BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TERRY W. EMMERT, dba SPRINGWATER FARMS, LLC,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2011-052

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Kenneth C. Bauman, Portland, filed the petition for review and argued on behalf of petitioner.

Rhett C. Tatum, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 01/04/2012

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 decision by the county denying petitioner's application for a non-relative farm worker dwelling on land zoned exclusive farm use.

FACTS

In June, 2010, petitioner applied for approval to site a non-relative farm worker dwelling on property located at 15341 S. Springwater Road.[1] Clackamas County Zoning and Development Ordinance (ZDO) 401.09(I)(1)-(9) provide the applicable approval criteria.[2]

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[1] The decision states that petitioner submitted the application "to remedy a code violation for placing the dwelling without required permits." Record 1.

[2] ZDO 401.09(I) provides in relevant part:

> "Accessory Farm Dwelling – Non-Relative: An accessory farm dwelling for a nonrelative of the farm operator may be allowed subject to the following criteria:
>
> "1. The accessory farm dwelling shall be occupied by a person or persons who will be principally engaged in the farm use of the land and whose seasonal or year-round assistance in the management of the farm use, such as planting, harvesting, marketing or caring for livestock, is or will be required by the farm operator;
>
> "* * * * *;
>
> "3. The accessory farm dwelling shall be located:
>
> "a. On the same lot or parcel as the primary farm dwelling; or
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> "b. On the same tract as the primary farm dwelling when the lot or parcel on which the accessory farm dwelling will be sited is consolidated into a single parcel with all other contiguous lots and parcels in the tract; or
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> "c. On a lot or parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is a manufactured dwelling and a deed restriction is filed with the County Clerk. The deed restriction shall require the manufactured dwelling to be removed when the lot or parcel is conveyed to another party. The manufactured dwelling may remain if it is re-approved pursuant to Section 401; or
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> "d. On a lot or parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is limited to only attached multi-unit residential structures allowed by the applicable state building code or similar types of farm labor housing as existing farm labor housing on the farm operation registered with the Department of Consumer and Business Services, Oregon

In an August, 2010 decision, the planning director denied the application because he concluded that ZDO 401.09(I)(3) and (5) were not met. Petitioner appealed the planning director's decision to the hearings officer.

The hearings officer held an evidentiary hearing on the application on January 27, 2011. At the hearing, petitioner objected to the introduction of evidence by the county at the hearing without providing prior notice of that evidence to petitioner. At the conclusion of the hearing, petitioner requested that the record remain open for 60 days to provide additional evidence and argument. The hearings officer left the record open until March 3, 2011, and allowed petitioner to request that the record remain open for additional time at the end of the 30 day period. Record 4. During the open record period, county staff submitted one

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> Occupational Safety and Health Division under ORS 658.750. The county shall require all accessory farm dwellings approved in this subsection to be removed, demolished or converted to a nonresidential use when farm worker housing is no longer required; or
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> "e. On a parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is located on a lot or parcel at least the size of the applicable minimum lot size and the lot or parcel complies with the gross farm income requirements of Subsection 401.09(E)(1) or 401.09(F)(1) whichever is applicable.
>
> "4. There is no other dwelling on lands designated for exclusive farm use owned by the farm operator that is vacant or currently occupied by persons not working on the subject farm or ranch and that could reasonably be used as an accessory farm dwelling;
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> "5. The primary farm dwelling to which the proposed dwelling would be accessory, shall meet one of the following:
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> "a. On Low Value Farmland, the primary farm dwelling is located on a farm or ranch operation that is currently employed in farm use, as defined in ORS 215.203, and produced at least $32,500 in gross annual income from the sale of farm products within the last two years or three of the last five years; or
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> "b. On land identified as High Value Farmland, the primary farm dwelling is located on a farm or ranch operation that is currently employed in farm use, as defined in ORS 215.203, and produced at least $80,000 in gross annual income from the sale of farm products in the last two years or three of the last five years[.]"

additional item into the record (Exhibit 32).[3] Petitioner submitted four additional items into the record. The record closed on March 3, 2011.

On April 28, 2011, the hearings officer issued a decision denying the application, concluding that petitioner had failed to demonstrate that ZDO 401.09(I)(1) and (4) were satisfied. *See* n 2. This appeal followed.

ASSIGNMENTS OF ERROR

OAR 661-010-0030(4)(d) requires that the petition for review "[s]et forth each assignment of error under a separate heading," followed by argument in support of each assignment of error. The petition for review contains no assignments of error denominated as such.[4] The nearest part of the petition for review to a recognizable assignment of error is a section, Section IV, entitled "Argument" that contains five subsections, A through E.[5] Nonetheless, the failure to set out an assignment of error is not fatal and we will consider alleged errors to the extent they can be discerned from the petition for review. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999).

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[3] Exhibit 32 is a copy of a printed page from a website advertisement with a posting date of February 2, 2011, describing a house located on the subject property and advertising it for rent. The hearings officer relied in part on Exhibit 32 to determine that ZDO 401.09(I)(4), which requires that there be no other vacant residence on the property that could reasonably be used as an accessory farm dwelling, was not satisfied. Record 7-8. *See* n 2.

[4] As we explained in *Frewing v. City of Tigard*, 59 Or LUBA 23, 25 (2009):

> "An assignment of error generally consists of a sentence or short paragraph that briefly (1) identifies the finding, omission or aspect of the decision that is challenged and (2) cites one or more bases on which LUBA is urged to conclude that the decision is erroneous and the error warrants reversal or remand, e.g., 'The hearings officer misconstrued the applicable law and adopted findings not supported by substantial evidence in finding that the proposed development is a permitted use in the EFU zone.' An assignment of error is typically followed by supporting arguments that include discussion of the standard of review, the applicable law and the evidence in the record that has some bearing on that applicable law."

[5] Subsection A is entitled "This Proceeding Was A Contested Administrative Hearing." Petition for Review 11. Subsection B is entitled "Requirements for Due Process in a Contested Administrative Hearing." Petition for Review 13. Subsections C through E are discussed below.

A. Subsections C and D

Petitioner's overarching theme in Subsections C and D of the petition for review is that he believes that the county's conduct during and after the hearing violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. According to petitioner, the Due Process Clause requires the county to provide petitioner with notice of the county's submission of documents and testimony into the record both before and during the hearing and during the time the record is left open after the hearing concludes. Subsections C and D of the petition for review are entitled, respectively, "Pre-Hearing Due Process Violation" and "Post-Hearing Due Process Violation," and contain what we characterize as assignments of error that allege that the county "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner" under ORS 197.835(9)(a)(B). In Subsection C petitioner argues that the hearings officer's acceptance of evidence and testimony from the county at the January 27, 2011 hearing without prior notice to petitioner regarding the existence and content of that evidence and testimony violated petitioner's rights to notice and a fair hearing under the Due Process Clause. In Subsection D we understand petitioner to argue that the county violated petitioner's right to notice and a fair hearing under the Due Process Clause because after the hearing had ended, but during the open record period, the county failed to notify petitioner that county staff had entered a document (Exhibit 32) into the record approximately four days before the record closed.

The legislature has set out the procedural framework for the conduct of quasi-judicial hearings on land use applications in ORS 197.763(6). Petitioner acknowledges in the petition for review that ORS 197.763 sets out the minimum procedures the county is required to follow in the conduct of quasi-judicial land use hearings under ORS Chapter 215. Petition for Review 12. Prior to the conclusion of the initial hearing on a quasi-judicial land use application, ORS 197.763(6)(a) allows any participant to request an opportunity to present

additional evidence, arguments or testimony regarding the application. ORS 197.763(6)(a) requires the hearings officer to grant such a request by either continuing the public hearing pursuant to ORS 197.763(6)(b), or leaving the record open for additional written evidence, arguments or testimony pursuant to ORS 197.763(6)(c) for at least seven days. If new evidence is introduced during the continued public hearing or open record period, any participant can request that the record be reopened to respond to that evidence and the hearings officer is required to reopen the record for that purpose. ORS 197.763(6)(c). Finally, ORS 197.763(6)(e) allows the applicant, after the conclusion of any open record period, "at least seven days after the record is closed to all other parties to submit final written arguments in support of the application."

We understand petitioner to have requested that the record remain open for 60 days in order to respond to evidence and testimony introduced at the initial evidentiary hearing, and that the hearings officer left the record open for 30 days for that purpose under ORS 197.763(6)(c). We also understand petitioner to have introduced evidence during the open record period to respond to and rebut some of the evidence and testimony the county presented at the January 27, 2011 hearing. The county introduced Exhibit 32 during that same open record period. *See* n 3. However, petitioner did not request, under ORS 197.763(6)(c), an additional opportunity to respond to Exhibit 32, and petitioner did not submit "final written arguments in support of the application" under ORS 197.763(6)(e). Thus, petitioner failed to avail himself of some of the procedural rights given to him by the legislature to respond to new evidence and to make his final argument to the decision maker.

Although petitioner acknowledges the existence of ORS 197.763, which sets out minimum procedures that the county is required to follow when conducting quasi-judicial land use hearings, petitioner makes almost no attempt to explain why those statutory procedures are insufficient to protect any rights petitioner may have to confront and rebut evidence under the due process clause. Specifically, the county submitted evidence to the

hearings officer at the January 27, 2011 hearing without providing petitioner with prior copies or notice of that evidence. But ORS 197.763 does not require that the county provide petitioner with prior copies or notice of the evidence that it submitted at the initial evidentiary hearing. To the extent allowing parties to submit evidence at the initial evidentiary hearing without requiring that they provide other parties with prior copies or notice of that evidence might violate the other parties' right to due process, ORS 197.763(6)(a) allows those other parties to request an opportunity to present additional evidence to rebut that evidence, or for any other reason. Petitioner was given a right to submit additional evidence after the county submitted evidence at the January 27, 2011 initial hearing, and petitioner submitted responsive and rebuttal evidence. With one exception that we address and reject below, petitioner makes no attempt to explain why the right under ORS 197.763(6)(a) to present additional evidence, which petitioner took advantage of here, was not sufficient to protect any rights petitioner has under the due process clause to confront and rebut evidence that the county submitted at the January 27, 2011 hearing. For that reason we reject petitioner's due process arguments directed at the evidence the county submitted at the January 27, 2011 hearing.

In subsections C and D, petitioner makes two additional arguments. First, petitioner argues that the hearings officer's decision to leave the record open to allow petitioner to respond to the evidence and testimony introduced at the hearing violates the Due Process Clause, because that decision did not allow petitioner to "call and confront the witness." Petition for Review 18. However, it is well-settled that there is no right under the Due Process clause of the Fourteenth Amendment to cross-examination in quasi-judicial land use hearings in Oregon. *Clinkscales v. City of Lake Oswego*, 47 Or App 1117, 1122-23, 615 P2d 1164 (1980); *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 614 (1989). Petitioner does not acknowledge that well-settled principle or otherwise explain

why the Due Process Clause compels the county to allow a party to "cross-examine" a witness in a quasi-judicial land use hearing on a land use application.

Second, petitioner argues that the county was required by the Due Process Clause to notify him that county staff had placed Exhibit 32 into the record during the open record period. However, petitioner points to no authority that requires a local government that receives and processes record submissions related to a land use permit application to notify the applicant or any other party when an item is submitted into the record. To the extent petitioner suggests that the Due Process Clause itself requires the county to go beyond making the record accessible to all parties and imposes an additional obligation to notify petitioner or any other party when an item is submitted into the record, petitioner does not support that suggestion with any convincing authority, statutory or otherwise. First, petitioner cites Oregon Department of Justice administrative rules at OAR 137-003-0501 to 0700, which govern contested case proceedings under ORS Chapter 183, the Oregon Administrative Procedures Act (APA). Those administrative rules do not apply to local government quasi-judicial land use hearings.

Petitioner also cites two United States Supreme Court cases addressing minimum procedural due process requirements in prisoner discipline and parole hearing settings, and Oregon Supreme Court and Court of Appeals cases that involved parties challenging the state's suspension or refusal to issue a license to a person to participate in a specific business activity.[6] To the extent those cases stand for the proposition that the Due Process Clause requires that the government provide a prisoner, parolee, or license or permit holder or seeker with prior notice of the evidence against them, that proposition does not apply in the context of a quasi-judicial hearing on a land use permit application. Finally, petitioner cites *Fasano*

[6] Those cases are *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 87 P3d 1120 (2004); *Gregg v. Oregon Racing Commission*, 38 Or App 19, 588 P2d 1290 (1979); *The Grog House, Inc. v. OLCC*, 12 Or App 426, 507 P2d 419 (1973); *Smith v. Veterinary Medical Examining Board*, 175 Or App 319, 27 P3d 1081 (2001); *Wolff v. McDonnell*, 418 US 539 (1974); and *Morrissey v. Brewer*, 408 US 471 (1972).

v. Washington County, 264 Or 574, 507 P2d 23 (1973). Petition for Review 13. However, as potentially relevant here, *Fasano* simply held that parties in quasi-judicial rezoning hearings have a right to present and rebut evidence. And as the Oregon Supreme Court clarified in *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 80-81, 742 P2d 39 (1987), the holding in *Fasano* rests on comprehensive land use planning statutes rather than the Due Process Clause.

Accordingly, petitioner's assignments of error set out in Subsections C and D of the petition for review are denied.

B. Subsection E

Subsection E is entitled "Respondent's System for Contested Administrative Hearings" and contains what we characterize as an assignment of error that alleges that the hearings officer was biased. Petition for Review 21 - 25. Petitioner's arguments appear to relate to a separate, related county land use enforcement proceeding against petitioner. To the extent Subsection E was intended as an assignment of error alleging bias on the part of the decision maker, it is inadequately developed and for that reason it is denied.[7]

The county's decision is affirmed.

[7] In order to demonstrate bias, a petitioner must show that a decision maker or body was incapable of making a decision based on the evidence and argument before them. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001). In the present case, petitioner does not come close to making that demonstration.