

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CHERYL BROETJE-McLAUGHLIN and)

5 DELORES D. BROETJE,)

6)

7 Petitioners,)

8)

9 vs.)

10) LUBA No. 91-056

11 CLACKAMAS COUNTY,)

12) FINAL OPINION

13 Respondent,) AND ORDER

14)

15 and)

16)

17 LONNIE BAIN,)

18)

19 Intervenor-Respondent.)

20

21

22 Appeal from Clackamas County.

23

24 Cheryl Broetje-McLaughlin, Milwaukie, and Delores D.
25 Broetje, Milwaukie, filed the petition for review. Cheryl
26 Broetje-McLaughlin argued on her own behalf.

27

28 Gloria Gardiner, Oregon City, filed a response brief
29 and argued on behalf of respondent.

30

31 Leslie Roberts, Portland, filed a response brief and
32 argued on behalf of intervenor-respondent. With her on the
33 brief was Josselson, Potter & Roberts.

34

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

37

38 REMANDED 10/21/91

39

40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Clackamas County hearings
4 officer's decision approving a conditional use permit to add
5 a "garden room" and covered walkway to the historic Broetje
6 House.

7 **FACTS**

8 The subject property is approximately 1.5 acres in size
9 and is owned by intervenor-respondent (intervenor) and his
10 wife. It is designated medium density residential/historic
11 landmark on the Clackamas County Comprehensive Plan (plan)
12 map. It is zoned Medium Density Residential/Historic
13 Landmark (MR-1/HL).¹ Surrounding properties are zoned MR-1
14 or Urban Low Density Residential (R-7). The immediate area
15 is developed with single family dwellings and a few multiple
16 family dwellings. The property adjoining the subject
17 property to the west is owned by petitioners and is occupied
18 by five mobile homes.

19 The subject property contains the historic Broetje
20 House and its surrounding grounds, including a gazebo,
21 patio, trees and gardens. The northern third of the
22 property is a gravelled parking area. In 1987, intervenor
23 obtained a conditional use permit (1987 permit) from the
24 county to use the Broetje House for "a bed and breakfast,

¹The HL district is an overlay zone applied to designated historic landmarks.

1 weddings, meetings, seminars and workshops." Supp
2 Record 113. At the time the 1987 permit was approved, the
3 property was zoned MR-1. The county's recently adopted HL
4 overlay district had not yet been applied to the subject
5 property. Supp Record 101.

6 On December 18, 1990, intervenor and his wife filed an
7 application for a conditional use permit to add the disputed
8 garden room and covered walkway to the Broetje House. The
9 garden room was proposed to be used for "weddings and
10 receptions, banquets, meetings, or any gathering [of] social
11 or business groups." Record 900. The application also
12 requested that the limit on the maximum number of people
13 attending events at the Broetje House be increased from 150
14 to 250,² and that the hours of operation be extended from
15 the current 9:00 a.m. - 9:00 p.m. to 8:00 a.m. - 10:00 p.m.

16 On April 23, 1991, after a public hearing, the hearings
17 officer issued the challenged decision. The decision
18 approves a conditional use permit for a 30 ft. by 60 ft.
19 garden room, located to the east (in front) of the Broetje
20 House and connected to it by a covered walkway. Record 316.
21 The decision continues the prior limitation of the maximum
22 number of people attending events at the Broetje House to

²Maximum occupancy of the Broetje House itself is 49. Although the maximum number of people allowed to attend an event at the Broetje House under the 1987 permit is 150, without the proposed garden room, intervenor's facility can only accommodate groups of 50 - 150 people at outdoor events, during good weather. Record 880.

1 150 people, but modifies the limitation on hours of
2 operation (except for the bed and breakfast use) to
3 8:00 a.m. - 9:00 p.m.

4 **SECOND ASSIGNMENT OF ERROR**

5 "The findings of the Hearings Officer are
6 inadequate because the Hearings Officer has failed
7 to substantiate his conclusion that the proposed
8 use is a Service Recreation[al] use * * *."

9 Clackamas County Zoning and Development Ordinance (ZDO)
10 Section 707 governs the HL overlay district. ZDO 707.05A
11 provides:

12 "Primary Uses: A Historic Landmark * * * may be
13 used for any use which is allowed in the
14 underlying district * * *, provided such use is
15 not detrimental to the preservation of the
16 historic resource, subject to the specific
17 requirements for the use, and all other
18 requirements of this Section."

19 The list of conditional uses allowed in the MR-1 zone
20 includes "service recreational uses." ZDO 302.05A.6.
21 ZDO 813.01 lists the uses allowed as service recreational
22 uses and establishes development standards for some of the
23 listed uses. ZDO 813.01 contains the following relevant
24 provisions:

25 "USES PERMITTED

26 "A. Private commercial, noncommercial or
27 nonprofit recreational areas, uses and
28 facilities, including country clubs, lodges,
29 fraternal organizations, swimming pools, golf
30 courses, riding stables, boat moorages, parks
31 and concessions. * * *

32 " * * * * *

1 "E. Any other use similar to the above mentioned,
2 as determined by the Hearings Officer."

3 "* * * * *"

4 The challenged decision includes the following
5 findings:

6 "This proposal is for the construction of a garden
7 room and covered walkway as additions to the
8 existing historic Broetje House, to be used in
9 conjunction with the Broetje House and grounds for
10 weddings and receptions, meetings and gatherings
11 for social or business groups. * * * [ZDO]
12 813.01(E) includes any other uses similar to
13 [those listed above in ZDO 813.01A], as determined
14 by the Hearings Officer, as permitted service
15 recreation[al] uses. While the proposed use is
16 not specifically listed in [ZDO] 813.01(A), it is
17 substantially similar to uses frequently occurring
18 at a country club, lodge or fraternal
19 organization, and it is a commercial recreation
20 use. This proposed use has also been previously
21 determined to be included within the allowable
22 service recreation[al] uses by the Board of County
23 Commissioners, [in approving the 1987 permit]."
24 Record 3.

25 Intervenor contends petitioners failed to raise below
26 the issue of whether the proposed use is properly classified
27 as a "service recreational use" and, therefore, are
28 precluded from raising the issue in an appeal to this Board.
29 ORS 197.763(1); 197.830(10); 197.835(2). Intervenor argues
30 petitioners' written testimony does not contend the proposed
31 use is not a service recreational use, but rather argues
32 (1) the use allowed under the 1987 permit is properly
33 classified under the ZDO Section 832 "Bed and Breakfast
34 Residences and Inns" use category, and (2) use of the

1 property should be limited to what is allowable under that
2 category.³

3 Petitioners contend the issue of whether the proposed
4 use is a service recreational use under ZDO 302.05A.6 and
5 813.01A and E was raised in written testimony petitioners
6 submitted to the hearings officer below. The written
7 testimony cited is a section with the following caption:

8 "Applicants state Medium Density Residential [ZDO]
9 302.05 Conditional Uses Sec. A.6 Service
10 Recreational Uses, Sec. 813.01 A & E apply to
11 their application." Supp Record 8.

12 ORS 197.763(1) provides:

13 "An issue which may be the basis for an appeal to
14 [LUBA] shall be raised not later than the close of
15 the record at or following the final evidentiary
16 hearing on the proposal before the local
17 government. Such issues shall be raised with
18 sufficient specificity so as to afford the
19 governing body, planning commission, hearings body
20 or hearings officer, and the parties an adequate
21 opportunity to respond to each issue."

22 ORS 197.835(2) provides:

23 "Issues [in an appeal to LUBA] shall be limited to
24 those raised by any participant before the local
25 hearings body as provided by ORS 197.763. * * *"

26 In Hale v. City of Beaverton, ___ Or LUBA ___ (LUBA No.
27 90-159, June 4 1991), slip op 8, we stated:

³"Bed and Breakfast Residences or Inns, subject to the provisions of [ZDO] Section 832" is listed as a primary use of the MR-1 zone. ZDO 302.03G. Additionally, under ZDO 707.05B and 707.05C.5, a "Bed and Breakfast establishment" may be allowed as a conditional use in the HL overlay district, even if it is not listed as allowed in the underlying district, provided applicable criteria of ZDO Sections 800 and 1203 and ZDO 707.05B.1-4 are satisfied.

1 "The purpose of ORS 197.763(1) and 197.835(2) is
2 to prevent unfair surprise. If an issue is not
3 raised in the local proceedings, a petitioner may
4 not surprise the local government and other
5 parties by raising that issue for the first time
6 before this Board. However, ORS 197.763(1) does
7 not require that arguments identical to those in
8 the petition for review have been presented during
9 local proceedings. What it requires is that the
10 arguments presented in the local proceedings
11 sufficiently raise the issue sought to be raised
12 in the petition for review, so that the local
13 government and other parties had a chance to
14 respond to that issue in the local proceedings.
15 Boldt v. Clackamas County, ___ Or LUBA ___ (LUBA
16 No. 90-147, March 12, 1991), slip op 8[, aff'd 107
17 Or App 619 (1991)]."

18 At most, the arguments presented in petitioners'
19 written testimony, under the caption quoted above, contend
20 (1) the use approved by the 1987 permit is more
21 appropriately classified as a bed and breakfast than a
22 service recreational use; (2) use of the property should be
23 limited to what is allowable under the bed and breakfast
24 category; and (3) higher intensity service recreational uses
25 are not typical in or appropriate for the subject area. We
26 agree with intervenor that nowhere in this argument do
27 petitioners contend that the proposed use is not a service
28 recreational use.⁴

29 We conclude petitioners' testimony does not
30 sufficiently raise the issue of whether the proposed use is

⁴Petitioners concede the proposed use is not allowable under the bed and breakfast category and, in arguing that service recreational uses are not found in or appropriate for the subject area, appear to accept the idea that the proposed use is a service recreational use.

1 a service recreational use to have allowed the other parties
2 to respond to this issue in the proceedings below.
3 Accordingly, petitioners may not raise this issue before
4 this Board.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 "The findings of the Hearings Officer are
8 inadequate because the Hearings Officer has failed
9 to substantiate his conclusion that the proposed
10 use would be an allowed use, subject to [ZDO]
11 707.05(C)."

12 ZDO 707.05B provides that under the HL overlay
13 district, uses listed in ZDO 707.05C, "which are not
14 otherwise allowed in the underlying district, may be
15 allowed, subject to the specified review procedure." One
16 use listed is "Community Center for civic or cultural
17 events." ZDO 707.05C.13. In addition, ZDO 707.05C.14 lists
18 "[o]ther uses determined by the Hearings Officer to be
19 similar to those listed [in ZDO 707.05C.1 through 13]." The
20 challenged decision concludes the proposed use is allowable
21 as a conditional use under ZDO 707.05C.14 because it is
22 "substantially similar to a community center used for [civic
23 and cultural] events." Record 3. Petitioners' third
24 assignment of error challenges this determination.

25 Intervenor argues that this assignment of error, even
26 if sustained, provides no basis for reversal or remand,
27 because the county properly determined the proposed use is
28 allowable as a conditional use in the MR-1/HL zone as a

1 service recreational use under ZDO 302.05A.6. Therefore,
2 according to intervenor, the county's alternative finding
3 that the proposed use also qualifies as a conditional use
4 under ZDO 707.05C.14 is unnecessary to uphold the decision.

5 Intervenor is correct that in order to be potentially
6 allowable as a conditional use in the MR-1/HL zone, a
7 proposed use need only be either a use listed as a
8 conditional use in the MR-1 zone in ZDO 302.05A or a use
9 listed as a conditional use in the HL overlay zone in
10 ZDO 707.05C. The county determined the proposed use is a
11 service recreational use, allowable as a conditional use
12 under ZDO 302.05A.6. Petitioners cannot challenge that
13 determination in this appeal, for the reasons stated under
14 the second assignment of error. Therefore, even if
15 petitioners' arguments under this assignment of error were
16 valid, they would not provide a basis for reversing or
17 remanding the challenged decision.

18 The third assignment of error is denied.

19 **FIRST ASSIGNMENT OF ERROR**

20 "The Hearings Officer's Decision violates the
21 applicable provisions of [ZDO] Section 707,
22 Historic Landmark (HL) * * *. The Hearings
23 Officer approved incompatible development on a
24 documented Historic Landmark site. The Hearings
25 Officer failed to substantiate his conclusion that
26 the commercial use and new structure must be
27 allowed in order to allow preservation of the
28 resource."

29 **SEVENTH ASSIGNMENT OF ERROR**

30 "The Hearings Officer has exceeded his authority

1 by approving a new structure, to be used for a
2 conditional use, on a Historic Landmark site.
3 This is in violation of [ZDO] 707.05(B)(4)."

4 Under these assignments of error, petitioners challenge
5 the county's determinations of compliance with two approval
6 criteria for conditional uses in the HL overlay district.⁵
7 These criteria require that the proposed use:

8 * * * * *

9 "1. Will preserve or improve a resource which
10 would probably not be preserved or improved
11 otherwise;

12 * * * * *

13 "4. Will utilize existing structures rather than
14 new structures. Alterations and additions to
15 existing structures shall satisfy the
16 provisions of [ZDO] 707.07." ZDO 707.05B.

17 Intervenor contends petitioners failed to raise below
18 any issue concerning compliance of the proposed use with ZDO
19 Section 707 and, therefore, are precluded from raising any
20 such issue in an appeal to this Board. ORS 197.763(1);
21 197.830(10); 197.835(2).

⁵It is not entirely clear to us whether the approval criteria in ZDO 707.05B.1-4 apply to the approval of all conditional uses allowable where the HL overlay district is applied, or whether they apply only to the approval of conditional uses listed in ZDO 707.05C that are in addition to those allowed by the underlying zoning district. It is also unclear which interpretation the county applied in making the challenged decision. However, as neither respondent nor intervenor argues that ZDO 707.05B.1-4 are not approval criteria for a conditional use permit for a service recreational use in the MR-1/HL zone, for the purposes of this opinion, we assume they are.

1 **A. ZDO 707.05B.1**

2 Petitioners contend the record does not contain
3 substantial evidence to support the county's determination
4 that approval of the subject application "is necessary for
5 the preservation of the historic Broetje House." Record 4.
6 However, petitioners do not identify in the record where
7 this issue was raised. Neither do petitioners contend the
8 county failed to follow the procedural requirements of
9 ORS 197.763.

10 Where a party alleges petitioners failed to raise an
11 issue during the local proceedings, and petitioners neither
12 contend they raised the issue below nor claim the local
13 government failed to follow the procedures required by ORS
14 197.763, petitioner may not raise the issue for the first
15 time at LUBA. ORS 197.763(1); 197.835(2). Wethers v. City
16 of Portland, ___ Or LUBA ___ (LUBA No. 90-121, June 5,
17 1991), slip op 19; Boldt v. Clackamas County, supra.

18 This subassignment of error is denied.

19 **B. ZDO 707.05B.4**

20 **1. Use of Existing Structures**

21 The first sentence of ZDO 707.05B.4 requires that
22 conditional uses in the HL district "utilize existing
23 structures rather than new structures." Petitioners contend
24 the proposed "garden room" is a new structure for a
25 conditional use on a designated historic landmark site and,
26 therefore, is prohibited by ZDO 707.05B.4. Petitioners

1 argue this issue was raised by petitioner Delores Broetje in
2 a letter submitted to the hearings officer below, as
3 follows:

4 "[The proposed] 30' x 60' building is not anything
5 as dignified as a 'garden room[.]' It is an
6 oversized, wood and glass commercial building.
7 Not a 'room,' an entire building. This large
8 building would destroy the view of the [Broetje
9 House]. The house would not be seen except for
10 the roof. It would destroy trees, yard and
11 shrubs. The house, yard, trees and shrubs are to
12 be preserved. * * * That Garden Room is a
13 commercial building, a thing to cover the whole
14 east side of the beautiful old home. * * * This
15 historic home and grounds were put on the Historic
16 Landmark List because of [its] long and unchanged
17 past, yet a commercial building is being allowed
18 to become more important. * * *" Record 444.

19 The letter from which the above quote is excerpted does
20 not cite any provision of ZDO Section 707. The letter
21 protests the impacts of intervenor's existing and proposed
22 operations on the historic resource and on the livability of
23 the neighborhood. The letter does not use the operative
24 terms of ZDO 707.05B.4 ("existing structure" and "new
25 structure"), but rather argues the proposal should be
26 characterized as a "commercial building" rather than a
27 "garden room." In this context, the thrust of the above
28 quoted statements appears to be that mischaracterization of
29 the proposed structure as a "garden room," rather than a
30 commercial building, leads to underestimation of its
31 impacts. We do not believe the above quoted statements are
32 sufficient to have afforded the other parties a chance to

1 respond to a contention that intervenor's proposal
2 constitutes a "new structure" prohibited by ZDO 707.05B.4.
3 Therefore, petitioners cannot raise this issue before this
4 Board. ORS 197.835(2).

5 This subassignment of error is denied.

6 **2. Compliance with ZDO 707.07**

7 The second sentence of ZDO 707.05B.4 requires that
8 proposed alterations and additions to existing structures in
9 the HL district satisfy the provisions of ZDO 707.07.
10 ZDO 707.07 establishes procedures and criteria for review of
11 proposed alteration and development in a HL district by the
12 county Historic Review Board (HRB). ZDO 707.07B and C.
13 There are separate approval criteria for "alterations" and
14 for "new construction." ZDO 707.07C.4 and .5. These
15 criteria address design and siting issues concerning impacts
16 on and compatibility with a designated historic resource.
17 Decisions of the HRB may be appealed to the hearings
18 officer. ZDO 707.07C.7.

19 Petitioners contend ZDO 707.05B.4 requires that
20 compliance with ZDO 707.07 be determined at the time a
21 conditional use permit in the HL district is approved.
22 Petitioners argue the proposal does not comply with approval
23 criteria in ZDO 707.07, and that the hearings officer erred
24 in failing to adopt findings demonstrating compliance with
25 ZDO 707.07 when approving the subject conditional use.
26 Further, petitioners cite testimony below concerning review

1 by the HRB and adverse impacts of the proposed use on the
2 historic resource, establishing that petitioners adequately
3 raised this issue below.

4 The challenged decision does not include findings
5 addressing criteria established by ZDO 707.07. It states
6 the subject application "satisfies [the] standards [of ZDO
7 Section 707], as the [HRB] has approved the proposed
8 development pursuant to the requirements of [ZDO]
9 Section 707." Record 7. However, the challenged decision
10 also imposes the following condition:

11 "Approval of the final design by the [HRB]
12 pursuant to the provisions of Section 707 of the
13 ZDO, and compliance with all conditions imposed by
14 such approval." Id.

15 As described above, ZDO 707.07 establishes a complete
16 process for review of proposed alterations and development
17 in a HL district by the HRB. This process results in final
18 decisions by the HRB which are subject to a local appeal.
19 ZDO 707.07C.7. In this context, the requirement of the
20 second sentence of ZDO 707.05B.4, that "[a]lterations and
21 additions to existing structures shall satisfy the
22 provisions of [ZDO] 707.07," simply means that proposed
23 conditional uses in a HL district which involve alterations
24 and additions to existing historic structures are also
25 required to be reviewed and approved by the HRB pursuant to
26 ZDO 707.07. We therefore conclude the hearings officer
27 complied with this provision of ZDO 707.07B.4 by imposing a

1 condition of approval requiring that the final design for
2 the proposed conditional use be approved by the HRB pursuant
3 to ZDO 707.07.⁶

4 This subassignment of error is denied.

5 The first and seventh assignments of error are denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 "The Hearings Officer has failed to interpret
8 Section 1203 of the [ZDO], Conditional Uses, in
9 the manner required by law to insure that the use
10 is a compatible use in the underlying district.
11 The Hearings Officer has not placed adequate
12 conditions upon the conditional use to insure that
13 it does not alter the character of the surrounding
14 area in a manner which substantially limits,
15 impairs or precludes the use of surrounding
16 properties for primary uses listed in the
17 underlying zoning district."

⁶The hearings officer's finding that the proposed use had already been approved by the HRB pursuant to ZDO 707.07 is incorrect. The hearings officer refers to a preliminary decision of the HRB, reflected only in the minutes of its January 8, 1991 meeting. Record 243-46. No final decision regarding compliance of the proposal with ZDO 707.07 had been made by the HRB at the time the challenged decision was made. However, as we explain in the text, such a decision by the HRB is not required for compliance with ZDO 707.07B.4.

Intervenor also attaches to his brief minutes of a HRB August 9, 1991 meeting, which intervenor contends constitute the final decision by the HRB on compliance of intervenor's proposal with ZDO 707.07. The other parties do not object to our considering this document. However, as this HRB decision was made after the decision challenged in this appeal, it can have no direct bearing on the validity of the challenged decision. We also note that the proposal apparently approved by the HRB is somewhat different from that approved by the challenged conditional use permit, at least in that the HRB approved proposal includes rotating the proposed garden room 90° and moving it northward on the site an unspecified distance. We express no position on whether development under the plan approved by the HRB can proceed without modification of the approved conditional use permit. Our review in this appeal is limited to the proposal approved by the challenged decision.

1 **A. ZDO 1203.01A**

2 ZDO 1203.01A requires that a proposed conditional use
3 be "listed as a conditional use in the underlying district."
4 Petitioners cite their arguments under the second and third
5 assignments of error.

6 This subassignment of error is denied for the reasons
7 stated supra, under the second assignment of error.

8 **B. ZDO 1203.01B**

9 ZDO 1203.01B establishes the following approval
10 criterion for conditional uses:

11 "The characteristics of the site are suitable for
12 the proposed use considering size, shape,
13 location, topography, existence of improvements
14 and natural features."

15 The county findings addressing this standard include:

16 "The existence of the historic Broetje House and
17 its associated landscaping and grounds are
18 relevant features. It is important that the
19 proposed additions not adversely affect the
20 historic and cultural significance of the Broetje
21 House and grounds. Substantial and conflicting
22 evidence has been presented on this issue. The
23 Hearings Officer believes the better evidence is
24 that the proposal will not adversely affect this
25 resource. That is also the determination of the
26 [HRB], the body created by the County to exercise
27 expertise in this area." Record 4.

28 Essentially, the above quoted findings state the
29 requirement imposed by ZDO 1203.01B is met, if the proposal
30 will not adversely affect the historic and cultural

1 significance of the Broetje House and grounds.⁷ This
2 interpretation of ZDO 1203.01B is not challenged by the
3 parties. What petitioners dispute is whether there is
4 substantial evidence in the record to support the county's
5 determination that intervenor's proposal will not adversely
6 affect the historic resource.⁸

7 We have reviewed the evidence in the record cited by
8 the parties concerning the effects of intervenor's proposal
9 on the historic significance of the Broetje House and
10 grounds. The evidence is conflicting with regard to such
11 impacts. There is testimony that the proposal will not
12 adversely affect the historic significance of the Broetje
13 House and grounds from an architectural consultant and
14 Oregon Preservation Coordinator for the American Institute
15 of Architects, a cultural resource specialist and a citizens
16 group formed to preserve historic homes. Record 44-48,
17 70-71, 296, 297. There is also the preliminary approval of
18 the proposal by the HRB.⁹ Record 243-46. On the other

⁷We also note that ZDO 707.05A allows property subject to the HL overlay district to be used for any use allowed in the underlying district "provided such use is not detrimental to the preservation of the historic resource."

⁸Petitioners' additional contention that the decision fails to address a condition imposed on the subject property by a 1983 plan and zone map amendment is addressed under the sixth assignment of error, infra.

⁹The HRB minutes do not explicitly discuss impacts of the proposal on the historic significance of the Broetje House and grounds or the relevant approval standards in ZDO 707.07C. However, as the purpose of the HRB is to assist the county in preserving designated historic resources

1 hand, letters by an Acting Deputy State Historic
2 Preservation Officer indicate that while the concept of
3 placing an addition on the east side of the Broetje House
4 was acceptable to the State Historic Preservation Office, he
5 has concerns that certain aspects of the proposed design
6 "are not compatible with the historic resource." Record
7 514-17. There is also testimony by petitioners that the
8 proposal will destroy the historic significance of the
9 Broetje House and grounds. Record 444-46; Supp Record 8-9.

10 Substantial evidence is evidence a reasonable person
11 would rely upon in reaching a decision. Where the local
12 record contains conflicting believable evidence, the choice
13 of which evidence to believe belongs with the local
14 government decision maker. City of Portland v. Bureau of
15 Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Eckis
16 v. Linn County, ___ Or LUBA ___ (LUBA No. 90-132,
17 September 11, 1991), slip op 10, 23; Douglas v. Multnomah
18 County, 18 Or LUBA 607, 617 (1990). We conclude the
19 evidence in the record is such that a reasonable person
20 could conclude, as the county did, that the proposed use
21 will not adversely affect the historic significance of the
22 Broetje House and grounds.

23 This subassignment of error is denied.

(ZDO 707.06C), and approval standards applicable to its decisions require that the historic character of property be retained (ZDO 707.07C.4 and.5), we believe the county could give some weight to the HRB's preliminary approval of the proposal.

1 **C. ZDO 1203.01C**

2 ZDO 1203.01C establishes the following approval
3 criterion for conditional uses:

4 "The * * * proposed development is timely,
5 considering the adequacy of transportation
6 systems, public facilities and services existing
7 or planned for the area affected by the use."

8 S.E. Holly Avenue (Holly) is a substandard local street
9 which adjoins the subject property to the north and provides
10 access to the gravelled parking area. According to
11 petitioners, Holly has numerous potholes and lacks
12 sidewalks, curbs and gutters. Petitioners contend
13 testimony, photographs and a videotape submitted below
14 focussed on the disrepair of and current traffic and parking
15 problems on Holly. Record 103-05, 154-55, 447, 452 (10-13).
16 Petitioners argue the county's findings fail to address the
17 adequacy of Holly to accommodate increased usage due to
18 approval of intervenor's proposal. According to
19 petitioners, usage of Holly will increase because the
20 approved proposal will allow the facility to operate at a
21 maximum level all year round. Petitioners contend the
22 county should have imposed a condition of approval requiring
23 intervenor to construct half-street improvements on Holly.

24 The county's findings addressing ZDO 1203.01C include:

25 "* * * A review of this proposal by the County
26 Traffic Management Section determined that there
27 is adequate capacity in the affected
28 transportation system to accommodate the expected
29 traffic. The proposed additions [to the Broetje
30 House operation] will not increase the traffic

1 impacts so long as maximum usage of the property
2 remains at 150 persons, previously imposed as a
3 condition in [the 1987 permit]. A condition of
4 approval herein will retain this limitation."
5 Record 4-5.

6 The issue required to be addressed under ZDO 1203.01C
7 with regard to Holly is whether this street has adequate
8 capacity to accommodate the proposed use.¹⁰ Petitioners'
9 testimony and exhibits concerning the disrepair of and
10 traffic problems on Holly are relevant to this issue. The
11 county may not simply rely on the fact it found Holly to be
12 adequate in its 1987 decision, particularly in view of the
13 new evidence submitted by petitioners and the issues raised
14 by petitioners below with regard to the adequacy of Holly.
15 See Nelson v. Clackamas County, ___ Or LUBA ___ (April 30,
16 1990), slip op 13-14. The county must address in its
17 findings whether Holly has adequate capacity to accommodate
18 the proposed use in view of its present condition, evidence
19 of any existing traffic problems and the fact that the
20 proposed garden room will allow larger events to occur on
21 the subject property year round, rather than just during
22 good weather.¹¹

¹⁰The issue of the impacts of traffic due to the proposed use on the surrounding neighborhood is relevant to compliance with ZDO 1203.01D, and is addressed in the following section.

¹¹We note that another section of the county's findings states the "effect of this proposal will be to increase the frequency of larger events." Record 5. We also note that in a letter to the county transportation department, intervenor's wife and the manager of the Broetje House explained that without the proposed garden room, use of the property

1 This subassignment of error is sustained.

2 **D. ZDO 1203.01D**

3 ZDO 1203.01D establishes the following approval
4 criterion for conditional uses:

5 "The proposed use will not alter the character of
6 the surrounding area in [a] manner which
7 substantially limits, impairs, or precludes the
8 use of surrounding properties for the primary uses
9 listed in the underlying district."

10 Some of petitioners' arguments under this assignment of
11 error are essentially complaints that the hearings officer
12 should have imposed certain conditions proposed by
13 petitioners and others. Disagreement with the hearings
14 officer's choice of conditions does not, in itself, provide
15 a basis for reversing or remanding the decision. Our
16 discussion below is limited to those aspects of petitioners'
17 argument which sufficiently express a possible basis for
18 reversal or remand of the challenged decision.

19 **1. Character and Livability of Surrounding Area**

20 Petitioners contend the county's findings do not
21 adequately describe the character of the surrounding area or
22 identify the qualities which comprise the livability and
23 appropriate development of the abutting properties and
24 surrounding neighborhood. Petitioners argue that according
25 to our decision in Benjamin v. City of Ashland, ___ Or LUBA

by 150 persons is limited to outdoor events held approximately three months
out of the year, and at other times is limited to the 49 people which can
be accommodated in the house itself. Record 286.

1 ____ (LUBA No. 90-065, November 13, 1990) (Benjamin), such
2 findings are necessary for a local government to determine
3 whether impacts on such qualities will be minimal.

4 Benjamin involved the application of a conditional use
5 permit approval standard which was worded differently from
6 ZDO 1203.01D. The standard at issue in Benjamin required
7 that a proposed use "have minimal impact on the livability
8 and appropriate development of abutting properties and the
9 surrounding neighborhood." Benjamin, supra, slip op at 4.
10 ZDO 1203.01D makes no reference to "livability" or
11 "appropriate development" and, therefore, does not require
12 findings on these qualities of the surrounding area.

13 ZDO 1203.01D does, however, require that a proposed use
14 will not alter the character of the surrounding area (in a
15 manner which substantially limits use of surrounding
16 properties for the primary uses of their zoning districts).
17 Therefore, ZDO 1203.01D requires the adoption of findings
18 describing the character of the surrounding area, as well as
19 findings concerning the impacts of the proposed conditional
20 use on that character.

21 The challenged decision includes the following
22 findings:

23 "Vicinity Information: This area is residential
24 in character. Generally, the immediate area is
25 developed with single family homes, although there
26 are a few multiple family units located in the
27 area. The property adjacent on the west has been
28 granted approval for development as a mobile home
29 park." Record 2.

1 Petitioners offer no explanation of why these findings,
2 which appear sufficient to describe the character of the
3 surrounding area, are inadequate. Petitioners therefore
4 provide no basis for reversing or remanding the challenged
5 decision. Williams v. Wasco County, 18 Or LUBA 61, 70
6 (1989); Vizina v. Douglas County, 16 Or LUBA 936, 944
7 (1988).

8 This subassignment of error is denied.

9 **2. Traffic and Parking**

10 The decision includes the following findings on traffic
11 and parking impacts:

12 * * * The traffic impacts have been found
13 acceptable in the [1987 permit] approval, and will
14 not be increased significantly because the maximum
15 number of people will remain at 150. * * *

16 "Parking on local streets by patrons of the
17 Broetje House has resulted in adverse impacts on
18 surrounding residential uses. The off-street
19 parking area has capacity for 55 vehicles. A
20 condition of approval will require that there be
21 no off-site parking, except in lots approved by
22 [the county]. This condition should remove any
23 parking impact." Record 5-6.

24 The decision also imposes the following condition:

25 "Off-site parking is prohibited, except for any
26 shared parking arrangement approved by [the
27 county]." Record 7.

28 Petitioners argue the county improperly relied on its
29 1987 permit approval decision, because there is evidence in
30 the record of traffic impacts which were not anticipated in
31 1987, and because the proposed use would increase the total

1 volume of traffic associated with operation of the Broetje
2 House, by allowing larger events to be held year round.
3 Petitioners also argue the findings are inadequate because
4 they fail to address relevant issues raised below concerning
5 the impacts of using the existing gravel parking lot to
6 handle increased winter traffic, considering alleged
7 inadequacies in its construction. Record 101-03, 478-82.

8 Finally, petitioners contend the findings on off-street
9 parking impacts are inadequate. According to petitioners,
10 the only effective way to prohibit off-street parking in
11 association with use of the Broetje House, which the above
12 quoted condition purports to do, is to post "No Parking"
13 signs on all affected streets. Petitioners argue the county
14 failed to consider the impacts this would have on the use of
15 surrounding property for residential purposes. Record
16 282-83.

17 As explained above, we agree with petitioners that the
18 county cannot simply rely on the 1987 permit approval
19 decision in determining the impacts of the proposed use
20 comply with ZDO 1203.01. Further, where issues relevant to
21 compliance with applicable approval criteria are raised in
22 the proceedings below, the county must address these issues
23 in its findings. Norvell v. Portland Metro Area LGBC, 43
24 Or App 849, 853, 604 P2d 896 (1979); Benjamin, supra,
25 slip op at 7; Highway 213 Coalition v. Clackamas County, 17
26 Or LUBA 258, 259 (1988). We agree with petitioners that the

1 county should have considered issues raised below with
2 regard to the adequacy of the existing parking lot and the
3 impacts of prohibiting off-street parking in the surrounding
4 area.

5 This subassignment of error is sustained.

6 **3. Surface Runoff**

7 The findings state:

8 "Testimony was received that surface water
9 drainage from the [Broetje House] parking area is
10 harmful to surrounding properties. This proposed
11 addition will not result in any enlargement of the
12 off-street parking area. However, these concerns
13 should be resolved by a condition of approval
14 which requires that the County approve a drainage
15 and erosion control plan for the entire property
16 as part of this development." Record 5-6.

17 The condition referred to in the above quoted finding
18 states:

19 "[County] approval of a comprehensive drainage and
20 erosion control plan for the entire property,
21 including the parking area." Record 8.

22 Petitioners argue that improper construction of the
23 gravel parking lot severely adds to the runoff problem, and
24 that this condition should be alleviated by requiring the
25 parking area to be paved.

26 The decision appears to concede there is currently a
27 runoff problem which impacts surrounding properties. The
28 county purports to alleviate this problem by requiring
29 approval of a comprehensive drainage and erosion control
30 plan. Petitioners do not contend requiring such a plan is

1 insufficient to insure that runoff impacts from the proposed
2 use will not substantially limit use of surrounding
3 properties.

4 This subassignment of error is denied.

5 **4. Noise**

6 The findings provide, in relevant part:

7 "Noise from activities at the Broetje House has
8 been identified as an impact on surrounding
9 residential uses. Development of the garden room
10 and walkway will allow larger events to be held
11 during inclement weather. * * * At the same
12 time, construction of the garden room will provide
13 an enclosed area for gatherings in both good and
14 bad weather. The noise impact from events are
15 [sic] both from crowd noise and vehicular noise.
16 * * * It is difficult to judge whether the
17 increased number of larger events will result in
18 increased crowd noise impacts, given the indoor
19 facility availability. However, a condition of
20 approval will require that activities comply with
21 County and DEQ noise standards. The Hearings
22 Officer believes that these noise degradation
23 standards are sufficient to protect surrounding
24 residential uses from unreasonable noise impact.
25 Additionally, [intervenor] will be required by a
26 condition of approval to submit an acoustical
27 engineering study for review and approval by
28 County and DEQ prior to the use of any outside
29 amplified music. With these conditions, the noise
30 impact should not be such as to substantially
31 limit or impair the use of surrounding properties
32 for the permitted residential uses." Record 5.

33 The conditions referred to provide:

34 "[Intervenor] shall submit for review and approval
35 by County and DEQ an acoustical engineering report
36 for any proposed outside amplified music prior to
37 the use of any such outdoor amplified music.

38 "Compliance with DEQ and County noise degradation
39 standards." Record 7-8.

1 Petitioners argue the record shows they monitored
2 events at the Broetje House during September 1990, and
3 determined that noise impacts were "almost continually" in
4 excess of the 60 dbA limit established by the Clackamas
5 County Noise Control Ordinance (noise ordinance).¹² Supp
6 Record 190-211. Petitioners contend the county's findings
7 are contradictory because although they state that noise
8 from activities at the Broetje House impacts surrounding
9 residences, they also state it cannot be determined whether
10 the subject proposal, which will increase the number of
11 larger events, will result in increased noise impacts. In
12 view of this, petitioners argue the findings fail to
13 adequately explain the rationale for the county's conclusion
14 that noise impacts from the proposed use will not
15 substantially limit or impair the use of surrounding
16 properties for the permitted residential uses.

17 The challenged findings explain that it is difficult to
18 judge whether the increased number of larger events
19 resulting from the proposed use will result in increased
20 noise impacts on surrounding properties because an uncertain
21 proportion of the larger events will take place inside the
22 proposed garden room, which will be located on the opposite

¹²Section 5 of the noise ordinance states that it is a violation of the ordinance to produce or permit to be produced sound which, when measured at or within the boundary of the property on which a noise sensitive unit is located, exceeds 60 dbA at any time between 7 a.m. and 10 p.m." Supp Record 154. The definition of "noise sensitive unit" includes "individual residential units." Noise Ordinance § 3.A. Supp Record 152.

1 side of the Broetje House from the closest noise sensitive
2 property. The findings also explain the county is relying
3 on the conditions imposed requiring (1) approval of an
4 acoustical engineering report prior to use of outdoor
5 amplified music, and (2) compliance with DEQ and county
6 noise standards to insure noise impacts will comply with
7 ZDO 1203.01D. Petitioners fail to explain why these
8 conditions are inadequate to insure such compliance.

9 This subassignment of error is denied.

10 The fourth assignment of error is sustained, in part.

11 **SIXTH ASSIGNMENT OF ERROR**

12 "The Hearings Officer has failed to require
13 [intervenor] to address several conditions of a
14 1983 Comprehensive Plan/Zone Change which are
15 applicable to this property. The * * * findings
16 were made without any consideration or reference
17 to Conditions #1, #3, or #4 * * *, therefore the
18 Hearings Officer's Decision is not consistent with
19 county regulations."

20 In 1983, the plan map designation for the subject
21 property was changed from Low Density Residential to Medium
22 Density Residential, and the property was rezoned from Low
23 Density Residential (R-10) to MR-1.¹³ Clackamas County
24 Order No. 83-1939. Supp Record 83. Those amendments were
25 adopted subject to the following conditions of approval:

26 "1. The existing single family residence, barn,

¹³At the time of the 1983 plan amendment and zone change, the county had not yet adopted its present Historic Landmarks, Districts and Transportation Corridors plan element or the HL overlay district.

1 Redwood trees, and associated trees and
2 shrubs in the yard area shall be preserved as
3 an historic site.

4 "2. Any development of the subject property shall
5 require approval of a Committee consisting of
6 the Design Review Committee and two technical
7 experts in architectural history. This
8 Committee shall insure that development of
9 the subject property is not incompatible in
10 terms of site and building character * * *.

11 "3. Access for any medium density development of
12 the subject property shall be restricted to
13 Holly and/or Courtney Avenues.

14 "4. Dedication of a small triangular strip at the
15 intersection of Oatfield Road and Courtney
16 Avenue prior to any medium density
17 development of the subject property should be
18 addressed in the review of the site by the
19 Design Review Committee. * * *" Supp Record
20 86-87.

21 Petitioners argue the above quoted conditions apply to
22 development of the subject property. Petitioners contend
23 the county erred by failing to address conditions 1, 3 and 4
24 in the challenged decision.¹⁴ Petitioners argue condition 1
25 was originally placed on the subject property to protect the
26 house and yard from future development and to guarantee
27 protection of the site. Petitioners further argue
28 condition 1 "prohibits new development on the historic site
29 and guarantees future protection of the historic site."

¹⁴Condition 2 is addressed in a condition of approval requiring that final design for the proposed development "be subject to review and approval by a Committee consisting of the Design Review committee and two technical experts in architectural history." Record 7.

1 (Emphasis in original.) Petition for Review 40.

2 We agree with petitioners that the conditions imposed
3 on the subject property by the 1983 plan amendment/zone
4 change are potentially applicable to decisions approving
5 development of the property. However, conditions 3 and 4
6 are applicable only to "medium density development" of the
7 subject site. Petitioners do not contend the subject
8 proposal constitutes "medium density development," and we do
9 not understand that it does. Therefore, the county did not
10 err by failing to address conditions 3 and 4.

11 With regard to condition 1, we disagree with
12 petitioners' contention that it prohibits development on the
13 subject property. Interpreting conditions 1 and 2 together,
14 it is clear that some development of the subject property
15 was anticipated, so long as the residence, barn, redwood
16 trees, and associated trees and shrubs are preserved
17 (condition 1) and the development is compatible with the
18 historic character of the site (condition 2). Thus,
19 although condition 1 does not prohibit development on the
20 subject property, it is applicable to the approval of
21 development on the subject property, and the county should
22 have adopted findings demonstrating compliance with this
23 standard.

24 The sixth assignment of error is sustained, in part.

1 The county's decision is remanded.¹⁵

¹⁵Petitioners' argument under the fifth assignment of error merely repeats arguments made under the second and fourth assignments of error, and does not require additional discussion.