BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL WAKEMAN and BETTY WONG, Petitioner, vs. JACKSON COUNTY, Respondent, and NICHOLAS PREBOSKI, Intervenor-Respondent.	LUBA No. 94-092 FINAL OPINION AND ORDER

Appeal from Jackson County.

Paul Wakeman and Betty Wong filed the petition for review. Paul Wakeman argued on his own behalf.

No appearance by respondent.

John Hassen and Richard H. Berman filed the response brief on behalf of intervenor-respondent. With them on the brief was Blackhurst, Hornecker, Hassen & Ervin B. Hogan. Richard H. Berman argued on behalf of intervenor-respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee, participated in the decision.

AFFIRMED 08/22/95

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal a county order denying their request for revocation of a 1990 nonfarm dwelling permit on a parcel zoned for exclusive farm use.

MOTION TO INTERVENE

Nicholas Preboski (intervenor) moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In 1990, the county approved a nonfarm dwelling permit for property adjacent to property owned by petitioner Betty Wong. The permit was subject to several conditions, including a condition that, within 120 days of the approval, the applicant submit evidence that the property had been disqualified for farm use valuation ("Condition A"); and conditions requiring a road approach permit and a premises identification sign for access to the property from Ashland Lane. The 1990 approval was not appealed.

Condition A was not satisfied within 120 days. The property was not, however, tax-assessed for farm use under ORS 308.345(2) at the time of the approval, nor has it been since then. The conditions requiring a road approach permit and identification sign for access from Ashland Lane have not yet been satisfied, nor has any driveway accessing Ashland Lane been constructed.

Shortly after the county approved the 1990 permit, intervenor purchased the subject property. Intervenor subsequently constructed a driveway to the property from Butler Creek Road. In May, 1993, intervenor requested a fuel break reduction for a home site on the property. The county hearings officer approved the fuel break reduction in July, 1993. That approval includes conditions regarding the location of the home site and a condition requiring an address sign at the driveway from Butler Creek Road. That approval was not appealed.

In September, 1993, petitioners filed a request with the county for an investigation and public hearing under Jackson County Land Development Ordinance (LDO) 285.025(3)(C)(ii) for the purpose of revoking the 1990 nonfarm permit.[1] Petitioners' request alleged noncompliance

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[1]LDO 285.025(3)(C) states:

"The process for modification or revocation of a permit shall consist of either or both of the following:

"i) Enforcement of the penalty provisions of Chapter 290;

"ii) A hearings process which shall consist of:

"a) An investigation by the Department of alleged violations of, or noncompliance with, the conditions of the permit.

"b) A hearing scheduled pursuant to Section 285.040 in which valid proof of a violation of, or noncompliance with, conditions is found by the hearings body.

"c) Modification or revocation of a permit may occur after proper notice and such public hearing."

with conditions of approval and false information in the 1990 application. Upon investigation, the county concluded that time limits on two conditions had been violated, and that a hearing was necessary to determine whether such violations warranted revocation of the 1990 approval.[2] The county also reviewed the allegations of false information in the 1990 application, and concluded that the allegations constituted a request for reinterpretation and evaluation of the evidence from the 1990 permit proceeding, which the revocation process did not allow. Thus, the county did not initiate a public hearing on those allegations.

Following a public hearing on the condition violations, the county denied petitioners' revocation request and modified two of the conditions from the 1990 approval. One of the modified conditions requires evidence that the parcel has been disqualified for farm use assessment prior to issuance of building permits for a nonfarm dwelling.[3]

This appeal followed.

Neither petitioners' request, filed September 2, 1993, nor their request addendum, filed December 29, 1993, sought enforcement of the penalty provisions of Chapter 290. Record 151.

[2]One of the time limit violations concerned Condition A. The other time limit violation concerned recording of a restrictive covenant. Petitioners' appeal does not challenge the county's findings regarding the restrictive covenant.

[3]The other amended condition modifies the requirement for recording the restrictive covenant. Petitioners do not challenge that condition.

FIRST ASSIGNMENT OF ERROR

Petitioners contend the 1990 nonfarm dwelling permit expired 120 days after the county approved it, because the applicants failed to satisfy Condition A, which states:

> "A building permit shall not be issued for the nonfarm dwelling until the applicant has furnished the Planning Director with evidence the lot or parcel upon which the dwelling is proposed has been disqualified for valuation at true cash value for farm use under ORS 308.370. This evidence shall be provided to the Planning Director within 120 days of the date of the Board order approval. * * * * *" Record 173.

Petitioners claim that, because the applicant did not comply with this condition, under LDO 218.120(2)(E) and Policy 64 the approval automatically expired after 120 days.

LDO 218.120(2)(E) states:

> Pursuant to ORS 215.236, building permits shall not be issued for proposed dwellings which are reviewed under this section on a lot or parcel which is valued at true cash value for farm use under ORS 308.370, until the applicant has furnished the Planning Director with evidence that the lot or parcel upon which the dwelling is proposed has been disqualified for valuation at true cash value for farm use under ORS 308.370. Such evidence shall be provided to the Planning Director within 120 days of approval or the decision is void.

Policy 64 was an interpretive policy, applicable in 1990, which stated:

> "Since 1987, the ORS has not placed a time limit on the disqualification of nonfarm parcels from farm assessment. However, the Land Development Ordinance [218.120(2)(E)] still carries the 120-day requirement. Until this is amended, we will

> simply review each application exceeding 120 days for possible change in circumstances. If none are apparent, the approval can then be completed without regard to time or reapplication."

Petitioners argue that, because of changes in circumstances relating to ownership and development of the parcel since 1990, under Policy 64 the approval expired when the applicant failed to provide evidence of disqualification within 120 days of the approval.

Following its investigation, the county determined Condition A had not been satisfied. The county concluded, however, that LDO 218.120(2)(E) does not render the approval void for noncompliance with Condition A, because that ordinance applies only to parcels which are assessed for farm use at the time of approval. The county board of commissioners concluded that, since this parcel was not assessed for farm use at the time of the 1990 approval, LDO 218.120(2)(E) does not apply. The board of commissioners explained its conclusion by stating:

> "[T]he 120 day time limit included in Condition A is not necessary to meet the intent of the Land Development Ordinance. In fact, at the time of the original approval, disqualification of a parcel for special farm tax assessment was not required by statute or the Land Development Ordinance for a parcel that was not at that time receiving such special assessment, and the 120 day time limit was not required by statute for such disqualifications when required. Consequently, the Board concludes that the condition should be modified, as allowed by [LDO] 285.025(3), to require disqualification of the subject parcel from special farm tax assessment before permits can be issued for the dwelling." Record 5.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[4] This means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "clearly wrong." Reeves v. Yamhill County, 132 Or App 263, 269, ___ P2d ___ (1995); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

The county's interpretation of LDO 218.120(2)(E) is not clearly wrong. Rather, it is consistent with the express language of the ordinance. LDO 218.120(2)(E) causes a nonfarm dwelling permit approval to become void if evidence of disqualification from special farm assessment is not provided within 120 days only when that property is assessed for farm use at the time of approval. Since the property was not assessed for farm use in 1990 when the county

[4]ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

granted the nonfarm dwelling permit, LDO 218.120(2)(E) does not apply in this case.

Policy 64 is likewise inapplicable. That policy, by its terms, interprets LDO 218.120(2)(E). Since LDO 218.120(2)(E) does not apply to the property at issue, Policy 64 is also inapplicable to the subject approval.[5]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the county misconstrued LDO 285.025(4)(C) when it modified Condition A to remove the 120-day requirement and instead require evidence of disqualification from farm use assessment prior to issuance of a building permit.

LDO 285.025(4)(C) states:

> "Conditions expressly required by this or other county ordinances, state statutes, administrative rules or other requirements of law shall not be subject to the review procedures herein set forth."

Petitioners argue LDO 285.025(4)(C) prohibits the county from modifying Condition A because Condition A is required by LDO 218.120(2)(E) and ORS 215.236(2).[6]

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[5]Moreover, petitioners reliance on Policy 64 is misplaced; application of that policy would weaken petitioners' argument. Policy 64 liberalizes LDO 218.120(2)(E) by providing that the disqualification after 120 days is not automatic, but will be evaluated based on the circumstances of each individual case. Even if LDO 218.120(2)(E) applied to the subject property, Policy 64 would have provided a basis for the county to find the permit did not automatically expire after 120 days.

[6]ORS 215.236(2) states:

The county determined that, like LDO 218.120(2)(E), ORS 215.236(2) applies only to situations where the property is assessed for farm use at the time of the approval. Since the subject property was not assessed for farm use when the county approved the nonfarm dwelling permit, neither LDO 218.120(2)(E) nor ORS 215.236(2) requires that farm assessment disqualification be filed within 120 days of approval. Petitioners do not assert, nor is there any evidence in the record, that Condition A is mandated by any other ordinance, statute or other requirement.

We defer to the county's interpretation that LDO 285.025(4)(C) did not prohibit it from modifying Condition A.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that in 1990 the subject property should have been taxed-assessed for farm use, and that the county erred by failing to consider how the assessor's office has interpreted and applied the state statute regarding disqualification of farm land from farm use tax assessment. This appeal is of a county land use decision

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"The governing body or its designate shall not grant final approval of an application * * * for the establishment of a dwelling on a lot or parcel in an exclusive farm use zone that is, or has been, receiving special assessment without evidence that the lot or parcel upon which the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308.370 * * *."

on petitioners' request under LDO 218.120(2)(E) to revoke a neighbor's 1990 nonfarm dwelling approval. How petitioners believe the neighbor's property should have been tax-assessed in 1990 is irrelevant to this review. See Springer v. LCDC, 111 Or App 262, 269, 826 P2d 54, rev den 313 Or 354 (1992).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the county's decision "does not comply with the local ordinance criteria that the penalty provisions of Chapter 290 be applied to the process of modification or revocation of a permit when false statements have been made on an application." Petition for Review 15. LDO Chapter 290 is the county's enforcement ordinance; LDO 290.030 provides that false statements in an application constitute a violation of that ordinance.

Intervenor responds that petitioners have waived their right to raise this issue before LUBA, because petitioners did not raise any issue related to application of the enforcement provisions before the county, as required by ORS 197.763(1) and ORS 197.835(2).[7] Intervenor also argues

[7]ORS 197.763(1) provides, in relevant part:

> "An issue which may be the basis for an appeal to [LUBA] 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 [local government

that "[s]ince the [c]ounty was not asked to institute an enforcement proceeding and was not given sufficient grounds to do so, it committed no error by not doing so." Intervenor-Respondent's Brief 10.

Where a party contends petitioners have waived certain issues, and petitioners neither cite where in the local record those issues were raised nor contend they may raise new issues under ORS 197.835(2)(a) or (b), those issues have been waived. Pend-Air Citizen's Comm. v. City of Pendleton, ___ Or LUBA ___ (LUBA No. 94-178, June 27, 1995); Larson v. Wallowa County, 23 Or LUBA 527 (1992).

Petitioners have not cited to the record where they requested that the county commence enforcement proceedings under LDO 290.030. Nor is there any indication that petitioners asserted below that the county was required to initiate enforcement proceedings on its own initiative under

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decision maker], and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides, in relevant part:

"Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues [before LUBA] if:

"(a) The local government failed to follow the requirements of ORS 197.763; or

"(b) The local government made a land use decision * * * which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

LDO 285.025(3)(C)(i). Their September 2, 1993 request and December 29, 1993 addendum request an investigation and hearing, as provided for in LDO 285.025(3)(C)(ii).[8] Petitioners may not raise the county's failure to conduct enforcement proceedings for the first time in this appeal.[9]

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend the 1993 fuel break reduction approval authorizes noncompliance with three conditions of the 1990 permit. Conditions in the fuel break reduction approval authorize a change in home site location from that which petitioners claim is required under the 1990 permit and require an address sign be posted at the driveway to the

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[8]Petitioners' December 29, 1993 addendum cites to the enforcement provisions of LDO 292.030 for the premise that a false statement in an application is a code violation. However, petitioners do not request, in either their original request or addendum, that the county initiate enforcement proceedings or assert that the county is required to initiate enforcement proceedings.

[9]The county did investigate the allegation of falsification of information, pursuant to petitioners' request for an investigation and hearing, and concluded it had no basis to review the merits of the 1990 decision. The county concluded: "The approval criteria for the nonfarm dwelling are not included as criteria in the 'process for modification of a permit' under Section 285.025." Record 99. We defer to that interpretation. Moreover, the essence of petitioners' claims of falsification is that they disagree with the information in the 1990 application. The time for appealing the 1990 nonfarm dwelling approval was in 1990. Petitioners cannot collaterally attack the 1990 approval through this request for permit revocation Sahagian v. Columbia County, 27 Or LUBA 341 (1994).

property from Butler Creek Road.[10]

Petitioners acknowledge the 1993 fuel break approval was not appealed. Petitioners cannot, through this proceeding, collaterally challenge the conditions imposed in that earlier approval. Sahagian v. Columbia County, 27 Or LUBA at 344.

However, while in this assignment of error petitioners expressly asserts only that the conditions of the 1993 fuel break reduction approval violate conditions of the 1990 approval, petitioners also appear to argue that Conditions B, D and F of the 1990 approval have been violated, without regard to the 1993 approval.

Condition B of the 1990 approval states:

> "The nonfarm dwelling shall be placed on the southerly portion of the property where the soils have been classified Class IV, as indicated on the revised map submitted with the application." Record 173.

No nonfarm dwelling has been constructed on the property, nor has any building permit for such a dwelling been requested. Therefore, there cannot yet be any violation

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[10]The 1993 condition petitioners claim violates the 1990 access conditions states:

> If not already in place, an address sign shall be posted so that it is visible from the driveway entrance off Butler Creek Road and, if necessary, where the driveway forks." Record 160.

of this condition.[11]

With regard to the other alleged condition violations, petitioners appear to argue that Conditions D and F of the 1990 approval require exclusive access from Ashland Lane and that, by constructing access to the property from Butler Creek Road, intervenor has violated those conditions. Those conditions state:

> "D) The landowner's authorized agent shall obtain a road approach permit for the creation of any new driveways or modifications of existing driveways off Ashland Lane, as per requirements of the Department of Public Works.
>
> "* * * * *
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> "F) The following fire safety requirements must be met prior to occupancy of the dwelling. Inspection is to be requested by submitting the form (enclosed) to the Planning Department when all requirements have been met.
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> "* * * * *
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> "3) Premise identification (address sign) must be placed at the driveway access to the subject parcel visible from Ashland Lane." Record 173-74.

As the county found, nothing in these conditions requires exclusive access from Ashland Lane. Therefore, intervenors' construction of a driveway from Butler Creek

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[11]Moreover, in a subsequent proceeding the home site location could be refined so long as the refinement was consistent with the nonfarm dwelling permit requirements.

Road does not violate either of them. Moreover, since no access has been constructed from Ashland Lane, the county determined there could not yet be any violation of either of those conditions.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend "[t]he county failed to give proper notice of * * * conditions as is required by local ordinance criteria; the modification decision is in violation of applicable law and therefore invalid." Petition for Review 22.

Under this assignment of error, petitioners recite two county notice requirements, then conclude, without any analysis, that "[t]he respondent here clearly has not complied with its own ordinance requirements; the attempt at permit modifications is invalid and must be reversed and remanded back to Jackson County." Id.

A procedural error is grounds for remand or reversal only when a party establishes the violation prejudices its substantial rights. Champion v. City of Portland, 28 Or LUBA 618 (1995); Shapiro v. City of Talent, 28 Or LUBA 542 (1995).

Petitioners here have merely asserted, without any explanation, that the county violated its notice procedures. If, in fact, the county's notice of the proceedings was defective, petitioners have provided no indication what the

defect might have been, or how petitioners were prejudiced by it. We will not search the record for an alleged notice violation. See Neuman v. City of Albany, 28 Or LUBA 337 (1994); Doob v. Josephine County, 27 Or LUBA 293 (1994).

The sixth assignment of error is denied.

The county's decision is affirmed.