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

DALE HURST and HRP, LLC,
Petitioners,

vs.

CITY OF ROGUE RIVER,
Respondent.

LUBA No. 2021-115

FINAL OPINION
AND ORDER

Appeal from City of Rogue River.

E. Michael Connors filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Christopher P. Koback and Hathaway Larson LLP.

Michael W. Franell filed the response brief on behalf of respondent.

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

REMANDED 09/01/2022

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a city council decision revoking a conditional use permit.

FACTS

Petitioners' 4.98-acre property is split zoned Commercial (C-1) on the southern approximately one-half and Residential High Density (R-2) on the northern approximately one-half. The property is bounded on the north and west by Wards Creek. Properties to the east of petitioners' property are zoned R-2 and are developed with residences. Properties to the north, across Wards Creek, are zoned Residential Single Family (R-1), and properties to the west are zoned Public/Open Space and R-2. The subject property is accessed from Main Street on the south.

Petitioners operate convenience stores throughout the state with one of petitioners' convenience stores, Lil' Pantry, located on the subject property.[1] In 2016, the city approved a conditional use permit and site design review (together, the 2016 CUP) for a warehouse to the north of the convenience store, for ice production, storage, and distribution to petitioners' network of convenience

[1] A Shell service station is also located on the C-1 zoned portion of the subject property, to the south of the convenience store.

stores. Record 347-49. The CUP included 14 conditions.[2] In 2019, petitioners sought and received approval of their mechanical plan and their site plan.[3] Record 303, 305. Petitioners subsequently paid the city system development charges and other fees totaling approximately $192,000, received building permits to construct the warehouse, and in March 2020 received a certificate of occupancy for the warehouse. Record 302-305, 505-506, 600. Thereafter, petitioners began using the warehouse for producing, storing and distributing ice.

Sometime in October 2020 the city contacted petitioners with concerns about weeds on petitioners' property, maintenance of the riparian area, grease interceptors, and noise.[4] Sometime after that contact, the city sent petitioners a letter that is undated that asserted violations of the CUP conditions of approval. Record 433-34. In November 2020, petitioners responded to the undated letter by sending an email to the city that summarized petitioners' responses to the

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[2] In 2018, the city approved a modification to the CUP to increase the size of the warehouse and locate it to the south of the approved location. Record 145-46.

[3] In three separate orders, dated March 7, 2022, June 1, 2022, and again on August 2, 2022 after oral argument was held without the participation of the city, we ordered the city to provide LUBA with more legible copies of Record 303 to 305. The city did not comply with any of our orders, and has not transmitted more legible copies of Record 303 to 305. Accordingly, we assume for purposes of this opinion that petitioners' description of Record 303 to 305 is accurate.

[4] Petitioners do not explain the method of contact and the record does not reflect the method of contact.

concerns, and planned actions in response to the alleged violations. Record 435-36.

On July 14, 2021, city staff notified petitioners in writing that the city staff planned to recommend that the planning commission revoke the 2016 CUP and require the ice warehouse to cease operating. Record 437-38. The city then provided notice of a public hearing on the proposed revocation scheduled for August 10, 2021 before the planning commission. Record 603. On that date, the planning commission held a public hearing on the city's proposal to revoke the 2016 CUP. Petitioners and the city presented evidence and testimony regarding the proposed revocation and the city's planning staff recommended that the planning commission revoke the 2016 CUP. At the conclusion, the planning commission voted to revoke the 2016 CUP.

Petitioners appealed the planning commission's decision to the city council. The city council held three hearings, on September 9, 2021, October 14, 2021, and October 28, 2021, on the proposed revocation, at which petitioners submitted evidence and testimony regarding compliance with the conditions of the 2016 CUP and to address the alleged violations. At its meeting on November 4, 2021, the city council voted to revoke the CUP, and at its subsequent meeting voted to adopt a written decision revoking the CUP. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Rogue River Municipal Code (RRMC) 8.05, entitled "Nuisances," provides enforcement procedures to address violations of the RRMC for "loud,

disturbing or unnecessary noise," property maintenance issues, and other nuisances. RRMC 8.05.230; RRMC 8.05.310. Such violations may be remedied by the city through inspections, fines, and abatement remedies. In addition, RRMC 17.130, part of the city's zoning code, provides for code enforcement procedures resulting in fines, abatement, and court-ordered relief. Finally, RRMC 17.100.110 provides the standards and criteria for a proceeding to revoke a previously issued conditional use permit.

Petitioners' first assignment of error is that the city committed a procedural error that prejudiced their substantial rights when it failed to follow the procedures in RRMC 8.05 to address alleged violations and instead followed the procedures in RRMC 17.100.110 to revoke the 2016 CUP. According to petitioners, "[t]he city typically uses these code enforcement procedures to address these types of operational or maintenance concerns to ensure the noncompliant situation is corrected." Petition for Review 9 (citing Record 151). We understand petitioners to argue that the city was required to use the enforcement procedures in RRMC 8.05 and/or RRMC 17.130 and failed to do so. This failure, it is argued, prejudiced petitioners' substantial right to a legitimate opportunity to correct any violations of the RRMC and to have more limited consequences for such a violation through fines and abatement. ORS 197.835(9)(a)(B).

The city responds, and we agree, that petitioners have not established that the city was required to follow the procedures in RRMC 8.05 or RRMC 17.130

in order to remedy alleged noncompliance with the 2016 CUP conditions. While that may have been petitioners' preferred course of action in order to allow petitioners to have the opportunity to correct any alleged violations of the 2016 CUP's conditions, petitioners have not demonstrated that the city committed a procedural error in conducting proceedings to revoke the 2016 CUP pursuant to RRMC 17.100.110, rather than bringing an enforcement proceeding under RRMC 8.05 and/or RRMC 17.130.[5]

Petitioners also argue that the city was required and failed to adopt findings explaining why it failed to follow RRMC 8.05 and/or RRMC 17.130. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979) (findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below). However, given that we conclude that RRMC 8.05 and RRMC 17.130 are not approval standards in a CUP revocation proceeding or otherwise relevant to the city's decision, we reject petitioners' argument that the city was required to adopt findings explaining why it did not pursue remedies under the enforcement procedures set out in RRMC 8.05 and/or RRMC 17.130.

The first assignment of error is denied.

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[5] However, as we explain in our resolution of the fourth assignment of error, the city appears to have in some instances conflated alleged violations of the conditions of the 2016 CUP with alleged violations of provisions of the city's zoning code at RRMC Chapter 17. The appropriate remedy for alleged violations of RRMC Chapter 17 is set out in RRMC 17.130.

SECOND ASSIGNMENT OF ERROR

A. Introduction

RRMC 18.05 governs hearing procedures for all public hearings "relating to * * * conditional use permits[.]" RRMC 18.05.010. RRMC 18.05.050(A) provides that "[t]he burden of proof is on the proponent. The more drastic the change or the greater the proposal or the greater the impact of the proposal in an area, the greater is the burden upon the proponent."

B. Assignment of Error

In their second assignment of error, petitioners argue that the city committed a procedural error that prejudiced their substantial rights when it improperly shifted the burden of proof to petitioners to prove compliance with the conditions, where, rather, the city was required to prove noncompliance. ORS 197.835(9)(a)(B) (LUBA may remand where the local government "[f]ailed to follow the procedures applicable to the matter before it" and the failure prejudiced the substantial rights of the petitioner). Moreover, petitioners argue, given the great impact of the proposed revocation, which if it occurred would require petitioners to cease operating after investing several million dollars in developing the warehouse, the city failed to apply the heightened burden set out in the second sentence of RRMC 18.05.050(A). Relatedly, petitioners argue, the city was required and failed to adopt findings addressing the heightened burden of proof and to explain what is required under that heightened burden.

The city does not provide a meaningful response to petitioners' argument except to respond that the city properly provided petitioners with the opportunity to demonstrate that they were complying with the 2016 CUP conditions. Response Brief 8. The city's response appears to us to concede that the city placed the burden of proof on petitioners, who were not the proponents of the revocation proceeding. The city council's decision refers to petitioners throughout as the "applicant," and we agree with petitioners that the city approached the revocation proceeding from the wrong direction by requiring petitioners to prove that the conditions have not been violated. The city was the applicant for the revocation throughout the entire proceeding, even after the planning commission's decision, and the city was required to prove petitioners' noncompliance to the city council. *Andrews v. City of Prineville*, 28 Or LUBA 653, 658-59 (1995) (the city council may not, in its review of a planning commission decision, shift the burden of proof concerning compliance with approval standards to the local appellants; the burden of proof remains with the applicant even on appeal). Accordingly, we agree with petitioners that the city council committed a procedural error that prejudiced their substantial rights, to require the city to establish that revocation was warranted, when it placed the burden of proof on petitioners to prove compliance with the 2016 CUP conditions, rather than on the city to prove noncompliance with the conditions.

We also agree with petitioners that given the consequences of revocation, the heightened burden described in the second sentence of RRMC 18.05.050(A)

applies to the revocation proceeding. On remand, the city council should place the burden of proof on the city to demonstrate noncompliance through evidence of noncompliance with the conditions, and should explain what is required under the heightened burden of proof described in the second sentence of RRMC 18.05.050(A).

The second assignment of error is sustained.

C. Conclusion

In a typical appeal, LUBA would remand a decision to correct procedural errors before resolving the merits of any assignments of error that challenge the local government's decision. Although we ultimately sustain petitioners' second, procedural assignment of error and remand for remedial proceedings, in our view, the interests of the parties are best served by resolving the remaining assignments of error. *See* ORS 197.835(11)(a) ("Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(14), [LUBA] shall decide all issues presented to it when reversing or remanding a land use decision.").

THIRD ASSIGNMENT OF ERROR

RRMC 18.05 sets out hearing procedures for public hearings, and RRMC 18.05.050(B) provides:

"The requested proposal must be supported by proof that:

"1. Comprehensive Plan. That the proposal conforms with the comprehensive plan for the area. (Important: The findings

must state what uses the comprehensive plan actually projects for the area and how the proposed use conforms with it.)

"2. Public Need. That there is a public need to be served by the proposal. (Important: Add "because" and then say why.)

"3. Public Need II. That there is no land elsewhere available to meet the public need, or if there is land elsewhere already available for this purpose within the city, the public need can nevertheless be best served by subject proposal 'because...' (Important: It would not be enough that the applicants happened to own the subject parcel and not the other lands already available.)

"In lieu of findings (B)(1), (2), and (3) of this section, strong factual findings of mistake may be sufficient. Mistake must involve something in the nature of a correction of an error whereby RRMC Title 17 did not express the intent of the council at the time of its adoption and must be supported by evidence."

In their third assignment of error, petitioners argue that the city was required and failed to adopt findings addressing RRMC 18.05.050(B)(2) and (3) that explain the public need served by the proposal to revoke the 2016 CUP, and demonstrate that the public need is best served by the proposal.

In its response brief, the city responds that RRMC 18.05.050(B) does not apply to appeals to the city council from planning commission decisions. Response Brief 8. We reject the city's interpretation included for the first time in the city's response brief. The city adopted no findings regarding whether RRMC 18.05.050(B) applies to the revocation proceeding. Although ORS 197.829(2) provides that we may interpret a provision where the local government fails to do so, we decline to do so here. The city may interpret RRMC 18.05.050(B) in the

first instance on remand. *Green v. Douglas County*, 245 Or App 430, 441-42, 263 P3d 355 (2011) (where the decision must be remanded in any event for further proceedings, the better course is to allow the governing body to supply the interpretation on remand).

The city also responds that a demonstrated public need for the revocation "can be inferred" from the evidence in the record. Response Brief 8. We understand the city's response to invoke ORS 197.835(11)(b). ORS 197.835(11)(b) authorizes LUBA to overlook minor discrepancies or deficiencies in findings. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368, 384 (2014), *aff'd* 270 Or App 599, 351 P3d 89 (2015); *Terra v. City of Newport*, 36 Or LUBA 582, 589-90 (1999). The "clearly supports" standard is generally only appropriately applied to approval standards that are objective or do not require interpretation or much discretionary judgment. *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993). RRMC 18.05.050(B) is a highly subjective standard, and accordingly, we decline to apply the "clearly supports" standard to the city's decision. We agree with petitioners that the city was required to adopt findings addressing RRMC 18.05.050(B) and failed to do so.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

RRMC 17.100.110 provides:

> "The planning commission, on its own motion at a public hearing, may revoke any conditional use permit for noncompliance with the conditions set forth in granting said permit. Notice of said public

hearing shall be given."

As noted, the 2016 CUP included 14 conditions. The city council concluded that petitioners failed to establish compliance with Conditions 1, 2, 3, 4, 6, 7, 8, 9, 12, 13 and 14. In several subassignments of error under their fourth assignment of error, petitioners argue that the city's decision improperly construes the conditions and is not supported by substantial evidence in the record or adequate findings.

A. Conditions 4, 6, 8, 9, and 14 – Approval Conditions

In their second, third, fifth, sixth, and ninth subassignments of error, petitioners argue that the city improperly construed Conditions 4, 6, 8, 9, and 14, and that the city's decision that found noncompliance with those conditions is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C), (D). Petitioners also argue that these conditions required a demonstration of compliance prior to commencing operation of the warehouse, and that the city may not, in considering whether to revoke the 2016 CUP under RRMC 17.100.110, revisit petitioners' prior demonstration of compliance. We sometime refer to these conditions as "approval conditions."

1. Conditions 4 and 14

Condition 4 is:

> "Where a site adjoins or is located across an alley from a residential district, a solid wall or fence, six feet in height, shall be located on the property line common to such districts." Record 21.

Condition 14 is:

> "Applicant will communicate with the owners of the properties to the West and East to come up with a fence solution." Record 26.

The city found that the constructed cyclone fence with privacy slats does not comply with Condition 4 because "it does not completely shield the adjoining property from the impacts of light and/or noise created by the plant." Record 21. The city also found that "the applicant has not communicated with the neighboring properties regarding fencing and a solid wall or fence, adequately mitigating loud noise and lighting, has not been installed." Record 26.

Petitioners argue, and we agree, that Conditions 4 and 14 are conditions that, by their terms, required satisfaction prior to commencement of operations under the 2016 CUP. The plain language of Conditions 4 and 14 supports petitioners' argument that these are approval conditions that petitioners were required to satisfy prior to operation. Record 26 (applicant "will communicate * * * to come up with a fence solution"); Record 21 (the fence "shall be located on the property line").

With regard to the installed fence, petitioners point out that the site plans the city reviewed and approved in 2019 identified a cyclone fence with privacy slats. Record 305; *see* n 2. Petitioners argue that having approved the site plans, the city may not now claim that the installed fence fails to comply with Condition 4 as a basis to revoke the 2016 CUP.

The city's responses to these subassignments of error do not address petitioners' arguments that the city previously approved the existing fence when it approved the site plans for the warehouse in 2019, or that the evidence in the

record demonstrates that petitioners communicated with the neighbors prior to constructing the fence, and therefore are not helpful in resolving these subassignments of error.[6] It is undisputed that the site plans the city approved in 2019 showed a cyclone fence with privacy slats. Record 305; *see* n 2. Accordingly, we agree with petitioners the city may not now conclude that the installed fence fails to comply with Condition 4. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 501 (2004) (the city's attempt to correct a miscalculation in a previously approved site plan by denying the subsequent application for construction of the improvements was "nothing short of a collateral attack on the correctness of the [prior] decision."); *Gansen v. Lane County*, ___ Or LUBA ___, ___ (LUBA No 2020-074, Feb 22, 2021) (slip op at 11-12).

Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision-maker. Rather, LUBA must consider all the evidence to which it is directed and determine whether, based on that evidence, a reasonable local decision-maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). The evidence in the record

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[6] We understand the city's response to take the position that at some point in the past petitioners agreed to construct a solid wall or solid fence. The city's response brief includes the following citation to support its contention: "(Rec. *)." Response Brief 10. Absent any support in the record for the city's contention, we reject it.

is that petitioners submitted and the city approved a site plan that showed the fence, and that prior to commencing operations, petitioners erected a six-foot tall cyclone fence with privacy slats along the property line that borders the residentially zoned properties to the east. Record 305; *see* n 2. The evidence in the record is that petitioners communicated with the owners of residential properties to the east prior to installing the fence. Record 41 (referring to a meeting with the neighbors that occurred prior to construction). The undisputed evidence in the record is also that the same fence remains in that location presently. Accordingly, we agree with petitioners that the city's conclusions that the fence does not comply with Condition 4 and that petitioners did not comply with Condition 14 are not supported by substantial evidence in the whole record.

Finally, we agree with petitioners that the city's conclusion that the fence does not comply with Condition 4 improperly construes Condition 4 and has no support in the plain language of that condition. ORS 197.835(9)(a)(D). Condition 4 does not require a fence that "completely shield[s] the adjoining property from the impacts of light and/or noise," as the city found the condition required. Rather, Condition 4 requires "a solid wall or fence, six feet in height[.]"

These subassignments of error are sustained.

2. Condition 6

Condition 6 states:

> "Outdoor lighting standards and fixtures for illumination of premises shall be so designed and installed that direct rays are not toward or parallel with a public street or highway or directed toward

any residential uses." Record 24.

The city found that the "lights on the eastern side of the building were not adequately shielded to prevent light from being directed toward residential uses *until after the notice of the hearing* to revoke the conditional use permit." Record 24 (emphasis added). However, the city found that the lighting that was originally installed was directed downward and not towards residential properties. Record 21.

Petitioners first argue that the city previously approved the installed lighting when it reviewed and approved building permits and issued a certificate of occupancy for the warehouse. Record 288, 302. Petitioners argue that the city's issuance of the building permit and certificate of occupancy determined that the lights complied with Condition 6. The city responds that the city contracts with a third party for building permit review and no review of compliance with land use conditions occurs during that third party contractor review. Response Brief 2-3, 10. Thus, we understand the city to argue, the city did not determine compliance with the 2016 CUP conditions at building permit review or when issuing the certificate of occupancy.

In the reply brief, petitioners respond that the city's findings do not include any discussion about the city's third-party contractor arrangement for building permit review or about whether the city is bound by building permit or certificate of occupancy issuance, and that nothing in the RRMC supports this theory presented for the first time in the response brief. We agree with petitioners that

the city's findings do not reflect at all the city's legal theory included in its response brief regarding the effect of building permit review and certificate of occupancy issuance, and we will not consider legal theories raised for the first time in the response brief that are not adopted by the challenged decision. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57, 62 (2016).

In addition, the undisputed evidence in the record is that on the date the city council made its decision, light shields were installed and that the lighting is directed downwards. Record 24, 108, 399-400. Accordingly, we agree with petitioners that the city's decision is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

This subassignment of error is sustained.

3. Condition 8

Condition 8 is:

> "The applicant shall submit a revised site plan showing off-street parking and loading facilities as required in RRMC Chapter 17.70." Record 25.

The city concluded that petitioners failed to comply with Condition 8:

> "Specifically, the applicant has utilized larger trucks than what he initially proposed. The initial proposal provided for bobtail type trucks. Bobtail trucks required less maneuvering room. Even with that, the applicant was going to have to utilize twenty-five feet of the property adjoining to the west to accommodate the turning radiuses of the trucks. The applicant has now switched to using primarily semi tractor and trailer rigs for deliveries. These require even more maneuvering room. The applicant has regularly utilized the vacant residential property immediately to the west of the ice

> plant to maneuver the semi trucks. This parcel is not paved and therefore has not been in compliance with RRMC 17.70.030(C)." Record 22.

Petitioners argue that the city's conclusion improperly construes Condition 8. We agree. ORS 197.835(9)(a)(D). Condition 8 required petitioners to submit a revised site plan showing off street parking and loading facilities. Petitioners submitted that site plan depicting off-street parking and loading facilities and the city approved the revised site plan. Record 305; *see* n 2. Condition 8 does not refer to or limit the size of delivery trucks or address the use of the residentially zoned portion of the subject property.[7]

This subassignment of error is sustained.

4. Condition 9

Condition 9 is:

> "The Applicant shall submit a Level 3 Water Management Plan and Level 3 Erosion Control Plan to comply with RRMC Chapter 17.90 Storm and surface water management and RRMC Chapter 17.95 Erosion Prevention and Sediment Control." Record 22.

The city council found:

> "The applicant provided the required plans. However, the applicant failed to maintain the site in accordance with the submitted plan. The applicant permitted significant weed growth to occur, thereby

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[7] As petitioners point out, the city's findings appear to conflate lack of compliance with conditions of approval, which is the subject of RRMC 17.100.110, with lack of compliance with provisions of the RRMC, which could be the proper subject of a code enforcement proceeding under RRMC 17.130 and/or RRMC 8.05. Petition for Review 36.

> reducing the effectiveness of the Storm Water Management Plan and subjecting the property to a significantly greater risk of fire. This condition was not corrected until after the applicant was notified of Rogue River's intent to revoke the conditional use permit. While the applicant initially met this condition, the applicant has failed to comply with the provisions of his Storm Water Management Plan by providing ongoing maintenance of the detention area." Record 22.

Petitioners argue, and we agree, that Condition 9 required petitioners to submit the plans described in the condition, and it is undisputed that petitioners submitted those plans, as the city concedes in its findings. Accordingly, we agree with petitioners that there is not substantial evidence in the record to support the city's conclusion that petitioners have not complied with Condition 9. ORS 197.835(9)(a)(C).

The city's response to this subassignment of error takes the position that petitioners have failed to comply with the RRMC. Response Brief 12. To the extent the city found that petitioners have not complied with provisions of the RRMC or with the provisions of the water management and erosion control plans, that alleged lack of compliance with the RRMC or the plans does not provide a basis to conclude that petitioners have not complied with Condition 9. *See* n 7.

This subassignment of error is sustained.

B. Conditions 1, 12, and 13 – Operating Conditions

Some of the conditions of the 2016 CUP impose ongoing, post-approval obligations on petitioners while the use is in operation. We refer to those conditions as operating conditions. The city found noncompliance with those

operating conditions. We address petitioners' challenges to the city's decision regarding those operating conditions here.

1. Condition 1

> Condition 1 imposes an ongoing, post-approval obligation on petitioners:
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> "To operate consistently with the applicant's application, Findings of Fact and letter of intent including 'Hours of delivery will be Monday through Friday from 7:00am to approximately 3:00pm, usually being loaded 1 to 2 times per business day, depending on the season.'" Record 20.

The city found that petitioners are not in compliance with Condition 1 for three reasons: (a) the delivery trucks used are larger than bobtail trucks; (b) there are more deliveries than the condition allows; and (c) deliveries have occurred outside the specified hours of delivery.[8]

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[8] The city's findings regarding Condition 1 are interspersed throughout the decision and are quoted here:

> "Delivery vehicles have not been confined to deliveries from 7:00am to approximately 3:00pm Monday through Friday, but rather have been allowed and are proposed to continue to be allowed to operate twenty-four hours per day, seven days per week.
>
> "* * * * *
>
> "The applicant has not operated consistent with the letter of intent. Specifically, the letter indicated the applicant would be using his own trucks for delivery. While the condition did not include the size of the trucks, the applicant represented his trucks were bobtail trucks. Turning radiuses were provided for the bobtail trucks. Since the plant has been operating the primary delivery trucks are semi

Petitioners argue that the city improperly construed Condition 1 because neither it nor the "letter of intent" referred to in the condition specifies the size of the delivery trucks. In its response brief, the city argues that "[p]etitioner had represented that he would be using his own trucks and that they were bobtail sized trucks." Response Brief 9. However, the city does not provide a citation to anything in the record to support its statement.[9] More importantly, the city admits in its findings that the condition does not specify the size of delivery trucks. Record 20, 24. We also agree with petitioners that the letter of intent referenced

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> tractors and trailers. They have a significantly larger turning radius and it has been necessary for the trucks to use the adjoining residentially zoned property to complete their maneuvering. The applicant has been previously warned against this action. Additionally, contrary to the representation the deliveries would occur 7:00am to 3:00pm, Monday through Friday, the applicant is now indicating the ice plant will operate 7am through 10pm Monday through Saturday, but delivery trucks may still come and go. The applicant has not complied with the original condition.
>
> "* * * * *
>
> "For reasons addressed in more detail above, the City Council have determined through testimony of staff, neighbors, and the applicant that the warehouse operation, specifically deliveries, do not operate within the time frames stated, have significantly greater numbers of deliveries, and do not utilize the same types of delivery vehicles as described in the original application and presentation." Record 20, 24.

[9] Again, the response brief alleges noncompliance with provisions of the RRMC, which could provide a basis for a code enforcement proceeding but is not a basis to find noncompliance with Condition 1.

in Condition 1 does not specify the size of the delivery trucks.[10] Record 346 (explaining "our own vehicles will be the only vehicles coming and going onto the new area of the premises[.]").

Finally, petitioners argue that the site plan the city approved showed larger delivery trucks, and we assume petitioners' representation is accurate. Record 305; *see* n 2. The city improperly construed Condition 1 in determining that

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[10] The letter of intent identifies nine store locations in its footer. The letter of intent states:

> "We are intending to erect a new building at 501 E. Main Street, Rogue River, Oregon for the purpose of supplying products and ice to the stores. The hours of delivery will be Monday-Friday from 7:00 a.m. to approximately 3:00 p.m. The business will employ approximately 10 warehouse workers, including part time and full time. We are an equal opportunity employer and will continue to practice safety in all areas of the business.
>
> "The nature of our daily operations will include food preparation and ice production and packaging, and loading the delivery vehicles with said products for daily deliveries to the stores.
>
> "We will be enlarging the existing parking lot to accommodate truck maneuvering room and for a 3-door loading dock for the delivery trucks, but the entrances and exits will remain unchanged. Our own vehicles will be the only vehicles coming and going onto the new area of the premises, usually being loaded at the facility 1-2 times per business day, depending on the season.
>
> "Employees will have access to the outside through double door exits, loading area doors, and well-marked emergency exits that will remain unlocked during business hours." Record 346.

petitioners are not in compliance with the condition due to the size of the delivery trucks. ORS 197.835(9)(a)(D).

Next, petitioners argue, Condition 1 does not limit the number of deliveries and the city improperly construed Condition 1 to find noncompliance based on the number of deliveries. While the condition states that "usually" one to two deliveries a day would occur, that statement is not a limitation on the number of deliveries per day. The city improperly construed that language in Condition 1 in finding noncompliance based on the number of deliveries per day. ORS 197.835(9)(a)(D).

Finally, petitioners also argue that the city's decision is not supported by substantial evidence in the record where the city found that deliveries have occurred outside the hours specified in Condition 1. In reaching its conclusion, the city relied on petitioners' statement prior to and during the first hearing before the city council on September 9, 2021 that the hours of operation of the *warehouse* would be limited to 7:00 am to 10:00 pm Monday through Saturday but that "delivery trucks may still come and go." Record 20, 513; Supplemental Record 20. Petitioners argue that the statement is taken out of context because petitioners made the statement in connection with noise mitigation measures they proposed.

The city responds that the statement provides evidence of petitioners' previous lack of compliance with the delivery hours in Condition 1, and their intent that they would not, in the future, comply with the delivery hours required

in Condition 1. Response Brief 9-10. However, the letter of intent referenced in Condition 1 states "The hours of delivery will be Monday – Friday from 7:00 a.m. to approximately 3:00 p.m." The statement that "delivery trucks *may still come and go*" appears to indicate that as of the date of the September 9, 2021 city council hearing, delivery trucks may have been coming and going without limitation, and may support the city's conclusion that petitioners were at some point conducting deliveries in a manner inconsistent with Condition 1's limit on delivery times. However, there is not substantial evidence of the extent of the violation as of the date of the city council's decision, and therefore no basis for a determination of whether the violation, if it occurred, is of such an extent as to support the high burden revocation requires.

The city also relied on the city planner's statement that "[t]rucks have been observed loading and maneuvering at the Ice Plant as early as 4:00 am[.]" Record 41. Petitioners argue that Condition 1 limits "deliveries" but does not limit or prohibit "loading and maneuvering," which is the activity that the planner's statement described as having been observed and that the city council relied on. We disagree with petitioners that Condition 1 does not encompass the activity of "loading and maneuvering," rather than "deliveries." Loading and maneuvering are essential parts of delivery.

Petitioners also argue that there is no corroborating evidence in the record to support the planner's statement about delivery activities occurring as early as 4:00 a.m., and that it is not credible because it is too vague for petitioners to be

able to respond to or rebut. Hearsay statements are not particularly strong evidence, but a reasonable decision maker could choose to rely on hearsay evidence where it is not countered by other testimony or evidence. However, where as here, the city has the burden of proof to establish noncompliance with Condition 1 pursuant to RRMC 17.05.050(A), and that burden of proof is a heightened one, we conclude that the planner's statement about observations by unidentified persons is too vague for petitioners to be able to respond to or rebut, and it is not substantial evidence to support the city council's decision.

This subassignment of error is sustained.

2. Condition 12

Condition 12 imposes an ongoing, post-approval obligation on petitioners:

> "This Conditional Use Permit is contingent on the proposed building remaining consistent with the declared use and associated with the existing business on the parcel. Any change of use shall require a new Conditional Use Permit." Record 22.

The city council found:

> "The City Council finds while the use of the building as an ice plant is consistent with the initial proposed use, the level at which the building is being used and operated is not consistent. Mr. Hurst represented in his letter of intent that he would be producing ice for Lil' Pantry stores. He would be using his bobtail trucks for delivery and delivery would only generally occur between the hours of 7am to approximately 3pm Monday through Friday, depending on the season. Instead this plant operates significantly more hours, and some trucks are from outside organizations. The deliveries occur on a much more frequent basis and occur all hours of the day and/or night. The extended hours of delivery from the building is having significant impact on the residents which surround the ice plant both

> with noise and with the hours of operation, such that the building really is more appropriate for property zoned industrial. For these reasons, the applicant has not complied with this condition." Record 22.

Petitioners argue that Condition 12 requires petitioners to operate the warehouse consistent with the *use* identified in the 2016 CUP, a "warehouse for ice production, storage and distribution," and that the undisputed evidence in the record is that the use of the warehouse building is, as the city concedes in its findings, "consistent with the initial proposed use." Record 22. Accordingly, petitioners argue, the city improperly construed Condition 12 to find noncompliance based on other issues that are not referenced in the condition.

The city responds that the city council properly found that the "declared use" is production of ice for Lil Pantry stores. Response Brief 12. The city further responds that "[a]fter the plant was constructed, * * * [t]he plant began to supply ice to several businesses on a statewide basis. This was an expansion of the use that was no longer associated with the Lil' Pantry stores, but had substantially changed." *Id.*

Condition 12 of the 2016 CUP requires the use to remain "consistent with the declared use" and "associated with the existing business on the parcel." It appears from the city's findings quoted above that the city council may have interpreted the phrases "the declared use" and "associated with the existing business on the parcel" to refer to the use and business described in the letter of intent that is referenced in Condition 1. If that is the case, we reject that interpretation. Unlike Condition 1, Condition 12 does not refer to the letter of

intent at all. *M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___ (LUBA No 2018-143, Aug 14, 2019), *aff'd*, 302 Or App 159, 460 P3d 117 (2020) (LUBA reviews interpretations of conditions of approval to determine whether they are correct). Absent any reference in Condition 12 to the letter of intent, we conclude that the "declared use" referenced in Condition 12 is the use described in the 2016 CUP, which is a "Lil' Pantry warehouse * * * [that will be used] for ice production, storage and distribution." Record 347. The "existing business on the parcel" referenced in Condition 12 is a Lil' Pantry convenience store. Record 22, 347. It is undisputed that petitioners supply ice to that convenience store and to other Lil' Pantry stores throughout the region. The city improperly construed Condition 12 to find noncompliance based on requirements not included in the condition. ORS 197.835(9)(a)(D).

This subassignment of error is sustained.

3. Condition 13

Condition 13 also a imposes an ongoing, post-approval obligation on petitioners:

> "Open storage of materials attendant to a permitted use or conditional use shall be permitted only within a paved area surrounded or screened by an approved solid wall or an approved site screening fence six feet in height; provided, that no materials or equipment, except vehicles, shall be stored to a height greater than that of the wall or fence." Record 22-23.

The city council found:

"The City Council finds on the site visit the City administrator

> conducted on August 4, 2021, under invitation from the property owner, the city administrator noted stacks of pallets and barrels of unknown substance located on the property which were not shielded from view by a site obscuring fence or wall and which were not located on a paved surface. Based upon complaints the City has received, the City Administrator believes this to have been a regular practice of the applicant. Therefore, the applicant is found not to have complied with this condition." Record 23.

Petitioners argue that the city's decision is not supported by substantial evidence in the whole record where the photographs are undated, and more importantly, at least one photograph that the city council relied on was taken outside of the *brick* Lil' Pantry building located to the south of the subject warehouse property. *See* Record 92 (photograph showing barrels and pallets outside of a brick building). We agree with petitioners that the undated photograph of a brick building relied on by the city council is not evidence a reasonable person would rely on.

Petitioners also argue that the city administrator's "belief" that open storage was "a regular practice" is not competent evidence, where it is based on vague descriptions of complaints received without any identifying information about the date, number of complaints, description of the complainant or any other details. Record 23. Petitioners argue that such vagueness renders the statement incompetent evidence. We agree. *J4J Miscellaneous PAC v. City of Jefferson*, 75 Or LUBA 120, 143-44 (2017).

In the response brief, the city does not respond to this subassignment of error at all. Particularly given that, as we discuss in our resolution of the second

assignment of error above, the city has the burden of proof to demonstrate that revocation is warranted, we agree with petitioners that the city council's decision that Condition 13 is not met is not supported by substantial evidence in the whole record. The decision that Condition 13 is violated relies on undated photographs, at least one of which appears to have been taken in a location other than the subject property, and on hearsay evidence in the form of a general description of "complaints" the city administrator received and the city administrator's belief that violations have occurred. That is not evidence that a reasonable person would rely on to conclude that petitioners are not in compliance with Condition 13. *Younger*, 305 Or at 358-60.

This subassignment of error is sustained.

C. Condition 7 – Hybrid Approval Condition and Operating Condition

Condition 7 is:

> "Noise impact on neighboring residential areas shall be mitigated by shielding and locating mechanical equipment away from residences. Selecting mechanical equipment designed to generate less noise and construction of adequate noise barrier walls along neighboring residential areas." Record 21.

Condition 7 is both an approval condition that petitioners were required to satisfy prior to operations, and an ongoing post-approval obligation. Condition 7 required petitioners to do three things to mitigate "noise impact:" (a) shield mechanical equipment and locate it "away from residences;" (b) select

mechanical equipment designed to generate less noise; and (c) construct adequate noise barrier walls along neighboring residential areas. *Id.*

Petitioners first argue that the plans approved by the city in 2019 approved the type and location of the mechanical equipment. Record 303, 305. We agree with petitioners. *See* n 2. The plans at Record 303 identify the specific mechanical equipment to be installed and include a "mechanical plan" that shows the location of mechanical equipment. Accordingly, the city may not now revisit the location and type of mechanical equipment petitioners installed.

Petitioners also argue, and we agree, that Condition 7 does not prohibit *locating* mechanical equipment on the east, north and south sides of the warehouse, and to the extent the city concluded that the mechanical equipment's location on those sides of the warehouse violated Condition 7, that conclusion improperly construes the condition. Condition 7 only required petitioners to locate equipment "away from residences." The city's decision does not interpret the meaning of the phrase "away from residences" or explain why it concluded that the mechanical equipment located adjacent to the warehouse does not mean that it is located "away from residences." Absent any explanation regarding the meaning of the phrase "away from residences," we agree with petitioners that the location of the approved mechanical equipment complies with Condition 7.

Petitioners also argue that Condition 7 does not apply to noise generated by exhaust louvers because exhaust louvers are not "mechanical equipment." Relatedly, petitioners argue that noise from delivery trucks and lights shining on

residences are not within the scope of Condition 7 and the city improperly construed the condition in considering noise from delivery trucks and light pollution. Absent any explanation from the city about why noise from delivery trucks and lighting fall within the scope of Condition 7, we agree with petitioners that they do not.

Finally, petitioners argue here, and also in their tenth and eleventh subassignments of error, that Condition 7 does not define "noise impacts" with reference to any particular noise standards, and that the city's findings are inadequate to explain why the city concluded Condition 7 was violated by alleged noncompliance with Oregon Department of Environmental Quality (DEQ) noise standards.[11] Petitioners also argue that the findings are inadequate to address the evidence in the record that during several hearings before the city council petitioners committed to implementing mitigation measures to bring noise within DEQ noise limits.

The city responds by pointing to petitioners' acoustical engineer's noise study that found that petitioners' nighttime operations violated DEQ noise standards. Respondent's Brief 11 (citing Record 109-118). We explain the evidence in the record regarding noise impacts on nearby residences.

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[11] Oregon Department of Environmental Quality (DEQ) has adopted regulations with specific noise level limits that would apply to noise radiating from the ice plant, at OAR 340-035-0035, "Noise Control Regulations for Industry and Commerce."

In August, 2021, petitioners' acoustical engineer conducted a noise study, and concluded that nighttime noise from mechanical equipment, during the hours between 10:00 pm and 7:00 am, exceeds DEQ noise standards at residences on the east side of the warehouse, but could be mitigated to a level that complies with DEQ noise standards through specified mitigation measures. Record 114, 117-118; Supplemental Record 18-20 (listing 10 mitigation measures that would mitigate noise to comply with DEQ noise standards). At the first city council hearing on September 9, 2021, petitioners confirmed their agreement to implement all of the mitigation measures proposed by their acoustical engineer, and listed the measures that petitioners could begin to implement immediately. Supplemental Record 20 (listing six immediate noise mitigation measures). Petitioners explained that due to the COVID-19 pandemic and a shortage of materials, the work would be completed as soon as the contractors could place them on their work schedule. Supplemental Record 19, 28. Petitioners also agreed to operate only between 7:00 am and 10:00 pm, times when petitioners operated in compliance with noise standards. Supplemental Record 20. At the October 14, 2021 hearing, petitioners confirmed that some of the mitigation work had been completed. Supplemental Record 33.

At its October 28, 2021 hearing, the city council deliberated, with deliberations continuing at its November 4, 2021 meeting, and at the conclusion, voted to revoke the 2016 CUP. The city concluded:

"The City Council finds the applicant significantly impacted

> residences, especially to the east of the plant, by having equipment located on the north, south, and east of the building without adequate noise barriers and by placing the exhaust louvers on the east side of the building, thus causing noise significantly in excess of state standards to the adjoining residences. These actions caused significant disruption to the neighbors located to the east of the ice plant. In addition, the City Council finds the applicant has permitted semi trucks to access the site at all hours of the day and/or night, running the refrigeration units at all hours causing noise related issues as well as the inconvenience of having headlights shine in residential windows for those residences located west of the plant site. Applicant has not complied with this condition.
>
> "* * * * *
>
> "Through testimony from City Staff, concerned neighbors, and the applicant's expert testimony the City Council find that mechanical equipment has not been located in a design to adequately mitigate noise, and that noise barriers to date have not adequately shielded the neighboring residential properties from excessive noise." Record 21-25.

For the reasons explained above, the city's reliance on the location of mechanical equipment, including exhaust louvers, noise from semi trucks on the property, and light from headlights are not legitimate bases for finding noncompliance with Condition 7.

The city's findings do not elucidate the reason why the city concluded that a violation of state noise standards is a basis to revoke the 2016 CUP.[12] The city's findings also do not address the mitigation measures proposed by the acoustical

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[12] Given the city's decision, however, we assume that compliance with the state noise standards would establish compliance with Condition 7.

engineer that petitioners agreed to implement and began to implement prior to the date of the city council's decision, including operating only during daytime hours, when DEQ noise standards were not violated. Accordingly, we agree with petitioners that where the city's findings do not address at all the proposed mitigation measures or explain why implementation of the mitigation measures will not demonstrate that Condition 7 is met, the city council's findings are inadequate. *Norvell*, 43 Or App at 853 (findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below).

This subassignment of error is sustained.

D. General Conditions

The 2016 CUP also includes two general or "catch-all" conditions, Conditions 2 and 3.

1. Condition 2

Condition 2 is:

> "Applicant shall comply with all city, state and federal requirements." Record 24.

The city council found that petitioners failed to comply with Condition 2 based on violations of state noise standards, city vehicle maneuvering standards, and city storm water management requirements:

> "The City Council finds that the applicant has violated state regulations regarding noise pollution, violated vehicle maneuvering standards of the City, and violated City storm water management

> requirements. As evidence the applicant provided expert testimony to clarify that the noise created by the operation of the warehouse did violate state standards for noise. The applicant was directed several times to maintain the storm water detention basin. However, evidence shows that he allowed weeds to grow in violation of his storm water detention plan. The applicant continues to utilize property located to the west of the paved road which is zoned for residential development for maneuvering of the large semi trucks which are delivering ice to various customers around the state. The property owner's referral to other properties in town in which trucks utilize paved areas is not applicable in that those areas referred to were grandfathered in prior to the adoption of the City of Rogue River parking and access standards.
>
> "* * * * *
>
> "The City Council finds that the applicant continues to use a gravel area for truck turnaround that was not approved and is on land zoned for residential use. This gravel area does not meet commercial vehicle operation area standards of the City." Record 20, 24.

Petitioners argue that the findings are inadequate to explain the city's decision that petitioners have not established compliance with Condition 2, and that the decision is not supported by substantial evidence in the whole record and improperly construes the applicable law.

a. Noise Standards

Petitioners first argue that the city has not adopted its own noise standards in either RRMC 8.05 or the city's zoning code at RRMC chapter 17, and therefore is limited to enforcing state noise standards as set forth in ORS 467.990, which provides that a violation of state noise standards is a misdemeanor. Petitioners also argue that RRMC 8.05.290 provides that noise violations are subject to enforcement and fines, and therefore the city's conclusion that noise violations

can lead to revocation of a conditional use permit is inconsistent with that RRMC section and improperly construes that section and Condition 2.

The city does not provide a response to this argument. However, we see no reason why the city is limited to enforcing state noise standards in the manner set forth in ORS 467.990 or why the city is limited to enforcing noise violations under RRMC 8.05.290. *See* n 11.

Petitioners also incorporate their arguments in the fourth subassignment of error regarding Condition 7. Petition for Review 46-47. As we explained in our resolution of the fourth subassignment of error, the city's findings that petitioners are not in compliance with Condition 2 regarding noise standards are inadequate. The findings fail to address the mitigation measures proposed by the acoustical engineer that petitioners began to implement prior to the date of the city council's decision, including operating only during daytime hours when DEQ noise standards were not violated. As we explained above, under the heightened burden of proof for revocation of a CUP required by RRMC 18.05.050(A), the city is required to establish a violation of condition. Where the city's findings do not address at all the proposed mitigation measures or explain why implementation of the mitigation measures will not demonstrate that Condition 2 is met, the city council's findings are inadequate. *Norvell*, 43 Or App at 853.

b. Vehicle Maneuvering

Petitioners argue that nothing in the 2016 CUP conditions prohibits delivery trucks from using residentially-zoned property for vehicle

maneuvering.[13] Petitioners also argue that the city's conclusion that petitioners' use of a gravel area for vehicle maneuvering violates the RRMC is not supported by substantial evidence in the record. More importantly, and persuasively, petitioners also point out that at the time of the planning commission and city council hearings, petitioners had applied for city approval to pave that exact area, but the application had not yet been processed or approved by the city. Accordingly, petitioners argue, the city may not now claim a violation of the RRMC due to lack of paving.

The city does not provide any meaningful response to petitioners' arguments, and does not dispute that petitioners have applied to pave the turnaround area but the city has not processed or approved the application. Absent any meaningful response, we agree with petitioners that the city's decision is not supported by substantial evidence in the record where the evidence in the record is that the area would be paved but for the city's failure to process and approve the application for paving.

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[13] Petitioners allege that the approved site plan at Record 305 shows the truck maneuvering area, which was unpaved at the time, and the city is precluded from revisiting the decision to approve the site plan showing the unpaved area. While we tend to agree with that argument, we need not resolve it because we agree with petitioners that the city may not fail to process petitioners' application to pave the area and then conclude that petitioners have violated the RRMC.

c. Storm Water Management Requirements

Finally, petitioners argue that the city's conclusion that petitioners violated the city's storm water management requirements is not supported by substantial evidence in the whole record. During the proceedings before the city council, petitioners submitted an expert report showing that all weeds had been removed and that the storm water detention area meets all requirements. Record 493-95.

The city responds that on the date of the August 10, 2021 planning commission hearing, the evidence in the record before the planning commission was that petitioners did not comply with RRMC requirements regarding maintenance of the storm water detention area. The city takes the position that because the city council hearing was on appeal of the planning commission's decision, the city was obligated only to consider whether on the date the planning commission made its decision, the planning commission's decision should be affirmed. We reject that argument. Under RRMC 17.120.020, where the city council conducted a hearing and accepted new evidence and testimony, the city council was required to determine whether, *on the date the city council made its decision,* the city had met its burden of proof to support revocation of the 2016 CUP. We agree with petitioners that the city's decision that petitioners violated the storm water maintenance provisions of the RRMC is not supported by substantial evidence in the record, and that the evidence in the record as of the date of the city council decision was that petitioners are in compliance with those provisions.

The tenth subassignment of error is sustained.

2. Condition 3

Condition 3 is:

> "No use shall be permitted and no process, equipment or materials shall be used which are found by the Planning Commission to be harmful to persons living or working in the vicinity or by reason of odor, fumes, dust, smoke, cinders, dirt, refuse, water-carried waste, noise, vibrations, illumination, glare, or unsightliness or to involve any hazard of fire or explosions." Record 24.

The city council found noncompliance with Condition 3 based on its findings of noncompliance with the more specific Conditions 1, 6, and 7:

> "The City Council finds the applicant significantly impacted residences, especially to the east of the plant, by having equipment located on the north, south, and east of the building without adequate noise barriers and by placing the intake louvers on the east side of the building, thus causing noise significantly in excess of state standards to the adjoining residences. Additionally, during the first nearly two years of operation, the plant had unshielded security lighting which allowed light rays to shine directly onto adjoining residential properties. Finally, the plant permitted delivery trucks to access the plant at all hours of the day or night, causing excess noise as they left their engines idling and causing headlights to shine directly into apartments located to the west of the plant. The applicant did not comply with this condition.
>
> "* * * * *
>
> "The City Council finds that the operation of the 'Ice House' plant has, since commencement of operation, to date created excessive noise, as agreed by applicant's expert witness, which is harmful to persons living within the vicinity. Additionally, the Ice Plant has operated deliveries substantially outside the hours of limitation placed upon the operator by the original conditional use which has

> caused additional aggravation to neighbors from noise and from headlights on the delivery vehicles and until given notice of the intent to consider revocation of the conditional use permit, the applicant had lighting which shined on adjoining residential properties in violation of this condition." Record 21, 24.

Petitioners argue, and we agree, that the city's conclusion that Condition 3 was violated is derivative of its conclusions that petitioners have failed to comply with Conditions 1, 6 and 7. The city does not provide a meaningful response to petitioners' argument except to argue, again, that on the date of the August 10, 2021 planning commission hearing, the evidence in the record before the planning commission was that petitioners did not comply with noise standards.

Having sustained petitioners' subassignments of error regarding Conditions 1, 6, and 7, we agree with petitioners that the city's decision that petitioners failed to comply with Condition 3 improperly construes that condition and is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C), (D).

The eleventh subassignment of error is sustained.

The fourth assignment of error is sustained.

The city's decision is remanded.