BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KELLY GORDON,
Petitioner,

vs.

POLK COUNTY,
Respondent.

LUBA No. 2005-095

FINAL OPINION
AND ORDER

Appeal from Polk County.

Kelly Gordon, Monmouth, filed the petition for review and argued on his own behalf.

No appearance by Polk County.

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

REMANDED 10/31/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision approving a forest template dwelling on a four-acre parcel.

FACTS

The subject property is zoned Farm Forest, and is in farm tax deferral. The predominant soil on the property is Bellpine silty clay loam, a high-value farm soil that is also highly productive forest soil. Winnie Davies, the applicant, and her husband acquired the property in 1992 along with a contiguous 33-acre parcel to the north, tax lot 100.[1] At that time the subject property consisted of pasture and was unforested. Historic use of the property up until 1992 had been grazing.

The subject property is roughly rectangular in shape, with an internal fence dividing the property into an L-shaped strip of land along the western and northern borders, approximately one acre in size, and a larger three-acre portion consisting of the middle and eastern areas of the parcel. The L-shaped strip along the western border includes an access road that serves the adjacent parcel to the north. Fishback Road borders the property to the south. Along the eastern border is a forested area. At the time of the present application in 2005 there were scattered small trees in the eastern portion of the property, but most of the property remains open pasture.

OAR 660-006-0050(2) provides that in an agricultural/forest zone a county shall approve a dwelling application under the standards in OAR Chapter 660, Division 006 or Division 033, "based on the predominant use of the tract on January 1, 1993."[2] The main issue in the present

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[1] The applicant gained sole title to the subject property in 2004. Apparently because the ownerships of the two adjoining parcels were not identical at the time of the 2005 application, the county did not treat the two parcels as a single tract.

[2] Polk County Zoning Ordinance (PCZO) 138.020 implements OAR 660-006-0050(2), and provides:

> "The siting of dwellings and other allowable land uses within the Farm/Forest Zoning District are based on a determination of the predominant use of a tract as either farm or forest land. A 'tract' is defined as one (1) or more contiguous lots or parcel(s) under the same ownership.
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> "Predominant use is defined as more than 50 percent of the area of the tract. Polk County will review tax assessor records, aerial photos, soils capability data, and existing uses to determine

case is whether the predominant use of the property on January 1, 1993, was farm or forest use. If in farm use, the provisions governing dwellings zoned for exclusive farm use apply; if in forest use, the provisions governing dwellings in forest zones apply.

In 2004, the applicant applied for a forest template dwelling under OAR 660-006-0027(1)(f) and implementing county regulations, asserting that the subject property had been in forest use on January 1, 1993. That assertion was based on the applicant's representation that she had planted trees in the middle and eastern portion of the property prior to January 1, 1993, and again in 1998, but that most of the planted trees had died. Opponents to the application argued that the existing small trees in the eastern portion of the subject property were seedlings from the mature trees along the eastern boundary, not planted trees, and that the applicant had submitted no evidence, such as receipts, demonstrating that trees were planted prior to January 1, 1993. The county board of commissioners denied the application on a 2-1 vote, based in part on a 1994 aerial photograph that showed no trees on the property, and the applicant's failure to provide evidence showing that she had ever stocked the subject property with trees.

In 2005, the applicant resubmitted the present application. The planning director denied it, concluding that the applicant had again failed to demonstrate that the subject property was in forest use rather than farm use on January 1, 1993. The applicant appealed the director's decision to the board of commissioners, which had a different composition due to intervening elections. The board of commissioners held a hearing on April 27, 2005, and closed the record on May 11, 2005. Two of the commissioners conducted a site visit on May 16, 2005, accompanied by the applicant's husband and petitioner. At the subsequent hearing on May 25, 2005, the two commissioners entered their observations into the record, including an observation that the small trees present in the eastern portion of the property appeared to have been planted in rows. Based on that observation

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on a case-by-case basis whether a tract was predominantly used for farm or forest purposes as of January 1, 1993. Authorized uses and development standards for each tract will be based on this determination."

and other evidence in the record, the board of commissioners voted 2-1 to approve the application for a forest template dwelling. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county erred in allowing the applicant to resubmit the same application after it was denied in 2004. According to petitioner, the applicant could have appealed the county's 2004 denial to LUBA, but did not. By allowing the applicant to resubmit the same application, petitioner argues, the county essentially circumvented state law providing for LUBA's exclusive review of land use decisions, and impermissibly allowed reconsideration of a final decision.

Some local government codes include provisions that prohibit re-submittal of denied applications or substantially similar applications within specified time frames or under specified circumstances. Polk County's land use ordinance apparently does not include such provisions. Absent a local provision to that effect, nothing that we are aware of precludes an applicant from re-submitting, or the local government from accepting, a previously denied application supported by the same or additional evidence. *See Lawrence v. Clackamas County*, 180 Or App 495, 43 P3d 1192 (2002) (denial of an application for nonconforming use verification did not create issue or claim preclusion barring a new application for the same nonconforming use verification). Because the applicant in the present case submitted a new application, we do not see that the county's consideration of that new application circumvents our statutory authority or is accurately characterized as a reconsideration of the 1994 decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county violated a county code provision requiring posting notice of the public hearing on the application at least 20 days prior to the hearing in such a manner "as may be most readily seen by the public." PCZO 111.050. According to petitioner, he drove by the subject property many times during the period when the notice should have been posted and never saw it. Petitioner states that during the May 16, 2005 site visit he found the notice lying rolled up on

the ground near the roadway without any tack or staple puncture marks or other evidence that it had been mounted. Petitioner speculates that had the sign been properly posted local residents who did not receive mailed notice may have attended the hearings and testified.

ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if the Board finds that the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." Even assuming that the notice was improperly posted as petitioner alleges, that error did not prejudice *petitioner's* substantial rights. Petitioner knew of the hearing and attended it. Petitioner may not seek reversal or remand of the challenged decision based on alleged prejudice to other persons who are not parties to the appeal. *See Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000) (under ORS 197.835(9)(a)(B), prejudice must be to petitioner's, not a third party's, substantial rights).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, two of the county commissioners conducted a site visit on May 16, 2005, accompanied by the applicant's husband and petitioner. Petitioner states that during the visit the applicant's husband repeatedly conversed with one of the commissioners. According to petitioner, the two commissioners split up and viewed separate portions of the property at different times, and petitioner walked back and forth between the two commissioners. Petitioner states that the one occasion he was able to hear part of the conversation between the applicant's husband and the commissioner, the husband was describing the process by which the property had been planted in trees. Following the site visit, petitioner objected in writing to the conversation, and argued that the county should disclose the contents and allow rebuttal of that testimony. Record 16.

According to petitioner, during the May 25, 2005 hearing the commissioner who had engaged in the conversation with the applicant's husband explained that even though he understood at the time that he could not use any testimony received during the site visit, he did not want to be rude and terminate the conversation. Petition for Review 12-13 (quoting audiotape of the May 25,

2005 hearing). However, petitioner argues, the commissioner never disclosed the contents of the conversation, or offered petitioner or others the opportunity for rebuttal, as required by ORS 215.422(3).[3] In addition, petitioner questions the commissioner's assurance that he did not rely on any testimony received during the conversation, noting a later statement by the commissioner during deliberations that echoes the part of the conversation that petitioner was able to hear.

We agree with petitioner that the communication between the commissioner and the applicant's husband on May 16, 2005, was either an *ex parte* communication or the receipt of new testimony after the evidentiary record had closed.[4] In either case, the county was required to take steps to ensure the integrity of the decision-making process. If the conversation is characterized as an *ex parte* contact, the decision maker receiving that communication is required to disclose the

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[3] ORS 215.422 provides, in relevant part:

> "(3) No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
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> > "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
> >
> > "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.
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> "(4) A communication between county staff and the planning commission or governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section."

[4] Arguably, because petitioner was present for a part of the conversation, at least that part of the conversation was literally not an "ex parte" communication with respect to petitioner. However, petitioner was apparently present only for a small portion of the conversation, and could not have been present for the whole conversation and still accompany the other commissioner on his separate viewing of the property. Under those circumstances, petitioner is entitled to disclosure of the substance of the entire conversation, and an opportunity for rebuttal, notwithstanding that he overheard a part of the conversation. In addition, petitioner and the applicant's husband were not the only parties who participated in the hearings below, although they appear to be the only parties who attended the site visit. Thus, even if petitioner had been present for the whole conversation, that conversation would be *ex parte* and trigger obligations to disclose and allow rebuttal under ORS 215.422(3). Had the commissioner disclosed the communication and offered the opportunity for rebuttal as required by ORS 215.422(3), we see no reason why petitioner could not have offered rebuttal, notwithstanding that he had not heard the entire conversation.

content of the communication and offer other parties the opportunity to rebut the substance of that communication. ORS 215.422(3). This the county did not do. If the conversation is characterized as new evidence received after the close of the record, the county is required to either explicitly reject the new evidence or offer other parties an opportunity to respond to it. *Tucker v. City of Adair Village*, 31 Or LUBA 382, 389 (1996). The county did neither.[5] Remand is therefore necessary to disclose the contents of the conversation and allow other parties the opportunity for rebuttal.

The third assignment of error is sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner argues that the county's conclusion that the subject property was in forest use on January 1, 1993, is not supported by adequate findings and substantial evidence.

Because we sustained the third assignment of error, which will require re-opening the evidentiary record for disclosure and to allow petitioner opportunity to rebut the contents of the disclosure, we need not and do not reach these assignments of error.

We do not resolve the fourth and fifth assignments of error.

The county's decision is remanded.

[5] If the county rejects the new evidence, the county need not offer other parties an opportunity to respond. *Sheppard v. Clackamas County*, 45 Or LUBA 507, 515 (2003). However, that approach perhaps works best when a written document is submitted and the decision maker rejects it without reading it. That approach is questionable where the decision maker in fact reads the document and thus actually considers the evidence or, as here, where the new testimony is delivered orally to the decision maker, because it is often difficult to determine whether or not the decision maker relied on the new evidence or testimony. *Id.*