BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GENE COPE, HARRIET COPE, and XTRA LIMITED PARTNERSHIP, Petitioners,	)	
vs.	)	LUBA No. 97-186/213/214
CITY OF CANNON BEACH, Respondent.	)	FINAL OPINION AND ORDER

Appeal from City of Cannon Beach.

Dean N. Alterman, Portland, filed the petition for review and argued on behalf of petitioners.

William R. Canessa, Seaside, filed the response brief and argued on behalf of respondent. With him on the brief was Campbell, Moberg, Canessa, Faver & Hooley, P.C.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 05/19/98

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

Per curiam.

NATURE OF THE DECISION

In this consolidated appeal, petitioners appeal the city's revocation of petitioners' conditional use permit to operate a pay parking lot, and the city's adoption of two ordinances terminating the use of nonconforming pay parking lots in the city after a four-month amortization period.

FACTS

On May 2, 1991, the city granted petitioners Gene Cope and Harriet Cope (the Copes) a conditional use permit (1991 CUP) to operate a 24-space pay parking lot on tax lot 1400 (the parking lot), located in the city's C-1 Limited Commercial zone. A pay parking lot is not a use conditionally allowed in the C-1 zone; nonetheless, the city planning commission allowed the proposed use, analogizing a pay parking lot to a public parking lot, which is conditionally allowed in the zone. In September 1995, the Copes deeded the parking lot to petitioner Xtra Limited Partnership (Xtra), for no consideration. The Copes are the general partners and trustees of Xtra.

On June 30, 1996, the city granted the Copes' design review application for construction of a commercial building known as "the Landing" on tax lot 2300, located near the parking lot. Pursuant to local provisions, the Copes were required to provide offstreet parking for the Landing either on tax lot 2300 or within 300 feet of tax lot 2300. The Copes

chose to use 22 of the 24 parking spaces on the parking lot in tax lot 1400 to meet the offstreet parking requirements for the Landing. Accordingly, the city conditioned approval of the Landing on a deed restriction to that effect.

By using the parking lot to satisfy the Landing's offstreet parking requirements, the Copes were able to make the Landing a substantially larger building than if offstreet parking were provided on the same lot as the Landing. In granting the design review application, the city design review board found that "[t]ax lot 1400 will convert from a pay parking lot to parking associated with the proposed development," and that "[t]wenty-two of the available offstreet parking spaces on tax lot 1400 will have to be retained for offstreet parking associated with the development of tax lot 2300." Record 87 (97-186). However, the city did not specify as a condition of approval that pay parking for the 22 spaces on the parking lot be terminated.

Pursuant to the condition of design review approval, the Copes, acting as trustees of Xtra, conveyed to themselves, as owners of the Landing, a non-exclusive easement for 22 parking spaces on the parking lot, for no consideration. The parking easement cannot be terminated without the written consent of the city, but terminates automatically if the city adopts an ordinance eliminating the offstreet parking requirement for the Landing.

In May 1997, the city issued an occupancy permit for the Landing, and at the same time initiated a review before the city planning commission to determine whether dedication of 22 of the 24 parking spaces on the parking lot to satisfy the Landing's offstreet parking requirements constitutes a change of use in violation of the approved plans for the 1991 CUP. After hearings, the planning commission found that a change of use had occurred from private pay parking to required offstreet parking associated with a permitted use, the Landing. Accordingly, it revoked the 1991 CUP. Petitioners appealed to the city council, which in September 1997 adopted the findings and affirmed the decision of the planning commission. An appeal to this Board followed (LUBA No. 97-186).

Meanwhile, in June 1997 the council adopted ordinance 97-12, which prospectively prohibited pay parking lots from meeting off-street parking requirements, and ordinance 97-13, which prospectively prohibited pay parking lots as a conditional use in commercial zones. In October 1997, the council adopted ordinance 97-25 and ordinance 97-26, which amend two sections of the city's zoning ordinance to allow an amortization period of four months for pay parking lots that existed prior to the adoption of ordinances 97-12 and 97-13, after which pay parking use must terminate. Because Xtra operates the only pay parking lot in the city, as a practical matter ordinances 97-25 and 97-26 apply only to its parking

lot. Petitioners appealed to this Board the adoption of ordinance 97-25 (LUBA No. 97-213) and ordinance 97-26 (LUBA No. 97-214).

FIRST ASSIGNMENT OF ERROR (LUBA No. 97-186)

Petitioners argue that there is no substantial evidence supporting the city's finding that the dedication of 22 parking spaces to satisfy the Landing's offstreet parking requirements constitutes a change of use or departure from the approved plans for the 1991 CUP. Accordingly, petitioners contend that no violation of the city's zoning code occurred and that no basis exists to revoke the 1991 CUP.

Cannon Beach Zoning Ordinance (CBZO) 17.80.080 provides that

> "compliance with conditions established for a conditional use and adherence to the submitted plans, as approved, is required. Any departure from these conditions of approval and approved plans constitutes a violation of this title."

With respect to that provision, the city's findings state:

> "Municipal Code, Section 17.04565, defines 'use' as 'the purpose for which land or a structure is designed, arranged or intended, or for which it is occupied or maintained.' The use of the property was intended, approved and occupied as a private pay parking lot. The planning commission approved [the 1991 CUP] pursuant to its finding * * * that a private pay parking lot was similar to a public parking lot, which was listed in the zoning code as a conditional use in the C-1 Zone. The planning commission did not find that a private pay parking lot was similar to required offstreet parking in conjunction with a permitted use. If it had, no conditional use permit would have been required since required offstreet parking in conjunction with a permitted use does not require a conditional use

> permit. In summary, a private pay parking lot and offstreet parking to meet the offstreet parking requirement for a permitted use are different uses. Therefore, a change from one use to another use has occurred." Record 4 (LUBA No. 97-186).

The city's findings are based essentially on an interpretation and a legal conclusion drawn from the city's zoning ordinance, i.e., that a pay parking lot and a parking lot associated with a permitted use are different uses, and hence that a change of use occurred. Petitioners do not directly challenge the city's interpretation, but rather attack the city's conclusion as being fatally undermined by two sets of alleged facts: (1) the 1991 CUP and 1996 design review approval both contemplated joint use of the property to operate a pay parking lot and to satisfy offstreet parking requirements for permitted uses in the C-1 zone; and (2) in any case, petitioners have not violated the conditions of the 1991 CUP because physical use of the parking lot as a parking lot has not changed.

Petitioners argue, first, that neither the 1991 CUP nor the 1996 design review approval expressly prohibited using the parking lot to satisfy offstreet parking requirements for permitted uses, and therefore joint use of the parking lot for pay parking and parking associated with a permitted use does not violate the 1991 CUP. Further, petitioners cite to an exchange before the planning commission in 1991 when petitioner Gene Cope was asked whether "there was any intent to use the parking lot to satisfy parking requirements for

other property." Record 83 (LUBA No. 97-186). Petitioner Cope replied "most definitely." Id. We understand petitioners to contend on the basis of this exchange that use of the parking lot for both purposes was contemplated in the 1991 CUP, and thus petitioners' use of the parking lot to meet the offstreet parking requirements of the Landing is not contrary to the 1991 CUP.

We disagree that the city's conclusions regarding a change of use are undermined by any of the evidence petitioners cite. The fact that the city did not expressly prohibit joint use of the parking lot for multiple uses does not imply that the 1991 CUP approved multiple uses, or negate in any way the city's conclusion that the two uses at issue here constitute different uses and thus a change of use has occurred. Similarly, we see nothing in the exchange quoted that implies the city's approval of multiple uses on the lot. The exchange is equally consistent with the city's expectation, expressed in the findings for the 1996 design review approval, that the parking would be converted from a pay parking lot to parking associated with permitted uses.

At oral argument, petitioners advanced the additional argument that no change of use has occurred because the 1991 CUP approved a pay parking lot, and, notwithstanding that 22 of the parking lot's spaces are now dedicated to satisfying the parking requirements of the Landing, petitioners intend to operate, and have continued to operate, the parking lot as a

pay parking lot. That is, petitioners contend that the actual, physical use of the parking lot has not changed, even if the legal relationships and character of the parking lot might have changed, and thus no "change of use" has occurred.

We disagree that continued operation of the parking lot for parking or for pay parking undermines the city's conclusion that a pay parking lot and a parking lot associated with a permitted use constitute two different uses, and hence that a change of use occurred. That conclusion is fundamentally a matter of interpreting the provisions of CBZO 17.80.080 and Municipal Code 17.04565, and applying those provisions, as interpreted, to the undisputed findings that the 1991 CUP approved a pay parking lot and that in 1997 petitioners began using 22 of the 24 spaces on the parking lot for required offstreet parking for the Landing. There is substantial and uncontested evidence in the record to support those findings.[1]

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR (LUBA No. 97-186/213/214)

Petitioners argue that the city's revocation of the 1991 CUP and the adoption of ordinances 97-25 and 97-26 deprive petitioners of any "economically viable use" of the parking lot, and thus the city has unlawfully taken petitioners'

[1]To the extent petitioners' first assignment of error is an indirect challenge to the city's interpretation of its ordinances, petitioners have not demonstrated that the city's interpretation is contrary to the text, purposes or policy of either ordinance. ORS 197.829(1)(a)-(c).

property without just compensation, in violation of the Fifth Amendment of the United States Constitution. Cope v. City of Cannon Beach, 317 Or 339, 344, 855 P2d 1083 (1993).[2] Petitioners state that the net effect of the city's actions and the easement is that Xtra must provide 22 offstreet parking spaces to the Landing without any fee or charge, and cannot develop the parking lot in any other manner, leaving no economically viable use for the parking lot.[3]

We note, as an initial matter, that petitioners have not appealed ordinance 97-12[4] or ordinance 97-13.[5] Because

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[2]Petitioners make no claim under the Oregon Constitution. With respect to their federal takings claim, petitioners cite to Cope for the following formulation of the federal standard, based on federal precedent:

> "The Fifth amendment is violated when a land use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of the land." Id. at 344.

In addition to their principal argument that the county's action denied them economically viable use of the parking lot, petitioners also assert that the city's decision "to eliminate pay parking" on the parking lot does not substantially advance any legitimate state interest, and that the city's only purpose is to pursue a "vendetta" against the Copes and Xtra. Petition for Review 8. However, petitioners do not develop this line of argument, cite to any substantiating evidence in the record, or otherwise attempt to demonstrate that the three city decisions appealed in this consolidated case do not serve legitimate state interests. It is petitioners' responsibility to allege the facts and supply the argument necessary to tell us the basis upon which we might grant relief. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982). Petitioners' assertion regarding the lack of a legitimate state interest is not sufficiently developed to permit our review.

[3]Petitioners do not indicate whether the takings analysis differs in any material respect between the two types of decision challenged here: adoption of two land use regulations, and revocation of a conditional use permit. We assume, but do not decide, that the takings analysis and applicable standards are the same for both types of decisions. But see Nelson v. City of Lake Oswego, 126 Or App 416, 419-422, 869 P2d 350 (1994) (discussing differences between "regulatory takings" cases and "development condition" cases).

[4]Ordinance 97-12 amends CBZO 17.78.010 by adding a new subsection, 17.78.010.K, to read as follows:

petitioners have not appealed either ordinance, the validity of those ordinances are not at issue in this appeal. The only city actions at issue in this appeal are the city's revocation of the 1991 CUP and adoption of ordinances 97-25 and 97-26. Ordinance 97-25 amends CBZO 17.78.010.K to state that where a fee was charged for use of offstreet parking spaces provided to meet offstreet parking requirements for a permitted use prior to the adoption of ordinance 97-12, an amortization period of four months is established after which charging a fee of any kind is prohibited.[6] Ordinance 97-26 provides that the use of a private parking lot shall not be controlled as a

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> "It shall be unlawful to charge a fee of any kind for the use of off-street parking spaces provided to meet the off-street parking requirements specified in Section 17.78.020 or Section 17.22.050.J.1."

[5]Ordinance 97-13 added a new definition to Chapter 17.04 "Definitions," to read as follows:

> "'Private parking lot' means an area designed for the off-street parking vehicles where an hourly or daily fee is charged for the use of the parking spaces and where those parking spaces are not provided in order to satisfy off-street parking requirements of a permitted or conditional use. A private parking lot does not include an area designed for the off-street parking of vehicles where those parking spaces are made available through monthly or yearly lease arrangements."

[6]Ordinance 97-25 amends CBZO 17.78.010.K to state:

> "It shall be unlawful to charge a fee of any kind for the use of off-street parking spaces provided to meet the off-street parking requirements specified in Section 17.78.020 or Section 17.22.050.J.1. Where such a fee was charged prior to the effective date of Ordinance 97-12, an amortization period of four months, from the effective date of Ordinance 97-25, is established. At the conclusion of the amortization period, charging a fee of any kind for the use of off-street parking spaces provided to meet the off-street parking requirements specified in Section 17.78.020 and Section 17.22.050J.1 shall be prohibited whether or not a fee was charged prior to the adoption of Ordinance 97-12." (Emphasized language added to CBZO 17.78.010.K by ordinance 97-25).

nonconforming use or pre-existing use, but where a private parking lot existed prior to ordinance 97-13, that a four-month amortization period is established, after which the use of a nonconforming private parking lot shall be terminated.[7]

The city responds, first, that if we uphold the city's revocation of the 1991 CUP, then petitioners' taking argument becomes moot because petitioners have no right to continue using the parking lot as a pay parking lot. We agree that our resolution of the first assignment of error changes the landscape of our discussion of the second and third assignments of error, which set out petitioners' takings claims. The initial question is whether, given that Xtra no longer has the conditional right to operate a pay parking lot on the property, the city's actions appealed in these cases have the effect of depriving petitioners of any economically viable use of the parking lot.

Petitioners do not explain how ordinances 97-25 and 97-26 contribute to the loss of all economically viable use of the parking lot. The apparent effect of those ordinances is to allow a four-month amortization period, and then terminate any

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[7]Ordinance 97-26 adds a new subsection, CBZO 17.82.080, to state as follows:

> "The use of a private parking lot shall be controlled by the provisions of this section and not those of Section 17.82.030, Nonconforming uses, or Section 17.82.060, Pre-existing uses. Where a private pay parking lot existed prior to the effective date of Ordinance 97-13, an amortization period of four months from the effective date of Ordinance 97-26 is established. At the conclusion of the amortization period, the use of a nonconforming private parking lot shall be terminated."

fees for pay parking lots and terminate use of any nonconforming pay parking lots. In other words, ordinances 97-25 and 97-26 appear to do nothing adverse to petitioners that is not already a necessary, and more immediate, consequence of the city's revocation of the 1991 CUP. Petitioners do not argue that they have a right to operate the parking lot as a nonconforming use or pre-existing use, notwithstanding revocation of the CUP.

What clearly does limit the economic use of the parking lot is the easement between Xtra and the Copes. The easement dedicates 22 of the 24 parking spaces in the parking lot to parking, effectively preventing petitioners from developing the property for other uses permitted or allowed in the C-1 zone. The city's revocation of the 1991 CUP, on the other hand, terminates petitioners' right to use the property for a single conditional use, a pay parking lot, but does not itself affect petitioners' right or ability to develop the property for some other use permitted or allowed in the C-1 zone. Petitioners do not suggest that the city's revocation of the 1991 CUP by itself could possibly "take" petitioners' property within the meaning of the Fifth Amendment.

The difficulty here is that the easement is not a governmental exaction, but rather a transaction between Xtra and the Copes.[8] As the city points out, the Copes could have

[8]Petitioners at one point assert that the city "extracted" the easement from the Copes. Petition for Review 10. However, it is not evident, nor do petitioners explain, how the city's actions with respect to the

chosen to satisfy the offstreet parking requirements for the Landing by building offstreet parking on the same lot as the Landing, building offstreet parking elsewhere within 300 feet of the Landing, or by dedicating 22 spaces of the parking lot to the Landing. The Copes chose to dedicate 22 spaces of the parking lot to the Landing and effected that choice by granting the easement on behalf of Xtra to themselves, as owners of the Landing, for no consideration. The city contends that it did not compel Xtra to grant an easement at all, much less one for no consideration. That was a decision the Copes made, as general partners and trustees of Xtra. Thus, the city argues, any loss of economic value resulting from the easement stems not from the city's actions but first from the Copes' choice to use the parking lot rather than another site to meet the offstreet parking requirements for the Landing, and second from the Copes' choice not to value the easement at market price.[9]

As framed by the city, the question presented here is, where a landowner has voluntarily restricted all development on his property so that only one narrow subcategory of use, i.e. parking, is thereafter feasible, and a local government then denies the landowner the economic benefits of using the property as a pay parking lot, does the diminution of economic

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offstreet parking requirements of the Landing, which were not appealed here, constitute an "extraction."

[9]The record does not reflect the market value of the easement or the development value of the parking lot; however, the parking lot's assessed value in 1996 was $320,000.00. Record 37 (LUBA No. 97-186).

viability resulting from the combination of those two actions constitute an unconstitutional "taking" of property?

Petitioners do not cite any authority that suggests a taking has occurred where the loss of almost all economic use of a property is the result of the landowner's actions, rather than the government's actions. The only remotely analogous case we find in state law is Dept. of Transportation v. Hewett Professional Group, 321 Or 118, 895 P2d 755 (1995), an inverse condemnation case where the landowner claimed the state had taken a building without exercising its power of eminent domain. The landowner had demolished the building and started to build another when the state instituted a condemnation proceeding to acquire the land underlying the former building. The landowner counterclaimed for inverse condemnation for the value of the building, arguing that the state had induced its demolition by false misrepresentation, and thus the building's destruction was a government action, a taking of property for which the state must compensate the landowner. The Oregon Supreme Court disagreed, holding that an action in inverse condemnation lies only for property taken by government action, and that because the landowner demolished the building, "[t]he diminution in value of the property thus resulted from the acts of the [landowner], not of the government." 321 Or at 132.

We believe the same principle applies in the present context. Whether a taking occurs in violation of the Fifth

Amendment depends on the scope and effect of the government's action. The three decisions appealed here, the revocation of the 1991 CUP, and adoption of ordinances 97-25 and 97-26, have the effect of limiting only one subcategory of possible economic uses for the property. Petitioners voluntarily limited all other categories of possible economic uses on the property, and did so in a way that benefits two of the petitioners (the Copes) at the expense of the third (Xtra). Petitioners' actions are not attributable to the city and cannot be combined with the city's actions to demonstrate a complete loss of viable economic uses on the property, and hence a taking.

We conclude that none of the three city decisions appealed in these consolidated cases had the effect, singly or together, of taking petitioners' property in violation of the Fifth Amendment. Our resolution of the second assignment of error on the foregoing basis makes it unnecessary to consider the city's argument that no taking occurred because substantial economic use of the parking lot remains.[10]

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[10]The city found that the Copes derive substantial economic benefit from the easement, that is, the use of 22 offstreet parking spaces for their commercial development, the Landing. The city also found with respect to petitioner Xtra:

> "Tax lot 1400 contains 24 offstreet parking spaces. Twenty-two of these spaces are reserved by easement for the provision of offstreet parking in conjunction with the Landing. The remaining two parking spaces are not subject to the easement. * * * [T]hese two parking spaces can provide required offstreet parking for 800 square feet of new commercial development anywhere in the downtown area. [Xtra] can sell the right to use these parking spaces. This is a substantial economic use of the property, with a conservative value of between $20,000

Resolution of the second assignment of error also makes it unnecessary to consider the alternative argument framed in petitioners' third assignment of error. Petitioners argue in the third assignment of error that, if the four-month amortization period is relied upon to avoid a taking, the city's decision to adopt ordinance 97-25 and 97-26 should be remanded for imposition of a longer, more reasonable amortization period. Our determination that no taking occurred does not rely upon the existence of the amortization period granted by the city.

The second and third assignments of error are denied.

The city's decisions are affirmed.

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and $30,000. Alternatively, [Xtra] can rent the two parking spaces on a long-term lease basis. There are other downtown property owners who lease parking spaces on a long term basis. Finally, [Xtra] could lease the use of the 22 offstreet parking spaces, which meet the offstreet parking requirements for the Landing, to the [Copes]. The ability to lease the parking to the [Copes] for the benefit of the Landing is a substantial economic use of the property." Record 5 (LUBA No. 97-213); Record 5 (LUBA No. 97-214).