BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, Petitioner, vs. BENTON COUNTY, Respondent, and MEL ANDREWS, ROD BRENNEMAN SHIRLEY DEARDOFF, and BRADLEY PETERS, Intervenors-Respondent.	)	LUBA No. 90-066 FINAL OPINION AND ORDER

Appeal from Benton County.

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

Jeffrey G. Condit, Corvallis, filed a response brief and argued on behalf of respondent.

David B. Smith, Tigard, filed a response brief and argued on behalf of intervenors-respondent.

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

AFFIRMED 09/14/90

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 appeals Benton County Ordinance 90-0069 which amends the procedures set forth in the county's acknowledged land use regulations for conducting quasi-judicial land use hearings.

MOTION TO INTERVENE

Mel Andrews, Rod Brenneman, Shirley Deardoff, and Bradley Peters move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION AND FACTS

The 1989 legislature imposed new requirements governing notice and procedures that must be observed in the conduct of local government quasi-judicial land use hearings. ORS 197.763. ORS 197.763(2) establishes standards for determining who must be provided notice of such hearings. ORS 197.763(3) imposes requirements concerning the content and timing of notices of hearing. ORS 197.763(4) requires that evidence relied upon by the applicant and any staff report be made available at specified times in advance of the hearing. ORS 197.763(5) requires a statement be made at the beginning of the hearing which (1) identifies the applicable standards, (2) states that testimony should be directed toward those standards, and (3) states that failure to raise an issue with sufficient specificity precludes an appeal to LUBA on that issue.

At the conclusion of a hearing held pursuant to ORS 197.763, any participant may request that the evidentiary record be held open for seven days after the hearing. ORS 197.763(6). In addition, any time the evidentiary record is reopened, any party may raise new issues which relate to the new evidence. ORS 197.763(7).

ORS 197.763 requires that local governments incorporate the above described procedures into their comprehensive plans and land use regulations. ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [the Land Use Board of Appeals] 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. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

Under ORS 197.835(2), LUBA's scope of review is specifically limited to issues raised during local proceedings, provided the final decision is not different from the proposal described in the notice of hearing and the requirements of ORS 197.763 are followed by the local government.

Prior to adoption of the above described statutory requirements, issues concerning a land use decision could be raised for the first time on appeal to this Board. See 1000 Friends of Oregon v. Lane County, 102 Or App 68, ___ P2d ___ (1990); Lane County v. City of Eugene, 54 Or App 26, 633 P2d 1306 (1981); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 369-370 (1986). The parties in this appeal agree that the

above described statutory scheme represents a quid pro quo designed to require that relevant issues be raised locally so the local government has an opportunity to address those issues in its final decision. The quid pro quo is achieved by requiring broader and more detailed notice of hearing, requiring the local government to explicitly identify applicable standards in the notice and at the beginning of local hearings, and making evidence in support of the requested land use action and staff reports available in advance of local hearings. Where the notice and other procedural requirements imposed on local governments by ORS 197.763 are observed, a participant in local government quasi-judicial land use proceedings loses his or her right to raise issues in an appeal to this Board if the issues were not sufficiently raised during the local proceedings.

This appeal concerns the adequacy of amendments to the Benton County Code (BCC) adopted to implement requirements in ORS 197.763(3) concerning content and timing of notices of hearing and a related requirement in ORS 197.763(4)(a) concerning when documents and evidence relied upon by the applicant must be submitted to the county and made available to the public.

FIRST ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by authorizing only one evidentiary land use hearing before the issuance of a decision, and only ten days to gather and present evidence at that

hearing."

THIRD ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by failing properly to incorporate into the code the statutory requirement that an applicant submit to the county all documents and evidence in support of an application at least twenty days before the evidentiary hearing."

With one exception, the detailed notice of hearing required by ORS 197.763(2) and (3) is required to be mailed not less than "[t]wenty days before the evidentiary hearing * * *." ORS 197.763(3)(f)(A). The exception provides:

> "If two or more evidentiary hearings are allowed, [the required notice must be mailed] ten days before the first evidentiary hearing * * *." ORS 197.763(3)(f)(B).

ORS 197.763(4)(a) requires that at the same time the notice required by ORS 197.763(2) and (3) is provided, the "documents or evidence relied upon by the applicant" must be made available to the public.

Under BCC § 51.610(1), notice of a planning commission hearing on specified quasi-judicial land use decisions need only be provided ten days before the hearing. Similarly, BCC § 51.710(1) requires that the applicant submit the documents and evidence it will rely upon not less than 10 days before the planning commission hearing. In its first and third assignments of error, petitioner contends these BCC sections violate ORS 197.763(3)(f), because only one evidentiary hearing is allowed before the planning

commission.[1]

Petitioner recognizes that the opportunity for a second evidentiary hearing before the board of commissioners is provided by BCC § 51.825(3).[2] However, petitioner contends the requirements of ORS 197.763(3)(f) must be met at each level of local government decision making. In other words, if evidentiary hearings are provided before the planning commission and the board of commissioners, petitioner contends the county must either provide twenty days notice of the hearing before each body or, if only ten days notice of hearing is provided, must make available two evidentiary hearings before each body. Petitioner also argues that because the county forces a participant in local quasi-judicial land use proceedings to (1) pay an appeal fee, (2) file an appeal, and (3) shoulder the burden of taking forward an appeal to the board of commissioners in order to obtain the second evidentiary hearing, the participant's rights are prejudiced and the county does not "allow" two

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[1]Because ORS 197.763(4)(a) simply requires that the evidence and testimony relied upon by the applicant be provided to the public at the same time notice is provided under ORS 197.763(3)(f), the parties agree that our decision on the first assignment of error controls our decision on the third assignment of error.

[2]BCC § 51.825(3) provides that persons who appeared orally or in writing before the planning commission may appeal the planning commission's decision to the board of commissioners by filing an appeal. BCC §§ 51.830(2) and (3) require payment of a filing fee and a statement of standing. BCC § 51.830(1) requires "[a] statement of the reasons for the appeal, citing the specific Comprehensive Plan or Development Code provisions which are alleged to violated."

evidentiary hearings within the meaning of ORS 197.763(3)(f)(B).

We agree with respondent that nothing in the language of ORS 197.763(3)(f) or the overall statutory purpose of ORS 197.763 requires that the "two or more evidentiary hearings * * * allowed" under ORS 197.763(3)(f)(B) must be held at the same level of local government. It would have been a simple matter for the legislature to impose that requirement in ORS 197.763(3)(f)(B).[3] The legislature did not do so, and it would be inappropriate for this Board to read that requirement into the statute.[4] ORS 174.010;

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[3]As petitioner correctly points out, the introductory paragraph to ORS 197.763 states that the procedures set out in that section "shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer * * *." (Emphasis added.) If we understand petitioner correctly, it argues that because the levels of local government to which the procedures in ORS 197.763 apply are stated in the disjunctive, the requirement of ORS 197.763(3)(f)(B) for two evidentiary hearings necessarily must be satisfied at each level where an evidentiary hearing is held. We do not agree that the quoted languange is sufficient to express such a legislative intent.

[4]Respondent contends that such a requirement would render Benton County's land use proceedings unworkable. Under Benton County's land use regulations, many county land use decisions are rendered initially by the planning director, subject to a right of appeal first to the planning commission and then to the board of commissioners. The county provides notice and opportunity to present evidence at all three levels. Respondent argues that in view of the multiple opportunities for evidentiary hearings and the ability under ORS 197.763(6) to require that the evidentiary record remain open seven days after each hearing, petitioner's interpretation of ORS 197.763(3)(f) is both unnecessary and at odds with the expression of legislative policy in ORS 197.805 "that time is of the essence in reaching final decisions in matters involving land use * * *."

Petitioner points out that much of the delay that respondent identifies could be eliminated by providing the evidentiary hearing or hearings

Whipple v. Howser, 291 Or 475, 481, 632 P2d 752 (1981).

Petitioner's second argument, concerning whether the board of commissioners' de novo review of planning commission decisions satisfies the requirement of ORS 197.763(3)(f)(B) for a second evidentiary hearing presents a closer question. We generally agree with petitioner that although ORS 197.763(3)(f)(B) only requires that "two or more evidentiary hearings" be "allowed," that language may not be read in a vacuum, and the county may not impose unreasonable conditions or restrictions on persons seeking to exercise their right under ORS 197.763(3)(f)(B) to two evidentiary hearings where only 10 days notice of the first hearing is provided.[5] However, we disagree with petitioner that the county's procedures impose unreasonable conditions or restrictions on participants' right to a second evidentiary hearing under ORS 197.763(3)(f)(B).

Petitioner contends participants in quasi-judicial land use proceedings will be prejudiced by having to file an

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required by ORS 197.763(3)(f) at a single local decision making level, and limiting subsequent local review to the record.

[5]We also generally agree with petitioner that requiring participants to review applicants' testimony and evidence and staff reports and prepare their own testimony and evidence with only 10 days notice will in some cases present severe time constraints. However, the legislature presumably was aware of the possibility of such time constraints when ORS 197.763(3)(f)(B) was adopted. In addition, such time constraints are ameliorated to some extent by the availability of the second evidentiary hearing, the unqualified right to require that the record be held open for seven days after the hearings and the possibility that one or both hearings will be continued if new evidence in support of the application is submitted at the hearing. See ORS 197.763(4)(b); 197.763(6).

appeal and pay an appeal fee in order to obtain the second evidentiary hearing required by ORS 197.763(3)(f)(B). Petitioner further contends appellants are prejudiced by having to assume the burden of proof before the board of commissioners at the second evidentiary hearing.

We do not believe that requiring persons to file a notice of appeal and pay an appeal fee before they may receive the second evidentiary hearing that must be "allowed" under ORS 197.763(3)(f)(B) necessarily conflicts with the statute.[6] It is true that unless one or more participants before the planning commission appeal the planning commission's decision, only one evidentiary hearing would actually be conducted. If the statutory requirement were that two or more evidentiary hearings must be "held" or "provided" we might agree with petitioners that the county's requirement that an appeal be filed in order to obtain the second evidentiary hearing would violate ORS 197.763(3)(f)(B). However, we agree with the county that simply requiring that an appeal be filed and a fee be paid before a second evidentiary hearing is held does not violate the requirement of ORS 197.763(3)(f)(B) that two or more evidentiary hearings be "allowed."[7]

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[6]We do not understand petitioner to contend that the amount of the appeal fee imposed by the county or the procedure the county requires to file an appeal are unreasonable.

[7]ORS 215.422(1) specifically allows the county to provide for appeals from planning commission decisions and to impose a fee for such appeals.

Petitioner also argues that the county transfers the burden of proof in the hearing before the board of commissioners from the applicant to the appellant. According to petitioner, this means that if the appellant from the planning commission's decision is an opponent of the requested land use approval, the appeal hearing before the board of commissioners does not satisfy the requirement of ORS 197.763(3)(f)(B) for a second evidentiary hearing on the original application.

A person appealing a planning commission decision granting land use approval is required by BCC § 51.830 to specify the plan or code provisions the appellant believes are violated by the planning commission's decision. See n 2, supra. In addition, under BCC § 51.720, such an appellant would testify first, followed by the applicant and others, with a right for the appellant to rebut issues raised by the applicant or others. Petitioner reasons from these procedures that the county shifts the burden of proof from the applicant to the appellant, thus prejudicing the appellant's chances of prevailing in the local proceedings.

We agree with respondent that the cited BCC provisions do not impermissibly shift the burden of proof from the applicant to an appellant challenging a planning commission

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Therefore, even if we were to interpret ORS 197.763(3)(f)(B) to require that both of the evidentiary hearings mandated by that section be held before the planning commission, an appeal from the planning commission to the board of commissioners could nevertheless be required by the county before the decision became final and subject to appeal to this Board.

decision granting land use approval before the board of commissioners. It is clear the applicant for land use approval has the burden of proof that applicable approval standards are met; an opponent is not obligated to prove such standards are not met. Fasano v. Washington Co. Comm, 264 Or 574, 586, 507 P2d 23 (1973); Billington v. Polk County, 13 Or LUBA 125 (1985); Bobitt v. Wallowa County, 10 Or LUBA 112 (1984).

The term "burden of proof" encompasses two separate concepts:

> "* * * first, the 'burden of persuasion', which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the 'burden of going forward with the evidence', which may shift back and forth between the parties * * *." Black's Law Dictionary 178 (5th ed 1979).

See McCormick, Evidence 783, § 336 (2d ed E. Cleary 1972); ORS 40.105; 40.115. Although BCC §§ 51.720(2) and 51.830(1) require that the appellant identify the reasons for an appeal and alter the order in which parties present argument and evidence, they do not impermissibly alter the burden of persuasion regarding compliance with applicable approval standards. The burden of persuasion remains with the applicant.[8]

In addition, we do not agree that an opponent's chances

[8]Neither do BCC § 51.702(2) and 51.830(1) shift the burden of producing evidence. The applicant retains the burden to produce sufficient evidence to support a determination that applicable approval standards are met.

of prevailing during local proceedings are prejudiced by the procedure adopted by the county. Under BCC § 51.840, the board of commissioners conducts a full de novo review of the planning commission decision and renders its own decision based on a new record. According to respondent, the planning commission's decision is "granted no legal deference." Respondent's Brief 10. The board of commissioners, in addition to considering the record made before the planning commission, must consider new evidence or issues raised in the hearing before the board of commissioners, and is to "affirm, reverse, or modify in whole or in part the decision that is under appeal" and adopt "findings of fact in support of its decision."[9] BCC § 51.840. In short, if the applicant for land use approval prevails before the planning commission and an appeal to the board of commissioners is filed, the opponent as well as the applicant get a second chance to present their respective

[9]Where as here a local government elects to give only 10 days notice of the initial evidentiary hearing, subject to a right to a second evidentiary hearing on appeal to the ultimate local decision maker, ORS 197.763(3)(f)(B) requires that a participant be allowed to raise new issues during the second evidentiary hearing. A local government could not, consistent with ORS 197.763(1), (3)(f)(B), and (5)(b) cut off that right prematurely by requiring that all issues to be raised in the second hearing be identified in the notice of appeal of the planning commission decision. Although BCC § 51.840 does not explicitly state that appellants and other participants have the right to raise issues at the hearing before the board of commissioners which were not raised before the planning commission or identified in the written notice of appeal required by BCC § 51.830, respondent at oral argument advised the Board that the county interprets BCC § 51.840 to allow new issues to be raised for the first time at the hearing before the board of commissioners. We agree with that interpretation of BCC § 51.840.

positions before the board of commissioners, which is required to decide the case anew.[10]

In view of the above, we conclude that under the county's procedures the applicant for land use approval retains the burden of proof; and the county's obligation to find that an application complies with applicable approval standards remains the same, whether the decision maker is the planning commission or the board of commissioners. See ORS 197.175(2)(c) and (d); 197.835(6); 215.416(9). If the planning commission finds the applicant has satisfied its burden of proof and adopts a decision explaining why applicable standards are met, the appellant is provided a full opportunity before the board of commissioners to question whether the applicant has satisfied its burden of proof and to challenge the planning commission's decision that applicable standards are met. In pursuing its appeal, the appellant is free to present new evidence and issues. We fail to see how such a procedure violates ORS 197.763(3)(f)(B).

The first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction and improperly construed the applicable law by failing properly to incorporate into the code the

[10]In fact, as respondent notes, the appellant's position before the board of commissioners could be viewed as more favorable, in that BCC § 51.720(2) provides the appellant with the final opportunity for rebuttal.

> statutory requirements governing the contents of a notice of a quasi-judicial land use hearing."

ORS 197.763(3)(j) requires that the notice of hearing required by ORS 197.763(2) and (3) "[i]nclude a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings." BCC § 51.615(1)(i) requires that the notice of hearing provided by the county must

> "[s]tate that any interested person may submit testimony prior to the final decision or prior to the public hearing, state the address to which written comments may be sent, and state the procedure for making the decision or for conduct of the hearing."

Petitioner argues BCC § 51.615(1)(i) is inadequate to implement ORS 197.763(3)(j).

Although BCC § 51.615(1)(i) is not worded precisely in the same manner as ORS 197.763(3)(j), we believe it is adequate to obligate the county to provide the information required by ORS 197.763(3)(j). Petitioner's only specific complaint is that under BCC § 51.615(1)(i) the notice may describe either the procedure for <u>making the decision</u> or for <u>conduct of the hearing</u>, and that those procedures are different.

As respondent explains, BCC § 51.615(1)(i) governs both notices of <u>hearings</u> before the planning commission and board of commissioners and notices of initial <u>decisions</u> by the planning official which may be appealed to the planning commission. Respondent explains that when it gives notice

of the former, it gives notice of hearing procedures; but when it gives notice of the latter, it provides notice of the procedure followed by the planning official in reaching a decision subject to appeal. We agree with the interpretation of BCC § 51.615(1)(i) offered by respondent, and interpreted in this manner it is consistent with ORS 197.763(3)(j).

The third assignment of error is denied.

The county's decision is affirmed.