BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

R/C PILOTS ASSOCIATION, Petitioner, vs. MARION COUNTY, Respondent.	LUBA No. 96-250
THE BARNSTORMERS RC CLUB, INC., Petitioner, vs. MARION COUNTY, Respondent, and JOHN LEKAS and TERRENCE KAY, P.C., Intervenors-Respondent.	FINAL OPINION AND ORDER LUBA No. 96-256

Appeal from Marion County.

Norman R. Hill, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Webb & Martinis.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief and argued on behalf of respondent. With her on the brief was Michael J. Hansen, County Counsel.

Terrence Kay, Salem, represented intervenors-respondent.

HANNA, Referee; LIVINGSTON, Referee, participated in

the decision.

AFFIRMED 10/02/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners, in these consolidated appeals, appeal the county's denial of their separate applications for conditional use permits to operate radio-controlled model airplane parks on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

John Lekas and Terrence Kay, P.C., move to intervene in LUBA No. 96-256 on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

Petitioners R/C Pilots Association (Pilots) and the Barnstormers RC Club (Barnstormers) each applied for a conditional use permit to operate a model airplane park on separate properties owned by persons not involved in this appeal. Both properties are composed predominantly of high-value soils, are considered high-value farmland under OAR 660-33-020, and are zoned EFU. In each case, petitioners planned to lease a small portion of a property to operate their respective model airplane parks.

Petitioners argued in separate proceedings before the same county hearings officer that they were entitled to conditional use permits to operate their model airplane parks under Marion County Zoning Ordinance (MZCO)

136.040(V),[1] which lists as a conditional use a park "owned and operated by a governmental agency or nonprofit community organization."[2]

On October 7, 1996, the hearings officer issued an order approving Pilots' application, based on the conclusion that Pilots is a "nonprofit community organization" and that Pilots need not own the land underlying the park in order to "own and operate" the park for purposes of MCZO 136.040(V). On October 16, 1997, the decision of the hearings officer was presented to the board of county commissioners (county), which voted to "call up" the decision for review.[3] On October 22, 1996, the county issued a remand order, stating:

> "* * * [T]he [county] remands the application back to the Hearings Officer for reconsideration. This reconsideration shall be based on the record and the evaluation based on past and current [county]

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[1]The Marion County Zoning Code was renumbered shortly after Pilots submitted its application. We follow the parties in using the current section numbers.

[2]MCZO 136.040(V) provides that:

> "The following uses may be permitted in an EFU zone subject to obtaining a conditional use permit and satisfying the criteria in Section 136.050(A), and any additional criteria specified for the use:
>
> "* * * * *
>
> "(V) Parks owned and operated by a governmental agency or nonprofit community organization[.]
>
> "* * * * *"

[3]The record does not indicate that the October 7, 1996 decision was ever issued to Pilots.

interpretation [that] the definition of the term 'owned,' as used in Section [136.040(V)] of the Marion County Rural Zoning Ordinance, shall have the same definition as the term 'owners' contained in Section 110.425 of the Marion County Rural Zoning Ordinance.

> "* * * [T]he Hearings Officer shall further define and clarify whether the applicant, Salem R/C Pilots Association, truly qualifies as a non-profit community organization." Record 80.

Accordingly, the hearings officer reconsidered Pilots' application, and on November 4, 1996, issued a decision denying it. The hearings officer concluded that because Pilots did not own the land, it did not meet the requirement at MCZO 136.040(V) that its park be "owned and operated" by a nonprofit community organization. In addition, the hearings officer concluded that because Pilots is not a registered nonprofit corporation under state law, Pilots is not a "nonprofit community organization" for purposes of MCZO 136.040(V). The hearings officer then considered Barnstormers' application under the standard announced in the November 4, 1996 Pilots' decision, and, on November 15, 1996, issued an order denying Barnstormers' application because it also did not own the land underlying its park, and thus did not comply with MCZO 136.040(V).[4]

Both petitioners appealed the hearings officer's decisions to the county. On December 2, 1996, the county affirmed the November 4, 1996 hearings officer's decision regarding Pilots, adopting the hearings officer's Findings of Fact, Additional Findings of Fact and Conclusions of Law as its own. On December 9, 1996, the county affirmed the

[4]Unlike Pilots, Barnstormers submitted evidence that it is a registered non-profit corporation under state law.

November 4, 1996 hearings officer's decision regarding Barnstormers, adopting the hearings officer's Findings of Fact, Additional Findings of Fact and Conclusions of Law as its own.[5]

These appeals followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county erred when it concluded that ORS 215.283(2)(d), the statute on which MZCO 136.040(V) is based, prohibits as a matter of law model airplane parks on lands zoned EFU.[6] Petitioners rely on a discussion in which a commissioner made a statement to that effect:

> "Chair Franke added that he does not have objections to this use as long as people are good neighbors and do not become a nuisance, but ORS

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[5]In both cases the county expressly adopted the interpretations of the hearings officer challenged in this appeal. Those interpretations thus become the interpretations of the county. See Gage v. City of Portland, 319 Or 308, 315, 877 P2d 1187 (1994). Unless stated otherwise, references to the challenged decisions or the county's interpretations are to the hearings officer's decisions or interpretations adopted by the county's orders in each case.

[6]ORS 215.283(2) states in material part:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(d) Parks, playgrounds or community centers owned and operated by a governmental agency or nonprofit community organization.
>
> "* * * * *"

215.283(2)(d) has historically been interpreted that it does not allow this." Record 26.

Statements made by individual decision makers expressing erroneous interpretations of law or legally improper reasons for adopting a land use decision provide no basis for reversal or remand unless such statements are adopted in the final written decision or findings supporting the written decision. Waker Associates, Inc. v. Clackamas County, 21 Or LUBA 588, 591 (1991). Nothing in the challenged decisions concludes that, as a matter of law, ORS 215.283(2)(d) prohibits model airplane parks on EFU lands.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in concluding that ORS 215.283(2)(d) requires the conditional use permit holder to own both the conditionally approved activity and fee title to the land on which the activity is located. The challenged decisions were made under MCZO 136.040(V), not ORS 215.283(2)(d). Nonetheless, we understand petitioners to argue that because MCZO 136.040(V) is the local codification of ORS 215.283(2)(d), the county cannot interpret its local ordinance in ways contrary to the statute it implements. ORS 197.829(1)(d).[7]

[7]ORS 197.829(1)(d) states that:

"(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and

Petitioners argue that, although the phrase "owned and operated" has never been interpreted with respect to either MCZO 136.040(V) or ORS 215.283(2)(d), the county's interpretation is contradicted by the plain meaning and the context of both provisions of law. According to petitioners, the phrase "owned and operated" was included in ORS 215.283(2)(d) solely to distinguish public and non-profit parks from "private parks" allowed under ORS 215.283(2)(c).[8] Thus, petitioners reason that the term "owned" does not refer to fee ownership of the land. Rather, it refers to ownership of the "park," or activity being allowed as a conditional use.

Petitioners also argue that the county's interpretation is not supported by the context of its own ordinance. The challenged decisions equate "ownership" for purposes of MCZO

> land use regulations, unless the board determines that the local government's interpretation:
>
> "* * * * *
>
> (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[8]ORS 215.283(2) provides that:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> (c) Private parks, playgrounds, hunting and fishing preserves and campgrounds.
>
> "* * * * *"

136.040(V) with the definition of "owner" in MCZO 110.425, which is a general definition for purposes of the entire MCZO that limits the meaning of "owner" to possessors of fee title.[9] Petitioners agree that the MCZO 110.425 definition of "owner" is properly used in other sections of the MCZO (for example, under MCZO 119.020, to limit persons who can make conditional use applications to fee owners), but argue that it makes no sense to distinguish between fee owners and leaseholders with respect to "parks" under MCZO 136.040(V). According to petitioners, the scheme of both ORS 215.283(2) and MCZO section 136 is to control the type of uses on EFU land, and hence limit impacts on resource lands. The impact of "parks" on resource lands is exactly the same whether the land underlying the park is owned by a leaseholder or fee owner. Petitioners conclude that the county's more restrictive reading of MCZO 136.040(V) to limit "parks" allowed on EFU lands to ones operated by the fee owner misconstrues the statute that it implements, ORS 215.283(2)(d), and is inconsistent with the purpose of the county's zoning regulations. ORS 197.829(1).

Petitioners' reading of MCZO 136.040(V) is plausible, but in no way demonstrates that the county's more

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[9]MCZO 110.425 defines "owner" as:

> "The owner of record of real property as shown on the latest tax rolls or deed records of the county, or a person who is purchasing a parcel of property under written contract."

restrictive reading is contrary to ORS 215.283(2)(d). The county is entitled to apply more stringent local criteria in its ordinances to uses allowed under ORS 215.283(2) than is stated in that statute. Brentmar v. Jackson County, 321 Or 481, 497, 900 P2d 1030 (1995). Further, a county may regulate or define uses allowed under ORS 215.283(2) as long as it does not define those uses more expansively than permitted under state law. See Von Lubken v. Hood River County, 104 Or App 683, 687, 803 P2d 750 (1990), adhered to on reconsideration, 106 Or App 226 (1991); City of Sandy v. Clackamas County, 28 Or LUBA 316, 320 (1994). At most, petitioners establish that the county's interpretation applies a more restrictive definition than state law. Doing so is not contrary to ORS 215.283(2)(d). Nor is the county's interpretation so inconsistent with the purpose of its zoning ordinance as to be "clearly wrong." Accordingly, we are required to affirm the county's interpretation. ORS 197.829(1); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the challenged decisions violate petitioners' constitutional rights to equal protection under the United States and Oregon constitutions. Specifically, petitioners argue that the county's interpretation limiting "parks" allowed in EFU zones to ones operated by fee owners

of the land discriminates between two groups (leaseholders vs. fee owners) without a rational relationship to a legitimate governmental purpose. Kawaoka v. City of Arroyo Grande, 17 F3d 1227 (9th Cir. 1994).

Petitioners reiterate their arguments above that there is no rational basis for distinguishing between leaseholders and fee owners for purposes of uses allowed in EFU zones. In either case the impact on resource land is identical. For this reason, petitioners contend that the county's interpretation bears no rational relationship to the purpose of protecting lands zoned EFU.

The challenged decisions found that the distinction between leaseholders and fee owners created by the county's interpretation bore a rational relationship to protection of farm land, because limiting "parks" to fee owners would discourage proliferation of nonfarm uses on farm lands. Pilots Record 10-11; Barnstormers Record 16-17. On appeal, the county suggests another rational basis for distinguishing between leaseholders and fee owners: requiring fee ownership of public parks on EFU lands ensures that, once established, the parks are more likely to remain open and not revert to a landlord who could take advantage of the development for private rather than public benefit. Respondent's Brief 5. Either justification provides a rational basis for distinguishing between leaseholders and fee owners for purposes of allowing conditional uses on

lands zoned EFU, and thus the county's interpretation does not violate the Equal Protection Clause of the United States Constitution.

Petitioners' related argument under Article 1, section 20 of the Oregon Constitution (the privileges and immunities clause) also fails to demonstrate error.[10] The privileges and immunities clause prohibits creation of classes among citizens only when those classes are based on antecedent personal or social status or characteristics. Ag West Supply v. Hall, 126 Or App 475, 478, 869 P2d 383 (1994). Generally, when one can leave or enter a statutory grouping at will, as one can with the class of fee owners, the statutory classification is not one prohibited by the privileges and immunities clause. Downtown Community Association v. City of Portland, ___ Or LUBA ___ (LUBA No. 95-258, September 4, 1996), slip op 16 (an ordinance distinguishing between owners of land along light rail transit streets and owners of land along transit mall streets is not improper class legislation). Petitioners have neither established that the class of "fee owners" is closed to them, nor that the county's interpretation is based on antecedent personal or social status or

[10]Article 1, section 20, of the Oregon Constitution states:

> "**Equality of privileges and immunities of citizens.** No law shall be passed granting to any citizens or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

characteristics.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As an alternative basis for approval, petitioners contended below that their proposed model airplane parks are allowed as "private parks" under ORS 215.283(2)(c). MCZO 136.040(U), which is based on ORS 215.283(2)(c), differs from that statute in prohibiting establishment of new private parks, but allowing expansion of existing private parks. The county's ordinance

follows in this respect OAR 660-33-120, which prohibits establishment of new private parks on high-value farmland.

The challenged decisions determine that MCZO 136.040(U) rather than ORS 215.283(2)(c) controls, and that under its ordinance the county has no basis to approve the proposed use as a new private park. Pilots Record 13; Barnstormers Record 18. Petitioners argue that this determination incorrectly applies land use regulations in light of Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995), and Lane County v. LCDC, 138 Or App 635, 910 P2d 414 (1996), modified 140 Or App 368, 914 P2d 1114 (1996), rev'd 325 Or 569, ___ P2d ___ (1997).

Petitioners' argument under both Brentmar and Lane County is essentially that the county cannot completely prohibit uses allowed by ORS 215.283(2), i.e. that MCZO 136.040(U) and OAR 660-33-120 are invalid to the extent they prohibit uses allowed by ORS 215.283(2). Petitioners filed their brief before the Oregon Supreme Court issued its opinion in Lane County, 325 Or 569 (filed August 7, 1997), which reversed the Court of Appeals. In that opinion, the Supreme Court held OAR 660-33-120 is valid "even if those regulations have the effect of prohibiting uses otherwise permissible under the applicable statute." 325 Or at 583. Because MCZO 136.040(U) implements and follows OAR 660-33-120 in prohibiting private parks on high-value farmlands, we conclude that it too is valid, notwithstanding that it

prohibits a use allowed under ORS 215.283(2).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Pilots argues that the county violated its procedural rights when the county "called up" and remanded, without notice or opportunity for hearing, the original decision of the hearings officer approving the conditional use. Pilots argues that nothing in the MCZO authorizes the county summarily to call up a hearings officer's decision and remand it with instructions, all without notice or opportunity for hearing.

The county responds that its actions were authorized under MCZO 122.070,[11] which provides:

> "The [county] may call up any action of the * * * Hearings Officer in granting or denying [an application]. Such action of the [county] shall be taken at the meeting where notice of the decision is presented. When the [county] takes such action * * * [the] Hearings Officer's records pertaining to the [application] shall be submitted to the [county] * * * and such call up shall stay all proceedings in the same manner as the filing of a notice of appeal."

Under MCZO 122.070, when the county "calls up" a decision by a hearings officer it essentially initiates an appeal to itself. Appeal to the county is governed by MCZO

[11]MCZO 122.070 governs variances. However, under conditional use provisions at MCZO 119.080, the variance procedures for "calling up" and consideration on appeal under MCZO 122.040 through MCZO 122.140 are applicable to conditional uses.

122.120(c), which states:

> "The [county] shall review the action of the * * * Hearings Officer and may refer the matter back to the * * * Hearings Officer for further consideration, in which case the * * * Hearings Officer shall conduct further investigation if it is deemed advisable and report its findings to the [county]. The [county] may summarily, after considering the application and appeal and finding that the facts therein stated do not warrant any further hearings, affirm the action of the * * * Hearings Officer and deny the appeal. * * *."

The county argues that its remand action was authorized under these provisions, which allow it to (1) call up the decision, and then (2) summarily refer the decision back to the hearings officer for further consideration, without opportunity for a hearing. In any case, the county argues, Pilots suffered no prejudice from this summary procedure, because it was able to appeal the hearings officer's decision on reconsideration, and argue to the county its view of the issues.

We agree with the county's reading of these provisions. Pilots does not identify any provision in MCZO or elsewhere that requires the county to provide notice that it is calling up the decision of a hearings officer.[12] MCZO

[12]The county's authority to "call up" lower decisions apparently stems from ORS 215.422(1)(a), which allows a local government to review lower decisions on its own motion. ORS 215.422(1)(a) further provides that "[t]he procedure and type of hearing for such an * * * review shall be prescribed by the governing body * * *." Nothing in that section or elsewhere requires the governing body to provide notice that it is calling up the lower decision.

122.120(c) does not require the county to hold a hearing before it refers the decision back to the hearings officer for reconsideration. Van Veldhuizen v. Marion County, 26 Or LUBA 468, 474 (1994). In any case, we agree that Pilots has not established that the county committed any procedural error which prejudiced Pilots' substantial rights. ORS 197.835(9)(a)(B).

The fifth assignment of error is denied.

We need not resolve Pilots' sixth assignment of error, which argues that the county erred in requiring it to be registered as a nonprofit corporation under ORS chapter 65 in order to qualify as a "non-profit community based organization" under MCZO 136.040(V). Pilots is required to demonstrate compliance with each standard under MCZO 136.040(V), and, we have concluded, the county correctly determined that Pilots failed to establish the requirement that it be fee owner of the property underlying the model airplane park. On appeal of a denial of a conditional use application, the county need only establish the existence of one adequate basis for denial. Baughman v. Marion County, 17 Or LUBA 632, 636 (1989).

The county's decisions are affirmed.