

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

3
4 LESLIE TERRA and DOUG TERRA,)
5)
6 Petitioners,)
7)
8 and)
9)
10 FRAN RECHT, MICHAEL NOACK,)
11 SALLY NOACK, JOHN COURTER,)
12 MICHAEL O'GARA and JANELLE O'GARA,)

13)
14 Intervenors-Petitioner,)
15)
16 vs.)
17)
18 CITY OF NEWPORT,)
19)
20 Respondent,)
21)
22 and)
23)
24 VISTA LAND CORPORATION OF OREGON,)
25)
26 Intervenor-Respondent.)

LUBA No. 92-068
)
FINAL OPINION
AND ORDER

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28
29 Appeal from City of Newport.

30
31 Leslie Terra and Doug Terra, Newport, filed a petition
32 for review. Leslie Terra argued on her own behalf.

33
34 Fran Recht, Depoe Bay, filed a petition for review and
35 argued on her own behalf.

36
37 No appearance by respondent.

38
39 Dennis J. Wine, Lincoln City, filed the response brief
40 and argued on behalf of intervenor-respondent.

41
42 SHERTON, Chief Referee; KELLINGTON, Referee,
43 participated in the decision.

44
45 HOLSTUN, Referee, dissenting.

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REMANDED

01/22/93

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 order approving a
4 conditional use permit for a motel or hotel.

5 **FACTS**

6 The subject property is 8.84 acres in size, designated
7 High Density Residential by the comprehensive plan, and
8 zoned High Density Multi-Family Residential (R-4). The
9 property is located west of Highway 101. It is adjoined by
10 the Pacific Ocean on the west and NW 68th Street on the
11 north. The subject property contains a wooded canyon.
12 Schooner Creek flows from the east side of the property to
13 its northwest corner. There are relatively steep slopes on
14 the southern and northeastern portions of the property.

15 Properties to the east and south are also zoned R-4.
16 Properties to the north are zoned Medium Density Single-
17 Family Residential (R-2). Property to the north and east
18 are developed with single family residences. Properties to
19 the south contain the Schooner Landing time share project
20 and the Pacific Shores recreational vehicle park.

21 Intervenor-respondent (intervenor) applied for a
22 conditional use permit for a 100 unit condominium
23 development as a "motel" or "hotel."¹ The proposed

¹The Zoning Ordinance of the City of Newport (NZO) allows "condominiums" as a permitted use in the R-4 zone. NZO 2-2-1.025(d)(20). However, the city determined that the "condominium" use allowed as a permitted use in the R-4 zone does not include short term rentals. The city further

1 development includes short and long term rental units and an
2 8,000 square foot community building. The original proposal
3 included access to the proposed development from both
4 Highway 101 and NW 68th Street. The community building and
5 associated parking were proposed to be located on the
6 northeast corner of the property, north of Schooner Creek.
7 The condominiums were proposed to be located south of
8 Schooner Creek.

9 After public hearings on September 9, October 14 and
10 October 28, 1991, the planning commission approved
11 intervenor's application.² Petitioners, intervenors-
12 petitioner and the Oregon Department of Transportation
13 (ODOT) appealed the planning commission's decision to the
14 city council. The city council conducted an on the record
15 review of the planning commission's decision. On March 2,
16 1992, the city council issued an order approving the
17 conditional use permit, with conditions requiring that
18 intervenor (1) pave NW 68th Street and provide a cul-de-sac
19 at its western terminus; (2) provide for certain
20 improvements to the intersection of NW 68th Street and
21 Highway 101; (3) relocate the community building south of

determined that in order to approve short term rental use of the proposed
condominium development, it must be approved as a "motel" or "hotel," which
are conditional uses in the R-4 zone. NZO 2-2-1.025(d)(12). Record 2-3.
The city's determination that the proposed development requires a
conditional use permit as a motel or hotel is not challenged in this
appeal.

²During this process, the proposal was modified to provide access only
from NW 68th Street, not from Highway 101.

1 Schooner Creek, limit it to 3,000 square feet in size, and
2 restrict its use to the occupants of the proposed units; and
3 (4) convey to the city an open space easement for visual
4 access to the portion of the property north of Schooner
5 Creek.

6 This appeal followed.

7 **NINTH ASSIGNMENT OF ERROR**

8 Petitioners and intervenor-petitioner Recht
9 (petitioners) contend certain conditions imposed by the
10 challenged order, concerning parking spaces to be provided
11 in the western terminus of NW 68th Street and the
12 permissibility of enclosing the area north of Schooner Creek
13 with a fence, do not accurately reflect the city council's
14 discussion or deliberations.

15 As we have explained on numerous occasions, it is a
16 local government's final written decision that is subject to
17 our review, not statements made by decision makers during
18 the proceedings leading to adoption of a land use decision.
19 Toth v. Curry County, 22 Or LUBA 488, 492-93 (1991); Gruber
20 v. Lincoln County, 16 Or LUBA 456, 460 (1988); Oatfield
21 Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766,
22 768-69 (1986); McCullough v. City of Baker, 14 Or LUBA 198,
23 200 (1986); Citadel Corporation v. Tillamook County, 9 Or
24 LUBA 61, 67 (1983). Any positions that were expressed
25 orally by the city council members during the city council
26 proceedings, with regard to conditions to be imposed, were

1 at most preliminary and subject to change in the city
2 council's final written decision. Toth v. Curry County,
3 supra; see Sokol v. City of Lake Oswego, 18 Or LUBA 375,
4 400-01, aff'd 100 Or App 594 (1990) (an oral decision is
5 tentative and may be changed any time before the decision is
6 reduced to writing and becomes final).

7 The ninth assignment of error is denied.

8 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

9 In these assignments of error, petitioners challenge
10 the evidentiary support for certain individual findings in
11 the challenged decision and for the city's overall
12 determination of compliance with the conditional use permit
13 approval standard established by NZO 2-5-3.005.

14 **A. Individual Findings**

15 This Board is required to reverse or remand local
16 government land use decisions where those decisions are not
17 supported by substantial evidence. ORS 197.835(7)(a)(C);
18 Griffith v. City of Milwaukie, 19 Or LUBA 300, 304 (1990);
19 Sellwood Harbor Condo. Assoc. v. City of Portland, 16 Or
20 LUBA 505, 513-514 (1988). ORS 197.835(7)(a)(C) does not
21 require that every statement or finding adopted in support
22 of a land use decision must be supported by evidence in the
23 record. That a particular finding is not supported by
24 substantial evidence, of itself, provides no basis for
25 remanding the decision the finding is adopted to support,
26 unless the finding is critical to the decision. Cann v.

1 City of Portland, 14 Or LUBA 254, 257 (1986); Bonner v. City
2 of Portland, 11 Or LUBA 40, 52-53 (1984). Therefore, in
3 addition to demonstrating a challenged finding is not
4 supported by substantial evidence, a petitioner must
5 demonstrate the challenged finding is critical to (i.e.
6 necessary to support) the challenged decision. Id.

7 First, petitioners challenge the evidentiary support
8 for findings that the proposed development is "essentially
9 residential in nature," "substantially similar to the
10 residential uses otherwise permitted" and "similar in nature
11 and extent to the surrounding uses." Record 4, 5, 172.³
12 However, petitioners do not explain why these findings are
13 essential to the challenged decision, and we do not see that
14 they are.⁴

15 Second, petitioners challenge the evidentiary support
16 for a finding that "testimony is not entirely certain as to
17 the traffic effects of [approving] the Conditional Use

³The city council's decision incorporates by reference as findings in support of its decision the "Findings of Fact, Recommendations and Conclusions" of the September 9, 1991 staff report found at Record 168. Record 6.

⁴As explained below, the NZO 2-5-3.005 conditional use permit approval standard requires that "the characteristics of [a proposed] conditional use shall not be unreasonably incompatible with" existing or permitted uses in surrounding areas. This standard does not require that a proposed conditional use be similar to existing or permitted uses in surrounding areas, but rather only that it not be unreasonably incompatible with such uses. However, to the extent evidence cited by petitioners with regard to the (dis)similarity of the proposed development to surrounding uses is relevant to the required compatibility determination, it is considered in section B below.

1 Permit." Record 5. Petitioners contend this finding is
2 incorrect because there is undisputed evidence in the record
3 establishing there would be an increase in daily trip
4 generation from 600 to 1,000 if the proposed condominiums
5 were used as motel units rather than residences. However,
6 petitioner does not explain why the quoted finding is
7 essential to the decision. The challenged decision includes
8 additional findings addressing traffic impacts due to the
9 proposed development and the effects of conditions imposed
10 requiring certain street improvements. Record 5-9. We
11 regard the finding challenged by petitioners as surplusage.⁵

12 Third, petitioners challenge the correctness of and
13 evidentiary support for the city finding that "conditions
14 respecting street and intersection improvements * * * cannot
15 be imposed if the Conditional Use Permit is denied and the
16 developer chooses to construct a condominium * * *
17 residential project as an outright [permitted] use."
18 Record 6. Petitioners argue that NZO 2-3-6.040 (Access)
19 authorizes the city to impose street improvement conditions
20 on an outright permitted use. However, petitioners do not
21 explain why the quoted finding is necessary to comply with
22 NZO standards for approval of a conditional use permit, and
23 we do not see that it is.

⁵We consider below the evidence cited by petitioner with regard to traffic impacts, in evaluating the evidentiary support for the city's determination of compliance with the compatibility standard established by NZO 2-5-3.005.

1 This subassignment of error is denied.

2 **B. NZO 2-5-3.005**

3 NZO 2-5-3.005 (Authorization to Grant or Deny
4 Conditional Uses) provides in relevant part:

5 " * * * The purpose of conditional use permit
6 reviews shall be to determine that the
7 characteristics of [the proposed] conditional use
8 shall not be unreasonably incompatible with the
9 type of uses existing or permitted in surrounding
10 areas. * * *"

11 We understand petitioners to challenge the evidentiary
12 support for the city's determination that the proposed
13 development will not be unreasonably incompatible with the
14 single family residences north of NW 68th Street,
15 particularly considering the nature of the proposed
16 motel/hotel use and its traffic impacts. Petitioners argue
17 the evidence shows the proposed development will have the
18 characteristics of a resort. Petitioners also argue the
19 adverse traffic impacts of the proposed development on the
20 residences to the north will not be mitigated by the
21 improvements to NW 68th Street and its intersection with
22 Highway 101 that are required by the challenged decision.
23 According to petitioners, the record shows the improvements
24 themselves are not compatible with the residences to the
25 north, because they will result in faster traffic on NW 68th
26 Street and the removal of trees presently buffering
27 residences from NW 68th Street.

28 Intervenor argues that any development of the subject

1 property will increase the traffic on NW 68th Street, and
2 require upgrading that street to city standards. Intervenor
3 also argues the record shows the traffic impacts of the
4 proposed development are actually less than the traffic
5 impacts that would be generated by more intense outright
6 permitted uses of the property. Intervenor further contends
7 that conditions imposed by the city will mitigate the
8 impacts of the proposed development on the residences to the
9 north. Intervenor also argues that in determining whether
10 the proposed development is "unreasonably incompatible" with
11 the existing and permitted uses of the R-2 zoned area to the
12 north, the intent of the R-2 zone must be considered.
13 Intervenor points out NZO 2-2-1.020 provides that the R-2
14 zone is intended "to serve as a transitional area between
15 the low density residential district and higher density
16 residential districts."

17 We recently described our scope of review in
18 substantial evidence challenges as follows:

19 "The Supreme Court has held that what this Board
20 must decide in reviewing a substantial evidence
21 challenge is "whether, in light of all evidence in
22 the record, the [local government's] decision was
23 reasonable." Younger v. City of Portland, 305 Or
24 346, 360, 752 P2d 262 (1988). For a decision to
25 be reasonable, it need not be the decision that
26 this Board would have made based on the same
27 evidence. Id. While this Board must consider all
28 relevant evidence cited by the parties, including
29 evidence that detracts from the challenged
30 decision as well as evidence that supports it, it
31 cannot reweigh the evidence. 1000 Friends of
32 Oregon v. Marion County, [116 Or App 584, ___ P2d

1 ___ (1992)]; Eckis v. Linn County, 110 Or App 309,
2 313, 821 P2d 1127 (1991). Where this Board
3 concludes a reasonable person could reach the
4 decision made by the local government, in view of
5 all the evidence in the record, it defers to the
6 local government's choices between conflicting
7 evidence and of reasonable conclusions to be drawn
8 from the evidence. Angel v. City of Portland, 22
9 Or LUBA 649, 659, aff'd 113 Or App 169 (1992);
10 Wissusik v. Yamhill County, 20 Or LUBA 246, 260
11 (1990); Stefan v. Yamhill County, 18 Or LUBA 820,
12 838 (1990); Douglas v. Multnomah County, 18
13 Or LUBA 607, 617 (1990)." Heceta Water District
14 v. Lane County, ___ Or LUBA ___ (LUBA No. 92-105,
15 January 13, 1993), slip op 34-35.

16 We have reviewed the evidence in the record cited by
17 petitioners and intervenor that is relevant to the issues
18 raised by petitioners concerning the city's determination of
19 compliance with NZO 2-5-3.005. We have also considered the
20 conditions imposed by the city to lessen the impacts of the
21 proposed development. We find that based on this evidence
22 and these conditions, a reasonable person could conclude, as
23 did the city council, that the characteristics of the
24 proposed development are not unreasonably incompatible with
25 the existing or permitted uses in the R-2 zoned area to the
26 north. Record 7-8.

27 This subassignment of error is denied.

28 The first, second and third assignments of error are
29 denied.

30 **FOURTH ASSIGNMENT OF ERROR**

31 NZO 2-5-3.015 provides that, in reviewing a conditional
32 use permit application, the city "may consider the most

1 appropriate use of the land * * *." The challenged decision
2 addresses this provision as follows:

3 "It should be noted that the word 'may' is used
4 rather than the word 'shall.' While the [City]
5 Council believes that [this factor] generally
6 should be considered, such consideration does not
7 appear to be mandatory and, more importantly,
8 [this factor appears] to be subordinate to the
9 statement of purpose [in NZO 2-5-3.005.]

10 * * * * *

11 "Accordingly, this body concludes that the
12 applicant must show that the characteristics of
13 the conditional use are not unreasonably
14 incompatible with the type of uses existing or
15 permitted in the surrounding area, giving
16 reasonable consideration to the most appropriate
17 use of the land * * *." Record 3-4.

18 Petitioners contend the above quoted provision of
19 NZO 2-5-3.015 establishes a mandatory conditional use permit
20 approval standard, and that the city council erred in
21 interpreting it to be merely a factor that should be
22 considered in determining compliance with NZO 2-5-3.005.⁶

23 LUBA is required to defer to a local government's
24 interpretation of its own ordinances, so long as the
25 proffered interpretation is not "clearly contrary to the
26 enacted language," or "inconsistent with express language of

⁶Petitioners also argue that city Resolution No. 1778, which adopts procedural rules for city land use hearings, makes finding a proposed development is the most appropriate use of the land a mandatory approval standard. However, the provision cited by petitioners, Rule 5(3)(c), simply provides that relevant factors to be considered include "the character of the area involved and its peculiar suitability for particular uses." This provision does not have the effect ascribed to it by petitioners.

1 the ordinance or its apparent purpose or policy." Clark v.
2 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).
3 Here, the city's interpretation that under NZO 2-5-3.015,
4 "the most appropriate use of the land" is a factor to be
5 considered in determining compliance with the compatibility
6 standard of NZO 2-5-3.005, not an approval standard in its
7 own right, is consistent with the language, purpose and
8 policy of these NZO provisions.

9 The fourth assignment of error is denied.

10 **FIFTH ASSIGNMENT OF ERROR**

11 NZO 2-5-3.020 provides that a conditional use "shall
12 ordinarily comply with the standards of the zone concerned
13 for [uses] permitted outright except as specifically
14 modified by the [city] in granting the conditional [use]
15 permit." Petitioners argue the "standards" of the R-4 zone
16 include the following provision in NZO 2-2-1.020:

17 "This district is intended to provide for high
18 density multi-family residential and some limited
19 commercial development. * * *" (Emphasis by
20 petitioners.)

21 Petitioners argue the city did not find, and the evidence in
22 the record does not support a finding, that the proposed
23 commercial development would be of a sufficiently limited
24 nature to satisfy the above quoted standard.⁷

⁷Petitioners also argue that another portion of NZO 2-2-1.020, concerning where "new R-4 zones" should be located, is not satisfied by the subject property. However, as the subject property is already zoned R-4,

1 As explained above, this Board is required to defer to
2 a local government's interpretation of its own ordinances,
3 unless that interpretation is contrary to the express words,
4 policy or context of the local enactment. Clark v. Jackson
5 County, supra. However, this Board may not interpret a
6 local government's ordinances in the first instance, but
7 rather must review the local government's interpretation of
8 its ordinances. Weeks v. City of Tillamook, 117 Or App 449,
9 453-54, ___ P2d ___ (1992). Further, a local government
10 interpretation must be adequate for such review, "a
11 conclusory statement does not suffice as an interpretation
12 of [ordinance] provisions." Larson v. Wallowa County, 116
13 Or App 96, 104, ___ P2d ___ (1992).

14 In this case, the language of NZO 2-5-3.020 and
15 2-2-1.020 is ambiguous, i.e. capable of more than one
16 possible meaning; and, therefore, requires interpretation.
17 The challenged decision does not include an interpretation
18 with regard to whether NZO 2-2-1.020 establishes a "standard
19 of the [R-4] zone," with which the subject conditional use
20 permit is required to comply under NZO 2-5-3.020. Neither
21 does it find that any such standard has been "specifically
22 modified * * * in granting the conditional [use] permit."
23 Therefore, the challenged decision must be remanded for the
24 city to interpret and apply these provisions in the first

any requirements for "new R-4 zones" clearly do not apply to the subject conditional use permit application.

1 instance.

2 The fifth assignment of error is sustained.

3 **SIXTH ASSIGNMENT OF ERROR**

4 Petitioners contend the city erred in failing to apply
5 NZO 2-4-7.040 (Slope Density Guidelines) in approving the
6 subject conditional use permit application. However,
7 petitioners offer no explanation of why NZO 2-4-7.040
8 applies to the subject conditional use permit application.

9 The challenged decision does not refer to
10 NZO 2-4-7.040. However, as explained below, this is not a
11 situation where the ordinance language is ambiguous and
12 different sustainable interpretations of the local ordinance
13 could be adopted by the local government. Therefore, the
14 fact that the challenged decision does not include an
15 interpretation of NZO 2-4-7.040 regarding its applicability
16 to the subject application does not provide a basis for
17 remand under Weeks v. City of Tillamook, supra.

18 NZO 2-4-7.040 establishes slope density guidelines to
19 be applied "[i]n reviewing applications for partitioning,
20 subdivisions, planned or clustered developments, or
21 multi-family dwellings." The subject application is clearly
22 not one for partitioning, subdivision or a planned or
23 clustered development. Further, the subject application is
24 for a conditional use permit for a motel or hotel, and not
25 for multi-family dwellings as that term is defined in

1 NZO 2-1-1.101.⁸ Therefore, the language of NZO 2-4-7.040
2 and the NZO definition of "dwelling, multi-family"
3 unambiguously establish that NZO 2-4-7.040 does not apply to
4 the subject conditional use permit application.

5 The sixth assignment of error is denied.

6 **SEVENTH ASSIGNMENT OF ERROR**

7 The purpose of NZO Section 2-5-7 (Shoreland Natural
8 Resources Impact Review) is:

9 " * * * to provide a procedure for review of
10 development proposals within the City of Newport's
11 Coastal Shoreland Boundary. This procedure shall
12 be used to identify the physical characteristics
13 and resources of a particular site and to evaluate
14 the compatibility of the proposed development with
15 the existing physical characteristics and natural
16 resources."

17 NZO 2-5-7.020 states that "[a]ny person proposing
18 development within the Newport Coastal Shoreland Boundary"
19 shall submit a "Shoreland Resources Impact Review
20 Application." NZO 2-5-7.030 provides that a "development
21 request shall be denied" if "the city determines that the
22 proposed development is inconsistent with the physical
23 characteristics and natural values of the site."

24 With regard to procedure, NZO 2-5-7.030 requires that
25 an applicant submit proposed findings which "demonstrate

⁸NZO 2-1-1.101 defines "dwelling, multi-family" as a "building containing five or more dwelling units." It also defines "dwelling unit" as "[o]ne or more rooms designed for occupancy by one family only and not having more than one cooking facility, but not including recreational vehicles, hotels, motels, boarding houses, and mobile homes." (Emphasis added.)

1 that the proposed development is or is not consistent with
2 the physical characteristics and natural values of the
3 site." NZO 2-5-7.030 provides for an administrative review
4 by the city planner. However, NZO 2-5-7.030 further
5 provides:

6 "* * * If the proposed development involves a
7 conditional use, the procedures in [NZO] Section
8 2-5-3 [(Conditional Uses)] shall be followed, and
9 the proposed findings of compatibility shall be
10 forwarded to the Planning Commission for review
11 during the public hearing."⁹

12 Petitioners contend the city erred in not conducting a
13 shoreland natural resources impact review pursuant to
14 NZO Section 2-5-7 as part of the conditional use permit
15 proceeding below. Petitioners argue no proposed findings of
16 compatibility of the proposed development with the natural
17 resources of the site were submitted to or reviewed by the
18 city decision makers. According to petitioners, the
19 challenged decision improperly fails to demonstrate that the
20 proposed development is compatible with the subject
21 property's shoreland natural resources.

22 Intervenor concedes the challenged decision does not
23 specifically refer to NZO Section 2-5-7 or a shoreland
24 natural resources impact review. Intervenor argues,
25 however, that during the planning commission hearings
26 extensive evidence was introduced concerning the physical

⁹NZO 2-5-3.015 and 2-5-3.030 require the city planning commission to hold a public hearing on a conditional use permit application.

1 characteristics of the subject property, including geology,
2 topography, soils, flora, fauna, wetland areas and streams.
3 Intervenor contends the information submitted was sufficient
4 to facilitate a shoreland natural resources impact review
5 and, therefore, petitioners' substantial rights have not
6 been violated by any failure of the city to follow the
7 procedures prescribed by NZO Section 2-5-7.¹⁰

8 There is no dispute that the subject property is within
9 the city's Coastal Shoreland Boundary. It is also clear
10 that the city did not conduct a shoreland natural resources
11 impact review as part of the proceedings below and did not
12 interpret or apply NZO Section 2-5-7 in the challenged
13 decision.

14 NZO Section 2-5-7 requires a shoreland natural
15 resources impact review to be conducted for development
16 proposals within the shoreland boundary, and requires such

¹⁰Intervenor also contends that under ORS 197.763(1) and 197.835(2), petitioners have waived the ability to raise the issue of compliance with NZO Section 2-5-7 in this appeal, because they failed to raise this issue before the planning commission prior to the close of the record at or following the final evidentiary hearing below. Petitioners cite nothing in the record demonstrating that they raised this issue prior to the close of the record at or following the final evidentiary hearing below. However, the city's notice of hearing did not identify NZO Section 2-5-7 as applicable. Therefore, if NZO Section 2-5-7 establishes an approval criterion applicable to the challenged decision, the city's notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify an applicable approval criterion, and petitioners may raise the city's failure to require compliance with that approval criterion as an issue in this appeal proceeding. ORS 197.835(2)(a); Neuenschwander v. City of Ashland, 20 Or LUBA 144, 157 (1990). Thus, the critical issue that must be decided is whether NZO Section 2-5-7 establishes an approval criterion applicable to the challenged decision.

1 development to be denied if "the proposed development is
2 inconsistent with the physical characteristics and natural
3 values of the site." NZO 2-5-7.030. However, the language
4 of NZO 2-5-7.030 is ambiguous with regard to whether in the
5 circumstances of this case, shoreland natural resources
6 impact review must be conducted as part of the conditional
7 use permit proceedings or may be conducted separately or in
8 conjunction with some other proceeding.¹¹ The challenged
9 decision does not include an interpretation of NZO 2-5-7.030
10 in this regard. Therefore, the challenged decision must be
11 remanded for the city to interpret and apply these
12 provisions in the first instance. Weeks v. City of
13 Tillamook, supra; Larson v. Wallowa County, supra.

14 The seventh assignment of error is sustained.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 Petitioners contend the challenged decision contains
17 inadequate findings on the issue of geologic hazards and is
18 not supported by substantial evidence concerning the
19 geologic stability of the subject property. Petitioners
20 note the staff report adopted as part of the city's findings
21 states:

22 "The request appears to comply with the general
23 criteria for conditional use permits. There are

¹¹We note that under either interpretation of NZO 2-5-7.030, the procedures for conditional use permit review must be followed in conducting a shoreland natural resources impact review, if the proposed development involves a conditional use.

1 two significant issues that need to be addressed.
2 One is the geologic stability of the property.
3 The applicant has already had an extensive
4 geologic hazard report prepared and it is
5 attached. It [is suggested] that all the
6 recommendations for the development outlined in
7 the geotechnical report be followed * * *."
8 Record 173.

9 Petitioners contend the city council's final decision
10 is flawed because it fails to address the "significant
11 issue" of geologic stability identified in the staff report,
12 and fails to impose the conditions "suggested" by the staff
13 report. Petitioners also argue the finding that an
14 "extensive geologic hazard report" has been prepared is
15 inaccurate because the report submitted fails to meet
16 standards for hazard reports established by the State Board
17 of Geological Examiners. According to petitioners, the city
18 improperly determined that the issue of geologic stability
19 should be addressed through the "Notice of Intent to Build
20 in a Geologic Hazard Area" process established by
21 NZO 2-4-7.030, discussed in more detail below. Finally,
22 petitioners argue that by not requiring the applicant to
23 submit information to resolve uncertainties regarding
24 geologic stability, the city impermissibly shifted the
25 burden of proof to petitioners.

26 Intervenor argues that the city council properly
27 determined that the issue of geologic stability need not be
28 addressed as part of the subject conditional use permit
29 application review, but rather may be addressed during

1 building permit application review, under the provisions of
2 NZO 2-4-7.030 and 2-4-7.035.

3 NZO 2-4-7.030 (Notice of Intent to Build in a Geologic
4 Hazard Area)¹² provides, in relevant part:

5 "Upon request for a geologic permit, the applicant
6 shall file with the Building Official a 'Notice of
7 Intent to Build in a Geologic Hazard Area.' Such
8 notice shall contain [geologic] reports [as] set
9 forth in [NZO] 2-4-7.025. The notice of intent
10 may be filed at any time prior to or in
11 conjunction with the filing of a building permit,
12 geologic permit, or any other permit required by
13 the City. * * *" (Emphasis added.)

14 Following the filing of a Notice of Intent to Build in a
15 Geologic Hazard Area, notice is given and objections to the
16 issuance of a geologic permit may be filed. NZO 2-4-7.035.

17 The challenged decision addresses this provision as
18 follows:

19 "* * * The building permit and plans review
20 process addresses issues such as * * * geology and
21 other factors of a similar nature, and these
22 issues are not properly addressed as part of the
23 [conditional use permit] process." Record 4.

24 We understand the above finding to state that geologic
25 stability may be addressed at the building permit
26 application stage of a proposed development, under
27 NZO 2-4-7.030, and is not required to be addressed as part
28 of conditional use permit review.

29 This Board must defer to the city's interpretation of

¹²There is no dispute that the subject site is recognized by the NZO as a Geologic Hazard area.

1 its own ordinance, unless its interpretation is contrary to
2 the express words, policy or context of the ordinance.
3 Clark v. Jackson County, supra. Recent opinions by the
4 Court of Appeals have stated that under Clark, the question
5 for this Board to resolve is not whether a local government
6 interpretation of its own code is "right," but rather
7 whether it is "clearly wrong." Goose Hollow Foothills
8 League v. City of Portland, 117 Or App 211, 217, ___ P2d ___
9 (1992); West v. Clackamas County, 116 Or App 89, 92-93, ___
10 P2d ___ (1992).

11 In this instance, petitioners point to no provision of
12 the NZO conditional use permit approval standards that
13 specifically requires consideration of the issue of geologic
14 stability of the subject site as part of the conditional use
15 permit process. Petitioners do point out that Resolution
16 No. 1778, Rule 5(3)(c) provides that in land use hearings,
17 the following are "deemed relevant and material and shall be
18 considered":

19 "All factors pertinent to the preservation and
20 promotion of the public health, safety and general
21 welfare, including, but not limited to, the
22 character of the area involved [and] its peculiar
23 suitability for particular uses * * *."

24 On the other hand, NZO 2-4-7.030 and 2-4-7.035 set out
25 a specific process for evaluation of proposed developments
26 in geologic hazard areas. Under the language of
27 NZO 2-4-7.030 emphasized above, it is clear that this
28 process may be initiated at any time prior to or in

1 conjunction with the filing of an application for any permit
2 required by the city. Therefore, we conclude the city's
3 interpretation that it need not address geologic stability
4 as part of the subject conditional use permit process is not
5 "clearly wrong."

6 The eighth assignment of error is denied.

7 The city's decision is remanded.

8 Holstun, Referee, dissenting.

9 I do not agree with the majority's resolution of the
10 fifth assignment of error. NZO 2-5-3.020 simply provides
11 that a conditional use "shall ordinarily comply with the
12 standards of the zone concerned for [uses] permitted
13 outright except as specifically modified by the [city] in
14 granting the conditional [use] permit." In my view, that
15 section simply makes it clear that the city may modify
16 applicable standards within the zoning district. NZO 2-5-
17 3.020 does not, as the majority suggests it might, make the
18 general expressions of intent of the city's zoning districts
19 listed at NZO 2-2-1.020 mandatory approval standards which
20 must be addressed in approving a conditional use permit.
21 See Von Lubken v. Hood River County, 104 Or App 683, 803 P2d
22 750 (1990), adhered to 106 Or App 226 (1991); Stotter v.
23 City of Eugene, 18 Or LUBA 135 (1989); Standard Insurance
24 Co. v. Washington County, 16 Or LUBA 30, 34 (1987). The NZO
25 includes standards for each of its zones, and the general
26 expressions of intent for each of the zoning districts are

1 not among those standards. Because I believe this
2 conclusion is supported by a clear and straightforward
3 reading of NZO 2-2-1.020 and 2-5-3.020, I do not believe a
4 remand is required under Clark v. Jackson County, supra, to
5 have the city confirm what the NZO already provides in
6 unambiguous language.

7 I also disagree with the majority's resolution of the
8 seventh assignment of error. The majority concludes that
9 because (1) the city failed to apply the Shoreland Natural
10 Resources Impact Review requirements of NZO 2-5-7.030, and
11 (2) there is some ambiguity whether NZO 2-5-7.030 must be
12 applied at this stage of development approval or as part of
13 "some other proceeding," the decision must be remanded for
14 the city to interpret and apply NZO 2-5-7.030 in the first
15 instance.¹³ I conclude because the city neither listed NZO
16 2-5-7.030 as an applicable approval criterion nor applied
17 NZO 2-5-7.030 to the challenged decision, it interprets
18 NZO 2-5-7.030 as not applying to the challenged decision.

19 The Oregon Supreme Court's decision in Clark holds that
20 this Board must defer to a local government's interpretation
21 of its own ordinances, unless the interpretation is contrary
22 to the express words, policy or context of the local
23 enactment. The Court of Appeals decision in Weeks v. City

¹³I assume for purposes of this dissent that NZO 2-5-7.030 is ambiguous and, therefore, may reasonably be interpreted either as applying to the challenged decision or as applying at some other later stage in the approval process.

1 of Tillamook, supra, explains that the Supreme Court's
2 opinion in Clark has the dual effect of reallocating
3 interpretive authority and interpretive responsibility to
4 local governments.¹⁴ In Weeks the Court of Appeals goes on
5 to explain as follows:

6 "[a]fter Clark, local governments may no more fail
7 to articulate interpretations of their legislation
8 that are necessary to their decisions than they
9 may omit necessary findings of fact, and LUBA has
10 no more authority on review to supply missing
11 interpretations than it does to make findings that
12 the local government has failed to include in its
13 decision."

14 I believe the factual context in Weeks is important and
15 that it limits the scope of the court's holding in that
16 case. In Weeks the challenged decision simply concluded
17 that a disputed conditional use permit "is still valid."
18 Weeks, 117 Or App at 451. Where the local government makes
19 no attempt in its decision to identify the criteria it
20 applied in reaching a decision, and the parties identify
21 arguably relevant criteria which are ambiguous, it makes
22 sense to remand the challenged decision so that the local
23 government can adopt findings identifying the relevant
24 criteria and interpreting those criteria in the first

¹⁴In Cope v. City of Cannon Beach, 115 Or App 11, 16-17, ___ P2d ___
(1992), the Court of Appeals explained that, prior to Clark, while a local
government's interpretation of its own enactments was entitled to some
weight, ultimate interpretive authority and responsibility rested with this
Board and with the appellate courts on review of this Board's decisions.
See Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50 (1978);
McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988),

1 instance.

2 The decision challenged in this appeal is quite
3 different from the decision in Weeks. The decision
4 identifies the standards and criteria the city believes
5 apply to the challenged decision and applies them. NZO 2-5-
6 7.030 is not among the applicable criteria identified by the
7 city. It is true that the city does not include an
8 explanation of why it believes that each inapplicable
9 criterion is inapplicable. However, in my view, such an
10 explanation is neither practical nor required by Clark or
11 Weeks.¹⁵ I believe LUBA may assume, by virtue of the city's
12 failure to identify and apply NZO 2-5-7.030 in this case,
13 that the city subscribes to the reasonable interpretation of
14 NZO 2-5-7.030 that the criterion does not apply to the
15 challenged decision.

¹⁵If such interpretive findings are required by Clark and Weeks, local governments now must examine all inapplicable criteria for potential ambiguities, and adopt findings resolving such ambiguities, or risk that those ambiguous criteria will be raised for the first time in an appeal to this Board and result in an automatic remand for interpretive findings.