

Oct 13 3 00 PM '82

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

3 ELIZABETH ORR, JOANNE)
 4 FERERRO, LAWSON and H.)
 5 PAUL DUEBER, III,)
 6)
 7 Petitioners,)
 8)
 9 vs.)
 10)
 11 CITY OF EUGENE,)
 12)
 13 Respondent,)
 14)
 15 HOUSING AUTHORITY AND)
 16 COMMUNITY SERVICE AGENCY)
 17 OF LANE COUNTY,)
 18 MARGARET M. MAHONEY,)
 19 DIRECTOR,)
 20)
 21 Intervenor-Respondents)

LUBA No. 82-032

FINAL OPINION
AND ORDER

Appeal from the City of Eugene.

Bill Kloos, Eugene, filed the Petition for Review and argued the cause on behalf of Petitioners.

LaVerne Edwards, pro se.

Timothy J. Sercombe, Eugene, filed the brief and argued the cause on behalf of Respondent City of Eugene.

William A. Van Vactor, Eugene, filed the brief and argued the cause on behalf of Intervenor-Respondents.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

AFFIRMED

10/13/82

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal the approval by the Eugene Planning
4 Commission¹ of a conditional use permit which would allow the
5 construction of 24 low income multi-family housing units on
6 2.37 acres of land in the City of Eugene. Petitioners set
7 forth eight assignments of error as follows:

8 "(1) The Planning Commission erred in concluding
9 that the issue of whether this site was once a city
10 dump is not relevant to the appeal of the Hearings
11 Officer's decision.

12 "(2) The Planning Commission's findings on the
13 dump issue are inconsistent, conclusory, and not
14 supported by the evidence.

15 "(3) The DEQ condition is an improper delegation
16 of quasi-judicial fact findings and regulatory
17 authority on the dump issue because it affords
18 Petitioners no opportunity to participate in the fact
19 finding or regulatory process.

20 "(4) Because the Planning Commission has
21 delegated fact finding authority to the DEQ on a
22 question relevant to the criteria for approving this
23 CUP, the Commission cannot and has not made the
24 necessary findings for approving the CUP.

25 "(5) The conclusion that the project will have
26 minimal impact on the livability of the surrounding
area is not supported by substantial evidence and is
based on insufficient findings.

"(6) Approval of the CUP was improper because it
violated a relevant criterion for the decision which
prohibits Eugene city councilors from having any
interest in the project.

"(7) The City made a major interpretation of the
procedural standards for the appeal at the conclusion
of the hearing and did not provide the Petitioners an
opportunity to be heard on the proper interpretation.
Neither did it afford Petitioners an opportunity to
comply with the new interpretation after making it.

1 "(8) The planning Commission erred in refusing
2 to accept and consider selected materials submitted at
3 its March 9 hearing, and this refusal prejudiced
petitioners."

4
5 STATEMENT OF FACTS

6 On December 4, 1981, intervenor-respondent Housing
7 Authority for Lane County applied to the City of Eugene for a
8 conditional use permit to permit the Housing Authority to
9 construct a controlled income and rent (low income) housing
10 project on 2.37 acres. The request was for 24 units: 18 two
11 bedroom units and 6 three bedroom units. The units were
12 proposed to be housed in six structures of two and one story
13 heights. The units would be staggered on the eastern portion
14 of the site and be 22 feet in height. Seventy percent of the
15 site would be devoted to open space.

16 The conditional use permit application was first heard by
17 the City of Eugene hearings official on January 13, 1982. A
18 portion of the testimony before the hearings officer centered
19 on the composition of the soil on the site. The Northwest
20 Testing Laboratories conducted a report entitled "Soil And
21 Foundation Investigation." Mr. William Orr, a registered
22 Oregon geologist, testified concerning development constraints
23 associated with geologic and soils conditions on the site. He
24 testified that he believed more extensive investigation of the
25 underlying soils on the site was needed than just what appeared
26 in the Northwest Testing Laboratories' report.

1 On January 25, 1982, the hearings official issued his
2 findings and conclusions allowing issuance of the conditional
3 use permit. His findings addressed the soil suitability for
4 foundations as follows:

5 "A soils report submitted at the time of public
6 hearing by an appropriate expert indicates that
7 certainly some areas of the site contain soils that
8 will require special consideration in utilizing the
9 site for the intended purpose. The representative of
10 the applicant has indicated a willingness to utilize
11 one of the two methods recommended to deal with the
12 unstable soil conditions that do exist on the site. A
13 condition has been imposed requiring the developer to
14 follow the information and recommendations presented
15 in the soils report submitted. It is noted that
16 public comment questioned the reasonableness of
17 development of the site in light of the cost of
18 dealing with soil conditions as they exist. Whether
19 an unreasonable cost will be incurred is not the
20 issue, rather whether there will be an environmental
21 hazard involved. Here, report of the expert indicates
22 the site can be developed without an environmental
23 hazard."

24 Petitioners appealed the hearings official's decision to
25 the Eugene Planning Commission. Petitioners thereafter
26 submitted an "appeals statement," a portion of which addressed
the soils suitability issue contained in the hearings officer's
findings:

27 "GEOLOGY. The geologist's report states that the
28 existing soil will either need to be removed or
29 expensive pilings driven because of the unstable fill
30 now on the site. It is estimated that solving this
31 geologic problem with the site will add \$4,877 to the
32 cost of each unit (on top of the basic cost of \$65,000
33 per unit). While the hearings officer did not
34 consider cost to be in his realm, we as citizens of
35 Eugene and federal taxpayers believe that this is a
36 waste of money and that the insistence of the Housing
37 Authority and city staff to proceed with this site
38 will result in needless extra expense."

1 On March 2, 1982, the Eugene Planning Commission conducted
2 a hearing on petitioners' appeal. Mr. Orr was allowed to
3 testify with respect to the existence of a former dump on the
4 project site and provided new evidence on the source of much of
5 the fill material on the site. Additional testimony concerning
6 the previous location of a dump on the site was submitted.
7 R.J. Holvey, a building contractor in the Eugene area, said in
8 a letter that the proposed building site was once a refuse
9 disposal site for the City of Eugene and that

10 "...in addition to residential garbage, the City of
11 Eugene disposed of containers of insecticides and
12 herbicides from spraying the parks. Also dumped at
13 this site were containers from insecticides used by
14 the county while spraying for mosquitos. Some
15 industrial waste from the numerous small lumber mills,
16 which now no longer exist, were dumped at this site,
17 too."

18 At the conclusion of the testimony on March 2, 1982, the
19 planning commission discussed the appeal. The planning
20 commission voted tentatively to deny the appeal subject to the
21 preparation and review of draft findings in support of denial.
22 The draft findings were submitted to the applicant, appellants
23 below (petitioners herein) and the planning commission on March
24 4, 1982. The planning commission's draft findings concluded
25 that the scope of review was limited to issues addressed by the
26 hearings officer or at least those issues presented to the
27 hearings officer and set forth in the appeals statement. The
28 conclusion was reached that the issue of whether this project
29 site was formerly a dump containing environmentally hazardous

1 materials was not an issue before the planning commission
2 because the issue had not been considered by the hearings
3 officer or raised in the appeals statement. The planning
4 commission also reviewed supplemental findings about the dump
5 issue which had been prepared in the event the dump issue may
6 be determined by some review body to be relevant.

7 Petitioners (appellants below) submitted written comments
8 on the proposed findings which were considered by the planning
9 commission at its March 9, 1982 meeting. Petitioners sought to
10 introduce additional evidence not previously considered by the
11 planning commission. The planning commission ruled that such
12 evidence should not be considered by the planning commission
13 because the public hearing on the appeal had been closed on
14 March 2, 1982. The planning commission thereafter adopted the
15 findings of the hearings officer entered on January 13, 1982,
16 explained that certain issues, such as those concerning the
17 possible former existence of a dump on the project site, were
18 not relevant to the appeal because this issue had not been
19 raised before the hearings officer or addressed in the appeals
20 statement, and then adopted the supplemental findings
21 addressing the dump. This appeal followed.

22 ASSIGNMENTS OF ERROR ONE - FOUR

23 Petitioners' first assignment of error is that the planning
24 commission erred in not considering additional testimony about
25 on-site environmental hazards and in treating this issue as
26 irrelevant to the appeal. The planning commission said that

1 the issue of whether the site had once been a dump and used to
2 deposit insecticides and other toxic chemicals had not been
3 raised below or addressed in the appeals statement and
4 therefore could not be considered by the planning commission.
5 The pertinent Eugene code provisions are sections 9.714 and
6 9.716. Section 9.714 requires a person who seeks to appeal a
7 hearings officer's decision to file a notice of intent to
8 appeal within ten days of the hearings official's action. The
9 notice of appeal is to be filed with the planning department on
10 a form provided by the planning department. Section 9.716 is
11 entitled "Action On Appeal By Planning Commission" and
12 provides, in pertinent part, as follows:

13 "****The appellant shall submit, no later than ten days
14 prior to the date set for the public hearing on the
15 appeal, a written statement setting forth in detail
16 the basis for the appeal, and which, in addition,
17 shall specifically refer to those portions of the
18 record, if any, which support the appeal. Interested
19 city departments and any other interested party shall
20 have the right to submit a written statement no later
21 than five days prior to the public hearing on the
22 appeal setting forth the respective parties'
23 contentions regarding the adequacy or inadequacy of
24 the record relative to the issues raised by the
25 appeal. Any such statements so filed shall be added
26 to and made a part of the record which shall be
considered in its entirety by the planning commission
before reaching a decision on the appeal. At the time
of the public hearing, the planning commission may
take testimony of the applicant or his
representatives, interested city departments and other
interested parties. Based upon such testimony and the
record, the planning commission shall render its
decision, which shall be made no later than 60 days
after the filing of the appeal. The planning
commission may, by resolution, affirm, reverse or
modify in whole or in part, any decision,
determination or requirement of the hearings
official. Before granting any appeal, or before

1 changing any of conditions imposed in the use permit
2 granted by the hearings official, the planning
3 commission shall make findings of fact, setting forth
4 wherein the hearings official's findings were in
5 error.***"

6 First, petitioners argue the above code provisions do not
7 limit planning commission review to issues raised before the
8 hearings officer and set forth in the appeals statement. The
9 code allows new evidence to be introduced before the planning
10 commission and does not limit such evidence to just those
11 issues which were raised before the hearings official and set
12 forth in the appeals statement. Second, petitioners argue the
13 issue of whether the site was once a dump was raised before the
14 hearings officer and was identified in petitioners' appeal
15 statement filed with the planning department pursuant to Eugene
16 Code 9.716. Petitioners contend they were, therefore, entitled
17 to introduce evidence concerning environmental hazards on the
18 site caused by the deposit of toxic chemicals when the site was
19 a dump.

20 Respondent City of Eugene agrees that the dump issue was
21 raised before the hearings officer, but argues the issue before
22 the hearings officer had to do with whether the soil on the
23 site was suitable for foundations. Petitioners' attack before
24 the planning commission changed to one concerning toxicity of
25 the fill materials in the dump and potential contamination of
26 surface water. The city says its hearing was not de novo, but
was limited to a determination of whether the hearings

1 officer's findings were in error. For this reason, it would
2 have been improper for the planning commission to receive new
3 testimony concerning toxicity and water contamination. The
4 city says the whole purpose of the appeals statement is to give
5 notice to the parties as to the issues which the planning
6 commission will consider. The city does concede that it may
7 allow additional testimony before the planning commission, but
8 such testimony must be limited to issues which have been
9 noticed in the petitioners' appeals statement filed with the
10 planning department. The city argues that we should defer to
11 the city's interpretation of its code as it relates to the
12 procedures which the city follows in conducting its hearings.

13 The procedure for conducting appeals at the local level is
14 for the local governing body to decide. See ORS 215.422
15 (counties) and ORS 227.180 (cities). ORS 227.180(1), as well
16 as its county counterpart (ORS 215.422(1)(a)), require that:

17 "The procedure for such an appeal or review shall be
18 prescribed by the council but shall include a hearing
at least for argument.***"

19 We believe this statute requires not only that a city adopt
20 procedures for conducting appeals, but implicitly requires that
21 those procedures clearly communicate to potential appellants
22 what is expected of them in order to perfect an appeal and what
23 the scope of the appeal will be. For example, a local
24 ordinance could provide that only persons who are adversely
25 affected or aggrieved could appeal a decision of the hearings
26

1 officer to the planning commission. Unless the local ordinance
2 so provides, the planning commission could not, after the
3 hearings officer's decision, tell a potential appellant that
4 whether s/he is adversely affected or aggrieved will be decided
5 by a review of the record before the hearings officer. If the
6 planning commission (or city council) is to impose such a
7 requirement, it must state the requirement in the appeals
8 ordinance so as to give notice to a potential appellant that if
9 s/he wants to preserve a right of appeal, facts establishing
10 the person would be adversely affected or aggrieved must be
11 introduced at the hearings officer stage in the proceedings.

12 The same would be true if the local governing body desired
13 to conduct appeals strictly "on the record" rather than to
14 accept new testimony. A person is entitled, by virtue of ORS
15 227.180(1), to know whether s/he must put in all the evidence
16 at the hearings officer stage, or whether s/he might be allowed
17 to add evidence at the planning commission level and, if so,
18 under what circumstances.

19 The responsibility of a city to clearly define in advance
20 the procedures to be followed for conducting appeals is, in our
21 view, no different than the Energy Facility Siting Council's
22 (EFSC's) duty to adopt reasonably clear standards by which
23 permits for the siting of nuclear power generating facilities
24 are to be reviewed. In Marbett v PGE, 277 Or 447, 561 P2d 154
25 (1977), the Court explained:

26 "****The demand of ORS 469.470 for standards 'that

1 applicants for site certificates must meet,' indicates
2 that these standards will be available to applicants
3 and to persons opposing applications in sufficiently
4 meaningful terms to guide them in deciding whether and
5 how to submit or oppose an application.***"2

6 We have concern that Eugene's procedure for conducting
7 appeals from the hearings officer to the planning commission do
8 not adequately apprise persons that their appeal will be
9 limited to issues raised in the appeal's statement. However,
10 we need not decide, for purposes of this appeal, whether the
11 city properly refused to consider, because not raised in the
12 appeals statement, the issue of whether the site was free of
13 toxic chemicals or other environmentally hazardous materials.
14 We so conclude because this issue does not relate to any of the
15 criteria which the city's findings on a conditional use permit
16 are required to address.

17 There are three criteria under the Eugene Code for granting
18 a conditional use permit which, arguendo, might require
19 findings concerning on-site environmental hazards. The first
20 criterion is Eugene Code Section 9.702(a), which requires a
21 finding that:

22 "The location, size, design, and operating
23 characteristics of the proposed development are such
24 that it will be reasonably compatible with and have
25 minimal impact on the liveability and the appropriate
development of abutting properties and the surrounding
neighborhood, with consideration given to availability
of public facilities and utilities, to the generation
of traffic and capacity of surrounding streets; and to
any other relevant impact of the development."

26 By its terms, the above section of the Eugene Code addresses

1 off-site as opposed to on-site impacts from granting a
2 conditional use permit. Prior to the close of the public
3 hearing on March 2, 1982,³ the evidence concerning use of the
4 site for a dump only suggested the possibility that there might
5 be on-site environmental hazards. No testimony to which we
6 have been directed or which we have been able to find in the
7 record indicates the placement of herbicides and insecticides
8 on the site many years ago might possibly have an impact "on
9 the livability and the appropriate development of abutting
10 properties and the surrounding neighborhood."⁴

11 The second provision which might, arguendo, require an
12 analysis of on-site environmental hazards involves Eugene Code
13 Section 9.702(b). This provision requires consistency of a
14 conditional use proposal with applicable resolutions of the
15 city. One such resolution is the Housing Dispersal Plan,
16 Resolution No. 3129. Policy No. 5 of that plan sets forth site
17 guidelines for the location of subsidized housing. One of
18 these guidelines is that the building area should be located on
19 a site which is generally free of environmental hazards. As
20 the city argues and the hearings officer found:

21 "According to this policy, the criteria are not rigid
22 standards but are guidelines with which to evaluate a
23 project and deficiencies in a site's suitability will
not preclude the project development if there are
significant advantages to the site." R. 330.

24
25 Even if we were to hold that the city's findings addressing
26 on-site environmental hazards were inadequate, we do not

1 believe that inadequate findings with respect to a guideline in
2 a city ordinance is grounds for reversal or remand of the
3 decision. Our scope of review is governed by 1979 Or Laws, ch
4 772, sec 5(4), which provides as follows:

5 "The board shall reverse or remand the land use
6 decision under review only if:

7 (a) The Board finds that the city, county or special
8 district governing body:

9 (A) Exceeded its jurisdiction;

10 (B) Failed to follow the procedure applicable to
11 the matter before it in a manner which
12 prejudiced the substantial rights of the
13 petitioner;

14 (C) Made a decision that was not supported by
15 substantial evidence in the whole record;

16 (D) Improperly construed the applicable law; or

17 (E) Made a decision that was
18 unconstitutional;..."

19 With the exception of subparagraph (C), the above bases for
20 reversal or remand are all concerned with whether the local
21 governing body made a decision that was contrary to some legal
22 standard or requirement. Even subparagraph (C) is only a basis
23 for reversal or remand if there is a lack of substantial
24 evidence with respect to a legal standard or requirement. We
25 know of no law which holds that a guideline contained in a
26 local ordinance or resolution is a legal standard or
requirement which must be satisfied in order for the decision
to be said to comply with the applicable legal criteria. We
have not been directed to anywhere in the Eugene Code that

1 would suggest guidelines are substantive standards. Even if,
2 therefore, the city erred in failing to make adequate findings
3 that the site "is generally free of environmental hazards," the
4 lack of adequate findings, in our judgment, would not be
5 grounds for reversal or remand of this decision.

6 Petitioners have argued there exists a third basis for
7 requiring findings concerning environmental hazards on-site.

8 Petitioners state:

9 "Section 9.702(c) requires consistency with 'the
10 objectives of the zoning ordinance, the general plan
11 and any other applicable plans and policy resolutions
12 as adopted by the city.' Providing a safe and healthy
13 environment is a recurring standard in general plan
and zoning ordinance objectives. For example, in the
general plan (which appears as Attachment I in the
record) see III-C-5, Goal 4; III-C-6, Objective 6;
III-E-2, Goal 1." Petition for Review at 23.

14 The provisions to which petitioners refer are very general and
15 were not intended by the city, in our view, to be applicable to
16 specific conditional use permit requests. The "standards"
17 cited by petitioners are as follows:

18 III-C-5, Goal 4: "Provide a healthy and attractive
19 environment for the Metropolitan population."

20 III-C-6, Objective 6: "Prevent damage to life and
21 property and expenses associated with flooding and
problem soils."

22 III-E-2, Goal 1: "Secure a safe, clean, and
23 comfortable environment which is satisfying to the
mind and senses."

24 We believe the appropriate time for the city to have addressed
25 the above standards was when the city made the decision whether
26

1 to zone the subject site for residential development. We do
2 not believe the city intended by including these "standards" as
3 policies in its plan that these policies be reapplied when a
4 specific development permit request consistent with the zoning
5 designation of the property were made.

6 Petitioners' assignments of error 1, 2, 3 and 4 relate to
7 the issue of on-site environmental hazards and are premised on
8 the notion that an analysis of on-site environmental hazards
9 was required by the Eugene Code. As we have concluded an
10 analysis of on-site environmental hazards was not required.
11 Petitioners assignments of error 1 through 4 are denied.

12 FIFTH ASSIGNMENT OF ERROR

13 Petitioners fifth assignment of error is that the city
14 improperly concluded that the project would have minimal impact
15 on the livability of the surrounding area, as required by
16 Eugene Code Section 9.702(a). Petitioners contend the
17 conclusion is not supported by adequate findings or by
18 substantial evidence.⁵

19 Petitioners focus on three issues: density of the project,
20 harmony with surrounding neighborhood and park impacts, as
21 claiming the proposed project will not have "minimal impact."
22 Under density of project, petitioners note the proposed
23 development will have a significantly greater density than
24 surrounding residential properties. Concerning harmony with
25 surrounding neighborhood, petitioners note that the units will
26 be clustered at the eastern end of the property, and many will

1 be two stories tall as compared to the single story residential
2 houses surrounding the site. Petitioners believe there will be
3 substantial visual impact on the area because the dense
4 clustering of houses will prevent cars traveling north on
5 Hilliard Avenue from being able to see through the project.
6 Concerning park impacts, petitioners testified as to their
7 concern about the impact of the project on the adjacent Amazon
8 Park. Petitioners believe the project's impact on the park
9 will have more than a minimal impact on the livability of the
10 neighborhood. Apparently, the project site has been used as an
11 extension of the south Amazon Park, and petitioners are
12 concerned that development of the site will not only take land
13 away from park usage but will increase the number of people who
14 will be using the park in its reduced size.

15 The city says the proper way to interpret Eugene Code
16 Section 9.702(a) is not to examine whether the development will
17 have any adverse impact on the neighborhood, but whether the
18 development will have a greater impact on the neighborhood than
19 would development of the property as it is presently zoned.
20 Under this analysis, the city points out that the existing
21 zoning on the property allows the development of structures 30
22 feet high and would allow the placement of 19 dwelling units on
23 the property (8.1 units per acre). The fact that the
24 conditional use will allow development of the property at a
25 greater density does not, by itself, mean the development is
26 going to adversely impact the neighborhood. The city also

1 notes that only five additional housing units are being
2 permitted in addition to what is permitted outright given the
3 zone on the property. Petitioners' contention that the Amazon
4 Park is a neighborhood park is, according to the city,
5 "preposterous." The city argues that Amazon Park is huge,
6 extending from 19th Street south to 30th Avenue, a distance of
7 over one mile; that the hearings official's finding that Amazon
8 Park is a "large city park" is well supported in the record;
9 and that no evidence supports petitioners' assertion five more
10 housing units are going to overtax the park and interfere with
11 the livability of the neighborhood.

12 We agree, for the most part, with the city's position on
13 petitioners' fifth assignment of error. First, the inquiry
14 should not be whether this development will cause any adverse
15 impact, but whether that impact will be minimal. Second, as
16 "minimal" is a relative term, the question which must be
17 addressed is "minimal as compared to what: no development at
18 all or development which is permitted within the zone
19 outright?" The city argues the latter standard is the
20 appropriate standard and we agree. Conditional uses are made
21 conditional largely because it is feared the impact on
22 surrounding properties may be such that the uses either should
23 not be allowed or, if allowed, then only with conditions to
24 minimize negative impacts on other uses. The intent is not,
25 however, to make the impacts less than would result from
26 outright permitted uses; only to make the impacts minimal when

1 compared with impacts associated with outright permitted uses.

2 Viewed in this light, we disagree with petitioners'
3 contentions the hearings officer failed to adequately address
4 in his findings the impact which this conditional use permit
5 would have on abutting properties and the surrounding
6 neighborhood. The density increase is only 1.9 units per acre
7 above that which is permitted outright. The hearings officer
8 found that 70% of the site would be left in open space. Amazon
9 Park extends northerly from the site for over a mile in
10 length. Of the existing residences in the area, only two would
11 be closer than 140 feet from any units in the project, and
12 those two residences would be 100 and 110 feet away.

13 The hearings officer further found:

14 "The one residence just south of the development is
15 the only residence relatively close to the
16 development. It will be buffered not only by the
17 distance between it and the structures on the site but
18 also by a screen fence and landscaping between the
19 project boundaries and the properties to the south.

20 "The design, scale and bulk of the units are such that
21 they will not impose upon the single-family
22 residential use in the general area. The drawings
23 submitted indicate the use of six structures and their
24 location in a staggered manner on the site will
25 provide a variety and openness to the development.
26 Although the building coverage is only 15%, the units
are of a maximum elevation of 22 feet at the peak of
the roof, well within the height limitation of the R-1
zoning district.

23 "Certainly the density on the site will exceed that
24 the surrounding single-family residential area. This
25 particular site and the manner in which the
26 development has been designed will accommodate that
density in a compatible manner. The design is such
that 70% of this site is open space. Additionally,
this site is uniquely appropriate for the increased

1 density due to the adjacent South Amazon Park and the
2 recreational opportunities it affords. As the
3 schematic site plans submitted demonstrates, the
development at none of its boundaries imposes upon or
threatens existing single-family uses in the area."

4 The above findings adequately address petitioners' concern
5 about density and harmony with the neighborhood.

6 It is true, as petitioners argue, that the hearings officer
7 did not address in his findings the adverse impact this
8 development would have on adjacent Amazon Park. But we agree
9 with the city that to reverse or remand this decision because
10 the hearings officer neglected to address petitioners' concerns
11 on this issue is unwarranted. Again, under the city's
12 interpretation of the code, with which we agree, the hearings
13 officer was only required to address the impact which an
14 additional five units would have on park usage. We can
15 understand, given the immense size of Amazon Park, why the
16 hearings officer may have decided this was not an issue which
17 had to be addressed. As we have previously said, not every
18 issue on which testimony is presented must be addressed in
19 findings. Faye Wright Neighborhood Planning Council v City of
20 Salem, 1 Or LUBA 246 (1980). See also: Goose Hollow Foothills
21 League v City of Portland, 3 Or LUBA 256 (1981). We believe
22 this is one such issue. Petitioners' fifth assignment of error
23 is denied.

24 SIXTH ASSIGNMENT OF ERROR

25 Petitioners' sixth assignment of error is a conflict of
26

1 interest assertion based upon the Eugene City Code. Section
2 9.702(c) of the city's code requires that a proposed
3 development be consistent with the objectives of the city
4 zoning ordinance, general plan and any other applicable plans,
5 policies or resolutions as adopted by the city. A special
6 criteria in the Eugene Code for controlled income and rent
7 housing requires:

8 "The site conforms to the other criteria set
9 forth by the local, state or federal financing agency
10 involved, and the contemplated project will be subject
to the rent and income limitations set forth in the
regulations of the public agency."

11 A criteria of HUD, the federal financing agency, required that
12 the developer, the Housing Authority, enter into a "cooperative
13 agreement" with the city. This agreement was executed in April
14 of 1981 and prohibited any member of the governing body "who
15 exercises any responsibilities or functions with respect to any
16 project during his tenure or for one year thereafter" from
17 having "any interest, direct or indirect, in any project or any
18 property included or planned to be included in any project, or
19 any contracts in connection with such projects or property."

20 The conflict asserted by petitioners was that city
21 councilmember Smith's husband is a member of the architectural
22 firm to whom the architectural contract award was made by the
23 Housing Authority in September of 1981.

24 Petitioners' sixth assignment of error is denied.
25 Councilor Smith has not participated in her official capacity
26

1 in the granting by the city of this conditional use permit.
2 The application for the conditional use permit was made to the
3 city planning department and heard initially by the hearings
4 officer. The hearings officer's decision wa appealed to the
5 planning commission from whose decision no appeal is possible
6 to the city council under the Eugene Code. Councilor Smith not
7 only has not participated but could not participate in this
8 conditional use permit decision making process. Thus, to the
9 extent the "no conflict" requirement exists, it has no
10 application to this particular land use decision.

11 SEVENTH ASSIGNMENT OF ERROR

12 Petitioners argue the planning commission erred in not
13 allowing petitioners the opportunity for input into the city's
14 decision to exclude testimony concerning environmental
15 hazards. Petitioners seem to be particularly concerned because
16 petitioners went to considerable time and expense to gather and
17 present evidence to the city concerning an issue they believed
18 was important and relevant to the permit, only to find out
19 later that the evidence would not be considered. Petitioners
20 believed they were entitled to know in advance that this would
21 be the position of the planning commission in interpreting its
22 code provision governing appeals from the hearings officer.
23 Petitioners believe the rationale of Sun Ray Drive-In Dairy,
24 Inc. v OLCC, 16 Or App 63, 530 P2d 289 (1973) applies in this
25 situation. Sun Ray, according to petitioners, stands for the
26 following propositions as it applies to the facts in this

1 case: (1) a party should be able to know the procedural ground
2 rules for bringing an appeal of a conditional use permit; (2)
3 parties need to know what is to be heard in the appeal hearing;
4 (3) parties should be allowed to address issues of
5 interpretation of applicable legal requirements during the
6 hearings process to ensure that decisions are made by rule of
7 law rather than for subjective or adhominem reasons; (4)
8 judicial review is facilitated where parties have an
9 opportunity to address interpretations, because the record will
10 contain a greater quantity of material for review by the
11 judicial body.

12 We have previously in this opinion expressed our concerns
13 about the city's interpretation of its code provision. We
14 believe parties are entitled to know with a reasonable degree
15 of certainty what the rules of the game are going to be
16 sufficiently in advance of the hearing that they will be
17 afforded a meaningful opportunity to participate in the
18 hearing. We disagree with petitioners, however, to the extent
19 they are arguing they were denied fair play in not having the
20 opportunity to comment prior to the planning commission's
21 adoption of an interpretation of the city code. We can
22 understand petitioners' frustration when they found out that
23 their offered testimony would not be considered by the planning
24 commission. As the city notes, however, petitioners were
25 offered the opportunity to comment on the planning commission's
26 interpretation because the parties were allowed the opportunity

1 after the close of the public hearing on March 2, 1982, to
2 respond in writing as well as orally to the planning
3 commission's proposed findings.

4 In any event, we have concluded the planning commission did
5 not err in excluding testimony concerning environmental hazards
6 on-site because this evidence did not relate to any of the
7 criteria on which the planning commission was required to make
8 findings. It would be anomalous to now say the planning
9 commission erred in failing to allow petitioners the
10 opportunity to argue why the planning commission should have
11 considered such evidence. Petitioners' seventh assignment of
12 error is denied.

13 EIGHTH ASSIGNMENT OF ERROR

14 Petitioners eighth assignment of error is that the planning
15 commission erred in refusing to receive and consider certain
16 materials offered by petitioners at the March 9 hearing. The
17 planning commission refused to receive and consider these
18 materials because they were new evidence. Petitioners contend
19 they left the March 2, 1982, hearing with the clear impression
20 that their testimony made in the form of comments on the
21 proposed findings would be accepted at the limited public
22 hearing on March 9. Petitioners believe their impression is
23 supported by the minutes of the March 2 hearing, which state as
24 follows:

25 "There would be an opportunity on March 9 for the
26 appellants to comment on the proposed findings. The
commission on March 9 would hold a limited hearing on

1 the appeal. The comments could be submitted in
writing."

2
3 The minutes of the March 2 meeting reflect some members of
4 the planning commission were concerned about the adequacy of
5 the evidence concerning environmental hazards on-site. A
6 suggestion was made by the planning commission chair that staff
7 present information on the environmental hazard issue to the
8 planning commission at its next meeting. The planning
9 commission did not take any action on this suggestion,
10 apparently because the city attorney informed the planning
11 commission that if it considered additional evidence from the
12 staff it would have to reopen the hearing to allow the parties
13 an opportunity to respond to the new evidence.

14 The quote from the minutes cited above was taken from
15 petitioners' brief. A review of the minutes indicates that a
16 sentence immediately preceding the quotation cited above
17 clarifies, in our view, that no new evidence would be taken at
18 the March 9 hearing. That sentence is the following: "Mr.
19 Sercombe [city attorney] said the public hearing [on March 9,
20 1982] would not be reopened." The fact that petitioners were
21 afforded the opportunity to "comment on the proposed findings,"
22 when read in connection with the statement from the city
23 attorney, fairly clearly indicates that the "comments" would be
24 limited to the adequacy or inadequacy of the findings based on
25 the evidence already in the record. We do not believe the
26 planning commission erred in refusing to receive additional

1 evidence after the March 2, 1982, public hearing.

2 The decision of the Eugene Planning Commission granting a
3 conditional use permit is affirmed.

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FOOTNOTES

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4 We have been advised by the City of Eugene, and it does not
5 appear to be in dispute, that no appeal is available to the
6 city council from a planning commission decision on a
7 conditional use permit.

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7 ORS 469.470 provided that the EFSC shall:

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"(3) Establish standards and promulgate rules that
applicants for site certificates must meet
including, but not limited to, standards of
financial ability and qualifications as to
ability to construct and operate the energy
facility to which the site certificate applies
and prescribe the form." 277 Or at 460.

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14 Whether the city council erred in not considering
15 additional evidence subsequent to the close of the public
16 hearing on March 2, 1982, is discussed infra under petitioners'
17 eighth assignment of error.

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18 There are a number of reasons why we believe Section
19 9.702(a) does not require analysis of potential on-site
20 environmental risks in development. The first reason that
21 Section 9.702(a) by its terms refers only to a concern about
22 "the livability and the appropriate development of abutting
23 properties and the surrounding neighborhood." By its terms, it
24 appears to be limited to off-site concerns. The second reason
25 has to do with the reason why local ordinances allow some uses
26 conditionally. Local ordinances allow some uses conditionally
as opposed to outright because of the concern that they may not
fit in with the neighborhood. Conditional use ordinances,
thus, typically contain a requirement that an analysis be made
of the impact of the use on abutting and surrounding
properties. The language of Section 9.702(a) satisfies this
requirement. Therefore, absent some evidence that on-site
environmental impacts might result in off-site impacts, we do
not believe Section 9.702(a) required an on-site environmental
risk analysis. The third reason has to do with the fact the

1 subject site is zoned residential under the city's acknowledged
2 comprehensive plan. We presume the question of environmental
3 hazard in developing property is one which would be answered at
4 the time property is zoned, rather than at the time someone
5 applies for a development permit. Absent, therefore, some
6 clear language in an ordinance indicating on-site suitability
7 for development must be considered at the time a conditional
8 use permit is requested, we will not construe an ordinance as
9 requiring an on-site suitability analysis when a conditional
10 use permit is requested.

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7 Petitioners say there are two standards which must be met:
8 reasonably compatible and minimal impact. Petitioners argue
9 the minimal impact standard, a higher standard than "reasonably
10 compatible," must be strictly applied to a low income housing
11 project such as this. Petitioners do not say why it must be
12 strictly applied, however."

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