BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAMELA STRAWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 90-169
CITY OF ALBANY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
MILESTONES FAMILY RECOVERY, INC.,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Albany.

Pamela Strawn, Albany, filed the petition for review and argued on her own behalf.

James V.B. Delapoer, Albany, filed a response brief and argued on behalf of respondent. With him on the brief was Long, Delapoer, Healy & McCann, P.C.

George B. Heilig, Corvallis, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 05/13/91

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals an Albany City Council decision denying her appeal of a City of Albany Hearings Board decision approving an application to modify a non-conforming use.

MOTION TO INTERVENE

Milestones Family Recovery, Inc. moves to intervene on the side of respondent. There is is no objection to the motion, and it is allowed.

FACTS

In a previous appeal of a city council decision approving the application challenged in this appeal, we remanded the city's decision. Strawn v. City of Albany, ___ Or LUBA ___ (LUBA No. 90-098, December 6, 1990) (Strawn I). The relevant facts as set forth in that opinion are as follows:

> "The subject property is designated Low Density Residential in the Albany Comprehensive Plan and is zoned Single Family Residential (R-1). The property includes 8,163 square feet and is the site of the Hochstedler House, an historic structure constructed in 1889. The structure, described as "a locally-significant and well-preserved example of Stick/Eastlake Style architecture," was constructed as a single family home and has been included on the National Register of Historic Places since 1980. In addition, the subject property is located within the Hackleman Historic District, which is also listed on the National Register of Historic Places.

> "Sometime prior to 1971, the Hochstedler House was converted from a single family dwelling to a three unit dwelling. Under the zoning regulations in effect at that time, three unit dwellings were allowed on lots in excess of 8,000 square feet. Under the current R-1 zoning, the three unit dwelling is a 'non-conforming situation.'
>
> "The applicant proposes to convert the existing three unit dwelling to a residential alcohol and drug treatment center for adolescents. * * *." (Footnotes and record citations omitted.) Strawn I, slip op at 3-4.

Under Albany Development Code (ADC) § 1.090(1), the term "non-conforming situation" is defined to include non-conforming "lots, developments, and uses * * *." We understand the definition of "non-conforming situation" to mean improved property may be non-conforming in at least three ways. First, a lot may be non-conforming. Second, the structures located on a lot may be non-conforming. Finally, the use to which the structure or lot is put may be non-conforming.

There is no contention that the lot upon which the Hochstedler House is located is non-conforming. However, the use of the Hochstedler House as a three unit apartment is a non-conforming use.[1] In addition, the Hochstedler House is a non-conforming structure, because the original single family home was modified when it was converted to a

[1]Multi-family dwellings are allowed in the R-1 zone if approved as part of a planned development. However, the three unit dwelling on the subject property was not approved as part of a planned development.

three unit apartment.[2]

It is clear that intervenor proposes to change the existing use of the property from the non-conforming three unit apartment to a residential alcohol and drug treatment center for adolescents, which is also a non-conforming use. The extent of approval granted by the challenged decision for modifications of the existing non-conforming structure, which may be necessitated by the new non-conforming use, is less clear.[3]

In Strawn I, we determined the Albany City Council erroneously interpreted the legal effect of its three to two vote as denying petitioner's appeal and affirming the Albany Hearings Board's approval of intervenor's application. We determined that because the city council failed to achieve the four votes required by its charter "to decide any question," the legal effect of its three to two vote in favor of the application was to deny the application.[4]

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[2]Several doors were added to divide the house into three units, and two of the original rooms were converted to kitchens.

[3]We discuss the scope of approved structural modifications below under the fourth assignment of error.

[4]We remanded rather than reversed the county's decision because we were unsure whether a member of the city council properly abstained from participating in the decision. We also suggested that the vote of a seventh council member who appeared to be absent might provide the fourth vote required by the charter. Strawn I, slip op at 11-12. In fact, the seventh member of the city council is the mayor who, according to respondent, may not vote under the city charter unless required to do so to break a tie vote. Thus while the mayor was present, the three to two vote

On remand, the city council voted five to one to approve the application. The two city councillors who previously voted to deny the application, voted on remand to approve the application. The city councilor who abstained in the prior decision, cast the single vote on remand to deny the application. This appeal followed.

FIRST, SECOND, THIRD AND FIFTH ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner contends the city's proceedings on remand violated public meeting law requirements and failed to properly respond to our remand in Strawn I.

A. Public Meetings Law Requirements

Statutory requirements for public meetings are set forth at ORS 192.610 through 192.690. It is not clear to us specifically how petitioner believes the statutory requirements for public meetings were violated. The only statutory provisions cited by petitioner are ORS 192.620, 192.640 and 192.650.[5]

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did not present a tie vote; and the mayor was, therefore, not entitled to cast a vote.

[5]ORS 192.620 is the statutory policy concerning public meetings, which is as follows:

> "The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly."

ORS 192.640 establishes public meeting notice requirements. ORS 192.640(1) provides in part:

A decision rendered in violation of the public meeting requirements of ORS 192.610 through 192.690 may be voided. ORS 192.680. However, the provisions of ORS 192.680 establish the exclusive remedy for violations of ORS 192.610 through 192.690, and provides the circuit court for the county in which the governing body ordinarily meets has jurisdiction. We therefore lack jurisdiction to consider petitioner's public meeting law allegations.

Even if ORS 197.825(1)[6] could be construed to give this Board jurisdiction to consider petitioner's allegations of violation of statutory public meeting law requirements, for the reasons discussed below we do not believe petitioner's arguments have merit.

Respondent does not dispute that its proceedings on remand were subject to the statutory requirements for public meetings. However, respondent contends that all such statutory requirements were satisfied. Respondent first

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> "The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons * * * of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a local governing body to consider additional subjects."

ORS 192.650 requires that minutes be taken for public meetings and requires in part that the "minutes must give a true reflection of the matters discussed at the meeting and the views of the participants."

[6]ORS 197.825(1) grants this Board exclusive jurisdiction to review land use decisions. There is no dispute that the challenged decision is a land use decision.

contends the published agenda of the city council's December 12, 1991 meeting was sufficient to satisfy any notice requirements imposed by ORS 192.640. See n 4, supra.

We agree with respondent. Certainly petitioner was aware of the December 12, 1990 meeting, as she both attended the meeting and was prepared to present argument concerning her views about the action required on remand. Thus, even if the notice given by the city were inadequate in some way, it does not appear petitioner's substantial rights were affected by inadequate notice of the December 12, 1990 meeting.

Respondent next contends that petitioner's real dispute is that the city council refused to reopen the evidentiary record to allow petitioner to submit additional testimony. Respondent concedes ORS 192.630(1) requires that public meetings be open to the public and that all members of the public be permitted to attend. However, respondent contends nothing in ORS 192.620, ORS 192.630 or the other statutes governing public meetings requires that the city reopen the evidentiary record to allow petitioner to present additional evidence or allow petitioner to present legal argument.

The statutes governing public meetings require that the public's business be conducted in public. Notice of public meetings is required and, except as provided in ORS 192.660 for executive sessions, the public is entitled to attend and observe deliberations by a public body. Although petitioner

clearly wished to present testimony concerning her disagreement with city staff concerning the actions she believed were required to respond adequately to our remand in Strawn I, nothing in the statutes governing public meetings grants petitioner a statutory right to present testimony regarding these concerns to the city council.

Petitioner alleges there is no clear indication in the record to show the city councillors actually received a copy of our decision in Strawn I. We do not see how such a failure, even if true, violates the statutes governing public meetings.[7]

Finally, petitioner alleges the minutes of the December 12, 1990 meeting are inadequate to reflect her request to address the city council or the nature of the argument she wished to present. Although the minutes are brief, they do reflect that petitioner wished to address the city council concerning this matter and that her request was denied. We do not believe more detail is required by ORS 192.650.[8]

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[7]Of course the city council's decision on remand must be consistent with our decision in Strawn I and must be adequate to address deficiencies identified in that decision and any errors properly alleged in this appeal. However, nothing to which we are cited specifically requires that city staff provide each city council member with a copy of our decision in Strawn I.

[8]We also note that petitioner prepared a transcript of relevant portions of the December 12, 1990 meeting and attached that transcript to her petition for review. Therefore, even if the minutes were inadequate, petitioner has not been prejudiced by any such inadequacy in this proceeding.

B. Requirements on Remand

The gist of petitioner's remaining arguments under these assignments of error is that under her reading of our decision in Strawn I, the city council was only to (1) supplement the record by allowing the abstaining city council member to reconsider whether abstention was proper in this case, and if not enter her vote, and (2) adopt findings in support of its decision. Petitioner contends there is nothing in our decision in Strawn I to suggest that the city councillors who originally voted to deny the requested permit could vote on remand to approve the permit.

Although we see no particular reason why the city could not have adopted its decision on remand in the manner petitioner suggests, we do not agree with petitioner that the city was required by our decision in Strawn I to do so. Petitioner's essential premise is that with the exception of the city council member who abstained, the remaining city councillors either were powerless to change their vote or were bound to vote as they previously did in this matter. We are cited no legal authority requiring that result, and certainly nothing in our decision in Strawn I so limited the city's proceedings or decision on remand.

The city takes the position that it simply proceeded in this matter as though our remand placed the city in the same position it was in when the earlier three to two vote was cast. After the city councillor who previously abstained

made additional disclosures concerning her contacts in this matter, the city council again voted in this matter. The three city councillors who previously voted to approve the application again voted to approve the application. The two city councillors who previously voted to deny the application voted on remand to approve the application. With five votes to grant the request and the previously abstaining council member casting the sole negative vote, the application was approved. We see noting wrong with the procedure followed by the city.

The first, second, third and fifth assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner challenges the adequacy of, and evidentiary support for, the findings adopted by the city in support of its decision. Specifically, petitioner contends she raised a number of issues during the local proceeding and the city council erred by failing to respond to those issues. The only issues identified and discussed by petitioner with sufficient specificity to allow consideration under this assignment of error are her arguments that the proposed treatment center will be required to comply with a variety of state and federal structural regulations. Petitioner contends that these regulations will require a number of

significant alterations to the historic Hochstedler House.[9] Petitioner further contends these alterations will diminish the historic significance of the Hochstedler House, resulting in adverse impacts on the surrounding historic district in violation of ADC § 1.100(5)(a).

A development permit is required before modifying a non-conforming situation. ADC § 1.100(1). The relevant standards governing modification of a non-conforming situation are set forth at ADC § 1.100(5)(a) as follows:

> "1. The requested modifications will not create additional adverse effects for abutting properties or the neighborhood (e.g. objectionable conditions; visual, noise, and/or air pollution; increased vehicular traffic, dust, or street parking).
>
> "2. To the maximum extent possible, as determined by the approval authority, the requested modification meets all other applicable [ADC] standards, or necessary variances are granted.
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> "3. The existing non-conforming situation was not created illegally or without required approvals."

In Strawn I, we did not reach the merits of petitioner's arguments that interior and exterior modifications to the existing structure would be required to

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[9]Petitioner contends that under the Uniform Building Code, significant alterations will be required to the stairways between the main floor and the upper floor and the basement. Petitioner further contends that the windows in the basement are too small to conform to Uniform Building Code requirements and, therefore, will have to be made larger. Petitioner argues an upstairs fire escape may be required and additional structural modifications will be required to provide required handicapped access.

satisfy state and federal requirements imposed on facilities such as the one approved by the city in this decision. However, in Strawn I we pointed out the nature of the city's obligation to adopt findings addressing ADC § 1.100(5) depended on the scope of the "modification" it was approving.

> "To the extent a city decision simply approves a change in the non-conforming use of the existing structure with no approval of interior or exterior modifications to accommodate that new use, we agree with respondents that no findings are required to explain why hypothetical modifications to the structure do not violate the standards governing modification of non-conforming situations set forth in ADC § 1.100(5). On the other hand, it is possible the city may wish to approve the requested modification of the current non-conforming use along with any interior or exterior modifications that may be necessary to accommodate the proposed use -- in the sense such interior or exterior modifications could be made in the future without applying for a development permit under ADC § 1.100(1) or demonstrating that such modifications comply with the criteria in ADC § 1.100(5). If this latter type of approval is intended, the city must explain in its findings whether such structural modifications will be required and, if so, demonstrate that such modifications are consistent with the criteria in ADC § 1.100(5)." Strawn I, slip op at 15-16.

As the above language from our prior opinion in Strawn I makes clear, the Hochstedler House may not be modified in the manner that petitioner contends ultimately may be required to accommodate the proposed use, unless the city first approves such modifications to the presently non-conforming structure pursuant to ADC §§ 1.100(1) and

1.100(5). In granting such an approval, the city must demonstrate such structural modifications to the Hochstedler House do not violate the standards governing modification of non-conforming situations, including the requirement of ADC § 1.100(5)(a)(1) that such modifications "not create additional adverse effects for abutting properties or the neighborhood * * *."

However, the application approved by the city council does not propose such modifications. The application states, in part, as follows:

> "The only alterations planned by Milestones to use this property for a residential program are to remove the doors which divide the building into its three units, remove two of the kitchens and update the remaining kitchen, and finish for living space the area currently used for storage in the basement. * * *." Record Strawn I (HB) 194.[10]

Although it could have been made clearer, we interpret the application to propose a change of use from a three unit apartment to a residential alcohol and drug treatment center. The only structural changes proposed by the intervenor and approved by the city are removing the doors and two kitchens installed to convert the house into three apartments, updating the remaining kitchen and furnishing

[10]The record in Strawn I is included in the record in this proceeding. The record in Strawn I is divided into the record before the Albany Hearings Board (HB) and the record before the city council (CC).

the basement for living space.[11] As respondent and intervenor point out, these changes only have the effect of removing the presently non-conforming aspects of the structure, and we do not understand petitioner to challenge these proposed structural changes.

In short, approval for the additional structural modifications petitioner identifies was neither requested nor granted by the city in the challenged decision. As we indicated in our prior opinion, we believe the city may, if it chooses, limit its decision to the changes in use and structural changes requested in the application.

While the city's decision can be read to suggest that structural alterations beyond those identified in the application could be authorized in the future without obtaining approval for such additional structural modifications under ADC §§ 1.100(1) and 1.100(5), we emphasize that such is not the case.[12] If the structural changes petitioner identifies ultimately are required to accommodate the proposed use, approval of such modifications

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[11]As we interpret the application, intervenor did not request and the city did not grant approval to enlarge the basement windows.

[12]The challenged decision can be read to suggest that review of additional structural modifications would only be subject to review by the city's Landmarks Advisory Commission under Albany Municipal Code §§ 2.76 and 18.04. Although additional structural modifications might require review under these code sections, and such review might involve considerations similar to those that must be addressed pursuant to ADC §§ 1.100(1) and 1.100(5), review by the Landmarks Advisory Commission does not obviate the review required by ADC §§ 1.100(1) and 1.100(5).

to the non-conforming structure under ADC §§ 1.100(1) and 1.100(5) must first be obtained. Although we said in Strawn I that the city need not review and approve hypothetical structural modifications that it does not believe will be required to accommodate the proposed use, we also clearly stated that if such structural modifications are required, they must first be approved as required by ADC § 1.100(1).

In summary, because we do not agree with petitioner that the city was required at this point to determine all the possible structural modifications that might ultimately be required by the change of use approved, we do not agree the city erred by failing to adopt findings addressing those structural modifications and whether they would violate the standards imposed by ADC § 1.100(5).

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner contends under the sixth assignment of error that the challenged decision violates ADC § 1.090(1) and Albany Comprehensive Plan Goal 5 as well as certain Goal 5 Policies and Implementation Measures.[13]

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[13]ADC 1.090(1) provides, in pertinent part, that "[i]t is the intent of these [ADC] provisions to permit * * * non-conformities to continue, but not to encourage their perpetuation." The Plan Goal 5 provisions cited by petitioner are as follows:

> "Goal: Protect Albany's historic resources and utilize and enhance those resources for Albany residents and visitors.
>
> "Policies:

"1. Support the identification, recognition, development, and promotion of Albany's historic buildings and districts through City programs or other organizations.

"2. Maintain survey information which accurately reflects the historic characteristics and quality of each of Albany's historic structures.

"* * * * *

"IMPLEMENTATION METHODS:

"* * * * *

"4. Within historic districts, encourage the development of landscapes and the planting and retention of trees associated with the applicable historic periods.

"* * * * *

"7. Stabilize and improve property values in existing and proposed historic districts. Methods might include:

"a. Emphasizing the importance of owner-occupied housing through methods such as encouraging loan programs for the acquisition and renovation of historic structures.

"* * * * *

"c. Ensuring that Development Code regulations enhance the preservation and renovation of historic structures.

"8. Develop review criteria which would discourage those zone changes resulting in increased pressure to replace historic structures with more intense land uses.

"* * * * *

"10. For significant primary structures, create a 'landmark district' overlay zone designation which would provide for the protection of significant historic sites and buildings from incompatible development of surrounding properties.

"* * * * *

ADC § 1.090(1) does not prohibit modifications of non-conforming uses, and petitioner does not explain how the approved change in use and removal of existing non-conforming aspects of the structure violates ADC § 1.090(1). Neither do the cited plan provisions appear to be standards for modification of non-conforming uses. See Bennett v. City of Dallas, 96 Or App 645, 773 P2d 1340 (1989). In general, the cited plan provisions appear to be directed at zoning decisions, adoption of other implementing land use regulations and preparation of inventories. See Stotter v. City of Eugene, ___ Or LUBA ___ (LUBA No. 89-037, October 10, 1989), slip op 41-43. Petitioner offers no argument explaining why she believes the cited plan provisions establish applicable approval standards or why she believes they are violated.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Under the final assignment of error, petitioner contends the mayor and city manager gave the city attorney more of a voice in this matter "than the applicant, the appellants, the petitioner, and members of the Albany

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> "12. Continue research into the origin and importance of Albany's historic resources and have that research published.
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> "* * * * *"

Hearing Board and the Albany City Council."[14] Petition for Review 41.

Neither the seventh assignment of error nor the arguments advanced by petitioner in support of the seventh assignment of error provide a basis for reversal or remand.

The seventh assignment of error is denied.

The city's decision is affirmed.

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[14]Petitioner argues the city attorney denied her request for a continuance at the June 27, 1990 city council de novo hearing in this matter, but does not identify in the record where the request for a continuance was made and denied or why she believes she was entitled to a continuance. Petitioner identifies a variety of other actions by the city attorney which she contends either were legally improper or demonstrate the city attorney exercised undue influence over the city council. Petitioner's allegations concerning the legal propriety of the city attorney's actions generally relate to her public meetings law arguments discussed above, are not sufficiently developed to merit review under this assignment of error.