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

LAVOUNE RUFF,)
)
Petitioner,)
)
vs.)
) LUBA No. 92-063
HARNEY COUNTY,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
JOHN WITZEL and CINDY WITZEL,)
)
Intervenors-Respondent.)

Appeal from Harney County.

Patrick Emmal, Canyon City, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hydes & Nickel.

Tim Colahan, Burns, filed a response brief and argued on behalf of respondent.

John Witzel and Cindy Witzel, Frenchglen, filed a response brief. John Witzel argued on his own behalf.

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

REMANDED 07/28/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county court
4 approving a conditional use permit for a commercial use and
5 a variance to certain setback requirements on property zoned
6 Rural Community (R-3).

7 **MOTION TO INTERVENE**

8 John Witzel and Cindy Witzel, the applicants below,
9 move to intervene on the side of respondent. There is no
10 opposition to the motion, and it is allowed.

11 **FIRST ASSIGNMENT OF ERROR**

12 "The county failed to comply with ORS 215.416(9)
13 and failed to apply the applicable law."

14 The nature of the proposed use is unclear. However, it
15 appears that the proposal is to establish a repair and
16 manufacturing business on property located in the
17 unincorporated community of Frenchglen.¹ The R-3 zone lists
18 as a conditionally permitted use "[a]utomobile, truck or
19 farm implement repair and service shop," among other things.
20 Harney County Zoning Ordinance (HCZO) 3.120(2). Currently,

¹The application states the proposal is:

"To construct a fabrication shop facility [with] covered storage and office space. The facility will house our newly formed business. The purpose of the business is to provide welding fabrication and general mechanical/welding repair for the rural farms and ranches of this area. The intent of the business is also to provide emergency mechanical repair for tourists, and to patent and produce products that will be used in the agriculture and recreation industries." Record 8.

1 the subject property is occupied by the applicants'
2 residence.

3 The challenged decision consists of recitations of
4 facts and five conditions of approval. In this assignment
5 of error, petitioner contends the county erroneously
6 approved the proposal without complying with ORS 215.416(9),
7 which provides:

8 "Approval or denial of a permit * * * shall be
9 based upon and accompanied by a brief statement
10 that explains the criteria and standards
11 considered relevant to the decision, states the
12 facts relied upon in rendering the decision, and
13 explains the justification for the decision based
14 on the criteria, standards and facts set forth."

15 Because respondent provides different arguments concerning
16 the conditional use approval and the variance approval, we
17 address those approvals separately.

18 **A. Conditional Use Permit Approval**

19 Petitioner cites several standards which she contends
20 the notice of hearing stated were applicable to the
21 proposal, and points out that none of those standards were
22 addressed in the challenged decision. See Record 10.
23 Petitioner further argues the challenged decision
24 erroneously fails to identify any standards applicable to
25 the challenged decision, or to contain any justification for
26 the challenged decision based on the applicable standards,
27 as required by ORS 215.416(9).

28 Respondent does not dispute that the standards cited by

1 petitioner are applicable to the challenged decision.²
2 Respondent argues a list of the relevant standards was
3 mailed to petitioner, together with the notice of hearing,
4 and that the relevant standards were also stated orally at
5 the beginning of the county court's hearing on the proposal.
6 Respondent contends that under ORS 197.835(9)(b),³ the

²The source of these standards is unclear. However, we assume that these standards are found either in the HCZO or the county comprehensive plan, as no party contests their applicability. The notice of hearing states these standards are the following:

- "1. That the proposed use is in conformance with both the land use map and goals and policies of the 'Harney County Comprehensive Plan,' or that it was a mistake in the Plan, or that conditions have substantially changed since the Plan was adopted.
- "2. That there is a demonstrated need for the proposed use.
- "3. That there are no other appropriately zoned and available lands that could be used to satisfy the public need.
- "4. That the particular property is better suited to meet the public need than other potential properties.
- "5. That there will be no undue impacts on the provisio[n] of public facilities and services including but not limited to schools, roads, sheriff, etc.
- "6. That any particular provisions of the zone designation or a comprehensive plan designation are complied with.
* * *." Record 10.

³ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record * * *."

1 record "clearly supports" a determination that the proposal
2 complies with the relevant standards for conditional use
3 permit approval.

4 We agree with petitioner that the county erred by
5 failing to identify the relevant standards in its decision,
6 and by failing to justify its decision on the basis of
7 compliance with the relevant standards, as required by
8 ORS 215.416(9).

9 In addition, the evidence cited by respondent does not
10 "clearly support" the challenged conditional use permit
11 approval decision. The most serious problem with the
12 challenged conditional use permit approval decision is that
13 we cannot tell what standards apply. Further, the evidence
14 cited by respondent does not clearly support a determination
15 that the proposed use is a conditionally permitted use in
16 the R-3 zone in the first place. The proposal appears to
17 contemplate establishing a manufacturing use, as well as a
18 repair use, on the subject property. See n 1, supra. If
19 so, the R-3 zone does not specifically permit manufacturing
20 uses. While HCZO 9.070 allows the county to authorize a use
21 not specifically listed in a zone where such use is "of the
22 same general type as uses permitted" in the zone, HCZO 9.070
23 also provides that where the particular use is specifically
24 listed in another zone, it may not be allowed as a similar
25 use. HCZO 3.130(1)(c)(14) specifically lists manufacturing
26 uses as permitted uses in the county's Commercial zone.

1 Therefore, it is erroneous to allow a manufacturing use as a
2 similar use in the R-3 zoning district.

3 In addition, to the extent the existence of a public
4 need is a criterion for conditional use (or variance)
5 approval, that (1) people expressed support for the
6 proposal, (2) the community of Frenchglen does not have a
7 similar business, and (3) the applicants have been
8 "contacted by 15 to 20 people asking when their business was
9 going to start as they had work for it," does not "clearly
10 support" a determination that there is a public need for the
11 proposed use. Respondent's Brief 4.

12 This subassignment of error is sustained.

13 **B. Variance Approval**

14 Petitioner points out there are no findings of
15 compliance with HCZO 7.020, which contains the criteria for
16 variance approval.

17 The county argues that under ORS 197.763(1) and
18 ORS 197.835(2), petitioner waived the issue of compliance
19 with the variance standards because that issue was not
20 raised below.⁴

⁴ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

"Issues shall be limited to those raised by any participant
before the local hearings body as provided by ORS 197.763.
* * *"

ORS 197.763(1) provides:

1 ORS 197.835 does not apply where the local government
2 failed to follow the procedures required by ORS 197.763.
3 ORS 197.835(2)(a). ORS 197.763(3)(b) requires the local
4 government to state the relevant plan and land use
5 regulation standards in its notice of hearing. Here, the
6 notice of hearing did not contain any reference to the
7 variance standards of HCZO 7.020. Accordingly, petitioner
8 is free to raise the issue of compliance with those
9 standards in this appeal. Neuenschwander v. City of
10 Ashland, 20 Or LUBA 144, 157 (1990).

11 We agree with petitioner that the challenged decision
12 erroneously fails to adopt any findings of compliance with
13 HCZO 7.020 and that the evidence in the record does not
14 "clearly support" a determination of compliance with
15 HCZO 7.020.

16 This subassignment of error is sustained.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 "The county's decision is not based on substantial
20 evidence in the record."

21 Under the first assignment of error, we determine the
22 challenged decision fails to adopt findings that the

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

1 proposed use complies with applicable standards for
2 conditional use permit and variance approval. Under these
3 circumstances, the decision is fundamentally flawed; and no
4 purpose is served in determining whether the decision is
5 supported by substantial evidence in the record.

6 The second assignment of error is sustained.

7 The county's decision is remanded.