

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

4 ROBERT WEEKS, ELVA WEEKS,           )  
5 BILL BECK and ELZA BECK,           )  
6    )  
7           Petitioners,                )  
8    )  
9           vs.                            )  
10   )  
11 CITY OF TILLAMOOK,                    )  
12   )  
13           Respondent,                 )  
14   )  
15           and                            )  
16   )  
17 COMMUNITY ACTION TEAM, INC.,        )  
18   )  
19           Intervenor-Respondent.        )

LUBA No. 91-110  
FINAL OPINION  
AND ORDER

20  
21  
22           On remand from the Court of Appeals.

23  
24           Phillip E. Grillo, Portland, filed the petition for  
25 review and argued on behalf of petitioners.

26  
27           Douglas E. Kaufman, Tillamook, filed a response brief  
28 and argued on behalf of respondent.

29  
30           Neil C. Lemery, Rockaway Beach, filed a response brief  
31 on behalf of intervenor-respondent.

32  
33           KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
34 Referee, participated in the decision.

35  
36                   AFFIRMED   10/14/92

37  
38           You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a determination by the city council  
4 that a previously approved conditional use permit is valid.

5 **MOTION TO INTERVENE**

6 Community Action Team, Inc., moves to intervene on the  
7 side of respondent. There is no objection to the motion,  
8 and it is allowed.

9 **MOTION TO DISMISS AND REQUEST FOR ATTORNEY FEES**

10 Ten days after oral argument, the city filed a motion  
11 to dismiss this appeal proceeding, contending that the  
12 appeal is frivolous, and a request for attorney fees. We  
13 deny the motion to dismiss. In addition, the request for  
14 attorney fees is premature. Under OAR 661-10-075(1)(a), a  
15 petition for attorney fees can only be filed by the  
16 "prevailing party." Until the Board has issued its final  
17 opinion and order, there is no prevailing party.

18 **FACTS**

19 This case is before us on remand from the Court of  
20 Appeals in Weeks v. City of Tillamook, 113 Or App 285, \_\_\_  
21 P2d \_\_\_ (1992) (Weeks). The relevant facts, as set out in  
22 the Court of Appeals' decision, are as follows:

23 "Petitioners opposed the construction and  
24 operation of a homeless shelter for which the City  
25 issued a conditional use permit to intervenor \* \*  
26 \*. Petitioners and others twice appealed to LUBA  
27 the granting of the permit. The first time, LUBA  
28 remanded the City's decision and, after the City's  
29 decision on remand, LUBA affirmed the granting of

1 the permit. On judicial review, we affirmed LUBA.  
2 Beck v. City of Tillamook, 105 Or App 276, 805 P2d  
3 144 (1991). The Supreme Court allowed review and,  
4 after the parties filed their briefs to us in the  
5 present case, it affirmed [the Court of Appeals']  
6 decision in the main, but remanded [to the Court  
7 of Appeals] for [it] to consider one issue. \* \* \*

8 "While the review proceeding on the allowance of  
9 the permit was progressing, the one-year  
10 anniversary of the decision to grant it occurred,  
11 and petitioners filed a document 'requesting [the  
12 City] Council to \* \* \* either (1) direct staff to  
13 acknowledge the fact that the permit had indeed  
14 expired, or (2) specify why Council feels the  
15 permit has not yet expired and to authorize staff  
16 to continue the denial of the permit's expiration  
17 and proceed into Court to determine the permit's  
18 status.' The filing cited section 34 of the city  
19 zoning ordinance, which provides in relevant part:

20 "Any \* \* \* conditional use permit \* \* \*  
21 granted in accordance with the terms of  
22 this ordinance shall be deemed revoked  
23 if not used within one year from the  
24 date of approval or such time as  
25 specified by the planning commission.  
26 Said permit shall not be deemed used  
27 unless the applicant has actually  
28 obtained a building permit, and  
29 commenced construction thereunder.'

30 "Section 27(5)(c) of the ordinance provides:

31 "[A] conditional use permit shall  
32 become void after one year after  
33 approval, or after such greater or  
34 lesser times as may be specified as a  
35 condition of approval, unless within  
36 that time the required building  
37 construction, alteration, or enlargement  
38 has been commenced and diligently  
39 pursued, or, if no such construction,  
40 alteration, or enlargement is required,  
41 unless the permit activity is being  
42 regularly conducted on the premises.  
43 Planning Commission may extend the

1 permit for a period of one year.'

2 "The matter was presented to the Council at a  
3 meeting on June 3, 1991. It is not entirely clear  
4 what occurred at the meeting, but the preliminary  
5 discussion apparently took place in executive  
6 session. After the regular meeting was resumed,  
7 Council members were polled, and on the basis of  
8 the stated view of each of the five members, the  
9 minutes of the meeting recite that '[i]t was the  
10 consensus of Council that the conditional use  
11 permit is still valid.' \* \* \* (Footnote  
12 omitted.) Weeks, 113 Or App at 287-88.

13 The quoted entry in the minutes of the city council  
14 meeting constitutes the appealed decision. In Weeks v. City  
15 of Tillamook, \_\_\_ Or LUBA \_\_\_\_ (LUBA No. 91-110, February  
16 19, 1992), we determined that this entry in the minutes is  
17 not a final land use decision. However, the Court of  
18 Appeals found that the challenged decision is a final land  
19 use decision, and remanded the decision to us to review the  
20 city council's determination that the conditional use permit  
21 is valid.

22 **SECOND ASSIGNMENT OF ERROR**

23 "The city's decision is outside the range of  
24 discretion allowed by the city's zoning  
25 ordinance."

26 **THIRD ASSIGNMENT OF ERROR**

27 "The city's decision violates a provision of  
28 applicable law and is prohibited as a matter of  
29 law."

30 **FOURTH ASSIGNMENT OF ERROR**

31 "In the alternative, the city has improperly  
32 construed the applicable law.

1 "A. The city's interpretation of its own  
2 ordinance is inconsistent with the express  
3 language of the ordinance.

4 "B. The city's interpretation is inconsistent  
5 with the apparent purpose or policy of  
6 Section 27 and Section 34 of the ordinance."

7 We must decide whether the city council correctly  
8 applied Tillamook City Zoning Ordinance (TCZO) Sections  
9 27(5)(c) and (7) and 34.<sup>1</sup> Section 27(5)(c) and 34 are  
10 quoted above. Section 27(7) provides:

11 "No building or other permit shall be issued in  
12 any case where a Conditional Use Permit is  
13 required by the terms of this Ordinance until ten  
14 (10) days after the approval of the conditional  
15 use by the Planning Commission. An appeal from an  
16 action of the Planning Commission shall  
17 automatically stay the issuance of a building or  
18 other permit until such appeal has been  
19 completed."

20 Under Section 27(5)(c), a conditional use permit is  
21 "void" if required construction is not "commenced" within  
22 one year after the date a conditional use permit is  
23 approved.<sup>2</sup> Similarly, under Section 34, a conditional use  
24 permit is "deemed revoked" if it is not "used." Section 34  
25 goes on to specify what kinds of activities constitute "use"

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<sup>1</sup>There is no city interpretation of those sections before us to which we must defer. See Clark v. Jackson County, 313 Or 508, \_\_\_ P2d \_\_\_ (1992). The entire challenged decision consists of a sentence saying the city determines "the conditional use permit is still valid." Record 28. Our charge is to determine whether the city correctly determined the conditional use permit is valid under the TCZO. McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

<sup>2</sup>There is no dispute that the proposed use, a homeless shelter, requires building and other permits in order to begin operating.

1 of a conditional use permit to avoid automatic revocation.  
2 Those activities, as specified in Section 34, are (1)  
3 issuance of a building or other required permit, and (2)  
4 beginning construction under such permit(s). Finally, under  
5 Section 27(7), the city may not properly issue a building or  
6 other required permit to enable such construction until an  
7 appeal from the planning commission's approval of the  
8 conditional use "has been completed."

9 In summary, a conditional use permit must be "used"  
10 within one year from the date it is approved or it is void.  
11 To be "used," construction of the use must be started within  
12 the specified one year period. However, building or other  
13 permits necessary for construction will not be issued by the  
14 city until an appeal from the planning commission decision  
15 approving the conditional use permit is completed. We  
16 believe the period when building and other permits may not  
17 be issued, due to an appeal of a planning commission  
18 decision approving a conditional use permit, includes  
19 periods while such an appeal is pending before the city  
20 council, this Board and the appellate courts of this state.  
21 Thus, Sections 27(5)(c) and (7) and 34 together toll the  
22 running of the one year period of time for "using" a  
23 conditional use permit during those periods of time when a  
24 building or other permit necessary to "use" the conditional  
25 use permit cannot properly be issued due to an appeal from  
26 the planning commission's approval of the conditional use

1 permit.<sup>3</sup> Where the planning commission acts on a  
2 conditional use permit application, and an appeal of the  
3 planning commission's decision is filed (as in the instant  
4 case), for purposes of the running of the one year period,  
5 the conditional use permit is not "approved" until the  
6 appeal is completed.

7 The next question is whether the conditional use permit  
8 was "used" within one year after the completion of the  
9 appeal of the city's decision approving the conditional use  
10 permit.

11 The subject conditional use permit was approved by the  
12 city council on April 3, 1990. The city council's decision  
13 was reviewed on appeal by this Board (Beck v. City of  
14 Tillamook, 20 Or LUBA 178 (1990)); the Court of Appeals  
15 (Beck v. City of Tillamook, 105 Or App 276, 805 P2d 114  
16 (1991)); the Oregon Supreme Court (Beck v. City of  
17 Tillamook, 313 Or 148, \_\_\_\_ P2d \_\_\_\_ (1992)); and a second  
18 time by the Court of Appeals (Beck v. City of Tillamook, 113

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<sup>3</sup>In this case, the planning commission's action on the conditional use permit occurred in 1988 or 1989. The planning commission decision was one to deny the requested conditional use permit. That conditional use permit decision was appealed to the city council, and the city council approved the conditional use permit. The city council's approval decision was appealed to this Board. We remanded the city council's decision. Beck v. City of Tillamook, 18 Or LUBA 587 (1990). On remand, the city council again approved the conditional use permit, apparently without returning the decision to the planning commission. See Beck v. City of Tillamook, 20 Or LUBA 178, 182 (1990). This second city council decision approved the conditional use permit the city determined to be valid in the decision challenged in this appeal. Under these circumstances, we believe it makes no difference that the original decision to approve the CUP is the city council's rather than the planning commission's.

1 Or App 660, \_\_\_ P2d \_\_\_ (1992)). The appellate judgment in  
2 that appeal (CA A67345) was issued on August 19, 1992.<sup>4</sup> We  
3 believe that under Sections 27(7) and 34, the date the  
4 appellate judgment was issued, finally completing the appeal  
5 of the local conditional use permit decision, was the first  
6 time the applicant below could have "used" its conditional  
7 use permit.<sup>5</sup> For purposes of the one year period in the  
8 TCZO for "using" or losing a conditional use permit, the  
9 conditional use permit at issue in this appeal could not  
10 properly have been "used" until August 19, 1992. Therefore,  
11 the city correctly concluded the disputed conditional use  
12 permit is "valid."

13 The second, third and fourth assignments of error are  
14 denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 "The city made a decision not supported by  
17 substantial evidence in the whole record."

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<sup>4</sup>LUBA may take official notice of judicially cognizable law. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 209 (1988), rev'd on other grounds 96 Or App 552 (1989). Judicially cognizable law is codified in ORS 44.090. ORS 40.090(1) provides that notice may be taken of the decisional law of this state. That appeals were taken of the disputed conditional use permit and that an appellate judgment ending such appeals was issued are part of the decisional law of this state of which we may take official notice.

<sup>5</sup>There is nothing in the record to establish whether any building or other necessary permits were in fact issued before the date of the final appellate judgment on the appeal of conditional use permit. However, even if such permits had been issued prematurely, that would not affect our determination of the period during which the conditional use permit remained valid under TCZO Sections 27(5)(c) and (7) and 34.

1           Petitioners correctly point out that there is little  
2 evidence in the 64 page record submitted by the city.  
3 However, the facts that are relevant to the application of  
4 TCZO Sections 27(5)(c) and (7) and 34 (whether an appeal was  
5 filed and when the appellate judgment in that appeal was  
6 issued) can be determined by taking official notice of the  
7 published appellate cases and the appellate judgment of the  
8 Court of Appeals. See McCaw Communications, Inc. v. Marion  
9 County, supra. Consequently, this assignment of error  
10 provides no basis for reversal or remand of the challenged  
11 decision.

12           The fifth assignment of error is denied.

13           **FIRST ASSIGNMENT OF ERROR**

14           "The city failed to follow the procedures  
15 applicable to the matter before it in a manner  
16 that prejudiced the substantial rights of the  
17 petitioners.

18           "A. The city failed to provide adequate notice.

19           "B. The city failed to prepare and adopt  
20 findings.

21           "C. The city's failure to follow requirements of  
22 ORS 197.763 entitles petitioners to raise new  
23 issues on appeal to the Board."

24           Under this assignment of error, petitioners argue that  
25 the city committed procedural errors causing "arguable"  
26 prejudice to petitioners' substantial rights by failing to  
27 provide written notice of the challenged decision.  
28 Petitioners also contend that their "substantial rights were  
29 arguably prejudiced by the city's failure to disclose what

1 it believed to be the applicable criteria. \* \* \*"<sup>6</sup> Petition  
2 for Review 5.

3 On April 3, 1991, petitioners' attorney submitted a  
4 letter to the city attorney stating that he believed the  
5 disputed conditional use permit was invalid due to the  
6 passage of time. Petitioners' attorney's letter cites  
7 Section 27 as providing the basis for his conclusion that  
8 the permit had expired.

9 Thereafter, at least some of petitioners attended a  
10 city council meeting on May 6, 1991, and requested the city  
11 council to determine during that meeting whether the  
12 disputed conditional use permit was valid due to the passage  
13 of time. Petitioners submitted a writing to the city  
14 council outlining the requirements of Section 34, discussed  
15 at length above. This written submittal also stated, in  
16 relevant part:

17 "We feel this matter is relatively basic and  
18 straightforward, and can be settled right here  
19 with the Council's cooperation. We have been  
20 communicating with staff for over a month, so we  
21 do not feel it unreasonable to request and expect  
22 a prompt answer from the Council tonight." Record  
23 45.

24 At this meeting, petitioner Robert Weeks proceeded to review  
25 a packet of information for the council and submitted  
26 photographs for the council's review. Record 38. The

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<sup>6</sup>Petitioners do not claim that these alleged errors are "substantive errors" and we express no opinion on whether they are.

1 minutes of this meeting disclose that the council felt it  
2 did not have sufficient time to consider the request and  
3 that it "did not make a decision at this time." Id.

4 On May 20, 1991, petitioners' request was scheduled for  
5 council consideration. However, the council did not have a  
6 quorum and, thus, nothing was decided on that date.

7 On June 3, 1991 petitioners' request again appeared on  
8 the council's agenda. On this date, the council adjourned  
9 to an executive session to consider petitioners' request and  
10 the next entry in the minutes of that meeting is the  
11 challenged decision, viz, "[i]t was the consensus of the  
12 Council that the conditional use permit is still valid."  
13 Record 28.

14 On June 12, 1992, petitioners' attorney wrote a letter  
15 to the city attorney advising him that the procedure used by  
16 the city on June 3, 1991, to reach the requested decision  
17 was wrong. This letter stated petitioners' attorney would  
18 treat the minutes of the June 3, 1991 meeting as the final  
19 city decision unless he "personally receive[d] timely  
20 written notice \* \* \* that the Council will be reconsidering  
21 its June 3rd oral decision in this matter." Record 22.

22 Clearly, petitioners were aware of the relevant  
23 standards for determining the validity of the disputed  
24 conditional use permit. It is equally clear that  
25 petitioners were aware of the request for a land use  
26 decision, because they made the request. Further, the

1 challenged decision is adequate for our review, and we do  
2 not understand petitioners to have been unable to adequately  
3 prepare their case due to the lack of findings adopted in  
4 support of the decision.<sup>7</sup> In short, petitioners have not  
5 established how the procedure employed below caused  
6 prejudice to their substantial rights, and we do not see  
7 that it did. Although the circumstances are somewhat  
8 unusual, it appears that petitioners got what they requested  
9 from the council at its May 6, 1991 meeting, i.e. an answer  
10 to whether the council believed the disputed conditional use  
11 permit was valid notwithstanding the passage of time.

12 The first assignment of error is denied.

13 The city's decision is affirmed.

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<sup>7</sup>That findings are not an absolute requirement is evidenced by ORS 197.835(9)(b), which provides that we are to overlook deficiencies in a local government's findings and affirm a challenged decision where the record "clearly supports" the decision.