BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KEITH W. SHEPPARD,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

PAUL PALASKE,
Intervenor-Respondent.

LUBA No. 2003-046

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

John T. Gibbon, Tigard, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Assistant County Counsel, Oregon City, filed a response brief.

Jeffrey L. Kleinman, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 10/16/2003

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 concluding that two tax lots may not be separately developed.

MOTION TO INTERVENE

Paul Palaske (intervenor), an opponent below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

This matter is before us for the second time. In *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002), we described the relevant facts as follows:

> "[Keith Sheppard's (Sheppard's)] property consists of * * * tax lots 509 and 519. In 1977, tax lots 509 and 519 were conveyed in a single deed to the Doans, [Sheppard]'s predecessors in interest. There is one dwelling on tax lot 519, which was built in approximately 1978. In 1979, tax lots 509 and 519 were rezoned to Rural Residential Farm Forest, 5-acre minimum parcel size (RRFF-5).
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> "On November 13, 1985, in response to a request by Doan, county planning staff determined that the subject property consisted of only one legal lot. The planning staff's decision states, in relevant part:
>
> > 'Tax lots 509 and 519, combined, form one legal lot. Although each lot has a separate tax lot number, this simply reflects the description of 2 parcels on a single deed.' Record [I] 333.[1]
>
> "The Doans conveyed tax lots 509 and 519 in a single deed to [Sheppard] in 1986. In March 2001, [Sheppard]'s agent filed a request to 'confirm that [tax lot 509] is a buildable lot of record.' Record 371. * * * On May 18, 2001, the planning director issued a decision concluding that tax lots 509 and 519 are two separate lots of record. * * *
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> "The Far West Community Planning Organization ([Far West] CPO) appealed the planning director's decision to the county hearings officer. The hearings officer sustained the appeal, overturning the planning director's decision and concluding that tax lots 509 and 519 are one legal lot. [Sheppard] appealed the

[1] We refer to the record in *Palaske* as Record I. We refer to the record in this appeal as Record II.

> hearings officer's decision to the board of county commissioners (BOC). The BOC overturned the hearings officer's decision, concluding that tax lots 509 and 519 are two legal lots. [Paul Palaske], a neighboring property owner, filed [an] appeal to LUBA." 43 Or LUBA at 204-206 (footnote added and omitted).

In *Palaske*, we agreed with the petitioner that the county's three alternative bases for deciding that tax lots 509 and 519 were separate parcels misconstrued the applicable law. We remanded the decision to the county to reconsider its decision.

On January 15, 2003, the BOC held a hearing to address our remand decision. Petitioner and intervenor presented testimony through their attorneys and presented other evidence supporting their respective positions. The BOC then closed the hearing and the record, and scheduled deliberations for February 5, 2003. On February 5, 2003, by a vote of 2-1, the BOC reversed its prior decision, and concluded that tax lots 209 and 219 comprise one parcel for development purposes. This appeal followed.

MOTION TO STRIKE

A. Exhibit B

Intervenor moves to strike Exhibit B from the petition for review. Intervenor argues that Exhibit B, a copy of the minutes of the Far West CPO meeting dated January 23, 2003, was never presented to nor considered by the board of commissioners during the remand proceedings. Intervenor argues that because the minutes are not part of the county's record, LUBA may not consider the minutes.

Petitioner concedes that the minutes were not placed before the board of county commissioners during the proceedings that led to the challenged decision. However, petitioner argues that the minutes provide evidence that supports his arguments in the first assignment of error that the Far West CPO was determined to present evidence and advocate against petitioner's position, even after the record was closed. Petitioner requests that we take official notice of the minutes pursuant to Oregon Evidence Code (OEC) 202. In the

alternative, petitioner moves for the board to consider the minutes as evidence not in the record pursuant to OAR 661-010-0045.[2]

LUBA may take official notice of

> "[a]n ordinance, comprehensive plan or enactment of any county * * * in this state, or a right derived therefrom. * * *" OEC 202(7).

Petitioner does not explain how the Far West CPO minutes constitute an "enactment" of the county within the meaning of OEC 202(7), and we do not see that they do. The minutes are merely a reflection of the business of the Far West CPO; they are not an "enactment" of the county in their own right.

With respect to petitioner's request that we consider the Far West CPO minutes pursuant to our authority under OAR 661-010-0045(1), we agree with intervenor that petitioner has not demonstrated that the minutes include "disputed facts" that are material to our resolution of petitioner's first assignment of error. Accordingly, petitioner's request is denied. The motion to strike is granted with respect to Exhibit B.

B. Exhibits C and D

Intervenor moves to strike Exhibits C and D from the petition for review. Exhibits C and D are documents pertaining to petitioner's request that the county reconsider its decision denying his request for a determination that tax lots 509 and 519 are separate parcels. According to intervenor, the documents included in Exhibits C and D are not relevant to petitioner's assignments of error and therefore should not be considered by the Board in resolving petitioner's assignments of error.

Petitioner responds:

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[2] OAR 661-010-0045(1) provides, in relevant part:

> "The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * *ex parte* contacts, * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

> "* * * Petitioner understands the nature [of] Intervenor's argument to be that * * * Petitioner's attaching its Reconsideration Motion as an exhibit is an effort to submit an item into the record that, because * * * petitioner did not assign error to the County's refusal to reconsider its [decision,] should not be in the record. Petitioner did not intend for Exhibit[s C and D] with any intent that it be considered as part of the record but as solely to insure that the exhibit[s'] legal arguments are consider[ed] as support for [the petition for review.] Petitioner asks the Board's indulgence to treat the Exhibit in this form in this manner and acknowledges it requires that the Board Members, like trial judge[s] dealing with motion practice[,] strike from [its] consideration any inappropriate evidentiary * * * assertions while considering the additional and in some cases duplicative legal arguments it makes in this [m]otion. * * *
>
> "* * * [I]n a case such as this, where a party has gone to the effort * * *, albeit * * * prior to the preparation of the record, [to articulate] legal argument[s] regarding a local government[']s] actions and those arguments are considered in the context of an active LUBA appeal that, at least those arguments be given consideration in that appeal process. To do otherwise would seem to deny or at least unduly burden petitioner's right to a full and fair hearing." Petitioner's Response to Intervenor-Respondent's Motion to Strike 1-2.

From the above-quoted response, we understand petitioner to argue that we should consider Exhibit C to the extent it includes additional legal arguments that support the arguments set out in petitioner's first assignment of error. We consider arguments included in petitions for review even though the arguments are not set out in the manner required by OAR 661-010-0030(4)(d), to the extent we can discern those arguments. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-125 (1999). However, we have denied assignments of error that rely on arguments incorporated from an assignment of error included in an appeal of a related decision as insufficiently developed for review, where we must speculate why the incorporated arguments provide a basis for reversing or remanding the local government's decision regarding a different code provision. *Homebuilders Assoc. v. City of Eugene*, 41 Or LUBA 453, 460 (2002).

The present case falls somewhere between the two situations described above. Here, the arguments are included in an exhibit attached to the petition for review. In several places in the first assignment of error, petitioner cites to the arguments included in Exhibit C as

support for his argument that the county erred in failing to reopen the record to allow him to rebut a letter submitted by the Far West CPO after the record had closed. In this circumstance, we will consider the arguments in Exhibit C to the extent we can find them and to the extent the arguments in Exhibit C support the assignments of error in the petition for review for which the arguments are cited as support. We will disregard any extraneous evidence or argument.

With respect to Exhibit D, petitioner does not respond to intervenor's motion to strike. Therefore the motion is granted with respect to Exhibit D.

Intervenor's motion to strike is sustained, in part.

FIRST ASSIGNMENT OF ERROR

On January 31, 2003, the board of county commissioners received a January 24, 2003 letter from Sparkle Anderson on behalf of the Far West CPO (Anderson letter.)[3] On January

[3] The Anderson letter states, in relevant part:

> "Far West CPO met on Thursday January 23, 2003. Sparkle Anderson, President reported on her testimony to the Board of County Commissioners * * * at the January 15th, 2003 meeting [regarding the Sheppard application.]
>
> "Far West CPO reviewed the minutes of this hearing and voted 16 to 0 to create and send the following:
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> "* * * [W]e are uncomfortable with a pattern of what seems to be disregard for the law and land use rules by the [BOC.] For years Far West members have supported the concepts and rules of land use when these rules and laws are 'equally' and fairly enforced. We depend on staff, counsel and hearings officers to make decisions that are 'legal' and consistent. * * *
>
> "Reviewing Chapter 11 of the Comprehensive Plan, Section 1400 of the ZDO and [ORS] Chapter 215 * * *, there is no directive to the [BOC] to create a financial remedy for the well intended, ill informed or misled among us.
>
> "The Comprehensive Plan does charge the [BOC] with overseeing the compatibility between agencies. Perhaps including proof of legal lot status before tax lots are created or recorded would prevent problems in the future. Please note the number of tax lots vs. legal lots owned by our CPO members on the following pages.
>
> "The [BOC] is able to initiate legislative changes * * *[.] [To change] laws you feel are too restrictive for 'everyone's' benefit is a better option than ignoring existing law and thus compounding problems."

31, 2003, the county counsel e-mailed the board of county commissioners, informing them that the Anderson letter was received after the record had been closed, and advising them that the Anderson letter could not be considered in making its decision on remand. At the beginning of the deliberations held on February 5, 2003, the county counsel again advised the board not to consider the Anderson letter. The challenged decision states, in relevant part:

> "On January 31, 2003 the [BOC] received a letter from Far West CPO dated January 24[, 2003.] As the record had been closed at the end of the January 15 hearing, the Far West CPO letter was not deemed part of the record and forms no part of the basis for this decision." Record 4.

Petitioner argues that, notwithstanding the BOC's statement in the decision that specifically rejects the Anderson letter, the board of county commissioners did consider the letter and for at least one commissioner, the Anderson letter formed the basis for his decision to reverse his prior vote concluding that petitioner has two developable parcels. Petitioner argues that the Anderson letter is an *ex parte* communication and, therefore, a remand is required to allow petitioner an opportunity to rebut the contents of the communication. *Horizon Construction Inc. v. City of Newberg*, 114 Or App 249, 253, 834 P2d 523 (1992). Petitioner argues that the county's failure to allow an opportunity for rebuttal prevented him from (1) questioning the BOC regarding the impact the Anderson letter had on its decision-making; and (2) presenting evidence to rebut the factual assertions in the letter.

Petitioner also argues that the county's consideration of the Anderson letter violated the procedures set out in ORS 197.763. According to petitioner, ORS 197.763 establishes a process where the applicant has the benefit of having the last word before the decision makers. ORS 197.763(6)(e).[4] In petitioner's view, the BOC's consideration of the Anderson letter effectively eliminated his right to have the last word.

On the second page of the Anderson letter is a column listing the names and addresses of ten persons, a second column listing the number of tax lots owned by those persons, and a third column listing the number of "legal" lots owned by those persons.

[4] ORS 197.763(6)(e) provides, in relevant part:

According to the county, the Anderson letter merely reiterates Far West CPO's longstanding opposition to petitioner's position. The county argues that the Anderson letter does not contain new evidence or, at worst, includes irrelevant evidence. The county also argues that the BOC declined to accept the letter into the record and, therefore, the letter did not have any impact on the county's decision.

Had the county in fact rejected and refused to consider that late-filed Anderson letter, we do not believe that the receipt of that letter after the close of the record would constitute error or give rise to a right to rebut the contents of the letter. However, from the minutes of the February 5, 2003 BOC meeting, it is clear that at least two of the three commissioners had read the Anderson letter, and that the contents of the Anderson letter may have played a role in reaching a decision on petitioner's application.[5] We therefore disagree with the county that the BOC in fact rejected the Anderson letter. We conclude that, in these circumstances, the county erred by not providing petitioner an opportunity to rebut the substance of the Anderson letter, and that error requires remand. *Tucker v. City of Adair Village*, 31 Or LUBA 382, 389 (1996).

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. * * *"

[5] The minutes state, in relevant part:

> "[Commissioner] Sowa[:] * * * I will just reiterate that it's because [of] issues like this that I think the land use process is broken and Mrs. Anderson's letter indicates [that the board of commissioners should not decide that the tax lots 509 and 519 are separate parcels] unless this is cleared up by State Law * * *." Record 105.

Immediately after voting in favor of a motion concluding that petitioner has only one developable parcel, Commissioner Kennemer stated:

> "* * * I think one of the things I would like to take into consideration in light of the CPO's concern * * * we [might] consider creating a task force to explore what should be done because it[']s clear [that] some of the houses are not on their proper lots and there are a lot of issues out there that remain unresolved and there were clearly errors in the way partitions were created in times past." Record 106.

The first assignment of error is sustained. On remand, the county must allow petitioner an opportunity to rebut the substance of the Anderson letter and adopt a new decision that, if necessary, reflects its consideration of the Anderson letter and petitioner's response to it. Because we remand the county's decision for further proceedings, we do not address petitioner's second assignment of error.

The county's decision is remanded.