

1                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                   SKY LAKES MEDICAL CENTER, INC.,

5                                   *Petitioner,*

6  
7                                   vs.

8  
9                   CITY OF KLAMATH FALLS,

10                                   *Respondent,*

11  
12                                   and

13  
14                   STATE OF OREGON DEPARTMENT OF  
15                   ADMINISTRATIVE SERVICES and DEPARTMENT OF  
16                   HUMAN SERVICES, and KLAMATH FALLS HOLDINGS, LLC,

17                                   *Intervenors-Respondents.*

18  
19                                   LUBA No. 2019-019

20  
21                                   FINAL OPINION

22                                   AND ORDER

23  
24                   Appeal from City of Klamath Falls.

25  
26                   Josh Newton and Ellen H. Grover, Bend, filed the petition for review and  
27 argued on behalf of petitioners. With them on the brief was Karnopp Petersen,  
28 LLP.

29  
30                   Michael Swanson, Klamath Falls City Attorney, City of Klamath Falls,  
31 filed a joint response brief and argued on behalf of respondent.

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33                   Tia M. Lewis filed a joint response brief and argued on behalf of  
34 intervenors-respondents State of Oregon Department of Administrative Services  
35 and Department of Human Services. With her on the brief was Schwabe,  
36 Williamson & Wyatt, P.C.

1           Sydnee B. Dryer and Garrett K. West filed a joint response brief and  
2 argued on behalf of intervenor-respondent Klamath Falls Holdings, LLC. With  
3 them on the brief was Huycke O'Connor Jarvis, LLP.

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5           RYAN, Board Chair; RUDD, Board Member, participated in the decision.

6  
7           ZAMUDIO, Board Member, did not participate in the decision.

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9                           REMANDED                           05/24/2019

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

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**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving applications for a conditional use permit and site design review for a three-story building.

**MOTIONS TO INTERVENE**

State of Oregon Department of Administrative Services (DAS) and Department of Human Services (DHS) each move to intervene on the side of the respondent. No party opposes the motions, and they are granted.

Klamath Falls Holdings, LLC (intervenor) moves to intervene on the side of the respondent. No party opposes the motion and it is granted.<sup>1</sup>

**FACTS**

Intervenor applied for a conditional use permit and site design review approval for a three-story building containing approximately 92,000 square feet, to be located in the city’s downtown central business district. The subject property is zoned Mixed Use (MU). According to the application, DHS will lease the entire building from intervenor and intends to operate a “DHS Multi-Service Center.” Record 263. Approximately 265 employees working at the DHS Multi-Service Center will provide services to DHS clients through various programs, including the Self-Sufficiency Program, the Child Welfare Program, the Aging and People with Disabilities Program, and the Oregon Vocational Rehabilitation

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<sup>1</sup> DAS, DHS, and intervenor are sometimes referred to in this opinion as “intervenors-respondents.”

1 Service, on only the first floor of the three story building, and in a single room  
2 on the second floor of the building. Record 319. The second and third floors of  
3 the building will contain workstations, offices and conference spaces. DHS in  
4 turn intends to lease an unspecified portion of the building to Klamath Basin  
5 Behavioral Health (KBBH), a nonprofit organization described as providing  
6 behavioral health services to the community. Record 329.

7 The planning director exercised his authority to schedule a hearing on the  
8 applications before the planning commission. The planning commission  
9 approved the applications, and petitioner appealed the decision to the city  
10 council. The city council held a de novo hearing on the appeal and at the  
11 conclusion, voted to approve the applications. This appeal followed.

## 12 **FIRST ASSIGNMENT OF ERROR**

13 We briefly describe the relevant provisions of the Klamath Falls  
14 Community Development Ordinance (CDO) before turning to petitioner's first  
15 assignment of error.

16 CDO 12.000 sets out a table of uses permitted by zone. The table describes  
17 broad categories of uses: Residential, Accessory, Commercial Trade,  
18 Commercial Services, Public, and Industrial. Within each broad category of uses  
19 are specific uses. "Government Office" is listed as a specific kind of Public use  
20 conditionally allowed in all city zones, including the MU zone. The term  
21 "Government Office" is defined in CDO 10.010 as "[a]n office where  
22 government employees work. Typical uses include, but are not limited to, city,

1 county, state, federal, school district, and transit district offices.” “Social Service”  
2 is also listed as a specific kind of Public use, but is not a use that is allowed in  
3 the MU zone. The CDO does not define the term “Social Service.” The table also  
4 includes a list of Commercial Service uses consisting of 20 different uses.

5 CDO 12.000 provides that “one principal use or structure is permitted per  
6 lot.” CDO 10.010 defines “principal use” as “[a] use permitted in a zone as an  
7 outright or conditional use *and is the predominant use of any lot or parcel.*”  
8 (Emphasis added.) CDO 10.010 in turn defines “use” as “the purpose or activity  
9 for which land or structures are designed, arranged or intended or for which land  
10 or structures are occupied or maintained.”

11 The city council concluded that intervenors’ proposed building is a  
12 Government Office as defined in CDO 10.010:

13 “[T]he predominant use of the proposed facility controls when  
14 analyzing the uses permitted by zone. \* \* \* As described by the  
15 Applicant, the proposed facility will include both office space and  
16 space for delivery of services where the first floor will provide  
17 services directly to the public and floors 2 and 3 will have no public  
18 access and be designed exclusively for use by State employees. The  
19 City Council finds the proposed building will be an office where  
20 State government employees work and by definition is a  
21 government office use and therefore, is an allowed use in the MU  
22 zone subject to Conditional Use Approval.

23 “ \* \* \* \* \*

24 “The Applicant submitted testimony and evidence that  
25 approximately two-thirds of the building would be devoted to  
26 offices, with one-third or less open to public and providing a social  
27 service component. This evidence is un rebutted and the City

1 Council finds it persuasive.” Record 10-11.

2 In its first assignment of error, petitioner argues that the city council  
3 improperly construed CDO 12.000 in determining that the building is a  
4 Government Office, and argues that the city council should have classified the  
5 proposed building as Social Service, a use not allowed in the MU zone.<sup>2</sup>  
6 According to petitioner, the social service use is the “predominant” use of the  
7 building around which other components of the building were designed, while  
8 the government-employed workers will occupy the property only to facilitate the  
9 primary use of delivery of social services to clients. Petition for Review 24.  
10 Petitioner also challenges the city council’s interpretation of CDO 10.010’s  
11 definition of “principal use” by reliance on the building square footage allocation  
12 to office uses compared to service uses, and argues that the city’s interpretation  
13 is not supported by the express language of CDO 12.000 or CDO 10.010’s  
14 definitions of “principal use” and “use.”

15 LUBA’s review of petitioner’s challenges to the city council’s  
16 interpretation of CDO 12.000 and CDO 10.010 is subject to a deferential standard  
17 of review set out at ORS 197.829(1), which in relevant part requires LUBA to  
18 affirm a governing body’s interpretation of a land use regulation, unless the  
19 interpretation is inconsistent with the express language or purpose of the

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<sup>2</sup> Respondents do not dispute that social service uses will be provided on the first floor of the building. Record 11 (finding that “approximately two-thirds of the building would be devoted to offices, with one-third or less open to the public and providing a social service component.”)

1 regulation. *See Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010)  
2 (LUBA must affirm a city council’s code interpretation under ORS 197.829(1)  
3 unless the interpretation is “implausible”). Intervenors-respondents and the city  
4 (together, respondents) respond that ORS 197.829(1) requires us to affirm the  
5 city’s interpretation of the relevant CDO provisions because the city’s  
6 interpretations are not “inconsistent with the express language of” the relevant  
7 provisions, or with the underlying purpose of the provisions.

8         We agree. The salient and defining interpretation is the city council’s  
9 interpretation of and reliance on the word “predominant,” as used in CDO  
10 10.010’s definition of “principal use,” to conclude that the allocation of two-  
11 thirds of the physical space in the building to office uses makes the office use the  
12 predominant use of the building. That interpretation is not inconsistent with the  
13 plain, ordinary meaning of “predominant.”<sup>3</sup> It is also supported by the definition  
14 of “use” in CDO 10.010, which means in part “the purpose or activity \* \* \* for  
15 which land or structures are occupied or maintained.” CDO 10.010. While there  
16 is some support for petitioner’s interpretation that the proposed building is better  
17 categorized as a “social service” use based on the descriptions of the purpose of  
18 the project included in the record, the city council’s interpretation of the relevant

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<sup>3</sup> Webster’s Third New International Dictionary unabridged (2002) defines “predominant” as “holding an ascendancy: having superior strength, influence, authority or position: CONTROLLING, DOMINATING, PREVAILING.” *Webster’s Third New Int’l Dictionary* 1786 (unabridged ed 2002).

1 CDO provisions to determine the predominant use of the building based on  
2 square footage devoted to a use is equally plausible. Accordingly, we affirm that  
3 interpretation. ORS 197.829(1).

4 In the remainder of petitioner’s first assignment of error, petitioner  
5 challenges other findings and interpretations adopted by the city that are  
6 tangential to the city’s ultimate conclusion that “the predominant use of the  
7 proposed facility controls when analyzing the permitted uses by zone” and that  
8 the predominant use is determined based on square footage devoted to a use.  
9 Record 10-11. Because those arguments do not affect our conclusion affirming  
10 the city’s interpretation of CDO 12.000, they do not provide a basis for reversal  
11 or remand of the decision.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 CDO 10.010 defines “Mixed Use Zone” as:

15 “A zone that requires Buildings to have a vertical mix of uses on a  
16 single Lot, with residential dwelling units above the first floor. This  
17 can be a combination of the following uses on a single lot:  
18 Residential; Commercial Service; Commercial Trade; public; and  
19 where appropriate, uses allowed in the Light Industrial Zone.

20 The city council found that the building contains a combination of Public and  
21 Commercial Service uses. CDO 10.010 defines Commercial Service as: “any  
22 commercial enterprise which provides a useful labor that does not produce or  
23 involve the sale of a tangible commodity or good.” The city council found that



1 the portion of the building that will be occupied by KBBH is a Commercial  
2 Service use and that accordingly, the building satisfies the Mixed Use Zone  
3 definition's requirement for a combination of uses on a single lot.

4 In the second assignment of error, petitioner argues that the city council's  
5 findings are inadequate to explain why it concluded that the portion of the  
6 building to be occupied by KBBH is a Commercial Service use, and that the city  
7 council's conclusion is not supported by substantial evidence in the record.  
8 Petition for Review 29. Petitioner argues that the city council's findings fail to  
9 explain why KBBH's activities in the building qualify as a Commercial Service  
10 under the CDO 10.010 definition, and fail to identify which of the 20 listed  
11 Commercial Service uses listed in CDO 12.000 table it falls under. Petitioner  
12 points out that the evidence in the record is that KBBH is a non-profit corporation  
13 that delivers behavioral health counseling services.

14 Respondents respond that petitioner failed to raise the issue presented in  
15 the second assignment of error prior to the conclusion of the initial evidentiary  
16 hearing, and may not now raise it for the first time at LUBA. In a reply brief,  
17 petitioner responds that the issue raised in the second assignment of error was  
18 raised at Record 289-90. We agree with petitioner that the issue was raised.

19 We also agree with petitioner that the city council's findings are inadequate  
20 to explain why it concluded that the KBBH use of the building is a Commercial  
21 Service use, as that term is defined in CDO 10.010. The findings provide:

22 "While the Conditional Use Permit is only required for the proposed

1 government office use, according to the application, portions of the  
2 building will be occupied by a non-governmental office use,  
3 Klamath Basin Behavioral Health. This non-governmental office  
4 use is categorized as Commercial Service. As the building will  
5 contain uses from two of the applicable use categories – Commercial  
6 Services and Public – it satisfies the requirement for mixed use.”  
7 Record 17-18.

8 The findings do not explain why the city concluded that KBBH’s use is a  
9 Commercial Service, which is defined a “commercial enterprise which provides  
10 a useful labor that does not produce or involve the sale of a tangible commodity  
11 or good.” Respondents’ response does not point to any other findings in the  
12 record that explain why KBBH’s use is a Commercial Service. Given the  
13 evidence in the record that KBBH is a nonprofit corporation that provides  
14 behavioral health services to clients, we agree with petitioner that remand is  
15 required for the city to explain its conclusion that the KBBH use falls within the  
16 definition of a Commercial Service at CDO 10.010.

17 The second assignment of error is sustained.

18 **THIRD ASSIGNMENT OF ERROR**

19 The conditional use permit criterion at CDO 11.105(3) requires that the  
20 “site for the proposed use relates to streets and highways adequate in width and  
21 pavement type to carry the quantity and kind of traffic generated by the proposed  
22 use.” In order to demonstrate that the proposed use met CDO 11.105(3),  
23 intervenor submitted a traffic study prepared by a traffic engineer.

24 In the third assignment of error, we understand petitioner to argue that the  
25 city’s finding that CDO 11.105(3) was met is not supported by substantial

1 evidence in the record. ORS 197.835(9)(a)(C). According to petitioner, that is so  
2 because intervenor’s traffic study does not account for the traffic to be generated  
3 by employees present in the building pursuant to the sublease to KBBH, which,  
4 petitioner argues, will increase of the number of employees in the building  
5 beyond the projected 265 DHS employees.

6 Respondents respond that the city’s reliance on intervenor’s expert’s  
7 evidence was reasonable because that evidence was not contradicted by any other  
8 expert evidence. However, that response misses the point of petitioner’s  
9 argument. Petitioner and respondents agree that the traffic study calculated trip  
10 generation rates for the proposed use based on the projected number of DHS  
11 employees in the building. Record 550. The traffic study specifically notes that  
12 while the square footage of the proposed building would not change the trip  
13 generation outcome, “what would change the outcome would be an increase in  
14 employees.” *Id.* In response to petitioner’s argument, intervenor’s traffic  
15 consultant took the position that “the average trip rate developed and used to  
16 generate trips for the proposed facility \* \* \* represents all trips that would be  
17 expected to/from the site (i.e. trips from employees, deliveries, citizens ... etc).”  
18 Record 64. However, that statement does not address petitioner’s point, which is  
19 that the trip generation rates are based on the number of *DHS* employees in the  
20 building, and do not account for additional KBBH employees in the building  
21 pursuant to the sublease. We agree with petitioner that absent a better explanation  
22 for why the trip generation rates are accurate without accounting for KBBH

1 employees, or explicit confirmation that the trip generation rates include  
2 projected KBBH employees, it was not reasonable for the city to rely on  
3 intervenor's traffic study to conclude that CDO 11.105(3) was met.

4 The third assignment of error is sustained.

5 **FOURTH ASSIGNMENT OF ERROR**

6 The conditional use permit criterion in CDO 11.105(2) requires that "the  
7 site for the proposed use is adequate in size and shape to accommodate said use  
8 and all \* \* \* parking \* \* \* required to blend said use with land and uses in the  
9 neighborhood." CDO 14.005 includes off-street parking requirements for  
10 different types of specified uses. Government Office is not one of the uses  
11 specifically listed in CDO 14.005. In that circumstance, CDO 14.010(3) provides  
12 that "parking requirements for types of structures and uses not specifically listed  
13 in [CDO] Section 14.000 to 14.045 shall be determined by the Director based  
14 upon the requirements of comparable uses." Accordingly, the city applied the  
15 parking requirements for "bank and professional office" uses (one space per 400  
16 square feet), and concluded that the proposed building included sufficient  
17 parking. Record 12-13.

18 In its fourth assignment of error, we understand petitioner to argue that the  
19 city's conclusion that the parking requirements in CDO 14.005 are met is not  
20 supported by substantial evidence in the record. Petition for Review 35. Petitioner  
21 also argues that CDO 14.010(3) required the planning director to include findings  
22 explain why, pursuant to that section, the director applied the parking

1 requirements for “bank and professional office” uses, and that the planning  
2 director failed to do so.

3 Respondents respond, initially, that the issue presented in the fourth  
4 assignment of error was not raised and that petitioner is precluded from raising it  
5 for the first time at LUBA. ORS 197.763(1): ORS 197.835(3). Petitioner  
6 responds that the issue was raised at Record 214. We agree. Record 214 (“There  
7 are no findings as to whether the Planning Director has any discretion to identify  
8 a different use – “Professional Office” – to establish the parking requirements  
9 nor any findings as to why “Professional Office” use is supportable in this case.”)

10 Respondents also respond, and we agree, that the city’s conclusion that the  
11 predominant use of the building is an “office” supports the city’s conclusion that  
12 a “comparable use” within the meaning of CDO 14.010(3) is a “bank and  
13 professional office” and its determination to apply the parking requirements for  
14 a “bank and professional office.” Absent any developed argument to the contrary,  
15 we think the city’s findings are adequate to explain why the city relied on “bank  
16 and professional office” as a comparable use for parking requirements, and that  
17 substantial evidence in the record supports the city’s conclusion. Record 34.

18 The fourth assignment of error is denied.

19 The city’s decision is remanded.