BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH COTTER,	)	
	)	LUBA No. 98-107
Petitioner,	)	
	)	FINAL OPINION
vs.	)	AND ORDER
	)	
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Joseph Cotter, Eagle Creek, filed the petition for review and argued on his own behalf.

H. Andrew Clark, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Chair.

REVERSED 04/29/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges a county hearings officer decision approving a campground in the county's Timber (TBR) zoning district.

FACTS

The subject 37 acres was formerly used as a log staging area until the mid 1980s. The property was logged in 1994 and replanted. The applicant proposes to construct 120 improved recreational vehicle (RV) campsites. The RV campsites would average 2,100 square feet with 1,400 square feet of paved area and 700 square feet of lawn. The RV campsites would be improved with electric, potable water and sewage hookups. The proposal includes a home for a manager/caretaker, a bath house and laundry, a shed for grounds keeping equipment and a shed for large equipment and a truck.

FIRST ASSIGNMENT OF ERROR

The county's TBR zoning district was adopted to implement Statewide Planning Goal 4 (Forest Lands). Goal 4 requires that the county "conserve forest lands." Among the uses that may be allowed on forest lands under Goal 4 are "recreational opportunities appropriate in a forest environment." The Land Conservation and Development Commission adopted OAR chapter 660, division 6 to implement Goal 4.[1] Under OAR 660-006-0025(4)(e), "[p]arks and campgrounds" are allowed on forest lands, provided they meet the approval standards provided at OAR 660-006-0025(5).[2] OAR 660-006-0025(4)(e) provides:

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[1]The relevant provisions of OAR chapter 660, division 6 were amended effective July 1, 1998. The rule provisions that were in effect prior to that revision govern the county decision at issue in this appeal, and the rule provisions cited and discussed in this opinion are the rules as they existed prior to the July 1, 1998 revisions.

[2]OAR 660-006-0025(5) provides:

> "A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use

"Parks and campgrounds. For purposes of this rule a campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes. A camping site may be occupied by a tent, travel trailer or recreational vehicle. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations[.]"

Consistent with OAR 660-006-0025(4)(e), the county's TBR zone authorizes "Parks and campgrounds" as a conditional uses. Clackamas County Zoning and Development Ordinance (ZDO) 406.06(B)(4). The description of "parks and campgrounds" at ZDO 406.06(B)(4) is substantially identical to the description at OAR 660-006-0025(4)(e) quoted above.[3] ZDO 406.06(B)(4) was adopted to implement OAR 660-006-0025(4)(e) and, therefore, may not be interpreted or applied inconsistently with OAR 660-006-0025(4)(e). Accordingly, our focus in this opinion is on the rule rather than on the code language. ORS 197.829(1)(d); see Doob v. Josephine County, 31 Or LUBA 275, 281-82 (1996) (plan or land use regulation provisions adopted to implement statewide planning goals may not be interpreted in a manner that is inconsistent with the goals they implement).

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compatible with forest operations and agriculture and to conserve values found on forest lands:

"(a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;

"(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and

"(c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner which recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (l), (r), (s) and (v) of this rule."

[3]ZDO 406.06(B)(4) lists the following as a conditional use in the TBR zone:

"Parks and campgrounds which are devoted to overnight temporary use for vacation or recreational or emergency purposes but not for residential purposes. These areas may be occupied by a tent, travel trailer or recreational vehicle, but may not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations and not for residential purposes[.]"

Petitioner argues that the 120-space RV campground approved by the challenged decision is not the kind of campground authorized by OAR 660-006-0025(4)(e) and ZDO 406.06(B)(4). Specifically, petitioner argues that the rule and code do not allow the kind of "intensively developed" campground proposed here. In making his argument under this assignment of error, petitioner relies heavily on our decision in Donnelly v. Curry County, 33 Or LUBA 624 (1997).

The RV camp at issue in Donnelly included 51 RV spaces and 10 tent camping sites. Like the RV spaces at issue in this appeal, the RV spaces in Donnelly were served by water, sewer and electrical hookups. In concluding that the proposed RV camp in Donnelly was not allowed under OAR 660-006-0025(4)(e), we explained:

> "In the present case, the challenged decision makes no effort to explain how a full-service RV camp with 51 concrete RV pads, each with water, sewer and electrical hookups, is a 'relatively low impact' use 'appropriate in the forest environment.' The decision appears to assume, without any justification, that because [OAR 660-006-0025(4)(e)] provides that a camping site 'may be occupied by a tent, travel trailer or recreational vehicle' that [OAR 660-006-0025(4)(e)] necessarily permits a full-service RV camp in forest zones. That assumption ignores the fact that, like tents and travel trailers, RVs can occupy a camping site without the utilities and intensive infrastructure associated with a full-service RV park." 33 Or LUBA at 634.[4]

In responding to this issue, the hearings officer appears to have relied almost entirely on the fact that the rule only expressly prohibits "intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations." The hearings officer explains in his decision that "[t]he proposed facility will not include those listed intensifying elements, or other similar elements." Record 5.

The hearings officers apparently interprets OAR 660-006-0025(4)(e) to provide that the design and level of development proposed for individual campsites and the services

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[4]Our decision in Donnelly relies in part on our decision in Tice v. Josephine County, 21 Or LUBA 371 (1991) where we determined that a motocross racetrack was not the kind of outdoor recreational activity envisioned by Goal 4 for forest lands. In Tice we described OAR 660-006-0025 as contemplating "recreational uses with a relatively low impact on the forest environment." 21 Or LUBA at 378 n 7.

proposed to support those campsites need not be addressed under the rule so long as (1) the proposal "is an area devoted to overnight temporary use for vacation, recreational or emergency purposes;" (2) campsites are "occupied by a tent, travel trailer or recreational vehicle;" and (3) the proposal does not include the kinds of intensive recreational features that are listed in the rule. While that interpretation may be plausible, it is inconsistent with the interpretation of OAR 660-006-0025(4)(e) that we adopted in Donnelly. As we explained in Donnelly, the rule does not authorize campgrounds without regard to the nature of the campsites and the level of improvements proposed for those campsites. The express prohibition in the rule against forest zone campgrounds incorporating intensive recreational features provides context and guidance in determining what kinds of campgrounds are permissible under OAR 660-006-0025(4)(e) and ZDO 406.06(B)(4) in the TBR zone. The hearings officer's apparent understanding, that the nature of the campsites and the intensity of improvements proposed are irrelevant, is incorrect.

We see no material difference between the 120-space RV camp approved by the decision challenged in this appeal and the 51-space RV camp we found to be inconsistent with OAR 660-006-0025(4)(e) and county code provisions adopted to implement that rule in Donnelly. It may be that the campgrounds OAR 660-006-0025(4)(e) and ZDO 406.06(B)(4) authorize on forest lands zoned TBR may include campsites designed to accommodate RVs in a manner that is appropriate for a forest environment. However, the challenged proposal is a full-service RV park, and such an RV park is not a "campground," within the meaning of OAR 660-006-0025(4)(e) and ZDO 406.06(B)(4).[5]

The first assignment of error is sustained.

[5]As noted earlier in this opinion, OAR 660-006-0025(4)(e) was amended, effective July 1, 1998. Although the amended version of OAR 660-006-0025(4)(e) does not apply to the challenged decision, we note that the current version of OAR 660-006-025(4)(e) specifically prohibits provision of "[s]eparate sewer, water or electric service hook-ups * * * to individual camp sites."

SECOND ASSIGNMENT OF ERROR

Nine county zoning districts specifically allow "Service Recreational Uses" as a conditional use. [6] Under ZDO section 813, "Service Recreational Uses" include, inter alia, "Recreational Vehicle Camping Facilities." ZDO 813.01(D). ZDO 813.01(D) imposes detailed standards for Recreational Vehicle Camping Facilities and requires certain minimum improvements, including electrical hookups, potable water hookups, and sewage disposal service.

The TBR zone is not among the nine zoning districts that explicitly list Service Recreational Uses as allowed conditional uses in those zones. Nevertheless, the hearings officer found that the proposed use constituted a Recreational Vehicle Camping Facility, applied the standards of ZDO section 813, and approved the proposed use under those standards. Petitioner contends that because the TBR zone does not specifically allow Service Recreational Uses as a conditional use, Recreational Vehicle Camping Facilities are not allowed in the TBR zone.

Under our discussion of the first assignment of error, we concluded that the provisions for "parks and campgrounds" in OAR 660-006-0025(4)(e) and ZDO 406.06(B)(4) do not authorize approval of intensively developed recreational vehicle campsites in the TBR zone such as were approved in the challenged decision. Our resolution of the first assignment of error renders the question presented in the second assignment of error somewhat academic. That is because even if the TBR zone could be interpreted as allowing

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[6]The zoning districts specifically allowing "Service Recreational Uses" as conditional uses are as follows:

> Recreational Residential District (RR), ZDO 305.05(A)(5); Mountain Recreational Resort District (MRR), ZDO 306.06(A)(5); Rural Area Single Family Residential District (RA-1), ZDO 307.05(A)(8); Rural Area Single Family Residential District (RA-2), ZDO 308.05(A)(8); Rural Residential Farm/Forest 5 Acres (RRFF-5), ZDO 309.05(A)(10); Farm-Forest (FF-10), ZDO 310.05(A)(10); Hoodland Residential District (HR), ZDO 312.05(A)(6); Medium High Density Residential (MR-2), ZDO 313.05(A)(3); Campus Industrial (CI), ZDO 601.06(B)(3).

Recreational Vehicle Camping Facilities such as those described in ZDO 813.01(D), under a theory that such facilities qualify as "parks and campgrounds" which are allowed in the TBR zone, that interpretation would allow the kind of intensively developed facility that OAR 660-006-0025(4)(e) and hence ZDO 406.06(B)(4) prohibit. The narrow question presented under this assignment of error is whether the explicit authorization of Recreational Camping Facilities in nine zones while failing to explicitly authorize such Recreational Camping Facilities in the TBR zone means the TBR zone prohibits such facilities.

Because the challenged decision does not address the interpretive issue raised in the second assignment of error, we consider petitioner's interpretive argument ab initio. ORS 197.829(2); Opp v. City of Portland, 153 Or App 10, 14, 955 P2d 769 (1998). In Sarti v. City of Lake Oswego, 20 Or LUBA 387, reversed on other grounds 106 Or App 594, 809 P2d 701 (1991), we explained that where a zoning ordinance specifically permitted dance schools in one zoning district an inference is created that dance schools are not allowed under a more general provision within a second zoning district that did not specifically permit the use.

> "The general principle expressed in Sevcik v. Jackson County, [16 Or LUBA 710, 713 (1988)] and Clatsop County v. Morgan, [19 Or App 173, 178, 526 P2d 1393 (1974)] is that where a zoning ordinance specifically lists a use as allowed in one zoning district and fails to specifically list that use in a second zoning district, but includes in the list of permitted uses in the second zoning district a more subjective and open ended category of uses, there is an 'inference' that the use specifically allowed in the first zoning district is not also allowed in the second zoning district under the open ended use category.
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> "Applying the above principle in this case, the explicit provision for dance schools in three of the city's commercial districts suggests, but does not conclusively demonstrate, that the city did not intend that * * * dance schools be allowed in its residential districts as an * * * educational or cultural facility * * *." Sarti, 20 Or LUBA at 393 (footnote omitted, emphasis in original).

We conclude that the inference discussed in Sarti applies in this case and supports petitioner's interpretation of the ZDO. ZDO 813.01(D) sets out detailed standards and minimum development requirements for Recreational Vehicle Camping Facilities. Nine

zoning districts specifically refer to ZDO section 813 in authorizing Recreational Vehicle Camping Facilities; the TBR does not mention Recreational Vehicle Camping Facilities or refer to ZDO section 813. Although the county in fact applied the development and approval standards at ZDO 813.01(D) in approving the disputed application, we believe it is unreasonable and incorrect to interpret the TBR as authorizing Recreational Vehicle Camping Facilities where the county failed to include the TBR zone among the zones that specifically authorize such facilities.

We emphasize, as we did under the first assignment of error, that this does not necessarily mean that the "parks or campsites" authorized in the TBR zone under ZDO 406.06(B)(4) may not include sites designed for recreational vehicles. However, it does mean that the intensively improved Recreational Vehicle Camping Facilities that are envisioned by ZDO 813.01(D) and specifically authorized in nine county zoning districts are not authorized in the TBR zone.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues "[t]he county's finding that there is a need for 'additional Recreational Vehicle Camping opportunities' is not supported by substantial evidence in the record." Petition for Review 22. However, petitioner does not identify where in the decision the challenged finding is located. Neither does petitioner identify which applicable approval criterion requires a finding that there is a "need for additional Recreational Vehicle Camping opportunities," and we are not aware of such a criterion. Because petitioner fails to demonstrate why the disputed finding is an essential part of the challenged decision, his argument that the finding lacks evidentiary support provides no basis for remand. Richards-Kreitzberg v. Marion County, 32 Or LUBA 76, 92 (1996); Waite v. Marion County, 16 Or LUBA 353, 361 (1987).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under the fourth assignment of error, petitioner argues "[t]he county's finding that the subject property is not in forest production [and] incapable of growing trees, is not supported by evidence in the record." Petition for Review 25.

Petitioner concedes that the property was clear cut in 1994 and does not appear to argue that the property is currently in forest production or that this part of the disputed finding is important. Rather, petitioner's challenge under this assignment of error focuses on the second part of the disputed finding, viz. that the property is incapable of growing trees. However, as petitioner's argument under the fourth assignment of error appears to recognize, the hearings officer did not find that the property is "incapable of growing trees." Rather, the hearings officer found that the subject property "is minimally suitable for the production of forest products, given its prior use and the graveled portion of the property formerly used for decking logs * * *."[7] Record 9.

The argument presented under the fourth assignment of error is not consistent with the assignment of error itself. Additionally, petitioner makes no attempt under the fourth assignment of error to explain why the disputed finding is critical to the challenged decision. It is possible that petitioner believes the disputed finding is a critical part of the county's findings addressing ZDO 1203.01(E). See n 7. However, petitioner makes no attempt to make or explain that argument, and we therefore decline to consider the fourth assignment of error further.

The fourth assignment of error is denied.

[7]The quoted finding is included with other findings which were adopted to address ZDO 1203.01(E) which requires that "[t]he proposal satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use." Petitioner challenges the portion of the county's decision addressing ZDO 1203.01(E) under the fifth assignment of error.

FIFTH ASSIGNMENT OF ERROR

ZDO 1203.01(E) requires that the county demonstrate that the proposed use "satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use." The county's findings addressing this criterion appear at Record 9. Because our resolution of the first assignment of error will likely require that the proposal be modified, new findings will almost certainly be required to address ZDO 1203.01(E) on remand. We therefore do not address petitioner's arguments under this assignment of error in detail.

Although we agree with petitioner that the county's findings addressing ZDO 1203.01(E) are inadequate, much of petitioner's argument either reflects a misunderstanding of the obligation that ZDO 1203.01(E) assigns to the county in this matter or overstates the nature of that obligation. The county is not obligated under ZDO 1203.01(E) to demonstrate that the proposal will further particular goals or policies under the Forest section of the Comprehensive Plan. Rather, the county's obligation is to demonstrate whether all plan goals and policies "which apply to the proposed use" are satisfied. The challenged decision states that the plan goals and policies need only be satisfied "on balance," and petitioner does not assign error to that interpretation. Record 9.

We agree with petitioner that the first step in applying ZDO 1203.01(E) is to identify the plan goals and policies that the county believes "apply to the proposed use." Without agreeing with petitioner that all of the plan goals and policies identified in the petition for review necessarily apply in this case, we conclude that the challenged decision does not adequately address the threshold question of which goals and policies "apply to the proposed use."[8] The burden imposed by a criterion such as ZDO 1203.01(E) is potentially enormous. However, the county is not required to discuss all the plan goals and policies that do not

[8]On remand the county must determine whether the plan goals and policies identified by petitioner "apply to the proposed use."

apply; the county is only obligated to discuss those that do apply.[9] Even that obligation is mitigated to some extent because, among the relevant plan goals and policies, some will be more applicable than others; and the county has some latitude in limiting its detailed discussion to those plan goals and policies that are the most relevant. Nevertheless, we agree with petitioner that the perfunctory way in which the challenged decision addresses the question of which plan goals and policies apply under ZDO 1203.01(E), and how they apply, is clearly inadequate.

Once the applicable plan goals and policies are identified, the county will be in a position to determine whether the proposal, on balance, satisfies those goals and policies. In addressing this question, the county is not obligated, as petitioner apparently assumes it is, to provide a detailed explanation of how each and every plan goal and policy is satisfied.[10] The relevant question is whether the applicable plan goal and policies are satisfied on balance. In applying criteria such as ZDO 1203.01(E) that require balancing of a number of factors, it will almost always be the case that a particular proposal will be compatible with some of those goals and policies and incompatible with others.[11] See Waker Associates, Inc. v. Clackamas County, 111 Or App 189, 194, 826 P2d 20 (1992) (stating principle). While applicable plan goals and policies may not be ignored, incompatibility with particular goals and policies need not be fatal to the proposed use, as petitioner appears to argue. Once the county has adequately identified the applicable plan goals and policies, it is for the county to

[9]However, as petitioner points out, it is not always clear in the challenged decision which plan goals and policies the county believes apply to the proposal or how they apply.

[10]In several places petitioner argues, incorrectly, that the county is also obligated to include statewide planning goals in its analysis under ZDO 1203.01(E).

[11]ZDO 1203.01(E) does not explicitly require that the applicable goals and policies be satisfied "on balance." However, as previously noted, the hearings officer interpreted ZDO 1203.01(E) to require that applicable plan goals and policies be satisfied "on balance," and petitioner does not challenge that interpretation.

determine whether the proposal satisfies those goals and policies in the first instance and to explain that determination in its findings.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues that the hearings officer ignored the opponent's evidence, accepted the applicant's evidence without question, and therefore failed to fulfill his obligation as an unbiased decision maker under Fasano v. Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973). Petitioner clarifies that he believes the hearings officer conducted the local hearing "in a professional and even handed manner" and "allowed all present to speak without limit and accepted all evidence introduced at the hearing." Petition for Review 37. Nevertheless, petitioner argues that we should find the hearings officer was biased in this matter because he failed to comment on certain opposition testimony and did not adopt petitioner's legal interpretation of the ZDO as discussed under the second assignment of error.

Petitioner's arguments do not demonstrate that the hearings officer was biased in this matter. The sixth assignment of error is denied.

CONCLUSION

Our resolution of the first two assignments of error means the challenged facility is prohibited as a matter of law and cannot be approved as proposed in the application. Accordingly the county's decision must be reversed rather than remanded. OAR 661-010-0071(1)(c); Angius v. Washington County, ___ Or LUBA ___ (LUBA No. 98-148, February 11, 1999).

The county's decision is reversed.