BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LUIS ELENES, MARLA GIBSON,
and AL DERTINGER
Petitioners,

vs.

12/06/18 PM12:58 LUBA

DESCHUTES COUNTY,
Respondent,

and

THE MAZAMAS FOUNDATION,
Intervenor-Respondent.

LUBA No. 2018-071

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Chelsea J. Glynn, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Ty K. Wyman and Dunn Carney LLP.

D. Adam Smith, Deschutes County Legal Counsel, Bend, filed the response brief and argued on behalf of respondent.

Liz Fancher, Bend, represented intervenor-respondent.

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

ZAMUDIO, Board Member, did not participate in the decision.

1 REMANDED 12/06/2018
2
3 You are entitled to judicial review of this Order. Judicial review is
4 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners' decision approving a conditional use permit (CUP) application for establishment of a bed and breakfast.

MOTION TO INTERVENE

The Mazamas Foundation (intervenor), the applicant below, moves to intervene on the side of the respondent. No party opposes the motion and it is allowed.

REPLY BRIEF

Petitioners filed a reply brief in response to the county's response brief. There is no opposition to the brief and it is allowed.

FACTS

This dispute arises over intervenor's application for a CUP for establishment of a bed and breakfast inn, and an application for a CUP and site plan approval to establish a campground, on a 2.5-acre property located on Multiple Use Agricultural (MUA-10) zoned land in Deschutes County. The property is adjacent to Smith Rock State Park.

Intervenor submitted a single application on April 21, 2017. Record 1651. The application proposed to remove an existing modular dwelling on the property and replace it with a new 2,200 square-foot single-story structure, which includes a kitchen, bathrooms, living area, and four bedrooms: one for a

1 caretaker and three guest rooms for a maximum of eight guests. In response to
2 a code provision requiring that the bed and breakfast inn be "owner-occupied,"
3 the applicant stated that the "caretaker, who will be a member of the Mazamas
4 and a Mazamas Foundation staff member, will permanently reside in the single-
5 family house in the caretaker room." Record 1514.

6 The application also proposed a six-space campground, which the board
7 of commissioners ultimately denied. The county processed intervenor's
8 application as two separate applications, assigning each with separate project
9 numbers and application fees. On July 12, 2017, the county issued a Notice of
10 Public Hearing for the intervenor's request for a "Conditional Use Permit and
11 Site Plan Review approval to establish a bed and breakfast inn with three (3)
12 guest bedrooms, a campground with six campsites for up to 12 tents, a 17-space
13 vehicular parking lot, and pedestrian walkways." Record 1474. The hearing
14 took place before the county hearings' officer on August 8, 2017. On October
15 12, 2017, the hearings officer issued a decision approving the permits to
16 establish the bed and breakfast inn and the campground. Among other things,
17 the hearings officer found that the proposed bed and breakfast would be
18 "owner-occupied" because "The Mazamas proposed to occupy the [bed and
19 breakfast inn] with Mazamas staff." Record 1092.

20 Petitioner Marla Gibson appealed the hearings officer's decision to the
21 board of commissioners. On January 17, 2018, intervenor submitted a
22 modification to the application, apparently to address some of the neighbors'

1 objections. The modified application increased the campground setbacks to the
2 south property line, and increased screening at all property lines. Record 455-
3 57.

4 On January 25, 2018, the county issued a notice of a public hearing
5 before the county board of commissioners, to be conducted as a *de novo* hearing
6 on the modified application. Record 444. The notice described the proposal as
7 "a request to modify the conditional use permit and site plan review
8 applications to establish a bed and breakfast inn and campground." *Id.* On
9 February 7, 2018, the county board of commissioners held a hearing on the
10 modified application. Among other issues raised before the hearing were
11 challenges to the hearings officer's finding that the proposed structure would be
12 "owner-occupied."[1] Record 769, 961.

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[1] Opponents raised the following issue:

> "According to county records the property is owned by the Mazama Foundation, a non-profit Oregon based corporation. The Mazama Foundation is not an individual owner and it does not have staff, only Directors. The Mazama Foundation benefits and performs functions for the purpose of the Mazamas (mazamasfoundation.org), a separate, non-profit organization with staff. The caretaker of the premises would have no ownership of the property or structure, thus this definition cannot be fulfilled. Additionally, the caretaker would be from the Mazamas, not the Mazama Foundation. The Hearings Officer * * * gives no legal or logical explanation of how this criterion is determined to be satisfied." Record 764, 961.

1 The board of commissioners closed the record on February 28, 2018, and,
2 on June 6, 2018, issued the county's final decision, which upheld the hearings
3 officer's decision approving intervenor's the bed and breakfast use, but
4 overturned the hearings officer's decision approving the campground. Record
5 12. The board of commissioners' decision did not address the issues raised
6 regarding whether the proposed use will be "owner-occupied."

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 In their first assignment of error, petitioners argue that the county
10 committed procedural error in approving a use and development "that differed
11 materially from that described in the relevant notice of public hearing." Petition
12 for Review 7. In essence, petitioners argue that because the county ultimately
13 approved *only* intervenors' application for a bed and breakfast, the public notice
14 issued by the county describing both intervenor's proposals for a bed and
15 breakfast *and* a campground "did not reasonably describe" the county's final
16 decision. *Id.* As legal support for their assignment of procedural error,
17 petitioners cite ORS 197.830(3), which tolls the period to appeal a decision to
18 LUBA in certain circumstances, including where the "local government makes
19 a land use decision that is different from the proposal described in the notice of

1 hearing to such a degree that the notice of the proposed action did not
2 reasonably describe the local government's final actions[.]"[2]

3 The county offers several responses, including that to challenge the
4 alleged procedural error before LUBA, petitioners must establish that they
5 objected to the procedural error below, if there was reasonable opportunity to
6 do so. *Pennock v. City of Bandon*, 72 Or LUBA 379, 398 (2015). The county
7 contends that the possibility of approving the bed and breakfast, but not the
8 campground, was discussed during the hearing before the board of
9 commissioners and petitioners could have raised procedural objections at that
10 point, but failed to do so. Petitioners dispute that they had an opportunity to
11 object to the alleged procedural error, because they could not know until the

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[2] ORS 197.830(3) provides, in full:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

1 county issued its decision that the final decision would approve something
2 different than the proposal that was noticed. We agree with petitioners.
3 However, on the merits, petitioners have failed to demonstrate that the
4 county committed any procedural error. ORS 197.830(3) does not specify a
5 "procedure," the violation of which could be challenged at LUBA. The
6 circumstances set forth in that statute operate only to allow a petitioner a
7 delayed period of time to file an appeal to LUBA. Petitioners filed a timely
8 appeal to LUBA under the standard 21-day deadline set forth in ORS
9 197.830(9), so their appeal is not subject to ORS 197.830(3). Petitioners cite to
10 no statute or local code provision that prohibits the county from approving an
11 application that differs in some respects from the original proposal that was
12 described in the notice of hearing. Finally, even if petitioners had cited some
13 applicable procedure that the county violated, petitioners make no effort to
14 demonstrate that the alleged procedural error prejudiced their substantial rights.
15 ORS 197.835(9)(a)(B) (LUBA shall reverse or remand a decision if the local
16 government failed to follow applicable procedures in a manner that prejudiced
17 the substantial rights of the petitioner).
18 The first assignment of error is denied.
19 **SECOND ASSIGNMENT OF ERROR**
20 In their second assignment of error, petitioners argue that the county
21 committed procedural error in allowing a modification of the application after
22 the close of the record, by approving the bed and breakfast but denying the

1 proposed campground. In support of this argument, petitioners cite to
2 Deschutes County Code (DCC) 22.20.055.A, which provides in relevant part
3 that "[a]n applicant may modify an application at any time during the approval
4 process up until the close of the record, subject to the provisions of DCC
5 22.20.052 and DCC 22.20.055."[3]

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[3] "DCC 22.20.055. Modification of Application.

> "A. An applicant may modify an application at any time during the approval process up until the close of the record, subject to the provisions of DCC 22.20.052 and DCC 22.20.055.
>
> "B. The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. The 150-day time clock for an application, as modified, may be restarted as many times as there are modifications.
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> "C. The Planning Director or Hearings Body may require that the application be re-noticed and additional hearings be held.
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> "D. Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant's submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Planning Director or Hearings Body's determination on whether a submittal constitutes a modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the County on an application."

The county responds, and we agree, that petitioners have failed to identify any procedural error. DCC 22.04.020 and DCC 22.20.055 prohibit an applicant from modifying the application after the close of the record, but do not prohibit the final decision maker from taking action, after the close of the record, to approve something less than the entire application, or imposing conditions of approval or other modifications to the project in order to ensure compliance with applicable standards of approval. Approving one application, but denying a separate application processed concurrently, does not constitute a "modification of application," as contemplated by the DCC.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioners argue for two reasons that the county misconstrued the applicable law in concluding that the proposed bed and breakfast qualifies as a "bed and breakfast inn" that is a conditional use in the MUA zone. DCC 18.128.310.A (discussed below).

A. Single-Family Dwelling and Family

Petitioners first argue that the hearings officer erred in concluding that the proposed use qualifies as a "bed and breakfast inn" as defined at DCC 18.04.030 and related definitions.

DCC 18.04.030 defines a "bed and breakfast inn" as:

> "[A] *single-family dwelling unit* where lodging and meals are provided for compensation, in which no more than three guest rooms are provided for no more than eight guests. A guest shall not

> rent for a time period longer than 30 consecutive days." *Id.* (emphasis added).

"Dwelling, single family" is defined as:

> "[A] detached building containing one dwelling unit and *designed for occupancy by one family only*, not including temporary structures such as tents, teepees, travel trailers and other similar structures." *Id.* (emphasis added).

"Family" is defined as:

> "[A]n individual or two or more persons related by blood, marriage, legal adoption, or legal guardianship living together as one housekeeping unit using a common kitchen and providing meals or lodging to not more than three additional unrelated persons, excluding servants; or a group of not more than five unrelated persons living together as one housekeeping unit using a common kitchen."

Petitioners contend that the approved use of the structure fails to meet the definition of a single-family dwelling and therefore cannot meet the definition of a bed and breakfast, because it is not "designed for occupancy by one family." Instead, petitioners argue, it is designed for occupancy by a caretaker and up to eight non-resident guests. Petitioners contend that the proposed occupancy does not constitute a "family" as defined in DCC 18.04.030. Even if the caretaker is regarded as a single "family" consisting of one individual, petitioners argue that the proposed occupancy is inconsistent with the definition of a "family," because the applicant proposes to provide lodging to more than three additional unrelated persons.

The hearings officer also questioned whether the proposed use qualifies as a "bed and breakfast inn," although for different reasons than argued by

1 petitioners, concluding that several conditions of approval were necessary to
2 distinguish the proposed use from a hotel/motel or a boarding house, neither of
3 which are allowed in the MUA zone.[4] As relevant here, the hearings officer

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[4] The hearings officer's decision states:

> "I think there is a significant issue as to whether the proposed building qualifies as a 'bed and breakfast.' The definition states that 'lodging *and* meals are provided for compensation.' I have seen nothing in the submittal indicating that the facility intends to provide any meals. Perhaps it is implicit; in any event this can be solved by a condition of approval requiring that breakfast be provided to guests of the dwelling.
>
> "Another issue is whether the proposed structure is a single family dwelling unit. The Code defines [quoting DCC definitions of "Dwelling, single family," "Dwelling Unit," and "Family"]. Of course, in reality there are many 'single family' homes that are much larger than what is proposed, with more residents, bedrooms and multiple kitchens, including commercial type kitchens and outdoor kitchens. So in application 'single family dwelling' seems to have little meaning in the context of a bed and breakfast. It appears that a bed and breakfast may have up to 8 overnight guests in addition to the 'family' (*i.e.*, on-site staff residents) and only one kitchen facility.
>
> "The proposal is for no more than three [guest] rooms and eight guests. Unless a meal is provided, it appears more like a 'boarding house' which is a building where 'meals *or* lodging" are provided for compensation for more than four persons. Neither hotels/motels nor boarding houses are allowed in the MUA zone. * * *
>
> "* * * * *

1 found that the caretaker constitutes a "family" for purposes of the DCC
2 definitions, and that the proposed building is designed for occupancy by a
3 single "family," and thus meets the definition of "single family dwelling unit."
4 The board of commissioners adopted no supplemental findings on this point,
5 but adopted by reference the hearings officer's findings.

6 On appeal, petitioners argue that the proposed use involves no "family"
7 as defined in DCC 18.04.030, but rather occupancy by up to nine unrelated
8 persons. Petitioners dispute that the caretaker constitutes a "family." Further,
9 petitioners argue that even if the caretaker is deemed to constitute a "family"
10 the "family" can remain within the confines of the definition only if the
11 caretaker provides meals or lodging to no more than three additional unrelated
12 persons. Because the proposed structure is designed and proposed for
13 occupancy by a caretaker and up to eight unrelated persons, petitioners argue
14 that the proposed structure does not qualify as either a single-family dwelling or
15 a bed and breakfast inn.

16 In its response brief, the county quotes the hearings officer's findings,
17 quoted in the margin, and argues that the hearings officer properly recognized
18 that whether a structure is "*designed* for occupancy by one family only" is a

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> "On balance, I find that the proposal qualifies as a single family residential bed and breakfast inn provided the applicant compiles with the following conditions of approval [listing three conditions]." Record 27 (italics in original).

different question from how a structure is actually occupied and used. However, the county does not respond to petitioners' arguments that the caretaker does not constitute a "family" and the alternative argument that because the structure is designed and proposed to provide lodging for more than three unrelated persons the proposed occupants fall outside the DCC definition of "family."

The hearings officer's conclusion that the caretaker constitutes a "family" is conclusory, expressed in a parenthetical, with no explanation or analysis on that point. *See* n 4. The definition of "family" includes an "individual," so certainly a single individual could constitute a "family" for purposes of approval criteria in which include that defined term. The hearings officer does not address the qualification that a "family" does not include one or more occupants that provide lodging to more than three persons, or the apparent tension with the DCC definition of "bed and breakfast inn," which authorizes up to three guest rooms and up to eight guests. We can think of several ways to harmonize or resolve that apparent tension, but the hearings officer's findings make no attempt to do so, the board of commissioners adopted no supplemental findings on this point, and the response brief offers no assistance. If the findings embody an implicit interpretation of the relevant DCC terms, that interpretation is not adequate for review. ORS 197.829(2).[5]

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[5] ORS 197.829 provides in relevant part:

1 Although ORS 197.829(2) authorizes LUBA in the absence of an
2 interpretation adequate for review to interpret the relevant definitions and code
3 language in the first instance, we conclude below that remand is necessary for
4 the board of commissioners to provide an interpretation of DCC 18.128.310.A,
5 which limits bed and breakfast inns to owner-occupied single-family dwellings.
6 Because the decision must be remanded in any event, it is more appropriate to
7 remand the related issue of whether the proposed structure is designed for
8 occupancy by a single "family" under the relevant code definitions, rather than

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> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [and]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]
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> "* * * * *
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> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

interpret those code provisions in the first instance. *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011).

B. Owner-Occupied Single-Family Residence

DCC 18.128.310.A is one of the conditional use standards applicable in the MUA zone, and provides that bed and breakfast inns "shall be restricted to *owner-occupied* single-family residences." (Emphasis added.)

Petitioners argue that the legal owner of the subject property is the Mazamas Foundation, registered as a domestic non-profit corporation, a different entity from the Mazamas organization itself. Petitioners argue that a caretaker is someone who takes care of a house or land in the absence of the owner, and that caretakers by definition cannot themselves be the "owner." Because the structure is designed and proposed for occupancy by someone other than the "owner," petitioners contend that the proposed use is more akin to a commercial hotel or motel, and cannot be approved as a bed and breakfast inn.

The hearings officer's only findings on this point state that "The Mazamas Foundation owns the subject property. The Mazamas propose to occupy the [bed and breakfast] with Mazamas staff. This criterion [DCC 18.128.310.A] will be met." Record 1092. However, those findings are conclusory and fail to explain the conclusion that occupancy by Mazamas staff of a building owned by the Mazamas Foundation complies with the requirement that the bed and breakfast be an "owner-occupied single family residence[.]"

1 The board of commissioners provided no supplementary findings or
2 interpretations on this point, despite the fact that the issue was raised several
3 times before the board of commissioners.[6] Record 764, 961.

4 In its response brief, the county argues that petitioners' argument would
5 have the logical consequence, if fully accepted, that no absentee owner or
6 corporate owner could possibly obtain approval of a bed and breakfast inn,
7 because absentee owners and corporate owners would necessarily rely on
8 caretakers or employees to occupy and operate the bed and breakfast inn. The
9 county contends that the county's conclusion that occupancy by a caretaker can
10 constitute "owner" occupancy for purposes of DCC 18.128.310.A is supported
11 by the DCC definition of "owner," which provides that "owner" means:

12 > "[t]he owner of real property *or the authorized agent thereof* or the
13 > contract purchaser of real property of record as shown on the last

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[6] Opponents argued to the board of commissioners that:

> "According to county records the property is owned by the Mazamas Foundation, a non-profit Oregon based corporation. The Mazamas Foundation is not an individual owner and it does not have staff, only Directors. The Mazamas Foundation benefits and performs functions for the purpose of the Mazamas (mazamasfoundation.org), a separate, non-profit organization with staff. The caretaker of the premises would have no ownership of the property or structure, thus this definition cannot be fulfilled. Additionally, the caretaker would be from the Mazamas, not the Mazamas Foundation. The Hearings Officer (p.44, 24 7-17-000319-CU) gives no legal or logical explanation of how this criterion is determined to be satisfied." Record 764.

1 available complete tax assessment roll or County Recorder's
2 records." DCC 18.04.030 (emphasis added).

3 According to the county, as long as the property owner authorizes a caretaker to
4 occupy and operate a bed and breakfast inn in a single-family dwelling the
5 county can conclude that the proposed use is an "owner-occupied" single-
6 family dwelling.

7 We agree with the county that the board of commissioners might well be
8 able to adopt a sustainable interpretation of DCC 18.128.310.A, read in context
9 with the definition of "owner," to the effect that a bed and breakfast inn is
10 "owner-occupied" as long as the absentee owner or corporate owner authorizes
11 the caretaker to live there and operate the bed and breakfast. However, that
12 interpretation is not compelled by the definition of "owner" or any other text
13 cited to us. That a property owner can designate an agent to file land use
14 applications or perform similar functions does not necessarily mean that the
15 county intended that the restriction on "owner-occupied" bed and breakfast inns
16 can be satisfied by simply authorizing an agent or employee to occupy the
17 dwelling. Under the interpretation proposed in the county's brief, the DCC
18 18.128.310.A restriction to "owner-occupied" bed and breakfast inns is so
19 easily satisfied that it becomes largely meaningless.

20 Given the absence of reviewable findings and interpretations in the
21 county's decision, the potentially significant consequences of adopting either
22 petitioners' or the county's contrasting interpretations, and our uncertainty over
23 the correct answer regarding what the county intended in restricting bed and

1 breakfast inns to "owner-occupied" dwellings, we conclude that the better
2 course is to remand the decision to the board of commissioners to provide an
3 interpretation of the applicable code language in the first instance. ORS
4 197.829(2) provides that in the absence of a reviewable interpretation LUBA
5 "may" determine whether the decision is correct, implying that LUBA may
6 decide not to exercise that discretion, but instead allow the local government to
7 interpret ambiguous code language in the first instance. *See* n _5. Accordingly,
8 the third assignment of error is sustained.
9 The county's decision is remanded.