

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 FRIENDS OF THE HOOD RIVER WATERFRONT,
5 CORIE LAHR and RICHARD DEREK BELL,
6 *Petitioners,*

7
8 vs.
9

10 CITY OF HOOD RIVER,
11 *Respondent,*

12
13 and

14
15 NBW HOOD RIVER,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2012-050

19
20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Hood River.

24
25 Brent Foster, Hood River, filed the petition for review and argued on behalf of
26 petitioners.

27
28 Daniel H. Kearns, Portland, filed a joint response brief and argued on behalf of
29 respondent. With him on the brief was Reeve Kearns, PC.

30
31 Steven L. Naito, Portland, filed a joint response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Tarlow Naito & Summers, LLP.

33
34 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

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

37
38 REMANDED 03/13/2013

39
40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision that affirms a planning commission decision that granted conditional use and preliminary site plan approval for (1) a 45,000 square foot, four-story, 88-room hotel, (2) a 20,000 square foot, two-story office building, and (3) parking for both the hotel and office building.

FACTS

The proposed hotel, office and parking are to be constructed on land located immediately west of the mouth of Hood River, on the City of Hood River waterfront. The subject property is adjacent to Nichols Boat Basin, which is connected to the Columbia River and separated from Hood River by a breakwater. The proposed office building would be built partially on land immediately adjacent to Nichols Boat Basin, and partially on piers that would be submerged at times of ordinary high water.

The original proposal included a proposal for a wake-boarding cable park that would have been located in Nichols Boat Basin. After opposition to the proposal materialized, the cable park was deleted from the proposal, and the challenged decision grants conditional use and preliminary site plan approval for only the hotel, office and related parking.

MOTION TO STRIKE AND MOTION TO SUPPLEMENT THE RECORD

The Joint Response Brief includes an appendix with three documents that were not included in the record in this appeal. The city and intervenor-respondent contend the three documents should have been included in the record and request that we consider those three documents in ruling on petitioners' challenge to the decision on appeal. Petitioners move to strike the three documents and oppose LUBA's consideration of those documents, because the city failed to include them in the copy of the record that was transmitted to LUBA and served on the parties in this appeal. The city thereafter moved to supplement the record with the three documents, which all parties apparently agree were placed before the final decision

1 maker and inadvertently omitted from the record that the city transmitted to LUBA and
2 served on the parties.

3 The city's motion to supplement the record was filed after the petition for review and
4 joint response brief were filed and three days before oral argument. All parties recognize that
5 if we were to allow the requested supplement, additional time would be required to allow
6 supplemental briefing.

7 Our disposition of the first and third assignments of error require remand, and that
8 disposition would not be affected even if we were to consider the omitted documents.
9 Therefore even if we were to allow additional briefing and considered the three documents,
10 the city's decision could not be affirmed. The city's motion to supplement the record is
11 denied. Petitioners' motion to strike is granted.

12 **REPLY BRIEF**

13 Petitioners move for permission to file a reply brief to respond to new issues raised in
14 the joint response brief. The motion is granted.

15 **FIRST ASSIGNMENT OF ERROR**

16 While the challenged conditional use and preliminary site plan approval decision is
17 directly governed by Hood River Municipal Code (HRMC) 17.06.030 (Conditional Use
18 Approval Criteria) and HRMC 17.16.040 (Site Plan Review Criteria), petitioners' petition for
19 review is based in large part on a number of Hood River Comprehensive Plan Goals,
20 Policies, Guidelines and other provisions that petitioners believe the city was legally
21 obligated to apply directly in approving the disputed applications. HRMC 17.06.030(4), one
22 of the applicable conditional use approval criteria, requires that the proposal must "be
23 consistent with the Comprehensive Plan and the requirements of the Zoning Ordinance."¹

¹ As relevant, 17.06.030 provides:

1 ORS 197.175(2)(d) similarly provides that cities with acknowledged comprehensive plans
2 and land use regulations must “make land use decisions * * * in compliance with the
3 acknowledged plan and land use regulations[.]” In their first, fourth and fifth assignments of
4 error, petitioners argue the proposal does not comply with a number of Hood River
5 Comprehensive Plan (HRCP) requirements and that the city council erred by interpreting
6 those HRCP provisions not to apply directly in this matter.

7 We turn first to the HRCP Goal 7 provisions cited by petitioners under the first
8 assignment of error, but before doing so we set out the city’s general findings concerning the
9 role it interpreted the HRCP to play in this proceeding. It is worth noting at this point that
10 our review of the city council’s finding concerning the applicability of the HRCP Goal 7
11 provisions cited by petitioners is subject to a highly deferential standard of review under
12 ORS 197.829(1).² Under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010),

“A conditional use shall be granted if the Planning Commission finds that the proposed use
conforms, or can be made to conform through conditions, with the following approval criteria.
* * *.

“* * * * *

“4. Plan Consistency: The proposal shall be consistent with the Comprehensive Plan and
the requirements of the Zoning Ordinance.”

² ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its
comprehensive plan and land use regulations, unless the board determines that the local
government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use
regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the
comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan
provision or land use regulation implements.”

1 the city council’s interpretation that the particular HRCP provisions that petitioners cite do
2 not apply directly as mandatory approval criteria must be affirmed unless that interpretation
3 is shown to be inconsistent with the relevant “express language” of the city’s comprehensive
4 plan and land use regulations.

5 **A. The City’s General HRCP Findings**

6 The HRCP Goals, Policies, Guidelines, Implementation Measures, and other
7 provisions that petitioners argue the city erred by failing to apply directly in approving the
8 disputed application generally address flooding and water quality. The city found that those
9 HRCP provisions are fully implemented by the city’s acknowledged land use regulations and
10 do not apply directly to applications for conditional use and site plan approval.³ The city’s
11 general findings concerning the role of the HRCP in reviewing an application for conditional
12 use approval are set out below:

13 “* * * The proposal shall be consistent with the Comprehensive Plan and the
14 requirements of the Zoning Ordinance. The CUP standard implicates only
15 applicable provisions of the City’s Comprehensive Plan. The Council does
16 not construe this requirement to convert all goals, policies, and other
17 provisions of the Comprehensive Plan into mandatory approval standards that
18 can be applied to a quasi-judicial land use application. Instead, the Council
19 implements the comprehensive plan goals and policies through the zoning
20 ordinance, the underlying zoning designation and other development
21 standards that are expressed as mandatory approval criteria. *In this regard, we*
22 *look to the wording of the applicable goals and policies and only apply in this*
23 *application those that are expressed in mandatory terms as an approval*
24 *standard.* We interpret goals and policies that are expressed in aspirational
25 and less-than-mandatory terms as designed to be implemented legislatively.
26 * * *

27 “Staff explained and the City Council agrees that the Comprehensive Plan text
28 and map is the overarching and guiding document for the City of Hood River
29 land use program and is not intended to apply directly to quasi-judicial

³ As defined by ORS 197.015(11), land use regulations are “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

1 proposals as a source of approval criteria – thus the requirement in the CUP
2 criteria for ‘consistency’ and not compliance with the comprehensive plan.”
3 Record 18-19; underlining and italics added).

4 The city council then goes on to address specifically some of the HRCP Goal 5, 6, 7, 11 and
5 12 policies and other requirements cited by petitioners and concludes that the HRCP Goal 5,
6 6, 7, 11 and 12 goals, policies and other provisions cited by petitioners do not apply directly
7 as approval criteria in this case. Record 19-21.

8 We note at the outset that we do not agree with the city’s attempt to rely upon the
9 difference between the words “consistency” and “compliance” in the last sentence quoted
10 above, as support for the general conclusion that the comprehensive plan does not apply
11 directly to quasi-judicial permit applications as approval criteria. Whatever nuanced
12 difference there might be between the words “consistency” and “compliance” is of no
13 importance here. The county is correct that HRMC 17.06.030(4) requires plan *consistency*.
14 But the conditional use and site plan approval that is the subject of this appeal is a land use
15 decision, and ORS 197.175(2)(d), which was quoted earlier, requires that land use decisions
16 must be adopted in *compliance* with the comprehensive plan. See n 1 and related text. The
17 city’s decision is subject to both HRMC 17.06.030(4) and ORS 197.175(2)(d). To the extent
18 there is a difference between a requirement for plan *compliance* and a requirement for plan
19 *consistency*, both requirements apply here.

20 We also note that the underlined and the italicized sentences in the above-quoted
21 findings can be understood to say two very different things. The underlined sentence can be
22 read to say that in no circumstances can comprehensive plan “goals, policies, and other
23 provisions” be mandatory approval criteria that apply directly to individual quasi-judicial
24 land use applications. Under that interpretation, comprehensive plan “goals, policies, and
25 other provisions” operate *solely* to guide legislative action to adopt and amend land use
26 regulations which in turn include the standards that implement the comprehensive plan. That
27 position is asserted with some frequency at LUBA and, in the abstract, we see no reason why

1 it could not be a meritorious position. But given the language of HRMC 17.06.030(4) and
2 ORS 197.175(2)(d) there must be something in the text of the comprehensive plan or the
3 implementing land use regulations or both that supports that position. In practice,
4 comprehensive plans and land use regulations rarely rule the comprehensive plan out as a
5 potential source of approval criteria for permit decisions. Acknowledged comprehensive
6 plans and land use regulations much more frequently include language like HRMC
7 17.06.030(4) that suggests, to the contrary, that the comprehensive plan includes applicable
8 approval criteria, without giving any helpful guidance in how to go about identifying the
9 parts of the comprehensive plan that operate directly as permit approval criteria and those
10 that do not. *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d
11 1340 (1989).

12 The city cites no HRCP or HRMC language that can be read to render the HRCP
13 wholly inapplicable as a source of potential approval criteria when reviewing applications for
14 conditional use approval. Certainly nothing in HRMC 17.06.030(4) can be read to state that
15 position. The closest the city comes is to cite to the HRCP definitions of “Goals,” “Policies”
16 and “Strategies”. However, those definitions do not expressly say that HRCP Goals, Policies
17 and Strategies can never apply directly to applications for permit approval.⁴ The HRCP
18 includes no definition for Guidelines, and several Guidelines are cited by petitioners. And

⁴ Those HRCP definitions are set out below, along with the HRCP definition of “Land Use Designations and Standards.

“**GOALS:** are intended to define what is to be the ideal situation; what is sought for.

“**POLICIES:** are intended to be broad statements providing direction for public decisions concerning the goal.

“**STRATEGIES:** are intended to set forth the means for implementing the Plan, i.e., adoption of regulations, special studies.

“**LAND USE DESIGNATIONS AND STANDARDS:** are intended to define the extent of development and broad standards for such development in a given area.” HRCP 1.

1 the definition of “Land Use Designation and Standards,” one of which is cited by petitioners,
2 explicitly states that they are “intended to define * * * broad standards for * * *
3 development[.]” See n 4.

4 Finally, it is hard to understand why the city council would have adopted a
5 conditional use approval criterion worded like HRMC 17.06.030(4), which expressly
6 requires that a proposed conditional use “shall be consistent with the Comprehensive Plan,”
7 if the city intended that no part of the comprehensive plan could ever apply as a potential
8 source of approval standards in reviewing an application for conditional use approval.
9 Instead, the city council presumably would have worded HRMC 17.06.030(4) to read
10 something like “conditional uses shall be consistent with the Comprehensive Plan by
11 complying with all applicable land use regulation requirements.”

12 The italicized sentence, which immediately follows the underlined sentence in the
13 findings quoted above, seems to take a very different position from the underlined sentence.
14 That sentence states that whether comprehensive plan goals, policies and other provisions
15 apply directly as mandatory approval criteria in this case depends on the “wording of the
16 applicable goals and policies.” According to the italicized sentence, HRCP provisions only
17 operate as mandatory approval criteria if they “are expressed in mandatory terms as an
18 approval standard.” Reading the underlined and italicized language together, it is reasonably
19 clear that the city takes the position that the HRCP Goals, Policies and other provisions are
20 for the most part implemented by the city’s acknowledged land use regulations, and the
21 HRCP Goals, Policies and other provisions do not apply directly to individual applications
22 for conditional use approval, *unless* the comprehensive plan provision at issue is written in
23 “mandatory terms as an approval standard.” As explained above, the city specifically
24 addressed some of the HRCP Goals, Policies and other provisions cited by petitioners and
25 adopted findings that concluded that none of those HRCP Goals and Policies is worded as a

1 mandatory approval criterion. Record 19-21. Those findings are consistent with the
2 interpretation embodied in the italicized finding.

3 To summarize, the city’s findings take the position that whether HRCP Goals,
4 Policies and other provisions apply directly as conditional use approval criteria in this case
5 depends on their wording and they only operate as directly applicable approval criteria if they
6 “are expressed in mandatory terms as an approval standard.” That interpretation is consistent
7 with a long line of LUBA decisions that have considered that question in a variety of
8 contexts. As we explained in *Save our Skyline v. City of Bend*, 48 Or LUBA 192, 209-10
9 (2004):

10 “[L]ocal and statutory requirements that land use decisions be consistent with
11 the comprehensive plan do not mean that all parts of the comprehensive plan
12 necessarily are approval standards. *McGowan v. City of Eugene*, 24 Or
13 LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA
14 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff’d* 96 Or
15 App 645, 773 P2d 1340 (1989). Local governments and this Board have
16 frequently considered the text and context of cited parts of comprehensive
17 plans and concluded that the alleged comprehensive plan standard was not an
18 applicable approval standard. *Stewart v. City of Brookings*, 31 Or LUBA 325,
19 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248,
20 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990).
21 Even if the comprehensive plan includes provisions that can operate as
22 approval standards, those standards are not necessarily relevant to all quasi-
23 judicial land use permit applications. *Bennett v. City of Dallas*, 17 Or LUBA
24 at 456. Moreover, even if a plan provision is a relevant standard that must be
25 considered, the plan provision might not constitute a separate mandatory
26 approval criterion, in the sense that it must be separately satisfied, along with
27 any other mandatory approval criteria, before the application can be approved.
28 Instead, that plan provision, even if it constitutes a relevant standard, may
29 represent a required *consideration* that must be balanced with other relevant
30 *considerations*. See *Waker Associates, Inc. v. Clackamas County*, 111 Or App
31 189, 194, 826 P2d 20 (1992) (‘a balancing process that takes account of
32 relative impacts of particular uses on particular [comprehensive plan] goals

1 and of the logical relevancy of particular goals to particular uses is a
2 decisional necessity’).”⁵

3 Our task in this appeal is to consider petitioners’ contentions that the city council’s
4 conclusion that none of the HRCP provisions they cited are mandatory approval criteria or
5 considerations is “implausible,” because that conclusion is inconsistent with the relevant text
6 of the HRCP. *Siporen*, 349 Or at 243.

7 **B. HRCP Goal 7 Policies, Implementation Strategy and Land Use**
8 **Designation and Standard**

9 In their first assignment of error, petitioners cite two Goal 7 Policies, a Goal 7
10 Implementation Strategy and a Goal 7 Land Use Designation and Standard, which we set out
11 below:

12 **HRCP Goal 7, “Natural Disasters”**

13 **HRCP Goal 7, Policy 1.**

14 “Floodplains will be maintained as natural drainageways. No permanent
15 structures other than dams and bridges shall be permitted which inhibit flood
16 stream flows or endanger other property.”

17 **HRCP Goal 7, Policy 4.**

18 “4. In cases where detailed mapping of 100-year floodplains is not
19 complete, the 100-year floodplain will be determined by at least one of
20 the following methods:

21 “a. The natural stream bank drop-off to the current floodplain.

22 “b. A field inspection.

23 “c. HUD Special Flood Hazard area maps.

⁵ We elaborated on the “consideration” vs “approval criterion” distinction in *Bothman v. City of Eugene*, 51 Or LUBA 426, 439 (2006):

“[E]ven where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require * * * consistency with applicable plan provisions.”

1 “d. Soil information from the Soil Conservation Service.

2 “e. Consultation with both the County Sanitarian and the Public
3 Works Director or other applicable agencies.”

4 **HRCP Goal 7, Natural Disaster Implementation Strategy 4.**

5 “No permanent structure shall be erected within a flood hazard area unless the
6 structure or the area meets the criteria set forth in the ‘FP’ overlay zone.”

7 **HRCP Goal 7, Land Use Designations and Standards, Floodplain, “FP”**
8 **Combining Zone.**

9 “Development or occupancy of any of the lands designated “F?” (floodplain)
10 will not be permitted without approval by the Hood River City Planning
11 Commission. Before approval will be considered, proponents of the
12 development will be required to submit a report that addresses, at a minimum,
13 the following:

14 “a. A description of the proposed use.

15 “b. The impact on the area.

16 “c. A diagram of the proposed structure and the relation to the floodplain.

17 “d. Proposed mitigating measures.”

18 **C. The City Council’s Goal 7 Findings**

19 The findings that the city council adopted in rejecting petitioners’ arguments
20 concerning the above-quoted HRCP Goal 7 provisions are set out below:

21 “Friends [of Hood River Waterfront] assert that the City’s Goal 7 applies
22 directly to this proposal as a set of independent approval standards. Again, we
23 disagree. The City implements and applies this Goal through its Floodplain
24 Ordinance, floodplain mapping and related zoning regulations, not as a
25 standalone approval standard applicable to permits on a quasi-judicial basis.
26 Through compliance with the City’s Flood Hazard ordinance, to the extent it
27 applies at all, is how this development achieves consistency with Goal 7.”
28 Record 20-21.

29 **D. Conclusion**

30 The city council’s findings appear to address Goal 7 itself, rather than the Goal 7
31 Policies, Implementation Strategy and Land use Designation and Standards set out above.

1 Goal 7 itself only requires that the city “protect life and property from natural disasters and
2 hazards.” Based on the above findings, we cannot tell whether the city council even
3 considered the text of the Goal 7 Policies, Implementation Measure and Land Use
4 Designation and Standards set out above.

5 The petition for review also devotes little attention to the actual text of the cited Goal
6 7 provisions and makes almost no effort to explain why that text is sufficient to make the
7 cited Goal 7 provisions mandatory approval criteria or mandatory considerations in
8 approving this request for conditional use approval.⁶ For example HRCP Goal 7, Policy 4
9 only applies “where detailed mapping of 100-year floodplains is not complete,” something
10 petitioners neither allege nor attempt to establish. The potential applicability of the other
11 three of those provisions (Goal 7, Policy 1, Implementation Strategy 4 and the Land Use
12 Designations and Standards for the FP Zone would seem to turn on a threshold determination
13 regarding whether the proposed development will be located at least partially in a
14 “floodplain,” “flood hazard area,” or “FP” zone. We understand petitioners to suggest those
15 thresholds are met, but respondents suggest in their brief that such is not or may not be the
16 case.⁷

17 The HRCP provisions quoted above are directed at structures, development and
18 floodplains and flood hazard areas. It is not clear to us why those HRCP Goal 7
19 requirements are inapplicable here. Given the lack of a direct response from the city council

⁶ Petitioners do argue, correctly, that the cited Goal 7 provisions are written as “shalls” and “wills,” which suggests they are mandatory. But that mandatory language does not clearly state in what context the Goal 7 provisions are mandatory. As noted in the text, some of the cited provisions reference development in certain zones, and such provisions obviously would not apply to development in other zones.

⁷ It is exceedingly unclear to us what the facts are. Respondents contend the line of Ordinary High Water is at 80.65 feet above mean sea level and the 100 year floodplain line is at 86 feet above mean sea level. There does not appear to be any question that the proposed office building will be located within the 100-year floodplain, although the office building is proposed to be located on pilings and will presumably be elevated so that the first floor of the building itself will be located above both Ordinary High Water and the 100 year flood level.

1 in its findings concerning the above-quoted HRCP Goal 7 provisions, and the lack of any
2 argument that petitioners failed to raise the issue of the applicability of those HRCP Goal 7
3 provisions below, we sustain the first assignment of error. On remand, the city must directly
4 address the question of whether, based on the text of the cited HRCP Goal 7 provisions,
5 viewed in context, those HRCP Goal 7 provisions are mandatory approval criteria or
6 considerations that the city council is required to address in granting conditional use approval
7 for the disputed proposal. If they are, the city must demonstrate that the proposal is
8 consistent with those HRCP Goal 7 provisions.

9 The first assignment of error is sustained.

10 **SECOND ASSIGNMENT OF ERROR**

11 We set out the text of petitioners' second assignment of error below:

12 "The City committed a procedural error by not disclosing it was applying city
13 floodplain ordinance HRMC 15.44 prior to the close of the record." Petition
14 for Review 16.

15 Petitioners contend the city failed to give notice prior to the public hearing in this
16 matter that HRMC 15.44 was among the "applicable criteria," as required by ORS
17 197.763(3)(b).⁸ Petitioners contend HRMC 15.44 was first mentioned in a condition
18 proposed by planning staff at the May 7, 2012 planning commission hearing after the
19 evidentiary record had been closed on April 24, 2012. The City Council imposed the
20 following condition of approval:

21 "c. The City Building Official is appointed to administer and implement
22 the Flood Hazards chapter (HRMC ch. 15.44). A portion of the retail
23 building might be located in the flood hazard area, in which case, the
24 developer shall apply for and obtain a development permit before
25 construction or development begins within any area of special flood
26 hazard established in HRMC 15.44.030. The permit shall be for all
27 structures, including manufactured, as set forth in HRMC 15.44.010,

⁸ ORS 197.763(3)(b) provides that notice of a local government quasi-judicial land use hearing must "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

1 and for all other development including fill and other activities, also as
2 set forth in HRMC 15.44.010. The floodplain (hazard) study shall be
3 stamped by an Oregon Engineer licensed to complete such studies and
4 shall be included in the application for building permit delineating if
5 any or part of the building is subject to Flood Hazard requirements.”
6 Record 45.

7 The above seems to have been the city’s response once it discovered that the
8 proposed office building may be located in a flood hazard area, which would make that
9 aspect of the proposal subject to the city’s flood hazard regulations at HRMC 15.44.

10 Petitioners’ second assignment of error is difficult to understand. Petitioners seem to
11 argue the city should have given prior notice that HRMC 15.44 would be applied, accepted
12 relevant evidence concerning application of the city’ flood hazard regulations as part of this
13 conditional use and site plan review proceeding, and then presumably have issued a
14 development permit only if the proposal complies with all requirements of the HRMC flood
15 hazard regulations.

16 There are a number of problems with petitioners’ argument. Initially, petitioners’
17 assignment of error alleges a failure on the city’s part to give notice that HRMC 15.44 would
18 be applied as an “applicable criteri[ion],” as required by ORS 197.763(3)(b). *See* n 8. But as
19 petitioners recognize, the city did not apply HRMC 15.44 as an approval criterion. Even if
20 petitioners’ second assignment of error can be read to allege the city *should have* applied
21 HRMC 15.44 in the conditional use and site plan proceeding that led to the decision that is
22 before us in this appeal, petitioners cite nothing to support that view. HRMC 15.44.040
23 requires a development permit before any “construction or development begins with any area
24 of special flood hazard * * *.” HRMC 15.44.050 appoints “[t]he city building official * * *
25 to administer and implement [HRMC 15.44] by granting or denying development permit
26 applications in accordance with its provisions.” The conditional use and site plan decision
27 that is the subject of this appeal simply recognizes that the proposed office building may be
28 located partially within a flood hazard area and therefore may be subject to regulation under

1 HRMC 15.44, and imposes a condition that the proposal comply with HRMC 15.44 if it
2 applies. As far as we can tell, the applicant would be required to comply with HRMC 15.44
3 even without the condition. Petitioners offer no argument that we can understand that
4 establishes the city council committed an error regarding HRMC 15.44.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 Because the challenged decision is quasi-judicial, the ORS 197.763 standards for
8 conducting quasi-judicial land use hearings apply, as does HRMC 17.09.040, which parrots
9 the statute. We limit our discussion to the statute.

10 Under ORS 197.763(6)(a), if prior to conclusion of the initial hearing on a quasi-
11 judicial permit application a participant requests an opportunity to present “additional
12 evidence, arguments or testimony regarding the application,” the city must grant that request
13 in one of two ways. The city can continue the hearing pursuant to ORS 197.763(6)(b) or it
14 can leave the record open for seven days pursuant to ORS 197.763(6)(c).⁹

15 In this case a request was made to present “additional evidence, arguments or
16 testimony regarding the application” prior to the conclusion of the April 16, 2012 public
17 hearing, and pursuant to ORS 197.763(6)(c) the city held the record open for seven days until
18 April 24, 2012. Three items of new evidence were submitted between April 16, 2012 and
19 April 24, 2012:

- 20 “1. A 1-page letter from [the Oregon Department of Fish and Wildlife
21 (ODFW)] expressing concerns about the development’s potential

⁹ORS 197.763(6)(a) provides:

“Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to [ORS 197.763(6)(b)] or leaving the record open for additional written evidence, arguments or testimony pursuant to [ORS 197.763(6)(c)].”

1 impacts on anadromous fish species that use, or might use, the Nichols
2 Boat Basin,

3 “2. Comments from opponent Polly Wood, which included 4 scientific
4 studies related to anadromous fish and sub-lethal effects of pollutants
5 often contained in stormwater runoff from parking lots, most notably
6 copper, and

7 “3. Comments from Patrick Hiller asserting that the cable park would have
8 a harmful impact on anadromous fish in the Nichols Boat Basin and
9 including a map of the designated critical habitat for several federally
10 listed anadromous fish species showing the critical habitat included the
11 Columbia main-stem at Hood River adjacent to the Nichols Boat
12 Basin.” Record 141.

13 Petitioners requested an “opportunity to respond” to the above new evidence. As
14 explained below, the planning commission assumed petitioners simply wished to submit
15 more opposition evidence, rather than rebut the new evidence noted above, and refused to
16 reopen the record. Petitioners contend the planning commission’s refusal to reopen the
17 record is inconsistent with the statute. We agree with petitioners.

18 Petitioners’ request for an “opportunity to respond” to the new evidence noted above
19 was governed by ORS 197.763(6)(c), which provides in relevant part:

20 “Any participant may file a written request with the local government for an
21 opportunity to respond to new evidence submitted during the period the record
22 was left open. If such a request is filed, *the hearings authority shall reopen*
23 *the record* pursuant to [ORS 197.763(7)].”¹⁰

¹⁰ ORS 197.763(7) provides as follows:

“When a local governing body, planning commission, hearings body or hearings officer
reopens a record to admit *new evidence, arguments or testimony*, any person may raise new
issues which relate to the *new evidence, arguments, testimony* or criteria for decision-making
which apply to the matter at issue.” (Emphases added.)

The “new issues” that the last clause of ORS 197.763(7) authorizes persons to raise presumably must relate to
any “new evidence, arguments or testimony” submitted pursuant to the first clause of ORS 197.763(7).

1 Even though ORS 197.763(6)(c) states that the city “shall reopen the record” if the city
2 receives a request to respond to new evidence, the city refused to do so here. The city
3 planning commission offered the following explanation for its refusal to do so:

4 “* * * Friends [of Hood River] asserts a right to reopen the record under ORS
5 197.763(6)(c) * * * based on what it calls ‘new evidence’ that came in at the
6 April 24th deadline. While the * * * request is somewhat unclear about
7 whether Friends seeks the ability to submit additional argument or new
8 evidence or both, the attorney for Friends made it clear at the May 7 meeting
9 that Friends want to submit both. The attorney argued that the three cited
10 documents raised a serious question as to whether, in fact, there were federally
11 listed fish present in the Nichols Boat Basin. The attorney offered a multi-
12 page memo and a large stack of documents (approximately 6 inches high)
13 purportedly consisting of 16 scientific articles related to endangered fish
14 species and their actual or possible presence in the Nichols Boat Basin, plus a
15 CD containing photographs of actual fish from the Nichols Boat basin. The
16 applicant’s representative strongly objected to the Friend’s request to reopen
17 the record, stating they (the applicant) did not submit any new evidence
18 during the final rebuttal, and they have not requested the opportunity to rebut
19 any of the opponent evidence submitted by the April 24th deadline. The
20 applicant requests that the record remain closed.

21 “The Commission finds that ORS 197.763(6)(c) * * * do[es] not give the
22 opponents an endless unilateral opportunity to submit new evidence during an
23 open record period and then demand additional opportunities to ‘respond’ to
24 the evidence they submitted during the previous open record period. *The*
25 *Commission interprets these procedural requirements as affording the*
26 *applicant the right to reopen the record for rebuttal if the opponents submit*
27 *new evidence during an open record period and vice versa.* * * * As such the
28 Commission denied the Friends’ request to reopen the record to ‘respond’ to
29 the second and third documents listed above.” Record 141-42 (emphasis
30 added).

31 The planning commission went on to find that the ODFW letter does not constitute
32 “evidence” and therefore does not give rise to a right to have the record reopened under ORS
33 197.763(6)(c).

1 Turning first to the city council’s conclusion that the ODFW letter does not constitute
2 evidence, we do not agree. ORS 197.763(9)(b) defines “evidence” quite broadly.¹¹ At least
3 parts of the ODFW letter clearly fall within that definition.

4 Next, we agree with the city’s point in the final paragraph of findings quoted above
5 that neither ORS 197.763 nor any other authority we are aware of grants anyone “endless”
6 opportunities to submit new evidence or to respond to new evidence. *Wetherell v. Douglas*
7 *County*, 56 Or LUBA 120, 127 (2008); *Rice v. City of Monmouth*, 53 Or LUBA 55, 60
8 (2006), *aff’d* 211 Or App 250, 154 P3d 786 (2007). But that is not the issue. The relevant
9 issue presented in this appeal is whether under ORS 197.763(6)(c) and (7) the city was
10 legally obligated to grant petitioners *one* more opportunity to submit “new evidence,
11 arguments or testimony,” to “respond” to the new evidence that was submitted during the
12 ORS 197.763(6)(c) seven-day open record period.

13 The legislature did not draft ORS 197.763(6)(c) and (7) to limit applicants to a right
14 to *rebut opponent* evidence and opponents to a right to *rebut applicant* evidence. Those
15 words do not appear in ORS 197.763(6)(c) and (7). The legislature used the word “rebut” in
16 ORS 197.763(6)(b) (“[a]n opportunity shall be provided at the continued hearing for persons
17 to present and rebut new evidence, arguments or testimony”). But although the legislature
18 could have used the word “rebut” in ORS 197.763(6)(c) and (7), it instead drafted them to
19 allow “any participant” to submit “new evidence, arguments or testimony,” to “respond” to
20 any new evidence that was submitted during the ORS 197.763(6)(c) seven-day open record
21 period. Because the legislature used the words “rebut” and “respond” in different
22 subsections of the same statute, they presumably do not mean the same thing. *Johnson v.*

¹¹ ORS 197.763(9)(b) provides:

“‘Evidence’ means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”

1 *DPSST*, 253 Or App 307, 313-14, 293 P3d 228 (2012). Neither the city nor LUBA is free to
2 substitute the arguably more restrictive term “rebut” for the term the legislature used.¹²
3 Neither may the city limit the right of application opponents to respond to new evidence to
4 circumstances where the applicant submits the new evidence, when the words of the statute
5 impose no such limitation. ORS 174.010. The city council’s interpretation of the statutes is
6 inconsistent with the language of ORS 197.763(6)(c) and (7).

7 We do not attempt here to determine the scope of the word “respond” in ORS
8 197.763(6)(c). But whatever the word “respond” means in ORS 197.763(6)(c), it does not
9 mean the same thing as “rebut.” In addition, the new evidence that parties have a right to
10 respond to under ORS 197.763(6)(c) and (7), cannot be limited to evidence that was
11 submitted by parties that the decision maker believes are adverse to that party. Petitioners
12 are correct that it is frequently difficult to neatly characterize evidence as wholly supporting
13 either an applicant’s or an individual opponent’s position on an application. And in any
14 event, ORS 197.763(6)(c) and (7) simply do not impose such a limitation. Finally, while the
15 city is entitled under ORS 197.763(6)(c) and (7) to limit any “new evidence, arguments or
16 testimony,” that petitioners submit to evidence that “respond[s]” to the new evidence that
17 was submitted during the ORS 197.763(6)(c) seven-day open record period, the city is at
18 least obligated to examine the evidence that petitioners submit to determine whether the
19 evidence does not qualify as evidence that “respond[s].” Here, as far as we can tell, the city
20 council simply assumed that the evidence that petitioners wanted to submit was not evidence
21 that “respond[ed] to new evidence submitted during the period the record was left open.”

¹² Webster’s Third New International Dictionary (Unabridged 1981) provides the following relevant definitions of those terms:

“**rebut** * * * to contradict, meet, or oppose by formal legal argument, plea or countervailing proof[.]” *Id.* at 1893.

“**respond** * * * to say something in return : make an answer[.]” *Id.* at 1935.

1 The third assignment of error is sustained.

2 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

3 Under the fourth and fifth assignments of error, petitioners contend the city
4 inadequately responded to their arguments based on HRCP Goals, Guidelines, Policies and
5 Implementation Strategies and sections of the HRMC that they collectively refer to as “water
6 quality related” and “aquatic habitat protection” criteria. Petitioners’ arguments are
7 numerous and far-ranging, and petitioners make little attempt to link those arguments to the
8 actual language of the HRCP and HRMC provisions that they are nominally based on. We
9 turn first to the HRCP provisions cited by petitioners.

10 **A. HRCP Goals, Policies, Implementation Strategies, and Guidelines**

11 The HRCP provisions that petitioners rely on are set out at footnote 18 of page 31 and
12 at page 47 of the petition for review. We set out those HRCP provisions below:
13

14 **HRCP Goal 2 “Land Use Planning”**

15 **Goal 2, Guideline 5**

16 “Conserve and protect resources.”

17 **Goal 2, Guideline 3.**

18 “Maintain the quality of air, water, and land resources of the planning area.”
19

20 **HRCP Goal 5 “Open Spaces, Scenic and**
21 **Historic Areas And Natural Resources”**

22 **Goal 5, Open Spaces Policy 2.**

23 “[P]reserve water resources, riparian, and wildlife habitats.”
24

25 **HRCP Goal 6 “Air, Water,**
26 **and Land Resources Quality”**

27 **HRCP Goal 6.**

1 “To maintain and improve the quality of the air, water, and land resources of
2 the planning area to provide a relatively pollution-free environment.”

3 **HRCP Goal 6, Water Policy 2.**

4 “Development which would decrease the water volume or degrade the quality
5 of perennial streams and/or domestic water supply systems shall be
6 discouraged.”

7 **HRCP Goal 6, Water Implementation Strategy 2.**

8 “Soil run-off and sedimentation shall be minimized by the establishment of
9 building setbacks and vegetative buffer areas for construction projects
10 adjacent to any stream. Building setbacks from streams shall be established in
11 the Zoning Ordinance.”

12 **HRCP Goal 6, Water Implementation Strategy 4.**

13 “The use of catch basins or sediment traps will be encouraged when
14 construction occurs adjacent to streams”

15

16 **HRCP Goal 11 “Public Facilities and Services”**

17 **HRCP Goal 11, Policy 18.**

18 “Discourage or prohibit adverse impacts from erosion and sedimentation in
19 natural drainage ways and storm drain facilities.”¹³

20 The first question that must be answered is whether the above-quoted HRCP
21 provisions are accurately characterized as mandatory, applicable criteria that the city council
22 was obligated to apply directly in granting conditional use and site plan approval. Petitioners
23 offer no focused argument, based on the text of the above-quoted HRCP provisions, that
24 there is anything about that text that suggests these HRCP provisions were adopted to operate
25 as conditional use approval criteria under HRMC 17.06.030(4). For the reasons that follow,
26 we agree with respondents that the text of the above-quoted HRCP provisions supports the

¹³ Petitioners also cite HRCP Goal 7, Policy 1 under their fourth assignment of error. That is a flood related policy that we have already concluded that the city council will be required to interpret on remand and apply if it applies directly. HRCP Goal 7, Policy 1 does not appear to be a water quality standard and it adds nothing to petitioners’ arguments under the fourth and fifth assignments of error. We do not consider HRCP Goal 7, Policy 1 further.

1 city council's findings that they *are not* mandatory approval criteria or considerations that
2 under HRMC 17.06.030(4) the city was obligated to apply directly in granting conditional
3 use and site plan approval in this case.

4 Although the challenged decision does not expressly address the text of HRCP Goal
5 2, Guidelines 3 and 5, those "Guidelines" are clearly aspirational and are not written as
6 mandatory approval criteria applicable to specific development proposals. Although the
7 HRCP does not define the term "Guidelines," in the Statewide Planning Goal context
8 "Guidelines" are not mandatory standards. ORS 197.015(9).¹⁴ Absent some reason to think
9 otherwise, it is appropriate to assume the HRCP Guidelines are also nonmandatory.
10 *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 340-41, 722 P2d 1258 (1986).

11 In findings that are not challenged by petitioners, the city council explained that Goal
12 5 "is implemented legislatively through the Goal 5 resource inventory and ESEE evaluation
13 process." Record 20. Goal 5 is "[t]o conserve historic and scenic resources." Goal 5, Open
14 Spaces Policy 2 is just as open ended and aspirational as Goal 5 itself. Petitioners have not
15 established that the city council erred in refusing to apply Goal 5, Open Spaces Policy 2 as a
16 mandatory approval criterion or consideration under HRMC 17.06.030(4).

17 In findings that are not challenged by petitioners, the city council concluded that Goal
18 6 is fully implemented by the city's land use regulations and does not apply directly in this
19 case or any other quasi-judicial proceeding. Record 20. Petitioners point to nothing in the
20 text of the cited Goal 6 Policy and Implementation Strategies that is inconsistent with the city

¹⁴ The ORS 197.015(9) definition of "Guidelines" appears immediately after the ORS 197.015(8) definition of "Goals" and provides:

"Guidelines" means suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. *Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.*" (Emphasis added.)

1 council's position that those Goal 6 provisions are intended to govern the city's adoption or
2 amendment of land use regulations, and not intended to apply directly to individual quasi-
3 judicial permit decisions. Petitioners identify nothing about the text of the Goal 6 Policy and
4 Implementation Strategies that is inconsistent with the city council's position.

5 Finally, in findings that are not challenged by petitioners, the city council found that
6 the directive set out in HRCP Goal 11, Policy 18 is fully implemented through "Stormwater
7 standards, grading and erosion control requirements, which were designed to achieve these
8 policy objectives." Record 21. There is nothing about the language of HRCP Goal 11,
9 Policy 18 that is inconsistent with that interpretation.

10 In summary, because petitioners fail to establish that the cited HRCP provisions
11 quoted above must be interpreted and applied as mandatory approval criteria that the city
12 council was obligated to apply directly in this case under HRMC 17.06.030(4), their
13 arguments under the fourth and fifth assignments of error provide no basis for reversal or
14 remand, to the extent they are based on those HRMC Goals, Guidelines, Policies and
15 Implementation Strategies.

16 **B. HRMC Standards**

17 In their fourth assignment of error, petitioners identify three site review criteria,
18 which we set out and discuss separately below.

19 **1. HRMC 17.16.040(A)¹⁵**

20 HRMC 17.16.040(A) provides in part:

21 "Natural Features: Significant natural features shall be protected to the
22 maximum extent feasible. * * *"

23 In their findings addressing HRMC 17.16.040(A), the city council found that under
24 its Goal 5 Economic, Social, Environmental and Energy (ESEE) analysis and program the

¹⁵ Petitioners erroneously identify the quoted text as appearing at HRMC 17.22.020(C)(1).

Nichols Boat Basin is not a “significant natural feature,” within the meaning of HRMC 17.16.040(A), and was given “no protection, *i.e.*, a zero level of protection” under Goal 5.

Record 23. The city’s findings go on to explain:

“The ‘significant natural resources’ under consideration in the site plan review criteria are those resources inventoried, designated and protected under Goal 5, and then only to the extent of the protection selected through the ESEE process. * * * We interpret this site plan standard as requiring the [City] Council to ensure that designated Goal 5 natural resources are protected and actually receive the protection their designation requires. This is not an independent protection scheme to be applied in addition to or beyond Goal 5. Instead, this standard requires compliance with the level and extent of protection adopted for designated Goal 5 significant natural resources.”

Record 23.

In the above-quoted findings we understand the city council to have found that HRMC 17.16.040(A) does not require that the city afford protection in this case that goes beyond the protections that are in place and required under the city’s acknowledged Goal 5 program. The city found that its Goal 5 program for this area requires no protection for the Nichols Boat Basin. To the extent petitioners believe more protection is required under HRMC 17.16.040(A), they should have assigned error to and demonstrated error in the above-quoted findings. Petitioners did not do so, and we do not consider HRMC 17.16.040(A) further.

2. HRMC 17.16.040(D)

HRMC 17.16.040(D) provides, in part:

“Public Facilities: Adequate capacity of public facilities for water, sanitary sewers, storm drainage, fire protection, streets, and sidewalks shall be provided to the subject parcel. * * *.”

HRMC 17.16.040(D) is a public facility “capacity” standard and the city council treated it as such, essentially finding that the public facilities, including storm drainage facilities, would have to be constructed in accordance with city standards for such construction and would therefore provide adequate capacity. We fail to see how the HRMC

1 17.16.040(D) public facility capacity standard has any bearing on petitioners' water quality
2 arguments under the fourth and fifth assignments of error. Because petitioners make no
3 attempt to explain what connection their water quality arguments have with the HRMC
4 17.16.040(D) public facility capacity standard, we do not consider HRMC 17.16.040(D)
5 further.

6 **3. HRMC 17.16.040(C)**

7 The text of HRMC 17.16.040(C) that petitioners cite and rely on is set out below:

8 "Grading: Any grading, contouring, on-site surface drainage, and/or
9 construction of on-site surface water storage facilities shall take place so that
10 there is no adverse effect on neighboring properties, public rights-of-way, or
11 the public storm drainage system. * * *."

12 In rejecting petitioners' contentions that the proposal does not comply with HRMC
13 17.16.040(C), the city council adopted the following findings:

14 "The applicant submitted a preliminary grading plan and has asserted that the
15 site will be graded and a subsurface, continuous drainage system will be
16 installed at the building perimeter. Plantings will be installed immediately
17 after construction is complete.

18 "* * * * *

19 "The City Engineering Department has not received a storm water
20 management plan which usually accompanies a building permit as an
21 engineering improvement plan to demonstrate how storm water can all be
22 handled on site. One will be required to be approved prior to a building
23 permit.

24 "Contrary to the Friends' suggest[ion], the Council does not interpret [HRMC
25 17.16.040(C)] as requiring a zero level of impact, sediment or stormwater
26 discharge to Nichols Boat Basin. This provision prohibits 'adverse effect on
27 neighboring properties, public rights-of-way, or the public storm drainage
28 system.' It does not prohibit all silt discharge from the site or impose a more
29 stringent water quality standard than required by the City's stormwater
30 standards. In this regard, the Council concludes that the City's stormwater
31 standards and grading and erosion control standards are designed to
32 implement these standards. As such, compliance with the City's stormwater,
33 grading and erosion control standards will achieve compliance with this
34 standard, as least so far as water quality standards are concerned.

1 “In order to minimize erosion and adverse impact to the neighboring
2 properties, conditions of approval are recommended that contouring for on-
3 site surface drainage and/or construction of on-site water storage facilities
4 shall take place so that there is no adverse effect on neighboring properties,
5 public rights-of-way the public storm drainage system. Graded areas shall be
6 replanted as soon as possible after construction to prevent erosion. As
7 conditioned, the proposal complies with this criterion.” Record 26.

8 We understand petitioners to take the position that under HRMC 17.16.040(C) “[a]ny
9 grading, contouring, on-site surface drainage, and/or construction of on-site surface water
10 storage facilities” must be such that it will have “no adverse effect” on the adjoining Nichols
11 Boat Basin. Although petitioners and the city council do not have a shared understanding of
12 what “no adverse effect” means, we do not understand the city to have disagreed with
13 petitioners’ interpretation of HRMC 17.16.040(C). The last two sentence of the third
14 paragraph of findings quoted above can be read to take the position that compliance with “the
15 City’s stormwater, grading and erosion control standards” necessarily will be sufficient to
16 achieve the HRMC 17.16.040(C) “no adverse effect” standard. While it may be that in some
17 cases the stormwater and grading and erosion control standards will be sufficient to satisfy
18 the HRMC 17.16.040(C) “no adverse effect” standard, we do not agree with that broad
19 statement, which effectively would read HRMC 17.16.040(C) out of the site review criteria.

20 But the city council’s findings can also be read to take a more measured position that
21 the city council believes that evidence in the record demonstrates that compliance with those
22 “stormwater and grading and erosion control standards” will be sufficient in this case to
23 ensure that there are no water quality impacts on Nichols Boat Basin that would violate
24 HRMC 17.16.040(C). In that regard, the city’s construction inspector testified below:

25 “* * * The typical approach is that we leave it to the applicant to provide a
26 means to address the storm water issues. With the site so close to the outlet, I
27 would like to see some type of filter systems. You can [construct] catch
28 basins that have the filters built in or you could pipe everything through a
29 large vault type of structure with multiple filters in it. It’s not a real big
30 challenge to get water quality treatment even this close to the outlet.” Record
31 199.

1 Consistent with the city construction inspector’s testimony and the last paragraph of findings
2 quoted above, the city council imposed a condition of approval that required the following:

3 “Contouring for on-site surface drainage and/or construction of on-site surface
4 water storage facilities shall take place so that there is no adverse effect on
5 neighboring properties, public rights-of-way or the public storm drainage
6 system. Graded areas shall be replanted as soon as possible after construction
7 to prevent erosion.” Record 47.

8 It is clear that the city council does not interpret the HRMC 17.16.040(C) “no adverse
9 effect” standard to impose the stringent water quality standard that petitioners would interpret
10 it to impose, and the city council’s interpretation in that regard is entitled to deference under
11 *Siporen*.

12 With regard to petitioners’ evidentiary challenge, it is true that the record does not
13 show that the city construction inspector has any particular training or expertise in water
14 quality. But we do not think it is unreasonable for a city council that likely also has no
15 particular expertise in water quality management to assign some weight to its construction
16 inspector’s testimony that filtration methods are available so that it is not a “challenge to get
17 water quality treatment even this close to the outlet.” But in assessing petitioners’ water
18 quality challenges the city appears to have relied in significant part on one of the documents
19 that was the subject of its belated attempt to supplement the record. Just as importantly our
20 disposition of the third assignment of error could lead to the record being supplemented with
21 additional relevant evidence. That evidentiary uncertainty makes it inappropriate for us to
22 attempt to resolve petitioners’ evidentiary challenge here. On remand, once the record is
23 closed, the city council will have an opportunity to determine whether it remains of the view
24 that the HRMC 17.16.040(C) “no adverse effect” standard is satisfied in this case with regard
25 to water quality, and to adopt any supplemental findings or conditions it believes are
26 necessary to support that view.

1 The fifth assignment of error is denied, the fourth assignment of error is sustained in
2 part.

3 **CONCLUSION**

4 Because we sustain the first assignment of error, remand is required so that the city
5 council can more directly respond to petitioners' argument that the HRCP Goal 7 Policies,
6 Implementation Strategy and Land Use Designation and Standard discussed under the first
7 assignment of error are mandatory approval criteria or considerations that must be considered
8 in granting conditional use and site plan approval in this case. If they are, the city council
9 will need to ensure that the proposal complies with the HRCP Goal 7 Policies,
10 Implementation Strategy and Land Use Designation and Standard.

11 Because we also sustain petitioners' third assignment of error, the city council will be
12 required to reopen the record to provide petitioners an opportunity "to respond to" the new
13 evidence that was received before the record closed on April 26, 2012, as required by ORS
14 197.763(6)(c) and (7). If that evidence is within the scope of the right "to respond" that is
15 granted by ORS 197.763(6)(c) and (7), the city must include that evidence in the record.
16 That evidence may have some bearing on the HRCP Goal 7 Policies, Implementation
17 Strategy and Land Use Designation and Standard that are the subject of the first assignment
18 of error, depending on the city council's decision on remand regarding their applicability. If
19 so, the city council will need to consider that evidence in applying any HRCP Goal 7
20 Policies, Implementation Strategy and Land Use Designation and Standard that it finds to be
21 applicable in this case. That evidence may also have some bearing on the HRMC
22 17.16.040(C) "no adverse effect" standard that petitioners raise under the fourth assignment
23 of error. If so, the city council will need to consider that evidence in determining whether the
24 proposal complies with HRMC 17.16.040(C) "no adverse effect" standard.

25 The city's decision is remanded.