

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a city decision granting site
4 plan approval for a recycling center complex.

5 **FACTS**

6 The applicant proposes to construct a facility that
7 will accept a variety of waste/recyclable materials. The
8 proposed facility would include shop and office buildings
9 and an enclosed transfer station building where the material
10 would be deposited for recycling or disposal. The subject
11 property is located in the M-2 Heavy Industrial and
12 Manufacturing District.

13 The applicant presently operates a transfer station at
14 a different site. The existing transfer station recycles
15 approximately 35% of the material delivered to that site.
16 The materials recycled include cardboard, glass, tin, mixed
17 paper, newspaper, metals, appliances and used motor oil.
18 According to testimony presented by the applicant, with
19 expected increased efficiencies at the new proposed
20 facility, the addition of machinery to allow recycling of
21 wood waste and eventual recycling of plastics, 60% to 70% of
22 the waste material delivered to the subject property will be
23 recycled. All waste material that is not recycled will be
24 removed daily and disposed of at a landfill.

25 The city planning commission approved the disputed site
26 plan, and that decision was appealed by petitioner to the

1 city council, which affirmed the planning commission's
2 decision.

3 **FIRST ASSIGNMENT OF ERROR**

4 After the public hearing in this matter before the city
5 council was closed, the city council consulted with the city
6 attorney.¹ The city attorney commented on the arguments and
7 testimony that had been received and provided advice
8 concerning interpretation of the city zoning ordinance.
9 Petitioner contends she was entitled to rebut the city
10 attorney's comments and that the city committed reversible
11 error in failing to provide her with an opportunity to rebut
12 the city attorney's advice to the city council.

13 Where a city is receiving evidence from city staff in
14 support of or in opposition to an application for land use
15 approval, parties are entitled to an opportunity to rebut
16 such evidence, just as they are entitled to an opportunity
17 to rebut evidence submitted by other parties. However,
18 after the close of the evidentiary phase of a land use
19 proceeding, a city is free to seek advice from its staff in
20 reaching a land use decision, and is not required to provide
21 parties with an opportunity to rebut the substance of
22 staff's advice.

23 We conclude the city council's consultation with the
24 city attorney in this case fall into this latter category.

¹While the public hearing had been closed, this consultation occurred during a public meeting.

1 The city attorney read from the zoning ordinance and
2 commented on evidence and arguments submitted during the
3 earlier phases of the local proceedings in this matter. The
4 city council is entitled to engage in this kind of
5 consultation with staff, and is not even required to
6 disclose such contacts. ORS 227.180(4). To the extent the
7 city attorney's reasoning was accepted by the city council,
8 and incorporated into its decision, petitioner may challenge
9 that reasoning in an appeal to this Board. However, while
10 the city attorney's reasoning may be correct or incorrect,
11 neither the city's zoning ordinance nor any other provision
12 of law that we are aware of gives petitioner a right to
13 rebut that reasoning during the local proceedings. Dickas
14 v. City of Beaverton, 92 Or App 168, 172-73, 757 P2d 451
15 (1988).

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 The Dalles Zoning Ordinance (TDZO) does not
19 specifically provide for solid waste transfer stations. The
20 gist of petitioner's complaint under this assignment of
21 error is that the proposed facility is really a solid waste
22 transfer station, with a recycling component, and the city
23 cannot allow such a use in the M-2 district under the guise
24 that it is a recycling facility. According to petitioner,
25 because the facility will receive a significant amount of
26 waste that will not be recycled and will have to be disposed

1 of at a landfill, it is not allowable in the M-2 district.

2 The city concedes that its zoning ordinance does not
3 specifically provide for solid waste transfer stations.
4 However, the city concludes in the challenged decision that
5 the proposed facility nevertheless is allowable under zoning
6 ordinance provisions permitting "recycling centers" and
7 "collection, packaging, storage and reprocessing of
8 recyclable materials" and "customarily incidental uses."

9 TDZO 3(b) defines "Recycling Center" as follows:

10 "Recycling Center. A place of business engaged in
11 the receiving of waste materials, such as glass,
12 cans, and paper and the temporary storage of such
13 waste materials until they are removed to another
14 site for reprocessing.

15 The direct significance of the above definition is somewhat
16 unclear since, as far as we can tell, neither the M-2 zone
17 nor any other zone specifically lists recycling centers as
18 an allowed or conditional use. However, TDZO 16.2(A)(1)
19 does list the following as uses as permitted in the M-2
20 zone:

21 "In the 'M-2' Heavy Industrial and Manufacturing
22 District the following uses are permitted:

23 "* * * * *

24 "g. Collection, packaging, storage and
25 reprocessing of recycleable [sic] materials
26 such as newspaper, cardboard, glass, metal,
27 plastic or oil.

28 "* * * * *

29 "l. Uses customarily incidental to any of the
30 above uses and accessory buildings when

1 located on the same lot or land parcel."

2 The city determined the words "such as" in TDZO
3 16.2(A)(1)(g) make it clear that the listing of possible
4 recyclable materials is not exclusive. Therefore, the city
5 reasons, it is not important that the proposed recycling
6 facility may accept materials that are not listed in TDZO
7 16.2(A)(1)(g). The city further determined that temporary
8 storage and same day disposal of wastes that cannot be
9 recycled is "a use which is customarily incidental to the
10 operation of a recycling center."²

11 We agree with the city that TDZO 16.2(A)(1)(g) does not
12 purport to list all materials that may be accepted for
13 recycling. Therefore, there is nothing in TDZO
14 16.2(A)(1)(g) that necessarily precludes a facility from
15 accepting recyclable materials that are not listed in that
16 section. We agree with the city that to the extent the
17 proposed facility will accept the kinds of recyclable
18 materials specifically listed in TDZO 16.2(A)(1)(g), as well
19 as other recyclable materials, the proposed facility is a
20 permitted use in the M-2 zone. However, we also do not
21 understand petitioner to dispute this point.

22 Turning to the next interpretive issue, the city
23 interprets TDZO 16.2(A)(1)(1), quoted supra, as allowing the

²In its decision the city explains that planning staff contacted the Oregon Department of Environmental Quality and were "advised that other transfer stations in the state generate refuse as a by-product of their recycling activities." Record 11.

1 city to approve a facility that will accept garbage or solid
2 waste which must be removed and disposed of at a landfill.
3 We agree with the city that TDZO 16.2(A)(1)(1) potentially
4 allows the city to approve a facility incorporating such a
5 solid waste transfer function, provided that function is (1)
6 customary and (2) incidental to the recycling activities
7 allowed by TDZO 16.2(A)(1)(g). Clearly, it is within the
8 city's interpretive discretion to interpret its zoning
9 ordinance in this manner. Clark v. Jackson County, 313 Or
10 508, ___ P2d ___ (1992).

11 We turn to the final question on which the parties
12 disagree, whether the solid waste transfer station component
13 of the facility is "incidental" to the recycling use and is
14 "customary." We limit our review in this matter to the
15 record, as we are required to do by ORS 197.830(13)(a).³

16 As noted above, the applicant testified that while the
17 waste to be accepted at the proposed facility will include
18 waste that ultimately will not be recycled and, therefore,
19 will have to be disposed of at a landfill, up to 70% of the
20 waste accepted at the facility will be recycled. In the
21 absence of substantial evidence contradicting that

³At oral argument petitioner submitted a document which includes transcripts of portions of the tapes of the local proceedings. See n 4, infra. We consider the partial transcripts included in that document in reaching our decision in this matter. However, that document also includes descriptions of conversations and other material that is not included in the record submitted by the city in this matter. We do not consider these extra-record evidentiary materials.

1 contention, we conclude the record is sufficient to support
2 the city's finding that up to 70% of the waste material to
3 be accepted at this facility ultimately will be recycled.
4 We understand the city to have concluded that because the
5 solid waste transfer component of the operation ultimately
6 will be responsible for disposition of only about 30% of the
7 total waste/recyclable material to be accepted, it is
8 properly viewed as "incidental." We have no reason to
9 question that conclusion.

10 Whether solid waste transfer functions such as those
11 proposed in this case are properly viewed as "customarily"
12 provided in conjunction with recycling centers is a close
13 question. The challenged decision includes a finding that
14 the proposed retention and transfer of refuse is "a use
15 which is customarily incidental to the operation of a
16 recycling center." Record 11. Petitioner complains that
17 the city currently has operating within its jurisdiction
18 examples of recycling centers that make efforts to accept
19 only recyclables. Petitioner contends the city, therefore,
20 had no reason to look elsewhere to determine whether it is
21 customary for recycling facilities to accept waste which
22 includes both recyclables and non-recyclables.

23 We do not agree that the city was precluded from
24 looking beyond existing recycling centers located within its
25 city limits in determining whether solid waste transfer
26 functions of the nature proposed are properly viewed as

1 incidental to, and customarily provided in conjunction with,
2 recycling centers.

3 There is limited evidence in the record concerning the
4 existence of facilities that accept recyclable material
5 mixed with solid waste, sort that material into recyclables
6 and non-recyclables, and then recycle the former and dispose
7 of the latter at a landfill. The challenged decision cites
8 testimony by the applicant that all recycling centers accept
9 some material that ultimately cannot be recycled, and
10 therefore must be disposed of. The decision also notes that
11 a city planner testified concerning conversations he had
12 with the Oregon Department of Environmental Quality
13 regarding the existence of facilities which accept mixed
14 material and sort that material into recyclables and
15 non-recyclables.⁴ While that testimony certainly could be
16 more detailed concerning the nature of such facilities and
17 the relationship of the recycling and non-recycling
18 components of those facilities, we conclude the testimony is
19 sufficient to constitute substantial evidence that the solid
20 waste transfer component of the proposed facility may be
21 viewed as allowable under TDZO 16.2(A)(1)(1), as
22 "customarily incidental" to the recycling component of the

⁴The only place we have been able to find that testimony is at pages 8 through 9 of the document submitted by petitioner at oral argument in this matter. See n 3, supra.

1 proposed facility.⁵

2 The second assignment of error is denied.

3 **THIRD ASSIGNMENT OF ERROR**

4 In her final assignment of error, petitioner challenges
5 certain statements made by individual city councillors and
6 argues the city erred by failing to address certain issues
7 she raised during the local proceedings.

8 The statements made by individual city councillors
9 provide no basis for reversal or remand. As we have
10 explained on numerous occasions, "the reviewable land use
11 decision at LUBA is the final written decision, not what * *
12 * members of the decision making body may have stated from
13 time to time during the course of local government
14 proceedings." Waker Associates, Inc., v. Clackamas County,
15 21 Or LUBA 588, 591 (1991) (and cases cited therein).

16 Finally, while the city did not agree with the issues
17 petitioner identifies under this assignment of error, the
18 city is correct that the challenged decision addresses each
19 of those issues.

20 The third assignment of error is denied.

⁵In reaching this conclusion, we emphasize that it is based on the city's determination that the solid waste transfer component of the facility (as opposed to the recycling component) ultimately will dispose of only approximately 30% of the material to be accepted at the facility. We will not speculate concerning how much larger the percentage of the material accepted at this facility disposed of in this manner could be and still have the facility qualify as a recycling facility with an incidental solid waste transfer component. Obviously, however, at some point it would no longer be possible to characterize the facility as a recycling facility with an incidental solid waste transfer component.

1 The city's decision is affirmed.

2