

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 WILLIAM E. HARVEY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BAKER CITY,
10 *Respondent,*

11 and

12
13 ELLINGSON LUMBER COMPANY,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2000-179

17
18 FINAL OPINION
19 AND ORDER

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21 Appeal from City of Baker City.

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23 William E. Harvey, Haines, filed the petition for review and argued on his own
24 behalf.

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26 No appearance by City of Baker City.

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28 Martin Leuenberger, Baker City, filed the response brief and argued on behalf of
29 intervenor-respondent.

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

33
34 AFFIRMED

35 03/13/2001

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

NATURE OF THE DECISION

Petitioner appeals a city decision to approve a conditional use permit to operate a public office within the city’s Light Industrial (I-L) zone.

FACTS

The subject property is a 6.73-acre parcel owned by Ellingson Lumber Company (intervenor). The property contains several buildings, including an office building that was originally used solely for company offices. In 1998, intervenor leased a portion of the office space on the property to the Oregon Division of Motor Vehicles (DMV) for use as a regional office.

At the time of the 1998 lease to the DMV, the property was zoned Industrial. Office uses are not permitted in Baker City’s Industrial zone. Therefore, in 2000, intervenor applied for a zone change from Industrial to I-L. Among other things, the city’s I-L zone permits a “public building or use” as a conditional use. Intervenor concurrently applied for a conditional use permit to allow it to continue to lease office space to the DMV.

During the proceedings before the city, petitioner objected to intervenor’s applications, contending that the proposed use was a “public office” under the city’s zoning scheme and, therefore, the city could not approve a conditional use permit for a “public office,” because the category “public office” is not among the listed uses that may be allowed in the I-L zone. The city approved both the zone change and the conditional use permit, concluding that the DMV offices constitute a “public building or use” that may be permitted as a conditional use in the I-L zone.

This appeal followed.¹

¹Petitioner does not appeal the city’s rezoning decision.

1 **INTERPRETATION OF “PUBLIC BUILDING OR USE”**

2 The crux of petitioner’s arguments in this appeal is that the city erred in concluding
3 that the proposed DMV office can be permitted as a “public building or use” within the city’s
4 I-L zone. Baker City Zoning Ordinance (BCZO) 2.060 permits the city to allow a use not
5 specifically listed among the allowed uses in a zone “if it is similar to the allowed uses in the
6 zone *and if it is not specifically listed as an allowed use in another zone.*” (Emphasis added.)
7 Petitioner contends that BCZO 2.060 prevents the city from approving the proposed DMV
8 office as a “public building or use” within the I-L zone because it is a “public office” and a
9 “public office” is an allowed use in the city’s General Commercial and Central Commercial
10 zones.

11 A “public building or use” is an allowed use only in the Tourist Commercial zone,
12 and may be permitted as a conditional use in the city’s residential, General Commercial,
13 Central Commercial and the I-L zones. According to petitioner, the ordinance makes a
14 distinction between a “public building or use” and a “public office,” and that distinction is
15 eliminated by the city’s approval of a conditional use permit to allow a state agency to lease
16 space within a private office building located within the I-L zone. Petitioner argues that the
17 city’s definition of “public building or use” contemplates an ownership or a management
18 interest that is not inherent in a lease agreement and, therefore, it is not possible to consider a
19 “public office” to be similar to a “public building or use.”²

²BCZO 1.030 defines “public building or use” as

“Any building or property publicly owned or operated, including parks and recreational facilities.”

The city’s ordinance does not define “public office.”

1 Intervenor responds that the city did not determine that a “public office” is “similar”
2 to a “public building or use” under BCZO 2.060.³ We agree. The city’s findings, set forth
3 below, do not include BCZO 2.060 or make a determination that the proposed use is
4 “similar” to a use allowed in the zone. Instead, the city finds that the proposed use falls
5 within a use conditionally allowed in the zone, *i.e.*, a “public building or use.” The remaining
6 issue under petitioner’s two assignments of error is whether the city adopted a reviewable
7 interpretation of its code and, if so, whether that interpretation is sustainable under the
8 appropriate standard of review.

9 The city’s findings state, in relevant part:

10 “The building involved is an 11,000 square foot modern office building that
11 was constructed in 1991. The present owner, Ellingson Lumber Company,
12 uses only approximately 30% of the building for its purposes and the
13 remainder is available for lease for public offices.

14 “* * * * *

15 “The operation of all or a portion of the building * * * by the [DMV] or
16 another public agency of like character satisfies the definition of the Baker
17 City Zoning Ordinance that a ‘public use’ is ‘any building or property
18 public[ly] owned or operated.’” Record 6.

19 According to intervenor, the city interpreted the term “public office” to be a
20 subcategory of “public building or use” and, therefore, the city may approve a conditional
21 use permit to allow the DMV to lease offices on property zoned I-L as a “public building or
22 use.” Intervenor argues that this interpretation of the ordinance makes sense, in that every
23 public office is a “public building or use” while not every public building or use is a “public
24 office.” In the alternative, intervenor argues that the city found that the operation of an office

³Intervenor also argues that BCZO 2.060 does not apply to actions of the city council because the code provision states that the *planning commission* has the authority to make a similar use determination only if the use is not specifically listed among the allowed uses in the zone. We agree with petitioner that, to the extent the city council is reviewing the correctness of the planning commission’s similar use determination, the city council must review that decision for compliance with BCZO 2.060.

1 by a public agency for a public purpose constitutes a “public use” that is permissible as a
2 conditional use in the I-L zone.

3 This Board is required to defer to a local governing body’s interpretation of its own
4 enactment, unless that interpretation is contrary to the express words, purpose or policy of
5 the local enactment or to a state statute, statewide planning goal or administrative rule that
6 the local enactment implements. ORS 197.829; *Gage v. City of Portland*, 319 Or 308, 316-
7 17, 877 P2d 1187 (1994); *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992).
8 This means we must defer to a local government’s interpretation of its own enactments,
9 unless that interpretation is “clearly wrong.” *Goose Hollow Foothills League v. City of*
10 *Portland*, 117 Or App 211, 217, 843 P2d 992 (1992).

11 In *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 942 P2d
12 836 (1997), *rev dismissed* 327 Or 555 (1998), the Court of Appeals determined that an
13 implicit interpretation that is adequate for review may be affirmed under the standard
14 enunciated in *Clark*. The court held that an implicit interpretation is adequate for review
15 where:

16 “The [local government’s] understanding of what [the standard] means is
17 inherent in the way that it applied the standard, and we conclude that its order
18 expresses that understanding in a manner that satisfies the ‘adequate
19 articulation’ test that *Weeks [v. City of Tillamook*, 117 Or App 449, 844 P2d
20 914 (1992)] and *Larson [v. Wallowa County*, 116 Or App 96, 103-04, 840 P2d
21 1350 (1992)] establish for determining whether a reviewable interpretation
22 has been made.” *Id.* at 267.

23 It is reasonably clear from the findings, above, that the city considers an office
24 operated by a public agency for a public use to fall within the more general category of
25 “public building or use” that may be conditionally permitted within the I-L zone. This
26 interpretation is adequate for review and is not “clearly wrong.” Therefore, we must defer to
27 it.

1 **SUBSTANTIAL EVIDENCE**

2 In the first subassignment of error, petitioner argues that the city’s decision that the
3 building will be “owned or operated” by the DMV is not supported by substantial evidence.
4 Petitioner contends that the record clearly shows that the DMV will occupy only a portion of
5 the building, and that intervenor owns, maintains and manages the entire structure for use as
6 an office building. According to petitioner, a leasehold interest demonstrates neither
7 ownership nor responsibility for the operation of the building.

8 Intervenor responds that there is evidence in the record to show that the DMV will
9 use the leased office space to conduct public business, and that is sufficient evidence to
10 demonstrate that the area proposed to be leased to the DMV will be a “public use.”

11 The city interpreted the phrase “public building or use” to include offices like the
12 DMV, where a portion of a building is operated to conduct public business. Given that
13 interpretation, we agree with intervenor that there is substantial evidence in the record to
14 support a finding that the proposed activity falls within the category of “public building or
15 use.”

16 The first and second assignments of error are denied.

17 The city’s decision is affirmed.