BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

19TH STREET PROJECT ASSOCIATION II, and SAM CIRANNY, Petitioners, vs. CITY OF THE DALLES, Respondent, and MID-COLUMBIA MEDICAL CENTER, Intervenor-Respondent.	LUBA No. 90-053 FINAL OPINION AND ORDER

Appeal from City of The Dalles.

M.D. Van Valkenburgh, The Dalles, filed the petition for review and argued on behalf of petitioners. With him on the brief was Van Valkenburgh & Hoffman, P.C.

Gene E. Parker, The Dalles, and James M. Habberstad, The Dalles, filed a response brief on behalf of respondent and intervenor-respondent. With them on the brief was Dick, Dick & Habberstad. Gene E. Parker argued on behalf of respondent. James M. Habberstad argued on behalf of intervenor-respondent.

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

REVERSED 02/11/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a resolution of The Dalles City Council approving a conditional use permit for operation of a child day care center in a Single Family Residential (R-1) zone.

MOTION TO INTERVENE

Mid-Columbia Medical Center moves to intervene on the side of respondent in this appeal. There is no objection to the motion, and it is granted.

FACTS

Intervenor-respondent Mid-Columbia Medical Center (intervenor) operates a hospital complex in the City of The Dalles, located on several acres of land south of East 19th Street (hospital site). The hospital site is zoned R-1. Intervenor's hospital operations are allowed in the R-1 zone under a Public/Quasi-Public Facilities overlay district approved by the city in 1981. The master site plan approved as part of the overlay district approval showed a day care facility on the hospital site, and a day care facility began operating on the site in 1982.

In June, 1989, intervenor applied to the city for an amendment to the master site plan to reflect the proposed construction of a medical office building on the day care facility site, and relocation of the day care facility to another portion of the hospital site. The city approved the

master site plan amendment. Subsequently, intervenor decided it would not be economically feasible to relocate the day care facility on the hospital site.

The area to the north of East 19th Street, across from the hospital site, is zoned R-1 and consists primarily of single family dwellings. On October 11, 1989, intervenor applied for a conditional use permit to operate a child day care facility for up to 36 children in a then vacant single family dwelling located on the north side of East 19th Street. The proposed day care facility will be operated by a non-resident provider.

On December 7, 1989, after a public hearing, the planning commission approved the requested conditional use permit. That decision was appealed by petitioners. Because petitioners sought to introduce new evidence, the matter was referred back to the planning commission, which conducted another hearing and approved the conditional use permit again on February 1, 1990. Petitioners appealed this decision to the city council. On March 19, 1990, the city council adopted a resolution denying petitioners' appeal and approving the conditional use permit.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The application for the [conditional use permit] is specifically inconsistent with and contrary to the city's comprehensive plan."

Petitioners argue that approval of the challenged

conditional use permit is inconsistent with the following provision of the City of The Dalles Comprehensive Plan (plan):

> "Medical Facilities
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> "Medical Facilities in The Dalles Urban Area include The Dalles General Hospital[1] on E. 19th Street. The hospital is a fairly new facility, with wing expansion. The plant and location will serve the community for years to come. Further expansion of the hospital and hospital related development of adjacent lands, however, is anticipated. Expansion is necessary to provide adequate service to this community. Medical facility expansion is planned on property to the east of the present facility."
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> "* * * * *" (Emphasis added.) Plan, p. 111.

Petitioners also argue the Public/Quasi-Public Facilities overlay district and master site plan for the hospital site were approved because they were consistent with the plan. According to petitioners, because the approved overlay district and master site plan show intervenor's day care facility located on the hospital site, the city cannot approve a conditional use permit for that facility on the subject property north of East 19th Street without amending the master site plan.

Respondent and intervenor (respondents) concede that the plan, overlay district and master site plan envision that hospital expansion will take place on property to the

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[1]The Mid-Columbia Medical Center was formerly known as The Dalles General Hospital.

east of the hospital.[2] However, respondents argue that nothing in these documents prohibits intervenor from operating a day care facility on the subject property north of East 19th Street. According to respondents, intervenor's conditional use permit application was entitled to the same consideration as any other application for a day care facility in the R-1 zone.

We agree with respondents. The plan provision quoted above is from introductory findings to the Public Facilities and Services chapter of the plan. The statements therein are not plan policies or approval standards for land use decisions. They simply indicate that the city anticipates that hospital expansion will take place on property to the east of the current facility, not that hospital facilities are prohibited on other property. Further, the property which is the subject of the challenged conditional use permit is not within the Public/Quasi-Public Facilities overlay or covered by the approved master site plan. Those documents do not affect the approval of a conditional use permit for the subject property.

The first assignment of error is denied.

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[2]Respondents also point out that after the challenged conditional use permit was approved, on March 23, 1990, the city amended the master site plan for the hospital site to delete any reference to a day care facility. However, we note that under ORS 227.178(3), approval or denial of intervenor's conditional use permit application must be "based upon the standards and criteria that were applicable at the time the application was first submitted."

SECOND ASSIGNMENT OF ERROR

> "The city's decision improperly construes the city's [zoning] ordinance and should be reversed."

A. Introduction

Prior to 1987, day care facilities were not allowed in the R-1 zone. On August 3, 1987, the City of The Dalles Zoning Ordinance (TDZO) was amended to add "child care center" as a conditional use in the R-1 zone.[3] Ordinance No. 87-1084.

Also in 1987, the Oregon Legislature adopted legislation concerning "family day care providers." Or Laws 1987, ch 621 and 794. The legislation amended ORS 418.805 to include the following definition of "family day care provider":

> "* * * a day care provider who regularly provides day care in the provider's home in the family living quarters." Or Laws 1987, ch 794, § 1.

The legislation also provided that the home of any family day care provider who provides care in the provider's home to fewer than 13 children, including children of the provider, "shall be a permitted use in all areas zoned for residential or commercial purposes, including areas zoned

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[3]"Child care center" was defined by the TDZO as:

> "An institution for the care of children of preschool age, the activity of which shall be conducted between the hours of 7 a.m. and 7 p.m. Even though some instruction may be offered in connection with such care, the institution shall not be considered a 'school' within the meaning of this ordinance." TDZO § 3(b).

for single-family dwellings." Or Laws 1987, ch 794, § 3 and ch 621, § 12; codified at ORS 418.817. The legislation also prohibited cities and counties from imposing on such a family day care provider's home, conditions which are more restrictive than conditions imposed on other residential dwellings in the same zone. Id. This legislation became effective on July 1, 1988. Or Laws 1987, ch 794, § 7.

In 1988, the city amended the TDZO in response to this state legislation. Ordinance No. 88-1092. All references to "child care center" were deleted. Although the amendments to the TDZO did not use or define the term "family day care provider," the following definition of "day care," substantially the same as that found in the amended ORS 418.805, was added to TDZO § 3(b):

> "The care, supervision and guidance on a regular basis of a child, unaccompanied by a parent, guardian or custodian, provided to a child during a part of the 24 hours of the day, in a place other than the child's home, with or without compensation."

The city amended the TDZO to list the following permitted use in all residential and commercial zoning districts,[4] including the R-1 zone:

> "Day Care, for fewer than 13 children, including provider's own, in residential homes." TDZO §§ 7.2(A)4, 8.2(A)8, 9.2(A)7, 10.2(A)8, 12.2(A)12,

[4]The single exception is the Recreational Commercial district, which does not list any form of day care as either a permitted or conditional use. TDZO § 11.

13.2(A)16, 14.2(A)20.

The city also amended the TDZO to list the following conditional use in all residential districts, including the R-1 zone:

> "Day Care for 13 or more children, including the provider's own, in residential homes." TDZO 7.2(B)9, 8.2(B)9, 9.2(B)11, 10.2(B)11.

The commercial districts, however, were amended to list the following conditional use:

> "Day Care for 13 or more children." TDZO 12.2(B)5, 13.2(B)12, 14.2(B)10.

The challenged conditional use permit was approved under TDZO § 7.2(B)9, as a day care facility "for 13 or more children, including the provider's own, in residential homes."

B. Decision

Petitioners argue that "Day Care, for fewer than 13 children, including provider's own, in residential homes" was added as a permitted use in the R-1 district to comply with the statutory requirement that providing day care for 13 or fewer children, including the provider's own, in the provider's own home, be a permitted use in residential zones. Petitioners contend the clear meaning of the parallel "Day Care for 13 or more children, including the provider's own, in residential homes," language in TDZO § 7.2(B)9 is that a resident in the R-1 zone may obtain a conditional use permit to provide day care to 13 or more

children, in that resident's own home. Petitioners argue this interpretation is consistent with ORS 418.817, as the statute does not prevent cities and counties from imposing zoning restrictions on family day care providers who care for 13 or more children in their own homes.

Petitioners further argue that although the TDZO contains no definition of "residential home" or "home," their interpretation of TDZO § 7.2(B)9 is consistent with the following definition of "home" in Black's Law Dictionary:

> "One's own dwelling place; the house in which one lives; especially the house in which one lives with his family; the habitual abode of one's family; a dwelling house. * * *" Black's Law Dictionary 660 (5th ed., 1981).

Petitioners contend TDZO § 7.2(B)9, therefore, does not allow institutional day care facilities such as intervenor's, which are not conducted in the "home" of the day care provider, as a conditional use in the R-1 zone.

Respondents agree that the 1988 amendments to the TDZO were intended to bring the TDZO into compliance with the 1987 family day care provider legislation. However, respondents point out that the 1988 TDZO amendments did not use the term "family day care provider" or adopt the statutory definition of "family day care provider." According to respondents, the term "in a residential home" in TDZO § 7.2(A)4 and (B)9 means that the day care referred to must be provided in a single family dwelling structure.

Respondents further argue that because neither TDZO § 7.2(A)4 nor (B)9 explicitly refers to day care which is provided in the home of the provider, these provisions are ambiguous as to whether the day care referred to can only be provided in the home of the provider. Respondents contend there is nothing in the legislative history of the 1988 amendments to the TDZO which indicates the city intended to restrict day care in the R-1 zone to persons providing day care in their own homes.[5] Respondents further contend that interpreting these provisions not to limit day care to the home of the provider is consistent with the 1987 family day care provider legislation, as that legislation was not intended to restrict the provision of day care by non-family day care providers.

Respondents conclude that the city's interpretation of its own ordinance is reasonable and not contrary to the terms of that ordinance, and is entitled to deference from this Board. Hood River Valley Residents Committee v. City of Hood River, 15 Or LUBA 458, 462, (1987); Texaco, Inc. v. City of King City, 15 Or LUBA 198, 204 (1987).

The interpretation of local ordinances is a question of law which must be decided by this Board and other reviewing bodies. McCoy v. Linn County, 90 Or App 271, 275, 752 P2d

[5]As legislative history, respondents attach to their brief minutes of planning commission and city council hearings on the proposed 1988 TDZO amendments. These minutes are not in the record of the appealed decision.

323 (1988). Although we consider a local government's interpretation of its own ordinance, our acceptance or rejection of that interpretation is determined solely by whether the interpretation is correct. Id. In McCoy v. Linn County, 90 Or App at 276 n 1, the Court of Appeals noted that a reviewing body's opinion could be more influenced by the local government's interpretation when the provision is ambiguous and the local interpretation is based on local legislative history. However, the Court of Appeals recently decided, in an appeal of a decision by this Board, that local legislative history documents are not judicially noticeable and, therefore, cannot be considered by the court if they are not in the record of the appealed decision. Byrnes v. City of Hillsboro, 104 Or App 95, 99, ___ P2d ___ (1990).

Our review, like that of the Court of Appeals when reviewing our decisions, is confined to the record of the appealed decision. ORS 197.830(13)(a); 197.850(8). Further, ORS 197.805 provides that our decisions are to be made "consistently with sound principles governing judicial review." We have interpreted this provision to allow us to take official notice of the same kinds of documents of which an appellate court can take judicial notice under the Oregon Evidence Code. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 209 (1988), rev'd other grounds 96 Or App 552 (1989); Faye Wright Neighborhood Planning Council v.

Salem, 6 Or LUBA 167, 170 (1982). In view of the Court of Appeals' decision in Byrnes v. City of Hillsboro, supra, we must conclude that we cannot take official notice of local legislative history documents. Further, since our review is confined to the record, we cannot consider items of legislative history if they are not in the record and are not officially noticeable.[6] We, therefore, may not consider the planning commission and city council minutes attached to respondents' brief.[7]

Prior to the 1988 amendments to the TDZO, the city did not allow any type of day care facility as a permitted use in the R-1 zone. The parties agree that the 1988 TDZO amendments were intended to implement the 1987 family day care provider legislation. That legislation requires the city to allow, as a permitted use in residential zones, day care for fewer than 13 children, including the provider's

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[6]In Foland v. Jackson County, ___ Or LUBA ___ (LUBA Nos. 89-105 and 89-111, February 7, 1990), slip op 8, aff'd 101 Or App 632, rev allowed, 310 Or 393 (1990), we stated that we may "consider legislative or administrative history materials, when such materials are necessary to our interpretation of statutes, administrative rules or ordinances, regardless of whether the materials are in the record of the proceedings below." This statement must be qualified with the proviso that if such materials are not in the record, we may only consider them if they are officially noticeable. We further note that the items in dispute in Foland v. Jackson County were from the legislative history of state statutes, planning goals and administrative rules. In Byrnes v. City of Hillsboro, 104 Or App at 97, the Court noted that items of state legislative history are subject to judicial notice under OEC 202(2).

[7]We do not mean to suggest that our decision in this appeal would be different if we could consider the local legislative history offered by respondents.

own, in the provider's own home. In view of these facts, it is reasonable to interpret "Day Care, for fewer than 13 children, including provider's own, in residential homes," listed in TDZO § 7.2(A)4 as a permitted use in the R-1 zone, as meaning day care for fewer than 13 children provided in the provider's own home. It is, therefore, also reasonable to interpret "Day Care for 13 or more children, including the provider's own, in residential homes," listed in TDZO § 7.2(B)9 as a conditional use in the R-1 zone, as meaning day care for 13 or more children provided in the provider's own home.

We realize that this interpretation of TDZO § 7.2(B)9 means that the 1988 amendments, which deleted "day care center" as a conditional use in the R-1 zone, had the effect of limiting the forms of day care which can be approved as a conditional use in the R-1 zone. However, it is significant that the 1988 amendments listed as a conditional use in the city's commercial zones, "Day Care for 13 or more children." Thus, in the commercial zones, providing day care as a conditional use clearly is not limited to the provider's own home. To interpret TDZO § 7.2(B)9 as respondents advocate would result in there being no difference in meaning between "Day Care for 13 or more children, including the provider's own, in residential homes" and "Day Care for 13 or more children." Provisions of local government zoning ordinances should be interpreted in a manner which gives meaning to all

parts of the zoning ordinance. Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 18; Foster v. City of Astoria, 16 Or LUBA 879, 885 (1988); Forest Highlands Neighborhood Assoc. v. Portland, 11 Or LUBA 189, 193 (1984).

We conclude that TDZO § 7.2(B)9 requires that day care for 13 or more children approved as a conditional use in the R-1 zone be provided in the provider's own home. There is no dispute in this case that the approved day care facility does not provide day care in the provider's own home.

The second assignment of error is sustained. Because the proposed day care facility is prohibited as a matter of law in the R-1 zone, this requires that we reverse the city's decision. OAR 661-10-071(1)(c).

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners argue that subsection (D) of TDZO § 31 ("Conditional Use Permits") "does not specify [conditional use permit approval] criteria sufficient to enable concerned parties to interpret the needs of the ordinance." Petition for Review 11.

We are unable to determine the basis for petitioners' argument under this assignment of error. Unless petitioners demonstrate that an applicable legal criterion or standard has been violated by the county's decision, LUBA cannot grant relief. Weist v. Jackson County, ___ Or LUBA ___ (LUBA No. 89-119, January 12, 1990), slip op 19; Lane County

School District 71 v. Lane County, 15 Or LUBA 150, 153 (1986).

The third assignment of error is denied.

The city's decision is reversed.