

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

3
4 IRVING LEOPOLD and RHODA LEOPOLD,)
5)
6 Petitioners,)
7)
8 vs.)
9) LUBA No. 92-140
10 CITY OF MILWAUKIE,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 JOHN L. JENSEN,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Milwaukie.

22
23 Max M. Miller, Jr., Portland, filed the petition for
24 review and argued on behalf of petitioners.

25
26 Michael C. Robinson, Portland, filed the response brief
27 and argued on behalf of respondent.

28
29 John L. Jensen, Portland, represented himself.

30
31 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
32 Referee, participated in the decision.

33
34 AFFIRMED 11/13/92

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision denying their
4 request for an alternation of a nonconforming use.

5 **MOTION TO INTERVENE**

6 John L. Jensen moves to intervene on the side of the
7 respondent in this appeal proceeding. There is no objection
8 to the motion, and it is allowed.

9 **FACTS**

10 The subject property consists of two parcels zoned
11 Manufacturing (M) that total 18,000 square feet in area.
12 Petitioners, the applicants below, currently lease other
13 neighboring M-zoned property to an automobile dealership.
14 The automobile dealership is a nonconforming use in the M
15 zone. A portion of the property on which the dealership is
16 located is being condemned by Oregon Department of
17 Transportation (ODOT). The proposal is to relocate that
18 portion of the automobile dealership to the subject
19 property. The challenged decision contains the following
20 supplementary facts:

21 "[ODOT] is condemning part of the applicant's
22 property in the widening of McLoughlin Boulevard.
23 The applicant and ODOT have been involved in
24 litigation over the condemnation. To compensate
25 for the area lost to the McLoughlin project, the
26 applicant and ODOT reached a tentative settlement
27 wherein ODOT would replace the condemned property
28 with two parcels owned by it that are near the
29 auto dealership. The application proposed to use
30 these areas for the display of automobiles.

1 "The lots to be used for the proposed expansion
2 are currently vacant in anticipation of ODOT's
3 construction of landscaped storm water retention
4 basins. ODOT has proposed relocating the ponds to
5 another ODOT site off McLoughlin if this
6 application is approved.

7 "After holding three public hearings, the City
8 Planning Commission denied the application. The
9 applicants appealed the Planning Commission's
10 denial to the City Council." Record 2-3.

11 The city council denied the application, and this appeal
12 followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 "The city erred in characterizing petitioners'
15 application as one for expansion of a
16 nonconforming use."

17 Milwaukie Zoning Ordinance (MZO) 802 provides the
18 following requirements applicable to nonconforming uses:

19 "A nonconforming use may be continued, but shall
20 not be altered unless such alteration is approved
21 by the Planning Commission after public hearing *
22 * * upon a determination that the proposed
23 modifications would result in no more of a
24 detriment to surrounding properties than the
25 existing use."

26 The challenged decision states the following concerning
27 the proposal's compliance with MZO 802:

28 "In this case the 'existing use' is the auto
29 dealership.

30 "An initial question is whether an existing
31 non-conforming use may be expanded as proposed.
32 [MZO] 802 allows 'alteration' of a non-conforming
33 use. The applicant argued that alteration may
34 include expansion. The City Council rejects this
35 reading of [MZO] 802. Alteration is defined to
36 mean 'a change in construction or a change of

1 occupancy' MZO 103. Alteration does not include
2 the expansion of a non-conforming use onto land on
3 which it is not currently located. Such a reading
4 of the MZO is consistent with its intent to
5 require non-conforming uses to eventually comply
6 with the MZO. For this reason alone, the Council
7 concludes that the application should be denied."
8 (Emphasis supplied.) Record 3-4.

9 Petitioners argue the provisions of MZO 601.1 referring
10 to alterations of nonconforming uses that are currently
11 classified as conditional uses, indicate the proper scope of
12 "alterations" in the context of MZO 802.¹ MZO 601.1
13 provides:

14 "In the case of a use existing prior to the
15 effective date of this Ordinance and now
16 classified as a conditional use, any alterations,
17 including but not limited to: change in use, lot
18 area, or alteration of structure shall come before
19 the Planning Commission to assure conformance with
20 all current requirements for such a conditional
21 use."

22 Petitioners argue that because MZO 601.1 states alterations
23 include changes in lot area, that necessarily the proposal
24 to increase the lot area of the automobile dealership by
25 moving part of it to a new location is also an alteration.

26 We disagree. As petitioners recognize, MZO 601.1 does
27 not apply directly in this case, because the proposal does
28 not involve a use "now classified as a conditional use."
29 MZO 601.1 at most provides indirect support for petitioners'
30 understanding of the scope of permissible alterations under

¹This case does not involve an application for a conditional use.

1 MZO 802. Moreover, the reference to change in lot area in
2 MZO 601.1 could just as easily be limited to making an
3 existing lot larger. It need not have anything to do with
4 relocating a nonconforming use to adjoining or nearby
5 parcels not currently utilized by the nonconforming use.

6 MZO Section 800 includes standards specifically
7 governing nonconforming uses. MZO 802 authorizes
8 alterations of nonconforming uses.² MZO 103 defines
9 "alteration" as:

10 "[A] change in construction or change of
11 occupancy. Where the term 'alteration' is applied
12 to a change in construction, it is intended to
13 apply to any change, addition, or modification in
14 construction. When the term is used in connection
15 with a change in occupancy, it is intended to
16 apply to changes in occupancy from one use to
17 another."

18 LUBA is required to defer to the city's interpretation
19 of its ordinance unless that interpretation is clearly
20 contrary to the ordinance's express terms or policy. Clark
21 v. Jackson County, 313 Or 508, 515, ____ P2d ____ (1992).
22 The city's interpretation that MZO 802 does not authorize an
23 expansion of a nonconforming use onto such property not

²While the city's characterization of the proposal as an "expansion" of the nonconforming use is not critical to its decision, we have no difficulty agreeing with the city that the proposal is correctly described as such. The proposal includes replacing approximately 15,000 square feet of the land currently occupied by petitioners' lessees with the 18,000 square foot subject property, and it includes relocating portions of the nonconforming automobile dealership to the subject property. The automobile dealership's street frontage will be increased by 40%. Also, the dealership will occupy a total of five parcels, whereas it currently occupies only three parcels.

1 currently utilized by the nonconforming use, such as
2 proposed by petitioners, is not clearly contrary to the
3 express words or policy of MZO 802 or 103. Therefore, this
4 assignment of error provides no basis for reversal or remand
5 of the challenged decision.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 "The city erred in determining that there would be
9 greater detriment to surrounding property."

10 **THIRD ASSIGNMENT OF ERROR**

11 "The city incorrectly concluded that the
12 application should be denied because it will
13 prevent future development of detention ponds."

14 It is well established that where the challenged
15 decision denies a proposed development, the local government
16 need only adopt findings, supported by substantial evidence,
17 demonstrating that one or more standards are not met. Garre
18 v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123
19 (1990). We determine above that the challenged decision
20 properly concludes that MZO 802 does not authorize the
21 proposed expansion of a nonconforming use. Therefore, even
22 if the proposal satisfies the standards articulated in MZO
23 802 applicable to alterations of nonconforming uses, that
24 would not provide a basis for reversal or remand of the
25 challenged decision.

26 The second and third assignments of error are denied.

27 The city's decision is affirmed.