

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

SHARON COATES,
Petitioner,

and

PAMELA HOGAN,
Intervenor-Petitioner,

vs.

COLUMBIA COUNTY,
Respondent.

LUBA No. 2020-084

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Sharon Coates filed a petition for review and argued on behalf of herself.

Pamela Hogan filed a petition for review and argued on behalf of herself.

No appearance by Columbia County.

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

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

REMANDED

02/26/2021

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

NATURE OF THE DECISION

Petitioner appeals a county planning commission decision approving a home occupation conditional use permit authorizing construction of a commercial kitchen and production of charcuterie on residentially zoned land.

MOTION FOR SUMMARY REVERSAL

The county did not file a response brief in this appeal. Petitioner moves for summary reversal of the planning commission's decision "on the grounds and for the reason that the [county] has defaulted in timely preparing and filing [its] Brief and has abandoned any right to object to * * * Petitioner's requested relief."

Motion for Summary Reversal 1.

Our rules set out deadlines for the filing of petitions for review and response briefs. OAR 661-010-0030(1) governs petitions for review and provides, in part:

"Unless the Board orders otherwise pursuant to ORS 197.830(10)(a), the petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. * * * *Failure to file a petition for review within the time required by this section, and any extensions of time * * *, shall result in dismissal of the appeal * * *.*" (Citation omitted; emphasis added).

OAR 661-010-0035(1) governs response briefs and provides, in part:

"Unless otherwise provided by the Board, respondent's brief together with four copies shall be filed within 42 days after the date the record is received or settled by the Board."

1 Unlike the rule applicable to petitions for review, the rule applicable to response
2 briefs does not provide that failure to file a response brief will result in the
3 opposing party prevailing in the appeal. The motion is denied.

4 **FACTS**

5 The 15-acre subject property is located in the Single-Family Residential
6 (R-10) zone and is bordered to the west by a one-acre, R-10 zoned property and
7 to the south by S.W. Orchard Street. Properties to the north and east are zoned R-
8 10 and Primary Forest (PF-80).

9 The subject property contains the applicant's residence and a detached
10 shop. The applicant seeks to expand the shop and construct a commercial kitchen
11 for the production of charcuterie. As proposed, the charcuterie production will
12 involve the use of wood chips for cold smoking, primarily curing purchased
13 meats by using dry rubs and applying sodium nitrate with any remaining residue
14 wiped from the curing trays and disposed of with the household garbage.

15 The applicant sought a Type I home occupation conditional use permit
16 (CUP) authorizing the proposed use. On May 7, 2020, the planning director
17 approved the CUP with conditions. On May 12, 2020, petitioner appealed the
18 planning director's decision. On July 20, 2020, the planning commission held a
19 virtual public hearing on the appeal and, on July 23, 2020, upheld the planning
20 director approval with additional conditions.

21 This appeal followed.

22 **PETITIONER AND INTERVENOR'S SUBSTANTIAL EVIDENCE**

1 **ASSIGNMENTS OF ERROR**

2 ORS 197.835(9)(a)(C) provides that we must reverse or remand a land use
3 decision that is “not supported by substantial evidence in the whole record.”
4 Petitioner and intervenor-petitioner (intervenor) argue that the county’s findings
5 that four criteria are met are not supported by substantial evidence, that is,
6 evidence a reasonable person would rely upon to make a decision.¹ *Dodd v. Hood*
7 *River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of*
8 *Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)). Because petitioner’s and
9 intervenor’s arguments largely overlap, we address them together.

1 ¹ In approving the application with conditions, the planning director expressly
2 incorporated the findings contained in a staff report dated May 7, 2020. Record
3 21, 23-36. The planning commission’s decision explains:

4 “The Planning Commission held a hearing regarding this proposed
5 development on July 20, 2020 where the Commission considered
6 written materials including the Staff Report dated July 8, 2020 as
7 well as testimony received from the applicant, [petitioner], and
8 adjacent property owners/residents. * * * With * * * two new
9 Conditions, the Planning Commission Affirmed the original
10 decision to Approve the [CUP] and adopts the original Conditions
11 of Approval included in the [planning director’s decision.]” Record
12 8.

13 Although this statement expressly incorporates the planning director’s
14 conditions of approval, it does not expressly incorporate the findings contained
15 in either the July 8 or May 7 staff reports. However, petitioner and intervenor
16 proceed as if these staff reports are part of the final decision. We therefore assume
17 that they are.

1 **A. CZO 1503.5(G)**

2 Columbia County Zoning Ordinance (CZO) 1503 governs CUPs. In order
3 to grant a CUP, CZO 1503.5(G) requires the county to find that “[t]he proposal
4 will not create any hazardous conditions.” Intervenor argues that the record lacks
5 substantial evidence that the proposal will not create hazardous conditions.

6 Intervenor and petitioner testified below that they were concerned that the
7 use would create odors as well as smoke containing hazardous contaminants. The
8 applicant testified, “If I’m allowed to do this on a small commercial basis, I’ll put
9 a combustor on it and there won’t be visible or probably smell the smoke.” Audio
10 Recording, Planning Commission Hearing, July 20, 2020, at 1:15:16 (comments
11 of the applicant). At another point in the hearing, a planning commissioner asked
12 whether the applicant’s smoker would be like one found in a local restaurant, and
13 the applicant responded, “I suppose so.” *Id.* at 0:26:07. The planning
14 commissioner then commented that he had not smelled offensive odors near the
15 referenced restaurant. *Id.* at 0:26:20. In finding that the use would not create
16 hazardous conditions, the county concluded:

17 “As far as hazardous conditions, as stated previously, the applicant
18 states that the only chemicals that he will be using will be salt, dry
19 spices, and sodium nitrate. The County Building Official does not
20 have any concerns for the proposed Home Occupation provided all
21 structural, electrical, mechanical, and plumbing permits are obtained
22 for the existing shop’s required expansion and change of occupancy.
23 The County Sanitarian will also review and approve a Lot
24 Authorization Permit to ensure the existing residential septic system
25 will not be compromised by the new uses of the expanded shop. For
26 these reasons, and with conditions covered elsewhere in this report,

1 staff finds that the proposal * * * will comply with this criterion.

2 “Compliance with all conditions of approval and applicable
3 standards will be required for the lifetime of applicant’s home
4 occupation * * *. Staff finds that the criteria in Section 1503.5(G)
5 can be met with these conditions of approval.” Record 33.

6 Vague assertions that the applicant’s equipment *may* be like that used in a
7 restaurant and that a planning commissioner has not personally observed
8 offensive conditions near a particular restaurant is not substantial evidence that
9 the proposal will not create any hazardous conditions. Absent information
10 regarding the type of combustor to be used and the combustor’s features for
11 controlling odor and smoke, there is not substantial evidence that the combustor’s
12 use will prevent hazardous conditions. This subassignment of error is sustained.

13 **B. CZO 1507.3**

14 CZO 1507 governs home occupations. CZO 1507.3 provides that home
15 occupations shall be operated substantially in the dwelling or “[o]ther buildings
16 normally associated with uses permitted in the zone in which the property is
17 located” and that the “home occupation shall not unreasonably interfere with
18 other uses permitted in the zone in which the property is located.”

19 Petitioner argues that, because the county failed to determine where the
20 smoke box would be located, the county’s conclusion that the use will occur
21 substantially in the dwelling or other associated buildings is not supported by
22 substantial evidence. Intervenor argues that, because the county did not require
23 detailed information on the meat smoking equipment that the applicant would

1 employ, the county's conclusion that the use will not unreasonably interfere with
2 other uses permitted in the zone is not supported by substantial evidence. The
3 May 7 staff report addresses this criterion in Finding 12:

4 "The indoor charcuterie production operation requested for the
5 subject home occupation will take place inside the site's existing
6 residence or accessory shop structure. Authorization of this home
7 occupation will result in allowing the applicant to establish and
8 annually renew an [Oregon Department of Agriculture (ODA)]
9 licensed charcuterie producer as a home occupation from his
10 residence. Per the preceding Findings, the applicant will take
11 appropriate steps to mitigate any potential negative impacts from
12 interfering with neighbors' quality of life and other uses permitted
13 in this unincorporated area of the county within the City of
14 Clatskanie's UGB and zoned for single family residential uses.
15 Staff finds that these criteria will be met and adhered to with the
16 applicable conditions of approval for the lifetime of its operation."
17 Record 34.

18 The county found that the operation will take place within the home or shop and
19 imposed Condition 2, which provides, "All work resulting from this Home
20 Occupation permit shall be conducted inside the detached accessory shop or the
21 existing house." Record 8. With this condition of approval, there is substantial
22 evidence that the smoke box will be located within the dwelling or "[o]ther
23 buildings normally associated with uses permitted in the zone in which the
24 property is located." CZO 1507.3. There is not, however, substantial evidence
25 that there will be no unreasonable interference with neighboring uses. The
26 findings do not explain how an ODA license prevents unreasonable interference.
27 Although other findings state that on-site signs are prohibited, sales will be by

1 mail, and an expansion of the operation to include employees would require
2 additional planning commission approval, the findings do not identify substantial
3 evidence concerning odor and smoke. We agree with intervenor that this is not
4 evidence upon which a reasonable person would rely.

5 This subassignment of error is sustained, in part.

6 **C. CZO 1503.5(C) and (D)**

7 CZO 1503.5(C) and (D) require the county to find as follows:

8 “C. The characteristics of the site are suitable for the proposed use
9 considering size, shape, location, topography, existence of
10 improvements, and natural features; [and]

11 “D. The site and proposed development is timely, considering the
12 adequacy of transportation systems, public facilities, and
13 services existing or planned for the area affected by the
14 use[.]”

15 The May 7 staff report found that the characteristics of the site make it suitable
16 for the home occupation given that (1) the shop expansion will be at least 400
17 feet away from the closest residence and the applicant will obtain required
18 permits for improvements and (2) the existing barn, driveway, and utilities are
19 suitable for the use. Petitioner argues that the only evidence on the suitability of
20 the location considering fire safety was the signature of the fire chief on the
21 application. Petitioner also argues that the applicant did not provide evidence
22 regarding the temperature in the smoking chamber, the smoldering of wood
23 chips, ignition sources, periods of time when the smoke generator would be
24 unattended, and how fires would be prevented and suppressed. Petitioner also

1 argues that the meaning of the fire chief's signature on the application is unclear
2 and that the fire department's sign-off may be limited to confirming that
3 emergency access is available.

4 The county found that "[t]he Clatskanie Fire Department has reviewed [the
5 application] and has no objections to its approval as requested." Record 29. The
6 relevant standard requires a determination that "[t]he site and proposed
7 development is timely, considering the adequacy of transportation systems [and]
8 public facilities." The fire department review confirming emergency access is
9 evidence upon which a reasonable person would rely to determine that the
10 proposed development is timely, consider the adequacy of fire access. This
11 subassignment of error is denied.

12 **C. CZO 1503.5(E)**

13 CZO 1503.5(E) requires the county to find that "[t]he proposed use will
14 not alter the character of the surrounding area in a manner which substantially
15 limits, impairs, or precludes the use of surrounding properties for the primary
16 uses listed in the underlying district." Concluding that this criterion is met, the
17 county found that the primary uses on other properties will not be impaired
18 because the applicant will have no other employees, signage, or customers on the
19 subject property; will advertise and conduct all business transactions
20 electronically and mail all purchased charcuterie; will be required to obtain all
21 necessary permits; will develop a Wastewater Management Plan; and will apply

1 for a Lot Authorization Permit from the County Sanitarian to ensure that the
2 residential septic system will not be compromised.

3 We agree with petitioner and intervenor that there is not substantial
4 evidence that this standard will be met. There is no evidence of the type of smoker
5 that will be used, the amount of smoke that will be emitted, or the way in which
6 smoke will be discharged outside the shop. The potential for odor and smoke may
7 impact the use of surrounding properties, and the conclusion that this criterion is
8 met is not supported by substantial evidence.

9 This subassignment of error is sustained.

10 **PETITIONER'S PROCEDURAL ASSIGNMENT OF ERROR**

11 ORS 197.835(9)(a)(B) provides that we will reverse or remand the land
12 use decision under review if we find that the local government "[f]ailed to follow
13 the procedures applicable to the matter before it in a manner that prejudiced the
14 substantial rights of the petitioner."

15 **A. Adequacy of Prehearing Notice**

16 Petitioner argues that, although the county placed two notices of the
17 planning commission hearing in newspapers serving the southern part of the
18 county, the county should have also placed notices in newspapers serving the
19 northern part of the county. Petitioner also argues that the newspaper notices were
20 not included in the prehearing packet available prior to the planning commission
21 hearing and that petitioner and intervenor did not see the notices prior to
22 transmittal of the record in this appeal.

1 Petitioner concedes that ORS 197.763, governing quasi-judicial land use
2 hearings, does not require notice by newspaper publication. There was no failure
3 by the county to follow applicable procedures, and petitioner has not established
4 a basis for remand or reversal based on the newspaper notices.

5 **B. Adequacy of Video Hearing and Ability to Respond to New**
6 **Evidence**

7 Petitioner argues that, after transmittal of the record in this appeal,
8 petitioner and intervenor listened to the audio recording of the planning
9 commission hearing and heard the following announcement:

10 “Oregon Law also provides that continuances to the hearing or
11 additional opportunities for testimony or written submittals may be
12 granted in certain circumstances. Prior to the conclusion of the
13 initial evidentiary hearing, any participant may request an
14 opportunity to present additional evidence or testimony regarding
15 the application. The local hearings authority shall grant such request
16 by continuing the public hearing, or by leaving the record open for
17 additional written evidence or testimony.” Petitioner’s Petition for
18 Review 8.

19 Petitioner argues that they could not hear this announcement during the virtual
20 hearing and, therefore, were not aware of the opportunity to request that the
21 hearing be continued or the record left open. Petitioner maintains that the
22 “challenge of the covid-19 pandemic affected the Petitioner and neighbors
23 disproportionately.” Petitioner’s Petition for Review 10. Petitioner argues that
24 they were denied a full and fair hearing because they and other neighbors should
25 have been given an opportunity to speak further at the hearing and that the
26 prehearing notice did not explain, as the newspaper notice did, that, “[a]fter the

1 presentation of evidence and arguments, the public hearing record will be either
2 left open or closed by the Planning Commission.” *Id.*

3 Due to the COVID-19 pandemic, the county held the public hearing
4 virtually. Petitioner explains that several neighbors of the subject property are
5 elderly and disabled, with limited experience using technology, and that the
6 county denied petitioner’s request that the county host a large, well-equipped
7 videoconference room staffed by a county employee and complying with
8 COVID-19 protocols. Because the county did not provide an in-person venue,
9 petitioner allowed a group of opponents, including intervenor, to gather for the
10 hearing in their garage. Petitioner explains that connectivity issues were annoying
11 and distracting and that it was difficult to hear the proceedings. Petitioner also
12 explains that, due to the five-minute time limit for testimony, petitioner’s
13 comments during the hearing were truncated. After the planning commission
14 chair closed the public hearing and as planning commissioners deliberated and
15 asked questions, intervenor realized that the microphone was on. Petitioner
16 describes intervenor interjecting to ask if intervenor could make a comment and
17 explains that, at that point, petitioner prepared to make more comments, as well.
18 The chair advised intervenor that the opportunity for opponents to comment was
19 over. The applicant, however, was allowed to speak further. Another planning
20 commissioner asked if the chair was going to allow intervenor to speak and the
21 chair responded in the negative.

1 A procedural error is not a basis for reversal or remand unless the petitioner
2 in the appeal to LUBA shows prejudice to *their* substantial rights. *Eng v. Wallowa*
3 *County*, 79 Or LUBA 421, 427-28 (2019). Petitioner did not request an
4 opportunity to speak further at the hearing and may not make claims of prejudice
5 on behalf of others, including intervenor. Further, petitioner has not identified
6 what evidence, if any, the applicant was able to submit into the record after the
7 public hearing was closed and what responsive evidence petitioner would have
8 submitted if given the opportunity. Therefore, petitioner has not established
9 prejudice to their substantial rights. *Jacobus v. Klamath County*, ___ Or LUBA
10 ___, ___ (LUBA No 2020-054, Dec 10, 2020) (slip op at 7-8) (holding that,
11 where declarations do not identify the new evidence that was presented at the
12 hearing or the additional evidence that the declarants would have submitted had
13 they been allowed to do so, petitioners have failed to establish prejudice to their
14 substantial rights).

15 This subassignment of error is denied.

16 The county's decision is remanded.