BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAYNE J. HIEBENTHAL
and DAVID L. HIEBENTHAL,
Petitioners,

vs.

POLK COUNTY,
Respondent,

and

MEDURI FARMS, INC.,
Intervenor-Respondent.

LUBA Nos. 2001-084 and 2001-085

FINAL OPINION
AND ORDER

Appeal from Polk County.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson & Sherton, PC.

David Doyle, Polk County Counsel, Dallas, filed a joint response brief and argued on behalf of respondent.

Mark D. Shipman, Salem, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Misti K. Johnson and Saalfeld, Griggs, Gorsuch, Alexander & Emerick, PC.

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

LUBA NO. 2001-084	REMANDED	
LUBA NO. 2001-085	AFFIRMED	02/05/2002

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

In LUBA No. 2001-084, petitioners appeal a hearings officer's decision that approves three new buildings, which will be used for fruit dehydration and food processing in an exclusive farm use (EFU) zone. In LUBA No. 2001-085, petitioners appeal a letter from county counsel rejecting petitioners' appeal to the county board of commissioners from the hearings officer's decision.

FACTS

The subject property is a 104-acre tract zoned EFU, surrounded by large-acreage farm tracts in farm use. The property is currently occupied by a prune orchard, a dwelling and nine buildings used for fruit processing. The property has a long history of fruit processing. A fruit dehydrator was built on the property in 1905, to dry fruit grown on the property and in neighboring orchards. In 1944, a 13,900 square foot building replaced the original dehydrator building. The 1944 building was used to dry prunes and other farm products from farms in Polk, Yamhill and Marion counties.

In 1970, the county adopted its zoning ordinance, which makes "commercial activities in conjunction with farm use" a conditional use in the EFU zone. Polk County Zoning Ordinance (PCZO) 136.020; *see also* ORS 215.283(2)(a). However, the county has never issued conditional use approval for the facility, and has never made a determination of the nature and extent of the operation that existed on the property when the EFU zone was first applied.

Intervenor-respondent Meduri Farms, Inc. (intervenor) began operating the processing facility in 1983 and acquired the property and facility in 1993. Prior to intervenor's acquisition, only the 1944 dehydrator building (Building No. 1) was used in the processing operation, and the facility operated only two to three months per year. Soon after acquiring the property, intervenor constructed three new buildings (Building Nos. 2, 5 and

9), without obtaining county land use or building permit approval. Sometime thereafter, intervenor expanded Building No. 2 to include employee sanitary and luncheon facilities. In 1999, intervenor applied for a permit to legalize the addition to Building No. 2, and to make improvements to other buildings on the property. The county treated intervenor's application as a request for alteration and repair of a nonconforming use under the county's zoning ordinance. The county's 1999 decision determined that intervenor's food processing operation, including the proposed expansion, consisted of eight buildings, totaling 23,965 square feet. The county granted retroactive land use approval for 760 square feet of floor space as an addition to Building No. 2, and for repairs, including replacing failing floors, installing floors in pole buildings, upgrading electrical systems, moving the cooling room and adding concrete walkways around buildings. However, that decision did not address the extent to which the eight buildings that existed on the property qualified as preexisting nonconforming uses.

In March 2001, Building No. 1 burned down. On April 10, 2001, intervenor filed a request to (1) replace Building No. 1 with a new 15,000 square foot structure located on a portion of the property not previously used for food processing; (2) replace three other buildings (Building Nos. 6, 7, and 8) which totaled 5,820 square feet, with a single 15,000 square foot building (Building No. 10); and (3) construct a new 600 square foot shop building (Building No. 11) to serve the processing facilities. The site plan also proposes paving the area between the buildings, constructing a new access driveway, and installing new septic tanks and drainfields. According to the hearings officer's decision, prior to the fire, the building space used for the processing facility totaled 35,987 square feet.[1] Under

[1]The hearings officer's decision does not explain the discrepancy between the 23,965 square feet of building space that was identified in the 1999 decision and the 35,987 square feet of building space that is attributed to the processing facilities in 2001, nor the discrepancy in the number of buildings.

intervenor's proposed site plan, the proposed total building square footage would be 46,856.[2] Intervenor's facility currently employs 40 full-time employees, with up to 80 part-time employees during the harvesting season, in two or three shifts. Intervenor anticipates that the proposed site plan will result in a decreased number of employees because the new facilities will be more efficient.

The county zoning ordinance contains a provision whereby

> "[a]ny use which is permitted as a conditional use as provided in this ordinance shall not be deemed a nonconforming use, but shall without further action, be deemed a conforming use qualified with such conditions as the Hearings Officer has required." PCZO 114.110.

Based on PCZO 114.110, the county treated intervenor's entire application as one that could be approved ministerially "as a conditional use in the underlying zone," a process intended to "qualify the use, with conditions required by the Polk County Hearings Officer, as a conforming use." Record 78.

The county issued a notice to property owners within 750 feet of the subject property, and conducted a hearing before the hearings officer on May 1, 2001. The county's notice cited PCZO 114.110, PCZO chapter 112, pertaining to development standards, and PCZO 119.070(D), a conditional use approval standard authorizing the imposition of conditions if they are necessary to protect public health, safety and welfare, as being applicable review standards.

Petitioners attended and testified at the hearing. The hearings officer issued his decision approving the application on May 10, 2001. Petitioners then appealed the hearings officer's decision to the county board of commissioners.

---

[2]The 46,856 square feet includes: Replacement Building No. 1 (15,000 square feet), Building No. 10 (15,000 square feet), Building No. 11 (600 square feet), and the remaining square footage presumably contained in Building Nos. 2, 3, 5 and 9, which remain on the property. The site plan does not depict a Building No. 4.

On May 23, 2001, the county counsel advised petitioners' attorney by letter that due to conflicts of interest involving the three county commissioners, the board of commissioners could not hear the appeal. The county counsel took the position that the hearings officer's decision was final, and that all local appeals had been exhausted. Petitioners thereupon appealed to LUBA, challenging both the hearings officer's decision (LUBA No. 2001-084) and the county counsel letter rejecting petitioners' local appeal (LUBA No. 2001-085).

JURISDICTION

The parties dispute that LUBA has jurisdiction over the decisions appealed in LUBA Nos. 2001-084 and 2001-085. The county and intervenor (together, respondents) argue that the hearings officer's decision is neither a statutory land use decision under ORS 197.015(10) nor a "significant impacts" land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).[3] With respect to ORS 197.015(10), respondents contend that the hearings officer's decision is subject to the exception to the definition of "land use decision," at ORS 197.015(10)(b)(B), for building permits issued under clear and objective standards.[4] Because the hearings officer's decision is not a land use decision,

---

[3]ORS 197.015(10)(a) defines "land use decision" to include:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> > "(i) The goals;
> >
> > "(ii) A comprehensive plan provision;
> >
> > "(iii) A land use regulation; or
> >
> > "(iv) A new land use regulation[.]"

[4]ORS 197.015(10)(b) provides in relevant part that a "land use decision":

> "Does not include a decision of a local government:
>
> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment; [or]

respondents argue, neither is the denial of the local appeal of that decision, which is challenged in LUBA No. 2001-085.

Petitioners question whether the hearings officer's decision is the final decision of the county. According to petitioners, PCZO 111.280 provides that all hearings officer decisions are subject to appeal to the board of commissioners. Therefore, petitioners contend, the logical consequence of that right of local appeal is that only a decision by the board of commissioners can be the county's "final decision," as that term is used in ORS 197.015(10).[5] In the first assignment of error, petitioners suggest that the proper disposition of these appeals may be to dismiss LUBA No. 2001-084, because the hearings officer decision challenged in that appeal is not the county's final decision. Petitioners argue in the first assignment of error that LUBA should remand the board of commissioners' decision appealed in LUBA No. 2001-085 to provide petitioners with the local appeal they are entitled to under the county's code. We address respondents' arguments first.

A. The hearings officer's decision is not subject to the ORS 197.015(10)(b)(B) exception to the definition of "land use decision."

The hearings officer's decision interprets and applies zoning ordinance provisions regarding uses that are listed as conditional uses in the EFU zone, but never have been approved as such, and includes determinations regarding allowed uses on the property. We have often held that these types of decisions are discretionary land use decisions subject to our jurisdiction. *See, e.g., Hood River Sand v. City of Mosier*, 24 Or LUBA 381, 384 (1993) (application of city's nonconforming use provisions requires significant discretion and is

---

> "(B) Which approves or denies a building permit issued under clear and objective land use standards[.]"

[5]PCZO 111.280(A) provides, in relevant part:

> "An appeal may be taken to the Polk County Board of Commissioners by any person whose interests are affected adversely or who is aggrieved by action on an application under Section 111.240 * * *. An appeal must be filed * * * within 10 days after the mailing of notice to the applicant."

therefore a land use decision); *Komning v. Grant County*, 20 Or LUBA 481, 491 (1990) (determination that a dwelling for management of a nonconforming park is an accessory use is a land use decision). While those cases were based on the exception to the definition of land use decision set out in ORS 197.015(10)(b)(A), we reach the same conclusion in this case under ORS 197.015(10)(b)(B). *See* n 4.

B. The hearings officer's decision is the county's final decision.

As stated above, the board of county commissioners had numerous *ex parte* contacts with intervenor. Those contacts had to do with on-going litigation between the county and intervenor regarding code compliance issues arising from intervenor's fruit processing operations on the property. As a result of these *ex parte* contacts and litigation, the board of commissioners has essentially taken the position that they are unable to impartially review petitioners' appeal, and declared that the hearings officer's decision is the county's final decision pertaining to the subject application.

In their first assignment of error, petitioners argue that the county erred in concluding that the bias of the board of commissioners prevented it from hearing petitioners' appeal. Petitioners contend that they are aggrieved by the hearings officer's decision within the meaning of PCZO 111.280(A) and, therefore, they have an absolute right to have the board of commissioners hear their case. *See* n 5. Petitioners also argue that, because the alleged bias arose from the board of commissioners' responsibility to ensure compliance with land use and other environmental laws, that partiality is not the kind of bias that requires recusal from decision making.

We disagree with petitioners that the board of county commissioners is *required* to hear petitioners' appeal in this circumstance. The commissioners declared that their interactions with intervenor are such that they are a biased tribunal. In *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), the Oregon Supreme Court held that parties appearing before a quasi-judicial decision making body have certain procedural and

substantive rights. One of those procedural rights is the right to an impartial tribunal. *Id.* That right permits the board of county commissioners in this instance to conclude that they must recuse themselves and allow the hearings officer's decision to stand as the county's decision. *See Komning*, 20 Or LUBA at 486-87 (letter from county counsel stating that a planning commission's decision stands for the county's decision because all of the county commissioners recused themselves from hearing the appeal is sufficient to demonstrate that the planning commission's decision is the final decision of the county).

In this case, we must weigh what are essentially competing rights: (1) petitioners' right to a local appeal; and (2) the rights of all parties to an impartial tribunal. In the circumstances present in this appeal, denying the local appeal to the board of commissioners will not deprive petitioners of an opportunity to obtain a local decision, and have it reviewed on its merits. Where such an opportunity exists, the right to an impartial decision maker supersedes the right to an appeal, if the decision making body that will hear the appeal is biased.

Eastgate Theatre v. Bd. of County Comm'rs, 37 Or App 745, 755, 588 P2d 640 (1978), on which petitioners rely, does not require a different result. In *Eastgate Theatre*, two of the county commissioners recused themselves. The vote of the remaining county commissioners was split and, as a result, there were insufficient votes to take action on the application for a comprehensive plan map amendment. In *Eastgate Theatre*, the consequence of the board of commissioner's failure to adopt a decision was that there was *no* local decision. Here, there is a decision on the merits that may be reviewed. The county did not err by refusing to hear petitioners' appeal. Accordingly, the county's final decision in this matter is the decision of the hearings officer.

Petitioners' first assignment of error is denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

The three assignments of error that are directed at the hearings officer's decision challenge (1) the procedures the county followed to make its decision; (2) the standards used to determine that intervenor's proposal satisfies statutory and ordinance requirements regarding uses within EFU zones; and (3) the findings the hearings officer adopted to support his conclusion that the applicable standards have been met.

As we stated earlier, the county purported to approve the subject application as a "ministerial review of a pre-existing use that is permitted as a conditional use in the underlying zone," a process intended to "qualify the use, with conditions required by the Polk County Hearings Officer, as a conforming use." Record 78. We understand the hearings officer's decision to interpret PCZO 114.110 to allow the county to treat uses described in that provision as outright permitted uses, subject only to conditions that address health, safety and welfare concerns. We also understand the hearings officer to take the position that the county's determination pursuant to PCZO 114.110 and the resulting imposition of conditions are non-discretionary.

As we explain above, the hearings officer's decision is a discretionary land use decision subject to our jurisdiction. In addition, the challenged decision involves "the discretionary approval of a proposed development of land" under ORS 215.402 and, therefore, the county must follow the procedures for issuing discretionary permits under that statute, including offering a hearing or the opportunity for a hearing subject to ORS 197.763. ORS 215.416(5). Although the hearings officer conducted a hearing, petitioners argue, and the county does not dispute, that the hearing did not comply with the requirements for a hearing set out at ORS 197.763.[6]

[6]ORS 197.763 provides, in relevant part:

Petitioners argue that the failure to follow the procedures set out in ORS 197.763 prevented petitioners from submitting testimony regarding the applicable criteria. In addition, petitioners point to requests by an opponent and intervenor to keep the record open to allow parties to respond to testimony and evidence that was provided in the initial evidentiary hearing. The hearings officer declined to keep the record open, despite those requests. This was error that precluded a full and fair hearing for all parties. These errors prejudiced petitioners' substantial rights. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

The county's failure to follow the procedures set out in ORS 197.763 requires that we remand the hearings officer's decision so that the county may follow all of the procedures set forth in that statute. In the present posture, we do not address the fourth assignment of error, which challenges the adequacy of the hearings officers' findings. However, we address the

---

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body * * * or hearings officer on application for a land use decision * * *:
>
> "* * * * *
>
> "(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria;
>
> "(b) States that testimony, arguments and evidence must be directed toward the criteria described in [ORS 197.763(5)(a)] or other criteria in the plan or land use regulation which the person believes to apply to the decision; and
>
> "(c) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes an appeal to [LUBA] on that issue.
>
> "(6)(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing * * * or leaving the record open for additional written evidence, arguments or testimony * * *."

Local provisions that mirror ORS 197.763 are set out in PCZO 111.340, 111.350 and 111.380.

third assignment of error, because that assignment of error raises the issue of what criteria and procedures will apply on remand.

In the third assignment of error, petitioners argue that the county erred in failing to address the application as either (1) an application for expansion of a nonconforming use under the criteria applicable to such expansions; (2) an application for expansion of a conditional use in the EFU zone, under the criteria applicable to such expansions; or (3) some combination of the two.

Petitioners argue, and we generally agree, that how the county proceeds on the application and what criteria it applies must be consistent with statutes governing uses in the EFU zone and those governing nonconforming uses. Petitioners contend that there are only two statutory bases on which the county can allow the proposed additions to an existing food processing operation in the EFU zone, at least where, as here, the facility exceeds 10,000 square feet.[7] One is if the expansion is approved as a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a), and subject to approval standards at ORS 215.296. The second is if the expansion is approved as an alteration of a nonconforming use under ORS 215.130(5) and (9).

Respondents dispute petitioners' premise that what the county approved in this case constitutes an expansion or alteration of a kind that would require approval under ORS 215.283(2)(a) or under ORS 215.130(5) and (9). According to respondents, the principal changes proposed in the site plan are to replace Building No. 1 with another, similar building, and replace Building Nos. 6, 7 and 8 with a single new building, Building No. 10. Respondents argue that, while the existing processing operation will become more efficient using the new buildings, there will be no net increase in activity. Respondents argue

[7]ORS 215.283(1)(v) allows as an outright permitted use a facility for the processing of farm crops located on a farm operation that provides at least one-quarter of the farm crops processed at the facility. However, the building established for the processing facility may not exceed 10,000 square feet.

that the underlying "use," the commercial activity in conjunction with farm use, will not be expanded, and therefore no approval for the new buildings is necessary under ORS 215.283(2)(a) or 215.130(5) and (9).

We disagree with respondents. The new buildings and associated improvements are part of a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a) and must receive county approval under that statute and implementing regulations, unless the county articulates a sufficient legal basis to avoid that conclusion. Respondents' focus on whether the "use" is altered, and its reliance on that focus to ignore the approval of new buildings and physical improvements, misconstrues the relevant statutes.

To the extent the county believes the existing use is properly viewed as a nonconforming use, ORS 215.130(9) defines "alteration" of a nonconforming use requiring county approval to include not only changes in the use, but also changes "in the structure or physical improvements." The county cannot rely entirely on statutory and code provisions that allow nonconforming uses to be replaced when destroyed by fire. We do not believe that replacement of a 13,900 square foot building with a 15,000 square foot building in a different location than formerly used for the underlying use is properly regarded simply as "replacement" of a nonconforming use under ORS 215.130(6).[8] We also see no arguable basis in the statute or code for treating the construction of Building Nos. 10 and 11, which total 15,600 square feet, as a "replacement" under ORS 215.130(6), or any other statutory provision that would obviate review under ORS 215.283(2)(a). By any reasonable measure, a proposal to reconstruct a 35,987 square foot processing facility into a 46,856 square foot facility, with extensive new paving, driveway, and septic facilities, is properly regarded as an expansion or alteration of that facility.

---

[8]ORS 215.215 provides that "if a nonfarm use exists in an [EFU] zone, and is unintentionally destroyed by fire * * *, the county may allow by its zoning regulations such use to be reestablished *to its previous nature and extent*[.]" (Emphasis added.)

Nor is the county assisted by PCZO 114.110, which provides:

> "Any use which is permitted as a conditional use as provided in this ordinance shall not be deemed a nonconforming use, but shall without further action, be deemed a conforming use qualified with such conditions as the Hearings Officer has required."

The hearings officer apparently interpreted PCZO 114.110 to provide that a use that could be approved as a conditional use in the applicable zone may be automatically viewed as a permitted use in the zone for purposes of county review, and can be expanded or altered without county land use approval. To the extent that is the hearings officer's view of PCZO 114.110, we reject it. PCZO 114.110 simply says that an existing use that could be approved as a conditional use in the zone is deemed a conforming use. PCZO 114.110 says nothing regarding the expansion of such a use, or what criteria might apply to expansion of such a conditional use. It is one thing to say that PCZO 114.110 can be interpreted to allow Building No. 1 or an appropriate replacement for Building No. 1 to be "deemed" to be a "conforming" conditional use, even though Building No. 1 has never been approved under relevant county approval standards and ORS 215.283(2), which requires compliance with the criteria at ORS 215.296. It is quite another thing to suggest that PCZO 114.110 provides authority to view Building No. 1 or any other part of the existing facility as a use permitted outright under ORS 215.283(1). If that is the hearings officer's legal theory, it is simply wrong. In addition, the hearings officer is also wrong if he believes that under PCZO 114.110 he may grant ministerial approval to construct an appropriate replacement for Building No. 1 at a different location on the subject property, or additional buildings that significantly expand the floor area of the facility. Whether Building No. 1 could have been viewed as a conforming conditional use and whether some of the other buildings might be entitled to such recognition, does not mean those building can be removed and replaced with a collection of buildings with more floor area located on different parts of the subject property. We understand petitioners to argue that with the exception of Building No. 1, and the

improvements authorized in 1999, the buildings on the subject property were all constructed without required permits and do not qualify as "conforming" conditional uses under PCZO 114.110. We do not attempt to resolve that issue here.

In short, the county has not demonstrated that the structures and improvements allowed in this decision are not subject to review under ORS 215.283(2)(a) and associated statutes and code provisions. The second and third assignments of error are sustained.

LUBA No. 2001-084 is remanded.

LUBA No. 2001-085 is affirmed.