BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM JOHN KUHN,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

JEFFREY T. DOWELL,
and PATTI J. DOWELL,
Intervenors-Respondents.

LUBA No. 2016-048

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of petitioner.

David Doyle, County Counsel, Bend, filed a joint response brief.

Garrett Chrostek and Sharon R. Smith, Bend, filed a joint response brief. Sharon R. Smith argued on behalf of intervenors-respondents. With them on the brief was Bryant, Lovlien & Jarvis, P.C.

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

AFFIRMED 08/16/2016

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a declaratory ruling issued by the board of county commissioners interpreting a condition of approval from a 1980 cluster development conditional use permit.

FACTS

In 1980, the county approved a conditional use permit for a three-parcel cluster development comprised of two residential parcels and a 33-acre open space parcel. Record 1198-1200. The property is zoned Forest Use and is part of the Tumalo Winter Deer Range, subject to a Wildlife Area Combining Zone overlay and a Landscape Management Combining Zone overlay. In approving the conditional use permit, the county hearings officer placed several conditions of approval on the parcels, including as relevant here:

> "1. The applicant shall receive an approved partition for two residential lots, with the remaining lot to be held in joint ownership prior to the sale of any lots.
>
> "2. Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition." Record 1200.

Notwithstanding Condition 2, the owner of the property, Barton, did not record any written agreement that either established a homeowners association or an assured the maintenance of the common property, prior to selling the parcels to petitioner and intervenors-respondents (intervenors), together with an undivided one-half interest in the jointly owned open space common property.

The county subsequently approved building permits for residences on the two residential lots.

The parties hold very different views about how the common property should be managed, and in the absence of an agreement there have been a series of conflicts and legal proceedings between the parties, including two appeals to LUBA. We understand that the county has recently initiated enforcement actions against the parties, and in that process has taken the position that no further building permits for redevelopment or improvement of the two lots will be approved until Condition 2 is satisfied.

In 2013, intervenors sought a declaratory ruling from the county, requesting an interpretation of Condition 2 as to what constitutes an agreement sufficient to satisfy Condition 2. A hearings officer issued a decision on June 3, 2014, concluding that Condition 2 can be satisfied only by an agreement between the parties. Intervenors appealed the hearings officer's decision to the board of commissioners, but the appeal was suspended to pursue settlement negotiations, which were not successful.

On May 14, 2015, intervenors reactivated the appeal and requested that board of commissioners hear the appeal *de novo*. After a public hearing and open record period, the board of commissioners deliberated and issued their decision on April 13, 2016. As relevant here, the declaratory ruling concluded that Condition 2 can be satisfied in one of three ways: (1) agreement between the parties, subject to county review and approval, (2) execution by both parties

and the county of a Conditions of Approval agreement, attached as Exhibit A to the declaratory ruling, or (3) execution by one party and the county of a Conditions of Approval agreement, attached as Exhibit B to the declaratory ruling. With respect to the third option, the decision explains:

> "[T]he Board finds that the Required Agreement need not be signed by both the Kuhns and the Dowells. * * * As long as one co-owner affirmatively agrees to its obligations, and to cover the obligations of the other property owner should they fail to meet their obligations, the objective of Section 8.06(16)(C)(c) and Condition #2 is satisfied. Accordingly, an agreement between the County and one of the joint owners identifying the owner's obligations for the Open Space Parcel would satisfy Condition of Approval #2 as to that owner." Record 17.

Petitioner appealed the decision to LUBA.

ASSIGNMENT OF ERROR

Petitioner asserts a single assignment of error that includes a number of sub-assignments challenging the board of commissioners' interpretation of Condition 2.

Initially, the parties do not agree on the methodology the county should use in resolving a dispute over the meaning of ambiguous language in a condition of approval. Petitioner argues that the standard method for interpreting ambiguous statutes articulated in *PGE v. BOLI*, 317 Or 606, 611-612, 859 P2d 1143 (1993) (ambiguities in legislation can be resolved through consideration of text, context and legislative history) should govern. In their joint response brief, the county and intervenors (collectively respondents) argue that the methodology for interpreting contracts should apply, citing

Yogman v. Parrot, 325 Or 358, 361, 363, 937 P2d 1019 (1997) (ambiguities in contract language can be resolved through consideration of text, context, and extrinsic evidence).

A condition of land use approval is not a contract because it is not an agreement between two or more parties, and we therefore agree with petitioner that interpreting an ambiguous condition of approval bears a much closer relationship to interpreting ambiguous statutory language than it does to interpreting ambiguous contract language. Conditions of approval do not need the assent of the applicant for land use approval in order for a local government to impose them and to bind the applicant to their terms. Rather, the local government generally has broad authority in its land use regulations to impose conditions of approval. Most conditions of approval, including Condition 2, are intended to ensure compliance with applicable approval criteria, and interpretation of the condition sometimes involves interpretation of the underlying approval criterion. Conversely, extrinsic evidence of the intent of the parties to a contract, an important consideration in interpreting contracts, is not relevant at all to interpreting a condition of approval. We also note that no party takes the position that the different methodologies lead to different results.

As to LUBA's standard of review of the board of commissioners' interpretation of Condition 2, petitioner argues that LUBA owes no deference under ORS 197.829(1) to the commissioners' interpretation of a condition of

approval.[1] Respondents argue that a deferential standard of review is appropriate to the limited extent LUBA reviews any interpretations of county land use regulations that the commissioners made in the course of interpreting Condition 2. We agree with respondents. However, we agree with petitioner that we do not owe any deference under ORS 197.829(1) to the board of county commissioners' interpretation of Condition 2 itself, which was imposed by a county hearings officer rather than the board of county commissioners and does not qualify as a "comprehensive plan" or "land use regulation." *See Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010) (explaining that "one of the fundamental ideas behind applying [deference under] ORS 197.829(1) is that, when a governing body is responsible for enacting an ordinance, it may be assumed to have a better understanding than LUBA or the courts of its intended meaning").

A. Collateral Attack on Prior LUBA Decision

Petitioner first argues that the county's interpretation is a collateral attack on a prior LUBA decision, *Kuhn v. Deschutes County* 62 Or LUBA 165 (2010), *aff'd*, 240 Or App 563 (2011) (*Kuhn II*). In that appeal, petitioner challenged as unnecessary dicta a finding by the board of commissioners that the word "acceptable" as used in Condition 2 means acceptable to the county.

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[1] ORS 197.829(1) requires LUBA to affirm a governing body's interpretation of a comprehensive plan provision or land use regulation, unless the interpretation is inconsistent with the express language, purpose or policy underlying the provision or regulation.

We agreed with petitioner that the interpretation was unnecessary to resolve the particular issue before the county in that decision, but concluded that it was not reversible error for the board of commissioners to express, in dicta, its opinion regarding the meaning of the term "acceptable" in Condition 2. We then commented:

> "The board of county commissioners' interpretation is also obviously correct. *The agreement that is required by Condition 2 will only be entered if it is acceptable to both intervenors and petitioners.* The only other entity that has any direct interest in the agreement is the county. Viewed in this context, the requirement that the agreement be 'acceptable' could only mean it must be acceptable to the county." 62 Or LUBA at 172 (italics added).

Citing to the italicized language of the above-quoted passage, petitioner argues that LUBA conclusively resolved that the two landowners had to be parties to a single agreement. Given LUBA's resolution on that point, petitioner argues that the county cannot now interpret Condition 2 to the effect that an agreement between the county and intervenors is an acceptable means of satisfying Condition 2, as to intervenors. Petitioner characterizes the county's decision both as a "collateral attack" on LUBA's decision in *Kuhn II*, and a resolved matter subject to the doctrine of issue preclusion.

Respondents argue, and we agree, that the above-quoted passage from *Kuhn II* assumed but did not determine that both parties must sign an agreement in a single instrument, in order to fulfill Condition 2. The issue of whether the parties could sign separate instruments with the county to satisfy Condition 2 was not raised in *Kuhn II*, much less litigated and resolved.

Accordingly, the county's interpretation in the present case is not a "collateral attack" on LUBA's holding in *Kuhn II*.

Petitioner's arguments based on the similar concept of issue preclusion are also unavailing. In *Nelson v. Emerald People's Util. Dist.*, 318 Or 99, 862 P2d 1293 (1993), the Oregon Supreme Court specified the five requirements that are necessary for an issue to be precluded in a subsequent proceeding:

> "1. The issue in the two proceedings is identical.* * *
>
> "2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding. * * *
>
> "3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue. * * *
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> "4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding. * * *
>
> "5. The prior proceeding was the type of proceeding to which this court will give preclusive effect. * * *." 318 Or at 104 (case citations omitted).

For the reasons discussed above, petitioner has not established that the first and second *Nelson* factors are met. The issues in the two proceedings were not identical, the issue of what constitutes an "agreement" was not actually litigated, and LUBA's assumption that there would be a single agreement signed by both landowners was not essential to resolving the issue that was before LUBA in *Kuhn II*. Accordingly, petitioner has not shown that the issue is precluded by the prior litigation in *Kuhn II*.

B. The Declaratory Ruling Does Not Contravene the 2002 Circuit Court Order

In 2002, a circuit court issued an order to resolve litigation between the Kuhns and the Dowells, in which the circuit court ordered the defendants, the Dowells, to enter into either a homeowner's association or an agreement regarding maintenance of the common property.[2]

In the decision before us, the board of commissioners concluded that the 2002 judgment did not preclude the county from interpreting Condition 2 to be satisfied by one or both parties entering into agreements with the county to ensure maintenance of the common property, because the 2002 judgment did not identify the necessary parties to the required maintenance agreement. Petitioner challenges that conclusion, arguing that the 2002 judgment implicitly required that the agreement must be between the two parties to the judgment, the Kuhns and the Dowells.

Respondents argue, and we agree, that while the 2002 circuit court decision presumed that the two litigants would jointly enter into an agreement

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[2] The September 24, 2002 judgement provided:

> "On the Plaintiffs' sixth claim for relief for mandatory injunction, the Court orders the Defendants to enter into a homeowner's association or agreement assuring the maintenance of the common property as set forth in the conditions required with respect to the conditional use permit which shall, at a minimum, provide that any property taxes and maintenance costs with regard to the common property shall be shared equally." Record 1275.

to ensure the maintenance of the common property required by Condition 2, the 2002 judgment did not address, resolve, or preclude the possibility that Condition 2 could be satisfied, as far as the *county* is concerned, by other means. The circuit court's order is not in the present record, but the selected portions that petitioner quotes do not expressly state or require that the defendants, the Dowells, must enter into a maintenance agreement with the Kuhns. Even if the circuit court order had language to that effect, petitioner does not explain why the order would constrain *the county's* ability to interpret Condition 2 to the effect that the condition can *also* be satisfied by individual landowner agreements with the county. Accordingly, this argument does not provide a basis for remand or reversal.

C. Interpretation of the Condition of Approval

Next, petitioner challenges the county's interpretation of Condition 2, to the effect that one way the condition can be satisfied is by one or more landowners executing separate Condition of Approval agreements with the county to ensure the maintenance of the open space parcel.

1. Singular v. Plural; County as a Party

Petitioner first argues that Condition 2 refers to "agreement" in the singular, which creates the inference that the intent was to create a single agreement, embodied in a single instrument. Even if the word "agreement" does not preclude multiple instruments such as the option of signing separate Conditions of Approval agreements, petitioner argues that there is no basis to

conclude that the author of Condition 2 intended that the county be one of the two parties to the agreement. Because Condition 2 requires the agreement to be recorded, petitioner argues that Condition 2 contemplated that the agreement must be between two landowners, not between the county and one of the affected landowners.

Respondents respond that an agreement can be comprised of more than one instrument, as evidenced by the common use of integration clauses. Further, respondents argue that there is no reason that Condition 2 must be construed to limit the parties to the "agreement" to the existing property owners, or to preclude the county from being a party to the instruments that make up the agreement.

We generally agree with respondents. The hearings officer who originally imposed Condition 2 in 1980 may have assumed that any agreement would be embodied in a single instrument, but nothing in Condition 2 or anything else cited to us precludes multiple agreements, or a single agreement that consists of multiple instruments, as long as the agreement or agreements are sufficient to ensure the maintenance of the open space parcel. Nor does anything in Condition 2 or elsewhere cited to us limit the parties to an agreement to the two owners of the residential lots. In fact, because Condition 2 required that the HOA or agreement be recorded *prior* to sale of any lots, it is highly unlikely that the hearings officer contemplated that the agreement would be signed by the two future owners of the residential lots, as petitioner argues.

In any case, nothing in Condition 2 expressly precludes the county from being a party to any agreement, or a party to various instruments that comprise an agreement.

2. Agreement Means CC&Rs

Petitioner argues next that because the language of Condition 2 refers to "an acceptable homeowners association or agreement" recorded prior to the sale of the parcels, it must be assumed that the contemplated "agreement" was an alternative to a homeowners association. From that assumption petitioner argues that the agreement was intended to be in the form of Covenants, Conditions and Restrictions (CC&Rs) or a similar recordable agreement binding property owners. According to petitioner, because CC&R's are agreements between existing property owners, and the "agreement" contemplated in the condition requires CC&Rs or something like CC&Rs, the required agreement must include the signatures from all property owners.

Respondents respond, and we agree, that petitioner's argument improperly inserts the term "CC&Rs" into the language of Condition 2. CC&Rs recorded by the original developer prior to sale, which assured maintenance of the common property, almost certainly would suffice to constitute the "agreement" contemplated by Condition 2, and that may well have been what the hearings officer who imposed Condition 2 in 1980 had in mind. However, Condition 2 uses the broader term "agreement," and is not limited to CC&Rs or any similar agreement.

3. Contextual Code Language

Petitioner argues that the code provision that Condition 2 was intended to implement is context for interpreting the condition. Deschutes County Code (DCC) 8.06(16)(C)(c) (1979) provided that all applications for cluster development must be accompanied by "[a] written agreement establishing an acceptable homeowners association assuring the maintenance of the common property in the development." Petitioner argues that because the code required a type of contractual servitude, *i.e.*, a homeowners association, it must follow that the additional language "or agreement" added to Condition 2 by the hearings officer in 1980 must also have contemplated some kind of contractual servitude between landowners. Because only a property owner can enter into a contractual servitude, petitioner argues, the context provided by DCC 8.06(16)(C)(c) (1979) suggests that the agreement contemplated by Condition 2 must be between the existing property owners, and therefore cannot include the county as a party to the agreement.

Petitioner also argues that PL-14 (1979) provides relevant context. PL-14 is an ordinance that created a system for reviewing tentative plat applications where a subdivision review committee would review a plat and make recommendations to a hearings officer, with section 2.050(1) of PL-14 listing a number of factors that the committee would consider in reviewing the application. As petitioner argues, section 2.050(1)(O) mandated consideration of "Agreement or by-laws to provide for management, construction,

maintenance, or other services pertaining to common facilities or elements in the development." Petitioner argues that this language provides contextual support for the argument that "Agreement" means CC&Rs or a similar contractual servitude. Petitioner also cites to PL-14 section 9.010, which provides that "the applicant shall * * * execute and file with the Planning Department an agreement between himself and the County" regarding required improvements, as evidence that the county knows how to draft language that authorizes the county to be a party to an agreement with the applicant.

Respondents argue, and we agree, that petitioner's reliance on the 1979 zoning ordinances as context for Condition 2 does not establish that the board of commissioners misconstrued the condition. As noted, Condition 2 uses the broad term "agreement," and does not restrict the scope of that term to particular types of instruments. Further, Condition 2 required that the agreement be recorded prior to any sale, which means that the hearings officer who imposed the condition almost certainly did not contemplate a *post-sale* agreement of any kind that is executed by the post-sale owners. Petitioner argues that a post-sale agreement signed by the two existing landowners is the *only* way to satisfy Condition 2 under the present circumstances, but the author of Condition 2 almost certainly did not contemplate such a post-sale agreement at all.

The county attempted to interpret Condition 2 to effect its intent and purpose (to ensure the maintenance of the open space parcel) under

circumstances where the lots were sold without first recording the required homeowners' association or an agreement.[3] Under these circumstances, any interpretation of Condition 2, including petitioner's, will require some creative license to achieve the purpose of the condition: to ensure the maintenance of the open space parcel. The county's interpretation seems at least as consistent with the text, context and presumed intent of Condition 2 as does petitioner's contrary interpretation, and further seems far more likely to result in an agreement or agreements that actually achieve the purpose of Condition 2.

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[3]In so doing, the county also seemed to have interpreted DCC 8.06(16)(C)(c) (1979). The county's decision states, in relevant part:

> "* * * The County's concern in adopting Section 8.06(16)(C)(c) [(1979)] and imposing Condition of Approval #2 is to assure that the Open Space Parcel does not fall out of compliance with applicable laws as a result of lack of coordination between the joint property owners. As long as one co-owner affirmatively agrees to its obligations, and to cover the obligations of the other property owner should they fail to meet their obligations, the objective of Section 8.06(16)(C)(c) [1979] and Condition of Approval #2 is satisfied. Accordingly, an agreement between the County and one of the joint owners identifying that owner's obligations for the Open Space Parcel would satisfy Condition of Approval #2 as to that owner." Record 17.

As above noted, the county's interpretation of its land use regulations, including DCC 8.06(16)(C)(c) (1979) must be affirmed under ORS 197.829(1) unless the interpretation is inconsistent with the express language, purpose or underlying policy of the code provision. Petitioner makes no attempt to argue that the county's interpretation of DCC 8.06(16)(C)(c) (1979) is reversible under ORS 197.829(1).

Moreover, it is important to keep in mind that the declaratory ruling did not arise out of some abstract interpretative exercise, but out of the context of the county's enforcement proceedings against petitioner and intervenors. Under the ruling, both petitioner and intervenors can, even in the absence of agreement between themselves, bring to a conclusion the county's enforcement proceeding, and establish compliance with Condition 2, at least as far as the county is concerned, by executing an agreement acceptable to the county undertaking to provide for the maintenance of the open space parcel in the ways specified in Exhibit B attached to the declaratory ruling.[4] The county presumably could have used its enforcement proceedings as the vehicle to offer a similar resolution to the impasse that has bedeviled these parties for the past several decades. The county commissioners essentially used the declaratory ruling process to present the parties with the same options for resolution the

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[4] The county's decision states:

> "The agreements attached as Exhibits A and Exhibits B to this decision satisfy the requirements of this decision and are acceptable to the County. If the agreement in Exhibit A is executed, the County will find that both the Dowells and the Kuhns have satisfied their obligations under Condition of Approval #2 and will dismiss the pending code enforcement action against both the Dowells and the Kuhns. If the agreement in Exhibit B is executed by a property owner and the County, the County will find that the signing property owner has satisfied its obligations under Condition of Approval #2 and will dismiss the pending code enforcement action against that property owner." Record 21 (underlining in original, footnote omitted).

county could have presented as part of the enforcement proceedings. This background informs our conclusion that petitioner has failed to establish that the county misconstrued Condition 2.

The assignment of error is denied.

The decision is affirmed.