

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ALBERT NELSON, WALTER NELSON

5 and NELSON FARM,

6 *Petitioner,*

7
8 vs.

9
10 CURRY COUNTY,

11 *Respondent,*

12
13 and

14
15 DAVE ITZEN and BROTHERS 4, LLC,

16 *Intervenors-Respondent.*

17
18 LUBA No. 2003-173

19
20 FINAL OPINION

21 AND ORDER

22
23 Appeal from Curry County.

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25 Duane Wm. Schutlz, Grants Pass, filed the petition for review and argued on behalf of
26 petitioners.

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28 No appearance by Curry County.

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30 Gary Firestone, Portland, filed the response brief and argued on behalf of intervenors-
31 respondent. With him on the brief was Ramis, Crew, Corrigan and Bachrach LLP.

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

34
35 AFFIRMED

06/29/2004

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal county approval of a planned unit development (PUD) on a four-acre parcel zoned light commercial (C-1).

FACTS

The subject property is located adjacent to the intersection of Highway 101 and West Benham Lane, within the City of Brookings Urban Growth Area. The property is bordered on the north by Benham Lane, which has a storm drain line that feeds to the City of Brookings storm drain system. South and west of the subject property is residentially-zoned property with a mobile home park under construction. A small drainageway slopes southwest from the subject property, through the adjoining mobile home park, and thence through property owned by petitioners. Petitioners' property is zoned and used for farm uses.

Intervenors-respondent (intervenors) applied to the county for a PUD to divide the subject property into five lots, to facilitate proposed commercial development. The contemplated commercial uses are permitted outright in the C-1 zone; however, a PUD is a conditional use in the zone. The planning director referred the PUD application to the planning commission, which conducted a hearing and voted to approve the application. Petitioners appealed the planning commission decision to the county board of commissioners, which held a *de novo* hearing and on October 1, 2003, adopted a written decision approving the requested PUD. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Curry County Zoning Ordinance [CCZO] 3.152 lists planned unit developments as among the conditional uses allowed in the C-1 zone subject to an administrative approval by the planning director. However, CCZO 6.020, which governs planned unit development proposals, requires that PUD applications be considered and approved by the planning commission. The planning director solved this apparent conflict by referring intervenors' PUD application to the planning commission, pursuant to CCZO 2.090(1) and (3), which allows referral of matters to the planning

1 commission in certain circumstances.¹ The county board of commissioners adopted findings that
2 recite the planning director’s referral with apparent approval.²

3 Petitioners argue that the county erred in allowing the planning director to refer the PUD
4 application to the planning commission under CCZO 2.090(1) and (3), because none of the bases
5 for referral under CCZO 2.090(3) are present in this case. According to petitioners, inconsistency
6 between CCZO 3.152 and CCZO 6.020 regarding which decision maker considers a PUD
7 application in the C-1 zone is not a permissible basis to refer the application to the planning
8 commission under CCZO 2.090(1) or (3).

9 Intervenors respond that no objection was raised below to the planning director’s referral
10 under CCZO 2.090, and therefore any issue regarding that deferral is waived, pursuant to

¹ CCZO 2.090 provides, in relevant part:

“1. After accepting a completed application for Administrative Action pursuant to Section 2.060(1) of this ordinance, the Director shall act on or cause a hearing to be held on the application.

“* * * * *

“3. [The Director shall refer the matter to the Planning Commission if] the Director determines that he/she has:

“a. an actual conflict of interest;

“b. a potential conflict of interest;

“c. a direct or substantial financial interest in the matter to be decided; or

“d. an inability to render fair judgment because of prejudice or prejudgment[.]”

² The county board of commissioners’ decision states, in relevant part:

“Section 3.152 of the Curry County Zoning Ordinance provides for Planned Unit Developments in the C1 Zone, subject to the uses and dwelling density allowed by the zone, as an administrative decision of the Planning Director; however, both [CCZO] 6.020 of the zoning ordinance, and Article IV of the Curry County Land Division Ordinance require application to, and approval by, the Curry County Planning Commission. Sections 2.090(1) and (3) give the Planning Director authority to refer an administrative decision to the Planning Commission; in light of the seeming conflict in local regulation as to procedure, the Planning Director referred this matter to the Planning Commission under the authority granted in Section 2.090.” Record 9-10.

1 ORS 197.763(1). In any case, intervenors argue, petitioners have not demonstrated that any
2 procedural error prejudiced their substantial rights. ORS 197.835(9)(a)(B). On the merits,
3 intervenors argue that under the CCZO, PUD applications must be submitted to and considered by
4 the planning commission, and therefore the director’s referral was consistent with, indeed required
5 by, the county code.

6 Petitioners do not argue that any objection was made below to the planning director’s
7 referral, or that there was no opportunity to make such an objection. Where a party has the
8 opportunity to object to a procedural error before the local government, but fails to do so, that error
9 cannot be assigned as grounds for reversal or remand of the local government’s decision in an
10 appeal to LUBA. *Simmons v. Marion County*, 22 Or LUBA 759, 774 (1992). In addition, we
11 agree with intervenors that petitioners have not demonstrated that initial consideration by the
12 planning commission rather than the planning director prejudiced their substantial rights.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 As noted, CCZO 3.152 lists PUDs among the uses that are allowed as conditional uses in
16 the C-1 zone, subject to approval by the planning director, but other code provisions require that
17 PUD applications be submitted to and considered by the planning commission. For reasons not
18 entirely clear to us, the county understood the code to require that intervenors’ PUD application be
19 referred to the planning commission for decision, while intervenors must submit a separate
20 application for a conditional use permit for the PUD to the planning director for a separate and
21 subsequent decision.³

³ The county’s findings state, in relevant part:

“The proposed development * * * require[s] conditional use approval as the C1 Zone only allows a PUD as a conditional use, which must be the subject of an Administrative Decision by the Planning Director. There are no criteria or standards set forth in the C1 Zone that a proposed PUD must meet, and the Planning Commission must hear the matter; therefore, there seems to be a conflict in the CCZO. The County interprets this seeming conflict in the procedure followed for this application; the County chose to have the Planning Commission

1 Petitioners argue that separate and subsequent consideration of a conditional use permit
2 application is contrary to Curry County Land Division Ordinance (CCLDO) 4.0310, which requires
3 that the planning commission first dispose of a conditional use permit, if one is required, before
4 considering a PUD application.⁴ According to petitioners, the county’s procedural error prejudiced
5 their substantial rights, because petitioners were unable to address the criteria applicable to the
6 conditional use permit, which petitioners speculate might focus more on adverse impacts to nearby
7 properties than the PUD criteria.

8 Intervenors respond that no objection or issue was raised below regarding CCLDO 4.0310
9 or separate consideration of the conditional use permit, and therefore any such issues are waived.
10 Intervenors also argue that the conditional use criteria and PUD criteria are the same, so bifurcating
11 the conditional use and PUD applications did not prejudice petitioners’ substantial rights. On the
12 merits, intervenors argue that CCLDO 4.0310 only applies in circumstances where both the PUD
13 and conditional use application are before the planning commission at the same time, not when they
14 are processed separately, as in the present case.

15 Again, petitioners do not argue that any objection was made below to the alleged violation
16 of CCLDO 4.0310 or to bifurcation of the PUD and conditional use applications, or that there was
17 no opportunity to make such an objection. Therefore, petitioners’ arguments under this assignment
18 of error do not provide a basis for reversal or remand.

hear the matter as required, and once the [PUD] decision is made, the Planning Director will make an administrative decision for the conditional use as also required by the Ordinance. Therefore, the procedure followed in this case is the proper procedure in addressing the requirements and standards set forth in this report. A conditional use permit has been applied for, and the decision on that request will be made by the Planning Director as an administrative decision as procedurally required by the CCZO once the decision on this [PUD] request is final. * * *” Record 32.

⁴ CCLDO 4.0310 provides:

“In general the actions taken by the Planning Director and Planning Commission shall be the same as stated in Article II hereof, pertaining to subdivisions and major partitions. *In the event a zone change or conditional use permit is required, the Planning Commission shall first dispose of this. If such disposition is favorable to the applicant, the Planning Commission shall then proceed with the consideration of the Planned Unit Development in accordance with Article III.*” (Emphasis added.)

1 The second assignment of error is denied.

2 **THIRD AND FIFTH ASSIGNMENTS OF ERROR**

3 CCZO 6.020(3)(c) requires a finding that the proposed PUD is “substantially compatible
4 with the land use of the surrounding area.” The county’s findings conclude that the proposed PUD
5 is compatible with adjoining residential and commercial uses, and that compliance with the Harbor
6 Bench Farm District Overlay (HBFO) requirements is sufficient to ensure that the proposed PUD is
7 compatible with nearby agricultural uses.⁵

8 The HBFO requirements at CCZO 7.040(19) require, in relevant part, that development of
9 non-agricultural land within the HBFO area not force a significant change in, or significantly increase
10 the cost of farming practices on adjacent agricultural land, and further require that drainage be
11 directed away from adjacent or nearby agricultural lands and into the existing drainage system.⁶ The

⁵ The county’s findings state, in relevant part:

“Findings and conclusions from above sections of this report are herein included by this reference. This criterion has been partially addressed by the applicant’s statement of compatibility with supporting information [Record; Exhibit A, pages 98 through 101] which the Board adopts as findings of fact. However, in determining [compliance with] this criterion, findings that all requirements of the HBFO Zone are met must be made in order for this criterion to be completely satisfied as regards compatibility with adjacent agricultural uses on the parcel to the east of the subject property. Those requirements are dealt with in a subsequent section of this report; if all are met, this requirement is satisfied.

“**Conclusion:** The proposed development is compatible with the mixed residential and commercial uses occurring to the north, west and south; compatibility with land zoned for farm use is examined in subsequent sections of this report. If the requirements of the HBFO Zone, specifically adopted to ensure compatibility of farm/nonfarm uses on adjacent parcels, are met, this criterion will be satisfied. * * *” Record 19.

⁶ CCZO 7.014(19) provides, in relevant part:

- “a. If the proposed use is located on a lot or parcel zoned for non-agricultural use and is adjacent to land zoned for commercial agricultural use and is in agricultural use then the proposed use shall not force a significant change in, or significantly increase the cost of accepted and typical farming practices on the agricultural land.
- “b. As a condition of approval a written easement shall be recorded with the deed of the lot or parcel zoned for non-agricultural use by the land owner which recognizes the rights of the owners of land zoned for commercial agricultural use to conduct farming operations consistent with accepted and typical farming practices used for commercial farming within the [HBFO] District.

1 county's decision addresses the HBFO requirements, and concludes that the proposed PUD is
2 consistent with those requirements.

3 Petitioners first argue that the county's findings regarding compliance with the compatibility
4 requirement of CCZO 6.020(3)(c) are inadequate, because with respect to compatibility with farm
5 uses the findings simply state that compatibility is assured if the HBFO standards are satisfied.
6 However, we agree with intervenors that the county's decision essentially adopts the findings
7 addressing the HBFO standards as the county's explanation for why the proposed PUD is
8 compatible with farm uses, for purposes CCZO 6.020(3)(c). Petitioners do not dispute that the
9 HBFO standards are intended to ensure compatibility between agricultural and non-agricultural uses
10 in the HBFO area including the subject property. We see no error or inadequacy in addressing
11 compliance with CCZO 6.020(3)(c) by reference to the HBFO standards, as long as the county's
12 decision in fact adopts adequate findings addressing the HBFO standards. We turn, then, to
13 petitioners' challenge to the county's findings under the HBFO standards.

14 **A. CCZO 7.040(a)**

15 Intervenors took the position before the county that compliance with CCZO 7.040(a) was
16 assured by the steps intervenors proposed to ensure compliance with CCZO 7.040(a) through (d).
17 The county concurred with that approach.⁷ Petitioners argue that the findings addressing are
18 CCZO 7.040(a) are inadequate, and tantamount to no findings at all.

"c. If the proposed use located on a lot or parcel zoned for non-agricultural use within the [HBFO] District includes the development of a structure or the creation of an impervious ground surface, the person proposing the use shall be required to direct all drainage from the structure or impervious surface away from adjacent or nearby lands zoned for commercial farm use and into the existing storm drainage system. The owner of the nonfarm use may divert surface water drainage onto farm land if such drainage is agreed to in writing by the farm land owner who wishes to receive the water for a use beneficial to agriculture. The written agreement shall contain a provision that the owner of the nonfarm parcel will re-direct the surface water drainage into the existing storm water drainage system at any time the farm land owner no longer desires to receive such water."

⁷ The county's findings state, in relevant part:

1 The county’s findings adopt an explicit interpretation of CCZO 7.040(a), to the effect that
2 measures taken to comply with CCZO 7.040(b) through (d) are sufficient to ensure compliance
3 with CCZO 7.040(a). Petitioners offer no focused challenge to that interpretation. Further, the
4 only specific adverse impact to farm practices petitioners identify and discuss is drainage runoff, an
5 impact that is addressed under CCZO 7.040(c). Petitioners have not demonstrated that the
6 county’s findings addressing CCZO 7.040(a) are inadequate.

7 **B. CCZO 7.040(b)**

8 The county’s decision requires as a condition of approval that intervenors record deeds with
9 written “easements” consistent with the requirements of CCZO 7.040(b).⁸ Petitioners argue that the
10 apparent intent of CCZO 7.040(b) is not to require an “easement” but rather to waive the rights of

“The applicant addressed this requirement on page 6 of Exhibit C under Item 4. The applicant indicates that all development shall be located at least 30 [feet] from the property line, and that there will be a solid fence 6 feet in height constructed on this line. In addition, the applicant shows storm water directed into the existing storm drainage system, and notes that the property owner will sign a waiver of right to object to farm practices. * * * The applicant concludes that these measures will ensure no significant impact on the farm practices on the adjacent farm parcel.

“The measures indicated by the applicant are those measures required below in this section. As stated above, this section of the Ordinance is to provide protection to adjacent farm lands through a requirement that certain specific measures be met; therefore, if all those specific measures are complied with the intended protection is provided and no significant impact should result.

“**Conclusion:** The Board [of commissioners] concurs that this section of the Ordinance ensures protection for parcels in farm use within a specific area, from nonfarm uses occurring on parcels which are zoned for those uses which are also within that specific area, the HBFO. This protection is provided by specific requirements set forth in subsequent sections of this report. The applicant indicates that if all those specific requirements are met, the intent of this section of the ordinance as expressed in this criterion, will be met. The Board [of Commissioners] agrees with this interpretation.

“The specific standards and criteria are examined below. **CRITERION WILL BE MET IF ALL CRITERIA AND STANDARDS IN SECTION 7.040(19) ARE SATISFIED.**” Record 51-52.

⁸ The county’s findings state, in relevant part:

“The deeds for each lot created from the proposed development must include the written easement as set forth above; the current owner/developer must record a written easement as set forth above for the entire subject property prior to receiving approval for any development permits. This will be required as a condition of approval to satisfy this criterion.” Record 52.

1 intervenors and their successors to object with respect to any conflicts with farm uses on nearby
2 farms. Petitioners contend that the county’s finding and condition does not explain how recordation
3 of an “easement” will satisfy the intent of CCZO 7.040(b).

4 Petitioners are probably correct that the term “easement” does not accurately describe the
5 restriction that CCZO 7.040(b) is intended to impose. Nonetheless, that is the term the code
6 provision employs, and we do not see that the county’s finding or the condition of approval imposed
7 to comply with CCZO 7.040(b) are inadequate.

8 **C. CCZO 7.040(c)**

9 The county adopted several pages of findings explaining why the proposed PUD complies
10 with the CCZO 7.040(c) requirement to direct storm drainage away from farm lands and into the
11 “existing storm drainage system.” In relevant part, the county concluded that “the existing storm
12 drainage system” was the existing drainageway that flows from the subject property south and west
13 through petitioners’ property, and that all storm drainage from the subject property would continue
14 to discharge through that drainageway.

15 Petitioners fault the county’s findings, arguing that CCZO 7.040(c) requires the applicant to
16 direct all storm drainage into a separate drainage system than that used by nearby farms. According
17 to petitioners, there is no explanation for why storm drainage from the subject property could not be
18 redirected from its historic drainage into the existing storm drainage line along Benham Lane, which
19 is part of the city’s storm drainage system, or into some newly-created system. In addition,
20 petitioners argue that the applicant failed to provide any base line data on pre-development flows to
21 allow the county to determine whether the existing drainageway is adequate for post-development
22 storm drainage volumes and velocities. Finally, petitioners contend that the county failed to consider
23 the cumulative effect of runoff from impervious surfaces on the adjacent mobile home park under
24 construction.

25 Intervenor respond, and we agree, that petitioners have not demonstrated that the county’s
26 findings of compliance with CCZO 7.040(c) are inadequate. Petitioners’ view that CCZO 7.040(c)

1 requires that storm drainage be redirected into a different drainage system than the “existing storm
2 drainage system” that has historically served the subject property is simply inconsistent with the text
3 of CCZO 7.040(c). CCZO 7.040(c) does not require that the applicant establish the level of pre-
4 development stormwater flows, or that the county compare pre- and post-development stormwater
5 runoff, or that the county conduct a cumulative impacts analysis including runoff from other
6 properties.

7 The third and fifth assignments of error are denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 CCZO 6.020(3)(f) requires the PUD applicant to demonstrate that “adequate” drainage
10 facilities are available. Petitioners took the position below that the commercial uses facilitated by the
11 proposed PUD are “urban” uses, and therefore that the applicant must provide an “urban level”
12 storm drainage system, in order to provide “adequate” drainage facilities. Petitioners contended that
13 drainage facilities that serve the subject property must therefore comply with standards adopted by
14 the City of Brookings for storm drainage systems. Petitioners again point out that there is a city
15 storm drainage line along Benham Lane, and suggest that the county should require connection to
16 the city system, rather than using the existing historic drainageway on the property.

17 The county adopted several pages of findings explaining why it believes the proposed storm
18 drainage facilities are adequate. The county rejected the argument that stormwater must be diverted
19 into the “urban” system along Benham Lane, on the grounds that the applicants have no right to
20 divert water from one drainage into another drainage. Record 58. The county also rejected the
21 argument that the stormwater system must comply with city standards. Record 54. Petitioners do
22 not challenge these findings or otherwise demonstrate reversible error with respect to the county’s
23 findings under CCZO 6.020(3)(f).

24 The fourth assignment of error is denied.

25 The county’s decision is affirmed.