

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

MAY 23 4 09 PM '88

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2
3 APRIL SEVCIK, ROBERT SEVCIK,)
4 BEN BELKNAP, JERI BELKNAP,)
5 ROSS ADAMS, WALLACE BRILL and)
6 MEL WINGLER,)
7)
8 Petitioners,)
9)
10 vs.)
11 JACKSON COUNTY,)
12 Respondent,)
13)
14 and)
15)
16 R. ALLEN SURGEON and TERI)
17 GREEN,)
18)
19 Participants-Respondent.)

LUBA No. 87-087

FINAL OPINION
AND ORDER

Richard B. Thierolf, Jr., Medford, filed the petition for review and argued on behalf of petitioners. With him on the brief was Jacobson, Jewett & Thierolf, P.C.

No appearance by respondent.

No appearance by participants-respondent.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee, participated in the decision.

REVERSED 05/23/88

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

1 Opinion by Sheraton.

2 NATURE OF THE DECISION

3 Petitioners appeal Jackson County Board of Commissioners
4 Order No. 293-87 approving a site plan for a firewood sales
5 yard.

6 FACTS

7 The proposed firewood sales yard is located on a 1.96 acre
8 parcel within the Medford Urban Growth Boundary, in the General
9 Commercial (GC) zone. The property has been used for
10 preparation and retail sale of firewood for 1-3 years without
11 benefit of site plan review. It is surrounded by several
12 residences and relatively noiseless businesses, including
13 office buildings, a restaurant, a retail machine shop and a
14 pool and patio shop.

15 Participants-respondent (participants) filed an application
16 for site plan review pursuant to Jackson County Land
17 Development Ordinance (LDO) Chapter 282. The application
18 describes the proposed use as "retail firewood sales and
19 activities related thereto." Related activities listed on the
20 application are firewood storage, loading, unloading, cutting,
21 splitting and seasoning and a repair shop for equipment and
22 trucks.

23 Wood products manufacturing wastes, in the form of slab
24 wood or log ends, are delivered to the site. Approximately 30%
25 of the wood delivered requires some sawing prior to sale as
26 firewood. Two types of saws are employed for this purpose -- a

1 radial arm saw with a 30" diameter blade and chain saws.

2 The county planning department approved the site plan, with
3 conditions. This decision was appealed to the county hearings
4 officer by participants. The hearings officer denied the
5 application, finding that the proposed use is not a permitted
6 use in the GC zone. Participants appealed that decision to the
7 board of commissioners.

8 On September 14, 1987, the board of commissioners issued
9 the challenged order reversing the hearings officer's decision
10 and approving the site plan with conditions.¹ This appeal
11 followed.

12 FIRST ASSIGNMENT OF ERROR

13 "The Commissioners erred in deciding this case
14 pursuant to the site plan review process."

15 Petitioners argue the county erred in interpreting
16 LDO 236.020. This section lists uses permitted outright in the
17 GC zone through the site plan review process. The county
18 interpreted the section as including the proposed firewood
19 sales yard. Petitioners argue that LDO 236.020 does not
20 encompass a "wood lot using chainsaws and six-blade gang saws"
21 which petitioners term "an industrial-type sawing operation."
22 Petition for Review 7-8. According to petitioners, the
23 proposed use can only be allowed in the GC zone under
24 LDO 236.030(5) ("other use similar to those listed in this
25 Chapter") through the conditional use permit process.

26 There is no appearance by the county or participants.

1 However, the county's order finds that retail sales of firewood
2 and accessory uses such as sawing, stacking and delivery of
3 firewood are permitted uses in the GC zone under
4 LDO 236.020(34) ("other retail trade or service commercial
5 establishment"). Record 6. The county's decision provides the
6 following reasoning to support its interpretation:

7 "The conclusion is based on a comparison of sale of
8 firewood from a wood yard with activity with [sic]
9 other permitted uses in the zoning district. Cabinet
10 and carpenter shops and lumber yards are listed as
11 permitted uses in the General Commercial zoning
12 district. It is common knowledge that these uses
include sawing as part of their daily activity.
Therefore, it is logical that other retail trade or
service commercial uses also includes [sic] sawing as
part of their daily activity."

13 The interpretation of local ordinance provisions is a
14 question of law which LUBA reviews for correctness. McCoy v.
15 Linn County, 90 Or App 271, 275, ___ P2d ___ (1988); Gordon v.
16 Clackamas County, 73 Or App 16, 21, 698 P2d 49 (1985).
17 Although we give some weight in our review to the local
18 government's interpretation of its own enactment, where that
19 interpretation is not clearly contrary to the express language
20 and intent of the enactment, our acceptance or rejection of
21 that interpretation is determined by whether we believe the
22 interpretation to be correct. McCoy v. Linn County, 90 Or App
23 at 275-276; Fifth Avenue Corp. v. Washington Co., 282 Or 591,
24 599-600, 581 P2d 50 (1974).

25 The rules that govern statutory construction also apply to
26 the construction of local government ordinances. City of

1 Hillsboro v. Housing Devel. Corp., 61 Or App 484, 489, 657 P2d
2 726 (1983). A statute (or ordinance) should be construed as a
3 whole and effect should be given to the over-all policy which
4 it is intended to promote. Wimer v. Miller, 235 Or 25, 383 P2d
5 1005 (1963). This rule of construction is especially
6 applicable when interpreting a comprehensive zoning ordinance.
7 Clatsop County v. Morgan, 19 Or App 173, 178, 526 P2d 1393
8 (1974).

9 A comprehensive zoning ordinance assigns specific permitted
10 or conditional uses to each zoning district. Where a zoning
11 ordinance expressly permits a particular use in one zone, an
12 inference is created that the ordinance expresses an intent
13 that that use not be carried on in another zone where that use
14 is not expressly permitted. Clatsop County v. Morgan, 19 Or
15 App at 178-179 (zoning ordinance which expressly permits
16 "commercial amusement establishments" in commercial zones
17 cannot be interpreted to permit a "commercial amusement
18 establishment" in a non-commercial zone which does not
19 expressly permit that use).

20 In this case, the GC zone does not expressly allow fuel
21 storage and processing. However, the county's General
22 Industrial (GI) zone does expressly allow, as a use permitted
23 outright subject to site plan review:

24 "Fuel storage facilities, including manufacturing and
25 processing plants."

26 LDO 240.020(19). In these circumstances, LDO 236.020(34),

1 permitting "other retail trade or commercial service
2 establishments" in the GC zone, cannot be interpreted to
3 include fuel storage and processing.² Since fuel (firewood)
4 storage and processing (sawing) are integral parts of the
5 proposed firewood yard use, the proposed use cannot be allowed
6 in the GC zone.

7 The first assignment of error is sustained.

8 SECOND ASSIGNMENT OF ERROR

9 "The Commissioners erred in taking it upon themselves
10 to devise and impose conditions for participant-
respondents' proposed use."

11 Petitioners argue that the LDO does not authorize the board
12 of commissioners to impose conditions on a proposed use when
13 reversing a denial by the hearings officer. Petitioners argue
14 that LDO 285.020(10) authorizes the board of commissioners to
15 impose conditions only if it affirms the hearings officer.

16 The ordinance provision which petitioners cite, LDO
17 285.020(10), is part of a section entitled "Appeals" and
18 provides:

19 "If the appellate body elects to overturn or modify
20 the previous decision it shall make a finding
declaring one or more of the following:

21 "A) That the Planning Commission, Hearings
22 Council, Hearings Officer, or Department did not
23 correctly interpret the requirements of this
ordinance, the Comprehensive Plan, or other
requirements of law.

24 "B) That the Planning Commission, Hearings
25 Council, Hearings Officer, or Department did not
26 consider all of the information in the existing
record which was pertinent to the case.

1 "If the appellate body affirms the decision, it may
2 adopt by reference the findings and conclusions
3 previously made, may alter or delete any part of the
said findings, or make additional findings, and may
amend or add to any conditions imposed."

4 According to petitioners, the LDO charges the county
5 planning staff with the responsibility for developing suitable
6 conditions. Thus, petitioners claim that if the board of
7 commissioners determines on appeal that the imposition of
8 conditions is essential for compliance with applicable legal
9 standards, it must remand the application to the planning
10 department for development and application of such conditions.

11 Once again, we interpret the county's zoning ordinance as a
12 whole. LDO Chapter 200, "Establishment of Zoning Regulations,"
13 contains the following section entitled "Placing Conditions on
14 a Permit":

15 "In permitting any land use action subject to review
16 required by this ordinance, the County may impose, in
17 addition to those standards expressly specified by
18 this ordinance, conditions determined to be reasonably
19 necessary to ensure compliance with the standards of
this ordinance, the Comprehensive Plan, and to
20 otherwise protect the best interests of the
21 surrounding area or the community as a whole. * * * "

22 LDO 200.090. "The County" is defined by the ordinance as
23 "Jackson County, Oregon, the legally elected or appointed
24 officials thereof, and the Jackson County Planning Director."

25 LDO 00.040. Thus, LDO 200.090 gives the board of commissioners
26 general authority to impose conditions when permitting a land
use action subject to review under the LDO.

The effect of the provisions of LDO 285.020(10) cited by

1 petitioners on the board of commissioners' authority is
2 clarified by LDO 285.020(11):

3 "The appellate body's action on an appeal shall be
4 governed by the same general regulations of this
5 ordinance, which applied to the tribunal appealed from
6 in the original consideration of the application
7 except as set forth above."

8 Thus, the only way in which LDO 285.020(10) modifies the
9 board of commissioners' authority to approve a land use permit,
10 when reversing a denial by a lower decision-maker, is to
11 require that the board of commissioners make one or both of the
12 findings described in paragraphs (A) and (B) of that
13 subsection. LDO 285.020(10) does not alter the board of
14 commissioners' general authority, under LDO 200.090, to impose
15 conditions when approving a land use permit.

16 The second assignment of error is denied.

17 The county's decision is reversed.

