

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

3
4 SLIM SIMMONS, SHARON K. CATES,)
5 JIM L. CATES and ROY RUTSCHMAN,)
6))
7 Petitioners,)

8)
9 vs.)

10) LUBA No. 93-045
11 MARION COUNTY,)
12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)
16)

17 APOSTOLIC CHRISTIAN CHURCH,)
18)
19 Intervenor-Respondent.)

20
21
22 Appeal from Marion County.

23
24 William G. Paulus, Salem, filed the petition for review
25 and argued on behalf of petitioners. With him on the brief
26 was Garrett, Hemann, Robertson, Paulus, Jennings & Comstock.

27
28 Jane Ellen Stonecipher, Assistant County Counsel,
29 Salem, filed a response brief and argued on behalf of
30 respondent. With her on the brief was Robert C. Cannon,
31 County Counsel.

32
33 James L. Murch, Salem, filed a response brief and
34 argued on behalf of intervenor-respondent. With him on the
35 brief was Sherman, Bryan, Sherman & Murch.

36
37 SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,
38 Referee, participated in the decision.

39
40 AFFIRMED 07/27/93

41
42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Marion County Board of
4 Commissioners order approving a lot line adjustment and
5 conditional use permit for a church in an exclusive farm use
6 zone.

7 **MOTION TO INTERVENE**

8 Apostolic Christian Church, the applicant below, moves
9 to intervene in this proceeding on the side of respondent.
10 There is no objection to the motion, and it is allowed.

11 **FACTS**

12 This is the second time a county decision approving the
13 subject conditional use permit and lot line adjustment has
14 been before this Board. In Simmons v. Marion County, 22
15 Or LUBA 759, 761 (1992) (Simmons I), we described the
16 proposal as follows:

17 "The subject property is designated Primary
18 Agriculture on the Marion County Comprehensive
19 Plan (plan) map and is zoned Exclusive Farm Use
20 (EFU). The subject property consists of two
21 adjoining parcels, 4.0 and 34.5 acres in size.
22 The parcels are undeveloped and in farm use. They
23 are located at the northeast corner of Silverton
24 Road (Highway 213) and Howell Prairie Road. Land
25 to the east, north and west is zoned EFU and is in
26 commercial farm use. To the south are several
27 commercial uses on land zoned Commercial General
28 (CG) or Commercial Retail (CR), and a public
29 school on land zoned EFU. This developed area to
30 the south is referred to in the plan as the
31 Central Howell 'rural service center.' Plan
32 p. 42.

33 "The Apostolic Christian Church * * * was

1 established in the late 1800's, and has
2 approximately 150-160 members. Its facilities are
3 currently located in the City of Silverton. On
4 May 15, 1991, the ACC filed applications with the
5 county for a lot line adjustment to create parcels
6 5.0 acres and 33.5 acres in size and for a
7 conditional use permit to place a church on the
8 5.0 acre parcel. The church facility is proposed
9 to include a sanctuary, Sunday school rooms, a
10 fellowship and dining hall, and a parking area."

11 In Simmons I, we remanded the county's original
12 decision in this matter solely because it failed to comply
13 with one applicable approval standard, Marion County Zoning
14 Ordinance (MCZO) 136.040(e)(2), which is discussed in detail
15 below. On remand, the board of commissioners remanded the
16 matter to the county hearings officer, who held an
17 evidentiary hearing regarding compliance with MCZO
18 136.040(e)(2). On September 14, 1992, the hearings officer
19 issued an order denying intervenor's application.

20 Intervenor appealed the hearings officer's decision to
21 the board of commissioners. The board of commissioners held
22 an additional evidentiary hearing on the subject
23 application. On March 5, 1993, the board of commissioners
24 adopted an order approving the requested conditional use
25 permit and lot line adjustment. This appeal followed.

26 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

27 Under MCZO 136.030(o), churches are allowed as
28 conditional uses in the county's EFU zone if, among other

1 things, they satisfy either MCZO 136.040(c) or (e).¹

2 MCZO 136.040(c) establishes the following approval standard:

3 "[The use] shall be situated on generally
4 unsuitable land for farm use considering the
5 terrain, adverse soil or land conditions, drainage
6 and flooding, location and size of the parcel."

7 In the present case, there is no dispute that the church is
8 proposed to be located on land that does not satisfy
9 MCZO 136.040(c) (i.e. the church is proposed to be located
10 on land that is generally suitable for farm use). Thus, the
11 county may approve the subject conditional use permit only
12 if the following three criteria established by
13 MCZO 136.040(e) are met:

14 "(1) There is a demonstrated need that the use
15 will satisfy for area residents or the
16 general public which outweighs the need for,
17 or benefits of, the existing or potential
18 farm or forest use; and

19 "(2) There is no other feasible location for the
20 proposed use that would satisfy [MCZO]
21 136.040(c); and

22 "(3) [The proposed use] will not cause adverse
23 long term environmental, economic, social and
24 energy consequences for the area, the region
25 or the state."

26 In Simmons I, we sustained petitioners' challenge only

¹A requirement to satisfy either MCZO 136.040(c) or (e) is also imposed on schools, golf courses, solid waste disposal sites, power generation facilities, parks, hunting and fishing preserves, campgrounds, playgrounds, and community centers proposed to be located in the EFU zone. MCZO 136.030(1)-(p).

1 with regard to compliance with MCZO 136.040(e)(2).² The
2 local record in Simmons I included a study submitted by
3 intervenor of 55 potential church locations in the area
4 north, west and south of Silverton (ACC study). We
5 concluded:

6 "The evidence in the record would not allow a
7 reasonable person to determine that at least sites
8 7, 8, 10, 16, 21 and 45 on the ACC study are not
9 feasible locations for the proposed use. Further,
10 there is no evidence in the record as to whether
11 these sites would satisfy MCZO 136.040(c) (general
12 unsuitability for farm use). Therefore, there is
13 not substantial evidence in the record to support
14 the county's determination that 'there is no other
15 feasible location for the proposed use that would
16 satisfy [MCZO] 136.040(c),' as required by
17 MCZO 136.040(e)(2)." Simmons I, 22 Or LUBA
18 at 771-72.

19 The county decision challenged in this appeal interprets
20 MCZO 136.040(e)(2) and concludes that MCZO 136.040(e)(2) is
21 satisfied because there is no other feasible location in the
22 EFU zone for the proposed church that would satisfy
23 MCZO 136.040(c).

24 In their assignments of error, petitioners challenge
25 the county's interpretation of MCZO 136.040(e)(2), the
26 adequacy of the county's findings of compliance with
27 MCZO 136.040(e)(2) and the evidentiary support for the
28 county's determination of compliance with

²We specifically rejected petitioners' challenges to the county's determinations of compliance with MCZO 136.040(e)(1) and (3). Simmons I, 22 Or LUBA at 767-68, 772.

1 MCZO 136.040(e)(2).

2 **A. Interpretation**

3 **1. Limitation to EFU Zoned Sites**

4 The challenged decision interprets MCZO 136.040(e)(2)
5 as requiring that there be no other feasible location for
6 the proposed use in the EFU zone that satisfies the
7 generally unsuitable land requirement of MCZO 136.040(c).³
8 In other words, the county does not interpret
9 MCZO 136.040(e)(2) to require a demonstration that there is
10 no other feasible location for the proposed use within urban
11 growth boundaries (UGB's) or on land in rural residential,
12 commercial, industrial or other non-EFU zones.

13 Petitioners argue the county's interpretation
14 impermissibly adds a requirement (the limitation to EFU
15 zoned land) that is not present in the text of
16 MCZO 136.040(e)(2). Petitioners also contend the county's
17 interpretation is incorrect because it is inconsistent with
18 provisions of ORS 215.243 and the county comprehensive plan
19 that favor the preservation of EFU zoned land in large
20 blocks for farm use.

21 Respondent and intervenor (respondents) point out that

³The challenged decision states:

"* * * The provisions of MCZO 136.030 and MCZO 136.040 relate to [standards] of approval for the Exclusive Farm Use zone and do not deal with other county zones or property in other zones of surrounding municipalities." Record 15.

1 state law does not require the county to place any
2 restrictions on allowing a church in its EFU zone.⁴
3 Respondents argue that MCZO 136.040(e)(2) must be
4 interpreted together with MCZO 136.040(1) and (3), and that
5 those standards, which the proposed church has been found to
6 satisfy, also protect EFU zoned land. In particular,
7 respondents point out that under MCZO 136.040(e)(1), the
8 proposed use is required to satisfy a "demonstrated need
9 * * * which outweighs the need for, or benefits of, the
10 existing or potential farm * * * use."

11 Respondents also argue that because MCZO 136.040(c) is
12 a standard for allowing nonfarm uses in the EFU zone, it is
13 reasonable to interpret the other locations "that would
14 satisfy MCZO 136.040(c)," as provided in MCZO 136.040(e)(2),
15 to refer only to other locations in the EFU zone.
16 Respondents further argue the county's interpretation is
17 reasonable because MCZO 136.040(e)(2) is also applicable to
18 uses such as parks, campgrounds and hunting and fishing
19 preserves, and it would be unreasonable to consider siting
20 such uses within UGB's or on land zoned for residential,
21 commercial or industrial use.

22 This Board is required to defer to a local government's
23 interpretation of its own ordinances, unless that
24 interpretation is contrary to the express words, policy or

⁴ORS 215.283(1)(b) provides that churches "may be established in any area zoned for exclusive farm use."

1 context of the local enactment. Clark v. Jackson County,
2 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must
3 defer to a local government's interpretation of its own
4 enactments, unless that interpretation is "clearly wrong."
5 Goose Hollow Foothills League v. City of Portland, 117 Or
6 App 211, 217, 843 P2d 992 (1992); West v. Clackamas County,
7 116 Or App 89, 93, 840 P2d 1354 (1992).

8 Under MCZO 136.030(o) and 136.040(c) and (e), if the
9 county proposes to locate a church (or certain other nonfarm
10 uses) on EFU zoned land that is not generally unsuitable for
11 agricultural production, it must satisfy
12 MCZO 136.040(e)(1)-(3). Reading these provisions together,
13 the county is within its interpretive discretion to
14 interpret MCZO 136.040(e)(2) to require that there be no
15 other feasible location for the proposed use in the EFU zone
16 that is generally unsuitable for agricultural production.
17 As respondents point out, the county's interpretation is not
18 inconsistent with specific policies or requirements of the
19 EFU statutes or of the county plan. This is particularly
20 true because MCZO 136.040(e)(1) in any case requires a
21 showing that the proposed use will satisfy a demonstrated
22 need of area residents or the general public that outweighs
23 the need to use the land in question for farm use.

24 This subassignment of error is denied.

25 **2. Availability of Sites**

26 Petitioners argue the county incorrectly interpreted

1 "feasible location," as that term is used in
2 MCZO 136.040(e)(2), as not including sites that were
3 unavailable for sale at the time of the county's hearings on
4 remand. As we understand it, petitioners contend that if a
5 site was available when the subject application was first
6 submitted, or became available at some point after the
7 application was submitted, it should not be eliminated from
8 consideration as a "feasible location" simply because it was
9 no longer available for sale at the time of the county's
10 hearings on remand. Petitioners argue that interpreting
11 "feasible location" in this manner would allow intervenor
12 "to benefit from [its] own inaction * * *." Petition for
13 Review 9.

14 In Simmons I, 22 Or LUBA at 770 n 6, we stated with
15 regard to this issue:

16 "It is not entirely clear whether petitioners
17 dispute the propriety of the ACC study eliminating
18 from consideration locations which are not for
19 sale or have been sold recently to other buyers.
20 Petitioners do state that 'other acceptable
21 property undoubtedly will go on the market in the
22 future.' * * * To the extent petitioners make
23 such an argument, in view of the established
24 present need for a new church facility for the ACC
25 congregation, we believe it is proper for the
26 county, in the context of approving a conditional
27 use permit under MCZO 136.040(e)(2), to determine
28 that sites which are not presently available for
29 sale are not 'feasible locations.'"

30 Our above quoted determination in Simmons I was not
31 appealed by petitioners and, therefore, under the doctrine
32 of waiver cannot be challenged in this appeal. Davenport v.

1 City of Tigard, 23 Or LUBA 565, 579, aff'd 116 Or App 248
2 (1992). However, if petitioners' argument raises an issue
3 that could not have been raised in the prior appeal, then we
4 may review such issue. Gage v. City of Portland, ___
5 Or LUBA ___ (LUBA No. 93-030, June 11, 1993), slip op 5-6.
6 We understand petitioners to make only one argument in this
7 regard. Petitioners suggest the county may not interpret
8 "feasible location" to exclude a site that was available at
9 the time of the initial county proceedings, but unavailable
10 at the time of the county's proceedings on remand. However,
11 we reiterate that in view of the present need for a church
12 facility established by the county's decision, the county is
13 within its discretion to interpret "feasible location" in
14 MCZO 136.040(e)(2) not to include sites that are not
15 currently available for sale.⁵

16 This subassignment of error is denied.

17 **B. Findings and Evidentiary Support**

18 Petitioners argue the county's findings that ACC study
19 sites 7, 8, 10, 16, 21 and 45 are not "feasible locations"
20 under MCZO 136.040(e)(2) are inadequate and are not

⁵We note that petitioners and others were free to introduce evidence into the record during the county's hearings on remand concerning (1) sites in the ACC study that were not available at the time of the initial county proceedings but were available at the time of the hearings on remand, or (2) additional sites available at the time of the hearings on remand. Petitioners did, in fact, introduce evidence of an additional available site (Laird property). However, that site is residentially zoned land within the City of Silverton. Record 73-76. As explained in the preceding section, MCZO 136.040(e)(2) does not require consideration of alternative sites that are not zoned EFU.

1 supported by substantial evidence in the whole record.

2 In Simmons I, 22 Or LUBA at 771-72, we found the record
3 lacked substantial evidence to support the county's
4 conclusion that ACC study sites 7, 8, 10, 16, 21 and 45 are
5 not "feasible locations" under MCZO 136.040(e)(2). With
6 regard to these sites, the decision challenged in this
7 appeal states:

8 "The Board [of Commissioners] has reviewed sites
9 7, 8, 10, 16, 21 and 45, and based upon the
10 additional evidence submitted by [intervenor,]
11 specifically finds that each and every one of
12 these sites is not feasible." Record 15.

13 The above quoted finding is impermissibly conclusory,
14 as it does not explain why the board of commissioners
15 concluded sites 7, 8, 10, 16, 21 and 45 are not "feasible
16 locations" for the proposed church. However, under
17 ORS 197.835(9)(b) we may nevertheless affirm the county's
18 decision if "the parties identify relevant evidence in the
19 record which clearly supports the decision * * *."

20 We have reviewed the evidence in the record cited by
21 the parties. There is uncontroverted evidence in the record
22 that sites 7, 10, 16 and 45 were not available for sale at
23 the time of the county proceedings on remand. Record 62-67,
24 109-10, 122-24. As explained above, this evidence clearly
25 supports the county's determination that these sites are not
26 "feasible locations" for the proposed use. There is also
27 uncontroverted evidence in the record that site 8 is within
28 the Silverton UGB and is zoned industrial. Record 110.

1 Under the county's interpretation of MCZO 136.040(e)(2),
2 this evidence clearly supports a determination that site 8
3 need not be considered further.

4 The only alternative site remaining in dispute is site
5 21. This site was the subject of a previous application by
6 intervenor for approval of the proposed church. The
7 previous application sought approval for an exception to
8 Statewide Planning Goal 3 (Agricultural Land), a
9 comprehensive plan map amendment from Primary Agriculture to
10 Public, a zone change from EFU to Public (P), a conditional
11 use permit and a partition. This application was denied in
12 1990, on the basis of failure to comply with requirements
13 for a goal exception and a comprehensive plan amendment.
14 Record 290-96. This past denial of a goal
15 exception/comprehensive plan amendment/zone change does not
16 in itself establish that site 21 is not a "feasible
17 location" for the proposed church, as a conditional use in
18 the EFU zone under MCZO 136.040(e)(2). However, the record
19 contains uncontroverted evidence that site 21 contains
20 Class II soils and is suitable for agricultural use.
21 Record 110, 293. Therefore, even if site 21 were considered
22 to be a "feasible location" for the proposed church, the
23 evidence in the record clearly supports a determination that
24 site 21 does not meet the second requirement of
25 MCZO 136.040(e)(2), that it satisfy the "generally
26 unsuitable land" requirement of MCZO 136.040(c).

1 Based on the above, we conclude the evidence identified
2 by the parties in the record clearly supports the county's
3 determination of compliance with MCZO 136.040(e)(2).⁶

4 Consequently, this subassignment of error is denied.

5 The first and second assignments of error are denied.

6 The county's decision is affirmed.

⁶Because the evidence in the record "clearly supports" this part of the county's decision, it necessarily also constitutes "substantial evidence" in support of the decision. See Friedman v. Yamhill County, 23 Or LUBA 306, 311 (1992).