

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council denying
4 their application for a bed and breakfast use in the
5 Residential (R-7) zoning district.

6 **MOTION TO INTERVENE**

7 Ardis Mangels, William Mangels, Norman Janzer, and
8 Terwilliger Neighbors Coalition move to intervene on the
9 side of respondent in this appeal proceeding. There is no
10 objection, and the motion is allowed.

11 **MOTION TO AMEND PETITION FOR REVIEW**

12 On June 29, 1992, petitioners delivered to this Board,
13 a motion to delay this appeal proceeding and to amend the
14 petition for review to add an assignment of error. The
15 proposed new assignment of error is to be based on evidence,
16 not in the record, of an unrelated city decision on an
17 unrelated application for a bed and breakfast establishment.

18 Our final opinion and order is due on July 1, 1993.
19 Petitioners' request would result in delay of the issuance
20 of our final opinion and order, in contravention of the
21 statutory requirement that we issue our final opinion and
22 order within 77 days of the date the record is submitted.

23 Petitioners' request to amend their petition for review
24 is denied.

25 **MOTION FOR EVIDENTIARY HEARING**

26 On June 29, 1993, petitioners submitted a motion for

1 evidentiary hearing as an alternative to their motion to
2 amend the petition for review. As we understand it, the
3 evidentiary hearing is to sought to present evidence of a
4 city decision approving an unrelated application for a bed
5 and breakfast use on property other than the subject
6 property.

7 ORS 197.830(13)(b) provides the following concerning
8 evidentiary hearings:

9 "In the case of disputed allegations of
10 unconstitutionality of the decision, standing, ex
11 parte contacts or other procedural irregularities
12 not shown in the record which, if proved, would
13 warrant reversal or remand, the board may take
14 evidence and make findings of fact on those
15 allegations. * * *" (Emphasis supplied.)

16 OAR 661-10-045(1) and (2) provides:

17 "(1) Grounds for Hearing: The Board may, upon written motion,
18 conduct an evidentiary hearing in the case of disputed
19 allegations in the parties' briefs concerning
20 unconstitutionality of the decision, standing, ex parte
21 contacts or other procedural irregularities not shown in
22 the record and which, if proved, would warrant
23 reversal or remand of the decision. An
24 evidentiary hearing may also be held upon
25 motion or at the direction of the Board to
26 consider disputes regarding the content of
27 the record or requests for stays, attorney
28 fees and actual damages under ORS 197.845.

29 "(2) Motions for Hearings: A motion for an
30 evidentiary hearing shall contain a statement
31 explaining with particularity what facts the
32 moving party will present at the hearing and
33 how those facts will affect the outcome of
34 the review proceeding. Whenever possible
35 such facts shall be presented by affidavit
36 with the motion.

37 "* * * * *" (Emphasis supplied.)

1 Petitioners fail to explain how establishing that the
2 city approved an unrelated application for a different bed
3 and breakfast on a different piece of property would affect
4 the outcome of this appeal proceeding, or how such evidence
5 could result in the reversal or remand of the challenged
6 decision.

7 Petitioners' motion for evidentiary hearing is denied.

8 **FACTS**

9 This is the second time a city decision on the subject
10 application for a bed and breakfast has been before this
11 Board. In Adler v. City of Portland, _____ Or LUBA _____
12 (LUBA No. 92-041, September 1, 1992), slip op 2 (Adler I),
13 we described the characteristics of the proposal, as
14 follows:

15 "The proposed bed and breakfast use would be
16 located in an existing dwelling. The operating
17 characteristics of the proposed bed and breakfast
18 consist of four guest rooms to accommodate a
19 maximum of six guests per night. A part-time
20 housekeeper and gardener are proposed to be hired
21 to assist in the operation of the bed and
22 breakfast."

23 In Adler I, we remanded the city's decision denying
24 petitioners' application because the city failed to advise
25 petitioners of their right to request that the local record
26 remain open for a period of seven days, as required by
27 Portland City Code (PCC) 33.730.100(B)(3).

28 On remand, the city allowed new evidence to be
29 submitted and provided a period for the submission of

1 rebuttal evidence. The city council heard the matter on the
2 basis of the prior record and the evidence submitted on
3 remand. After the public hearing, the city council again
4 denied petitioners' application. This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 "Council's failure to follow the remand procedures
7 recommended by the city attorney's office,
8 accepted by all parties, and adopted by council,
9 and [its decision] to tolerate a climate in which
10 the city attorney's office and intervenor-
11 respondents were permitted to do the same, not
12 only denied petitioners' rights to substantive due
13 process of law, but also substantially prejudiced
14 petitioners' rights to rebut evidence, to have a
15 complete decision based on compliance with the
16 adopted remand procedures, and to frame a LUBA
17 appeal."

18 Petitioners allege various procedural errors in the
19 process utilized by the city on remand. The city council
20 gave all parties an opportunity to submit evidence before,
21 and legal argument during, a public hearing. All parties
22 took advantage of these opportunities. Petitioners cite no
23 local code, statutory or other requirement violated by the
24 procedures employed by the city on remand.¹

25 In addition, even if petitioners established that the
26 procedures used by the city on remand were erroneous in some
27 way, petitioners' allegations at most establish the

¹To the extent petitioners may argue the procedures employed by the city on remand violate some constitutional provision, no argument is explicitly made or adequately developed for review. Joyce v. Multnomah County, 23 Or LUBA 116, 118 (1992).

1 existence of procedural error for which we see no prejudice
2 to their substantial rights. Therefore, this assignment of
3 error provides no basis for reversal or remand of the
4 challenged decision.² ORS 197.835(7)(a)(B).

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 "The context in which the remand process actually
8 took place had the effect of unlawfully denying
9 petitioners their right to rebut evidence
10 submitted in opposition to their application."

11 Petitioners argue that on remand, the city denied them
12 the right to rebut findings, and to rebut alleged new
13 evidence submitted by intervenors during the rebuttal
14 segment of the local remand proceedings. Citing Fasano v.
15 Washington Co. Bd. of Comm., 264 Or 574, 507 P2d 23 (1973),
16 petitioners contend these alleged failures amount to a
17 violation of their right to rebut evidence.

18 There is no requirement that petitioners be provided
19 with an opportunity to rebut proposed findings. Terraces
20 Condo. Assn. v. City of Portland, 22 Or LUBA 151, 161, aff'd
21 110 Or App 471, 823 P2d 1004 (1992). Accordingly,

²Petitioners also contend the deputy city attorney was biased against them, and argue that this allegation provides a basis for reversal or remand of the challenged decision. First, none of the alleged conduct of the deputy city attorney cited by petitioners establishes the existence of bias by the deputy city attorney. Second, even if such conduct amounted to bias, petitioners fail to establish how alleged bias of a city staff person provides any basis for reversal or remand of a decision made by the city governing body. See Schmaltz v. Hood River County, 22 Or LUBA 115, 112 n 7 (1992).

1 petitioners' argument in this regard provides no basis for
2 reversal or remand of the challenged decision.

3 We turn to petitioners' allegations that they were
4 denied an opportunity to rebut new evidence presented during
5 the rebuttal segment of the local proceedings on remand.
6 The new evidence allegedly submitted by intervenors during
7 the rebuttal segment of the local remand proceedings is as
8 follows:

- 9 "1. [Transmittal] letter dated 12/1/92 to the
10 Council
- 11 "2. The record in LUBA No. 92-41
- 12 "3. The final opinion in LUBA No. 92-041
- 13 "4. Intervenor[s]' and Respondent's brief in LUBA
14 No. 92-041
- 15 "5. Proposed findings." Intervenors' Brief 8.

16 These documents do not constitute new evidence that
17 petitioners were entitled to rebut during the local remand
18 proceedings. These documents did not add anything new to
19 the record that petitioners had not had other opportunities
20 to rebut during the local proceedings in Adler I. Further,
21 the briefs in the LUBA proceedings in Adler I do not
22 constitute new evidence which petitioners were entitled to
23 rebut during the local proceedings on remand.

24 The second assignment of error is denied.

25 **THIRD ASSIGNMENT OF ERROR**

26 "Council's failure to consider mitigating
27 conditions for approval as recommended by the
28 planning bureau staff and by petitioners violated

1 [PCC} sections 33.815.105, 33.815.010, 33.800.070,
2 and 33.800.050(A)."

3 As we understand it, petitioners argue under this
4 assignment of error that this Board misunderstood their
5 arguments previously made to this Board in Adler I.
6 Petitioners contend this Board did not address arguments
7 they made in their petition for review in Adler I, namely
8 that the city erred in failing to consider whether
9 mitigating conditions of approval could be imposed to enable
10 approval of the application. Petitioners maintain this
11 Board's determination in Adler I, that the city did not err
12 because the city is not required to impose conditions of
13 approval to make a conditional use permit approvable, misses
14 their point. Regardless of whether the city is required to
15 impose conditions of approval, according to petitioners, the
16 city is required to at least consider the effect of
17 mitigating conditions of approval.

18 It is not clear how to characterize the issue raised by
19 petitioners in this assignment of error. Our decision in
20 Adler I explains that filing a conditional use permit
21 application does not guarantee or require conditional use
22 approval, and that a local government is not required to
23 impose conditions of approval when considering a request for
24 a conditional use permit. Adler I, supra, slip op at 11-12.
25 The most logical characterization of petitioners' arguments
26 under this assignment of error leads to a conclusion that
27 petitioners raise issues that were disposed of in Adler I,

1 and that petitioners should have appealed our decision in
2 Adler I if dissatisfied.

3 However, it makes no difference here how petitioners'
4 arguments are characterized for purposes of disposing of
5 this assignment of error. Petitioners' arguments under this
6 assignment of error were either raised in the petition for
7 review in Adler I or could have been so raised. Having
8 either failed to raise this issue during the proceedings
9 before this Board in Adler I, or failed to appeal from this
10 Board's interpretation of the issue petitioners did raise in
11 this regard, petitioners are precluded from now raising this
12 issue. Beck v. City of Tillamook, 313 Or 148, 152-53, 157,
13 ___ P2d ___ (1992); Hearne v. Baker County, 89 Or App 282,
14 748 P2d 1016, rev den 305 Or 576, 746 P2d 728 (1987); Mill
15 Creek Glen Protection Assoc. v. Umatilla County, 88 Or App
16 522, 746 P2d 728 (1987).

17 The third assignment of error is denied.

18 **FOURTH ASSIGNMENT OF ERROR**

19 "Council's decision is not supported by
20 substantial evidence in the record taken as a
21 whole."

22 It is the applicant's burden to establish compliance
23 with each relevant approval standard. Consequently, where
24 the applicant fails to establish compliance with a single
25 approval standard, a decision denying an application will be
26 affirmed. Garre v. Clackamas County, 18 Or LUBA 877, aff'd
27 102 Or App 123 (1990). Therefore, if there is substantial

1 evidence in the whole record to support any ground for
2 denial relied on by the city, the city's decision must be
3 affirmed.³

4 Portland City Code (PCC) 33.815.105(C) requires:

5 "The proposal will not have significant adverse
6 impacts on the livability of nearby residential
7 zoned lands due to:

8 * * * * *

9 "(2) Privacy and safety issues."

10 In addition, PCC 33.815.105(D)(2) requires the following:

11 "The transportation system is capable of safely
12 supporting the proposed use in addition to the
13 existing uses in the area. Evaluation factors
14 include street capacity and level of service,
15 access to arterials, transit availability,
16 on-street parking impacts, access requirements,
17 neighborhood impacts, and pedestrian safety."

18 There is evidence in the record that the streets
19 accessing the subject dwelling are steep, narrow and
20 winding; and in many places the sight distances are
21 impaired. There is also evidence that most guests will
22 arrive by private automobile or taxi, as there is no public
23 transportation available to the subject dwelling. There is
24 evidence in the record that parking in the area is already

³Petitioners do not challenged the adequacy of the city's findings that the proposal fails to comply with relevant standards. As part of their substantial evidence challenge, petitioners may also be making a challenge to the city's interpretation of its code. However, if such an interpretational challenge is made, it is inadequately developed to merit review. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

1 quite limited, and that on-street parking can pose serious
2 safety hazards. There is evidence in the record that the
3 year-round occupants of the proposed dwelling have two cars,
4 two college age daughters who drive but do not live at home,
5 and that there will be four bedrooms in the dwelling
6 available for guests and, thus, a potential for at least
7 four guest automobiles to be present at the property. In
8 addition, there is evidence in the record that parking space
9 will be provided for the part-time gardener and for the
10 part-time housekeeper. Finally, there is evidence in the
11 record that guests will arrive and depart in automobiles
12 late at night and early in the morning, and that the
13 similarity of street names could easily cause the guests of
14 the proposed bed and breakfast to become confused in
15 attempting to locate the subject dwelling.

16 Substantial evidence is evidence upon which a
17 reasonable person would rely to reach a conclusion.
18 Evidence is considered "substantial evidence" even though it
19 is possible for a reasonable person to draw different
20 conclusions from the same evidence. Carsey v. Deschutes
21 County, 21 Or LUBA 118, 123, aff'd 108 Or App 113 (1991).

22 We conclude a reasonable person could rely on the
23 evidence cited by respondents that the proposed bed and
24 breakfast will generate additional traffic which will add to
25 the already undesirable traffic situation on the street on
26 which the proposed bed and breakfast is located and in the

1 surrounding area. We believe this is substantial evidence
2 to support a determination that PCC 33.815.105(C)(2)
3 concerning safety issues and PCC 33.815.105(D)(2) concerning
4 the adequacy and safety of area transportation systems to
5 accommodate the proposed use are not satisfied. Therefore,
6 the city's decision that the proposal does not comply with
7 these standards is supported by substantial evidence.
8 Further, because petitioners challenge the city's denial of
9 their application on the basis of noncompliance with the
10 conditional use criteria on evidentiary grounds, petitioners
11 must demonstrate they carried their burden to demonstrate
12 compliance with those criteria as a matter of law.
13 Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d
14 1241 (1979); McCoy v. Marion County, 16 Or LUBA 284, 286
15 (1987). Petitioners have not done so here.

16 The fourth assignment of error is denied.

17 The city's decision is affirmed.