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 on remand from the Court of Appeals.

E. Michael Connors and Christopher P. Koback represented petitioner.

Peter O. Watts represented respondent.

Garrett H. Stephenson and Bailey M. Oswald represented intervenor-respondent.

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

REMANDED 04/30/2024

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, a conditional use permit, a tentative subdivision plat, and a sensitive lands development permit required to subdivide the subject property and develop numerous single-family residential lots.

BACKGROUND

This matter is on remand from the Court of Appeals. In *Haugen v. City of Scappoose*, ___ Or LUBA ___ (LUBA No 2023-001, Sept 5, 2023), we denied petitioner's first, second, third, fifth and sixth assignments of error. We sustained petitioner's fourth and seventh assignments of error and remanded the decision to the city. In *Haugen v. City of Scappoose*, 330 Or App 723, 545 P3d 760 (2023), the Court of Appeals reversed and remanded our decision with respect to the second and third assignments of error. We now address the court's decision.

ASSIGNMENTS OF ERROR

A. Second Assignment of Error

Petitioner explained that, pursuant to ORS 197.522(3), the city council reopened the record to allow intervenor to propose changes to its application and conditions of approval.[1] Petitioner argued that the city council erred in not

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[1] ORS 197.522(3) provides, in relevant part:

> "If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to

allowing petitioner to respond to intervenor's statements. Petitioner asserted: "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. We denied petitioner's second assignment of error.

The Court of Appeals explained:

> "In his second assignment of error, we understand petitioner to assert that LUBA erred by declining to address the merits of his argument that the information intervenor discussed with the city council after it reopened the record was 'evidence.' ORS 197.797(9)(b) defines 'evidence' in the context of a land use hearing 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.'" *Haugen*, 330 Or App at 730.

The Court of Appeals reversed and remanded our decision on this issue, explaining that we erred in finding that petitioner did not develop their argument that the information provided by intervenor's counsel was evidence because petitioner did not identify approval criteria to which the information related. The Court of Appeals concluded that petitioner had identified with as much specificity as city council members' concerns "about the 'density, lot sizes and

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> 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. * * *."

floodplain since the R-1 zone is a low-density residential zone and a significant amount of the property is within the floodplain.'" *Id.* at 732.

After describing in detail statements made by intervenor's counsel after the record was reopened, we previously observed that:

> "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. 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."[1] *Haugen*, ___ Or LUBA at ___ (slip op at 23) (record citation omitted).

We explained that "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." *Id.* at (slip op at 26) (emphasis from original omitted). We concluded, however, that petitioner did not identify specific approval standards related to the new information and therefore did not develop their argument that the new information was new evidence offered to demonstrate compliance with the standards relevant to the decision. Consistent with the Court of Appeals decision, we now address whether the information submitted was evidence, conclude that it was, and determine that petitioner was entitled to an opportunity to address the evidence provided.

For purposes of ORS 197.797(9)(b), "evidence" 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." Approval criteria applicable to planned development overlays include "[t]he proposed development complies with the comprehensive land use plan and is compatible with the surrounding area or its proposed future use[.]" Scappoose Municipal Code (SMC) 17.81.070(A). Conditional use permit approval criteria include "[t]he characteristics of the site are suitable for the proposed use considering size, shape, location, topography and natural features[.]" SMC 17.130.050(A)(1). Information related to engineering issues, the financial infeasibility of certain lot sizes, and the impact on project amenities are potentially responsive to both of these criteria and is evidence. Intervenor argued that its project concerned "needed housing" and that pursuant to ORS 197.522(3) (2021), the applicant, and only the applicant, is allowed to offer amendments or conditions of approval if a local government intends to find that its land use regulations are not met. We need not address this argument because we conclude that intervenor submitted evidence in addition to amendments and conditions of approval.

The second assignment of error is sustained.

B. Third Assignment of Error

The city council adopted as findings a staff report addressing the compliance of a 48-lot development with the applicable approval criteria. The

city council nonetheless imposed a condition of approval limiting the total lot number to 44. In its third assignment of error, petitioner argued 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 31-32 (first emphasis in original, second emphasis added).

We agreed with respondents that the city adopted findings, supported by substantial evidence, that a 48-lot project satisfies the applicable approval criteria. We also agreed 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 ha[d] not shown that additional findings [we]re required." *Haugen*, ___ Or LUBA at ___ (slip op at 31).

Differently, the Court of Appeals agreed with petitioner and reasoned:

> "Petitioner's argument was that, in light of that inconsistency, the council should be understood to have approved only a 44-lot project, notwithstanding its configuration of the ordinance as approving a 48-lot project with a condition limiting the number and minimum size of the lots. LUBA did not explain why, given the procedures the council followed, petitioner's understanding was incorrect. By failing to engage with the facts underlying petitioner's argument that the council's order was not supported by substantial evidence and reason, LUBA misapplied its standard of review and its order is therefore unlawful in substance." *Haugen*, 330 Or App at 734-35.

As the Court of Appeals explained, although the city council ultimately imposed a condition of approval limiting the development to 44 lots, the adopted decision concludes that a development with 48 lots meets the applicable criteria.

> "[I]t is the final written decision that is subject to LUBA review, not the oral statements that individual decision makers may make during the local proceedings. *Lowery v. City of Portland*, 68 Or LUBA 339, 359 (2013); *Hale v. City of Beaverton*, 21 Or LUBA 249, 258 (1991); *McCoy v. Linn County*, 16 Or LUBA 295, 306 (1987); *Citadel Corporation v. Tillamook County*, 9 Or LUBA 401, 404 (1983)." *Rawson v. Hood River County*, 77 Or LUBA 415, 424 (2018).

Accordingly, it is not clear to us that the city council concluded *that the applicable criteria* required that the development be limited to 44 lots. However, the final written decision must be supported by substantial evidence, that is, evidence a reasonable person would rely upon to reach a conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). We conclude in the second assignment of error that the city council was required to allow petitioner to respond to the evidence introduced by intervenor. Because there was no opportunity to respond to it, intervenor's unchallenged evidence was not evidence upon which a reasonable person would rely, it was not substantial, and the findings are not adequate.

The third assignment of error is sustained.

The Court of Appeals decision does not disturb the remainder of our September 5, 2023 decision.

The city's decision is remanded.