

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

3  
4   ANDREW SILANI, LORD MAITREYA,    )  
5   and ROBERT WOLDT,                    )  
6    )  
7            Petitioners,                )

8    )  
9            vs.                            )

10   KLAMATH COUNTY,                    )  
11    )  
12    )  
13            Respondent,                )

14    )  
15            and                            )

16    )  
17   JOHN BROOKS, LORELI BROOKS, and )  
18   WILLIAM BUEHLER,                    )  
19    )  
20            Intervenors-Respondent.    )

LUBA No. 91-140  
FINAL OPINION  
AND ORDER

21  
22  
23            Appeal from Klamath County.

24  
25            Andrew Silani, Lord Maitreya and Robert Woldt, Klamath  
26   Falls, filed the petition for review and argued on their own  
27   behalf.

28  
29            No appearance by respondent.

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31            Bradford J. Aspell, Klamath Falls, filed the response  
32   brief and argued on behalf of intervenors-respondent. With  
33   him on the brief was Aspell, Della-Rose & Richard.

34  
35            KELLINGTON, Referee; SHERTON, Referee, participated in  
36   the decision.

37  
38                    REMANDED   02/27/92

39  
40            You are entitled to judicial review of this Order.  
41   Judicial review is governed by the provisions of ORS  
42   197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order approving a  
4 conditional use permit for a restaurant on a parcel zoned  
5 Neighborhood Commercial (CN).

6 **MOTION TO INTERVENE**

7 John Brooks, Loreli Brooks and William Buehler move to  
8 intervene on the side of respondent in this appeal. There  
9 is no objection to the motion, and it is allowed.

10 **FACTS**

11 Intervenors-respondent (intervenors) applied for a  
12 conditional use permit for a restaurant.<sup>1</sup> The planning  
13 director approved the application and petitioners appealed  
14 to the county hearings officer, who affirmed the decision of  
15 the planning director. Petitioners appealed the hearings  
16 officer's decision to the board of commissioners. After a  
17 public hearing, the board of commissioners affirmed the  
18 decision of the planning director and this appeal followed.

19 **PRELIMINARY ISSUE**

20 Intervenors contend the assignments of error contained  
21 in the petition for review are inadequately stated to merit  
22 review by this Board.

23 We disagree. We will consider the arguments expressed

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<sup>1</sup>As is discussed more fully below, an application for a conditional use permit for a tavern on the subject property was denied by the county a few months before the conditional use permit application at issue here was submitted.

1 in any section of the petition for review where we are able  
2 to determine the nature of those arguments and where such  
3 arguments are stated clearly enough to afford intervenors an  
4 opportunity to respond. Eckis v. Linn County, 110 Or App  
5 309, 311, \_\_\_ P2d \_\_\_ (1991); Bjerk v. Deschutes County, 17  
6 Or LUBA 187, 194 (1988); Schoonover v. Klamath County, 16 Or  
7 LUBA 846, 848 n 4 (1988). Most of petitioners' arguments  
8 fall into this category.

9 **FIRST ASSIGNMENT OF ERROR**

10 "The county improperly construed ORS 215.416(1) by  
11 accepting the application for CUP 34-91."

12 ORS 215.416(1) provides:

13 "When required or authorized by the ordinances,  
14 rules and regulations of a county, an owner of  
15 land may apply in writing \* \* \* for a permit \* \*  
16 \*." (Emphasis supplied.)

17 Petitioners contend that because intervenors were not  
18 the owners of the subject parcel at the time they submitted  
19 their conditional use permit application, the county had no  
20 authority to approve the conditional use permit.

21 Intervenors argue they submitted to the county a letter  
22 from the property owners which indicates that intervenors  
23 had authority to apply for the permit.<sup>2</sup> Intervenors also  
24 point out they submitted a letter from a real estate broker  
25 stating that intervenors possessed an earnest money interest

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<sup>2</sup>Petitioners do not dispute that intervenors had authority from the owners of the subject parcel to apply for the conditional use permit.

1 in the subject property.

2 At a minimum, intervenors were acting as the agents of  
3 the property owners when they filed the conditional use  
4 permit application. Under these circumstances, there is no  
5 violation of ORS 215.416(1). See Simonson v. Marion County,  
6 \_\_\_ Or LUBA \_\_\_\_\_ (LUBA No. 90-171, June 21, 1991) (in the  
7 absence of a specific intention expressed in an ordinance  
8 provision that a requirement that the owner of land submit  
9 the application for permit approval is jurisdictional, this  
10 Board will not conclude such a provision is jurisdictional).

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 "The county improperly construed Section 44.040(F)  
14 of the LDC by considering the application for CUP  
15 34-91."

16 **THIRD ASSIGNMENT OF ERROR**

17 "The county failed to comply with  
18 Section 44.040(F) of the LDC."

19 Klamath County Land Development Code (LDC) 44.040  
20 provides several requirements applicable to the processing  
21 of applications for conditional use permits. LDC 44.040(F)  
22 provides:

23 "Time Limitation -- No request for a Conditional  
24 Use Permit shall be considered by a review body  
25 within a one-year period immediately following a  
26 previous denial of such request."

27 Petitioners argue this provision prohibits the county  
28 from accepting any conditional use permit application for  
29 any property on which a conditional use permit has been

1 denied within a previous year. Petitioners also argue the  
2 county was bound to automatically deny the subject  
3 application under LDC 44.040(F), on the basis of the  
4 previous denial of the conditional use permit application  
5 for a tavern. See n 1.

6 The interpretation of local ordinances is a question of  
7 law which must be decided by this Board. McCoy v. Linn  
8 County, 90 Or App 271, 275-76, 752 P2d 323 (1988).

9 LDC 44.040(F) establishes a limitation on the  
10 submission of a conditional use permit request for  
11 particular property within one year of a denial of "such"  
12 request.<sup>3</sup> "Such" request refers to the previously submitted  
13 conditional use permit application. We believe the correct  
14 and reasonable way to interpret LDC 44.040(F) is that it  
15 bars the submission of applications for conditional use  
16 permits for a particular use, where within the previous year  
17 an application for a conditional use permit for that use was  
18 denied. Thus, so long as the subject application for a  
19 conditional use permit for a restaurant is for a different  
20 use, LDC 44.040(F) does not prevent the county from  
21 considering the new application.<sup>4</sup> Consequently, the county

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<sup>3</sup>We express no opinion on whether LDC 44.040(F) states merely a procedural requirement.

<sup>4</sup>Whether the subject conditional use permit application for a restaurant is in fact for a use different from the tavern proposed by the previously denied conditional use permit application, is the subject of the fourth assignment of error, infra.

1 correctly interpreted how LDC 44.040(F) is applied.

2 The second and third assignments of error are denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 "The county's decision that the use applied for in  
5 the matter of CUP 34-91 is different from the use  
6 that was denied in the matter of CUP 23-91 is not  
7 supported by substantial evidence in the whole  
8 record."

9 **EIGHTH ASSIGNMENT OF ERROR**

10 "The county failed to follow the correct procedure  
11 when it refused to accept substantial evidence  
12 during the de novo appeal hearing that was held  
13 regarding CUP 34-91."

14 The issues under these assignments of error concern  
15 whether the subject conditional use permit application is  
16 for the same use for which a conditional use permit  
17 application was denied within the previous year. The  
18 previous conditional use permit application was for a  
19 "tavern." The subject conditional use permit application is  
20 for a "restaurant." Petitioners argue the county's  
21 determination that the proposed restaurant is not the same  
22 as the previously rejected "tavern," is not supported by  
23 substantial evidence in the whole record.

24 During the local proceedings on the subject application  
25 for a "restaurant," the county made it clear to petitioners  
26 that it would refuse to accept any evidence or allow any  
27 argument concerning the prior conditional use permit

1 application for a "tavern."<sup>5</sup> Specifically, petitioners  
2 offered evidence during the local proceedings to establish  
3 that the proposed "restaurant" use is, in essence, the same  
4 as the "tavern" use proposed by the conditional use permit  
5 application denied earlier in the year. The county refused  
6 to accept petitioners' evidence concerning the similarities  
7 between the use described in the first "tavern" application  
8 and the "restaurant" use described in the subject  
9 application. However, whether the subject application for a  
10 conditional use permit is for a use substantially identical  
11 to a use proposed by a conditional use permit application  
12 denied within the previous year, is relevant to determining  
13 the proposal's compliance with LDC 44.040(F). Consequently,  
14 the county erred by refusing to accept petitioners' evidence  
15 on this issue.<sup>6</sup>

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<sup>5</sup>In the county's response to petitioners' record objection requesting that the materials concerning the prior "tavern" application be included in the record, it stated:

"The record indicates \* \* \* that Lord Maitreya offered a blue binder into evidence that included the record from [the previous proceedings concerning the tavern application]. The record also indicates that [the] Chairman \* \* \* of the Board of County Commissioners refused to accept and consider any evidence relative to [the tavern application] or the Hearings Officer's decision on that issue." Respondent's Memorandum in Support of the Record 2.

During a conference call with the parties concerning petitioners' record objection, the parties agreed with this view of the record.

<sup>6</sup>Intervenors also argue that petitioners were required to make an "offer of proof" during the local proceedings in order to argue before this Board that the county erroneously rejected relevant evidence. We disagree.

1 No purpose is served in reviewing the evidentiary  
2 support for the challenged decision where the challenged  
3 decision must be remanded in any case because petitioners'  
4 evidence was excluded erroneously.

5 The fourth and eighth assignments of error are  
6 sustained.

7 **FIFTH ASSIGNMENT OF ERROR**

8 "The county failed to comply with Section  
9 44.030(C) of the LDC."

10 **SIXTH ASSIGNMENT OF ERROR**

11 "The county improperly construed ORS 215.416(9)."

12 **SEVENTH ASSIGNMENT OF ERROR**

13 "The county's decision, that the conditions  
14 imposed by the Planning Director and the BOCC upon  
15 the applicant will effectively alleviate the  
16 potential safety hazards resulting from the  
17 proposed use, is not supported by substantial  
18 evidence in the whole record. Findings 6 and 8 of  
19 the BOCC order and findings 6, 9, and 10 of the  
20 Planning Director's order are not supported by  
21 substantial evidence."

22 In these assignments of error, petitioners contend the  
23 county failed to properly apply LDC 44.030(C), and that the  
24 county's determinations of compliance with that standard are  
25 not supported by substantial evidence in the whole record.

26 LDC 44.030 sets out several standards with which a

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Nothing in the LDC requires that participants in local proceedings make "offers of proof." Further, nothing requires that the formalities of civil trial and appellate practice apply to local land use proceedings and appeals to this Board. See Boldt v. Clackamas County, 107 Or App 619, 624, \_\_\_ P2d \_\_\_ (1991) (the formalities for preserving issues in circuit courts are not applicable to local land use proceedings).

1 conditional use permit applicant must establish compliance.

2 LDC 44.030(C) requires a showing that:

3 "The location, size, design, and operating  
4 characteristics of the proposed use will not have  
5 a significant adverse impact on the livability,  
6 value or appropriate development of abutting  
7 properties and the surrounding area."

8 Petitioners offered evidence below relevant to this  
9 standard, and the county rejected that evidence. Record 19.  
10 This is error. That the county improperly rejected relevant  
11 evidence below requires that the challenged decision be  
12 remanded. In such circumstances, it serves no purpose to  
13 review the evidentiary support for the challenged decision.

14 An additional argument merits comment. We understand  
15 petitioners to argue that, as a matter of law, a restaurant  
16 which serves alcoholic beverages could never comply with  
17 LDC 44.030(C). We disagree. This standard first requires  
18 an analysis of the livability characteristics, the value and  
19 the "appropriate" development of abutting and surrounding  
20 area properties. Next, LDC 44.030(C) requires an analysis  
21 of the impacts of the proposed use on those characteristics,  
22 and a determination of whether those impacts are  
23 "significant." See Murphey v. City of Ashland, 19 Or LUBA  
24 182, 203 (1990).<sup>7</sup> LDC 44.030(C) requires a case by case

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<sup>7</sup>We do not mean to suggest that if on remand petitioners provide evidence which raises an issue relevant to the livability standard, that such issue need not be considered by the county. Clearly, if petitioners submit evidence which raises a relevant issue, then the county must address

1 analysis of each application for a conditional use permit.  
2 There is nothing about LDC 44.030(C) to suggest that no  
3 restaurant which serves alcoholic beverages could ever  
4 comply with its terms.

5 The fifth, sixth and seventh assignments of error are  
6 sustained, in part.

7 The county's decision is remanded.

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that issue in its findings. Norvell v. Portland Area LGBC, 43 Or App 849,  
853, 604 P2d 896 (1979).