

NATURE OF THE DECISION

Petitioner appeals a decision by the city determining that a conditional use permit is void and denying a request for an extension of the permit.

FACTS

Petitioner’s one-acre property located in the city includes a dwelling, and a 124-year old wooden barn. In 2012, petitioner applied for a conditional use permit to use the barn as an event center. On October 26, 2012, petitioner received a conditional use permit approval to hold events in the barn (2012 CUP).¹ Record 16-21. As we discuss in detail later in this opinion, Gearhart Zoning Ordinance (GZO) 7.090 provides that conditional use authorization is “void” after one year unless “substantial construction pursuant thereto” has taken place. GZO 7.090 allows the city “at its discretion” to extend the authorization for an additional six months.² Sometime prior to the one-year expiration of the 2012 CUP in 2013, the city approved petitioner’s application to extend the conditional use permit for six months.³

¹ The 2012 CUP included 13 conditions of approval. Record 19-20.

² GZO 7.090 provides:

“Authorization of a conditional use shall be void after one year unless substantial construction pursuant thereto has taken place. However, the City may, at its discretion, extend authorization for an additional six (6) months upon request, provided such request is submitted in writing at least 10 days prior to expiration of the permit.”

³ In 2012, 2013, and 2014, petitioner submitted structural plans and fire, life and safety plans to the building official in preparation for construction activities to upgrade the barn for events, and petitioner and the city’s building

1 On April 15, 2014, petitioner submitted a letter to the city that took the
2 position that “substantial construction pursuant to [the 2012 CUP]” would be
3 completed by April 26, 2014, but that petitioner was also submitting a request
4 for an extension in the event additional time was needed to complete the
5 construction. Supplemental Record (SR) 209. On April 24, 2014, the city
6 administrator denied the request for an extension in an email he sent to
7 petitioner. SR 1.

8 On April 25, 2014, petitioner filed an appeal of the city administrator’s
9 April 24, 2014 decision. SR 41-43. The appeal took the position that
10 “substantial construction pursuant [to the 2012 CUP]” has taken place under
11 GZO 7.090, or in the alternative that the city administrator should have granted
12 an extension. SR 41.

13 In a letter to petitioner dated April 30, 2014, the city administrator
14 restated his prior April 24, 2014 decision to deny petitioner’s requested six-
15 month extension. That April 30, 2014 letter also determined that “substantial
16 construction” had not taken place.⁴

official met occasionally regarding the plans and corrections or changes to the
plans that the building official required in order to approve them. SR 99, 126,
130, 205.

⁴ The city administrator found:

“The City of Gearhart does not agree that you have substantially completed your project. We have not yet issued a permit for the Structural plans as we are awaiting a valuation of the work to complete the permit. We have not received a complete set of Fire Life and Safety Plans for your project. These two items are major portions of the project and the work has not yet started. If work has started you would be in violation as building permits have not been issued.” SR 269.

1 As we discuss in more detail below, GZO 12.060(1) provides that a
2 decision by the city administrator regarding a provision of the GZO may be
3 appealed to the planning commission.⁵ On May 1, 2014, petitioner requested
4 that the city council hear and decide her appeal.⁶ SR 6. The city administrator
5 and city council agreed. SR 7. At the May 7, 2014 city council meeting,
6 petitioner submitted evidence and testimony regarding the 2012 CUP and work
7 that had occurred pursuant to it, and argued that “substantial construction
8 pursuant [to]” the 2012 CUP had taken place.⁷ Petitioner also argued that an
9 extension of the 2012 CUP should be granted. At the end of the meeting, the
10 city council agreed to place the matter on the agenda for its June 4, 2014
11 meeting. Record 13.

12 At the June 4, 2014 meeting, one city councilor moved to grant petitioner
13 a six-month extension of the 2012 CUP. Record 7. However, no other

⁵ The GZO was apparently amended sometime in 2014. All citations and quotes of the GZO are to the current on-line version of the GZO found at <http://www.ci.gearhart.or.us/docs/GZO%20NEW%2008.14.pdf>. As far as we can tell no substantive difference exists between the relevant provisions of the GZO in each version.

⁶ Petitioner requested in writing that the city administrator place an item on the agenda for the May 7, 2014 city council meeting for petitioner “to address matters regarding the barn.” SR 6.

⁷ As far as we can tell from the record, the construction includes installation of additional exit lighting, construction of additional entrances and exits, ADA accessible ramps and decks, installation of new shear walls and knee braces with upper supports. As far as we are aware a remaining dispute between petitioner and the city is whether permanent restroom facilities must be constructed. SR 12.

1 councilor seconded the motion and the motion died for lack of a second.
2 Petitioner subsequently filed her notice of intent to appeal with LUBA.

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

4 In her second assignment of error, petitioner argues that the city council
5 committed a procedural error that prejudiced her right to a final decision on her
6 appeal when it failed to make a decision on her appeal and adopt a written
7 decision supported by findings. ORS 197.835(9)(a)(B).

8 The parties appear to agree that petitioner’s alternative requests for (1) a
9 determination that the 2012 CUP will not expire because “substantial
10 construction” has occurred or (2) an extension of the 2012 CUP constitute an
11 application for a “permit” as that term is defined at ORS 227.160(2). As
12 discussed below, ORS 227.173(3) requires that approval or denial of a permit
13 application shall be based upon a brief statement that explains the criteria and
14 standards, the facts relied upon, and the justification for the decision based on
15 the criteria, standards and facts set forth. ORS 227.175 and 227.178, discussed
16 below, set out the procedures that govern city review of permit applications.
17 The parties disagree, however, on how these statutory provisions were applied
18 and complied with below.

19 **A. ORS 227.178(4)**

20 The city responds initially that petitioner’s application for an extension
21 of the 2012 CUP and/or a determination that substantial construction pursuant
22 to the 2012 CUP has occurred became “void” 181 days after the application
23 was submitted, pursuant to ORS 227.178(4), because petitioner failed to submit
24 missing information that was identified by the city as required to process

1 petitioner’s application.⁸ ORS 227.178(2) requires the city to notify an
2 applicant for a permit in writing “what information is missing” within 30 days
3 of receipt of an application, and requires an applicant to either submit the
4 missing information or notify the city in writing that no more information will
5 be submitted.⁹ The city points to a May 7, 2014 email from the city building

⁸ ORS 227.178(4) provides:

“On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

“(a) All of the missing information;

“(b) Some of the missing information and written notice that no other information will be provided; or

“(c) Written notice that none of the missing information will be provided.”

⁹ ORS 227.178(2) provides:

“If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:

“(a) All of the missing information;

“(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

“(c) Written notice from the applicant that none of the missing information will be provided.”

1 official to petitioner that explains why building plans that petitioner had
2 previously submitted fail to comply with various building code provisions. SR
3 11-12. We understand the city to take the position that that May 7, 2014 email
4 from the building official is the required notification in writing of “what
5 information is missing” pursuant to ORS 227.178(2).

6 We reject the city’s contention that the application became void under
7 ORS 227.178(4). First, less than two weeks after petitioner applied for an
8 extension of the permit and later sought a determination that substantial
9 construction pursuant to the 2012 CUP has taken place, the city administrator
10 made a decision on April 30, 2014 to deny petitioner’s extension application
11 and also determined under GZO 7.090 that “substantial construction” had not
12 taken place. SR 268-69. If the city was waiting for “missing information” to
13 be supplied it would not, and could not, have made those decisions because it
14 did not have a complete application.

15 Second, there is nothing in the record that gives petitioner a clear signal
16 that her application for an extension of the 2012 CUP is incomplete within the
17 meaning of ORS 227.178(2), or notifies petitioner “in writing of exactly what
18 information is missing” that prevents the extension application from being
19 processed. The May 7, 2014 email from the building official that the city relies
20 on does not list “missing information” related to the extension application but
21 lists deficiencies in petitioner’s submitted building plans. SR 268.

22 Finally, and most importantly, petitioner’s April 25, 2014 appeal
23 statement includes the following statement:

24 “I [] plan to submit no additional documentation except Coaster
25 Construction bid estimate for my building permit. My application
26 is considered complete. A written decision shall be provided.
27 Any denial is required to be provided to me in writing citing

1 specific criteria and citing specifically how the documentation
2 submitted fails to meet the criterion cited.” SR 52.

3 That statement is sufficient to have the application deemed complete under
4 ORS 227.178(2). *See* ns 8 and 9. The application could not, therefore,
5 become void under ORS 227.178(4).

6 **B. Exhaustion**

7 The city next argues that petitioner failed to exhaust all available
8 administrative remedies, by failing to pursue the local appeal process available
9 under the city’s code.

10 ORS 197.825(2)(a) limits LUBA’s jurisdiction to those cases in which
11 the petitioners have exhausted “all remedies available by right” before
12 petitioning the Board for review. The city’s code provides that the city
13 administrator’s actions may be appealed to the planning commission, and the
14 planning commission’s decision on that local appeal may be appealed to the
15 city council. GZO 12.060(1)-(2). The city argues that petitioner shortcut that
16 process and failed to exhaust her administrative remedies by seeking review of
17 her appeal by the city council rather than the planning commission. However,
18 it is the city, not petitioner, who is responsible for processing her appeal
19 according to the city’s procedures for appeals set out in GZO 12.060. The city
20 council agreed to bypass the planning commission and hear petitioner’s appeal.
21 Having agreed to hear petitioner’s appeal, rather than rejecting her appeal or
22 directing her appeal to the planning commission, the city may not now argue
23 petitioner failed to exhaust her administrative remedies.

24 **C. The City Failed to Decide Petitioner’s Appeal**

25 We agree with petitioner that the city erred in failing to take action and
26 issue a written decision supported by adequate findings on her appeal. GZO

1 12.060(7) entitles petitioner to a decision on her appeal.¹⁰ Petitioner’s appeal
2 placed two issues before the city council. The first issue is whether substantial

¹⁰ GZO 12.060(7) provides:

“Review Body Decision

“A. Upon review, the City Council may affirm, reverse, or modify in whole or part, a determination or requirement of the decision that is under review. When the City Council modifies or renders a decision that reverses a decision of the Planning Commission, the City Council shall set forth its finding and state its reasons for taking the action and shall be in conformance with the requirements of Section 11.040(6). When the City Council elects to remand the matter back to the Planning Commission for further consideration as it deems necessary, it shall include a statement explaining the error found to have materially affected the outcome of the original decision and the action necessary to rectify such.

“B. Notice of the City Council decision shall be provided to all parties to the hearing within seven working days of the date that the final order is signed. The notice of the decision shall include:

“(1) A brief description of the decision reached.

“(2) A statement that the decision may be appealed to the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days.

“(3) A statement that the complete case, including the final order is available for review at the City.”

In addition, ORS 227.173(3) requires approval or denial of a permit application to be “based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states

1 construction pursuant to the 2012 CUP has taken place. Petitioner presented
2 evidence to the city administrator and the city council to support her position
3 that substantial construction has taken place. The city council failed to make a
4 decision regarding whether the substantial construction has taken place.

5 Accordingly, we agree with petitioner that remand is necessary for the
6 city to issue a decision on petitioner’s local appeal, and make a determination
7 whether “substantial construction pursuant [to the 2012 CUP],” within the
8 meaning of GZO 7.090, has taken place. In order to make that determination,
9 the city will need to first determine what construction is required by the 2012
10 CUP. Under GZO 7.090, if substantial construction pursuant to the 2012 CUP
11 has taken place, then no extension of the permit is required.

12 Second, if the city determines that “substantial construction” has not
13 taken place, the city will need to determine whether to grant petitioner’s
14 request for an extension pursuant to GZO 7.090. Petitioner also presented
15 evidence regarding her extension request, and the city council failed to either
16 approve or deny her extension request. Accordingly, remand is required for the
17 city to address petitioner’s two appeal issues and issue a written decision that
18 resolves both of those appeal issues in accordance with GZO 12.060(7).¹¹

19 **D. ORS 227.175 Procedural Requirements**

20 Also in her second assignment of error, petitioner argues that the city
21 erred in failing to process her application for an extension of the 2012 CUP

the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

¹¹ In sustaining petitioner’s second assignment of error, we do not decide that the city council is the only body that may hear petitioner’s appeal pursuant to GZO 12.060.

1 according to the procedures in ORS 227.175 for an application for a permit.
2 We understand petitioner to argue that ORS 227.175(10)(a)(A) required notice
3 of the city administrator’s decision to deny the application for the permit
4 extension, and an opportunity to appeal the decision as provided in ORS
5 227.175(10)(a)(D).¹²

6 Petitioner has not established that any procedural errors the city made in
7 failing to process her application according to the procedures for processing
8 permits prejudiced her substantial rights. She appealed the city administrator’s
9 decision, the city granted her an appeal hearing, and she presented evidence to
10 support her appeal at the appeal hearing. As far as petitioner has demonstrated,

¹² ORS 227.175(10)(a) provides in relevant part:

“(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

“ * * * * *

“(D) An appeal from a hearings officer’s decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.”

1 the city’s prejudicial error occurred when it failed to issue a written decision
2 supported by findings on her appeal.

3 **E. Substantial Construction**

4 Finally, in her third assignment of error, petitioner challenges the merits
5 of the city administrator’s decision, which, as explained, petitioner appealed to
6 the city council. Petitioner argues that the city administrator’s decision that
7 substantial construction has not taken place misconstrues GZO 7.090, and is
8 not supported by substantial evidence in the record or adequate findings. We
9 agree with petitioner on that point. However, the city’s final decision on the
10 merits of petitioner’s request for a determination that substantial construction
11 has occurred will be made by the planning commission or the city council,
12 pursuant to GZO 12.060. Accordingly, any errors in the city administrator’s
13 decision can be raised in an appeal of that decision to the planning commission
14 and/or the city council, and accordingly do not provide a basis for reversal or
15 remand of the decision.

16 Petitioner also argues that the city administrator’s interpretation of
17 “substantial construction” within the meaning of GZO 7.090 is inconsistent
18 with the Supreme Court’s holding in *Clackamas County v. Holmes*, 265 Or
19 193, 508 P2d 190 (1973), and that the city is required to apply the factors
20 identified in *Holmes* to determine whether “substantial construction pursuant
21 [to the 2012 CUP]” has taken place. We disagree with petitioner that the
22 *Holmes* analysis has any direct bearing in this appeal. The factors and analysis
23 set out in *Holmes* apply where the zoning changes after implementation of a
24 previously authorized use has commenced but not yet been fully implemented.
25 Here, petitioner’s use is a conditional use in the zone and was authorized by the
26 2012 CUP. The question that the city must answer on remand is whether

1 substantial construction pursuant to the 2012 CUP has occurred within the
2 meaning of GZO 7.090.

3 The second assignment of error is sustained, in part. The third
4 assignment of error is denied.

5 **FIRST ASSIGNMENT OF ERROR**

6 In her first assignment of error, petitioner argues that the city committed
7 a procedural error that prejudiced her substantial rights when the mayor
8 participated in the city council proceedings on petitioner’s appeal, because the
9 mayor is biased against petitioner. ORS 197.835(9)(a)(B). According to
10 petitioner, the city erred in allowing the mayor to participate in the appeal
11 proceeding because the mayor has “so prejudged the particular matter as to be
12 incapable of determining its merits on the basis of the evidence and arguments
13 presented.” *Beck v. City of Tillamook*, 113 Or App 660, 662-63, 833 P2d 1327
14 (1992) (statement of the standard for prejudgment bias).

15 Petitioner cites to a statement in the record that relates a conversation
16 between the mayor and the author of the statement that occurred sometime in
17 2012, while petitioner’s application for the 2012 CUP was pending before the
18 city, in which the mayor is alleged to have stated that she is a member of the
19 city council and petitioner’s application would not succeed.¹³ SR 193.
20 Petitioner also points out that in 2012, the mayor, who was then a city
21 councilor, recused herself from participating in an appeal of the city’s initial
22 approval of petitioner’s application for the conditional use permit, and alleges

¹³ The statement alleges that the mayor stated to the supporter that “[petitioner] would succeed only ‘over her dead body,’ [while] she was on City Council and could make sure that [petitioner] did not succeed.” SR 193.

1 that that recusal is an acknowledgement of her inability to make a decision on
2 the application based on the evidence and the standards and criteria.

3 The city responds that petitioner's reliance on events and statements that
4 occurred in 2012 are related to a different application, the application that
5 resulted in the 2012 CUP. Citing *Columbia Riverkeeper v. Clatsop County*,
6 267 Or App 578, 602, 341 P3d 790 (2014), the city responds those statements
7 do not demonstrate that the mayor is biased in the current proceeding on
8 petitioner's appeal of the city administrator's denial of her request to extend the
9 2012 CUP or to verify substantial construction.

10 Although the city council gave cursory consideration to one of the bases
11 for petitioner's appeal, the extension request, the city council did not consider
12 the other basis for petitioner's appeal, that substantial construction occurred.
13 More importantly, the city council made failed to take action, either oral or
14 written, on petitioner's requests. For those reasons, petitioner's challenge to
15 the participation of the mayor in the proceedings on petitioner's appeal is
16 premature, and we decline to resolve it at this stage of the proceedings. The
17 GZO contains standards and procedures for challenging a member's
18 participation in a quasi-judicial proceeding on grounds of bias. GZO
19 12.050(1). On remand, the city will need to consider petitioner's bias
20 challenges to the mayor's participation in any appeal proceeding.

21 We do not reach the first assignment of error.

22 The city's decision is remanded.