BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COY REED,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2009-136

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Coy Reed, White City, filed the petition for review and argued on his own behalf.

Tommy A. Brooks, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Cable Huston LLP and G. Frank Hammond, Medford, Jackson County Counsel.

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

AFFIRMED 06/02/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's order determining that petitioner violated the county's land development ordinance by conducting a wedding on his property.

FACTS

Petitioner owns and lives on exclusive farm use (EFU)-zoned land in rural Jackson County. Petitioner grows flowers on the property, which are also sold as decorative hanging baskets. Petitioner apparently allows weddings to be held on the property and sells hanging flower baskets to the wedding parties. Record 4. On September 26, 2009, a wedding attended by approximately 80 to 100 people was held on the property.

A neighbor registered a written complaint with the county's code enforcement division that an unauthorized commercial wedding had occurred. The code enforcement officer subsequently issued a complaint and summons directing petitioner to appear before a county hearings officer. The hearings officer found that petitioner had violated the provisions of the Jackson County Land Development Ordinance (LDO) specifying allowed uses in an EFU zone, and levied a fine of $600. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The challenged decision is a hearings officer's decision in a code enforcement proceeding brought against petitioner by the county. After a summons and complaint was issued to petitioner, the hearings officer held a hearing at which petitioner and the county's code enforcement officer testified and presented evidence. The hearings officer found that the wedding that occurred on September 26, 2009, on petitioner's property violated the LDO, specifically LDO 4.2.7(A). LDO 4.2.7(A) is part of the chapter of the LDO that specifies the uses allowed in the county's various zoning districts. LDO 4.2.7(A) allows a commercial activity in conjunction with farm use under certain circumstances, and requires Type 3 review of an application for a permit:

> "A commercial activity in considered in conjunction with farm use when any of the following criteria are met:
>
> "(1) The commercial activity is either exclusively or primarily a customer or supplier of farm products;
>
> "(2) The commercial activity is limited to providing products and services essential to the practice of agriculture by surrounding agricultural operations that are sufficiently important to justify the resulting loss of agricultural land to the commercial activity; or
>
> "(3) The commercial activity significantly enhances the farming enterprises of the local agricultural community, of which the land housing the commercial activity is a part."

The hearings officer found that the wedding that was held was a commercial activity because petitioner sold hanging flower baskets to the wedding party, and specifically rejected petitioner's contention that the wedding was not a commercial activity because he merely enjoys hosting such activities. The hearings officer also found that the commercial activity did not satisfy the criteria set forth in LDO 4.2.7(A)(1) – (3).[1] In sum, the hearings officer found that the wedding was a commercial activity, but it did not qualify as a "commercial activity in conjunction with farm use," as allowed by LDO 4.2.7(A).

Petitioner does not challenge the hearings officer's finding that the use of the property for hosting the wedding was commercial or that the use of the property for hosting a wedding does not comply with LDO 4.2.7(A). Instead, petitioner argues in his petition for review that the wedding is allowed as a "commercial activity accessory to farm use" under

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[1] The hearings officer also found:

> "The Hearings Officer finds that the wedding in question was commercial, but even if it were not, the activity itself fails to meet the balance of the requirements of LDO 4.2.7(A): It was not 'exclusively or primarily a customer or supplier of farm products;' the wedding was not 'limited to providing products and services essential to the practice of agricultur[e by surrounding] agricultural operation[s];' and there is absolutely no evidence that 'it significantly enhance[d] the farming enterprises of the local agricultural community.'
>
> "By all appearances the Defendant is using the property as an outdoor social events venue for which they are attempting to avoid securing permits from the County." Record 4-5.

LDO 6.4.4(E)(1), and argues that the hearings officer erred in failing to address whether the wedding qualified as a "commercial activity accessory to farm use." Petitioner requests that the decision be remanded for the hearings officer to address LDO 6.4.4(E)(1).[2]

LDO 6.4.4(E)(1) is part of LDO Section 6.4, "Accessory Uses and Structures," which sets out the applicable standards governing accessory uses and structures in various zoning districts in the county. LDO 6.4.1 provides that the purpose of Section 6.4 is to:

> " * * * authorize[] the establishment of accessory uses and structures *that are incidental and customarily subordinate to principal uses* in all zoning districts * * *. The County's intent in adopting this Section is to allow a broad range of accessory uses and structures, provided such uses are located on the same site as the principal use and they comply with the standards set forth in this Ordinance.
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> "Approved uses will be deemed to include *accessory uses and activities that are necessarily and customarily associated with, and appropriate, clearly incidental, and subordinate to, the principal uses allowed in zoning districts.* Accessory uses and activities will be subject to the same regulations as apply to principal uses in each district, unless otherwise expressly stated." (Emphases added.)

LDO 6.4.4 provides in relevant part:

> "(A) In addition to complying with the general standards in Section 6.4.1, the following types of accessory uses are subject to the specific regulations set forth in this Section.
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> " * * * * *
>
> "(E) Commercial activities accessory to farm use occurring on the same parcel are permitted *subject to a Type 1 review* in all zones where agriculture is a Type 1 use. Such activities may occur inside an existing building, outside, or both. Any regular activities conducted in conjunction of farm use must be primarily for the purpose of displaying, tasting, or otherwise consuming products primarily grown

[2] Apparently to overcome any argument from the county that petitioner failed to raise an issue regarding LDO 6.4.4(E)(1) during the proceedings below, and is therefore precluded under ORS 197.763(1) from raising the issue for the first time at LUBA, petitioner asserts that he is entitled to raise this issue under ORS 197.835(4)(a) because the notice of the hearing did not adequately describe the applicable criteria as required by ORS 197.763(3)(b). The county responds that ORS 197.763 does not apply because the decision does not involve an application for a permit. We agree with the county.

> and produced on-site. Regular, ongoing activities may include sales, tasting or consumption of farm products, with or without music or artistic entertainment * * *." (Emphasis added.)

The respondent's brief's responds to petitioner's argument that the wedding was a outright permitted use under LDO 6.4.4(E)(1) as follows:

> "* * * LDO 4.2.7(A) does cross reference LDO 6.4.4(E), accessory uses. However, that cross reference refers only to LDO 6.4.4(E) as a source of *additional* requirements for an allowed use, whether as a primary use or an accessory use, and that section of the LDO does not *replace* the requirements contained in LDO 4.2.7(A) for commercial uses on EFU land. Section 6.4 of the LDO is very clear on this point:
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> "'**All accessory uses** and accessory structures **will conform to the applicable requirements of this Ordinance, including Chapters 4 through 8. The provisions of this Section establish *additional* requirements** and restrictions for particular uses and structures.' LDO 6.4.2(B).
>
> "Thus, to the extent that petitioner's wedding activity is a commercial use on EFU land, whether or not it is a primary use or an accessory use, it is allowed only if it meets the regulations contained in LDO 4.2.7(A)." Respondents' Brief 3-4. (Emphasis and bold in original.)

In other words, the county's position is that even if the wedding is properly viewed as a commercial activity accessory to farm use subject to LDO 6.4.4(E), the accessory use provisions are additional requirements to those at LDO 4.2.7(A). According to the county, a commercial activity accessory to farm use could not be permitted under LDO 6.4.4(E)(1) unless and until petitioner obtained a Type 3 approval of a commercial use in conjunction with farm use under LDO 4.2.7(A).

We do not agree with the county's understanding of the relationship between LDO 6.4.4(E)(1) and LDO 4.2.7(A). While the two provisions use overlapping and hence confusing terms, it appears that a "commercial activity in conjunction with farm use" under LDO 4.2.7(A) is a *primary* use of the parcel, and not "accessory" to any farm use of the parcel. None of the criteria that apply under LDO 4.2.7(A) require actual farm use of the property. In contrast, a "commercial activity accessory to farm use" under LDO 6.4.4(E)(1) appears to be an *accessory* use to the primary farm use of the property. It seems highly

unlikely that a single commercial use on a farm parcel could somehow constitute both a primary use and an accessory use of the parcel. Whatever LDO 6.4.2(B) means by providing that the accessory use provisions of Chapter 6.4 are "additional requirements" and that the accessory uses must conform to the requirements of Chapters 4 through 8, we disagree with the county that those statements mean that a use that qualifies as a commercial use accessory to farm use within the meaning of LDO 6.4.4(E)(1) must also qualify as a commercial use in conjunction with farm use under LDO 4.2.7(A), or vice versa.

Turning to petitioner's arguments regarding LDO 6.44(E)(1), we understand petitioner to assert that LDO 6.4.4(E)(1) provides a complete defense to the hearings officer's finding of a violation of the LDO, because accessory uses under LDO 6.4.4(E)(1) are "permitted subject to a Type 1 review." According to petitioner, all Type 1 uses under the LDO are outright permitted uses, which require no county review or approval. Therefore, we understand petitioner to argue, the hearings officer erred in concluding that the disputed wedding required county review and approval.

However, we disagree with petitioner that Type 1 uses under the LDO do not require any county review or approval. LDO 3.1.2 provides the review procedures for Type 1 reviews:

> "**Type 1 Land Use Authorizations, Permits and Zoning Information Sheet**
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> "Type 1 uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. Type 1 authorizations are limited to situations that do not require interpretation or the exercise of policy or legal judgment. Type 1 authorizations are not land use decisions as defined by ORS 215.402."

Thus, it appears that the county has adopted a procedure for review of Type 1 uses, including a commercial activity that is an accessory use to farm use, under which the county staff reviews the proposed use to determine whether it complies with LDO standards, and issues a

decision approving or rejecting the proposed use, which may take the form of a zoning information sheet.

However, petitioner does not assert that he has ever requested a Type 1 review of a proposed accessory use or that such review has ever occurred. Therefore, even assuming petitioner raised before the hearings officer the theory that the wedding could have been reviewed and approved as a Type 1 accessory use under LDO 6.4.4(E)(1), that theory would not offer a defense to the enforcement action or provide a basis to reverse or remand the hearings officer's conclusion that petitioner had failed to obtain the required county review and approval. Assuming that theory was presented to the hearings officer, he might have chosen to view it as a request to conduct a Type 1 review and consider whether the wedding in fact qualified as a commercial activity accessory to farm use of the property, but petitioner does not explain why the hearings officer was obligated to do so. To the extent petitioner requests that LUBA determine in the first instance whether the wedding qualified as a commercial activity accessory to farm use under LDO 6.4.4(E)(1), we decline to do so.[3]

Even though we disagree with the county's understanding of the relationship between LDO 4.2.7(A) and LDO 6.4.4(E)(1), the fact remains that petitioner does not challenge the hearings officer's finding that the use of his property for a wedding was a commercial use for which no permit was secured under LDO 4.2.7(A), and he does not allege that the commercial activity he conducted has undergone Type 1 review under LDO 6.4.4(E)(1) or LDO 3.1.2, or otherwise received required county review and approval. Therefore, petitioner's arguments provide no basis for reversal or remand of the hearings officer's decision that a code violation occurred.

The first and second assignments of error are denied.

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[3] We seriously question whether large commercial weddings held on EFU-zoned property would satisfy the requirement that the accessory use be "incidental and customarily subordinate to principal uses" and "necessarily and customarily associated with, and appropriate, clearly incidental, and subordinate to" the principal farm uses allowed in EFU zones, as required by LDO 6.4.1.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer was biased. In order to demonstrate bias, a party must show that the decision maker prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented during the proceedings. *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). Actual bias sufficiently strong to disqualify a decision maker must be demonstrated in a clear and unmistakable manner. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985).

On the day that the hearings officer heard the complaint against petitioner that is the subject of this appeal, there was also apparently another complaint hearing against petitioner regarding a wedding that was held on a different day.[4] According to petitioner, the code enforcement officer dismissed the other complaint and would have preferred to dismiss the complaint at issue in this appeal as well. Petitioner argues that somehow the hearings officer convinced the code enforcement officer to proceed with the complaint against his wishes based on the following statement:

> "Before the county withdraws this I have to point out that the legal context for this alleged infraction is dramatically different from the legal context for the prior one. * * * By the time [the September 26, 2009 wedding] occurred the LDO had changed and that change, in particular regard that concerns this matter, requires churches to have a Type 2 review in EFU land, so any activity that might be authorized in conjunction with churches would require a similar review."[5]

We fail to see how this statement by the hearings officer evidences any indication that the hearings officer was incapable of applying the relevant standards based on the evidence

[4] The county objects that some of the testimony relied upon by petitioner comes from the hearing on the other complaint and is not part of the record in this appeal. We need not resolve that issue because we find that even considering all the testimony cited by petitioner, petitioner has failed to establish that the hearings officer was biased.

[5] This issue is addressed in the seventh assignment of error.

and argument presented during the proceedings. Although the hearings officer may have been mistaken that the change in the LDO had any effect on either complaint as we discuss in the seventh assignment of error, it in no way demonstrates that he was biased.

Petitioner maintains in his petition for review that, when the hearings officer asked the code enforcement officer whether he wished to withdraw the complaint, the code enforcement officer states that he decided to proceed with the complaint because he "was directed to." Petition for Review 9. We understand petitioner to argue that the person that "directed" the code enforcement officer to proceed was the hearings officer, and that that direction evidences bias on the part of the hearings officer. However, petitioner does not establish that the person that "directed" the code enforcement officer to proceed was the hearings officer, rather than someone at the county other than the hearings officer.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In his fourth assignment of error, petitioner complains that the county has allowed weddings to take place on EFU-land without permits in the past, and the county's treatment of such weddings has been inconsistent. According to petitioner, the decision must be remanded to the county to interpret the provisions of LDO 4.2.7(A) and 6.4.4(E)(1). We do not see that this assignment of error adds anything to the first two assignments of error – whether the wedding was an allowed use. To the extent petitioner meant to argue something else, the argument is not sufficiently developed for our review. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that weddings help promote the purpose of Goal 3 (Agricultural Lands) and therefore weddings should be allowed. Even assuming petitioner is correct that weddings would somehow help preserve agricultural lands, petitioner does not explain how

that relates to the specific violations of the LDO found by the hearings officer. Petitioner's argument does not provide a basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the county's decision fails to state that petitioner had the right to appeal the decision to LUBA. According to petitioner, ORS 227.175(12) requires the county to provide this information in the decision.[6] The county's only response is that ORS 227.175(12) applies to cities, not counties, and therefore petitioner's argument should be denied. While the county is correct that ORS 227.175(12) only applies to cities, the county is presumably aware that ORS 215.416(13) provides the identical requirement for counties.[7]

Although the county does not address the issue, the problem with petitioner's argument is that even assuming there was a violation of a statutory requirement to notify parties that an appeal to LUBA was available, that would be a procedural error, and procedural errors provide a basis for reversal or remand only if the error prejudices a party's substantial rights. ORS 197.835(9)(a)(B). The only error petitioner assigns to the county is that it failed to apprise him of the right to appeal to LUBA.[8] Petitioner, however, determined

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[6] ORS 227.175(12) provides:

> "At the option of the applicant, the local government shall provide notice of the decision described in ORS 227.160(2)(b) in the manner required by ORS 197.763 (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights."

[7] ORS 215.416(13) provides:

> "At the option of the applicant, the local government shall provide notice of the decision described in ORS 215.402(4)(b) in the manner required by ORS 197.763 (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights."

[8] The challenged decision specifically states at its conclusion that the decision "is subject to judicial review by the Circuit Court for Jackson County as provided under ORS 34.010 to 34.100." Record 6.

on his own that an appeal to LUBA was possible and timely appealed the decision to LUBA. Therefore, petitioner has not established any prejudice to his substantial rights.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the wedding was also an allowed use pursuant to ORS 215.441, which provides:

> "If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship is allowed on real property under state law and rules and local zoning ordinances and regulations, a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity, including worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education."

According to petitioner, because churches are permitted uses on EFU-land and the county must allow weddings as a use customarily associated with churches under ORS 215.441, weddings are permitted uses on EFU-land.

Petitioner misconstrues ORS 215.441. We agree with the hearings officer that ORS 215.441 allows weddings on EFU-land only if they are associated with "a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship" that is located on EFU-land.[9] In other words, if there is a church located on EFU-land, weddings can occur at the church, but if there is no church for the wedding to be "customarily associated with the practices of," then weddings are not allowed under ORS 215.441. Because there is no church or other place of worship on petitioner's property, weddings are not permitted uses on petitioner's property under ORS 215.441.

[9] Apparently, the county amended the LDO after earlier weddings on petitioner's property but before the September 26, 2009 wedding to change church approval on EFU-land from a Type 1 review process to a Type 2 review process. Also, this amendment apparently was thought to have some effect upon the issue of weddings on petitioner's property as discussed under the third assignment of error. As best we can tell there was never a church or other place of worship on petitioner's property, and we therefore fail to see what impact the LDO amendment has on the issue of whether weddings are an allowed use on petitioner's property.

The seventh assignment of error is denied.

The county's decision is affirmed.