

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THE FLIGHT SHOP, INC.,
5 and AERO FACILITIES LLC,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

14
15 LEADING EDGE AVIATION, INC.
16 and THE CITY OF BEND,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2013-073

20
21 FINAL OPINION
22 AND ORDER

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24 Appeal from Deschutes County.

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26 Michael H. McGean, Bend, filed the petition for review and argued on behalf of
27 petitioners. With him on the brief was Francis Hansen & Martin LLP.

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29 No appearance by Deschutes County.

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31 Sharon R. Smith, Bend, filed a response brief and argued on behalf of intervenor-
32 respondent Leading Edge Aviation, Inc. With her on the brief were Garret Chrostek and
33 Bryant Lovlien & Jarvis PC.

34
35 Gary Firestone, Assistant City Attorney, Bend, filed a response brief and argued on
36 behalf of intervenor-respondent City of Bend. With him on the brief was Mary A. Winters,
37 City Attorney.

38
39 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
40 participated in the decision.

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42 REMANDED 01/10/2014

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

NATURE OF THE DECISION

Petitioners appeal a decision by a county hearings officer approving an application for site plan review for a new aviation fueling station at the Bend Municipal Airport.

MOTION TO INTERVENE

Leading Edge Aviation, Inc., the applicant below (Leading Edge) and the City of Bend (together, intervenors) each move to intervene on the side of the respondent in the appeal. The motions are granted.

FACTS

The Bend Municipal Airport is owned by the city but located outside the city on property zoned and regulated by the county. The runway at the airport runs north and south, and the area to the west of the runway is developed with hangars, parking areas, and other aviation-related businesses, including petitioners' fueling business. There is some development in the area to the east of the runway as well, although it is less developed than the area west of the runway.

Leading Edge applied to the county for site plan approval for a new aviation fueling station at the airport, to be located to the north of its existing aircraft rental and instruction business that is located west of the runway. The hearings officer approved the application, and petitioners appealed the decision to the county board of commissioners. The board of commissioners declined review, and this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The central dispute in this appeal is over the applicability and effect of the county's adopted Bend Municipal Airport Master Plan on the site plan review application. In order to understand petitioners' assignments of error and our resolution of them, a brief overview of the county's plan and zoning regulation of the airport is necessary.

1 **A. Bend Municipal Airport Master Plan**

2 The current adopted version of the county’s Transportation System Plan (TSP)
3 incorporates the “1994 Bend Municipal Airport Master Plan,” as amended by a 2002
4 Supplement.¹ The TSP describes the Bend Municipal Airport Master Plan, which we refer to
5 as the airport master plan:

6 “In order to guide airport land uses, the County adopted and utilizes the 1994
7 Bend Municipal Airport Master Plan, as amended in 2002 the ‘Supplement to
8 1994 Airport Master Plan,’ which is incorporated by reference herein. This is
9 the guiding document for airport planning and development. This document
10 incorporates a range of facility improvements for the Bend Municipal Airport
11 over the 20-year planning horizon (2021), including short, intermediate, and
12 long-term projects to improve safety and function at the airport. In 2003 the
13 County adopted DCC 18.76, Airport Development (AD) Zone to identify
14 outright permitted and conditional activities at the airport. The County in 2001
15 adopted DCC Chapter 18.80, Airport Safety Combing Zone (AS) to ensure
16 surrounding land uses and structures were compatible with airport operations.”
17 2012 TSP 48.²

18 The airport master plan includes six drawings called “Airport Layout Plans.” Record
19 214, 220-225. As relevant here, the airport master plan includes Drawing 1, labeled “Airport
20 Layout Plan,” and Drawing 6, labeled “On-Airport Land Use Plan.” Record 220, 225. The
21 airport master plan explains that “[Drawing 1] presents the existing and ultimate airport
22 layout and depicts the improvements that are recommended to meet forecast aviation
23 demand[,]” and that “[Drawing 6] depicts the recommended uses of airport property
24 associated with the ALP[.]” Record 215, 218. The airport master plan goes on to explain
25 that the west side of the airport, the northern half of the east side of the airport, and an area
26 surrounding a pond and along the east edge of the airport boundary, are shown in Drawing 6

¹ The TSP is incorporated into the Deschutes County Comprehensive Plan (DCCP).

² The airport master plan was apparently supplemented in 2007, but that supplement does not appear to be relevant to this appeal. Record 89.

1 as “Aviation Support,” and that “Aviation-Related Industrial” areas are located on the east
2 side of the airport. Record 218-219.

3 Both Drawing 1 and Drawing 6 include a “Building Legend” that depicts “Existing”
4 buildings and development and “Future” buildings and development by circled numbers.
5 “Fuel storage” is depicted on both legends under the “Existing” column as “1.” “Fuel storage
6 reserve” is depicted on both drawing legends under the “Future” column as “17.” Although it
7 is not possible to tell from the scale of Drawings 1 and 6 included in the record where “1” is
8 located within the airport, we understand that petitioners’ existing fuel storage is labeled “1”
9 and is located on the west side of the runway, and the “future” “fuel storage reserve” labeled
10 as “17” is located on the east side of the runway. As discussed below, one of the issues in
11 this appeal is whether the airport master plan or its drawings limit development of new fuel
12 storage facilities to the east side of the runway.

13 **B. Deschutes County Code Section 18.76**

14 The airport is designated and zoned “Airport Development” (AD) on the county’s
15 comprehensive plan and zoning maps. As explained above, Deschutes County Code (DCC)
16 Section 18.76 governs development in the AD zone. The AD zoning district is comprised of
17 three separate zoning sub-districts: the Airfield Operations District (AOD), the Aviation
18 Support District (ASD) and the Aviation-Related Industrial District (ARID). “Fuel storage
19 and sales” is identified as “permitted outright” in all three zoning sub-districts. The fueling
20 station is proposed to be located on property zoned AOD, on the west side of the runway.³

³ We use a large number of acronyms in this opinion. We set them all out here for reference.

AD Airport Development. The county zoning designation for the subject property.

ALPs Airport Layout Plans. There are six ALPs in the airport master plan.

AOD Airfield Operations District. One of three subdistricts in the AD zoning district.

ARID Aviation-Related Industrial District. One of three subdistricts in the AD zoning district.

1 **C. Assignments of Error**

2 As explained above, the hearings officer approved the application and concluded that
3 she was not required to consider whether the application is consistent with the airport master
4 plan because the application proposes a use permitted outright in the AOD zone:

5 “The Hearings Officer finds [that] I need not reach the merits of The Flight
6 Shop’s arguments concerning application of the Airport Master Plan and ALP
7 to the applicant’s proposal because the plain language of Section 18.76.100
8 makes it applicable only to conditional uses and not to uses permitted outright
9 in the AOD zone under Section 18.76.070(A) such as ‘fuel storage and sales.’
10 As discussed in the findings above, I have found the applicant’s proposal falls
11 within this outright permitted use.”⁴ Record 55.

12 In their first assignment of error, petitioners argue that the hearings officer misconstrued
13 DCC 18.76.070 and DCC 18.76.100 and provisions of the TSP in concluding that the county
14 is not required to determine whether the proposed fueling station is consistent with the airport
15 master plan.

ASD Aviation Support District. One of three subdistricts in the AD zoning district.

⁴ DCC 18.76.070, “Airfield Operations District,” provides in relevant part:

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

“A. Runway, taxiway, service road, *fuel storage and sales* and emergency repair.

“B. Facilities approved or mandated by the FAA or Oregon State Aeronautics Division
specifically supporting airport operations.” (Emphasis added.)

DCC 18.76.100, “Design and Use Criteria,” provides in relevant part:

“The Planning Director or Hearings Body shall take into account the impact of any proposed
conditional use within the AD Zone on nearby residential and commercial uses, and on the
capacity of transportation and other public facilities and services. In approving a proposed
conditional use, the Planning Director or Hearings Body shall find that:

“A. The proposed use is in compliance with the Comprehensive Plan, including the 1994
Bend Airport Master Plan as amended (supplemented) in 2002. * * *”

1 Petitioners first argue that the purpose statement for the AD zone, DCC 18.76.010,
2 requires the county to determine that the application for a fueling station is consistent with
3 the airport master plan.⁵ DCC 18.76.010 provides:

4 “The purpose of the Airport Development (AD) Zone is to allow for
5 development compatible with ongoing airport use *consistent* with the
6 Deschutes County Year 2000 Comprehensive Plan and the 1994 Bend Airport
7 Master Plan (as amended by a 2002 supplement), while providing for public
8 review of proposed development likely to have significant impact on
9 surrounding lands. The AD Zone is composed of three separate zoning
10 districts, each with its own set of allowed uses and distinct regulations, as
11 further set forth in DCC 18.76.” (Emphasis added.)

12 Petitioners maintain that the hearings officer’s decision fails to give effect to DCC 18.76.010.
13 Petitioners argue that while DCC 18.76.100 specifically requires the county to determine
14 whether the proposal is “in compliance with the * * * Airport Master Plan” when reviewing
15 certain proposed conditional uses, and DCC 18.76.070 allows fuel storage as an outright
16 permitted use in the AOD zoning district, nothing in the language of either provision
17 indicates that uses permitted outright may be approved without demonstrating that they are
18 “in compliance with the * * * Airport Master Plan” under DCC 18.76.010. *See* n 4.

19 Petitioners also argue that the language of the TSP itself requires the application to be
20 consistent with the airport master plan. Petitioners rely on the provision of the TSP quoted
21 above that describes the airport master plan as the “guiding document for airport planning
22 and development,” and argue that the TSP and the airport master plan require that any new
23 development at the airport must be consistent with the airport master plan. According to

⁵ Petitioners also cite ORS 197.175(2)(d) in support of their argument. ORS 197.175(2)(d) provides that counties with acknowledged comprehensive plans and land use regulations must “make land use decisions * * * in compliance with the acknowledged plan and land use regulations[.]” Leading Edge responds that petitioners are precluded from raising an issue regarding ORS 197.175(2)(d) because petitioners failed to cite ORS 197.172(2)(d) during the proceedings before the hearings officer.

At oral argument, petitioners responded that the “issue” that was raised during the proceedings below was whether the county’s decision is consistent with applicable provisions of the DCCP, including the TSP and the airport master plan, and that their lack of citation to ORS 197.175(2)(d) during the proceedings below does not preclude them from raising that issue. We agree with petitioners.

1 petitioners, the text of the airport master plan and the ALPs attached to the airport master
2 plan as Drawings 1 through 6 *require* new fueling stations to be located east of the runway,
3 and approval of an application that locates a new fueling station west of the runway is
4 inconsistent with the airport master plan. Petition for Review 9.

5 Intervenors respond first that Leading Edge’s application was not required to satisfy
6 DCC 18.76.010 because DCC 18.76.010 is not properly viewed as an approval criterion.
7 According to intervenors, the airport master plan is no longer relevant after adoption of the
8 AD zoning regulations. Intervenors argue that DCC 18.76.010 merely expresses the county’s
9 conclusion that the zoning regulations that follow in DCC 18.76 are consistent with the
10 DCCP and the airport master plan, and does not require new development that is permitted
11 outright under the AD zoning regulations to also separately demonstrate that such
12 development is consistent with the airport master plan. Intervenors argue that petitioners’
13 interpretation of DCC 18.76.010 as requiring review of outright permitted uses for
14 consistency with the airport master plan renders the requirement in DCC 18.76.100 for
15 conditional uses to show “compliance with” the airport master plan superfluous.⁶ Intervenors
16 argue that the fact that the parts of DCC 18.76 that specifically apply to outright permitted
17 uses do not include a similar requirement for those outright permitted uses means that the
18 county deliberately chose not to require such a showing of “compliance with” the airport
19 master plan for outright permitted uses.

20 Intervenors also respond that the language of the TSP that petitioners rely on is non-
21 mandatory and merely advisory, because it describes the master plan as a “guiding
22 document.” Intervenors also point to the language of the TSP that describes the function of
23 the airport master plan in conjunction with DCC 18.76, and argue that the TSP recognizes
24 that DCC 18.76 provides the only approval criteria for development at the airport.

⁶ As explained above, DCC 18.76.100 requires the county to find that certain proposed conditional uses are “in compliance with” the airport master plan. *See* n 4.

1 Finally, intervenors respond that the location of the proposed fuel storage station is
2 consistent with the text of the airport master plan because nothing in the language of the
3 airport master plan relied on by petitioners, or the ALPs attached to the airport master plan,
4 either prescribe or proscribe development in a particular location. In particular, intervenors
5 point out that ALP attached to the airport master plan as Drawing 6 depicts areas on both the
6 west side and the east side of the runway as encompassing “Aviation Operations,” “Aviation
7 Support,” and “Aviation-Related Industrial” uses. Record 225. Because fuel storage and
8 sales are permitted outright in the AOD, ASD and ARID zoning districts under DCC 18.76,
9 intervenors argue, there can be no inconsistency with the On Airport Land Use ALP in
10 allowing fuel storage and sales on the west side of the runway, which is zoned AOD.

11 ORS 197.835(9)(a)(D) allows LUBA to remand the county’s decision if it
12 “[i]mproperly construe[s] the applicable law[.]” The hearings officer concluded that because
13 DCC 18.76.100 expressly requires that conditional uses in the airport zones must comply
14 with the master plan, but does not include an express requirement to that effect with respect
15 to permitted uses, the master plan simply does not apply in approving permitted uses. We
16 agree with petitioners that the hearings officer’s interpretation infers too much from the text
17 of DCC 18.76. The master plan is adopted as part of the TSP, which is part of the county’s
18 comprehensive plan. The comprehensive plan is frequently a *potential* source of approval
19 standards or requirements with respect to development approvals, and if such standards or
20 requirements exist in the comprehensive plan, then ORS 197.175(2)(d), if nothing else,
21 requires that development comply with such standards or requirements. That DCC 18.76
22 does not specify that permitted uses must comply with the master plan, or any other part of
23 the comprehensive plan, does not mean that, as a matter of law, the master plan includes no
24 applicable requirements for permitted development within the airport zones. If in fact the
25 master plan includes a requirement that applies to proposed development, for example, an

1 express or implied prohibition on locating new fuel facilities in certain locations of the
2 airport, then such requirement must be complied with.⁷

3 The relevant question, then, is whether the airport master plan includes any applicable
4 standards or requirements with respect to the proposed fuel storage facility. More
5 specifically, the relevant question is whether the airport master plan precludes approval of a
6 fueling station on the west side of the runway in the proposed location. The hearings officer
7 never reached that question, relying instead on inferences drawn from the text of DCC 18.76
8 to conclude that as a matter of law the master plan does not apply to permitted uses. As
9 explained above, that conclusion is an insufficient basis to conclude that the master plan
10 includes no requirements that apply in approving the proposed fuel storage facility.

11 In their second assignment of error, petitioners argue that the master plan prohibits
12 locating a fuel storage facility in the proposed location. Intervenors respond that the airport
13 master plan neither prescribes nor proscribes the location of the proposed fueling station.
14 Those are questions that the hearings officer must consider in the first instance on remand.
15 Therefore, we do not reach the second assignment of error.

16 The first assignment of error is sustained.

17 The county's decision is remanded.

⁷ As an example, runways are allowed in all three zoning districts as outright permitted uses. However, the master plan depicts the existing and future expansion areas for runways, and all of the existing and future airport development is based on the location of the runway as planned in the master plan. Under the hearings officer's interpretation, the runway could be moved or expanded in ways that are entirely inconsistent with the master plan. But we cannot imagine that the county could approve, without consideration of the master plan, a proposal to site a fueling station as an outright permitted use in an area designated on the airport master plan for expansion of the runway, because runway expansion is necessarily limited by the location of the existing runway to one or two areas of the entire airport.