

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

3  
4 LORIN FREELAND and  
5 TERRY ANN FREELAND,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF BEND,  
11 *Respondent,*

12  
13 and

14  
15 BRYAN D. DONNELL,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2003-059

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from City of Bend.

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25 Christopher C. Eck, Bend, filed the petition for review and argued on behalf of  
26 petitioners. With him on the brief was Eck, Elliott & Anderson, LLP.

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28 No appearance by respondent City of Bend.

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30 Liz Fancher, Bend, filed the response brief and argued on behalf of intervenor-  
31 respondent.

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33 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
34 participated in the decision.

35  
36 REMANDED

08/05/2003

37  
38 You are entitled to judicial review of this Order. Judicial review is governed by the  
39 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal a hearings officer decision that granted site design approval for a commercial building expansion.

**MOTION TO INTERVENE**

Bryan D. Donnell (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is a 7,000-square-foot, rectangular-shaped lot located at the corner of Franklin Avenue and NE Second Street in Bend. The lot has 50 feet of frontage on Franklin Avenue and 140 feet of frontage on NE Second Street. An unnamed alley runs along the property’s rear lot line. The subject property and all surrounding lots are zoned Limited Commercial.

The subject property is developed with an 800-square foot dwelling that has been converted to commercial use. Intervenor proposes to remodel the existing building and, as a result, will add approximately 2,380 square feet to the structure. The remodeled building will be two stories tall. As proposed, the front building line will be located approximately 12.5 feet north of Franklin Avenue. Franklin Avenue is a designated minor arterial. In order to minimize conflicts between vehicles entering and leaving the property and traffic on Franklin Avenue, intervenor proposed to eliminate the existing vehicular access to Franklin Avenue and limit access to NE Second Street only.

Petitioners own the adjacent lot to the east of the subject property. Petitioners’ property is developed with a commercial building that is leased to several retail tenants. Petitioners’ building is located at the rear of their lot, approximately 95 feet north of Franklin Avenue. Petitioners’ building location was dictated by private development restrictions placed on petitioners’ property by petitioners’ eastern neighbor.

1 Intervenor’s site design was reviewed by the city’s design review committee for  
2 compliance with the city’s site design review criteria. Petitioners submitted written  
3 comments to the committee opposing the site design and later appealed the design review  
4 committee’s approval to the city hearings officer. Most opposing testimony dealt with the  
5 adverse impact the proposed two-story structure in the proposed location would have on  
6 retail activities on petitioners’ property, because the proposed structure would block views of  
7 petitioners’ building from Franklin Avenue. The hearings officer adopted additional findings,  
8 and upheld the site design committee’s decision. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Bend City Code (BCC) 10-10.23 includes the city’s site design standards, and the  
11 process the city uses to consider site design proposals. BCC 10-10.23(1) describes the  
12 purpose of the site design process:

13 “The purpose of Site Plan Approval is to ensure compliance with the  
14 objectives of this Ordinance and the Comprehensive Plan where development  
15 may cause a conflict between uses in the same or adjoining zones by creating  
16 unsightly, unhealthful or unsafe conditions and thereby adversely affect the  
17 public health, safety, and general welfare. The purpose shall also be to avoid  
18 creating undue burdens on public facilities and services. *In considering a site  
19 plan the committee shall take into account the impact of the proposed  
20 development on nearby properties, on the capacity of the street system, on  
21 land values and development potential of the area, and on the appearance of  
22 the street and community.*” (Emphasis added.)

23 Petitioners argue that the portion of BCC 10-10.23(1) emphasized above sets out  
24 applicable approval criteria that supplement the approval criteria listed in BCC 10.10.23(8).<sup>1</sup>

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<sup>1</sup> BCC 10-10.23(8) provides:

“Site Plan Criteria. Approval of a site plan shall be based on the following criteria:

- “(a) Safety and Privacy. Residential site plans shall be designed to provide a safe living environment, while offering appropriate opportunities for privacy and transitions from public to private spaces.

1 According to petitioners, they and others raised issues regarding the negative impact the  
2 proposed site design would have on adjacent properties and on the neighborhood property  
3 values. Petitioners argue that neither the design review committee nor the hearings officer  
4 addressed those issues. According to petitioners, the hearings officer erred in concluding that  
5 the design review committee addressed the issues they raised regarding compliance and also  
6 erred in his alternative conclusion that BCC 10-10.23(8) incorporates those considerations  
7 into specific approval criteria.

8 Intervenor responds that the hearings officer properly declined to add the factors  
9 listed in BCC 10-10.23(1) to the approval criteria set out in BCC 10-10.23(8). According to  
10 intervenor, the hearings officer's conclusion is the proper interpretation and is consistent  
11 with past city interpretations of the purpose statement. In addition, intervenor argues that the  
12 hearings officer did consider the testimony of petitioners and others, but concluded that the

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- “(b) Special Needs of Handicapped. When deemed appropriate the site plan shall provide for the special needs of handicapped persons, such as ramps for wheelchairs, drop curbs, and handicapped parking stalls.
  - “(c) Preservation of Natural Landscape. The landscape and existing grade shall be preserved to the maximum practical degree, considering development constraints and suitability of the landscape or grade to serve the applicant's functions. Preserved trees and shrubs shall be protected during construction.
  - “(d) Pedestrian and Vehicular Circulation and Parking. The location and number of points of access to the site, the interior circulation patterns, designs of parking areas, and the separation between pedestrians and moving and parked vehicles shall be designed to promote safety and avoid congestion on adjacent streets.
  - “(e) Buffering and Screening. Area, structures, and facilities for storage, machinery and equipment, services (main, refuse, utility wires, and the like), loading and parking, and similar accessory areas and structures shall be designed, located, buffered, or screened to minimize adverse impacts on the site and neighboring properties.
  - “(f) Utilities. All utility installations above ground, if such are allowed, shall be located so as to minimize adverse impacts on the site and neighboring properties.
  - “(g) Public Facilities. The proposed use shall not be an undue burden on public facilities, such as the street, sewer or water systems.

1 impact of the proposed site design would be minimized by landscaping, fencing and other  
2 buffers.

3 The hearings officer’s decision states, in relevant part:

4 “The Hearings Officer upholds the City Planning Division’s interpretation of  
5 BCC [10-10.23(1)] and finds that the language of the ‘Purpose Statement’ is  
6 intended to be implemented through the approval criteria contained in [BCC  
7 10-10.23(8)]. The record demonstrates that the City has consistently applied  
8 this interpretation of the code \* \* \*.

9 “The Hearings Officer finds that the City Planning Division adequately  
10 evaluated the impact of the proposed development on [petitioners’] property  
11 through the application of the standards and criteria contained in [BCC] 10-  
12 10.23, 10-10.23A and 10-10.24. Consistent with the language of [BCC 10-  
13 10.23(1)], the Site Plan approval criteria require the City \* \* \* to evaluate[:]  
14 safety and privacy, the preservation of natural landscape, pedestrian and  
15 vehicular circulation and parking, buffering and screening, the placement of  
16 utilities and the impact of a proposed project on all public facilities. Each of  
17 these substantive standards is intended—in large part—to insure that building  
18 and development is conducted in a manner that will not adversely impact or  
19 place an undue burden on surrounding properties.

20 “The City Code provides additional protection for surrounding properties  
21 through the implementation of the ‘Required Minimum Standards’ for a Site  
22 Plan that are set forth in [BCC 10-10.23(9)]. The minimum site plan  
23 requirements dictate stringent and extensive landscaping and maintenance  
24 requirements and provide that the applicant must establish different buffer  
25 areas to protect surrounding properties. In addition, the Design Review  
26 Standards of [BCC 10-10.23A] contain building and design standards that will  
27 insure the building is constructed in a manner that will protect the value of  
28 surrounding development. \* \* \*” Record 32-33.

29 The hearings officer correctly rejected petitioners’ argument that the BCC 10-  
30 10.23(1) provides site plan approval criteria; it does not. The site plan approval criteria are  
31 set out at BCC 10-10.23(8). *See* n 1. However, in rejecting petitioners’ contention that BCC  
32 10-10.23(1) sets out mandatory approval criteria, the hearings officer erroneously concludes  
33 that the city need not directly consider the impacts identified in BCC 10-10.23(1). While  
34 there is some language in the hearings officer’s decision that can be read to suggest that he in  
35 fact directly considered the “impacts” that BCC 10-10.23(1) expressly states the city “shall  
36 take into account,” it is clear from the decision as a whole that he ultimately agreed with

1 planning staff that only the BCC 10-10.23(8) approval criteria and BCC 10-10.23(9) required  
2 minimum standards had to be directly considered. Stated differently, the hearings officer  
3 ultimately concluded that while the city must directly consider the site plan approval criteria  
4 at BCC 10-10.23(8) and the required minimum standards at BCC 10-10.23(9), it could not  
5 directly consider the impact of the proposed development on land values under BCC 10-  
6 10.23(1) or require modifications in the proposed site design if it determined such  
7 modifications were warranted. That is an erroneous construction of BCC 10-10.23(1).

8 We review the hearings officer’s interpretation of the BCC as presenting a question of  
9 law. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). In reviewing a  
10 local government’s interpretation, we consider both the text and context of the ordinance at  
11 issue. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P2d 1143 (1993);  
12 *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140, 143-44 (2002), *aff’d*  
13 187 Or App 241, 65 P3d 1123 (2003).

14 Purpose statements in land use regulations are often generally worded expressions of  
15 the motivation for adopting the regulation, or the goals or objectives that the local  
16 government hopes to achieve by adopting the regulation. Where a purpose statement is  
17 worded in that manner, it does not play a direct role in reviewing applications for permits  
18 under the land use regulations. *Beck v. City of Tillamook*, 20 Or LUBA 178, 185-86 (1990),  
19 *aff’d* 105 Or App 276, 812 P2d 16 (1991), *rev’d on other grounds* 313 Or 148, 831 P2d 674  
20 (1992). The first two sentences of BCC 10-10.23(1) appear to be such non-regulatory,  
21 general expressions. In other cases, however, purpose statements can impose additional  
22 affirmative duties upon the local government that must be fulfilled. The third sentence of  
23 BCC 10-10.23(1) unambiguously imposes a requirement that certain specified impacts,  
24 including impacts “on land values” be taken “into account.” Unlike the first two sentences of  
25 BCC 10-10.23(1), the last sentence does not express a general purpose; it imposes an  
26 affirmative obligation to consider certain identified impacts. Thus, although BCC 10-

1 10.23(1) does not state approval criteria, it does set out four impacts that the city is obligated  
2 to consider. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386, 395 (1993).

3 If the site plan criteria at BCC 10-10.23(8) or the required minimum standards at  
4 BCC 10-10.23(9) separately required that the impacts identified in BCC 10-10.23(1) be  
5 considered, the city would obviously not have to apply BCC 10-10.23(1) directly and  
6 duplicate those considerations. However, that is not the case here. Neither BCC 10-10.23(8)  
7 nor BCC 10-10.23(9) require that the city directly consider impacts on land values. The fact  
8 that applying BCC 10-10.23(8) and (9) could indirectly require changes that could have some  
9 impact on land values is not sufficient to satisfy the express and unambiguous requirement of  
10 BCC 10-10.23(1) that impacts on land values must be considered.

11 The BCC 10-10.23(1) requirement that the city directly consider the impact of the  
12 proposed site design on “land values and development potential of the area” is not only  
13 dictated by the unambiguous language of BCC 10-10.23(1), but also by its context. In  
14 particular, BCC 10-10.23(6) provides:

15 “The committee may require the following *in addition to the minimum*  
16 *standards of this ordinance* as a condition to the Site Plan Approval.

17 “\* \* \* \* \*

18 “(m) Any other limitations or conditions which it considers necessary to  
19 achieve *the purposes* of this ordinance.” (Emphasis added).

20 This section clearly contemplates considerations beyond “the minimum standards” of the  
21 ordinance, which is presumably a reference to the site plan criteria at BCC 10-10.23(8) and  
22 the required minimum standards at BCC 10-10.23(9). BCC 10-10.23(1) dictates that the city  
23 consider the site design’s impact on land values, and BCC 10-10.23(6)(m) expressly provides  
24 that the hearings officer may impose conditions that he “considers necessary” to address  
25 those impacts.

26 In summary, we agree with the hearings officer that BCC 10-10.23(1) does not  
27 impose a mandatory approval criterion that would, if not met, require that the application be

1 denied. BCC 10-10.23 is worded as a mandate that certain impacts be *considered*, not as a  
2 standard that must be *achieved*. However, BCC 10-10.23(1) does obligate the city to consider  
3 the impact the proposed site plan will have on land values. BCC 10-10.23(1) does not specify  
4 what the city must do after it has considered the impacts set out in BCC 10-10.23(1).  
5 However, when BCC 10-10.23(1) is read in context with BCC 10-10.23(6)(m), it is clear that  
6 the city could impose conditions to mitigate impacts on land values if it “considers  
7 [conditions] necessary.” The city presumably has a great deal of discretion in determining  
8 whether any conditions are “necessary” to mitigate impacts on land values, but BCC 10-  
9 10.23(6)(m) makes it clear that the city has both the authority and the obligation to make that  
10 determination. The city erred in concluding that it lacked authority to consider the impacts  
11 that BCC 10-10.23(1) requires it to consider.

12 The first assignment of error is sustained.

### 13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioners argue that the city made a decision not supported by substantial evidence  
15 because the hearings officer misconstrued petitioners’ argument that BCC 10-10.23(1)  
16 requires consideration of the negative impact on adjacent property values of the proposed site  
17 plan, as an argument that an “independent financial analysis” was required. Similarly,  
18 petitioners contend the hearings officer misconstrued their argument that commuters’ views  
19 of petitioners’ property must be considered, as an argument that they were entitled to a scenic  
20 “view corridor.”

21 We do not agree that the hearings officer misconstrued petitioners’ arguments. We  
22 believe it is reasonably clear that the hearings officer understood petitioners’ arguments,  
23 considered them, and eventually did not agree with them. The phrases “independent financial  
24 analysis” and “view corridor” appear to merely be the shorthand description that the hearings  
25 officer used to succinctly describe petitioners’ arguments. While petitioners’ may not agree

1 with those descriptions, we do not see that they are inaccurate. The hearings officer's  
2 decision, when describing petitioners' arguments, states:

3 "[Petitioners] argue [that] the City Planning Division erred in not specifically  
4 addressing the financial impacts of the proposed Site Plan on neighboring  
5 property owners as an independent approval criterion. [Petitioners] point to  
6 the mandatory 'shall' language contained in the purpose statement and  
7 contend that a detailed financial impacts analysis is necessary before  
8 providing Site Plan approval. \* \* \*

9 "The record on appeal contains evidence submitted on behalf of [petitioners]  
10 that the proposed Site Plan would have negative financial impacts on the  
11 adjacent property owned by [petitioners]. [Petitioners'] property is a newly  
12 developed commercial office building that houses multiple retail tenants who  
13 rely on being visible to the passing retail public. \* \* \* [Petitioners] believe the  
14 proposed Site Plan and building orientation would make it difficult to secure  
15 tenants for the property and would result in financial harm." Record 31.

16 The above quoted findings demonstrate that the hearings officer understood that  
17 petitioners were arguing that BCC 10-10.23(1) required consideration of negative financial  
18 impacts to neighboring properties outside the context of just the approval criteria and  
19 required minimum standards. The hearings officer, however, did not agree with petitioners'  
20 interpretation. Record 32. The above quoted findings also make clear that the hearings  
21 officer's use of the phrase "view corridor" later in his decision referred to views of the  
22 properties by commuters rather than views of the surrounding landscapes from the buildings.  
23 Record 33. The hearings officer did not misconstrue petitioners' arguments.

24 Because we have already determined that the hearings officer misconstrued the  
25 applicable law, whether he additionally misconstrued certain particulars of petitioners'  
26 arguments is irrelevant. Petitioners' second assignment of error adds no additional basis for  
27 remand.

28 The second assignment of error is denied.

29 **THIRD ASSIGNMENT OF ERROR**

30 Petitioners argue that the hearings officer misconstrued the law and made a decision  
31 not supported by substantial evidence by finding that a city street policy "dictated" approval

1 of intervenor’s site plan.<sup>2</sup> According to petitioners, because intervenor’s lot is 140 feet deep,  
2 placing the access point 50 feet from Franklin Avenue still leaves it closer to the southern  
3 edge of the lot. Also, petitioners argue there is nothing in the street policies that require the  
4 parking lot to be located in the same place as the access point. Finally, petitioners submitted  
5 their own version of the site plan depicting the parking lot at the northern end of the lot.

6 We do not believe the hearings officer found that the street policy, in itself, “dictated”  
7 approval of the site plan. The hearings officer’s findings state:

8 “\* \* \* the record on appeal demonstrates that *City standards dictated – in part*  
9 – the southern orientation of the [intervenor’s] proposed structure. The [street  
10 policy requires intervenor’s] proposed Second Street entry point to be located  
11 a minimum of 50-feet from the Franklin Avenue curb return.” Record 33.  
12 (Emphasis added.)

13 The decision refers to city standards, not merely the street policy, and more importantly,  
14 clearly states that they dictate “in part” the southern orientation of the structure. It is clear  
15 that the hearings officer did not believe these standards and policies compelled approval of  
16 the site plan as proposed, merely that they limited site layout options that were available to  
17 intervenor.

18 Petitioners do not argue that the street policy is violated or that there is insufficient  
19 evidence demonstrating that it is complied with. Petitioners’ argument is that the street  
20 policies do not require the parking lot to be at the northern end of the lot. Even if that is true,  
21 that does not mean that the street policy *prevents* the parking lot from being at the northern  
22 end of the lot, and we do not see that it does. The hearings officer did not misconstrue the  
23 street policy, and the finding that it is complied with is supported by substantial evidence.  
24 Finally, although the hearings officer could have perhaps required intervenor to make some  
25 of the changes to the site plan that petitioners suggest, there is no requirement that he provide

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<sup>2</sup> City of Bend Street Policy 2, Section 6 requires that a driveway access point should be located no less than 50 feet from an arterial intersection. Because intervenor’s frontage on Franklin Avenue is only 50 feet wide, the city required the access to be relocated to Second Street.

1 a reason for not imposing a condition of approval submitted by another party to the appeal.  
2 *Hunt v. City of Ashland*, 35 Or LUBA 467, 478 (1999) (there is no applicable legal standard  
3 that requires a local government to have a reasonable basis for declining to impose a  
4 condition of approval proposed by another party).<sup>3</sup>

5 The third assignment of error is denied.

6 The city's decision is remanded.

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<sup>3</sup> As discussed under the first assignment of error, under BCC 10-10.23(1) and (6), the city may have an affirmative duty to impose conditions of approval to mitigate impacts the city is required to consider, if the city finds such conditions are "necessary."