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

HOLLIS LUNDEEN,
Petitioner,

vs.

CITY OF WALDPORT,
Respondent,

and

TIDEWATER DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2020-071

FINAL OPINION
AND ORDER

Appeal from City of Waldport.

Hollis Lundeen filed the petition for review and argued on behalf of themselves.

Benedict J. Linsenmeyer filed a response brief and argued on behalf of respondent. Also on the brief was Macpherson, Gintner, & Diaz.

Dennis L. Bartoldus filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 05/05/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a city council decision on remand from LUBA, approving a planned unit development.

MOTION FOR JUDICIAL NOTICE

In the conclusion of the petition for review, petitioner requests that LUBA take "judicial notice" of several letters and photographs in Appendix 4 of the petition for review. The letters and photographs describe and depict construction or grading activity on the subject property that petitioner allegedly witnessed after the city issued the challenged decision. Petitioner cites the extra-record letters and photographs as evidence that the city erred in approving the proposed development under the applicable land use criteria, because the city allegedly allowed intervenor-respondent Tidewater Development, LLC (intervenor), to engage in construction or grading activities for the planned development without obtaining the Department of Environmental Quality (DEQ) permits required by the city's decision.[1]

With limited exceptions, LUBA's evidentiary review is confined to the local evidentiary record. ORS 197.835(2). Petitioner makes no attempt to demonstrate that the letters and photographs in Appendix 4 are subject to any

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[1] We understand intervenor to argue that the activities petitioner witnessed and photographed are authorized under an Oregon Forest Practices Act permit, previously obtained to log the subject property, and were not authorized under the decision challenged in this appeal.

exception to our limited scope of review under ORS 197.835(2). Petitioner also fails to assert any basis to take "judicial notice" of the letters and photographs. LUBA is not subject to and has no authority under ORS 40.060 to 40.085, which allow courts to take judicial notice of certain "adjudicative facts" outside the court record. LUBA has held that it will, in appropriate cases, take judicial notice of laws, regulations, and official acts pursuant to ORS 40.090. However, the letters and photographs in Appendix 4 clearly do not constitute judicially cognizable law under ORS 40.090. Accordingly, petitioner's request to take judicial notice of the letters and photographs in Appendix 4 is denied.

FACTS[2]

This is the third time that petitioner has appealed the city's approval of the challenged planned development. *Lundeen v. City of Waldport*, 78 Or LUBA 95 (2018) (*Lundeen I*); *Lundeen v. City of Waldport*, ___ Or LUBA ___ (LUBA No 2019-046, Oct 24, 2019) (*Lundeen II*). In *Lundeen II*, we described the subject property as follows:

> "The subject property is 7.75 acres, vacant, located within the City of Waldport (city), and is zoned Residential R-1 for single-family

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[2] At oral argument, petitioner presented arguments outside the briefs, supported by citation to facts not in the record. The Board will not consider arguments presented for the first time at oral argument. *See* OAR 661-010-0040(1) ("The Board shall not consider issues raised for the first time at oral argument."). The Board will disregard any arguments and factual statements made at oral argument that are not in the parties' briefs and not supported by citations to and evidence in the record.

> dwellings. Surrounding land uses include single-family residential development and some undeveloped, residential-zoned property. Some of the subject property is comprised of steep slopes but much of the property slopes gently to the west. The proposed lots are primarily located on the more gently sloping areas. Most of the property that has steeper slopes is proposed for open space on a tract adjacent to the north and east boundaries of the planned development. A steep ravine runs along the north and a portion of the east boundaries.
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> "Access to the subject property is proposed via an extension of Norwood Drive, an existing public right of way that currently dead ends before it reaches the property. Norwood Drive serves multiple existing residences. The proposed development would extend Norwood Drive across the open space tract and steep ravine and into a circular street system that would provide access to the new lots." ___ Or LUBA at ____ (slip op at 3).

In 2018, the city approved intervenor's application for a 34-unit single-family residential planned development on the subject property. The city found that the proposed use complied with all Waldport Development Code (WDC) approval criteria, including WDC 16.60.030(C)(4), which provides:

> "In considering a development proposal, the planning commission shall seek to determine that the development will not overload the streets outside the planned development area; and that the proposed utility and drainage facilities are adequate for the population densities and type of development proposed and will not create a drainage or pollution problem outside the planned area."

Petitioner appealed the city's initial approval to LUBA. In *Lundeen I*, we rejected all of petitioner's assignments of error except one that argued that the city's findings failed to evaluate whether the proposed utility and drainage facilities will "create a drainage or pollution problem outside the planned area." We

sustained that assignment of error and remanded to the city to adopt findings on that point.

On remand, the city council referred the matter back to the planning commission, which conducted additional evidentiary proceedings and adopted findings concluding that the proposed utility and drainage facilities will not create a drainage or pollution problem outside the planned area. Petitioner appealed the planning commission decision to the city council, which again approved the application. Petitioner then appealed the city's second approval to LUBA. In *Lundeen II*, we rejected all of petitioner's assignments of error other than an argument that the findings on remand failed to consider whether temporary construction activities outside the planned area, *i.e.*, construction of the Norwood Drive extension in the city-owned right-of-way, would cause drainage or pollution problems outside the planned area. We sustained that portion of an assignment of error and remanded to the city to adopt findings addressing that narrow issue.

On remand from *Lundeen II*, the city council retained the matter instead of referring it to the planning commission and scheduled a public hearing on May 14, 2020, to accept testimony and evidence on the limited issue of whether construction of the Norwood Drive extension would cause drainage or pollution problems outside the planned area, contrary to WDC 16.60.030(C)(4). Due to COVID-19 restrictions, the city limited in-person participation to petitioner and intervenor's representative, both of whom appeared at the hearing and offered

testimony and evidence. The city kept the record open for an additional seven days, until May 21, 2020, for interested parties to submit additional testimony or evidence. Both petitioner and intervenor submitted additional testimony and evidence during that seven-day period. As part of its submittal, intervenor provided a two-page letter from an engineer. The record closed on May 21, 2020. On May 28, 2020, the city council deliberated and voted to approve the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Remand Proceedings

Petitioner argues that the city committed procedural error by failing to refer the matter on remand to the planning commission and, instead, conducting an evidentiary remand hearing before the city council. Petitioner contends that WDC 16.60.030(C)(4) plainly requires that the *planning commission* determine whether the proposed utility and drainage facilities will "create a drainage or pollution problem outside the planned area." Petitioner argues that the city council has no authority under the WDC to take up that question in the first instance, based on newly submitted evidence that was never introduced to the planning commission.

In its decision, the city council adopted findings rejecting petitioner's argument:

> "7. The city finds that it is appropriate that this matter on remand be heard only by the City Council and does not need to be referred to the Planning Commission. The city development

code contains no requirement that this matter be referred to the planning commission after remand and LUBA imposed no such requirement. LUBA only remanded to allow the city to determine whether construction activities will create a drainage or pollution problem outside the planned area. This is a determination the City Council can make as the final decision maker of development in the city and as the city body that interprets the city's ordinances. Additionally, as a practical matter, any decision of the planning commission could be appealed to the City Council by any party who participated and it is extremely likely that any party that did not prevail at the Planning Commission on this matter would appeal to the City Council. By holding an evidentiary hearing before the City Council on the remanded issue the city provided the opportunity for the parties to submit evidence to the ultimate decision maker at the city. No party is prejudiced by that procedure and it provides due process to all the parties.

"8. The Planning Commission has twice previously approved this Planned Development. It is apparent to the City Council that the Planning Commission believed that it had adequately addressed all the requirements for approval of the planned development. Additionally, planned developments can be approved by the Planning Commission unless they are appealed to the City Council. Once they are appealed to the City Council the council has jurisdiction and authority to make the decision. [LUBA] remanded this matter to the city to make a determination and since this decision remanded from LUBA was remanded from a decision of the City Council it is appropriate for the City Council to address the remanded issue." Record 16-17.

The city council is correct that nothing in LUBA's opinion in *Lundeen II* obligates the city to refer the matter on remand to the planning commission. The city council is the city governing body and the city's ultimate land use decision-making authority. In *Lundeen I* and *II*, LUBA reviewed the city council's final

land use decision and, in both cases, returned the decision to the city council for further proceedings. Following remand in *Lundeen I*, the city council chose to return the matter to the planning commission. However, unless the city council has adopted legislation that irrevocably delegates decision-making authority to a lower decision-making body, or otherwise limits the authority of the city council to take up a land use issue on remand from LUBA, the city council may choose to conduct the remand proceeding itself, which the city council did following *Lundeen II*. *See Rosenzweig v. City of McMinnville*, 66 Or LUBA 164, 170-71 (2012) (unless the city code requires a second hearing before the planning commission, the city council may choose to conduct a remand hearing itself).

Petitioner cites nothing in the WDC or elsewhere that purports to limit the authority of the city council to conduct remand proceedings. WDC 16.60.030(C)(4) simply specifies that the planning commission, as the initial decision-making body on a planned development application, must consider whether the proposed development would cause certain impacts outside the planned area. The planning commission (and city council on local appeal) have twice considered and applied WDC 16.60.030(C)(4), although we ultimately held that the city's final decisions failed to adopt adequate findings addressing that criterion. To the extent that WDC 16.60.030(C)(4) embodies a procedural expectation that the planning commission will initially apply the provision, that expectation has been met in this case. Petitioner has not demonstrated that the city erred in failing to refer our remand in *Lundeen II* to the planning commission.

B. New Evidence

Petitioner next argues that the city council committed procedural error in accepting new evidence from intervenor on May 21, 2020, the last day of the seven-day open record period following the remand hearing, and failing thereafter to give petitioner and other participants the opportunity to respond to that new evidence. Petitioner argues that, at the subsequent proceeding on May 28, 2020, the city council conducted only deliberations and failed to provide for public comment or testimony or any opportunity to respond to the new evidence submitted on May 21, 2020.

Petitioner does not identify the "new evidence" that intervenor submitted on May 21, 2020, but we, like intervenor, assume that petitioner refers to the two-page letter from intervenor's engineer at Record 93 to 94. The engineer's letter discusses best management practices and other means typically required pursuant to DEQ permits to reduce drainage and pollution impacts from construction such as the Norwood Drive extension. Based on the application and testimony in the record, including the engineer's letter submitted on May 21, 2020, the city council adopted findings proposed by intervenor prior to the May 14, 2020 hearing, detailing the proposed means of ensuring compliance with WDC 16.60.030(C)(4).[3] The city also imposed a condition of approval requiring that

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[3] The city council's findings on remand state, in relevant part:

> "1. The applicants will be required to apply for permits required by any local, state or federal agency to develop the property.

At a minimum they will need to apply for permits from DEQ regarding how runoff will be managed during construction. In applying for permits the applicants will need to follow the regulations of the permitting agency which are meant to address offsite pollution and drainage. The City is not listing every possible permit or regulation in granting the approval since all necessary permits must be obtained and the city cannot pick and choose what permits are required or which regulations are followed. The applicant is legally required to apply for all necessary permits and follow all applicable regulations for the agencies with jurisdiction over the project.

"2. The applicant will disturb as little of the property as possible in developing the property and will preserve as much existing vegetation down gradient as possible. It will also re-seed slopes after completion of grading and re-establish vegetation prior to the next rain season. The applicant will install sediment fences around the area of the property to be developed in order to protect areas not [to] be developed and to protect off site properties. The applicant will also install sediment fences around the area of road to be developed leading to the applicant's property. In addition to sediment fences the applicant will also utilize straw waddles, bark chip bags, erosion mats and other DEQ accepted forms of erosion protection to protect the surrounding properties. The applicant will also place rock and biobag check dams in any ditch line of the new access road during construction. Sediment fences, straw waddles and bark chip bags, erosion mats and other procedures to be employed by the applicant are commonly and effectively utilized in coastal construction and will be utilized here as in the development of other coastal properties, many of which contain slopes. Additionally, the applicant has left a significant part of the property undeveloped and the vegetation on the slopes will further act as a barrier to protect surrounding properties. Development will occur during periods when there is no or little rainfall and the machinery will be operated by experienced operators who

intervenor, prior to any construction activities, obtain all required DEQ permits and provide engineered plans for review and approval by the city engineer. Based on the findings and conditions of approval, the city council resolved the narrow issue framed by our remand in *Lundeen II*, concluding that construction of the Norwood Drive extension would not cause drainage or pollution problems outside the planned area.[4]

> are familiar with working in coastal geography. In the event of dry weather with wind, the applicant will employ accepted methods of dust control such as dampening any area that is disturbed. The applicant has also shown that there are feasible options to divert drainage away from the forest service property." Record 15-16.

[4] The city's decision concludes:

> "The Vista View Planned Development (Case File #l-PD-PC-17) was remanded to the City to determine whether construction activities would create a drainage or pollution problem outside the planned area. Based on the above facts and findings staff recommends the following conclusions:
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> "A. The City Council concludes that the construction activities will not create an off-site drainage or pollution problem. This conclusion applies to the construction of the planned unit development, the road leading to the planned unit development and includes the paving of the access road and the roads and lots within the planned development. The planned development in all aspects is feasible.
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> "B. This application and conceptual plan satisfy the provisions of the Waldport Municipal Code and Comprehensive Plan." Record 17.

On appeal, the question is whether the city council committed prejudicial procedural error in accepting what is arguably "new evidence" in the form of the engineer's letter, and relying in part on that evidence in its findings, without providing petitioner an opportunity to respond to the new evidence.

The source of the procedure that petitioner alleges that the city violated is not clear. Petitioner cites WDC 16.108.020, which sets out the review procedures for land use applications. However, the city council's proceedings on remand are not necessarily governed by the same procedural requirements that apply to the city's initial evidentiary proceedings. For example, WDC 16.108.020 implements the procedures set out in ORS 197.763(6) for continuing the *initial* evidentiary hearing to allow additional evidence and for opportunities to respond to such evidence.[5] However, those procedures do not necessarily govern

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[5] ORS 197.763(6) provides, in relevant part:

> "(a) 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 paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or

subsequent evidentiary proceedings, including remand proceedings, which occur long after the initial evidentiary proceedings have concluded. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458, 461-62 (1994).

Petitioner does not cite any WDC provision that governs either remand proceedings or city council evidentiary proceedings. We note that WDC 16.108.020(I) specifies that evidentiary proceedings before the city council on local appeal are governed by "the city council's rules of procedure."[6] It is not

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testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

"(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

[6] WDC 16.108.020(I) provides:

"City Council Review. Review by the city council at a public hearing shall be accomplished in accordance with its own adopted rules of procedure and the requirements of this chapter. The city council may continue its hearing to gather additional evidence or to consider the application more completely pursuant to this chapter. Appeals will be heard de novo by the city council and allow the introduction of new evidence and testimony. The presentation of

clear what constitutes the city council's rules of procedure. However, we will assume without deciding, for purposes of this appeal, that those procedures embody basic notions of procedural fairness and that those procedures are potentially violated if the city council accepts evidence in a quasi-judicial land use proceeding without providing interested parties a reasonable opportunity to respond to that new evidence. *See Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) (parties in certain quasi-judicial land use proceedings have the right to present and rebut evidence).

Even under that assumption, however, petitioner can obtain from LUBA reversal or remand of the city's decision for procedural error only if petitioner demonstrates that the city "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B). Petitioner has not met that burden. In the petition for review, petitioner simply asserts that, on May 21, 2020, intervenor submitted "new evidence," without identifying what the alleged "new evidence" is or explaining why it constitutes "new evidence." We have followed intervenor in assuming that the alleged "new evidence" is located in the engineer's letter at

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such testimony and evidence shall be governed by the procedures applicable to the presentation of such matters as provided in the city council's rules of procedure. The decision of the city council on an appeal shall be recorded within forty-five (45) days of receiving the record of the subject decision, unless a longer period of time is stipulated to by the parties."

Record 93 to 94. However, even with that generous assumption, petitioner's demonstration of procedural error is undeveloped and unsupported, for several reasons.

First, the engineer's letter was submitted as part of the open record period, during which the city allowed new testimony and new evidence to be submitted (including from petitioner). Thus, there was no error in accepting the engineer's letter, even if it contained new evidence. If petitioner wanted to respond to that properly received evidence, it was incumbent on petitioner to request that opportunity. Under either ORS 197.763(6)—applicable to initial evidentiary hearings, which this was not—or *Fasano* more generally, the ability to seek rebuttal of evidence submitted during a public hearing or an open record period is not automatic but, rather, must be requested. However, as far as petitioner informs us, they never requested the opportunity to rebut anything in intervenor's May 21, 2020 submittal.

Petitioner complains that the city failed to provide them with copies of intervenor's May 21, 2020 submittal until just prior to the May 28, 2020 meeting, at which point it was presumably too late to request an opportunity to repond. However, it is incumbent on the parties to a land use proceeding to timely apprise themselves of the content of the record, including documents submitted into the record during an open record period. Petitioner offers no reason to conclude that, had she contacted the city after the close of the open record period on May 21, 2020, and requested a copy of intervenor's May 21, 2020 submittal, the city

would not have supplied them with a copy well ahead of the May 28, 2020 meeting. Moreover, even without knowing the contents of intervenor's May 21, 2020 submittal, petitioner could have preserved their procedural objections by filing a timely written request with the city for an opportunity to respond to intervenor's submittal. However, as far as petitioner informs us, they did nothing between May 21, 2020, and May 28, 2020, to either obtain a copy of the submittal or lodge a written request for rebuttal with the city.

Second, petitioner makes no effort to demonstrate that the engineer's letter or anything else in intervenor's May 21, 2020 submittal includes "new" evidence that might warrant an opportunity to respond. Intervenor argues that the engineer's letter largely repeats testimony already in the record, describing methods that intervenor proposed to ensure that road construction would not cause drainage or pollution problems outside the planned area. Record 153-56 (intervenor's April 13, 2020 submittal). We agree with intervenor that testimony that simply reiterates evidence already in the record does not necessarily represent "new evidence," to which the city might, if requested, have an obligation under *Fasano* to provide an opportunity for other parties to respond. We have compared the engineer's letter at Record 93 to 94 with intervenor's April 13, 2020 submittal at Record 153 to 156 and, while there are differences (for example, the engineer's letter gives a more detailed description of some drainage and pollution control methods than intervenor's April 13, 2020 submittal), it is not evident that there is anything "new" in the engineer's letter.

It is also not clear that anything "new" in the engineer's letter warrants an evidentiary rebuttal. In any case, because petitioner does not make any attempt to demonstrate that anything in intervenor's May 21, 2020 submittal includes "new evidence," we decline to make that determination on our own.

In sum, petitioner failed to lodge a request for rebuttal with the city, either verbally or in writing, a necessary step to obligate the city to even consider providing a rebuttal opportunity and a necessary step to preserve their procedural arguments before LUBA. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980). Further, on appeal, petitioner failed to cite *Fasano* or any authority for the proposition that the city is obligated to provide them with an opportunity to rebut new evidence submitted during the open record period. Finally, those problems aside, petitioner has failed to identify any new evidence in intervenor's May 21, 2020 submittal. Intervenor and we have assumed that the engineer's letter was the alleged "new evidence" but, as explained above, we do not find new evidence in the letter. Petitioner has not demonstrated that the city failed to follow the applicable procedures in a way that substantially prejudiced petitioner.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

On remand, the city adopted 11 numbered findings and adopted (or re-adopted) 14 conditions of approval. Under the second assignment of error,

petitioner advances a number of challenges to the city's 11 findings and two of the conditions adopted or re-adopted on remand.

Some of petitioner's challenges are based on evidence outside the record, and those challenges are therefore beyond our scope of review. Other challenges are directed at something other than the impacts of constructing the Norwood Drive extension and, thus, exceed the scope of our remand in *Lundeen II*. For example, several of petitioner's challenges argue that the findings are inadequate because they fail to address criteria other than WDC 16.60.030(C)(4) or to address the impacts of construction or development within the planned area. However, as explained above, our remand in *Lundeen II* was limited to the narrow issue of addressing compliance with WDC 16.60.030(C)(4) with respect to the impacts of constructing the Norwood Drive extension, which is located outside the planned area. All other issues, such as the impact of construction activities within the planned area or compliance with other WDC criteria, were resolved or otherwise are law of the case and, hence, beyond our scope of review in this appeal. *See Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that were resolved or could have been raised and resolved in a prior LUBA appeal cannot be raised in a subsequent appeal of the decision on remand). Accordingly, we will address here only those challenges that fit squarely within our scope of remand in *Lundeen II*.

A. Finding 1: DEQ permits

Finding 1, quoted above, notes that intervenor will be required to obtain all necessary permits, including a DEQ permit to govern stormwater runoff. See n 3. Petitioner argues, based on evidence outside the record, that the city has subsequently allowed intervenor to engage in construction or grading activities on the subject property without obtaining DEQ permits. However, because that argument is based entirely on evidence outside the record, it is beyond our scope of review.

B. Finding 2: Best Management Practices

Finding 2, quoted above, describes the various methods that intervenor proposed in testimony and draft findings to control runoff, dust, etc., from construction activities. See n 3. Petitioner argues that Finding 2 is vague and nonspecific regarding certain measures, for example, how to disturb existing vegetation as little as "possible" or exactly what constitutes the "rain season" or a "sediment fence."

Adequate findings must identify the relevant approval standards, set out the facts relied upon, and explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The city's remand findings satisfy this minimal standard. Finding 2 recites a number of "best management practices" for reducing drainage and pollution impacts from construction, practices that are presumably familiar to those who engage in or issue permits for road construction. In this context, we

disagree with petitioner that a deeper level of detail and specificity is necessary for Finding 2 to adequately perform its function. Finding 2 adequately sets out the relevant facts and helps to explain, along with related findings, why the city believes that the best management practices required by the decision and by various permits will prevent the proposed road construction from causing drainage or pollution problems outside the planned area.

C. Finding 3: Planned Development versus Subdivision

Finding 3 states that the proposed planned development will have no greater off-site drainage than if it were developed as a subdivision, in part because the planned development will preserve steep slopes on the subject property. Petitioner disagrees with this statement but fails to explain what either the statement or their disagreement has to do with the impacts of constructing the Norwood Drive extension, which is the only issue within the scope of remand.

D. Finding 4: DEQ Monitoring

Finding 4 states that the city is aware that DEQ monitors coastal development and has the ability to enforce its permits. Petitioner cites to evidence outside the record to argue that the city has allowed grading activities on the subject property without obtaining DEQ permits. This argument is outside our scope of review.

E. Finding 5: Public Works Monitoring

Finding 5 notes that the city's public works department will also monitor development of the property. Petitioner argues that this observation is

meaningless without an "established monitoring schedule" and again cites to documents outside the record to argue that the city is allowing grading activities without a permit. Petitioner does not explain why an "established monitoring schedule" is necessary in order to rely, in part, on city monitoring to ensure compliance with WDC 16.60.030(C)(4). Petitioner's other arguments are outside our scope of review.

F. Finding 6: Incorporated Findings

Finding 6 incorporates by reference the findings in the city's two previous final decisions regarding stormwater drainage and pollution. Petitioner observes that LUBA found that some of those findings were inadequate to demonstrate full compliance with WDC 16.60.030(C)(4). While that is true, that observation does not demonstrate error in the city's findings on remand.

Petitioner next argues that the incorporated and remand findings do not explain how stormwater will be routed from the Norwood Drive extension to a sediment pond located within the planned area, arguing that the sediment pond is located at a higher elevation than some portions of the Norwood Drive right-of-way. However, petitioner does not cite to anything in the record suggesting that intervenor proposed directing runoff from the public road uphill into a sediment pond on the subject property. More importantly, petitioner does not cite any findings in the challenged decision suggesting that the city relied on uphill conveyance of stormwater to the sediment pond to conclude that runoff from the road construction activities and the road will not "create a drainage or pollution

problem outside the planned area." Absent a more developed argument, petitioner's arguments do not demonstrate any inadequacy in Finding 6.

G. Findings 7 and 8: Planning Commission

Finding 7, quoted above, explains why the city council chose not to refer the appeal to the planning commission for a third hearing after remand in *Lundeen II*. Finding 8, also quoted above, provides additional explanation for that choice. Petitioner repeats their arguments, rejected under the first assignment of error, that the city should have referred the matter to the planning commission. We reject those arguments again.

H. Finding 9: City Council Proceeding

Finding 9 describes the proceedings before the city council on remand from *Lundeen II*. Petitioner repeats their arguments, rejected above, that the city erred in not providing them with an opportunity to rebut new evidence submitted into the record during the open record period. We reject those arguments again.

I. Finding 10: WDC 16.12.030(E) and (F)

Finding 10 states that the drainage standards in WDC 16.12.030(E) are outside the scope of remand because those standards apply at the building permit stage, to individual lots, and not at the preliminary plan stage. Finding 10 also states that the excavation and fill standards in WDC 16.12.03(F) apply only at the stage when removal or fill greater than 50 cubic yards is proposed.

Petitioner argues that, because we remanded the city's decision in *Lundeen II* for the city to address "drainage" issues under WDC 16.60.030(C)(4), the

scope of remand should be understood to encompass compliance with WDC 16.12.030(E) and (F), which also relate to drainage. However, as explained, the scope of remand under *Lundeen II* did not include any approval standards other than WDC 16.60.030(C)(4).

J. Finding 11: Significant Natural Resources Overlay Zone

Finding 11 states that the issues petitioner raised under the city's Significant Natural Resources Overlay Zone are outside the scope of remand. Petitioner disagrees but fails to demonstrate that the narrow scope of remand under *Lundeen II* includes any issues involving the overlay zone.

K. Condition of Approval 13

The subject property is east of and near Highway 101. Condition 13 provides:

> "If storm drainage will be increased to the [Oregon Department of Transportation (ODOT)] highway right of way in an amount to require review and approval by ODOT, [intervenor] shall contact ODOT to seek ODOT's review and approval or [intervenor] may construct an appropriately engineered retention pond or facility as identified in the preliminary plan to reduce flows to levels that do not require ODOT's review and approval." Record 19.

Petitioner argues that Condition 13 is unworkable absent some kind of monitoring to establish an annual baseline of storm drainage from the property, so that intervenor can know when and by how much drainage increases above that baseline level.

Condition 13 was apparently re-adopted from the city's earlier decision following remand in *Lundeen I* and was not imposed as a new condition in the current decision following remand in *Lundeen II*. The city's current decision recites findings from the earlier planning commission decisions, including findings addressing drainage impacts on Highway 101, noting testimony from ODOT that the "proposed development should not increase drainage to ODOT highway right-of-way" and stating that, "[i]f it will propose to increase drainage to the ODOT highway right-of-way, [intervenor] should contact ODOT to seek ODOT's review and approval." Record 13. Condition 13 was apparently imposed by the planning commission to address the possibility that, notwithstanding all evidence to the contrary, the proposed planned development might in some way increase drainage onto the highway. Condition 13 was not newly imposed or modified in the current decision, and it cannot be challenged in the present appeal. *Beck*, 313 Or at 150.

L. Condition of Approval 14

Condition 14 requires intervenor to obtain permits required by any governmental authority, including DEQ, prior to any construction activity within the planned area or the construction of the Norwood Drive extension. Petitioner cites again to evidence outside the record to argue that the city has allowed intervenor to begin construction activity without obtaining required DEQ permits. As explained, those documents are beyond our scope of review and, hence, petitioner's arguments do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Citing to evidence outside the record, petitioner claims that the city has allowed intervenor to conduct construction or grading activities on the subject property without obtaining required DEQ permits. From that premise, petitioner argues that, in the present decision, the city erred in relying on DEQ permits to assure compliance with WDC 16.60.030(C)(4).

The city and intervenor respond that the third assignment of error is fatally premised on evidence outside the record and, therefore, petitioner's arguments are beyond LUBA's scope of review. The city and intervenor are correct.

The third assignment of error is denied.

The city's decision is affirmed.