

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

4 PORT DOCK FOUR, INC., PORT DOCK)
5 FOUR CONDOMINIUM OWNERS)
6 ASSOCIATION, ROBERT AVERY, KATHY)
7 AVERY, WARNE H. NUNN, ALLEN)
8 CONLEY, BEVERLY CONLEY, TWYLAH)
9 OLSON and DELORES KEHOE,)
10)
11 Petitioners,)
12)
13 vs.)
14)
15 CITY OF NEWPORT,)
16)
17 Respondent,)
18)
19 and)
20)
21 BEACH DEVELOPMENT,)
22)
23 Intervenor-Respondent.)

LUBA No. 97-126

FINAL OPINION
AND ORDER

24
25
26 Appeal from City of Newport.

27
28 George B. Heilig, Corvallis, filed the petition for
29 review and argued on behalf of petitioners. With him on the
30 brief was Cable, Huston, Benedict & Haagensen.

31
32 No appearance by respondent.

33
34 Douglas R. Holbrook, Newport, filed the response brief
35 and argued on behalf of intervenor-respondent. With him on
36 the brief was Kurt Carstens and Litchfield & Carstens.

37
38 LIVINGSTON, Administrative Law Judge; HANNA,
39 Administrative Law Judge, participated in the decision.

40
41 REMANDED 10/31/97

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving a conditional use permit for a combined
5 retail/condominium development in the city's Water Related
6 (W-2) zone.

7 **MOTION TO INTERVENE**

8 Beach Development (intervenor), the applicant below,
9 moves to intervene on the side of the respondent in this
10 proceeding. There is no opposition to the motion, and it is
11 allowed.

12 **FACTS**

13 On February 3, 1997, intervenor applied for a
14 conditional use permit to construct a two-story building
15 with three condominiums above a 4,000-square-foot, four-unit
16 retail space. The subject property, which is occupied by a
17 small trailer park, is situated on the northwest corner of
18 the intersection of S.W. Bay Boulevard with South Pine
19 Street.¹ Petitioners' property, which is developed with a
20 10-unit two-story residential condominium, is north of and

¹Petitioners contend the property was vacant at the time of application. However, the challenged decision finds that it is occupied by a trailer park, and petitioners do not challenge that finding. Petitioners' argument, which is not clearly stated, may be that the city should have based its decision on factual circumstances existing at the time of application. If that is petitioners' argument, it is not persuasive. A local government processing an application need not proceed as if factual circumstances existing at the time of application remain unchanged. Petree v. Marion County, 29 Or LUBA 449, 452-53 (1995).

1 uphill from the subject property. A dead-end alley running
2 east to west from South Pine Street ends at the west
3 property line of the subject property and separates it from
4 petitioners' property. Petitioners propose to locate
5 parking for the proposed structure adjacent to this alley.

6 To the south, across S.W. Bay Boulevard, are the
7 Yaquina Bay Marina and a boardwalk. To the east and west
8 are marine supply stores. About 28 feet from the front
9 (south) property line, the north portion of the subject
10 property slopes steeply up to the rear property line.

11 The property was deeded to intervenor on October 3,
12 1996. Petitioner Port Dock Four, Inc. possesses an
13 easement, granted in 1979 (the easement), for access and
14 parking over the north 20 feet of the property.²

15 On March 10, 1987, the planning commission approved
16 intervenor's application after a public hearing.
17 Petitioners appealed to the city council, which conducted a
18 hearing on the record and approved the application on June
19 16, 1997.

20 This appeal followed.

²Notwithstanding doubts expressed in intervenor's brief concerning the existence of the easement, intervenor's own application states that "[t]he steep, 7300 sf lot is encumbered with a 20'-wide easement along the rear for access and parking of the Port Dock Condos." Record 148. This statement is included as a finding in the planning commission's decision, Record 99, which is upheld by the challenged decision, and the finding is not challenged on appeal.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners contend the city misconstrued the
3 applicable law and failed to make adequate findings
4 supported by substantial evidence in the record when it
5 approved a conditional use permit based, in part, on a
6 provision in the city zoning ordinance (NZO) which allows an
7 exception to the city's parking requirements under certain
8 circumstances. The city's parking, loading, and access
9 requirements are set forth in Section 2-3-6 of the NZO. NZO
10 2-3-6.020 states the number of off-street parking spaces
11 required for each use. NZO 2-3-6.020(A)(1) requires one
12 space per dwelling unit for the first four dwelling units.
13 NZO 2-3-6.020(B)(5) requires one space per 300 square feet
14 of retail space. Because the proposed development would
15 include three dwelling units, three parking spaces are
16 required to satisfy NZO 2-3-6.020(A)(1). Because the
17 development would include 4,000 square feet of retail space,
18 14 additional parking spaces are required to satisfy NZO
19 2-3-6.020(B)(5). A total of 17 spaces is thus required by
20 NZO 2-3-6.020(B)(5) and 2-3-6.020(A)(1).

21 NZO 2-3-6.030(B) states a special exception to these
22 requirements:

23 "It is recognized that certain buildings or uses
24 may not now provide the parking required under
25 this Section 2-3-6, and such buildings or uses
26 will be required to fully comply with the
27 requirements hereof in the event of a change in
28 use or expansion of use (unless the number of
29 additional parking spaces so required would be

1 fewer than three). In the event that the owner of
2 the property, or any person seeking -- with the
3 authority of the owner of the property -- to
4 change or expand the use, shall believe that
5 special circumstances exist constituting a
6 hardship and making it unreasonably difficult to
7 provide such additional parking required by the
8 change in use or expansion of use in an existing
9 building, such person may apply to the City
10 Planner for authority to participate instead in
11 the provision of public parking and/or mass
12 transit services within the City of Newport by
13 payment to the City of Newport, such payment to be
14 placed in a special fund for such purposes."

15 Although 17 spaces are required, intervenor proposes to
16 develop only 12 parking spaces along the alley to the
17 northwest of the proposed structure.³ Record 224. Ten of
18 these would be covered. Of these, four would be allocated
19 to the use of petitioners, "to replace the maximum five non-
20 exclusive outdoor parking spaces to which [petitioners]
21 presently have access." Record 16. Only six covered spaces
22 would be allocated to the proposed structure.⁴ The two

³The plan submitted by intervenor to the city shows an additional six perpendicular parking spaces on South Pine Street and seven parallel parking spaces on S.W. Bay Boulevard. Record 149. The findings do not mention these parking spaces, which apparently do not act to satisfy the code parking requirement.

⁴The challenged decision is comprised of several discrete documents. The city council decision upholds the planning commission's decision, with additional findings. Record 12-16. The planning commission's decision incorporates an Exhibit A (findings provided by the applicant as part of its application for development) and an Exhibit B (findings prepared by the city planning staff). Record 99-117. The findings in Exhibit A and Exhibit B are not consistent as to the allocation of parking spaces. In Exhibit A, the applicant explains:

"There are two spaces planned for each residential unit on the subject lot, for a total of six parking spaces for the proposed

1 uncovered spaces would be available on a first come, first
2 served basis. Record 142.

3 The challenged decision determines that NZO
4 2-3-6.030(B) is satisfied, based on the following finding:

5 "The applicant is changing use on applicant's
6 property from that of a small trailer park to
7 commercial retail below residential.

8 "Historically, the City of Newport has allowed
9 access to the parking fund exemption to property
10 owners, changing use and structure in areas where
11 parking is otherwise limited by geography or other
12 conditions.

13 "Examples of historic application include Newport
14 Book Center, which was a new building on vacant
15 property, Phasian Voyage Conversion on Bay
16 Boulevard, and the new building on the corner of
17 Bay Boulevard and Case Street built by Mo's
18 Enterprise, all similar circumstances to the
19 subject application." Record 16.

20 Petitioners contend these findings are inadequate
21 because they do not expressly interpret the terms "change in

condos. In addition, there are four spaces planned for the re-
configured parking of the Port Dock Four Condos * * *."
Record 147.

In Exhibit B, the planning staff explains that "The parking requirement
for the proposed three condominium units will be 3 spaces -- at the rate of
one space per dwelling unit." Record 154. The planning staff's
explanation is consistent with NZO 2-3-6.020(A)(1).

The number of covered spaces that can be allocated to the proposed
retail use in satisfaction of the 14-space requirement obviously depends on
how many of the covered spaces are reserved for residential use. Depending
on whether the applicant's allocation or the staff's allocation is used,
either no spaces or three spaces can be allocated to retail. However,
since petitioners do not assign error to the inconsistency in the findings,
and since the challenged decision grants an exception to the parking
requirements stated in NZO 2-3-6.020(A)(1) and NZO 2-3-6.020(B)(5), we do
not discuss the matter further.

1 use" or "expansion of use" in NZO 2-3-6.030(B) in a way that
2 would allow the construction of a building on a lot
3 presently being used as a trailer park to be a change or
4 expansion of a use. According to petitioners, the exception
5 should be limited in its application to "a change in current
6 active use of buildings developed prior to modern codes
7 which, because of their special circumstances, cannot meet
8 modern requirements." Petition for Review 10.

9 Findings need not include an express interpretive
10 statement about the meaning of a code standard as long as
11 the local government's understanding of what the standard
12 means is inherent in the way that it applies the standard.
13 Alliance for Responsible Land Use v. Deschutes Cty., 149 Or
14 App 259, 266-67, ___ P2d ___ (1997). Although the city's
15 finding is not express, it is clear that the city rejects
16 the interpretation of NZO 2-3-6.030(B) advanced by
17 petitioners. It is a close call, but we conclude that the
18 city's understanding of NZO 2-3-6.030(B) can be discerned
19 from the way in which it has applied the standard. The city
20 interprets NZO 2-3-6.030(B) to permit an exception in the
21 event of a change in use on the subject property, and
22 concludes that the change from a small trailer park to
23 "commercial retail below residential" is such a change of
24 use. Although we might not interpret NZO 2-3-6.030(B) as
25 the city has, our responsibility does not include providing
26 an independent interpretation of the city's land use

1 legislation. Huntzicker v. Washington County, 141 Or App
2 257, 261, 917 P2d 1051 (1996). The city's interpretation is
3 owed deference under ORS 197.829(1) and Clark v. Jackson
4 County, 313 Or 508, 514-15, 836 P2d 710 (1992). Since the
5 interpretation is not "clearly wrong" or "beyond a colorable
6 defense" or "indefensible," we defer to it. deBardelaben v.
7 Tillamook County, 142 Or App 319, 922 P2d 683 (1996); Zippel
8 v. Josephine County, 128 Or App 458, 461, 876 Pd 854, rev
9 den 320 Or 272 (1994); Goose Hollow Foothills League v. City
10 of Portland, 117 Or App 211, 843 P2d 992 (1992).

11 Petitioners contend next that there are no "special
12 circumstances" which constitute a hardship sufficient to
13 justify an exception to the code parking requirements. In
14 response, intervenor points to findings that "[t]owards the
15 northern half of the property the elevation rises steeply to
16 a high bank," Record 145, and "[t]he combination of
17 topography and the 20 foot easement for access and parking
18 for the Port Dock Four Condos create a serious hardship
19 making the back half of the property unusable for on-site
20 uses." Record 147. Intervenor also remarks that the
21 easement restricts building on the area covered by the
22 easement.

23 Findings must (1) identify the relevant approval
24 standards, (2) set out the facts which are believed and
25 relied upon, and (3) explain how those facts lead to the
26 decision on compliance with the approval standards.

1 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
2 21, 569 P2d 1063 (1977); Heiller v. Josephine County, 23 Or
3 LUBA 551 556 (1992). We agree with petitioners that the
4 findings identified by intervenor do not adequately explain
5 how the stated facts justify an exception to the code
6 parking requirements. As petitioners point out,
7 intervenor's proposal calls for the use of the easement area
8 for parking. Therefore, the existence of the easement does
9 not reduce the amount of area available for parking and
10 thereby justify a reduction in the parking requirement.
11 Furthermore, while the steep slope at the rear of the
12 subject property might preclude the use of this area for
13 parking under certain circumstances, the challenged decision
14 does not explain why the proposed structure cannot be
15 designed to allow parking elsewhere on the property.

16 Finally, petitioners argue that because the topography
17 of the lot is shared by other nearby properties, it cannot
18 constitute a serious hardship justifying an exception for
19 the subject property. However, petitioners do not explain
20 why the fact that the topography is shared by other
21 properties precludes a finding of serious hardship with
22 respect to the subject property, and we do not see that it
23 does.

24 The first assignment of error is sustained, in part.

25 **SECOND ASSIGNMENT OF ERROR**

26 Petitioners contend the city erred in failing to apply

1 the provisions of city Resolution 1778, which is Appendix D
2 to the NZO. Resolution 1778, which was adopted in December,
3 1974, states procedural rules for land use hearings, but it
4 also contains rules pertaining to an applicant's burden of
5 proof, including a requirement that the applicant show there
6 is a public need for the proposal.⁵ On appeal to the city
7 council, petitioners raised the failure of the planning
8 commission to make findings addressing this requirement.⁶

9 In response, the city council found:

10 "Although, Resolution 1778 was not repealed, it
11 has been superseded by the acknowledged
12 Comprehensive Plan for the City of Newport, the
13 City of Newport Zoning Ordinance (Ordinance No.
14 1308 as amended), and the vast body of state
15 legislation and case law regarding land use.
16 Resolution 1778 is therefore no longer relevant in
17 land use matters." Record 15.

18 Intervenor maintains that Resolution 1778 was repealed
19 by implication, and even if it was not so repealed, the
20 public need standard is satisfied by a finding that the
21 proposal will "create for the benefit of the public

⁵The standard may have been included in Resolution 1778 in response to Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973), where the Oregon Supreme Court held that someone seeking a zone change must show that there is a "public need for the kind of change in question * * *." The Fasano "public need" requirement now applies only when local governments include a requirement for such a showing in their comprehensive plan or land use regulations. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979), rehearing den 288 Or 585 (1980); Friends of Cedar Mill v. Washington County, 28 Or LUBA 477, 485 (1995).

⁶Petitioners raise additional issues related to Resolution 1778 in the petition for review. However, as intervenor notes, these issues were not raised below and, therefore, cannot be considered by this Board. ORS 197.835(3).

1 substantial additional improved parking beyond that
2 presently existing." Record 15.

3 Petitioners argue that because Resolution 1778 is an
4 appendix to the NZO and was not repealed, it is still in
5 force. We agree with petitioners. The city states no basis
6 for its finding that the adoption of the city's land use
7 regulations and comprehensive plan caused Resolution 1778 to
8 be superseded. That finding cannot be sustained, given that
9 Resolution 1778 is an appendix to the NZO.⁷ As far as we
10 can tell, Resolution 1778 is part of the city's acknowledged
11 land use regulations.

12 We also note that NZO 2-6-6 provides:

13 "The rules, requirements, and provisions of this
14 ordinance are in addition and not in lieu of any
15 prior ordinance, resolution, rule, requirement, or
16 procedure previously adopted by the City of
17 Newport except as may have been expressly
18 repealed, provided, however, that the provisions
19 of this ordinance shall be controlling cases where
20 there may be conflicting provisions." (Emphasis
21 added.)

22 Since the challenged decision finds that Resolution 1778 has
23 not been repealed, it appears that under NZO 2-6-6, it is
24 still in force to the extent that it does not conflict with
25 provisions in the NZO.

26 We reject without further comment intervenor's

⁷At oral argument, the parties informed the Board that Resolution 1778 was repealed after intervenor's application was approved. We do not know whether the removal of Resolution 1778 as an appendix has been acknowledged under ORS 197.610 to 197.625.

1 contention that the public need standard is satisfied by the
2 finding that the proposal will "create for the benefit of
3 the public substantial additional improved parking beyond
4 that presently existing."

5 The second assignment of error is sustained.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioners contend the findings are inadequate in
8 failing to address concerns raised in connection with NZO
9 2-5-3.015(A)(3), which provides, in relevant part:

10 "In reviewing a Type I Decision^[8], the Planning
11 Commission must find that the request complies
12 with the following criteria:

13 * * * * *

14 "(3) The proposed use does not have an adverse
15 impact, or impacts can be ameliorated through
16 conditions."⁹

17 Petitioners also contend the findings addressing NZO
18 2-5-3.015(A)(3) are not supported by substantial evidence.

19 In a May 14, 1997 letter to the city council,
20 petitioners stated in connection with this criterion:

⁸The parties do not dispute that the challenged decision is a Type I decision.

⁹NZO 2-5-3.010 defines "impact" as "The effect of a nuisance on a neighborhood or the city," and "nuisance" as

"The use of property or course of conduct that causes damage or annoyance, or which unlawfully interferes with or obstructs or renders unsafe other persons in the enjoyment of life or in the use of property. Nuisances include dust, smoke, noise, glare, vibration, safety, and odors."

1 "[If the development is approved, t]here will be
2 loss of privacy, visual impacts, noise impacts,
3 lighting impacts, congestion and loss of safety.
4 None of these issues were addressed in the
5 February, 1997 decision. There are no findings
6 concerning these negative impacts. There is no
7 evidence on ameliorating these impacts." Record
8 69.

9 Findings must address and respond to specific issues,
10 raised in the proceedings below, that are relevant to
11 compliance with applicable approval standards. Hillcrest
12 Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293,
13 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or
14 App 849, 853, 604 P2d 896 (1979); McKenzie v. Multnomah
15 County, 27 Or LUBA 523, 544-45 (1994); Heiller v. Josephine
16 County, 23 Or LUBA 551, 556 (1992).

17 The challenged decision includes the following findings
18 addressing NZO 2-5-3.015(A)(3):

19 "The proposed uses are not expected to have any
20 adverse impacts on the neighborhood or surrounding
21 area such as dust, noise, odor, smoke, glare,
22 vibration or safety." Record 147.

23 "As defined in the Zoning Ordinance, 'impacts' are
24 the effect of nuisances such as dust, smoke,
25 noise, glare, vibration, safety, and odors on the
26 neighborhood. This criterion relates to the issue
27 of whether or not the proposed use has potential
28 'adverse impacts' and whether conditions may be
29 attached to ameliorate those 'adverse impacts.'

30 "It appears * * * that the proposed use, if
31 permitted under the circumstances and conditions
32 of this particular case, is not expected to have
33 any adverse impacts in the area." Record 154.

34 Loss of privacy and congestion do not appear to be

1 issues relevant to compliance with NZO 2-5-3.015(A)(3).
2 However, visual impacts (including lighting impacts), noise
3 and safety are mentioned in the code, were specifically
4 raised by petitioners, and must be addressed in the
5 findings. To the extent the findings address these issues
6 at all, we agree with petitioners the findings are
7 conclusory and fail to identify substantial evidence in the
8 record which supports them.

9 The third assignment of error is sustained.

10 **FOURTH ASSIGNMENT OF ERROR**

11 NZO 2-6-1.025 provides that "[a] property owner, their
12 [sic] authorized agents, or an interested person with the
13 written approval of the property owner, may make application
14 for a land use action." Petitioners contend that because
15 they hold an easement over the subject property, they are
16 "owners" under the code, and NZO 2-6-1.025 requires that
17 intervenor obtain their consent as part of the application
18 process.¹⁰

19 Intervenor responds that an easement holder is not a
20 property owner and that an easement holder's rights are not
21 properly an issue in a land use proceeding. Intervenor
22 points out that petitioners' interpretation of "owner" could

¹⁰Even if petitioners were "owners," it is not clear from the language of NZO 2-6-1.025 that another owner, such as intervenor, could not make application for a land use action without petitioners' consent. However, intervenor does not make this argument, and we do not decide the assignment of error on this basis.

1 create insurmountable practical difficulties, since anyone
2 with an inchoate privilege in land would be able to block
3 development on that land by refusing to sign an application.

4 The challenged decision states:

5 "The Council finds that the City has not
6 historically considered an easement holder an
7 'owner' for purposes of its land use ordinances
8 and therefore has not historically required the
9 consent or participation of easement holders.

10 "The holder of an easement is not possessed of
11 sufficient interest in real property to entitle
12 them to participate in the land use processes
13 within the City of Newport." Record 15.

14 We need not and do not decide whether the city
15 council's interpretation of NZO 2-6-1.025 is reasonable or
16 correct. It is within the council's interpretive
17 discretion, and we defer to it.

18 The fourth assignment of error is denied.

19 The city's decision is remanded.