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

BRUCE C. HUGO,)
)
Petitioner,)
)
vs.)
)
COLUMBIA COUNTY,)
)
Respondent,)
)
and)
)
JOHN A. PETERSEN AND TIDE)
CREEK ROCK, INC.,)
)
Intervenors-Respondent.)

LUBA No. 98-035
FINAL OPINION
AND ORDER

Appeal from Columbia County.

Michael F. Sheehan, Scappoose, filed the petition for review and argued on behalf of petitioner.

No appearance by Columbia County.

Agnes Marie Petersen, St. Helens, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 06/19/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a limited
4 exemption certificate expanding a 40-acre surface mining
5 operation to 160 acres.

6 **MOTION TO INTERVENE**

7 Intervenors-respondent John A. Petersen and Tide Creek
8 Rock, Inc. (intervenors), the landowner and applicant below,
9 move to intervene on the side of the county. There is no
10 opposition to the motion, and it is granted.

11 **FACTS**

12 Intervenors operate a 40-acre surfacing mining operation
13 under a limited exemption certificate (certificate) granted by
14 the county. A certificate exempts surface mining operations
15 that existed before 1972 from compliance with the regulatory
16 requirements of the county's Surface Mining Ordinance (SMO).

17 The SMO was adopted in 1972 and amended in 1990. In
18 Petersen v. Columbia County, ___ Or LUBA ___ (LUBA No. 96-205,
19 May 30, 1997), slip op. 6, we determined that the SMO is a
20 land use ordinance and that decisions made under it are land
21 use decisions. Under the SMO, a certificate must be renewed
22 every year in the same manner as operating permits.
23 Applications to renew certificates or permits are reviewed by
24 a Surface Mining Advisory Committee (committee), which makes
25 recommendations to the county board of commissioners
26 (commissioners). The commissioners make a decision on the

1 application during a "public meeting," but are not required to
2 hold a hearing. SMO 2.3(3). Notice of the decision is sent
3 to the landowner or applicant. Landowners or applicants
4 adversely affected by the decision may appeal the decision to
5 the commissioners and receive an evidentiary hearing. Notice
6 of the hearing is sent to the appellant. At the hearing, only
7 the appellant may present evidence and argument; the
8 commissioners are not required to consider evidence or
9 testimony from other persons. SMO 2.4(3).

10 The subject property is a 160-acre tract, approximately
11 five acres of which was mined in 1972. In 1994, the
12 commissioners granted intervenors a certificate to operate
13 exempt surface mining on 40 acres. In June 1997, intervenors
14 applied to expand the exempt surface mining activity subject
15 to the certificate to 160 acres. The committee recommended
16 approval, and the commissioners conducted proceedings on July
17 23, 1997, pursuant to SMO 2.3. Notice of the proceeding was
18 sent only to intervenors. At that proceeding, the
19 commissioners permitted intervenors and others supporting the
20 application to present evidence and testimony supporting
21 approval, but refused permission for petitioner and others
22 present at the proceeding to present evidence and argument
23 opposing the application.

24 On December 10, 1997, the commissioners conducted another
25 proceeding where, again, proponents of the application offered
26 evidence and testimony, but the commissioners refused

1 permission for anyone to present evidence and testimony
2 opposing the application. Letters from opponents arguing that
3 the county's proceedings violated the provisions of ORS
4 197.763 and ORS 215.422 were not accepted into the record.

5 On January 5, 1998, the commissioners issued Order No.
6 98-01, which granted a limited exemption certificate for 80
7 acres. In addition, Order No. 98-01 provided that:

8 "The decision of the [commissioners] is subject to
9 further review in accordance with ORS 197.763 and
10 215.422. ORS 215.422 permits local governments to
11 allow aggrieved parties an opportunity to appeal a
12 land use decision at the local level. Therefore,
13 the local process to implement ORS 215.422 is found
14 in Section 2.4 of the [SMO] and Section 1703 of the
15 Columbia County Zoning Ordinance. Adjacent property
16 owners, the applicant and others entitled to notice
17 of this decision will receive notice of this
18 decision by mail in accordance with ORS 197.763."
19 Record 25.

20 On January 21, 1998, the commissioners issued Order No.
21 04-98, which rescinded Order No. 98-01 and directed issuance
22 of the certificate to intervenors. Instead of the notice and
23 appeal provisions of Order No. 98-01, Order No. 04-98 states
24 that:

25 "Beginning with the permit renewal cycle 1998-99,
26 the [commissioners] will adopt orders * * * to issue
27 new or renewal limited exemption certificates. The
28 orders will contain descriptions of the property
29 subject to the limited exemption certificate, and
30 will contain findings of fact and conclusions of law
31 regarding satisfaction of certificate conditions
32 * * *. The orders will also include a clarification
33 of the local review and appeal procedures to ensure
34 compliance with ORS 197.763 and ORS 215.422."
35 Record 17-18.

36 Petitioner appeals Order No. 04-98.

1 **STANDING**

2 Intervenor challenge petitioner's standing to bring this
3 appeal, arguing that no "hearing" was held at which petitioner
4 could "appear" within the meaning of ORS 197.830(2).¹
5 Intervenor argue that to have standing in this case,
6 petitioner would have to be "adversely affected" under ORS
7 197.830(3).² ORS 197.830(3) allows a person "adversely
8 affected" by a decision made without a hearing to appeal to
9 LUBA, notwithstanding that the person did not appear before
10 the local government. Intervenor dispute that petitioner is
11 "adversely affected" within the meaning of ORS 197.830(3).
12 Intervenor contend that a person can be "adversely affected"

¹ORS 197.830(2) provides:

"Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

- "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
- "(b) Appeared before the local government, special district or state agency orally or in writing."

²ORS 197.830(3) states:

"If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

- "(a) Within 21 days of actual notice where notice is required; or
- "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

1 by a land use decision only if that person owns property
2 adjacent to or within sight or sound of the subject property.

3 Petitioner acknowledges that he does not own property
4 adjacent to or within sight or sound of the subject property,
5 but contends that he is "adversely affected" by the decision
6 within the meaning of ORS 197.830(3) because he has been
7 deprived of his right to provide input to the decision maker
8 and his right to local appeal. Petitioner states that he is
9 an opponent of the application, and that he possesses and was
10 ready to present evidence and argument to the commissioners
11 during proceedings below showing that intervenors' proposed
12 expansion of their surface mining activities does not meet the
13 applicable criteria under the SMO. Petitioner contends that
14 the commissioners' refusal to allow any opposition testimony
15 during the proceedings below or allow for local appeal has
16 adversely affected petitioner within the meaning of ORS
17 197.830(3). Petitioner argues, in the alternative, that the
18 two proceedings conducted below were "hearings" subject to ORS
19 215.416, and that petitioner's attempts to participate in
20 those hearings are sufficient to "appear before the local
21 government" for purposes of ORS 197.830(2).

22 We need not address whether the county's refusal to allow
23 petitioner to participate in the proceedings below renders
24 petitioner "adversely affected" for purposes of ORS 197.830(3)
25 because we agree with petitioner that the two proceedings
26 below were "hearings" within the meaning of ORS 215.416 and

1 subject to the requirements of ORS 197.763, notwithstanding
2 the county's efforts to characterize them otherwise. We also
3 conclude that petitioner's efforts to participate in the
4 proceedings below, involving sending letters to the
5 commissioners and making requests to present evidence and
6 testimony during the two hearings, are sufficient to satisfy
7 the requirement that petitioner "appear before the local
8 government" within the meaning of ORS 197.830(2). Stated
9 differently, the appearance requirement is obviated where the
10 local government fails to abide by the statutorily mandated
11 procedures in a way that precludes petitioner's ability to
12 appear. Flowers v. Klamath County, 98 Or App 384, 389, 780
13 P2d 227 (1989). We conclude that petitioner has standing to
14 bring this appeal.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner argues that the county violated the
17 requirements of ORS 197.763, 215.416 and 215.422 when it
18 approved intervenor's application without providing any
19 opportunity for public input other than the applicant's.

20 We agree. The challenged decision is subject to the
21 requirements of ORS 197.763 and 215.416. The procedural
22 framework embodied in those statutes mandates that the county
23 provide opportunity for public input on land use decisions of
24 this type. The county has a certain range of choices in how
25 it goes about providing that opportunity, but under no
26 conceivable circumstances can it deny that opportunity

1 altogether, as it did here.

2 We do not understand intervenors to contend otherwise.
3 Intervenors' main response is that, while petitioner may have
4 demonstrated a procedural error, petitioner has not shown that
5 the county's failure to abide by the statutory requirements
6 has prejudiced petitioner's substantial rights, and thus
7 petitioner has not stated a basis for reversal or remand of
8 the county's decision. ORS 197.835(9)(a)(B).³ Intervenors
9 argue that the county made an administrative decision without
10 a hearing, pursuant to ORS 215.416(11) and thus that it was
11 required only to give notice of the decision in the manner
12 provided by ORS 197.763 and to provide an opportunity for
13 local appeal to those persons who would have had a right to
14 notice of a hearing, had a hearing been scheduled, or who are
15 adversely affected or aggrieved.⁴ Intervenors contend that

³ORS 197.835(9) provides, in relevant part:

"[T]he board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

⁴ORS 215.416(11)(a) provides:

"The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same

1 petitioner is not "adversely affected" by the decision, and
2 that petitioner would not have had a right to notice of a
3 hearing had a hearing been held. Because petitioner had no
4 right to notice of the decision or appeal, intervenors
5 conclude, the county's alleged procedural errors did not and
6 cannot prejudice petitioner.

7 Intervenor's argument is a variant of their position that
8 petitioner lacks standing, and is equally misdirected. Even
9 if intervenors are correct that the county made a decision
10 without a hearing as permitted by ORS 215.416(11)(a),
11 intervenors' argument ignores the fact that, under the
12 county's conduct and the terms of the challenged decision, no
13 person other than intervenors had any opportunity to provide
14 input or any right to local appeal. The county cannot rely on
15 a limitation imposed by ORS 215.416(11)(a) when the county has
16 completely disregarded its own obligations under that statute.
17 ORS 197.763 and 215.416 are designed to ensure that citizens
18 have the opportunity to participate in local land use
19 decisions. That opportunity is a substantive right, perhaps
20 the most fundamental right extended by Oregon's land use
21 system. The county's refusal to allow petitioner and other
22 opponents to participate in the proceedings it conducted
23 denied petitioner that substantive right. It follows that the

manner as required by ORS 197.763. An appeal from a hearings officer's decision shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a de novo hearing."

1 county has "failed to follow the procedures applicable to the
2 matter before it in a manner that prejudiced the substantial
3 rights of the petitioner." ORS 197.835(9)(a)(B).

4 The second assignment of error is sustained.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner argues that the challenged decision contains
7 no findings with respect to any of the applicable criteria
8 imposed by SMO 4.1, 4.3 and 4.4. ORS 215.416(8) and (9).

9 Intervenors respond that SMO 4.1, 4.3 and 4.4 govern
10 applications for limited exemption certificates, and that
11 intervenors' application was to renew an existing certificate,
12 which is governed by SMO 4.5. According to intervenors, SMO
13 4.5 contains no approval criteria, and thus the complete
14 absence of findings in the challenged decision does not
15 violate the requirements of ORS 215.416(8) and (9).⁵

16 We disagree with intervenors. SMO 4.5 requires that the
17 applicant submit information on its past, present and

⁵ORS 215.416(8) and (9) require:

"(8) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.

"(9) Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

1 projected surface mining activities to allow the county "to
2 determine continued eligibility." It is difficult to imagine
3 how the county could determine continued eligibility without
4 referring to the eligibility requirements at SMO 4.1, 4.3 and
5 4.4.⁶

6 Moreover, the decision approves a 40-acre expansion of
7 the area subject to the limited exemption certificate in
8 apparent violation of SMO 4.6, which prohibits expansion of
9 surface mining under limited exempt status affecting more than
10 one acre without obtaining an operating permit subject to
11 regulatory requirements. At oral argument, intervenors
12 explained that the renewal application was a partially
13 successful attempt to correct the boundaries of the mine to
14 reflect those described in the original 1972 certificate.
15 Even granting that to be the case, intervenors do not explain
16 why such correction would not require application of the
17 eligibility requirements stated in SMO 4.1, 4.3 and 4.4, and
18 hence an obligation to make findings regarding those criteria
19 pursuant to ORS 215.416(8) and (9).

20 The first assignment of error is sustained

21 The county's decision is remanded.

⁶It is equally difficult to imagine why, if renewal of a limited exemption certificate involves no approval criteria, review by first the committee and then the commissioners is necessary, and why renewal of intervenors' certificate required two separate hearings over a six-month period.