

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

3
4 MARK J. MAZESKI and DIANA CROSBY)
5 MAZESKI,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 WASCO COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 HOOD RIVER SAND, GRAVEL &)
18 READY-MIX, INC.,)
19)
20 Intervenor-Respondent.)

LUBA No. 93-100
FINAL OPINION
AND ORDER

21
22
23 Appeal from Wasco County.

24
25 Mark J. Mazeski, Mosier, filed the petition for review
26 and argued on his own behalf.

27
28 No appearance by respondent.

29
30 Michael C. Robinson and Steven L. Pfeiffer, Portland,
31 filed the response brief on behalf of intervenor-respondent.
32 With them on the brief was Stoel Rives Boley Jones & Grey.
33 Michael C. Robinson argued on behalf of intervenor-
34 respondent.

35
36 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
37 Referee, participated in the decision.

38
39 REMANDED 12/08/93

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order approving a
4 conditional use permit for a sand and gravel mining
5 operation.

6 **MOTION TO INTERVENE**

7 Hood River Sand, Gravel & Ready-Mix, Inc., the
8 applicant below, moves to intervene in this proceeding on
9 the side of respondent. There is no opposition to the
10 motion, and it is allowed.

11 **FACTS**

12 The subject property is an 8.5 acre parcel designated
13 Exclusive Farm Use on the county's comprehensive plan map
14 and zoned "A-1(20)" Exclusive Farm Use. The property is
15 also subject to two divisions of the Environmental
16 Protection District overlay zone, Division 5 - Mineral
17 Resources Overlay (EPD-5) and Division 6 - Columbia River
18 Gorge Overlay (EPD-6). The subject property is located
19 within the Columbia River Gorge National Scenic Area.

20 On October 15, 1992, intervenor submitted an
21 application for a conditional use permit for a sand and
22 gravel mining operation to the county. The county planning
23 commission conducted a public hearing on the application on
24 January 4, 1993. Deliberation on the matter was continued
25 to January 11, 1993. At its January 11, 1993 meeting, the
26 planning commission reopened the hearing for certain

1 additional testimony, and decided to leave the hearing
2 record open for seven days for submittal of additional
3 written testimony. Record 241, 250. Planning commission
4 deliberation on the application was continued to February 8,
5 1993. At its February 8, 1993 meeting, the planning
6 commission made a tentative oral decision to approve the
7 subject application. On March 22, 1993, the planning
8 commission issued a resolution approving the application,
9 subject to 18 conditions.

10 Both petitioners and intervenor appealed the planning
11 commission decision to the governing body (county court).¹
12 The county court heard the appeals at a combined hearing on
13 May 5, 1993. On June 16, 1993, the county court issued an
14 order denying petitioners' appeal and approving the
15 conditional use permit.² This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 "The record that was before the county court
18 contained information that was not in the record
19 [before] the planning commission, in violation of
20 [LUDO] 2.180."

21 Petitioners argue the evidentiary record of the hearing
22 before the planning commission was closed on January 18,
23 1993, after the expiration of the seven day period for

¹Intervenor's appeal requested changes to four of the conditions imposed by the planning commission's decision.

²In response to intervenor's appeal, the county court modified three of the conditions of approval. However, the county court's disposition of intervenor's appeal is not raised as an issue in this proceeding.

1 additional written testimony allowed by the planning
2 commission. Record 250. Petitioners contend the planning
3 commission record placed before the county court improperly
4 included evidence submitted after the close of the hearing
5 record before the planning commission. According to
6 petitioners, this material includes, among other things,
7 (1) a letter from intervenor's attorney, dated February 8,
8 1993, that was specifically rejected by the planning
9 commission at its February 8, 1993 meeting (Record 212,
10 227-31); (2) a packet of materials submitted by intervenor
11 on April 2, 1993 to demonstrate compliance with conditions
12 imposed by the planning commission decision (Record 155-90);
13 (3) a final site plan submitted by intervenor on April 7,
14 1993 (Record Appendix A); and (4) notice of April 21 and 26,
15 1993 decisions by the planning director determining that the
16 revised site plan satisfies certain conditions imposed by
17 the planning commission decision (Record 143-53).

18 Petitioners argue the inclusion of this material in the
19 record placed before the county court violates Wasco County
20 Land Use and Development Ordinance (LUDO) 2.180, which
21 provides that "review of [a] decision of the Planning
22 Commission by the County Court shall be confined to the
23 record of the proceedings * * *." Petitioners also point
24 out the notice of the county court's hearing on their appeal
25 states county court review is "on-the-record." Record 134.
26 Petitioners argue the inclusion of this material in the

1 record placed before the county court is prejudicial to
2 their substantial rights, because the material includes
3 evidence relevant to the application's compliance with
4 applicable approval criteria, particularly those concerning
5 scenic and visual impacts, and petitioners were given no
6 opportunity to respond to or rebut this evidence.

7 Petitioners maintain they were unaware at the time of
8 the county court proceedings that these materials were
9 improperly included in the planning commission record placed
10 before the county court. Petitioners argue they were not
11 provided with a copy of the record submitted to the county
12 court and relied on LUDO 2.180 and the notice of the county
13 court hearing in believing that the county court's review
14 would be limited to the evidentiary record established
15 during the hearing before the planning commission.

16 Intervenor does not dispute that the material
17 identified by petitioner under this assignment of error was
18 included in the planning commission record placed before the
19 county court. Further, intervenor does not contend
20 inclusion of this material in the record placed before the
21 county court complies with LUDO 2.180. Rather, intervenor
22 argues (1) the proper content of the county record was
23 settled by an earlier order of this Board denying
24 petitioners' objections to the record, (2) petitioners
25 waived their right to raise this issue by failing to object
26 below, and (3) petitioners fail to show that the county's

1 procedural error prejudiced their substantial rights. We
2 address each of intervenor's arguments below.

3 **A. Effect of LUBA Order**

4 Intervenor argues petitioners filed an objection to the
5 record in this appeal proceeding, and objected to the
6 inclusion in the county record of the materials at issue in
7 this assignment of error. Intervenor further argues that
8 this Board denied petitioners' record objections and did not
9 strike the challenged items from the county record. Mazeski
10 v. Wasco County, ___ Or LUBA ___ (LUBA No. 93-100, Order on
11 Record Objections, August 11, 1993) (Mazeski). Therefore,
12 according to intervenor, the challenged materials are
13 properly included in the record of the county court
14 proceeding.

15 In our order denying petitioners' record objections, we
16 determined only that the items in question are properly part
17 of the county record in this appeal, because they were
18 actually placed before the county court. We specifically
19 noted:

20 "Whether the county may have erred in accepting
21 and considering the disputed documents goes to the
22 merits of this appeal. [T]hat question is
23 independent from the question of what documents
24 are included in the local government record
25 [before LUBA] in this matter. * * *" Mazeski,
26 supra, slip op at 2.

27 Thus, our prior order does not settle the issue of whether
28 the county court's acceptance and consideration of the
29 disputed items is an error that provides a basis for

1 reversal or remand of the challenged decision.

2 **B. Waiver**

3 Intervenor argues that under ORS 197.763(1) and
4 197.835(2), petitioners waived their right to object to the
5 inclusion of the disputed materials in the record placed
6 before the county court because petitioners failed to object
7 to their inclusion with sufficient specificity below.³
8 Intervenor also argues that petitioners are not excused from
9 this requirement under ORS 197.835(2)(a), because the county
10 did not fail to comply with the requirements of ORS 197.763
11 as alleged by petitioners.⁴

12 Intervenor further argues that irrespective of
13 ORS 197.763(1) and 197.835(2), a procedural error does not
14 provide a basis for reversal or remand where petitioners had
15 the opportunity to object to the error below, but failed to

³ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides, in relevant part:

"Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. * * *"

⁴Under ORS 197.835(2)(a), a petitioner may raise new issues before this Board if "[t]he local government failed to follow the requirements of ORS 197.763."

1 do so. Seagraves v. Clackamas County, 17 Or LUBA 1329, 1336
2 (1989). Intervenor contends petitioners' ignorance of the
3 fact that the disputed items were included in the record
4 placed before the county court does not excuse them from
5 this requirement, because petitioners had an obligation to
6 check the record to determine if new materials were
7 included. See Chauncey v. Multnomah County, 23 Or LUBA 599,
8 603 (1992).

9 ORS 197.835(2) requires that issues raised before this
10 Board have been raised below "as provided in ORS 197.763."
11 ORS 197.763(1) requires that issues be raised "not later
12 than the close of the record at or following the final
13 evidentiary hearing on the proposal before the local
14 government." In this case, the planning commission hearing
15 was the final evidentiary hearing by the county, and the
16 record of that hearing closed on January 18, 1993. However,
17 the procedural error alleged by petitioners occurred when
18 the disputed materials were placed before the county court,
19 after the close of the record following the final local
20 government evidentiary hearing on the subject application.
21 Therefore, it is not possible for petitioners to have raised
22 this error below "as provided by ORS 197.763" and,
23 therefore, petitioners cannot be precluded from raising this
24 issue in this appeal by ORS 197.835(2).⁵

⁵In any case, petitioners would be allowed to raise new issues in this appeal under ORS 197.835(2)(a), because the county failed to comply with

1 Prior to the enactment of ORS 197.763(1) and
2 197.835(2), this Board consistently held that where a party
3 has the opportunity to object to a procedural error before
4 the local government, but fails to do so, that error cannot
5 be assigned as grounds for reversal or remand of the local
6 government's decision in an appeal to this Board. Torgeson
7 v. City of Canby, 19 Or LUBA 511, 519 (1990); Miller v. City
8 of Ashland, 17 Or LUBA 147, 153 (1988); Meyer v. City of
9 Portland, 7 Or LUBA 184, 190 (1983), aff'd 67 Or App 274,
10 rev den 297 Or 82 (1984); Dobaj v. Beaverton, 1 Or LUBA 237,
11 241 (1980). As we explained in Simmons v. Marion County, 22
12 Or LUBA 759, 774 n 8 (1992), we do not believe the
13 requirement that parties raise objections to procedural
14 errors, when it is possible to do so at any stage of the
15 local proceedings, is superseded by the requirements of
16 ORS 197.763(1) and 197.835(2). See Murphy Citizens Advisory
17 Comm. v. Josephine County, ___ Or LUBA ___ (LUBA No. 93-024,
18 May 11, 1993), slip op 5-6. However, in this case,
19 petitioners contend they were not provided with a copy of
20 the planning commission record and were unaware that the
21 disputed items were included in the planning commission
22 record.

23 Intervenor correctly notes we have previously held that

the procedural requirements of ORS 197.763. As stated under the eighth assignment of error, infra, the county's notice of its evidentiary hearing failed to list certain applicable LUDO approval standards, as required by ORS 197.763(3)(b). See Weuster v. Clackamas County, ___ Or LUBA ___ (LUBA No. 93-017, June 9, 1993), slip op 3-6.

1 parties to a land use proceeding have an obligation to
2 familiarize themselves with the items in the local
3 government record. Chauncey v. Multnomah County, supra;
4 Schellenberg v. Polk County, 22 Or LUBA 673, 679 n 7 (1992);
5 Sigurdson v. Marion County, 9 Or LUBA 163, 167 (1983).
6 However, these cases dealt with instances where parties
7 failed to check the decision maker's files to review
8 evidence (Schellenberg and Sigurdson), or appellate briefs
9 (Chauncey), that had been submitted to the decision maker in
10 advance of the decision maker's hearing, in situations where
11 the parties had no reason to think such items could not be
12 submitted or would not be accepted. This case is
13 distinguishable, because petitioners reasonably relied on
14 provisions in the county code and the notice of county court
15 hearing stating that the county court's review would be
16 limited to the evidentiary record before the planning
17 commission. We therefore conclude petitioners did not waive
18 their right to assert the county's error in placing the
19 disputed materials before the county court as a basis for
20 reversal and remand because they failed to object to this
21 error below.

22 **C. Prejudice to Substantial Rights**

23 Local government failure to follow applicable
24 procedures is a basis for reversal or remand of the local
25 government's decision only if petitioners' substantial
26 rights are prejudiced. ORS 197.835(7)(a)(B). Intervenor

1 argues petitioners failed to adequately explain how
2 placement of the disputed items before the county court
3 prejudiced their substantial rights.

4 As explained above, petitioners argue their substantial
5 rights were prejudiced because the material improperly
6 placed before the county court includes evidence relevant to
7 the proposal's compliance with applicable approval criteria,
8 and petitioners had no opportunity to respond to or rebut
9 this evidence. We agree with petitioners that at least the
10 four items listed above (intervenor's letter, final site
11 plan, intervenor's packet and planning director's decisions)
12 contain evidence relevant to the proposal's compliance with
13 applicable approval standards.

14 Petitioners have the right to rebut evidence placed
15 before the local decision maker in a quasi-judicial
16 proceeding. Fasano v. Washington Co. Comm., 264 Or 574, 507
17 P2d 23 (1973); Angel v. City of Portland, 21 Or LUBA 1, 8
18 (1991). This right is one of the substantial rights
19 referred to in ORS 197.835(7)(a)(B). See Muller v. Polk
20 County, 16 Or LUBA 771, 775 (1988). Where petitioners are
21 denied the opportunity to rebut evidence that is relevant to
22 applicable approval standards, their substantial rights are
23 prejudiced and the challenged decision must be remanded.
24 Caine v. Tillamook County, ___ Or LUBA ___ (LUBA No. 92-153,
25 April 22, 1993), slip op 5-6.

1 The first assignment of error is sustained.⁶

2 **EIGHTH ASSIGNMENT OF ERROR**

3 The mining of aggregate and other mineral resources is
4 listed as a conditional use in the A-1 zone in
5 LUDO 3.210(D)(4). LUDO 3.210(E) lists six approval
6 standards that "shall apply to a conditional use permitted
7 in subsection (D) of [LUDO 3.210]." The challenged decision
8 includes findings addressing these standards. Record 48-57.

9 Petitioners' argument in support of their eighth
10 assignment of error, in its entirety, is as follows:

11 "[LUDO] 3.210(E) contains six additional
12 conditional use approval standards for conditional
13 uses in the [A-1] zone.' Record 48 [quoting the
14 challenged decision]. The Order by the County
15 Court raises, for the first time, these standards.
16 These standards were not specified in the Planning
17 Office staff report, were not mentioned by the
18 applicant, were not addressed at any of the
19 hearings, and were not addressed in any written
20 submissions to the Planning Commission.
21 ORS 197.763. As such, they cannot now be raised
22 here for the first time." Petition for Review 37.

23 We understand petitioners to argue that the six
24 approval standards of LUDO 3.210(E) were never mentioned in

⁶Because the challenged decision must be remanded and the record reopened to provide petitioners an opportunity to rebut the disputed evidence, no purpose would be served by addressing petitioners' assignments of error challenging the adequacy of and evidentiary support for county findings addressing approval criteria to which the disputed evidence is relevant. Such criteria include those concerning scenic and visual impacts, compatibility, traffic safety and impacts on accepted farming practices. We therefore do not address the second through seventh assignments of error. We address the eighth assignment of error below, because its resolution is not affected by the remand required by our disposition of the first assignment of error.

1 the proceedings below until adoption of the challenged
2 order. The only legal standard petitioners identify as
3 violated by this course of action is ORS 197.763. We agree
4 with petitioners that the county's failure to list
5 LUDO 3.210(E)(1)-(6) as applicable approval standards in its
6 notice of the evidentiary hearing before the planning
7 commission violates ORS 197.763(3)(b). However, petitioners
8 appear to contend the consequence of this failure to list
9 LUDO 3.210(E)(1)-(6) as applicable approval standards in the
10 notice of evidentiary hearing is that the county cannot
11 adopt findings addressing these standards in its final
12 decision. We disagree.

13 Local government failure to comply with ORS 197.763(3)
14 notice of hearing requirements has two consequences. First,
15 under ORS 197.835(2)(a), it allows us to consider issues
16 that were not raised below. Second, it is a procedural
17 error which, under ORS 197.835(7)(a)(B), provides a basis
18 for reversal or remand of the challenged decision only if
19 such error prejudices petitioners' substantial rights.
20 Caine v. Tillamook County, 22 Or LUBA 687, 692-93 (1992).

21 Petitioners do not explain how their substantial rights
22 were prejudiced by the county's failure to comply with
23 ORS 197.763(3)(b). Neither do petitioners challenge the
24 adequacy of, or evidentiary support for, the findings
25 adopted by the county to address LUDO 3.210(E)(1)-(6).
26 Accordingly, this assignment of error provides no basis for

1 reversal or remand.

2 The eighth assignment of error is denied.

3 The county's decision is remanded.