BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BUD MILES and MILES OIL, Inc.,
Petitioners,

vs.

CITY OF FLORENCE,
Respondent,

and

SAFEWAY, INC.,
Intervenor-Respondent.

LUBA No. 2003-007

FINAL OPINION
AND ORDER

Appeal from City of Florence.

Dan Terrell, Eugene, filed the petition for review. With him on the brief was the Law Office of Bill Kloos, PC. Bill Kloos argued on behalf of petitioners.

No appearance by the City of Florence.

Steven P. Hultberg, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Perkins Coie LLP.

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

REMANDED 04/18/2003

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

Petitioners appeal a city decision that grants conditional use and design review approval for a vehicle fueling facility.

MOTION TO INTERVENE

Safeway, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO ALLOW REPLY BRIEF

Petitioners move for an order allowing a reply brief. The reply brief that petitioners included with their motion is limited to responding to new matters that are raised in intervenor's response brief, as OAR 661-010-0039 requires. Intervenor does not object to the reply brief, and it is allowed.

FACTS

Intervenor owns an existing grocery store located east of Highway 101 in the City of Florence. The proposed fueling facility would be located between the grocery store and Highway 101. The facility would have one shared access with an existing bank directly onto Highway 101. The facility would also have access from Sixth Street to the south and Seventh Street to the north. Sixth Street and Seventh Street are east/west streets, which intersect with Highway 101.

The planning commission approved intervenor's application and petitioners appealed that decision to the city council. The city council affirmed the planning commission's decision, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The Florence City Code (FCC) provisions for conditional uses appear at Title 10, Chapter 4. In their first assignment of error, petitioners allege the city erred by failing to adopt findings that demonstrate the proposal complies with "General Criteria" C, E and F,

which are set out at FCC 10-4-9.[1] Intervenor argues that the issues that petitioners raise in the first assignment of error were not raised below by any participant and, therefore, those issues are waived and may not be considered by LUBA in this appeal.[2]

The September 10, 2002 planning commission decision in this matter adopts the August 27, 2002 planning staff report as findings in support of its decision to approve the disputed application. That staff report appears at Record 197-206. That staff report includes findings that address the comprehensive plan (General Criterion A). The staff report includes no findings that specifically address General Criteria C, E and F.

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[1] 10-4-9 provides:

> "A conditional use permit may be granted only if the proposal conforms to all the following general criteria:
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> "A. Conformity with the Florence Comprehensive Plan.
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> "B. Compliance with special conditions established by the Planning Commission to carry out the purpose of this Chapter.
>
> "C. Findings that adequate land is available for uses which are permitted outright in the district where the conditional use is proposed. Available land can be either vacant land or land which could be converted from another use within the applicable zoning district. Land needs for permitted uses may be determined through projections contained in the Florence Comprehensive Plan or other special studies.
>
> "D. Conditional uses are subject to design review under the provisions of Chapter 6 of this Title, except single family and duplex residential use. * * *
>
> "E. Adequacy of public facilities, public services and utilities to service the proposed development.
>
> "F. Adequacy of vehicle and pedestrian access to the site, including access by fire, police and other vehicles necessary to protect public health and safety."

[2] ORS 197.763(1) provides:

> "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 and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) limits LUBA's scope of review to issues that were "raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

Petitioners appealed the planning commission decision on September 25, 2002. FCC 10-1-1-7(D)(3) provides that an appellant must identify "[t]he specific errors, if any, made in the decision of the initial action and the grounds therefore." Petitioners identified four alleged errors. The issues raised in the first assignment of error are not identified in petitioners' September 25, 2002 appeal. The issues in the first assignment of error were not raised before the city council on appeal. [3]

Petitioners correctly point out that the scope of issues that they may raise in this appeal to LUBA is not limited to issues that they personally raised during the local proceedings. So long as "any participant" before the city raised the issues that are presented in the first assignment of error, ORS 197.835(3) does not bar LUBA from considering those issues. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507, 511 n 3 (2000); *Spiering v. Yamhill County*, 25 Or LUBA 695, 714 (1993). Citing *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001), petitioners contend that because the application submitted by intervenor identifies General Criteria C, E and F as relevant approval criteria and addresses those criteria, the issue of the applicability of those criteria and the legal requirement that the city adopt findings that demonstrate compliance with those criteria was adequately raised and is not waived under ORS 197.763(1) and 197.835(3).

Central Klamath County CAT v. Klamath County and an earlier, identically captioned decision lend some support to petitioners' argument. In both of those decisions we concluded that because the applicant identified certain development code provisions as applicable criteria and addressed those development code criteria in its application, a party

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[3] We note that *Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989), involved a similar local requirement that local appellants identify the issues that formed the basis for the local appeal. In *Smith*, the Court of Appeals held that it was error for the board of county commissioners to consider issues that were not presented in the notice of local appeal. Because the parties' arguments in the current appeal are directed solely at ORS 197.763(1) and 197.835(3) and those arguments neither cite nor discuss the possible relevance that *Smith* may have on this case, without regard to whether the issues presented in the first and second assignments of error were waived under ORS 197.763(1) and 197.835(3), we do not consider that question.

that opposed that application could challenge the board of county commissioners' failure to adopt findings addressing those development code criteria at LUBA, even though the opposing party did not raise any issue locally concerning the applicability of those development code criteria. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111, 120-123 (2001); 40 Or LUBA at 135-136.

Although there are similarities between the present case and our *Central Klamath County CAT* cases, there is an important difference. The "issue" in those cases was whether the disputed development code criteria were applicable criteria. 40 Or LUBA at 123 ("whether LDC 54.040 provides applicable approval criteria"); 40 Or LUBA at 136 ("whether 54.040 provides approval criteria applicable to the proposed facility"). In the present appeal, intervenor argues there is no dispute that General Criteria A through F are applicable criteria. The application addresses all of the General Criteria, including General Criteria C, E, and F. Record 242-243. The notice that preceded the planning commission hearing lists FCC Title 10, Chapter 4 among the applicable criteria. Record 214. For some reason the planning commission's decision addresses General Criterion A, but does not specifically address General Criteria B though F. Record 200-201. Likewise, the city council's decision addresses General Criterion A, but does not specifically address General Criteria B through F. According to intervenor, the issue that is presented in the first assignment of error is not which of several potentially applicable standards apply, but rather whether the city erred by failing to adopt findings that specifically address General Criteria C, E and F, standards that indisputably apply.

We agree with intervenor's description of the issue that is presented in the first assignment of error. The planning commission's decision that petitioners appealed to the city council clearly failed to adopt findings addressing General Criteria B through F. Petitioners could have but did not identify that failure as one of the bases for their appeal, as required by FCC 10-1-1-7(D)(3). Had they done so, the city could have adopted findings

addressing those criteria. Because petitioners did not do so, the issue is waived under ORS 197.763(1) and 197.835(3). *DLCD v. City of Warrenton*, 40 Or LUBA 88, 95-96 (2001).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

FCC 10-4-11 subjects certain conditional uses to "Additional Conditions." FCC 10-4-11(D)(2) subjects service stations to special site dimension standards.[4] Much of the debate during the local proceedings concerned the last two sentences of FCC 10-4-11(D)(2), which require "a minimum distance of four hundred feet * * * between service stations except at intersections," and that there be "[n]o more than two * * service stations * * * at any intersection." Petitioners second assignment of error concerns the requirement of the first sentence of FCC 10-4-11(D)(2), which requires that the site have 150 feet of "frontage."

The FCC does not define the term "frontage." If FCC 10-4-11(D)(2) requires that the site have 150 feet of frontage along Highway 101, the requirement is met because the site has 177 feet of frontage along Highway 101. If FCC 10-4-11(D)(2) requires that the site have 150 feet of frontage along Seventh Street, the requirement is not met because the site has only 144 feet of frontage along Seventh Street. Petitioners read FCC 10-4-11(D)(2) together with FCC 10-1-4 definition of front lot line to argue that the shorter Seventh Street road frontage is the frontage that must be at least 150 feet long under FCC 10-4-11(D)(2).[5]

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[4] FCC 10-4-11(D)(2) provides:

> "Site Dimensions: The minimum size for a service station shall be one hundred fifty foot (150') frontage and one hundred foot (100') depth. They shall not abut existing residential districts and there shall be a minimum distance of four hundred feet (400') between service stations except at intersections. No more than two (2) service stations will be allowed at any intersection."

[5] FCC 10-1-4 provides definitions for front, rear and side lot lines. The definition of front lot line is as follows:

> "* * * The private property line contiguous with the public street line or place. For corner lots the front lot line shall be the narrowest street frontage or as shown on the official plat of the property."

Intervenor argues that the city council correctly found that the FCC 10-4-11(D)(2) frontage requirement is properly measured along the Highway 101 frontage. Intervenor contends that FCC 10-4-11(D)(2) is unambiguous and that when it is read in context with other FCC provisions where frontage is a relevant consideration, it is clear that the city council correctly measured the FCC 10-4-11(D)(2) 150-foot frontage requirement along Highway 101.

As with the first assignment of error, intervenor argues petitioners waived the issue presented under the second assignment of error because no party raised the issue below. Intervenor is mistaken. The planning commission's questioning of the applicant's representative shows there was significant confusion below concerning how the 150-foot frontage requirement is applied to lots with frontage on more than one road and whether the FCC 10-4-11(D)(2) 150-foot frontage requirement should be applied to the Highway 101 frontage or to the Seventh Street frontage. Record 168-171. This discussion occurred prior to the close of the final evidentiary hearing in this matter and was sufficient to raise the issue that is presented in the second assignment of error.[6]

On the merits, the FCC 10-4-11(D)(2) requirement that the site have "one hundred fifty foot (150') frontage" is ambiguous. Read in context with other FCC provisions that the parties cite, it could have a number of different meanings. It might mean (1) the frontage along Highway 101 must be at least 150 feet long;[7] (2) the frontage along the front property

[6] The confusion at the planning commission level over how the FCC 10-4-11(D)(2) frontage requirement should be applied in this case carried over to the city council meeting. However, the city council discussion that petitioners cite and rely on to argue that the issue presented in the second assignment of error was raised below occurred after the close of the final evidentiary hearing. Under ORS 197.763(1) and 197.835(3) issues must be raised prior to the conclusion of the final evidentiary hearing. *See* n 2.

[7] As previously noted, the city council measured the 150-foot frontage requirement along Highway 101, although its decision does not explain why it did so. Intervenor cites a definition in FCC 10-26-2 as supporting the city's finding that 177 feet of frontage along Highway 101 is sufficient to satisfy FCC 10-4-11(D)(2). FCC 10-26-2 provides that for purposes of the city's sign regulations "Primary Highway Frontage" is defined as "[t]he lineal portion of a lot or parcel that abuts either Highway 101 or Highway 126."

line (Seventh Street in this case) must be 150 feet long;[8] (3) the access along the frontage that will actually be used for the main access to the property (in this case that appears to be Seventh Street) must be at least 150 feet long;[9] (4) for sites with more than one frontage, at least one frontage must be 150 feet long, (5) for sites with more than one frontage, all frontages must be 150 feet long, (6) for sites with more than one street frontage, those multiple street frontages must total 150 feet in length.

We offer the above list of possible interpretations without considering whether any of them is necessarily correct or whether one or more of them is necessarily an interpretation that LUBA would be bound to defer to under ORS 197.829(1). They are offered simply to demonstrate that FCC 10-4-11(D)(2) is far from clear. Given the ambiguity of the frontage requirement in FCC 10-4-11(D)(2), and the fact that the ambiguity of that frontage requirement was recognized below but never resolved in the decision, remand is appropriate so that the city council can explain its interpretation of FCC 10-4-11(D)(2). The challenged decision simply applies the FCC 10-4-11(D)(2) frontage requirement to the frontage along Highway 101 without offering any explanation for selecting Highway 101 as the relevant frontage under FCC 10-4-11(D)(2). There is no express or implicit interpretation of FCC 10-4-11(D)(2) for LUBA to defer to. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67, 942 P2d 836 (1997). Given the number of possible interpretations, it is not appropriate for LUBA to interpret FCC 10-4-11(D)(2) without first giving the city council an opportunity to explain its understanding of how the FCC 10-4-11(D)(2) frontage requirement should be applied to property, such as the subject property, that has multiple road frontages. *St Johns Neighborhood Assoc. v. City of Portland*, 38 Or

[8] As noted, this is the interpretation that petitioners advocate.

[9] This appears to have been intervenor's initial understanding of how the FCC 10-4-11(D)(2) frontage requirement applied in this case.

LUBA 275, 282 (2000); *OTCNA v. City of Cornelius*, 39 Or LUBA 62, 71 (2000); *Botham v. Union Co.*, 34 Or LUBA 648, 658 (1998).

The second assignment of error is sustained.

The city's decision is remanded.