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

DON WILLIAMSON and ARLINGTON)
TOWING, INC.,)
)
Petitioners,)
)
vs.)
)
CITY OF ARLINGTON,)
)
Respondent.)

LUBA No. 98-075
FINAL OPINION
AND ORDER

Appeal from City of Arlington.

Annetta L. Spicer, Heppner, filed the petition for review and argued on behalf of petitioners. With her on the brief was Kuhn, Spicer & Mills.

Paul T. Beasley, The Dalles, filed the response brief on behalf of respondent. With him on the brief was Van Valkenburgh, Hoffman & Beasley. M. D. Van Valkenburgh argued on behalf of respondent.

HANNA, Board Member, participated in the decision.

AFFIRMED 08/26/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's approval of a conditional
4 use permit to operate a vehicle impound yard in the city's
5 General Industrial (M-1) zone.

6 **FACTS**

7 Petitioners filed an application with the city to operate
8 a towing/impound yard on a lot in the city's M-1 zone.¹ The
9 lot is unpaved but improved with an existing 30-foot by 40-
10 foot building. The proposed use involves towing approximately
11 20 wrecked or abandoned vehicles a month to the lot under a
12 contract with the Oregon State Police, and storing the towed
13 vehicles on the lot for 30-60 days. The subject property is
14 across the street from an area zoned residential, and adjacent
15 to a lot on which petitioners operate an automotive repair
16 business.

17 On November 28, 1997, the city recorder denied
18 petitioners' application, on the basis that a towing/impound
19 yard is not among the outright permitted uses listed in the
20 Arlington City Zoning Ordinance (ACZO) 9-3D-2. Petitioners
21 appealed that decision to the city planning commission. At a
22 meeting held December 30, 1997, the planning commission voted

¹Among the issues disputed below and on appeal is the proper characterization of petitioners' proposed use. Petitioners prefer "towing facility" or "towing business"; the challenged decision refers to the proposed use as a "vehicle impound yard." For purposes of this opinion, we adopt the use petitioners applied for, "towing/impound yard," without suggesting any significance to that choice.

1 to require petitioners to file an application for a
2 conditional use permit as an "other industrial use" allowed
3 under ACZO 9-3D-3, effectively upholding the city recorder's
4 decision that the proposed use was not a use permitted
5 outright in the M-1 zone.²

6 Petitioner did not appeal the planning commission's
7 December 30, 1997 decision, but instead filed a conditional
8 use application with the city on January 5, 1998. A city
9 staff report and a supplemental staff report recommended a
10 number of conditions if the planning commission approved the
11 use. At a hearing conducted February 3, 1998, petitioners
12 contended that a towing/impound yard was permitted outright as
13 either a "retail, wholesale or service business" or a use
14 involving "repair, rental, sales, servicing and storage"
15 permitted under ACZO 9-3D-2, and further opposed the
16 conditions requested in the staff report.³ On February 17,

²ACZO 9-3D-3 provides, in relevant part:

"CONDITIONAL USES: In an M-1 Zone, the following uses and their accessory uses are permitted when authorized in accordance with the provisions of this Article and Section 9-8-6 of this Title:

"Any use permitted when authorized by Section 9-3D-2 of this Article adjacent to or across the street from a lot within a duly platted subdivision or residential zone.

"* * * * *

"Any other industrial use not declared a nuisance by the City * * * [.]"

³ACZO 9-3D-2 states, in relevant part:

"USES PERMITTED OUTRIGHT: In an M-1 Zone, the following regulations shall apply:

1 1998, the planning commission determined that the proposed use
2 is an unspecified conditional use, and approved the
3 application with the conditions requested in the staff
4 reports.

5 Petitioners appealed the planning commission's February
6 17, 1998 decision to the city council, arguing that the
7 planning commission erred in determining that the proposed use
8 was a conditional rather than a permitted use. After a
9 hearing on the record before the planning commission, the city
10 council issued the challenged decision on April 8, 1998. The
11 city council's decision adopts and upholds the planning
12 commission's decision, adopts and incorporates the staff
13 reports as its own, and approves the permit, modifying several
14 conditions of approval.

15 Petitioners appeal the city council's decision.

16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioners argue that the city misinterpreted ACZO 9-3D-
18 2 in determining that the proposed towing/impound yard was a
19 conditional use rather than a "retail, wholesale or service

"* * * * *

"Repair, rental, sales, servicing and storage of
machinery, implements, equipment, trailers or mobile
homes, and the manufacture thereof.

"* * * * *

"Retail, wholesale, or service business establishments
except a use set forth in Section 9-3D-3 [conditional
uses] and subject to the limitations set forth in Section
9-3D-4 of this Article."

1 business" or a use involving "repair, rental, sales, servicing
2 and storage," both of which are permitted outright in the M-1
3 zone. Petitioners argue that the proposed towing/impound yard
4 is "clearly" a permitted use because a towing business is a
5 service business that involves the temporary storage of towed
6 vehicles.

7 We must defer to the city's interpretation of its zoning
8 regulations unless that interpretation is inconsistent with
9 the text, purpose or policy of the city's comprehensive plan
10 or land use regulations. ORS 197.829(1)(a) to (c); see also
11 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) (LUBA
12 must defer to a local government's interpretation of a local
13 ordinance unless that interpretation is "clearly wrong"). We
14 understand petitioners to contend that the city's
15 interpretation and application of ACZO 9-3D-2 and 9-3D-3 is
16 clearly wrong or inconsistent with the text of those
17 provisions, and thus we need not defer to the city's
18 interpretation.

19 We disagree with petitioners. A towing/impound yard is
20 nowhere mentioned in the list of permitted uses set forth at
21 ACZO 9-3D-2. That list does not contain any provision
22 permitting uses that are "similar" to listed uses, or any type
23 of catchall provision. Nor does the proposed towing/impound
24 yard fit readily into either of the two listed uses cited by
25 petitioners. The proposed use does not plausibly involve the
26 "repair, rental, sales, servicing and storage of machinery,

1 implements, equipment, trailers or mobile homes," none of
2 which involve vehicles. And even if the proposed use could
3 plausibly be considered a "retail, wholesale or service
4 business establishment" as listed in ACZO 9-3D-2, all listed
5 uses in ACZO 9-3D-2 are considered conditional uses when
6 adjacent to or across the street from a residential zone. In
7 addition, unlike the listed uses in ACZO 9-3D-2, the list of
8 conditional uses in ACZO 9-3D-3 contains a catchall provision
9 allowing as a conditional use "any other industrial use[.]"
10 The city found that the proposed use was subject to the
11 catchall provision as an "other industrial use" and thus was a
12 conditional use.

13 Given the foregoing, we cannot say that the city's
14 determination that the proposed use is a conditional use
15 rather than a use permitted outright is either "clearly wrong"
16 or inconsistent with any text of ACZO 9-3D-2 or 9-3D-3 that is
17 cited to us. Accordingly, we affirm the city's
18 interpretation.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 Petitioners argue that, assuming the city is correct that
22 the proposed use is a conditional use, the city erred in
23 imposing several conditions that are either not permitted by

1 the city's zoning code or lack evidentiary support in the
2 record.⁴

3 Petitioners challenge four of the conditions imposed by
4 the city: (1) a prohibition on loading or unloading vehicles
5 after normal business hours, other than in the enclosed
6 building on the property; (2) a requirement that petitioners
7 submit a grading and drainage plan, including a water and oil
8 separator, to be completed within 12 months; (3) a prohibition
9 on outdoor repair work on the property; and (4) a requirement
10 that the conditional use permit shall be reviewed annually and
11 may be revoked for failure to meet conditions at any time.
12 Petitioners argue that none of these conditions are authorized
13 by ACZO 9-8-3, which describes the general conditions the city
14 may impose on conditional use permits.⁵

⁴A persistent theme throughout the second assignment of error and indeed the petition for review as a whole is petitioners' contention that the city is discriminating against petitioners by treating their proposed use more stringently than other, similar uses in the M-1 zone. For example, petitioners argue that similar businesses such as automotive repair facilities in the M-1 zone are allowed outright, and no other uses, permitted or conditional, are subject to the conditions regarding hours of operation, drainage plans, outdoor repair work or annual reviews that the city imposed on petitioners.

However, petitioners do not explain how the city's alleged inequitable treatment of petitioners, even if true and established in the record, provides a basis to reverse or remand the challenged decision. Petitioners make no claim or argument under the Equal Protection Clause of the United States Constitution or under analogous state constitutional provisions, nor explain why, if the city can lawfully regulate petitioners' proposed use, the city's alleged failure to regulate similar uses in the M-1 zone prohibits the city from regulating petitioners' use. We are aware of no authority that requires the city to continue a past pattern of failing to apply or enforce its code. Thus, the only cognizable argument petitioners present to us is that the proposed use is not among the uses the city can, based on this record, lawfully regulate or condition. Our analysis will focus on those arguments.

⁵ACZO 9-8-3 provides, in relevant part:

1 **A. Hours of Operation**

2 Petitioners contend that nothing in the city's zoning
3 ordinance allows the city to regulate its hours of business,
4 or activities outside those hours. Further, petitioners argue
5 that the city's prohibition on loading and unloading vehicles
6 after business hours is based solely on a concern about noise
7 affecting nearby residences. Petitioners submit, however,
8 that the uncontroverted testimony during the evidentiary
9 hearing was that unloading towed vehicles causes minimal
10 noise.

11 ACZO 9-8-3(A) allows the city to limit the manner in
12 which the use is conducted, including the "time an activity

"In addition to the standards and conditions set forth in a specific zone, this Chapter and other applicable regulations, in permitting a new conditional use or the alteration of an existing conditional use, the Commission may impose conditions which it finds necessary to avoid a detrimental impact and to otherwise protect the best interests of the surrounding area or the City as a whole. These conditions may include the following:

"A. Limiting the manner in which the use is conducted including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution, glare and odor.

"* * * * *

"I. Requiring diking, screening, landscaping or another facility to protect adjacent or nearby property and designating standards for its installation and maintenance.

"* * * * *

"K. Protecting and preserving existing trees, vegetation, water resources, wildlife habitat or other significant natural resources.

"L. Other conditions necessary to permit the development of the City in conformity with the intent and purpose of this Title and the policies of the Comprehensive Plan."

1 may take place." We conclude that the city's restrictions on
2 the time and manner of unloading towed vehicles are expressly
3 permitted by the city's zoning code.

4 With respect to petitioners' evidentiary challenge, where
5 the evidentiary support for imposition of a condition is
6 challenged, we evaluate the evidence cited to us in the record
7 to determine whether that evidence would lead a reasonable
8 person to conclude that there is a need for the condition to
9 further a relevant planning purpose. Sherwood Baptist Church
10 v. City of Sherwood, 24 Or LUBA 502, 505 (1993); Wastewood
11 Recyclers v. Clackamas County, 22 Or LUBA 258, 263-64 (1991).

12 Petitioners contend that, while noise from offloading
13 towed vehicles was discussed at the hearing, petitioners
14 testified that such noise would not be "excessive." Record
15 17. The city responds that the city council adopted findings
16 that the loading and unloading of towed vehicles adjacent to a
17 residential zone during irregular hours would create a
18 nuisance to those properties. Record 5, 30. The findings
19 note that the Oregon State Police impose a similar time
20 restriction on towing of impounded vehicles, and that
21 residentially zoned properties exist directly across the
22 street from the lot. We agree with the city that a reasonable
23 person could conclude from the record that there is a need for
24 a condition restricting petitioners' hours and manner of
25 operation. This subassignment of error is denied.

1 **B. Grading and Drainage Plan**

2 Petitioners argue that the condition requiring a grading
3 and drainage plan and completion within 12 months is not
4 supported by substantial evidence. Petitioners contend that
5 the city's concern regarding chemical runoff from wrecked cars
6 is unfounded, because petitioners testified that all fluids
7 would be drained from towed vehicles prior to being placed on
8 the property and that all such fluids would be recycled.

9 The city council adopted the following findings:

10 "The applicant has stated repeatedly that it is not
11 to be an automobile wrecking yard, but the current
12 yard contains several of his personal vehicles and
13 customer vehicles which are not part of the impound
14 business. There is a concern about water drainage
15 on the site, and the drainage of gasoline, oil and
16 other hazardous materials into China Ditch. There
17 is also concern that the site will become an
18 automobile wrecking yard.

19 "* * * * *

20 The applicant stated during the course of the public
21 hearing that he intended to pave the impound yard
22 within eight months. The paving of the site
23 requires a drainage plan to ensure unwanted car
24 lubricants and gasoline do not drain into China
25 Ditch. An oil and water separator is a standard
26 device for ensuring that unwanted chemicals do not
27 harm the stormwater runoff. * * *" Record 30-31.

28 In addition, the record contains letters from neighbors
29 expressing concern that chemicals from wrecked or stored cars
30 could drain into the adjacent China Ditch, near where
31 neighborhood children swim.

32 We agree with the city that a reasonable person could
33 conclude from the record that a need exists for a drainage

1 plan, notwithstanding petitioners' testimony that fluids would
2 be drained from wrecked and abandoned cars before towing, and
3 the fluids recycled. First, the city council was not required
4 to lend unqualified credence to petitioners' unsupported
5 testimony, and perhaps did not. See Record 17 (city council
6 member "questioned draining of fluids from wrecks").
7 Petitioners' testimony does not establish that no amount of
8 chemicals or other toxic substances could drip or fall from
9 wrecked or stored vehicles onto the paved lot and ultimately
10 enter China Ditch. In addition, petitioners' testimony does
11 not specify where the chemicals and fluids drained from towed
12 cars will be stored or how they will be transported. Given
13 the proximity and sensitivity of China Ditch, petitioners'
14 plans to pave the lot and the uncertainty regarding the scope
15 of petitioners' intended operations, a reasonable person could
16 conclude that a need exists for a drainage plan to reduce the
17 possibility of contamination. This subassignment of error is
18 denied.

19 **C. Prohibition on Outdoor Repair Work**

20 Petitioners argue that the condition prohibiting outdoor
21 repair work on the property is inappropriate because
22 petitioners do not propose doing any outdoor repair work and
23 the record provides no basis to suggest that such a
24 prohibition is needed.

25 The challenged decision adopted a finding that states:

26 "The Zoning Ordinance lists several Permitted and
27 Conditional Uses for various industrial activities

1 where the primary activity is to take place inside a
2 wholly enclosed building. The purpose of this
3 condition is to ensure the impound yard remains just
4 that and that no repair work is conducted inside the
5 yard." Record 32.

6 In addition, the city cites to evidence that petitioners
7 operate an automobile repair facility adjacent to the subject
8 property, and that during a site inspection of the subject
9 property city staff noted several of petitioners' personal
10 vehicles and customer vehicles that were unrelated to the
11 proposed use. The city argues that the prohibition on outside
12 repair work is necessary to ensure that the property remains a
13 towing/impound yard and does not become an adjunct to
14 petitioners' repair business.

15 We agree with the city that a reasonable person could
16 conclude from the record that a need exists to prohibit
17 outdoor repair work. This subassignment of error is denied.

18 **D. Annual Review**

19 Finally, petitioners contend that the condition requiring
20 annual review of the conditional use permit is "unreasonable
21 and improper." Petition for Review 10. We understand
22 petitioners to contend that the annual review condition is not
23 authorized by the city's zoning ordinance.

24 The city's finding on this condition states:

25 "The Planning Commission is very concerned about the
26 ongoing operation and maintenance of this proposed
27 facility. [ACZO] 9-8-3(L) provides that 'any other
28 conditions necessary to permit the development of
29 the City in conformity with the intent and purposes
30 of this title and the policy of the Comprehensive
31 Plan.' Clearly, the City has the latitude to put

1 forth a periodic review of Conditional Uses. Many
2 cities do so, particularly when there is concern
3 about the ongoing operation and maintenance of a
4 proposed use." Record 32.

5 The city thus adopted an interpretation of ACZO 9-8-3(L)
6 that allows it to impose a condition of annual review, at
7 least where concerns exist regarding ongoing operation and
8 maintenance of the proposed use and the annual review is
9 necessary to address those concerns.⁶ We cannot say that the
10 city's interpretation of ACZO 9-8-3(L) as allowing the city to
11 impose a condition of annual review is inconsistent with the
12 broad terms of that provision. ORS 197.829(1)(a).

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioners argue that the proposed use is similar to
16 permitted uses listed in ACZO 9-3D-2, and that the city erred
17 in regulating a similar use more stringently than it regulates
18 outright permitted uses, citing to Great Northwest Towing v.
19 City of Portland, 17 Or LUBA 544 (1989). Petitioners rely on
20 Great Northwest for the proposition that a towing business is
21 similar to permitted uses such as automotive repair
22 facilities, and thus may not be regulated more stringently
23 than permitted uses.

24 Petitioners' reliance on Great Northwest is misplaced.
25 LUBA did not find in Great Northwest, as petitioners contend,

⁶We do not understand petitioners to challenge the evidentiary basis for the cited concerns.

1 that a towing business is similar to a permitted automotive
2 repair facility. LUBA reviewed the city's determination that
3 a towing business was similar to a permitted use under the
4 city's ordinance, and held that, where the local code provides
5 no basis to treat uses similar to permitted uses differently
6 from permitted uses, the city erred in conditioning a use
7 similar to a permitted use. Great Northwest, 17 Or LUBA at
8 553.

9 Great Northwest is neither controlling nor particularly
10 relevant to the present case. We affirmed, in the first
11 assignment of error, the city's determination that the
12 towing/impound yard proposed here is a conditional use.
13 Unlike the respondent in Great Northwest, the city's code has
14 no provision allowing uses "similar" to permitted uses. On
15 the contrary, as we understand ACZO 9-3D-2 and 9-3D-3, all
16 uses not otherwise listed either as permitted or conditional
17 uses are categorized as conditional uses. Thus, even if the
18 proposed use is "similar" to a permitted use, that similarity
19 provides no basis to reverse or remand the city's decision
20 that the proposed use is a conditional use, or to reverse or
21 remand any conditions the city imposes on the proposed use.

22 The third assignment of error is denied.

23 The city's decision is affirmed.