

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

3  
4 HORIZON CONSTRUCTION, INC.,         )  
5 RICH RACETTE, and WALT RACETTE,     )  
6                                                 )  
7                     Petitioners,         )  
8                                                 )  
9             vs.                                 )  
10                                                 )  
11 CITY OF NEWBERG,                         )  
12                                                 )  
13                     Respondent.         )

LUBA No. 94-207  
  
FINAL OPINION  
AND ORDER

14  
15  
16             Appeal from City of Newberg.

17  
18             Wallace W. Lien, Salem, filed the petition for review  
19 and argued on half of petitioners.

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21             Terrence D. Mahr, City Attorney, Newberg, filed the  
22 response brief and argued on behalf of respondent.

23  
24             SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,  
25 Referee, participated in the decision.

26  
27                                 AFFIRMED                                 02/07/95

28  
29             You are entitled to judicial review of this Order.  
30 Judicial review is governed by the provisions of ORS  
31 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal two city council resolutions denying  
4 a conditional use permit for a 108-unit apartment complex.

5 **FACTS**

6 This is the third time a city decision denying  
7 petitioners' application for a conditional use permit for  
8 the subject apartment complex has been before this Board.<sup>1</sup>  
9 In Horizon Construction, Inc. v. City of Newberg, 23 Or LUBA  
10 159, 160-61 (1992) (Horizon I), we described petitioners'  
11 proposal as follows:

12 "The subject property is a vacant 5.64 acre parcel  
13 owned by petitioners Racette. The property is  
14 designated Mixed Use on the Newberg Comprehensive  
15 Plan Map. The subject property is zoned Community  
16 Commercial (C-2). Approximately one-third of the  
17 parcel is within the Approach Surface of Sportsman  
18 Airpark, and is subject to the Airport Overlay  
19 (AO) zone.

20 "The land adjoining the subject parcel to the  
21 west, north and east is also vacant and zoned C-2.  
22 One parcel adjoining the [west side of the]  
23 subject parcel to the south is zoned Light  
24 Industrial (M-2) and contains two industrial  
25 businesses. The other parcel adjoining the [east  
26 side of the] subject parcel to the south is zoned  
27 Medium Density Residential (R-2) and contains a  
28 mobile home park. Record 203.

29 "On September 27, 1991, petitioners applied for a

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<sup>1</sup>The local records submitted in the two earlier LUBA appeals are part of the local record in this appeal as well. In this opinion, we refer to the local record submitted in LUBA Nos. 92-002, 93-065 and 94-207 as Record I, Record II and Record III, respectively.

1 conditional use permit for development of the  
2 proposed 108 unit apartment complex on the subject  
3 parcel. The site plan accompanying the  
4 conditional use permit application indicates the  
5 proposed dwelling units would be located on the  
6 periphery of the parcel, with parking areas in the  
7 center. [Record I 231.]" (Footnotes omitted.)

8 After a public hearing, the city planning commission  
9 approved the conditional use permit, subject to certain  
10 conditions. The planning commission's decision was appealed  
11 to the city council. After an additional evidentiary public  
12 hearing, the city council denied the conditional use permit.  
13 In Horizon I, we affirmed the city council's decision.  
14 Petitioners appealed to the Court of Appeals. In Horizon  
15 Construction, Inc. v. City of Newberg, 114 Or App 249, 834  
16 P2d 523 (1992), the Court of Appeals reversed and remanded  
17 our decision, holding the city council committed substantive  
18 error by failing to comply with the requirements of  
19 ORS 227.180(3) regarding disclosure and rebuttal of ex parte  
20 contacts. The Court of Appeals stated:

21 "Failure to comply with ORS 227.180(3) requires a  
22 remand to the city council and a plenary rehearing  
23 on the application. \* \* \*" Id. at 253-54.

24 On remand, the city council held another public hearing  
25 on petitioners' application. During the proceedings on  
26 remand, petitioners submitted revised application materials,  
27 including revised site plans showing the proposed dwelling  
28 units clustered in structures at the center and south end of  
29 the subject parcel, with parking areas located primarily

1 along the east and west margins of the parcel.<sup>2</sup> Record II  
2 164-65. After further deliberation, the city council  
3 adopted a second decision denying petitioners' conditional  
4 use permit application.

5 The city council's second decision was appealed to this  
6 Board. In Horizon Construction, Inc. v. City of Newberg, 25  
7 Or LUBA 656 (1993) (Horizon II), we remanded the city's  
8 second decision because the city council failed to comply  
9 with the requirements of ORS 227.180(3) on remand. After  
10 the second remand, the city council held another public  
11 hearing on petitioners' conditional use permit application.  
12 On October 3, 1994, the city council adopted two resolutions  
13 denying the conditional use permit.<sup>3</sup> This appeal followed.

#### 14 INTRODUCTION

15 To support denial of a land use permit, a local  
16 government need only establish the existence of one adequate  
17 basis for denial. Kangas v. City of Oregon City, 26 Or LUBA  
18 177, 180 (1993); Rozenboom v. Clackamas County, 24 Or LUBA  
19 433, 437 (1993); Garre v. Clackamas County, 18 Or LUBA 977,

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<sup>2</sup>The revised site plans are two alternative plans for a 112-unit apartment complex. However, petitioners told the city orally that they are willing to reduce the proposal to 108-units, but no further. Record II 179.

<sup>3</sup>Resolution No. 94-1869 reverses the planning commission's decision to approve the subject conditional use permit and adopts findings supporting the city council's decision to deny the permit. Record III 3-16. Resolution No. 94-1868 adopts findings setting out "wherein the [Planning Commission's] findings were in error," as required by City of Newberg Zoning Ordinance (NZO) 652. Record III 17-18.

1 981, aff'd 102 Or App 123 (1990). The challenged decision  
2 finds the proposed development fails to comply with each of  
3 the three approval criteria for conditional use permits  
4 established by NZO 638. Because we sustain the city's  
5 determination of noncompliance with NZO 638.1, infra, we do  
6 not address petitioners' challenges to the city's  
7 determinations of noncompliance with NZO 638.2 and .3.

8 **FIRST (PART A), SECOND AND FIFTH (PART B) ASSIGNMENTS OF**  
9 **ERROR**

10 NZO 638.1 establishes the following approval criterion  
11 for conditional use permits:

12 "That the location, size, design and operating  
13 characteristics of the proposed development are  
14 such that it can be made reasonably compatible  
15 with and [will] have minimal impact on the  
16 livability or appropriate development of abutting  
17 properties and the surrounding neighborhood, with  
18 consideration to be given to harmony in scale,  
19 bulk, coverage and density; to the availability of  
20 public facilities and utilities; to the generation  
21 of traffic and the capacity of surrounding  
22 streets, and to any other relevant impact of the  
23 development."

24 The city's findings explain the bases for its  
25 determination of noncompliance with NZO 638.1:

26 "The location, size, design and operating  
27 characteristics of the proposed development are  
28 not reasonably compatible with abutting properties  
29 and surrounding development as follows:

30 **"1. Harmony in scale, bulk, coverage, density,**  
31 **and other factors**

32 "The proposed use does not offer adequate  
33 separation or buffering [from] surrounding  
34 properties to assure that the residential

1 uses will be compatible with future  
2 commercial and industrial development in the  
3 area. The surrounding area represents one of  
4 a limited number of vacant commercially zoned  
5 areas in the City. The development of this  
6 site for residential purposes will have a  
7 negative impact on the proper commercial  
8 development of the surrounding area by  
9 creating the opportunity for future noise,  
10 odor, lighting, and other nuisance complaints  
11 by residents of the apartment complex. To  
12 reduce the potential for nuisance complaints,  
13 the use should be located further to the east  
14 and incorporate the 2 acre site [to the  
15 east]. This relocation [would] allow greater  
16 land area and distance to be provided from  
17 commercial property to the west and  
18 industrial property to the south. It will  
19 also allow the use to front upon an extension  
20 of Deborah St. which should be extended from  
21 Hayes to Hancock.<sup>[4]</sup> \* \* \* The relocation  
22 [would] also allow the use to be located  
23 outside of the airport approach surface,  
24 thereby eliminating some of the concern  
25 regarding the airport.

26 "Because apartments are proposed under the  
27 airport approach zone, potential conflicts  
28 with the airport exist. The noise generated  
29 by planes will create a potential nuisance  
30 for residents.

31 **"2. Traffic generation and the capacity of**  
32 **surrounding streets**

33 "The proposed development will generate

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<sup>4</sup>Access to the proposed development would be from Hayes St., a local street adjoining the subject property to the north. Hancock St. adjoins the subject property to the south. The west end of Hayes St. terminates at Elliott St., a collector street running north-south from Highway 99W to Hancock St. The east end of Hayes St. terminates at Deborah St., which extends north to intersect with Highway 99W. An extension of Deborah St. to the south, to intersect with Hancock St., is planned, as is an extension of Hayes St. to the east, to intersect with Springbrook Rd.

1 approximately 605 trips per day based on ITE  
2 data. These vehicles will be forced to use  
3 Elliott and Deborah roads to access  
4 Highway 99W. The applicant has submitted a  
5 letter from a traffic engineer but no traffic  
6 study has been prepared to examine the  
7 adequacy of the street system. The traffic  
8 engineer's letter notes that with additional  
9 development in this area it will be necessary  
10 to complete the street network by extending  
11 Hayes. No funds have been allocated for this  
12 purpose.

13 "The timing of construction of a traffic  
14 signal at Elliott and Highway 99W is  
15 uncertain. Without a traffic signal, an  
16 extreme traffic hazard will exist for  
17 pedestrians wishing to cross Highway 99W.  
18 Although the applicant has agreed to bus  
19 children to school, children who occupy the  
20 development will likely walk to playgrounds  
21 and parks across Highway 99 W. Based on  
22 these pedestrian safety concerns, the  
23 development should not be approved unless  
24 safe pedestrian access across Highway 99W can  
25 be provided." Record 13-14.

26 Petitioners challenge the city's interpretation of  
27 NZO 638.1, the adequacy of the above findings to explain the  
28 basis for the city's decision, and the evidentiary support  
29 for the city's determination of noncompliance with  
30 NZO 638.1. Petitioners also argue the city council exceeded  
31 its authority by requiring that the proposed development be  
32 relocated to property not owned by petitioners.

33 **A. Interpretation of NZO 638.1**

34 Petitioners argue the city incorrectly interprets  
35 NZO 638.1 as allowing a conclusion that residential use of  
36 the subject property should not be allowed, even though the

1 subject property bears a Mixed Use plan designation and  
2 dwelling units are listed as conditional uses in the C-2  
3 zone. According to petitioners, interpreting NZO 638.1 to  
4 allow denial of the subject application based on the  
5 location of the site, rather than requiring changes to the  
6 design of the proposed development to ensure compatibility  
7 with uses of neighboring property, is inconsistent with the  
8 Mixed Use plan designation and C-2 zone. Petitioners  
9 further argue that NZO 638.1 does not allow the city to  
10 speculate with regard to development that may occur on  
11 surrounding properties in the future, to assume that  
12 development of surrounding C-2 zoned property will be  
13 commercial or industrial in nature, or to base its decision  
14 on the mere possibility of future complaints from residents  
15 of the proposed apartment complex. Finally, petitioners  
16 contend the city erroneously interprets NZO 638.1 to require  
17 that the proposed development be absolutely compatible with  
18 surrounding uses and free of any impacts whatsoever,  
19 contrary to the express language of NZO 638.1.

20 The city argues that the listing of "dwelling units" as  
21 a conditional use in the C-2 zone does not mean the city  
22 must approve all such conditional use applications, or that  
23 it is limited to imposing conditions of approval. Adler v.  
24 City of Portland, 24 Or LUBA 1, 9-10 (1992). The city  
25 disagrees that its decision means no residential use of the  
26 subject property is allowed. According to the city, the



1 primary basis for its determination of noncompliance with  
2 NZO 638.1 is that the proposed development is at the highest  
3 possible density allowed in the city and does not provide  
4 for adequate buffering.

5 This Board is required to defer to a local governing  
6 body's interpretation of its own enactment, unless that  
7 interpretation is contrary to the express words, purpose or  
8 policy of the local enactment or to a state statute,  
9 statewide planning goal or administrative rule which the  
10 local enactment implements. ORS 197.829; Gage v. City of  
11 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.  
12 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).<sup>5</sup>  
13 This means we must defer to a local government's  
14 interpretation of its own enactments, unless that  
15 interpretation is "clearly wrong." Reeves v. Yamhill  
16 County, 132 Or App 263, 269, \_\_\_ P2d \_\_\_ (1995); Goose  
17 Hollow Foothills League v. City of Portland, 117 Or App 211,  
18 217, 843 P2d 992 (1992); West v. Clackamas County, 116  
19 Or App 89, 93, 840 P2d 1354 (1992).

20 In this case, much of petitioners' argument is based on  
21 an underlying contention that NZO 638.1 does not authorize  
22 the city to deny a proposed conditional use if conditions of

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<sup>5</sup>ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the Court of Appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

1 approval could conceivably solve any perceived compatibility  
2 problem. In Horizon I, 23 Or LUBA at 168, we addressed this  
3 issue:

4 "[W]e do not agree with petitioners that the NZO  
5 requires the city to approve conditional use  
6 permit applications where conditions could be  
7 imposed to ensure the proposal's compliance with  
8 applicable approval standards. The 'Description  
9 and Purpose' section of the NZO's conditional use  
10 permit chapter concludes as follows:

11 " '\* \* \* The purpose of review shall be  
12 to determine that the characteristics of  
13 any such [proposed conditional] use  
14 shall be reasonably compatible with the  
15 type of uses permitted in surrounding  
16 areas, and for the further purpose of  
17 stipulating such conditions as may be  
18 reasonable so that the basic purposes of  
19 the ordinance shall be served. Nothing  
20 construed herein shall be deemed to  
21 require the [city] to grant a  
22 Conditional Use Permit." (Emphasis  
23 added.) NZO 632.'

24 Read together, NZO 632 and 638.1 are reasonably  
25 interpreted to authorize the city to rely upon  
26 reasonable conditions in finding compliance with  
27 the approval standard imposed by NZO 638.1, but  
28 not to require that such conditions be imposed."  
29 (Emphasis in original.)

30 On this issue, we adhere to Horizon I.

31 We also disagree with petitioners' contentions that the  
32 challenged decision finds noncompliance with MZO 638.1  
33 because no residential use of the subject property should be  
34 allowed, and that the decision improperly interprets  
35 MZO 638.1 to require that there be absolute compatibility  
36 with, and no adverse impacts from, the proposed use. Fairly

1 read, the challenged decision determines the proposed  
2 development does not comply with NZO 638.1 because a  
3 108-unit apartment complex on the subject 5.64-acre site is  
4 not reasonably compatible with, and will have more than  
5 minimal impact on, the appropriate commercial development of  
6 the surrounding C-2 zoned property. According to the  
7 decision, the perceived compatibility and impact problems  
8 are due to the high density of the proposed project,  
9 insufficient buffering from surrounding properties, and  
10 inadequate capacity of the surrounding streets to handle  
11 pedestrian traffic from the proposed development. This  
12 interpretation of NZO 638.1 is not "clearly wrong," and must  
13 be affirmed.

14 Two additional interpretive issues raised by  
15 petitioners warrant comment. NZO 638.1 requires reasonable  
16 compatibility with, and no more than minimal impact on,  
17 livability and appropriate development of surrounding  
18 properties. Therefore, NZO 638.1 authorizes the city to  
19 consider a proposed conditional use's compatibility with,  
20 and impact on, future development of currently vacant  
21 properties. The C-2 zone lists a total of 123 uses as  
22 outright permitted, the vast majority of which are  
23 commercial in nature. NZO 354. We see nothing clearly  
24 wrong in the city assuming that the appropriate future  
25 development of the C-2 zoned property surrounding the  
26 subject site is for commercial use.

1 This subassignment of error is denied.

2 **B. Adequacy of Findings**

3 Petitioners contend the findings are inadequate.  
4 Petitioners complain that although the proposed site plan  
5 was drastically revised after the city council made its  
6 first decision and before it made the decision at issue in  
7 this appeal, the city council's findings on "harmony in  
8 scale, bulk, coverage and density" are virtually the same.  
9 Petitioners argue the findings do not address the revised  
10 site plan or specifically discuss the scale, bulk, coverage  
11 and density of the proposed development. According to  
12 petitioners, the findings do not explain why the added  
13 buffering provided by the revised site plan is inadequate.  
14 With regard to "generation of traffic and the capacity of  
15 surrounding streets," petitioners argue the findings do not  
16 determine the capacity of surrounding streets or explain why  
17 the proposed development will be incompatible because of  
18 traffic.

19 With regard to the findings on "harmony in scale, bulk,  
20 coverage and density," whether they are similar, or  
21 identical, to those adopted in a previous city decision  
22 based on a different site plan does not of itself provide a  
23 basis for reversal or remand. What the findings must do is  
24 adequately explain the basis for the city's determination  
25 that the proposed development does not comply with  
26 NZO 638.1. Contrary to petitioners' assertions, the

1 findings do discuss the submittal of the revised site plan  
2 and set out facts regarding the density, scale, bulk and  
3 coverage of the proposed development. Record 11.  
4 Additionally, the findings explain the city believes the  
5 proposed development is too dense to be reasonably  
6 compatible with future commercial development of adjoining  
7 properties.

8 With regard to consideration of "generation of traffic  
9 and the capacity of surrounding streets," the findings  
10 include a projection of the number of automobile trips per  
11 day that will be generated by the proposed development. The  
12 findings also state that children living in the proposed  
13 development will walk to playgrounds and parks located  
14 across Highway 99W. The findings explain that without a  
15 traffic signal at Elliott St. and Highway 99W, there will be  
16 extreme traffic hazards for pedestrians from the proposed  
17 development. The findings are adequate to explain why the  
18 city believes the surrounding streets are inadequate to  
19 handle the pedestrian traffic generated by the proposed  
20 development.

21 This subassignment of error is denied.

22 **C. Evidentiary Support**

23 Petitioners contend the city's determination of  
24 noncompliance with NZO 638.1 is not supported by substantial  
25 evidence in the whole record. Petitioners point out the  
26 site plan was revised to place the apartment buildings at

1 the center of the subject property and parking spaces at the  
2 periphery, thereby providing greater separation between the  
3 proposed living area and future commercial development of  
4 adjoining properties. Petitioners argue that under the  
5 revised site plan, the closest any building on adjoining  
6 property could get to one of the proposed apartment  
7 buildings is 84 feet on the north and south and 92 feet on  
8 the east and west. According to petitioners, with such  
9 separation, no reasonable person could conclude the proposed  
10 development will not be reasonably compatible with future  
11 commercial development of adjacent properties.

12 Petitioners also contend there is no evidence in the  
13 record that pedestrians from the proposed development  
14 wishing to cross Highway 99W will face an "extreme traffic  
15 hazard." According to petitioners, there is no data in the  
16 record on how many pedestrians will be generated by the  
17 proposed development, how many will cross Highway 99W or  
18 whether they will use the existing cross walk at Elliott St.  
19 or the existing traffic signal at Springbrook Rd.

20 In challenging the city's determination of  
21 noncompliance with NZO 638.1 on evidentiary grounds,  
22 petitioners bear a heavy burden. It is not sufficient for  
23 petitioners to show there is substantial evidence in the  
24 record to support their position. Rather, the "evidence  
25 must be such that a reasonable trier of fact could only say  
26 petitioners' evidence should be believed." Morley v. Marion

1 County, 16 Or LUBA 385, 393 (1988); McCoy v. Marion County,  
2 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7  
3 Or LUBA 42, 46 (1982). In other words, petitioners must  
4 demonstrate that they sustained their burden of proof of  
5 compliance with the applicable standard as a matter of law.  
6 Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241  
7 (1979); Consolidated Rock Products v. Clackamas County, 17  
8 Or LUBA 609, 619 (1989).

9 We have reviewed the evidence in the record cited by  
10 the parties. There is conflicting evidence concerning  
11 whether the proposed development would be compatible with  
12 future commercial development of adjoining C-2 zoned  
13 properties. Record I 98, 185; Record II 18, 112, 152-57,  
14 179-80, 210, 268-70; Record III 70-71. There is also  
15 conflicting evidence regarding whether the existing street  
16 system is adequate to handle pedestrian traffic from the  
17 proposed development.<sup>6</sup> Record II 24, 193-94, 209, 311-12;  
18 Record III 70. In these circumstances, we cannot say that  
19 petitioners have established the proposal's compliance with

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<sup>6</sup>Petitioners correctly note the record does not contain a numerical projection regarding the numbers of pedestrians that will be generated by the proposed development or the number that will cross Highway 99W. However, the record does include evidence that the proposed development will generate pedestrians (which petitioners do not dispute) and that some of those pedestrians, particularly children wishing to reach parks and playgrounds located on the other side of Highway 99W, will wish to cross Highway 99W. That this evidence is not quantified into specific, projected numbers of pedestrians does not prevent a reasonable person from concluding that with regard to street system capacity to handle pedestrian traffic, petitioners have not met their burden of establishing compliance with NZO 638.1 as a matter of law.

1 NZO 638.1 as a matter of law.

2 This subassignment of error is denied.

3 **D. Authority to Require Relocation**

4 Petitioners argue the city exceeded its authority by  
5 requiring petitioners to move the proposed development onto  
6 property petitioners do not own -- a vacant two-acre parcel  
7 adjoining the subject property to the east. According to  
8 petitioners, the city cannot deny a conditional use permit  
9 application on the basis of failure to include other  
10 property, under different ownership, in the application.

11 The city replies that it did not approve petitioners'  
12 conditional use permit application, subject to a requirement  
13 that the proposed development be relocated onto the  
14 neighboring parcel, but rather denied the application for  
15 failure to comply with NZO 638.1. The city argues the  
16 comments in the challenged decision regarding inclusion of  
17 the adjacent, two-acre parcel, quoted supra, are merely  
18 suggestions to petitioners regarding how decreasing density  
19 or providing additional buffering might enable the proposed  
20 development to comply with NZO 638.1. We agree with the  
21 city.

22 This subassignment of error is denied.

23 The first (part A), second and fifth (part B)  
24 assignments of error are denied.

25 **FIFTH (PART A) ASSIGNMENT OF ERROR**

26 NZO 652 provides, in relevant part:



1           "\* \* \* The [City] Council may, by resolution,  
2           affirm, reverse or modify in whole or in part, any  
3           decision, determination or requirement of the  
4           planning commission. Before granting any appeal,  
5           \* \* \* the city council shall make findings of  
6           fact, setting forth wherein the planning  
7           commission's findings were in error. \* \* \*  
8           (Emphasis added.)

9           Petitioners contend that under the above emphasized  
10          provision of NZO 652, the city council must first identify  
11          an error by the planning commission, before it can act on an  
12          appeal of a planning commission decision. The challenged  
13          decision includes five findings concerning how the planning  
14          commission erred. Record III 18. Petitioners contend none  
15          of these findings are supported by substantial evidence in  
16          the record.

17          We need not determine whether, under NZO 652, the city  
18          council lacks authority to hear an appeal from a planning  
19          commission decision if it fails to adopt findings  
20          identifying any error by the planning commission before  
21          allowing the appeal. Here the city complied with NZO 652,  
22          with regard to at least one alleged error by the planning  
23          commission. The challenged decision finds:

24                 "The [planning commission] did not adequately  
25                 consider and require adequate buffering to have  
26                 minimal impact on the surrounding  
27                 commercial/industrial development and the  
28                 surrounding neighborhood." (Emphases added.)  
29                 Record III 18.

30          Petitioners contend the above finding erroneously  
31          states the planning commission failed to consider buffering

1 or impacts, because the record demonstrates the planning  
2 commission did consider these issues. However, we  
3 understand the above finding to mean the city council  
4 disagrees with the planning commission's ultimate conclusion  
5 that there is adequate buffering to make the proposed  
6 development "reasonably compatible with and have minimal  
7 impact on" surrounding properties, as required by NZO 638.1.

8 We infer from this finding, and the other city council  
9 findings regarding how the city council believes the  
10 planning commission erred, that the city council interprets  
11 NZO 652 to allow it to substitute its judgment for that of  
12 the planning commission on questions of fact or law, and to  
13 find the planning commission erred because it relied on  
14 different evidence or reached a different conclusion than  
15 did the city council. See Horizon I, 23 Or LUBA at 166-67.  
16 The city council's interpretation of the scope of its  
17 authority under NZO 652 is well within the discretion  
18 afforded by Gage v. City of Portland, supra, and Clark v.  
19 Jackson County, supra.

20 The fifth (part A) assignment of error is denied.

21 The city's decision is affirmed.