



1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision that grants conditional use approval for a florist  
4 shop as a home occupation in the city's General Residential (R-2) zone.

5 **MOTION TO INTERVENE**

6 Kathy Bates Parkhurst (intervenor), the applicant below, moves to intervene on the  
7 side of respondent. There is no opposition to the motion, and it is allowed.

8 **MOTION TO STRIKE**

9 Petitioners attach to their petition for review some documents that did not exist at the  
10 time the challenged decision was made.<sup>1</sup> Petition for Review Appendices III and IV.  
11 Petitioners also attach several documents that are not included in the record of the local  
12 proceedings submitted by the city. Petition for Review Appendices II and V. Intervenor  
13 moves to strike the appendices.

14 The motion is granted. It does not matter whether the appendices are relevant to  
15 issues raised in the petition for review, as petitioners allege. With limited exceptions that do  
16 not apply here, our review is limited to the local government record. ORS 197.835(2)(a);  
17 Dorgan v. City of Albany, 27 Or LUBA 64, 68-69 (1994).

18 **FACTS**

19 Intervenor operates a "florist/nursery" business in a commercial zone and proposes to  
20 relocate her business to an existing house located in the R-2 zone. Intervenor submitted an  
21 application for a "conditional use permit for [a] home occupation." Record 29. The city  
22 council conducted a public a hearing on March 2, 1999, and, on April 6, 1999, approved the  
23 application.

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<sup>1</sup>Those documents show that intervenor has purchased the existing house and initiated construction of the greenhouses that are at issue in this appeal.

1 In its decision the city council described the application as follows:

2 "The application includes a conditional use for the placement of two  
3 greenhouses on the property for the purpose of a commercial plant nursery.  
4 The greenhouses will not only be used for the cultivation of nursery stock but  
5 for its display and retail sale. The application also includes a request for a  
6 florist shop located within the dwelling already located on the property."  
7 Record 1.

8 The city council found that the uses allowed outright in the R-2 zone include "crop  
9 cultivation" and a "plant nursery." Record 2. However, the city also found that

10 "There is no provision in the zoning ordinance for a conditional use for a  
11 commercial plant nursery where plants will be displayed and sold on a retail  
12 basis. Therefore, the application for a conditional use for a commercial plant  
13 nursery must be denied." Record 3.

14 The city council went on to grant a conditional use permit "for a home occupation for the  
15 purpose of a florist shop" in the existing dwelling. Record 7. The city council imposed four  
16 conditions, including the following:

17 "The applicant shall not erect any additional accessory structures from which  
18 florist supplies or nursery stock will be sold retail. Although the zoning  
19 ordinance allows for the cultivation of crops in a plant nursery, there is no  
20 outright use nor conditional use for the property as a commercial or retail  
21 plant nursery. Any attempt to circumvent this ruling will result in revocation  
22 of the conditional use [permit] granted herein. Record 8.

23 This appeal followed.

#### 24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioners argue that the written notice that preceded the city council's March 2,  
26 1999 hearing did not list the relevant criteria, as required by ORS 197.763(3)(b). Petitioners  
27 also argue that the oral statement that the city council provided prior to its hearing pursuant  
28 to ORS 197.763(5)(a) failed to identify the relevant approval criteria. Petitioners further  
29 complain that the staff report, which does identify approval criteria, was not provided seven  
30 days before the hearing, as required by ORS 197.763(4)(b). At oral argument, petitioners  
31 stated that while the staff report was made available at the hearing, there were only a  
32 sufficient number of copies for the city council, and that petitioners did not actually have a

1 chance to review the staff report until after the March 2, 1999 hearing. Petitioners argue that  
2 by virtue of these failures, parties "were denied their right to provide the City with  
3 meaningful support or objections[.]" Petition for Review 13.

4 The procedural errors petitioners identify provide no basis for reversal or remand,  
5 unless petitioners' substantial rights were prejudiced as a result of those errors. ORS  
6 197.835(9)(a)(B); Mason v. Linn County, 13 Or LUBA 1, 4 (1984), aff'd in part rev'd and  
7 rem'd on other grounds Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529  
8 (1985). Petitioners' substantial rights include the right to "prepare and submit their case and  
9 a full and fair hearing." Muller v. Polk County, 16 Or LUBA 771, 775 (1988). Intervenor  
10 argues that petitioners fail to demonstrate that their substantial rights were prejudiced by the  
11 failure of the notice of hearing to list the approval criteria. Intervenor points to petitioners'  
12 written and oral testimony as evidence that their ability to participate and make their case at  
13 the March 2, 1999 hearing was not prejudiced by the city's defective notice. We do not  
14 agree.

15 It is clear that there was significant confusion concerning the city's view of the nature  
16 of the conditional use request. The application that initiated the process does not clearly  
17 indicate what kind of approval is being requested. Record 39. The notice that preceded the  
18 city council hearing indicates the request is for a "home occupation permit" "to relocate  
19 [intervenor's] florist/nursery." Record 38. The staff report prepared for the city council  
20 hearing states the request is for a "Conditional Use Permit for a Home Occupation," but also  
21 states it involves relocating intervenor's existing "florist/nursery business." Record 29. The  
22 challenged decision takes the position that the application included a request for greenhouses  
23 that "will not only be used for the cultivation of nursery stock but for its display and retail  
24 sale." Record 1. The challenged decision denies conditional use approval for a commercial  
25 greenhouse, but grants conditional use approval for a florist shop in the existing dwelling as a  
26 home occupation. It is not clear from the record at what point during the proceedings below

1 the city came to view the greenhouses as allowable as an outright use if they did not include  
2 retail sales.

3 We believe petitioners' right to a fair opportunity to present their case was  
4 substantially prejudiced by the city's failure to identify the relevant approval criteria. This is  
5 particularly the case in view of the confusion over what was being requested and how the  
6 city viewed the proposal. The legal theory that the city ultimately applied to approve the  
7 request is somewhat intricate and apparently evolved during the approval process.<sup>2</sup> If the  
8 project is viewed only as a request for conditional use approval for a florist shop (because the  
9 greenhouses are a permitted use in the zone if not operated as commercial plant nursery), the  
10 relevance of the greenhouses in considering the approval criteria may be affected.<sup>3</sup> It is clear  
11 that the opposition to the proposal was focused almost entirely at the greenhouses. The city's  
12 failure to identify the relevant approval criteria added to the confusion during the local  
13 hearing and interfered with the ability of both the supporters and opponents of the application  
14 to present their case.<sup>4</sup>

15 The first assignment of error is sustained.

## 16 **SECOND ASSIGNMENT OF ERROR**

17 To operate a florist shop as a home occupation in the R-2 zone, conditional use  
18 approval is required. City of Joseph Zoning Ordinance (JZO) 3.050(7). JZO 6.010

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<sup>2</sup>If we understand the city's decision correctly, it denies conditional use approval to operate a greenhouse where customers may walk through the greenhouse and buy plants, but allows the applicant to construct greenhouses on the property where plants will be grown and transported to the existing house where the florist shop home occupation business will sell those plants to customers.

<sup>3</sup>We express no view concerning the possible direct or indirect relevance of the greenhouses in considering conditional use approval for a florist shop as a home occupation in the existing dwelling.

<sup>4</sup>Petitioners also argue under their first assignment of error that the city's failure to identify the relevant approval criteria prior to the hearing means that petitioners are not precluded from raising issues about compliance with relevant approval criteria, even though they may not have raised those issues below. Petitioners are correct in this contention as well. ORS 197.835(4)(a); Eppich v. Clackamas County, 26 Or LUBA 498, 502-03 (1994); Friends of the Metolius v. Jefferson County, 25 Or LUBA 411, 414, aff'd 123 Or App 256, 860 P2d 278 adhered to 125 Or App 122, 866 P2d 463 (1993).

1 establishes criteria for approving conditional uses.<sup>5</sup> Under this assignment of error,  
2 petitioners argue the city failed to address JZO 6.010. As petitioners correctly note, JZO  
3 6.010 explicitly requires that the city consider "adverse conditions that would result from  
4 authorizing the particular development at the location proposed," and find that the three  
5 criteria set out in the margin " are either met, can be met by observance of conditions or are  
6 not applicable."<sup>6</sup>

7 The staff report in the record indicates that JZO 6.010 is an approval criterion.  
8 However, the challenged decision does not address JZO 6.010; it neither takes the position  
9 that JZO 6.010 does not apply nor makes any attempt to demonstrate compliance with JZO  
10 6.010.

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<sup>5</sup>JZO 6.010 provides:

"AUTHORIZATION TO GRANT OR DENY CONDITIONAL USES. A conditional use listed in this ordinance shall be permitted, altered or denied in accordance with the standards and procedures of this article. \* \* \* 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 that the following criteria are either met, can be met by observation of conditions or are not applicable:

- "(1) The proposal will be consistent with the [City of] Joseph's Land Use Plan and the objectives of the Zoning Ordinance and other applicable policies of the city.
- "(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 development within the area and the zone as possible.

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

<sup>6</sup>Petitioners argue:

"The petitioners do not find that the City 'weighed 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 did not meet the criteria outlined in [JZO] 6.010 (1), (2), and (3). Petition for Review 17 (emphases deleted).

1           Because the city did not address JZO 6.010 we sustain the second assignment of  
2 error. Petitioners argue that the challenged decision violates JZO 6.010 for a variety of  
3 reasons. Because we remand the decision for the city to address JZO 6.010, we do not  
4 consider petitioners' other arguments under this assignment of error.

5           The second assignment of error is sustained.

6           The city's decision is remanded.