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

VITO CERELLI,
Petitioner,

vs.

CITY OF MANZANITA,
Respondent,

and

OREGON COAST ALLIANCE,
Intervenor-Respondent.

LUBA No. 2022-073

FINAL OPINION
AND ORDER

Appeal from City of Manzanita.

David J. Petersen filed the petition for review and reply brief and Mick Harris argued on behalf of petitioner. Also on the brief was Tonkon Torp LLP.

No appearance by City of Manzanita.

Sean Malone filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

REMANDED 02/27/2023

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city council decision denying their application to establish a hotel on land zoned Special Residential/Recreation.

FACTS

The subject property is 3.83 acres and is zoned Special Residential/Recreation (SRR). It is located to the south of Dorcas Lane, west of Classic Street, and north and east of a golf course. In January 2022 petitioner submitted an application to develop a 34-unit hotel on the subject property. Hotels are a permitted use in the SRR zone. The application proposed a hotel including 19 studio hotel rooms in 11 stand-alone buildings; a 2,963 square-foot building for gatherings of hotel guests, including a kitchen and bar area (but no restaurant) and an adjacent outdoor fire pit; nine stand-alone approximately 1,000 square foot lodging units; six A-frame cabins around a shared open space; and 53 parking spaces. The hotel is proposed to be developed on the northern part of the property, while approximately 14,800 square feet of open space is proposed for the southern part of the site adjacent to the existing golf course. The sole access point is proposed along the north boundary of the property onto Dorcas Lane, a local street. As part of their application materials, petitioner submitted a traffic impact study that was reviewed by a city transportation consultant. Record 424-25.

The planning commission held a public hearing on the application on March 21, 2022, after which it continued the hearing to April 18, 2022 to allow petitioner time to submit additional information requested by the Commission. At petitioner's request, the April 18, 2022 planning commission meeting was later continued to May 16, 2022. At the May 16, 2022 meeting, the Commission received additional information from petitioner, and continued the hearing to June 20, 2022. At the June 20, 2022 meeting, the Commission received additional testimony and evidence, including a letter from a transportation engineer on behalf of opponents of the project. In addition, the city's planning staff submitted a report recommending approval. Record 291-306. At the conclusion of the June 20, 2022, hearing, the planning commission closed the record, deliberated, and voted to deny the application. The Commission issued its written decision denying the application on June 24, 2022.

On July 7, 2022, petitioner appealed the decision to the City Council. Petitioner's appeal included a statement that they did "not seek de novo review." Record 207. On July 8, the city issued notice that the appeal would be heard by the city council on "Monday, July 20, 2022," which was not a real date because July 20, 2022 fell on a Wednesday. Petition for Review 8; Record 19. On July 12, 2022, the city issued a corrected notice identifying the date of the city council proceeding on the appeal as Tuesday, July 19, 2022. Record 203. At the on-the-record proceeding before the city council, petitioner appeared both in writing and by Zoom video conference. At the end of the meeting, city council voted

unanimously to deny petitioner's appeal and uphold the planning commission decision. The city council issued its written decision two days later, on July 21, 2022. This appeal followed.

WAIVED ISSUES

In its responses to the third, fifth, sixth, seventh, and eighth assignments of error, intervenor-respondent (intervenor) argues that petitioner failed to raise the issues raised in those assignments of error prior to the close of the evidentiary hearing as required by ORS 197.797(1), and, in some cases, failed to raise the issues in their appeal statement as required to exhaust their remedies under ORS 197.825(2)(a). Accordingly, intervenor argues, the issues presented in those assignments of error may not be raised for the first time at LUBA. Although intervenor does not cite any particular statute to support its arguments, we understand intervenor to argue in part that petitioner failed to satisfy the statutory "raise it or waive it" requirement at ORS 197.797(1) and ORS 197.195(3)(c)(B), and in part that petitioner failed to exhaust their remedies under ORS 197.825(2)(a). We briefly describe the relevant statutes and case law before turning to intervenor's waiver arguments and petitioner's responses.

A. Exhaustion Waiver, Statutory Waiver, and Preservation of Issues

ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" In *Miles v. City of Florence*, 190 Or

App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), the Court of Appeals concluded that, when the local appeal ordinance requires an appealing party to specify the issues for appeal, and the local ordinance expressly or impliedly limits the local appeal body to the issues so specified, the local appeal body's review is generally limited to the specified issues. 190 Or App at 509-10.

> "When such an ordinance limits the local body's review to the issues so specified, the local appeal body cannot go beyond those issues. *See Smith v. Douglas County*, 93 Or App 503, 506-07, 763 P2d 169 (1988), *aff'd*, 308 Or 191, 777 P2d 1377 (1989). Even when an ordinance does not expressly limit the local body's review, such a limitation may be inherent in the requirement that the issues for the local appeal be specified in advance." *Id.* at 510.

We refer to that kind of waiver as exhaustion waiver.

The court held that "exhaustion principles traditionally require not only that an avenue of review be pursued, but also that the particular claims that form the basis for a challenge [at LUBA] be presented to the administrative or local government body whose review must be exhausted." 190 Or App at 506. The court explained that "a party does not exhaust his or her remedies 'simply by stepping through the motions of the administrative process without affording the [administrative or local government body] an opportunity to rule on the substance of the dispute.'" *Id.* at 507 (quoting *Mullenaux v. Dept. of Revenue*, 293 Or 536, 541, 651 P2d 724 (1982); brackets in *Miles*). The purpose of the exhaustion waiver doctrine is to ensure that the final local decision-maker has an opportunity to address the issues that may become the basis for appeal to LUBA. That purpose

is achieved only if the appellant identifies the appellant's particular concerns with the underlying decision in the notice of local appeal, where the local ordinance requires such an identification. Here, Manzanita Zoning Ordinance (MZO) 10.160(C) requires that the appeal statement include "The specific grounds relied upon for review, including a statement that the criteria against which review is being requested were addressed at the Design Review Board or Planning Commission hearing." The MZO impliedly limits the appeal body to the issues so specified.

The statutory "raise it or waive it" requirement in ORS 197.797(1) and ORS 197.195(2)(c)(B) for limited land use decisions, which we refer to as statutory waiver, is different from the exhaustion waiver doctrine. The purpose of the statutory waiver requirement is to provide "fair notice" of an issue, such that the decision-maker and other parties have an adequate opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991).

Finally, OAR 661-010-0030(4)(d) provides that the petition for review shall

> "[s]et forth each assignment of error under a separate heading. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required."

B. Third and Seventh Assignments of Error

As we explain in our resolution of the third and seventh assignments of error below, we reject intervenor's waiver arguments and conclude that the issues raised in those assignments of error were preserved for purposes of statutory waiver and exhaustion waiver.

C. Waived Issues

1. Fifth Assignment of Error

Petitioner's fifth assignment of error argues that the city improperly construed the MZO by applying criteria in MZO 4.136(3)(c) that are not clear and objective, as required by ORS 197.307(4). Petitioner argues that if the hotel units are "dwelling units" for purposes of MZO 3.030(4)(a), as the city concluded, then they are "housing" to which ORS 197.307(4) applies and prohibits the city from applying standards that are not clear and objective.

In the petition for review, petitioner asserts that it raised the issue during their testimony to the city council during the July 19, 2022 proceeding, and appends a portion of that transcribed testimony as Exhibit H to the petition for review. Intervenor responds that raising the issue for the first time in testimony during the city council proceeding on their appeal is insufficient to preserve the issue raised in the fifth assignment of error for purposes of exhaustion waiver or statutory waiver.

We agree with intervenor that petitioner has not established that the issue raised in the fifth assignment of error was raised for purposes of exhaustion

waiver. Under ORS 197.825(2)(a) and *Miles*, it is not sufficient to raise an issue for the first time in testimony during an on the record appeal proceeding before the city council. Accordingly, the issue raised in the fifth assignment of error is waived.[1]

The fifth assignment of error is denied.

2. Sixth Assignment of Error

In their sixth assignment of error, petitioner argues that the city misconstrued the MZO by applying the PUD criteria in MZO 4.136 to its application, and that because its application is for a permitted use in the SRR zone, the discretionary standards at MZO 4.136 do not apply. Intervenor responds that petitioner has failed to establish that the issue was preserved for purposes of statutory waiver and also for purposes of exhaustion waiver.

In the reply brief, petitioner responds that petitioner did not have the opportunity to raise the issue to the planning commission because the issue arose after the evidentiary record was closed. Reply Brief 2. We disagree. The May 9,

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[1] In the reply brief, petitioner responds that for purposes of statutory waiver, they could not have raised the issue prior to the close of the evidentiary hearing, because the planning commission determined for the first time in its decision that the standards in MZO 3.030(4)(a) applied. Reply Brief 2; Record 223. We agree. The staff reports to the planning commission took the position that MZO 3.030(4)(a) did not apply to the application. Record 386-87; Record 300. As we explain in our resolution of the fourth assignment of error, for the first time in its decision, the planning commission took the position that MZO 3.030(4)(a) might apply.

2022 and June 10, 2022 staff reports to the planning commission took the position that the standards in MZO 4.136 applied to the application. Record 382-386; 294-300. Petitioner has not established that they could not have raised the issue prior to the close of the evidentiary hearing.

The sixth assignment of error was not preserved as required by ORS 197.797(1) and ORS 197.835(3), and accordingly is denied.

3. Eighth Assignment of Error

Petitioner's eighth assignment of error is that the city failed to follow the procedures in MZO 4.136(3)(e) by failing to direct petitioner to file an application to amend the MZO to identify the property as a planned development on the city's zoning map.[2] Intervenor responds that petitioner failed to preserve the issue raised in the eighth assignment of error for purposes of both statutory waiver and exhaustion waiver.

In the reply brief, petitioner responds that petitioner did not have the opportunity to raise the issue to the planning commission because the issue arose after the evidentiary record was closed. Reply Brief 2. We disagree. The May 9, 2022 and June 10, 2022 staff reports to the planning commission discussed application of MZO 4.136(3)(e). Record 299; 386. Petitioner has not established

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[2] MZO 4.136(3)(e) provides:

> "Following this preliminary meeting, the applicant may proceed with his request for approval of the planned development by filing an application for an amendment to this Ordinance."

that they could not have raised the issue raised in the eighth assignment of error prior to the close of the evidentiary hearing. We agree that the issue raised in the eighth assignment of error was not raised prior to the close of the evidentiary hearing, and may not be raised for the first time at LUBA.

The eighth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that LUBA should reverse the city's decision and order the city to grant approval of the application under ORS 197.835(10)(a)(B), because the city's action in denying their application was "for the purpose of avoiding the requirements" of ORS 227.178.[3] ORS 227.178(1) requires that the city take final action on the application within 120 days of the date the application is deemed complete.[4] In an order denying a motion to take evidence in *Wal-Mart*

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[3] ORS 197.835(10)(a)(B) provides:

> "[LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> " * * * * *
>
> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or [ORS] 227.178."

[4] If the city does not do so, ORS 227.179 grants the applicant the right to file a writ of mandamus with the circuit court to compel the city to approve the application or, in the alternative, to elect to proceed with application after the 120 day deadline has expired. In the latter circumstance, unless the applicant agrees

Stores, Inc. v. City of Central Point, 49 Or LUBA 697, 708 (2005) (*Wal-Mart Order*), we explained that ORS 197.835(10)(a)(B) is intended to protect the rights of development applicants under the foregoing statutes, by discouraging local governments from spurious, bad faith denials prior to the 120th day. *See also Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd*, 153 Or App 30, 956 P2d 209 (1998) (holding so).[5] Conversely, we explained, ORS 197.835(10)(a)(B) does not apply where the local government denial, timely or untimely, is based on the merits of the application, that is, on findings of noncompliance with applicable approval criteria. *Wal-Mart Order*, 49 Or LUBA at 707-08.

A. Motion to Take Evidence

In conjunction with their assignment of error, petitioner moves for LUBA to allow petitioner an opportunity to submit extra-record evidence, pursuant to ORS 197.835(2)(b) and OAR 661-010-0045, that will establish that petitioner offered and the city rejected their offer to extend the 120-day deadline in ORS

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to an extension of time, the local government must refund the unexpended portion of any application fees or deposits previously paid, or half of the application fees, whichever is greater. ORS 227.178(8).

[5] In *Miller*, we concluded after examining the text and legislative history of ORS 197.835(10)(a)(B) that it was primarily intended to discourage local governments from spuriously denying applications to avoid the necessity of refunding application fees, a necessity imposed by contemporaneously enacted legislation codified at ORS 215.428(7) and 227.178(7). 33 Or LUBA at 652-53.

227.178(1).[6] Petitioner contends that the evidence shows that the city was motivated by a bad faith desire to avoid the requirements of ORS 227.178.

As we understand it, the city does not dispute that on July 15, 2022, petitioner offered to extend the 120-day deadline, which was set to expire on July 23, 2022. There is also no dispute that the city rejected their offer. Accordingly, petitioner has not established that "disputed factual allegations" exist. The dispute is over the legal effect of those actions, as we explain below. Accordingly, petitioner has not established a basis for LUBA's consideration of the motion.

The motion to take evidence is denied.

B. ORS 197.835(10)(a)(B)

We discussed in *Wal-Mart Order* some of the difficulties that are present in determining whether a city's decision that is expedited to comply with the deadline in ORS 227.178 should instead be viewed as a decision that was taken "for the purpose of avoiding the requirements of ORS 227.178." 49 Or LUBA at

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[6] LUBA's review is generally limited to the record that was compiled by the local government whose decision is on appeal at LUBA. ORS 197.835(2)(a). However, ORS 197.835(2)(b) provides:

> "*In the case of disputed allegations of* standing, unconstitutionality of the decision, ex parte contacts, *actions described in subsection [ORS 197.835](10)(a)(B)* * * * or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations." (Emphasis added.)

704-709. Later, in *Wal-Mart Stores, Inc. v, City of Central Point*, 49 Or LUBA 472 (2005) (*Wal-Mart Opinion*), we explained:

> "reading ORS 197.835(10)(a)(B) together with ORS 227.178 and [ORS] 227.179, it is clear that the legislature intended to provide the option of a mandamus remedy to the applicant, in part, as an incentive to cities to take the 120-day deadline seriously and take all appropriate steps to render a final decision within that deadline. While a city may not take procedural short-cuts that it knows or reasonably should know will prejudice one or more party's substantial rights and thereby provide a reasonably certain basis for an appeal to and remand by LUBA, we do not see anything in ORS 197.835(10)(a)(B) or ORS 227.178 that prohibits a city from expediting its local review process to meet the 120-day deadline, provided that expedited process does not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application." *Id.* at 482.

Here, petitioner first argues that the city was required and failed to adhere to the 20-day notice requirements in MZO 10.040 and ORS 197.797(3)(f)(A). Petitioner takes the position that MZO 10.040 required the city to give petitioner at least 20 days' notice of the appeal proceeding before the city council, and that ORS 197.797(3)(f)(A) similarly required 20 days' notice. The city gave petitioner only seven days' notice of the proceeding, which petitioner argues was an action under ORS 197.835(10)(a)(B) for the purpose of avoiding the 120-day deadline. Petitioner argues that as a result of the non-compliant notice of the appeal proceeding, petitioner did not have adequate time to prepare and present their case. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

We disagree with petitioner that ORS 197.797(3)(f)(a) required the city to give petitioner 20 days' notice of the city council proceeding on appeal. That statute requires the city to mail notice "at least * * * twenty days before the *evidentiary hearing*" that is referenced in ORS 197.797. (Emphasis added.) As noted, petitioner's appeal statement stated "[t]he appellant does not seek de novo review." Record 213. Accordingly, the city council's review of the planning commission's decision to deny the application was an on-the-record proceeding, not an evidentiary hearing. Record 207, 213.

For similar reasons, we also disagree with petitioner that MZO 10.040 required the city to give petitioner at least 20 days' notice of the appeal proceeding. MZO 10.040 provides that "[*w*]*here required*, notice shall be mailed, published, and posted 20 days prior *to the hearing requiring the notice*." (Emphases added.) Petitioner argues that MZO 10.040 required 20 days' notice of the city council's proceeding on their appeal, but does not explain why. MZO 10.040's introductory phrase is "where required," which strongly suggests that notice is not always required. The last phrase suggests that it is only required for "the hearing requiring the notice."

Intervenor responds that MZO 10.180 specifies the procedure for a "Review on the Record," and does not use the term "hearing" at all in referring to the on the record review proceeding before the city council. Differently, the procedure at MZO 10.190 for a *de novo* review by the city council expressly uses the term "hearing" in several places. MZO 10.190(A), (B). Absent any developed

argument from petitioner regarding why MZO 10.040 required 20 days' notice to petitioner, we conclude that it did not.

Second, petitioner argues that the city's rejection of petitioner's offer to extend the 120-day deadline constituted an "action" within the meaning of the statute and that action was for the purpose of avoiding the 120-day deadline. Intervenor responds, and we agree, that the city is not obligated to extend the 120-day deadline. ORS 227.178(5) provides that the deadline "may be extended for a specified period of time at the written request of the applicant." Under the plain language of that provision, an applicant does not have a right to an extension.

Finally, petitioner argues, the city's issuance of a decision that is nearly identical to the planning commission's decision is a "*pro forma*" decision of the kind we described in *Wal-Mart Opinion*. In *Wal-Mart Opinion*, we explained that "[a] timely decision on an application is worthless to an applicant if that timely decision is a *pro forma* denial rather than a timely decision on the merits of the application" because "at best, it provides an applicant with an opportunity to seek a remand at LUBA, with the additional delay that such an appeal entails, rather than a final decision on the merits, from which the applicant can assess its chances for ultimate success." 49 Or LUBA at 481-82.

Intervenor responds, and we agree, that given petitioner's choice to not seek *de novo* review, the city council's decision that denies petitioner's appeal and upholds the planning commission's decision is not evidence of a spurious or

bad faith denial. Rather, the city council's decision explains the reasons it concluded that the planning commission correctly denied the application on the merits.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LUBA will reverse or remand a limited land use decision if "[t]he local government committed a procedural error which prejudiced the substantial rights of the petitioner." ORS 197.828(2)(d). The substantial rights referred to in ORS 197.828(2)(d) are the same as those referred to in ORS 197.835(9)(a)(B). *Warren v. City of Aurora*, 25 Or LUBA 11, 16 (1993). Those rights are the right to an adequate opportunity to prepare and submit one's case and to a full and fair hearing. *Muller*, 16 Or LUBA at 775. In order to establish a procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). In the second assignment of error petitioner argues that the city committed several procedural errors.

First, petitioner restates the same argument set forth in the first assignment of error that the city committed a procedural error that prejudiced their substantial rights when it failed to provide 20 days' notice of the city council's appeal proceeding. For the reasons explained above, we reject that argument.

Second, petitioner alleges that the city committed a procedural error that prejudiced their substantial rights when it failed to provide a staff report that the notice of appeal proceeding referenced. Petitioner argues this failure prejudiced

their substantial right to know what the city's planning staff recommended. Intervenor responds that petitioner identifies no statute or MZO provision that required the city to provide a staff report and accordingly, has not established any procedure that was violated. We agree.

Finally, petitioner cites ORS 197.797(6)(e), which provides:

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or [ORS] 227.178 and ORS 215.429 or [ORS] 227.179."

The planning commission held hearings on March 21, 2022, April 18, 2022, and May 16, 2022, and petitioner presented evidence at those hearings. The planning commission also held a hearing on June 20, 2022 and received evidence at that hearing. As explained above, at the June 20, 2022 planning commission hearing, the planning commission accepted new evidence and testimony from opponents of the application, including a letter from a transportation engineer. At the conclusion, the planning commission closed the record, deliberated, and voted to deny the application. Petitioner argues that the planning commission committed a procedural error at its June 20, 2022 hearing when it accepted evidence into the record from opponents of the application without giving petitioner an adequate opportunity to respond to it. Petition for Review 14-15. Petitioner argues that this was a failure to comply with ORS 197.797(6)(e) that prejudiced their substantial

right to respond to new evidence. Petition for Review 15 (citing ORS 197.797(6)(e) and *Brome v. City of Corvallis*, 36 Or LUBA 225, 234-35, *aff'd*, 163 Or App 211, 987 P2d 1243 (1999)).

We reject petitioner's arguments. First, ORS 197.797(6)(e) does not give petitioner the right to respond to new evidence. Rather, it gives petitioner seven days after the record closes in which to submit final written argument before the decision-making body, specifically *without new evidence.* Accordingly, petitioner's argument that cites and relies on ORS 197.797(6)(e) to argue that the planning commission committed a procedural error in failing to allow them to respond to the new evidence presented at the planning commission hearing provides no basis for reversal or remand.

Petitioner cites *Brome* for the proposition that "[v]iolation of ORS 197.797(6)(e) by failing to allow a party to rebut new evidence is prejudicial error that warrants remand or reversal." Petition for Review 15. Petitioner's citation to *Brome* is unpersuasive. In *Brome*, we held that the city erred in accepting new evidence from the applicant as part of the applicant's final written argument without offering other parties an opportunity to respond to that new evidence. 36 Or LUBA at 234-35. *Brome* does not assist petitioner, where petitioner did not submit any final written argument to the planning commission.

Intervenor responds that the proceeding before the city council cured any procedural error that may have occurred before the planning commission in failing to allow petitioner seven days for final written argument before making a

decision on the application, and that the city council proceeding gave petitioner "the equivalent of ORS 197.797(6)(e)" to present its final argument, without new evidence, to the city council. Intervenor's Brief 15. Petitioner presented written argument to the city council, and also provided in-person testimony to the city council. Record 467-75. Petitioner has not explained how any planning commission error in failing to provide them with seven days for final written argument was not cured by the subsequent city council proceeding.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 197.015(12) defines "limited land use decision" to mean

> "(a) * * * a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "* * * * *
>
> "(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

A threshold issue presented by the third assignment of error is whether the challenged decision is a limited land use decision. Petitioner argues that the challenged decision is a limited land use decision because the proposed hotel is a permitted use in the SRR zone, and the city's decision concerns the application

of discretionary standards that are designed to regulate the physical characteristics of the outright permitted use.

We agree. MZO 3.030(2)(h) allows as permitted uses in the SRR zone "motel, hotel, including an eating and drinking establishment in conjunction therewith." The provisions of MZO 3.030(4) are SRR zone standards that are designed to regulate the physical characteristics of that permitted use. MZO 3.030(4)(c) provides that "[t]he Planning Commission shall use the procedure set forth in Section 4.136 of this Ordinance (Planned Development) in order to evaluate development proposals in this area." The PUD provisions at MZO 4.136(3)(c) include procedural requirements and substantive standards and are also designed to regulate the physical characteristics of the outright permitted use.

ORS 197.195(1), in turn, governs limited land use decisions and provides:

> "A limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to [ORS] 197.625. *If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision.*" (Emphasis added.)

One of the PUD provisions at MZO 4.136(3)(c)(2) provides that for a preliminary development plan "[r]esulting development will not be inconsistent with the Comprehensive Plan provisions or zoning objectives of the area, particularly with regard to dune stabilization, geologic hazards and storm drainage."

The city council denied the application because it concluded that for purposes of MZO 4.136(3)(c)(2), the application failed to demonstrate compliance with Objective 3 of the Manzanita Comprehensive Plan (MCP) Land Use Section, which is to "[p]rotect the character and quality of existing residential areas and neighborhoods from incompatible new development."[7]

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[7] The city council found:

> "3.(c)(2) – Resulting development will not be inconsistent with the Comprehensive Plan provisions or zoning objectives of the area, particularly with regard to dune stabilization, geologic hazards and storm drainage.
>
> "FINDINGS: Planning Commission members specifically noted under 'Comprehensive Plan Policies' item #2: *The plan overrides other city ordinances, such* as *zoning, subdivision or other ordinances when there is* a *conflict.*
>
> "In this regard, the Commission finds the goals, objective and policies contained in the Plan apply to this development.
>
> "The Goal provisions in 'Land Use' states the following: *To guide the development of land so that land use is orderly, convenient, and suitable related to the natural environment. The uses must fulfill the needs of residents and property owners, and be adequately provided with improvements and facilities.*

In their third assignment of error, petitioner argues that ORS 197.195(1) prohibited the city from relying on any MCP provisions as a basis for denying the application under MZO 4.136(3)(c)(2). Intervenor responds that the issue presented in the third assignment of error is waived because, according to intervenor, petitioner did not raise the issue in its appeal statement. We disagree. Petitioner's appeal statement includes the following:

> "If the substantive approval criteria of MZO 4.136(3)(c) apply to this application, the Planning Commission erred in directly applying the Comprehensive Plan provisions to the application, in violation of ORS 197.195(1) and other applicable law." Record 207.

> "Objective #1 states the City will: *Designate separate land use areas within which optimum conditions can be established for compatible activities and uses.*
>
> "While Objective #3 notes the following: *Protect the character and quality of existing residential areas and neighborhoods from incompatible new development.*
>
> "Based on testimony and presented evidence, the Commission finds the proposed hotel incompatible with area activities that are dominated by recreational (golf course) and residential uses. This conclusion is based on the amount of traffic generated by the site and potential traffic impacts on the local street system. Further, the Commission heard testimony indicating the size of the hotel (accordingly the largest in the city) is incompatible with area development. On balance, the Commission found the proposal did not comply with the applicable Comprehensive Plan Policies." Record 10-11 (emphases in original).

It is hard to imagine how petitioner could have raised the issue of the ORS 197.195(1) prohibition on applying the comprehensive plan more clearly than they did.

On the merits, we agree with petitioner that the city erred in relying on MCP provisions as a basis for the limited land use decision, and in particular as a basis to deny the application for failure to satisfy MZO 4.136(3)(c)(2). *Oster v. City of Silverton*, 79 Or LUBA 447, 453 (2019) (citing *Paterson v. City of Bend*, 49 Or LUBA 160, *aff'd, in part, rev'd and rem'd on other grounds*, 201 Or App 344, 118 P3d 842 (2005) (ORS 197.195(1) contemplates more than a broad reference to unspecified portions of the comprehensive plan.))

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

MZO 3.030(4)(a) is a standard for development in the SRR zone and provides:

> "Overall density for the [SRR] zone is 6.5 dwelling units per gross acre. Dwellings may be clustered on one portion of a site within the [SRR] zone and achieve a maximum density of 13 dwellings per acre where at least 40% of the total lot or parcel area is reserved or dedicated as permanent open space as a public or private park area or golf course. The open space shall be so indicated on the Plan and zoning map, and deed restrictions to that effect shall be filed with the City."

We refer to that provision as the Density Standard. The May 9, 2022 and June 10, 2022 staff reports to the planning commission took the position that the

Density Standard did not apply because the project does not include residential development. Record 386-87, 300. However, the planning commission found:

> "While submitted as a hotel project, the Commission notes a number (if not all) can meet the definition of a 'dwelling unit' contained in [MZO 1.030]. Therefore, application of the density requirement is appropriate. Additional information on the specific level of improvement would be needed to determine whether the development complies with the density requirements in this Section." Record 223.

The city council adopted the identical findings. Record 13-14.

Petitioner argues that the hotel project does not propose "dwelling units" as defined in MZO 1.030, and argues that the city council's application of the Density Standard to petitioner's proposal "does not comply with the applicable land use regulations" because it is inconsistent with the plain language of the Density Standard and other relevant provisions of the MZO. ORS 197.828(2)(b); Petition for Review 19-20.

Intervenor responds that the city council properly applied the Density Standard to deny petitioner's project because, according to intervenor, the project proposes units that are dwelling units as defined in MZO 1.030. Record 13-14. There are two problems with that response. First, the city council's brief findings on the Density Standard do not include a reviewable interpretation of all of the relevant MZO provisions, so we cannot determine why the city council concluded that the Density Standard could apply to petitioner's proposal, if it in fact did reach that conclusion. Second, the city council did not conclude that the hotel

units *are* dwelling units. The city council merely concluded that some or all of the units "can meet" the definition of dwelling unit, and that more information on the "specific level of improvement would be" needed. Record 13-14. Given that equivocal language, we do not understand the city to have denied the application on the basis that the application failed to satisfy the Density Standard. Rather, we understand the city council to have adopted an equivocal finding that the Density Standard could apply *if* the units are "dwelling units" as defined in MZO 1.030, without deciding whether the units are in fact dwelling units.

In that circumstance, we agree with petitioner that remand is appropriate for the city council to adopt a reviewable interpretation of all of the relevant MZO provisions and determine, after receiving the referenced "additional information on the specific level of improvement[,]" whether the Density Standard applies to the proposal. Record 14.

The fourth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

In the decision, the city denied the application because it concluded that for purposes of MZO 4.136(3)(c)(3), "as noted above [in its discussion of MZO 4.136(3)(c)(2) and MCP Objective 3], the hotel [is] incompatible with area uses." Record 11. The city also denied the application because it concluded, based in part on evidence submitted at the June 20, 2022 hearing, that MZO 4.136(3)(c)(5) was not met:

"While the applicant submitted a traffic impact study (subsequently

> reviewed by the City's traffic engineer), opponents provided a more comprehensive study. The report indicated the project would generate more than 309 vehicle trips per day. Many of these trips would be directed to downtown where most of the eating establishments are located. This creates adverse impacts on streets within the vicinity. *Not only is this a safety issue with pedestrian and bicycle traffic,* but the Commission also finds the use and potential traffic impacts conflict with [MCP] 'Land Use' Objective #3*: Prevent the concentration of uses that would overload streets and other public facilities, or destroy living quality and natural amenities*." Record 12 (first emphasis added, second emphasis in original.)

Petitioner's seventh assignment of error first argues that the comprehensive plan provisions that the city relied on to conclude that MZO 4.136(3)(c)(3) and (5) were not met are impermissible bases for doing so. Petition for Review 25-26, 28. For the reasons explained in our resolution of the third assignment of error, we agree with petitioner. ORS 197.195(1) prohibits the city from relying on the MCP as a basis for evaluating the application.

Also in the seventh assignment of error, petitioner argues that the city council's decision that MZO 4.136(3)(c)(5) is not met is not supported by substantial evidence in the record. MZO 4.136(3)(c) provides in relevant part:

> "(c) * * * In considering the plan, the Planning Commission shall seek to determine that:
>
> "* * * * *
>
> "(5) The streets are adequate to support the anticipated traffic and the development will not overload the streets outside the planned area."

Intervenor first responds that petitioner has failed to establish that the issue raised in the seventh assignment of error regarding MZO 4.136(3)(c)(5) was preserved for purposes of exhaustion waiver. Intervenor argues that the preservation statement included in the petition for review is insufficient because it cites the nine-page July 19, 2022 letter from petitioner's attorney to the city council, at Record 467-75, to establish where the issue was raised, requiring LUBA and intervenor to search those nine pages for where the issue was raised.

While it is a close call, we disagree with intervenor that the issue raised in the seventh assignment of error regarding MZO 4.136(3)(c)(5) was not raised for purposes of exhaustion waiver.[8] Petitioner's appeal statement includes the following description of the bases for appeal:

> "If the substantive approval criteria of MZO 4.136(3)(c) apply to this application, the Planning Commission's findings of non-compliance are not supported by substantial evidence properly in the record.
>
> "The Planning Commission erred in finding that the applicant's materials in support of the application were inadequate and did not provide sufficient detail for the Commission to determine if the applicable approval criteria were met." Record 207.[9]

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[8] We do not understand intervenor to allege that the issues were not raised for purposes of statutory waiver. Intervenor's Brief 27.

[9] Record 472 includes a similar statement that "If the substantive approval criteria of MZO 4.136(3)(c) apply to this application, the Planning Commission erred in concluding that the criteria were [not] met."

On the merits, at the outset, we note that it is difficult to tell from the city council's findings how much weight the city council assigned to the quoted MCP provision, which, as noted, is an impermissible basis for evaluating the application. However, to the extent the city's finding regarding MZO 4.136(3)(c)(5) is independent from its evaluation pursuant to the MCP, we also agree with petitioner that the planning commission's conclusion that the project will generate "more than 309" vehicle trips is not supported by substantial evidence in the record. ORS 197.828(2)(a). Both petitioner's and opponent's traffic engineer estimated that the project would generate "up to" 309 vehicle trips on the peak day, a Saturday in the summer. Record 541; 42-46. Evidence that a project would generate up to 309 trips does not establish that a project would generate "more than" 309 trips.

Petitioner also argues that there is no evidence in the record to support the city's conclusion that "[m]any of these trips would be directed to downtown." Record 12. Intervenor does not respond to this argument, or point to any evidence in the record to support the city council's conclusion. Accordingly, we agree with petitioner that the city council's decision that "many of the trips would be directed to downtown" is not supported by substantial evidence in the record.

The seventh assignment of error is sustained.

CONCLUSION

We sustain the third and seventh assignments of error and conclude that the city erred in evaluating the proposal for compliance with MCP provisions.

We also sustain a portion of the seventh assignment of error that argues that the city's decision that MZO 4.136(3)(c)(5) is not met is not supported by substantial evidence in the record. Finally, we also sustain the fourth assignment of error, and conclude that (1) application of the Density Standard is not supported by a reviewable interpretation of that standard or other relevant standards of the MZO, and (2) a determination regarding application of the Density Standard to the proposal should be undertaken after receiving the referenced "[a]dditional information on the specific level of improvement." Record 14.

The city's decision is remanded.