BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL SCHEYER,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent,

and

JANE NICHOLS, JIM NICHOLS
and ERIC KOIVISTO,
Intervenors-Respondent.

LUBA No. 2002-051

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Paul Scheyer, Bremerton, Washington, filed the petition for review and argued on his own behalf.

No appearance by City of Hood River.

Steven P. Hultberg, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Perkins Coie, LLP.

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

AFFIRMED 10/01/2002

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

Petitioner appeals a city council decision to approve a bed and breakfast facility within an existing dwelling located in the city's Urban Standard Residential (8,000 square foot lot size) (R-2) zone.

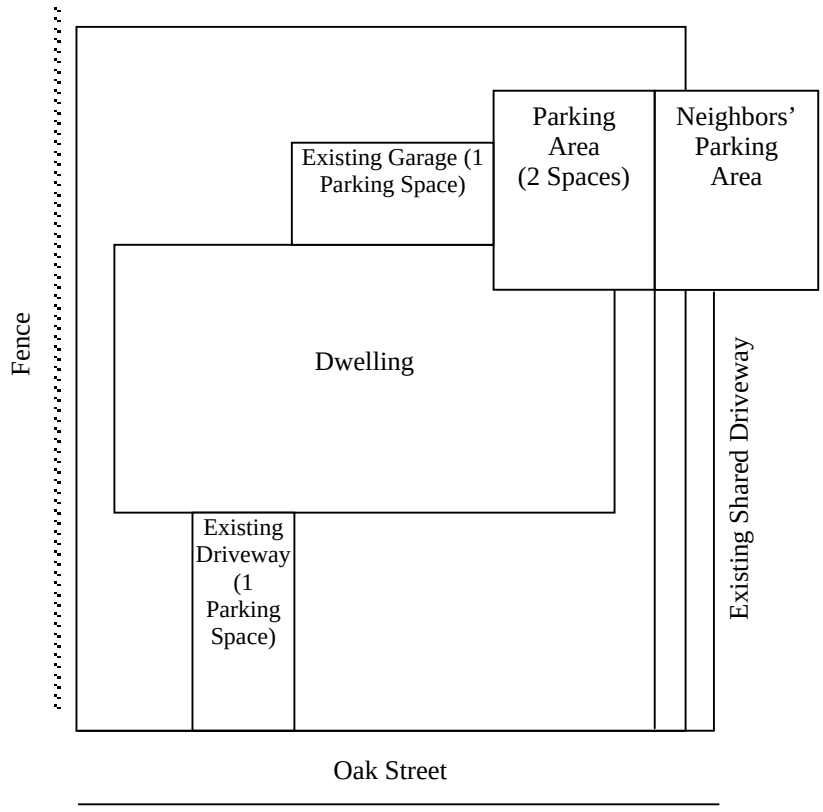
FACTS

The subject property is an 8,000 square foot lot fronting Oak Street in the City of Hood River. Oak Street is also known as State Highway 100. The property is improved with a single-family dwelling, a one-car garage, and a fence. The subject property shares a paved driveway with the adjacent property to the east. Adjacent properties are also zoned R-2.

Intervenors-respondent (intervenors) own the subject property, which is currently being used as a single-family residence. Intervenors applied for a three-bedroom bed and breakfast facility in November 2001, but subsequently withdrew their application and submitted an application for a two-bedroom bed and breakfast facility in December 2001.[1]

No structural changes or remodeling alterations to accommodate the bed and breakfast facility are being proposed for the subject property. Under the Hood River Municipal Code (HRMC), a paved off-street parking space is required for each bed and breakfast guest room. HRMC 17.04.110(B)(3). The paved driveway that intervenors share with the adjoining property to the east leads to a garage and two paved off-street parking spaces behind the existing house. Intervenors propose that one of the off-street parking spaces behind the house be used by guests of the bed and breakfast. A second paved off-street parking space in front of the house, with its own access to Highway 100, will also be used by the bed and breakfast guests. Below is a diagram, not to scale, of the subject property. Below is a diagram, not to scale, of the subject property.

[1] The second application is the subject of this appeal.



Because the subject property is adjacent to a state highway, intervenors met with staff from the Oregon Department of Transportation (ODOT) to discuss whether intervenors needed to apply for and obtain an access permit from ODOT for the proposed bed and breakfast. At the time of the city's decision, ODOT had not yet indicated whether intervenors must obtain an access permit for either the driveway or the single guest parking space.

The city planning director administratively approved intervenors' application on January 9, 2002, subject to conditions, including a condition that intervenors coordinate with ODOT regarding access. Neighboring property owners appealed the planning director's administrative decision to the planning commission. The planning commission heard the appeal *de novo*, denied the appeal and approved the application. Petitioner then appealed the planning commission's decision to the city council. The city council heard the appeal on the record, denied petitioner's appeal and approved the application. This appeal followed.

MOTION TO STRIKE

At oral argument, petitioner presented a written copy of his oral argument testimony to the Board and to intervenors. Petitioner's oral argument was an almost verbatim recitation of the written document. Intervenors objected to the document at oral argument, contending that petitioner improperly raised new issues during oral argument that were not raised in the petition for review. After oral argument, intervenors moved to strike almost half of petitioner's oral argument. In their motion, intervenors argue that the portions of the oral argument transcript they move to strike are unrelated to issues raised in the petition for review or the response brief and, therefore, should not be considered by the Board.

Petitioner responds that, contrary to intervenors' argument, all of the matters petitioner raised in his oral argument presentation were either raised in the petition for review, could be reasonably inferred from the arguments presented in the petition for review, or respond to arguments intervenors made in their response brief. Petitioner further argues that several of the issues amplified in the oral presentation were included in his summary of arguments in the petition for review. Therefore, petitioner argues, all of the matters he discussed in his oral argument should be considered by the Board in reaching a decision.

LUBA may not consider issues that are raised for the first time at oral argument. OAR 661-010-0040(1); *DLCD v. Douglas County*, 28 Or LUBA 242, 252 (1994). Arguments that are fairly presented in the petition for review may be included in petitioner's oral argument. LUBA will consider allegations of error, even if those allegations of error are set out in the summary of arguments contained in the petition for review rather than separately identified as assignments of error, provided those allegations of error are fairly discernable in the petition for review. *Freedom v. City of Ashland*, 37 Or LUBA 123 (1999).

With respect to the portions of the oral argument that petitioner argues can be discerned from the summary of arguments, we disagree that that is the case. Petitioner's summary of arguments outlines petitioner's general objections to the city's decision, and

includes references to certain city code provisions pertaining to the duties of the building official and nonconforming uses, and to ORS 227.175. However, petitioner's brief does nothing more than identify those code and statutory provisions. It does not link those provisions to a particular assignment of error, nor does it provide intervenors or the Board fair notice that those provisions form the basis for petitioner's assignments of error set out later in his brief. Therefore, we will not consider petitioner's arguments pertaining to those matters.

We also agree with intervenors that petitioner raised new issues at oral argument pertaining to: (1) whether the proposed bed and breakfast is an intensification of use which, under the state building code, requires intervenors to bring the subject property into compliance with the building code prior to allowing the new intensified use; (2) compliance with the Americans with Disabilities Act; (3) whether ORS 227.175 requires that certain nonconforming structures that are located on the subject property be brought up to current development standards before the bed and breakfast facility may be approved; (4) violations of specific policies contained within the city's comprehensive plan; and (5) whether the city council's notice of hearing adequately explained what an "on the record" review means. Therefore, we disregard those arguments. We believe the remaining arguments in petitioner's written version of his oral argument are either amplifications of arguments set out in the petition for review or responses to matters raised in the response brief. Therefore, to the extent they are relevant, we will consider those arguments in our opinion.

BACKGROUND

HRMC 17.03.020.A permits both "single-family dwellings" and "bed and breakfast facilities" in the R-2 zone. HRMC 17.03.020.A.1 and 6. However, before a bed and breakfast facility may be established, an application for the facility must be reviewed and approved by the planning director in accordance with standards that apply specifically to bed and

breakfast facilities. HRMC 17.04.110.[2] Chapter 17.09 of the HRMC also establishes generally applicable review procedures for ministerial, administrative, quasi-judicial and legislative actions. HRMC 17.09.100 establishes generally applicable "Criteria for Approval" that apparently apply to applications such as the one at issue in this appeal.[3]

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[2] HRMC 17.04.110 provides, in relevant part:

> "A. Review Procedures.
>
> > "1. Applications. Applications for Bed and Breakfast Permits shall be accompanied by a plot plan drawn to scale indicating the location of existing or proposed structures, number of guests or bedrooms, and location of the required off-street vehicle parking.
> >
> > "2. Review. Where permitted, Bed and Breakfast facilities are permitted outright as accessory uses, and as such shall be processed as administrative actions * * * and approved, approved with conditions, or denied by the [planning director].
>
> "B. Approval Standards:
>
> > "1. The structure shall retain the characteristics of a single-family dwelling.
> >
> > "2. The number of guestrooms shall be limited to five[.] The number of guests shall be limited to ten[.]
> >
> > "3. In addition to required off-street parking for the residential use, one * * * hard surfaced off-street parking space shall be provided for each bed and breakfast guestroom.
> >
> > "* * * * *
> >
> > "6. A bed and breakfast facility shall be subject to approval by the County Health Officer, the City Fire Marshal, and the City Building Official."

[3] HRMC 17.09.100 provides, in relevant part:

> "The burden of proof shall be upon the applicant seeking approval. The more drastic the change or greater the proposal or greater the impact of the proposal in an area, the greater the burden is upon the applicant.
>
> "A. For any application to be approved, it shall be first established that the proposal conforms to the City's Comprehensive Plan, the Zoning Ordinance, the Subdivision Ordinance, and the Oregon Revised Statutes, as applicable."

FIRST ASSIGNMENT OF ERROR

According to petitioner, intervenors' fence and roof eave encroach on property to the west, in violation of HRMC 17.03.020.D.3 and 17.04.050.[4] Petitioner argues that because the proposal must conform to the zoning ordinance under HRMC 17.09.100.A, the request to change the existing single-family use to a bed and breakfast facility cannot be approved. *See* n 3. In addition, petitioner argues that the city improperly relied on the plot plan submitted by intervenors to satisfy HRMC 17.04.110.A.1, which requires the applicant to describe the existing layout of the property and depict the location of the dwelling and parking spaces, because that plot plan does not accurately identify the dwelling and parking space dimensions, nor does it reveal the west fence line encroachment. *See* n 2. As a result, petitioner argues, the city erred in concluding that HRMC 17.04.110.A was satisfied.

Intervenors respond that the city council rejected petitioner's interpretation of HRMC 17.09.100.A to require that the proposed bed and breakfast facility be shown to comply with each and every element of the comprehensive plan and zoning ordinance before it can be approved. Intervenors contend that the city interpreted HRMC 17.09.100.A to mean that the

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[4] HRMC 17.03.020.D provides, in relevant part:

"The minimum setback requirements [in the R-2 zone] shall be as follows:

"* * * * *

"3. Side yard/rear yard.

"a. No structure shall be placed closer than five feet from the side property line.

"* * * * *

"d. [Building p]rojections may not encroach more than three inches for each foot of required yard width."

HRMC 17.04.050 provides, in relevant part:

"Fences and walls * * * are permitted within or on all property lines * * * when vision clearance requirements are met."

applicants need only show compliance with HRMC 17.04.110. In other words, intervenors argue, the city council concluded that the code provisions that regulate the establishment of bed and breakfast facilities are the "applicable" standards of HRMC 17.09.100.A that the application must conform to. Intervenors also argue that HRMC 17.09.100.A applies to "the proposal," which in this case is a proposal to change the *use* of the existing dwelling to allow a bed and breakfast use. We understand intervenors to argue that no change in the existing structure is part of "the proposal." As a result, intervenors contend, even if certain aspects of the dwelling and fence do not conform to the R-2 setback and general fence siting standards, such violations are irrelevant to approval of a bed and breakfast use of the property.

The city council's finding pertaining to HRMC 17.09.100.A states, in relevant part:

> "[HRMC 17.09.100.A.1] is met if the decision maker finds that all applicable approval criteria are met.
>
> "* * * * *
>
> "[Intervenors have] met the burden of proof. * * * Based on the information [intervenors] provided in their application and the analysis [pertaining to HRMC 17.04.110 set forth earlier in the city council's decision] [intervenors meet] the zoning ordinance and applicable comprehensive plan standards. The public health and safety standards have been incorporated into the bed and breakfast review criteria and are addressed under those sections. The Planning Department, Fire Marshal, Building Official and ODOT have reviewed this application and have not found it to create a public health or safety issue." Record 7.

Fairly read, the city council finding interprets HRMC 17.09.100.A.1 to be satisfied if the applicant demonstrates that the criteria set out at HRMC 17.04.110 are met. Other parts of the decision take the position that because the "application does not include any new construction or alterations to the existing structure," any issue concerning whether the existing structure encroaches into the side yard setback or onto the adjoining property to the west is irrelevant. Record 8. Without a more focused argument from petitioner that those interpretations are contrary to some specific provision in the city's comprehensive plan or zoning ordinance, we must defer to those interpretations. ORS 197.829(1)(a) (LUBA must

uphold a governing body's interpretation of its land use regulation unless that interpretation is "inconsistent with the express language of the comprehensive plan or land use regulation"); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992) (city council interpretation will be upheld unless it is "clearly wrong").

Turning to petitioner's argument that the plot plan submitted by intervenors is insufficient to satisfy HRMC 17.04.110.A., the city council determined that in order to approve a bed and breakfast facility, the plot plan submitted in accordance with HRMC 17.04.110.A need only depict those elements that demonstrate that the approval criteria set out in HRMC 17.04.110.B are satisfied.[5] As intervenors argue, the city found that, while the plot plan was not entirely accurate with respect to certain encroachments, those inaccuracies were not relevant, because those encroachments have no effect on whether the proposed bed and breakfast satisfies the criteria set out at HRMC 17.04.110.B. Petitioner has not demonstrated that the city erred in reaching this conclusion.

Finally, as petitioner correctly notes, the city council decision includes a finding that "[t]his house is considered a legal nonconforming structure." *See* n 5. HRMC 17.05.030 provides that nonconforming structures that were "allowed when established," may be continued. We agree with petitioner that to the extent that finding can be read to conclude that the alleged fence and building encroachments were "allowed when established," that finding is not supported by substantial evidence in the record. However, we also agree with intervenors that even if the city intended to adopt such a finding, it was an alternative to its interpretation that "the proposal" is limited to the change in use and that HRMC 17.04.110.B

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[5] The city council's findings state, in relevant part:

> "It is the City staff's responsibility to accept complete plans from the applicant for review of applications based on what is being applied for. * * * The applicant has submitted a plot plan to scale that the City has found appropriate for review of a Bed and Breakfast application. Finally, whether or not a portion of the structure extends over the property line and the side of the side yard [is] not relevant to these proceedings. This house is considered a legal nonconforming structure." Record 8.

provides the relevant zoning ordinance criteria under the general burden of proof that is imposed by HRMC 17.09.100(A).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred in failing to conclude that the proposed bed and breakfast facility will result in a "change of use," as that term is described in HRMC 17.01.060.[6] According to petitioner, the city used the definition of "change of use" as that term is described in the Uniform Building Code to conclude that the proposed bed and breakfast facility is not a change of use.[7] Petitioner argues that the conversion of the subject property from a single-family dwelling to a bed and breakfast facility will result in an increase in the number of required parking spaces, and will change the use of the structure from strictly residential use to a commercial use. Petitioner argues that because the approval of a bed and breakfast facility will result in a change of use, it cannot be approved, because changes in use are listed as permitted "uses" only in the city's commercial and industrial zones.

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[6] HRMC 17.01.060 defines "Change of Use" as:

> "[A]ny use that substantially differs from the previous use of a building, structure, or land. Factors to consider when identifying a change of use include the effects on parking, drainage, circulation, landscaping, building arrangements, and nuisance factors including, but not limited to, traffic, lighting and noise."

[7] The 1997 Uniform Building Code, Section 3405, describes the circumstances where the building official may approve an occupancy permit. It provides, in relevant part:

> "No change shall be made in the character of the occupancies or use of any building that would place the building in a different division of the same group of occupancy or in a different group of occupancies, unless such building is made to comply with the requirements of this code for such division or group of occupancy. * * * No change in the character of occupancy of a building shall be made without a certificate of occupancy, as required in * * * this code. * * * Unless additions or alterations are made to the building or facility, change in use or occupancy alone shall not require compliance with the provisions of Chapter 11, Accessibility."

To the extent we understand petitioner's second assignment of error, it is based entirely on an erroneous interpretation of the HRMC. As just noted, HRMC 17.01.060 specifically defines "change of use." *See* n 6. Petitioner appears to believe that because certain zones specifically include "change of use" in the list of permitted uses in those zones, and the R-2 zone does not list "change of use" as a permitted use in the R-2 zone, the city may not approve the disputed request to change the existing single-family use to a bed and breakfast use, even though both of those uses are permitted uses in the R-2 zone. Several city commercial and industrial zones establish two categories of permitted uses; one category is subject to "site plan review" and one is not.[8] The listing of "change of use" as a "Permitted Use Subject to Site Plan Review" in those zones is to make it clear that if a permitted use that is subject to site plan review subsequently is changed, the original site review cannot be relied on and the "change of use" is subject to site review. Similarly, under HRMC

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[8] For example, HRMC 17.03.040 lists the following permitted uses in the Office/Residential Zone:

"A. Permitted Uses Subject to Site Plan Review:

"1. Professional Offices

"2. Change of use

"3. Parking lots of 4 or more spaces * * *

"4. Multi-family dwellings

"5. Group Residential, if 15 or more persons

"6. Transportation Facilities * * *

"B. Permitted Uses Not Subject to Site Plan Review"

"1. Single-family dwellings and accessory structures

"2. Townhouse projects

"3. Duplexes and triplexes

"* * * * *"

17.03.020, certain parking requirements are triggered by a "change of use."[9] The fact that "change of use" is not specifically listed as a permitted use or conditional use in the R-2 zone does not mean the city cannot approve a change in use from one permitted use to another. Viewed in context, the city simply regulates changes in permitted uses in certain circumstances and does not regulate changes in permitted uses in other circumstances. The city's failure to list "change of use" among the permitted uses in the R-2 zone simply does not have the legal effect that petitioner assumes it does.

Petitioner's arguments under the second assignment of error provide no basis for reversal or remand. Accordingly, the second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

According to petitioner, intervenors are required to obtain two access permits from ODOT in order to use the parking spaces they have allocated for guests. Petitioner argues that there is no evidence in the record to support the city's conclusion that intervenors have applied for the requisite access permits from ODOT.

Intervenors respond that petitioner fails to explain why the lack of an access permit from ODOT requires reversal or remand. Intervenors argue that no HRMC approval criterion

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[9] As relevant, certain parking requirements apply in the R-2 zone under HRMC 17.03.020(F):

"Parking Regulations:

"1. Each dwelling unit shall be provided with at least two parking spaces on the building site, one of which may be in the required front yard setback area.

"* * * * *

"3. All parking areas and driveways shall be hard surfaced prior to occupancy, under the following circumstances:

"a. New Construction

"b. Change of use

"c. New or expanded parking area[.]"

requires that they obtain an access permit from ODOT or apply for an access permit before the disputed application can be approved. Intervenors contend that to the extent access permits may be required pursuant to regulations other than the city code, there is evidence in the record that they are working with ODOT to obtain them. Finally, intervenors argue that the city imposed a condition of approval that requires intervenors to coordinate with ODOT regarding the access permits and that the condition of approval is sufficient to ensure that access permits are obtained if necessary.

We agree with intervenors. HRMC 17.04.110.B.3 requires that two hard surface parking spaces be available for the guests of the bed and breakfast. The city found that two parking spaces will be made available to the guests. To the extent an access permit is required, ODOT is the entity that imposes that requirement, and the city's condition of approval that notifies intervenors of the obligation to coordinate with ODOT is sufficient to inform intervenors of that requirement.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As noted above, the subject property shares a driveway with an adjacent lot. The parking areas at the rear of the two lots lie across the driveway from each other. As proposed, the two parking spaces on the adjoining property are located directly across the driveway from the three parking spaces that will be used by intervenors and their bed and breakfast guests. Petitioner argues that the proposed parking arrangement will result in a "parking lot" as that term is defined in HRMC 17.04.060. As such, petitioner argues, intervenors must improve the lot to parking lot specifications, including larger parking spaces, a turnaround area and an access aisle.[10] Petitioner argues that the garage parking space cannot be used to

[10] HRMC 17.04.060 provides, in relevant part:

> "A parking lot, whether an accessory or principal use, intended for the parking of four (4) or more automobiles or trucks shall comply with the following stipulations:

comply with the parking standards, because the required parking space size is 18 feet by 9 feet, and intervenors' garage is only 17 feet long.[11]

The city's findings state, in relevant part:

> "[The proposed bed and breakfast facility] is required to have four off-street parking spaces. The applicants have proposed that one of the guest parking spaces be located off Oak Street and the other guest parking space be located in the north part of the adjacent parking area. The two residential parking spaces will be located in the garage and * * * in front of the garage area. This parking configuration does not create a parking lot * * *. The fact that the proposed B & B facility shares access with its neighbor and that the parking areas of the two residences are contiguous does not turn the parking area for the proposed use into a parking lot. Therefore, [HRMC] 17.04.060 does not apply." Record 27.

The city council interpreted HRMC 17.04.060 not to apply in the circumstances described in this appeal. While petitioner's interpretation is certainly possible, the standard of review we apply is whether the city council's interpretation is clearly wrong. It is not. Therefore, we defer to it.

The fourth assignment of error is denied.

> "A. Areas used for standing or maneuvering of vehicles shall have hard surfaces maintained adequately for all-weather use and be so designed as to avoid flow of water across sidewalks.
>
> "B. Access aisles shall be of sufficient width for all vehicular turning and maneuvering.
>
> "C. Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provided maximum safety of traffic access, and the maximum safety of pedestrians and vehicular traffic on the site."

Petitioner also argues that OAR chapter 734, division 51, the regulations governing access to state highways, requires that the parking area must include parking and access aisles for six vehicles.

[11] Intervenors argue that petitioner waived the issues of (1) garage space and (2) compliance with OAR chapter 734, division 51, by not raising those issues below. The pages in the record that petitioner cites to to support his argument that the issues are not waived address compliance with OAR chapter 734, division 51, but do not identify inadequate garage space. Therefore, the issue of whether the garage space can be counted as a parking space has been waived. ORS 197.763(1); ORS 197.835(3).

FIFTH ASSIGNMENT OF ERROR

The city processed the subject application as an administrative decision, subject to a *de novo* review by the planning commission. HRMC 17.09.030.B. HRMC 17.09.030.K provides that administrative decisions may be appealed to the planning commission, and that planning commission decisions on appeal may be further appealed to the city council. The city's appeal procedures, set out at HRMC 17.09.070.G.2, provide:

> "The [planning] commission or [city] council shall make findings and conclusions, and make a decision based on the hearing record, except in cases of appeals of administrative actions, which shall be heard *de novo*."

The city council appeal hearing was based on the planning commission record and was not a *de novo* hearing. Petitioner argues that HRMC 17.09.070.G.2 requires that *both* the planning commission and city council hearings be *de novo*. Petitioner argues that the hearings must be *de novo* for two reasons: (1) ORS 197.763 requires that the city provide two evidentiary hearings before rendering a land use decision; and (2) the city has no process for making a decision on the record. Petitioner argues that because the city council did not hold a *de novo* hearing, he was unable to present evidence to support his arguments that the bed and breakfast application should be denied.

Intervenors respond that the city properly followed its local procedures for reviewing administrative actions. According to intervenors, the only decisions that may be heard *de novo* on appeal are administrative actions. In the City of Hood River, the planning commission is the designated body for hearing appeals of administrative actions. Therefore, intervenors argue, only the planning commission hearing must be *de novo.* According to intervenor, an appeal of the planning commission's decision is, under the city code, a quasi-judicial matter that is subject to the general requirement for on-the-record review by the city council. Intervenors argue that the city implicitly interpreted its code to provide for only one level of *de novo* review and that the implicit interpretation is subject to deference.

We need not decide whether the city's process in this case resulted in an implicit interpretation of its code to require only one *de novo* review, because we agree with intervenors that petitioner has not demonstrated that he is entitled to a *de novo* review before the city council. The city code is relatively clear that the majority of local appeals are considered on the record. HRMC 17.09.070.G.2 provides that only appeals of administrative actions, which are not subject to a prior evidentiary hearing, are heard *de novo*. HRMC 17.09.060 provides the process to be used to render quasi-judicial decisions, including appeals of administrative actions by the planning director. HRMC 17.09.060.A.1. The hearings process set out in HRMC 17.09.060 mirrors the requirements for quasi-judicial hearings found in ORS 197.763. ORS 197.763 does not require two evidentiary hearings. The city's process for a single *de novo* hearing before the planning commission implements ORS 197.763, and that procedure was followed by the city planning commission in this case.[12]

The requirements for a local appeal of a quasi-judicial decision are considerably more flexible. *See* ORS 227.180 (setting out the minimum requirements for review of a permit decision). ORS 227.180 does not require that the city council hold a *de novo* hearing on appeal of a land use decision after a *de novo* hearing by the planning commission. Because petitioner has not demonstrated that the city erred in limiting the appeal to the evidentiary record compiled by the planning commission, the city's failure to provide a second *de novo* hearing does not provide a basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error contains one paragraph, which states:

[12] It is also consistent with ORS 227.175(10)(a)(D), which requires that an appeal of an administrative decision made without a prior hearing must include a *de novo* hearing.

> "There is nothing in the whole record to indicate petitioner had a right to appeal the B & B administrative decision to LUBA except for the final City Council decision notice. HRMC 17.09.030.K * * * does not mention appeal to LUBA. This error prejudiced the substantial rights of the petitioner under the ['raise it or waive it'] doctrine applied to LUBA appeals. The decision should be remanded." Petition for Review 9.

We understand petitioner to argue that the city's notices of appeal are legally inadequate because only the city's council's decision contained the notice that petitioner had the right to appeal to LUBA. We also understand petitioner to argue that the city's failure to notify him of this right, and of his obligation to raise issues before the city to avoid waiving those issues on appeal to LUBA, prejudiced his substantial rights.

The sixth assignment of error provides no basis for reversal or remand. The planning commission's hearing notice informed petitioner that he was obligated to

> "present oral or written testimony at the public hearing. Failure to raise an issue at the hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the Planning Commission an opportunity to respond to the issue precludes appeal of their decision based on that issue." Record 90.

The city council hearing notice provided the same warning. Record 51.

To the extent petitioner is arguing that all city notices must provide an overview of local appeal procedures and how those procedures may affect an appeal to LUBA, we reject that argument. The notices provided by the city comply with the requirements of ORS 197.763 and the city's own code and were sufficient to apprise petitioner that he was obligated to raise issues regarding compliance with applicable criteria at the earliest opportunity.

Similarly, we agree with intervenors that to the extent petitioner argues that he was entitled to a direct appeal of the planning director's administrative action to LUBA, he is mistaken. ORS 197.825(2)(a) provides that the jurisdiction of LUBA is limited "to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review." In this case, all local remedies were not exhausted until the city council

rendered its decision. Therefore, the city's notices provided the correct information regarding when and whether petitioner could bring an appeal at LUBA.

The sixth assignment of error is denied.

The city's decision is affirmed.