BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SEQUOIA PARK CONDOMINIUM UNIT OWNERS' ASSOCIATION, Petitioner, vs. CITY OF BEAVERTON, Respondent, and MILLER SANITARY SERVICE and CITISTICS, INC., Intervenors-Respondent.	)	LUBA No. 98-055
HENRY KANE, Petitioner, vs. CITY OF BEAVERTON, Respondent, and MILLER SANITARY SERVICE and CITISTICS, INC., Intervenors-Respondent.	)	LUBA No. 98-059

FINAL OPINION AND ORDER

Appeal from City of Beaverton.

J. David Bennett and Katherine A. Dreyfus, Portland, filed a petition for review and argued on behalf of petitioner Sequoia Park Condominium Unit Owners' Association. With them on the brief was Copeland, Landye, Bennett and Wolfe.

Henry Kane, Beaverton, filed a petition for review and argued on his own behalf.

Mark Pilliod, City Attorney, Beaverton, filed a response brief and argued on behalf of respondent.

Edward J. Sullivan, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Preston, Gates and Ellis.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 06/30/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the city's decision modifying a prior decision that approved a recycling facility in an industrial zone.

MOTION TO INTERVENE

Miller Sanitary Service and Citistics, Inc. (intervenors), owners of the subject property, move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

MOTIONS TO FILE REPLY BRIEFS

Petitioner Sequoia Park Condominium Unit Owners' Association (Sequoia Park) and petitioner Kane move separately to file a reply brief pursuant to OAR 661-010-0039.[1] Both petitioners contend that their respective reply briefs are allowed under that rule because they are confined solely to "new matters" raised in the response briefs. Intervenors object to both reply briefs, on the grounds that neither reply brief addresses any "new matters" raised in a response brief within the meaning of OAR 661-010-0039. In addition, intervenors object to Kane's motion to file a reply brief on the grounds that it was filed December 1, 1998, less than two days before oral argument and more than one month after the response briefs were filed in this case. Intervenors argue that Kane failed to submit his proposed reply brief "as soon as possible" after the response briefs were filed, and thus violated OAR 661-010-0039.

A. Sequoia Park's Motion to File a Reply Brief

Sequoia Park's motion to file a reply brief asserts that a reply brief is warranted to respond to new matters raised in the response briefs, but does not identify those alleged new

---

[1]OAR 661-010-0039 provides in part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief."

matters or attempt to demonstrate compliance with OAR 661-010-0039. Instead, that attempt is made in the reply brief itself, mixed in with Sequoia Park's arguments replying to the alleged new matters, and in a response to intervenors' objections. The reply brief identifies, and responds to, over a dozen alleged "new matters" raised in the response briefs.

Intervenors argue that the proposed reply brief is unwarranted, because it consists entirely of additional argument on matters that were or could have been anticipated and raised in the petition for review. Intervenors submit that a "new matter" warranting a reply brief under OAR 661-010-0039 is limited to unanticipated defenses raised in the response brief. According to intervenors, each of Sequoia Park's six assignments of error argues either that the city misconstrued the applicable law or that its decision is not supported by substantial evidence. Intervenors posit that there should be a rebuttable presumption that responses to such assignments of error are not "new matters" within the meaning of OAR 661-010-0039.

We agree with intervenors to the extent that responses directed to the merits of an assignment of error are unlikely to constitute "new matters" warranting a reply brief under OAR 661-010-0039. D.S. Parklane Development, Inc. v. Metro, ___ Or LUBA ___ (LUBA Nos. 97-048/050/052-055/057/063, February 25, 1999) slip op 6-7. Rather, responses warranting a reply brief tend to be arguments that assignments of error should fail regardless of their merits, based on facts or authority not involved in those assignments. Id.

In the present case, Sequoia Park's proposed reply brief identifies two arguments in the response brief to the effect that certain assignments of error should fail, based not on the merits of those assignments but on facts or authority extrinsic to those merits. Those two new matters are (1) whether intervenors' facility was "grandfathered" in; and (2) whether certain issues or assignments of error were resolved by the city's prior approval of intervenors' facility and thus cannot be challenged here.

We agree with intervenors that the remaining new matters alleged in the reply brief are simply responses to the merits of certain assignments of error, and that the replies directed to those alleged new matters constitute embellishments of arguments already presented in the petition for review.

Accordingly, Sequoia Park's reply brief is allowed with respect to the two new matters set out above; otherwise the reply brief is denied.[2]

B. Kane's Motion to File a Reply Brief

The procedural requirements in our rules "are intended to promote the speediest practicable review of land use decisions* * *." OAR 661-010-0005. Notwithstanding that intent, "[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision." Id. In the present case, intervenors argue that their substantial rights to the "speediest practicable review of land use decisions" is violated by Kane's submission of a 32-page reply brief two days before oral argument, and more than one month after the response briefs were filed. We agree.

Whether untimely submission of a motion to file a reply brief violates respondents' substantial rights depends in large part on whether respondents have adequate time to respond to the motion and will have adequate preparation time to respond at oral argument to the arguments included in the reply brief. Shaffer v. City of Salem, 29 Or LUBA 592, 593-94 (1995) (reply submitted 35 days after the response briefs were filed, but 27 days prior to oral argument, is a technical violation of LUBA's rules). That in turn depends on the length of the proposed reply brief and the proximity of oral argument. Sparrows v. Clackamas County, 24 Or LUBA 318, 320 (1992) (a seven-page reply brief filed 17 days after the response briefs were filed and four days before oral argument did not prejudice the

[2]Sequoia Park's reply brief is limited to pages 1-3, and 9-17 of the proposed reply brief.

respondents' substantial rights); see also Knapp v. City of Jacksonville, 20 Or LUBA 189, 193 (1990) (striking response brief filed 21 days late and one day before oral argument).

In the present case, submission of a 32-page reply brief two days before oral argument allows respondents neither sufficient time to respond to the motion nor adequate preparation time to respond at oral argument. Accordingly, Kane's motion to file a reply brief is denied as untimely filed.

MOTION TO STRIKE MATERIAL STATEMENTS OF FACT

Petitioner Kane moves to strike ten specifically identified portions of the "statement of fact" contained in intervenors' response brief. Kane argues that the challenged statements are false and not supported by the record, and moves to strike them.

That a brief includes allegations of fact that are not supported by the record is not grounds for striking those allegations from the brief. Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40, 747 P2d 373 (1987). If any allegations of fact in a brief are not supported by the record, we disregard those allegations of fact. Mannenbach v. City of Dallas, 25 Or LUBA 136, 138, aff'd 121 Or App 441, 856 P2d 345 (1993); Hammack & Associates, 16 Or LUBA at 78.

Kane's motion to strike the disputed statements in intervenors' brief is denied.

MOTION TO VIEW EVIDENCE IN THE RECORD

Kane moves the Board to view a videotape in the record. No such motion is necessary to direct the Board's attention to evidence in the record, other than an explanation in a pleading or at oral argument as to why the Board should do so. Accordingly, Kane's motion is denied.

Intervenors object to and move to strike three appendices attached to Kane's motion, arguing that those appendices contain excerpts from two city council meetings and a copy of a city resolution that post-date the challenged decision, and thus are not part of the record of

the proceedings below. We agree. The three appendices to Kane's motion are stricken.[3]

FACTS

The subject property is a 5.5-acre site zoned light industrial (LI). The site is bordered on the south by a 132-unit condominium managed by Sequoia Park and zoned for multi-family residential use. It is bordered on the southwest by a parcel also zoned LI, and to the west across Alger Street by land zoned for multi-family residential use. East of the subject property lie railroad tracks, Highway 217, and more property also zoned LI. North of the subject property are lands zoned for commercial uses and the city center.

Intervenor Miller Sanitary Services began using the site in 1977 as part of an operation collecting and handling solid waste. In 1981, the zoning was changed from Industrial Park to Light Industrial, and the city-zoning ordinance was amended to include Recycling Centers and Salvage Yards as conditional uses within the LI zone. Miller's operation evolved and expanded over time and, prior to 1996, consisted of collecting and handling residential and commercial wastes and curbside recyclables that had been presorted by consumers. Some of the collected wastes and recyclables were returned to the subject property and processed further there, while some were taken directly to a transfer facility for disposal. Any "wet garbage," or putrescible waste, delivered to the facility did not stay on site, but was loaded directly from one truck to another and delivered to a transfer station for ultimate disposal in a landfill.

In 1996, intervenors applied to the city for design review and conditional use approval to expand their operation. Intervenors proposed to replace an existing shed-type building with a "recovery processing facility" intended to "complement, enhance, and/or replace all aspects of the off-loading, sorting, picking, and reloading operations by way of an

[3]LUBA may, if a party requests it, take official notice of the city enactments pursuant to OEC 202. However, Kane does not request that we take official notice of the city's resolution appended to his motion, and we consider it no further.

automated/mechanized processing system located in a completely enclosed structure." Record 478. The proposal calls for garbage trucks to back into the new facility to dump solid waste inside. The solid waste is then run over a conveyor belt through a "pick line," where recyclable material is recovered. The recyclables will be stored overnight in closed bins, and then transferred elsewhere to be recycled. Residual wastes are reloaded onto trucks and transferred to other facilities at the end of each day.

Notice of intervenors' application was sent to Sequoia Park, who participated in proceedings before the city planning commission (commission) on September 18, 1996. The commission approved the application, with conditions, on September 27, 1996. Condition 6 of the commission's approval prohibited intervenors from accepting any "putrescible waste," "except as authorized in Condition 5." Record 410. Condition 5 allows the applicant to accept and process "nonputrescible" wastes, but also states that "no other wastes shall be accepted unless specifically authorized in writing by the Department of Environmental Quality [DEQ] and/or Metro." Record 410.[4]

After the city's 1996 approval, intervenors applied for and obtained a building permit for the proposed building, and constructed that building. Intervenors also applied to DEQ

---

[4]Condition 5 states in relevant part:

"The applicant is authorized to accept and process:

"a. Dry nonputrescible construction and demolition (C&D) and dry nonputrescible and non-hazardous mixed commercial and industrial wastes collected by Miller Sanitary Service. The authorized materials include wood, corrugated cardboard, metals, sheetrock, plastics, rock and concrete, but specifically excluding any putrescrible solid waste.

"* * * * *

"b. Source separated recyclables that are collected by Miller Sanitary Service via curbside recycling programs and Miller Sanitary Service's commercial recycling programs.

"If otherwise required by law, no other wastes shall be accepted unless specifically authorized in writing by the [DEQ] and/or Metro." Record 409-410.

and Metro for a franchise and solid waste disposal permit to process putrescible waste. DEQ wrote to the city to request that it formally amend the 1996 commission order to clarify the commission's intent regarding acceptance and processing of putrescible waste. After further correspondence, the commission held hearings on January 14 and 28, 1998, and on January 30, 1998, issued an order clarifying that Conditions 5 and 6, read together, allow intervenors to process putrescible waste, as long as intervenors obtain specific authorization from DEQ or Metro. The commission's January 30, 1998 order modified the language of Condition 5 to reflect that clarification.

Petitioner Sequoia Park appealed the commission's 1998 order to the city council. The city council conducted a public hearing on February 17, 1998, at which it enlarged its scope of review to include not only whether the commission's clarification of the 1996 permit was correct, but also to reexamine whether the original 1996 proposal to process putrescible waste complies with applicable approval criteria. The city council's March 4, 1998 decision affirmed the commission's clarification of Conditions 5 and 6, and also determined that the proposal to process putrescible waste complied with all applicable criteria. The March 4, 1998 order amended several conditions of approval in the 1996 permit, in particular amending Condition 5 to state that:

> "The applicant is authorized to accept and process domestic solid waste and its putrescible component(s) from residential locations. The facility shall not accept any putrescible waste except as a contaminant component of domestic solid waste which shall not exceed 25% by weight of the total waste stream to the facility. Sorting, processing and removal from site shall be accomplished within guidelines or regulations as governed by DEQ and/or Metro. All putrescible material (not as a contaminant of recycled material) shall be removed at the close of business each day and shall not be stored on site over night." Record 2-3.

This appeal followed.

LAW OF THE CASE

As a threshold matter, respondents[5] contend that each of Sequoia Park's six assignments of error and Kane's first assignment of error must be denied because those assignments of error involve issues that were raised and resolved, or could have been raised, in the 1996 proceedings. Respondents argue that petitioners' challenges under these assignments of error are essentially collateral attacks on matters resolved in the city's 1996 decision, and thus those challenges must be denied.

Respondents' argument invokes a principle of judicial review described in Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992), and applied in similar circumstances to the present case in Kalmiopsis Audubon Society v. Curry County, 131 Or App 308, 312, 884 P2d 894 (1994), rev den 320 Or 567 (1995). In Kalmiopsis Audubon Society, the Court of Appeals affirmed LUBA's dismissal of an appeal, where the challenged decision merely corrected a clerical error in a previous, unchallenged decision. The court affirmed LUBA's conclusion that the unchallenged decision was the final, appealable land use decision. Further, the court explained that:

> "Assuming arguendo that the second order was also appealable, the only issues that petitioner could have raised in an appeal from it would be those that could not have been raised in an appeal from the first. Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992). Petitioner does not suggest that the issues it elected to raise in its appeal concerned matters that were peculiar to the [corrected material] from the first order or matters that could not reasonably have been raised in the absence of that [material]. LUBA stated that '[p]etitioner's challenges could have been, but were not, made in an appeal of [the first order].' Petitioner does not contend otherwise, and it demonstrates no error." 131 Or App at 312 (emphasis in original, footnote omitted).

We disagree with respondents that the principle applied in Kalmiopsis Audubon Society precludes petitioners from challenging the city's 1998 decision on the grounds stated in Sequoia Park's six assignments of error and Kane's first assignment of error. Respondents

[5]The city joins in and adopts intervenors argument on this threshold matter.

have not established that the matters raised in those assignments of error were resolved, or are matters that petitioners could have raised and resolved, in the 1996 decision. More importantly, respondents' argument fails to recognize that the city council's 1998 decision in this case is both a modification of the 1996 decision and a de novo review of whether the proposed facility is a use allowed in the LI zone and whether it complies with applicable criteria. As the quoted passage from Kalmiopsis Audubon Society suggests, petitioners may raise issues that were resolved, or could have been raised, in the 1996 decision, to the extent the 1998 decision revisited or modified the 1996 decision regarding those issues. Respondents have not established that any of the matters raised in the petitions for review involve matters that were not subject either to the city council's modification of the 1996 decision or its de novo determination that the proposed facility is an allowed conditional use in the LI zone that complies with all applicable criteria.

FIRST ASSIGNMENT OF ERROR (SEQUOIA PARK)

Sequoia Park argues that the city's finding that the proposed use is a "recycling center" or "salvage yard" allowed as a conditional use in the LI zone is not supported by substantial evidence in the record.

The challenged decision finds that the proposed use is a "recycling center" and "salvage yard" as the city interprets those terms:

> "Council interprets recycling centers to be primarily engaged in gathering, sorting, [and] storing recyclable material from solid waste. It is not limited to collection of curbside 'source separated material.' The basic qualities which, in our view, make this use a recycling center are that the primary purpose is the extraction of recyclable materials from the waste stream, the segregation of those materials and the transfer of them to various recycling markets rather than to a disposal facility. The opponents to this facility have focused primarily on the putrescible waste and residual material that remains after the recyclable materials have been culled out. We acknowledge that residual materials will be a byproduct of this recycling center, but the fact that such waste will be generated does not detract from the primary nature of the facility as a recycling center. Furthermore, the on-site separation of reusable material from waste is an inherent feature of a salvage operation, a separate basis for conditional use treatment. The fact that the applicant in this case proposes

> using a material recovery facility to separate recyclable material from solid waste, does not mean that its primary purpose is other than recycling and salvage." Record 23-24.

A. Recycling Center

Sequoia Park does not challenge the city's interpretation, but argues that the city's finding, that the primary purpose of the proposed facility is to extract recyclables from the waste stream, is not supported by any evidence in the record. Without some evidence regarding the percentage of recyclables that may be culled from a given waste stream, Sequoia Park argues, the city's finding that extraction of recyclables is the "primary purpose" has no basis in the record and, accordingly, the proposed facility does not constitute a "recycling center" even under the city's interpretation of that term. Further, Sequoia Park argues that the only evidence in the record suggests that the primary purpose of the facility is not to recover recyclable material, but instead to reduce costs by separating the waste stream into dry and wet components that intervenors may then transfer elsewhere for disposal at a lesser cost.

Sequoia Park relies on Linebarger v. City of the Dalles, 24 Or LUBA 91 (1992), for the proposition that in determining whether a recycling operation is a "primary" rather than an "incidental" purpose of a proposed recycling facility, the city must quantify the composition of the waste stream and how much material will be recycled, and show that the recycled material constitutes the majority of the waste stream.

Intervenors respond, and we agree, that Linebarger is not controlling. In Linebarger, the zoning district permitted "collection, packaging, storage" and uses "customarily incidental" to those listed uses under the city' code, which defined "recycling center" in a manner that excluded a solid waste transfer function and, by implication, extraction of recyclables from a waste stream. One of the issues presented in that appeal was whether the "solid waste transfer station component" of a recycling facility was "'incidental' to the recycling use." Linebarger, 24 Or LUBA at 95. LUBA held that the city's affirmative

conclusion was supported by substantial evidence, based on evidence that only 30 percent of the waste stream would be transferred for disposal. Id. at 96-97.

The present case is distinguishable. Unlike the definition at issue in Linebarger, the city here interprets "recycling centers" as facilities having the primary purpose of extracting recyclables from a waste stream. That is, a facility for extracting recyclables from a waste stream is an allowed conditional use in the LI zone, where extracting such recyclables is the "primary purpose" of the facility. The city's code, as interpreted, does not necessarily require a demonstration that the majority of the waste stream will be recycled, and thus does not necessarily require any particular quantification of the waste stream.[6]

With respect to Sequoia Park's second argument, that the record lacks evidence that primary purpose of the proposed facility is to recover recyclables, Sequoia Park cites to Record 414, where the applicant testified that after extracting recyclables from the waste stream, residual waste would be sent to a Metro transfer facility, with the exception of "dry residuals," which would be sent to a specialized facility. A commissioner commented: "* * * avoided costs is really the whole point of the exercise. You'll avoid the Metro $75 and you'll go to the [$59.87] at Grabhorn." Id.[7] Sequoia Park argues that the commissioner's comment

---

[6]The amount of material actually recycled will be a function of how much recyclable material is in the waste brought to the facility, an amount that presumably will vary. However, under the city's interpretation of its code, recycling can be the "primary purpose" of the facility even if the majority of the material brought to the facility ultimately goes to a landfill.

[7]The transcript of the planning commission hearing reflects the following colloquy:

"[COMM'R]: Where will you be taking your residual solid waste and in what mode?

"[APPLICANT]: Currently the plan for the residual is at Metro [South].

"* * * * *

"[COMM'R]: [Highway] 217 to Oregon City then?

"[APPLICANT]: Correct. Ah, residuals in terms of dry materials, Lakeside.

"[COMM'R]: Right. So you would go to Metro approved or designated facility?

indicates that he understood the primary purpose of the proposed facility to be segregation of wet and dry wastes in order to reduce tonnage costs, and that there is no evidence in the record indicating that recovering recyclables is the primary purpose of the proposed facility.

In response, intervenors cite to a number of places in the record where the proposed facility is described in terms that, according to intervenors, make it clear that recovering recyclables from the waste stream is the primary purpose of the facility. Record 243-53 (applicant's testimony); 680-81 (project description sent to DEQ); 734-35 (DEQ evaluation); 906-11 (narrative describing facility); 1708-12 (original application). The cited portions of the record contain lengthy descriptions of the proposed facility, the recyclable recovery process, and the anticipated economic and societal benefits of that process, with little discussion or emphasis on residual wastes. The cited testimony generally emphasizes that the key aspect of the facility is the "pick line," where recyclables are recovered. In contrast, discussion of residual waste is minimal. The narrative at Record 907-08 is representative. That narrative describes the nine steps of the proposed operation of the facility, only one of which pertains to residual waste, and then only to state that the residual waste "will be stockpiled in compactors under the pick line and removed to the Metro South transfer station or other disposal point as soon as the compactor containers are full." Record 908. In addition, intervenors cite to the applicant's testimony that:

"[APPLICANT]: Yes.

"[COMM'R]: So you'll be going through avoided costs is really the whole point of the exercise. You'll avoid the Metro $75 and you'll go to the fifty-nine eighty-seven at Grabhorn.

"[APPLICANT]: For those materials that are residuals that we cannot recycle.

"[COMM'R]: Okay.

"[APPLICANT]: But there is still a considerable volume of material in here to be recovered that will not go to either type of proposal." Record 413-14.

> "[t]here's still a large volume of material in the residential side which simply isn't getting into the recycling program which is going currently straight through to landfills. We want to recover some of that material. The heart of this whole process which makes economic sense is the convenience, the centralized location, the shorter distances and, of course, the cost avoidance. But it's a package arrangement and it needs to have all of the components in order to be successful. If you take out one of those components it may or may not be economically viable * * * [.]" Record 418.

Intervenors argue that the "cost avoidance" that is the "heart of the whole process" refers to the avoided tonnage charges for recycled waste that would otherwise go to the landfill.

Substantial evidence is evidence a reasonable person would rely upon in making a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984). Where the evidence is conflicting, if a reasonable person could reach the decision the local government made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995).

In the present case, Sequoia Park is incorrect that there is no evidence supporting the city's finding that recovering recyclables is the primary purpose of the facility. More accurately, there is conflicting evidence regarding the purposes of the proposed facility, and the relative primacy of those purposes.[8] However, the record as a whole indicates that the most significant function and justification for the proposed facility, and particularly the pick line that is the main feature of the facility, is to recover recyclables. Intervenor argues, and we agree, that a reasonable person could conclude from the record that the primary purpose of the proposed facility is to recover recyclables, notwithstanding that the proposed facility

[8]It is not clear that the commissioner's comment, which is the sole basis for Sequoia Park's argument that the primary purpose of the facility is to segregate wet and dry wastes, constitutes evidence. See Forster v. Polk County, 23 Or LUBA 420, 426, rev'd on other grounds 115 Or App 475, 839 P2d 241 (1992) (comments by decision-makers during deliberations do not constitute evidence). For purposes of this opinion, we assume, without deciding, that comments by a decision maker during questioning of an applicant can constitute evidence supporting or opposing a challenged decision.

might serve or facilitate other economic purposes.

We conclude that the city's findings that the primary purpose of the proposed facility is to recover recyclables and thus the facility is a "recycling center" as the city interprets that term is supported by substantial evidence in the record.

B. Salvage Yard

Because we affirm the city's determination that the proposed use is a "recycling center" under the city's code, we need not address Sequoia Park's evidentiary challenges to the city's alternate finding that the proposed use constitutes a "salvage yard" as the city interprets that term. See Port Dock Four, Inc. v. City of Newport, ___ Or LUBA ___ (LUBA No. 98-061, March 25, 1999) slip op 7 (LUBA will deny an assignment of error challenging the findings addressing an approval criterion, where there is an unchallenged alternative finding that the approval criterion does not apply).

The first assignment of error (Sequoia Park) is denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR (SEQUOIA PARK)

In the second assignment of error, Sequoia Park challenges the city's alternative determination that the proposed facility qualifies as a "salvage yard," arguing that the city failed to recognize that the term "salvage yard" is defined in the Beaverton Development Code (BDC).[9] Sequoia Park contends that the city's ad hoc interpretation of "salvage yard" in the finding quoted above is inconsistent with the definition in the city's code. Further, Sequoia Park argues, the proposed facility is plainly not a "salvage yard" under the code definition, because it is not "out-of-doors."

---

[9]BDC 5.75 defines "Salvage Yard" as

> "A place out-of-doors where waste, discarded or salvaged materials are bought, sold, exchanged, baled, packed, disassembled or handled, including vehicle wrecking yards, building wrecking yards, used lumber yards and places of storage of salvaged buildings; wrecking and structural steel materials and equipment, but not including rummage, yard or garage sales of no more than four (4) days duration. Three or more dismantled or inoperable vehicles on one lot shall constitute a salvage yard."

In the third assignment of error, Sequoia Park challenges the city's alternative determination that the proposed use qualifies as a conditional use allowed in the LI zone because if it is not a recycling center or salvage yard it is "similar" to those uses, and thus allowed under BDC 11.[10] Sequoia Park argues that the city council misconstrued BDC 11 in failing to require that the planning director render a written decision under that provision.

In the fourth assignment of error, Sequoia Park challenges the evidentiary basis for the city's conclusion that the planning director had invoked BDC 11 and thus that the proposed use is allowed as a use "similar" to listed conditional uses.

In the first assignment of error we affirmed the city's determination that the proposed facility is a "recycling center" as the city interprets that term, and thus that the proposed use is a conditional use allowed in the LI zone. Accordingly, we need not address Sequoia Park's challenges to the city's alternative bases for concluding that the proposed use is an allowed conditional use.

The second, third and fourth assignments of error (Sequoia Park) are denied.

FIFTH ASSIGNMENT OF ERROR (SEQUOIA PARK)

Sequoia Park challenges the city's findings of compliance with BDC 99.3(A), (B), and (C), arguing that those findings are inadequate.[11]

BDC 99.3 provides that:

---

[10]BDC 11 provides in relevant part:

> "**Authorization for Similar Uses.** The Planning Director may authorize that a use, not specifically named in the allowed uses[,] be permitted if the use is of the same general type and is similar to the allowed uses; * * * The decision of the Planning Director shall be in writing on a form prescribed for this purpose. A person disagreeing with the Planning Director's decision may appeal that decision as provided by [BDC] 4.2.

[11]Although Sequoia Park's challenges under this assignment of error are couched in terms of a challenge to the adequacy of the city's findings, in fact most of them can be more accurately described as substantial evidence challenges pursuant to ORS 197.835(9)(a)(C), or as arguments that the city misapplied or misconstrued the relevant criteria. Our discussion attempts to address these arguments as well as Sequoia Park's adequacy challenges.

"In order to grant a Conditional Use Permit, the Planning Commission or Planning Director shall make findings of fact to support the following conclusions:

"(A) The proposed conditional use will comply with the purpose of this section and with all of the applicable provisions of this ordinance.

"(B) The proposed development will comply with the Comprehensive Plan.

"(C) That the location, size, design and functional characteristics of the proposed use are such that it can be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood."

A. BDC 99.3(A)

Sequoia Park argues that, except for general references, the challenged decision fails to address the requirements of BDC 99.3(A). Sequoia Park appears to recognize that BDC 99.3(A) is largely derivative, in that compliance with that standard is achieved by finding compliance with all other applicable provisions. However, Sequoia Park argues that the challenged decision fails to establish that the proposed facility complies with three applicable provisions, BDC 56.11(A), 56.11(C), and 57.2.

1. BDC 56.11(A)

BDC 56.11(A) requires that "[a]ll business, service, repair, processing, storage or merchandise display shall be conducted wholly within an enclosed building unless screened by a sight-obscuring fence or wall." Although the challenged decision requires the applicant to conduct most operations within the enclosed building and to add three feet to the existing six-foot high wall, Sequoia Park argues that some operations will still occur outside the building or with the building doors open, and that the nine-foot high wall does not completely screen the facility from the elevated portion of Highway 217 nearby or the second story windows of Sequoia Park's condominium units. Consequently, Sequoia Park argues, the record does not demonstrate that the proposed facility complies with BDC 56.11(A).

The city disagrees with Sequoia Park's implicit argument that BDC 56.11(A) requires complete visual blockage at all times from all potential viewpoints. The city argues that the "sight obscuring" requirement of BDC 56.11(A) does not mean that nothing can ever be seen, but simply that operations are obscured from view at normal times and from normal view points. According to the city, BDC 56.11(A) does not prohibit brief glimpses of the facility's interior while doors are temporarily open, nor does it require screening outdoor operations from elevated platforms such as low-flying aircraft, Highway 217, or multi-story buildings.

The challenged decision does not address the interpretational issue raised by the parties. Pursuant to ORS 197.829(2), LUBA may determine whether the city's decision is correct.[12] We agree with the city that the sight-obscuring wall or fence allowed by BDC 56.11(A) requires screening only from a street-level perspective, not from elevated platforms such as the upper stories of nearby buildings. Sequoia Park's view of BDC 56.11(A) would effectively preclude the use of a wall or fence as a screening device, contrary to the terms of that provision. Accordingly, we conclude that the city's finding of compliance with BDC 56.11(A) is adequate and, as interpreted here, supported by substantial evidence.

This subassignment of error is denied.

2. BDC 56.11(C)

BDC 56.11(C) requires that "[a]ll materials, including wastes, shall be stored and all grounds shall be maintained in a manner which will not attract or aid the propagation of insects or rodents or create health or fire hazards. All areas for storage of waste shall be fully screened."

---

[12]ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

Sequoia Park contends that the record does not support the city's finding of compliance with BDC 56.11(C), because the applicant proposes overnight storage of recyclables contaminated with putrescible wastes in outdoor, closed-top storage bins currently used for presorted recyclables, which Sequoia Park argues will attract and propagate insects and rodents, as well as present a potential fire hazard.

The challenged decision prohibits overnight storage of putrescible wastes, and requires that all recyclables be stored in closed-top compactors or storage bins. The decision also requires that the applicant perform additional vector control measures and finds compliance with BDC 56.11(C) based on these requirements. Sequoia Park's speculation that storage of contaminated recyclables in closed containers will attract insects and rodents or lead to fire hazards does not establish that the city's findings are inadequate.

This subassignment of error is denied.

3. BDC 57.2

BDC 57.2 provides that "[t]he emission of odorous gasses or matter as to be readily detectable at any point beyond the property line is prohibited." Sequoia Park argues that the city made no effort to demonstrate that odors will not migrate across property lines, but instead merely required that if odors are detected beyond the property line, the applicant will have to install an odor or emission system of some kind to address the problem. For this reason, Sequoia Park contends that the challenged decision does not adequately address BDC 57.2.

The challenged decision acknowledges that any determination of whether or not the proposed facility will comply with BDC 57.2 is speculative, given that the proposed facility has not begun operation. However, the city relied on testimony that the proposed facility would produce no greater odor problem than the existing operation, and that no odor complaints had been reported against the existing operation, to conclude that BDC 57.2 is satisfied. In addition, the city required that, if odor becomes a problem, the applicant will

have to install modifications, such as negative pressure ventilation or misting systems over the pick line, to correct that problem.

Adequate findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the proposal, as conditioned, satisfies the approval standards. Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995). The challenged findings adequately explain the city's reasons for concluding that the proposed facility, as conditioned, will not generate odors detectable at the property line.

This subassignment of error is denied.

B. BDC 99.3(B)

BDC 99.3(B) requires consistency with applicable comprehensive plan policies and objectives. Sequoia Park argues that the proposed facility is inconsistent with several comprehensive plan policies.

1. Industrial Policy 3

Beaverton Comprehensive Plan (BCP) Industrial Policy 3 provides that "[n]ew industrial development in the community should recognize and respect the character of surrounding development." Sequoia Park argues that processing putrescible waste is new industrial development that cannot, by its nature, "recognize" or "respect" the character of the adjoining residential development.

The city responds that the challenged decision interpreted BCP Industrial Policy 3 to determine that the proposed facility is not "new industrial development" subject to that provision:

> "The development proposed in this case is not 'new' as that word is used in the Plan. For approximately 20 years the applicant has conducted a garbage collection business at this address, including the collection of source separated recyclables and the reloading of domestic solid waste, including putrescible waste, from small trucks into larger vehicles[.] * * *

> The specific activity sought to be conducted by the applicant in this instance involves additional steps besides recycling and reloading of smaller solid waste loads into larger loads. The applicant proposed a materials recovery facility, which generally involves separating recyclable materials from commercial, industrial and domestic waste streams. While these additional activities might be considered 'new' they were also approved under the original [conditional use permit]." Record 25.

Sequoia Park does not directly challenge this interpretation, but instead argues that in fact the activities related to separation of putrescible waste are "new industrial development" because the current facility does not perform those activities. However, the city council interpreted BCP Industrial Policy 3 to the effect that expansion of existing industrial uses to include additional steps in an existing process is not "new industrial development" within the meaning of that provision. That interpretation is not inconsistent with the terms, purpose, or policy of BCP Industrial Policy 3 or "clearly wrong," and thus must be affirmed. ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992). As the city interprets BCP Industrial Policy 3, its conclusion that the proposed facility is not "new industrial development" is supported by substantial evidence in the record. Sequoia Park's arguments to the contrary do not provide a basis to reverse or remand the challenged decision.

This subassignment of error is denied.

2. Industrial Policy 10

BCP Industrial Policy 10 provides that "[w]herever industrial uses abut residential uses or residential zoning, special development standards relating to setbacks, screening, signs, building height and architectural review should be established."

The challenged decision finds that BCP Industrial Policy 10 "has been addressed by the establishment of the design review process, special site development standards applicable to industrial uses and the separate, final decision of the Board of Design Review, which decision has not been appealed." Record 26. In other words, the city council finds that BCP Industrial Policy 10 is not a mandatory approval criterion that applies directly to the

challenged decision, but instead merely requires that the city adopt standards. The city implemented BCP Industrial Policy 10 by adopting standards to be applied in the design review process.

Sequoia Park does not challenge the city's interpretation of BCP Industrial Policy 10, but instead faults the city for making a finding of compliance with that policy without identifying the evidence that was before the Board of Design Review, arguing that without that evidence the city's finding of compliance with BCP Industrial Policy 10 is inadequate. However, an inadequate finding of compliance with a plan provision that the city has determined does not constitute a mandatory approval criterion is, at most, harmless error. Gettman v. City of Bay City, 28 Or LUBA 116, 119 (1994).

This subassignment of error is denied.

3. Industrial Policy 11

BCP Industrial Policy 11 requires that "[i]ndustrial lands should be used by industries which will enhance the livability of the area * * *. Continuing efforts should be made to upgrade and enforce performance standards as the area grows."

The city found with respect to BCP Industrial Policy 11 that

> "the industrial area here has been in existence for many years along the Southern Pacific Railroad right of way. The 'area,' referred to in this policy, which is sought to be enhanced is not defined specifically. The existing activity at the particular site will be enhanced by the replacement of an older structure with a new one, the removal of underground fuel tanks and their replacement with an above ground tank and additional landscaping. In addition, the service which the applicant can provide under this conditional use approval will provide a public benefit by offering an alternative to sending recyclable components along with nonrecyclable solid waste to landfills. Operation of this facility will also aid in Metro and State objectives to achieve a 50% recovery of recyclable materials by the year 2000." Record 26.

Sequoia Park argues that this finding is inadequate, because (1) it fails to reflect any "continuing efforts * * * to upgrade and enforce performance standards"; (2) it supersedes

consideration of the relevant area by invoking statewide objectives; and (3) in any case, the proposed use does not enhance the livability of the area.

Sequoia Park does not explain why the language in BCP Industrial Policy 11 encouraging "continuing efforts * * * to upgrade * * * performance standards" constitutes a mandatory approval standard for decisions such as the decision challenged in this appeal, rather than a directive that the city take legislative action to "upgrade" performance standards. In addition, with regard to the directive to "enforce" performance standards, petitioners fail to identify any performance standards the city failed to enforce under BCP Industrial Policy 11.

Nor is it clear why the city's reference to a statewide objective in finding compliance with BCP Industrial Policy 11 supersedes consideration of the relevant "area." The challenged findings appear to define the relevant area as the "industrial area" including the subject property, and identify several ways the proposed facility benefits that area. Sequoia Park does not challenge these findings, and has not established that city's additional reliance on public benefits of recycling, which may have local, regional and statewide consequences, is error.

This subassignment of error is denied.

3. Residential Policy 13 and Residential Objective 11

BCP Residential Policy 13 provides that "[e]stablished and viable residential neighborhoods shall be preserved." BCP Residential Objective 11 provides that "[v]arious residential uses should be protected from the intrusion of incompatible uses in order to preserve and stabilize values and the character of the area."

The challenged decision finds compliance with both provisions, stating that "the applicant's use of the site for similar activities has occurred for about the same length of time as [Sequoia Park's] residential use. Protection is assured through both the conditional use and design review processes, which have been accomplished in this case." Record 26.

Further, the city finds that "residential neighborhood is preserved. The applicant has obtained conditional use approval for an activity which is substantially similar to activities which have occurred on this site over the past 20 years." Id.

Sequoia Park faults the above-quoted findings because they "avoid consideration of the proposed new uses." Petition for Review 40. The city responds, and we agree, that the above-quoted findings find compliance with the pertinent plan provisions based on findings to the effect that the proposed facility is "substantially similar" to the existing facility, which has long operated next to residential uses. Accordingly, we disagree with Sequoia Park that the challenged findings are inadequate because they fail to consider the proposed new uses.

This subassignment of error is denied.

C. BDC 99.3(C)

BDC 99.3(C) requires that the proposed use be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood. The challenged decision made the following findings of compliance with BDC 99.3(C):

> "Council notes that this requirement is designed to achieve reasonable compatibility, not the absence of adverse impacts. It must be remembered that the applicant has legally used the site as a recycling and reloading facility for approximately 20 years. Impacts and complaints have been minimal, even though the type of wastes that are received at the facility are largely the same as proposed for the new operation. As the Planning Commission's findings indicate, the impacts from the proposed operation have been addressed. Council adopts those findings. * * * Other than possible odor, dust and pest problems, other relevant factors were decided in favor of issuing the original CUP. The evidence indicates that the closest residence to this facility is about 170 feet from the nearest on site process, the truck wash. In addition between these two points is a brick wall and substantial evergreen landscaping. * * *" Record 27.

The challenged findings go on to make specific findings regarding impacts such as noise, and odor, and further adopt commission findings regarding similar impacts.

Sequoia Park argues first that the challenged findings are inadequate because they rely on an invalid comparison with the impacts from the current facility. According to Sequoia Park, the proposed facility will process up to 100 tons of solid waste per day, a portion of which will consist of putrescible waste, but the city did not quantify the volume or type of waste the current facility handles. Absent such quantification, Sequoia Park argues, the impacts of the current facility have no relevance in determining the impacts of the proposed facility.

The city adopted a finding that "the waste stream is not expected to significantly change in make-up or volume from the current situation." Record 11. Sequoia Park does not appear to challenge the evidentiary basis for that finding, other than to argue that the current facility does not involve processing tons of putrescible material per day, and thus the current facility cannot serve as a surrogate for determining the impacts of the proposed facility. However, the city did not find that the two facilities would have identical waste streams, only that the waste stream is not expected to significantly change. That finding is an adequate basis for the city to use the impacts of the current facility in determining the impacts of the proposed facilities. Consequently, we disagree with Sequoia Park that the challenged findings are inadequate.

Sequoia Park also contends that the city's findings regarding odor and noise are conclusory. With respect to noise, the city made the following findings, based on a 1996 noise study:

> "The ambient noise from the near-by Highway 217 freeway and related traffic was measured at 72.5 to 76.8 decibels. Noise from the adjacent railroad was not measured, but it is likely that a passing train would mask all sounds from [the subject property].
>
> "The loudest noise from operations within the processing building will be approximately 80 decibels, but noise insulation provided by the building's construction and the masonry wall on the south property line will reduce that level substantially below present ambient noise levels outside the building. * * * Therefore the record shows that the only noise from this operation likely to be audible at the south property line will be truck back-up beepers at the

> unloading bay and truck wash bay (85 decibels at a distance of 10 feet). * * * The noise from back-up beepers will be contained within the bays and directed out to the west, not toward the Sequoia Park Condominiums.
>
> "We find the noise level likely to result from this [facility] to be no more than current ambient levels. * * * [A] substantial number of garbage and recycling trucks already use the Miller site and are equipped with back-up beepers. The number of trucks is expected to increase by no more than 10% above current levels. We do not find this will result in increase in noise levels for neighboring properties, and therefore, find that the applicable noise and compatibility standards will be met with regard to noise." Record 12.

Sequoia Park contends that these findings are inadequate because they do not explain why highway sounds will likely mask sounds from the proposed facility, or how noise from back-up beepers will be contained and directed away from Sequoia Park's condominiums. We disagree. The challenged findings adequately explain both points.

With respect to odor, the city made extensive findings to the effect that the proposed facility should produce no more or greater odor or dust problems than the current facility. Record 12. In fact, the city found that the proposed operations should reduce odor and dust. Id. Sequoia Park faults the city's reliance on the condition prohibiting the applicant from receiving commercial putrescible waste, while allowing the applicant to receive only domestic putrescible waste. Sequoia Park argues that there is no evidence that domestic waste is any less odoriferous than commercial waste. However, the city did not impose that condition because it believed domestic waste is less odoriferous than commercial waste, as Sequoia Park suggests, but rather, as the city points out, because commercial putrescible waste contains little or no recyclable material. Sequoia Park also faults the city's findings regarding odor, dust, and airborne contaminants from Highway 217, as not being based on any data. However, Sequoia Park misses the point of the city's finding, which is that whatever the existing background level of odor, dust and contaminants from the highway and the current facility, the proposed facility will produce no greater impacts and may produce less. Sequoia Park's arguments under this subassignment of error do not demonstrate inadequacy in the city's findings.

This subassignment of error is denied.

The fifth assignment of error (Sequoia Park) is denied.

SIXTH ASSIGNMENT OF ERROR (SEQUOIA PARK)

Sequoia Park argues that a number of findings in the challenged decision regarding noise, odor, health, and visual impacts are not supported by substantial evidence. Sequoia Park lists a number of findings that it contends are not supported by any evidence in the record.[13] None of the challenged findings are ultimate findings of compliance with applicable approval criteria, and Sequoia Park does not explain why the challenged findings are so critical to those ultimate findings as to provide a basis for reversal or remand.

In response, intervenors point to evidence in the record that it contends supports the challenged findings. We agree with intervenors either that each of the challenged findings are supported by substantial evidence in the record, or that the challenged findings are nonessential to the ultimate findings of compliance with applicable approval criterion, and thus any lack of support in the record for those nonessential findings is not a basis to reverse or remand the challenged decision.[14] Kirpal Light Satsang v. Douglas County, 17 Or LUBA 387, 399, rev'd on other grounds 96 Or App 207, 772 P2d 944, adhered to 97 Or App 614, 776 P2d 1312 (1989).

The sixth assignment of error (Sequoia Park) is denied.

---

[13]Sequoia Park challenges the evidentiary basis for the city's findings that (1) the proposed facility has a double wall design, insulation, and heavy overhead doors; (2) the proposed facility is designed to contain dust and odors; (3) the wastewater collection and treatment system is designed to prevent contamination of area surface waters; (4) the applicant's use of chemicals to clean the facility will make the operation safer and more compatible with residential neighbors than it would be without them; (5) the proposed facility will segregate hazardous materials; (6) the proposed facility has been designed to applicable seismic standards; (7) that fears of seasonal flooding are unfounded; (8) that the wall along the southern property line will protect neighbors from odor and sounds; and (9) that domestic putrescible waste is less offensive than commercial putrescible waste. Sequoia Park's Petition for Review 45-47.

[14]We agree with intervenors that challenged findings 1 through 8, summarized in the preceding footnote, are supported by substantial evidence, and that finding 9, to the extent Sequoia Park accurately characterizes that finding, is not essential to a finding of compliance with any approval criterion.

FIRST ASSIGNMENT OF ERROR (KANE)

Kane argues that the city erred in approving the proposed facility because that facility is a "materials recovery facility" as defined by OAR 340-093-0030(57), and the city's development code does not authorize a "materials recovery facility" in the LI zone.[15] Kane reasons that, because the proposed facility meets the definition of a "materials recovery facility," it cannot also be a "recycling center" allowed as a conditional use in the LI zone.

Kane does not explain why the definition at OAR 340-093-0030(57) is relevant, much less controlling, in determining whether the city correctly categorized the proposed facility as a recycling center under its development code. For example, Kane does not argue, and it does not appear to be the case, that the relevant provisions of the city's development code implement OAR 340-093-0030(57). Even if the proposed facility meets the rule's definition of a materials recovery facility, it does not follow that it cannot also be a "recycling center" under the city's development code.

The first assignment of error (Kane) is denied.

THIRD ASSIGNMENT OF ERROR (KANE)[16]

Kane argues that the city erred in basing its 1998 conditional use approval on its understanding of what the city intended to approve in the 1996 conditional use approval. According to Kane, the city erred in relying upon post hoc expressions of intent to discern the meaning of Conditions 5 and 6 of the 1996 approval. United Telephone Employees PAC v. Secretary of State, 138 Or App 135, 139, 906 P2d 306 (1995) (subsequent statements of legislators' intent are not probative of the intent of statutes already in effect).

---

[15]OAR 340-093-0030(57) defines a "materials recovery facility" in relevant part to mean "a solid waste management facility which separates materials for the purpose of recycling from an incoming mixed solid waste stream * * *."

[16]At oral argument, Kane withdrew his second assignment of error.

However, Kane does not point out where in the challenged decision the commission or council relies on post hoc expressions of intent to discern the meaning of the 1996 permit approval. On the contrary, it appears that the commission attempted to determine the meaning of the 1996 permit by examining its terms:

> "We conclude that our present interpretation of the 1996 [conditional use permit], to the extent that interpretation is consistent with the language of the permit, is legally meaningful and sustainable. The City of Beaverton has plenary authority to interpret and enforce its land use permits * * *. Both [intervenor-respondent] Miller and [petitioner] Sequoia Park claim the meaning of [the 1996 permit] is clear, yet both parties propose diametrically opposed views of what that meaning should be. * * * [W]e find that Condition Nos. 5 and 6, when read together, can be harmonized and interpreted in a way that is internally consistent and does not, as Sequoia Park warns, do violence to the language of our 1996 permit." Record 9 (emphasis in original).

Generally, the process of determining the meaning of legislation focuses on discerning the intent of the enactors, by examining, at least initially, the text and context of that legislation. ORS 174.010; 174.020; PGE v. Bureau of Labor and Industries, 317 Or 606, 610, 859 P2d 1143 (1993). Kane assumes, as do we for purposes of this opinion, that this process of statutory interpretation is equally applicable to interpretations of permit conditions. However, Kane has not established that the city's approach in interpreting the terms of the 1996 permit is inconsistent with that process. Further, even if the commission or city council did rely on post-hoc expressions of intent as evidence for what the city originally intended Conditions 5 and 6 to mean, the city conducted the 1998 proceedings as a modification to the 1996 permit. Kane does not explain why United Telephone Employees PAC or any other authority prohibits the city from modifying the conditions of the 1996 permit to conform those conditions or the permit to the city's present intent.

The third assignment of error (Kane) is denied.

FOURTH ASSIGNMENT OF ERROR (KANE)

Kane argues that the challenged decision violate BDC 13 and 102, which govern the modification of previously approved land use actions. BDC 13.1(B) requires that "[s]ubstantial changes or alterations of conditions shall be processed in the same manner as the original application or request." Similarly, BDC 102 provides that "[a] request to substantially modify an existing Conditional Use Permit shall be processed in the same manner as a request for a Conditional Use Permit." Kane contends that the city failed to process the 1998 modification in the same manner as the original 1996 conditional use application.

In other words, Kane argues that the city failed to follow the procedures applicable to the matter before it. ORS 197.835(9)(a)(B). That being the case, Kane must show that the city's procedural error prejudiced his substantial rights. Id. We agree with intervenors that Kane does not explain under this assignment of error what "process" is missing from the 1998 proceedings, nor has Kane attempted to show any prejudice to his substantial rights from the city's alleged violation of BDC 13.1(B) and 102.

The fourth assignment of error (Kane) is denied.

FIFTH ASSIGNMENT OF ERROR (KANE)

Kane argues that the city committed procedural error in setting a public hearing date before the city council before any party filed an appeal of the commission's decision.

Kane explains that on January 22, 1998, the city published notice that if the commission's decision is appealed, the city council would conduct a public hearing on the appeal on February 17, 1998. Petitioner Sequoia Park filed an appeal of the commission's decision on February 5, 1998. Kane contends that setting the city council hearing date prior to an appeal being filed violates BDC 132.4(A), which requires that the hearing date on an appeal be set with the concurrence of the appellant at the earliest possible date. Kane also

argues that the city violated BDC 130.3 and 132.5, which require 20 days notice of a city council hearing on an appeal of a commission action.

The city council adopted the following relevant findings:

> "Based on the number of opponents of the proposed facility at the Planning Commission hearing on January 14, 1998 the City staff anticipated that an appeal would be filed. Therefore, prior to the filing of an appeal from Planning Commission's decision [on January 30, 1998] the City staff identified an available meeting date on the City Council's future agenda and gave public notice that in the event an appeal was filed, the hearing would occur on said date. Notice was thus initiated prior to the appeal filing deadline and before an appeal was received. Council did not establish the meeting date.
>
> "* * * * *
>
> "The City Council interprets [BDC] 132.5, 132.4 and 130.3 as presenting a potential conflict, especially when ORS 227.178 applies, and seeks to harmonize those sections. The City Council interprets these sections as allowing notice of an appeal hearing to be given before an appeal is filed. A contrary interpretation (requiring notice to be given only after an appeal is filed) could jeopardize the City Council's ability to conduct an appeal hearing without violating [the 120-day provisions of] ORS 227.178. Therefore, where an appeal to the City Council can reasonably be expected from a final Planning Commission decision and a hearing date can be identified based on that expectation, notice can be given in advance of the filing of the appeal without violating [BDC] 132.5." Record 18-19.

Kane does not challenge the city's interpretation, or argue that it is "clearly wrong." ORS 197.829(1); Goose Hollow Foothills League, 117 Or App at 217. Moreover, even if the city's view of the relevant code provisions is erroneous, we agree with the city that Kane has not established any prejudice to his substantial rights from the city's procedural error. Kane was not the appellant, and thus had no expectation that the city would seek his concurrence in setting an appeal date. Kane had more than 20 days notice that, if any appeal was filed, the hearing on that appeal would occur on February 17, 1998. While Kane had only 18 days to review the commission's decision and prepare for the February 17, 1998 hearing, Kane has not established that a longer time was necessary to allow him to prepare for that hearing.

The fifth assignment of error (Kane) is denied.

SIXTH ASSIGNMENT OF ERROR (KANE)

Kane argues that the city committed procedural error in limiting the city council's February 17, 1998 hearing to certain issues, in violation of BDC 132.3(B). Kane explains that the city's January 22, 1998 notice stated that the city council hearing, if any, would be "limited to issues pertinent" to the commission's decision, that is, "to what extent the earlier CUP approval (96006) intended to allow Miller Sanitary Service to receive and process putrescible and domestic wastes[.]" Record 539. Kane argues that this limitation of issues violates BDC 132.3(B), which allows the city council to review a commission decision either de novo or on the record before the commission, but does not, according to Kane, allow the city council to confine its review to something less than the range of issues before the commission.

However, Kane does not explain in what respect the city council's review was narrower than the commission's. As far as we can tell, the only issue before the commission was whether the 1996 permit allowed processing of putrescible waste, i.e. the same issue the city council announced it would address. Further, the city did not confine itself to the commission's scope of review, but at its February 17, 1998 hearing announced that, whether or not the 1996 permit allows the processing of putrescible waste, it would also consider de novo whether the proposed processing of putrescible waste is consistent with applicable approval criteria. Record 24. Kane does not explain how the city council's initial limitation or later expansion of its scope of review prejudiced his substantial rights, nor explain what issues the city's action prevented Kane from raising.

The sixth assignment of error (Kane) is denied.

SEVENTH ASSIGNMENT OF ERROR (KANE)

Kane argues that the city committed procedural error when city staff neglected to transmit a document to the city council that had been submitted to the commission, in violation of BDC 132.4(B). BDC 132.4(B) provides that the record before the city council

on appeal of a commission decision shall include "[a]ll materials submitted by the Planning Director with respect to the application." Kane argues that the missing document is a memorandum, with attachments, from a city planner that was submitted to the commission on January 14, 1998, and thus should have been included in the record before the city council. Kane attaches to his petition for review the first page of the memorandum.

The city responds that the January 14, 1998 memorandum is located at Record 1651-54, as the first attachment to a packet of documents submitted to the city council on February 4, 1998. Record 1650. The February 4, 1998 transmittal at Record 1650 lists 13 attachments, consisting of documents located elsewhere in the record. The city argues that, because Kane does not indicate what documents are attached to the January 14, 1998 memorandum, it is impossible to determine whether the documents listed at Record 1650 and located elsewhere in the record are the same documents that Kane alleges were not transmitted to the city council. Thus, the city contends, Kane has not established that the disputed memorandum and attachments were not transmitted to the city council. In any case, the city argues, Kane has not attempted to establish that the alleged error in failing to transmit the memorandum or its attachment to the city council prejudiced Kane's substantial rights. We agree with both points.

The seventh assignment of error (Kane) is denied.

EIGHTH ASSIGNMENT OF ERROR (KANE)

Kane argues that each of the city's findings at Record 5-29 are grossly inadequate, because they fail to set forth the evidence relied upon. However, the only finding that Kane specifically addresses is the city's finding that "[t]he applicant indicated it will not otherwise use chemical insecticides or rodenticides." Record 13. Kane argues that this finding is inadequate because it does not specify where in the record the applicant made the disputed statement. However, Kane cites no authority for the requirement that findings must indicate the location in the record where the evidence relied upon is found, and we are aware of none.

We decline to address Kane's general and undeveloped challenge to the remaining findings at Record 5-29. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).

In addition, Kane argues that the challenged decision made findings at Record 13-14 regarding vectors, pesticide use, chemical contaminants, hazardous materials contaminants, and storm water, flooding and surface water contamination without identifying the criteria to which those findings are directed. However, at Record 12 the decision states that the findings that Kane challenges are impact issues subject to BDC 99.3 and BCP Industrial Policies 3, 9, 10, 11 and Resource and the Environment Policy on Noise. Accordingly, we disagree with Kane that the challenged decision fails to identify the applicable criteria.

Finally, Kane sets forth a list of local provisions that, according to Kane, the challenged decision failed to address. However, Kane provides no argument or explanation as to why those provisions are mandatory approval criteria applicable to the challenged application. It is not our function to supply petitioner with legal theories or make petitioner's case for him. Deschutes Development, 5 Or LUBA at 220.

The eighth assignment of error (Kane) is denied.

The city's decision is affirmed.