

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

3
4 THE FLIGHT SHOP INC.,
5 and AERO FACILITIES LLC,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

14
15 LEADING EDGE AVIATION INC.,
16 and CITY OF BEND,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2014-090

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Deschutes County.

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26 Michael H. McGean, Bend, filed the petition for review and argued on
27 behalf of petitioners. With him on the brief was Francis Hansen & Martin LLP.

28
29 Laurie A. Craghead, County Counsel, Bend, filed a joint response brief
30 on behalf of respondent.

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32 Gary Firestone, City Attorney, Bend, filed a response brief and argued
33 on behalf of the intervenor-respondent City of Bend. With him on the brief
34 were Mary A. Winters and Alan R. Dale III.

35
36 Garrett Chrostek, Bend, file a response brief and argued on behalf of
37 intervenor-respondent Leading Edge Aviation. With him on the brief were
38 Sharon R. Smith and Bryant Lovlien & Jarvis PC.

1 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
2 Member, participated in the decision.

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4 AFFIRMED

02/25/2015

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

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners approving a site plan review application for a new aviation fueling station at the Bend Municipal Airport.

MOTION TO INTERVENE

Leading Edge Aviation, Inc. (Leading Edge), the applicant below, and the City of Bend (together, intervenors) each move to intervene on the side of the respondent in the appeal. The motions are granted.

FACTS

The challenged decision is the county’s decision on remand from our decision in *The Flight Shop, Inc. v. Deschutes County*, __ Or LUBA __ (LUBA No. 2013-073, January 10, 2014) (*Flight Shop I*). We take the relevant facts from *Flight Shop I*:

“The Bend Municipal Airport is owned by the city but located outside the city on property zoned and regulated by the county. The runway at the airport runs north and south, and the area to the west of the runway is developed with hangars, parking areas, and other aviation-related businesses, including petitioners’ fueling business. There is some development in the area to the east of the runway as well, although it is less developed than the area west of the runway.

“Leading Edge applied to the county for site plan approval for a new aviation fueling station at the airport, to be located to the north of its existing aircraft rental and instruction business that is located west of the runway. * * *” *Flight Shop I*, slip op at 2.

Flight Shop I explained that (1) the county has adopted the Bend Municipal Airport Master Plan (Airport Master Plan) as part of the county’s transportation system plan, which is a part of the county’s comprehensive plan; (2) the

1 Airport Master Plan incorporates several drawings labeled “Airport Layout
2 Plans;” and (3) the county has adopted the Airport Development (AD) Zone
3 and three sub-zones in Deschutes County Code (DCC) 18.76, to govern
4 development in the AD zone. “Fuel storage” is an outright permitted use in the
5 AD zone and all three sub-zones. Slip op 3-4.

6 In the decision challenged in *Flight Shop I*, the hearings officer
7 concluded that she was not required to consider whether the Airport Master
8 Plan prohibits approval of the fuel storage facility in the proposed location,
9 because she concluded that fuel storage is an outright permitted use in the zone
10 in which the facility is proposed to be located. We remanded the decision to
11 determine whether the Airport Master Plan includes any criteria that apply to
12 the proposed fueling station. *Id.* at slip op 8-9.

13 On remand, the hearings officer examined the text of the Airport Master
14 Plan (and its incorporated Airport Layout Plans) to determine if any of the
15 provisions of those documents and drawings contain criteria that apply to the
16 site plan review application for the fueling station in the proposed location. She
17 concluded that nothing in the Airport Master Plan or the Airport Layout Plans
18 prohibits siting the fueling station in the proposed location. Remand Record
19 71. The hearings officer also examined provisions of the county’s
20 transportation system plan cited by petitioners to determine if any of its
21 provisions make the Airport Master Plan a possible source of applicable
22 approval criteria or prohibit the fueling station, and concluded that they do not.
23 Finally, the hearings officer concluded that DCC 18.76.010, the purpose
24 statement for the AD zone, is not an applicable approval criterion.

25 Petitioners appealed the hearings officer’s decision to the board of
26 county commissioners, and the board of commissioners accepted review of the

1 decision. The board of commissioners adopted findings affirmed the hearings
2 officer's decision, and this appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 The board of commissioners concluded that nothing in the language of
5 the Airport Master Plan itself, the purpose statement for the AD zone at DCC
6 18.76.010, or the provisions of the county's transportation systems plan cited
7 by petitioners contains language that makes the Airport Master Plan apply to
8 the proposed fueling station. In their first assignment of error, petitioners argue
9 that the board of commissioners improperly construed the relevant provisions
10 of the DCC and the transportation system plan. ORS 197.835(9)(a)(C). We
11 explain in more detail below the board of commissioners' interpretation of each
12 relevant provision and describe petitioners' challenges to the board of
13 commissioners' interpretations.

14 As relevant here, under ORS 197.829(1), the board of commissioners'
15 interpretation of provisions of the DCC and the county's transportation system
16 plan is reversible only if it "is inconsistent with the express language of the
17 comprehensive plan or land use regulation." Under *Siporen v. City of Medford*,
18 349 Or 247, 261, 243 P3d 776 (2010), LUBA's standard of review under ORS
19 197.829(1) is highly deferential, and LUBA must defer to the county
20 commissioners' interpretations unless they are implausible.

21 **A. Airport Master Plan**

22 The board of commissioners concluded that nothing in the language of
23 the Airport Master Plan itself assigns it a role in evaluating site-specific
24 development proposals for uses permitted outright in the AD zone. Remand
25 Record 15, 71. The board of commissioners concluded that the Airport Master
26 Plan is a guiding document for the county to refer to in adopting land use

1 regulations that apply to site specific development at the airport. Remand
2 Record 15. The board of commissioners adopted as its own the hearings
3 officer’s interpretation that the Airport Master Plan presents a series of planned
4 development alternatives for the airport that are intended to accommodate both
5 planned development and development that was not anticipated at the time the
6 Airport Master Plan was adopted. Remand Record 15, 71.

7 Petitioners argue that the board of commissioner’s decision that the
8 Airport Master Plan is not a source of approval criteria for the proposed fueling
9 station is inconsistent with (1) the express language of DCC 18.76.010 and (2)
10 the provisions of the transportation system plan that are discussed below.

11 **B. DCC 18.76.010**

12 DCC 18.76.010, Purpose Statement, provides:

13 “The purpose of the Airport Development (AD) Zone is to allow
14 for development compatible with ongoing airport use *consistent*
15 *with* the Deschutes County Year 2000 Comprehensive Plan and
16 the 1994 Bend Airport Master Plan (as amended by a 2002
17 supplement), while providing for public review of proposed
18 development likely to have significant impact on surrounding
19 lands. * * *” (Emphasis added.)

20 The board of commissioners interpreted the reference to the Airport Master
21 Plan in the purpose statement at DCC 18.76.010 as a conclusion that the AD
22 zone regulations are consistent with the Airport Master Plan, and not as a
23 requirement that the county find that for each development application the
24 proposed development is depicted on the Airport Master Plan. Remand Record
25 18. Petitioners argue that the board of commissioners’ interpretation is
26 inconsistent with the express language of DCC 18.76.010 that requires the
27 county to determine whether site specific development applications are
28 “consistent with” the Airport Master Plan. Petition for Review 14. The county

1 and intervenors (respondents) respond that the county’s interpretation of the
2 purpose statement as reciting a conclusion that the AD zone regulations are
3 consistent with the Airport Master Plan is not inconsistent with any of the
4 express language of the DCC or the county’s transportation system plan or
5 comprehensive plan, and is plausible. We agree with respondents. *Siporen*,
6 349 Or at 261.

7 **C. Transportation System Plan Provisions**

8 Chapter 2 of the transportation system plan describes the Airport Master
9 Plan:

10 “In order to guide airport land uses, the County adopted and
11 utilizes the 1994 Bend Municipal Airport Master Plan, as amended
12 in 2002 the ‘Supplement to 1994 Airport Master Plan,’ which is
13 incorporated by reference herein. This is the guiding document for
14 airport planning and development. This document incorporates a
15 range of facility improvements for the Bend Municipal Airport
16 over the 20-year planning horizon (2021), including short,
17 intermediate, and long-term projects to improve safety and
18 function at the airport. In 2003 the County adopted DCC 18.76,
19 Airport Development (AD) Zone to identify outright permitted and
20 conditional activities at the airport. The County in 2001 adopted
21 DCC Chapter 18.80, Airport Safety Combing Zone (AS) to ensure
22 surrounding land uses and structures were compatible with airport
23 operations.”

24 The board of commissioners concluded that nothing in Chapter 2 of the
25 county’s transportation system plan quoted above that describes the Airport
26 Master Plan as the “guiding document for airport planning and development”
27 serves to make the Airport Master Plan an applicable approval criterion for site
28 plan review, or give it any role in evaluating site specific development
29 proposals. The board of commissioners found:

1 “[T]he Board notes that these documents will continue to serve as
2 ‘guiding documents’ that allow the County and other airport
3 planners to identify those goals and characteristics worth
4 advancing, to plan for potential future development and to adopt
5 any revisions to the zoning criteria. In turn, these higher level
6 planning documents inform legislative land use regulations to
7 evaluate site specific development.” Remand Record 15.

8 Chapter 5, Subchapter 5.6, Goal 16, Policy 16.2(h) of the county’s
9 transportation system plan provides that the county “shall:”

10 “Specifically designate any proposed airport facility relocations or
11 expansions within County jurisdiction on an airport master plan or
12 airport layout plan map, as amended, and establish the appropriate
13 airport zoning designation to assure a compatible association of
14 airport growth with surrounding urban or rural development[.]”

15 The board of commissioners concluded that Policy 16.2(h) does not have the
16 effect of making the Airport Master Plan a source of approval criteria or
17 require that the Airport Master Plan be amended to show the proposed fueling
18 station at the location proposed, because Policy 16.2(h) applies only to airport
19 infrastructure, such as runways, taxiways, and lighting and not to other
20 ancillary, non-infrastructure airport development such as the proposed fueling
21 station. The board of commissioners relied on context provided by the chapter
22 of the Airport Master Plan entitled “Facilities” to interpret the word “facility”
23 as used in Policy 16.2(h) to mean only “airport infrastructure elements
24 provided by the City (the owner of the airport)”:

25 “[T]he Board finds that policy 16.2(h) does not apply to user
26 development such as Applicant’s fueling station because such
27 development is not a ‘facility’ for purposes of policy 16.2(h). The
28 term ‘facilities’ is not defined in either the TSP or the AMP. The
29 Board finds that the 2002 AMP update and the purpose of ALP
30 provide the most relevant context for interpreting this term.

1 “The subchapter entitled ‘Airport Facilities’ within the 2002 AMP
2 update identifies ‘facilities’ as airport infrastructure elements
3 provided by the city (the owner of the airport) - i.e., runways
4 (paved and dirt), taxiways, runway and taxiway surface lighting,
5 instrument landing and navigational lighting, lighted wind cone,
6 and rotating beacon. This interpretation is consistent with the
7 purpose of the ALP, which the Appellant alleges prohibits the
8 Applicant’s fueling station. The ALP is a document required by
9 the FAA and periodically updated with the FAA’s review and
10 approval to support federal grant allocations for airport
11 improvements, namely to those improvements identified by the
12 2002 AMP update as ‘facilities.’ Because the AMP and ALP’s
13 purpose are to plan for infrastructure improvements provided by
14 the airport owner, the reference to ‘facilities’ in policy 16.2(h)
15 refers to infrastructure provided by the airport’s owner and not to
16 development of users of the airport such as the Applicant’s fueling
17 station.” Record 17.

18 Petitioners argue that the county’s interpretations that the Airport Master Plan
19 is a “guiding document” only and not a source of approval criteria and of the
20 word “facility” as including only airport infrastructure such as runways and
21 taxiways, are inconsistent with the cited provisions and the plain meaning of
22 the word “facility.”

23 Respondents respond that the county’s interpretation of Chapter 2 of the
24 transportation system plan is consistent with the express language of Chapter 2
25 that provides that the Airport Master Plan is a “guid[e][.]” Respondents also
26 respond that the county’s interpretation of the word “facility” is supported by
27 context provided by the chapter of the Airport Master Plan entitled “Facilities”
28 that identifies infrastructure as “facilities” and is not inconsistent with any of
29 the county’s land use regulations or the comprehensive plan.

30 We agree that the county’s interpretation of the cited language of the
31 transportation system plan that refers to the Airport Master Plan as a “guide” is
32 not inconsistent with the express language of that provision. We also agree

1 with respondents that the context of other provisions of the Airport Master Plan
2 supports the county’s interpretation of the word “facility” as referring to airport
3 infrastructure and not ancillary development, and that it is plausible. *Siporen*,
4 349 Or at 261. The board of commissioners’ interpretations of the cited
5 provisions of the DCC and its transportation system plan are affirmed. ORS
6 197.829(1).

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioners’ second assignment of error argues that the county’s decision
10 to approve the fueling station is not supported by substantial evidence in the
11 record because the Airport Master Plan applies as an approval criterion and it
12 prohibits locating a fuel storage facility in the proposed location. The
13 assignment of error is derivative of the first assignment of error, which we
14 reject above.

15 The second assignment of error is denied.

16 The county’s decision is affirmed.