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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

CITIZENS FOR RESPONSIBLE GROWTH,
KATE HUSEBY, STUART WATSON,
KATHY WATSON and CITY OF HOOD RIVER,
Intervenors-Respondent.

LUBA No. 2004-021

FINAL OPINION
AND ORDER

Appeal from Hood River County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gregory S. Hathaway and Davis Wright Tremaine, LLP.

Wilford K. Carey, Hood River, filed a response brief and argued on behalf of respondent. With him on the brief was Annala, Carey, Baker and Thompson, PC.

Christine M. Cook, Portland, filed a response brief and argued on behalf of intervenors-respondent Citizens for Responsible Growth, Kate Huseby, Stuart Watson and Kathy Watson.

Alexandra Sosnkowski, Hood River, filed a response brief and argued on behalf of intervenor-respondent, City of Hood River.

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

AFFIRMED

07/16/2004

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

NATURE OF THE DECISION

Petitioner appeals the county’s denial of petitioner’s site plan review application for a 186,685-square foot retail/grocery store on a 16.30-acre parcel.

REPLY BRIEF

Petitioner moves to file a reply to address three alleged “new matters” raised in the response briefs: (1) whether procedural error alleged in the petition for review prejudiced petitioner’s substantial rights; (2) whether petitioner waived its objection to those procedural errors by failing to raise them below; and (3) whether the challenged decision includes an implicit interpretation of a code provision to which LUBA must defer. Respondent and intervenor-respondent Citizens for Responsible Growth contest the motion to file a reply brief, however, we agree with petitioner that the proposed reply brief is warranted under OAR 661-010-0039, and it is allowed.

FACTS

The subject property is zoned general commercial (C-2) and located within the City of Hood River urban growth boundary. The surrounding area is a mix of low-density residential and commercial uses. An existing 72,000-square foot Wal-Mart store is located to the east. Phelps Creek flows through the property, under Interstate-84, and through the grounds of the Columbia Gorge Hotel, to the Columbia River. In February 1996, Phelps Creek flooded, covering much of the subject property and inundating the grounds and structure of the Columbia Gorge Hotel.

The C-2 zone allows commercial uses subject to site plan review. In December 2001, petitioner applied to the county for site plan review for a 186,685-square foot, one-story structure and a 900-space parking lot. The application proposed placing 60,000 cubic yards of fill on the property, including 27,000 cubic yards within the floodplain of Phelps Creek, which would be relocated to a prior natural channel in order to facilitate the proposed store and parking lot. To address code requirements that the proposed grading and fill would have “no adverse effect” on neighboring properties, petitioner retained a hydrologist, who prepared an analysis concluding that

1 proposed development would cause an estimated 10 to 15 acre-feet loss of floodplain storage, but
2 would not cause additional flooding or have an adverse effect on downstream properties.¹ The
3 county retained a consultant to review the hydrologist’s analysis, as did intervenor-respondent
4 Citizens for Responsible Growth (CRG). After petitioner’s hydrologist submitted additional
5 information requested by the county, the county’s consultant ultimately concluded, in a September
6 12, 2003 letter, that petitioner had failed to establish that the estimated 10 to 15 acre-feet loss of
7 floodplain storage would not cause increased flooding on downstream properties, and
8 recommended that the county require no net loss of floodplain storage in order to comply with the
9 “no adverse effect” standard.

10 To address code requirements that the “bulk and scale” of proposed development be
11 “compatible” with buildings in the surrounding area, petitioner proposed various architectural
12 features, earth-tone building materials, landscaping and similar design elements to minimize the visual
13 impact on surrounding properties. Intervenor-respondent City of Hood River (the city) argued that
14 the county compatibility standard, which is based on an identical city standard, requires the county
15 to determine that the proposed 186,685-foot structure is compatible in size with other buildings in
16 the area. The city pointed out that the largest existing commercial use in the area is the existing
17 72,000-square foot Wal-Mart store to the east of the subject property.

¹ Hood River County Zoning Ordinance (HRCZO) 17.10.040 provides the following relevant decision criteria for site plan review:

“3. **Grading:** Any grading, contouring, on-site surface drainage, and/or construction of on-site surface water storage facilities shall take place so that there is no adverse effect on neighboring properties, public rights-of-way, or the public storm drainage system. * * *

“* * * * *

“8. **Compatibility:** The height, bulk and scale of buildings shall be compatible with the site and buildings in the surrounding area. Use of materials should promote harmony with surrounding structures and sites.”

1 The planning commission held a hearing September 24, 2003, at which petitioner's
2 hydrologist responded to the September 12, 2003 letter and testified that the estimated 10 to 15
3 acre-feet loss of floodplain storage would not cause increased flooding. In memoranda dated
4 October 5 and 15, 2003, the county's consultant responded by citing additional concerns with the
5 hydrologist's analysis.

6 On December 2, 2003, the planning commission approved the application, subject to
7 conditions. One of those conditions required petitioner to submit a revised site plan showing no net
8 loss of floodplain storage. The planning commission decision also determined that the county
9 compatibility standard is satisfied by minimizing visual impacts and does not require that the
10 proposed structure be compatible in size with other buildings in the area.

11 Three parties appealed the planning commission decision to the county board of
12 commissioners. In relevant part, petitioner appealed the requirement of a showing of no net loss of
13 floodplain storage, the city appealed the planning commission's interpretation of the compatibility
14 standard, and CRG appealed the county's decision to allow petitioner to submit a revised site plan.
15 The board of commissioners elected to review the planning commission decision on the record, and
16 scheduled a public hearing January 5, 2004, to hear oral argument of the parties. Petitioner's
17 representatives did not attend the January 5, 2004, hearing due to severe weather and road
18 conditions in the Columbia River Gorge area, but provided written arguments to the board of
19 commissioners. The city and CRG attended and submitted written and oral testimony. CRG's
20 hydrology consultant submitted a memorandum with an attached diagram depicting the location of
21 the floodplain on the subject property.

22 The board of commissioners reversed the planning commission decision. While the board
23 affirmed the planning commission's interpretation that the "no adverse effect" standard requires no
24 net loss of floodplain, the board concluded that submission of a revised site plan as required by the
25 planning commission would constitute a "major amendment" requiring a new application. In
26 addition, the board rejected the planning commission interpretation of the compatibility standard,

1 and agreed with the city that that standard requires the county to compare the size of the proposed
2 building to the size of buildings in the surrounding area. Because the proposed building was two to
3 three times larger than any building in the area, the board concluded that petitioner failed to comply
4 with the compatibility standard.

5 This appeal followed.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner contends that the board of commissioners misconstrued the
8 HRCZO 17.10.040(8) compatibility standard to require a comparison of the size of the proposed
9 building with that of other existing buildings in the area. According to petitioner, the planning
10 commission's interpretation of HRCZO 17.10.040(8)—that it is primarily concerned with visual
11 compatibility and thus satisfied by measures that minimize the visual impacts of the proposed
12 building—is the correct interpretation.

13 Petitioner argues that the board of commissioners' interpretation of HRCZO 17.10.040(8)
14 is inconsistent with the text, context and purpose of that provision.² Petitioner notes that the text of

² The board of commissioners' decision states, in relevant part:

“The Board found that the record did not contain substantial, probative, reliable evidence to demonstrate compliance with Section 17.10.040(8) of the HRCZO. The Board disagreed with the Planning Commission's interpretation that the criterion is intended to be applied solely as a visual standard. The Board found that the height, bulk, and scale of the proposed building could not be made compatible with the site and other buildings in the identified surrounding area through visual means only and that dimensional aspects of a building must also be taken into consideration. The Board found that the bulk and scale of the building was disproportionately larger than, and therefore incompatible with, all other buildings within the identified surrounding area, thereby conflicting with the plain language of the criterion. These determinations are based on the following adopted findings of fact:

- “1. Compatibility is based on [a] building's harmonious relationship with the site and with the dimensional size of existing buildings within the defined surrounding area.
- “2. Compatibility with surrounding buildings requires a comparison between the proposed building and those in the surrounding area. This interpretation is consistent with the plain language and mandatory wording (*'shall be'*) of the criterion.
- “3. The Board found that substantial differences in the building's height, bulk and/or scale, as compared with other buildings in the area and as supported by substantial

1 HRCZO 17.10.040(8) requires evaluation of “compatibility,” not a “comparison” of size or other
2 features. The board’s contrary interpretation, petitioner argues, improperly reads additional terms
3 into HRCZO 17.10.040(8). According to petitioner, the intended focus of HRCZO 17.10.040(8)
4 on visual rather than size compatibility is shown by the second sentence of that code provision,
5 which requires that “[u]se of materials should promote harmony with surrounding structures and
6 sites.”

7 As to context, petitioner notes that there was no express size restriction in the C-2 zone at
8 the time it filed its application, although the county subsequently adopted code amendments that
9 impose a maximum 50,000-square foot size for commercial uses in the C-2 zone. Petitioner argues
10 that it is significant that the county placed that size restriction in the C-2 zone provisions and not in
11 the site design review provisions at HRCZO 17.10, indicating that the county understands size to be
12 a use-related, not design-related issue. Further, petitioner points out that the site plan review

documentation in the record, would be enough to determine that the compatibility
criterion has not been met.

“4. The Board accepted the defined surrounding area * * * as all properties within 500
feet of the subject tract (the adjacent property owner notification area) and all
commercially zoned property from the existing Wal-Mart store west to the subject
tract and north along Westcliff Drive. * * *

“* * * * *

“6. The bulk size of the proposed structure is 5,880,577 cubic feet. The nearest
comparable building size within the surrounding area is the existing Wal-Mart store at
approximately 1,800,000 cubic feet.

“7. The scale of the proposed structure is 186,685 square feet. The nearest comparable
building size within the defined surrounding area is the existing Wal-Mart store at
approximately 72,000 square feet in size.

“8. The bulk size of the proposed building is over 3 times the bulk size and 2.5 times the
scale size of the largest building within the defined surrounding area.

“9. The Board found that the difference between the bulk and scale of the proposed
building and other buildings in the defined surrounding area is substantial and will,
therefore, cause it to be incompatible with other buildings in the surrounding area.

“10. Based on the above, the Board finds that the design element modifications are not
sufficient to meet the compatibility criteria with respect to bulk and scale size. * * *”
Record 8-11

1 submittal requirements at HRCZO 17.10.030 do not include a requirement that the applicant
2 provide information regarding the size of proposed structures. If the county truly intended
3 HRCZO 17.10.040(8) to restrict the size of the proposed building to that of other buildings in the
4 area, petitioner argues, it surely would have expressly required the applicant to provide such
5 information.

6 Finally, petitioner argues that the county’s interpretation is inconsistent with the purpose of
7 HRCZO 17.10.040(8), which petitioner understands to be minimization of visual impacts of new
8 development on existing development. According to petitioner, the board of commissioners’
9 interpretation would prohibit a structure that was underground or otherwise without visual impact to
10 surrounding development, if the total size of that structure significantly exceeded that of surrounding
11 development.

12 The city responds that HRCZO 17.10.040(8) is not limited to evaluation of visual
13 compatibility and that, by its terms, it requires the county to evaluate whether the “height, bulk and
14 scale” of proposed structures are compatible with surrounding buildings. It is simply impossible, the
15 city argues, to perform that evaluation without comparing the size of the proposed structures with
16 existing structures in the area. The city disputes that the purpose of HRCZO 17.10.040(8) is
17 limited to ensuring visual compatibility, or that its context suggests that size is not a proper
18 consideration under that provision.

19 We agree with the city and county that the board of commissioners’ interpretation is not
20 reversible under the deferential scope of review we apply to a governing body’s code
21 interpretations under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 525, 69
22 P3d 759 (2003).³ As the city notes, HRCZO 17.10.040(8) explicitly requires that the “height, bulk

³ ORS 197.829(1) provides, in relevant part:

“[LUBA] 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:

1 and scale” of proposed buildings must be compatible with other buildings in the surrounding area.
2 The county apparently understands “bulk” to equate to building volume (height multiplied by square
3 footage) and “scale” to equate to the building footprint, or square footage. Record 10. The terms
4 “height, bulk and scale” clearly make the size of the proposed building a relevant consideration
5 under HRCZO 17.10.040(8). Further, the requirement that the bulk and scale of the proposed
6 building be “compatible” with buildings in the area clearly requires some comparison with the bulk
7 and scale of existing buildings in the area. The county’s interpretation—that evaluation of height,
8 bulk and scale is not limited to considering the visual impacts of the proposed building, but includes
9 also comparison of bulk and scale—is not inconsistent with the text of HRCZO 17.10.040(8).

10 Further, we do not see that the context petitioner cites to undermines the county’s
11 interpretation. There is no intrinsic reason why a regulatory concern to ensure compatibility of
12 height, bulk and scale between proposed and existing development must be expressed in zoning
13 standards rather than in site design review standards. That the county has subsequently adopted a
14 numeric limit on square footage for commercial uses in the C-2 zone says little if anything about the
15 meaning of HRCZO 17.10.040(8).⁴ Finally, HRCZO 17.10.030 lists the required elements of the
16 proposed site plan, but does not purport to describe the universe of information necessary to
17 demonstrate compliance with the “decision criteria” at HRCZO 17.10.040. For example,
18 HRCZO 17.10.030 does not require submission of information regarding air quality, adequacy of
19 public facilities or adequacy of transportation facilities, yet those considerations are “decision
20 criteria” under HRCZO 17.10.040(2), (4) and (5). HRCZO 17.10.040(8) explicitly makes “bulk

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- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
 - “(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[.]”

⁴ For example, under the current HRCZO, a 50,000-square foot building might be incompatible in “bulk and scale” if it were proposed in an area of much smaller commercial buildings.

1 and scale” mandatory considerations in approving or denying a site plan review application, and the
2 fact that HRCZO 17.10.030 does not expressly require submission of information regarding “bulk
3 and scale” is not a particularly strong basis to argue, as petitioner does, that consideration of “bulk
4 and scale” is limited to the visual impacts without regard to building size.

5 As to the purpose of HRCZO 17.10.040(8), the board of commissioners disagreed with
6 petitioner and the planning commission that the only purpose of that provision is to mitigate visual
7 impacts of proposed development. We are not cited to any comprehensive plan or code language
8 that describes the purpose of HRCZO 17.10.040(8) consistent with petitioner’s understanding.
9 Absent such language, petitioner’s disagreement with the board of commissioners over the purpose
10 of HRCZO 17.10.040(8) does not provide a basis for reversal or remand.

11 The third assignment of error is denied.

12 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

13 In the first and second assignments of error, petitioner challenges the other bases for denial
14 in the county’s decision, the board of commissioners’ conclusion that petitioner failed to
15 demonstrate compliance with the “no adverse effect” standard at HRCZO 17.10.040(3), and
16 similar flood control standards at HRCZO 44.50. As far as we can tell or the parties can establish,
17 resolving these assignments of error would not affect our disposition of the county’s denial under the
18 compatibility standard at HRCZO 17.10.040(8), discussed above.⁵ To support a denial decision,
19 the county need only establish the existence of one adequate basis for denial. *Horizon*
20 *Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995). Thus, even if we
21 resolved the first or second assignment of error in petitioner’s favor, we must affirm the county’s

⁵ The second subassignment to the first assignment of error argues that the county erred in accepting new evidence without allowing petitioner an opportunity to respond to that new evidence. However, the alleged new evidence relates only to flooding issues relevant under HRCZO 17.10.040(3) and HRCZO 44.50. Petitioner does not argue that that evidence relates to the compatibility standard at HRCZO 17.10.040(8), or that the county’s alleged procedural errors otherwise provide a basis for reversal or remand, if the county’s denial under HRCZO 17.10.040(8) is sustained.

1 decision denying petitioner's site plan review application. Under these circumstances, we see no
2 point in resolving the first and second assignments of error.

3 We do not reach the first and second assignments of error.

4 The county's decision is affirmed.