

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GREGORY ROE and WARREN ROE,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF UNION,
10 *Respondent,*

11 and

12
13
14 ROY BAREMORE and TANYA BAREMORE,
15 *Intervenors-Respondent.*

16
17 LUBA No. 2003-130

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Union.

23
24 Dan Van Thiel, Baker City, filed the petition for review and argued on behalf of
25 petitioners.

26
27 No appearance by respondent.

28
29 Roy Baremore and Tonya Baremore, Union, filed the response brief and argued on
30 their own behalf.

31
32 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
33 participated in the decision.

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35 AFFIRMED

11/26/2003

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

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NATURE OF THE DECISION

Petitioners appeal a city decision that grants approval for a home occupation.

FACTS

The subject property includes approximately .6 acres and is located in the city’s R-1 Residential zone. Home occupations are allowed as a conditional use in the R-1 zone, provided the general conditional use criteria in the City of Union Zoning Ordinance (UZO) and the specific criteria that apply to home occupations under the UZO are satisfied. Intervenors, the applicants below, sought approval for an auto-diesel repair business as a home occupation.

The disputed auto-diesel repair business would be operated in large part as a mobile business off-site. The home occupation part of the business would be conducted in a 25-foot by 50-foot shop located at the rear of intervenor’s property. The city’s planning commission found that intervenors adequately demonstrated that the proposal complies with all relevant criteria and approved the application. Petitioners appealed that decision to the city council, which denied the appeal and “adopt[ed] the [p]lanning [c]ommission’s decision * * * as its own[.]” Record 1.¹ This appeal followed.

INTRODUCTION

Among the conditional uses allowed in the R-1 zone are “[h]ome occupations.” UZO 3.512(7). UZO 1.030(28) defines “[h]ome occupation” as “[a] lawful occupation carried on by a resident in his dwelling or accessory building, where the occupation is secondary to the main use of the property as a residence.” UZO 5.010 authorizes the city’s planning commission to approve conditional uses, and sets out the general criteria that must be met for

¹ As we note later, petitioners erroneously direct a number of their arguments at the planning commission’s decision rather than at the city council’s decision.

1 the planning commission to grant conditional use approval.² In addition to the general
2 conditional use criteria at UZO 5.010, UZO 5.050(1) sets out specific requirements for
3 approval of home occupations.³ In 16 assignments of error, petitioners present substantive
4 and procedural challenges to the city’s decision. We address those assignments of error
5 below.

6 **FIRST ASSIGNMENT OF ERROR**

7 The enacting clause of the UZO provides, in part:

² As relevant, UZO 5.010 provides:

“Authorization to grant or deny conditional uses. A conditional use listed in this ordinance shall be permitted * * * in accordance with the standards and procedures of [Section 5 of the UZO]. * * * In judging whether or not a conditional use proposal shall be approved or denied the Planning Commission shall weigh its appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, in order to approve such use, shall find that the following criteria are met, can be met by observance of conditions, or are not applicable:

- “1) The proposal will be consistent with the comprehensive plan and the objectives of the zoning ordinance and other applicable policies of the City.
- “2) The location size, design and operating characteristics under the proposal will have minimal adverse impact on the livability, value or appropriate development of abutting properties and the surrounding area.
- “3) The location and design of the site and structures of the proposal will be as attractive as the nature of the use and its setting warrant.
- “4) The proposal will preserve environmental assets of particular interest to the community.
- “5) The applicant has a bona fide intent and capability to develop and use the land as proposed and has no inappropriate purpose for submitting the proposal, such as to artificially alter property values for speculative purposes.”

³ UZO 5.050(1) provides:

“Home occupations. Any home occupation which causes abnormal automotive or pedestrian traffic or which is objectionable due to unsightliness or emission of odor, dust, smoke, noise, glare, heat, vibration or similar causes discernable on the outside of any building containing such home occupation shall be prohibited. The premises shall at all times be maintained as residential in appearance. Any materials used or any item produced or repaired on the premises shall not be displayed or stored so as to be visible from the exterior of the building. Structural alterations shall not detract from the outward residential appearance. Any use that interferes with local radio or television reception shall be discontinued.”

1 “AN ORDINANCE TO DESIGNATE, REGULATE AND RESTRICT THE
2 LOCATION AND USE OF BUILDINGS, STRUCTURES AND LAND FOR
3 RESIDENCE, BUSINESS, TRADE, INDUSTRY, AGRICULTURE,
4 RECREATION AND OTHER PURPOSES; AND FOR SAID PURPOSES
5 TO DIVIDE THE CITY INTO ZONES OR DISTRICTS OF SUCH
6 NUMBER, SHAPE AND AREA AS MAY BE DEEMED BEST SUITED TO
7 CARRY OUT THESE REGULATIONS * * *.” Petition for Review
8 Appendix B-9.

9 Petitioners contend that approval of “a public garage, as a home occupation in a residential
10 zone openly defies the basic intention of [the UZO].” Petition for Review 7.

11 As initial matter, petitioners make no attempt in their argument under this assignment
12 of error to explain why the above-quoted UZO enacting clause applies directly as an
13 approval standard for the disputed application. It is not obvious to us why the enacting
14 clause is a relevant consideration in a decision to approve this particular home occupation
15 application, since neither UZO 5.010 nor 5.050 mentions the enacting clause. It may be that
16 petitioners are relying on the general requirement in UZO 5.010(1) that the proposal “be
17 consistent with * * * the objectives of the zoning ordinance[.]” See n 1. Even if we assume
18 that is the case, petitioners’ arguments are difficult to decipher. Petitioners’ entire argument
19 is set out below:

20 “Knowingly allowing a public garage as a home occupation in a residential
21 zone openly defies the basic intention of [the UZO]. As described above the
22 purpose of the [UZO] is to provide guidance to ‘regulate and restrict’ land
23 uses that may conflict. Approving conflicting land uses to attempt to co-exist
24 will only be detrimental to the community. This fact has been realized
25 historically resulting in the City of Union authoring and adopting its
26 Comprehensive Land Use Plan in 1984. No present day circumstances
27 supercede the original intent of the Plan. In fact the City chose to further
28 define restrictions with [UZO sections 2 and 3] so as to protect the citizens of
29 Union, and their future. OAR 661-010-007(1)(c) applies due to the fact that
30 ‘The decision violates a provision of applicable law and is prohibited as a
31 matter of law’.” Petition for Review 7-8.

32 Petitioners’ arguments under this assignment of error are simply too unfocused and
33 undeveloped to provide a basis for remand. *Deschutes Development v. Deschutes Cty.*, 5 Or
34 LUBA 218, 220 (1982). Petitioners’ first sentence characterizes the proposed home

1 occupation as a “public garage,” but does not explain the significance of, or the basis for, that
2 characterization. The second sentence says that the enacting clause states the purpose or
3 objective of the UZO, which petitioners characterize as “to ‘regulate or restrict’ land uses
4 that may conflict.” While it may be true that other parts of the UZO express a purpose of
5 avoiding land use conflicts, the UZO enacting clause (which is the only provision that
6 petitioners identify in this assignment of error) says nothing about conflicting land uses. The
7 third sentence simply states petitioners’ opinion that the proposal will be a “conflicting” land
8 use that will be “detrimental to the community.” Petitioners are entitled to their opinion, but
9 their expression of opinion is insufficient to state a basis for reversal or remand. Without
10 further elaboration, the remaining sentences add nothing of any legal significance to the first
11 three.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 In part, UZO 5.050(1) prohibits a home occupation “*which is objectionable* due to
15 * * * emission of odor, dust, smoke, noise, glare, heat, vibration or similar causes discernable
16 on the outside of any building containing such home occupation.” (Emphasis added.) *See n*
17 2. Petitioners argue “[t]he law states that *any* emissions of the above pollutants shall be
18 prohibited in a residential zone.” Petition for Review 8 (petitioners’ emphasis). Petitioners
19 go on to argue “[i]t would be impossible to operate a garage without any emissions of noise,
20 odor, dust, heat, or vibration.” *Id.*

21 Petitioners mischaracterize UZO 5.050(1) as a criterion that prohibits “any”
22 omissions, when in fact it prohibits “objectionable” home occupations and lists a number of
23 factors that may cause a home occupation to be “objectionable.” Petitioners make no attempt
24 to explain why the omissions that may be produced by the proposed home occupation, as
25 proposed by intervenors and approved by the city, will be objectionable and thus violate
26 5.050(1). The city’s findings point out that most of intervenors’ repair business is mobile

1 and conducted off-site and that only 4-5 vehicles per month will be repaired on-site. The city
2 also adopted the following finding:

3 “* * * While diesel-powered vehicles typically generate more noise, smoke,
4 and vibration than gasoline-powered vehicles, the applicants stated that all
5 work will be conducted inside the existing shop, which will eliminate, or
6 reduce odors, dust, smoke, noise or vibration to levels that should not be
7 objectionable. * * *” Record 9-10.

8 Petitioners make no attempt to challenge the adequacy of the city’s findings. Given these
9 unchallenged findings, the second assignment of error provides no basis for reversal or
10 remand.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 UZO 8.000 provides that where more than one city legal requirement applies, the
14 more restrictive requirement must be complied with.⁴ Petitioners again take the position that
15 UZO 5.050(1) states, “any pollutants will not be tolerated” and contends that the city’s
16 decision therefore “violates not only [UZO] 5.050(1) but also [UZO] 8.000.” Petition for
17 Review 9. That argument again inaccurately characterizes the emissions limitation imposed
18 by UZO 5.050(1). It also states a UZO 8.000 argument that we do not understand, since
19 petitioners identify no overlapping requirement to which UZO 8.000 might apply.

20 The third assignment of error is denied.

21 **FOURTH AND FIFTEENTH ASSIGNMENTS OF ERROR**

22 UZO 3.513 lists prohibited uses in the R-1 zone.

⁴ UZO 8.000 provides:

“Interpretation. The provisions of [the UZO] shall be held to be the minimum requirements fulfilling its objectives. Where conditions imposed by any other provision of this ordinance or of any other ordinance, resolution or regulation exist, the provisions which are more restrictive shall govern.”

1 “Prohibited uses. Any use declared a nuisance * * * by action of the City
2 Council, or by a court of competent jurisdiction. All uses prohibited in the
3 Commercial C-1 zone. * * *”

4 Under the fourth assignment of error, petitioners argue the proposal is a prohibited
5 “nuisance.” Under the fifteenth assignment of error, petitioners argue the proposal is
6 prohibited in the R-1 zone because it is prohibited in the C-1 zone.

7 **A. Nuisance**

8 Petitioners contend the proposal “would clearly constitute a nuisance due to
9 emissions of odor, dust, smoke, noise, glare, heat, and vibrations that are necessary to
10 conduct such a business.” Petition for Review 9. However, petitioners do not argue that the
11 city council or a court has “declared” the proposed home occupation to be a nuisance.
12 Unless and until there is such a city council or court declaration, UZO 3.513 could not apply
13 to prohibit the proposed home occupation as a nuisance.

14 The fourth assignment of error is denied.

15 **B. Uses Prohibited in the C-1 Zone**

16 UZO 3.114(8) prohibits the following retail uses in the C-1 zone:

17 “8) Heavy retail sales such as but not limited to:

18 “a) Automotive sales

19 “b) Tire sales and service

20 “c) Trailer sales and service

21 “d) Pleasure craft sales and rental”

22 Petitioners next cite UZO 7.070, which allows the planning commission to “*permit* a
23 particular use in a zone provided the use is of the same general type as the uses permitted” in
24 the zone. (Emphasis added). Petitioners then apply UZO 7.070 in exactly the opposite way
25 and argue that the city would be required to *prohibit* the proposed home occupation the C-1
26 zone because it is of the same general type as the above listed prohibited heavy retail sales
27 uses. Petitioners argue that UZO 3.513 extends that prohibition to the R-1 zone.

1 We do not agree that UZO 7.070 operates in the way that petitioners argue. UZO
2 7.070 allows the city to expand the list of permitted uses; it does not allow the city to expand
3 the list of prohibited uses. Even UZO 7.070 did allow expansion of the list of prohibited
4 uses, we do not agree with petitioners that the proposed home occupation is of the “same
5 general type” as the above listed heavy retail sales uses. We do not understand the city to
6 have authorized *any* retail sales.

7 The fifteenth assignment of error is denied.

8 **FIFTH ASSIGNMENT OF ERROR**

9 UZO 5.010(1) requires that conditional uses be “consistent with the comprehensive
10 plan[.]” *See* n 2. UZO 5.010(2) requires that conditional uses “have minimal adverse impact
11 on the livability, value or appropriate development of abutting properties[.]” *Id.*

12 **A. Comprehensive Plan**

13 Petitioners first argue that the proposed home occupation violates comprehensive
14 plan Goal 6, Policy 2 and Recommendations 1 and 2.⁵ Although petitioners assert that the
15 cited plan policy and recommendations are violated, they do not develop an argument to
16 explain why they believe that is the case. The city adopted the following findings that
17 explain when the comprehensive plan policies apply directly to the challenged decision:

18 “* * * Generally, unless otherwise noted, if an applicant demonstrates that all
19 of the applicable criteria and standards contained in the zoning ordinance are

⁵ Goal 6, Policy 2 is as follows:

“Sources of noise, air, or water pollution will be located so as to have the least impact on resources and existing land use activities.”

Goal 6, Recommendations 1 and 2 are as follows:

- “1. That sources of noise, air, land, and water pollution be located where compatible with surrounding uses through the Zoning Ordinance and Land Use Plan requirements.
- “2. That buffer areas between conflicting uses will be maintained through use of Zoning Ordinance and Land Use Plan classifications.”

1 met, the [proposed conditional] use will be consistent with the comprehensive
2 plan. This report outlines all of the criteria and standards contained in the
3 zoning ordinance that are considered applicable to this request, as well as any
4 policies noted within the comprehensive plan that are otherwise applicable.”
5 Record 6.

6 Because the city does not separately address the comprehensive plan policy and
7 recommendations that petitioners cite, we understand the above-quoted findings to take the
8 position that intervenors’ demonstration that the proposed home occupation complies with
9 the UZO conditional use and home occupation approval standards is also sufficient to
10 demonstrate that it complies with these parts of the comprehensive plan.

11 Petitioners do not challenge the above-quoted findings. Without such a challenge,
12 petitioners’ arguments concerning comprehensive plan Goal 6, Policy 2 and
13 Recommendations 1 and 2 provide no basis for reversal or remand.

14 **B. Minimal Adverse Impact**

15 The city adopted over a page of single-space findings in which it goes into some
16 detail explaining why it concluded the physical characteristics of intervenors’ property and
17 surrounding properties, and the manner in which intervenors propose to carry out the home
18 occupation are sufficient to ensure that the proposal will have “minimal adverse impact on
19 the livability, value, or appropriate development of abutting properties and the surrounding
20 area.” Record 6-7.

21 Petitioners’ arguments neither acknowledge nor challenge the city’s findings.
22 Instead, petitioners argue (1) a petition submitted by opponents was ignored, and (2) that
23 testimony by “a realtor from the area provided evidence * * * that land value of the ‘abutting
24 properties and the surrounding area’ would be negatively affected.” Petition for Review 10.

25 To the extent petitioners advance a findings challenge under this part of the fifth
26 assignment of error, their failure to make any attempt to explain why the city’s findings are
27 deficient is fatal. To the extent petitioners are advancing a substantial evidence challenge,

1 they offer no reason to believe the city ignored the opponents' petition.⁶ With regard to the
2 cited realtor's testimony, we have explained on many occasions that the choice between
3 conflicting believable evidence belongs to the local decision maker. *Bottum v. Union*
4 *County*, 26 Or LUBA 407, 412 (1994); *Douglas v. Multnomah County*, 18 Or LUBA 607,
5 617 (1990). Petitioners make no attempt to show that the realtor's testimony was so strong
6 and convincing that the city could not reasonably believe the evidence it discusses and relies
7 on in its findings to conclude that the proposal satisfies the "minimal adverse impact"
8 criterion.

9 The fifth assignment of error is denied.

10 **SIXTH ASSIGNMENT OF ERROR**

11 ORS 215.448(1) authorizes the "governing body of a county" to approve home
12 occupations if certain conditions are met. However, ORS 215.448(3) provides that nothing
13 in ORS 215.448 "authorizes the governing body or its designate to permit construction of
14 any structure that would not otherwise be allowed in the zone in which the home occupation
15 is to be established."

16 Petitioners argue the proposed "auto/diesel garage" should be viewed as an
17 "industrial use" which is allowed in the city's industrial zone, but not allowed in the R-1
18 zone. We understand petitioners to argue that the city's decision to allow what they believe
19 is an industrial use as a home occupation in the R-1 zone, violates ORS 215.488(3). There
20 are two problems with petitioners' argument under this assignment of error. First,
21 petitioners' disagreement with the city about whether the proposal must be viewed as an
22 industrial use, as opposed to a home occupation, is not sufficient to establish that the city's

⁶ Petitioners do not identify where the referenced petition appears. We assume they are talking about the letter to the planning commission that appears at Record 63. Petitioners cite page 71 of the record, which is one page of the minutes of the planning commission hearing in this matter. That page of the minutes indicates the planning commission "reviewed" "testimony that had been received." One planning commissioner stated he "didn't think that the concerns in the letter, or others he had heard, were justified in the adverse impacts they anticipated." Disagreeing with the concerns expressed in the letter is not the same thing as ignoring them.

1 view is legally incorrect. Second, and more importantly for purposes of this assignment of
2 error, ORS 215.448 applies to counties not cities.

3 The sixth assignment of error is denied.

4 **SEVENTH ASSIGNMENT OF ERROR**

5 Petitioners' argument under this assignment of error is similar to their argument
6 under the sixth assignment of error in that it relies on their assumption that the proposal must
7 be viewed as an industrial use. Petitioners first cite the comprehensive plan's description of
8 "Residential" and "Industrial" land use classifications.⁷ Neither of those classifications
9 addresses home occupations, which are expressly allowed under the UZO. Neither do those
10 plan classification descriptions impose any identifiable limits on what may be allowed as a
11 home occupation. Petitioners simply repeat their position that the proposed home occupation
12 is properly viewed as an industrial use and argues that the city's decision is inconsistent with
13 the plan classification descriptions. We reject the argument.

14 The seventh assignment of error is denied.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 Under this assignment of error, petitioners repeat their position that the proposal is an
17 "industrial use" and a "public garage" and claim that because the outbuilding where the
18 repair work will take place is not vented, the door will have to remain open for ventilation
19 purposes "resulting in increased noise, smoke, vibration, and odor emissions to the residents

⁷ Those descriptions are as follows:

"Residential: To provide areas suitable and desirable for single-family residential, duplex, and multi-family dwellings. Residential development is identified on the Plan Map as being suitable within the Urban Growth Area on currently uncommitted lots." City of Union Comprehensive Plan 4.

"Industrial: To provide areas suitable and desirable for those industrial activities needed to maintain or improve area economy and employment. Industrial areas are generally located where service and transportation improvements are available, and development is compatible with surrounding area uses. Industrial development is shown on the Plan Map as being most suitable where existing industrial activities are located." *Id.*

1 of the area.” Petition for Review 12. We understand petitioners to argue that this result
2 violates comprehensive plan Goal 6, Policy 2 (“[s]ources of noise, air, or water pollution will
3 be located so as to have the least impact on resources and existing land use activities”). *See*
4 n 5.

5 As we already noted in rejecting the fifth assignment of error, petitioners do not
6 challenge the city’s finding that demonstrating compliance with the UZO approval criteria
7 makes it unnecessary to address this plan policy directly. Without challenging that finding,
8 petitioners cannot fault the city for failing to address comprehensive plan Goal 6, Policy 2.
9 That problem aside, it may be that the lack of a roof vent could mean that more noise and
10 vibrations will escape through the door, but it is hard to see how venting smoke and odors
11 out the door rather than through the roof could have any appreciable effect. In any event,
12 even if comprehensive plan Goal 6, Policy 2 applied directly, the policy is directed at where
13 sources of pollution are “located.” The policy has nothing to do with the operational
14 characteristics that petitioners complain about in this assignment of error.

15 The eighth assignment of error is denied.

16 **NINTH AND TENTH ASSIGNMENT OF ERROR**

17 Under these assignments of error, petitioners repeat their claims that the proposed use
18 violates comprehensive plan Goal 6, Policy 2 and Recommendation 1. We deny these
19 assignments of error for the same reason we denied the fifth assignment of error.

20 **ELEVENTH ASSIGNMENT OF ERROR**

21 Citing a small part of ORS 227.090, petitioners argue the planning commission only
22 has authority to make a recommendation to the city council on the home occupation permit
23 application and committed reversible error by taking final action on the application.⁸

⁸ The language from ORS 227.090 that petitioners rely on is set out below:

“(1) Except as otherwise provided by the city council, a city planning commission may:

1 Petitioners are wrong for several reasons. First, even if the planning commission did
2 err in making a final as opposed to a recommended decision, that decision was appealed to
3 the city council, and the city council adopted the planning commission’s decision as its own.
4 It is the city council’s decision that is before us in this appeal, not the planning commission’s
5 decision. The city council’s decision to adopt the planning commission’s decision as its own
6 would likely cure the error petitioners identify, if it was error. But the planning commission
7 acted within its authority. ORS 227.175 sets out the statutory requirements for making
8 decisions on permit applications. Another subsection of ORS 227.090 that petitioners do not
9 cite, ORS 227.090(h), expressly authorizes the planning commission to “[d]o and perform all
10 other acts and things necessary or proper to carry out the provisions of ORS * * * 227.175
11 * * *.” In addition to this statutory authority, UZO 5.010 expressly authorizes the planning
12 commission to make conditional use permit decisions. *See* n 2. UZO 5.010 sets out the
13 criteria the planning commission is to apply in determining whether the application should be
14 “approved or denied;” it does not direct that the planning commission forward a
15 recommendation for action to the city council for final action.

16 The eleventh assignment of error is denied.

17 **TWELFTH, THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR**

18 In these assignments of error, petitioners rely on language in ORS 227.170(2),
19 227.173(1), and 227.175(4) which collectively require that permit decisions be based on
20 “factual information,” the “comprehensive plan,” and the UZO. Petitioners’ arguments
21 under this assignment of error repeat arguments that we have already rejected in rejecting the
22 first eleven assignments of error. We reject them here for the same reasons without
23 additional discussion.

24 The twelfth, thirteenth and fourteenth assignments of error are denied.

“(a) Recommend and make suggestions to the council and to other public authorities concerning [a large number of things].”

1 **SIXTEENTH ASSIGNMENT OF ERROR**

2 Petitioners’ entire argument under their final assignment of error is set out below:

3 “Petitioner contends that a breach of procedure occurred on May 21, 2003 at
4 the Planning Commission hearing when [the proposed home occupation] was
5 discussed and consequently approved. No quorum existed as only three
6 voting members were present, and one ex-officio member who under ORS
7 227.030(1) was not allowed to vote. In doing such ‘the governing body
8 exceeded its jurisdiction’ and the decision should be reversed. OAR 661-010-
9 070(1)(a).” Petition for Review 16.

10 Petitioners’ sixteenth assignment of error must be denied. Petitioners attach to their
11 petition for review Ordinance 259, which establishes the planning commission and sets out
12 its powers and duties.⁹ Two sections of that ordinance are relevant here and are set out
13 below:

14 “Section 2. Membership. The Planning Commission of the City of Union
15 shall consist of seven members to be appointed by the Mayor, not more than
16 two of whom shall be nonresidents of the City of Union. Not more than two
17 members of the Planning Commission may be city officers, who shall serve as
18 ex officio members.”

19 “Section 6. Quorum. Four members of the commission shall constitute a
20 quorum. At least three members appointed by the mayor shall at all times
21 constitute a part of such quorum.”

22 We note that Section 6 requires “at least three members appointed by the mayor,” while
23 Section 2 seems to say all the planning commission members are appointed by the mayor.
24 For purposes of this opinion, we resolve this ambiguity in a way that is most favorable to
25 petitioners by assuming the drafters of Section 6 intended to distinguish between voting and
26 ex officio members, who under ORS 227.030 are nonvoting members, rather than between
27 members who are appointed by the mayor and members who are not. Viewed in that way,
28 Section 6 requires the presence of at least four planning commissioners for a quorum, and at
29 least three of the four members must be voting members. Viewed in that way, the planning

⁹ The city has not appeared in this appeal. We assume that Ordinance 259 is still in effect and has not been amended.

1 commission had a quorum, because there is no dispute that there were three voting members
2 and one ex officio member at the May 21, 2003 planning commission hearing.

3 Petitioners may have meant to argue that the three votes to approve the home
4 occupation at the May 21, 2003 planning commission meeting were insufficient to constitute
5 a majority of the planning commission because there are seven planning commission
6 members (counting the two ex officio nonvoting members). Even if the sixteenth assignment
7 of error could be read to make that argument, we would reject it.

8 The Oregon Attorney General interprets ORS 174.130 to require that the affirmative
9 votes of a majority of a body that is made of three or more persons to take action, rather than
10 a majority of the members of the body who happen to be present.¹⁰ Letter of Advice dated
11 January 16, 1985, to Jeffrey Milligan, Executive Director, Juvenile Services Commission
12 (OP-5763). However, where a body's enabling legislation includes provisions for a quorum,
13 which is the case here, a majority vote of the quorum is sufficient to take action. *Id.* Section
14 6 of Ordinance 259 provides that four members of the planning commission make up a
15 quorum. It follows that only the vote of a majority of the quorum (three votes) is needed for
16 the planning commission to take action.¹¹ To the extent petitioners' sixteenth assignment of
17 error can be read to contend that the vote of four of the five voting planning commission

¹⁰ ORS 174.130 provides:

“Any authority conferred by law upon three or more persons may be exercised by a majority of them *unless expressly otherwise provided by law.*” (Emphasis added).

¹¹ If a quorum includes only three of the five voting members of the planning commission, Section 6 of Ordinance 259 effectively requires a unanimous vote of those three voting members to take action. Under petitioners' view, a quorum of three voting members and one ex officio member would be unable to take action.

1 members is required to approve the disputed conditional use permit, we reject the
2 argument.¹²

3 The sixteenth assignment of error is denied.

4 The city's decision is affirmed.

¹² As we noted earlier in this decision, even if the vote of the planning commission was defective, that decision was appealed to the city council and it is the city council decision that adopted that planning commission decision as its own that is before us in this appeal.