BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRED HENDRIX,
Petitioner,

vs.

BENTON COUNTY,
Respondent,

and

ALSEA COMMUNITY EFFORT,
Intervenor-Respondent.

LUBA No. 2001-092

FINAL OPINION
AND ORDER

Appeal from Benton County.

Cary B. Stephens, Corvallis, filed the petition for review and argued on behalf of petitioner.

No appearance by Benton County.

George B. Heilig, Corvallis, and Jay R. Faulconer, Corvallis, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 09/06/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision approving the siting of a community center/library on property zoned exclusive farm use (EFU).

FACTS

The subject property is a 45,900 square foot parcel located to the south of the unincorporated community of Alsea, and is zoned EFU. It is bordered on the west by the Alsea School and on the north by a medical clinic. The school and clinic are zoned RR-2. The subject parcel is bordered on the east and south by EFU-zoned property. The subject parcel is currently being used for hay production and pasture in conjunction with the adjoining EFU-zoned property.

Intervenor-respondent Alsea Community Effort (intervenor) proposes to site a community center/library on the subject parcel. The center will be owned and operated by intervenor. The majority of the space will be taken up by the library. Library services within the community center will be provided by the City of Corvallis through an intergovernmental agreement between the city and the Benton County Service District for library services. In addition to the library, the building will house (1) a large community meeting space that will accommodate up to 80 people; (2) restrooms designed to be available during community events at the adjacent school athletic fields, even when the remainder of the building is closed; and (3) a small office for intervenor.

Petitioner appeared before the county during the proceedings below and testified in opposition to the application, arguing that libraries are not permitted in EFU zones. The county approved the application, concluding that the proposed facility falls within the definition of "community center," as that term is used in the county code and in ORS 215.283(2)(d). This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.283(2) provides, in relevant part, that certain nonfarm uses may be established in an EFU zone, so long as the local government finds that the proposed nonfarm use complies with ORS 215.296.[1] The list of nonfarm uses in ORS 215.283(2) includes:

> "(d) [C]ommunity centers owned by a governmental agency or a nonprofit community organization and operated primarily by and for residents of the local rural community. * * *"

The phrase "community centers" is not defined by statute. The county turned to the dictionary definition of "community center" and concluded that the proposed mixed-use building fell within the definition of community center.[2] In the alternative, the county found that a public library is a type of community center.

Petitioner challenges these conclusions and argues that the text and context of ORS 215.283(2)(d) demonstrate that the definition of community centers used by the county is overly broad. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).[3] According to petitioner, the legislative policy to limit nonagricultural uses on agricultural lands requires a less expansive definition. *See McCaw Communications, Inc. v. Marion*

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[1]ORS 215.296 provides, in relevant part:

> "(1) A use allowed under * * * ORS 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
>
> > "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
> >
> > "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

[2]Relying on the definition found in the *Random House Dictionary of the English Language*, the county defined "community center" as "a building or other place in which members of a community may gather for social, educational, or recreational activities." Record 24.

[3]In *PGE*, the Oregon Supreme Court set out an analysis for interpreting ambiguous statutes. The analysis requires the reviewing body to first look to the text and context of the statute to determine legislative intent. If the text and context do not resolve the ambiguity, the next step is to review legislative history. If there is no legislative history, or if the legislative history does not address the ambiguity, the reviewing body may resort to maxims of statutory construction to interpret the statute. 317 Or at 610-612.

County, 96 Or App 552, 555, 773 P2d 779 (1989) (EFU zoning provisions allowing nonfarm uses should be interpreted consistently with legislative policy against diverting agricultural land to nonagricultural use); *Warburton v. Harney County*, 39 Or LUBA 398, 407, *aff'd* 174 Or App 322, ___ P3d ___ (2001) (interpreting "public or private schools" in ORS 215.283(1)(a) not to include a school for training hunting and horsepacking guides). Petitioner argues that if the county's definition of "community center" is accepted, a number of the other nonfarm uses specifically listed in ORS 215.283 would be redundant.[4] Petitioner contends that whatever "community center" means, the legislature did not intend for it to include libraries.

We need not address petitioner's argument that the dictionary definition of "community center" that the county relied upon is overly broad. Nor need we resolve whether a facility that consisted solely of a public library would qualify as a "community center" under ORS 215.283(2)(d). The narrower issue before us is whether a mixed-use community facility that includes a public library as its main element qualifies as a "community center" under the statute. Petitioner does not dispute that the other elements of the proposed center (the meeting room, offices, etc.) are appropriate for a community center, under any definition.

Nothing cited to us in the text or context of the statute resolves the narrow issue before us. Petitioner may be correct that, when the legislature listed "community centers" separately from other nonfarm uses allowed in the EFU zone under ORS 215.283(2), it intended that community centers not include the other listed uses. However, that observation, even if valid, does not assist us, because "public library" is not among the other listed uses. Petitioner's larger point, that the context of ORS 215.283(2)(d) indicates that "community center" should not include the entire range of uses that might be allowable under the

[4]For example, petitioner argues that the county's definition of community center could encompass schools, parks, or playgrounds, uses that are already allowed pursuant to ORS 215.283(1) or (2).

interpretation the county gave it, may also be true. However, that point is also not of much assistance, because it does not answer the question of what uses, short of those hypothetically allowed under the county's interpretation, may be allowed in a "community center" as that term is used in the statute.

McCaw Communications, Inc. and *Warburton* lend some support to petitioner's argument that a "community center" under ORS 215.283(2)(d) cannot include a public library. Those cases stand for the general proposition that nonfarm uses listed in ORS 215.283 should not be expansively interpreted to encompass uses that would subvert the goal of preserving land for agricultural use, where a less expansive interpretation is possible. *Warburton*, 174 Or App at 328; *see also Craven v. Jackson County*, 308 Or 281, 287-88, 779 P2d 1011 (1989) (rejecting a broad interpretation of "commercial activities in conjunction with farm use" under ORS 215.203(2)(a) because the "goal of preserving land in productive agriculture would be subverted"). Petitioner argues that these cases require that the term "community center" be interpreted narrowly to include only such things as grange halls or other typical rural meeting places. However, there is a considerable difference between rejecting an expansive interpretation of an undefined term where that expansive interpretation would subvert the goal of preserving land for agricultural use and, as petitioner advocates, adopting a very narrow interpretation that has no textual or contextual support in the statute. Petitioner does not argue, and makes no attempt to demonstrate, that construing ORS 215.283(2)(d) to allow a mixed-use community center that includes a public library would subvert the goal of preserving land for agricultural use.[5]

The Court of Appeals in *Warburton* relied in part on statutory context that suggested the legislature intended the phrase "private or public schools" to refer to elementary and

[5]Such an argument may be difficult to make, because the legislature has itself limited the types of community centers allowed under the statute to those that (1) are owned by a local government or a nonprofit corporation; (2) are operated primarily by and for the local rural community; and (3) comply with the provisions of ORS 215.296.

secondary schools, and did not refer to other types of schools, such as the proposed career school. In the present case, petitioner does not cite to any similar context suggesting that the legislature intended the phrase "community center" to be limited to rural meeting places or otherwise limited in a manner that would prohibit including a public library within a community center. Although we need not and do not determine here the range of uses that may be properly included within a community center under ORS 215.283(2)(d), we conclude that the facility at issue here, a mixed-use center that includes a public library and other facilities intended for community use, is allowable as a "community center" under the statute.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's findings are inadequate to demonstrate that the proposed facility will be "operated primarily by * * * residents of the local rural community." ORS 215.283(2)(d). According to petitioner, the library comprises the majority of the building, and the library will be operated by employees of the City of Corvallis. Petitioner contends that as a result, there is not substantial evidence in the record to support the county's conclusion that the proposed community center will be operated in the manner required by ORS 215.283(2)(d).

Intervenor argues that petitioner failed to raise any issue before the county during the proceedings below concerning whether the public facility would be "operated primarily by * * * residents of the local rural community." Intervenor concedes that one of the issues before the county was whether the proposed community center would in fact be primarily operated *for* the local rural community. However, intervenor contends that the issue of whether the community center would be operated *by* residents of the local rural community

was never presented to the county. Therefore, intervenor argues, pursuant to ORS 197.763(1) and ORS 197.835(3), the issue may not be raised for the first time before LUBA.[6]

ORS 197.763(1) provides, in relevant part, that:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

DLCD v. Coos County, 25 Or LUBA 158, 167-68 (1993) and *Lett v. Yamhill County*, 32 Or LUBA 98 (1996) are instructive on this point. In *DLCD*, the petitioner challenged the county's approval of a forest dwelling under standards that required that a forest dwelling be both "necessary" and "accessory" to a permitted forest use. In a letter presented to the county during the local proceedings, an opponent argued that the proposed dwelling was not necessary to conduct forest operations on the site, and also generally cited the "necessary" and "accessory" standard. The petitioner contended that the issue of compliance with the "accessory" standard was sufficiently raised in that letter to permit argument regarding the standard on appeal to LUBA. We agreed with the petitioner that it was not required to comply with judicial preservation concepts in order to raise an issue or present argument on a related point of law on appeal. However, we noted that the "raise it or waive it" statute requires fair notice to adjudicators and opponents that an issue was being raised and needs to be addressed. In *DLCD*, we concluded that the letter did not serve as a fair notice to the local government or the parties that the "accessory" standard was an issue in addition to the "necessary" standard.

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[6]ORS 197.835(3) provides:

> "Issues [that may be raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by * * * ORS 197.763[.]"

In *Lett*, the county approved a nonfarm dwelling, based in part on a finding that the proposed dwelling complied with OAR 660-033-0130(4)(a), in that the dwelling "[would] not materially alter the stability of the overall land use pattern in the area." At LUBA, the petitioner in *Lett* challenged the county's reliance on a study area comprised of a one-half-mile radius of the subject property as representative of the land use pattern in the area. During the proceedings before the county the petitioner had argued that, as a general matter, the applicant had not shown that the stability standard had been met, but the petitioner had not directly challenged the one-half-mile radius as the study area. We concluded that the study area was extensively discussed during the proceedings below, that it was evident that the county would rely on that study area in its decision and findings and, therefore, it was incumbent on the petitioner to raise the issue of the study area radius before the county. Because the petitioner in *Lett* did not raise the issue before the county, we concluded that the issue of the suitability of the study area was waived. 32 Or LUBA at 107.

In petitioner's reply brief in the present case, petitioner argues (1) that the issue of compliance with each component of ORS 215.283(2)(d) was raised when he argued that the statute applied to the application; and (2) that he could not have anticipated that the county would rely on a management scheme that would result in the City of Corvallis operating the major portion of the building. We disagree with both arguments. First, the only testimony regarding compliance with ORS 215.283(2)(d) to which we are directed dealt with the question of whether a library could be considered an allowed use as a community center, and whether the proposed facility would be "operated primarily * * * for the rural residents of the area."

In addition, the application and the testimony before the county clearly show that intervenor intended to rely on the City of Corvallis to provide staffing for the library portion of the building. As a result, it was incumbent on petitioner to raise the issue of whether that organizational structure would comply with the requirement that the proposed community

center be "operated primarily by * * * the residents of the local rural community." Petitioner did not do so. Therefore, the issue is waived.

The second assignment of error is denied.

The county's decision is affirmed.