

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEAD INDIAN MEMORIAL ROAD NEIGHBORS,
5 KEN OGDEN, JAMIE PAIKEN, MARGARET SAYDAH
6 and DOROTHY MITCHELL,
7 *Petitioners,*

8
9 vs.

10
11 JACKSON COUNTY,
12 *Respondent,*

13
14 and

15
16 JOSEPH DAUENHAUER,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2002-089

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Jackson County.

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26 Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of
27 petitioners. With him on the brief was Davis, Gilstrap, Hearn, Saladoff & Smith, P.C.

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29 Steven R. Rinkle, Assistant County Counsel, represented respondent.

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31 Allen E. Eraut, Medford, filed the response brief and argued on behalf of intervenor-
32 respondent. With him on the brief was Frohnmayer, Deatherage, Pratt, Jamieson, Clarke &
33 Moore, P.C.

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

37
38 REMANDED

01/29/2003

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

NATURE OF THE DECISION

Petitioners appeal a county decision granting site plan approval for a quarry and associated processing activities on portions of a 2,874-acre parcel zoned Aggregate Resource (AR).

FACTS

We take the following facts from our earlier order in this case. *Dead Indian Memorial Road Neighbors v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2002-089, Order, October 31, 2002).

*** On April 30, 2002, the county administratively approved a quarry and associated processing activities, including rock crushing and an asphalt batch plant, on portions of a 2,874-acre parcel, pursuant to ORS 215.416(11)(a). Trucks going to and from the quarry will travel along Dead Indian Memorial Road, on which all named petitioners reside. Notice of the decision was mailed to the owners of all property within 750 feet of the subject parcel, as required by ORS 215.416(11)(a)(B) and (c). Petitioner Mitchell lives within 750 feet of the subject property, and received written notice of the planning department’s tentative decision. Petitioners Ogden, Paiken and Saydah live more than 750 feet from the subject property, and did not receive written notice. Petitioner Dead Indian Memorial Road Neighbors (DIMRN) is a group of approximately 25 persons who live along Dead Indian Memorial Road. The county does not recognize DIMRN as a neighborhood or community organization that is entitled to notice under ORS 215.416(11)(c)(B), and no notice was provided to DIMRN.

“The notice described the county’s decision as a ‘tentative departmental approval’ of:

“‘Site plan review for a basalt quarry and associated processing activities, including rock crushing and an asphalt batch plant. The operation will occur within areas ‘E,’ ‘F’ and ‘H,’ which are zoned Aggregate Resource. A request has also been made to allow 24 hour operation of the asphalt plant.’ Record 96.

“The notice also stated: ‘You have the right to request a quasi-judicial hearing on the tentative Departmental decision. If a hearing is requested, the County’s final decision will be made by the hearings body.’ *Id.* The notice specified that the request for a hearing must be received no later than May 13, 2002.

1 “On May 13, 2002, * * * Nancy Wojtas filed a written request for a hearing
2 on the county’s decision. The county scheduled a public hearing before a
3 hearings officer on June 17, 2002. Under LDO 285.050, the hearings officer’s
4 decision on an appeal of a tentative departmental decision is the county’s final
5 decision, subject to exceptions not present here. Two days before the hearing,
6 on June 15, 2002, someone distributed flyers describing intervenor’s
7 application and the coming public hearing to persons living along Dead Indian
8 Memorial Road, including petitioners Ogden, Paiken and Saydah. At the June
9 17, 2002 hearing all named petitioners appeared, submitted written comments
10 and spoke on the record in opposition to intervenor’s application. During the
11 hearing, intervenor challenged Nancy Wojtas’ standing to request a hearing
12 on the planning department’s tentative decision. The hearings officer treated
13 the objection as a motion to dismiss, and continued the hearing until July 15,
14 2002, to allow time for intervenor and Wojtas to brief the issue. The next day,
15 June 18, 2002, Wojtas submitted a letter to the county withdrawing her
16 request for a public hearing.

17 “On July 1, 2002, the hearings officer issued an ‘Order Dismissing the
18 Request for Hearing.’ The order stated, in relevant part:

19 ““The parties (applicant and Ms. Wojtas) were given further
20 opportunity to present written memoranda in support of their
21 respective positions on the motion to dismiss with the stipulation that
22 the Hearings Officer would rule on the motion by July 9, 2002. If the
23 motion to dismiss were granted, the continued public hearing would be
24 canceled on the ground the Hearings Officer would have no
25 jurisdiction to proceed.

26 ““On June 18, 2002, Nancy C. Wojtas * * * filed a letter [withdrawing
27 her request for a public hearing].

28 ““* * * * *

29 ““Based upon the foregoing, it is ordered the request for hearing filed
30 by Nancy C. Wojtas on May 13, 2002, is dismissed. In the absence of
31 a request for hearing, the Hearings Officer lacks jurisdiction to
32 proceed and the public hearing continued to July 15, 2002, is
33 canceled.’ Record 163-64.

34 ““The county mailed notice of the hearings officer’s order to persons who
35 participated in the June 17, 2002 hearing, including petitioners. Two days
36 later, on July 3, 2002, petitioners filed a notice of intent to appeal (NITA)
37 with LUBA, appealing the county’s April 30, 2002 tentative decision.” *Id.* slip
38 op 1-5 (footnotes omitted).

1 Respondents moved to dismiss the appeal on the grounds that the appeal was not
2 timely filed and that petitioner Mitchell failed to exhaust all available administrative
3 remedies before appealing to LUBA. ORS 197.830(9); 197.825(2). Respondents argued that
4 the hearings officer's dismissal of the request for a public hearing had the effect of making
5 the tentative planning department decision the final decision and that the 21-day period for
6 appealing that decision was retroactive to the date the period for requesting a public hearing
7 expired. We agreed that the hearings officer's decision had the effect of making the tentative
8 decision the county's final decision on the application, but disagreed as to the retroactive
9 finality of the tentative decision. We held the time for appealing the tentative decision did
10 not begin to run until the hearings officer dismissed the request for the public hearing.
11 Petitioners appealed within 21 days of the hearings officer's decision.

12 Respondents also argued that petitioner Mitchell failed to exhaust all available
13 remedies by not requesting a public hearing, thereby being completely dependent upon the
14 Wojtas request for a hearing to challenge the tentative decision. We disagreed, and held that
15 when a public hearing is requested and a petitioner appears at that hearing, that petitioner has
16 satisfied ORS 198.825(2)(a) even if the person who originally requested the hearing later
17 withdraws her request. Accordingly, we rejected the jurisdictional challenges to this appeal
18 and set the briefing schedule. We now turn to the assignments of error set forth in the
19 petition for review.

20 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

21 Petitioners' first two assignments of error challenge the hearings officer's decision to
22 limit testimony at the public hearing solely to the issue of whether Wojtas had standing to
23 request the local public hearing. Petitioners, however, appealed the planning department's
24 tentative decision to LUBA; they did not appeal the hearings officer's decision. Petitioners
25 read our order denying the motion to dismiss as deciding that the hearings officer erred in
26 limiting the testimony to Wojtas' standing. Petitioners misunderstand our order. We merely

1 ruled that the appeal of the tentative decision was timely and that petitioner Mitchell did not
2 fail to exhaust all available remedies. As explained, we held that the hearings officer's
3 decision to dismiss the request for a public hearing had the effect of rendering the planning
4 department's tentative decision final as of the date of the hearings officer's decision and that
5 the deadline for filing an appeal to LUBA began to run on the date of the hearings officer's
6 decision. Our order established that petitioners had filed a timely appeal and did not fail to
7 exhaust all available remedies; it did not decide whether the hearings officer's decision was
8 substantively correct. Petitioners did not appeal the hearings officer decision to LUBA, and
9 we may not consider assignments of error directed at that decision.

10 The first and second assignments of error are denied.

11 **THIRD THROUGH EIGHTH ASSIGNMENTS OF ERROR**

12 Petitioners' third through eighth assignments of error challenge the planning
13 department's tentative decision. Intervenor's response consists entirely of an argument that
14 petitioners failed to raise those issues before the local hearings body as required by ORS
15 197.835(3).

16 ORS 197.835(3) limits issues before LUBA to those raised by any participant before
17 the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.¹
18 ORS 197.195 provides the procedures for limited land use decisions, and ORS 197.763
19 provides the procedures for quasi-judicial land use hearings. In the present case, it is
20 undisputed that the decision was not a limited land use decision. Therefore, ORS 197.195
21 does not apply. It is also undisputed that the county did not hold a quasi-judicial public
22 hearing on the matter, at least not one where petitioners were permitted to raise the issues

¹ ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 they now raise in their petition for review.² Therefore, ORS 197.763 does not apply either.
2 Because neither ORS 197.195 nor 197.763 are applicable, ORS 197.835(3) does not prevent
3 petitioners from raising issues for the first time at LUBA. *See Leathers v. Marion County*, 29
4 Or LUBA 343, 347 (1995) (petitioners do not waive the right to raise issues on appeal when
5 they have not been provided the forum to raise them at the local level).

6 The third assignment of error asserts that the proposed aggregate sites on the subject
7 property are merely undefined blobs without legal descriptions. According to petitioners,
8 without a proper legal description, the county will be unable to regulate activities on the site.
9 The fourth assignment of error asserts that the county failed to provide the expanded notice
10 required to approve the request for a 24-hour operation under LDO 244.040(9). The fifth
11 assignment of error alleges that the decision that the application complies with LDO
12 280.110(3) requirements concerning winter range habitat for deer and elk is not supported by
13 substantial evidence. The sixth assignment of error is directed at safety concerns regarding
14 traffic and access pursuant to Policy J of the comprehensive plan Transportation Element,
15 that petitioners argue are not addressed by the decision. The seventh assignment of error
16 asserts that the application is incomplete regarding the water usage of the proposed aggregate
17 operation. The eighth assignment of error asserts that the decision fails to include mitigation
18 measures regarding sound and appearance, which are required because the highway fronting
19 the subject property is in a designated scenic viewshed.

20 Although neither party identifies the decision or attaches it to their brief, it appears to
21 us that the final decision is the staff report. Record 82-92. Intervenor does not attempt to
22 defend the decision on the merits against petitioners' third through eighth assignments of
23 error. We decline to attempt to resolve these assignments of error in the absence of any
24 assistance from respondents. For example, we receive no help in attempting to resolve the

² Although participants at the public hearing did address issues concerning the merits of the application, the hearings officer made clear that the only issue he would consider was the issue of Wojtas' standing.

1 safety concerns raised by petitioners in their sixth assignment of error. We cannot tell from
2 the decision or the portions of the record we have been directed to why those safety concerns
3 are not legitimate. We have similar difficulty resolving the other remaining assignments of
4 error. Under these circumstances, the best course is to remand the decision to the county to
5 respond to the third through eighth assignments of error.

6 The county's decision is remanded.