

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

HOOD RIVER VALLEY RESIDENT'S )  
COMMITTEE, )  
Petitioner-Cross- )  
Respondent, )  
vs. )  
CITY OF HOOD RIVER, )  
Respondent, )  
and )  
ROBERT J. BARMAN, )  
Intervenor-Respondent- )  
Cross-Petitioner. )

LUBA No. 96-112  
FINAL OPINION  
AND ORDER

Appeal from City of Hood River.

Max M. Miller, Portland, filed a petition for review and a response brief to cross-petition, and argued on behalf of petitioner and cross-respondent. With him on the briefs was Tonkin, Torp, Galen, Marmaduke & Booth.

No appearance by respondent.

David B. Smith, Tigard, filed a response brief and a cross petition for review, and argued on behalf of intervenor-respondent - cross-petitioner.

HANNA, Chief Referee; GUSTAFSON, Referee, participated in the decision.

AFFIRMED 05/27/97

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a conditional  
4 use permit for a service station and convenience store.  
5 Intervenor, in a cross-petition, appeals the city's decision  
6 that the proposed use is not a vested use, but must be  
7 approved as a conditional use.

8 **MOTION TO INTERVENE**

9 Robert J. Barman (intervenor), the applicant below,  
10 moves to intervene on the side of respondent. There is no  
11 opposition to the motion, and it is allowed.

12 **FACTS**

13 Intervenor is the owner of the subject property, which  
14 is located north of an I-84 interchange in the city's light  
15 industrial (LI) zone. The interchange was recently  
16 reconstructed by the Oregon Department of Transportation  
17 (ODOT). The ODOT reconstruction project required the taking  
18 by eminent domain of a portion of intervenor's property for  
19 additional right-of-way and the removal of a service station  
20 owned by intervenor that was lawfully established in 1965.  
21 The challenged decision approves a conditional use permit  
22 for a service station and convenience store to replace the  
23 service station.

24 Following a public hearing, the planning commission  
25 conditionally approved the application. Petitioners  
26 appealed the planning commission's decision to the city

1 council. The city council heard the appeal on the record  
2 and affirmed the planning commission's decision. In its  
3 decision, the city council took one of three actions with  
4 respect to each of the planning commission's findings. It  
5 either incorporated the finding by reference in its own  
6 decision, modified the finding and condition of approval, or  
7 prepared a wholly new finding and condition of approval.

8 This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR (PETITIONER)**

10 Petitioner contends the city erred in determining that  
11 the proposal satisfies Hood River Municipal Code (HRMC)  
12 17.03.060.I.3, alleging three bases for error: (1) a  
13 statement petitioner describes as the finding of compliance  
14 with HRMC 17.03.060.I.3 is not supported by substantial  
15 evidence; (2) the decision allows preliminary grading and  
16 the issuance of grading permits before the applicant has  
17 established that the HRMC 17.03.060.I.3 standards can be  
18 met; and (3) the decision impermissibly defers a decision on  
19 compliance with HRMC 17.03.060.I.3 to a later time and  
20 allows it to be made by the city engineer without proper  
21 notice and a hearing.

22 HRMC 17.03.060.I.3 is one of several criteria to be  
23 used in evaluating conditional use proposals in the LI zone.

24 It requires:

25 "The grading and contouring of the site shall take  
26 place and on-site surface drainage and on-site  
27 storage of surface water facilities are

1 constructed when necessary, so there is no adverse  
2 effect on neighboring properties, public rights-  
3 of-way, or the public storm drainage system. \* \*  
4 \*"

5 **A. Evidentiary Challenge**

6 Petitioner argues that a statement that it describes as  
7 the city's finding of compliance with HRMC 17.03.060.I.3 is  
8 not supported by substantial evidence. Petitioner contends  
9 that the statement was initially made in the application and  
10 was adopted first by the planning commission and then by the  
11 city council as a finding of compliance with HRMC  
12 17.03.060.I.3. The application states:

13 "A grading and contouring plan will be completed  
14 prior to the issuance of a building permit. There  
15 is not sufficient information at this time to  
16 prepare such a plan; additional surveying must  
17 first be completed after initial excavation or  
18 fill-out work is done. Facilities for on-site  
19 surface drainage and for on-site storage of  
20 surface water will be constructed to satisfy the  
21 City engineering department." Record 127.

22 While the planning commission adopted a finding very  
23 similar to the quoted application statement, the city  
24 council did not incorporate that finding in its decision.  
25 See Record 4-5 and 55. Petitioner has not established that  
26 the statement it described as a finding is, in fact, a part  
27 of the city's final decision. Thus, it is immaterial  
28 whether the identified statement is supported by substantial

1 evidence in the record.<sup>1</sup>

2 This subassignment of error is denied.

3 **B. Permitting Grading Before Final Approval**

4 Petitioner argues that the challenged decision allows  
5 issuance of grading permits and grading before it has been  
6 established that the HRMC 17.03.060.I.3 standards can be  
7 met. Specifically, petitioner contends:

8 " \* \* \* the Applicant claims that initial  
9 excavation and fill (grading) work must be done  
10 before a grading and contour plan can be prepared.  
11 Grading requires a grading permit. So, the city  
12 has accepted this notion that a grading permit can  
13 commence before it is determined whether the  
14 grading drainage standards can be met. That is  
15 contrary to the requirements that the standard be  
16 satisfied prior to permits being granted."  
17 Petition for Review 7.

18 Intervenor responds that "[p]etitioner's argument does  
19 not challenge the city's findings and decision \* \* \*."  
20 Intervenor's Brief 8. We agree that in this subassignment  
21 of error, petitioner has not demonstrated that the  
22 challenged decision allows activities regulated under HRMC  
23 17.03.060.I.3 to be conducted before this regulation is met.

24 This subassignment of error is denied.

25 **C. Deferral of Decision**

26 Petitioner argues that the decision impermissibly  
27 defers a decision on compliance with HRMC 17.03.060.I.3 to a

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<sup>1</sup>Petitioner does not challenge the finding actually adopted by the city council addressing HRMC 17.03.060.I.3 or the evidentiary support for that finding. That finding is set forth in subassignment of error C.

1 later time and allows it to be made by the city engineer  
2 without proper notice and a hearing.

3 The challenged decision states:

4 "The Council finds that the applicant testified  
5 that the service station and convenience store  
6 could be constructed such that there would be no  
7 adverse impact from surface water on neighboring  
8 properties, public rights of way, and the public  
9 drainage system, and that both construction plans  
10 and actual construction would be accomplished to  
11 the satisfaction of the city engineer. There was  
12 no evidence submitted in opposition. The Council  
13 finds the evidence of the applicant is  
14 substantial, and shows compliance with this  
15 requirement. The argument of the [petitioner] is  
16 without merit. This requirement is satisfied,  
17 subject to a condition that the surface water  
18 drainage plan and the actual grading and  
19 contouring of the site shall be done to the  
20 satisfaction of the city engineer." Record 4.  
21 (Emphasis added.)

22 The city then adopted an alternative finding, the  
23 applicability of which is contingent on the filing of an  
24 appeal with LUBA.<sup>2</sup> The alternative finding states:

25 "The Council also finds in the alternative that,  
26 if the evidence submitted by the applicant showing  
27 compliance with this requirement should not be  
28 deemed substantial on appeal, if an appeal should  
29 be filed, this requirement is satisfied subject to  
30 a condition that, prior to building construction,  
31 the grading and contouring plan and the surface

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<sup>2</sup>Petitioner contends that the imposition of the condition contingent on appeal is without basis in law, thus this Board should award attorney fees. The evaluation of a request for an award of attorney fees is premature at this time. See Cox v. Yamhill County, 31 Or LUBA 270, 273 (1996). In any event, petitioner does not develop an argument challenging the city's procedure, that of making an alternative finding. Petitioner challenges only the substance of the alternative finding.

1 water drainage plan be submitted to, and approved  
2 by the City Engineer, and be reviewed in public  
3 hearing by the Planning Commission."<sup>3</sup> Id.

4 The contingent conditions imposed by the city council  
5 state:

6 "W. The applicant's plan for grading and  
7 contouring and surface water drainage shall  
8 be submitted to the City Engineer for  
9 approval at the time application is made for  
10 a building permit, or prior to the  
11 commencement of building construction.

12 "X. Building construction pursuant to this permit  
13 shall be contingent on approval by the City  
14 Engineer of the applicant's surface water  
15 drainage plan and the actual grading and  
16 contouring of the site." Record 18.

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<sup>3</sup>The challenged decision continues, stating:

"In support of this alternative, the Council concludes the following:

"A. The Council believes that HRMC 17.03.060(I)(3) is ambiguous as to when grading and contouring of the site must be shown to meet its requirements. \* \* \*

\*\* \* \* \* \*

"C. The Council thus concludes that the applicant's plan for grading and contouring must be submitted to the City Engineer for approval at the time application is made for a building permit, or prior to the time of commencement of building construction. After approval by the Engineer, the plan shall be reviewed by the Planning Commission. The Planning Commission shall determine that the requirements of HRMC §17.03.060(I)(3) have been satisfied. That review will be limited to that issue, and will be conducted in accordance with the notice and hearing procedures of HRMC §§ 17.09.050 and 17.09.060. No building permit shall be issued until the requirements of HRMC § 17.03.060(I)(3) have been shown to have been satisfied. The Council finds that this standard is satisfied, subject to this condition." Record 4-5.

1           What is missing from petitioner's argument is an  
2 allegation that the initial finding actually made by the  
3 city establishing compliance with HRMC 17.03.060.I.3, as  
4 opposed to that statement identified by petitioner in  
5 subassignment A, is inadequate or not supported by  
6 substantial evidence in the record. If the initial finding  
7 is not defective, we need not reach petitioner's argument  
8 that the alternative finding is defective. Because we have  
9 no basis for making a decision on the initial finding, we  
10 have no basis for reaching the alternative finding.

11           This subassignment of error is denied.

12           The first assignment of error is denied.

13           **SECOND ASSIGNMENT OF ERROR (PETITIONER)**

14           HRMC 17.03.060.I.4 requires that lighting installed in  
15 the LI zone pursuant to a conditional use permit "be  
16 subdued." In the application, intervenor proposed use of  
17 six shielded 1000-watt lights, including two on 15-foot  
18 poles. In response to petitioner's appeal of the planning  
19 commission decision, the city council adopted a condition of  
20 approval, as follows:

21           "The height of floodlights shall not exceed 15  
22 feet and lighting will be deflected downward and  
23 will not glare onto adjacent property. All  
24 exterior lights will be shielded and no direct  
25 light will spill off the site." Record 16.

26           The council found that, with this condition, the  
27 proposed development will meet the standard for "subdued"  
28 lighting. Record 6.

1           Petitioner contends that "there is no substantial  
2 evidence in the record that it is feasible for six 1000-watt  
3 halogen lights to be set up in a way that no direct light  
4 will spill off the site." Petition for Review 9. However,  
5 the condition of approval does not require six 1000-watt  
6 halogen lights. Intervenor provides the following  
7 transcription of the city council hearing audiotapes, in  
8 which a member of the council explained: "[i]f six 1000 watt  
9 bulbs is too much, [the applicant can] put something else  
10 in. That's it." Response Brief 12. The councilor's oral  
11 comment regarding lighting was essentially incorporated into  
12 the condition that the exterior lights, whatever size they  
13 may be, be shielded and that no direct light spill off the  
14 site.

15           Petitioner has not shown that the challenged decision,  
16 as conditioned, violates HRMC 17.03.060.I.4.

17           The second assignment of error is denied.

18           **THIRD ASSIGNMENT OF ERROR (PETITIONER)**

19           Petitioner challenges the city's conclusion that HRMC  
20 17.03.060.I.5, did not require an off-site traffic study in  
21 this case. Petitioner contends that:

22           "it is an abuse of discretion for the city to  
23 decide not to require a traffic study for  
24 erroneous reasons. Respondent decided not to  
25 require a traffic study because it believed ODOT  
26 had done one and that the city engineer  
27 recommended against one. Neither proposition is  
28 supported by substantial evidence in the Record."  
29           Petition for Review 9.

1 HRMC 17.03.060.I.5 provides:

2 "The circulation pattern shall be safe and  
3 efficient within the boundaries of the site. A  
4 study of off-site traffic may be required for  
5 projects on or adjacent to major streets."  
6 (Emphasis added.)

7 The city addressed the second sentence of this  
8 provision by stating:

9 "The decision on whether to require a traffic  
10 study is within the sound discretion of the  
11 Planning Commission. The words 'may be required'  
12 in this standard make it discretionary. Staff  
13 advised the Commission that the City Engineer had  
14 reviewed the application and determined no study  
15 was needed. The Council concludes it would be  
16 redundant to conduct another traffic study when it  
17 was not required by ODOT or the City Engineer."  
18 Record 7. (Emphasis added.)

19 The finding does not assert that ODOT performed a  
20 traffic study. It does state that the city engineer  
21 determined that a traffic study was not needed. Although  
22 petitioner does not clearly establish the basis upon which  
23 it contends the decision is erroneous, as we understand it,  
24 petitioner argues that there is not substantial evidence in  
25 the record to support the findings made in support of the  
26 decision not to require a traffic study.<sup>4</sup>

27 Intervenor identifies several places in the record  
28 where the city discussed whether a traffic study was  
29 required. We have examined the portions of the record cited

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<sup>4</sup>Petitioner's citations to allegedly conflicting evidence in the record to concern opinions expressed by petitioner that legislators improperly influenced ODOT in handling this matter.

1 by intervenor and conclude that there is substantial  
2 evidence in the record to support the city's conclusion that  
3 a traffic study is not required. See Record 20, 37, 86, 88,  
4 117.

5 The decision as to whether to require an off-site  
6 traffic study under HRMC 17.03.060.I.5 is discretionary.  
7 The city correctly found that HRMC 17.03.060.I.5 does not  
8 require an off-site traffic study. Petitioner has not  
9 established that the challenged decision fails to comply  
10 with HRMC 17.03.060.I.5.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR (PETITIONER)**

13 Petitioners contend that the record does not support  
14 the finding that the interior lot landscaping requirement of  
15 HRMC 17.04.160.C has been met. HRMC 17.04.160.C requires:

16 "Landscaping and parking areas shall be planted in  
17 combination along the perimeter and in the  
18 interior of the lot and shall be designed to guide  
19 traffic movement and lessen the visual dominance  
20 of the lot." (Emphasis added.)

21 The challenged decision states:

22 "The applicant's landscape architect testified  
23 that the site plan, which is part of the record,  
24 showed landscape plantings in the parking areas in  
25 several locations. The Council finds these  
26 plantings are sufficient to meet the requirements  
27 of this standard, and conclude this argument of  
28 the HRVRC is without merit." Record 9.

29 The landscape diagram portion of the site plan clearly  
30 shows plantings in pots on the interior of the lot. It also

1 shows three trees to be planted adjacent to the two parking  
2 areas in the interior of the lot. Record Oversized Exhibit.  
3 The landscape diagram demonstrates the required interior lot  
4 landscaping. HRMC 17.04.160.C requires no more.

5 The fourth assignment of error is denied.

6 **FIFTH ASSIGNMENT OF ERROR (PETITIONER)**

7 Petitioner contends that there is not substantial  
8 evidence in the record to support the county's conclusion of  
9 compliance with HRMC 17.04.170.A.1, which requires a minimum  
10 of 10 feet in width of perimeter landscaping.

11 HRMC 17.04.170.A.1 requires:

12 "[An] average ten (10) foot wide landscaped area,  
13 at minimum, shall be planted along the perimeter  
14 of the parcel fronting the street right-of-way as  
15 part of the landscape requirement." (Emphasis  
16 added.)

17 Petitioner states "[t]here is no evidence that there is an  
18 average ten foot wide landscape area, at minimum, along the  
19 perimeter of the parcel fronting the street right-of-way of  
20 all three sides." Petition for Review 12. The crux of  
21 petitioner's argument is that the decision addresses only  
22 landscaping on Second Street and does not address  
23 landscaping on two other perimeter rights-of-way.

24 The challenged decision states:

25 "The applicant's landscape architect testified  
26 that the landscaping plan in the record shows that  
27 the average width of landscape plantings along the  
28 perimeter of the property fronting the 2nd Street  
29 right-of-way is 17 feet." Record 9. (Emphasis  
30 added.)

1           The city's decision does not clearly establish which  
2 streets border the property. However, intervenor explains  
3 that the January 25, 1996 staff report to the planning  
4 commission identified Second Street as bordering the  
5 property on three sides (Record 106 and 123), and concludes:

6           "Thus, the city's finding that the average width  
7 of landscaping along 2nd Street exceeded the  
8 minimum average of 10 feet [\* \* \*] encompasses the  
9 rights-of-way on three sides of the property. \* \*  
10 \* The petitioner fails to challenge the city's  
11 conclusion that it is 2nd Street that borders the  
12 site on three sides \* \* \*." Intervenor's Brief  
13 18.

14 Intervenor explains that because Second Street is the  
15 perimeter right-of-way on the three sides, and the decision  
16 finds that landscaping is sufficient for the perimeter on  
17 Second Street, the decision is supported by substantial  
18 evidence.

19           We agree with intervenor that there is substantial  
20 evidence in the record to support the city's determination  
21 that the requirements of HRMC 17.04.170.A.1 are met.

22           The fifth assignment of error is denied.

23 **SIXTH ASSIGNMENT OF ERROR (PETITIONER)**

24           Petitioner argues "[t]here is not substantial evidence  
25 to support the finding that the proposed station will have  
26 no greater adverse impact than would an outright permitted  
27 light industrial use." Petition for Review 12.

28           The challenged decision includes a four-page discussion  
29 of the HRMC 17.06.010.B conditional use standard that

1 requires:

2 "Taking into account location, size, design, and  
3 operation characteristics, the proposal will have  
4 a minimal adverse impact on the:

5 "a. Livability;

6 "b. Value, and

7 "c. Appropriate development of abutting  
8 properties and the surrounding area compared  
9 to the impact of development that is  
10 permitted outright."

11 Intervenor's responds:

12 "It is clear from the plain language of this  
13 provisions that no comparison between impacts of  
14 proposed development and that of development  
15 permitted outright need be made for either  
16 livability or value> The comparison is limited to  
17 [paragraph] 'c. Appropriate development of  
18 abutting properties \* \* \*.' Thus, petitioner's  
19 arguments about adequacy of transportation  
20 services '24-hour use, signage, noise, and site  
21 design,' \* \* \* are all irrelevant." Intervenor's  
22 Brief 19-20.

23 The findings state, in pertinent part:

24 "The Council concludes there will be no greater  
25 adverse impact on the livability of abutting  
26 properties and the surrounding area from this  
27 development than is permitted outright. \* \* \*

28 "\* \* \* \* \*

29 "The Council concludes there will be no greater  
30 adverse impact on the value of abutting properties  
31 and the surrounding area from this development  
32 than is permitted outright. There will be no  
33 inflation of values of abutting properties or the  
34 surrounding area due to the commercial use of this  
35 property. This property has been devoted to a  
36 similar commercial use since 1965.

37 "The Council also concludes there will be no

1 greater adverse impact on the appropriate  
2 development of abutting properties and the  
3 surrounding area from this development than is  
4 permitted outright. \* \* \*

5 "The Council concludes that, taking into account  
6 location, size, design, and operation  
7 characteristics, the proposed service station and  
8 convenience store will have a minimal adverse  
9 impact on the livability, value, and appropriate  
10 development of abutting properties and the  
11 surrounding area compared to the impact of  
12 development that is permitted outright in the LI  
13 zone." Record 13-14. (Emphasis added.)

14 Petitioner's argument is generic in nature and we are  
15 not certain which of these findings petitioner alleges is  
16 not supported by substantial evidence. In any event,  
17 petitioner only clarifies his argument by alleging that  
18 there is insufficient evidentiary support for statements in  
19 the application and that "there is no evidence on the issues  
20 of 24-hour use, signage, noise, and site design. \* \* \* There  
21 is simply no evidence in the record to back up the city's  
22 findings." Petition for Review 13-14.

23 Intervenor points to evidence, throughout the record  
24 that indicates that because the earlier service station  
25 produced no negative affect on the area this proposal will  
26 not either, particularly considering the improvements  
27 proposed over the earlier service station, such as  
28 landscaping. See Record 22, 40, 84, 136. Taken together,  
29 this evidence is substantial evidence of compliance with  
30 HRMC 17.06.010.B.2. Additionally, the findings set forth a  
31 well-reasoned discussion of petitioner's objections as they

1 relate to HRMC 17.06.010.B.2 and as addressed by the  
2 evidence.

3 The sixth assignment of error is denied.

4 **INTERVENOR'S CROSS-PETITION**

5 Intervenor filed a cross-petition for review, stating:

6 "Intervenor seeks this relief if, and only if,  
7 this Board should determine that the respondent  
8 erred in approving the applicant's conditional use  
9 permit." Intervenor's Cross-petition 1.

10 Because we affirm the city's decision, we do not decide  
11 the arguments raised in intervenor's cross-petition.

12 The city's decision is affirmed.