



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city planning  
4 commission approving a conditional use permit for the  
5 operation of a recovery house in the city's Suburban  
6 Residential (RA) zone.<sup>1</sup>

7 **FACTS**

8 On July 15, 1996, petitioner filed an application for a  
9 conditional use permit in order to maintain a single family  
10 dwelling as a home for 16 unrelated men recovering from  
11 alcohol and drug addiction. The preliminary staff notes in  
12 connection with the application state:

13 "The subject property is zoned RA Suburban  
14 Residential. Recovery House VI has been operating  
15 on the subject site for approximately nine months.  
16 The subject of whether or not a recovery house  
17 operation is [a] permitted or conditionally  
18 permitted use in the RA and R-1 zoning district  
19 was previously decided by the Eugene Hearings  
20 Official as well as the United State[s] District  
21 Court (Recovery House 4 vs. the City of Eugene).  
22 The Eugene Hearings Official stated that the use  
23 of the property as a recovery house requires a  
24 conditional use approval based on Section 9.492 of  
25 the Eugene Code, which states:

26 "Where a use is not authorized, or  
27 where ambiguity exists concerning the  
28 appropriate classification or procedure  
29 for the establishment of a particular  
30 use or type of development within the

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<sup>1</sup>Petitioner's notice of intent to appeal states that petitioner appeals the denial of a conditional use permit. Record 1. However, the decision clearly allows the conditional use permit subject to conditions.

1 meaning and intent of this ordinance,  
2 said use or type of development may be  
3 established by Conditional Use Permit in  
4 accordance with the provisions of  
5 sections 9.696 to 9.722, until such time  
6 as this ordinance is amended.'

7 "In a subsequent court case, the summary judgment  
8 by Judge Hogan of the United States District Court  
9 for the District of Oregon ruled that the Fair  
10 Housing Act did not exempt a Recovery House from  
11 being reviewed under the special use provisions of  
12 local government. Thus, a conditional use permit  
13 was subsequently submitted." Record 268.

14 After a public hearing, the city hearings official  
15 denied the permit. Petitioner appealed the denial to the  
16 city planning commission. Petitioner asked that the  
17 planning commission either reverse the hearings official's  
18 decision or "in the alternative, issue a decision that  
19 indicates a conditional use permit is not required for the  
20 use presently being conducted \* \* \* at the Subject  
21 Property." Record 132. The planning commission concluded  
22 that the hearings official did not err in finding a  
23 conditional use permit to be required. Record 14. It  
24 approved the permit subject to conditions that are  
25 unacceptable to petitioner.

26 This appeal followed.

27 **DISCUSSION**

28 Petitioner contends the city has no authority to  
29 require it to obtain a conditional use permit because, under  
30 the Eugene Code (EC), the proposed use is permitted as of  
31 right in the RA zone. The city responds that no evidence in

1 the record supports petitioner's contention that the city  
2 required it to apply for a conditional use permit. The city  
3 argues:

4 "Petitioner's application for, and receipt of, the  
5 CUP \* \* \* makes the issue raised moot. The  
6 question of whether the City had the authority to  
7 take enforcement action, requiring petitioner to  
8 apply for and obtain a CUP, is not justiciable in  
9 this proceeding. The City gave petitioner what it  
10 asked for -- the CUP. Any LUBA decision as to  
11 whether the alleged 'requirement' was proper would  
12 be purely advisory. LUBA has no jurisdiction to  
13 render advisory opinions. Brugh v. Coos County,  
14 31 Or LUBA 158 (1996). Petitioner applied for and  
15 has received the CUP without the City taking the  
16 enforcement action that petitioner allegedly  
17 feared." Response Brief 3-4.

18 The city urges us to dismiss this appeal for lack of  
19 jurisdiction.

20 Petitioner contended at oral argument that the city's  
21 motion to dismiss is untimely because it was not filed  
22 within 10 days of the date the city received petitioner's  
23 notice of intent to appeal to LUBA. Petitioner relied on  
24 our rule addressing motions, which states, in relevant part:

25 "Time of Filing: A party seeking to challenge the  
26 failure of an opposing party to comply with any of  
27 the requirements of statutes or Board rules shall  
28 make the challenge by motion filed with the Board  
29 and served on the adverse party within 10 days  
30 after the moving party obtains knowledge of such  
31 alleged failure. \* \* \*." OAR 661-10-065(2).

32 A challenge to our jurisdiction may be brought at any  
33 time and is not subject to the ten-day requirement of  
34 OAR 661-10-065(2). See Elliott v. Lane County, 18 Or LUBA

1 871, 874 (1990).

2 We believe the record supports the conclusion that  
3 petitioner's decision to apply for a conditional use permit  
4 was prompted by earlier actions of the city in connection  
5 with either this application or a similar application.  
6 However, petitioner did not follow a formal procedure to  
7 obtain an interpretation that no conditional use was  
8 required. Cf. Medford Assembly of God v. City of Medford,  
9 297 Or 138, 681 P2d 790 (1984) (a formal determination, even  
10 though only declaratory, that a conditional use permit is  
11 required is a land use decision). See also General Growth  
12 v. City of Salem, 16 Or LUBA 447 (1988) (where city's  
13 decision was not rendered pursuant to a code declaratory  
14 ruling procedure, it is not reviewable by LUBA under Medford  
15 Assembly of God).<sup>2</sup> Petitioner instead applied for a  
16 conditional use permit. We agree with the city that by  
17 complying with the city's demand that it file an application  
18 for a conditional use permit in order to continue its  
19 operation, petitioner accepted the validity of that demand,  
20 at least for the purposes of the proceeding on its  
21 application. Because it cannot be presented to us in an  
22 appeal of the conditional use permit that petitioner applied  
23 for and that the city actually granted, we express no

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<sup>2</sup>Neither party contends that the EC permits formal requests for code interpretations comparable to the declaratory procedure that was the subject of Medford Assembly of God.

1 opinion on the question of whether the city properly  
2 determined that a conditional use permit was required in the  
3 first place.<sup>3</sup>

4 Although we have no jurisdiction over the decision  
5 petitioner attacks in his assignment of error, we do not  
6 dismiss for lack of jurisdiction, because we do have  
7 jurisdiction over the decision petitioner ostensibly  
8 appeals. That decision grants a conditional use permit  
9 subject to conditions. Since petitioner does not assign  
10 error to any aspect of that decision, however, other than  
11 the portion that concludes a conditional use is required,  
12 petitioner states no basis for reversal or remand.

13 The city's decision is affirmed.

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<sup>3</sup>That determination could be made in a circuit court enforcement proceeding. See Marson v. Clackamas County, 128 Or App 18, 874 P2d 110 (1994).