BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAROLD McCORMICK, JOANNA McCORMICK,
MERNA HALL, ROBERT HALL,
DANIEL McQUISTON, CHERYL McQUISTON,
ANITA HANDYSIDE, GARY HANDYSIDE,
VIC HANDYSIDE, ARCHIE TITUS
and NADINE TITUS,
Petitioners,

vs.

CITY OF BAKER CITY,
Respondent,

and

BORDEN GRANGER and SANDI GRANGER,
Intervenors-Respondent.

LUBA No. 2003-143

FINAL OPINION
AND ORDER

Appeal from City of Baker City.

D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of petitioners.

Timothy M. Collins, City Attorney, Baker City, filed a response brief.

Martin Leuenberger, Baker City, filed a response brief and argued on behalf of intervenors-respondent.

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

REVERSED 12/16/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners challenge a city decision that interprets the city's zoning ordinance to allow four grass tennis courts, support structures and ancillary parking as an accessory use to residential use in the city's Medium Density-Residential Zone (R-MD.)

MOTION TO INTERVENE

Borden and Sandi Granger (intervenors), the owners of the property in dispute in this appeal, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 4.13-acre parcel located within the city. It fronts on Grace Street, a dead end residential street that lies partially within the city and partially in unincorporated Baker County. The city limits abut the property's western boundary. Within the city, Grace Street is improved with a gravel surface. Outside of the city, Grace Street is graded but sparsely graveled. Approximately eight residences are located on Grace Street outside of the city.

According to the challenged decision, improvements to the subject property include:

> "* * * a 1,988 square foot single-family residence, a detached garage/shop, [and] 4 regulation-size grass tennis courts surrounded by [a] retaining wall and wind screen. The combination of wall and screen are approximately 10 feet high. Each of the 4 courts is lit for evening play. The lighting is of the 'cannister' design [that] directs a large majority of the light downward.
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> "Between the 2 sets of dual courts is a cabana-like 'clubhouse.' This space has a shower and bathrooms. A raised viewing platform has been constructed at the rear of the courts to allow viewing all 4 courts at once. It is approximately 12 [feet] by 20 [feet] in size and is located just above the windscreen.
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> "* * * The property to the rear is also owned by [intervenors] and it has been partially leveled and is used for automobile parking and some tent camping during tennis gatherings.

> "* * * The front portion of the property is level and has room for 15-20 cars. On several occasions during the summer this area is full of vehicles for 1-2 days at a time." Record 4.

The decision also describes the tennis-related activities on the property as follows:

> "* * * The tennis courts are used for [intervenors' and their guests'] personal use. In addition, [intervenors] have issued a standing public invitation to anyone who wishes to visit them and play on the courts. They do not charge anything to play on the courts.
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> "* * * [Intervenors] host 5 tennis tournaments each summer between late June and early September. Entrants in the various tournaments range in number from 18-48. Total tournament days amount to 22-27 days. Some of the entrants are allowed to stay on the [subject] property either in a tent or self-contained RV. Photographs taken during a 2003 tournament indicate the number of tents and RV's may be as many as 7-8. The lights are used for many of the tournament evenings as well as often for the personal use of [intervenors] and their guests. The lights are always off before 10:00 p.m.
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> "* * * * *
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> "* * * [Intervenors] constructed the home on the property sometime prior to building the courts. Two of the courts have been constructed for approximately 8 years while the 2 newer courts are 3-4 years old.
>
> "* * * * *
>
> "* * * The use of the tennis courts for tournaments adds 540 vehicle trips per summer to Grace Street." Record 4-5.

Petitioners own property nearby. In early 2003, they filed a "petition" with the city council, citing concerns about increases in traffic and dust during the summer caused by persons traveling over Grace Street to use the tennis courts, noise generated by the tennis activities, and disposal of waste from the RVs. Petitioners also alleged that at least some of the tennis-related activities included the sale of food and alcohol in violation of state regulations. Record 105-107. In response to the concerns identified in the petition, the city council held a hearing to try to negotiate an informal resolution of the identified issues.

When the city council's informal efforts failed to result in a compromise that satisfied petitioners' concerns, petitioners filed a request for interpretation pursuant to Baker City Zoning Ordinance (BCZO), Section 15.6.2.[1]. The request asked:

> "[Do] four tennis courts, including a club house * * * used for 22-27 tournament days per summer and lit for evening play constitute a valid accessory use to a residential single-family dwelling [in] a medium density zone[?] The tournaments involve up to 48 or more players each and play often continues up to and after 10 p.m. In addition, there is a standing invitation to anyone interested to use the courts at anytime." Record 28.

During the interpretational proceedings, petitioners argued that the tennis courts and associated activities extend beyond an "accessory use" of the property. The city council issued its decision on August 25, 2003, concluding that the described use is accessory to the residential use of the property and that, with some conditions pertaining to night lighting,

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[1] BCO Section 15.6.2 provides, in relevant part:

> "A. Requests. A request for a code interpretation ('interpretation') shall be made in writing to the Planning Director. The Planning Director may develop written guidelines for the application process.
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> "B. Decision to Issue Interpretation. The Planning Director shall have the authority to review a request for an interpretation. The Planning Director shall advise the requester in writing within 14 days after the request is made, on whether or not the City will issue the requested interpretation.
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> "C. Declining Requests for Interpretation. The Planning Director is authorized to issue or decline to issue a requested interpretation. [Bases] for declining may include, but is not limited to, a finding that the subject Code section affords only one reasonable interpretation and the interpretation does not support the request. * * *
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> "D. Written Interpretation. If the Planning Director * * * decides to issue an interpretation, it shall be issued in writing and shall be mailed or delivered to the person requesting the interpretation and any other person who specifically requested a copy of the interpretation. The written interpretation shall be issued within 14 days after the City advises the requester that an interpretation shall be issued. * * * *
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> "E. Appeals. The applicant and any party who received such notice or who participated in the proceedings through the submission of written or verbal evidence of any interpretation may appeal the interpretation to the City Council within 14 days after the interpretation was mailed * * * to the applicant.
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> "F. Appeal Procedure. City Council shall hear all appeals of a Planning Director * * * interpretation as a Type III action pursuant to [BCZO Section] 15.1.5 * * *."

camping, and food and beverage service, the use is permitted in the R-MD zone. This appeal followed.

MOTION TO DISMISS

Intervenors move to dismiss this appeal, arguing that the challenged decision is merely a reiteration of an earlier decision made by the city council on May 14, 2003.[2] Intervenors argue that petitioners may not, through an appeal of the city's August 25, 2003 decision, make a belated attack on the initial decision that addressed all of petitioners' arguments.

We disagree with intervenors that petitioners may not appeal the city's August 25, 2003 decision to LUBA. First, it is not apparent to us that the May 14, 2003 letter can be considered to be a final land use decision of the city council. It did not apply any land use regulations and was not signed by the decision maker. Even if the May 14, 2003 letter can in some way be construed as a final land use decision, intervenors do not identify any part of the BCZO that prevents petitioners from filing multiple requests for interpretation of the city's zoning ordinance.

Intervenors' motion to dismiss is denied.

ASSIGNMENT OF ERROR

Residential uses and accessory uses to residential uses are permitted outright in the R-MD zone.[3] BCZO 1.030 defines "accessory use" as:

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[2] Intervenors do not attach a copy of the May 14, 2003 decision to their brief. However, there is a May 14, 2003 letter in the record from the interim city manager to intervenors, explaining to intervenors that on April 22, 2003, the city council had considered intervenors' use of their property for tennis activities, including United States Tennis Association sanctioned tournaments, and concluded that, with some restrictions, the tennis activities could continue as an accessory to intervenors' residential use of their property. Record 29-30.

[3] BCZO Chapter 4 provides in relevant part:

"Section 4.010 Purpose

"A use or structure incidental and subordinate to the main use of the property, located on the same lot as the main use, but detached from the main structure by a minimum distance of five (5) feet. * * *"

The city concluded that the tennis courts and associated structures and uses are an accessory use, stating in relevant part:

"[Intervenors] are retired and reside in the dwelling on the site for 6½ months per year. * * * A 'house sitter' resides in the house while [intervenors] are gone. [Intervenors] own no other residences.

"* * * * *

"The fact that [intervenors] allow other people–up to 48 over a weekend–to use their tennis courts without compensation of any kind does not, in itself, make that use the predominant use of the property. The construction and maintenance of the tennis courts is [intervenors'] personal hobby * * * and is in no way an occupation.

"The medium density residential zone (R-MD) is intended for higher density of population with a mixture of single family dwelling units with duplexes and, under certain circumstances, multi-family units.

"Section 4.020 Permitted Uses

"The following uses *and their accessory uses* are permitted outright in a R-MD Zone:

"1. Single family dwelling

"2. Two-family dwelling

"3. Double-wide mobile home * * *

"4. Mobile home within MH Overlay zone * * *

"5. Home occupation

"Section 4.030 Conditional Uses

"The following uses and their accessory uses are permitted when authorized in accordance with the provisions of Article 16:

"* * * * *

"12. Service club, lodge or other quasi-public use" (Emphasis added.)

> "The use of the tennis courts for tournaments adds 540 vehicle trips per summer to Grace Street. This is an insignificant amount and does not add measurably to the overall use of Grace Street.
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> "* * * The lights at the courts are not on beyond 10 p.m. As such, they are less intrusive than yard security lights [that] are on continually during the hours of darkness.
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> "* * * Because the tennis courts are grass, the use of the courts is only possible for approximately 4 months per year. The other 8 months of the year, the courts are totally unused.
>
> "**Conclusions of Law**
>
> "Based on the foregoing, it is obvious that the primary use of the property at 3925 Grace [Street] is residential. The use of part of the remaining portion for recreational purposes, especially for a large parcel such as this, is a common and generally accepted practice in residential areas. Therefore, the tennis courts in question, as built and used, are incidental and subordinate to the main use of the property and are lawful." Record 5 (Bold lettering and underlining in original).

Petitioners argue that the city erred in concluding that the use, as described, is "incidental and subordinate" to the residential use of the property. Petitioners concede that one tennis court, without the bath and shower facilities, lighting, viewing stands, and parking, could be viewed as a subordinate residential use. However, petitioners argue that in this case, the property is used primarily as a seasonal tennis facility, and secondarily as a residence for the property owners. Petitioners argue that the city's interpretation lacks textual or contextual support because only uses that are clearly identified as residential uses may be permitted on property zoned R-MD, and the tennis facility is more akin to a "quasi-public use" such as a service club or lodge, which is a conditional use, than an accessory to a residential use. *See* n 3.

Respondent and intervenors (respondents) respond that the city's interpretation is within the range of discretion afforded local governments by ORS 197.829(1) and is

supported by substantial evidence.[4] In respondents' view, the fact that intervenors live on the subject property, and tennis players and spectators come onto the subject property with intervenors' permission, tends to show that the tennis courts are properly viewed as a residential amenity, much like a private swimming pool or basketball court. Respondents argue that such a view is appropriate in this case, where the tennis courts are only used on a seasonal basis and are located on a large city lot. Respondents also argue that steps have been taken to limit the impact of the tournaments and tennis-related use of the property to the property itself, and that as a result, the city properly found that the tennis facility is an accessory to the residential use of the property.

The city relied on three considerations to determine that the tennis facility is incidental and subordinate to residential use. First, the city emphasized the seasonal nature of the tennis facility compared to the year-round occupancy of the dwelling. Second, the city noted that intervenors did not charge tennis players to play at the facility. Third, the city relied on the absence of significant adverse impacts to adjoining properties from traffic and lighting associated with the facility.

The city's decision does not explain why the third consideration has any bearing on whether the tennis facility is "accessory" to residential use of the property, under the city's

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[4] ORS 197.829(1) provides:

> "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:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

basic approach of comparing the nature and scale of the facility and the residential use to determine which is primary and dominant and which is incidental and subordinate. The first two considerations appear to be more relevant under that approach. However, the city's exclusive reliance on those two factors ignores other, more obvious considerations. There is no dispute that the tennis facility far exceeds the physical scope, scale and intensity of both the dwelling and the recreational needs of the dwelling's residents. There also seems no dispute that most of the structural and operational aspects of the tennis facility (the extra courts, bleachers, clubhouse, parking, RV camping, public tournaments and unrestricted public access) go far beyond the recreational needs of the residents and were designed and built to accommodate large, intensive public tennis events. The city's decision does not explain why, under its basic approach of comparing the nature and scale of the tennis facility and dwelling, it is permissible to rely on two factors to the exclusion of other, highly relevant considerations.

The question under ORS 197.829(1) is whether the city's interpretation of its code is consistent with the express language of the code, read in context. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). The BCZO does not define "incidental" or "subordinate," and the challenged decision does not provide an express interpretation of those terms. Land use codes often define "accessory" uses with similar terms. There is no reason to believe that the city code gives those terms something other than their ordinary meaning.[5] Yet, by focusing exclusively on the seasonal and noncommercial nature of the tennis facility, the challenged decision allows a use that in almost all other parameters dwarfs

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[5] *Webster's Third Internat'l Dictionary* 1981, 1142 defines "incidental" as:

"1 : subordinate, nonessential, or attendant in * * * significance."

Webster's Third Internat'l Dictionary 1981 at 2277 defines "subordinate" as:

"1: to place in a lower order or class: make or consider as of less value or importance."

residential use of the property. We do not think the terms "accessory," "incidental" and subordinate" are quite that elastic.

Consideration of context supports our view that the city's interpretation exceeds the discretion allowed the city under ORS 197.829(1). As noted, the R-MD zone allows as a conditional use a "service club, lodge or other quasi-public use." If there is a meaningful difference between the disputed tennis facility and a "quasi-public use," we do not know what it could be.[6] The fact that the proposed facility appears to fall squarely within a category of non-residential uses conditionally allowed in the R-MD zone is a strong contextual indication that the disputed facility cannot be reasonably viewed as an "accessory" use to a residential use.

Our conclusion that the city may not allow the tennis facility as an accessory use to the residential use of the property means that we must reverse the city's decision because, as a matter of law, the city may not allow the tennis facility as a permitted use. *See* OAR 661-010-0071(1)(c) (LUBA shall reverse a land use decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law.") Accordingly, the city's decision is reversed.

[6] Any public or quasi-public tennis club with outdoor courts would likely be seasonal in eastern Oregon, and would by definition be noncommercial or nonprofit, so the two factors relied upon by the city would not distinguish the disputed tennis facility from uses conditionally allowed under BCZO 4.030(12).