BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VICKI NEUENSCHWANDER, ROBERT BLANKHOLM and DAVID ALEXANDER,
Petitioners,
vs.
CITY OF ASHLAND,
Respondent,
and
WATSON AND ASSOCIATES,
Intervenor-Respondent.

LUBA No. 90-068

FINAL OPINION AND ORDER

Appeal from City of Ashland.

Vicki Neuenschwander, Ashland, filed the petition for review and argued on her own behalf.

Ronald Salter, Ashland, filed a response brief and argued on behalf of respondent.

John R. Hassen, Medford, filed a response brief and argued on behalf of intervenor. With him on the brief was Blackhurst, Hornecker, Hassen & Thorndike & Ervin B. Hogan.

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

REMANDED 10/19/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a decision of the Ashland City Council approving an application for (1) annexation of a portion of the subject property to the city, (2) rezoning of the annexed portion of the subject property to the city's Employment (E-1) zone, and (3) site review for a community shopping center.

MOTION TO INTERVENE

Watson and Associates, the applicant below, moves to intervene on the side of the respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject property consists of three parcels, tax lot 300, tax lot 600 and tax lot 1200. Intervenor proposes to construct a 121,000 square foot shopping center on all three parcels. Tax lot 300 consists of 3.98 acres, tax lot 600 consists of 4.11 acres and tax lot 1200 consists of 2.38 acres. Record 39. All three parcels are within the city's urban growth boundary, and are designated on the city's comprehensive plan as "Employment." Record 41. Prior to the challenged decision, tax lots 300 and 600 were within the city limits, but tax lot 1200 was not within the city limits. Record 48, 92. Tax lot 300 is zoned Commercial - Retail (C-1) and tax lot 600 is zoned

Employment (E-1).[1] Record 91. Prior to the challenged decision, tax lot 1200 was zoned RR-5 by Jackson County.[2] Tax lot 1200 is the only parcel subject to intervenor's annexation and rezoning request, but site plan approval for the proposed shopping center is requested for all three parcels.

The planning commission recommended denial of intervenor's application. Notwithstanding the planning commission's recommendation, the city council approved intervenor's application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Ashland City Council failed to adequately address the criteria of Section 18.108.190[(A)(5)] of the Ashland Land Use Ordinances regarding annexations: That a public need for additional land, as defined in the city's comprehensive plan, can be demonstrated."

SECOND ASSIGNMENT OF ERROR

> "The proposal is not in conformance with the acknowledged Comprehensive Plan."

Ashland Land Use Ordinance (ALUO) 18.108.190(A) establishes the following requirements applicable to

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[1]As we understand it, the "Employment" plan designation may be implemented by any of three general zoning designations. Those three general zoning designations are Employment (E-1), Commercial (C-1), and Industrial (M-1).

[2]It is unclear whether the county zoning designation for tax lot 1200 was Rural Residential (RR-5) or Farm-5. Compare Record 92, 5 with Record 1. However, for purposes of this decision, the precise county zoning of tax lot 1200 is irrelevant.

requests for annexation:

> "The following findings shall be required for approval of an annexation to the city:
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> "* * * * *
>
> "(2) That the proposed zoning and project are in conformance with the City's Comprehensive Plan.
>
> "* * * * *
>
> "(5) That a public need for additional land, as defined in the City's Comprehensive Plan, can be demonstrated."

A. Public Need to Annex Tax Lot 1200

While ALUO 18.108.190(A)(5) requires findings establishing the existence of a public need as defined by the city's plan before an annexation request may be approved, the city's comprehensive plan (plan) does not contain a definition of the term "public need." However, in the challenged decision, the city identifies certain plan provisions as relevant to defining the scope and meaning of the term "public need" with regard to annexation of the subject land to the city. Those plan provisions follow:

> "It is the City of Ashland's goal to maintain a compact urban form and to include an adequate supply of vacant land in the city so as to not hinder natural market forces within the city, and to ensure an orderly and sequential development of land in the City limits." Plan goal XII - Urbanization.
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> "The City shall strive to maintain at least a 5-year supply of land for any particular need in the City limits. The 5-year supply shall be determined by the rate of consumption necessitated

> in the projections made in this Comprehensive Plan." Plan policy XII-1.
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> "The City shall incorporate vacant land only after a showing that land of similar qualities does not already exist in the City limits, or if annexation is necessary to alleviate a probable health hazard." Plan policy XII-2.
>
> "The City shall zone and designate within the Plan Map sufficient quantity of lands for commercial and industrial uses to provide for the employment needs of its residents and a portion of rural residents consistent with the population projection for the rural area." Plan policy VII-1.

Petitioners contend plan policies VII-1 and XII-1 are irrelevant to a determination of whether there is a public need for additional E-1 zoned land within the city. Petitioners claim plan policy VII-1 is intended to guide zoning decisions and is not relevant to annexation decisions. Additionally, petitioners contend plan goal XII is irrelevant because it relates only to the maintenance of adequate quantities of vacant land, and the proposal will not add to the city's inventory of vacant E-1 zoned land.

Petitioners also contend that regardless of whether those plan policies are relevant, the city's findings are, in any event, inadequate to establish the existence of a public need for an additional 2.38 acres of E-1 zoned land within the city. Petitioners cite the following city findings as establishing that there is an adequate supply of "Employment" designated land (which includes E-1 zoned land) within the city to satisfy the city's employment and retail

needs, and that there is no "public need" for any additional land for these purposes:

> "The total acreage of vacant land in the three categories [Employment plan designation zoning districts, E-1, C-1 and M-1] suggest an adequate land supply. The annexation of the subject 2.38 acre parcel will add to the current inventory. The fact that 'at least' a five year supply of land is available before and after the annexation indicates compliance with the quantitative part of the standard." Record 48.

Petitioners also argue the city incorrectly focused on whether there is a need for a ten acre "community shopping center," rather than on whether there is a need for an additional 2.38 acres of E-1 zoned land. Petitioners contend that the findings do not establish a public need for additional E-1 zoned land within the city.

Intervenor and respondent (respondents) contend that the plan policies cited in the challenged decision as applicable to a determination of public need to annex tax lot 1200 are relevant considerations in determining need but are not independent approval criteria.[3] Respondents argue that these plan provisions therefore serve as factors to be applied in determining public need. Respondents suggest

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[3]Respondents maintain that this Board has stated in reviewing other decisions of the city, that city plan policies which have corresponding specific implementation measures do not operate as independent approval criteria applicable to individual development proposals. See Murphey v. City of Ashland, ___ Or LUBA ___ (LUBA No. 89-123, May 16, 1990), aff'd without opinion, 103 Or App 238 (1990); Miller v. City of Ashland, 17 Or LUBA 143 (1988). Respondents suggest that the plan policies cited in the challenged decision have specific corresponding implementation measures.

that so long as at least some of the plan provisions identified as relevant to defining the meaning of public need support the challenged annexation, it does not matter that other relevant plan provisions are not supportive.

Respondents also argue the city's findings are adequate to establish a public need for additional retail shopping space within the city, and that the 2.38 acres included in tax lot 1200 are required in order to provide the total of 10 acres necessary for a "community shopping center."[4] Respondents also argue that the findings establish:

> "* * * the absence of other land within the city which could be used in conjunction with the subject property to provide a block at least 10 acres in size." Respondents' Brief 14.

We are required to determine whether the city correctly selected and applied plan goal XII, plan policy XII-1, plan policy XII-2, and plan policy VII-1, as relevant for

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[4]Respondents cite the following findings as establishing a public need for a 10 acre shopping center within the city:

> "Need for Additional Acreage for Community Center: According to the source reference: *Shopping Center Development Handbook*, by the Urban Land Institute (ULI), 1977, there are four different types of shopping centers: Neighborhood, Community, Regional and Super-Regional. The proposed project is designed as a community shopping center offering a combination of shopping and convenience goods and services. Community centers have a 3-5 mile radius trade area according to ULI, a market area calculated in this case to serve all of Ashland. Guidelines for the size of the four types of centers in the above referenced source indicate that community centers should have 10-30 acres. The proposed site is 8.09 acres without the inclusion of subject tax lot 1200. The entire site increases to 10.47 acres when tax lot 1200 is included, thereby affording an appropriate amount of acreage." Record 46.

establishing whether additional E-1 land is "needed" in order to justify the challenged annexation. In so far as possible, we construe these plan provisions and ALUO 18.108.190(A)(5) together to give meaning to both. Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 16.

ALUO 18.108.190(A)(5) specifically requires the city to determine whether there is a public need, as defined by the plan, before additional land may be annexed to the city. Accordingly, particular plan provisions are independently relevant to annexation decisions because ALUO 18.108.190(A)(5) relies upon the plan to set the terms by which the city demonstrates public need to annex land. In other words, ALUO 18.108.190(A)(5) by its own terms requires that a determination of public need be supported by relevant plan provisions. We agree, however, with respondents that ALUO 18.108.190(A)(5) does not convert plan provisions which are not otherwise independent approval standards into independent approval standards. Thus, that all relevant plan policies do not support a proposed annexation would not necessarily mean there is no public need for the proposed annexation.

We believe ALUO 18.108.190(A)(5) requires the city to establish that some relevant plan provisions do support a determination of public need. Conversely, if other relevant plan provisions do not support a determination of public

need, then the city must balance the competing plan provisions and explain in its findings why the result supports its determination of public need. In sum, compliance with ALUO 18.108.190(A)(5) may be established by adequate findings demonstrating that a determination of public need to annex tax lot 1200 is supported by relevant plan provisions, and adequate findings explain why other relevant plan policies which are not supportive of such a determination may be disregarded.

We agree with respondents that there is nothing improper in relying on plan goal XII, plan policy XII-1, plan policy XII-2, and plan policy VII-1 in determining the existence of a public need for additional E-1 zoned land. We believe the city correctly concluded that these plan policies, and plan goal XII, are relevant measurements of whether the city has a public need to annex additional E-1 zoned land.

Next, we must determine (1) what those identified plan provisions require in the context of defining the scope and meaning of the term public need under ALUO 18.108.190(A)(5), and (2) whether those plan provisions support the city's determination that there is a public need to annex tax lot 1200.

In the context of the ALUO 18.108.190(A)(5) requirement that public need be established before particular land may be annexed, Plan goal XII states it is important to the city

to maintain an adequate supply of vacant land within the city. Plan policy XII-1 states it is important to the city to maintain a 5 year supply of land for the "employment needs" of its residents.[5] Additionally, we believe plan policy XII-2, in the context of ALUO 18.108.190(A)(5), states that annexation of vacant land is only necessary and therefore needed, if land having similar qualities to the land proposed to be annexed does not exist within the city. Finally, we believe that in this context, plan policy VII-1 states that the city must zone a sufficient quantity of land for commercial and industrial uses to provide for the employment needs of its residents.

Plan goal XII, which requires provision of vacant land to ensure orderly and sequential development, does not support the city's determination of public need because the city's findings establish that tax lot 1200 will not remain vacant, but rather will be utilized for the proposed shopping center.[6]

Additionally, the findings establish that the city currently has a 5 year supply of vacant "Employment" designated lands adequate to meet the city's employment

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[5]The parties do not dispute that this policy refers to a 5 year supply of vacant Commercial, Industrial and Employment zoned lands. See also Murphey v. City of Ashland, supra, slip op at 22-23.

[6]We do not mean to suggest that Plan goal XII is inconsistent with the city's decision in this case. However, the purpose of the goal is to assure an inventory of vacant developable land, not to provide vacant land for a particular development.

requirements. Consequently, plan policy XII-1, which requires a 5 year supply of land to meet the city's employment needs, does not support the city's determination of public need.

Plan policy VII-1, which requires the city to provide sufficient quantities of land for commercial and industrial uses to provide for the employment needs of the city, also does not support the proposed annexation of tax lot 1200. The city's findings establish that there is an adequate 5 year supply of vacant "Employment" designated land, as well as land in the E-1, commercial and industrial zoning designations, available for the city's employment needs. There is no suggestion in the city's findings that more E-1 zoned land is required in order to provide sufficient land for commercial and industrial uses to satisfy the city's employment needs.

Plan policy XII-2 provides that vacant land outside of the city limits may only be annexed if land similar to that proposed to be annexed does not already exist within the city limits. The city's findings establish that the only unique characteristic of tax lot 1200 is that it is proximate to tax lots 300 and 600, upon which intervenor wishes to build a community shopping center.[7] Therefore, in

[7]Specifically, regarding the lack of other sites similar to tax lot 1200, the city's findings state:

order for policy XII-2 to support a determination of public need to annex tax lot 1200, the city's findings would have to establish that there is a need to build a community shopping center in the city and that an adequate site for such a shopping center does not already exist within city limits.

The city's findings do, arguably, establish a need for some quantity of additional retail <u>business</u> in Ashland because there is an undesirable amount of "retail leakage" to the nearby City of Medford.[8] The city's findings also establish that the applicant would like to construct a "community shopping center" to stop some or all of this retail leakage, and that industry standards require a "community shopping center" to consist of at least 10 acres. However, the city's findings do not establish the scope of

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> "<u>Best Site to Obtain Appropriate Size Site</u>: The * * * inventory indicates an absence of other land already within the city which could be used in conjunction with the subject property to provide a block at least ten acres in size. Other adjacent land to the east along Highway 66 is currently developed with a motel, restaurant, and service station, land to the north is itself outside current city limits, and is designated for high density residential use by the comprehensive plan." Record 47.

[8]The city's findings regarding retail leakage are taken from a "draft" revision to the city's plan "Economic Element," which "suggests" that 20-30% of retail business which otherwise should be captured by Ashland, "leaks" to the City of Medford. Record 45. For purposes of resolving this assignment of error, we assume without deciding that the city may rely upon the factual assumptions and conclusions drawn from a draft update to its plan which suggests that there is retail leakage to the City of Medford. Additionally, we assume for purposes of this opinion that the draft plan revision adequately establishes that there is undesirable retail leakage to the City of Medford.

the alleged public need for additional land for retail space, or whether there is an insufficient quantity of retail land already within the city to provide such retail space, and to stop the alleged "retail leakage." The findings essentially state that there are some unmet retail needs in the city and that the applicant would like to build a community shopping center to satisfy those needs and that 10 acres are required to build a community shopping center.

The findings attempt to show a public need for a ten acre community shopping center, of which tax lot 1200 would be a part. However, the city's findings do not establish any nexus between the stated "needs" for additional retail business in the city and to stop retail leakage from Ashland to the City of Medford, and a "need" for a "community shopping center" which would require a 10 acre site of vacant retail zoned land within the city. The city's findings do not explain why a "community shopping center," as opposed to some other type of retail facility, is what is "needed" to provide for the unmet retail needs of the city, or to stop the stated retail leakage to the City of Medford.

We conclude plan policy XII-2 does not support the city's determination of public need to annex tax lot 1200.

Because none of the plan provisions cited by the city as relevant to defining the term public need support a determination of public need to annex tax lot 1200, the city's findings are inadequate to establish the existence of

a public need within the meaning of ALUO 18.108.190(A)(5).[9]

This subassignment of error is sustained.

B. Compliance with the Comprehensive Plan

ALUO 18.108.190(A)(2) requires that both the proposed project and the proposed zoning of the property to be annexed, are in conformity with the comprehensive plan.[10]

Petitioners contend the project does not comply with plan goal VII - the Economy element of the plan, which provides it is the city's goal:

> "To ensure that the local economy grows and diversifies in the number, type and size of businesses and industries consistent with the local social needs, public service capabilities, and the retention of a high quality environment."

The fact that ALUO 18.108.190(A)(2) requires certain land use actions to be consistent with the comprehensive plan, does not transform all plan goals into approval criteria for those decisions. Bennett v. City of City of Dallas, ___ Or LUBA ____ (LUBA No. 88-078, February 7, 1989), aff'd 96 Or App 645 (1989). In order to determine whether particular plan provisions are approval standards,

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[9]We understand the petition for review to include an evidentiary challenge to the city's findings regarding the existence of a public need to annex tax lot 1200. However, no purpose is served in addressing the evidentiary support for inadequate findings. Schryver v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 90-097, October 12, 1990), slip op 23-24; DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988).

[10]It is undisputed that the plan designation for the subject property is Employment and that the E-1 zone implements the "Employment" designation. Accordingly, the application of the E-1 zone to the property to be annexed, tax lot 1200, conforms with the plan.

we look to the language used in the plan provisions and the context in which such plan provisions appear. Id.

There is nothing in the language or context of plan goal VII to suggest that goal is intended to operate as an approval standard for decisions such as the one challenged in this appeal. Respondents are correct that plan goal VII is not a decisional standard. It is therefore unnecessary for us to determine whether the city's findings are adequate to establish compliance with plan goal VII. Bennett v. City of Dallas, supra.

Petitioners also contend the project is not in compliance with plan policy VII-7, which provides:

> "The City shall not encourage economic growth but rather encourage economic development of the local resources. The City's policy is that economic development shall always have as its primary purpose the better utilization of local resources, both human and natural. Economic development activities which will cause growth beyond the long term rate established in this plan shall be discouraged."

This plan provision is a direction to the city to "encourage" "economic development" rather than "economic growth." Further, policy VII-7 states that it is the primary objective of such economic development to achieve better utilization of local resources. Finally, policy VII-7 states that the city will discourage such economic development if it will cause undesirable growth.

It is not clear how this policy is to be implemented.[11] However, in any event we agree with respondents that policy VII-7 is not an independent approval criterion. The first sentence and focus of this policy is to "encourage" "economic development." The sentences of the policy that follow describe how that economic development is to be encouraged. Plan policies which simply encourage development patterns are not independent approval criteria.[12] Schryver v. City of Hillsboro, supra; Bennett v. City of Dallas, supra.

This subassignment of error is denied.

The first assignment of error is sustained. The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The City Council did not base its decision on Section 18.108.190, Annexations, of the ALUO."

Petitioners argue that the members of the city council who voted in favor of intervenor's application did not provide an adequate oral explanation during the city council hearing to justify casting their votes as they did.

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[11]This policy has a corresponding plan statement that it is implemented by "Council Policy." Neither party, however, explains how or what "council policy" is designed to implement policy VII-7, and it is not clear how any such "council policy" is relevant to the implementation of policy VII-7.

[12]Petitioners cite numerous other plan policies and suggest without explanation that the challenged decision violates these other plan policies. However, we will not presume that the city's decision violates other plan policies. It is petitioners' responsibility to develop their arguments and provide a basis upon which we might grant relief.

Respondents are correct that our review is of the city's final written decision. The oral comments of individual members of the city council are not relevant to our review, and do not provide a basis for reversal or remand of the challenged decision. Cook v. City of Eugene, 15 Or LUBA 344, 353 (1987); S&J Builders v. Tigard, 14 Or LUBA 708, 712 (1986).

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The Ashland City Council failed to meet the requirements of ALUO 18.62.040(E): Criteria for Approval of a Physical Constraints Review Permit."

The parties do not dispute that the applicant is required by ALUO 18.62.040(A) to obtain a Physical Constraints Review Permit (permit), and has not done so.[13] The only issues under this assignment of error are (1) whether under ORS 197.763 petitioners may raise as an issue in this appeal the failure of the city to require approval of such a permit, and (2) if petitioners may raise the lack of the permit as an issue, whether the failure to obtain such permit is a procedural error for which no prejudice to

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[13]At oral argument, respondents conceded the applicability of ALUO 18.62.040 and that it had not been satisfied, and suggested that it would be satisfied at a later time. ALUO 18.62.040(A) provides:

> "A Type I Physical Constraints Review Permit is required for any development * * * in areas identified as Floodplain Corridor Land, Riparian Reserve, Erosive and Slope Failure land, or Severe Constraint land."

petitioners' substantial rights has been established. We address these issues separately below.

A. Whether Petitioners May Raise Failure to Require the Permit as an Issue in This Appeal Proceeding

Respondents claim petitioners are precluded under ORS 197.763(1) from raising as an issue in this appeal the city's failure to require approval of a permit, because petitioners did not raise the necessity of obtaining the permit as an issue in the city's proceedings below.[14]

Petitioners argue that under ORS 197.835(2)(a) and ORS 197.763(3)(b), they are not precluded from raising the ALUO 18.62.040 requirement for the permit as an issue in this appeal.[15] Petitioners state the city's notice of

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[14]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

[15]ORS 197.835(2)(a) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body, as provided in ORS 197.763. A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to follow the requirements of ORS 197.763."

ORS 197.735(3)(b) requires:

> "The notice [of hearing] provided by the jurisdiction shall:
>
> "* * * * *

hearing did not comply with ORS 197.763(3)(b) because it did not identify ALUO 18.62.040 as a relevant approval criterion.

ALUO 18.62.040 is a relevant approval criterion for the proposed development, and was not identified in the city's notice as an applicable criterion.[16] Accordingly, the city's notice did not comply with ORS 197.763(3)(b). We agree with petitioners that they may raise the city's failure to require approval of the permit as an issue in this appeal proceeding. ORS 197.835(2)(a).

B. Failure to Require the Permit as Procedural Error

Respondents argue that the city's failure to require the permit is a mere procedural error for which there is no prejudice.[17]

"(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue."

[16]ALUO 18.62.040(B) provides:

> "If a development is a part of a Site Review * * * or other Planning Action, then the [permit] Review shall be conducted simultaneously with the Planning Action and no additional fees shall be charged." (Emphasis supplied.)

Under this provision, if a development requires a physical constraints permit, the review for the physical constraints permit must be conducted simultaneously with site review (or other development action) for the proposed development. Since the city proceeding below included site review, it should have also included review for approval of a physical constraints permit, and the criteria for approval of such physical constraints permit should have been listed in the city's notice of hearing as applicable criteria.

[17]To the extent respondents also argue that the failure to approve the permit "simultaneously" with the challenged decision is a mere procedural

We disagree. ALUO 18.62.040(E) and (G) contain substantive criteria. Failure to find compliance with these substantive criteria would presumably lead to denial of the permit, as well as denial of the proposed development requiring the permit.[18] See McConnell v. City of West Linn, ___ Or LUBA ___ (LUBA No. 88-111, March 13, 1989), slip op 26-28; Hopper v. Clackamas County, 15 Or LUBA 413, 418 (1987).

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error, respondents cite to nothing in the challenged decision or in the ALUO which (1) ensures that intervenor must obtain the permit prior to exercising rights granted under the challenged decision, and (2) establishes that the city's failure to determine compliance with ALUO 18.62.040 at the time of, or prior to the challenged decision, could have no effect on the underlying validity of the challenged decision. We disagree with respondents that the city's failure to require approval of the permit simultaneously with the subject decision could be mere procedural error where there is no assurance that the permit will be obtained in the future, and where it is not established whether one or all of the approvals given in the challenged decision are dependent upon approval of a permit.

[18]ALUO 18.62.040(E) provides, in part:

> "A Physical Constraints Review Permit shall be issued by the Hearings Officer when the Applicant demonstrates the following;
>
> "(1) That the development will not cause damage or hazard to persons or property upon or adjacent to the area of development.

"* * * * *"

ALUO 18.62.040(G) provides, in part:

> "The Staff Advisor or Planning Commission may deny the Physical * * * Constraints Permit if, in its opinion:
>
> "(1) The proposed development will have a detrimental effect on the lands regulated and protected by this Chapter, or if inconsistent with the Comprehensive plan.
>
> "* * * * *"

The third assignment of error is sustained.

The city's decision is remanded.