BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOOD RIVER VALLEY
RESIDENTS' COMMITTEE, INC.
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

MARC GELLER and JENNIFFER GELLER,
Intervenors-Respondents.

LUBA No. 2017-080

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Christopher L. Tackett-Nelson, Portland, filed the petition for review and argued on behalf of petitioner.

Wilford K. Carey, County Counsel, Hood River, filed the response brief and argued on behalf of respondent. With him on the brief was Annala, Carey, Thompson, VanKoten & Cleaveland, P.C.

Marc Geller, Hood River, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief was Marc Geller, P.C.

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

REVERSED 01/04/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving an application for a short-term rental permit.

FACTS

On May 31, 2017, intervenors-respondents (intervenors) submitted an application for a short-term rental (STR) permit to use their 5.42-acre parcel zoned Rural Residential (RR) for short term rental purposes. Record 34-35. On July 11, 2017, a county compliance planner sent a letter to intervenors notifying intervenors that their application was denied. Record 25. On July 18, 2017, intervenors submitted a letter to that planner taking the position that their application meets all of the applicable requirements, along with a re-application fee, and the county assigned a new application number to intervenors' application. Record 16-19.

On August 3, 2017, the county issued a decision approving the July 18, 2017 application. Record 5. Petitioner appealed that August 3, 2017 decision to LUBA, and also appealed the decision locally. Record 3-4. The county proceeded to transmit the record to LUBA, and in a letter accompanying the record transmittal, took the position that the county "is compelled to place the local appeal on hold while [this] LUBA appeal [is] resolved." Cover Letter to Record. This appeal then proceeded.

JURISDICTION

The county argues that petitioner failed to exhaust its administrative remedies, as ORS 197.825(2)(a) requires it to do.[1] Petitioner responds by pointing to pages in the record that demonstrate that petitioner filed a local appeal of the county's decision. Record 3-5.

We simply do not understand the county's argument. Petitioner filed a local appeal of the county's decision. Record 3. After that, the record does not provide a clear picture of what events, if any, happened between the date petitioner filed its local appeal and the date in October that the county transmitted the record. But that transmittal of the record included a cover letter addressed to LUBA, stating that petitioner's local appeal would not proceed until this appeal is resolved. A reasonable reading of that letter is that the county took the position with the parties and LUBA that it would not provide petitioner with a local appeal of the decision. There is nothing more that petitioner need have done beyond filing its local appeal to satisfy the exhaustion requirement in ORS 197.825(2)(a).

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner argues that the county committed a procedural error that prejudiced its substantial rights when the

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[1] ORS 197.825(2)(a) limits LUBA's jurisdiction to "those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review."

county processed the subject application as a "Ministerial Action (Type I)" as defined in Hood River County Zoning Ordinance (HRCZO) 1.170 rather than according to the procedures in HRCZO Article 60 and Article 72. ORS 197.835(9)(a)(B). In an opinion issued this date in *Hood River Valley Residents Committee, Inc. v. Hood River County*, __ Or LUBA __ (LUBA No. 2017-081, January 5, 2018), petitioner presented an identical assignment of error. We sustained that assignment of error.

For the reasons explained in that opinion, the second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

HRCZO Article 60 sets out the procedures for an "[a]dministrative action[]," described in HRCZO 60.00 as "a proceeding pursuant to [Article 60]." HRCZO 60.10 places the burden of proof on the applicant seeking the administrative action.

HRCZO 60.12 provides that:

> "[i]f the application is denied, either initially or upon review by the Board or action by the courts affirming denial, no new application for the same or substantially similar action shall be filed for at least one year from the date of final order on the action denying the application."

In its fourth assignment of error, petitioner argues that the county lacked authority to accept intervenors' second application filed on July 18, 2017. Petitioner argues that on July 11, 2017, the county's compliance planner denied intervenors' original application. Record 25. According to petitioner, HRCZO

60.12 prohibited the county from accepting a second application for the same use for at least one year from July 11, 2017.

The county responds that the county's July 11, 2017 letter was not a denial of intervenors' application, but "sought clarification concerning applicant's residency pursuant to [HRCZO] Section 53.30(A), which requires that the use be 'operated by a resident of the property.'" County's Response Brief 11-12. We understand the county to take the position that intervenors' July 18, 2017 letter furnished additional information that would allow the county to approve intervenors' original application.

Intervenors respond that HRCZO 60.12 only applies to decisions to deny an application that are made by "the Board [of County Commissioners] or the courts. Since the only entity that initially denied the applicant's permit is the planning commission this section of the ordinance is not even applicable." Intervenors' Response Brief 31.

We reject both the county's and intervenors' arguments. The July 11, 2017 letter is unequivocally a decision that denies intervenors' May 31, 2017 application. The letter references the application number assigned to intervenors' May 31, 2017 application (415-17-0150), is addressed to intervenors, and states:

> "Pursuant to applicable requirements of [HRCZO] Section 53.20-53.65 [], your request to operate a Short-Term Rental (STR) out of your second home located at [property address] in Mt. Hood/Parkdale, on the above-referenced property is hereby denied." Record 25.

At its conclusion, the letter also includes a statement of appeal rights. Notably, intervenors did not file a local appeal.

Moreover, the county's characterization of intervenors' July 18, 2017 letter to the county planner as merely providing additional information to allow the county to approve intervenor's *original* application is not supported by the record. The county charged intervenors a "re-application fee," and assigned a new application number upon payment of that fee (415-17-0196). Record 18. The county's August 3, 2017 decision challenged in this appeal references that new application number. Record 5. That new application number is also written at the top of intervenors' July 18, 2017 letter. Record 16. The acceptance of a "re-application" fee and assignment of a new application number that is referenced in the decision supports a conclusion that there was a new application submitted by intervenors and accepted by the county after the initial July 11, 2017 denial of intervenors' original application.

We also reject intervenors' argument that HRCZO 60.12 only applies to a decision by the board of county commissioners or the courts. That argument fails to give any effect to the phrase "either initially" included in HRCZO 60.12, and is inconsistent with the plain language of that phrase.

We agree with petitioner that the county erred in accepting intervenors' new application because HRCZO 60.12 prohibited the county from doing so. Lacking any authority to accept the application, the county exceeded its jurisdiction in making a decision on that application. ORS 197.835(9)(a)(A).

The fourth assignment of error is sustained.

FIRST AND THIRD ASSIGNMENTS OF ERROR

In its first assignment of error, petitioner argues that the county erred in failing to provide petitioner with a local appeal of the county's decision that petitioner argues HRCZO Article 72 required the county to provide. ORS 197.835(9)(a)(B). In its third assignment of error, petitioner argues that county's decision that the STR will "be operated by a resident of the property" on which the STR will be located improperly construes the term "resident" and is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C) and (D).

Because we have determined in the fourth assignment of error that the county exceeded its jurisdiction under HRCZO 60.12 in accepting intervenors' new application after intervenors' May 31, 2017 application was initially denied, we need not address the remaining assignments of error.[2] However, as we noted above, in an opinion issued this date in *Hood River Valley Residents Committee v. Hood River County*, __ Or LUBA __ (LUBA No. 2017-081, January 5, 2018), nearly identical assignments of error were presented, and our resolution of those assignments of error may provide guidance to the parties on

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[2] Petitioner moves to strike portions of intervenors' response brief and an appendix to intervenors' response brief that include unsupported factual allegations not found in the record, in violation of OAR 661-010-0035(3)(a). Because we do not address these assignments of error, we need not address petitioner's motion to strike.

some of the issues presented in this appeal, in the event that a future STR application for the subject property is filed.

CONCLUSION

OAR 661-010-0071(1)(a) and (c) provide that LUBA shall reverse a land use decision when the governing body exceeded its jurisdiction or when the decision violates a provision of applicable law and is prohibited as a matter of law. We concluded above that the county violated HRCZO 60.12, and thereby exceeded its jurisdiction and issued a decision that is prohibited as a matter of law.

Accordingly, the county's decision is reversed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-080 on January 4, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 4th day of January, 2018.

Kelly Burgess
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