BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE JEFFERSON LANDFILL COMMITTEE and JEFF FAHEY, Petitioners, vs. MARION COUNTY, W.R. SCHLITT, W.R. SCHLITT, JR., and BROWNS ISLAND, INC., Respondents.	LUBA No. 82-005 FINAL OPINION AND ORDER

M. Chapin Milbank, Salem, filed the petition for review and supplemental memorandum, and argued the cause on behalf of Petitioners. With him on the brief was Schlegel, Milbank, Jarman & Hilgemann.

Robert C. Cannon, Salem, filed the response brief and argued the cause on behalf of Respondent Marion County.

Richard C. Stein, Salem, filed the response brief and supplemental memorandum, and argued the cause on behalf of Respondents Schlitt, Schlitt Jr., and Browns Island, Inc. With him on the brief were Ramsay, Stein, Feibleman & Myers.

BAGG, Chief Referee; KRESSEL, Referee; participated in this decision.

DuBAY, Referee; Concurring.

REMANDED 08/31/84

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal decisions of Marion County granting respondents' application for a major partition and a conditional use. The major partition divides a 160 acre parcel zoned Special Agriculture (SA) into two parcels of 48 and 112 acres. The conditional use authorizes construction and operation of a solid waste disposal site on the 412 acre parcel. Petitioners ask us to reverse the decisions.[1]

FACTS

The parcel is about 10 miles south of Salem and is east of the north Jefferson interchange on Interstate Highway 5. The area has mixed soil types including clay soils. It is characterized by oak woodlands with some Douglas Fir and Big Leaf Maple. Adjacent areas are in agricultural use.

The county commissioners heard the applications on October 21, 1981. A final order was issued approving the applications on December 23, 1981.

ASSIGNMENT OF ERROR NO. 1

> "The county erred in failing to allow the Marion County Planning Commission or Hearings Officer to initially consider the conditional use request or major partitioning."

Petitioners first allege the county violated its zoning ordinance by hearing the conditional use request itself rather than allowing the planning commission or hearings officer to hear the application. Petitioners state the Marion County

Zoning Ordinance (MCZO) provides that conditional use applications shall be made to the planning commission or hearings officer. MCZO 120.320-330. MCZO 122.060 provides that an application

> "shall not be granted except on approval by a majority of the members of the Planning Commission present and voting, or the Hearings Officer."

Petitioners assert this process is mandatory. The only way the county commissioners may hear the case is on appeal from the planning commission or hearings officer, according to petitioners.

Petitioners make the same argument with respect to the major partition. Petitioners point to the Marion County subdivision ordinance similarly requiring that a major partition request be submitted to the planning commission or hearings officer. There is no provision allowing the governing body to consider the application in the first instance.

Petitioners cite Downtown Community Association v. Portland, 3 Or LUBA 244 (1981) in support of their argument. In that case, we said the City of Portland violated its own ordinance because it granted a variance where (1) no applicaton for a variance had been filed and, (2) the city's code provided all variance requests had to be heard first by the planning commission or a hearings officer. Petitioners argue the case is directly applicable here even though the case was about a city ordinance enacted under the authority of ORS Chapter 227. The case here involves a county ordinance enacted under the

authority of ORS 215.406.

ORS 215.406 provides:

"(1) A county governing body may authorize appointment of one or more planning and zoning hearings officers, to serve at the pleasure of the appointing authority. The hearings officer shall conduct hearings on applications for such classes of permits and contested cases as the county governing body designates.

"(2) In the absence of a hearings officer a planning commission or the governing body may serve as hearings officer with all the powers and duties of a hearings officer."[2]

This statute was considered by the Oregon Supreme Court in South of Sunnyside Neighborhood League v. Clackamas County, 280 Or 3, 569 P2d 1063 (1977), hereinafter, Sunnyside. In that case, the court considered an argument alleging that because ORS 215.402 to 215.422 and the Clackamas County ordinance provided for action by the planning commission before action by the county commissioners, the commissioners lacked jurisdiction to hear a plan change request until the planning commission had reviewed it. The court said

"[p]etitioners also argue that the provisions of ORS 215.402-215.422, which provide for hearings and review in contested land use cases, require that action by either a hearings officer or the planning commission precede action by the Board on a quasi-judicial plan change. We do not agree. ORS 215.406 provides that, in the absence of a hearings officer, either the planning commission or the governing body may serve as the forum for a contested case hearing. Here, the Board itself held a full hearing. It did not purport to simply review the planning commission's action." (Footnotes omitted). Sunnyside, 280 Or at 9.[3]

In Sunnyside, the county board had before it a request to change the comprehensive plan. Under the provisions of ORS

215.050, it is the county governing body only which has the authority to adopt and revise a comprehensive plan. The adoption and revision of comprehensive plans is distinguishable from consideration of contested cases and the granting of permits under ORS 215.401 - ORS 215.438. Under ORS 215.406, and 215.416, a county governing body may appoint planning and zoning hearings officers or a planning commission to hear and decide applications "for such classes of permits and contested cases that the county governing body designates." There is no authority to delegate decisionmaking responsibility for enactment or revision of a comprehensive plan.

Marion County has chosen to give the planning commission or the hearings officer the authority to hear conditional use requests (and, also, requests to partition land). See MCZO 120.340-120.350 and ORS 92.044(2)(a) and (b). As of the date of the decisions on review, there was no provision in the Marion County Zoning Ordinance allowing the county governing body to consider such requests in the first instance.[4] Because the county commission delegated the power to act initially on permit applications to the planning commission, it was error for it to bypass that procedure in this case.

Having reached the above conclusion, however, we nonetheless can not grant the relief requested. We agree the county has committed error. However, the error is procedural in nature. We do not believe the county governing body, by granting the planning commission or hearings officer authority

to make land use decisions upon application, divested itself of jurisdiction to consider such applications in the first instance. The county governing body retains the ultimate power to decide the outcome of such applications because a decision by the planning commission or the hearings officer may be appealed to the governing body. Also, we note that MCZO 122.070 provides that the county commission may review a planning commission or hearings officer decision without a third party having filed an appeal. We conclude, therefore, that the delegation of power to the planning commission did not divest the governing body of jurisdiction to consider these applications for the conditional use and partitions. We will not presume the county has given up jurisdiction without a clear indication of such intent in the ordinance. See Sunnyside, 280 Or at 7-8. See also the concurring opinion of Judge Tanzer in Ayres v. Cannon Beach, 31 Or App 1337, 572 P2d 644 (1978); see also, Golf Holding Company v. McEachron, 39 Or App, 675, 593 P2d 1202 (1979).

Petitioners may obtain reversal or remand of these decisions on grounds of procedural error only if the error prejudiced their substantial rights. ORS 197.835(8)(a)(B). We conclude no such prejudice has occurred.[5] The basis of petitioners' argument is that they were not given findings of fact and conclusions of law by a hearings officer, an opportunity to review and prepare for an appeal before the board of county commisioners, and an appearance before a

"non-political, impartial initial review." However, the record discloses petitioners were given a full opportunity to participate in the county's proceedings. Having suffered no prejudice as a result of the error committed by the county, petitioners are not entitled to relief.

The first assignment of error is denied.

ASSIGNMENT OF ERROR NO. 2

> "There was insufficient or no evidence to support the multiple local and state criteria required to approve the site for a garbage dump."

The county ordinance requires applicants for a conditional use must meet the following standards:

> "(c) Uses in 136.030(b), (c) and (d) shall be situated on generally unsuitable land for farm use considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel.
>
> "(d) The following criteria apply to all uses in 136.030 except (a).
>
> "(1) The use is compatible with farm or forest uses and is consistent with ORS 215.243; and
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> "(2) It does not interfere seriously with farming or forest practices on adjacent lands; and
>
> "(3) It does not materially alter the stability of the overall land use pattern of the area; and
>
> "(4) Adequate fire protection and other rural services are available; and
>
> "(5) Will not have a significant adverse impact on timber production, grazing land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality and outdoor recreation activities; and
>
> "(6) The proposed use complies with the purpose and intent of the agricultural policies in the Marion County Comprehensive Plan." MCZO

136.040(c) and (d).

Petitioners' first complain the findings erroneously recite there will be no use of open (agriculture) land. Petitioners claim all the evidence in the record shows the site is composed of such land. They allege over 30% of the canyon (a portion of the site) appears to be Class III soil.[6] We understand petitioners to complain that the county is making use of agricultural land for a project which is not compatible with agricultural uses and with the Special Agriculture (SA) Zone.

The fact this facility may make use of open or agricultural land does not mean the decision must be reversed or remanded. See J.R. Golf Services v. Linn County, 62 Or App 360, 661 P2d 91 (1983).[7] Indeed, under MCZO 137.030(a), a landfill is a conditional use on agricultural land. Petitioners' concerns, then, must be directed at the validity of the conditional use permit, not at whether the facility is to be sited on agricultural land.

Petitioners next argue there is no substantial evidence to support the county's conclusion the facility will not interfere seriously with farming or forest practices. This conclusion is required by MCZO 137.040(d)(2). Petitioners assert there will be serious adverse impacts on water wells and raw crop land.[8] Further, they complain there is no evidence to support the county's statement the landfill will be less smokey, odorous and noisy than a farm.[9]

There is a hydrology report in the record concluding this

site is a groundwater discharge area. Record, Vol. V, App. I, pp. 18-21. The hydrologist concludes that conditions on the property will limit migration of contaminates. Record, Vol. V, App. I, p. 42.[10] Additionally, there is a report by Jeffrey R. Tross, a land planning consultant, concluding that

> "the possibility of the landfill affecting local groundwater conditions or any private wells is minimal. The nearest well that could be affected by the Creswell Drainage Basin is approximately 2200 feet from the landfill area, and there are only five wells within one-half mile of the site." Record, Vol. VI, Exhibit 30, p. 8.

There is also an engineering report in the record at Vol. V, Exhibit 27, §2, which similarly concludes that there will not be serious risk of surface and groundwater contamination. Further, the county has provided for monitoring of the site to insure that any pollution that does occur will be recognized. We believe these reports furnish substantial evidence for the county's conclusion that the facility will not interfere seriously with water quality. Braidwood v. City of Portland, 24 Or 477, 480, 546 P2d 777 (1976).

As to the challenge to the county's finding that the landfill will not have serious adverse impact on farm or forest uses, we note the report prepared by Jeffrey R. Tross concludes that noise, dust and odors produced by landfills have "little or no effect upon adjacent farm, forest or open space uses." Record, Vol. VI, Exhibit 30, p. 2. The report states also that the noise levels produced will not exceed those already

produced by Interstate Highway 5 as measured at nearby residences. Ibid, p. 11. Dust and odors will be controlled by compacting soil over the landfill on a daily basis. This evidence is sufficient to support the county's conclusion there will not be serious adverse impacts on farm and forest uses. See Roseburg Firefighters Local #1489 v. City of Roseburg, 292 Or 266, 277, 295 P2d 551 (1982).

Petitioners next attack the decision on the ground there is no effective fire protection in the area. Adequate fire protection is a requirement in MCZO 137.040(d)(4).

The county findings on fire protection are confusing. First, the county finds that fire protection and other rural services "must be available" before the conditional use is established. Record, 10. This condition is not a finding of compliance with applicable criteria. See Margolis v. City of Portland, 4 Or LUBA 89 (1981). However, in the next sentence, the findings recite the property is within the Turner and Jefferson Rural Fire Protection Districts. Fire protection will be furnished by a 10,000 gallon reservoir and an on-site water truck. Id. The findings also say there will be no burning on the site, and a firebreak road will extend around the perimeter of the site. The county then concludes that "these measures will provide adequate fire protection." Id. Next, the findings seem to reverse direction. They recite the landfill site is in close proximity to wooded areas, and a fire management plan is to be developed and approved to insure

surrounding property can be protected from a "potential" fire hazard. Id.

> "The landfill site is in close proximity to wooded areas which may be flammable during the dry season. A fire hazard management plan shall be developed and approved by the Turner Rural Fire Protection District, the Jefferson Rural Fire Protection District, and the State Department of Forestry, as a requirement of any approval, to insure that surrounding property can be protected from any potential fire hazard." Record, 10.

We understand the county's finding, then, to state there is little fire hazard associated with the facility, and there is adequate fire protection on-site. However, the county recognizes an off-site fire hazard requiring a fire hazard management plan which is, as yet, not in existence. There is, then, not a finding that adequate fire protection exists, but only that partial fire protection exists. Such a finding does not meet the criterion in MCZO 137.040(d)(4) requiring adequate fire protection. It is not enough to base compliance with the criterion on some future evidence, or in this case, a future planning effort. See Meyer v. City of Portland, __ Or App, ___, ___ P2d ___ (Slip Op of March 7, 1984).

The decision, therefore, must be remanded for findings showing compliance with MCZO 137.040(d)(4).

Petitioners next allege the county's finding that the watershed would not be adversely effected is not supported by substantial evidence. Protection of watershed is a requirement of MCZO 137.040(d)(5). Petitioners point to evidence that DEQ found leachate problems at the site. They cite to an exhibit

consisting of a large volume of several hundred pages. We will not search the exhibit to find evidence supporting petitioners claim. Also, we have previously discussed two reports in the record which address water quality. They furnish substantial evidence for the county's conclusion that the watershed will be adequately protected.

Petitioners next claim the county's finding there is no indication of potential for slope instability is without evidentiary support in the record. Petitioners say there is evidence in the record the area is a potential trouble spot because of steep slopes. Petitioners cite generally to Exhibits 51, 41, 46 and 50.

A geology report in the record at Vol. 7, pp. 539-540 concludes there is little danger of slope failure as a result of the project. This expert testimony furnishes substantial evidence to support the county's conclusion. Valley & Siletz Railroad v. Laudahl, 56 Or App 487, 642 P2d 337, rev dis, 296 Or 779 (1984). Petitioners have not explained how the report fails to address issues which might render the county's conclusion incomplete or not responsive to the criterion.

The next complaint is that there was no evidence of the county's ability to cover the site during the winter months. This inability could adversely affect air and water quality, as we understand petitioners' complaint.

We do not understand how air and water quality will be adversely affected even if there is no ability to cover the

site during the winter months. Petitioners must do more than advise us of a matter of fact and leave us to conjure up reasons why this fact means a criterion is unmet. In this instance, we do not know whether it is appropriate or necessary to cover the site during winter months.

The last complaint in this series is that there was no meaningful study of whether disposing of garbage by conversion into energy would be feasible. Petitioners point to attempts by private industry to present plans for such conversion. See, Vol. IV, p. 327. Petitioners fail to cite us to any requirement in the county ordinance that energy conversion must be considered. We therefore decline to hold the county in error for an alleged failure to perform an unnecessary act.[11]

The Second Assignment of Error is denied.[12]

The conditional use and partition granted by Marion County are remanded. In the manner prescribed by applicable county ordinances,[13] the county must consider whether the applications meet the requirements of MCZO 137.040(d)(4) (requiring fire protection). If the standard is deemed satisfied, findings of fact and reasons explaining why this is so must be included in the final order.

DuBay, Referee, Concurring.

Although I concur in the view this case must be remanded, I take a different view than the majority on the first assignment of error. The majority characterized the action of the county board of commissioners in hearing and deciding the conditional use application as procedural error. I believe the county's failure to follow its own ordinance providing for planning commission or hearings officer approval of the application was a more fundamental error.

I agree with the majority the case here is distinguishable from the setting in which the Supreme Court decided South of Sunnyside Neighborhood League v. Clackamas County, 280 Or 3, 569 P2d 1063 (1977). Here, a statute allowed the county to delegate to the planning commission or hearings officer some of the county's authority to decide conditional use applications. ORS 215.406. There was no statutory power to delegate in Sunnyside. In making the delegation, the county gave complete authority to the planning commission and hearings officer to make conditional use permit decisions. See MCZO 122.060.

Although Marion County retained the authority to review the decisions of the planning commission and hearings officers on appeal, the ordinance delegated final decisionmaking authority in all cases except those appealed. The grant of such power to the planning commission and hearings officer can be considered a divestiture by the board of commissioners of their power to make initial decisions on these applications. See Judge

Tanzer's concurring opinion in Ayres v. City Council of Cannon Beach, 31 Or App 1337, 1342, 572 P2d 664 (1978).

True, the board of commissioners did not, and likely cannot, divest themselves of their legislative authority to reassign the delegated powers back to themselves. Until they do so, however, they must follow their own ordinances. As of the date of this decision, they had not. Therefore, I would remand on this point also. See Weiner and Associates, Inc. v. Caroll, 276 A2d 732 (Del. 1971).

> "Such delegated powers and functions may not be reclaimed summarily by the council at will. The council may not preemptorily interpose and substitute itself in the place of the Commission in the performance of powers and duties thus lawfully assigned to the commission. Nowhere in the statute or the regulations is there reserved to the city council the power to intervene in the Commission's deliberations and decisions or to substitute itself for the Commission; nor is there reserved to the council power summarily to review and reverse decisions made by the Commission. Having failed to reserve the power to review and reverse action of the Planning Commission, it is clear on the face of the Land Subdivision Regulations that the decisions of the Planning Commission made in accordance therewith are final, subject only to judicial review." Weiner, 276 A2d at 735.

FOOTNOTES

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1 This case is before us on remand from the Supreme Court. Our previous review of the matter resulted in a dismissal for lack of standing. Jefferson Landfill Committee v. Marion County, 6 Or LUBA 1 (1983). That decision was appealed to the Court of Appeals which sustained the decision in Jefferson Landfill Committee, et al v. Marion County, 65 Or App 319, 671 P2d 763 (1983). The Supreme Court accepted review and reversed the decision holding petitioners did have standing to bring the appeal. Jefferson Landfill Committee, et al v. Marion County, 297 Or 280, ___ P2d ___ (1984).

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2 A similar statute exists for cities. ORS 227.165 provides:

> "A city may appoint one or more planning and zoning hearings officers, to serve at the pleasure of the appointing authority. Such an officer shall conduct hearings on applications for such classes of permits and zone changes as the council designates."

There is no counterpart to ORS 215.406(2), however.

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3 Under ORS 215.402(1), contested case means:

> "A proceeding in which the legal rights, duties or privileges of specific parties...are required to be determined only after a hearing of which specific parties are entitled to appear and be heard."

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4 There is now such a provision. Because this case is to be remanded, under the provision of MCZO 110.765 the county will be free to consider this matter without routing it first to the planning commission or hearings officer.

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5 See 1979 Or Laws, Ch 772, §5(4)(a)(b).

[6] Land composed of U.S. Soil Conservation Service Class III soil is agricultural land under LCDC Goal 3.

[7] Also, the fact that a single line out of a several page finding document may be ambiguous, unclear or, indeed, not supported by substantial evidence in the record does not necessarily mean that the decision must be reversed or remanded. Only where a findings is critical to a showing of compliance with required criteria will such an error result in reversal or remand. Patzkowsky v. Klamath County, 8 Or LUBA 64 (1983).

[8] Petitioners also challenge what is described in the finding as a positive response from the Department of Environmental Quality (DEQ). We understand petitioners to quarrel with DEQ's issuance of a preliminary approval for the landfill because DEQ did not compare the site with other sites and did not detail specific reasons why the existing dump facility had to be closed. Petitioners add there is no evidence as to what corrective measures might be taken should groundwater be found to be contaminated by this facility.

We do not regard the finding about DEQ to be required by any county approval criterion. Therefore, we see no need to discuss what appears to be only a comment about the county's finding.

[9] The county's finding under attack is one labeled "Non-Interference" appearing at pages 9 to 10 of the record.

[10] We are also cited to a letter from DEQ appearing at page 96 of the record which respondents say shows wells will not be seriously impacted. The letter does not address wells, it addresses contamination of water for irrigation purposes.

[11] See MCZO 137.040(e)(3). This provision requires a use not have adverse long-term energy consequences. The requirement, however, is not even applicable unless MCZO 137.040(d) can not be met. The requirements of MCZO 137.040(d) were met. Therefore, we do not understand how MCZO 137.040(e)(3) applies.

[12] In this assignment of error, petitioners also allege the decision violates statewide planning Goal 1 and Goal 2. We note that Marion County's Comprehensive Plan has been acknowledged. We therefore lack authority to consider the goal claims. Fujimoto v. LUBA, 52 Or App 875, 630 P2d 364, rev den, 291 Or 662 (1981).

[13] As discussed in Footnote 4, supra, Marion County Ordinances now provide for initial consideration of permit applications by the county commission.