

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

3
4 JACK G. KAADY,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 93-169
10 CITY OF CANNON BEACH,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 TOLOVANA INN UNIT OWNERS)
17 ASSOCIATION,)
18)
19 Intervenor-Respondent.)

20
21
22 On remand from the Court of Appeals.

23
24 Jack G. Kaady, Milwaukie, represented himself.

25
26 No appearance by respondent.

27
28 P. Stephen Russell III, Portland, represented
29 intervenor-respondent.

30
31 REMANDED 01/12/95

32
33 You are entitled to judicial review of this Order.
34 Judicial review is governed by the provisions of ORS
35 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council order determining the
4 Tolovana Inn is a motel and, therefore, not subject to city
5 regulations governing the short term rental of dwellings.

6 **FACTS**

7 We take the facts from our previous decision in this
8 matter, Kaady v. City of Cannon Beach, 27 Or LUBA 464, 465,
9 rev'd 130 Or App 611 (1994):

10 "On February 3, 1992, the city manager wrote a
11 letter to intervenor's manager advising him the
12 Tolovana Inn is not subject to the requirements of
13 city Ordinance No. 92-1. Petitioner learned of
14 the city manager's decision and demanded that
15 Ordinance No. 92-1 be 'enforced' against the
16 Tolovana Inn. On July 2, 1992, the city manager
17 wrote petitioner a letter advising him that the
18 Tolovana Inn is not subject to the requirements of
19 Ordinance No. 92-1. Petitioner appealed the city
20 manager's letter, and the appeal was referred to
21 the planning commission. The planning commission
22 affirmed the city manager's decision, and
23 petitioner appealed to the city council. The city
24 council also affirmed the city manager's decision.
25 * * *"

26 This Board affirmed the city council's decision. On
27 appeal, the court of appeals reversed our decision and
28 determined the following:

29 "The [Tolovana Inn] was originally allowed through
30 a conditional use permit issued by the city in
31 1971, and has been the subject of subsequent
32 zoning and other regulatory actions. The gist of
33 petitioner's position is that all of the units
34 comprising the [Tolovana Inn] are in separate
35 private ownership, some of which are owner-
36 occupied, and it is a condominium rather than a

1 motel now and has been from its inception.
2 Therefore, according to petitioner, the [Tolovana
3 Inn] does not come within the exception from
4 short-term rental regulation that Ordinance No.
5 92-1 and related provisions establish for motels.

6 "The city council arrived at its conclusion that
7 the [Tolovana Inn] is a 'motel' principally by
8 reference to the council's findings and analysis
9 concerning the use that was allowed by the 1971
10 and later zoning actions and concerning the
11 history of the [Tolovana Inn's] use. However,
12 LUBA's opinion is essentially silent about those
13 matters. Its holding on the principal issue it
14 addressed turned on its conclusion:

15 "[T]he city exercised its
16 interpretative discretion in adopting
17 the challenged decision and interpreting
18 the term 'motel,' as defined by
19 Ordinance No. 92-1, to include the
20 Tolovana Inn.'

21 "LUBA added, in a footnote:

22 "'Petitioner contends a 1971 decision
23 and subsequent planning actions
24 affecting the Tolovana Inn were
25 incorrectly decided by the city.
26 However, the time to appeal the legal
27 correctness of those previous planning
28 actions has long since expired.'

29 "In one of his assignments to us, petitioner
30 contends that LUBA erred by 'construing' his
31 second assignment to it 'as a challenge to the
32 city's 1971 decision' itself, when what he argued
33 instead was that the city misinterpreted the 1971
34 action in its present decision. Two of
35 petitioner's other assignments to this court raise
36 related points.

37 "Petitioner is correct. Without suggesting a view
38 on their merits, we agree that his assignment and
39 argument before LUBA did raise questions about the
40 city's determinations in the present proceeding
41 that bear on whether what it approved in 1971 was-

1 -or later became--a motel. Independently of the
2 meaning of Ordinance No. 92-1, which was adopted
3 21 years after the permit was allowed, those
4 questions could affect the appropriate disposition
5 of petitioner's appeal to LUBA. Correspondingly,
6 they could also have bearing on the correctness of
7 the city's conclusion regarding the applicability
8 of the term 'motel' in the 1992 ordinance to the
9 use that was allowed and regulated by the earlier
10 actions. See Terraces Condo. Assn. v. City of
11 Portland, 110 Or App 471, 823 P2d 1004 (1992).
12 Because LUBA did not address petitioner's
13 assignment of error as we understand it, it is
14 necessary to remand the case to LUBA to consider
15 the assignment of error." (Emphasis in original.)
16 Kaady v. City of Cannon Beach, 130 Or App 611,
17 613-14, ____ P2d ____ (1994).

18 We understand the court of appeals to require us to
19 address whether the city incorrectly interpreted either the
20 Tolovana Inn's June 7, 1971 conditional use permit
21 (Record 364) or subsequent zoning actions concerning the
22 Tolovana Inn, in determining in the challenged decision that
23 the Tolovana Inn is a motel and, therefore, not subject to
24 the requirements of Ordinance No. 92-1.

25 INTRODUCTION

26 Ordinance No. 92-1 regulates the "transient occupancy
27 of dwelling units." Ordinance No. 92-1, section 2, provides
28 the following definition:

29 "'Motel * * *' means a structure or part of a
30 structure, containing motel rental units, occupied
31 or designed for occupancy by transients for
32 lodging or sleeping and including the terms
33 'hotel' and 'inn', but shall not include the term
34 'bed and breakfast establishment' or the transient
35 occupancy of a dwelling unit regulated by this
36 ordinance."

1 The city council findings determine the Tolovana Inn is a
2 motel, as follows:

3 "1. [T]he developer of the Tolovana Inn applied
4 for a conditional use permit for a
5 condominium and allied facilities in 1971.
6 The conditional use was granted by means of
7 Ordinance No. 71-5. Pursuant to Ordinance
8 No. 69-9, the property was zoned R-3, High
9 Density Residential. Multiple-family
10 dwellings were an outright use in the R-3
11 zone * * * and motels were allowed as a
12 conditional use * * *. The conclusion to be
13 drawn from the city's action in 1971 is that
14 a conditional use permit was required because
15 the Tolovana Inn was determined to be a motel
16 use. If the city were treating the Tolovana
17 Inn as a multiple-family dwelling, there
18 would not have been a need for a conditional
19 use permit since a multi-family dwelling was
20 permitted outright in the R-3 zone. Under
21 the language of Ordinance No. 69-9, the fact
22 that the Tolovana Inn was to be in
23 condominium ownership did not result in a
24 requirement for a conditional use permit. A
25 condominium is a form of ownership, not a
26 use, and as such this aspect of the proposal
27 was not regulated by Ordinance No. 69-9. A
28 multi-family dwelling, in condominium
29 ownership, could have been constructed
30 without the need for a conditional use
31 permit. [Petitioner] has argued the
32 conditional use permit was not required for
33 the Tolovana Inn units, but rather for the
34 'allied facilities' referenced in the
35 application. [Petitioner] cites a restaurant
36 as an example of an 'allied facility' which
37 required the conditional use permit.
38 Ordinance No. 69-9, Section 3.030, High
39 Density Residential Zone, R-3 did not provide
40 for a restaurant as either an outright or
41 conditional use. Therefore, the purpose of
42 the conditional use permit could not have
43 been solely to authorize the construction of
44 a restaurant.

1 "2. Even though the application for a conditional
2 use for the Tolovana Inn did not use the term
3 motel, in adopting Ordinance No. 71-5, the
4 City Council was aware that the Tolovana Inn
5 was to be operated as a motel. [In] the
6 minutes of the May 3, 1971 Council meeting,
7 at which a motion for the first reading of
8 the ordinance was passed, Councilor Edstrom
9 noted that 'this property has been a motel
10 since 1911, ... therefore he does not object
11 to the conditional use application.'
12 Councilor Edstrom would not have made the
13 statement about the historic use of the
14 property as a motel except insofar as the
15 Tolovana Inn was also to be used as a motel.

16 * * * * *

17 "IV. CONCLUSION AND ACTION

18 "The Tolovana Inn is a motel. The Planning
19 Commission decision that the Tolovana Inn is a
20 motel, and thus not subject to [Ordinance No.
21 92-1], is upheld." Record 4-7.

22 At the outset we note that many of petitioner's
23 arguments are colored by his view that a residential unit
24 held as a condominium can never be properly considered a
25 "motel" under Ordinance No. 92-1, because of its form of
26 ownership and because a condominium constitutes a "dwelling
27 unit."¹ However, the challenged decision determines there
28 is nothing in the city's zoning code which prevents the city
29 from finding a structure held in condominium ownership is a

¹Cannon Beach Zoning Ordinance (CBZO) 17.04.210 defines "dwelling unit"
as follows:

"[O]ne or more rooms designed for occupancy by one family for
living purposes and having only one cooking facility, but not
including motel units." (Emphasis supplied.)

1 motel, if it otherwise meets the definition of "motel" in
2 Ordinance No. 92-1. Record 7 (finding 4). The challenged
3 decision also determines that because CBZO 17.04.210
4 specifically excludes motel units from the definition of
5 dwelling unit, once the city determines a use is a "motel,"
6 as defined in Ordinance No. 92-1, the individual units it
7 contains are motel units, not dwelling units. Record 7
8 (finding 5). The city council's interpretations of the
9 city's ordinances in this regard are well within its
10 interpretive discretion under ORS 197.829 and Clark v.
11 Jackson County, 313 Or 508, 515, 836 P2d 710 (1992).

12 The disputed exemption in Ordinance No. 92-1 applies
13 simply to motels, as defined. Therefore, the only relevant
14 inquiry is whether the Tolovana Inn is a "motel," as defined
15 in Ordinance No. 92-1.

16 **FOURTH ASSIGNMENT OF ERROR**

17 Under this assignment of error, petitioner argues there
18 is no evidentiary support for the city's determination that
19 the Tolovana Inn was located in the R-3 zoning district at
20 the time the city adopted the 1971 conditional use permit
21 decision.²

22 Intervenor cites no evidence to support the findings in
23 the challenged decision that the Tolovana Inn was located

²Petitioner also contends that the record fails to include information concerning other condominium projects. However, even assuming this is the case, we do not see how such an allegation establishes error in the challenged decision.

1 within the R-3 zoning district at the time the 1971
2 conditional use permit was approved, and we are aware of
3 none.³ We cannot tell from the challenged decision whether
4 the city would have determined that the Tolovana Inn is a
5 motel in the absence of its determination that at the time
6 of the 1971 conditional use permit decision, the subject
7 property was located within the R-3 zoning district.

8 The fourth assignment of error is sustained, in part.

9 **REMAINING ASSIGNMENTS OF ERROR**

10 We address petitioner's remaining assignments of error,
11 except for those arguments relating to constitutional issues
12 that were summarily rejected by the Court of Appeals.

13 Petitioner assumes the Tolovana Inn was within the
14 Planned Development (PD) zoning district at the time the
15 1971 conditional use permit was issued. According to
16 petitioner, because the Tolovana Inn was within the PD
17 zoning district, the 1971 conditional use permit could have
18 approved either a motel or a condominium. This is because

³Intervenor's response to this assignment of error does not appear to relate to the issue of the zoning of the subject property in 1971 at all. The 1971 conditional use permit decision in the record does not indicate the zoning of the subject property. Further, we have not been provided with or asked to take official notice of the official city zoning maps in effect in 1971. As far as we can tell, whether the Tolovana Inn was located within the R-3 zoning district at the time the 1971 conditional use permit was approved is important because motels were allowed as conditional uses in the R-3 zone, whereas they were not allowed in certain other zoning districts. Petitioner's reasoning under this assignment of error is that if a motel was not conditionally allowed on the subject property at the time the 1971 conditional use permit was approved, then the city could not have approved a conditional use permit for a motel in 1971.

1 petitioner contends that under the PD zoning district,
2 condominiums were required to obtain conditional use permit
3 approval. The problem with petitioner's argument in this
4 regard is that petitioner offers nothing to support his
5 assertion that the Tolovana Inn was within the PD zoning
6 district at the time the 1971 conditional use permit was
7 approved.

8 Petitioner also asserts another condominium project was
9 conditionally approved around the same time the Tolovana Inn
10 received its conditional use permit approval, and that this
11 lends support to petitioner's argument that the Tolovana Inn
12 was conditionally approved as a condominium only. However,
13 nothing in the record establishes the underlying zoning of
14 such other project, its nature, or whether it was, in fact,
15 approved by the city. See Record 382. Therefore, the
16 possible existence of a conditional use permit approval for
17 another condominium lends little, if any, support to
18 petitioner's arguments.

19 The only other argument we can discern from the
20 petition for review is that the city erroneously relies on
21 the Tolovana Inn prospectus.⁴ As we understand it,

⁴The challenged decision includes the following findings concerning the prospectus:

"The following actions were taken after the adoption of Ordinance No. 71-5. Taken together, these actions corroborate the conclusion that in approving Ordinance No. 71-5, the City was approving the development of a motel.

1 petitioner contends there is no evidence that the Tolovana
2 Inn prospectus was before the city when it approved a
3 conditional use permit for the Tolovana Inn in 1971, and
4 that no prospectus is in the record in this proceeding.

5 Taking the latter argument first, a prospectus for the
6 Tolovana Inn is in the record beginning at Record 224. In
7 addition, we do not understand the challenged decision to
8 determine whether the prospectus was or was not before the
9 city when it made its decision on the 1971 conditional use
10 permit. The challenged decision simply evaluates the
11 prospectus as well as other evidence to determine the nature
12 of the Tolovana Inn. The city did not err in evaluating the

"a. The Cannon Beach Condominium, Oreg. Ltd., which acted as the developer of the Tolovana Inn, filed a prospectus, dated February 24, 1972, with the Corporation Commissioner of the State of Oregon for the Tolovana Inn Condominiums. This filing in conjunction with the issuance of a security was required because the Tolovana Inn was established so that unit owners could collectively operate their units as a motel. This filing would not have been required if the Tolovana Inn was to be a multi-family dwelling.

"b. The Tolovana Inn prospectus clearly indicates the intent of the property developers was to have the development operated as a motel. For example, Risk factor (6), page 1, states that 'if 70 units owners do not execute the Agent's Agreement, the Agent will not accept the duties of renting the units to the public...'. Rental receipts, page 7, first paragraph, state that 'Unit purchasers have the option of entering into an Agent's Agreement * * * providing for the rental of their Units. The amount of income or deficit after expenses, realized by the Unit Owners from the rental of their Units will necessarily depend upon the occupancy rate experienced by the motel operation.'

** * * * * Record 5.

1 Tolovana Inn prospectus to determine the nature of the
2 Tolovana Inn for purposes of determining whether it is a
3 motel within the meaning of Ordinance No. 92-1.

4 Petitioner also argues the city's determination that
5 the Tolovana Inn is a motel is not supported by substantial
6 evidence in the whole record.

7 Among other evidence, the evidence in the record relied
8 upon by the city consists of the following: (1) the 1975
9 comprehensive plan for Tolovana Park, showing the Tolovana
10 Inn as a motel; (2) the Tolovana Inn prospectus, discussed
11 above; (3) the 1984 Tolovana Inn "Certificate of Authority"
12 as a "hotel" indicating that, as such, the Tolovana Inn pays
13 hotel-motel room taxes to the city; and (4) a 1985
14 conditional use permit decision permitting the expansion of
15 the Tolovana Inn office, referring to the Tolovana Inn as a
16 condominium/motel complex and the Tolovana Inn's units as
17 "motel units," and stating the reason for the proposed
18 expansion was to accommodate customers during summer peak
19 periods. Record 325.

20 We have reviewed the evidence cited by the parties,
21 including evidence relied on by petitioner. Assuming the
22 subject property was zoned R-3 when the 1971 conditional use
23 permit was approved, a reasonable person could determine as
24 the city did that the Tolovana Inn is a motel. Younger v.
25 City of Portland, 305 Or 346, 752 P2d 262 (1988).

26 Petitioner's remaining assignments of error are denied.

1 The city's decision is remanded.