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

1
2
3 JAMES MUHS AND DIANA MUHS,)
et al,)
4)
Petitioners,)
5)
vs.)
6)
JACKSON COUNTY,)
7)
Respondent.)

LUBA No. 84-029

FINAL OPINION
AND ORDER

8 _____)
9 SYLVIA GOODMAN,)
10)
Petitioner,)
11)
vs.)
12 JACKSON COUNTY,)
13)
Respondent.)

LUBA No. 84-033

14 Appeal from Jackson County.

15 William A. Mansfield, Medford, filed the Petition for
16 Review and argued the cause on behalf of Petitioners Muhs, et
17 al, in case number 84-029. Mr. Mansfield filed a response
brief on behalf of Intervenors Muhs, et al, in case number
84-033.

18 William R. Goode, Portland, filed the Petition for Review
19 and argued the cause on behalf of Petitioner Goodman in case
number 84-033. Mr. Goode filed a response brief on behalf of
Intervenor Goodman in case number 84-029.

20 No appearance by Jackson County.

21 BAGG, Chief Referee; KRESSEL, Referee, participated in the
22 decision.

23 AFFIRMED 10/26/84

24
25 You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 On March 28, 1984, the Jackson County Board of
4 Commissioners granted a conditional use permit to Sylvia
5 Goodman to operate a community center in a rural residential
6 zone in the county. The commission upheld the decision of the
7 Jackson County Hearings Council to grant the permit but
8 attached a number of conditions. Petitioner Sylvia Goodman
9 challenges the county's action on several procedural grounds.
10 Petitioner Goodman would have the county's decision invalidated
11 and replaced by the decision of the hearings council.

12 Petitioners James Muhs and others appeal the same
13 decision. However, these petitioners ask us to declare the
14 conditional use permit invalid because, in their view, the
15 permit was issued contrary to provisions in the Jackson County
16 Land Development Ordinance. Petitioners Muhs, et al, also
17 claim the county's decision was not based on substantial
18 evidence in the record.

19 These two cases have been consolidated for the purposes of
20 our review.

21 FACTS

22 In May of 1983 Sylvia Goodman applied to Jackson County for
23 a conditional use permit to operate and expand a counseling
24 facility on Ashland Mine Road in Jackson County. The service
25 was in operation at the time of the application, and the
26 purpose of the conditional use permit was to conform the

1 operation to Jackson County Ordinance requirements.

2 The property is slightly over four acres and includes a
3 residence. It is in a Rural Residential-5 (RR-5) zone. It is
4 in an area characterized by rural residential parcels of 5 or
5 more acres. The proposed use includes a counseling business
6 with food catering, outdoor entertainment and parking.

7 The Jackson County Hearings Council held a hearing on
8 July 27, 1983. The hearings council approved the application,
9 and executed an order to that effect on September 14, 1983.
10 The order incorporated a revised staff report.

11 On October 6, 1983, an attorney, Virgil Osborn, filed a
12 letter of appeal to the board of commissioners. The letter did
13 not disclose other parties to the appeal, and it did not
14 include a statement of standing or the grounds constituting
15 error by the hearings council. The letter simply informed the
16 county an appeal was being taken from the hearings council's
17 decision.

18 The county commissioners scheduled a hearing for January 4,
19 1984, but the hearing was continued until January 16, 1984.
20 Mr. Osborn did not appear at either time. However, an
21 attorney, William A. Mansfield, appeared at both meetings. The
22 minutes of the January 4 meeting show he was acting as the
23 attorney for the "appellants." Record, 129. On July 6, he
24 filed an affidavit listing the various individual appellants,
25 including those before LUBA in this proceeding. Record,
26 120-126.

1 At the January 16 meeting, the board of commissioners
2 elected to hear the appeal upon its own motion pursuant to
3 §285.020 of the Jackson County Land Development Ordinance. The
4 board then considered evidence and testimony in addition to
5 that presented to the hearings council.

6 On March 28, 1984, the board held a hearing to approve a
7 final order. The board considered comment from a
8 representative of the Health Department, made changes to the
9 draft order, and approved it as modified. This appeal followed.

10 PROCEDURAL ISSUES

11 The first six assignments of error are those made by Sylvia
12 Goodman.

13 FIRST ASSIGNMENT OF ERROR

14 "THE BOARD OF COMMISSIONERS ERRED IN HEARING AN APPEAL
15 OF THE HEARINGS COUNCIL ORDER OF SEPTEMBER 14, 1983,
16 FILE 83-13-CUP, BECAUSE THE APPELLANT VIRGIL OSBORN
17 FAILED TO PERFECT AN APPEAL BY PROPERLY FILING A
18 NOTICE OF APPEAL CONTAINING SPECIFIC GROUNDS
19 CONSTITUTING ERROR AND A STATEMENT SHOWING STANDING TO
20 MAINTAIN THE APPEAL, PURSUANT TO PROCEDURAL RULES
21 ADOPTED BY THE JACKSON BOARD OF COUNTY COMMISSIONERS
22 FOR THE CONDUCT OF A LAND USE ORDINANCE ADMINISTRATIVE
23 HEARINGS."

19 Under this assignment of error, Petitioner Goodman claims
20 Jackson County violated its own procedural rules governing the
21 conduct of land use hearings. The rules were adopted on
22 August 3, 1978, and Petitioner Goodman asserts the rules govern
23 proceedings such as the one at issue in this case. The rules
24 provide that notice of appeal of a hearings council's decision
25 must contain:
26

- 1 "a. reference, by title and date to the decision
appeal (sic) from;
- 2 "b. the specific grounds relied upon as constituting
3 error;
- 4 "c. a statement showing the appellant's standing to
5 maintain the appeal. Remonstrance before the
6 body from whose decision appeal is taken shall
confer prima facie standing." Procedural Rules,
Section 4(B)(3).¹

7 Petitioner alleges that Mr. Osborn's letter of appeal did not
8 state the specific grounds relied upon as constituting error
9 and did not include a statement showing Mr. Osborn's standing
10 to maintain the appeal.

11 The Jackson County Land Development Ordinance includes an
12 administrative section, §285.020, which controls appeals of
13 hearings officer or hearings council decisions. The procedural
14 rules relied upon by petitioner were enacted on August 3,
15 1978. Nothing in the county order refers to the old rules.
16 The county order, when it refers to procedure, refers to
17 §285.020 of the ordinance. Even if we accept petitioner's
18 invitation to find the old rules are still effective, we must
19 still attempt to read the new ordinance as having force and
20 effect. Ordinance §285.020(3) provides:

- 21 "3) An action or ruling of the Planning Commission,
22 Hearings Council, or Hearings Officer, pursuant
23 to the Land Division or zoning Regulations of
24 this ordinance may be appealed to the Board of
Commissioners within 30 calendar days after the
Planning Commission, Hearings Council, or
Hearings Officer has rendered a decision.
- 25 "4) Appeals shall be filed with the Department of
26 Planning and Development and shall be submitted
in writing. An aggrieved person may file an

1 appeal subject to the requirements of this
2 ordinance."

3 There is no requirement for a statement of standing or a
4 statement of error as required by the 1978 rules of procedure.

5 It is not clear that the requirement in the rules for a
6 statement of standing and a statement of error are mandatory
7 requirements which, if not followed, will result in dismissal
8 of the appeal. Without a clear showing that the county
9 intended these provisions in the rules and the ordinance to be
10 mandatory, we will not so conclude. See Hoffman v. City of
11 Portland, 294 Or 150, 654 P2d 1106 (1983). We therefore
12 decline to rule that failure to include a statement of reasons
13 for appeal and a statement of standing bars the county
14 commissioners from hearing the appeal.

15 The first assignment of error is denied.

16 SECOND ASSIGNMENT OF ERROR

17 "THE BOARD OF COMMISSIONERS ERRED IN HEARING AN APPEAL
18 OF THE HEARINGS COUNCIL ORDER OF SEPTEMBER 14, 1983,
19 FILE 83-13-CUP, BECAUSE THE APPELLANT, VIRGIL OSBORN,
20 ABANDONED THE APPEAL BY NOT APPEARING AT THE HEARING
21 OF JANUARY 4, 1984."

22 Petitioner complains that Mr. Osborn abandoned the appeal.
23 He did not make it clear that he represented any person other
24 than himself, and the fact that he failed to prosecute the
25 appeal should preclude the county from consideration of the
26 matter, according to Petitioner Goodman. Petitioner notes she
received no notice of an appeal by anyone other than Mr.
Osborn, and her right to a final decision by the hearings

1 council was prejudiced by consideration of other alleged
2 appellants who had not properly perfected an appeal within 30
3 days of the hearings council decision as required by
4 §285.020(3) and (5) of the Jackson County Land Development
5 Ordinance.

6 William A. Mansfield appeared at the hearing of January 4,
7 1984, and the record shows that Mr. Mansfield was regarded in
8 the minutes as an attorney representing "the appellants." The
9 identity of the appellants is not clear from the minutes of
10 that meeting. At the hearing of January 16, 1984, Mr.

11 Mansfield stated the appellants included several individuals
12 mentioned in an affidavit of Mr. Mansfield's filed on
13 January 6. Petitioner claims these circumstances are not
14 sufficient to perfect an appeal for the new appellants claimed
15 to be represented by Mr. Mansfield. Further, petitioner
16 asserts Mr. Osborn's abandonment of the appeal should preclude
17 any further consideration by the board of commissioners.

18 We do not believe we have to answer the question of whether
19 or not an appeal was perfected by particular individuals. It
20 is clear that Mr. Osborn filed an appeal within the 30 day
21 limit specified in §285.020(3). It is also clear from the
22 county's order that the county elected to hear the matter on
23 its own motion. The county board order recites:

24 "Whereas, the Board of Commissioners heard this matter
25 on January 4 and 16, 1984, and elected to hear it on
26 the Board of Commissioners' own motion pursuant to
Section 285.020(1) of the Land Development Ordinance,
after notice was given pursuant to Section 285.040 of

1 the Land Development Ordinance." Record, 1.2

2 Section 285.020(1) of the ordinance provides:

3 "(T)he Board of Commissioners on their own motion may
4 review any decision of the Department, Hearings
5 Officer or Hearings Council. Any such decision may be
6 reversed or remanded for further action only when it
7 appears

8 "A. The decision is based upon a violation of or
9 an improper interpretation of a stated
10 policy or order of the Board, the applicable
11 ordinances, or other law.

12 "B. Improper procedures were followed.

13 "C. There is no authority or jurisdiction to
14 render the decision."

15 Nothing in this section limits the board's consideration to
16 a set time after the hearings officer or hearings council
17 renders a decision. However, §285.020(5) provides if an appeal
18 is not filed within 30 days of the date the decision is final,
19 the decision of the planning commission, hearings council or
20 hearings officer shall be final. The ordinance limits the
21 board's action to the same 30 day period required of any
22 appellant.

23 In this case, we do not believe the circumstances require
24 us to consider the board without authority to review the
25 hearings council action. There was a properly perfected appeal
26 filed by Virgil Osborn within 30 days after the date of the
hearings council decision. The board considered that appeal at
the January 4 meeting. The board continued that proceeding to
January 16. The county board did not state it considered the
Osborn appeal withdrawn.

1 We believe the board was entitled to view the appeal before
2 it to be properly filed and to then decide to take the matter
3 up on its own motion. The fact there was dispute about whether
4 Mr. Osborn was still involved in the case or whether his appeal
5 or that of his unknown clients was taken over by Mr. Mansfield
6 did not require the county board to dismiss the appeal. There
7 is nothing in the county ordinance to which we have been cited
8 to mandate dismissal of an appeal because an appellant fails to
9 show up. We believe the county was entitled under its
10 ordinance to take over the appeal at any time it wished as long
11 as an appeal was pending before it.

12 The second assignment of error is denied.

13 THIRD ASSIGNMENT OF ERROR

14 "THE BOARD OF COMMISSIONERS ERRED IN HEARING AN APPEAL
15 OF THE HEARINGS COUNCIL ORDER, PROSECUTED BY ATTORNEY
16 MANSFIELD BECAUSE THE "APPELLANTS" REPRESENTED BY
17 MANSFIELD WERE NOT PARTIES TO THE APPEAL FILED BY
18 APPELLANT VIRGIL OSBORN."

19 This assignment of error echoes Assignments of Error No. 1
20 and 2. Because of our holding under Assignment of Error No. 2,
21 we deny this assignment of error. The county commission itself
22 undertook consideration of the hearings council decision, and
23 in so doing, mooted all questions of standing.

24 FOURTH ASSIGNMENT OF ERROR

25 "THE BOARD OF COMMISSIONERS ERRED IN HEARING AN APPEAL
26 OF THE HEARINGS COUNCIL ORDER ON THE BOARD'S OWN
MOTION BECAUSE THAT MOTION DID NOT COMPLY WITH THE 30
DAY LIMITATION CONTAINED IN SECTION 285.020 OF THE
LAND DEVELOPMENT ORDINANCE FOR JACKSON COUNTY OR WITH
THE PROCEDURAL RULES PREVIOUSLY ADOPTED BY THE COUNTY
NOT INCONSISTENT WITH THE ORDINANCE."

1 This assignment of error is similar to the complaint found
2 in Assignment of Error No. 1. Here, it is petitioner's
3 position that the 30 day time limit requirement in the 1978
4 rules must be read into that portion of §285.020 allowing the
5 county board to review land use decisions made by the hearings
6 council. Petitioner claims she was prejudiced by this alleged
7 improper consideration of the hearings council's decision.

8 We agree with petitioner that §285.020 imposes a 30 day
9 time limit on the county board's power to review a lower body
10 decision. See our discussion under the second assignment of
11 error, supra. However, our agreement does not mean we must
12 sustain petitioner's fourth assignment of error.

13 As we stated in our discussion of Assignment of Error No.
14 3, the county board had before it a properly perfected appeal
15 filed by Mr. Osborn, and its decision to review the matter on
16 its own may be seen as simply an assumption of an already
17 existing appeal. There is nothing in the ordinance to prohibit
18 such an action, and we fail to see how petitioner is prejudiced
19 under these circumstances.³

20 The fourth assignment of error is denied.

21 FIFTH ASSIGNMENT OF ERROR

22 "IF THE BOARD HAD JURISDICTION, IT ERRED IN RENDERING
23 A DECISION BASED UPON EVIDENCE BEYOND THE SCOPE OF THE
24 RECORD OF THE PROCEEDINGS OF THE HEARINGS COUNCIL OR
25 THE CONTENT OF THE FILES OF THE PLANNING DEPARTMENT ON
26 SEPTEMBER 14, 1983."

25 Petitioner next asserts the county commissioners improperly
26 considered evidence beyond that given before the hearings

1 council. Petitioner cites the Jackson County Procedural Rules
2 as follows:

3 "(5) Hearing before the Board shall be confined to the
4 record of the initial hearing and arguments of
5 parties, except that, as the Board may determine
6 the public interest so requires, the Board may
7 permit additional evidence to be received, or the
8 Board may, on its own motion, direct additional
9 evidence to be produced. Cross-examination and
10 rebuttal shall be allowed as to any new evidence
11 received." Rules, Section 4(B)(5).

12 Petitioner further complains the board was required to make
13 a specific finding that it was in the public interest to
14 consider additional evidence and the county board failed to do
15 so. The petitioner would have us reverse the decision for this
16 reason.

17 Petitioner adds the Jackson County Land Development
18 Ordinance includes no provisions for new or additional evidence
19 when an appeal is heard by the board of commissioners.
20 Petitioner claims this lack of authorization to take evidence
21 renders the county's action invalid.

22 We are not certain whether the enactment of the Jackson
23 County Land Development Ordinance of 1982 impliedly repealed
24 the 1978 county rules of procedure. The county has made no
25 appearance in this case, and we do not know whether or not the
26 county considers the rules to be in effect. If we agree with
petitioner that both the rules and the ordinance are in effect
and must be read together, we are still not obliged to sustain
this assignment of error.

First, we do not consider a violation of the rules,

1 assuming there was such a violation in this case, to be harmful
2 error unless prejudice resulted to petitioner. Here, no
3 prejudice is shown.⁴

4 Second, the provision that the commissioners can take new
5 evidence if the public interest so requires does not
6 necessitate a finding to that effect as petitioner seems to
7 insist. That is, unlike a specific approval criterion
8 requiring a finding of compliance before a permit may be
9 granted, the provision question is an authorization of
10 procedural authority. It is impliedly fulfilled when the
11 county board proceeds to take new evidence. The county board
12 need not make a finding, obvious from its action, that it
13 believes the public interest requires the taking of additional
14 evidence.⁵

15 We also do not find §285.020 prohibits the county board
16 from taking new evidence. Section 285.020(1) gives the board
17 of commissioners power to review a decision of the hearings
18 council. Subsection 6 requires the board to hold a public
19 hearing on the appeal, and subsection 7 requires one or more of
20 the following findings:

21 "A) That the Planning Commission, Hearings Council,
22 Hearings Officer, or Department did not correctly
23 interpret the requirements of this ordinance, the
24 Comprehensive Plan, or other requirements of law.

25 "B) That the Planning Commission, Hearings Council,
26 Hearings Officer, or Department did not consider
all of the information which was pertinent to the
case."

Subsection 8 of §285.020 provides that an action on appeal is

1 governed by the same general regulations applying to the
2 original application. Those regulations include taking
3 evidence. While the ordinance is not clear on the point, we
4 believe it is appropriate to interpret it to allow the county
5 commissioners to take new evidence during the course of a
6 review proceeding.

7 Therefore, we decline to find in petitioners favor on this
8 assignment of error.

9 The fifth assignment of error is denied.

10 SIXTH ASSIGNMENT OF ERROR

11 "IF THE BOARD HAD JURISDICTION, IT ERRED IN AMENDING
12 THE HEARINGS COUNCIL'S ORDER WITHOUT FIRST FINDING
13 SUBSTANTIVE OR PROCEDURAL ERROR OF THE HEARINGS
14 COUNCIL."

15 In this assignment of error, petitioner claims the county
16 commissioners had no power to alter the order of the hearings
17 council without first making one of the required findings under
18 §285.020(7)(A) and (B). Petitioner argues that such a finding
19 was a prerequisite to a modification of the order.

20 Under §285.020(6), the board of commissioners is given
21 specific authority to modify the conditions of a decision of
22 the hearings council. In §285.020(7), if the board decides to
23 overturn or modify the decision, it must make one or more of
24 the findings under subsection A and B. No specific finding was
25 made under this ordinance provision. The only finding that
26 touches upon this question is a recital that the evidence
received by the hearings council and the board

1 "was oriented toward demonstrating that the existing
2 use adversely effects (sic) people who reside in the
3 area (sic) and therefore any expansion of such a use
4 would likely further exasperate (sic) existing
5 problems.

6 "The proposed use will not adversely impact the
7 liveability, value, or appropriate development of
8 abutting properties in the surrounding area providing
9 there is adherence to the conditions of approval
10 contained within this order. The conditions of
11 approval have been developed in response to the
12 concerns and objections raised during the public
13 hearings conducted by the Hearings Council and Board
14 of Commissioners. The conditions of approval will
15 ensure that the proposed use will not adversely impact
16 the liveability, value, or appropriate development of
17 abutting properties in the surrounding area." Record,
18 2.

19 It is clear from the county's finding quoted supra, that
20 the county believed the evidence showed conditions were
21 necessary to insure the use would not adversely impact "the
22 liveability, value or appropriate development of abutting
23 properties in the surrounding area." Record, 2. Implicit in
24 this finding is the board of commissioner's view that without
25 the conditions, the proposal would have an adverse impact on
26 the surrounding area. We can assume the county would not make
such a finding if it believed the action taken by the hearings
council insured that this requirement had been met.

21 We conclude, therefore, that the finding states, albeit
22 indirectly, that the hearings council improperly concluded the
23 proposed use would not exacerbate existing problems in the
24 surrounding area. The finding implies the hearings council did
25 not properly consider all of the information pertinent to the
26 case, fulfilling the requirement in §285.020(7)(B).

1 Considering the totality of the county's order, it is also
2 clear the county believed the hearings council decision was
3 mistaken in finding compliance with the ordinance. Only after
4 the county board considered additional evidence and reapplied
5 all the evidence to the facts, did the county find compliance
6 with the provisions of its ordinance. We believe the county
7 concluded, therefore, that the hearings council had also
8 improperly interpreted the critical standard. In so doing, the
9 county board fulfilled the requirement stated in §285.020(7) (A)
10 of its ordinance that it find error in the lower body's
11 interpretation of the ordinance.

12 The sixth assignment of error is denied.

13 SUBSTANTIVE ISSUES

14 The remaining assignments of error are those made in
15 Petitioners' Muhs, et al, petition for review.

16 SEVENTH ASSIGNMENT OF ERROR

17 "THE BOARD OF COMMISSIONERS ERRED IN GRANTING THE
18 CONDITIONAL USE PERMIT WHERE THE HEARINGS COUNCIL
19 FAILED TO FIND THAT THE LOCATION, SIZE, DESIGN AND
20 OPERATING CHARACTERISTICS OF THE PROPOSED USE WOULD
21 HAVE NO ADVERSE EFFECT ON THE LIVABILITY, VALUE OR
22 APPROPRIATE DEVELOPMENT OF ABUTTING PROPERTIES AND THE
23 SURROUNDING AREA, AS REQUIRED BY JACKSON COUNTY LAND
24 DEVELOPMENT ORDINANCE, SECTION 260.040(2)."

25 EIGHTH ASSIGNMENT OF ERROR

26 "THE BOARD OF COMMISSIONERS ERRED IN GRANTING THE
27 CONDITIONAL USE PERMIT WHERE THERE WAS NOT SUFFICIENT,
28 OR ANY, EVIDENCE IN THE RECORD BEFORE THE HEARINGS
29 COUNCIL ON WHICH THE HEARINGS COUNCIL COULD BASE A
30 FINDING THAT THE LOCATION, SIZE, DESIGN AND OPERATING
31 CHARACTERISTICS OF THE PROPOSED USES WILL HAVE NO
32 ADVERSE IMPACTS ON THE LIVABILITY, VALUE OR
33 APPROPRIATE DEVELOPMENT OF ABUTTING PROPERTIES AND THE

1 SURROUNDING AREA, AS IS REQUIRED BY JACKSON COUNTY
2 LAND DEVELOPMENT ORDINANCE SECTION 260.040(2)."

3 NINTH ASSIGNMENT OF ERROR

4 "THE BOARD OF COMMISSIONERS ERRED IN GRANTING THE
5 CONDITIONAL USE PERMIT WHERE THERE WAS NOT SUFFICIENT
6 EVIDENCE IN THE WHOLE RECORD BEFORE THE BOARD OF
7 COMMISSIONERS ON WHICH TO FIND THAT THE LOCATION,
8 SIZE, DESIGN, AND OPERATING CHARACTERISTICS OF THE
9 PROPOSED USE WOULD HAVE NO ADVERSE IMPACT ON THE
10 LIVABILITY, VALUE, OR APPROPRIATE DEVELOPMENT OF THE
11 ABUTTING PROPERTIES AND THE SURROUNDING AREA."

12 In these three assignments of error, Petitioners Muhs, et
13 al, argue that the hearings council and the board of
14 commissioners each failed to find

15 "that the location, size, design, and operating
16 characteristics of the proposed use will have no
17 adverse impact on the liveability, value, or
18 appropriate development of abutting properties and the
19 surrounding area." Jackson County Land Development
20 Ordinance, Section 260.040(2).

21 Petitioners remind us that the hearings council's order (and
22 the county commissioner's order) concluded that if the
23 conditions imposed in granting the conditional use permit were
24 followed, ordinance compliance would be assured. As we
25 understand the argument, petitioners believe such conditional
26 compliance with ordinance criteria is impermissible. We
27 disagree.

28 First, whether the hearings council made the required
29 finding is beside the point. The decision on review is that of
30 the county board of commissioners. Our review will be limited
31 to the county board's findings.

32 The county found the conditions "will ensure (sic) that the
33

1 proposed use will not adversely impact liveability, value, or
2 appropriate development of abutting properties in the
3 surrounding area." Record, 2. The county also found the use
4 "will not adversely impact the liveability, value, or
5 appropriate development of the abutting properties in the
6 surrounding area providing there is adherence to the conditions
7 of approval contained within this order." Record, Id. These
8 findings make the required recital included in §260.040 of the
9 ordinance. Conditions may be imposed to insure compliance with
10 the ordinance provision, where without conditions, compliance
11 would not be possible. See Fedde v. City of Portland, 8 Or
12 LUBA 220; aff'd without opinion, 67 Or App 801 (1984); Dotson
13 v. City of Bend, 8 Or LUBA 33 (1983).⁶

14 Also, we do not find in petitioners' favor on their second
15 claim that there is insufficient evidence upon which to find
16 compliance with the county's "liveability" criterion under
17 §260.040(2) of the Land Development Ordinance. The criterion
18 calls for a subjective judgment about the impacts of the
19 proposal, including the conditions limiting its operation.
20 Although the record includes much comment on adverse impacts,
21 the county responded by attaching 19 conditions to the permit.
22 The 19 conditions control use of the swimming pool and
23 overnight accommodations, food service, domestic water,
24 parking, access, height of structures, landscaping and
25 screening, number of persons that may be present on the
26 property, lighting and other items which bear on the level of

1 activity on the site and the perception of those activities by
2 persons on properties surrounding the site. We believe the
3 county could reasonably conclude these conditions would bring
4 the proposal within the terms of the ordinance. We decline to
5 hold the county to have committed error by failing to meet this
6 standard.

7 Assignments of Error 7, 8, and 9 are denied.

8 TENTH ASSIGNMENT OF ERROR

9 "THE BOARD OF COMMISSIONERS ERRED IN GRANTING THE
10 CONDITIONAL USE PERMIT WHERE THE APPLICANT WAS IN
11 VIOLATION OF STATUTES, REGULATIONS, OR ORDINANCES AT
12 THE TIME OF THE APPLICATION."

13 Petitioners Muhs, et al, argue the applicant was in
14 violation of a number of county requirements at the time she
15 filed application for the conditional use permit.
16 Specifically, petitioners allege construction of buildings
17 without permits and improper use of buildings as dwellings. In
18 support of their argument, petitioners claim a valid
19 non-conforming use requires the use be lawfully established.
20 Petitioners argue Ms. Goodman can not meet this requirement.

21 The county order states the application is for a
22 conditional use permit "to legitimize an activity on the site
23 that consists primarily of individual and group
24 counseling...." Record, 1. The county's order does not
25 discuss expansion of a non-conforming use, and it is unclear
26 why petitioners' citations to cases about non-conforming uses
are relevant. The conditional use permit is for a community

1 center in the Rural Residential-5 zone. Under the Jackson
2 County Land Development Ordinance, a community center is a
3 conditional use in the RR-5 zone. It is, therefore, not a
4 proposal subject to requirements governing non-conforming
5 uses.

6 To the extent petitioners are asking us to hold that an
7 otherwise illegal activity may not be legitimized by the
8 issuance of a permit, we decline to do so. We understand the
9 county's order to authorize an existing activity that is one of
10 the listed conditional uses within the RR-5 zone. The fact the
11 activity may have commenced without issuance of a permit should
12 not preclude the operator from later filing an application for
13 the appropriate permit.⁷

14 The tenth assignment of error is denied.

15 ELEVENTH ASSIGNMENT OF ERROR

16 "THE BOARD OF COMMISSIONERS ERRED IN GRANTING THE
17 CONDITIONAL USE PERMIT IN THAT THERE WAS NOT
18 SUFFICIENT EVIDENCE BEFORE THE HEARINGS COUNCIL OR
19 BEFORE THE BOARD OF COMMISSIONERS ON WHICH TO BASE A
20 FINDING THAT THE USE PROPOSED BY APPLICANT GOODMAN
21 FELL WITHIN THE DEFINITION OF A "COMMUNITY CENTER", AS
22 THAT TERM IS DEFINED BY JACKSON COUNTY LAND
23 DEVELOPMENT ORDINANCE, SECTION 00.040."

24 Under this assignment of error, petitioners advise the
25 Jackson County Land Development Ordinance defines a community
26 center as

27 "a place of meeting, recreation, or social activity."
28 Jackson Land Development Ordinance, Section 00.040.

29 Petitioners complain that the application in issue is for
30 something other than a meeting, recreation or social activity.

1 Petitioners concede the application as proposed does include
2 meeting and recreation and social activity, but they argue the
3 term "community center" evokes

4 "images of a hall or garden where neighborhood persons
5 meet for social and recreational purposes. Such is
6 not the case for Applicant's activities." Muhs, et
7 al, Petition for Review at 12.

8 Petitioners quote two of the county commissioners who
9 characterized the use as some sort of restaurant or hotel
10 business.

11 We are cited to no use category in the ordinance which more
12 accurately describes the activities proposed for the subject
13 property. However, one of the conditional uses listed in the
14 RR-5 zone, in addition to the community center use, is a

15 "medical clinic, sanitarium, rest home, home for the
16 aged, nursing home, convalescent home, retirement
17 home, or institution for the care of alcoholic,
18 narcotic, or psychiatric patients." Jackson County
19 Land Development Code, §222.030(9).

20 We also find at §222.030(12) a provision for

21 "licensed shelter care facility, half-way home, group
22 home, or other related residential or day treatment
23 facilities."

24 The fact the facility contemplated here may be closer in
25 some respects to either a medical clinic or a day treatment
26 facility,⁸ does not change the outcome under this assignment
of error. Each of these uses are conditional uses in the RR-5
zone subject to the same criteria. Whether the county may have
misnamed or mischaracterized the proposed use is not important
as long as the ordinance may be reasonably interpreted to

1 accommodate the use as a conditional use within this zone.⁹

2 Because the activities on the property do not directly
3 contradict the definition of community center as contained in
4 the ordinance, and because we are not cited to another zone
5 more precisely including the activities proposed here, we are
6 not in a position to agree with the petitioners that the county
7 was unreasonable in treating the proposal as a community
8 center. The fact the activity may not fall precisely within a
9 category as defined in the ordinance does not mean that the
10 county is not free to interpret its ordinance in such a way as
11 to allow the facility to operate as long as the interpretation
12 is reasonable and not contrary to the express limits of the
13 ordinance.¹⁰ Alluis v. Marion Co., 64 Or App 478, 668 P2d
14 1242 (1983).

15 The eleventh assignment of error is denied.

16 The decision of Jackson County is affirmed.

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FOOTNOTES

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3 ¹

The rules are found in an appendix to Sylvia Goodman's
Petition for Review. The county did not include these rules in
its record. We express no opinion as to whether the rules
continue to control proceedings in Jackson County.

6

²

All record references are to the amended record filed by
the county on May 18, 1984.

8

9 ³

We may only reverse or remand for procedural errors when it
can be shown the error prejudices the "substantial rights" of
the petitioner. ORS 197.835(8) (a) (B).

11

12 ⁴

Actually, the only evidence specifically complained of by
petitioner consists of the statements by an agency official
indicating support for certain conditions of approval. We do
not construe the statements quoted by petitioner as new
evidence, rather they are comments on the merits of proposed
conditions.

16 ⁵

We note also that §285.020 of the county ordinance does not
require a finding that the taking of new evidence is in the
public interest. Also, the county order nowhere makes
reference to county rules of procedure, but only refers to
county ordinance §285.020 and other provisions of Chapter 285.
It is doubtful, therefore, that the county considered itself
governed by the provisions of the rules of procedures.

21 ⁶

Further, the Jackson County Land Development Ordinance at
§285.020(6), permits the board of commissioners to modify the
conditions of approval set out by the hearings council. This
authorization reflects the ideas that some proposals may not
meet permit criteria unless limited or controlled by special
conditions. In this case, compliance with the county's
liveability requirements is furthered by the imposition of 19
conditions controlling use of the property.

26

1 We see nothing improper about this approach. Compare
2 Margolis v. City of Portland, 4 Or LUBA 89 (1982).

3 7
4 There is no county order or other clear evidence showing
5 the prior activities on the land were, in fact, not permissible
6 under county or other legal standards.

7 8
8 We note also that the ordinance defines a "health related
9 center or spa" as

10 "a facility which offers health related treatment,
11 education, recreation, or other resort activities, not
12 including long-term or emergency care." Jackson
13 County Land Development Ordinance, §00.040.

14 However, we do not find this use listed as a permitted or
15 conditional use in the ordinance.

16 9
17 Our holding might be in favor of petitioners if the
18 ordinance clearly categorized this use as permitted in a
19 different zone, since that would undermine the county's
20 interpretation.

21 15
22 The fact that two of the county commissioners observed that
23 the use had some hotel or restaurant characteristics does not
24 change the county's conclusion, apparent in its order, that the
25 activities contemplated fell within the definition of a
26 community center. The county board speaks in its order, not in
the comments of the board members. Citadel Corp. v. Tillamook
Co., ___ Or ___, (LUBA No. 83-049, 9/13/83); 66 Or App 965, 675
P2d 1114 (1984).

27 10
28 We note in addition that overnight occupancy of the center
29 is limited by a condition. Condition 12 in the county's order
30 provides:

31 "Overnight sleeping of more than six guests within any
32 single calendar month is prohibited. For
33 clarification, this condition provides that a maximum
34 of six individual guests per calendar month, may stay
35 one or more nights at the subject residence in
36 conjunction with uses provided by this community
center."

1 In addition, Condition 18 requires that:

2 "All events involving more than 20 people, which
3 includes the staff, shall conclude and the people
4 shall depart prior to 10:00 p.m., except for guests
5 staying overnight consistent with condition 12."
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