BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEWEY R. TRIBBET and JUDY TRIBBET, Petitioners, vs. BENTON COUNTY, Respondent.	LUBA No. 80-093 FINAL OPINION AND ORDER

Appeal from Benton County.

William G. Nokes, Corvallis, filed the Petition for Review and argued the cause for Petitioners Tribbet. With him on the brief were Nokes & Cohnstaedt.

Richard T. Ligon, Corvallis, filed the brief and argued the cause for Respondent Benton County.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

AFFIRMED 1/12/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

REYNOLDS, Chief Referee

NATURE OF THE PROCEEDINGS

Petitioners appeal Benton County's denial of their request for a conditional use permit to allow petitioners to build a personal residence on a 15.59 acre parcel located within an EFU-40 zone.

ASSIGNMENTS OF ERROR

Petitioners' assignments of error are procedural in nature. Petitioners' first assignment of error is that a proper appeal was not taken to the planning commission from the planning staff's original decision to approve the conditional use permit. Petitioners' second assignment of error is somewhat confusing, but seems to allege that the county changed the applicable policies and procedures between the time of the planning staff's approval and the time the planning commission concluded its review of the appeal. Petitioners claim that they had no notice of the change in procedures or policies governing approval of their conditional use permit.

Petitioners' third assignment of error is somewhat tied to the second assignment of error in that it is asserted that the county failed to adopt and publish the procedures and criteria which it used in reviewing the appeal and failed to notify petitioners as to what was expected and required of them. Petitioners' fourth assignment of error asserts that equal protection guaranteed by the United States Constitution has been denied petitioners. The basis for this claim relates back

to the county's alleged failure to follow its applicable procedures with the result that petitioners were treated differently than other people similarly situated.

STATEMENT OF FACTS

The planning staff, pursuant to Benton County's ordinance, granted approval to petitioners' conditional use request to place a residence on their 15 acre parcel. Petitioners also owned two 1 acre contiguous parcels upon one of which was a mobile home that petitioners used as their residence. Petitioners wanted to build a house on the 15 acre parcel and finance the construction of this house by selling the 1 acre parcel on which existed the mobile home. The planning staff approved the conditional use request. This occurred on September 28, 1979. Sometime between October 4, 1979 and October 12, 1979, a planning commission member, Gary Brumbaugh, orally notified the planning department that he wished to appeal the staff's approval. He did not, however, file a written appeal with the department until October 15, 1979, three days after the fourteen day time limitation for filing appeals.[1]

The planning commission first heard the appeal on October 23, 1979. However, it continued the hearing on the appeal in order to give Mr. Tribbet time to prepare his case. At this hearing Mr. Tribbet was advised of what the planning commission perceived to be the correct interpretation of the law, which was that the statewide planning goals and ORS 215.213(3)

applied to his request. The hearing was continued to November 27, 1979. Six days prior to this hearing, Mr. Tribbet submitted his written statement in support of his conditional use request in which he addressed the criteria in ORS 215.213(3). The planning commission heard the appeal on November 27, 1980, and voted to affirm the planning staff's grant of the conditional use request.

Sometime after this November 27, 1979 hearing it was discovered that the notice for the October 23rd hearing was inadequate. Therefore, the planning commission decided to publish proper notice and start over again. At its next hearing, the planning commission approved the conditional use request allowing the non-farm dwelling, but attached a condition to the approval requiring that the mobile home on the 1 acre parcel be removed.[2]

The Tribbets appealed the condition placed on the approval of their conditional use permit to the Board of Commissioners. The Board of Commissioners took the matter under advisement following a hearing and reversed the planning commission approval which would allow the new dwelling to be built on the 15 acre parcel. The Board of Commissioners did, however, allow petitioners to build a new dwelling on the same site as the existing mobile home. However, the Board of Commissioners' formal order simply stated that the petitioners' request for a dwelling on the 15 acre parcel was denied as not in conformance with ORS 215.213(3) and the county's zoning ordinance.

OPINION ON THE MERITS

Petitioners' first assignment of error is that the appeal of the planning staff approval of the conditional use permit was not timely and was made without a filing fee, in violation of the county's ordinance. The county has taken the position that (1) an oral appeal if made within the 14 day period satisfies the ordinance's requirement that an appeal be filed with the planning department, and (2) even if an oral appeal does not satisfy the ordinance the objection to the manner in which the appeal was made and the lateness of the filing of the written appeal was not timely raised by petitioners before the county.

We do not decide whether the county's position that an oral appeal satisfies the filing requirement is a reasonable reading of its ordinance because we believe the county has the authority to conclude that the failure to file a written appeal within the 14 day period required by the ordinance, if not objected to in a timely fashion, is not a jurisdictional defect requiring dismissal of the appeal. We conclude the county has the same authority with respect to the failure of an appellant to include a filing fee with an appeal filed by the county.

In the quasi-judicial or judicial arena, the question of when failure to follow certain requirements is a jurisdictional defect necessitating dismissal of an appeal is not entirely clear. However, it does appear that the trend is not to dismiss an appeal for failure to comply with procedural

requirements unless the legislative intent behind the procedural requirements clearly is that the requirements be construed as jurisdictional. See: B & L Holdings v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 80-004, Opinion and Order Denying Motion to Dismiss, 1980).[3]

The county is the one primarily charged with ascertaining the intent of and, hence, interpreting its own procedural requirements. The county adopted a 14 day filing requirement but has said in this case it did not intend for the requirement to be a jurisdictional requirement at least in the absence of a timely objection to a late filing. The county has also taken the position before this Board that the failure of the appeal to the planning commission from the planning official's action to include a filing fee is not a jurisdictional defect because it, too, has not been timely raised by the petitioners. These are both reasonable interpretations of the county's procedural ordinances and we are bound by them. Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904, (1977).[4]

In this case, the planning commission held three separate hearings on the appeal over a period of some four months. It wasn't until after the planning commissions' decision was appealed to the Board of Commissioners and approximately six months had elapsed from the time of the original appeal of the planning official's decision that the issue of timeliness of the appeal to the planning commission was ever raised. It appears from the record that at no time did petitioners raise

before the Board of Commissioners the matter of the failure of the appeal from the planning official's action to include a filing fee. Given these circumstances, it was appropriate in our view for the county to conclude the objection to the late filing of the written appeal was untimely, and it is appropriate for the county to now assert the objection raised in the petition for review to the lack of a filing fee is also untimely.

Petitioners' second assignment of error is that petitioners were not given adequate notice of the content and nature of certain "policy changes" made by the county and, thus, were unable to meet these policies. The "policy changes" made by the county consisted of a departure from the practice of allowing existing parcels of agricultural land to be built upon without first applying the criteria in ORS 215.213(3) or statewide planning Goal 3 (Agricultural Lands). Petitioners also argue under this assignment of error that once facts are found at, for example, the planning staff stage, as long as those facts are supported by evidence in the record they cannot be changed on appeal. The concerns expressed in petitioners' second assignment of error are adequately disposed of by the following from the county's brief which we adopt:

> "Respondent concurs that as a matter of procedural fairness an applicant for an administrative permit must be made aware of the standards to be utilized in making the decision. See Sun Ray Drive-In Dairy, Inc. vs. Oregon Liquor Control Commission, 16 Or App 63, 517 P2d 289 (1973). A review of the record herein reveals, however, that the Tribbets were very

much aware of applicable standards and had a fair opportunity to prepare their case utilizing those standards.

"As previously indicated, the County Planning Department improperly allowed several non-farm dwellings in EFU areas prior to Tribbet. The staff' (sic) approval of the Tribbet request raised the non-farm dwelling issue. At the October 23, 1979 Planning Commission meeting, Mr. Craig Greenleaf of LCDC, among others, discussed the requirement of applying the state laws, planning goals and court cases to non-farm dwelling request (record at p. 72, 73).

"It is uncontroverted that the state-wide goals apply to planning actions in any county which does not have an acknowledged comprehensive plan. South of Sunnyside v. Clackamas County Commissioners, 280 Or 1, 569 P2d 1063 (1977). Benton County's plan was not acknowledged as of the date of the Tribbet hearing. State planning goal No. 3 requires that agricultural lands such as the Tribbets' be preserved for farm uses unless an exception is taken to that goal, or a non-farm dwelling is approved pursuant to ORS 215.213(3). Rutherford v. Strong, 31 Or App 1319 (1977); Jurgenson v. Union County Court, 42 Or App 505 (1979). These decisions were handed down by the courts of this state and cannot be ignored by a local government. Like the government, the petitioners are charged with knowledge of, and compliance with, the laws of this state as interpreted by the courts. If a local government unknowingly makes an improper interpretation of a law, it is neither required, nor can it legitimately continue, to ignore the law when the proper interpretation becomes known. Such is the situation here. The state statute existed in clear terms at the time Mr. Brumbaugh filed his appeal. The County should have applied it in determining whether to locate a non-farm dwelling. When the Planning Commission realized at the October 23, 1979 meeting that the law was applicable, it postponed the meeting for over one month, to November 27, 1979, in order to review the situation and to give the Tribbets ample time to address the statutory criteria. The Tribbets submitted a written statement to the Planning Department prior to the November 27 meeting wherein they state that "The following information is written as burden of proof for the approval of putting a non-farm dwelling on EFU land..." The statement expressly discussed the criteria of ORS 215.213(3) for

non-farm dwellings. Clearly, the Tribbets had actual knowledge of the statutory standards as of that time and attempted to address them.

"Thereafter, as previously noted, the October 23 and November 27 meetings were rescinded due to failure to publish legal notice. A second Planning Commission public hearing on the matter was conducted on January 22 and continued to February 26, 1980. Petitioners relied on the same written statement in those meetings to support their burden of proof. The February 26, 1980 meeting occurred 91 days after the written statement was submitted by the petitioners, prior to the November 27, 1980 meeting. The January and February 1980 meetings were a separate proceeding unrelated to the earlier hearings, and were separately advertised. Petitioners could have presented any new evidence at these meetings which they desired. Even if petitioners could show that they did not have time to adequately prepare for the first meeting, they certainly were aware of the state laws and had adequate time to address them at the subsequent meetings."

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"Respondent rejects the suggestion that the Planning Commission is bound by staff's action. Nowhere in the Zoning Ordinance is the Planning Commission's authority to review a staff decision limited to a review of the staff record. Initial staff approvals of the type involved in this case are low level administrative decisons intended to relieve the Planning Commission of an excessive workload. They are not formal quasi-judicial hearings. A formal hearing is conducted for the first time on review before the Planning Commission. Section 20.04 of the County's Ordinance does not authorize a public hearing at the administrative level. Contrary to petitioners' assertion in Assignment of Error No. 4, full Fasano safeguards are not afforded at the Planning Official level. For example, persons are not given a formal opportunity to appear and testify or to cross-examine witnesses. The Commission is free to make it's own findings of fact on the appeal based on the Planning staff's report and the evidence presented at the hearing."

Petitioners' final assignment of error seems to assert a violation of the Fourteenth Amendment to the United States

Constitution in that petitioners claim they were treated differently than others similarly situated. A summary of petitioners' contention as set forth in their brief is as follows:

> "This is a case of governmental action depriving Petitioners of a constitutionally protected right to equal treatment under the applicable ordinances. No other Petitioner for a Conditional use under Benton County Zoning Ordinance Article XX, Section 20.04 had ever been granted staff determination of conditional use and then had a Planning Commissioner appeal the staff decision to the Planning Commission. As applied in this situation, this is unfair. If (sic) offends our commonly held sense of fair play and substantial justice for all who deal with governmental authorities."

Petitioners argument seems to be, in a nut-shell, that this is the first time anything like this has happened in Benton County. That fact alone, however, does not deprive petitioners of equal protection of the laws. In order to meet their burden of demonstrating a denial of equal protection under the laws, petitioners would have to establish a pattern or practice of action on the part of Benton County and a departure from that pattern or practice with respect to the petitioners. If petitioners had demonstrated that in the past in similar factual situations the county had acted differently than it did in this situation, then petitioners at least would have the foundation for an argument petitioners had been treated differently than others similarly situated. Petitioners, however, have failed to lay this minimal foundation. Accordingly, we deny petitioners' contention that they have

been denied equal protection of the laws under the United States Constitution.

For the foregoing reasons, the decision of Benton County in this matter is affirmed.

FOOTNOTES

1 Section 20.04, Benton County Zoning Ordinance, provides in pertinent part, as follows:

> "Conditional uses...may be processed by the Planning Official. Following a decision of the Planning Official, the applicant, property owners, Citizen Advisory Committee from the affected area, or the Commission may appeal a decision to a public hearing before the Commission by filing an appeal with the Planning Department within 14 days of the decision of the Planning Official. The appeal fee shall be the the same as the initial request.***"

2 The reason for the planning commission's condition, according to the county, is that staff research had revealed the three pacels owned by Tribbets were in contiguous ownership and that, therefore, the parcels were considered to be a single unit which could support only one dwelling. Since the mobile home already existed, it had to be removed if the dwelling were to be allowed.

3 For purposes of construing our own statute (Oregon Laws 1979, ch 772) we have concluded the requirements that a Notice of Intent to Appeal be filed with the Board within 30 days of the date of the decision and that the Petition for Review be filed within 20 days of the date of transmittal of the record are both jurisdictional requirements. We so concluded because the legislature, in our view, intended for these requirements to be strictly adhered to or result in dismissal of an appeal. See, e.g., Hayes v. Yamhill County, ___ Or LUBA ___ (LUBA No. 79-035, 1980).

4 Compare section 20.04 (footnote 1) with section 23.03 concerning appeals from planning commission decisions and which provides as follows:

> "A decision or ruling of the Commission pursuant to this Ordinance may be appealed to the County Board within fifteen (15) days after the Commission has rendered its decision. Written notice of the appeal

shall be filed with the Board of Commissioners stating the reason for the appeal and shall be accompanied with a fee equivalent to those fees applicable to the particular Planning Commission action being appealed. If the appeal is not filed within the period specified above, the decision of the Planning Commission shall be final. If the appeal is filed, the Board of County Commissioners shall receive a report and recommendation thereon from the Planning Commission and shall hold a public hearing on the appeal.

"A decision or ruling of the Commission pursuant to this Ordinance may be reviewed by the County Board upon its own initiative within fifteen (15) days after the Commission has rendered its decision. Written notive [sic] of review shall be given to the applicant or proponent before the Commission. The review shall then proceed as in matters of appeal from the Commission.

"No permits or authorization shall be issued until the decision of the Planning Commission is final." (Emphasis in original)

In section 23.03, the county has clearly stated its intent that in order for an appeal of a planning commission decision to be heard by the Board of County Commissioners, it must be filed within the prescribed time.