BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT L. COATS, Petitioner, vs. CROOK COUNTY, Respondent.	LUBA No. 88-123 FINAL OPINION AND ORDER

Appeal from Crook County.

Frank M. Parisi, Portland, represented petitioner

Thomas N. Corr, Prineville, represented respondent.

HOLSTUN, Referee; SHERTON, Chief Referee,; KELLINGTON, Referee, prticipated in the decision.

REMANDED 11/08/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner's application for a conditional use permit to develop and operate a rock quarry was denied by the Crook County Planning Commission (planning commission). Petitioner appeals a Crook County Court (county court) decision dismissing petitioner's appeal of the planning commission's action on the conditional use permit.

FACTS[1]

On September 28, 1988, the planning commission voted to deny petitioner's application for a conditional use permit to develop and operate a rock quarry in what is referred to as the "Lone Pine" area of Crook County. The planning commission's written decision is dated October 13, 1988.

On October 21, 1988, petitioner filed a notice of appeal to the county court, specifying ten errors in the planning commission's decision.[2] On October 26, 1988, the county court considered the notice of appeal in executive session with county

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[1]The statement of facts that follows is substantially identical to the statement of facts contained in our August 9, 1989 order on respondent's motion to dismiss.

[2]Crook County Zoning Ordinance (CCZO) 9.030 requires that a notice of appeal of a planning commission decision on a conditional use permit "must be filed with the county within 15 days after the [planning commission] decision * * *." Assuming the planning commission's decision became final on October 13, 1988, as the parties apparently do, petitioner's appeal was filed seven days after the planning commission's decision.

As discussed later in this opinion, CCZO 9.030 also requires that a notice of appeal set forth "the specific grounds for appeal * * *."

counsel.[3] Apparently at the county court's direction, county counsel placed a telephone call to petitioner's attorney on October 27, 1988. During that conversation, petitioner's attorney agreed to grant the county additional time in which to consider the appeal,[4] and agreed to provide clarification, during the week of October 31 through November 4, concerning six of the ten alleged errors in the notice of appeal.

On November 8, 1988, county counsel wrote to petitioner's attorney reminding him of his agreement to provide additional clarification concerning six of the alleged errors in the notice of appeal. County counsel concluded in this letter that since the appeal period expired on October 31, 1988, and petitioner had not provided the requested clarification by November 4, 1988 as agreed, "I can only conclude you have withdrawn your appeal." Response to Motion to Dismiss Exhibit D.

On November 9, 1988, the county court apparently voted to dismiss the appeal. In a November 11, 1988 letter to county counsel, petitioner's attorney argued it was inappropriate to dismiss the entire appeal since clarification had only been requested for six of the ten errors specified in the notice of appeal. Petitioner's attorney also disputed having ever been told the county viewed the notice of appeal as failing to comply

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[3]The parties take different positions about what occurred during the executive session.

[4]Under CCZO 9.030(1), the county court is required to hold a hearing within 30 days from the time a notice of appeal is filed.

with CCZO 9.030, stating:

> "It was my understanding that you were simply asking me to make the notice of appeal more specific as a matter of courtesy, much in the same way that you were asking for an extension of time for the hearing. As a matter of courtesy I agreed to do both, though I did not believe that I was compelled to do either. It took longer than I expected simply [due to] other commitments." Response to Motion to Dismiss Exhibit E.

Petitioner's attorney concluded his November 11, 1988 letter by providing further specification concerning the six disputed allegations of error in the notice of appeal.

The county court considered petitioner's attorney's November 11, 1988 letter on November 23, 1988. On November 28, county counsel advised petitioner's attorney that the county would proceed with the appeal limited, however, to the four grounds that were adequately specified in the October 21, 1988 notice of appeal.

In a November 29, 1988 letter, petitioner's attorney responded to the November 28, 1988 letter, making several points. First, he stated that petitioner did wish a hearing before the county court on December 12, 1988. Second, he agreed that if the county court limited petitioner to four of his ten allegations of error, petitioner would so limit his argument to the county court. Third, he stated that by agreeing to limit his argument to the county court, petitioner did not waive his right to argue to LUBA that his notice of appeal was adequate regarding the six disputed allegations of error.

In an order dated December 7, 1988, the county court

dismissed petitioner's appeal as "untimely and inappropriately filed." Motion to Dismiss Exhibit A. This appeal followed.

DECISION[5]

As noted above, the notice of appeal filed by petitioner on October 21, 1988 specified ten errors.[6] That notice of appeal

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[5]On August 9, 1989, we issued an order denying respondent's motion to dismiss this appeal proceeding. Although no record, petition for review or response brief has been filed in this proceeding, the parties agree that we may determine the only issue presented in this appeal, i.e., whether the county court erred in dismissing petitioner's notice of appeal as "untimely and inappropriately filed," based upon the legal arguments and evidence presented by the parties in conjunction with their arguments concerning the motion to dismiss.

[6]The ten alleged errors are as follows:

"1. Bias, prejudice, interest in the outcome, ex parte contacts, and other improper conduct by the Planning Department, and members of the Planning Commission;

"2. The admission of repetitive and irrelevant evidence;

"3. Failure to grant applicant a fair and impartial hearing;

"4. Failure to make findings for which there was sufficient evidence in the record;

"5. Failure to make conclusions of law which were supported by the evidence and findings;

"6. Failure to allow applicant to make an objection on the record of an interest in the outcome by a member of the Planning Commission (see Exhibit A);

"7. Misinterpretation of LCDC Goal 5 and the Goal 5 rule, and failure to protect Goal 5 resources;

"8. Misinterpretation of and failure to follow other LCDC planning goals, the land use planning statutes, the Crook County Comprehensive Plan and Zoning Ordinance, state mining laws, state and federal antitrust laws, and state and federal laws with respect to competitive bidding on public contracts;

"9. The decision was based upon findings of fact that were not supported by sufficient evidence in the record; and

was filed well within the 15 day deadline for filing a notice of appeal under CCZO 9.030. Assuming that notice of appeal was adequate to comply with the requirement in CCZO 9.030 that the notice state "the specific grounds for the appeal setting forth the error and the basis for error sought to be reviewed," the county court was obligated under CCZO 9.030 to hold a hearing on the appeal within 30 days after the notice of appeal was filed.

The only evidence presented to LUBA of what the county court directed county counsel to do on October 26, 1988 is an entry in the county court's journal which states:

> "An executive session was called at the request of county counsel to discuss the appeal filed by attorneys representing Mr. Coats. Following the executive session, the court directed county counsel to contact Mr. Coats' attorney for issue clarification." Response to Motion to Dismiss Appendix F.

The evidence of what actually transpired during the October 27, 1988 telephone conversation between county counsel and petitioner's attorney is sketchy, conflicting and embodied only in after-the-fact statements by participants in the call.[7]

> "10. The decision was based upon conclusions of law that were incorrect and not supported by the findings or the evidence in the record." Response to Motion to Dismiss Exhibit A.

Exhibit A, referred to in the sixth allegation of error above, is a letter to the planning commission from petitioner's attorney arguing that one of the planning commission members, a competitor of petitioner, had an actual conflict of interest, making his participation in petitioner's conditional use permit application inappropriate.

[7]In his November 8, 1988 letter, county counsel states he told petitioner's attorney that the county court concluded the notice of appeal did not satisfy CCZO 9.030. County counsel further states in the letter

As we see it, the critical fact concerning the October 26, 1988 county court meeting and the October 27, 1988 telephone call is one which apparently is not disputed. Petitioner was asked to supply additional clarifying information concerning six of his ten allegations of error and was given until November 4, 1988, four days after the October 31, 1988 deadline established by CCZO 9.030, to do so. From this we infer that the other four allegations of error in the notice of appeal were considered by the county court to be sufficient to comply with CCZO 9.030. The adequacy of petitioner's specification of the other four allegations of error was later confirmed by the county court when it invited petitioner, on November 28, 1988, to proceed with an appeal limited to those four allegations of error.

In its December 7, 1988 decision to dismiss the entire appeal, the county court explained its decision as follows:

> "(9) Crook County Counsel received a letter from Mr. Lilly on November 11, 1988, in which among other matters, he argued:
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> > "'Even if the County Court was acting properly in dismissing a portion of the appeal it cannot dismiss the entire appeal when you sought clarification on only some of the points raised in the notice.'
>
> "The County Court considered that statement and

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that petitioner's attorney was allowed time after the October 31 deadline for filing a notice of appeal to submit information to comply with CCZO 9.030. According to county counsel's letter, petitioner's attorney agreed to do so by November 4, 1988, but failed to submit the promised information. Petitioner's attorney states, in an affidavit, that the request for information was viewed as a courtesy and explicitly denies that at any time during the phone conversation was he advised that the county viewed the notice of appeal to be insufficient to comply with CCZO 9.030.

its merits on November 23, 1988. On November 28, 1988, Crook County Counsel wrote a letter to Mr. Lilly advising him that the County Court had 'made the determination that there is merit to [Mr. Lilly's] observation that the Notice of appeal may be perfected as to items 6, 7, 9, and 10,' * * * (emphasis in original) and that the Court on that basis would be willing to proceed to an appeal hearing in only those four points.

"(10) The County Court further finds that the language of applicant's attorneys [sic] letter of November 29, 1988, was unconvincing that applicant's attorneys' [sic] have accepted any responsibility for their untimely and inappropriately filed Notice of Appeal.

"(11) The Crook County Court in its duly and regularly scheduled meeting on December 7, 1988 unanimously determined, after reviewing the matter to date, that the appeal had not been timely or appropriately perfected and that a written order dismissing the Notice be issued this date." Order Dismissing Appeal 4.

The county court apparently viewed allegations of error six, seven, nine and ten, see n 6 supra, as sufficient on November 28, 1988, yet it dismissed the appeal without stating whether, or giving any explanation of why, it changed its view regarding the sufficiency of those allegations of error to comply with CCZO 9.030.[8] We cannot say as a matter of law that those allegations of error are inadequate to comply with CCZO 9.030. We conclude the county court's dismissal of petitioner's notice of appeal, as to allegations of error six,

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[8]The only explanation the county court suggests is it found the petitioner's attorney had accepted no responsibility for the manner in which the notice of appeal was filed. This does not explain why the county court might now view the notice of appeal to be inadequate regarding allegations of error six, seven, nine and ten.

seven, nine and ten was, therefore, in error. Because dismissal as to those allegations of error was erroneous, the county's decision must be remanded so that the county court may consider petitioner's appeal concerning those allegations of error.[9]

In view of our decision that this case must be remanded to the county to consider petitioner's allegations of error six, seven, nine and ten, we do not determine at this point whether we agree with the county's apparent view that allegations of error one through five and eight are inadequately specified. Nowhere in the county court's decision does it explain why assignments of error one through five and eight do not provide the minimal specificity required by CCZO 9.030. As with allegations of error six, seven, nine and ten, we are unable to determine as a matter of law that they are insufficient to

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[9]We do not mean to imply that the county might not be able, on remand, to explain adequately why petitioner's allegations of error six, seven, nine and ten are inadequate to comply with CCZO 9.030. However, should the county elect that course, we believe the Court of Appeals' decisions in Bryant v. Clackamas County, 56 Or App 442, 643 P2d 649 (1982), and Hilliard v. Lane County Commr's., 51 Or App 587, 626 P2d 905, rev den 291 Or 368 (1981), may provide some guidance in determining whether such a position can be justified in this case.

In Bryant v. Clackamas County, supra, the court held that failure to include the concise description of the land use decision required in a notice of intent to appeal to this Board by OAR 661-10-030 was not a material error. In Hilliard v. Lane County Commr's., supra, the Court of Appeals made it clear that LUBA is not to invoke "technical requirements of pleading having no statutory basis" in dismissing appeals before this Board. Id. at 595. Although under ORS 215.422(1) the county may prescribe local appeal procedures, we believe the appellate courts would similarly require that a local government not impose overly formalistic and technical pleading requirements in its land use appeals.

comply with CCZO 9.030.[10]

The county's decision is remanded.[11]

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[10]We note, however, much of our discussion in n 9 could have some bearing on allegations of error one through five and eight as well, particularly in view of the fact that the county allowed additional time past October 31, 1988 for petitioner to provide the requested additional clarification. Although petitioner apparently did not provide that clarification by November 4, 1988 as agreed, it was provided by November 11, 1988.

Although past practice may not be controlling, we further note petitioner claims on page 2 of his November 11, 1988 letter that respondent has permitted abbreviated allegations of error in the notice of appeal in prior cases, with more detailed briefs being filed later, prior to the hearing before the county court.

[11]ORS 197.830(13)(b) provides:

> "The Board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the Board finds presented a position without probable cause to believe the position was well founded, and primarily for a purpose other than to secure appropriate action by the Board."

Petitioner argues we should award reasonable attorney's fees because respondent's dismissal of his notice of appeal "was respondent's method of 'punishing' petitioner" for refusing to waive his rights to seek review before LUBA concerning allegations of error one through five and eight. Petitioner also claims (1) there are numerous misstatements of fact in the county court's order, (2) requiring "clarification and perfection" has no basis in the code, and (3) the county court consistently violated public meetings law requirements during the proceeding below.

With one exception, we do not believe petitioner identifies positions presented by the county that might give rise to an award of attorney's fees under ORS 197.830(13)(b).

The exception is the possibility that the county's apparent change of position concerning the adequacy of allegations of error six, seven, nine and ten was based solely on petitioner's refusal to waive his right to contest the correctness of the county's dismissal of the remaining allegations of error before LUBA or the appellate courts. We conclude, supra, that we cannot determine as a matter of law whether allegations of error six, seven, nine and ten satisfy CCZO 9.030 and that the county court must do so on remand. However, we note that if the county attempted to defend before this Board a position that allegations of error six, seven, nine and ten were inadequate and we (1) found that position to be presented "without probable cause to believe it was well founded," and (2) were convinced that the reason the county adopted that position was petitioner's refusal to waive his rights on appeal to this Board, an award of attorney's

fees might well be in order. Clearly, it is improper to require that a party give up its right to assert error on appeal as a requirement for proceeding with otherwise properly presented parts of a local appeal.

However, at this point we are unable to agree with petitioner that his appeal was dismissed because he would not agree to waive his right to assert error in the county's treatment of allegations of error one through five and eight. Although there is evidence in the record to suggest the county may have had this motive, it is not sufficient for us to conclude that this was the basis for the county's dismissal of the appeal. We note that the county's December 7, 1988 order emphasizes that the allegations of error "may be perfected as to items 6, 7, 9, and 10." Although petitioner is correct that the county does not explain what it means by "perfected" we understand the county to suggest that allegations of error six, seven, nine and ten might or might not be sufficiently specific to comply with CCZO 9.030. Although we conclude the county did not adequately explain why these allegations of error do not comply with CCZO 9.030 in view of the county court's prior position that they were adequate, this may have been the basis for the county's decision and, if so, an award of attorney's fees would not be appropriate under ORS 197.830(13)(b). In view of our uncertainty concerning the county's reason and motives for dismissing the notice of appeal, we conclude an award of attorney's fees under ORS 197.830(13)(b) is not warranted.