

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

10/15/18 PM 1:09 LUBA

3
4 HOOD RIVER VALLEY RESIDENTS COMMITTEE,

5 *Petitioner,*

6
7 vs.

8
9 HOOD RIVER COUNTY,

10 *Respondent.*

11
12 LUBA No. 2018-028

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from Hood River County.

18
19 Sean T. Malone, Eugene, filed the petition for review and argued on behalf
20 of petitioner.

21
22 Diana L. McDougale, Hood River, filed the response brief and argued on
23 behalf of respondent. With her on the brief was Annala, Carey, VanKoten &
24 Cleaveland, P.C.

25
26 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board
27 Member, participated in the decision.

28
29 REMANDED

10/15/2018

30
31 You are entitled to judicial review of this Order. Judicial review is
32 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners dismissing its local appeal of a planning director decision approving a conditional use permit.

FACTS

A property owner filed an application for a conditional use permit to operate a short-term rental on a 2.54-acre property zoned exclusive farm use. The county planning director approved the application, and petitioner appealed the planning director’s decision to the planning commission. The planning commission held a hearing and voted to dismiss the appeal on the basis that petitioner had not satisfied the requirements of Hood River Zoning Ordinance (HRZO) 72.45, which we set out and discuss later in this opinion. Petitioner appealed the planning commission’s decision to the board of county commissioners, which held a hearing on the appeal and voted to affirm the planning commission’s decision.

This appeal followed.

ASSIGNMENT OF ERROR

In order to frame the single issue presented in this appeal, we first set out the relevant HRZO provisions that apply to appeals of a decision on a “permit”

1 as defined in ORS 215.402(4).¹ We then set out the relevant statutory
2 requirements for decisions on a permit.

3 HRZO 72.20 requires the planning director to send “Notice” of an
4 application, including a conditional use permit application, to various recipients.²
5 On June 16, 2017, the county sent notice of the application to various parties
6 (Notice). Record 142-43. Petitioner is listed as an addressee on the Notice, but is
7 not listed as a recipient of mailed notice or emailed notice. *Id.* The Notice
8 includes a subheading entitled “Response,” which provides “If you have
9 comments regarding this application, please respond by **5:00 pm., Friday, July**
10 **7, 2017.**” Record 142 (emphasis in original). The Notice does not state any effect
11 or consequence of either providing or failing to provide comments.

¹ ORS 215.402(4) defines “permit” to mean in relevant part “discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.”

² HRZO 72.20 provides:

- “A. Notice shall be sent by mail to all property owners within 250’ of the property which is the subject of the application.
- “B. Notice shall be sent to affected local, state and federal agencies, the cities of Hood River and Cascade Locks, and individuals who request such notice. Persons who request and pay the fee established by the Director shall receive notice.
- “C. Notice shall be placed in a newspaper of general circulation at least 10 days prior to the Director’s final decision.”

1 HRZO 72.45 is entitled “Standing” and provides in part that:

2 “(B) In order to have standing for review under [the HRZO], a
3 party, as defined in subsections 1, 2, 3 and 4 below, must
4 attend a conference or submit written comments to the
5 Director prior to the Director’s final decisions and speak or
6 introduce written comments in opposition to the Director’s
7 ultimate act or decision, unless the party can show to the
8 Planning Commission good cause or reason why a discussion
9 or submittal of information to the Director was not possible.”³
10 (Emphasis added.)

11 Thus, under HRZO 72.45, petitioner is entitled to appeal the planning director’s
12 decision approving the permit only if (1) petitioner “attend[ed] a conference or
13 submit[ted] written comments to the Director prior to the Director’s final
14 decisions and sp[oke] or introduce[d] written comments in opposition to the

³ HRZO 72.45(B) provides in relevant part:

- “1. The Planning Commission shall make all decisions of who shall qualify as a party having standing under this ordinance prior to the time set for final hearing on review.
- “2. A person or persons jointly or severally, adversely affected or aggrieved in fact by an action or ruling of the Director.
- “3. A governmental agency, civic or environmental organization that demonstrates to the Planning Commission that it has a valid interest in the preservation of aesthetic, healthful, or conservational conditions for the welfare of the general public.
- “4. Any other person who demonstrates to the Planning Commission that his legal rights are substantially affected by the Planning Director’s decision.”

1 Director’s ultimate act or decision” and (2) petitioner falls within one or more of
2 the categories of a “party” listed in HRZO 72.45(B) (1)-(4). The planning
3 commission and the board of county commissioners found that petitioner failed
4 to attend a conference or submit written comments in opposition to the
5 application “prior to the Director’s final decision[],” and therefore that petitioner
6 lacked standing to appeal the planning director’s decision.⁴

7 ORS 215.416(3) requires the county to hold at least one public hearing on
8 an application for a permit, unless the county processes the permit application
9 according to the statutory procedures for a decision on an application for an ORS
10 215.402(4) permit that is made without a prior hearing. Those procedures are set
11 out and described in detail at ORS 215.416(11)(a) through (c), relevant portions
12 of which we set out below.

13 ORS 215.416(11)(a) provides in part:

14 “(A) The hearings officer or such other person as the governing
15 body designates may approve or deny an application for a
16 permit without a hearing if the hearings officer or other
17 designated person gives notice of the decision and provides
18 an opportunity for any person who is adversely affected or
19 aggrieved, or who is entitled to notice under paragraph (c) of
20 this subsection, to file an appeal.⁵

⁴ The county does not dispute that petitioner satisfies HCZO 72.45(B)(1)-(4).

⁵ ORS 215.416(11)(c) provides:

“(A) *Notice of a decision* under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record

- 1 “(B) Written notice of the decision shall be mailed to those persons
2 described in paragraph (c) of this subsection.
- 3 “(C) Notice under this subsection shall comply with ORS 197.763
4 (3)(a), (c), (g) and (h) and shall describe the nature of the
5 decision. In addition, the notice shall state that any person
6 who is adversely affected or aggrieved or who is entitled to
7 written notice under paragraph (c) of this subsection may
8 appeal the decision by filing a written appeal in the manner
9 and within the time period provided in the county’s land use
10 regulations. A county may not establish an appeal period that
11 is less than 12 days from the date the written notice of
12 decision required by this subsection was mailed. The notice

of property on the most recent property tax assessment roll where such property is located:

“(i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;

“(ii) Within 250 feet of the property that is the subject of the notice when the subject property is outside an urban growth boundary and not within a farm or forest zone;
or

“(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.

“(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

“(C) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.” (Emphasis added).

1 shall state that the decision will not become final until the
2 period for filing a local appeal has expired. The notice also
3 shall state that a person who is mailed written notice of the
4 decision cannot appeal the decision directly to the Land Use
5 Board of Appeals under ORS 197.830.”

6 In its single assignment of error, petitioner argues that the board of county
7 commissioners erred in dismissing its appeal of the planning director’s decision.
8 Petitioner argues as applied to a “permit” as defined at ORS 15.402(4), HRZO
9 72.45’s limit on the right to appeal a planning director’s decision made without a
10 hearing to a “party” as defined in HRZO 72.45(A) and (B) is inconsistent with
11 ORS 215.416(11)(a). That is so, petitioner argues, because HRZO 72.45 imposes
12 additional requirements for filing an appeal that are not present in ORS
13 215.416(11)(a)(A) and are not authorized by or consistent with the statute.
14 According to petitioner, HRZO 72.45 is inconsistent with the statute because it
15 limits the right of appeal of a permit decision made without a hearing to persons
16 or organizations who attended a conference or provided written comments in
17 opposition to the application prior to the decision, while the statute contains no
18 such limits.

19 We agree with petitioner that the county erred in dismissing petitioner’s
20 appeal of the planning director’s decision. *See Elle Belle Bend, LLC v. City of*
21 *Bend*, 69 Or LUBA 158, 162 (2014) (a local code provision that limits the right
22 to appeal a permit decision made without a hearing to a “party,” defined in the
23 local code as including only those who submitted written comments prior to the
24 administrative decision being made, is inconsistent with the statutory analogs

1 applicable to cities, at ORS 227.175(10)(a)(A) and (C), which allow a person
2 who is “adversely affected or aggrieved” to file an appeal of a decision on a
3 permit made without a hearing). ORS 215.416(11)(a)(A) allows “any person
4 who is adversely affected or aggrieved, or who is entitled to notice under
5 paragraph (c) of this subsection” to appeal a decision made without a hearing.
6 The statute does not make participation prior to a decision, either by attending a
7 conference (that may or may not have occurred), or providing written comments,
8 or in any other manner, a requirement in order to appeal the decision.⁶

9 The county argues that ORS 215.416(11)(a)(C) authorizes it to impose the
10 additional requirements contained in HRZO 72.45, by providing that the county
11 may determine the “manner” in which appeal of a permit decision made without
12 a hearing is filed. The county understands the authority to specify the “manner”
13 in which appeals are filed to include the authority to impose whatever additional
14 standing or other restrictions the county desires, even if such additional
15 restrictions prevent a person who is entitled to file an appeal under the ORS
16 215.416(11)(a)(A) right to file a local appeal.

17 We disagree with the county. As noted above, ORS 215.416(11)(a)(A) is
18 the section of the statute that identifies the two classes of persons who may appeal
19 a decision made without a hearing. Nothing in ORS 215.416(11)(a)(A) suggests

⁶ The county does not take the position that every application includes a conference or otherwise explain its “conference” process.

1 that a county may impose additional restrictions that deny the right of local appeal
2 to persons entitled to a local appeal under that statute. ORS 215.416(11)(a)(C),
3 by contrast, is directed at the contents of the *notice of decision* that is required,
4 pursuant to ORS 215.416(11)(c), to be sent to property owners within a certain
5 distance of the property that is the subject of the decision. The notice of decision
6 must state, consistent with ORS 215.416(11)(a)(A), that “any person who is
7 adversely affected or aggrieved or who is entitled to written notice under
8 paragraph (c) of this subsection may appeal the decision by filing a written appeal
9 in the manner and within the time period provided in the county’s land use
10 regulations.” ORS 215.416(11)(a)(C) reaffirms that the persons entitled to appeal
11 a decision made without a hearing are “adversely affected or aggrieved” persons,
12 and persons “who [are] entitled to notice [of the decision] under [ORS
13 215.416(11)(c).” The county’s reading of the phrase “in the manner” as
14 authorizing the county to impose further restrictions on the two classes of persons
15 entitled under ORS 215.416(11)(a)(A) to appeal a decision made without a
16 hearing is inconsistent with the plain text of ORS 215.416(11)(a)(A) of the
17 statute, and the statute’s structure, because ORS 215.416(11)(a)(C) only sets out
18 the requirements for the notice of a decision. It does not allow the county to place
19 additional restrictions on who can appeal a decision on a permit that is made
20 without a hearing.

21 ORS 215.416(3) requires the county to hold a public hearing that is
22 conducted in conformance with the provisions of ORS 197.763, prior to a

1 decision on an application for a permit. ORS 215.416(11) allows the county to
2 make a decision on a permit without first holding the public hearing that is
3 otherwise required by ORS 215.416(3). But there is a *quid pro quo* where the
4 county chooses to dispense with the prior public hearing: the statute gives to
5 persons who are “adversely affected or aggrieved” by the decision made without
6 a public hearing, or who are entitled to notice of the decision under ORS
7 215.416(11)(c), the right to request that the county conduct the *de novo*
8 evidentiary hearing that, but for ORS 215.416(11), the county was required to
9 provide before approving a permit.

10 Petitioner’s assignment of error is sustained.

11 The county’s decision is remanded.