BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THERESA KAIMANU,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

SUNNY HILLS PRESCHOOL
and MILLIE ALVAREZ,
Intervenors-Respondents.

LUBA No. 2014-035

FINAL OPINION
AND ORDER

Appeal from Washington County.

David C. Noren, Hillsboro, filed the petition for review and argued on behalf of petitioner.

Jacquilyn Saito-Moore, Senior Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

William C. Cox, Portland, filed a response brief and argued on behalf of intervenors-respondents.

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

RYAN, Board Chair, did not participate in the decision.

REMANDED 09/16/2014

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision that grants special use and development review approval for a preschool.

FACTS

The subject 0.2 acre property is located at the northwest corner of SW 80th Avenue (a north/south collector street) and SW Chestnut Street (an east/west local street). The property is zoned Neighborhood Commercial (NC) which allows nursery schools through the county's Type II procedure.[1] At least part of the existing building on the subject property was constructed in 1940, before county zoning was first applied to the property.[2] The existing building on the property is set back 20 feet west from SW 80th Avenue, which complies with the 20-foot setback that applies under current county zoning to all structures in the NC zone. Washington County Community Development Code (CDC) 311-6.2.[3] However, the structure is setback only 15 feet from the property to the north. The west side of the structure varies in distance from the

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[1] The county's Type II procedure requires notice and an opportunity to comment followed by a decision by the planning director, which may be appealed to the county hearings officer. Washington County Community Development Code 202-2.3.

[2] The challenged decision states there have been additions to that initial building that were constructed in subsequent years. The challenged decision does not identify whether those additions were constructed after zoning applied to the property or whether those additions complied with any zoning that may have applied at the time of the addition.

[3] The hearings officer found that in the circumstances presented in this case, CDC 311-6.2 requires 20-foot setbacks for front, rear and side yards. Record 18. No party disputes that interpretation and application of CDC 311-6.2.

west property line, with part of the structure set back over 30 feet from the adjoining property to the west and a part of the structure set back 11.5 feet from the property to the west. The structure adjoins the SW Chestnut Street right of way and therefore intrudes 100 percent into the required 20-foot setback on that side.

The structure on the property has been used over the years as a store, gas station, barber shop and real estate appraisal office. Record 122-23. In 2013 the structure was put to use as a preschool, without first securing the required special use permit. The challenged permit was issued by the county to authorize the disputed preschool.

INTRODUCTION

A recurring issue in this appeal is the hearings officer's assumption that the structure on the subject property qualifies as a nonconforming structure under CDC Chapter 440. Simply stated, a nonconforming structure is one that either predated the CDC or complied with any then-existing CDC requirements at the time of construction of the structure or at the time of any subsequent modifications to the structure, but does not comply with current setbacks or other requirements that would apply to the structure if constructed today. Under CDC Chapter 440, if the disputed structure qualifies as a nonconforming structure, it may be protected and perhaps may be altered, notwithstanding that the existing structure does not comply with current CDC requirements.

Petitioner challenges the hearings officer's findings regarding the nonconforming structure. Intervenors-respondents contend petitioner waived its nonconforming structure arguments by failing to raise them below.

With one possible exception that is discussed below, it does not appear to be disputed that the first time the CDC Section 440 regulations concerning

nonconforming uses and structures were cited or relied upon was in the hearings officer's written decision following the close of the hearing in this matter. At that time, petitioner had no opportunity to raise any issue concerning whether the existing structure qualifies as a nonconforming structure under CDC Section 440 or meets statutory and CDC requirements to alter a nonconforming structure. None of the notices that preceded the hearing in this matter stated that the structure qualifies as a nonconforming structure or listed the CDC Section 440 nonconforming structure and use restrictions as applicable criteria. Record 320; 327. Neither did the planning staff report that recommended denial of the application take the position that the subject structure is a nonconforming structure or that the proposed school could be approved as an alteration of a nonconforming structure or use. Record 246-75.[4]

ORS 197.835 establishes LUBA's scope of review and generally limits LUBA's review to "[i]ssues * * * raised by any participant before the local hearings body * * *." ORS 197.835(3). However, ORS 197.835(4)(a) allows a petitioner at LUBA to raise issues that were not raised below where "[t]he local government failed to list the applicable criteria for a decision under ORS * * * 197.763(3)(b), in which case a petitioner may raise new issues based upon

[4] In addressing whether the proposal complies with the CDC 311-6.2 20-foot setback requirements, the planning staff did state that it is "likely that the existing setbacks are legally nonconforming to the dimensional standards of the NC District." Record 255. However, the planning staff ultimately recommended that the hearings officer deny the application because planning staff concluded the proposal does not comply with other CDC requirements, including the CDC 430-121.4 30-foot setback requirement for schools, the CDC Section 413 parking and loading requirements for schools, and the CDC 411 Screening and Buffering requirements. Record 275.

applicable criteria that were omitted from the notice."[5] That is the case here. The hearing officer relied on CDC Section 440 in (1) assuming that the disputed building qualifies as a nonconforming structure and approving the disputed permit in part based on that assumption, and (2) concluding the proposal satisfies the statutory and CDC requirements for altering a nonconforming use or structure. Petitioner is entitled to raise issues about the hearings officer's reliance on the CDC Section 440 nonconforming use regulations.

Intervenors-respondents point out that the pre-hearing notices do refer to CDC "Article IV, Development Standards." Record 320; 327. Intervenors-respondents argue that reference is sufficient to provide notice to petitioner that the county might rely on the CDC Section 440 nonconforming use criteria and therefore complies with ORS 197.763(3)(b). *See* n 5.

We reject the argument. CDC Article IV includes 373 single-spaced pages of land use regulations that are broken down into 44 sections that address everything from "Transit Oriented Design Principles, Standards and Guidelines" to "Special Use Standards" for over one hundred separately listed uses, including "adult book stores," "auto wrecking yards," and "schools." CDC 430-3; 430-15, 430-121, 431. The general reference in those notices to CDC Article IV is not sufficient to provide notice that the eight pages of nonconforming structure and use regulations at CDC Section 440 would be applied in this case as approval criteria. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242, 248 (2005) (general reference to comprehensive plan insufficient

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[5] ORS 197.763(3)(b) requires that a notice of quasi-judicial land use hearing must "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

to comply with ORS 197.763(3)(b)); *Herman v. City of Lincoln City*, 36 Or LUBA 521, 531 (1999) (reference to unspecified portion of comprehensive plan inadequate); *ONRC v. City of Oregon City*, 29 Or LUBA 90, 97-98 (1995) (listing entire zoning ordinance in notice of hearing is inadequate notice under ORS 197.763(3)(b)).

Before turning to the parties' arguments, it is worth noting that the nonconforming use/structure issue has been rendered more complicated in this appeal than it probably needs to be. As far as we can tell, the prior *uses* of the property and the proposed *use* of the property are all permissible *uses* of NC zoned property. Simply stated none of the prior uses of the property was nonconforming and the proposed use of the property is not nonconforming. It is the *structure* on the property that now violates current setbacks but either was constructed or modified before the CDC setbacks were adopted or was constructed in compliance with prior CDC setbacks (in which case it is a nonconforming structure), or was constructed in violation of required setbacks. We understand respondent and intervenors-respondents to take the position that the structure is a nonconforming structure and the use is merely being changed from one permissible use to another permissible use. We understand petitioner to contend that the county erred in assuming the structure is a nonconforming structure and erred further in relying on its assumed status as a nonconforming structure regarding certain CDC setback requirements to excuse the proposal's inconsistency with other CDC requirements.

FIRST ASSIGNMENT OF ERROR

In her first assignment of error petitioner contends the hearings officer erred by approving the requested special use permit, notwithstanding that the

proposed school will not comply with the CDC special minimum setback requirement for schools and the CDC parking requirements for schools.[6]

A. The Special 30-foot Minimum Setback For Schools

The CDC is an extremely complicated set of overlapping land use regulations. In addition to the regulations that are set out in CDC Section 311 that apply generally within the NC zone, the CDC imposes "Special Use Standards" that apply specifically to separately listed uses, no matter what zoning district the listed uses may be located in. As we have already noted the NC zone generally imposes a 20-foot setback on structures in the NC zone, which the existing structure does not fully comply with. CDC 311-6.2. That problem aside, petitioner contends that because the property has never been legally used for a school before, to now approve a school use for the structure means the proposed school must comply with the CDC's special setback requirement for schools.

CDC 430-121.4 applies specifically to schools, including nursery schools, and provides that "[t]he minimum setback for all yards shall be thirty (30) feet." The structure that would house the approved school does not fully comply with the CDC 430-121.4 30-foot setback requirement. In approving the permit notwithstanding the resulting violation of the CDC 430-121.4 30-foot setback requirement, the hearings officer explained:

> "* * * The Structure was constructed in 1940 and subsequently modified over time. The Hearings Officer finds that the existing

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[6] In her first assignment of error, petitioner also challenges the hearings officer's findings concerning screening and buffering requirements and street improvement requirements. We address those aspects of the hearings officer's decision later under other assignments of error.

> setbacks are legally nonconforming to the dimensional standards of the NC district.[7] The structure would further be subject to the setback requirements of Section 430-121, addressed below, but for the nonconformity." Record 18.
>
> "[CDC] 430-121.4 states that the minimum setback for all yards is required to be thirty (30) feet. The existing structure currently maintains the following setbacks: 15 feet from the north; 20 feet from the east; 0 feet from the south; and 11 feet, 6 inches from the west (for a small portion of the structure). No expansion or other exterior remodeling of the structure is proposed at this time, except for internal tenant improvements.
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> "There are no opportunities to provide 30 foot setbacks for the structure, in particular from the west or north as these adjoining properties are developed with residential uses. The other two yards are street yards (street side and front). The nonconforming setbacks were preexisting deficiencies that cannot be mitigated. As found above, these limitations are nonconforming and are allowed to continue." Record 26-27.

The hearings officer's reasoning is a non sequitur. Assuming the structure on the property is a nonconforming structure, if that structure had been in use as a school when the CDC 430-121.4 30-foot setback requirement was first adopted for schools, the hearings officer's nonconforming use/structure analysis likely would have merit. But in this case the structure has never been used as a school in the past. It is the applicants' current desire to convert the prior use of the structure (an office) to the proposed use (a school) that implicates the CDC 430-121.4 30-foot setback requirement for the first time. The hearings officer apparently found that, because the prior office use was located in a structure that is nonconforming regarding the general CDC

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[7] This is presumably a reference to the CDC 311-6.2 20-foot setback requirement in the NC zone.

311-6.2 20-foot setback, that nonconformity can be relied to convert the use of the structure to a school notwithstanding the CDC 430-121.4 30-foot setback requirement that applies to schools. Even if we assume the existing structure is entitled to nonconforming structure status regarding the CDC 311-6.2 20-foot setback, we do not agree that the existing structure's protection as a nonconforming structure regarding the CDC 311-6.2 20-foot setback can also be relied on to obviate the CDC 430-121.4 30-foot setback requirement, which only now applies to the property as a result of the desired conversion to a school. The CDC 311-6.2 20-foot setback applies generally to all *structures* in the NC zone; the CDC 430-121.4 30-foot setback applies to a particular *use* (schools). If the existing structure is to be converted to a school, notwithstanding the CDC 430-121.4 30-foot setback requirement, some other legal basis for doing so (perhaps a variance) will be required.[8] Under the hearings officer's reasoning, if the structure on the property enjoys nonconforming use status regarding one requirement (the CDC 311-6.2 20-foot setback) that status gives a change in use a right to violate CDC limits on new uses that have never been applied to the property because the property has not previously been put to those uses. That is an erroneous interpretation of the CDC Section 440 and ORS 215.130(5)-(11) protections granted nonconforming structures and uses.

[8] The county's variance criteria are set out at CDC 435-4, and we do not mean to suggest that we believe a variance necessarily could be granted under the criteria that govern variance approval, in the circumstances presented in this appeal.

B. Parking

CDC 413-7.2(H)(1) sets out off-street parking requirements for pre-schools and requires "[t]wo spaces plus one (1) for each employee." The proposed school is to have six employees, making the required number of off-street parking spaces eight. The applicant proposes to provide five parking spaces, which is three short of the number of spaces required by CDC 413-7.2(H)(1). The hearings officer found the proposal should be excused from the CDC 413-7.2(H)(1) off-street parking requirement because the existing structure is nonconforming:

> "* * * A minimum of 8 off-street parking spaces are required by this standard. The Hearings Officer finds the nonconforming nature of this structure limits the options for parking on-site, and that the standard should not be applied." Record 23.

As was the case with the CDC 430-121.4 30-foot setback for schools, the CDC 413-7.2(H)(1) off-street parking requirement for schools applies here only because the applicants propose to convert the prior office use to a school use. The fact that the existing structure may be nonconforming and may present insurmountable problems in providing the required eight parking spaces does not obviate the CDC 413-7.2(H)(1) requirement for eight off-street parking spaces. The applicants will either need to locate a different site that can provide the required eight parking spaces or seek a variance to the CDC 413-7.2(H)(1) requirement for eight off-street parking spaces under CDC 435 to use the existing structure without providing the eight off-street parking spaces required by CDC 413-7.2(H)(1). Even if the existing structure qualifies as a nonconforming structure with regard to the CDC 311-6.2 20-foot setback requirement, that does not entitle the applicants to site a school in the structure in violation of other CDC requirements that apply to schools.

The first assignment of error is sustained. If the applicants wish to site a school in the existing structure on the subject property, they will need to seek a variance to the CDC 430-121.4 30-foot setback for schools and the CDC 413-7.2(H)(1) requirement for eight off-street parking spaces for schools with six employees. Even if the existing structure qualifies as a nonconforming use with regard to the CDC 311-6.2 20-foot setback requirement, that does not excuse the applicants from new CDC requirements that apply by reason of the requested conversion from an office use to a school use.[9]

Finally, it is not at all clear whether petitioner takes the position in her first assignment of error that the county also should have denied the proposal because it does not satisfy the CDC 311-6.2 general 20-foot setback requirements. To the extent the first assignment of error can be read to make that argument, we reject that argument for two reasons. First, petitioner did not raise that issue below and therefore the issue was not preserved for LUBA review. Second, the argument is at most suggested in the first assignment of error and insufficiently developed to merit review.

The first assignment of error is sustained.

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[9] To be clear, we do not mean to foreclose other options for avoiding the CDC 430-121.4 30-foot setback for schools and the CDC 413-7.2(H)(1) requirement for eight off-street parking spaces for schools that may exist somewhere in the CDC that have not been called to our attention. We only decide here that the applicants and the county cannot rely on the existing structure's status as a nonconforming use vis-a-vis the CDC 311-6.2 20-foot setback requirement, assuming that is the case, to avoid the CDC's school-specific setback and parking requirements.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner alleges the hearings officer erred in applying CDC 440-6.2(B)(1), which requires the hearings officer to find that a "change [in] a lawful nonconforming use" "will have no greater adverse impact on the neighborhood."

A. Does the ORS 215.130(9) And CDC 440-6.2(B) No Greater Adverse Impact to the Neighborhood Standard Apply in this Case?

Initially we question whether a change from one authorized (conforming) use in the NC zone (office use) to another authorized (conforming) use in the NC zone (school use) must be treated as a change in a nonconforming use that is subject to the ORS 215.130(9) and CDC 440-6.2(B) no greater adverse impact standard.[10] As noted earlier, it is only the existing structure on the subject property that is, at least in part, nonconforming. ORS 215.130(5) through (10) is not clear regarding how to address changes from one permitted *use* to another permitted *use* in a nonconforming *structure*, where the structure is not otherwise changed. In *Nielsen v. City of Gresham*, 66 Or LUBA 24, 30-31 (2012), the city's regulations concerning nonconforming uses distinguished between nonconforming uses and nonconforming structures. We agreed with the city in *Nielsen* that the applicant's proposal to replace one permitted use with another permitted use in a nonconforming structure, without making any

[10] ORS 215.130(9) authorizes "alteration" of nonconforming uses which the statute defines as "[a] change in the use of no greater adverse impact to the neighborhood[.]" CDC 440-6.2(B) also authorizes "alteration to change or expand a lawful nonconforming use" provided "[t]he alteration will have no greater adverse impact on the neighborhood[.]"

changes in the nonconforming structure, did not require the applicant to bring the nonconforming structure into compliance with existing buffer requirements.

The hearings officer in the present case found that the CDC treats nonconforming uses and nonconforming structures as nonconforming uses:

> "Both state and local law affecting counties, in this case the CDC, treat nonconformity of *structures* and *uses* as one and the same, making no distinction in terms of how changes to either should be treated as compared to the other. CDC 106-141 defines 'nonconforming use' combining both use and structure. CDC 106-13 defines 'alteration to include 'change in use of a structure.' This application clearly presents an 'alteration' in that it is a proposed change in use of a nonconforming structure. As such, the Hearings Officer concludes that ORS 215.130(9) applies, requiring application of the 'no greater adverse impact to the neighborhood' standard. That standard is incorporated into the CDC, at 440-6.2.B." Record 27-28 (emphasis in original).

The hearings officer is correct that the CDC 106-141 definition of "nonconforming use" appears to define "nonconforming use" to encompass both nonconforming uses and nonconforming structures.[11] However, that may be attributable more to careless code drafting than an intent to define nonconforming uses to include nonconforming structures. Although the CDC 106-13 definition of "alteration" does include both structural and use alteration, it does not state that alterations of structures are the same thing as alterations of uses.[12] Rather the definition simply makes it clear that both uses and structures

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[11] CDC 106-141 provides: "Nonconforming Use A *structure or use of land* which does not conform to the provisions of this Code or Comprehensive Plan lawfully in existence on the effective date of enactment or amendment of this Code or Comprehensive Plan." (Italics added; underlining in original.)

[12] CDC 106-13 provides: "Alteration A change or modification in use of a structure or a parcel of land; or addition or modification in construction of a

may be altered. More importantly, CDC 106-13 specifically references CDC Section 440 as governing alterations of "nonconforming uses and structures." CDC 440-6 provides:

> "Alterations to a nonconforming use or structure are permitted through a Type I or II procedure. Alteration includes a change in nonconforming use of a structure or parcel of land; or replacement, addition or modification in construction to a structure."

The first sentence quoted above distinguishes between nonconforming use and nonconforming structure. The first clause of second sentence provides that alterations include changes in "*nonconforming* use of a structure." The first clause of the second sentence does not define changes in *conforming* uses as an alteration to a nonconforming use. Just as importantly, CDC 440-6 is broken down into a number of subsections that apply to alterations of nonconforming uses and to alterations of nonconforming structures. None of those subsections appear to apply to changes from one conforming use to another conforming use in a nonconforming structure that is not to be changed. In fact the subsection that the hearings officer ultimately applied here, CDC 440-6.2(B), applies to "[a]n alteration to change or expand a lawful nonconforming use, or to change, repair or remodel a structure *associated with a lawful nonconforming use* * * *." (Emphasis added.)

Our review of CDC 106-13; CDC 106-141 and CDC 440-6 suggests that while a change or alteration of a nonconforming use and a change or alteration of a nonconforming structure are subject to the "no greater adverse impact standard" a change from one conforming use to another conforming use in a

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structure. Alterations to nonconforming uses or structures are governed by Section 440." (Underlining in original.)

nonconforming structure that otherwise remains unchanged may not be subject to the "no greater adverse impact standard." However, no party to this appeal assigns error to the hearings officer's conclusion that changing the use of the subject structure from an office use to a school use requires application of the ORS 215.130(9)(a) and CDC 440-6.2(B)(1) "no greater adverse impact to the neighborhood" standard.[13] We therefore do not consider that question further, but neither do we preclude the hearings officer from considering that question on remand if the question arises.

B. The No Greater Adverse Impact to the Neighborhood Standard

CDC 440-6.2(B)(1)(a) requires that alteration of a nonconforming use or structure must have "no greater adverse impact to the neighborhood". Our discussion below of the "no greater adverse impact to the neighborhood" assumes without deciding that changing a conforming use to another conforming use in a nonconforming structure, without altering the nonconforming structure, must be viewed as an alteration of a nonconforming use under CDC 440-6.2(B)(1)(a).

Although CDC 440-6.2(B)(1)(a) does not expressly answer what the adverse impact of the altered nonconforming use must be compared to, it is clear that CDC 440-6.2(B)(1)(a) requires a comparison of the adverse impact of the altered nonconforming use with the adverse impact of the nonconforming

[13] In its brief, intervenors-respondents argue the hearings officer did not approve "an alteration to a non-conforming structure." Intervenors-Respondents' Brief 11. That may be true, but the hearings office clearly approved an alteration to a nonconforming *use*, whether she was required to do so or not. It is that approval that we understand petitioner to challenge.

use prior to alteration. Petitioner contends the hearings officer erroneously compared the adverse impact of the proposed school to the adverse impact of other uses that are permitted in the NC zone:

> "Within the Neighborhood Commercial zone, the uses that could be allowed on this site include uses that could have significantly greater impacts than the proposed school under CDC Section 311, including drive-in facilities, convenience groceries, personal service establishments, and service stations. On balance, given the strong support from a great number of neighboring property owners and the proposal to provide additional screening and buffering, the Hearings Officer concludes that the proposed use will not have any greater adverse effect on the neighborhood than would other potential uses, and that it is not reasonable to compare the proposed use to the impacts of a vacant facility such as has existed at this location recently." Record 29.

Again, assuming CDC 440-6.2(B)(1)(a) applies in this case, we agree with petitioner that the hearings officer erroneously compared the expected adverse impacts of the proposed school to the adverse impacts that might be expected from other uses that are allowed in the NC zone. The findings do not explain why "all the other uses potentially allowed in the NC zone" is the appropriate focus of the comparison of adverse impacts for purposes of CDC 440-6.2(B)(1)(a), and nothing cited to us in the CDC that supports that view. We do agree with the hearings officer that the appropriate focus of comparison is not the currently vacant structure. It is possible that the appropriate focus of comparison for purposes of CDC 440-6.2(B)(1)(a) is the office use that immediately preceded the current proposal, or perhaps the range of uses that the structure has been employed for since it became a nonconforming structure, or perhaps its first use, or some other subset of uses. However, for present purposes, we agree with petitioners that a comparison of adverse impacts of the

proposed school and all of the potential uses allowed in the NC zone is not consistent with CDC 440-6.2(B)(1)(a).

On remand, if a satisfactory answer can be found to the issues presented under our resolution of the first assignment of error, the hearings officer must then determine whether the CDC 440-6.2(B)(1)(a) "no greater adverse impact to the neighborhood" standard applies in the circumstances presented in this case. If the standard applies, the hearings officer must determine what is the appropriate focus of the comparison of adverse impacts under CDC 440-6.2(B)(1)(a) in the present circumstances.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

ORS 215.130(8) provides that a proposal for verification of a nonconforming use is "subject to the provisions of ORS 215.416." ORS 215.416 in turn requires notice of the applicable approval standard in accordance with ORS 197.763. ORS 215.416(5). As we have already noted, the applicant did not seek verification of a nonconforming use and did not seek approval of an alteration of a nonconforming use. Despite the lack of an application for a verification of a nonconforming use or an application for alteration of a nonconforming use the hearings officer assumed the existing structure qualifies as a nonconforming use and granted approval for an alteration of the nonconforming use. Petitioner argues:

> "* * * Because the hearings officer raised the issue of the applicability of the nonconforming use standards for the first time after the hearing was closed, petitioner had no opportunity to prepare for and present evidence concerning key elements of any decision concerning alteration of a nonconforming use, including the nature and extent of the [existing nonconforming] use, whether it was lawfully established, the extent to which the use may have

> changed (lawfully or unlawfully) since it was first established, and whether the use has been discontinued or abandoned, which would terminate the use pursuant to ORS 215.130(7)(a) and CDC 440-4. Perhaps most important, petitioner was not provided an opportunity to address whether the proposed alteration in use would have a greater adverse impact on the neighborhood tha[n] the lawfully established nonconforming use. * * *" Petition for Review 16.

We agree with petitioner that the county's decision to recognize the existing structure as a legally established nonconforming use and to grant approval for an alteration of that nonconforming use, without giving notice of the CDC criteria that govern such decisions in its notices of hearing, constitutes procedural error that prejudiced petitioner's substantial right to know the decision making criteria so that she could present her position concerning whether the proposal satisfies those criteria. ORS 197.835(9)(a)(B). *See Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) ("Under ORS 197.835[(9)(a)(B)] the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing.") If on remand the hearings officer continues to believe that the CDC standards for evaluating a nonconforming use or structure applies to the proposed development, the hearings officer must provide the parties with notice and an opportunity to address those standards.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

CDC Section 411 sets out screening and buffering requirements. CDC Section 411-1.2 provides that "Screening and Buffering shall apply to all Development permits * * *." As far as we can tell, the hearings officer's

decision in this case was pursuant to a Type II or Type III process and therefore qualifies as a development permit. CDC 106-58.[14]

The screening and buffering type is determined by referring to the matrix at CDC 411-5. Because the subject property is designated NC and the adjacent land use district is R-9 and adjoining properties are "developed" rather than "vacant," the CDC 411-5 matrix appears to require Type 4 screening and buffering. A separate matrix at CDC 411-6 sets out the requirement for Type 4 screening and buffering, including the required "structure" to be included with the screening and buffering. With the minimum 15-foot additional setback, the required structure is denominated "S-3." CDC 411-7 explains that an S-3 structure is a six foot "Wall of Cement Block, Rock, Concrete, Brick, etc."

In her findings the hearings officer initially found that Type 4 screening and buffering should be required. Record 62. For reasons that are not entirely clear, the hearings officer also found that an S-4 structure should be required, rather than an S-3 structure.[15] *Id*.

After the hearings officer's decision was initially issued on March 17, 2014, the applicant raised issues concerning the required Type 4 screening and buffering and S-4 structure directly with the office staff of the hearings officer. According to an affidavit attached to the respondent's brief, the hearings officer then discovered an inconsistency between the Type 4 screening and

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[14] CDC 106-58 provides: "Development Permit The Director's or Hearings Officer's written approval shall be the Development Permit for any Type I, Type II or Type III decisions. * * *"

[15] The only difference between an S-3 structure and an S-4 structure is that the S-3 structure must be six feet tall, whereas an S-4 structure must be eight feet tall.

buffering and S-4 structure discussed in the March 17, 2014 findings and the conditions of approval for that decision, which according to the hearings officer called for an "S-2" structure. Petition for Review App 46.[16]

On March 25, 2014 the hearings office issued a "Revised and Reissued" final order. In the March 25, 2014 final order, the findings explain that Type 3 screening and buffering and an S-2 fence will be required.[17] Record 22. The conditions of approval in the revised and reissued final order also require Type 3 screening and buffering and an S-2 fence.

Most of the parties' arguments under the fourth assignment of error are directed at whether the hearings officer's revised and reissued final order was the product of an impermissible *ex parte* contact by the applicants. We need not and do not decide that question because the hearings officer's decision must be remanded to further address the screening and buffering and required structure issue in any event.

As far as we can tell, the matrix at CDC 411-6 requires Type 4 screening and buffering within a 15 foot setback, in the circumstances presented in this appeal. And the matrix at CDC 411-7 appears to call for an S-3 structure. Again, as far as we can tell, the hearings officer decision to require Type 3 screening and buffering and an S-2 structure appears to be based entirely on the

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[16] As far as we can tell there was no inconsistency in the March 17, 2014 decision. The findings call Type 4 screening and buffering and an S-4 structure and the conditions of approval require the same. Record 62 (findings); 78 (conditions).

[17] As far as we can tell, the Type 3 screening and buffering and S-2 fence was based on the applicants' proposal, which called for Type 3 screening and buffering and an S-2 fence in a 10 foot buffer area.

applicant's proposal. To state the obvious, that the applicant may be proposing something different from what the CDC requires does not by itself justify deviating from what the CDC requires. On remand, the hearings officer must provide a sufficient explanation for requiring Type 3 screening and an S-2 structure when the CDC appears to require Type 4 screening and buffering and an S-3 structure. Assuming the CDC does require Type 4 screening and buffering and an S-3 structure in the circumstances presented in this case, and the hearings officer wishes to allow the applicants to deviate from that requirement, the hearings officer will need to approve a variance after providing required notice of her intent to do so.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

The Metzger – Progress Community Plan includes General Design Elements, one of which imposes the following requirement:

> "14. New development shall dedicate, when determined to be appropriate through the development review process, right-of-way for road extensions and alignments as indicated in Washington County's Transportation Plan and this Community Plan. * * *" Record 12.

The hearings officer found that any requirement that the applicants dedicate additional right of way and make roadway and sidewalk improvements would be subject to the rough proportionality requirement described in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) and the nexus requirement described in *Nollan v. California Coastal Comm'n*, 483 US 825, 835-36, 107 S Ct 3141, 97 L Ed 2d 677 (1987). The hearings officer found that in this case a requirement to dedicate additional right of way and make

roadway and side walk improvements could not be imposed because it would be disproportionate to expected impacts.

> "Despite the potential increase in daily vehicle trips to the site, the Hearings Officer finds that the County did not produce sufficient evidence to support the requested conditions requiring land dedication and street improvements. In order to be lawful, the requirements imposed on a proposed development must be roughly proportional to the impact of the development (the 'Dolan' test), and must directly resolve those impacts (i.e., have a sufficient nexus to the proposed development, the 'Nollan' test). The county's street standards do not in and of themselves form a basis to require the dedication of right of way or the requested improvements. Those improvements may well be of community-wide benefit, or even of local benefit, but it is not appropriate to require one property owner to make those improvements. * * *" Record 13.

Petitioner expresses disagreement with the hearings officer's findings, but provides no focused argument to challenge the hearings officer's findings. Petition for Review 22. Because petitioner does not adequately develop an argument under the fifth assignment of error that is sufficient for review, we do not consider the fifth assignment of error further.

The fifth assignment of error is denied.

The county's decision is remanded.