BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WARREN CASEY, EVE CASEY, FRANCIS KILGORE, LUCILLE KILGORE, WAYNE LIEN, ARMINTA LIEN, CLAYTON TRENT, CASSIE TRENT, JOHN MEIER and REIDAMAE MEIER, Petitioners, v. CITY OF DAYTON, REX A. HOWARD and RANDY S. HOWARD, Respondents.	LUBA NO. 81-074 FINAL OPINION AND ORDER

Appeal from City of Dayton.

John W. Hitchcock, McMinnville, filed a petition for review and argued the cause for petitioners.

Stan Bunn, Newberg, filed a brief and argued the cause for Respondent City of Dayton.

Thomas C. Tankersley, filed a brief for Respondents Rex A. Howard and Randy S. Howard.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Remanded. 2/24/82

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).

BAGG, Referee.

NATURE OF THE DECISION

Petitioners appeal a conditional use permit by the City of Dayton allowing construction of a chiropractic clinic. The property lies in a single family residential zone (R-1), and is 4 1/2 acres in size. The clinic will include remodeling of a chiropractic physician's residence and exercise trails utilizing much of the 4 1/2 acres.

STANDING

Petitioners allege that they live within sight and sound of the proposed development (within 500 feet or less), and petitioners allege their interests are adversely affected by the development of the clinic "in their neighborhood consisting of only single-family dwellings in a low density residential area." Petition for Review 1-2. Precisely how petitioners are injured is not specified. Petitioners also allege that they appeared at the proceedings before the planning commission on January 19 and February 16, 1981, and petitioners alleged that they appeared before the Dayton City Council at its meetings of April 13 and May 18, 1981.

Petitioners' standing is challenged by Respondent City on the ground that the petitioners have failed to allege sufficient facts to satisfy the appearance requirement of Oregon Laws 1979, ch 772, sec 4(3)(a) in that "they have not alleged facts sufficient to show that they were entitled as of right to notice and hearing prior to the decision to be

reviewed or that their interests were adversely affected under section 4(3)(b)." Respondent's Brief at 1-2. Respondent argues that the petitioners do not live within the boundary of 300 feet of the subject property thereby entitling them to notice of the public hearings on the conditional use permit application. Additionally, respondent states that petitioners have alleged no facts showing a direct, personal injury suffered as a result of this decision. An allegation that petitioners are within sight and sound of the development states a fact, claims the city, but does not make any allegation of injury.

Petitioners clearly satisfy the first part of the test outlined in Oregon Laws 1979, ch 772, sec 4 providing that a quasi-judicial land use decision may be appealed if the petitioner

> "appeared before the city, county or special district governing body or state agency orally or in writing * * * *"

The petitioners did make the necessary appearance. What remains is the issue of whether or not they have alleged facts sufficient to demonstrate that their "interests are adversely affected or * * * aggrieved by the decision."

We held in Van Volkinburg v. Marion County, 2 Or LUBA 112 (1980), Merrill v. Van Volkinburg, 54 Or App 873 (1981), that the mere allegation of residence within sight and sound of a proposed development is sufficient injury to confer standing. See also Duddles v. City of West Linn, 21 Or App

310, 535 P2d 583 rev den (1975), wherein the court said that petitioners' close proximity to a project, such as within sight and sound, should ordinarily be sufficient to confer standing. Respondent does not challenge the assertion that petitioners live within sight and sound of the project. Respondents do not advance reasons why this presumption of standing, based on sight and sound, should be overruled. We decline to depart from the court's view that sight and sound gives rise to a presumption of standing. We conclude petitioners have standing.

FACTS

On December 15, 1980, the applicants submitted a conditional use application for a chiropractic clinic with walking trails and exercise stations in an R-1 zone in the City of Dayton. The application was heard by the planning commission on January 19, 1981, and continued on February 16. At that later date, the commission approved the application along with certain conditions. Petitioners appealed this decision to the city council, and the city council held a de novo public hearing on April 13, 1981 to consider the appeal. The council hearing was continued until May 18 because the applicant had failed to file a scale plan as required by the ordinances of the City of Dayton. On May 18, after receiving copies of the scale plan and hearing additional testimony, the council approved the project and adopted the findings of the planning commission, along with other findings and conditions.

Within the R-1 zone, certain conditional uses are allowed

if they otherwise meet the provisions of the City of Dayton's zoning ordinance. Among the conditional uses are "home occupations" and "professional offices: medical, dental, certified public accountant, lawyer, engineer and architect." Zoning Ordinance of the City of Dayton, Section 4.20. The grant of a home occupation is subject to the provisions of Ordinance Section 17.50:

> "HOME OCCUPATIONS. The intent of the home occupation is to recognize the needs of people who are engaged in small-scale business or professional operations from their place of residence. The residential character of the property is maintained and the home occupation is conducted in such a manner as not to give an outward appearance nor manifest any characteristic of a business in the ordinary meaning of the term. A home occupation shall not infringe upon the right of neighboring residents to enjoy the peaceful occupancy of their home for which purpose the residential zone was created and primarily intended."

The standard for home occupations include a provision that

> "The business or activity shall be conducted wholly within the home or within a small attached (not greater than 1/2 the floor area of the house) accessory building, residential in appearance." Zoning Ordinance Section 17.60(C).

Conditional uses are subject to the following standards:

> "CIRCUMSTANCES FOR GRANTING CONDITIONAL USES. The Planning Commission may prescribe restrictions or limitations for the proposed conditional use. Any reduction or change of the requirements of the Ordinance must be considered as varying the Ordinance and must be requested and viewed as such. The Planning Commission shall impose conditions only after it has determined that such conditions are necessary for the public health, safety and general welfare, or to protect persons or improvements in the area. The Planning Commission may prescribe such conditions it deems necessary to fulfill the purpose and intent of this Ordinance. The Planning Commission shall analyze the following criteria and incorporate such into their

decision:

"A. There is a public need for the conditional use;

"B. There is an inadequacy of other property to satisfy the public need;

"C. The conditional use conforms to the Comprehensive Plan, all other provisions of this Ordinance, and any applicable street or highway plans;

"D. The site for the proposed use is adequate in size and shape to accommodate said use of all yards, spaces, walls and fences, parking, loading, landscaping and other features required to adjust said use with land uses in the neighborhood;

"E. The site for the proposed use relates to streets and highways adequate in width and pavement type to carry the quantity and kind of traffic generated by the proposed use;

"F. The proposed use will have no adverse effect on abutting property or the permitted uses thereof; and

"G. The conditions stated in the decision are deemed necessary to protect the public health, safety and general welfare." Zoning Ordinance Section 17.30.

This section is renumbered from Section 13.30. For the purposes of this appeal, Section 13.30 is identical to Section 17.30.[1]

The city found that some 90 plus persons from the City of Dayton are currently patients of the doctor and a clinic located in Dayton would be "convenient for such established patients." Also, the city found that there was a potential for serving patients not only from Dayton and the surrounding area, but also a much larger geographical area.

"In addition to serving the established and potential patients from Dayton and the surrounding area, the proposed clinic would provide a unique service to

persons from throughout the state and the country. Testimony from the applicant indicates there are no such facilities (clinic in conjunction with walking trails and exercise stations) located on the west coast of the US and there are only a few facilities in the eastern part of the country."

ASSIGNMENT OF ERROR NO. 1

"The council's approval of the Howard's application was not based upon the standards and criteria set forth in the applicable zoning ordinance."

Within this assignment of error, petitioners' first complaint is that the applicant did not file a complete application with the planning commission. Petitioners claim Section 9.50(5)(renumbered to 15.50e) requires a completed application, and the city's application form requires ten copies of a site plan, drawn to scale, showing structures, driveways, landscaping and other features. Petitioners claim they apprised the city council of this deficiency, but the city council failed to obtain compliance. Petitioners claim prejudice because the failure to file a plan makes it difficult for petitioners to understand the impact of the proposed development. Further, the ordinance requires review of applications, and a meaningful review is impossible without a complete scale plan.

Petitioners' second complaint within this assignment of error is that the council failed to follow the requirements of its floodplain management provisions. Section 8.40 (renumbered to 10.40) controls floodplain management and limits construction within areas identified as special flood hazard

areas. Petitioners say the applicant's property is in a floodplain, and we understand the petitioner to be arguing that there is no showing that the special floodplain provisions have been met.

The respondent states that it is correct that the applicant did not file a scale plan with the planning commission. Respondent claims no filing was made because none was requested.[2] The respondent notes, however, that the applicant did file a scale plan with the city council, and the details of that scale plan were discussed fully at the May 18 city council meeting. Petitioners were present at that meeting, and respondent claims that because of extensive testimony pro and con, all of the factors required in the application form were clearly examined at that meeting. Respondent states that the council's acceptance of the drawings, even if deficient in some fashion, should not result in remand or reversal of this case as petitioners are unable to show any prejudice. Petitioners were not prevented from a meaningful review of the application, says respondent, even though the plan submitted on May 18 did not specifically show all of the required criteria listed in the application form.

We agree with the respondents that petitioners are unable to show prejudice from any procedural error committed with respect to the scale plan. Appeals to the city council from the planning commission are, as we understand the city's interpretation of its ordinance, de novo.[3] The city is not

restricted by its ordinance to a review of the planning commission record. The city may expand the record as it may see fit. Any defect occasioned by failure to file a scale plan with the planning commission was cured upon the filing with the city council. Additionally, we agree that the city council discussion clearly shows consideration of relevant criteria, and petitioners had every opportunity to completely examine the application as presented. We do not believe the city's error in not requiring a scale plan at the planning commission level resulted in a procedural error that warrants reversal or remand given the facts in this case.

As to the second complaint in this first assignment of error, the respondent states that the petitioner has failed to present facts showing the location of the Howards' property in relation to the comprehensive plan map showing the flood hazard areas. However, respondent does admit a portion of the Howard property lies in a floodplain area. Respondent claims that no structures would be built upon this portion of this property. In the next sentence, however, respondent states that "a portion of existing trails is in the floodplain..." Brief of City at 12. Respondent claims that the applicant did not propose a permanent construction or development of these trails "at the present time," and since there was no construction or development occurring within the flood hazard area, there was no need to comply with Section 10.40 of the zoning ordinance.

We do not agree with respondent on this issue. The

findings of fact do not mention flood hazards at all. There is sufficient evidence in the record (indeed the respondent admits) to suggest that at least a portion of the property lies within the flood hazard area identified in the comprehensive plan. Additionally, petitioners alerted the city to potential conflict with floodplain problems, and the city's minutes show that floodplain and possible construction within the floodplain was an issue. Under those circumstances, and considering the record shows that many of the trails will be paved, we do not believe that the city may escape even a mention of the floodplain management section of its ordinance. Included within the flood management section of the ordinance are requirements for a development review by the planning commission, anchoring of construction, requirements as to construction materials and methods and other requirements. Whether or not these individual standards apply directly to paved jogging trails or exercise stations is a matter for city determination in the first instance. In the face of petitioners' clear concern and in the face of the existence of its ordinance, however, we believe it was incumbent upon the city to at least address the standards in the flood management section of its ordinance and discuss whether or not they were applicable and whether or not they had been met. Cf. Faye Wright Neighborhood v. City of Salem, 1 Or LUBA 246 (1980).

The first assignment of error is sustained insofar as the city has failed to address Section 10.40 of its zoning

ordinance concerning floodplain management.

ASSIGNMENT OF ERROR NO. 2

> "The Council's findings of fact and conclusions of law are inadequate because: They fail to adequately address the criteria required to be met; and they are not supported by substantial evidence in the record."

In the second assignment of error, the petitioner takes each of the criteria for granting a conditional use as quoted in the "facts" section above and claims that the city's findings fail to show compliance. The first criteria is a demonstration of public need for the use. The city's findings are as follows:

> "(1) There is a public need for the conditional use."
>
> > "(a) The need for the proposed chiropractic clinic is based on the following:
> >
> > > "(i) The applicant, Dr. Howard, presently operates a chiropractic clinic with an established clientele in McMinnville. Records indicate that 90+ persons from Dayton are currently patients of Dr. Howard. A clinic located in Dayton would be convenient for such established patients. At least eight of Dr. Howard's current or past patients testified as to the need for this facility in the Dayton area; and
> >
> > > "(ii) In addition to serving the established and potential patients from Dayton and the surrounding area, the proposed clinic could provide a unique service to persons from throughout the State and County. Testimony by the applicant indicates that there are no such facilities (clinic in conjunction with walking trails and exercise stations) located on the west coast of the U.S. and there are only a few such facilities in the eastern part of the

> country. Dr. Howard testified that this type of facility is needed for the treatment of arthritis and that there was no such regional facility available to meet this public need.

Petitioners claim there is no showing of a public need to move the clinic to Dayton. Petitioners conclude only that patients from Dayton suffer inconvenience at having to travel to the present clinic in McMinnville. Petitioners also say the record includes no evidence of a need for such a medical facility.

The respondents argue that the record includes testimony as to the need for a clinic to reduce travel time, to increase the growth of the city, to fill a vacancy of health care, and for the particular kind of facility proposed. Respondent says that the test for determining whether this finding is supported by substantial evidence is to be found in Stringer v Polk County, 1 Or LUBA 104 (1980), and in particular that portion of the opinion quoting Christian Retreat Center v Washington County Board of Commissioners, 28 Or App 673, 679, 560 P2d 1100 (1977):

> "Where, as here, it is alleged that the findings of the lower tribunal are not supported by substantial evidence, the inquiry to be made by this court is the limited one of whether the record contains evidence which a reasonable mind might accept as adequate to support the findings challenged. Where the record includes conflicting believable evidence, that conflict is to be resolved not by this court but by the lower tribunal which may choose to weigh the evidence as it sees fit."

We agree that the city has adequately shown a need for this particular kind of facility. The city has identified a need

that exists which is certainly much more than a mere market demand and which we feel recognizes a benefit which most people would recognize as a need. Cf. Still v. Marion County, 42 Or App 115, 600 P2d 433 (1979). The need recognized is a kind of regional medical need. The facts to support the assertion of need are not challenged by the petitioners, and we conclude that a medical "need" is a legitimate public need contemplated by the ordinance.

The second of the criteria attacked by petitioners is a requirement that

> "(2) There is an inadequacy of other property to satisfy the public need.
>
> "(a) The applicant has indicated that the site necessary to accommodate the type of clinic and facilities proposed must be a minimum of two (2) acres, preferably with some topographic variations. The site of the proposed clinic exhibits these characteristics since the parcel is approximately four and one-half (4.5) acres in size with gentle variations in topography. In that recent surveys conducted by both the applicant and an area realtor indicate that there are no commercially zoned properties of adequate size and exhibiting similar topographic features, existing in Dayton, it would appear that there is an inadequacy of other property to satisfy the public need and that this property would best accommodate the type of facilities proposed.
>
> "The Council finds the survey by the applicant to be accurate and finds that there is no commercial property of adequate size in the City of Dayton to allow for development of the proposed facility.
>
> "The survey was done by reviewing all commercially zoned property in the City of

Dayton."

Petitioners claim that this finding is inadequate because it does not consider whether other property might be available to fill the need regardless of zone. Petitioners further complain that the record is devoid of any finding or evidence that the applicant's existing facility is not adequate to meet this need.

Respondent cites testimony showing a review of commercial and non-commercial property was conducted showing that there was no other property large enough to accommodate the particular use proposed. Record 28. Respondent points to a letter from an area realtor that she had been unable to locate "suitable property" for the project. Record 70. Respondent urges that the council's finding should be viewed as insufficient only if evidence exists that a parcel of property exists that could accommodate the proposed use. In short, the evidence submitted by the realtor should be sufficient as substantial evidence absent evidence in rebuttal.

We agree with the respondent. The finding is supported by evidence, and we are cited to no contrary evidence. Here the applicant required property of a certain size to accommodate all of the activities proposed, and the record shows that a survey was performed in an attempt to find other property that might be suitable. The conclusion of the researcher was that other property was not suitable, and we believe that testimony is substantial evidence absent other evidence to the contrary

in the record.

The third criteria requires that the conditional use conform to the comprehensive plan and other applicable requirements. Here the petitioner attacks the notion that a facility as large as the one proposed, serving upwards of 50 patients a day, could possibly meet the comprehensive plan and zoning ordinance as their provisions touch upon the R-1 residential zone. Petitioners also say the city failed to make any findings concerning floodplain hazards.

The city's finding is as follows:

"(3) The conditional use conforms to the Comprehensive Plan, all other provisions of this Ordinance, and any applicable street or highway plans."

"(a) In that the site of the proposed clinic is plan designated R-1, and the R-1 zoning district provides that medical offices may be allowed in the district by conditional use, the proposal would appear to conform to the Comprehensive Plan and Zoning Ordinance. Further, the proposal is consistent with plan policies regarding the preservation of open space, and the diversification and improvement of the City's economy in that:

"(i) Establishment of the proposed clinic and accessory facilities would involve minimal structural development, essentially preserving the area as an open space use;

"(ii) Establishment of the proposed clinic and exercise facilities would preclude residential development and would thus preserve more open space;

"(iii) Establishment of the clinic would help to diversify the City's economy and would contribute to the City's tax base."

The respondent cites that portion of the finding wherein the city likens the proposed development to a medical office, an allowed conditional use within the R-1 zone. See 3(a), supra. The city states its belief that the proposed use is consistent with the city conditional use ordinance. The city claims that any failure to comply with the floodplain management ordinance is irrelevant because such findings were not necessary.

We can agree with petitioners that findings concerning the floodplain ordinance were necessary because of the property's location within floodplain hazard area. See Assignment of Error No. 1, supra. The matter of whether such a use is even comtemplated in an R-1 zone is more difficult. Here, because of the large outside exercise area, however, the use contemplated goes beyond what one might consider to be that allowed in a "professional office." Indeed, the use requires 4-1/2 acres in addition to the "professional office" which is limited to but a portion of the doctor's residence.

We view the term "professional office" to be an inexact term requiring interpretation by the local government. In Springfield Education Association v The School District, 290 Or 217, 621 P2d 547 (1980), the Supreme Court noted three classes of statutory terms, of which "inexact terms" is one.

> "...each of which conveys a different responsibility for the agency in its initial application of the statute and for the court on review of that application. They may be summarized as follows

"(1) Terms of precise meaning, whether of common or technical parlance, requiring only fact finding by the agency and judicial review of substantial evidence;

"(2) Inexact terms which require agency interpretation and judicial review for consistency with legislative policy; and

"(3) Terms of delegation which require legislative policy determination by the agency and judicial review of whether that policy is within the delegation." 290 Or 217 at 223.

With respect to these inexact terms, the court advised that:

"Whether certain things are included will depend upon what the user intended to communicate or accomplish by the use of the word. To determine the intended meaning of inexact statutory terms, in cases where their applicability may be questionable, courts tend to look to extrinsic indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase. In any event, however the inquiry remains the same: what did the legislature intend by using the term." 290 Or at 217 at 224.

As we noted in Theland v Multnomah County, ___ Or LUBA ___ (LUBA No. 81-081, Slip Op 11/23/81), what the administrative agency or here the city meant by this term must be set forth in the city's order. Slip Op at p. 9. The City of Dayton found the use was consistent with the R-1 zone because it preserved open space and involved minimal structural development. If we note the other conditional uses allowed within the R-1 zone, it would appear that preservation of open space and minimal structural development is one requirement of any conditional use. In other words, the city desires that its conditional uses be kept to small structures. The conditional uses

permitted in the R-1 zone are duplexes, planned unit developments, churches, home occupations, farming (excluded livestock and poultry), day nurseries and the professional offices mentioned earlier. Ordinance Section 4.20 (not renumbered).

Because the apparent intensity of this use (50 person per day) and the structural improvements contemplated are to be kept to a relatively small scale, we can agree that the present intensity of the use is compatible with the uses allowed in the R-1 Zone. Were the proposal to include a large structure, or were the expected patient load to exceed that of other doctors' offices, we would find it more difficult to agree that the intensity of uses is similar. In this case, the evidence shows the applicant's present office serves some 90 persons each day. That intensity of use is greater than the 50 patients per day envisioned for the proposed development.

However, this use takes 4 1/2 acres permanently out of residential availability, and there is no explanation of the effect of this act on the city's residential land needs and policies. The other conditional uses in the R-1 zone do not generally make use of large parcels of land. See Ordinance Section 4.20. There are two uses that do use large lots: farms and parks. Farms do not forever remove land from residential use, and parks are common in residential settings and are, of course, open to the public. Though this plan leaves land in open space, as is encouraged by the

comprehensive plan, the open space is closed to the public (it is not a park) and it is closed to future residential uses.[4] In sum, although we can agree the planned intensity of the proposed use is compatible with other land uses in the R-1 zone, we do not find the proposed use is at all similar in its ultimate disposition of the land. Also, we note that there are no conditions limiting the patient load or intensity of the use, and the city has cited us to no provision that would allow the city to insure that the future intensity of use is kept to one compatible with the other use intensities in the R-1 Zone. We can not agree with the county's interpretation of its ordinance because the county has failed to explain how the proposed use meets the intent of the R-1 Zone, or, how it is that the proposed use falls within the "compass" of the terms of the R-1 Zone. See Springfield, 290 Or at 225, supra.

The fourth criteria requires the use to be adequate in size and shape as may be necessary to "adjust" the use with land uses in the neighborhood. The petitioners claim that without the requisite scale plan, it is not possible to assess the relationship between this site and the proposed use. The petitioners complain the city's findings are not supported by evidence in the record and are "conclusionary."

The finding is as follows:

> "(4) The site for the proposed use is adequate in size and shape to accommodate said use of all yards, spaces, walls and fences, parking, loading, landscaping and other features required to adjust said use with land uses in the neighborhood.

"(a) The applicant's property is adequate in size and shape to accommodate the proposed clinic and accessory uses and to adjust said use with land uses in the neighborhood that:

"(i) The location of the existing residence and the proposed clinic addition is such that there would be over 100 feet from the front, rear or side property lines. The R-1 zoning district setback standards only require that a minimum front yard setback of twenty (20) feet, a minimum rear yard setback of fifteen (15) feet and a minimum side yard setback of seven and a half (7.5) feet shall be maintained;

"(11) The four and one-half (4.5) acre parcel can adequately accommodate the proposed facilities and the necessary parking and loading requirements as demonstrated by the site plan submitted by the applicant which delineates the walkway and exercise station layout, the addition to the clinic and the proposed off-street parking and loading facilities; and

"(iii) "Because of the size of the applicant's property and the location of the proposed facilities, a land area buffer exists between the proposed clinic and adjacent residential uses."

The city responds that the petitioners had ample opportunity to explore this "scale plan" issue during the review of the scale drawing. We agree. The drawings that were submitted showed the addition to the doctor's house and walking trails and exercise stations. The drawings showed parking areas and other features from which the city could easily conclude that the site was adequate in size to accommodate the use. Also, the findings articulate reasons for the city's view

that the property is large enough for the intended use. The apparent purpose for this provision is to ensure that the property requested for a conditional use is not so small as to be unable physically to accommodate the use. As most of the property is left in open space, we fail to see an error.

The fifth criteria requires that the use be adequate for the traffic generated. The petitioners state that the finding adequately addressed the matter of pavement, but petitioner complains that no evidence was presented or findings made addressing petitioners' concerns about pedestrian safety. Further, petitioners submit that the applicants presented no information that the street was adequate in width to accommodate pedestrian and vehicular traffic. There are no sidewalks, and there is apparently no other provision for pedestrians.

The city's finding is as follows:

> "(5) "The site for the proposed use relates to streets and highways adequate in width and pavement type to carry the quantity and kind of traffic generated by the proposed use.
>
> "(a) In that testimony, as presented at the February 16, 1981 Planning Commission meeting, indicated that the access roadway was recently paved and exhibits a surface thickness greater than any other street in the City of Dayton, the pavement type of the street would appear to be more adequate than any other existing City street to carry the kind of traffic expected to be generated by the proposed clinic.
>
> "(b) The City Engineer has indicated that the traffic flow created by the Howard proposal will have very little impact on street

> condition. In fact that report indicates that the deterioration of residential streets is usually caused by weather rather than traffic usage, and that additional usage could be of some benefit."

The respondent city states there is sufficient evidence in the record to show the road had recently been paved and is more than adequate to support anticipated traffic. Respondent notes the city engineer's letter discussing Palmer Lane and finding that Palmer Lane meets or exceeds normal design standards for residential streets.

As to pedestrian safety and the lack of a sidewalk, respondent claims the evidence was conflicting. Respondent claims the council resolved this conflict by requiring no warning signs or the installation of a sidewalk. Respondent does not deny that pedestrian "traffic" is not a consideration under city's requirements for adequate streets and highways.

We do not view the finding to be adequate given petitioners' clear concerns over pedestrian safety. We are cited to no evidence in the record and we are unable to find evidence showing the council even considered the matter of pedestrian safety. Whether or not the council chooses to believe that a sidewalk or other protection for pedestrians is necessary, the city was required to address these concerns, when well articulated (as they were here) by the petitioners. Cf. Faye Wright, supra.

The last requirement is that any conditions imposed be necessary to protect public health, safety and welfare. The

city's finding that "conditions may be imposed to further minimize the impact of the proposal on abutting nearby properties," states the requirement but imposes no conditions. The petitioners simply say that "since the council did not impose any conditions on the Applicant's proposed use the seventh criteria has no applicability." We do not understand petitioners to be attacking the city's compliance with criteria number 7 and we do not address the city's compliance under that criteria.

ASSIGNMENT OF ERROR NO. 3

> "The council acted unreasonably in construing its zoning ordinance to permit the requested use in an area zoned 'single family residential.'"

In this assignment of error, the petitioners argue that the council ignored the clear intent of the ordinance in allowing this use in a residential zone. Petitioners' point is that the size and scope of a professional office in a residential neighborhood is to be small and unobtrusive. Petitioners appear to liken the proposed use to a hospital or medical clinic, and petitioners conclude that to allow such a use is to "emasculate" the section controlling conditional uses and allowing professional offices in a residential zone. Petitioners claim that the ordinance does not contemplate a national or regional treatment center.

Respondent states that it was not unreasonable for the council to interpret its ordinance to allow for the proposed use as a professional office. The respondent notes the home

occupation section of the ordinance quoted above "as a special type of conditional permitted use which must satisfy fairly rigid criteria...." The rigid criteria for a home occupation is to be contrasted, according to respondent, with the more liberal criteria for other conditional uses including professional offices. In other words, were the city council to have intended to limit professional offices in the same strict manner as home occupations, the city council would have said so. By implication, this proposed use would be prohibited as a home occupation, but not as a "professional office."

It does appear that the city contrasted home occupations with other conditional uses. City of Dayton ordinance restrictions of a proposed use to the dwelling unit or small attached building in the home occupations section does not appear generally in the conditional use section. We conclude that such strict rules do not apply generally to other conditional uses, such as "professional offices." However, home occupations are like the other conditional uses in the R-1 zone in that the other uses require little land area or are open to the public or at least do not permanently foreclose conversion for residential development.

In addition, we are troubled by the potential for this "professional office" to be something considerably more than appears to be contemplated in the zoning ordinance, and indeed, by the city council. If the facility should develop into a national facility, the intensity of use may increase

tremendously. We are cited to no provision in the ordinance where the city could even review its conditional use permit grant under such changed circumstances.

For these reasons and those discussed under assignment of error no. 2, supra, we agree with the petitioners that the city's construction of its ordinance is in error.

This matter is remanded to the City of Dayton for further findings not inconsistent with this opinion.

FOOTNOTES

[1] The city's findings recite that the criteria to be applied in this application were included in Section 13.30 (17.30) of the Zoning Ordinance. It is our understanding from the findings that the city did not understand that it was granting Dr. Howard a conditional use for a home occupation.

[2] We note here the ordinance requires the filing of the scale plan; the ordinance does not say the plan is to be filed only on request.

[3] Counsel for the city so advised at oral argument.

[4] See the "Policies" section of the comprehensive plan of the City of Dayton under "Open Spaces," page 12.