BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY P. SPERBER,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA Nos. 2010-030 and 2010-031

FINAL OPINION
AND ORDER

Appeal from Coos County.

Timothy P. Sperber, Coos Bay, filed the petition for review and argued on his own behalf.

Jacqueline G. Haggerty, Coos County Legal Counsel, Coquille, filed the response brief and argued on behalf of the respondent.

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

BASSHAM, Board Member; did not participate in the decision.

REMANDED 07/22/2010

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 the county's denial of his request for refunds of his fees incurred during the county's proceedings on a partition application and a variance application.

FACTS

The county refused to refund certain fees to petitioner after the county allegedly failed to make a decision within 120 days, as required by ORS 215.427(8), which provides:

> "Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application."

LUBA No. 2010-030 is an appeal of the county's decision to deny petitioner's request for a refund of his application fees for a partition application. The final decision on the partition application was made more than 120 days after the application was deemed complete. The county, however, denied petitioner's request for the refund because it took the position that the 120-day deadline was extended by petitioner's request for an extension of time to cure a zoning law violation on the property. The county found that the final decision was made before the 120-day deadline expired, if petitioner's requested extension of time is considered.

LUBA No. 2010-031 is an appeal of the county's decision to deny petitioner's request for a refund of certain fees incurred in processing his application for a variance. The county does not dispute that its initial decision on petitioner's variance application was made after the 120-day deadline had expired, and the county refunded petitioner's variance application fee. Petitioner, however, appealed the county's initial decision denying the variance to LUBA, and LUBA remanded the county's decision. *Sperber v. Coos County*, 57

Or LUBA 365 (2008). After that remand, the county charged petitioner an additional fee for the hearing it held following LUBA's remand. Petitioner requested a refund of the remand hearing fee, but the county found that the refund provisions of ORS 215.427(8) do not apply to proceedings on remand.

Petitioner requested refunds of fees from both appeals from the county on February 9, 2009. The board of county commissioners orally denied the request for any refund of the partition application fees and for any refund of fees on remand in the variance proceeding on June 6, 2009, but did not reduce the decisions to writing. Petitioner subsequently filed an action in Coos County Circuit Court to recover the refunds, but the circuit court dismissed the case. The county then issued a final written decision denying the requests on April 6, 2010. These appeals followed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to new issues raised in the respondent's brief that LUBA does not have jurisdiction to hear the appeals because the issues petitioner raises in the petition for review were not raised below and therefore were waived. A reply brief to address a challenge to LUBA's jurisdiction is permitted. *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17, 18 (2008). The motion is granted.

JURISDICTION

The county argues that LUBA does not have jurisdiction to hear petitioner's appeal because he should have raised the issue of whether he is entitled to a refund of fees in the proceedings on the merits of each application, and that petitioner failed to raise any issue concerning fee refunds at the local level. According to the county, although petitioner raised the issue of fee refunds in his LUBA appeal of the county's denial of the variance application, LUBA denied that assignment of error and, according to the county, petitioner may not have a "second bite at the apple." Response Brief 3.

The county's characterization of the issue as jurisdictional mischaracterizes the issue. The challenged decisions are clearly land use decisions, and the county has offered no reason why LUBA does not have jurisdiction to review those land use decisions. What the county likely meant to argue is that LUBA should affirm the decisions because the issues petitioner seeks to raise now were not raised during the proceedings below, and are therefore waived.

First, the county's understanding of LUBA's decision in petitioner's appeal of the county's denial of his variance application is incorrect. In that decision, we stated:

> "Petitioner argues that he demanded refund of 50 percent of his application fee and other fees he paid to the county. According to petitioner, '[s]taff agreed to look into the matter, but as of this date the County has not made any refund.' * * *
>
> "The only decision that is before us in this appeal is the county's decision denying petitioner's variance application. That decision takes no position regarding refund of application fees under ORS 215.427(8). When the county makes a decision regarding refund of fees, petitioner will be free to seek review of that decision in an appropriate forum if he is dissatisfied with that decision." 57 Or LUBA at 376.

Contrary to the county's argument, we did not deny petitioner's assignment of error regarding refund fees on the merits, we specifically stated that any decision regarding such fees was not before us and that when such a decision was made petitioner could challenge it. That is precisely what has happened in the variance fee appeal.

Second, the partition application decision, though not appealed to LUBA, similarly did not purport to render judgment on a fee refund request, and for the same reason petitioner was not required to raise the issue until a final decision denying the refund request was made. Petitioner's arguments are not waived.

FIRST ASSIGNMENT OF ERROR

The partition application was deemed complete on December 14, 2006. Pursuant to ORS 215.427(1), the county was required to issue a final decision on the partition application within 120 days, which was April 13, 2007. The county issued its final decision approving the partition on April 19, 2007. The county argues that petitioner requested an extension to

the ORS 215.427(1) 120-day deadline under ORS 215.427(5), and therefore the April 19, 2007 decision was issued before the 120 days had expired.[1] Petitioner argues that the extension he requested had nothing to do with the ORS 215.427(1) 120-day deadline. If petitioner did not request an extension to the ORS 215.427(1) 120-day deadline, there is no dispute that the county's decision violated that deadline. We therefore turn to the question of whether petitioner requested an extension of the ORS 215.427(1) 120-day deadline.

On December 19, 2006, during a pre-application meeting for a different application that is not at issue in this appeal, petitioner mentioned to a county planner that a watchman was living on a travel trailer on the property. Petitioner had earlier obtained approval of a single family dwelling for the property. Under the terms of the zoning clearance letter (ZCL) for the single family dwelling, petitioner was allowed to have a travel trailer on site during the construction of the dwelling. The county, however, informed petitioner that although a travel trailer was allowed for the construction of the dwelling, it could not be used as residence for a watchman. On December 21, 2006, the county informed petitioner in writing that he was in violation of the ZCL and the ZCL would be revoked in 30 days if the violation was not cured. Record 74-75.

Although petitioner disputed that the county's regulations prohibited a watchman living in the travel trailer under the circumstances, he apparently decided to comply with the county's demand to remove the watchman. On January 16, 2007, petitioner wrote a letter to the county that requested additional time to find a new residence for the watchman. Petitioner's letter states:

> "The notice of the violation in this regard was not received until January 12, 2007, which only gave us seven days to correct it. My employee needs more

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[1] ORS 215.427(5) provides:

> "The period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days."

> time to find a new place to live and it would work a hardship on him to have to vacate by January 19th. I therefore request that we be given 30 days from the date of the notice of the violation to correct it, which I understand to be the normal time allowed. The 30 days would expire on February 10, 2007." Record 80-81.

On January 17, 2007, the county informed petitioner in writing that it had discontinued processing the partition application, and it would not be processed until the ZCL violation was cured. Record 82.

According to the county, the above-quoted letter from petitioner was a written request under ORS 215.427(5), and therefore the 120-day deadline for processing the partition application was extended by 30 days. Petitioner argues that he was not requesting an extension of the 120-day deadline for processing his partition application, and in fact he was unaware of the ORS 215.427(1) 120-day deadline at the time.

The "written request" under ORS 215.427(5) must be a request to extend the 120-day deadline set forth in ORS 215.427(1). The alleged violation was of a ZCL for an unrelated application – a single family dwelling. It was the county's deadline for correcting that violation that was the subject of petitioner's requested extension, not the 120-day deadline set forth in ORS 215.427(1). Petitioner's letter did not mention ORS 215.427 or the partition application. Petitioner's letter is directed solely at the county's seven-day deadline for correcting the alleged violation of the ZCL regarding the single family dwelling. The county's reading of petitioner's letter to constitute a "written request" to extend the 120-day "period set in subsection (1)" of ORS 215.427 is not supported by the text of the letter.

The county also argues that petitioner's letter must be considered a request to extend the 120-day deadline because the county would have been required to deny the partition application if there was an outstanding zoning violation occurring on the property. Even if it is true that the watchman's use of the travel trailer as a temporary residence would have justified a county decision to deny the partition application, that is not what the county did. The fact that the county could potentially have denied the partition application based on the

violation of the ZCL for a different application does not transform petitioner's request for an extension of the thirty-day deadline to correct the violation of the ZCL into a request to extend the ORS 215.427(1) 120-day deadline.

Petitioner's letter was not a written request to extend the 120-day deadline in the partition application. The county's final decision was rendered after the 120-day deadline had run, and the county misconstrued the applicable law in denying petitioner's request for a fee refund. Therefore, petitioner is entitled to a refund pursuant to ORS 215.427(8).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The second assignment of error involves petitioner's request for a refund of the remand fee the county charged him after LUBA remanded the county's initial decision denying the variance application. Unlike the partition application, the county does not dispute that it failed to render a decision on the variance application within the 120 days required by ORS 215.427(1). Accordingly, pursuant to ORS 215.427(8), the county refunded 50 percent of the initial application fee and refunded 100 percent of petitioner's payment of the additional governmental fees incurred, with one disputed exception, the fee petitioner paid for the remand hearing. Thus, the only question under this assignment of error is whether the fee refund provisions of ORS 215.427(8) apply to fees charged for proceedings following a LUBA remand.

We set out ORS 215.427(8) again:

> "Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. *The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits.* However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application." (Emphasis added.)

Petitioner argues that the fees on remand were "additional governmental fees incurred subsequent to the payment" of the application fees or deposits. According to petitioner, ORS 215.427(8) expressly provides that petitioner may not be held liable for the county's remand fees in the circumstances presented in this matter.

The county responds that ORS 215.435 sets out a different procedure and timeline for decisions on remand and that procedure does not provide for a refund of fees. ORS 215.435(1) provides:

> "Pursuant to a final order of the Land Use Board of Appeals under ORS 197.830 remanding a decision to a county, the governing body of the county or its designee shall take final action on an application for a permit, limited land use decision or zone change within 90 days of the effective date of the final order issued by the board. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of the board under ORS 197.850 (3). If judicial review of a final order of the board is sought under ORS 197.830, the 90-day period established under this subsection shall not begin until final resolution of the judicial review."

The county argues that ORS 215.435 sets out a separate and distinct process for decisions on remand from LUBA. According to the county, if the legislature had intended to provide for a refund of fees incurred following a LUBA remand it could have done so in ORS 215.435, but it did not do so, and therefore such refunds are not required.

The county's interpretation of state law is owed no deference. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076 (1992). Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), we begin with the text and context of the statute in an attempt to discover the intent of the legislature. ORS 215.427(8) is clear that when a county violates the 120-day deadline, an applicant is not liable for any fees expended after the application fee. The proceedings on remand are a continuation of the original land use application and not a new application. *Foland v. Jackson County*, 53 Or LUBA 629, 631 (2007); *Rutigliano v. Jackson County*, 47 Or LUBA 628, 629-30 (2004); *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291, 307 (2000). While these cases do

not concern the refund of application fees under ORS 215.427(8), there is nonetheless no question that proceedings on remand are a continuation of the original proceedings. If ORS 215.427(8) were the only relevant text regarding the issue before us, it is hard to see how there could be any question that petitioner is entitled to a refund of his fees expended on remand.

Although ORS 215.435(1) makes the question somewhat more debatable, it does not change our conclusion. ORS 215.435(1) is directed at local government procedures and time lines for decisions that have been remanded by LUBA. It is entirely silent regarding fees. The fact that ORS 215.435(1) is silent regarding fees indicates that to the extent the legislature was considering fees at all in enacting ORS 215.435, it chose not to change the existing scheme embodied in ORS 215.427(8). Thus, we are left with a situation where absent some other authority, an applicant is not liable for fees on remand when a county violates ORS 215.427(1), and the county has not provided any authority we believe affects that outcome. Perhaps had the legislature specifically considered the question, it would have chosen not to preclude a county from charging fees on remand under such circumstances. But ORS 215.427(8) and ORS 215.435(1) as written make no exception to the general rule that an "applicant is not liable for additional governmental fees incurred subsequent to the payment" of the application fee or deposit when the county violates ORS 215.427(1). To read ORS 215.435(1) as providing an exception to the general rule that would allow the county to charge fees on remand under these circumstances would be to insert text that was omitted, which we may not do.[2]

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[2] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

The second assignment of error is sustained.

CONCLUSION

We sustain both of petitioner's assignments of error. The county misconstrued the applicable law in determining that petitioner's letter constituted a request for an extension under ORS 215.427(5), and in determining that its remand fee was not subject to refund under ORS 215.427(8). Therefore, the proper disposition is to remand the county's decision so that the county can refund the amounts required by the statute.

The county's decisions are remanded.