

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

3  
4 NORMAN BROWN,                           )  
5    )  
6                    Petitioner,            )  
7    )  
8                vs.                            )  
9    )  
10 UNION COUNTY,                            )  
11    )  
12                    Respondent,            )  
13    )  
14                and                            )  
15    )  
16 ROBERT TEETER, DONNA TEETER,        )  
17 MICHAEL PARTNEY, and TRACY            )  
18 PARTNEY,                                    )  
19                    Intervenors-Respondent.                                    )

LUBA No. 95-246

FINAL OPINION  
AND ORDER

20  
21  
22                Appeal from Union County.

23  
24                Daniel Kearns, Portland, filed the petition for review.  
25 With him on the brief was Preston Gates & Ellis.

26  
27                No appearance by respondent.

28  
29                D. Rahn Hostetter, Enterprise, filed the response brief  
30 and argued on behalf of intervenors-respondent. With him on  
31 the brief was Mautz, Baum, Hostetter & O'Hanlon.

32  
33                HANNA, Chief Referee; LIVINGSTON, Referee,  
34 participated in the decision.

35  
36                           REMANDED    11/05/96

37  
38                You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

1 Opinion by HANNA.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county commission's approval of  
4 a conditional use permit to allow aggregate mining in the A-  
5 1 Exclusive Farm Use zone.

6 **MOTION TO INTERVENE**

7 Robert and Donna Teeter and Michael and Tracy Partney  
8 (intervenors), the applicants below, move to intervene in  
9 this proceeding on the side of respondent.<sup>1</sup> There is no  
10 opposition to the motion, and it is allowed.

11 **FACTS**

12 On May 8, 1995, intervenors applied for a plan  
13 amendment to add the subject property to the county's  
14 aggregate inventory, and a conditional use permit to mine  
15 aggregate basalt. The planning commission recommended  
16 approval of the plan amendment and denied the conditional  
17 use permit. Intervenors appealed the denial of the  
18 conditional use permit to the board of county commissioners  
19 (commissioners).<sup>2</sup>

20 On September 20, 1995, the commissioners held an  
21 evidentiary hearing and left the record open until September  
22 28, 1995 for the introduction of additional written

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<sup>1</sup>Robert and Donna Teeter are the owners of the subject property and Michael and Tracy Partney are the proposed operators of the mining operation.

<sup>2</sup>The planning commission's approval of the comprehensive plan amendment was not appealed, and is not relevant to this appeal.

1 evidence. On September 28, 1995, an opponent submitted a  
2 well-log report into the record stating that intervenors'  
3 well could produce only 20 gallons of water per minute. On  
4 October 9, 1995, after the record had closed, one of the  
5 intervenors telefaxed another well-log report to a  
6 commissioner that established a 100 gallon per minute water  
7 production rate for the subject property.<sup>3</sup> At a hearing on  
8 October 18, 1995, the commissioners reopened the record to  
9 accept the telefaxed well-log report into the record for  
10 purposes of correcting the earlier well-log report.<sup>4</sup> The  
11 commissioners specifically declined to accept any testimony,  
12 finally closed the record, and tentatively reversed the  
13 planning commission decision and approved the conditional  
14 use permit. On November 22, 1996 the commissioners adopted  
15 the challenged decision, approving the conditional use  
16 permit.

17 This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioner contends that intervenor engaged in an ex  
20 parte communication with a commissioner, and did not provide  
21 petitioner an opportunity to rebut the substance of that

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<sup>3</sup>The applicant who sent the telefax to the commissioner later telephoned a county planner to explain that the first well-log report submitted by an opponent was not prepared for the subject property while the telefaxed well-log report was prepared for the subject property. Record 17.

<sup>4</sup>Although the commissioners described their acceptance of the second well-log report as correcting the record, it is actually a case of each side submitting conflicting evidence into the record.

1 communication. Petitioners assert that although the  
2 commissioner disclosed receipt of the telefax and the  
3 commission decided to accept the telefax as evidence, the  
4 commission made a decision not to accept testimony regarding  
5 the telefax.

6 Intervenor's acknowledge that one of the commissioners  
7 received the telefax. They respond that the communication  
8 was disclosed at the next hearing after the telefax was  
9 received, on October 18, 1995, and no one objected to the  
10 commissioners' acceptance of the telefax. Intervenor's argue  
11 that petitioners has not demonstrated that he was prejudiced  
12 by the commissioners' acceptance of the telefax.

13 ORS 215.422(3) states:

14 "No decision or action of a planning commission or  
15 county governing body shall be invalid due to ex  
16 parte contact or bias resulting from ex parte  
17 contact with a member of the decision-making body,  
18 if the member of the decision-making body  
19 receiving the contact:

20 "(a) Places on the record the substance of any  
21 written or oral ex parte communications  
22 concerning the decision or action; and

23 "(b) Has a public announcement of the content of  
24 the communication and of the parties' right  
25 to rebut the substance of the communication  
26 made at the first hearing following the  
27 communication where action will be considered  
28 or taken on the subject to which the  
29 communication related. (Emphasis added.)

30 In Horizon Construction, Inc. v. City of Newberg, 114  
31 Or App 249 834 P2d 523 (1992), an ex parte contact was not  
32 disclosed in a timely manner and the petitioner was not

1 permitted an adequate opportunity to rebut the contact.<sup>5</sup>  
2 The court found that the requirement to disclose an ex parte  
3 contact requires both disclosure at the earliest time and  
4 giving parties the greatest opportunity to prepare and  
5 present rebuttal. The court also agreed with petitioner's  
6 argument that LUBA erred when it characterized the error as  
7 merely "procedural."

8 In Cole v. Columbia County, 28 Or LUBA 62 (1994), the  
9 circumstances surrounding the submission of additional  
10 evidence were similar to those here. After the close of the  
11 evidentiary hearing, the county reopened the record and  
12 announced an ex parte contact. However, in Cole, the county  
13 satisfied the ORS 215.422(3) requirement when it allowed the  
14 parties to rebut the ex parte contact.

15 In the case before us, the county violated ORS 215.422,  
16 when it did not provide for an opportunity for rebuttal of  
17 the ex parte communication. Because violation of ORS  
18 215.422 is not a procedural error, petitioner is not  
19 required to show that his substantial rights were prejudiced  
20 by the county's error.

21 The first assignment of error is sustained.

22 **SECOND ASSIGNMENT OF ERROR**

23 Petitioner contends that the county violated ORS  
24 197.763 also when it accepted the telefaxed well-log report

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<sup>5</sup>Horizon Construction, Inc. v. City of Newberg addressed ORS 227.180(3),  
the city corollary to the county requirement in ORS 215.442(3).

1 into the record without providing the opportunity for  
2 rebuttal.

3 Intervenor's argue that a violation of ORS 197.763 is a  
4 procedural error for which petitioner must demonstrate that  
5 his substantial rights were prejudiced. Intervenor's argue  
6 petitioner has not established that the commissioner's  
7 acceptance of the correct well-log report violated his  
8 substantial rights.

9 Under ORS 197.835(9)(a)(B), a procedural error is not a  
10 basis for reversal or remand unless petitioners' establish  
11 that the error caused prejudice to their substantial rights.  
12 ONRC v. City of Oregon City, 29 Or LUBA 90, 97 (1995).  
13 Petitioner has not attempted to show that he was prejudiced  
14 by the county's acceptance of the well-log report.

15 The second assignment of error is denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 Petitioner argues:

18 "Respondent misconstrued and misapplied the  
19 applicable law by approving the application when  
20 it did not meet the first requirement for an  
21 aggregate mine CUP, viz. the requirement in  
22 [Zoning, Partition and Subdivision Ordinance] ZPSO  
23 21.07(3)(A)(1) that the applicant shall submit  
24 information on the quality and quantity of mineral  
25 resources at the site." Petition for Review 12.  
26 (Emphasis added.)

27 Intervenor's argue that petitioners did not raise this  
28 issue below. Petitioner states:

29 "Respondent may argue that petitioner is barred  
30 from raising this issue under ORS 197.835 because

1 it was not raised in the proceeding below.  
2 However, the notice of the board's hearings was  
3 defective in that it failed to list ZPSO 21.06 and  
4 ORS 215.296 as applicable approval criteria. See  
5 Rec 80 and 83. (Emphasis added.) Petition for  
6 Review 12.

7 Petitioner is correct that the hearing notices do not  
8 identify ZPSO 21.06 as an applicable approval criterion.  
9 However, it is not ZPSO 21.06 that petitioner relies on as  
10 the basis of his argument. Petitioner argues the  
11 application of ZPSO 21.07(3)(A)(1). Petitioner has not  
12 established that he raised the application of ZPSO  
13 21.07(3)(A)(1) below.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioner argues that the challenged decision  
17 addresses the requirements of ORS 215.296 in only summary  
18 and conclusory terms, and contends the findings are  
19 inadequate because they are not "detailed, fact-specific and  
20 exhaustive, in that there is no identification of the area  
21 of the surrounding lands and no description of the resource  
22 uses." Petition for Review 15.<sup>6</sup>

23 ORS 215.296(1) states:

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<sup>6</sup>As in the third assignment of error, intervenor contends that petitioner did not raise below the application of ORS 215.296 to the challenged decision. Petitioner's contention that the hearing notices did not identify ORS 215.296 as an applicable approval criterion is correct. Because the hearing notice did not identify ORS 215.296 as an applicable approval criterion, petitioner may raise issues now regarding compliance with that criterion.

1           "(1) A use allowed under ORS 215.213 (2) or  
2           215.283 (2) may be approved only where the  
3           local governing body or its designee finds  
4           that the use will not:

5           "(a) Force a significant change in accepted  
6           farm or forest practices on surrounding  
7           lands devoted to farm or forest use; or

8           "(b) Significantly increase the cost of  
9           accepted farm or forest practices on  
10          surrounding lands devoted to farm or  
11          forest use.

12          The challenged decision addresses this requirement by  
13          stating:

14          "The applicants have satisfied the criteria in ORS  
15          215.296 which requires the proposed uses do not  
16          significantly change or increase the cost of  
17          accepting [sic] farming or forest practice in the  
18          surrounding land area devoted to farm and forest  
19          use because there are no surrounding forest uses  
20          and surrounding farm uses are owned and operated  
21          by two of the applicants \* \* \* and an adjacent  
22          landowner to the west \* \* \*, all [sic] testified  
23          in support of the application \* \* \*. No evidence  
24          or testimony in opposition identified how the  
25          proposed uses would significantly force change in  
26          or increase the cost of accepted farming practices  
27          in the area." Record 6.

28          In order to demonstrate compliance with ORS 215.296(1),  
29          county findings must (1) describe the farm and forest  
30          practices on surrounding lands devoted to farm or forest  
31          use, (2) explain why the proposed use will not force a  
32          significant change in those practices, and (3) explain why  
33          the proposed use will not significantly increase the cost of  
34          those practices. Schellenberg v. Polk County, 21 Or LUBA  
35          425 (1991).

1           The findings establish that analysis pertaining to  
2 forest practices is not required for the subject property.  
3 With respect to farm practices, the findings are indeed  
4 summary, relying on the fact that the applicants, who own  
5 some or all of the surrounding property, do not object to  
6 the proposal and that no evidence or testimony identified  
7 how the proposed use would significantly force a change in  
8 or increase the cost of accepted farm practices in the area.

9           In Berg v. Linn County, 22 Or LUBA 507 (1992), we  
10 explained that a local government may not assume that there  
11 are no adverse farm impacts from an absence of information  
12 in the record. The local government has the burden to  
13 identify and explain why it believes there are no  
14 significant adverse impacts and why it believes the cost of  
15 accepted farm practices would not be increased. To do  
16 otherwise would impermissibly shift the burden for  
17 establishing compliance with the criterion to the  
18 petitioner. Mission Bottom Assoc. v. Marion County, \_\_\_ Or  
19 LUBA \_\_\_ (LUBA No. 96-057, September 26, 1996).

20           Absent the required evaluation and explanation the  
21 county's findings are inadequate.

22           The fourth assignment of error is sustained.

23           **FIFTH ASSIGNMENT OF ERROR**

24           Petitioner argues that although it is unclear whether  
25 the general conditional use provisions of ZPSO 21.06 apply  
26 in addition to the particular conditional use provisions of

1 ZPSO 21.07(3), the challenged decision, in fact, applies the  
2 requirements of ZPSO 21.06, and does so in an inadequate  
3 manner. Petitioner argues that to satisfy ZPSO 21.06, the  
4 commissioners were required to (1) determine the area for  
5 making the general compatibility assessment, (2) inventory  
6 and identify the outright and conditional nearby uses that  
7 might be affected by the proposed use, and (3) analyze how  
8 the proposed use on the subject property might affect nearby  
9 uses. In proposing this test, petitioner relies on the  
10 process set forth in Sweeten v. Clackamas County, 17 Or LUBA  
11 1234 (1989) used to interpret administrative rules  
12 regulating the siting of dwellings on exclusive farm use  
13 lands, and argues that ZPSO 21.06 must be interpreted in a  
14 like manner.

15 Intervenor argue that petitioner did not raise below  
16 the application of ZPSO 21.06 to the challenged decision;  
17 that the commissioners did not apply ZPSO 21.06 in its  
18 entirety to the challenged decision and that ZPSO 21.06 in  
19 its entirety does not apply to the challenged decision.  
20 Intervenor point out that the county applied only ZPSO  
21 21.06(1) to the proposal.

22 The Criteria section of the challenged decision states:

23 "Section 21.06 1. states conditional use shall  
24 ordinarily comply with the standards of the zone  
25 concerned for uses permitted outright except as  
26 specifically modified by the Planning Commission.  
27 Record 4.

28 The Ultimate Findings section of the challenged

1 decision states:

2 "Section 21.06 1. is interpreted to require  
3 Conditional Use applications to satisfy a 'general  
4 test of compatibility' with adjacent and nearby  
5 uses and other permitted uses within the  
6 applicable zone(s)." Record 7.

7 It is unclear whether the challenged decision applies  
8 the general conditional use provisions of ZPSO 21.06(1) in  
9 addition to the particular conditional use provisions of  
10 ZPSO 21.07(3).<sup>7</sup>

11 ZPSO 21.06(1) states:

12 "A conditional use shall ordinarily comply with  
13 the standards of the zone concerned for uses  
14 permitted outright except as specifically modified  
15 by the Planning Commission in granting the  
16 conditional use."

17 Petitioner refers to and bases his argument on ZPSO  
18 21.06(2).<sup>8</sup> ZPSO 21.06(2) specifically excludes from its

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<sup>7</sup>We agree with intervenor that the application of ZPSO 21.06 in its entirety was not properly raised under ORS 197.763. We will not consider it now. ORS 197.835(3).

<sup>8</sup>ZPSO 21.06(2) states:

"Other uses similar to those enumerated within specified zones except in the A-1, A-2 and A-3 zones which are consistent with the purposes and intent of the applicable zone may be modified by the Planning Commission if the use is found:

"A. To be compatible with outright or conditional uses in the applicable zone.

"B. Not to interfere seriously with established and accepted practices on adjacent lands.

"C. Not to materially alter the stability of the overall land use pattern of the area.

1 ambit uses in the A-1 zone. Petitioner's argument is not  
2 relevant to compliance with ZPSO 21.06(1). Petitioner has  
3 not demonstrated that the findings establishing compliance  
4 with ZPSO 21.06(1) are inadequate.

5 The fifth assignment of error is denied.

6 The county's decision is remanded.

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"D. That the proposed use can comply with the standards of  
the zone, and

"E. To comply with such other conditions as the Planning  
Commission or its designate considers necessary to carry  
out the purposes of this ordinance."