

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

EUGENE S. CARSEY, JR.,)
)
 Petitioner,)
)
 vs.)
) LUBA No. 91-003
 DESCHUTES COUNTY,)
) FINAL OPINION
 Respondent,) AND ORDER
)
 and)
)
 HARRY FAGEN and BEVERLY FAGEN,)
)
 Intervenor-Respondent.)

Appeal from Deschutes County.

Eugene S. Carsey, Jr., Bend, filed the petition for review and argued on his own behalf.

Rick Isham, Bend, filed the response brief and argued on behalf of respondent.

Robert S. Lovlien, Bend, represented intervenor-respondent.

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

AFFIRMED 04/15/91

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals the county's denial of approvals necessary to allow relocation of his commercial enterprise "Buffet Flat Deluxe" (hereafter "Buffet Flat") from its present location on Nichols Market Road just west of Highway 97 to a new location on Nichols Market Road just east of Highway 97.

MOTION TO INTERVENE

Harry Fagan and Beverly Fagan move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

Buffet Flat is located approximately halfway between Bend and Redmond and "consists of retail shops, flea market, petting zoo, miniature golf [course], maze and photo booth."¹ Record 140. Buffet Flat presently occupies a .83 acre site (existing site) on Nichols Market Road a short distance west of the intersection of that road with Highway 97 (Deschutes Junction). Petitioner leased the existing site from a prior owner in 1985. The lease expires

¹Buffet Flat is a unique establishment and has both a local and tourist oriented clientele. A newspaper article in the record states "[e]very square inch of the place -- the walls, floors and ceilings -- is smothered with items ranging in date from 1756 to last Tuesday afternoon." Record 46. Buffet Flat's animal attractions include "'Big Cat' a 16-pound feline who wears clothes" and "Lucy the goat," who lives in a pink car on the property, has her own sun deck, and is fed pickles by visiting customers. Id.

December, 1991. Following the death of the prior owner, petitioner's business partner purchased the existing site on December 12, 1989. Petitioner's business partner then sold the property on April 3, 1990 to the current owner who plans to develop a convenience store on the existing site.

At some point, petitioner learned that improvements planned for Highway 97 will reduce the .83 acre existing site to .60 acres. Petitioner contends continued operation of Buffet Flat on the reduced existing site would be impractical. On June 29, 1988, petitioner's parents purchased a 17.4 acre parcel located on Nichols Market Road a short distance from the existing site, just east of and adjacent to Highway 97. Petitioner wishes to relocate Buffet Flat on an approximately 3.95 acre portion of the 17.4 acre parcel and applied for comprehensive plan and zoning map changes for the 3.95 acre site as well as a conditional use permit.² The requested plan map amendment is from Agriculture to Rural Service Center/Commercial and the requested zoning map change is from EFU-20 to Rural Service Center. Because the property is not located within an urban growth boundary and includes agricultural land, petitioner also requested exceptions to Statewide Planning

²In addition, the property is subject to a Landscape Management Combining Zone. That zone imposes a design review process which requires that the "[h]eight, width, color, bulk and texture" of buildings or other structures must be "visually compatible with the surrounding natural landscape and * * * not unduly generate glare or other distracting conditions."

Goals 3 (Agricultural Lands) and 14 (Urbanization).

After a public hearing on July 31, 1990, the hearings officer found the applicant had not adequately addressed Deschutes County Comprehensive Plan (Plan) Agricultural Lands Policy 10 and that the proposal had not been shown to be "consistent with the purpose and intent of the [Rural Service Center zone]," as required by Deschutes County Zoning Ordinance (DCZO) § 10.025(2).³ The hearings officer also found petitioner failed to demonstrate compliance with the standards for approval of an exception to Goal 3 and denied the requested plan and zone changes.⁴

³Agricultural Lands Policy 10 provides:

"Conversion of agricultural land to non-agricultural uses shall be based on the following:

"(a) Acceptable environmental, energy, social and economic consequences;

"(b) Demonstrated need consistent with Land Conservation and Development Commission goals * * *."

The purpose of the Rural Service Center zone is as follows:

"The purpose of the Rural Service Center Zone is to provide standards and review procedures for concentrations of local commercial services to meet the needs of rural residents; as well as limited tourist commercial services consistent with the maintenance of the rural character of the area." DCZO § 4.130.

⁴The hearings officer did not address whether an exception to Goal 14 was justified. The hearings officer's decision also expresses doubts that Buffet Flats could be replicated and approved on the new site under the Landscape Management Combining Zone standards, see n 2 supra. However, the hearings officer's decision only denies the requested plan and zoning map changes and does not specifically deny conditional use permit approval on the basis of noncompliance with those standards. Presumably the conditional use permit could not be granted without also granting the requested plan and zoning map changes.

The hearings officer's decision was appealed to the board of county commissioners and a public hearing was held on September 25, 1990. During deliberations at a subsequent public meeting in this matter one of the county commissioners expressed concern that reversing the hearings officer's decision would result in two Rural Service Center zoned areas at Deschutes Junction. The board of county commissioners later voted to "reverse the hearings officer decision and support the application * * * with eight conditions." Record 88. The eighth condition required that a zone change be initiated to remove Rural Service Center zoning from the existing Buffet Flat site.

Before the tentative decision could be reduced to writing and adopted by the board of county commissioners, it was discovered that the zone change required by condition eight could not be initiated over the objection of the present property owner, and the present property owner objected to downzoning the existing site. Following an additional public hearing on November 14, 1990, the board of county commissioners rescinded its prior oral decision and denied petitioner's appeal, affirming the hearings officer's decision. In support of its decision, the board of county commissioners adopted the hearings officer's findings and five additional findings, including findings that the expected traffic impacts from the request would violate statewide planning goal exception criteria.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner challenges the adequacy of, and evidentiary support for, a number of the findings adopted by the hearings officer and the board of county commissioners in support of the challenged decision. The decision petitioner challenges in this proceeding is a denial of his request for land use approval. In challenging a decision denying a request for land use approval, a petitioner must successfully challenge each of the bases the local government identifies as supporting its decision to deny the request. McCaw Communications, Inc. v. Polk County, ___ Or LUBA ___ (LUBA No. 88-083, February 25, 1991) slip op 6; Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), slip op 6-7; Van Mere v. City of Tualatin, 16 Or LUBA 671, 689 n 2 (1988).

A. Traffic Impacts

Petitioner contends the board of county commissioners' findings that traffic impacts would be unacceptable are inconsistent with the the hearings officer's findings that they would be acceptable. Petitioner contends the evidence in the record conflicts with the board of county commissioners' findings.

The board of county commissioners' findings are as follows:

- "4. The allowance of commercial zoning on both sides of Highway 97, at what is already a busy intersection, would result in traffic

impacts more adverse than would typically result if the proposed use were located in other areas requiring a goal exception. For this reason, the application fails to meet the requirements of OAR 660-04-020(2)(c) * * *.

"5. The establishment of an additional commercial area on the east side of the highway, with its attendant increase in traffic, would result in conflicts with other adjacent uses. For this reason the application fails to meet the requirements of OAR 660-04-020(2)(d) * * *." Record 11.

The hearings officer found the estimated 30 cars per week day and 70 cars per weekend day expected to visit Buffet Flat at its new location could be accommodated on Nichols Market Road with "a left turn lane on [Nichols Market] Road and a requirement that the access to the flea market be located at the eastern portion of the rezoned area."⁵ Record 142.

Substantial evidence is evidence upon which a reasonable person would rely to support a conclusion, and it may be possible for reasonable persons to draw different conclusions from the same evidence. City of Portland v.

⁵Petitioner cites a July 13, 1990 inter-office memorandum from the Oregon Department of Transportation Region Traffic Supervisor stating the proposed site satisfies requirements for an access management agreement. The memorandum explains that when the traffic volumes on Nichols Market Road reach a level where a traffic signal would be warranted, an interchange will be constructed. The memorandum goes on to express the view that because peak traffic at Buffet Flat occurs on weekends, traffic generated by Buffet Flat at the proposed location "should not cause a major conflict with the [existing commercial and] industrial traffic." Record 213.

Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1974); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976); Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 13. Therefore, that the board of county commissioners' findings are somewhat inconsistent with the hearings officer's findings concerning traffic conflicts provides no basis for reversal or remand, so long as there is adequate evidentiary support for the board of county commissioners' findings.

The memorandum cited by petitioner does state a position that the site proposed for Buffet Flat "should" not cause major conflicts with existing traffic and that traffic congestion at Deschutes Junction ultimately will be corrected through construction of an interchange. See n 5, supra. However, respondent cites a great deal of testimony from residents of the area that Deschutes Junction is a dangerous intersection now, for a variety of factors, and that it has been the scene of numerous accidents.

We conclude a reasonable person could rely on the testimony cited by respondent to conclude that Buffet Flat will generate additional traffic which will add to an already undesirable traffic situation at Deschutes Junction. Therefore, the county's findings on this point are supported

by substantial evidence. In addition, we note petitioner does not present any argument challenging the conclusion in board of county commissioners' finding 4 that such traffic impacts might be avoided if Buffet Flat were located at other areas requiring a goal exception. Neither does petitioner challenge the conclusion in board of county commissioners' finding 5 that the additional traffic will cause conflicts with uses adjoining the proposed site.⁶

This subassignment of error is denied.⁷

B. Landscape Management Combining Zone

In this subassignment of error petitioner challenges

⁶These conclusions are the basis for the county's determination that the proposal fails to satisfy OAR 660-04-020(2)(c) and (d). OAR 660-04-020(2)(c) and (d) are two of the four factors a local government must address when considering a "reasons" statewide planning goal exception. Those factors provide, in part, as follows:

"(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception. * * *

"(d) 'The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.' * * *."

⁷Actually, because petitioner challenges the county's findings of noncompliance with the exception criteria on evidentiary grounds, petitioner must demonstrate he carried his burden to demonstrate compliance with those criteria as a matter of law. Jurgenson v. Union County, 42 Or App 505, 510, 600 P2d 1241 (1979); Forest Park Estate v. Multnomah County, ___ Or LUBA ___ (LUBA No. 90-070, December 5, 1990), slip op 30; McCoy v. Marion County, 16 Or LUBA 284, 286 (1987). The memorandum cited by petitioner is clearly insufficient to demonstrate compliance with OAR 660-04-020(2)(c) and (d) as a matter of law.

two findings and two conclusions adopted by the hearings officer which discuss concerns about the past operation of Buffet Flat at the existing site, certain improvements that have already been made at the proposed site, and certain difficulties the hearings officer believes petitioner would have in securing approval of Buffet Flat under the standards imposed by the Landscape Management Combining Zone.

As we explain earlier in this decision, although the challenged findings speculate that the proposal could not be approved under the Landscape Management Combining Zone standards, the challenged decision is not based on a finding of noncompliance with those standards. Therefore, even if the challenged findings are inadequate or are not supported by substantial evidence, that would provide no basis for reversal or remand. Garre v. Clackamas County, *supra*, slip op at 6, Douglas v. Multnomah County, *supra*, slip op at 16.

This subassignment of error is denied.

C. Bias and Prejudgment

Petitioner next contends that the hearings officer's use of the term "garish" in describing Buffet Flat demonstrates bias and prejudice.

Reading the hearings officer's findings and conclusions as a whole we find no support for petitioner's claim of bias and prejudice.⁸

⁸The hearings officer ultimately concluded:

This subassignment of error is denied.

D. Exception Findings and Conclusions

The hearings officer concluded the proposed site is committed to farm use.⁹ The hearings officer also concluded petitioner had not carried his burden to demonstrate satisfaction of the requirements of OAR 660-04-020 through 660-040-022 for a "reasons" exception. The hearings officer adopted findings in support of these conclusions.

In support of the first conclusion, the hearings officer found the property was not irrevocably committed to nonfarm use because the 17.5 acres are receiving farm use assessment and historically have been used for farm use. The hearings officer found 14.7 acres of the total have water rights and soils which are suitable for farm use when irrigated. The hearings officer also found the 3.95 acres for which an exception is requested include dwellings and other buildings customarily provided in conjunction with

"This opinion should not be taken as a repudiation of the concept of Buffet Flat's [sic] (garish buildings, unique merchandise and a flea market). There is strong support for the continuation of this enterprise. Indeed, this Hearings Officer hopes it will continue as well. Given the policy decisions previously made by the County, the site east of Highway 97 at Deschutes Junction is not now, however, a proper site for Buffet Flat." Record 146.

⁹Petitioner seeks an exception to Goal 3. One of the ways an exception could be justified is to demonstrate the property is irrevocably committed to nonfarm use. ORS 197.732(1)(b); OAR 660-04-028. Therefore, the county is not required to demonstrate the property is committed to farm use, petitioner must demonstrate the property is irrevocably committed to nonfarm use.

farm use.

In support of the second conclusion, the hearings officer first noted the petitioner identified the following need for the proposed use:¹⁰

"Goal 8 [Recreational Needs] recognizes that recreation and Goal 9 [Economy of the State] recognizes that economics, are both enhanced by variety. Not everyone fishes, hunts or rides mountain bikes. Recreational diversity and economic diversity are strengthened by the continuance of a [sic] ongoing and well known amusement establishment." Record 144.

The hearings officer found petitioner had submitted insufficient "information to justify why this exception is needed at this location for this business." Id.

The hearings officer also found petitioner failed to demonstrate OAR 660-04-020(2)(b) is satisfied:

"OAR 660-04-020(2)(b) requires findings which

¹⁰The first of the four factors that must be addressed when taking a "reasons" exception requires, in part, that "[r]easons justify why the state policy embodied in the applicable goals should not apply." OAR 660-04-020(2)(a). OAR 660-04-022(1) provides:

"* * * Such reasons include but are not limited to the following:

"(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; and either

"(b) A resource upon which the proposed use or activity is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. * * *; or

"(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

demonstrate that other areas not requiring an exception cannot reasonably accommodate the use. The applicant has address[ed] this criterion by stating that the use requires highway frontage, and that the use cannot be located within an urban growth boundary because the cost of land there is too high. The applicant has not presented information on the feasibility of siting the use on land within a different rural service center, or on the feasibility of siting the use on land contiguous to its present location. It is the Hearings Officers [sic] opinion that the information submitted by the applicant does not fully address the requirements of this subsection." Record 145.

Petitioner contends the above described conclusions and findings are not supported by substantial evidence in the record.

There is evidence in the record supporting the county's findings that the property is not committed to nonfarm use and the evidence cited by petitioner does not support a contrary conclusion.

With regard to the county's findings that petitioner failed to carry his burden to demonstrate compliance with OAR 660-04-020(2)(a) and (b), we may only reverse or remand if petitioner demonstrates, as a matter of law, that the rule requirements are met. Petitioner cites testimony from a realtor who stated land located within an urban growth boundary would be expensive, argument presented by his attorney and over 300 letters in support to the application. This evidence suggests (1) it would likely be more expensive for Buffet Flat to move to a location different than

proposed, (2) Buffet Flat has developed some identity with its present location, and (3) Buffet Flat has numerous and varied supporters. The evidence does not, however, demonstrate that the requirements of OAR 660-04-020(2)(a) and (b) are met by this application as a matter of law. At most it shows relocation to a location other than the one proposed may be more difficult and expensive, and that Buffet Flat would lose whatever benefit it now derives from its association with its current location.

This subassignment of error is denied.

The first assignment of error is denied.¹¹

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner contends the proposed use at the new site is allowed as a conditional use in the Rural Service Center zone¹² and the hearings officer's finding that the proposal is not consistent with the purpose of the Rural Service Center zone misconstrues DCZO § 4.130(1). See n 3, supra.

Under the first assignment of error we reject petitioner's challenges to several of the county's findings that the proposal does not comply with relevant approval

¹¹We also note petitioner does not appear to challenge the county's finding that petitioner's request is not consistent with Plan Agricultural Policy 10. Therefore, this finding provides an additional basis for affirming the county's decision.

¹²The list of conditional uses in the Rural Service Center zone includes "commercial amusement or recreation establishment." DCZO § 4.130(3)(G).

standards. Therefore, even if petitioner is correct that the hearings officer erroneously found his proposed use is not consistent with the purpose of the Rural Service Center zone, that error would provide no basis for reversal or remand. McCaw Communications, Inc. v. Polk County, supra; Garre v. Clackamas County, supra; Van Mere v. City of Tualatin, supra.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

"The county failed to follow proper procedures, which resulted in substantial prejudice to petitioner."

Under the final assignment of error, petitioner contends the county should have known he did not own the existing site at the time the county imposed the condition that the existing site be rezoned to eliminate the existing Rural Service Center zoning. Petitioner contends the county committed a procedural error by imposing an impossible condition of approval as part of its oral decision on October 3, 1990, and thereby caused prejudice to petitioner's substantial rights.

Respondent points out regardless of whether the county should have recognized that because petitioner did not own the existing site it might be impossible to comply with condition eight, the October 3, 1990 oral decision was based on the mistaken assumption the existing site could be

downzoned.¹³ When the county discovered its mistake, it rescinded its prior oral decision, citing traffic impact concerns and also adopting the hearings officer's findings that other applicable approval standards were not satisfied. While the erroneous assumption that the existing site could be downzoned perhaps should not have been made in the first place, the error nevertheless was discovered before a final decision was adopted. The mistake was corrected, and a new decision was adopted based on the apparently accurate factual and legal determination that a proceeding to downzone the existing site cannot be initiated because neither petitioner nor his business partner now own the existing site and the current owner opposes downzoning.

We fail to see how petitioner's substantial rights were prejudiced by the above course of events. Although petitioner understandably would have preferred that the county simply delete condition eight upon discovering it was impossible to comply with that condition, petitioner's substantial rights do not include a right to a particular decision on his request for land use approval. Muller v. Polk County, 16 Or LUBA 771, 775 (1988); see Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988)(construing OAR 661-10-005).

¹³Respondent points out that petitioner did not object at the time the condition was imposed that it might not be possible to comply with the condition.

The third assignment of error is denied.

The county's decision is affirmed.