BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK J. GREENFIELD,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

BELLA ORGANICS LLC, MIKE HASHEM,
ELIZABETH HASHEM, JOHNNY KONDILIS-HASHEM,
and SOFIA KONDILIS-HASHEM,
Intervenors-Respondents.

LUBA No. 2012-102

BELLA ORGANICS LLC, MIKE HASHEM,
ELIZABETH HASHEM, JOHNNY KONDILIS-HASHEM,
and SOFIA KONDILIS-HASHEM,
Petitioners,

vs.

MULTNOMAH COUNTY,
Respondent,

and

MARK J. GREENFIELD,
Intervenor-Respondent.

LUBA No. 2012-103

FINAL OPINION
AND ORDER

Appeal on remand from Court of Appeals.

Mark J. Greenfield, Portland, represented himself.

Ty K. Wyman, Portland, represented Bella Organics, LLC et al.

Jed R. Tomkins, Assistant County Attorney, Portland, represented respondent.

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

REMANDED 04/08/2014

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

Opinion by Holstun.

Our decision in this appeal was reversed and remanded by the Court of Appeals, in part. *Greenfield v. Multnomah County*, ___ Or LUBA ___ (LUBA Nos. 2012-102 and 2012-103, June 19, 2013), *rev'd and remanded* 259 Or App 687, 317 P3d 274 (2013). The court's remand requires that we address four issues, which we address below.

A. Farm to Plate Dinners (Greenfield's Second and Third Assignments of Error)

The county decision that is the subject of this appeal, among other things, authorizes and places limits on what are referred to as "outdoor promotional dinners" or "farm to plate dinners."

> "d. Farm-to-plate dinners shall be limited to a maximum number of 75 guests or less per dinner and limited to no more than 20 events per year for those dinners for which Bella prepares all the food. In addition, Bella may host no more than 2 catered farm to plate dinners for 75 guests or less per year. No farm-to-plate dinners may be held in the month of October." Record 41.

In our original opinion, we sustained Greenfield's second and third assignments of error, in part, based on our conclusion "that the authorized farm to plate dinners are accurately described as 'banquets' and are not permitted under the farm stand statute and the farm stand rule." Slip op at 20. The Court of Appeals reversed that aspect of our decision.

> "Accordingly, we conclude that LUBA erred when it concluded that outdoor promotional dinners are not an allowed promotional activity because "banquets" are not permitted in a farm stand structure. On remand, LUBA may consider Greenfield's remaining procedural objections to the county's allowance of the farm-to-plate dinners." 259 Or App at 704.

In our original opinion, we did not consider Greenfield's procedural objections under the second and third assignments of error, which we described as follows:

> "* * * Greenfield also raises two procedural objections. First, the hearings officer's decision to limit the catered farm-to-plate dinners to two events, and to require that Bella prepare the food for the remaining 20 authorized farm to plate dinners did not come until after the close of the evidentiary hearing. Greenfield contends that condition changed the nature of the application and the hearings officer should have required a new application. Greenfield contends the hearings officer's failure to do so prejudiced Greenfield's substantial rights. Greenfield also contends, based on an argument that was advanced by Bella's legal counsel, that Bella waived any right to seek approval of catered farm-to-plate dinners. Although we agree with the county's response that both procedural objections are without merit, our decision to sustain Greenfield's substantive challenge under these assignments of error make it unnecessary to resolve those procedural challenges, and we decline to do so." Slip op at 20.

The county's response to Greenfield's procedural objections, which we agree with and now adopt, is set out below:

> "* * * Bella described its proposal of farm-to-plate dinners in sufficient detail to allow the County to determine whether the proposal meets the approval standards for promotional activity. Specifically, the County found that the proposal included a tour of the farm, a cooking demonstration and dinner involving Bella's farm crops, and the sale of farm crops from the farm stand. Considering these findings in light of the approval standards for promotional activity, the County concluded, '[a]s described by Mr. Kondillis, the Bella Plan for farm to plate dinners seems much more like a fee-based promotional activity designed to promote the sale of farm crops or livestock at a farm stand * * *.'
>
> "Greenfield appears to view the preparation of farm-to-plate dinners *by Bella* as a substantial departure from the original

proposal of dinners prepared by *a caterer*. However, the County understands that the farm-to-plate dinners will be conducted as described above regardless of whether the dinner is prepared by Bella or by a caterer. As such, the only 'change' to the application that occurred during the County's review process was the identity of the *chef* for these dinners. Importantly, the identity of the chef is utterly immaterial to the approval standards for promotional activity. As discussed above, satisfaction of these approval standards is demonstrated without any reference to the identity of the chef for these farm-to-plate dinners.

"Accordingly, the Decision does not contravene the rule in *Miller* [*v. City of Joseph*, 31 Or LUBA 472 (1996)] because, here, Bella's description of its proposal was sufficiently detailed to establish compliance with the approval standard.[1] In addition, this 'change' in the application does not warrant the filing of a new application or the publication of a new notice of application because the application as originally submitted remains 'fundamentally intact' after this change. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466, 486 (2005); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 606-607 (1993) (a new application is not required if the original proposal remains 'fundamentally intact').

"Regarding Greenfield's [remaining procedural] argument * * *, the County simply does not agree that the record reflects any withdrawal by Bella of its request for approval of farm-to-plate dinners, whether prepared by Bella or a caterer." Respondent's Brief 8-10 (emphases in original).

For the reasons explained above, Greenfield's second and third assignments of error are denied.

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[1] In *Miller*, we held that the city failed in that case to demonstrate that a proposed arts and crafts store and educational center could comply with a requirement to have no more than ten employees because "the scope of the proposal has yet to be defined." 31 Or LUBA at 477.

B. Dinner Pricing and Accounting (Greenfield's Fourth Assignment of Error)

In our original decision we described Greenfield's fourth assignment of error, but ultimately determined it was unnecessary to decide that assignment of error based on our resolution of Greenfield's second and third assignments of error.

> "In an October 25, 2012 declaration, the Bella farm supervisor made the following representation:
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> > "'* * * At the conclusion of each [farm-to-plate] dinner, Bella will give each customer a basket of our fruits vegetables, flowers, cheeses, milk, apple cider, jams and sauces. * * * The dinner will cost no more than $25 per dinner and $75 per box of produce.' Record 316.
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> "In his fourth assignment of error, Greenfield argues the hearings officer erred 'by tacitly authorizing Bella to engage in accounting practices that comingle income from fee-based activity with income from the sale of farm products, rather than requiring Bella to account for these as separate items for purposes of complying with the 25 percent requirement.' Greenfield Petition for Review 33. Greenfield argues the prices suggested above are a sham and that the meals will be worth much more than $25 and the produce boxes will be worth much less than $75. The result will be, petitioner argues, a thinly veiled ruse to avoid the 25 percent rule.
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> "Because we have already sustained Greenfield's second and third assignments of error we need not resolve this assignment of error. If we did have to resolve this assignment of error, we tend to agree with the county that Greenfield's challenge is at best premature and at worst challenges a decision that the county did not make, because the county did not authorize Bella to charge $25 for its meals or $75 for its produce baskets.
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> "We need not and do not resolve Greenfield's fourth assignment of error." Slip op at 23-24.

We now reject Greenfield's fourth assignment of error, because we agree with the county that the challenged decision does not approve, "tacitly or otherwise, * * * accounting practices that would be inconsistent with the limitations on farm stand revenue set forth in the 25% Revenue Cap." Respondent's Brief 11. Specifically, we do not understand the county to have taken a position, one way or the other, how Bella must account for its sale of meals and produce baskets to farm-to-plate dinner patrons under the 25% Revenue Cap that applies to fee based income.

Greenfield's fourth assignment of error is denied.

C. Food Carts (Greenfield's Sixth Assignment of Error)

We understand the Court of Appeals to have found fault with two aspects of our resolution of Greenfield's sixth assignment of error, which concerns the decision's authorization for additional food carts.

1. Structures "Designed and Used For Sale of Farm Crops and Livestock"

The farm stand rule authorizes the "sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock" inside structures that are "designed and used for sale of farm crops and livestock grown on the farm operation," but it does not authorize structures that are specifically designed and used for retail sales and fee-based promotional activity. The Court of Appeals found that LUBA erred in not considering whether the authorized food carts qualify as structures that are "designed and used for sale of farm crops and livestock grown on the farm operation."

> "* * * We are not certain * * * whether LUBA considered food carts to be 'structures.' If LUBA concluded that food carts are *not* structures, we agree with Greenfield that that conclusion was erroneous. Because food carts are structures, they are permissible

> under the farm stand statute only if they are 'designed and used for the sale of farm crops or livestock grown on the farm operation' and are not designed for activities other than the sale of farm crops or livestock. ORS 215.283(1)(o). On remand, LUBA may choose to determine itself whether the food carts meet those requirements, or it may direct the county hearings officer to make that determination along with the other determinations that LUBA has directed." 259 Or App at 709 (emphasis in original).

Determining whether the authorized food carts qualify as structures "designed and used for sale of farm crops and livestock," will likely require consideration of factual variables that are best resolved by the hearings officer in the first instance. On remand, the hearings officer must consider whether the proposed food carts qualify as structures "designed and used for sale of farm crops and livestock grown on the farm operation."[2]

2. Food Cart Incidental Sales

In sustaining Greenfield's sixth assignment of error, we concluded that the sales of items from the food carts approved by the challenged decision were too extensive to qualify as "sales of retail incidental items."

> "The challenged decision approves food carts at up to 24 events per year and imposes no limits on those food carts or on the number of food carts that may be employed at the special events. Such a broad unlimited authorization of food carts at Bella's farm stand cannot be characterized as 'sales of retail incidental items'

[2] In another part of our original decision that was affirmed by the Court of Appeals, we remanded the county's decision in part for the hearings officer to determine whether an existing corn maze structure and existing tents qualify as structures that are "designed and used for sale of farm crops and livestock grown on the farm operation." As a result of the Court of Appeals decision concerning the foot carts, the hearings officer will need to make that same determination regarding the food carts.

and is therefore not permitted under the farm stand rule." Slip op 33.

The Court of Appeals agreed that the county must establish that "the extent of the types of food items sold at the allowed food carts would [not] be more than 'incidental'" but concluded that the number of food carts and the volume of sales at those food carts is not relevant in considering whether food cart sales are properly viewed as incidental.

> "We agree in part with the county. As noted, food carts are 'structures' under the statute and are to be designed and used for the sale of farm crops, and can additionally be used for 'the sale of retail incidental items.' ORS 215.283(1)(o)(A). 'Incidental' in the statute modifies 'items.' LUBA erred to whatever extent it implied that 'incidental' particularly limited the amount of the sales of incidental items.[3] That limitation, as the county observes, is set out in the 25 percent rule. The plain meaning of 'incidental' is 'subordinate, nonessential, or attendant in position or significance: as * * * occurring as a minor concomitant < allowing a few dollars extra for expenses >.' *Webster's* at 1142. 'Incidental items' would mean a few items among many others. 'Incidental' in the farm stand statute, then, limits the number of the types of nonfarm crops or livestock items sold at the farm stand. LUBA correctly remanded the food carts allowance to the county to determine if the extent of the types of food items sold at the allowed food carts would be more than 'incidental.'" 259 Or App at 711 (footnote omitted).

Greenfield's sixth assignment of error is sustained. On remand the county must first determine whether the proposed food carts qualify as

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[3] Later in its decision the Court of Appeals seems to say that LUBA's error was in suggesting that, to be incidental, the number of food carts must be limited: "If the food carts do [qualify as structures that are designed and used for sale of farm crops and livestock], LUBA erred in limiting the number of food carts used at Bella's farm stand (as opposed to the extent of the items sold at the food carts)." 259 Or App at 715.

structures that are "designed and used for sale of farm crops and livestock." If they are, then the county must also determine whether "the extent of the types of food items sold at the allowed food carts would be more than 'incidental.'"

The county's decision is remanded.