

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.)
14

15
16 Appeal from Deschutes County.
17

18 Paul J. Speck, Bend, filed the petition for review.
19

20 Andrew B. Crosby, Assistant County Counsel, Bend, filed
21 the response brief and argued on behalf of respondent.
22

23 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
24 Referee, participated in the decision.
25

26 AFFIRMED 01/31/95
27

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.¹ 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

¹Such 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.²

6 Petitioner's assignment of error is denied.

7 The county's decision is affirmed.

²In 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).