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

1 IONE PIERRON,)
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Petitioner,

LAVERNE EDWARDS,

Petitioner-Participant,

v.

CITY OF EUGENE,

Respondent,

BIJOU THEATER,

Respondent-Participant.

LUBA NO. 82-104

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Ione Pierron, Eugene, filed a petition for review and argued the cause on her own behalf.

LaVerne Edwards, Eugene, filed a petition for review and argued the cause on her own behalf.

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

Bill Kloos, Eugene, filed a brief and argued the cause on behalf of Respondent-Participant.

Cox, Board Member; Bagg, Board Member; participated in the decision.

Reversed.

6/7/83

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), as amended by Oregon Laws 1981, ch 748.

1 COX, Board Member.

2 NATURE OF PROCEEDING

3 Petitioner appeals the Eugene Planning Commission's October
4 18, 1982 decision granting Conditional Use Permit CU 80-9. The
5 decision rules on applicant Bijou Theater's request for a major
6 modification of an existing conditional use permit to allow the
7 addition of a 110 seat movie theater to a site containing an
8 Historic Landmark building. The subject site is zoned C-2
9 Community Commercial District and is located at the
10 intersection of 13th Avenue and Ferry Street.

11 ALLEGATIONS OF ERROR

12 Petitioner Pierron sets forth the following as her
13 assignments of error:

- 14 1. "The Planning Commission made procedural errors
15 which prejudiced petitioner's case."
- 16 2. "Some findings are not supported by the evidence."
- 17 3. "The noise performance conditions attached to the
18 modification are meaningless in that they cannot
19 be adequately tested or enforced."
- 20 4. "The Commission was unreasonably inconsistent in
21 its modification of the existing CUP."
- 22 5. "The decision is based on conclusionary findings
23 which are not consistent with relevant Eugene
24 planning documents and code criteria."

25 Petitioner-Participant Edwards covers the same basic areas
26 in her allegations of error and, in addition, stresses her
claim that adequate protections to the exterior of an historic
landmark were not imposed. Edwards also claims the
Eugene-Springfield Metropolitan Plan, which has been

1 acknowledged by the LCDC, was not properly followed because one
2 of the elements was given heavier weight than other elements.

3 STATEMENT OF FACTS

4 This appeal involves a decision by the Eugene Planning
5 Commission to approve applicant Bijou Theater's request for a
6 conditional use permit to allow expansion of its theater
7 operation. The theater is located in the Willcox Building, and
8 the property upon which it sets is zoned C2, Community
9 Commercial. Theaters are a use permitted outright in the C2
10 zone. The Willcox Building, however, is designated an historic
11 landmark site by the Eugene Code. Because of the historic
12 designation, a theater use in the building requires issuance of
13 a conditional use permit. The Willcox Building originally was
14 designed as a church. The main sanctuary, in the portion of
15 the building closest to 13th Avenue, contains an existing
16 theater approved under a conditional use permit issued in
17 1980. On-site parking covers the western portion of the
18 property, while a narrow alley to the south is the dividing
19 line between the C2 Community Commercial zoning to the north
20 and the R-3 multi-family residential zoning to the south.
21 Petitioner Pierron's is the closest residence to the Willcox
22 Building, separated from the entire site by a narrow alley.

23 The City of Eugene, in 1979, granted the Willcox Building
24 Historic Landmark status. In June, 1980, a Eugene hearings
25 officer approved use of the building as a theater under a
26 conditional use permit procedure. That theater has been

1 operating under the terms of that permit, which include
2 restrictions on hours of operation, since the June, 1980
3 approval. In 1982 applicant Bijou Theater applied for a
4 modification of the conditional use permit (CUP) under which it
5 was then operating, in order to allow a second theater to be
6 developed in an out building existing on the site. The
7 building proposed for the second theater is a low garage that
8 fronts on the alley between the site and Petitioner Pierron's
9 residence. The original 1982 request contained several
10 elements. The elements are summarized in the commission's
11 findings as

- 12 "1. Conversion of an existing garage unit on the
13 property to a second theater, holding a maximum
of 110 seats.
- 14 "2. Expansion of the existing theater by expanding
15 the balcony and adding 49 more seats.
- 16 "3. Extension of closing hours to 2:00 a.m. on all
17 nights (rather than just Friday and Saturday).
- 18 "4. Variance from on-site parking requirements to use
U-Lane-O parking lot at 11th and Ferry Streets."

19 Item No. 4, the variance, was requested because the Eugene Code
20 requires off-street parking to be within 400 feet of the site.
21 The applicant proposes to lease available parking space from
22 U-Lane-O Credit Union which is located over 400 feet away from
23 the theater site.

24 The hearings officer approved the request in part. In
25 summary, he

- 26 1. denied use of the garage as a theater;

1 2. approved the addition of balcony seats to the existing
2 theater;

3 3. denied extension of closing hours; and

4 4. approved the use of the U-Lane-O parking lot to the
5 extent needed to accommodate the expanded balcony seating.

6 None of the parties was happy with the hearings officer's
7 decision. That lack of satisfaction resulted in four
8 individual appeals to the Eugene Planning Commission, which is
9 the final decision maker on this type of appeal under the
10 Eugene City Code. The Bijou Theater appealed asking for
11 approval of the request as it was initially submitted while
12 three other parties, including petitioner and
13 petitioner-participant, appealed asking for full denial. -

14 On appeal the planning commission accepted new testimony
15 from all of the appellants. Both petitioners herein submitted
16 written testimony and testified orally at the commission
17 hearing on September 14, 1982. During the course of the
18 proceeding, the applicant dropped its request to increase the
19 existing theater's size by addition of the balcony. Also
20 dropped by the applicant was its request for extended closing
21 hours.

22 After hearing the testimony and reviewing the hearings
23 officer's decision, the commission reversed in part, modified
24 in part and affirmed in part the hearings officer's decision
25 and order. In doing so, the planning commission's order and
26 findings can be summarized as:

1 1. The hearings official's decision on the second theater
2 was reversed. The existing garage was approved for use as a
3 second theater with up to 110 seats.

4 2. The hearings official's denial of the extension of
5 closing hours to 2:00 a.m. on all nights was affirmed.

6 3. The hearings official's approval of the variance to
7 allow use of the U-Lane-O parking lot was modified to reflect
8 the needs of the second theater instead of the balcony addition.

9 In granting the permit, the planning commission placed 19
10 conditions on the project. The conditions, for the most part,
11 require design, operation and construction changes aimed at
12 mitigating neighborhood impact. Nearly all the conditions have
13 to be completed prior to opening the new theater. Most notable
14 among the conditions, from the standpoint of the petitioners
15 are: removal of existing parking stalls in the narrow alley
16 between Petitioner Pierron's house and the proposed new
17 theater; a complete redesign of the parking lot on-site in a
18 manner that precludes theater traffic from using the alley
19 adjacent to Petitioner Pierron's house; and various
20 soundproofing strategies. The commission's findings also
21 include a discussion of what it considered to be non-issues in
22 the appeal. Those include a finding that the appeal dealt only
23 with the proposed modification, not the compatibility of the
24 existing theater under the existing conditional use permit.

25 DECISION

26 PETITIONER PIERRON'S FIRST ASSIGNMENT OF ERROR

1 Petitioner Pierron alleges in her first assignment of error
2 that the planning commission made procedural errors that
3 prejudiced her case. Pierron elaborates on eight specific ways
4 in which she believes the the planning commission failed to
5 follow proper procedure. Woven into these arguments are claims
6 of constitutional violations. We deny Petitioner Pierron's
7 first assignment of error and all its eight suballegations.
8 The Land Use Board of Appeals has limited jurisdiction and
9 limited remedial powers. Oregon Laws 1979, ch 772, sec 5(4),
10 as amended by Oregon Laws 1981, ch 748, states:

11 "The Board shall reverse or remand the land use
12 decision under review only if

13 (a) The Boards finds the city, county or special
14 district governing body:

15 "(A) Exceeded its jurisdiction;

16 "(B) Failed to follow the procedure applicable to the
17 matter before it in a manner that prejudiced the
18 substantial rights of petitioner;

19 "(C) Made a decision that was not supported by
20 substantial evidence in the whole record;

21 "(D) Improperly construed the applicable law; or

22 "(E) Made a decision that was unconstitutional;"
23 (Emphasis added).

24 Dealing first with the allegations regarding procedural
25 error, we find insufficient prejudice has been alleged and
26 shown, regardless of whether an error or errors occurred.
Petitioner's arguments are unconvincing because some of them
are of the type that should have been raised before the
planning commission but were not so raised. There is no

1 showing in petitioner's brief or in the record that the alleged
2 procedural irregularities were sufficiently objected to before
3 the planning commission. The purpose of requiring an objection
4 at the time of the hearing is to inform the hearing body that
5 there has been error so it has a chance to cure the defect, if
6 any. See Dobaj v. City of Beaverton, 1 Or LUBA 237, 241 (1980).

7 The one possible exception to the above general fact
8 statement is petitioner's statement indicating her frustration
9 when the planning commission asked her to terminate her oral
10 argument. Oral argument, however, is not necessarily an
11 essential element in the opportunity to be heard and to present
12 and rebut evidence. See Fasano v. Washington County Comm., 264
13 Or 574, 588, 507 P2d 23 (1973). Submission of written
14 testimony may be sufficient in most cases with the possible
15 exception of when the issue is credibility of witnesses.
16 Credibility was not an issue before the planning commission.
17 See generally Davis, Administrative Law Treatise, Second
18 Edition, Volume 2, Sec 13.9. Furthermore, petitioner has not
19 indicated how she was prejudiced by the planning commission's
20 request she terminate her presentation. Petitioner had already
21 submitted a lengthy written appeals statement required of all
22 appellants by the Eugene Code. Since we do not believe there
23 is unlimited right to oral argument, petitioner is placed in
24 the position of showing how the oral argument she was granted
25 and her written testimony was improperly treated. Such
26 prejudice must be shown with specificity and explained

1 thoroughly. Petitioner merely makes the general comment that
2 her case was prejudiced. Such a blanket statement is
3 insufficient for this Board to review allegations of
4 prejudice. See also Sunnyside Neighborhood v. Clackamas Co.
5 Comm., 280 Or 3, 10, 569 P2d 1063 (1977); Olney v. Hammond, 5
6 Or LUBA 125, 132 (1982); Dobaj v. Beaverton, supra.

7 Second, Petitioner Pierron has sprinkled throughout her
8 eight assertions an indication she believes her
9 constitutionally guaranteed right of due process has been
10 violated. She does not elaborate on her belief nor does she
11 identify what portion of the constitution or for that matter
12 which constitution she is relying on. At a minimum, a claim of
13 constitutional error must cite which constitution and which
14 particular textual provision therein is being relied upon.
15 This rule is apparent from a series of decisions by Oregon
16 courts as well as Land Use Board of Appeals decisions. In
17 Megdal v. Board of Dental Examiners, 288 Or 293, 605 P2d 273,
18 (1980), the Supreme Court of Oregon stated

19 "Petitioner begins his brief in the Court of Appeals
20 with a constitutional attack on the statutory phrase
21 'unprofessional conduct.' The attack is as unspecific
22 as its target. We have had previous occasion to point
23 out that constitutional claims should identify the
24 provisions of the constitution, state and federal,
25 that the governmental action is said to contravene and
26 should show the relevance of those provisions to the
claim. See e.g. Rogers v. Department of Revenue, 284
Or 409, 412, n. 2, 587 P2d 91 (1978). Petitioner's
briefs cites no clause of either constitution for his
assertion that 'unprofessional conduct' is so vague as
to be 'constitutionally impermissible.' 288 Or at
296-297.

1 This Board has routinely refused to address undeveloped claims
2 of unconstitutionality. See Constant v. City of Lake Oswego, 5
3 Or LUBA 311 (1982); Van Sant v. Yamhill County, 4 Or LUBA 359
4 (1982); Jefferson County Co-op v. Jefferson County, 4 Or LUBA
5 199 (1981).

6 Next, Petitioner Pierron asserts that the planning
7 commission made a site visit to the theater property prior to
8 its study session on September 13, 1982. She complains

9 "The record shows no report of site visit findings and
10 petitioner and another appellant who accompanied the
11 members on the visit, were not allowed to talk with
12 them during or after the visit."

13 Citing this Board's ruling in Friends of Benton County v.
14 Benton County, 3 Or LUBA 165 (1981), she claims that the city
15 should have disclosed what knowledge it gained from the site
16 visit. The Benton County decision was based on a factual
17 setting in which neither prior notice was given that the local
18 government intended to conduct the site view nor an opportunity
19 given to rebut any information gained from that view. As we
20 stated:

21 "We recognize that no statement appears in the record
22 or the findings as to what the commissioners found in
23 their view of the property. We have every reason to
24 believe that nothing impermissible occurred to the
25 detriment of the petitioner. However, we do believe a
26 requirement exists in the law that any view of
property be disclosed on the record so that any
evidence presented is subject to effective rebuttal by
other parties in the case. This requirement is part
of due process of law to which any participant in a
quasi-judicial land use case is entitled. Fasano v.
Washington County, 264 Or 574, 507 P2d 23 (1973). We
believe the commissioners are certainly entitled to

1 take a view of the property and a view may indeed be
2 necessary in order to assist the commissioners in
3 understanding the evidence presented. However, that
4 view must be disclosed in sufficient detail to allow
5 petitioners a meaningful opportunity to comment on and
6 rebut, if needed, any evidence or impressions gained
7 by the view before the decision is made." 3 Or LUBA
8 at 173.

9 The Benton County case cites to this Board's opinion in
10 Concerned Property Owners v. Klamath County, 3 Or LUBA 182
11 (1981). In Concerned Property Owners, the Klamath County Board
12 of Commissioners made an unannounced visit to the site. A
13 review of the record in that case did not reveal what, if any,
14 factual information the commissioners gained as a result of
15 their visit.

16 Respondent-Applicant Bijou Theater asks this Board to
17 retreat from its holdings in those cases. We do not believe
18 there is any necessity to retreat from our announced position
19 because the facts in the case before the Board are inapposite
20 to those in Concerned Property Owners and Benton County. In
21 this case, the city announced its intended site visit. The
22 notice indicated that the purpose of the site visit was
23 "familiarization."

24 "This time has been set aside for the planning
25 commission members to become familiar with the
26 location and present use of the properties which are
subject of the public hearing on September 14, 1982.
The commission will tour the subject properties prior
to this study session and then will be briefed on such
things as the present zoning and use of surrounding
properties, the vicinity, special natural constraints
on the site, and other such background information.
The public is welcome to attend the study sessions,

1 however public testimony and official action will be
2 taken at the public hearing on September 14, 1982."

3 Both petitioner and respondent have incorrectly interpreted
4 the above mentioned cases to indicate that in all fact
5 situations a commissioner making a site visit has an
6 affirmative duty to state on the record that which he or she
7 saw or believes as a result of the visit. Only at times when
8 there has been insufficient notice of a site visit and
9 excusable non-attendance by the parties, is it necessary that
10 each planning commissioner announce what he or she gained from
11 the visit. In this case, petitioners accompanied the
12 factfinders and were privy to all public discussions held at
13 that visit. As a result, petitioners were armed at the time of
14 the subsequent public hearing to rebut or clarify any announced
15 misconceptions that may have been gained by planning
16 commissioners as a result of the visit. While it would be
17 helpful for the planning commissioners to have summarized their
18 beliefs, if any, that found their source in the visit, the
19 appeals system has built in protections which prevent the local
20 government from making a decision on unannounced facts. On
21 appeal any decision based on unannounced facts would be
22 reversed for lack of being supported by substantial evidence in
23 the whole record. Petitioner's first assignment of error is
24 denied.

25 PETITIONER-PARTICIPANT EDWARDS' FIRST ASSIGNMENT OF ERROR.

26 Petitioner-Participant Edwards first claims

1 "The Planning Commission made its decision on the
2 basis of erroneous assumptions."

3 Of the six sub-assignments included under this allegation of
4 error, five of them attack consistency of statements made
5 during the hearings by planning staff members, commission
6 members and applicant's attorney. The sixth allegation,
7 concerning the granting of a variance, will be dealt with in a
8 later portion of this opinion.

9 With reference to the five arguments dealing with
10 inconsistencies, we deny Petitioner-Participant Edwards'
11 assertions. Those assertions are not developed. They do not
12 indicate how the decision that resulted was based upon the
13 alleged inconsistencies. Furthermore, Ms. Edwards does not
14 indicate how she was prejudiced by the alleged statements. See
15 our discussion on prejudice set forth above.

16 Based on the foregoing, Petitioner-Participant Edwards'
17 arguments under this assignment of error are all denied.

18 PETITIONER PIERRON'S SECOND ASSIGNMENT ERROR.

19 Petitioner Pierron argues that "the finding opening the
20 theater at 6:00 p.m. Monday-Thursday will not alleviate noise
21 problems, traffic and crowd congestion and is not supported by
22 the facts." Ms. Pierron here argues that the finding is not
23 supported by substantial evidence. As Ms. Pierron states "this
24 finding flies in the face of the empirical evidence presented
25 by petitioner." She believes that the evidence she presented
26 should have been the evidence upon which the city based a

1 finding denying the conditional use permit on the basis of
2 excess noise. The "finding" to which petitioner objects states:

3 "Hours of Operation. The existing hours of operation
4 creates scheduling problems, so that not enough time
5 could be scheduled between movies. We find that the
6 hearings official was correct in finding that a later
7 closing hour would be incompatible. Instead, we have
8 imposed a condition (condition 6) that allows the
9 theaters to open one hour earlier on weekday
10 evenings. This will help mitigate noise impacts by
11 allowing longer breaks between movies so that the
12 peaking of traffic and crowd noise between those
13 entering and exiting the parking lot will be reduced."

14 We find the above quoted finding is supported by
15 substantial evidence. A written report of an acoustical
16 engineer states:

17 "The congestion in the parking lot during a 15 minute
18 intermission can be categorically different than that
19 of a 30 minute intermission. Cars leaving and
20 arriving at the same time will increase the loudness
21 of the intermission period by at least 3dB, over that
22 measured during a longer separated leaving and arrival
23 intermission.

24 "The second factor also develops. The short
25 intermission contains a number of early arrival drive
26 throughs. [Patrons drive through a full lot looking
27 for a parking space because find none because others
28 have not left the preceding show.] The long
29 intermission will stop this excess traffic and so
30 further reduce noise level during intermission.

31 "The longer hours spread out the time over which the
32 sound can be averaged. Even though the number of cars
33 may be the same, the overall sound level will be
34 lower. Extending hours from 7-1 to 6-1 reduces 0.7dB
35 lower sound level if averaged over the 6 or 7 hour
36 periods. If drive throughs are eliminated, further
37 reduction of 1dB is possible." Record 83.

38 The question as presented by petitioner is not whether the
39 actions go far enough to satisfy petitioner's concerns, but
40 rather whether there is substantial evidence to support the

1 finding that was made. Ms. Pierron's concerns address specific
2 circumstances which have resulted in excess noise from the
3 theater, not whether there is support for the finding. The
4 city conditioned its approval of the permit, in part, on
5 reductions in and control of noise. Those conditions include:

6 "Noise generated on-site shall not exceed whichever is
7 the highest: either the noise levels within 9.644(a)
8 of the City Code or 3dBa* above the ambient traffic
9 noise levels in existence adjacent to the site. If
10 on-site noise exceeds the above standard, the
11 applicant shall construct a sound barrier that will
12 make it possible to comply with the above standards."

13 "*This allows the Bijou Theater to produce the same
14 amount of noise as local traffic."

15 Assignment of error denied.

16 PETITIONER-PARTICIPANT EDWARDS SECOND ASSIGNMENT OF ERROR

17 Participant Edwards argues:

18 "The Planning Commission erred by allowing only one
19 appellant to become a proponent of the hearings
20 official's decision, by improperly construing the
21 Eugene Code by changing the format for the public
22 hearing, and by allowing an expert witness to give new
23 information during rebuttal testimony."

24 The arguments presented by Petitioner-Participant Edwards
25 under this assignment of error are, for all intents and
26 purposes, the same arguments presented by Petitioner Pierron in
27 her first assignment of error. We refer the reader back to our
28 opinion regarding Petitioner's first assignment of error.
29 Petitioner-Participant Edwards' second assignment of error is
30 denied.

1 PETITIONER PIERRON'S THIRD ASSIGNMENT OF ERROR

2 Ms. Pierron argues "The noise performance condition cannot
3 be effective." Petitioner is concerned about condition no. 18
4 of the Eugene Planning Commission decision. Condition 18
5 states:

6 "The applicants shall provide a report from an
7 acoustical engineer showing compliance with the
8 soundproofing conditions of this approval."

9 Pierron claims the condition does not recognize the
10 difference between theater crowd noises and traffic noises and
11 noises emanating from such sources as a factory or mill where
12 there is more or less continuous, easily measurable machinery
13 noise. She claims theater crowd noises are intermittent,
14 unpredictable; overflow crowds create a certain type of noise,
15 small crowds another.

16 Even if we were to assume that the petitioner was right and
17 that there is an inconsistency in the conditions that make
18 condition 18 ineffective, that flaw does not relate to any of
19 the bases for reversal or remand granted the Land Use Board of
20 Appeals by the Legislature. See above. We are not sure what
21 petitioner is arguing. She is neither claiming a finding to be
22 unsupported by substantial evidence nor that the city
23 misapplied the applicable law, exceeded its jurisdiction or
24 made an unconstitutional decision. She is merely attacking a
25 condition. Such an allegation of error is outside the scope of
26 this Board's jurisdiction. If we are being asked to infer from
petitioner's argument that the basis for the claim of error is

1 to be found in the conditional use permit ordinances'
2 standards, she does not identify the standard she believes
3 applicable and, therefore, violated.

4 Petitioner's third assignment of error is denied.

5 PETITIONER-PARTICIPANT EDWARDS' THIRD ASSIGNMENT OF ERROR

6 Ms. Edwards claims:

7 "The Planning Commission erred when they [sic]
8 accepted additional written information from the
9 applicant-appellant after the deadline of September 7,
10 1982."

11 We are not entirely clear as to what Petitioner-Participant
12 Edwards is alleging under this assignment of error. She starts
13 out discussing a missed filing deadline and ends with a
14 discussion of historic preservation matters. The portion of
15 her assignment of error discussing historic preservation
16 concerns is merely what appears to be reargument of the facts
17 in the case and neither cites to a law that has been violated
18 nor addresses how that law was violated.

19 In reference to her allegation regarding acceptance of
20 additional written information, apparently Petitioner-
21 Participant is citing Eugene Code 2.392 for the proposition
22 that what the applicant did in this case is prohibited. We do
23 not understand the code of the City of Eugene to operate in the
24 manner that Ms. Edwards apparently is proposing. Petitioner-
25 Participant apparently views Eugene Code 2.392(6) as the basis
26 for claiming that she has a right to advanced copies of all
applicant's materials. EC 2.392(6) does not refer to testimony

1 which apparently the supplemental materials of which Ms.
2 Edwards is complaining consisted. The additional material of
3 which she complains is not "applications, proposals and city
4 staff notes, reports and recommendations covered by EC 2.392."
5 That code provision states:

6 "Applications, proposals and city staff notes, reports
7 and recommendations shall be presented at a time that
8 will permit their review prior to the hearing to
9 facilitate informed and orderly consideration of
10 matters. The staff notes, reports and recommendations
11 shall simultaneously be furnished to the applicant or
12 proponent and shall be kept available for public
13 inspection in the manner required by law." Eugene
14 Code 2.392(6)

15 Ms. Edwards mentions a 10 day limit on filing of the
16 supplemental materials. There is a 10 day requirement set out
17 in Eugene Code Section 9.716 which states:

18 "The appellant shall submit, no later than 10 days
19 prior to the date set for the public hearing on the
20 appeal, a written statement setting forth in detail
21 the basis for the appeal, and which, in addition,
22 shall specifically refer to those portions of the
23 record, if any, which support the appeal."
24

25 That code provision was met by the Bijou Theater's appropriate
26 filing of a written statement, it does not refer to
supplemental material of the kind involved here. The applicant
submitted its supplemental material prior to and at the
hearing. To the extent petitioner-participant may be arguing
that since the city accepted the materials too near the hearing
date, it "failed to follow the procedure applicable to the
matter before it in a manner that prejudiced the substantial
rights of the petitioner," she does not identify the

1 substantial rights she claims were prejudiced or even how her
2 rights may have been prejudiced.

3 Based on the foregoing, we deny Petitioner-Participant
4 Edwards' third assignment of error.

5 PETITIONER PIERRON'S FOURTH ASSIGNMENT OF ERROR

6 Petitioner Pierron claims that

7 "The Commission was unreasonably inconsistent in the
8 application of the conditions."

9 The way petitioner presents her argument under this
10 assignment of error, we are at a loss to understand what she is
11 asking us to do. Again, petitioner sets forth no legal theory
12 upon which LUBA could reverse or remand the city's decision.
13 Ms. Pierron's entire assignment of error is based on
14 disagreements with the conditions the city placed on the
15 proposed use. She complains about some conditions which will
16 immediately affect the existing theater structure. In
17 addition, petitioner attacks the fact that other conditions
18 were delayed until a future date, i.e. when the second theater
19 becomes operational. Petitioner claims she is at a loss to
20 "explain its [planning commission] not making the parking lot
21 reconfiguration independent of the new theater."

22 To the extent that it is of any assistance to the
23 petitioner, she should be made aware that the then existing
24 theater conditional use permit was not the subject of the
25 planning commission deliberations. The only items before the
26 planning commission were requests to change the existing use.

1 The question of whether the original conditional use permit
2 should be terminated or modified in the manner petitioner
3 desires was not an issue before the city. The new conditions
4 placed upon the use are reflective of changes in that use and
5 are scheduled to go into affect once the change of use becomes
6 reality.

7 In short, petitioner does not raise a legal allegation of
8 error. Therefore, Petitioner Pierron's fourth assignment of
9 error is denied.

10 PETITIONER-PARTICIPANT EDWARDS'S FOURTH ASSIGNMENT OF ERROR

11 Here Ms. Edwards claims

12 "The Planning Commission erred when they [sic] failed
13 to give each of the planning goals found in the
14 Metropolitan Plan equal weight."

15 She alleges that throughout the entire process of dealing
16 with the conditional use permit request, the goal of economic
17 aggrandizement has "taken precedence over all other goals found
18 in the Metro Plan." The only "other goal" specifically
19 addressed by Ms. Edwards is found in her claim the planning
20 commission may not discard the housing goal in favor of the
21 economic goal.

22 We are again not sure what petitioner-participant is
23 alleging to be the law governing the assertions she is making.
24 The facts indicate the property is presently used as a
25 theater. There is no indication that the alternative of
26 removing the building to provide a site for residential housing
was before the planning commission.

1 In order for this Board to review a decision, petitioner,
2 or in this case, petitioner-participant must set forth clearly
3 her allegation of error and what law(s) purportedly has (have)
4 been violated by the decision. Petitioner-Participant has done
5 neither under this assignment of error. Therefore, her fourth
6 assignment of error is denied.

7
8 FIFTH ASSIGNMENT OF ERROR BY BOTH PETITIONER AND
9 PETITIONER-PARTICIPANT

9 Under this assignment of error both petitioner and
10 petitioner-participant (hereinafter petitioners) claim the
11 parking variance granted by the City of Eugene is violative of
12 the city's variance code.

11 Pursuant to Eugene Code Section 9.752(2):

12 "The board may grant a variance to a regulation
13 prescribed by this ordinance with respect to
14 off-street parking facilities or off-street loading
15 facilities as the variance was applied for in modified-
16 form, if, on the basis of the application,
17 investigation and the evidence submitted, the board
18 makes the findings prescribed in subsection (1) above
19 and the following additional findings:¹

16 "(a) That neither present nor anticipated future
17 traffic volumes generated by the use of the site
18 or use of sites in the vicinity reasonably
19 require strict literal interpretation and
20 enforcement of the specified regulation.

19 "(b) That the granting of the variance will not result
20 in the parking or loading of vehicles on public
21 streets in such a manner as to interfere with the
22 free flow of traffic on the streets.

21 "(c) That the granting of the variance will not create
22 a safety hazard or any other condition
23 inconsistent with the objectives of the zoning
24 ordinance."

24 Applicant Bijou Theater, as part of its overall plan
25 requested a variance from the provisions of the Eugene Code
26 Section 9.582.² The applicant needed the variance in order

1 to incorporate into its planned use of the site several
2 off-site parking spaces located 550 feet away from the theater
3 site. The Code section limits off-site parking to not greater
4 than 400 feet from the site. The off-site parking spaces are
5 necessary to comply with the Eugene Code provision requiring
6 one parking space for each four theater seats. Petitioners
7 attack the city's findings on each of the eight criterion
8 necessary to be met before the 150 foot variance can be
9 allowed. Those eight standards are the ones imposed by Eugene
10 Code 9.752(1) and (2), (see above and footnote 1). Petitioners
11 argue the findings misconstrue the applicable law, are
12 conclusional and are not supported by the evidence.

13 In order to grant a variance, the Eugene Planning
14 Commission must have found that all of sections 9.752(1) and
15 (2) have been met. Section 9.752(1)(a) requires the city to
16 find:

17 (a) That strict or literal interpretation
18 and enforcement of the specified regulation would
19 result in practical difficulty or unnecessary
physical hardship inconsistent with the
objectives of the zoning ordinance.

20 The Planning Commission concluded that a strict interpretation
21 of the 400 foot requirement would result in practical
22 difficulty for the applicant. It found a literal
23 interpretation of the 400 foot regulation would be inconsistent
24 with the objectives of the zoning ordinance. Specifically the
25 commission stated:

26

1 "The applicant now provides as many parking spaces as
2 practicable in the development site. There is no way
3 to increase the number of spaces; in fact, they will
4 probably lose spaces through the redesign of the
5 parking lot. The applicant can provide the needed
6 number of parking spaces required by the zoning
7 ordinance a distance of 550' away from the site. A
8 survey done by the applicants indicates the
9 willingness of the theater patrons to walk the
10 additional distance to go to the theater. This would
11 meet the intent of the Code."

12 In addition, the commission found:

13 "The Willcox Building has an historic designation and
14 is exceptional when compared to most other C-2
15 properties. In order to preserve the historic
16 integrity of the site, on-site development must be
17 done with care. Building a parking structure to
18 accommodate the needed number of parking spaces on-
19 site would not be compatible with the historic
20 integrity of the site. Provision for an adequate
21 number of parking spaces 550' off site would be
22 compatible and would alleviate the applicants'
23 exceptional circumstance on the property."

24 Petitioners claim the applicant has failed to show any
25 hardship or practical difficulty that is not self created.
26 They argue the historic designation of the Willcox Building is
not something inherent in the site itself. Petitioners claim
that the theater is only a conditional use and its owner has
"no inalienable right" to seek expansion farther into a
neighborhood where the testimony in the record indicates the
theater is already incompatible with that neighborhood. The
basis for petitioners' argument is that in 1979 the Willcox
Building was granted Historic Landmark status in response to a
petition by the building's owner. The owners of the Bijou
Theater are merely tenants in the building and knew at the time
of application for the original CUP in 1980 that the building

1 held the Historic Landmark designation. Petitioners claim that
2 applicant knew before accepting the original CUP that parking
3 for a theater operation was strained. From the petitioners'
4 claim the building's owner and/or the lessee Bijou Theater
5 have, in fact, created their "own alleged hardship."

6 We agree with petitioners to the extent the applicant has
7 either failed to show or the commission has failed to make a
8 finding that either practical difficulties or necessary
9 physical hardship exist as a basis for granting the said
10 variance. One must not lose sight of the fact that the
11 variance is being required to meet the parking demands of an
12 entirely new theater. The fact that it is housed in an
13 existing out building on the site does not change the fact that
14 this is a request for an expansion of a conditional use.³
15 The additional parking spaces would not be required if the
16 applicant was to remain in operation under the provisions of
17 their original CUP.

18 The Court of Appeals in Lovell v. Independence Planning
19 Comm., 37 Or App 3, 86 P2d 99 (1978), held that the ability to
20 use a lot more profitably did not constitute either practical
21 difficulty or extraordinary circumstances. The court held that
22 the difficulty or circumstances must arise out of conditions
23 inherent in the land. 37 Or App at 6.

24 The findings in this case do not present any facts that the
25 alleged practical difficulty is inherent in the land.
26 Moreover, the request for an additional theater is at best

1 merely based on a desire by the applicant to expand its
2 profits. While expanding profits is certainly an acceptable
3 motivation, it is not a practical difficulty upon which a
4 variance may be based.

5 We find it unnecessary to address the other arguments set
6 forth by petitioner regarding the variance proposal. The city
7 planning commission has misapplied the law governing
8 variances. Its findings fail to establish a practical
9 difficulty of the nature acceptable to the courts as a basis
10 upon which variances can be granted. However, for the sake of
11 future reference by the city, if this matter should come before
12 it again, we might comment that the findings on the other
13 standards are marginal at best. In many cases, the "findings"
14 are merely a restatement of the standard to be imposed. In
15 addition, there are many conclusional remarks but very few
16 findings of fact. For instance, the three standards in EC
17 9.752(2) (see above) are each addressed by the findings. In
18 the "findings" addressing each standard, the city starts off
19 with what amounts to merely a restatement of the standard. In
20 all cases those restatements are followed by conclusional
21 statements, In one circumstance in particular, the commission
22 doesn't apply the standard correctly. For example, Provision
23 9.752(2)(a) states:

24 "That neither present or anticipated future traffic
25 volumes generated by the use of the site or use of
26 sites in the vicinity reasonably require strict or
literal intepretation and enforcement of the specified
regulation."

1 After restating the standard and concluding that it has been
2 met, the findings indicate that "anticipated traffic loads
3 should not cause any additional problems." (Emphasis added).
4 Even without going to the record to see if that statement is
5 supported by the evidence, we can see that it does not apply
6 the standard. The mere statement that something should not
7 occur avoids the ultimate test imposed by the standard. The
8 standard requires a finding that neither present nor
9 anticipated future traffic volumes require strict or literal
10 interpretation.

11 Based on the foregoing, we find no reason to further
12 elaborate on the multitude of other allegations made by the
13 petitioners. Those other allegations generally relate to
14 specific questions addressed by our holding on the variance
15 question.

16 Reversed.

1 FOOTNOTES

2
3 1

4 Eugene Code 9.752 states:

5 "Action of the Zoning Board of Appeals.

6 "(1) The board may grant a variance to a
7 regulation prescribed by this ordinance with respect
8 to fences and walls, site area, width, frontage,
9 depth, coverage, front yard, rear yard, side yards,
10 outdoor living area, height of structures, distances
11 between structures or landscaped areas as the variance
12 was applied for or in modified form, if, on the basis
13 of the applicant, investigation and evidence
14 submitted, the board makes the following findings:

15 "(a) That strict or literal interpretation
16 and enforcement of the specified regulation would
17 result in practical difficulty or unnecessary
18 physical hardship inconsistent with the
19 objectives of the zoning ordinance.

20 "(b) That there are exceptional or
21 extraordinary circumstances or conditions
22 applicable to the property involved or to the
23 intended use of the property which do not apply
24 generally to other properties classified in the
25 same zoning district.

26 "(c) That strict or literal interpretation
and enforcement of the specified regulation would
deprive the applicant of privileges enjoyed by
the owners of other properties classified in the
same zoning district.

"(d) That the granting of the variance will
not constitute a grant of special privilege
inconsistent with the limitations on other
properties classified in the same zoning district.

"(e) That the granting of the variance will
not be detrimental to the public health, safety
or welfare or materially injurious to properties
or improvements in the vicinity.

"(2) The board may grant a variance to a
regulation prescribed by this ordinance with respect
to off-street parking facilities or off-street loading

1 facilities as the variance was applied for or in
2 modified form, if, on the basis of the application,
3 investigation and the evidence submitted, the board
4 makes the findings prescribed in subsection (1) above
5 and the following additional findings:

6 "(a) That neither present nor anticipated
7 future traffic volumes generated by the use of
8 the site or use of sites in the vicinity
9 reasonably require strict literal interpretation
10 and enforcement of the specified regulation.

11 "(b) That the granting of the variance will
12 not result in the parking or loading of vehicles
13 on public streets in such a manner as to
14 interfere with the free flow of traffic on the
15 streets.

16 "(c) That the granting of the variance will
17 not create a safety hazard or any other condition
18 inconsistent with the objectives of the zoning
19 ordinance."

2

Eugene Code Section 9.582 states:

21 "Required Off-Street Parking. Off-street parking
22 shall be provided on the development site for all AG,
23 RA, R-1, C-1, M-1, M-2 and M-3 zones. In all other
24 zones, the required parking shall be on the
25 development site or within 400 feet of the development
26 site which the parking is required to serve. All
27 required parking must be under the same ownership as
28 the development site served, except through special
29 covenant agreements as approved by the city attorney,
30 which bind the parking to the development site.
31 Off-street parking is not required in the C-3
32 district, except for dwelling units."

3

33 It is not clear to this Board that the Historic Landmark
34 designation had any bearing on the variance decision. Our
35 uncertainty comes from the facts which indicate only the
36 Willcox Building has historic significance. The garage has not
37 been pointed to as part of that historic designation.