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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

JANOS ANDRUSKO, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 CLACKAMAS COUNTY, )  
 )  
 Respondent. )

LUBA No. 97-158  
FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Robert S. Simon, Oregon City, filed the petition for review and argued on behalf of petitioner.

Susie L. Huva, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 5/28/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of petitioner's  
4 request for a variance from the county's sign ordinance.

5 **FACTS**

6 Petitioner operates an adult foster care home on a .68-  
7 acre parcel zoned Urban Low Density Residential. The home is  
8 operated within petitioner's single family dwelling, which has  
9 access via an 85-foot long driveway to Country Club Drive.

10 Petitioner advertises the name and phone number of the  
11 foster care home on a white wooden sign located on the  
12 property line abutting County Club Road. The sign is 46  
13 inches high and 36 inches wide. The sign does not state the  
14 address of the foster care home.

15 The county's zoning and development ordinance (ZDO)  
16 prohibits advertising signs in a low density residential zone,  
17 limits other types of signs to three square feet in extent,  
18 and requires that such signs shall be located inside the  
19 dwelling or placed flat against the dwelling. In March 1997  
20 petitioner applied to the county for a variance from the size  
21 and locational requirements of the sign ordinance to permit  
22 his existing sign to remain. To demonstrate a hardship as  
23 required by the county's variance provisions, petitioner  
24 asserted that the size and location of the sign was necessary  
25 to allow emergency response services to quickly locate the  
26 foster care home. County staff denied the variance request,

1 and petitioner appealed to a hearings officer, who conducted a  
2 hearing and issued a decision denying petitioner's variance  
3 request, in part because the record demonstrated that  
4 emergency service providers use residential grid information  
5 keyed to addresses, not advertising signs.

6 This appeal followed.

7 **ASSIGNMENT OF ERROR**

8 Petitioner argues that the county's denial of his  
9 variance request violates the federal Fair Housing Act (FHA).  
10 Specifically, petitioner contends that the occupants of his  
11 foster care home qualify as persons with disabilities within  
12 the meaning of the FHA, and that a "reasonable accommodation,"  
13 i.e. a variance from the county's sign ordinance, is necessary  
14 to afford the occupants of petitioner's foster care home equal  
15 opportunity to use and enjoy a dwelling. 42 USC § 3604(f).<sup>1</sup>

16 The county responds that petitioner failed to raise the  
17 issue of FHA requirements during the proceeding below, and  
18 thus has waived that issue. ORS 197.763(1);<sup>2</sup> ORS 197.835(3).<sup>3</sup>

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<sup>1</sup>42 USC § 3604(f)(3) provides in relevant part:

"For the purposes of this subsection, discrimination includes:

"\* \* \* \* \*

"(B) a refusal to make reasonable accommodations in the rules, policies, practices, or services, when such accommodations may be necessary to afford such person [with disabilities] equal opportunity to use and enjoy a dwelling[.]"

<sup>2</sup>ORS 197.763(1) states:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of

1           Petitioner concedes that he did not mention the FHA below  
2 or specifically demand reasonable accommodation under the FHA,  
3 but argues that his testimony was sufficient to apprise the  
4 hearings officer that the FHA might apply. Petitioner cites  
5 to the transcript of the hearing, where he testified (1) that  
6 his clients were disabled and (2) that a sign is needed to  
7 identify the property for emergency response services.  
8 Petitioner also cites to a letter from the local fire  
9 department, which recommends that the address of the foster  
10 care home be plainly visible.

11           Petitioner contends that his testimony and the fire  
12 department letter constitute "statements or evidence  
13 sufficient to afford the [hearings officer] an adequate  
14 opportunity to respond." ORS 197.763(1). We disagree. The  
15 statements and evidence cited are not sufficient to apprise  
16 the decision maker that petitioner's clients are disabled  
17 within the meaning of the FHA, or that the FHA is implicated  
18 in any way, much less that a variance to the sign ordinance is  
19 necessary to accommodate the disabilities of his clients and  
20 afford them equal opportunity to use and enjoy a dwelling.

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the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

<sup>3</sup>ORS 197.835(3) provides that, for purposes of our review:

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

1           Petitioner next argues that, even if he did not raise the  
2 applicability of the FHA with sufficient specificity, the  
3 hearings officer himself raised the issue, and thus was  
4 sufficiently cognizant of the issue to be able to respond to  
5 it.    Petitioner cites to the transcript at record 25 to  
6 support his assertion that the hearings officer raised the  
7 applicability of the FHA.    However, the transcript at record  
8 25 contains no mention of the FHA.    Petitioner probably  
9 intends to refer to record 35, where the hearings officer  
10 responded to a comment from an opponent that operation of a  
11 business, the foster home, already represents an exception in  
12 the residential zone and thus granting the sign variance  
13 request would represent an additional exception.    The hearings  
14 officer explained:

15           "Basically what the county has done is implement the  
16 Federal Fair Housing law and the State Fair Housing  
17 [by defining] this type of use as a dwelling and the  
18 members are members of a family dwelling basically.  
19 The other side of that [is that] it is treated like  
20 a dwelling insofar as identification signs are  
21 concerned, that's why the standard is three feet as  
22 it would be for any other dwelling.    This use is not  
23 an exception.    It's an outright permitted use."  
24 Record 35.

25           We disagree with petitioner that the mention of the FHA  
26 in the quoted passage indicates any cognition that the FHA  
27 applies to petitioner's variance request.    Petitioner has not  
28 demonstrated that any participant raised the issue of the  
29 FHA's applicability to petitioner's variance request with the  
30 specificity required by ORS 197.763(1).

1           Finally, petitioner contends that, even if the issue was  
2 not raised below, the county's decision violates the FHA and  
3 the Board must, as a matter of public policy, review that  
4 violation. Petitioner concedes that he may seek redress in  
5 another forum, but argues that, because the parties are now  
6 before the Board, requiring petitioner to seek redress  
7 elsewhere violates "public policy" because it is a waste of  
8 judicial resources. Petition for review 8-9.

9           Petitioner does not cite any authority for his view that  
10 "public policy" favoring judicial economy trumps the public  
11 policy, embodied at ORS 197.763(1) and ORS 197.835(3),  
12 favoring initial review by local governments of all issues  
13 applicable to land use decisions. The raise it or waive it  
14 rule itself serves the interests of judicial economy, in  
15 addition to other important policy interests. Petitioner has  
16 not cited any authority for this Board to ignore the  
17 requirements of ORS 197.763(1) and ORS 197.835(3).<sup>4</sup>

18           The assignment of error is denied.

19           The county's decision is affirmed.

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<sup>4</sup>At oral argument petitioner contended, for the first time, that the FHA implements Title 8 of the federal Civil Rights Act, which implements the 14<sup>th</sup> Amendment of the United States Constitution, and thus that application of the FHA involves constitutional issues that, according to petitioner, can be raised at any time without regard to the raise it or waive it rule. Petitioner concedes that no authority supports his assertion that constitutional issues can be raised at any time regardless of ORS 197.763(1). Our decisions are to the contrary. See Larson v. Multnomah County, 25 Or LUBA 18, aff'd 121 Or App 119, adhered to on reconsideration 123 Or App 300 (1993).