

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

3
4 SOUTHEAST NEIGHBORS UNITED,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 DESCHUTES COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 THE CHURCH OF JESUS CHRIST OF)
17 LATTER DAY SAINTS,)
18)
19 Intervenor-Respondent.)

LUBA No. 96-019

FINAL OPINION
AND ORDER

20
21
22 Appeal from Deschutes County.

23
24 Daniel E. Van Vactor, Bend, filed the petition for
25 review and argued on behalf of petitioner.

26
27 No appearance by respondent.

28
29 Sharon R. Smith, Bend, and James H. Bean, Portland,
30 filed the response brief and argued on behalf of intervenor-
31 respondent. With them on the brief were Bryant, Lovlien &
32 Jarvis, and Lindsay, Hart, et al.

33
34 LIVINGSTON, Referee; HANNA, Chief Referee, participated
35 in the decision.

36
37 REMANDED 11/29/96

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the board of county
4 commissioners (commissioners) approving the site plan for a
5 church.

6 **MOTION TO INTERVENE**

7 The Church of Jesus Christ of Latter Day Saints
8 (intervenor), the applicant below, moves to intervene on the
9 side of the respondent. There is no opposition to the
10 motion, and it is allowed.

11 **MOTION TO FILE REPLY BRIEF**

12 Pursuant to OAR 661-10-039, petitioner moves for
13 permission to file a reply brief. There is no opposition to
14 the motion, and the reply brief is allowed.

15 **FACTS**

16 The subject property is an approximately five-acre
17 parcel zoned Multiple Use Agricultural (MUA-10) and Surface
18 Mining Impact Area (SMIA), located adjacent to the Bend
19 urban growth boundary on the southeastern corner of Knott
20 Road (to the north) and Tekampe Road (to the west). The
21 land adjacent to the site is either undeveloped or developed
22 with rural residences.

23 On February 1, 1994, the county approved a conditional
24 use permit for a "12,000 +/-" square foot church. That
25 conditional use approval (CU-93-119) was not appealed and is
26 now final. The conditional use approval required separate

1 site plan approval prior to the issuance of any building
2 permits.

3 On July 10, 1995, intervenor applied for site plan
4 review of a "church of 13,660 square feet and parking."
5 Record 500. With its application, intervenor submitted two,
6 nearly identical site plans (hereinafter referred to jointly
7 as "original site plan").¹ The county planning director
8 gave notice of an administrative action, describing the
9 subject of the proposed land use action as "an application
10 for Site Plan Review, for construction of a church facility
11 and parking lot in an MUA10/SMIA Zone." Record 493.
12 Because of the strong response to the notice, the county
13 decided to hold a hearing before the county hearings
14 officer. After that hearing, on September 5, 1995, at which
15 many neighbors spoke in opposition to the proposed site
16 plan, the hearings officer visited the site and prepared a
17 site visit report, mailed to the parties on September 13,
18 1995, which described potential impacts from the proposed
19 church location and recommended certain changes to the
20 original site plan.

21 On September 19, 1995, the last day the record was
22 open, intervenor submitted a draft revised site plan. The
23 draft revised site plan does not contain the same level of
24 detail as the original site plan. For example, it does not

¹The differences between the site plans are not significant for purposes of our review.

1 show the location of the septic drainfield and reserve area
2 or the locations of proposed outdoor lighting. It does show
3 the proposed church and, to the east, an extension of
4 similar size, labeled "Later Phase Construction."

5 The hearings officer made findings with respect to the
6 site plan criteria in Deschutes County Code (DCC) 18.124 and
7 approved the draft revised site plan. Her October 26, 1995
8 decision explains:

9 "As discussed in the findings above, in order to
10 meet all of the site plan approval criteria, the
11 applicant must submit a revised site plan,
12 consistent with the draft site plan * * *, and
13 relocating the church building and parking areas,
14 including all of the landscaping, buffering and
15 screening indicated in the draft revised site
16 plan, and including design details equivalent in
17 all other respects to the original site plan
18 submitted.

19 "The Hearings Officer further finds that staff
20 review of the revised site plan required to be
21 submitted under this decision will not require the
22 exercise of discretion on the part of staff, but
23 rather will simply require staff to verify that
24 the revised site plan conforms as required by this
25 decision with the original site plan, with the
26 draft revised site plan and * * * with the
27 conditions of approval contained in this decision,
28 as appropriate." Record 39.

29 The hearings officer required that a final revised site
30 plan be submitted within 90 days of her decision (i.e., by
31 January 24, 1996). On November 6, 1995, the last day of the
32 appeal period, petitioner appealed from the hearings
33 officer's decision to the commissioners. The commissioners
34 heard the appeal of selected issues on the record. On

1 November 22, 1995, they affirmed the hearings officer's
2 decision, and this appeal followed.

3 **WAIVER**

4 Petitioner's brief anticipates the argument that
5 because it raises certain issues for the first time on
6 appeal, these issues are beyond the scope of our review
7 under ORS 197.835(3).² Petitioner contends the challenged
8 decision illegally modified the 1994 conditional use
9 approval. Petitioner observes that the notice of
10 administrative action given by the county in the local
11 proceedings in this case did not mention a modification of
12 the conditional use.³ Petitioner argues that pursuant to
13 ORS 197.835(4)(c), it can raise new issues to the Board
14 without limitation.⁴

²ORS 197.835(3) provides: "Issues [on appeal to LUBA] 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."

³We question petitioner's terminology. DCC 22.36.050 governs modification of land use approvals. It provides that "[a]n applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final." DCC 22.36.050(A). Since the application for the challenged site plan approval was made more than one year after the 1994 conditional use approval, a modification of that approval was no longer possible and could not have been noticed as a proposed land use action.

⁴ORS 197.835(4) provides, in relevant part:

"A petitioner may raise new issues to [LUBA] if:

"* * * * *

"(c) The local government made a land use decision or limited land use decision which is different from the proposal

1 Although DCC 22.36.050 allows the modification of a
2 conditional use only under certain circumstances which are
3 not present here, petitioner's real point is that the
4 approved site plan exceeds what was approved by CU-93-119.
5 However, the challenged decision finds specifically that

6 "the proposed church was approved in the 1994
7 conditional use permit decision in CU-93-119. The
8 approval was for a church of essentially the same
9 size and height as the one proposed in the site
10 plan application. (At 13,660 square feet and 33
11 feet in height, the proposed church is just 12
12 percent larger and taller than the 'approximately'
13 12,000 sq. ft. and 29-foot high church considered
14 by the former Hearings Officer.)" Record 24.

15 The notice of administrative action stated the
16 application is for site plan review. Record 493. The
17 challenged decision concludes the size of the proposed
18 church is within the scope of the conditional use approval
19 in CU-93-119 and approves a site plan. Since the notice
20 reasonably described what was likely to be approved (and
21 what in fact was approved), ORS 197.835(4)(c) provides no
22 basis for petitioner to raise new issues before this Board.
23 We address intervenor's waiver contentions and petitioner's
24 replies in the discussion of individual assignments of
25 error.

26 **FIRST ASSIGNMENT OF ERROR**

27 Under the first assignment of error, petitioner makes

described in the notice to such a degree that the notice
of the proposed action did not reasonably describe the
local government's final action."

1 two subassignments: (1) the proposed use is not limited to
2 the church, which was approved as a conditional use, but
3 also includes a parochial school and a parish hall; and (2)
4 the proposed church is substantially larger than the church
5 that was approved in CU-93-119, and therefore a new
6 conditional use review is required.⁵ Intervenor contends
7 petitioner failed to raise the issue of noncompliance with
8 the earlier conditional use approval during the local
9 proceedings and therefore this issue is beyond the scope of
10 our review under ORS 197.835(3).

11 Both the uses of the proposed structure and its size
12 were raised in letters submitted prior to the hearings
13 officer's decision. Record 112, 113. The notice of appeal
14 from the hearings officer's decision to the commissioners
15 states, "The Hearings Officer erred in not denying the
16 application based on the opponent's challenge of the
17 underlying Conditional Use Permit." Record 109. The
18 additional findings of the commissioners affirm the findings
19 and conclusions of law stated on pages 4-8 of the hearings
20 officer's decision. Record 11. Among those findings is one
21 that "the conditional use permit approved in the decision in
22 CU-93-119 precludes [the hearings officer] from revisiting
23 the issue of whether the proposed church should be allowed

⁵Petitioner contends parochial schools and parish halls are separate conditional uses. In addressing the first subassignment of error, we assume without deciding that petitioner is correct.

1 on the subject property." Record 19-20.

2 The letters in the record and statements made in the
3 local notice of appeal raised the issue of compliance with
4 the earlier conditional use permit with sufficient
5 specificity to afford the commissioners an opportunity to
6 respond.⁶ See Boldt v. Clackamas County, 107 Or App 619,
7 623, 813 P2d 1078 (1991) (fair notice to adjudicators and
8 opponents is sufficient); Lett v. Yamhill County, ___ Or
9 LUBA ___ (LUBA No. 96-051, October 7, 1996), slip op 10-11
10 (notwithstanding statutory requirement for statements or
11 evidence, what is "sufficient" still depends upon whether
12 the decision maker and the parties are afforded an adequate
13 opportunity to respond to each issue). The commissioners
14 did in fact respond by adopting the findings of the hearings
15 officer, which state expressly that the proposal submitted
16 for site plan review is not outside the scope of the
17 conditional use approval.

18 Because the issue of compliance with the earlier

⁶ORS 197.763(1) provides:

"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 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."

ORS 197.835(3) limits this Board's scope of review to issues raised by any participant before the local hearings body "as provided by ORS * * * 197.763."

1 conditional use approval was adequately raised below, we
2 consider both subassignments of the first assignment of
3 error.

4 **A. Uses Approved**

5 Petitioner contends the proposed structure will be used
6 not just as a church, but also as a parochial school and a
7 parish house. Petitioner points to evidence the church will
8 include a "cultural hall/auditorium, meeting rooms and
9 offices," Record 118; and that the meeting rooms will be
10 used for an "early morning seminary" for 20 to 30 students
11 each weekday following the school year. Record 319.
12 However, petitioner acknowledges that CU-93-119 recognizes
13 that "the church could be used throughout the week for
14 various religious and community events and activities."
15 Record 514.

16 We agree with intervenor that the activities described
17 clearly fall within the scope of what was approved by
18 CU-93-119. This subassignment of error is denied.

19 **B. Size of Church**

20 The decision in CU-93-119 states: "The applicant is
21 seeking conditional use approval to allow the construction
22 of a 12,000 +/- square foot church * * *." Record 508. The
23 challenged decision states: "The applicant is requesting
24 site plan review and approval for the construction of a
25 13,660 square foot church * * *." Record 15.

26 In a finding addressing DCC 18.124.060(A), the

1 challenged decision states:

2 "[T]he proposed church was approved in the 1994
3 conditional use permit decision in CU-93-119. The
4 approval was for a church of essentially the same
5 size and height as the one proposed in the site
6 plan application. (At 13,660 square feet and 33
7 feet in height, the proposed church is just 12
8 percent larger and taller than the 'approximately'
9 12,000 sq. ft. and 29-foot high church considered
10 by the former Hearings Officer.)" Record 24.

11 The county's conditional use and site plan review
12 criteria address many of the same concerns, but they are not
13 identical.⁷ If the applicant and the county had specified a

⁷The conditional use criteria that were applied in CU-93-119 include the following, stated in DCC 18.128.015:

"A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

"1. Site, design and operating characteristics of the use;

"2. Adequacy of transportation access to the site; and

"3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

"B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in (A) above.

"C. These standards and any other standards of this chapter may be met by the imposition of conditions calculated to insure that the standard will be met."

DCC 18.124.060 states the site plan approval criteria, including:

"A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features.

1 wide range of possible sizes during the conditional use
2 process, the consistency of the site plan with the
3 conditional use approval would not be an issue. However,
4 the term "12,000 +/-" does not clearly include a number as
5 high as 13,660. Without findings explaining why, for
6 purposes of conditional use approval, a 13,660 square foot

"B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.

"* * * * *

"E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.

DCC 18.124.040(D) states that the site plan shall indicate the following:

- "1. Access to site from adjacent rights of way, streets and arterial.
- "2. Parking and circulation areas.
- "3. Location, dimensions (height and bulk) and design of buildings and signs.

"* * * * *

- "10. Areas to be landscaped.
- "11. Exterior lighting.

"* * * * *

- "16. Drainfield locations.

"* * * * *"

1 church 33 feet high is "essentially the same size and
2 height" as a "12,000 +/-" square foot church 29 feet high,
3 we cannot affirm that it is.

4 This subassignment of error is sustained.

5 The first assignment of error is sustained, in part.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner contends the county "exceeded its
8 jurisdiction" in expanding the conditional use approval in
9 CU-93-119 during the site plan review proceedings.
10 Petitioner provides little argument. Notwithstanding the
11 allusion to the county's jurisdiction, we understand this
12 assignment of error to be a restatement of the first
13 assignment of error.

14 To the extent it states a different argument from the
15 first assignment of error, the second assignment of error is
16 denied.

17 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

18 Petitioner contends the hearings officer approved a
19 draft site plan that was insufficiently specific to be
20 reviewed against the county's site plan criteria and, in
21 doing so, violated ORS 197.763 and petitioner's right to due
22 process. We do not discuss the issues raised by petitioner
23 further because intervenor maintains they were not raised
24 below and are therefore outside the scope of our review, and

1 petitioner does not show that they were raised below.⁸ ORS
2 197.835(3). Pend-Air Citizens' Comm. v. City of Pendleton,
3 29 Or LUBA 362, 368 (1995).

4 The third and fourth assignments of error are denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 Petitioner contends the county's inability to provide a
7 tape or transcript of the December 9, 1993 hearing on
8 CU-93-119 and the refusal of the commissioners to provide a
9 de novo hearing on its appeal from the hearings officer's
10 decision violated its right to due process under the
11 Fourteenth Amendment, because as a consequence it was
12 "unable to develop several arguments on the expiration of
13 the conditional use permit." Petition for Review 29.
14 Petitioner relies on DCC 22.32.030(D), which provides in
15 relevant part:

16 "* * * [T]he board [of commissioners] may hear an
17 appeal de novo if the board determines that:

18 "1. The magnetic tape of the hearing below or a
19 portion thereof, is unavailable due to a
20 malfunctioning of the recording device during
21 that hearing; or

22 "* * * * *"

23 The December 9, 1993 hearing on CU-93-119 was a hearing
24 in a separate proceeding, not a "hearing below" on the site
25 plan review application. Therefore, DCC 22.32.030(D) does

⁸Petitioner had an opportunity to raise these issues in its appeal to the commissioners of the hearings officer's decision, but did not.

1 not apply. To the extent petitioner's claim of a right to a
2 tape or transcript of the December 9, 1993 hearing is
3 constitutionally based, petitioner does not adequately
4 develop an argument in support of its theory. Vestibular
5 Disorder Consult. v. City of Portland, 19 Or LUBA 94, 99
6 (1990).

7 The fifth assignment of error is denied.

8 The county's decision is remanded.

9