BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JON FESSLER, JUDITH FESSLER,
DANIEL ROBINSON and MELANIE ROBINSON,
Petitioners,

vs.

CITY OF FOSSIL,
Respondent,

and

R.K. ENTERPRISES LLC and
RANDY ROBINSON,
Intervenor-Respondents.

LUBA No. 2007-071

FINAL OPINION
AND ORDER

Appeal from City of Fossil.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was the Goal One Coalition.

No appearance by City of Fossil.

Megan D. Walseth, Portland, filed the response brief and argued on behalf of intervenor-respondents. With her on the brief was Ball Janik, LLP.

BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

REMANDED 09/04/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city council decision determining that use of a vacant residential lot to site two recreational vehicle pads with full hookups is not a violation of the city's zoning ordinance.

FACTS

Intervenor-respondents (intervenors) own two adjacent lots, tax lot 5000 and 5100, both zoned for residential use (R-2). Tax lot 5100 is developed with a single-family dwelling. Tax lot 5000 is vacant. Sometime in 2006, intervenors installed on tax lot 5000 facilities to site two recreational vehicles (RVs), including gravel pads, water and electrical hookups, and septic drainfields. In response to concerns that intervenors were operating a Recreational Vehicle Park (RV Park), which is not allowed in the R-2 zone, the city council directed the city planner and city attorney to determine whether intervenors' development of tax lot 5000 is permitted under the Fossil Zoning Ordinance (FZO). At the same time, intervenors wrote to the city, arguing that the development is not an RV park as the FZO defines that term, because it is not open to the general public.[1] Intervenors informed the city that only friends and associates of the owners of the dwelling on tax lot 5100 would use the RVs located on tax lot 5000.

[1] FZO 1.3 defines "Recreational Vehicle Park" as follows:

> "Any area designed to establish, operate, manage, or maintain the same for picnicking or overnight recreational vehicle or tent camping by the general public. This includes areas open to use free of charge or through a payment of a tax or fee or by virtue of rental, lease, license, membership, association, or common ownership. This further includes but is not limited to those areas divided into two or more lots, parcels, units, or other interests for the purposes of such use. Such recreational vehicle parks as defined are not intended for residential occupancy. The maximum length of stay is limited to 180 consecutive days. The facility shall be licensed in accordance with ORS Chapter 446."

On November 15, 2006, the city attorney issued a decision concluding that the development and proposed use of tax lot 5000 is not lawful under the FZO.[2] The city attorney ordered intervenors to cease and desist, and to remove the developments on tax lot 5000. The city attorney's decision states that the decision is final, unless an appeal is filed within 15 days. In addition, the decision suggests several possible remedies other than appeal, including rezoning tax lot 5000 to a zone that allows an RV park, or combining the two lots into a single lot, eliminating one RV pad, and keeping the remaining RV pad as an accessory use to the single-family dwelling.

Intervenors chose to appeal the city attorney's decision. The city council held a hearing on the appeal on February 22, 2007. Following the close of the hearing, the city council deliberated and voted to overturn the city attorney's decision, concluding in particular that the two RV spaces did not constitute a "Recreational Vehicle Park" as the FZO defines that term, because it is not open to the general public. The city council adopted a written decision on March 13, 2007, and this appeal followed.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city committed several procedural errors in processing intervenors' appeal and conducting the public hearing on that appeal.

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[2] The November 15, 2006 city attorney decision stated, in relevant part:

> "Based on staff observations, you are in the process of completing two RV spaces on the lot adjacent to the dwelling you have recently purchased in the City of Fossil. That construction of RV spaces on the vacant lot constitutes a primary use, not an accessory use, on the individual lot.
>
> "By the City's Zoning Ordinance and State Law, the two spaces constitute an RV park. The argument that the development is not an RV park because it is not open to the general public is not valid. Family and friends are indeed considered 'General Public.' Many homeowners with RVs often establish a parking space for their RV and some even install a small dumpsite for the wastewater. While technically a violation of most cities' sewer ordinance, most cities, including Fossil, do not bother to stop this practice. However, in this case, you have established two separate RV spaces in a vacant lot adjacent to a single-family residence. The spaces appear to be complete with water, sewer, and electrical service and specific graveled parking pads. In all respects it appears as a dedication of the property to RV usage as a primary use of the property." Record 8.

Intervenors respond that petitioners fail to demonstrate that any procedural errors that the city may have committed prejudiced petitioners' substantial rights. We agree with intervenors. ORS 197.835(9)(a)(B) authorizes the Board to remand a land use decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" Although petitioners allege that due to various procedural irregularities they did not have an adequate opportunity to prepare and present evidence, petitioners do not explain why that is so. Petitioners appeared at the city council hearing and submitted both oral and written testimony. If there is evidence that petitioners were denied an adequate opportunity to submit, petitioners do not identify what that evidence is or attempt to link the failure to provide that evidence to any procedural error on the city's part. Accordingly, we have no basis under this assignment of error to reverse or remand the city's decision.

The third assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under the first assignment of error, petitioners challenge the city council's determination that the proposed use of tax lot 5000 does not constitute an "RV park" as that term is defined in the FZO. Petitioners also argue under the first assignment of error that the city council failed to adopt any finding that the proposed use is an "accessory" use to the residential use on the adjoining tax lot 5100. Relatedly, under the second assignment of error, petitioners argue that the city council's decision determined only that proposed use "does not violate the City of Fossil Zoning Ordinance as an 'RV Park,'" but failed to determine what the proposed use actually is and explain why it is allowed in the R-2 zone.

A. RV Park

As noted, FZO 1.3 defines "Recreational Vehicle Park" as an area designed for "overnight recreational vehicle or tent camping by the general public." *See* n 1. The city council interpreted the phrase "by the general public" in that definition to exclude use by

friends or associates of the landowner or, in this case, the friends or associates of the principals of the limited liability company that owns tax lot 5000.[3] Accordingly, the city council concluded that the proposed use of tax lot 5000 does not constitute an RV park.

Petitioners contend that the second sentence of the definition expands the scope of "general public," in providing that an RV park includes areas that are "open to use free of charge or through a payment of a tax or fee or by virtue of rental, lease, license, membership, association, or common ownership." *See* n 1. According to petitioners, this clause indicates

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[3] The city council's decision states, in relevant part:

> "On the 22nd day of February, 2007, the City Council of the City of Fossil, Oregon, heard the appeal of [intervenors] from a City of Fossil Staff Decision of November 15, 2006. A copy of the staff decision is attached. After hearing, it was moved [and seconded by two city councilors] that the staff decision be overturned and that the City find that the development of R.K. Enterprises on Tax Lot 5000 of Wheeler County Assessor's Map 6S-21E-33CB is not in violation of the City of Fossil Zoning regulations. Council unanimously approved the motion.
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> "* * * * *
>
> "3. Council has determined that there are two areas that are dedicated to RV placement and usage (hereinafter 'RV spots') on the subject property. These two RV spots have water, electricity, sewer and graveled pads. Councils finds that these two RV spots are solely for the use of the principals of R.K. Enterprises LLC and the friends and associates of the principals of R.K. Enterprises LLC.
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> "4. Under R-2 zoning, an RV park is not an allowable permitted use, nor is it an allowable Conditional Use in this zone. Council finds that the definition of 'RV Park' in the [FZO] is vague, such that it cannot be determined that the development of R.K/ Enterprises LLC is an 'RV Park." Council finds this based on the following:
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> "* * * * *
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> "b. The words, 'by the general public,' seem to limit the definition of RV Parks to developments open to the general public. The common definition of the words, 'by the general public,' seems to exclude usage that is limited to friends, family and associates of the owner or in the case of an LLC, the friends, family and associates of the principals or members of the LLC.
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> "5. Based on this interpretation of the [FZO], the two RV spaces, because of their intended occupancy and use do not constitute an 'RV Park.'
>
> "6. Because of these findings, the City Council of the City of Fossil finds that the development of the Appellant does not violate the [FZO] as an 'RV Park.'" Record 2.

that an RV park includes use of land for RV camping that is available to persons who are "associated" with the landowner, even if not available to the "general public."

Intervenors respond, and we agree, that the second sentence of the "RV Park" definition is intended to include facilities that are available only to a subset of the general public, for example by membership in an RV club or association. Nothing in the definition suggests that that limited expansion of the scope of "general public" includes circumstances where a landowner allows extended family or social guests to occupy an RV on the property.[4] We do not believe that such family members or social guests are part of a "membership, association, or common ownership" within the meaning of that second sentence.

Petitioners have not demonstrated that the city council interpretation of the definition is inconsistent with the text or context of the code provision. Accordingly, we affirm that interpretation. ORS 197.829(1).[5]

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[4] As an interesting sidenote, a former planning commission member stated at the city council hearing that, in her opinion, the definition of RV Park was drafted to "keep the Rajneesh out[.]" Supplemental Record 11. The reference is apparently to the followers of the Baghwan Rajneesh, who during a period in the 1980s attempted to establish the new city of Rajneeshpuram at the site of a former cattle ranch located between the cities of Fossil and Antelope. The residents of Rajneeshpuram also moved to the City of Antelope in large enough numbers to obtain an electoral majority in city elections.

[5] ORS 197.829 provides, as relevant:

> "(1) [LUBA] 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;
> >
> > "(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[.]
> >
> > "* * * * *

B. Accessory Use

The city attorney's decision (referred to in the city council's decision as the staff decision) appears to conclude that the proposed use of tax lot 5000 violates the FZO on two grounds. First, as discussed, that the proposed use constitutes an RV Park not allowed in the R-2 zone. Second, the city attorney's decision finds that the "construction of RV spaces on the vacant lot constitutes a primary use, not an accessory use, on the individual lot." Record 8; *see* n 2. The city attorney proposes as one possible remedy consolidating tax lots 5000 and 5100 into one lot, and using one of the RV spaces for private use, apparently as an accessory use to the primary single family dwelling use. Record 9. As discussed further below, the R-2 zone allows accessory uses that are "clearly incidental and subordinate to the primary use of the main building," which includes single family dwellings. FZO 3.2(1)(C). The code defines "accessory use" as a use that is "incidental and subordinate to the main use of the property and *located on the same lot as the main use*." (Emphasis added.)

The city council decision reversed the city attorney's interpretation of the RV Park definition and concluded that the proposed use of tax lot 5000, limited to occupancy by intervenors' friends and associates, does not constitute an RV Park as defined in the FZO. However, as petitioners note, the city council decision did not explicitly address the city attorney's finding that the proposed use is not a permissible accessory use. Further, as petitioners point out, the city council did not reach any explicit conclusions as to how the proposed use is categorized under the FZO, or whether that category of use is allowed in the R-2 zone. Nonetheless, the decision generally recites at one point that the proposed development "is not in violation of the City of Fossil Zoning regulations," and the city council appears to have overturned the city attorney's decision in its entirety. Record 5.

> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

From the minutes of the city council hearing, it appears that the city council believed that they were resolving all issues regarding the legality of the proposed use, and that, as far as the city council was concerned, intervenors could use tax lot 5000 as proposed, *i.e.*, to house friends and associates in RVs located on the two developed RV pads. *See* Supplemental Record 18 (minutes of the February 22, 2007 city council hearing reflecting a successful motion "to approve Mr. Robinson's house the way it is, that we don't require anything else of him * * *"). We understand petitioners to argue that remand is necessary under these circumstances to adopt findings addressing how the proposed use is categorized under the FZO and whether that use is in fact allowed in the R-2 zone.

Intervenors respond that the city council decision was limited in scope to the issue of whether the proposed use constitutes an RV Park, and the city council did not attempt, and was not required to attempt, to categorize the proposed use or determine whether it is allowed in the R-2 zone. With respect to whether the proposed use can be viewed as an accessory use to the single family dwelling on tax lot 5100, intervenors argue the city council decision did not resolve that issue and was not required to. In the alternative, intervenors argue that if the city council erred in failing to resolve that issue, the evidence in the record "clearly supports" a finding that use of the RV pads is incidental and subordinate to the residential use on tax lot 5100 and is thus a permitted accessory use in the R-2 zone. ORS 197.835(11)(b).[6]

Intervenors cite *Revoal v. City of Eugene*, 47 Or LUBA 136 (2004), for the proposition that in responding to a request for a code interpretation as to whether proposed

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[6] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, [LUBA] shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

development is permitted, the local government may limit its decision to the requested interpretation, and need not resolve all potential issues related to other criteria for development. Similarly, here, intervenors argue that the city was entitled to address only the question of whether the proposed use of tax lot 5000 is an "RV park," and was not required to determine what the proposed use is or whether it is allowed in the R-2 zone.

Revoal is distinguishable, in our view. In that case, the applicant applied for a code interpretation to determine whether a proposed home occupation complied with applicable criteria. The planning director interpreted two of the 12 home occupation criteria and opined that, under his interpretation, the proposed use would not comply with those two criteria. The applicant appealed to the city hearings officer, who interpreted the two criteria differently and concluded that the proposed use would comply with those two criteria. On appeal to LUBA, we concluded that neither the planning director nor the hearings officer addressed or interpreted the remaining criteria, and no final decision was reached with respect to those criteria or whether the applicant was entitled to a home occupation permit. Accordingly, we declined to address assignments of error directed at the other ten criteria.

Here, the city council decision arose essentially out of an enforcement action initiated by the city involving the legality of existing development, not a hypothetical proposed use in anticipation for which the potential applicant sought to resolve a discrete interpretative issue regarding some of the approval criteria that would apply. It was reasonably clear in *Revoal* that the city had not approved the contemplated home occupation or issued the necessary permit; it had simply answered the discrete interpretative question posed to it, under code provisions designed to answer such discrete interpretative questions. In the present case, while the parties to the proceedings below focused their arguments on the proper interpretation of the code definition of "RV parks," the general issue that was before the city attorney and later the city council was whether the development and use of tax lot 5000 for two RV pads is allowed at all in the R-2 zone. As noted, the city attorney's decision

concluded that the development and proposed use is not allowed, because the RV pads are not accessory to any primary use of tax lot 5000, and because use of the RV pads as proposed constitutes an impermissible RV park. The city council explicitly addressed only the latter question. Nonetheless, the city council decision can be read to conclude broadly that the development and proposed use is a permitted use. Further, it appears based on the minutes that the city council believed that its decision ended the possibility of any future enforcement proceeding and essentially authorized the proposed use of tax lot 5000. Nothing in the decision or record suggests, as was the case in *Revoal*, that the city council deliberately chose to leave other issues undecided, to be resolved in a later development or enforcement proceeding.

Consequently, we agree with petitioners that remand is necessary to adopt findings determining what the proposed use is and whether it is allowed in the R-2 zone. We disagree with intervenors that the present case is one where we may affirm the city's decision notwithstanding inadequate findings, under ORS 197.835(11)(b). That statute applies in limited circumstances where findings are inadequate, but the evidentiary record "clearly supports" a finding of compliance with applicable standards. Here, the critical unresolved issue is primarily an interpretative one: under what legal theory if any is the development and proposed use of tax lot 5000 allowed in the R-2 zone? Specifically, does the development and proposed use of tax lot 5000 qualify as an accessory use to the dwelling on tax lot 5100?

The city attorney's decision appeared to answer that question in the negative, and the city council decision can be understood to overturn that answer, but without explaining why. Intervenors argue in the response brief that the RV pads are "accessory" to the dwelling because they are clearly "incidental and subordinate" to the main dwelling use. However, as noted, the code definition of "accessory use" requires that the accessory use must be "located on the same lot as the main use."

At oral argument, intervenors advanced an interpretation of the code term "lot" to include a "tract," and argued that because tax lots 5000 and 5100 are contiguous and in common ownership, and hence constitute a "tract," the RV pads are therefore located on the same "lot" as the dwelling. Intervenors urged us to adopt that interpretation, under the authority granted by ORS 197.829(2). *See* n 5. We decline to do so. While that may or may not be a permissible interpretation and application of the relevant code definitions, that interpretation was not advanced until oral argument, which did not give petitioners an adequate opportunity to respond. Further, we believe that the city council is in the best position to determine the meaning of the relevant code definitions in the first instance and how those code definitions as interpreted should be applied in the present case.[7]

The first and second assignments of error are sustained, in part.

The city's decision is remanded.

[7] Among other unresolved questions, we note that the city attorney seemed to believe that one RV pad with full hookups (including a separate septic system) might be incidental and subordinate to the main dwelling use, if the two lots were combined into a single lot, but that two RV pads with full, separate hookups would not be. The city council decision does not resolve that issue. Thus, even if we or the city council were to adopt intervenors' interpretation that "lot" includes "tract," it does not necessarily follow that two RV pads with full hookups are accessory to the main dwelling use. That is a mixed question of law and fact that the city council should, if necessary, resolve in the first instance.