BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID KING,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2009-037

FINAL OPINION
AND ORDER

Appeal from Washington County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Christopher A. Gilmore, Senior Assistant County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

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

REMANDED 12/23/2009

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 the county's decision approving petitioner's application for a "contractor's establishment," with a condition that petitioner construct a site-obscuring fence on the property line within ninety days of the decision.

FACTS

The subject property is the southwest portion of tax lot 400, which is within the Metro urban growth boundary and planned for industrial use. Tax lot 400 and all surrounding properties are zoned Future Development 20-Acre minimum (FD-20), which is a holding zone intended to preserve land until annexation, when it is contemplated that the area will be zoned and developed for industrial uses.

Tax lot 400 is bisected from northwest to southeast by a Bonneville Power Administration (BPA) right-of-way. The BPA right-of-way is not an easement but rather owned in fee by BPA, as a result of a 1939 eminent domain action. The BPA right-of-way divides tax lot 400 into two portions each shaped like an isosceles triangle, with the BPA right-of-way in between and separating those triangles. In this opinion we refer to the separate portions of tax lot 400 as the northeast portion and the southwest portion.

The northeast portion is vacant, bordered on its northern and eastern sides by a sight-obscuring fence. Properties to the north and east are also zoned FD-20, but developed with residential uses. The southwest portion is developed with a dwelling and is bordered by SW Tonquin Road and SW Tonquin Loop on its southern and western sides. For several years, petitioner operated a short load concrete storage business on tax lot 400, which at times encroached onto the BPA right-of-way.

A short load concrete storage business is a "contractor's establishment" allowed in the FD-20 zone, subject to county approval. However, the county has not approved a contractor's establishment on the subject property. After the county initiated an enforcement

action against petitioner, petitioner applied to the county to approve a contractor's establishment to continue operation of the existing short load concrete business. The application sought approval to stockpile raw materials and powdered cement mixture using block retaining walls, and to store six trucks. Petitioner also requested permission to store a water truck to control dust on the site and a back loader to load and unload materials on the trucks. The initial application sought approval for a parking area and material storage on the BPA property. However, after unsuccessful negotiations with BPA, petitioner submitted a revised application confining the proposed operations to the southwest portion of tax lot 400.

The county hearings officer approved the application, subject to conditions. Based in part on concerns that petitioner would continue to encroach on the BPA property without BPA's permission, the hearings officer imposed Condition F(1), which requires petitioner to construct "a site-obscuring fence, at least five feet in height, adjacent to the entire southwest boundary of the BPA right-of-way." The required fence thus separates the southwest portion of tax lot 400 from the BPA right-of-way and the northeast portion of tax lot 400.[1] That condition is the focus of this appeal.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Under the first assignment of error, petitioner argues that Condition F(1) is inconsistent with applicable county code provisions and is not authorized under the county's code. Under the third assignment of error, petitioner argues that the hearings officer's findings regarding the fence required by Condition F(1) are inadequate.

A. Consistency with County Code

Initially, we note that much of petitioner's argument is based on the premise that both the southwest and northeast portions of tax lot 400 constitute a single unit of land. The hearings officer found, however, that the BPA right-of-way is not an easement but owned in

[1] It is not clear from the record whether petitioner has a legal right to cross the BPA right-of-way to access the northeast portion of tax lot 400 from the southwest portion, or how the northeast portion obtains access.

fee, and that it separates the two portions into two noncontiguous units of land, albeit units of land in common ownership and that share the same tax lot designation. Petitioner has not assigned error to that finding or demonstrated otherwise. Accordingly, we evaluate petitioner's arguments under this assignment of error with that understanding.

Petitioner first argues that Condition F(1) is inconsistent with Community Development Code (CDC) 411-5.2, which provides that "[r]equired fences shall be located as near the property line as practical or most effective." Similarly, petitioner argues that Condition F(1) is inconsistent with CDC 411-2, which requires that "[s]creening and buffering shall be located on the perimeter of a lot or parcel, extending to the lot or parcel boundary line * * *." Petitioner contends that the fence required by Condition F(1) is located in the "middle" of tax lot 400, not near or on the property line or perimeter of the property. However, petitioner does not explain why the property line between the southwest portion of tax lot 400 and the fee-owned BPA right-of-way is not properly viewed as the "property line" or "perimeter" of the southwest portion, for purposes of approving development on the southwest portion under CDC 411-5.2 and 411-2.

B. Authorized under County Code

Petitioner next argues that the fence required by Condition F(1) is not authorized under the county code. The hearings officer found that CDC 411-1.2 authorizes a fence as part of buffering and screening that the hearings officer deemed necessary to reduce impacts of the proposed use on nearby properties. CDC 411-1.2 provides that "[s]creening and [b]uffering shall apply to all Development permits as determined in Section 411-3 or as determined by the Review Authority." CDC 411-3 generally requires screening and buffering when property is developed in certain zoning districts near property in different zoning districts, for example development in industrial districts that adjoin residential districts. However, the FD-20 District is not among those zoning districts listed in CDC 411-

3.[2] The hearings officer concluded that CDC 411-3 does not impose specific screening and buffering requirements on uses in the FD-20 District, and therefore pursuant to CDC 411-1.2 any screening and buffering is "as determined by the Review Authority." As a guide, the hearings officer examined the screening and buffering requirements of CDC 411-3, particularly those between industrial and residential uses, and concluded that a fence was necessary to ensure an adequate buffer between the proposed contractor's establishment and residential uses to the north and northeast of tax lot 400.[3]

Petitioner contends that the hearings officer misconstrued CDC 411-1.2. According to petitioner, CDC 411-1.2 merely allows the hearings officer to apply the standards in CDC 411-3 where those apply; it does not grant the hearings officer discretion to impose buffering and screening requirements using the CDC 411-3 standards as a guide, outside of circumstances where those standards do not apply.

Where CDC 411-3 does not supply specific standards, CDC 411-1.2 allows the hearings officer to impose buffering and screening requirements "as determined by the Review Authority." That grant of discretion is extremely broad. We see no error in using the standards in CDC 411-3 as a guide to determine what buffering and screening

---

[2] CDC 411-3 references a matrix at CDC 411-5 that cross-references certain zoning districts with other zoning districts, with the result being a number that identifies the specific buffering and screening standards at CDC 411-6 that apply to development. The FD-20 District is not listed anywhere on the matrix, although it includes a catch-all category of "Other." The notation for "Other" category is "to be determined by review authority." Arguably, the "Other" category includes the FD-20 District. If so, that is consistent with CDC 411-1.2 and the grant of authority to impose buffering and screening "as determined by" the hearings officer.

[3] The hearings officer found, in relevant part:

> "[CDC] 411-3 provides no specific requirements for screening or buffering of FD-20 uses. Therefore, any buffering or screening will be 'as determined by the Review Authority.'
>
> "Inside the UGB, CDC provisions specifically require screening and buffering when commercial and industrial uses adjoin residential uses. In this case, the site is in the FD-20 District and is bordered on the north and northeast by residential development, also located in the FD-20 District. Although the area is made up of a mix of residential and industrial type uses, some type of buffer is appropriate between this industrial use and the residential uses abutting on the north and northeast." Record 21.

requirements, if any, should be imposed in approving development for which no specific standards are supplied by CDC 411-3. To cabin the otherwise unrestricted grant of discretion under CDC 411-1.2, the hearings officer simply considered buffering and screening requirements that apply in analogous circumstances, to determine what requirements are appropriate in the circumstances before her. We see no error in taking that approach.

Relatedly, petitioner argues that the hearings officer erred in how she considered the CDC 411-3 buffering and screening standards. The hearings officer concluded that because the proposed use is an industrial use, and adjacent properties to the north and northeast are developed with residences, the appropriate analogous requirements are those that apply between areas zoned for industrial use and those zoned for residential use. We understand petitioner to argue that because all properties in the area are zoned FD-20 and are planned for eventual industrial use, it is inappropriate to consider the existing residential uses, which will likely become nonconforming uses. Because CDC 411-3 imposes no specific standards for uses within the FD-20 zone or any industrial use adjacent to another industrial use, we understand petitioner to argue that exercise of the hearings officer's discretion under CDC 411-1.2 should result in no buffering or screening requirements at all.

The county responds that the FD-20 zone is not itself an industrial zone, but an interim holding zone that permits some industrial uses, and that the hearings officer did not err in considering the buffering and screening requirements that would apply to reduce the impacts of industrial uses on nearby residential uses, in determining what buffering or screening is appropriate to reduce impacts of the proposed industrial use on nearby residential uses. We agree with the county. That the existing residential uses are now or will someday be nonconforming uses does not mean that the hearings officer should ignore impacts on those existing uses, or that the hearings officer cannot impose buffering or screening requirements to reduce impacts on those existing uses.

It is impossible to succinctly describe the county's buffering and screening requirements at CDC 411-5, 411-6 and 411-7, or the process for determining which requirements apply, but it suffices to say that the code describes six types of buffering and screening requirements from the most minimal (Type 1) to the most rigorous (Type 6), with various vegetative and fencing requirements depending in part on the depth of the setback between the two conflicting uses. The vegetative buffer and type of fencing chosen by the hearings officer appear to correspond most closely to Type 4 requirements, which the hearings officer found is the most minimal standard the CDC requires in urban industrial districts. Petitioner has not demonstrated that the hearings officer erred in exercising her discretion under CDC 411-1.2, and in her consideration of the CDC 411 buffering and screening requirements, to conclude that some buffering and screening is required between the proposed industrial use and nearby residential uses.

C. Justification for the Fence

Petitioner next argues that the hearings officer failed to establish that a fence, particularly a sight-obscuring fence, is necessary along the southwestern boundary of the BPA right-of-way, in order to reduce noise and visual impacts on residential uses located north and northeast of the northeast portion of tax lot 400. We address here, also, the arguments under the third assignment of error that the findings regarding the fence are inadequate. Petitioner points out that a buffer at least 80 feet wide effectively exists between the proposed operation on the southwest portion and the existing residential uses, consisting of the BPA right-of-way and the vacant northeast portion of tax lot 400. Moreover, petitioner notes that a sight-obscuring fence is already located on the boundary between the northeast portion of tax lot 400 and the adjoining residential uses. Petitioner argues that the hearings officer does not explain why an *additional* sight-obscuring fence is necessary along the BPA right-of-way to reduce noise and visual impacts on those residential uses.

In her findings, the hearings officer explained why she believes that, in addition to the 80-foot buffer area and the required vegetative screening, a fence along the boundary with the BPA right of way is necessary to reduce noise and visual impacts on residential uses to the north and east, given petitioner's history of encroachments into the BPA right-of-way.[4] The hearings officer acknowledged that "[i]f the issue was only one of protecting BPA

[4] The hearings officer found, in relevant part:

> "Due to the location of the existing BPA right-of-way and BPA's strict limitations on use of that right-of-way, the applicant proposes to limit operations to the southwest portion of the subject site. Consequently, the area of the site approved for use in the operation of the contractor's establishment is separated from the northern boundary of the site by approximately 80 feet, and from the northeastern corner of the site by approximately 160 feet. Once the operations are contained within the approved southwest portion of the site, this distance will provide something of a buffer area between the proposed contractor's establishment and adjacent residential uses. The distance will reduce some of the noise and visual impacts on the adjacent residential uses.
>
> "The applicant has a history of progressively expanding the use of the site, and in fact has begun to expand onto the adjacent lot [tax lot 500] that is also owned by the applicant. In spite of BPA orders to remove all activity from the BPA right-of-way, the applicant has expanded onto and continued to use that right-of-way.
>
> "The application shows the operation contained on the southwest portion of Tax Lot 400, and conditions of approval will require that within 90 days the applicant remove all operations from the BPA right-of-way and Tax Lot 500. However, the applicant's history does not support a conclusion that the activities will stay confined as required without some physical barrier that prevents expansion back into those prohibited areas. In order to ensure that the buffer is maintained, the applicants needs to construct and maintain a fence adjacent to the southwestern boundary of the BPA right-of-way.
>
> "The condition requiring the fence is authorized by CDC Section 411-3. The fence is necessary to ensure maintenance of the buffer, and is within the authority of the Hearings Officer under this code provision. In addition, CDC Section 207-5.1 authorizes the Hearings Officer to impose conditions 'to protect the public from potential adverse impacts of the proposed use or development.'
>
> "The BPA indicated an intent to build a fence within the right-of-way to prevent the applicant from using their property, but no fence has been built. If the issue was only one of protecting BPA property, it could be left to that agency to decide whether or not to construct a fence. However, for the purposes of this land use application, the fence is necessary to insure that the buffer will be maintained to protect the adjacent residential properties from the visual and noise impacts of the proposed use.
>
> "Making the fence at least five feet in height and of sight-obscuring materials will further reduce visual impacts. A sight-obscuring fence is also required by CDC Section 423-9.2, which is discussed later in this decision." Record 21-22

property, it could be left to that agency to decide whether or not to construct a fence." However, the hearings officer believed that absent such a fence, encroachments into the BPA right-of-way might again occur, which would bring the proposed use closer to the residential uses, undermining the effectiveness of the distance buffer and vegetative screen with respect to noise and visual impacts. The hearings officer concluded that "the fence is necessary to insure that the buffer will be maintained to protect the adjacent residential properties from the visual and noise impacts of the proposed use."

Generally, a condition of approval must further some legitimate planning purpose. *Davis v. City of Bandon City*, 28 Or LUBA 38, 48 (1994) (citing cases). Reducing conflicts with adjoining uses as required by applicable approval criteria is certainly a legitimate planning purpose. In the present case, however, we agree with petitioner that the record and findings do not establish that the sight-obscuring fence required by Condition F(1) furthers the two purposes stated in the findings, to reduce visual and noise impacts of the proposed use on adjacent residential uses to the north and east.

The hearings officer acknowledged that the mere possibility that petitioner might again encroach without permission on the BPA right-of-way was not sufficient to justify a fence, as far as protecting BPA's interests were concerned. The sole stated rationale for the fence is to reduce noise and visual impacts on residences to the north and northeast, apparently by placing a physical barrier to prevent petitioner from expanding the proposed operation onto the BPA right-of-way (whether by BPA's permission or not) and bringing that operation closer to residences, thus potentially increasing noise and visual impacts. However, with respect to visual impacts, there is no dispute that a solid, sight-obscuring fence already exists on the northern and eastern boundaries of the northeast portion of tax lot 400, between the proposed operation and the residential uses to the north and northeast. The hearings officer does not address this existing fence, or explain why a *second* sight-obscuring

fence is necessary to reduce visual impacts to the residences, even if the operation were at some point expanded into the BPA right-of-way.[5]

The hearings officer found that a sight-obscuring fence is independently required under CDC 423-9.2, to provide a visual screen for equipment or vehicles parked on the site. CDC 423-9.2 provides that "[n]o open storage of materials and equipment shall be permitted unless contained by a site obscuring fence or landscaped screening." In addressing CDC 423-9.2, the hearings officer reasoned that because a fence is required along the BPA right-of-way for other reasons, the fence might as well be sight-obscuring, to comply with CDC 423-9.2.[6] However, CDC 423-9.2 does not *require* a sight-obscuring fence; it prohibits storage of materials and equipment unless contained by *either* a sight-obscuring fence *or* landscaped screening. The hearings officer apparently believed that landscaped screening on the other boundaries of the southwest portion of tax lot 400 was sufficient to screen the sight of parked vehicles for purposes of CDC 423-9.2, but offered no independent reason under CDC 423-9.2 to require a sight-obscuring fence instead of landscaping along the BPA right-of-way. For purposes of visual screening of parked vehicles from the residences to the north

---

[5] Such an expansion would be inconsistent with the county's decision and would presumably require a new application and new approval, even if BPA granted permission to the use the right-of-way. In that approval process the county could impose conditions needed to mitigate impacts of the expanded operation on adjacent uses, or deny the application if no conditions could ensure compliance with approval criteria. If petitioner expanded onto the right-of-way without obtaining county approval, the county could presumably institute an enforcement action against petitioner, as it has in the past.

[6] The hearings officer found with respect to CDC 423-9.2:

> "* * * The ultra block walls will meet the requirement for a sight-obscuring fence for open storage of materials as required by [CDC] 423-9.2. The powdered concrete mixture is to be located within a sealed area.
>
> "[CDC] 423-9.2 also requires that storage of equipment be contained by a site obscuring fence or landscaped screening. As a fence is necessary in order to ensure containment of the operations on the southwest portion of the site, it is reasonable to also make the fence site-obscuring to improve the visual screening of the trucks and other equipment that will be stored in the open. * * *." Record 25.

and northeast, the hearings officer did not explain why vegetative screening would not suffice, particularly given the existing sight-obscuring fence.

The only other stated rationale for requiring a fence along the BPA right-of-way is to avoid the possibility of increased noise impacts on residential uses that might result from potential expansion of the operation into the right-of-way, an expansion the fence is apparently intended to forestall. However, the decision cites no evidence in the record with respect to noise impacts on residential uses, and neither does the county in its brief. There may be some evidence in the record that an expanded operation in the right-of-way would significantly increase noise impacts to residences to the north and east compared to an operation confined to the southwest portion of tax lot 400, but if so we are not cited to it.[7] Further, the current application proposes no operation in the right-of-way, and the county's decision in fact imposed conditions requiring cessation of all activities associated with the operation of a contractor's establishment in the right-of-way as well as the northeast portion of tax lot 400. Petitioner has not challenged those conditions, and any violation of them would be cause for an enforcement action. Any attempt to expand the operation into these areas will at a minimum require a new land use approval or, if expanded without county approval, be subject to enforcement. In these circumstances, it is not clear to us what function the required fence serves, or how it furthers a legitimate planning objective.

In sum, we agree with petitioner that remand is necessary for the hearings officer to adopt findings, supported by substantial evidence, explaining why the condition is needed to ensure compliance with applicable approval criteria, or otherwise serves a legitimate planning purpose. If that cannot be done, the hearings officer should modify or delete Condition F(1).

---

[7] The county cites to testimony from neighbors complaining about the existing operation, at Record 256-66. However, as far as we can tell, those complaints mostly concerned dust from a concrete batch plant (which is not proposed in the application or approved in this decision) and did not mention noise.

The first and third assignments of error are sustained, in part.

SECOND ASSIGNMENT OE ERROR

Under the second assignment of error, petitioner argues that the fence required by Condition F(1) eliminates access to the northeast portion of tax lot 400, effectively making it a landlocked unit of land. We understand petitioner to assert that he has a property right in the BPA right-of-way, to use the right-of-way to access the northeast parcel from the southwest parcel, under one of three theories: as a way of necessity, under an implied easement, or as a matter of adverse possession. Petitioner contends that the county exceeded its jurisdiction by interjecting itself into a property ownership dispute that can be resolved only by an action in circuit court.

The county responds in part that the issue of whether petitioner has some right of access to the northeast portion over the BPA right-of-way, or elsewhere, was not before the hearings officer, and she made no determination regarding or affecting access to the northeast portion of tax lot 400, which is a matter for circuit court. We agree with the county that nothing in the challenged decision precludes access to the northeast portion of tax lot 400 from the southwest portion, across the BPA right-of-way. If such a right of access exists, or petitioner establishes one through a future circuit court action, we see nothing in the decision that would prohibit petitioner from installing a gate in the required fence, for example, in order to exercise that right. Accordingly, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that imposition of Condition F(1) "eliminated the value of nearly one-half of petitioner's property when it prevented access to the northeast portion of the subject lot," in violation of petitioner's rights under the Due Process Clause of the Fourteenth

Amendment to the U.S. Constitution. Petition for Review 18. Petitioner contends that the county failed to provide notice and a chance to be heard before imposing Condition F(1)

The county responds, and we agree, that petitioner's one paragraph argument falls far short of establishing a claim under the Due Process Clause, and is insufficiently developed for review. Petitioner has not demonstrated that the Condition F(1) prevents access to the northeast portion of tax lot 400, or precludes lawful use of that portion. As for what process is due, there is generally no requirement under Oregon law to provide notice of, or the opportunity to comment on, conditions imposed in land use approvals. *Waluga Neighborhood Association v. City of Lake Oswego*, 57 Or LUBA 507, 515 (2008). If Condition F(1) did "deprive" petitioner of his "property" within the meaning of the Due Process Clause—something petitioner has not established—we would likely agree that additional process was due before effecting that deprivation. However, petitioner has not established the necessary elements of a due process claim.

In any case, remand under the first and third assignments of error may entirely moot this issue. On remand, the county must adopt findings, supported by substantial evidence, explaining why Condition F(1) furthers a legitimate planning objective, and if that is not possible, modify or delete the condition. While the remand proceeding required under our resolution of the first and third assignments of error need not involve an evidentiary hearing or other public hearing at which petitioner could testify regarding Condition F(1) and the alleged impacts on access to the northeast portion, the hearings officer may choose to expand the remand proceedings to provide that opportunity. If so, that would likely eliminate any further issues under the Due Process Clause.

The fourth assignment of error is denied.

The county's decision is remanded.