

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GERALD POE and STEPHANIE POE,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF WARRENTON,
10 *Respondent,*

11 and

12
13 TERRY MILLER and RONALD MILLER,
14 *Intervenors-Respondents.*

15
16 LUBA No. 2010-092

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from City of Warrenton.

23
24 Blair J. Henningsgaard, Astoria, filed the petition for review and argued on behalf of
25 petitioners.

26
27 No appearance by the City of Warrenton.

28
29 Ronald L. Miller, Long Beach, Washington, filed the response brief and argued on
30 behalf of intervenors-respondents.

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

34
35 REMANDED

02/07/2011

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the city approving a conditional use permit and site
4 design review for a two story building.

5 **FACTS**

6 The subject property is a vacant lot in the city that is zoned General Commercial (C-
7 1). Intervenors-respondents (intervenors) applied for a conditional use permit and site design
8 review to construct a two-story building containing 12 mini-storage units and six garages on
9 the ground floor, and six apartments on the second floor. The planning commission held a
10 hearing on the applications and voted to approve the applications. The city sent a notice of
11 the planning commission’s decision to interested parties, including petitioners, and
12 petitioners filed a notice of appeal to the city commission. The city commission adopted
13 findings of fact and conclusions of law affirming the planning commission’s decision. This
14 appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Warrenton Development Code (WDC) 2.5.120(B)(9) allows “[m]ini-warehouses or
17 similar storage uses,” and WDC 2.5.120(B)(11) allows “[c]ommercial uses with 2nd floor
18 residential use(s) [apartment(s)]” as conditional uses in the C-1 zone. WDC 2.5.120 provides
19 that those uses “shall comply with Sections 2.5.130 thru 2.5.140, 3.2 (Landscaping) and 4.2
20 (Site Design Standards).”¹ In their first assignment of error, petitioners argue that the second

¹ WDC 2.5.120 provides in relevant part:

“The following uses and their accessory use may be permitted in the C-1 zone when approved under Section 4.4 and shall comply with Sections 2.5.130 [through] 2.5.140, 3.2 (Landscaping) and 4.2 (Site Design Review):

“ * * * * *

“B. The following uses and their accessory uses are permitted in all other C-1 zoned areas within the City limits of Warrenton:

1 story apartments proposed by intervenors are “multi-family housing developments” as that
2 term is used in WDC 3.18.1, and that their inclusion in the proposal triggered a requirement
3 for the city to apply the design standards for multi-family housing developments that are
4 found at WDC 3.18.1.² According to petitioners, intervenors’ proposed second floor
5 apartments fail to provide the amount of open space that is required by WDC 3.18.3(B).³

6 The city found:

7 “The applicant’s proposal for dwelling units on the second floor is a
8 secondary use and not the primary use. The C-1 zone no longer allows for
9 any type of new dwelling unit other than second floor dwelling unit(s) above
10 an allowed commercial use on the first floor. The primary use of this proposal
11 is the commercial based mini-storage, which dictates the standards the
12 applicant is required to meet (landscaping, parking, trash receptacles).
13 Because the dwelling units are classified as the ‘secondary’ use, the primary
14 use (commercial mini-storage) is required to meet the standards of the * * *
15 C-1 zoning district; thus the open space requirement in [WDC] 3.18 * * * is
16 not required.” Record 137.

17 Petitioners argue that the city’s findings misconstrue applicable law because the WDC does
18 not define “primary” or “secondary” uses and does not distinguish between “primary” and
19 “secondary” uses for purposes of the application of design standards. Petitioners also argue
20 that the city’s finding that the apartments are a “secondary” use of the property is not

“ * * * * *

“9. [m]ini-warehouses or similar storage uses.

“ * * * * *

“11. Commercial uses with 2nd floor residential use(s) [apartment(s)].”

² WDC 3.18.1 provides that “[m]ulti-family housing means housing that provides four or more dwelling units on a single legal lot and sharing common walls, floor/ceilings, courtyard, playground, parking area, or other communal amenity. Condominiums are considered multi-family housing.” WDC 1.3 contains an almost identical definition.

³ WDC 3.18.3(B) requires that a minimum of 20% of the site area of a multi-family housing development be reserved as common open space.

1 supported by substantial evidence in the record because the record demonstrates that 75% of
2 the building is proposed for the apartment uses.⁴

3 The city has not filed a response brief, and intervenors do not provide any meaningful
4 response to petitioners' assignment of error. However, petitioners are wrong about the WDC
5 not including a definition of "primary." WDC 1.3 defines "primary" as

6 "[t]he largest or most substantial element on the property, as in 'primary': use,
7 residence, entrance, etc. All other similar elements are secondary in size or
8 importance."

9 WDC 1.3 also defines the term "apartment:"

10 "A portion of a building which is occupied or which is intended or designed to
11 be occupied as an independent dwelling unit and contains separate
12 housekeeping facilities for living, sleeping, cooking and eating. As used in
13 this Code, apartment refers to a secondary and accessory use of a portion of an
14 otherwise non-residential building although apartment, as it is commonly
15 used, may refer to an individual unit within a multi-family dwelling."

16 Under *Siporen v. City of Medford*, 349 Or 247, 266, 243 P3d 776 (2010) we are
17 required to defer to city council interpretations of the city's land use laws if the interpretation
18 is plausible. The question here is whether the city's interpretation of the WDC, quoted
19 above, is plausible, given the definitions of "primary" and "apartment" quoted above, or
20 whether it is implausible because it is inconsistent with the express language of the WDC
21 and those definitions. The city's findings quoted above make no reference to the WDC 1.3
22 definitions of "primary" and "apartment," and do not consider whether those definitions may
23 have some bearing on intervenors' proposal. At most, the above-quoted findings are an
24 incomplete interpretation of all of the relevant provisions of the WDC. Accordingly, remand
25 is necessary for the city to interpret all of the relevant provisions of the WDC, including the
26 definitions of "primary" and "apartment" in light of intervenors' proposal, and to explain

⁴ The decision explains that in order to satisfy the parking requirements set forth in WDC 3.3 for the proposed dwellings, intervenors are providing each apartment with a two-car garage located on the first floor of the building. Record 91.

1 why that interpretation leads the city to conclude again, if it so concludes, that the apartments
2 are not subject to the design standards for “multi-family housing developments” that are
3 described in WDC 3.18.1.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 In their second assignment of error, petitioners argue that the city’s findings that the
7 proposal complies with the conditional use approval criteria found in WDC 4.4.3(A) are
8 inadequate and are not supported by substantial evidence in the record.⁵ According to
9 petitioners, the city failed to adopt findings regarding some of the six criteria found at WDC
10 4.4.3(A), and adopted other findings that are inadequate. Specifically, petitioners argue that
11 the city failed to adopt any findings regarding WDC 4.4.3(A)(1), (5) and (6), and argue that
12 the findings that were adopted by the city are inadequate to explain how the proposal meets
13 the criteria set forth in WDC 4.4.3(A)(2) through (4).

⁵ WDC 4.4.3(A) provides:

“Before a conditional use is approved findings will be made that the use will comply with the following standards:

- “1. The proposed use is in conformance with the Comprehensive Plan.
- “2. The location, size, design and operating characteristics of the proposed use are such that the development will be compatible with, and have a minimal impact on, surrounding properties.
- “3. The use will not generate excessive traffic, when compared to traffic generated by uses permitted outright, and adjacent streets have the capacity to accommodate the traffic generated.
- “4. Public facilities and services are adequate to accommodate the proposed use.
- “5. The site’s physical characteristics, in terms of topography, soils and other pertinent considerations, are appropriate for the use.
- “6. The site has an adequate area to accommodate the proposed use. The site layout has been designed to provide for appropriate access points, on-site drives, public areas, loading areas, storage facilities, setbacks and buffers, utilities or other facilities which are required by City ordinances or desired by the applicant.”

1 Intervenors point to a general finding adopted by the city that addresses impacts on
2 the surrounding neighborhood.⁶ However, the city’s decision does not reference WDC 4.4.3
3 as an applicable approval criterion, and the general findings adopted by the city that are set
4 out in n 6 do not specifically address any of the conditional use criteria listed at WDC
5 4.4.3(A). Therefore, we agree with petitioners that the city’s findings are inadequate to
6 explain whether the city concluded that the proposal satisfies WDC 4.4.3(A) and if so, why it
7 reached that conclusion. Remand is necessary for the city to consider each criterion listed in
8 WDC 4.4.3(A) and determine whether the proposal meets that criterion or, if the city believes
9 a criterion is not applicable, explain why that is so.

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 The planning commission held a hearing on intervenors’ applications and, at their
13 July 8, 2010 meeting, voted to approve the applications. On July 13, 2010, the planning

⁶ The decision contains the following:

“2. Proposed development is too intense and would have an adverse impact on the surrounding neighborhood.

“**Response:** The property is zoned General Commercial (C-1), which outright permits commercial uses * * *

“Under conditional uses, these are: * * * [list of conditional uses omitted]

“Some of these uses, both outright permitted and conditional are more intense in nature and could potentially cause an adverse affect on the neighborhood. Such as the building materials and sales yard, government buildings, medical offices, amusement, schools, eating and drinking establishments, hotels, motels, carpenter and metal shops. As you look over the listed uses, you know that these are or have the potential to be more intense than the applicant’s proposed mini-storage and dwelling units.

“Each dwelling unit (s) is required to have 1.75 parking spaces per unit (based on a 2-bedroom units). The applicant is providing 2-car garages for each unit, with additional parking for visitors and storage facility.

“Warrenton Development Code Table 3.3.3.A, #24, requires 1 parking space per 1000 square feet of gross floor area for mini-storage. The applicant is providing seven (7) additional parking spaces for visitors and the mini-storage. No vehicles are planned for storage at this time.” Record 91.

1 director sent a “Notice of Decision” to interested parties, including petitioners. Record 171-
2 72. After receiving the notice of decision, petitioners filed an appeal of the planning
3 commission’s decision to the city commission. According to petitioners, no written decision
4 or findings were ever adopted by the planning commission, even though a written decision
5 with findings of fact and conclusions on relevant approval criteria is required by the relevant
6 WDC provision.⁷

7 In their third assignment of error, we understand petitioners to argue that the city
8 committed a procedural error when it failed to follow applicable WDC procedures that
9 require the planning commission’s decision to be supported by a written decision with
10 findings and conclusions.⁸ Petitioners argue “[t]he failure of the planning commission to
11 enter a written order has caused confusion among the City Commissioners and prejudices
12 petitione[rs’] ability to understand or enforce the order approving this application.”
13 Petition for Review 13.

14 The record does not contain any written decision or findings by the planning
15 commission, which tends to support petitioners’ assertion that the city committed a
16 procedural error when the planning commission failed to adopt a written decision as required
17 by WDC 4.1.5(E)(3). The absence of a written decision for petitioners to challenge
18 undoubtedly complicated petitioners’ efforts to persuade the city council to overturn or
19 modify the planning commission decision. However, the city commission held what appears
20 to be a *de novo* evidentiary hearing on the appeal. As far as we are informed, petitioners
21 were not limited in any way in their ability to present evidence and testimony to the city

⁷ WDC 4.1.5(E)(3) provides in relevant part that “[t]he hearings body shall issue a final written order containing * * * findings and conclusions * * * which either approves, denies, or approves with specific conditions * * *.”

⁸ Under ORS 197.835(9)(a)(B), LUBA is authorized to reverse or remand a land use decision if the decision maker “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

1 commission regarding the proposal's failure to comply with applicable approval criteria, the
2 city commission considered all arguments and evidence, and adopted its own written
3 decision, supported by findings, to approve the application. Petitioners have not shown that
4 any procedural error in failing to adopt planning commission findings prejudiced petitioners'
5 substantial rights.

6 The third assignment of error is denied.

7 The city's decision is remanded.