



1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council resolution denying  
4 petitioner Kane's application for a conditional use permit  
5 to relocate a restaurant and cocktail lounge.

6 **FACTS**

7 Petitioner Kane operated a restaurant and cocktail  
8 lounge in the City of The Dalles (city) until the property  
9 on which it was located was purchased by a new owner.  
10 Petitioner Kane proposes to retain his liquor license and  
11 relocate his restaurant and lounge operation to a parcel of  
12 land owned by petitioner C.H. Stinson, Inc., located in the  
13 city's Light Industrial and Manufacturing (M-1) zone. The  
14 proposed restaurant and lounge would have seating for 159  
15 customers, a "sports bar" format, and live entertainment,  
16 including bands.

17 The subject property is occupied by a vacant building  
18 currently being used as a warehouse and a paved parking  
19 area. The subject property is adjoined on the northwest by  
20 a restaurant and lounge and a machine shop, on the east by  
21 railroad tracks and an aluminum plant, on the south by a  
22 motel and trailer park, and on the west by Interstate 84.

23 The city planning commission denied petitioner Kane's  
24 application, and petitioners appealed to the city council.  
25 After a public hearing, the city council adopted a  
26 resolution affirming the decision to deny the application.

1 This appeal followed.

2 **THIRD ASSIGNMENT OF ERROR**

3 "The City's decision is inconsistent [with] and  
4 contrary to the city's Zoning Ordinance Section  
5 [15.2(B)(2)] and Goal #9 of the city's  
6 Comprehensive Plan."

7 **A. Plan Goal #9**

8 Goal #9 of the city comprehensive plan provides:

9 "[E]ncourage improvement of the community's  
10 economic base through a diversity of business and  
11 industry in a manner compatible with the  
12 maintenance and protection of the area's  
13 environmental resources.

14 "\* \* \* \* \*"

15 We are unable to discern from the petition for review  
16 why petitioners believe this plan goal is an approval  
17 standard for a conditional use permit in the M-1 zone, or  
18 why petitioners believe the challenged decision denying the  
19 conditional use permit is inconsistent with or violates this  
20 plan provision. It is petitioners' responsibility to  
21 develop their legal argument sufficiently to establish a  
22 basis for reversal or remand. Deschutes Development v.  
23 Deschutes County, 5 Or LUBA 218, 220 (1982).

24 This subassignment of error is denied.

25 **B. City of The Dalles Zoning Ordinance 15.2(B)(2)**

26 City of The Dalles Zoning Ordinance (TDZO) 15.2(B)(2)  
27 lists restaurants as a conditional use in the M-1 zone as  
28 follows:

29 "Restaurants \* \* \*; provided that the Planning

1 Commission makes the additional finding that any  
2 proposed use permitted by this subsection is  
3 primarily dependent upon and related to activities  
4 and service needs generated by the industrial uses  
5 permitted in the 'M-1' zone."<sup>1</sup> (Emphasis added.)

6 The challenged decision finds:

7 " \* \* \* The applicant testified he planned on a  
8 significant portion of business from the employees  
9 of Northwest Aluminum Company, a large adjacent  
10 employer. The record indicates that the  
11 applicant's previous restaurant and lounge has  
12 served customers from throughout the Mid-Columbia  
13 area, and outside the State of Oregon. The  
14 applicant did not present evidence establishing  
15 the proposed sports bar [would be] primarily  
16 dependent upon the activities and service needs of  
17 the local residents and employees of the 'M-1'  
18 district." Record 6.

19 As we understand it, petitioners challenge the  
20 evidentiary support for the above quoted city determination  
21 of noncompliance with YDZO 15.2(B)(2).

22 In order to overturn, on evidentiary grounds, a local  
23 government's determination that an applicable approval  
24 criterion is not met, it is not sufficient for petitioners  
25 to show there is substantial evidence in the record to  
26 support their position. Rather, the "evidence must be such  
27 that a reasonable trier of fact could only say petitioners'  
28 evidence should be believed." Morley v. Marion County, 16  
29 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA  
30 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42,

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<sup>1</sup>"Restaurants" are outright permitted uses in the city's Central Business and General Commercial districts. TDZO 13.2(A)(7); 14.2(A)(9).

1 46 (1982). In other words, petitioners must demonstrate  
2 that they sustained their burden of proof of compliance with  
3 applicable criteria as a matter of law. Jurgenson v. Union  
4 County Court, 42 Or App 505, 600 P2d 1241 (1979);  
5 Consolidated Rock Products v. Clackamas County, 17 Or LUBA  
6 609, 619 (1989).

7 We have reviewed all relevant evidence in the record  
8 cited by the parties. The only evidence cited in support of  
9 petitioners' position is the following excerpt from the city  
10 planning department staff report:

11 "A restaurant and lounge is typically used by the  
12 community, with patrons from proximate businesses  
13 and residential areas. While it is more difficult  
14 to determine whether the [proposed] use would be  
15 primarily dependent upon permitted industrial  
16 uses, it is clear that the industrial sector  
17 employs a significant number of people who might  
18 frequent the proposed restaurant. Considering the  
19 close profit margin between success and failure of  
20 a restaurant, all patronage could be considered as  
21 crucial. Staff recommends that the [proposed] use  
22 is dependent upon permitted industrial uses that  
23 now exist or might develop in the future." (First  
24 emphasis in original; second emphasis added.)  
25 Record 43-44.

26 On the other hand, respondent cites evidence in the record  
27 that the proposed restaurant and lounge will be operated in  
28 a manner similar to petitioner Kane's previous facility, a  
29 facility that served many customers from outside the city.  
30 Record 43, 74-75, 77. In addition, many signers of the  
31 petition presented by petitioners in support of the proposed  
32 use reside outside the city. Record 89-123, 126-141.

1           The above described evidence does not establish  
2 compliance of the proposed restaurant and lounge with TDZO  
3 15.2(B)(2) as a matter of law. The above quoted portion of  
4 the staff report states the planning staff believes the  
5 proposed use will be "dependent upon" permitted industrial  
6 uses, not that it will be "primarily dependent upon and  
7 related to activities and service needs generated by"  
8 permitted industrial uses, as is required by TDZO  
9 15.2(B)(2). Further, as indicated by the second provision  
10 emphasized in the quote above, the staff's conclusion of  
11 dependency is apparently based on an assumption that in  
12 general, any patronage of a restaurant is crucial and,  
13 therefore, the staff report provides no basis for finding  
14 the proposed restaurant will be primarily dependent upon any  
15 particular type of customer.

16           This subassignment of error is denied.

17           The third assignment of error is denied.<sup>2</sup>

18           The city's decision is affirmed.

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<sup>2</sup>A decision denying development approval must be sustained if this Board determines that one applicable approval criterion is not met. Samoilov v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-131, December 12, 1991), slip op 8; Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). Since we uphold, supra, the city's determination that the proposed restaurant and lounge does not comply with TDZO 15.2(B)(2) we do not consider petitioners' first and second assignments of error challenging the general conditional use approval criteria in TDZO 31 and the city's determinations of noncompliance with TDZO 31(A) and (C).