

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

4 PAMELA R. LATTA, WILLIAM BRADLEY,
5 DEBRA BRADLEY, KELLY CLARK,
6 LEIGH C. LATTA III, PAM FAHEY,
7 BARBARA EAVES and MILLIE FRASER,
8 *Petitioners,*
9

10 vs.

11 CITY OF JOSEPH,
12 *Respondent.*
13

14 LUBA No. 2000-074
15

16 FINAL OPINION
17 AND ORDER
18

19 Appeal from City of Joseph.
20

21 Pamela R. Latta, Joseph, filed the petition for review and argued on her own behalf.
22

23 No appearance by City of Joseph.
24

25
26 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
27 participated in the decision.
28

29 AFFIRMED

01/18/2001

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.
33

NATURE OF THE DECISION

Petitioners appeal a city decision granting a conditional use permit for a home occupation for a florist/nursery business in the city’s General Residential (R-2) zone.

FACTS

The challenged decision is the city’s decision following our remand in *Latta v. City of Joseph*, 36 Or LUBA 708 (1999) (*Latta I*). The applicant owns a lot in the R-2 zone. The lot is improved with a 1,436 square foot single-family residence. As interpreted by the city council, the city’s R-2 zone does not allow commercial nurseries. However, the R-2 zone does allow “crop cultivation” and “plant nurser[ies]” as uses permitted outright and allows “home occupations” as a conditional use. The challenged decision (1) finds that the applicant may construct two large greenhouses on the subject property as an outright permitted use and (2) authorizes a florist shop as a home occupation in the existing dwelling.¹ The decision rejects the applicant’s request that sale of plants be allowed in and around the greenhouse. As approved by the city council, sale of plants is limited to the florist shop.

INTRODUCTION

A recurring issue in this appeal concerns the city’s interpretation of its zoning ordinance to allow it to bifurcate the proposal into two parts and approve one of those parts (the two large greenhouses) as a use permitted outright and thereafter ignore the existence of and any impacts associated with the greenhouses in approving the other part (the commercial florist business) as a home occupation. Because petitioners’ disagreement with this interpretation is repeated in many of the arguments presented in the petition for review, we

¹One of the proposed greenhouses is to be 20 feet by 48 feet and the other is to be 30 feet by 48 feet, for a total of 2,400 square feet of greenhouse space. The existing dwelling includes approximately 1,400 square feet, and the florist shop would occupy approximately one-third of that floor area.

1 address this interpretive question first, before turning to petitioners’ assignments of error.

2 In interpreting its zoning ordinance to allow the requested greenhouses as an outright
3 permitted use, the city council first points out that City of Joseph Zoning Ordinance (JZO)
4 3.040(1) allows “crop cultivation” and “plant nurser[ies]” as outright permitted uses in the
5 R-2 zone.² Record 3. The city council explains:

6 “* * * The Council finds that a *plant nursery* can include greenhouses in that
7 the climate in Joseph, Oregon will probably not support a plant nursery in the
8 absence of a greenhouse. Therefore the greenhouses proposed by the
9 applicant are an outright [permitted] use, and no conditional use permit is
10 required for their construction.” Record 3-4 (emphasis in original).

11 The city council then goes on to describe the applicant’s proposal as a “commercial
12 plant nursery.”³ The city council then explains that commercial uses are not allowed in the
13 R-2 zone, either as a permitted use or a conditional use. However, rather than deny the
14 request, the city council approves a modified version of the requested plant nursery:

15 “* * * In order to reconcile the provisions of the R-2 zone that allow crop
16 cultivation and the development of a plant nursery and the desirability of
17 maintaining the residential nature of the zone, the City Council interprets the
18 ordinance to allow the cultivation of crops and development of a plant nursery
19 *for distribution and sale at the site* only if it is done in conjunction with a
20 residential use of the property and a legitimate home occupation. The Council
21 believes the drafters of the ordinance intended for the uses described in
22 Section 3.010(3) to be for the private benefit of the persons residing on the
23 property. To interpret the ordinance otherwise would mean that a commercial
24 use is allowed outright in a residential zone which is contrary to the policy,
25 spirit and general structure of the residential zone. * * *” Record 4 (emphasis
26 in original).

²Under JZO 3.010(3) those uses are permitted outright in the R-1 residential zone. Under JZO 3.040(1) the same uses that are permitted outright in the R-1 zone are also allowed outright in the R-2 zone.

³The critical feature of the proposal that made it a commercial plant nursery in the city’s view was the applicant’s proposal to allow customers to enter the greenhouses, select plants and purchase those plants in and around the greenhouses.

1 The city council imposed a condition of approval that forbids construction of additional
2 accessory structures and requires that nursery stock be sold in the “florist shop only.”
3 Record 15.

4 We believe it is within the city’s discretion under ORS 197.829(1) and *Clark v.*
5 *Jackson County*, 313 Or 508, 836 P2d 710 (1992), to interpret JZO 3.010(3) and 3.040(1) in
6 the manner that it did.⁴ The practical effect of the city council’s interpretation is to eliminate
7 any necessity for the city council to consider the greenhouse structures or the growing of
8 plants in those greenhouses as part of the home occupation which will be located in the
9 existing dwelling.⁵ This in turn affects the required analysis in determining whether the
10 proposed home occupation meets zoning ordinance approval criteria that are designed to
11 limit the off-site impacts that may be associated with home occupations.

12 **FIRST ASSIGNMENT OF ERROR**

13 The notice of public hearing that was given initially in this matter described the
14 request as a request to “relocate florist/nursery from 301/302 N. Main Street.” Petition for
15 Review 18. Following our remand in *Latta I*, the city issued a notice of public hearing that
16 described the request as a request for a “Conditional Use Permit for a Home Occupation
17 including outright use of greenhouses.” Record 33. Petitioners argue this change in the way
18 the proposal is described in the notice of public hearing constitutes an improper modification
19 of the application.

⁴Under ORS 197.829(1) and *Clark*, the city council enjoys significant discretion in interpreting and applying its zoning ordinance. We may only reject the city council’s interpretation of the city’s zoning ordinance where we conclude that its interpretation is indefensible or clearly wrong. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).

⁵The city council’s interpretation and application of its zoning ordinance to (1) require that any on-site sales of plants from the greenhouses be made in the florist shop and (2) treat the home occupation florist shop as entirely separate from the greenhouses is somewhat inconsistent. However, in view of the significant deference we are required to extend to a city council’s interpretation of its zoning ordinance under ORS 197.829(1) and *Clark*, we cannot say the city council’s interpretation is clearly wrong.

1 The second notice simply describes the proposal in the way the city council
2 ultimately came to view the proposal. Petitioners were fully aware of the city council's
3 position that the greenhouses could be viewed as permitted uses if the proposal was
4 appropriately conditioned and were able to present their contrary view during the hearings
5 before the city council. Even if the conditions imposed by the city council can be viewed as
6 modifying the proposal, we fail to see how those conditions or the disputed notice constitute
7 error on the city's part. *Barge v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2000-
8 085, December 6, 2000), slip op 8-9.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 JZO 4.100 imposes a number of limitations on home occupations. JZO 4.100(1)
12 provides that a home occupation may not be allowed if it

13 “is not clearly secondary to the use of the dwelling for dwelling purposes or
14 * * * changes the residential character of the lot in any manner visible off the
15 property.”

16 The city council's findings addressing this criterion are as follows:

17 “The use of a portion of the dwelling for a florist's shop will be secondary to
18 the use of the dwelling as applicant's residence. The use of the yard area as a
19 plant nursery is allowed outright, and the applicant proposes no changes to the
20 dwelling structure. The use of the dwelling as a florist shop where the nursery
21 stock will be sold will not change the residential nature of the lot. * * *”
22 Record 6.

23 In other words, consistent with the interpretation discussed earlier in this opinion, the city
24 council treated the home occupation as being limited to the florist shop in the existing
25 dwelling.

26 Petitioners concede that JZO 4.100 is satisfied, if the home occupation is properly
27 viewed as including only the florist shop that will occupy approximately one-third of the
28 existing dwelling. Petition for Review 22. Petitioners' argument under the second

1 assignment of error is based on their contention that the city’s interpretation that the home
2 occupation is properly viewed in that manner is wrong.

3 Because we have already concluded that the city’s interpretation is not reversibly
4 wrong under ORS 197.829(1) and *Clark*, the second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Home occupations must be approved as conditional uses. JZO 6.010 establishes
7 criteria for approval of conditional uses.⁶ In the subassignments of error discussed below,
8 petitioners contend that the city failed to demonstrate that the disputed home occupation
9 complies with JZO 6.010(1)-(3).

10 **A. Compliance with the City Comprehensive Plan**

11 Under JZO 6.010(1), the city must find that the proposed home occupation complies
12 with the city’s comprehensive plan. *See* n 6. Petitioners contend the city erred in finding
13 that the proposal complies with JZO 6.010(1). Petitioners cite language from the city’s
14 comprehensive plan that requires the city to plan and zone sufficient land for residential and
15 commercial uses and to keep such uses separate. Petition for Review 27-28. Petitioners also
16 cite language from the comprehensive plan that states the city has sufficient commercially

⁶As relevant, JZO 6.010 provides in part:

“* * * In judging whether or not a conditional use proposal shall be approved or denied, the Council shall weigh the proposal’s appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed, and to approve such use, shall find the following criteria are either met, or are not applicable:

“(1) The proposal will be in compliance with the City of Joseph’s Land Use Plan and Zoning Ordinances.

“(2) Taking into account location, size, design and operation characteristics, the proposal will have a minimal impact on the abutting properties and the surrounding area compared to the impact of the development that is permitted outright.

“(3) The location and design of the site and structures for the proposal will be as attractive and as consistent with other developments within the area and the zone as possible.”

1 zoned land to meet “foreseeable future need.” Petition for Review 28. Petitioners contend
2 that the record shows that there are in fact vacant commercially zoned properties in the city.

3 We assume that petitioners’ argument under this subassignment of error is based on
4 their view that the proposed greenhouses and florist shop must be considered together and,
5 when considered together, they constitute a commercial use. It is not clear whether
6 petitioners argue that the proposed florist shop, considered alone, is inconsistent with the
7 cited comprehensive plan provisions. The city concluded that the florist shop is consistent
8 with the comprehensive plan because it is a home occupation. Petitioners have not explained
9 why the proposed florist shop is inconsistent with the comprehensive plan or identified any
10 other error in the city’s findings of compliance with JZO 6.010(1).

11 This subassignment of error is denied.

12 **B. The Conditional Use Will Have Minimal Impact Compared to Impacts**
13 **From Permitted Uses**

14 JZO 6.010(2) requires that the city find that “[t]aking into account location, size,
15 design and operation[al] characteristics, the proposal will have a minimal impact on the
16 abutting properties and the surrounding area compared to the impact of the development that
17 is permitted outright.” In finding that this criterion is met, the city council found:

18 “The property is located on the Hurricane Creek Highway which is a major
19 arterial for the [C]ity of Joseph. The Hurricane Creek Highway serves as the
20 access to 1917 Lumber Company (located in the block directly east of the
21 applicant’s property on the other side of Mill Street), the Cheyenne Café
22 (directly south of 1917 Lumber Company and on the other side of the
23 Hurricane Creek Highway with parking off of the Hurricane Creek Highway),
24 Alpine House (an assisted living facility located on the south side of the
25 Hurricane Creek Highway and about a block west of the applicant’s property),
26 the Chief Joseph Days Rodeo Arena and Indian Campground (which is
27 located on the north side of the Hurricane Creek Highway and takes up the
28 entire block west of the vacant lot which abuts the applicant’s property to the
29 west) and the Joseph Airport which is located approximately a mile west of
30 the applicant’s property. The applicant’s property is located one block west
31 of Main Street which is the major commercial zone in the city. The parking
32 for the business is located on the west side of the lot and is accessed by the
33 alley off Hurricane Creek Highway. The design for the off-street parking will

1 minimize the impact to the neighboring parcels. The parking for the dwelling
2 is located off Mill Street and may be used at times by patrons of the business,
3 but will not be intrusive on the abutting property. The property is abutted on
4 the West by a vacant lot (across the public alley), on the South by the
5 Hurricane Creek Highway, on the East by Mill Street and on the North by a
6 residence. *The proposed use will have no more effect on the abutting property*
7 *than a public park, which is an outright use of the property,* and less effect
8 than uses that are allowed conditionally like churches, schools or community
9 buildings. * * * Given the foregoing, the proposed use meets this criteri[on].”
10 Record 10-12 (emphasis added).

11 Petitioners present essentially three separate arguments under this subassignment of
12 error.

13 **1. Impacts From Commercial Greenhouses**

14 Petitioners first argue that the city improperly failed to recognize and consider the
15 commercial nature of the proposed greenhouses in applying JZO 6.010(2). For the reasons
16 previously explained, we do not agree that the city erred in this regard.

17 This subassignment of error is denied.

18 **2. Traffic Impacts**

19 Petitioners next argue that the proposal will generate traffic impacts that will violate
20 JZO 6.010(2). The challenged decision conditions approval on the applicant providing
21 parking for the proposed use on the west side of the lot, with access from Hurricane Creek
22 Highway via an alley. The city council found that traffic impacts on Mill Street would thus
23 be minimized.

24 Instead of directly challenging the findings that the city did adopt, petitioners argue
25 that the condition requiring parking spaces on the alley side of the lot will not be effective to
26 minimize traffic impacts on Mill Street and the residences served by Mill Street.⁷ Petitioners
27 first argue that the city council failed to “weigh the proposal’s appropriateness and

⁷Petitioners suggest the condition was imposed to keep the proposal from violating JZO 4.100(9) which provides that the city may not allow a proposal for a home occupation if it will “[create] a volume of traffic inconsistent with the level of traffic of the street on which it is located.” The city’s findings support that suggestion. Record 9.

1 desirability or the public convenience or necessity to be served against any adverse
2 conditions that would result from authorizing the particular development at the location
3 proposed * * *.” Petition for Review 29 (emphasis deleted). We understand petitioners to
4 argue that JZO 6.010 requires such a weighing process in addition to addressing the criteria
5 specified in JZO 6.010(1) through (5). Next, petitioners argue that requiring that alley on the
6 west side of the lot be used for primary access to the proposed use violates the JZO definition
7 of “alley.”⁸ Petitioners finally argue that the home occupation’s address will be on Mill
8 Street, not the alley, and petitioners contend the one small sign that is allowed under the
9 disputed decision will be inadequate to direct customers to the parking in the rear.⁹

10 Contrary to petitioners’ first argument, the city did adopt findings to weigh the merits
11 of the proposal against its adverse effects.¹⁰ Petitioners make no attempt to challenge the
12 adequacy of those findings. Petitioners’ second and third arguments present a closer
13 question, but we conclude they provide no basis for sustaining this subassignment of error
14 either. Petitioners do not claim in their petition for review that they raised the issues they

⁸JZO 1.030(3) provides the following definition of alley:

“ALLEY. A narrow street which affords only secondary means of access to a property.”

⁹Petitioners suggest that a city councilor who visited the subject property in conjunction with the local proceedings accessed the property from Mill Street rather than the alley.

¹⁰The challenged decision includes the following findings:

“Pursuant to [JZO] 6.010 the Council must weigh the proposal’s appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed. The economy of the City of Joseph has taken a beating in the last few years with the closure of the Boise Cascade Mill and the severe limitations placed on the harvest of the national forest. The applicant has established a viable business in the community, and it is in the interest of the entire community to keep businesses in operation. The sale of the property where her business was formerly located was a circumstance she could not control. Her desire to actually purchase property indicates a commitment to the future of the business. Because we have found that the development of the business in this particular location will have minimal impact on the abutting properties, we also find that the need for viable businesses in the community outweighs any adverse conditions that may result from the proposed use at the proposed location.” Record 13-14.

1 identify in the second and third arguments under this subassignment of error about the
2 efficacy of the alley-side parking condition. Had they done so, the city would be obligated to
3 specifically address those issues in its findings. *Norvell v. Portland Area LGBC*, 43 Or App
4 849, 852-53, 604 P2d 896 (1979); *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989);
5 *McCoy v. Linn County*, 16 Or LUBA 295, 302 (1987), *aff'd* 90 Or App 271, 752 P2d 323
6 (1988). Because petitioners do not allege that they raised the issues presented in their second
7 and third arguments before the city council, the city council cannot be faulted for not
8 specifically addressing those issues.

9 As the question is presented to us concerning the JZO definition of “alley,” we do not
10 believe the city council committed reversible error in requiring that parking for the florist
11 shop be accessed from the alley. That condition was imposed to avoid the traffic impacts
12 that would otherwise result if customers accessed the florist shop from Mill Street.
13 Assuming this means primary access to the florist shop will be from the alley, we agree with
14 petitioners that this would appear to be inconsistent with the definition of “alley” at JZO
15 1.030(3). However, petitioners offer no reason why such an apparent inconsistency with the
16 JZO 1.030(3) definition of “alley” would prevent imposing such a condition in the
17 circumstances presented in this case. In the absence of such argument, we will not assume
18 the definition imposes the kind of absolute requirement that petitioners assume that it does.
19 There may be provisions elsewhere in the JZO that would preclude such a condition, but
20 petitioners do not identify any such provisions.

21 Finally, we reject petitioners’ suggestion that the proposal’s address and the single
22 sign condition will inevitably mean that Mill Street rather than the alley parking lot will be
23 used for access by florist shop customers. We see no reason why a properly designed
24 parking area that is accessed via the alley would not minimize any traffic impacts on Mill
25 Street, as the city council found would be the case.

1 The city’s findings, quoted above, explain why the city council believed that
2 requiring the parking lot on the alley side of the lot with access via the alley from Hurricane
3 Creek Highway would orient the proposal toward other commercial uses located in nearby
4 commercial zones rather than the neighboring residences and thereby minimize traffic
5 impacts on Mill Street. Petitioners make no direct attempt to challenge those findings and, in
6 particular, make no direct attempt to challenge the city council’s ultimate conclusion that
7 “[t]he proposed use will have no more effect on the abutting property than a public park,
8 which is an outright use of the property * * *.” Record 11. We conclude that the city
9 council’s findings are adequate to demonstrate compliance with JZO 6.010(2).

10 **3. Attractive and Consistent with Other Development in the Area**

11 As noted earlier in this opinion, JZO 6.010(3) requires that “[t]he location and design
12 of the site and structures for the proposal will be as attractive and as consistent with other
13 developments within the area and the zone as possible.” Petitioners’ arguments that this
14 criterion is violated by the proposal are all directed at the large greenhouses, and they fail to
15 demonstrate error for the reasons we have already explained.

16 This subassignment of error is denied.

17 The third assignment of error is denied.

18 The city’s decision is affirmed.