BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON,	)	
	)	
Petitioner,	)	LUBA No. 89-132
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
LANE COUNTY,	)	
	)	
Respondent.	)	

Appeal from Lane County.

Neil S. Kagan, Portland, filed the petition for review and argued on behalf of petitioner.

Stephen L. Vorhes, Eugene, filed the response brief and argued on behalf of respondent.

SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 02/21/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals Lane County Ordinance No. 10-89, which amends the Lane Code (LC) to implement provisions of ORS 197.763 concerning procedures required for quasi-judicial hearings on land use applications.

FACTS

In 1989, the Oregon legislature enacted "raise it or waive it" provisions applicable to all quasi-judicial land use hearings before local governing bodies, planning commissions and hearings officers.[1] ORS 197.763. ORS 197.763(2), (3) and (5) include detailed provisions concerning the notices which a local government must give prior to and at the commencement of a quasi-judicial land use hearing. ORS 197.763(4) and (6) establish requirements concerning submittal of evidence by the applicant at the time notice of the hearing is given, availability of local government staff reports prior to the hearing and keeping the local government record open after conclusion of the initial evidentiary hearing. ORS 197.763(1), (2)(e) and (5)(c) state that failure to raise an issue prior to the

[1]The 1989 provisions replaced "raise it or waive it" provisions enacted in 1987, which were applicable only to hearings before local governing bodies on applications for development of property entirely within urban growth boundaries, and which (1) required the local government to give certain notices prior to and at the commencement of the hearing; and (2) precluded appeal on issues which were not raised at the hearing. The 1987 provisions were codified at ORS 197.762.

close of the record at or following the local government's final evidentiary hearing precludes raising that issue in an appeal to this Board.[2]

In September 1989, the county initiated legislative proceedings to adopt an ordinance amending the LC to implement the provisions of ORS 197.763. On October 4, 1989, Ordinance No. 10-89 was adopted. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by amending the county code to require persons other than an applicant to submit written evidence exceeding two pages in length at least ten days in advance of the evidentiary hearing on an application for a land use decision."

Ordinance No. 10-89 amended subsection (5) of LC 14.300 ("De Novo Hearing Procedure") to provide as follows:

> "Written Materials. All documents or evidence relied upon by the applicant shall be submitted to the [Planning] Department and made available to the public at least 20 days prior to the first evidentiary hearing. Unless otherwise specified by the Approval Authority, all other written materials, documents or evidence, exceeding two pages in length must be submitted to and received by the Department at least 10 days in advance of

[2]The 1989 law which enacted ORS 197.763, Oregon Laws 1989, chapter 761, also amended ORS 197.830(10) to add that issues raised in a petition for review filed with this Board shall be limited to those raised by any participant before the local government hearings body, as provided in ORS 197.763, unless the local government failed to comply with the procedural requirements of ORS 197.763 or the local government's decision is significantly different from the proposal described in its notice of hearing. Oregon Laws 1989, chapter 761, section 12.

the hearing. The Approval Authority may allow written materials to be submitted and received after this 10-day deadline if:

"(a) The written materials are solely responsive to written materials submitted at least 10 days in advance of the hearing, and

"(b) The responsive, written materials could not have been reasonably prepared and submitted at least 10 days in advance of the hearing.

"If additional documents, evidence or written materials are provided contrary to the above deadlines, any party shall be entitled to a continuance of the hearing. Upon request, the application file containing these materials shall be made available to the public by the Department for inspection at no cost and copies will be provided at reasonable cost." (Emphasis added.)

Petitioner argues that the provision of LC 14.300(5) emphasized above is inconsistent with both the letter and spirit of ORS 197.763.[3] Petitioner argues:

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[3]The provisions of ORS 197.763 relevant to this opinion provide as follows:

"(1) An issue which may be the basis for an appeal to the board 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. * * *

"* * * * *

"(3) The notice provided by the jurisdiction shall:

"* * * * *

"(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide sufficient specificity to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

"(f) Be mailed at least:

"(A) Twenty days before the evidentiary hearing; or

"(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

"* * * * *

"(h) State that a copy of the application, all documents and evidence relied upon by the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

"(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; * * *

"* * * * *

"(4) (a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public at the time notice provided in subsection (3) of this section is provided.

"(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. * * *

"(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

"(a) Lists the applicable substantive criteria;

"(b) States that testimony and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; * * *

"* * * * *

> "The quid pro quo inherent in [ORS 197.763] is plain: to compensate for eliminating the opportunity to raise new issues before [LUBA], more persons get better information sooner so they will have a better opportunity to prepare for the hearing and raise all issues at the local government level." Petition for Review 7-8.

Petitioner argues that ORS 197.763 imposes, for the first time, a statewide requirement that notice of an evidentiary land use hearing be mailed at least 20 days before the hearing. ORS 197.763(3)(f)(A). Furthermore, ORS 197.763 requires that by the time the notice is mailed, all evidence relied upon by the applicant must be submitted to the local government. ORS 197.763(4)(a). Additionally, the notice must alert prospective participants that they must raise an issue in the hearing in order to preserve the right to appeal on that issue to LUBA. ORS 197.763(3)(e).

Petitioner further contends that the notice of hearing must also provide prospective participants with resources to help them meet this burden of raising all issues at the hearing -- including an explanation of the nature and location of the proposed use; a list of approval criteria; the name of a local government representative to contact for more information; an explanation of hearing procedures; a

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> "(6) Unless there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. * * *
>
> "* * * * *"

statement that the application and evidence relied on by the applicant are available for inspection; and a statement that a staff report will be available for inspection at least seven days prior to the hearing. ORS 197.763(3)(a)-(c), (g)-(j). According to petitioner, the only plausible reason for requiring provision of such notice to prospective participants is to enable advance preparation for the hearing, specifically, 20 days in advance.[4]

Petitioner argues that other provisions of ORS 197.763 also indicate the statute entitles prospective participants to have 20 days to prepare for a hearing, not the ten days which would be provided by the appealed ordinance. Petitioner points out that ORS 197.763(1) requires a participant to raise issues "not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government." (Emphasis added.) Petitioner contends that under ORS 197.763(1), participants are entitled to raise new issues any time up to the close of the hearing record. Petitioner argues that because new issues may be raised any time before close of the record, participants must also be allowed to present evidence until the close of the hearing record.

Petitioner also points out that ORS 197.763(5)(b)

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[4]Petitioner notes that a prospective participant may actually have something less than 20 days from the time he or she receives the notice to prepare for a hearing because, under ORS 197.763(3)(f)(A), the local government need only mail the notice at least 20 days before the hearing.

requires a statement to be made at the commencement of the hearing that "testimony and evidence must be directed toward the criteria described in [the notice] or other criteria in the plan or land use regulation which the person believes to apply to the decision." Petitioner argues that, contrary to the appealed ordinance, this statutory notice requirement recognizes no limitation whatsoever on the form or length of evidence which may be presented at the hearing itself.

Petitioner maintains that ORS 197.763(6) grants all participants in an evidentiary hearing the unqualified right to introduce any evidence into the record for a minimum of seven days after the conclusion of the evidentiary hearing, unless there is a continuance. Petitioner contends that the appealed ordinance would impermissibly eliminate or limit that right by (1) not allowing written evidence longer than two pages to be submitted on issues not raised at least ten days prior to the hearing; and (2) requiring participants to establish that written evidence longer than two pages, responsive to issues raised at least ten days before the hearing, could not reasonably have been submitted ten days prior to the hearing.

Petitioner also contends the legislative history of ORS 197.763 supports an interpretation that participants in local government quasi-judicial land use hearings are entitled to at least 20 days in which to prepare for such hearings. Petitioner points out that an earlier version of

the bill which enacted ORS 197.763 would only have required that notice be mailed at least ten days prior to the hearing. According to petitioner, the notice period was expanded to 20 days to provide participants additional time to prepare for the hearing. Petitioner quotes the testimony of a Department of Land Conservation and Development (DLCD) staff member concerning the proposed amendments before the House Environment and Energy (E&E) Committee that "[w]ith those improved notice [requirements] the assumption is all parties will have an opportunity to effectively participate at the local government level." Petition for Review App. 88.

Petitioner also argues that the legislative history of the ORS 197.763(4)(b) provision requiring a staff report to be available prior to the hearing is relevant, because it shows that the legislature intended participants (other than the applicant) to have at least until the hearing itself to make their cases. Petitioner points out the original version of what is now ORS 197.763, in HB 2288, contained no such provision. According to petitioner, it was only after testimony by DLCD staff and others, stating that participants needed to be able to review a staff report before the hearing in order to prepare their presentations to be made at the hearing, that HB 2288 was amended to include the requirement that a staff report be made

available at least seven days prior to the hearing.[5]

Petitioner maintains that the challenged provision of LC 14.300(5) improperly reduces by half the time period required by statute for prospective participants to prepare for a quasi-judicial land use hearing. Petitioner concludes that this change impermissibly "undermines the legislature's efforts to structure a fair system that would elicit and resolve all issues at the local government level." Petition for Review 20.

The county argues that LC 14.300(5), as amended by the challenged ordinance, simply encourages the early submittal of written evidence more than two pages in length, if that evidence is available. The county argues that LC 14.300(5) imposes "no limitations on the ability to [submit] evidence not available in advance of the hearing." Respondent's Brief 9. The county further contends that even if LC 14.300(5) did have the effect of excluding certain written evidence from being submitted at the hearing, it could be read into the record at the hearing or submitted within seven days after the hearing, pursuant to

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[5]Petitioner also quotes the following statement by the chairman of the Senate Agriculture and Natural Resource Committee during the senate floor debate on B-Engrossed HB 2288:

> "You have to be there [at the evidentiary hearing], you have to state your case, but [the local government staffs] have to have their recommendations out 7 days in advance of the hearing so you can at least have the opportunity to study what's in the local decision." (Emphasis by petitioner.) Petition for Review 19.

LC 14.300(7)(n).[6]

The county also argues that while ORS 197.763 specifies certain procedural requirements to be included in local government procedures for quasi-judicial land use hearings, it does not purport to cover every conceivable aspect of hearing procedures, and counties retain substantial authority to establish procedures for the conduct of land use hearings under ORS 215.402 to 215.428. According to the county, we should not reverse or remand Ordinance No. 10-89 unless we find a clear conflict between the procedures required by that ordinance and ORS 197.763. The county contends there is no provision in ORS 197.763 which prohibits a local government from requiring participants other than the applicant to submit lengthy written evidence prior to the hearing on a quasi-judicial land use application.

The county argues there is no express requirement in ORS 197.763 that participants have at least 20 days between the mailing of notice of the evidentiary hearing and the time when written evidence must be submitted. The county points out, for instance, that ORS 197.763(3)(f)(B) allows a

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[6]LC 14.300(7)(n) provides, in relevant part:

> "At the conclusion of the hearing, the Approval Authority * * * may continue the hearing to a time and date certain or, if requested by a party before the conclusion of the hearing, shall leave the record open for at least seven days after the hearing. * * *"

ten day notice period when two or more evidentiary hearings are scheduled. The county also points out that the 20 day notice requirement of ORS 197.763(3)(f)(A) applies only to mailed notice to certain property owners, and argues that other prospective participants may obtain notice of the hearing much later.

The county also argues that the guarantee of ORS 197.763(1) that participants may raise any issue at the hearing does not preclude earlier deadlines for the submittal of written evidence, since issues do not have to be raised in writing. The county further argues that ORS 197.763(5) simply sets out the required content of the statement to be made at the beginning of an evidentiary hearing, and does not preclude local government limitations on the form or length of evidence submitted.

The county argues that one purpose of ORS 197.763 is to encourage informed, effective participation at the local level. The county contends that the disputed code provision encouraging early submittal of written evidence longer than two pages provides the opportunity for preparation of a balanced staff report. The county maintains that inclusion of analysis of this evidence in the staff report makes preparation for the hearing more complete, provides meaningful information to the decision maker in advance of the hearing and increases the ability of participants to address important issues at the hearing.

Finally, the county contends that even if implementation of LC 14.300(5) could in specific instances be inconsistent with ORS 197.763, LUBA should not invalidate the challenged ordinance. According to the county, if its refusal to accept written evidence at a quasi-judicial land use hearing pursuant to LC 14.300(5) amounts to a failure to follow the procedures required by ORS 197.763, in a particular proceeding, then issues not raised before the county can be raised by a party appealing to LUBA. Additionally, if in a particular instance the county's refusal to accept written evidence pursuant to LC 14.300(5) results in prejudice to a party's substantial rights, the party may appeal to LUBA and obtain a remand of the county's decision.

If all LC 14.300(5) did was encourage early submission of written evidence greater than two pages in length by ten days prior to a quasi-judicial land use hearing,[7] as the county contends, we would agree with the county that this provision could not be contrary to the letter and intent of ORS 197.763. However, LC 14.300(5) does more than that. It prohibits the submittal, after the ten day deadline, of any written material greater than two pages in length which is

[7]We note that since notice of the hearing is required to be mailed no later than 20 days before the hearing, under LC 14.300(5) a prospective participant would generally have less than ten days after receipt of the notice in which to prepare and submit written evidence greater than two pages in length.

not responsive to written materials submitted at least ten days prior to the hearing. It also restricts the ability of participants to submit responsive written materials after the ten day deadline, unless the decision maker determines that the materials "could not have been reasonably prepared and submitted at least 10 days in advance of the hearing."[8] LC 14.300(5)(b).

However, we agree with the county that ORS 197.763 does not prohibit the imposition of any requirement that certain types of evidence be submitted to a local government prior to a quasi-judicial land use hearing or in a particular form. We also agree with the county that ORS 197.763 does not guarantee participants in such hearings that they will always have at least 20 days between when notice of the hearing is mailed and when evidence is required to be submitted to the local government.[9]

On the other hand, it is clear from the language of

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[8]We also disagree with the county concerning the relationship between LC 14.300(7)(n), quoted in n 6, supra, and the restrictions of LC 14.300(5). Under LC 14.300(5), the submittal of certain written materials is prohibited after ten days prior to the hearing. Thus, although the county may be required to leave the record open for at least seven days after a hearing, pursuant to LC 14.300(7)(n), it can accept only those written materials which comply with the requirements of LC 14.300(5). Furthermore, even if the county could, under LC 14.300(7)(n), accept written submittals after the hearing which it could not accept at or within ten days prior to the hearing, we do not believe that this would be an adequate replacement for a right to submit written evidence to the decision maker before or at the hearing.

[9]However, if 20 days is provided between the mailing of hearing notice and when any evidence must be submitted to the local government, that certainly would be adequate to comply with ORS 197.763.

ORS 197.763(1) that new issues may be raised by participants up to the time the record is closed at or following the evidentiary hearing. It is also clear from ORS 197.763(5)(b) that participants are entitled to address all applicable criteria at the evidentiary hearing. Furthermore, interpreting ORS 197.763 as a whole, and considering its legislative history, we find that the statute expresses an intent to provide participants in quasi-judicial land use hearings with an adequate opportunity to prepare and submit evidence and testimony for such hearings, an opportunity greater than that to which they were entitled prior to enactment of ORS 197.763.

The legislature indicated that ten days between the mailing of hearing notice and the required submittal of evidence is not adequate when it changed the ten day notice requirement in the original HB 2288 to the 20 day requirement enacted in ORS 197.763.[10] We conclude the limitation on the submittal of written evidence by participants in quasi-judicial land use hearings imposed by LC 14.300(5) is not consistent with ORS 197.763.[11]

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[10]Of course, LC 14.300(5) does not require that all evidence from participants other than the applicant be submitted within ten days of the mailing of hearing notice, but the evidence it does require to be submitted within that time limit, i.e. written evidence greater than two pages in length, is precisely the evidence which requires the most time to prepare.

[11]We recognize the logic of the county's argument that having as much evidence as possible submitted prior to issuance of the staff report will enable that report to address evidence on both sides of the issues, and will aid the local decision maker in evaluating the evidence. However, the

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by amending the county code in a manner that allows an applicant to submit evidence in support of an application for a land use decision less than twenty days before the evidentiary hearing on the application."

LC 14.300(5), as amended by Ordinance No. 10-89, provides in relevant part:

> "Written Materials. All documents or evidence relied upon by the applicant shall be submitted to the [Planning] Department and made available to the public at least 20 days prior to the first evidentiary hearing. * * *
>
> "* * * * *
>
> "If additional documents, evidence or written materials are provided contrary to the above deadlines, any party shall be entitled to a continuance of the hearing. * * *" (Emphasis added.)

Petitioner argues that the provision emphasized above is inconsistent with ORS 197.763 because it implies that the applicant is allowed to submit evidence in support of the application less than 20 days before the evidentiary land use hearing, authorizing a continuance in that event.

Petitioner contends ORS 197.763(3)(f)(A) and (4)(a), read together, expressly require that all documents or

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legislative history of ORS 197.763 clearly indicates that the primary purpose for requiring that a staff report be issued at least seven days prior to the local government's evidentiary hearing is to aid the participants in evaluating the development application and in preparing their cases for the hearing.

evidence relied upon by the applicant shall be submitted to the local government and made available to the public at least 20 days before the evidentiary hearing. Petitioner argues that the purpose of these statutory requirements is to enable other participants to analyze the applicant's proposal and prepare their cases for the hearing. According to petitioner, this purpose would be frustrated by the challenged code provision.

Petitioner argues that the absolute nature of the requirement of ORS 197.763(3)(f)(A) and (4)(a) that all documents or evidence relied on by the applicant be submitted at least 20 days before the hearing is not affected by two other provisions in ORS 197.763 which allow submittal of certain evidence in support of an application after the 20 day deadline. Petitioner argues that the provision of ORS 197.763(4)(b) stating "[i]f additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing" must be interpreted, consistently with ORS 197.763(3)(f)(A) and (4)(a), to refer to additional evidence from sources other than the applicant. Petitioner similarly argues that the provision of ORS 197.763(6) allowing the local government record to remain open for at least seven days after the evidentiary hearing can only authorize the introduction of rebuttal evidence, because the language of ORS 197.763(4)(a) is unequivocal.

The county argues that the correct interpretation of ORS 197.763(4)(a) and (b), considered together, is that all materials relied upon by the applicant in support of the application must be submitted to the local government at least 20 days before the hearing. However, if relevant issues are raised at the hearing, the applicant, as well as other participants, may submit information addressing those issues, including information supporting the application. If additional evidence is provided in support of the application, then any party is entitled to a continuance of the hearing.

According to the county, to preclude the applicant from submitting additional information in support of the application at the time of the hearing could prejudice the applicant's substantial rights. The county also points out that the provision of ORS 197.763(6) requiring that the record be kept open after the evidentiary hearing in certain circumstances makes no distinction between the applicant and other parties.

ORS 197.763(3)(f)(A) and (4)(a) do require the applicant to submit all documents or evidence relied on in support of the application to the local government at least 20 days before the evidentiary hearing, but do not expressly state what the local government is required to do if the applicant seeks to submit additional evidence in support of the application after that deadline. Petitioner argues the

statute requires that the local government reject any such additional evidence. However, we agree with the county that ORS 197.763(4)(b) indicates that the acceptance of such additional evidence is not precluded, but rather if such additional evidence is submitted, the appropriate local government response is to continue the evidentiary hearing. An appropriate continuance would serve the statutory purpose of providing participants with sufficient time and resources to prepare for the evidentiary hearing.[12]

Accordingly, we conclude the provision of LC 14.300(5) providing that any party is entitled to a continuance of the hearing if additional documents or evidence is submitted to the county contrary to the deadlines established by that subsection is consistent with ORS 197.763.

The second assignment of error is denied.

The county's decision is remanded.

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[12]We note petitioner does not argue that the challenged provision of LC 14.300(5) is inadequate because it fails to guarantee that the continuance of the evidentiary hearing to which the parties are entitled will be of sufficient length to serve this statutory purpose. Petitioner simply argues that ORS 197.763 prohibits submittal by the applicant of additional evidence in support of the application after the 20 day deadline.