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

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LAVERN and DELLA BJERK,)
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Petitioners,)
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vs.)
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DESCHUTES COUNTY,)
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Respondent,)
)
and)
)
PATRICK and REBECCA HODGE,)
DIRK and JUDI VAN HOUWELING,)
)
Intervenors-)
Respondent.)

LUBA No. 88-067

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

LaVern and Della Bjerck, Puyallup, Washington, filed the petition for review. LaVern Bjerck argued on his own behalf.

No appearance by Respondent Deschutes County.

HOLSTUN, Chief Referee; BAGG, Referee; SHERTON, Referee, participated in this decision.

AFFIRMED 11/22/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal Deschutes County's denial of their
4 application for a conditional use permit to allow a bed and
5 breakfast facility. The bed and breakfast would be in a
6 dwelling to be constructed on an 8 acre parcel in the Rural
7 Residential (RR-10) and Landscape Management Combining (LM)
8 zones. The dwelling would be occupied by petitioners' family
9 and would include two rooms to be utilized as a bed and
10 breakfast. A maximum of four overnight visitors would be
11 allowed.

12 FACTS

13 The Deschutes County Zoning Ordinance (DCZO) does not
14 expressly provide for bed and breakfast facilities.
15 Petitioners seek approval of their proposal under code
16 provisions allowing "home occupations." Home occupations are
17 allowed in the RR-10 and LM zones as a conditional use. The
18 code defines home occupation as follows:

19 "Any lawful occupation carried on by a resident of a
20 dwelling as an accessory use within the same dwelling,
21 or in an accessory building on the same or adjacent
22 property, with limited retail sales or sales accessory
23 to service, and employing no full-time employees
except members of the immediate family, and not
affecting the external appearance of the premises in a
way inconsistent with its use as a residence." DCZO
Section 1.030; Record 23.

24 In addition, the code subjects home occupations to a number of
25 limitations, including the following:

26 "The home occupation is to be secondary to the main

1 use of the property or the residence and shall be
2 conducted only by the resident of such dwelling or
3 immediate family members, within the same dwelling or
4 in an accessory building on the same or adjacent
5 property." DCZO Section 8.050(7); Record 24.

6 The code defines "accessory use" as follows:

7 "A use of a structure incidental and subordinate to
8 the main use of the property and located on the same
9 lot as the main use." DCZO Section 1.030; Record 23.

10 On February 27, 1988, petitioners submitted an application
11 for approval of their proposed residence and bed and breakfast
12 facility. Following a hearing on May 3, 1988, the county
13 hearings officer denied the application. The board of
14 commissioners held a hearing on petitioners' appeal of the
15 hearings officer's decision on July 14, 1988 and at a meeting
16 on July 20, 1988 voted to uphold the hearings officer's
17 decision denying the application. Petitioners were given
18 written notice of the board of commissioners' decision by
19 letter dated July 27, 1988.

20 MOTION TO INTERVENE

21 Patrick and Rebecca Hodge and Dirk and Judi Van Houweling
22 moved to intervene in this proceeding on the side of Respondent
23 Deschutes County. There is no objection to the intervention
24 and it is allowed.

25 INTERVENORS-RESPONDENT'S APPLICATION FOR EXTENSION OF TIME
26 AND MOTION TO PERMIT FILING OF BRIEF

Petitioners filed their notice of intent to appeal on
August 15, 1988. Intervenors-respondent filed a motion to
intervene on September 1, 1988.¹ The record was received by

1 LUBA on September 6, 1988 and LUBA advised the parties by
2 letter on that date that under LUBA's rules

3 "The petition for review is due twenty-one days after
4 receipt of the record. The respondent's brief is due
4 forty-two days after receipt of the record."

5 Petitioners filed the petition for review by mail on
6 September 22, 1988. On October 3, 1988, twenty-seven days
7 after the record was filed and eleven days after the petition
8 for review was filed, the county submitted a supplement to the
9 record. The supplement to the record was a nine page verbatim
10 transcript of the July 20, 1988 board of county commissioners'
11 meeting.²

12 LUBA initiated a conference call on October 4, 1988, with
13 all parties, including intervenors-respondent, to determine
14 whether petitioners objected to the county's supplementing the
15 record after their petition for review had been filed.

16 Petitioner LaVern Bjerk stated he had listened to the tape of
17 the hearing and reviewed the transcript. He stated the
18 transcript was accurate and he had no objection to including
19 the transcript in the record. The city and
20 intervenors-respondent also stated they had no objection to
21 including the transcript.³ LUBA advised the parties that it
22 would maintain the current briefing schedule.

23 On October 14, 1988, intervenors-respondent advised LUBA
24 they would be seeking an extension of time in which to file
25 their brief.⁴ Intervenors-respondent attempted,
26 unsuccessfully, to obtain a stipulation for an extension of

1 time in which to file their brief. On October 20, two days
2 after the date the intervenors-respondent's brief was due to be
3 filed, intervenors-respondent filed their application for a
4 twenty-one day extension of time in which to file their brief.
5 Intervenors-respondent argued in their application for an
6 extension of time that the petition for review violated several
7 requirements specified in OAR 661-10-030(3), making preparation
8 of the intervenors-respondent's brief more difficult.⁵
9 Intervenors-respondent also noted the county would not be
10 filing a brief and the attorney for intervenors-respondent was
11 new to the case and was not the same attorney who represented
12 intervenors-respondent during local proceedings.

13 During our conference with the parties on October 24, we
14 denied intervenors-respondent's application for additional time
15 in which to file their brief and motion to permit filing of the
16 brief.⁶ Under our rules, failure to file a timely notice of
17 intent to appeal or petition for review will result in
18 dismissal of the appeal. OAR 661-10-015(1); OAR
19 661-10-030(1). Under OAR 661-10-005 we explicitly provide that
20 violations of these timelines are not viewed by LUBA as
21 technical violations. However, failure to comply with OAR
22 661-10-035(1) and OAR 661-10-050(3)(b) concerning the deadline
23 to file respondent's and intervenors-respondent's brief can be
24 a technical violation which we will overlook, provided the
25 failure to file a timely brief does not affect "the substantial
26 rights of parties," OAR 661-10-005, and does not interfere with

1 the overriding legislative policy "that time is of the essence
2 in reaching a final decision in matters involving land * * *."
3 ORS 197.805.

4 In this case, intervenors-respondent's request would
5 violate the substantial rights of petitioners or delay our
6 final decision in this matter or both. If
7 intervenors-respondent's request were granted, we would have to
8 allow reasonable time after November 8 for petitioners to
9 review the intervenors-respondent's brief before oral
10 argument. Otherwise, we believe the substantial rights of
11 petitioners would be violated. We are required to issue our
12 final decision before November 22, 1988. The request to delay
13 filing respondent's brief would result in a shortened time
14 period for oral argument and drafting of our final opinion, and
15 ultimately would likely delay issuance of our final opinion.
16 Such delay is not warranted in these circumstances. We will
17 not delay this appeal to afford intervenors-respondent more
18 time to prepare and file their brief. Although it is true the
19 petition for review does not comply in all respects with our
20 rules, we believe intervenors-respondent could have noted those
21 defects and responded to the substance of petitioners' argument
22 within the time period provided in our rules.

23 Finally, intervenors-respondent's motion to permit filing
24 of brief argues the date the supplemental transcript was
25 received by LUBA, October 3, 1988, was the date the record was
26 received for briefing schedule purposes. On November 14, 1988,

1 intervenors-respondent filed their respondent's brief.
2 Intervenor-respondent argue the brief filed on November 14,
3 1988 was filed within forty-two days of October 3, 1988 and
4 that intervenor-respondent's brief therefore was timely filed
5 under OAR 661-10-050(3)(b).

6 As noted supra, the Board initiated a conference on October
7 4, 1988 to discuss the effect of the supplemental transcript.
8 It is true that conference was primarily concerned with whether
9 petitioners wanted additional time to respond to the
10 supplemental transcript filed after the petition for review.
11 However, it was sufficiently clear during that conference that
12 LUBA, in the absence of any objection by petitioners or the
13 other parties, intended to adhere to the briefing schedule
14 based on the September 6 receipt of the record. If
15 intervenor-respondent believed they required forty-two days
16 from the date the nine page transcript was submitted by the
17 county, the time to make that request was during the October 4
18 conference with the parties, not one day before oral argument
19 and not eight days before the final opinion is due. We do not
20 consider intervenor-respondent's brief in reaching our
21 decision.

22 ASSIGNMENT OF ERROR

23 Petitioners' combined assignment of error and argument, in
24 its entirety, is as follows:

25 "Dechutes [sic] county legal counsel does not support
26 the hearing officer, Mr. Edward P. Fitch's decision to
deny the conditional use permit. We believe Mr. Fitch

1 was in error and made an emotional judgement instead
2 of a legal one. Secondly, two of the DECHUTES [sic]
3 COUNTY COMMISSIONERS were for overturning the Hearings
4 officer finding, and the other said he was going
5 against his legal counsels [sic] advice, but was not
6 going to change his mind. Commissioner Maudlins'
7 [sic] words "Legal counsel tells me I'm Nuts," [sic]
8 Then when Commissioner Throop saw that he could vote
9 his real feeling and change the outcome, he did so.
10 At this point I'm not sure if our rights were violated
11 by that or not. That may come up later, but not at
12 this forum. After Commisioner [sic] Throop changed
13 his stand on the issue, Mr. Maudlin looked at us and
14 said, "now I think you have grounds for an appeal."
15 We Agree . . ." Petition for Review 6.

9 The county's decision (Record 8-9) denies the conditional
10 use request and adopts the hearings officer's findings together
11 with the following finding:

12 "Based upon the fact that the structure is to be built
13 for the express purpose of engaging in room rental
14 activities as a bed and breakfast facility, the
15 proposed home occupation is not secondary to the main
16 use of the property as a residence. Therefore, the
17 applicant has failed to meet their burden of proof."
18 Record 9.

16 The above finding concludes the proposed bed and breakfast
17 facility would not be secondary to the main use of the
18 property; and, therefore, is not an accessory use and not a
19 home occupation.⁷

20 Petitioners apparently misunderstood the role LUBA performs
21 in reviewing local land use decisions. We rely on petitioners
22 to identify specifically how they believe the county
23 commissioners erred in denying their requested permit. In
24 part, because petitioners failed to comply with OAR
25 661-10-030(3)(d) and list specific assignments of error, we are
26 unable to determine precisely the error or errors petitioners

1 allege. See, Freels v. Wallowa County, (LUBA No. 88-046,
2 November 14, 1988); Schoonover v. Klamath County, ____ Or
3 LUBA ____ (LUBA No. 88-024, August 3, 1988); Standard Insurance,
4 Company v. Washington County, ____ Or LUBA ____ (LUBA No. 87-020,
5 September 1, 1987).

6 The fact there are memoranda in the record by county
7 counsel concluding the proposal qualifies as a home occupation,
8 does not necessarily mean the board of county commissioners'
9 contrary interpretation is erroneous. To the extent the above
10 quoted assignment of error and argument can be read to
11 challenge the board of commissioners' interpretation,
12 petitioners offer no explanation for why they believe county
13 counsel's interpretation was correct and the board of county
14 commissioners' interpretationn was incorrect. We will not
15 develop petitioners' legal theory for them. Doughtery v.
16 Tillamook County, 12 Or LUBA 20, 33 (1984); Deschutes
17 Development Company v. Deschutes County, 5 Or LUBA 218, 220
18 (1982).

19 However, even if the board of commissioners' conclusion
20 that the proposed bed and breakfast did not constitute a home
21 occupation was erroneous, the board of commissioners based its
22 decision on other grounds as well. To challenge a denial of
23 land use approval successfully, applicants must demonstrate
24 that all the grounds stated for denial are erroneous. See,
25 McCoy v. Marion County, ____ Or LUBA ____ (LUBA No. 87-063,
26 December 15, 1987); Portland City Temple v. Clackamas County,

1 11 Or LUBA 70, 78 (1984); Weyerhaeuser v. Lane County, 7 Or
2 LUBA 42, 46 (1982).

3 The board of county commissioners adopted by incorporation
4 the hearings officer's findings and conclusions. The hearings
5 officer based his decision, in part, on a concern that the
6 request constitutes an urban commercial type of use that is
7 improper in the rural residential area that would be affected.
8 Record 12-14. Although it is not entirely clear, the hearings
9 officer's denial also appears to be based in part on the
10 inadequacy of the existing well serving the property.

11 While there may be bases upon which to attack these other
12 reasons for denial, petitioners do not present them in their
13 petition for review. Without argument from petitioners
14 explaining why those reasons for denial are improper or
15 inadequate, we must affirm the county's decision. See, McCoy
16 v. Marion County, supra, slip op 3.

17 The county's decision is affirmed.

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FOOTNOTES

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OAR 661-10-050(2) provides in pertinent part:

"* * * in the interest of promoting timely resolution of appeals, a motion to intervene shall be filed as soon as is practicable after the notice of intent to appeal is filed * * *."

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In its September 30, 1988 letter transmitting the supplemental record, the county stated "[t]his verbatim transcript of the Board of County Commissioners meeting where the final decision was made was inadvertently left out of the original record of the case and should be inserted as Item 5A." Under our administrative rules, the county is required to supply a copy of the record to intervenors only if they request a copy and pay "the reasonable expense incurred in copying the record." OAR 661-10-025(3).

Intervenors-respondent suggest, incorrectly, in their motion to permit filing of brief, discussed infra, that certain memoranda from county counsel to the governing body were included in the supplemental record. Those memoranda were contained in the original record submitted September 6, 1988. Record 15-19, 196.

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LUBA noted during that conference that parties to LUBA appeals are permitted to attach transcripts of local proceedings to their briefs without formally supplementing the record. See, Hammack v. Clackamas County, ___ Or LUBA ___, (LUBA No. 87-037, September 11, 1987), n 2. When transcripts of local proceedings are attached to a party's brief, the other parties are allowed an opportunity to call our attention to inaccuracies or other inadequacies in the transcripts. Id.

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Under OAR 661-10-035, the respondent's brief is due "within forty-two days after the record is received by the Board." Intervenors-respondent must file their brief within the time limit for respondent's brief under OAR 661-10-035. OAR 661-10-050(3)(b). Because the record was

1 received on September 6, 1988, intervenors-respondent's
2 brief was due October 18, 1988.

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5 Intervenor-respondent noted, correctly, that the
6 petition for review did not contain a statement of facts
7 with citations to the record, or specific assignments of
8 error.

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7 Petitioners objected to intervenors-respondent's
8 request for twenty-one additional days to file their
9 brief. During the October 24, 1988 conference,
10 petitioners noted the oral argument in this appeal was set
11 for the next day, October 25. Petitioners, residents of
12 the State of Washington, and other persons as well, would
13 be traveling substantial distances to attend oral argument
14 in Salem and had already made plans to do so.

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17 The relevant code provisions are set forth under the
18 statement of facts, supra.

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