

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

3  
4                   OREGON COAST ALLIANCE,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   CITY OF BANDON,  
10                  *Respondent,*

11  
12                  and

13  
14                  BANDON BEACH VENTURES, LLC  
15                  and PERK DEVELOPMENT, LLC,  
16                  *Intervenors-Respondents.*

17  
18                  LUBA No. 2024-020

19  
20                  FINAL OPINION  
21                  AND ORDER

22  
23                  Appeal from City of Bandon.

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

27  
28                  No appearance by City of Bandon.

29  
30                  Garrett K. West filed the intervenors-respondents' brief and argued on  
31                  behalf of intervenors-respondents. Also on the brief was O'Connor West, LLC.

32  
33                  ZAMUDIO, Board Member; RYAN, Board Chair, participated in the  
34                  decision.

35  
36                  RUDD, Board Member, did not participate in the decision.

37  
38                  REMANDED

09/05/2024

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

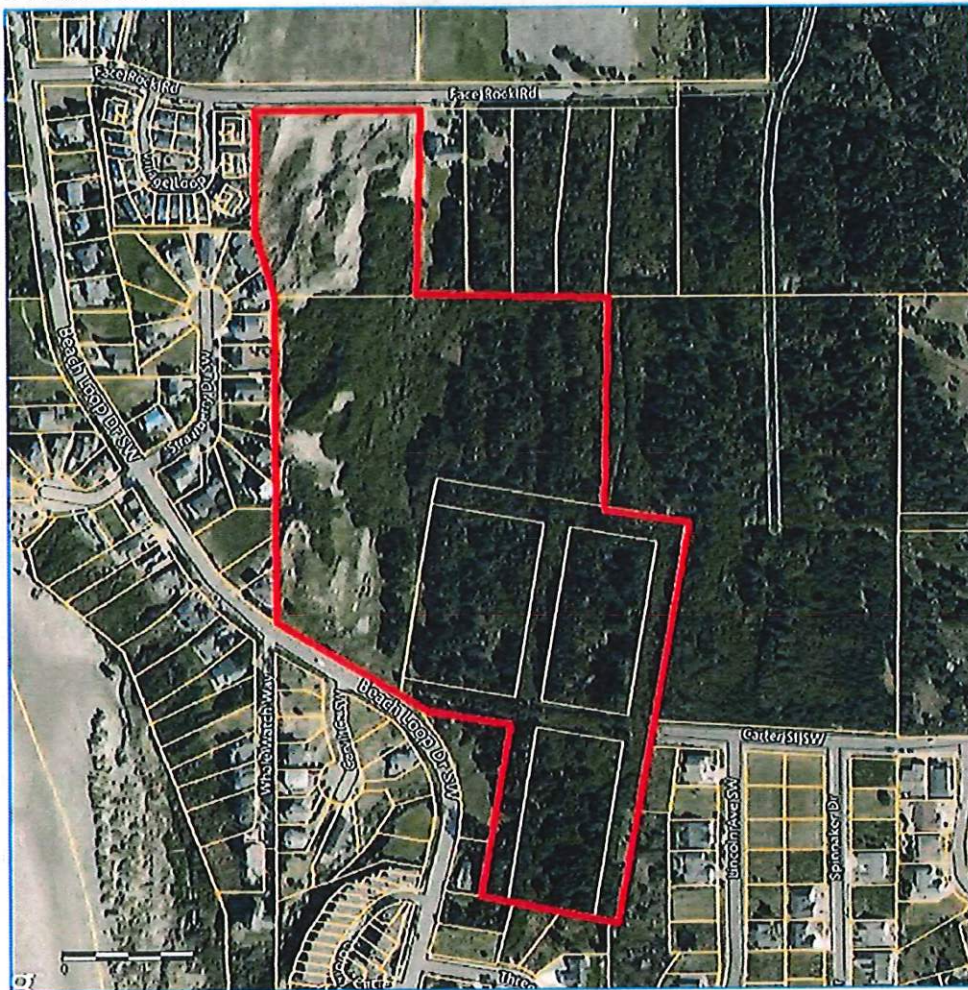
1 Opinion by Zamudio.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a conditional use  
4 permit (CUP) and site plan review for a 110-room hotel, two restaurant spaces,  
5 meeting rooms, spa, and 32 villas.

6 **BACKGROUND**

7 The subject property is approximately 24.2 acres zoned Controlled  
8 Development 1 Zone. The site abuts Beach Loop Drive, Face Rock Road, and  
9 Carter Street.



10 Record 1829.

1 Beach Ventures, LLC and Perk Development, LLC (intervenors) submitted to the  
 2 city an application seeking conditional use, site plan review, and height variance  
 3 approval. We refer to the overall development as Gravel Point, as the parties did  
 4 below.



Gravel Point Bandon, OR | Rendered Site Plan



5  
 6 Record 192. After public hearings, the planning commission approved the  
 7 application. The planning commission decision did not adopt supportive findings.  
 8 Record 1828.

9 Petitioner appealed the planning commission decision by submitting an  
 10 appeal statement that asserted errors in the planning commission approval and

1 contended that intervenors' proposal was flawed in various respects.<sup>1</sup> Record  
2 411-23. Prior to the city council hearing, intervenors submitted revisions to the  
3 application, including withdrawing the variance request. The city council then  
4 held a public hearing. At that hearing, petitioner requested that the record be left  
5 open for seven days to allow petitioner to respond to changes to the application.  
6 The city council denied that request. The city council approved the modified  
7 application with conditions. This appeal followed.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner argues that the city council committed a procedural error that  
10 prejudiced petitioner's substantial rights when the city rejected petitioner's  
11 request to hold the record open to allow petitioner to respond to intervenors'  
12 modifications to the application after the planning commission approval and  
13 before the city council approval. We will remand a decision if we conclude that  
14 the local government "[f]ailed to follow the procedures applicable to the matter  
15 before it in a manner that prejudices the substantial rights of the petitioner[.]"  
16 ORS 197.835(9)(a)(B). Those rights are the right to an adequate opportunity to  
17 prepare and submit one's case and to a full and fair hearing. *Muller v. Polk*  
18 *County*, 16 Or LUBA 771, 775 (1988). To establish procedural error, a petitioner  
19 must (1) identify the procedure allegedly violated, (2) establish that the error was

---

<sup>1</sup> Another individual also appealed the planning commission decision. Record 446.

1 preserved or that preservation does not apply, and (3) establish prejudice. *Stoloff*  
2 *v. City of Portland*, 51 Or LUBA 560, 563 (2006); *Confederated Tribes v. City*  
3 *of Coos Bay*, 42 Or LUBA 385, 391-92 (2002); *Concerned Citizens v. Jackson*  
4 *County*, 33 Or LUBA 70, 83 (1997).

5 Intervenor submitted a modified application on February 13, 2024, after  
6 the local appeal was filed, and prior to the February 21, 2024, city council  
7 hearing. Record 122-87. Also on February 13, 2024, intervenors submitted new  
8 supportive documents, including updated plans, traffic assessment, and a  
9 memorandum from intervenors' attorney. Intervenor's counsel states that they  
10 provided those documents to petitioner's counsel contemporaneously with their  
11 filing. On February 21, 2024, the date of the city council hearing, petitioner  
12 submitted an additional 1,200 pages of documents into the record. In those  
13 documents, and orally at the hearing, petitioner requested that the city council  
14 hold the record open. The city council denied that request.

15 Petitioner argues that the city should have granted petitioner's request to  
16 leave the record open to provide petitioner an opportunity to respond to the  
17 application modifications and new evidence. Petitioner argues that the city's  
18 denial of petitioner's request prejudiced its substantial right to make its case to  
19 the city. Petition for Review 40.

20 Intervenor respond that petitioner has not identified any legal authority  
21 that entitles petitioner to an extended open record period to allow petitioner to  
22 submit a response to documents that intervenors submitted prior to the city

1 council hearing. Intervenors also respond that petitioner has not established any  
2 prejudice to its right to make its case. Intervenors emphasize that they provided  
3 petitioner with copies of their revised application and supporting documentation  
4 in advance of the hearing and petitioner submitted documents on the day of the  
5 hearing. We agree with intervenors that petitioner has not demonstrated  
6 prejudice. Petitioner has not identified any evidence or argument that petitioner  
7 was prohibited from submitting due to the city's procedural choice to close the  
8 record after the city council hearing. Where the record shows that a petitioner  
9 was aware of criteria and participated effectively in the hearing, there is no  
10 prejudice to petitioner's substantial rights. *Eng v. Wallowa County*, 79 Or LUBA  
11 421, 427-28 (2019); *Furler v. Curry County*, 27 Or LUBA 546, 550 (1994).  
12 Petitioner has not established a basis for remand because petitioner has not  
13 demonstrated that any prejudice to its right to make its case resulted from the  
14 alleged procedural error.

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 Petitioner argues procedural error in the city council interpreting its local  
18 code as limiting the city council's *de novo* review to the issues identified in the  
19 local appeal statement. Record 11.<sup>2</sup> Intervenors respond, and we agree, that

---

<sup>2</sup> The city found:

1 petitioner has not demonstrated any prejudice. Petitioner concedes that the city  
2 council addressed all the issues that petitioner raised during the local appeal.  
3 Petition for Review 42-43.

4 The fourth assignment of error is denied.

5 **FIRST ASSIGNMENT OF ERROR**

6 Conditional use criterion Bandon Municipal Code (BMC) 16.12.040(F)  
7 requires the city to find that “[a]ll required public facilities and services have  
8 adequate capacity to serve the proposal, and are available or can be made  
9 available by the applicant[.]” Petitioner argues that the city misconstrued and  
10 made inadequate findings not supported by substantial evidence that BMC  
11 16.12.040(F) is satisfied with respect to water and wastewater services.

---

“The City Council reads [Bandon Municipal Code (BMC)] 16.04.070(E)(2) and (3) together and interprets them to mean that Type III appeals in the City of Bandon are normally limited to those issues raised in the Notices of Appeal. The term ‘de novo’ as used in BMC 16.04.070(E)(3)(c) does not mean that BMC 16.04.070(E)(2)(c) (‘A statement explaining the specific issues being raised on appeal’) is void or invalidated. Nor does the term ‘de novo’ mean to wipe the slate clean so as to eliminate the record created below or to throw open the doors for all issues on appeal without limitation. Instead, it means that when the City’s reviewing body elects to hold a de novo hearing on the merits of the appeal, the record is reopened to allow additional evidence and arguments to be placed before it and the reviewing body reviews the record as a whole without deference to the lower decision-making body.”  
Record 11.



1           **A.     Water Usage**

2           Petitioner argues that the city’s findings on the volume of water that Gravel  
3 Point will require and the volume of wastewater that Gravel Point will produce  
4 are inadequate and not based on substantial evidence. Intervenors estimated their  
5 water and wastewater needs in their application materials and explained as  
6 follows:

7           “Our team conducted a study on the capacity of the streets, water,  
8 sewer, and infrastructure facilities in the City of Bandon. We have  
9 reviewed the Bandon Water Management and Conservation Plan of  
10 2003, and the Bandon Revised Water Master Plan of 2022, the  
11 Bandon Comprehensive Plan, and the Oregon Statewide Land Use  
12 Planning Goals and have analyzed the capacity of every system that  
13 would be affected by our proposed development. Our team has also  
14 met with Jim Wickstrom, Electric Supervisor, and Tim Lakey,  
15 Public Works Supervisor, and have concluded that our project does  
16 not exceed the capacity for water, sewer, or power for the proposed  
17 Gravel Point Development.

18           “As of 2022, the treated water peak average for average daily  
19 demand was 1,440,000 gallons per day (6 Year Average). The  
20 treated water capacity is averaging 488,414 gallons per day. This  
21 results in a delta of approximately 951,586 available gallons per day  
22 before reaching the peak factor. If Gravel Point were to operate the  
23 hotel, amenities, food & beverage areas, & spa areas as a normal  
24 hotel without any efficiencies, our average daily demand would be  
25 21,773 gallons per day. We have proposed pursuing a LEED Gold  
26 Certification. LEED Gold forecasted water usage savings for Gravel  
27 Point are approximately 23%, which would result in a 16,844 gallon  
28 per day demand for Gravel Point Hotel. Furthermore, we have  
29 requested a variance for a flat green roof which also has water  
30 conserving elements associated with greige water harvesting. If we  
31 should be approved for this variance, we would look to further  
32 reduce our demand with surplusage of an additional 481,987 gallons  
33 per year. This would reduce our average daily demand to 15,520

1 gallons per day. Gravel Point’s forecasted LEED Gold water usage  
2 is approximately 3.1% of the current overall average daily water  
3 distributed through the City of Bandon.” Record 1879 (footnotes  
4 omitted).

5 The city found:

6 “The City Council finds that there is substantial evidence in the  
7 record that all required public facilities and services have adequate  
8 capacity to serve the proposal and are available or can be made  
9 available by [intervenors]. Issues related to public facilities are  
10 detailed in the Staff Report at pages 8-11, which has been adopted  
11 by the City Council as a part of this decision. Those findings  
12 establish that there will not be any overuse of utilities. The City  
13 Council finds that there is little and certainly not ‘overwhelming  
14 evidence’ that the City’s public facilities are inadequate.” Record  
15 17.

16 Petitioner argues that finding misconstrues BMC 16.12.040(F) and is not  
17 based on substantial evidence because the city relied on intervenors’ stated  
18 estimates of water usage without supporting documentation. “Petitioner submits  
19 that any determination made about the adequacy or capacity of the City’s utilities,  
20 pursuant to BMC 16.12.040(F) requires a disclosure or estimate of the amount of  
21 water or sewer usage by an expert or the information used to come to the  
22 conclusion must be shown.” Petition for Review 12-13.

23 Intervenors respond, and we agree, that nothing in BMC 16.12.040(F)  
24 requires that an applicant submit an expert opinion or underlying data  
25 documentation. The city did not misconstrue BMC 16.12.040(F) by not requiring  
26 an expert opinion or underlying data documenting intervenors’ estimate.

1           Petitioner also alleges that the city’s findings are inadequate because they  
2 do not respond to testimony that contradicted intervenors’ estimated water usage.

3 A city resident submitted the following in a letter to the city council:

4           “The city council needs to ask the applicant to prove the amount of  
5 water they cite would be the actual likely use amount.

6           “I am not a water use expert nor do I have any particular experience  
7 in this area. However, this number appeared very low to me. I did  
8 some quick research online using average hotel room water usage  
9 numbers provided by Pure Blue Sustainability and other sources.  
10 Using conservative estimates my calculations came to 35,000  
11 gallons a day for the rooms and villas alone. This does not include  
12 restaurants, spa, meeting rooms, public restrooms and landscape  
13 use. My estimate is incomplete and difficult to calculate, but it raises  
14 questions about [intervenors’] stated water use.” Record 481.

15           Intervenors respond that “quick research online” is not substantial  
16 evidence that the city was required to rely on to invalidate intervenors’ estimated  
17 water usage and, even if it was, the record demonstrates adequate capacity to  
18 meet that demand.

19           With respect to the findings challenge, where we are “able to determine  
20 that a reasonable decision maker would rely on the evidence the decision maker  
21 chose to rely on, findings specifically addressing conflicting evidence are  
22 unnecessary.” *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004). While  
23 a local government is required to identify the facts it relied upon in reaching its  
24 decision, it is not required to explain why it chose to balance conflicting evidence  
25 in a particular way, or to identify evidence it chose not to rely on. *Evans v. City*  
26 *of Bandon*, 74 Or LUBA 418, 425 (2016); *Melton v. City of Cottage Grove*, 28

1 Or LUBA 1, 20 (1994); *Angel v. City of Portland*, 22 Or LUBA 649, 656-57,  
2 *aff'd*, 113 Or App 169, 831 P2d 77 (1992). The city did not err in failing to make  
3 findings addressing the resident's online research suggesting greater water usage  
4 than intervenors' estimate.

5 The issue then is whether a reasonable person could rely on intervenors'  
6 estimate. Intervenors observe that the city council did not rely solely on  
7 intervenors' estimate. Instead, intervenors explained that they consulted with city  
8 public works staff regarding water and sewage needs and capacity, and the city  
9 engineers determined that the city water and sewage facilities have adequate  
10 capacity and are available to serve the proposal. Record 67-68. We conclude that  
11 a reasonable person could rely on a commercial developer's stated estimate of its  
12 water and wastewater usage needs that is reviewed and analyzed by city public  
13 works and engineering staff and that is not contradicted by overwhelming  
14 contradictory evidence. The city's findings regarding water and wastewater  
15 usage are supported by substantial evidence.

## 16 **B. Water System Capacity and Water Availability**

17 Petitioner argues that the city's findings that the city has adequate,  
18 available water and wastewater capacity to serve Gravel Point are inadequate and  
19 not based on substantial evidence.

### 20 **1. Water System Capacity**

21 Petitioner argues that the city erred in finding adequate water system  
22 capacity by considering the capacity of the system in comparison to the city

1 population. Petitioner argues the city improperly relied on the number of city  
2 residents instead of the “Total Water Service Population,” which would include  
3 transient and tourist populations. Petition for Review 23. Therefore, petitioner  
4 argues, the city’s findings are inadequate and not based on substantial evidence.

5 The challenged finding states:

6 “Opponents argue that the wastewater treatment plant was  
7 engineered to handle the wastewater for only 5,068 people. This  
8 information was cited from the City’s 2002 Wastewater System  
9 Master Plan, p. 3-14. The City has made improvements to the system  
10 since 2002. Further, even if that number was still accurate, as  
11 indicated in the Water Master Plan at 6-12, the City of Bandon  
12 currently only has a population of approximately 3,344 people. By  
13 2041 the Population Research Center, Portland State University  
14 projects the City will have a total population of only about 3,845  
15 people. The sub issue is therefore denied.” Record 19.

16 Intervenors emphasize that petitioner’s population argument is based on  
17 the city’s 2002 Water Master Plan, which the city council found is out of date  
18 because the city adopted the 2022 Water Master Plan. More importantly,  
19 intervenors respond that the challenged finding is an alternative finding. The city  
20 also found that the city water system has adequate capacity based on water  
21 volume. In other words, intervenors argue that, while the city rejected petitioner’s  
22 people-measured capacity argument by referencing city population, any error in  
23 that finding is harmless because the city also found adequate capacity based on  
24 water volume. We agree. The city found:

25 “The City’s engineers have verified that the City’s water system has  
26 the capacity to serve the proposed development. See Planning

1 Commission Record, Staff Report at pages 5-6 of 41. Therefore,  
2 there is more than sufficient capacity to produce potable water for  
3 both the City's current needs and the project." Record 19.

4 The referenced staff report to the planning commission explained:

5 "[Intervenors] also stated that the City's Water Master Plan (2022)  
6 assumes growth through 2041 and that there is adequate capacity to  
7 serve this use. [Intervenors] are proposing to increase the line on  
8 Beach Loop Drive from a 6" line to a 10" line to meet fire-flow  
9 requirements. As has been reported often recently, the City's water  
10 system provides for adequate water most of the year. The issue we  
11 have is with raw water storage, which generally becomes an issue  
12 only in late summer when the stream flows decrease. We have  
13 additional water rights we have not had to call, but we also know  
14 there may be years in the future when the City has to proceed with  
15 water restrictions. *This issue is separate from whether or not we*  
16 *have the capacity to serve new development, which we do.* The  
17 City's engineer's provided the following statement regarding the  
18 water system:

19 "Water System – The Water-CAD model was adjusted to  
20 show the proposed 10-inch diameter water line in lieu of the  
21 existing 6-inch diameter. Attached is a map showing the  
22 before and after water flows. Before flows were estimated at  
23 1,350 gpm and after improvements 1,935 gpm. We did not  
24 model the system with an additional connection on Lincoln  
25 Avenue. Assume the larger buildings will be sprinkled but not  
26 sure what their required fire flow will be." Record 2224-25  
27 (emphasis added).

28 We agree with intervenors that, even if the city committed an analytical  
29 error by relying on resident population instead of overall water users, that error  
30 is not a basis for remand.

1                   **2.     Water Availability**

2           Petitioners argue that, even if the city water system has “adequate  
3 capacity” to serve Gravel Point, the city erred in finding that water service is  
4 “available or can be made available” because the city has a raw water storage  
5 problem, particularly in late summer when the stream flows decrease. BMC  
6 16.12.040(F).<sup>3</sup> Petitioner points to evidence that the city’s water system capacity  
7 may be inadequate due to raw water storage deficiencies. At a September 12,  
8 2022 city council meeting concerning the 2022 Water System Master Plan, an  
9 engineer consultant described the city’s water system:

10           “The Ferry Creek Reservoir and the Geiger Creek Reservoir fed raw  
11 water to the Lower Pump Station, which pumped it to the Middle  
12 Pond. From there, raw water was pumped to the Water Treatment  
13 Plant. At some point in the past, a third pump was added at the Low  
14 Water Pump Station, allowing use of water that went through the  
15 Fish Hatchery, which had senior water rights.

16           “\* \* \* \* \*

17           “For treated water storage, the City had a one-million-gallon tank  
18 and a two-million-gallon tank, both made of welded steel.” Record  
19 1714-15.

20   The engineer consultant explained that “[d]eficiencies in the intake system  
21 included the lack of storage during low-flow months, in part because the Ferry  
22 Creek and Geiger Creek Reservoirs were silted in, reducing their capacity.”

---

<sup>3</sup> Intervenors do not assert that BMC 16.12.040(F) does not require a demonstration of water availability. Accordingly, we assume for purposes of this decision that it does.

1 Record 1715. The engineer consultant further explained that “the engineers, the  
2 [Oregon Department of Fish and Wildlife (ODFW)] fish biologists, and the  
3 hatchery operators were not in agreement about the dam” and “what it would take  
4 to get the Ferry Creek impoundment dredged out.” Record 1716.

5 Petitioner also points to a September 2023 City Manager’s Newsletter  
6 “Water system update” that states:

7 “Our most immediate need is to dredge out the existing  
8 impoundment at Ferry Creek. It was last dredged in the early 1990s  
9 and has silted in over the last couple of years. It holds a few days’  
10 worth of water when it is dredged out. More importantly, it helps  
11 operationally, as we can use it to pump a higher volume of water for  
12 a shorter period of time. Our engineers are meeting this week with a  
13 contractor to discuss the most cost-effective way to do the project.”  
14 Record 500.

15 Petitioner also points to “the Bremmer/O’Dea memo,” which alleges that the  
16 city’s water and wastewater plants are operating beyond their capacity and  
17 service life and that future water needs cannot be satisfied by impoundment at  
18 Geiger Creek or Ferry Creek. Record 52, 479, 1729-40.

19 The city found:

20 “The City’s [2022] Water Master Plan identifies a deficiency in the  
21 City’s ability to store raw water for use in producing potable  
22 (drinking) water. While the City’s Water Treatment Plant has  
23 sufficient capacity to produce potable water and the City possesses  
24 sufficient water rights to serve this development and growth well  
25 into the future, an issue arises when sediment is deposited into the  
26 Ferry Creek Reservoir without being dredged on a regular routine  
27 basis *resulting in reduced raw water storage. This condition can be*  
28 *resolved through routine maintenance and dredging of the Ferry*  
29 *Creek Reservoir annually.* The Plan identifies possible solutions to



1 permanently increase raw water storage including the development  
2 of a groundwater well field and/or off-channel reservoir. With that  
3 said, City staff finds that the City’s current potable water capacity is  
4 more than sufficient to accommodate Gravel Point’s proposal.”  
5 Record 67 (emphasis added).

6 Petitioner argues that the city’s finding that the raw storage deficiency can  
7 be resolved through dredging is not supported by substantial evidence because  
8 the record demonstrates that, in 2022, ODFW and the fish hatchery opposed the  
9 city dredging the reservoirs. Record 1716.

10 Intervenors respond that city staff reported to the city council that a  
11 “[d]redging project is underway to triple the capacity of the City’s raw water  
12 impoundment facility[,]” and petitioner does not acknowledge or dispute that  
13 evidence. Intervenors further argue that the existing system is sufficient to serve  
14 Gravel Point and the plan for increased raw water storage is to serve future  
15 development. Intervenors-Respondents’ Brief 23 n 1.

16 We agree with intervenors that the city’s findings adequately address the  
17 raw water storage issue and the city’s finding that adequate water is available to  
18 serve Gravel Point is supported by substantial evidence.

19 The first assignment of error is denied.

## 20 **SECOND ASSIGNMENT OF ERROR**

21 Petitioner argues that the city erred in finding the proposal satisfied the  
22 applicable criteria through imposition of conditions of approval.

1           **A. Street Vacation**

2           Petitioner argues that the city erred in deferring compliance with  
3 comprehensive plan policies regarding street vacations to a separate, future street  
4 vacation proceeding because the city does not provide the same procedural  
5 protections and the comprehensive plan policies are not clearly applicable in a  
6 street vacation proceeding. We agree.

7           The city must find that a conditional use is consistent with the  
8 comprehensive plan. *See* BMC 16.12.040(A) (“The approval of all conditional  
9 uses shall be consistent with \* \* \* [t]he comprehensive plan[.]”). Bandon  
10 Comprehensive Plan (BCP) Policy 4 states: “The City recognizes the importance  
11 of City-owned and managed property to accessible and unobstructed views, and  
12 shall maintain these areas for future public use and enjoyment.” The associated  
13 implementation measure provides, in part:

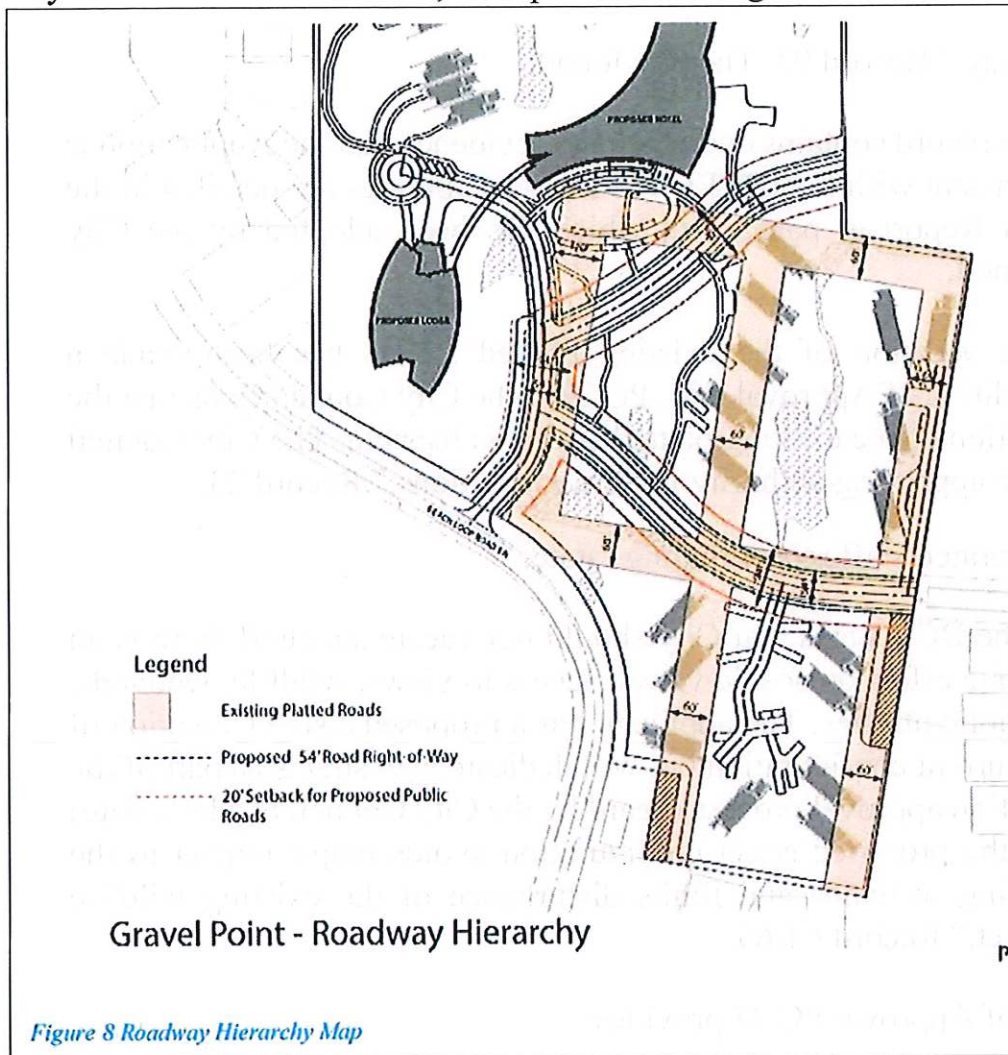
14           “The City shall not vacate rights-of-way or sell City property when  
15 it is found that the vacation or sale would have an adverse impact on  
16 one or more of the following:

- 17           Scenic views or access to views
- 18           Wildlife
- 19           Wetlands
- 20           Storm drainage
- 21           Existing or future utilities

22           “The City shall only vacate rights-of-way when there is a clear  
23 benefit to the City. \* \* \*”

24           Petitioner argues, and intervenors do not dispute, that BCP Policy 4 and its  
25 implementation measure impose mandatory approval criteria for a CUP that  
26 involves vacating a city right-of-way. *See Friends of the Hood River Waterfront*

1 v. *City of Hood River*, 68 Or LUBA 459 (2013) (differentiating between  
2 comprehensive plan general planning policies and mandatory approval  
3 standards). Intervenor's site plan proposes to vacate the platted (undeveloped)  
4 grid-pattern rights-of-way and proposes to dedicate new, reconfigured rights-of-  
5 way to accommodate the use, as depicted in the figure below.



6 *Figure 8 Roadway Hierarchy Map* Record 94.

7 During the local proceeding, petitioner argued that intervenors had not  
8 demonstrated that its proposed street layout and a street vacation would avoid  
9 adverse impacts that are prohibited by BCP Policy 4. Record 547. Petitioner

1 argued that the city must impose a CUP condition of approval requiring a street  
2 vacation approval following a local proceeding providing all the same procedural  
3 protections as the CUP proceeding. *Id.*

4 The decision states that the street reconfiguration “will be approved  
5 separately through a City Council action to vacate and accept the dedication of  
6 rights-of-way.” Record 93. The city found:

7 “The record contains overwhelming evidence that the Application is  
8 consistent with the [BCP]. The relevant findings are detailed in the  
9 Staff Report at pages 5-6, which has been adopted by the City  
10 Council.

11 “The vacation of the existing platted streets has been made a  
12 Condition of Approval (No. PC 27). The City Council finds that the  
13 vacation of the existing platted streets is feasible. The City Council  
14 is the approving authority for street vacations.” Record 23.

15 The incorporated staff report findings state:

16 “[T]he BCP states that City should not vacate streets if there is an  
17 adverse effect on scenic views, access to views, wildlife, wetlands,  
18 or public utilities. The applicant has a proposed a street vacation of  
19 the current configuration but will dedicate new streets as part of the  
20 vacation approval process (heard by the City Council at a later date)  
21 and the proposed street configuration avoids major impact to the  
22 existing wetlands and limits disturbance of the existing wildlife  
23 habitat.” Record 64-65.

24 Condition of Approval PC 27 provides:

25 “Rights-of-Way – The property owner shall be required to dedicate  
26 the rights-of-way proposed by this application, found in Exhibit A,  
27 pages 6 & 7 of the applicant’s materials, or as otherwise required by  
28 the City. This shall occur after the existing streets have been vacated  
29 by the City Council, but prior to the commencement of

1 construction.” Record 48.

2 In *Rhyne v. Multnomah County*, we explained:

3 “Where the evidence presented during the first stage approval  
4 proceedings raises questions concerning whether a particular  
5 approval criterion is satisfied, a local government essentially has  
6 three options potentially available. First, it may find that although  
7 the evidence is conflicting, the evidence nevertheless is sufficient to  
8 support a finding that the standard is satisfied or that feasible  
9 solutions to identified problems exist, and impose conditions if  
10 necessary. Second, if the local government determines there is  
11 insufficient evidence to determine the feasibility of compliance with  
12 the standard, it could on that basis deny the application. Third, if the  
13 local government determines that there is insufficient evidence to  
14 determine the feasibility of compliance with the standard, instead of  
15 finding the standard is not met, it may defer a determination  
16 concerning compliance with the standard to the second stage. In  
17 selecting this third option, the local government is not finding all  
18 applicable approval standards are complied with, or that it is feasible  
19 to do so, as part of the first stage approval (as it does under the first  
20 option described above). Therefore, the local government must  
21 assure that the second stage approval process to which the decision  
22 making is deferred provides the statutorily required notice and  
23 hearing, even though the local code may not require such notice and  
24 hearing for second stage decisions in other circumstances.” 23 Or  
25 LUBA 442, 447-48 (1992) (footnotes and citation omitted).

26 Petitioner argues that the city selected the third *Rhyne* option and did not  
27 find that BMC 16.12.040(A) and BCP Policy 4 are satisfied but, instead, deferred  
28 that determination to a future street vacation proceeding, which does not provide  
29 an opportunity for notice or public participation, contrary to *Rhyne*. Petitioner  
30 further argues that is unclear whether BMC 16.12.040(A) and BCP Policy 4,  
31 which apply to conditional uses, would apply to a future street vacation

1 proceeding in the absence of a specific condition of approval requiring that those  
2 criteria be applied and addressed in that later proceeding.

3 Intervenor's respond that the city selected the first *Rhyme* option and found  
4 that it was feasible for the public rights-of-way to be vacated and feasible that the  
5 city will find that BMC 16.12.040(A) is satisfied in a future proceeding.  
6 Intervenor's-Respondents' Brief 30-31.

7 We agree with petitioner that the city selected the third *Rhyme* option. The  
8 city did not find that BMC 16.12.040(A) and BCP Policy 4 are satisfied, or that  
9 it is feasible for them to be satisfied through condition PC 27. As petitioner points  
10 out, condition PC 27 does not require that the city apply BMC 16.12.040(A) and  
11 BCP Policy 4 to a future street vacation proceeding. It is not clear to us that the  
12 city will apply those standards in a future proceeding. We agree with petitioner  
13 that, consistent with *Rhyme*, the city must find that the proposed conditional use,  
14 including the proposed street realignment, satisfies BMC 16.12.040(A) and BCP  
15 Policy 4. If the city chooses to defer that determination, then the city must adopt  
16 a condition of approval that will require compliance with BMC 16.12.040(A) and  
17 BCP Policy 4 in a later approval process that will provide procedural protections  
18 equivalent to conditional use review.

19 The first subassignment of error is sustained.

20 **B. Geologic Assessment Review**

21 Petitioner argues that the city erred in deferring geologic assessment  
22 review. During the local proceeding, petitioner argued that intervenors failed to

1 address geologic assessment review criteria in BMC Chapter 17.78. City staff  
2 observed that “[t]his site does contain an area of high landslide susceptibility,  
3 which will require either an exemption request or a Geologic Assessment  
4 Review. [Intervenors have] chosen to submit a separate application for review.”  
5 Record 2223. Intervenors agreed that a geologic assessment review is required  
6 “because of the unique topography and geology of the subject property, which is  
7 located in the Hazards Overlay Zone,” and agreed to a condition of approval  
8 requiring geologic assessment review. Record 130.

9 The city found:

10 “Pursuant to BMC Chapter 17.78, Geologic Assessment Review is  
11 a separate Type II application. While BMC 16.04.090 grants  
12 [intervenors] discretion as to whether to consolidate the  
13 applications, [intervenors] have not consolidated the subject  
14 Application with a Geologic Assessment Review. [Petitioner] does  
15 not otherwise raise issues with Geotech Review criteria with enough  
16 specificity for the City to understand what issue is being raised.  
17 Condition of Approval No. PC4 is imposed on this application,  
18 requiring [intervenors] to receive Geologic Assessment Review  
19 approval prior to receiving zoning compliance.” Record 12.

20 In two subassignments of error, petitioner argues that the city improperly  
21 deferred geologic assessment review.

### 22 **1. Third Subassignment of Error**

23 In the third subassignment of error, petitioner argues that geologic  
24 assessment review might disclose evidence relevant to conditional use criteria  
25 BMC 16.12.040(D) and (E), which require the city to determine that “the site size  
26 and dimensions provide adequate area for the needs of the proposed use,” and

1 that “[t]he characteristics of the site are suitable for the proposed use considering  
2 size, shape, location, topography and natural features.” BMC 16.12.040(D), (E).  
3 We refer to those criteria as the site suitability standards. Petitioner argues that  
4 the city must determine compliance with the site suitability standards  
5 concurrently with the geologic assessment review.

6 Intervenor respond, initially, that this issue is waived. We agree. ORS  
7 197.835(3) requires that issues before LUBA on review “shall be limited to those  
8 raised by any participant before the local hearings body as provided by ORS  
9 197.195 or 197.797, whichever is applicable.” ORS 197.797(1), in turn, requires  
10 that:

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

18 The “raise it or waive it” principle does not limit the parties on appeal to the exact  
19 same arguments made below, but it does require that the issue be raised below  
20 with sufficient specificity to prevent “unfair surprise” on appeal. *Boldt v.*  
21 *Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078  
22 (1991); *Friends of Yamhill County v. Yamhill County*, (LUBA No 2021-074, Apr  
23 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential memorandum opinion),  
24 *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular issue must be identified



1 in a manner detailed enough to give the local government and the parties fair  
2 notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When  
3 attempting to differentiate between “issues” and “arguments,” there is no “easy  
4 or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA  
5 672, 690 (2001).

6 In its preservation statement in the petition for review, petitioner asserts  
7 that it preserved this issue below when it asserted that “various criteria here  
8 cannot be determined until the geologic assessment is available for review.”  
9 Record 1799. Intervenor responds, and we agree, that broad reference to “various  
10 criteria” is insufficient to raise the issue of whether the city was required to defer  
11 finding that the site suitability standards are satisfied until concurrently with or  
12 after geological assessment review.

13 The city made findings rejecting petitioner’s argument that the proposal is  
14 inconsistent with the site suitability standards because the development is too  
15 large, and traffic generated by the conditional use will create adverse impacts.  
16 Record 14-16. If petitioner had asserted below that the city was required to defer  
17 determining compliance with the site suitability standards, then the city would  
18 have had an opportunity to determine in the first instance whether the city had  
19 sufficient information to decide whether the site suitability standards are satisfied  
20 prior to a subsequent geological assessment review. Raising that issue for the first  
21 time at LUBA constitutes unfair surprise to the city and intervenors. We conclude  
22 that issue is waived.

1           The third subassignment of error is denied.

2                           **2.     Second Subassignment of Error**

3           Petitioner observes that the consolidated application in this appeal required  
4   Type III review, which provides for a hearing as of right. Differently, geologic  
5   assessment review is a Type II review, which allows for a planning director  
6   approval with the opportunity for a hearing. Petitioner does not identify any  
7   authority for its proposition that intervenors are prohibited from submitting  
8   sequential applications with different review processes.

9           The second subassignment of error is denied.

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

11          The city’s decision is remanded.