BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DANIEL GUMTOW-FARRIOR and
CATHY GUMTOW-FARRIOR,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

JASON BRONSON and
DAMON SHAEFER,
Intervenors-Respondent.

LUBA No. 2004-052

FINAL OPINION
AND ORDER

Appeal from Crook County.

Gary Abbott Parks, Tualatin, filed the petition for review and argued on behalf of petitioners.

Jeff M. Wilson, County Counsel, Prineville, and Daniel Kearns, Portland, filed a joint response brief and argued on behalf of respondent and intervenors-respondent. With them on the brief was Reeve Kearns, PC.

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

AFFIRMED 06/28/04

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 county decision approving a conditional use permit for a commercial recreational park.

MOTION TO INTERVENE

Jason Bronson and Damon Shaefer (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 challenged decision is the county's decision following our remand in *Gumtow-Farrior v. Crook County*, 45 Or LUBA 612 (2003) (*Gumtow-Farrior I*). There, we set out the following relevant facts:

> "The subject property includes 576 acres, located approximately two and one-half miles from the Prineville Reservoir. The property is accessed via a BLM easement to SE Juniper Canyon Road, a county road. The property is zoned Recreation Residential Mobile, 5-acre minimum lot size (RR(M)-5), a rural, nonresource zoning designation.
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> "The property is currently undeveloped. The property's terrain is uneven, and there are several seasonal drainage ravines on the property. Property to the west, north and east is managed by BLM. Land to the south, and portions of property to the east and west are privately owned, and zoned RR(M)-5. Some of those privately owned parcels are developed with seasonal or year-round dwellings.
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> "In early 2003, intervenors-respondent (intervenors) submitted an application for a conditional use permit to develop a commercial recreational park. As proposed, the subject property would be developed with (1) a motocross and all-terrain vehicle (ATV) track; (2) a mountain bike trail; (3) a running trail; and (4) an archery range. In the future, intervenors anticipate adding a camping area to the property. The motocross/ATV track will be located in the center portion of the property, and the other uses will be developed around that track.
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> "Crook County permits 'commercial recreation uses' as conditional uses in the RR(M)-5 zone. During the proceedings before the county planning commission and county court, petitioners and others argued that (1) the proposed use does not fall within the scope of a commercial recreation use; (2) the proposed use is not compatible with other uses allowed within the zone, particularly residential uses; (3)

the RR(M)-5 zone is more of a residential zone than a commercial recreational zone; and (4) the proposal does not satisfy all applicable approval criteria.

"The planning commission held a hearing on the application, and approved the application with conditions. Petitioners and others appealed the planning commission's decision to the county court. The county court, after a hearing, denied petitioners' appeal and approved the application, adopting a modified version of the planning commission's decision and imposing additional conditions of approval. * * *" 45 Or LUBA at 613-14.

Petitioners appealed the county's approval to LUBA, alleging nine assignments of error. We sustained two of petitioners' assignments of error and remanded the decision to the county. One of those assignments of error concerned the Crook County Zoning Ordinance (CCZO) 6.020 general conditional use criteria. Petitioners challenged the county's findings regarding the impact the proposed commercial recreation use would have on the value of nearby properties under CCZO 6.020(2). The other assignment of error concerned a limitation that CCZO 3.070(10) imposes on conditional uses in the RR(M)-5 zone. On remand, the county court reconsidered its first decision, accepted new evidence, and reapproved intervenors' application. This appeal followed.

In this appeal petitioners assert three overlapping assignments of error, which challenge the county's response to both of our bases for remand in *Gumtow-Farrior I*. We address the county's responses separately below.

CCZO 6.020

CCZO 6.020 provides, in relevant part:

"In judging whether or not a conditional use proposal shall be approved or denied, the [county decision maker] shall weigh the proposal's appropriateness and desirability of the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable.

"* * * * *

"2. Taking into account location, size, design and operation[al] characteristics, the proposal will have a minimal adverse impact on the (A) livability, (B) value and (C) appropriate development of abutting properties and the

surrounding area compared to the impact of development that is permitted outright."

In *Gumtow-Farrior I*, the county found that the proposed recreational park would not have an adverse impact on the value of abutting property. The county based its finding in significant part on evidence from the county assessor. The county assessor opined that impacts on neighboring property values could not be established with any certainty until two or three years after the proposed commercial recreation park was built. We agreed with the petitioners that the county assessor's testimony did not support the county's finding that the proposal would have a minimal adverse impact, as CCZO 6.020(2)(B) requires. *Gumtow-Farrior I*, 45 Or LUBA at 626-27. We pointed out that because the county assessor testified that it was not possible to determine whether neighboring property values would be adversely impacted by the proposal until it was built, that testimony supported a finding that the applicants failed to carry their burden of proof concerning impacts on property values under CCZO 6.020(2)(B). *Id.* at 627.

On remand, the county court accepted additional evidence and adopted new findings to address impacts on property values under CCZO 6.020(2)(B). Those new findings address the question concerning property values under CCZO 6.020(2)(B) in two ways. First, the county expressly interprets CCZO 6.020(2)(B) to require a comparative rather than a discrete analysis of adverse impacts the proposed use would have on property values. Significantly, the county found that if the proposed recreational park were *publicly* rather than *privately* owned, it would be permitted outright.[1] The county's findings explain:

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[1] The RR(M)-5 zone authorizes the following relevant permitted and conditional uses:

"In an **RR(M)-5 Zone**, the following regulations shall apply:

1. **Uses Permitted Outright.** In an **RR(M)-5 Zone**, the following uses and their accessory uses are permitted outright:

"* * * * *

"D. Public park, recreation area, community or neighborhood center.

> "The standard in CCZO 6.020(2) requires a comparison to the impact of uses allowed outright. The record reflects that a public motocross park could be established in the [RR(M)-5] zone as an outright use and that a public motocross park would have no more impact than a private motocross park. Consequently, the [county] Court finds that there will be no more impact to value from the proposed use than that caused by uses allowed outright." Record 16-17.[2]

As clarified by the county on remand, we understand the county to interpret the CCZO 6.020(2) requirement that the proposed commercial recreation park "have a minimal adverse impact on the * * * value * * * of abutting properties and the surrounding area *compared to the impact of development that is permitted outright*" to be met in this case, as a matter of law, because it will have no more impact on the value of abutting properties and the surrounding area

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> "* * * * *[.]
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> "2. **Conditional Uses Permitted**. In an **RR(M)-5 Zone**, the following uses and their accessory uses are permitted when authorized in accordance with the requirements set forth by this section and Article 6 of this Ordinance.
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> "A. Private parks, campground or picnic grounds, hunting and fishing preserves.
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> "B. Commercial recreation use; including but not limited to stables, resort, gun club, traveler's accommodations, and recreational or organizational camp.
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> "* * * * *[.]" CCZO 3.070.

[2] Although the county does not cite to a specific place in the record where it determines that the proposed recreational park would be allowed outright, but for the fact that it will be privately owned and operated, the planning commission's earlier decision includes the following explanation:

> "The first question to answer is 'is the proposed use a 'commercial recreational use?''
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> > "Commercial recreational use includes, but is not limited to stables, resort, gun club, traveler's accommodations, and recreational or organizational camps. This is a conditional use within the RRM-5 Zone. The County distinguishes between public and commercial uses. A public park, recreation area, community centers, and other public uses necessary to serve the recreation residential needs for the area are permitted as an outright use. Hiking, biking, archery, riding of motorcycles on a track is all considered recreational. These uses provided by a private individual or firm for compensation and profit makes these a commercial recreational use." Record (*Gumtow-Farrior I*) 163.

than a "[p]ublic * * * recreation area," a use that is permitted outright under CCZO 3.070.[3] *See* n 1. This is because, as the county interprets CCZO 3.070, the only difference between a commercial recreation use, which is a conditional use, and a public recreation area, which is a use that is permitted outright, is the private ownership of the former and the public ownership of the latter; the same recreational activities may be offered at both the private and public uses.[4] That interpretation and application of CCZO 6.020(2) in this case is within the county's interpretive discretion under ORS 197.829(1).[5]

Because we sustain the county's interpretation of CCZO 6.020(2) above, it is not necessary for us to consider whether the county's additional findings, in which it concludes that the proposed recreational park would not have a negative impact on property values, are supported by substantial evidence.

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[3] In other words, we understand the county to have interpreted the CCZO 6.020(2) conditional use standard to be satisfied, even if the proposed commercial recreation park would have adverse impacts on nearby property values, if one of the uses that is permitted outright would have the same or worse adverse impacts on nearby property values that the proposed conditional use would have.

[4] Petitioners contend that there is no evidence in the record that supports a finding that a public motocross park could be allowed as a permitted use in the RR(M)-5 zone. However, in *Gumtow-Farrior I*, we agreed with respondents that the county found that "motorized recreational activities may occur on property developed for public recreational purposes, and those same motorized activities may occur as a commercial recreation use as well." 45 Or LUBA at 618. Our decision in *Gumtow-Farrior I* was not appealed to the Court of Appeals and, therefore, petitioners may not raise that issue again in a challenge to the county's decision on remand. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

[5] 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;
>
> "(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."

CCZO 3.070(10)

CCZO 3.070(10) provides, in relevant part:

> "Limitations on Conditional Uses. In addition to the standards and conditions that may be attached to the approval of conditional uses as provided by [CCZO] Article 6, the following limitations shall apply to conditional uses in a **RR(M)-5 zone**:
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> "* * * * *
>
> "(B) An application for a Conditional Use in the **RR(M)-5 Zone** may be denied if the applicant fails to demonstrate that a location in close proximity to the recreation resource to be served is essential to the public interest and to the full development of the recreation resource."

In *Gumtow-Farrior I*, petitioners argued that the findings supporting the county's first decision in this matter neither explained what CCZO 3.070(10)(B) requires, nor explained why the county believed that the evidence intervenors provided demonstrated that the standard was met. We summarized petitioners' argument as follows:

> "Petitioners argue that there is nothing in the decision or the record that explains (1) what the county believes the 'recreation resource' is; (2) whether the proposed use must be in close proximity to that recreation resource; (3) why the conditional use is essential to the public interest; and (4) why the proposed conditional use is essential to the full development of the recreation resource." 45 Or LUBA at 632.

In response to petitioners' assignment of error, in *Gumtow-Farrior I* the county argued in its brief that the county's first decision should be understood to have found that the zone itself is the referenced resource, because private recreational parks can only be allowed on property within the county that is zoned RR(M)-5. Intervenors, on the other hand, argued in their brief in *Gumtow-Farrior I* that the county's first decision should be understood to have found that CCZO 3.070(10)(B) was not a mandatory approval standard. While we agreed with the respondents that either of those two explanations might be sufficient to allow approval of the disputed commercial recreation use, we disagreed with respondents that the county court had articulated either explanation in its first decision in addressing CCZO 3.070(10)(B). 45 Or LUBA at 633.

In response to our decision, the county court adopted the following findings in its decision on remand:

"The Court finds that approval of the Prineville Adventure Park meets the requirements of CCZO 3.070(10)(B), to the extent the Code Section applies at all, because 'the proposed use must be in close proximity to the recreational resource.'

"In remanding the case to Crook County, LUBA agreed with [petitioners] that the findings adopted by the Planning Commission are inadequate with respect to CCZO 3.070(10)(B) in at least 4 different particulars. In that regard, the Court finds as follows:

A. The Crook County Planning Commission was correct in finding that the recreation resource is the Prineville Reservoir and surrounding public lands, as well as the [RR(M)-5] zone.

"B. That the proposed use must be in close proximity to the recreational resources because that is the only zone where the use is a permitted conditional use;

"C. That the conditional use is essential to the public interest because the public interest is served by maintaining a broad range of recreational uses in the community; and

"D. The conditional use is essential to the full development of the recreational resource because of the need to maintain a broad scope of recreational uses in the area, and to comply with Crook County's Recreational Policy #7 encouraging private development; and

"The Court further finds that the language of CCZO 3.070(10)(B) uses the discretionary language of 'may' rather than the mandatory language of 'shall' and for that reason, the Court finds that the application of this ordinance criterion is discretionary." Record 17-18.

Petitioners argue that the county's error with respect to CCZO 3.070(10)(B) in *Gumtow-Farrior I* is not cured by the county's decision on remand, because that decision does not choose between the options described in the county's and intervenors' response briefs in that appeal. Petitioners further argue that the decision does not define "public interest," does not explain why the proposed use is essential to that public interest or is essential for full development of the resources. Petitioners also argue that there is not substantial evidence in the record to support a finding that some public interest is served by approving the proposed recreational park.

We understand the county's decision on remand to adopt the arguments set out in the response briefs in *Gumtow-Farrior I* as *alternative* bases for approval. As the findings adopted

on remand explain, the county court found that the Prineville Reservoir and surrounding public lands and the RR(M)-5 zone itself constitute the "resource" referred to in CCZO 3.070(10)(B). The county also found that the proposed commercial recreational use, which the county found to further recreational development policies included in the comprehensive plan, must be close to that recreational resource because it is only allowable in the RR(M)-5 zone. We understand the county to have found that the "public interest" in the proposed recreational park is reflected in recreational policies set out in the comprehensive plan. We disagree with petitioners that the county's findings are inadequate to explain what the "public interest" is and why the county believes that the proposed recreational park meets the criterion.

We also conclude that petitioners have not established that the county's alternative interpretation that CCZO 3.070(10)(B) is not a mandatory approval standard is legally erroneous. That interpretation is not inconsistent with the express language of CCZO 3.070(10)(B), and petitioners do not identify any purpose or underlying policies that provide the basis for that provision that might provide a basis for reversal or remand. ORS 197.829(1). *See* n 5.

Petitioners' assignments of error are denied.

The county's decision is affirmed.