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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LOWER LAKE SUBCOMMITTEE)
OF THE MIDLAND AREA)
COMMITTEE FOR CITIZEN)
INVOLVEMENT,) LUBA NO. 81-002
Petitioner,)
v.) FINAL OPINION
BOARD OF COMMISSIONERS OF) AND ORDER
KLAMATH COUNTY,)
Respondent.)

Appeal from Klamath County.

William M. Ganong, Klamath Falls, filed a brief and argued the cause for Petitioner.

Robert D. Boivin, Klamath Falls, filed a brief and argued the cause for Respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Reversed.

5/11/81

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioner seeks review of respondent's December 8, 1980
4 grant of a conditional use permit for J.N.S. Excavation
5 Company. The permit allows the construction and operation of a
6 septic waste dumping site on land zoned agricultural/forestry.
7 The petitioner also seeks to nullify a December 19, 1980
8 amendment to the December 8, 1980 order. The amendment
9 modifies the legal description of the land which is the subject
10 of the conditional use permit.

11 STANDING

12 Petitioner's standing has not been contested.

13 SUMMARY OF FACTS

14 Petitioner is a group of citizens who reside generally in
15 an area located ten miles south of Klamath Falls, Oregon, known
16 locally as the Lower Lake Area. The Lower Lake Area is within
17 the jurisdiction of the Midland Area Committee for Citizen
18 Involvement, known herein as the "CCI." On June 11, 1980, one
19 of two Klamath County hearings officers held a public hearing
20 pursuant to respondent's zoning ordinance to receive testimony
21 concerning the J.N.S. application. Incorporated in the record
22 of the June 11, 1980 proceeding was the record of a hearing
23 held on March 5, 1980 before a different hearings officer,
24 involving a similar application by the J.N.S. Company. This
25 prior conditional use permit application had been denied.
26 Therefore, the June 11, 1980 request was a re-application for

1 the conditional use permit.

2 After the June 11, 1980 public hearing the hearings officer
3 held open the record fifteen days to allow each side of the
4 dispute to submit in writing further testimony. No provisions
5 were made to allow either party to rebut any of the additional
6 "written testimony." In addition, the hearings officer
7 indicated that any party who disagreed with the decision he
8 would render could appeal to the Board of Commissioners and
9 would be entitled to a hearing de novo by the Board of
10 Commissioners. This statement is in accord with a statement by
11 the other hearings officer who presided at the March 5, 1980
12 hearing concerning the first application for this conditional
13 use permit.

14 On August 4, 1980, the second hearings officer entered an
15 order granting the conditional use permit for the construction
16 and operation of the septic waste dump site. On August 14,
17 1980, the petitioner herein filed notice of appeal with Klamath
18 County. The notice of appeal outlined nine general assignments
19 of error and also stated that additional evidence would be
20 presented to the Board of Commissioners at the hearing on
21 appeal.

22 On September 3, 1980, notice of hearing on the CUP appeal
23 before Klamath County Board of Commissioners was issued. The
24 notice stated in part:

25 "Please Note: This is a new hearing on an appeal
26 before the Board of County Commissioners."

1 On September 18, 1980, Respondent Board of Commissioners
2 conducted a public hearing in the matter of the appeal. During
3 the hearing, a member of the CCI attempted to introduce new
4 testimony and exhibits. The respondent refused to allow the
5 CCI representative to introduce any new evidence at that time.
6 The county then delayed the hearing to allow research into the
7 question of whether or not the county could allow new evidence
8 to be introduced.

9 The county decided it would not accept any new evidence and
10 denied the petitioner's request to present testimony. It
11 appears, however, from the record that testimony both pro and
12 con, which went beyond the scope of the record made before the
13 hearings officer, was allowed. One Commissioner stated that
14 the reason for taking new testimony was to determine whether
15 there were enough questions raised to refer the matter to a new
16 de novo hearing. Included in the additional testimony which
17 may be adverse to the petitioner is that of a County Health
18 Department representative who was allowed to present evidence
19 concerning other septic dump sites in the state. In addition,
20 a DEQ representative was allowed to present additional evidence
21 in favor of the application concerning investigations made of
22 the dump site by geologists and soil scientists. Further, the
23 record indicates that the applicant (J.N.S. Company), was
24 allowed to testify concerning its experience which had been
25 attacked at an earlier hearing. Respondent then adjourned the
26 hearing. On October 7, 1980, respondent reopened the continued

1 hearing, announced that it was investigating several
2 alternative sites and once again continued the hearing. No
3 additional testimony or evidence was allowed at that time. The
4 record reveals, however, that petitioner's representative
5 requested a chance to review the alternatives and offer
6 evidence thereon when the hearing would reconvened.

7 On November 6th, the commissioners again reopened the
8 hearing. After a brief staff report, one Commissioner
9 acknowledged several "ex parte" contacts concerning the septic
10 dump site had been made to the commissioners. He did not
11 indicate the content of the contacts but did state "that those
12 contacts will not be used in making a decision tonight." Then,
13 without allowing testimony from the public or from the
14 petitioner, the appeal was denied. A final order was signed on
15 December 8, 1980.

16 On December 19, 1980, the Board of Commissioners issued an
17 amendment to their order denying the appeal. The amendment
18 changed the legal description of the property which is the
19 subject of the conditional use permit. The amendment appears
20 to have been made without any public notice and without any
21 opportunity for comment by opposing parties. The amendment
22 changes the property description from the

23 "parcel of land approximately 10 acres in size zoned
24 AF (Agricultural Forestry) and generally located east
25 of Lower Lake Road approximately two miles south of
Crossroad, and more particularly described as being in
the E 1/2 of the NE 1/4 of the SE 1/4 and that portion

26

1 of the NW 1/4 of the SE 1/4 lying east of the Lower
2 Lake Road of Section 17, Township 40, Range 9, being
3 Tax Lot 117-1, Klamath County, Oregon"

3 to

4 "That real property described as the parcel of land,
5 approximately 10 acres, within a 40 acre parcel and
6 generally located east of Lower Lake Road,
7 approximately two miles south of Crossroad, and more
8 particularly described as being in the NE 1/4 of the
9 NE 1/4 of Section 17, Township 40, Range 9, being Tax
10 Lot 117-1, Klamath County, Oregon."

11 The former description had been that used for notice purposes
12 as well as by the hearings officer in his opinion.

13 DECISION

14 Taken as a whole, petitioner's allegations of error fall
15 into two general categories: the first being that petitioner
16 was denied due process and the second being that the Board of
17 Commissioners failed to make appropriate or sufficient findings
18 on several statewide planning goals. We will deal with these
19 matters in that order.

20 Due Process

21 Petitioner alleges that it was denied due process because:

22 1. It was not allowed to offer counter testimony and
23 evidence to the evidence submitted by applicant during the
24 15-day open record period granted by the hearings officer;

25 2. It was unable to present testimony before the Board of
26 County Commissioners after being notified the appeal to them
27 would be de novo;

28 3. The Board of County Commissioners allowed the
29 applicant, a County Health Department representative and a

1 Department of Environmental Quality representative to present
2 evidence not found in the record before the hearings officer
3 while refusing petitioner the opportunity to address that
4 additional evidence;

5 4. The Board of County Commissioners considered other
6 sites without allowing petitioner an opportunity to address the
7 alternative site considerations;

8 5. The Board of County Commissioners failed to specify the
9 content of ex parte contacts and allow petitioner an
10 opportunity to counter any taint those contacts may have caused.

11 6. The Board of County Commissioners failed to allow
12 petitioner an opportunity to be heard on the amendment of the
13 legal description of the property covered by the permit.

14 We agree with petitioner's position and, therefore, reverse
15 respondent's decision. Klamath County Zoning Ordinance,
16 Section 121.005(2) requires the hearings officer to prescribe
17 rules and regulations which

18 " * * * [s]hall be in conformance with the other
19 provisions of this Article and shall additionally
20 guarantee parties an opportunity to be heard, to
21 present and rebut evidence, to have a record made and
findings of fact made on which the decision is
based." (Emphasis added).

22 Holding the record open for 15 days without a provision for
23 opponents to review and rebut applicant's additional evidence
24 violates section 121.005. The record indicates that the
25 hearings officer gave the parties 15 days beginning June 11,
26 1980, the date of the hearing before him, to supplement the

1 record. Applicant submitted additional evidence on June 25,
2 1980, leaving no opportunity for petitioner herein to rebut
3 it. Respondent does not argue the additional material was not
4 prejudicial or mere repetition of prior evidence to which
5 petitioner had a previous chance to respond. A review of the
6 record indicates that applicant's additional evidence related
7 to other possible sites, health hazards, and company
8 qualifications. Opponents should have been given an
9 opportunity to rebut that evidence. Had the petitioner herein
10 been given an opportunity for a de novo hearing before the
11 Board of County Commissioners, as the hearings officer and the
12 public notice led it to believe it would be afforded, then the
13 error might have been cured. That is not the case, however.

14 Petitioner was also denied due process when proponents of
15 the project were allowed to introduce additional testimony
16 before the Board of County Commissioners but petitioner was
17 denied the same opportunity. In addition, petitioner should
18 have been allowed access and comment to the Board of
19 Commissioners' consideration of alternative sites. Parties to
20 contested land use cases before the county governing body are
21 entitled to due process protection. As was held in Fasano v.
22 Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973):

23 "Parties at the hearing before the county
24 governing body are entitled to an opportunity to be
25 heard, to an opportunity to present and rebut
26 evidence, to a tribunal which is impartial in the
matter - i.e. having had no prehearing or ex parte
contacts concerning the question at issue and to a
record made and adequate findings executed." Comment,

1 Zoning Amendments - The Product of Judicial or
2 Quasi-Judicial Actions, 33 Ohio St LJ 130-143 (1972).

3 See also Menges v. Bd. of Comm. of Jackson Co., 44 Or App 603 ,
4 603 P2d 681 (1980). It is clear, given the facts of this case
5 that the petitioners were not allowed an opportunity to rebut
6 when appropriate.

7 As regards petitioner's concern about the amendment of the
8 legal description, respondent maintains the amendment was
9 necessitated by a mere typographical error. Respondent argues
10 everyone involved knew which property was involved regardless
11 of the description. This Board cannot be certain from the
12 record before us that some boundary change which potentially
13 may have affected petitioner did not occur. Notice and a
14 reasonable opportunity to be heard should have been afforded
15 petitioner.

16 As regards the admitted ex parte contacts, they may have
17 biased the tribunal but without knowing the content of those ex
18 parte contacts, we are not prepared to rule specifically on
19 that issue. See Yost v. City of Ontario, 2 Or LUBA 49 (1980).

20 In petitioner's allegation concerning the statewide
21 planning goals, it alleges the order of the Board of
22 Commissioners violates Statewide Land Use Planning Goal Nos. 2,
23 3, 5, 7, 11 and 14. The only portion of respondent's December
24 8, 1980, as amended December 19, 1980, order addressing the
25 statewide goals is not a finding but rather merely a conclusion
26 which states:

1 "The granting of this conditional use permit is
2 consistent with the goals of the LCDC."

3 Petitioner specifically alleged violations of the statewide
4 goals and submitted a list of questions concerning the goals to
5 the hearings officer. Klamath County has not had its
6 Comprehensive Plan acknowledged by LCDC. Prior to such
7 acknowledgment, the county must address the applicable goals.
8 Neither the respondent's findings nor the hearings officer's
9 findings as adopted by the respondent address the goals. In
10 addition, when faced with a specific allegation of violation of
11 a statewide goal requirement, it is the responsibility of the
12 local government to make findings addressing those assertions.
13 Petitioner has a right to such findings and none exist.
14 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569
15 P2d 1063 (1977); see also Twin Rocks Water District v.
16 Rockaway, 2 Or LUBA 36 (1980).

17 For the above stated reasons, the decision of Respondent
18 Klamath County granting conditional use permit no. 80-16 for
19 J.N.S. Excavation Company is hereby reversed.
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BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

LOWER LAKE SUBCOMMITTEE OF THE
MIDLAND AREA COMMITTEE FOR CITIZEN
INVOLVEMENT,

Petitioner(s),

v.

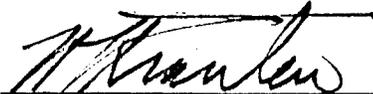
KLAMATH COUNTY,

Respondent.

LUBA 81-002
LCDC Determination

The Land Conservation and Development Commission hereby adopts the
proposed opinion and order of the Land Use Board of Appeals in
LUBA 81-002 concerning allegations of Statewide Goal violations.

DATED THIS 5TH DAY OF MAY, 1981.


W. J. Kvarsten, Director,
For the Commission

WJK:ER:af
5341A