

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,

10 *Respondent,*

11 and

12
13 TUMALO IRRIGATION DISTRICT,

14 *Intervenor-Respondent.*

15
16 LUBA No. 2006-178

17
18
19 ORDER

20 **INTRODUCTION**

21 Oral argument in this appeal was held on January 24, 2008. We issue this order and
22 our final opinion in this appeal on this date. Seven days before oral argument, on January 17,
23 2008, petitioner filed a Motion to Strike or Disregard Unsupported Assertions of Fact and
24 Evidence. Petitioner asks that LUBA strike or disregard twenty four separate allegations in
25 intervenor-respondent's brief. Intervenor was given an opportunity to file a written response
26 to petitioner's January 17, 2008 motion, and did so on January 31, 2008. Petitioner was
27 given an opportunity to file a reply to the January 31, 2008 response, and did so on February
28 7, 2008. We now resolve the motion.

29 **INTERVENOR-RESPONDENT'S AMENDED RESPONSE BRIEF**

30 Along with its January 31, 2008 response, intervenor filed an amended response brief.
31 No motion or explanation was filed to explain why intervenor filed the amended response
32 brief, but it appears to be an attempt on intervenor's part to amend its response brief so that
33 the summary of facts and arguments more accurately reflect the record.

1 Petitioner objects that there is no provision in LUBA’s rules to allow a new brief to
2 be filed following oral argument. Petitioner argues that if LUBA decides to allow the
3 amended response brief, it should allow petitioner to file a reply.

4 Resolution of this appeal has already been delayed by the need to resolve the parties’
5 disputes regarding factual allegations in intervenor’s response brief. Petitioner is correct that
6 our rules do not expressly authorize post-oral argument briefing. Even if we might allow
7 post oral argument amendments to a response brief where it was warranted, it is not
8 warranted in this appeal. We reject intervenor’s amended response brief.

9 **MOTION TO STRIKE OR DISREGARD UNSUPPORTED ASSERTIONS OF FACT**
10 **AND EVIDENCE**

11 **A. Facts**

12 Some understanding of the factual context for this appeal will facilitate our resolution
13 of petitioner’s 24 objections. This appeal concerns a county decision that grants approval to
14 partition an exclusive farm use (EFU) zoned property into two parcels and grants conditional
15 use approval for a non-farm dwelling on each of those parcels. The property is located on
16 the west side of Highway 20 in Deschutes County near the unincorporated area of Tumalo.
17 The newly created parcels are not to have access directly onto Highway 20. As proposed, the
18 subject parcels and additional parcels to the north will have access onto a newly dedicated
19 right of way that runs north from Tumalo Reservoir Road, which is located to the south of
20 the subject property. The newly designated road will travel north along the west side of the
21 subject property and the east side of an adjoining reclaimed mine site that lies to the west of
22 the subject property and will terminate at the subject property’s northern property line. At
23 some point in the future, the road will continue north to provide access to the other properties
24 to the north that are the subject of other partition and non-farm dwelling decisions that are
25 not before us in this appeal. The proposed new right of way will connect at Highway 20
26 north of the subject property, but that intersection is proposed to be a secondary access for

1 emergency access only. The primary access for the subject parcels would be across the
2 proposed right of way to Tumalo Reservoir Road to the south and then east to Baily Road
3 and Highway 20.

4 We now turn to petitioner’s objections.

5 **1. Adjacent Like Properties**

6 Petitioner challenges the following allegation in intervenor’s brief:

7 “A range expert report found that the property is not suitable for agricultural
8 use alone or if joined with other parcels of property in the surrounding area.
9 (Record 249)[.]” Intervenor-Respondent’s Brief 4.

10 Petitioner argues:

11 “The range expert report actually addressed the more specific ‘adjacent like
12 properties,’ not the more general ‘other parcels of property in the surrounding
13 area.’” Motion to Strike 1.

14 We understand intervenor to dispute the significance of the different wording in the
15 allegation. But we also understand intervenor to concede petitioner’s point regarding the
16 actual wording of the text in the record.

17 We will consider the allegation as clarified. Petitioner’s motion to disregard the
18 allegation is denied.

19 **2. Hilltop Location is not the Reason for Lack of Irrigation**

20 Petitioner challenges the following allegation:

21 “Irrigation is not available to the property because the property is on a hill and
22 has never been served by an irrigation district. (Record at 244)[.]” Intervenor-
23 Respondent’s Brief 4.

24 Petitioner argues:

25 “There is no mention on [Record 244] of why irrigation is allegedly not
26 available.” Motion to Strike 1.

27 Intervenor responds:

28 “The Range Inventory and Forage Study Report at Page 244 states:

1 ““There is no source of livestock water within the boundaries
2 of this parcel...No agricultural use has been made of this
3 property during this extended period of ownership. . . .
4 Topography is mostly an old, flat to gently sloping, dissected
5 plateau consisting of lava plains and glacial outwash plains.
6 Only two areas with steeper slopes occur here . . .’

7 “Therefore, it is reasonable to conclude that the property is on a hill and that
8 there is no irrigation available.” Response to Petitioner’s Motion 2.

9 The cited page of the record supports an allegation that the property does not have
10 irrigation available and it supports an allegation that the property is on a hill. The record
11 does not support the allegation that the reason “[i]rrigation is not available to the property” is
12 “because the property is on a hill.” We are not sure whether intervenor disputes the point,
13 but, to the extent intervenor does dispute the point, we agree with petitioner.

14 Petitioner’s motion to strike or disregard is granted with regard to intervenor’s
15 allegation that the *reason* the property lacks irrigation is its hilltop location.

16 **3. Irrigation Rights are Required for Reclamation of the Surface Mine**

17 Petitioner challenges the following allegation:

18 “It is not possible to transfer irrigation rights from the adjacent surface mine
19 property because those irrigation rights are required for reclamation of the
20 Surface Mine. (Record at 119, 120 and 299)[.]” Intervenor-Respondent’s
21 Brief 4.

22 We agree with intervenor that a reasonable person could infer from the record that the
23 irrigation rights may be needed for reclamation of the mined adjacent property and that the
24 irrigation rights could not be transferred to the subject property while they are being used for
25 that purpose. While we agree with intervenor that such an allegation belongs in the argument
26 section of the brief rather than the summary of material facts that is required by OAR 661-
27 010-0030(4)(b)(C), we will not disregard the allegation because it is misplaced in the
28 response brief.

29 As clarified by intervenor, the allegation is supported by the record. With the above
30 clarification, petitioner’s motion to strike or disregard is denied.

1 **4. The Proposed Road Crosses a Portion of the Adjacent Depleted Surface**
2 **Mine**

3 Petitioner challenges the following allegation:

4 “The proposed road which will be used to access the proposed non-farm
5 dwelling parcels crosses a section of depleted surface mine property. (Record
6 at 119, 120, 299 and 300)[.]” Intervenor-Respondent’s Brief 4.

7 To the extent it matters, intervenor appears to be correct that the record supports a
8 conclusion that the proposed road crosses the eastern edge of the property that is being
9 reclaimed. It is less clear whether the proposed road will actually cross a part of the property
10 that has been mined and reclaimed.

11 With the above clarification, petitioner’s motion to strike or disregard is denied.

12 **5. A Reason for Seeding the Surface Mine Site is to Prevent Erosion**

13 Petitioner disputes intervenor’s allegations that the reclaimed surface mine is being
14 seeded “to prevent erosion and noxious weed growth.” Intervenor-Respondent’s Brief 4.

15 Intervenor concedes its allegation that the reclaimed surface mine has been seeded to
16 prevent noxious weed growth is not supported by the record. However, we understand
17 intervenor to argue that a reasonable person could conclude from the record that one of the
18 reasons that the reclaimed surface mine is being seeded is to prevent erosion. We agree with
19 intervenor.

20 Petitioner’s motion to disregard the above allegation is granted in part and denied in
21 part.

22 **6. Farm Use of the Surface Mined Property**

23 Petitioner challenges the following allegation:

24 “The purpose of the reclamation is not, as implied by the Petitioner, to put the
25 surface mine to farm use but instead to prevent damage from further erosion.”
26 Intervenor-Respondent’s Brief 4-5.

27 The parties apparently agree that there is no evidence in the record, one way or the
28 other, regarding whether the depleted surface mine is being reclaimed for farm use. As we

1 conclude under objection five above, there is evidence that one of the purposes is to prevent
2 erosion.

3 With the above clarification, petitioner’s motion to strike or disregard the above
4 allegation is denied.

5 **7. Suitability of the Surface Mined Property for Farm Use**

6 Petitioner disputes intervenor’s allegation that “mining activities have made the mine
7 unsuitable for farming purposes.” Intervenor-Respondent’s Brief 5.

8 We agree with petitioner that there does not appear to be any evidence in the record
9 that clearly or directly addresses whether the surface mining of the property has rendered the
10 property unsuitable for farm use.

11 Petitioner’s motion to disregard the above allegation is granted.

12 **8. Similarity to Another Parcel that was Rezoned from Surface Mining to**
13 **Multiple Use Agriculture.**

14 The parties dispute whether the record demonstrates that the reclaimed surface mine
15 is similar to another property that was recently rezoned from Surface Mining to Multiple Use
16 Agriculture. No party explains why the finding is material and we do not see that it is.
17 Therefore it does not matter whether the properties are similar and it does not matter whether
18 the record shows the properties are similar.

19 Petitioner’s motion to strike or disregard the above allegation is denied.

20 **9. Need for the Road to Complete Surface Mine Reclamation**

21 Petitioner challenges the following allegation:

22 “The road * * * will also provide access to the eastern portion of the surface
23 mine for completion of reclamation activities. (Record 64) [.]” Intervenor-
24 Respondent’s Brief 5.

25 The parties apparently agree that the proposed road will provide access to the eastern
26 part of the adjacent surface mine that is being reclaimed. Petitioner contends the record does

1 not establish that the proposed road is *needed* for mine reclamation. Petitioner is correct but
2 the record does support a conclusion that the road *could be used* for mine reclamation.

3 With the above clarification, petitioner’s motion to strike or disregard is denied.

4 **10. Fire Department Position Regarding Extension of the Proposed Road**
5 **North**

6 Petitioner challenges the following allegation:

7 “The continuation of the [proposed] road to access Highway 20 is not
8 necessary at this time because the fire department does not require secondary
9 access for two dwellings. (Record 650) [.]” Intervenor-Respondent’s Brief 5.

10 Intervenor correctly points out that, based on the document that appears at Record
11 650, a secondary access to Highway 20 is not among the recommended requirements put
12 forth by the fire department. However, petitioner argues that the legal conclusion that a
13 secondary access is not required at this time does not necessarily follow from the fire
14 department’s comment. We understand petitioner to argue that just because a secondary
15 access is not among the fire department’s requirements does not mean there could be no
16 other legal requirement for such secondary access. We agree with petitioner.

17 Petitioner’s motion to disregard the above allegation is granted.

18 **11. Fire Department Review if the Emergency Road Access is not Completed**

19 Petitioner challenges the following allegation:

20 “[T]he decision ensures that proper fire department approval will be required
21 if the emergency road access is not completed. (Record at 25) [.]”
22 Intervenor-Respondent’s Brief 5.

23 The county road department provided comments that include the following:

24 “* * * The applicant is to meet the following conditions if this land use
25 application is approved:

26 “* * * * *

27 “4. The alignment shown on the Road Dedication Exhibit is dependent
28 upon the partitioning of tax lot 1200 and the subsequent dedication of
29 right of way north to Highway 20. If this partition does not occur, this

1 will alter this dedication to include a cul-de-sac which would require
2 approval by the fire department.” Record 25.

3 Petitioner argues that although the county road department took the position that fire
4 department approval of a cul-de-sac would be required if the proposed road is not extended
5 north to provide a secondary access, the hearings officer’s decision in this matter does not
6 include a separate condition of approval to impose that requirement. Petitioner is correct.

7 Petitioner’s motion to disregard the above allegation is granted.

8 **12. Whether Emergency Access to Highway 20 is Precluded as a Matter of**
9 **Law**

10 Petitioner challenges the following allegation:

11 “The record provides evidence that an emergency access to Highway 20 is not
12 precluded as a matter of law because ODOT is considering the application and
13 approval of such access. (Record at 207, 198)[.]” Intervenor-Respondent’s
14 Brief 5.

15 We agree with intervenor that the record demonstrates that ODOT has received an
16 application for restricted emergency access to Highway 20 for the disputed proposed
17 roadway. We also agree with intervenor that the application and the fact that ODOT is
18 processing that application constitutes *some* evidence that emergency access to Highway 20
19 is not precluded as a matter of law. We need not and do not decide here whether that
20 application and other evidence in the record is substantial evidence that such access is not
21 precluded as a matter of law.

22 With the above clarification, petitioner’s motion to strike or disregard is denied.

23 **13. Applicant’s Burden of Proof**

24 On page 12 of intervenor’s brief, intervenor quotes a portion of the burden of proof
25 that it submitted in this matter, to support of its contention that it has an existing legal right
26 of access to Highway 20 from its property. Petitioner objects that the quoted portion of the
27 burden of proof is not evidence.

1 Regardless of whether the quoted portion of the burden of proof itself qualifies as
2 evidence of the factual allegations therein, intervenor cites other evidence that generally
3 supports the factual allegations.

4 Petitioner’s motion to strike or disregard the quoted portion of the burden of proof is
5 denied.

6 **14. Quotation at the Bottom of Page 12 of Intervenor’s Brief**

7 The parties agree that the quotation that appears at the bottom of page 12 of
8 intervenor’s brief includes an error. We note the error and the parties’ agreement on how the
9 error should be corrected.

10 With the above clarification, petitioner’s motion to strike or disregard is denied.

11 **15. Intervenor’s June 6, 2006 Letter**

12 Petitioner argues the following allegation is not supported by the June 6, 2006 letter
13 that appears at Record 194.

14 “[Intervenor] has proposed to relocate the reserved access point in exchange
15 for a new emergency only access point at Gerking Market Road. (Record at
16 194)[.]” Intervenor-Respondent’s Brief 13.

17 Intervenor argues that if the letter is read together with the revised application that is attached
18 to the letter at 196-207 lends some support to the allegation. Petitioner’s point appears to be
19 that the cited pages of the record do not show that intervenor is proposing to *exchange* its
20 reserved access point for the proposed emergency access point.

21 The challenged factual allegation is that intervenor proposed to ODOT that it be
22 allowed to relocate its reserved right of access north to the point where the new emergency
23 access is to be located. The letter that appears at Record 194 supports that allegation.

24 Petitioner’s motion to disregard the above allegation is denied.

25 **16. ODOT Agreement**

26 Petitioner challenges the following allegation:

1 “[T]he hearings officer explained that she relied upon the evidence provided
2 by the Intervenor-Respondent and ODOT, and that there was an existing
3 access point that ODOT agreed would need to be removed. (Record 43-44 and
4 58)[.]” Intervenor-Respondent’s Brief 13.

5 There does not appear to be any dispute that intervenor claims to have a reserved
6 right of access to Highway 20 from its property, and there does not appear to be any dispute
7 that intervenor is seeking ODOT approval for an emergency-only access to Highway 20 in
8 exchange for relinquishing its claimed reserved right of access to Highway 20. Petitioner’s
9 point appears to be that Record 43-44 and 58, which intervenor cites to support the
10 allegation, does not support the allegation that ODOT has *agreed* the existing access point
11 would need to be removed. Petitioner is correct.

12 Petitioners’ motion to disregard the allegation that ODOT has *agreed* that
13 intervenor’s reservation would need to be removed is granted.

14 **17. Road Dedication**

15 Petitioner challenges the following allegation:

16 “Condition of Approval No. [13] requires the road dedication. (Record 25
17 and 60)[.]” Intervenor-Respondent’s Brief 14.

18 Petitioner argues that Road Department comments appear at Record 25 and that condition of
19 approval 13 is not mentioned on those pages. Petitioner then argues:

20 “Condition No. 13 at Record 60 requires only that the Applicant dedicate ‘the
21 right of way for a new road,’ not dedicate the road.” Motion to Strike 3.

22 The relevant text of condition of approval 13 is set out below:

23 “The applicant shall dedicate that portion of the right of way for the new road
24 on the final plan, and shall construct the entire road from Tumalo Reservoir
25 Road to the north property line of the subject property to the County’s rural
26 local road standards. The road construction/design plans, as well as the actual
27 road construction, shall require review and approval from the County Road
28 Department, and shall be completed prior to final plat approval.” Record 60.

1 If we understand petitioner correctly, petitioner argues that the above condition may
2 be adequate to require dedication of the right of way but the condition is inadequate to
3 require dedication of the constructed road. We reject the argument.

4 Petitioner's motion to strike or disregard is denied.

5 **18. Fire Department Approval for an Emergency Vehicle Turnaround**

6 Petitioner challenges the following allegation:

7 "[T]he decision requires fire department approval of a turn around for
8 emergency vehicles if the road dedication through to Hwy 20 is not
9 completed. (Record 25)[.]" Intervenor-Respondent's Brief 15.

10 This objection essentially duplicates objection 11 above. As we noted there, although
11 the county road department indicated fire department approval would be required if the
12 secondary emergency access to Highway 20 is not built, the hearings officer did not
13 specifically include a condition of approval to that effect. We understand petitioner to argue
14 that, based on that failure, the decision therefore does not require fire department approval of
15 a turn around for emergency vehicles if the secondary emergency access is not built.

16 As we indicated above in discussing objection number 11, we will address that
17 question if necessary in our decision on the merits in this appeal. We will not address the
18 question here.

19 **19. Same as Objection 5**

20 This objection raises the same issue that is raised in objection 5 above. We resolve
21 objection 19 the same way we resolve Objection 5, for the same reasons.

22 **20. Surface Mine Water Rights**

23 Petitioner challenges the following allegation:

24 "The water associated with the surface mine zoned property therefore, cannot
25 be removed and transferred to the subject property." Intervenor-Respondent's
26 Brief 18.

27 Intervenor agrees that the above allegation can be disregarded and will rely on its
28 similar allegation in the statement of fact.

1 Petitioner’s motion to disregard the above allegation is granted.

2 **21. Grazing on Reclaimed Mine Property**

3 Petitioner challenges the following allegation:

4 “Grazing animals on the reseeded, reclaimed property may result in increased
5 erosion and noxious weeds. (Record at 247-248)[.]” Intervenor-Respondent’s
6 Brief 18.

7 Intevenor concedes the above allegation may be disregarded.

8 Petitioner’s motion to disregard the above allegation is granted.

9 **22. Impractical to Bring Irrigation Water Uphill to Serve Soils That are Low**
10 **in Water Holding Capability**

11 Petitioner challenges the following allegation:

12 “It is not practical to bring irrigation water up hill to serve an area that has
13 never had irrigation and is likely to be subject to erosion as a result of
14 irrigation due to soils that are low in water holding capacity. (Record 244,
15 247-248)[.]” Intervenor-Respondent’s Brief 18.

16 Petitioner argues;

17 “There is no mention on these Record pages of bringing ‘irrigation water
18 uphill’ or that it ‘is likely to be subject to erosion as a result of irrigation due
19 to soils that are low in water holding capacity.’ Motion to Strike 4.

20 We agree with petitioner. Petitioner’s motion to disregard the above allegations is
21 granted.

22 **23. Hobby Farms**

23 Petitioner challenges the following allegation in intervenor’s brief:

24 “[T]he majority of nearby uses include ‘hobby farms’ of 2-5 acres in size
25 where the animals are supported by purchased feed and hay. (Record 51)[.]”
26 Intervenor-Respondent’s Brief 18.

27 Petitioner argues there is no mention of hobby farms at Record 31. Intervenor responds that
28 the intended citation was to page 51 of the record not page 31.

29 Record 51 is a page of the hearings officer’s decision in this matter, which describes
30 nearby farms as hobby farms. Intervenor’s allegation is an accurate description of what the

1 hearings officer found. If that part of the hearings officer’s decision is not supported by
2 substantial record, petitioner may assign error to the hearings officer’s findings. We can see
3 no basis for disregarding intervenor’s description of what the hearings officer found.

4 Petitioner’s motion to strike or disregard the above allegation is denied.

5 **24. Range Expert Test Forage Plots**

6 Petitioner challenges the following allegation in intervenor’s brief:

7 “The range expert analyzed 12 plots across the proposed non-farm parcels.
8 (Record at 250) * * * The sites were evenly distributed with approximately
9 six test forage plots * * * on each non-farm parcel. (Record 240 and 250)
10 Only one site had a rating of ‘good’ and this site is not near the proposed
11 dwelling location. * * *” Intervenor-Respondent’s Brief 19.

12 Petitioner contends that Record 240 and 250 do not show the location of the proposed non-
13 farm dwellings and that a review of those two pages of the record shows that at most only
14 five plots are located on parcel 2.

15 Intervenor concedes that only five plots are on parcel 2. However, intervenor argues
16 that if those maps are compared with the map that appears at Record 800, which shows the
17 location of the proposed dwellings, it is clear that the proposed dwelling is not close to the
18 plot that received a good rating for forage. Intervenor’s latter point is correct.

19 As corrected by intervenor’s concession and citation to Record 800, petitioner’s
20 motion to strike or disregard the above allegation is denied.

21 Dated this 13th day of March, 2008.

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Michael A. Holstun
Board Chair