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

SPENCER CREEK NEIGHBORS, JANE)
NOVICK and JERRY STRAND,)
Petitioners,)
vs.)
LANE COUNTY,)
Respondent.)

LUBA No. 96-079
FINAL OPINION
AND ORDER

Appeal from Lane County.

William H. Sherlock and Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

Stephen L. Vorhes filed the response brief and argued on behalf of the respondent.

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

REMANDED 01/31/97

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's conditional approval of
4 a special use permit for a paintball park in an Impacted
5 Forest Land (F-2) zone.

6 **FACTS**

7 The owner and a prospective tenant of an 85-acre parcel
8 in the F-2 zone applied for a special use permit for a
9 paintball park.¹ The land surrounding the subject parcel is
10 also zoned F-2. The development proposed for the park
11 includes a 30-foot by 30-foot clubhouse, gravel parking lot
12 and other amenities such as open-sided rest shelters.²

13 On August 11, 1995, the planning director issued a
14 decision conditionally approving a special use permit. The

¹The Hearings Officer's decision describes the games proposed to be conducted in the paintball park:

"Paintball games, as contemplated by the applicant, are competitions between teams of 'paintballers.' The competition is supervised by one or more umpires. The teams assemble within an area marked off for the competition, which may be an area of 100 feet on a side. Within that area, the teams work to capture the other team's flag or eliminate all of the other team's players by marking them with a paintball expelled from a special CO2 or air-powered paintgun. The paintballs used are gelatin balls containing vegetable or food coloring dyes and suspending agents. Paintball games also occasionally involve the use of paintball grenades, which usually contain non-toxic, water soluble latex paint." Record 287.

²The conditions of approval specifically restrict use of the clubhouse to equipment storage, first aid, communications for park activities, instruction of participants and sanitary facilities. The conditions specifically exclude food and beverage service and sleeping accommodations.

1 planning director's decision included numerous development
2 requirements and six conditions. Petitioners appealed that
3 approval to a hearings officer. On October 25, 1995, the
4 hearings officer denied petitioners' appeal, approved the
5 request to allow the paintball park, and, as later described
6 in the challenged decision, "clarified" the conditions
7 imposed by the planning director by reformulating the
8 requirements and conditions into 14 specific conditions.
9 The hearings officer's decision does not adopt the planning
10 director's decision.

11 Petitioners appealed the hearings officer's decision to
12 the board of county commissioners (commissioners). On March
13 6, 1996, the commissioners heard petitioners' appeal and
14 approved the special use permit. The commissioners adopted
15 five pages of "findings of fact" and "ultimate findings of
16 fact and conclusions" and then ordered:

17 "1. Except to the extent more fully explained and
18 clarified in this Order, the Board
19 incorporates the findings, conclusions and
20 determination of the Planning Director and
21 the Hearings Official in conditionally
22 approving the Special Use Permit for a
23 paintball park on the subject property;

24 "2. The Board restates and approves all
25 conditions and limitations imposed by the
26 Hearings Official in connection with the
27 provisional approval of that Special Use
28 Permit[.]" Record 13-14.

29 Petitioners appeal the commissioners' decision.

1 **PRELIMINARY ISSUE**

2 The commissioners' decision generally alludes to and,
3 in the ultimate findings of fact, purports to adopt
4 unspecified portions of the planning director's and hearings
5 officer's decisions. However, the final decision makes
6 specific reference to only limited portions of the hearings
7 officer's decision.

8 We have addressed the standard which a local government
9 must meet to incorporate all or a portion of a document into
10 another document:

11 "If a local government wishes to incorporate all
12 or portions of another document by reference into
13 its findings, it must (1) clearly indicate its
14 intent to do so, and (2) clearly identify the
15 document or portions of the document so
16 incorporated. Gonzalez v. Lane County, 24 Or LUBA
17 251, 259 (1992). A local government decision will
18 satisfy these requirements if a reasonable person
19 reading the decision would realize that another
20 document is incorporated into the findings and,
21 based on the decision itself, would be able both
22 to identify and to request the opportunity to
23 review the specific document thus incorporated."
24 Johnson v. Lane County, ___ Or LUBA ___ (LUBA No.
25 95-207, August 19, 1996) slip op 7-8.

26 Except for the conditions imposed by the hearings
27 officer, which the commissioners specifically adopted, we
28 cannot determine from the county's final decision which
29 portions of the planning director's and hearings officer's
30 decision the commissioners intended to adopt. Therefore, in
31 reviewing the county's final decision, we rely solely on the
32 commissioners' decision and the portions of the hearings

1 officer's decision specifically referred to in the
2 commissioners' decision.

3 **SECOND ASSIGNMENT OF ERROR**

4 At the appeal hearing before the commissioners only
5 petitioners' counsel was allowed to speak. Petitioners
6 argue that the county impermissibly denied petitioners
7 Novick and Strand the opportunity to respond to the issues
8 raised in the local appeal and to correct errors in the
9 hearings officer's findings which relate directly to the
10 relevant approval standards, thereby prejudicing Novick's
11 and Strand's substantial rights.

12 LC 14.400(1) states:

13 "(1) Review on the Record. The review of the
14 decision by the Board shall be confined to
15 the record of the proceeding before the
16 Hearings Official except as provided in LC
17 14.400(2) and 14.400(3) below [De Novo
18 Hearing/Remand to Hearings Official]."³

³LC 14.400(1) states:

"(2) Limited Additional Testimony. The Board may admit additional testimony and other evidence without holding a de novo hearing, if it is satisfied that the testimony or other evidence could not have been presented at the initial hearing. In deciding such admission, the Board shall consider:

"(a) Prejudice to parties.

"(b) Convenience or availability of evidence at the time of the initial hearing.

"(c) Surprise to opposing parties.

"(d) When notice was given to other parties of the intended attempt to admit the new evidence.

1 LC 14.400(9)(b) provides:

2 "In the conduct of a hearing on the record, unless
3 otherwise specified by the Board, the Board shall
4 * * * [a]nnounce to all persons present that * * *
5 only persons who, pursuant to LC 14.600(4) have
6 qualified to participate in the on-the-record
7 hearing will be allowed to be heard, and that the
8 issues discussed will be limited to those raised
9 in the notice of appeal."

10 LC 14.600(4) states that those who may participate in
11 an on-the-record hearing are:

12 "(a) The applicant and the applicant's
13 representative.

14 "(b) The Director.

15 "(c) The appellant and the appellant's
16 representative.

17 "(d) Other persons who have:

18 "(i) At least one day prior to the date of
19 the Board's determination, submitted
20 into the possession of the Director a
21 written request to participate including
22 statements about how they qualify as
23 parties and the issues they wish to
24 speak about.

25 "(ii) Have been qualified as parties by the
26 Hearings Official in the decision being
27 appealed."

28 Petitioners argue that (1) Novick complied with LC
29 14.400 by sending a letter requesting she and Strand they be

"(e) The competency, relevancy and materiality of the proposed
testimony or other evidence.

"(f) Whether the matter should be remanded for a de novo
hearing under LC 14.400(3) below."

1 allowed to participate, and (2) both were specifically
2 qualified by the hearings officer as parties to the local
3 appeal. Petitioners argue that because Novick and Strand
4 qualified to participate, they were entitled to speak at the
5 on-the-record hearing.⁴

6 The county responds that although Novick and Strand
7 were listed as appellants as members of petitioner Spencer
8 Creek Neighbors, neither Novick nor Strand was qualified to
9 participate as an individual. The county relies on the
10 board's use of the "Lane Manual" to limit arguments to 10
11 minutes and to limit who may make presentations.⁵ However,
12 even if the Lane Manual could be interpreted to limit
13 petitioners' ability to speak, the county fails to establish
14 that the Lane Manual was applicable to its proceeding.⁶

⁴Petitioners point out that the county provided a sign-up sheet, stating "If you wish to testify, please PRINT your name and address." The challenged decision suggests that even if Novick and Strand were qualified to participate as individuals, the county has discretion to determine whether to hear them speak. Although petitioners refute this contention, the county does not address this issue in its response brief.

⁵The county contends that 10 minutes were allotted to petitioner's attorney to speak. Therefore, there was no time remaining for Novick and Strand to speak.

⁶There is no reference in LC 14.400(9) to the Lane Manual, and the county has not otherwise demonstrated that the Lane Manual governs its appeal procedures. Furthermore, the county's notice of hearing does not identify the Lane Manual as containing an applicable criterion. In the relevant and controlling portion of the Lane Code, the Lane Manual is referenced once. Under "Appeal Content Requirements," all appeals shall contain the following information:

- (d) An explanation with detailed support specifying one or more of the following as assignments of error;

1 Consequently, we limit our decision to the applicable LC
2 provisions.

3 Petitioners Novick and Strand met the participation
4 criteria when the hearings officer qualified each of them as
5 parties to the decision being appealed. Furthermore, the
6 county qualified Novick and Strand by listing individual
7 members of Spencer Creek Neighbors as appellants.

8 Where petitioners are denied the opportunity to rebut
9 evidence relevant to the approval standards in a
10 quasi-judicial land use proceeding, their substantial rights
11 are prejudiced and the challenged decision must be remanded.
12 ORS 197.835(7)(a)(B). Mazeski v. Wasco County, 26 Or LUBA
13 226 (1993). Petitioners' rights were prejudiced when they
14 were precluded from responding to the issues on appeal and
15 correcting possible errors in the hearings officer's
16 findings which relate directly to the relevant approval
17 standards.

18 The second assignment of error is sustained.

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioners argue that the county misconstrued the law
21 and failed to make adequate findings supported by

** * * * *

"(iv) The Approval Authority misinterpreted the Lane Code
or Manual, State Law (statutory or case law) or
other applicable criteria ... "

** * * * *." LC 14.515(3)(d)(iv).

1 substantial evidence when it concluded that the proposed
2 paintball facility is allowed under Statewide Planning Goal
3 4 and the Goal 4 implementing rules in OAR Chapter 660,
4 Division 6, and Lane Code (LC) 16.211(3)(d).

5 **A. Interpretation of Rule and Ordinance**

6 The challenged decision concludes that the paintball
7 facility is a park under OAR 660-06-025(4)(e)⁷ and LC
8 16.211(3)(d).

9 LC 16.211(3) states, in relevant part:

10 "The following uses may be allowed [in forest
11 zones] provided the requirements in LC 16.211(5)
12 below are met.^[8]

⁷OAR 660-06-025(4) states:

"The following uses may be allowed on forest lands subject to
the review standards in section (5) of this rule:

"* * * * *

"(e) Parks and campgrounds. For the purpose of this
rule a campground is an area devoted to overnight
temporary use for vacation, recreational or
emergency purposes, but not for residential
purposes. A camping site may be occupied by a
tent, travel trailer or recreational vehicle. Camp-
grounds authorized by this rule shall not include
intensively developed recreational uses such as
swimming pools, tennis courts, retail stores or gas
stations[.]"

⁸LC 16.211(5) sets forth various uses in F-2 zones that are subject to
the planning director's approval. To approve a use under LC 16.211(5), the
planning direct must determine whether the following requirements are met:

"(a) The proposed use will not force a significant change in
or significantly increase the cost of, accepted farming
or forest practices on agriculture or forest lands.

1 "* * * * *

2 "(c) Parks.^[9]

3 "(d) Campgrounds for areas devoted to
4 overnight temporary use for vacation,
5 recreational or emergency purposes, but
6 not for residential purposes and not
7 including intensively developed
8 recreational uses such as swimming
9 pools, tennis courts, retail stores or
10 gas stations."

11 The challenged decision states:

12 "The Board also finds that the Hearings Official
13 correctly interpreted OAR 660-06-025(4)(e) to
14 include a requirement that in order to be approved
15 under that administrative rule a park could not
16 include intensively developed recreational uses
17 such as swimming pools, tennis courts, retail
18 stores or gas stations." Record 11.

19 On appeal, the county explains:

20 "The county decision in this case relies on a
21 reasonable and correct interpretation of a local
22 regulation consistent with the express language,
23 purpose and underlying policy of LC 16.211(3)(c)."
24 Respondent's Brief 10-11.(Citations omitted.)

25 OAR 660-06-025(4)(e) only specifically prohibits
26 intensively developed recreational uses in campgrounds. LC
27 16.211(3)(c) also only specifically prohibits intensively

"(b) The proposed use will not significantly increase fire hazard or significantly increase risks to fire suppression personnel.

"(c) [A] written statement [recognizing] the rights of adjacent and nearby landowners to conduct forest operations consistent with the Forest Practices Act and Rules."

⁹"Park" is not defined in either OAR 660-06-025 or LC 16.211.

1 developed recreational uses in campgrounds. However, the
2 commissioners' decision interprets OAR 660-06-025(4)(e) to
3 apply the prohibition against intensively developed
4 recreational uses to parks as well as to campgrounds. The
5 commissioners also adopted the hearings officer's decision
6 construing LC 16.211(3) to include the same prohibition
7 against intensely developed recreational uses in parks that
8 the commissioners found in the rule.¹⁰

9 **B. Adequacy of Findings and Substantial Evidence**

10 Petitioners argue generally that the findings are
11 inadequate because the county misconstrued OAR 660-06-
12 025(4)(e) and LC 16.211(3)(d) when it concluded that the
13 proposed paintball facility is not a recreational use of
14 forest land. Petitioners rely on the county's determination
15 that intensively developed recreational uses are prohibited
16 in parks, and argue generally that a paintball facility is
17 an intensively developed recreational use. Petitioners also
18 challenge the substantial evidence upon which the county's

¹⁰This 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).

The county argues that it has made an interpretation to which we must defer. While we are not obligated to defer to the county's interpretation of an agency rule, we must defer to the county's restrictive interpretation of its code. The county's restrictive interpretation of the rule is useful as it illustrates the county's analysis of its restrictive interpretation of its code.

1 decision is based, by merely stating:

2 "To the extent that the County has found that the
3 proposed use complies with the intensity standard
4 in the Rule and the Code, it has made a finding
5 that is not supported by substantial evidence in
6 the record." Petition for Review 7-8.

7 We concluded above that petitioners have not yet been
8 provided an adequate opportunity to participate in the local
9 proceedings. Because the evidentiary record may be expanded
10 by additional proceedings before the county, it would be
11 premature to address petitioners' challenge to the
12 substantiality of the evidence in the record or the adequacy
13 of the findings.

14 The decision is remanded.