

BEFORE THE KLAMATH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF APPEAL OF CONDITIONAL
USE PERMIT 34-91 FOR BROOKS/BUEHLER

ORDER

THIS MATTER came before the Board of Commissioners on July 30th, as an appeal by Andrew Albert Silani Trust and Lord Maitreya per LDC 22.030(C) with appellants statement of appeal filed under LDC 33.040. The appeal was filed on July 1, 1991, six days after the decision of the Planning Directors decision of approval, with conditions of a Conditional Use Permit to establish a family restaurant on property zoned Neighborhood Commercial (CN).

Notice and opportunity to comment was mailed out per notice requirements of Article 32 of the LDC.

On July 30th, 1991, The Board of Commissioners took relevant information, data, and evidence considering the appeal of CUP 34-91. The Board of Commissioners continued the appeal to August 7, 1991, with record left open for additional written comments. All letters, exhibits, and order dated June 25th, 1991 of the Planning Directors decision as well as exhibits of the appeal were made part of the record.

On August 7th, 1991, after reviewing and considering relevant information, exhibits, and additional written comments of the appeal, the Board of Commissioners make the following findings of fact and changes to conditions of CUP 34-91;

1. On July 1, 1991 Andrew Albert Silani Trust and Lord Maitreya appealed the Planning Directors decision under Section 22.030(C). Appellants statement of appeal filed under Section 33.040 alleged the following:

a. The Planning Director erred in accepting the CUP Application for a restaurant in that Section 44.040(F) of LDC precludes receipt of an application for any conditional use permit regardless of changed use for a period of one year after an earlier permit has been denied while alternatively that the application for a restaurant is substantially identical to the earlier one for a tavern and is a re-application within the one year period.

b. Granting of the conditional use permit will necessarily draw patrons to the establishment from an area larger than the immediate area of the established neighborhood, contrary to purpose set forth in creating a neighborhood commercial zone found in Section 52.210.

c. That the Planning Director erred as a matter of law in applying Section 44.030(C) to require a finding of "no significant adverse impact", rather than "no adverse impact".

d. The Planning Director erred in comparing outright permitted uses allowed in the CN zone with the conditional use being sought in weighing the extent of adverse impact.

e. The Planning Director erred in failing to find that property values in the area would decrease with the establishment of this permit.

f. The Planning Director erred in failing to find that the livability of the surrounding area would decrease.

g. The Planning Director erred in failing to find that traffic safety would be impaired by alcohol impaired patrons coming from the restaurant. The Planning Director erred in dismissing that the applicants are not the owner of the real property.

2. The Board found that pursuant to ORS 197.763 the appellant requested that the record remain open through August 7, 1991. Prior to that date applicant submitted the following additional evidence, Exhibit Q, a letter from Metvan Circle K, Inc. establishing the applicants authorization to make application and that applicants had an earnest money agreement to purchase subject property; Exhibit S, a petition signed by realtors living and working in the area offering their input that property values would not be adversely impacted by the establishment of a family restaurant on subject site zoned CN.

3. Based on the record below, the testimony adduced at the hearing the evidence submitted and arguments of appellants and respondents, Board of Commissioners makes the following additional findings of fact:

4. The purpose of Section 44.040(F) to restrict re-application for conditional use permits is to avoid re-application for the same conditional use time after time. Here the prior conditional use application was to establish a Tavern, with current application being for a family restaurant. The Board of Commissioners find that children will be allowed within the restaurant while children would not have been allowed within a Tavern. The Board of Commissioners further finds that the principal activity in a restaurant is the service of food, whereas in a Tavern it is the service of alcohol. The Board concludes that the application for conditional use for a dissimilar use is not prohibited by Section 44.040 and that this application is for a different use.

5. Applicants claim that operation of the facility will of necessity draw patrons to the establishment who reside outside the local market. The appellants assertions are vague in this regard. They have failed to establish what constitutes the local market, why a facility would operate as other than a local restaurant, or what people and in what numbers would be drawn to the area. The Board of Commissioners however finds that the testimony of the applicants showed that the

site is accessible and convenient to nearby residents and that the size, design, menu amenities and operation are consistent with the purpose of the zone.

6. Appellants incorrectly cited Section 44.030(C) of the LDC. The criteria requires that the proposed use "will not have a significant adverse impact" not that it will not have adverse impact. Nevertheless the governing body finds that the tentative development will have no adverse impact. First, impact upon adjacent properties must be viewed against other uses permitted within the CN zone. These uses include those set forth in the Planning Director's findings. This conditional use, judged against outright permitted uses, provide no greater impact upon adjacent properties in the form of traffic, congestion, parking late night operation, law enforcement or congregation of persons than a convenience store, video arcade, laundromat or movie rental facility all of which are permitted outright. The Board of Commissioners concludes that the hours of operation, number of patrons per hour and the type of patrons on the premises would have a less significant effect on adjoining residential properties than many permitted uses. In addition, the Board of Commissioners considers the lack of objection by abutting property owners indicate the support for this application. Despite objection by 6 property owners in the immediate vicinity to the establishment of a tavern, all but one an appellant herein, failed to file any objection in this application.

7. Appellant, Andrew Silani, who is the owner of a three-plex across Madison St. from the proposed location claimed that opening the restaurant would have as adverse impact upon property values. Appellants failed to produce any evidence to support this claim and instead speculate that tenants will move out based upon traffic noise and undesirable people in neighborhood. Appellants provide no evidence whatsoever of the effect on property values. Appellants failed to indicate how the existing derelict and run down building on the site has affected their property values, or how the establishment of a restaurant as differentiated from outright lawful permitted uses including a convenience store, laundromat, video parlor, video rental establishment or other uses allowed within the neighborhood commercial zone would have any different effect. The applicants responded with a letter signed by real estate agents and brokers expressing the opinion that no adverse affect on property values would result. Accordingly the Board of Commissioners are unable to find that the value would be affected by this application.

8. The Board of Commissioners finds that the conditions imposed upon the applicant by Planning Director will effectively alleviate the potential safety hazards resulting through use of the subject property as a restaurant site by requiring the following conditions.:

- a. A street light will be erected by the applicant to light the street in front of the restaurant.

b. Traffic will be channeled into and through the parking lot and a fence erected so that people neither back into the paths of oncoming cars on Madison Street or towards pedestrians.

c. CUP 34-91 will be reviewed six (6) months from date of order of the Board of Commissioners at which time additional conditions may be imposed.

d. Restaurant hours not to exceed opening at 10:00 AM and closing at 11:00 PM, on Monday thru Thursday and opening at 10:00 AM and closing at 12:00 AM (Midnight) Friday and Saturday.

Based on the above findings of fact and conclusions and the Planning Director's Order dated June 25th, 1991, and relevant information, data and evidence considered on the appeal before the Board of Commissioners on July 30th, 1991, and August 7th, 1991, hereby upholds the Planning Directors decision and denies the appeal.

Dated this 4th day of September 1991

Out of Office Today

CHAIRMAN


COMMISSIONER


COMMISSIONER

Approved as to Form and Content


Reginald Davis, County Counsel

Notice of appeal right:

You are hereby notified that this decision may be appealed to the Land Use Board of Appeals within 21 days following the mailing of this Order. Failure to do so in a timely manner may affect your right to appeal the decision.

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of _____ the 6th day
of September A.D., 19 91 at 10:05 o'clock A.M., and duly recorded in Vol. MO1
of _____ Needs _____ on Page 17752

FEE None
Return: Commissioners Journal

Evelyn Biehn • County Clerk

By Reginald Davis