

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

3  
4   LESLIE TERRA and DOUG TERRA,        )  
5    )  
6                    Petitioners,        )  
7    )  
8            and                            )  
9    )  
10   FRAN RECHT, MICHAEL NOACK,        )  
11   SALLY NOACK, JOHN COURTER,        )  
12   MICHAEL O'GARA and JANELLE O'GARA,)

13    )  
14                    Intervenors-Petitioner,        )  
15    )  
16            vs.                            )  
17    )  
18   CITY OF NEWPORT,                    )  
19    )  
20                    Respondent,        )  
21    )  
22            and                            )  
23    )  
24   VISTA LAND CORPORATION OF OREGON,        )  
25    )  
26                    Intervenor-Respondent.        )

LUBA No. 92-068  
)  
FINAL OPINION  
AND ORDER

27  
28  
29            Appeal from City of Newport.

30  
31            Leslie Terra and Doug Terra, Newport, filed a petition  
32 for review. Leslie Terra argued on her own behalf.

33  
34            Fran Recht, Depoe Bay, filed a petition for review and  
35 argued on her own behalf.

36  
37            No appearance by respondent.

38  
39            Dennis J. Wine, Lincoln City, filed the response brief  
40 and argued on behalf of intervenor-respondent.

41  
42            SHERTON, Chief Referee; KELLINGTON, Referee,  
43 participated in the decision.

44  
45            HOLSTUN, Referee, dissenting.

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REMANDED

01/22/93

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council order approving a  
4 conditional use permit for a motel or hotel.

5 **FACTS**

6 The subject property is 8.84 acres in size, designated  
7 High Density Residential by the comprehensive plan, and  
8 zoned High Density Multi-Family Residential (R-4). The  
9 property is located west of Highway 101. It is adjoined by  
10 the Pacific Ocean on the west and NW 68th Street on the  
11 north. The subject property contains a wooded canyon.  
12 Schooner Creek flows from the east side of the property to  
13 its northwest corner. There are relatively steep slopes on  
14 the southern and northeastern portions of the property.

15 Properties to the east and south are also zoned R-4.  
16 Properties to the north are zoned Medium Density Single-  
17 Family Residential (R-2). Property to the north and east  
18 are developed with single family residences. Properties to  
19 the south contain the Schooner Landing time share project  
20 and the Pacific Shores recreational vehicle park.

21 Intervenor-respondent (intervenor) applied for a  
22 conditional use permit for a 100 unit condominium  
23 development as a "motel" or "hotel."<sup>1</sup> The proposed

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<sup>1</sup>The Zoning Ordinance of the City of Newport (NZO) allows "condominiums" as a permitted use in the R-4 zone. NZO 2-2-1.025(d)(20). However, the city determined that the "condominium" use allowed as a permitted use in the R-4 zone does not include short term rentals. The city further

1 development includes short and long term rental units and an  
2 8,000 square foot community building. The original proposal  
3 included access to the proposed development from both  
4 Highway 101 and NW 68th Street. The community building and  
5 associated parking were proposed to be located on the  
6 northeast corner of the property, north of Schooner Creek.  
7 The condominiums were proposed to be located south of  
8 Schooner Creek.

9 After public hearings on September 9, October 14 and  
10 October 28, 1991, the planning commission approved  
11 intervenor's application.<sup>2</sup> Petitioners, intervenors-  
12 petitioner and the Oregon Department of Transportation  
13 (ODOT) appealed the planning commission's decision to the  
14 city council. The city council conducted an on the record  
15 review of the planning commission's decision. On March 2,  
16 1992, the city council issued an order approving the  
17 conditional use permit, with conditions requiring that  
18 intervenor (1) pave NW 68th Street and provide a cul-de-sac  
19 at its western terminus; (2) provide for certain  
20 improvements to the intersection of NW 68th Street and  
21 Highway 101; (3) relocate the community building south of

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determined that in order to approve short term rental use of the proposed  
condominium development, it must be approved as a "motel" or "hotel," which  
are conditional uses in the R-4 zone. NZO 2-2-1.025(d)(12). Record 2-3.  
The city's determination that the proposed development requires a  
conditional use permit as a motel or hotel is not challenged in this  
appeal.

<sup>2</sup>During this process, the proposal was modified to provide access only  
from NW 68th Street, not from Highway 101.

1 Schooner Creek, limit it to 3,000 square feet in size, and  
2 restrict its use to the occupants of the proposed units; and  
3 (4) convey to the city an open space easement for visual  
4 access to the portion of the property north of Schooner  
5 Creek.

6 This appeal followed.

7 **NINTH ASSIGNMENT OF ERROR**

8 Petitioners and intervenor-petitioner Recht  
9 (petitioners) contend certain conditions imposed by the  
10 challenged order, concerning parking spaces to be provided  
11 in the western terminus of NW 68th Street and the  
12 permissibility of enclosing the area north of Schooner Creek  
13 with a fence, do not accurately reflect the city council's  
14 discussion or deliberations.

15 As we have explained on numerous occasions, it is a  
16 local government's final written decision that is subject to  
17 our review, not statements made by decision makers during  
18 the proceedings leading to adoption of a land use decision.  
19 Toth v. Curry County, 22 Or LUBA 488, 492-93 (1991); Gruber  
20 v. Lincoln County, 16 Or LUBA 456, 460 (1988); Oatfield  
21 Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766,  
22 768-69 (1986); McCullough v. City of Baker, 14 Or LUBA 198,  
23 200 (1986); Citadel Corporation v. Tillamook County, 9 Or  
24 LUBA 61, 67 (1983). Any positions that were expressed  
25 orally by the city council members during the city council  
26 proceedings, with regard to conditions to be imposed, were

1 at most preliminary and subject to change in the city  
2 council's final written decision. Toth v. Curry County,  
3 supra; see Sokol v. City of Lake Oswego, 18 Or LUBA 375,  
4 400-01, aff'd 100 Or App 594 (1990) (an oral decision is  
5 tentative and may be changed any time before the decision is  
6 reduced to writing and becomes final).

7 The ninth assignment of error is denied.

8 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

9 In these assignments of error, petitioners challenge  
10 the evidentiary support for certain individual findings in  
11 the challenged decision and for the city's overall  
12 determination of compliance with the conditional use permit  
13 approval standard established by NZO 2-5-3.005.

14 **A. Individual Findings**

15 This Board is required to reverse or remand local  
16 government land use decisions where those decisions are not  
17 supported by substantial evidence. ORS 197.835(7)(a)(C);  
18 Griffith v. City of Milwaukie, 19 Or LUBA 300, 304 (1990);  
19 Sellwood Harbor Condo. Assoc. v. City of Portland, 16 Or  
20 LUBA 505, 513-514 (1988). ORS 197.835(7)(a)(C) does not  
21 require that every statement or finding adopted in support  
22 of a land use decision must be supported by evidence in the  
23 record. That a particular finding is not supported by  
24 substantial evidence, of itself, provides no basis for  
25 remanding the decision the finding is adopted to support,  
26 unless the finding is critical to the decision. Cann v.

1 City of Portland, 14 Or LUBA 254, 257 (1986); Bonner v. City  
2 of Portland, 11 Or LUBA 40, 52-53 (1984). Therefore, in  
3 addition to demonstrating a challenged finding is not  
4 supported by substantial evidence, a petitioner must  
5 demonstrate the challenged finding is critical to (i.e.  
6 necessary to support) the challenged decision. Id.

7 First, petitioners challenge the evidentiary support  
8 for findings that the proposed development is "essentially  
9 residential in nature," "substantially similar to the  
10 residential uses otherwise permitted" and "similar in nature  
11 and extent to the surrounding uses." Record 4, 5, 172.<sup>3</sup>  
12 However, petitioners do not explain why these findings are  
13 essential to the challenged decision, and we do not see that  
14 they are.<sup>4</sup>

15 Second, petitioners challenge the evidentiary support  
16 for a finding that "testimony is not entirely certain as to  
17 the traffic effects of [approving] the Conditional Use

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<sup>3</sup>The city council's decision incorporates by reference as findings in support of its decision the "Findings of Fact, Recommendations and Conclusions" of the September 9, 1991 staff report found at Record 168. Record 6.

<sup>4</sup>As explained below, the NZO 2-5-3.005 conditional use permit approval standard requires that "the characteristics of [a proposed] conditional use shall not be unreasonably incompatible with" existing or permitted uses in surrounding areas. This standard does not require that a proposed conditional use be similar to existing or permitted uses in surrounding areas, but rather only that it not be unreasonably incompatible with such uses. However, to the extent evidence cited by petitioners with regard to the (dis)similarity of the proposed development to surrounding uses is relevant to the required compatibility determination, it is considered in section B below.

1 Permit." Record 5. Petitioners contend this finding is  
2 incorrect because there is undisputed evidence in the record  
3 establishing there would be an increase in daily trip  
4 generation from 600 to 1,000 if the proposed condominiums  
5 were used as motel units rather than residences. However,  
6 petitioner does not explain why the quoted finding is  
7 essential to the decision. The challenged decision includes  
8 additional findings addressing traffic impacts due to the  
9 proposed development and the effects of conditions imposed  
10 requiring certain street improvements. Record 5-9. We  
11 regard the finding challenged by petitioners as surplusage.<sup>5</sup>

12 Third, petitioners challenge the correctness of and  
13 evidentiary support for the city finding that "conditions  
14 respecting street and intersection improvements \* \* \* cannot  
15 be imposed if the Conditional Use Permit is denied and the  
16 developer chooses to construct a condominium \* \* \*  
17 residential project as an outright [permitted] use."  
18 Record 6. Petitioners argue that NZO 2-3-6.040 (Access)  
19 authorizes the city to impose street improvement conditions  
20 on an outright permitted use. However, petitioners do not  
21 explain why the quoted finding is necessary to comply with  
22 NZO standards for approval of a conditional use permit, and  
23 we do not see that it is.

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<sup>5</sup>We consider below the evidence cited by petitioner with regard to traffic impacts, in evaluating the evidentiary support for the city's determination of compliance with the compatibility standard established by NZO 2-5-3.005.

1 This subassignment of error is denied.

2 **B. NZO 2-5-3.005**

3 NZO 2-5-3.005 (Authorization to Grant or Deny  
4 Conditional Uses) provides in relevant part:

5 " \* \* \* The purpose of conditional use permit  
6 reviews shall be to determine that the  
7 characteristics of [the proposed] conditional use  
8 shall not be unreasonably incompatible with the  
9 type of uses existing or permitted in surrounding  
10 areas. \* \* \*"

11 We understand petitioners to challenge the evidentiary  
12 support for the city's determination that the proposed  
13 development will not be unreasonably incompatible with the  
14 single family residences north of NW 68th Street,  
15 particularly considering the nature of the proposed  
16 motel/hotel use and its traffic impacts. Petitioners argue  
17 the evidence shows the proposed development will have the  
18 characteristics of a resort. Petitioners also argue the  
19 adverse traffic impacts of the proposed development on the  
20 residences to the north will not be mitigated by the  
21 improvements to NW 68th Street and its intersection with  
22 Highway 101 that are required by the challenged decision.  
23 According to petitioners, the record shows the improvements  
24 themselves are not compatible with the residences to the  
25 north, because they will result in faster traffic on NW 68th  
26 Street and the removal of trees presently buffering  
27 residences from NW 68th Street.

28 Intervenor argues that any development of the subject

1 property will increase the traffic on NW 68th Street, and  
2 require upgrading that street to city standards. Intervenor  
3 also argues the record shows the traffic impacts of the  
4 proposed development are actually less than the traffic  
5 impacts that would be generated by more intense outright  
6 permitted uses of the property. Intervenor further contends  
7 that conditions imposed by the city will mitigate the  
8 impacts of the proposed development on the residences to the  
9 north. Intervenor also argues that in determining whether  
10 the proposed development is "unreasonably incompatible" with  
11 the existing and permitted uses of the R-2 zoned area to the  
12 north, the intent of the R-2 zone must be considered.  
13 Intervenor points out NZO 2-2-1.020 provides that the R-2  
14 zone is intended "to serve as a transitional area between  
15 the low density residential district and higher density  
16 residential districts."

17 We recently described our scope of review in  
18 substantial evidence challenges as follows:

19 "The Supreme Court has held that what this Board  
20 must decide in reviewing a substantial evidence  
21 challenge is "whether, in light of all evidence in  
22 the record, the [local government's] decision was  
23 reasonable." Younger v. City of Portland, 305 Or  
24 346, 360, 752 P2d 262 (1988). For a decision to  
25 be reasonable, it need not be the decision that  
26 this Board would have made based on the same  
27 evidence. Id. While this Board must consider all  
28 relevant evidence cited by the parties, including  
29 evidence that detracts from the challenged  
30 decision as well as evidence that supports it, it  
31 cannot reweigh the evidence. 1000 Friends of  
32 Oregon v. Marion County, [116 Or App 584, \_\_\_ P2d

1        \_\_\_ (1992)]; Eckis v. Linn County, 110 Or App 309,  
2        313, 821 P2d 1127 (1991). Where this Board  
3        concludes a reasonable person could reach the  
4        decision made by the local government, in view of  
5        all the evidence in the record, it defers to the  
6        local government's choices between conflicting  
7        evidence and of reasonable conclusions to be drawn  
8        from the evidence. Angel v. City of Portland, 22  
9        Or LUBA 649, 659, aff'd 113 Or App 169 (1992);  
10       Wissusik v. Yamhill County, 20 Or LUBA 246, 260  
11       (1990); Stefan v. Yamhill County, 18 Or LUBA 820,  
12       838 (1990); Douglas v. Multnomah County, 18  
13       Or LUBA 607, 617 (1990)." Heceta Water District  
14       v. Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 92-105,  
15       January 13, 1993), slip op 34-35.

16        We have reviewed the evidence in the record cited by  
17        petitioners and intervenor that is relevant to the issues  
18        raised by petitioners concerning the city's determination of  
19        compliance with NZO 2-5-3.005. We have also considered the  
20        conditions imposed by the city to lessen the impacts of the  
21        proposed development. We find that based on this evidence  
22        and these conditions, a reasonable person could conclude, as  
23        did the city council, that the characteristics of the  
24        proposed development are not unreasonably incompatible with  
25        the existing or permitted uses in the R-2 zoned area to the  
26        north. Record 7-8.

27        This subassignment of error is denied.

28        The first, second and third assignments of error are  
29        denied.

30        **FOURTH ASSIGNMENT OF ERROR**

31        NZO 2-5-3.015 provides that, in reviewing a conditional  
32        use permit application, the city "may consider the most

1 appropriate use of the land \* \* \*." The challenged decision  
2 addresses this provision as follows:

3 "It should be noted that the word 'may' is used  
4 rather than the word 'shall.' While the [City]  
5 Council believes that [this factor] generally  
6 should be considered, such consideration does not  
7 appear to be mandatory and, more importantly,  
8 [this factor appears] to be subordinate to the  
9 statement of purpose [in NZO 2-5-3.005.]

10 \* \* \* \* \*

11 "Accordingly, this body concludes that the  
12 applicant must show that the characteristics of  
13 the conditional use are not unreasonably  
14 incompatible with the type of uses existing or  
15 permitted in the surrounding area, giving  
16 reasonable consideration to the most appropriate  
17 use of the land \* \* \*." Record 3-4.

18 Petitioners contend the above quoted provision of  
19 NZO 2-5-3.015 establishes a mandatory conditional use permit  
20 approval standard, and that the city council erred in  
21 interpreting it to be merely a factor that should be  
22 considered in determining compliance with NZO 2-5-3.005.<sup>6</sup>

23 LUBA is required to defer to a local government's  
24 interpretation of its own ordinances, so long as the  
25 proffered interpretation is not "clearly contrary to the  
26 enacted language," or "inconsistent with express language of

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<sup>6</sup>Petitioners also argue that city Resolution No. 1778, which adopts procedural rules for city land use hearings, makes finding a proposed development is the most appropriate use of the land a mandatory approval standard. However, the provision cited by petitioners, Rule 5(3)(c), simply provides that relevant factors to be considered include "the character of the area involved and its peculiar suitability for particular uses." This provision does not have the effect ascribed to it by petitioners.

1 the ordinance or its apparent purpose or policy." Clark v.  
2 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).  
3 Here, the city's interpretation that under NZO 2-5-3.015,  
4 "the most appropriate use of the land" is a factor to be  
5 considered in determining compliance with the compatibility  
6 standard of NZO 2-5-3.005, not an approval standard in its  
7 own right, is consistent with the language, purpose and  
8 policy of these NZO provisions.

9 The fourth assignment of error is denied.

10 **FIFTH ASSIGNMENT OF ERROR**

11 NZO 2-5-3.020 provides that a conditional use "shall  
12 ordinarily comply with the standards of the zone concerned  
13 for [uses] permitted outright except as specifically  
14 modified by the [city] in granting the conditional [use]  
15 permit." Petitioners argue the "standards" of the R-4 zone  
16 include the following provision in NZO 2-2-1.020:

17 "This district is intended to provide for high  
18 density multi-family residential and some limited  
19 commercial development. \* \* \*" (Emphasis by  
20 petitioners.)

21 Petitioners argue the city did not find, and the evidence in  
22 the record does not support a finding, that the proposed  
23 commercial development would be of a sufficiently limited  
24 nature to satisfy the above quoted standard.<sup>7</sup>

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<sup>7</sup>Petitioners also argue that another portion of NZO 2-2-1.020, concerning where "new R-4 zones" should be located, is not satisfied by the subject property. However, as the subject property is already zoned R-4,

1           As explained above, this Board is required to defer to  
2 a local government's interpretation of its own ordinances,  
3 unless that interpretation is contrary to the express words,  
4 policy or context of the local enactment. Clark v. Jackson  
5 County, supra. However, this Board may not interpret a  
6 local government's ordinances in the first instance, but  
7 rather must review the local government's interpretation of  
8 its ordinances. Weeks v. City of Tillamook, 117 Or App 449,  
9 453-54, \_\_\_ P2d \_\_\_ (1992). Further, a local government  
10 interpretation must be adequate for such review, "a  
11 conclusory statement does not suffice as an interpretation  
12 of [ordinance] provisions." Larson v. Wallowa County, 116  
13 Or App 96, 104, \_\_\_ P2d \_\_\_ (1992).

14           In this case, the language of NZO 2-5-3.020 and  
15 2-2-1.020 is ambiguous, i.e. capable of more than one  
16 possible meaning; and, therefore, requires interpretation.  
17 The challenged decision does not include an interpretation  
18 with regard to whether NZO 2-2-1.020 establishes a "standard  
19 of the [R-4] zone," with which the subject conditional use  
20 permit is required to comply under NZO 2-5-3.020. Neither  
21 does it find that any such standard has been "specifically  
22 modified \* \* \* in granting the conditional [use] permit."  
23 Therefore, the challenged decision must be remanded for the  
24 city to interpret and apply these provisions in the first

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any requirements for "new R-4 zones" clearly do not apply to the subject conditional use permit application.

1 instance.

2 The fifth assignment of error is sustained.

3 **SIXTH ASSIGNMENT OF ERROR**

4 Petitioners contend the city erred in failing to apply  
5 NZO 2-4-7.040 (Slope Density Guidelines) in approving the  
6 subject conditional use permit application. However,  
7 petitioners offer no explanation of why NZO 2-4-7.040  
8 applies to the subject conditional use permit application.

9 The challenged decision does not refer to  
10 NZO 2-4-7.040. However, as explained below, this is not a  
11 situation where the ordinance language is ambiguous and  
12 different sustainable interpretations of the local ordinance  
13 could be adopted by the local government. Therefore, the  
14 fact that the challenged decision does not include an  
15 interpretation of NZO 2-4-7.040 regarding its applicability  
16 to the subject application does not provide a basis for  
17 remand under Weeks v. City of Tillamook, supra.

18 NZO 2-4-7.040 establishes slope density guidelines to  
19 be applied "[i]n reviewing applications for partitioning,  
20 subdivisions, planned or clustered developments, or  
21 multi-family dwellings." The subject application is clearly  
22 not one for partitioning, subdivision or a planned or  
23 clustered development. Further, the subject application is  
24 for a conditional use permit for a motel or hotel, and not  
25 for multi-family dwellings as that term is defined in

1 NZO 2-1-1.101.<sup>8</sup> Therefore, the language of NZO 2-4-7.040  
2 and the NZO definition of "dwelling, multi-family"  
3 unambiguously establish that NZO 2-4-7.040 does not apply to  
4 the subject conditional use permit application.

5 The sixth assignment of error is denied.

6 **SEVENTH ASSIGNMENT OF ERROR**

7 The purpose of NZO Section 2-5-7 (Shoreland Natural  
8 Resources Impact Review) is:

9 " \* \* \* to provide a procedure for review of  
10 development proposals within the City of Newport's  
11 Coastal Shoreland Boundary. This procedure shall  
12 be used to identify the physical characteristics  
13 and resources of a particular site and to evaluate  
14 the compatibility of the proposed development with  
15 the existing physical characteristics and natural  
16 resources."

17 NZO 2-5-7.020 states that "[a]ny person proposing  
18 development within the Newport Coastal Shoreland Boundary"  
19 shall submit a "Shoreland Resources Impact Review  
20 Application." NZO 2-5-7.030 provides that a "development  
21 request shall be denied" if "the city determines that the  
22 proposed development is inconsistent with the physical  
23 characteristics and natural values of the site."

24 With regard to procedure, NZO 2-5-7.030 requires that  
25 an applicant submit proposed findings which "demonstrate

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<sup>8</sup>NZO 2-1-1.101 defines "dwelling, multi-family" as a "building containing five or more dwelling units." It also defines "dwelling unit" as "[o]ne or more rooms designed for occupancy by one family only and not having more than one cooking facility, but not including recreational vehicles, hotels, motels, boarding houses, and mobile homes." (Emphasis added.)

1 that the proposed development is or is not consistent with  
2 the physical characteristics and natural values of the  
3 site." NZO 2-5-7.030 provides for an administrative review  
4 by the city planner. However, NZO 2-5-7.030 further  
5 provides:

6       "\* \* \* If the proposed development involves a  
7 conditional use, the procedures in [NZO] Section  
8 2-5-3 [(Conditional Uses)] shall be followed, and  
9 the proposed findings of compatibility shall be  
10 forwarded to the Planning Commission for review  
11 during the public hearing."<sup>9</sup>

12       Petitioners contend the city erred in not conducting a  
13 shoreland natural resources impact review pursuant to  
14 NZO Section 2-5-7 as part of the conditional use permit  
15 proceeding below. Petitioners argue no proposed findings of  
16 compatibility of the proposed development with the natural  
17 resources of the site were submitted to or reviewed by the  
18 city decision makers. According to petitioners, the  
19 challenged decision improperly fails to demonstrate that the  
20 proposed development is compatible with the subject  
21 property's shoreland natural resources.

22       Intervenor concedes the challenged decision does not  
23 specifically refer to NZO Section 2-5-7 or a shoreland  
24 natural resources impact review. Intervenor argues,  
25 however, that during the planning commission hearings  
26 extensive evidence was introduced concerning the physical

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<sup>9</sup>NZO 2-5-3.015 and 2-5-3.030 require the city planning commission to hold a public hearing on a conditional use permit application.

1 characteristics of the subject property, including geology,  
2 topography, soils, flora, fauna, wetland areas and streams.  
3 Intervenor contends the information submitted was sufficient  
4 to facilitate a shoreland natural resources impact review  
5 and, therefore, petitioners' substantial rights have not  
6 been violated by any failure of the city to follow the  
7 procedures prescribed by NZO Section 2-5-7.<sup>10</sup>

8         There is no dispute that the subject property is within  
9 the city's Coastal Shoreland Boundary. It is also clear  
10 that the city did not conduct a shoreland natural resources  
11 impact review as part of the proceedings below and did not  
12 interpret or apply NZO Section 2-5-7 in the challenged  
13 decision.

14         NZO Section 2-5-7 requires a shoreland natural  
15 resources impact review to be conducted for development  
16 proposals within the shoreland boundary, and requires such

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<sup>10</sup>Intervenor also contends that under ORS 197.763(1) and 197.835(2), petitioners have waived the ability to raise the issue of compliance with NZO Section 2-5-7 in this appeal, because they failed to raise this issue before the planning commission prior to the close of the record at or following the final evidentiary hearing below. Petitioners cite nothing in the record demonstrating that they raised this issue prior to the close of the record at or following the final evidentiary hearing below. However, the city's notice of hearing did not identify NZO Section 2-5-7 as applicable. Therefore, if NZO Section 2-5-7 establishes an approval criterion applicable to the challenged decision, the city's notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify an applicable approval criterion, and petitioners may raise the city's failure to require compliance with that approval criterion as an issue in this appeal proceeding. ORS 197.835(2)(a); Neuenschwander v. City of Ashland, 20 Or LUBA 144, 157 (1990). Thus, the critical issue that must be decided is whether NZO Section 2-5-7 establishes an approval criterion applicable to the challenged decision.

1 development to be denied if "the proposed development is  
2 inconsistent with the physical characteristics and natural  
3 values of the site." NZO 2-5-7.030. However, the language  
4 of NZO 2-5-7.030 is ambiguous with regard to whether in the  
5 circumstances of this case, shoreland natural resources  
6 impact review must be conducted as part of the conditional  
7 use permit proceedings or may be conducted separately or in  
8 conjunction with some other proceeding.<sup>11</sup> The challenged  
9 decision does not include an interpretation of NZO 2-5-7.030  
10 in this regard. Therefore, the challenged decision must be  
11 remanded for the city to interpret and apply these  
12 provisions in the first instance. Weeks v. City of  
13 Tillamook, supra; Larson v. Wallowa County, supra.

14 The seventh assignment of error is sustained.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 Petitioners contend the challenged decision contains  
17 inadequate findings on the issue of geologic hazards and is  
18 not supported by substantial evidence concerning the  
19 geologic stability of the subject property. Petitioners  
20 note the staff report adopted as part of the city's findings  
21 states:

22 "The request appears to comply with the general  
23 criteria for conditional use permits. There are

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<sup>11</sup>We note that under either interpretation of NZO 2-5-7.030, the procedures for conditional use permit review must be followed in conducting a shoreland natural resources impact review, if the proposed development involves a conditional use.

1 two significant issues that need to be addressed.  
2 One is the geologic stability of the property.  
3 The applicant has already had an extensive  
4 geologic hazard report prepared and it is  
5 attached. It [is suggested] that all the  
6 recommendations for the development outlined in  
7 the geotechnical report be followed \* \* \*."  
8 Record 173.

9 Petitioners contend the city council's final decision  
10 is flawed because it fails to address the "significant  
11 issue" of geologic stability identified in the staff report,  
12 and fails to impose the conditions "suggested" by the staff  
13 report. Petitioners also argue the finding that an  
14 "extensive geologic hazard report" has been prepared is  
15 inaccurate because the report submitted fails to meet  
16 standards for hazard reports established by the State Board  
17 of Geological Examiners. According to petitioners, the city  
18 improperly determined that the issue of geologic stability  
19 should be addressed through the "Notice of Intent to Build  
20 in a Geologic Hazard Area" process established by  
21 NZO 2-4-7.030, discussed in more detail below. Finally,  
22 petitioners argue that by not requiring the applicant to  
23 submit information to resolve uncertainties regarding  
24 geologic stability, the city impermissibly shifted the  
25 burden of proof to petitioners.

26 Intervenor argues that the city council properly  
27 determined that the issue of geologic stability need not be  
28 addressed as part of the subject conditional use permit  
29 application review, but rather may be addressed during

1 building permit application review, under the provisions of  
2 NZO 2-4-7.030 and 2-4-7.035.

3 NZO 2-4-7.030 (Notice of Intent to Build in a Geologic  
4 Hazard Area)<sup>12</sup> provides, in relevant part:

5 "Upon request for a geologic permit, the applicant  
6 shall file with the Building Official a 'Notice of  
7 Intent to Build in a Geologic Hazard Area.' Such  
8 notice shall contain [geologic] reports [as] set  
9 forth in [NZO] 2-4-7.025. The notice of intent  
10 may be filed at any time prior to or in  
11 conjunction with the filing of a building permit,  
12 geologic permit, or any other permit required by  
13 the City. \* \* \*" (Emphasis added.)

14 Following the filing of a Notice of Intent to Build in a  
15 Geologic Hazard Area, notice is given and objections to the  
16 issuance of a geologic permit may be filed. NZO 2-4-7.035.

17 The challenged decision addresses this provision as  
18 follows:

19 "\* \* \* The building permit and plans review  
20 process addresses issues such as \* \* \* geology and  
21 other factors of a similar nature, and these  
22 issues are not properly addressed as part of the  
23 [conditional use permit] process." Record 4.

24 We understand the above finding to state that geologic  
25 stability may be addressed at the building permit  
26 application stage of a proposed development, under  
27 NZO 2-4-7.030, and is not required to be addressed as part  
28 of conditional use permit review.

29 This Board must defer to the city's interpretation of

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<sup>12</sup>There is no dispute that the subject site is recognized by the NZO as a Geologic Hazard area.

1 its own ordinance, unless its interpretation is contrary to  
2 the express words, policy or context of the ordinance.  
3 Clark v. Jackson County, supra. Recent opinions by the  
4 Court of Appeals have stated that under Clark, the question  
5 for this Board to resolve is not whether a local government  
6 interpretation of its own code is "right," but rather  
7 whether it is "clearly wrong." Goose Hollow Foothills  
8 League v. City of Portland, 117 Or App 211, 217, \_\_\_ P2d \_\_\_  
9 (1992); West v. Clackamas County, 116 Or App 89, 92-93, \_\_\_  
10 P2d \_\_\_ (1992).

11 In this instance, petitioners point to no provision of  
12 the NZO conditional use permit approval standards that  
13 specifically requires consideration of the issue of geologic  
14 stability of the subject site as part of the conditional use  
15 permit process. Petitioners do point out that Resolution  
16 No. 1778, Rule 5(3)(c) provides that in land use hearings,  
17 the following are "deemed relevant and material and shall be  
18 considered":

19 "All factors pertinent to the preservation and  
20 promotion of the public health, safety and general  
21 welfare, including, but not limited to, the  
22 character of the area involved [and] its peculiar  
23 suitability for particular uses \* \* \*."

24 On the other hand, NZO 2-4-7.030 and 2-4-7.035 set out  
25 a specific process for evaluation of proposed developments  
26 in geologic hazard areas. Under the language of  
27 NZO 2-4-7.030 emphasized above, it is clear that this  
28 process may be initiated at any time prior to or in

1 conjunction with the filing of an application for any permit  
2 required by the city. Therefore, we conclude the city's  
3 interpretation that it need not address geologic stability  
4 as part of the subject conditional use permit process is not  
5 "clearly wrong."

6 The eighth assignment of error is denied.

7 The city's decision is remanded.

8 Holstun, Referee, dissenting.

9 I do not agree with the majority's resolution of the  
10 fifth assignment of error. NZO 2-5-3.020 simply provides  
11 that a conditional use "shall ordinarily comply with the  
12 standards of the zone concerned for [uses] permitted  
13 outright except as specifically modified by the [city] in  
14 granting the conditional [use] permit." In my view, that  
15 section simply makes it clear that the city may modify  
16 applicable standards within the zoning district. NZO 2-5-  
17 3.020 does not, as the majority suggests it might, make the  
18 general expressions of intent of the city's zoning districts  
19 listed at NZO 2-2-1.020 mandatory approval standards which  
20 must be addressed in approving a conditional use permit.  
21 See Von Lubken v. Hood River County, 104 Or App 683, 803 P2d  
22 750 (1990), adhered to 106 Or App 226 (1991); Stotter v.  
23 City of Eugene, 18 Or LUBA 135 (1989); Standard Insurance  
24 Co. v. Washington County, 16 Or LUBA 30, 34 (1987). The NZO  
25 includes standards for each of its zones, and the general  
26 expressions of intent for each of the zoning districts are

1 not among those standards. Because I believe this  
2 conclusion is supported by a clear and straightforward  
3 reading of NZO 2-2-1.020 and 2-5-3.020, I do not believe a  
4 remand is required under Clark v. Jackson County, supra, to  
5 have the city confirm what the NZO already provides in  
6 unambiguous language.

7 I also disagree with the majority's resolution of the  
8 seventh assignment of error. The majority concludes that  
9 because (1) the city failed to apply the Shoreland Natural  
10 Resources Impact Review requirements of NZO 2-5-7.030, and  
11 (2) there is some ambiguity whether NZO 2-5-7.030 must be  
12 applied at this stage of development approval or as part of  
13 "some other proceeding," the decision must be remanded for  
14 the city to interpret and apply NZO 2-5-7.030 in the first  
15 instance.<sup>13</sup> I conclude because the city neither listed NZO  
16 2-5-7.030 as an applicable approval criterion nor applied  
17 NZO 2-5-7.030 to the challenged decision, it interprets  
18 NZO 2-5-7.030 as not applying to the challenged decision.

19 The Oregon Supreme Court's decision in Clark holds that  
20 this Board must defer to a local government's interpretation  
21 of its own ordinances, unless the interpretation is contrary  
22 to the express words, policy or context of the local  
23 enactment. The Court of Appeals decision in Weeks v. City

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<sup>13</sup>I assume for purposes of this dissent that NZO 2-5-7.030 is ambiguous and, therefore, may reasonably be interpreted either as applying to the challenged decision or as applying at some other later stage in the approval process.

1 of Tillamook, supra, explains that the Supreme Court's  
2 opinion in Clark has the dual effect of reallocating  
3 interpretive authority and interpretive responsibility to  
4 local governments.<sup>14</sup> In Weeks the Court of Appeals goes on  
5 to explain as follows:

6 "[a]fter Clark, local governments may no more fail  
7 to articulate interpretations of their legislation  
8 that are necessary to their decisions than they  
9 may omit necessary findings of fact, and LUBA has  
10 no more authority on review to supply missing  
11 interpretations than it does to make findings that  
12 the local government has failed to include in its  
13 decision."

14 I believe the factual context in Weeks is important and  
15 that it limits the scope of the court's holding in that  
16 case. In Weeks the challenged decision simply concluded  
17 that a disputed conditional use permit "is still valid."  
18 Weeks, 117 Or App at 451. Where the local government makes  
19 no attempt in its decision to identify the criteria it  
20 applied in reaching a decision, and the parties identify  
21 arguably relevant criteria which are ambiguous, it makes  
22 sense to remand the challenged decision so that the local  
23 government can adopt findings identifying the relevant  
24 criteria and interpreting those criteria in the first

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<sup>14</sup>In Cope v. City of Cannon Beach, 115 Or App 11, 16-17, \_\_\_ P2d \_\_\_  
(1992), the Court of Appeals explained that, prior to Clark, while a local  
government's interpretation of its own enactments was entitled to some  
weight, ultimate interpretive authority and responsibility rested with this  
Board and with the appellate courts on review of this Board's decisions.  
See Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50 (1978);  
McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988),

1 instance.

2 The decision challenged in this appeal is quite  
3 different from the decision in Weeks. The decision  
4 identifies the standards and criteria the city believes  
5 apply to the challenged decision and applies them. NZO 2-5-  
6 7.030 is not among the applicable criteria identified by the  
7 city. It is true that the city does not include an  
8 explanation of why it believes that each inapplicable  
9 criterion is inapplicable. However, in my view, such an  
10 explanation is neither practical nor required by Clark or  
11 Weeks.<sup>15</sup> I believe LUBA may assume, by virtue of the city's  
12 failure to identify and apply NZO 2-5-7.030 in this case,  
13 that the city subscribes to the reasonable interpretation of  
14 NZO 2-5-7.030 that the criterion does not apply to the  
15 challenged decision.

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<sup>15</sup>If such interpretive findings are required by Clark and Weeks, local governments now must examine all inapplicable criteria for potential ambiguities, and adopt findings resolving such ambiguities, or risk that those ambiguous criteria will be raised for the first time in an appeal to this Board and result in an automatic remand for interpretive findings.