

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3  
4 DUCK DELIVERY PRODUCE, INC., an )  
5 Oregon corporation, )  
6 )  
7 Petitioner, ) LUBA No. 94-173  
8 )  
9 vs. ) FINAL OPINION  
10 ) AND ORDER  
11 DESCHUTES COUNTY, )  
12 )  
13 Respondent. )

16 Appeal from Deschutes County.

18 Paul J. Speck, Bend, filed the petition for review.

20 Andrew B. Crosby, Assistant County Counsel, Bend, filed  
21 the response brief and argued on behalf of respondent.

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

26 AFFIRMED 01/31/95

28 You are entitled to judicial review of this Order.  
29 Judicial review is governed by the provisions of ORS  
30 197.850.

1                   Opinion by Kellington.

2                   **NATURE OF THE DECISION**

3                   Petitioner appeals an order of the board of  
4 commissioners denying petitioner's request for a use  
5 variance.

6                   **FACTS**

7                   The challenged decision states the following facts:

8                   "ZONING: The subject property is zoned RR-10,  
9                   Rural Residential, with a Landscape Management  
10                  combining zone. It is designated [R]ural  
11                  [R]esidential and [L]andscape [M]anagement by the  
12                  County Comprehensive Plan.

13                  "SITE DESCRIPTION: The subject property is  
14                  approximately five acres and is generally level  
15                  with a cover of juniper and ponderosa pine trees  
16                  and scrub brush in undeveloped areas. There is  
17                  also an existing shop building, refrigerated  
18                  storage building and a pumphouse. Access to the  
19                  property is off of Rocking Horse Road, with a  
20                  cinder/gravel driveway and parking area. There  
21                  appears to be on the same property a foundation  
22                  where a large building previously existed. This  
23                  building burn[ed] down in approximately 1988.

24                  "SURROUNDING LAND USE: Land use in the area  
25                  includes the Pacific Power substation across  
26                  Rocking Horse Road to the south \* \* \*,  
27                  single-family dwellings to the west, an abandoned  
28                  substation and Highway 97 to the east, and vacant  
29                  land to the north. The railroad tracks are also  
30                  located near the subject property.

31                  "REQUEST: The applicant is requesting approval of  
32                  a use variance to allow the existing cold storage  
33                  business to become a valid use within the zone.  
34                  The produce business has been located on the  
35                  subject property since 1981, according to the  
36                  applicant. \* \* \*

37                  "BACKGROUND: The subject property has two

1 buildings; a shop building and cold storage  
2 building. The cold storage building was  
3 constructed in 1980. The shop building does not  
4 show up on the County Assessor's records, nor is  
5 there a building permit for it. The burned down  
6 building also does not show up on the Assessor's  
7 records. It is not clear when the shop building  
8 was constructed.

9 "The subject property has had code enforcement  
10 questions and proceedings over the last several  
11 years \* \* \*. The issue of the use on the property  
12 was discussed by the Board of County Commissioners  
13 sometime in 1989. The Board [of County  
14 Commissioners] took no formal action on the  
15 issue." Record 2-3.

16 The hearings officer conducted a public hearing and,  
17 thereafter, denied petitioner's application. Petitioner  
18 appealed to the board of commissioners. After a public  
19 hearing, the board of commissioners affirmed the decision of  
20 the hearings officer, and this appeal followed.

21 **ASSIGNMENT OF ERROR**

22 "Deschutes County did not properly interpret the  
23 provisions of its zoning ordinance."

24 At the outset we note that because the challenged  
25 decision is one to deny the proposal, the county need only  
26 adopt findings, supported by substantial evidence,  
27 demonstrating that one or more standards are not met. Garre  
28 v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123  
29 (1990).

30 Deschutes County Zoning Ordinance (DCZO) 18.132.020  
31 provides as follows:

32 "A variance may be granted unqualifiedly or may be  
33 granted subject to prescribed conditions, provided

1           that the Planning Director or Hearings Body shall  
2       make all of the following findings:

3           "\*\* \* \* \*

4           **"B. Use Variance.**

5           "a. That the literal application of the  
6       ordinance would result in unnecessary  
7       hardship to the applicant. An  
8       unnecessary hardship will be found when  
9       the site cannot be put to any beneficial  
10      use under the terms of the applicable  
11      ordinance.

12           "\*\* \* \* \*

13       The county interpreted DCZO 18.132.020(B)(a) to mean  
14      that so long as some beneficial use could be established on  
15      the subject property, DCZO 18.132.020(B)(a) was not  
16      satisfied. The county determined residential use of the  
17      property is a beneficial use and that a dwelling could be  
18      established on the subject property, as could other  
19      permitted uses listed in the RR-10 zoning district.<sup>1</sup> The  
20      county concluded the application of the RR-10 standards to  
21      the subject property does not constitute an unnecessary  
22      hardship in view of the uses to which the subject property  
23      may be put.

24       We are required to defer to a local governing body's  
25      interpretation of the local code, so long as the  
26      interpretation is not contrary to the express words, policy  
27      or purpose of the enactment. ORS 197.829; Gage v. City of

---

<sup>1</sup>Such other uses include utility facilities and a community center.

1   Portland, 319 Or 308, 860 P2d 282 (1993); Clark v. Jackson  
2   County, 313 Or 508, 515, 836 P2d 710 (1992). The board of  
3   commissioners' interpretation of DCZO 18.132.020(B)(a) is  
4   not contrary to the express words, policy or purpose of that  
5   provision, and we defer to it.<sup>2</sup>

6                 Petitioner's assignment of error is denied.

7                 The county's decision is affirmed.

---

<sup>2</sup>In fact, the county's interpretation is one we have repeatedly held to be correct, even under the more exacting standard of review applied to local governing body decisions prior to Clark v. Jackson County, supra, and the adoption of ORS 197.829. See Sokol v. City of Lake Oswego, 17 Or LUBA 429 (1989).