

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

3
4 FRAN RECHT,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF DEPOE BAY,
10 *Respondent,*

11
12 and

13
14 RONNIE WILSON,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-023

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Depoe Bay.

23
24 Sean T. Malone filed the petition for review and reply brief and argued on
25 behalf of petitioner.

26
27 Corey G. Blake filed respondent's brief and argued on behalf of
28 respondent.

29
30 Ty K. Wyman represented intervenor-respondent.

31
32 RUDD, Board Member; ZAMUDIO, Board Chair, participated in the
33 decision.

34
35 RYAN, Board Member, did not participate in the decision.

36
37 REMANDED

07/13/2022

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

NATURE OF THE DECISION

Petitioner appeals a city council decision approving numerous variances from development standards.

FACTS

The subject property is 0.7-acres in size and undeveloped. It is bounded by a five-foot wide sidewalk and Highway (Hwy) 101 to the west, NE Bradford Street to the south, NE Williams Avenue to the east and the platted but unbuilt NE Berg Street to the north. The subject property’s topography “steps down from east to west, beginning with a substantial drop from Williams Avenue to the property, level for a portion, then another steep drop to US Hwy 101.” Record 11.

Single family residences are generally located to the north, east and southeast of the subject property. Various commercial uses are located to the south and west of the subject property and a motel is located immediately to the north of the subject property.

Intervenor-respondent (intervenor) seeks to develop six townhouse style buildings, each containing three units, on the subject property. As proposed, 12 of the units will provide transient lodging and six of the units will provide residences.

“[Intervenor] proposes to orient the buildings to an interior parking area. Access to the development would be from Bradford Street. The development would be linked by sidewalks from the building

1 entryways, through the parking area, and a 5-foot sidewalk along the
2 north side of Bradford Street to the existing sidewalk on US HWY
3 101. No access is proposed from Williams Avenue.” Record 27.

4 The subject property is zoned Retail Commercial (C-1) and intervenor
5 requested variances to various C-1 development standards. As shown in the aerial
6 photograph provided below, the subject property is heavily vegetated with stands
7 of mature trees, dense shrubs and brush.



8 Figure 1 - Project Vicinity Map

Record 438.

9 It is also “marked by a rock outcrop [along the Hwy 101 frontage] that ranges in
10 height from a few feet up to approximately 8 feet.” Record 11. The requested
11 variances included but were not limited to relief from requirements to provide a
12 useable public space with pedestrian amenities along the subject property’s Hwy
13 101 frontage, including an eight-foot-wide sidewalk adjacent to Hwy 101, and to
14 orient the building main entrances toward Hwy 101.¹ Depoe Bay Zoning
15 Ordinance (DBZO) 3.115(3)(B)(2), 3.115(8)(A), 3.115(5).

¹ For example, the city council also approved a variance to a requirement that a sidewalk be provided along Williams Avenue, but the assignments of error in this appeal do not challenge that variance.

1 On October 13, 2021, and November 10, 2021, the planning commission
2 held public hearings on intervenor's variance application. On November 24,
3 2021, the planning commission approved the application. On December 9, 2021,
4 petitioner, a member of the city council, appealed the planning commission
5 decision and recused themselves from the city council's appeal proceedings.

6 On January 31, 2022, the city council held a hearing on the appeal. The
7 city council continued deliberations until February 7, 2022. On March 1, 2022,
8 the city council denied the appeal and approved the application.

9 This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 DBZO 8.010 provides, in part, that variances to the requirements of the
12 zoning ordinance may be authorized "where it can be shown that, owing to
13 special and unusual circumstances related to a specific piece of property, strict
14 application of the ordinance would cause an undue or unnecessary hardship." A
15 variance may only be granted if each of the following criteria are met:

16 "1. Exceptional or extraordinary circumstances apply to the
17 property which do not apply generally to other properties in the same
18 zone or vicinity, and result from lot size or shape, legally existing
19 prior to the date of this ordinance, or other circumstances over which
20 applicant has no control.

21 "2. The variance is necessary for the preservation of a property
22 right of the applicant substantially the same as owners of other
23 property in the same zone or vicinity possess.

24 "3. The variance would not be materially detrimental to the
25 purposes of this ordinance or to property in the zone or vicinity in

1 which the property is located, or otherwise conflict with the
2 objective of any city plan or policy.

3 “4. The hardship is not self-imposed and the variance requested
4 is the minimum variance which would alleviate the hardship.

5 “5. The hardship asserted as a basis for the variance does not arise
6 from a violation of the Zoning Ordinance.” DBZO 8.020.

7 DBZO 3.115(3)(B)(2) provides that within the C-1 zone, along Hwy 101,

8 “[A] usable public space with pedestrian amenities (e.g., plaza,
9 pocket park, managed landscaping, outdoor dining area or town
10 square with seating) shall be provided in the entire area between the
11 building and front property line.”

12 DBZO 3.115(8)(A) provides:

13 “Pedestrian sidewalks shall be provided on all street sides of
14 buildings, parking areas, etc. in the entire C-1 zoned area. These
15 sidewalks shall have a minimum 8 foot width along Highway 101,
16 and minimum 5 foot width elsewhere. Sidewalks shall be concrete
17 with a city-approved surface material that is consistent with adjacent
18 and nearby sidewalks. All sidewalks shall be ADA compliant to
19 meet current laws.”

20 The city adopted these pedestrian-friendly criteria in 2019.

21 Petitioner’s first assignment of error is that the city council made
22 inadequate findings not supported by substantial evidence when approving
23 variances for these sidewalk and public amenities requirements.

24 **A. First and Sixth Subassignments of Error**

25 “Total development would have 200’ of frontage on US HWY 101, 201’
26 along Bradford Street, 100’ along Williams Ave., and 202’ along Berg Street

1 (city street platted but not existing).” Record 9. The city council found in part,
2 that

3 “[c]urrent conditions include a 5-foot +/- sidewalk, slot drain at the
4 base of the rock outcropping, parallel parking, and curb bulb outs at
5 the intersection of US HWY 101 and Bradford Street. The rock
6 outcropping is immediately to the east of the sidewalk. The edge of
7 the highway right-of-way is approximately 5 feet to the east of the
8 sidewalk. Any pedestrian amenities at this location would require
9 removal of a portion of the rock outcropping to the east.” Record 22.

10 The city council granted intervenor a variance to DBZO 3.115(3)(B)(2)’s
11 requirement that intervenor provide “a usable public space with pedestrian
12 amenities (e.g., plaza, pocket park, managed landscaping, outdoor dining area or
13 town square with seating) * * * in the entire area between the building and front
14 property line,” in this case Hwy 101. The city council also granted intervenor a
15 variance to DBZO 3.115(8)(A)’s requirement that an eight-foot-wide sidewalk
16 be provided along the property’s Hwy 101 frontage. The city council’s findings
17 in support of the variances include “The applicant has stated that removal of the
18 rock outcropping would be cost prohibitive to the development and would create
19 significant disturbance to adjacent properties.”² Record 22. The city council also
20 found “The west property line consists of a vertical rock wall that varies in height
21 from a few feet up to 8 feet. Providing access over/through the rock could be
22 challenging and cost prohibitive.” Record 24.

² The city council repeats the statement that the applicant said the removal is cost prohibitive in its decision. *See, e.g.,* Record 25.

1 Petitioner’s first and sixth subassignments of error are that the city
2 council’s findings, that the cost of removing the rock outcropping and the
3 attendant disturbance of adjacent properties while the removal occurred (1)
4 constitute “[e]xceptional or extraordinary circumstances appl[icable] to the
5 property * * * over which applicant has no control”; and (2) that the approved
6 variance is the minimum required, are not supported by substantial evidence.³
7 DBZO 8.020(1), (4); Petition for Review 14-15, 31. We agree.

8 We will remand a decision not supported by substantial evidence in the
9 whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence a
10 reasonable person would rely upon to reach a decision. *Dodd v. Hood River*
11 *County*, 317 Or 172, 179, 855 P2d 608 (1993). Again, the city council found
12 “[t]he applicant has stated that removal of the rock outcropping would be cost
13 prohibitive to the development and would be significant disturbance to adjacent
14 properties.” Record 22. Petitioner argues:

15 “The applicant has not provided any analysis, study, or other means

³ The city council identified as exceptional or extraordinary circumstances applicable to the subject property the fact that

“A large rock outcropping exists across the properties along US HWY 101. The west property line consists of a vertical rock that varies in height from a few feet up to 8 feet.

“In addition, the Oregon Department of Transportation (ODOT) has a slope easement on the first ten feet of the properties along US HWY 101.” Record 22.

1 by which to base a finding that removal of all or some of the rock
2 would be cost-prohibitive. The record does not contain an estimate
3 of the cost of removal as compared to the anticipated return on the
4 applicant's investment or something similar. Simply put, there is
5 nothing – except for the applicant's bare allegation – to support a
6 finding that the removing the rock would be cost prohibitive.

7 “The same is true for alleged ‘disturbance.’ While one individual
8 indicated that disturbance was a concern (‘I am concerned with the
9 level of construction noise is that will take place that could disturb
10 our tenants.’ Record 154), that same individual noted that “I went to
11 the website for the City of Depoe Bay and were [*sic*] unable to find
12 any impact studies or additional information about this proposal.
13 Record 154; Record 385 (‘Unfortunately, the applicant did not
14 provide a geological survey as requested by the Commissioners at
15 their October meeting.’).” Petition for Review 14-15 (footnotes
16 omitted).

17 We agree with petitioner that the city council did not identify evidence other than
18 assertions by intervenor's representatives supporting the findings that removal of
19 the rock outcropping was cost prohibitive or evidence detailing the removal-
20 related disturbance. Petitioner directs us to an assertion in intervenor's architect-
21 prepared application narrative stating:

22 “No new sidewalks are proposed in the development due to the
23 aforementioned geological and topographical constraints of the
24 project site. There is currently an existing sidewalk along the Hwy
25 101 frontage that appears to be approximately 5 feet wide.
26 Increasing the stated design standard width to 8 feet would be
27 extremely difficult if not impossible and *in addition would render*
28 *the property undevelopable due to the cost of removing the tall,*
29 *natural rock wall formation that spans the project site frontage.* This
30 natural rock wall formation also stretches beyond the project site to
31 the North in front of the Travelodge Hotel, where currently it
32 appears the same existing approximate 5 foot wide sidewalk
33 extends. On NE Bradford Street, the existing slope is steep and not

1 feasible and prevents the development of an ADA compliant
2 sidewalk. NE Berg Street to the North is not developed and does not
3 connect with Hwy 101 but ends short of the top of the vertical rock
4 wall above Hwy 101. Williams Avenue to the East does not have
5 sidewalks in front of the adjacent neighboring properties but instead
6 has a tall retaining wall to support the street because of the steep
7 downward slope and therefore does not connect with NE Bradford
8 Street.” Record 661 (emphasis added).

9 Intervenor did not file an intervenor’s response brief. The city filed a
10 response brief but did not provide citations to evidence in the record supporting
11 the city council’s findings.

12 Planning Commission meeting minutes include the following recounting
13 of the developer’s testimony:

14 “Mark Lisac introduced his partner on the project, Ronnie Wilson.
15 Testimony included: (1) He developed property on Williams
16 Avenue – They are contractors; (2) He is requesting a decision from
17 the Planning Commission before moving forward with the
18 additional costs associated with a geological engineer, traffic study,
19 etc.; (3) Removal of the natural rock wall may be cost-prohibitive or
20 not feasible[.]

21 “* * * * *

22 “Lisac stated they need to know this is a developable property that
23 does not require the costly removal of a 250’ long rock wall [.]”
24 Record 528.

25 The October 13, 2021 staff report appears to accept intervenor’s
26 representations on their face, concluding:

27 “No new sidewalks are proposed in the development due to the
28 aforementioned geological and topographical constraints of the
29 project site. There is currently an existing sidewalk along the Hwy
30 101 frontage that appears to be approximately 5 feet wide.

1 Increasing the stated design standard width to 8 feet would be
2 extremely difficult if not impossible and in addition would render
3 the property undevelopable due to the cost of removing the tall,
4 natural rock wall formation that spans the project site frontage.”
5 Record 587.

6 The October 13, 2021 staff report summary of “Public Agency Comments”
7 includes

8 “a. The Oregon Department of Transportation (ODOT) provided
9 comments through emails and conversations with the applicant and
10 the City Planner.

11 ODOT does not typically require sidewalk improvements along
12 state highways unless the local jurisdiction requires improvements.
13 If so, then ODOT’s design, permitting, and construction
14 requirements are triggered. The DBZO, through the City’s 2017
15 Transportation System Plan, requires 8-foot sidewalks along US
16 HWY 101. Current conditions include a 4’ sidewalk, parallel
17 parking, and curb bulb outs at intersections. The rock outcropping is
18 immediately to the east of the sidewalk. An 8-foot sidewalk at this
19 location would require removal of the rock outcropping 4’ to the
20 east, or widening the sidewalk 4’ to the west which would remove 8
21 to 10 existing parking spots. *The first option could be extremely*
22 *disruptive to the surrounding community as well as being cost*
23 *prohibitive.* Reducing existing parking along HWY 101 is not an
24 option since parking is in such high demand and low supply along
25 this section of the highway and the City’s main downtown area.”
26 Record 590 (emphasis added).

27 Review of an ODOT email in the record shows ODOT does not opine on cost or
28 disruption associated with removal of the rock outcropping. Record 687-88.
29 Rather, the ODOT representative relays intervenor’s partner’s concern that
30 removing the rock outcropping would be costly.

1 Planning commission deliberations included whether to require “a cost
2 analysis and geological study to remove the rock wall and to construct an eight
3 feet wide sidewalk, install benches and a retaining wall at least the height of the
4 existing rock while maintaining the proposed building heights” but it appears no
5 studies were ultimately provided or required. Record 378-79. The intervenor
6 developer and their architect may well have expertise on costs and project
7 profitability. However, whether an act is “cost prohibitive” is necessarily context
8 driven and we have not been directed to any contextual evidence.⁴ The city
9 council did not rely upon substantial evidence that the cost is an exceptional or
10 extraordinary circumstance as required by the code where that information, that
11 is, why the cost of removal is such that development profits cannot support it,
12 was not shared with the city. Disturbance related to the removal of the rock
13 outcropping is similarly unquantified and unsupported by substantial evidence.

14 Petitioner submitted photographs showing that rock outcroppings had been
15 removed from nearby commercial properties at the time they developed, stating
16 “After I moved here in 1990, the basalt walls fronting Depoe Bay were jack

⁴ Petitioner does not argue that cost of removing the rock outcropping cannot constitute “an exceptional or extraordinary circumstance” that could support a variance under DBZO 8.020(1). Accordingly, we express no opinion on that matter. Petitioner observes generally that the Court of Appeals has concluded that evidence that a property owner could use their land more profitably if a variance were granted “would be insufficient to establish a practical difficulty warranting a variance.” *Lovell v. Planning Commission of Independence*, 37 Or App 3, 7, 586 P2d 99 (1978); Petition for Review 22.

1 hammered away to allow the development we see now with the frontages on Hwy
2 101,” including “the whole block for Larissa Plaza * * * and later for the Nash
3 Building * * * and the building to the north[.]” Record 554-556. Petitioner also
4 testified “other property owners have removed the rock to create a contiguous,
5 vibrant neighborhood feel to the downtown commercial area” and that other
6 individuals have indicated how long excavation of bedrock would take. Record
7 385.

8 Given that there is evidence in the record that development of other
9 commercial properties in the same zone and vicinity included rock outcropping
10 removal, we agree with petitioner that intervenor’s unsupported assertion that
11 removal is cost prohibitive and unduly disruptive is not substantial evidence, that
12 is evidence a reasonable person would rely upon to reach a decision. The city
13 council’s finding that this constituted an exceptional or extraordinary
14 circumstance is not supported by substantial evidence.

15 The first subassignment of error is sustained.

16 DBZO 8.020(4) requires that the city council determine that “[t]he
17 hardship is not self-imposed and the variance requested is the minimum variance
18 which would alleviate the hardship.” The city council found that the rock
19 outcropping is a naturally occurring feature and

20 “[g]iven the above circumstances, the existing walkability of the
21 area, and the nature of the development (tourist accommodations
22 without retail), a landscaped strip as described in Section
23 3.1115(8)(B)(4), along with the pedestrian amenities at the corner

1 of US HWY 101 and NE Bradford Street as proposed in item 3
2 above, would be more appropriate to the proposed development.

3 “The City Council finds the hardship is not self-imposed and the
4 variances requested are the minimum to alleviate the hardship.”
5 Record 23 (boldface omitted).

6 Petitioner’s sixth subassignment of error is that the city council findings
7 that the variances requested are the minimum to alleviate the hardship are
8 inadequate and not supported by substantial evidence because they do not address
9 whether removal of a portion, rather than all, of the rock outcropping and
10 placement of pedestrian amenities in a more limited area along Hwy 101 would
11 address petitioner’s assertions that removal of rock outcropping is cost
12 prohibitive. Adequate findings “(1) identify the relevant approval standards, (2)
13 set out the facts which are believed and relied upon, and (3) explain how those
14 facts lead to the decision on compliance with the approval standards.” *Heiller v.*
15 *Josephine County*, 23 Or LUBA 551, 556 (1992). Adequate findings address and
16 respond to specific issues raised concerning compliance with approval standards.
17 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853 (1979). As we explained in
18 our resolution of the first subassignment of error, there is not evidence in the
19 record of the cost of rock outcropping removal and its relationship to
20 development costs. There is evidence in the record that the height of the rock
21 outcropping varies along the property frontage. Petitioner’s query as to whether
22 the alleged prohibitive cost of rock outcropping removal could be remedied by
23 removal of a portion of the rock outcropping and amenities placed in that more

1 limited area are not addressed in the findings. We agree with petitioner that the
2 findings are conclusory and inadequate. The findings do not address whether
3 removal of less than all of the rock outcropping is an option and therefore do not
4 resolve whether the approved variance is the minimum required. Petition for
5 Review 31.

6 The sixth subassignment of error is sustained.

7 **B. Second Subassignment of Error**

8 The city council found “[t]he ODOT slope easement prohibits placement
9 of any permanent structures within the first ten feet of the property. Because of
10 the height of the rock wall, safety measures/structures such as railings would be
11 required.” Record 22. Petitioner’s second subassignment of error is that the city
12 council’s findings that the ODOT slope easement precludes placement of
13 pedestrian amenities within it is inadequate. Petition for Review 20. We agree.

14 The slope easement grants to ODOT

15 “the perpetual right and easement to construct, maintain, repair and
16 have free access to all slopes of cuts or fills upon the property of the
17 grantor, for a distance of 10 feet, outside of and adjoining on the
18 East the property herein conveyed, occasioned by or resulting from
19 the construction, operation or maintenance of a public highway and
20 its appurtenances.” Record 627.

21 Petitioner testified in the proceedings below that other properties encumbered by
22 an ODOT slope easement have pedestrian amenities within the easement. Record
23 315, 407. The findings do not explain how the evidence in the whole record leads
24 to the conclusion that placement of pedestrian improvements within this slope

1 easement is prohibited, where such amenities have been provided in nearby
2 ODOT slope easements.

3 The second subassignment of error is sustained.

4 **C. Third Subassignment of Error**

5 Petitioner's third subassignment of error is that the city council's findings
6 that the rock outcropping and slope easement constitute exceptional or
7 extraordinary conditions unique to the property are inadequate because they fail
8 to explain how conditions shared by other properties are nonetheless exceptional
9 or extraordinary conditions supporting variances. Petition for Review 24. The
10 city council confirmed that other properties historically had a rock outcropping,
11 stating:

12 "The ODOT slope easement and rock outcropping could be
13 considered exceptional circumstances that do not generally apply to
14 other properties in the same zone with the exception of the properties
15 immediately to the north. These properties do not currently have
16 pedestrian amenities. *Properties to the south, as presented through*
17 *anecdotal evidence and historic photographs, had varying degrees*
18 *of rock outcropping prior to development.* The properties to the
19 south are primarily commercial, i.e. retail/souvenir stores and
20 restaurants. With the exception of driveways, alleyways, and other
21 vehicle access, the DBZO does not require final grade of structures
22 be the same as adjacent existing public-right of way. It can be
23 surmised that properties to the south wanted to be at street level
24 based on their use and removed the rock outcropping as part of their
25 development and not because of a DBZO requirement." Record 22
26 (emphasis added).

1 Petitioner also posits that other properties in the area have pedestrian amenities
2 within an ODOT slope easement area and that the findings do not explain how a
3 common slope easement creates an exceptional or extraordinary condition.

4 We agree with petitioner that the findings are inadequate. The findings do
5 not explain how the evidence that properties to the south removed rock
6 outcropping at the time of development relates to the conclusion that the rock
7 outcropping is an exceptional or extraordinary circumstance not generally
8 applicable to properties in the area. The findings also do not explain why
9 evidence that the rock cropping to the north was not removed at the time the motel
10 developed leads to the conclusion that the rock outcropping is an extraordinary
11 or exceptional condition not generally applicable to properties in the area. Lastly,
12 the findings do not address the testimony that other property owners have placed
13 pedestrian amenities within an ODOT slope easement or explain why that does
14 not lead to the conclusion that intervenor may do so. For these reasons, we agree
15 with petitioner that the findings do not explain how the evidence leads to the
16 conclusion that the standard is met and are inadequate.

17 Petitioner also argues that the city council misconstrued its variance
18 standard because these regulations “did not apply at the time [of the prior]
19 developments, and, therefore, it is legal error to rely on properties that pre-date
20 [these regulations] because that development was not subject to the same
21 standards.” Petition for Review 24. Petitioner’s stated legal proposition is very

1 broad. Petitioner does not develop its argument and we will not develop it for
2 them. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

3 The third subassignment of error is sustained, in part.

4 **D. Fourth Subassignment of Error**

5 Pursuant to DBZO 8.020(2), the variance must be “necessary for the
6 preservation of a property right of the applicant substantially the same as owners
7 of other property in the same zone or vicinity possess.” Petitioner’s fourth
8 subassignment of error is that the city council made inadequate findings that the
9 variance is necessary to preserve a property right. Petition for Review 27.

10 The city council found:

11 “Geological challenges similar to those of this proposed
12 development exist to the properties to the north. Those properties,
13 e.g. Travelodge, have developed without additional pedestrian
14 amenities along US HWY 101.

15 “Given the challenges presented by the circumstances described in
16 item 1 above, providing additional pedestrian amenities along US
17 HWY 101 is logistically difficult and would prevent the applicant
18 from developing the properties.” Record 23.

19 Although the city council findings do not expressly identify the property
20 right that the city council found the variance necessary to preserve, the city
21 council appears to have found that there is a property right to develop in the same
22 manner as the motel development to the north of the subject property. We agree
23 with petitioner that the motel and other area development forms illustrate that
24 when the zoning ordinance did not require removal of the rock outcropping to

1 provide pedestrian amenities, some developers chose to remove the wall and
2 provide amenities and others did not. We agree with petitioner that an existing
3 development's inconsistency with current design standards, without more, is not
4 substantial evidence of infringement on a property right.

5 When considering a variance in *Lovell v. Planning Commission of*
6 *Independence*, the Court of Appeals concluded the local land use regulations

7 “apply equally to all properties located in those areas designated for
8 future urban growth and do not arise out of conditions inherent in
9 the land. If the city believes that its current zoning ordinances
10 impede the accomplishment of goals deemed important to its
11 citizens' welfare, the proper 'remedy lies in amending the zoning
12 ordinance not in granting a variance.' * * * As to finding 1.c., if the
13 city believes the lot size that would be left after the proposed
14 partitioning is sufficient for its R-1 residential areas, then it should
15 change its zoning restrictions to reflect that belief. Variances should
16 not be employed as a substitute for the normal legislative process of
17 amending zoning regulations.” 37 Or App at 6-7.

18 Adopted in 2019, the C-1 regulations require that,

19 “Along Highway 101 frontage, landscaping, building setbacks, and
20 other pedestrian amenities [that] sustain the feel of a small
21 community located between two Oregon State parks and vegetated
22 corridors. These amenities *will distinguish* Depoe Bay from many
23 cities and towns that have arterial development dominated by
24 pavement, parking lots and stark building facades immediately
25 adjacent to narrow sidewalks.” DBZO 3.115(2)(C) (emphasis
26 added).

27 By adopting these regulations, the city council concluded that the regulations
28 reflect the desired design of *future* development and the findings do not explain
29 the relevance of the design of *past* development. The findings do not explain what

1 constitutes a property right protected by this provision or why the fact that a motel
2 built before the city adopted its current design regulations has not removed the
3 adjacent rock outcropping and does not have an eight-foot-wide sidewalk or
4 pedestrian amenities along Hwy 101 reflects a property right to which intervenor
5 is entitled. If the city council determines that developments of the type proposed
6 by intervenor should be subject to different development standards than other
7 types of commercial development, amendment of the zoning code is the
8 appropriate recourse.

9 The fourth subassignment of error is sustained.

10 **E. Fifth Subassignment of Error**

11 DBZO 8.020(3) requires a finding that “[t]he variance would not be
12 materially detrimental to the purposes of this ordinance or to property in the zone
13 or vicinity in which the property is located, or otherwise conflict with the
14 objective of any City plan or policy.” Petitioner’s fifth subassignment of error is
15 that the city council adopted inadequate findings when concluding that this
16 standard is met because the findings did not respond to petitioner’s arguments
17 that the variances are inconsistent with the objectives of C-1 regulations and
18 establish a precedent of approving development inconsistent with current
19 regulations. Petition for Review 29-30.

20 The city council found:

21 “Since one of the intents of DBZO 3.115 is to encourage walking,
22 not providing or improving pedestrian amenities could conflict with
23 the City’s code.

1 “However, since there is an existing sidewalk along US HWY 101,
2 this area is already considered ‘walkable.’ Given the challenges
3 presented by the circumstances described in item 1 above, providing
4 additional pedestrian amenities along US HWY 101 is logistically
5 difficult. The City Council finds that not improving the existing
6 sidewalk along US HWY 101 would not conflict with the objectives
7 of any City plan or policy, on the condition that the lack of
8 improvements to the sidewalk and pedestrian amenities along US
9 HWY 101 is offset by pedestrian amenities at the corner of US
10 HWY 101 and NE Bradford Street as depicted in the artist rendering
11 on page 6 above, with the plans for the pedestrian amenities to be
12 approved by the Depoe Bay Public Works Director.” Record 23
13 (boldface omitted).

14 DBZO 3.115(2) provides in part

15 “A. In the Commercial Zone C-1 on arterials (specifically Hwy.
16 101), these commercial guidelines help create a vibrant pedestrian
17 environment by slowing traffic down, providing a storefront
18 business friendly character to the street, and especially by
19 encouraging walking for the enjoyment of residents and visitors. To
20 create a social and approachable ‘streetscape’ the setback standards
21 are flexible to encourage public spaces between sidewalks and
22 building entrances (e.g., extra-wide sidewalks, plazas, squares,
23 outdoor dining areas, and pocket parks). The addition of these
24 pedestrian amenities serves as informal gathering places for
25 socializing, resting, and enhanced enjoyment of the Depoe Bay
26 commercial district.

27 “B. The standards encourage the formation of solid blocks of
28 commercial and mixed-use buildings for individual walkable
29 districts that are tied to the overall business district.”

30 The city argues that

31 “[e]ach of the variances were only agreed to by the City Council
32 with additional conditions intended to make the properties better
33 conform to the ‘vibrant pedestrian environment’ requirements of
34 DBZO 3.115. There is already a walkable sidewalk along HWY 101

1 and the lack of pedestrian amenities along HWY 101 will be offset
2 by additional pedestrian amenities at the corner of HWY 101 and
3 NE Bradford Street.” Respondent’s Brief 7; *see also* Respondent’s
4 Brief 8.

5 Although the city does not cite a finding corresponding to its argument, one
6 exists. Petitioner does not address the city council finding that the variance does
7 not conflict with *any plan or policy* because it is “offset by pedestrian amenities
8 at the corner of US HWY 101 and NE Bradford Street as depicted in the artist
9 rendering on page 6 above, with the plans for the pedestrian amenities to be
10 approved by the Depoe Bay Public Works Director.” Record 23. Where a party
11 does not challenge responsive findings, that party does not establish a basis for
12 reversal or remand. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 603
13 (2000). We will not address this subassignment of error further.

14 The fifth subassignment of error is denied.

15 The first assignment of error is sustained in part.

16 **SECOND ASSIGNMENT OF ERROR**

17 DBZO 3.115(5) requires that “Buildings shall have their primary
18 entrance(s) oriented to (facing) Hwy 101, except as noted below; [exceptions to
19 orientation requirement].” The city council granted intervenor a variance
20 allowing primary entrances to the buildings along Hwy 101 to face inward,
21 toward the parking area. The city council findings that the variance criteria are
22 met rely upon the presence of the ODOT slope easement and the prohibitive cost
23 of removing the rock outcropping. For example, the city council found that
24 “[p]roviding access over/through the rock could be challenging and cost

1 prohibitive. The ODOT slope easement prohibits placement of any permanent
2 structures within the first ten feet of the property. Because of the height of the
3 rock wall, safety measures/structures such as railings would be required.” Record
4 24. The city council findings also rely on the fact that the motel to the north
5 developed orienting away from Hwy 101. Record 25.

6 Petitioner’s second assignment of error is that the city council’s findings
7 are inadequate and are not based on substantial evidence as it relates to the
8 requested variance to standards requiring the western orientation of the buildings.
9 Petitioner incorporates the arguments from its first assignment of error and its
10 subassignments by reference. Petition for Review 35.

11 Similar to its fifth subassignment of error under the first assignment,
12 petitioner does not address the finding that the variance will not be detrimental
13 to the purposes of the ordinance because

14 “the lack of direct access to US HWY 101 is offset by the applicant
15 providing a pathway or sidewalk in front of all the buildings along
16 US HWY 101 that connects the buildings along US HWY 101 to
17 each other and also connects to a sidewalk, pathway or stairs that
18 descend from said pathway or sidewalk in front of the buildings
19 along US HWY 101 to NE Bradford Street near the corner of NE
20 Bradford and US HWY 101”

21 and we deny the assignment of error as it relates to this criterion. Record 25
22 (boldface omitted).

1 For the reasons set forth in the remainder of our resolution of the first
2 assignment of error, the city council’s findings are inadequate and not supported
3 by substantial evidence.

4 The second assignment of error is sustained, in part.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioner’s third assignment of error is that the city council’s findings as
7 they relate to access on the property are inadequate. The assignment of error is
8 not the model of clarity but appears at its core to be that intervenor’s project
9 design does not meet standards applicable to the parking lot access and the
10 parking lot design.

11 The city responds that four variances were approved and that the city
12 council’s decision

13 “specifically provides that the proposed development shall meet all
14 other DBZO Retail Commercial Zone C-1 Standards. * * *
15 Petitioner discuss roads, driveways, parking areas, handicap spots,
16 and turn arounds but the City granted no variances with regard to
17 any of these and as noted above, the order specifically requires that
18 the proposed development shall meet all other DBZO Retail
19 Commercial zone C-1 Standards.”⁵ Respondent’s Brief 9.

⁵ Condition of Approval 4 is: “Except for the variances identified in Condition of Approval #2 above, the proposed development shall meet all other DBZO Retail Commercial C-1 Standards.” Record 30-31.

1 Neither party directs us to findings of consistency of the driveways and
2 parking lots with applicable standards. Petitioner’s third assignment of error
3 maintains that it was not made clear in the proceedings below whether the access
4 being provided by the intervenor was subject to street, driveway, and/or parking
5 area standards. We will affirm certain local government interpretations, unless
6 we determine that “[A] local government fails to interpret a provision of its
7 comprehensive plan or land use regulations, or if such interpretation is inadequate
8 for review, the board may make its own determination of whether the local
9 government decision is correct.” ORS 197.829(2). Because we are sustaining
10 portions of the first and second assignment of error, we will not interpret the
11 city’s street, driveway, and parking lot regulations in the first instance. On
12 remand, the city council findings are required to address petitioner’s argument
13 that the proposal does not meet applicable parking and access standards.

14 The third assignment of error is sustained.

15 The decision is remanded.