

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

4 WILLIAM JACKMAN, MARGARET JACKMAN, )  
5 RAYMOND JACOBS, SHERRYL GOERTZEN- )  
6 JACOBS, DORTHY RADCLIFFE, RYAN )  
7 RADCLIFFE, HAROLD SCHILLING, )  
8 LAURA SCHILLING, ROBERT SPITTLES )  
9 and MARY HENDERSHOTT-SPITTLES, )

10   ) )  
11                               Petitioners, )  
12   ) )

13                               vs. )

14   ) LUBA Nos. 94-006 and 94-099

15 CITY OF TILLAMOOK, )

16   )                               FINAL OPINION  
17                               Respondent, )                               AND ORDER  
18   ) )

19                               and )

20   ) )  
21 THE CHURCH OF THE NAZARENE, )  
22   ) )

23                               Intervenor-Respondent. )  
24  
25

26                               Appeal from City of Tillamook.  
27

28                               Harold L. Schilling, Tillamook, filed the petition for  
29 review and argued on his own behalf.  
30

31                               Douglas Kaufman and Lois A. Albright, Tillamook, filed  
32 a response brief on behalf of respondent and intervenor-  
33 respondent. With them on the brief was Albright & Kittell.  
34 Lois A. Albright argued on behalf of intervenor-respondent.  
35

36                               SHERTON, Chief Referee; GUSTAFSON, Referee; LIVINGSTON,  
37 Referee, participated in the decision.  
38

39                               REMANDED                               07/10/95  
40

41                               You are entitled to judicial review of this Order.  
42 Judicial review is governed by the provisions of ORS  
43 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 In LUBA No. 94-006, petitioners appeal a city council  
4 decision approving a conditional use permit to use an  
5 existing single family dwelling as church offices. In LUBA  
6 No. 94-099, petitioners appeal a city council decision  
7 granting site plan approval for an off-street parking lot as  
8 an accessory use appurtenant to a church.

9 **MOTION TO INTERVENE**

10 The Church of the Nazarene, the applicant below, moves  
11 to intervene in this proceeding on the side of respondent.  
12 There is no opposition to the motion, and it is allowed.

13 **FACTS**

14 Intervenor's church is located at the southwest corner  
15 of Third Street and Del Monte Avenue, on land zoned  
16 Single-Family and Duplex Residential (R-5.0). This  
17 consolidated appeal concerns two applications by intervenor  
18 for church-related use of properties on the block located  
19 across Third Street from the church.<sup>1</sup> Apparently,  
20 intervenor was using a single family dwelling on a lot  
21 fronting on Third Street across from the church (Tax Lot

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<sup>1</sup>The zoning of the block located across Third Street from the church, where the properties that are the subject of the applications at issue in this appeal are located, is in dispute. Petitioners contend it is zoned R-5.0, whereas the city and intervenor (respondents) contend it is zoned Residential-Office (R-O). This issue is addressed under the first assignment of error, infra.

1 1500) as church offices, and was in the process of  
2 developing a parking lot on primarily the rear portion of an  
3 adjacent double-size lot fronting on Del Monte Avenue that  
4 already contains an existing dwelling (Tax Lot 1000).<sup>2</sup> The  
5 back of Tax Lot 1500 is separated from the rear portion of  
6 Tax Lot 1000 by a public alley leading to Del Monte Avenue.

7 After complaints concerning intervenor's activities on  
8 the subject properties were made to the city, intervenor  
9 applied for conditional use permit and site plan approval to  
10 use the dwelling on Tax Lot 1500 as church offices and place  
11 a sign in the yard. Record B119.<sup>3</sup> After public hearings,  
12 the city planning commission adopted separate decisions  
13 granting conditional use permit and site plan approval.  
14 Record 206, 211. Petitioners appealed the conditional use

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<sup>2</sup>Whether Tax Lot 1000 is actually one or two separate parcels is also a matter of dispute, although it appears from the record that both the existing dwelling and the proposed parking spaces are located, in part, on both halves of Tax Lot 1000.

<sup>3</sup>The local record in this consolidated proceeding consists of six different volumes. The record for LUBA No. 94-006 received by this Board on February 25, 1994 shall be cited as "Record \_\_\_\_." Additionally, we note the city council order challenged in LUBA No. 94-006 appears as two unnumbered pages at the beginning of this record volume. The two-page order shall be cited as "Record 0" and "Record 00." The record for LUBA No. 94-099 received on June 24, 1994 shall be cited as "Record A\_\_\_\_." The supplemental record for both appeals received on September 2, 1994 shall be cited as "Record B\_\_\_\_." The supplemental record for both appeals received on November 29, 1994 shall be cited as "Record C\_\_\_\_." The addendum to the supplemental record for both appeals received on January 12, 1995 shall be cited as "Record D\_\_\_\_." The final supplemental record for both appeals received on February 16, 1995 shall be cited as "Record E\_\_\_\_."

1 permit decision to the city council.<sup>4</sup> Record 413.

2 The city council conducted proceedings on petitioners'  
3 appeal on December 20 and 27, 1993 and January 3, 1994.  
4 Whether these proceedings are properly termed meetings or  
5 public hearings, and whether they satisfied the procedural  
6 requirements of the City of Tillamook Zoning Ordinance (TZO)  
7 and state statutes is disputed. On January 3, 1994, the  
8 city council adopted an order affirming the planning  
9 commission decision. Record 0. This order (hereafter  
10 conditional use decision) is appealed in LUBA No. 94-006.

11 A separate item under the "Legislative" section of the  
12 agenda for the January 3, 1994 city council meeting was  
13 "Review of Administrative Decision Allowing Parking Lot  
14 within R-0 zone as an outright use."<sup>5</sup> Record 2. The  
15 minutes indicate this proceeding concerned an interpretation  
16 of the TZO regarding whether intervenor's proposed parking  
17 lot use of Tax Lot 1000 in the R-0 zone requires a  
18 conditional use permit. On January 18, 1995, the city  
19 council adopted a motion that it "affirms the interpretation  
20 of the parking lot as an accessory or appurtenant use to a  
21 permitted use \* \* \*," and that the planning commission

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<sup>4</sup>Petitioners did not appeal the decision granting site plan approval for the proposed use of the dwelling on Tax Lot 1500 as church offices, and that decision is not at issue in this appeal.

<sup>5</sup>The "administrative decision" or "administrative interpretation" regarding this issue referred to at this and other places in the record appears to be located at Record B32-39.

1 should perform a site plan review of the proposed parking  
2 lot. Record B27.

3 On January 25, 1994, intervenor filed an application  
4 for site plan review of the proposed 14-space parking lot on  
5 Tax Lot 1000. Record A127. The site plan shows 9 parking  
6 spaces located behind the existing dwelling and 5 parking  
7 spaces located between the existing dwelling and the alley  
8 to the south. Record A138. Access to the parking lot would  
9 be from the alley.

10 After a public hearing, the planning commission  
11 approved intervenor's site plan for the proposed parking  
12 lot. Record A110. Petitioners appealed the planning  
13 commission decision to the city council. Record A96. The  
14 city council conducted additional proceedings on  
15 petitioners' appeal. On June 6, 1994, the city council  
16 adopted an order affirming the planning commission's  
17 decision and granting site plan approval, with certain  
18 modifications. This order (hereafter site plan decision) is  
19 appealed in LUBA No. 94-099.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioners argue the challenged decisions should be  
22 reversed because the subject properties are zoned R-5.0, not  
23 R-0, and offices and off-street parking lots are not allowed  
24 in the R-5.0 zone. Petitioners contend the subject  
25 properties were zoned strictly for residential use prior to  
26 1980, and the city never adopted an ordinance changing the

1 zone to R-0. Petitioners note the conditional use decision  
2 states:

3 "Tillamook City Resolution #1064 adopted on  
4 March 5, 1984 formally adopted the zoning map  
5 which depicted the [subject] property as [R-0]."  
6 Record 0.

7 Petitioners argue that under ORS 227.215 and TZO provisions,  
8 the zoning of the subject properties can only be changed by  
9 an ordinance, not a resolution.

10 Pursuant to respondents' request, we take official  
11 notice of a City of Tillamook Comprehensive Plan and Zoning  
12 Map adopted by City of Tillamook Ordinance No. 1038 and  
13 signed by the city's mayor on March 22, 1982. This map  
14 shows the comprehensive plan designation of the subject  
15 properties as Medium Density Residential & Office and the  
16 zone as Multi-Family Residential (R-0.0).<sup>6</sup> Record B124. We  
17 therefore conclude the subject properties were already zoned  
18 R-0 by ordinance prior to the adoption of the 1984  
19 resolution referred to in the conditional use decision.

20 The first assignment of error is denied.

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<sup>6</sup>The zoning designations depicted on the legend of this map match those listed in the current TZO, which in turn are the same as those listed in the TZO adopted in 1980 by City of Tillamook Ordinance No. 979, except that the map lists a Multi-Family Residential (R-0.0) zone rather than the Residential-Office (R-O) zone listed in the text of the TZO and referred to in the challenged decision. However, the parties treat the R-0.0 zone shown on the map as being the same as the R-O zone listed in the TZO, so we do the same.

1     **SECOND ASSIGNMENT OF ERROR**

2             **A.     Comprehensive Plan Provisions**

3             Petitioners contend the findings supporting the  
4 challenged decisions are inadequate because they fail to  
5 address City of Tillamook City Comprehensive Plan (plan)  
6 Policies 7, 15, 43, 51 and 81, which concern housing,  
7 offices and traffic, as well as plan Transportation System  
8 Goal and Objective 1. Petitioners further contend they  
9 raised the issue of the applicability of these plan  
10 provisions during the proceedings below.

11            The plan provisions cited by petitioners are arguably  
12 relevant to the challenged decisions. Neither decision  
13 includes any findings addressing these provisions,  
14 determining either that they are inapplicable or that the  
15 proposal in question satisfies them. Respondents ask us to  
16 make such determinations based on the evidence in the  
17 record. However, the city council must interpret and apply  
18 these plan provisions in the first instance. Weeks v. City  
19 of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992).

20            This subassignment of error is sustained.

21             **B.     TZO 22.6(F)(1)**

22             TZO Section 22 establishes site development standards  
23 for the R-0 (and other) zones. TZO 22.6(F) is titled  
24 "Traffic Capacity Analysis." TZO 22.6(F)(1) provides:

25             "The [Planning] Commission may require a proposed  
26 development to submit a detailed Traffic Capacity  
27 Plan."

1 TZO 22.6(F)(2)-(7) set out the requirements for a traffic  
2 capacity analysis.

3 Petitioners contend the city erred by failing to  
4 require a traffic capacity analysis for the proposed uses.  
5 Petitioners point to the following "condition" listed in the  
6 site plan decision:

7 "[T]here is no need for a traffic analysis."  
8 Record A112.

9 Petitioners argue the planning commission "was provided no  
10 staff analysis, considered no data, reviewed no  
11 documentation of any sort, and received no qualified  
12 testimony" in reaching the above conclusion, which was also  
13 adopted by the city council.<sup>7</sup> Petition for Review 11.

14 TZO 22.6(F)(1) simply provides that the city may  
15 require a traffic capacity analysis as part of the site plan  
16 approval process. Petitioners point to no legal standard  
17 arguably requiring such an analysis in this instance or  
18 establishing standards for city decisions on whether to  
19 require such an analysis. Without a contention that some  
20 legal standard has been violated, we cannot provide relief.  
21 Frankton Neigh. Assoc. v. Hood River County, 25 Or LUBA 386,  
22 389 (1993); Lane School District 71 v. Lane County, 15  
23 Or LUBA 150, 153 (1986).

24 This subassignment of error is denied.

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<sup>7</sup>There is no dispute that each challenged city council order incorporates by reference the corresponding planning commission decision.

1 The second assignment of error is sustained in part.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners contend the city improperly refused to  
4 allow them to present testimony and argument regarding  
5 whether a parking lot is an outright permitted use of Tax  
6 Lot 1000 during the proceedings leading to the conditional  
7 use permit decision on office use of Tax Lot 1500.  
8 Petitioners argue the city's conditional use permit  
9 proceedings should have included consideration of whether a  
10 conditional use permit is required for the parking lot, and  
11 the conditional use decision should include findings on this  
12 issue.

13 The challenged conditional use decision finds that  
14 issues concerning the proposed parking lot on Tax Lot 1000  
15 are not relevant to whether a conditional use permit should  
16 be approved for Tax Lot 1500. Record 00. We agree. The  
17 city was not required to expand the scope of its proceedings  
18 on intervenor's application for a conditional use permit for  
19 office use of Tax Lot 1500 to include an unrelated issue  
20 concerning Tax Lot 1000. See Pend-Air Citizen's Citizen's  
21 Comm. v. City of Pendleton, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
22 94-178, June 27, 1995), slip op 6.

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 Petitioners contend the city's notice of public hearing  
26 on intervenor's conditional use permit application for

1 office use of Tax Lot 1500 failed to satisfy the requirement  
2 of ORS 197.763(3)(a) to "explain the nature of the  
3 application and the proposed use or uses which could be  
4 authorized."<sup>8</sup> Petitioners contend intervenor had used, and  
5 would continue to use, the subject property for additional  
6 uses, such as a meeting facility and counseling center.

7 If the city's notice of hearing failed to comply with  
8 ORS 197.763(3)(a), which we do not determine, that would be  
9 a procedural error. Under ORS 197.835(7)(a)(B), a  
10 procedural error provides a basis for reversal or remand of  
11 the challenged decision only if petitioners' substantial  
12 rights are prejudiced by the error. Here, petitioners do  
13 not contend their substantial rights were prejudiced by the  
14 alleged violation of ORS 197.763(3)(a), and we do not see  
15 that they were.

16 The fourth assignment of error is denied.<sup>9</sup>

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<sup>8</sup>Petitioners also assert the city's hearing notice violated TZO 27.11, which provides that a conditional use permit "shall apply to the specific use applied for only \* \* \*." However, petitioners provide no supporting argument, and we will not supply petitioners' arguments for them. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

<sup>9</sup>In their petition for review, petitioners also contend under this assignment of error that the conditional use decision fails to comply with TZO 25.4(F), which concerns off-street parking and loading requirements for various types of uses. However, during oral argument petitioners conceded TZO 25.4(F) is relevant to site plan, rather than conditional use permit, approval for Tax Lot 1500 and that the city's site plan approval for Tax Lot 1500 is not before this Board on appeal.

1 **FIFTH AND NINTH ASSIGNMENTS OF ERROR<sup>10</sup>**

2 **A. Impartial Tribunal**

3 Petitioners contend they were denied their right to an  
4 "impartial tribunal," but present no argument to establish  
5 that the city decision makers were biased or prejudged the  
6 subject matter. Petitioners simply state they have "no way  
7 of knowing" whether the planning commission or city council  
8 deliberations were tainted by improper influence or  
9 contacts.

10 In contending their right to an impartial tribunal was  
11 denied, petitioners have the burden of showing the local  
12 decision maker was biased or prejudged the application and  
13 did not reach a decision by applying relevant standards  
14 based on the evidence and argument presented. Eppich v.  
15 Clackamas County, 26 Or LUBA 498 (1994). Petitioners fail  
16 to do so.

17 This subassignment of error is denied.

18 **B. Availability of Public Documents**

19 Petitioners contend the city's failure to provide them  
20 with timely access to the draft minutes of the planning  
21 commission and city council proceedings violated the Public  
22 Records Law. Petitioners also contend the city violated the  
23 requirement of ORS 197.763(3)(h) and (i) that copies of all

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<sup>10</sup>The subassignment of the ninth assignment of error concerning whether the proposed parking lot would make the existing dwelling on Tax Lot 1000 nonconforming is addressed under the eighth assignment of error, infra.

1 staff reports and all documents and evidence relied on by  
2 the applicant be provided at reasonable cost, and that the  
3 city's notice of hearing so state. Petitioners specifically  
4 complain that while petitioner Jackman was required to pay  
5 \$14 (\$1 per page) for a staff report, intervenor was  
6 provided with the same material free of charge.

7 We do not determine whether draft, unapproved minutes  
8 are subject to inspection under the Public Records Law  
9 because, even if they were, the Public Records Law itself  
10 provides that it is enforced by petition to the county  
11 district attorney and, if that fails, by instituting an  
12 action in circuit court. ORS 192.460. This Board does not  
13 have jurisdiction to review alleged Public Records Law  
14 violations.

15 With regard to the alleged violations of the notice  
16 requirements of ORS 197.763(3)(h) and (i), the city's  
17 notices of the planning commission hearing on each  
18 application simply state "[m]aterials pertinent to [the  
19 application] are available for review" at the city planning  
20 department. Record A123, B118. This statement does not  
21 fully comply with the requirements of ORS 197.763(3)(h) and  
22 (i) that the notices of hearing state that the staff report  
23 and applicant's materials "are available for inspection at  
24 no cost and [copies] will be provided at reasonable cost."  
25 However, this failure to comply fully with the statute is at  
26 most a procedural error, and petitioners do not allege or

1 explain how it violates their substantial rights.  
2 ORS 197.835(7)(a)(B).

3 With regard to petitioners' more serious allegation  
4 that the city failed to provide them with copies of staff  
5 reports and applicant's materials at a reasonable cost,  
6 while providing the applicant with free copies, we note that  
7 petitioners' allegations are not supported by citations to  
8 the record. Our review is limited to the record, unless  
9 petitioners move for an evidentiary hearing to introduce  
10 evidence of procedural irregularities not shown in the  
11 record which would warrant reversal or remand.  
12 ORS 197.830(13). Petitioners have not moved for a hearing  
13 to introduce evidence of the alleged procedural  
14 irregularities. Further, the only undisputed fact alleged  
15 by petitioners is that petitioner Jackman was required to  
16 pay \$14 for a copy of a 14-page staff report. Although we  
17 tend to agree with petitioners that \$14 is not a "reasonable  
18 cost" for the 14-page document, as required by  
19 ORS 197.763(3)(i), we do not see that the overcharge is  
20 severe enough to violate petitioners' substantial rights.

21 This subassignment of error is denied.

22 **C. Planning Commission Membership and Procedures**

23 Petitioners contend that, contrary to the city  
24 ordinance establishing a planning commission, more than two  
25 members of the planning commission are nonresidents of the  
26 city. This Board has jurisdiction to review the challenged

1 land use decisions. Whether the planning commission members  
2 comply with city requirements for the make-up of the  
3 planning commission is not within this Board's scope of  
4 review.

5 Petitioners also contend the planning commission's  
6 decisions were improperly adopted, in that the orders and  
7 findings were neither adopted by the planning commission at  
8 a public meeting nor ratified by the planning commission  
9 members after being signed by the chairman. However, the  
10 city decisions subject to our review are the city council's  
11 decisions. Any procedural errors in the manner in which the  
12 planning commission's orders and findings were adopted do  
13 not affect our review.

14 This subassignment of error is denied.

15 **D. City Council Appeal Procedures**

16 As relevant here, TZO 33.2(B) provides, with regard to  
17 the procedures for appeal hearings before the city council:

18 "It shall be the duty of the City Council, upon  
19 receiving an [appeal] of a Decision by the  
20 Planning Commission, to receive and examine  
21 available information and conduct a public hearing  
22 on behalf of the applicant or other interested  
23 party. \* \* \*

24 "The City Council shall review only the record of  
25 [the] prior proceeding, and may ask for  
26 clarification or additional information from the  
27 participating parties as it relates to the record.  
28 Full disclosure of both parties must be made at  
29 the Planning Commission level and additional  
30 non-related arguments shall not be accepted by the  
31 City Council.

1           "\* \* \* \* \*"

2           Petitioners argue they were denied an opportunity to  
3 present argument explaining the bases for their appeal.  
4 Aside from an undeveloped suggestion of a violation of "due  
5 process," petitioners' major contention is that the city  
6 council's appeal procedures violate ORS 227.180(1)(a)(B),  
7 which requires "a hearing at least for argument." However,  
8 ORS 227.180(1) prescribes procedures only for appeals from a  
9 hearings officer's decision to a planning commission or city  
10 council, not for appeals from a planning commission  
11 decision. In any case, we note the record shows petitioners  
12 were allowed to testify extensively on the bases for their  
13 appeal and to submit written argument. Record 414-18,  
14 434-56.

15           Petitioners also contend the city council allowed the  
16 applicant to submit new evidence during the appeal hearing  
17 on the conditional use permit application and that although  
18 they objected, petitioners were denied the opportunity to  
19 respond to such evidence. Record 150-52.

20           Under Fasano v. Washington Co. Comm., 264 Or 574, 507  
21 P2d 23 (1973), petitioners have a right to rebut evidence  
22 placed before the decision maker in a quasi-judicial land  
23 use hearing. This is one of the substantial rights referred  
24 to by ORS 197.835(7)(a)(B). Muller v. Polk County, 16  
25 Or LUBA 771, 775 (1988).

26           Respondents do not contend the testimony submitted to

1 the city council on behalf of the applicant on trends in  
2 neighborhood property values (Record 150-52) merely restates  
3 evidence already in the record or is irrelevant to  
4 conditional use permit approval standards. The record shows  
5 petitioners asked for an opportunity to respond, but were  
6 denied. Record 152. Where petitioners are denied the  
7 opportunity to rebut evidence that is potentially relevant  
8 to applicable approval standards in a quasi-judicial land  
9 use proceeding, their substantial rights are prejudiced and  
10 the challenged decision must be remanded. Wicks v. City of  
11 Reedsport, \_\_\_ Or LUBA \_\_\_ (LUBA No. 94-139, March 8, 1995),  
12 slip op 12; Mazeski v. Wasco County, 26 Or LUBA 226, 233  
13 (1993).

14 This subassignment of error is sustained in part.

15 The fifth and ninth assignments of error are sustained  
16 in part.

17 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

18 Petitioners contend the proposed off-street parking lot  
19 to be used in conjunction with intervenor's church is not an  
20 outright permitted use of Tax Lot 1000, but rather requires  
21 a conditional use permit. Petitioners argue the city  
22 misconstrued or failed to apply several provisions of the  
23 TZO concerning accessory uses, location of parking  
24 facilities and expansion of nonconforming uses in deciding  
25 the proposed parking lot does not require a conditional use  
26 permit.

1 Respondents contend the decision that the proposed  
2 parking lot is an outright permitted use of Tax Lot 1000,  
3 requiring only site plan review, was not made in either of  
4 the decisions appealed here, but rather in a separate  
5 decision interpreting the TZO made by the city council on  
6 January 18, 1994. Record B27. Respondents argue  
7 petitioners failed to appeal that decision and cannot  
8 collaterally attack it in this proceeding.

9 We must determine whether the city council's decision  
10 that the proposed parking lot is an outright permitted,  
11 rather than conditional, use of Tax Lot 1000 was made in the  
12 challenged site plan decision or in a separate final,  
13 appealable land use decision made on January 18, 1994,  
14 before intervenor's site plan application was filed. The  
15 city council held hearings on this interpretive issue on  
16 January 3 and 18, 1994, after which it adopted a motion that  
17 it "affirms the interpretation of the parking lot as an  
18 accessory or appurtenant use to a permitted use \* \* \*."  
19 Record B27. The minutes are accompanied by a document  
20 titled "Nazarene Parking Lot Administrative Interpretation,"  
21 dated January 18, 1994. Record B32-B39.

22 As far as we can tell, the city council's January 3 and  
23 18, 1994 proceedings regarding whether the proposed parking  
24 lot is a permitted or conditional use of Tax Lot 1000 under  
25 the TZO were not conducted pursuant to a formal process  
26 established by the TZO for issuing declaratory rulings.

1 However, in Weeks v. City of Tillamook, 113 Or App 285, 289,  
2 832 P2d 1246 (1992) (Weeks), the Court of Appeals explained  
3 that whether a final land use decision has been made does  
4 not depend on the procedures followed by the local  
5 government, but rather on whether "a land use decision, as  
6 defined in ORS 197.015(10)(a)(A) was sought and one was  
7 made." In rejecting this Board's opinion in Weeks v. City  
8 of Tillamook, 22 Or LUBA 667 (1992), that the city council  
9 had not made a final land use decision because no formal  
10 motion was made and the minutes memorializing the decision  
11 were prefaced by the words "[i]t was the consensus of  
12 Council," the Court stated:

13 "We do not agree with LUBA that the decision was  
14 not final or that it was merely advisory. The  
15 minutes give a clear and decisive answer to a  
16 clear question. LUBA's opinion suggests that the  
17 procedures that the city followed were deficient  
18 and that the cursory notation in the minutes falls  
19 well short of the necessary contents for a land  
20 use decision. If so, however, we reiterate that  
21 'any procedural defects in a land use decision are  
22 reviewable exclusively by the land use appeal  
23 process.' Sauvie Island Agricultural v. GGS  
24 (Hawaii), Inc., 107 Or App 1, 7, 810 P2d 856  
25 (1991). The existence of such defects does not  
26 mean that there is no land use decision that can  
27 be appealed to LUBA; rather, it means that there  
28 is a potentially reversible land use decision, if  
29 the defects are assigned as error in the appeal."  
30 (Footnotes omitted.) Weeks, supra, 113 Or App  
31 at 289.

32 In this case, petitioners sought to raise, throughout  
33 the conditional use proceedings concerning office use of Tax  
34 Lot 1500, the question of whether use of Tax Lot 1000 for

1 church-related off-street parking requires a conditional use  
2 permit. This was in essence a request for a decision  
3 concerning application of the TZO to a specific fact  
4 situation; in other words a request for a "land use  
5 decision" as defined by ORS 197.015(10)(a)(A). The city  
6 council decided to conduct a separate proceeding on this  
7 question, and both petitioners and intervenor participated  
8 in that proceeding. Record 2, 50-98. The minutes indicate  
9 the city made a decision interpreting the TZO in this  
10 regard. Record B27. Therefore, under Weeks the city  
11 council's January 18, 1994 decision was a final, appealable  
12 land use decision regarding whether the proposed parking lot  
13 requires a conditional use permit, and petitioners cannot  
14 challenge it in their appeal of the city's subsequent  
15 decision granting site plan approval for the parking lot.

16 The sixth and seventh assignments of error are denied.

17 **EIGHTH ASSIGNMENT OF ERROR**

18 In this assignment of error, petitioners challenge the  
19 site plan decision in several respects.<sup>11</sup>

20 **A. Use of Alley**

21 According to the approved site plan, access to the  
22 proposed parking lot will be provided by the public alley

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<sup>11</sup>Petitioners also complain that at various times during the proceedings city staff members gave erroneous opinions or comments. However, none of these staff statements are included in the final site plan decision adopted by the city council. Therefore, regardless of whether they are erroneous, they provide no basis for reversal or remand.

1 extending west from Del Monte Avenue. Petitioners contend  
2 such means of access is not allowed, because TZO 4 defines  
3 "alley" as "a public or private way \* \* \* affording only  
4 secondary means of access to abutting property." (Emphasis  
5 added.) Petitioners also contend that with regard to  
6 right-of-way and pavement width and construction standards,  
7 the decision improperly fails to require the alley to be  
8 developed to the standards established by city Ordinance  
9 No. 936. Compare Record A5 with Record B12-13.

10 The site plan decision does not interpret or apply the  
11 arguably relevant provisions of the TZO and Ordinance  
12 No. 936 cited by petitioners.

13 This subassignment of error is sustained.

14 **B. Landscaping Requirements**

15 Petitioners argue that TZO 22.6(B)(1)(a) requires that  
16 the proposed parking lot have landscaping that equals at  
17 least 15% of the buildable area. Petitioners contend the  
18 city erroneously gave intervenor landscaping credit for the  
19 existing lawn in the required front and side yards of the  
20 existing dwelling on Tax Lot 1000. Petitioners base this  
21 argument on TZO 6, which provides:

22 "[N]o yard or other open space provided about any  
23 building or on any building lot for the purpose of  
24 complying with the provisions of this Ordinance  
25 shall be considered as providing a yard or other  
26 open space for any other building or any other  
27 building lot."

28 As we understand it, petitioners contend that if the front

1 and side lawns of the existing dwelling are not included,  
2 the site plan decision does not satisfy the landscaping  
3 requirements of TZO 22.6(B)(1)(a).

4 Petitioners also contend the site plan decision fails  
5 to comply with TZO 25.10(A), which provides:

6 "An off-street parking area for more than five (5)  
7 vehicles shall be effectively screened by a  
8 sight-obscuring fence, hedge or planting, on each  
9 side which adjoins property situated in a R-7.5,  
10 R-5.0 or R-0 District \* \* \*."

11 The challenged decision does not interpret or apply the  
12 apparently relevant provisions of TZO 6, 22.6(B)(1)(a) and  
13 25.10(A).

14 This subassignment of error is sustained.

15 **C. Lot Area, Yard and Setback Requirements**

16 Tax Lot 1000 is approximately 10,000 square feet in  
17 size. In the R-0 zone, a single-family dwelling generally  
18 requires a minimum lot size of 5,000 square feet.  
19 TZO 14.5(A). Petitioner contends the approved site plan  
20 eliminates all of the back yard and 90% of the southerly  
21 side yard currently serving the dwelling on Tax Lot 1000,  
22 leaving an effective lot area for the dwelling of only 2,000  
23 square feet, in violation of TZO lot size requirements.  
24 Petitioners similarly contend the approved parking lot site  
25 plan improperly results in violations of the TZO yard and  
26 setback requirements for the existing dwelling.

27 The site plan decision fails to address the relevant  
28 issues raised by petitioner regarding compliance with the

1 TZO lot area, yard and setback requirements for the existing  
2 dwelling on Tax Lot 1000.

3 This subassignment of error is sustained.

4 **D. One Lot or Two**

5 Petitioners contend a prior lot line adjustment  
6 eliminated a line that previously divided Tax Lot 1000 into  
7 two 5,000 square foot parcels. Intervenor disagrees,  
8 contending Tax Lot 1000 is comprised of two separate 5,000  
9 square foot legal parcels. However, neither party explains  
10 what, if any, position the site plan decision takes on this  
11 issue, or why this issue is relevant to any standard for  
12 site plan approval.<sup>12</sup>

13 This subassignment of error is denied.

14 The eighth assignment of error is sustained, in part.

15 The city's decisions are remanded.

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<sup>12</sup>Petitioners contend the mixing of different uses on one parcel violates the purpose provision of the R-5.0 zone. However, we determine, supra, that the subject property is zoned R-0, not R-5.0. In addition, we note that according to the site plan, whereas most of the existing dwelling is located on the front "half" of Tax Lot 1000, a significant portion of the dwelling extends onto the back "half," and a significant portion of the proposed parking lot will extend onto the front "half." Therefore, even if there are two parcels, both the dwelling and the parking lot will be located on both parcels.