

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WILLIAM JACKMAN, MARGARET JACKMAN,)
5 RAYMOND JACOBS, SHERRYL GOERTZEN-)
6 JACOBS, DORTHY RADCLIFFE, RYAN)
7 RADCLIFFE, HAROLD SCHILLING,)
8 LAURA SCHILLING, ROBERT SPITTLES)
9 and MARY HENDERSHOTT-SPITTLES,)

10))
11 Petitioners,)
12))

13 vs.)

14) LUBA Nos. 94-006 and 94-099

15 CITY OF TILLAMOOK,)

16) FINAL OPINION
17 Respondent,) AND ORDER
18))

19 and)

20))
21 THE CHURCH OF THE NAZARENE,)
22))

23 Intervenor-Respondent.)
24
25

26 Appeal from City of Tillamook.
27

28 Harold L. Schilling, Tillamook, filed the petition for
29 review and argued on his own behalf.
30

31 Douglas Kaufman and Lois A. Albright, Tillamook, filed
32 a response brief on behalf of respondent and intervenor-
33 respondent. With them on the brief was Albright & Kittell.
34 Lois A. Albright argued on behalf of intervenor-respondent.
35

36 SHERTON, Chief Referee; GUSTAFSON, Referee; LIVINGSTON,
37 Referee, participated in the decision.
38

39 REMANDED 07/10/95
40

41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 In LUBA No. 94-006, petitioners appeal a city council
4 decision approving a conditional use permit to use an
5 existing single family dwelling as church offices. In LUBA
6 No. 94-099, petitioners appeal a city council decision
7 granting site plan approval for an off-street parking lot as
8 an accessory use appurtenant to a church.

9 **MOTION TO INTERVENE**

10 The Church of the Nazarene, the applicant below, moves
11 to intervene in this proceeding on the side of respondent.
12 There is no opposition to the motion, and it is allowed.

13 **FACTS**

14 Intervenor's church is located at the southwest corner
15 of Third Street and Del Monte Avenue, on land zoned
16 Single-Family and Duplex Residential (R-5.0). This
17 consolidated appeal concerns two applications by intervenor
18 for church-related use of properties on the block located
19 across Third Street from the church.¹ Apparently,
20 intervenor was using a single family dwelling on a lot
21 fronting on Third Street across from the church (Tax Lot

¹The zoning of the block located across Third Street from the church, where the properties that are the subject of the applications at issue in this appeal are located, is in dispute. Petitioners contend it is zoned R-5.0, whereas the city and intervenor (respondents) contend it is zoned Residential-Office (R-O). This issue is addressed under the first assignment of error, infra.

1 1500) as church offices, and was in the process of
2 developing a parking lot on primarily the rear portion of an
3 adjacent double-size lot fronting on Del Monte Avenue that
4 already contains an existing dwelling (Tax Lot 1000).² The
5 back of Tax Lot 1500 is separated from the rear portion of
6 Tax Lot 1000 by a public alley leading to Del Monte Avenue.

7 After complaints concerning intervenor's activities on
8 the subject properties were made to the city, intervenor
9 applied for conditional use permit and site plan approval to
10 use the dwelling on Tax Lot 1500 as church offices and place
11 a sign in the yard. Record B119.³ After public hearings,
12 the city planning commission adopted separate decisions
13 granting conditional use permit and site plan approval.
14 Record 206, 211. Petitioners appealed the conditional use

²Whether Tax Lot 1000 is actually one or two separate parcels is also a matter of dispute, although it appears from the record that both the existing dwelling and the proposed parking spaces are located, in part, on both halves of Tax Lot 1000.

³The local record in this consolidated proceeding consists of six different volumes. The record for LUBA No. 94-006 received by this Board on February 25, 1994 shall be cited as "Record ____." Additionally, we note the city council order challenged in LUBA No. 94-006 appears as two unnumbered pages at the beginning of this record volume. The two-page order shall be cited as "Record 0" and "Record 00." The record for LUBA No. 94-099 received on June 24, 1994 shall be cited as "Record A____." The supplemental record for both appeals received on September 2, 1994 shall be cited as "Record B____." The supplemental record for both appeals received on November 29, 1994 shall be cited as "Record C____." The addendum to the supplemental record for both appeals received on January 12, 1995 shall be cited as "Record D____." The final supplemental record for both appeals received on February 16, 1995 shall be cited as "Record E____."

1 permit decision to the city council.⁴ Record 413.

2 The city council conducted proceedings on petitioners'
3 appeal on December 20 and 27, 1993 and January 3, 1994.
4 Whether these proceedings are properly termed meetings or
5 public hearings, and whether they satisfied the procedural
6 requirements of the City of Tillamook Zoning Ordinance (TZO)
7 and state statutes is disputed. On January 3, 1994, the
8 city council adopted an order affirming the planning
9 commission decision. Record 0. This order (hereafter
10 conditional use decision) is appealed in LUBA No. 94-006.

11 A separate item under the "Legislative" section of the
12 agenda for the January 3, 1994 city council meeting was
13 "Review of Administrative Decision Allowing Parking Lot
14 within R-0 zone as an outright use."⁵ Record 2. The
15 minutes indicate this proceeding concerned an interpretation
16 of the TZO regarding whether intervenor's proposed parking
17 lot use of Tax Lot 1000 in the R-0 zone requires a
18 conditional use permit. On January 18, 1995, the city
19 council adopted a motion that it "affirms the interpretation
20 of the parking lot as an accessory or appurtenant use to a
21 permitted use * * *," and that the planning commission

⁴Petitioners did not appeal the decision granting site plan approval for the proposed use of the dwelling on Tax Lot 1500 as church offices, and that decision is not at issue in this appeal.

⁵The "administrative decision" or "administrative interpretation" regarding this issue referred to at this and other places in the record appears to be located at Record B32-39.

1 should perform a site plan review of the proposed parking
2 lot. Record B27.

3 On January 25, 1994, intervenor filed an application
4 for site plan review of the proposed 14-space parking lot on
5 Tax Lot 1000. Record A127. The site plan shows 9 parking
6 spaces located behind the existing dwelling and 5 parking
7 spaces located between the existing dwelling and the alley
8 to the south. Record A138. Access to the parking lot would
9 be from the alley.

10 After a public hearing, the planning commission
11 approved intervenor's site plan for the proposed parking
12 lot. Record A110. Petitioners appealed the planning
13 commission decision to the city council. Record A96. The
14 city council conducted additional proceedings on
15 petitioners' appeal. On June 6, 1994, the city council
16 adopted an order affirming the planning commission's
17 decision and granting site plan approval, with certain
18 modifications. This order (hereafter site plan decision) is
19 appealed in LUBA No. 94-099.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioners argue the challenged decisions should be
22 reversed because the subject properties are zoned R-5.0, not
23 R-0, and offices and off-street parking lots are not allowed
24 in the R-5.0 zone. Petitioners contend the subject
25 properties were zoned strictly for residential use prior to
26 1980, and the city never adopted an ordinance changing the

1 zone to R-0. Petitioners note the conditional use decision
2 states:

3 "Tillamook City Resolution #1064 adopted on
4 March 5, 1984 formally adopted the zoning map
5 which depicted the [subject] property as [R-0]."
6 Record 0.

7 Petitioners argue that under ORS 227.215 and TZO provisions,
8 the zoning of the subject properties can only be changed by
9 an ordinance, not a resolution.

10 Pursuant to respondents' request, we take official
11 notice of a City of Tillamook Comprehensive Plan and Zoning
12 Map adopted by City of Tillamook Ordinance No. 1038 and
13 signed by the city's mayor on March 22, 1982. This map
14 shows the comprehensive plan designation of the subject
15 properties as Medium Density Residential & Office and the
16 zone as Multi-Family Residential (R-0.0).⁶ Record B124. We
17 therefore conclude the subject properties were already zoned
18 R-0 by ordinance prior to the adoption of the 1984
19 resolution referred to in the conditional use decision.

20 The first assignment of error is denied.

⁶The zoning designations depicted on the legend of this map match those listed in the current TZO, which in turn are the same as those listed in the TZO adopted in 1980 by City of Tillamook Ordinance No. 979, except that the map lists a Multi-Family Residential (R-0.0) zone rather than the Residential-Office (R-O) zone listed in the text of the TZO and referred to in the challenged decision. However, the parties treat the R-0.0 zone shown on the map as being the same as the R-O zone listed in the TZO, so we do the same.

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. Comprehensive Plan Provisions**

3 Petitioners contend the findings supporting the
4 challenged decisions are inadequate because they fail to
5 address City of Tillamook City Comprehensive Plan (plan)
6 Policies 7, 15, 43, 51 and 81, which concern housing,
7 offices and traffic, as well as plan Transportation System
8 Goal and Objective 1. Petitioners further contend they
9 raised the issue of the applicability of these plan
10 provisions during the proceedings below.

11 The plan provisions cited by petitioners are arguably
12 relevant to the challenged decisions. Neither decision
13 includes any findings addressing these provisions,
14 determining either that they are inapplicable or that the
15 proposal in question satisfies them. Respondents ask us to
16 make such determinations based on the evidence in the
17 record. However, the city council must interpret and apply
18 these plan provisions in the first instance. Weeks v. City
19 of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992).

20 This subassignment of error is sustained.

21 **B. TZO 22.6(F)(1)**

22 TZO Section 22 establishes site development standards
23 for the R-0 (and other) zones. TZO 22.6(F) is titled
24 "Traffic Capacity Analysis." TZO 22.6(F)(1) provides:

25 "The [Planning] Commission may require a proposed
26 development to submit a detailed Traffic Capacity
27 Plan."

1 TZO 22.6(F)(2)-(7) set out the requirements for a traffic
2 capacity analysis.

3 Petitioners contend the city erred by failing to
4 require a traffic capacity analysis for the proposed uses.
5 Petitioners point to the following "condition" listed in the
6 site plan decision:

7 "[T]here is no need for a traffic analysis."
8 Record A112.

9 Petitioners argue the planning commission "was provided no
10 staff analysis, considered no data, reviewed no
11 documentation of any sort, and received no qualified
12 testimony" in reaching the above conclusion, which was also
13 adopted by the city council.⁷ Petition for Review 11.

14 TZO 22.6(F)(1) simply provides that the city may
15 require a traffic capacity analysis as part of the site plan
16 approval process. Petitioners point to no legal standard
17 arguably requiring such an analysis in this instance or
18 establishing standards for city decisions on whether to
19 require such an analysis. Without a contention that some
20 legal standard has been violated, we cannot provide relief.
21 Frankton Neigh. Assoc. v. Hood River County, 25 Or LUBA 386,
22 389 (1993); Lane School District 71 v. Lane County, 15
23 Or LUBA 150, 153 (1986).

24 This subassignment of error is denied.

⁷There is no dispute that each challenged city council order incorporates by reference the corresponding planning commission decision.

1 The second assignment of error is sustained in part.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners contend the city improperly refused to
4 allow them to present testimony and argument regarding
5 whether a parking lot is an outright permitted use of Tax
6 Lot 1000 during the proceedings leading to the conditional
7 use permit decision on office use of Tax Lot 1500.
8 Petitioners argue the city's conditional use permit
9 proceedings should have included consideration of whether a
10 conditional use permit is required for the parking lot, and
11 the conditional use decision should include findings on this
12 issue.

13 The challenged conditional use decision finds that
14 issues concerning the proposed parking lot on Tax Lot 1000
15 are not relevant to whether a conditional use permit should
16 be approved for Tax Lot 1500. Record 00. We agree. The
17 city was not required to expand the scope of its proceedings
18 on intervenor's application for a conditional use permit for
19 office use of Tax Lot 1500 to include an unrelated issue
20 concerning Tax Lot 1000. See Pend-Air Citizen's Citizen's
21 Comm. v. City of Pendleton, ___ Or LUBA ___ (LUBA No.
22 94-178, June 27, 1995), slip op 6.

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 Petitioners contend the city's notice of public hearing
26 on intervenor's conditional use permit application for

1 office use of Tax Lot 1500 failed to satisfy the requirement
2 of ORS 197.763(3)(a) to "explain the nature of the
3 application and the proposed use or uses which could be
4 authorized."⁸ Petitioners contend intervenor had used, and
5 would continue to use, the subject property for additional
6 uses, such as a meeting facility and counseling center.

7 If the city's notice of hearing failed to comply with
8 ORS 197.763(3)(a), which we do not determine, that would be
9 a procedural error. Under ORS 197.835(7)(a)(B), a
10 procedural error provides a basis for reversal or remand of
11 the challenged decision only if petitioners' substantial
12 rights are prejudiced by the error. Here, petitioners do
13 not contend their substantial rights were prejudiced by the
14 alleged violation of ORS 197.763(3)(a), and we do not see
15 that they were.

16 The fourth assignment of error is denied.⁹

⁸Petitioners also assert the city's hearing notice violated TZO 27.11, which provides that a conditional use permit "shall apply to the specific use applied for only * * *." However, petitioners provide no supporting argument, and we will not supply petitioners' arguments for them. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

⁹In their petition for review, petitioners also contend under this assignment of error that the conditional use decision fails to comply with TZO 25.4(F), which concerns off-street parking and loading requirements for various types of uses. However, during oral argument petitioners conceded TZO 25.4(F) is relevant to site plan, rather than conditional use permit, approval for Tax Lot 1500 and that the city's site plan approval for Tax Lot 1500 is not before this Board on appeal.

1 **FIFTH AND NINTH ASSIGNMENTS OF ERROR¹⁰**

2 **A. Impartial Tribunal**

3 Petitioners contend they were denied their right to an
4 "impartial tribunal," but present no argument to establish
5 that the city decision makers were biased or prejudged the
6 subject matter. Petitioners simply state they have "no way
7 of knowing" whether the planning commission or city council
8 deliberations were tainted by improper influence or
9 contacts.

10 In contending their right to an impartial tribunal was
11 denied, petitioners have the burden of showing the local
12 decision maker was biased or prejudged the application and
13 did not reach a decision by applying relevant standards
14 based on the evidence and argument presented. Eppich v.
15 Clackamas County, 26 Or LUBA 498 (1994). Petitioners fail
16 to do so.

17 This subassignment of error is denied.

18 **B. Availability of Public Documents**

19 Petitioners contend the city's failure to provide them
20 with timely access to the draft minutes of the planning
21 commission and city council proceedings violated the Public
22 Records Law. Petitioners also contend the city violated the
23 requirement of ORS 197.763(3)(h) and (i) that copies of all

¹⁰The subassignment of the ninth assignment of error concerning whether the proposed parking lot would make the existing dwelling on Tax Lot 1000 nonconforming is addressed under the eighth assignment of error, infra.

1 staff reports and all documents and evidence relied on by
2 the applicant be provided at reasonable cost, and that the
3 city's notice of hearing so state. Petitioners specifically
4 complain that while petitioner Jackman was required to pay
5 \$14 (\$1 per page) for a staff report, intervenor was
6 provided with the same material free of charge.

7 We do not determine whether draft, unapproved minutes
8 are subject to inspection under the Public Records Law
9 because, even if they were, the Public Records Law itself
10 provides that it is enforced by petition to the county
11 district attorney and, if that fails, by instituting an
12 action in circuit court. ORS 192.460. This Board does not
13 have jurisdiction to review alleged Public Records Law
14 violations.

15 With regard to the alleged violations of the notice
16 requirements of ORS 197.763(3)(h) and (i), the city's
17 notices of the planning commission hearing on each
18 application simply state "[m]aterials pertinent to [the
19 application] are available for review" at the city planning
20 department. Record A123, B118. This statement does not
21 fully comply with the requirements of ORS 197.763(3)(h) and
22 (i) that the notices of hearing state that the staff report
23 and applicant's materials "are available for inspection at
24 no cost and [copies] will be provided at reasonable cost."
25 However, this failure to comply fully with the statute is at
26 most a procedural error, and petitioners do not allege or

1 explain how it violates their substantial rights.
2 ORS 197.835(7)(a)(B).

3 With regard to petitioners' more serious allegation
4 that the city failed to provide them with copies of staff
5 reports and applicant's materials at a reasonable cost,
6 while providing the applicant with free copies, we note that
7 petitioners' allegations are not supported by citations to
8 the record. Our review is limited to the record, unless
9 petitioners move for an evidentiary hearing to introduce
10 evidence of procedural irregularities not shown in the
11 record which would warrant reversal or remand.
12 ORS 197.830(13). Petitioners have not moved for a hearing
13 to introduce evidence of the alleged procedural
14 irregularities. Further, the only undisputed fact alleged
15 by petitioners is that petitioner Jackman was required to
16 pay \$14 for a copy of a 14-page staff report. Although we
17 tend to agree with petitioners that \$14 is not a "reasonable
18 cost" for the 14-page document, as required by
19 ORS 197.763(3)(i), we do not see that the overcharge is
20 severe enough to violate petitioners' substantial rights.

21 This subassignment of error is denied.

22 **C. Planning Commission Membership and Procedures**

23 Petitioners contend that, contrary to the city
24 ordinance establishing a planning commission, more than two
25 members of the planning commission are nonresidents of the
26 city. This Board has jurisdiction to review the challenged

1 land use decisions. Whether the planning commission members
2 comply with city requirements for the make-up of the
3 planning commission is not within this Board's scope of
4 review.

5 Petitioners also contend the planning commission's
6 decisions were improperly adopted, in that the orders and
7 findings were neither adopted by the planning commission at
8 a public meeting nor ratified by the planning commission
9 members after being signed by the chairman. However, the
10 city decisions subject to our review are the city council's
11 decisions. Any procedural errors in the manner in which the
12 planning commission's orders and findings were adopted do
13 not affect our review.

14 This subassignment of error is denied.

15 **D. City Council Appeal Procedures**

16 As relevant here, TZO 33.2(B) provides, with regard to
17 the procedures for appeal hearings before the city council:

18 "It shall be the duty of the City Council, upon
19 receiving an [appeal] of a Decision by the
20 Planning Commission, to receive and examine
21 available information and conduct a public hearing
22 on behalf of the applicant or other interested
23 party. * * *

24 "The City Council shall review only the record of
25 [the] prior proceeding, and may ask for
26 clarification or additional information from the
27 participating parties as it relates to the record.
28 Full disclosure of both parties must be made at
29 the Planning Commission level and additional
30 non-related arguments shall not be accepted by the
31 City Council.

1 "* * * * *"

2 Petitioners argue they were denied an opportunity to
3 present argument explaining the bases for their appeal.
4 Aside from an undeveloped suggestion of a violation of "due
5 process," petitioners' major contention is that the city
6 council's appeal procedures violate ORS 227.180(1)(a)(B),
7 which requires "a hearing at least for argument." However,
8 ORS 227.180(1) prescribes procedures only for appeals from a
9 hearings officer's decision to a planning commission or city
10 council, not for appeals from a planning commission
11 decision. In any case, we note the record shows petitioners
12 were allowed to testify extensively on the bases for their
13 appeal and to submit written argument. Record 414-18,
14 434-56.

15 Petitioners also contend the city council allowed the
16 applicant to submit new evidence during the appeal hearing
17 on the conditional use permit application and that although
18 they objected, petitioners were denied the opportunity to
19 respond to such evidence. Record 150-52.

20 Under Fasano v. Washington Co. Comm., 264 Or 574, 507
21 P2d 23 (1973), petitioners have a right to rebut evidence
22 placed before the decision maker in a quasi-judicial land
23 use hearing. This is one of the substantial rights referred
24 to by ORS 197.835(7)(a)(B). Muller v. Polk County, 16
25 Or LUBA 771, 775 (1988).

26 Respondents do not contend the testimony submitted to

1 the city council on behalf of the applicant on trends in
2 neighborhood property values (Record 150-52) merely restates
3 evidence already in the record or is irrelevant to
4 conditional use permit approval standards. The record shows
5 petitioners asked for an opportunity to respond, but were
6 denied. Record 152. Where petitioners are denied the
7 opportunity to rebut evidence that is potentially relevant
8 to applicable approval standards in a quasi-judicial land
9 use proceeding, their substantial rights are prejudiced and
10 the challenged decision must be remanded. Wicks v. City of
11 Reedsport, ___ Or LUBA ___ (LUBA No. 94-139, March 8, 1995),
12 slip op 12; Mazeski v. Wasco County, 26 Or LUBA 226, 233
13 (1993).

14 This subassignment of error is sustained in part.

15 The fifth and ninth assignments of error are sustained
16 in part.

17 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

18 Petitioners contend the proposed off-street parking lot
19 to be used in conjunction with intervenor's church is not an
20 outright permitted use of Tax Lot 1000, but rather requires
21 a conditional use permit. Petitioners argue the city
22 misconstrued or failed to apply several provisions of the
23 TZO concerning accessory uses, location of parking
24 facilities and expansion of nonconforming uses in deciding
25 the proposed parking lot does not require a conditional use
26 permit.

1 Respondents contend the decision that the proposed
2 parking lot is an outright permitted use of Tax Lot 1000,
3 requiring only site plan review, was not made in either of
4 the decisions appealed here, but rather in a separate
5 decision interpreting the TZO made by the city council on
6 January 18, 1994. Record B27. Respondents argue
7 petitioners failed to appeal that decision and cannot
8 collaterally attack it in this proceeding.

9 We must determine whether the city council's decision
10 that the proposed parking lot is an outright permitted,
11 rather than conditional, use of Tax Lot 1000 was made in the
12 challenged site plan decision or in a separate final,
13 appealable land use decision made on January 18, 1994,
14 before intervenor's site plan application was filed. The
15 city council held hearings on this interpretive issue on
16 January 3 and 18, 1994, after which it adopted a motion that
17 it "affirms the interpretation of the parking lot as an
18 accessory or appurtenant use to a permitted use * * *."
19 Record B27. The minutes are accompanied by a document
20 titled "Nazarene Parking Lot Administrative Interpretation,"
21 dated January 18, 1994. Record B32-B39.

22 As far as we can tell, the city council's January 3 and
23 18, 1994 proceedings regarding whether the proposed parking
24 lot is a permitted or conditional use of Tax Lot 1000 under
25 the TZO were not conducted pursuant to a formal process
26 established by the TZO for issuing declaratory rulings.

1 However, in Weeks v. City of Tillamook, 113 Or App 285, 289,
2 832 P2d 1246 (1992) (Weeks), the Court of Appeals explained
3 that whether a final land use decision has been made does
4 not depend on the procedures followed by the local
5 government, but rather on whether "a land use decision, as
6 defined in ORS 197.015(10)(a)(A) was sought and one was
7 made." In rejecting this Board's opinion in Weeks v. City
8 of Tillamook, 22 Or LUBA 667 (1992), that the city council
9 had not made a final land use decision because no formal
10 motion was made and the minutes memorializing the decision
11 were prefaced by the words "[i]t was the consensus of
12 Council," the Court stated:

13 "We do not agree with LUBA that the decision was
14 not final or that it was merely advisory. The
15 minutes give a clear and decisive answer to a
16 clear question. LUBA's opinion suggests that the
17 procedures that the city followed were deficient
18 and that the cursory notation in the minutes falls
19 well short of the necessary contents for a land
20 use decision. If so, however, we reiterate that
21 'any procedural defects in a land use decision are
22 reviewable exclusively by the land use appeal
23 process.' Sauvie Island Agricultural v. GGS
24 (Hawaii), Inc., 107 Or App 1, 7, 810 P2d 856
25 (1991). The existence of such defects does not
26 mean that there is no land use decision that can
27 be appealed to LUBA; rather, it means that there
28 is a potentially reversible land use decision, if
29 the defects are assigned as error in the appeal."
30 (Footnotes omitted.) Weeks, supra, 113 Or App
31 at 289.

32 In this case, petitioners sought to raise, throughout
33 the conditional use proceedings concerning office use of Tax
34 Lot 1500, the question of whether use of Tax Lot 1000 for

1 church-related off-street parking requires a conditional use
2 permit. This was in essence a request for a decision
3 concerning application of the TZO to a specific fact
4 situation; in other words a request for a "land use
5 decision" as defined by ORS 197.015(10)(a)(A). The city
6 council decided to conduct a separate proceeding on this
7 question, and both petitioners and intervenor participated
8 in that proceeding. Record 2, 50-98. The minutes indicate
9 the city made a decision interpreting the TZO in this
10 regard. Record B27. Therefore, under Weeks the city
11 council's January 18, 1994 decision was a final, appealable
12 land use decision regarding whether the proposed parking lot
13 requires a conditional use permit, and petitioners cannot
14 challenge it in their appeal of the city's subsequent
15 decision granting site plan approval for the parking lot.

16 The sixth and seventh assignments of error are denied.

17 **EIGHTH ASSIGNMENT OF ERROR**

18 In this assignment of error, petitioners challenge the
19 site plan decision in several respects.¹¹

20 **A. Use of Alley**

21 According to the approved site plan, access to the
22 proposed parking lot will be provided by the public alley

¹¹Petitioners also complain that at various times during the proceedings city staff members gave erroneous opinions or comments. However, none of these staff statements are included in the final site plan decision adopted by the city council. Therefore, regardless of whether they are erroneous, they provide no basis for reversal or remand.

1 extending west from Del Monte Avenue. Petitioners contend
2 such means of access is not allowed, because TZO 4 defines
3 "alley" as "a public or private way * * * affording only
4 secondary means of access to abutting property." (Emphasis
5 added.) Petitioners also contend that with regard to
6 right-of-way and pavement width and construction standards,
7 the decision improperly fails to require the alley to be
8 developed to the standards established by city Ordinance
9 No. 936. Compare Record A5 with Record B12-13.

10 The site plan decision does not interpret or apply the
11 arguably relevant provisions of the TZO and Ordinance
12 No. 936 cited by petitioners.

13 This subassignment of error is sustained.

14 **B. Landscaping Requirements**

15 Petitioners argue that TZO 22.6(B)(1)(a) requires that
16 the proposed parking lot have landscaping that equals at
17 least 15% of the buildable area. Petitioners contend the
18 city erroneously gave intervenor landscaping credit for the
19 existing lawn in the required front and side yards of the
20 existing dwelling on Tax Lot 1000. Petitioners base this
21 argument on TZO 6, which provides:

22 "[N]o yard or other open space provided about any
23 building or on any building lot for the purpose of
24 complying with the provisions of this Ordinance
25 shall be considered as providing a yard or other
26 open space for any other building or any other
27 building lot."

28 As we understand it, petitioners contend that if the front

1 and side lawns of the existing dwelling are not included,
2 the site plan decision does not satisfy the landscaping
3 requirements of TZO 22.6(B)(1)(a).

4 Petitioners also contend the site plan decision fails
5 to comply with TZO 25.10(A), which provides:

6 "An off-street parking area for more than five (5)
7 vehicles shall be effectively screened by a
8 sight-obscuring fence, hedge or planting, on each
9 side which adjoins property situated in a R-7.5,
10 R-5.0 or R-0 District * * *."

11 The challenged decision does not interpret or apply the
12 apparently relevant provisions of TZO 6, 22.6(B)(1)(a) and
13 25.10(A).

14 This subassignment of error is sustained.

15 **C. Lot Area, Yard and Setback Requirements**

16 Tax Lot 1000 is approximately 10,000 square feet in
17 size. In the R-0 zone, a single-family dwelling generally
18 requires a minimum lot size of 5,000 square feet.
19 TZO 14.5(A). Petitioner contends the approved site plan
20 eliminates all of the back yard and 90% of the southerly
21 side yard currently serving the dwelling on Tax Lot 1000,
22 leaving an effective lot area for the dwelling of only 2,000
23 square feet, in violation of TZO lot size requirements.
24 Petitioners similarly contend the approved parking lot site
25 plan improperly results in violations of the TZO yard and
26 setback requirements for the existing dwelling.

27 The site plan decision fails to address the relevant
28 issues raised by petitioner regarding compliance with the

1 TZO lot area, yard and setback requirements for the existing
2 dwelling on Tax Lot 1000.

3 This subassignment of error is sustained.

4 **D. One Lot or Two**

5 Petitioners contend a prior lot line adjustment
6 eliminated a line that previously divided Tax Lot 1000 into
7 two 5,000 square foot parcels. Intervenor disagrees,
8 contending Tax Lot 1000 is comprised of two separate 5,000
9 square foot legal parcels. However, neither party explains
10 what, if any, position the site plan decision takes on this
11 issue, or why this issue is relevant to any standard for
12 site plan approval.¹²

13 This subassignment of error is denied.

14 The eighth assignment of error is sustained, in part.

15 The city's decisions are remanded.

¹²Petitioners contend the mixing of different uses on one parcel violates the purpose provision of the R-5.0 zone. However, we determine, supra, that the subject property is zoned R-0, not R-5.0. In addition, we note that according to the site plan, whereas most of the existing dwelling is located on the front "half" of Tax Lot 1000, a significant portion of the dwelling extends onto the back "half," and a significant portion of the proposed parking lot will extend onto the front "half." Therefore, even if there are two parcels, both the dwelling and the parking lot will be located on both parcels.