BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY ANN HUFF,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

RICKY GUEST and DIANE GUEST,
Intervenors-Respondent.

LUBA No. 2001-077

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Thomas J. Rastetter, Oregon City, and Heather Hansen Lyell, Oregon City, filed the petition for review. Heather Hansen Lyell argued on behalf of petitioner.

Michael E. Judd, Assistant County Counsel, Oregon City, filed a response brief on behalf of respondent.

Timothy V. Ramis, Portland, Stephen F. Crew, Portland, and Dana L. Krawczuk, Portland, filed a response brief. With them on the brief was Ramis, Crew, Corrigan and Bachrach. Timothy V. Ramis argued on behalf of intervenors-respondent.

BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 07/27/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision rezoning the western third of a 5.82-acre parcel from Rural Residential Farm/Forest 5-acre minimum (RRFF-5) to Rural Commercial and changing the comprehensive plan designation of that portion of the parcel from Rural to Rural Commercial.

MOTION TO INTERVENE

Ricky Guest and Diane Guest (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject 5.82-acre property is a long narrow parcel bordered on its narrow western edge by Oregon Highway 213. Adjacent properties to the north and south along Highway 213 are zoned RRFF-5 and generally developed with rural dwellings. The subject property is approximately one mile south of the rural community of Mulino, and approximately one-third mile north of the intersection of Highway 213 and Union Mills Road.

Commercial use of the subject property began as a wrecking yard in the late 1940s. In 1948, a two-bay shop building was constructed on the northwestern portion of the property, and used in conjunction with the wrecking yard business. In 1968, the wrecking yard was discontinued and a dwelling was moved onto the southwestern portion of the property. From 1968 to 1985, the property owner resided in the dwelling and operated a lawn and garden equipment repair business from the dwelling and from the existing shop building. In 1979, the property was zoned RRFF-5, which rendered the equipment repair business a nonconforming use. In 1985, the equipment repair business was discontinued. The owner, who continued to reside in the dwelling, leased the shop building to other persons, who operated a series of automobile repair businesses on the property until 1999.

Intervenors acquired the property in 1999, and filed an application with the county to expand the preexisting nonconforming automobile repair business. Intervenors sought to replace the two-bay shop building with a six-bay building. Staff approved the requested expansion. Believing that the staff approval had not been appealed, intervenors obtained a county demolition permit and demolished the existing shop building. However, petitioner had filed an appeal of the staff approval and, on February 17, 2000, a county hearings officer denied intervenors' application to expand the nonconforming automobile repair business.[1]

Intervenors then filed the instant application to redesignate and rezone the subject property to allow for rural commercial uses. Based on a recommendation from county staff, the application was modified to request rezoning only for the western 300 feet of the subject property adjacent to Highway 213, an area that contains the dwelling and the site of the former shop building. The planning commission recommended denial of the application on several grounds. On April 19, 2001, the board of county commissioners approved the proposed amendments and zone change. This appeal followed.

FIRST, SECOND, THIRD AND FIFTH ASSIGNMENTS OF ERROR

Petitioner argues that the county misconstrued the applicable law, and adopted findings unsupported by substantial evidence, in concluding that the area has an "historical commitment to commercial uses," and thus can be rezoned pursuant to Clackamas County Comprehensive Plan Rural Commercial Policy 18.[2]

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[1]Among other things, the hearings officer found that the nonconforming automobile repair shop had been destroyed and the small engine repair business discontinued, and that neither could be restored under the county's ordinance. That decision was then appealed to LUBA, *Guest v. Clackamas County* (LUBA No. 2000-031), and that appeal was suspended pending the outcome of the present appeal.

[2]Clackamas County Comprehensive Plan Rural Commercial Policy 18 provides in relevant part:

> "The Rural Commercial (RC) Zoning District implements the Rural Commercial Plan designation. Areas may be designated Rural Commercial when either the first, or all of the other criteria are met:
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> "a. Areas having an historical commitment to commercial uses."

A. Interpretation of Policy 18

Most of the issues under these assignments of error turn on the proper interpretation of Policy 18. The parties differ over whether the county's decision contains necessary interpretations of the pertinent terms of Policy 18 and, if so, whether those interpretations are adequate for review and pass muster under the deferential standard of review imposed by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).[3]

1. Express Language of Policy 18

Petitioner argues that the terms "historical commitment" in Policy 18 must be interpreted to mean "exclusive dedication or concentration of the property to a commercial use." Petition for Review 8. Thus, petitioner contends, because the subject property has been used for both residential and commercial uses since 1968, the county erred in concluding that it has been historically committed to commercial uses.

Further, petitioner argues that the county erred in limiting the "area" subject to consideration to the western portion of the subject property. According to petitioner, the county understands the pertinent "area" of analysis to be coextensive with the land used for commercial purposes, regardless of how small or limited that area is, or how predominant noncommercial uses are on the parcel viewed as a whole. That reading, petitioner argues,

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[3]ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

effectively reads the term "area" out of Policy 18. Petitioner contends that any county interpretation to that effect is contrary to the express language of Policy 18. ORS 197.829(1)(a).

The county's findings under Policy 18 rely in part on interpretations set forth in a previous county decision, and conclude that intervenors sufficiently demonstrated that the western 300 feet of the subject property have been historically committed to commercial uses.[4]

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[4]The county's findings state in relevant part:

> "As stated in Order No. 00-273 * * *, this Board interprets the term 'areas' to include single parcels such as the property which is the subject of this application. There is no requirement that adjacent properties also have an historical commitment to commercial uses * * *.
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> "As stated in Order No. 00-273, this Board interprets the term 'historical commitment' as not requiring that the property have legal nonconforming use status. In this case, the applicant has submitted evidence that the property was used for commercial purposes from 1950 until November 1999, and the main commercial structure demolished under a county permit in January 2000. For reasons discussed below, we find this history is sufficient to satisfy a finding of historic commitment to commercial use on a portion of this property.
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> "* * * * *
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> "* * * While there has been no commercial use of the property since November 1999, we find the applicant has provided sufficient evidence in the application materials and in testimony before us that the purchase of this property in November 1999, the subsequent demolition of the old garage and this application for plan amendment and zone change to Rural Commercial are a continuation of the historic commitment to commercial use of this property. As this Board interprets Policy 18, under these circumstances there has been an historical commitment to commercial uses that continues to this day.
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> "* * * There is considerable evidence before this Board that illustrates the extent of the historic commercial use of the property, especially a series of aerial photographs * * * taken in 1950, 1956, 1967 and 1997. The applicant presented other evidence corroborating the nearly continuous use of the subject property for commercial purpose for nearly 50 years. * * *
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> "* * * Opponents do not deny there was commercial use on this property, but they have argued that the commercial use was less extensive than claimed by the applicant and the staff. However, we find the applicant's arguments and exhibits more persuasive on this issue than the arguments and exhibits of opponents. Specifically, we find [the applicant's testimony and exhibits] all combine to provide strong evidence of the extent of the historical commitment to commercial use on this property. The opponents' evidence of less intensive commercial use relates to later years, long after the historic commitment to commercial use had been established. * * *" Record 3-4.

Intervenors respond that the board of commissioners interpreted the pertinent terms of Policy 18, and that the commissioners' interpretations are adequate for review and consistent with the express language of the policy. According to intervenors, the commissioners rejected petitioner's view that Policy 18 requires an *exclusive* commitment in order to demonstrate "historical commitment to commercial uses." Instead, intervenors argue, the commissioners interpret Policy 18 to be satisfied if there is a history of *extensive*, but not necessarily exclusive, commercial use of the property. With respect to the meaning of "area," intervenors argue, the commissioners correctly understand the term to refer to the land under consideration for rezoning, whether or not that land corresponds to parcel boundaries or other discrete areas.

Intervenors and respondent point out that in *Swyter v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2001-014, June 12, 2001), LUBA affirmed the county's interpretation of similar code language providing for rezoning land to Community Commercial where the applicant demonstrates that the "area" has been historically committed to commercial uses. The county interpreted "area" in that case to refer to the area under consideration for rezoning, *i.e.*, the applicant's property, and rejected the petitioner's argument that "area" required a demonstration that the surrounding neighborhood or adjoining property was also historically committed to commercial uses. *Swyter* was an

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The county also adopted the following relevant findings from the staff report:

> "The applicant has requested to change the [plan] and zoning designation to RC on the entire property. Staff finds the historical commitment of commercial uses has been limited to the westerly 200 to 300 feet of the property adjacent to the [Highway 213]. The policy issue is whether it is appropriate to designate the entire property or just the portion historically committed to commercial uses as Rural Commercial. Staff's opinion is that this determination should be made on a case-by-case basis. In this instance, staff finds it is more appropriate to only designate a portion of the property RC, for the following reasons, 1) clearly, only the front (westerly) 200-300 feet of the property has been historically used for commercial purposes, 2) the property is not adjacent to or near any other properties zoned RC, 3) the property is not adjacent to any other commercial uses, 4) the subject property is very narrow and rectangular in shape, and 5) the western one-third of the property [is] topographically at the same level as the highway, the eastern two-thirds of the property breaks off and slopes down to Milk Creek." Record 330.

appeal of the county decision (Order 00-273) cited in the above-quoted findings. Intervenors and respondent argue that the present case involves the same principle: the pertinent "area" for purposes of Policy 18 is the land under consideration for rezoning, whether that "area" is a portion of a parcel, a parcel, or a group of adjoining parcels.

We agree with intervenors that the county's findings contain implicit interpretations of Policy 18 that are adequate for purposes of our review. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 942 P2d 836 (1997) (LUBA and the court must defer to implicit interpretations of local provisions that are adequate for review). It is clear from the county's findings that the commissioners reject petitioner's view that Policy 18 requires an exclusive commitment to commercial uses. It is equally clear that the commissioners do not share petitioner's view that the "area" subject to analysis under Policy 18 must refer at a minimum to the entire parcel. While the county's decision does not articulate what level or character of commercial uses suffices to demonstrate commitment in circumstances where mixed uses are present, or the precise delineation of "areas" subject to analysis under Policy 18, such articulation is not necessary to resolve the issues raised in these assignments of error. The test under ORS 197.829(1) and *Clark* is whether no person could reasonably interpret the local provision in the manner the local body did. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). A reasonable person could, as the county has, interpret Policy 18 not to require a demonstration of exclusive commercial use. Similarly, a reasonable person could interpret the term "areas" to refer to the land considered for rezoning under Policy 18.

2. Purpose of Policy 18

Petitioner also contends that the county's interpretations of Policy 18 are inconsistent with the purpose of and policies underlying Policy 18, and therefore those interpretations are reversible under ORS 197.829(1)(b)-(c).

Petitioner cites to the purpose statement for the Rural Commercial zone, at Zoning and Development Ordinance (ZDO) 505.01, and argues that the county's interpretation is inconsistent with that statement, because it allows uncoordinated and disorderly development of lands.[5]

Intervenors argue, and we agree, that the county's interpretations of Policy 18 are not inconsistent with the purpose of that provision, to the extent that purpose is set forth in ZDO 505.01. Petitioner has not demonstrated that the county's interpretations of Policy 18 are inconsistent with "local shopping needs," the "historic character of rural communities," or the preservation of agricultural character. The cited comprehensive plan language is generally worded and bears no discernible relationship to Policy 18. We do not believe that either the plan provision's concern with orderly, coordinated development, or the prohibition on unlawful uses at ZDO 102.02, constitutes an "underlying policy" with respect to Policy 18.

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[5]ZDO 505.01 provides:

> "This section is adopted to implement the policies of the Comprehensive Plan for Rural Commercial areas. These provisions accommodate local shopping needs, recognize and protect the historic character of rural communities while preserving and protecting the agricultural or forestry character of the surrounding areas."

Petitioner also cites to ZDO 102.02, which provides in relevant part:

> "Except as herein specified, no land, building, structure or premise shall be used or transferred, and no building or part thereof, or the structure, shall be located, erected, moved, reconstructed, extended, enlarged or altered except in conformity with the regulations herein specified for the district in which it is located."

Finally, petitioner also cites to the introduction to the county's comprehensive plan, which states in relevant part:

> "Planning is essentially an organized attempt at community foresight. It seeks to guide the future conservation and development of an area within a framework of goals and policies consistent with physical constraints, legal requirements and attitudes and resources of the community. * * *"

3. Contrary to State Statute

Petitioner next argues that the county erred in interpreting Policy 18 as not requiring that the historic commercial uses that qualify the property for rezoning under that provision be legal nonconforming uses. Petitioner argues that the county's interpretation is contrary to statutory provisions governing nonconforming uses at ORS 215.130(5) and (9), and therefore reversible under ORS 197.829(1)(d).[6] According to petitioner, the restrictions on expansion or alteration of nonconforming uses in ORS 215.130 are undermined by the county's determination to consider, for purposes of Policy 18, allegedly illegal commercial uses of the property after 1985. Petitioner contends that the county's decision invites landowners to attempt unlawful activities with the expectation that such activities can later be used to justify a zone change under Policy 18.

Intervenors respond that Policy 18 does not implement any provision of ORS 215.130 and, in any case, the county's interpretation of Policy 18 is not contrary to any cited statutory provision. We agree with both points. Petitioner does not explain how Policy 18 implements ORS 215.130. Further, as we said in rejecting a similar challenge in *Swyter*:

> "[D]ifferent criteria are applied to (1) establish the existence of a right to continue a nonconforming use and (2) change a property's comprehensive plan and zoning map designations. [ORS 215.130 and local code provisions implementing the statute are not] directly relevant in changing the

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[6]ORS 215.130 provides in relevant part:

> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. * * *
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> "* * * * *
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> "(9) As used in this section, 'alteration' of a nonconforming use includes:
>
> > "(a) A change in the use of no greater adverse impact to the neighborhood; and
> >
> > "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

> comprehensive plan and zoning map designations, and they certainly do not have the prohibitive effect that petitioner argues they have." Slip op at 9.

Nothing in ORS 215.130 pertains to or constrains a county's ability to rezone land to allow uses that, under preexisting zoning, might not be permitted as a nonconforming use. Because ORS 215.130 establishes criteria for continuation and alteration of nonconforming uses, and does not concern rezoning property, the county's interpretation of Policy 18 to allow it to consider historical commercial uses that may have been inconsistent with the limitations imposed by ORS 215.130 is not contrary to the statute.[7]

B. Evidence Supporting Historical Commitment

Finally, petitioner challenges the sufficiency of the evidence in the record to demonstrate "historical commitment to commercial uses" on the western 300 feet of the subject property. Petitioner argues that, even assuming the record shows sufficient commitment to commercial uses near the site of the former shop building, the record establishes that the dwelling itself has been used as a residence since 1968. Petitioner requests that if LUBA does not reverse or remand the county's decision in its entirety, it should nonetheless remand to the county with instructions to exclude from the plan amendment and rezoning the southwestern portion of the property that surrounds the dwelling.

Intervenors respond that petitioner failed to raise any issue below regarding the sufficiency of the evidence of commitment to commercial uses with respect to the dwelling, and that issue is thus waived. ORS 197.763(1). In the alternative, intervenors cite to evidence that the dwelling was used in part as a business office for the various commercial uses of the property, even after 1985.

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[7]As previously noted, petitioner's appeal of the hearings officer's decision denying intervenor's request for permission to expand a nonconforming use has been suspended. *See* n 1. Therefore it has not yet been finally determined whether some of the prior commercial uses the county relied on in its decision were operated in violation of ORS 215.130.

We need not address intervenors' waiver argument, because we agree with intervenors that substantial evidence in the record supports the county's determination that the entire western portion of the property, including the dwelling, has been historically committed to commercial uses, as the county has interpreted those terms.[8]

The first, second, third and fifth assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county's decision to split zone the subject property—to rezone only the western 300 feet while leaving the remainder in RRFF-5 zoning—is inconsistent with language in the introduction to the county's comprehensive plan, quoted above in footnote 5. According to petitioner, split zoning the subject property in this case is inconsistent with orderly regulation of land, because the portion of the parcel zoned RRFF-5 is smaller than the minimum five acres required under that zone.

We agree with intervenors and respondent that petitioner has not demonstrated that split zoning of the subject property is a basis for reversal or remand. The cited language from the introduction to the comprehensive plan is not an approval criterion for redesignating and rezoning land under Policy 18. Nor has petitioner explained why it constitutes reversible error that the RRFF-5 zoned portion of the property is smaller than the minimum five acres required in that zone.

The fourth assignment of error is denied.

The county's decision is affirmed.

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[8]We understand the county to reject petitioner's position that *any* residential use of the dwelling disqualifies the portion of the property occupied by the dwelling. The county's less exacting application of Policy 18, to allow it to recognize the mixed commercial and residential use of the dwelling over time, is not clearly wrong.