BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES, JEFF GILMORE,
JEANNIE GILMORE and ELIZABETH COKER,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

DONALD E. ROWLETT and JEAN ROWLETT,
Intervenors-Respondents.

LUBA Nos. 2015-097/2016-009

FINAL OPINION
AND ORDER

Appeal from Jackson County.

William H. Sherlock, Eugene, filed the petition for review. With him on the brief was Hutchinson Cox PC.

No appearance by Jackson County.

H. M. Zamudio, Medford, filed the response brief and argued on behalf of intervenors-respondents. With her on the brief was Huycke O'Connor Jarvis LLP.

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

REMANDED (LUBA No. 2015-097) 07/14/2016
DISMISSED (LUBA No. 2016-009) 07/14/2016

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

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, petitioners seek review of (1) a stipulated agreement regarding a campground, lodge, frontier village replica, guest houses and accessory structures operating as a nonconforming use, and (2) a county order authorizing the county administrator to execute the stipulation.

FACTS

In 1969 and 1970, intervenors-respondents Donald and Jean Rowlett (intervenors) purchased the subject property with the intent to build and operate a guest ranch in conjunction with their cattle ranch. In 1973, Jackson County zoning was first applied to the property, which allowed a guest ranch as a conditional use in an agricultural zone. After being denied a conditional use permit by the county, intervenors sought declaratory relief from Jackson County Circuit Court. In 1975, after a trial, the circuit court entered a decree entitled "Findings of Fact, Conclusions of Law and Decree" (Original Decree). The Original Decree determines that intervenors had a vested right and were permitted to complete certain development of the property as a nonconforming use. The Original Decree states that intervenors are "entitled to use [of the subject property] for the following purposes:

> "1. A sixty (60) unit campground with potable water, bathrooms, showers and laundry facilities, including washers and dryers.
>
> "2. General store for ranch guests, a chapel and a lodge with bunkhouse.

> "3. A replica of a frontier village, jail house, museum, postoffice [sic], blacksmith's shop and livery stable.
>
> "4. Six (6) log guest houses, five (5) miscellaneous structures and uses relating to the campground recreation facilities, including a covered firebowl, nature and snowmobile trails and interior road development." Original Decree at Intervenors' Response Brief, Appendix A-6.

In 1987, intervenors and the county entered into a stipulation to amend the Original Decree (First Stipulation), which refined the descriptions of the listed uses, and added other authorized uses such as an office and reception area, living quarters for personnel, and "other buildings as might be a part of a frontier village[.]" Intervenors' Appendix B-3. The First Stipulation also added that "the rights to make further developments for nonconforming uses within the terms of this Decree shall expire January 1, 2007[.]" *Id*.

On December 20, 2013, the county and intervenors entered into a second stipulation to amend the Original Decree (Second Stipulation), the decision which is the subject of LUBA No. 2015-097. Prior to entering into the Second Stipulation, the county board of commissioners signed an order (County Order) authorizing the county administrator to execute the Second Stipulation. The County Order is the subject of LUBA No. 2016-009.

The Second Stipulation provides in relevant part that intervenors "have initiated development on the subject property in accordance with the Decree to the extent that no expiration of the development rights as provided in the Decree is warranted." Record 4. In other words, the Second Stipulation

revived any development rights that otherwise had expired under the First Stipulation. The Second Stipulation also concluded that a number of buildings and uses have been "lawfully established." Record 5.[1] The Second Stipulation

[1] The Second Stipulation states that "[t]he following development on the subject property has been lawfully established and constructed in accordance with the Decree and this Second Stipulated Amended Judgment:

> "a. A 60 unit campground with potable water, bathrooms, showers and laundry facilities, including washers and dryers (partially constructed); no overnight use of motorhomes, travel trailers or similar recreational vehicles is allowed;
>
> "b. Building for ranch office, reception area and museum (constructed);
>
> "c. Frontier Village: Town Hall (constructed);
>
> "d. Frontier Village: decorative structures (constructed);
>
> "e. Three (3) guest houses (constructed);
>
> "f. One (1) cookhouse building in conjunction with campground recreational facilities (constructed); this is one of the five 'miscellaneous' structures allowed in previous decrees;
>
> "g. Nature and snowmobile trails (partially constructed);
>
> "h. Interior road development (partially constructed);
>
> "i. Wagon Barn – pre-Amended Decree – decorative (constructed);
>
> "j. Harness Maker pre-Amended Decree – decorative (constructed);
>
> "k. Corn Crib pre-Amended Decree – decorative (constructed);

also lists future development that is allowed, listing many of the uses identified in the Original Decree and First Stipulation, but also clarifies that the future "lodge" includes "overnight guest accommodations[.]" Record 6. The Second Stipulation also approves the location of future development within new boundaries, an apparent change from the First Stipulation, which had limited all future development to the frontier village. Record 3. The Second Stipulation then concludes:

> "Jackson County * * * shall permit [intervenors] to develop the subject property in accordance with this Second Stipulated Amended Judgment as a nonconforming use, despite any inconsistent requirement, standard, criteria, rule, code, law or statute set forth in or implemented through the Jackson County Comprehensive Plan and/or the Jackson County Land Development Ordinance or any amendments thereof." Record 7.

The Second Stipulation is signed by the county administrator, the county attorney, intervenors, and a circuit court judge.

MOTION TO TAKE EVIDENCE, OTHER MOTIONS

Petitioners Rogue Advocates, Jeff and Jeannie Gilmore and Elizabeth Coker (petitioners) filed a motion for an extension of time to file a reply brief, a motion for a reply brief, a motion for an overlength seven-page reply brief, and a motion to take new evidence to support standing. Petitioners then filed a ten-

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> "l. Well pump-house, accessory to lodging structures (constructed); and
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> "m. A non-covered firebowl (constructed)." Record 5.

page reply brief with attached documents in support of petitioners' standing that included petitioners' attorney billing statement, email communications between the county and petitioners' attorney, and declarations of petitioners' attorney, the president of Petitioner Rogue Advocates, and Petitioners Jeff and Jeannie Gilmore. Petitioners' latest filing explains that the discrepancy between the requested page limit and the actual reply brief was due to reformatting and an accelerated effort to file the reply brief as soon as possible.

Intervenors move to strike the motion to take evidence and portions of the reply brief. Regarding the motion to take evidence, intervenors assert that petitioners failed to abide by OAR 661-010-0045 when they failed to state with particularity what facts the declarations sought to establish, how those facts pertain to petitioners' standing, and how those facts affect the outcome of the proceedings.[2] Intervenors state that this is not a mere technical violation

[2] OAR 661-010-0045 provides in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

because absent the particularity statement, intervenors cannot ascertain what facts petitioners seek to establish.

We disagree with intervenors. It is relatively clear that petitioners' supporting evidentiary documents were submitted to determine issues of timely filing and standing, specifically whether petitioners are adversely affected by the decisions. Petitioners specifically stated that the new evidence is "in support of the Reply Brief that Petitioners concurrently filed * * * and [is] limited to demonstrating timely filing of the consolidated appeals and petitioners' standing." Motion to Take Evidence 1. Petitioners' reply then explains how the proffered evidence supports petitioners' standing. This is sufficient to comply with OAR 661-010-0045. We therefore grant petitioners' motion to take evidence and consider it when reviewing intervenors' challenges to petitioners' standing.

> "(2) Motions to Take Evidence:
>
> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.
> >
> > "(b) A motion to take evidence shall be accompanied by:
> >
> > > "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish[.]"

Intervenors also move to strike portions of the reply brief. First, intervenors argue that pages 8-10 should be stricken because they exceed the seven pages requested. Intervenors also assert that the six matters addressed in the reply brief—timeliness of the appeal, whether petitioners are adversely affected, finality of the County Order, whether the Second Stipulation is a land use decision, whether petitioners are required to allege that a procedural error prejudiced petitioners substantial rights, and whether the challenged decisions violate applicable law—are not "new matters" within the meaning of OAR 661-010-0039, but rather matters that petitioners could have, and did, address in the petition for review.

As we noted in *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008), while a petition for review requires that petitioner addresses standing and LUBA's jurisdiction, petitioner is not generally required to anticipate all of the various arguments that might be advanced against standing and jurisdiction. As long as the reply brief is not merely reiterating or embellishing arguments already made in the petition for review's jurisdictional section, a reply brief is warranted to respond to a jurisdictional challenge in the response brief. *See also Sievers v. Hood River County*, 46 Or LUBA 635, 637 (2004) ("[A]lthough all petitions for review must state why the challenged decision is subject to LUBA's jurisdiction, jurisdiction does not become an issue in an appeal until respondents contend that LUBA lacks jurisdiction."); *Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996); *Shaffer v. City of Salem*, 29 Or LUBA

592, 594 (1995). The county does not allege, and it does not appear to be the case, that the reply brief merely reiterates or embellishes arguments already made in the petition for review. Finally, we decline to strike the final three pages of the reply brief because the brief exceeds the seven pages initially requested. This appeal presents complicated jurisdictional issues, and the extra briefing on jurisdiction is warranted. The motions to strike are denied, and the ten-page reply brief is allowed.

JURISDICTION

In a January 28, 2016 order, we denied intervenors' motion to dismiss for lack of jurisdiction the appeal of the Second Stipulation. We agreed with petitioners that the Second Stipulation concerns the application of at least some county land use regulations and therefore constitutes a "land use decision" as defined at ORS 197.015(10)(a), after concluding that the Second Stipulation is effectively a stipulation "to alter the scope of the nonconforming uses that are authorized on the property as part of the vested right and as nonconforming uses." *Rogue Advocates v. Jackson County*, __ Or LUBA ___, (LUBA No. 2015-097, January 28, 2016) (Order at 4). The Second Stipulation also modified and removed the expiration date of the First Stipulation, a modification that we considered to "arguably represent[] the verification or alteration of a nonconforming use." *Id.* at 5. Further, we noted that the Second Stipulation provides that "the county shall allow future development of the property consistent with the Second Stipulation 'as non-conforming uses,

despite' any contrary county comprehensive plan provisions or land use regulations." *Id.* Finally, we stated our understanding that the circuit court's involvement in entering judgment based on the stipulation did not constitute any kind of review of the stipulation against land use standards, noting that a circuit court's review against nonconforming use land use standards would likely exceed the court's jurisdiction. *See Grabhorn, Inc. v. Washington County*, 255 Or App 369, 297 P3d 524 (2013) (affirming the circuit court's dismissal of a declaratory ruling action seeking to declare the nonconforming use status of a landfill, for lack of jurisdiction).

Our January 28, 2016 order addressed only jurisdiction over the Second Stipulation. In its response brief, intervenors challenge LUBA's jurisdiction over the County Order. In addition, intervenors advance new arguments that LUBA lacks jurisdiction over the Second Stipulation.

A. LUBA No. 2016-009: County Order

In their response brief, intervenors argue that the County Order is not a final decision, and therefore not a "land use decision" as defined at ORS 197.015(10)(a).[3] According to intervenors, the County Order simply authorized and directed the county administrator to execute the second stipulation, and further authorized the administrator to execute any future

[3] ORS 197.015(10)(a) defines "land use decision" in relevant part as a *final* decision of a local government that concerns the application of comprehensive plan provisions or land use regulations.

amendments, addenda, or agreements related to the matter, and therefore the County order does not constitute a "final" decision of any kind.

We agree with intervenors. In *Schock v. Jackson County*, 61 Or LUBA 403 (2010), we concluded that an order that merely directs the County Administrator to move forward with securing a permit is not a final decision, and for that reason not a land use decision. Similarly, in the present case, all the County Order does is authorize and direct county staff to execute the second stipulation and future amendments, addenda, etc. It is the county's execution of the second stipulation that is the county's final decision regarding the uses authorized on the subject property, for purposes of ORS 197.015(10)(a). The County Order is at best an initiatory or interlocutory step toward that final decision. Accordingly, the County Order is not a land use decision, and the appeal of the County Order (LUBA No. 2016-009) is dismissed.

B. LUBA No. 2015-097: Second Stipulation

1. Failure to Exhaust Remedies

Intervenors first argue that petitioners failed to exhaust all "remedies available by right before petitioning [LUBA] for review." ORS 197.825(2)(a). According to intervenors, petitioners could have challenged the Second Stipulation before petitioning LUBA for review by filing a motion with the circuit court to set aside or vacate the circuit court's judgment under Oregon

Rules of Civil Procedure (ORCP) 71, with a further right to appeal to the Court of Appeals.

There are several problems with that argument, starting with the presumption that the decision on review before LUBA is the circuit court's judgment. As discussed in our earlier order and also in this opinion, the decision on review before us is the county's stipulation with intervenors regarding the uses allowed on the subject property. While that stipulation forms the basis for the judgment, the judgment itself is not within our scope of review. In any case, we do not see that filing a motion in circuit court to vacate the judgment is a remedy available by right before petitioning LUBA for review, for purposes of ORS 197.825(2)(a). As intervenors note, the resolution of that motion would be subject to appeal and the exclusive jurisdiction of the Court of Appeals. A remedy that would remove the matter entirely from LUBA's review is not a remedy that a petitioner is required to exhaust before seeking LUBA's review. The remedies ORS 197.825(2)(a) refers to are local appeals or similar local administrative remedies, the results of which would be land use decisions subject to LUBA's review.

2. Circuit Court Jurisdiction

Intervenors also take issue with our January 28, 2016 order, in which we relied on *DLCD v. Benton County*, 27 Or LUBA 49 (1994), to support our conclusion that the Second Stipulation is a land use decision. Like the present case, *DLCD v. Benton County* involved a challenge to a county stipulation

regarding the scope of a vested right/nonconforming use that, like the present case, formed the basis for a circuit court judgment. LUBA concluded that the stipulation was a land use decision, and the entry of the circuit court judgment based on the stipulation did not deprive LUBA of jurisdiction to review the stipulation. In our January 28, 2016 order, we noted that the only circumstance distinguishing the present case from that in *DLCD v. Benton County* is that in the present case, the circuit court judgment had the effect of modifying the Original Decree that was issued in 1976, prior to LUBA's existence. However, we concluded that that distinction made no difference. We explained our understanding that in accepting the Second Stipulation and issuing the judgment modifying the Original Decree, the circuit court did not engage in a review of the stipulation against land use standards. Such a review against land use standards is the county's function, as it is LUBA's exclusive function to review appeals of the county's land use decision regarding non-conforming uses. We further noted that

> "if the county and intervenors wish to amend the Original Decree to reflect their stipulation, they obviously must obtain the circuit court's approval and signature to do so. Only the circuit court has authority to modify a circuit court decree. But that does not mean that the stipulation itself is not potentially a land use decision subject to appeal to LUBA." Slip op 8-9.

On appeal, intervenors argue that "[b]ecause the circuit court undoubtedly had jurisdiction in 1976, the circuit court retained jurisdiction to enter subsequent stipulated general judgments in the same proceeding."

Response Brief 12. We do not disagree that the circuit court had jurisdiction and authority to modify the 1976 Original Decree. But, again, that does not mean that the Second Stipulation itself is not a land use decision subject to LUBA's exclusive jurisdiction to review. In order to construct and lawfully operate the uses and development authorized in the Second Stipulation, intervenors had to obtain county approval. The Second Stipulation represents that county approval. If intervenors also wished to modify the 1976 decree to reflect the Second Stipulation, intervenors obviously had to obtain the circuit's approval for that modification, but the process of obtaining circuit court approval to modify the 1976 decree to reflect the terms of the Second Stipulation does not transform the stipulation itself into something other than a land use decision, under the reasoning in *DLCD v. Benton County*. *See also Murphy Citizens Advisory Committee v. Josephine County*, 319 Or 477, 878 P2d 414 (1994) (a stipulation between the applicant and county to issue a permit is a land use decision, notwithstanding that the stipulation was used to moot and dismiss a pending mandamus action).

3. Standing

Intervenors also challenge petitioners' standing to appeal the Second Stipulation, and the timeliness of the appeal. Where a local government provides a proceeding at which persons may appear, the petitioners must show that they appeared orally or in writing before the local government in order to establish standing to appeal the decision to LUBA. ORS 197.830(2)(b).

Further, the deadline to appeal the decision to LUBA is usually 21 days from the date the decision becomes final. ORS 197.830(9). However, where the local government does not conduct a hearing on the matter, as in the present case, under ORS 197.830(3) adversely affected petitioners may establish standing to appeal the decision without making an appearance, pursuant to a tolled 21-day deadline. We understand petitioners to rely on ORS 197.830(3) to establish standing and the timeliness of the appeal. ORS 197.830 provides, in relevant part:

> "If a local government makes a land use decision without a hearing, * * *, a person adversely affected by the decision may appeal the decision to the board under this section:
>
> " * * * * *
>
> "b. Within 21 days of the date a person knew or should have known of the decision where no notice is required."

We understand intervenors to dispute that (1) petitioners are adversely affected, and (2) the appeal was filed within 21 days of when petitioners first knew or should have known of the decision.

a. Timeliness

In their reply, petitioners argue that the appeal of the Second Stipulation was timely filed within 21 days of November 16, 2015, the date when petitioners' attorney was first informed by the county that the Second Stipulation authorized development on the subject property. Petitioners' argument is supported by the declaration of petitioners' attorney (Sherlock Declaration) and attorney billing information, which indicates that on

November 10, 2015, petitioner Rogue Advocates hired Sherlock to investigate proposed development on the subject property, apparently prompted by information viewed on a website for "New Paradigm Ranch." The proposed development apparently included a 200-unit hotel. On November 11 or 12, 2015, petitioners' attorney contacted the county planning department asking about the development seen on the website. On November 16, 2015, the county responded by telephone, advising that the 200-unit hotel and other development seen on the website was authorized by the Second Stipulation. The Sherlock Declaration states that petitioners' attorney then obtained a copy of the Second Stipulation and shared it with his client.[4]

Intervenors do not dispute any of the facts alleged in the declaration, or that petitioners' attorney was first informed that the Second Stipulation authorized the hotel development on the property on November 16, 2015. However, intervenors argue that the declaration suggests that petitioners knew

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[4] The billing records suggest that individual petitioners Jeff Gilmore, Jeannie Gilmore, and Elizabeth Coker became clients of Rogue Advocates' attorney on or about December 4, 2015. However, none of the declarations indicate when or how individual petitioners knew or should have known of the Second Stipulation. The declarations do not indicate that Jeff Gilmore, Jeannie Gilmore, and Elizabeth Coker are members of Rogue Advocates, although that may well be the case. On the other hand, intervenors do not appear to differentiate the standing of individual petitioners with respect to the "knew or should have known" standard, but treat all petitioners as a single collective mind for that purpose. For simplicity, we shall do the same. Specifically, for purposes of this opinion we shall assume that the individual petitioners knew or should have known of the Second Stipulation no later than the date that Rogue Advocates learned of the decision, via its attorney.

something about development on the subject property by at least by November 10, 2015, the date they hired their attorney. According to intervenors, petitioners were on at least inquiry notice as of November 10, 2015, which is more than 21 days before the appeal of the Second Stipulation was filed with LUBA.

Intervenors' arguments regarding inquiry notice are unavailing. As we noted in *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002):

> "[I]t is clear under ORS 197.830(3)(b) that where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision, the petitioner is placed on inquiry notice. *If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered.* Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice." (Emphasis added.)

As explained in *Rogers*, the 21-day appeal period beings on the date the *decision itself* is discovered, not the date that petitioners were placed on inquiry notice that there might be a local government decision that authorized development. Intervenors do not dispute that petitioners' attorney made timely efforts to discover and obtain a copy of the Second Stipulation, or that the county first informed petitioners' attorney that the Second Stipulation authorized the disputed development on November 16, 2015, within 21 days of the date the appeal was filed.

Intervenors also argue that the declaration merely establishes when petitioners' *attorney* knew about the Second Stipulation, and fails to establish

when the *petitioners* knew about the Second Stipulation. Intervenors are correct that petitioners rely on the imputed knowledge gained by their attorney to establish when and how they gained knowledge of the Second Stipulation, for purposes of ORS 197.830(3)(b). However, as petitioners argue, intervenors cite no basis to believe that any petitioner possessed more than inquiry notice of the Second Stipulation prior to November 16, 2015, the date their attorney and agent discovered the decision. Because petitioners hired Sherlock to discover the county decision, if any, that authorized the disputed development of the subject property, an appropriate inference is that petitioners had no more knowledge of the Second Stipulation than their attorney. We disagree with intervenors that petitioners' reliance on that imputed knowledge to establish timely filing under ORS 197.830(3)(b), and failure to submit evidence regarding when and how the individual petitioners gained knowledge of the Second Stipulation, means that petitioners have failed to establish that the appeal was filed within 21 days of the date the petitioners knew or should have known of the Second Stipulation.

Accordingly, the appeal was timely filed under ORS 197.830(3)(b).

b. Adversely Affected

Intervenors also argue that petitioners have failed to demonstrate that petitioners are adversely affected by the development authorized under the Second Stipulation. Petitioners attach to their reply the declaration of petitioner Rogue Advocate's president Steve Rouse, stating that Rogue Advocates'

members live nearby and recreate on public lands within sight and sound of the subject property.[5] In addition, petitioners provide the declaration of petitioners Jeff Gilmore and Jeannie Gilmore, stating that they own property nearby that relies on the same access road as the subject property, and will be adversely affected by traffic, among other impacts.[6]

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[5] The Rouse Declaration states, in relevant part:

> "6. Rogue Advocates has members who live nearby the Rowlett property in the Greensprings area. In addition to these local residents, many of our members recreate on nearby public forest lands. Some of these public lands are within sight and sound of the Rowlett property and are accessed by the single main access road serving this area. The subject property is an existing inholding within the Cascade-Siskyou National Monument. Adjacent Jenny Creek is within sight and sound of the subject parcel and this Creek is currently proposed for scenic protection in Congress under the Wild and Scenic Rivers Act.
>
> "7. Within this forested setting, the proposed two-hundred unit hotel, large scale music and other public events, off road vehicle use, and related traffic impacts will have adverse impacts on our members, including their use and enjoyment of their own property and the nearby federally managed property that they frequent for recreation. These outdoor activities include cross-country skiing and snow shoeing in the winter, as well as biking, hiking, birding, etc., in the summer." Declaration of Steven Rouse 2.

[6] The Gilmores' declaration states, in relevant part:

> "1. We are residents and property owners in the Greensprings area, 20 miles east of Ashland, where we have lived for the past 37 years.

First, we note that petitioners have not put forth any evidence to establish that Petitioner Elizabeth Coker is adversely affected by the Second

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> "2. Non conforming land use development at the Rowlett/New Frontier Ranch would adversely affect us personally in the following ways:
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> "a. DRIVING SAFETY: Increased traffic on our lovely, historic mountain highway would create more dangerous driving conditions for us, especially in winter. This narrow, winding road provides the only access to the Rowlett property and to ours.
>
> "b. CYCLING SAFETY: We frequently bicycle on Highway 66. Increased traffic from the Rowlett property would directly increase the danger for us.
>
> "c. NOISE: Noise from increased traffic would directly impact the enjoyment of our land, due to hundreds of additional vehicles going to and from the Rowlett property.
>
> "d. FIRE DANGER: More activity and development on the Rowlett property greatly increases the fire danger to our home and land. A wildfire on the Rowlett property could quickly and easily burn through our property and all of our neighbors in the Greensprings area, which is heavily forested.
>
> "e. RECREATIONAL IMPACT: Looking down on the Rowlett/New Frontier Ranch property from viewpoints on our hiking and skiing trails, we (and many neighbors) observe a quiet, serene setting. This view would be terribly compromised by unregulated development, and noise from the area would disturb our peaceful recreational activities." Declaration of Jeff and Jeannie Gilmore, 1-2.

Stipulation. Accordingly, we agree with intervenors that Petitioner Coker must be dismissed from this appeal.

With respect to individual petitioners Jeff Gilmore and Jeannie Gilmore, intervenors move to strike their declaration on the grounds that it does not contain physical signatures, rather it includes conformed signatures ("S\ Jeffrey H. Gilmore aka Jeff Gilmore [;] S\ L. Jean Gilmore (aka) Jeannie Gilmore)." Intervenors argue that absent signatures LUBA should disregard the Gilmore declaration as unauthenticated and unreliable.

Nothing in our rules requires that declarations submitted to LUBA pursuant to OAR 661-010-0045 to establish standing must be signed by the declarant in any particular way. LUBA's consideration of documents submitted under OAR 661-010-0045 to establish standing is not subject to the Oregon Evidence Code or similar evidentiary standards. In our view, an unsigned or improperly signed declaration might be less persuasive in the face of conflicting evidence regarding standing, but we disagree with intervenors that such a declaration must be stricken and not considered at all for the proffered purpose.

Intervenors argue next that the motion to take evidence fails to explain "with particularity what facts the moving party seeks to establish" as required by OAR 661-010-0045(2)(a), and thereby prejudices intervenors' ability to respond as required by OAR 661-010-0045(3) by stating "what facts alleged in the motion are contested, with references to where contrary facts are found in

the record or in affidavits or documents appended to the response." OAR 661-010-0045(3). Petitioners respond, and we agree, that the motion, fairly read, seeks to establish as facts the allegations in the Rogue Advocates and Gilmore declarations, in order to establish that petitioners are adversely affected by the Second Stipulation, for purposes of establishing standing under ORS 197.830(3).

Intervenors do not specifically dispute any alleged facts stated in the declarations, but argue that the declarations are insufficient to establish that development authorized by the Second Stipulation adversely affects the Gilmores or Rogue Advocates' members who reside or recreate nearby, because the declarations do not identify the location or proximity of property owned or used for recreation.

This argument presents a close question. Being "adversely affected" for purposes of ORS 197.830(3) is closely correlated with the use of land that is in some way impacted by the use or development at issue. In *Jefferson Landfill Comm. v. Marion County*, 297 Or 280, 283, 686 P2d 310 (1984), the Oregon Supreme Court interpreted a similar standing requirement to mean that the decision

> "impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. Examples of adverse effects would be noise, odors, increased traffic or potential flooding."

LUBA has long held that persons living within sight or sound of a proposed development are presumed to be adversely affected by it. *Kampii v. City of*

Salem, 21 Or LUBA 498, 501 (1991). In the present case, no petitioner alleges that they reside within sight or sound of the subject property. To the extent petitioners purport to rely on the "within sight or sound" presumption, we agree with intervenors that petitioners must identify the location of the property owned or used that is within sight or sound. Petitioners may of course attempt to establish adverse effect without that presumption. Petitioners rely on a mix of alleged impacts to use and enjoyment of property that they own, and alleged impacts to their use of public property near the subject property. Nonetheless, the problem remains that petitioners do not specifically identify the location of the property receiving the impacts. That failure to specify the precise property location makes it difficult for intervenors to respond or dispute the alleged impacts. For example, petitioners Gilmore allege that the proposed development will increase risk of wildfire affecting their property. But without identifying the address or exact location of the Gilmore property, intervenors cannot argue or present countervailing evidence to rebut that allegation, for example, by showing that the Gilmore property is upwind of the subject property in the winds that prevail during the fire season.

Nonetheless, some of the allegations involved impacts from increased traffic on the road that provides access to the Gilmore property, which the Gilmores describe as a "narrow, winding road that provides the only access to the Rowlett property and to ours." Rogue Advocates also alleges traffic impacts on its members who reside in the area. The increased traffic impacts of

a 200-unit hotel on a narrow winding rural road certainly could adversely affect the use of the road by area residents who rely on the road for access and recreation, regardless of the exact location of the property along the road that the residents own. We conclude that, despite petitioners' failure to specifically identify the location of property that they own or use near the subject property, the declarations include allegations sufficient to establish that the Gilmores and Rogue Advocates, through its affected members, are adversely affected by the development authorized under the Second Stipulation.

For the foregoing reasons, we conclude that petitioners Rogue Advocates, Jeff Gilmore and Jeannie Gilmore have standing to appeal and have filed timely appeals under ORS 197.830(3)(b). Accordingly, LUBA has jurisdiction over the appeal of the Second Stipulation.

SCOPE OF REVIEW

Petitioners' single assignment of error argues in relevant part that both the county *and* the circuit court erred in executing the Second Stipulation to verify and expand the nonconforming use of the property without complying with the procedural and substantive requirements that govern the verification and expansion of a nonconforming use.

We understand intervenors to argue that any allegations of error on the part of the circuit court are beyond LUBA's scope of review. We generally agree. As relevant here, LUBA's scope of review is set out in ORS 197.835(9), which is limited to certain errors committed by a "local government or special

district[.]"[7] The circuit court is not a local government or special district, and circuit court actions are not subject to LUBA's review. Accordingly, we confine our review to petitioners' arguments that the county erred in approving the Second Stipulation.

ASSIGNMENT OF ERROR

Petitioners argue that the county erred as a matter of law when it verified and expanded the nonconforming uses on the subject property by executing the Second Stipulation, without following the procedures and applying the substantive standards that govern a decision that purports to verify and approve alterations to a non-conforming use.

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[7] ORS 197.835(9) provides, in relevant part:

> "* * * [LUBA] shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government or special district:
>
> "(A) Exceeded its jurisdiction;
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
>
> "(C) Made a decision not supported by substantial evidence in the whole record;
>
> "(D) Improperly construed the applicable law; or
>
> "(E) Made an unconstitutional decision[.]"

Petitioners cite several statutes and code provisions that petitioners argue apply to a decision that verifies and alters intervenors' nonconforming use, including ORS 197.763 (notice and hearing requirements for land use and limited land use decisions by local governments), ORS 215.130 (state mandated minimum requirements for nonconforming use status); and Jackson County Land Development Ordinance (LDO) Chapter 11 (standards for reviewing, approving, or denying applications for verifying, altering, expanding or enlarging nonconforming uses). Petitioners also assert that due to the failure to apply the governing procedures and substantive standards, the record does not include adequate findings supported by substantial evidence.

Intervenors respond initially that the petition for review does not explain with particularity how the county violated a provision of applicable law, or how any procedural errors prejudiced petitioners' substantial rights. Intervenors also argue that LUBA should refrain from making *sua sponte* determinations regarding the application and interpretation of the applicable law, absent a more developed argument from petitioners.

We disagree with intervenors that the petition for review fails to state a basis for reversal or remand. Petitioners clearly assert that in agreeing to the Second Stipulation the county effectively verified and approved alterations to a nonconforming use, and that a decision with that effect is a land use decision that must be processed according to land use procedures that require notice and hearing, and is subject to substantive review standards at LDO Chapter 11.

On the merits, we understand intervenors to dispute that the substantive standards at LDO Chapter 11 apply. Specifically, intervenors dispute that the Second Stipulation verified any part of the nonconforming use or vested right on the property, or approved any alterations or expansions of the nonconforming use.[8] According to intervenors, the Second Stipulation "merely specified the structures and uses that were recognized as vested rights in the Original Decree," and the Second Stipulation does not alter, expand or enlarge any non-conforming use or development, as those terms are used in LDO Chapter 11. Response Brief 1.

However, that position is hard to square with the terms of the Second Stipulation. As noted, the Second Stipulation revives the right to construct several buildings or uses, including the lodge or hotel, that otherwise had expired under the First Stipulation. That alone appears to us to be an alteration or expansion of the vested right/nonconforming use, which requires review and county approval under ORS 215.130 and LDO Chapter 11. Second, the Second Stipulation authorizes development in a different area of the subject property than allowed under the Original Decree and First Stipulation. Again, at a minimum that seems an alteration of the scope of the vested right/nonconforming use. Third, the Original Decree had authorized a "lodge

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[8] Intervenors' response to the assignment of error includes no such argument. The only argument on this point is found in the Statement of the Case portion of the response brief. We will consider that argument as intervenors' response to this portion of the assignment of error.

with bunkhouse." The First Stipulation had allowed a "lodge," with no mention of a bunkhouse, and specified that the lodge must be located on Buck Hill. The Second Stipulation authorizes a "lodge, including overnight guest accommodations, to be constructed within the designated Village Boundary." Response Brief, Appendix D-6. It is not clear where Buck Hill is located with respect to the designated Village Boundary. Petitioners allege, and intervenors do not dispute, that the "lodge with bunkhouse" originally proposed in 1976 has become a proposal for a 200-unit hotel. At a minimum, the county must review that proposal to determine if it constitutes an alteration of the vested right/nonconforming use, and if so whether that alteration can be approved under the applicable standards. Finally, the Second Stipulation states that the county shall allow development of the subject property in accordance with the Second Stipulation, "despite any inconsistent requirement, standard, criteria, rule, code, law or statute set forth in or implemented" in the county comprehensive plan or land use regulations. *Id.* at Appendix D-7. That language appears to be a blanket verification that all uses and development of the property allowed under the Second Stipulation qualify as lawful non-conforming uses. The standards at ORS 215.130 and LDO Chapter 11 apply to the verification and alteration of nonconforming uses. Accordingly, we agree with petitioners that the county erred in failing to apply those standards.

With respect to procedural error, ORS 197.835(9)(a)(B) authorizes LUBA to remand a decision where the local government failed to follow the

procedures applicable to the matter in a manner that prejudiced the substantial rights of the petitioner. Intervenor is correct that the petition for review fails to include an argument that the county's failure to follow the applicable procedures at ORS 197.763, etc. prejudiced the substantial rights of the petitioners. Petitioners do not allege, for example, that any individual or represented petitioners would be entitled to written notice if the county conducted a hearing pursuant to ORS 197.763. For that reason, we do not sustain petitioners' arguments regarding procedural error.[9]

The assignment of error is sustained, in part.

DISPOSITION

We understand petitioners to request that LUBA reverse rather than remand the Second Stipulation.[10] Intervenors take no position on disposition, in the event LUBA concludes that it has jurisdiction over the Second Stipulation. OAR 661-010-0071(1) and (2) provide, in relevant part:

"(1) The Board shall reverse a land use decision when:

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[9] However, the point is largely moot. Any county review under the standards at ORS 215.130 and LDO Chapter 11 must necessarily be conducted under the procedures for issuing a permit decision under statutes at ORS 215.416 and implementing code provisions that provide for notice and opportunity for a hearing. In all probability, petitioners will learn about, and have an opportunity to participate in, any such proceedings, even if they are not entitled to written notice of the proceedings.

[10] As explained, to the extent petitioners challenge the circuit court's action in signing the Second Stipulation, or amending the Decree based on the Second Stipulation, the circuit court's actions are not within our scope of review.

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law.

"(2) The Board shall remand a land use decision for further proceedings when:

"(a) The findings are insufficient to support the decision * * *;

"(b) The decision is not supported by substantial evidence in the whole record;

"(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s);

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law[.]"

In entering into the Second Stipulation, the county appears to have verified or approved the alteration of a vested right/non-conforming use without applying any of the statutory and LDO provisions that must govern such a decision. The county entered into the Second Stipulation in a manner that entirely sidesteps the land use proceedings and substantive criteria that must be followed and complied with. That is a misconstruction of the applicable law, so either OAR 661-010-0071(1)(c) or OAR 661-010-0071(2) appears to govern. The remaining question is whether the decision is "prohibited as a matter of law." We conclude that the decision is not prohibited as a matter of law. The county undoubtedly has jurisdiction to verify or approve alterations of nonconforming uses, assuming the county

applies and finds that all relevant land use criteria for verifying or approving alterations of nonconforming uses are met. Without commenting on whether the proposal can be approved under those criteria, we believe the appropriate disposition in this matter is to remand the decision to the county so that it can make that determination in the first instance.

The county's decision at issue in LUBA No. 2015-097 is remanded. LUBA No. 2016-009 is dismissed.