

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 AILEEN P. KAYE, TERRY BERRY,
5 and RICHARD VAN PELT,
6 *Petitioners,*

7
8 vs.

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10 MARION COUNTY,
11 *Respondent,*

12
13 and

14
15 MATTHEW SWISHER and DONNA SWISHER,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2010-029

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Marion County.

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25 Aileen P. Kaye, Turner, Terry Berry, Salem, and Richard van Pelt, Salem, filed a
26 joint petition for review and argued on their own behalf.

27
28 Jane Ellen Stonecipher, County Counsel, Salem, filed the response brief and argued
29 on behalf of respondent.

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31 Matthew Swisher and Donna Swisher, Salem, represented themselves.

32
33 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
34 participated in the decision.

35
36 AFFIRMED

09/07/2010

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

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NATURE OF THE DECISION

Petitioners appeal a county decision authorizing transfer of approximately 6,000 square feet of county park property to intervenors-respondents.

MOTION TO INTERVENE

Matthew Swisher and Donna Swisher (intervenors) move to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

Intervenors own property that abuts Spongs’ Landing Park, a county park. In 2008, the county discovered that a fence built along the boundary between intervenors’ property and the park actually encroached a short distance into the park. The Board of County Commissioners (BOC) met with the county public works staff in April and early June of 2008 to determine the best way to resolve the encroachment. The BOC initially considered pursuing a claim for trespass against intervenors. In late June and July of 2008, the BOC discussed the possibility of selling the property enclosed by the fence to intervenors, and intervenors indicated that they would like to purchase the property.

ORS 275.330 governs “[c]onveyance of county forests, parks or recreational areas * * *.” Under subsection 3 of that statute the county is required to hold a public hearing to consider any objections to the conveyance; and under subsection 2 of the statute the county must find that the conveyance is “in the best interest of the public.”¹ On October 1, 2008,

¹ ORS 275.330 provides in part:

“(2) In addition to the methods described in subsection (1) of this section, lands that have been set aside for county forest, public park or recreational area may be alienated, sold or conveyed, in part or in whole, by the public body upon a finding that it is in the best interest of the public. Upon a determination that an alienation, sale or conveyance is in the public interest, the lands set aside may be sold at public or private sale, or other lands may be taken in exchange and set aside for park or recreational purposes. When a sale, an alienation or conveyance takes place, the proceeds shall be held for maintenance and improvement of existing park and

1 the BOC conducted a hearing pursuant to ORS 275.330(3) to consider the sale of the
2 property to intervenors. Petitioners appeared at the hearing and testified against the proposed
3 sale. On October 6, 2008, the BOC determined pursuant to ORS 275.330(2) that the sale
4 would be in the public interest and authorized the sale of the property.² Petitioners then
5 appealed that decision to LUBA.

6 At LUBA, the county moved to dismiss petitioners' appeal based on an argument that
7 decisions pursuant to ORS 275.330 are not land use decisions subject to LUBA's
8 jurisdiction. We denied the motion to dismiss, holding that a Marion County Comprehensive
9 Plan (MCCP) Parks and Recreation Objective for Spongs' Park (Spongs' Landing Park
10 Objective) appeared to apply to a county decision to sell Spongs' Landing Park property and
11 the county had not addressed that objective.

12 "We agree with petitioners that the challenged decision falls within the
13 statutory definition of 'land use decision' in ORS 197.015(10)(a)(A)(ii).
14 Petitioners identified a MCCP Objective that certainly could be interpreted to
15 apply to a decision to sell 6,135 square feet of Spong's Landing Park property
16 and could be interpreted to prohibit a decision to sell Spong's Landing Park
17 property. The county did not respond to petitioners' argument or provide any
18 basis for us to conclude that the cited MCCP Objective does not apply. Given
19 these circumstances, we conclude that the challenged decision is a land use
20 decision and that we have jurisdiction to review the decision. It also seems
21 very likely that the county's decision will have to be remanded to allow the

recreation lands or future acquisition of lands to be set aside for park or recreational
purposes.

"(3) Before making an order for an alienation, sale or conveyance of the property without
approval at an election, or before entering into agreements for management of timber
and other forest products under subsection (1)(c) of this section, the county
governing body shall hold a hearing in the county at which objections to the
proposed agreements or alienation, sale or conveyance may be heard. Notice of the
hearing shall be given by publication weekly for two consecutive weeks in a
newspaper circulated generally within the county, and the notice shall describe
particularly the property affected."

² In its October 6, 2008 decision, the BOC found that:

"* * * conveying the property will serve the public interest by improving park security and
providing flood protection, will not have a negative impact on any public use of the park, and
that \$5000 represents the fair market value of the property[.]" *Kaye I* Record 1.

1 county to adopt an explanation for why the county interprets the Spong's
2 Landing Park Objective to apply or not to apply to a decision to sell Spong's
3 Landing Park property. If the Spong's Landing Park Objective does apply to
4 a decision to sell Spong's Landing Park property, the county will need to
5 determine whether the challenged sale of Spong's Landing Park property is
6 consistent with that objective." *Kaye v. Marion County*, 58 Or LUBA 680,
7 683 (2009) (*Kaye I*).

8 The county subsequently stipulated to a remand to address the MCCP objective.

9 On remand, the BOC did not initially take up the issue of whether the MCCP
10 objective applies to the proposed sale of the park property. Intervenors first filed an
11 application for a property line adjustment (PLA).³ The county hearings officer conducted a
12 public hearing on the PLA, and petitioners participated in that hearing. The hearings officer
13 addressed the Spongs' Landing Park Objective identified in *Kaye I* and found that the
14 conveyance was consistent with the Spongs' Landing Park Objective. The hearings officer
15 also found that all of the PLA approval criteria were satisfied, and approved the application.
16 Petitioners did not file a local or a LUBA appeal of the hearings officer's decision, and that
17 decision is now final.

18 The hearings officer's decision included language that petitioners understood to say
19 that the BOC was also going to address the MCCP objective and hold another hearing on the
20 ORS 275.330 public interest standard.

21 "HOWEVER, this does not mean that the PLA process satisfies the LUBA
22 remand. It appears that the BOC will still need to consider the MCCP
23 objective prior to conveying the subject property. If the property line
24 adjustment criteria are met, the approval can include a condition stating that
25 the final plat shall not be filed until the BOC conveyance process under ORS
26 275.330 is properly completed." Record 39.

27 The hearings officer's decision included a condition of approval requiring that:

28 "Prior to recording property line adjustment deeds, applicants shall provide
29 proof to the Marion County Planning Division that ORS 275.330 procedures
30 have been completed." Record 53.

³ The PLA also included a floodplain permit application and greenway permit application.

1 After the hearings officer approved the PLA, the BOC again took up the matter. The
2 BOC considered the issue at a public meeting, but did not conduct another public hearing. In
3 a two-page order dated March 24, 2010 the BOC first described its earlier decision, the first
4 LUBA appeal and the hearings officer's decision following LUBA's remand. The BOC's
5 March 24, 2010 Order then states:

6 "IT IS HEREBY ORDERED that a determination has already been made that
7 it is in the public interest to convey .11 acres of Spongs' Landing park
8 property to the [intervenors] for \$5000; and

9 "IT IS FURTHER ORDERED that the [BOC] takes official notice of the final
10 county decision in Property Line Adjustment/Floodplain/Greenway
11 Development Permit #09-017, and finds that the conveyance of the .11 acres
12 complies with Marion County Comprehensive Plan Parks and Recreation
13 Policy Objective for Spongs' Landing Park policy II F-9." Record 2.

14 **INTRODUCTION**

15 As is perhaps obvious by now, this matter has been confused procedurally from the
16 beginning. At the October 1, 2008 hearing that the BOC held to address the requirements of
17 ORS 275.330, petitioners argued that the proposed conveyance of park property is
18 inconsistent with arguably applicable comprehensive plan land use standards. Those land
19 use issues were ignored by the BOC in its October 6, 2008 decision that adopted the public
20 interest findings that are required by ORS 275.330(2). The BOC's October 6, 2008 decision
21 was appealed to LUBA and remanded pursuant to the parties' stipulation, after LUBA
22 determined that the October 6, 2008 decision was a land use decision. But in granting the
23 parties' stipulated remand, LUBA did not address the merits of the BOC's October 6, 2008
24 decision. Following LUBA's remand in *Kaye I*, the hearings officer considered the
25 applicable land use standards and found that they are all satisfied. Petitioners participated in
26 the public hearing before the hearings officer but did not appeal that hearings officer's
27 decision. It would appear that the PLA decision and petitioners' failure to appeal that
28 decision fully resolves any questions regarding whether the proposed transfer is consistent
29 with the county's comprehensive plan or land use regulations. As far as we can tell, the only

1 question that remains to be resolved is whether the county adequately demonstrated that the
2 conveyance is consistent with ORS 275.330. As we have already explained, that statute
3 imposes two relevant requirements. First ORS 275.330(3) requires that the county must hold
4 a public hearing to allow “objections to the proposed * * * sale [to be] heard.” *See* n 1.
5 Second, ORS 275.330(2) requires that the county find that the proposed sale is “in the best
6 interest of the public.” *Id.*

7 **FIRST ASSIGNMENT OF ERROR**

8 The nature and scope of petitioners’ first assignment of error is not clear. We set out
9 the assignment of error and the first paragraph of petitioners’ arguments under the first
10 assignment of error below:

11 “FIRST ASSIGNMENT OF ERROR – The County Must Hold a Hearing and
12 Find that Conveying the Land is in the Public Interest Prior to Processing the
13 PLA

14 “The County’s Order NO. 10-22 incorporates by reference Order No. 08-143,
15 dated October 6, 2008, and states that the order found that the sale of the park
16 property was in the public interest. However, Order No. 08-143 was
17 remanded by LUBA in the previous [LUBA appeal]. Order No. 10-22 also
18 reasserts that selling the land is in the public interest. However, the [BOC]
19 has made no findings to support a conclusion that sale of the land is in the
20 public’s interest and the order that the County relies on was remanded. Thus,
21 the County still must hold a hearing to deal with the public interest
22 requirements of ORS 275.330.” Petition for Review 3-4 (underlining in
23 original).

24 **A. Issues That Are Not Clearly Raised**

25 It is clear under the first assignment of error that petitioners take the position that
26 following LUBA’s remand the county was legally required to hold another public hearing to
27 comply with ORS 275.330. We address that question later in this opinion. The first
28 assignment of error and the first paragraph of argument quoted above can be read to suggest
29 two other issues. First, was it error for the county to adopt the PLA decision before the BOC
30 adopted its decision following remand concerning ORS 275.330? Second, did the BOC fail
31 to adopt findings regarding the ORS 275.330 public interest criterion? The county

1 apparently did not understand the first assignment of error to raise either of those issues,
2 because it does not respond to those issues in its brief.

3 **1. It Was Not Error to Adopt the PLA Decision First**

4 Petitioners offer no cognizable legal theory for why they believe the county should
5 have proceeded first to consider the requirements of ORS 275.330 before adopting the PLA
6 decision. In fact, if the county had adopted a PLA decision that addressed the Spongs'
7 Landing Park Objective before it adopted its first decision in this matter in 2008, there likely
8 would have been no need for the BOC to address the Spongs' Landing Park Objective in its
9 decision concerning ORS 275.330, and the BOC's first decision likely would not have been a
10 land use decision appealable to LUBA.

11 **2. The Public Interest Findings**

12 While it might be possible to read the paragraph of argument quoted above to include
13 an allegation that the county failed to adopt any findings regarding ORS 275.330, we decline
14 to do so. The assignment of error itself only challenges the failure to provide a second public
15 hearing; it makes no mention of a failure to adopt findings or a failure to adequately readopt
16 the public interest findings in the BOC's first decision. In fact, the first sentence of argument
17 states that the BOC's second decision (the decision that is before us in this appeal)
18 "incorporates by reference" the BOC's October 6, 2008 decision (the first decision). That
19 would suggest that petitioners understood that the BOC intended to readopt the findings in
20 the first decision. The third sentence of argument quoted above states that the decision on
21 appeal "reasserts that selling the land is in the public interest." That also suggests that
22 petitioners understood that the BOC adopted public interest findings. Only the fourth
23 sentence seems to assert that the BOC's second decision fails to adopt findings regarding
24 ORS 275.330. That isolated sentence, viewed in context, is inadequate to broaden the first
25 assignment of error into a findings challenge.

1 But even if we were to read the first assignment of error broadly to include a
2 challenge to the adequacy of the BOC’s findings in its second decision, it is reasonably clear
3 that the BOC intended to readopt and rely on the public interest finding that it adopted in its
4 first decision. It is true that the BOC’s findings in the second decision state that the public
5 interest determination “has already been made” and do not expressly state that the BOC
6 “readopts” that earlier decision or intended to “rely” on the public interest findings it
7 previously adopted in that first decision. *See* n 2. However, while it is a reasonably close
8 question, we conclude it is sufficiently clear that the BOC intended to readopt and rely on the
9 public interest findings in its first decision. Petitioners do not challenge the adequacy of
10 those findings.

11 To summarize, the first assignment of error is inadequate to allege a findings
12 challenge, and even if it were adequate to allege such a challenge, the BOC’s second
13 decision readopts and relies on the public interest findings in the BOC’s first decision, which
14 petitioners do not challenge.

15 **B. A Second Public Hearing is Not Required**

16 There is no general or absolute requirement that a local government hold a public
17 evidentiary hearing following a LUBA remand. *Arlington Heights Homeowners v. City of*
18 *Portland*, 41 Or LUBA 185, 208 (2001). As we stated in *Arlington Heights*:

19 “[u]nless the legal errors that are identified in an appellate court or LUBA
20 decision that leads to remand necessitate a hearing, we can think of no reason
21 why a party should have an unqualified right to expand his or her argument
22 and evidentiary presentation following a remand from LUBA.” *Id.* at 209.

23 There was nothing about our remand of the county’s first decision that necessitated a second
24 public hearing regarding ORS 275.330.

25 Given the level of confusion in this matter, it certainly would not have been
26 unreasonable for the BOC to elect to hold a second public hearing before addressing ORS
27 275.330, following the hearings officer’s decision on the PLA. But we see no legal

1 requirement that the BOC was required to hold a second public hearing to comply with ORS
2 275.330(3). The statute does not require more than one public hearing, and petitioners do not
3 argue that they were given an inadequate opportunity in the October 1, 2008 public hearing
4 to oppose the proposed park property sale or to argue that the proposed sale is not in the
5 public interest. Our view on this point is unaffected by the petitioners' apparent
6 understanding of the hearings officer's decision to say there would be an opportunity for
7 another hearing before the BOC. The hearings officer simply opined that the "BOC will still
8 need to consider the [Spongs' Landing Park Objective] prior to conveying the subject
9 property." Record 39. The hearings officer did not promise petitioners that the BOC would
10 conduct a second public hearing concerning ORS 275.330, and the hearings officer almost
11 certainly lacks the legal authority to make such a promise in any event.

12 Finally, petitioners point out that the hearings officer imposed a condition of PLA
13 approval that the BOC first complete its consideration of ORS 275.330 before deeds can be
14 recorded to complete the property line adjustment. Petitioners attempt to rely on *Western*
15 *Express v. Umatilla County*, 54 Or LUBA 571, *aff'd* 215 Or App 703, 170 P3d 368 (2007) to
16 argue that this condition of approval obligated the county to provide a second public hearing
17 regarding ORS 275.330. *Western Express* concerned a conditional use permit where there
18 was a right to a public hearing, and the decision granting conditional use approval deferred a
19 finding of compliance with a conditional use approval standard to a future date. In that
20 circumstance, we concluded a public hearing was required in conjunction with the future
21 decision on the deferred conditional use permit approval criterion. Here the hearings officer
22 has simply imposed a condition of approval that delays recording of the deeds that will
23 complete the property line adjustment until the BOC completes its proceedings regarding
24 ORS 275.330. *Western Express* is simply inapposite. The hearings officer did not defer
25 findings of compliance with any PLA criteria. To the contrary, the hearings officer found all
26 applicable PLA criteria are satisfied. The condition was imposed because at the time of PLA

1 approval the BOC had additional decision making to complete under ORS 275.330 following
2 LUBA's remand, before the conveyance could go forward. The conveyance is a related but
3 separate matter from the PLA approval decision.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners argue that the BOC failed to disclose *ex parte* communications regarding
7 the property. Presumably, petitioners mean to argue that the BOC violated ORS
8 215.422(3).⁴ According to petitioners, even though the BOC stated for the record at the
9 March 24, 2010 public hearing that there were no *ex parte* conflicts to report, one of the
10 commissioners had previously admitted at the February 11, 2010 quarterly meeting of the
11 parks commission that she had met with intervenors regarding the property.

12 In general, in order for undisclosed *ex parte* contacts to provide a basis for remand,
13 there must be some indication that the communication had something to do with the factual
14 determinations or legal standards that govern approval or denial of the application. *Carigg v.*
15 *City of Enterprise*, 48 Or LUBA 328, 333 (2004). Although the BOC's deliberations
16 concerning ORS 275.330 do not include an initiating application as such, it was the BOC's
17 deliberations regarding whether to sell the property to intervenors and whether that sale
18 would be in the public interest that led to the decision on appeal. As we explained in

⁴ ORS 215.422(3) provides:

“No decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

- “(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
- “(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.”

1 *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 542 (1996), there can be no *ex*
2 *parte* contact between an applicant and the decision maker before the application that
3 initiates a quasi-judicial land use proceeding is filed. In this case, the alleged *ex parte* contact
4 occurred when the BOC was considering whether to bring a trespass case against intervenors
5 and require that the encroaching fence be removed. The alleged *ex parte* contact occurred
6 well before the BOC initiated its proceedings to sell the park property to intervenors pursuant
7 to ORS 275.330(3). Therefore, as with communications before an application is filed, any
8 communications in this case were not *ex parte* communications pursuant to ORS 215.422(3)
9 because they preceded initiation of the proceedings that led to the challenged decision.

10 The second assignment of error is denied.

11 The county's decision is affirmed.