



Opinion by Sherton.

**NATURE OF THE DECISION**

Petitioners appeal a Clackamas County Hearings Officer's decision to remand an application for approval of a gravel drive and parking area for one recreational vehicle in a Principle River Conservation Area (PRCA) to the county Planning Director for further proceedings.

**FACTS**

The subject property is approximately 0.4 acres in size and is zoned Recreational Residential (RR). It is located adjacent to the Salmon River. Land within a quarter mile of the mean low water line of the Sandy/Salmon River corridor is subject to the requirements of Clackamas County Zoning and Development Ordinance (ZDO) § 704 (Principle River Conservation Area). The subject property contains a gravel drive and recreational vehicle parking area.

The county planning division staff originally approved the application for a PRCA permit allowing construction of a gravel drive and parking area for the occasional parking of one recreational vehicle. The planning division decision was appealed to the hearings officer by petitioners. After holding public hearings, the hearings officer on June 26, 1990 issued a document entitled "Findings and Decision of the Hearings Officer" which includes the following determinations:

- (1) The proposed gravel access drive and parking area

do not constitute a structure, and the intermittent occupation of these areas by a recreational vehicle does not constitute a use, which is regulated by ZDO § 305 (Recreational Residential District).

(2) The applicant filled, graded and cleared vegetation in locating the access drive and parking area. The gravel access drive and parking area are potentially subject to the requirement of ZDO § 305.05(A)(12) that filling, grading or clearing of vegetation in a "stream corridor area," as defined in ZDO § 202, requires a conditional use permit. ZDO § 202 provides that a stream corridor area includes both the stream bed and a buffer of land "necessary to maintain streamside amenities and existing water quality" and that the "width of the stream corridor area varies with the site conditions and shall be determined by on-the-ground investigation, as provided [in ZDO §] 1002.05B." The planning division made no determination, by on-the-ground investigation, of the necessary buffer area for the Salmon River corridor on the subject property and, therefore, did not determine whether a conditional use permit is required for the proposed use.

(3) The proposed use is not a "development" in a PRCA subject to the standards of ZDO § 704.03.

(4) The proposed use is subject to the requirement of ZDO § 704.05 that tree cutting and grading be prohibited within a "buffer or filter strip of existing vegetation"

along the Salmon River bank, the depth of which is to be determined based on evaluation of five factors set forth in that section. The planning division decision did not analyze those factors or determine the depth of the required buffer strip along the Salmon River on the subject property. The record does not permit the hearings officer to determine the depth of the appropriate buffer strip under ZDO § 704.05.

(5) The ZDO permits appeals of planning division decisions on applications for PRCA permits by persons other than the applicant.

Based on the above determinations, the hearings officer's decision remands the application to the Planning Director for (1) a determination, based on an on-the-ground investigation, of whether a conditional use permit is required pursuant to ZDO § 305.05(A)(12); and (2) a determination of the depth of the buffer strip required under ZDO § 704.05. This appeal followed.

**MOTION TO DISMISS**

Respondent moves that this appeal be dismissed because the appealed hearings officer's decision is not a "land use decision," as defined by ORS 197.015(10), in that it is not a final decision. Respondent argues that, although there are no specific provisions in the ZDO regulating remand of applications to the planning director by the hearings officer,

"[i]t is obvious, \* \* \* given the nature of the [appealed] decision, that the matter will come back to the hearings officer, and he will then have to issue another decision. It is not clear at this point whether \* \* \* the hearings officer will entertain further testimony or argument on the issues on which he made tentative decisions in the order under appeal here. Clearly though, he will have to address those issues in the next decision, if only by reference back to his previous opinion. At that time, there will be a final decision that is appealable on all issues." (Emphasis in original.) Motion to Dismiss 2.

Respondent maintains that a single appeal on all issues raised by the subject application should await the issuance of a final decision by the hearings officer.<sup>1</sup>

Petitioners argue that determinations (1), (3) and (5) described above are a final decision by the hearings officer on the applicability of ZDO § 305 and 704.03 to the proposed use and on whether petitioners have a right to appeal the planning division's decision on the subject application. Petitioners contend that whether a local government's decision is final and appealable to this Board is determined by the local government's ordinances. Columbia River Television v. Multnomah County, 299 Or 325, 332-334, 702 P2d 1065, 1069-1070 (1985). Petitioners point out that ZDO § 1304.01 provides:

"FINAL DECISION: The decision of the Hearings Officer shall be the final decision of the County

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<sup>1</sup>Respondent notes the ZDO does not provide for appeal of the hearings officer's decisions on permit applications to the county planning commission or board of county commissioners.

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According to petitioners, under ZDO § 1304.01, the county can take no further action on issues (1), (3) and (5) and, therefore, the hearings officer's decision on these issues has "binding legal effect." See Kasch's Gardens v. City of Milwaukie, 14 Or LUBA 406, 411-412 (1986).

Petitioners also argue that no ordinance, state statute or regulation grants the hearings officer authority to remand any portion of the matter before him.<sup>2</sup> According to petitioners, by remanding certain portions of the matter before him to the planning director, the hearings officer exceeded his authority. Petitioners argue that under ORS 197.835(7)(a)(A) and OAR 661-10-071,<sup>3</sup> this Board has specific authority to consider cases in which a hearings officer exceeded his jurisdiction. Thus, to the extent the hearings officer exceeded his jurisdiction, the decision

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<sup>2</sup>Petitioners contend that under ZDO § 1303.02 and ORS 215.402(2)(a) and 215.416, the hearings officer is authorized only to approve, deny or approve with conditions a permit application.

<sup>3</sup>ORS 197.835(7)(a)(A) provides:

"\* \* \* the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"(A) Exceeded its jurisdiction[.]"

OAR 661-10-071(1)(a) provides:

"The Board shall reverse a land use decision when:

"(a) The [local government] exceeded its jurisdiction[.]"

appealed from is final.

Petitioners finally contend that the legislative policy of ORS 197.805 in favor of expeditious review of land use matters will be furthered by not dismissing this appeal. According to petitioners, if this appeal is dismissed, the issue of whether the hearings officer exceeded his authority by remanding portions of the matter to the planning director will inevitably be raised in a second appeal from the hearings officer's ultimate decision. Petitioners contend that if this Board agrees with them on this issue in such a second appeal, a third decision by the hearings officer will be required, possibly followed by a third appeal. Therefore, by deciding this issue in this appeal, the Board will avoid the necessity for a third decision and appeal.

This Board has "exclusive jurisdiction to review any land use decision of a local government \* \* \*." ORS 197.825(1). ORS 197.015(10)(a)(A) defines "land use decision" as:

"A final decision or determination made by a local government \* \* \* that concerns the adoption, amendment or application of [the goals, comprehensive plan provisions or land use regulations.]"<sup>4</sup> (Emphasis added.)

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<sup>4</sup>Even if a decision does not satisfy the statutory definition of "land use decision," it may nevertheless be a "land use decision" if it meets the "significant impact test" enunciated in Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982). Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). The requirement for finality is inherently part of the "significant impact test" because a decision cannot have significant impacts on the use of land

ZDO § 1304.01 simply establishes that the decision of the hearings officer is the final decision of the county -- i.e., that there is no appeal from the hearings officer's decision to another county body. It does not purport to determine whether a decision by the hearings officer is the hearings officer's final decision on a particular matter.

In CBH Company, supra, we considered whether a city council decision remanding a decision of the city architectural review board (ARB) concerning the design of the applicant's proposed apartment complex was a final decision. In CBH Company, the planning director had originally approved the design and the planning director's approval was appealed to the ARB by a neighborhood association. The ARB rejected the design, and the applicant appealed to the city council, arguing that the ARB lacked jurisdiction because the neighborhood association lacked standing to appeal and, therefore, the planning director's approval was final. The city council determined the planning director had not given the required notice of his original decision and remanded the matter to the planning director to reissue his decision with the required notice.

We decided that because the city council had remanded the matter for further proceedings, the city's proceedings were not yet complete and, therefore, the city council's

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unless it is a final effective decision. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 748, 752, aff'd 93 Or App 73 (1988); CBH Company v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988) (CBH Company).



decision was not a final decision. Id. at 404. We stated that the petitioner in that case might yet receive on remand the design approval it sought and, if not, when the city's proceedings were complete, the petitioner could appeal the city's final decision to this Board and obtain review of the issue of whether the planning director's original approval became final.<sup>5</sup> Id. at 402-403.

As in CBH Company, the decision appealed in this case remands an application to the planning director for further action. As in CBH Company, petitioners in this case may yet receive from the county, when its proceedings are complete, the disposition of the application which they seek. Also as in CBH Company, if petitioners are not satisfied by the decision reached by the county at the conclusion of its proceedings, they may appeal that decision to us and may raise in that appeal the issue of whether the hearings officer exceeded his jurisdiction by remanding certain matters to the planning director.

The only difference between this case and CBH Company is that here the hearings officer remanded the subject application to the planning director only for further action on certain issues. Petitioners argue this means that the

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<sup>5</sup>We also noted that ORS 197.825(2)(a) limits our jurisdiction to instances where all available local remedies have been exhausted. We concluded that ORS 197.825(2)(a) itself imposes a requirement, separate from the definition of "land use decision," that a decision be "the final outcome of the proceedings below in order to be subject to LUBA review." Id., at 405-406 n 7.

hearings officer's decision is a final, legally effective decision with regard to those issues which are not the subject of the remand.<sup>6</sup> However, we agree with respondent that the hearings officer (and, therefore, the county) has not yet made any final decision on the subject application. Only when all county proceedings on the subject application are complete will the county have made its final decision on the application.<sup>7</sup>

This appeal is dismissed.

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<sup>6</sup>Petitioner's reliance on our language in Kasch's Gardens v. City of Milwaukie, supra, concerning lack of "binding legal effect" of the appealed decision as justification for dismissal of the appeal is misplaced. In Kasch's Gardens, the city's proceedings on the appealed matter were clearly complete. The question we addressed in Kasch's Gardens was whether a city decision endorsing a program of highway improvements proposed by the Metropolitan Service District is not a "land use decision" because it is merely advisory in nature.

<sup>7</sup>As respondent points out, we cannot now determine whether the county's final decision on the subject application will address again the issues which are not the subject of the remand to the planning director, or will simply incorporate by reference the determinations on those issues made in the decision appealed in this case. However, in either case, petitioners would be able to obtain review of those issues by this Board, if they appeal the county's final decision on the subject application.