06/08/20 PM12:21 LUBA

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 MITCHELL JONES
5 and HAROLD K. LONSDALE,
6 *Petitioners*,
7
8 vs.
9
10 CLACKAMAS COUNTY,
11 *Respondent*,
12
13 and
14
15 WILLAMETTE UNITED FOOTBALL CLUB,
16 *Intervenor-Respondent*.
17
18 LUBA No. 2019-063
19
20 FINAL OPINION
21 AND ORDER
22
23 Appeal from Clackamas County.
24
25 Carrie A. Richter, Portland, filed the petition for review and argued on
26 behalf of petitioners. With her on the brief was Bateman Seidel, P.C.
27
28 Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a
29 response brief. With him on the brief was Stephen L. Madkour.
30
31 Wendie L. Kellington, Lake Oswego, filed a response brief and argued on
32 behalf of intervenor-respondent. With her on the brief was Kellington Law Group
33 PC.
34
35 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
36 Member, participated in the decision.
37
38 REMANDED 06/08/2020

1
2 You are entitled to judicial review of this Order. Judicial review is
3 governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a county planning director decision that a sports facility is a use similar to Recreational Uses and conditionally allowed in the Rural Residential Farm Forest 5 (RRFF-5) zone.

FACTS

On August 25, 2017, intervenor-respondent Willamette United Football Club (intervenor) filed with the county a land use application for a planning director interpretation. Intervenor included with its application a narrative explaining that its application:

> "request[ed] that the Planning Director authorize, as a use similar to those listed under 'Recreational Uses' in Table 316-1, a proposed development by Willamette United Football Club on property located at 1521 Borland Road, West Linn, Oregon. The subject property includes Tax Lots 300, 400, 500, 600 and 700 on Clackamas County Assessor's Map 21E28D. The site is zoned Rural Residential Farm Forest 5-Acre (RRFF-5) and is approximately 21 acres in area." Supplemental Record 61.

Intervenor's application narrative referenced "a proposed development by [intervenor] on property located at 1521 Borland Road," although intervenor's application did not seek approval of development on the property.[1] *Id.* Rather, intervenor sought a determination that the use it described in the application for

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[1] As we discuss in more detail below, the application is signed by Lake Oswego Foursquare Church, the owner of the property identified in the application.

1 an interpretation is similar to Recreational Uses that are conditionally allowed in
2 the RRFF-5 zone, and because it is similar, also potentially approvable as a
3 conditional use in the RRFF-5 zone. As described in intervenor's application, the
4 sports facility uses to be evaluated for similarity with the RRFF-5 Recreational
5 Uses include artificial turf sports fields, basketball and volleyball courts, an
6 indoor training facility for futsal, team rooms, concessions, jogging/walking
7 paths, a playground, a picnic area with a barbeque pit, storage, an operational
8 building for indoor athletic training, classroom space, related offices and an
9 amphitheater.

10 The county sent notice of the pending similar use application to active
11 neighborhood planning organizations whose boundaries include land zoned
12 RRFF-5. The county did not send individualized notice to property owners. On
13 December 13, 2017, the county issued its Notice of Type II Land Use Decision
14 in which the county planning director concluded that certain uses identified by
15 intervenor are similar to one or more Recreational Uses and therefore
16 conditionally allowed on any property zoned RRFF-5 (the Similar Use Decision).
17 The planning director determined that (1) concessions, storage facilities and
18 playgrounds are listed in the Clackamas County Zoning Ordinance (CCZO) as
19 allowed Recreational Uses and therefore conditionally allowed in the RRFF-5
20 zone, (2) artificial turf sports fields, basketball and volleyball courts, an indoor
21 training facility for futsal, jogging/walking path, picnic area with barbeque pit,
22 and amphitheater are similar uses to Recreational Uses and, therefore,

1 conditionally allowed on any property zoned RRFF-5, (3) operational buildings
2 and offices, team rooms and parking are similar uses to Recreational Uses and
3 conditionally allowed only to the extent they are ancillary to other allowed
4 Recreational Uses, and (4) an operational building for classroom space is not a
5 similar use to Recreational Uses.

6 Petitioners own property in the vicinity of the property identified by
7 intervenor in its narrative. The county did not send notice of intervenor's
8 application or the planning director's decision to petitioners. Petitioners learned
9 of the planning director's decision after learning of intervenor's subsequently
10 filed conditional use permit application, and subsequently filed this appeal of the
11 Similar Use Decision.[2] The county approved intervenor's conditional use permit
12 application in the "2019 Willamette United Conditional Use Permit Decision,"
13 which is the subject of a separate pending appeal in LUBA No. 2019-135.[3]

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[2] In an Order dated November 20, 2019, we denied intervenor and the county's motion to dismiss, concluding that this appeal was timely filed. *Jones v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-063, Order, Nov 20, 2019).

[3] In an opinion issued this date in *Jones v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-135, June 8, 2020), we remand the 2019 Willamette United Conditional Use Permit Decision because we conclude that the hearings officer improperly construed the CCZO in determining that he was bound by the Similar Use Determination and was consequently prohibited from independently determining whether the sports facility is a use allowed in the RRFF-5 zone as a similar use.

1 **MOTION TO TAKE EVIDENCE**

2 Petitioners ask that we take as evidence outside the record a 2016 county
3 land use decision described as the "2016 Neighborhood Church Decision."
4 Petition for Review 19 n 12. The county and intervenor (respondents) oppose the
5 motion. If, however, we grant petitioners' motion to take evidence, respondents
6 ask that we also take as evidence the county's 2019 Willamette United
7 Conditional Use Permit Decision (the subject of the appeal in LUBA No. 2019-
8 135). Intervenor's Response Brief 3-4. For the reasons discussed below, both
9 motions are granted.

10 OAR 661-010-0045(1) provides that:

11 "The Board may, upon written motion, take evidence not in the
12 record in the case of disputed factual allegations in the parties' briefs
13 concerning unconstitutionality of the decision, standing, ex parte
14 contacts, actions for the purpose of avoiding the requirements of
15 ORS 215.427 or 227.178, or other procedural irregularities not
16 shown in the record and which, if proved, would warrant reversal or
17 remand of the decision. The Board may also upon motion or at its
18 discretion take evidence to resolve disputes regarding the content of
19 the record, requests for stays, attorney fees, or actual damages under
20 ORS 197.845."

21 A party that moves the board to take evidence outside the record must "explain[]
22 with particularity what facts the moving party seeks to establish, how those facts
23 pertain to the grounds to take evidence * * *, and how those facts will affect the
24 outcome of the review proceeding." OAR 661-010-0045(2)(a). A local
25 government's use of an incorrect review procedure that prejudiced a party's

substantial rights could be a procedural irregularity sufficient to support reversal or remand. ORS 197.835(9)(a)(B).

CCZO 1308.02(E) provides:

> "Filing an application for an interpretation shall be precluded if the specific question raised in the application has already been decided through another land use permit application. A question shall not be deemed to have been decided, if the fact circumstances in the previous land use permit application differ from those presented in the interpretation application."

As discussed below, intervenor asked that the county use its interpretation procedure to determine whether intervenor's proposed use was permittable in the RRFF-5 zone as a similar use. Pursuant to CCZO 1308.02(E), the interpretation process was precluded if the requested interpretation had already been made in another land use application. In their third assignment of error, petitioners argue that the county was prohibited by CCZO 1308.02(E) from considering intervenor's similar use application. If petitioners successfully establish that the requested interpretation had already been made in the 2016 Neighborhood Church Decision, the interpretation procedure that the county used to process the similar use request was inappropriate. Accordingly, petitioners' motion to take as evidence the 2016 Neighborhood Church Decision is related to an alleged procedural irregularity which could warrant reversal or remand of the challenged decision. Petitioners' motion to take evidence is granted.

Respondents rely upon the 2019 Willamette United Conditional Use Decision to establish that the county had not previously decided the specific

question raised in the requested interpretation and, thus, the interpretation review procedure the county used in this case was appropriate. Respondents request that we take as evidence the 2019 Willamette United Conditional Use Decision is granted.

MOTION TO TAKE OFFICIAL NOTICE

Respondents ask that we take judicial notice of the 2017 CCZO, the version that was effective at the time when the similar use application was submitted and decided (2017 CCZO), as well as the current version of the CCZO, as amended in 2018 (2018 CCZO). Consistent with the legislative policy set forth in ORS 197.805, LUBA may take official notice of law subject to judicial notice as defined in ORS 40.090.[4] *Blatt v. City of Portland*, 21 Or LUBA 337, *aff'd*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). Items subject to judicial notice include:

> "An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015." ORS 40.090(7).

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[4] ORS 197.805 provides:

> "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to accomplish these objectives."

1 The 2018 CCZO and the 2017 CCZO are ordinances adopted by a county.[5]
2 LUBA routinely takes official notice of local government comprehensive plans
3 and land use regulations. *McNamara v. Union County*, 28 Or LUBA 722 (1994).
4 No party objects to the Board taking official notice of the CCZO. The motion is
5 granted.

6 **FIRST ASSIGNMENT OF ERROR**

7 CCZO 106.01(C) explains that CCZO Table 316-1 "identif[ies] instances
8 where uses similar to a listed conditional use may be authorized as a conditional
9 use[.]"[6] CCZO 106.02 explains that "An authorization of a similar use requires
10 review as an interpretation pursuant to Section 1308, *Interpretation*[.]"
11 (Emphasis in original.)

12 CCZO 1308.02 in turn provides that "An interpretation requires review
13 through a Type II application pursuant to Section 1307 and Subsection 1308.02.
14 Where the provisions of Section 1308.02 conflict with Section 1307, Subsection
15 1308.02 shall control." CCZO 1308.02(A) provides that only a property owner
16 or property owner representative may request an interpretation of the
17 applicability of a regulation to a specific property. CCZO 1308.02(C) provides

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[5] References in this opinion to the CCZO are to the 2017 version of the CCZO in effect at the time intervenor's application was filed in 2017.

[6] CCZO Table 316-1 states that uses deemed "similar to" Recreational Uses are, like Recreational Uses, allowed in the RRFF-5 zone subject to obtaining a conditional use permit.

1 that notices of applications for interpretations of the CCZO and decisions must
2 be mailed to "all active community planning organizations, hamlets and villages
3 that are recognized by the County, if property to which an interpretation could be
4 applicable lies wholly or partially inside the boundaries of such organization,
5 hamlet or village." The county provided notice of the application (and the Similar
6 Use Decision) to the active community planning organizations (CPOs).

7 CCZO 1308.02(D) provides:

> 8 "Only if an interpretation relates to the applicability of the
> 9 Comprehensive Plan or this Ordinance to a specific property, shall
> 10 mailing of notices, applications and decisions required by Section
> 11 1307 include property owners of record pursuant to Section
> 12 1307.09(A)(1)(b) or 1307.10(A)(3)(b)."

13 CCZO 1307.09(A)(1)(b)(ii) in turn provides that Type II review includes notice
14 to property owners of record within 500 feet of the subject property.

15 In the first assignment of error, petitioners contend that the county
16 committed a procedural error that prejudiced their substantial rights in failing to
17 provide petitioners with notice of the request for the Similar Use Decision in
18 violation of CCZO 1308.02(D), CCZO 1307.09(A)(1)(b)(ii), ORS 215.416 and
19 ORS 197.763. Petitioners argue that the county's failure to provide petitioners
20 with notice of the similar use request and decision deprived them of their right to
21 appeal the director's interpretation and present testimony in a public hearing. *See*
22 *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) ("'substantial rights' of
23 parties that may be prejudiced by failure to observe applicable procedures are the

1 rights to an adequate opportunity to prepare and submit their case and a full and
2 fair hearing").

3 We reject petitioners' argument that they were entitled to notice under
4 ORS 215.416 and ORS 197.763. Those statutes govern procedures related to
5 permits. ORS 215.402(4) provides in relevant part that:

6 "'Permit' means discretionary approval *of a proposed development*
7 *of land* under ORS 215.010 to 215.311, 215.317, 215.327 and
8 215.402 to 215.438 and 215.700 to 215.780 or county legislation or
9 regulation adopted pursuant thereto." (Emphasis added.)

10 The similar use request is not an application for a permit, and the Similar Use
11 Decision is not a permit because no "development of land" is proposed or
12 approved as part of the Similar Use Decision.

13 Petitioners next maintain that they were entitled to notice of the application
14 under CCZO 1308.02(D), because the "interpretation relates to the applicability
15 of the * * * [CCZO] to a specific property[.]" Petitioners argue that nothing in
16 the 2017 CCZO authorized the planning director to expand intervenor's
17 application to apply county-wide and thus the county failed to provide the
18 individualized notice required under CCZO 1307.09(A)(1)(b)(ii). Petitioners also
19 argue that even if the 2017 CCZO provided some authority for allowing the
20 planning director to issue an interpretation that applied county-wide, here, the
21 evidence in the record supports a conclusion that intervenor's application related
22 to a specific piece of property, and therefore the county was required to provide
23 notice under CCZO 1307.09(A)(1)(b)(ii).

1 Respondents argue that CCZO 1308.02(D) "expressly provides that
2 individualized notice of an application only occurs if the interpretation relates to
3 specific property as opposed to applying County-wide." Intervenor's Response
4 Brief 11. Respondents maintain that during the process of considering
5 intervenor's similar use request, the county planning director determined that his
6 interpretation would be applicable to all RRFF-5 zoned properties, and therefore
7 the county properly provided notice of the application only to the CPOs, and not
8 the individualized notice required by CCZO 1307.09(A)(1)(b)(ii). Intervenor also
9 asserts that although it provided property specific information as part of its
10 application, it provided more information than the county required, and the
11 director was free to determine that the requested interpretation was unrelated to
12 a specific property.

13 Intervenor's application form, which, as noted, is signed by the property's
14 owner, states that it is a "Request for authorization of similar use pursuant to
15 [CCZO] Section 106 to establish that a proposed use at 1521 Borland Rd. may
16 be permitted as a recreational use in the RRFF-5 zone." Supplemental Record 60;
17 *see* n 1. Petitioners argue, and we agree, that the fact that the owner of the subject
18 property signed intervenor's application lends support to a conclusion that the
19 application was related to a specific property.

20 Intervenor's narrative also identified the 1521 Borland property.
21 Supplemental Record 61. Intervenor argues that it simply provided the county
22 with more information than the county needed. Petitioners argue, and we agree,

1 that the inclusion of the address lends further support to our conclusion that the
2 application was related to a specific property.

3 Respondents also argue that the Similar Use Decision did not apply to a
4 particular property because the decision did not examine "how those uses might
5 be applied in any development proposal or the characteristics of any individual
6 property or area." Intervenor's Response Brief 15. It is true that a conditional use
7 permit is necessary in order to operate a sports facility on RRFF-5 zoned
8 property, and the *Similar Use Decision* itself does not discuss the subject
9 property. This does not alter the fact, however, that the relevant CCZO provisions
10 require individualized notice of an "application" for interpretation if an
11 interpretation relates to a specific piece of property. The fact that the Similar Use
12 Decision fails to discuss the specific property identified in the application cannot,
13 after the fact, legitimize the county's failure to provide required individualized
14 notice to petitioners. Intervenor's application has a causal connection with the
15 Similar Use Decision; it was the impetus for that decision. The application
16 requested an interpretation related to a specific property. We agree with
17 petitioners that CCZO 1308.02(D) required individualized notice to petitioners.

18 *Lamm v. City of Portland*, 28 Or LUBA 468, 475-76 (1995), cited by
19 respondents, does not require a different result. In *Lamm*, the applicants sought
20 elimination of a condition imposed in a prior conditional use permit approval.
21 Petitioners argued that "the city lack[ed] authority to remove conditions of

1 approval other than the one intervenor specifically requested be eliminated in its
2 development application." *Id.* at 475. We explained in *Lamm* that:

3 "Limitations on a local government's authority over development
4 applications must be specifically expressed in the local code.
5 *Simonson v. Marion County*, 21 Or LUBA 313, 318 (1991). We are
6 cited to nothing in the [local code] which limits the city's ability to
7 approve a proposal to only the specific requests included in a
8 development application, and we are not aware of any such
9 limitation." *Id.*

10 Our discussion in *Lamm* provides that, absent a restriction in the local code, a
11 local government may, in a land use proceeding seeking development approvals,
12 issue development approvals beyond those specifically requested by the
13 applicant. *Lamm* does not stand for the broad principle that a local government
14 may unilaterally expand a land use decision that interprets its local code to apply
15 to properties that are not the subject of the application.[7]

16 Respondents do not argue that petitioners do not own property within the
17 notice area required under CCZO 1308.02(D) and CCZO 1307.09(A)(1)(b)(ii).
18 Intervenor argues that petitioners were not entitled to individual notice and, thus,
19 their substantial rights were not prejudiced. Petitioners argue that if they had been
20 provided notice of intervenor's similar use interpretation request, petitioners
21 would have participated in the local proceeding and argued to the planning

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[7] In fact, we held in *Goodman v. City of Portland*, 19 Or LUBA 289 (1990), cited in *Lamm*, that the local government lacked the authority to impose development restrictions on property that was not subject to the development application before it.

director that intervenor's proposed uses are not similar to the Recreational Uses conditionally allowed in the RRFF-5 zone. We agree with petitioners that remand is required in order to provide them an opportunity to participate in the county's review of intervenor's property-specific application. *See Johnson v. Jackson County*, 59 Or LUBA 94, 99-100 (2009) ("A party's substantial rights under ORS 197.835(9)(a)(B) include an adequate opportunity to prepare and submit a case and a full and fair hearing. * * * The county's decision must be remanded so that it can follow the required Type 2 procedure and provide petitioner the notice and opportunity for a hearing that is required under the [Jackson County Land Development Ordinance].")

The first assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioners argue that CCZO 1308.02(E), quoted and discussed above in our resolution of the Motions to Take Evidence, prohibited the county from making a decision on intervenor's application because, according to petitioners, "the specific questions raised in the application [have] already been decided through another land use permit application." Petition for Review 19.

In 2016, Neighborhood Church Assembly of God (Neighborhood Church) applied for a conditional use permit (CUP) for development of a 26.18-acre property zoned RRFF-5. The hearings officer denied the CUP and explained that:

"The current conditional use application is described by the church

1 as:

2 'Soccer, football, basketball, lacrosse, archery training,
3 general outdoor play, kite flying, balloon launches, concerts,
4 BBQ picnics, car shows, festivals, outdoor movies &
5 crusades, parties, Easter egg hunts, outdoor church services,
6 Harvest parties, seasonal decorations, scout training
7 programs, campouts, cookouts, Tepee campouts, farmers
8 markets, Frisbee golf, fundraisers, tournaments, festivals,
9 Christian & secular ceremonies and other hosted events with
10 complementary groups in the community including schools,
11 churches, sports clubs etc. and other similar religious and
12 non-religious activities.'

13 "The church proposes to construct two artificial turf soccer fields,
14 one with stationary bleachers, an arena field, and a challenge course
15 and court. These fields would be made available to local soccer,
16 football, and lacrosse clubs and organizations for use." Petition for
17 Review, Appendix 61.

18 Neighborhood Church argued that the proposed use was a Recreational
19 Use. Petition for Review, Appendix 63. Opponents argued that the proposed use
20 was not a Recreational Use and could not be allowed absent a determination that
21 it was a similar use. The hearings officer concluded that "The proposed use is not
22 listed as a conditional use in the zoning district in which the subject property is
23 located [RRFF-5]." Petition for Review, Appendix 65. Although the hearings
24 officer opined that "even if the applicant attempted to proceed under the
25 provisions for authorizing similar uses, [the hearings officer thought] the
26 applicant would not succeed." Petition for Review, Appendix 64-65 (footnote
27 omitted). He also recognized, however, that "The applicant [had] made no effort
28 to proceed under [the similar use] provision." Petition for Review, Appendix 65

n 7. The use proposed by Neighborhood Church has some features in common with the use proposed by intervenor but it is not an identical use. Moreover, the specific question of whether intervenor's proposed use is a Similar Use to a Recreational Use in the RRFF-5 zone has not previously been decided because that question was not before the hearings officer in Neighborhood Church. As the hearings officer recognized in the 2016 Neighborhood Church Decision, the staff report "did not particularly address the [similar use] issue as it was not raised until well after the public hearing." Petition for Review, Appendix 63 (footnote omitted). Given that "the specific question raised" in intervenor's similar use application had not already been decided in another proceeding, CCZO 1308.02(E) did not preclude the county's consideration of intervenor's application.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the county's decision that the sports facility described in intervenor's application is allowed as a similar use on all properties in the county that are zoned RRFF-5 is a post acknowledgement plan amendment (PAPA) that failed to comply with the PAPA procedures in ORS 197.610 to 197.625. In sustaining the first assignment of error, we agreed with petitioners that intervenor's application for an interpretation related to the specific piece of property identified in their application materials.

1 Therefore, we disagree with petitioners that the challenged decision was a PAPA
2 that required notice pursuant to ORS 197.610 to 197.625.[8]
3 The second assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 In the fourth assignment of error, petitioners argue that the planning
6 director erred in concluding that the sports facility described in the application is
7 "similar" to a "Recreation Facility," as described in CCZO Table 316-1, and
8 therefore allowed as a similar use in the RRFF-5 zone. We remand the decision
9 to the county to provide petitioners with the notice required by the CCZO, which
10 will provide petitioners with the opportunity, for the first time, to present to the
11 planning director their arguments regarding why the proposed sports facility is
12 not similar to a Recreation Facility. Accordingly, it would be premature for us to
13 address the fourth assignment of error, and we do not address it.
14 The decision is remanded.

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[8] We do not decide here whether a similar use decision that applies to all properties within a particular zoning district is a *de facto* amendment of the CCZO.