

LAND USE
BOARD OF APPEALS
BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MAR 14 4 25 PM '83

CLARENCE RUEF,)
)
Petitioner,)
)
v.) LUBA No. 82-097
)
CITY OF STAYTON and STAYTON) FINAL OPINION
CANNING CO.,) AND ORDER
)
Respondents.)

Appeal fromm City of Stayton.

Donald M. Kelley, Silverton, filed a petition for review and argued the cause on behalf of Petitioner.

James L. Murch, Stayton, filed a brief and argued the cause for Respondent Stayton Canning Co.

BAGG, Board Member; COX, Board Member; participated in the decision.

REMANDED 3/14/83

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), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals a Resolution of Intent to Rezone
4 Property, Resolution No. 308, made by the City of Stayton. The
5 decision evidenced the city's intent to rezone certain property
6 from a Single-Family Dwelling (LD) designation to a Light
7 Manufacturing, Assembly and Storage designation (IL). The
8 rezoning takes effect upon the satisfaction of certain
9 conditions.¹ The effect of the decision is to permit the
10 Stayton Canning Co. to construct a warehouse on the property.
11 Petitioner asks that we reverse the decision on a number of
12 grounds.

13 STANDING

14 Petitioner Clarence Ruef alleges he owns real property some
15 70 feet south of the subject property on the same public
16 street. He asserts that the building to be constructed will
17 decrease property values of nearby residential property
18 including his own. Petitioner alleges the building will be
19 within sight, sound and smell of his property. This proximity
20 will create an inconvenience to petitioner and decrease the
21 "enjoyability" of his residence, he says. Petitioner further
22 claims that if material stored in the proposed warehouse will
23 be of a flammable nature, there will be an increase in fire
24 danger to his property.

25 Petitioner alleges he appeared at hearings about this
26 application and made known his objections.

27 Respondent challenges petitioner's standing. Respondent
28 argues petitioner has not made sufficient allegations of fact

1 to show that he has standing to appeal to this Board.
2 Respondent seems to concede that petitioner made the
3 "appearance" required under Or Laws 1979, ch 772, sec 4(3), as
4 amended by Or Laws 1981, ch 748, but posits that the claim for
5 standing is insufficient because the facts alleged simply do
6 not show that the petitioner has suffered or will suffer an
7 injury sufficient to grant him standing under existing case
8 law. Respondent urges that the appeal be dismissed "for
9 failure to adequately state how the City of Stayton Resolution
10 No. 308, which is the subject matter of this action, will
11 adversely impact the petitioner." Brief of Respondent at 2.

12 In order to have standing to bring a land use decision to
13 this Board for review, the person seeking the review must meet
14 the requirements of Or Laws 1979, ch 772, sec 4, as amended by
15 Or Laws 1981, ch 748:

16 "(3) Any person who has filed a notice of intent
17 to appeal as provided in subsection (4) of this
18 section may petition the board for review of a
19 quasi-judicial land use decision if the person:

20 "(a) Appeared before the local government or
21 special district governing body or state agency orally
22 or in writing; and

23 "(b) Was a person entitled as of right to notice
24 and hearing prior to the decision to be reviewed or
25 was a person whose interests are adversely affected or
26 who was aggrieved by the decision."

27 We believe the petitioner has adequately met these tests. In
28 considering petitioner's allegations, we will accept the facts
alleged as true only for the purpose of testing petitioner's
standing. Kenagy v Benton County, 3 Or LUBA 165; 56 Or App
567, 642 P2d 358; 294 Or 79, ___ P2d ___ (1983). Here,
petitioner claimed that he will be within sight and sound of

1 the property. Ordinarily, sight and sound proximity to the
2 subject property is sufficient to confer standing. Casey v
3 Dayton, 5 Or LUBA 96 (1982). Additionally, petitioner has
4 alleged that the changes in the neighborhood occasioned by the
5 structure will have the effect of decreasing petitioner's
6 property value. We believe such an effect, if true, would be
7 adverse to petitioner and sufficient to enable petitioner to
8 test the adequacy of the decision. See Warren v Lane County, 5
9 Or LUBA 227 and 6 Or LUBA 47 (1982). We conclude that
10 petitioner has standing to bring this appeal.

11 FACTS

12 The parcel subject to the Resolution of Intent to Rezone
13 measures 50 feet by 100 feet. It is bordered by residential
14 property to the east and south and by industrial property on
15 the north and west. If the subject property is rezoned as
16 requested, the Canning Co. will be able to combine it with a
17 neighboring parcel to the north in order to build a larger
18 storage building than would otherwise be possible.

19 The application for rezoning was first before the Stayton
20 Planning Commission on July 7, 1982, at which time the Planning
21 Commission voted to deny the rezoning. The applicant appealed
22 the denial to the City Council, and the city moved to approve
23 the rezoning subject to certain conditions. See footnote 1.
24 Petitioner herein filed a notice of intent to appeal with LUBA,
25 and that appeal was resolved by a stipulated dismissal, Ruef v.
26 Stayton (LUBA No. 82-080, October 1, 1982).

27 Additional hearings were held before the City Council, and
28 the present decision was made approving the resolution. The

1 resolution was made on November 1, 1982 and signed by the Mayor
2 on November 3, 1982.

3 ASSIGNMENT OF ERROR NO. 1

4 "The City Council erred in granting the
5 resolution of intent to rezone since that act violates
6 the Stayton Comprehensive Plan, which designates the
7 subject property for low density residential use."

8 Petitioner argues the City of Stayton has an acknowledged
9 comprehensive plan with an official zoning map showing the
10 property to be designated Single-Family Dwelling or LD.
11 Petitioner argues the Resolution of Intent to Rezone does
12 nothing with the comprehensive plan designation. Petitioner
13 argues that zoning decisions must be consistent with the
14 existing comprehensive plan, citing Baker v. City of Milwaukie,
15 271 Or 500, 533 P2d 772 (1975). As the property is designated
16 LD in the comprehensive plan, petitioner argues it cannot be
17 rezoned to Light Manufacturing, Assembly and Storage or IL.

18 Respondent counters that the Resolution of Intent to Rezone
19 will effect a zone change and a comprehensive plan map
20 amendment. However, respondent does not cite to any provision
21 of the zoning ordinance or comprehensive plan that would effect
22 such a change.

23 The Stayton Zoning Code provides for zone changes upon the
24 request of a property owner. Under Code Section 8.3020, zone
25 changes are permissible through the use of a resolution of
26 intent to rezone. The resolution of intent to rezone may
27 include conditions and becomes binding, under Section 8.3025,
28 when all the conditions have been fulfilled. The zone change
is final and effective under Section 8.3030 through the

1 passage of an ordinance by the city council. The Zoning Code
2 at 8.3030(4) provides,

3 "Whenever any premises are reclassified as to
4 zone or a new zone established, or boundary lines of a
5 zone changed, the official zoning map shall be
6 changed."

7 As we understand the comprehensive plan, quasi-judicial
8 amendments may be made in the same way as any "discretionary
9 land use application." Comprehensive Plan at 71. Though
10 somewhat unclear, we believe this provision is an adoption of
11 the zone change procedure contained in the Zoning Code.
12 Therefore, when a change in zone is made under the zoning
13 ordinance, the final result includes an ordinance and a change
14 in the official zoning map. That map is found in the
15 comprehensive plan at page 55, and we consider the map to be
16 part of the plan. We believe that a change in zone as provided
17 in the Zoning Code will result in a comprehensive plan change.
18 We, therefore, deny assignment of error no. 1.

19 ASSIGNMENTS OF ERROR NOS. 2 - 5

20 "ASSIGNMENT OF ERROR NO. 2

21 "The City Council erred in that its finding that
22 the proposed zone change is compatible with the
23 surrounding area is inadequate."

24 "ASSIGNMENT OF ERROR NO. 3

25 "The City Council erred in that they made no
26 finding that the intended use of the subject property
27 is compatible with the surrounding area."

28 "ASSIGNMENT OF ERROR NO. 4

"The City Council erred in that there is no
substantial evidence in the records which would
support a finding that the rezoning is compatible with
the surrounding area."

"ASSIGNMENT OF ERROR NO. 5

1
2 "The City Council erred in that there is no
3 substantial evidence in the record which would support
4 a finding that the intended use is compatible with the
5 surrounding area."

6
7 Petitioner argues that the Zoning Code Section
8 8.2035(3)(a), requires the city to make findings that the
9 proposed zone change and the proposed use of the property will
10 be compatible with the surrounding area.² Petitioner claims
11 the findings only say the proposed rezoning is compatible with
12 the surrounding area; the findings are silent on whether the
13 intended use of the property is also compatible. Petitioner
14 also says the findings make only the conclusion of
15 compatibility as to the rezoning, stating no facts that might
16 lead the decisionmaker to that conclusion. Further, petitioner
17 relates there is little evidence as to compatibility in the
18 record.

19
20 Respondent points out that property to the north and east
21 of the subject property is zoned IL, and property directly
22 across the street to the west is zoned MD (Medium Density
23 Residential District). The only property that is zoned LD is
24 property to the south. Compatibility in the area, then, must
25 consider the whole area of mixed uses, according to the
26 respondent. Respondent stresses the council was either to deny
27 the zone change and see a possible single-family residence
28 flanked on two sides by multi-story warehouse walls as would be
allowed under existing zoning, or approve the zone change with
a resolution of a intent to rezone and thereby control the use
of the property, and indeed beautify it. Respondent points to

1 restrictions on the rezoning that include building height,
2 maintenance of a 37 foot wide open space strip and requirements
3 for sound proofing to show that the council considered matters
4 of noise, traffic, visual impact and spacial and sound
5 buffering. All of these factors go to the matter of
6 compatibility, according to the respondent.

7 Respondent argues that the use of the property as a dry
8 storage warehouse was considered by the City Council in its
9 findings discussing physical aspects of the warehouse and the
10 requirement of soundproofing. Respondent claims that with
11 controlled development of the property, the community is
12 assured "of an attractive, lower scale building, and landscape
13 opened-space to buffer separating nearby residents, noise
14 control and traffic minimization." Brief of Respondent at 6.

15 The city's findings touching upon the issue of
16 compatibility are as follows:

17 "2. There is a public need for the Resolution of
18 Intent to rezone for the reasons that with the
19 Resolution, the community will observe a more
20 attractive, better designed building separated
21 from the nearest residence by 37 feet of
22 landscaped open space. This fosters land use
23 compatibility and makes industry and residences
24 better neighbors, a relationship for which there
25 is a public need. Stated conversely, there is a
26 public need to avoid the consequences of full
27 buildout as currently allowed (without buffer,
28 without design review control, without
landscaping and without noise insulation), or in
the alternative, the maintenance of the entire
parcel in a vacant state as the result of
residential use unmarketability. Such is viewed
to be a public as well as private disinvestment."

"3. The Council finds that the proposed rezoning by
Resolution is compatible with the surrounding
area for same reasons advanced in lc above, which
reasons are incorporated herein as if fully set
forth. Compatibility is found in the greater

1 visual, spatial and sound buffering created by
2 the open space strip. The building height
3 limitation, color designation and requirement of
4 attached building access will facilitate a
5 similarity of scale, enhanced visual
6 attractiveness and avoidance of the traffic and
7 noise of street access that may well have
8 attended construction on the Cannery's north lot
9 only."

6 We understand the city to believe that the project will be
7 compatible because conditions imposed on its construction
8 (buffering, etc.) will improve the area. In its analysis of
9 compatability, the city stresses this improvement rather than
10 the characteristics of the proposed use.³ We do not believe
11 this analysis adequately considers the compatibility of this
12 rezoning and the proposed use with the surrounding area. The
13 findings say there are nearby residences and there are
14 industrial uses, but we are not told what the industrial uses
15 are. We are also not told much about what this proposed use
16 is. For example, how intensive is the use, how noisy, how much
17 traffic will it generate and are these characteristics
18 "compatible" with existing structures and uses. We believe the
19 city is correct to view the condition imposed as relevant to
20 the issue of compatibility. That is, a compatibility
21 requirement may be fulfilled through the use of conditions that
22 enable an otherwise incompatible use to become compatible.
23 What we find lacking here, however, is a sufficient description
24 of the area and of the use of the structure to explain to a
25 reader how it is that the city finds the use, including the
26 conditions imposed, to be compatible as the ordinance requires.

27 We sustain that portion of assignments of error 2 through 5
28 which alleges the city failed to adequately explain how it is

1 that the proposed rezoning and use is compatible with the
2 surrounding area. We do not reach the issue of whether there
3 is sufficient evidence in the record to support a proper
4 finding of compatibility. See Hill v Union County Court, 42 Or
5 App 883, 601 P2d 905 (1979).

6 ASSIGNMENTS OF ERROR NOS. 6 - 8

7 "ASSIGNMENT OF ERROR NO. 6

8 "The City Council erred in that they made no
9 finding that other properly zoned land is not
available in sufficient quantity within the city to
satisfy current and projected needs."

10 "ASSIGNMENT OF ERROR NO. 7

11 "The City Council erred in that there is no
12 substantial evidence in the record which would support
a finding that other properly zoned land is not
13 available in sufficient quantity within the city to
satisfy current and projected needs."

14 "ASSIGNMENT OF ERROR NO. 8

15 "The City Council improperly construed the meaning
16 of the term 'available' as used in Section
8.2035(3)(b) of its development regulation."

17 Petitioner advises Code Section 8.2035(3)(b) requires the
18 city to find that there is not other properly zoned land
19 sufficient to satisfy current projected needs. See footnote
20 2. Petitioner complains the city's finding only says there
21 "appears" to be unavailability of land so zoned. Citing
22 Norvell.v. Portland Metropolitan Area, 43 Or App 849, 604 P2d
23 896 (1979), petitioner argues that the city's finding is not
24 the statement of fact required in the ordinance; the finding is
25 at best a conclusion and must fail. See Richland Enterprises
26 v. Woodburn, 6 Or LUBA 60 (1982).

27 Petitioner also claims that the record includes statements

1 that property is available for about \$4.00 a square foot.
2 Petitioner points to a statement of a Mr. Butler, representing
3 the Stayton Canning Co., that the cannery could build across
4 the street from the subject property. Petitioner argues there
5 is no discussion of alternative sites and no consideration of
6 the apparently available 120 acres of vacant, buildable,
7 industrial land plus 7 acres of redevelopable industrial land
8 in the city. Petitioner argues that without more information,
9 the findings simply are not supported by substantial evidence
10 and are contradicted by these facts.

11 Petitioner also complains that there is no basis for the
12 city's equation of "not available" in the zoning code with
13 "reasonably unavailable," the standard it apparently used when
14 making its finding. Additionally, the whole issue of cost of
15 the property is challenged by petitioner, claiming the
16 applicant holds large parcels of industrial land, and its
17 holdings necessarily influence the price of undeveloped land in
18 the city.

19 Respondent counters that the word "appears" means "clear to
20 the comprehension." Black's Law Dictionary, 4th Ed., (1968).
21 Respondent argues that the finding is sufficient because it
22 means that there is no other available land. In addition,
23 respondent urges the city has the power to interpret its own
24 ordinance, and its construction of the term "not available" in
25 the Code to mean "reasonably available" is therefore proper.

26 As to the question of whether sufficient facts exist in the
27 record to support the unavailability of sufficient properly
28 zoned property, respondent urges the city plan policies require

1 the city to try to protect the interest of the cannery by
2 creating buffers around the site. Respondent claims there is
3 no other property which would allow a buffer to the proposed
4 dry storage warehouse. This site is the only one which might
5 provide a buffer between industrial land to the north and
6 residential land to the south. Further, respondent does not
7 believe the city has a burden to show that each other piece of
8 industrial zoned land was not available in order to meet the
9 high standard of absolute unavailability.

10 The city's finding on unavailability of land is as follows:

11 "4. There appears to be an unavailability of properly
12 zoned land in sufficient quantity to satisfy
13 current and projected needs. Availability is
14 construed to mean reasonable availability, not
15 absolute availability. The Cannery has indicated
16 that unused IL zoned land in the area is either
17 not for sale or sells for a price which, relative
18 to the costs of utilizing the subject parcel,
19 makes these other parcels reasonably unavailable
20 to meet the need for cannery warehouse space.
21 The current and projected needs component has a
22 locational aspect to it. The Cannery has
23 indicated a need for warehouse space in this
24 area. More distant parcels are not reasonably
25 and economically utilized and are therefore not
26 available to meet the need for industrially zoned
27 land near functioning industry."

28 This finding is little more than a conclusion. However, it
includes a discussion of price and land location which are
relevant considerations to the issue of availability of land.
That is, the city has explained how it found other properly
zoned land not adjacent to the existing cannery location to be
not available. The finding is sketchy for its want of any
discription of inventory of available land or a complete
explanation of why the city concluded other properly zoned land

1 was not available, but the finding does address the "other
2 land" issue in Zoning Code Section 8.2035(3)(b).

3 Our concern about this finding is that it does not appear
4 to be adequately supported in the record. The evidence in the
5 record about other properly zoned land is that there is about
6 127 acres of such land. There are no facts about land prices
7 in general or land owned by Stayton Canning Co. from which the
8 city could conclude that other available property is too
9 expensive to be "available" for a warehouse as the use is
10 contemplated by the applicant. Similarly, though we may
11 surmise that the cannery would be better served by a warehouse
12 immediately adjacent to its existing operation, we are cited to
13 no facts in the record from which the city might draw that
14 conclusion. In short, evidence in the record tends to point to
15 the availability of other properly zoned property, not its
16 unavailability. Without a more complete discussion in the
17 findings as to why the city chose to believe other available
18 property was in fact not available, we can only conclude that
19 the city's finding is not adequately supported in the record.

20 We must also say that we do not agree with the city's
21 interpretation that "not available," as the term appears in
22 Code Section 8.2035(3)(b) means "reasonably unavailable." Had
23 the city intended to include a reasonableness standard to guide
24 it when testing whether sufficient industrial land exists for a
25 particular project, the city should have included that
26 reasonableness standard in its code. Without the
27 reasonableness standard written into the code, the city's case
28 by case application of a different standard results in an

1 attempt to change the terms of the ordinance without the
2 benefit of the proper legislative process. The time to make
3 such changes is during a legislative proceeding, not during a
4 quasi-judicial proceeding. Lovell v Independence, 37 Or App 7,
5 586 P2d 99 (1978). On remand, the city should either use the
6 "not available" standard written in the ordinance, or explain
7 its interpretation more fully so a reviewing body may conclude
8 that the city's interpretation is correct. Beinz v City of
9 Dayton, 29 Or App 761, 566 P2d 904, rev den (1977); Fifth
10 Avenue Corporation v Washington County, 282 Or 591, 581 P2d 50
11 (1978).

12 Assignments of error 6 through 8 are sustained in so far as
13 they allege the city failed to have an adequate factual base
14 for its finding on Zoning Code Section 8.2035(3)(b) and failed
15 to make use of the proper ordinance standard.

16 ASSIGNMENTS OF ERROR NOS. 9 AND 10

17 "ASSIGNMENT OF ERROR NO. 9

18 "The City Council erred in that it made no
19 finding that there was a public need for the intended
20 use of the subject property."

21 "ASSIGNMENT OF ERROR NO. 10

22 "The City Council erred in that there is not
23 substantial evidence in the record which would support
24 a finding that there is a public need for the intended
25 use,"

26 Petitioner recites that Code Section 8.2035(3)(c) requires
27 the city to make a finding that there is a public need for the
28 intended use. According to the petitioner, the city has simply
answered this requirement with discussions about the quality of
the building saying little or nothing about the use to which

1 the building will be put. In short, petitioner argues there
2 has been no showing of public need for the storage area.
3 Petitioner also takes issue with the city's reasoning that
4 there is a public need to avoid the consequences of
5 constructing a house on the subject property as permitted under
6 the existing zone. That is, the city appears to argue that
7 allowing the property to be developed as presently permitted
8 would result in adverse consequences. As we understand the
9 argument, petitioner argues such a condition arising out of the
10 ordinance does not constitute a public need.

11 Respondent argues the council did make a finding regarding
12 public need. Respondent points to discussion of a need for
13 storage space to accommodate an anticipated expansion.
14 Respondent points to portions in the record (but not in the
15 findings) wherein an expected increase of productivity of 15 to
16 20 percent and an associated need for more warehouse space is
17 discussed. Respondent also ties the city's equation of public
18 need to adequate buffers between the IL and LD zones as will be
19 provided along with the structure. Respondent says

20 "Admittedly, the cannery could have produced reams of
21 studies and logistic data which would supplement the
22 evidence it submitted as to the need for more
23 warehouse space; however, these studies would have
24 been at great expense to the cannery and only provided
25 supplemental evidence. The council had before it
26 sufficient evidence with which to make its finding of
27 need for the intended use on the intended site
28 particularly when coupled with the above referenced
considerations, i.e. Restriction (R1)." Respondent's
Brief at 11.

26 The "Restriction" apparently refers to the conditions imposed
27 on the development including soundproofing, landscaping, height

1 limitations and other conditions. See footnote 1 supra.

2 The city does not define what it means by public need, but
3 we understand from the city's findings that the city equates
4 public need with compliance with its comprehensive plan. The
5 city believes a more attractive neighborhood created by the
6 building with its 37 feet of open space equals public need. We
7 do not believe that is the whole of the definition of public
8 need as used in the Code.

9 We recognize that "public need" is a very difficult matter
10 to define. See DLCD v Tillamook County, 3 Or LUBA 138 (1981).
11 It is not as though the issue had never been before us,
12 however. In Friends of Linn County v. Lebanon, 1 Or LUBA 50
13 (1980), we discussed public need in terms of the community's
14 need for an electronics facility that could employ a
15 considerable number of citizens. In that case, public need was
16 the community's need for a diversification of its economy and
17 greater employment. Here, the city seems to have equated
18 public need not with the need for the particular use, but with
19 a need for landscaping and buffering in this particular
20 neighborhood. We do not believe that discussion is sufficient
21 to show that there is a need for the intended use, that is, the
22 warehouse. For example, we are unable to find any discussion
23 of any need that may exist for the community to support the
24 cannery. There is, however, a statement in the findings that
25 the cannery has a need for warehouse space. That is the
26 cannery's need, however, and though the cannery's need may also
27 be the community's need, that link is not established in the
28 findings. We, therefore, believe the city has failed to comply

1 with its ordinance requiring it to show that a public need
2 exists for the use.⁴

3 Assignments of error nos. 9 and 10 are sustained insofar as
4 they allege the city failed to make adequate findings on the
5 public need for the proposed zone change and use.

6 ASSIGNMENTS OF ERROR NOS. 11 AND 12

7 "ASSIGNMENT OF ERROR NO. 11

8 "The City Council erred in that there is no
9 finding that a reasonable use cannot be made of the
property as it is currently zoned."

10 "ASSIGNMENT OF ERROR NO. 12

11 "The City Council erred in that there is no
12 substantial evidence in the record which would support
a finding that a reasonable use cannot be made of the
property as currently zoned."

13 Petitioner here argues that it is incumbent upon the
14 applicant to show the parcel to be rezoned could not be used
15 for residential purposes.

16 We are aware of no such requirement existing in the
17 ordinance. Assignments of error 11 and 12 are denied.⁵

18 ASSIGNMENT OF ERROR NO. 13

19 "The City Council erred in that it did not
20 indicate errors or omissions in the written findings
made by the Stayton Planning Commission as required by
21 SDR Section 8.2045(2)(c)."

22 Petitioner says Code Section 8.2045(2)(c) requires the City
23 Council to indicate the errors or omissions in the written
24 findings made by the Planning Commission should the City
25 Council overturn the Planning Commission. Petitioner claims
26 there is no such discussion in these findings. Respondent
27 counters that the cited portion of the ordinance relates only
28 to a review on the record and does not apply to a case on which

1 there is a de novo appeal hearing.

2 Stayton Zoning Code Section 8.2045(2)(c) requires the City
3 Council to address the findings of the Planning Commission. We
4 see nothing in the ordinance that allows the City Council to
5 avoid this responsibility. However, we do not believe this
6 error is fatal to the city decision because we fail to see how
7 the petitioner has been prejudiced thereby. Petitioner has
8 enjoyed a full hearing on the merits before the City Council;
9 and, therefore, any failure to address matters raised or
10 discussed by the Planning Commission does not prejudice the
11 petitioner.

12 Assignment of error no. 13 is denied.

13 ASSIGNMENT OF ERROR NO. 14

14 "The City Council erred in accepting and
15 approving the application of Stayton Canning Co. which
16 was insufficient according to the requirements of the
17 City of Stayton in that it did not contain a certified
18 list of property owners within two hundred fifty (250)
feet of the subject property, and did not contain a
vicinity map of the affected area showing ownerships,
streets, landmarks and other identifying features."
(Emphasis in original).

19 Petitioner's argument is that the application is defective
20 since it does not include a certified list of property owners
21 within 250 feet of the subject property. The list is required
22 on the form provided by the city administrator and is,
23 therefore, made a requirement of application through Code
24 Section 8.2025(1).

25 We note that there was a line drawn on a map in the
26 application which may have been used to show property owners
27 within the 250 foot limit. However, failure to list
28 individuals living within the line with particularity does not

1 appear to us to be an issue that prejudices a petitioner who
2 took part in the proceedings. Assignment of error no. 14 is
3 denied.

4 ASSIGNMENT OF ERROR NO. 15

5 Assignment of error no. 15 states:

6 "The City Council erred in that there is no
7 substantial evidence in the record which would support
8 a finding that granting the application created an
adequate buffer around the site as required by the
City of Stayton's Comprehensive Plan Industrial Policy
No. 3."

9 Petitioner argues that the Resolution of Intent to Rezone
10 does not create an adequate buffer around the site as required
11 in the City of Stayton's Comprehensive Plan Industrial Policy
12 No. 3. Petitioner argues that once the zoning is complete on
13 this property, any open space required in the resolution may be
14 filled up with industrial uses thereby removing the buffer.

15 Respondent says petitioner misreads the language in the
16 Resolution requiring that any site plan preserve a portion of
17 the property as open space. Respondent argues that once the
18 site plan required by this resolution is approved, it is
19 binding upon the property; and, there will be no departures
20 from the approved plan.

21 We agree with the respondent. We do not believe the
22 Resolution of Intent to Rezone may be violated by the applicant
23 once the rezoning is granted. The conditions of the rezoning,
24 including the site plan, become conditions precedent to the
25 actual zone change on the property. The official zoning map
26 bears a notation on all such property, that it is "subject to
27 approved site plan." See Stayton Zoning Code Section

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

8.3023(1). The ordinance as it is structured requires the conditions of the rezoning to follow the property. We deny this assignment of error.

The decision of the City of Stayton is remanded for proceedings not inconsistent with this opinion.

FOOTNOTES

1
2
3 1
4 The city declared its intent to rezone upon the following
5 conditions:

- 6 "1. That improvement of the lot be in accordance with
7 applicant's building plans showing a warehouse
8 situated on the northerly 13 feet of the property.
9
10 "2. That the color of the building be light green.
11
12 "3. That the building be no higher than the existing
13 concrete wall abutting the property to the west, and
14 that the building slope toward the street.
15
16 "4. That the only entrance into the building be from an
17 attached building to the west.
18
19 "5. That the East and South walls be insulated for
20 soundproofing equal to or better than that found in
21 the existing East wall of the building to the south
22 (not to exceed 50 decimials).
23
24 "6. That a site plan be approved by the Council showing,
25 at a minimum, the location of proposed structures,
26 access and landscaping. Said site plan shall reserve
27 the southerly 37 feet of the property as permanent
28 open space. Once approved, the site plan shall be
binding on the property and no departures from the
approved site plan may be made except pursuant to a
Council-approved amendment, variance, or release from
site plan restrictions."

19 2
20 Under the ordinance, the zone change must meet these
21 standards:

- 22 "(a) The proposed zone change and intended use is
23 compatible with the surrounding area.
24
25 "(b) Other properly zoned land is not available in
26 sufficient quantity within the City to satisfy current
27 projected needs.
28
29 "(c) There is a public need for the intended use.
30
31 "(d) Reasonable use cannot be made of the property as it is
32 currently zoned.
33
34 "(e) There are adequate urban services to serve the
35 possible use under the zone proposed." Stayton

1 Zoning Code 8.2035(3)(a).

2
3

4 We note it is not really clear in the city ordinance
5 whether the city is to test a rezoning against the zones in the
6 surrounding area or what exists in the surrounding area. Since
the city ordinance simply requires that the zone change and the
use be "compatible with the surrounding area," we can only
conclude that the city is required to consider what exists on
the ground in the surrounding area.

7
8

9 We do not reach the issue of whether or not there is
10 substantial evidence in the record to support a finding that
11 there is a public need for the intended use. We note there is
commentary in the record at page 26 regarding anticipated
growth of the cannery, but we do not find that discussion
carried over into the findings. See Hill v. Union Co. Ct., 42
Or App 883, 601 P2d 905 (1979).

12
13

14 The former ordinance required a showing of no reasonable
15 use under existing zoning. The former ordinance was repealed
16 in April of 1981.