of a proposed
5 subdivision. In the case of a denial of tentative [subdivision]
6 approval, [the] grounds [for denial] must be articulated in a manner
7 sufficiently detailed to give a subdivider reasonably definite guides
8 as to what it must do to obtain final plat approval, or inform the
9 subdivider that it is unlikely that a subdivision will be approved."
10 *Commonwealth Properties*, 35 Or App at 398-400 (emphasis
11 added).

12 Finally, the court explained, "[a]n applicant, be he seeking a liquor license or a
13 subdivision, should not be put in a position of having his success or failure
14 determined by guessing under which shell lies the pea." *Id.* at 399.

15 This obligation is not limited to applications with a two-step process such
16 as a tentative and final subdivision plan. In *Bridge Street Partners*, we remanded
17 a city decision denying an application for a residential planned unit
18 development.[5] We relied on *Commonwealth Properties* and concluded that the
19 city's findings were inadequate to inform the petitioner of the steps it needed to
20 take to secure approval of the PUD. *Bridge Street Partners*, 56 Or LUBA at 394.

21 In *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016),
22 we remanded city decision denying a residential planned unit development. We
23 relied on *Commonwealth Properties* to conclude that the city failed to give the

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[5] As the court of appeals explained in *Willamette Oaks, LLC v. City of Eugene*, 248 Or App 212, 226 n 4, 273 P3d 219 (2012), a decision regarding a tentative planned unit development in an urban growth boundary is a hybrid of both types of limited land use decisions described in ORS 197.015(12)(a).

1 unsuccessful applicant a reasonably definite guide as to what it must do to obtain
2 approval of a PUD with smaller lot sizes than the minimum lot size allowed under
3 a code provision allowing smaller lot sizes in exchange for enhanced "design and
4 amenities" that would warrant the smaller lot sizes. *Id.* at 68-69. We concluded
5 that the city's findings "left petitioner largely in the dark" and "gave no real
6 indication regarding the nature and extent" of amenities that could satisfy the
7 criterion. *Id.*

8 In *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010), we remanded a city
9 decision denying conditional use permit and site plan approval for a dwelling.
10 Relying on *Bridge Street Partners*, we concluded that the city's findings were
11 inadequate to explain why a revised site plan submitted by the petitioner during
12 the proceedings that showed roof eaves projecting 18 inches into a yard setback,
13 in apparent compliance with the applicable setback, was not evidence of
14 compliance with the criterion. *Id.* at 293.

15 **B. Assignments of Error**

16 In the second assignment of error, we understand petitioner to advance two
17 types of challenges. First, petitioner contends that the findings include erroneous
18 interpretations of applicable law, which we understand to mean that the limited
19 land use decision does not comply with applicable provisions of the land use
20 regulations. ORS 197.828(2)(b) (LUBA shall reverse or remand a limited land
21 use decision if it "does not comply with applicable provisions of the land use
22 regulations"). Second, petitioner contends that some of the city's findings are

1 internally inconsistent, and inadequately explain the city's justification for its
2 decision, because the findings fault petitioner for failing to submit evidence
3 demonstrating compliance without addressing the evidence that petitioner did
4 submit. Petition for Review 23-24; *Id.* at 26; *Id.* at 31-32. We address each
5 challenge below as they relate to the design review criteria that the city found
6 were not met.

7 In addition, in a portion of the fifth assignment of error, petitioner alleges
8 that the city's denial of its application for failing to satisfy WZO 11.050(4)(b)(5)
9 is an unconstitutional taking, and we address that challenge below in our
10 discussion of that provision.

11 **1. WZO 11.050(4)(a)(6)**

12 WZO 11.050(4)(a)(6) requires

> 13 "Primary building entrances shall open directly to the outside and
> 14 shall have walkways connecting them to the street sidewalk. Create
> 15 storefronts and entries that are visible and easily accessible from the
> 16 street. Either orient the primary entrance to the building along a
> 17 street facing property line or create an ADA accessible
> 18 courtyard/plaza incorporating pedestrian amenities including street
> 19 trees, outdoor seating and decorative pavers. Ensure a direct
> 20 pedestrian connection between the street and buildings on the site,
> 21 and between buildings and other activities within the site. In
> 22 addition, provide for connections between adjacent sites, where
> 23 feasible."

24 The site plan and other materials submitted by petitioner show what petitioner
25 identifies as the primary entrance to the building facing south, with a parking lot
26 on the east side of the building and a loading dock in approximately the middle

1 of the east side of the building. Sidewalks are shown along portions of the north
2 and east and along the south perimeters of the subject property, with breaks where
3 the driveway entrance from Marine Drive is located and where the loading dock
4 is located. Record 85, 87, 94. The entrance to the building on the south side of
5 the building is proposed to include a covered area, with open sides. Record 97.
6 The application identifies that area as a "courtyard/plaza." Record 68.

7 The primary entrance is not oriented along a street facing property line,
8 and therefore the design must "* * * create an ADA accessible courtyard/plaza
9 incorporating pedestrian amenities including street trees, outdoor seating and
10 decorative pavers." WZO 11.050(4)(a)(6). The city found that the application
11 failed to "create an ADA accessible courtyard/plaza incorporating pedestrian
12 amenities including street trees, outdoor seating and decorative pavers:"

> 13 "In order to avoid having an entrance facing the street, the applicant
> 14 alleges that '[t]he primary entrance will lead to a created ADA
> 15 accessible courtyard.' A courtyard is generally defined as an
> 16 unroofed area that is completely or mostly enclosed by the walls of
> 17 a large building. There does not appear to be any such place on the
> 18 site plans. However, even assuming that the applicant could satisfy
> 19 such a definition, there does not appear to be any courtyard
> 20 identified on any site plan in the record. Moreover, there is no
> 21 evidence identifying what the applicant proposes as a courtyard or
> 22 what such a courtyard would look like. At a very minimum, the
> 23 applicant would have to identify a courtyard on the site plan, but the
> 24 applicant has failed to make such a showing. In the absence of a
> 25 courtyard, the applicant is required to place the entrance facing the
> 26 street. Again, the site plans plainly show that the entrance does not
> 27 face the street. Without evidence in the record of a courtyard and its
> 28 location or a street-facing entrance, the applicant failed to carry its
> 29 burden. Therefore, this criterion is not satisfied." Record 29.

1 Petitioner argues that the findings fail to explain why the paved and
2 covered area at the primary entrance fails to qualify as the "courtyard/plaza" that
3 is required if the primary entrance is not oriented to the street. According to
4 petitioner, the interpretation of "courtyard" in the city's decision does not comply
5 with WZO 11.050(4)(a)(6) because nothing in the text of the provision suggests
6 an enclosed area. Petitioner argues that the provision itself is concerned with
7 visibility and easy accessibility to the primary entrance, and having a completely
8 or mostly enclosed area would frustrate the goal of easy and visible access.
9 Moreover, petitioner argues, the findings do not address the word "plaza" at all
10 or explain why the paved and covered area at the entrance fails to qualify as a
11 plaza. Petition for Review 24.

12 We agree with petitioner that the city's findings are inadequate to explain
13 why the covered area at the primary entrance to the building fails to qualify as
14 the "courtyard/plaza" that is a required substitute for a street facing entrance.
15 First, the findings do not identify, and we cannot tell, the source of the city's
16 definition of "courtyard." *Webster's Third New Int'l Dictionary* 523 (unabridged
17 ed 2002) defines "courtyard" as "[A] court or enclosure adjacent to or attached
18 to a house, castle, palace, or other building." Nothing in the common definition
19 of "courtyard" requires it to be "unroofed" or "completely or mostly enclosed,"
20 as the city found was required.

21 Second, the city's findings do not explain the meaning of "plaza" or
22 explain why the covered, open primary entrance to the building fails to qualify

1 as a "plaza" as that word is used in WZO 11.050(4)(a)(6). "Plaza" is defined as
2 "[A[] public square in a city or town : an open square." *Webster's Third New Int'l*
3 *Dictionary* 1738 (unabridged ed 2002). *See McNulty v. Lake Oswego*, 15 Or
4 LUBA 16, 24-25 (1986) (a design-review decision must explain why the design
5 review criterion is or is not met by defining the pertinent terms and explaining
6 how a term is applied in context of the design on review).

7 The city also found that the design failed to "[e]nsure a direct pedestrian
8 connection between the street and buildings on the site, and between buildings
9 and other activities within the site." WZO 11.050(4)(a)(6). The city found:

> 10 "FINDINGS: Walkways will connect the parking area to each
> 11 building entrance (commercial and industrial). Except for a break
> 12 due to two garage entrances, pedestrian access will connect both
> 13 parts of the facility. In addition, the entrance to the commercial
> 14 portion includes a covered entrance.
>
> 15 "However, the applicant must ensure a direct pedestrian connection
> 16 between the buildings and other activities, including direct
> 17 pedestrian access from the one side of the parking lot to the
> 18 buildings. The site plan demonstrates that a direct pedestrian
> 19 connection is frustrated by the loading area, placed in the middle of
> 20 the building and on the eastside of the building facing the street,
> 21 effectively dividing the parking lot and not allowing direct
> 22 pedestrian access to the entrance for half of the parking spaces. This
> 23 design would appear to create safety problems for patrons and
> 24 workers accessing the building to have to navigate forklifts or trucks
> 25 that are loading/unloading. Entryways on the west and north appear
> 26 to be doors but no access to those doors via sidewalks. Effectively,
> 27 those entryways do not connect to the street because the sidewalks
> 28 do not even connect to the entryways. As such, the applicant has
> 29 failed to carry its burden under this criterion, and this criterion is not
> 30 satisfied." Record 28-29.

1 Petitioner argues that the city's findings do not explain why the city
2 reached the conclusion it did, given the site plan and other materials submitted
3 by petitioner that show sidewalks encircling the parking lot that connect the
4 building's primary entrance, and that the findings do not explain how the location
5 of the loading area means there is not a direct pedestrian connection between the
6 building and "other activities on the site." WZO 11.050(4)(a)(6). Petitioner
7 argues that the site plan and other submitted materials show that the primary
8 entrance to the building is accessible from the sidewalk and the parking area. In
9 addition, petitioner argues that avoidance of "safety problems" is not a relevant
10 consideration for the criterion and that any safety problems created by the design
11 are speculative at best.

12 Intervenor-Respondent (intervenor) responds that the site plan shows that
13 the loading area blocks the parking spaces north of the loading area from *directly*
14 connecting to the primary building entrance, and there is therefore no direct
15 connection from one half of the parking lot to the primary entrance. Intervenor
16 also responds that "* * * safety * * * appear[s] to be the reason for the 'direct
17 pedestrian connection' requirement." Intervenor-Respondent's Brief 5.

18 WZO 11.050(4)(a)(6) provides "Ensure a direct pedestrian connection
19 between the street and buildings on the site, and between buildings and other
20 activities within the site." We agree with intervenor that the sidewalks do not, as
21 petitioner asserts, encircle the parking lot, but are instead interrupted by the
22 driveway and the bay doors. We agree, however, with petitioner that the city's

findings are inadequate. They do not explain why the sidewalks provided are insufficient to provide a direct pedestrian connection to the building. The design criterion simply does not state that all connections must be to the primary building entrance, or that a direct connection must be provided to all activities on the site. While intervenor may be correct that safety is an important reason behind the requirement for a direct pedestrian connection, the city's findings do not include that explanation. Absent any interpretation of the relevant terms of the provision, petitioner is left to guess as to what modifications to the design could satisfy the requirement.

Where the challenged decision lacks a necessary interpretation of a local provision, LUBA may, but need not, interpret that provision in the first instance. ORS 197.829(2); *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den* 327 Or 620 (1998). Given the ambiguities in WZO 11.050(4)(a)(6) and the city's inadequate findings with respect to that criterion, it is more appropriate to remand the decision to the city to adopt more adequate findings and any necessary interpretations.

2. WZO 11.050(4)(b)(1)

WZO 11.050(4)(b)(1) provides:

> "The height and scale of the buildings should be compatible with the site and adjoining buildings. Use of materials should promote harmony with the surrounding structures and site. The materials shall be chosen and constructed to be compatible with the natural elements and applicable city ordinances."

One of the bases for denying the application was the city's conclusion that the application failed to meet WZO 11.050(4)(b)(1):

> "FINDINGS: The submitted plan information indicates the building will not exceed 24-feet, which complies with the Zoning Ordinance limitation. The building combines gray metal siding; a dark gray roof; wooden trim, including a board and batten exterior on the commercial second floor; and white window trim.
>
> "However, while the applicant's response to this criterion simply lists the materials proposed to be used, the applicant has not proposed how the height and scale of the proposed buildings will be compatible with the site or adjoining buildings. Similarly, the applicant has not indicated how the materials proposed will promote harmony with the structures and site. Instead, the applicant has simply listed the proposed materials. Finally, the applicant has not demonstrated how the materials are compatible with the natural elements. The City Council is unable to discern the applicant's rationale for the applicant's proposal. Without some argument and evidence in the record to demonstrate how the materials chosen are compatible and promote harmony, the Council cannot find that this provision has been satisfied. Moreover, the applicant has not included in the record any information on the 'natural elements' that are identified in this criterion and for which there must be a finding of compatibility. As such, the applicant has not carried its burden of proof in demonstrating how this criterion is satisfied." Record 31.

Petitioner argues that the city's decision does not comply with the permissive language of the provision, and that under WZO 1.070(1), which provides that "The word shall is mandatory and the words should or may are permissive," the provision is not mandatory. We understand petitioner to argue that the city impermissibly required petitioner to demonstrate compliance with provisions that the WZO provides are "permissive," which, according to

1 petitioner, means they are not mandatory approval criteria. Petition for Review
2 25. Petitioner also argues that petitioner provided evidence in the application that
3 identifies the materials to be used for construction – dark grey and black roofing,
4 brown wood siding, grey metal siding, and black window and door trim – and
5 that although the city's findings refer to that evidence, the findings fail to explain
6 why that evidence is not sufficient to demonstrate that "* * * [t]he materials shall
7 be chosen and constructed to be compatible with the natural elements and
8 applicable city ordinances." WZO 11.050(4)(b)(1).

9 Petitioner also argues, as it argues in the third assignment of error, that the
10 city improperly found that petitioner failed to provide argument or findings
11 explaining why the materials are not compatible with the natural elements when
12 the WZO does not include such a requirement. Intervenor does not really respond
13 to petitioner's argument except to argue that the last sentence of WZO
14 11.050(4)(b)(1) includes mandatory language, and argue that the city's findings
15 merely identify that petitioner has the burden of proof to demonstrate that
16 applicable criteria are met.

17 We agree with petitioner that the city's findings are inadequate to explain
18 why the evidence in the record that identifies the materials to be used in
19 construction is not evidence that demonstrates that the last sentence of WZO
20 11.050(4)(b)(1) is met. *Rudell*, 62 Or LUBA at 293. In addition, the phrase
21 "materials" is ambiguous, and the phrase "natural elements" is similarly
22 ambiguous. Absent any explanation in the findings as to what the natural

1 elements are and why the materials chosen are not compatible with those
2 elements, the city's findings leave petitioner "largely in the dark" about how to
3 satisfy that criterion. *J. Conser and Sons, LLC* , 73 Or LUBA at 68.

4 Moreover, while we tend to agree with petitioner that WZO 1.070 means
5 that the first two sentences of the provision are non-mandatory provisions, on
6 remand the city should adopt reviewable interpretations of WZO 1.070 and WZO
7 11.050(4)(b)(1) in the first instance. If it determines that the first two sentences
8 of WZO 11.050(4)(b)(1) are mandatory criteria, the city should resolve any
9 conflict between that provision and WZO 1.070. *See Champion v. City of*
10 *Portland*, 28 Or LUBA 618, 628 (1995) (design review guidelines expressed in
11 non-mandatory terms are properly interpreted by the city council as non-
12 mandatory, and that interpretation is entitled to deference under ORS
13 197.829(1)).

14 **3. WZO 11.050(4)(b)(2)**

15 WZO 11.050(4)(b)(2) provides:

16 "Architectural style should not be restricted[.] Evaluation of a
17 project should be based on quality of design and the relationship to
18 its surroundings. However, the use of styles characteristic of
19 Wheeler and the coastal area are preferred. These include the use of
20 natural wood siding such as cedar shingles. The City encourages the
21 use of pitched roofs, large overhangs, wood fences and wood signs.
22 Colors should be earth tones harmonious with the structure, with
23 bright or brilliant colors used only for accent."

1 One of the bases for the city's denial of the application was that the application

2 failed to satisfy WZO 11.050(4)(b)(2).[6] Petitioner argues that the permissive

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[6] The city found:

> "FINDINGS: This provision requires the City to review the overall design quality of a proposal, including its relationship to its surroundings. The criterion encourages certain types of design elements, but does not restrict architectural style. The City Council interprets this provision to require an applicant to explain how the proposed development does, or does not, use the identified styles and, to the extent a proposal does not use 'styles characteristic of Wheeler and the coastal area,' or the other identified features, the applicant must explain how the design was arrived at and why [*sic*] its relationship to its surroundings.
>
> "In this case, the applicant's narrative and response simply allege that the 'Project design was influenced from historical pictures of previous buildings in Wheeler' and points to Exhibit III. Exhibit III is an elevation of the building. The City Council finds that this approach is not sufficient. It does not explain whether, in fact, the design incorporates the styles characteristic of Wheeler and the coastal area, nor does it use the identified design elements. To the extent the applicant relies on 'historical pictures of previous buildings in Wheeler,' the applicant has not submitted any of those photographs or pictures of those previous buildings. Without such photographs or pictures in the record, the Council cannot make findings based on such allegations. Without support in the record, there is no evidentiary basis for the provision to use 'styles characteristic of Wheeler and the coastal area.'
>
> "The applicant has similarly failed to provide evidence of the surrounding structures and sites. While architectural style is not restricted, this criterion and the design review generally is also not a blank check in the City of Wheeler. The applicant must make a sufficient showing in the first place. Without sufficient information

1 language used in WZO 11.050(4)(b)(2), coupled with WZO 1.070's statement
2 that "should or may are permissive" means that the provision is non-mandatory,
3 and therefore that the city cannot rely on WZO 11.050(4)(b)(2) to deny the
4 application.

5 Petitioner also argues that the city's findings fail to explain why the
6 evidence petitioner did submit, that the building will use the styles listed in this
7 hortatory provision, is insufficient to demonstrate that the provision is met.
8 Petition for Review 29-30 (citing Record 67, 68, 70, 78, 83, 94, 96, and 100).
9 Intervenor responds that the city correctly concluded that the applicant had failed
10 to provide historical pictures of buildings in the city, although the application

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about the surrounding area, the Council cannot make adequate findings based on the provision for the surroundings, the City cannot find sufficient evidence about the 'quality of design and the relationship to its surroundings.' The Council interprets 'surroundings' as broader than 'abutting' and 'adjacent.' The surroundings could include the nearby wetlands and the waterway, but the applicant has not identified the surroundings as such, nor has the applicant attempted to make a connection between the surroundings and the design of the building. The site plans, in and of themselves, do not demonstrate the design without relation to buildings in the 'surrounding' area. The Council also acknowledges that this criterion states that '[t]hese include the use of natural wood siding such as cedar shingles,' but the Council finds that these features alone cannot fully satisfy the requirement. And, in any event, the building itself is overwhelmingly metal, with only minimal use of natural wood and only outdoor services will be screened by a six-foot cedar fence and no cedar shingles. As such, the applicant has not carried its burden of proof in demonstrating how this criterion is satisfied." Record 32-33.

stated that the building design was influenced from historical pictures of buildings in the city, and that without that evidence the city could not determine whether the other evidence submitted by the applicant satisfied the provision.

As with WZO 11.050(4)(b)(1), we tend to agree with petitioner that, given the permissive language in WZO 11.050(4)(b)(2) and the clarification in WZO 1.070, WZO 11.050(4)(b)(2) is non-mandatory, and therefore may not be relied on as a basis to deny an application. However, because we are remanding the decision for other reasons, on remand the city can adopt reviewable interpretations of WZO 1.070 and WZO 11.050(4)(b)(2) in the first instance and, if it determines that WZO 11.050(4)(b)(2) is a mandatory criterion, resolve any conflict between that provision and WZO 1.070.

4. WZO 11.050(4)(b)(3)

WZO 11.050(4)(b)(3) provides:

> "Monotony of design in single or multiple building projects shall be avoided. Variety of detail, form, and site design shall be used to provide visual interest. In a Planned Development, no more than 25% of all buildings in the development shall replicate the same roofline or footprint."

The city council found the provision was not met:

> "* * * The proposed structure is largely dominated by gray/black metal with only a small amount of wood proposed. The Council notes that other provisions of the zoning ordinance encourage natural wood siding. Here, there is only a relatively small amount of the structure devoted to natural wood. Monotony is defined as a lack of variety, tedious repetition, and routine. The Council finds that the use of two materials, with the exception of the roofing and windows,

1 to lack variety and to be monotonous. The Council finds that it does
2 not provide visual interest. The north and west elevations show
3 nothing but the similar patterns of windows amidst gray/black metal
4 siding and a single door. The Council finds the north and west
5 elevations are particularly monotonous and lack detail. Given the
6 site's location on the waterfront, the Council believes the
7 requirements in this criterion are particularly important. The
8 Council finds that the applicant has submitted inconsistent
9 information regarding the window trim. On one hand, the vinyl
10 windows are referred to as white in the narrative, yet they appear
11 black in elevations and plans. The Council finds that the applicant
12 has not satisfied this criterion." Record 33.

13 Petitioner argues that the findings are inadequate to explain why the city
14 concluded that the evidence submitted by petitioner that shows three contrasting
15 roof lines, a second floor overhang for the south primary entrance, a canopy over
16 the entrance on the north side of the building, black windows, contrasting exterior
17 finishes on the first and second floors, contrasting wood finish around the loading
18 doors, the building's irregular shape, and a footprint that follows the contours of
19 the water, are insufficient to show compliance with WZO 11.050(4)(b)(3).[7]
20 Petition for Review 32. Finally, petitioner points to other findings regarding
21 WZO 11.050(4)(b)(9) and (10), which point out "distinct roof separation and
22 exterior finish" and find that "improvements on the industrial portion of the site
23 effectively break up the monotony of a blank wall," and argue those findings are

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[7] In addition, petitioner points to evidence in the record demonstrating that any inconsistency between the application and the submitted plans regarding the color of the window trim was cleared up in petitioner's additional submittals, at Record 98 and 99, which clarify that the window trim is black. Petition for Review 31.

1 inconsistent with the city's findings regarding WZO 11.050.4.b(3). Record 16-
2 17.

3 The city council does not explain the source of its definition of
4 "monotony," but *Webster's* defines it as "sameness that produces boredom" and
5 "sameness or uniformity of tone or sound * * *." *Webster's Third New Int'l*
6 *Dictionary* 1464 (unabridged ed 2002). The city council found specifically that
7 "[t]he north and west elevations show nothing but the similar patterns of windows
8 amidst gray/black metal siding and a single door. The Council finds the north and
9 west elevations are particularly monotonous and lack detail." Record 15. We find
10 the adequacy of this finding to be the closest call. Although petitioner argues that
11 there is a canopy over the entrance on the north side, the canopy detail shown on
12 the elevation appears minimal and the roofline variations are less varied on the
13 north and west sides of the building. Record 99. We agree, however, with
14 petitioner that the city's findings are inadequate to explain why the detail, form
15 and site design proposed by petitioner are inadequate to demonstrate that the
16 proposed design satisfies this criterion. The criterion is focused on avoidance of
17 monotony of design in a "building project," and the findings do not explain
18 whether the criterion requires evaluation of monotony on an elevation by
19 elevation basis, as opposed to the building as a whole. The criterion includes no
20 measuring points, no description of what is necessary to demonstrate a "variety"
21 of detail, form, and site design, and no description of what is meant by "visual
22 interest." If the city desires to have a certain amount of wood versus metal, or a

1 certain number of colors used, or other features that, in the city's view, "avoid
2 monotony," the city is obligated to inform petitioner, in the words of
3 *Commonwealth*, "specifically how those policies will be applicable to the project
4 in question."[8] 35 Or App at 400. We also agree with petitioner that the city's
5 findings regarding this criterion are inconsistent with other findings that point out
6 that the retail sales portion of the building has "distinct roof separation and
7 exterior finish" and that "improvements on the industrial portion of the site
8 effectively break up the monotony of a blank wall." Record 16-17. On remand,
9 the city must specify what is lacking in petitioner's proposal to meet the required
10 "variety of detail, form and site design," and what is meant by "visual interest."

11 **5. WZO 11.050(4)(b)(5)**

12 WZO 11.050(4)(b)(5) provides that "[t]he impact that structures will have
13 on views from adjacent or other areas will be taken into account." The city found
14 this criterion was not satisfied:

15 "The City Council finds that there is evidence in the record that the
16 proposal will block views from an adjacent or other area, including
17 a residence across highway 101. The Council finds that the
18 'adjacent' and 'other areas' is broad enough to include the residence
19 across from Highway 101. The applicant's justification [is] that
20 '[t]he building will be no taller than 24 feet, which is the allowable
21 height.' The Council finds that this criterion is not reduced to the

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[8] We also assume, as the court assumed in *Commonwealth*, that "in many instances planning authorities will communicate, at least preliminarily, much of this information to [applicants] on an informal basis prior to the hearing[.]" 35 Or App at 400.

1 maximum height allowed but rather whether there will be an impact
2 to structures that have views. If the criterion could be satisfied
3 merely by complying with the height restriction, then the criterion
4 would have no independent purpose from the height restriction,
5 making it superfluous. This criterion is intended to protect views,
6 including those from adjacent structures or structures in other areas.
7 The Council finds that the residence at 175 Nehalem Boulevard is
8 such a structure that would have its view of the Nehalem Bay
9 adversely affected. The Council finds that this criterion has not been
10 satisfied." Record 15-16.

11 In the second assignment of error, petitioner argues that the city council's
12 findings fail to address the evidence in the record that the building does not
13 exceed the maximum allowed height for the zone, and that 90% of the site is
14 preserved as open space. Relatedly, in a portion of the fifth assignment of error,
15 petitioner also argues that the city council's findings and its implied interpretation
16 of WZO 11.050(4)(b)(5) to prohibit any impact to the views of the bay from other
17 properties creates a view easement that burdens petitioner's property in favor of
18 other properties, and amounts to a taking or exaction of petitioner's property
19 without just compensation under the Fifth Amendment to the United States
20 Constitution. Petitioner argues that as the city has interpreted the criterion, any
21 structure on the now vacant property will impact views of the bay. Petitioner also
22 argues that in zoning the property I and WRC, zones that allow buildings up to
23 24 feet in height, the city has determined that buildings up to 24 feet in height on
24 the property satisfy applicable design review provisions.

25 The city responds that the city council's findings do not amount to an
26 exaction of petitioner's property without compensation because a different design

1 approach, such as reducing building height or changing the roof line, could be
2 approved. Respondent's Brief 20. The problem with the city's response is that
3 the findings do not reflect it. Rather, the findings reflect the city council's
4 position that a building that otherwise conforms to the standards in the zoning
5 ordinance would impact views of the bay for the structure at 175 Nehalem
6 Boulevard, and that therefore the city may deny the proposal. That rationale
7 comes exceedingly close to constituting an unconstitutional exaction of a view
8 easement in favor of other property owners without just compensation to
9 petitioner. However, because we are remanding the decision on other bases,
10 petitioner has not yet established that the city has exacted a view easement over
11 petitioner's property without just compensation.

12 It is axiomatic that any development on the now vacant property will
13 "impact" the existing views of the bay from other areas, because there is nothing
14 obstructing that view presently. We agree with petitioner that given that any
15 development of the vacant property will impact the views from other areas, the
16 city's justification for why this criterion is not met does not satisfy the applicable
17 provisions of the WZO. ORS 197.828(2)(b). On remand, the city must evaluate
18 compliance WZO 11.050(4)(b)(5) with the understanding that petitioner's use is
19 permitted outright on the property, and that the city cannot, consistent with the
20 United States Constitution, interpret the provision in a manner that results in a de
21 facto view easement over petitioner's property.

22 The second assignment of error is sustained.

1 The fifth assignment of error is, in part, denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioner's third assignment of error is premised on its argument that one
4 basis for the city council's decision to deny petitioner's application was that
5 petitioner failed to provide the city with written argument or draft detailed
6 findings related to the applicable design review criteria, and that such a basis is
7 outside the range of the discretion afforded to the city. ORS 197.835(10)(a)(A);
8 ORS 197.828(2)(c)(A).[9] Petitioner argues that nothing in the WZO requires an
9 applicant for design review to provide "* * * extensive written findings on each
10 and every design guideline," and accordingly the failure to provide findings is

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[9] ORS 197.835(10)(a)(A) provides in relevant part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

ORS 197.828(2)(c)(A) provides in relevant part:

> "The board shall reverse or remand a limited land use decision if:
>
> "* * * * *
>
> (c) The decision is:
>
> "(A) Outside the scope of authority of the decision maker[.]"

not a permissible basis for denial. Petition for Review 35. Petitioner cites findings the city adopted at Record 31 to 33 that, according to petitioner, take the position that petitioner failed to provide "argument" regarding how the proposal met the applicable design review criteria.[10]

Intervenor does not really respond to petitioner's argument, but rather argues that the city correctly concluded that petitioner failed to satisfy its burden of proof to demonstrate compliance with the criteria by submitting evidence that demonstrates that compliance. *Fasano*, 264 Or at 588 (applicants in quasi-judicial land use proceedings have had the burden of demonstrating that a proposal complies with relevant approval criteria). Intervenor argues that the submitted site plans and other information required to be submitted under WZO 11.050(3) were not sufficient evidence to demonstrate compliance with the subjective design review criteria. Intervenor-Respondent's Brief 18.

We agree with petitioner that there is no requirement in the WZO (or state law) that requires petitioner to provide written findings or argument explaining how an application meets the applicable design review criteria. For example, WZO 11.050(4)(b)(2) provides:

> "Architectural style should not be restricted[.] Evaluation of a project should be based on quality of design and the relationship to

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[10] We do not understand petitioner to argue the evidence that petitioner submitted in support of the application demonstrates compliance with the design review criteria as a matter of law.

1 its surroundings. However, the use of styles characteristic of
2 Wheeler and the coastal area are preferred. These include the use of
3 natural wood siding such as cedar shingles. The City encourages the
4 use of pitched roofs, large overhangs, wood fences and wood signs.
5 Colors should be earth tones, harmonious with the structure, with
6 bright or brilliant colors used only for accent."

7 WZO 11.050(4)(b)(2), and the WZO generally, do not require that petitioner
8 submit a narrative in support of its application.[11] The city council nonetheless
9 found that an applicant must "explain" why the criterion is met. The city's
10 findings provide

11 "* * * The City Council interprets this provision to require an
12 applicant to explain how the proposed development does, or does
13 not, use the identified styles and, to the extent a proposal does not
14 use 'styles characteristic of Wheeler and the coastal area', or the
15 other identified features, the applicant must explain how the design
16 was arrived at and why [*sic*] its relationship to its surroundings."
17 Record 32.

18 The above quoted findings proceed, however, to state that petitioner's narrative
19 relies upon historical pictures of previous buildings but the referenced historical
20 pictures were not submitted into the record, and the absence of those photographs

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[11] As the applicant, petitioner bears the burden of proof and persuasion to establish satisfaction of the design review criteria. Due to the subjective nature of these design review criteria, the criteria often will be more fully articulated in the context of specific development proposals. While the WZO does not prescribe the form of proof, as a general practice, applicants for design review should submit arguments about the interpretation of ambiguous design-review criteria and evidence sufficient to support a finding that the design review criteria are satisfied under the applicant's proffered interpretation. An applicant that relies solely on site plans and elevations that satisfy minimum submittal requirements does so at their own peril.

1 in the record left the council unable to rely on the petitioner's narrative for
2 compliance with this criterion. *Id.* We understand that statement to conclude that
3 the city council chose not to rely on the evidence in the record submitted by
4 petitioner because, in the city council's view, the evidence was not complete.

5 Here, petitioner is simply wrong that one basis for denial of the application
6 was that petitioner failed to submit written argument or draft detailed findings.
7 The city council concluded that petitioner's evidence was incomplete and
8 therefore did not demonstrate that the approval criterion was met.

9 As explained above, where a local government denies an application on
10 multiple grounds, LUBA will affirm the decision on appeal if at least one basis
11 for denial survives all challenges. *Wal-Mart Stores*, 47 Or LUBA at 266.
12 However, as we discuss in detail above in our resolution of the second assignment
13 of error, while petitioner's arguments under this assignment of error provide no
14 independent basis for reversal or remand of the decision, conversely, our denial
15 of this assignment of error also does not mean that the decision should be
16 affirmed under *Wal-Mart Stores*, because the city's findings are inadequate to
17 inform petitioner what would satisfy the design review criteria, why the proposal
18 failed to satisfy the applicable criteria, and explain why it chose not to rely on
19 petitioner's evidence.

20 The third assignment of error is denied.

21 **FOURTH AND PORTION OF FIFTH ASSIGNMENTS OF ERROR**

22 ORS 197.524 provides:

1 "(1) When a local government engages in a pattern or practice of
2 delaying or stopping the issuance of permits, authorizations
3 or approvals necessary for the subdivision or partitioning of,
4 or construction on, any land, including delaying or stopping
5 issuance based on a shortage of public facilities, the local
6 government shall:

7 "(a) Adopt a public facilities strategy under ORS 197.768;
8 or

9 "(b) Adopt a moratorium on construction or land
10 development under ORS 197.505 to 197.540.

11 "(2) The provisions of subsection (1) of this section do not apply
12 to the delay or stopping of the issuance of permits,
13 authorizations or approvals because they are inconsistent with
14 the local government's comprehensive plan or land use
15 regulations."

16 In its fourth assignment of error, petitioner argues that the city's decision amounts
17 to a moratorium that was not adopted pursuant to the requirements of ORS
18 197.505 to 197.540. Petitioner argues that the city's decision denying the
19 application, together with two prior city decisions denying two different
20 applications for conditional uses on the same property, amount to a "pattern or
21 practice" of stopping the issuance of authorizations for construction on its
22 property.[12] In its related fifth assignment of error, petitioner argues that the city's
23 denial of the applications is a taking of petitioner's property without just

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[12] Those two decisions were appealed to LUBA in *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA Nos 2021-072/073, Mar 17, 2022). We remanded the city's decision in order for the city to conduct proceedings on the applications without the participation of biased city councilors. We did not reach the merits of petitioner's challenges to the city's bases for denial.

1 compensation because the city has prevented petitioner "from making any
2 economically feasible private development or use of the [p]roperty." Petition for
3 Review 39.

4 The city responds, and we agree, that pursuant to ORS 197.524(2), denial
5 of an application for land use approval on the basis that the application is not
6 consistent with the applicable land use regulations is not a moratorium under
7 ORS 197.505 to 197.540. *Vista Construction LLC v. City of Grants Pass*, 55 Or
8 LUBA 590, 594-95 (2008). In denying the conditional use permits and in denying
9 the design review application, the city determined that the applications failed to
10 comply with the applicable provisions of the WZO. See n 5. For the reasons
11 explained in our resolution of the second assignment of error, the city must adopt
12 findings that better explain why the proposal fails to satisfy the mandatory design
13 review criteria, and that explain what steps are needed to gain approval of the
14 application under the applicable criteria. Accordingly, at best petitioner's fourth
15 assignment of error is premature, and does not establish a basis for reversal or
16 remand.

17 The same is true for petitioner's takings argument in the fifth assignment
18 of error. Because we remand the decision for the city to adopt better findings that
19 explain why petitioner's submitted materials are not evidence of satisfaction of
20 the applicable criteria and that explain what steps are needed to gain approval, at
21 best this portion of petitioner's fifth assignment of error is premature, and does
22 not establish basis for reversal or remand of the decision.

1 The fourth assignment of error is denied.

2 The fifth assignment of error is denied, in part.

3 **CONCLUSION**

4 The city's decision is remanded for the reasons explained in our resolution
5 of the second assignment of error. We emphasize that our remand is narrow. The
6 city must adopt findings on remand that are sufficient to inform petitioner of the
7 nature and types of changes in the proposal that will be necessary to obtain
8 approval, that is, sufficient to avoid petitioner "having [its] success or failure
9 determined by guessing under which shell lies the pea." *Commonwealth*
10 *Properties*, 35 Or App at 399.

11 The city's decision is remanded.