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

BUCKMAN COMMUNITY ASS'N, LISA )  
LONG, SUSAN LINDSAY, TOM HALLMAN, )  
ANDREW EISMAN, AND MARK WELLS, )

Petitioners, )

vs. )

CITY OF PORTLAND, )

Respondent, )

and )

OUT FRONT HOUSE, INC., )

Intervenor-Respondent. )

LUBA Nos. 98-128 and 98-144

FINAL OPINION  
AND ORDER

Appeal from City of Portland.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns, PC.

Peter A. Kasting, Senior Deputy City Attorney, Portland, filed a response brief. Frank Hudson, Deputy City Attorney, argued on behalf of respondent.

J. Richard Forester, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Grenley Rotenberg Evans Briggs and Brodie, PC.

BRIGGS, Board Member; HOLSTUN, Board Chair, participated in the decision.

AFFIRMED 09/10/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioners appeal administrative use determinations which found that certain  
4 residential youth treatment facilities are permitted outright in the single-family residential  
5 zone.

6 **MOTION TO INTERVENE**

7 Out Front House, Inc. (OFH) filed a motion to intervene on the side of respondent.  
8 There is no objection to the motion and it is allowed.

9 **FACTS**

10 OFH requested two use determinations from the City of Portland (city) Bureau of  
11 Planning for property OFH controls in southeast Portland. The first request (LUBA No. 98-  
12 144) involves an existing adolescent residential care facility, which has operated within a  
13 dwelling on SE 18<sup>th</sup> Avenue (18<sup>th</sup> Avenue facility), subject to a conditional use permit, since  
14 1976. The property is zoned R-2.5. OFH proposes to change the focus of the facility,  
15 increasing the number of youths residing in the home from nine to ten, and providing more  
16 intensive treatment options for them. The residents, both boys and girls, range in age from  
17 13 to 17 years of age, and have been placed in the facility by a court because of dependency,  
18 delinquency, abuse, or because they cannot remain in their parents' homes or their previous  
19 out-of-home placement. The Oregon Youth Authority is the legal guardian of the children  
20 and, by contract, grants custody of its wards to OFH for residential treatment. The contract  
21 requires comprehensive treatment for youth that have a history of substance and behavioral  
22 problems. Most of the counseling and treatment services would be conducted off-site.

23 OFH's request states that the residents, as described, fall under the definition of  
24 "household" as provided for in the Portland City Code (PCC) and "handicapped persons"  
25 under the federal Fair Housing Act Amendments of 1988 (FHAA) and, therefore, the

1 dwelling is a permitted use in the R-2.5 zone.<sup>1</sup>

2 The second request (LUBA No. 98-128) involves a proposed intensive residential  
3 treatment facility, to be located within a dwelling on SE Morrison Avenue (Morrison Avenue  
4 facility). The dwelling is also located in the R-2.5 zone. Up to twelve youths would be  
5 housed at the Morrison Avenue facility, ranging in age from 14 to 19 years of age. No more  
6 than five youths residing at the facility at any one time would be older than 18. Intensive  
7 counseling, independent skill development, vocational training and recreation activities  
8 would be offered on-site. Residents would be enrolled as full-time students at Portland  
9 Community College, and would be transported there by staff. Like the 18<sup>th</sup> Avenue facility,  
10 the youths are placed at the Morrison Avenue facility by a court because of dependency,  
11 delinquency, abuse, or because they cannot remain in their parents' homes or their previous  
12 out-of-home placements. Unlike the 18<sup>th</sup> Avenue facility, the focus of the Morrison Avenue  
13 facility is on the rehabilitation of African-American males.

14 The city's principal planner determined that the activities as described in the two  
15 requests constituted "households" located within dwellings and, as such, constitute  
16 "household living" which is a permitted use in the R-2.5 zone. Petitioners, who submitted  
17 unsolicited letters in opposition to the use determination, appealed the planner's decisions to  
18 LUBA.

## 19 INTRODUCTION

20 In their first assignment of error, petitioners argue that the principle planner failed to  
21 correctly interpret and apply certain PCC provisions that would have led her to conclude that  
22 the disputed facilities constitute group living. In their second assignment of error, petitioners  
23 advance essentially two arguments. First, that the planner erroneously interpreted and  
24 applied the PCC and FHAA in concluding that the disputed facilities constitute "household

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<sup>1</sup>As discussed later in this opinion, whether the residents are a "household" or "handicapped" has a bearing on whether the dwelling qualifies as "household living," which is allowed outright in the R-2.5 zone.

1 living." Second, petitioners argue that the challenged use determination involved the  
2 exercise of discretion and therefore required that the city follow statutory notice and hearing  
3 procedures that the city did not follow. We address petitioners' procedural arguments first.  
4 Substantive arguments are addressed separately.

## 5 **PROCEDURAL ARGUMENTS**

6 Pursuant to ORS 227.160(2)(b)<sup>2</sup>, the city determines the appropriate zoning  
7 classification for a particular use by applying criteria or performance standards defining the  
8 uses permitted within the zone. Respondent has not adopted specific local procedures to  
9 implement ORS 227.160. Instead, it applies ORS 227.160(2)(b) directly and complies with  
10 ORS 227.175(11), which establishes certain procedures for making and reviewing use  
11 determinations. North Portland Citizens v. City of Portland, 32 Or LUBA 70, 73 (1996),  
12 aff'd 145 Or App 548, 930 P2d 902, rev den 325 Or 247 (1997).

13 Petitioners argue that the use determination process used by the planner to decide that  
14 the uses proposed by OFH constitute "household living" involves more discretion than is  
15 permitted by the statute. Therefore, according to petitioners, the proper procedure is to  
16 provide either notice of the decision and an opportunity for a local appeal, or to render a  
17 decision after a hearing has been provided. ORS 227.175(3). Petitioners' argument assumes  
18 the challenged decisions are "permits," as that term is defined by ORS 227.160(2).

19 Respondent argues that, no matter how much discretion or policy judgment is  
20 involved in a use determination under ORS 227.160(2)(b), it is not a "permit" within the  
21 meaning of the statute. Respondent emphasizes that the use determination is limited to the

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<sup>2</sup>ORS 227.160(2) defines "permit" as "discretionary approval of a proposed development of land, under \* \*  
\* city legislation or regulation." ORS 227.160(2)(b) specifically excludes the following from the statutory  
definition of "permit":

"A decision which determines the appropriate zoning classification for a particular use by  
applying criteria or performance standards defining the uses permitted within the zone, and  
the determination applies only to land within an urban growth boundary[.]"

1 particular facts submitted, and does not, by itself, authorize a use or establish an alternative  
2 permitting process. Rather, respondent characterizes the use determination as the city's  
3 mechanism to provide a more formal response to an inquiry as to whether a particular use is  
4 allowed within a particular zoning district.

5 In 1991, the legislature adopted the provisions codified at ORS 227.160(2)(b). The  
6 effect of the statute was to overrule a line of cases that held that making a decision about  
7 whether a use is allowed in a particular zone may constitute a "permit," within the meaning  
8 of ORS 227.160(2), if the decision involves the exercise of discretion. See Flowers v.  
9 Klamath County, 98 Or App 384, 392, 780 P2d 227 (1989) (decision classifying a medical  
10 waste incinerator as a scrap operation). The legislation is clear on its face. PGE v. Bureau of  
11 Labor and Industries, 317 Or LUBA 606, 611, 859 P2d 1143 (1993). The exemption  
12 provided in ORS 227.160(2) does not depend on the decision being non-discretionary.  
13 Indeed, it is the discretionary nature of some use determinations that makes the exemption  
14 necessary in the first place. Even if the statute were ambiguous, the city cites legislative  
15 history that is clearly contrary to petitioners' position. Except for their arguments that the  
16 statutes do not apply here, petitioners do not challenge the city's compliance with either ORS  
17 227.160(2)(b) or ORS 227.175(11).

18 Subassignments of error B and D of the second assignment of error are denied.

19 **FIRST ASSIGNMENT OF ERROR**

20 At the outset, we address the differing descriptions of the proposed activities  
21 presented by the parties. Petitioners describe OFH as the operator of "halfway houses" for  
22 juveniles, where youths who otherwise would be incarcerated, or are currently on probation,  
23 live and receive rehabilitative treatment. Intervenor describes the activities as providing  
24 "adolescent residential care" in the case of the 18<sup>th</sup> Avenue facility, and establishing an  
25 "intensive residential treatment living facility" in the case of the Morrison Avenue facility.

1 Rather than adopt one or the other of the parties' descriptions, we refer to the names of the  
2 two sites and describe the particular activities when we discuss the assignments of error.

3 **A. Definition of "Group Living"**

4 Petitioners argue that a plain reading of PCC 33.920.100<sup>3</sup> and PCC 33.920.520(D)<sup>4</sup>

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<sup>3</sup>PCC 33.920.100 describes the "Group Living" use category as follows:

"**A. Characteristics.** Group Living is characterized by the residential occupancy of a structure by a group of people who do not meet the definition of Household Living. The size of the group will be larger than the average size of a household. Tenancy is arranged on a month-to-month basis, or for a longer period. \* \* \* The residents may or may not receive any combination of care, training, or treatment, as long as they also reside at the site. Group living may also include the State definition of residential facility. \* \* \* (Emphasis added.)

"\* \* \* \* \*

"**C. Examples.** Examples include \* \* \* some group homes for the physically disabled, mentally retarded, or emotionally disturbed; some residential programs for drug and alcohol treatment; and alternative or post-incarceration facilities.

"**D. Exceptions.**

"\* \* \* \* \*

"2. Lodging where the residents meet the definition of Household, and where tenancy is arranged on a month-to-month basis, or for a longer period is classified as Household Living.

"3. Facilities for people who are under judicial detainment and are under the supervision of sworn officers are included in the Detention Facilities category."

<sup>4</sup>PCC 33.920.520 "Detention Facilities" provides, in relevant part:

"**A. Characteristics.** Detention facilities includes facilities for the judicially required detention or incarceration of people. Inmates and detainees are under 24 hour supervision by sworn officers, except when on an approved leave.

"\* \* \* \* \*

"**D. Exceptions.** Programs that provide care and training or treatment for psychiatric, alcohol, or drug problems, where patients are residents of the program, but where patients are not supervised by sworn officers are classified as Group Living. Programs that provide transitional living experience for former offenders, such as halfway houses, where residents are not supervised by sworn officers, are also classified as Group Living."

1 require a conclusion that the residential treatment facilities described in the two use  
2 determination requests are "group living" rather than "household living."<sup>5</sup> Petitioners argue  
3 that the characteristics of "group living" include larger than average households, and that  
4 examples of group living include "some residential programs for drug and alcohol treatment;  
5 and alternative or post-incarceration facilities." PCC 33.920.100. "Alternative or post-  
6 incarceration facilities" are a subset of "group living," and are not permitted in residential  
7 zones.<sup>6</sup> Petitioners claim the activities described in the use determination requests are  
8 clearly more closely aligned with "group living." Petitioners also argue that, of the uses  
9 included in the "group living" category, the concept of "alternative or post-incarceration  
10 facilities" best matches OFH's activities.

11 Respondent argues that the planner reviewed the requests as presented. The assumed  
12 facts are that residents of the facilities will consist of (1) persons who share a common  
13 guardian, (2) persons who are "handicapped" as that term is defined in the FHAA, plus (3)  
14 not more than five others.<sup>7</sup> Based on the assumed facts and the undisputed fact that the

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<sup>5</sup>PCC 33.920.110 describes the "Household Living" use category as follows:

**A. Characteristics.** Household Living is characterized by the residential occupancy of a dwelling unit by a household. Tenancy is arranged on a month-to-month basis, or for a longer period. \* \* \* In addition, residential homes as defined by the State of Oregon are included in the Household Living category. \* \* \*" (Emphasis added.)

PCC 33.910.030 defines "Household" as follows:

"One or more persons related by blood, marriage, legal adoption or guardianship, plus not more than 5 additional persons, who live together in one dwelling unit; or one or more handicapped persons as defined in the Fair Housing Act Amendments of 1988, plus not more than 5 additional persons, who live together in one dwelling unit." (Emphasis added.)

<sup>6</sup>"Alternative or Post Incarceration Facility" is defined as a "Group Living use where the residents are on probation or parole." PCC 33.910.030

<sup>7</sup>FHAA, 42 USC § 3602(k) (1988), defines "handicap" as:

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such impairment, or (3) being regarded as having such impairment, but such term does not include current, illegal use of or addiction to a controlled substance."

1 persons would reside in a dwelling, respondent argues that the planner correctly determined  
2 that the described use constitutes "household living," which is allowed in single-family  
3 residential zones. See n 5. This analysis, respondent argues, is supported by the first phrase  
4 of the definition of "group living," which excludes those uses defined as "household living"  
5 from the "group living" category. Intervenor argues that the planner's interpretation is  
6 consistent with, and required by, the FHAA. Intervenor contends that had the city adopted  
7 the petitioners' position, the determinations would have violated the clear mandate of the  
8 FHAA to prevent discrimination on the basis of handicap and/or familial status.

9 We agree with the city that, based on the facts presented to the planner, she correctly  
10 determined that whether a use constitutes "group living" under PCC 33.920.100(A) requires  
11 a threshold determination of whether the use constitutes "household living." See n 3. In this  
12 case, the planner first had to determine whether the proposed uses of the Morrison Avenue  
13 and 18<sup>th</sup> Avenue facilities constitute "household living." If they do, notwithstanding the  
14 description in PCC 33.920.100 of what "group living" entails, they are not "group living." It  
15 also follows, that if the planner correctly determined that the proposed uses constitute  
16 "household living," she need not have also considered whether the proposed activities are  
17 "group living uses which consist of alternative or post-incarceration facilities."

18 Subassignments of error A and B under the first assignment of error are denied.

19 **B. Prior interpretations**

20 Petitioners argue that the planner's determinations that the proposed uses constitute  
21 "household living" are in direct contrast to previous determinations that the uses as described  
22 are "group living." Petitioners cite to the 1976 conditional use permit that permitted the  
23 Morrison Avenue facility in the first instance, and to a comment made by a city hearings  
24 officer to the effect that the change in interpretation should be subject to notice and a hearing  
25 process as proof positive that the uses as described require more process than that provided  
26 by a use determination. Petitioners also rely on Holland v. City of Cannon Beach, 154 Or

1 App 450, 962 P2d 701 (1998) for the proposition that, when the city determined in 1976 that  
2 the proposed use required a conditional use permit, it could not later change its view of the  
3 activity to permit it outright as "household living." In addition, petitioners argue that the  
4 planner's determination is not subject to deference. Gage v. City of Portland, 319 Or 308,  
5 877 P2d 1187 (1994). Petitioners argue that LUBA should remand the city's decisions  
6 because the interpretation is not "reasonable and correct." McCoy v. Linn County, 90 Or  
7 App 271, 752 P2d 323 (1988).

8 Respondent argues that petitioners' reasoning fails because OFH's 1976 application  
9 was made under different provisions than those currently in effect. Amendments to the city  
10 code in 1992 changed the definition of "household" and "group living" to comply with  
11 FHAA provisions, which were themselves enacted in 1988. The amendments  
12 correspondingly changed how the city approached the characterization of the activities in the  
13 use determinations. The city argues that it took the changing view of "household" into  
14 consideration when it determined that the proposed activities comprise "household living."

15 LUBA has stated in the past that there may be circumstances where a change in long  
16 standing interpretations may require notice and an opportunity for comment. Wicks v. City  
17 of Reedsport, 29 Or LUBA 8, 19 (1995); Heceta Water District v. Lane County, 24 Or  
18 LUBA 402, 419 (1993). In both of those cases, we determined that the petitioners were not  
19 entitled to an opportunity to submit evidence regarding an interpretation adopted for the first  
20 time in the local government's final decision, because the petitioners had failed to show that  
21 there was a clear and longstanding interpretation that was overruled by the subsequent  
22 interpretation. It is the same in this case. Petitioners have failed to show that the 1976  
23 determination that the Morrison Avenue facility was "group living" was the result of an  
24 established interpretation of that phrase.

25 Similarly, petitioners' reliance on Holland is misplaced. In Holland, the court's  
26 concern was with changing interpretations of applicable standards during the review of one

1 application. In that case, it was apparent that the city interpreted its code to apply only to the  
2 applicant, when others similarly situated were not subject to the restriction imposed by the  
3 interpretation. In the present case, the city is determining how the two uses, as described,  
4 should be categorized under the PCC. Petitioners have not shown that other, similarly  
5 situated applicants have been treated differently in the past.

6 We will address whether the planner's conclusion that the proposed use is "household  
7 living" is reasonable and correct in our discussion of her consideration of the terms  
8 "guardian" and "handicapped" below.

9 Subassignment D of the first assignment of error is denied, in part.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 We now turn to petitioners' challenge to the planner's consideration of the words  
12 "guardian," "guardianship" and "handicapped." PCC 33.910.030 defines "Household" as:

13 "One or more persons related by blood, marriage, legal adoption or  
14 guardianship, plus not more than 5 additional persons, who live together in  
15 one dwelling unit; or one or more handicapped persons as defined in the Fair  
16 Housing Act Amendments of 1988, plus not more than 5 additional persons,  
17 who live together in one dwelling unit." (Emphasis added.)

18 The planner determined that the residents of both the 18<sup>th</sup> Avenue facility and the  
19 Morrison Avenue facility are under the legal guardianship of the Oregon Youth Authority  
20 which, in turn, has transferred custody of the children to OFH. The planner concluded that  
21 the relationship that the state has as legal guardian is sufficient to establish a familial  
22 relationship between the residents of the dwellings and, therefore, the residents constitute a  
23 "household." In the alternative, the planner determined that the residents were a "household"  
24 because a majority, if not all, of the residents are "handicapped," as that term is defined in the  
25 FHAA. See n 7.

26 The planner, in reviewing the use determination requests, was provided the following  
27 statements:

1 [1. Regarding the 18<sup>th</sup> Avenue facility]—"The Oregon Youth Authority has  
2 legal guardianship over the children, and by written contract it grants custody  
3 of its wards to [OFH] for residential treatment purposes." Record 2 (LUBA  
4 No. 98-144).

5 "Up to 10 'handicapped persons' as defined in the [FHAA], plus no more than  
6 5 additional others, will live at the house for residential treatment purposes."  
7 Record 4 (LUBA No. 98-144).

8 [2. Regarding the Morrison Avenue facility]—"The adolescents will be under  
9 the guardianship of [OFH] through their contract with the Oregon Youth  
10 Authority, a state agency. Nor more than 5 persons residing in this house will  
11 be 18 years of age or older. Youth placed in this house are under the care and  
12 physical custody of [OFH]." Record 12 (LUBA No. 98-128).

13 "Up to 12 'handicapped persons' as defined in the [FHAA], plus no more than  
14 5 additional others, will live at the house for residential treatment purposes."  
15 Record 14 (LUBA No. 98-128).

16 **A. "Guardian" and "Guardianship"**

17 The PCC does not define "guardian" or "guardianship." When the PCC does not  
18 define a particular term, PCC 33.700.070.D.1 provides that "words have their dictionary  
19 meaning." The dictionary used by the planner did not have a separate definition for  
20 "guardianship," so she derived the term's meaning from the definition of the word "guardian"  
21 in the Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> edition—"One that guards: custodian:  
22 one who has the care of a person or property of another." Petitioners argue that the selection  
23 of this particular definition from this particular dictionary is arbitrary and capricious, as there  
24 are many other dictionaries and other definitions of the term. In the alternative, petitioners  
25 argue that the planner's interpretation is broader than the context allows, because the  
26 definition of "household" is limited to those persons related by "blood, marriage, legal  
27 adoption or guardianship." Petitioners claim that the planner's interpretation could result in a  
28 determination that all of the persons under the custody of the state, in whatever capacity,  
29 could be housed in the R-2.5 zone.

30 Respondent and intervenor argue that there is nothing in the code that prescribes a  
31 particular dictionary definition, and that the discretion allowed the planner through the use

1 determination process permitted her to use whatever reasonable definition is available.  
2 Intervenor also argues that the definition of "familial status" as found in the FHAA, as it has  
3 been interpreted by the courts has a direct bearing on the planner's decision, and in fact,  
4 requires a determination that the word "guardian" includes the situation described in the use  
5 determinations.<sup>8</sup>

6 We review the planner's decision to determine whether it is reasonable and correct.  
7 McCoy, 90 Or App at 274-76. In doing so, we must attempt to give effect to the city  
8 council's intent when it adopted the particular provision. In the first level of analysis, the text  
9 of the ordinance provision itself is the starting point for interpretation and is the best  
10 evidence of legislative intent. In trying to ascertain the meaning, LUBA considers rules of  
11 construction of the statutory text that bear directly on how to read the text. Words of  
12 common usage typically should be given their plain, natural, and ordinary meaning. LUBA  
13 also considers the context of the statutory provision at issue, which includes other provisions  
14 of the same statute or other, related statutes. PGE, 317 Or at 610-11.

15 Considered in context, guardianship is simply one of four ways to establish a  
16 "household" "relationship" under the first clause of PCC 33.910.030. Just as blood, marriage  
17 and legal adoption establish a legal relationship that provides a basis under the PCC to have a  
18 "household," guardianship establishes such a legal relationship. Here, both the Oregon  
19 Youth Authority and OFH clearly fall within the literal terms of the dictionary definition of  
20 "guardian" selected by the planner.<sup>9</sup> Petitioners concede that the Oregon Youth Authority is

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<sup>8</sup>Because the planner's decisions are not based on the FHAA definition of "familial status," we need not, and do not, address this aspect of intervenor's argument.

<sup>9</sup>We do not agree with petitioners' suggestion that the dictionary definition selected by the planner is unusually expansive. Webster's Third New International Dictionary (unabridged ed 1981) 1007 includes the following definition of "guardian:"

"[O]ne that guards or secures: one to whom a person or thing is committed for protection, security, or preservation[.]"

1 the legal guardian, and OFH falls within the dictionary definition selected by the planner  
2 because it has legal "custody." The only real question is whether a narrower interpretation of  
3 guardian is required for some reason.

4 Petitioners' strongest argument is that, without a narrower interpretation of  
5 guardianship in PCC 33.910.030, a number of facilities that would otherwise be regulated as  
6 "Group Living" or a "Alternate or Post Incarceration Facility" will not fall within the PCC  
7 definitions of those kinds of facilities and will escape the regulatory restrictions that would  
8 otherwise apply. The question is whether, viewed in this context, the planner's interpretation  
9 is too broad. Although petitioners' contextual argument may lend some support to their  
10 position, it certainly does not compel a more circumscribed interpretation of guardianship  
11 than the one adopted by the planner. In support of the planner's interpretation of the term  
12 "guardianship" in this context, the city points out, that the current definition of household at  
13 PCC 33.910.030 was adopted to avoid potential conflict with the FHAA. The ordinance that  
14 adopted those changes and documents explaining the intent of that ordinance are attached to  
15 city's brief and make it clear that the incorporation of the provisions for handicapped persons  
16 into PCC 33.910.030 was intended to broaden the "household" concept to avoid possible  
17 conflict with the FHAA. This lends at least some support to the city's position that selecting  
18 an applying a broad dictionary definition of "guardianship" is not inconsistent with the city's  
19 overall intent in adopting amendments to PCC 33.910.030.

20 While the question is a close one, we conclude the planner's interpretation of  
21 "guardianship" is reasonable and correct.

22 Subassignment A of the second assignment of error is denied.

23 **B. "Handicapped"**

24 Petitioners argue that the planner reached the wrong result in deciding that the  
25 residents of the facilities described are "handicapped," because applications for youth

1 treatment facilities, like the ones described in the use determinations, may be subject to  
2 facially neutral review and approval procedures without running afoul of the FHAA.

3 Respondent argues that the planner did not make an independent factual inquiry into  
4 the status of particular residents; instead, she relied upon the facts presented to her by the  
5 applicant. The assumed facts are that the residents are, "handicapped" as that term is defined  
6 in the FHAA.

7 Petitioners argue that the planner erroneously determined that the disputed facilities  
8 qualify as a "household" within the meaning of PCC 33.910.030, based on the handicapped  
9 status of the residents. However, petitioners' arguments are based on the erroneous  
10 assumption that the planner independently determined that the residents of the two disputed  
11 facilities are in fact "handicapped," as that term is defined by the FHAA. We agree with the  
12 respondent that the planner's determination was based entirely on the applicant's  
13 representation that most of the residents of the facilities would be "handicapped" pursuant  
14 the to FHAA definition. If the applicant's representation is taken at face value, as the planner  
15 apparently did, her conclusion is legally correct.

16 Subassignment C of the second assignment of error is denied.

17 **ESTABLISHMENT OF A CITIZENS ADVISORY COMMITTEE**

18 ORS 169.690(1) requires that before a public agency establishes a "halfway house,"  
19 that the public agency must designate a citizens advisory committee in the proposed affected  
20 geographic area.

21 ORS chapter 169 concerns the activities of penal institutions operated by a  
22 government or other public agency. Petitioners have not shown that it is the city that is  
23 operating the penal institution such that it would be responsible for establishing such a  
24 citizens advisory committee, nor have petitioners shown that the use determinations  
25 themselves are the equivalent of establishing a halfway house, as provided for in the statute.

1 Finally, petitioners have not shown that a requirement for the establishment of a citizens  
2 advisory committee by a public agency (here, OFH) results in a particular review process by  
3 the city in making its use determinations.

4 Subassignment C of the first assignment of error is denied.

5 The first and second assignments of error are denied.

6 The city's decisions are affirmed.