

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the city council approving a conditional use permit
4 for a combined retail/residential condominium development in the City of Newport's Water
5 Related (W-2) zone.

6 **MOTION TO INTERVENE**

7 Beach Development (intervenor), the applicant below, moves to intervene on the side
8 of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 This appeal challenges the city's decision following our remand in Port Dock Four,
11 Inc. v. City of Newport, 33 Or LUBA 613 (1997) (Port Dock Four I). The subject property is
12 located north of the Yaquina Bay Marina, across S.W. Bay Boulevard. The applicant
13 proposes to develop the lower portion of the property (lower property) along S.W. Bay
14 Boulevard with a two story building that would include a four-unit retail space on the ground
15 floor and three residential condominium units above the retail space. With planned grading
16 and retaining wall improvements, the lower property will include a developable area of
17 approximately 40 feet by 100 feet.

18 Approximately 28 feet back from the front property line along S.W. Bay Boulevard,
19 the property slopes very steeply up to a second area of the property (upper property) that is
20 approximately 30 feet higher than the lower property. On the upper property, the applicant
21 proposes to construct ten covered parking spaces and two uncovered parking spaces, with a
22 stairway located in the middle of the property to provide access from the upper property
23 down to the building on the lower property. Automobiles will reach these twelve parking
24 spaces from S. Pine Street, which proceeds north from S.W. Bay Boulevard, adjacent to the
25 eastern boundary of the property, up the hill to the entrance of a dead-end alley. The dead-
26 end alley proceeds west from S. Pine Street along the northerly property line of the subject

1 property and ends at a retaining wall at the subject property's west property line.

2 Petitioners' property, which is developed with a 10-unit condominium, is located
3 adjacent to the upper property, along its northerly property line. Petitioners own an easement
4 for parking and access along the north 20 feet of the property in the approximate location of
5 the dead-end alley which separates petitioners' condominiums from the proposed covered
6 parking. The proposed parking spaces on the upper property are located partially within this
7 easement area. Petitioners' view of Yaquina Bay across the proposed covered parking and
8 two-story mixed use development will be affected by the proposed development. Record,
9 Applicant's Oversized Exhibit A.

10 **THIRD ASSIGNMENT OF ERROR**

11 In Port Dock Four I, we explained that under relevant Newport Zoning Ordinance
12 (NZO) provisions, the proposed change in use requires a total of 17 off-street parking spaces.
13 The city approved the proposal with fewer parking spaces, pursuant to NZO 2-3-6.030(B).
14 NZO 2-3-6.030(B) provides that a property owner may pay into a "special fund" for
15 "provision of public parking and/or mass transit services within the City of Newport," and
16 thereby be relieved of the obligation to provide required parking spaces in the event that:

17 "* * * special circumstances exist constituting a hardship and making it
18 unreasonably difficult to provide such additional parking required by the
19 change in use[.]"

20 In Port Dock Four I, we found the city's findings addressing NZO 2-3-6.030(B) were
21 inadequate. In reaching that conclusion, we observed that the "challenged decision does not
22 explain why the proposed structure cannot be designed to allow parking elsewhere on the
23 property." Port Dock Four I, 33 Or LUBA at 619.

24 Petitioners argue under the third assignment of error that the city's findings on
25 remand fail to demonstrate that the property cannot accommodate the required parking.
26 According to petitioners, there are no "special circumstances" and it is not "unreasonably
27 difficult" to provide the required parking on the subject property. According to petitioners,

1 the crux of the parking problem is the building design proposed in the application that seeks
2 to develop the entire lower property without providing parking and the applicant's desire to
3 "maximize profit" by not providing any parking on the lower property. Petition for Review
4 11-12.

5 The difficulty with petitioners' argument under this assignment of error is that, aside
6 from their characterization of the city's findings as a misguided attempt to allow the applicant
7 to proceed with its original proposal and thereby "maximize profit," petitioners make no
8 specific attempt to challenge the findings the city adopted. Petition for Review 12.

9 The city's findings explain that the topography of the subject property complicates
10 development of the property. The findings note that the retaining wall separating the lower
11 property from the upper property cannot be moved further north to expand the area available
12 on the lower property for development without encroaching on the parking proposed on the
13 upper property. The decision concludes that this would be contrary to the purpose of NZO 2-
14 3-6.030 and that the 12 parking spaces proposed for the upper property should be retained.

15 The findings also explain the problems and expense that would be encountered in
16 providing off-street parking on the lower property. Providing automobile access to such
17 parking from either S.W. Bay Boulevard or S. Pine Street would remove four on-street
18 parking spaces. The city finds that any off-street parking to be provided on the lower
19 property should at least make up for these four lost on-street parking spaces to result in a net
20 gain in parking spaces. The findings explain that in order to meet dimensional requirements
21 for such off-street parking, "fifty-to-sixty percent of the buildable area [of the lower
22 property] is required to have a net gain of only one parking space over the applicant's plan."
23 Record 16.

24 The city council's decision goes on to adopt the following interpretive findings:

25 "The council specifically interprets NZO 2-3-6.030(B) to include economic
26 hardship as a [criterion] or factor in determining whether it is unreasonably
27 difficult to meet the regular parking requirements. Where the economic

1 hardship is out of proportion to the gain of parking spaces, while not always a
2 determinative factor, [it] is one of the factors the [c]ouncil may consider in
3 [its] decision. * * *" Record 16 (footnote omitted).

4 The findings discuss the economic impact of requiring that off-street parking be provided on
5 the lower property and then explain why the city concluded the standard in NZO 2-3-
6 6.030(B) is met:

7 "* * * Because over fifty-to-sixty percent of the buildable area would be lost,
8 and only one parking space could be gained, the council concludes the
9 applicant has proved that the size and steep topography of the lot, the parking
10 design behind the building, which consumes part of the subject property, and
11 the fact [that] it is unsafe to back onto S.W. Bay Boulevard are sufficient
12 cumulative circumstances making it unreasonably difficult to provide
13 additional parking.

14 "The proposed use will increase the demand for parking as the opponents
15 argue, however, no reasonable alternative has been proved by opponents. It is
16 not merely a matter of failing to maximize profit as the opponents argue since
17 no reasonable plan exists that will net more than one parking space overall.
18 The costs do not justify the results. The standard is whether it is
19 'unreasonably difficult to provide additional parking.' Unreasonably difficult
20 circumstances include a disproportionate financial cost compared to the gain
21 in parking spaces. * * *" Record 17.

22 Petitioners do not appear to assign error to the above-quoted interpretation. To the
23 extent they do, the council's interpretation of NZO 2-3-6.030(B) as allowing it to consider
24 whether the economic impacts on the applicant are out of proportion to the possible net gain
25 in parking spaces is clearly within its interpretive discretion. ORS 197.829(1); Clark v.
26 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992); deBardelaben v. Tillamook
27 County, 142 Or App 319, 922 P2d 683 (1996); Zippel v. Josephine County, 128 Or App 458,
28 461, 876 P2d 854 (1994); Goose Hollow Foothills League v. City of Portland, 117 Or App
29 211, 217, 843 P2d 992 (1992). Neither does petitioner make any specific attempt to explain
30 why the detailed findings that the city council adopted to demonstrate compliance with NZO
31 2-3-6.030(B) are defective or lack evidentiary support. We conclude that the city's findings
32 concerning NZO 2-3-6.030(B) are adequate and supported by substantial evidence in the
33 record.

1 The third assignment of error is denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 In our decision in Port Dock Four I, we sustained petitioners' assignment of error
4 alleging that the city erred by "failing to apply the provisions of city Resolution 1778[.]" We
5 explained that Resolution 1778 provides "procedural rules for land use hearings, but it also
6 contains rules pertaining to an applicant's burden of proof, including a requirement that the
7 applicant show there is a public need for the proposal." Port Dock Four I, 33 Or LUBA at
8 619. We rejected the intervenor's arguments in Port Dock Four I that Resolution 1778 had
9 been repealed and found that "it is still in force to the extent that it does not conflict with
10 provisions in the NZO." 33 Or LUBA at 620. We found that the city had not adopted
11 adequate findings to demonstrate compliance with the requirements of Resolution 1778, Rule
12 5 concerning public need. Id.¹

13 On remand the city adopted alternative findings concerning Resolution 1778. First,
14 the city found that Resolution 1778 was repealed by Resolution 3155.² Second, the city
15 found that even if Resolution 1778 potentially applies to this decision, Resolution 1778 was
16 suspended pursuant to Rule 10 of the resolution, which expressly provides for suspension of
17 the resolution.³ Third, the city found that even if Resolution 1778 potentially applies to this
18 decision, it conflicts with the NZO and, pursuant to NZO 2-6-6, the zoning ordinance
19 controls and Resolution 1778 does not apply. Finally, the city adopted findings that in the
20 event Resolution 1778 applies the applicant demonstrated the proposal satisfies the "public
21 need" and that the application therefore complies with Resolution 1778.

¹Rule 5 of Resolution 1778 sets out the "Burden and Nature of Proof." Subsection 2(c) of the Rule requires proof that the "[t]here is a public need for the proposal."

²Resolution 3155 was adopted after the permit application in this matter was filed with the city.

³Rule 10 of Resolution 1778 provides that the rules in Resolution 1778 that are "not required by law * * * may be amended, suspended or repealed at any hearing by a majority vote of those Council member present and voting."

1 We consider the last two bases for the city council's decision briefly below.

2 NZO 2-6-6 provides as follows:

3 "The rules, requirements, and provisions of [the NZO] are in addition and not
4 in lieu of any prior ordinance, resolution, rule, requirement, or procedure
5 previously adopted by the City of Newport except as may have been expressly
6 repealed, provided, however, that the provisions of [the NZO] shall be
7 controlling in cases where there may be conflicting provisions." (Emphasis
8 added.)

9 The challenged decision finds that Resolution 1778 conflicts with the NZO and therefore
10 that, under NZO 2-6-6, Resolution 1778 does not apply in this case. The decision explains:

11 "If it is later determined that Resolution No. 1778 is applicable to this hearing,
12 Section 2-6-1.030 and -040 of the [NZO set] forth public hearings procedures
13 which, taken as a whole, conflict with Rules 2, 3, 4 and 6 of Resolution No.
14 1778. The need for commercial and development land is evidenced through
15 the City's acknowledged comprehensive plan and zoning ordinance and
16 therefore conflicts with the requirements of Rule 5 ('public need' requirement)
17 of Resolution No. 1778. Pursuant to Section 2-6-6 of the [NZO], the
18 provisions of the [NZO] conflict with Resolution No. 1778 and therefore the
19 provisions of the zoning ordinance shall control as to the requirements
20 imposed upon the applicant for the proposed development." Record 17-18.

21 Petitioners do not challenge the above finding which expresses an independent
22 alternative basis for concluding that Resolution 1778 does not establish applicable approval
23 criteria. We have frequently held that we must affirm a decision denying a permit
24 application, where the petitioner at LUBA fails to challenge one of several independent bases
25 for denial. Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123, 792
26 P2d 117 (1990); Scott v. City of Portland, 17 Or LUBA 197, 203-04 (1988); Hutmacher v.
27 City of Salem, 16 Or LUBA 187, 190 (1987). Similarly, we must deny an assignment of
28 error challenging the findings addressing an approval criterion, where there is an
29 unchallenged finding that the approval criterion does not apply. Accordingly, the fourth
30 assignment of error must be denied.

31 In addition, petitioners do not assign error to the city's alternative findings in which
32 the city council finds that there is a public need for the disputed proposal, in the event the

1 "public need" criterion in Rule 5 of Resolution 1778 applies. Record 12-13, 18-19.
2 Petitioners simply criticize the city council for not discussing the "conflicting evidence"
3 concerning public need during its oral deliberations on March 2, 1998. That criticism fails
4 for several reasons. First, it is the city's written decision, rather than its oral deliberations
5 that is important in cases where the local decision maker is required to explain its choice
6 between conflicting evidence. See Derry v. Douglas County, 26 Or LUBA 25, 29 (1993)
7 (rejecting challenge that written decision did not accurately reflect oral deliberations, on the
8 basis that LUBA reviews the written decision not the decision maker's oral deliberations);
9 Terra v. City of Newport, 24 Or LUBA 438, 441-42 (1993) (same). Moreover, petitioners
10 have not demonstrated that the city findings needed to do more than identify the evidence
11 that the city chose to rely on. Where this Board is able to determine that a reasonable
12 decision maker would rely on the evidence the decision maker chose to rely on, findings
13 specifically addressing the conflicting evidence are unnecessary. Angel v. City of Portland,
14 22 Or LUBA 649, 656-57, aff'd 113 Or App 169, 831 P2d 77 (1992); Douglas v. Multnomah
15 County, 18 Or LUBA 607, 619 (1990). Finally, even if a discussion of conflicting evidence
16 were required, petitioners make no attempt to explain why the findings at record 12-13 and
17 18-19 are insufficient to resolve any conflicts in the evidence that require discussion in the
18 findings.⁴

⁴Findings 25, 26, 27 and conclusion II (E) discuss evidence submitted by the applicant concerning scarcity and market demand for bay front condominium units and retail space and the expected increase in demand for such space in the future due to expected population increase. Finding 37 acknowledges the opponent's evidence concerning the existence of retail and residential space on the bay front. In conclusions II (E), (H) and (I) the city council explains why it concludes that the proposal will satisfy a public need. Conclusion II (I) explains that the opponent's evidence in opposition to a need for bay front condominiums relies on units that "are either daily rentals or timeshares." Record 12-13; 18-19.

1 Because petitioner fails to challenge the city's findings (1) that the public need
2 criterion conflicts with the NZO and for that reason does not apply and (2) that the public
3 need criterion is met if it does apply, we deny the fourth assignment of error.⁵

4 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

5 Petitioners argue under their first assignment of error that the city erred by failing to
6 adopt findings demonstrating that the proposal complies with the landscaping requirements
7 of NZO 2-4-5.005.⁶ Under their second assignment of error, petitioners argue that the city
8 council erred by failing to consider their arguments concerning a private covenant that limits
9 the permissible height of buildings on the subject property to 30 feet.⁷

10 Intervenor argues petitioners did not raise an issue in Port Dock Four I concerning
11 compliance with either the landscape requirements of NZO 2-4-5.005 or the private covenant
12 limiting building height. Intervenor contends that because petitioners failed to raise those
13 issues in Port Dock Four I they had no right to raise those issues on remand before the city
14 and may not raise those issues in this appeal. Caine v. Tillamook County, 25 Or LUBA 209,
15 214-15 (1993).

16 The city council was entitled to limit its consideration on remand to the correcting the
17 deficiencies that were identified in our decision in Port Dock Four I as the basis for the
18 remand. O'Rourke v. Union County, 31 Or LUBA 174, 177 (1996); Wilson Park Neigh.

⁵In view of our conclusions above, we need not and do not consider the city council's other findings that Resolution 1778 was repealed and was suspended under Rule 10.

⁶As relevant, that provision requires that the proposal include landscaping for 15% of the subject property. We understand petitioners to argue that the city was required to address NZO 2-4-5.005 because it is a relevant consideration under the burden of proof imposed by Rule 5 of Resolution 1778 and the adverse impact criterion imposed by NZO 2-5-3.015(A)(3). Petitioners' assignments of error concerning those criteria were sustained in Port Dock Four I.

⁷Petitioners' legal theory for why the city was required to consider the private covenant on remand is difficult to follow. We understand petitioners to argue the city was required to address the issues it raised concerning the private covenant because (1) NZO 2-5-3.015(A)(4) requires that the development be "consistent with the overall development character of the neighborhood," (2) "the character of the neighborhood is defined by the [covenant]" and (3) violating that covenant's building height restriction is a "per se visual impact" which in turn violates the adverse impact criterion imposed by NZO 2-5-3.015(A)(3). Petition for Review 9-10.

1 Assoc. v. City of Portland, 27 Or LUBA 106, 127, aff'd 129 Or App 33, 877 P2d 1205
2 (1994); Bartels v. City of Portland, 23 Or LUBA 182, 185 (1992); Von Lubken v. Hood
3 River County, 19 Or LUBA 404, 419, rev'd on other grounds 104 Or App 683, 803 P2d 750
4 (1990), adhered to 106 Or App 226, 806 P2d 727 (1991).

5 In our decision in Port Dock Four I, we sustained petitioners' assignment of error
6 challenging the city's findings concerning a conditional use criterion that requires that the
7 city find that "[t]he proposed use does not have an adverse impact, or impacts can be
8 ameliorated through conditions." NZO 2-5-3.015(A)(3).⁸

9 In sustaining petitioners' assignment of error concerning adverse impacts under NZO
10 2-5-3.015(A)(3), we explained that the city's "[f]indings must address and respond to specific
11 issues, raised in the proceedings below, that are relevant to compliance with applicable
12 approval standards." Port Dock Four I, 33 Or LUBA at 621. We went on to state "visual
13 impacts (including lighting impacts), noise and safety are mentioned in the code, were
14 specifically raised by petitioners, and must be addressed in the findings."⁹ Id. at 622.

15 On remand, the city adopted additional findings concerning the impacts identified in
16 our decision above concerning NZO 2-5-3.015(A)(3). Record 20-21 (conclusions III (E), (F)
17 and (G)). Petitioners do not challenge those conclusions. We agree with intervenor that the
18 adverse impact issue that petitioners raised in Port Dock Four I, and which resulted in

⁸In our decision we noted that NZO 2-5-3.010 defines "impact" as the "[t]he effect of a nuisance on a neighborhood or the city," and defines "nuisance" as

"[t]he use of property or course of conduct that causes damage or annoyance, or which unlawfully interferes with or obstructs or renders unsafe other persons in the enjoyment of life or in the use of property. Nuisances include dust, smoke, noise, glare, vibration, safety, and odors."

⁹We also sustained petitioners' assignment of error challenging the city's failure to adopt findings demonstrate compliance with Resolution 1778. On remand the city found that Rule 5 of Resolution 1778 conflicts with the NZO and therefore does not apply. We sustain that portion of the city's decision under the third assignment of error.

1 remand, did not include the landscaping and private building height covenant issues
2 petitioners describe in the first and second assignments of error in this appeal.¹⁰

3 If issues were raised by petitioners concerning the landscaping requirement or the
4 private covenant in Port Dock Four I, petitioners make no attempt to identify where, and this
5 failure is fatal to the first two assignments of error. Petitioners appear to assume that any
6 issue that could have been raised in Port Dock Four I as a relevant issue under the NZO 2-5-
7 3.015(A)(3) adverse impact standard or the burden of proof imposed by Rule 5 of Resolution
8 1778 had to be considered by the city on remand, because LUBA sustained petitioners'
9 assignments of error challenging the city's decision with regard to those criteria. To the
10 extent that is petitioners' argument, we reject it. Intervenor alleges the issues presented in the
11 first and second assignments of error are presented for the first time in this appeal.
12 Therefore, the threshold question in this appeal is whether the errors alleged under the first
13 and second assignment of error concerning the landscaping standard at NZO 2-4-5.005 and
14 the private height covenant were among the issues that were raised and sustained in our
15 decision in Port Dock Four I. Because the city limited the scope of its proceedings on
16 remand, it was our decision in Port Dock Four I that established the scope of the issues that
17 had to be considered on remand.

18 We conclude the issues petitioners raise in the first and second assignments of error
19 cannot be raised in this appeal because they were not included among the issues raised in
20 Port Dock Four I and were not part of our decision remanding the city's decision. Therefore,
21 for purposes of this appeal, it is irrelevant whether the landscaping standard at NZO 2-4-
22 5.005 is an applicable criterion or, if so, whether it is satisfied by the disputed proposal. It is
23 also irrelevant, for purposes of this appeal, whether the private covenant building height
24 limitation is an issue which the city would have been required to address under relevant

¹⁰Neither were those issues raised in connection with petitioners' arguments concerning Resolution 1778.

1 approval criteria, if the issue of the private covenant had been raised and resolved in
2 petitioners' favor in Port Dock Four I. The city did not err in refusing to consider those
3 issues on remand.

4 The first and second assignments of error are denied.

5 The city's decision is affirmed.