

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

3
4 BARBARA CHILLA,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF NORTH BEND,
10 *Respondent.*

11
12 LUBA No. 2001-173

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of North Bend.

18
19 C. Randall Tosh, Coos Bay, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Corrigan, McClintock & Tosh, LLP.

21
22 Michael R. Stebbins, North Bend, filed the response brief and argued on behalf of
23 respondent. With him on the brief was Stebbins & Coffey.

24
25 BASSHAM, Board Member, HOLSTUN, Board Chair; BRIGGS, Board Member;
26 participated in the decision.

27
28 AFFIRMED

03/29/2002

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the city to approve a conditional use permit for an
4 underground shooting range.

5 **FACTS**

6 This matter is before us for the second time. *Chilla v. City of North Bend*, 39 Or
7 LUBA 121 (2000), *aff'd* 173 Or App 170, 21 P3d 664 (2001). We recite the pertinent facts
8 from our prior opinion:

9 “On April 9, 1999, the operator of Pistol River Firearms submitted an
10 application for a conditional use permit for an underground shooting range
11 and an addition to an existing above-ground retail gun store. The subject
12 property is zoned Residential Transitional (R-T) and fronts Highway 101 (also
13 known as Broadway). The property is bordered on the other three sides by
14 residential property. The applicant currently owns and has operated a gun
15 store on the subject property since 1993 when he was granted a conditional
16 use permit for that use.

17 “The existing building includes 2,172 square feet. The applicant proposes to
18 expand the existing building by an additional 1,690 square feet to include
19 additional retail space, a storage area, shop area, office, restroom, and
20 stairwell to the underground shooting range. The shooting range will be
21 approximately 36 feet by 125 feet, and will consist of six shooting lanes. The
22 range will be built of solid concrete walls and will be soundproofed and
23 ventilated so that no sight, sound or smell of shooting activities can be
24 detected at the surface. The applicant proposes additional parking over the top
25 of the underground shooting range.” 39 Or LUBA at 122.

26 Our prior decision sustained two of five assignments of error, and remanded the city’s
27 decision approving the proposed shooting range. We remanded to the city to address the
28 relationship between certain elements of North Bend Zoning Ordinance (NBZO) 36,
29 specifically to determine whether NBZO 36(1) and the prefatory sentence to NBZO 36
30 contain applicable approval criteria.¹ We also remanded for the city to address the

¹NBZO 36 provides:

1 relationship between NBZO 36(2)(b) and (d), and to adopt any necessary findings of
2 compliance with the latter. On remand, the city planning commission conducted a hearing
3 and again approved the proposed use, adopting additional findings addressing the remand
4 issues. Petitioner appealed the commission decision to the city council, which denied the
5 appeal, affirming the decision. This appeal followed.

Limited Commercial Rezoning. Land within the R-T zone shall be subject to rezoning for certain limited commercial purposes on a conditional use basis under the following regulations and restrictions:

- “(1) Rezoning of parcels of land shall be for specified uses which shall be restricted to those which would generate low volumes of traffic and be compatible with adjacent uses.

- “(2) All construction and use permits for commercial uses will be subject to review and approval by the Planning Commission which shall apply the following restrictions and conditions:
 - “(a) No limited commercial use shall be permitted unless it will generate a low volume of vehicular and pedestrian traffic.

 - “(b) Restrictions shall be imposed so that improvements will be compatible with uses on adjacent properties and such restrictions shall include exercising architectural and design control, controlling commercial density including lot coverage, setbacks and height of buildings, and requiring landscaping and screening of adjacent residential areas and designating the location, height and type of signs.

 - “(c) The impact of traffic on adjacent properties and on adjacent streets shall be controlled by designating the location of driveways, access roads and parking facilities and by regulating the direction and flow of traffic to and from the property rezoned.

 - “(d) Other restrictions and conditions shall be imposed as may be necessary for the orderly development of the area and its conversion to commercial uses with the least amount of adverse [effect] upon traffic and adjoining properties.”

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Rezoning for Limited Commercial Purposes**

3 In the prior appeal, petitioner argued that reference to “certain limited commercial
4 purposes” in NBZO 36 indicates that the commercial uses allowed under that code provision
5 are limited to those allowed in the Limited Commercial (CL) zone. According to petitioner,
6 the use proposed here is not allowed in the CL zone. On remand, the city interpreted NBZO
7 36 to reject petitioner’s arguments that NBZO 36(1) and the prefatory sentence to NBZO 36
8 limit the commercial uses allowed under that provision to those allowed in the CL zone.²
9 According to the city, the phrase “certain limited commercial purposes” simply indicates that
10 commercial uses are allowed in the R-T zone, as limited by the specific criteria for a
11 conditional use permit issued under NBZO 36(2).

12 Petitioner challenges that interpretation, arguing that it is inconsistent with the
13 express language, purpose and policy underlying NBZO 36. ORS 197.829(1).³ According

²The city’s findings state, in relevant part:

- “1A. The issue for decision is governed generally by Sections 35 and 36 of the [NBZO], relating to the Residential Transitional Zone RT.
- “1B. The language ‘limited commercial purposes’ contained in the introductory paragraph to [NBZO] 36 does not constitute a separate category requiring a separate definition, rather the ‘commercial purposes’ are ‘limited’ by the remaining criteria set out in subsection 2 of [NBZO] 36.
- “1C. Subsection 1 of Section 36 of the [NBZO] states the general requirements for a conditional use permit in the RT zone. These general requirements for compatibility and low traffic volume are more specifically defined in Subsection 2 of Section 36.” Record 4-5.

³ORS 197.829(1) provides in relevant part:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 to petitioner, the prefatory sentence to NBZO 36 unambiguously requires (1) that the
2 property be *rezoned*, and (2) that the rezoning must be for a “limited commercial purpose.”
3 Petitioner submits that the only permissible way to rezone property within the R-T zone for
4 “certain limited commercial purposes” is to rezone it to CL.⁴ Under the city’s interpretation,
5 petitioner argues, the city allows virtually any commercial use in the R-T zone, limited only
6 by the requirements of NBZO 36(2). Petitioner contends that that view is inconsistent with
7 the text and purpose of the R-T zone.

8 The city responds that the remand decision correctly interprets NBZO 36 as allowing
9 commercial uses in the R-T zone, not limited to those enumerated in the CL zone, subject
10 only to the limitations prescribed at NBZO 36(2). According to the city, NBZO 36
11 implements its underlying policy by granting property owners in the R-T zone a conditional
12 use permit for certain commercial purposes, limited by the terms of NBZO 36(2).⁵ That
13 policy would be undermined, the city argues, if it rezoned the subject property to a

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
[or]

“(c) Is inconsistent with the underlying policy that provides the basis for the
comprehensive plan or land use regulation[.]”

⁴The NBZO provides for three commercial zones: Limited Commercial, General Commercial and Central Commercial. NBZO 37-42; 43-48; and 49-52, respectively.

⁵In support of their contrasting views of NBZO 36, both petitioner and the city cite to legislative history in the record. As far as we can tell, that legislative history is not of the ordinance that adopted NBZO 36, but rather minutes from proceedings leading to the adoption of a comprehensive plan amendment that apparently was a precursor to legislation that adopted the R-T zone. Record 83-96. The cited legislative history suggests that under the comprehensive plan as amended any application to rezone property to commercial uses within the area that includes the subject property would be limited by criteria similar to those found at NBZO 36(2). Apparently, at some point after adopting the proposed comprehensive plan amendment the city adopted an ordinance that establishes the R-T zone now found at NBZO 35 and 36, and rezoned the area including the subject property from R-5 to R-T. The copy of the city’s comprehensive plan available at LUBA’s offices does not contain any language we can find relating to rezoning of property for commercial uses. That suggests that the city repealed the comprehensive plan amendment adopted in 1978, and replaced that scheme with NBZO 35 and 36.

1 commercial zone, because that would take away the city’s ability to limit the adverse impacts
2 of uses permitted in commercial zones.⁶

3 The city’s findings contain an implicit interpretation to the effect that commercial
4 uses are allowed under NBZO 36 not by “rezoning” to a commercial zone in the usual sense
5 of that term, but by issuing a conditional use permit subject to the limitations set forth at
6 NBZO 36(2). The city’s findings also contain an explicit interpretation that the range of
7 commercial uses that can be allowed under NBZO 36 is not limited to those allowed in the
8 CL zone. To address the latter interpretation first, we agree with the city that petitioner has
9 not demonstrated that the city’s interpretation of the term “certain limited commercial
10 purposes,” as not limiting commercial uses allowed under NBZO 36 to those permitted in the
11 CL zone, is inconsistent with the language or purpose of NBZO 36. NBZO 36 does not
12 mention the CL zone, or any commercial zone. A reasonable person could view the code
13 provision, as the city does here, as not limiting the uses allowed under NBZO 36 to uses
14 allowed in any particular commercial zone. Therefore, we must affirm that interpretation.
15 ORS 197.829(1); *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051
16 (1996).

17 Petitioner’s argument that NBZO 36 requires “rezoning” to *some* commercial zone is
18 a closer question. At the outset, it is not clear to us that this interpretational issue was raised
19 during the prior proceedings before the city and in petitioner’s first LUBA appeal, or that it
20 was raised during the proceedings on remand. Our remand did not expressly include that
21 issue among the issues the city must address on remand. Arguably, the issue could have
22 been raised during the prior proceedings, but was not, and therefore petitioner is precluded

⁶It is not clear to us why the city believes rezoning the property to a commercial zone under petitioner’s view of NBZO 36(2) necessarily means that the city could not limit uses or adverse impacts of uses permitted in commercial zones. A zone change may be subject to conditions that limit the uses otherwise allowed in the zone. ORS 227.175(4); *Gann v. City of Portland*, 12 Or LUBA 1, 9-10 (1984). However, we need not resolve this point, given our conclusion below that the city’s interpretation of NBZO 36—as not requiring “rezoning” to a commercial zone—is within its discretion under ORS 197.829(1).

1 from raising that issue now. *See Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678
2 (1992) (issues that could have been raised in prior proceedings, but were not raised, are
3 waived in subsequent local land use proceedings following a LUBA remand). However, the
4 city does not argue that this issue is waived under *Beck*. We are also uncertain whether the
5 issue was outside the scope of our remand. Therefore, we will proceed to address
6 petitioner’s interpretational challenge.

7 As noted, NBZO 36 states that property in the R-T zone “shall be subject to rezoning
8 for certain limited commercial purposes on a conditional use basis.” NBZO 36(1) further
9 specifies that “[r]ezoning of parcels of land shall be for specified uses” restricted to those
10 uses that generate low traffic volumes and that are compatible with adjacent uses. The
11 concept of “rezoning * * * on a conditional use basis” is something of an oxymoron. The
12 city’s intent in juxtaposing the concepts of “rezoning” “on a conditional use basis” is
13 certainly unclear.

14 The phrase “rezoning * * * on a conditional use basis” could mean, as petitioner
15 posits, that the city must “rezone” in the usual sense of changing the applicable zoning map
16 designation, accompanied by a “permit” that limits the uses otherwise allowed in the new
17 zone. We understand the city to view NBZO 36 quite differently. According to the city,
18 proceedings under NBZO 36 involve a “rezone” only in the sense that, like an actual change
19 in zoning map designation, the conditional use permit issued under its provisions allows uses
20 that are not otherwise allowed in the R-T zone.⁷ According to the city, that interpretation

⁷NBZO 35 describes the uses allowed in the R-T zone, and provides:

Residential Uses and Restrictions. In the R-T zone the uses permitted outright, conditional uses and regulations concerning signs, lot size, yards, height of buildings and lot coverage shall be the same as those provided in the R-5 Residential zone.”

The uses allowed in the R-5 zone are essentially residential uses and certain conditional uses such as churches, libraries, schools and neighborhood grocery stores. NBZO 7, 8, 14, 15, 21, 22.

1 gives meaning to the disputed language in NBZO 36 and is consistent with the language and
2 purpose of that provision.

3 According to the decision and the parties, the purpose of NBZO 36 is to allow for the
4 orderly development of the area and its conversion to commercial uses with the least amount
5 of adverse effect upon traffic and adjoining properties. Record 9. The city’s interpretation
6 of NBZO 36—that the property will be subject to a conditional use permit that allows only
7 the proposed commercial use, as limited by the provisions of NBZO 36(2)—appears to be
8 consistent with the purpose of the R-T zone, or at least as consistent as petitioner’s contrary
9 interpretation.

10 The more difficult question is whether the city’s interpretation is consistent with the
11 express language of NBZO 36, viewed in context. The city’s interpretation is certainly at
12 odds with the generally understood meaning of “rezoning,” *i.e.*, to change a property’s
13 zoning classification. *See, e.g., Webster’s Third New Int’l Dictionary*, 1945 (unabridged ed
14 1993) (defining “rezone” as “to zone anew : alter the zoning of”). Nonetheless, the concept
15 of “rezoning” is not limited to that meaning. *See* ORS 227.186(9) (defining circumstances
16 where “property is rezoned” to include not only changes in zoning classification but
17 ordinance amendments that limit or prohibit land uses previously allowed in the zone).
18 ORS 227.186(9) lends some support to the view that the term “rezoning” can be understood
19 to include changes to the uses allowed in a zone, even though the zoning classification
20 remains the same. That is essentially how we understand the city to view NBZO 36: as a
21 formal process that changes the uses allowed in the R-T zone, even though property remains
22 zoned R-T.

23 Some additional support for that view comes from the context of the term “rezoning.”
24 As noted, NBZO 36 speaks of “rezoning * * * on a conditional use basis,” and then sets out
25 detailed criteria for allowing commercial uses on a limited basis, pursuant to a “permit for
26 commercial uses.” If the city intended the process under NBZO 36 to result in a change in

1 zoning classification to a commercial zone, then no “permit” in the usual sense of that word
2 would be necessary to allow a large range of commercial uses permitted in the zone. In that
3 circumstance, the terms “permit for commercial uses” and “on a conditional use basis” would
4 not have their usual meanings, but would instead have only a more figurative sense of
5 limitations or conditions placed on uses allowed in the new zone, *i.e.*, the kind of conditions
6 that result in conditional zoning. In short, even petitioner’s view of the ordinance, which
7 petitioner posits as the only permissible interpretation, does some violence to the commonly
8 understood meaning of the terms of NBZO 36.

9 Although it is a close question, we cannot say that the city’s interpretation of
10 NBZO 36 falls outside the city’s interpretative discretion under ORS 197.829(1) and *Clark v.*
11 *Jackson County*, 313 Or 508, 836 P2d 710 (1992).⁸

12 **B. Compatibility with Adjacent Uses**

13 In finding 1(C), *see n 2*, the city rejected petitioner’s argument that language in
14 NBZO 36(1) requiring that the proposed commercial use be restricted to those that are
15 “compatible with adjacent uses” imposes a different or broader requirement than those
16 imposed by NBZO 36(2). The city found that the “general requirements for compatibility” in
17 NBZO 36(1) “are more specifically defined” in NBZO 36(2). Record 5.

18 Petitioner argues that the city’s interpretation is inconsistent with the express
19 language of NBZO 36(1) and (2). According to petitioner, NBZO 36(1) requires an

⁸In reaching that conclusion, we are somewhat persuaded by the fact that, as far as we can tell or the parties have made known to us, the practical result under either the city’s or petitioner’s view of the “rezoning” language in NBZO 36 is the same. Whether the property is rezoned in the traditional sense, but under conditions that limit commercial uses to the proposed use, or whether the property remains zoned R-T, but under a conditional use permit that limits commercial uses to the proposed use, the only difference we can see involves whether the city has to change the colors of its zoning map or not. Under these circumstances, remand to require “rezoning” in the traditional sense would serve only a *pro forma* purpose. We recognize that, under petitioner’s view that the property can *only* be rezoned to CL, petitioner believes that the use proposed here cannot be allowed at all. However, we sustained, above, the city’s contrary interpretation under ORS 197.829(1) and *Clark*, that the commercial uses allowed under NBZO 36 are not limited to those in the CL zone. Although we do not necessarily agree with that interpretation, it is not reversible under our limited scope of review. Unless and until that interpretation is reversed, we do not see that the parties’ narrower dispute regarding the meaning of “rezoning” makes any real difference.

1 evaluation of whether the proposed *use* is compatible with adjacent uses, while
2 NBZO 36(2)(b) is instead concerned with whether proposed *improvements* are compatible in
3 *appearance* with adjacent uses. *See* n 1. Petitioner argues that the proposed *use*—a shooting
4 range—is incompatible with adjacent residential uses, and that findings of compatibility
5 directed at NBZO 36(2)(b) do not answer the question posed by NBZO 36(1).

6 The city apparently does not share petitioner’s belief that NBZO 36(1) and 36(2)(b)
7 are concerned with compatibility between different things. Finding 1(C) suggests that the
8 city views the compatibility language in NBZO 36(1) and 36(2)(b) to be directed at the same
9 object, although one is expressed in general terms and the other in more specific terms.
10 Consistent with that view, the city’s findings regarding compatibility address whether the
11 proposed *use* is compatible with adjacent residential uses, and answer that question in the
12 affirmative.⁹ Petitioner has not demonstrated that the city’s interpretation of NBZO 36(1)
13 and 36(2)(b) is reversible under ORS 197.829(1).

⁹The city’s findings state, in relevant part:

- “3D. The applicant proposes constructing an underground shooting range with 6 shooting lanes. The shooting range would be underneath the parking lot on the north portion of the property. There will be minimal visual impact from the addition. The range would be used for testing, training, and recreational purposes.
- “3E. The recreational use is not incompatible with the adjacent properties’ uses because it is underground.
- “3F. The proposed use, for an underground shooting range, is a compatible use with the adjacent neighborhood uses in this [R-T] zone.
- “3G. The shooting range will be constructed with thick cement walls and ceiling and a modern air and sound filtering system. No sound or odor will be detectible from the surface.
- “3H. The development of the shooting range propose by the applicant is a related use to the primary use of the property.
- “* * * * *
- “3J. There is no evidence in the record that the City has received any complaints concerning the existing use since it began operation in 1993.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner argues that the findings addressing compatibility quoted in footnote 9 are
4 conclusory and inadequate, because they do not state the facts relied upon, or explain why
5 the facts demonstrate that the compatibility requirements of NBZO 36(1) and (2) are
6 satisfied.

7 The city’s findings explain that the proposed shooting range cannot be detected by
8 sight, smell or sound from adjacent property. The city responds, and we agree, that the
9 challenged findings adequately explain why the proposed use is compatible with adjacent
10 residential uses.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Our prior decision required the city to determine the relationship between NBZO
14 36(2)(b) and (d) and adopt any necessary findings addressing NBZO 36(2)(d). On remand,
15 the city adopted the following interpretation of these two provisions:

16 “The provisions of NBZO 36(2)(b) are intended to specifically enumerate the
17 type of restrictions that can be imposed on improvements so that those
18 improvements will be compatible with uses on adjacent properties. NBZO
19 36(2)(d) gives the Council the authority to impose other restrictions and
20 conditions as may be necessary to minimize the impact of the transition from
21 a residential area to a commercial area on traffic and adjoining properties.

“3K. [Petitioner] has no objection to the use of the owner’s property as a retail firearms store and has no objection to the expansion of the square footage of the retail store.

“3L. * * * The applicant has met or exceeded all the restrictions in [NBZO] 36(2)(b) by placing the shooting range underground, designing the above ground structure to appeal residential in nature, providing a site-obscuring fence wall or evergreen hedge between the properties and providing screened lighting which will eliminate any off-site illumination.

Because of the foregoing, and because the underground gun range is an accessory use to the already existing retail gun shop, which has proven to be compatible in the past, the proposed improvements will be compatible with the uses on adjacent properties with the restrictions and conditions set out below.” Record 9-10.

1 The ordinance does not require that all possible adverse [e]ffects be identified
2 and addressed. The minutes from the Planning Commission and Council in
3 1978, during the adoption of [NBZO 36], reflect a consideration of the
4 potential adverse [e]ffects of the transition of the neighborhood from
5 residential to commercial. It was not intended that all those adverse [e]ffects
6 be again and again reconsidered in each conditional use permit once the
7 decision was made to change the complexion of the entire neighborhood from
8 residential to commercial. Rather, those specific restrictions and conditions
9 that the Council wanted to impose were specifically enumerated in Subsection
10 (b). In Subsection (d), the Council was left with some discretion to impose
11 other restrictions and conditions as they find may be necessary. * * *
12 Record 5-6.

13 Petitioner argues that the limited role the city’s interpretation gives to NBZO 36(2)(d)
14 is inconsistent with the express language of that provision. Alternatively, petitioner argues
15 that even under the city’s interpretation the city erred in failing to address adverse impacts
16 identified by petitioner, or explain why those impacts need not be addressed and mitigation
17 conditions imposed under NBZO 36(2)(d).

18 The city responds, and we agree, that the city’s view of the relationship between
19 NBZO 36(2)(b) and (d) is within its discretion under ORS 197.829(1) and *Clark*. We further
20 agree with the city that its findings adequately address the specific adverse impacts raised by
21 petitioner, such as traffic, parking, and light pollution. The city’s findings explain why
22 NBZO 36(2)(d) does not require consideration of more general adverse impacts, such as
23 impact on residential property values, that may result from converting property in the R-T
24 zone from residential to commercial uses.

25 The third assignment of error is denied.

26 **FOURTH ASSIGNMENT OF ERROR**

27 Petitioner argues that the city erred in finding that the proposed shooting range is an
28 accessory use to the existing retail gun shop. According to petitioner, the city’s code defines
29 “Accessory use” as “[a] structure or use incidental and subordinate to the main use of the
30 property and which is located on the same lot as the main use[.]” NBZO 3(1). Petitioner

1 contends that the shooting range will be located on a separate adjacent lot from the main use,
2 the retail gun shop, and therefore the shooting range cannot be an accessory use.

3 It is not clear to us why whether the proposed shooting range is an accessory use or
4 not is critical to the city's decision. In any case, the city's code defines "lot" to include
5 "parcel or tract." NBZO 3(21). The code does not define the term "tract," but that term is
6 generally understood to include one or more contiguous lots in the same ownership. *See,*
7 *e.g.,* ORS 215.010(2). Therefore, petitioner is incorrect that the proposed shooting range will
8 not be located on the same "lot" as the main use.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.