

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

3
4 MICKEY SHAFFER,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 96-151
10 CITY OF SALEM,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 TOSCO NORTHWEST COMPANY,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Salem.

22
23 Wallace W. Lien, Salem, filed the petition for review
24 and argued on behalf of petitioner.

25
26 Paul A. Lee, Assistant City Attorney, Salem, and Max M.
27 Miller, Jr., Portland, filed the response brief. With them
28 on the brief was Tonkon, Torp, Galen, Marmaduke & Booth.
29 Paul A. Lee argued on behalf of respondent. Max M. Miller,
30 Jr., argued on behalf of intervenor-respondent.

31
32 HANNA, Chief Referee; GUSTAFSON, Referee, participated
33 in the decision.

34
35 REMANDED 04/03/97

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals (1) the city's dismissal of
4 petitioner's appeal of a hearings officer's approval of a
5 variance as untimely; and (2) the city's alternative
6 decision affirming a hearings officer's conditional
7 approval of a variance.

8 **MOTION TO INTERVENE**

9 Tosco Northwest Company (intervenor), the applicant
10 below, moves to intervene in this proceeding on the side of
11 respondent. There is no objection to the motion, and it is
12 allowed.¹

13 **FACTS**

14 This matter is before us for the second time. In
15 Shaffer v. City of Salem, 29 Or LUBA 479, 480-81 (1995) we
16 described the facts as follows:

17 "Intervenor applied to the city for a variance to
18 reduce the required setback along the west
19 property line of certain property owned by
20 intervenor from 30 feet to 4 feet. Intervenor
21 proposed to place a service station, convenience
22 market and car wash on the subject property.

23 "Petitioner owns the property adjoining the west
24 property line of intervenor's property.
25 Petitioner's property contains a rental dwelling.
26 Petitioner appeared at the October 14, 1994
27 hearing before the hearings officer and testified
28 in opposition to the variance request.

¹The city and intervenor submitted a joint brief, which we refer to as Respondents' Brief.

1 "On November 7, 1994, the hearings officer issued
2 a decision granting the variance, with certain
3 conditions. Also on November 7, 1994, the city
4 mailed notice of the hearings officer's decision
5 to certain persons. Whether the city mailed
6 notice of the decision to petitioner and, if it
7 did so, to what address such notice was mailed,
8 are disputed by the parties.

9 "Petitioner contends he was not given notice of
10 the hearings officer's decision until December 21,
11 1994, when a copy of the decision was mailed to
12 petitioner by a city planner, after petitioner
13 contacted the planning department to inquire about
14 the status of the variance proceeding. On
15 January 4, 1995, petitioner filed an appeal to the
16 city council from the hearings officer's decision.
17 On January 12, 1995, the planning manager issued a
18 decision rejecting petitioner's appeal because it
19 was untimely filed under Salem Revised Code
20 (SRC) 114.200(b)." (Footnote omitted.)

21 We dismissed petitioner's appeal for failure to exhaust
22 local remedies. Specifically, we determined that we lacked
23 jurisdiction because petitioner had not appealed the
24 planning manager's rejection of his local appeal to the city
25 council before appealing to this Board. Petitioner appealed
26 our decision to the Court of Appeals, which remanded to us.
27 The court held that the city planning manager did not have
28 authority to reject petitioner's appeal to the city council.
29 Accordingly, the court directed LUBA to remand the case to
30 the city for the city council to determine the timeliness of
31 petitioner's local appeal of the hearings officer's
32 decision. Shaffer v. City of Salem, 137 Or App 583, 905 P2d
33 1175 (1995).

34 On remand from LUBA the city council (1) dismissed

1 petitioner's appeal of the hearings officer's decision as
2 untimely; and (2) alternatively, affirmed the hearings
3 officer's decision with two additional conditions in the
4 event that, on appeal to LUBA, petitioner's appeal to the
5 city council was determined to be timely.

6 This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner argues that the city erred in deciding that
9 the local appeal was not timely filed because: (1) there is
10 no substantial evidence that the city mailed the required
11 notice of decision to petitioner; and (2) the city
12 improperly determined the record date from which the time
13 for filing an appeal is calculated.

14 **A. Notice of Decision**

15 ORS 227.173(3) requires that "written notice of the
16 approval or denial be given to all parties to the
17 proceeding." SRC 114.190(b) requires a copy of the decision
18 be mailed to everyone who appeared personally at the
19 hearing.

20 Petitioner argues that he did not receive notice of the
21 November 7, 1994 decision until he telephoned the city on
22 December 21, 1994, and that there is not substantial
23 evidence that the city did in fact mail the required notice
24 of decision to him.

25 The city responds that there is substantial evidence in
26 the whole record to establish that the city properly mailed

1 its notice of decision to petitioner. The city explains
2 that in response to the notice of hearing on this matter
3 mailed to petitioner, petitioner and his wife attended the
4 hearing.² Petitioner's wife signed the sign-up sheet at the
5 hearing, providing the rental property address as her
6 address.³ Petitioner did not sign the sign-up sheet.
7 However, during petitioner's oral testimony, he verbally
8 provided both the rental property address at 1205 Barnes
9 Road and his home address in Stayton. Petitioner does not
10 contend that he specified which address was his mailing
11 address for purposes of mailing the notice of decision. The
12 city contends that it sent the notice of decision to the
13 1205 Barnes Road address.

14 The record reflects that on December 28, 1994, a city
15 secretary prepared a memorandum verifying that on November
16 7, 1994 she sent the notice of decision "to the owner,
17 filer, contact person, persons submitting a letter, persons
18 testifying at the hearing held on October 26, 1994, and the
19 Liberty Boone Neighborhood Association chair and land use
20 chairs." Record 239. Additionally, the record indicates
21 that, in preparation for the May 13, 1996 city council

²The notice of hearing was sent to petitioner's home address, listed in the tax records, in Stayton, Oregon. Notice of hearing was also sent to petitioner's rental property at 1205 Barnes Road, Salem, which is adjacent to the subject property.

³The sign-up sheet states "Clear and complete information will assure you delivery of the decision on this matter." Record 229.

1 hearing, petitioner obtained the city secretary's deposition
2 during which she detailed the city's procedures for mailing
3 notices of decision. She testified during that deposition
4 that she keeps track of activities concerning all appeals on
5 a secretarial processing sheet. She stated that she mailed
6 the notice of decision in this case to all persons who
7 testified and on the date of the mailing, noted this action
8 on a secretarial processing sheet. She testified further
9 that she obtained the 1205 Barnes Road address, to which she
10 mailed the notice of decision, from the sign-up sheet and
11 the minutes.⁴

12 The challenged decision briefly describes the procedure
13 the city used for sending the notice of decision in this
14 case, and then concludes that there is substantial evidence
15 that the city provided the required notice of the November
16 7, 1994 decision. However, we conclude that the evidence
17 upon which the city relied does not substantiate the city's
18 conclusion that it mailed the notice of decision to
19 petitioner.

20 The secretarial processing sheet does not provide a
21 list of those persons to whom the notice of decision was
22 sent. The processing sheet is a check list of duties
23 pertaining to land use applications. Record 236-38, 250.

⁴It is not clear from the record that the minutes had been prepared by November 7, 1994 or that the secretary consulted the minutes. In any case, after they were prepared the minutes reflected only the 1205 Barnes Road address and not the Stayton address.

1 Under the heading "RECEIPT OF HEARINGS OFFICER DECISION" is
2 an item "Distribute the packets as follows:" next to which
3 is entered "11-7," apparently an action date, under which is
4 an item "ACTION SHEET, NOTICE MAP, AND APPEAL PROCEDURE
5 SHEET. Under that title are four categories, of which the
6 relevant category, "Person testifying/submitting comments,"
7 is check marked. The city argues on appeal that this check
8 mark entry demonstrates that petitioner was sent the
9 required notice of decision. However, the processing sheet
10 does not identify who testified, a prerequisite to
11 determining to whom notice must be sent. The secretary's
12 deposition testimony does not demonstrate that the secretary
13 reviewed the minutes to determine if persons who did not
14 sign-up eventually testified or that she sent a notice of
15 decision to petitioner.

16 This subassignment of error is sustained.

17 **B. Record Date of Decision**

18 Petitioner argues that the city improperly determined
19 the record date from which the time for filing an appeal is
20 calculated. SRC 114.190(a) requires the planning
21 administrator to record the date of receipt of the hearings
22 officer's decision and states "[s]uch decision shall not be
23 deemed entered until so received and recorded." Petitioner
24 reasons that if the challenged decision has not been dated
25 as required by SRC 114.190(a), the decision is not yet final
26 for purposes of appeal.

1 The staff report, adopted as part of the challenged
2 decision, states:

3 "Appellant contends that the code requires that
4 the 'record date' be affixed by the administrator
5 on the Hearings Officer decision. This is not
6 what the code requires. The code requires that
7 the record date - the receipt date - * * * be
8 recorded on the decision. The transcript of the
9 clerk's interview shows that this is exactly the
10 case - the date is recorded on the decision. Not
11 only that, but that date is also recorded on the
12 Secretarial Processing Sheet and the Case
13 Information Sheet, both of which documents are
14 official file records.

15 "Consequently, the facts show that the record date
16 was properly recorded on the decision in this
17 matter." (Emphasis in original.) Record 67.

18 The county interprets its code to require that the
19 receipt date be recorded on the decision. We defer to the
20 county's interpretation. ORS 197.829(1).

21 This subassignment of error is denied.

22 The first assignment of error is sustained, in part.

23 **SECOND ASSIGNMENT OF ERROR⁵**

24 Petitioner argues that the challenged decision
25 impermissibly makes two separate alternative decisions:

26 "The first decision made by the respondent is that
27 the local appeal was not timely filed. The second
28 decision was that if its first decision was found
29 to be incorrect on appeal, a new decision would
30 spring forth approving the application with some

⁵Because we sustain petitioner's first assignment of error, that the city did not provide petitioner with timely notice of its decision, it is necessary for us to reach the second assignment of error to determine if we may consider the city's alternative decision.

1 additional conditions." Petition for Review 16-
2 17.

3 The city responds:

4 "This assignment of error should be denied for
5 several reasons. First, Petitioner had ample
6 opportunity to raise this issue below and failed
7 to do so. Second, the City's adoption of the
8 alternative decision was an administratively and
9 judicially economic response to an issue raised by
10 Petitioner below. Third, no law bars this
11 procedure. Fourth, Petitioner is in no way harmed
12 or prejudiced by the City's adoption of this
13 procedure in this case." Respondent's Brief 11-
14 12.

15 Petitioner is not raising a new issue before LUBA that
16 he should have but did not raise below. The city council
17 did not elect to adopt alternative decisions until after
18 public participation was concluded. Petitioner was not
19 required to contest the city staff's suggestion to the city
20 council that it adopt alternative decisions in order to
21 preserve this issue on appeal.

22 However, we agree with the city that adoption of the
23 alternative decision was an administratively and judicially
24 economic solution in lieu of making a second, later decision
25 if it was determined on appeal that petitioner's appeal to
26 the city council was timely. Moreover, the outcomes of the
27 alternative decisions do not differ. Under either decision,
28 the variance is allowed. Petitioner is in no way harmed or
29 prejudiced by the city's adoption of alternative decisions.

30 The second assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioner argues that the city improperly construed
3 SRC 115.020 in granting the variance.⁶ SRC 115.020 states:

4 "The hearings officer may grant the degree of
5 variance from any of the development standards
6 imposed on a particular subject property under the
7 provisions of this zoning code which is reasonably
8 necessary to permit development for an otherwise
9 lawful use upon finding that each of the following
10 criteria is met:

11 "(a) There are special conditions applying to the
12 land, buildings, or use referred to in the
13 application, which circumstances or
14 conditions do not apply generally to land,
15 buildings, or uses in the same district, and
16 which create unreasonable hardships or
17 practical difficulties which can be most
18 effectively relieved by a variance ordinance.
19 Nonconforming land, uses, or structures in
20 the vicinity shall not in themselves
21 constitute such special conditions, nor shall
22 the purely economic interests of the
23 applicant. The potential for economic
24 development of the subject property itself
25 may, however, be considered among the factors
26 specified in this section[;]

27 "(b) Granting a variance will not be unreasonably
28 detrimental to the public welfare or to
29 property or improvements in the neighborhood
30 of the subject property;

31 "(c) Granting a variance will not, under the
32 circumstances of the particular case,
33 unreasonably affect the health or safety of
34 persons working or residing in the
35 neighborhood of the subject property; and

⁶Because we deny petitioner's second assignment of error, we consider petitioner's subsequent assignments of error which addresss the alternative challenged decision.

1 "(d) Granting a variance will be consistent with
2 the comprehensive plan and with the intent
3 and purpose of the zoning ordinance."

4 Petitioner contends that "there is NO special
5 condition, unreasonable hardship or practical difficulties
6 present in the development of this property at all. * * *
7 This is a clear case of convenience, not hardship."
8 (Emphasis in original.) Petition for Review 29. The
9 remainder of petitioner's argument is that the city went so
10 far in interpreting its ordinance in a flexible manner that
11 no variance can ever be denied. Thus, petitioner argues,
12 the city's interpretation is clearly wrong and indefensible.
13 Petitioner relies on Salem Golf Club v. City of Salem, 28 Or
14 LUBA 561 (1995), aff'd 134 Or App 414 (1995) in which we
15 observed that although SRC 115.020(a) is less stringent than
16 a traditional variance ordinance, it does require a showing
17 that hardships can be most effectively relieved by a
18 variance. We fail to see how that observation supports
19 petitioner's contention that the city's interpretation of
20 its ordinance goes too far or is in some way impermissible.

21 In the Supplemental Findings, the city interpreted SRC
22 115.020 as part of SRC chapter 115, stating:

23 "The purpose of Section SRC Chapter 115
24 demonstrates that it is to be interpreted more
25 flexibly, and to be less onerous on applicants,
26 than traditional variance standards. We do not
27 interpret SRC Chapter 115 to be a traditional
28 variance standard that is as demanding on the
29 applicant as is proposed by the appellant. SRC
30 115.010 states that the variance criteria are to
31 be interpreted flexibly and adaptably to allow the

1 granting of variances when minimum criteria
2 justifying deviation from a code provision are
3 met." (Emphasis in original.) Record 70.

4 To support this interpretation, the city relies on the
5 intent and purpose statement of SRC 115.010 which states, in
6 relevant part:

7 "It is the intent of this chapter to provide
8 flexibility, adaptability, and reasonableness in
9 the application and administration of this zoning
10 code where special conditions exist."

11 Our inquiry is limited to whether the city's
12 interpretation is indefensible. deBardelaben v. Tillamook
13 County, 142 Or App at 325. The city's interpretation is not
14 inconsistent with the purpose and policy of SRC Chapter 115,
15 and thus, is not indefensible.

16 Because the remainder of petitioner's rationale is more
17 in the nature of an inadequate findings or substantial
18 evidence challenge it will be dealt with under the third
19 assignment of error.⁷

20 The fourth assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 Petitioner argues that the city's findings for the
23 alternative decision are inadequate because they improperly

⁷Much of petitioner's argument in this assignment of error contains allegations of noise and light pollution. Petitioner does not show that these problems would not occur in the absence of a variance. The record does reflect several complaints from petitioner and code enforcement activity addressing these problems. Record 64. However, petitioner does not relate these concerns to the subject of this assignment of error, the city's interpretation of SRC 115.020.

1 construe SRC 115.020 and "essentially ignore" issues raised
2 by petitioner.⁸ Petition for Review 21. Petitioner argues
3 generally that he

4 "went to great lengths before the respondent to be
5 thorough and specific about his concerns regarding
6 the variance. Since all the relevant permits were
7 issued and construction of the BP service
8 station/convenience market/carwash were complete
9 and a certificate of occupancy issued long before
10 the last public hearing, petitioner was in the
11 position of being able to not only express his
12 concerns but document them as well." Petition for
13 Review 20.

14 Petitioner identifies several issues that he raised
15 that the city did not address. Petitioner contends that a
16 variance is not necessary because intervenor could have used
17 a design that did not require a variance. Thus, petitioner
18 argues the variance is not "reasonably necessary" to permit
19 development of the site under the introductory language of
20 SRC 115.020.⁹ Petitioner contends also that the city did
21 not adequately address his concerns under SRC 115.020(c)
22 that the variance would unreasonably affect the health or
23 safety of persons residing in the neighborhood of the

⁸We addressed the city's interpretation of SRC 115.020 in the fourth assignment of error.

⁹Petitioner describes this assignment of error as an inadequate findings challenge. However, except insofar as petitioner alleges the city did not adequately respond to issues he raised, petitioner does not specifically identify how the city's findings are inadequate or to which criterion his argument relates. His statements assume that the city is obligated to explore the feasibility of each alternative design proposed by petitioner, without relating the failure to consider those proposals to any criterion or the adequacy of any particular finding.

1 subject property. Petitioner bases this contention on the
2 proximity of the employees break room to his property where
3 it creates noise and trash problems. We discuss each of
4 these issues under the appropriate variance criterion.

5 Findings must address and respond to specific issues,
6 raised in the proceedings below, that are relevant to
7 compliance with applicable approval standards. Hillcrest
8 Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293,
9 608 P2d 201 (1980); Norvell v. Portland Area LGBC, 43 Or App
10 849, 853, 604 P2d 896 (1979); Skrepetos v. Jackson County,
11 29 Or LUBA 193, 208 (1995); Mc Kenzie v. Multnomah County,
12 27 Or LUBA 523, 544-45 (1994). In order to determine if the
13 city's findings are adequate, we must determine if they
14 properly responded to the issues raised by petitioner.

15 **SRC 115.020(a)**

16 Petitioner argues that the city did not find that the
17 design chosen by intervenor was the most effective design to
18 relieve intervenor's hardship, as required by SRC
19 115.020(a). Much of petitioner's argument is premised on
20 findings that would be required to grant a variance under a
21 traditional, more stringent standard than that adopted by
22 the city.

23 The city contends that it responded in its findings to
24 petitioner's argument that granting the variance was
25 unnecessary to most effectively relieve hardships and
26 difficulties. The city finds that the use of the subject

1 property is constrained by special conditions because of
2 setback and buffer yard requirements on all sides so that:
3 "The net developable area of the property has been reduced
4 from 41,105 square feet to 25,899 square feet (a reduction
5 of approximately 37 percent due to SRC Chapter 130 and
6 Chapter 132)." Record 53. It also finds that, without a
7 variance, this reduction would require backing of and other
8 potentially hazardous movements for large tanker delivery
9 trucks.

10 The problem with the city's findings is that the
11 challenged decision does not discuss why granting a variance
12 is the most effective method to relieve the special
13 conditions of parcel size and shape. The findings do not
14 establish that the variance meets the requirements of SRC
15 115.020(a) that special conditions apply to the subject
16 property that "can be most effectively relieved by a
17 variance."

18 This subassignment of error is sustained.

19 **SRC 115.020(b) and (c)**

20 Petitioner alleges that the findings do not adequately
21 respond to the issue petitioner raised under SRC 115.020(b)
22 that the variance will not be unreasonably detrimental to
23 the public welfare and the neighborhood because they do not
24 address petitioner's concerns about noise and trash problems
25 created as a result of the proximity of the employee break
26 room to petitioner's property. Petitioner argues also that

1 allowing a reduction of a thirty-foot setback to four feet
2 to allow operation of a commercial enterprise is
3 unreasonably detrimental to the health and safety of the
4 neighborhood which precludes a variance under SRC
5 115.020(c). The bulk of petitioner's argument is devoted to
6 factual allegations regarding vacuum system noise and light
7 pollution.

8 The challenged decision finds:

9 "With regard to SRC 115.020(b) and (c) we agree
10 with the hearings officer that the granting of the
11 variance, as conditioned, will not adversely
12 affect Mr. Shaffer or his renters. Testimony
13 before us made it clear that the opponents were
14 primarily concerned about the existence of a
15 service station on the parcel, not about any
16 aspect related to the variance. The evidence
17 presented by both the applicant and the appellant
18 demonstrated that impacts on neighbors would
19 likely have been higher had a service station been
20 built on the site without a variance; light and
21 noise likely would have been directed more in the
22 direction of the Shaffer residence."¹⁰ (Emphasis
23 in original.) Record 70-71.

24 The findings supporting the decision, as conditioned,
25 adequately establish the factual and legal basis for the
26 city's conclusion that the variance will not be unreasonably

¹⁰The challenged decision imposes the following conditions:

- "1. Extend the existing wall located along the west property line to not less than 8 feet in height, with the height measured from the grade of the paved surface of the service station.
- "2. Lower the height of all outdoor lighting located within 30 feet of the west property line to a maximum height of eight feet." Record 47.

1 detrimental to the public welfare or the health and safety
2 of the neighborhood, and adequately responds to the issues
3 raised by petitioner.

4 This subassignment of error is denied.

5 **SRC 115.020 Introduction**

6 Petitioner argues that the challenged decision does not
7 make findings pertaining to introductory language
8 "reasonably necessary to permit development". We understand
9 petitioner to argue that the introduction sets forth
10 mandatory criteria. The challenged decision does not
11 address whether the introductory language contains mandatory
12 criteria or whether those statements are merely descriptive
13 of the focus of the four specific criteria. In any case,
14 petitioner argued below that the proposed variance was not
15 reasonably necessary to permit development of the property.
16 It is not clear whether the city responded to this argument.

17 This subassignment of error is sustained.

18 The third assignment of error is sustained, in part.

19 **FIFTH ASSIGNMENT OF ERROR**

20 Petitioner argues that the challenged decision is not
21 supported by substantial evidence in the whole record.
22 However, petitioner devotes his entire argument to an
23 elaboration of his earlier inadequate findings argument.

24 Petitioner has not developed a substantial evidence
25 argument sufficient for our review. See Canby Quality of
26 Life Committee v. City of Canby, 30 Or LUBA 166, 179 (1995).

1 The fifth assignment of error is denied.

2 The city's decision is remanded.