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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LAVERNE RATZLAFF and MARY JEAN RATZLAFF,
Petitioners,

vs.

POLK COUNTY,
Respondent,

and

SOUTHEAST POLK AREA ADVISORY COMMITTEE,
PATRICIA A. WHEELER, KELLY GORDON,
GARY CORDY, BRUCE ROBBINS and MARY THARP,
Intervenor-Respondents.

LUBA No. 2007-207

FINAL OPINION
AND ORDER

Appeal from Polk County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Wallace W. Lien, P.C.

David Doyle, Dallas, filed a response brief and argued on behalf of respondent.

Jannett Wilson, Eugene, filed a response brief and argued on behalf of intervenor-respondents. With her on the brief was the Goal One Coalition.

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

AFFIRMED

06/19/2008

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

NATURE OF THE DECISION

Petitioners appeal a decision by the county denying an application for partition and approval of a farm dwelling.

FACTS

In 2005, petitioners received waivers of certain land use regulations from the state and the county pursuant to ORS 197.352 (2005) (Measure 37). Thereafter, petitioners applied to partition their 24.36-acre exclusive farm use zoned parcel into two parcels and to site a farm dwelling on one parcel. On May 12, 2006, the county planning director approved the application. On May 24, 2006, intervenor Southeast Polk Area Advisory Committee (SEPAAC) appealed the planning director’s decision to the board of commissioners.

At the hearing before the board of commissioners, petitioners moved to dismiss SEPAAC’s appeal, arguing that SEPAAC’s failure to pay the appeal fee rendered the appeal invalid. The board of commissioners denied petitioners’ motion to dismiss.¹

The board of commissioners then held hearings on SEPAAC’s appeal, and on October 10, 2007, reversed the planning director’s decision approving the application and denied the application.² This appeal followed.

MOTION TO DISMISS

Intervenors move to dismiss the appeal “due to issues of mootness and lack of jurisdiction.” Motion to Dismiss 1. Intervenors argue that because the challenged decision arises out of a waiver granted by the Department of Land Conservation and Development

¹ Petitioners appealed that denial to the circuit court, which transferred the case to LUBA. LUBA dismissed that appeal, finding that the decision being appealed was an interlocutory decision and thus not a final decision subject to LUBA’s jurisdiction. *Ratzlaff v. Polk County*, 53 Or LUBA 480, 483 (2007).

² The appealed decision consists of three separate orders adopted by the board of commissioners: Order No. 07-196, 07-197, and 07-198. Record 335-351. Order No.07-196 denied petitioners’ motion to dismiss, and is the only Order that petitioners challenge in the appeal.

1 under Measure 37, and because that statute was modified by ORS 195.300 *et. seq.* (Measure
2 49) to eliminate previously granted rights under Measure 37 waivers. Intervenors argue that
3 for the most part, Measure 49 replaces Measure 37 rights with new development rights, and
4 the original Measure 37 waiver cannot provide any basis for reviewing the county’s decision
5 on the application. Intervenors also argue that petitioners cannot qualify for a vested right to
6 complete the development under Section 5(3) of Oregon Laws 2007, chapter 424, because,
7 intervenors argue, petitioners never possessed a valid permit to develop the property pursuant
8 to the applications. Therefore, intervenors argue, review of the county’s decision would have
9 no practical effect.

10 In their response to the motion to dismiss, petitioners respond that the appeal is not
11 moot because, as petitioners argue in their assignment of error, the appeal was wrongfully
12 allowed to proceed, and had the county not erred in allowing the appeal to proceed,
13 petitioners would possess a valid permit based on the planning director’s approval to develop
14 the property as proposed in their application.

15 While we tend to agree with intervenors that our review of the county’s decision may
16 have no practical effect, there remains at least some question about the effect a decision in
17 petitioners’ favor in this appeal might have on a potential vested rights determination under
18 Section 5(3) of Oregon Laws 2007, chapter 424. We cannot say with reasonable certainty
19 that our review of the county’s denial would have no practical effect, and therefore we
20 decline to dismiss this appeal as moot.

21 Intervenors’ motion to dismiss is denied.

22 **ASSIGNMENT OF ERROR**

23 Polk County Zoning Ordinance (PCZO) 111.280(D) requires an appeal to be
24 accompanied by payment of an appeal fee, except that no fee is required if an appeal hearing
25 is requested by “*the appropriate* Area Advisory Committee [AAC].” (Emphasis added.)
26 Petitioners’ single assignment of error argues that the county erred in allowing SEPAAC’s

1 appeal to proceed because, petitioners argue, SEPAAC was not a recognized Area Advisory
2 Committee at the time the appeal was filed, and thus an appeal fee should have accompanied
3 the appeal. According to petitioners, filing the required appeal fee is a jurisdictional
4 requirement. When no appeal fee was submitted, petitioners argue, the appeal became
5 invalid and the planning director's May 12, 2006 decision approving the application
6 therefore became the county's final decision on the application. Petition for Review 7.

7 The crux of petitioners' argument relies on their contention that certain actions or
8 omissions by SEPAAC meant that it was not a duly "recognized" AAC. In support of their
9 argument, petitioners cite to and rely on Ordinance 00-15, an ordinance adopted by the
10 county in November, 2000. Petition for Review Appendix D. Ordinance 00-15 adopted rules
11 and procedures for AACs to follow in order to be officially recognized by the county and
12 thus be entitled to file appeals without payment of the appeal fee. Petitioners argue that
13 SEPAAC failed to maintain an adequate number of board members, failed to provide proper
14 notice of AAC meetings to members of the AAC, and failed to provide minutes to the board
15 of commissioners of the annual meeting that identify the executive board of the AAC, all as
16 set forth in Ordinance No. 00-15. Petitioners further argue that SEPAAC did not submit its
17 2006 annual meeting minutes to the county until July 3, 2006. Due to its failure to comply
18 with all of the requirements of Ordinance 00-15, petitioners argue, SEPAAC was not a
19 "recognized" AAC on the date the appeal was filed, May 26, 2006.

20 Intervenor's first dispute petitioners' contention that SEPAAC failed to act in
21 accordance with Ordinance 00-15, and point to evidence in the record indicating compliance
22 with the challenged provisions of Ordinance 00-15. Record 396-97. More importantly,
23 intervenors argue, SEPAAC was the "appropriate" AAC to file the appeal pursuant to PCZO
24 111.280(D) and in fact, has been recognized by the county as an AAC since 2003. Record
25 396. Intervenor's explain that the county renews its recognition of previously recognized
26 AACs on an annual basis, but that for some reason, the county did not process any renewals

1 in 2004 or 2005 and was delayed in processing renewals in 2006. As intervenors explain it,
2 “[h]aving an executive board ‘recognized’ by the county commissioners is not what entitles
3 an [AAC] to a free appeal; being an [AAC] is what grants the free appeal.” Intervenor-
4 Respondents’ Brief 7.

5 PCZO 111.280(D) allows the “*appropriate* Area Advisory Committee” to file an
6 appeal without payment of the appeal fee. And although Ordinance 00-15 indicates the steps
7 that are required in order for an AAC’s Executive Board to be annually “recognized” by the
8 county, Section 4(A) of that ordinance provides that “[n]o fee is required for Area Advisory
9 Committee appeal to obtain an initial public hearing.” Like PCZO 111.280(D), that
10 provision does not use the term “recognized.”

11 In response to petitioners’ motion to dismiss the appeal, the county adopted the
12 following findings:

13 “The Executive Board recognition provision in Ordinance No. 00-15 has no
14 jurisdictional relevance to the issue at hand, to wit, whether the subject
15 appeals are invalidated because the appellant did not submit, and staff did not
16 require an appeal fee. In the present instance, SEPAAC, an established and
17 active area advisory committee, was well-known to county staff. The staff
18 member receiving the appeal document was unaware that Polk County had yet
19 to process its annual recognition of SEPAAC’s Executive Board. More
20 importantly, staff had no reason or basis to conclude that untimely compliance
21 with Ordinance 00-15 would somehow invalidate the provision in PCZO
22 111.280(D) * * *.

23 “ * * * * *

24 “Pursuant to PCZO 111.280, the singular jurisdictional requirement specific
25 to [AACs] and their ability to file an appeal document without submission of
26 the appeal fee is that the boundaries of the [AAC] include the site of the land
27 use action. The record confirms that property at issue in this land use action is
28 located within the boundaries of SEPAAC.” Record 338.

29 We understand the county to have determined in those findings that SEPAAC met the
30 requirement set forth in PCZO 111.280(D) of being an “appropriate” AAC because the
31 boundaries of SEPAAC include the subject property, and that merely because the county had
32 not processed its annual recognition of SEPAAC’s or any other AAC’s Executive Board,

1 SEPAAC was not disqualified from being the “appropriate” AAC to file the appeal without
2 payment of a filing fee. Under ORS 197.829(1), that interpretation of PCZO 111.280(D) is
3 not inconsistent with the express text of the zoning ordinance or Ordinance 00-15.

4 In addition, petitioners have failed to establish that payment of the local appeal fee is
5 a jurisdictional requirement. Petitioners cite to nothing in the PCZO or the county’s decision
6 that purports to establish that payment of the appeal fee is a jurisdictional requirement.
7 Petitioners cite *Breivogel v. Washington County*, 117 Or App 195, 843 P2d 982 (1982) and
8 *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690 (1988) in support of
9 their assertion that payment of the appeal fee is a jurisdictional requirement. However, in
10 both of those cases the county code provision at issue expressly stated that compliance with
11 the code section at issue was jurisdictional. Similarly, the other case cited by petitioners,
12 *BCT Partnership v. City of Portland*, 27 Or LUBA 278, *rev’d* 130 Or App 271, 881 P2d 176
13 (1994), does not support petitioners’ claim that payment of the local appeal fee is
14 unquestionably a jurisdictional requirement.

15 Accordingly, the county’s decision is affirmed.