BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

JEANNIE MARR,
Intervenor-Respondent.

LUBA No. 2016-106

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos PC.

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

AFFIRMED 05/02/2017

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 county governing body's decision approving a zone change from F-1 (Non-Impacted Forestland) to F-2 (Impacted Forestland).

FACTS

The subject property is tax lot 103, a 19.23-acre parcel that is split-zoned, with roughly half the property zoned F-1 and the other half F-2. The F-2 zone allows a dwelling; the F-1 zone does not. The property is developed with a single-family dwelling that was approved for development entirely on the F-2 zoned portion, but in fact was built some years ago straddling the line between the two zones.

After intervenor-respondent (intervenor) acquired the property, she sought county approval to construct improvements, at which point she discovered that the dwelling straddled the zoning line. At the county's suggestion, intervenor applied for a zone change to remove split-zoning from the property, so that it is entirely zoned F-2.

The hearings officer conducted a hearing on the zone change application on July 7, 2016, at which petitioner requested that the record remain open for one week to submit new evidence or argument. The hearings officer announced that the record would remain open under the following schedule: (1) the first week (until July 14, 2016) for any party to submit new evidence or argument, (2) the second week (until July 21, 2016) for any party to submit responsive

evidence or argument, and (3) the third week (until July 28, 2016) for the applicant to submit final written argument.[1]

At the end of the first 7-day open record period, on July 14, 2016, petitioner submitted new evidence and argument, which was limited to issues raised under Rural Comprehensive Plan (RCP) Goal 4, Policy 15(b). We set out and discuss RCP Goal 4, Policy 15(b) later in this opinion. Intervenor submitted nothing during the first 7-day open record period. At the end of the second week, July 21, 2016, intervenor submitted responses to the new evidence and argument that petitioner submitted during the first open record period. On the same date, July 21, 2016, petitioner submitted responses to the evidence that intervenor had submitted in her application and during the July 7, 2016 hearing. Intervenor objected to petitioner's July 21, 2016 submittal, arguing that the second open record period was limited to responses to any new evidence or issues raised in the first open record period, and was not an opportunity for petitioner to respond to evidence that intervenor submitted

[1] Specifically, the hearings officer announced:

> "Since I don't exactly have any idea what is coming in next week, we do a 1 week, 1 week, final week for rebuttal, is that ok with everybody? So July 14, 21, 28, new materials for both parties within the first week, cross-review and argument for second week, and final argument by the applicant by close of business July 28." July 7, 2016 Hearing, Audio at 19:40-20:17.

prior to or at the July 7, 2016 hearing. The hearings officer agreed with intervenor, and rejected petitioner's July 21, 2016 submittal.[2]

Meanwhile, petitioner objected to intervenor's July 21, 2016 submittal, which under the hearings officer's schedule was limited to responding to petitioner's July 14, 2016 submittal. Petitioner argued that intervenor's July 21, 2016 submittal was not limited to responding to petitioner's July 14, 2016 submittal. The hearings officer agreed with petitioner, but rather than try to sort out which portions of intervenor's July 21, 2016 submittal exceeded the permissible scope of a response, instead held the record open for an additional week to allow petitioner an opportunity to respond, and petitioner did so. Intervenor then submitted her final written argument on August 4, 2016.

On August 11, 2016, the hearings officer issued his decision approving the zone change. Petitioner appealed to the county board of commissioners, requesting that the commissioners make the hearings officer's decision the county's final decision. On August 26, 2016, the hearings officer issued a clarification, re-affirming the decision.

On September 27, 2016, the board of commissioners held a hearing to determine whether to hear the appeal, and voted not to hear the appeal, and to

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[2] The hearings officer clarified in an e-mail to the parties:

> "The intent of the second week of the open record period was to allow parties to respond to the new information placed into the record during the first week of the open record period." Record 206.

affirm and adopt the hearings officer's decision as its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In two sub-assignments of error, petitioner argues that the hearings officer committed procedural error prejudicial to petitioner's substantial rights, in rejecting petitioner's July 21, 2016 submittal, at the end of the second 7-day open record period.

A. ORS 197.763

Petitioner argues that the hearings officer violated ORS 197.763(6) and (7) by limiting the second 7-day open record period to responding to new evidence submitted during the first 7-day open record period.[3]

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[3] ORS 197.763(6) and (7) provide, in relevant part:

> "(6) (a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new

According to petitioner, the hearings officer erred in compressing into the first 7-day open record period two distinct procedural rights protected under ORS 197.763(6): (1) the right to submit *additional* evidence, argument, and testimony, and (2) the right to *respond* to evidence, argument and

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> written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.
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> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
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> "* * * * *
>
> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. * * *
>
> "(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

testimony submitted prior to and during the initial evidentiary hearing. We understand petitioner to contend that where a hearings officer elects to leave the record open under ORS 197.763(6)(c), and also provides a second 7-day period for responses, the statute requires that these two distinct procedural rights be accommodated separately, with one 7-day open record period devoted to submitting new or additional evidence, argument, and testimony, and a second 7-day open record period devoted to submitting responses to the evidence, arguments and testimony raised prior to and during the initial evidentiary hearing. Petitioner argues that its July 21, 2016 submittal, responding to the evidence, arguments and testimony submitted at the initial evidentiary hearing, was timely filed within the above-described framework, and thus the hearings officer erred in rejecting its July 21, 2016 submittal.

Intervenor responds, and we agree, that petitioner improperly construes the requirements of ORS 197.763(6) and (7). Initially, it is worth noting that the statute sets out minimum procedural requirements, and the hearings authority may elect to provide more procedure than the minimum required. In the present case, we understand petitioner to argue that the hearings officer failed to provide the minimum required procedures. We do not understand petitioner to argue that the hearings officer intended to provide additional procedures beyond those required by ORS 197.763.[4]

[4] The hearings officer apparently intended, under the three-week schedule he announced, that the parties would be relieved of the obligation under ORS

Under ORS 197.763(6)(a), a party may request at the initial evidentiary hearing an opportunity to present additional evidence, arguments or testimony regarding the application. If that request is made, the hearings authority must either (1) continue the hearing, subject to ORS 197.763(6)(b), or (2) leave the record open for at least seven days, subject to ORS 197.763(6)(c). Under either option, the continued hearing or open record period provides the parties an opportunity submit any additional evidence, arguments and testimony. The scope of additional evidence, arguments and testimony submitted during the continued hearing or open-record period is unrestricted, so it includes both (1) entirely new evidence, arguments and testimony, as well as (2) responses to evidence, arguments and testimony that were submitted at or prior to the initial hearing. Petitioner apparently understands the statutes to require that the hearings authority must provide two separate submittal opportunities, the first open record period for entirely new evidence, argument and testimony, and a second open record period that is limited to responding to previously submitted evidence, argument and testimony, whether that previously submitted evidence, argument and testimony was presented at or before the initial hearing or during the first open record period. For the reasons explained below, we conclude that petitioner's understanding has no basis in the statute.

197.763(6)(c) of requesting in writing an opportunity to submit responses to new evidence submitted during the first week's open record period.

Under either ORS 197.763(6)(b) or (c), if a party requests in writing an opportunity to respond to new evidence submitted at the continued hearing or during the open record period, respectively, the hearings authority must allow that opportunity. But the potential second open record period under ORS 197.763(6)(c) is expressly limited to responses to new evidence submitted during the continued hearing or during the first open record period, or what the hearings officer referred to as "cross-review." Nothing in the statute requires the hearings authority to expand this second open record period to include responses to evidence, arguments and testimony submitted at or prior to the initial evidentiary hearing. Such responses to that previously submitted evidence, arguments and testimony should be submitted at the continued hearing, under ORS 197.763(6)(b), or during the first open record period, under ORS 197.763(6)(c). Petitioner has not demonstrated that the hearings officer violated any provision of ORS 197.763(6) or (7) in rejecting petitioner's July 21, 2016 submittal.

B. Due Process

As noted, at the end of the first open record period petitioner submitted new evidence, argument and testimony, regarding compliance with RCP Goal 4, Policy 15. At the end of the second open record period, intervenor responded, submitting Exhibits P, Q, R and S, which consist of six sets of documents, but without any accompanying narrative or explanation. Petitioner objected that some of the documents submitted with intervenor's response did

not respond to anything petitioner submitted at the end of the first open record period, *i.e.*, did not concern compliance with RCP Goal 4, Policy 15, but instead appeared to consist of new evidence in support of other components of the application. In an e-mail to the parties, the hearings officer stated that he was sensitive to "due process claims muddying up any appeal[,]" and accordingly allowed petitioner until July 28, 2016, to respond to any new evidence that intervenor included in her response. Record 206. The hearings officer also extended the time for the applicant's final written argument to August 4, 2016. Petitioner took advantage of that opportunity, and submitted responses to new evidence that intervenor included in their July 21, 2016 submittal.

Under this sub-assignment of error, petitioner argues that the hearings officer's "disparate" treatment of petitioner's July 21, 2016 submittal and intervenor's July 21, 2016 submittal violated ORS 197.763(6) and (7) and petitioner's rights to "due process." Petitioner does not dispute that when new evidence is submitted at a time when the record is closed to new evidence, the hearings officer can choose to either (1) reject the new evidence, or (2) allow it, subject to providing other parties a chance to respond. However, petitioner argues that where different parties introduce evidence after the record is closed to new evidence, the hearings officer must apply the same approach to all parties, and cannot reject new evidence offered by one party after the record is

closed to new evidence, while accepting new evidence from another party in the same circumstances.

Intervenor responds that petitioner's arguments based on ORS 197.763(6) and (7), and "due process" are undeveloped and do not provide a basis for reversal or remand. Intervenor also argues that the hearings officer's differential approach in dealing with the two parties' respective violations of ORS 197.763(6) reflect material differences in the circumstances, not the least of which is intervenor's/applicant's ultimate burden to demonstrate compliance with the applicable approval criteria.

We agree with both responses. Petitioner develops no argument based on "due process," other than identifying the different ways the hearings officer responded to improper submittal of new evidence, nor explains why ORS 197.763(6) or (7) compel the hearings officer to treat all violations of those statutes in the same manner. Moreover, the circumstances involved in each party's violation are different. Under the process announced by the hearings officer, responses filed during the second open record period were limited to responses to the other parties' submittals during the first open record period. Intervenor submitted nothing during the first open record period, and thus petitioner was not entitled to submit any response at all during the second open record period, whether it consisted of new evidence or simply argument. Intervenor's July 21, 2016 submittal properly included evidentiary responses to petitioner's submittal during the first open record period, but included evidence

that arguably exceeded the scope of that response. Rather than sort through intervenor's submittal to determine which documents fell outside the proper scope of the response, the hearings officer chose to accept the entire submittal and offer petitioner and other parties an opportunity to respond. That common sense resolution does not violate any authority that petitioner identifies, and we disagree with petitioner that the hearings officer was compelled under these circumstances to accept intervenor's July 21, 2016 submittal only if he also accepts petitioner's July 21, 2016 submittal.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

RCP Goal 4, Policy 15 provides the criteria the county uses to determine whether the F-1 zone (non-impacted forest lands) or the F-2 zone (impacted forest lands) should be applied to land designated Forest in the county's comprehensive plan. Policy 15 provides that a decision to apply the F-1 or F-2 zone shall be based upon consideration of five characteristics of non-impacted forest lands, and four characteristics of impacted forest lands, with the county deciding which zone should apply based on whether the "characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone."[5]

[5] RCP Goal 4, Policy 15 provides:

> "Lands designated within the Rural Comprehensive Plan as forest land shall be zoned Non-Impacted Forest Lands (F-1, RCP) or

Impacted Forest Lands (F-2, RCP). A decision to apply one of the above zones or both of the above zones in a split zone fashion shall be based upon:

"a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

"b. Non-impacted Forest Land Zone (F-l, RCP) Characteristics:

"(1) Predominantly ownerships not developed by residences or non-forest uses.

"(2) Predominantly contiguous, ownerships of 80 acres or larger in size.

"(3) Predominantly ownerships contiguous to other lands utilized for commercial forest or commercial farm uses.

"(4) Accessed by arterial roads or roads intended primarily for forest management.

"(5) Primarily under commercial forest management.

"c. Impacted Forest Land Zone (F-2, RCP) Characteristics:

"(1) Predominantly ownerships developed by residences or non-forest uses

"(2) Predominantly ownerships 80 acres or less in size.

"(3) Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.

The hearings officer found that the subject property did not meet four of the five characteristics of F-1 zoned land, and met all four of the characteristics of F-2 zoned land, for a total "score" of 8-1 in favor of F-2 zoning. Petitioner does not challenge the findings or conclusions regarding eight of the nine characteristics. Instead, petitioner challenges only the findings under F-1 Policy 15(b)(2), which describes a characteristic of F-1 zoned land as being "[p]redominantly contiguous, ownerships of 80 acres or larger in size." The hearings officer's finding under Policy 15(b)(2) is very brief:

> "The property subject to this rezoning request is about 19 acres of contiguous ownership in size. The portion of the subject property that is zoned F-1 is about six acres in size. Neither the subject property, as a whole, or the F-1 zoned portion of the property, meets this characteristic of Non-impacted Forest Lands." Record 43-44.

Thus, the hearings officer appeared to understand the phrase "predominantly contiguous, ownerships" to refer to contiguous lots and parcels in common ownership, located within the area proposed for rezoning, and not to require analysis of lands contiguous to the subject property that are not proposed for rezoning. By contrast, the hearings officer evidently understood other characteristics, at Policy 15(b)(3) and (c)(3), to require analysis of other lands

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> "(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences."

contiguous to the subject property that are not in common ownership, because his findings conduct an analysis of such lands.

On appeal, petitioner argues that the hearings officer failed to give effect to the qualifier "contiguous," as it relates to "ownerships," as those terms are used in Policy 15(b)(2). Petitioner argues that the phrase "[p]redominantly contiguous, ownerships" is ambiguous, not least because it is ungrammatically punctuated,[6] and the county erred in failing to provide an interpretation of what it understands the phrase to mean. We understand petitioner to argue that Policy 15(b)(2) should be interpreted similarly to other characteristics, at Policy 15(b)(3) and (c)(3), which also use the terms "contiguous" and "ownerships" in somewhat different phrasings, to require analysis of lands beyond the subject property.

Intervenor responds initially that the issue raised under this assignment of error was not raised below, and is waived, under ORS 197.763(1). However, we agree with petitioner that issues regarding the proper interpretation of Characteristic 15(2)(b) were sufficiently raised at Record 73-75.

Intervenor next argues that both the hearings officer and the board of commissioners, in their respective findings, cited to Ordinance PA 1236 as providing controlling interpretations of the RCP Goal 4, Policy 15

[6] Intervenor agrees that it is a challenge to "dissect a standard that is so dumbly punctuated." Response Brief 16.

characteristics. The board of commissioners incorporated Ordinance PA 1236 into its decision, by reference. Record 6. With respect to Policy 15(b)(2), Ordinance PA 1236 states in relevant part that "the intent is to look within the land being proposed for rezoning to determine whether or not that land being proposed for rezoning consists of contiguous land owned by the applicant that is 80 acres or larger in size." Record 112 (underlining in original). Intervenor argues that the hearings officer's findings regarding Policy 15(b)(2) are consistent with the interpretations adopted in Ordinance PA 1236.

Petitioner does not challenge the merits of the board of commissioners' interpretation of Policy 15(b)(2) as incorporated from Ordinance PA 1236 and applied in the present case, but instead argues that Ordinance PA 1236 is internally inconsistent, since the findings that actually apply Policy 15(b)(2) to the facts in the quasi-judicial decision before the county in Ordinance PA 1236 *did* consider properties contiguous to the subject property. Record 113-14.

Intervenor responds that any potential error or inconsistency in how the county interpreted and applied Policy 15(b)(2) either in this case or in Ordinance PA 1236 is not a basis to reverse or remand the challenged decision, given the nature of the inquiry posed by Policy 15, which calls for a determination whether the characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone, considering nine factors. Intervenor notes that the hearings officer found eight characteristics in favor of F-2 zoning, and only one

characteristic in favor of F-1 zoning, and petitioner does not challenge any findings regarding other characteristics. Even if Policy 15(b)(2) were interpreted as petitioner appears to prefer, to require consideration of lands contiguous to the subject property, and even if the facts were such that Policy 15(b)(2) unambiguously pointed in favor of F-1 zoning under that interpretation, intervenor argues that the balance would then be seven characteristics in favor of F-2 zoning, and only two in favor of F-1 zoning, changing the ultimate result not at all.

We generally agree with intervenor. Policy 15(b)(2) is certainly ambiguous and in need of interpretation, if not amendment. However, the hearings officer apparently applied an interpretation of Policy 15(b)(2) adopted by the county board of commissioners in Ordinance PA 1236, a decision that the commissioners expressly incorporated into their decision in the present case to express their understanding of the requirements of Policy 15. Petitioner makes no effort to challenge the merits of the board of commissioners' interpretations of Policy 15. Petitioner's argument is primarily framed as an inadequate findings challenge, but the hearings officer's understanding of Policy 15(b)(2) and its application to the present facts is reasonably clear from the findings. We disagree with petitioner that the hearings officer is obliged to adopt additional findings in this decision that resolve all inconsistencies that might arise from application of Ordinance PA 1236 in this case, or that attempt to resolve all ambiguities associated with Policy 15(b)(2).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

RCP Goal 4, Policy 15(c)(3) describes a characteristic of F-2 land to be "[o]wnerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan." *See* n 5. Intervenor understood Policy 15(c)(3) to require evaluation of lands outside the area proposed for rezoning, and evaluated the characteristics of lands within 1000 feet of the subject property. The hearings officer requested that intervenor expand the study area to 2000 feet from the subject property. The hearings officer found that there are only two parcels greater than 80 acres within the study area, and many more parcels smaller than 80 acres or zoned other than F-1. Accordingly, the hearings officer concluded that this characteristic favored F-2 zoning.[7]

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[7] The hearings officer's findings regarding Policy 15(c)(3) state:

> "The Applicant has looked at an area within 1,000 feet of the subject property to define what it means to be 'generally contiguous.' Within this area, there are 12 parcels, several of which are part of a tract. Within this area are 8 tracts, five (63 percent) of which are less than 80 acres in size and contain a dwelling.
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> "Upon the Hearings Official's request, the Applicant enlarged this area to a diameter of 2,000 feet. The larger data area added six parcels zoned F-1, only one of which is larger than 80 acres. Of these six parcels, four were contained in tracts that were smaller

Petitioner argues that the hearings officer's findings regarding Policy 15(c)(3) are not supported by substantial evidence. According to petitioner, the hearings officer's request for additional evidence must have occurred at the July 7, 2016 hearing, and therefore the requested evidence regarding the characteristics of lands within the expanded study area could have entered the record only via intervenor's July 21, 2016 submittal, intervenor's only post-hearing evidentiary submittal. However, petitioner argues that nothing in the July 21, 2016 submittal includes data concerning the characteristics of lands within the expanded study area.

Intervenor responds by citing to maps and other documents at Record 274, 390-91, 394, 403, and 477 that intervenor argues provide the data that the hearings officer relied upon to study the characteristics of lands within the 2,000 foot study area. These documents were apparently submitted prior to or at the July 7, 2016 hearing. The documents appear to provide data regarding

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than 80 acres. The larger area also included 13 parcels zoned E-40, only two of which were larger than 80 acres. The larger analysis area also contained 7 parcels zoned rural residential. In summary, the 2,000-foot analysis area contained 38 parcels. It contains 10 tracts and 8 parcels zoned F-1, 14 (78 percent) of which are less than 80 acres in size.

"* * * [I]t can be seen that within an area 'generally contiguous' to the subject property there are only two tracts or parcels greater than 80 acres in size but perhaps a dozen parcels zoned F-2, RR or EFU. Based upon this statistic, it can be concluded that the application is consistent with this characteristic of Impacted Forest Lands." Record 45-46.

the characteristics of lands in the enlarged study area. Accordingly, petitioner's argument that the record does not include evidence supporting the hearings officer's findings regarding the expanded study area does not provide a basis for reversal or remand.

The third assignment of error is denied.

The county's decision is affirmed.