BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LEIGH WOODARD and RON WOODARD,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

STEPHEN SHEA,
Intervenor-Respondent.

LUBA No. 2007-204

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

Fredric Sanai, Assistant County Counsel, McMinnville, filed a joint response brief and represented respondent. With him on the brief were Thomas C. Tankersley, Catherine A. Wright and Drabkin, Tankersley & Wright, LLC.

Thomas C. Tankersley, McMinnville, filed a joint response brief and represented intervnor-respondent. With him on the brief were Fredric Sanai, Catherine A. Wright and Drabkin, Tankersley & Wright, LLC.

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

AFFIRMED 02/12/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that (1) dismisses their local land use appeal and (2) alternatively approves a modification of a condition of approval for a forest template dwelling on the merits.

MOTION TO INTERVENE

Stephen Shea (intervenor), the applicant below, moves to intervene on the side of the county in this appeal. There is no opposition to the motion, and it is granted.

FACTS

Petitioners were granted approval of a forest template dwelling on the subject 19.35-acre parcel in 1997. Petitioners subsequently sold the subject property to intervenor, and petitioners now reside on an adjacent parcel. Petitioners' 1997 application for the forest template dwelling included a rough drawing that indicated the dwelling would be located approximately 200 feet from the adjoining parcel to the south, where petitioners now reside. A condition of approval (Condition 1) specifically required a setback of 200 feet.

Intervenor was granted a building permit for the forest template dwelling with an 85-foot setback from petitioners' property line. Construction of the dwelling began prior to closing in 2000. After closing, a dispute between petitioners and intervenor arose regarding access. Petitioners complained to the county that intervenor's dwelling violates the 200-foot setback. Intervenor then filed an application to modify Condition 1 to require only an 85-foot setback.

Petitioners submitted a letter opposing the proposed condition modification. The planning director approved the application over petitioners' objections, without a hearing. Petitioners then appealed the planning director's decision to the board of county commissioners. While the matter was pending before the board of county commissioners, it was discovered that the dwelling is actually located 186 feet from petitioners' property line.

The board of county commissioners dismissed petitioners' appeal, finding that petitioners failed to specify the bases for the appeal in their local notice of appeal. The board of county commissioners also addressed petitioners' appeal on the merits and approved the application to modify Condition 1. As amended by the board of county commissioners, Condition 1 now requires a setback of 130 feet. Petitioner appeals alleging procedural and substantive errors.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county impermissibly dismissed their local appeal. Yamhill County Zoning Ordinance (YCZO) 1404.03 sets out the procedure for filing appeals in this situation

> "(A) A decision by the Director, Planning Commission or Board of County Commissioners to approve or deny an application or docket item request may be appealed provided the appellant has satisfied Subsections 1, 2 and 3:
>
> "(1) Filed a written appeal, accompanied with the appropriate filing fee with the Director within the time required by this ordinance submitted in accordance with Subsection B of this section;
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> "(2) Appeared before the Commission, hearings officer or Board orally or in writing; and
>
> "(3) Meets one of the following criteria:
>
> "(a) Was entitled by this ordinance to notice and hearing prior to decision appealed; or
>
> "(b) Is aggrieved or has interests adversely affected by the decision.
>
> "(B) Any appeal filed shall be in writing, shall explain the basis of the appeal, and shall include one or more of the following:
>
> "(1) A reference to the ordinance provisions or plan policies providing the basis of the appeal.
>
> "(2) Reasons why the decision is factually or legally incorrect.
>
> "(3) A description of new information or additional facts which should have been considered in the decision.

> "(4) A description of any mitigating factors which might be taken to make the decision acceptable."

The county's findings dismissing petitioners' local appeal state:

> "In the section of the application which asked for a description of the basis on which the decision is being appealed, [petitioners] re-stated that the Planning Director had approved the application and concluded with '*regulatory provisions that have not been satisfied and have been violated by the Planning Director's decision will be presented by our attorney.*' The only other explanation of the issues raised is contained on the first page, '*our grievance will be presented by our attorney.*' The Board carefully considered the arguments raised in [petitioners'] attorney's letter concerning this issue. The Board finds that, even though the language of YCZO 1404.03(A) may be ambiguous, YCZO 1401.01 provides: '*The Board shall have the authority and the duty to interpret and enforce the provisions of this ordinance*.' This Board interprets these provisions to make them compatible. Under this interpretation, [petitioners were] required to comply with the requirements of YCZO 1404.03(B). The Board further finds that this is consistent with the requirement of State law and, based on the affidavit of a County Planning Department staff member, [petitioners were] not misled by the County staff on the requirements.
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> "The Board, therefore, concludes that under applicable and clear requirements, an appeal complying with the ordinance was not timely made. The appeal filed by [petitioners] is, therefore, **dismissed.**" Record 6 (italics and bold type in original).

According to petitioners, because the planning director issued his decision without first providing a hearing, they were entitled to a *de novo* hearing and were not required to specify the bases for appeal in their notice of local appeal pursuant to ORS 215.416(11)(a)(E)(ii).

ORS 215.416(11)(a) expressly authorizes counties to issue permit decisions without first providing a hearing. Where a county renders such a permit decision, it must give notice to the persons specified in the statute of their right to file a local appeal. ORS 215.416(11)(a)(A), (B) and (C). ORS 215.416(11)(a)(D) requires that the local appeal include "a de novo hearing." ORS 215.416(11)(a)(E)(i) requires that appellants challenging such a permit decision be given the same opportunity to present "testimony, arguments and evidence" that they would have had, if the county had held a quasi-judicial hearing pursuant

to ORS 197.763 prior to issuing the permit decision. Importantly, for purposes of resolving petitioners' first assignment of error, ORS 215.416(11)(a)(E)(ii) provides "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal."

The challenged decision is a permit decision that was rendered without a prior hearing, as authorized by ORS 215.416(11)(a).[1] Under ORS 215.416(11)(a)(E)(ii), petitioners' "testimony, arguments and evidence" could not be limited to the issues specified in their notice of local appeal. Therefore, the county erred in dismissing petitioners' local appeal based on their failure to specify the issues they wished to raise on appeal in their local notice of appeal.

The county purports to rely on its discretion under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) to interpret its ordinances to require that the bases for the local appeal be specified in the notice of appeal.[2] While the county might be able to reject appeals of other kinds of decisions for this reason, when the county makes a permit decision without a hearing it must comply with ORS 215.416(11)(a).[3] *See*

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[1] Respondents do not argue that the challenged decision was not a permit.

[2] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[3] ORS 215.416(11)(a)(E)(ii) only applies to permit decisions that are issued without a prior hearing. For local appeals of permit decisions that are issued *following* a quasi-judicial hearing under ORS 197.763, the county almost certainly could dismiss or deny an appeal where the local notice of appeal failed to specify the

Sisters Forest Planning Comm. v. Deschutes County, 48 Or LUBA 78, 81-82 (2004), *rev'd on other grounds* 198 Or App 311, 108 P3d 1175 (2005) (so stating); ORS 197.829(1)(d) (LUBA will not affirm a local government's interpretation that is contrary to a state statute).

Respondents argue that the county properly dismissed the local appeal under ORS 215.416(11)(a) because the county did not limit the "presentation of testimony, arguments and evidence * * * to issues raised in a notice of appeal." According to respondents, because the county allowed petitioners to make all their arguments before dismissing the local appeal, the statute was not violated. We disagree. The ORS 215.416(11)(a)(E)(ii) requirement that counties allow local appellants to present testimony, arguments or evidence that is not raised in the notice of intent to appeal carries with it a requirement that the testimony, arguments and evidence not be summarily rejected or dismissed, simply because the testimony, arguments and evidence was not raised in the local notice of appeal. To allow counties to provide a meaningless hearing and then dismiss the local appeal for failure to specify issues in the notice of local appeal would defeat the entire purpose of ORS 215.416(11)(a)(E)(ii) and is inconsistent with the statute.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

If the county had simply dismissed petitioners' local appeal, the county's decision would have to be remanded. However, as we have already noted, the county alternatively proceeded with petitioners' local appeal and rendered a decision on the merits. Given the county's alternative decision on the merits, the county's erroneous dismissal of petitioners' local appeal provides no basis for remand. We turn to petitioner's challenge of the county's decision on the merits.

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issues on appeal in accordance with local law. *Miles v. City of Florence*, 190 Or App 500, 509, 79 P3d 382 (2003), *rev den* 336 Or 615, 90 P3d 626 (2004).

Petitioners argue that the county's findings in support of its decision to approve the requested modification of Condition 1 are inadequate. We address petitioners' specific challenges separately below.

A. Failure to Identify Approval Criteria

The challenged decision has a heading entitled "**CRITERIA.**" Record 4. The criteria listed after that heading are "Section 401.03(C), 401.08, 401.09 and 401.10 of the Yamhill County Zoning Ordinance." *Id.* YCZO 401.03(C) authorizes forest template dwellings and largely replicates the statute that authorizes forest template dwelling. ORS 215.750. YCZO 401.08 establishes standards for the siting of dwellings and structures in the Forest zone.[4] YCZO 401.09 sets out "Fire Siting and Construction Standards for Dwellings and Structures."[5] YCZO 401.10 sets out additional standards that govern partitioning and developing lots in the Forest zone.[6]

The county's findings include the following:

> "The original application indicated that the dwelling will be [a] minimum [of] 200 feet from the property line. The condition of approval at that time took that fact into consideration. However, at that time the minimum required setback would have been 80 feet which would have contained a 30 foot primary fire break and a 50 foot secondary fire break. The current location of the existing residence is 85 feet from the property line which is sufficient to maintain the fire breaks on the parcel." Record 5.

> "* * * After the appeal was filed and before the hearing, it was determined that the closest point on [intervenor's] dwelling to the [petitioner's property] boundary is 186 feet, not 85 feet. The measurements were made by a licensed surveyor based on well-established surveying techniques. In addition, slopes were measured, revealing that no slope next to the house is over 20% with

[4] One of those standards requires that an applicant demonstrate that the site "[m]inimizes the risk associated with wildfire." YCZO 401.08(A)(4).

[5] YCZO 401.09(F) requires a primary fire break that is "no less than 30 feet wide" and a secondary fire break that is "not less than 100 feet outside the primary fire break[.]" The required secondary firebreak must be increased to 150 feet if the dwelling is located on slopes in excess of "25% or other fire hazards exist." *Id.*

[6] YCZO 401.10(D) establishes a minimum setback of "30 feet."

> none even close to the fire safety threshold of 25%. The Board, therefore, determined that the dwelling's actual location not only met the applicable fire safety siting standards for forest template dwellings in 1997, when the forest template dwelling approval was issued, but also meets the 2007 firebreak standard distance of 130 feet, given these slopes. The Board further finds that, despite the written submission of the applicant, the situation is not the result of a knowing or negligent violation by [intervenor]. A mistake was made by several individuals and entities and it is in the Board's power and appropriate, to rectify the mistake." Record 7-8.

Petitioners argue that the county failed to identify the approval criteria for modifying a condition of approval. Petitioners' entire argument in this regard is set out below:

> "The challenged decision modifies Condition 1 without identifying any basis in its ordinance for doing so in this case. Respondent was required to make the challenged decision in accordance with its land use regulations. ORS 197.175(2)(d). *However, the decision does not cite a single relevant approval criterion, and makes no findings to explain why any facts relied upon support a conclusion that relevant approval criteria are met.* The challenged decision must therefore be remanded." Petition for Review 9 (emphasis added).

The challenged decision identifies the approval criteria that the county believed were relevant. Although the above findings admittedly do not "cite" the criteria they are addressing, those findings first make the point that the 200-foot setback was imposed because in 1997 the applicant proposed to site the house 200 feet from the property line, not because any approval criterion required a 200-foot setback. The findings then note that initially it was believed that the house was in fact constructed 85 feet from petitioners' property line. The findings go on to conclude that even if the dwelling was located 85 feet from the property line, the 85 foot setback was sufficient to comply with the fire break standards that were in effect when the dwelling was built. The findings then point out that the currently applicable fire break standards would require a setback of 130 feet, given the slopes around the house. The findings explain that based on a recent survey the dwelling satisfies the current fire break standard. The findings point out that the dwelling was mistakenly built in violation of the 200-foot setback requirement imposed by Condition 1 of the 1997 forest template dwelling approval. We understand the county to have concluded,

however, that because the 200-foot setback was not needed to comply with applicable fire break standards it was within the county's authority to amend the condition to require a setback of 130 feet.

The above findings are adequate to explain why the only applicable approval standard that might be implicated by reducing the 200-foot setback to 130 feet is not violated by such a reduction. If petitioners believe there are additional approval standards that might be implicated, they do not indicate what those approval standards might be.

This subassignment of error is denied.

B. Failure to Follow the Correct Procedure

YCZO 1202.05(B) provides the following authorization for altering a conditional use:

"A conditional use may be enlarged or altered pursuant to the following:

> "1. Major alterations of a conditional use including changes, alterations or deletion of any conditions imposed shall be processed as a new conditional use permit application, in accordance with the Type B application procedure set forth in Section 1301[.]"

Petitioners first argue that intervenor "has not requested to enlarge or alter his structure, and therefore this allowance for modification of conditions appears to require denial in this case." Petition for Review 10.

Despite the "enlarged or altered" wording in the first clause of YCZO 1202.05(B)(1), YCZO 1202.05(B)(1) expressly authorizes "changes, alterations or deletion of any conditions imposed * * *." The challenged decision either "changes" condition 1 or deletes that condition and replaces it with a modified condition of approval. In either case, YCZO 1202.05(B)(1) expressly authorizes what the county did here.

Petitioner next argues YCZO 1202.05(B)(1) requires "any modification be in response to a new conditional use permit application, and processed under a procedure that respondent did [not] utilize in this case." Petition for Review 10.

The record includes a 10-page application. Record 171-80. We cannot tell if that application qualifies as a "new conditional use permit application," but petitioners make no attempt to explain why they believe it does not. Petitioners appear to be correct that the county did not follow the county's "Type B application procedure," as YCZO 1202.05(B)(1) requires.[7]

For purposes of this opinion, we assume that the county did not require a "new conditional use permit application." It also appears that the county followed a Type A application procedure when it should have followed a Type B application procedure. Those errors are procedural errors. LUBA is required to reverse or remand a land use decision, based on procedural errors, if those procedural errors prejudice a petitioner's substantial rights. ORS 197.835(9)(a)(B).[8] Stated differently, procedural errors that do not prejudice petitioners' substantial rights provide no basis for reversal or remand. *Womble v. Wasco County*, 54 Or LUBA 68, 79 (2007), *aff'd* 214 Or App 171, 163 P3d 614, *rev den* ___ Or ___, ___ P3d ___ (2007); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part rem'd in part on other grounds* 73 Or App 334, 698 P2d 529 (1985). Petitioners neither allege that the county's procedural errors prejudiced their substantial rights nor make any attempt to demonstrate that those errors prejudiced their substantial rights. Therefore, those procedural errors provide no basis for reversal or remand.

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[7] As far as we can tell there is only one material difference between the county's Type A Procedure, which the county followed here, and the Type B Procedure, which the county should have followed under YCZO 1202.05(B)(1). Under the Type B Procedure notice and an opportunity to comment or request a hearing must be given before the planning director renders a decision under a Type B Procedure. If the planning director receives a request for a hearing, a hearing is scheduled before the board of county commissioners. If a hearing is not requested, the planning director renders a decision on the request. Under a Type A Procedure, there is no right to comment or request a prior hearing, only a right to request a hearing before the Board of County Commissioners after the planning director renders an initial decision.

[8] ORS 197.835(9)(a)(B) provides that LUBA must reverse or remand a land use decision if a local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner."

C. Petitioners' Remaining Arguments

Petitioners contend that the disputed condition modification could not be approved as a "minor alteration" under YCZO 1202.05(B)(2), because minor alterations can only be approved *before* a building permit is issued.[9] Petitioners also argue that the condition modification could not be approved as a variance under YCZO 1203, because there are no "special conditions and circumstances * * * which are peculiar to the land, building or structure involved," as required by YCZO 1203.02(A). Finally, petitioners argue the requested condition modification could not be granted as an administrative adjustment under YCZO 1203.07, because YCZO 1203.07(D) requires that there must be "special conditions or circumstances * * * which are peculiar to the land or use structure involved * * * which justify an adjustment * * *."

According to petitioners, they argued below that the requested modification of the condition could not be granted as a minor alteration, variance or administrative adjustment. Citing *Hixson v. Josephine County*, 26 Or LUBA 159, 162 (1993) and *Waugh v. Coos County*, 26 Or LUBA 300, 315 (1993), petitioners argue that because they raised interpretive issues below concerning whether the request could not be approved as a minor alteration, variance or administrative adjustment, it was error for the county not to adopt findings that respond to those issues.

Petitioners would almost certainly be correct, and remand would almost certainly be required, if the county had approved the condition modification as a minor alteration, variance or administrative adjustment, without responding to the issues petitioners raised

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[9] YCZO 1202.05(B)(2) provides:

> "Minor alterations of a conditional use may be approved by the Director *if requested prior to issuance of building permits for the conditional use*. Minor alterations are those changes which may affect the siting and dimensions of structural and other improvements relating to the conditional use, and may include small changes in the use itself. Any change which would affect the basic type, character, arrangement or intent of the conditional use originally approved shall be considered a major alteration." (Emphasis added.)

below. In that circumstance, the county would be obligated to explain why it believed Condition 1 could be modified via a minor alteration, variance or administrative adjustment, notwithstanding petitioners' interpretation of the YCZO to the contrary. However, from the county decision that is before us on appeal, there is simply no reason to suspect that the county granted the requested condition modification as a minor alteration, variance or administrative adjustment. The YCZO sections that authorize minor alterations, variances and administrative adjustments are neither cited nor discussed in the appealed decision.

As we have already explained, the county's legal theory for granting the requested condition modification is essentially fourfold. First, the condition was not imposed to ensure compliance with any approval criterion. Second, the dwelling was mistakenly constructed in violation of the 200-foot setback condition. Third, the dwelling as constructed meets the fire break setback requirement that was in place when the dwelling was constructed and complies with the more stringent current fire brake setback requirements that apply today. Finally, the county concluded that because the 200-foot setback requirement is not needed to ensure compliance with any approval criterion, it can be modified so that the dwelling does not violate the permit's conditions of approval. If there is a flaw in the county's reasoning that requires remand, we do not see it. Without a more direct challenge to that reasoning, we conclude that it is adequate to explain why the county granted the requested modification. Because the county did not purport to grant that modification as a minor alteration, variance or administrative adjustment, this subassignment of error provides no basis for reversal or remand.

The second assignment of error is denied.

Although we sustain the first assignment of error, our denial of the second assignment of error renders the error that leads us to sustain the first assignment of error harmless. The county's decision is affirmed.