

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

06/28/19 AM 9:00 LUBA

3
4 JAMES CARKULIS,
5 *Petitioner,*

6
7 vs.

8
9 LINCOLN COUNTY,
10 *Respondent,*

11 and

12
13
14 AWA SALISHAN, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-037

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Lincoln County.

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24 James Carkulis, Gleneden Beach, filed the petition for review and argued
25 on his own behalf.

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27 M. Gerald Herbage, Lincoln County Counsel, Newport, filed a joint
28 response brief and argued on behalf of respondent.

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30 Steven Hultberg, Bend, filed a joint response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Radler White Parks &
32 Alexander LLP.

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34 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
35 Member, participated in the decision.

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AFFIRMED

06/28/19

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

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving an amendment to the planned development approval for Salishan Resort.

FACTS

Salishan Resort was developed in the 1960s as a planned development with residential lots and a lodge, and currently operates as a lodge and golf resort on approximately 460 acres. In 2018, intervenor-respondent AWI Salishan, LLC (intervenor) applied to amend the Salishan planned development to incorporate an “aerial challenge course” on one of the lots included in the original planned development, located between fairway one and fairway six of the golf course portion of the planned development. Record 17. According the decision, the proposed “challenge course” is “comprised of a series of obstacles strung between trees using * * * cable, ranging in height from 10’ to 50’ off the ground. Around each tree is an octagonal platform, mounted using * * * bolts, to promote tree health and longevity.” Record 19.

The planning commission held a hearing on the application, and approved the application. Petitioner appealed the planning commission’s decision to the board of county commissioners. The board of county commissioners held an on the record hearing on the appeal, but allowed new argument from intervenor and petitioner. The board of county commissioners voted to approve the application and deny the appeal.

1 This appeal followed.

2 **FIRST ASSIGNMENT OF ERROR**

3 The provisions of the Lincoln County Code (LCC) that govern planned
4 developments are found in LCC 1.1380. LCC 1.1380 at one time included
5 specific procedures for amending an existing approved planned development, but
6 no longer include such procedures.¹

7 The planning commission found that “the existing procedures set forth in
8 LCC 1.225(2) and 1.1380 may be used to amend an existing planned
9 development.” Record 21. The board of county commissioners adopted the
10 planning commission’s findings, and also adopted additional “Findings and
11 Conclusions of the Board.” Record 29-33. The board of county commissioners
12 found that LCC 1.1125 provides a way for an applicant to amend a planned
13 development. The board of county commissioners also found that LCC 1.1380
14 allows an amendment to an approved planned development as long as an
15 applicant demonstrates that the entire planned development continues to meet the
16 approval criteria for a planned development found in LCC 1.1380(3):

¹ The decision explains:

“The [LCC] formerly consisted of procedures allowing for an amendment to an existing planned development. Such a procedure was inadvertently omitted when the LCC Section 1.1380 (Planned Development) of the zoning code was amended in 1997.” Record 22.

1 “The Board interprets LCC 1.1225 as not only providing an avenue
2 for legislative amendments to the LCC, but to also allow a pathway
3 for quasi-judicial applications for amendments to existing land use
4 approvals. The Board, in its interpretation, has focused on the
5 language in LCC 1.1225(2) which states that such amendments
6 ‘may be made only for the application of established policy to
7 specific properties in the county.’ That is what is being done in this
8 case. The Applicant is applying the established policy in LCC
9 1.1380 to the Salishan property in application to amend the planned
10 development.

11 “Even if the Board’s interpretation of LCC 1.1225 is in error, LCC
12 1.1380 provides for an avenue for an amendment to its planned
13 development. To be clear, whether or not LCC 1.1225 applies in this
14 case or not, the Board concludes that the applicable process to
15 amend a planned development is through application and evaluation
16 of the approval criteria set forth in LCC 1.1380(3). As set forth
17 above, the Applicant has demonstrated compliance with the relevant
18 approval criteria.” Record 31.

19 In his first subassignment of error, we understand petitioner to argue that
20 the board of county commissioners improperly construed the provisions of LCC
21 1.1380 when it found that intervenor could amend its planned development by
22 demonstrating compliance with the criteria in LCC 1.1380(3). Petition for
23 Review 10. We also understand petitioner to argue that the board of county
24 commissioners should have and failed to adopt findings demonstrating how the
25 proposed amendment complies with LCC 1.1380(3)(c)(C). Petition for Review
26 10.

27 The county and intervenor (together, respondents) respond that the board
28 of county commissioners’ interpretation of LCC 1.1380 is required to be affirmed

1 under ORS 197.829(1).² Petitioner has not challenged the board of county
2 commissioners' interpretation, quoted above, or otherwise attempted to explain
3 why LUBA is not required to affirm that interpretation under ORS
4 197.829(1)(a)–(d). Accordingly, we agree with respondents that petitioner's
5 argument that the county improperly construed LCC 1.1380 provides no basis for
6 reversal or remand.

7 Respondents also respond that the board of county commissioners adopted
8 findings to explain its conclusion that the proposed amendment satisfied LCC
9 1.1380(3)(c)(C), which are found at Record 16, 25, and 30-31. Petitioner's
10 argument that the county failed to adopt findings regarding LCC 1.138(3)(c)(C)
11 simply ignores and fails to challenge the findings that the county did adopt.

² ORS 197.829(1) requires LUBA to affirm a local governing body's interpretation of a land use regulation unless LUBA determines the interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 In his second subassignment of error, we understand petitioner to argue
2 that the board of county commissioners improperly construed LCC 1.1225 when
3 it concluded that it applies to the proposed planned development amendment.
4 Respondents respond, and we agree, that the county’s conclusion—that LCC
5 1.1225 applies to amendments to planned developments—is an alternative,
6 independent basis to approve the application, and the county expressly adopted
7 findings to that effect. Accordingly, any error that the county committed in
8 construing LCC 1.1225 as authorizing an amendment of a planned development
9 does not provide a basis for reversal or remand of the decision.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land
13 use decision if LUBA finds the local government “[f]ailed to follow the
14 procedures applicable to the matter before it in a manner that prejudiced the
15 substantial rights of the petitioner[.]” In his second assignment of error, we
16 understand petitioner to argue that the county committed a procedural error that
17 prejudiced his substantial rights when the board of county commissioners failed
18 to consider a written statement that petitioner submitted to the board of
19 commissioners at the hearing, which he now attaches to the petition for review

1 as “Addendum A.”³ Petitioner cites LCC 1.1270 and LCC 1.1275 for the
2 proposition stated in his petition for review that “[t]he Board is required to
3 consider all evidence presented to it prior to making its decision.”⁴ Petition for
4 Review 13. LCC 1.1270 provides:

5 “Review by the Board at a public hearing shall be accomplished in
6 accordance with its own adopted rules of procedure and the
7 requirements of this chapter. The Board may continue its hearing to
8 gather additional evidence or to consider the application more
9 completely pursuant to this chapter.”

10 LCC 1.1275 provides:

11 “Unless otherwise provided by the Board under LCC 1.1280, the
12 review of the decision of the Commission by the Board shall be
13 confined to the record of the proceeding, which shall include:

14 “(1) All materials, pleading, memoranda, stipulations, and
15 motions submitted by any party to the proceeding and
16 received or considered by the commission as evidence;

17 “(2) All materials submitted by the division with respect to the
18 application;

19 “(3) The transcript or tape of the public hearing of the commission;

20 “(4) The findings and action of the commission and the notice of
21 review; and

³ Respondents move to strike Addendum A. LUBA’s review is confined to the record. ORS 197.835(2)(a). Petitioner has not established that the materials included in Addendum A are part of the record. The motion to strike is granted.

⁴ Petitioner cites LCC 1.270. However, it is reasonably clear that petitioner is referring to LCC 1.1275.

1 “(5) Argument confined to the record by the parties or their legal
2 representatives at the time of review before the Board.”

3 Respondents respond first that petitioner has not established that the board
4 of county commissioners failed to consider his written statement. We also
5 understand respondents to respond that petitioner failed to object to the alleged
6 procedural error. Finally, respondents respond that petitioner has not established
7 that the county committed a procedural error or violated an applicable legal
8 standard.

9 We agree with respondents that petitioner has failed to establish that the
10 county committed a procedural error. One of the requirements to establish a
11 procedural error is that a petitioner must identify the procedure allegedly violated.
12 *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). Petitioner has not
13 developed any argument explaining why the board of county commissioners was
14 required to accept or consider petitioner’s written statement submitted at the
15 hearing. LCC 1.1270 describes the hearing procedures and allows, but does not
16 require, the board of county commissioners to continue the hearing “to gather
17 additional evidence[.]” LCC 1.1275 describes the content of the record of the
18 proceeding before the board of county commissioners.

19 We also agree that petitioner has not established that the board of county
20 commissioners failed to consider petitioner’s written statement. We will not
21 develop petitioner’s argument for him. *Evans v. Multnomah County*, 33 Or
22 LUBA 555, 562 (1997).

1 Finally, petitioner argues that “[i]n order to provide [p]etitioner with due
2 process, LUBA should reverse the Findings, Conclusions and Final Order of the
3 Board and remand this matter back to the Board to consider all of the evidence
4 and testimony before it before making a decision on this matter.” Petition for
5 Review 14. Petitioner has not sufficiently developed for our review a legal
6 argument that he was deprived of the due process protections of the United States
7 Constitution, and we will not develop that argument for him. *Joyce v. Multnomah*
8 *County*, 23 Or LUBA 116, 118, *aff’d* 114 Or App 244, 835 P2d 127 (1992).

9 The second assignment of error is denied.

10 The county’s decision is affirmed.