BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VIRGINIA G. MITCHELL, JACK OSWALD,
PAUL NEWMAN, AND WILLIAM H. MURPHY,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

RIVERSIDE HOMES, and
MICHAEL B. STEVENS,
Intervenors-Respondent.

LUBA No. 2000-123

FINAL OPINION
AND ORDER

Appeal from Washington County.

Virginia G. Mitchell, Aloha, Jack Oswald, Aloha, Paul Newman, Aloha, and William H. Murphy, Aloha, filed the petition for review. Jack Oswald argued on his own behalf.

Alan A. Rappleyea, Washington County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Gary Firestone, Portland, filed a response brief and argued on behalf of intervenor-respondent Riverside Homes. With him on the brief was Ramis, Crew, Corrigan and Bachrach.

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

AFFIRMED 12/14/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a preliminary plan for a 20-lot subdivision.

MOTION TO INTERVENE

Michael B. Stevens and Riverside Homes move to intervene on the side of the county. There is no opposition to their motions and they are allowed.

FACTS

The county's decision is on remand from LUBA. *Mitchell v. Washington County*, 37 Or LUBA 452, *aff'd* 166 Or App 363, 4 P3d 774 (2000). In our earlier opinion, we denied 10 of 12 assignments of error, but remanded the decision to the county to address certain grading permit and drainage hazard criteria. The county scheduled a hearing before the hearings officer on July 6, 2000. Prior to that date, petitioner Murphy visited county planning staff to examine the files on behalf of all petitioners. Staff gave petitioner three large file folders and assisted petitioner in finding documents in the files regarding the remand. Staff located nine pages of documents and, at petitioner's request, made a copy of those nine pages for petitioners.

At the July 6, 2000 hearing, the applicant, intervenor-respondent Riverside Homes, Inc. (intervenor), submitted additional evidence into the record. Petitioners objected to introduction of new evidence, including evidence in the county's files that petitioners had not obtained earlier. The hearings officer held the record open for seven days, to July 13, 2000, for any party to submit responses or new evidence. Both the applicant and petitioners submitted responses by July 13, 2000, including new evidence. On July 19, 2000, the applicant submitted final written argument.

The hearings officer then issued a decision that addressed both bases for remand in LUBA's earlier decision, and again approved the preliminary plan. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners argue that the county committed procedural error in failing to provide notice of a right to cross-examine witnesses at the hearing, and by failing to provide time and opportunity to exercise that right at the hearing.

Community Development Code (CDC) 204-4.3(M) requires that the notice of hearing contain "[a] general explanation of the requirements for submission of testimony and the procedure for conduct of hearings." *See also* ORS 197.763(3)(j).[1] CDC 205-5.2 provides that certain "procedural entitlements" shall be provided at the public hearing, including:

> "A reasonable opportunity to cross-examine witnesses, including staff, provided that right is asserted at the first reasonable opportunity. Staff similarly shall be entitled to reasonable cross-examination of witnesses[.]"

The three-page notice of hearing provided by the county contained a general explanation of the procedure to be followed at the hearing, but did not specifically refer to rights of cross-examination.[2]

Petitioners contend that the county was required by CDC 204-4.3 to provide notice of all potentially applicable procedures, including the right to cross-examine witnesses. Had

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[1]ORS 197.763(3) provides in relevant part:

> "The notice provided by the jurisdiction shall:
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> "* * * * *
>
> "(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

[2]The notice stated, in relevant part:

> "**RULES OF PROCEDURE**
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> "1. The Hearings Officer will summarize the applicable substantive review criteria.
> "2. A summary of the Staff Report is presented.
> "3. The applicant's presentation is given.
> "4. Testimony of others in favor of the application is given.
> "5. Testimony of those opposed to the application is given.
> "6. Applicant's rebuttal testimony is given." Record 171.

the county done so, petitioners argue, they would have exercised that right to challenge the applicant's witnesses. The county responds, and we agree, that neither CDC 204-4.3 nor ORS 197.763(3)(j) requires that the notice of hearing describe more than the general procedure governing the hearing.[3] There is no statutory right to cross-examination of witnesses in quasi-judicial land use proceedings.[4] The county's code provides for cross-examination, contingent upon assertion at the first reasonable opportunity. We do not believe that the "general explanation of the * * * procedure for conduct of hearings" required by CDC 204-4.3(M) and ORS 197.763(3)(j) must include all potentially applicable procedural devices.

Even if the notice is deficient in this respect, we also agree with the county that petitioners have failed to demonstrate how that defect prejudiced their substantial rights. ORS 197.835(9)(a)(B). Petitioners have not shown what information cross-examination could have elicited or what it otherwise might have accomplished, other than to suggest that cross-examination might have raised "serious doubts" regarding the strength of the applicant's evidence. Petition for Review 7. However, such general assertions are not sufficient to demonstrate prejudice to petitioners' substantial rights. *See Consolidated Rock Products*, 17 Or LUBA at 616 (assertion that cross-examination was necessary to determine the basis for the opponent's testimony is insufficient to show prejudice, absent explanation why cross-examination was the only available route to that information). Petitioners had and

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[3]Both the county and intervenor also argue that petitioners waived the right to raise this issue and other issues before LUBA, because those issues were not raised before the hearings officer. ORS 197.763(1); 197.835(3). In addition, intervenor argues that this issue and others have been waived because they could have been raised in the earlier proceeding before LUBA and were not. *Beck v. City of Tillamook*, 313 Or 148, 151-55, 831 P2d 678 (1992). However, we do not address these waiver arguments, because we resolve petitioners' assignments of error on other dispositive grounds.

[4]*See Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 616 (1989) (absent a code or other legislative requirement that participants in a quasi-judicial land use proceeding be allowed to cross-examine witnesses, there is no such right); *Younger v. City of Portland*, 15 Or LUBA 210, *aff'd* 86 Or App 211, 739 P2d 50 (1987), *rev'd on other grounds* 305 Or 346, 752 P2d 262 (1988) (setting forth test for determining whether any due process right to rebuttal is violated by denial of request for cross-examination).

exercised an opportunity to rebut the applicant's testimony, including submission of expert testimony. Petitioners have not demonstrated that that process was insufficient to allow petitioners to cast doubt on the applicant's evidence.

The first and second assignments of error are denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioners argue that the county erred in relying upon evidence submitted by the applicant during and after the hearing. Specifically, petitioners argue that the county violated CDC 204-4.3(K), which requires that the notice of hearing state that "a copy of the application [and] all documents and evidence relied upon by the applicant * * * are available for inspection at no cost and will be provided at reasonable cost." According to petitioners, CDC 204-4.3 must be understood to limit consideration of evidence to that which was "available" to petitioners at the time notice of hearing was mailed. Further, petitioners argue that most of the material in the county files at the time notice of the hearing was mailed was not in fact "available" to petitioners, because county staff provided petitioners with only nine pages of documents from the county files.

The county and intervenor respond, and we agree, that petitioners misunderstand CDC 204-4.3. Nothing in that provision purports to require that the applicant must submit all its evidence prior to the time the county mails notice of the hearing. Both statute and the county's code allow parties to submit additional evidence before, during and after the hearing. We also disagree with petitioners that the county failed to make its files "available" to petitioners. County staff gave petitioners three file folders of material. Apparently due to a miscommunication, for which petitioners must bear some responsibility, petitioners obtained copies of only nine pages of material. However, that does not demonstrate that the rest of the file was not available to petitioners.

The third and fourth assignments of error are denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioners contend that the hearings officer erred in refusing to disclose at the hearing the names of developers the hearings officer represents in his private law practice. Further, petitioners argue that the county erred in employing a part-time hearings officer with a private practice rather than a full-time hearings officer who is a county employee.

In both respects, petitioners argue, the county violated CDC 205-5.4, which requires that the hearings officer be "as free from potential conflicts of interest * * * as reasonably possible." According to petitioners, it is possible that the hearings officer may in the future represent developers seeking to develop lots in the subdivision at issue, and this possibility presents a potential conflict of interest. Petitioners suggest that even full disclosure of the hearings officer's clients could not reduce the potential conflict of interest to the extent reasonably possible, and therefore the county can comply with CDC 205-5.4 only by having full-time county employees act as hearings officers.

Petitioners' arguments are without merit, as applied generally to the use of attorneys in private practice as part-time hearings officers. The hearings officer's response to petitioners' arguments shows that those arguments are particularly without merit in this case.[5] The speculative possibility that a hearings officer with a private legal practice might someday represent persons seeking to develop a lot within a subdivision approved by that hearings officer does not constitute a potential conflict of interest that could preclude that hearings officer from approving or denying the application.[6] If the scope of a potential

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[5]In response to petitioners' challenges, the hearings officer disclosed that he has not represented any clients in unincorporated Washington County since being appointed a hearings officer for the county in 1991. Record 18. The hearings officer further supplied a summary of his clients and income showing that approximately 88 percent of his income is from work for local governments or public bodies, principally as a hearings officer. Record 24.

[6]ORS 244.020(7) defines "potential conflict of interest" as

> "any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the

conflict of interest were as broad as petitioners claim it to be, the county could not use or employ any attorney, on either a full or part-time basis, as a hearings officer.[7] Petitioners identify no law or other reason compelling that result. For the same reason, the county does not violate CDC 205-5.4 by employing part-time hearings officers.[8]

The fifth and sixth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners contend that the county failed to provide a reasonable opportunity to rebut new evidence submitted at the hearing, in violation of CDC 205-5.3.

The hearings officer held the record open for seven days after the conclusion of the evidentiary hearing to allow all parties to respond to evidence submitted at the hearing, pursuant to CDC 205-7.2.[9] *See also* ORS 197.763(6). Petitioners contend that seven days was insufficient time to obtain copies of the evidence submitted at the hearing, forward that evidence to their expert, and obtain an opinion from that expert. Petitioners argue that if the evidence submitted at the hearing had been available to petitioners 20 days prior to the hearing, when the county mailed notice of the hearing as required by CDC 204-4.1, petitioners would have had sufficient time to respond to that evidence.

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person or person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of [specified exceptions.]"

[7]Even a full-time hearings officer might leave county employment and later represent developers.

[8]As the county points out, one of the reasons why the county uses independent hearings officers rather than county employees is to avoid accusations of bias in favor of the local government.

[9]CDC 205-7.2 provides in relevant part:

> "Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The Review Authority shall grant such request by continuing the public hearing or leaving the record open for additional written evidence or testimony pursuant to [CDC 205-7.2(B)]:
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> "* * * * *
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> "B. If the Review Authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven (7) days. * * *"

The county responds that seven days is a presumptively reasonable time under the statute and code for submission of new evidence following the initial evidentiary hearing, and that petitioners have not demonstrated that any prejudice to their substantial rights resulted from failure to provide a longer period. The county also argues that the "reasonable opportunity" required by CDC 205-5.3 must be balanced against the statutory mandate at ORS 215.435(1) that counties issue decisions on remand within 90 days. The county notes that the hearings officer rejected a request by the applicant for an additional period of time to submit evidence because doing so would result in the county violating ORS 215.435(1).

We agree that petitioners have not demonstrated that a "reasonable opportunity" for rebuttal required more than the seven days provided. Despite the short time-frame, petitioners submitted new evidence rebutting evidence introduced by the applicant at the hearing. Petitioners argue that their evidence might have been more comprehensive and persuasive if more time had been available, but such speculations are inadequate to demonstrate reversible procedural error.

The seventh assignment of error is denied.

EIGHTH AND NINTH ASSIGNMENTS OF ERROR

Petitioners challenge the evidentiary basis for the county's finding of compliance with CDC 421-7.5, which requires that the proposed development "will not increase the existing velocity of flood flows so as to exceed the erosive velocity limits of soils in the flood area." Petitioners submit that the only reliable evidence regarding whether the proposed storm drainage system complies with CDC 421-7.5 is the opinion of their expert, who examined the data generated by the applicant's engineers and concluded that the proposed development cannot comply with CDC 421-7.5.

A. Increased Flood Flow Velocity

The disputed drainage system collects storm water from the proposed subdivision, runs it by pipeline down a 28-percent slope through several "dissipater" ponds, and

discharges the stormwater into Cedar Canyon Creek adjacent to the subject property. The applicant's engineers submitted several reports concluding that, in part because flows from the property would peak and pass prior to peak basin flows at the site, development of the project would cause no discernible impacts to peak storm flows in the creek, and would cause no increase in existing velocities in the creek. Record 36, 333. Petitioners' expert testified that the project would increase existing velocities in the creek, reasoning that, because flood flows in the creek are projected to increase as the drainage basin achieves full buildout, and because the subject property represents 4.88 percent of the drainage basin, the subject property therefore will contribute 4.88 percent to the projected increase in flood flows in the creek. Record 28-29. The hearings officer chose to rely upon the applicant's experts, finding that petitioners' expert had failed to take into account the effect of the storm water detention system and the location of the site near the bottom of the drainage basin:

> "[P]roposed storm water detention, treatment and metered discharge into the creek [will] reduce the impact of storm water from the site so that the rate of discharge from the site during peak flood conditions complies with applicable standards. That is, surface water on the site will be detained and released at a controlled rate so that it does not exceed predevelopment peak flows.
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> "* * * Because the site is near the bottom of the basin, storm water from the site will flow into the creek sooner than will peak flood flows from upstream. By the time peak upstream flows pass through the portion of the creek on the site, peak flood flows from development on the site will have long since flowed through the area and will not affect peak flood flows. Therefore the development will not increase the velocity of flood flows." Record 21.

Petitioners do not challenge these findings or explain how the hearings officer erred in reaching these conclusions. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106 (1997). Petitioners have not demonstrated that a reasonable person could not conclude, based on the whole record, that the proposed development complies with CDC 421-7.5.

B. Storm Pipe Anchors

As revised on remand, the proposed storm drainage system requires placing stormwater pipes on a 28-percent slope. Petitioners point out that local sewerage agency standards require that pipes on slopes greater than 20 percent have anchor walls. Based on this point, petitioners' expert testified that the proposed drainage system lacks anchor walls and, in their absence, the proposed drainage system may fail, in which case severe erosion of the slope might result. The hearings officer refused to consider that argument because it was beyond the scope of remand from LUBA. In the alternative, the hearings officer found that the sewerage agency had approved the proposed drainage system, and that the agency, not the county, is responsible for applying agency standards.

Petitioners argue that the hearings officer erred in failing to address the issue of anchor walls with respect to compliance with CDC 421-7.5. According to petitioners, the design of the drainage system was amended after remand, and the issue of anchor walls and compliance with the sewerage agency standards could not have been raised in the prior appeal. We tend to agree with petitioners that the scope of remand does not preclude addressing issues based on post-remand amendments to the application. Nonetheless, we agree with the hearings officer's alternative rationale. The hearings officer correctly concluded that the sewerage agency is the body responsible for reviewing construction standards for proposed drainage systems. Petitioners have not demonstrated that the county is required under CDC 421-7.5 to consider the possibility that drainage systems approved by the sewerage agency do not meet sewerage agency standards.

The eighth and ninth assignments of error are denied.

TENTH ASSIGNMENT OF ERROR

In our earlier decision in this case, we rejected an assignment of error arguing that local schools lack adequate capacity to accommodate the proposed development, as required by CDC 501-8.2(A)(1). *Mitchell*, 37 Or LUBA at 464. Our reasoning was based in part on

ORS 195.110(10), which provides that inadequate school capacity cannot be the sole reason for denial of a development application. Petitioners now urge revival of that issue, arguing that they have demonstrated error in the county's decision on remand that requires denial of the proposed development. Even if we assume that issue can be revived, ORS 195.110(10) requires denial of this assignment of error because we rejected petitioners' other assignments of error in the current appeal.

The tenth assignment of error is denied.

The county's decision is affirmed.