BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JENSEN PROPERTIES, LLC, MARK MYERS
and CATHERINE MYERS,
*Petitioners,*

vs.

WASHINGTON COUNTY,
*Respondent,*

and

POLYGON NORTHWEST COMPANY, LLC,
*Intervenor-Respondent.*

LUBA No. 2010-008

FINAL OPINION
AND ORDER

Appeal from Washington County.

Jeffrey D. Jensen, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Washington County.

Jack L. Orchard, Hillsboro, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dana Krawczuk and Ball Janik LLP

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

REMANDED 05/05/2010

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 decision approving a special use permit and floodplain alteration permit to construct a recreational trail and boardwalk.

**MOTION TO INTERVENE**

Polygon Northwest Company, LLC (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

**FACTS**

In 2004, in association with a proposal for a large mixed-use development within the urban growth boundary, intervenor obtained approvals to construct two segments of a recreational trail connecting to two nearby parks. The northern segment of the trail was largely completed. The southern segment is within the 100-year flood plain surrounding a tributary to Johnson Creek, and due to the presence of wetlands is designated as a significant natural resource on the county's comprehensive plan, and also listed on Metro's inventory of regionally significant habitat. The 2004 decision approved construction of an elevated boardwalk on the southern segment to minimize impacts on the wetlands. However, construction of the southern trail segment was never completed. At some point, the 2004 approval to construct the two trail segments expired. In 2009, intervenor applied for a special use permit and floodplain alteration permit to finish construction of the two trail segments approved in the 2004 permits.

The subject property is zoned R-5 (Residential 5 Units per Acre). The R-5 zone lists "parks" as a use permitted through a "Type I" development action. Washington County Community Development Code (CDC) 302-2.7. Type I actions are processed administratively, without public notice or hearing. CDC 202-1.3. The county planning director processed the application as a Type I action and on October 5, 2009, approved the special use permit and floodplain alteration permits for the two trail segments.

Petitioners own property adjoining the southern trail segment. Petitioners filed a timely appeal of the planning director's decision to the county hearings officer, and the county accepted the appeal.[1] The hearings officer conducted a *de novo* hearing on December 17, 2009, at which petitioner Jeffrey Jensen appeared. On January 20, 2010, the hearings officer issued a decision denying the appeal and approving the special use permit and floodplain alteration permit applications. This appeal followed.

**FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

Under these assignments of error, petitioners argue that the county should have processed the special use permit and floodplain alteration permit applications as a "Type II" development action. CDC 202-2 describes a "Type II" action as one requiring the exercise of "limited discretion." Under the CDC, the planning director issues an administrative decision on a Type II action, but provides notice to nearby property owners, and an opportunity to appeal the decision to the hearings officer. If an appeal is filed, the hearings officer conducts a *de novo* hearing on the appeal.

For purposes of our analysis, we assume without deciding that petitioners are correct that the applications should have been processed as a Type II rather than Type I development action. However, petitioners have not demonstrated that any procedural error the county may have committed in processing the application prejudiced petitioners' substantial rights.[2] Petitioners filed a timely local appeal of the director's decision, and received the *de novo* hearing on the appeal that they would be entitled to if processed as a Type II action. Petitioners argue that they misunderstood the nature of the hearing, and believed that it

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[1] At the same time, petitioners filed an appeal of the planning director's decision with LUBA. The appeal to LUBA was subsequently dismissed.

[2] Under ORS 197.835(9)(a)(B), LUBA may reverse or remand a 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[.]"

would be limited to the issues identified in petitioners' petition for review that was filed to initiate the appeal. That belief was apparently based on CDC 209-3.1(D), which specifies that "Unless otherwise directed by the appellate authority, the appeal of Type I and III decisions shall be limited to the issue(s) raised in the petition[.]" Petitioners argue that they were not prepared to participate in a *de novo* hearing that was not limited to the issues they had raised in their petition.

Intervenor argues, and we agree, that petitioners' misunderstanding of the nature of the hearing does not provide a basis for reversal or remand. In their petition for review initiating the local appeal, petitioners argued that the director should have processed the applications as a Type II decision, with the consequence that a hearing on the appeal would necessarily be a *de novo* hearing.[3] In an apparent attempt to cure or avoid any possible prejudice to petitioners, the hearings officer exercised her authority under CDC 209-3.1(D) to provide a *de novo* hearing on the appeal, not limited to the issues raised in the local petition for review. Accordingly, the notice of hearing does not set out any limitations on the presentation of issues or evidence, and in fact notes that if the record is re-opened to accept new evidence that "any person may raise new issues" regarding that new evidence, which does not suggest that the hearing is limited to issues raised in the local petition for review Record 55. If petitioners were confused about the nature of the hearing, it is not clear why.

Further, because petitioners were arguing that the applications should be treated as a Type II action, with the consequence that the hearing would be not be limited to the issues raised in the petition, petitioners should have been prepared for the possibility that the hearings officer might agree with them, and permit them to raise any new issues they wished.

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[3] The county's Type II procedures presumably implement ORS 215.416(11), which as discussed below allows counties to approve or deny an application for a "permit" without a hearing, if the county provides notice and opportunity to appeal and obtain a hearing. If a permit decision without a hearing is appealed, ORS 215.416(11)(a)(D) and (E) require that the appeal shall be to a *de novo* hearing, not limited to the issues raised in the notice of appeal.

However, petitioners do not identify any new issue they would have raised at the hearing, had they appreciated that the hearings officer had in fact already granted them the *de novo* hearing they believed they were entitled to. Petitioners' arguments regarding the nature of the hearing do not provide a basis for reversal or remand.

The only other potential prejudice from procedural error that petitioners identify is an argument under the fourth assignment of error that, if the director had processed the applications as a Type II action, the director would have required the applicant to hold a neighborhood meeting, pursuant to CDC 203-3.2(A).[4] That CDC provision lists a number of applications within the urban growth boundary that require a neighborhood meeting. Some of the listed applications are indeed categorized as Type II development actions, but none of them involve parks, recreational trails, boardwalks, or anything that resembles the uses proposed in intervenor's 2009 applications for special use permit and floodplain alteration

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[4] CDC 203-3.2 provides, in relevant part:

> "The following types of application shall be subject to the neighborhood meeting requirements:
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> "A. Inside the UGB:
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> "Partitions;
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> "Subdivisions;
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> "Type III Special Uses;
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> "Type II Manufactured Dwelling Parks;
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> "Type II Hardship Relief (Article V only);
>
> "Type III Variances;
>
> "Type II Alterations to a Nonconforming Use or Structure * * *;
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> "Residential Planned Developments;
>
> "Type II or III Development Review Residential; and
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> "Type II or III Development Review Commercial, Industrial, or Institutional * * *[.]"

permit. In a footnote, petitioners suggests that the applications for a recreational trail can be viewed as a Type II "Development Review—Residential" use. However, we do not understand how a recreational trail could be viewed as a residential use. Petitioners have not demonstrated that the requested uses are among the Type II uses that require a neighborhood meeting, and therefore petitioners have not demonstrated that any error in processing the application as a Type I rather than Type II action prejudiced petitioners' substantial rights.[5]

The first, second, third, and fourth assignments of error are denied.

**FIFTH ASSIGNMENT OF ERROR**

Under this assignment of error, petitioners first argue that the hearings officer's decision "completely ignores the Petition for Review [that was submitted to the hearings officer below] and does not address a single issue presented." Petition for Review 20. However, with one exception discussed below, petitioners do not identify any issue raised in the local petition for review that the hearings officer failed to address. The local petition for review is located at Record 66-73, and it is fair to say that it is not written in a manner that makes it easy to identify the issues raised therein. However, the last page at Record 73 appears to summarize petitioners' contentions, listing four arguments or issues. All four of the listed arguments are based on petitioners' assertion that the county erred in processing the applications as Type I actions rather than Type II actions, and that clearly was the main theme of the local petition for review. The hearings officer adopted findings addressing that assertion, so it is not accurate to claim that the hearings officer "does not address a single issue presented" in the local petition for review.

[5] We note that CDC 203-3.3 provides that failure to hold a required neighborhood meeting "shall result in denial of the application." Thus, if CDC 203-3.2 had required intervenor to conduct a neighborhood meeting on the applications, and intervenor failed to do so, the county would have been required to deny the applications. As explained, however, petitioners have not demonstrated that CDC 203-3.2 required intervenor to conduct a neighborhood meeting.

The only specific issue petitioners identify and argue that the hearings officer failed to address involves a local appeal fee of $2,740. In the local petition for review, petitioners point out that CDC 209-3.2 requires that "[t]he petition for review shall be submitted with the appeal fee specified in the Notice of Decision to be paid by cash, check or money order." Record 68. Petitioners argued that the notice of the planning director's administrative decision did not in fact specify any particular appeal fee, but simply advised the recipient to contact the appeal secretary for further information. Petitioners stated that they contacted the appeal secretary and were informed that the appeal fee would be $2,740, which they paid under protest, on the grounds that the notice of decision failed to specify any appeal fee. The local petition for review requests that the entire $2,740 appeal fee be returned uncashed or refunded to petitioners. A copy of petitioners' check is included in the record, with a handwritten notation "Not deposited as instructed[.]" Record 65 (underline in original).

The hearings officer's decision does not address the local appeal fee issue raised in the local petition for review, and intervenor's response brief does not respond to the appeal fee issue at all. The county did not file a brief. We understand that issue to be whether CDC 209-3.2 permits the county to charge petitioners any local appeal fee at all, when the notice of decision does not specify a particular appeal fee, but instead directs the recipient to contact the appeal secretary. Petitioners cite to no local or statutory authority that requires the hearings officer to adopt findings on the appeal fee issue, which does not relate to applicable approval criteria for the underlying land use application. In any case, even if the hearings officer was obligated to adopt findings addressing petitioners' contentions regarding CDC 209-3.2, those contentions are based on petitioners' unexplained view that where the county does not specify a particular appeal fee in the notice of decision, the consequence is that the county is precluded from charging an appellant any appeal fee at all, and must basically offer the appellant a free appeal. If that is petitioners' view of CDC 209-3.2, we

reject it.[6] Nothing in CDC 209-3.2 or anything else cited to our attention provides that the consequence for failure to specify a particular appeal fee in the notice of decision is that the county must provide a free appeal. It does not seem inconsistent with CDC 209-3.2 to instead request in the notice of decision that recipients contact the county to learn the amount of the appeal fee, which petitioner did in this case.

Also under this assignment of error, petitioners advance an argument regarding the appeal fee that is different from the argument raised in the local petition for review.[7] In their petition for review to LUBA, petitioners argue that:

> "* * * [U]nder ORS 215.416(11)(b) the maximum fee for an initial hearing shall be the cost to the local government of preparing and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. Petitioners request a ruling refunding the $2,740 Appeal Fee." Petition for Review 20.

The statute petitioners refer to, ORS 215.416(11)(b), provides in relevant part:

> "If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded."

ORS 215.416(11) in general allows the county to approve or deny an application for a "permit," as defined at ORS 215.402(4), without first conducting a hearing if the county gives notice of the decision and provides an opportunity for a local appeal to a *de novo* hearing. Petitioners' unspoken premise is that the application for special use permit and

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[6] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

[7] Intervenor does not respond to petitioners' argument regarding ORS 215.416(11)(b), and in particular does not argue that ORS 215.416(11)(b) was not raised during the proceedings below or that the issue is waived under ORS 197.763(1). We therefore consider the argument.

floodplain alteration permit for the proposed recreational trail and boardwalk is a "permit" within the meaning of ORS 215.402(4), and therefore ORS 215.416(11)(b) applies to limit the maximum amount a county can charge for an appeal of a permit decision without a hearing to $250. *See Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124, 135 (2007) (the county errs in charging the local appellant a $1,800 fee to appeal a permit decision made without a hearing).

ORS 215.402(4) defines "permit" in relevant part to mean the "discretionary approval of a proposed development of land" under county land use regulations. Petitioners argue elsewhere that the application should have been processed as a "Type II" decision because it requires the exercise of discretion. While petitioners do not identify any applicable approval criteria that they believe require the county to exercise discretion in approving the applications, we note that CDC 422-3.6 requires that for any proposed use in a Significant Natural Resource Area, the county must find that the proposed use "will not seriously interfere with the preservation of fish and wildlife areas and habitat" identified in the county comprehensive plan, or show how the interference can be mitigated. The hearings officer found that, with proposed mitigation, the proposed trail/boardwalk will not seriously interfere with preservation of habitat. Record 18. While construction of a trail/boardwalk may be a nondiscretionary decision in other circumstances, where CDC 422-3.6 applies it appears to require the county to exercise some discretion in approving or denying the use. There may be some other reason why a decision approving the proposed trail/boardwalk is not a "permit" as defined by ORS 215.402(4).[8] However, as noted, intervenor does not address any of petitioners' arguments on the appeal fee issue, and the county filed no

[8] One could argue that the boardwalk does not constitute the "development" of land. That would presumably depend on how broadly the CDC defines "development." One could also argue that even if approval of the boardwalk requires the exercise of discretion, that approval might constitute a "limited land use decision" as defined in ORS 197.015, which is excluded from the definition of "permit." ORS 215.402(4)(a). If so, then the $250 appeal fee limit at ORS 215.416(11)(b) would not apply. However, no parties make these arguments, and we consider them no further.

response brief at all. Absent some assistance from respondents on this point, we believe that petitioners have adequately demonstrated that ORS 215.416(11)(b) applies and therefore the county erred in charging petitioners more than $250 to appeal the planning director's administrative decision to the hearings officer.

The fifth assignment of error is sustained, in part.

**SIXTH ASSIGNMENT OF ERROR**

Under the sixth assignment of error, petitioners argue that the hearings officer's decision is not based on currently applicable CDC provisions, but instead is based in part on standards in effect in 2004, when the county originally approved the recreational trail/boardwalk. According to petitioners, the staff report and the hearings officer's decision based on the staff report quote and apply the 2004 version of CDC 422-2. Further, petitioners argue that the staff report and hearings officer apply Resolution and Order 04-09, requiring compliance with water quality and erosion control standards set by Clean Water Services, a regional water resource utility. Petitioners contend that Resolution and Order 04-09 was replaced in 2007 by Resolution and Order 07-20, which also requires compliance with Clean Water Service standards.

Intervenor responds that references in the staff report and the hearings officer's decision to superseded code provisions or resolutions are merely clerical errors, and that there are no substantive differences between the 2004 and the current version of CDC 422-2, or between Resolution and Order 04-09 and Resolution and Order 07-20. Intervenor notes that the hearings officer imposed a condition of approval requiring that the applicant obtain all required permits from Clean Water Services, which condition will ensure that current Clean Water Services standards are applied.

We agree with intervenor that petitioners have not identified any substantive difference between the superseded CDC provisions or resolutions the hearings officer applied and the currently applicable versions, and that petitioners have not demonstrated that

erroneous application of the superseded standards warrant reversal or remand. With respect to CDC 422-2, it was apparently amended after 2004 to specify that CDC 422 applied not only to lands identified as significant natural resources in the county comprehensive plan, but also to areas identified on Metro's current regionally significant habitat map.[9] The staff report and hearings officer found that the southern trail segment passes over land identified as a significant natural resource (wetlands) in the county comprehensive plan, and therefore applied the CDC 422 standards. Petitioners noted below that the parcel over which the southern trail segment runs is also identified on Metro's regionally significant habitat map. Record 72. However, petitioners did not explain below and do not explain on appeal what difference that makes, since the same CDC 422 standards apply whether the property is identified on the county comprehensive plan, the Metro significant habitat map, or both. The county's error in quoting the 2004 rather than the current version of CDC 422-2 appears to be harmless.

Similarly, petitioners have not established that there is any substantive difference between Resolution and Order 04-09 and Resolution and Order 07-20. Intervenor asserts, and petitioners do not dispute, that in relevant part both resolutions simply require that the applicant comply with Clean Water Services requirements and obtain necessary permits issued by that agency. The hearings officer conditioned approval on the applicant obtaining all permits required by Clean Water Services. If there is any meaningful difference between the two resolutions that would warrant remand to replace the hearings officer's citation to Resolution and Order 04-09 with a citation to Resolution and Order 07-20, petitioners do not identify what it is.

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[9] CDC 422-2 provides, in relevant part, that lands subject to CDC 442 include:

> "Those areas identified in the applicable Community plan or the Rural/Natural Resource Plan Element as Significant Natural Resources *and areas identified as Regionally Significant Fish & Wildlife Habitat on Metro's current Regionally Significant Fish & Wildlife Habitat Inventory Map*." (Emphasis indicates language added in 2007.)

The sixth assignment of error is denied.

The county's decision is remanded.