



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the city planning  
4 director adopting findings in support of a city decision  
5 approving a demolition permit.

6 **MOTION TO INTERVENE**

7 University of Oregon, the applicant below, moves to  
8 intervene in this proceeding on the side of respondent.  
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 This is the second appeal to come before us concerning  
12 the demolition of the Amazon Family Housing Complex  
13 (Amazon). In our decision in the first appeal, we described  
14 the facts as follows:

15 \* \* \* Amazon is owned by intervenor and consists  
16 of 47 buildings on a 13.1-acre site. Amazon is  
17 one of the last remaining examples of World War II  
18 era pre-fabricated housing used for defense  
19 workers and for college students under the G.I.  
20 Bill, and of the rowhouse design work of architect  
21 Pietro Belluschi. Amazon has been designated as a  
22 historic landmark district by respondent City of  
23 Eugene (city). The Oregon State Historic  
24 Preservation Office has proposed Amazon for  
25 listing on the National Register of Historic  
26 Places.

27 "On December 9, 1994, pursuant to Eugene Code  
28 (EC) 9.212 (Historic Property Moving and  
29 Demolition - Procedure and Criteria), intervenor  
30 submitted to the city an application for a permit  
31 to demolish Amazon. After a public hearing, the  
32 Eugene Historic Review Board (EHRB) issued an  
33 order approving the application for a demolition  
34 permit. Petitioner appealed the EHRB decision to

1 the city council. The city council conducted an  
2 'on the record' review of the EHRB decision.  
3 After a hearing for argument, the city council  
4 issued the challenged decision affirming the EHRB  
5 decision to grant the demolition permit. \* \* \*"  
6 Save Amazon Coalition v. City of Eugene, \_\_\_  
7 Or LUBA \_\_\_ (LUBA No. 95-042, May 5, 1995) (Save  
8 Amazon I), slip op 3-4.

9 Petitioner appealed the city council's decision to this  
10 Board. On May 5, 1995, after an expedited review, we issued  
11 a final opinion and order remanding the city's decision.  
12 Save Amazon I. The basis for the remand was that the city  
13 planning director failed to adopt findings explaining the  
14 basis for her determination that intervenor complied with  
15 the pre-application requirements of Eugene Code  
16 (EC) 9.212(2).<sup>1</sup> Id., slip op 14.

17 On May 10, 1995, without conducting additional  
18 hearings, the planning director issued a decision in  
19 response to our remand in Save Amazon I, supported by  
20 findings, determining intervenor complied with the  
21 pre-application requirements of EC 9.212(2). On May 11,  
22 1995, petitioner filed with this Board both a notice of  
23 intent to appeal the planning director's decision and a  
24 motion for stay of that decision.

25 Also on May 11, 1995, we granted an interim stay of the  
26 challenged decision. Save Amazon Coalition v. City of  
27 Eugene, \_\_\_ Or LUBA \_\_\_ (LUBA No. 95-087, Order Granting

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<sup>1</sup>This code provision is discussed in detail in our evaluation of petitioner's first assignment of error.

1 Stay, May 11, 1995). On May 22, 1995, we issued an order  
2 granting a stay of the challenged decision pending  
3 resolution of this appeal. Save Amazon Coalition v. City of  
4 Eugene, \_\_\_ Or LUBA \_\_\_ (LUBA No. 95-087, Order on Motion  
5 for Stay, May 22, 1995) (May 22, 1995 stay order).

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner argues that after the city's initial  
8 decision was remanded by this Board, the planning director  
9 should have provided an opportunity to petitioner and other  
10 members of the public to present evidence or argument  
11 regarding intervenor's compliance with the pre-application  
12 requirements of EC 9.212(2). Petitioner contends the  
13 planning director's failure to provide such an opportunity  
14 constitutes an error sufficient to justify reversal or  
15 remand. Petitioner points out it formally requested such a  
16 hearing on May 9, 1995. Record 822. Petitioner contends a  
17 hearing is required by EC 9.212(4), ORS 197.763(7) and  
18 certain appellate court decisions.

19 **A. EC 9.212(4)**

20 In Save Amazon I we concluded the city may interpret  
21 the EC as giving to the planning director the sole  
22 responsibility for determining whether the pre-application  
23 requirements of EC 9.212(2) have been completed.<sup>2</sup> Save

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<sup>2</sup>EC 9.212(2) states:

" Pre-application requirements (demolition). Prior to  
submittal of an application to demolish a historic property,

1 Amazon I, slip op 11-12. That determination is not subject  
2 to review by the EHRB or the city council. Id. Therefore,  
3 a hearing on the planning director's findings is not  
4 required or even authorized by EC 9.212(4).<sup>3</sup>

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the owner shall endeavor to prepare an economically feasible plan for its preservation. At a minimum, the owner shall solicit purchase offers for the historic property by giving notice of sale of the property as follows:

- "(a) Listing the property in both the Register Guard and the Oregonian at least eight times and at regular intervals beginning 90 days before submitting an application;
- "(b) Posting and maintaining a visible for sale sign on the property beginning at least 90 days before submitting an application;
- "(c) Making a financial prospectus on the status of the property available to interested persons at least 90 days before submitting an application; and
- "(d) Listing the property in at least two preservation newspapers or magazines at least 30 days before submitting an application."

<sup>3</sup>EC 9.212(4) states:

"Notice, public hearing, and decision.

- "(a) Unless the applicant agrees to a longer time period, the [EHRB] shall conduct a public hearing within 60 days following receipt of a complete application. \* \* \*
- "(b) Within 15 days of the close of the hearing and the record, the board shall decide whether to approve or postpone the moving or demolition application. The decision of the board shall be in writing and contain findings and conclusions if a postponement is required. The board shall approve the application unless the board finds that a postponement will likely result in preservation of the historic property or retention of the historic property at its current site. A postponement shall be for a maximum of 120 days from the time a complete application is filed. The board may consider the following in assessing the likelihood of preservation or retention:

1           **B.    ORS 197.763(7)**

2           ORS 197.763(7) provides:

3           "When a local governing body, planning commission,  
4           hearings body or hearings officer reopens a record  
5           to admit new evidence or testimony, any person may  
6           raise new issues which relate to the new evidence,  
7           testimony or criteria for decision-making which  
8           apply to the matter at issue."

9           ORS 197.763 governs how a quasi-judicial land use  
10          hearing is conducted, not whether it is required.  
11          ORS 197.763 does not confer a right to a quasi-judicial land  
12          use hearing where one does not otherwise exist. Since the  
13          EC does not provide for a hearing prior to the planning  
14          director's determination that an application for demolition  
15          is complete, petitioner's reliance on ORS 197.763 is  
16          misplaced.

17           **C.    Appellate Court Decisions**

18          Petitioner contends a hearing on remand is required by  
19          Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973).  
20          Fasano decided a disputed zone change application. The

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"1.    The state of repair of the historic property and  
        the financial and physical feasibility of  
        rehabilitation, moving, or leaving the property in  
        its current state or location.

"2.    The effects of the moving upon the use and  
        development of the historic property.

"3.    The marketability of the property and the  
        willingness of the property owner to sell the  
        property.

"\* \* \* \* \*"

1 Oregon Supreme Court held that parties at a hearing before a  
2 county governing body are entitled to an opportunity to be  
3 heard, to an opportunity to present and rebut evidence, to a  
4 tribunal which is impartial in the matter, and to a record  
5 made and adequate findings executed. Id., 264 Or at 588.

6 Many of the procedural safeguards required by Fasano  
7 have been codified in various locations, depending upon the  
8 type of land use proceeding. With respect to city planning  
9 and zoning matters, ORS 227.160 to 227.180 provide a right  
10 to a hearing on a discretionary land development permit.  
11 Neither in this appeal nor in Save Amazon I has petitioner  
12 relied on ORS 227.160 to 227.180 to support its contention  
13 that it is entitled to a hearing on the EC pre-application  
14 requirements. We decline to hold that Fasano independently  
15 confers a right to a hearing where none is conferred by a  
16 statute or a local code.

17 Petitioner argues that Morrison v. City of Portland, 70  
18 Or App 437, 689 P2d 1027 (1984) and Friends of the Metolius  
19 v. Jefferson County, \_\_\_ Or LUBA \_\_\_, (LUBA No. 94-163,  
20 January 25, 1995) give petitioner a right to a hearing on  
21 remand from LUBA. In Morrison, the Court of Appeals held  
22 that since the city's interpretation of its regulations was  
23 not available at the time of the original hearing, a new  
24 hearing was required on remand to give petitioners an  
25 opportunity to present an argument with the benefit of the  
26 city's clarification of its standards. In Friends of the

1 Metolius, this Board held that the county erred in adopting  
2 "interpretive" findings without a hearing on remand.

3 Petitioner's reliance on Morrison and Friends of the  
4 Metolius is misplaced since, in both cases, the decision  
5 maker was initially required to hold a hearing. The EC does  
6 not require a hearing prior to the planning director's  
7 determination that the pre-application requirements set  
8 forth at EC 9.212(2) have been met.<sup>4</sup>

9 The second assignment of error is denied.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioner contends intervenor has not complied with  
12 EC 9.212(2), which requires an owner to "endeavor to prepare  
13 an economically feasible plan" for the preservation of the  
14 historic property. Petitioner argues the explicit  
15 requirement that an economically feasible plan be prepared  
16 implicitly requires the owner to make good faith attempts to  
17 find and consider reasonable offers to preserve the historic  
18 resource.

19 As we stated in Save Amazon I, slip op 14, we are not  
20 required by ORS 197.829 and Clark v. Jackson County, 313 Or  
21 508, 836 P2d 710 (1992), to give the planning director's  
22 interpretation of the EC the deference accorded to an  
23 interpretation of the governing body. See Gage v. City of  
24 Portland, 319 Or 308, 877 P2d 1187 (1994) Instead, we must

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<sup>4</sup>We note that petitioner did submit written argument to the planning director, which was accepted into the record. Record 882-87.

1 ourselves determine if the planning director's  
2 interpretation is "reasonable" and "correct." McCoy v. Linn  
3 County, 90 Or App 271, 752 P2d 323 (1988).

4 We agree with the planning director that intervenor has  
5 done enough to satisfy EC 9.212(2). Record 876-79. The  
6 language in EC 9.212(2) requiring the property owner to  
7 prepare an "economically feasible plan for preservation" and  
8 to "solicit purchase offers" must be interpreted in light of  
9 EC 9.212(4), which requires the EHRB to approve the  
10 demolition application unless the EHRB finds that a  
11 postponement of a maximum of 120 days will likely result in  
12 preservation of the historic property. The EHRB may  
13 consider, in assessing the likelihood of preservation or  
14 retention of the property, "[t]he marketability of the  
15 property and the willingness of the property owner to sell  
16 the property." EC 9.212(4)(b)(3).

17 EC 9.212(4)(b)(3) clearly leaves the decision to sell  
18 or not sell up to the property owner. EC 9.212(2) requires  
19 only that the owner specify, in a "financial prospectus,"  
20 the terms, however difficult to meet, under which the owner  
21 will be willing to sell. Whether or not it is economically  
22 feasible to preserve an historic structure depends upon the  
23 property owner's own situation and resultant needs.<sup>5</sup> This

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<sup>5</sup>We note that intervenor completed two separate explorations into the economic viability of preserving the subject property. Both studies conclude that the most desirable alternative for the complex is redevelopment. Record 493-95, 877.

1 means that in some cases the "solicitation of offers" will  
2 be singularly uninviting. Nevertheless, the EC requires  
3 nothing more.

4 The first assignment of error is denied.

5 **DISPOSITION OF STAY**

6 In a "Request for Clarification on Duration of LUBA  
7 Stay," filed June 7, 1995, petitioner requests that we  
8 declare the May 22, 1995 stay order will remain in effect  
9 for 21 days after the issuance of this opinion. The request  
10 is denied.

11 As a state agency, LUBA has only those powers granted  
12 by the legislature or necessarily implied by a grant from  
13 the legislature. See Fechtig v. City of Albany, 27 Or LUBA  
14 648 (1994); Sarti v. City of Lake Oswego, 20 Or LUBA 562  
15 (1991) (and cases cited therein). ORS 197.830(14) requires  
16 this Board to issue a "final order." Once we have issued  
17 such an order, review jurisdiction rests with the Court of  
18 Appeals. ORS 197.850(3)(a). Therefore, with the issuance  
19 of this order, we dissolve the stay.

20 The decision of the city is affirmed.