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

HORIZON CONSTRUCTION, INC., an)
Oregon corporation, RICH RACETTE,)
and WALT RACETTE,)
Petitioners,) LUBA No. 92-002
vs.) FINAL OPINION
CITY OF NEWBERG,) AND ORDER
Respondent.)

Appeal from City of Newberg.

Wallace W. Lien, Salem, filed a petition for review and argued on behalf of petitioner Horizon Construction, Inc.

Michael G. Gunn, Newberg, filed a petition for review and argued on behalf of petitioners Racette.

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

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

AFFIRMED 04/21/92

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

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

5 **FACTS**

6 The subject property is a vacant 5.64 acre parcel owned
7 by petitioners Racette. The property is designated Mixed
8 Use on the Newberg Comprehensive Plan Map.¹ The subject
9 property is zoned Community Commercial (C-2). Approximately
10 one-third of the parcel is within the Approach Surface of
11 Sportsman Airpark, and is subject to the Airport Overlay
12 (AO) zone.

13 The land adjoining the subject parcel to the west,
14 north and east is also vacant and zoned C-2. One parcel
15 adjoining the subject parcel to the south is zoned Light
16 Industrial (M-2) and contains two industrial businesses.
17 The other parcel adjoining the subject parcel to the south
18 is zoned Medium Density Residential (R-2) and contains a
19 mobile home park. Record 203.

¹The plan states:

"The objective of [the Mixed Use] designation is to provide a compatible mixture of commercial, office, employment and high density residential uses. * * *

"[T]his designation provides flexibility and recognizes that certain commercial, residential and industrial activities can be located together without conflicts. Proposals for the mixed use area shall be consistent with the availability of services and should not adversely impact existing or potential development of adjacent lands." Plan, p. 42.

1 On September 27, 1991, petitioners applied for a
2 conditional use permit for development of the proposed 108
3 unit apartment complex on the subject parcel.² The site
4 plan accompanying the conditional use permit application
5 indicates the proposed dwelling units would be located on
6 the periphery of the parcel, with parking areas in the
7 center. A chain link fence is proposed along the east,
8 south and west property lines and a wrought iron fence along
9 Hayes Street to the north. After a public hearing, the
10 planning commission approved the conditional use permit,
11 with conditions. The planning commission's decision was
12 appealed to the city council. The city council conducted a
13 public hearing on December 2, 1991, and left the record open
14 until December 9, 1991 for submission of additional written
15 material. On December 16, 1991, the city manager, city
16 public works director, city planning director, president of
17 petitioner Horizon Construction, Inc. and petitioners
18 Racette's attorney met to discuss the proposal.³

19 At the beginning of the December 17, 1991 city council
20 deliberation on the subject application, a council member
21 disclosed that he had an ex parte contact concerning the
22 application approximately two months before. Also, the city

²Petitioners' original application was for a 112 unit apartment complex. However, petitioners modified the application to 108 units prior to the hearing before the planning commission.

³What exactly transpired at this meeting is a matter of dispute between the parties, as discussed under the second assignment of error, infra.

1 manager described the December 16, 1991 meeting between the
2 city's and petitioners' representatives. Petitioners
3 Racette's attorney objected to the city manager's
4 characterization of the meeting. The city attorney read the
5 city council a letter by petitioners Racette's attorney,
6 dated December 16, 1991. Record 5-6. After further
7 deliberations, the city council adopted a resolution
8 granting the appeal of the planning commission's decision
9 and denying the subject conditional use permit application.
10 This appeal followed.

11 **SECOND ASSIGNMENT OF ERROR**

12 "Respondent committed procedural error in allowing
13 untimely ex parte contact disclosure without
14 opportunity to rebut, and considered new evidence
15 which was not in the record in making its
16 decision."

17 **A. Disclosure of Ex Parte Contact**

18 ORS 197.835(10) provides in relevant part:

19 "The board may reverse or remand a land use
20 decision under review due to ex parte contacts or
21 bias resulting from ex parte contacts with a
22 member of the decision-making body, only if the
23 member of the decision-making body did not comply
24 with * * * ORS 227.180(3) * * *."

25 ORS 227.180(3) provides:

26 "No decision or action of a planning commission or
27 city governing body shall be invalid due to ex
28 parte contact or bias resulting from ex parte
29 contact with a member of the decision-making body,
30 if the member of the decision-making body
31 receiving the contact:

32 "(a) Places on the record the substance of any

1 written or oral ex parte communications
2 concerning the decision or action; and

3 "(b) Has a public announcement of the content of
4 the communication and of the parties' right
5 to rebut the substance of the communication
6 made at the first hearing following the
7 communication where action will be considered
8 or taken on the subject to which the
9 communication related." (Emphasis added.)

10 Petitioners contend a council member's disclosure, at
11 the beginning of the city council's December 17, 1991
12 deliberation, of an ex parte contact that had occurred some
13 two months previously violates the above-emphasized
14 requirement of ORS 227.180(3)(b). Petitioners argue their
15 substantial rights were prejudiced by this error because the
16 disclosure took place after the close of the public hearing,
17 when there was no opportunity for rebuttal testimony by
18 petitioners. Petitioners further argue the facts of this
19 case are identical to those in Angel v. City of Portland,
20 ___ Or LUBA ___ (LUBA No. 90-108, March 6, 1991), where this
21 Board remanded the challenged decision because ex parte
22 communications were disclosed for the first time during city
23 council deliberations and no opportunity for rebuttal was
24 provided.

25 The delay in disclosing the ex parte contact and
26 failure to make an announcement of the right to rebut the
27 substance of the ex parte communication are at most
28 procedural errors. See Walker v. City of Beaverton, 18
29 Or LUBA 712, 729 (1990). This Board has frequently held

1 that where a party has the opportunity to object to a
2 procedural error before the local government, but fails to
3 do so, that error cannot be assigned as a basis for reversal
4 or remand of the local government's decision in an appeal to
5 LUBA. Torgeson v. City of Canby, 19 Or LUBA 511, 519
6 (1990); Miller v. City of Ashland, 17 Or LUBA 147, 153
7 (1988); Meyer v. City of Portland, 7 Or LUBA 184, 190
8 (1983), aff'd 67 Or App 274, rev den 297 Or 82 (1984); Dobaj
9 v. City of Beaverton, 1 Or LUBA 237, 241 (1980).

10 In addition, we have previously held that where
11 petitioners are present at a local government meeting where
12 an alleged procedural error occurred, an objection must be
13 entered to preserve the right to raise that procedural error
14 in an appeal to this Board. Further, a petitioner is not
15 excused from entering an objection to the procedural error
16 on the ground that the local evidentiary record had
17 previously been closed and there was no scheduled
18 opportunity for public input at the meeting in question.
19 Schellenberg v. Polk County, ___ Or LUBA ___ (LUBA No.
20 91-018, August 2, 1991), slip op 26. It is in this respect
21 that the facts of this case differ significantly from those
22 in Angel, supra. There was no dispute that the petitioner
23 in Angel made known to the city council, prior to its
24 adoption of a final decision, his objections to the lack of
25 opportunity to rebut the ex parte contacts disclosed during
26 the city council deliberations. Id., slip op at 8.

1 Here, there is no dispute that petitioners were present
2 at the December 17, 1992 meeting when the disclosure took
3 place, but failed to object to the timing of the disclosure
4 or to the lack of opportunity for rebuttal. Accordingly,
5 petitioners may not assign these alleged procedural errors
6 as a basis for reversal or remand of the challenged
7 decision.

8 This subassignment of error is denied.

9 **B. Consideration of New Evidence**

10 Petitioners argue the evidentiary record was closed on
11 December 9, 1991. Petitioners contend the oral summary of
12 what transpired at the December 16, 1991 meeting between
13 city staff members and petitioners' representatives, given
14 to the city council at its December 17, 1991 meeting by the
15 city manager, constituted new evidence. According to
16 petitioners, their substantial rights were prejudiced
17 because they were not given an opportunity to rebut that new
18 evidence. Specifically, petitioners argue that the city
19 manager made inaccurate and incomplete statements with
20 regard to their willingness to abide by certain proposed
21 conditions of approval, an issue petitioners contend is
22 material to the city council's decision to deny their
23 application.

24 The city contends petitioners were not denied an
25 opportunity to rebut the city manager's statements
26 concerning what occurred at the December 16, 1991 meeting.

1 The city argues that petitioners Racette's attorney, who was
2 present at the December 16, 1991 meeting, requested that
3 certain information about the meeting contained in a letter
4 dated December 16, 1991 be related to the city council.
5 According to the city:

6 "When the counsel for the Petitioners objected to
7 the characterization of the meeting by the City
8 Manager, the City Attorney consulted with him and
9 inquired whether reading his letter into the
10 record would satisfy his objection. He indicated
11 that it would and that letter was read [to the
12 city council]." Respondent's Brief 19.

13 The city further argues petitioners' agreement that reading
14 the letter satisfied their objections to the city manager's
15 description of the December 16, 1991 meeting is reflected on
16 the videotapes in the record of the December 17, 1991 city
17 council meeting and in the minutes of the December 17, 1991
18 city council meeting.

19 The December 16, 1991 letter by petitioners Racette's
20 attorney, which was read to the city council, states:

21 "This letter will confirm during the meeting which
22 was held this morning that the applicant, Horizon
23 Construction, had offered to make certain
24 concessions regarding the setback of the proposed
25 development on the east and west property line[s].
26 The property owners believe in all fairness to all
27 parties that the staff should inform the City
28 Council of these concessions willing to be made by
29 the applicant. * * *" Respondent's Brief, App. A.

30 Based on the above quoted letter, the minutes of the
31 December 17, 1991 city council meeting at Record 5-6 and the
32 videotape of the relevant portion of the December 17, 1991

1 city council meeting,⁴ it is clear that petitioners objected
2 to the accuracy or completeness of the city manager's
3 description of the December 16, 1991 meeting between city
4 staff and petitioners' representatives. It is also clear
5 that petitioners' letter regarding the December 16, 1991
6 meeting, indicating that petitioners were willing to make
7 certain concessions, was read into the record. Whether
8 petitioners indicated that reading the letter satisfied
9 their objections to the city manager's description of the
10 December 16, 1991 meeting is not clear from the minutes or
11 videotape. However, it is certain that once the letter was
12 read, petitioners made no further request for additional
13 rebuttal. In these circumstances, we agree with the city
14 that it provided an adequate opportunity to rebut the city
15 manager's statements by allowing petitioners' letter to be
16 read into the record.

17 This subassignment of error is denied.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 "Respondent improperly interpreted its scope of
21 review on this appeal, and the approval criteria
22 in denying the conditional use application."

23 **FOURTH ASSIGNMENT OF ERROR**

24 "Respondent's findings are inadequate to justify
25 and support the decision reached."

⁴Petitioners showed the videotape of the relevant portion of the city council meeting as part of their oral argument.

1 **FIFTH ASSIGNMENT OF ERROR**

2 "Respondent's decision is not supported by
3 substantial evidence in the record."

4 City of Newberg Zoning Ordinance (NZO) 638 establishes
5 three approval criteria for conditional use permits. In
6 these assignments of error, petitioners challenge (1) the
7 city's interpretation of each criterion, (2) the adequacy of
8 the city's findings to establish noncompliance with each
9 criterion, and (3) the evidentiary support for the city's
10 determinations of noncompliance with each criterion. In
11 addition, petitioners contend the city council applied an
12 improper scope of review when reviewing the planning
13 commission's decision to approve the subject application.

14 **A. Scope of Review**

15 Petitioners contend the city council improperly failed
16 to limit its scope of review to issues specified in the
17 notice of appeal of the planning commission decision.
18 Petitioners rely upon language in NZO 652 (Action on Appeal
19 by City Council) which (1) states that a public hearing will
20 be held "on the appeal," (2) requires a planning commission
21 report on "the basis for the appeal," and (3) provides that
22 written statements regarding the adequacy of the record
23 "relative to the issues raised by the appeal" may be filed.
24 Petitioners also contend that under NZO 652, the city
25 council may not substitute its judgment on factual issues
26 for that of the planning commission. Petitioners rely on
27 NZO 652 provisions requiring that before the city council

1 grants an appeal, it must adopt findings explaining how the
2 planning commission erred.

3 NZO 652 does not specifically provide the city
4 council's review is limited to the issues specified in a
5 notice of appeal.⁵ Rather, NZO 652 provides as follows:

6 " * * * The [City] Council may, by resolution,
7 affirm, reverse or modify in whole or in part, any
8 decision, determination or requirement of the
9 planning commission. Before granting any appeal,
10 or before changing any of the conditions imposed
11 in the [conditional] use permit granted by the
12 planning commission the city council shall make
13 findings of fact, setting forth wherein the
14 planning commission's findings were in error.
15 * * *" (Emphasis added.)

16 The above emphasized language allows the city council to
17 address any aspect of the planning commission decision. We
18 therefore agree with the city that NZO 652 does not limit
19 the city council's scope of review to issues raised in the
20 notice of appeal of a planning commission decision.

21 Furthermore, we see nothing in NZO 652 to prevent the
22 city council from substituting its judgment on issues of
23 fact for that of the planning commission. NZO 652 requires
24 that a public hearing be held before the city council. New
25 evidence, not previously considered by the planning
26 commission, may be submitted at such hearing for the city

⁵For examples of code language which does specifically state that a local governing body's scope of review is so limited, see Smith v. Douglas County, 16 Or LUBA 731, 735, rev'd on other grounds 93 Or App 503 (1988), aff'd 308 Or 191 (1989), and Cusma v. City of Oregon City, 16 Or LUBA 473, 476 (1988).

1 council's consideration. The fact that NZO 652 requires the
2 city council to adopt findings explaining why "the planning
3 commission's findings were in error" does not alter this
4 conclusion. Findings must state what the decision maker
5 believes to be true. Sunnyside Neighborhood v. Clackamas
6 Co. Comm., 280 Or 3, 21, 569 P2d 1063 (1977); Eckis v. Linn
7 County, 19 Or LUBA 15, 22 (1990). If the city council
8 relies on evidence different from that relied on by the
9 planning commission, the city council could simply find that
10 the planning commission's findings were "in error" because
11 the planning commission relied on evidence other than that
12 relied on by the city council.

13 This subassignment of error is denied.

14 **B. Compatibility and Impacts**

15 NZO 638.1 establishes the following approval criterion
16 for conditional use permits:

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

29 **1. Interpretation**

30 Petitioners argue that in view of the language
31 emphasized in the quote above, NZO 638.1 is properly

1 interpreted to require the city to impose conditions on a
2 proposed development that would, or could, remedy perceived
3 compatibility problems. In other words, according to
4 petitioners, the city is authorized to deny a proposed
5 development for noncompliance with NZO 638.1 only if "no
6 conceivable conditions of approval [could] resolve the
7 problems." Petition for Review 29.

8 In Simonson v. Marion County, ___ Or LUBA ___ (LUBA
9 No. 90-171, June 21, 1991), slip op 15, we stated:

10 "[W]e see no reason why conditional uses could not
11 be treated under [a local] code as uses permitted
12 outright which must be approved, subject only to
13 the local government's authority to impose
14 conditions to modify the proposal to achieve
15 particular planning objectives specified in the
16 code. See Anderson v. Peden, 284 Or 313, 318, 587
17 P2d 59 (1978); Coffee v. City of North Bend, 17 Or
18 LUBA 527, 530-36 (1989). * * *

19 However, we do not agree with petitioners that the NZO
20 requires the city to approve conditional use permit
21 applications where conditions could be imposed to ensure the
22 proposal's compliance with applicable approval standards.
23 The "Description and Purpose" section of the NZO's
24 conditional use permit chapter concludes as follows:

25 "* * * The purpose of review shall be to determine
26 that the characteristics of any such [proposed
27 conditional] use shall be reasonably compatible
28 with the type of uses permitted in surrounding
29 areas, and for the further purpose of stipulating
30 such conditions as may be reasonable so that the
31 basic purposes of the ordinance shall be served.
32 Nothing construed herein shall be deemed to
33 require the [city] to grant a Conditional Use
34 Permit." (Emphasis added.) NZO 632.

1 Read together, NZO 632 and 638.1 are reasonably interpreted
2 to authorize the city to rely upon reasonable conditions in
3 finding compliance with the approval standard imposed by
4 NZO 638.1, but not to require that such conditions be
5 imposed.

6 In Simonson, supra, slip op at 16, we further stated:

7 "Where a local government imposes standards that
8 must be met to obtain approval of permits, the
9 local government must find that those standards
10 are met before granting approval. If the permit
11 applicant fails to demonstrate that applicable
12 approval standards are met, the local government
13 must deny the application. Of course, a local
14 government also may, in an appropriate
15 circumstance, impose conditions and rely on those
16 conditions in determining that the application, as
17 conditioned, meets the applicable approval
18 standards. Lousignont v. Union County, [16
19 Or LUBA 272, 278 (1987)]; Sigurdson v. Marion
20 County, 9 Or LUBA 163, 170 (1983); Margulis v.
21 City of Portland, [4 Or LUBA 89, 98 (1981)].
22 However, we are aware of no general requirement
23 that a local government must apply conditions to
24 modify a proposal for conditional use approval so
25 that it meets applicable standards. See Byrnes v.
26 City of Hillsboro, 101 Or App 307, 790 P2d 552,
27 adhered to 104 Or App 95 (1990). * * *"
28 (Footnotes omitted.)

29 Consequently, we agree with the city that if it properly
30 determines the development, as proposed, does not comply
31 with NZO 638.1, it may deny the subject application.

32 This subassignment of error is denied.

33 **2. Findings**

34 The challenged decision concludes:

35 "[T]he development should be denied based on the
36 fact that buffers will not be provided between the

1 development and adjoining commercial/industrial
2 development. * * *" Record 20.

3 The findings of noncompliance with NZO 638.1, as relevant to
4 the above quoted conclusion, provide:

5 "The location, size, design, and operating
6 characteristics of the proposed development are
7 not reasonably compatible with abutting properties
8 and surrounding development as follows:

- 9 1. Harmony in scale, bulk, coverage, density,
10 and other factors

11 "The proposed use does not offer adequate
12 setbacks to surrounding properties to assure
13 that the residential uses will be compatible
14 with future commercial and industrial
15 development in the area. The surrounding
16 area represents one of a limited number of
17 vacant commercially zoned areas in the City.
18 The development of this site for residential
19 purposes will have a negative impact on the
20 proper commercial development of the
21 surrounding area by creating the opportunity
22 for future noise, odor, lighting, and other
23 nuisance complaints by residents of the
24 apartment complex. To reduce this potential
25 for nuisance complaints, substantial buffers
26 should be provided on the subject property.
27 The applicants propose only minimal
28 separation and protection by way of a chain
29 link fence to separate the uses at the side
30 yards. Based on the yard requirement of the
31 zoning ordinance, adjoining properties may
32 build to the side yard property line. Based
33 on the close proximity between residential
34 and future commercial or industrial uses
35 there exists a strong possibility of land use
36 conflicts given the lack of adequate
37 buffers."

38 * * * * * Record 17-18.

39 Petitioners' challenge to the city's findings of
40 noncompliance with NZO 638.1 is as follows:

1 "* * * The majority of the language involves
2 speculation, guesswork, and general conclusions
3 that are not based on adequately stated findings
4 of fact. The alleged findings are drafted in
5 terms of opinions, and simply are not sufficiently
6 adequate to specify with any particularity
7 whatsoever why the City was taking the action it
8 did." Petition for Review 38.

9 We understand petitioners to contend the city's findings do
10 not adequately state the basis for its determination that
11 the proposed development does not comply with NZO 638.1.

12 We disagree. The findings adequately explain that the
13 city believes the proposed development is not reasonably
14 compatible with the future appropriate development of
15 abutting vacant properties for commercial and industrial
16 uses. The findings further explain that under the NZO,
17 commercial and industrial uses on abutting properties to the
18 east and west will be able to build to the subject
19 property's boundaries. The findings state the subject
20 application proposes only minimal separation and buffering
21 from the properties to the east and west, and the proposed
22 development will create "the opportunity for future noise,
23 odor, lighting, and other nuisance complaints by residents
24 of the apartment complex." This adequately explains the
25 city's rationale for concluding the proposed use is not
26 reasonably compatible with the appropriate development of
27 abutting properties.

28 This subassignment of error is denied.

1 **3. Evidentiary Support**

2 Petitioners contend the city's determination of
3 noncompliance with NZO 638.1 is not supported by substantial
4 evidence in the whole record.

5 Petitioners bear a heavy burden. In challenging the
6 city's determination of noncompliance with NZO 638.1 on
7 evidentiary grounds, it is not sufficient for petitioners to
8 show there is substantial evidence in the record to support
9 their position. Rather, the "evidence must be such that a
10 reasonable trier of fact could only say petitioners'
11 evidence should be believed." Morley v. Marion County, 16
12 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA
13 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42,
14 46 (1982). In other words, petitioners must demonstrate
15 that they sustained their burden of proof of compliance with
16 the applicable standard as a matter of law. Jurgenson v.
17 Union County Court, 42 Or App 505, 600 P2d 1241 (1979);
18 Consolidated Rock Products v. Clackamas County, 17 Or LUBA
19 609, 619 (1989).

20 We have reviewed the evidence in the record cited by
21 the parties.⁶ Record 98, 182-91, 199-209. There is
22 conflicting evidence concerning whether the proposed

⁶The parties rely entirely upon arguments presented elsewhere in their briefs regarding the evidentiary support for the city findings setting out why the planning commission's findings on fencing harmony and buffers were in error. Petition for Review 46; Respondent's Brief 33. We therefore consider here the evidence cited by the parties in these other sections of their briefs.

1 development would be compatible with future commercial and
2 industrial development of abutting, currently vacant C-2
3 zoned properties. In these circumstances, we cannot say
4 that petitioners established the proposal's compliance with
5 NZO 638.1 as a matter of law.

6 This subassignment of error is denied.

7 The third, fourth and fifth assignments of error are
8 denied.⁷

9 **FIRST ASSIGNMENT OF ERROR**

10 "The reversal by the City Council of the approval
11 by the Planning Commission of the conditional use
12 permit application * * * constituted a regulatory
13 taking by the City of the owners' property for
14 which the owners must be compensated by the City."

15 Petitioners' concede the findings "seem to indicate the
16 City Council reversed the decision of the Planning
17 Commission to advance a legitimate government interest;
18 specifically, the effect the development would allegedly
19 have on the [surrounding] area." Petition for Review 9.
20 However, petitioners argue the "real reason" the proposed
21 development was denied was "political pressure" associated
22 with the potential effects of the development on Sportsman
23 Airpark. Id. According to petitioners, the city council

⁷Because the challenged decision is one to deny the proposed development, the city need only adopt findings, supported by substantial evidence, demonstrating that one or more approval standards are not met. Garre v. Clackamas County, 18 Or LUBA 877, 880, aff'd 102 Or App 123 (1990). Consequently, having upheld the city's determination of noncompliance with NZO 638.1, we need not review petitioners' challenges to the city's other bases for denial.

1 believes "it should not allow any development on the said
2 property, notwithstanding whether or not the development
3 satisfie[s] all applicable ordinances and plans." Id.
4 Petitioners argue it is therefore "obvious" that the city
5 used the conditional use permit process "for an improper
6 purpose, not to advance a legitimate governmental interest,
7 but to restrict the usage of [the subject property] solely
8 for the benefit of an airport * * *." Petition for
9 Review 12.

10 We have explained on numerous occasions that it is a
11 local government's final written decision that is the
12 subject of our review, not statements made during the
13 proceedings leading to adoption of a challenged land use
14 decision. Toth v. Curry County, ___ Or LUBA ___ (LUBA No.
15 91-070, December 20, 1991), slip op 7; Gruber v. Lincoln
16 County, 16 Or LUBA 456, 460 (1988); Oatfield Ridge Residents
17 Rights v. Clackamas Co., 14 Or LUBA 766, 768-69 (1986);
18 Citadel Corporation v. Tillamook County, 9 Or LUBA 61, 67
19 (1983). In any case, the evidence in the record cited by
20 petitioners establishes, at most, that there was opposition
21 to the proposed development because of perceived conflicts
22 between it and Sportsman Park. Nothing cited by either
23 party establishes that the city's denial of the subject
24 application based on incompatibility with appropriate
25 development of abutting properties, as stated in the
26 challenged decision and sustained supra, is a sham.

1 The first assignment of error is denied.

2 The city's decision is affirmed.