BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL H. REEDER,	)	
	)	
Petitioner,	)	LUBA No. 90-107
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 11/O9/90

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 a Clackamas County Hearings Officer's decision denying his request for a zone change from Rural Residential Farm Forest, five acre minimum lot size (RRFF-5) to Rural Area Single Family Residential, two acre minimum lot size (RA-2).

FACTS

The subject property includes approximately nine acres of land and is located adjacent to the urban growth boundary (UGB). Clackamas County Comprehensive Plan (plan) policy 13.1(f) provides:

> "[I]n areas adjacent to urban growth boundaries, 2 acre zoning shall be limited to those areas in which virtually all existing lots are 2 acres or less." (Emphasis added.)

In denying petitioner's request for rezoning, the county hearings officer found the proposed rezoning complied with all applicable standards except plan policy 13.1(f).

ASSIGNMENTS OF ERROR

Petitioner presents three assignments of error. Petitioner first contends one of the bases upon which the hearings officer relied in interpreting and applying plan policy 13.1(f) is erroneous. Second, petitioner contends the hearings officer erroneously failed to follow precedent in interpreting and applying plan policy 13.1(f). Finally, petitioner contends the hearings officer engaged in ad hoc

policy making resulting in discriminatory application of the applicable zoning laws and violation of petitioner's rights to equal protection under the 14th Amendment of the United States Constitution and to equal privileges and immunities under Article 1 Section 20 of the Oregon Constitution. We discuss petitioner's contentions separately below.

A. 1979 Legislative Plan and Zone Amendments

The county legislatively adopted new plan and zoning provisions in 1979. The planning staff recommended that the rural subarea delineations which were used by the county for analysis in the 1979 legislative rezoning (including areas identified as R-12 and R-13) be used in applying plan policy 13.1(f) in the decision challenged in this appeal. Area R-13 includes the subject property.[1]

In his decision, the hearings officer adopted the following findings:

> "The applicant's argument * * * is that the properties within area R-13 less than 2 acres in size approximate 84 percent of the total parcels. The applicant points out that the Hearings Officer has previously approved a zone change [to] RA-2 wherein the Hearings Officer utilized an 'area' comprised of approximately 72 percent parcels 2 acres or less in size. The applicant then argues that this application must be approved, as the percentage in area R-13 is greater tha[n] that previously approved under the same standards.
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> "The applicant correctly states the legal position

[1]During local proceedings, petitioner agreed that area R-13 was the appropriate area for considering compliance with plan policy 13.1(f).

> that the application must be judged on * * * standards which are equally applied. However, the Hearings Officer is now convinced that the previous decision referenced by the applicant was incorrectly decided. The standard 'virtually all' means that the parcels, almost without exception, must be 2 acres or less. Accepting the applicants [sic] figures as correct, 16 percent of the parcels being in excess of 2 acres does [not] equate to virtually all of the parcels being 2 acres or less. This percentage certainly demonstrates that a large majority of the parcels are 2 acres or less, but does [not] demonstrate that virtually all the parcels are 2 acres or less. The Planning Division Staff report provides an example of what the Board of County Commissioners, the drafters of the language, deemed to constitute 'virtually all.' * * * [A]rea R-12 was zoned RA-2 as a part of the legislative zone change. That area, at that time, consisted of approximately 94 percent parcels 2 acres or smaller.
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> "This criterion is not met." (Emphasis added.) Record 3.

Petitioner points out that in 1979 plan policy 13.1 did not include subsection (f). When the county legislatively rezoned area R-12 to RA-2 and area R-13 to RRFF-5, it applied plan policy 13.1 as it existed in 1979. In 1981, following appeals of the county's 1979 legislative plan and zoning actions, the Metropolitan Service District recommended that the county amend plan policy 13.1 to add subsection (f), requiring that before property may be zoned RA-2 "virtually all existing lots [in the area must be] 2 acres or less." The county thereafter adopted subsection (f).

Petitioner contends in his first assignment of error

that because subsection (f) of plan policy 13.1 did not exist until 1981, the fact 94% of the parcels in area R-12 may have included 2 acres or less when they were zoned RA-2 in 1979 is irrelevant in interpreting the meaning of plan policy 13.1(f).[2] Petitioner contends the portion of the county's decision emphasized above is therefore erroneous and does not provide a legitimate basis for concluding plan policy 13.1(f) requires that 94% of the parcels within an area must be less than 2 acres.

We agree with petitioner, and respondent concedes the point in its brief. The hearings officer lacked a sufficient basis for assuming that when area R-12 was was zoned RA-2 in 1979, 94% of the parcels in area R-12 were two acres or less. In addition, he incorrectly assigned significance to that percentage in interpreting the meaning of plan policy 13.1(f), which was adopted two years later. However, such errors do not necessarily mean he incorrectly determined that plan policy 13.1(f) is not satisfied in this case, where only 84% of the parcels within the relevant area are less than two acres. Assuming the hearings officer is correct in this determination, his erroneous speculation about how much higher than 84% the percentage of parcels two acres or less must be to satisfy plan policy 13.1(f)

[2]Petitioner also contends that while the planning staff asserted that currently 94% of the parcels within area R-12 are two acres or less, there is no evidence in the record to establish the percentage of parcels in area R-12 that were two acres or less in 1979 or 1981.

provides no basis for reversal or remand.[3] See Cann v. City of Portland, 14 Or LUBA 254, 257 (1986); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 163 (1985); Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

The first assignment of error is denied.

B. Failure to Apply Prior Interpretation

As the hearings officer points out in the above quoted portion of his decision, a hearings officer's decision in a prior case, involving different parties and different property, determined that plan policy 13.1(f) was satisfied where only 72% of the parcels in the relevant area were less than two acres.[4] Petitioner contends that because the two decisions are so close in time, the hearings officer should be bound to apply the earlier interpretation of plan policy 13.1(f) and therefore approve his request for rezoning.

Petitioner concedes the county is not bound by statute or ordinance to follow its own precedents in quasi-judicial

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[3]This might not be the case in different circumstances. See Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978) (in denying tentative subdivision approval, a county's findings must explain what the applicant must do to secure approval under generally worded approval standards). However, in this case even if we assume the 94% figure suggested by the hearings officer is erroneous, it makes no difference that the county did not tell petitioner precisely how much higher than 84% the percentage must be. There is nothing petitioner can do to increase that percentage so that plan policy 13.1(f) is satisfied, no matter what the correct percentage is.

[4]The decision in the previous case was rendered in August 1989. The decision challenged in this appeal was rendered July 13, 1990.

decision making. However, petitioner contends it is well settled that federal administrative agencies must either interpret and apply the law consistently in quasi-judicial proceedings, or explain why they decide to depart from established precedents. See 4 Davis, Administrative Law Treatise § 20:11 (1983), and cases cited therein. In Oregon, a similar requirement is imposed by statute on state administrative agencies. ORS 183.482(8)(b)(B). Petitioner suggests ORS 215.416(8) can be read to impose essentially the same requirement on county decision makers.

Citing our recent decision in Nelson v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-151, April 30, 1990), petitioner contends contemporaneous application of approval criteria should not produce different results where applicants are similarly situated.[5] Petitioner contends the hearings officer went beyond his proper role as a quasi-judicial decision maker who, observing stare decisis,[6]

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[5]Our decision in Nelson concerned the applicability of the judicial doctrine of res judicata in administrative proceedings. Petitioner does not contend the county was bound by res judicata to apply the same interpretation in this case that it applied in the August 1989 case. Because the August 1989 decision relied upon by petitioner involved a different application and different parties, the county was not bound by res judicata to apply the same interpretation it applied in August 1989 in this case. See Nelson, supra, slip op 4-6; Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No.89-086. January 12, 1990), slip op at 6-8. We understand petitioner simply to rely on language in our decision in Nelson to the effect that similarly situated applicants in contemporaneous quasi-judicial proceedings should receive the benefit of the same interpretation and application of approval standards.

[6]"Stare decisis" is defined in Blacks Law Dictionary (5th Ed.) as follows:

should interpret and apply the law in the same way in similarly situated, contemporaneous cases. Petitioner contends the hearings officer improperly assumed the role of a policy maker, and substituted one reasonable interpretation of policy 13.1(f) for another. Where the choice is simply between two reasonable and correct interpretations, petitioner contends the hearings officer should observe stare decisis and adhere to the interpretation applied in the August 1989 decision.

There are several problems with petitioner's arguments under this assignment of error. First, it is not clear that ORS 215.416(8) and (9) impose the same obligation to explain departures from prior precedent that is imposed on state and federal agencies.[7] Even if the hearings officer were under

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> "Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. * * *" (Citations omitted.) Id. at 1261.

[7]ORS 215.416 imposes certain obligations on counties in rendering decisions on "permits," and provides in part:

> "(8) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed

such an obligation, the hearings officer in this case explained why he did not apply the same interpretation in this case that was applied in August 1989. He stated that the August 1989 interpretation of plan policy 13.1(f) was wrong, explaining that where 28 percent of the parcels in a given area are larger than two acres "virtually all" of the parcels are not less than two acres.

We have explained on several occasions that when this Board reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, if those prior decisions applied incorrect interpretations of the applicable approval standards. As we explained in Okeson v. Union County, 10 Or LUBA 1, 5 (1983) in rejecting petitioner's arguments that the county's decision in that case should be remanded for failure to follow prior decisions:

> "The issue here is whether [the challenged decision] meets all the applicable criteria based

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> use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
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> "(9) Approval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

In Constant v. City of Lake Oswego, 5 Or LUBA 311, 315 (1982), we concluded that provisions similar to those in ORS 215.416 which are located in ORS chapter 227 and govern city decisions on "permits" do not apply to "rezoning" decisions.

> upon the facts in the record. There is no requirement local government actions must be consistent with past decisions, but only that a decision must be correct when made. Indeed, to require consistency for that sake alone would run the risk of perpetuating error. * * *."

See also BenjFran Development v. Metro Service Dist., 17 Or LUBA 30, 46-47 (1988); S & J Builders v. City of Tigard, 14 Or LUBA 708, 711-712 (1986).

We also reject petitioner's suggestion that the hearings officer improperly assumed the role of policy maker and chose between two reasonable and correct interpretations of plan policy 13.1(f). The hearings officer is clearly correct that the construction of plan policy 13.1(f) applied in August 1989 was erroneous. Where 28 percent of the parcels in an area are in excess of two acres, it would be incorrect to conclude that "virtually all" of the parcels in the area are less than two acres. Similarly, the hearings officer's interpretation that policy 13.1(f) is not met in this case is also correct. Where 16 percent of the parcels in an area are in excess of two acres, it would be incorrect to conclude "virtually all" of the parcels are less than two acres.[8]

In this case, the hearings officer simply refused to

[8]We need not and do not decide what percentage of parcels in an area must be less than two acres to satisfy plan policy 13.1(f). It is sufficient to say the policy is a strict one, and the 1989 application and the application challenged in this appeal clearly fall short of complying with the policy.

follow a prior erroneous construction of plan policy 13.1(f). In doing so he committed no error. We believe the hearings officer would have erred had he applied the prior construction of policy 13.1(f) which petitioner argues he should have applied in this case. See McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

The second assignment of error is denied.

C. Constitutional Arguments

Petitioner's equal protection and equal privileges and immunities argument is brief. Petitioner simply states that ad hoc policy making may result in actual discrimination which in turn may violate the U.S. and Oregon Constitutions.

Because we do not agree that the hearings officer engaged in ad hoc interpretation or policy making, this assignment of error must be denied. As explained above, the hearings officer merely rejected an incorrect interpretation of plan policy 13.1(f) in favor of a correct interpretation. Aside from pointing out the hearings officer's interpretations are inconsistent, petitioner offers no evidence that the hearings officer improperly discriminated against petitioner. There is no suggestion that the hearings officer was personally biased against petitioner or that other improper motives were the actual reason for denial of the requested rezoning. In fact, the hearings officer explicitly recognized petitioner was entitled to equal treatment in this case. However, neither the right

under the 14th Amendment of the U.S. Constitution to equal protection nor the right to equal privileges and immunities under Article 1 Section 20 of the Oregon Constitution require the hearings officer to repeat in this case the erroneous August 1989 interpretation of plan policy 13.1(f).

The third assignment of error is denied.

The county's decision is affirmed.