

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)
11 KLAMATH COUNTY,)
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.

30
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.¹ 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

¹As 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.² Intervenors also
24 point out they submitted a letter from a real estate broker
25 stating that intervenors possessed an earnest money interest

²Petitioners 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.³ "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.⁴ Consequently, the county

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

⁴Whether 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."⁵ 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.⁶

⁵In 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.

⁶Intervenors 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

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).⁷ LDC 44.030(C) requires a case by case

⁷We 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.

8

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