BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUNBURST II HOMEOWNERS ASSOCIATION, STEVEN BREUM, and WILLIAM J. ALLRED,	)	
Petitioners,	)	LUBA No. 89-130
vs.	)	FINAL OPINION AND ORDER
CITY OF WEST LINN,	)	
Respondent.	)	

Appeal from City of West Linn.

Margaret D. Kirkpatrick, Portland, filed a petition for review and argued on behalf of petitioners. With her on the brief was Stoel, Rives, Boley, Jones and Grey.

William A. Monahan, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was O'Donnell, Ramis, Elliott & Crew.

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

AFFIRMED 01/26/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal an order of the West Linn City Council granting conditional use and design review approvals for a 110 foot high water tower. The water tower would be located on a .93 acre, Single Family Residential (R-10) zoned parcel located in the Sunburst II subdivision.

FACTS

Sunburst II is located in the city's Rosemont water pressure zone. In a prior appeal, Sunburst II Homeowners v. City of West Linn, ___ Or LUBA ___ (LUBA No. 88-092, January 26, 1989) (Sunburst), LUBA remanded a city decision granting conditional use and design review approval for the water tower. The basis of the remand of the city's decision was its failure to demonstrate compliance with design review criteria requiring that the scale and architectural features of public facilities such as the proposed water tower be comparable to adjoining structures. LUBA concluded that the city failed to explain how a 110 foot high spheroid water reservoir on a narrow pedestal was of comparable scale and had architectural features similar to the single family structures that adjoin the site.

On remand, the city amended its design review criteria to exempt public facilities which are identified in the comprehensive plan public facilities element from the scale and architectural features design review standards.

Applying the amended design review criteria, as well as other applicable approval criteria, the city granted design review and conditional use approvals. This appeal followed.

DOCUMENTS SUBMITTED AFTER THE RECORD WAS RECEIVED

On December 15 and December 19, 1989, the Board received a number of documents from respondent that were not included in the local government record filed pursuant to OAR 661-10-025. The documents are as follows:

> "l. City of West Linn Periodic Review Order, January, 1989 ('Periodic Review Order');
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> "2. City of West Linn Public Facilities Plan, January, 1989 ('Public Facilities Plan');
>
> "3. City of West Linn Ordinance No. 1248 ('Ordinance No. 1248');
>
> "4. City of West Linn Ordinance No. 1249 ('Ordinance No. 1249');
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> "5. a full-sized copy of the Sun Shadow Evaluation for the proposed water tower;
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> "6. a full-sized Reservoir Site Plan;
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> "7. a letter from Murray Smith & Associates, dated December 15, 1989, which discusses the Reservoir Site Plan and other materials and issues relevant to the case; and
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> "8. documents pertinent to Respondent's adoption, in February, 1989, of certain amendments to the City of West Linn Community Development Code ('CDC'), including:
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> "(a) a letter, dated December 18, 1989, from the City's Planning Director, Michael Butts, concerning errors in the codification of the CDC amendments;
>
> "(b) a page of corrections attached to the

Butts letter;

"(c) a copy of the Hillside Protection and Erosion Control chapter of the CDC;[1]

"(d) an additional copy of Ordinance 1248; and

"(e) exhibits to Ordinance No. 1248." Petitioners' Letter to the Board, dated January 5, 1990, pages 1 and 2.

Petitioners were given an opportunity to submit written objections to our consideration of these documents. Petitioners agree that one of the documents is properly considered part of the record and that certain other documents are documents of which we may take official notice. However, petitioners contend other documents submitted by respondent are neither part of the record nor documents of which we may take official notice.

As petitioners correctly note, this Board routinely takes official notice of comprehensive plans, land use regulations, and other local enactments which establish standards or criteria applicable to land use decisions on appeal. See Murray v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 89-008, May 22, 1989), slip op 30, n 18; McCaw Communications, Inc. v. Marion County, ___ Or LUBA ___ (LUBA No. 88-068, December 12, 1988), slip op 4; Faye Wright

[1]Actually, in addition to CDC pages 31-1 and 31-2 which comprise part of the Hillside Protection and Erosion Control chapter of the CDC, respondent also submitted CDC pages 55-7, 55-8, 87-7, 87-8, 89-3, 89-4. These CDC pages apparently incorporate amendments to the CDC adopted by Ordinance 1248.

Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982); Oregon Evidence Code Rule 202(7). Petitioners agree that items 1, 2, 3, 4, and 8 (c), (d) and (e), quoted above, are all documents subject to official notice. We take official notice of those items.

Item 5 is a full scale map depicting a Sun Shadow Evaluation. The map appears in reduced form at Record 422. Under OAR 661-10-025(2), large maps and other documents that are difficult to duplicate may be retained by the local government and submitted on the date of oral argument. Although petitioners point out respondent did not exactly follow the procedure set forth in our rules for submitting oversized documents, petitioners agree we may consider the oversized map as part of the record, as long as it is in fact the same map that appears in reduced form at Record 422. Aside from their size, the maps are the same, and we include the full scale Sun Shadow Evaluation as Record 422a.

Petitioners contend the remaining documents, items 6, 7, 8(a) and 8(b), are not part of the record and are not documents of which we may properly take official notice. Item 6, the full scale Reservoir Site Plan, although similar to a map with the same caption at Record 418, is not the same as the map in the record. The full scale map includes revisions added after the decision subject to review in this appeal was adopted. Similarly, items 7, 8(a), and 8(b) were all prepared after the decision at issue in this appeal was

adopted and after the record was received by the Board.

Petitioners contend these documents could not have been placed before the decision maker prior to its decision and, therefore, cannot be part of the local record. See e.g. Union Station Business Community Association, v. City of Portland, 14 Or LUBA 555 (1986); Panner v. Deschutes County, 14 Or LUBA 512 (1985). Petitioners also contend these documents clearly are not enactments of land use approval standards or criteria, of which official notice would be proper.

We agree with petitioners and do not take notice of items 6, 7, 8(a) and 8(b) or consider them part of the local record in this appeal.

FIRST ASSIGNMENT OF ERROR

> "Respondent failed to make findings, required by Code § 55.100 (A)(2)(d), that the scale of the proposed tower is comparable to the scale of the structures on adjoining lots and has architectural features similar to the features of structures on adjoining lots."

SECOND ASSIGNMENT OF ERROR

> "Respondent improperly construed Code § 55.100 (A)(2)(d) by concluding that it does not apply to the proposed water tower."

THIRD ASSIGNMENT OF ERROR

> "The decision violates Code § 55.100(A)(2)(d) because the scale of the proposed tower is not comparable to the scale of the structures on adjoining lots and the tower does not have architectural features similar to the architectural features of the structures on adjoining lots."

The proposed water tower is a "major utility" as that term is defined in the CDC. CDC 2.030. Major utilities are allowed in the R-10 zone as conditional uses, subject to CDC Chapter 60 provisions for conditional uses. CDC 11.060(7). In addition, the CDC requires that a major utility in the R-10 zone comply with the Design Review requirements of CDC Chapter 55. CDC 11.090(B); 55.050. Prior to its amendment on February 9, 1989, CDC 55.100(A)(2)(d) provided:

> "The proposed structure(s) shall be of a comparable scale with the existing structure(s) on site and on adjoining sites and shall have comparable architectural features with the structures on the site and on adjoining sites. This does not require the same architectural styles."

As noted earlier in this opinion, we concluded in the previous appeal that the city failed to demonstrate compliance with CDC 55.100(A)(2)(d). We also expressed serious doubts that the city could demonstrate that the proposed water tower complied with CDC 55.100(A)(2)(d). Sunburst, supra, slip op at 24 n 15.

Ordinance 1248 was adopted February 8, 1989,[2] after our remand of the city's decision in Sunburst, and amended CDC 55.100(A)(2)(d) by adding the following language:

> "The standards [of CDC 55.100(A)(2)(d)] shall not be applicable to those public facilities which are referenced in the City's adopted public facilities

[2]Although adopted on February 8, the ordinance provides its effective date is February 9, 1989.

element of the comprehensive plan."

In the decision challenged in this appeal, the city applied the amended version of CDC 55.100(A)(2)(d). Petitioners base their first, second and, to some extent, their third assignmentsof error on their contention that no new application for the water tower was submitted and, therefore, under ORS 227.178(3) the standards in effect when the application was first submitted (including the pre February 9, 1989 version of CDC 55.100(A)(2)(d)) continue to apply. Petitioners also suggest that even if a new application was submitted, the proposed water tower is not "referenced in the City's adopted public facilities element of the comprehensive plan" and, therefore, does not qualify for the exclusion adopted by Ordinance 1248.

A. ORS 227.178(3)

ORS 227.178(3) concerns applications for permits[3] and provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[3]There is no dispute that the approval granted by the city concerns an "application" for a "permit," as the latter term is defined in ORS 227.160(2).

We agree with petitioners that the above quoted statute makes the filing of an application, complete when filed or made complete within 180 days, the condition precedent to the operation of the balance of the statute. Such applications must be judged by the standards in effect when the application is filed. See Kirpal Light Satsang v. Douglas County, 96 Or App 207, 212, 772 P2d 944, modified on reconsideration 97 Or App 614, rev den 308 Or 382 (1989) (construing nearly identical statutory language at ORS 215.428(3) applicable to counties).

We also agree with petitioners that the statute does not limit the benefit of certainty concerning standards to the permit applicant. Under ORS 227.178(3), both the permit applicant and persons who may oppose a permit application are extended certainty concerning the applicable approval standards. See Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083, April 27, 1988), slip op 7-9 (concluding that parallel provisions of ORS 215.428(3) applicable to counties are not solely for the benefit of permit applicants).

However, petitioners go further and argue that even if the city did submit a new application following our remand, the amended language in CDC 55.100(A)(2)(d) would not apply because it would be inconsistent with the purpose of ORS 227.178(3) to change the applicable approval standards after the city decides its existing approval standards cannot be

met. Petitioners contend:

> "The purpose of ORS 227.178(3) is clear from its language: It is intended to protect participants in local land use proceedings from arbitrary attempts by local governments to change the rules of the game in mid-course. The Oregon Court of Appeals has recently held that a local government may not receive a land use application from an applicant, amend its land use standards in a way that is detrimental to the applicant, and then avoid the effect of the statute simply by requiring the applicant to submit a new application. [citing Kirpal Light Satsang v. Douglas County, supra.] Conversely, a local government may not change the rules of the game on a development opponent once a land use proceeding has begun by amending its regulations to favor the applicant and then allowing the applicant to submit a new, sham application in order to take advantage of the new, more lenient standards." Petition for Review 14-15.

Petitioners' understanding of ORS 227.178(3) is not supported by the statutory language, and ignores the fact that a city council properly exercises both quasi-judicial and legislative powers. Nothing in ORS 227.178(3) prevents a city from (1) determining that an application cannot meet a city approval standard, (2) amending the city approval standard, and (3) applying the amended approval standard to an application submitted thereafter.

We agree that in order for the amended CDC provisions to apply, ORS 227.178(3) requires that the subject application postdate the CDC 55.100(A)(2)(d) amendments which became effective on February 9, 1989. However, we do not agree that in order for the amended CDC provisions to

apply, the subject application cannot be identical to the original application. We see nothing in the statute to preclude an applicant from submitting a new application, similar or identical to a previous application found inconsistent with applicable standards, for the purpose of obtaining review under amended approval standards.[4]

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B. Was a New Permit Application Submitted After February 9, 1989?

Following our remand of the previous decision and the city's adoption of Ordinance 1248 on February 8, 1989, the city planning department prepared a report, dated April 21, 1989, to the planning commission. In that report, the planning department states:

> "Since the water tower case was remanded back to the City on the single ground that it failed to satisfy CDC Section 55.100(A)(2)(d) regarding scale and architectural features, this application and staff report is substantially the same as the findings of the Final Order adopted by the City Council with the appropriate changes to reflect the code amendments relating to Section 55.100(A)(2)(d)." Record 388.

The staff report goes on to provide proposed findings of fact and a recommendation for conditional use and design

[4]Petitioners' suggestion at oral argument that some indeterminate period of time must pass after LUBA's remand of the earlier decision before an application for the same water tower may be submitted is also without foundation in the statute.

review approval for the water tower. The staff report is followed in the record by a number of exhibits which include documents submitted in support of the original application. One of the exhibits is a document entitled "Development Review Application. This document is dated May 4, 1989, identifies the city as the applicant and is signed by John E. Buol.[5] Record 522. The document indicates it is a request for design review and for conditional use review. Although the document does not indicate it is an application for approval of the water tower, the legal description given in the application corresponds with the legal description of the .93 acre parcel given in the staff report. Record 385, 522.

On May 4 and 5, 1989, notice was given of the planning commission hearing on the city's request. The planning commission hearing was held on May 15, 1989, and the planning commission granted conditional use and design review approval. Following a local appeal to the city council, a hearing was held by the city council on August 9, 1989, and the planning commission's decision was affirmed by the city council on August 23, 1989.

Petitioners point out that there are references in the April 22, 1989 staff report to the file numbers assigned to the original application and to the date the original

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[5]Respondent identifies Mr. Buol as the city administrator.

application became complete. The original application file numbers are also included in the planning commission notices on May 4 and 5. Petitioners further note the planning commission chair referred to the original application file numbers at the beginning of the planning commission hearing.[6]

Petitioners contend these references show the city was proceeding on the basis of the original application. Petitioners contend the city may not rely on the May 4, 1989 "Development Review Application" contained in the record because it does not identify what the application is for, let alone address the applicable criteria, as required by the CDC. Petitioners also argue the May 4, 1989 document cannot constitute a valid application because the signer does not indicate he is authorized in writing to act on the city's behalf, as required by CDC 99.030(A).[7]

Respondent contends the city treated the May 4, 1989 application as a new application, albeit an application very similar to the one considered previously. Respondent concedes that the original application file numbers initially were used by the city, but this error was

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[6]Petitioners also cite an erroneous reference in the planning department staff report to a nonexistent March 1989 application.

[7]CDC 99.030(A) does require that an agent submitting an application be "authorized in writing" to do so. However, we do not understand that CDC section to require that the written authorization be included in the application.

recognized at the planning commission hearing and new application file numbers were used thereafter.[8] Respondent further argues:

> "The city treated the application as a new application as evidenced by the content of the form signed by the city's authorized representative [John Buol]. It is clear from the content of the application that it is a filing for a new proposal -- no mention of a continuation of a prior proposal is made. If the matter were considered as a remand, the City Administrator's [John Buol's] signature would not have been necessary as the 1988 Development Review Application would have been enough.
>
> "* * * * *
>
> "All supporting documentation prepared by the city's consulting engineers was identical to that found to be complete in the first submittal in 1988; hence, the May 18, 1988 completeness date found in the staff report prepared for the Planning Commission. In fact, the date cited by staff is incorrect since the application form was not filed until May 4, 1989. The date on which the application was complete then is May 4, 1989 * * *." Respondent's Brief 9-10.

Respondent disputes petitioners' contention that a completed application, as required by the CDC and ORS 227.178(3) was not submitted:

> "The application is found in the record. R. 410-22. It is supplemented by other documents in the staff report. R. 423-518. As is customary with some applications, the actual signed Development Review Application with authorization for filing

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[8]Respondent points out petitioner Breum cited the new file numbers in his appeal of the planning commission's decision to the city council. Record 343.

> of the application was the last piece of the submission package. It was prepared on May 4, 1989. * * *.
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> "* * * * *
>
> "* * * The * * * 'Development Review Application' is intended to be used as an intake sheet identifying the type of review requested and it functions as the authorization for filing. Other [application] materials were already in the hands of the city. * * *" Respondent's Brief 12-13.

We conclude the application for conditional use and design review approval approved by the city in this case was submitted on May 4, 1989. We find no particular significance in the mistaken references to the original application file numbers or the reference to the date the original application was complete. Here an application form was filed on May 4, 1989, and new application file numbers were assigned later. Although the application form filed on May 4, 1989 does not explicitly state it is for a water tower, it includes the legal description for the subject property and, when viewed with the staff report and supporting documents, constitutes an application for conditional use and design review approval for a water tower.[9] We also note that respondent argues, and petitioners do not dispute, that the city proceeded in the manner required under the CDC to consider a new application,

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[9]We found a somewhat similar collection of documents to constitute an application for a permit under ORS 215.428(3) in Kirpal Light Satsang v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-082, Final Opinion and Order on Remand, January 22, 1990), slip op 8-13.

rather than by conducting abbreviated proceedings before the city council, limited to the issue identified by LUBA in our review of the city's first decision.

As no issues were raised below concerning the completeness of the application or the application signer's authority to sign the application, we reject petitioners' suggestion that such issues might provide a basis for concluding a new application was not filed. At most, the shortcomings petitioners allege may constitute procedural errors, and petitioners do not argue their substantial rights were prejudiced by any such errors. ORS 197.835(7)(a)(B).

Based on the above, we find the May 4, 1989 Development Review Application, together with the other application documents already before the city, to constitute a new application.[10]

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[10]Respondent also provides partial transcripts of testimony before the planning commission and city council which show the decision makers were informed that the proceeding was to consider a new application. Respondent's Brief 10, 12. Respondent contends the transcripts make it clear a new application was filed and all parties understood a new permit application was being considered.

Petitioners complain the respondent should not be allowed to submit partial transcripts with its brief because neither tapes nor transcripts of the local proceedings are included in the record. Our rules do not require submission of tapes or transcripts of the local proceedings. OAR 661-10-025(1). However, it has been this Board's practice to allow parties to submit partial transcripts of local proceedings with their briefs, subject to the right of other parties to object to their accuracy or context. Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 99, n 2 (1987). Petitioners do not argue the partial transcripts are inaccurate or taken out of context.

C. Is the Proposed Water Tower Referenced in the Public Facilities Element of the City's Comprehensive Plan?

Petitioners contend that even if CDC 55.100(A)(2)(d) as amended on February 9, 1989 applies, the proposed water tower is not "referenced" in the Public Facilities Element of the comprehensive plan. According to petitioners, the City's 1982 Water Master Plan references a water tower of significantly different design and capacity, as this Board recognized in our prior decision. Sunburst, supra, slip op at 8.

Respondent answers that following our remand in the prior appeal, the city completed periodic review. See ORS 197.640 to 197.650. Ordinance 1249, adopted on February 8, 1989, amended the city's comprehensive plan by

> "adding the City of West Linn Periodic Review Order. The Order addressed Goal 11, the Public Facilities Rule. Attachment 1 [sic 11], the Public Facility Plan, as modified in January, 1989, was adopted as part of the plan." Respondent's Brief 16.

We agree with respondent that the Public Facilities Plan, as amended in 1989, is part of the city's comprehensive plan and specifically describes the water tower approved by the city in this decision.[11] Public Facilities Plan 26-27.

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[11]Apparently, when petitioners requested a current copy of applicable city plans and regulations, they were not given a copy of the Public Facilities Plan, as amended in 1989.

D. Conclusion

We conclude the application at issue in this proceeding is the application that was filed, or at least became complete, on May 4, 1989. Therefore, under ORS 227.178(3), CDC 55.100(A)(2)(d) as it existed on that date is the applicable approval standard, not the pre February 9, 1989 version of that CDC section. We also conclude that the water tower is referenced in the adopted public facilities element of the city's comprehensive plan and, therefore, the comparable scale and architectural features requirements in amended CDC 55.100(A)(2)(d) are inapplicable.

Accordingly, the first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

> "Findings 3, 14, 25, 30, 34, 35, 36 and 43, which rely on the existence of an approved landscaping plan for the site, are not supported by substantial evidence in the record."

Under this assignment of error, petitioners challenge a number of findings that petitioners allege are critical to the city's decision. Petitioners contend there is not substantial evidence to support the findings because there is no final (as opposed to a preliminary) landscape plan in the record.

Respondent concedes the only landscaping plan in the record, and the landscape plan referred to in the findings, appears at Record 421. That plan is stamped "PRELIMINARY

ONLY: DO NOT USE FOR CONSTRUCTION." However, respondent contends all landscape plans are preliminary in the sense that they may be changed prior to final approval by the city. Respondent points out nothing in the CDC precludes use of landscape plans labeled preliminary or tentative. Respondent contends that a different plan might have been required if the planning commission or city council required changes in the plan, but no such changes were required. Respondent argues the landscape plan in the record is adequate to show the landscape features the city relied upon in its findings. Respondent points out the city included a condition in its decision that the preliminary landscape plan will form the basis for final design and plans and provides that any changes "shall not materially alter the proposal or its anticipated impacts." Record 409.

We agree with respondent that there is nothing in the notation on the landscape plan, in and of itself, that renders the plan incapable of constituting substantial evidence to support the challenged findings. Petitioners offer no additional explanation for why the preliminary landscape plan is not sufficient to support the challenged findings.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "There is no evidence in the record to support the city's findings with respect to loss in passive solar heating effectiveness."

CDC 60.70(A) provides in part that:

"l. The site size and dimensions provide:

"* * * * *

"b. Adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses.

"* * * * *"

The city adopted findings under this criterion addressing loss of views and diminution of property values, and those findings are not challenged. The city also adopted findings addressing shadows as follows:

> "The impact of shadows has been kept to a maximum of two (2) hours per day as demonstrated in the City of West Linn Rosemont Reservoir Site Sun-shadow Evaluation and in the discussion of that study by Murray, Smith and Associates, the City's consulting engineers. There is a lack of credible scientific data to suggest otherwise. According to a solar specialist from the Oregon Department of Energy, two hours of shade results in only an eight (8) percent loss in passive solar heating effectiveness. The Solar Access Ordinances recently adopted by most metro area jurisdictions and West Linn require homes to be oriented within 30 degrees of the east-west axis to receive solar benefits. Most of the adjacent homes on Suncrest Drive are on a north-south access [sic] which is not as solar effective as homes on a east-west access [sic]. This means that these homes were not oriented to take full advantage of passive solar heating. Despite assertions by the petitioner that all houses are equally solar efficient, we find the evidence submitted by Murray, Smith and Associates to be more credible. There is no evidence that any of the houses in the area were designed to take advantage of solar exposure. If there were such designs, we find that the estimated 8% loss in passive solar energy

> is balanced by the benefits of increased water pressure and fire protection resulting from this proposal." Record 5-6.

Petitioners challenge the city's findings that "impact of shadows has been kept to a maximum of two (2) hours per day" and that "according to a solar specialist from the Oregon Department of Energy, two hours of shade results in only an eight (8) percent loss in passive solar heating effectiveness." Petitioners contend that neither of those findings is supported by the record.

Petitioners argue the city's consultant actually stated that the duration of shadows on adjoining homes "generally varies from between one and two hours during periods when the shadow is present." Record 427. Petitioners contend the consultant's statement is not the same as a statement that "impact of the shadows has been kept to a maximum of two (2) hours per day," as the city found. Record 5.

Although the consultant's statement is not worded in precisely the same manner as the finding, respondent contends the sun shadow exhibit in the record, on which the consultant relied, shows no home will experience a shadow in excess of two hours. The sun shadow exhibit permits reasonably precise calculations. Although we cannot say for sure that no home could ever experience shadows slightly exceeding two hours, two hours appears to be the maximum. We conclude the city's finding that shadows are limited to a maximum of two hours per day is supported by substantial

evidence in the record.

Petitioners also challenge the city's finding regarding the effect of two hours of shade on solar heating effectiveness. Petitioners contend that finding is not supported by any evidence in the record.

Respondent points out that one of the petitioners recounted a telephone conversation with a representative from the Oregon Department of Energy to the effect that two hours of shade could result in up to a 20% loss in passive solar heating. Respondent points out that there is no way to know what information was provided to, and relied upon by, the Oregon Department of Energy representative to which the petitioners refer. Respondent further points out that the homes adjoining the water tower are not oriented to take advantage of passive solar heating. Respondent argues that its consultant concluded that "final orientation of the reservoir * * * equalizes the visual and sun shadow impact to the greatest extent possible on all adjacent existing residences." Respondent's Brief 22-23. Respondent suggests that this is all that is required by the standard, which only requires that the impact be "minimized."

The parties point to no evidence in the record supporting the finding that only an 8% loss of passive solar heating effectiveness would result from two hours of shading per day. Therefore, we conclude that finding is not supported by substantial evidence.

However, as respondent points out, the remaining city findings note the homes affected by the tower's shadow are not oriented to take advantage of solar heating. In addition, whatever the percentage reduction in passive solar heating effectiveness of affected houses, shading will not exceed two hours per day. Findings not challenged by petitioners also state that the final location of the tower was selected to minimize visual impacts as well as shadows.

CDC 60.070(A)(1)(b) requires "[a]dequate area for aesthetic design treatment to mitigate any possible adverse effect * * * on surrounding properties."[12] As respondent correctly notes, mitigation does not require that all possible adverse effects be eliminated.

We conclude that even without the finding identifying the percentage effect of up to two hours of shading on passive solar heating effectiveness, the remaining findings quoted above are adequate to demonstrate the shading impacts of the proposed water tower are mitigated. Therefore, although the fifth assignment of error is sustained, in part, because the finding concerning the percentage effect of two hours of shading on solar heating effectiveness is not supported by substantial evidence, the lack of evidentiary support for that finding provides no basis for

[12]Although no questions concerning the scope of CDC 60.070(A)(1)(b) are raised, we have some question whether shading impacts are even within the scope of "aesthetic design treatment" under CDC 60.070(A)(1)(b).

remand. Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

The fifth assignment of error is sustained in part.

SIXTH ASSIGNMENT OF ERROR

> "Findings 3C, 4 and 29 are not supported by substantial evidence in the record."

Petitioners contend that the findings challenged in this assignment of error include erroneous statements of the distances between the tower and houses on adjoining properties. Petitioners contend:

> "Measurements from the maps at R.422 and R.500 show the following approximate distances from the tower: 108 feet to 19737 Suncrest Drive, 65 feet to 19735 Suncrest Drive, 72 feet to 19725 Suncrest Drive, 105 feet to 19721 Suncrest Drive and 75 feet to the home marked '1611'" Petition for Review 26, n 8.

Based on measurements made from maps in the record, petitioners contend the city's findings that the average setback is 118 feet, and that the distance from the proposed tower to the nearest home is 85 feet, are not supported by the record.

As noted earlier in this opinion, respondent reduced the maps included at pages 422 and 500 of the record. Thus, although the legend on the map at Record 422 states the scale is "1 [inch] = 43 [feet]," unless the reduction is taken into account, accurate measurements from this reduced map are not possible. As discussed earlier in this opinion, respondent has supplied the full size copy of the map that

appears in reduced form at Record 422, and the full size map has been included in the record at 422a. Using the full size map at Record 422a, the distances specified in the findings challenged in this assignment of error are accurate.

The sixth assignment of error is denied.

The city's decision is affirmed.