



1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 The challenged decision grants eight adjustments,  
4 allowing two single family dwellings to be constructed on  
5 irregularly shaped, sloping lots without complying with  
6 certain Portland City Code (PCC) requirements.

7 **MOTIONS TO INTERVENE**

8 Roderick Ashley, Jean Kendall Glazer, Hershhal M. Tanzer  
9 and Shirley B. Tanzer move to intervene on the side of  
10 respondent. There is no opposition to the motions, and they  
11 are allowed.

12 **FACTS**

13 The subject property is zoned R5 (Single-Dwelling on  
14 5,000 square foot lot). The eight adjustments granted by  
15 the challenged decision are as follows:

16 "Parcel 2

17 "1. To reduce the minimum lot depth from the  
18 required 80 to 71 feet.

19 "2. To increase the building height from the  
20 allowed 30 to 35 feet.

21 "3. To reduce the front building setback from the  
22 required 10 to 5 feet.

23 "4. To increase the building coverage from the  
24 allowed 45 to 56 percent.

25 "5. To increase the height of the solar shade  
26 point from 25 to 36.5 feet.

27 Parcel 3

1 "6. To increase the building height from the  
2 allowed 30 to 35 feet.

3 "7. To reduce the front building setback from the  
4 required 10 to 5 feet.

5 "8. To increase the height of the solar shade  
6 point from 18 to 35.25 feet." Record 9.

7 Intervenor Glazer requested the eight adjustments on  
8 January 29, 1993. On March 4, 1993, the Planning Bureau  
9 granted adjustments 1-4 and 6-7. Petitioners appealed that  
10 Planning Bureau decision to the city Adjustment Committee.  
11 On May 11, 1993, the Adjustment Committee granted  
12 adjustments 1-4 and 6-8. That Adjustment Committee decision  
13 was appealed to LUBA. On October 4, 1993, LUBA remanded the  
14 Adjustment Committee's May 11, 1993 decision, pursuant to  
15 the city's motion for voluntary remand. Edwards v. City of  
16 Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-081, October 4,  
17 1993). On November 30, 1993, the Adjustment Committee held  
18 a hearing and voted tentatively to reapprove the Planning  
19 Bureau's decision, but held the record open for seven days.  
20 On December 28, 1993, the Adjustment Committee voted to  
21 approve adjustment 5. On January 11, 1994, the Adjustment  
22 Committee adopted its final decision granting all eight  
23 adjustments. This appeal followed.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioners argue adjustments 1, 2, 3, 4 and 6 do not  
26 satisfy the approval criteria for adjustments. As relevant,

1 PCC 33.805.040 requires that an applicant for adjustments to  
2 the PCC demonstrate compliance with the following criteria:

3 "A. Granting the adjustment will equally or  
4 better meet the purpose of the regulation to  
5 be modified; and

6 "B. If in a residential zone, the proposal will  
7 not significantly detract from the livability  
8 or appearance of the residential area, or if  
9 in a C, E or I zone, the proposal will be  
10 consistent with the desired character of the  
11 area; and

12 "C. If more than one adjustment is being  
13 requested, the cumulative effect of the  
14 adjustments results in a project which is  
15 still consistent with the overall purpose of  
16 the zone; and

17 "D. City-designated scenic resources are  
18 preserved; and

19 "E. Any impacts resulting from the adjustment are  
20 mitigated to the extent practical."

21 In this opinion we refer to these criteria as criteria  
22 A through E. Petitioners present essentially two categories  
23 of arguments. First, petitioners generally attack the way  
24 the city interpreted and applied criteria A through C.  
25 Second, petitioners specifically challenge adjustments 1, 2,  
26 3, 4 and 6.

27 **A. General Challenges Under Criteria A through C**

28 **1. Legal Effect of Neighbors' Objections**

29 Petitioners contend "the very fact that several  
30 neighbors object to the adjustments meant that the  
31 applicants could not show that they [satisfy criteria A, B

1 and C]." Petition for Review 5. In other words,  
2 petitioners contend that because several neighbors object,  
3 as a matter of law, the requested adjustments (1) cannot  
4 "equally or better meet the purpose of the regulation to be  
5 modified" (criterion A), (2) will "significantly detract  
6 from the livability or appearance of the residential area"  
7 (criterion B), and (3) cannot result "in a project which is  
8 still consistent with the overall purpose of the zone"  
9 (criterion C).<sup>1</sup>

10 The city adopted several pages of findings interpreting  
11 and applying criteria A through C. Petitioners do not

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<sup>1</sup>PCC 33.110.010 provides that the purpose of the city's single-dwelling zones is as follows:

"The single-dwelling zones are intended to preserve land for housing and to provide housing opportunities for individual households. The zones implement the comprehensive plan policies and designations for single-dwelling housing. The regulations are intended to create, maintain and promote single-dwelling neighborhoods. They allow for some nonhousehold living uses but not to such an extent as to sacrifice the overall image and character of the single-dwelling neighborhood. The regulations preserve the character of neighborhoods by providing six different zones with different densities and development standards. The regulations promote desirable residential areas by addressing aesthetically pleasing environments, safety, privacy, energy conservation, and recreational opportunities. The site development standards allow for flexibility of development while maintaining compatibility within the City's various neighborhoods. In addition, the regulations provide certainty to property owners, developers, and neighbors about the limits of what is allowed. The development standards are generally written for houses on flat, regularly shaped lots. Other situations are addressed through special regulations or exceptions." (Emphasis added.)

Petitioners focus on the emphasized language and argue the neighbors' objections show their expectations about the limits of what is allowed are being violated.

1 directly challenge those findings, and it is clear the city  
2 does not interpret those criteria in the manner petitioners  
3 suggest is required. We reject petitioners' contention that  
4 the objections of several neighbors have the automatic legal  
5 effect of showing criteria A through C are violated.  
6 Although the substance of particular objections by the  
7 neighbors may lead to a conclusion that one or more of the  
8 adjustment criteria are violated, the fact that one or more  
9 neighbors object has no legal significance.

10 This subassignment of error is denied.

11 **2. Statements by Adjustment Committee Members**

12 Petitioners cite statements by individual Adjustment  
13 Committee members that granting the adjustments would have a  
14 negative impact on the neighborhood. In view of these  
15 statements and the statements and letters of objecting  
16 neighbors, petitioners contend the Adjustment Committee  
17 ignored the relevant standards in granting the disputed  
18 adjustments.

19 As respondent points out, even if the Adjustment  
20 Committee had found the construction of these two houses, as  
21 proposed, will have negative impacts, such a finding would  
22 not constitute a finding that criterion B is violated, i.e.  
23 that the houses will "significantly detract from the  
24 livability or appearance of the residential area."  
25 Moreover, we have stated on many occasions that we do not  
26 review oral statements made by individual members of the

1 decision making body. Waker Associates, Inc. v. Clackamas  
2 County, 21 Or LUBA 588, 591 (1991). Rather, it is the  
3 decision making body's final decision and the written  
4 findings supporting that decision that are subject to review  
5 at LUBA. The cited statements were made many months before  
6 the final decision challenged in this appeal. The persons  
7 making the statements could easily have changed their views  
8 about the impacts of the proposed adjustments. The cited  
9 statements of two members of the Adjustment Committee do not  
10 show the Adjustment Committee ignored the applicable  
11 criteria.

12 This subassignment of error is denied.

13 **3. Ability to Mitigate**

14 Criterion E requires that "[a]ny impacts resulting from  
15 the adjustment are mitigated to the extent practical."  
16 Petitioners first contend the ability to mitigate impacts  
17 does not mean the proposal "will not significantly detract  
18 from the livability or appearance of the residential area,"  
19 as required by criterion B. Petitioners are correct, but we  
20 have already rejected petitioners' contention that the  
21 filing of objections by neighbors demonstrates criterion B  
22 is violated. Petitioners present no additional arguments  
23 here that criterion B is violated.

24 Petitioners also argue the mitigation measures are  
25 minimal and complain that the houses are too close together.  
26 However, the city adopted findings identifying a number of

1 design and development features incorporated into the  
2 proposal and explaining why the city believes those features  
3 are sufficient to provide the mitigation required by  
4 criterion E. Petitioners do not explain why those findings  
5 are inadequate. Because petitioners do not present a  
6 focused challenge to the city's findings addressing  
7 criterion E, we reject petitioners' suggestion that  
8 criterion E is violated.

9 This subassignment of error is denied.

10 **4. Consideration of Adjustments Individually and**  
11 **Collectively**

12 Petitioners contend the city is required to consider  
13 each of the requested adjustments individually, and then  
14 consider those adjustments as a whole, to determine if they  
15 meet criteria A through E. Petitioners argue "[t]here is no  
16 evidence in [its] deliberations or decision that [the  
17 Adjustment Committee] did this." Petition for Review 7.

18 Contrary to petitioners' above suggestion, the city  
19 adopted findings specifically addressing each of the  
20 requested adjustments. Record 18-24. The city also  
21 explained in its findings why the city believes the  
22 cumulative effect of the adjustments is consistent with the  
23 overall purpose of the zone. Petitioners make no attempt to  
24 develop this argument or attack the city's findings. The  
25 arguments in petitioners' brief are insufficiently developed  
26 to warrant remand. See Deschutes Development v. Deschutes  
27 County, 5 Or LUBA 218, 220 (1982).



1 This subassignment of error is denied.

2 **B. Challenges to Specific Adjustments**

3 **1. Adjustments 2, 3 and 6**

4 Adjustments 2 and 6 permit the building heights to be  
5 raised from the allowed 30 feet to 35 feet. Adjustment 3  
6 allows the front building setback of parcel 2 to be reduced  
7 from the required 10 feet to 5 feet. The city adopted  
8 findings addressing both the building height adjustments and  
9 the front building setback adjustment. Petitioners do not  
10 challenge those findings. Instead, petitioners argue  
11 PCC 33.110.215 provides alternative height limits, and  
12 PCC 33.110.220 provides exceptions from required setbacks,  
13 for steeply sloping lots such as those at issue in this  
14 appeal. Petitioners complain the applicants seek to take  
15 advantage of PCC 33.110.215 and PCC 33.110.220, as well as  
16 the additional adjustments at issue in this appeal.  
17 Petitioners complain the applicants should not be allowed to  
18 seek the benefit of both provisions, but cite no PCC  
19 provision prohibiting the applicants from doing so.

20 This subassignment of error is denied.

21 **2. Adjustment 4**

22 Adjustment 4 permits an increase in allowed building  
23 coverage on parcel 2 from 45% to 56%. The purpose of the  
24 building coverage standards is explained at  
25 PCC 33.110.225(A), as follows:

1           "The building coverage standards, together with  
2           the height and setback standards control the  
3           overall bulk of structures. They are intended to  
4           assure that taller buildings will not have such a  
5           large footprint that their total bulk will  
6           overwhelm adjacent houses. Additionally, the  
7           standards help define the character of the  
8           different zones by limiting the amount of the  
9           buildings allowed on a site. They work in  
10          conjunction with the lot size standards to  
11          determine how built-up a neighborhood appears."

12          Petitioners complain the city is granting the building  
13          coverage adjustment as well as the height and setback  
14          adjustments. Petitioners argue that under criterion C the  
15          cumulative effect of these adjustments must be considered  
16          and "[t]he fact that the Adjustment Committee granted  
17          adjustments to all three standards and the neighbors have  
18          objected to each means that they have ignored the standards  
19          of [PCC] 33.805.040." Petition for Review 8.

20          Petitioners' arguments here essentially restate the  
21          arguments addressed under A(1) and (4) above. As we have  
22          already explained, petitioners make no specific challenge to  
23          the findings adopted by the city addressing the building  
24          coverage, height and setback adjustments.

25          This subassignment of error is denied.

### 26                           **3. Adjustment 1**

27          Under this subassignment of error, petitioners repeat  
28          arguments we have already rejected above, but add one  
29          additional argument. They contend the city erred by not  
30          applying the more stringent standards for deviating from  
31          land use regulation requirements that are typically required

1 to obtain variances. See Wentland v. City of Portland, 22  
2 Or LUBA 15, 24-25 (1991) (and cases cited therein).

3 Petitioners are correct that traditional variance  
4 standards are more stringent than the criteria quoted above,  
5 which the city has adopted for adjustments. However, the  
6 applicable criteria here are the adjustment criteria the  
7 city has adopted, not variance criteria that have been  
8 adopted by other local governments to govern deviations from  
9 land use regulation standards. See Sokol v. City of Lake  
10 Oswego, 17 Or LUBA 429, 435-40 (1989).

11 This subassignment of error is denied.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 PCC 33.710.030 requires that the Adjustment Committee  
15 adopt rules of procedure in writing. Those written  
16 procedures must "comply with the Oregon Public Meetings Law,  
17 Statutory land use hearing requirements, and [PCC Title  
18 33]." At the time the Adjustment Committee conducted the  
19 proceedings leading to its adoption of the challenged  
20 decision, it did not have such written rules of procedure.  
21 The Adjustment Committee adopted written rules of procedure  
22 on December 14, 1993, after the final evidentiary hearing  
23 was held in this matter. Petitioners contend the Adjustment  
24 Committee erred by conducting this proceeding without having  
25 first adopted written rules of procedure and, for that  
26 reason, its decision is invalid. Petitioners also contend

1 the written rules of procedure adopted on December 14, 1993  
2 are inadequate.

3 The Adjustment Committee's failure to adopt written  
4 rules of procedure prior to conducting the local proceedings  
5 in this matter is a procedural error. Such a procedural  
6 error provides a basis for reversal or remand only where  
7 petitioners' substantial rights are prejudiced by the error.  
8 ORS 197.835(7)(a)(B); Sunburst II Homeowners Assn. v. City  
9 of West Linn, 101 Or App 458, 461, 790 P2d 1142, rev den 310  
10 Or 1213 (1990); Colwell v. City of Portland, 1 Or LUBA 74,  
11 78-79 (1980). Because petitioners fail to identify any such  
12 prejudice to their substantial rights, the alleged  
13 procedural error provides no basis for reversal or remand.

14 Petitioners' allegations concerning the inadequacy the  
15 rules of procedure the Adjustment Committee adopted on  
16 December 14, 1993 are not properly presented in this appeal.  
17 Those rules of procedure were adopted in a separate  
18 proceeding and by a separate decision that has not been  
19 appealed to this Board. They were not adopted as part of  
20 the challenged decision and may not be challenged in this  
21 appeal. See Corbett/Terwilliger Neigh. Assoc. v. City of  
22 Portland, 16 Or LUBA 49, 52 (1987).

23 The second assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR**

25 Petitioners' final assignment of error alleges a number  
26 of procedural errors.

1           **A.    Solar Shade Adjustments**

2           In its initial May 11, 1993, decision the Adjustment  
3   Committee granted Adjustments 1-4 and 6-8.  The Adjustment  
4   Committee concluded that while a solar shade adjustment is  
5   required for parcel 3 (Adjustment 8), a solar shade  
6   adjustment is not required for parcel 2 (Adjustment 5).  The  
7   May 11, 1993 decision includes a note, which explains as  
8   follows:

9           "Although notification for Requests No. 5 and 8  
10          was originally made it was later determined by  
11          staff that these two requests were not required;  
12          therefore staff did not administratively approve  
13          them.  The Adjustment Committee, however, believed  
14          based on [its] understanding of the solar codes,  
15          that Parcel 3 did, indeed, require the solar  
16          adjustment Request No. 8, and therefore granted  
17          its approval for this development."  Record 115.

18          As explained earlier in this opinion, the Adjustment  
19   Committee's May 11, 1993 decision was appealed to this Board  
20   and, at the city's request, was remanded on October 4, 1993.  
21   The notices that preceded the Adjustment Committee's  
22   November 30, 1993 hearing in this matter did not indicate  
23   the Adjustment Committee would consider approval of  
24   Adjustment 5.  Following the conclusion of the November 30,  
25   1993 hearing before the Adjustment Committee, the record was  
26   held open for seven days for receipt of additional written  
27   testimony.  Petitioners submitted additional written  
28   testimony on December 7, 1993.

29          In their December 7, 1993 written testimony,  
30   petitioners quote a portion of PCC 33.110.330 ("Solar

1 Access") and argue a solar shade adjustment is required for  
2 parcel 2.

3 "Based on the solar shade code, we contend that  
4 both lots require solar shade adjustment. While  
5 the code does give an exception for a sloped lot,  
6 the fact that the applicant has requested a height  
7 adjustment \* \* \* requires that they [sic] get a  
8 solar shade adjustment. We further note that only  
9 parcel 2 is a sloped lot and that parcel 3  
10 requires a solar shade adjustment regardless of  
11 how the code is interpreted.

12 \* \* \* \* \*

13 \* \* \* The combination of both height and solar  
14 shade adjustments does not 'equally or better meet  
15 the purpose of the regulation to be modified;  
16 and ... will 'significantly detract from the  
17 livability or appearance of the residential  
18 area ...'. Additionally, if the code 'gives  
19 certainty to the neighbors about what is allowed'  
20 and we are objecting, this adjustment can not meet  
21 the purpose of the code and it will significantly  
22 detract from the quality of the neighborhood.  
23 (Emphasis in original.) Record 64-66.

24 At its December 28, 1993 meeting, the Adjustment  
25 Committee considered the solar shade adjustment issues  
26 raised by petitioners and voted to reinstate Adjustment 5.  
27 The findings ultimately adopted by the Adjustment Committee  
28 include the following:

29 "Findings: The purpose and intent of solar  
30 regulations is to promote the conservation of  
31 resources through the use of solar energy by  
32 limiting the amount of shade that can be cast by  
33 structures and some vegetation not abutting  
34 northern lots and by requiring an analysis of the  
35 amount of shade being cast onto a home's solar  
36 features.

1 "The administrative decision erroneously removed  
2 both solar height increase adjustments from the  
3 request because it was thought that both lots met  
4 an exception. At the [April 20, 1993] public  
5 hearing the requested solar height increases for  
6 the dwellings on both parcels were discussed, the  
7 request for Parcel 3 was re-instated, the  
8 [Adjustment] Committee found that Parcel 2 met an  
9 exception and [an adjustment] was not necessary  
10 and the [Adjustment] Committee granted an  
11 adjustment to increase the solar height for the  
12 structure on Parcel 3. After keeping the record  
13 open after the hearing on November 30, 1993, the  
14 appellants submitted new written information for  
15 the [Adjustment] Committee's consideration \* \* \*.  
16 Included was the statement that both lots needed  
17 adjustments to increase the solar height allowed  
18 for both dwellings. Upon further review of the  
19 Zoning Code ([PCC] 33.110.230.E.), it was found  
20 that it does state that 'Increases in height above  
21 the base zone limit require an adjustment.' The  
22 [Adjustment Committee] held over the final  
23 decision and adoption of findings in this case for  
24 two weeks in order to include [its] findings on  
25 both re-instated adjustments for increased solar  
26 height into [its] written findings." (Emphasis in  
27 original.) Record 22.

28 The Adjustment Committee goes on to adopt findings  
29 explaining why it concludes the solar shade adjustments are  
30 justified. Petitioners make no attempt to challenge the  
31 adequacy of those findings. Petitioners' sole objection is  
32 that there was no notice prior to the November 30, 1993  
33 Adjustment Committee hearing that Adjustments 5 and 8 would  
34 be considered. Petitioners contend the challenged decision  
35 must be remanded so that an opportunity for public testimony  
36 on the disputed solar shade adjustments can be provided.

37 Petitioners are incorrect about Adjustment 8. That  
38 adjustment was granted in the initial decision and

1 petitioners either were aware, or should have been aware,  
2 that the Adjustment Committee was considering reapproval of  
3 Adjustment 8 at the November 30, 1993 public hearing.

4 We agree with petitioners that it was procedural error  
5 for the city on remand to grant Adjustment 5 without  
6 providing notice prior to the November 30, 1993 hearing that  
7 approval of Adjustment 5 was being considered. However,  
8 petitioners presented argument concerning the necessity for  
9 both solar shade adjustments and took the position that the  
10 relevant PCC standards for such adjustments are not  
11 satisfied. As the adopted findings point out, the necessity  
12 for solar shade adjustments for both parcels was an issue  
13 during the proceedings leading to the May 11, 1993 decision,  
14 and evidence and arguments concerning shading issues were  
15 submitted to the Adjustment Committee prior to its May 11,  
16 1993 decision. Petitioners make no attempt in their  
17 petition for review to identify or explain what additional  
18 evidence or argument they might have presented had the city  
19 provided notice during the remand proceedings that  
20 Adjustment 5 was again under consideration. In view of this  
21 failure, and in view of the Adjustment Committee's earlier  
22 consideration of the Adjustment 5 solar shade issues prior  
23 to its May 11, 1993 decision, we conclude petitioners have



1 failed to adequately demonstrate their substantial rights  
2 were violated by the city's procedural error.<sup>2</sup>

3 This subassignment of error is denied.

4 **B. Burden of Proof**

5 Petitioners contend that because the Adjustment  
6 Committee had not yet adopted written rules of procedure  
7 when it conducted the evidentiary portion of the local  
8 proceedings in this matter, the burden of proof in this  
9 matter was improperly placed on them, rather than on the  
10 applicant.

11 PCC 33.800.060 explicitly places the burden of proof on  
12 the applicant to demonstrate compliance with applicable  
13 criteria. Respondent contends there is nothing in the  
14 findings to support petitioners' suggestion that they were  
15 improperly forced to carry the burden of proof in this  
16 matter.

17 Because petitioners do not support this subassignment  
18 of error with any argument showing the burden of proof was  
19 improperly shifted to them, beyond claiming that such was  
20 the case, this subassignment of error is denied.

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<sup>2</sup>The city also contends this subassignment of error should be denied because petitioners failed to object to the Adjustment Committee approving Adjustment 5 without having provided notice of its intent to do so prior to the November 30, 1993 public hearing. See Schellenberg v. Polk County, 21 Or LUBA 425, 444 (1991)(and cases cited therein). Although we do not reach the issue, we seriously doubt the petitioners waived their right to raise this issue by failing to raise an objection at a meeting held by the Adjustment Committee for the limited purpose of considering proposed findings. See Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 834 P2d 523 (1992).

1           **C.    Availability of Evidence**

2           Apparently two models and two diagrams (Record 93-95)  
3 were removed from the record by the applicant.<sup>3</sup> Although  
4 they were returned to the record prior to the November 30,  
5 1993 public hearing, they were not available when the notice  
6 of the public hearing on remand was sent on November 5,  
7 1993. Petitioners contend the Adjustment Committee violated  
8 the requirement of ORS 197.763(4)(a) that all evidence the  
9 applicant relies upon be available at the time the notice  
10 required by ORS 197.763(3) is provided.

11           The disputed models and diagrams were made available to  
12 petitioners, although they apparently were not available for  
13 review at the time notice of the November 30, 1993 hearing  
14 was provided. However, the record was held open for seven  
15 days after the November 30, 1993 public hearing to allow  
16 additional time for the parties to submit written testimony  
17 and argument.

18           In Citizens for Resp. Growth v. City of Seaside, \_\_\_ Or  
19 LUBA \_\_\_ (LUBA No. 93-163, January 31, 1994), slip op 6-7,  
20 we stated it was unclear whether ORS 197.763(4)(a) applies  
21 to local government proceedings on remand. In any event,  
22 the alleged error, if it is error, is procedural.  
23 Petitioners make no attempt to show how the alleged error

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<sup>3</sup>Apparently the model and diagrams were first submitted during the local proceedings leading to the Adjustment Committee's initial decision which was challenged in LUBA No. 93-081.

1 prejudiced their substantial rights. Without such prejudice  
2 to their substantial rights, the alleged error provides no  
3 basis for reversal or remand. ORS 197.835(7)(a)(B).

4 This subassignment of error is denied.

5 **D. Limit on Public Hearing Testimony**

6 Petitioners contend that testimony at the November 30,  
7 1993 public hearing was improperly limited to "issues raised  
8 in the applicant's rebuttal \* \* \*." Petition for Review 13.

9 Respondent concedes the notice of the November 30, 1993  
10 hearing states that oral testimony at the November 30, 1993  
11 hearing would be limited in the manner petitioners contend.  
12 However, the notice also states that the record would be  
13 held open for seven days after the November 30, 1993 hearing  
14 for receipt of written testimony. During the November 30,  
15 1993 hearing it was made clear that the written testimony  
16 could address any issue. Moreover, respondent contends the  
17 Adjustment Committee in fact allowed the parties to submit  
18 oral testimony on any issue they wished.

19 Respondent contends that in view of the above,  
20 petitioners' substantial rights were not prejudiced. We  
21 agree with respondent.

22 This subassignment of error is denied.

23 **E. Adjustment Committee Bias**

24 Citing a comment made by the chair of the Adjustment  
25 Committee and the fact the Adjustment Committee reached  
26 tentative conclusions on November 30, 1993, prior to the

1 close of the evidentiary record, petitioners contend the  
2 Adjustment Committee "is obviously biased against us."  
3 Petition for Review 13.

4 The burden petitioners must carry to demonstrate the  
5 Adjustment Committee was biased in this matter is explained  
6 in 1000 Friends of Oregon v. Wasco County, 304 Or 76, 742  
7 P2d 39 (1987). While it is somewhat unusual for a land use  
8 decision maker to reach formal tentative conclusions prior  
9 to the close of the evidentiary hearing, the Adjustment  
10 Committee later considered the evidence and argument  
11 submitted following the November 30, 1993 public hearing and  
12 adopted findings addressing that evidence and argument. The  
13 cited comment and the manner in which the Adjustment  
14 Committee proceeded in this matter do not demonstrate the  
15 Adjustment Committee was biased.

16 This subassignment of error is denied.

17 **E. Reinstatement of the Original Decision at the**  
18 **November 30, 1993 Public Hearing**

19 This subassignment of error is founded on the erroneous  
20 assumption that the Adjustment Committee reinstated its  
21 original decision at the November 30, 1993 public hearing.  
22 At that time the evidentiary record remained open for the  
23 submission of additional evidence and argument until the  
24 evidentiary record was closed on December 14, 1993.  
25 However, as noted above, the Adjustment Committee met again  
26 on December 28, 1993 to consider the evidence and argument  
27 and on January 11, 1994, adopted its decision and findings

1 in this matter. The findings address the evidence and  
2 argument submitted by petitioners after November 30, 1993.

3 As noted above, the Adjustment Committee's action to  
4 reach tentative conclusions concerning petitioners' appeal  
5 prior to the close of the evidentiary record is somewhat  
6 unusual. However, we conclude the Adjustment Committee's  
7 tentative action on November 30, 1993 only expressed the  
8 committee's tentative decision based on the record as it  
9 existed on that date. The Adjustment Committee subsequently  
10 considered the evidence and argument submitted by the  
11 parties after that date and adopted findings addressing that  
12 evidence and argument.

13 In the circumstances presented in this case, we do not  
14 believe the Adjustment Committee's tentative action  
15 constitutes error. Even if it did, it is at most a  
16 procedural error and there was no prejudice to petitioners'  
17 substantial rights.

18 This subassignment of error is denied.

19 The third assignment of error is denied.

20 The city's decision is affirmed.