BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TEXACO, INC., Petitioner, vs. KING CITY, Respondent.	LUBA No. 86-070 FINAL OPINION AND ORDER

Appeal from King City.

Donald R. Stark and Barry L. Adamson, Portland, filed the petition for review. With them on the brief were Williams, Fredrickson, Stark and Weisensee, P.C. Barry L. Adamson argued on behalf of Petitioners.

Jeffrey J. Bennett, Hillsboro, filed the response brief and argued on behalf of Respondent. With him on the brief were Schwenn, Bradly, Batchelor, Brisbee and Stockton.

KRESSEL, Referee; DuBAY, Chief Referee; Bagg, Referee; participated in the decision.

AFFIRMED 01/13/87

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

Opinion by Kressel.

NATURE OF THE DECISION

Respondent denied petitioner's application for a building permit. The permit would allow construction of a Texaco "Series 2000 Service Center."

FACTS

King City is incorporated as a retirement community.[1] The property in question is near the main entrance to the city and abuts US Highway 99-W. It is zoned "Planned Residential - Commercial (Limited)" (hereinafter "Limited Commercial"), as are the other properties in the immediate vicinity. An Arco service station abuts the property to the north. Across the street to the south are an office building and a shopping center. King City residences are nearby.

Texaco applied for a building permit to erect a "Series 2000 Service Center" on the property late in 1985. According to the application, the center integrates "...fueling service, limited commercial service, carwash service and clean-up facilities onto a single site." Record at 135. These components are more specifically described as follows:

"1. Covered Fueling Facilities

> Four 4x16 feet fueling island with four products each are proposed for this project. The fueling islands will be covered with a 40x108 feet canopy, offering full weather protection. The canopy is the primary architectural element of the development, and extends on both sides of the Cashier/Food Mart Facility.

"2. Cashier/Food Mart Facility

A Central cashier/food mart building contains a total of 1012 square feet of usable area, and accommodates a cashier stand; small market containing such items as gifts, delicatessen and other grocery selections, newspapers and books, non-prescription drugs, and variety goods; rest rooms; and storage areas. The food mart would occupy about 500 square feet.

"3. Car Wash Facility

An 18x31 feet automated car wash facility is proposed for the northeast corner of the site. The building is fully insulated for sound reduction purposes, and does not include a dryer. The car wash facility will be open to the public, and will not require a fuel purchase. A 7x14 feet stock room is proposed adjacent to the car wash facility. The entire car wash/stock room structure is surrounded by at least 10 feet of landscaped area.

"4. Clean-Up Facility

An air, water and vacuum island is proposed at the western edge of the site, separated from SW 116th Avenue by 6.0 feet of landscaped area." Record at 135.

Section 400(g) of the controlling ordinance lists the uses allowed in the Limited Commercial Zone. In pertinent part, the ordinance reads:

* * *

"No building, structure or land shall be used, and none erected hereafter, except for the following uses, unless by specific request to and approval of the City Council:

* * *

"Automobile service station

* * *

"Delicatessen store

* * *

"Drug store or pharmacy

* * *

"Grocery store or supermarket

* * *

"Variety store." Section 400(g), Ordinance No. 27[2]

The ordinance does not define any of the quoted terms.

The building permit application was referred to in Respondent's Architectural Review Committee for comment on whether the application satisfied zoning requirements. The committee did not take formal action. However, the minutes of its April 30, 1986 meeting conclude:

> "After much discussion amongst the committee and visitors, the chairman expressed an opinion that use of the land in question for a service station with gasoline sales, convenience store and car wash would be no asset to King City." Record at 95.

The King City Council held hearings on the permit request in July and August, 1986. At the hearings, Texaco argued that its proposal consists of several components, each of which is an allowed use, or is accessory to an allowed use[3] in the Limited Commercial Zone. However, the Council focused principally on whether the proposal is "an automobile service station," answering that question in the negative. The permit was accordingly denied.

The city's order stresses that the proposal does not offer many of the services conventionally associated with an automobile service station. The order states:

> "Texaco does not propose or intend to provide service for vehicles; to sell or service tires, batteries, auto accessories and replacement items; or to perform minor automotive maintenance and repair. In short, it does not propose to sell service. Rather it intends to sell gasoline, car washes and convenience items typically found in a 7-11 or Plaid Pantry Market." Record at 6.

The order characterizes "automobile service station" as an ambiguous term and interprets it to mean a facility that provides "benefits to motorists that go beyond the sale of gasoline and clean cars." Record at 6-7. The order adds that, at a minimum, an automobile service station should also (1) sell petroleum products, (2) sell and service tires, batteries, automotive accessories and replacement items, (3) provide minor automotive maintenance and repair services and (4) supply other incidental customer services and products.[4] Since the proposal does not offer these services, the city concludes that it cannot be classified as an "automobile service station" under the zoning ordinance.

The final order also rejects Texaco's claim that the proposal is permitted under the similar use provisions in Section 400(g). In pertenent part, the ordinance allows:

> "Other similar services, or retail use, if appoved by the City Council, and subject to the same conditions, which will benefit the neighborhood and not be objectionable to nearby property because of noise or other objectionable conditions." (Emphasis added)

The order concludes that neither the "benefit to the neighborhood" nor the "objectionable conditions" standards would be met.

FIRST ASSIGNMENT OF ERROR

Petitioner assigns error to the city's construction of Section 400(g) of the ordinance. As it argued before the city council, petitioner argues here that each of the components of the proposed Service Center is an allowed use or is accessory

to an allowed use in the Limited Commercial District. Thus, petitioner claims its fueling facility is an "automobile service station," the car wash and clean-up/maintenance facilities are accessories thereto, and the convenience market is either a "Delicatessen store," a "Drug store or Pharmacy," a "Grocery store or Supermarket," a "Variety store," or a combination of those uses. Alternatively, petitioner insists the proposal is an "automobile service station" (because of the predominance of the fueling facility) and that the additional components are subsidiary to that use.

The crux of petitioner's claim is that "automobile service station" is an unambiguous term that clearly includes the fueling station and related components of the proposed facility. The city disagrees, maintaining that "automobile service station" is ambiguous and that the city's interpretation is reasonable. We find the city's position persuasive.

A term is ambiguous when it admits of two or more meanings or can be understood in more than one way. Websters Third International Dictionary (1961). Like respondent, we find the term "automobile service station" to be ambiguous.

Petitioner's suggestion that the essential component of an automobile service station is the retail servicing of automobiles with gasoline and oil is plausible. The interpretation derives some support from Webster's Third International Dictionary (1961), which defines "service

station" as "1. filling station 2. a depot or place at which some service is offered." The dictionary defines "Filling station" as "a retail station for servicing automobiles and other motor vehicles esp. with gasoline and oil." Id.

Although not directly on point, the Pennsylvania case of V.S.H. Realty, Inc., v. Zoning Hearing Board of Sharon Hill, 27 Pa Cmwlth 32, 365 A2d 670 (1976) also gives some support to petitioner. In that case, the court held that a portion of a proposed convenience store consisting of self-service gasoline pumps should be classified as a "motor vehicle service station" rather than as a "retail use" under the local ordinance. As a result, the service station was subject to more rigorous siting requirements than the retail market.

However, petitioner's interpretation of respondent's ordinance is not the only reasonable interpretation. The city contends that a greater emphasis on "service" in "automobile service station" is warranted. Respondent contends that this emphasis is consistent with the purpose of the Limited Commercial district, which is to "comprise those retail stores, shops and services that would render a service" to this planned retirement community. Section 400(a), Ordinance No. 27. See also Section 400(g) (allowing uses similar to the listed uses in the Limited Commercial District if they "benefit the neighborhood" and are not objectionable to nearby property) Thus, the city argues that Texaco's proposal may be a fueling station, but it falls short of being an "automobile service

station" under the zoning ordinance. The city reads the term to include the services especially needed in a retirement community (e.g., minor auto repair, sales and service of tires, batteries and auto accessories in addition to gasoline). The city adds that it has interpreted "automobile service station" in this manner in a recent application (denying a proposal to convert the "full service" ARCO station adjacent to Texaco's site into a mini-mart/filling station).

We note that the city's interpretation is consistent with the dictionary definition relied on by petitioner. The definition is itself susceptible to more than a single interpretation or emphasis. The city emphasizes the general reference to automobile services in the definition, while Texaco directs our attention to the particular reference to gasoline and oil service.

The city's interpretation is reasonable and we uphold it. See Fisher v. Gresham, 69 Or App 411, 685 P2d 486 (1984); Allius v. Marion County, 64 Or App 478, 481, 668 P2d 1242 (1983); Cascade Broadcasting Corp. v. Groener, 51 Or App 533, 626 P2d 386 (1981). Where an ordinance can be reasonably interpreted in several ways, the interpretation by the body responsible for enacting it should control, especially where, as here, the interpretation is consistent with the ordinance as a whole.[5] Cf. 1000 Friends of Oregon v. LCDC, 72 Or App 443, 446, 696 P2d 550 (1984) rev den 299 Or 584 (challenger of LCDC order and LCDC each offered colorable interpretations of

statutory scheme and goal requirements; court upheld agency's interpretation).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner withdrew this assignment of error at oral argument. Therefore, we do not address it.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

As noted, the city council considered whether the proposal was similar to the retail services and uses specifically enumerated in Section 400, concluding that it was not. In so doing, the city applied the provision of Section 400(g) allowing:

> "Other similar services, or retail use, if appoved by the City Council, and subject to the same conditions, which will benefit the neighborhood and not be objectionable to nearby property because of noise or other objectionable conditions." (Emphasis added)

The final order notes that Texaco's principal selling point is that the Series 2000 Center offers convenience. However, the order responds by stating:

> "Convenience has a completely different connotation to a retirement community than to other neighborhoods. Goods and services can be purchased during more standard business hours more easily by retired people than by the general population. Since all goods to be offered at the center are available elsewhere in King City and the surrounding commercial centers, the benefit of this facility to the citizens of King City would be minor at best." Record at 7.

The order then states that "alternatively" the applicant must show that the use will not create objectionable conditions, concluding that the showing was not made in this

instance.

In these assignments of error, petitioner argues that (1) the city has interpreted the approval standards in the quoted provision to be alternative, rather than independent standards and (2) the finding that the facility will provide "minor benefits at best" means the proposal satisfies the benefit standard and therefore must be approved.

The city concedes that its final order treats the standards in the "similar use" provision as alternatives, but claims that it was error to do so. The zoning text clearly requires satisfaction of both standards, the city argues, and petitioner should not be allowed to circumvent the text by relying on a misstatement in the final order. We agree. The text of the ordinance, not the city's description of it in the order, is controlling. The standards in the zoning text are worded in the conjunctive.

We also find untenable petitioner's claim that the city's finding of a "minor benefit at best" amounts to an admission that the benefit standard is satisfied. We believe the "similar use" provision gives the city latitude in deciding which types of unlisted uses should be allowed in the Limited Commercial District. A similar use which offers only "minor benefits" need not be allowed. Petitioner states no reason why respondent is precluded from denying the permit on grounds the Texaco facility does not offer sufficient benefit to the retirement community. We believe the city could reject the

"similar use" claim for the same reason it rejected the claim that the facility is an "automobile service station," i.e., it does not provide the services needed in a retirement community but instead caters to the "convenience store" market. The findings clearly argue that respondent's citizens prefer service to "convenience."

In summary, we do not believe the city intended to rule that the proposal satisfied the benefit standard. Petitioner has not demonstrated that it was entitled to such a ruling.

The third and fourth assignments of error are denied.

FIFTH and SIXTH ASSIGNMENTS OF ERROR

As noted, the city's order also states that the proposal does not qualify as a use similar to those listed in Section 400(g) because it will create "objectionable conditions" (the second standard for a "similar use"). In these assignments of error, petitioner argues that the findings supporting this determination are inadequate.

As a preliminary matter, we note that petitioner would not be entitled to relief even if it prevailed in these assignments of error because, as we have already held, the city also found the proposal would not benefit the neighborhood. Since the proposal could not be approved unless it satisfied both standards for a "similar use," and since petitioner has not challenged the findings or supporting evidence concerning the benefit-to-the-neighborhood standard, we would affirm the decision regardless of the adequacy of the findings about

objectionable conditions. A decision denying a proposed development must be upheld if the development does not meet all applicable criteria. Heilman v. City of Roseburg, 39 Or App 71, 77, 591 P2d 390 (1979); Marracci v. City of Scappoose, 26 Or App 131, 552 P2d 552 (1976).

Notwithstanding the preceding caveat, we address the challenge to the findings below, assuming for argument's sake that the standards for a "similar use" in the Limited Commercial District are alternatives, as petitioner argues.

The findings refer to two "objectionable conditions:" 1) traffic noise and 2) public safety problems associated with operation of the Texaco facility on a 24 hour a day basis. With respect to noise, the findings note that (1) Texaco's property abuts a highway and is at the entrance to King City, (2) Texaco plans to operate the station 24 hours per day and to sell beer and wine at the convenience market and (3) the site is only 180 feet from the nearest residence and other residences are nearby. The order then states:

> "These residents now live near a shopping area whose businesses close at 9:00 p.m. or earlier. Texaco's planned extended hours of operation will in itself create additional traffic noise and other activity these residents find objectionable. Other facilities of this kind have experienced problems due to increased lighting, late night use, and potential safety problems with patrons walking between fueling autos to pay for their gasoline." Record at 7-8.

The findings also state that the extended hours of this facility will create an additional problem:

"The critical 'objectionable condition' relates to

> King City's lack of adequate police protection. Since the existing commercial center has standard business hours, the current arrangement of part-time police protection with emergency back-up arrangements is adequate. To have one business use with extended hours of operation would create the need for more police protection, which the City is not equipped for and has not budgeted. With the Texaco center open after 9:00 p.m., the closed stores may become attractions for vandalism or other problems, as may nearby homes and the golf course." Record at 8.

Petitioner charges that the findings are inadequate because they do not explain what evidence "addresses traffic noise or how any evidence relates to the criterion in the Ordinance... referring to 'noise or other objectionable conditions.'" Petition at 28-29. However, we are unaware of any legal requirement that findings of fact must include references to the evidence underlying the findings. Moreover, in our view, the findings adequately state the facts relied on and explain the justification for the determination that the use will create objectionable conditions. The findings are not mere conclusions. We find them adequate under ORS 227.173(2). See also, Lee v. City of Portland, 57 Or App 798, 803-04, 646 P2d 662 (1982). Whether the findings are supported by substantial evidence in the record is a separate question raised in the next assignments of error.

The fifth and sixth assignments of error are denied.

SEVENTH AND NINTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner claims the previously discussed findings are not supported by substantial evidence in the record. Petitioner claims that the only

evidence pertinent to the noise issue was provided by its own expert and that the findings concerning late night hours and the security problems associated with them are wholly based on conjecture.

The city answers by directing our attention to testimony by King City residents who expressed concern that Texaco's extended hours would create noise and other problems at night. The city also cites the testimony of the owner of the King City Arco station, who described the complaints generated by a mini-mart/gas station in another location. However, none of the evidence cited by respondent addresses a point that is critical to the determination that the proposal will create objectionable conditions, viz., that Texaco "...plans to operate the station 24 hours per day...." Record at 6.

The record consists of more than two hundred pages. We will not go over this material page by page in search of the necessary evidence. We are aware of a staff report stating the facility would be open 24 hours per day. We also know that during the July 16, 1986 hearing before the City Council, Texaco's attorney stated "(1) the market would determine the facility's hours of operation and (2) Texaco would abide by any ordinance restricting hours of operation." Transcript of July 16, 1986 hearing at 32-33. However, we have no confidence that this is the only pertinent evidence.

Under the circumstances, we must conclude that the findings concerning objectionable conditions are not supported by

substantial evidence. However, this conclusion does not warrant a remand of the decision. As already noted, the city's refusal to consider the facility to be similar to a listed use is based on another ground also (the "benefit to the neighborhood" standard). That ground is sufficient to sustain the decision. Heilman v. City of Roseburg, supra.

EIGHTH ASSIGNMENT OF ERROR

The city found that Texaco's facility would over-burden the city's police protection services, which are now part-time. the citizens. Petitioner contends that this is not a proper basis for denial of a permit because

> "To the extent that there exists inadequate police protection, that is a problem solely of Respondent's own making and one over which Respondent possesses exclusive control. It is a budget problem, not a land use issue." Petition at 34-35 (emphasis in original; citations omitted).

We believe it was reasonable for the city to interpret the "objectionable conditions" standard to include consideration of the demands the use would impose on public safety services. The distinction petitioner makes between budget problems and land use issues is difficult to appreciate. Land use decisions are frequently (and justifiably) made based partly on consideration of the adequacy of public facilities and services. Fiscal constraints are logically part of any such consideration.

The eighth assignment of error is denied.

The city's decision is affirmed.

FOOTNOTES

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1 The city advises that its acknowledged comprehensive plan seeks to "maintain a planned residential/recreational community desired and needed by many people in the mature segment of the population." Respondent's Brief at 8.

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2 Under the ordinance, allowed uses in the Limited Commercial District are subject to certain design, landscaping and lighting standards (Section 400(a)-(f)) and to additional standards governing access and off street parking and loading (Section 400-1 and 400-2). These standards do not come into play in this appeal.

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3 We find no reference in Ordinance No. 27 to the term "accessory use."

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4 This list was taken from another jurisdiction's zoning ordinance.

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5 Petitioner relies on City of Hillsboro v. Housing Dev. Corp. of Washington County, 61 Or App 484, 657 P2d 726 (1983); City of Portland v. Carriage Inn, 67 Or App 44, 676 P2d 943 (1984) and West Hills and Island Neighbors v. Multnomah County, 68 Or App 782, 683 P2d 1032 (1984) rev den 298 Or 150 (1984).

The first two cases involve terms that were unambiguously defined in the zoning ordinance. King City's ordinance does not define "automobile service station" and we believe the city's interpretation of the term is reasonable. The Multnomah County case also involved terms that were unambiguous.