BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CLINTON MATTHEWS,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2020-070

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos, Eugene, filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Charles W. Woodward IV, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

ZAMUDIO, Board Member; RUDD, Board Chair, participated in the decision.

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

REMANDED 11/13/2020

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner challenges a county hearings official denial of petitioner's application for modification of a nonfarm dwelling approval to enlarge the home site.

MOTION TO INTERVENE

Landwatch Lane County (intervenor) moves to intervene on the side of respondent. No party opposes the motion and it is allowed.

FACTS

The subject property is zoned Exclusive Farm Use and is vacant. In 2015, the county planning director approved a special use permit for a nonfarm dwelling on the subject property with a site plan that provided a 40 by 40 feet home site. That approval was appealed. On March 4, 2016, a county hearings official issued the county's final decision affirming the approval (2016 decision). Record 156. The 2016 decision includes Condition 2, which provides:

> "The proposed dwelling site shall be located as represented by the applicant's written statements and approved site plan. Any deviation from this representation shall require an application for a modification of conditions with the applicable fees subject to the Planning Director's discretion." Record 45.

In 2019, petitioner submitted to the planning director a Type II request for approval from the director to modify conditions of the 2016 decision to expand the home site to 70 by 170 feet. LC 14.090(5)(c) provides: "A decision on a modification of approval must be made by the same approval authority as the

original final decision unless the original decision allows modification by a different approval authority."[1] Planning staff concluded that the request required Type III review, with an initial hearing before a hearings official, because the 2016 decision was issued by a hearings official. Record 156. Petitioner disagreed that the application required Type III review and requested a director's decision on its application. The director denied the application and petitioner appealed.

The hearings official affirmed the denial, adopting the planning staff's conclusion that the modification required a Type III application and initial hearings official review. The hearings official denied the application solely on procedural grounds and did not reach the substance of the application. The hearings official concluded that they did not have authority to decide the merits on *de novo* review because the director had correctly determined that the wrong application type was filed. This appeal followed.

ASSIGNMENTS OF ERROR

Petitioner's two assignments of error raise related arguments, and we address them together. In the first assignment of error, petitioner argues that the hearings official erred in finding that they did not have authority to address the merits of the modification application. Petitioner first argues that the hearings

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[1] During the local appeal in this case, intervenor argued that the 2014 version of the LC applied to the modification application on review to the hearings official. On appeal to LUBA, the parties appear to agree that the 2019 version of the LC applies to the hearings official's decision on review. The 2019 version of LC 14.090(5)(c) is the same as the current code version. Record 171.

official's conclusion that they lacked authority to decide the merits of petitioner's application is not supported by adequate findings. Petitioner requests that LUBA remand to the hearings official for further findings on the authority issue. In the alternative, petitioner argues that the hearings official has authority to address the merits of the modification application on *de novo* review, independent of Condition 2, and that LUBA should remand for a decision on the merits.

Generally, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

Intervenor argues that petitioner failed to preserve any argument based on ORS 215.416 because petitioner did not cite that statute in the local proceeding. *See* ORS 197.835(3) ("Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."). Petitioner replies, and we agree, that a challenge to the adequacy of findings is generally not subject to waiver because the allegedly

deficient findings appear for the first time in the challenged decision.[2] *Rogue Advocates v. Josephine County*, 72 Or LUBA 275, 290 (2015). Petitioner's findings challenge is not subject to waiver.

We conclude that the hearings official's findings are adequate. The hearings official found that the application review and appeal procedures at LC Chapter 14

> "provide that applications are to be submitted on forms prescribed by the [Director] and accompanied by the appropriate filing fee. LC 14.050(l)(b) and (d) (2014); LC 14.040(1) and (l)(c) (2019). In this case, the Director prescribed the Type III form, which, pursuant to the Code, was the appropriate form. Accordingly, the Planning Director did not err in denying the application. Once the Hearings Official concludes that the Planning Director correctly denied the application, they no longer have authority to address the substance of the application." Record 7.

Those findings explain the criteria that the hearings official considered relevant to the decision—the minimum application submittal requirements. Those findings state the facts relied upon in rendering the decision—that petitioner did not submit the application on the form prescribed by the director. Finally, those findings explain the justification for the decision based on the criteria. The hearings official concluded that the director correctly denied the modification application, which the hearings official concluded deprived the

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[2] In petitioner's words, "[a]pplying the waiver rule for a findings challenge would impose a prescience requirement beyond the skill of most persons." Reply Brief 1.

hearings official of authority to address the merits of the application. The fact that petitioner disagrees with those findings and conclusions does not render them inadequate.

As noted, petitioner also argues in the first assignment of error that the hearings official has authority to address the merits of the modification application on *de novo* review, independent of Condition 2. We disagree with petitioner that the issue of whether the hearings official had authority to decide the merits of the modification application is susceptible to analysis independent of Condition 2. In our view, whether the hearings official erred in determining that they lacked authority to address the merits of the modification application depends on whether the hearings official correctly interpreted Condition 2 to require a Type III application with initial review by the hearings official.

On the authority issue, intervenor responds that this appeal is indistinguishable from our recent decision in *Mattson v. Lane County*, ___ Or LUBA ___ (LUBA No 2020-024, July 16, 2020). In *Mattson*, the petitioner challenged a hearings official's conclusion that the minimum application submission requirements authorized the planning director to reject petitioner's legal lot verification application because it was filed as a Type I instead of a Type II review. We affirmed the hearings official's decision not to reach the merits of the legal lot verification. We explained: "The hearings officer concluded that because the planning director properly rejected the application, there was no

application to review, and consequently no merits to decide. That conclusion was correct." ___ Or LUBA at ___ (slip op at 13) (citation omitted).

Petitioner responds that this appeal is distinguishable from *Mattson* because, in *Mattson*, the county rejected the application whereas, in this appeal, the county accepted and denied the application. Petitioner does not analyze why that procedural difference is legally significant, let alone dispositive, and petitioner does not explain why the reasoning in *Mattson* does not apply equally to rejection and denial of an application when the director determines that the applicant has filed an incorrect application type.

Nevertheless, we conclude that this case is distinguishable from *Mattson* for a different reason. In the second assignment of error, petitioner argues that the hearings official misinterpreted Condition 2 to conclude that petitioner's modification request required a Type III application with initial review by the hearings official. We agree. The hearings official reasoned:

> "The applicant contends that the phrase, 'subject to the Planning Director's discretion' means that the Planning Director, not the Hearings Official, is authorized to review the requisite modification of conditions. Staff disagrees with the applicant on this point:
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> > "'Condition 2 of the HO decision did not address the approval authority who will review a Modification of Conditions application, it simply provided that the Planning Director has discretion as to whether or not/when a Modification of Conditions application is required. That condition indicated that the Planning Director decides if a Modification is required.'
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> "While the sentence structure of Condition 2 is less than ideal, and

> while the applicant's interpretation of Condition 2 is plausible, the Hearings Official believes that Staff's interpretation is the more reasonable of the two. As the applicant has explained, the County has had a practice of foregoing the requirement for a Modification of Conditions application where an approved home site is being enlarged. It is this discretion NOT to require a modification of conditions application for some deviations from the approved site plan, to which that language in Condition 2 refers. In this case, the Planning Director has exercised their discretion and determined that, based on the significance of the requested change (*i.e.*, a 400% increase in size), a Modification of Conditions application is required." Record 6.

We review interpretations of conditions of approval to determine whether they are correct. *M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___ (LUBA No 2018-143, Aug 14, 2019) (slip op at 12-15), *aff'd*, 302 Or App 159, 170, 460 P3d 117 (2020); *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017). The hearings official concluded that the phrase "subject to the Planning Director's discretion" limits the director's discretion to whether an application is required for a specific modification. Differently, petitioner argues that "subject to the Planning Director's discretion" refers to substantive review of the modification. Petitioner emphasizes that Condition 2 provides that "any" deviation from the applicant's written statements and approved site plan "shall require an application." Thus, the terms of Condition 2 do not provide the director discretion regarding whether a modification application will be required. Instead, any modification shall require a modification application. Petitioner points out that the LC does not provide the director discretion to determine application fees on a case-by-case basis. We agree with petitioner that Condition 2 provides the

director discretion to review and decide a request for modification of the original approval. The hearings official's interpretation is contrary to the text of Condition 2 and therefore incorrect. We conclude that the hearings official misinterpreted Condition 2. Accordingly, the hearings official and the director erred in denying the application on procedural grounds. It follows that the hearings official had authority to review the merits of the modification application on *de novo* review.

This conclusion is consistent with our reasoning in *Mattson*. In *Mattson*, we affirmed the hearings official's conclusion that the director properly rejected an application that was submitted for the wrong type of review. In those circumstances, we agreed with the hearings official that they did not have authority to review the merits of the application. Differently, here, we conclude that the hearings official erred in concluding that the director properly denied the application based on the application type that petitioner submitted.

The LC does not provide authority for the hearings official to reverse or remand a decision to the director. LC 14.080(3)(b) provides:

> "Appeal of a Type II decision made by the Director will result in a *de novo* hearing before the Hearings Official. A hearing on an appeal of [a] Type II decision will follow the same procedure used for a hearing on a Type III review in accordance with the applicable procedures at LC 14.070 with notice in accordance with the Type III hearing notice requirements of LC 14.060."

On *de novo* review, the hearings official may "[g]rant, deny, or in appropriate cases, attach such conditions to the matter being heard to the extent allowed by applicable law and that may be necessary to comply with the applicable approval

criteria or in appropriate cases, formulate a recommendation for the Board." LC 14.070(11)(f). On remand, the hearings official should review and decide the merits of the modification application.

The second assignment of error is sustained.

The first assignment of error is sustained, in part.

The county's decision is remanded.