

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

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

RON O'NEAL and VICKI O'NEAL,)
)
Petitioners,)
)
vs.)
)
DESCHUTES COUNTY,)
)
Respondent,)
)
and)
)
SUN VILLAGE REALTY, INC.,)
)
Intervenor-Respondent.)

LUBA No. 93-096
FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Greg Hendrix, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hendrix and Chappell.

No appearance by the respondent.

Martin E. Hansen, Bend, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Karnopp, Petersen, Noteboom, Hubel, Hansen & Arnett.

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

REMANDED 10/20/93

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the board of county
4 commissioners granting conditional use and site plan review
5 approval.

6 **MOTION TO INTERVENE**

7 Sun Village Realty, Inc., the applicant below, moves to
8 intervene in this proceeding on the side of respondent.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property includes approximately 2.5 acres
12 and is located within the Business Park I area of Sunriver,
13 a planned community. The subject property is zoned Planned
14 Community, Industrial (I-PC) by the Deschutes County Zoning
15 Ordinance (DCZO) and is designated as Planned Community by
16 the Deschutes County Comprehensive Plan.

17 Intervenor proposes to construct an 8,700 square foot
18 building on the subject property. Approximately 6,300
19 square feet would be occupied by "Sun Village Realty, Inc.,
20 Real Estate and Property Management, including laundry,
21 housekeeping and maintenance operations and offices and
22 storage." Record 469. Approximately 2,400 square feet of
23 the structure would be occupied by a convenience store and
24 gas station.

25 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

26 Within the Planned Community designation, a total of

1 seven zoning districts are permitted, including the Planned
2 Community, Commercial (C-PC) and I-PC districts which are
3 relevant in this appeal. The commercial uses proposed by
4 intervenor are not allowed outright in the I-PC zone.
5 However, DCZO 18.108.020(E)(b)(5) allows the following as a
6 conditional use in the I-PC zone:

7 "Commercial uses which are consistent with the
8 Planned Communities Master Plan and which will not
9 conflict with the uses permitted within the [I-PC]
10 Zone."

11 Therefore, the commercial uses allowed by the
12 challenged decision are allowed within the I-PC zone,
13 provided the two requirements set out in DCZO
14 18.108.020(E)(b)(5) are met. Petitioners do not challenge
15 the county's findings that the proposed uses "will not
16 conflict with the uses permitted within the [I-PC] Zone."
17 Petitioners challenge is directed at the requirement that
18 commercial uses in the I-PC zone must be "consistent with
19 the [Sunriver] Master Plan."

20 The Sunriver Master Plan allows commercial uses in the
21 Business Park where the subject property is located, if the
22 commercial use would be "incompatible [with] the existing
23 commercial area."¹ Petitioners' argument that the county

¹Sunriver Master Plan 22(E) provides as follows:

"Commercial uses which are incompatible for [sic] the existing commercial area would be allowed in the Business Park only after a conditional use permit is approved. The area east of the Business Park would be reserved for industrial uses only."

1 erred in granting the requested conditional use approval is
2 twofold. First, petitioners point out the commercial uses
3 intervenor proposes are explicitly allowed as outright
4 permitted uses in the C-PC zone.² Secondly, petitioners
5 contend there is undeveloped C-PC zoned land within
6 Sunriver. Petitioners reason that the proposed uses cannot
7 be incompatible with the existing C-PC zoned areas within
8 Sunriver where that zone explicitly allows the proposed uses
9 and undeveloped C-PC zoned land is available.³

10 The fundamental problem with petitioners' argument is
11 that it depends on a faulty reading of the requirement

²Among the permitted uses in the C-PC zone, listed under DCZO 18.108.020(C)(a), are the following:

"* * * * *

"21. Food Store.

"* * * * *

"33. Office - business or professional, not including the retail sale of goods.

"* * * * *

"40. Service Station.

"* * * * *"

³Petitioners argue as follows:

"The standards of the DCZO requiring consistency with the master plan, and the plain language of the Sunriver Master Plan hold that commercial activities are allowed as a conditional use in the Business Park only if the proposal is 'compatible' with the zoning of the Sunriver Village. There is no ambiguity in the language. There is no disagreement that the Village has ten acres zoned to accept the proposed uses as outright permitted uses." Petition for Review 8.

1 stated in the Sunriver Master Plan. If the requirement were
2 that the proposed commercial uses must be found incompatible
3 with the existing zoning generally, or the C-PC zone in
4 particular, we might agree with petitioners that it would be
5 incorrect as a matter of law to find that uses allowed
6 outright in a particular zoning district are incompatible
7 with that zoning district or the overall zoning scheme.
8 However, the actual requirement stated in the Sunriver
9 Master Plan is that the proposed uses be found to be
10 incompatible with "the existing commercial area * * *." See
11 n 1, supra. Thus, the relevant inquiry is whether the
12 proposed uses would be incompatible with the existing
13 commercial area, not whether they would be incompatible with
14 the C-PC zone or with development that is allowed in that
15 zoning district. The county interpreted the Sunriver Master
16 Plan as applying in this manner, and that interpretation is
17 consistent with the Sunriver Master Plan language. Clark v.
18 Jackson County, 313 Or 508, 836 P2d 710 (1992).

19 The board of county commissioners' decision simply
20 concludes as follows:

21 "Applicant's proposed use is incompatible with the
22 existing Sunriver Commercial Core area." Record
23 32.

24 Petitioners are correct that this conclusion is not
25 sufficient to explain why the county believes the proposed
26 uses would be incompatible with "the existing commercial
27 area." Bruck v. Clackamas County, 15 Or LUBA 540, 541

1 (1987); McNulty v. Lake Oswego, 15 Or LUBA 16, 24 (1986).
2 However, the board of commissioners' decision also adopts by
3 reference the findings included in the staff report
4 appearing at Record 467-91. Record 15C. Those findings
5 conclude that the proposed uses would be incompatible with
6 the existing commercial area because the proposed uses would
7 exacerbate existing traffic congestion. Petitioners do not
8 challenge the adequacy of, or evidentiary support for, these
9 findings. On their face, these findings are adequate to
10 explain why the county believes the proposed use would be
11 incompatible with the existing commercial area.

12 The first and second assignments of error are denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 The hearings officer found that the proposal would
15 constitute a "shopping complex."⁴ DCZO Chapter 18.128
16 imposes general standards for approval of conditional uses.
17 DCZO 18.128.040(T) imposes a number of specific standards
18 for approval of a "shopping complex." The hearings officer
19 concluded that several of the standards set out in
20 DCZO 18.128.040(T) were not met. On appeal, the board of
21 county commissioners concluded as follows:

22 "The Shopping Complex criteria contained in DCZO

⁴DCZO 18.04.030 defines "shopping complex" as follows:

"A group of commercial establishments planned, constructed and managed as a total entity with customer and employee parking on site and aesthetic considerations which integrate it with the surrounding area."

1 18.04.030 does [sic] not apply to this
2 application." Record 15D.

3 Petitioners argue the above quoted conclusion is
4 insufficient to constitute an adequate interpretation of the
5 DCZO for this Board to perform its review function under
6 Clark v. Jackson County, supra. We agree with petitioners.
7 See Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844
8 P2d 914 (1992); Larson v. Wallowa County, 116 Or App 96, 104
9 840 P2d 1350 (1992).

10 Intervenor offers a detailed defense of the county's
11 conclusion. Intervenor first points out that the DCZO
12 provisions concerning shopping complexes are limited to the
13 Rural Service Center (RSC) Zone. The RSC zone lists
14 "shopping complex" as an allowed conditional use, subject to
15 the standards set out in DCZO 18.128.040(T). DCZO
16 18.64.030(N). According to intervenor, no other zone makes
17 provisions for shopping complexes and, therefore, the above
18 quoted definition at DCZO 18.04.030 and the standards for
19 approval of a shopping complex set out at DCZO 18.128.040(T)
20 are simply irrelevant when approving commercial uses allowed
21 in other zones. If we understand intervenor correctly, it
22 interprets the relevant DCZO provisions to provide that in
23 approving commercial uses in the I-PC zone the "shopping
24 complex" definition and approval standards are therefore
25 irrelevant, even if the particular mix and characteristics
26 of such commercial uses may come within the above quoted

1 definition of shopping complex.⁵

2 While the interpretation offered by intervenor may well
3 be one to which we would be required to defer under Clark v.
4 Jackson County, supra, that interpretation is not included
5 in the challenged decision and, for that reason, is not an
6 interpretation we can assume the county embraces. See
7 Eskandarian v. City of Portland, ___ Or LUBA ___ (LUBA No.
8 93-012, October 15, 1993), slip op 21-22. Although
9 intervenor suggests an adequate interpretation is included
10 in a staff report, intervenor does not identify to which
11 staff report it refers or where that interpretation appears
12 in the record. We find no discussion of this issue in the
13 October 26, 1993 staff report referenced in the board of
14 commissioners' decision. The staff report appearing at
15 Record 73-78 lends some support to the interpretation
16 suggested by intervenor, but the board of commissioners did
17 not adopt that staff report as part of its findings. See
18 Gonzalez v. Lane County, 24 Or LUBA 251, 259 (1992)
19 (explaining the requirements for adopting findings by
20 reference).

21 The issue of the applicability of the DCZO "shopping

⁵In support of its argument, intervenor submitted a copy of Ordinance 84-023, which adopts the above quoted definition of "shopping complex" and adds shopping complexes to the list of conditional uses allowable in the RSC zoning district. The ordinance incorporates a staff report, which explains the shopping complex provisions were adopted to expand the then existing provisions in the RSC zone for commercial uses, while at the same time limiting shopping complexes to the needs of rural communities.

1 complex" provisions was clearly raised below when the
2 hearings officer applied those provisions and found the
3 proposal violated them. The board of county commissioners'
4 decision simply concludes those provisions do not apply. To
5 the extent intervenor suggests we may conclude directly from
6 the language of those provisions that they do not apply in
7 this context presented in this case, without an adequate
8 interpretation from the county explaining that position, we
9 do not agree. See Gage v. City of Portland, ___ Or App ___,
10 ___ P2d ___ (September 22, 1993). The third assignment of
11 error is sustained.

12 The county's decision is remanded.