

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from an order of the city interpreting
4 the meaning of "accessory use" as used in the city's ordinance.

5 FACTS

6 Petitioner owns property zoned for industrial use and
7 proposes to lease it to Costco Wholesale Corp. (Costco).
8 Costco's method of doing business¹ is to sell merchandise to
9 its "members" out of large industrial style warehouses. There
10 are two classes of members. Customers with a current business
11 license are "wholesale members." The second class, "group
12 members," are employees of governmental, utility, financial and
13 other institutions. We understand group members purchase goods
14 for their personal use.

15 Merchandise is stacked in unopen or partially opened
16 cartons on industrial style shelving or pallets. No
17 advertising is utilized. Stores are open seven days a week for
18 a total of 60 hours. Wholesale members pay a posted price on
19 items purchased, while group members pay 5 percent above the
20 posted price.

21 There are more group member customers than wholesale member
22 customers, but the dollar amount of sales to wholesale members
23 is greater. Costco stores in other areas average 54.4 percent
24 of sales volume to the wholesale members.

25 In the Industrial Park (IP) zone where petitioner's
26 property is located, wholesale activities are a permitted use.

1 Retail sale facilities are allowed only for specific types of
2 products, such as equipment sales. However, accessory
3 structures and uses associated with permitted uses are also
4 permitted.

5 Petitioner requested an interpretation by the city that
6 Costco is predominantly engaged in wholesale activities and
7 that its retail sales are an accessory use under the
8 ordinance. The requested interpretation would allow Costco to
9 operate as a permitted use. However, the planning director
10 concluded Costco's retail sales were not merely accessory to a
11 permitted use. His decision was appealed to the planning
12 commission which upheld the planning director. The matter was
13 then appealed to the city council which held the retail portion
14 of Costco's business did not constitute an accessory use under
15 the ordinance.

16 ASSIGNMENT OF ERROR

17 Petitioner's sole assignment of error is that the city
18 erred in its interpretation of "accessory" use. "Accessory
19 structure or use" is defined in the ordinance as:

20 "A structure or use incidental, appropriate and
21 subordinate (sic) to the main structure or use."
Section 5.3 City of Beaverton Development Code.

22 Petitioner says the terms in this definition are not
23 ambiguous, and the city's interpretation is contrary to their
24 well established meanings. In particular, petitioner faults
25 the city's interpretation of "incidental" and "subordinate"²
26 as used in the definition.³

1 The city made the following findings:

2 "Included in the terms 'incidental' and 'subordinate'
3 is the definitional element that the incidental and
4 subordinate use is extremely minor in nature compared
5 to the main permitted use. Retail sales should be a
6 small portion of overall sales, something
7 significantly less than the 40 to 49 percent which
8 Costco's retail sales are based on its total sales
9 volume." Record at 3.⁴

10 Petitioner states the magnitude of the accessory use
11 relative to the primary use of the property is the critical
12 issue in applying the ordinance. Citing precedents from other
13 jurisdictions, petitioner says "incidental" and "subordinate,"
14 as used in the ordinance, require only that retail sales volume
15 be less than, or secondary to, wholesale volume to qualify as
16 an accessory use. Petitioner then says the city was wrong in
17 interpreting accessory use to mean the incidental and
18 subordinate use must be "extremely minor" compared with the
19 primary use.

20 We cannot agree with petitioner that the terms "incidental"
21 and "subordinate," which are critical in the city's definition,
22 are unambiguous and have the clearly limited meanings urged by
23 petitioner. Webster's Third New International Dictionary
24 defines incidental as follows:

25 "(1): subordinate, nonessential, or attendant in
26 position or significance...."

Also, "incidental" is compared with "accidental" in
Webster's New Dictionary of Synonyms (1978). The comment notes:

"Incidental may or may not imply chance; it typically

1 suggests a real and often designed relationship, but
2 one which is secondary and nonessential."

3 Webster's Third New International Dictionary also defines
4 subordinate as:

5 "(1): Placed in a lower order, class, rank; holding a
6 lower or inferior position..."

7 It is apparent these terms are not mathematically precise.
8 Concededly, they might be given the meaning contended by
9 petitioner. That is, an incidental and subordinate use is one
10 measurably less than a primary or predominant use, however
11 slight the difference. However, it is also possible to define
12 the terms, as the city did, to describe a use of substantially
13 lesser magnitude than the principal use. Another variant is to
14 interpret "incidental" solely in terms of whether the secondary
15 use is essential to the primary use. Because the terms are
16 capable of such different meanings, they must be considered
17 ambiguous, contrary to petitioner's claim. DeWolfe v.
18 Clackamas Co., 6 Or LUBA 249 (1982).

19 Interpretation of ambiguous ordinance language involves a
20 question of law within LUBA's jurisdiction. ORS 197.835(8);
21 Westhills and Island Neighbors v. Multnomah County, 68 Or App
22 782, 683 P2d 1032 (1984). Nevertheless, the courts and this
23 Board may defer to the interpretation given by a city or county
24 unless the interpretation is unreasonable or contrary to the
25 express language of the ordinance. Fifth Avenue Corp. v.
26 Washington Co., 282 Or 591, 581 P2d 50 (1978); DeWolfe v.

1 Clackamas County Board of Commissioners, 66 Or App 580, 674 P2d
2 1191 (1984); Alluis v. Marion County, 64 Or App 478, 668 P2d
3 1242 (1983); Brady v. Douglas County, 7 Or LUBA 251 (1983).

4 In determining whether the city's interpretation is
5 reasonable and consistent with the city's Development Code, we
6 look to the code provisions stating the purpose of the IP
7 zone. Section 52.1 of the Beaverton Development Code provides:

8 "The Industrial Park District is intended to provide
9 sites for manufacturing, distribution and industrial
uses."⁵

10 Given the stated purpose to provide for industrial uses, as
11 contrasted with retail uses, together with the ambiguity of the
12 terms used in the definition of accessory use, the city's
13 decision was within its range of discretion and not contrary to
14 the terms of the ordinance.

15 We therefore deny petitioner's assignment of error.

16 Affirmed.

17
18
19
20
21
22
23
24
25
26

FOOTNOTES

1
2
3
4 1
5 The characteristics of Costco's business and its method of
6 operation are not explained in the findings. The facts recited
7 in our opinion are found in the record. We do not understand
8 respondent to contest the facts presented by petitioner at the
9 city's hearings.

10
11 2
12 "Subordinate" is enclosed with quotation marks to indicate
13 the term interpreted by the city in the final order. The word
14 is spelled incorrectly ("subordinant") in the ordinance.

15
16 3
17 The city found Costco's retail sales activities to be
18 "appropriate" as used in the definition of accessory uses.

19
20 4
21 The city's findings note the existence of other methods of
22 measuring the relationship between wholesale and retail
23 activities in a mixed use such as Costco's facility, such as
24 the number of customers for each purpose. However, the only
25 findings made compared the dollar volume of sales in each
26 category. Because we believe these findings are adequate to
sustain the city's decision, we need not consider whether other
bases exist in the record to support it.

27
28 5
29 We note the Development Code defines the purpose of another
30 industrial zone to allow retail uses:

31 "The Campus Industrial or 'CI' is intended to provide
32 areas for the combining of light manufacturing, office
33 and limited retail uses in an 'employment activity
34 center' concept." Section 52.2 Beaverton Development
35 Code.