LAND USE
BOARD OF APPEALS
Nov 2 4 17 PM '81

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHEAST NEIGHBORHOOD ASSOCIATION, a Neigborhood Planning Organization duly recognized by the City of Salem, and FRIENDS OF ENGLEWOOD, an Oregon nonprofit corporation,	
Petitioners,	LUBA NO. 81-038
v.	
CITY OF SALEM,	FINAL OPINION AND ORDER
Respondent,	
and	
FIRST CHURCH OF THE NAZARENE of Salem, Oregon, an Oregon non-profit corporation,	
Intervenor-Respondent.	

Appeal from City of Salem.

Ellen E. Johnson, Portland, filed a brief and argued the cause for petitioners.

Jeannette Launer, Salem, filed a brief and argued the cause for Respondent. With her on the brief was William J. Juza, City Attorney.

Daniel A. Ritter and Kris Jon Gorsuch, Salem, filed a brief and argued the cause for Intervenor-Respondent. With them on the brief were Harland, Ritter, Saalfeld & Griggs.

Bagg, Referee; Reynolds, Chief Referee; participted in the decision; Cox, Referee, dissenting.

Remanded. 11/02/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

BAGG, Referee.

This case is about a grant of a conditional use and a variance to expand an existing use. The permit given by the City of Salem allowed Respondent First Church of the Nazarene to expand an existing sanctuary and to provide parking. The variance was granted to relieve the parking areas from certain set back requirements.

FACTS

The First Church of the Nazarene exists in an older residential neighborhood in the City of Salem. In September, 1980, the Church filed a conditional use application to expand its sanctuary located on single-family residential (RS) and multi-family residential (RM) zoned property. Conditional uses were requested for parking areas to be located within 200 feet of the sanctuary, and set back variances were also requested. In November, the conditional use for the proposed sanctuary expansion and additional parking was granted. Other conditional use and variance requests for additional parking were denied. The Northeast Neighborhood Association, a neighborhood association in opposition to the city's grants, filed an appeal with the city council.

Petitioners' main concern is over the procedural history of the case and particularly the matter of citizen-opponent participation in the city council proceedings. Prior to the hearing on the association's appeal, an individual representing the association discussed with the city attorney the matter of

participation in the argument. The city attorney told one of the appellants that Northeast Neighborhood Association (NEN) and the individually affected neighbors would not be classed as one entity. Each would receive separate time periods in which to speak of at least 10 minutes for NEN and 15 minutes for the named appellants. Petition for Review at 6. Petitioners took this grant to mean each individual appellant would be allowed 15 minutes. Later, the city advised that NEN and the individual applicants would indeed be treated as separate, and that all interested citizens would be given five minutes in which to speak. Shortly before the hearing on February 19, 1981, the city attorney again told an appellant that NEN would receive 10 minutes, the individual appellants 15 minutes, and all interested citizens five minutes each. Shortly after the hearing opened, the mayor announced the following time limits:

> "(a) 20 minutes for the applicant with 5 minutes for rebuttal: five minutes for citizens favoring the application,
>
> "(b) 20 minutes for NEN as the appellant,
>
> "(c) 10 minutes for all citizens opposing the application, whether named appellants or not."

Along with that announcement, there was an announcement that the mayor's business firm had performed an audit for the church within the two prior years. The mayor asked for a suspension of Rule 7A.3, Disqualification, and suspension of the rule passed. Also at the meeting, the mayor and a city councilmember, Councilmember Schneider, stated that each

attended the church, but neither were members of the church. There was no mention of any other relationship between the church and the members of the city council.

At the hearing, there was much objection raised by opponents of the time limits that had been imposed by the mayor. Petitioners in the brief relate a confusing account of what the Board understands to be two public hearings. One hearing was held on February 9. Two days were given after February 9 in which persons could submit written testimony regarding the proposal. Another meeting was held on February 16 and was a regularly scheduled Monday afternoon council meeting. At both hearings, persons spoke in opposition to the time limits imposed on comment from citizens and on the merits of the proposal. At one point, a "compromise proposal" aimed at providing citizens with further opportunity to speak was suggested by a councilmember. On March 2, further discussion was held, and this "compromise proposal" was defeated. At that March 2 meeting, a motion was passed to uphold the hearings officer's decision granting the conditional use.

A meeting was held on March 16 at which time, as we understand it, the written findings of fact were available for council consideration. Again an individual representing NEN appeared and complained about the findings of fact and also about an apparent lack of a tape recording of the February 9 hearing.

ASSIGNMENT OF ERROR NO. 1

Assignment of error no. 1 alleges

> "Petitioners' substantial rights were prejudiced by failure to receive an impartial tribunal in contradistinction to due process standards."

In this assignment of error, the petitioners allege that the rules of the City Council of the City of Salem and due process standards generally prohibit bias on the part of the decision-making body. Petitioners say that Mayor Aldrich attended the First Church of the Nazarene and conducted an audit for the church within two years prior to his participation in this land use decision. City Councilmember Schneider "admitted" that she regularly attended the church and planned to continue to do so. The petitioners claim further that Councilmember Schneider "carried on significant ex parte contacts with the church after the February 9, 1981 hearing." Petitioners describe these contacts as follows:

> "During the week after the hearing she either personally contacted or directed the City Attorney to contact the church. This was to inform the Church of a favorable compromise. On February 16, 1981, the Council met to discuss that proposal." Petition for Review at 17.

These facts are used by petitioners to claim violation of city rules and bias. We note that Councilmember Schneider did state in the record that she had contacted the church for the purpose of discussing a procedural matter.

Petitioners rely on City Resolution 71-48 controlling hearing procedure and disqualification of council members.

Resolution 71-48, as amended, at section 7A.3 reads as follows:

"7A.3 DISQUALIFICATION OF COUNCIL PERSON.
"(a) A member of the council shall not participate in discussion of the zoning proposal and shall refrain from voting on same when:
"(1) Any of the following has a direct or substantial financial interest: the council person or his or her spouse, brother, sister, child, parent, father-in-law, mother-in-law, any business which he is then serving or has served within the previous two years, or any business with which he is negotiating for or has an arrangement or understanding concerning prospective partnership or employment;
"(2) The council person owns property within the affected area of the zoning proposal;
"(3) The council person has a direct or indirect personal interest in the zoning proposal;
"(4) Such participation would be in violation of the conflict of interest section found in SRC 12.050;
. . . (b) Members of council shall reveal any significant prehearing or ex parte contacts with regard to any matter at the commencement of the public hearing on the matter. If such contacts have impaired a council person's impartiality or ability to vote on the matter, he or she shall so state and shall abstain therefrom."

Petitioners say that the mayor and the councilmember's attendance at the church constitutes a "direct or indirect personal interest" under section 7A.3(a)(3). Also, petitioners seem to argue that the mayor is specifically disqualified from acting on this proposal because within the past two years he conducted an audit for the church. In other words, petitioners appear to say that the mayor should be disqualified under section 7A.3(a)(1). Petitioners are mindful that Oregon Laws 1979, ch 772, sec 5(4)(a)(B) allows the Board to reverse or remand a decision only where procedural error has resulted in substantial prejudice to petitioners. Petitioners say that even if the Board is not convinced that the substantial rights

of the petitioners have been prejudiced, "there is no basis for concluding that a fair and open hearing was provided." Petition for Review at 18. In other words, church attendance by Mayor Aldrich and Councilmember Schneider, along with petitioners claim to be "significant ex parte contacts with the church" severely taint the proceeding.

Respondent City replies that Rule 7A.3(a)(3) does not require disqualification of Councilmember Schneider and Mayor Aldrich as the city has interpreted "personal interest" in the rule to have the same definition as exists in the City Code of Ethics, SRC Chapter 12. SRC 12.050 states that a "personal as distinguished from financial interest includes an interest arising from blood or marriage relationships or close business or political association." Respondent urges that no such relationships exist in this particular zoning proposal. Respondent says the city is entitled to interpret its own rule, and reminds this Board that we will follow a local government's interpretation of its own rules and ordinances where the local interpretation is reasonable. Eugene v. Lane County, 1 Or LUBA 265 (1980); Friends of Linn County, Inc. v. Lebanon, 1 Or LUBA 50 (1980). Respondent goes on to say that even if we were to consider a personal interest to exist in simple church attendance, there are no facts here to support a finding that the councilmember and the mayor have a personal interest "in the zoning proposal" as that language appears in Rule 7A.3. In other words, the rule goes to an individual who has some

interest in the specific proposal, not simply an interest in the property or the person or institution owning the property.

As to the matter of Mayor Aldrich's work for the church within the last two years, respondent makes no direct defense except to say that the council rules were suspended to allow Mayor Aldrich to participate in the matter.

We agree with respondent that mere church attendance does not result in a direct or indirect personal interest in the zoning proposal. It is not clear to us from the record in this case that the city specifically interpreted "personal interest" to mean the same thing as the term is used in section 12.050, but we believe that by reading the two provisions together, such an interpretation is reasonable. The ordinance and the rule concern generally the same subject matter, and it is legitimate for the city to use its ordinance as an aid to interpreting a similar language appearing in a rule, particularly where the ordinance and the rule have as their object a fair city hearing procedure. Davis v. Wasco Intermediate Education Dist., 286 Or 261, 593 P2d 1152 (1979). Further, even if the attendance at the church were considered a kind of personal interest subject to Rule 7A.3, there is no allegation that either Mayor Aldrich or Councilmember Schneider has any direct or personal interest in this particular zoning proposal. The city's rule places severe restriction on the city, and we do not believe that the words "in the zoning proposal" can be loosely translated or expanded to mean "in the

property or owner of the property." To so construe the rule might result in tying the city's hands needlessly. See generally ____ Op Atty Gen ____ (1981) (Opinion No. 8034). In short, we agree with respondents on this first of petitioners' challenges under Rule 7A.3.

As to the matter of Mayor Aldrich's participation in an audit for the church within the past two years, we note that a possible reading of the rule limits the rule to present and ongoing interests between the individual or the business in which he serves and the property or, conceivably, the owner of the property. Under this interpretation, if Mayor Aldrich's accounting firm were presently to be conducting audits for the church, he may be required to disqualify himself under Rule 7A.3(a)(1). We need not address this issue, however, as Mayor Aldrich's service to the church two years ago does not appear to fall within the purview of this rule.[1]

We do not find that the facts amount to a violation of due process standards such that we might reverse the city's decision. There is nothing to forbid a city council member from acting on a proposal, even where a business interest does exist, so long as he announces the interest and he does not personally gain thereby. ORS 244.120; 244.040(4). ___ Op Atty Gen ___ (1981) (Opinion No. 8034) We presume adherence to this statutory reeequirement would satisfy constitutional requirements.

Assignment of error no. 1 is denied.

ASSIGNMENT OF ERROR NO. 2

> "Respondent prejudiced the substantial rights of petitioners by denying them a reasonable opportunity to be heard."

Petitioners begin this assignment of error by saying that the right to be heard is "the most important element of due process which must be provided in quasi-judicial decision-making." Petition for Review at 19. Petitioners cite sections of the Salem City Code as follows:

> "SRC 111.010 Holding Public Heaings. (a) Any hearing before the planning commission or common council required by any provision of Title X of this code shall be a public hearing held in accordance with the provisions of this chapter.
>
> "(b) The planning commission as to its hearings and the commen [sic] council as to its hearings shall adopt rules governing the conduct of public hearings pursuant to this chapter. Such rules shall accord reasonable opportunity for all interested persons to be heard.
>
> "SRC 111.020 Appearance of Interested Citizen, Remonstrances. Any person or persons desiring to be heard for or against the subject of the hearing may file with the common council, the planning commission or the hearings officer, which ever holds the hearing, a statement in writing, or may appear and respond personally at the hearing in person or by attorney."

Petitioners allege that the reasonable opportunity to be heard required in the city code has been violated because the petitioners had been led to believe that the interests of both the Northeast Neighborhood Association and individual opponents to the proposal would be heard separately. Additionally, as some 28 persons living in the immediate neighborhood were denied even five minutes each, it is impossible that all

persons were given an opportunity to voice their views.

The city had advised the petitioners that each individual would have ample opportunity to speak (see facts supra at 3) and shortly before the hearing the mayor announced restrictive rules, severely limiting speaking time. Petitioners claim these rules, imposed suddenly by the Mayor, amount to a violation of a fundamental right afforded persons in a quasi-judicial proceeding.

In answer, the city points to rule 7A.2(e) as follows:

> "The presiding officer may set reasonable time limits for oral presentation as follows:
> "(1) Proponent's case - 15 minutes
> "(2) Neighborhood Organizations - 10 minutes
> "(3) Appellant's Case (if other than a proponent - 15 minutes
> "(4) All others - 5 minutes
> "(5) Rebuttal - 5 minutes
> "The presiding officer may exclude or limit cumulative, repetitious or immaterial matter. To expedite hearings, the presiding officer may call for those in favor of the pending proposal or those in opposition to same to rise and the clerk will note in the minutes the number."

The rule uses the word "may" in granting power to the presiding officer to set time limits. As absolute discretion rests with the mayor in such matters, no violation of city code has occurred, according to the city.

Also, the petitioners have the burden of showing prejudice to their substantial rights, and such a showing is not possible here, according to respondent. Respondent points out that "all individually named appellants, except one, who appeared at the Council hearing to speak either spoke before the Council or

hearings officer or submitted written testimony to the Council." Respondent City's Brief at 11-12. In other words, the opportunity to be heard, orally or in writing, existed either at the hearing or afterwards; and there is no authority, states respondent, indicating that testimony submitted in writing is less credible or less desirable than oral testimony.

We do not agree with petitioners. There appears to be no violation of city rules as discretion as to how the hearing is to be handled is left to the presiding officer. The city certainly has the power to establish its own procedural rules. 2 McQuillin, Municipal Corporations, sec 4.11 (3d ed, 1979), 4 McQuillin, supra at 13.42. The use of "may" in the context of the rule does appear to be a grant of discretion. However, even if one reads the rule to require the presiding officer to grant the time limits stated in the rule, should he choose to set time limits at all, there has been no violation. The rule does not say that each of the "all others" in paragraph 4 will have 5 minutes. The rule could easily be read to allow 5 minutes for "all others" together. In this context, we believe the city's view of the rule as permissive is the more reasonable.[2]

Moreover, since opponents were given the opportunity to submit comments in writing, we can not see how anyone was prejudiced by the city's conduct. Absent some showing of prejudice or harm, we can not reverse. 1979 Or Laws, ch 772, sec 5.

Assignment of error no. 2 is denied.

ASSIGNMENT OF ERROR NO. 3

> "The city erred by failing to follow its own ordinances in determiing that parking lots require a conditional use permit in a single family zone (SRC 131) and are permitted uses in a multi-family zone (SRC 132)."

Petitioners argue that the parking facility required or desired by the church is a parking "lot" that is permissible in commercial zones, but is not expressly permitted in an "R" zone such as that in which the church is located. Petitioners' contention is as follows:

> "SRC 118.030(a) (Exhibit H) states that a parking lot, if associated with a permitted use in a residential district, may be located within 200 feet of the lot containing the main use. Petitioners contend that SRC 118.030(a) states that a parking lot in a residential district located within 200 feet of the lot containing the permitted use, requires a conditional use permit. Additionally, a parking lot in a residential district not associated with a permitted use, requires a variance to be located off-site of the main use. Thus, City Council errored [sic] by failing to require a variance for the applicant's parking lots in the RSF district and a conditional use application for the parking lots in the RM district." Petition for Review at 23-24.

Petitioners argue that a parking lot in conjunction with a permitted use requires a conditional use. Petitioners also argue that a parking lot in conjunction with a use not permitted in a particular zone requires a variance. Churches are conditional uses in the RS zone and permitted uses in the RM zone. Therefore, petitioners argue that for any church within the RS zone, a parking lot requires a variance, and for any church within the RM zone, a parking lot requires a

conditional use. We do not agree with petitioners' interpretation of the ordinance.

Review of the city code shows that neither a variance nor a conditional use is necessary for a parking facility in connection with a use permitted in an R zone.[3] SRC 118.010 requires parking for any public facility.[4] Additionally, the location of the parking required by the city code is set by ordinance.

> "118.030 Location. Off-street parking and loading aras shall be provided on the same lot with the main building or structure or use except that:
> "(a) In an "R" district, automobile parking areas for dwellings and other uses permitted in a residential district may be located on another lot if such lot is within 200 feet of the lot containing the main building, structure, or use.
> "(b) In any other district, except the CB district, the parking area may be located off the site of the main building, strucutre, or use if it is within 500 feet of such site.
> "(c) In the CB district, customer off-street parking may be provided 800 feet from the site of the main building; and
> "(d) Employee off-street parking may be provided 2,000 feet from the site of the main building. (Ord No. 45-72)." (Emphasis added).

In 118.030(a), the ordinance speaks in terms of "uses permitted." The ordinance does not use the term "permitted use." We believe this language to mean that one may have a parking area for any use which is allowed in an R district, not simply for a use specifically listed as "permitted uses" in an R district.

If it becomes necessary to provide parking outside the limits stated in Chapter 118, then, conceivably, one is

considering the creation of a parking facility outside the scope of Chapter 118, and one would then have to comply with portions of the ordinance controlling parking lots.[5] Here, as respondent notes, the church could satisfy its parking requirements within 200 feet of the main use. Therefore, the church did not need any special permit from the city to build its parking area. Petitioners' first assignment of error is denied.

ASSIGNMENTS OF ERROR 4, 5 AND 6

Assignments of error no. 4 states:

> "The city erred in failing to address the mandatory criteria set forth in SRC 119.070(b) and SRC 119.070(c) and by using criteria not recognized in the ordinance."

Assignment of error no. 5 states:

> "City erred in granting the application where the findings of fact are insufficient to support that decision in that they are mere conclusions, irrelevant and internally inconsistent."

Assignment of error no. 6 states:

> "The city's decision to grant conditional use No. 80-17 is not supported by substantial evidence in the whole record."

We believe it is only necessary to discuss that portion of assignment of error no. 6 which concerns a variance from set back requirements for church parking lots. As noted in our discussion of the last assignment of error, we do not view a conditional use or a variance to be required for the provision of off-street parking associated with a use "permitted in a residential district." SRC 118.030. An important question, of

course, is whether a church sanctuary enlargement is a use "permitted" within an "R" district. This inquiry requires us to look at the permitted and conditional uses in the RS and RM zones, the zones within which the church property lies, and SRC Chapter 114, non-conforming uses.

It is agreed by the parties that the church was built before the passage of restrictive provisions in the "RS" zone making churches conditional uses. Within the RM zone, a church is a permitted use, but a majority of this church in in the RS zone. The fact that churches are now allowed under a conditional use permit does not mean that this church was operating as a conditional use at the time of application to the city. Though the use may be permitted under certain circumstances as a conditional use, it was, at the time of application to the city, a non-conforming use of land as no land use permit had been applied for and received. See SRC 119.010 and 119.020. As a non-conforming use, this church was entitled to certain privileges under SRC 114.030.

> "114.030. NONCONFORMING SCHOOLS AND CHURCHES MAY BE ENLARGED. Any educational institution, elementary or high school, or church, the erection or establishment whereof, under the provisions of this ordinance is not permitted in the district where located, may, like other nonconforming uses, continue, and may be altered and enlarged and additional buildings erected upon the same premises for the same purposes, provided all other applicable regulations contained in this ordinance are complied with. The provisions of this section shall likewise apply to schools and churches which may be erected or established in a district by variance or conditional use."

In other words, the church was quite free to expand at its

present location. Indeed, though the hearings officer found that a conditional use permit would be required "before the church could build a proposed sanctuary," he also found

> "were it not for the off-street parking requirements and the necessity of obtaining variances for set· backs, the church would have statutory authorization to enlarge their [sic] existing church building, as evidenced by the hereinafter mentioned ordinance." Record at 9.

The hearings officer went on to quote the provisions of SRC Section 114.030 quoted above.

In the briefs, the parties treated the matter as though conditional use permits for the church sanctuary and the parking lot were required, although the Intervenor Church in the proceedings before the city contended that SRC 114.030 controlled exclusively. We decline to follow the lead of the parties in the briefs and discuss this case in terms of the compliance with the conditional use permit criteria because we believe the case is controlled by the city's variance procedure found at SRC Chapter 122.[6]

A set back variance was necessary for parking areas proposed at Lots No. 1420, 1450 and 1470 Market Street, NE and 1200 16th Street, NE. Variances are subject to the following conditions before a grant is allowed.

> "CONDITIONS FOR GRANTING A VARIANCE. The hearings officer may permit and authorize a variance when it appears from the matters presented at the public hearing:
>
> "(a) That there are unncessary, unreasonable hardships or practical difficulties which can be

relieved only by modifying the literal requirements of the ordinance;

"(b) That there are exceptional or extraordinary circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same district; however, nonconforming land, uses, or structures in the vicinity shall not in themselves constitute such circumstances or conditions;

"(c) That granting the application will not be materially detrimental to the public welfare or be injurious to property or improvements in the neighborhood of the premises;

"(d) That such variance is necessary for the preservation and enjoyment of the substantial property rights of the petitioner;

"(e) That the granting of the application will not, under the circumstances of the particular case, adversely affect the health or safety of persons working or residing in the neighborhood of the property of the applicant; and

"(f) That granting of the application will be in general harmony with the intent and purpose of this ordinance and will not adversely affect any officially adopted comprehensive plan. (Ord No. 120-76)." SRC 122.020.

The city made the following findings in support of the variance:

"(a) There are practical difficulties in attempting to retain as much as possible the residential aspect of the neighborhood, and these difficulties will be alleviated by allowing the variances to provide the maximum amount of parking on subject's lots, and to reduce the impact on adjacent residential lots;

"(b) There are exceptional and extraordinary circumstances affecting the land and the Church building, since the Church is a major Church located adjacent to a residential neighborhood. While the Church use is permitted within the RS district, this situation is unique since similar churches have moved out to the suburbs in order to expand under fewer constraints. Salem First

Church of the Nazarene remains as a central city church providing invaluable services to residential neighbors, and granting variances will permit adequate parking and at the same time lessen the absorption of residential lots;

"(c) Granting the variances will not be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood because it will permit offstreet parking and lessen congestion on nearby streets, and also will maximize the parking capability on the lots and will minimize the need to use residentially zoned land for parking purposes. The Church's parking lots have been and will be generously landscaped in order to provide a visually pleasing aspect to neighbors. The Church's parking lots will be available for recreational purposes to the neighborhood generally when the lots are not being used in conjunction with Church services;

"(d) The variances are necessary for the preservation and enjoyment of the substantial property rights of the Church, since the Church has a tremendous investment in its buildings and existing parking lot and has expended considerable sums of money in acquiring lots fronting on 17th Street to concentrate its parking efforts towards that busy arterial. By granting the variance the Church will be able to avoid other costly purchases of residentially zoned lots and at the same time will reduce the amount of residentially zoned land that will be required for parking purposes;

"(e) Granting the variance will not adversely affect the health or safety of neighbors but will contribute positively to safety, since it will maximize the amount of cars that will be taken off of the street and thus will reduce traffic congestion. In addition, since the Church parking lots will be available for recreational purposes, they will contribute to the health of the neighborhood;

"(f) Granting of the application will be in general harmony with the intent and purpose of the ordinance and will not adversely affect any officially adopted Comprehensive Plan, all as set forth in other materials submitted with this application."

Petitioners attack the findings as unsupported by evidence in the record. Petitioners say, for example, that a landowner requesting a variance must show practical difficulties, and it is petitioners' position that no such practical difficulties were evident in this case. Petitioners cite the Board to Lovell v. City of Independence, 37 Or App 3, 586 P2d 99 (1978) and Faye Wright Neighborhood Planning Council v. City of Salem, 3 Or LUBA 17 (1981) in support of this proposition. Petitioners also assert that to obtain a variance under the city's code one must demonstrate that the property will be virtually useless unless the variance is granted. Presumably petitioners are referring here to the fourth criteria that the variance is "necessary for the preservation and enjoyment of the substantial property rights of the petitioners."

In reviewing these findings and the record before us, we are forced to agree with the petitioners at least with respect to one of the six criteria in the city's variance code.[7]

One would think that a set back variance should be an easy enough matter to obtain, especially considering that a set back variance generally does not interfere with public safety and convenience. However, set back variances under the city's code are not distinguished from variances for other purposes, and the city code requires that each of the six criteria cited above be met.[8]

We conclude that at least the fourth of the six criteria has not been satisfied. This fourth requirement is that the

variance must be found to be 'necessary' for the preservation and enjoyment of the substantial property rights of the petitioner." That language requires that a variance shall not be obtainable unless profitable or effective use of the property can not be made without the variance. A property right does not necessarily include a right to expand a present use. Indeed, Section 114.030 allows the church to expand, as a non-conforming use, "provided all other applicable regulations contained in this ordinance are complied with." (Emphasis added). One such regulation is the provision for parking. Where, as here, the church may not expand without exceeding its parking capacity as mandated by city ordinance, its choices include not expanding, a scaled down expansion requiring less parking and not expanding at all. The church already enjoys a substantial property right, it exists and may continue to exist. There is no "right" to exercise one code provision when to do so would violate another code provisions. Godfrey v. Marion County, 3 Or LUBA 5, 10 (1981). We emphasize that although the city has granted non-conforming churches a special right to expand, the right is not absolute; the church must follow other applicable requirements. SRC 114.030. Also, we believe this provision must be construed as similar provisions regarding non-conforming uses. Generally, non-conforming uses are not favored and may not be enlarged as they are against "the spirit of zoning regulation." 1 Anderson, Amercian Law of Zoning, sec 6.42 (2d ed 1976). Therefore, we can not say that

the church has a "substantial property right" in SRC 114.030 or otherwise to expand by varying other applicable requirements through a loose interpretation of ordinance variance requirements.

Conceivably, the church could purchase additional lots within the area in order to provide the necessary parking, or it could reduce the number of cars parked on the lots in question so that set back variances would not be required. In any event, we find no showing in the record that the church is prevented from seeking other alternatives. We appreciate the city and the church's desire not to take additional residential property for church use, but that alternative may have to be taken given the strict nature of the city's variance code as presently drafted. It is our view, however, that the most expeditious method might be an amendment to the city's ordinance. "Variances should not be employed as a substitute for the normal legislative process of amending zoning regulations." [Citations deleted.] Lovell v. Independence, 37 Or App 7, 586 P2d 99 (1978).[9] The remedy for the city is simply to amend its zoning ordinance to allow for an easier method of obtaining set back variances or amend the set back requirements. Faye Wright v. Salem, supra.

This case is remanded to the City of Salem for proceedings not inconsistent with this opinion for the reason that the findings used to justify a variance for set backs for certain parking lots are inadequate to support the variance.

COX, Referee, dissenting.

I respectfully dissent. I would affirm the city's decision.

The majority decision is based on what I believe to be an overly strict interpretation of Salem's Variance Ordinance. The pertinent facts herein are:

(1) The city recognizes a trend (fleeing of churches to the suburbs) which it finds in part as resulting from too many restrictions. The city in finding (b) indicates the need for this church to remain as a "central city" church.

(2) The church has shown it is providing a desired and used service to the community at its present location by the mere fact that its congregation has increased, resulting in the need for an expanded facility.

(3) In order to expand, a matter of right recognized by SRC 114.030, the church must meet the provisions of SRC 118.050(1)(1) (one parking space for every four seats).

(4) The city and the neighbors do not want church patrons parking on the streets.

(5) The neighbors wish to retain as much property around the church in residential use as possible.

I see nothing wrong with the city's decision and findings which allow the variance. The church has found itself in a quandry. It has the right to expand its sanctuary. That right (set forth in SRC 114.030) preceded the adoption and subsequent revisions of the city's zoning ordinance. In order to satisfy

the city parking space requirement of one space to every four seats, however, the church must seek to vary, by a few feet the set-back requirements or convert additional neighboring residential lots to parking. The latter was unsatisfactory to the city and the neighbors so the church sought the variance.

The church could have attempted to obtain a variance from the one parking space per four seat requirement but presumably that would have forced people to park their automobiles on the street. Even if such an alternative was the most logical, the majority's opinion in this case would have prevented its being put into effect. The majority would have held, as it did in addressing the church's choice of seeking the set-back variance, that the church is not being denied the enjoyment of a "substantial property right."

Given the majority's holding, there is no possible way for the church to meet the city's parking requirement. Therefore, its right to expand its sanctuary can not be exercised as long as it must provide the specified number of parking spots.

In review of decisions such as this, LUBA should defer to the local government's application of its ordinances. There exists a gray area where strict application of conflicting standards and policies must give way to interpretations which will achieve the greatest number of goals sought by the city. In this case those goals are central city churches, off street parking, and protection of neighborhood livability. I believe the church and the city took the only logical approach to

solving the problem with which they were faced. They chose the minimal variance necessary to achieve the goals sought and provided for in the Salem zoning ordinances. The majority opinion renders the provisions of SRC 114.030 (supra, page 16) a nullity.

FOOTNOTES

1

Our interpretation, however, is certainly not without doubt. We are troubled by the city council's waiver of this rule, as we can find no authority within the record or the ordinances provided by which the city might waive one of its rules. See 4 McQuillin, Municipal Corporations, Sec 13.49 (3d Ed, 1979). Presumably, the rule would have to be suspended by making use of the same formalities used when originally passing the rule. 4 McQuilln, supra at 13.42. There has been no showing that these formalities were complied with in this rule suspension for Mayor Aldrich.

2

> "The intent of the legislature may be implied from the language used or inferred on grounds of policy and reasonableness. It has been held in cases where no apparent actual or potential injury results to anyone from the failure to adhere to the provisions of a statute that the absence of facts indicating that a mandatory construction was intended is sufficient reason for a directory construction. And an oft-repeated formula is that statutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory." 2A Sands, Sutherland, Statutory Construction, sec 57.03, 4th ed, 1973.

3

See discussion infra in which we hold that expansion of the church sanctuary is a use permitted in the R zone through operation of SRC 114.030.

4

Churches, under 118.050(1)(l), must have one parking space for every four seats or eight feet of bench in the main auditorium. Therefore, this expansion of the church calls for additional parking spaces, assuming the church does not have a sufficient parking inventory at present. Indeed, the city so found.

"D. Issues and Opinions: The basic issue of the conditional use request, as pointed out by the Staff, is the parking issue. The proposed sanctuary requires 336 parking spaces to meet the minimum Code requirements and the original church parcel and approved parking lot on 16th Street are not adequate to meet the minimum code requirements. The church can provide approximately 271 parking spaces presently, but there is a deficit of 65 parking spaces required to meet the Code provisions."

5

There is no mention in this section or in any other section of a conditional use requirement controlling parking location. Also, we note the words "parking lot" are not used. One must look to other provisions in the ordinance for particular places in which "parking lot" appears. In so doing, one finds that "parking lots" are entities allowed in commercial zones, but apparently not in residential zones. See SRS 140.010(e). It seems, then, that off-street parking within 200 feet of the main building is not a "parking lot" but a "parking area" that "shall be provided and maintained."

6

We believe our approach is supported by the fact that we can find no adequate explanation in the city's findings as to why the conditional use process applies. There are no ordinance citations showing why the conditional use procedure is applicable, and we are at a loss to understand how the conditional use procedure works in this case. Again, as parking lots or even off-street parking facilities as distinguished from "parking lots" are not found in the conditional use portions of the ordinance or found as conditional uses in the applicable RS and RM zones, we fail to understand the reason for the hearings officer's opinion.

Though not explained by the city, perhaps the city believed that as churches are considered a conditional use in the RS zone, parking for a church facility in an RS zone somehow itself becomes a separate conditional use. In other words, if a conditional use were necessary to allow the church to add on to its sanctuary, a conditional use was then appropriate for the parking facility.

7

We note that the findings for the conditional use grant are scattered in several places in the record, and, like the

findings in support of the variance, are more general conclusions stated in the terms of the ordinance than findings of fact.

8

See 3 Anderson, American Law of Zoning, sec 18.46, 2d Ed (1977). The discussion therein suggests that "practical difficulties" that need be shown to obtain an area variance are not as stringent as those necessary to obtain a use variance. However, as we noted above, the Salem Code makes no distinction between area and use variances.

9

See Record page 15-16 and 24-26 for discussion of the parking problem.