BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALBERT NELSON and WALTER NELSON,
Petitioners,

vs.

CURRY COUNTY,
Respondent,

and

DAVE ITZEN and BROTHERS 4, LLC,
Intervenors-Respondent.

LUBA No. 2004-085

FINAL OPINION
AND ORDER

Appeal from Curry County.

Duane Wm. Schultz, Grants Pass, filed the petition for review and argued on behalf of petitioners. With him on the brief was Duane Wm. Schultz, PC.

No appearance by Curry County.

Gary F. Firestone, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Timothy V. Ramis and Ramis, Crew, Corrigan and Bachrach, LLP.

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

AFFIRMED 10/27/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a commercial planned use development.

MOTION TO APPEAR AS *AMICUS*

The Oregon Hydrangea Company (OHC) moves to appear as an *amicus* in this appeal. Intervenors oppose the motion. OAR 661-010-0052(1) provides:

> "A person or organization may appear as *amicus* only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of relevant issues would be significantly aided by participation of the *amicus*. A copy of the motion shall be served on all parties to the proceeding."

There are essentially two requirements to appear as an *amicus*: (1) to set forth the interest of the movant; and (2) to demonstrate why LUBA's review would be significantly aided by participation of the *amicus*. OHC states its interest is that it is a commercial producer of hydrangea plants on the Harbor Bench and is concerned about nonfarm encroachment into the area. OHC states that its participation would significantly aid our review because, as a result of its longstanding participation in land use planning for this area of the county and its long history of farming land in this part of the county, it has particular insight into the history and background of the land use provisions at issue in this appeal. OHC asserts that it can provide a broad and informed perspective to assist the Board because it can "knowledgeably discuss the history, legislative intent, and policy behind the approval criteria" at issue. Motion to Appear as *Amicus* 4.

Intervenors argue that the motion to appear as *amicus* should be denied on four grounds.

A. *Amicus* as *De Facto* Intervenor

Intervenors argue that OHC should not be able to miss the deadline for filing a motion to intervene and then appear as an *amicus*. OHC was involved in the proceedings below and

actively opposed the application. The manager of OHC filed a motion to intervene as an intervenor-petitioner. The manager, however, is not a licensed attorney in the State of Oregon and may not represent a corporation or other organization under our rules.[1] We informed the manager of our rules and provided him with an additional seven days to file an amended motion to intervene. OHC did not file an amended motion to intervene. OHC's motion to intervene was therefore denied. ___ Or LUBA ___ (LUBA No.2004-085, Order August 4, 2004).

While it is true that OHC could have intervened and become a party to the case, intervenors provide no authority for the proposition that that fact prohibits OHC from electing to appear instead as an *amicus*.[2] An *amicus* has fewer rights in an appeal than does a party. For instance, an amicus may not raise its own assignments of error, but may only provide argument in support of or in opposition to assignments of error that are raised by petitioners. In *Cotter v. Clackamas County*, 35 Or LUBA 749 (1998), we denied a motion to appear as an *amicus* because we found the movant had not established that its participation would significantly aid our review. That movant, however, was in substantially the same position as OHC. That movant had appeared below and failed to intervene in the appeal at LUBA. If, as intervenors argue, such movants are precluded from appearing as an *amicus*, there would have been no need for us to consider whether that movant's participation would have aided our review of that appeal. *Cotter* therefore is not authority for the broad rule that intervenors argue for to limit the potential for *amicus* participation.

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[1] OAR 661-010-0075(6) provides in pertinent part:

"A corporation or other organization shall be represented by an attorney."

[2] Intervenors do provide the legal definition of "*amicus*," arguing that an *amicus* is not a party. We do not see, however, that the fact that OHC could have been an actual party to the appeal in any way prevents them from lesser participation as an *amicus*.

B. Timeliness of Motion

OHC filed its *amicus* brief in a timely manner, but did not file a motion to appear as an *amicus* until one day later, the day after the *amicus* brief was due. Intervenors argue that OHC could not file an *amicus* brief when it had not timely filed a motion to appear as an *amicus*. Unlike the deadlines for filing the notice of intent to appeal and filing the petition for review, the deadline for filing a motion to appear as an *amicus* is not a deadline that is rigidly enforced. Therefore, intervenors must demonstrate how OHC's error in filing the motion one day late prejudiced their substantial rights. OAR 661-010-0005. Intervenors do not attempt to make such a demonstration, and as the *amicus* brief itself was filed timely, we do not see how they could.

C. Preclusion

Intervenors argue that because OHC could have filed its own notice of intent to appeal or motion to intervene, it is precluded from appearing as an *amicus*. Intervenors provide no authority for that assertion. As discussed earlier, our decision in *Cotter* suggests otherwise.

D. Significantly Aid Our Review

Intervenors argue that OHC makes essentially the same arguments as petitioners and therefore OHC's participation would not significantly aid our review. Intervenors rely principally upon our order denying intervention discussed earlier in *Cotter*, where we stated:

> "We do not understand how TKC's 'different perspective on development of its property' would significantly aid in our review of the challenged decision. Our review is limited to the county's decision, which approved TKC's development request, and does not include abstract questions of how the development of the property should occur. Thus, TKC's specific and narrow interest in the property itself does not provide a basis to conclude that our review of the relevant issues would be significantly aided by TKC's participation. TKC also has not articulated why its perspective of the county's approval is 'unique' or how its perspective would add to our review one that is distinct from the county's." 35 Or LUBA at 750.

According to intervenors, OHC's interest is little different than that of petitioners. OHC's *interest*, however, is a different question than whether its *participation would significantly aid* our review. The fact that OHC may have a private personal interest in the appeal does not bar *amicus* participation. *Adkins v. Heceta Water District*, 23 Or LUBA 207, 209 (1992). Our discussion of TKC's "specific and narrow interest in the property" in *Cotter* concerned TKC's position that its participation as *amicus* would significantly aid our review because it was the owner of the subject property. In the present appeal, that is not OHC's basis for arguing it can significantly aid our review. As discussed earlier, OHC believes it can aid our review because it can "knowledgeably discuss the history, legislative intent, and policy behind the approval criteria" at issue. OHC does provide a more detailed review of the history, intent, and policy of the relevant criteria than do petitioners. Although it is a close question, we believe OHC's basis for appearing as an *amicus* is sufficient under our rules.

The motion to appear as *amicus* is granted.

FACTS

This is the second time that a decision involving the proposed project has been appealed to LUBA. The county approved a conditional use permit (CUP) to create a commercial planned unit development (PUD) consisting of five lots on a four-acre parcel zoned light commercial (C-1). Approval of the project requires both approval of the CUP and approval of the PUD. The county bifurcated the proceedings and separately approved both the PUD and the CUP. In a prior LUBA appeal, petitioners challenged the county's approval of the PUD, and we affirmed that decision. *Nelson v. Curry County (Nelson I)*, ___ Or LUBA ___ (LUBA No. 2003-173, June 29, 2004). In the current appeal, petitioners challenge the county's approval of the conditional use permit. In *Nelson I*, we described the properties involved:

> "The subject property is located adjacent to the intersection of Highway 101 and West Benham Lane, within the City of Brookings Urban Growth Area. The property is bordered on the north by Benham Lane, which has a storm drain line that feeds to the City of Brookings storm drain system. South and west of the subject property is residentially-zoned property with a mobile home park under construction. A small drainageway slopes southwest from the subject property, through the adjoining mobile home park, and thence through property owned by petitioners. Petitioners' property is zoned and used for farm uses.
>
> "Intervenors-respondent (intervenors) applied to the county for a PUD to divide the subject property into five lots, to facilitate proposed commercial development. The contemplated commercial uses are permitted outright in the C-1 zone; however, a PUD is a conditional use in the zone. The planning director referred the PUD application to the planning commission, which conducted a hearing and voted to approve the application. Petitioners appealed the planning commission decision to the county board of commissioners, which held a *de novo* hearing and on October 1, 2003, adopted a written decision approving the requested PUD. * * *" Slip op 2.

We affirmed that PUD decision. In the bifurcated proceeding below, the planning director administratively approved the CUP, and petitioners appealed that approval to the board of county commissioners, who also approved the CUP. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Curry County Zoning Ordinance (CCZO) 3.152 lists PUDs among the conditional uses allowed in the C-1 zone subject to administrative approval by the planning director. CCZO 6.020, however, which governs PUD applications, provides that PUD applications are to be approved by the planning commission. The planning director solved this apparent conflict by referring intervenors' PUD application directly to the planning commission and later deciding the CUP application himself. The director chose to wait until the PUD proceedings concluded before addressing the CUP application. Petitioners argue that this sequence violates Curry County Land Development Ordinance (CCLDO) 4.0310 which provides:

> "In general the actions taken by the Planning Director and Planning Commission shall be the same as stated in Article III hereof, pertaining to subdivisions and major partitions. *In the event a zone change or conditional*

> *use permit is required, the Planning Commission shall first dispose of this. If such disposition is favorable to the applicant, the Planning Commission shall then proceed with the consideration of the Planned Unit Development in accordance with Article III.*" (Emphasis added.)

According to petitioners, because the county approved the PUD before approving the CUP, the county violated CCLDO 4.0310. Petitioners raised essentially the same issue in the earlier appeal, but we did not reach the merits of the issue because petitioners had failed to preserve the issue by raising it below. *Nelson I*, slip op 5. There is no dispute that the issue was preserved in this appeal.

Petitioners argue:

> "Clearly [CCLDO 4.0310] has not been complied with because the PUD was heard first and decided on October 1, 2003 and the CUP request was heard and decided later on May 4, 2004. * * * Since the county clearly did not follow its own procedures, the only relevant inquiry for LUBA is whether the same prejudiced the substantial rights of petitioners." Petition for Review 12.

Were it clear that the county violated its own procedures, we would likely agree with the remainder of petitioners' argument. It is not clear, however, that the county violated its own procedures. The county in fact adopted findings explaining why it processed the PUD before the CUP:

> "[Intervenor] submitted one application that included both a request for PUD approval and a request for a conditional use permit. County staff processed the PUD portion of the application and the CUP separately. This is consistent with the code, which provides that CUP applications are to be decided by the Director and PUD applications are to be decided by the Planning Commission.
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> "While [CCLDO] 4.0310 requires the Planning Commission to decide CUPs before they issue a decision on a PUD, that section applies only when both the CUP and PUD are before the Planning Commission at the same time. Here, the CUP decision was made administratively and was not before the Planning Commission at the time it made the PUD decision. Furthermore, the decision on the PUD is final, and any error would have been committed in the PUD proceedings, not in the CUP proceedings. [Opponents'] arguments do not provide any reason to deny the CUP application.
>
> "* * * * *

> "The [board of county commissioners finds persuasive the legal arguments presented by [intervenors' attorney] on this issue * * * as well as the legal arguments made by County Counsel * * * at the same hearing. The [board of county commissioners] interprets Section 4.0310 as not being applicable when the CUP decision is made administratively." Second Supplemental Record 14.

Pursuant to ORS 197.929(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003), we will affirm a local government's interpretation of its own land use legislation unless it is inconsistent with the express language, purpose, or policy of the legislation. In the present case, there is a detailed explanation for the county's interpretation of CCLDO 4.0310. Petitioners neither discuss that interpretation nor make an attempt to explain why it is wrong. Petitioners have not established that the county misconstrued the CCLDO. Therefore, petitioners' argument that the procedures the city followed prejudiced their substantial rights does not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The subject property is located in an overlay zone known as the Harbor Bench Farm District, which provides specific standards for conditional uses under CCZO 7.040(19), which provides in pertinent part:

> "(19) Harbor Bench Farm District.
>
> "a. If the proposed use is located on a lot or parcel zoned for non-agricultural use and is adjacent to land zoned for commercial agricultural use and is in agricultural use then the proposed use shall not force a significant change in, or significantly increase the cost of accepted and typical farming practices on the agricultural land.
>
> "b. As a condition of approval a written easement shall be recorded with the deed of the lot or parcel zoned for non-agricultural use by the land owner which recognizes the rights of the owners of land zoned for commercial agricultural use to conduct farming operations consistent with accepted and typical farming practices used for commercial farming within the [HBFO] District.

> "c. If the proposed use located on a lot or parcel zoned for non-agricultural use within the [HBFO] District includes the development of a structure or the creation of an impervious ground surface, the person proposing the use shall be required to direct all drainage from the structure or impervious surface away from adjacent or nearby lands zoned for commercial farm use and into the existing storm drainage system. The owner of the nonfarm use parcel may divert surface water drainage onto farm land if such drainage is agreed to in writing by the farm land owner who wishes to receive the water for a use beneficial to agriculture. The written agreement shall contain a provision that the owner of the nonfarm parcel will re-direct the surface water drainage into the existing storm water drainage system at any time the farm land owner no longer desires to receive such water."

A. CCZO 7.040(19)(a)

Petitioners argue that the county's findings regarding CCZO 7.040(19)(a) are inadequate. CCZO 7.040(19)(a) requires that "the proposed use shall not force a significant change in, or significantly increase the cost of accepted and typical farming practices on [adjacent] agricultural land." Petitioners raised the same argument in *Nelson I*, where the county interpreted CCZO 7.040(19)(a) to be satisfied if an applicant demonstrates compliance with the remaining provisions of CCZO 7.040(19). The county incorporated the findings from *Nelson I* into its decision in the present appeal. Petitioners did not challenge that interpretation in *Nelson I* and they do not challenge it in the present appeal. In *Nelson I*, we stated:

> "The county's findings adopt an explicit interpretation of CCZO 7.040(a), to the effect that measures taken to comply with CCZO 7.040(b) through (d) are sufficient to ensure compliance with CCZO 7.040(a). Petitioners offer no focused challenge to that interpretation. Further, the only specific adverse impact to farm practices petitioners identify and discuss is drainage runoff, an impact that is addressed under CCZO 7.040(c). Petitioners have not demonstrated that the county's findings addressing CCZO 7.040(a) are inadequate." Slip op 8-9.

Although we are not bound by our determination in *Nelson I* that the county did not misconstrue its ordinance and that the findings were adequate, petitioners have not provided us with any reason to reach a different conclusion in this appeal.

The first subassignment of error is denied.

B. CCZO 7.040(19)(c)

Among other things, CCZO 7.040(19)(c) requires that storm drainage be directed away from farmlands and into the "existing storm drainage system." The primary point of contention in this appeal is the county's finding that the "existing storm drainage system" is the existing drainageway that runs through farmlands, including petitioners' land. Petitioners argue that allowing intervenors to discharge storm drainage through their property violates CCZO 7.040(19)(c). Petitioners made essentially the same argument in *Nelson I*, where we found:

> "Intervenors respond, and we agree, that petitioners have not demonstrated that the county's findings of compliance with CCZO 7.040(c) are inadequate. Petitioners' view that CCZO 7.040(c) requires that storm drainage be redirected into a different drainage system than the 'existing storm drainage system' that has historically served the subject property is simply inconsistent with the text of CCZO 7.040(c). CCZO 7.040(c) does not require that the applicant establish the level of pre-development stormwater flows, or that the county compare pre- and post-development stormwater runoff, or that the county conduct a cumulative impacts analysis including runoff from other properties." Slip op 10.

In addition to adopting the findings we found adequate in *Nelson I*, the county adopted additional findings explaining their interpretation and decision. Petitioners add little to their previous arguments, other than perhaps a more focused argument that the county misconstrued the ordinance. However, we found in *Nelson I* that petitioners' interpretation was inconsistent with the text of the ordinance, and petitioners have not provided us with any reason to reach a different conclusion in this appeal.[3]

The second subassignment of error is denied.

[3] We have also considered the arguments made by the *amicus*, and we are not persuaded to change our conclusion in *Nelson I*.

C. Condition of Approval Two

In response to concerns about increased runoff on downstream properties, the county imposed a condition that intervenors provide construction plans for the project's storm drainage system for review and approval by the county's consulting engineer and that it meet certain requirements.[4] Although it is not entirely clear, petitioners appear to argue that this condition is insufficient in a number of ways.

Petitioners appear to argue that condition two is insufficient to satisfy CCZO 3.290 and CCZO 7.040(19)(a) and (c).[5] It is well established that in addressing an approval criterion a local government may: (1) find that the criterion is satisfied, or find that it is feasible to satisfy the criterion and adopt conditions necessary to ensure compliance; (2) deny the proposal; or (3) defer its decision regarding that criterion to a later stage that provides equivalent procedural protections and rights of public participation. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992). CCZO 7.040(19)(c) allows downstream owners to

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[4] Condition 2 provides:

> "The applicant must provide construction plans for the proposed drainage system that are consistent with the concept reviewed by [drainage expert] and approved by Curry County. These construction plans shall be reviewed by a registered Professional Engineer of the County's choosing and certified by that person as consistent with the approved concept. Applicant shall pay the costs of review by the County's consulting engineer. The drainage system must be constructed as indicated in the approved plans, and so certified when construction is completed, prior to scheduling a Final Plat hearing. From the beginning of the first phase, the construction and function of the drainage system must accomplish the requirement of providing for the storm drainage of a 25-year design storm such that flow rate of the runoff generated on the subject property will not exceed pre-development conditions. Detention for a 25-year design storm shall be accommodated in facilities expressly built for detention. The design and construction of the system must also provide for detention of additional stormwater from a 50-year design storm. The additional detention may be surface detention on or in a curbed parking, private street, or driveway area." Second Supplemental Record 14-15.

[5] CCZO 3.290 provides:

> "Purpose of Classification: The purpose of the HBFO zone is to reduce impact to the commercial agricultural uses within the Harbor Bench Farm District as defined in the Curry County Comprehensive Plan from nonfarm uses within the farm district."

CCZO 7.040(19) is quoted above at the beginning of our discussion of the second assignment of error.

use surface water drainage or to refuse to receive such drainage. The county imposed condition two in response to concerns from downstream property owners that they might not want to use any additional water put into the system by intervenors' development. Second Supplemental Record 10-12. Although petitioners argue that the county impermissibly deferred findings of compliance with approval criteria, which could be in error under the third option in *Rhyne* if procedures and rights of public participation are not provided, it is clear that the county proceeded under the first option in *Rhyne*, finding that it is "feasible" to comply with the approval criteria and imposing condition two to ensure that result.[6] Under such circumstances, the appropriate question is whether the county's findings of compliance or feasibility of compliance are adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).

1. CCZO 3.290

The county adopted detailed findings explaining how the proposal as conditioned would not adversely impact downstream owners. Second Supplemental Record 7-8. Although petitioners obviously do not think condition two is adequate, they neither acknowledge those findings nor explain how they are inadequate, and we do not see that they are. Absent some challenge to the city's findings, we cannot say that condition two is inadequate to satisfy CCZO 3.290 or that the finding of feasibility is inadequate.

2. CCZO 7.040(19)(a)

As we discussed earlier, we agree with the county and intervenors that compliance with the remaining subsections of CCZO 7.040(19) is sufficient to satisfy CCZO

[6] The county's findings state:

> "This condition will prevent any increase in the rate of runoff into the storm drainage system if the water is refused for agricultural purposes. It is feasible to comply with this requirement by providing additional on-site storage." Second Supplemental Record 11.

7.040(19)(a). Therefore, condition two is not necessary to satisfy CCZO 7.040(19)(a) independently of the remaining subsections of CCZO 7.040(19).

3. CCZO 7.040(19)(c)

Finally, petitioners argue that condition two is inadequate to satisfy CCZO 7.040(19)(c). The relevant portion of CCZO 7.040(19)(c) requires the applicant "to direct all drainage from the structure or impervious surface away from adjacent or nearby lands zoned for commercial farm use and into the existing storm drainage system." As we discussed earlier, we affirmed the county's interpretation that existing drainageways on downstream properties constitute the "existing storm drainage system" for purposes of CCZO 7.040(19)(c). This subassignment of error does not argue that drainage will not be directed into such drainageways. Therefore, petitioners do not provide a basis for reversal or remand. Furthermore, although petitioners take issue with the adequacy of the storm drainage system contemplated under condition two, they do not address the county's findings or explain why they are not supported by substantial evidence. In essence, petitioners are asking us to reweigh the evidence and reach a different conclusion from the county's, which we cannot do.[7]

The third subassignment of error is denied.

The county's decision is affirmed.

[7] We have also considered but find unpersuasive the *amicus*' arguments.