



1 NATURE OF PROCEEDING

2 Petitioners appeal Respondent City of Independence's denial  
3 of their request for a variance to allow conversion of their  
4 single-family residence into a duplex. The Independence City  
5 Council's decision was a reversal of the City Planning  
6 Commission's approval of petitioners' variance request.

7 STANDING

8 Standing is not an issue in this case.

9 FACTS

10 On June 25, 1980, petitioners submitted to the Independence  
11 Planning Department a request for a variance to convert their  
12 single family residence into a duplex. On July 7, 1980, after  
13 a public hearing, the Independence Planning Commission granted  
14 the variance.

15 The decision of the Planning Commission was appealed to the  
16 City Council, which appeal was heard by the City Council on  
17 August 12, 1980. The recording equipment had malfunctioned at  
18 the Planning Commission's hearing and the City Council had no  
19 transcript of the Planning Commission's hearing to review;  
20 therefore, petitioners were asked to re-present their case.  
21 The City Council apparently did have before it, however, the  
22 minutes of the Planning Commission's hearing, the staff report  
23 and other written materials submitted at the Planning  
24 Commission's hearing. While petitioners now complain that they  
25 were surprised and unprepared to once again present their case,  
26 they did not object or ask for a continuance at that time. In

1 fact, they once again presented their arguments to the City  
2 Council on August 12, 1980. Ironically the recording equipment  
3 in use at that City Council meeting also failed to operate.  
4 After hearing the evidence and reviewing the record before the  
5 Planning Commission, the council voted to deny petitioners'  
6 request. On August 18, 1980, petitioners were notified in  
7 writing that their application for a variance had been denied  
8 on the basis of a June 19, 1980, staff report from the  
9 Department of County Development regarding the petitioners'  
10 variance application. The report consists of seven pages and  
11 recommends that the request be denied on the grounds that it  
12 fails to comply with Section 70.020 of the city's zoning  
13 ordinance.

14 On September 11, 1980, petitioners filed a notice of intent  
15 to appeal with this Board.

16 ALLEGATIONS OF ERROR

17 In summary, petitioners' allegations of error are as  
18 follows:

19 (1) The City Council acted without an adequate number of  
20 members present to insure an equitable hearing.

21 (2) Petitioners were prejudiced by having to re-present  
22 their case due to a failure of the Planning Commission's  
23 recording equipment.

24 (3) Failure of the recording equipment at the City Council  
25 hearing has resulted in an insufficient record before this  
26 Board because it does not include petitioners' verbal responses

1 to appellants below, the concerns of City Council members and  
2 the insufficiency and inaccuracy of the Department of County  
3 Development report and staff analysis and findings.

4 (4) The City Council's record transmitted to the Board  
5 does not include two petitions in support of petitioner's  
6 requested variance, photographs of the property, improvements  
7 to parking control and traffic on 4th Street and adjacent high  
8 density property characteristics.

9 (5) City of Independence Ordinance 70.020 was improperly  
10 applied in that City Ordinance 70.005 controls.

11 DECISION

12 Adequate Number of Members Present.

13 Petitioners argue that five of seven council members were  
14 in attendance at the City Council hearing on their zoning  
15 request. Petitioners argue that the absention of one of the  
16 council members required that they gain a three-quarter  
17 majority of the voting members to sustain approval of their  
18 request. They argue that such action worked to prejudice their  
19 case.

20 Minutes of the August 12, 1980 regular council meeting at  
21 which petitioners' variance was heard indicates that there were  
22 five council members present as well as the mayor. The record  
23 indicates that the mayor did not vote, and one council member  
24 abstained. The vote was 3-1 in favor of the motion to deny the  
25 variance required by petitioners. Independence city government  
26 consists of a mayor and six council members. Since four of the

1 six council members were present and ready to participate at  
2 the August 12, 1980 hearing, a quorum was in attendance. ORS  
3 221.909.

4 Petitioners cite us to no authority, such as the city's  
5 charter, that would prohibit a majority of the quorum from  
6 transacting the business of the City Council. Petitioners cite  
7 us to no place in the record which would indicate they were in  
8 any way prejudiced by being required to convince a majority of  
9 the August 12, 1980, Independence City Council of the  
10 appropriateness of their variance. Petitioners' first  
11 assignment of error is denied.

12 Sufficiency of Record from Planning Commission Hearing.

13 Petitioners prevailed in their request before the Planning  
14 Commission; however, the recording equipment at the Planning  
15 Commission hearing failed. Petitioners claim they were  
16 prejudiced before the City Council by the lack of a complete  
17 record of the earlier Planning Commission decision. Their  
18 argument is that they were surprised to learn at the time of  
19 the August 12, 1980, City Council hearing that they were  
20 required to again present their case in support of their  
21 variance request.<sup>1</sup> Petitioners had the right at that time to  
22 request a continuance so that they might be better prepared to  
23 once again present the arguments in favor of their variance  
24 request. They did not do so but rather proceeded to argue  
25 their case.

26 Having chosen to proceed, we will not find the city to have

1 erred by letting petitioners have their way. Petitioners had  
2 the responsibility of objecting to the procedure at the time of  
3 the hearing. Their decision to proceed under these perhaps  
4 unfavorable circumstances was nonetheless a waiver of their  
5 right to request a continuance.

6 Assignment of error no. 2 is denied.

7 Failure of recording equipment, insufficient record.

8 We understand petitioners' third assignment of error to be  
9 that a failure of the recording equipment before the city  
10 council prejudiced their ability to have this Board review the  
11 city's decision to determine whether it was based upon  
12 substantial evidence.

13 The fact that the recording equipment failed, however, is  
14 not automatically grounds for reversal of the city's decision.  
15 The record transmitted to the Board included minutes, albeit  
16 perfunctory, of the City Council's proceeding. Section 6(A) of  
17 the Board's procedural rules provides that the record  
18 transmitted to the Board shall include minutes of the  
19 proceeding. Sections 6(C)(2) and (3) only require that all or  
20 part of the taped record be transcribed and transmitted to the  
21 Board if an objection has been properly made within ten days of  
22 transmittal of the record challenging the completeness or  
23 accuracy of the minutes. Petitioners filed nothing that could  
24 be characterized as an objection to the record before they  
25 filed their petition for review. The petition, however, was  
26 filed well after the ten day period for objecting to the record

1 had expired.

2 Even in their petition for review, however, petitioners do  
3 not challenge, at least directly, the completeness or accuracy  
4 of the minutes. Without any specific objection made to the  
5 completeness or accuracy of the minutes, let alone made in a  
6 timely fashion, the record on review before this Board is that  
7 transmitted by the city.

8 We find there is substantial evidence in the record as  
9 transmitted to the Board as a whole to support the city's  
10 decision denying the requested variance. The basis for the  
11 city's denial was the staff report which contained staff  
12 analysis and findings and recommended against approving the  
13 request. The record also contains the minutes from the  
14 Planning Commission's proceeding in which at least two people  
15 testified against the request on the basis of increased traffic  
16 and parking. Two other people also submitted letters opposing  
17 the request for parking and traffic reasons. This testimony,  
18 together with the staff report, constitutes substantial  
19 evidence to support the city's denial of the variance request  
20 on the grounds approval of the request would not be of greater  
21 benefit to the public than would enforcement of the  
22 requirements of the zoning ordinance. Independence Zoning  
23 Ordinance Section 70.020(E) (see infra at page 9).  
24 Failure to include petitions, photos, etc. in record.

25 Petitioners argue that their appeal is prejudiced because  
26 the city failed to include in the record submitted to this

1 Board (1) 2 petitions in support of their requested variance  
2 and (2) photographs of the property, improvements to traffic  
3 control and parking, and adjacent high density development.  
4 Petitioners did not raise this objection until they submitted  
5 their petition for review.

6 Petitioners' objection was not timely raised. As discussed  
7 in the preceding section of this opinion, objections to the  
8 completeness or accuracy of the record must be made within 10  
9 days of the date the record is transmitted. The petition for  
10 review was filed long after this ten day period for filing  
11 objections had passed. Therefore, petitioners' allegation of  
12 error is denied.

13 Ordinance 70.020 Properly Applied.

14 We understand this assignment of error to be that  
15 Independence City Ordinance Section 70.005 controls  
16 respondent's decision and not Section 70.020 which was cited as  
17 the appropriate authority by the planning staff.

18 Independence zoning ordinance section 70.005 states:

19 "70.005. Power To Grant Variances.

20 "The Planning Commission shall have the power to  
21 vary or modify the requirements of this Ordinance.  
22 The power to grant such variances shall be used  
23 sparingly and only according to the provisions of this  
24 Ordinance." (Emphasis added).

25 Section 70.020 states:

26 70.020. Standards For Granting Other Variances

"Any provision of this Ordinance not specified in  
section 70.015<sup>2</sup> may be varied if the Planning  
Commission finds that the variance would meet all of

1 the following standards:

2 "A. The requirements of the zoning ordinance  
3 prevent the applicant for the variance from making any  
4 substantial, beneficial use of the applicant's  
5 property;

6 "B. The condition which prevents or will prevent  
7 the applicant from making any substantial beneficial  
8 use of the property is a condition peculiar to the  
9 applicant's property and not found generally in other  
10 property in the zone;

11 "C. The condition which prevents the applicant  
12 from making substantial, beneficial use of the  
13 property was not caused by the applicant;

14 "D. The variance will be consistent with the  
15 Comprehensive Plan and with the purpose of the zone in  
16 which the applicant's property is located.

17 "E. Varying the requirements of the zoning  
18 ordinance will be of greater benefit to the public  
19 than would enforcement of the requirements of the  
20 zoning ordinance."

21 Petitioners point to the underlined portion of section  
22 70.005 and contend that the city doesn't have to apply 70.020  
23 if it doesn't want to. Petitioners misread that section. The  
24 "ordinance" referred to in sec 70.025 is the entire zoning  
25 ordinance, not sec 70.020 of the ordinance referring  
26 specifically to variances. Petitioners requested variance  
factually falls within section 70.020. The city's power to  
grant variances of the type desired by petitioners is not a  
matter of discretion but is specifically limited to the  
standards set forth in section 70.020. To read the ordinance  
as petitioners request would be to remove the applicable  
standards from consideration in variance cases. Permits such  
as variances must be controlled by standards. ORS 215.416.

1 Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973).

2       Petitioner's assignment of error is, therefore, denied.

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1 COX, Dissenting.

2 As regards the majority's holding on petitioners' third  
3 assignment of error, I dissent. The majority holding dismisses  
4 petitioners' concern that an insufficient record exists because  
5 of petitioners' failure to timely object and request  
6 supplementation pursuant to LUBA Procedural Rule 6(C)(2).

7 While the majority's posture is justified when a possibility  
8 exists that respondent could correct the record (such as in  
9 allegation of error no. 4), it ignores reality when correction  
10 would be impossible. To require petitioners to have formally  
11 objected and requested supplementation of the record with  
12 material that didn't exist places form over substance and leads  
13 to a futile exercise. Respondent understandably does not  
14 allege surprise because it knew no transcript could be produced  
15 due to recording equipment failure.

16 Petitioners argue that the failure of the recording  
17 equipment at the August 12, 1980 City Council hearing damaged  
18 their ability to "identify the substance and validity of  
19 [their] verbal response to the concerns of the persons filing  
20 the initial appeal, the concerns of the council members and the  
21 sufficiency and inaccuracy of the Department of County  
22 Development report and the staff analysis and findings."

23 Oregon Laws 1979, ch 772, sec 4(7) states in pertinent part:

24 "(7) Review of a decision under sections 4 to 6  
25 of this 1979 Act shall be confined to the record. \* \*  
26 \* The board shall be bound by any finding of fact of  
the city, county or special district governing body or  
state agency for which there is substantial evidence

1        in the whole record." (Emphasis added).

2        The record before this Board regarding what occurred and  
3 the testimony given at the August 12, 1980 City Council meeting  
4 is limited to minutes of the meeting. The equipment recording  
5 the verbatim testimony and evidence presented to the City  
6 Council failed and as a result, we do not have before us a  
7 record of petitioner's testimony and evidence. The minutes of  
8 the August 12, 1980, meeting in their entirety are as follows:

9        "Public Hearing Opened at 8:15 P.M. pertaining to the  
10 Use Variance [sic] at 740 S. 4th St., owned by Brian &  
11 Shirley Sparks. Brian Sparks, in favor, spoke about  
12 the adequate parking, the High Density Area close by  
13 and a petition with (6) six signatures of neighbors  
14 supporting the Variance [sic]. Arron Cooper, spoke  
15 against, concerning Parking, single lane traffic and  
16 to preserve the neighborhood. Mrs. Cooper spoke  
17 against the traffic and School Buses in that area.  
18 Hearing closed at 8:50 P.M. Motion by Kelley, second  
19 by Storey, do deny the Use Variance [sic]. Question.  
20 Baker, Storey, and Kelley, yes, Harris, nay and  
21 Oppliger, abstained. Motion carried."

22        Respondent replies to this allegation of error by arguing  
23 that even though there is no verbatim transcript and admitting  
24 the minutes that do exist in the record are insufficient, there  
25 nevertheless is data in the record in the form of affidavits  
26 and staff reports which amount to substantial evidence in that  
they lend a modicum of support to the decision to deny  
petitioner's variance request. This Board should not accept  
respondent's argument, however, because the substantial  
evidence test requires a review of the record as a whole, not  
just bits and pieces of that record which go to support  
Respondent's decision. As was stated in K.C. Davis,

1 Administrative Law, 3 Ed, sec 2903, page 531:

2 "Obviously, responsible men would not exercise their  
3 judgment on only that part of the evidence which looks  
4 in one direction; the rationality or substantiality of  
5 a conclusion can only be evaluated in the light of the  
6 whole fact situation or so much of it as appears.  
7 Evidence which may be logically substantial in  
8 isolation may be deprived of much of its character or  
9 its claim to credibility when considered with other  
10 evidence." (Emphasis added).

11 See also Universal Camera Corp. v. NLRB, 340 US 474, 488, 71 S  
12 Ct 456, 464, 95 L Ed 456 (1951) wherein the court stated:

13 "The substantiality of evidence must take into account  
14 whatever in the record fairly detracts from its  
15 weight."

16 See also Sane Orderly Development v. Douglas County, \_\_\_ Or  
17 LUBA \_\_\_ (1980) (LUBA No. 80-121).

18 While the information contained in the sketchy record  
19 before this Board, may logically be supportive of the city's  
20 decision in its isolated form, without the information on  
21 petitioners' side of the argument, this Board cannot determine  
22 as a matter of law whether the decision on review is supported  
23 by substantial evidence. I would remand the decision.  
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FOOTNOTE

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3 Petitioners do not, however, cite us to anything in the  
4 City of Independence ordinances which requires a transcript of  
5 the Planning Commission's hearing to be forwarded on to the  
6 City Council when a decision of the Planning Commission is  
7 appealed.

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10 "70.015. Standards For Granting Certain Variances

11 "The requirements of this Ordinance with regard to  
12 yards, frontages, setbacks, lot areas, lot coverage,  
13 heights of structures, widths of lots, accessory  
14 structures, recreation areas, parking, distances between  
15 buildings, or home occupations may be varied if the  
16 Planning Commission finds that the variance would meet all  
17 of the following standards:

18 "A. The requirements of the zoning ordinance cause  
19 practical difficulties to the applicant for the variance  
20 not caused generally to persons in the same zone.

21 "B. The practical difficulties resulting to the  
22 applicant for the variance have not been caused by the  
23 applicant;

24 "C. The variance will be consistent with the  
25 Comprehensive Plan and with the purpose of the zoning in  
26 which the applicant's property is located;

27 "D. Varying the requirements of the zoning ordinance  
28 will be of greater benefit to the public than would  
29 enforcement of the requirements of the zoning ordinance.