

LAND USE  
BOARD OF APPEALS

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

ARR 60 4:18 PM '88

JACQUES D. TOURNIER, LENDA C. )  
TOURNIER, SYLVIA L. SHLIM, )  
and RICHARD and SUE JONES, )  
Petitioners, )  
vs. )  
CITY OF PORTLAND, )  
Respondent, )  
and )  
CENTRAL CITY CONCERN, )  
Participant-Respondent.)

LUBA No. 87-111

FINAL OPINION  
AND ORDER

Appeal from City of Portland.

James S. Smith and Phillip C. Querin, Portland, filed the petition for review and James S. Smith argued on behalf of petitioners. With them on the brief was Ragen, Tremaine, Krieger, Schmeer & Neill.

Ruth Spetter, Portland, filed a response brief and argued on behalf of Respondent City.

Steven L. Pfeiffer, Portland, filed a motion to dismiss on behalf of Participant-Respondent Central City Concern. With him on the motion was Stoel, Rives, Boley, Jones & Grey.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee; participated in the decision.

AFFIRMED

04/06/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners appeal the November 9, 1987 order of respondent  
4 City of Portland (city) approving a conditional use permit for  
5 an institutional care facility providing transitional housing  
6 for up to 60 homeless women and children.

7 FACTS

8 The proposed facility, to be known as the West Women's  
9 Hotel (WWH), is located in northwest Portland. The WWH will  
10 replace a similar 30-bedspace facility currently operated by  
11 participant-respondent Central City Concern (CCC) just off  
12 Burnside Street in a high crime area of the city.

13 The WWH will provide shelter, and also counseling and  
14 referrals for employment, education, parenting and substance  
15 abuse. Ten to fifteen percent of the building will be used for  
16 administrative and program space, and the remainder for  
17 residential use. There will be 15 employees on the site and  
18 24-hour supervision.

19 The WWH site is zoned High-density Multifamily Residential  
20 (RH). The building on the site previously was used by the  
21 Rehabilitation Institute of Oregon (RIO) and has been vacant  
22 for two years. While occupied by RIO, the typical daily usage  
23 was by 36 patients, 80 staff people and 30 consulting  
24 physicians or visitors. The principal physical changes  
25 proposed are major interior modifications, addition of a play  
26 area, additional screening and landscaping, and blocking off a

1 driveway for creation of a loading area and play area.

2 The area immediately surrounding the WWH site is also zoned  
3 RH and is primarily residential in nature, with some commercial  
4 uses. Several other institutional uses are in the nearby area,  
5 including women's shelters and transitional housing.

6 After a conditional use permit for the WWH was initially  
7 approved by a city hearings officer, petitioners and several  
8 others appealed to the city council. A final decision was  
9 adopted by the council on November 5, and was signed by the  
10 mayor on November 9, 1987. Written notice of the council's  
11 decision, stating that the council's order was signed and  
12 effective on November 10, 1987, together with a copy of the  
13 council's order, was mailed to petitioners on November 10.  
14 Petitioners filed their notice of intent to appeal on  
15 December 1, 1987.

16 MOTION TO DISMISS

17 Participant CCC moves to dismiss this appeal, on the ground  
18 that the notice of intent to appeal was filed more than 21 days  
19 after the decision sought to be reviewed became final. CCC  
20 argues that the decision became final when it was reduced to  
21 writing and signed by the mayor on November 9; and, therefore,  
22 the deadline for filing a notice of intent to appeal was  
23 November 30, the day before the notice was filed with LUBA.  
24 According to CCC, the fact the written notice of the decision  
25 mailed to petitioners erroneously stated that the decision was  
26 signed on November 10 could not alter the date the decision

1 became final. The city concurs in CCC's motion.

2 Petitioners argue that the motion to dismiss is not timely  
3 under OAR 661-10-065(2) because it was not filed within ten  
4 days after CCC obtained knowledge of petitioners' alleged  
5 failure to file their notice of intent to appeal. Petitioners  
6 also argue that the deadline for filing their notice of intent  
7 to appeal was December 1, 1987, 21 days after they were mailed  
8 the written notice of the city's decision required by  
9 ORS 227.173(3), citing League of Women Voters v. Coos County,  
10 82 Or App 673, 729 P2d 588 (1986).

11 A challenge to our jurisdiction may be brought at any time  
12 and is not subject to the ten day requirement of  
13 OAR 661-10-065(2).<sup>1</sup> See Osborne v. Lane County, 4 Or LUBA  
14 368, 369 (1981); Grant County v. Oregon Dept. of Fish and  
15 Wildlife, 1 Or LUBA 214 (1980). The motion to dismiss was  
16 timely filed.

17 Under ORS 197.830(7) and OAR 661-10-015(1), a notice of  
18 intent to appeal must be filed not later than 21 days after the  
19 decision sought to be reviewed becomes final. In League of  
20 Women Voters v. Coos County, 82 Or App at 681, the Court of  
21 Appeals held that

22 " \* \* \* in all LUBA cases to which ORS 215.416(8)  
23 applies, the decision becomes final for purposes of  
24 appealing to LUBA under ORS 187.830(7) only after the  
prescribed notice of the decision is mailed or  
delivered personally to the party seeking to appeal."

25 The court noted that it did not purport to construe any other  
26 statutes relating to notice of local government decisions.

1       ORS 215.416(10)<sup>2</sup> and 227.173(3) set out identically  
2 worded requirements for notice of decisions on discretionary  
3 permits to develop land by counties and cities, respectively:

4       "Written notice of the approval or denial shall be  
5 given to all parties to the proceeding."

6       These provisions were added to the statutes by the same Act,  
7 Or Laws 1979, ch 772, sec 10a and 10b. We can conceive of no  
8 reason to interpret them differently.

9       Accordingly, we hold that, in all cases to which  
10 ORS 227.173(3) applies, a decision becomes final for the  
11 purpose of appeal to this Board under ORS 197.830(7) only after  
12 the prescribed written notice of the decision is mailed or  
13 delivered personally to the party seeking to appeal.<sup>3</sup>

14       In this case, there is no question that the conditional use  
15 permit approved is a discretionary permit as defined by  
16 ORS 227.160(2) and that petitioners were parties to the city's  
17 proceeding. Thus, petitioners were entitled to the written  
18 notice prescribed by ORS 227.173(3). That written notice was  
19 mailed to petitioners on November 10, 1987. Petitioners had  
20 until December 1, 1987 to file a notice of intent to appeal  
21 with this Board; and, therefore, their notice was timely filed.

22       The motion to dismiss is denied.

23       FIRST ASSIGNMENT OF ERROR

24       "The record is without substantial evidence to support  
25 the City Council's conclusion that the value of  
property surrounding the applicant's proposal will not  
be adversely affected."

26       Petitioners argue that the record does not contain

1 survey described in the Voget letter were not so different as  
2 to make the study's conclusions inapplicable to the WWH  
3 situation.

4 The city also argues that the Pietka letter is substantial  
5 evidence because it is the opinion of an expert real estate  
6 appraiser, with experience considering the impacts of a large  
7 criminal restitution center in a similarly mixed use Portland  
8 neighborhood. The city argues it is reasonable for it to  
9 believe that the WWH would not have greater negative impacts  
10 than a criminal restitution center.

11 Substantial evidence is evidence which a reasonable mind  
12 could accept as adequate to support a conclusion. Braidwood v.  
13 City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den  
14 (1976). See also, Christian Retreat Center v. Comm. for Wash.  
15 Co., 28 Or App 673, 679, 560 P2d 1100, rev den (1977). We must  
16 determine whether, in light of all the evidence in the record,  
17 the city's conclusion is reasonable. Younger v. City of  
18 Portland, \_\_\_ Or \_\_\_, \_\_\_ P2d \_\_\_ (March 29, 1988, p. 16).

19 Under Portland Code (code) 33.106.010, an applicant for a  
20 conditional use permit must demonstrate that the proposed use  
21 is "not detrimental or injurious to the \* \* \* value of the  
22 surrounding properties." The relevant city findings state:

23 "Neighbors and surrounding property owners presented  
24 generalized testimony that relocating the WWH to 20th  
25 and Kearney would have a detrimental effect on the  
26 character of the neighborhood and would lower the  
value of their properties. The Council finds this  
testimony to be unpersuasive because it was largely  
speculative and unsubstantiated. The Council heard

1 substantial evidence to support the city's conclusion that the  
2 WWH will not result in any reduction in property values.  
3 Petitioners assert that the only evidence in the record which  
4 supports the city's conclusion is (1) a hearsay summary of a  
5 report on dissimilar facilities and property in Hillsboro  
6 (Voget letter, Record 48-53); and (2) an opinion concerning the  
7 effects of a dissimilar facility, by a realtor who admits  
8 making no study of the subject property (Pietka letter, Record  
9 145-147). Petitioners argue that the factual situations which  
10 these letters describe "are so far removed from the subject  
11 property that a reasonable mind would not accept the evidence  
12 as adequate to support the City's decision." Petition for  
13 Review at 14.

14 Petitioners also argue that other evidence in the record  
15 about the effect of the WWH on property values in the subject  
16 area is all negative and is such that a reasonable mind would  
17 not consider the applicant's evidence substantial. Petitioners  
18 cite the opinion of a realtor familiar with the area (Tilbury  
19 letter, Supp. Record 17) and testimony of difficulty in leasing  
20 premises in the area because of fears about the WWH (Tournier  
21 testimony, Record 135).

22 The city replies that there is substantial evidence in the  
23 record to support its decision. The city argues the Voget  
24 letter is a probative review of property value impacts from  
25 special needs housing by a Multnomah County housing  
26 specialist. The city contends the situations examined by the

1 testimony that one property owner had experienced an  
2 increased number of vacancies since the applicant  
3 announced its plans to move to 20th and Kearney and  
4 had written leases with an 'escape clause' that the  
5 tenant could exercise if the WWH actually moved to  
6 that location. However, the Council heard no  
7 testimony that an increase in vacancy rates (of  
8 unknown and potentially short duration) equates to an  
9 overall or long-term decline in property values, nor  
10 is there evidence to indicate that such clauses are  
11 related directly or solely to this proposed use or  
12 will ever be exercised.

13 "Moreover, the applicant presented persuasive and  
14 credible evidence that relocation of the WWH to 20th  
15 and Kearney would not result in any reduction in  
16 property values. This evidence was based on studies  
17 of property values in areas surrounding a restitution  
18 center, a group home for developmentally disabled  
19 persons and a shelter for homeless families. In none  
20 of these instances did these facilities cause a  
21 perceptible decline in property values. The Council  
22 finds this evidence to be the best indicator that  
23 relocating the WWH to 20th and Kearney will not  
24 trigger a decline in the value of surrounding  
25 properties because it is based on actual experience  
26 and not speculation. Again, the conditions of  
approval imposed by the Council (specifically  
conditions C, F, H, I through X) are designed to  
insure that the WWH will be a good neighbor and  
compatible with the surrounding neighborhood." Second  
Supplemental (S. Supp.) Record 8-9.

18 We agree with the city that the Voget and Pietka letters  
19 are evidence on which a reasonable mind could base a conclusion  
20 that the WWH will not have an adverse effect on the value of  
21 neighboring properties. The facilities cited in the Voget  
22 letter, particularly the 20-24 bed shelter for homeless  
23 families in a mixed residential-commercial area, are  
24 sufficiently similar to the proposed WWH to allow comparison.  
25 The Pietka letter, describing the lack of adverse effect on  
26 property values by two restitution centers in mixed use



1 neighborhoods, is also a reasonable basis for concluding the  
2 WWH will not negatively impact property values. That Pietka  
3 did not make a direct study of the subject property does not  
4 destroy the credibility of his testimony. His letter shows he  
5 was familiar with the nature and circumstances of the proposed  
6 use and cites his extensive experience as an appraiser in  
7 analyzing similar issues.

8 The contrary evidence in the Tournier testimony and Tilbury  
9 letter does not so detract from the weight or undermine the  
10 credibility of the evidence relied on by the city as to render  
11 it not substantial.<sup>4</sup> See Universal Camera Corp. v. Labor  
12 Bd., 340 US 474, 488, 71 S Ct 456, 95 L Ed 456 (1951); Sane  
13 Orderly Development v. Douglas County Bd of Comm'rs, 2 Or LUBA  
14 196, 206 (1981).

15 Based on the evidence in the whole record, we find that the  
16 city's conclusion that the WWH will not cause a decline in the  
17 value of surrounding properties is reasonable.

18 The first assignment of error is denied.

19 SECOND ASSIGNMENT OF ERROR

20 "The record is without substantial evidence to support  
21 the council's conclusion that the use at a particular  
22 location is desireable to the public convenience and  
welfare."

23 Under code 33.106.010, an applicant for a conditional use  
24 permit must demonstrate that the proposed use "at the  
25 particular location is desireable to the public convenience and  
26 welfare." Petitioners argue the record does not contain

1 substantial evidence to support the city's conclusion that  
2 allowing the proposed WWH at the subject site is desireable to  
3 the public convenience and welfare.

4       Petitioners concede that there is a need in Portland for  
5 housing for homeless people and that the record is replete with  
6 evidence that the WWH would provide a needed service. However,  
7 petitioners contend that there is no evidence in the record to  
8 support a conclusion that the WWH at N.W. 20th and Kearney  
9 "benefits the convenience and welfare of all Portlanders."

10 Petition for Review at 16-17. According to petitioners, the  
11 evidence only demonstrates why CCC prefers the subject site.  
12 Petitioners also contend that city findings that the WWH will  
13 have fewer impacts than the previous nonconforming use and will  
14 add to the diverse, mixed-use character of the neighborhood are  
15 irrelevant to this standard.

16       Although petitioners characterize this assignment of error  
17 as a substantial evidence challenge, the issue presented in  
18 their argument is an alleged misinterpretation of the code  
19 standard. Petitioners contend the code standard requires a  
20 determination that the use at the proposed location provides  
21 benefits to all Portlanders. The city responds that it  
22 interprets the standard to require determinations that (1)  
23 there is a public need for the proposed use; and (2) the  
24 proposed location is desireable (in the sense of being  
25 suitable) for meeting that public need.<sup>5</sup>

26       The code does not contain a definition of "public

1 convenience and welfare." However, a local government's  
2 interpretation of its own enactment is entitled to some weight  
3 unless it is clearly contrary to the express language and  
4 intent of the legislation. Fifth Avenue Corp. v. Washington  
5 Co., 282 Or 591, 599, 581 P2d 50 (1978). In this instance, we  
6 find the city's interpretation of its code standard is  
7 reasonable and correct. See McCoy v. Linn County, \_\_\_ Or  
8 App \_\_\_, \_\_\_ P2d \_\_\_ (April 6, 1988); Gordon v. Clackamas  
9 County, 73 Or App 16, 20-21, 698 P2d 49 (1985).

10 Petitioners do not challenge the city's findings or  
11 supporting evidence with regard to the existence of a public  
12 need for the proposed use. Fairly read, petitioners do  
13 challenge the adequacy of the city's findings with regard to  
14 suitability of the particular location for the proposed use,  
15 alleging that the findings simply show why CCC prefers the  
16 subject site.<sup>6</sup> Petitioners also challenge the evidentiary  
17 support for the "suitability" findings.

18 The city's findings describe why the proposed site is  
19 suitable for meeting the public need the WWH is designed to  
20 serve. The findings describe the site's safety, on-site play  
21 area space and proximity to public transit, schools, parks,  
22 social service agencies, potential sources of employment and  
23 "other services likely to be used and needed by residents of  
24 the WWH."<sup>7</sup> S. Supp. Record 6. The findings are not limited  
25 to describing why the site is preferable to the applicant. The  
26 city cited us to numerous examples of evidence in the record

1 which supports the challenged findings. Record 58, 61, 179B,  
2 202, 285-289; Hearings Officer Hearing Transcript (HO Trans.)  
3 44; City Council Hearing Transcript (CC Trans.) 77.

4 The second assignment of error is denied.

5 THIRD ASSIGNMENT OF ERROR

6 "The record is without substantial evidence showing  
7 that the proposal is not detrimental to the peace and  
8 safety of the neighborhood."

8 Petitioners argue that the record lacks substantial  
9 evidence to support the city's conclusion that the WWH will not  
10 be detrimental to the "public health, peace or safety" of the  
11 surrounding neighborhood, as required by code 33.106.010. With  
12 regard to criminal activity, petitioners argue that, although  
13 there is no evidence in the record that the WWH is the cause of  
14 crime, drug and vagrancy problems at its present Burnside  
15 location, neither is there evidence in the record that these  
16 problems will go away if the WWH changes location.

17 Petitioners challenge the city's reliance on a letter in  
18 the record from the police chief comparing the WWH favorably to  
19 similar sized apartment buildings, with regard to police  
20 calls. According to petitioners, the police chief's letter  
21 does not support a finding that the WWH will not have a  
22 detrimental effect on northwest Portland as a source of  
23 criminal activity.

24 Petitioners also argue that the city's dismissal of  
25 petitioners' testimony with regard to crime, littering,  
26 vandalism and loitering cannot remedy the lack of substantial

1 evidence in the record to demonstrate that relocation of the  
2 WWH would not exacerbate these problems in the subject  
3 neighborhood. Petitioners further argue that the city's  
4 reliance on conditions to ensure compliance with this standard  
5 is improper. Petitioners contend the applicant must prove  
6 compliance with this criterion before a conditional use permit  
7 is issued.

8 The city's decision that the WWH meets the not detrimental  
9 to the public health, peace or safety criterion of code  
10 33.106.010 relies in part on findings that the concerns  
11 expressed by neighborhood residents and property owners were  
12 speculative and unsubstantiated by facts. S. Supp. Record  
13 7-8. The decision also relies on the imposition of a  
14 comprehensive set of conditions, governing requirements for WWH  
15 residency, behavior of WWH residents and visitors, security and  
16 supervision in the WWH, and cleaning, maintenance and screening  
17 of the WWH site. S. Supp. Record 14-20. In several places,  
18 the decision states these conditions will ensure any negative  
19 impacts of the WWH will be eliminated or mitigated. See, e.g.,  
20 S. Supp. Record 6, 11, 13.

21 The evidence in the whole record would allow a reasonable  
22 person to reach the conclusion that the proposed use, as  
23 conditioned by the decision, will not be detrimental to the  
24 peace and safety of the surrounding neighborhood. The city  
25 cites to numerous letters and statements in the record stating  
26 that any problems of crime, loitering, vandalism or littering

1 occurring in the neighborhood of the present WWH are not due to  
2 the WWH itself, and that the staff and residents of the present  
3 WWH are responsible, good neighbors. See e.g., Record 44-47,  
4 54, 71-74, 270. The city also cites testimony establishing  
5 that residency requirements for the WWH do not allow women  
6 involved in active domestic violence or substance abuse  
7 problems. Record 56-57; HO Trans. 48; CC Trans. 75.  
8 Petitioners do not cite contrary evidence in the record which  
9 detracts from the weight and credibility of the evidence cited  
10 by the city sufficiently to render it not substantial  
11 evidence.<sup>8</sup>

12 Furthermore, the city did not err in relying on the  
13 imposition of conditions. The city may rely on conditions to  
14 ensure compliance with the ordinance standard if it finds the  
15 conditions imposed are sufficient to ensure the standard will  
16 be met. McCoy v. Linn County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
17 87-046; December 15, 1987); cf. Sigurdson v. Marion County, 9  
18 Or LUBA 163, 176 (1983). The city did so in this case.<sup>9</sup>

19 The third assignment of error is denied.

20 FOURTH ASSIGNMENT OF ERROR

21 "There is no evidence in the record to support the  
22 conclusion that the subject proposal is an  
23 institutional care facility as opposed to a  
24 residential care facility. Since the proposed  
development is an RCF, and the siting requirements for  
an RCF have not been met, the applicant is not  
entitled to the requested use."

25 Petitioners argue that the proposed use meets the code  
26 definition of a "residential care facility"<sup>10</sup> (RCF) rather

1 than that of an "institutional care facility"<sup>11</sup> (ICF), as  
2 found by the city's decision. According to petitioners, the  
3 city erred in approving the use without requiring it to comply  
4 with code requirements for siting of an RCF.

5 Petitioners assert it is clear from the record that the  
6 WWH will offer 24 hour supervision to people living as a single  
7 housekeeping unit in a single dwelling unit, and therefore  
8 these aspects of the code RCF definition are satisfied.  
9 According to petitioners, the real issue is whether the WWH  
10 will provide care and planned treatment or planned training, as  
11 described in the code RCF definition. Petitioners argue that  
12 the applicant's description of the services to be provided by  
13 the WWH fits the code definition of "planned training."

14 Petitioners argue that the WWH will provide all of the  
15 services described as "care" in the code RCF definition.  
16 According to petitioners, the WWH will provide "assistance  
17 while bathing, dressing, grooming, or eating" in that meals  
18 will be prepared and facilities will be provided for these  
19 activities. Petitioners also argue that the city's  
20 interpretation of "care" reads non-existent words into the code  
21 RCF definition.

22 Once again, although petitioners characterize this  
23 assignment of error as a substantial evidence challenge, the  
24 issue presented in their argument is primarily that of proper  
25 interpretation of code provisions -- in this instance the code  
26 definitions of "institutional care facility" and "residential

1 care facility." The city's decision interprets the RCF "care"  
2 definition to mean the type of care "typically required by  
3 individuals with severe or significant physical or mental  
4 limitations, so that such care is essential to ensure their  
5 personal health and safety on a day to day basis." S. Supp.  
6 Record 4. The city's decision applies the code ICF and RCF  
7 definitions to the proposed use as follows:

8 "The proposal is for a development which would provide  
9 transitional housing for up to 60 women and children  
10 and which serves as a clearinghouse for professional  
11 services such as counseling, job training, parenting,  
12 transportation and other skills on an as-needed  
13 basis. The majority of the facility's residents will  
14 have their own personal living quarters, some of which  
15 will be equipped with kitchens and similar cooking  
16 facilities. Further, the proposal, while providing  
17 housing and limited training or referral services on  
18 an unstructured request basis, does not provide 'care'  
19 as the term is defined and interpreted above. Rather,  
20 residents of this facility are quite capable of and  
21 require no assistance in bathing, dressing, grooming,  
eating or similar basic human survival activities,  
which the specific language set forth in Sec.  
33.12.615 ('residential care facility'), requires to  
be provided in conjunction with any treatment or  
training. Finally, any training provided at the  
center or at specialized training or counseling for  
which a resident may be referred is provided on an  
individual rather than group basis, thereby leaving  
the Council to conclude that such training does not  
constitute 'planned treatment' as defined in Sec.  
33.12.165(v). Based on these reasons and available  
evidence, the Council concludes that this facility  
falls under the ICF, not RCF, category." S. Supp.  
Record 4-5.

22 The city interprets the distinction between "care" as  
23 defined in the code RCF definition and as used in the ICF  
24 definition as being one of degree, with RCF-type "care" being  
25 the type of care required by individuals with significant  
26 physical or mental limitations, necessary to ensure their



1 health and safety. We believe the city's interpretation of the  
2 distinction between RCF and ICF "care" is consistent with the  
3 code's language and intent and is a correct interpretation of  
4 the code. See McCoy v. Linn County, supra.

5 The application of this interpretation to the proposed use  
6 leads to a finding that the WWH will not offer RCF-type  
7 "care." S. Supp. Record 4-5. This finding is supported by  
8 substantial evidence in the whole record regarding the services  
9 offered by the WWH and the characteristics of its residents.  
10 See Record 56-57, 271, 272, 275, 279-284; CC Trans. 76.

11 Furthermore, as the city argues, the code RCF definition  
12 clearly requires that 24-hour supervision be provided at an RCF  
13 "for the purpose of \* \* \* providing care". The record shows  
14 there will be staff present at the WWH at all times, but that  
15 the 24-hour staffing requirement is for the purpose of security  
16 rather than providing care. Record 62; S. Supp. Record 18.

17 Finally, the city's finding that the majority of WWH  
18 residents will have their own living quarters, some equipped  
19 with kitchens, supports the city's conclusion that the WWH will  
20 contain more than the single housekeeping unit described in the  
21 code RCF definition. S. Supp. Record 4. This finding is  
22 supported by substantial evidence in the whole record. Record  
23 57; CC Trans. 76.

24 For the above reasons, we conclude that the city did not  
25 err in characterizing the proposed use as an "institutional  
26 care facility," rather than a "residential care facility."

1 The fourth assignment of error is denied.

2 FIFTH ASSIGNMENT OF ERROR

3 "The City's actions in evaluating this proposal and  
4 the appellant's position thereon denied the appellant  
the procedural due process required by law."

5 A. Timing of the Hearing

6 Petitioners argue that the city council erred in proceeding  
7 with its hearing on petitioners' appeal on October 21, 1987  
8 because petitioners were unable to present their entire case,  
9 in that several people who would have testified were not able  
10 to attend. According to petitioners, their inability to  
11 present their entire case was due to "the representations and  
12 practices of the Council." Petition for Review at 27.  
13 Petitioners argue that they "were denied the opportunity to  
14 present and rebut evidence, the fundamental due process  
15 required by Fasano." Id. at 28.

16 The city responds that petitioners had adequate notice of  
17 the council hearing on October 21, and the council was not  
18 obligated to grant petitioners another postponement of the  
19 hearing.<sup>12</sup> According to the city, it was agreed at the  
20 October 7 council meeting that the hearing on the appeal would  
21 occur on October 21 unless (1) a compromise had been reached;  
22 and (2) both sides agreed to a further postponement. The city  
23 argues petitioners had adequate notice of this October 7  
24 agreement.

25 The transcript clearly shows that it was decided on October  
26 7 that the hearing would occur on October 21 unless significant

1 progress toward a settlement was being made and both sides  
2 agreed to a further postponement. CC Trans. 26-28. Written  
3 notice of the October 21 hearing was not required. Apaletegui  
4 v. Washington County, 80 Or App 508, 723 P2d 1021 (1986) (oral  
5 notification of next hearing during a hearing is adequate). In  
6 addition, petitioners do not allege that any of them were  
7 unrepresented on October 7 or were unaware of the procedural  
8 agreement. Petitioners should have known they would have to  
9 present their case on October 21 unless CCC agreed to a further  
10 postponement, which CCC did not do. CC Trans. 33-37.  
11 Therefore, petitioners were not denied the opportunity to  
12 present and rebut evidence.

13 B. Appearance of Fairness

14 Petitioners assert that the city's decision will benefit  
15 the Portland Development Commission (PDC) and, indirectly, the  
16 council and mayor (who is in charge of the PDC). Petitioners  
17 argue that the city's involvement in selecting the site,  
18 cooperating with the applicant and expediting the hearing  
19 indicate an apparent bias in favor of locating the WWH at the  
20 subject site, and show an appearance of favoritism such that a  
21 disinterested observer would conclude that the facts had been  
22 prejudged. According to petitioners, the city's procedure in  
23 this case violated the "appearance of fairness doctrine," and  
24 denied petitioners their due process right to a hearing before  
25 an impartial tribunal.

26 Petitioners do not claim there was actual bias on the part

1 of the city council. Rather, petitioners assert that there was  
2 a lack of "appearance of fairness" which violated petitioners'  
3 due process right, under Fasano v. Washington Co. Comm., 264 Or  
4 574, 507 P2d 23 (1973), to a hearing before an impartial  
5 tribunal.

6 Fasano did not go beyond a standard of actual impartiality  
7 to demand that local decisionmakers in quasijudicial  
8 proceedings maintain the appearance of impartiality required of  
9 judges. 1000 Friends of Oregon v. Wasco County Court, 304 Or  
10 76, 82-83, \_\_\_ P2d \_\_\_ (1987). The Oregon Supreme Court does  
11 not interpret Oregon law as imposing an "appearance of  
12 fairness" requirement on quasijudicial local government land  
13 use proceedings. Id. at 85. Petitioners articulate no other  
14 legal basis for their claim that the "appearance of fairness"  
15 doctrine applies to the city's proceeding.

16 The fifth assignment of error is denied.

17 The city's decision is affirmed.

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FOOTNOTES

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4 We adopted new rules of procedure effective January 1,  
5 1988. However, because this appeal was commenced by a notice  
6 of intent to appeal filed on or before December 31, 1987, it is  
7 governed by OAR 661-10-005 through 661-10-075 as adopted  
8 October 3, 1983. OAR 661-10-000.

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10 2  
11 When League of Women Voters v. Coos County, supra, was  
12 issued this subsection was codified as ORS 215.416(8).  
13

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15 3  
16 We do not agree with CCC that this holding is inconsistent  
17 with the definition of "final decision or determination" in  
18 OAR 661-10-010(3). That definition states:

19 "Final decision or determination" means a decision or  
20 determination which has been reduced to writing and  
21 which bears the necessary signatures of the governing  
22 body."

23 This rule describes a final decision by setting out the  
24 minimum required characteristics a decision must have to be  
25 considered a final decision by this Board for purposes of our  
26 review. The rule does not attempt to establish when a local  
government decision becomes final. Columbia River Television  
v. Multnomah Co., 299 Or 325, 333, 702 P2d 1065 (1985).  
Consistent with this interpretation of the rule, the case cited  
by CCC in its motion, Astoria Thunderbird v. City of Astoria,  
13 Or LUBA 297, 299-300 (1985), dealt with whether a particular  
document (city council minutes signed by city finance director  
and secretary to the city council) met the threshold  
requirements of OAR 661-20-010(3), rather than when that  
decision became final.

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29 We agree with the city that the Tournier testimony did not  
30 link the claimed drop in leasing rates and increase in leases  
31 with "escape clauses" to a long-term drop in property values.  
32 Furthermore, although the Tilbury letter cites a familiarity  
33 with the sale of numerous northwest Portland apartment  
34 buildings, it does not state that the author is an appraiser  
35 and does not cite a familiarity with the specifics of the  
36 proposed use or with the effects of other similar uses on  
property values.

1  
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2 The city's decision concludes that the WWH at N.W. 20th and  
3 Kearney meets the "desireable to the public convenience and  
welfare" criterion because:

4 " \* \* \* (1) It will provide desperately needed housing  
for a presently underserved portion of the city's  
5 population; (2) It is close to bus, shopping,  
hospital, school, employment and other services  
6 required by residents of the WWH; (3) It will allow a  
building that has been vacant for almost two years to  
be used in a manner similar to the previous  
7 institutional use but with fewer impacts than the  
prior use; and (4) It will add to the already diverse,  
8 mixed-use character of the surrounding neighborhood."  
S. Supp. Record 5-6.

9  
10 6

11 Petitioners also challenge, as being irrelevant to the  
"not detrimental to the public convenience and welfare"  
12 code standard, the city's findings that the WWH will have  
fewer impacts than the previous nonconforming use and will  
add to the diverse, mixed-use character of the  
13 neighborhood. The challenged findings are indeed  
irrelevant to determining compliance with this standard,  
14 under either the city's or petitioners' interpretation of  
the standard. However, the inclusion of such surplus  
15 findings is not error requiring reversal or remand. Cook  
v. City of Eugene, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 86-088;  
16 April 7, 1987).

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18 The relevant findings at S. Supp. Record 6 state:

19 " \* \* \* The location at 20th and Kearney offers  
significant additional advantages over the current  
20 location of the WWH: a safer neighborhood where drugs  
and alcohol are less available and where there is less  
21 criminal activity; enough space for an on-site play  
area for children; and greater proximity to schools,  
22 medical services, employment services, social service  
agencies and other facilities used by women and  
23 children residing at the WWH. All of these factors  
increase the stability of the environment for  
24 residents of the WWH and increase the likelihood that  
they will be able to make the transition to successful  
25 and productive independent living situations. The  
former RIO site requires few interior or exterior  
26 alterations, other than landscaping, to accommodate

1 the WWH and its appearance will remain essentially  
2 unchanged. Futher, as explained below, the negative  
3 impacts of locating the WWH at this location feared by  
4 opponents of this proposal are unlikely to occur  
5 and/or can be adequately mitigated by the conditions  
6 of approval imposed by the Council.

7 "The proposed 20th and Kearney site for the WWH is  
8 located in a diverse, mixed-use neighborhood. Bus  
9 stops, a hospital, restaurants, shopping, offices,  
10 apartment buildings, single-family residences and a  
11 variety of commercial uses are located within several  
12 blocks of the site. Within 1/2-1 mile of the site are  
13 located schools, parks, social service agencies,  
14 potential sources of employment and other services  
15 likely to be used and needed by residents of the WWH.  
16 Locating the WWH at this site will not alter the  
17 mixed-use character of the neighborhood, nor will it  
18 tip the balance of the neighborhood toward any one  
19 predominant use. Since the WWH is a primarily  
20 residential use, it will complement the other  
21 single-family, apartment and institutional uses in the  
22 immediately surrounding neighborhood."

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8 However, petitioners do specifically challenge the city's  
reliance on a letter by the police chief (Record 54).  
Petitioners attack the letter because it states that the  
present WWH's record of police calls compares favorably to that  
of similarly sized apartment buildings in general, rather than  
specifically comparing the WWH call record to those of  
northwest Portland apartment buildings.

The police chief's letter also states the WWH has not been  
an attractor of crime or vagrancy at its present location, and  
reaches the following conclusion:

"Based on the Police Bureau's past experiences with  
the West Hotel, we do not anticipate that its move to  
the Kearney site will significantly increase the  
neighborhood crime rate or transient problems."

We find the city could reasonably rely on this letter in  
reaching a conclusion that the WWH will not have a detrimental  
effect in northwest Portland as a source of crime, vagrancy or  
loitering problems.

9

We note that petitioners do not challenge the

1 reasonableness of the city's conclusion that the conditions  
2 imposed are adequate to ensure compliance of the proposed use  
3 with the relevant standard. Petitioners simply challenge the  
city's ability to rely on the use of conditions to achieve  
compliance with the code standard.

4  

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10

5 The code definition of RCF states:

6 "33.12.615 'Residential care facility' means an  
7 establishment operated with 24-hour supervision for  
8 the purpose of and responsibility for providing care  
9 and planned treatment or planned training to persons  
who by reason of their circumstances or condition  
require such care and planned treatment or planned  
training while living as a single housekeeping unit in  
a dwelling unit.

10 "(a) 'Care' means services such as supervision,  
11 protection, assistance while bathing, dressing,  
12 grooming or eating, management of money,  
13 transportation, recreation and simple training of  
self-help skills or assistance with major life  
activities and the provision of room and board.

14 "(b) 'Planned treatment' means a systematic  
15 and/or individualized program of counseling,  
16 therapy, or other rehabilitative procedures or  
17 activities provided for a group of persons of  
similar or compatible circumstances or  
conditions. A planned treatment program which  
requires regular on-premise physician's or  
nurse's care shall not be allowed.

18 "(c) 'Planned training' means a predetermined  
19 sequence of systematic interactions, activities,  
20 or structured learning situations, designed to  
21 meet such residents' specific needs in the areas  
of physical, social, emotional, and intellectual  
growth."

22  

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11

23 The code definition of ICF states:

24 "33.12.427 'Institutional care facility' means an  
25 establishment which provides housing, training or care  
26 to more than 15 people who require such services by  
reason of their circumstances or condition.



1 "A facility or institution that is operated for the  
2 purpose of providing both care and planned treatment  
or planned training as defined in 33.12.615 is not an  
'institutional care facility.'"

3  
4 12

At the initially scheduled September 24, 1987 hearing on  
the appeal, only three of the five members of the city council  
were present. As a courtesy to the appellants, the city  
council postponed the hearing until October 7, 1987. At the  
October 7 hearing, the council agreed to continue the hearing  
to October 21.