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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
CROOK COUNTY,)
)
Respondent,)
)
and)
)
NORM CHADWICK,)
)
Intervenor-Respondent.)

LUBA No. 98-202
FINAL OPINION
AND ORDER

Appeal from Crook County.

Roger A. Alfred, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hardy Myers, Attorney General.

No appearance by Crook County.

Robert S. Lovlien, Bend, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Bryant, Lovlien and Jarvis.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

REMANDED 10/08/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the Crook County Court approving a partition and
4 two conditional use permits for nonfarm residences in the county's exclusive farm use (EFU)
5 zone.

6 **MOTION TO INTERVENE**

7 Norm Chadwick, the applicant below, moves to intervene on the side of respondent.
8 There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject parcel includes approximately 188 acres.¹ In January 1997, the Crook
11 County Court approved intervenor's application (1) to partition the 188 acres into two new
12 nonfarm parcels of ten acres each and a remainder farm parcel of 168 acres and (2) for
13 conditional use permits for a nonfarm dwelling on each of the two new nonfarm parcels.
14 That decision was appealed to LUBA. After petitioner filed its petition for review, the
15 parties stipulated to a voluntary remand. LUBA granted that voluntary remand in an
16 unpublished opinion dated December 15, 1997.

17 Following LUBA's remand, the county court considered the matter on September 23,
18 1998, and left the record open until October 7, 1998. On October 6, 1998, intervenor
19 submitted a document entitled "Supplemental Burden of Proof Statement." Record 23-34.
20 That document includes proposed findings of fact, and conclusions of law. That document
21 was put into the form of a final decision and adopted by the Crook County Court on
22 November 4, 1998. This appeal followed.

¹Before 1994, the subject parcel was part of the 1,200-acre Red Cloud Ranch. In June 1994 the county approved a partition of the Red Cloud Ranch to create three farm parcels of 870 acres, 165 acres and 160 acres. In December 1994, the new 870-acre farm parcel was partitioned to create the subject 188-acre parcel and two additional farm parcels of approximately 234 acres and 444 acres.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the only reason this matter was pending before the county court
3 in the first place was because petitioner appealed the county's first decision to LUBA and
4 that decision was remanded. Nevertheless, petitioner argues that the county did not give
5 petitioner individual notice of the proceedings on remand. Petitioner argues that the county's
6 failure to provide such notice constitutes procedural error and prejudiced petitioner's
7 substantial rights.

8 As a result of the county's failure to provide notice, petitioner argues it was "unaware
9 of the county's reconsideration of intervenor's application and was effectively prevented from
10 participating in the remand proceedings." Petition for Review 4. Petitioner argues that, had
11 it been given notice of the remand proceedings, "it would have presented evidence and
12 argument to rebut the 'Supplemental Burden of Proof Statement' submitted by intervenor."
13 *Id.*

14 Intervenor argues that the county did provide notice of the hearing on remand.²
15 However, we do not understand intervenor to argue that either of the notices included in the
16 record were provided to petitioner. Rather, intervenor argues that petitioner was not
17 prejudiced by the county's failure to notify petitioner of the proceedings on remand.

18 ** * * DLCD did not appear at the original hearing [on November 6, 1996].
19 DLCD did not appear at the original appeal hearing [on January 8, 1997].
20 There is no reason to think that DLCD would have appeared at the hearing on
21 remand, based on prior conduct.

22 "Any prejudice that [DLCD] may have incurred is cured by its opportunity to
23 raise substantive issues on appeal, even though it was not a party to the
24 proceedings below." Intervenor's Brief 1-2 (record citations omitted).

²The first notice identified by intervenor is a public notice of the September 23, 1998 hearing that appeared in the September 22, 1998 issue of the Central Oregonian. Record 35. The second notice is a one-page notice entitled "Legal Notice." Record 36. The record does not indicate to whom the "Legal Notice" notice was given.

1 LUBA will reverse or remand a decision based on procedural error, where the
2 procedural error results in prejudice to petitioner's substantial rights. ORS
3 197.835(9)(a)(B).³ Depending on the nature of the remand from LUBA, a local government
4 may or may not be obligated to conduct an evidentiary hearing or allow the parties an
5 opportunity to present legal argument. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d
6 145 (1998). However, where the county elects to provide the opportunity for a hearing at
7 which it accepts additional evidence and argument, all parties to the LUBA appeal that led to
8 the remand must receive some form of individualized notice of the proceedings on remand.
9 As far as we can tell, petitioner received no individualized notice of the proceedings on
10 remand, either oral or written.

11 During the local proceedings intervenor submitted proposed findings of fact and
12 conclusions of law and two large maps showing tax lots and topography.⁴ Those proposed
13 findings of fact and conclusions of law constitute factual and legal argument to the county
14 court and the maps were submitted to support the argument. Petitioner has a right to rebut
15 the argument and evidence presented by intervenor during proceedings on remand. *Caine v.*
16 *Tillamook County*, 25 Or LUBA 209, 214 (1993). The county's procedural error in failing to
17 notify petitioner of its proceedings on remand resulted in petitioner not attending the hearing
18 and not having the opportunity to rebut intervenor's evidence.

19 We reject intervenor's argument that we can assume that the county error resulted in
20 no prejudice because petitioner did not participate during the initial hearings that led to the
21 first LUBA appeal. Petitioner did participate by submitting written objections to the

³We have explained that the substantial rights of parties referred to by the statute are an adequate opportunity to prepare and present their case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

⁴The Supplemental Record table of contents includes the following notation: "Maps will be presented at time of oral argument." No maps were submitted at oral argument. However, intervenor made it clear during oral argument that maps showing the area around the subject property were submitted during the remand proceedings and were considered by the county court in making the decision challenged in this appeal.

1 proposal during the initial hearing. Supplemental Record 74-75. We cannot assume
2 petitioner would not have appeared and presented additional oral or written argument and
3 evidence, particularly where petitioner asserts otherwise. We also reject intervenor's
4 suggestion that any error or prejudice is obviated by petitioner's right to appeal the decision
5 on remand to LUBA. While we are not prepared to say the right to bring an appeal to LUBA
6 could *never* cure procedural errors in a local land use proceedings, the right to bring this
7 appeal does not cure the procedural error committed by the county here.

8 A party's right to present evidence and legal argument to a local decision maker and
9 the party's right to challenge the local decision to LUBA, once it is made, are very different.
10 Local decision makers have a significant amount of discretion in (1) weighing the evidence
11 presented to them and finding facts and (2) interpreting and applying the applicable legal
12 standards to those facts.⁵ Parties in local land use proceedings have the right to attempt to
13 persuade the decision maker to adopt a party's view of what the relevant facts are, based on
14 all of the evidence. Those parties also have a right to present argument concerning how the
15 applicable law should be interpreted and applied to those relevant facts. These rights are a
16 fundamental part of local land use hearings, and they are not replicated at LUBA.

17 The rights a party has in seeking LUBA review of a land use decision under ORS
18 197.835, once the decision is made, are much more circumscribed than the rights a party

⁵Where issues of interpretation of local land use legislation by a governing body are involved, the right to argue locally for a particular interpretation is very different from the right to argue at LUBA that a particular local interpretation is clearly wrong. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992); *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996); *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). Even in cases such as the present appeal where deference under ORS 197.829(1) and *Clark* is not appropriate, because the relevant county code provisions implement EFU zoning statutory and LCDC administrative rule provisions, the right to argue for a particular interpretation and the right to assign error to an adopted interpretation are not identical. *See Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742, 758 (1992) (local legislation may be susceptible to more than one correct interpretation); *Van Mere v. City of Tualatin*, 16 Or LUBA 671, 679 (1988)(same).

1 enjoys during a local land use hearing.⁶ For example, the right to challenge the evidentiary
2 basis of a decision at LUBA is not the equivalent of the right to submit and rebut evidence
3 during the local proceeding. In reviewing a decision for substantial evidence, LUBA does
4 not independently weigh the evidence, rather, it considers whether a reasonable decision
5 maker would rely on the evidence that was ultimately relied upon. *Younger v. City of*
6 *Portland*, 305 Or 346, 360, 752 P2d 262 (1988); *Tigard Sand and Gravel, Inc. v. Clackamas*
7 *County*, 151 Or App 16, 20, 949 P2d 1225 (1997), *rev den* 327 Or 83 (1998); *1000 Friends*
8 *of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). Similarly, the right
9 to seek LUBA review of the adequacy of a local government's findings is not equivalent to
10 the right to attempt to persuade a local government to adopt, or not to adopt, particular
11 findings. The latter is a much broader right, and petitioner's right to seek LUBA review does
12 not cure the county's failure to extend that right to petitioner in this case.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 In its second assignment of error, petitioner contends that the county failed to
16 demonstrate that the proposed nonfarm dwellings comply with Crook County Zoning
17 Ordinance criteria that implement statutory and administrative rule criteria for nonfarm
18 dwellings in EFU zones.

19 Because we sustain the first assignment of error, the challenged decision must be
20 remanded to the county to provide petitioner with an opportunity to rebut intervenor's legal
21 and evidentiary presentation to the county court. The arguments presented here by petitioner
22 can presumably be included as part of its presentation on remand, and the county will have
23 an opportunity to consider them. We therefore do not consider petitioner's arguments under

⁶We do not believe it is necessary to set out our scope of review under ORS 197.835 verbatim. Suffice it to say, LUBA's review is generally limited to the evidentiary record compiled by the local decision maker and is limited to determining whether the petitioner demonstrates any of the kinds of legal error identified in ORS 197.835. LUBA does not make its own decision based on the record, as the local decision maker does.

- 1 the second assignment of error.
- 2 The county's decision is remanded.