

# APA LEGAL ISSUES WORKSHOP

November 19, 1999

## HOW TO DRAFT FINDINGS

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### I. Findings

- A. Findings are statements which show whether each and every element of the approval criteria can or cannot be satisfied.
- B. Types of Findings
  - 1. Staff report
  - 2. Final order or final decision

### II. How the Decision is Made.

- A. State Statute
  - 1. ORS 227.173 (2) requires: Approval or denial of a permit application or limited land use decision shall be based upon and *accompanied* by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.
- B. Summary of Statutory Requirements
  - 1. The statute requires that facts be applied to the approval criteria and the decision will be:
    - a. Approval if each and every element of each approval criteria can be satisfied;
    - b. Approval with conditions if the approval criteria can be satisfied by facts and by imposing conditions of approval; or
    - c. Denial if any element of any approval criteria cannot be satisfied by facts or a condition of approval.
  - 2. Example:
    - a. Criterion: There will be no traffic hazard or congestion.

- b. Finding: The street is a two lane street operating at traffic capacity. Without a left turn lane there would be traffic hazard and congestion.
- c. Condition: Approval subject to a traffic signal and left turn lane.

III. What are Findings.

A. Definition

- 1. Findings are a written statement for each element of each approval criterion which applies the relevant facts relied upon by the hearings body to the criteria. The statement identifies the facts relied upon and states how the criterion is or is not satisfied based on the facts the hearings body believes.

B. Purposes of Findings

- 1. To show that the criteria were applied and the decision is not arbitrary.
- 2. To aid a reviewing court in deciding whether the decision was properly made.
- 3. To show that proper procedures were followed.
- 4. To define ambiguous terms and to interpret code sections.

C. Requirements

- 1. No magic words are required. What is required is:
  - a. A statement of the applicable criterion;
  - b. A statement of the relevant facts relied upon; and
  - c. A statement which applies the facts to the criterion and determines whether the criterion is satisfied or not, or can be satisfied by a condition of approval.

IV. Initial Steps in Drafting Findings.

A. Step I: Identify all of the applicable approval criteria.

B. Step II: Define ambiguous terms and terms of art and reconcile conflicting code sections:

- 1. Terms of art: Livability, character, no adverse impacts, substantial conformance, public interest.

2. Ambiguous Terms: Flights, vehicle trips, operations.
  3. Conflicting Code Sections: Base zone requires ground floor windows. Overlay zone allows a mural in lieu of ground floor windows.
  4. The law applicable to defining terms.
- C. Step III: Establish process for determining compatibility.
1. Example:
    - a. The proposal will be compatible with adjacent residential development based on characteristics such as the site size, building scale and style, setbacks and landscaping.
    - b. The applicable law. Wilson Park Neighborhood Assn. v. City of Portland.

V. Process of Acquiring the Evidence (The Facts).

A. Role of Staff

1. Reconcile conflicting facts and apply known relevant facts to the approval criteria and make a recommendation.

B. Role of Decision Makers

1. Reconcile conflicting facts and determine the relevant current facts.
2. Apply the facts to the criteria and make a decision.

C. Order of Testimony – Process for Determining Facts

1. Purpose of order of testimony.
  - a. To allow rebuttal of all facts submitted to determine truth.
2. Order of testimony.
  - a. Staff report.
  - b. Applicant.
  - c. Proponents.
  - d. Opponents.
  - e. Applicants rebuttal.

## VI. Process of Evaluating the Evidence

### A. Relevant Evidence

1. Relevant evidence is a fact which shows whether one of the approved criteria is or is not satisfied.

Example:

Criterion: there will be no traffic congestion or traffic hazard.

Relevant testimony: street conditions and width, number of lanes, traffic capacity, accident rates, sight distance, etc.

Irrelevant testimony: Property values, noise, air pollution.

Question: is this relevant testimony?

A petition signed by 1,000 people who state "please deny this application."

### B. How Much Evidence is Needed – Substantial Evidence

1. The fact need only appear in the record once to be relevant evidence which may be relied upon to show that an approval criterion is or is not satisfied.
2. It is "substantial evidence" if it is evidence a reasonable person would rely upon in reaching a decision. Substantial evidence means it has substance. It does not mean there is more volume at one set of evidence than another.

### C. Conflicting Evidence

1. In situations where there is conflicting evidence, the hearings body may choose the evidence it believes, but it must be "substantial evidence." The decision will be upheld if LUBA and the courts can conclude that "a reasonable decisionmaker could decide as the local government did in view of all the evidence in the record," (i.e., evidence which supports and detracts from the decision.)
2. Conflicting evidence should be identified and explained in the findings.

### D. The Evidence Relied Upon Must be Current and Reliable

1. The evidence relied upon must be sufficiently current to justify the local government's reliance.

## VII. Drafting Findings

## EXAMPLE

### I. CRITERIA

- A. Approval of the use shall not result in increased traffic congestion or increased hazardous conditions adjacent to the site or in the immediate neighborhood.
- B. The use shall be architecturally compatible with surrounding uses.
- C. The development of the site shall not result in a degradation of the environment.

### II. FACTS (Purely Hypothetical)

- A. The proposed use is a drive-thru deli specializing in prepared meals and healthy fast foods.
- B. The road is a two lane road and is at capacity. It has a 5:00 – 6:00 PM peak hour traffic count of 2000 vehicles per hour.
- C. The use is expected to generate 200 PM peak trips.
- D. The road curves on both sides of the entrance and exit and the site distance is 50 feet.
- E. The speed limit is 35 mph.
- F. The surrounding uses are two story wood home structures. This use is one story and proposed to be of red brick construction.
- G. The site is wooded and a stream runs through the site. The applicant proposes to cut the trees and culvert the stream.

### III. FINDINGS

- A. Elements of the Finding and Required Interpretations.
  - 1. Why interpretations are required.
  - 2. Criteria #1.
    - a. What does increased traffic congestion mean?
    - b. What does increased traffic hazardous mean?
    - c. What does adjacent to the site mean.
    - d. What does immediate neighborhood mean?
  - 3. Criteria #2.
    - a. What are the elements of architecture?

- b. What does surrounding uses mean?
4. Criteria #3.
- a. What is "development"?
  - b. What does "degradation" mean?
  - c. What constitutes the "environment"?
- B. Relevant Evidence
1. Criterion # 1 (Need data for site access and the area defined as immediate neighborhood.)
- a. R/W map
  - b. Assessor's quarter section map.
  - c. Traffic counts.
  - d. Accident reports.
  - e. Operation levels of the intersections; e.g., level A,B,C,D or F.
  - f. Data from Trip Generation Manual.
  - g. Stopping distance required at 35 mph.
  - h. Traffic gaps (intervals and length).
2. Criterion #2.
- a. Photographs of each of the structures in the area defined as "surrounding".
  - b. May want to include photographs of a development in which the architectural and building materials will be similar to the proposal.
3. Criterion #3 (Data collected depends on definition of "environment.")
- a. A topographic map which also shows the stream.
  - b. An aerial photograph
  - c. Mapped inventory of existing trees
  - d. Existing noise levels and data about noise generated by the proposed use.
  - e. Air quality levels and data about the proposed use.

- f. Information about the parking lot, water run-off and impacts on the water quality.

C. Proposed Findings

1. Approval of the use will result in increased traffic congestion at the entrance to the site because at p.m. peak the two lane road operates at capacity and according to the origin and destination study (Exhibit 1) and figures from the Trip Generation Manual (Exhibit 2) there will be approximately 100 left turns into the site. In this section of the road there are few traffic gaps (Exhibit 3) and therefore, traffic will be stacked behind vehicles attempting a left turn into the site. The applicants traffic engineer proposes to solve this problem by providing a left turn lane.

The problem of stacking could be solved by a left turn lane with a storage capacity for four vehicles. Based on the frequency of the gaps and the length of the gaps (Exhibit 3) a four vehicle left turn lane would eliminate stacking.

NOTE: This lays the ground work for a condition of approval which requires a left turn lane. It would have to be structured to pass the "Dolan" proportionality test.

2. Approval of the use will result in a potential traffic hazard. The site distance on each side of the entrance is 50 feet. A vehicle traveling 35 mph requires 100 feet to come to a complete stop. In 1998 after an access was built there were five accidents and in 1999 there have been six accidents - (Exhibit 4). This criterion could be satisfied if the access was moved to a point where there was 100 feet of site distance on both sides of the access point.

NOTE: This lays the foundation for a condition which requires the access in a different location.

- 3&4 Traffic analysis for the intersections.

5. The proposal is architecturally compatible with the surrounding uses. Surrounding uses have been defined as the uses within the same development and same block as the proposal. Architectural compatibility has been defined as including scale (building height and bulk) building material (siding and roofing) and window types. The American Heritage Dictionary 2<sup>nd</sup> Edition at page 300 defines compatible as: "Capable of living or performing in harmonious, agreeable, or congenial combination with another or others," or "capable of orderly, efficient integration and operation with other elements in a system."

The surrounding uses are two story wood frame structures. This use is one story and proposed to be red brick construction. The definition of compatible does not require the same building materials. The uses must be harmonious. The following analysis shows the uses are harmonious.

a. Building Scale.

The predominate building height is two stories. This use is one story. In terms of height and bulk it is smaller than the other buildings and does not create aesthetic disharmony. A similar situation is in the 10<sup>th</sup> Street Development. See attached photographs (Exhibit 5).

b. Building Materials.

The building materials are compatible. White wood frame construction and red brick are often used together – the roofing will be the same as adjoining uses.

c. Window Types.

The window types are the same. (See Exhibit 6), photographs of adjoining building and Exhibit 7, the architectural renderings of the building.

6. Development of the site includes all development, e.g., parking areas, structures, landscaping and the proposed culverting of the stream. Degrading means the existing level of, for example water quality, is less after all possible mitigating measures are taken. The environment in this case involves the quality of the water entering the stream and noise levels at the boundaries of the project.

This proposal proposes to culvert the stream. This is against City policy (see City Code 00.000.00). The stream must be made an integral part of the site design. This project cannot be approved because the area of the proposed parking lot and proposed volume of traffic will yield 5000 gallons of runoff pollutants a year into the stream. In order to satisfy this approval criteria, the applicant must prepare a plan for trapping the runoff and filtering the pollutants before the runoff enters the stream.

The occupants of the surrounding uses expressed concern at the public hearing about the impacts of noise on the adjoining sites. Unrebutted evidence was submitted into the record showing that sound levels established by DEQ will be exceeded during PM peak hours. The applicant has not submitted a mitigating plan.

CONCLUSION:

1. Approval criteria 1 & 2 can be satisfied, however the applicant has not satisfied criteria number 3. Action on this matter should be deferred. The applicant has agreed to waive the statutory requirement that a final decision be rendered within 120 days.