

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GERALD A. SCHATZ and SILVERWOOD)

5 INVESTMENT GROUP,)

6)

7 Petitioners,)

LUBA No. 92-221

8)

9 vs.)

FINAL OPINION

10)

AND ORDER

11 CITY OF JACKSONVILLE,)

12)

13 Respondent.)

14

15

16 Appeal from City of Jacksonville.

17

18 Carlyle F. Stout III, Medford, filed the petition for
19 review and argued on behalf of petitioners.

20

21 Tonia Moro, Medford, filed the response brief and
22 argued on behalf of respondent.

23

24 KELLINGTON Referee; SHERTON, Chief Referee; HOLSTUN,
25 Referee, participated in the decision.

26

27 REMANDED 05/17/93

28

29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council denying
4 their application for tentative subdivision plat approval.

5 **FACTS**

6 This is the third time a city decision has been before
7 this Board concerning an application for tentative
8 subdivision plat approval for the subject property. In Cecil
9 v. City of Jacksonville, 19 Or App 446, 449-50 (1990)
10 (Cecil), we stated the following facts:

11 "On August 9, 1989, [petitioners] applied for
12 tentative plat approval. The subject property is
13 vacant, includes 16.03 acres and is located within
14 the city's adopted urban growth boundary (UGB).
15 The subject property is designated Urban Single
16 Family Residential in the comprehensive plan and
17 is zoned R-1-8, Single Family Residential (8,000
18 square foot minimum lot size).

19 "The application was considered by the city's
20 subdivision committee on September 6, 1989. The
21 planning commission considered the request at a
22 public hearing on September 12, 1989. The matter
23 was continued twice by the planning commission,
24 once to September 25, 1989 and a second time to
25 October 10, 1989 to allow the applicant time to
26 submit additional written material. At its
27 October 10, 1989 meeting, the planning commission
28 voted to deny the application.

29 "[Petitioners] appealed the planning commission's
30 decision to the city council. On December 5,
31 1989, the city council held a hearing to review
32 the planning commission's decision. At the
33 conclusion of the December 5, 1989 hearing, the
34 city council voted to reverse the planning
35 commission and grant tentative plat approval. The
36 city council's decision was reduced to writing and
37 adopted by the city council on January 2, 1990."

1 (Footnote omitted.)

2 At the time of our decision in Cecil, the city's plan
3 and land use regulations were not acknowledged to be in
4 compliance with the Statewide Planning Goals (goals) under
5 ORS 197.251. Therefore, at the time we decided Cecil, the
6 city was required to apply all applicable goals to the
7 proposed tentative subdivision plat. ORS 197.175(2)(c). In
8 Cecil, we remanded the city's decision because the city had
9 failed to demonstrate the proposal's compliance with Goal 5
10 (Open Spaces, Scenic and Historic Areas, and Natural
11 Resources).

12 After our remand in Cecil, the city adopted an
13 ordinance establishing a moratorium on new construction in
14 all areas of the city served by city water facilities.¹ In
15 addition, the city scheduled a city council public hearing
16 "for the purpose of a Goal 5 review of the Silvercrest
17 [Heights] Subdivision." Schatz v. City of Jacksonville, 23
18 Or LUBA 40, 42 (1992) (Schatz I). In Schatz I we outlined
19 the subsequent chronology of events:

20 * * * At that hearing, the city council decided
21 to continue the hearing to May 6, 1991, for the
22 purpose of reviewing the proposed subdivision for
23 compliance with Statewide Planning Goals 1-14. *
24 * *

25 "On March 18, 1991, [the Land Conservation and

¹We affirmed the city's moratorium ordinance in a decision unrelated to the decision challenged in this appeal. Schatz v. City of Jacksonville, 21 Or LUBA 149 (1991).

1 Development Commission (LCDC)] issued [a limited
2 acknowledgment order] acknowledging the city's
3 comprehensive plan and land use regulations except
4 with respect to Goal 5 historic resources * * *.
5 On March 20, 1991, LCDC issued [a] Corrected
6 Enforcement Order [(Enforcement Order)], directing
7 the city to apply certain standards in making land
8 use decisions prior to amending its plan and
9 regulations to comply with Goal 5 with regard to
10 historic resources. * * *

11 "The city council conducted several additional
12 hearings and meetings concerning the subject
13 tentative plat approval application in May and
14 June, 1991. On July 17, 1991, the city council
15 adopted the challenged order denying tentative
16 plat approval." (Emphasis in original; footnotes
17 omitted.) Schatz I, 23 Or LUBA at 42-43.

18 In the local proceedings leading to the city's decision in
19 Schatz I, the city reversed its position in Cecil, and
20 denied the proposal based on a determination that the
21 proposal did not comply with Goal 5. In addition, in
22 Schatz I, the city also determined the proposal failed to
23 establish compliance with Goals 6 (Air Water and Land
24 Resources Quality), 8 (Recreation), 9 (Economy of the
25 State), 11 (Public Facilities and Services), 12
26 (Transportation), and 14 (Urbanization).

27 In our decision in Schatz I, we concluded the city's
28 determination that the proposal could be denied on the basis
29 of noncompliance with the statewide planning goals, was
30 erroneous. This was because of the intervening LCDC limited
31 acknowledgment order and enforcement order. We remanded the
32 city's decision in Schatz I on the basis that under the
33 terms of the newly issued (and unappealed) LCDC enforcement

1 order, the city was required to apply certain enforcement
2 order standards to establish compliance with Goal 5, in
3 place of Goal 5 itself. Specifically, we held:

4 "* * * Under the preceding assignments of error,
5 we determine the city erred in denying the subject
6 application on the [basis of noncompliance with
7 the goals]. * * * We agree with petitioners that
8 the approval standards applicable to the subject
9 application are established by the city's
10 comprehensive plan and land use regulations and
11 Attachment A and B of the enforcement order.
12 However, the challenged decision does not identify
13 and address the applicable standards in the city
14 plan and regulations and the enforcement order. *
15 * * Therefore, we remand the challenged decision
16 so the city may identify and apply applicable
17 plan, land use regulation and enforcement order
18 standards." (Footnote omitted.) Schatz I, supra,
19 23 Or LUBA at 50.

20 On remand after Schatz I, the city stated only the
21 following in its notice of remand proceedings:

22 "As this is a remand hearing, the evidence
23 accepted may be limited. Argument related to how
24 the application and evidence which presently
25 exists in the record complies or fails to comply
26 with Jacksonville's Comprehensive plan, Chapter 16
27 of the Jacksonville Land Development Code
28 (particularly 16.12.02) and Chapter 92 of the
29 Oregon Revised States is welcomed. * * *" Schatz
30 II Record 343.²

31 After petitioners received this notice, they asked the
32 city to identify the specific standards governing their
33 application for tentative subdivision plat approval. The

²The local record for this proceeding includes the records from Cecil, Schatz I and the instant case, which we refer to as Schatz II. We refer to the record in this proceeding as Cecil Record ____; Schatz I Record ____; or Schatz II Record ____, as appropriate.

1 city responded that the applicable criteria are located in
2 the Jacksonville Land Division Code Chapter 16, the
3 Jacksonville Comprehensive Plan, the LCDC Enforcement Order
4 and ORS chapter 92. Schatz II Record 347. Thereafter,
5 petitioners wrote a letter to the city attorney, asking the
6 city to identify the applicable approval criteria. In
7 response, the city attorney wrote a letter to petitioner as
8 follows:

9 "* * * I know the applicant is fully aware of the
10 standards and criteria that are applicable to the
11 application. First, he has two competent
12 professionals representing or assisting him on
13 this matter * * *. Second, he has already
14 attempted to comply with the applicable standards
15 and criteria applicable to a subdivison tentative
16 plat application. Third, the city has already
17 indicated the applicable criteria, albeit
18 generally.

19 "I told you I would further assist you in order to
20 appease your request for further assistance. As I
21 mentioned, it is not for me to determine what the
22 applicable standards and criteria are, that is for
23 the council to determine. The list below is a
24 list of standards and criteria that appear to be
25 wholly or partially applicable to the application.
26 The council may be asked to apply others not
27 listed and may do so. If, of course, there is
28 some reason you were not and should not have been
29 aware that other criteria were applicable and the
30 council rules that such is applicable, I am sure
31 the council will entertain a request to continue
32 the hearing to allow you time to demonstrate
33 compliance.

34 "* * * * *

35 "Standards and Criteria Applicable to

36 "Tentative Plat Approval

1
2 "1. Comprehensive Plan Provisions including
3 Goals, Policies and Implementation strategies:
4 "A. Environmental Setting.
5 "B. Historic Preservation.
6 "C. Parks, Recreation, Open Spaces - Natural
7 and Scenic Resources.
8 "D. Economy.
9
10 "E. Agriculture.
11
12 "F. Transportation.
13
14 "G. Housing.
15
16 "H. Land Use.
17
18 "2. Jacksonville Land Development and Division
19 Code, Titles 16 and 17, particularly:
20
21 "A. 16.12.080 - 16.12.080.
22
23 "B. 16.20.010 - 16.12.050, including
24 amendments Ordinances Nos. 324 & 327.
25
26 "C. 16.24.010 - 16.24.110.
27
28 "D. 16.28.010
29
30 "E. 17.20.020.
31
32 "F. 17.56.010 - 17.56.070.
33
34 "3. State Law
35 "A. ORS Chapter 92, particularly ORS 92.050
36 - 92.095 as they may relate to tentative
37 plat approval. This chapter was amended
38 in 1991.
39 "B. ORS Chapter 227, particularly
40 ORS 227.350. This section was amended
41 in 1991.

1 "4. Amendments and other provisions which may be
2 applicable or pertinent to the discussion.

3
4 "A. Ordinance 358, Moratorium

5
6 "B. Ordinance 365, Revises Road Grade
7 requirements.

8 "C. Ordinance 366, Revises Private Way
9 requirements.

10
11 "D. Historic Protection Ordinance.

12 "* * * * *" Schatz II Record 353-55.

13 When the city council convened its remand hearing,
14 petitioners submitted a motion to the city council
15 requesting that it identify the standards relevant to their
16 application for tentative plat approval. The city council
17 denied petitioners' motion. Schatz II Record 432.
18 Thereafter, the city denied petitioners' application, and
19 this appeal followed.

20 **MOTION TO DISMISS**

21 The city moves to dismiss this appeal. The city argues
22 that the petition for review improperly invokes this Board's
23 jurisdiction based on petitioners' mistaken characterization
24 of the challenged decision as a land use decision and
25 improperly requests relief under ORS 197.835(7). According
26 to the city, the challenged decision is a limited land use
27 decision, for which our scope of review is established by
28 ORS 197.828. Therefore, the city argues petitioners failed
29 to carry their burden of establishing our jurisdiction over
30 the challenged limited land use decision.

1 The petition for review establishes the challenged
2 decision is one to deny a tentative subdivision plat for a
3 proposed subdivision, and that the city applied provisions
4 of its plan and zoning ordinance in reaching its decision.
5 Therefore, whether the challenged decision is correctly
6 characterized as a land use decision or a limited land use
7 decision, we have jurisdiction.

8 The city's motion to dismiss is denied.

9 **PRELIMINARY ISSUE**

10 Whether the challenged decision is a land use decision
11 or a limited land use decision is an issue that potentially
12 affects the procedures required to be followed by the local
13 government and our scope of review. Accordingly, we address
14 this issue before turning to petitioners' assignments of
15 error.

16 ORS 197.010(12) defines "limited land use decision" as:

17 "* * * a final decision made by a local government
18 pertaining to a site within an urban growth
19 boundary which concerns:

20 "(a) The approval or denial of a subdivision or
21 partition, as described in ORS chapter 92.

22 "* * * * *"

23 ORS 197.010(12) requires that a limited land use
24 decision concern property located within an urban growth
25 boundary (UGB). In Cecil, this Board refused to apply an
26 exception to our jurisdiction which preceded the 1991
27 legislation creating limited land use decisions (previous

1 subdivision exception).³ The previous subdivision exception
2 was also predicated on property being located within a UGB.
3 In Cecil, supra, 19 Or LUBA at 452, we stated:

4 "* * * it is clear that the [previous subdivision
5 exception to LUBA's jurisdiction] only applies
6 where the subdivision is located within a UGB.
7 Further, we believe that a subdivision can be
8 located within a UGB in the sense intended by [ORS
9 197.015(10)(b)(B)(1989)] only where a jurisdiction
10 has an established UGB. A UGB is not established
11 until it is acknowledged. Branscomb v. LCDC, 64
12 Or App 738, 669 P2d 124 (1983); Roth v. LCDC, 57
13 Or App 611, 646 P2d 85 (1982)." (Emphasis
14 supplied.)

15 ORS 197.195 governs the procedures to be employed by a
16 local government in acting on an application for a limited
17 land use decision. ORS 197.828 governs our scope of review
18 of limited land use decisions. Both ORS 197.195 and
19 ORS 197.828 presuppose the existence of an acknowledged
20 local comprehensive plan and land use regulations, as no
21 goal inquiry is required by or contemplated in either. In
22 other words, these statutes contemplate that all inquiries
23 about the goal compliance of a city's plan and land use
24 regulations have been completed, and that LCDC has
25 acknowledged those provisions to be in compliance with the
26 goals. We conclude that for the purposes of determining

³ORS 197.015(10)(b)(B)(1989) provided that a land use decision subject to LUBA review did not include a local government decision:

"[w]hich approves or denies a subdivision * * * located within [a UGB] where the decision is consistent with land use standards. * * *"

1 whether a city decision is a limited land use decision under
2 ORS 197.015(12), a UGB is not established until the city's
3 comprehensive plan and land use regulations are fully
4 acknowledged.⁴ Therefore, because the city's comprehensive
5 plan and land use regulations here are not fully
6 acknowledged, the challenged decision is not a limited land
7 use decision. Rather, the challenged decision is a land use
8 decision.

9 **FIRST ASSIGNMENT OF ERROR**

10 "Respondent violated ORS 197.763(3)(b) and (5)(a)
11 in failing to list all applicable approval
12 criteria from its ordinance and plan prior to and
13 at the outset of the hearing. Respondent's
14 violations constituted procedural error which
15 prejudiced the substantial rights of petitioners
16 under ORS 197.835(7)(a)(B) and OAR 661-10-
17 071(2)(c)."

18 The city did not follow the procedures established by
19 ORS 197.763 during the local proceedings leading to the
20 decisions challenged in Cecil, Schatz I or this appeal.
21 Petitioners argue the city should have complied with
22 ORS 197.763 in the city proceedings leading to the
23 challenged decision and particularly with the requirements
24 of ORS 197.763(3)(b) and (5)(a) that the city list the
25 standards that apply to their application.

26 Respondent contends that ORS 197.763 did not apply to

⁴We do not mean to suggest that a limited acknowledgment order, which includes acknowledgment that a city complies with Goal 14, is ineffective for other purposes.

1 the proceedings below, because that statute does not apply
2 to proceedings on remand. Respondent contends:

3 "* * * petitioners are prevented from raising [the
4 issue of the city's noncompliance with ORS
5 197.763] as they failed to object to the first
6 notice which initiated the first public hearing on
7 their application. It was the notice issued on
8 September 1, 1989 that was subject to compliance
9 with any statutory requirements." Respondent's
10 Brief 8.

11 As a general proposition, we agree with the city that
12 on remand, unless the local code requires otherwise, the
13 city need not repeat the entire process it followed in
14 making the original decision. Wentland v. City of Portland,
15 23 Or LUBA 321, 326-27 (1992); Bartels v. City of Portland,
16 23 Or LUBA 182, 185-86 (1992); Washington Co. Farm Bureau v.
17 Washington Co., 22 Or LUBA 540 (1992). However, the city's
18 contentions that ORS 197.763 was applicable to the September
19 1, 1989 notice of local proceedings and that petitioners
20 should have raised an issue at that time concerning
21 compliance with ORS 197.763, is untenable. ORS 197.763 was
22 not effective until October 3, 1989, whereas the city's
23 notice of hearing (about which it says petitioners should
24 have raised an issue regarding compliance with ORS 197.763),
25 is dated September 1, 1989.⁵ Therefore, petitioners were

⁵No party contends that under ORS 227.178(3), ORS 197.763 is not applicable to the city's proceedings because it was not in effect when the subject application was first submitted. However, we explain, infra, that ORS 227.178(3) does not control the standards applicable to the subject application because the city's comprehensive plan and land use regulations were not acknowledged when the subject application was first submitted.

1 not required to object to the city's notice of the local
2 proceedings leading to the decision appealed in Cecil,
3 because the city was under no obligation at that time to
4 apply ORS 197.763.⁶ Petitioners had no basis under ORS
5 197.763 to object regarding the city's September 1, 1989
6 notice.

7 There is another reason why we believe the city erred
8 by not applying ORS 197.763 to the city proceedings leading
9 to the decision challenged in this appeal. This case is
10 unique in the sense that the unappealed, LCDC limited
11 acknowledgment and enforcement orders changed the standards
12 applicable to petitioners' application after the city's
13 first decision in Cecil. In view of that change, in Schatz
14 I, 23 Or App at 50, we specifically stated that we remanded
15 the challenged decision so the city could identify the
16 standards applicable to petitioners' application.

17 Notwithstanding our direction to the city in Schatz I,
18 there has never been a city proceeding on petitioners'

⁶In Cecil, supra, 19 Or LUBA at 454 n 9, we specifically stated the following regarding then intervenors-respondent's (now petitioners') motion to dismiss:

"[W]e reject the portion of intervenors-respondent's * * * motion to dismiss in which they claim petitioner failed to adequately raise below the issues he presents in this appeal. Although we disagree with intervenors-respondent's contention that the current 'raise it or waive it' provisions of ORS 197.763, which became effective October 3, 1989, or the more limited 'raise it or waive it' provisions of ORS 197.762 applicable within UGB's generally apply in this case, the issues asserted in petitioner's three assignments of error were raised [by evidence he submitted below.]"

1 application in which the city has identified the standards
2 applicable to petitioners' application after the effective
3 date of the LCDC limited acknowledgment and enforcement
4 orders. The notice of hearing on remand and city attorney
5 letter discussed, supra, generally identify nearly every
6 plan and ordinance provision as potentially applicable to
7 petitioners' application. However, the notice itself is
8 extremely general, and the city attorney's letter was also
9 general but, more important, it reserved to the city the
10 right to change its mind concerning which standards apply.
11 Neither of these are the equivalent of identifying standards
12 applicable to petitioners' application, as required by
13 ORS 197.763(3)(b).

14 In Bradbury v. City of Independence, 22 Or LUBA 783
15 (1991), this Board was presented with a similar situation.
16 We stated:

17 " * * * The city argues that after remand by this
18 Board, there was no requirement that the
19 applicable standards be specifically identified by
20 the city. According to the city, it is enough
21 that the applicable requirements are located in
22 the city's code and in ORS chapter 822 [relating
23 to wrecker licenses]. The city also argues that
24 petitioner had no right after remand to present
25 additional evidence or argument. The city
26 maintains that all it was required to do was to
27 adopt findings based on the record made during the
28 hearings held on petitioner's application in 1989.

29 "ORS 197.763(3)(b) and (5)(a) require the city to
30 identify the standards the city believes to be
31 applicable to an application for quasi-judicial

1 land use approval prior to its hearings on such an
2 application.³ * * *.

3 _____

4 "3 While ORS 197.763 was not in effect at the time
5 the application for the wrecking certificate was
6 filed with the city, it was in effect after we
7 remanded the city's first decision on the
8 application in [LUBA's first decision]. * * *"
9 Bradbury v. City of Independence, supra, 22 Or
10 LUBA at 785.

11 We believe the principles articulated above in Bradbury
12 are equally relevant to this appeal. We conclude it was
13 error for the city to fail to comply with ORS 197.763. In
14 particular, the city erred by failing to identify the
15 standards applicable to petitioners' application for
16 tentative plat approval, as required by ORS 197.763(3)(b)
17 and (5)(a).⁷ We note that in Caine v. Tillamook County,
18 _____ Or LUBA _____ (LUBA No. 92-153, April 22, 1993), slip
19 op 5, we acknowledged this Board has not yet determined
20 whether, or to what extent, ORS 197.763 applies to local
21 proceedings on remand. In this opinion, we do not mean to
22 announce a general rule that all requirements of ORS 197.763
23 apply to all local remand proceedings. We simply hold that
24 in the unique circumstances presented in this case, in which
25 (1) the applicable standards were different after remand due

⁷In addition, we do not understand the city to contend that it complied with the other requirements of ORS 197.763 during its proceedings on petitioners' application.

1 to intervening LCDC limited acknowledgment and enforcement
2 orders, (2) a prior opinion of this Board specifically
3 required the local government to identify applicable
4 standards, and (3) there had never been a local proceeding
5 in which the local government complied with ORS 197.763 --
6 ORS 197.763 is applicable to the local proceedings on
7 remand.

8 We are required to reverse or remand the city's
9 decision if the city failed to follow applicable procedures
10 in a manner that prejudiced petitioners' substantial rights.
11 ORS 197.835(7)(a)(B). The substantial rights of parties
12 include the "rights to an adequate opportunity to prepare
13 and submit their case and a full and fair hearing."
14 Bradbury, supra; Muller v. Polk County, 16 Or LUBA 771, 775
15 (1988). Here, it was not reasonably possible for
16 petitioners to determine what standards the city would apply
17 to their application. Under these circumstances, we believe
18 petitioners' substantial rights to prepare and submit their
19 case was prejudiced by the city's failure to identify the
20 applicable standards. Again, our decision in Bradbury,
21 supra, 22 Or LUBA 785-86, is instructive:

22 "In this case, in the absence of the relevant
23 standards being identified by the city, petitioner
24 was in no position to present evidence
25 establishing that he met the approval standards
26 which the city believed applied to his
27 application. * * *"

28 We conclude the challenged decision must be remanded

1 for the city to comply with ORS 197.763 by providing
2 petitioners with adequate notice of, and an opportunity to
3 be heard concerning, the standards applicable to their
4 application for tentative subdivision plat approval.

5 One further point merits comment. While no party
6 argues that the city erred in applying standards in the LCDC
7 enforcement order to the application because the enforcement
8 order was not a standard in effect at the time their
9 application was first submitted to the city, the issue
10 potentially could bear on this appeal. ORS 227.178(3).
11 Therefore, to avoid unnecessary confusion on remand, we
12 point out why the standards in the LCDC enforcement order
13 may be applied to petitioners' application.

14 ORS 227.178(3) provides as follows:

15 "If the application was complete when first
16 submitted * * * and the city has a comprehensive
17 plan and land use regulations acknowledged under
18 ORS 197.251, approval or denial of the application
19 shall be based upon the standards and criteria
20 that were applicable at the time the application
21 was first submitted." (Emphasis supplied).

22 In Schatz I, supra, 23 Or LUBA at 46, we stated:

23 "Because the city's comprehensive plan and land
24 use regulations were not acknowledged when the
25 subject application was initially filed, ORS
26 227.178(3) does not restrict the applicable
27 standards to those in effect when the application
28 was filed. Territorial Neighbors v. Lane County,
29 16 Or LUBA 641, 646-47 (1988). * * *"

30 Therefore, any relevant requirements in the LCDC enforcement
31 order may be applied to petitioners' application.

1 The first assignment of error is sustained.

2 **SECOND ASSIGNMENT OF ERROR**

3 "Respondent committed procedural error in
4 rejecting and excluding from the record, specific,
5 relevant and probative evidence relating to
6 approval criteria later used by the city in making
7 its decision."

8 During the remand proceedings, petitioners attempted to
9 introduce new evidence into the local record. The city
10 rejected some of petitioners' new evidence on the basis that
11 it was irrelevant to the existing application because it
12 related to how the modified proposal could meet city
13 standards.

14 The city has the discretion to approve or deny the
15 tentative subdivision plat based upon the original
16 application, and absent local code provisions to the
17 contrary, nothing requires the city to allow modifications
18 to the application for proposed development. There are no
19 standards of which we are aware requiring the city to allow
20 modifications to an existing application. See Simonson v.
21 Marion County, 21 Or LUBA 313, 325 (1991). Therefore, the
22 city was free to reject petitioners' evidence concerning
23 proposals to modify the application and to show that, as
24 modified, the proposal complies with relevant standards.

25 As far as we can tell, it appears the evidence the city
26 rejected, which is at issue under this assignment of error,
27 falls into this category and, if so, the city did not err by
28 rejecting it. However, we note the city's brief reflects a

1 fundamental misunderstanding of the city's obligations on
2 remand in this case. On remand, the city is required to
3 conduct a hearing which complies with ORS 197.763, at which
4 petitioners are allowed to present evidence and argument to
5 establish the existing proposal's compliance with all
6 relevant standards. In Bradbury, supra, 22 Or LUBA at 786,
7 we stated:

8 "[W]e believe the city was required to identify
9 the relevant standards after this Board's remand
10 * * *, but also was * * * required to hold an
11 evidentiary hearing to allow petitioner to present
12 evidence and argument concerning the proper
13 interpretation and application of those standards
14 to his application. Morrison v. City of Portland,
15 70 Or App 437, 689 P2d 1027 (1984)."

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 "The city misconstrued applicable law in
19 determining that comprehensive plan goals and
20 policies, implementing ordinances, and state
21 statutes constituted approval criteria. Where
22 approval criteria were properly identified, the
23 city's decision is not supported by substantial
24 evidence in the whole record."

25 This assignment of error alleges that the city
26 improperly applied various standards to the proposal.
27 Because the city will be required on remand to identify the
28 standards relevant to petitioners' application, and to
29 accept new evidence on remand relating to the proposal's
30 compliance with those standards, no purpose is served by
31 resolving petitioners' challenges to the manner in which
32 standards were applied in the decision challenged in this

1 appeal.

2 The third assignment of error is denied.

3 The city's decision is remanded.