BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUNRIVER VACATIONS
RECREATION ASSOCIATION, LLC
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2006-200

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine.

Laurie E. Craghead, Assistant Legal Counsel, Bend, filed the response brief and argued on behalf of respondent.

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

REMANDED 09/04/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a declaratory interpretation by the hearings officer determining that a putting course is not a permitted use in the applicable zone.

FACTS

Petitioner owns property located in Sunriver, Oregon, a large resort in Deschutes County. Sunriver is classified in the Deschutes County Code (DCC) as an urban unincorporated community. Petitioner's property consists of approximately 10 acres that was originally developed as a preparatory school, located in the Sunriver Community Neighborhood District (CN) zone. In 2003, petitioner applied for site plan approval to convert the existing school property into a recreational center with a health club, an indoor/outdoor aquatic center, a multi-purpose room for activities and meetings, and an 18-hole putting course to be developed on approximately one acre.[1] After a question was raised about whether the putting course was a permitted use in the CN zone, petitioner subsequently removed the putting course from the proposal and received site plan approval for the recreational center.

Approximately two years later, petitioner applied for a declaratory ruling that the proposed putting course is permitted in the CN zone. Petitioner argued that the putting course was either permitted outright in the CN zone as one of the permitted uses listed in DCC 18.108.150, or else was allowed because it was a "similar use" under DCC 18.116.010. The hearings officer determined that the proposed putting course was not a use permitted

[1] The petition for review includes the following description of the proposed "putting course:"

> "The course is built into the land and designed like a regulation golf course. It has holes of varying length and with different pars. It does not have any novelty obstacles, but uses natural features found on a regulation golf course. It is designed for users who desire to challenge and improve their putting technique. * * *" Petition for Review 12.

outright in the CN zone.[2] The hearings officer also determined that the use did not meet the criteria for a "similar use" determination under DCC 18.116.010.[3] Petitioner appealed that determination to the board of commissioners, which declined to hear the appeal. This appeal followed.

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[2] As relevant here, the CN zone lists the following uses as permitted uses:

"A. Uses Permitted Outright. The following uses and their accessory uses are permitted outright:

" * * * * *

"6. Park, playground and picnic and barbecue area.

"7. Recreational path.

" * * * * *

"9. Health and fitness facility.

" * * * * *

"17. Community center."

[3] DCC 18.116.010 provides:

"18.116.010. Authorization of Similar Uses.

"A. The purpose of DCC 18.116.010 is to, consistent with provisions of state law, provide for land uses not specifically listed in any zone, but which are similar in character, scale, impact and performance to a permitted or conditional use specified in a particular zone.

"B. Review Criteria. A similar use may be authorized by the Planning Director or Hearings Body provided that the applicant establishes that the proposed use meets the following criteria:

"1. The use is not listed specifically in any zone;

"2. The use is similar in character, scale, impact and performance to one or more of the permitted or conditional uses listed for the zone in which it is proposed; and

"3. The use is consistent with any applicable requirements of state law with respect to what uses may be allowed in the particular zone in question."

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the hearings officer erred in determining that a putting course is not a use permitted outright in the CN zone. During the proceedings below, petitioner argued that the hearings officer should find that the putting course is a use permitted outright in the CN zone because it is a permissible component of one or more of three listed uses in the zone: a park, a playground, and/or a community center. Record 32-33.

In addressing petitioner's argument that a putting course is a use permitted outright in the CN zone, the hearings officer found that a putting course does not fall within the definition of "park" or "playground:"

> "Before turning to the 'similar use' standards in Chapter 18.116 * * * the Hearings Officer finds it is necessary first to determine whether the applicant's proposed use is permitted in the [CN] District. * * * The applicant argues the proposed putting course falls within the 'park' and 'playground' uses. These terms are not defined in Title 18. * * * The Hearings Officer finds that while a putting course might be a component of, and located in, a park or playground, it is not the equivalent of these broadly described facilities that may contain a wide variety of recreational amenities. Rather, the applicant's proposal is a specialized type of recreational facility with distinct characteristics. For these reasons, I find the proposed putting course does not fall within any of the uses permitted outright in the [CN] District." Record 18-19.

Later in the decision, when addressing the "similar use" standards under DCC 18.116.040, the hearings officer found:

> "The applicant argues the proposed putting course is similar in character to a community center because it could be a component of such a facility. The applicant notes the putting course is being proposed as part of a larger recreational facility that includes a health club and a water park. * * * While the hearings officer finds the proposed putting course could be a component of a 'community center,' * * * again I find it is not the equivalent of that use. Nevertheless, I concur with the applicant that the putting course shares some characteristics with the 'community center' use. I also find it shares some characteristics with the uses described as 'playground' and 'recreational path.' * * *" Record 24-25.

Petitioner argues that the hearings officer erred in failing to address petitioner's argument that the putting course is a permitted use in the CN zone *because* it is a component of a "community center."[4] As petitioner explains, the hearings officer evaluated whether the putting course is a permitted use in the CN zone as a "park" or a "playground," but did not evaluate whether a putting course is a permitted use that is allowed outright in the CN zone as a *component* of a "community center." Rather, petitioner argues, the hearings officer only evaluated whether a putting course was a use "similar in character to a community center" under DCC 18.116.010(B)(2).

The county responds that the hearings officer correctly determined that, standing alone, a putting course is not a "park," "playground" or "community center." The county explains that the hearings officer was only asked to evaluate whether a putting course standing alone is an allowed use in the CN zone.

We agree with petitioner that the hearings officer failed to address petitioner's argument that the putting course is a use permitted outright as a component of a community center. The above findings demonstrate that, at best, the hearings officer evaluated whether the putting course is similar in character to a community center under the DCC "Authorization of Similar Uses" found in DCC 18.116.010. The hearings officer concluded that a putting course could be a component of a permitted use in the zone (a park or a community center), but did not explain why a use that is a component of a permitted use is not itself a permitted use if it is to be developed and used as part of a park or community center. The county argues that all that was required was evaluation of the putting course

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[4] DCC 18.04.030 defines "community center" as:

> "a community meeting, retreat and activity facility serving the social or recreational needs of community residents or visitors."

itself, and that evaluation of the putting course in the larger scheme of the uses permitted on the property was not required. We disagree. A use that is a component of a permitted use can itself be a permitted use, so long as it is developed and operated as a component of the permitted use.

The hearings officer appears to have determined that the proposed putting course could be allowed as a component of a community center. The basis for that determination is not clear to us, but assuming without deciding that it is correct, the next logical question is whether the existing recreational facility that was approved in 2003 can be viewed as a "community center," as that term is defined in the code. If that is the case, and if the proposed putting course is to be operated as a component of that existing community center, then it is difficult to understand why the putting course cannot be added to the community center later, so long as it will be operated as a component of the existing community center. On remand, the hearings officer should clarify the meaning of her original conclusion that the putting course could be a component of a community center, determine if the existing facility qualifies as a community center and explain why, if a putting course could have been approved in 2003 as part of the conversion of the school to a community center, it could not be approved now.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

DCC 18.116.110(B) provides:

> "Review Criteria. A similar use may be authorized by the Planning Director or Hearings Body provided that the applicant establishes that the proposed use meets the following criteria:
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> "1. The use is not listed specifically in any zone;
>
> "2. The use is similar in character, scale, impact and performance to one or more of the permitted or conditional uses listed for the zone in which it is proposed; and

> "3. The use is consistent with any applicable requirements of state law with respect to what uses may be allowed in the particular zone in question."

The hearings officer determined that DCC 18.116.110(B)(1) was not satisfied because a putting course is the same as "miniature golf," a conditional use in the Sunriver Commercial District. DCC 18.108.050(B)(6).

In the second assignment of error, petitioner argues that the hearings officer misconstrued DCC 18.116.110(B)(1) in contravention of the required analysis set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). First, petitioner argues that a "putting course" is not *specifically* listed in any other zone and that the hearings officer's interpretation of a putting course as being the same as "miniature golf" reads the word "specifically" in DCC 18.116.110(B)(1) out of that code section in violation of ORS 174.010.[5] Petitioner also argues that the hearings officer's interpretation of the term "miniature golf" found in DCC 18.108.050(B)(6) is contrary to the context surrounding the enactment of that section. Petitioner argues that evidence in the record suggests that when the current Sunriver zoning districts were adopted in 1997, the county determined the permitted and conditional uses in those districts based upon what uses already existed. Petitioner explains that prior to 1997, a portable miniature golf facility existed on property located in the Sunriver Commercial District, and that when the drafters of the current DCC used the term "miniature golf" in referring to a use allowed in the Sunriver Commercial District, they intended it to mean that existing portable miniature golf course and not a putting course like the one proposed by petitioner.

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[5] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

In evaluating the "similar use" issue, the hearings officer first interpreted DCC 18.116.110(B)(1):

> "I find the phrase 'listed *specifically* in any zone' (emphasis added) means that for purposes of this component of the 'similar use' analysis the use being considered must be a match with a use listed in any zone. *In other words, whether or not it is called by the same name, it must have matching characteristics*.
>
> "There is no dispute that 'putting course' is not a use specifically listed in any zone. Staff and the parties note that there are three golf-related uses listed in Sunriver zoning districts. Each of these uses and the degree to which it is a match with the proposed 'putting course' use are discussed separately in the findings below." Record 20 (emphasis added.)

The hearings officer next summarized and explained the evidence she relied on to determine that a putting course did not match the characteristics of a golf course or a putting green, but matched the characteristics of "miniature golf:"

> "The applicant submitted into the record as attachments to its June 19, 2006 memorandum five documents obtained on line concerning 'miniature golf' and 'mini-golf' facilities. The first document, entitled 'Miniature Golf History' and produced by the U.S. ProMiniGolf Association, provides a detailed evolution of 'miniature golf.' The article states the earliest miniature golf courses were replicas of championship golf courses. But beginning in the 1950s miniature golf course took on 'wacky, animated, trick hazards intended to be more challenging than straight putting.' And in the mid -1990s miniature golf-courses began to return to the early 'golf in miniature' facilities, described as follows:
>
> > 'Today's modern course features miniature replicas of regulation golf's 'Famous Holes' complete with undulations, contours, moguls, water, sand & vegetation traps on the greens. Thus miniature golf now offers the play[er] many of the challenges of real golf.'
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> "At the public hearing, both the applicant's attorney * * * and the applicant's expert * * *, whose company installs artificial turf for putting courses and putting greens, testified the proposed putting course would resemble the 'golf in miniature' described in the U.S. ProMiniGolf Association article.
>
> " * * * * *
>
> "The Hearings Officer finds from these five documents that the term 'miniature golf' has come to signify both the mid-century 'windmills and obstacles' facilities *and* the newer-generation – and actually more traditional –

> 'golf in miniature' facilities designed to replicate full-scale regulation golf courses using primarily natural terrain and vegetation. * * * I find it is entirely possible the drafters of Chapter 18.108 intended the term 'miniature golf' to include anything that resembled a golf course in miniature, including both the older 'putt-putt' courses and the newer courses such as the applicant's proposed putting course. And in any event I find the evidence submitted by the applicant that the two types of facilities are functionally and operationally equivalent. * * * The only real difference between the two types of facilities is the nature of the obstacles along the course." Record 22-23.

Petitioner has not explained why the hearings officer's interpretation of DCC 18.116.110(B)(1) as referring to uses listed in another zone that are the same uses called by a different name is incorrect. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988). The hearings officer's focus on the characteristics of the use that is actually occurring, rather than on an exercise in semantics or creative euphemisms for certain uses, is consistent with what DCC 18.116.110 appears to concern itself with: whether a use is already permitted in, and thus possibly more appropriate for, another zone. In addition, we are not persuaded that petitioner's testimony during the proceedings below regarding the circumstances surrounding the enactment of the various zoning districts and the allowed uses in those districts is "context" in which to interpret DCC 18.108.050. That testimony is at most speculation that the intent of the original drafters of DCC 18.108.050 in allowing "miniature golf" as a conditional use in the Sunriver Commercial District was to refer only to the portable miniature golf course that was already developed.

In the second assignment of error, petitioner also argues that the hearings officer's decision that a putting course is the same as miniature golf is not supported by substantial evidence in the record. As noted, the hearings officer summarized and explained the evidence she relied on to determine that a putting course matched the characteristics of a miniature golf course, much of which was introduced by petitioner or its expert. A reasonable decision maker could determine, based on the evidence cited in the above-quoted findings, that a putting course is miniature golf.

The second assignment of error is denied.

The county's decision is remanded.