

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS JUN 15 4 58 PM '88
OF THE STATE OF OREGON

THOMAS SMITH, JR.,
Petitioner,
vs.
DOUGLAS COUNTY,
Respondent,
and
CHARLES S. WEDDLE, DIANNE
WEDDLE, GEORGE ESSIN, LINDA
ESSIN, CHARLES C. AMOS, RUTH
J. AMOS and WINIFRED MAKER,
Intervenors-
Respondent.

LUBA No. 88-016
FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Johnson & Kloos.

No appearance by Douglas County.

Charles S. Weddle, Dianne Weddle, George Essin, Linda Essin, Charles C. Amos, Ruth J. Amos and Winifred Maker, filed a response brief and George Essin and Charles C. Amos argued on their own behalf.

HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee participated in the decision.

REMANDED 06/15/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals Douglas County Board of Commissioners'
4 (county board's) Order 87-104 reversing the county planning
5 commission's approval of a conditional use permit for a church
6 in the Rural Residential-2 (RR) Zone.

7 FACTS

8 Petitioner seeks a conditional use permit to allow an
9 existing dwelling located on a 5.01 acre parcel to be used as a
10 church. Road access to the 5.01 acre parcel is from Starveout
11 Creek Road by a 500 foot long dirt driveway located on a
12 60-foot wide access easement across an adjoining parcel to the
13 south.

14 When the planning commission heard the request on
15 September 3, 1987, a motion to approve the request resulted in
16 a 2-2 tie vote. Because a majority of the planning commission
17 members voting is required to approve a conditional use permit,
18 an order to deny the permit was issued. The denial was
19 appealed to the county board, which remanded the decision for
20 reconsideration by the full planning commission. On remand,
21 the planning commission voted 6-1 to approve the conditional
22 use permit.

23 The planning commission's approval of the conditional use
24 permit was appealed to the county board by nine neighbors,
25 including the seven intervenors in this proceeding. In their
26 appeal to the county board, the neighbors alleged seven

1 errors. The county board's review of the planning commission's
2 decision was a de novo review of the record established before
3 the planning commission. The county board considered only one
4 of the seven alleged errors and reversed the planning
5 commission's decision on that single ground.

6 STANDING

7 Intervenor's object to the following statement in
8 petitioner's standing allegations:

9 "[Petitioner's] interests in exercising their¹ first
10 amendment rights to freely assemble and to freely
11 exercise their religion have been adversely affected
12 by the decision under review." Petition for Review 1.

12 Intervenor's apparently understand petitioner to allege that
13 the county's decision violates his constitutional rights under
14 the First Amendment to freely assemble and exercise his
15 religion.

16 We understand petitioner's statement to claim he was
17 "adversely affected" as that term is used in
18 ORS 197.830(3)(c)(B). We do not understand petitioner to claim
19 the county board's decision deprived him of a constitutional
20 right.

21 Under ORS 197.830(3) petitioner has standing if he

22 "(a) Filed a notice of intent to appeal * * *;

23 "(b) Appeared before the local government * * *; and

24 "(c) Meets one of the following criteria:

25 "(A) Was entitled as of right to notice and hearing
26 prior to the decision to be reviewed; or

"(B) Is aggrieved or has interests adversely affected

1 by the decision."

2 In addition to the allegation concerning adverse effects
3 quoted above, petitioner also alleges he was entitled to notice
4 and a hearing as provided in ORS 197.830(3)(c)(A) and is
5 "aggrieved" as that term used in ORS 197.830(3)(c)(B).²

6 Because intervenors do not contest the notice and aggrievement
7 allegations, and these allegations are sufficient to satisfy
8 the standing requirement of ORS 197.830(3)(c), See Jefferson
9 Landfill Committee v. Marion County, 297 Or 280, 283-286, 686
10 P2d 310 (1984) and Warren v. Lane County, 297 Or 290, 296-301,
11 686 P2d 316 (1984), we find petitioner has standing.³

12 FIRST ASSIGNMENT OF ERROR

13 "The Board of Commissioners exceeded its jurisdiction
14 by reversing the decision of the Planning Commission
15 based upon an issue that was not raised in the appeal
before it. ORS 197.835(8)(a)(A)."

16 SECOND ASSIGNMENT OF ERROR

17 "The Board of Commissioners acted outside the range of
18 discretion allowed to it by the ordinances
implementing the comprehensive plan. ORS 197.835(9)."

19 THIRD ASSIGNMENT OF ERROR

20 "The Board of Commissioners acted in a manner that was
21 not consistent with the acknowledged land use
22 regulations and in a manner that is prohibited as a
matter of law by those regulations. ORS 197.835(3);
OAR 661-10-071(1)(c)."

23 The Douglas County Land Use and Development Ordinance
24 (LUDO) contains detailed procedures for review of planning
25 commission decisions by the county board.⁴ There are two
26 ways appeals of planning commission decisions may be initiated:

1 "Review of the decision:

2 "a. Shall be made by the Board pursuant to
3 Section 2.700 upon any party filing a Notice
4 of Review with the Director within 10 days
5 of the filing of the written decision sought
6 to be reviewed. Failure to file a Notice of
7 Review within 10 days shall be a
8 jurisdictional defect.

9 "b. May be made by the Board, pursuant to
10 Section 2,700, [sic] on its own motion
11 passed within 10 days of the filing of the
12 written decision sought to be reviewed."
13 LUDO Section 2.500(1).

14 A notice of review under LUDO Section 2.500(1)(a) is
15 required to contain "[t]he specific grounds relied upon
16 * * *." LUDO Section 2.500(5)(c).

17 LUDO Section 2.700(1) limits review by the county
18 board to "arguments of the parties and the record of the
19 proceeding below * * *." The key provision, for purposes
20 of the first three assignments of error, is LUDO Section
21 2.700(2) which provides:

22 "Review by the Board shall be a de novo review of the
23 record limited to the grounds relied upon in the
24 notice of review * * * if the review is initiated by
25 such notice." (Emphasis added).

26 In this case, the appeal of the planning commission's
27 decision was initiated by a notice of review filed by
28 intervenors under LUDO Section 2.500(1)(a). The notice of
29 review sets out seven allegations of error. Record 71-73. We
30 find nothing in the record to indicate the county board also
31 initiated review on its own motion under LUDO Section
32 2.500(1)(b).

1 The county board considered only one of the seven
2 allegations of error. That allegation of error is as follows:

3 "The Planning Commission erred by refusing to allow
4 testimony and evidence concerning the personal
5 background of Reverend Smith, and related financial
6 and religious practices and limitations of his church,
7 when such evidence was relevant to the question of
8 compatibility of the proposed use with adjacent
9 permitted uses and other uses permitted in the
10 underlying zone, under Douglas County Land Use and
11 Development section 3.39.050(1). This error is all
12 the more clear in light of the fact that
13 "compatibility" in Oregon does not mean the absence of
14 all negative impacts whatsoever, but does mean the
15 capability of living together harmoniously. * * *"
16 Record 71.

17 The county board concluded the planning commission did not
18 err by refusing to allow the evidence about Reverend Smith's
19 background. Record 4. However, the county board proceeded to
20 address, in its findings, the compatibility standard in LUDO
21 Section 3.39.050(1). The county board concluded the applicant
22 had not met his burden to show the proposed change would be
23 compatible with adjacent permitted uses and other uses
24 permitted in the underlying zone.

25 Petitioner argues that, under LUDO Section 2.700(2), the
26 county board has a limited role to perform in reviewing appeals
of planning commissions on conditional use permits. Petitioner
notes the county board expressly recognized this limited role
in its order.

 "The scope of this review is defined by section 2.700
of the Douglas County Land Use Development Ordinance
(LUDO). Review by the Board is confined to arguments
of the parties and the record of the proceeding
below. LUDO section 2.700.1. The Board conducts a de
novo review of the record limited to the grounds

1 stated in the Notice of Review. LUDO section
2.700.2." Record 1-2.

2 According to petitioner, the county board should have
3 stopped when it concluded the planning commission did not err
4 by refusing to take the evidence about Reverend Smith.
5 Petitioner says that by going further and considering whether
6 the proposed use met the LUDO's substantive compatibility
7 standard, the county board addressed an issue not identified in
8 the notice of review. By doing so, petitioner argues, the
9 county board exceeded its jurisdiction, exceeded its
10 discretion, and acted in a manner prohibited by the
11 acknowledged LUDO.

12 We agree with petitioner that the intervenors' allegation
13 of error, set forth supra, alleges only a procedural error by
14 the planning commission in not allowing evidence of Reverend
15 Smith's background. The allegation does not contest the
16 planning commission's substantive determination that the
17 compatibility standard in LUDO Section 3.39.050(1) is met.

18 A. County Board's Jurisdiction

19 The first assignment of error alleges the county exceeded
20 its "jurisdiction". The county board's failure to limit the
21 review as provided in LUDO Section 2.700(2), even if that
22 failure was error, did not amount to exceeding its
23 "jurisdiction" as that term is used in ORS 197.835(8)(a)(A).
24 The county board clearly has authority to adopt procedures for
25 the conduct of appeals of planning commission decisions n
26

1 conditional use permits. ORS 215.422(1). We are aware of no
2 statutory or goal provision prohibiting the county board from
3 considering issues beyond those specified in the notice of
4 review when it reviews such planning commission decisions.

5 The county board's "jurisdiction" is defined by the Oregon
6 Constitution and state statute. See City of Hermiston v. ERB,
7 280 Or 291, 295, 570 P2d 663 (1977). If LUDO Section 2.700(2)
8 truly deprived the board of commissioners of "jurisdiction" to
9 consider whether petitioner met his burden of proof under LUDO
10 Section 3.39.050(1), ORS 197.835(8)(a)(A) and
11 OAR 661-10-071(1)(a) would require reversal. However, just as
12 the county did not confer "jurisdiction" upon itself by
13 enacting other provisions in the LUDO, neither did it deprive
14 itself of "jurisdiction" to consider issues beyond the notice
15 of review when it adopted LUDO Section 2.700(2). See Jefferson
16 Landfill Committee v. Marion County, 12 Or LUBA 79, 83 (1984).
17 The county simply adopted a procedural requirement that it not
18 look beyond issues specified in the notice of review. The
19 county may have committed error when it nevertheless considered
20 those issues. The county's error was not, however, an act
21 beyond the county's "jurisdiction" as that term is used in ORS
22 197.835(8)(a)(A). See Hoffman v. City of Portland, 294 Or 150,
23 155-156, 654 P2d 1106 (1982).

24 The first assignment of error is denied.

25 B. County Board's Range of Discretion

26 The second assignment of error, if sustained, would also

1 require that we reverse the county's decision. ORS 197.835(9)
2 provides:

3 "The board shall reverse a local government decision
4 and order the local government to grant approval of an
5 application for development denied by the local
6 government if the board finds, based on the evidence
7 in the record, that the local government decision is
8 outside the range of discretion allowed the local
9 government under its comprehensive plan and
10 implementing ordinances. If the board does reverse
11 the decision and order the local government to grant
12 approval of the application, the board shall award
13 attorney fees to the applicant and against the local
14 government."

15 In our view, ORS 197.835(9) does not apply unless we find
16 the local government, as a matter of law, could only approve
17 the permit. In other words, petitioner must demonstrate that
18 the record supports only a decision that the permit complies
19 with all applicable criteria. As explained in our discussion
20 of the remaining assignments of error, the record in this case
21 does not show that the county must, as a matter of law, approve
22 the requested permit.

23 The second assignment of error is denied.

24 C. Consistency with Acknowledged Land Use Regulation

25 The LUDO is an "acknowledged land use regulation" as that
26 term is defined in ORS 197.015(11). Under ORS 197.835(3), we
are required to reverse or remand a land use decision that is
not consistent with an acknowledged land use regulation.

The LUDO provisions quoted supra establish a reasonably
specific appeal procedure. LUDO Section 2.500(5) specifically
requires that the grounds for the appeal be specified in the

1 notice of review. LUDO Section 2.700(2) assures the appeal
2 will be limited to the grounds specified in the notice of
3 review by directing the board of commissioners, in mandatory
4 language, to limit its review to the grounds specified in the
5 notice of review. The county has authority to adopt such
6 procedures. ORS 215.412; ORS 215.422(1); Menges v. Bd. of
7 Comm., 290 Or 251, 257-261, 621 P2d 562 (1980).

8 LUDO Section 2.700(2), taken at face value, strictly limits
9 the issues the county board could consider in the circumstances
10 presented by this case. Unlike the governing bodies in Graham
11 v. Curry County, ___ Or LUBA ___ (LUBA No. 87-088, February 23,
12 1988) and Cann v. City of Portland, 14 Or LUBA 254 affd 80 Or
13 App 246, 720 P2d 1348 (1986), the county board did not
14 expressly reserve to itself the right to consider issues beyond
15 those identified in the notice of review, when appeals are
16 initiated pursuant to LUDO Section 2.500(1)(a). The county has
17 not appeared in this proceeding and intervenors offer no reason
18 why we should not apply LUDO Section 2.700(2) as it is
19 written. We conclude that when the county board considered an
20 issue not identified in the notice of review, it acted
21 inconsistently with LUDO Section 2.700(2).

22 However, prior decisions of LUBA concerning failures of
23 local governments to follow their adopted appeal procedures
24 suggest the county's error is properly viewed as procedural.
25 See e.g., Jefferson Landfill Committee v. Marion County, supra;
26 Muhs v. Jackson County, 12 Or LUBA 201, 205-206 (1984); Hood

1 River Valley Residents v. City of Hood River, 15 Or LUBA 456,
2 462-463 (1987). Under ORS 197.835(8)(a)(B), a procedural error
3 will result in reversal or remand only if there is prejudice to
4 the substantial rights of petitioner.⁵

5 Petitioner failed to allege prejudice to his substantial
6 rights. That failure may be due to petitioner's
7 position in the first three assignments of error that the
8 county board's error was one of substance, not procedure.⁶
9 Our review of the record reveals the first time the county
10 board clearly indicated it would consider the issue of
11 compliance of the proposed church with the compatibility
12 standard in LUDO Section 3.39.050(1) was when it issued its
13 decision.⁷ Thus petitioner did not have had an adequate
14 opportunity to present argument on that issue to the county
15 board and his substantial rights were prejudiced. See Orr v.
16 Eugene, 6 Or LUBA 206, 212 (1982).⁸

17 The third assignment of error is sustained.

18
19 FOURTH ASSIGNMENT OF ERROR

20 "The Board's reversal of the Planning Commission
21 approval on the stated grounds and its findings in
22 support of the reversal are not supported by
23 substantial evidence in the record and are contrary to
24 evidence in the record."

25
26 FIFTH ASSIGNMENT OF ERROR

27 "The Board's decision was not based on the record
28 before it. The Board's finding that the record does
29 not contain information about the existing adjacent
30 uses is contradicted by evidence in the record
31 describing those uses. The Board's findings about

1 traffic congestion on the highway are not based on the
2 record. The Board's decision, therefore, violates
3 LUDO section 2.700(3)(a), which requires it to 'make
4 findings and conclusions, and make a decision based
upon the record before it as justification for its
decision.'

5 SIXTH ASSIGNMENT OF ERROR

6 "Because the Board's findings about an absence of
7 information on the existing adjacent uses and the
8 potential for traffic congestion were not based on the
9 record before it, and LUDO Section 2.700(3)(a)
requires it to based [sic] its decision on the record
before it, the Board acted outside the range of
discretion allowed by its ordinances."

10 LUBA has noted on numerous occasions that challenges to
11 denials of land use approvals on evidentiary grounds must
12 overcome a substantial legal burden. See e.g., McCoy v. Marion
13 County, ___ Or LUBA ___ (LUBA No. 87-063, December 15, 1987);
14 Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159,
15 163-164 (1985); Weyerhauser v. Lane Co., 7 Or LUBA 42, 46
16 (1982). As we noted in Chemeketa Industries Corp. v. City of
17 Salem, 14 Or LUBA at 163, ORS 197.835(8)(a)(C) requires
18 reversal or remand only if the "decision [is] not supported by
19 substantial evidence in the whole record." (Emphasis added).
20 Thus, even if a finding is not supported by substantial
21 evidence, reversal or remand under ORS 197.835(8)(a)(C) is not
22 appropriate unless the finding is critical to the decision.

23 In its decision, the county board concludes the "applicant
24 failed to carry his burden of proof in meeting the applicable
25 criteria." Record 2. The only facts directly supporting the
26 county board's conclusion are contained in the following

1 findings and are indicated by underlining:

2 "1.12 In addition, compatibility for conditional
3 uses under LUDO is required in this manner
(LUDO Section 3.39.050):

4 "1. The proposed use is or may be made
5 compatible with existing adjacent permitted
6 uses and other uses permitted in the
underlying zone.

7 "2. The proposed use is compatible with any
8 other criteria contained in specific zoning
district regulations of the Ordinance.

9 "In other words, the proposed use as a church must be
compatible with:

10 "1. existing adjacent permitted uses

11 "2. other uses permitted in the underlying zones

12 "3. any other criteria contained in the RR-2 zone

13 "4. accepted resource management practices where
14 a non-resource use is permitted in resource
15 areas (from the purpose statement in LUDO
Section 3.39.000).

16 "We cannot discern from the record what the 'existing
17 adjacent permitted uses' are. We know from the record
18 that property to the north and east is zoned Farm
19 Forest and property to the northeast is zoned Timber
20 Resource. We know that the farm forest zone (LUDO
21 Section 3.5.050) permits forest uses, farm uses,
22 dwelling, utility facilities, geothermal resource
23 exploration, water impoundments, home occupations,
aggregate exploration and mining and quarrying. We
recognize that a church could possibly be compatible
with all of these uses and could possibly be
incompatible with some of them. Our problem is that
the applicant has not shown that the church is or
could be compatible with the existing adjacent uses on
this farm forest property because the record does not
reveal what those existing uses are.

24 "Similarly, we cannot discern from the record what the
25 existing uses on the timber resource zoned property
26 are. We know that the timber resource zone (LUDO
Section 3.2.050) permits many of the same uses as the
farm forest zone plus parks and campgrounds. In

1 addition we know that such uses as solid waste
2 disposal sites and forest products processing are
3 conditionally permitted. What, if any, of those uses
4 are existing on the property is not apparent from the
5 record. The applicant has failed to show
6 compatibility with whatever uses exist on the timber
7 resource property.

8 "We know the existing uses to the west and south are
9 primarily residential because such uses were
10 inventoried and acknowledged as committed lands. In
11 addition the remonstrators were primarily from these
12 committed lands and testified about those uses. We
13 believe that the applicant has failed in his burden of
14 proof to show that the proposed use is compatible with
15 these residential uses. We note that the property for
16 the proposed use does not front on the highway but is
17 connected by a long narrow lane from the highway.
18 There is no turning or exit lane into the proposed
19 church so that it is likely that traffic will be
20 stacked on the highway while vehicles are attempting
21 to arrive or depart from the church. While
22 transportation is proposed primarily by bus to
23 alleviate the traffic problem, we note again that we
24 are evaluating this site for a church which may or may
25 not utilize bus transportation. We would deem it
26 unfair and perhaps unlawful to condition the access to
the church by bus only. To be a church it must be
open to the public and the public is not always going
to be using a bus to attend church, seek refuge,
attend meetings or seek personal counseling with the
pastor." Record 6-7.

18 The above quoted findings contain two critical findings of
19 fact. First, the board found petitioner failed to demonstrate
20 the proposed use will be compatible with the existing adjacent
21 uses on Farm Forest and Timber Resource zoned properties to the
22 north, northeast, and east because the petitioner failed to
23 identify the existing uses. Secondly, the county board found
24 the petitioner failed to show compatibility with residential
25 uses to the south and west because "it is likely that traffic
26 will be stacked on the highway while vehicles are attempting to

1 arrive or depart from the church." Record 7.⁹

2 It appears the county is correct in its conclusion that
3 petitioner failed to identify existing adjacent uses to the
4 north, northeast and east. However, petitioner points to
5 numerous places in the record establishing the uses on those
6 properties.¹⁰

7 The only reason given by the county for finding petitioner
8 did not meet his burden to show the proposed use would be
9 compatible with uses to the north, northeast and east was
10 petitioner's failure to identify the uses on those properties.
11 Because petitioner cites us to places in the record where that
12 information was in fact provided and available to the county
13 board, the reason given by the board is insufficient. The
14 county board's conclusion that petitioner failed to carry his
15 burden to demonstrate the proposed use is compatible with
16 properties to the north, northeast and east is not supported by
17 findings of fact for which there is substantial evidence in the
18 record.

19 Similarly, the county's finding that stacking of traffic at
20 the driveway entrance will result in impacts on residences to
21 the south and west is the only finding of fact supporting the
22 county's compatibility conclusion regarding those properties.
23 We are cited to no evidence in support of this finding.

24 The record shows the church plans to use two buses and that
25 only one bus is used at a time with one bus serving as a back
26 up. Church members are to be transported to the church by bus

1 because they do not have cars. There is testimony from nearby
2 property owners which expresses concern about traffic. There
3 is also testimony that use of buses to transport church members
4 in the future might not continue resulting in increased car
5 traffic. However, we are cited to no evidence in the record
6 concerning a stacking problem at the driveway entrance.

7 Intervenors cite us to testimony in letters submitted by
8 neighbors expressing concerns about traffic. Under
9 ORS 197.835(10)(b) we may, in appropriate circumstances, affirm
10 a county's decision even though the findings are defective if
11 there is "relevant evidence in the record which clearly
12 supports the decision." However, we do not find the concerns
13 expressed by the neighbors to be evidence that "clearly" shows
14 the proposed church will be incompatible with adjacent uses.
15 In situations such as that presented by this case, where there
16 is conflicting evidence and an extremely subjective standard
17 such as "compatibility", the resolution of that conflicting
18 evidence and application of the approval standard to the facts
19 found is the county's function. Because we might well find
20 different facts than the county, and apply the compatibility
21 standard of LUDO Section 3.39.050 to those facts differently
22 than the county, ORS 197.835(10)(b) does not apply in this case.

23 Because the only two reasons given by the county to explain
24 its conclusion the petitioner failed to carry his burden of
25 proof on the compatibility issue are not supported by
26 substantial evidence in the record, we sustain the fourth

1 assignment of error. The finding regarding the lack of
2 information about existing uses on adjoining properties to the
3 north, northeast and east is incorrect. The finding is not
4 supported by substantial evidence in the record and is contrary
5 to the evidence in the record. The finding regarding potential
6 stacking problems at the entrance of the driveway is not
7 supported by any evidence in the record.

8 We emphasize that in sustaining the fourth assignment of
9 error, we express no opinion about whether there is evidence in
10 the record to support a decision that the conditional use
11 permit fails to comply with the compatibility requirement in
12 LUDO Section 3.39.050. We conclude only that the two reasons
13 given by the county board for its decision to deny the permit
14 are not supported by substantial evidence. We do not know how
15 the county board views the rest of the evidence in the record.
16 In these circumstances, remand is appropriate so that the
17 county may adopt findings of fact based on substantial evidence
18 in the record.¹¹

19 In petitioner's fifth and sixth assignments of error, he
20 argues the county based its decision on evidence not in the
21 record and in doing so acted outside its range of discretion.

22 The parties do not identify the evidence the county relied
23 on when it made the disputed findings. While we agree with
24 petitioner under the fourth assignment of error that the
25 county's findings of fact are not supported by substantial
26 evidence in the record, we will not speculate that the county

1 considered evidence outside the record.

2 Petitioner's sixth assignment of error may be read to
3 allege violation of ORS 197.835(9). To the extent the
4 assignment alleges such error, our discussion under the second
5 assignment of error applies to the sixth assignment of error as
6 well.

7 The fifth and sixth assignments of error are denied.

8 The county's decision is remanded.

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FOOTNOTES

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While petitioner's standing allegations refer to "petitioners", there is a single petitioner in this proceeding.

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Petitioner also alleges that he satisfies the other requirements for standing found in ORS 197.830(3)(a) and (b), and intervenors do not challenge those allegations .

3

Even if it were necessary to determine whether petitioner's interests under the First Amendment were "adversely affected" as that term is used in ORS 197.830(3)(c)(B), petitioner would not be required by that paragraph to show his constitutional rights had been violated. If such a showing were required, a decision that petitioner had standing would also require reversal of the county's decision on the merits. A decision may adversely affect a petitioner's constitutional rights, or the exercise of such rights, without constituting a violation of those constitutional rights or the free exercise of those rights.

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LUDO Section 2.700 provides as follows:

"1. Review by the Board shall be confined to arguments of the parties and the record of the proceeding below, which will include the following:

"a. All materials, pleadings, memoranda, stipulations and motions submitted by any party to the proceeding and received or considered as evidence;

"b. All materials in the record submitted by the Director with respect to the application;

"c. The transcript of the hearing if required by the Board or otherwise provided, or the tape recording or other evidence of the proceeding of the hearing below; and

"d. The findings and conclusions.

"At the commencement of the review of any application for development of property entirely with [sic] an

1 urban growth boundary, a statement shall be made to
2 those in attendance that describes the applicable
3 substantive criteria; that the arguments to be heard
4 on the testimony and evidence in the record must be
directed towards these criteria; and that the failure
to address a criterion precludes appeal based on that
criterion.

5 "2. Review by the Board shall be a de novo review of the
6 record limited to the grounds relied upon in the
7 notice of review, or cross review, if the review is
initiated by such notice.

8 "3. The Board may affirm, reverse or modify the decision
9 and may approve or deny the request, or grant approval
10 with conditions necessary to carry out the
11 Comprehensive Plan, subject to the limitations of
12 Section 2.120.4.

11 "a. For all cases, the Board shall make findings and
12 conclusions, and make a decision based on the
13 record before it as justification for its action.

13 "b. The Board shall cause copies of a final order to
14 be sent to all parties participating in the review
15 before it.

14 "4. The Board may remand the matter if it is satisfied
15 that testimony or other evidence could not have been
16 presented at the hearing below. In deciding such
17 remand, the Board shall consider and make findings and
18 conclusions respecting:

18 "a. Prejudice to parties;

19 "b. Convenience or availability of evidence at the
20 time of the initial hearing;

20 "c. Surprise to opposing parties;

21 "d. Date notice was given to other parties as to an
22 attempt to admit; and

23 "e. The competency, relevancy and materiality of the
24 proposed testimony or other evidence.

24 "5. Only those members of the Board reviewing the entire
25 record may act on the matter reviewed. The agreement
26 of at least two members is necessary to amend,
reverse, or remand the decision upon failure of at

1 least two members to agree, the decision below shall
2 stand."

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5 Scope of review provisions such as LUDO Section 2.700(2)
6 focus and simplify local land use appeals. However, by not
7 expressly reserving the option to expand its inquiry in appeals
8 initiated under LUDO Section 2.500(1)(a), the county board may
9 be placed in a difficult position when it discovers errors in a
10 planning commission decision not identified in the notice of
11 review. While LUDO Section 2.700(2) provides the county board
12 may not consider such errors, ORS 197.825(3) provides those
13 errors may nevertheless be raised in an appeal to LUBA.
14 McNulty v. City of Lake Oswego, 14 Or LUBA 366, 369-370
15 (1986). But see ORS 197.762 (authorizing appeals procedures
16 for decisions affecting land within urban growth boundaries
17 under which an appellant may, in certain circumstances, waive
18 the right to appeal issues not raised locally).

19 Counties with scope of review provisions like LUDO Section
20 2.700(2) may able to address errors not specified in the notice
21 of review under code provisions such as LUDO Section
22 2.500(1)(b) which permit the county board to initiate review on
23 its own motion. However, the time limit for initiating review
24 of a planning commission decision under such a provision may
25 have expired. In such circumstances, a local government that
26 does not wish to risk reversal or remand by LUBA, based on
27 issues not identified in the notice of review, must violate its
28 scope of review limitation and commit procedural error if it
29 wishes to address the issue. Local governments electing to
30 commit such procedural error must assure there is no prejudice
31 to the substantial rights of the parties, or the procedural
32 error will result in remand under ORS 197.835(8)(a)(B), if
33 their decision is appeald to LUBA.

34

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36 In this appeal the procedural nature of the county's error
37 was not raised in the briefs or at oral argument. We therefore
38 will overlook petitioner's failure to allege his substantial
39 rights were prejudiced and we will review the record to see if
40 it clearly shows petitioner's substantial rights were
41 prejudiced as required by ORS 197.835(8)(a)(B).

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44 This explains why petitioner did not object during the
45 local proceedings to the county's procedural error in
46 addressing the compatibility standard.

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On remand, the county can afford petitioner an adequate opportunity to present argument on the compatibility issue raised by the county board.

Citing our decisions in Millcreek Glenn Protection Assoc. v. Umatilla County, ___ LUBA ___ (LUBA No. 87-003, August 14, 1987); Portland Audubon Society v. Clackamas County, 14 Or LUBA 433 (1986); and Abrego v. Yamhill County, 2 Or LUBA 101 (1980), petitioner argues under this assignment of error that intervenors waived their right to assert the remaining six allegations of error contained in their notice of review to the county board. According to petitioner, those allegations should have been raised before LUBA in this appeal or in a separate appeal.

The county board expressly did not consider intervenors' remaining six allegations of error

"In this appeal, the appellants filed a single notice of review and stated six [sic seven] grounds for the appeal. Only one ground is addressed in this order as it is dispositive of the matter before us." Record 2.

Because we do not know whether the county would decide in petitioner's or intervenors' favor on the remaining six allegations of error, there was nothing for the intervenors, or for petitioner for that matter, to appeal with regard to these allegations. Intervenors would waive their right to assert the remaining six allegations of error only if (1) the county board had a legal obligation to decide those issues, (2) it committed appealable error by failing to do so, and (3) petitioners failed to assert those errors in an appeal to LUBA. Petitioner cites no statutory, plan or LUDO provision requiring the county board to decide the six allegations of error it expressly did not decide. We are aware of no such requirement. Accordingly, we believe the county board may consider the six allegations of error it did not consider in this decision.

9

While the record shows discussion by a number of persons speculating about other possible transportation impacts on Starveout Road, the only reason stated by the county in its finding about traffic impacts is that traffic will stack on the highway when negotiating arrival and departure at the driveway entrance.

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The property to the north is a 111.22 acre parcel which

1 contains a residence located approximately 1,000 feet from the
2 petitioner's property. There is a ridge separating a residence
3 on the 111.22 acre parcel from the residence on petitioner's
4 property. The owner of the property opposed petitioner's
5 request and expressed concerns about trespass. However, the
6 county did not cite these concerns in its findings as the basis
7 for its conclusions about compatibility.

8 The property to the northeast is a 199.42 acre parcel in
9 timber use managed by the Bureau of Land Management. The
10 record shows there are no structures on the property. The
11 record also contains a letter from the BLM in which the area
12 manager states he sees "no apparent conflicts from the
13 proposal."

14 The 102 acre parcel to the east is forested and there are
15 no structures on the property. The owner testified that if he
16 built a house on the property in the future, the best building
17 site is close to petitioner's property and would be impacted by
18 the proposed church. As in the case with the property to the
19 north, the county does not indicate in its findings it
20 concurred with the land owner's concerns about the impacts from
21 the church.

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14 The county is required to adopt adequate findings of fact
15 to explain and justify its decision. ORS 215.416(9). Because
16 the fourth assignment of error alleges, correctly, the only two
17 findings of fact are not supported by substantial evidence, we
18 read the fourth assignment of error also to say the county
19 board's decision is not supported by adequate findings of fact
20 as required by ORS 215.416(9). Because the county did not
21 adopt adequate findings of fact, remand is required. See Hill
22 v. Union County Court, 42 Or App 883, 886-887, 601 P2d 905
23 (1979).