

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the board of
4 commissioners approving a conditional use permit for a
5 livestock sales facility on a 17.6 acre parcel zoned
6 Exclusive Farm Use (EFU-C).

7 **MOTION TO INTERVENE**

8 Bernard Simonsen, the applicant below, moves to
9 intervene on the side of respondent in this appeal
10 proceeding. There is no objection to the motion, and it is
11 allowed.

12 **FACTS**

13 This is the second time a county decision approving a
14 proposed livestock sales facility on the subject property
15 has been appealed to this Board. In Collins v. Klamath
16 County, 26 Or LUBA 434, 435-36 (1994) (Collins I), we stated
17 the following facts:

18 "The subject property * * * is improved with a
19 dwelling and a 6,800 square foot enclosed
20 structure. The livestock sales authorized by the
21 challenged decision would be held in the 6,800
22 square foot structure and would cater to breeders
23 rather than commercial cattle buyers. The record
24 includes testimony that such sales are smaller and
25 more social events and commonly are held in hotel
26 ballrooms and convention facilities. As
27 conditioned, intervenor would be limited to four
28 sales per year, with no more than 100 cattle
29 offered for sale at any single sale. Each sale is
30 expected to attract approximately 50 to 100
31 people.

32 "The challenged decision also limits the times

1 during which cattle may be delivered and the
2 number of days before and after each sale cattle
3 may be held on-site. The decision further
4 requires that manure be removed within five days
5 after each sale. Finally, the decision imposes a
6 condition that intervenor obtain approval from the
7 State Highway Division for a relocated entrance
8 onto Highway 140.

9 "Most of the surrounding properties, like the
10 subject property, are zoned EFU-C and are utilized
11 for cattle grazing. One nearby property is used
12 as a poultry farm and the Shield Crest Golf Course
13 is located across Highway 140." (Footnote
14 omitted.)

15 We remanded the county decision challenged in Collins I on
16 the basis that the findings were inadequate to establish
17 compliance with Klamath County Land Development Ordinance
18 (LDO) 54.040(C).¹

19 On remand, the county scheduled a hearing on the matter
20 before the planning commission and board of commissioners
21 for March 22, 1994. A notice of this March 22, 1994,
22 hearing apparently was mailed to petitioners.² However, no
23 hearing was conducted on that date. Rather, it appears the
24 planning commission met and continued its hearing on the

¹LDO 54.040(C) provides:

"The location, size, design and operating characteristics of the proposed use will not have a significant adverse impact on the livability, value or appropriate development of abutting properties and the surrounding area."

²This notice is not included in the local record submitted to this Board for this appeal, but rather is attached to the county's brief in this appeal. No party objects to our consideration of the notice, and we will consider it as requested.

1 matter to April 26, 1994, but the board of commissioners
2 never met to continue the March 22, 1994, hearing set before
3 it.³

4 On April 26, 1994, the board of commissioners conducted
5 a hearing on remand. At the April 26, 1994 hearing, the
6 board of commissioners approved the following motion:

7 "It's been moved and seconded to defer the request
8 back to staff, and if they feel that there is not
9 adequate information that they can put into the
10 document then to request a new hearing."
11 Transcript 29.

12 On October 19, 1994, presumably at a public meeting, the
13 board of commissioners approved the challenged decision.
14 This appeal followed.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioners contend the challenged decision was adopted
17 unlawfully because the only notice of a hearing before the
18 ultimate decision maker -- the board of commissioners was
19 for March 22, 1994, and the board of commissioners did not
20 meet on that date and continue its hearing. Petitioners
21 contend the challenged decision was improperly adopted by
22 the board of commissioners, because no hearing was ever
23 conducted.

24 The county suggests it was not required to hold any

³An affidavit and transcript of the planning commission's efforts to continue the March 22, 1994 hearing are appended to the county's brief. While these items are not included in the local record, there is no objection to our consideration of them.

1 hearing following LUBA's remand in Collins I. The county
2 was required to adopt a new decision after remand, because
3 we determined in Collins I that the decision at issue there
4 did not establish compliance with relevant approval
5 standards. Thus, at a minimum, on remand, the county was
6 required to conduct a hearing for argument concerning the
7 proposal's compliance with LDO 54.040(C). See Morrison v.
8 City of Portland, 70 Or App 437, 441-42, 689 P2d 1027
9 (1984). Because a hearing is required, the county is
10 required to provide notice of such a hearing. See Fasano v.
11 Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).

12 In Apalategui v. Washington County, 80 Or App 508, 514,
13 723 P2d 1021 (1986) and Coats v. Crook County, 18 Or LUBA
14 332 (1989), both this Board and the court of appeals have
15 made it clear a decision making body may continue its
16 hearing to a date and time certain without the necessity of
17 repeating the original notice process. However, here, the
18 board of commissioners was the decision making body, and it
19 did not continue the hearing noticed for March 22, 1994.⁴
20 Rather, the planning commission met and continued the
21 hearing originally noticed to be before it and the board of
22 commissioners.⁵ Further, on April 26, 1994, the date and

⁴There is no dispute that petitioners did not appear at the March 22, 1994 planning commission hearing or the board of commissioners' April 26, 1994 hearing or October 19, 1994 meeting.

⁵As far as we can tell, the planning commission was not a decision maker on remand.

1 time set for the continued planning commission hearing, only
2 the board of commissioners met, not the planning commission.

3 This case is unusual in the sense that the original
4 notice of hearing identified two decision makers and only
5 one of those decision makers met and continued its portion
6 of the hearing. While it is possible the board of
7 commissioners could have continued its hearing, even though
8 it did not itself convene, that did not happen.⁶ Only the
9 planning commission continued its hearing, and it appears
10 the planning commission never met again to discuss the
11 matter. Under these circumstances, the board of
12 commissioners did not continue its hearing set for March 22,
13 1994 and, therefore, the board of commissioners never
14 conducted a properly noticed hearing on remand.

15 One final point merits comment. The county argues that
16 under ORS 197.763(8), the failure of a property owner to
17 receive notice of a hearing as provided in ORS 197.763 does
18 not invalidate the county's proceedings on remand, where
19 there is an affidavit showing such notice was given. The
20 requirement that petitioners be given notice of the county's
21 hearing on remand is not based on ORS 197.763. This is
22 because ORS 197.763(2) and (3) apply to notice of a local

⁶We do not foreclose the possibility that the local decision maker could specifically appoint another person or body to attend the designated hearing and announce on the decision maker's behalf that its hearing is continued to a date and time certain. However, nothing of the sort occurred here, and no one argues that such was the case below.

1 government's first evidentiary hearing. Therefore ORS
2 197.763(8) does not apply. In any case, as explained above,
3 the affidavit attached to the county's brief simply states
4 notice was given of the board of commissioners' March 22,
5 1994 hearing. There is no affidavit that petitioners were
6 given notice of the board of commissioners' April 26, 1994
7 hearing. We explain, supra, why the board of commissioners
8 did not properly continue its March 22, 1994 hearing to
9 April 26, 1994.

10 The second assignment of error is sustained.

11 **FIRST ASSIGNMENT OF ERROR**

12 Under this assignment of error, petitioners contend the
13 findings in the challenged decision fail to establish
14 compliance with LDO 54.040(C) and lack evidentiary support
15 in the record.

16 **A. Preliminary Issue**

17 Intervenor argues many of the issues petitioners raise
18 in this appeal were decided in Collins I, and because
19 petitioners did not appeal Collins I, they may not
20 relitigate those issues in this proceeding. See Mill Creek
21 Glen Protection Assoc. v. Umatilla County, 88 Or App 522,
22 527, 746 P2d 728 (1987); Louisiana Pacific v. Umatilla
23 County, ____ Or LUBA ____ (LUBA No. 94-054, September 8,
24 1994); Caine v. Tillamook County, 25 Or LUBA 209 (1993).

25 The doctrine of waiver established by the above cited
26 cases does not apply to issues that were the basis of our

1 remand in Collins I. The waiver doctrine applies only to
2 those issues we decided adversely to petitioners in
3 Collins I or that petitioners failed to raise in Collins I.
4 After reviewing the parties' arguments in this regard, we
5 believe the only issue raised by petitioners that is within
6 the scope of the waiver doctrine relates to the impacts of
7 access to the proposed livestock sales facility on the golf
8 course. In Collins I, 26 Or LUBA at 436-37 n 2, we stated:

9 "Petitioners point out the State Highway Division
10 will approve the location of the entrance [for the
11 proposed sales facility] based solely on safety
12 considerations and, therefore, it cannot be
13 assumed that compliance with LDO 54.040(C)
14 necessarily will be achieved by the State Highway
15 Division's review and approval of the relocated
16 entrance on Highway 140. We agree with
17 petitioners that the county may not defer the
18 required finding of compliance with LDO 54.040(C)
19 to the State Highway Division. * * * However,
20 although we conclude the county's findings
21 concerning LDO 54.040(C) are inadequate with
22 regard to the issue of traffic impacts on the golf
23 course, we do not understand the county to have
24 improperly deferred the required finding of
25 compliance with LDO 54.040(C) to the State Highway
26 Division. Moreover, to the extent petitioners
27 suggest the county may not rely on the condition
28 requiring Highway Division approval of a relocated
29 entrance as part of its rationale in concluding
30 the proposal will not have significant adverse
31 traffic impacts on the golf course, we reject the
32 argument. * * *" (Emphasis supplied.)

33 Therefore, that portion of petitioners' assignment of error
34 alleging the county improperly deferred a determination of
35 the proposal's compliance with LDO 54.040(C) regarding
36 impacts on the golf course of the access for the proposed

1 livestock sales facility is waived, and we do not consider
2 that issue further.

3 **B. Findings**

4 Petitioners argue the challenged decision fails to
5 include any determination concerning the location of the
6 entrance to the proposed facility and the traffic impacts of
7 that entrance on petitioner Collins's property. Petitioners
8 are correct. The findings in this regard are inadequate.

9 Petitioners also argue the challenged decision includes
10 findings asserting, without explanation, that intervenor
11 could transport livestock from other property he owns and
12 sell them on the subject property, as a permitted use.
13 Petitioners contend the findings strongly suggest a
14 determination of compliance with LDO 54.040(C) is justified
15 because the impacts of such allegedly permitted outright
16 activity would be no more than the impacts of the proposed
17 conditional use.

18 Petitioners contend the LDO makes stockyards and animal
19 sales conditional uses in the EFU-C zoning district, and
20 LDO 11.030 defines such facilities as:

21 "Temporary keeping of transient livestock for
22 auction, market or sale, shipping or slaughter."

23 Petitioners maintain that even if intervenor transported
24 only his own livestock located on other property to the
25 subject property for auction, a conditional use permit would
26 still be required for such use, and such use would not be a
27 permitted use available for comparison with the proposed

1 use.

2 We agree with petitioners that in the absence of a more
3 detailed explanation and interpretation of the county's
4 code, the county cannot assume intervenor may, as a
5 permitted use, transport his animals located on other
6 property to the subject property for sale in the manner
7 proposed.

8 This subassignment is sustained.

9 **C. Evidentiary Support**

10 Petitioners contend that in determining compliance with
11 LDO 54.040(C), the challenged decision relies on findings
12 that the golf course does not have significant use or
13 operations during winter months. Petitioners also contend
14 the challenged decision finds the golf course club house is
15 located one-half mile from the proposed livestock sales
16 facility, and that the golf course only has one hole from
17 which the proposed sales facility may be viewed.
18 Petitioners contend there is no evidentiary support for
19 these findings.

20 Intervenors cite two maps as providing evidentiary
21 support for the county's decision. We presume these are the
22 maps at Original Record 101 and 102.⁷ However, neither of
23 these maps appear to be drawn to scale. We agree the record
24 lacks evidentiary support for the above summarized findings.

⁷The parties agree the record for the challenged decision includes the record from Collins I (original record) and the remand record.

1 Petitioners also contend the challenged decision relies
2 on findings that the impacts of the proposed sales facility
3 will be reduced because the livestock to be sold are
4 purebred animals. Petitioners identify two problems with
5 this statement. First, petitioners state nothing in the
6 challenged decision limits the livestock to be sold to
7 purebred animals. Second, petitioners maintain there is no
8 evidence in the record to establish that purebred animals
9 cause fewer impacts than animals of mixed ancestry.
10 Petitioners are correct on both counts.

11 This subassignment of error is sustained.

12 The first assignment of error is sustained, in part.

13 The county's decision is remanded

14