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

WILD ROSE RANCH ENTERPRISES, LLC,
KEITH SLATER, and C.C. & S. CRUSHING INC.,
Petitioners,

vs.

BENTON COUNTY,
Respondent,

and

WAKE-UP, an organization of citizens,
Intervenor-Respondent.

LUBA No. 99-034

Appeal from Benton County.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioners. On the brief with him was Weatherford, Thompson, Quick & Ashenfelter, P.C.

Vance M. Croney, Corvallis, filed the response brief and argued on behalf of respondent.

John M. Junkin, Portland, filed the response brief and argued on behalf of intervenor-respondent. On the brief with him was Bullivant, Houser, Bailey, P.C.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 12/17/99

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

1 Briggs, Board Member.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision denying an application for a conditional use
4 permit to operate a commercial rock quarry.

5 **MOTION TO INTERVENE**

6 WAKE-UP (intervenor) moves to intervene on the side of the respondent. There is
7 no opposition to the motion, and it is allowed.

8 **MOTION TO FILE REPLY BRIEF**

9 Petitioners move for permission to file a reply brief pursuant to OAR 661-010-0039,
10 arguing that the respondent's and the intervenor's response briefs raise "new matters" that
11 entitle petitioners to reply. Respondent opposes this motion on the grounds that neither
12 response brief raise "new matters" within the meaning of OAR 661-010-0039 and, therefore,
13 petitioners' reply brief is not warranted.

14 Petitioners' reply brief contains arguments addressing respondent's and intervenor's
15 responses to seven assignments of error contained in the petition for review. As we have
16 interpreted OAR 661-010-0039, "new matters" include arguments that an assignment of error
17 should fail, regardless of its merits, based on facts or law not implicated by the merits of the
18 assignment of error. *D.S. Parklane Development, Inc. v. Metro*, ____ Or LUBA ____ (LUBA
19 Nos. 97-048 *et. al.*, February 25, 1999) slip op 6-7.

20 In the second assignment of error in the petition for review, petitioners argue that the
21 county erred by failing to include a decisional criterion in its notice document and further
22 erred by subsequently relying on that criterion as one ground to deny the subject application.
23 The petition for review contends that the county's use of the criterion as the basis for denial
24 violated their substantial rights.

25 In intervenor's response brief, intervenor argues that petitioners did not raise that
26 issue below, and therefore it is waived. ORS 197.763(1); ORS 197.835(3). Intervenor has

1 raised a new matter and therefore that portion of petitioners' reply brief that responds to that
2 issue is allowed. The remainder of petitioners' reply brief is denied, as the arguments merely
3 supplement the arguments contained in the petition for review. Therefore, we do not consider
4 them. *Sanders v. Yamhill County*, 34 Or LUBA ____ (LUBA No. 96-173, February 5, 1998).

5 **FACTS**

6 The subject property is a 100 acre, sloped, hillside tract within the Forest
7 Conservation (FC) zone. The property is surrounded by lands zoned for farm and forest uses,
8 with some residential uses located on nearby properties. A four-acre portion of the subject
9 parcel is listed as a 1-B aggregate resource in the county's comprehensive plan, meaning that
10 not enough information is known about the quality or quantity of the rock source on the site
11 to justify a plan amendment to permit mining outright.

12 In 1988, petitioners began operating a rock quarry on the four-acre portion of the
13 subject property. In 1998, petitioners proposed to expand the quarry upslope to encompass
14 40 of the 100 acres in the aggregate operations. Because the expansion would result in an
15 amount of rock being extracted that exceeded the limit permitted in the zone, petitioners
16 applied to the county for a conditional use permit. The planning commission denied the
17 application. Petitioners appealed the decision to the Benton County Board of Commissioners
18 (commissioners). After a public hearing, the commissioners affirmed the decision of the
19 planning commission and denied the requested conditional use permit.

20 This appeal followed.

21 **FIFTH ASSIGNMENT OF ERROR**

22 Petitioners argue that the county's denial should be reversed due to the failure of one
23 of the commissioners to disclose the substance of her *ex parte* contacts with intervenor as
24 required by ORS 215.422(3).¹ Respondent and intervenor do not deny that the *ex parte*

¹ ORS 215.422(3) provides:

1 contact occurred, but argue that, by failing to object to the adequacy of the commissioner’s
2 disclosure either at the hearing or before the decision was rendered, petitioners waived their
3 opportunity to challenge the contacts on appeal.

4 LUBA may reverse or remand a land use decision under ORS 197.835(12), due to “*ex*
5 *parte* contacts or bias resulting from *ex parte* contacts with a member of the decision-making
6 body, only if the member of the decision-making body did not comply with ORS
7 215.422(3)[.]”

8 The draft minutes of the commissioners’ hearing on January 19, 1999, show that one
9 of the earliest points of business was the disclosure of *ex parte* contacts, bias, and conflicts of
10 interest. At that time, one commissioner stated that she had attended a meeting where the
11 neighbors of the subject property aired their concerns about the proposed expansion of the
12 rock quarry. According to the commissioner, discussion topics included “noise, increased
13 truck traffic, safety, slides, and the possible effects on water supplies.” Record 31-31a. At the
14 board meeting, the commissioner stated that she had only “heard the concerns of just one of
15 the factions involved in this matter” and was “look[ing] forward to hearing the other side” in
16 order to “make an objective decision.” Record 31a. Petitioners neither objected to the
17 adequacy of the disclosure, nor requested further clarification from the commissioner
18 regarding the *ex parte* contact.

19 The commissioner disclosed the contact as the first order of business during the

“No decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

“(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

“(b) Has a public announcement of the content of the communication and of the parties’ right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.”

1 January 19, 1999 public hearing. That disclosure included a summary of the discussion's
2 substance and allowed petitioners an adequate opportunity to rebut the communication or
3 object to the adequacy of the disclosure. Petitioners have not demonstrated that the
4 commissioner's actions constitute a violation of ORS 215.422(3). Even assuming that the
5 commissioner's disclosure was inadequate, petitioners failed to object to the adequacy of that
6 disclosure. *See Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995) ("Where a party has the
7 opportunity to object to a procedural error before the local government, but fails to do so,
8 that error cannot be assigned as grounds for reversal or remand of a local government
9 decision in an appeal to this Board.").

10 The fifth assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioners argue that the county erred by not allowing petitioner the right to final
13 rebuttal as provided in ORS 197.763(6)(e). According to petitioners, they did not waive their
14 right to submit final written arguments, and therefore, they were entitled to submit them.
15 Petitioners argue that this statutory right is essential in this case, because opponents to the
16 application presented new evidence in their rebuttal. Without the opportunity for written
17 argument, petitioners would not be able to respond to the opponents' new evidence.

18 ORS 197.763(6)(e) provides, in relevant part:

19 "Unless waived by the applicant, the local government shall allow the
20 applicant at least seven days after the record is closed to all other parties to
21 submit final written arguments in support of the application. The applicant's
22 final submittal shall be considered part of the record, but shall not include any
23 new evidence."

24 The county contends that petitioners waived their right to rebuttal by failing to object
25 to the submittal of new evidence prior to or at the time of the commissioners' deliberations.
26 According to the county, there was opportunity to raise the issue of final arguments before
27 the local government, either orally, at the close of testimony on January 19, 1999, or in
28 petitioners' written rebuttal submitted on January 25, 1999.

1 At the close of oral testimony on January 19, 1999, both petitioners and intervenor
2 agreed that the record would remain open for seven days in order for both parties to respond
3 to the new evidence that had been presented at the January 19, 1999 hearing. Record 39.
4 There was substantial discussion between the commissioners and the parties about what
5 would be permitted as rebuttal, and at one point, petitioners' attorney indicated that any
6 concerns that either he or opposing counsel had with the procedures adopted by the
7 commissioners, would be "filed" with the county counsel. Record 39.

8 At the January 19, 1999 hearing, petitioners' attorney knew that the rebuttal
9 testimony would be received until January 25, 1999, and that the commissioners would be
10 deliberating on January 26, 1999. Petitioners had the opportunity to object to the fact that the
11 proposed decision process failed to include time for the submittal of final written argument at
12 that point, or prior to the time the commissioners began its deliberations on January 26, 1999.
13 In this circumstance, we conclude that, by agreeing with and then failing to object to the
14 process for receiving written responses into the record after the January 19, 1999 closing date
15 for oral testimony, petitioners waived their right to submit final argument.

16 The second assignment of error is denied.

17 **FOURTH ASSIGNMENT OF ERROR**

18 In this assignment of error, petitioners argue that the county committed a procedural
19 error by limiting oral testimony during the January 19, 1999 hearing. Petitioners contend that
20 the county's limitation on oral testimony denied petitioners' due process and right to equal
21 protection.

22 In the county's notice of hearing on the appeal, the county announced that the
23 applicants and their representatives were allowed twenty minutes to make their oral
24 presentation and ten minutes for rebuttal. All other persons testifying before the
25 commissioners would be allowed only three minutes to present their testimony. The
26 commissioners did not limit the inclusion of written material submitted prior to or during the

1 hearing. At the hearing, petitioners complained about the time limitation to the
2 commissioners, but proceeded to present testimony where, by and large, the persons speaking
3 on behalf of petitioners abided by the three-minute limitation. According to petitioners, the
4 intervenor's witnesses were allowed to concede portions of their time to other opponents,
5 thereby permitting some of intervenor's witnesses more than three minutes to testify.
6 Petitioners' witnesses were not allowed such liberty, either in their own testimony or during
7 rebuttal. Petitioners argue this arbitrary procedure substantially prejudiced their rights and is
8 so egregious that it warrants a reversal by this Board.

9 Respondent denies that the procedures violated petitioners' substantial rights. The
10 county claims that even if the commissioners erred by not allowing petitioners the
11 opportunity to cede their time to other proponents, that error did not violate petitioners'
12 substantial rights, and certainly does not rise to a constitutional violation. Respondent cites
13 *Northeast Neighborhood Assoc. v. City of Salem*, 4 Or LUBA 221, 228 (1981), *aff'd* 59 Or
14 App 499, 651 P2d 193 (1982), *rev den* 294 Or 460 (1983) for the proposition that a local
15 government may establish limits on oral testimony without violating any participant's right
16 to a full and fair hearing, so long as the local government provides an opportunity to
17 supplement oral argument with written materials.

18 Even if the time limits and the limitation on petitioners' witnesses to three minutes of
19 testimony constrained petitioners' opportunity to be heard, we agree with respondent. Any
20 error was remedied in this case by the commissioners' acceptance of new evidence prior to
21 the January 19, 1999 hearing and by the commissioners providing an opportunity after the
22 hearing closed for the submission of written rebuttal.

23 The fourth assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR**

25 In this assignment of error, petitioners challenge the county's conclusions that the
26 proposal failed to comply with Benton County Code (BCC) 53.215. Petitioners argue that the

1 county improperly construed applicable law in reaching its conclusion, and also argue that
2 the county’s findings are not supported by substantial evidence. Petitioners contend that the
3 county’s interpretation of the provisions of the local code effectively preempted the authority
4 of the Oregon Department of Transportation (ODOT) to regulate access to and use of state
5 highways. Petitioners also contend that the county’s findings that the proposed quarry
6 activity will adversely affect drainage in the area are not supported by substantial evidence in
7 the record.

8 **A. Improper Application of Local Ordinance Provisions**

9 BCC 53.215 establishes the approval criteria for conditional use permits. It provides,
10 in relevant part, that

11 “The decision to approve a conditional use permit shall be based on findings
12 that:

13 “* * * * *

14 “(2) The proposed use does not impose an undue burden on any public
15 improvements, facilities, utilities, or services available to the area[.]”

16 The subject property is accessed via Oregon State Highway 223. In its findings
17 addressing this criterion, the county found that the applicant had failed to show that the
18 quarry-related vehicles would not impose an undue burden on Highway 223.²

²The county’s findings are as follows:

“The proposed use may impose an undue burden on the state highway in the vicinity of the operation. [The s]ubject property utilizes State Highway 223 as the primary transportation route for hauling gravel to the various job sites. Although ODOT has indicated it does not have specific authority to impose conditions, the State Highway is a public improvement and under BCC 53.215(2) * * *, the county is obligated to require the Applicant to mitigate negative impacts to public improvements that are created as a result of any undue burden imposed by the activity.

“In this case, the Applicant has not provided evidence demonstrating that this standard has been met. Specifically, [the Applicant failed to mitigate] the impacts of truck traffic to the highway and identifying how any needed repairs will be made. Furthermore, there has been no evidence submitted demonstrating the amount of traffic to be generated from the operation, the frequency of traffic, or the nature of the vehicles to be used in the operation. Conversely, there is evidence in the record indicating that there may already be impacts to the

1 Prior to applying for the conditional use permit for quarrying activities, petitioners
2 applied for an access permit from ODOT. ODOT agreed to issue the access permit, provided
3 certain improvements to the approach to the state highway, including signage and improved
4 sight distance, were made. Petitioners argue that they presented evidence before the
5 commissioners to show that they would comply with ODOT's requirements. According to
6 petitioners, the conditions imposed by the ODOT access permit indicate that so long as the
7 conditions were met, there is no undue burden on that particular public improvement.
8 Because ODOT conditionally approved the access permit, petitioners argue, the county could
9 not subsequently find that the quarry activities would impose an undue burden on the *state's*
10 facilities, in the face of an ODOT finding which concluded otherwise.

11 We disagree with petitioners that by granting an access permit, ODOT determines
12 that a proposed use will not impose a burden on those facilities.³ We also disagree with
13 petitioners that the state's regulation of access preempts the county's ability to require that a
14 proposed use not impose an undue burden on those facilities. *See Moorefield v. City of*
15 *Corvallis*, 18 Or LUBA 95, 108 (1989) (Determining that a use complies with DEQ

highway due to the truck traffic which has accrued as a result of the stepped-up gravel extraction operations of the Applicant.

"Compelling evidence and testimony was presented that the commercial quarry would have a detrimental effect on the Hwy. 223, by reason of, among other things, creating traffic safety problems due to the necessary slowing and wide turns of rock trucks entering and leaving the subject property. Further, evidence was presented that the continuous traffic from and to the proposed commercial quarry will have detrimental effect[s] on the road bed and pavement. Testimony and video evidence was presented establishing that existing drainage facilities are not sufficient to adequately address the storm water runoff from the subject site in matters of quantity and water quality, thereby resulting in flooding of Highway 223.

"Conclusion: Additional truck traffic, unsafe access and storm water flooding generated by the proposed commercial quarry would impose an undue burden on * * * Highway 223. The Applicant failed to meet its burden by showing that the proposed commercial quarry use would not impose an undue burden on any public improvements, facilities, utilities, or services available to the area. (BCC 53.215(2))." Record 26-27.

³The ODOT access permit presumably constitutes some evidence that the proposed quarry satisfies BCC 53.215(2), but we disagree with petitioners that ODOT's approval has any preemptive or conclusive effect.

1 standards does not remove the necessity for the local government to determine whether local
2 requirements are met.)

3 **B. Substantial Evidence**

4 Petitioners argue that the county's findings to support its determination that their
5 application failed to comply with BCC 53.215(2) are not supported by substantial evidence
6 in the record. Petitioners contend that there is insufficient evidence to show that storm
7 drainage caused by quarry activities may damage the highway.

8 To successfully challenge a denial on evidentiary grounds, petitioners must
9 demonstrate that its evidence must be believed as a matter of law. *Jurgenson v. Union*
10 *County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Horizon Construction, Inc. v. City*
11 *of Newberg*, 28 Or LUBA 632, 641-42 (1995); *Kegg v. Clackamas County*, 15 Or LUBA
12 239, 244 (1987).

13 The county's findings conclude that the application failed to comply with BCC
14 53.215(2) for several reasons, including the fact that the applicants failed to provide evidence
15 regarding the impact of vehicles on highway infrastructure and traffic safety. Petitioners cite
16 to evidence to support its contention that quarry operations would not cause runoff: a letter
17 from the Oregon Department of Forestry concluding that erosion control measures would
18 comply with the Oregon Forest Practices Act; evidence that water runoff originates from an
19 area larger than the subject property; and evidence that a culvert intended to divert water
20 from the road is 18 inches in diameter, and meets a culvert that is 12 inches in diameter, and
21 the excess capacity cannot be contained in the smaller culvert.

22 Even if petitioners' evidence is to be believed as a matter of law with regard to the
23 impact of drainage, petitioners have not challenged the adequacy of the evidence to support
24 the remainder of the county's findings addressing BCC 53.215(2). The county found that in
25 addition to increasing runoff that might damage the road, additional truck traffic would
26 increase damage to the road infrastructure, and would impede safe travel on the highway.

1 The evidence cited by petitioners does not demonstrate as a matter of law that the “proposed
2 use does not impose an undue burden on any public improvements, facilities, utilities, or
3 services available to the area.” BCC 53.215(2).

4 The third assignment of error is denied.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioners argue that the county committed procedural error in failing to provide
7 notice that Plan Element IV, Policy C(1) was one of the decision criteria. According to
8 petitioners, the county ultimately denied the application based in part on findings of
9 noncompliance with Plan Element IV, Policy C(1). However, the county requires only one
10 valid basis for denial for it to be affirmed by this Board. *Patton v. Clackamas County*, 22 Or
11 LUBA 415, 416 (1991) (A local government’s denial of a land development application will
12 be affirmed if the local government’s determination that any one approval standard is not
13 satisfied is sustained.) Because we affirmed the county’s basis for denial under the third
14 assignment of error, any errors that the county committed with respect to its alternative bases
15 for denial do not provide a basis for reversal or remand.

16 The first assignment of error is denied.

17 The county’s decision is affirmed.