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

JOEL HAUGEN,
Petitioner,

vs.

CITY OF SCAPPOOSE,
Respondent,

and

DAVID WEEKLEY HOMES,
Intervenor-Respondent.

LUBA No. 2023-001

FINAL OPINION
AND ORDER

Appeal from City of Scappoose.

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

Peter O. Watts filed the joint respondent's brief and argued on behalf of respondent.

Garrett H. Stephenson filed the joint respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Bailey M. Oswald and Schwabe, Williamson & Wyatt, P.C.

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

REMANDED 09/05/2023

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a planned development overlay zone designation and a conditional use permit in conjunction with the planned development, a tentative subdivision plat, and a sensitive lands development permit required to subdivide the subject property and develop 44 single-family residential lots.[1]

FACTS

The 17-acre subject property is located south of SW JP West Road near Captain Roger Kucera Way. South Scappoose Creek and SW 4th Street are located to the east and SW Jobin Road is located to the west of the subject property.

The subject property and the property to its west and south are zoned Low Density Residential (R-1). The property to its east is zoned Moderate Density Residential (R-4), High Density Residential (A-1), and Public Lands Utility (PL-U). The property to the north is zoned Public Lands Recreation (PL-R).

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[1] The subject property contains "floodplain, wetlands, fish and riparian corridor and slope hazard areas[.]" Record 29. The sensitive lands development permits are required for development within a floodplain, as well as where there are wetlands, a slope hazard, and a fish and riparian corridor. The conditional use permit is required for a planned development in the Low Density Residential (R-1) zone.

Intervenor-respondent (intervenor) sought city approval of a phased development including 48 single-family residential lots ranging from 3,410 square feet to 13,083 square feet in size and seven open space tracts. Intervenor submitted seven separate applications, with city approval of all seven requests required for intervenor "to be permitted to construct the proposed, phased residential subdivision." Record 29. The seven applications were designated ZC1-22 (Planned Development), CU1-22 (Conditional Use Permit), SB1-22 (48-lot Subdivision), SLDP 1-22 (Floodplain Sensitive Lands Permit), SLDP 2-22 (Wetlands Sensitive Lands Permit), SLDP 3-22 (Slope Hazard Sensitive Lands Permit), and SLDP 4-22 (Fish and Riparian Corridor Sensitive Lands Permit.)

On October 6, 2022, the city published notice that the planning commission would hold a public hearing on intervenor's applications on October 27, 2022. On October 20, 2022, the city issued a staff report evaluating the applications. The staff report included the following "observation":

> "The applicant is requesting approval of seven separate applications. Planning Commission provides a recommendation to City Council for the Planned Development application and Council is the decision authority. While the Planning Commission would normally be the approval authority for the proposed subdivision, conditional use and associated sensitive lands permits, due to consolidation of proceedings, the City Council will decide the entire application package (based on Planning Commission's recommendation)." Record 29.

On October 27, 2022, the planning commission conducted a public hearing on the applications. At the hearing, the planning commission (1) voted to leave

the record open for 10 days to accept additional written testimony and to allow intervenor seven days after the 10-day period closed to submit a rebuttal statement; and (2) continued the hearing to November 17, 2022. Record 24. On November 17, 2022, the planning commission voted to recommend to the city council that it approve the applications.

On December 5, 2022, the city council held an on the record public hearing on the applications. On December 12, 2022, the city council conducted deliberations on the applications. During the December 12, 2022, deliberations, members of the city council expressed concerns related to the proposed lot sizes. The city attorney advised the city council to reopen the record to allow the intervenor to address the identified concerns by either amending its application or proposing conditions of approval. The city council reopened the record for the sole purpose of discussing the applications with intervenor. In response to city councilor concerns expressed, intervenor proposed to reduce the number of lots from 48 to 44 and to increase the minimum lot size for all lots to 4,000 square feet. The city council proceeded to approve the applications subject to a condition of approval limiting the number of lots to 44 and requiring a minimum lot size of 4,000 square feet. Record 24-25. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city council committed procedural errors prejudicing their substantial rights. We will reverse or remand a local government decision if we find that the local government "[f]ailed to follow the procedures

applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" ORS 197.835(9)(a)(B).

A. Ability to Comment on Subdivision Application

Petitioner argues in their first subassignment of error that they were improperly precluded from submitting testimony to the city council on intervenor's subdivision application.[2] Petition for Review 16. The city and intervenor (collectively, respondents) maintain that petitioner did not preserve their argument. Joint Respondent's Brief 7-8.

ORS 197.835(3) provides that "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.797(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

The notice for the initial evidentiary hearing before the planning commission stated, in part, that the meeting is scheduled

> "for Thursday, October 27, 2022, at 7:00 p.m. in the Scappoose City Hall Council Chambers * * * and a subsequent hearing by City Council is scheduled for November 21, 2022[.]

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[2] The numbering of petitioner's subassignments of error in this opinion are our own and selected for organizational purposes.

"* * * * *

> "*Subdivisions are processed as a Limited Land Use Decision and do not require a public hearing (there will be no opportunity to provide verbal testimony regarding the subdivision specifically).* Sensitive Lands Development Permits, Conditional Use Permits, and the Planned Development Overlay Zone Change are processed as a Quasi-Judicial decision which does require a Public Hearing (both verbal and written testimony may be provided)." Record 2227 (emphasis added).

We agree with respondents that petitioner did not preserve the issue raised in this subassignment of error. Respondents point out that "[s]tarting on October 19, 2022, [p]etitioner participated in writing prior to, during, and after the initial evidentiary hearing." Joint Respondent's Brief 5 (citing Record 2197). Petitioner did not object to the city's process for evaluating the subdivision application and may not do so for the first time at LUBA. *Pliska v. Umatilla County*, 61 Or LUBA 429, 438 (2010), *aff'd* 240 Or App 238, 246 P3d 1146 (2010), *rev den*, 350 Or 408 (2011) (state that an issue is waived where it was not raised below and the petitioner did not dispute that there was an opportunity to raise the procedural assignment of error below).

The first subassignment of error is denied.

B. On the Record Review

Petitioner next argues that the city council utilized the wrong procedure when it evaluated intervenor's applications, resulting in prejudice to petitioner's substantial rights. The order of quasi-judicial hearings, set out in Scappoose Municipal Code (SMC) 17.162.130(B)(2), is:

"a. Recognize parties;

"b. Request the planner to present the staff report, to explain any graphic or pictorial displays which are a part of the report, summarize the findings, recommendations and conditions, if any, and to provide such other information as may be requested by the approval authority;

"c. Allow the applicant or a representative of the applicant to be heard;

"d. Allow parties or witnesses in favor of the applicant's proposal to be heard;

"e. Allow parties or witnesses in opposition to the applicant's proposal to be heard;

"f. Upon failure of any party to appear, the approval authority shall take into consideration written material submitted by such party;

"g. Allow the parties in favor of the proposal to offer rebuttal evidence and testimony limited to rebuttal of points raised.

"h. Make a decision pursuant to Section 17.162.140 or take the matter under advisement pursuant to Section 17.162.180."

Petitioner maintains that the city council was required to conduct a *de novo* hearing on the applications consistent with SMC 17.162.130. Petition for Review 7. Petitioner does not identify a specific subsection of SMC 17.162.130 identifying a requirement for a *de novo* hearing.

In order to establish a procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). SMC 17.81.060 provides:

"*An application for a planned development overlay shall be heard*

> *and approved under the public hearing procedures set forth in Chapter 17.162 of Title 17* of the [SMC]. A planned development, quasi-judicial zone change, and as necessary, a quasi-judicial comprehensive plan map amendment, may be processed concurrently. The fee charged for initiating a planned development overlay shall be equal to that charged for zone changes." (Emphasis added.)

The city council found intervenor's "*request for a Planned Development Overlay will be heard and approved under the public hearing procedures in Chapter 17.162. * * * Section 17.81.060 is satisfied.*" Record 35 (emphasis added, underscoring omitted). Petitioner argues that instead of providing a *de novo* review consistent with the process in SMC 17.162.130, the city council used the "on the record" appeal procedures set out in SMC 17.62.300.[3]

It is undisputed that evidence was accepted by the planning commission. Petitioner cites the provision in SMC 17.162.090(D) that "[u]pon appeal or recommendation, the city council shall conduct a public hearing in the manner prescribed by this chapter[,]" for the proposition that following receipt of a

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[3] SMC 17.162.300(B) provides:

> "The appeal of a decision of the planning commission to the council shall be:
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> "1. Confined to the record of the proceedings unless council determines the admission of additional evidence is appropriate;
>
> "2. Limited to the grounds relied upon in the notice of appeal and the hearing shall be conducted in accordance with the provisions of this chapter."

planning commission recommendation, the city council was required to use the same hearing process as the planning commission. Petition for Review 10. Petitioner argues that because the planning commission only made a recommendation of approval of the applications, the city council was the initial (and only) decision maker and was required to conduct a *de novo* hearing. *Id.* (citing SMC 17.162.090(D)(2)).

SMC 17.81.060 states that the procedures will be those set out in chapter 17.162, but respondents point out that the term *"de novo"* is not found anywhere in SMC 17.162. Joint Respondent's Brief 10. Respondents answer that SMC 17.22.030 governs the proceedings and specifically provides for the process the city council utilized. SMC 17.22.030 provides:

> "Quasi-judicial amendments shall be in accordance with the procedures set forth in Chapter 17.162 and the following:
>
> "A. The commission shall make a recommendation to the Council to approve, approve with conditions or deny an application for a quasi-judicial comprehensive plan amendment or zone changes.
>
> "B. *The council shall decide the applications on the record.*
>
> "C. A quasi-judicial application may be approved, approved with conditions or denied." (Emphasis added.)

SMC 17.22.030(B) provides that quasi-judicial amendments will be decided by the city council on the record. Petitioner acknowledges that "[a] planned development is an overlay zone and is processed the same as a quasi-judicial map amendment." Petition for Review 10 (citing SMC 17.81.060,

Record 756). SMC 17.81.010 provides that "[a] planned development shall be considered as an overlay to an existing zone[.]" The city council decision approving intervenor's applications expressly states that intervenor applied "*to amend the Zoning Map* in order to apply a Planned Development Overlay designation" and approves "[t]he Planned Development Overlay Zone Change[.]" Record 24 (emphasis added). The decision also directs the city planner "to conform the City Zoning Map to [its] provisions [.]" *Id.* The Planned Development is a quasi-judicial zone change.

In their reply, petitioner responds that the city council never identified SMC 17.22.030 below. This is incorrect. The city council adopted the findings in the October 20, 2022, staff report attached as Exhibit B to the ordinance approving intervenor's applications. Record 24. The findings in Exhibit B set out the text of SMC 17.22.030 and conclude that "[t]he Planned Development Overlay is a quasi-judicial review, which requires Planning Commission recommendation and a City Council decision. *Section 17.22.030 is satisfied.*" Record 47 (emphasis added, underscoring omitted). Petitioner does not address this finding and we conclude that SMC 17.22.030 applies. *Delmonico v. Washington County,* ___ Or LUBA ___, ___ (LUBA No 2022-072, Nov 21, 2022) (where petitioner does not challenge a finding on criterion applicability, we assume that the finding is correct) (slip op at 10). Accordingly, petitioner's argument that *de novo* review was required does not provide a basis for reversal or remand. Because petitioner has not identified a procedure violated by the city

council, we will not consider petitioner's arguments that they were prejudiced by the city council's decision to limit its review to the record.

The second subassignment of error is denied.

C. Denial of Request to Keep the Record Open After City Council Hearing

Petitioner's third subassignment of error is that the city council erred by denying petitioner's request that the city council leave the record open after its December 5, 2022, hearing as required by SMC 17.162.160. Petition for Review 17. SMC 17.162.160 provides:

> "A. Unless there is a continuance, the record shall remain open for new evidence for at least seven days at the request of any participant in the initial evidentiary hearing before the planning commission or the city council, if the request is made prior to the conclusion of the hearing.
>
> "B. When the record is left open to admit new evidence, testimony, or criteria for decision-making, any person may raise new issues which relate to that new material."

Petitioner argues that "[u]nlike ORS 197.797(6), which limits the right to request an open record to the 'initial evidentiary hearing' period, SMC 17.162.160(A) provides for this request at the initial evidentiary hearing before the city council."[4] Petition for Review 17. Petitioner argues that the December 5, 2022,

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[4] ORS 197.797(6) states:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional

hearing "was the initial evidentiary hearing before the city council. Therefore, the City's refusal to grant Petitioner's request to leave the record open violated SMC 17.162.160(A)." Petition for Review 17.

Respondents maintain that the city council was not required to keep the record open because the hearing before the city council was on the record. Joint Respondent's Brief 6. Respondents state repeatedly that the city council hearing was not the first evidentiary hearing, and that the city council hearing was on the record. We understand this to be an argument that SMC 17.162.160(A) did not apply to the city council hearing.[5] For the reasons set out in our resolution of the second subassignment of error, we agree that the hearing before the city council

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> evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
>
> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

[5] In their reply, we understand petitioner to argue that respondents did not respond to this argument in the Joint Respondent's Brief and should be deemed to have waived the opportunity to respond. Petitioner's Reply Brief 3.

was properly on the record. The city council was not required to open the record before its hearing and therefore was not required by the code to keep the record open following the conclusion of its hearing.

Furthermore, even if respondents waived their ability to respond to the substance of this subassignment, by failing to include a response referencing SMC 17.162.160(A) in their responsive briefing, we agree with respondents that petitioner has not established prejudice to its substantial rights as a result of the city council closing the hearing to the public after its on the record hearing. Joint Respondent's Brief 12-13. Petitioner had notice before the local proceedings began that the city council would conduct an on-the-record hearing. At the conclusion of the planning commission hearing, "the City attorney and [intervenor] requested that the record be left open for more than the required seven days specifically so that Petitioner's attorney(s) could be given more time to submit written testimony." Joint Respondent's Brief 15. The record was then left open for submissions from petitioner for 10 days after the initial evidentiary hearing before the planning commission. Petitioner has not established prejudice to their substantial rights.

The third subassignment of error is denied.

D Inability of Petitioner to Submit Written Testimony at City Council and Limitation on Time Petitioner Allowed to Testify Before City Council

Petitioner argues that the city council erred in not accepting written testimony from petitioner or other parties and in limiting the amount of time petitioner was allowed to present oral testimony.

SMC 17.162.130 sets out the order in which a quasi-judicial hearing is conducted. Petitioner argues that there is "nothing in SMC 17.162.130 that limits or prohibits the submission of written comments[,]" that it is common practice for parties to submit written comments at hearings, and that the city council erred in not accepting written testimony. Petition for Review 15. Petitioner also argues that the city council improperly limited each "project opponent" to five minutes of oral testimony while intervenor was given unrestricted time to testify. Petitioner argues that an unequal distribution of time can create procedural error if there is not adequate justification and it creates a significant disadvantage for a party.[6] Petition for Review 16.

To the extent an unidentified "project opponent" is not petitioner, petitioner may not assert substantial prejudice on behalf of others. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000) ("[T]he alleged procedural error must

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[6] Petitioner argues that although opponents were allowed five minutes of testimony, intervenor testified for 56 minutes during its initial presentation and 35 minutes during its rebuttal. Petition for Review 15. Respondents maintain that opponents testified for a total of 1 hour 56 minutes and intervenor's team testified for approximately 2 hours, 43 minutes. Joint Respondent's Brief 13.

affect *petitioner's* rights, not the rights of others. Petitioner's complaint about an alleged failure to notify a third party (who is not a party to this appeal) fails to state a claim upon which we may grant relief." (Emphasis in original, footnote omitted.)).

Petitioner argues that there was substantial prejudice to their rights because:

> "The issues involved in this case were numerous, complicated, and technical. Intervenor was allowed to submit a detailed final written argument at the end of the planning commission process and was granted unlimited time to make its case before the city council. Rec[ord] 1422-1435. Petitioner's substantial rights were prejudiced because he was forced to make his entire case with a limited amount of time for oral testimony while Intervenor had the luxury of a detailed written argument and unlimited time to testify before the city council." Petition for Review 19-20.

Respondents answer, and we agree, that petitioner has not identified a basis for reversal or remand. As respondents point out, SMC 17.162.130(A)(1)(e) provides that unless otherwise provided in the SMC or other ordinance adopted by the city council, the presiding officer of the planning commission and of the city council shall have the authority to "[r]egulate the course, sequence and decorum of the hearing[,]" and "[t]ake such other action appropriate for conduct commensurate with the nature of the hearing[.]" SMC 17.162.130(A)(1)(b), (f). Petitioner has not identified any provision limiting the ability of the presiding officer to set limits on the proceedings. More importantly, intervenor had *seven* applications before the city council. "An applicant has the burden of proof

throughout a quasi-judicial process to demonstrate that all applicable approval criteria have been satisfied." *Friends of Yamhill County v. Yamhill County*, 44 Or LUBA 777, 780 (2003) (citing *Rochlin v. Multnomah County*, 35 Or LUBA 333, 348 (1998), *aff'd*, 159 Or App 681, 981 P2d 399 (1999)). Given that intervenor had the burden of proof, an uneven division of time is reasonable and petitioner has not established that the distribution of time was unreasonable.

We also agree with respondents that petitioner has not identified a provision of state or local law requiring that the city council accept written testimony. Petitioner has not identified a procedure violated and has not established a basis for reversal or remand based on the city council not accepting written testimony. Furthermore, even if petitioner had identified a procedure violated by the city council, petitioner failed to establish prejudice to their substantial rights.

Petitioner does not argue that the city's process violated constitutional due process. However, petitioner cites *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368, 374-75 (1999) and *Reeves v. City of Wilsonville*, 62 Or LUBA 142, 148 (2010), *aff'd*, 240 Or App 563, 249 P3d 166 (2011) in support of petitioner's observation that "[l]ocal governments typically compensate for any disparity in the allocation of time for oral testimony by allowing the submission of written testimony." Petition for Review 16.

In *Wild Rose Ranch Enterprises v. Benton County*, the petitioner argued that the county limitation on oral testimony denied them their federal

constitutional rights to due process and equal protection. 37 Or LUBA at 374-75. We concluded that any error associated with the time limits on petitioner's testimony at a hearing was remedied by the commissioners' acceptance of new evidence prior to the hearing and an opportunity after the hearing closed for submission of written rebuttal. Here, petitioner was not able to supplement their oral testimony before the city council with a written submission. Petitioner has not, however, explained why their substantial rights were prejudiced.

In *Reeves v. City of Wilsonville*, the design review board accepted written and oral testimony and approved an application over the petitioner's objections. 62 Or LUBA at 144. The petitioner appealed the decision to the city council which reviewed the appeal on the record, rejected the appeal and approved the application. We found, in *Reeves*, that the petitioner had not explained how the design review process deprived them of due process. *Id.* at 147-48. Similarly, here, the planning commission accepted oral and written testimony and the city council reviewed the planning commission recommendation on the record and petitioner has not shown how they were prejudiced by that process. Petitioner has not explained how its inability to submit written testimony to the city council prejudiced their substantial rights when petitioner and their counsel collectively submitted pages of written testimony to the planning commission and presumably did or could have submitted the desired material at that time.

For the reasons we set out in our resolution of the second subassignment of error we conclude that the city council was permitted to consider the

applications on the record and was not required to accept written testimony from petitioner or give petitioner additional time to testify before the city council.

The third subassignment of error is denied.

E. Lack of City Council Findings Addressing Petitioner's Procedural Arguments

Lastly, petitioner argues that the city council was required but failed to adopt findings addressing its procedural concerns. Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). We agree with respondents that the procedural arguments raised by petitioner do not relate to approval standards and do not require findings. We also agree with respondents that the cases cited by petitioner as legal authority for its position that the city council was required to adopt findings responding to its procedural arguments do not stand for that proposition. Petitioner does not establish a basis for reversal or remand.

The fourth subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Background

ORS 197.303 and ORS 197.522(1)(a) define "needed housing" as:

> "all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for

housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 [USC section] 1437a."

It is undisputed that intervenor's proposal is to develop needed housing.

ORS 197.522 provides, in part:

"(2) A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land for needed housing that is consistent with the comprehensive plan and applicable land use regulations.

"(3) If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations. If an applicant seeks to amend the application or propose conditions of approval:

"(a) A county may extend the time limitation under ORS 215.427 for final action by the governing body of a county on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

"(b) A city may extend the time limitation under ORS 227.178 for final action by the governing body of a city on an application for needed housing and may set forth a new time limitation for final action on the consideration of future amendments or proposals.

"(4) A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through

> amendments to the application or the imposition of reasonable conditions of approval."

During deliberations,

> "Council President Greisen stated what she would like to say to her fellow Councilors is that the minimum the proposed, on page 31 of the packet, under chapter 17.44, there's three columns that say the dimensional requirements for the R[-]1 zone requirements and then what's proposed by the overlay, the planned development overlay, and so what she is having pause with is that the proposed, what's proposed by the planned development overlay is that there is a minimum of 3,410 square feet lot size and that is what she would like to address." Record 671.

Petitioner contends that the council president and another councilor expressed concerns about the density, lot sizes, and flood plain. At one point, a city councilor opined about the potential for a 4,700 minimum square foot lot size. Pursuant to ORS 197.522(3), the city council reopened the record to allow intervenor to propose changes to the application and conditions of approval. Intervenor's counsel testified after the record was reopened for discussions with them and their statements included:

> "There's a lot of engineering that goes into it and they want to make sure that they can still do the project and that means not reducing the lots so much that it becomes, you know, essentially unbuildable. So, they looked at this and they figured out a way and they hope that it would satisfy the concern of getting the minimum, all the minimums that, well the average lot size would be substantially more than 5,000 square feet. They can get all the lots above 4,000 square feet. Which would be for a lot of those lots an increase of 600 - 500 square feet so forth. That's something they could probably do. They looked at doing that or looked at adding a park amenity instead of having a few of the lots. The idea being is that with the P[lanned] D[evelopment] code, as he understands it, the idea is it's a balance

between the amount of open space you have and the amount of lots you can get. Now if they go down to 44 lots, at that point, you're looking at two lots fewer than the number of lots they could get under the standard zoning, plus you know 57% of the parcel being preserved for open space. Now we get all the lots above 4,000 square feet. *They cannot get every single lot above 5,000 square feet, that's not financially feasible. They could probably get to where each of the small lots are 4,000 and then you end up with 44 instead of 48.*

"* * * * *

"[Y]eah, *because the problem is, [a city councilor's math] would work great if this were a standard site. The problem we have with focusing on the smallest lot size is, as [city planner] said we're clustering these, and they have to be clustered to make room for the creek. That's the simple way of looking at it. So doing 4,700 square feet, he doesn't think that's feasible. Like he said, if it were just a flat field with no issues that they had to work around, you could probably do that but the problem they have is they can't move these lots around anywhere else on the property, which means we can't make them larger and still protect the natural resources on the property.* So, 4,000 is really as far down as we can go in terms of the minimum lot size.

"At a certain point it becomes more sensible to come back with a straight subdivision, which you know does not necessarily go through Planning Commission and would not have as much open space associated with it. *So, what he is trying to do is make this project work because of the amount of open space they'd be offering the City and the number of amenities they're offering without having to say, well it's just not going to pencil, there's no way we can make that work and coming back with just a straight subdivision application, which I don't think the Council would like frankly, as much as this one. So, he would say 4,000 is probably the best they can do and remember when we're talking about 4,000, we're talking about the smallest lot.* They worked it out all lots just a little over 4,000 square feet but the average is substantially above 5,000 square feet and most of the lots are in that and most of smallest lots are in that 4,500 square foot range. *So, they're adding a substantial*

> *amount of square feet to the smallest lots, but he doesn't think yeah 4,700 square feet, that would kill it, he doesn't know how many lots, yeah, a substantial number and remember you know we're already now at 44.* We are at two lots beneath what they could get through a standard subdivision. So, they're really not getting anything extra from the P[lanned] D[evelopment] process at all. They're offering a lot extra in the way of the public amenities, the pathway, and that sort of thing." Record 677-78 (emphases added).

After a city councilor asked whether reducing the number of lots would reduce the amount of green space, intervenor's counsel responded that it would not because intervenor would redraw the lot lines particularly along the main street so that the green space and proposed public improvements would not change. Record 679. The city council proceeded to approve intervenor's applications with a condition of approval that the minimum lot size be 4,000 square feet and the number of residential lots limited to 44. Record 13.

B. Opportunity to Respond to Condition of Approval or New Evidence

Petitioner's second assignment of error is that they were improperly denied the opportunity to respond to new evidence submitted by intervenor. Petitioner explains:

> "When the city attorney suggested that the city council reopen the record and allow Intervenor to address the council's concerns about density and the number of lots, he was very clear that other parties were not permitted to respond. The city attorney advised the city council to 'open the record for the very limited purpose of the lot size discussion with the [intervenor].'" Petition for Review 21-22 (quoting Record 674, emphasis omitted).

Petitioner maintains that "[a]ll participants in a hearing have the right to rebut evidence placed before the decision-maker." Petition for Review 23 (citing *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973); *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146, 153 (1994)). Petitioner asserts:

> "Intervenor's modified plan was itself new evidence because it significantly changed the proposal. Intervenor's statements regarding the engineering issues, the need for smaller lots, 4,700 square foot lots being infeasible, larger lots prohibiting Intervenor from protecting the natural resources and the inability to provide project amenities with larger lots was all new evidence." Petition for Review 26-27.

Petitioner argues that they:

> "[N]ever had an opportunity to comment on the modified proposal or the new evidence. Petitioner was deprived of the opportunity to explain that because Intervenor requested a planned development overlay, which is a discretionary process, the city was not limited to applying clear and objective standards to the Applications. Petitioner did not have the opportunity to clarify that the minimum lot sizes in the R-1 zone would prevent the City from being forced to accept a 46-lot subdivision with no project amenities. Petitioner did not have the opportunity to dispute Intervenor's statements regarding the engineering issues, the ability to protect the creek with larger lots, the feasibility of minimum lot sizes above 4,000 square feet, or the unsubstantiated claim that the project won't pencil out with larger lot sizes and fewer lots. Petitioner was deprived of any opportunity to address the most critical issues that ultimately led the city council to change from being concerned about the project to

approving it."[7] Petition for Review 27-28 (citations omitted).

Petitioner argues that "[t]he city council's refusal to reopen the record to allow [p]etitioner and other parties an opportunity to respond to this new [information] clearly prejudiced [p]etitioner's substantial rights." Petition for Review 27.

Respondents answer, in part, that the city council reopened the record before making a final decision pursuant to ORS 197.522(3), and that the statute does not provide an opportunity for a response to new evidence, arguing:

> "The legislature went out of its way to give the City the option to extend the 120-day deadline to further consider such proposals by an applicant, but it does not require local governments to extend that deadline to give others the opportunity to respond. ORS 197.522(3)(b). In so doing, the legislature carved out certain procedural protections for the local governments to allow them time to consider proposals intended to make projects better meet land use regulations, but did not do so for the public, which is meaningful evidence that the legislature did not intend to do so." Joint Respondent's Brief 17.

We do not examine whether the legislature intended to preclude public comment on conditions of approval or modified applications submitted in response to the provision in ORS 197.522 providing that an applicant will be

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[7] We observe that petitioner's testimony at the December 5, 2022, hearing included arguing to the city council that the needed housing statutes did not require the application of only clear and objective standards because of the discretionary review path selected by intervenor. Record 721.

given an opportunity to propose a condition of approval or project modifications.[8] Both *Fasano* and *Woodstock* predate the legislature's adoption of ORS 197.522(3)'s requirement that an applicant be afforded an opportunity to modify a housing proposal or offer conditions of approval in response to a local government's determination that applicable approval criteria are not met. Assuming, however, for purposes of this opinion that *Fasano* and *Woodstock* apply and there is a right to rebut new evidence, we conclude petitioner's substantial rights were not prejudiced because petitioner has not identified any new evidence that was presented.

Respondents point to our decision in *Jacobus v. Klamath County* where we concluded that the petitioners had not established prejudice to their substantial rights where they did not *identify the alleged new evidence* admitted (or the additional evidence that they would have submitted in response). 81 Or LUBA 785, 788-89 (2020). Here, intervenor did not submit a new plan, but we agree with petitioner that the intervenor's statements that 44 was the number of lots intervenor could make "pencil" while protecting the creek and providing a minimum lot size of 4,000 square feet, constituted new *information*. *See Freedman v. City of Grants Pass*, 57 Or LUBA 385, 393 (2000) ("Even if we assume that all of the underlying facts, documents, and data cited in the [a

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[8] We acknowledge that it may be that the legislature intended that one of the reasons a city might extend the time to evaluate a modified proposal or a condition of approval is to allow it time to receive public comment.

consultant's] letter are derived from the [transportation impact assessment] or otherwise found elsewhere in the existing record, something intervenor has not established, [the consultant's] ultimate conclusions constitute new 'other information' referenced in ORS 197.7[97](9)(b), in the form of new expert testimony."). In *Woodstock*, we agreed

> "with petitioner that under *Fasano* it ha[d] a substantial right to rebut evidence submitted by petitioner at the city council hearing. Therefore, if intervenor presented new *evidence* relevant to the applicable approval standards during the 'Appellant's Rebuttal' period, and petitioner was denied an opportunity to rebut that evidence, petitioner's substantial rights were prejudiced." *Woodstock*, 28 Or LUBA at 153 (emphasis in original).

We then concluded that the statements made by the intervenor were not new evidence and petitioner was therefore not denied an opportunity to respond to new evidence.

Evidence, for purposes of ORS 197.797, is defined as "facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision." ORS 197.797(9)(b). We agree with respondents that "the legislature's allowance of applicant proposals [for conditions of approval] is consistent with existing case law that provides that, as a general matter, the proposal of a condition of approval is not new evidence." Joint Respondent's Brief 17. "Conditions of approval are routinely applied as part of the decision making process to address issues that are

raised during the evidentiary phase of land use proceedings."[9] *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 597 (2000). In *Marine Street LLC*, the petitioner did not provide any authority for their assertion that a condition of approval providing that a maximum of 20 residential units may be built *was evidence* and we concluded that the petitioner had not provided a basis for remand. 37 Or LUBA at 597-98.

Similarly, petitioner does not identify specific approval standards related to the new information identified above and does not develop their argument that the information provided was "evidence"; that is, information related to approval criteria. We will not develop their argument for them.[10] *Deschutes Development Company v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city's decision is not supported by adequate findings or substantial evidence. Petition for Review 28.

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[9] However, "petitioners are free to challenge the efficacy of any conditions that are attached to the challenged decision to ensure compliance with approval criteria." *Marine Street LLC*, 37 Or LUBA at 598.

[10] Petitioner lists a variety of arguments and evidence they contend they were not allowed to submit. *See* Petition for Review 18 nn 5 & 6. We observe that it remains unclear why the items listed could not have been submitted while the record was open.

As we explained above, adequate findings (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller*, 23 Or LUBA at 556. Adequate findings are required to support quasi-judicial land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

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). Where there is conflicting evidence and we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice of evidence. *Younger v. City of Portland*, 305 Or 356, 360, 752 P2d 262 (1988); *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993) (stating that, if there is substantial evidence in the whole record to support the local government's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence). LUBA shall reverse or remand a decision that is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

A. Adequacy of City Findings Related to 44-Lot Development

Petitioner argues that the approval of the 44-lot project is not supported by adequate findings or substantial evidence because the evidence in the record relates to the 48-lot proposal. Petition for Review 33. Petitioner argues that "the

city council cannot conclude that a modified plan complies with the approval criteria if it has no idea what that modified plan will look like." Petition for Review 33. Petitioner argues that the city council

> "did not adopt *any* findings regarding the revised plan. The city council findings do not contain a single reference to the 44-lot revised plan, clarify how it addresses the city council's concerns, or explain why it complies with the applicable criteria. *The city council's conclusion that the 44-lot revised plan complies with the approval criteria cannot be affirmed in the absence of any findings addressing the revised proposal itself.*" Petition for Review 32-33 (first emphasis in original, second emphasis added).

The city council adopted "the recommendations of the Scappoose Planning Commission and the findings outlined in the staff report attached as Exhibit B, attached [to and incorporated into Ordinance 909]" and approved:

> "The Planned Development Overlay Zone Change, Subdivision Tentative Plan Approval, Conditional Use Approval, and Sensitive Lands Development Permits for Flooding, Wetlands, Slope Hazard and Fish and Riparian Corridor * * * subject to the conditions of approval outlined in the staff report, attached as Exhibit B, [attached to and incorporated into Ordinance 909]. In addition to the conditions of approval contained in the Planning Commission staff report, during the December 12, 2022, hearing, Council added an additional condition of approval, which was accepted by the applicant, to limit the number of lots to 44 and to require a minimum lot size of 4,000 square feet." Record 24-25.

Respondents answer that the staff report findings adopted by the city council "thoroughly establishes the compliance of the 48 lots with the approval criteria applicable[,]" and that this is substantial evidence, "especially when the only change is the reduction of lots to make the plan more compliant with lot size

minimums." Joint Respondent's Brief 20. Respondents contend "Petitioner offers no evidence or argument that contradicts these points, nor do [do they] explain which criteria or standard, if any, a reduction from [48 to 44] lots would violate." *Id.*

We agree with respondents that absent identification of criteria that the city council found required imposition of the 44-lot, 4,000 square foot minimum lot size condition of approval, petitioner has not shown that additional findings are required. Although city councilors discussed a desire to obtain a larger minimum lot size, the city council adopted findings that the 48-lot proposal met the applicable standards. Contrary to petitioner's assertion, the city council did not find that a 44-lot proposal met the applicable criteria; it found that the 48-lot proposal met the applicable criteria. We agree with respondents that petitioner does not explain what criteria or standard is violated by the reduction in the number of lots. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994) (where petitioner does not identify which provision they believe to be violated by the challenged decision, they do not adequately develop an argument for review.) Absent a showing that a finding is required, substantial evidence supporting such a finding is not required.

The first subassignment of error is denied.

B. Substantial Evidence of 44-Lot Development Compliance with Approval Criteria or Feasibility Studies

Petitioner argues "the city council's approval of the 44-lot revise[d] plan is not supported by substantial evidence of feasibility or compliance with the approval criteria. As previously noted, the application narrative and all supporting technical analysis are based on the 48-lot site plan and layout." Petition for Review 33. Petitioner argues that the findings are inadequate and are not supported by substantial evidence because the city did not review a 44-lot proposal and determine that it was feasible or provide a later process for parties to address the 44-lot proposal.

Again, we note that there is not a modified, 44-lot proposal; there is a 44-lot condition of approval. As described above, the city council relied upon its findings for a 48-lot development. We agree, again, with respondents that petitioner does not explain which criteria or standard is violated by a reduction to 44-lots. The city council's findings do not link the 44 lot (and minimum 4,000 square foot lot) condition to applicable criteria and petitioner does not do so. Petitioner has not adequately developed a finding or substantial evidence challenge. Petitioner argues:

> "If the City concludes that an application does not comply with the approval criteria, the City's options are limited to: (1) finding that it is feasible to satisfy the criterion and adopt conditions necessary to ensure compliance; (2) deny the proposal; or (3) defer a finding of compliance with the criterion to a later process that provides for public notice and hearing." Petition for Review 29.

Petitioner has not identified a criterion the city council concluded the applications did not meet. Petitioner has not identified a finding dependent upon the condition of approval and has not adequately developed an argument that the city council was required to evaluate feasibility or provide for additional public process.[11]

The second subassignment of error is denied.

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[11] Respondents also argue that because conditions of approval are not new evidence, they do not necessarily require findings and proceeds to cite to evidence in the record as support for the 44-lot condition of approval. *Davis v. City of Bandon*, cited by respondents as authority for our consideration of evidence in the record, did not involve a fact pattern similar to that before us. In *Davis*, the petitioner appealed a planning commission approval of their subdivision application with conditions of approval. 28 Or LUBA 38, 41 (1994). The city council voted to approve the subdivision with additional conditions of approval and petitioner tried to withdraw their application. The city council proceeded to approve the subdivision with its conditions of approval, including requiring a bridge be constructed over a wetland. We said:

> "As an initial point, petitioners appear to suggest that all conditions of approval must be supported by findings which explain the justification for the condition. We are aware of no general requirement that a decision imposing conditions of approval be remanded simply because a condition of approval is not supported by findings, and we reject the suggestion. Where a condition of approval is challenged and the decision or findings do not identify the authority for imposing that condition or the evidence in the record supporting its imposition, respondent may in its brief, identify the requisite authority and the supporting evidence in the record." *Id.* at 49 (emphasis added, footnote omitted).

Unlike *Davis*, however, this is not a case where the petitioner is objecting to the authority of a local government to impose a condition of approval on its application and we do not consider *Davis* further.

C. Consistency and Clarity of Conditions of Approval

Petitioner's third subassignment of error is that the decision should be remanded because the findings and conditions of approval are confusing and inconsistent. Petition for Review 32. Petitioner also argues that the decision will be difficult to implement because other conditions of approval refer to Lots 45, 46, 47 and 48, numbered lots that will not exist given Condition 53 limits the maximum number of lots to 44. Petitioner argues:

> "The city council's notice of decision and findings repeatedly and exclusively address the 48-lot proposal. [Joint Respondent's Brief] App[, at] 8, 10, 15-16, 20, 26, 30, 33, 37, 44, 65 and 74; Rec[ord] 6. Several conditions (*conditions nos. 24, 32, and 45) impose additional requirements and assessments for Lots 46, 47, and/or 48, which will be confusing or difficult to implement* because these lots no longer exist under the revised 44-lot proposal. [Joint Respondent's Brief] App[, at] 85-87. The city council's decision must be remanded because the findings and other conditions of approval are confusing and wholly inconsistent with condition no. 53." Petition for Review 32 (emphasis added).

Petitioner does not develop a specific argument concerning findings. The conditions identified by petitioner as problematic are numbers 24, 32 and 45. Respondents answer that the findings and conditions remain clear. Respondents maintains that with respect to condition 24,

> "[p]etitioner does not explain how [intervenor] will be unable to determine which lots contain certain residences behind other properties for the purpose of installing signage, and it can reasonably be assumed that the City will be able to determine compliance with this condition as well. Condition 32 requires '5 feet minimum separation between house foundations and face of retaining walls proposed on Lots 7-9 and 47-48.' Rec[ord] 10. As

> the retaining wall itself is clearly shown on the site plan(s) (Rec[ord] 232, 237) and is not proposed to be changed, there is no reason to believe that [intervenor] or the City will not be able to determine which lots contain retaining walls. Lastly, condition 45 requires '[s]ite-specific geotechnical recommendations shall be provided for houses on Lots 7-9, 17-19, and 47-48 prior to issuance of building permits.' Again, as these lots are shown on the approved plans, there is no reason to believe that [intervenor] or the City will be unable to determine which renumbered lots now contain lots 47 and 48." Joint Respondent's Brief 22-23.

We agree with respondents that petitioner has not explained how the identified findings or conditions of approval are, in context, confusing, inconsistent or difficult to apply and has not identified a basis for remand or reversal.

The third subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city council failed to adopt adequate findings explaining why all of Phase 1 of intervenor's project is permitted under SMC 17.84.040(B). Petition for Review 34. Phase 1 of the proposed development includes construction of two private stormwater detention ponds within the floodplain. SMC 17.84.040(B) provides that uses allowed in special flood hazard areas, with a flood hazard development permit, include, as relevant here:

> "3. Installation, reconstruction or improvement of underground utilities or roadway improvements including sidewalks, curbs, streetlights and driveway aprons;
>
> "4. Minimal ground disturbance(s) but no landform alterations;
>
> "* * * * *

"6. Community recreation uses such as bicycle and pedestrian paths or athletic fields or parks;

"7. Public and private conservation areas for water, soil, open space, forest and wildlife resources [.]"

The city council found:

"[w]ork within the floodplain areas fall under categories 3, 4, 6 and 7. This includes roadway and utility improvements along JP West Road and Eggleston Lane, grading, retaining walls, planting within the riparian corridor, construction of a public walkway in Tract D, and preservation of open space. Section 17.84.040 is satisfied." Record 67 (underscoring omitted).

Petitioner argues that the city council's findings are inadequate because they do not explain why the stormwater detention ponds are allowed.

Petitioner argued to the city that stormwater detention ponds and related grading work do not qualify as permitted uses under SMC 17.84.040(B).[12]

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[12] Petitioner argued:

"[A] critical component of [intervenor's] plan is to use 'allowed development' to generate fill raising the floodplain level in areas now subject to the more restrictive 20,000 lot size requirement. That is the only way the applicant can seek approval for 30 of the proposed lots. The applicant's stated plan is to develop all of the site development in Phase I, including the streets, utilities, and stormwater detention ponds. Ostensibly, the excavation from that development will be used to alter the floodplain allowing the developer to propose a formal change to FEMA. However, the applicant skips over an important point. Not all of the site development that will generate the fill it needs is allowed in the floodplain. [SDC 17.84.040 lists out the permitted uses.]

[Intervenor] *is seeking approval to develop in Phase I, two stormwater detention ponds. Tract C, the larger of the two ponds, is located primarily in the current floodplain. It appears that about 2/3 of that pond is in the floodplain. Tract G, a smaller detention pond, is completely within the current floodplain.*

There is no way to read SDC 17.84.040 to allow development of private stormwater detention ponds in the floodplain. * * * Grading for two significant detention ponds cannot be justified as minimal ground disturbance, improvements to existing structures, recreational uses, or public works projects. The only provision the applicant could try to use is Subsection 3 that relates to utilities and road improvements.

However, private detention ponds are clearly not underground utilities. The ponds are open surface improvements unlike any underground utility such as sewer and water pipes that cannot be observed from the surface. There is no plausible way to squeeze large, open detention ponds into underground utilities. Nor are the ponds, that primarily serve to detain private runoff from 48 proposed lots, roadway improvements. Applying the rules of construction required, the plain text limits allowed development under Subsection 3 to road improvements, which include the street, sidewalks, curbs, street lighting, and driveway aprons. The drafters did not include private detention ponds in the definition of a roadway improvement. If the drafters intended road improvements to include private detention ponds for private stormwater, they would have included that term in Subsection 3. ORS 174.010 advises that in construing legislation, one is not to add terms that the drafters omitted.

There is additional context that supports our position. The proposed detention ponds do not serve only to treat runoff roadway improvements referred to in SDC 17.84.040(B.3). The streets, sidewalks, and curbs will all be dedicated to and maintained by the public. Those are the only roadway improvements. The detention

Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853-54, 604 P2d 896 (1979); *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92, 97-98 (2015). We agree with petitioner that the city council was required to adopt findings addressing petitioner's argument to the city that the stormwater ponds were not permitted within the floodplain.

Respondents argue that petitioner does not develop an argument as to why we should not affirm the city council's conclusion that SMC 17.620.040(B) is met. Respondents argue that the city council adopted the staff report findings concluding that work within the floodplain areas falls within SMC 17.620.040(B)(3), (4), (6), and (7). Respondents argue that the city council necessarily took the position that the stormwater ponds are allowed as "installation, reconstruction, or improvement of underground utilities or roadway improvements including sidewalks, curbs, streetlights and driveway aprons."

> ponds will remain privately owned by an association. That is because the primary purpose of the ponds is to detain runoff from the improvements on all 48 proposed lots. Staff Report, p. 342. Of the 167,488 feet of impervious surface that contributes runoff to the pond, 126,720 feet is attributed to the 48 lots. The runoff from those 126,720 feet of surface is all private runoff not from any roadway improvements. Clearly the proposed ponds are not roadway improvements by any stretch. Consequently, applying the plain text of SDC 17.84.040, in context, the applicant cannot obtain approval to develop the ponds as part of Phase I." Record 1461-63 (emphasis added).

Joint Respondent's Brief 25 (quoting SMC 17.84.040(B)(7)). Respondents next argue that if we find this inadequate, the city council implicitly accepted the community development director's understanding of the code. Respondents direct us to the planning director's testimony before the planning commission and city council and the city engineer's testimony to the planning commission. Record 734-35, 1401-05. This includes testimony that the ponds could be allowed under SMC 17.84.040(B)(8) as a public work structure, a code section not listed in the city council's findings.

ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

The test under ORS 197.829(1) is not whether the interpretation is correct, or the best or superior interpretation, but whether the governing body's interpretation is "plausible," given its text and context. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). In light of the standard described

in *Siporen,* deference is owed under ORS 197.829(1) when (1) a governing body of a local government; (2) makes an interpretation of its own land use policies; (3) that is plausible and not inconsistent with the standards set out in the statute. *Green v. Douglas County*, 245 Or App 430, 437, 263 P3d 355 (2011). The court determined that there is not a rigid test for whether an interpretation is adequate for review

> "An implicit interpretation of an ordinance provision that is eligible for ORS 197.829(1) deference is one where '[t]he practical effect of the findings is to give definition to the term' and where the 'county's understanding of [the term] is inherent in the way that it applied the standard.' *Alliance for Responsible Land Use[v. Deschutes Cty.]*, 149 Or App[259,] 267, 942 P2d 836 [1997]. That is, a local government's implicit interpretation of an ordinance must carry with it only one possible meaning of the ordinance provision and an easily inferred explanation of that meaning." *Green*, 245 Or App at 439.

We do not agree with respondents that the city council explicitly or implicitly interpreted SMC 17.84.040 to mean that the stormwater ponds are permitted uses. We also disagree with respondents that the city council's findings incorporate the planning director's testimony before the planning commission. Petitioner argues that the city council was required to but failed to make findings that the stormwater ponds are permitted uses. We agree.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city council erred in determining that the project does not conflict with administrative rules implementing Statewide Planning

Goal 5 (Natural Resources, Scenic Historic Areas, and Open Spaces) and the city's Goal 5 Comprehensive Plan policies. Petition for Review 39. Respondents respond that this petitioner made only general Goal 5 and unrelated comprehensive plan arguments below and waived the issue in this assignment of error. Joint Respondent's Brief 29.

First, petitioner argues that the planned development is a new conflicting use in the floodplain and has not been analyzed for the purpose of the economic, social, environmental, and energy analyses (ESEE) required by OAR 660-023-0040(4). OAR 660-023-0040(4) provides:

> "Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analysis of the ESEE consequence shall be adopted either as part of the plan or as a land use regulation."

Petitioner argued below that the application is counter to Goal 5 as currently written. Record 532. Petitioner argued that "[a]dditional research should be required for how the development pertains to * * * Goal 5," and that "[t]he documents provided state that the proposed zone change, planning

development overlay and subdivision is not in conflict with this goal[,] however[,] this site contains Natural Resources, Scenic Areas and Open Spaces all of which will be negatively impacted by this development." Record 620. Petitioner did not raise the alleged need for an ESEE analysis below and petitioner does not answer respondents' argument that this issue was not preserved. We agree with respondents that petitioner has not preserved the Goal 5 ESEE issue. The purpose of the statutory waiver requirement is to provide "fair notice" of an issue, such that the decision-maker and other parties have an adequate opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). ORS 197.797(1) requires that

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

Petitioner did not provide fair notice such that the city had an opportunity to respond to the ESEE issue raised in their petition for review.

Second, petitioner maintains that SMC 17.22.040(A) to (B) and SMC 17.81.070(A) require intervenor to demonstrate compliance with comprehensive plan policies and that the city council failed to make findings showing such compliance.

SMC 17.22.040(A) provides that the city council must determine "[i]f *the proposal involves an amendment to the comprehensive plan*, the amendment is consistent with the Statewide Planning Goals and relevant Oregon Revised Statutes and Administrative Rules[.]" (Emphasis added.) The decisions do not amend the comprehensive plan, SMC 17.22.040(A) is not applicable and we do not address it further.

SMC 17.22.040(B) provides that the city council must determine as part of their review of a zoning map request that "[t]he proposal *is consistent with the comprehensive plan* (although the comprehensive plan may be amended concurrently with the proposed changes in zoning of this title), the standards of this title or other applicable implementing ordinances[.]" (Emphasis added.) SMC 17.81.070(A) provides that a planned development overlay application may be approved upon a finding of substantial conformance with criteria including that "[t]he proposed development *complies with the comprehensive land use plan* and is compatible with the surrounding area or its proposed future use[.]" (Emphasis added.) Petitioner argues that the "city council erred in concluding that the proposed development complies with the Comprehensive Plan Goal 5 policies" and quotes language from the Comprehensive Plan discussing development in the floodplain. Petition for Review 38-39.

Respondents argue that petitioner did not preserve this assignment of error. In their reply, petitioner responds that "SMC 17.22.040(B) requires a finding that the 'proposal is consistent with the comprehensive plan.' The Comprehensive

Plan Goal 5 provisions cited by Petitioner are part of the Comprehensive Plan." Petitioner's Reply Brief 5.

It was argued below:

> "The Scappoose Comprehensive Plan has identified the following in the Goal for Natural Factors and Local Resources:
>
> "Goal 4: Ensure the conservation of fish and wildlife areas and habitats, including wetlands, floodplain, and riparian areas. Goal 5: Encourage the retention of open spaces within and between the different zoning areas. Goal 7: Preserve outstanding scenic areas. *The Buxton Ranch development is contrary to this entire set of goals, not just the three I listed. Once the development is built, all 7 of these expressed goals become meaningless. There is no returning nature or the City's local resources back to a pre-developed state. If these are the City's goals, this development should not be considered.*" Record 633, 1360 (original emphasis omitted, emphasis added).

The issue argued below was that the development was not consistent with the city's seven Natural Factors and Local Resources goals.[13] We agree with

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[13] The city council found that its goal "to protect natural resources and conserve scenic and historic area and open spaces" was met. Record 36-37. The city council concluded:

> "South Scappoose Creek and wetlands associated with the creek are subject to and are provided with a 50-foot buffer, while other wetlands are subject to and provided with a 25-foot buffer to protect the natural resources in this area. Additionally, the applicant has proposed to dedicate development rights to the City for preservation of the open space tracts and to place a conservation easement over Tract D to protect the associated wetlands and riparian corridor along South Scappoose Creek, as noted in [intervenor's] narrative and shown on [intervenor's] circulation plan which assists in

respondents that petitioner did not assert below that what appears to be narrative comprehensive plan language they identify for the first time in their petition for review constituted an applicable plan policy. This assignment of error was not preserved.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the city council's findings that the project complies with SMC 17.81 are inadequate and are not supported by substantial evidence.

A. SMC 17.81.070(A)

SMC 17.81.070(A) provides that a planned development overlay may be approved, approved with conditions, or denied based upon substantial conformance with the criterion, including that "[t]he proposed development complies with the comprehensive land use plan and is compatible with the surrounding area or its proposed future use[.]" Petitioner argues that the city council erred in its findings concluding that the smaller lots are compatible with the surrounding area as required by SMC 17.81.070(A). Petitioner argues that suburban lots in the surrounding area are substantially larger than the proposed

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preserving the City's open space. Therefore, the proposed zone change, planned development overlay, and subdivision is not in conflict with this goal." Record 37 (internal citations omitted).

Petitioner does not address this finding.

lots and the city council failed to explain why smaller lots are compatible. Petitioner asserts:

> "The city council concluded that the Application complies with SMC 17.81.070(A) because '[a]dding in the range of lot sizes for single family detached homes compliments the surrounding area by adding housing options * * *.' [Record 60]. SMC 17.81.070(A) requires that the proposed development be compatible with the surrounding area, not that it provides a new range of housing types." Petition for Review 41.

We agree with respondents that the city council's findings are adequate and supported by substantial evidence. The city council found:

> "The subject site is designated for low density residential development and is zoned R-1, consistent with the comprehensive plan's Suburban Residential plan designation as explained above in the Comprehensive Plan Findings Land Use Policies Section. Housing types within the area vary and include large acreages with single family homes, smaller R-1 standard lots with single family homes and an apartment complex across Scappoose Creek near the site's southeast corner. Adding in the range of lot sizes for single family detached homes complements the surrounding community by adding housing options in an area planned for residential use, with larger lots on the western border to be compatible with the existing residential neighborhoods." Record 60.

The city council identified the relevant criterion and explained how the facts led to its conclusion that that the project complies with the comprehensive plan and is compatible with the area.

Substantial evidence supports the city council's conclusion. The planning director explained that the SMC

> "states in relation to compatibility, that the planned development

> shall present an organized arrangement of buildings, facilities, open spaces and improvements such as recreation facilities, landscaping and fencing to ensure compatibility with the comprehensive plan in the area in which it is to be located, adding that this application proposes all of the amenities mentioned, and that this site is adjacent to three different zoning districts as it is adjacent to the R-1, which is low density[,] R-4, which is moderate density, and A-1 which is high density along its SE border. [The planning director] continued by stating that the R-1 zoning district then, is not the sole zoning district to use as the basis for compatibility, as several comments have suggested." Record 1405.

This is evidence upon which a reasonable person would rely on to conclude that the proposed residential lots are compatible with the varied, existing residential neighborhoods. Petitioner's disagreement with the city council's conclusion is not a basis for reversal or remand. The findings are adequate and supported by substantial evidence.

The first subassignment of error is denied.

B. SMC 17.81.070(C)

SMC 17.81.070(C) requires "[t]hat the proposal include[] designs and construction standards in compliance with city code and that all completed infrastructure be approved by the city and ownership of all infrastructure and public utilities [must be] deeded to the city upon completion[.]" Petitioner argues that the city council erred in concluding that the proposal complies with SMC 17.81.070(C)'s provision that "ownership of all infrastructure and public utilities [must be] deeded to the city upon completion." Petitioner argues that the private stormwater detention ponds will be owned and maintained by the homeowners association rather than by the city.

Respondents answer that petitioner did not preserve this assignment of error. Petitioner states in their reply that they raised the issue of ownership of the ponds at Record 721. Petitioner made a variety of arguments reflected at Record 721, including that there was a concern related to the potential failure of the homeowners association to maintain the stormwater ponds. Petitioner did not preserve the issue it now raises that the stormwater ponds must be owned by the city.

The second subassignment of error is denied.

C. SMC 17.81.070(G)

SMC 17.81.070(G) requires that "[t]he proposed development can be substantially completed within a reasonable period of time." Petitioner argues that the city council erred in finding that the project complies with 17.81.070(G). Respondents answer and we agree that petitioner did not preserve an assignment of error concerning this criterion.

The third subassignment of error is denied.

D. SMC 17.81.080(E)

SMC 17.81.080 sets out tentative plan requirements. SMC 17.81.080(E) governs when a tentative plan will expire and provides:

> "If substantial construction or development, as determined by the director, has not taken place within four years from the date of approval of the general plan, the planning commission shall review the planned development permit at a public hearing to determine whether or not its continuation in whole or in part is in the public interest, and if found not to be, shall remove the planned

development designation on the subject."

Petitioner argues that the city's finding that it will evaluate in the future if the applicant does not complete substantial construction within the required time requires a finding of feasibility. Record 65. Respondents answer and we agree that petitioner did not preserve did not preserve an assignment of error concerning this criterion.

The fourth subassignment of error is denied.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the city erred in determining that the project satisfies the standards in SMC 17.154.040.

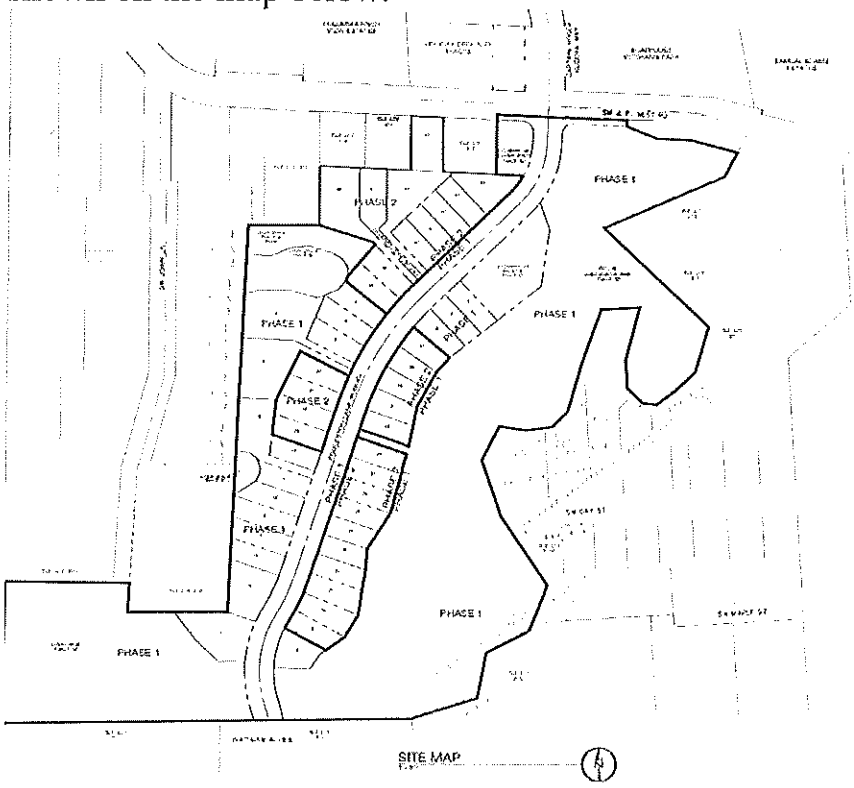
SMC 17.154.040(B) sets out block length regulations and provides:

> "Except for arterial streets, no block face shall be more than five hundred and thirty (530) feet in length between street corner lines and no block perimeter formed by the intersection of pedestrian access ways and local, collector and arterial streets shall be more than one thousand five hundred feet in length. If the maximum block size is exceeded, mid-block pedestrian and bicycle access ways should be provided at spacing no more than 330 feet, unless one or all of the conditions in Subsection C can be met. Minimum access spacing along an arterial street must meet the standards in the city's adopted Transportation System Plan. A block shall have sufficient width to provide for two tiers of building sites. Reverse frontage on arterial streets may be required by the planning commission."

"A public street will be extended through the site, as an extension of SW Eggleston Lane, located to the south." Record 1168. Petitioner argues intervenor's Eggleston Lane extension exceeds 500 feet in length, is a cul-de-sac

but does not include the required circular or hammer head turnaround and that the project does not provide a required pedestrian and bicycle access way. Petitioner also argues that the city council did not adequately address the potential to provide a connection with Day Street.

Eggleston Lane and Day Street, along with the proposed 48-lot layout are shown on the map below.



Record 230.

It is undisputed that intervenor's project does not comply with SMC 17.154.040(B). The city approved an exception to SMC 17.154.040(B) as allowed by SMC 17.154.040(C) which provides:

> "*Exemptions from requirement of Subsection B of this section may be allowed, upon approval by the planner and the city engineer, where one or all of the following conditions apply*:

"1. *Where topography and/or other natural conditions, such as wetlands or stream corridors, preclude a local street connection consistent with the stated block length standards. When such conditions exist, a pedestrian access way shall be required in lieu of a public street connection if the access way is necessary to provide safe, direct and convenient circulation and access to nearby destinations such as schools, parks, stores, etc.*

"2. Where access management standards along an arterial street preclude a full local street connection. Where such conditions exist, and in order to provide for adequate connectivity and respect the needs for access management, the approval authority shall require either a right[-]in/right-out public street connection or public roadway connection to the arterial in lieu of a full public street connection. Where a right-in/right-out street connection is provided, turning movements shall be defined and limited by raised medians to preclude inappropriate turning movements.

"3. *A cul-de-sac street shall only be used where the city engineer and planner determine that environmental or topographical constraints, existing development patterns, or compliance with other applicable City requirements preclude a street extension.* Where the City determines that a cul-de-sac is allowed, all of the following standards shall be met:

"a. *The cul-de-sac shall not exceed a length of 500 feet, except where the city engineer and planner determine that topographic or other physical constraints of the site require a longer cul-de-sac.* The length of the cul-de-sac shall be measured along the centerline of the roadway from the near side of the intersecting street to the farthest point of the cul-de-sac.

"b. *The cul-de-sac shall terminate with a circular or hammer-head turnaround meeting the Uniform Fire Code and the standards of Public Works Design Standards.*

> "c. The cul-de-sac shall provide, or not preclude the opportunity to later install, a pedestrian and bicycle access way between it and adjacent developable lands. Such access ways shall conform to the standards in Section 17.120.180(Q), as applicable." (Emphases added.)

Petitioner argues that the city council erred in finding that

> "[Eggleston] Lane complies with the block length requirement based on the exemption under SMC 17.154.040(C)(1). [Record 99]. The city council determined that the topography prevents compliance with the block length requirement and Intervenor satisfied these criteria to the degree possible. [Record 99]. There are multiple errors with this conclusion." Petition for Review 44.

First, petitioner argues that there is not adequate analysis or evidence of intervenor's inability to extend Day Street in order to comply with SMC 17.154.040(B). Petition for Review 44. Second, petitioner argues intervenor did not demonstrate compliance with SMC 17.154.040(C)(3)'s provision that "a cul-de-sac street shall only be used where the city engineer and planner determine that environmental or topographical constraints, existing development patterns, or compliance with other applicable City requirements preclude a street extension." Petitioner maintains that because Eggleston Lane dead ends within the subdivision, it is a cul-de-sac and because it is a cul-de-sac, the city council was required to explain how it will connect or how it complies with cul-de-sac requirements. Third, petitioner argues that the exceptions in SMC 17.154.040(C) requires approval by the city planner and city engineer and that there is not

evidence of such approval. Lastly, petitioner argues a pedestrian access way is required because

> "[e]ven if Intervenor was entitled to an exception under SMC 17.154.040(C)(1), 'a pedestrian access way shall be required in lieu of a public street connection if the access way is necessary to provide safe, direct and convenient circulation and access to nearby destinations such as schools, parks, stores.' SMC 17.154.040(C)(1)." Petition for Review 45.

Respondents direct us to a variety of city council findings. The city council found:

> "[Intervenor] proposes construction of a new local street, Eggleston Lane, which extends south from SW JP West Road and is stubbed at the south to allow for a future roadway extension. The applicant proposes a right-of-way width (Eggleston Lane of 54 feet. * * * The SW Eggleston Lane right-of-way is proposed to extend to the southern boundary of the site, but the improvements are proposed to stop just north of the riparian corridor associated with the unnamed stream, to minimize environmental impacts." Record 33.

The city council also found that

> "[t]here is a relatively narrow band of developable land between the South Scappoose Creek Floodplain on the east and steep slopes and some steep drainageways rising above the valley floor to the west. The block length for Eggleston Lane could exceed 2,000 feet due to these natural conditions which do not permit City design standards (namely, maximum street grades) to be met. Through the project site, the valley floor outside the floodplain is not wide enough to create a block or have 2 parallel streets to help create a block. These natural conditions do not permit development on the site to comply strictly with the block length criterion; however those criteria are met to the degree practicable. These limitations, associated with topography which prevent street connections to the east or west, are consistent with the provisions of criterion (A). Section

17.154.040(A) is satisfied.

> "There are limitations associated with topography which prevent street connections to the east or west as additionally described in Subsection C below addressing permitted exceptions. With the approval of these exceptions, Section 17.154.040(B) is satisfied." Record 99 (underscoring omitted).

With respect to Section 17.154.040(C), the city council found:

> "The east side of the project is dominated by South Scappoose Creek, its floodplains, wetlands and buffers and riparian corridors. A roadway or pedestrian bridge to Day Street would negatively impact natural resources, floodplain and floodway and constitute an impractical cost for the project.
>
> "Accessways to the east and west are not necessary to provide safe, direct and convenient circulation. To the west, an accessway would be steep and would not appreciably improve pedestrian circulation beyond that available in JP West Road. To the east, an existing sidewalk system along JP West Road already provides safe, direct and convenient circulation to nearby destinations such as schools, parks, stores, etc." Record 100.

The city council identified topographical constraints and natural resources that impeded connections, including to Day Street, and determined that a pedestrian accessway was not required. Record 99-100. The city council found that there was already safe and direct circulation in one direction and that it was precluded in another direction. Petitioner's disagreement with the city council's weighing of evidence and conclusions is not a basis for reversal or remand.

Respondents do not, however, address petitioner's argument that city planning director and engineer approval is required with respect to SMC17.154.040(C) exemptions. Further, respondents argue that there is no cul-

de-sac but do not explain the basis for that assertion or otherwise respond to petitioner's argument that cul-de-sac standards applied. Again, SMC 17.154.040(C) provides, in part, that "[e]xemptions from requirement of Subsection B of this section may be allowed, upon approval by the planner and the city engineer[.]" SMC 17.154.040(C)(3) first provides that "[a] cul-de-sac street shall only be used where the city engineer and planner determine that environmental or topographical constraints, existing development patterns, or compliance with other appliable City requirements preclude a street extension[,]" and then sets out standards applicable to cul-de-sacs. We agree with petitioners that the findings are not adequate because they do not explain how the evidence leads to the conclusion that the city planner and city engineer agree that the exemption is appropriate, and do not either explain why the street is not a cul-de-sac or, if it is a cul-de-sac, address the cul-de-sac standards.

The seventh assignment of error is sustained.

The decision is remanded.