

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

BILL and ELZA BECK, GLENN BELL, )  
JACK BESSO, GARY and JOANNE BEYER,)  
MARTHA BEYER, O.F. BEYER, EDNA )  
DALLAS, TIM HAMBURGER, FRED HAMEL,)  
NIKKI HEATH, ELIZABETH KEHL, )  
BYRON and LINDA RICHARDSON, JODI )  
SANDER, KEN SEEGER, JOSEPHINE )  
VELTRI, BUD WALKER, H.O. and )  
MARTHA WEITMAN, BOB and ELVA )  
WEEKS, )  
Petitioners, )  
vs. )  
CITY OF TILLAMOOK, )  
Respondent, )  
and )  
COMMUNITY ACTION TEAM, INC., )  
Intervenor-Respondent. )

LUBA No. 89-096  
FINAL OPINION  
AND ORDER

Appeal from City of Tillamook.

Gregory S. Hathaway and Virginia L. Gustafson, Portland, filed the petition for review. With them on the brief was Garvey, Schubert & Barer. Gregory S. Hathaway argued on behalf of petitioners.

Douglas E. Kaufman, Tillamook, filed a response brief and argued on behalf of respondent.

Ted Grove, Clatskanie, filed a response brief on behalf of intervenor-respondent.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED

1/08/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a Tillamook City Council decision approving a conditional use permit for an emergency shelter home for homeless people (homeless shelter).

MOTION TO INTERVENE

Community Action Team, Inc. (CAT), the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor-respondent CAT (intervenor) currently operates a homeless shelter with capacity to provide temporary housing for up to twelve people and permanent housing for one employee as live-in staff.

In 1988, intervenor applied for and obtained from the federal Department of Housing and Urban Development a community development block grant. The funds from the block grant were to be used to purchase a different site for a larger capacity homeless shelter. Thereafter, intervenor entered into an earnest money agreement to purchase the subject property and also applied for a conditional use permit for a homeless shelter. The new shelter is proposed to house up to twenty people and one live-in staff person.

The subject property is designated Downtown Commercial by the Tillamook Comprehensive Plan and is zoned Central Commercial (C-C). The land to the east and southwest of the

subject property is zoned C-C. The land to the south and west is apparently also zoned C-C, but is occupied by what the city refers to as "non-conforming" residential development.<sup>1</sup> Record 3. The city's findings do not identify the zoning of the property to the north of the proposed homeless shelter.<sup>2</sup> The city's findings also refer to "the Central Commercial area and the adjacent R-5.0 zone." Record 3.

The planning commission denied the application. Intervenor appealed the planning commission's decision to the city council. The city council approved intervenor's application, and this appeal followed.

#### FIRST ASSIGNMENT OF ERROR

"The city misconstrued the applicable law in finding that the proposed residential homeless shelter is a public facility allowed as a conditional use in the Central-Commercial zone."

The Tillamook City Zoning Ordinance (TCZO) section 17 provides that a "public facility" is a conditional use in the C-C zone. TCZO section 4 defines "public facility" as follows:

"Projects, activities and facilities deemed to be necessary for the maintenance of other public

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<sup>1</sup>This reference is somewhat inconsistent with the staff report, which suggests that the land to the west is zoned Single Family and Duplex Residential (R-5.0).

<sup>2</sup>The staff report states that the land to the north is zoned C-C. Record 129. However, the staff report was not incorporated into the city's findings.

purposes consistent with Comprehensive Plan policies, including nonpublic activities permitted by government agencies. Such public facilities shall include any activity undertaken or structures held, used, or controlled for public or quasi-public purposes including but not limited to, churches, fraternal organizations or clubs, hospitals, schools, nursing homes, federal, state, county or municipal offices or facilities, recreational facilities, and public utilities. Such determination shall be made without reference to the ownership of the structure or the realty upon which it is situated."

Petitioners contend that the city's findings fail to specifically determine that the proposed homeless shelter is a "public facility" as defined by the TCZO.

Petitioners also contend that in any case, the TCZO does not allow homeless shelters in the C-C zone as public facilities. Petitioners argue that the examples of public facilities listed in the TCZO definition do not include residential types of uses. According to petitioners, a homeless shelter is a residential use, and the only residential uses authorized in the C-C zone are those specifically listed as conditional uses. Petitioners maintain that by specifically listing "housing for the elderly or handicapped persons" in TCZO section 17, as conditional uses in the C-C zone, the city has, by implication, excluded all other types of residential housing from consideration as conditional uses in the C-C zone. Petitioners reason that because the proposed homeless shelter will provide housing for the homeless, it is a

residential facility. Petitioners argue that because the proposed shelter is a residential facility, it cannot be authorized in the C-C zone because it will not provide housing exclusively for the elderly or the handicapped.

The city contends that petitioners' interpretation of the meaning of public facility as defined in TCZO section 4, is improperly narrow and incorrect. The city argues that nothing in the TCZO disqualifies a facility from being considered as a "public facility" simply because the facility will provide shelter for homeless families and individuals. According to the city, the TCZO does not make any distinction between residential and non-residential uses serving public purposes. The city argues that under the TCZO, the hallmark of a public facility is that it advance a public purpose.<sup>3</sup> The city contends that provision of shelter for the homeless serves a public purpose and, therefore, such shelters are public facilities. The city also argues that it is not required to make a finding that the proposed homeless shelter is a public facility as defined in TCZO section 4.

The city made no express determination that the proposed homeless shelter is a "public facility." However,

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<sup>3</sup>The city states:

"Providing for housing of persons of low income is a public purpose for which public money may be spent, and such purpose may be fulfilled by a private corporation." Respondent's Brief 5.

in its order the city listed the TCZO section 4 definition of "public facility" and identified the C-C zone "public facility" conditional use provision as an applicable approval criterion. We conclude the city implicitly determined that the proposed homeless shelter is a "public facility" within the meaning of TCZO section 4 in approving intervenor's application.

The correct interpretation of provisions of a local land use ordinance is a question of law which must be decided by this Board on appeal. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988); Mental Health Division v. Lake County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-004, July 18, 1989), slip op 8. The provisions of a comprehensive zoning ordinance should be construed as a whole, and effect given to the overall policy of the ordinance. Clatsop County v. Morgan, 19 Or App 173, 178, 526 P2d 1393 (1974); Kellog Lake Friends v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-061, December 22, 1988), slip op 10, aff'd 96 Or App 536, rev den 308 Or 197 (1989).

We do not believe that the fact that the city specifically lists certain types of residential uses as conditional uses necessarily precludes other types of arguably residential uses from being approved as conditional uses in the C-C zone. The city's definition of public facility encompasses residential and other types of uses.

Furthermore, the city's definition of "public facility" does not distinguish between residential and non-residential facilities. The listed examples of uses which are public facilities include hospitals and nursing homes. Either of these uses are residential in the sense that a stay at either institution is indeterminate and overnight accommodations, housing and residential services are provided for the duration of the stay. The TCZO definition of public facility requires only that the proposed use be "deemed necessary for the maintenance of public purposes."

TCZO section 4.

Because it was disputed below whether the proposed homeless shelter was a public facility, the city erred in adopting no findings explaining why it concluded that the proposed homeless shelter is a public facility. See, Highway 213 Coalition v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-060, December 15, 1988), slip op 5. However, if the parties identify evidence in the record which "clearly supports" a finding that the proposed homeless shelter is necessary for the maintenance of public purposes (and therefore is a public facility), then we must affirm the city's decision even though it made no explicit finding that the proposed shelter is a public facility.

ORS 197.835(9)(b).<sup>4</sup>

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<sup>4</sup>ORS 197.835(9)(b) provides in relevant part:

The city cites evidence that the proposed shelter is supported by public funds and that it provides shelter to families and individuals who have none. We conclude that this is evidence which clearly supports a finding that the proposed shelter is necessary for the maintenance of public purposes and is, therefore, a public facility within the meaning of the TCZO definition of that term.

The first assignment of error is denied.

#### SECOND ASSIGNMENT OF ERROR

"The city misconstrued the applicable law and made findings that are legally inadequate by failing to explain all applicable criteria, the facts relied upon in reaching its decision and the justification for the decision based on the criteria, standards and facts set forth."

ORS 227.173(2) provides:

"[a]pproval or denial of a permit application shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based in the criteria, standards and facts set forth."

##### A. Relevant Approval Criteria

Petitioner contends the city failed to identify and address as approval criteria (1) the requirement of TCZO

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"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record \* \* \*."

section 17(7) for provision of parking spaces in the C-C zone,<sup>5</sup> and (2) TCZO section 17(8)(b) which requires in relevant part:

"In any C-C District directly across the street or abutting any \* \* \* R-5.0 \* \* \* District, the parking and loading area shall be set back at least ten (10) feet from the street right of way. These areas shall be appropriately landscaped either along the residential street frontage, side yard or rear yard to protect the character of adjoining residential property. Such landscaping shall be maintained."

The city argues that its order does set out the applicable approval criteria in its order under the heading "Findings of Fact."<sup>6</sup>

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<sup>5</sup>TCZO section 17(7) provides:

"Off Street Parking and Loading. Off street parking and loading spaces or an equivalent as accepted by the Planning Commission shall be provided as required in Section 25.

"Exception: The parking and loading requirements shall be exempted from the area contained by the C-4 District of Ordinance No. 830, the former Zoning Ordinance, and delineated as C-C on the Map which accompanies this Ordinance and is a part hereof."

No argument is made that the subject property is within the exception stated above, and no map or other evidence has been cited to show that the subject property is delineated as an exception area.

<sup>6</sup>The portion of the order cited by the city provides as follows:

"3. Findings of Fact:

"The following land use laws and regulations were in effect at the time of denial:

"Comprehensive Plan

"Policy 21

It is not clear in TCZO sections 17 and 27 what the relevant approval criteria are for conditional uses in the C-C zone. Section 17 identifies permitted and conditional uses. Section 17 also specifies height, lot size and other requirements in the C-C zone, including those concerning parking, loading and setbacks in section 17(7) and (8)(b) identified by petitioners and quoted in the text and in n5, supra. However, as far as we can tell, these requirements apply to permitted uses as well as to conditional uses, and it is not clear that they are to be applied as a part of the conditional use process.

The conditional use permit provisions of TCZO section 27 expressly provide that conditional use permit

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"\* \* \* \* \*

"Policy 22

"\* \* \* \* \*

"[TCZO]

"1. Section 17 Central Commercial District

"A. Purpose \* \* \*

"B. Conditional Uses - The following conditional uses may be permitted subject to a conditional use permit:

"(1) Any public facility

"\* \* \* \* \*

"3. Section 27 Conditional Use Permits

"A. Purpose \* \* \* " Record 2.

applications may be approved, approved with conditions, or denied.<sup>7</sup> However, although TCZO section 27 specifies a number of considerations that may form the basis for the imposition of conditions, it does not clearly specify approval standards which, if not met, may result in denial of the application. TCZO section 27(5)(a) comes the closest to identifying mandatory approval criteria:

"In order to grant any conditional use, the Planning Commission must find that the establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be in violation of the appropriate regulations and standards contained in this ordinance."

We understand TCZO section 27 to simply identify the types of considerations that may be applied to impose conditions and to provide, in addition, that a conditional use permit may be approved or denied based on mandatory criteria located elsewhere in the zoning ordinance.<sup>8</sup>

#### 1. Parking Setback Requirements

The city contends that the TCZO section 17(8)(b) provision regarding setbacks for parking and loading areas is not a relevant approval criterion and, accordingly, need

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<sup>7</sup>TCZO section 27(5) provides in relevant part:

"The [city] may approve, approve with conditions, or disapprove the application for a Conditional Use Permit. \* \* \*"

<sup>8</sup>Of course, any comprehensive plan policies which are approval criteria applicable to conditional use permit approvals also must be satisfied.

not be identified as such.<sup>9</sup> Specifically, we understand the city to argue that it was not required to apply the provision of TCZO section 17(8)(b) which requires parking setbacks where the C-C district either "abut[s]" or is "across the street from" a R-5.0 district, because in this case, there is no R-5.0 district "immediately adjacent" to the subject C-C district. Respondent's Brief 8.

We agree with the city that if TCZO section 17(8)(b) is inapplicable to its decision, then the ORS 227.173(2) requirement regarding identification of relevant standards is not violated, because it only requires the city to identify standards which are applicable to its decision. In this case, whether the parking setback requirements of TCZO 17(8)(b) are applicable to the city's decision depends upon whether the subject C-C zoning district is "directly across the street [from] or abutting" property zoned R-5.0.

The city's findings state that "adjacent" to the subject C-C "area" there is a R-5.0 zone. Specifically, the city's order states:

"The proposed conditional use request is allowable in both the Central Commercial area and the

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<sup>9</sup>We note that this position is inconsistent with the city's apparent position that the landscaping provision of the same subsection is an applicable approval criterion. The positions are inconsistent because the provisions of TCZO section 17(8)(b) regarding both parking setbacks and landscaping only apply where a R-5.0 district "abuts" or is "across the street" from the C-C zoning district. The city does not explain why the landscaping provision of this subsection is an applicable approval criterion, but the parking setback provision is not.

adjacent R-5.0 zone. \* \* \*" <sup>10</sup> Record 3.

TCZO section 17(8)(b) does not use the term "adjacent" regarding parking setbacks and the city's order provides no explanation of the intended meaning of this term in this context.<sup>11</sup> The TCZO terms that trigger the disputed TCZO section 17(8)(b) parking setback provision, are whether the subject C-C zoning district "abut[s]" or is "across the street" from the "adjacent" R-5.0 district.

TCZO section 4, however, defines the terms "abutting" and "adjacent." "Abutting" is defined as "\* \* \* adjoining with a common boundary line \* \* \*." TCZO section 4. "Adjacent" is defined as follows:

"Adjacent shall mean near, close; for example, an Industrial District across the street or highway from a Residential District shall be considered as 'Adjacent'. TCZO section 4.

The city's finding that the subject C-C "area" is "adjacent" to a R-5.0 zoning district is tantamount to a finding that the subject C-C area is "near or close" to the R-5.0 zoning district. That a zoning district is "near or close" to another zoning district is not the same as the two zoning districts "abutting" one another. However, the

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<sup>10</sup>We are cited to nothing which explains or shows the proximity between the subject C-C district and the "adjacent" R-5.0 district.

<sup>11</sup>Similarly, the city does not explain what it intends by the term "area." However, from the context in which it is used, we understand it to mean that the subject homeless shelter is located in a C-C zoning district which is adjacent to a R-5.0 district.

example listed as intended to clarify the meaning of "near or close" in the TCZO definition of "adjacent," refers to "near or close" as the equivalent of a zoning district being "across the street" from another zoning district. Accordingly, the city's choice of the term "adjacent" could mean that the subject C-C zoning district is across the street from the "adjacent" R-5.0 zoning district.<sup>12</sup> Under these circumstances, we cannot say as a matter of law that the TCZO section 17(8)(b) provision regarding parking setbacks is inapplicable.

Furthermore, we are cited to no evidence in the record to "clearly support" a determination that TCZO section 17(8)(b) is inapplicable. See ORS 197.835(9)(b).

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<sup>12</sup>The city suggests that the following findings in the staff report to the planning commission, establishes that the TCZO section 17(8)(b) parking setback provision is inapplicable:

- "1. Property immediately adjacent to the proposed site is zoned Central Commercial. Outlying property to the west and northwest is Single Family/Duplex Residential; to the north, east, and south, Central Commercial.
- "2. There are no lot requirements for a C-C District that abuts a C-C District.
- "3. Parking as required by the Planning Commission except for in the C-4 District, which is designated C-C." Record 129.

These findings do not establish as a matter of law that the subject C-C district does not "abut" or is not "across the street from" a R-5.0 district. These findings say nothing about the zoning designation of the property to the west of the subject C-C district other than "outlying property to the west and northwest is zoned Single Family Residential/Duplex Residential \* \* \*." Record 129.

The city is required to either identify the parking setback provision of TCZO section 17(8)(b) as an applicable approval criterion, or to explain why the parking setback provision of TCZO section 17 (8)(b) is inapplicable. The city could establish the latter by reference to a zoning map or by adopting particular findings that the subject C-C zoning district is neither abutting nor across the street from the R-5.0 zoning district which the city found to be "adjacent" to the subject C-C area.

This subassignment of error is sustained.

## 2. Parking Space and Landscaping Requirements

The city's order does not explicitly identify as applicable the provisions of TCZO section 17(7) and (8) regarding parking space and landscaping requirements that petitioners contend are applicable approval criteria. However, the city does not dispute that these provisions are applicable approval criteria.

The city claims it addressed TCZO sections 17(7) and (8) regarding required parking spaces and landscaping, in a manner adequate to satisfy ORS 227.173(2), by adopting the following findings:

"The Common Council finds that the Planning and Zoning Commission was in error in not basing its decision on land use regulations. There was no substantial evidence that appellant's proposal would result in any adverse impact on the neighborhood, and that the interests and concerns of surrounding neighbors can be met by requiring the following conditions be made a part of the conditional use permit:

\*\*\*\*\*

"2. The applicant to provide four (4) off-street parking spaces.

\*\*\*\*\*

"4. Additional landscaping be placed and maintained along the southerly portion of the site to soften appearance and reduce possible noise impact.

"The Common Council of the City of Tillamook order the following:

\*\*\*\*\*

"3. The Community Action Team shelter home be allowed subject to the following conditions:

\*\*\*\*\*

"(2) The applicant to provide four (4) off-street parking spaces.

\*\*\*\*\*

"(4) Additional landscaping be placed and maintained along the southerly portion of the site to soften appearance and reduce possible noise impact."<sup>13</sup> Record 3-4.

We must determine whether these findings are adequate to establish compliance with the TCZO section 17(7) requirement for provision of parking spaces and the TCZO

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<sup>13</sup>While the city's findings do not explicitly identify TCZO section 17(7) regarding parking spaces and TCZO section 17(8)(b) regarding landscaping as approval standards, the parties do not dispute that these provisions are approval standards and it appears from the findings that the city applied them as such. Under these circumstances, we do not believe that there is a violation of the ORS 227.173(2) requirement that the city identify the relevant approval criteria.

section 17(8)(b) requirement that:

"In any C-C District directly across the street or abutting any \* \* \* R-5.0 \* \* \* District, the parking and loading area \* \* \* shall be appropriately landscaped either along the residential street frontage, side yard or rear yard to protect the character of adjoining residential property. Such landscaping shall be maintained."

The city's findings conclude, without explanation, that four parking spaces are adequate to serve the proposed homeless shelter. Assuming (as the parties apparently do) that TCZO section 17(7) is applicable, it requires that parking must be provided "as accepted by the planning commission \* \* \* as required in Section 25." TCZO section 25 sets out numerous requirements for parking and we cannot ascertain which, if any, of those requirements the city applied here.<sup>14</sup> Similarly, the city's findings regarding landscaping do not establish that the city complied with the landscaping provision of TCZO section 17(8)(b) which requires the city to landscape certain areas "to protect the

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<sup>14</sup>We note that TCZO section 25 (3) states:

"Off street parking spaces shall be provided and maintained as set forth in the (sic) section for all uses in all zoning district (sic) except the Downtown Business District."

It is not argued that the proposed homeless shelter is within this exemption. We note that the property is located in the Central Commercial zone and is designated "Downtown Commercial" by the Tillamook Comprehensive Plan. Unless there is a separate zoning or planning designation known as the "Downtown Business District," we do not know why this exemption would not apply. However, no party argues that it does apply and it is not our function to supply arguments for the parties, especially where, as here, we are uncertain of the scope and applicability of the exemption.

character of adjoining and adjacent residential property."<sup>15</sup> Accordingly, we conclude that the city's findings are inadequate to show that the city complied with either TCZO section 17(7) regarding parking spaces or TCZO Section 17(8)(b) regarding landscaping.

Additionally, we are cited to no evidence in the record, pursuant to ORS 197.835(9)(b), that would "clearly support" a determination that these provisions were properly applied or addressed.<sup>16</sup>

This subassignment of error is sustained.

**B. Explanation of Rationale for Decision**

Petitioners argue:

"the City's findings are nearly void of any relevant facts on which the city could rely in applying the relevant criteria. \* \* \* [T]he city has not set forth any facts regarding the character of the proposed use such as, for example, the purpose of the use, the intensity of the use or the relationship to the surrounding area." Petition For Review 11-12.

Specifically, petitioners contend that (1) the city did not explain how the justifications the city gave for approval of intervenor's application relate to the relevant approval criteria; (2) the city impermissibly shifted the

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<sup>15</sup>The scope of the landscaping requirement is unclear. Specifically, it is not clear whether parking and loading areas only must be landscaped or whether landscaping is required beyond the parking and loading areas.

<sup>16</sup>On remand, the county may want to reexamine the question of whether these provisions are applicable approval criteria.

burden of proof to petitioners to provide evidence that the proposed use would violate the relevant approval criteria; (3) the city did not explain how the imposition of conditions satisfies the relevant approval criteria; and (4) the city did not determine that the proposed use presently satisfies the relevant approval criteria.

The city findings state:

"Factors Leading to Conclusion:

"The proposed conditional use request is allowable in both the Central Commercial area and the adjacent R-5.0 zone. The commercial zone is more appropriate as:

- "1. Land to the east is a car lot, to the southeast a restaurant/convenient [sic] grocery store with non-conforming residential use to the south and west.
- "2. The proposed use is more intensive from the standpoint of walk in and drive in usage and therefore is appropriate within a commercially zoned area.
- "3. The proposed use will aid an eventual conversion to commercial uses by removal of a residential use from the central commercial land use inventory.
- "4. [CAT] was willing and able to meet the conditional use requirements proposed by the City Planning Commission.
- "5. Concerns expressed by those opposing the shelter home were not land use considerations.
  - "A. The testimony of those opposing the siting of the use were [sic] not backed by evidence.

"The past record of the existing shelter

home indicates little problem with crime and trespass.

"B. The proposed lowering of property values was not evidenced by a professional appraiser's judgment.

"Comprehensive Plan Goal 21 and 22 will be accomplished, in part, by this proposal as it is a more intensive use that is better suited to a commercial zone and will remove a strictly residential use from the land inventory." Record 3.

The city concluded that the planning commission erred in denying the application for the proposed homeless shelter because:

"[t]here was no substantial evidence that applicant's proposal would result in any adverse impact on the neighborhood, and that the interests and concerns of surrounding neighbors can be met by requiring the following conditions \* \* \*" Record 3-4.

We agree with petitioners that (1) the city did not relate its findings to the approval criteria it identified and applied, (2) the city impermissibly determined that it was the responsibility of the petitioners to establish that relevant approval criteria were violated, and (3) the city did not explain why it concluded that the conditions it imposed satisfy the approval criteria it identified and applied.

The second assignment of error is sustained.

#### THIRD ASSIGNMENT OF ERROR

"The city's approval of the conditional use permit is not based on substantial evidence in the whole record."

Petitioners claim the city's determination that the proposed homeless shelter is a public facility is not supported by substantial evidence in the whole record. We understand the thrust of petitioners' challenge here to be that because the proposed homeless shelter has characteristics of a residential facility, there can be no substantial evidence to show it meets the definition of public facility as petitioners interpret that term. However, we determined under the first assignment of error that we disagree with petitioners' interpretation of the term "public facility." Additionally, we also determined that the evidence in the whole record "clearly supports" a finding that the proposed homeless shelter will provide shelter to homeless families and individuals and is publically funded, at least in part. Our determination that there is evidence in the whole "record to clearly support" a finding that the proposed homeless shelter is a public facility applies a more demanding test than whether there is substantial evidence in the whole record to support that finding. Accordingly, we conclude that there is substantial evidence in the whole record to support the city's determination that the proposed homeless shelter is a "public facility" as defined in the TCZO. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988)

Petitioners also argue that the city made a determination of compliance with TCZO section 27(1) and that

the city's determination is not supported by substantial evidence in the whole record.

TCZO section 27(1) provides:

"Purpose- Conditional uses may be permitted in certain districts, subject to the granting of a Conditional Use Permit. Conditional uses may require special consideration, because of unusual characteristics of the area in which it is to be located. It is important that conditional uses be properly located with respect to the objectives of this Ordinance and the effect to the surrounding properties."

Under the second assignment of error, we determined that TCZO section 27 identifies considerations which may be the basis for the imposition of conditions of approval, but does not establish approval criteria. Similarly, the purpose statement of TCZO section 27(1) is not a mandatory approval criterion. To the extent that the city made findings of compliance with TCZO section 27(1), such findings are unnecessary to the city's decision. We need not review the evidentiary support for unnecessary findings.

Moorefield v. City of Corvallis, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-045, September 28, 1989), slip op 32.

Petitioners also contend that there is not substantial evidence to support the city's findings that policies 21 and 22 of the Tillamook Comprehensive Plan (plan), are satisfied.

Plan policy 21 states:

"The downtown area of Tillamook shall be permitted to expand through conversion and replacement of

non-commercial uses. The area of the expansion is illustrated by the existing and proposed Plan Maps. Retail uses are encouraged to remain in the downtown area to maintain its vitality.

"Currently 21 acres of land are devoted to commercial activity in the downtown area. The comprehensive plan designates 20 additional acres located generally, west, south and east of the existing downtown."

Plan policy 22 states:

"20 additional acres, located generally west, south and east of the existing downtown, shall be designated central commercial."

Petitioners contend that the following findings intended to satisfy these plan policies are not supported by substantial evidence:

"The proposed use will aid in eventual conversion to commercial uses by removal of a residential use from the central commercial land use inventory.\* \*

"Comprehensive Plan Goal 21 and 22 will be accomplished, in part, by this proposal as it is a more intensive use that is better suited to a commercial zone and will remove a strictly residential use from the land inventory." Record 3.

We infer from petitioners' argument that they believe plan policies 21 and 22 require that all development approvals on C-C zoned land must result in conversion of the existing uses to commercial uses. However, petitioners offer no explanation why these policies necessarily require

this result, and it is not obvious to us that they do.<sup>17</sup> We interpret these policies to encourage conversion to commercial uses but not to require it. Therefore, even if the proposed homeless shelter is not a commercial use, within the meaning of plan policies 21 and 22, this provides no basis for reversal or remand of the city's decision.

Finally, petitioners claim that there is not substantial evidence in the whole record to support the city's findings that TZCO sections 17(7) and (8)(b) are satisfied. However, under the second assignment of error, we concluded that the city's findings are inadequate. No purpose would be served in reviewing the evidentiary support for inadequate findings. DLCD v. Columbia County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-109, March 15, 1988), slip op at 7.

The third assignment of error is denied.

#### FOURTH ASSIGNMENT OF ERROR

"The city failed to follow its applicable procedures by approving a block grant for the proposed use at the proposed site six months before the conditional use application came before the city without providing any notice to the affected property owners. The city council's decision to approve the proposed use at the subject site prior to the land use proceedings deprived petitioners of a fair and impartial

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<sup>17</sup>We note in addition that petitioners provide no explanation of what commercial characteristics the proposed homeless shelter lacks, other than that it provides shelter for homeless individuals and families. Petitioners do not explain why this characteristic necessarily disqualifies the proposed shelter from being considered as a commercial use under these plan provisions.

decision which substantially prejudiced their right to due process."

Petitioners argue that the city was required to provide surrounding property owners with notice of the city's potential and actual approval of the block grant to the intervenor as follows:

"[i]n December, 1988, six months before the application for the proposed residential homeless shelter was presented to the City, the City Council approved a Community Block Grant to allow the applicant to purchase the proposed residential shelter home. The Block Grant application specified the location for the proposed shelter. Even though the application was site specific, no public notice was provided and the surrounding property owners were not notified that the city was considering approval of funds for a residential homeless shelter in their neighborhood." Petition for Review 30.

According to petitioners, in approving the block grant, the city committed itself to approving the subsequent application for a conditional use permit, and petitioners were consequently denied a fair hearing before an impartial tribunal.<sup>18</sup>

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<sup>18</sup>Petitioners state that the following statement by the applicant demonstrates that the city was committed to approve the proposed homeless shelter at the proposed location:

"We think it's important, it's something we want to do, it's something we've been planning for more than a year, it's something we have the City Council's cooperation on already, to apply for the grant, and they knew the site we had in mind at the time they approved the application at a public hearing." Record 119.

Petitioners also contend that they were harmed by the city's alleged bias because the city allowed intervenor to "clarify" its earlier testimony before the planning commission and denied petitioners an opportunity to respond to such clarification. Petitioners also contend that:

"The Council's lack of impartiality was also evidenced in their findings. The City's findings, conclusions an order are, in no way, based on the applicant's satisfaction of the required approval criteria. The entire tenor of the order erroneously implied the opponents had the obligation to prove why this accepted proposal should not go forward." Petition for Review 32.

The city contends that petitioners received a fair hearing before an impartial tribunal. The city argues that under Oatfield Ridge Residents v. Clackamas Co., 14 Or LUBA 766 (1986), petitioners must establish that the city was "incapable of making a fair and impartial decision." The city contends that petitioners failed to carry that burden. The city also disputes that the block grant was specific to

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Petitioners also contend that the following statement by the mayor establishes that the city was committed to approving the proposed homeless shelter:

"\* \* \* the City Council endorsed the grant and we did that full knowing that what we wanted was a facility and we wanted to have it funded, and we wanted to avoid some of this month to month scraping and scrabbling for funds. We endorsed that grant, and when they got the grant, then they applied to buy this particular house. Until that particular thing came before the Planning and Zoning, [sic] they didn't have the grant, so they really couldn't buy the house. It was conditional upon their [sic] getting the grant, then as soon as they get the grant, then it has to come before the Planning and Zoning, [sic] who [sic] has to decide if it's a permitted use, a non-permitted use, or a conditional use. So they made the proposal on the basis of a conditional use. When they do that, then they have to notify property owners \* \* \*." Record 65.

the subject property, as petitioners contend. The city maintains that any reference to property regarding the block grant was general, as is apparent from the minutes of the hearing regarding the block grant as follows:

"[a spokesperson] of the Community Action Team distributed information to the Council regarding their [sic] activity, and then gave an overview of the proposal. They wish to, through the City, purchase a centrally located building to be used for the homeless program in Tillamook." Record 185.

Furthermore, the city argues that it twice published notice of the city's consideration of approval of the block grant. The city also argues that petitioners were given, and have taken advantage of, opportunities to participate in the city's proceedings on intervenor's application for a conditional use permit for the subject property. Finally, the city argues that the city council's request for clarification of testimony does not show bias, but rather demonstrates the city council was a fair and impartial tribunal.

We agree with the city. The fact that the city approved federal funds for intervenor's homeless shelter project does not disqualify the city council for bias. See Oatfield Ridge Residents v. Clackamas Co., 14 Or LUBA at 768, ("[a]gency sponsorship of a project may or may not earn it the support of elected officials when they review it for conformance with land use requirements." )

Nothing to which we have been cited regarding approval

of the block grant or the conduct of the city hearings below persuades us that the city was incapable of making a fair and impartial decision. We do not believe that by approving a federal grant the city committed itself to approve the subsequent conditional use permit for the proposed homeless shelter at the subject location without proper consideration of applicable land use approval criteria. Furthermore, there is no suggestion that either the mayor or any of the members of the city council would derive any private financial gain from approval of the proposed homeless shelter.

The fourth assignment of error is denied.

The city's decision is remanded.