

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 denying an application for a dwelling in a residential
5 zone.¹

6 **PRELIMINARY MATTER**

7 As we explained in an earlier order of this Board,
8 Johns v. City of Lincoln City, ___ Or LUBA ___ (LUBA Nos.
9 96-082/96-083, Order on Motion for Relief from Consolidation
10 of Appeals, May 9, 1995), the city council decision giving
11 rise to this appeal consolidated two local appeals from the
12 city planning commission.² Nevertheless, petitioner filed
13 two appeals to LUBA, which we consolidated pursuant to OAR
14 661-10-055.³

15 Petitioner disregarded our order consolidating LUBA
16 Nos. 96-082/96-083 and filed one petitioner's brief under
17 each file number. The city filed one respondent's brief
18 that addresses the arguments made in both of petitioner's

¹Although the challenged decision falls within the definition of "limited land use decision" in ORS 197.015(12), the city followed the procedures for a land use decision in deciding the application. Therefore, we evaluate petitioner's procedural assignments of error under ORS 197.763 and the provisions of the city's code that apply to land use decisions. See Gensman v. City of Tigard, 29 Or LUBA 505, 512 (1995).

²Petitioner does not assign error to the city council's decision to consolidate its review of the two planning commission decisions.

³OAR 661-10-055 provides that LUBA "* * * may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s)."

1 briefs.

2 Because the total number of pages in petitioner's two
3 briefs does not exceed the maximum number of pages allowed
4 by our rules for one petitioner's brief, we consider both of
5 petitioner's briefs.⁴ For purposes of identification,
6 assignments of error in the petitioner's brief labeled LUBA
7 No. 96-082 are identified as "___ Assignment of Error
8 (Darnell)," and assignments of error in the petitioner's
9 brief labeled LUBA No. 96-083 are identified as
10 "___ Assignment of Error (Morfitt)."⁵

11 **FACTS**

12 The subject property is located in a city residential
13 zone⁶ and the city's Environmental Quality Overlay (EQ)
14 zone. Although the proposed dwelling is an outright use in
15 the residential zone, a discretionary review is necessary to
16 ensure compliance with the EQ zone requirements, which are
17 set forth in the city's Zoning Ordinance No. 84-02 (ZO)
18 3.110 and 3.120.

19 ZO 3.110 provides, in relevant part:

20 "* * * * *

21 "(4) Standards: Beyond the requirements of

⁴Although we consider both briefs, we disapprove of the filing of two petitioner's briefs in consolidated cases.

⁵Darnell and Morfitt are the names of the local appellants.

⁶Precisely what zoning classification applies is the subject of petitioner's first assignment of error in both Darnell and Morfitt.

1 Section 3.120 of the zoning ordinance, the
2 following standards will be applied in
3 reviewing an application for any uses in the
4 EQ Overlay zone:

5 * * * * *

6 "(c) Exceptional Aesthetic Resources.

7 "1. Development on coastal headlands or
8 in areas of exceptional aesthetic
9 quality shall not reduce the scenic
10 character of the area.

11 * * * * *

12 "(e) Natural Hazards.

13 "1. Development of all types, except
14 rip-rap beach front protective
15 structures and natural means of
16 beach protection, in hazard areas
17 identified on the Comprehensive Plan
18 Map shall not occur until a review
19 is completed by a qualified engineer
20 or qualified engineering geologist.
21 The review shall be prepared at the
22 developer's expense. All costs
23 incurred by the City to review the
24 development shall be the
25 responsibility of the applicant.
26 The review shall include but is not
27 limited to erosion control,
28 vegetation removal, slope
29 stabilization, and other items
30 necessary to satisfy the
31 requirements of the Comprehensive
32 Plan.

33 "2. The review completed shall be
34 submitted to the City as a written
35 report and shall consider as a
36 minimum, the following:

37 "(a) An explanation of the degree
38 the hazard affects the property
39 use in question.

1 (b) An explanation of the method(s)
2 to be employed to minimize the
3 losses associated with the
4 hazard.

5 (c) An explanation of the
6 environmental consequences the
7 development and the protective
8 measure will have on the
9 surrounding properties.

10 "* * * * *

11 ZO 3.120, the implementing section, requires that a
12 written environmental assessment be prepared that includes
13 information necessary to evaluate the "environmental,
14 scientific, or aesthetic resources of the site and the
15 impact the development may have to surrounding properties."
16 ZO 3.120(3)(e). Pursuant to ZO 3.120(4)(a), the city
17 planning director must review the environmental assessment
18 "to determine if significant adverse impacts will result
19 from the proposed project." The director then must prepare
20 a written statement with findings authorizing, denying, or
21 conditionally approving the project. That decision, which
22 is made without a hearing, may be appealed to the planning
23 commission under ZO 3.120(5) and 9.040(1), city code
24 provisions corresponding to ORS 227.175(1)(a).

25 Petitioner hired H.G. Schlicker & Associates, Inc. to
26 prepare an environmental assessment (Schlicker assessment)
27 and an independent consulting firm, SRI/Shapiro, to perform
28 a peer review (Shapiro review) of the Schlicker assessment.
29 H.G. Schlicker & Associates, Inc. obtained geotechnical

1 assistance from Wright/Deacon & Assoc., Inc. (Wright).
2 SRI/Shapiro obtained geotechnical assistance from Squier
3 Associates (Squier). The Schlicker assessment, the Shapiro
4 review, and the comments of Wright and Squier all address
5 concerns related to the visual impacts of the proposed house
6 design and the potential impacts of construction on
7 neighboring properties.⁷ The Shapiro review specified

⁷The Schlicker assessment describes the subject property as follows:

"The site lies on the oceanfront on an elevated marine terrace * * *. The oceanfront is marked by a bluff approximately 70 feet high.

"The eastern, upper part of the lot is nearly flat, and the topsoil has been removed. The distance from SW Anchor Avenue to the bluff varies from about 45 to 50 feet. The eastern property line extends to within four to nine feet of the existing west edge of Anchor Avenue * * *.

"The western bluff slope varies from 26° to 62° * * *. Seawalls at the toe of the slope on the west edge of the site and the adjacent lot to the north substantially protect the western slope from erosion by waves. The surficial material on the slope has slid in the past, leaving a loose sand slope from the seawall to about 40 feet above the beach. The upper 15 feet of the bluff is unvegetated and nearly vertical on the north edge of the property, but densely vegetated on the south half. Erosion is moderate on the unprotected sand slopes adjacent to and on the north half of the site, but the lower slopes and southern half of the site are covered with vegetation and appear to be stable.

"North and south of the site wood-framed residences have been built on the bluff. North of the site public beach access is provided at Canyon Drive Park. South of the site streets end at the beach providing public access in several locations." Record 329-30.

The Shapiro review describes the special challenges posed by the site and petitioner's design response to those challenges:

1 two conditions that, if satisfied, would avoid the creation
2 of significant natural hazards during and after
3 construction. It then stated, "[T]he [Schlicker assessment]
4 substantially complies with the requirements of the City EQ
5 overlay zone, with the exception of the discussion of
6 exceptional aesthetic resources." It continued:

7 "With regard to exceptional aesthetic resources,
8 the proposed development likely will create a
9 significant adverse impact and will require
10 substantial aesthetic treatment, such as screening
11 or landscaping, to reduce its visual impact. It
12 is questionable whether compatibility of the
13 proposed house with surrounding property and the
14 natural environment of the area can be achieved.
15 It is recommended the following condition be
16 satisfied:

17 "3. The applicant shall review the proposed

"A somewhat unique design for the foundation system has been provided for the residence. Because the level area of the site is relatively small, averaging only about 40 feet from the property line to the bluff edge, and the required setback from the street occupies about 10 feet, only a 30-foot wide area exists for the proposed residence. Hence the desired area of the residence footprint does not include any setback from the bluff edge to allow future bluff retreat. Consequently, a deep foundation scheme has been developed with the engineering perspective that bluff retreat could occur without threatening the structural integrity of the residence. * * *

** * * * *

** * * The foundation design recommendations should provide a suitable foundation and should result in a satisfactory design life for the structure, but will result in no apparent setback from the bluff edge over time. The structure will initially be very close to the bluff edge, and over time will project out over the bluff edge. This design approach represents [a] non-conventional approach for this area that should be evaluated in conjunction with the owner's and City's visual impact requirements." Record 319-20.

1 design to determine potential modifications
2 and/or visual screening techniques that would
3 reduce the visual impact of the structure.
4 The applicant shall then provide a proposal
5 to the city for its consideration." Record
6 315-16.

7 On June 14, 1995, after reviewing additional materials
8 submitted by petitioner's attorney, the planning director
9 issued a "Notice of Administrative Decision." The planning
10 director included in his decision the two conditions
11 pertaining to natural hazard reduction recommended in the
12 Shapiro review. He also concluded the proposed design
13 addressed "the visual impact concerns expressed by the
14 environmental consultant." Record 305.

15 Two timely notices of appeal were filed from the
16 planning director's administrative decision. The notice of
17 appeal form requires an appellant state "[t]he
18 interpretation that is being appealed and the basis for the
19 appeal." The Morfitt notice of appeal states:

20 "1. Bank set back -- From drawings on file at
21 City overhang may be greater than 13' with
22 Deck.

23 "2. Ft. Yard set back (Ave. of front yards on
24 Anchor in vicinity of proposed project).

25 "3. Height of proposed Bldg -- as determined by
26 ave. elev. at foundation lines--

27 "4. Bank slopes as appearing on Drawings on file
28 with Planning Dept." Record 302.

29 The Darnell notice of appeal states: "[E]nvironmental
30 assessment does not protect adjoining property and does not

1 relate to the unbuildable nature of the land." Record 301.
2 The Darnells supplemented the notice of appeal with a letter
3 filed August 7, 1995, which discusses the Schlicker
4 assessment, the Shapiro review, and the comments of Wright
5 and Squier; attaches several plans and drawings with
6 handwritten notations; and elaborates on the Darnells'
7 concerns regarding protection of adjacent properties,
8 including their own, against erosion. Record 262-64.

9 On September 14, 1995, the city attorney delivered a
10 memorandum to the planning director and planning commission
11 that discussed the substantive and procedural requirements
12 of ZO 3.110(4)(c) and (e) and ZO 3.120. The memorandum
13 stated, "[O]f the EQ Zone requirements, the [planning]
14 Commission only may consider those requirements that the
15 Darnell and Morfitt Notices of Appeal reasonably can be
16 interpreted as raising." Record 240. The memorandum then
17 concluded that the Morfitt notice of appeal raises the
18 exceptional aesthetic resource criterion in ZO 3.110(4)(b)
19 and that the Darnell notice of appeal raises the natural
20 hazards criterion in ZO 3.110(4)(e)(2)(c).

21 On August 15, September 19, and October 3, 1995, the
22 planning commission held hearings on the Darnell and Morfitt
23 appeals. At the September 19 hearing, the city attorney
24 explained:

25 "In reading both the record and specifically the
26 two notices of appeal, what I tried to do was
27 figure out okay, let's give the appellants

1 frankly, the benefit of the doubt and try and
2 figure out which criteria that are part of the EA
3 process might their notice of appeal and what they
4 have identified in them come under. * * * I tried
5 to read from reading the record and their notices
6 which of those criteria they were trying to
7 address and it looked like they were the two that
8 I identified." Record 138-39.

9 The planning commission made separate findings in the
10 Morfitt and Darnell appeals in support of its separate
11 decisions to overturn the planning director's administrative
12 decision. The findings in the Morfitt appeal addressed the
13 exceptional aesthetic resources criterion in ZO 3.120(4)(c).
14 The findings in the Darnell appeal addressed the natural
15 hazards criterion in ZO 3.110(4)(e)(2) and 3.120(4)(a).

16 On January 29, 1996, the city council held a
17 consolidated hearing on the record on the Morfitt and
18 Darnell appeals. On March 25, 1996, in one decision, the
19 city council affirmed the planning commission decisions.
20 This appeal followed.

21 **SECOND THROUGH FOURTH ASSIGNMENTS OF ERROR (MORFITT)**
22 **SECOND THROUGH FOURTH ASSIGNMENTS OF ERROR (DARNELL)**

23 Petitioner contends the planning commission and city
24 council, acting on the advice of the city attorney, restated
25 the criteria on which the Morfitt and Darnell appeals were
26 based, in violation of ZO 9.040(1), which provides, in
27 relevant part:

28 "A decision of the Planning Department on the
29 issuance of an administrative permit or
30 discretionary action concerning a land use matter
31 may be appealed to the Planning Commission by an

1 affected party by filing an appeal with the
2 Planning and Community Development Director within
3 ten (10) days of the mailing of the decision. The
4 Notice of Appeal that is filed with the City shall
5 indicate the interpretation that is being appealed
6 and the basis for the appeal. The notice shall
7 indicate in what respects the decision being
8 appealed is a discretionary decision involving a
9 land use matter. The matter at issue will be a
10 determination of the appropriateness of the
11 interpretation of the requirements of the
12 Ordinance. * * *" (Emphasis added.)

13 Petitioner contends the Morfitt notice of appeal, which
14 lists front and bank setbacks, the height of the house and
15 the slope of the bank, does not adequately raise the
16 exceptional aesthetic resource criterion stated in
17 ZO 3.110(4)(b); and the Darnell notice of appeal, which
18 states only that the environmental assessment does not
19 protect adjoining property and "does not relate to the
20 unbuildable nature of the land," does not raise
21 ZO 3.110(4)(e)(2). Petitioner contends the planning
22 commission's review of the planning director's decision for
23 compliance with ZO 3.110(4)(b) therefore exceeded its
24 jurisdiction. Finally, petitioner contends he was
25 substantially prejudiced by the expanded review both because
26 it required him to face "an ongoing modification of the
27 issues he must defend after the ten (10) day period [for
28 filing a notice of appeal] has run," Petition for Review
29 (Morfitt) 14; and because it demonstrated the planning
30 commission was partial to Morfitt.

31 The city responds it acted properly to review the

1 Morfitt notice of appeal to determine what issues it could
2 be said to raise in the context of an EQ zone review. The
3 city contends notices of appeal should be liberally
4 interpreted to avoid the exclusion of citizens from the
5 appeal process.

6 **A. Limitation of Hearing on Appeal**

7 Neither petitioner nor the city address the most
8 fundamental issue: whether the city can limit the scope of
9 the hearing on appeal from the planning director's decision.

10 ORS 227.175(10)(a) provides:

11 "The hearings officer, or such other person as the
12 governing body designates [i.e. the planning
13 director], may approve or deny an application for
14 a permit without a hearing if the hearings officer
15 or other designated person gives notice of the
16 decision and provides an opportunity for appeal of
17 the decision to those persons who would have had a
18 right to notice if a hearing had been scheduled or
19 who are adversely affected or aggrieved by the
20 decision. * * * An appeal from a hearings
21 officer's decision shall be made to the planning
22 commission or governing body of the city. An
23 appeal from such other person as the governing
24 body designates shall be to a hearings officer,
25 the planning commission or the governing body. In
26 either case, the appeal shall be a de novo
27 hearing." (Emphasis added.)

28 We understand ORS 227.175(10)(a) to require the city to
29 provide, on appeal from a decision made without a hearing,
30 at least one hearing at which any issue may be raised.
31 Since that is essentially what the city did, petitioner's
32 substantive and procedural rights have not been prejudiced.

33 Moreover, we see nothing in ZO 9.040 that prohibits

1 either the planning commission from considering issues
2 beyond those indicated as the basis for the appeal from the
3 planning director's or planning department's decision; or
4 anyone from raising more issues prior to or during the
5 hearings process. Cf. Smith v. Douglas County, 93 Or App
6 503, 506-07, 763 Pd 169 (1988), aff'd 308 Or 191 (1989)
7 (where ordinance specifically states review on local appeal
8 shall be limited to the grounds relied upon in the notice of
9 review, failure to so limit the review is substantive
10 error).

11 **B. Impartial Decision Maker**

12 Even if petitioner were correct that the notices of
13 appeal limited the issues the planning commission could
14 consider, the fact the planning commission, in reliance on
15 the opinion of the city attorney, considered issues not
16 directly raised would not, of itself, come close to
17 supporting an inference of impermissible bias. See 1000
18 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 742 P2d 39
19 (1987); Jones v. Lane County, 28 Or LUBA 193, 196-97 (1994).

20 These assignments of error are denied.

21 **FIFTH ASSIGNMENT OF ERROR (MORFITT)**

22 Petitioner contends the "exceptional aesthetic
23 resources" standard of ZO 3.110(4)(c) violates petitioner's
24 Fourteenth Amendment rights to due process and equal
25 protection. Petitioner complains the standard is "so vague,
26 the petitioner could not determine what was required in

1 designing a house and proposing a development for his
2 property." Record 16.

3 The Oregon Supreme Court concluded in Anderson v.
4 Peden, 284 Or 313, 326, 587 P2d 59 (1978), that the
5 Fourteenth Amendment does not provide a basis for holding
6 that "policy development under an extremely broad delegation
7 could not constitutionally proceed by the decision of
8 concrete cases without prior rulemaking." Although Peden
9 concerned the articulation of standards in advance of a
10 specific conditional-use proceeding, we see no reason to
11 believe the court would require more precise rulemaking in
12 connection with a specific environmental quality review.

13 The Peden court explained that if an attack on the
14 vagueness of a particular criterion is to have a

15 "constitutional footing, it must be found in the
16 risk that ad hoc policy making will grant to some
17 'citizen or class of citizens privileges, or
18 immunities, which, upon the same terms, [do] not
19 equally belong to all citizens.' Or Const Art I,
20 § 20. That risk is real in all discretionary
21 administration. But an attack based on this
22 premise must show that in fact a policy unlawfully
23 discriminating in favor of some persons against
24 others either has been adopted or has been
25 followed in practice." Id. (Emphasis added.)

26 See also Towry v. City of Lincoln City, 26 Or LUBA 554, 557-
27 58 (1994). The standard discussed and upheld in Peden was
28 one that required an applicant to show a proposed
29 development was "an encouragement of the most appropriate
30 use of land." Peden at 318. We do not think the standards
31 petitioner attacks in this proceeding -- "areas of

1 exceptional aesthetic quality" and "scenic quality" -- are
2 more vague.

3 Petitioner attempts to show unlawful discrimination by
4 reference to earlier, unsuccessful attempts to gain the
5 necessary land use approvals and by claims that a comparable
6 development was permitted by the city on a nearby, similarly
7 situated lot. We do not underestimate the difficulty of
8 showing the unfair application of design review standards.
9 Even if true, petitioner's contentions would be insufficient
10 to make the necessary showing. Furthermore, they are not
11 supported by citations to evidence in the record.

12 This assignment of error is denied.

13 **FIFTH ASSIGNMENT OF ERROR (MORFITT)**

14 Petitioner contends findings 2, 3 and 4 of the planning
15 commission's decision in Morfitt, which were adopted by the
16 challenged decision, are not supported by substantial
17 evidence in the whole record. These findings, which address
18 ZO 3.110(4)(c), elaborate on the theme that a large,
19 cantilevered residence jutting out over the edge of a cliff
20 subject to erosion, in a scenic, though developed, coastal
21 area, will have a substantial adverse impact on the view
22 from the beach and from nearby residences. The findings are
23 supported by comments in the Shapiro review and letters in
24 the record, including one from the Department of Land
25 Conservation and Development at Record 251. No more support
26 is required, as the findings proceed from the application of

1 highly subjective standards to the undisputed facts of the
2 proposal itself.

3 This assignment of error is denied.

4 **REMAINING ASSIGNMENTS OF ERROR**

5 To support denial of a land use permit, a local
6 government need only establish the existence of one adequate
7 basis for denial. Horizon Construction, Inc. v. City of
8 Newberg, 28 Or LUBA 632, 635, aff'd 134 Or App 414 (1995);
9 Kangas v. City of Oregon City, 26 Or LUBA, 180 (1993);
10 Rozenboom v. Clackamas County, 24 Or LUBA 433, 437 (1993);
11 Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or
12 App 123 (1990). We therefore do not reach petitioner's
13 remaining assignments of error.⁸

14 The city's decision is affirmed.

⁸Petitioner's first assignments of error in Darnell and Morfitt concern a gratuitous finding as to zoning. The sixth assignment of error (Darnell) contains a challenge to the city's findings with respect to ZO 3.110(4)(e).