



1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's denial of a site design  
4 review application.

5 **FACTS**

6 Petitioner operates what he describes as an "industrial  
7 storage yard" of "uses permitted outright in the city's  
8 light industrial zone."<sup>1</sup> Petition for Review 3.

9 In December, 1994, the city granted petitioner a  
10 business license for an "industrial storage" business on the  
11 property. Shortly thereafter, the city issued petitioner  
12 building permits for construction of a fence and placement  
13 of fill on the property. Petitioner then filled the site,  
14 erected the fence, and commenced his business.

15 In August, 1995, the city informed petitioner by letter  
16 that his land use was subject to site design review. The  
17 letter states, in relevant part,

18 "The purpose of this letter is just a reminder.  
19 Before anyone can use land inside the City Limits  
20 they must comply with the ordinances. I have  
21 noticed that you appear to be erecting a fence on  
22 a property tentatively identified as Tax lot

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<sup>1</sup>Petitioner has declined to elaborate on the exact use or the types of industrial materials to be stored. In the petition for review he states "the intended uses are not to be hazardous, obnoxious, offensive or unsightly by reason of emission of odor, sound, vibration, radioactivity, electrical interference, glare, liquid or solid wastes, smoke or other air pollutants." Petition for Review 3. These intended restrictions correspond verbatim to the list of restrictions to industrial uses permitted in the city's industrial zone, set forth in St. Helens Zoning Ordinance (SHZO) 2.140(2).

1 419121100. The fill and the fence can be  
2 accomplished with only a building permit, but  
3 parking, storing or any type of use of the land  
4 must meet the requirements of the zone in which  
5 the property is located. The property appears to  
6 be located in LI, Light Industrial zone per the  
7 City's Zoning Map.

8 "All 'permitted uses' must, at least, go through  
9 Site Design Review and all 'conditional uses' must  
10 additionally go through the conditional use  
11 permitting process. If you desire to use the  
12 property you should apply for the use with the  
13 applicable application and allow from five to  
14 twelve weeks for the process to be completed under  
15 normal circumstances." Record 31; 365.

16 Petitioner submitted a site design review application,  
17 under protest, on August 30, 1995. In the application,  
18 petitioner described the project as an "existing fenced  
19 storage yard" and added "property is already developed. No  
20 improvements are planned unless required by law." Record  
21 35. On September 1, 1995, the city informed petitioner his  
22 application was not complete because petitioner had not  
23 labeled drawings submitted with the application, had not  
24 included a landscaping plan, and had not adequately  
25 described the proposed use. With regard to the proposed  
26 use, the city's letter states:

27 "No explanation of the use has been fully set out  
28 in the application. The applicant needs to state  
29 what he intends to place for storage on the site,  
30 with a full description of the type of equipment,  
31 use of the equipment, actions on the property to  
32 place or remove the equipment, safety of the  
33 equipment, safety of the placing or removing the  
34 equipment, hazardous or non-hazardous nature of  
35 the equipment and whatever else is necessary to  
36 fully explain the use of the site." Record 38.

1 The applicant then labeled the drawings, but did not submit  
2 a landscaping plan and, in subsequent correspondence to the  
3 city, did not elaborate further on the intended uses of the  
4 property except to state:

5 "An explanation [of the intended use] was fully  
6 set out in the application. My use is industrial  
7 storage. Please read the city's zoning ordinance  
8 so that you can see the allowed items which are  
9 legal for storage in that zone. I wish to be  
10 allowed to store anything that is legal for  
11 storage in the zone which does not require any  
12 additional special permits. I do not wish to  
13 violate any laws, and need the use as liberal as  
14 possible. The staff report should reflect this  
15 request by listing as much as possible from the  
16 zoning ordinance. Actions on the property to  
17 place or remove storage items are by hand,  
18 forklift, truck, trailer, and other means  
19 necessary to function in a safe manner. Safety is  
20 always a prime concern to me in my endeavors."  
21 Record 45.

22 The city again informed petitioner that the application  
23 was not yet complete but, at the applicant's request, set  
24 the matter for hearing. The city planning commission held a  
25 hearing on the application on October 10, 1995. Upon  
26 questioning by commissioners during the public hearing,  
27 petitioner discussed drainage and landscaping issues;  
28 however, no drainage or landscaping plans were submitted.  
29 Petitioner did not elaborate further on the nature of the  
30 proposed use. At the close of the hearing, the  
31 commissioners recommended that the hearing be continued to  
32 allow petitioner to complete his application with a full  
33 description of the proposed use and the required landscaping

1 and drainage plans. Petitioner declined, stating "I'd  
2 prefer you make a decision now so that we can get on with  
3 the appeal process." Record 167. The Planning Commission  
4 then voted to deny the application and concluded in its  
5 findings, in part:

6 "The Planning Commission (sitting as the Site  
7 Design Review Board) concluded that they had to  
8 deny the proposal specifically for the following  
9 reasons:

10 "a. Uses were not clearly stated in the  
11 application.

12 "b. There was no drainage plan submitted.

13 "c. There was no landscaping plan submitted.

14 "d. There were errors found on the site plan.

15 "e. The Criteria for Evaluating Site Design  
16 Review Plans were not adequately addressed \*  
17 \* \* [.]"

18 The findings continue by listing the five areas for which  
19 the planning commission concluded the criteria for  
20 evaluation were not addressed, including crime prevention,  
21 pedestrian and vehicular circulation, surface drainage,  
22 landscaping and land use.

23 Upon petitioner's appeal, the city council conducted a  
24 hearing on the record. During that hearing, the city  
25 permitted discussion of the appeal by city officials, but  
26 did not permit additional testimony or argument by  
27 petitioner. At the close of the hearing, the city council  
28 upheld the planning commission's denial. This appeal

1 followed.

2 **FIRST ASSIGNMENT OF ERROR**

3 Petitioner contends the city failed to follow the  
4 applicable procedures in a manner that prejudiced  
5 petitioner's substantial rights when it refused to allow  
6 petitioner to present testimony to the council or rebut  
7 statements made by city officials at the appeal hearing.  
8 Petitioner argues the city council's conduct violated both  
9 ORS 197.763(7) and the city's code.

10 ORS 197.763(7) addresses the situation when a local  
11 record is reopened to admit new evidence.<sup>2</sup> While petitioner  
12 states he wished to have the record reopened, the record  
13 does not reflect that it was reopened. Because the record  
14 was not reopened, ORS 197.763(7) does not apply.

15 With regard to the alleged violation of the city's  
16 code, petitioner cites SHZO 5.020(8)(a), which states:

17 "The Planning Commission or City Council, in  
18 conducting [sic] which will result in a  
19 determination as to the permissible use of a  
20 specific property, are acting in an  
21 administrative, quasi judicial capacity, and all  
22 hearings are conducted accordingly. Interested  
23 parties are therefore entitled to an opportunity  
24 to be heard, to present and rebut evidence to an

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<sup>2</sup>ORS 197.763(7) states:

"When a local governing body, planning commission, hearings  
body or hearings officer reopens a record to admit new evidence  
or testimony, any person may raise new issues which relate to  
the new evidence, testimony or criteria for decision-making  
which apply to the matter at issue."

1 impartial court, to have the proceedings recorded  
2 and to have a decision based only on the evidence  
3 which is supported by findings of fact as a part  
4 of that record."

5 On the basis of that provision, petitioner argues he was  
6 denied his right to be heard before the city council.

7 However, while SHZO 5.020(8)(a) provides parties a  
8 right to be heard before the city council when it conducts  
9 an evidentiary hearing, that section does not mandate that  
10 the city council conduct evidentiary hearings. Rather, the  
11 city council has the discretion to conduct appeals from the  
12 planning commission on the record. As explained in SHZO  
13 5.020(3)(c):

14 "The City Council may hold an evidentiary or  
15 review hearing to consider such an appeal from a  
16 decision or ruling of the Planning Commission, and  
17 may affirm, reverse or modify such decision in  
18 whole or in part."

19 The city council acted in accordance with SHZO 5.020(3)(c)  
20 when it chose to conduct a review hearing on petitioner's  
21 appeal.

22 Petitioner also argues the city council's refusal to  
23 grant him his "right" to address the city council during the  
24 appeal hearing violated his substantial due process rights  
25 because the city council allowed the planning staff and city  
26 attorney to speak. According to petitioner, by not allowing  
27 petitioner to address comments made by staff during the  
28 appeal hearing, he was not allowed to bring contrary  
29 evidence to their attention, and "in adopting the decision

1 of its Planning Commission, the city council ignored  
2 relevant evidence in the record which the planning  
3 commission had also ignored." Petition for Review 8.

4 Petitioner does not allege, nor does the record  
5 indicate, that the comments petitioner wished to rebut  
6 during the appeal hearing constituted new evidence. Rather,  
7 the comments related to the staff and city attorney's  
8 analysis of the facts already in the record.

9 Petitioner's argument is essentially one of substantial  
10 evidence, which is not the subject of this assignment of  
11 error. If the city based its decision on misstatements or  
12 evidence not in the record, petitioner may have an argument  
13 that the decision is not based on substantial evidence.  
14 However, such purported misstatements do not give rise to a  
15 right by petitioner to rebut comments of the city attorney  
16 or planning staff during the city council's appeal hearing  
17 based on evidence already in the record. Linebarger v. City  
18 of the Dalles, 24 Or LUBA 91, 93 (1992) (city is free to  
19 seek advice from staff and city attorney in reaching a land  
20 use decision and is not required to provide parties an  
21 opportunity to rebut the substance of the staff advice).  
22 See Dickas v. City of Beaverton, 92 Or App 168, 172-73, 757  
23 P2d 451 (1988).

24 The first assignment of error is denied.

25 **SECOND ASSIGNMENT OF ERROR**

26 Petitioner contends the city misconstrued the



1 applicable law when it continued to process the site design  
2 review application after the city failed to render a  
3 decision within 36 days of the application date, as required  
4 by Ordinance 2252, § 10(2). According to petitioner, the  
5 application should have been deemed approved on the 36th day  
6 after the application was filed.

7 The city processed the application under SHZO  
8 5.020(12), which implements and mirrors state law  
9 requirements regarding time limits for applications set  
10 forth in ORS 227.178.

11 Ordinance 2252, § 10(2), adopted in 1978, states:

12 "The [site design review] board shall meet within  
13 30 days of any submission and shall announce its  
14 decision within five days of hearing the  
15 application, unless the matter is continued for  
16 action at a later meeting. Thirty-six days after  
17 a submission has been filed, if not extended with  
18 the consent of the applicant, and if the board has  
19 not reached a decision, the (submission) shall be  
20 treated as if approved."

21 SHZO 5.020(12), adopted in 1991, states:

22 "a. Final action on land use permits and zone  
23 changes authorized by this ordinance,  
24 including resolutions of appeals, shall be  
25 within 120 days after the application is  
26 deemed complete.

27 "b. If an application for a land use permit or  
28 zone change is deemed incomplete by the City,  
29 it shall notify the applicant of exactly what  
30 information is missing within 30 days of  
31 receipt of the application and allow the  
32 applicant to submit the missing information.  
33 The application shall be deemed complete upon  
34 the receipt of the missing information. If  
35 the applicant refuses to submit the missing

1 information, the application shall be deemed  
2 complete on the 31st day after receipt by the  
3 City. Approval or denial shall be based upon  
4 the application meeting the applicable  
5 criteria of this ordinance.

6 \* \* \* \* \*

7 "e. The 120 day time limit also does not apply to  
8 amendments to the city's Comprehensive Plan  
9 or legislative revisions to this ordinance or  
10 any other land use ordinance adopted by the  
11 City."

12 In the city's September 1, 1995 letter to petitioner,  
13 it recited the requirements of SHZO 5.020(12) to explain to  
14 petitioner that his application would be deemed complete for  
15 filing purposes when petitioner submitted the missing  
16 information. However, in petitioner's subsequent  
17 correspondence with the city, it appears petitioner was  
18 relying on Ordinance 2252, § 10(2) to expect that the  
19 planning commission was required to act within 36 days of  
20 his initial application. We are not cited to a point during  
21 the evidentiary hearing where petitioner raised the  
22 applicability of Ordinance 2252, § 10(2), and the city did  
23 not address its applicability in its decision.  
24 Nonetheless, the city recognizes the applicability of  
25 Ordinance 2252 generally, petitioner did generally raise the  
26 time line issue in his written correspondence, and the city  
27 does not contend petitioner waived his right to raise this  
28 issue here. Therefore, we address it, and make our own  
29 determination of whether the city's decision is correct.  
30 ORS 197.829(2).

1           Petitioner argues that there is nothing in SHZO 5.020  
2 or otherwise in the city's code that would indicate  
3 Ordinance 2252, § 10(2) has been repealed and that further,  
4 by virtue of SHZO 5.020(12)(e), the 120-day rule does not  
5 apply to the site design review ordinance. The city  
6 responds, essentially, that the site design review ordinance  
7 is subject to the zoning ordinance, and that to the extent  
8 the site design review ordinance does not define when an  
9 application is complete, the definition in the zoning  
10 ordinance applies. The city also argues that, to the extent  
11 § 10(2) of Ordinance 2252 violates ORS 227.178, it cannot be  
12 enforced.<sup>3</sup>

13           Employing a standard maxim of statutory construction,  
14 local legislation must be interpreted in a manner which  
15 gives effect to all provisions. PGE v. Bureau of Labor and  
16 Industries, 317 Or 606, 859 P2d 1143 (1993). Moreover,  
17 those provisions must be interpreted in a manner which is  
18 consistent with state statutes. See e.g. Historical  
19 Development Advocates v. City of Portland, 27 Or LUBA 617,  
20 623 (1994).

21           We agree with petitioner that Ordinance 2252, § 10(2)  
22 applies to the site design review process. However, that  
23 ordinance does not define "submission" or provide a date

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<sup>3</sup>The city also suggests that the site design review timeline has been implicitly repealed. There is nothing in the city's code to confirm such a repeal.

1 upon which a "submission" is deemed complete. Petitioner's  
2 argument is premised on an interpretation that the city must  
3 act within 36 days of the initial submission, regardless of  
4 the completeness of the application or whether it is  
5 submitted in a form upon which the site design review board  
6 can evaluate it. Such an interpretation would violate ORS  
7 227.178, which requires that applicants be given an  
8 opportunity to amend an incomplete application before it is  
9 deemed complete for purposes of review.

10 In an effort to be both consistent with state statute,  
11 and to give effect to the city's own regulations, we read  
12 Ordinance 2252, § 10(2) to require the city to act within 36  
13 days of when the application or "submission" is deemed  
14 complete, in accordance with ORS 227.178.

15 The city "deemed" the application complete on September  
16 15, 1995 at petitioner's request, after he informed the city  
17 he did not wish to further supplement the application. The  
18 planning commission reached its decision within 36 days  
19 after that date. Thus, we find the city's decision correct.

20 The second assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 Petitioner contends the site design review ordinance  
23 applies only to situations where a building permit is  
24 pending. Accordingly, petitioner argues the city improperly  
25 construed the law when it forced petitioner to apply for  
26 site design review on land for which no building permit was

1 pending and for a use that had been "permitted and licensed"  
2 for nearly nine months. Petitioner relies on Ordinance  
3 2252, § 4, which states:

4 "No building permit shall be issued for a building  
5 subject to this ordinance until a design review  
6 plan is approved by the City. Actual site  
7 construction shall conform to mat approved plan.  
8 Additionally, no occupancy permit or final  
9 building inspection permit shall be issued until  
10 the building inspector has determined the  
11 conditions of the design review plan have been  
12 met."

13 Petitioner also cites Ordinance 2252, § 6(4), which states:

14 "The prospective applicant for a building permit  
15 which is subject to the site design review  
16 procedure shall submit to the recorder the  
17 following: \* \* \*."

18 Petitioner argues these citations confirm that Ordinance  
19 2252 applies only to building permits.

20 The city responds first that no use has ever been  
21 reviewed or approved for petitioner's property. The  
22 issuance of a business license, by its terms, does not  
23 permit use of the property without necessary land use  
24 approvals; the building permits for a fence and fill also  
25 did not approve a particular use of the property. In  
26 addition, the city responds that petitioner has taken  
27 excerpts of Ordinance 2252 out of context. Read as a whole,  
28 and in conjunction with the zoning code, the city argues the  
29 site design review is authorized and required before any  
30 particular use can be made of petitioner's property.

31 Ordinance 2252, § 3, entitled "Types of Development

1 Included," states:

2 "This ordinance shall apply to all:

3 "(1) New development designated for such review by  
4 the city of St. Helens' Zoning Ordinance or  
5 Comprehensive Plan.

6 "\* \* \* \* \*"

7 SHZO 2.140, which addresses the LI zone, states:

8 "\* \* \* \* \*

9 "2. Uses Permitted Outright. In the LI-1 Light  
10 Industrial Zone the following buildings and  
11 uses are permitted as hereinafter  
12 specifically provided, subject to the general  
13 provisions and exceptions set forth in this  
14 ordinance, and the Site Design Review  
15 Ordinance.

16 "\* \* \* \* \*

17 "4. Standards. In the LI-Zone, the following  
18 standards shall apply:

19 "\* \* \* \* \*

20 "e. Landscaping may be required by the Site  
21 Design Review Board on any side of a  
22 building that faces a residential zone,  
23 and for outdoor storage facilities.

24 "f. The Site Design Review Board may require  
25 up to a one-hundred (100) yard buffer  
26 area between any facility and any  
27 residential zone."

28 The site design review ordinance is, in some respects,  
29 inartfully drafted. As petitioner points out, some  
30 provisions of that ordinance appear to apply only to  
31 situations in which a building permit is requested. It may  
32 be that some provisions of the site design ordinance apply

1 only to building permit applications. However, the fact  
2 that some provisions may address situations where a building  
3 permit is subject to site design review does not restrict  
4 the ordinance to a review of building permits. Rather, the  
5 express language of the zoning and site design review  
6 ordinances makes clear that uses in the LI zone are subject  
7 to site design review, regardless of whether a building  
8 permit is requested.

9 Petitioner's argument that he proposes no new  
10 development that could be subject to site design review is  
11 also without merit. First, as a factual matter, neither the  
12 building permits for a fence and fill, nor the business  
13 license purported to or had the effect of granting approval  
14 for any particular use of petitioner's property.  
15 Petitioner's reliance on those documents is misplaced.  
16 Moreover, although the nature and extent of petitioner's  
17 intended use of the property is unclear, it is clear that he  
18 intends to develop it for some type of outdoor industrial  
19 storage. However minor the development may be, this use  
20 requires some development. For example, under SHZO  
21 2.140(4)(e), the use may require development of landscaping.  
22 As the city's decision points out, the use will also require  
23 some sort of development for vehicular circulation and  
24 parking.<sup>4</sup> Thus, we agree with the city that petitioner's

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<sup>4</sup>In listing the site design review criteria petitioner failed to address, the decision notes under "Service and Delivery,"

1 use is subject to design review.

2 The second assignment of error is denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 Petitioner contends the city improperly construed the  
5 applicable law by imposing standards for review that were  
6 not set forth in the land use regulations.

7 The essence of petitioner's argument is that the city  
8 contradicted ordinances governing (1) petitioner's right to  
9 participate in quasi-judicial hearings, (2) the  
10 applicability of the site design review ordinance, and (3)  
11 the mandate that his application be deemed approved 36 days  
12 after it was submitted. According to petitioner, because  
13 the city violated these ordinances it "must have been  
14 relying on unannounced land use regulations." Petition for  
15 Review 13.

16 There is no merit to petitioner's argument. Even if  
17 the city had misapplied or incorrectly construed or  
18 interpreted an applicable ordinance, that would not equate  
19 to or in any way indicate that the city relied on  
20 "unannounced regulations" in reaching its decision.

21 Alternatively, petitioner contends the city's standards

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"This was not addressed by applicant in the application. Applicant states in his staff rebuttal letter that there are no buildings for service and delivery. It is just a fenced storage yard. The applicant did not address the fact that items to be stored or removed from the proposed storage yard will be delivered or picked up somehow. This [criterion] is intended to address how this will be accomplished." Record 124.



1 are "void for vagueness" because "[t]he standards by which  
2 petitioner was judged are not clear enough for an applicant  
3 to know what he must show in the application process."  
4 Petition for Review 14. We find no merit to petitioner's  
5 argument. More significantly, however, petitioner did not  
6 raise this argument below, and may not raise it for the  
7 first time here. Craven v. Jackson County, 29 Or LUBA 125,  
8 132, aff'd 135 Or App 250, rev den 321 Or 512 (1995).

9 **FIFTH ASSIGNMENT OF ERROR**

10 Petitioner contends the city's decision is not  
11 supported by substantial evidence because the findings and  
12 conclusions ignore evidence submitted by petitioner.

13 The city denied petitioner's application because  
14 petitioner did not submit required drainage and landscape  
15 plans, and refused to explain the proposed use. The city  
16 urged petitioner to allow a continuance of the planning  
17 commission hearing specifically so that petitioner could  
18 submit those materials. Petitioner declined to take  
19 advantage of that opportunity. Petitioner now asserts that  
20 the evidence he submitted compels approval of the  
21 application, in part because at the hearing "drainage plans  
22 and existing grading and fill efforts were discussed,  
23 pictures and site plans submitted by petitioner. \* \* \*  
24 Landscaping was addressed." Petition for Review 15.  
25 Regardless of whether petitioner discussed drainage and  
26 landscaping, he did not submit the required drainage and

1 landscaping plans. Nor did petitioner respond to the city's  
2 repeated requests that he explain his intended use of the  
3 property beyond a summary statement that he intended to do  
4 whatever the code allowed. Because petitioner did not  
5 submit the required information, the city could not evaluate  
6 the application, let alone find that each criterion was  
7 satisfied.

8 Because the challenged decision denies petitioner's  
9 site design review approval, the city need only point to  
10 findings, supported by substantial evidence, demonstrating  
11 that one or more approval standards are not met. Garre v.  
12 Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123  
13 (1990); Baughman v. Marion County, 17 Or LUBA 632, 638  
14 (1989). Further, in order to overturn on evidentiary  
15 grounds the city's determination that an applicable approval  
16 criterion is not met, it is not sufficient for petitioner to  
17 show there is substantial evidence in the record to support  
18 his position. Rather, the "evidence must be such that a  
19 reasonable trier of fact could only say petitioner['s]  
20 evidence should be believed." Thomas v. City of Rockaway  
21 Beach, 24 Or LUBA 532, 534 (1993); Schmaltz v. City of Hood  
22 River, 22 Or LUBA 115, 119 (1991); McCoy v. Marion County,  
23 16 Or LUBA 284, 286 (1987). Petitioner must demonstrate he  
24 sustained his burden of proof of compliance with all  
25 applicable criteria, as a matter of law. Jurgenson v. Union  
26 County Court, 42 Or App 505, 600 P2d 1241 (1979).

1           Petitioner has not established that the evidence in the  
2 record so undermines the city's findings so as to compel a  
3 conclusion that, as a matter of law, each of the applicable  
4 criteria have been satisfied. Moreover, until petitioner  
5 submits the necessary information for the city to evaluate  
6 his application, no determination can be made whether the  
7 applicable criteria are satisfied.

8           The fifth assignment of error is denied.

9           **SIXTH ASSIGNMENT OF ERROR**

10           Petitioner contends the city violated SHZO 5.020(15)  
11 because the planning commission did not reply to  
12 petitioner's request that it interpret specific terms and  
13 meaning of specific code provisions.<sup>5</sup>

14           SHZO 5.020(15) states:

15           "It shall be the duty of the Planning Commission  
16 to rule on the meaning, spirit and intent of the  
17 provisions of this ordinance as is necessary for  
18 its administration. In interpreting and applying  
19 the regulations, they shall be held to be the  
20 minimum requirements for the promotion of the  
21 public health, safety, convenience and general  
22 welfare."

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<sup>5</sup>The three questions posed by petitioner, which he requested the planning commission answer during the public hearing, were:

"Was my site-design review application approved by ordinance before the public hearing begins?" Record 90.

"Should the city require a site design review hearing for my use after issuing a fill permit, fence permit, and a business license?" Record 93.

"Should the city create and provide applications for occupancy permits?" Record 94.

1           This provision does not mandate that the planning  
2 commission make an interpretation at the request of  
3 petitioner. The planning commission's failure to respond  
4 specifically to petitioner's questions provides no basis for  
5 relief.

6           The sixth assignment of error is denied.

7           **SEVENTH ASSIGNMENT OF ERROR**

8           Petitioner contends the city's decision violates his  
9 federal constitutional rights to due process and federal and  
10 state equal protection guarantees. Petitioner states he  
11 "did not have fair notice of what conduct was expected of  
12 him or the risk of penalty he faced if he complied with  
13 Respondent's demand for a site design review application."  
14 Petition for Review 17.

15           Petitioner did not raise this argument below, and may  
16 not raise it for the first time here. Craven v. Jackson  
17 County, 29 Or LUBA at 132. Even if it had been raised,  
18 petitioner has not established any basis for relief.

19           This assignment of error is denied.

20           The city's decision is affirmed.