

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

GREENWOOD INN,)
)
Petitioner,) LUBA No. 87-054
)
vs.) FINAL OPINION
) AND ORDER
)
CITY OF BEAVERTON,)
THE MARRIOTT CORPORATION and)
THE KOLL COMPANY,)
)
Respondents.)

Appeal from City of Beaverton.

E. Andrew Jordan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bolliger, Hampton & Tarlow.

Pamela J. Beery, Beaverton, filed a response brief and argued on behalf of Respondent City of Beaverton.

Jack L. Orchard, Portland, filed a response brief and argued on behalf of Respondent Marriott Corporation. With him on the brief was Ball, Janik & Novack.

Steven W. Abel, Portland, filed response briefs and argued on behalf of Respondent Koll Company and Intervenor/Respondent KC Creekside II. With him on the briefs were Schwabe, Williamson & Wyatt.

DuBAY, Chief Referee; BAGG, Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 10/15/87

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

1 Opinion by DuBay.

2 NATURE OF DECISION

3 The appeal challenges adoption of an amendment to the
4 city's zoning code to permit hotels in the Campus Industrial,
5 CI, zone.

6 FACTS

7 The city's Development Code includes the following
8 description of the CI district:

9 "The Campus Industrial or 'CI' District is intended to
10 provide areas for the combining of light
11 manufacturing, office and limited retail uses in an
12 'employment activity center' concept." Section 52.2,
13 Development Code.

14 The city has five Development Control Areas (DCA's), each
15 zoned CI. The city code permits some retail businesses in
16 DCA's as follows:

17 "54.3 Up to 10 percent of the land area in a
18 Development Control Area may provide retail businesses
19 offering products or services primarily for the
20 convenience or necessity of employees and businesses
21 in the CI District, as indicated by size and location,
22 as opposed to the general public, including:

23 "A. Candy, nut and confectionary stores.

24 "B. Restaurants, except drive-in restaurants
25 (windows) and take-out restaurants serving
26 larger market areas.

"C. Pharmacies, non-general merchandise.

"D. Book, magazine and stationary stores and
newstands.

"E. Cigar or cigarette stores and stands.

"F. Office, stores, including office furniture
and fixtures, service and repair of same.

1 "G. Barber and beauty shops.

2 "H. Shoe repair.

3 "I. Health clubs, spas and reducing salons.

4 "J. Travel agencies.

5 "K. Other uses which in the determination of the
6 Planning Director are within the intent and
7 purpose of the CI District as stated in the
8 comprehensive plan and this ordinance, and are
9 intended to serve primarily employees and
10 businesses within an [sic] CI District and, only
11 incidentally, the general public." Beaverton
12 Development Code.

9 The challenged code amendment adds a new subsection L to
10 Section 54.3. The new provision adds hotels to the list of
11 non-industrial uses allowable in the CI zone provided certain
12 conditions are met.¹

13 Respondent Marriott Corporation made the proposal for the
14 amendment of Section 54.43. The proposal explained the
15 amendment would permit construction of a 149 room hotel on 4.5
16 acres in a particular location within a DCA. The planning
17 commission approved the amendment, and the city council adopted
18 the amendment by ordinance on June 15, 1987. This appeal
19 followed.

20 FIRST ASSIGNMENT OF ERROR

21 Petitioner alleges the code amendment conflicts with the
22 city's comprehensive plan. The plan provision cited by
23 petitioner as controlling states:

24 "In order for the employment center, mixed industrial
25 and office use concept to function effectively, a
26 limited amount of commercial use should be
encouraged. Restaurants and sandwich shops, personal

1 services, banking, some limited retail and
2 recreational facilities will make the area attractive,
3 diverse, and allow employees to stay on-site during
4 lunch hours, as well as prevent these areas from being
5 totally inactive during off business hours. The net
6 effect will be to reduce automobile usage, thereby
7 decreasing fuel consumption and air quality problems,
8 and increase the desirability of alternatives to the
9 automobile." (Emphasis added) Beaverton General Plan,
10 R-21.

11 Petitioner contends this plan provision restricts retail
12 uses by emphasis on a "limited amount of commercial use" and
13 "limited retail and recreational facilities." Petitioner says
14 the word "limited" in the plan must be given some reasonable
15 meaning, and the development code points to the correct
16 meaning. According to petitioner, the uses listed in the
17 comprehensive plan provision above quoted and the list of uses
18 in Section 54.3 of the development code illustrate what is
19 meant by the term "limited" in the comprehensive plan.
20 According to petitioner, a four story, 149 room hotel on four
21 and a half acres is so unlike the listed uses that it
22 constitutes an unreasonable interpretation of limited uses as
23 used in the comprehensive plan.

24 Respondents argue that petitioner's emphasis on the size of
25 hotels allowable under the amendment, particularly the size of
26 the proposed Marriott Hotel, does not address any criterion
stated in the plan. Respondents contend the plan language
cited by petitioner calls for a limited amount of commercial
uses, and that standard was implemented by the provision in
Section 54.3 restricting commercial uses to 10% of the land

1 area in a DCA. In addition, respondents contend the cited plan
2 provision merely describes commercial uses in industrial areas
3 of the city and is not a controlling standard. However,
4 respondents say the following plan policy is relevant because
5 the CI zone is treated as one of the city's industrial zones:

6 "5. A functional and attractive mix of light industry
7 and office industry uses should be encouraged in areas
8 designated on the plan for industrial park. A limited
9 but complementary number of commercial and other
10 non-industrial uses will improve these areas'
11 attractiveness as employment centers. (GPA 4-81)"
12 Industrial Policy 5, Comprehensive Plan.

13 We agree with respondents. The plan provision cited by
14 petitioner includes no express limitation on the size of
15 commercial uses authorized in the CI zone. Petitioner's
16 argument is based on the plan provision describing how limited
17 retail facilities will allow employees to stay on-site during
18 lunch hours and will increase utilization of the site after
19 business hours. That description states no policy direction
20 about the size of commercial uses to be encouraged in the CI
21 zone. The plan provision encouraging a limited amount of
22 commercial uses does not support petitioner's argument either,
23 for that language supports respondents' argument that the
24 amount of commercial use is the focus of the provision.

25 Given Industrial Policy 5, with its general emphasis on
26 complementary commercial and non-industrial uses to improve the
attractiveness of industrial parks, the city's interpretation
that hotels are not categorically excluded from the CI zone is
neither unreasonable nor contrary to the express provisions of

1 the comprehensive plan. We decline to impose a different
2 interpretation on the city.

3 This assignment of error is denied.

4 SECOND ASSIGNMENT OF ERROR

5 Petitioner alleges the amendment conflicts with portions of
6 Development Code Section 54.3 that remain unamended.

7 According to petitioner, the list of permitted commercial uses
8 in Section 54.3 can include only uses that offer

9 "...products or services primarily for the convenience
10 or necessity of employees and businesses in the CI
11 district, as indicated by size and location, as
12 opposed to the general public...." Section 54.3,
13 Development Code.

14 Petitioner claims this provision sets a standard for all
15 allowable commercial uses in the DCA. According to petitioner,
16 the specific uses listed in Section 54.3 (A) through (J) meet
17 this standard and the plan provision discussed in the first
18 assignment of error. Petitioner says the proposed hotel is
19 much too large to be primarily for the convenience and
20 necessity of CI district employees. As proof, petitioner
21 points to two surveys submitted by the applicant showing that
22 businesses in the district will generate between 13% and 25%
23 occupancy of the proposed 149 room hotel. Petitioner argues
24 this is inconsistent with the requirement that allowed uses
25 under Section 54.3 must be for the primary convenience or
26 necessity of employees in the district because most of the
27 hotel's occupants will come from the general public.

28 We agree with petitioner that the above quoted portion of

1 Section 54.3 establishes a criterion that must be applied as a
2 pre-requisite to approval of the uses permitted by that
3 section. As we read the ordinance, however, the listed uses do
4 not meet this standard merely because they are listed. That
5 is, the ordinance appears to list specific uses that will be
6 permitted if their size and location indicate they offer
7 products or services primarily for the convenience of employees
8 and businesses in the CI district.

9 We therefore disagree with Respondent Marriott Corporation
10 that the addition of hotels to the list of uses in Section 54.3
11 amounts to a legislative determination that hotel use meeting
12 the six conditions in 54.3(L) is convenient to CI district
13 employees and businesses, and, therefore, primarily for their
14 benefit. Marriott Corporation's Brief at 19-21. That
15 interpretation would eliminate the need to look at any
16 indicators, such as size and location, of the primary
17 beneficiaries of a proposed use. To determine whether the
18 proposed use will, as Section 54.3 apparently requires, offer
19 "services primarily for the convenience or necessity of
20 employees and businesses in the CI district * * *," the
21 ordinance requires looking at least at size and location.
22 Nothing in the amendment, including the six conditions
23 pre-requisite to hotel use, or in the unamended ordinance
24 states the size and location of the listed uses have been
25 evaluated or that the listed uses are exempt from the general
26 standard in Section 54.3.

1 Our disagreement, however, does not mean the decision is
2 flawed. The amendment to Section 54.3 adds hotels to the list
3 of uses that are permitted if they meet the Section 54.3
4 standards. Although the city considered the amendment in
5 connection with Marriott Corporation's proposal for a specific
6 development, the amendment did not approve it. To the extent
7 the findings discuss the Marriott Corporation proposal, they
8 are surplusage. We will not review in this appeal whether the
9 proposed hotel meets the Section 54.3 criteria.

10 Petitioner also argues the amendment is inconsistent with
11 Section 54.3 because, unlike hotels, the uses listed in the
12 unamended ordinance are all small enterprises which, if located
13 in an industrial area, would naturally attract employees and
14 customers within the industrial area but not from the general
15 public outside the industrial area. The unstated implication
16 of this argument is that any hotel could not meet the criteria
17 in Section 54.3 requiring that uses must be primarily for the
18 convenience or necessity of employees and businesses in the CI
19 district, as indicated by size and location.

20 We reject this argument for two reasons. First, we noted
21 above that the listed uses are not necessarily for the primary
22 convenience or necessity of employees of businesses in the CI
23 district. As we read Section 54.3, all new commercial uses,
24 even those listed, must be tested against that standard.
25 Second, we do not agree with petitioner's premise that all uses
26 listed in Section 54.3 are small, convenience type stores.

1 Nothing in the description of the uses limits their size. The
2 nature of some of the uses may limit size, but others may have
3 large space requirements, e.g. restaurants, office, and stores,
4 including office furniture and fixtures. For these reasons, we
5 do not believe that adding hotels to the list of authorized
6 uses is inconsistent with any express code provision limiting
7 the size of authorized uses in the zone.²

8 The assignment of error is denied.

9 THIRD ASSIGNMENT OF ERROR

10 Petitioner alleges the amendment conflicts with two
11 provisions in the comprehensive plan concerning traffic
12 generation of new development. Petitioner says the proposed
13 hotel would generate substantial traffic (909 trips per day),
14 and that typical hotels generate even more (1565 trips per
15 day). According to petitioner these amounts are more than
16 allowed by the following plan provisions:

17 "19. Care should be taken to control the size,
18 location and scale of new commercial developments so
19 they do not generate traffic from outside the intended
service area." Policy 19, General Commercial
District, Comprehensive Plan.

20 "In order for the employment center, mixed industrial
21 and office use concept to function effectively, a
22 limited amount of commercial use should be
23 encouraged. Restaurants and sandwich shops, personal
24 services, banking, some limited retail and
25 recreational facilities will make the area attractive,
26 diverse, and allow employees to stay on-site during
lunch hours, as well as prevent these areas from being
totally inactive during off-business hours. The net
effect will be to reduce automobile usage, thereby
decreasing fuel consumption and air quality problems,
and increase the desirability of alternatives to the
automobile." (Emphasis added) Industrial Areas,

1 General Plan at 57.

2 We agree with respondent's assertion that the first of the
3 above plan provisions does not apply here. Policy 19 of the
4 General Plan applies to uses in the commercial districts, not
5 in the industrial districts. The CI zone is one of the
6 industrial zones described in the city's plan. The cited
7 policy does not control permissible uses in the CI district.

8 We also do not agree with petitioner that the second
9 provision quoted above prohibits, or is inconsistent with, the
10 amendment to Section 54.3. We read the provision to describe
11 the effect on automobile use resulting from limited commercial
12 development in the CI zone. The provision sets no standards
13 for evaluating reduction of automobile traffic. It establishes
14 no benchmark against which to measure traffic reduction, fuel
15 consumption or air pollution. In substance, the provision is a
16 generally worded description that sets no standard for
17 selection of the types of uses appropriate for the CI
18 district.

19 The city appears to have given the provision such a
20 general, non-binding effect when it made the following finding:

21 "Reduction in automobile traffic as contemplated by
22 the Plan is not a goal in and of itself, but rather is
23 envisioned as an added benefit of meeting the other
goals established for the District in the Plan."
Record at 3.

24 The city also found:

25 "The goals of the General Plan in allowing such a mix
26 of uses in these zones are to enhance their economic
viability, increase their attractiveness, allow

1 employees to stay on-site during lunch hours, and
2 prevent the areas from being totally inactive at
3 night. The net effect of these goals was envisioned
4 as reducing automobile usage with the attendant
5 consequences of such reduction. Not every retail use
6 allowed as part of the ten percent allowance will meet
7 every one of these goals, but by meeting some or all
8 of them and and not being inconsistent with any
9 others, the intent of the Plan is met." Record at 2.

6 The plan provision cited by petitioner is not a goal or
7 policy of the plan and, therefore, is not a criterion for the
8 amendment to Section 54.3.

9 The assignment of error is denied.

10 FOURTH ASSIGNMENT OF ERROR

11 Petitioner alleges the amendment violates the following
12 policy in the General Plan:

13 "Zoning for additional or expanded commercial center
14 areas should be allocated on a basis of apparent need
15 and this need should be supported by a current market
16 analysis submitted by the applicant."

16 Petitioner's claim fails for two reasons. First, the
17 quoted policy is in the General Plan section concerning uses in
18 commercial districts. This section does not refer to
19 commercial uses in any industrially zoned area. We do not
20 believe the policy applies to the CI district. However, even
21 if the policy applied to the CI zone, the addition of hotels as
22 authorized uses does not allocate new or expanded areas of
23 commercially zoned land.

24 Petitioner contends the amendment operates to allocate
25 additional hotel space, a commercial use, and this allocation
26 has the same economic impact as if land is newly zoned for

1 hotels.

2 This argument, however, loses sight of the basic point in
3 the policy that areas for commercial centers should not be
4 increased without a showing of need. Increasing the kinds of
5 uses authorized in existing commercial areas does not violate
6 this policy.

7 The assignment of error is denied.

8 The decision is affirmed.

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FOOTNOTES

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The conditions for establishing hotels in the CI zone are:

"1) Within a CI District with at least fifty percent of the Development Control Area developed.

"2) Site size a minimum of two acres and a maximum of five acres.

"3) Vehicular access only from internal streets to the District, not from an abutting arterial or regional traffic route.

"4) Signage is allowed as per Section 187.3 of this code. However, only one free standing sign, up to 32 square feet per face, 64 square feet for all faces combined or one wall sign up to 64 square feet may orient toward an abutting arterial or regional traffic route.

"5) Signage shall not be allowed for auxilliary uses such as restaurants, meeting rooms, etc.

"6) Auxilliary uses such as restaurants and meeting rooms shall be designed to meet the needs of the guests of the facility and not the general public."

2

In its brief, the city also suggests that under the amendment to Section 54.3 a hotel meeting the six criteria in subsection (L) and the conditional use standards in Section 99.3 could be approved without also finding the hotel, based on size and location considerations, could be "primarily for the convenience or necessity of employees and businesses in the CI district...." We do not interpret the city's evidence to permit this interpretation. If we are incorrect and the city did adopt that interpretation, the conditional use process will supply an opportunity for the city to clearly explain its interpretation and the rationale for that interpretation.