BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON CHILD DEVELOPMENT COALITION
and HARA SHICK ARCHITECTURE, PC.,
Petitioners,

vs.

CITY OF MADRAS,
Respondent,

and

LARRY EASTER, MARIE EASTER, GARY HARRIS, CAMILLE K. HARRIS, ED CHOTARD, PATRICIA TAYLOR, LANGSTON FISHER, CHARLES CAMPBELL, ROGER TATHWELL, CHUCK ANDERSON, LINDA ANDERSON, DON VANDEWEGHE, BOB FORBES, ELOISE THORNTON and ERNEST SIMPSON,
Intervenors-Respondent.

LUBA No. 2002-026

FINAL OPINION
AND ORDER

Appeal from City of Madras.

John A. Rankin, Sherwood, filed the petition for review and argued on behalf of petitioners.

Robert S. Lovlien, Bend, filed a joint response brief and argued on behalf of respondent. With him on the brief was Bryant, Lovlien and Jarvis, PC.

Dan Van Vactor, Bend, filed a joint response brief and argued on behalf of intervenors-respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 10/18/2002

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners challenge a city decision denying an application for a migrant worker Head Start program to be located on property zoned Single-Family Residential (R-1).

FACTS

We set out the relevant facts in an earlier order in this appeal:

> "In 1998, the city approved an application submitted by the Jefferson County Early Childhood Development Center (Juniper Junction) for a Head Start program to be located on property zoned Single-Family Residential (R-1).[1] None of the city's zoning designations specifically permit preschool or day care programs. The city approved the Juniper Junction application based on a finding that the Head Start program at issue fell within the definition of a 'school.' Schools are a conditional use in the R-1 zone. *See* [Madras Zoning Code (MZC)] 8-8.3.1(2)(C) (conditional uses include '[p]ublic buildings, such as * * * public or private schools').
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> "In 2001, petitioner Oregon Child Development Coalition (OCDC) submitted an application to the city to construct a building to house a migrant worker Head Start program on a property located immediately to the south of the Juniper Junction building. The proposed migrant worker Head Start program differs from traditional Head Start programs in that it is geared to the farm worker season in central Oregon ([May] through October), and serves infants through kindergarten-aged youngsters. According to the testimony cited by petitioners, typical Head Start programs follow the academic calendar year (September through June) and serve three to four year olds.
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> "The subject property includes 4.8 acres, developed with a public park. Property within the vicinity is developed with single-family dwellings, an assisted living facility and a hospital. Petitioners propose to use a little over two acres for the migrant worker Head Start program, including an approximately 16,200 square foot building, a secure play area, landscaping and access. Petitioners anticipate that most children will arrive via school bus from surrounding areas, and will leave by 6 p.m. At times, the building will be open in the evenings to provide classes for the families of the students.

[1] "[T]he purpose of [Head Start is] to promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." 42 U.S.C. 9831.

> "The city planning commission approved the application. Opponents appealed the planning commission decision to the city council. The city council upheld the appeal, and denied petitioners' application, concluding that the proposed migrant worker Head Start program is a day care facility, not a school, and is therefore not allowed in the R-1 zone." *Oregon Child Development Coalition v. City of Madras*, __ Or LUBA __ (LUBA No. 2002-026, September 16, 2002), slip op 2-3 (original footnotes omitted; footnote added.)

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under the city code, appeals of the planning commission's decision must be received by the city within 15 days of the date the planning commission's decision was mailed to parties entitled to notice. MZC 8-8.9.21.1. The planning commission's notice of decision was mailed on November 9, 2001. Intervenors' appeal of the planning commission's decision was not submitted until December 10, 2001. Petitioners argue in the first assignment of error that intervenors' appeal to the city council was untimely and, therefore, the city council exceeded its jurisdiction by accepting and processing the late appeal.

Petitioners concede that they did not raise the issue of whether the city council had jurisdiction over the appeal during the city council proceedings.[2] However, petitioners argue that the city should have known that it was exceeding its jurisdiction when it accepted the appeal substantially more than 15 days after the final decision was mailed. According to petitioners, they had the right to rely on the finality of the planning commission decision when no appeal was filed within 15 days of the decision being mailed.

In the second assignment of error, petitioners argue that the city's consideration of the late appeal prejudiced petitioners' substantial rights by extending the time for filing an appeal and by allowing the introduction of new evidence at the city council hearing, when

[2] Petitioners state that they were not represented by an attorney during the local proceedings. According to petitioners, it was only when petitioners' attorney reviewed the record that the jurisdictional issue became apparent.

MZC 6.2.3 provides that the city council shall hear appeals of planning commission decisions on the record.[3]

Respondents argue that the appeal was timely filed.[4] According to respondents the initial notice of decision was undated, and was not mailed to all of the persons entitled to notice. Therefore, on the last day of the appeal period, the city mailed a letter to all parties, advising them of their appeal rights, and extending the time to file an appeal to December 10, 2001. The appeal of the planning commission's decision was filed by December 10, 2001. In addition, respondents argue that petitioners waived the issue of the late filing by not raising it below.

Even if the city erred in providing an extended period of time to file a local appeal based on the city's notice error, we agree with respondents that petitioners waived the issue of the jurisdiction of the city council by not raising it below. *See Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55, 70 (1992) (issues regarding the authority of the local government to render a decision must be raised during the local proceedings). We also agree that petitioners waived the right to challenge the city council's *de novo* proceedings, because that issue was not raised below. *See Confederated Tribes v. City of Coos Bay*, __ Or LUBA __ (LUBA No. 2002-016, July 17, 2002), slip op 7 (challenges to city council's procedures in a local appeal must be made during those proceedings or they are waived). The first and second assignments of error are therefore denied.

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[3] MZC 6.2.3 provides, in relevant part:

> "The City Council shall [conduct its hearing on an appeal of a] decision of the Planning Commission on the record without hearing further evidence. It shall either affirm the decision of the Planning Commission in total, at which time the decision shall be final, or shall affirm the decision and modify any conditions of approval made by the Planning Commission, or shall set the entire matter for hearing *de novo* before the City Council. * * *"

[4] Respondent and intervenors-respondent filed a joint response brief. Therefore, we refer to the parties as "respondents."

THIRD ASSIGNMENT OF ERROR

In its decision, the city's primary basis for denial is the city council's conclusion that the proposed facility is not a permitted or conditional use in the R-1 zone. However, the city council's decision also finds that the application does not satisfy applicable conditional use criteria.[5] Petitioners challenge the city's conclusion that the proposed migrant worker Head Start facility cannot be permitted in the zone and the city's conditional use findings.

A. Public Building

The R-1 zone list of conditional uses includes: "[p]ublic buildings, such as [a] library; [a] fire station, [a] museum, public or private schools, etc." MZC 8-8.3.1(2)(C). The city council concluded that because the proposed facility is more closely aligned with a "day care facility" as that term is defined in the city code than with the code definition of "school," the proposed facility cannot be allowed as a conditional use in the R-1 zone.[6]

Petitioners argue that the city's interpretation of its code is either wrong or inadequate for review. Petitioners argue that the evidence better supports a conclusion that the proposed

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[5] Respondents argue that petitioners waived their right to challenge the city's conditional use findings because petitioners' issues regarding those criteria were not raised below. ORS 197.763(1); ORS 197.835(3). We disagree. The issue of whether the subject application complied with conditional use criteria was an integral part of the proceedings below. Petitioners need not have (indeed could not have) advanced below the specific challenges to the city's findings and interpretations that they advance before LUBA. Therefore, petitioners have not waived their ability to challenge the city's findings and interpretations with respect to the applicable criteria. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993).

[6] MZC 8-8.1.3 defines "Day Care Facility" as:

> "[A]ny facility that provides day care to children, including * * * those known under a descriptive name, such as nursery school, preschool, kindergarten, * * * [or] child development center, except for those facilities excluded by law. This term applies to the total day care operation. It includes the physical setting, equipment, staff, provider, program and care of children."

The same code provision defines "school" as:

> "A place for teaching, demonstration or learning. However, unless otherwise qualified, the word 'school' means a place for primarily academic instruction equivalent to what is commonly known as kindergarten, grade school, junior high school, college, or a combination of them."

facility is a school rather than a day care facility, and that such a conclusion is consistent with the city's treatment of the Juniper Junction Head Start facility. Petitioners argue that the programs that will be housed in the proposed facility will support early childhood learning, will provide for teaching and instruction of both children and parents and, therefore, the proposed facility is a school. Petitioners contend that the contrary conclusion is clearly wrong, based on the evidence in the record and the city's past treatment of the Juniper Junction application.

Petitioners also argue that, even if the proposed migrant worker Head Start facility is not a school, the city has not explained why the facility would not otherwise qualify as a public building that could be approved as a conditional use in the R-1 zone. Petitioners contend that the types of "public buildings" that are conditionally allowed in the R-1 zone are not limited to those buildings and uses specifically named. Petitioners argue that the city's findings are inadequate to explain why it believes that a facility that is owned and operated by a non-profit corporation, and includes programs funded by the federal government that provide services in accordance with federal and state standards, is nevertheless not a public building within the meaning of the code.

The relevant question under MZC 8-8.3.1(2)(C) is whether the proposal may be allowed as a "public building," not whether the proposal is in every respect properly viewed as a school. Even if the proposal does not fall entirely within the MZC definition of "school," that does not necessarily mean the proposal is not a public building, within the meaning of MZC 8-8.3.1(2)(C). The city council erred by focusing almost exclusively on whether the proposal is properly viewed as a school, and failing to answer the relevant question, *i.e.*, whether the proposed use is properly viewed as a public building. We are also at a loss to explain the city's additional finding that "the proposed use may be allowed as a 'similar use'

in the Madras commercial zone."[7] Record 16. It is difficult to see how the proposed use *does not* fall within the relatively broad and open-ended definition of public building, but *does* qualify as a commercial use that is similar to a retail store, service establishment, professional or other office, recreational enterprise, financial institution, hotel or apartment. Assuming it is possible to reconcile those two interpretive conclusions, the city council's findings simply do not do so.

The city's decision to deny the proposed application is based primarily on its conclusion that the proposed use is not allowed in the R-1 zone. However, as we stated above, the city council decision also sets out the conditional use criteria, and finds that petitioners fail to satisfy four of those criteria. Because the conditional use findings may serve as alternate bases for denial, we turn to petitioners' arguments regarding those findings.

B. Adverse Impact on the Livability, Value and Appropriate Development of Abutting Properties and Surrounding Area.

MZC 8-8.6.1(2) sets out the criteria for approving a conditional use and provides, in relevant part:

"Standards for granting Conditional Uses are:

"* * * * *

> "B. Taking into account location, size, design, and operation characteristics, the proposal will have a minimal adverse impact on the (a) livability, (b) value, and (c) appropriate development of abutting properties and surrounding area compared to the impact of development that is permitted outright."

[7] The Commercial Zone list of permitted uses includes the following:

> "All commercial uses including retail stores, service establishments, professional and other office, recreational enterprises, financial institutions, hotels, apartments, and similar uses." MZC 8-8.3.5(1)(F).

The city council found that the proposed migrant worker Head Start facility would have more than a minimal adverse impact on the livability of abutting properties and the surrounding area. The city council's findings state, in relevant part:

> "* * * The *only* development permitted outright in the R-1 zone are residences, or residential-type structures like a duplex or residential home facility. The applicant failed to demonstrate how a proposed 16,000 square foot childcare/daycare facility and preschool would not adversely impact the surrounding single-family residences. One of the Council stated he felt having a neighbor relationship was an important part of why the R-1 zone was put in place by the City. The size and scope of the proposed facility would defeat such a neighborhood relationship, *i.e.*, the opportunity to have dinner together or talk over the fence. * * *
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> "Based on the evidence presented, the Council determined the proposed use was not consistent with the surrounding single-family residences due to the size and nature of the use, the amount of traffic generated, and the number of parking spaces required [by the facility]. * * * Staff determined that the proposed use was similar to a 'public building' and would require 41 to 54 parking spaces. * * * [Petitioners] failed to address the impact of the proposed 50 parking spaces on the livability of the surrounding area." Record 17 (emphasis in original).

Petitioners argue that the city improperly limited its analysis under MZC 8-8.6.1(2)(B) to single-family dwellings. Petitioners point out that duplexes and residential care facilities are also allowed outright in the R-1 zone. According to petitioners, if the subject property is developed for duplexes and/or residential care facilities at the maximum density, those permitted uses would have as much or more impact than the proposed use. For example, petitioners contend that their traffic consultants estimated that the proposed use would generate approximately 214 vehicle trips per day (vtd). If the subject property is developed for the maximum number of duplexes, 320 vtd would be generated. Similarly, petitioners argue that there is no limitation on the size of residential care facilities or the number of persons that could reside in them. Given those facts, petitioners argue that it is possible for a residential care facility to be as large as or larger than the proposed facility, and operate on a 24-hour per day basis. Petitioners contend that these impacts are similar or

greater than the impacts that are likely to occur from the proposed use and therefore, the city erred in not considering those potential impacts in its analysis under MZC 8-8.6.1(2)(B).

We agree with petitioners that the city erred in comparing the impacts of the proposed development to only one allowed use within the R-1 zone. The standard requires a comparison between the uses that are allowed outright and the proposed use. As petitioners point out, the R-1 zone permits more than single-family residential development in the zone. Therefore, when considering the impact of the proposed facility on abutting properties and the surrounding area to determine whether the proposed use satisfies MZC 8-8.6.1(2)(B), the city must look at all uses allowed outright in the zone.

C. Assets of Particular Interest to the Community

MZC 8-8.6.1(2)(D) provides, in relevant part, that an applicant for a conditional use demonstrate that "[t]he proposal will preserve assets of particular interest to the community." The city council concluded that petitioners did not satisfy that standard. Petitioners argue that the challenged decision is inadequate to explain what assets the city believed required preserving, and why petitioners' application did not adequately preserve them. Petitioners argue that the proposed program will serve the children of the community by providing education and programming that fosters their development. Petitioners contend that the children of Madras, including the children of migrant workers, are assets of particular interest to the community that will be "preserved" within the meaning of MZC 8-8.6.1(2)(D).

The city's findings with respect to MZC 8-8.6.1(2)(D) state, in relevant part:

> "* * * Staff noted [that] the school would help underpriviledged children within the community, but Council noted that [the] assistance would only be seasonal for migrant farmworkers' children. Many people in opposition to the project were concerned [that] the proposed use would duplicate services already provided in the City of Madras. * * * Neighbors, residents, and Staff noted that the community expressed concern [that] the school duplicated the use of an existing Head Start Center funded by the State of Oregon located in Madras.

> "[Petitioners] did not submit satisfactory evidence about the use of the facility between November and April of each year. The application failed to include information as to whether the applicant intends to rent the facility, close the facility and how the facility will be secured during the 'off-season.' * * * Without adequate information from [petitioners], the Council was unable to evaluate the application as if other uses would occur during the day and/or evening. Such other uses must qualify as a permitted or conditional use in the R-1 zone. Without an application for such uses no finding can be made to support the requests. The Council concluded the proposed use would not preserve an asset of particular interest to the city." Record 17-18.

As we stated in *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266 (2000):

> "* * * While findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with such criteria, findings of noncompliance must be sufficient to explain the local government's conclusion that the applicable criteria are not met, and must suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. * * *" 38 Or LUBA at 270 (emphasis omitted.)

Here, neither MZC 8-8.6.1(2)(D) nor the city's findings clearly articulate how petitioners may satisfy the standard and why, precisely, petitioners failed to "preserve assets of particular interest in the community" in this instance. The planning commission concluded that MZC 8-8.6.1(2)(D) was met because the proposed facility "will provide a valuable resource which will help the underpriviledged children within the community and [surrounding] areas." Record 207. The city council's findings indicate general concerns regarding (1) the limited population that will be served by the proposed migrant worker Head Start program; and (2) the potential duplication of services between the Juniper Junction program and the proposed migrant worker Head Start program. The findings also question the nature and duration of uses that will occur on the property during the times of the year that the migrant worker Head Start program is not in operation. The city council decision does not address the planning commission's rationale for concluding MZC 8-8.6.1(2)(D) was met. Nor does the city council decision explain why those general concerns set out in its findings translate into "assets of particular interest in the community" within the meaning of MZC 8-8.6.1(2)(D) that the proposed facility will not preserve. We therefore agree with

petitioners that the city council's findings are inadequate to explain what MZC 8-8.6.1(2)(D) requires, and why petitioners' application fails to satisfy that requirement.

D. Capability to Develop and Use the Land as Proposed

MZC 8-8.6.1(2)(E) requires a demonstration that

> "[T]he applicant has a bona fide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal and is not motivated solely by such purposes as the alteration of property values for speculative purposes."

The city council's finding with respect to MZC 8-8.6.1(2)(E) states:

> "[Petitioners] did not address funding for the proposed project. * * * Diane Treadway testified on behalf of [petitioners] that there were several programs [that] OCDC did not have enough financial resources for. * * *
>
> "Without funding information, the City cannot make a determination of the impact of the proposed facility [on the] surrounding neighborhood or whether the proposed use if constructed would be in compliance with the R-1 zoning. The City of Madras ordinances provide, in addition to the conditional use requirement that the applicant have a bona fide intent and capability to develop and use the land, that:
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> > "'*Agreement and Security.* The developer and owner shall, *as a condition of approval,* execute a development agreement for any improvements required [* * *] and *may be required to file with the City a performance bond or other security* as approved by the City Attorney to assure full performance of the required improvements plus ten percent[.]' [MZC] 8-8.4.9(3)(G) (emphasis added).
>
> "The Council determined this criterion was not addressed based on the information submitted by the applicant." Record 18-19.

Petitioners argue that it provided evidence to the city regarding its funding for the proposed facility and the source of funding for the major program that would be housed there. They argue that the testimony by their employee regarding inadequate resources was taken out of context and does not support the city's conclusion that petitioners do not have

enough funding to support the proposed development.[8] In addition, petitioners argue that MZC 8-8.4.9(3)(G) is a required condition of approval that imposes bonding obligations for financing needed public improvements, and is not an approval criterion. To the extent MZC 8-8.4.9(3)(G) imposes some type of requirement that petitioners demonstrate that they have the financial resources to ensure infrastructure improvements are completed, petitioners contend that they argued below that the amount of potential liability for infrastructure improvements had yet to be determined and therefore it was premature for the city council to draw conclusions as to whether petitioners could afford the infrastructure bonds if such bonding was imposed as a condition of approval. Record 77.

In addition, petitioners argue that the city council ignored substantial, undisputed evidence that petitioners have the financial capability and program experience to ensure the proposed facility would be constructed in accordance with applicable standards and that the programs it would operate in the buildings will be adequately financed. Petitioners argue that one of their representatives testified before the planning commission that the federal government would be providing a majority of the funding for the facility, and would not allow petitioners to use the building for anything other than early childhood development programs. Record 346. That same representative testified that petitioner OCDC is a nonprofit organization that has been in business for approximately 30 years and has extensive experience in providing early childhood educational programming throughout Oregon.

[8] The statement that is apparently relied upon by the city council is a statement made by Diane Treadway in rebuttal to opponents' concerns that the proposed development would evolve into a 24-hour, seven day a week facility. The minutes of the November 7, 2001 planning commission summarize Ms. Treadway's comments as follows:

> "* * * The migrant families that use their program have requested that [OCDC] provide services from 6:00 a.m. until 6:00 p.m. [OCDC] operate[s] Monday through Friday. In some other areas the OCDC does occasionally provide a Saturday program; however it is not in their plans to do so [here]. She does not have enough staff or resources to operate programs six * * * days per week. It was never [OCDC's] intention to operate a 24 hour, seven day a week program. * * *" Record 304.

Record 318. Finally, petitioners argue that they provided evidence that the estimated payroll for the proposed facility amounted to $685,000. Record 460. Petitioners argue that the city has not explained why that evidence is inadequate to satisfy MZC 8-8.6.1(2)(E). Petitioners contend that the only testimony that could be remotely construed to contest petitioners' financial capability was one comment by an opponent who wondered where the funding for the proposed use would come from. Record 342.

The city council's decision does not address the evidence petitioners presented regarding their financial stability and their ability to ensure the development would be constructed and operated as proposed. We agree with petitioners that the city's findings are inadequate to explain what other financial information it needed to be assured that the proposed use satisfies MZC 8-8.6.1(2)(E). We further conclude that the city has not explained why MZC 8-8.6.1(2)(E) imposes a mandatory requirement that petitioners provide a guarantee that they have the wherewithal to provide a bond to underwrite public improvements, when it is not clear that such public improvements are necessary, and the amount of the bond has yet to be established.

E. Excessive Burden on Traffic Flows in the Area

MZC 8-8.6.1(2)(F) requires a demonstration that "[t]he proposal will not place an excessive burden on * * * traffic flows in the area." The city found the proposed facility will serve approximately 100 children and employ 45 persons, with hours of operation from 6 a.m. to 6 p.m., from May through October. As a result, the city found that the proposed use will generate approximately 300 vtd, more than the number of trips generated by single-family residential uses. The city council decision notes that there is some question as to whether one of the points of access to the proposed property would be improved to city standards prior to the completion of the proposed development, and that existing streets currently provide access for the Juniper Junction facility, a nearby hospital, and an assisted living center. The city council also found that because petitioners did not provide a traffic

impact study, petitioners failed to meet their burden of demonstrating that the proposed facility will not create an excessive burden on traffic flows. Record 19.

Petitioners respond that they provided a trip generation study from a reputable transportation planning firm that estimated the number of vtd that will be generated by the proposed facility (214) based on an estimated 100 students and 30 employees.[9] Record 369-71. That study considered existing access via nearby city streets. The study estimated that the peak times for trips in and out of the proposed facility would be between 6 and 7 a.m. and 4 to 5 p.m. The traffic expert estimated that, during those peak times, the proposed use would generate 31 and 34 trips, respectively. Record 371. Relying on national road standards, the expert concluded that the roads serving the subject property are local roads that have a maximum vehicle capacity of 1,200 at any one time. Based on the trip generation analysis, the expert concluded that trips generated by the proposed facility would not degrade existing transportation facilities to unacceptable levels. Record 370. Petitioners argue that the city erred in failing to consider that evidence and by relying on unsubstantiated vtd estimates and general statements by opponents that the proposed use would generate too much traffic. Petitioners also argue that because the city council relied on non-specific statements alleging that the proposed use would create traffic problems and a non-expert's estimate of vtd, and did not address petitioners' evidence regarding traffic impacts, the city's decision is not supported by substantial evidence.

We need not address petitioners' evidentiary argument because we agree with petitioners that the city council findings are inadequate to explain why it believes the proposed use will "place an excessive burden" on traffic. The findings are inadequate because they erroneously state that petitioners failed to submit a traffic impact study and they

[9] The trip generation study assumed 30 employees. The city found, based on a comparison with the neighboring Juniper Junction facility, that the number of employees would total 45.

do not explain why the evidence petitioners supplied with respect to traffic generation is insufficient to address traffic impacts.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city's denial resulted in discrimination against a protected class, namely persons of Hispanic and latino descent, in violation of the 14th Amendment to the U.S. Constitution and Article I, section 20, of the Oregon Constitution. According to petitioners, there is no principled reason why the city approved the Juniper Junction application in 1998, and denied petitioners' application, when the only difference between the programs is the type of clientele that they serve.[10]

Because we have sustained the third assignment of error, which requires a remand, we conclude that it is premature for us to address petitioners' arguments in the fourth assignment of error.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the city denied its application in order to avoid the requirements of ORS 227.178 and, therefore, the subject application must be approved and petitioners are entitled to attorney fees pursuant to ORS 197.835(10).

ORS 197.835(10) provides, in relevant part:

> "(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "* * * * *

[10] In an order dated September 16, 2002, we allowed petitioners' motion to take evidence not in the record pertaining to the approval of the Juniper Junction facility, based on our conclusion that petitioners adequately alleged that the extra-record evidence was necessary to support the arguments set out in the fourth assignment of error. *Oregon Child Development Coalition v. City of Madras*, __ Or LUBA __ (LUBA No. 2002-026, September 16, 2002), slip op 6.

> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS * * * 227.178.
>
> "(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."

In relevant part, ORS 227.178 requires that land use permit decisions be rendered within 120 days of the date an application is deemed complete. ORS 227.178(1). Petitioners argue that the city council rendered a decision denying the application for the purpose of avoiding the 120-day deadline.

Petitioners' argument is without merit. Petitioners concede that the challenged decision was rendered 125 days after the application was deemed to be complete. We cannot see how the city's decision could possibly have been intended avoid the 120-day deadline, when the relevant deadline had already passed.

The fifth assignment of error is denied.

The city's decision is remanded.