BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID SETNIKER and JOAN SETNIKER,
Petitioners,

and

MADJIC FARMS, INC.,
MICHAEL S. CALEF and SUSAN D. CALEF,
Intervenors-Petitioners,

vs.

POLK COUNTY,
Respondent,

and

CPM DEVELOPMENT CORPORATION,
ADRIAN VANDERHAVE, ARY DIRKZWAGER
and MCKAY LAND CO., LLC,
Intervenors-Respondents.

LUBA No. 2008-184

FINAL OPINION
AND ORDER

Appeal from Polk County.

William Hugh Sherlock, Eugene, represented petitioners.

Corinne C. Sherton, Salem, represented intervenors-petitioners.

Dave Doyle, Dallas, represented respondent.

Wallace W. Lien, Salem, represented intervenors-respondents.

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

RYAN, Board Member, did not participate in the decision.

DISMISSED 12/29/2008

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

Petitioners appeal a county board of commissioners' resolution initiating a legislative comprehensive plan amendment process.

MOTION TO INTERVENE

Madjic Farms, Inc., Michael S. Calef and Susan D. Calef move to intervene on the side of the petitioners in this appeal. There is no opposition to the motion and it is granted.

CPM Development Corporation, Adrian Vanderhave, Ary Dirkzwager and McKay Land Co. (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO FILE REPLY MEMORANDUM

Intervenors filed a motion to reply to petitioners' response to the respondents' motion to dismiss. Petitioners object, arguing that the motion does not identify any new issues raised in petitioners' response that might warrant a reply.

While our rules do not specifically authorize filing a reply to a response to a motion to dismiss, our practice is to allow such a reply where it responds to new issues raised in the response and will not unduly delay the appeal process. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000); *Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011, 1017 (2000). In our view, intervenors' reply responds to what can fairly be characterized as new issues, and does not unduly delay this appeal process. The reply is allowed.

JURISDICTION

The county and intervenors move to dismiss this appeal, arguing that the challenged resolution is not a final decision, and therefore not a land use decision subject to LUBA's jurisdiction.[1]

The present appeal is related to a previous county decision to approve comprehensive plan and zoning amendments facilitating a proposed aggregate mining operation on land zoned for exclusive farm use. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006), *aff'd* 212 Or App 497, 158 P3d 524 (2007). In *Rickreall*, LUBA remanded the decision in relevant part because the county erred in failing to follow the legislative process required by county code to adopt a text amendment to the comprehensive plan. On remand, the board of commissioners conducted a public hearing on September 19, 2008. At the hearing, the applicant submitted evidence directed at the criteria for approving a legislative comprehensive plan amendment, at Polk County Zoning Ordinance (PCZO) 115.060. The opponents to the project, including petitioners, requested a continuance to address that new evidence. In addition, the opponents suggested that the matter be remanded to the planning commission, which under the applicable procedures at PCZO 115.040 is the body that first considers the merits of a proposed legislative comprehensive plan amendment. The board of commissioners essentially agreed with that suggestion, and closed the hearing without allowing any further evidentiary submittals. At a

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[1] ORS 197.015(10)(a)(A) defines "land use decision" subject to LUBA's jurisdiction to include:

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

meeting September 24, 2008, the board of commissioners adopted the resolution challenged in this appeal, supported by four pages of findings that address the criteria necessary to initiate a legislative comprehensive plan amendment, and remanded the matter to the planning commission for its consideration and recommendation.

PCZO 115.040 provides that the board of commissioners may initiate a comprehensive plan amendment where the commissioners find that the "proposed change is in the public interest and will be of general public benefit."[2] If the commissioners make that finding and initiate a legislative plan amendment process, the matter is sent to the planning commission for public hearings resulting in a recommendation, based on which the commissioners makes a subsequent final decision whether or not to approve the proposed amendment. As part of the decision before us, the board of commissioners adopted four pages of findings explaining why the board believes the proposed plan amendment is in the public interest and will be of general public benefit, as required by PCZO 115.040(A).

Respondents argue that under PCZO 115.040, the decision to initiate a legislative comprehensive plan amendment is not a "final" decision subject to LUBA's jurisdiction. We

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[2] PCZO 115.040 sets out the procedures for legislative plan amendments, and provides, in relevant part:

> "(A) Legislative amendments may be initiated by the Board of Commissioners or Planning Commission. An interested party may request that the Planning Commission or Board initiate a legislative amendment. Legislative amendments shall only be initiated by the Board or Planning Commission after findings are made that the proposed change is in the public interest and will be of general public benefit. * * *
>
> "(B) After a legislative amendment has been initiated, the Planning Commission shall hold a public hearing as prescribed in Chapter 111 on the complete petition for plan amendment. After concluding this hearing, the Planning Commission shall submit a recommendation to the Board of Commissioners.
>
> "(C) The Board of Commissioners shall hold a public hearing on the proposed plan amendment as provided in Chapter 111. Final decision by the Board of Commissioners shall not be effective until 21 days after mailing of the decision. * * *. Any plan amendment or reclassification of property shall be by ordinance which shall be passed by the Board of Commissioners. Any denial of a proposed plan amendment shall be by order."

agree. Under PCZO 115.040, the final decision for purposes of appeal to LUBA is clearly the decision the board of commissioners adopts following the recommendation of the planning commission whether or not to approve the proposed comprehensive plan amendment. The decision to initiate that process is not a "final" decision, at least for purposes of appeal to LUBA.

Petitioners argue that the board of commissioners will not revisit PCZO 115.040 again in any future proceeding, and therefore its determination under PCZO 115.040(A) that the proposed plan amendment is in the public interest and will be of general public benefit is the final, and only, decision with respect to that criterion. We understand petitioners to argue that if they cannot appeal the challenged resolution to LUBA now, they will never be able to challenge the county's findings under PCZO 115.040 or any procedural errors the county made in adopting those findings.

The short answer is that if the county made a procedural or other error at an intermediate step of the process set out in PCZO 115.040, petitioners may challenge such error in an appeal of the ultimate board of commissioners' decision to approve or deny the proposal comprehensive plan amendments, following the planning commission proceedings. *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546, 555 (2006). It is sometimes the case that errors made at intermediate stages of a multi-step local government proceeding are rendered harmless by later stages or decisions, or otherwise become a non-issue, but if that is not the case, such errors can generally be challenged on appeal of the local government's final decision.

Petitioners next point out that the notice of the resolution includes a paragraph at the bottom stating that decisions of the board of commissioners can be appealed to LUBA. However, erroneous statements in the notice of decision do not affect whether the decision is a land use decision, or otherwise affect LUBA's jurisdiction. *See Friends of Jacksonville v.*

City of Jacksonville, 44 Or LUBA 379, 385, *aff'd* 189 Or App 283, 76 P3d 121 (2003) (erroneous appeal period on notice of decision does not extend appeal deadlines to LUBA).

Finally, petitioners argue that while they would not object to a simple resolution remanding the matter to the planning commission, here the commissioners instead adopted four pages of findings determining that the proposed plan amendment is "in the public interest and will be of general public benefit." Petitioners point out that that standard is identical to one of the ultimate approval standards under PCZO 115.060, which also requires a finding that the legislative plan amendment is "in the public interest and will be of general public benefit[.]"[3] According to petitioners, the commissioners essentially predetermined the planning commission recommendation with respect to PCZO 115.060(C), and impermissibly prejudged one of the ultimate approval standards, all without giving petitioners an adequate opportunity to address PCZO 115.040(A) or the evidence that the commissioners relied upon.

Again, any procedural or other error the board of commissioners might have made in making determinations under PCZO 115.040 to initiate the comprehensive plan amendment

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[3] PCZO 115.060 provides:

> "CRITERIA FOR LEGISLATIVE PLAN AMENDMENTS. A legislative plan amendment may be approved provided that the request is based on substantive information providing a factual basis to support the change. In amending the Comprehensive Plan, Polk County shall demonstrate:
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> "(A) Compliance with Oregon Revised Statutes, and the statewide planning goals and related administrative rules. If an exception to one or more of the goals is necessary, Polk County shall adopt findings which address the exception criteria in Oregon Administrative Rules, Chapter 660, Division 4;
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> "(B) Conformance with the Comprehensive Plan goals, policies and intent, and any plan map amendment criteria in the plan;
>
> "(C) That the proposed change is in the public interest and will be of general public benefit; and
>
> "(D) Compliance with the provisions of any applicable intergovernmental agreement pertaining to urban growth boundaries and urbanizable land."

process is potentially subject to challenge in an appeal of the ultimate final decision. Further, we note that in order to initiate a comprehensive plan amendment under PCZO 115.040, the board of commissioners was *required* to determine whether proposed plan amendment is "in the public interest and will be of general public benefit." Arguably, the commissioners would have erred if they had *failed* to adopt adequate findings explaining why initiating the amendment process satisfies that standard.

In sum, petitioners have not established that the challenged resolution initiating the proposed comprehensive plan amendment process is a final decision subject to LUBA's jurisdiction. Accordingly, this appeal is dismissed.[4]

[4] Pending before the Board are petitioners' objections to the record. Because we dismiss the appeal, we do not resolve those record objections.