

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MAURY SANCHEZ,)
5)
6 Petitioner,)
7) LUBA No. 94-122
8 vs.)
9) FINAL OPINION
10 CLATSOP COUNTY,)
11) AND ORDER
12 Respondent.)
13
14

15 Appeal from Clatsop County.
16

17 Robert S. Simon, Oregon City, filed the petition for
18 review and argued on behalf of petitioner. With him on the
19 brief was The Robert S Simon Law Firm.
20

21 Kenneth S. Eiler, Seaside, filed the response brief and
22 argued on behalf of respondent. With him on the brief was
23 Bauske, Eiler & Settles.
24

25 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
26 Referee, participated in the decision.
27

28 AFFIRMED 03/10/95
29

30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals two land use ordinance enforcement
4 decisions.

5 **FACTS**

6 Petitioner owns a .23-acre parcel (hereafter referred
7 to as Tax Lot 400) located south of the City of Warrenton in
8 Clatsop County. Tax Lot 400 is zoned Single Family
9 Residential-1 Acre Minimum (SFR-1) and is subject to the
10 Beaches and Dunes Overlay (BDO) district.

11 Petitioner resides in a mobile home on a leased space
12 in a mobile home and recreational vehicle park. In this
13 opinion, we refer to this space as Tax Lot 3300. Tax Lot
14 3300 is zoned Tourist Commercial (TC).

15 In August 1993, petitioner began cutting trees on an
16 approximately 3000 square foot portion of Tax Lot 400.
17 Petitioner wishes to construct a log home on this 3000
18 square foot portion of Tax Lot 400. Petitioner stored the
19 logs from Tax Lot 400, as well as lumber milled from those
20 logs, on Tax Lot 3300 to allow the logs and lumber to dry
21 and cure for subsequent use in constructing a log home on
22 Tax Lot 400. On September 17, 1993, the city mailed
23 petitioner notice that cutting trees on Tax Lot 400 and
24 storage of the logs and lumber from Tax Lot 400 on Tax Lot
25 3300 violates certain requirements of the Clatsop County
26 Land and Water Development and Use Ordinance (LWDUO).

1 On October 21, 1993, an enforcement subcommittee of the
2 county planning commission (hereafter planning commission)
3 held a hearing on the alleged violations. On October 28,
4 1993, the planning commission adopted findings and issued an
5 order finding petitioner in violation of the LWDUO and
6 assessing two fines of \$7,500 each for the violations on
7 each tax lot.

8 On November 4, 1993, petitioner appealed the October
9 28, 1993 orders to LUBA. The record was settled in that
10 appeal on January 19, 1994. The petition for review was
11 filed on February 29, 1994. On March 22, 1994, LUBA granted
12 respondent's motion that the orders be remanded to the
13 county for additional proceedings. Sanchez v. Clatsop
14 County, ___ Or LUBA ___ (LUBA No. 93-184, March 22, 1994)
15 (Sanchez I). Thereafter, on June 7, 1994, petitioner was
16 given notice that the planning commission would hold a
17 "public hearing to review the record and adopt findings * *
18 *." Record 114a. The planning commission held a hearing on
19 June 28, 1994, limited to the evidentiary record already
20 compiled. However, the planning commission allowed
21 petitioner to comment on the proposed findings. The
22 planning commission adopted the orders challenged in this
23 appeal on June 28, 1994.¹ Those orders were recorded, and

¹The order concerning Tax Lot 400 finds a violation of the LWDUO "for harvesting trees and removing vegetation without first obtaining a development permit and complying with LWDUO S4.104(1) and S4.104(2) * * *." Record 131. The order imposes a fine of \$7,500 unless certain corrective

1 petitioner was given written notice of the orders, on July
2 14, 1994. This appeal followed.

3 **WAIVER**

4 In response to several arguments advanced by
5 petitioner, respondent contends petitioner waived his right
6 to assert the argument because petitioner failed to raise
7 the issue below. ORS 197.763(1); 197.835(2). ORS
8 197.835(2) provides that issues before LUBA shall be limited
9 to those issues raised before the local hearings body, as
10 provided in ORS 197.763. ORS 197.763 applies to "the
11 conduct of quasi-judicial land use hearings conducted before
12 a local * * * planning commission * * * on application for a
13 land use decision * * *." (Emphasis added.) Other
14 provisions of ORS 197.763 also refer to the "application"
15 and "applicant." The proceeding leading to the challenged
16 orders is an action initiated by the county against
17 petitioner for violation of the LWDUO. There was no
18 "application" for development approval or "applicant" in the
19 sense those terms are used in ORS 197.763. ORS 197.763 does
20 not apply to such enforcement proceedings.

actions are taken to eliminate the identified LWDUO violations, in which case the fine is reduced to \$250.

The order concerning Tax Lot 3300 finds petitioner to be in violation of the LWDUO "for storing lumber in a Tourist Commercial zone * * *." Record 121. The order imposes a fine of \$7,500 unless "all of the lumber and logs are permanently removed" from the property by a specified date. Id. The order specifies that if the lumber and logs are removed, the fine will be reduced to \$700.

1 Petitioner may raise issues without regard to whether
2 he raised those issues below.

3 **FIRST ASSIGNMENT OF ERROR**

4 As explained above, the planning commission's initial
5 decision in this matter was rendered on October 28, 1993.
6 LUBA remanded that decision in Sanchez I on March 22, 1994.
7 The orders challenged in this appeal were rendered by the
8 planning commission on July 14, 1994, 114 days after LUBA's
9 March 22, 1994 remand in Sanchez I. Petitioner contends the
10 challenged orders are "null" because they were rendered more
11 than 60 days after March 22, 1994, as required by LWDUO
12 6.530(2) and more than 90 days after March 22, 1994, as
13 required by OAR 661-10-021(1).

14 **A. LWDUO 6.530(2)**

15 The LWDUO includes specific provisions concerning
16 enforcement proceedings. LWDUO 10.240. LWDUO 10.240(4)
17 provides:

18 "The hearing before the Planning Commission shall
19 be conducted pursuant to procedures adopted by the
20 Commission and shall at a minimum provide an
21 opportunity for the Violator and/or Property Owner
22 to present testimony and evidence as well as
23 comments from any other interested parties as
24 determined by the Commission. * * *" (Emphasis
25 added.)

26 Petitioner contends the above emphasized language obligated
27 the county in this matter to comply with the time deadline
28 imposed by LWDUO 6.530(2), which provides:

29 "Action by the review body shall be decided by a
30 majority vote of its members present at the

1 meeting at which review as [sic] made and shall be
2 taken either at that or any subsequent meeting.
3 The review body shall render its decision no later
4 than sixty (60) days after the filing of the
5 request for review and shall file that decision
6 with the County Clerk within ten (10) days after
7 it is rendered."

8 Respondent points out the LWDUO 6.530 review provisions
9 govern requests for review under LWDUO 6.500. LWDUO 6.410
10 and 6.500(1) and (2) make it clear these provisions concern
11 appeals of decisions concerning issuance of a "development
12 permit." Respondent contends the LWDUO 6.530(2) provisions
13 cited by petitioner are inapplicable to code enforcement
14 proceedings. We agree with respondent.

15 Moreover, we reject this subassignment of error for a
16 second reason. Absent code provisions to the contrary, when
17 a local government decision is remanded by LUBA, the local
18 government is not required to repeat the procedures
19 applicable to the initial proceedings unless LUBA's remand
20 specifically requires that those procedures be followed.
21 Wentland v. City of Portland, 23 Or LUBA 321, 326-27 (1992).
22 Therefore, even if LWDUO 6.530(2) applied to the planning
23 commission's initial October 28, 1993 decision, it does not
24 apply to the planning commission's decision on remand.

25 **B. OAR 661-10-021**

26 OAR 661-10-021(1) provides:

27 "If a local government or state agency, pursuant
28 to ORS 197.830(12)(b), withdraws a decision for
29 the purposes of reconsideration, it shall file a
30 notice of withdrawal with [LUBA] on or before the

1 date the record is due. A decision on
2 reconsideration shall be filed with [LUBA] within
3 90 days after the filing of the notice of
4 withdrawal or within such other time as [LUBA] may
5 allow."

6 As respondent correctly points out, our remand in
7 Sanchez I followed respondent's motion for remand. It did
8 not result from a notice of withdrawal pursuant to OAR 661-
9 10-021. A local government may only exercise its right to
10 withdraw a decision unilaterally for reconsideration under
11 OAR 661-10-021(1) where the notice of withdrawal is filed
12 "on or before the date the record is due."
13 ORS 197.830(12)(b), cited in our rule, also imposes that
14 requirement.

15 The motion for voluntary remand in Sanchez I was filed
16 after the record was filed and after the petition for review
17 was filed.² OAR 661-10-021(1) and the 90-day deadline
18 specified in that rule for decisions on reconsideration do
19 not apply in this matter.

20 This subassignment of error is denied.

21 **C. Finality**

22 At the end of his argument under this assignment of
23 error, petitioner suggests the county failed to render a
24 final decision in this matter, because the orders are not
25 signed by the planning commission. See OAR 661-10-010(3)

²Petitioner opposed the motion for voluntary remand, but we allowed the motion because petitioner offered no reason why the requested voluntary remand should not be allowed.

1 ("[a] decision becomes final when it is reduced to writing
2 and bears the necessary signatures of the decision maker(s),
3 unless a local rule or ordinance specifies that the decision
4 becomes final at a later time * * *").

5 If the county has not adopted a "final" decision, LUBA
6 lacks jurisdiction and we would be required to dismiss this
7 appeal. ORS 197.015(10); Randall v. Wilsonville, 8 Or LUBA
8 185, 189 (1983). However, petitioner is incorrect. While
9 the copies of the disputed orders included at Record 115-16
10 and 124-25 are not signed, the signed orders are included in
11 the record at Record II 148-49 and 156-57.

12 This subassignment of error is denied.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 Petitioner challenges the county's order regarding Tax
16 Lot 400. Petitioner first contends the county is barred by
17 the Forest Practices Act from applying BDO restrictions to
18 his use of Tax Lot 400. Petitioner also contends his
19 actions on Tax Lot 400 are exempt from the BDO requirements
20 under LWDUO 1.062. We address these contentions separately
21 below.

22 **A. Forest Practices Act**

23 Petitioner contends Tax Lot 400 is "forest land," as
24 that term is defined by ORS 527.620(5). Petitioner further
25 contends the clearing and harvesting of trees and vegetation
26 that led to the order concerning Tax Lot 400 is a "forest

1 practice," as that term is defined by ORS 527.620(6).
2 Finally, petitioner contends ORS 527.722(1) prohibits the
3 county from applying its land use regulations to "forest
4 practices" on "forest lands" located outside an urban growth
5 boundary unless one of the exceptions provided in ORS
6 527.722(2) applies.

7 As noted earlier, the county found petitioner's removal
8 of trees and other vegetation on Tax Lot 400 violates a
9 prohibition under the BDO against removing vegetation
10 without a development permit and that certain LWDUO
11 standards applicable under the BDO were violated by
12 petitioner's actions on Tax Lot 400. Respondent offers four
13 reasons why it believes the challenged order does not
14 violate ORS 527.722(1). We consider one of those reasons.

15 ORS 527.722(2)(d) provides an exception to the
16 ORS 527.722(1) prohibition against county regulation of
17 forest practices on forest lands. ORS 527.722(2)(d)
18 provides that notwithstanding the prohibition in ORS
19 527.722(1), a county may apply a land use regulation to
20 "prohibit or regulate" "[t]he siting or alteration of
21 dwellings."

22 Petitioner concedes the 3000 square foot area of Tax
23 Lot 400 was cleared to make room for his planned log home.
24 Petition for Review 3. The exemption provided by
25 ORS 527.722(2)(d) applies, and the county's action is not
26 prohibited by ORS 527.722(1).

1 This subassignment of error is denied.

2 **B. Applicability of BDO Requirements**

3 Tax Lot 400 is located in the BDO district. LWDUO
4 4.060. LWDUO Section 4.067 imposes a number of requirements
5 on "development," which the county found petitioner's
6 clearing activity on Tax Lot 400 violates. LWDUO Section
7 4.067 additionally subjects development to the "Beach and
8 Dune Area Requirements of Sections S4.100 to S4.138 of
9 Chapter 4 of the Development and Use Standards Document * *
10 *."³ If the above requirements apply, the record
11 demonstrates, and we do not understand petitioner to
12 dispute, that some of those requirements were violated by
13 his clearing of 3000 square feet of Tax Lot 400.

14 LWDUO 1.030 includes the following definition:

15 "Development or Use:

16 "Use: The end to which a land or water area is
17 ultimately employed. A use often involves
18 the placement of structures or facilities
19 for industry, commerce, habitation, or
20 recreation. An accessory use is a use
21 incidental and subordinate to the main use
22 of the property and located on the same lot
23 or parcel as the main use.

24 "Activity: Any action taken either in conjunction
25 with a use or to make a use possible.
26 * * *"

27 The county found that petitioner's action to clear 3000

³S4.104(1) provides, in part, "removal of vegetation from a dune for the purpose of construction shall not occur more than ten (10) days prior to the start of construction."

1 square feet of Tax Lot 400 in preparation for eventual
2 construction of a single family log home on Tax Lot 400
3 constitutes development. As such, the county found that a
4 development permit is required under LWDUO 1.060 and the
5 above cited requirements of the BDO apply.

6 Petitioner contends the above provisions do not apply
7 to his action on Tax Lot 400, because LWDUO 1.062 provides
8 an exception to the LWDUO 1.060 requirement that he first
9 seek approval of a development permit.⁴ LWDUO 1.062
10 provides as follows:

11 "Except as indicated otherwise, an activity or
12 development listed below is excluded from the
13 requirement for a development permit. A listed
14 activity is not excluded from the permit
15 requirement in special purpose districts and
16 resource zones [including the BDO district] except
17 for numbers (1) through (2), (4) through (7), (9)
18 through (11) of the following list:

19 * * * * *

20 "(6) The propagation or management of timber or
21 the cutting of timber for other purposes such
22 as erosion control or personal use.

23 * * * * *

24 "Exclusion from a permit does not exempt the
25 development or its use from applicable
26 requirements of the [LWDUO]." (Emphases added.)

27 Petitioner contends the timber cut on Tax Lot 400 was cut

⁴LWDUO 1.060(1) provides:

"Except as excluded by [LWDUO] 1.062, no person shall engage in or cause to occur a development for which a development permit has not been issued. * * *"

1 for personal use and, therefore, under LWDUO 1.062 a
2 development permit is not required and the above noted BDO
3 standards do not apply.

4 LWDUO 1.062 is difficult to follow. The first sentence
5 says that the 11 activities and developments listed in LWDUO
6 1.062 do not require a development permit. The second
7 sentence says these activities and developments are not
8 excluded from the development permit requirement if located
9 in certain special purpose and resource zones. However, the
10 second sentence goes on to almost swallow the exception by
11 stating that nine of the 11 activities and developments
12 listed in LWDUO 1.062 are excluded from the development
13 permit requirement in those special purpose and resource
14 districts.⁵ Petitioner is correct, that LWDUO 1.062 as
15 written exempts "cutting of timber for * * * personal use"
16 within the BDO district from the requirement to obtain a
17 development permit.

18 Regardless of petitioner's and respondent's arguments,
19 the final sentence of LWDUO 1.062 makes the exemption
20 provided in LWDUO 1.062 somewhat meaningless in this case.
21 The final sentence makes it clear that the exemption is only
22 from the requirement to obtain a development permit. The
23 BDO district requirements for "development," as defined in
24 LWDUO 1.030, nevertheless apply. The only assistance LWDUO

⁵The county's contrary construction of LWDUO 1.062 is at odds with the plain language of LWDUO 1.062, and we reject it without comment.

1 1.062 could provide petitioner, is that it potentially
2 obviates the requirement that he obtain a development permit
3 for Tax Lot 400 under LWDUO 1.060. It does not obviate the
4 requirement that removal of trees and vegetation comply with
5 BDO district requirements.

6 Nevertheless, we agree with respondent that petitioner
7 is not excused from the requirement that he obtain a
8 development permit. Regardless of LWDUO 1.062(6), the
9 county also concluded a development permit is required
10 because petitioner's action on Tax Lot 400 was "site
11 preparation" for construction of his proposed log home.⁶
12 While petitioner's action may also have constituted cutting
13 timber for personal use, petitioner's tree cutting and
14 vegetation clearing action on Tax Lot 400 is not properly
15 viewed in isolation. There is simply no dispute that the
16 trees and vegetation were removed from Tax Lot 400 to
17 prepare Tax Lot 400 for development as a homesite. To the
18 extent petitioner contends the county was required to ignore
19 this aspect of his activity simply because the requirement
20 for a permit might have been obviated had his action not
21 been taken in part to prepare Tax Lot 400 for development as
22 a homesite, we reject the contention.

⁶The county found:

"In the BDO district, site preparation which involves
vegetation removal requires that a development permit be
obtained prior to any activity on the site." Record 127.

1 Petitioner finally argues that certain findings are not
2 supported by substantial evidence. Petition for Review 36.
3 The findings are not critical to the county's decision.
4 Therefore, even if they lack evidentiary support, that would
5 provide no basis for reversal or remand.

6 This subassignment of error is denied.

7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 The trees cut and milled on Tax Lot 400 are now stacked
10 around petitioner's mobile home located in an RV park in the
11 TC zone.⁷ LWDUO 3.326 through 3.330 set out the uses
12 allowed in the TC zone. Storing lumber is not one of the
13 allowed uses. In one of the challenged orders, the county
14 finds petitioner in violation of the LWDUO because storage
15 of lumber is not an allowed use in the TC zone.

16 **A. Preliminary Issues**

17 Petitioner first contends the county erred by not
18 adopting findings interpreting the relevant TC zone
19 provisions. See Weeks v. City of Tillamook, 117 Or 449, 844
20 P2d 914 (1992). Even if the county's findings are not
21 sufficiently detailed for our review under Weeks, the

⁷Respondent contends there are "405 pieces of lumber varying in length from 8 feet to 20 feet in several large stacks placed between and around [petitioner's] mobile home * * *." Respondent's Brief 26. The record citations provided by respondent do not confirm that there are "405 pieces," but the cited photographs in the record make it clear that there are several very large stacks of lumber and logs scattered around petitioner's mobile home.

1 limitation under Weeks on our authority to interpret the
2 LWDUO in the first instance does not apply here. The
3 challenged decision is a decision by the planning
4 commission, not the board of county commissioners. Ellison
5 v. Clackamas County, ___ Or LUBA ___ (LUBA No. 94-138,
6 January 13, 1995), slip op 6.

7 Petitioner next contends the county erred by not
8 addressing in its findings petitioner's contention that the
9 stacking of lumber on Tax Lot 3300 is a permissible
10 "accessory use." Norvell v. Portland Area LGBC, 43 Or App
11 849, 853, 604 P2d 896 (1979). Respondent disputes that
12 petitioner raised this issue below, and petitioner does not
13 cite where in the record the issue was raised. We have
14 already explained petitioner's failure to raise an issue
15 below does not preclude him from raising that issue in this
16 appeal. However, the county cannot be faulted for failing
17 to address an issue specifically in its findings, if that
18 issue was not raised below. We turn to the merits.

19 **B. Accessory Use**

20 Petitioner does not contend that stacking lumber is a
21 permitted or conditional use in the TC zone. However,
22 petitioner contends the permitted and conditional uses
23 specified under the TC district do not include all
24 permissible activities. Petitioner contends the county
25 erred by not viewing the large stacks of lumber on Tax Lot

1 3300 as an "accessory use."⁸ Petitioner explains:

2 "* * * Dog fencing of yards is not on [the] list,
3 * * * having social events, and a myriad of
4 incidental uses of a person's property [are] also
5 not 'listed' under LWDUO 3.326 as 'Type I'
6 permitted uses.

7 "Does the County mean to assert that stacking
8 roofing shingles on a rooftop, or having an
9 overnight guest could be a subject for violation
10 of [LWDUO] 3.326? * * *" Petition for Review 39.

11 Whatever can be said regarding petitioner's point that
12 what properly qualifies as an accessory use under the LWDUO
13 may not be entirely clear in all circumstances, we agree
14 with respondent that stacking enough lumber to build a house
15 around a mobile home located in a mobile home and
16 recreational vehicle park is not properly viewed as an
17 accessory use in the TC zone.

18 The third assignment of error is denied.⁹

19 **FOURTH ASSIGNMENT OF ERROR**

20 Petitioner's final argument is that the county violated
21 his rights to due process of law and to equal protection of
22 the law under the Fourteenth Amendment to the United States

⁸LWDUO 1.030 includes the following:

"An accessory use is a use incidental and subordinate to the
main use of the property and located on the same lot or parcel
as the main use."

⁹As under the second assignment of error, petitioner challenges the
evidentiary support for certain findings without explaining why the
findings are critical to the challenged decision. Petition for Review 43.
We conclude petitioner's evidentiary allegations under this assignment of
error provide no basis for reversal or remand.

1 Constitution.

2 **A. Due Process**

3 Petitioner's due process arguments are insufficiently
4 developed to demonstrate reversal or remand is warranted.
5 Petitioner contends the county failed to explain his
6 procedural rights, but does not identify what procedural
7 rights he believes the county failed to identify.
8 Petitioner objects to not being allowed to present evidence
9 at the hearing conducted on remand, where the planning
10 commission considered and adopted new findings. However,
11 petitioner does not explain why the evidentiary hearings in
12 this matter conducted by the county earlier provided an
13 inadequate opportunity for him to present relevant evidence.

14 Finally, petitioner complains he was not allowed to
15 cross-examine witnesses below. However, petitioner does not
16 allege he asked to cross-examine witnesses against him or
17 that the county denied such a request. See Younger v. City
18 of Portland, 15 Or LUBA 210, 233, aff'd 86 Or App 211
19 (1987), rev'd on other grounds 305 Or 34 (1988).

20 This subassignment of error is denied.

21 **B. Equal Protection**

22 Petitioner contends the county violated his right to
23 equal protection under the law by directing the order
24 concerning Tax Lot 3300 at petitioner while excusing the
25 property owner.

26 The property owner apparently initially gave petitioner

1 permission to store lumber on Tax Lot 3300. However, when
2 the county made it known that storage of the amount of
3 lumber petitioner stacked around his mobile home was not
4 permitted in the TC district, the property owner revoked his
5 prior permission. Moreover, the property owner attempted to
6 have petitioner remove the lumber and ultimately advised
7 petitioner he would have to vacate Tax Lot 3300.

8 The county clearly had a rational basis for limiting
9 its order concerning Tax Lot 3300 to petitioner.
10 Petitioner's equal protection claim is without merit.

11 The fourth assignment of error is denied.

12 The county's decision is affirmed.