

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

PHILIP THORMAHLEN and SHARON	)	
THORMAHLEN,	)	
	)	
Petitioners,	)	
	)	
vs.	)	
	)	LUBA No. 90-102
CITY OF ASHLAND,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
OREGON SHAKESPEARE FESTIVAL,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Ashland.

Philip Thormahlen and Sharon Thormahlen filed the petition for review and Leo Frank, Portland, argued on behalf of petitioners.

Ronald L. 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-respondent. With him on the brief was Blackhurst, Hornecker, Hassen & Thorndike, & Ervin B. Hogan.

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

AFFIRMED 11/05/90

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 a conditional use permit and site review for a seating pavilion for the outdoor Elizabethan Theater of the Oregon Shakespeare Festival.

**MOTION TO INTERVENE**

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

**FACTS**

The subject property is owned by the city and leased to intervenor. It is zoned Commercial Downtown Overlay (C-1-D), and consists of seventy acres, including the Elizabethan Theater at issue, the Angus Bowmer Theater and Lithia Park. The proposed pavilion will cover a part of the Elizabethan Theater, which is located on a small fraction of the subject property. Properties to the south of the proposed pavilion are zoned Residential (R-2 and R-1-7.5). Petitioners' residence and bed and breakfast establishment is directly across the street from the proposed pavilion. The other properties surrounding the Elizabethan Theater are zoned C-1-D.

The challenged order identifies the following additional facts:

"The project is a +/- \$6 million renovation and remodeling of the existing Elizabethan Theater. The project includes the following items:

"Removal and relocation of the existing seating and constructing a cover over the new seating area and appurtenances. The number of seats will not change significantly. There are currently 1,194 seats. The new facility will have between 1,185 and 1,200 seats, at maximum [sic] an increase of six seats, or one half of one percent of the existing capacity. The final number of seats will be determined precisely through final architectural design processes.

"Removal of the two existing large concession booths within the Chautauqua walls.

"Remodeling and enlargement of the existing women's restroom for use by men, and replacing the existing men's restroom with a new women's restroom.

"Construction of a replacement secondary stage for the Tudor Fair/Green Show between two of the four now existing booths located adjacent to the Chautauqua wall.

"Removal and relocation of an existing concrete retaining wall located behind the new women's restroom.

"Removal of the existing control room structure and lighting towers, and relocating equipment within the upper roof structure of the new seating cover and in new lighting towers.

"Installation of brick paving and landscape areas in place of existing asphalt surfaces within the area between the existing Chautauqua wall and the rear of the new seating area.

"Construction of an addition to the basement of the Elizabethan stage house under the new seating risers equal to approximately 2033 square feet, to provide tunnel entrances for the actors." Record 9-10.

It is undisputed that the proposed pavilion is designed, at least in part, to keep outside noise from interfering with intervenor's theater productions. Because the proposed pavilion will exceed 40 feet in height, a conditional use permit is required.<sup>1</sup> Additionally, site review is required before the pavilion may be approved.

The planning commission approved intervenor's applications for a conditional use permit and site review for the proposed pavilion. Petitioners appealed to the city council. The city council held a hearing on the proposal and accepted further evidence and argument concerning the proposal. The city council then approved intervenor's application for a conditional use permit and site review. This appeal followed.

#### **FIRST ASSIGNMENT OF ERROR**

"The City of Ashland erred in approving the Oregon Shakespeare Festival applications because the applicant failed to establish compliance with the standards and criteria of the Ashland Land Use Ordinance for approval for a conditional use permit pursuant to Section 18.104.040."

ALUO 18.104.040 provides:

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<sup>1</sup>Ashland land Use Ordinance (ALUO) 18.32.050(B) provides that in the C-1-D zoning district:

"Structures which are greater than 40 ft. in height, but less than 55 ft., may be permitted as a conditional use."

"A conditional use permit shall be granted if the approval authority finds that the proposal conforms with the following general criteria:

"A. The proposal is in conformance with the Comprehensive Plan.

"B. The location, size, design and operating characteristics of the proposed development are such that the development will be reasonably compatible with and have minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood.

"C. In determining the above, consideration shall be given to the following:

"1) Harmony in scale, bulk, coverage and density.

"2) The availability and capacity of public facilities and utilities.

"3) The generation of traffic and the capacity of surrounding streets.

"4) Public safety and protection.

"5) Architectural and aesthetic compatibility with the surrounding areas."

Petitioners make essentially two separate contentions in this assignment of error. First, petitioners argue that the proposal violates ALUO 18.104.040(A) because it is not in compliance with provisions of the Ashland Comprehensive Plan (plan), including the Ashland Downtown Plan (downtown plan). Second, petitioners contend the proposal is not "reasonably compatible" with, and will have more than a "minimal impact" on, abutting properties, in violation of

ALUO 18.104.040(B) and (C). We address these contentions separately below.

**A. Plan Compliance**

Petitioners argue the city's findings are inadequate to establish compliance with plan policies IV-33 and VI-2, and the provision in the downtown plan entitled "Elizabethan Theater."

**1. Plan Policy IV-33**

Plan policy IV-33 provides it is the city's policy to:

"Continue to strengthen the site review process and assess accurately the environmental impact and ensure that change in land use acknowledges limitations and opportunities of the site and have [sic] as little detrimental impact as possible."

Respondent and intervenor (respondents) contend that plan policy IV-33 is not an approval standard.

We agree with respondents. In determining whether particular plan provisions are approval standards, we look to the language used in the challenged plan provision and the context in which it appears. Neuenschwander v. City of Ashland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-068, October 19, 1990), slip op 14; Stotter v. City of Eugene, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-037, October 10, 1989); Bennett v. City of Dallas, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-078, February 7, 1989), aff'd 96 Or App 645 (1989). Here, plan policy IV-33 states general objectives, but does not purport to state mandatory approval requirements. There is nothing in either the language or the context of plan policy IV-33 to suggest that

it is intended to operate as an approval standard. Accordingly, petitioners' allegations regarding the adequacy of the city's findings to establish compliance with plan policy IV-33 provide no basis for reversal or remand of the challenged city decision. Bennett v. City of Dallas, supra.<sup>2</sup>

This subassignment of error is denied.

## **2. Plan Policy VI-2**

Plan policy VI-2 states:

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<sup>2</sup>The plan also states that this policy is implemented through "[ALUO] Chapter 18.72 (Site Review)." Petitioners assert that the city's site review process does not implement policy IV-33 because site review does not require the preparation of an "environmental assessment," and does not specifically require that the "limitations and opportunities" of property be identified. Petition for Review 6. While it is unnecessary under our disposition of this subassignment of error to determine whether plan policy IV-33 is adequately implemented by the ALUO Chapter 18.72 site review provisions, we note that plan policy IV-33 does not require a specific "environmental assessment," or require specific identification of "limitations and opportunities." Plan policy IV-33 aspires to strengthen the site review process to accurately assess the environmental impacts of proposals and, in acknowledgment of the limitations and opportunities of each site, to ensure that the proposed development has "as little detrimental impact as possible."

"Using the following techniques, protect existing neighborhoods from incompatible development and encourage upgrading:

- "a) Do not allow deterioration of residential areas by incompatible uses and developments. Where such uses are planned for, clear findings of intent shall be made in advance of the area designation. Such finding shall give a clear rationale, explaining the relationship of the area to housing needs, transportation and open space, and any other pertinent Plan topics. Mixed uses often create a more interesting and exciting urban environment and should be considered as a development option wherever they will not disrupt an existing residential area.
- "b) Prevent inconsistent and disruptive designs in residential areas through the use of a limited design review concept, in addition to using Historic Commission review as a part of the site review, conditional use permit, or variance approval process.
- "c) Develop programs and efforts for rehabilitation and preservation of existing neighborhoods, and prevent development which is incompatible and destructive." (Emphasis supplied.)

The plan states that policy VI-2 is implemented through "Conditional uses allowed in R-2 zones (18.24); Chapter 2.24 of the City Code (Ashland Historic Commission); [ALUO] Chapter 18.72 Site Review." Plan policy VI-2.

Petitioners argue that the city's findings are inadequate to establish compliance with the above emphasized language in policy VI-2.

Respondents argue that plan policy VI-2 is not a relevant standard because it applies only to R-2 zoning



districts. Respondents also contend that plan policy VI-2 is not a mandatory approval standard in any event.

Based on the language and context of plan policy VI-2, we conclude it governs the development of zoning ordinance standards. Specifically, plan policy VI-2 requires the city to (1) plan in advance for uses which are potentially incompatible with residential areas, (2) develop a "limited design review" concept and include "Historic Commission" review as a part of the site review process, and (3) develop programs to rehabilitate and preserve existing neighborhoods. These plan provisions do not purport to govern individual permit decisions. Accordingly, we agree with respondents that plan policy VI-2 is not an approval standard applicable to the decision challenged in this appeal. It is therefore unnecessary for us to determine whether the city's findings are adequate to establish compliance with plan policy VI-2.<sup>3</sup>

This subassignment of error is denied.

### **3. Downtown Plan**

Petitioners cite the following provision in the downtown plan:

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<sup>3</sup>It is not clear to us that plan policy VI-2 applies only to development activities in the R-2 zone as respondents contend. However, under our disposition of this subassignment of error, it is unnecessary for us to determine the complete scope of plan policy VI-2.

"ELIZABETHAN THEATER

"One of the upcoming projects that will have a substantial impact on the city will be the renovation of the Elizabethan Theater. The current construction, dating from 1959, is dated, and the rising ambient noise level of the city has degraded the performance quality significantly in recent years. The stage needs to be buffered from the traffic and the street. These changes will change the appearance of the streetscape, and it must be done in a sensitive manner, considering that it lies on the border between residential and commercial uses. Nevertheless, the Elizabethan Theater is Ashland's flagship playhouse, and is the cornerstone of much of the festival's success. Its renovation is an important project that must be accomplished if the high quality of the Festival is to be maintained and improved." Downtown Plan 45.

Petitioners contend that the city is required to, but did not, address this provision of the downtown plan in the challenged decision.

Respondents cite findings in the planning commission's decision, which are incorporated into the challenged city council decision, and claim that these findings are adequate to address the "Elizabethan Theater" provision in the downtown plan.<sup>4</sup>

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<sup>4</sup>Respondents cite the following findings:

"The Commission finds that the application presented by the Festival is in full accord with the Downtown Plan's vision and we believe that the submitted information fully justifies the approval of this application. The Commission does not find any significant conflict with the Ashland Comprehensive Plan raised by the opposing

This "Elizabethan Theater" provision of the downtown plan is within a segment of the downtown plan entitled "Regulation." The "Regulation" segment of the downtown plan is a part of a section entitled "The Program." "The Program" section of the downtown plan describes the following role for the policies falling under the heading of "Regulation":

"\* \* \* any effective plan must recommend ways to alleviate current or future problems. This section ["The Program" section] considers the improvements needed to continue the downtown's success.

"Since this plan is primarily action-oriented, it has a short time frame. Recommended actions are specific and intended for implementation within five years - most within two years. However, because these actions define a direction for the downtown, several long range policies are also described. These should be implemented after the successes or failures of prior actions, and changing conditions are evaluated.

"The actions are divided into four major sections: Physical Development, Downtown Management, Regulation, and Economic Development. Physical Development includes capital intensive projects such as parking and pedestrian improvements.

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testimony. While diverse opinions and interpretations can be offered of the Plan document, the Commission finds no factual information in the testimony that indicates a conflict." Record 85.

Because we determine below that the downtown plan provision at issue does not constitute an approval standard applicable to the challenged decision, we need not review the adequacy of these findings.

Downtown Management involves changes in ordinances, policies, and operating procedure, the maintenance and improvement of existing facilities, and the identification of revenue sources to support the programs. Regulation includes changing the city's laws and plans to better implement this plan. Economic Development involves policies or actions which will enhance the downtown's economy. Most of these actions will be taken by the municipal government, but it will necessarily include the city's partners in downtown improvements -- the Parks and Recreation Commission, the Chamber of Commerce, the Ashland Downtown Association, the Oregon Shakespeare Festival, and others." (Emphasis supplied.)  
Downtown plan 27.

We understand this language in the downtown plan to state that the development policies listed under the "Regulation" segment of the downtown plan are policies intended to shape laws to be enacted in the future, but do not apply as approval standards to individual development applications. Therefore, we believe petitioners' allegations concerning compliance with the "Elizabethan Theater" segment of the downtown plan provide no basis for reversal or remand of the city's decision.

This subassignment of error is denied.<sup>5</sup>

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<sup>5</sup>Petitioners also suggest that the challenged decision fails to identify relevant comprehensive plan provisions. However, the city's order identifies several plan provisions and addresses them. Petitioners do not explain what relevant plan policies the city failed to consider.

## **B. Compatibility and Impacts**

Petitioners cite particular city findings of compliance with ALUO 18.104.040(B) and (C), and argue that those findings are inadequate to establish compliance with ALUO 18.108.040(B) and (C).<sup>6</sup> Petitioners argue these

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Petitioners also assert that the city's findings regarding compliance with the plan provisions addressed in the challenged order are "conclusory" and are "not supported by substantial evidence found in the entire record." Petition for Review 5. However, it is petitioners' responsibility to identify those findings which they believe to be inadequate and not supported by substantial evidence. Petitioners' general allegation that the findings regarding compliance with the plan and downtown plan are inadequate and not supported by substantial evidence is too broad an allegation to provide a basis for review. McCoy v. Linn County, 16 Or LUBA 295, 314-315 (1987), aff'd 90 Or App 271 (1988).

<sup>6</sup>Petitioners cite the following findings:

"The City Council finds the design of the project is compatible with the Architecture of other Shakespeare Festival buildings located in the immediate vicinity.

"In plan [sic] view, the scale, bulk, coverage, and density of the seating cover is consistent with those of the Angus Bowmer Theater located adjacent thereto, and with other buildings in the adjacent downtown area. As illustrated by the city's AutoCAD site plan of the downtown area, upon which the structure has been superimposed, the 'footprint' of the seating cover is similar to many downtown buildings." Record 13.

findings do not establish that the proposed pavilion is reasonably compatible with the abutting residentially zoned land, considering ALUO 18.104.040(C)(1) and (5) regarding harmony in bulk, scale, density and coverage, and architectural compatibility. Additionally, petitioners contend the city's findings fail to adequately describe the character of the surrounding neighborhood and, specifically, fail to identify and analyze the characteristics of the adjacent residentially zoned land.<sup>7</sup>

Respondents argue that the city's findings adequately establish that the proposed pavilion is reasonably compatible with, and will have a minimal impact on, the livability and appropriate development of the surrounding neighborhood, considering the factors listed in ALUO 18.104.040(C). Respondents cite other findings, in addition to those cited by petitioners, as establishing compliance

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" \* \* \* \* \*

"The height information indicates the planned seating cover will have a height greater than some downtown buildings but less than others. The information supports a conclusion that the height of the planned structure is consistent with other downtown buildings." Record 14.

<sup>7</sup>Petitioners also assert the challenged city findings are not supported by substantial evidence. However, petitioners' general allegation that the findings are not supported by substantial evidence is too broad an allegation to provide a basis for our review. McCoy v. Linn County, supra.

with ALUO 18.104.040(B) and (C). In particular, respondents cite city findings which identify the characteristics of abutting and neighboring properties, including the residentially zoned properties, and explain why the city determined the proposed pavilion is reasonably compatible with, and will not have more than a minimal adverse impact upon, such properties. Specifically, respondents cite the following findings:

"The location and operating characteristics of the theater will not change as a result of the planned improvements. The size of the theater in terms of seating will not change as a result of the planned improvements. The size of the structure will change by virtue of covering a portion of currently uncovered seating area. The City Council finds the design of the project is compatible with the architecture of other Shakespeare festival buildings located in the immediate vicinity." Record 13.

"The downtown area is characterized by groups of individual buildings which are either attached, or separated by 10 feet or less. The proposed structure is related to its own building group consisting of the Angus Bowmer Theater, Elizabethan stage and stage house. The building scale, bulk, coverage, and density of the subject building group, with the roof cover addition, is consistent and compatible with that of other building groups in the downtown area \* \* \*" Record 13.

"\* \* \* a principal reason for the new seating cover is to attenuate noise emanating from the surrounding neighborhood which impacts theater performances, and to attenuate noise created by performances which impacts on the surrounding neighborhood. The value of noise attenuation will serve to enhance the livability of abutting properties and the surrounding neighborhood.

"To the extent it is argued that the new seating cover will block or obscure views from the residential area located south and southwest, inconsistent with the reasonable compatibility/minimal impact criteria, the City Council finds the alteration of views is relevant only to the extent it may affect livability and appropriate development. In this regard the Council finds:

- "1) Based on topographic information \* \* \* nearby residential dwellings are at a substantially higher elevation than the proposed structure, and their views have already been altered by the existing Shakespeare buildings \* \* \*
- "2) View alterations are minimal for the nearest residential dwellings located approximately 160 and 220 feet from the proposed structure, and at an elevation approximately 20-25 feet higher at grade. \* \* \*
- "3) Existing mature trees on and off the project site serve to obscure nearby residential views." Record 14.

"Based on findings pertaining to CUP standards regarding building harmony, the City Council finds the project will be neither incompatible nor destructive to the existing neighborhood within which the theater is located. In making the finding it is important to note that [the] theater is located on the periphery of three zoning districts: C-1-D, R-2 and R-1-7.5. The theater is within but on the fringe of the C-1-D district. The nearest residential property is situated approximately 20-25 feet higher. The uses are separated and screened by existing and planned landscaping. While nearby residential architecture is different, the difference emanates from the different uses it serves and the different zones in which the uses are located. The mere fact that the architecture is different does not necessarily mean it is incompatible and destructive. The City Council finds the planned project will be neither." Record 35.



ALUO 18.104.040(B) provides that proposed development must be reasonably compatible with, and not have more than a minimal adverse impact on, abutting properties and the area surrounding proposed development. The determinations regarding reasonable compatibility and impact are to be based on consideration of the factors specified in ALUO 18.104.040(C). The factors listed in ALUO 18.104.040(C) are not themselves approval standards, and no one of the ALUO 18.104.040(C) factors is conclusive. See Miller v. City of Ashland, 17 Or LUBA 147, 178-179 (1988). In Murphey v. City of Ashland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-123, May 16, 1990), slip op 28, we stated that compliance with ALUO 18.104.040(B) requires:

"[t]he city [to] identify the qualities constituting the livability and appropriate development of the abutting properties and the surrounding neighborhood, and \* \* \* determine whether the proposed use will have more than a minimal impact on those identified qualities."

Admittedly, the city's findings in this case could be more detailed. However, findings of compliance with relevant approval criteria need not be perfect, rather they need only be adequate to establish the factual and legal basis for the particular conclusions drawn in a challenged decision, sufficient for review. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21, 569 P2d 1063 (1977).

The findings cited by respondents identify the characteristics of the neighborhood in which the pavilion is

proposed. The findings state that the proposed pavilion is located on the edge of three different zoning districts (C-1-D, R-2 and R-1-7.5). The findings identify residential uses and commercial uses, including theater uses within the area surrounding the proposed pavilion. The findings recognize that the qualities of residential livability in the abutting neighborhood are already impacted by the existing theater operations in that the existing theater produces noise and is within the residential area's viewshed. The findings state the architecture of the proposed pavilion is similar to that of of the existing theater buildings constituting the "building cluster" of which the proposed pavilion will be a part. Additionally, the findings determine that the area surrounding the proposed pavilion is characterized and impacted by the existing theater buildings. The findings determine that the appropriate development of the area is fixed in part by the continued development of the theater operations permitted within the zone on which the subject property is located.

Regarding whether the proposed pavilion is reasonably compatible with these characteristics, and whether the pavilion will have more than a minimal adverse impact on the qualities of livability and appropriate development of the area, the findings recognize that the architecture of the proposed pavilion is different from residential architecture in the adjacent residential zones. The city's findings

nevertheless determine that the proposed pavilion will be reasonably compatible with abutting properties as well as the area surrounding the proposed pavilion, considering the factors of ALUO 18.104.040(C). In essence, the city findings determine that the bulk, scale, density and coverage of the proposed pavilion will be less than the existing theater in that it will only cover a part of the existing theater, and that the only difference in this regard is that the pavilion will be taller than the existing Elizabethan Theater.

The findings also determine that the height of the pavilion is exceeded by the elevation of the abutting residences, and that the higher elevation of the residences, coupled with the mature vegetation buffer between the pavilion and abutting residences, will provide an adequate screen such that the pavilion will only minimally impact existing residential views. Additionally, the findings determine that the proposed pavilion will reduce the noise impacts of theater operations which currently affect residential livability, and that the operating characteristics of the existing theater will not change as a result of the proposed pavilion, because no appreciable increase in theater seating capacity is contemplated.<sup>8</sup>

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<sup>8</sup>Petitioners suggest that there is not substantial evidence in the whole record to support the city's determination that the noise emanating from

Finally, the findings determine that the proposed pavilion is compatible with the city's downtown area because (1) the "footprint" of the proposed pavilion is similar to that of other downtown buildings; and (2) the proposed pavilion is consistent with its own building group, which includes another indoor theater, the Elizabethan Theater and Elizabethan Theater stagehouse, as well as with other downtown building clusters.

Petitioners do not identify other area characteristics which the city failed to consider in determining reasonable compatibility and impacts of the proposed pavilion.<sup>9</sup> Absent

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theater productions will be significantly reduced. However, respondents cite evidence in the record from an acoustics expert that the proposed pavilion will reduce noise emanating from the theater. Record 196. Nothing which petitioners cite so detracts from this evidence that it cannot be considered substantial evidence to support the city's conclusion that the proposed pavilion will reduce the noise impacts on abutting areas from the theater productions. We believe the evidence from the applicant's acoustics expert is substantial evidence to support the city's conclusions regarding mitigation of theater noise impacts on the adjacent residential neighborhood.

<sup>9</sup>Petitioners are correct that there are no findings cited which specifically identify the characteristics of Lithia Park or specifically analyze whether the proposed pavilion is reasonably compatible with the park. However, petitioners do not explain why Lithia park should be

such an explanation, we believe, read as a whole, the city's findings adequately determine the character of the abutting properties and neighborhoods, and show how the proposed pavilion will be reasonably compatible with, and will not have more than a minimal adverse impact on, those properties considering the factors of ALUO 18.104.040(C). See Miller v. City of Ashland, 17 Or LUBA 147, 180 (1988); McNulty v. City of Lake Oswego, 15 Or LUBA 283, 286-288 (1987).

This subassignment of error is denied.

The first assignment of error is denied.

#### **SECOND ASSIGNMENT OF ERROR**

"The respondent City of Ashland exceeded [its] statutory authority in approving a structure which exceeds fifty five (55) feet in height where the C-1-D zoning district specifically limits the

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specifically addressed and its characteristics analyzed and compared to those of the proposed pavilion. This is petitioners' responsibility.

Petitioners also complain that the city determined other buildings in the surrounding area are as tall or taller than the proposed pavilion. Petitioners argue that the evidence in the record establishes that there is only one building in the area which as tall or taller than the proposed pavilion, and that is the Mark Antony Hotel. However, even if the pavilion will be the second tallest building in the surrounding area, in view of the other findings discussed above, this fact in itself would not establish that the pavilion will not be reasonably compatible with or that it will have more than a minimal impact on surrounding properties.

height of structures to forty (40) and may allow structures not to exceed fifty five (55) feet with a conditional use permit. (Section 18.32.050[B] LUO)"

ALUO 18.32.050(B) provides:

"Structures which are greater than 40 ft. in height, but less than 55 ft., may be permitted as a conditional use."

Petitioners contend that the proposed pavilion will exceed 55 feet in height. Petitioners argue that under ALUO 18.32.050(B) the city has no authority to approve as a conditional use, a building taller than 55 feet.

Petitioners contend that the city improperly measured the height of the proposed pavilion from the height of the sidewalk at Pioneer street and should have measured the height of the proposed pavilion from "grade" as defined by ALUO 18.08.090 and 18.08.280.<sup>10</sup> Petitioners contend that measured from "grade," as they calculate it, the proposed pavilion will be 73.16 feet in height.

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<sup>10</sup>ALUO 18.08.090 provides:

"Height of Buildings. The vertical distance from the 'grade' to the highest point of the coping of a flat roof or the deck line of a mansard roof or to the average height of the highest gable of a pitch or hip roof."

ALUO 18.08.280 provides:

"Grade or Ground Level The average of the finished ground level at the center of all walls of the building. In case a wall is parallel to and within five feet of a sidewalk, the ground level shall be measured at the sidewalk."

Respondents argue that petitioners may not raise the issue of the height of the proposed pavilion, because they failed to raise the issue during the city proceedings below. ORS 197.835(2).<sup>11</sup> Alternatively, respondents argue that the city properly measured the height of the proposed pavilion and determined that the pavilion will be 54 feet 11 inches tall, less than the 55 foot limit for conditional uses under ALUO 18.32.050(B). Respondents argue that the city properly measured the distance from the calculated grade of 104'-7 1/4" to the highest point of the proposed pavilion. Respondents contend that the city properly established the "grade" or "ground level" by averaging the levels at the center of each of the proposed pavilion's walls, and did not simply use the level of the sidewalk at Pioneer Street.

Respondents are correct that under ORS 197.835(2), if the city complied with the requirements of ORS 197.763, issues not raised below may not be raised for the first time on appeal. However, the city's notice of hearing does not

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<sup>11</sup>ORS 197.835(2) provides that issues before LUBA

"\* \* \* shall be limited to those raised by any participant before the local hearings body as provided by 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 \* \* \*

"\* \* \* \* \*"

appear to comply with the requirements of ORS 197.763. ORS 197.763(3) requires the city's notice to:

"\* \* \* \* \*

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

\* \* \* \* \*

"(e) State that the failure of an issue to be raised in a hearing, in person or by letter, or failure to provide sufficient specificity to afford the decisionmaker an opportunity to respond to the issue, precludes appeal to the board on that issue."

"\* \* \* \* \*" (Emphasis supplied.)

The city notice to which we are cited states that "the ordinance criteria applicable to this application are attached to this notice." Record 228, see also Record 1, 239. However, there are no ordinance provisions attached to, or listed in, any of the notices found at the record pages indicated above, and it is therefore impossible to ascertain whether any of the city notices either listed or appended applicable criteria.<sup>12</sup> Accordingly, we review

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<sup>12</sup>Additionally, we note that the cited notices do not accurately state the effect of failure to properly raise an issue at the local level. The notice on Record 228 states the following:

"\* \* \* Oregon law states that failure to raise an objection concerning this application, either in person or by letter, or failure to provide sufficient specificity to afford the decisionmaker



petitioners' contention regarding the height of the proposed pavilion.

As we understand it, the city determined the height of the proposed pavilion by first determining the ground level or grade. The ground level or grade was determined by averaging the levels of the center point of each of the pavilion's walls. Then the city measured the distance from the ground level or grade so determined, to the top of the highest point of the pavilion. There is no dispute that the height of the pavilion so calculated is 54 feet 11 inches. We believe the city properly measured the height of the proposed pavilion, consistent with the requirements of ALUO

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an opportunity to respond to that issue, precludes your right of appeal to the Land use Board of Appeals (LUBA). Failure to specify which ordinance criteria the objection is based on also precludes your right of appeal. \* \* \*" (Emphasis supplied.)

The city notice at Record 239 states:

"\* \* \* Oregon law states that failure to raise an objection concerning this application, either in person or by letter, precludes your right of appeal. Failure to specify which ordinance criteria the objection is based on also precludes your right of appeal. \* \* \*" (Emphasis supplied.)

However, the right which is foreclosed by failing to raise an issue at all, or with sufficient specificity so that the local government may respond, is not the right to appeal. Rather, it is the right to appeal to LUBA for review of the issue(s) which are either not raised at all or which are inadequately raised.

18.08.090 and 18.08.280.<sup>13</sup> Accordingly, the city had authority to review the proposed pavilion under the requirements of ALUO 18.32.050(B) applicable to a conditional use permit.

The second assignment of error is denied.

### **THIRD ASSIGNMENT OF ERROR**

"The respondent did not adequately address and apply the criteria for site plan review. Specifically, the respondent failed to properly apply the criteria which relate to noise and building materials."

Petitioners make two separate contentions in this assignment of error. Petitioners contend that the pavilion will not meet city noise standards, and will not be composed of proper building materials. We address these contentions separately below.

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<sup>13</sup>Petitioners also contend that intervenor's "Lighting Angles Study" establishes that "many of the light locations will exceed 60 feet in height." Petition for Review 16. Respondents argue, among other things, that the "Lighting Angles Study" establishes only "ideal lighting angles, not where the lighting instruments shall actually be placed. At most [the study] suggests that, by complying with the 55' height limit, Applicant is accepting a less-than-ideal lighting positions." Respondents' Brief 25. We agree with respondents.

### **A. Noise Standards**

Petitioners argue that in its site review, the city failed to determine the proposed pavilion would reduce noise emanating from the theater. Petitioners also argue that the city impermissibly relied on the opinion of an expert to determine that noise levels emanating from the theater will be reduced. Petitioners further argue the city did not make an ultimate determination the proposed pavilion will reduce noise emanating from the theater, and instead improperly imposed a condition that the noise requirements of the city be met.

The most troublesome part of this assignment of error is that the parties do not cite any particular standard establishing the city's noise requirements, and we do not find any in the ALUO site review provisions. Respondents cite the following language in the challenged order as paraphrasing the city's noise standard:

"Special attention to glare ([ALUO] 18.72.11.) and noise (AMC 9.08.170(C) & AMC 9.08.175) should be considered in the project design to alleviate future foreseeable problems." Record 19.<sup>14</sup>

The parties do not, however, contest the accuracy of this statement of the city's noise requirements, and we assume it is an accurate reflection of those provisions.

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<sup>14</sup>We assume AMC refers to Ashland Municipal Code, of which we have not been provided a copy.

Respondents cite findings establishing that the city considered reduction of the noise which emanates from the Elizabethan Theater. Petitioners do not explain why the findings cited by respondents are inadequate, and we do not believe that they are.

Additionally, the city may rely on the opinions of experts in making a determination of whether a proposal is in compliance with an applicable standard. Pierron v. City of Eugene, 8 Or LUBA 113, 120 (1983). We see nothing wrong with the city's reliance on the opinion of the applicant's acoustic expert, in this case, to determine that the proposed pavilion will reduce the amount of noise emanating from the theater.

Regarding petitioners' contention that the city improperly deferred its determination of compliance with the applicable noise standard, the challenged decision states:

"\* \* \* the City Council finds the subject use will comply with the cited noise [sic] as evidenced by [the testimony of applicants acoustic expert] and as a condition of approval. \* \* \*" (Emphasis supplied.)

Accordingly, the city made the requisite finding that the proposal will comply with the applicable noise standard, and did not impermissibly defer the ultimate determination of compliance with that standard. See Holland v. Lane County, 16 Or LUBA 583, 596 (1988).

This subassignment of error is denied.

## **B. Building Materials**

As we understand this assignment of error, petitioners argue that the proposed pavilion does not comply with the city's Site Design and Use Guidelines (guidelines), regarding building materials used in construction.<sup>15</sup>

Respondents point out that we stated in Miller v. City of Ashland, 17 Or LUBA at 186 n 29, that the guidelines do not appear to be mandatory approval standards. We continue to believe our statement in Miller is correct. Further, nothing in the cited provision of the guidelines suggests that it is intended as a mandatory approval standard. Accordingly, findings of compliance with the cited provision are surplusage, and it is unnecessary to review the adequacy of those findings.

This subassignment of error is denied.

The third assignment of error is denied.

The city's decision is affirmed.

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<sup>15</sup>Specifically, petitioners cite the following provision:

"Building Materials: Building Materials and paint colors should be compatible with the surrounding area. Buildings made of unadorned tilt up concrete, concrete block, or metal siding are not acceptable. Concrete and metal buildings that will be visible from adjacent streets should have brick or wood, or imitation rock facades. Avoid extensive use of glass as building skin. Bright colors used to attract attention to the building are unacceptable." Petition for Review 18.