

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

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84 LUMBER COMPANY,)
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Petitioner,)
) LUBA No. 81-007
vs.)
) FINAL OPINION
CITY COUNCIL OF THE)
CITY OF PHOENIX, OREGON,)
) AND ORDER
Respondent.)

Appeal from the City of Phoenix.

John R. Hassen and Daniel C. Thorndike, Medford filed the
Petition for Review and argued the cause on behalf of
Petitioner. With them on the brief were Blackhurst, Hornecker,
Hassen & Brian.

Ronald L. Salter, Ashland, filed the brief and argued the
cause on behalf of Respondent.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;
participated in this decision.

REMANDED 8/26/81

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals the City of Phoenix's denial of
4 petitioner's request for a conditional use permit¹ to
5 establish a retail lumber and hardware outlet in the City of
6 Phoenix. Respondent says it denied the conditional use permit
7 because petitioner failed to establish that there was a public
8 need for the proposed use or that the proposed use would not
9 create an adverse impact on the surrounding property.

10 Petitioner proposed to locate its retail lumber store and
11 hardware outlet on Fern Valley Road, west of and adjacent to
12 the Interstate 5 interchange and within the corporate limits of
13 the City of Phoenix. The city found that the subject land was
14 affected by two different zoning regulations of the City of
15 Phoenix: Section 57 of the city's "old" ordinance and chapters
16 2.500 and 2.600 of the city's "new" zoning ordinance adopted in
17 September of 1980. Section 57 of the "old" ordinance
18 prescribes uses permitted within the commercial district.
19 Chapter 2.500 and 2.600 of the city's "new" zoning ordinance
20 creates two commercial districts (Commercial Tourist and
21 General Commercial) and prescribes the uses permitted both
22 outright and conditionally within each. The city's order
23 analyzed the requested conditional use under both zoning
24 ordinances and concluded neither would permit the retail lumber
25 and hardware store at the I-5/Fern Valley Road intersection.²
26 The city found that there was no public need demonstrated for

1 the proposed use because the applicant's own testimony was that
2 the store could not survive if located in downtown Phoenix.
3 The store requires a high volume of sales and must be located
4 in an area of easy accessibility to a wide area. Because the
5 petitioner could not survive in downtown Phoenix, the council
6 concluded there was no need for the retail store.

7 The city council also concluded that there would be an
8 adverse impact on the surrounding property caused by a high
9 volume of traffic. The petitioner's property did not have
10 access onto a public road and was adjacent to a mobile home
11 recreation vehicle park. The high volume of traffic and
12 limited access to the site would add to the "congestion and
13 adverse impact upon the adjacent land."

14 The city also analyzed petitioner's request under the newly
15 adopted comprehensive plan and zoning ordinance. The
16 comprehensive plan was adopted along with the "new" zoning
17 ordinance in September, 1980, but without a corresponding land
18 use map. The city found that the comprehensive plan does not
19 "directly affect the subject land except as the principles and
20 guidelines in the comprehensive plan do identify it as being
21 governed thereby."

22 The city found that the comprehensive plan breaks down
23 presently designated commercial land into two classifications:
24 General Commercial and Tourist Commercial.

25 "These classifications are located in relation to
26 the demands of each particular category. The General
Commercial use is primarily striped along South

1 Pacific Highway, while the Tourist Commercial uses are
2 beginning to emerge at the Fern Valley Road/I-5
Interchange.

3 "As land use applications, these commercial
4 patterns are expected to continue. The area at the
Fern Valley Road/I-5 Interchange should be reserved
for tourists and highway oriented commercial use."

5 While the comprehensive plan contains no land use map
6 designation for petitioner's property, the city concluded,
7 based upon the above quoted portion of the plan, that
8 petitioner's property is located in what should be zoned a
9 commercial tourist area. The commercial tourist designation
10 under the city's newly adopted zoning ordinance specifies as
11 permitted uses such things as hotels, service stations, gift
12 shops, restaurants, bars, and other uses that the planning
13 commission finds are similar and compatible to such uses.
14 Conditional uses within the commercial tourist zone include
15 such uses as grocery stores, government structures,
16 professional offices and commercial buildings over 35 feet in
17 height. The city concluded that the retail lumber yard is
18 neither a permitted nor a conditional use within the commercial
19 tourist designation. As such, the city concluded that
20 petitioner's request to construct a retail lumber yard and
21 hardware outlet could not be allowed under either the land use
22 designation existing on the property at the time petitioner
23 made its application or under the newly adopted comprehensive
24 plan and zoning ordinance.

1 OPINION

2 Petitioner sets forth numerous assignments of error. We
3 need address, however, only the following issues involved in
4 petitioner's assignments:

5 (1) Whether the city's "new" zoning ordinance
6 and comprehensive plan or its "old" zoning ordinance
7 was applicable.

8 (2) Whether the city made adequate findings in
9 support of its decision.

10 We conclude, for reasons which follow, that the city's "old"
11 ordinance applied but that the city's findings were inadequate
12 to justify denial.

13 The first issue presented by this appeal is whether the new
14 comprehensive plan and zoning ordinance text for the City of
15 Phoenix or the old zoning ordinance and in particular Section
16 57 controls the city's denial of petitioner's conditional use
17 request. If the comprehensive plan and zoning text adopted by
18 the City of Phoenix in September of 1980 were the applicable
19 land use standards governing consideration of petitioner's
20 conditional use request, the city concedes that the findings
21 are inadequate with respect to these standards and that the
22 decision should be remanded to the city for further
23 proceedings. On the other hand, the city argues that if
24 Section 57 of the "old" ordinance were applicable the city has
25 complied with the relevant legal standards governing
26 petitioner's request.

 We conclude that Section 57 of the "old" ordinance contains

1 the applicable legal criteria governing the City of Phoenix's
2 approval of petitioner's conditional use request. The new
3 zoning ordinance simply establishes two zoning districts. The
4 city has not as yet adopted a zoning map applying its zoning
5 district to any property within the city nor has the city tied
6 its new zoning districts to its old zoning map.³ The "new"
7 zoning ordinance text for the City of Phoenix as well as the
8 comprehensive plan leave open the possibility that petitioner's
9 property could ultimately be rezoned either commercial tourist,
10 under which petitioner's request would not be allowed, or
11 highway oriented general commercial, under which petitioner
12 argues its conditional use request should be granted. Until
13 the City of Phoenix rezones petitioner's property, (i.e., when
14 it adopts a zoning map) the city cannot resolve the issue of
15 whether petitioner's requested use is permissible.⁴

16 Unlike the city's "new" zoning ordinance, however, we
17 believe it was the intent of the City of Phoenix that its
18 comprehensive plan adopted in September of 1980 was to have
19 effect immediately as to land within the City of Phoenix.
20 Under the commercial land use section of the plan is found the
21 following:

22 "Present commercial land use can be identified in
23 two classifications: (1) General Commercial and (2)
24 Tourist Commercial. These classifications are located
25 in relation to the demands of each particular
26 category. The General Commercial use is primarily
found striped along south Pacific Highway, while the
tourist commercial uses are beginning to emerge at the
Fern Valley Road/I-5 Interchange.

1 "As land use applications, these commercial
2 patterns are expected to continue. The area at the
3 Fern Valley Road/I-5 Interchange should be reserved
4 for tourist and highway-oriented commercial use."
5 (Emphasis added).

6 Petitioner's property is located in the area of the Fern Valley
7 Road/I-5 Interchange. We think the comprehensive plan intended
8 that this area, from the moment of the plan's passage, "should
9 be reserved for tourist and highway-oriented commercial use."

10 The effect of deciding that the "new" comprehensive plan
11 for the City of Phoenix must be considered in this conditional
12 use request is not particularly significant in the context of
13 this case, however. Petitioner argues that its conditional use
14 request should be allowed because it is a highway oriented
15 commercial use and thus, consistent with the comprehensive
16 plan. We express no opinion as to whether petitioner is
17 correct that its conditional use request is a highway oriented
18 commercial use. We do agree, however, that it must show its
19 conditional use request is a highway oriented commercial use to
20 be consistent with the comprehensive plan.

21 In summary, we conclude that the "new" comprehensive plan
22 is applicable but the new zoning districts established under
23 the "new" zoning ordinance are not applicable at this time.
24 There appears to have been no intent on the part of the city
25 that the new zoning districts be applicable and there exists no
26 means in the absence of a zoning map applying the districts to
27 specific parcels by which the districts could be made
28 applicable to decisions such as the one involved in this

1 case.⁵

2 Having decided that Section 57 of the city's "old"
3 ordinance was applicable to petitioner's conditional use
4 request, we must address whether the city properly applied the
5 standards contained in that ordinance. For reasons which
6 follow, we conclude that the city did not properly apply the
7 criteria in Section 57.

8 City of Phoenix Ordinance Section 57 sets forth within the
9 commercial zoning district a list of some fifty-six permitted
10 uses. The first fifty-five listed uses are relatively specific
11 and include such uses as amusement enterprises, service
12 stations, hardware stores, hotels, delicatessens, shoe repair
13 shops and pawn shops. The 56th "permitted use" is as follows:

14 "Other retail stores and shops similar to those
15 listed above where permitted by the City Council after
16 written application and approval of the City Planning
17 Commission, also uses customarily incidental to any of
18 the above uses, including the usual accessory
19 buildings and storage garage for the use of the
20 patrons; provided, however, that the uses permitted in
21 this district shall include no manufacturing,
22 compounding, assembly, processing or treatment of
23 products other than those clearly incidental and
24 essential to a retail store or business and sold at
25 retail on the premises. No use, manufacturing,
26 compounding, assembly, processing or treatment of
products shall be permitted that are objectionable by
reason or (sic) odor, dust, noise, vibration or
similar objections."

22 The city found that while Section 57 permitted a hardware
23 store it did not allow as a permitted use a combination
24 hardware store and lumber yard. The city said:

25 "The question of whether or not to permit a
26 lumber yard or lumber retail outlet at this area

1 involves a question of public need and adverse impact
2 on the surrounding property."

3 The city then found that there was no public need demonstrated
4 for the proposed use and that there would be an adverse impact
5 on the surrounding property caused by a high volume of
6 traffic. The petitioner's property did not have access onto a
7 public road and was adjacent to a mobile home recreation
8 vehicle park. The high volume of traffic and limited access to
9 the site would, according to the city's finding, add to the
10 "congestion and adverse impact upon the adjacent land."

11 There is nothing to which we have been directed in the
12 applicable portions of the city's ordinance which requires a
13 finding that there is a public need for the use and that there
14 will be little or no adverse impact on surrounding property.
15 Adverse impact on surrounding property may be relevant to the
16 extent the adverse impact may involve "odor, dust, noise,
17 vibration or similar objections." But the city's finding
18 relating to adverse impact dealt only with the traffic volume
19 generated by petitioner's proposed use and did not tie traffic
20 volume to "odor, dust, noise, vibration or similar objections."

21 Thus, to the extent the City of Phoenix denied petitioner's
22 conditional use request on the basis that it found no public
23 need for the proposed use, we believe the city erred because it
24 applied a criterion not expressed or implied in its zoning
25 ordinance and not required by any other provisions of law of
26 which we are aware. See ORS 215.416(5).⁶ To the extent the

1 city attempted to rely upon adverse impact on surrounding
2 property caused by petitioner's proposed use, we believe the
3 city's finding is inadequate because the finding is not
4 specifically tied to the kinds of adverse impacts set forth in
5 the city's ordinance.

6 The City of Phoenix made no finding as to whether
7 petitioner's proposed use was "similar" to those listed as
8 permitted uses in the zoning ordinance. The city skipped over
9 this finding apparently because it felt it unnecessary in view
10 of its findings concerning public need and adverse impact. We
11 agree with the city that had the city properly found the
12 proposed use would adversely impact surrounding properties by
13 virtue of such things as noise, dust, odor, or vibration, the
14 city would not have been required to consider whether the
15 proposed use was similar to those expressly permitted in the
16 zoning ordinance. In the absence, however, of a proper finding
17 of adverse impact based upon odor, dust, noise or vibration,
18 the city could only deny petitioner's requested use on the
19 basis that it was not similar to those listed as permitted
20 uses. Having made no such determination in this case, we must
21 remand this matter to the city for additional findings.

22 For the foregoing reasons, the decision of the City of
23 Phoenix denying petitioner's conditional use request is
24 remanded to the city for further proceedings not inconsistent
25 with this opinion.

FOOTNOTES

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Petitioner says it is unclear as to the exact nature of the land use decision made by the City of Phoenix. Respondent, however, characterizes the decision as a denial of a request for a conditional use and we will so treat it for purposes of this opinion.

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The reason for the dual analysis was apparently because the city was unsure which ordinance applied to the conditional use request. The application was made before adoption of the new zoning ordinance. The new zoning ordinance did not have any maps adopted along with it applying the new zoning districts to specific parcels of land within the city. Thus, the city was apparently unsure whether the new ordinance, absent any implementing maps, was even effective and, if so, whether it should be applied to petitioner's request.

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We do not mean to imply that the city must adopt a zoning map for the entire city before its new zoning ordinance can be applied to any land within the city.

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Moreover, the absence of a zoning map applying the new zoning districts to property within the city leads us to believe the city did not intend to replace the "old" zoning ordinance with the "new." See Carmel Estates v LCDC, 51 Or App 435, ___ P2d ___ (1981).

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The alternative to our conclusion with respect to the applicability of the City of Phoenix's "new" zoning ordinance is that the "new" zoning ordinance replace the "old" ordinance. The effect of this, however, would be for land such as petitioner's to be presently unzoned. This means that there would be no guidelines, save the general guidelines contained in the comprehensive plan, which would govern and set forth the procedures for determining permissible land uses.

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6 ORS 215.416(5) provides:

"Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."