BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BILL BECK, ELZA BECK, JOHN BEGIN, TAMI BEGIN, JACK BESSO, JUDITH BESSO, JOANNE BEYER, O.F. BEYER, MARTHA BEYER, NICKI HEATH, DAVID KEHL, ELIZABETH KEHL, BYRON RICHARDSON, LINDA RICHARDSON, KEN SEEGER, JOSEPHINE VELTRI, H.D. WEITMAN, MARTHA WEITMAN, ROBERT WEEKS and ELVA WEEKS,	)	LUBA No. 90-056
Petitioners,	)	FINAL OPINION AND ORDER
vs.	)	
CITY OF TILLAMOOK,	)	
Respondent.	)	

Appeal from City of Tillamook.

William Beck, Tillamook, filed the petition for review and argued on his own behalf.

Douglas Kaufman, Tillamook, filed the response brief and argued on behalf of respondent.

Ted Grove, Clatskanie, represented Community Action Team.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 10/25/90

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the Tillamook City Council approving a conditional use permit for an emergency shelter home for the homeless.

MOTION TO INTERVENE

Community Action Team (CAT), the applicant below, moves to intervene on the side of respondent. Petitioners object to CAT's motion on the basis that it is untimely.

Petitioners filed their Notice of Intent to Appeal, and served CAT with that notice, on April 23, 1990. After the record for this appeal was settled, the respondent's brief was due on August 31, 1990. Through an agreement between petitioners and the city, the time to file the respondent's brief was extended to September 15, 1990. CAT moved to intervene on September 12, 1990, three days before the extended deadline for filing the respondent's brief. CAT did not, however, file its response brief on September 15, 1990. Furthermore, CAT did not appear at oral argument on September 26, 1990, and failed to file its response brief until September 28, 1990, two days after the oral argument for this appeal was held.

CAT offers no explanation why it waited to file its motion to intervene until nearly five months after the notice of intent to appeal was filed, or why it failed to file a brief until after oral argument.

OAR 661-10-050(2) states:

> "* * * a motion to intervene shall be filed as soon as is practicable after the Notice of Intent to Appeal is filed. * * * "

OAR 661-10-050(3)(b) requires an intervenor-respondent's brief to be filed:

> "* * * within the time for filing a respondent's brief * * * in OAR 661-10-035."

Additionally, OAR 661-10-050(1) states that while the Board recognizes the moving party's status as an intervenor when a motion to intervene is filed, "the Board may deny that status at any time prior to the issuance of its final order." Finally, OAR 661-10-005 provides authorization for the Board to overlook technical violations of its rules, if such violations do not affect the substantial rights of parties or interfere with the Board's review of the appealed decision.

We do not believe CAT's motion to intervene, filed nearly five months after the Notice of Intent to Appeal was filed, can reasonably be considered to have been filed "as soon as is practicable after the Notice of Intent to Appeal [was] filed." OAR 661-10-050(2). Accordingly, we may only allow CAT's motion to intervene if we may consider its untimely filing a technical violation of our rules which does not affect the substantial rights of the parties. OAR 661-10-005; Columbia Steel Castings v. City of Portland, ___ OR LUBA ___ (LUBA No. 89-058, Order on Motion to Intervene,

March 9, 1990), slip op 4.

The substantial rights of the parties to which OAR 661-10-005 refers, are the rights to (1) the speediest practical review, (2) a reasonable opportunity to prepare and submit argument, and (3) a full and fair hearing. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988).

We believe that granting CAT's motion to intervene will both affect the substantial rights of the parties, and interfere with issuance of our final order. Specifically, neither petitioners nor respondent have had an opportunity to respond to the arguments contained in CAT's brief, a right which is among the parties' substantial rights referred to above. If the motion to intervene is granted, petitioner and respondent would be entitled to an opportunity to present argument in response to intervenor's brief. Provision of such an opportunity to respond to the brief would interfere with the issuance of the final opinion in this case, in that it would necessitate further delays. Under these circumstances, the tardy filing of the motion to intervene is not an excusable technical violation of our rules under OAR 661-10-005.

CAT's motion to intervene is denied.

FACTS

This is the second time a city decision to approve the subject emergency shelter home for the homeless has come

before this Board. In Beck v. City of Tillamook, ___ Or LUBA ___ (LUBA No. 89-096, January 8, 1990) (Beck I),[1] we stated:

> "[The Community Action Team (CAT)] currently operates a homeless shelter with capacity to provide temporary housing for up to twelve people and permanent housing for one employee as live-in staff.
>
> "In 1988, [CAT] applied for and obtained from the federal Department of Housing and Urban Development a development block grant. The funds from the block grant were to be used to purchase a different site for a larger capacity homeless shelter. Thereafter, [CAT] entered into an earnest money agreement to purchase the subject property and also applied for a conditional use permit for a homeless shelter. The new shelter is proposed to house up to twenty people and one live-in staff person.
>
> "The subject property is designated Downtown Commercial by the Tillamook Comprehensive Plan and is zoned Central Commercial (C-C). The land to the east and southwest of the subject property is zoned C-C. The land to the south and west is apparently also zoned C-C, but is occupied by what the city refers to as 'non-conforming' residential development. The city's findings do not identify the zoning of the proposed homeless shelter. * * *" (Record citations and footnotes omitted.) Beck I, slip op at 2-3.

We remanded the city's decision in Beck I on essentially four bases. We determined the city had impermissibly shifted the burden of proof to petitioners to establish that applicable approval criteria had not been

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[1]The parties agree that the record in this appeal includes the record in Beck I.

complied with, that the city's findings did not support its conclusions, that the city did not identify relevant approval criteria or explain how the conditions it imposed satisfied relevant approval criteria, and that it was unclear whether the city applied applicable standards regarding parking and landscaping.

After our remand in Beck I, the city council held a public hearing and considered additional evidence and argument. The city council then adopted the challenged order authorizing the proposed homeless shelter. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Off-street parking: the city still maintains that four parking spaces are adequate, citing only TCZO Section 25, 'Welfare or Correctional Institutions' as the criteria for the decision."

The parking requirements at issue in this assignment of error are found in Tillamook City Zoning Ordinance (TCZO) 25. TCZO 25.3(b) provides that if the capacity of a building is increased by more than 50%, the offstreet parking requirements of TCZO 25.4 apply.[2] TCZO 25.4 states the required number of offstreet parking spaces for various uses. A homeless shelter is not a listed use in TCZO 25.4. If a proposed use is not among the listed uses, TCZO 25.4(h)

[2]No party disputes that the capacity of the subject building will be increased by 50%, or that TCZO 25.4 states applicable offstreet parking requirements.

provides:

> "Other uses not specifically listed above shall furnish parking as required by the Planning Commission. The Planning Commission shall use the above list as a guide for determining requirements for said other uses."

With regard to the uses listed in TCZO 25.4, the city determined that the proposed homeless shelter was most analogous to a "welfare or correctional institution" for which one offstreet parking space is required for each "five beds for patients or inmates." TCZO 25.4(c). Because the proposed homeless shelter will have 20 beds, 4 offstreet parking spaces are required by the challenged decision pursuant to TCZO 25.4(c).

As we understand it, petitioners challenge only the evidentiary support for the city's determination that the offstreet parking requirements of TCZO 25.4(c) are applicable. Petitioners do not cite another TCZO 25.4 use category as providing a more suitable analogy to the proposed shelter and its projected parking needs.[3] Accordingly, we determine whether the city's reliance on the

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[3]Specifically, petitioners do not contend that the characteristics of the proposed homeless shelter are materially different from the characteristics of a "welfare institution." Petitioners only contend that there is evidence which shows that the proposed homeless shelter will have different parking requirements than are expressed in TCZO 25.4(c) as adequate for a welfare institution. Petitioners do argue that the city erred by considering only client cars and not the shelter manager's car. However, failure to include the shelter manager's car in a determination of actual parking utilization does not establish that the city improperly applied TCZO 25.4(c). TCZO 25.4(c) requires only that there be "one [parking] space per 5 beds for patients or inmates." (Emphasis supplied.)

parking requirements for welfare institutions to establish the parking requirements for the proposed homeless shelter is supported by substantial evidence in the record.

Petitioners cite evidence in the record establishing that the existing homeless shelter, which accommodates half as many homeless people as the proposed shelter and is operated by the applicant for the proposed shelter, has as many as 6 associated cars parked there at any given time. According to petitioners, because the proposed homeless shelter will house twice as many homeless people, it should have twice as many parking spaces as the existing shelter uses, or 12 parking spaces. Petitioners reason because there is evidence that 12 cars per day might be associated with the proposed shelter, the proposed homeless shelter cannot be similar to a welfare institution which would only require, and presumably need, 4 parking spaces under TCZO 25.4(c).

Respondent cites evidence in the record that most of the homeless clients of the proposed facility will not own or have access to an automobile. Respondent also cites the results of a survey, conducted by the director of the proposed (and the existing) homeless shelter, which establishes the parking utilization of the existing homeless shelter over a period of a month. Respondent states this survey indicates that during the surveyed month, an average of 2.5 cars per day were parked at the shelter, including

the shelter manager's car. Respondent argues that under TCZO 25.4(c) only client cars are counted in determining parking spaces. Respondent states the city correctly reasoned from this evidence that if there is an average of 1.5 client cars parked at the existing homeless shelter per day, at doubled capacity the proposed homeless shelter can reasonably be expected to average 3 client cars per day. Respondent argues that this constitutes substantial evidence that the 4 parking spaces mandated by the TCZO 25.4(c) standards applicable to welfare institutions, are appropriately applied in this case.

TCZO 25.4(h) provides that where a particular use is not included in the uses listed in TCZO 25.4, the city is required to apply that list as a guide for determining the proper number of parking spaces for the unlisted use. TCZO 25.3 requires provision of offstreet parking as provided in TCZO 25.4. We believe that under these TCZO provisions, while the city is required to provide for offstreet parking and is also required to consider the parking requirements for listed uses, the city is given considerable discretion in establishing parking requirements for unlisted uses under TCZO 25.4(h).

Petitioners are correct that there is evidence in the record suggesting the proposed homeless shelter may have more than 4 associated cars parked there at any given time. However, the city cites conflicting and believable evidence

that an average of 3 parked client cars per day may also reasonably be anticipated at the proposed shelter. The choice between conflicting believable evidence belongs to the city, and we will not disturb that choice. Vestibular Disorders v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-112, April 6, 1990), slip op 11.

We conclude there is substantial evidence in the whole record to support the city's determination that the offstreet parking standards applicable to a welfare institution may reasonably be applied to establish offstreet parking requirements for the proposed homeless shelter. Petitioners have not established any basis for disturbing the city's application of the TCZO 25.4(c) welfare institution offstreet parking requirements to establish the offstreet parking requirements for the proposed homeless shelter.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The city impermissibly shifted the burden of proof to petitioners to provide evidence that the proposed use would not violate the relevant approval criteria."

Petitioners argue that the city improperly shifted the burden of proof with regard to the following purpose statement in TCZO 27:

> "It is important that conditional uses be properly located with respect to the objectives of the ordinance and the effect to the surrounding properties."

Petitioners also argue that the city ignored evidence they submitted, which they allege establishes that homeless shelters generally have deleterious effects on surrounding properties.

We stated in Beck I:

> "The conditional use permit provisions of TCZO section 27 expressly provide that conditional use permit applications may be approved, approved with conditions, or denied. However, although TCZO section 27 specifies a number of considerations that may form the basis for the imposition of conditions, it does not clearly specify approval standards which, if not met, may result in denial of the application. TCZO section 27(5)(a) comes the closest to identifying mandatory approval criteria:
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> > "'In order to grant any conditional use, the Planning Commission must find that the establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be in violation of the appropriate regulations and standards contained in this ordinance.'
>
> "We understand TCZO section 27 to simply identify the types of considerations that may be applied to impose conditions and to provide, in addition, that a conditional use permit may be approved or denied based on mandatory approval criteria located elsewhere in the zoning ordinance." (Footnotes omitted.) Beck I, slip op at 10-11.
>
> "* * * the purpose statement of TCZO section 27(1) is not a mandatory approval criterion. * * *" Id., slip op at 21.

As we stated in Beck I, the language used in the purpose statement of TCZO 27 states general objectives only, and does not purport to apply as an independent approval

standard. Bennett v. City of Dallas, ___ Or LUBA ___ (LUBA No. 89-078, February 7, 1989), aff'd 96 Or App 645 (1989); Stotter v. City of Eugene, ___ Or LUBA __ (LUBA No. 89-037, October 10, 1989).

Because the TCZO 27 purpose statement is not a approval standard, petitioners' contention that the city ignored evidence which allegedly establishes that the proposal is not in compliance with that purpose statement, provides no basis for reversal or remand of the city's decision. Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The city did not explain how the imposition of conditions satisfies the relevant approval criteria."

This assignment of error is premised on the assumption that the TCZO 27 purpose statement, and Tillamook Comprehensive Plan (plan) polices 21 and 22, are mandatory approval criteria.[4] However, we determined supra, that the

[4]The city argues the issue of compliance with plan policies 21 and 22 was resolved in favor of the city in Beck I. The city contends it was not required to, and did not, reconsider those issues in the appealed decision. The city is correct that on remand from LUBA it is entitled to limit its consideration of a request for land use approval to the issues which were the basis for the remand. Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 90-031, August 22, 1990), slip op 19; Hearne v. Baker County, 89 Or App 282, 748 P2d 1016, rev den 305 Or 576 (1988); Mill Creek Glen Protection Assoc. v. Umatilla County, 88 Or App 522, 746 P2d 728 (1987). However, in Beck I we remanded the city's prior decision in part on the basis that the city had impermissibly shifted the burden of proof to

TCZO 27 purpose statement is not an approval standard. Accordingly, both city findings adopted to address, and conditions designed to implement, the purpose statement of TCZO 27 are surplusage, and do not provide a basis for reversal or remand of the city's decision.

With regard to plan policies 21 and 22,[5] we stated in Beck I:

> "We interpret these policies to encourage conversion to commercial uses but not to require it. Therefore, even if the proposed homeless shelter is not a commercial use, within the meaning of plan policies 21 and 22, this provides no basis for reversal or remand of the city's decision." Beck I, slip op at 22.

We adhere to our determination in Beck I that plan policies 21 and 22 do not establish approval standards for conditional use permits. Accordingly, petitioners'

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petitioners. Where we remand a decision in part on the basis that the city has improperly shifted the burden of proof to petitioners, the city cannot limit its consideration on remand to only the specific issues which are the other bases for the remand.

[5]Plan policy 21 provides:

> "The downtown area of Tillamook shall be permitted to expand through conversion and replacement of non-commercial uses. The area of expansion is illustrated by the existing and proposed Plan maps. Retail uses are encouraged to remain in the downtown area to maintain its vitality.
>
> "Currently, 21 acres of land are devoted to commercial activity in the downtown area. The comprehensive plan designated 20 additional acres located generally, west, south and east of the existing downtown."

Plan policy 22 provides:

> "20 additional acres, located generally west, south and east of the existing downtown, shall be designated central commercial."

contentions under this assignment of error regarding plan polices 21 and 22 do not furnish a basis for reversal or remand of the city's decision.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The city had decided this case, site specific, without public notification in December of 1988, and is thereby improperly hearing and deciding the appeal of its own decision."

Petitioners argue the city predetermined how it would resolve an application for a homeless shelter on the subject property when it approved the applicant's application for a Department of Housing and Urban Development block grant in December 1988. Petitioners also argue that the city's alleged bias in favor of approval of the proposed shelter is evidenced by the manner in which the city council deliberated and weighed the evidence.

We stated in Beck I:

> "* * * The fact that the city approved federal funds for [the proposed] homeless shelter project does not disqualify the city council for bias. See Oatfield Ridge Residents v. Clackamas County, 14 Or LUBA at 768 ('[a]gency sponsorship of a project may or may not earn it the support of elected officials when they review it for conformance with land use requirements').
>
> "Nothing to which we have been cited regarding approval of the block grant or the conduct of the city hearings below persuades us that the city was incapable of making a fair and impartial decision. We do not believe that by approving a federal grant the city committed itself to approve the subsequent conditional use permit for the proposed

> homeless shelter at the subject location without proper consideration of applicable land use criteria. Furthermore, there is no suggestion that either the mayor or any members of the city council would derive any private financial gain from approval of the proposed homeless shelter." Beck I, slip op at 25-26.

Petitioners' arguments regarding bias in this appeal are essentially the same as those advanced in Beck I. Petitioners have not established that the above quoted determination from Beck I is erroneous here, and we believe it is valid as applied to the subject appeal.

The fourth assignment of error is denied.

The city's decision is affirmed.