

NATURE OF THE DECISION

Petitioners appeal a city decision that grants intervenors’ request to reduce the required front yard setback for their lot.

MOTION TO INTERVENE

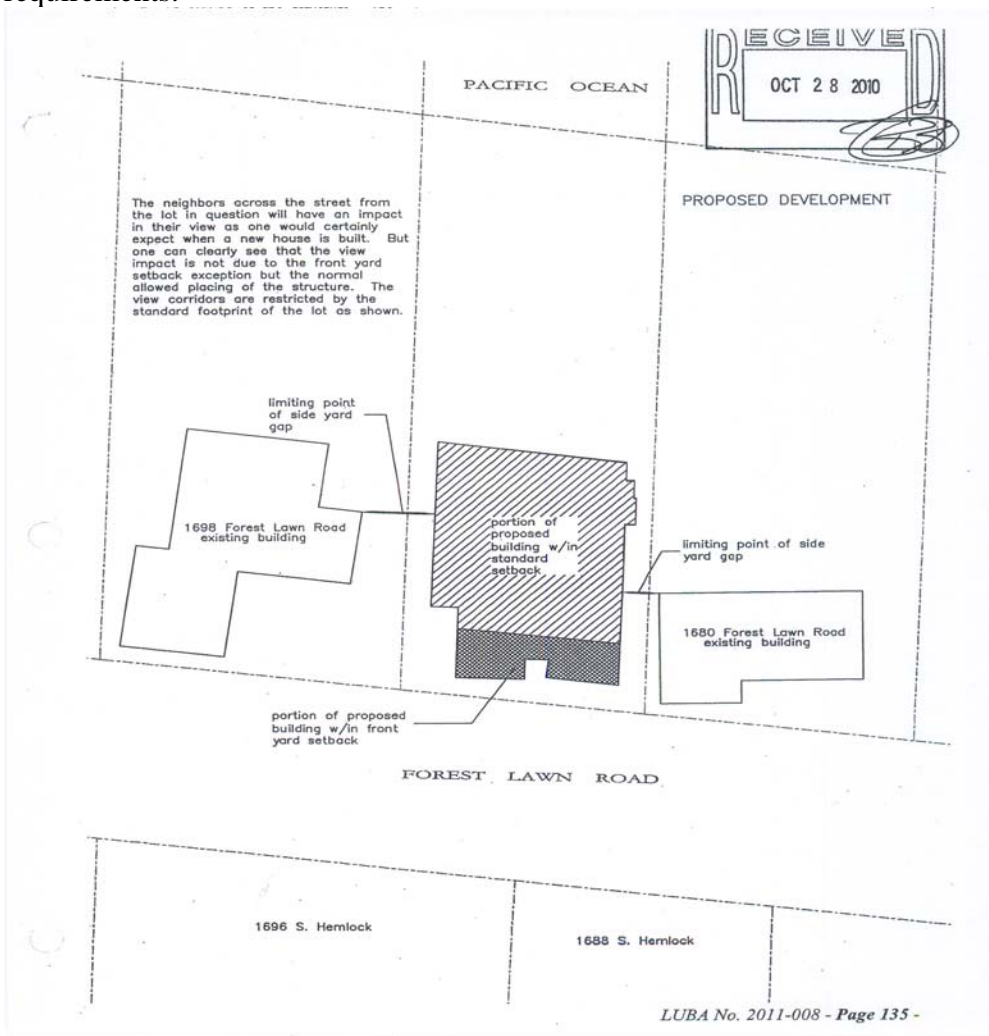
Michael Tutmarc and Nancy Tutmarc (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

INTRODUCTION

Intervenors own a 5,770 square foot ocean-front lot in the vicinity of Haystack Rock in Cannon Beach. Intervenors’ lot and adjoining lots are located in the Medium Density Residential (R-2) zone, which requires a 15-foot front yard setback from the front lot line. The challenged decision grants a front yard setback reduction to allow intervenors to site their proposed dwelling three feet from the front lot line.

A map, which was prepared by intervenors, is included on the next page and shows the subject and surrounding properties. The Pacific Ocean is located to the west of the lot, at the top of the map. The properties to the north and south of the subject property (to the right and left respectively) are already developed with houses that partially obstruct the view of the Pacific Ocean from Forest Lawn Road and properties to the east of Forest Lawn Road. Petitioners’ home is located on the southernmost lot at the bottom of the map, on the east side of Forest Lawn Road. Although views of the ocean from Forest Lawn Road and the lots to the east of Forest Lawn Road are partially obstructed by the existing houses to the north and south of the subject property, the view across intervenors’ currently undeveloped lot is not obstructed by a dwelling. Part of the house that intervenors propose to build (shown in single cross-hatch) would be located in compliance with Cannon Beach Zoning Ordinance (CBZO) setback requirements. In other words, the single cross-hatch portion of the house could be built without any front setback reduction and would wholly or partially block views

1 of the ocean across intervenors' lot from various vantage points. But part of the house
2 (shown in double cross-hatch) would intrude twelve feet into the 15-foot front yard setback
3 that would normally be required under the CBZO. One of the setback reduction criteria
4 requires that significant views of the ocean not be obstructed by the setback reduction. One
5 of the issues in this appeal is whether the double cross-hatch portion of the proposed dwelling
6 would block significant views of the ocean that would not be blocked by the portion of the
7 proposed dwelling (the single cross-hatch portion) that complies with CBZO setback
8 requirements.



9

1 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

2 Under the CBZO, setbacks that are required under the CBZO may be reduced,
3 without a variance, if the criteria set out at CBZO 17.64.010 are satisfied. Petitioners
4 challenge the city’s findings concerning several of the CBZO 17.64.010 criteria in their
5 second, fourth and fifth assignments of error. In their first and third assignments of error,
6 petitioners contend the city erred by failing to give notice of, and failing to apply and
7 demonstrate compliance with, a number of other CBZO development standards in approving
8 the requested front yard setback.¹

9 Under ORS 197.763(2), the city must give notice of quasi-judicial land use hearings.
10 There does not appear to be any dispute that the city hearing in this matter was a quasi-
11 judicial land use hearing. Under ORS 197.763(3)(b), the city is required to “[l]ist the
12 applicable criteria from the [CBZO] and the [city’s comprehensive] plan that apply to the
13 application at issue.” And under ORS 197.763(5)(a), at the commencement of a quasi-
14 judicial land use hearing the city must include a statement that “[l]ists the applicable
15 substantive criteria.” In their first assignment of error, petitioners contend the city violated
16 ORS 197.763(3)(b) and 197.763(5)(a) because the city’s notice of hearing in this matter did
17 not list a number of the development standards that will ultimately have to be satisfied to
18 build a house on intervenors lot.² We understand petitioners to argue in their first
19 assignment of error that the city’s failure to list those other CBZO standards has two legal
20 consequences. First, petitioners’ substantial rights were violated, which warrants remand.

¹ The standards identified by petitioners include the: R-2 zoning “Standards” (CBZO 17.14.040), CBZO 17.42.050(A)(6) “Oceanfront Setback;” CBZO 17.78.020 “Off-street parking requirements;” CBZO 17.50.040 requirement for a “Geologic Site Investigation Report;” CBZO 17.88 requirements for “Public Deliberations and Hearings;” CBZO 17.90.065 requirement for “Architectural Design Elements;” and CBZO 17.90.020 “Access Requirement.”

² The city’s notice of hearing identifies the CBZO 17.14.040(B)(3) 15-foot front yard setback requirement and the CBZO 17.64.010 setback reduction criteria. Record 154. No other CBZO criteria are identified in the notice.

1 Second, that failure to list all applicable standards allows petitioners to raise issues in this
2 appeal based on the omitted standards, without regard to whether those issues were raised
3 before the city in the proceedings that led to the challenged decision. ORS 197.835(4)(a).³
4 In petitioners’ third assignment of error, petitioners contend the city erred by not imposing
5 conditions of approval that petitioners suggest might be necessary to meet the CBZO
6 standards that were not identified in the city’s notice.

7 We do not understand petitioners’ first and third assignments of error. The
8 challenged decision only approves a setback reduction; it does not approve a dwelling. The
9 criteria that must be satisfied to approve a setback reduction are listed at CBZO 17.64.010.
10 CBZO 17.64.010 gives no indication that any other criteria must be applied to adopt a
11 decision that only grants a setback reduction. To the extent the CBZO standards that
12 petitioners identify apply to the disputed dwelling, they will apply when and if intervenors
13 seek approval of a development permit to construct the dwelling.⁴ All that the disputed front
14 yard setback reduction does is give intervenors the right to seek approval of a development
15 permit and building permit for a dwelling that is located three feet from the front lot line,
16 rather than 15 feet from that front lot line, as would be required by CBZO 17.14.040(B)(3)
17 without the setback reduction. The city was not required to list all of the CBZO criteria that

³ Under ORS 197.835(3), the issues that may be raised in a LUBA appeal of a quasi-judicial land use decision are generally “limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.” However, ORS 197.835(4)(a) provides a petitioner at LUBA may raise new issues if “[t]he local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice.” *Stewart v. City of Salem*, 58 Or LUBA 605, 611 (2009); *Lowery v. City of Keizer*, 48 Or LUBA 568, 584-85 (2005); *City of Newberg v. Yamhill County*, 36 Or LUBA 473, 484 (1999).

⁴ Some of petitioners’ arguments under the first assignment of error suggest that petitioners are concerned that the city might grant a development permit in the future at the same time it approves a building permit, and might do without a public hearing or without providing petitioners notice and an opportunity for a local appeal. Without commenting on whether those concerns might have merit, they provide no basis for requiring the city to apply criteria in approving a setback reduction other than the criteria that the city has adopted at CBZO 17.64.010 to govern such decisions.

1 will apply when and if the city grants a development permit and building permit to allow
2 intervenors to construct a dwelling on their lot.

3 It may be, as petitioners suggest, that if intervenors locate their dwelling three feet
4 from the front lot line, rather than 15 feet from the front lot line, the approved setback
5 reduction may alter the way those criteria apply to intervenors' dwelling, although it is not at
6 all clear to us that such would be the case. However, even if that is the case, we fail to see
7 how that would provide a basis for requiring that the city apply those criteria to a decision
8 that merely grants permission to locate the dwelling three feet from the front property line.
9 The setback reduction decision does not purport to waive or obviate the requirement to
10 comply with any and all CBZO development standards that apply to intervenors' property.

11 The first and third assignments of error are denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 One of the CBZO 17.64.010 criteria for setback reductions is CBZO 17.64.010(2),
14 which requires that the city find that:

15 "Significant views of the ocean, mountains or similar features from nearby
16 properties will not be obstructed any more than would occur if the proposed
17 structure were located as required by the zoning district."

18 To address CBZO 17.64.010(2) the city adopted the following findings;

19 "Adjoining properties to the east of Forest Lawn Road * * * Tax Lot 4103
20 * * * and Tax Lot [4102] * * * have significant views of the ocean across the
21 applicants' property. However, the Planning Commission determined, based
22 on staff determination * * * and the exhibit prepared by the applicant and
23 presented to the Planning Commission * * * that these ocean views will not be
24 obstructed [any more] with the proposed dwelling sited with a three foot front
25 yard setback from Forest Lawn Road than would occur if the proposed
26 dwelling complied with the required 15 foot front yard setback adjacent to
27 Forest Lawn Road. This is because the proposed building volume obstructs
28 the available ocean views from east of Forest Lawn Road in a similar fashion
29 whether that building volume is located with a three foot setback from Forest
30 Lawn Road or a 15 foot setback from Forest Lawn Road. In making its
31 determination, the Planning Commission considered the testimony from
32 adjoining property owners regarding potential view impacts of the proposed
33 setback reduction and found no specific testimony that contradicts the above
34 finding that ocean views from nearby properties will not be obstructed [any

1 more] with the proposed dwelling sited with a three foot front yard setback
2 from Forest Lawn Road than would occur if the proposed dwelling complied
3 with the required 15 foot yard setback adjacent to Forest Lawn Road.”
4 Record 5.

5 Petitioners’ arguments under the second assignment of error are divided into
6 “findings” and “evidentiary” challenges and petitioners work hard to make the question
7 presented under CBZO 17.64.010(2) far more complicated than the city found the relevant
8 question to be. And in doing so, petitioners present some arguments to LUBA that were not
9 presented to the city.

10 **A. Nearby Properties**

11 Petitioners fault the city for not defining what the words “nearby properties” mean in
12 CBZO 17.64.010(2). The city’s findings identify petitioners’ lot and the lot to the north and
13 explain that there are significant views of the ocean across intervenors’ presently
14 undeveloped lot from both petitioners’ lot and the adjoining lot to the north. If petitioners
15 believe there are other nearby properties that have significant views of the ocean across
16 intervenors’ presently undeveloped lot they make no attempt to identify those other nearby
17 properties. Without a better developed argument from petitioners, we conclude the city’s
18 findings adequately identify the nearby properties with views that are potentially entitled to
19 protection under CBZO 17.64.010(2).

20 **B. Higher Elevation – View of Haystack Rock**

21 Petitioners contend that the elevation of intervenors’ lot is higher next to the road (in
22 the reduced setback area) and lower toward the rear of the lot. Petitioners contend that if the
23 house is built in the reduced setback area the house will be taller and will block the view of
24 Haystack Rock that petitioners would otherwise have over the top of intervenors’ shorter
25 house if it were set back the required 15 feet from Forest Lawn Road.

26 Respondents object that no issue was raised below concerning any view of Haystack
27 Rock and no issue was raised about the elevation of intervenors’ lot being higher in the

1 reduced setback area. Respondents contend that any issue regarding whether the setback
2 reduction will result in obstructed views that are attributable to a taller dwelling and any
3 issue regarding an obstructed view of Haystack Rock has been waived under ORS
4 197.835(3).⁵ Petitioners did not file a reply brief to respond to respondents’ waiver
5 argument. Petitioners’ only response to the waiver argument came at oral argument, where
6 petitioners argued that the city’s failure to list additional CBZO development criteria should
7 permit petitioners to raise issues without regard to whether the issues were raised below. We
8 have already rejected petitioners’ assignments of error in which they argue the city failed to
9 list or identify all the CBZO criteria that apply to the setback reduction. Petitioners waived
10 the issues they raise regarding the view over the dwelling of Haystack Rock and the higher
11 elevation in the reduced setback area.

12 **C. Traffic Hazard Findings and Conditions**

13 The city found that vehicles parking in the Forest Lawn Road right of way will not
14 obstruct traffic. Petitioners argue that if vehicles that are wider than normal they could not
15 be parked in the right of way without creating a traffic hazard. Petitioners fault the city for
16 not imposing a condition of approval to ensure that wider than normal vehicles will not be
17 parked in the Forest Lawn Road right of way.

18 Respondents contend that this argument has nothing to do with the second assignment
19 of error, which concerns the CBZO 17.64.010(2) view obstruction criterion. Respondents
20 also argue that petitioners waived any issue about the possibility that wider than normal
21 vehicles might create a hazard by failing to raise that issue below. We agree with

⁵ ORS 197.835 describes LUBA’s scope of review. ORS 197.835(3) provides that in an appeal to LUBA “[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 respondents that the wider than normal vehicle argument was waived; and we also agree that,
2 in any event, that argument is irrelevant under the second assignment of error.⁶

3 **D. Petitioners’ Remaining Arguments**

4 Given that the central issue in this appeal is whether the disputed setback reduction
5 will result in an obstruction of the views across intervenors property that would be avoided if
6 the setback reduction were not granted, it is hard to understand why the record does not
7 include a photograph that shows the existing view across intervenors’ lot. Such a photograph
8 might not show the impact of the setback reduction, but it might provide useful context.

9 The best drawing in the record from which to attempt to assess the impact of the
10 disputed setback reduction appears at Record 135—the same drawing that was set out earlier
11 in this opinion. It is fair to say that the city council seems to have been swayed by
12 intervenors’ argument that it is the portion of the dwelling that complies with all setbacks
13 (the single cross-hatch portion) that will block the significant ocean view that petitioners and
14 their neighbor now enjoy across intervenors’ lot. The only view of the ocean across
15 intervenors’ lot that would be left after construction of a dwelling that occupied that footprint
16 would be small remnants of that view through the side yards between intervenors’ proposed
17 dwelling and the existing dwellings to the north and south. It is clear from the drawing that
18 no right angle views (or due west views) from Forest Lawn Road and the lots to the east of
19 Forest Lawn Road through the remaining gaps between the dwellings would be affected at all
20 by intervenors’ front yard setback reduction. The city also appears to have been influenced
21 by that lack of impact on right angle or due west views.

22 Petitioners make two points in their brief. First, if oblique views are drawn from
23 multiple vantage points along Forest Lawn Road and the lots east of Forest Lawn Road
24 through the side yard view that would not be blocked by the part of the dwelling that

⁶ We address the issues that petitioners raised below regarding potential traffic hazards, in our discussion of the fourth assignment of error.

1 complies with all setbacks, some of those oblique views would be blocked by the corners of
2 the double cross-hatch portion of the dwelling to be located in the setback area closest to the
3 road. Petitioners appear to be correct that some of those oblique views would be clipped by
4 the easternmost corners of the proposed dwelling. Second, petitioners argue that all other
5 things being equal a dwelling that is closer to the viewer will block more of the view around
6 the dwelling than a dwelling that is located farther away from the viewer. Petitioners’
7 second point is correct as well, but petitioners’ second point is of little import since it is the
8 view of the ocean that is at issue and the starting point for purposes of applying CBZO
9 17.64.010(2) in this case is not an unobstructed view of the ocean around the proposed
10 dwelling. Neither of petitioners’ points is sufficient to establish that the city erroneously
11 interpreted CBZO 17.64.010(2) or that the city adopted a decision that is not supported by
12 substantial evidence. Petitioners’ point about the corners of the house in the setback area
13 was not specifically raised below. Petitioners’ second point, while raised below, was not
14 developed in a way that makes it terribly useful in applying CBZO 17.64.010(2) in the
15 circumstances presented in this case. We therefore do not fault the city for failing to adopt
16 findings specifically addressing those issues.

17 A reasonable decision maker looking at the drawing could conclude that the
18 “significant views of the ocean” across intervenors’ presently undeveloped lot that
19 petitioners and others currently enjoy will be almost completely obstructed by the part of the
20 dwelling that complies with all setbacks (the single cross-hatch part). The part of the
21 dwelling that will be located within the setback reduction (the double cross-hatch part) has at
22 most a *de minimis* impact on what little view of the ocean will remain through the side yards.
23 The standard imposed by CBZO 17.64.010(2) requires that the city find “[s]ignificant views
24 of the ocean * * * will not be obstructed any more than would occur” without the setback
25 reduction. The issue reduces to determining whether this additional *de minimis* impact on

1 the small remaining views through the side yards necessarily means the view of the ocean is
2 more “obstructed” with the front yard setback.

3 The CBZO does not include definitions of “obstruct” or “obstructed.” The Webster’s
4 Third New Int’l Dictionary (1981) definition of “obstruct” is set out below:

5 “* * * 3: to cut off from sight: shut out <the high wall [obstructed] the view>
6 * * *.” *Id.* at 1559.

7 Petitioners apparently interpret CBZO 17.64.010(2) to require that the view of ocean with the
8 setback reduction must be identical to the view of the ocean without the setback reduction.
9 While it might be possible to adopt such a strict interpretation of CBZO 17.64.010(2) under
10 the above definition of “obstruct,” the relevant question in this appeal is whether CBZO
11 17.64.010(2) must be interpreted to require that the view be identical or better than it would
12 be without the reduction. We do not think so. By any objective standard, the impact on the
13 view that can be attributed solely to the front yard setback is *de minimis*. As the word
14 “obstruct” is defined above, we believe the city has the interpretive latitude to conclude that
15 if the views with the front yard setback and without the front yard setback are as *similar* as
16 they are in this case, the significant views of the ocean are not any more obstructed with the
17 set back reduction than they would be without the setback reduction. Stated differently, we
18 conclude that a reasonable decision maker working with the drawing could conclude that the
19 *de minimis* impact those corners may might have on some of the limited oblique views of the
20 ocean through the side yards amounts to something less than an obstruction. Such an
21 interpretation is plausible under the above dictionary definition of “obstruct” and therefore
22 within the interpretative discretion LUBA must extend to the city council under *Siporen v.*
23 *City of Medford*, 349 Or 247, 243 P3d 776 (2010).

24 The second assignment of error is denied.

25 **FOURTH ASSIGNMENT OF ERROR**

26 Another setback reduction criterion is set out at CBZO 17.64.010(7), which provides:

1 “Any encroachment into the setback will not substantially reduce the amount
2 of privacy which is or would be enjoyed by an abutting property[.]”

3 In addressing CBZO 17.64.010(7), the city found that the requested front yard setback
4 reduction would not substantially reduce the privacy enjoyed by the abutting properties to the
5 north and south. In adopting that finding, the city noted that both of the existing dwellings
6 on those lots intrude into the front yard setback. We do not understand petitioners to
7 challenge those findings.

8 In rejecting petitioners’ argument that intervenors’ requested front yard setback
9 reduction violates CBZO 17.64.010(7) with regard to the two lots across Forest Lawn Road,
10 the city found that the lots across Forest Lawn Road do not *abut* intervenors’ lot and for that
11 reason CBZO 17.64.010(7) does not apply to those lots.

12 CBZO 17.42.050(A)(6) imposes an oceanfront setback which requires that
13 development be set back a significant distance from the rear (oceanfront) lot line. CBZO
14 17.42.050(A)(6) and the front yard setback imposed by CBZO 17.14.040(B)(3) operate in
15 concert to reduce the area of oceanfront lots that can be developed. A front yard setback may
16 be available to reduce the impact of those setbacks where the oceanfront setback imposed by
17 CBZO 17.42.050(A)(6) reduces the buildable area of an oceanfront lot to less than 40 percent
18 of the lot’s depth. Petitioners argue:

19 “* * * The underlying policy and purpose of [CBZO 17.64.010(7)] is to
20 ensure that the affected nearby lots are not harmed by the [front yard] setback
21 reduction. For the city to summarily dismiss the properties across Forest
22 Lawn Road as not ‘abutting’ is inconsistent with the purpose and policy of the
23 provision – to protect the properties adjacent to the setback reduction.”
24 Petition for Review 28.

25 Petitioners go on to argue the city’s interpretation is inconsistent with the definition of
26 “abutting.”

27 Respondents first contend that petitioners misstate the purpose of CBZO 17.64.010
28 setback reductions. The purpose is set out at CBZO 17.64.010, which provides in part:

1 “It is the purpose of setbacks to provide for a reasonable amount of privacy,
2 drainage, light, air, noise reduction and fire safety between adjacent
3 structures.”

4 We understand respondents to contend the purpose is to protect “a reasonable amount of
5 privacy,” which is not the same thing as ensuring no harm. Respondents contend that the
6 city’s interpretation of CBZO 17.64.010(7) not to apply to lots located east of Forest Lane
7 Road because they do not abut the subject property is consistent with the purpose of
8 providing “a reasonable amount of privacy * * * between adjacent structures.” Respondents
9 contend the 40-foot Forest Lawn Road right of way and the three-foot front yard setback,
10 together with the setback of the dwelling on intervenors’ and intervenors’ neighbor’s house
11 provides “a reasonable amount of privacy” between those dwellings, making the city’s
12 interpretation of CBZO 17.64.010(7) consistent with the underlying policy of CBZO
13 17.64.010.

14 Respondents also contend the city’s interpretation of “abutting properties” in CBZO
15 17.64.010(7) to include lots with shared property lines and to exclude lots that are separated
16 from intervenors’ lot by a 40-foot right of way is consistent with the dictionary definition of
17 “abut.”⁷ We agree with respondents

18 The fourth assignment of error is denied.

19 **FIFTH ASSIGNMENT OF ERROR**

20 Another of the setback reduction standards requires the city to find that “[t]he
21 reduction would not create traffic hazards; or impinge upon a public walkway or trail[.]”
22 CBZO 17.64.010(A)(6). In an October 26, 2010 letter to the city, the city fire chief
23 expressed concern that with only a three-foot front yard setback, “it is not possible to park a

⁷ Webster’s Third New Int’l Dictionary (1981) defines abut as follows:

Abut * * * 1: to border on: reach or touch with an end < two lots that [abut] each other * *
*.” *Id.* at 8.

1 vehicle in the front of the home without obstructing part of the right-of-way.” Record 145.

2 The fire chief went on to say:

3 “The Forest Lawn Road right-of-way is platted at 40 feet. If some measures
4 can be taken to ensure the improved portion of the right-of-way will not be
5 reduced to anything less than 20’ by vehicular parking on either side of the
6 street, I offer my approval of the request to reduce the setback. If however,
7 such measures cannot be implemented, I view the requested setback reduction
8 as a fire hazard and stand in opposition.” *Id.*

9 The city’s findings explain that intervenors propose to provide two off-street parking
10 spaces and whether intervenors’ front yard is three feet deep or 15 feet deep will have no
11 effect on the location or number of parking spaces within the Forest Lawn Road right of way,
12 because there is no additional requirement under the CBZO that property owners make their
13 front yards available for off-street parking. The findings go on to explain that the improved
14 gravel travel surface located within the one-way Forest Lawn Road right of way is 14 feet
15 wide where it passes in front of intervenors lot and slightly less than 12 feet wide in other
16 places. Outside the 14-foot travel surface are approximately 11-foot shoulders, which
17 provide sufficient area outside the improved 14-foot roadway to park vehicles within the 40-
18 foot right of way.⁸ Addressing the fire chief’s concern that room for a 20-foot travel surface
19 should be preserved, the city’s findings point out that there is only a 14-foot improved travel
20 surface and that “[w]ith a one-way configuration, a 14 foot wide roadway surface is adequate
21 for fire vehicle access.” Record 7.

22 Petitioners argue that while an 11-foot shoulder may be wide enough to accommodate
23 an eight-foot wide automobile, it might not be wide enough to accommodate “a sports utility
24 vehicle (SUV) with off road tires, service truck, motor home, trailer or oversized pick up
25 truck * * *. Petition for Review 30. We have already agreed with respondents, that
26 petitioners did not raise any issue below regarding oversized vehicles, and that issue has

⁸ The findings point out that most vehicles are approximately eight feet wide.

1 therefore been waived. Petitioners also fault the city for not imposing conditions of approval
2 to ensure that parking on the roadway shoulders will not create a traffic hazard. We agree
3 with respondents that the city's findings are adequate to explain the city council's rationale
4 for concluding that with the existing 14-foot travel surface the 11-foot shoulders can
5 accommodate on street parking without creating traffic hazards. Petitioners have not shown
6 that conditions of approval are needed to ensure compliance with CBZO 17.64.010(A)(6).

7 The fifth assignment of error is denied.

8 The city's decision is affirmed.