

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

3
4 CAROL KNAPP,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF JACKSONVILLE,
10 *Respondent,*

11
12 and

13
14 PETER BRITT GARDENS MUSIC AND ARTS
15 FESTIVAL ASSOCIATION, INC.,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2014-041

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Jacksonville.

24
25 Dorothy S. Cofield, Beaverton, filed the petition for review and argued
26 on behalf of petitioner. With her on the brief was Cofield Law Office.

27
28 No appearance by City of Jacksonville.

29
30 Timothy L. Jackle, Medford, filed the response brief and argued on
31 behalf of intervenor-respondent. With him on the brief was Foster Denman,
32 LLP.

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

36
37 REMANDED 10/14/2014

38
39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision approving a modification to a conditional use permit to pave an existing parking lot.

FACTS

Intervenor-respondent (intervenor) Peter Britt Gardens Music and Arts Festival hosts an annual series of outdoor music concerts during the summer. The festival is located within the City of Jacksonville’s South Oregon Street Historic Character Unit (SOSHCU or historic district), which includes a residential neighborhood. Modifications to structures within the SOSHCU require approval through a special permitting process, which includes review by the city’s Historic Architectural Review Commission (HARC) and an approved Certificate of Appropriateness.

In 2006, intervenor obtained conditional use permit and master plan agreement approval for phased improvements to their facilities. That 2006 approval includes a Certificate of Appropriateness for an unpaved parking lot at the intersection of Pine Street and First Street, which is currently used to park buses. The buses enter on First Street and exit on Pine Street.

In January 2014, intervenor filed an application to modify the 2006 Certificate of Appropriateness to improve the parking lot. However, the application was denied without prejudice, because the city provided an inadequate notice of hearing. Britt resubmitted essentially the same application in March 2014. The city administrator waived the application fee, and did not require intervenor to undergo a pre-application meeting required by code.

The parking lot is 14,000 square feet in size, sloping up to the south from Pine Street, and roughly rectangular in shape. On one-third of the property, the

1 application proposes to construct eight handicapped parking spaces, served by
2 a central circulation aisle, with a new access onto First Street (the handicapped
3 parking lot). To protect subsurface historic or archeological remains, the State
4 Historic Preservation Office (SHPO) advised building the parking lot on fill,
5 with no cuts. Accordingly, intervenor proposed to construct the handicapped
6 parking lot on top of an unspecified amount of fill. The northern part of the lot
7 (at the intersection of First Street and Pine Street) would be paved and striped
8 for three bus parking lanes, and would continue to use the existing accesses on
9 First and Pine Streets (the bus parking lot). The application states that 10
10 percent of the lot area would be covered in pervious asphalt, 50 percent in
11 impervious asphalt, and 40 percent in landscaped areas.

12 Petitioner, who owns adjoining residential property, appeared at the
13 HARC hearing in opposition. The HARC approved the application with
14 conditions, adopting the March 19, 2014 staff report as findings. Petitioner
15 appealed HARC's decision to the city council, citing four bases for appeal.
16 City council review is confined to the record developed before the HARC. At
17 the city council hearing petitioner attempted to submit two modified site plans
18 with hand-drawn calculations of lot coverage. After discussion, the city council
19 voted to reject the modified site plans as new evidence. In April 2014, the city
20 council affirmed HARC's decision. This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner argues that the city erred in waiving mandatory code
23 requirements for an application fee and pre-application conference, and that as
24 a result the city had no jurisdiction over the application.

25 City of Jacksonville Development Code (JDC) 18.02.020(A) requires
26 applicants to submit the information and materials required under that code

1 section, and also provides that the city planner is empowered to waive any
2 submittal requirement, except filing fees.¹ JDC 18.02(M) requires the city to
3 charge a fee for processing applications, with amounts to be established by City
4 Council resolution. In addition, JDC 18.02.010 and JDC 18.07.020 require the
5 applicant for a modified Certificate of Appropriateness to have a pre-
6 application conference, but that requirement can be waived.

7 As noted, intervenor initially applied to modify the Certificate of
8 Appropriateness for the parking lot, but that application was dismissed without
9 prejudice due to notice errors. Intervenor then re-filed the same application.
10 On the application form where a filing fee is supposed to be listed is the
11 handwritten notation “N/A [not applicable] per Jeff Alvis.” Record 135. Jeff
12 Alvis is the city administrator.

13 Petitioner contends that the application fee is a jurisdictional pre-
14 requisite to processing of the application, and that nothing in the JDC
15 authorizes the city administrator or any other city agent to waive the filing fee.
16 In addition, petitioner argues that the city apparently waived the required pre-
17 application conference, but without any findings to justify the waiver under
18 JDC 18.02.020(A).

¹ JDC 18.02.020(A) provides:

“All applicants shall submit to the City information and materials consistent with the requirements of this section. The City Planner, or in their absence, the City Recorder, is empowered to waive the submittal of any of the following application items, except filing fees, which are deemed unnecessary or inapplicable based on the nature, scope and significance of the proposed project. Waiver of application items, if any, shall occur following a pre-application conference during the review of an application for completeness.”

1 The city responds, initially, that petitioner failed to raise any issue below
2 regarding the application fee or the lack of a pre-conference application, and
3 thus the issues raised in this assignment of error are waived, pursuant to ORS
4 197.763(1).² On the merits, the city argues that the code requirements to pay
5 an application fee and have a pre-application conference are not
6 “jurisdictional” requirements, and that failure to comply with those
7 requirements does not deprive the city of authority to process the application.

8 In anticipation of a waiver challenge, petitioner argues that the notice of
9 hearing failed to list the submittal requirements at JDC 18.02.020(A) or the
10 pre-application conference requirements at JDC 18.02.010 and JDC 18.07.020
11 as applicable criteria, and therefore, pursuant to ORS 197.835(4), petitioner
12 may raise issues before LUBA regarding those criteria, notwithstanding failure
13 to raise those issues below.³

² ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

³ ORS 197.835 provides, in relevant part:

“(3) Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.

“(4) A petitioner may raise new issues to the board if:

1 The city responds, and we agree, that the submittal requirements at JDC
2 18.02.020(A) and the pre-application conference requirements at JDC
3 18.02.010 and JDC 18.07.020 are not “applicable criteria” within the meaning
4 of ORS 197.835(4)(a). That statute refers to ORS 197.763(3)(b), which
5 requires that the notice of hearing that is sent out to persons entitled to notice
6 “[l]ist the applicable criteria from the ordinance and the plan that apply to the
7 application at issue[.]” The notice of hearing is sent out only after the
8 application has been submitted and deemed complete, long after any pre-
9 application conference has been concluded, and well after all application
10 requirements have been satisfied or deemed to be satisfied. The purpose of the
11 notice requirements at ORS 197.763(3)(b) is to alert interested persons to the
12 criteria that the application will be approved or denied under, not to list
13 submittal or pre-application requirements that do not constitute “criteria.”

14 We also agree with the city that even if the city erred in waiving the
15 application fee or failing to require a pre-application conference, such errors
16 are procedural errors. LUBA has long held that where a party has an
17 opportunity to object to a procedural error before the local government, but
18 fails to do so, the procedural error cannot be assigned as grounds for reversal or
19 remand. *Confederated Tribes of Coos v. City of Coos Bay*, 42 Or LUBA 385,

“(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]”

1 391 (2002); *Mazeski v. Wasco County*, 26 Or LUBA 226, 232 (1993). Despite
2 opportunities to do so, petitioners did not object to any errors regarding the
3 application fee or pre-application requirements.

4 Finally, although we need not reach the merits, we question petitioner’s
5 premise that under the city’s code an improper waiver of the application fee or
6 failure to properly waive a pre-application conference are “jurisdictional”
7 failures that deprive the city of authority to process the application. Nothing
8 cited to us in the JDC states or necessarily implies that such procedural errors
9 constitute “jurisdictional” defects.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 JDC 18.05.040(B) is an approval criterion requiring a finding that the
13 proposed development will “conform to the Character Criteria of the Historic
14 Character Unit within which the subject property is located.” The “Character
15 Criteria” consist of five categories set out in the historic element of the city’s
16 comprehensive plan that describe the salient features of the historic district.⁴
17 Petitioner argued below that an asphalt surface for a parking lot does not
18 “conform” to the Character Criteria. Intervenor and staff responded by
19 observing that asphalt is a common surface material for roads and driveways in
20 the historic district. The city council ultimately concluded that substantial
21 evidence in the record demonstrates that the proposed parking lot conforms to
22 the Character Criteria. Record 12-13.

⁴ The five categories are (1) Vegetation/Landscape Character, (2) Visual/Scenic Character, (3), Architectural Character, (4) Development Patterns/ Land use, and (5) Streetscape Character. Each category is followed by text that elaborates on each category.

1 Petitioner argues first that the city council’s finding at Record 12-13 is
2 conclusory and inadequate, because it does not address the Character Criteria.
3 Petitioner concedes that the March 19, 2014 staff report includes findings
4 addressing the Character Criteria, but petitioner argues that neither the city
5 council nor the HARC incorporated the staff report as findings. Failure to
6 incorporate the staff report as findings, petitioner argues, means that the city
7 council’s findings are conclusory and inadequate.

8 Intervenor responds, and we agree, that the city council decision affirms
9 and adopts the HARC decision as the city council’s decision, and that the
10 HARC decision fairly read adopts the staff report as the HARC’s findings on
11 the approval criteria. The staff report at Record 117-127 includes findings of
12 compliance with applicable approval criteria and was clearly intended to
13 constitute findings that the HARC could adopt. The HARC decision includes
14 no findings of its own on the approval criteria, but is a single page sheet stating
15 “approved with conditions” and attaching the staff report. The city council
16 decision also does not include findings of its own directly addressing the
17 approval criteria, but cites and relies upon the HARC decision, which
18 incorporates the staff report, as the basis for the city council’s decision. Under
19 these circumstances, we conclude that the city council decision effectively
20 incorporates the findings in the staff report. Petitioner does not contend that
21 the staff findings on the Character Criteria are inadequate.

22 Petitioner next argues that the record does not include substantial
23 evidence that an asphalt parking lot “conforms” with the applicable historic
24 unit Character Criteria. Intervenor testified below, and petitioner does not
25 dispute, that asphalt paving is common on driveways and streets throughout the
26 historic district. However, petitioner argues that such testimony is insufficient

1 to demonstrate that an asphalt parking lot conforms with the Character Criteria.
2 Petitioner contends that because asphalt paving is common throughout the city,
3 and the Character Criteria describe the *distinctive* historical features of each
4 district, asphalt paving therefore cannot “conform” to the Character Criteria.
5 According to petitioner, a reasonable person would not find that the character
6 of the historic unit is “comprised of asphalt streets and driveways.” Petition for
7 Review 21.

8 Petitioner apparently understands JDC 18.05.040(B) to allow a parking
9 lot to be paved only if the paving material is described in the Character Criteria
10 for the historic district. Petitioner argues that because the character criteria
11 describe specific or distinctive historical features, a “common” building
12 material such as asphalt cannot possibly conform to the Character Criteria.
13 However, it is reasonably clear from the staff findings incorporated into the
14 HARC and city council decisions that the city council does not share
15 petitioner’s understanding. Under the city’s apparent interpretation, a building
16 material that is common in the historic district conforms to the Character
17 Criteria, precisely *because* it is a common building material in the district.
18 Petitioner has not demonstrated that the city’s understanding is erroneous.

19 Finally, as discussed under the third assignment of error, the JDC and
20 comprehensive plan include requirements that in most parts of the city parking
21 lot paving be pervious, except when pervious paving is deemed infeasible.
22 Under the second assignment of error, petitioner cites those JDC and plan
23 requirements and argues that impervious paving is not the “norm,” and
24 therefore impervious paving cannot “conform” to the Character Criteria for the
25 district. That might be a stronger argument if the JDC and comprehensive plan
26 prohibited impervious paving in historic districts. However, as discussed

1 below, the applicable code and plan provisions allow impervious paving where
2 pervious paving is not feasible. To the extent the JDC and plan provisions
3 regarding the paving of off-street parking lots are relevant to whether a
4 proposal to pave an existing parking lot “conform[s]” to the Character Criteria
5 for purposes of JDC 18.05.040(B), those provisions suggest that an impervious
6 surface can “conform,” at least where the city finds that a pervious surface is
7 not feasible.

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 JDC 18.17.100(D) is part of a JDC section providing standards for off-
11 street parking areas, and it requires in relevant part:

12 “Areas used for standing and maneuvering of vehicles shall have
13 permanent, dust-free surfaces maintained adequately for all-
14 weather use and adequately drained so as to avoid flow of water
15 across sidewalks and pathways. Unless determined unfeasible by
16 a certified Engineer, all new parking areas shall be constructed
17 with pervious materials[.] * * * In the HC [Historic Core] and GC
18 Zones, parking areas provided for any property located within one
19 bloc of California and North 5th Streets shall be paved with an
20 asphalt or concrete surface. However, notwithstanding that
21 requirement, the design shall be such that the parking area
22 functions as a pervious surface.”⁵

23 Three certified engineers provided oral and written testimony that it was
24 not feasible to construct the parking lot with pervious materials. The city

⁵ JDC 18.17.100(D) presumably implements Policy 5 of the City of Jacksonville Comprehensive Plan Historic Element, Section (F) (Streetscape), which is to “[p]ave parking lots in Historic Core if located within one block of an arterial street.” One of the implementation measures for Policy 5 is to “[r]equire that other parking lots in historic portion of community utilize permeable surface, with well-compacted earth base and sufficient sub-base.”

1 engineer stated that he had reviewed the information on pervious surface
2 materials submitted by opponents, but concurred with the other engineers that a
3 pervious surface was infeasible, listing four reasons. Record 116.

4 Petitioner first argues that the three engineers reviewed only one type of
5 pervious surface material, and did not review all of the alternative types of
6 pervious surface material submitted by opponents. However, the city
7 engineer's letter states that he reviewed the information provided by opponent
8 David A. Gibbs for alternative surface treatments. Record 116. That
9 information is found at Record 94-115, and appears to be the same information
10 petitioner cites to.

11 Petitioner next argues that the city engineer's conclusion that pervious
12 surfaces are infeasible, for the four listed reasons, is undermined by the
13 evidence at Record 94-115. Intervenor responds, and we agree, that the city
14 engineer's conclusion is supported by substantial evidence. One reason listed
15 by the city engineer is that, due to the historic nature of the site minimal
16 excavation or soil disturbance is allowed, and that pervious surfaces require
17 considerable excavation and placement of rock in order to provide sub-surface
18 storage for water to slowly soak into the existing ground. Record 116.
19 Petitioner's only challenge to that reason is that the city engineer did not
20 explain why an impervious asphalt surface would be any different. However,
21 the city engineer explained that pervious surfaces require excavation to install a
22 rock substructure to store water, clearly implying that an impervious surface
23 does not require similar excavation. Moreover, intervenor cites to evidence in
24 the record that pervious surfaces require greater excavation than impervious
25 surfaces. Record 52, 130. That reason alone is sufficient to support the
26 engineers' conclusion that pervious paving surface is infeasible, given the need

1 to protect sub-surface historic or archeological resources. Accordingly, we
2 need not address petitioner’s challenges to the other three reasons.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Petitioner raises three related issues under this assignment of error. First,
6 petitioner argues that there is no “driveway” serving the bus parking lot as
7 required by JDC 18.17.100(A). Second, petitioner argues that the city erred in
8 approving placement of fill for the handicapped parking lot more than twenty
9 horizontal feet from the edge of the shoulder of a driveway or street in violation
10 of JDC 18.20.040(A). And, finally, petitioner argues that the city erred in
11 approving placement of more than 30 cubic yards of fill without specifying the
12 amount of fill, contrary to JDC 18.20.040(C).

13 **A. Lower Lot Driveway**

14 JDC 18.17.100(A) requires that groups of two or more parking spaces
15 “shall be so located and served by a driveway that their use will require no
16 backing movements or other maneuvering within a street or right-of-way[.]”
17 The JDC includes a general definition of “driveway”: a “legally and physically
18 defined area available and practical for ingress and egress to the building site
19 from a road.” JDC 18.38.010.

20 The incorporated staff findings state that the handicapped parking lot
21 will be served by a new driveway off First Street, and the bus parking lot will
22 be served by two existing driveways, which will be reconstructed. Record 118.
23 Petitioner first argues that the bus parking lot has no driveway, because the site
24 plans do not show a “legally and physically defined area” for ingress and
25 egress.

1 Intervenor responds that this issue was not raised below and is waived.
2 ORS 197.763(1). *See* n 2. On the merits, intervenor argues that the site plans
3 show that the city approved two driveways connecting the bus parking lot and
4 adjoining streets, driveways that are physically distinct from abutting
5 landscaped areas.

6 Petitioner does not respond to the waiver argument, and we agree with
7 intervenor that no issue regarding whether the bus parking lot is served by a
8 “driveway” was raised below. In addition, petitioner does not explain her
9 assertion that the two existing connections between the bus parking lot and
10 adjoining streets do not constitute “driveways” under the JDC definition.

11 **B. JDC 18.20.040(C)**

12 JDC 18.20.040(C) sets out standards for placing fill in excess of 30 cubic
13 yards.⁶ Intervenor proposed to place an unspecified amount of fill, in excess of
14 30 cubic yards, to support the parking lot. The staff report addressed the JDC
15 18.20.040(C) standards and found compliance. Record 127. Petitioner argued

⁶ JDC 18.20.040(C) provides, in relevant part:

“Earth or aggregate materials in excess of thirty (30) cubic yards shall only be removed or placed as fill material on property following the granting of a Certificate of Appropriateness through an administrative permit process based upon a finding of compliance with the following standards:

“* * * * *

“2. The project has been properly engineered.

“3. * * * [P]roposed fill will not be materially detrimental to any significant historic site or structure in the Historic Landmark District[.]”

1 to the city that JDC 18.20.040(C) requires a computation of the amount of fill
2 to be placed, and further argues that the fill will have a detrimental effect on
3 her property and nearby historic structures. Record 73. The city council
4 summarily rejected those arguments, and affirmed the HARC decision.

5 On appeal, petitioner repeats her argument that intervenor must provide
6 evidence to establish the amount of fill to be placed. However, petitioner has
7 not demonstrated that JDC 18.20.040(C) or any other standard cited to us
8 requires that the applicant submit evidence on, or the city evaluate, the amount
9 of fill above 30 cubic yards. The same approval standards apply whether the
10 amount of fill is 40 cubic yards, 50 cubic yards, or whatever the amount above
11 30 cubic yards.

12 Petitioner also challenges the finding that the fill will not be materially
13 detrimental to any significant historic site or structure in the historic district.
14 Petitioner repeats her arguments from the second assignment of error that an
15 asphalt parking lot does not “conform” to the Character Criteria for the historic
16 district. We reject those arguments as repeated here.

17 Finally, petitioner argues that no evidence supports the finding that the
18 project has been “properly engineered.” The city’s findings state that the
19 project has been designed by intervenor’s two engineers, as guided by the city
20 engineer, and concludes that the criterion is met. Record 127. Petitioner cites
21 no basis to conclude otherwise.

22 **C. JDC 18.20.040(A)**

23 JDC 18.20.040(A) provides:

24 “* * * [E]xisting landforms shall be retained to the greatest
25 extent possible by limiting the cut-and-fill disturbance area to
26 within twenty-five (25’) horizontal feet of foundations or twenty

1 (20') horizontal feet from the edge of the shoulder of driveways
2 and roads.”

3 The handicapped parking lot consists of a central aisle with four
4 handicapped parking spaces on each side, with the aisle connecting to First
5 Street to the north. This central aisle is referred to as the “circulation area.”
6 The paved portion of the parking lot extends approximately 50 feet from the
7 sidewalk on First Street, with a five-foot wide “bump out” in the center aisle to
8 provide space for cars to maneuver out of the southern-most stalls. The
9 parking lot is placed on top of fill, capped by retaining walls. Additional fill
10 slopes down from the retaining walls to form terraces on three sides. Record
11 36, 38.

12 Petitioner argued to the city council that the staff report and HARC
13 decision did not address compliance with the 20-foot limit in JDC
14 18.20.040(A), and that the proposed fill clearly violates the 20 foot limit. In
15 oral testimony, intervenor’s engineer opined that JDC 18.20.040(A) was
16 “aspirational,” but in any case the standard is met, because the circulation area
17 or central aisle constitutes part of the “driveway,” and JDC 18.20.040(A) limits
18 fill to 20 horizontal feet of the “edge of driveways.” Response Brief, Appendix
19 2, page 18.

20 The city council decision briefly rejected petitioner’s argument under
21 JDC 18.20.040(A):

22 “The Council finds that the evidence in the record supports the
23 HARC’s decision that the proposed improvements are in
24 compliance with the standards for the excavation or removal of
25 earth or aggregate and for the placement of fill materials.
26 Therefore, this assignment of error does not provide a basis for
27 reversal of the HARC’s decision.” Record 13.

1 On appeal, petitioner argues, and we agree, that the staff report, the
2 HARC decision and the city council’s decision do not include findings
3 demonstrating compliance with JDC 18.20.040(A). The above-quoted city
4 council finding is inadequate to do so. The staff report incorporated into the
5 HARC decision as that body’s only findings does not address JDC
6 18.20.040(A), so the HARC made no “decision” at all regarding that standard.

7 We cannot tell, but it is possible that the city council may have agreed
8 with intervenor’s engineer’s interpretation that the circulation area is part of the
9 “driveway” for purposes of JDC 18.20.040(A), which would allow fill to be
10 placed up to 20 feet from the edge of the shoulder of that “driveway.”
11 However, the city council findings do not expressly or implicitly adopt that
12 interpretation. Even under that interpretation, the city’s findings would need to
13 identify where the “edge of the shoulder” of the driveway is located in the
14 present case. From the site plan, it appears that fill will be placed in the
15 terraced slopes further than 20 feet from the furthest edge of the circulation
16 area, even if the five-foot “bump-out” is considered the “shoulder” of the
17 driveway. Record 36. We conclude that remand is necessary for the city to
18 adopt findings addressing JDC 18.20.040(A), and provide any interpretations
19 and factual determinations necessary to resolve the issues petitioner raised
20 below under that standard.

21 The fourth assignment of error is sustained, in part.

22 **FIFTH ASSIGNMENT OF ERROR**

23 JDC 17.30.060 limits the lot coverage to 40 percent of the total lot area.
24 JDC 18.21.020(C) provides that “impervious surfaces can only cover ten (10%)
25 more parcel area than the lot coverage allowance.” Effectively, these
26 provisions together limit development to 50 percent of the total lot area. The

1 staff report found compliance with JDC 18.21.020(C) based on Exhibit C to the
2 staff report, which consists of two pages of civil construction drawings.
3 Record 120. The construction drawing states that 40 percent of the lot area is
4 covered with landscaping, 10 percent with pervious surfaces, and 50 percent
5 with impervious surfaces. Record 129.

6 During the proceedings before the HARC and on appeal to the city
7 council, petitioner argued that the proposed impervious surfaces exceed 50
8 percent of the total lot area. Record 73-74. However, the city council rejected,
9 as new evidence, petitioner's submittal of modified site plans with handwritten
10 annotations, based on which petitioner calculated that the total impervious area
11 in fact exceeds 50 percent of the lot area. As noted, the city council's review is
12 confined to the evidentiary record before the HARC.

13 Petitioner first argues that the city council committed procedural error by
14 rejecting her calculations of impervious area. According to petitioner, her
15 calculations are not "new" evidence, but simply a restatement of evidence that
16 was already apparent on the face of the applicant's site plans.

17 Intervenor argues, and we agree, that the annotated site plans and
18 petitioner's calculations of lot coverage constitute "new evidence," which was
19 submitted to controvert testimony, on the construction plans and orally at the
20 hearing, that the proposed development complies with the lot coverage
21 limitations. It is not apparent on the face of the site plans that the impervious
22 surfaces exceed 50 percent of the lot area. Petitioner's argument to that effect
23 relies on a series of interpretations, assumptions and trigonometric calculations
24 that was not previously available in the HARC record. Because the city
25 council's review was confined to the HARC record, the city council correctly
26 rejected that new evidence.

1 Additionally, petitioner argues that even without considering her
2 calculations and the annotated site plans that the record does not include
3 substantial evidence supporting a finding that the proposed development
4 complies with the 50 percent lot coverage standard. However, the construction
5 plans state that the total of impervious surfaces does not exceed 50 percent of
6 the lot coverage. Record 37. Intervenor’s engineer also provided direct
7 testimony to that effect. Response Brief, Appendix 2, page 18-19. That is
8 substantial evidence, *i.e.*, evidence a reasonable person could rely upon to
9 conclude that the lot coverage standard is met.

10 The fifth assignment of error is denied.

11 The city’s decision is remanded.