



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council  
4 determining that a second dwelling, in addition to a house,  
5 on a single lot is a nonconforming use in the city's single-  
6 family residential (R-1) zone.

7 **FACTS**

8 On April 5, 1994, the city staff issued a building  
9 permit for "the adding of a second electric meter for a  
10 studio apartment" in the city's R-1 zone.<sup>1</sup> Record 49. At  
11 the request of a city planning commissioner, who was  
12 concerned about the establishment of two households on one  
13 lot, the city planner conducted an investigation and  
14 concluded that as there was already a house with electrical  
15 service on the subject property, the city had issued the  
16 permit in error. A September 8, 1995 memorandum from the  
17 city planner to the city planning commission states:

18 "It has been determined that this [electric meter]  
19 permit was issued in error. This property is  
20 zoned, R-1, Single Family Residential. Duplexes  
21 are not allowed in this zone district.

22 "Even though the Building Permit was issued in  
23 error, the duplex is still in violation of the  
24 city's zoning ordinance. The only way the duplex  
25 could be legalized would be through the granting  
26 of a variance. The city's requirement to  
27 eliminate the duplex would most likely result in a

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<sup>1</sup>The so-called studio apartment is not actually attached to the existing house.

1 lawsuit." Record 56.

2 On November 17, 1995, the property owner applied for a  
3 variance. The city waived the normal application fee "due  
4 to city error." Record 47. The staff subsequently  
5 determined the Phoenix Zoning Ordinance (PZO) does not allow  
6 "use" variances and, on February 21, 1996, prepared a  
7 memorandum that stated:

8 "[I]t would be in the best interest of the City to  
9 acknowledge that a mistake was made and therefore,  
10 the City should consider the second unit to be a  
11 legal non-conforming use. As a non-conforming  
12 use, the second unit would be allowed to be  
13 retained subject to compliance with the Zoning  
14 Ordinance regulations relating to non-conforming  
15 uses.

16 "This solution to the problem is considered fair  
17 to the property owner since he was originally  
18 informed that he was in compliance with City  
19 regulations. No precedent will be established  
20 since the problem was created due to an error made  
21 by the City. Steps have been taken by the City to  
22 make sure the same error is not duplicated in the  
23 future." Record 20.

24 There was no public hearing before the challenged  
25 decision was made. At the city council's March 4, 1996  
26 meeting, however, the property owner and petitioners  
27 testified. Record 16-17. The city council then decided to  
28 accept the second dwelling as a legal non-conforming use.

29 This appeal followed.

30 **FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR**

31 In these overlapping assignments of error, petitioners  
32 contend the challenged decision is a land use decision that

1 violates the requirements of PZO Section 2.100, which  
2 describes permitted and conditional uses in the city's R-1  
3 zone, and of Section 4, which addresses nonconforming uses.  
4 The city responds that the decision to issue a building  
5 permit for a second electric meter was ministerial, and is  
6 therefore not a land use decision subject to this Board's  
7 jurisdiction. ORS 197.015(10)(b)(B).<sup>2</sup> However, the city  
8 also argues that the non-conforming use was established  
9 before the decision to allow the use to continue was made.

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<sup>2</sup>ORS 197.015(10) states, in relevant part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) \* \* \* ; and

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;

"(B) Which approves or denies a building permit issued under clear and objective land use standards;

"(C) Which is a limited land use decision; or

"\* \* \* \* \*"

1 The city contends that the March 4, 1996 decision "did not  
2 approve or change the use in question but affirmed its  
3 status legally as a non-conforming use." Respondent's Brief  
4 6.

5 The subject of this appeal is the city council's March  
6 4, 1996 decision, not the earlier staff decision to issue a  
7 permit for a second electric meter. The March 4, 1996  
8 decision legitimizing a nonconforming use is subject to the  
9 application of the city's land use regulations, and is  
10 therefore a land use decision under ORS 197.015(10)(a)(A).<sup>3</sup>

11 The city does not dispute that the establishment of a  
12 second dwelling on the subject property does not satisfy the  
13 requirements of PZO Section 2.100. PZO 2.103 allows more  
14 than one single-family dwelling on a lot as a conditional  
15 use in the R-1 district, subject to certain restrictions.<sup>4</sup>

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<sup>3</sup>On May 14, 1996, the city moved for reconsideration of our earlier order denying the city's motion to dismiss, which was made on jurisdictional grounds. Smith v. City of Phoenix, \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-067, Order, May 7, 1995) slip op 1-2. Since we conclude the challenged decision is a land use decision, the city's motion for reconsideration is denied.

<sup>4</sup>PZO 2.103 provides, in relevant part:

"The following uses and their accessory uses are permitted on a lot in the R-1 zoning district when authorized in accordance with Section 3:

"A. More than one single-family dwelling, provided each dwelling has a minimum of 6,000 square feet of lot area and an unobstructed accessway of not less than fifteen (15) feet in width to a public street.

\*\* \* \* \* \*

1 However, the city council did not make findings supporting  
2 approval of the second dwelling as a conditional use.

3 PZO Section 4 defines nonconforming use as follows:

4 "A lawfully existing structure or use at the time  
5 of this ordinance, or any amendment thereto, which  
6 does not conform to the requirements of the zone  
7 in which it is located is considered a  
8 'nonconforming use' \* \* \* ."

9 We understand "this ordinance" to refer to the PZO  
10 generally, and not just to PZO Section 4, which was adopted  
11 by city ordinance 563 in July, 1983. We do not know when  
12 PZO Section 2.100 was adopted. However, unless the city  
13 finds, based on substantial evidence, that the small  
14 dwelling was a lawfully existing use as a dwelling at the  
15 time the applicable restrictions stated in PZO Section 2.100  
16 were adopted, it may not consider the dwelling to be a  
17 nonconforming use.

18 The first, second and fifth assignments of error are  
19 sustained.

20 **THIRD ASSIGNMENT OF ERROR**

21 Petitioners contend that by waiving the fees for a  
22 variance application, the city acted as an agent for the  
23 property owner. We can speculate, based on their  
24 contention, that petitioners intend to argue improper bias  
25 on the part of the city decision makers. However, it is  
26 petitioners' responsibility not only to allege the facts  
27 which support their claim, but also to tell us the legal  
28 basis upon which we might grant relief. It is not our

1 function to supply petitioners with legal theories or to  
2 make their case for them. Deschutes Development v.  
3 Deschutes Cty., 5 Or LUBA 218 (1982). Petitioners' argument  
4 under this assignment of error is not sufficiently developed  
5 to permit review.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioners contend they were denied their right to a  
9 fair hearing because the city did not consider the  
10 challenged decision to be a land use decision, and therefore  
11 did not hold a public hearing with appropriate procedural  
12 safeguards. Since we conclude the challenged decision is a  
13 land use decision allowing development for which a permit is  
14 normally granted, we agree with petitioners that before  
15 determining that the second dwelling is a nonconforming use,  
16 the city must follow the procedures set forth in ORS 227.175  
17 and the PZO governing permit applications.

18 The fourth assignment of error is sustained.

19 The city's decision is remanded.