

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 ANDREW HEAD,
4 *Petitioner,*

5
6 vs.

7
8 LANE COUNTY,
9 *Respondent,*

10
11 and

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13 RINDY SPICER, CODY SPICER,
14 TIMOTHY PAYNE, KARRELY PAYNE,
15 JAN B. HALL, STEVE DILLON,
16 VALERIE DILLON, TRACY ENGHOLM,
17 JOHN MCCALLUM, LAURA MCCALLUM,
18 DANIEL WALTER, HEATHER REDWINE-WALTER,
19 and LANDWATCH LANE COUNTY,
20 *Intervenors-Respondents.*

21
22 LUBA No. 2015-045

23
24 FINAL OPINION
25 AND ORDER

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27 Appeal from Lane County.

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29 Bill Kloos, Eugene, filed the petition for review and cross-response brief
30 and argued on behalf of petitioner.

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32 No appearance by Lane County.

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34 Sean T. Malone, Eugene, filed the response brief and cross petition for
35 review, and argued on behalf of intervenor-respondents.

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37 RYAN Board Member; BASSHAM, Board Chair; HOLSTUN, Board

1 Member, participated in the decision.

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AFFIRMED

12/03/2015

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners denying an application for a home occupation permit for an event venue.

FACTS

Petitioner applied for a special use permit for an event center “home occupation” on a 40-acre parcel zoned Impacted Forest (F-2), on which he resides. The parcel is located on Fleck Road and is developed with a dwelling, two agricultural buildings, one of which is identified on the site plan as a pavilion, a gazebo, a 25 by 25 foot “pond house,” and a 30 foot by 30 foot structure. The application sought approval to host events of up to 250 people on Fridays and Saturdays, and on two other weekdays, with varied start and end times, with the latest end time for music at 11:00 p.m. Properties surrounding the subject property are zoned F-2, Rural Residential (RR-5), and Exclusive Farm Use (E-40).

The hearings officer denied the application after concluding that the application failed to demonstrate that the proposed event center would not “unreasonably interfere with uses permitted by the zoning of nearby lands or with other uses allowed” by the Lane Code (LC), described in more detail later in this opinion. Petitioner appealed the hearings officer’s decision to the board

1 of county commissioners. Opponents of the proposed event center also
2 appealed the hearings officer’s decision to the board of county commissioners.
3 The board of county commissioners held an on-the-record hearing on the
4 appeals and at the conclusion voted to affirm and adopt the hearings officer’s
5 decision as its own. This appeal followed.

6 **ASSIGNMENT OF ERROR**

7 **A. Background**

8 **1. The Hearings Officer’s Decision**

9 LC 16.211(3)(n)(v) requires the county to find that the proposed home
10 occupation “[s]hall not unreasonably interfere with uses permitted by the
11 zoning of nearby lands or with uses allowed by LC 16.211(2) * * * [.]” As
12 noted, the lands adjacent to or near the subject property are either zoned for
13 resource use or for residential use. No lands nearby the subject property are
14 zoned for commercial or industrial use. The hearings officer interpreted the
15 phrase “unreasonably interfere” to mean that a “significant change in the
16 normal environment of a neighborhood would constitute an unreasonable
17 interference.” Record 56.

18 Petitioner submitted a noise study prepared by an acoustical engineer,
19 concluding that noise from the proposed events would not exceed the noise
20 standards set out in LC 5.615 or the Oregon Department of Environmental

1 Quality (DEQ) noise standards for commercial and industrial uses. Petitioner
2 argued to the hearings officer that satisfaction of the noise standards in LC
3 5.615 and the DEQ noise standards means that the proposed home occupation
4 also satisfies LC 16.211(3)(n)(v).

5 The hearings officer disagreed, and concluded that noise from the
6 proposed home occupation would unreasonably interfere with residential uses
7 permitted by the residential zoning of adjacent and nearby lands. The hearings
8 officer first rejected petitioner's argument that a demonstration of compliance
9 with county noise standards or DEQ noise standards that regulate commercial
10 and industrial uses means that noise from the proposed home occupation will
11 not "unreasonably interfere" with adjacent and nearby residential uses. Second,
12 the hearings officer expressed doubt about the credibility of petitioner's noise
13 study because the noise study failed to identify the ambient noise level in the
14 neighborhood in the evening hours when the events are proposed to occur.
15 Record 58. Absent that measurement of ambient noise levels in the
16 neighborhood at night, the hearings officer concluded, petitioner failed to carry
17 his burden to establish that noise from the proposed events would not
18 "unreasonably interfere" with adjacent and nearby residential uses.

1 The hearings officer also concluded that noise from the additional traffic
2 from the proposed events would “unreasonably interfere” with adjacent and
3 nearby residential uses.¹

4 **2. The Board of Commissioners’ Decision**

5 Petitioner and intervenors-respondents all appealed the hearings officer’s
6 decision to the board of county commissioners.² Petitioner argued to the board

¹ The hearings officer found:

“The problem isn’t that the proposed use will lower the level of service of Fleck Road or that it will significantly impact highway safety, although the potential for deer collisions would seem to increase substantially at certain times of the year. Rather the problem is that the increase in traffic will fundamentally change the nature of the neighborhood. As traffic is the major contributor to noise in the area, the duration of this noise source would increase by a factor of 25 percent, with half of the traffic occurring when people are preparing to sleep. In addition, eight of the driveways in the immediate area do not meet Lane County spacing standards, contributing to additional stress on vehicles navigating through the peak hours of the additional traffic.

“Given the uses allowed in the surrounding zoning districts, I can think of no other use allowed in the study area that would place a similar year round load on the local road system. I believe it is an unreasonable interference with the reasonable expectations of the local area residents to place what amounts to an urban commercial use within their midst.” Record 60.

² LC 14.515(3)(f) requires an appellant to elect between the following two appeal options:

1 of county commissioners that the hearings officer’s decision was inconsistent
2 with a 2002 board of county commissioners’ decision that interpreted a similar
3 standard found in a different section of the LC. That decision is referred to by
4 the parties as the Neumann decision. The Neumann decision involved an
5 application for a home occupation event center on Rural Residential (RR) -
6 zoned lands, and required a showing that a proposed home occupation use will
7 not “interfere with existing uses on nearby land or with other uses permitted” in
8 the RR zone. As we discuss in more detail below, the board of county
9 commissioners concluded in Neumann that a proposed event center on RR-
10 zoned lands would not “interfere” with existing uses on nearby land. Petition
11 for Review App 52.

12 The board of county commissioners elected to hold an on-the-record
13 hearing on the appeal and on May 5, 2015, and May 19, 2015, conducted the
14 hearing and deliberated on the appeal. At the conclusion of the June 2, 2015
15 hearing, the board of county commissioners voted to affirm and adopt the
16 hearings officer’s decision as the county’s final decision, and to “remain silent”

1 on the hearings officer's interpretations of the LC and applicable county
2 comprehensive plan policies.³ Record 3.

“(ii) Request that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. * * *”

³ LC 14.600(2) contains the procedures and criteria for the board of county commissioners to follow in deciding whether or not to conduct an on-the-record hearing on an appeal:

“(a) The Board shall determine whether or not they wish to conduct an on the record hearing for the appeal after an indication from the Hearings Official not to reconsider the decision and within 14 days of the expiration of the appeal period from the Hearings Official's decision.

“(b) Within seven days of the determination mentioned in LC 14.600(2)(a) above, the Board shall adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.

“(c) The Board order shall specify whether or not the decision of the Board is to have a hearing on the record for the appeal and shall include findings addressing the decision criteria in LC 14.600(3) below. If the Board's decision is to have a hearing on the record for the appeal, the Board order shall also specify the tentative date for the hearing on the record for the appeal and shall specify the parties who qualify to participate in the hearing on the record for the appeal.

“(d) If the decision of the Board is to not have a hearing, the Board order shall specify whether or not the Board expressly agrees with or is silent regarding any interpretations of the comprehensive plan policies or implementing ordinances made by the Hearings Official in

1 **B. Assignment of Error**

2 Although the assignment of error is difficult to follow, we understand
3 petitioner to allege two errors in the county’s decision. First, we understand
4 petitioner to allege that the board of county commissioners’ decision to affirm
5 and adopt the hearings officer’s decision is not supported by adequate findings
6 explaining why the hearings officer’s interpretation of the “unreasonable
7 interference” standard set out above is consistent with the board of county
8 commissioners’ 2002 Neumann decision.

9 Intervenors respond that nothing cited by petitioner requires the board of
10 county commissioners to adopt findings responding to petitioner’s argument
11 that the hearings officer’s interpretation is inconsistent with the county’s 2002
12 Neumann decision. We agree. ORS 215.416(9) provides that “[a]pproval or
13 denial of a permit or expedited land division shall be based upon and
14 accompanied by a brief statement that explains the criteria and standards
15 considered relevant to the decision, states the facts relied upon in rendering the
16 decision and explains the justification for the decision based on the criteria,
17 standards and facts set forth.” For non-permit land use decisions, findings must
18 address and respond to specific issues relevant to compliance with applicable

the decision being appealed. The Board order shall affirm

1 approval standards that were raised in the proceedings below. *Norvell v.*
2 *Portland Metropolitan Area Local Govt Boundary Commission*, 43 Or App
3 849, 853, 604 P2d 896 (1979). Petitioner points to nothing in the LC or state
4 law that requires the board of county commissioners to address petitioner’s
5 argument that a hearings officer’s interpretation of an applicable LC provision
6 is inconsistent with a thirteen-year-old board of commissioners’ interpretation
7 of a different LC provision.

8 Second, we understand petitioner to argue that the hearings officer’s
9 decision improperly construes LC 16.211(3)(n)(v) because his interpretation of
10 the “unreasonably interfere” standard at LC 16.211(3)(n)(v) is inconsistent
11 with the board of county commissioners’ interpretation of the “interfere”
12 standard at issue in the 2002 Neumann decision. ORS 197.835(9)(a)(D).
13 According to petitioner, the board of commissioners’ Neumann decision
14 required the hearings officer to measure “interference” with respect to noise
15 based on a comparison between the noise from the proposed events against the
16 potential maximum of noise that is possible from other uses in the
17 neighborhood. In the present case, petitioner argues, the hearings officer
18 instead determined whether the proposed use “unreasonably interfere[s]” with

the Hearings Official decision.”

1 nearby uses based on a comparison of noise from the proposed events against
2 the ambient noise levels in the neighborhood. Also according to petitioner, the
3 Neumann decision requires the hearings officer to conclude that noise from the
4 proposed events will not “unreasonably interfere” with rural residential uses if
5 the proposed events meet the LC and DEQ noise standards.

6 We have reviewed the Neumann decision and contrary to petitioner’s
7 arguments, we do not think the Neumann decision is binding on the hearings
8 officer in the present case, or that the hearings officer made a decision that is
9 inconsistent with the Neumann decision. First, the Neumann decision does not
10 contain an interpretation of the LC section that applied to the application at
11 issue in Neumann. Rather, the board of county commissioners applied the
12 standard at issue to the facts of the appeal before it, and concluded that the
13 proposed events would not interfere with rural residential uses in the area. The
14 Neumann decision involved a proposed event center on RR-zoned land that the
15 decision limited to one event per week, to 150 participants, May through
16 October only, and ending at sunset. The board of county commissioners found
17 that the area where the events were proposed was not “unique or unusual
18 regarding quietness or tranquility.” The Neumann decision also found that a
19 natural rock wall between the Neumann property and adjacent uses reduced the
20 impact of sound from the events.

1 Second, the Neumann decision did not conclude, as petitioner suggests,
2 that satisfaction of the DEQ or LC noise standards in all cases means that a use
3 will not interfere with nearby residential uses. Petition for Review App 48. For
4 the above reasons, the Neumann decision, which involved a different LC
5 standard and did not interpret that different LC standard, is not binding on the
6 hearings officer in applying LC 16.211(3)(n)(v) to the application.

7 Finally, although we do not understand petitioner to independently
8 challenge the hearings officer’s interpretation of LC 16.211(3)(n)(v), except as
9 discussed below with regard to traffic noise, we think the hearings officer’s
10 interpretation of the “unreasonably interfere” standard is correct.⁴ The hearings
11 officer interpreted the LC 16.211(3)(n)(v) “unreasonable interference” standard
12 to require petitioner to show that the proposed home occupation would not
13 result in a significant change in the normal environment of the neighborhood.
14 The hearings officer found that the noise from the proposed events would result
15 in a significant change in the noise level of the neighborhood at times of day

⁴ Our standard of review in this appeal is governed by ORS 197.835(9)(a)(D), and under that statute we must determine whether the hearings officer “[i]mproperly construed the applicable law,” “without according the deference required by *Clark [v. Jackson County]*, 313 Or 508, 515, 836 P2d 710 (1992).” *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994).

1 when it is not currently noisy. Record 58. The hearings officer rejected
2 petitioner's interpretation that relied on a showing of satisfaction of the noise
3 standards in the LC or DEQ noise standards, and petitioner does not explain
4 why the hearings officer's rejection of that interpretation improperly construes
5 LC 16.211(3)(n)(v), except to argue that the interpretation is inconsistent with
6 the county's 2002 Neumann decision. The hearings officer concluded that
7 petitioner failed to carry his burden to establish that noise from the proposed
8 events would not "unreasonably interfere" with adjacent and nearby residential
9 uses when he failed to provide a noise study showing the ambient noise levels
10 in the neighborhood.

11 Finally, we also understand petitioner to argue that the hearings officer
12 improperly construed LC 16.211(3)(n)(v) when he concluded that the increase
13 in the noise level on Fleck Road from the increase in traffic from the proposed
14 events would unreasonably interfere with existing residential uses on adjacent
15 and nearby properties. Petition for Review 20-21. Petitioner first argues that the
16 hearings officer erred in considering the effect of the increase in traffic on a
17 county road from the proposed use because the evidence shows that the road
18 will still function within acceptable level of service standards. Petitioner also
19 argues that the hearings officer erred in assuming that the neighborhood is
20 entitled to preservation of the existing noise level. According to petitioner,
Page 13

1 under the hearings officer’s interpretation, any new home occupation use that
2 results in any increase in traffic noise would constitute an “unreasonable
3 interference” under LC 16.211(3)(n)(v).

4 Intervenor’s respond, and we agree, that the hearings officer did not
5 interpret LC 16.211(3)(n)(v) to the effect that any increase in noise over the
6 existing ambient noise levels constituted “unreasonable interference.” Instead,
7 the hearings officer concluded that an increase in the noise level from
8 accompanying traffic that has the effect increasing the duration of the noise
9 source “by a factor of 25 percent, with half of the traffic occurring when people
10 are preparing to sleep,” constitutes “unreasonable interference.” Record 56. To
11 the extent petitioner challenges an interpretation the hearings officer actually
12 made, petitioner has not demonstrated that the hearings officer misconstrued
13 the applicable law.

14 The assignment of error is denied.

15 **CROSS PETITION FOR REVIEW**

16 Intervenor’s filed a cross-petition for review, pursuant to OAR 661-010-
17 0030(7), which provides as follows:

18 “Cross Petition: Any respondent or intervenor-respondent who
19 seeks reversal or remand of an aspect of the decision on appeal
20 regardless of the outcome under the petition for review may file a
21 cross petition for review that includes one or more assignments of
22 error. *A respondent or intervenor-respondent who seeks reversal*

1 *or remand of an aspect of the decision on appeal only if the*
2 *decision on appeal is reversed or remanded under the petition for*
3 *review may file a cross petition for review that includes contingent*
4 *cross-assignments of error, clearly labeled as such.* The cover
5 page shall identify the petition as a cross petition and the party
6 filing the cross petition. The cross petition shall be filed within the
7 time required for filing the petition for review and must comply in
8 all respects with the requirements of this rule governing the
9 petition for review, except that a notice of intent to appeal need
10 not have been filed by such party.” (Emphasis added.)

11 Intervenor’s cross petition does not clearly label the cross assignments of
12 error as “contingent” cross-assignments of error. However, as we have already
13 explained, the hearings officer’s decision denies petitioner’s application for
14 land use approval, a result that intervenors defend in their response brief. If we
15 were to sustain one or more of intervenors’ cross-assignments of error, we
16 likely would be required to reverse or remand the hearings officer’s decision, a
17 result that would seem to be at odds with intervenors’ position in this appeal.
18 We understand that intervenors’ cross-assignments of error raise issues that
19 might provide additional bases for the hearings officer to deny the application
20 if we were to sustain those cross-assignments of error. But unless our
21 resolution of petitioner’s assignment of error is reversed on appeal it is not
22 necessary to resolve those cross assignments of error. Given that resolution of
23 those cross-assignments of error would further delay this final opinion, perhaps

- 1 unnecessarily, we treat the cross-assignments of error as contingent and do not
- 2 attempt to resolve them in this opinion.
- 3 The county's decision is affirmed.