

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DORIS MARSON,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 WAYNE CARTER, RUBY CARTER, DAVE)
17 IMHOLT, LINDA IMHOLT, ROY SAWYER,)
18 DEANNA HAMILTON, DON MUSTOE,)
19 TERRY KENNEDY, SHEILA KENNEDY,)
20 ROBERT MATZKA, SUSAN MATZKA,)
21 and AL MORELLI,)
22)
23 Intervenors-Respondent.)

LUBA No. 91-134

FINAL OPINION
AND ORDER

24
25
26 Appeal from Clackamas County.

27
28 A. Gregory McKenzie, Oregon City, filed the petition
29 for review and argued on behalf of petitioner. With him on
30 the brief was Hibbard, Caldwell, Bowerman & Shultz, P.C.

31
32 Michael E. Judd, Oregon City, filed a response brief
33 and argued on behalf of respondent.

34
35 John H. Hammond, Jr., West Linn, filed a response brief
36 and argued on behalf of intervenors-respondent. With him on
37 the brief was Hutchison, Hammond, Walsh, Herndon & Darling,
38 P.C.

39
40 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
41 Referee, participated in the decision.

42
43 AFFIRMED 12/23/91

44
45 You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county hearings
4 officer revoking a temporary permit allowing log trucks to
5 be parked on an Exclusive Farm Use (EFU-20) zoned parcel.

6 **MOTION TO INTERVENE**

7 Wayne Carter, Ruby Carter, Dave Imholt, Linda Imholt,
8 Roy Sawyer, Deanna Hamilton, Don Mustoe, Terry Kennedy,
9 Sheila Kennedy, Robert Matzka, Susan Matzka and Al Morelli
10 move to intervene on the side of respondent. There is no
11 opposition to the motion, and it is allowed.

12 **FACTS**

13 The subject property is owned by petitioner and
14 consists of 65.59 acres zoned EFU-20. In 1990, the county
15 approved a temporary permit allowing nine log trucks to park
16 on the subject parcel. After several letters were exchanged
17 between the county planning department and petitioner's
18 attorney, the planning department scheduled a permit
19 revocation hearing before the county hearings officer. The
20 hearings officer issued an order revoking the temporary
21 permit, and this appeal followed.¹

22 **FIRST ASSIGNMENT OF ERROR**

23 "The hearings officer's decision was based upon
24 petitioner's failure to produce evidence on an

¹In the absence of the challenged decision revoking the temporary permit, the permit would, by its terms, expire on December 31, 1991.

1 issue that was not a part of the subject matter of
2 the revocation hearing."

3 The temporary permit was approved subject to several
4 conditions of approval. Condition 4 states:

5 "All truck movement shall depart from the subject
6 property as near to 4:00 a.m. as is possible. No
7 trucks may return to the subject property after
8 10:00 p.m." Record 399.

9 In addition, condition 6 states:

10 "Another temporary permit renewal or request will
11 not receive favorable consideration unless
12 accompanied by convincing written documentation
13 substantiating the applicant's search for
14 alternative sites, and a written explanation as to
15 why no suitable sites have been found." Id.

16 Petitioner alleges the hearings officer erroneously
17 determined the temporary permit should be revoked on the
18 basis of perceived violations of condition 6.

19 The hearings officer first determined that condition 4
20 had been violated. The hearings officer then considered
21 whether the violations of condition 4 required revocation of
22 the temporary permit. His consideration of the latter issue
23 includes the following findings, which are the basis for
24 petitioner's argument under this assignment of error:

25 "The Hearings Officer also must take into account
26 the fact that [petitioner's] use is temporary, and
27 is not permitted in the EFU-20 zoning district
28 except pursuant to a temporary permit. The
29 existing permit would expire on December 31, 1991,
30 unless again renewed. But Condition No. 6
31 provides that another renewal request would not
32 receive favorable consideration unless accompanied
33 by convincing evidence of unsuccessful efforts to
34 locate an alternative site. This record includes

1 no substantial evidence of efforts by [petitioner]
2 to locate any alternative site for the storage of
3 the logging trucks. Rather, the testimony on
4 behalf of [petitioner] demonstrated a
5 determination to continue the storage on the
6 subject property." Record 3-4.

7 However, the hearings officer concluded as follows:

8 "In this case, the Hearings Officer believes that
9 because Condition No. 4 was an integral part of
10 the conditions justifying the renewal of the
11 temporary permit, that the continued violation of
12 Condition No. 4 appears clear, and that such
13 violations are detrimental to surrounding
14 properties due to the adverse noise impacts on
15 residents along Bluff and Fish Roads, revocation
16 of the temporary permit is appropriate and
17 required." Record 4.

18 We agree with the county that the hearings officer
19 revoked the permit on the basis of violations of condition
20 4, not condition 6. Condition 6 simply advises petitioner
21 that subsequent temporary permit applications must contain
22 certain information to receive favorable treatment. The
23 above quoted findings referring to condition 6 simply
24 discuss under what circumstances petitioner's temporary
25 permit could be renewed. The challenged findings concerning
26 condition 6 are not essential to the decision and,
27 therefore, could not provide a basis for reversal or remand
28 of the challenged decision, even if they are erroneous in
29 some way.

30 The first assignment of error is denied.

31 **SECOND ASSIGNMENT OF ERROR**

32 "The hearings officer made a decision not
33 supported by substantial evidence in the whole

1 record that a violation of condition 4 had
2 occurred."

3 Petitioner argues the hearings officer's determination
4 that condition 4 had been violated is not supported by
5 substantial evidence in the whole record. The hearings
6 officer determined:

7 "* * * It is absolutely clear that all trucks did
8 not depart the subject property as near to 4:00
9 a.m. as possible. Condition No. 4 was not
10 directed to the convenience of the applicant, but
11 was designed to group all truck departures in an
12 effort to minimize, to the extent possible,
13 adverse noise impacts on the residents along Bluff
14 and Fish Roads." Record 3.

15 While petitioner frames her argument under this
16 assignment of error as concerning the evidentiary support
17 for the above findings, there is no dispute that on several
18 occasions log trucks departed from the subject property at
19 6:30 a.m. The focus of petitioner's argument is really on
20 the hearings officer's interpretation of condition 4.
21 Petitioner asserts the fact that log trucks occasionally
22 departed at 6:30 a.m. is insufficient to constitute a
23 violation of condition 4. Petitioner also asserts that when
24 trucks left the subject property at 6:30 a.m., it was due to
25 the schedules of local mills and an earlier time for
26 departure was, therefore, not "possible."

27 We believe that condition 4 is correctly interpreted to
28 require petitioner to ensure that the log trucks leave the
29 subject property at 4:00 a.m., unless it was not "possible"
30 to do so. The fact that a later departure time might be

1 more convenient to petitioner's logging operation is not the
2 equivalent of showing that it is not "possible" to leave the
3 subject property at 4:00 a.m., as required by condition 4.
4 Petitioner has at best established that it was at times more
5 convenient for log trucks to depart from the property at
6 approximately 6:30 a.m. However, she has not established
7 that it was not "possible" for the trucks to leave the
8 subject property at 4:00 a.m.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 "The county allowed evidence and testimony into
12 the record after it was closed regarding the time
13 of departure after the renewal hearing decision
14 was rendered on December 31, 1990, and did not
15 provide petitioner an opportunity to respond and
16 rebut that evidence, thereby violating
17 Petitioner's right to due process."

18 Petitioner argues the planning department received many
19 complaints from petitioner's neighbors concerning alleged
20 violations of condition 4. Petitioner argues that these
21 complaints made to the planning department are ex parte
22 contacts which the hearings officer should have disclosed
23 pursuant to ORS 215.422(3).²

²ORS 215.422(3) provides:

"No decision or action of a planning commission or governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

1 ORS 215.422(3) requires disclosure of ex parte contacts
2 with a decision maker. Here, the alleged ex parte contacts
3 were between the planning department and neighbors.
4 However, the planning department was not a decision maker in
5 this matter. The hearings officer had no obligation to
6 disclose any of the contacts between the neighbors and the
7 planning department.

8 Petitioner also contends there were contacts between
9 the planning department and the hearings officer concerning
10 the planning department's interpretation of condition 4.
11 Petitioner argues that these contacts were ex parte contacts
12 which she had a right to rebut. The hearings officer may
13 have committed an error of procedure in failing to disclose
14 his contacts with the planning department.³ However, we
15 cannot reverse or remand the challenged decision on the
16 basis of procedural error unless petitioner's substantial
17 rights were prejudiced. Parmenter v. Wallowa County, ___ Or

"(a) Places on the record the substance of any written or oral
ex parte communications concerning the decision or
action; or

"(b) Has a public announcement of the content of the
communication and of the parties' right to rebut the
substance of the communication made at the first hearing
following the communication where action will be
considered or taken on the subject to which the
communication is related."

³ORS 215.422(4) provides that communications between county staff and
the governing body or planning commission are not ex parte contacts subject
to ORS 215.422(3). However, the exemption provided by ORS 215.422(4) does
not explicitly include communications between county staff and a hearings
officer.

1 LUBA ____ (LUBA No. 91-064, August 23, 1991), slip op 5;
2 Burghardt v. City of Molalla, 18 Or LUBA 361, 365 (1989).

3 Here, we do not believe that petitioner's substantial
4 rights were prejudiced. The planning department disclosed
5 to petitioner its interpretation of condition 4 prior to
6 initiating the revocation proceedings in April 1991. Record
7 354-57. Further, petitioner responded to the planning
8 department's interpretation of condition 4 prior to the time
9 the revocation proceedings before the hearings officer were
10 initiated. Record 386-88. Finally, petitioner responded to
11 the planning department's interpretation of condition 4
12 during the revocation proceedings before the hearings
13 officer. Record 12-23. In sum, petitioner was aware of the
14 planning department's prior communications with the hearings
15 officer and the substance of the planning department's
16 interpretation of condition 4 early in the process and had
17 an opportunity, of which she availed herself, to respond to
18 that interpretation both before the planning department and
19 the hearings officer.

20 The third assignment of error is denied.

21 The county's decision is affirmed.