BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREG WAIBEL, DENISE WAIBEL, WILLIAM BREWER, DON KRIDER and MICHEIL BROWN,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

THOMAS M. BURKE, BRENDA BLAKENSHIP, MIKE BRIDGES, PATRICIA B. BURRELL, H. CURTISS BURRELL, JoRENE BYERS, MARION S. de POLO, TERRY DORVINEN, L. SUSAN DUNN, J. MICHAEL DUNN, JEANNE FRENCH, DONALD L. HANNA, NANCY KNOCHE, KEITH KNOCHE, DOROTHY MCCALL, LAWRENCE MCCALL, BEVERLY A. PARRISH, JANET ROBERTS, PHILIP ROBERTS, LANCE STEINMETZ, MARY KAY WALKER, J.R. WENDT, BECKY WRIGHT, BRUCE WRIGHT, DUANE BALCOM, SONDA BALCOM, JIM JOHANSEN, SHELLEY JOHANSEN, MIKE ROONEY, KAREN ROONEY, ROBERT PRINCEHOUSE, JUDITH PRINCEHOUSE, DIETER KOEHLER and MIKE UMBARGER,
Intervenors-Respondent.

LUBA Nos. 2000-126, 2000-127, 2000-128, 2000-129, 2000-130, 2000-131 and 2000-132

FINAL OPINION
AND ORDER

Appeal from Crook County.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioners. With him on the brief was Oregonians in Action Legal Center.

Peter M. Schannauer, County Counsel, Prineville, filed a response brief and argued on behalf of respondent.

Gary Abbott Parks, Lake Oswego, filed a response brief and argued on behalf of intervenors-respondent Thomas M. Burke, Brenda Blakenship, Mike Bridges, Patricia B. Burrell, H. Curtiss Burrell, JoRene Byers, Marion S. de Polo, Terry Dorvinen, L. Susan

Dunn, J. Michael Dunn, Jeanne French, Donald L. Hanna, Nancy Knoche, Keith Knoche, Dorothy McCall, Lawrence McCall, Beverly A. Parrish, Janet Roberts, Philip Roberts, Lance Steinmetz, Mary Kay Walker, J.R. Wendt, Becky Wright, and Bruce Wright.

Liz Fancher, Bend, filed a response brief and argued on behalf of intervenors-respondent Duane Balcom, Sonda Balcom, Jim Johansen, Shelley Johansen, Mike Rooney, Karen Rooney, Robert Princehouse, and Judith Princehouse.

Intervenors-respondent Dieter Kohler and Mike Umbarger represented themselves.

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

AFFIRMED 05/18/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

In this consolidated appeal, petitioners challenge seven ordinances that (1) approve exceptions to Statewide Planning Goal 3 (Agricultural Lands) for a large number of Exclusive Farm Use (EFU)-zoned properties and (2) determine that the soils on a large number of other EFU-zoned properties are not "agricultural lands," within the meaning of Goal 3.

FACTS

We set out the relevant facts in our earlier order denying respondent's and intervenors-respondent's motion to dismiss.

> "In 1998, three appeals were filed with LUBA challenging three county ordinances that approved exceptions to Statewide Planning Goal 3 (Agricultural Lands) for a number of Exclusive Farm Use (EFU)-zoned properties (hereafter exception ordinances). These appeals were consolidated for LUBA review. In 1999, five more appeals were filed challenging five county ordinances that determined that the soils located on certain properties are not 'Agricultural Land,' as defined by Goal 3 (hereafter nonresource land ordinances). These five appeals also were consolidated for LUBA review. At the parties' request, both consolidated appeals were suspended, pursuant to ORS 197.860, to permit the parties to enter into mediation.
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> "The parties entered into a settlement agreement. Record 89-101. The county approved the settlement agreement on May 24, 2000. Pursuant to that settlement agreement, the parties submitted a stipulated motion requesting that LUBA (1) dismiss one of the appeals challenging one of the nonresource land ordinances, (2) remand the other nonresource land ordinances for adoption of amended ordinances, and (3) remand the exception ordinances for adoption of amended ordinances. To carry out the parties' intent regarding the second and third requests, the parties attached the seven amended ordinances that the county was to adopt and requested that LUBA order the county to adopt the amended ordinances that were attached to the stipulated motion, pursuant to ORS 197.860.
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> "In *Burke v. Crook County*, ___ Or LUBA ___ (LUBA Nos. 99-037, 99-038, 99-039, 99-040 and 99-041; June 20, 2000) (*Burke I*), LUBA granted the first two requests and dismissed petitioners' appeal of one of the nonresource land ordinances (Ordinance 130) and remanded nonresource land Ordinances 131-134. In *Burke v. Crook County*, ___ Or LUBA ___ (LUBA Nos. 98-220, 98-

221, 98-222, 98-223, 98-224 and 98-225; June 20, 2000) (*Burke II*), LUBA granted the third request and remanded the exception ordinances.

> "Following our remand in *Burke I* and *Burke II*, the county conducted two public hearings on the ordinance amendments that were attached to our decisions: one on July 12, 2000, and one on July 26, 2000. At least three of the five petitioners in the current appeal appeared and objected to the proposed ordinance amendments. Record 35. At the conclusion of the July 26, 2000 public hearing, the county adopted the seven ordinance amendments that were attached to our decisions in *Burke I* and *Burke II*. Seven separate appeals were filed challenging those ordinances. Those seven appeals have been consolidated for review and are the subject of this appeal." *Waibel v. Crook County*, ___ Or LUBA ___ (LUBA Nos. 2000-126, 2000-127, 2000-128, 2000-129, 2000-130, 2000-131, 2000-132, Order, December 21, 2000), slip op 1-3 (footnotes omitted).

The total area affected by the challenged ordinances exceeds 15 1/2 square miles in the Powell Butte Area of Crook County. The three exception areas that are the subject of the exception ordinances include approximately 3,304 acres. Record *Burke II* (Volume I) 10.[1] The area affected by the nonresource land ordinances includes approximately 6,690 acres. Record *Burke I* (Volume I) 15. Petitioners in this appeal own land that was rezoned for exclusive farm use by amended ordinance 133, which is one of the ordinances that is the subject of this appeal.[2] Petition for Review 4-5.

STANDING

Respondent and intervenors-respondent (collectively respondents) challenge the standing of petitioners Krider and Brown.[3] The requirements that petitioners must satisfy to have standing in this appeal are set out in ORS 197.830(2).[4] Respondents argue that

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[1]The record in this appeal includes (1) the record in *Burke I* (cited as "Record *Burke I*"), (2) the record in *Burke II* (cited as "Record *Burke II*") and (3) the record compiled by the county following our remand in *Burke I* and *Burke II* (cited as "Record").

[2]In this opinion we collectively refer to the ordinances that are challenged in the present appeal as the amended ordinances or the challenged ordinances.

[3]There are three groups of intervenors-respondent. Only two groups of intervenors-respondent, which we refer to as intervenors Burke and intervenors Balcom, filed briefs.

[4]ORS 197.830(2) provides:

petitioners Brown and Krider do not have standing, because they did not appear orally or in writing during the local proceedings.[5]

Although the record does not include transcripts of the July 12, 2000 and July 26, 2000 county court hearings in this matter, intervenors Burke attach transcripts of those public hearings to their brief, as they are permitted to do under OAR 661-010-0030(5). Pages 8 and 9 of the July 26, 2000 transcript disclose that a letter signed by petitioners Brown and Krider was read to the county court and that the county court ruled that the letter would be part of the record. That transcript is sufficient to demonstrate that petitioners Brown and Krider satisfy the ORS 197.830(2) appearance requirement. All petitioners have standing to bring this appeal.

FIRST ASSIGNMENT OF ERROR

There is no dispute that the challenged ordinances amend the county's comprehensive plan. Accordingly, the county was required to provide notice and conduct a public hearing before adopting the challenged ordinances.[6] Under ORS 215.060, the challenged ordinances

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> "Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

[5]Petitioners attempt to rely on ORS 197.830(3), which does not require that petitioners have appeared during the local proceedings. However, ORS 197.830(3) only applies in circumstances where a notice of hearing inadequately describes the final action or the final action is adopted without a hearing. Petitioners do not argue the notice was inadequate, and we conclude later in this opinion that the county conducted a hearing. Therefore, ORS 197.830(3) does not apply.

[6]ORS 215.060 provides:

> "Action by the governing body of a county regarding [a comprehensive] plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the

would be without legal effect if the county failed to provide the notice and public hearing required by ORS 215.060.

Petitioners do not argue that the notice the county provided in advance of the July 12, 2000 hearing was inadequate. Record 51. Rather, petitioners argue the county violated ORS 215.060 because the public hearings the county conducted on July 12, 2000 and July 26, 2000 were not "public hearings," within the meaning of ORS 215.060.

Petitioners' argument is based on the settlement agreement that the county court signed on May 24, 2000. Petitioners contend that the settlement agreement unambiguously imposed a legal obligation on the county court to adopt specific ordinances. According to petitioners, "[h]ad the County chosen to reject or modify any of the amended ordinances, it would have been in breach of the settlement agreement, thereby reviving the disputes between the parties to the agreement." Petition for Review 6. Petitioners go on to argue that "petitioners' rights to persuade the decision maker and present argument concerning the merits of the amended ordinances were nonexistent, given that the County had already contractually obligated itself to adopt the amended ordinances." *Id*. at 7.

Petitioners contend that the county was required to provide the "one or more public hearings" required by ORS 215.060 *before* it entered into the settlement agreement on May 24, 2000, because there was no real opportunity to convince the county court to take a different course of action after that date. Petitioners argue the county's failure to do so requires that the challenged ordinances be remanded.

We first note that ORS 215.060 imposes no explicit requirements for the public hearings that are required by the statute.[7] Petitioners argue that the statutory requirement for a public hearing requires, at a minimum, that the public be allowed to present written or oral

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members of the governing body approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

[7]Like the parties we have not been able to find any appellate court or LUBA decisions that identify any specific requirements for the public hearings required by ORS 215.060.

testimony and that the county court consider that testimony without having already made a final decision to adopt a particular ordinance. For purposes of this opinion, we assume the statute imposes such minimum requirements. However, we agree with respondents that the county met those requirements here and therefore did not violate ORS 215.060.

Petitioners' strongest argument is that the settlement agreement certainly suggests that the parties intended that the amended ordinances that were attached to the settlement agreement would be adopted by the county court following LUBA's remand, without any changes. If that course of action were legally required by the settlement agreement, any public hearings required by ORS 215.060 would be an empty formality. However, we do not agree the settlement unambiguously imposes such an obligation.[8] The settlement agreement makes no reference to ORS 215.060 or the public hearings that are required by that statute. In one part of the settlement agreement, the possibility that different ordinances might ultimately be adopted by the county court is expressly recognized, and the agreement provides that in that event the parties are free to appeal such modified ordinances.[9] That provision at least suggests that the settlement agreement anticipated that one possible outcome following the public hearings required by ORS 215.060 was that the county court would be persuaded not to adopt the ordinances that were attached to the settlement agreement without change. The parties apparently anticipated that an appeal of such different ordinances would be the remedy for the parties to the settlement agreement.

We also note that rather than argue that the county court should readopt the original

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[8]We need not and do not address petitioners' contention below, that a settlement agreement that imposed such an obligation could be specifically enforced against the county.

[9]Paragraph 16 of the agreement states:

> "The parties hereto agree not to challenge ordinances the content of which is substantially similar to that of the Rural Residential Ordinances attached to this agreement as exhibits 9 through 11. Ordinances which contain provisions which have been materially modified (by an addition or deletion) from the provisions found in those exhibits are subject to appeal by any party. * * *" Record 95.

ordinances that had been remanded by LUBA, petitioners argued the county court was powerless to adopt ordinances that differed from the amended ordinances attached to the settlement agreement.[10] Despite petitioners' argument, the transcripts attached to the petition for review do not support a conclusion that the county court believed it was bound to adopt the amended ordinances attached to the settlement agreement. Those deliberations clearly show the county court was frustrated by the planning process and deliberations that preceded the public hearings in July 2000. However, they just as clearly show that the county court did not believe it was legally obligated to adopt the precise ordinances attached to the settlement agreement. County counsel on at least two occasions advised the county court that it could refuse to adopt those amended ordinances.[11] While the transcripts are less clear about whether the county court believed it could adopt the amended ordinances with additional modifications, we conclude the transcripts are more accurately characterized as showing the county court was extremely reluctant to do so, because such action would likely upset the mediated settlement and result in more appeals, rather that showing that the county court believed it legally *could not* adopt modified versions of the proposed amended ordinances.

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[10]Petitioners' July 11, 2000 letter to the county court states "the Court has already bound itself to a decision[.]" Record 48. In a separate letter dated July 25, 2000, petitioners took the position that "[t]he Settlement Agreement is a binding contract, which any party thereto can specifically enforce." Record 35.

[11]Page 9 of the July 12, 2000 transcript includes testimony criticizing the county court for agreeing to adopt the amended ordinances that are attached to the settlement agreement. Apparently responding to this testimony, county counsel made the following statement:

> "* * * That is true, now to be perfectly honest and clear, the ordinances that are being proposed to be adopted today, and the County Court does have some choices to whether to approve them or not to approve them. They're not required to approve them, they're still an act of volition that they have. * * *"

On page 2 of the transcript of the July 26, 2000 hearing, county counsel made the following statements:

> "* * * But, from the standpoint of where we are right now, is that this Ordinance has, these Ordinances have been sent to us from LUBA with directions for the County Court to adopt them and I think the County Court's options here are to adopt or not to adopt at this point and not to modify."

The county provided notice of its hearings in July 2000. The parties and members of the public were allowed to present written and oral testimony. While the amended ordinances attached to the May 14, 2000 settlement agreement clearly were the focus of the public hearings and were ultimately adopted without change, we do not agree with petitioners that the focus provided by the settlement agreement had the effect of rendering the public hearings on July 12, 2000 and July 26, 2000, something other than "public hearings," within the meaning of ORS 215.060.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue the county court was not an impartial tribunal.

> "A participant in a land use proceeding is entitled to a fair and impartial tribunal. *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). For the reasons set forth * * * in the first assignment of error, the County Court was not a fair and impartial tribunal during the land use proceeding following entry of the settlement agreement." Petition for Review 9.

We reject the second assignment of error for two reasons. First, as we have already explained, we do not agree with petitioners that the settlement agreement had the binding legal effect on the county court that they believe it did. In addition, there is also no dispute that the challenged ordinances are legislative rather than quasi-judicial decisions.[12] The protections extended by *Fasano*, including the requirement for a fair and impartial tribunal, were first extended to parties in quasi-judicial zoning proceedings.[13] The requirement for a

[12]Because the parties do not dispute the point, we see no reason to explain in detail why the challenged ordinances, which affect the planning and zoning for over 15 square miles of the county, are properly viewed as legislative decisions under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm*., 287 Or 591, 601 P2d 769 (1979).

[13]Those protections were subsequently extended by the appellate courts to other quasi-judicial land use proceedings. *See Sunnyside Neighborhood v. Clackamas Co. Comm*., 280 Or 3, 11-14, 569 P2d 1063 (1977) (single-tract comprehensive plan map amendment). Many of the *Fasano* procedural requirements have been expanded and codified. *See* ORS 197.763 (conduct of local quasi-judicial land use hearings); ORS 215.416 (county permit and zone change proceedings); ORS 227.175 (city permit and zone change proceedings).

fair and impartial tribunal has never been extended to legislative decisions, such as the amended ordinances at issue in this appeal.

The second assignment of error is denied.

The county's decision is affirmed.