LUBA
DEC 13 2024 AM08:49

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 1000 FRIENDS OF OREGON,
5 *Petitioner*,
6
7 vs.
8
9 CITY OF HILLSBORO,
10 *Respondent.*
11
12 LUBA No. 2024-043
13
14 FINAL OPINION
15 AND ORDER
16
17 Appeal from City of Hillsboro.
18
19 Andrew Mulkey filed the petition for review and reply brief and argued on
20 behalf of petitioner.
21
22 Christopher D. Crean filed the respondent's brief and argued on behalf of
23 respondent. Also on the brief was Beery, Elsner & Hammond, LLP.
24
25 RYAN, Board Member; RUDD, Board Member, participated in the
26 decision.
27
28 ZAMUDIO, Board Chair, did not participate in the decision.
29
30 AFFIRMED 12/13/2024
31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's adoption of Ordinance No. 6474 (the
4 Ordinance) amending the Hillsboro Comprehensive Plan (HCP) text and
5 adopting the 2021 Economic Opportunities Analysis (EOA).

6 **MOTIONS**

7 **A. Motion to Take Official Notice**

8 The city moves, pursuant to OAR 661-010-0046, to take official notice of
9 (1) Enrolled House Bill (HB) 3458; (2) Testimony of Association of Oregon
10 Counties, submitted to the Senate Natural Resources Committee on May 11,
11 2023; (3) Testimony of the City of Portland, submitted to the House Committee
12 on Agriculture, Land Use, Natural Resources, and Water on March 27, 2023; (4)
13 the transcript of a portion of the floor statement of Senator Golden on June 22,
14 2023; and (5) the vote explanation filed by Senator Findley on June 22, 2023.
15 Motion to Take Official Notice 1 (citing ORS 40.090(1) and (2)). The city states
16 that "[t]he documents are official legislative records that provide legislative
17 history for HB 3458 (2023), codified at ORS 197.622 [and] are relevant to the
18 statutory interpretation of ORS 197.622." *Id.* at 2 (citing ORS 174.020). There is
19 no opposition to the motion.

20 The Board may take official notice of relevant law as defined by ORS
21 40.090. OAR 661-010-0046(1). While ORS 40.090 does not provide a basis for
22 official notice of state legislative history, a party may offer and we may consider

1 legislative history for purposes of examining legislative intent in construing a
2 statute even without a motion for official notice. ORS 174.020. We will consider
3 those items for those purposes.

4 The motion is allowed.

5 **B. Motion for Overlength Reply Brief**

6 On November 12, 2024, petitioner filed their reply brief. The reply brief,
7 in a footnote, states: "I certify that this reply brief contains 1,227 [words]. I also
8 certify that the size and type in this brief is not smaller than 14 point for both the
9 text of the brief and footnotes." Reply Brief 7 n 1.[1] OAR 661-010-0039 requires
10 that "[a] reply brief shall not exceed 1,000 words, exclusive of appendices, unless
11 permission for a longer reply brief is given by the Board." Petitioner's reply brief
12 exceeds 1,000 words and permission for a longer reply brief has not been given
13 by the Board.

14 On November 14, 2024, two days after petitioner's reply brief was filed,
15 petitioner filed a "Motion for Overlength Reply." The city does not object to
16 petitioner's motion. However, OAR 661-010-0039 contemplates a timely request
17 for permission to file an overlength reply brief. LUBA's timelines are expedited
18 to facilitate our purpose to "promote the speediest practicable review of land use
19 decisions and limited land use decisions, in accordance with ORS 197.805–

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[1] OAR 661-010-0039 requires that "[a] reply brief must include the certificate of compliance required by OAR 661-010-0030(2)(k)."

1 197.855, while affording all interested persons reasonable notice and opportunity
2 to intervene, reasonable time to prepare and submit their cases, and a full and fair
3 hearing." OAR 661-010-0005. A reply brief "shall be confined to responses to
4 arguments in the respondent's brief," and is therefore limited to 1,000 words to
5 ensure brevity. OAR 661-010-0039.

6 Petitioner's overlength brief and late request for permission fails to comply
7 with LUBA's rules and their purpose. Petitioner's request is denied, the excess
8 227 words at the end of petitioner's reply, lines 4-20 of page 6, and lines 1-5 of
9 page 7 are struck, and we will not consider them.

10 **C. Motion to Take Evidence Not in the Record**

11 Accompanying petitioner's Motion for Overlength Brief was a Motion to
12 Take Evidence Not in the Record, filed on November 14, 2024. Petitioner
13 requests that "LUBA accept and consider the extra record *evidence attached to*
14 *petitioner's reply filed on November 12, 2024*." Motion to Take Evidence Not in
15 the Record 1 (emphasis added). Petitioner seeks for LUBA to consider four pages
16 of the petition for review filed in *LUBA No. 2022-103* and one page from the
17 record that was transmitted to LUBA in *LUBA No. 2022-103*.

18 OAR 661-010-0045 governs the circumstances where LUBA may take
19 evidence not in the record. Those circumstances are where there are

20 "disputed factual allegations in the parties' briefs concerning
21 unconstitutionality of the decision, standing, ex parte contacts,
22 actions for the purpose of avoiding the requirements of ORS
23 215.427 or 227.178, or other procedural irregularities not shown in

1 the record and which, if proved, would warrant reversal or remand
2 of the decision. The Board may also upon motion or at its discretion
3 take evidence to resolve disputes regarding the content of the record,
4 requests for stays, attorney fees, or actual damages under ORS
5 197.845." OAR 661-010-0045(1).

6 The city objects to petitioner's motion because, it argues, petitioner does not
7 identify any of the grounds, listed above, for allowing extra-record evidence.
8 Petitioner's motion states that "these extra-record documents respond to the
9 respon[dent's] brief's misapplication and misinterpretation of ORS 197.622."
10 Motion to Take Evidence Not in the Record 2. Petitioner believes that this motion
11 is appropriate because "LUBA's current rules do not cover the circumstances
12 recently imposed by ORS 197.622." *Id.* at 2.

13 We agree with the city that petitioner has not established grounds for
14 taking evidence not in the record. Petitioner does not develop any argument that
15 the evidence they seek to submit into the record meets any of the circumstances
16 provided by OAR 661-010-0045.

17 Petitioner's Motion to Take Evidence Not in the Record is denied.[2]

18 **BACKGROUND**

19 Under OAR 660-009-0015, local governments are required to adopt an
20 EOA as part of their comprehensive plan. The city adopted an EOA in 2017 and
21 then, in November of 2022, adopted the 2021 EOA. The 2021 EOA was appealed

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[2] As a result of the denial of petitioner's motion to take evidence not in the record, we will not address arguments made in the reply brief relying on this evidence.

1 to LUBA in *1000 Friends of Oregon v. City of Hillsboro*, LUBA No 2022-103
2 (Jul 20, 2023) (*LUBA No. 2022-103*).[3] As we discuss in more detail below, we
3 determined that the 2021 EOA was supported by an adequate factual base, except
4 that the Building Lands Inventory (BLI) did not "evaluate[] whether the
5 developed portions of lots and parcels are likely to redevelop during the planning
6 period[,]" and therefore its conclusions regarding developed and likely to be
7 redeveloped land were not supported by an adequate factual base. *LUBA No.*
8 *2022-103* (slip op at 23); OAR 660-009-0015(3) (requiring and EOA to have a
9 BLI); OAR 660-009-0005(1) (defining "developed land" as "non-vacant land
10 that is likely to be redeveloped during the planning period."). We sustained
11 petitioner's third subassignment of error under their second assignment of error,
12 concluding that "that part of the 2021 EOA, of which the BLI is a part, is not

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[3] In our Final Order and Opinion in *LUBA No. 2022-103* we discussed in detail the rule structure and requirements for undertaking the EOA process. We do not need to restate that discussion in its entirety here, but as relevant,

> "ORS 197.712, which was enacted in its current form in 1991, requires the Land Conservation and Development Commission (LCDC) to adopt rules that require local government comprehensive plans to include an EOA. ORS 197.712(2). OAR 660-009-0015 is one of the rules implementing ORS 197.712 and Statewide Planning Goal 9 (Economic Development), and it requires cities and counties to include EOAs as part of their comprehensive plans, to 'compare the demand for land for industrial and other employment uses to the existing supply of such land.'" *LUBA No. 2022-103* (footnote omitted) (slip op at 4).

supported by an adequate factual base[,]" and remanded the decision to the city. *LUBA No. 2022-103* (slip op at 23).

After the decision was remanded, on May 22, 2024, the city "reopened the public hearing and * * * after receiving a staff report and hearing public testimony, the [p]lanning [c]ommission approved a recommendation that the [c]ity [c]ouncil amend the [Hillsboro Comprehensive Plan (HCP).]" Record 1-2. On June 18, 2024, the city council "adopt[ed] the 2021 EOA as supplemented May 2024, in its entirety, attached as Exhibit B to th[e] Ordinance; and the 2021 EOA Technical Appendices as supplemented May 2024, in its entirety, attached as Exhibit C to th[e] Ordinance." *Id.* at 2. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error is that the city's decision violates Statewide Planning Goal 2 (Land Use Planning), is not supported by an adequate factual base, and violates OAR 660-009-0015(1) and (4).

A. Goal 2 and Adequate Factual Base

Goal 2 is

> "[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions."

Goal 2 requires that a decision that amends a comprehensive plan or land use regulation be supported by an adequate factual base. An "adequate factual base" is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *Restore Oregon v. City of Portland*, 80

1 Or LUBA 158, 162 (2019), *aff'd*, 301 Or App 769, 458 P3d 703 (2020) (citing
2 *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd*,
3 130 Or App 406, 882 P2d 1130 (1994)). Substantial evidence exists to support a
4 finding of fact when the record, viewed as a whole, would permit a reasonable
5 person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855
6 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262
7 (1988).

8 Petitioner argues that the employment projections forecasted in the EOA
9 lack an adequate factual base because the compound annual growth rate (CAGR)
10 chosen by the city to model a 10-to-11-year historic employment cycle cannot
11 reasonably be extrapolated to project a future 20-year employment cycle.
12 Petitioner also argues that, while the city discusses a "peak to peak" method
13 looking at a 12-year period for employment numbers to serve as "primary
14 employment benchmarks" because that time period "appears to be approaching a
15 full economic cycle[,]" the graphs in the city's findings only show employment
16 numbers for 11 or 10 years. This inconsistency in data points, petitioner argues,
17 shows that the EOA is not supported by an adequate factual base.

18 The city first responds that petitioner's arguments regarding an adequate
19 factual base are "substantially the same" as those that were rejected by LUBA in
20 *LUBA No. 2023-103* and are waived pursuant to ORS 197.622. Respondent's
21 Brief 4. ORS 197.622 provides:

22 "When a local government adopts a change to an acknowledged

1 comprehensive plan or land use regulation, and [LUBA] remands all
2 or a portion of that decision based solely on inadequate findings or
3 evidence, if the local government adopts the same changes
4 following remand with revised findings and additional evidence
5 responding to the remand, then a party may not raise new issues that
6 could have been but were not previously raised before the board, but
7 may only challenge the revised findings or additional evidence."

8 Petitioner argues that "respondent made substantive changes to the EOA on
9 remand[]" and therefore "respondent did not 'adopt[] the same changes * * *
10 following remand,' and ORS 197.622 does not apply." Petition for Review 4
11 (first brackets added, second brackets in original).

12 In interpreting statutes, we examine the statutory text, context, and
13 legislative history with the goal of discerning the enacting legislature's intent.
14 *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of*
15 *Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We are
16 independently responsible for correctly construing statutes. *See* ORS 197.805
17 (providing the legislative directive that LUBA "decisions be made consistently
18 with sound principles governing judicial review"); *Gunderson, LLC v. City of*
19 *Portland*, 352 Or 648, 662, 290 P3d 803 (2012) ("In construing statutes and
20 administrative rules, we are obliged to determine the correct interpretation,
21 regardless of the nature of the parties' arguments or the quality of the information
22 that they supply to the court." (*citing Dept. of Human Services v. J. R. F.*, 351 Or
23 570, 579, 273 P3d 87 (2012); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)).

24 ORS 197.622 sets out a two-part requirement in order for issues to be
25 limited on remand when a local government adopts a post acknowledgement plan

1 amendment: (1) LUBA remands all or a portion of a decision based solely on
2 inadequate findings or evidence, and second; (2) the local government adopts the
3 same changes following remand, with revised findings and additional evidence
4 responding to the remand.

5 Petitioner sets out a series of reasons that the Ordinance does not satisfy
6 the statute's requirements. Petitioner first posits in its preservation section in the
7 petition for review that, on remand, the city "made substantive changes" to the
8 EOA and therefore did not "adopt the same changes following remand." Petition
9 for Review 4; ORS 197.622. In the portion of the reply brief that we consider,
10 petitioner supports this argument by pointing to the changes made to the BLI to
11 support its argument that the decision is not the "same" as the decision in *LUBA*
12 *No. 2022-103*. Reply Brief 1-2, 4-5. ORS 197.622 does not employ the term
13 "substantive change." Petitioner is inserting words that are not in the text of the
14 statute, contrary to ORS 174.010. In addition, ORS 197.622 specifically
15 contemplates a situation where, when a decision is remanded, supporting
16 documents are supplemented with new evidence and findings. *LUBA No. 2022-*
17 *103* was remanded for further evidence regarding the city's BLI and the city
18 adopted new findings addressing that evidence. Petitioner does not challenge
19 those findings.

20 Petitioner next argues that the decision challenged in *LUBA No. 2022-103*
21 was not remanded "solely on inadequate findings or evidence," but instead was
22 remanded because the decisions "failed to comply with applicable law." Reply

1 Brief 2. Petitioner relies on our use of the term "evaluate" when discussing the
2 city's BLI analysis. Reply Brief 3 (citing *LUBA No. 2022-103* (slip op at 22)).
3 The city, conversely, reads our decision in *LUBA No. 2022-103* to have
4 "remanded * * * based on a lack of substantial evidence to support the BLI."
5 Respondent's Brief 9.

6 We agree with the city. In addressing petitioner's second assignment of
7 error in *LUBA No. 2022-103*, we stated that "petitioner argue[d] that the 2021
8 EOA is not supported by an adequate factual base, as required by * * * Goal 2."
9 (Footnote omitted) (slip op at 14). As explained in our decision, "OAR 660-009-
10 0015(3) requires an EOA to 'include an inventory of vacant and developed lands
11 within the planning area designated for industrial or other employment use[,]'"
12 and the BLI is that inventory. *LUBA No. 2022-103* (slip op at 22). We thus found
13 that "the 2021 EOA, *of which the BLI is a part*, is not supported by an adequate
14 factual base." *Id.* at 23. Our disposition was to remand the decision for the city to
15 identify further evidence and adopt further findings to support their decision.[4]

16 The context of ORS 197.622 also supports our conclusion that it applies in
17 this case. Helpful context for this statute is other provisions included in the same
18 piece of legislation. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485, 940 P2d

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[4] Petitioner does not argue, and we therefore do not address, whether our declining to reach their third assignment of error in *LUBA No. 2022-103* would change our analysis. We also note that, to the extent petitioner disagrees with our decision in *LUBA No. 2022-103*, the time period to seek judicial review has long passed. ORS 197.850.

1 1219 (1997) ("Context includes other provisions of the same rule, other related
2 rules, the statute pursuant to which the rule was created, and other related
3 statutes."). In this instance, House Bill (HB) 3458 (2023) included amendments
4 to ORS 197.835(1) that

5 "(b) If a local government demonstrates that a land use decision
6 adopting a change to an acknowledged comprehensive plan
7 or land use regulation contains a severability clause and
8 specifically challenged portions of the changes may be
9 reasonably severable from the remainder of the changes, the
10 board may affirm in part. Reasonably severable means the
11 remaining parts, standing alone, are complete and capable of
12 being executed with the legislative intent. The affirmed parts
13 are not affected by the reversal or remand, continue in effect
14 and are considered acknowledged as described in ORS
15 197.625." Or Laws 2023, ch 551, § 3.

16 Neither the Ordinance, nor its predecessor in *LUBA No. 2022-103*, contain a
17 severability clause, nor is that at issue in this case.[5] However, it is relevant
18 because it is clear that the legislature was seeking to allow for settled components

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[5] Our rules allow that

"[LUBA] may reverse or remand a land use decision in part when:

"(a) The decision adopts a change to an acknowledged comprehensive plan or land use regulation;

"(b) The decision contains a severability clause; and

"(c) The affirmed parts, standing alone, are complete and capable of being executed consistent with the local government's legislative intent." OAR 661-010-0071(3).

of local government decisions to be removed from contention or challenge, and to allow for the portions in dispute to continue to be litigated without having to relitigate or newly litigate issues thought to not be at issue.[6]

We next turn to the legislative history of HB 3458 (2023). In 2013, the Court of Appeals concluded that "the 'law of the case' waiver doctrine does not apply to legislative land use decisions." *Hatley v. Umatilla County*, 256 Or App 91, 112, 301 P3d 920 (2013). This resulted in the "law of the case" waiver only applying to challenges to quasi-judicial land use decisions. The city argues that HB 3458 (2023) was passed, in part, to address this issue. They point to testimony submitted by the City of Portland to the House Committee on Agriculture, Land Use, Natural Resources, and Water on March 27, 2023, to support their position. The letter from the City of Portland states, in part, that as a result from the *Hatley* decision,

> "a legislative remand, even if a [c]ity readopts the same code amendments but with revised findings, the parties are not limited to challenging the new findings. As a result, a party can repeatedly appeal a remanded ordinance raising new issues each time." Motion

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[6] The city also points to ORS 197.805 as relevant context. ORS 197.805 states in part "that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review." Although not dispositive to our analysis, we tend to agree that as a statute governing the policy of our review, and in light of the legislative history we discuss further below, ORS 197.805 and time being of the essence is relevant context in understanding ORS 197.622. *State v. Gaines*, 346 Or at 171-72.

1 to Take Official Notice Exhibit C, at 1.

2 The City of Portland goes on to say that HB 3458 (2023) "will partially address"

3 this by allowing

4 "LUBA [to] direct[] the local government to adopt supplemental
5 findings or consider additional evidence and the local government
6 is adopting substantively the same legislative package, parties may
7 not raise new issues that could have been but were not raised in the
8 prior appeal. Instead, parties may only challenge the revised
9 findings or new evidence. This amendment evens the playing field
10 and prevents parties from unfairly blocking or delaying legislative
11 action through repeat appeals." *Id.* at 2.

12 The city also points us to the floor speech given by Senator Golden on June 22,

13 2023, during the discussion of HB 3458 (2023). Senator Golden stated that HB

14 3458

15 "allows LUBA to affirm certain decisions in parts. The gist of this
16 bill * * * is that if the Land Use Board of Appeals remands back to
17 local government a certain decision, and the local government
18 adopts the indicated changes, no party is entitled to challenge the
19 decision on the basis of new issues that weren't previously
20 presented. *I believe this change can reduce some problematic delays*
21 ** * * without compromising the safeguards of our land use system.*"
22 Motion to Take Official Notice Exhibit D (emphasis in original
23 omitted; emphasis added).

24 The legislative history supports our conclusion that, where we remand a decision

25 for further findings or evidence, ORS 197.622 dictates that the issues that can be

26 appealed after a local government has made their decision on remand are limited

27 to challenging the new evidence or findings.

28 Petitioner's arguments do not challenge the new evidence or findings to

29 support the Ordinance. Petitioner's arguments are very close to, and in some

respects the same as, the arguments that were made in *LUBA No. 2022-103*, and as such are waived. ORS 197.622.

B. OAR 660-009-0015(1) and (4)

OAR 660-009-0015(1) provides:

> "The economic opportunities analysis must identify the major categories of industrial or other employment uses that could reasonably be expected to locate or expand in the planning area based on information about national, state, regional, county or local trends. This review of trends is the principal basis for estimating future industrial and other employment uses as described in section (4) of this rule. A use or category of use could reasonably be expected to expand or locate in the planning area if the area possesses the appropriate locational factors for the use or category of use. Cities and counties are strongly encouraged to analyze trends and establish employment projections in a geographic area larger than the planning area and to determine the percentage of employment growth reasonably expected to be captured for the planning area based on the assessment of community economic development potential pursuant to section (4) of this rule."

OAR 660-009-0015(4) provides:

> "The economic opportunities analysis must estimate the types and amounts of industrial and other employment uses likely to occur in the planning area. The estimate must be based on information generated in response to sections (1) to (3) of this rule and must consider the planning area's economic advantages and disadvantages. Relevant economic advantages and disadvantages to be considered may include but are not limited to:
>
> "(a) Location, size and buying power of markets;
>
> "(b) Availability of transportation facilities for access and freight mobility;
>
> "(c) Public facilities and public services;

"(d) Labor market factors;

"(e) Access to suppliers and utilities;

"(f) Necessary support services;

"(g) Limits on development due to federal and state environmental protection laws; and

"(h) Educational and technical training programs."

As part of their first assignment of error, petitioner also argues that the city "largely fails to adequately review national, state, and regional trends in the manner required by OAR 660-009-0015(1) and (4)." Petition for Review 20. We understand that argument to challenge the findings the city adopted addressing OAR 660-009-0015(1) and (4). The city responds that it adopted findings addressing OAR 660-009-0015(1) at Record 22-23, 34-35, 43-45, 136-38, and 144. The city points to findings addressing OAR 660-009-0015(4) at Record 53-55 and 143-53. Petitioner does not challenge or otherwise address those findings. Accordingly, we reject petitioner's argument that the city's findings are inadequate to address OAR 660-009-0015(1) and (4).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the city's "evaluation of land need pursuant to OAR 660-009-0025(2) based on employment forecasts required by OAR 660-009-0015(1) and (4) must be re-evaluated." Petition for Review 22. Petitioner argues that "[b]ased on a petitioner's first assignment of error" the city "must reevaluate its 'employment driven land need." *Id.* (citing OAR 660-009-

1 0025(2)). Petitioner's second assignment of error is derivative of and contingent

2 on its first assignment of error. Because we deny petitioner's first assignment of

3 error, the second assignment of error provides no basis for remand or reversal.[7]

4 Petitioner's second assignment of error is denied.

5 The city's decision is affirmed.

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[7] The city also responds that OAR 660-009-0025 is not yet applicable because it is applicable only after the adoption of the EOA:

> "After the [c]ity has adopted an EOA under OAR 660-009-0015, the [c]ity is then required to adopt plan policies to address those advantages and disadvantages. OAR 660-009-0020(1) (plan policies must be 'based on the community economic opportunities analysis prepared pursuant to OAR 660-009-0015.'). At that point, the [c]ity will be required to demonstrate compliance with OAR 660-009-0025, but not before. OAR 660-009-0025 ('Cities and counties must adopt measures adequate to implement policies adopted pursuant to OAR 660-009-0020.')." Respondent's Brief 27-28.

While we tend to agree with the city's reading of the rule, we need not and do not address it.