

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 JERI D. REYNOLDS and
5 BEAVER COUNTRY, LIMITED, INC.,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF SWEET HOME,
11 *Respondent,*
12

13 and
14

15 DOROTHY LYON,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2000-022
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Sweet Home.
24

25 Dale L. Crandall, Salem, filed the petition for review and argued on behalf of
26 petitioners.
27

28 Virginia Gustafson Lucker, Corvallis, filed a response brief and argued on behalf of
29 respondent.
30

31 Douglas M. DuPriest, Eugene, filed a response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Hutchinson, Anderson, Cox, Coons &
33 DuPriest, P.C.
34

35 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
36 participated in the decision.
37

38 AFFIRMED

08/17/2000

39
40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.
42

NATURE OF THE DECISION

Petitioners appeal a decision by the city council to amend a conditional use permit for a recreational vehicle (RV) park to extend the time allowed to comply with certain permit conditions and to delete other conditions.

MOTION TO INTERVENE

Dorothy Lyon, the applicant below (intervenor), moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.¹

FACTS

The subject property is located on the south side of Highway 20, near the east end of the City of Sweet Home. It is designated Planned Recreation Commercial (PRC) and is developed with a 25-space RV park, for which a conditional use permit was originally approved in 1991 and subsequently modified in 1992. In 1996 a new conditional use permit, replacing the modified 1992 permit, was approved. The 1996 permit requires the completion of landscaping and signage, the installation of a pay phone, and the construction of a clubhouse and laundry facility. In addition, the permit incorporates a requirement from the 1992 permit that the applicant install showers and a restroom.²

As of May 1999, the only improvement that had been made to implement the listed conditions of approval was the installation of three portable chemical toilets on the site. Petitioners, the owners of a neighboring RV park, filed a complaint with the city alleging that intervenor’s RV park was operating in violation of the conditions included in the 1996 permit. The city initiated a proceeding under the Sweet Home Municipal Code (SHMC)

¹We use the term “respondents” when referring to the city and intervenor together.

²In the interval between 1996 and 2000, pursuant to other conditions of approval, intervenor paved the entrance area to the RV park, regravelled the RV park’s internal roads, constructed RV pads, and connected public services to those pads, including sanitary sewer, water, and telephone lines. In addition, intervenor has installed a fire hydrant, street lighting, and a water catch basin.

1 17.80.060, which allows a conditional use permit to be revoked or modified based on
2 specified factors.

3 Following proceedings before the city planning commission, the planning
4 commission voted to modify, rather than revoke, the conditional use permit. The
5 modifications deleted the requirements for the clubhouse, and extended the time period for
6 completing installation of the pay phone, restrooms, showers and laundry facilities.

7 Intervenor appealed the planning commission's decision to the city council. In her
8 appeal, intervenor argued that the requirements for the restrooms, showers and laundry
9 facilities should be deleted. In the alternative, intervenor requested more time than the
10 planning commission had granted to complete the required improvements. On March 14,
11 2000, following *de novo* review of the planning commission's decision, the city council
12 affirmed the planning commission's decision to modify, rather than revoke, the conditional
13 use permit. The city council's decision deleted the requirement for the laundry facilities, and
14 further extended the time period for completion of the required showers and restrooms. This
15 appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 SHMC Chapter 13.08 contains the code provisions governing the city's sewer
18 system. SHMC 13.08.020 provides, in relevant part:

19 "A. It is unlawful for any person to place, deposit or permit to be deposited
20 in any unsanitary manner on public or private property within the city
21 * * * any human or animal excrement, garbage or other objectionable
22 waste.

23 "* * * * *

24 "D. The owner of all houses, buildings or properties used for human
25 occupancy, * * * recreation or other purposes that use water or
26 produce wastewater situated within the city and abutting on any street
27 * * * in which there is now located * * * a public sanitary sewer of the
28 city, is required at his expense to install suitable toilet facilities therein
29 and to connect such facilities directly with the proper public sewer in
30 accordance with the provisions of this chapter *within ninety days after*

1 *[the] date of official notice to do so; provided, that said public sewer is*
2 *within one hundred feet (30.5 m) of the property line.” (Emphasis*
3 *added.)*

4 A sanitary sewer lies within 100 feet of the property line, and intervenor has
5 connected the 25 RV spaces to the sanitary sewer. However, intervenor’s portable chemical
6 toilets are not connected to the sanitary sewer. Petitioners argue that intervenor’s failure to
7 connect her restroom facilities to the city’s sewer system violates the city’s sewer code and,
8 therefore, the city is obligated to revoke intervenor’s conditional use permit. Petitioners
9 contend that the deadlines established in the 1996 conditional use permit constitute the
10 “official notice” required by SHMC 13.08.020(D) that the restroom facilities must be
11 connected to the city’s sanitary sewer system.

12 Respondents argue that the 1996 condition requiring the installation of restroom
13 facilities by July 1, 1998, does not constitute “official notice” as that term is used in the
14 sewer code. The July 1, 1998 deadline does not correspond with the 90-day deadline
15 provided for in SHMC 13.08.020(D), nor does the 1996 condition explicitly connect the
16 requirements of a conditional use permit granted pursuant to zoning code provisions to the
17 provisions of the sewer code. Therefore, respondents argue, because no official notice has
18 been given, as required by SHMC 13.08.020(D), intervenor has not violated the sewer code.³

19 We agree with respondents that petitioners have failed to demonstrate why
20 intervenor’s failure to connect the RV park’s restroom facilities to the city sewer constitutes
21 a violation of SHMC 13.08.020(D). The 1996 permit does not require that the three toilets be
22 connected to the city sewer system and does not provide “official notice” of a requirement to
23 connect to the system within 90 days of the permit approval.

³Respondents also argue that the issue is waived because petitioners did not raise it below. However, the city attorney initially brought the issue before the city in a memorandum in which he questioned whether the sewer ordinance and OAR 333-031-0066 required that the restrooms be connected to the city sewer system. Record 39-40. We believe this memorandum is sufficient to satisfy the ORS 197.763(1) requirement that an issue that forms the basis of an appeal to LUBA be raised before the local government.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners argue that the continued use of the three portable chemical toilets violates
4 the OAR 333-031-0066 requirement that at least three restrooms be installed to serve a 25-
5 space RV park and the SHMC 13.08.020(D) requirement that those restrooms be connected
6 to the public sewer system.

7 Respondent contends that, contrary to petitioners’ argument, neither SHMC
8 13.08.020(D) nor OAR 333-031-0066 requires that intervenor’s restrooms be connected to
9 the city’s sewer system. Respondent explains that the record establishes that intervenor has a
10 license from the Oregon Health Division verifying compliance with the requirements of
11 OAR 333-031-0066. Further, respondent argues that SHMC 13.08.020(C) specifically
12 provides for alternative sewage disposal systems by allowing systems permitted by the
13 Oregon Department of Environmental Quality (DEQ) to be used in lieu of a connection to the
14 city’s sewers.

15 OAR chapter 333, division 31 contains the Oregon Health Division’s regulations
16 governing the construction, operation and maintenance of recreation parks.⁴ OAR 333-031-
17 0006(1) provides that “[s]ewage and waste water shall be disposed of into a public sewerage
18 system or in a manner approved by the Department of Environmental Quality.”⁵ OAR 333-
19 031-0066(1) requires that three toilets be provided for recreation parks with 16-30 spaces.
20 OAR 333-031-0066(3) provides that “if * * * chemical toilets are provided, they shall be
21 constructed, located, and maintained in accordance with the requirements of * * * OAR 340-

⁴The parties agree that intervenor’s RV park is a “recreation park” as that term is used in OAR 333-031-0066 and OAR chapter 340, division 71.

⁵OAR 340-0071-0100 through OAR 340-0071-0600 constitute DEQ’s regulations governing on-site sewage disposal.

1 0071-0100 through 340-0071-0600.” OAR 340-071-0330(2) permits the use of nonwater-
2 carried waste disposal facilities, such as chemical toilets,
3 “for temporary or limited use areas, including but not limited to recreation
4 parks, * * * provided all liquid wastes can be handled in a manner to prevent a
5 public health hazard and to protect public waters * * *.”

6 We have already determined that SHMC 13.08.020(D) does not require that
7 intervenor connect to the city’s sewer system, in the absence of “official notice.” We also
8 agree with respondent that there is nothing in OAR chapter 333, division 31 that requires a
9 connection to the city’s sewer system. Further, petitioners do not argue that intervenor has
10 fewer than three chemical toilets on site, or that their use and maintenance do not conform to
11 DEQ regulations, as required by OAR chapter 333, division 31.⁶ Therefore, petitioners’
12 assignment of error provides no basis for reversal or remand.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 SHMC 17.80.060 provides:

16 “A conditional use may be revoked or modified by the planning commission
17 after public hearing, on any one or more of the following grounds:

18 “* * * * *

19 “C. The use does not meet the conditions specifically established for it at
20 the time of approval of the application;

21 “D. The use is in violation of any provision of this title or any other
22 applicable statute, ordinance or regulation.”

23 Petitioners argue that SHMC 17.80.060 provides only two options for the planning
24 commission in the present case—the planning commission may modify the *use* or the

⁶Even if intervenor’s failure to connect to the city’s sewer system violates the provisions of SHMC 13.08.020(D), SHMC 13.08.020(C) allows the construction or maintenance of “facilit[ies] intended or used for the disposal of sewage” provided those facilities are permitted by DEQ regulations. We read SHMC 13.08.020(C) to provide for alternative methods of sewage disposal even if the property is located within 100 feet of a sewer line.

1 planning commission may revoke the permit. According to petitioners, SHMC 17.80.060
2 does not allow the planning commission to modify *conditions* attached to the initial
3 conditional use permit. If conditions could be modified, petitioners contend, those persons
4 who relied on the initial conditions to protect their interests are prejudiced. In addition,
5 petitioners challenge the city’s rationale for extending the time period for compliance with
6 the provisions of the conditional use permit. Petitioners argue that the city’s findings that an
7 extension of time is warranted, given the expense and time required to complete the
8 restrooms and showers in a quality manner, “are entirely devoid of any support in fact or law
9 as grounds to avoid the revocation of the permit.” Petition for Review 6.

10 We understand petitioners to challenge the city’s interpretation of SHMC
11 17.80.060(C) and the evidentiary support for its finding that an extension of time is necessary
12 to ensure that the restrooms and showers are constructed pursuant to the requirements of the
13 2000 permit.

14 The city’s decision provides the following interpretation of SHMC 17.80.060(C):
15 “The City Council interprets SHMC 17.80.060(C) to allow modification,
16 rather than revocation, of a conditional use permit under two conditions: First,
17 if, notwithstanding the permit holder’s failure to meet conditions of approval,
18 the council finds that the use meets or can, with conditions, meet the purpose
19 of conditional uses set forth in SHMC 17.80.010, the permit may be modified
20 to excuse compliance with those conditions. Second, if the permit holder has
21 established a valid basis to extend the time for compliance with the original
22 conditions, the permit may be modified to extend the time for compliance.”
23 Record 4.

24 This Board is required to defer to a local governing body’s interpretation of its own
25 enactment, unless that interpretation is contrary to the express words, purpose or policy of
26 the local enactment or contrary to a state statute, statewide planning goal or administrative
27 rule that the local enactment implements. ORS 197.829(1); *Clark v. Jackson County*, 313 Or
28 508, 514-15, 836 P2d 710 (1992). We must defer to a local government’s interpretation of its
29 own enactments, unless that interpretation is “clearly wrong.” *Goose Hollow Foothills*

1 *League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). The city's
2 interpretation is not clearly wrong and, therefore, we defer to it.

3 Petitioners also have not shown how they are prejudiced by the modification process
4 used by the city. The city's process included public hearings where persons who opposed the
5 continued operation of the disputed RV park, including petitioners, appeared and testified.
6 Petitioners' general statement that a modification extending the period of time for
7 compliance may be unfair to some other persons who relied on the imposition of the 1996
8 conditions of approval does not provide a basis for reversal or remand.

9 We now turn to petitioners' evidentiary argument. The city's findings explain that it
10 interpreted the conditional use permit standards to require that the toilets and showers be
11 connected to the city sewer system. The 2000 decision acknowledges that there is some
12 question as to whether the 1996 permit required that the restrooms be connected to the city
13 sewers, and resolves that question by affirmatively requiring connection to the city sewer
14 system by July 1, 2001. The city concluded that the extra time and expense required to install
15 flush toilets and a permanent shower justified the extension of time to July 1, 2001.

16 We are authorized to reverse or remand the challenged decision if it is "not supported
17 by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is
18 evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes*
19 *County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). Where we conclude a
20 reasonable person could reach the decision made by the local government, in view of all the
21 evidence in the record, we defer to the local government's choice between conflicting
22 evidence. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

23 The record contains evidence to show that it would take less than 15 months to install
24 flush toilets and showers and connect them to city sewers. The city accepted intervenor's
25 testimony that it would take her more time to obtain the funds necessary to comply with the

1 conditions of approval. Petitioners make no attempt to demonstrate that the city erred in
2 relying on that testimony to justify the extension of time.

3 Even if the city's findings on this point were not supported by substantial evidence,
4 petitioners' assignment of error provides no basis for reversal or remand. Petitioners have not
5 established why the city is prevented from establishing modified conditions of approval
6 through the 2000 permit, or that a particular land use standard requires the establishment of
7 an earlier compliance deadline.

8 The third assignment of error is denied.

9 The city's decision is affirmed.