BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BOWLUS CHAUNCEY and LYNNE D. CHAUNCEY, Petitioners, vs. MULTNOMAH COUNTY, Respondent, and RALPH W. JONES, KENT B. THURBER, DAVID P. ROY, HAROLD MASON, and RAY DeSILVA, Intervenors-Respondent.	LUBA No. 91-212 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Peggy Hennessy, Portland,filed the petition for review and argued on behalf of petitioners.

John L. DuBay, Portland, filed a response brief and argued on behalf of respondent.

Ralph W. Jones, Portland, filed a response brief and argued on his own behalf.

Kent B. Thurber and David P. Roy, Portland, filed a response brief and argued on their own behalf.

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

AFFIRMED 08/18/92

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners' order denying conditional use approval for operation of a wood by-products business in the Exclusive Farm Use (EFU) zone.

MOTIONS TO INTERVENE

Ralph W. Jones, Kent B. Thurber, David P. Roy, Harold Mason and Ray DeSilva move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

The subject property is a narrow strip of land, comprising 4.24 acres, located between Cornelius Pass Road to the east and the Washington County/Multnomah County line to the west. The northern portion of the property contains cleared forest, young fir trees originally planted as Christmas trees and a mobile home.[1] The southern third of the property, which contains the site of the proposed wood by-products business, consists of pasture and scattered trees. The surrounding properties in both Multnomah and Washington Counties are also zoned EFU.

Petitioners are the contract purchasers of the subject

[1]The mobile home was approved as a farm-related dwelling, in conjunction with a farm management plan for growing Christmas trees on the subject property.

property.[2] Their application requests conditional use approval for "transfer and storage of nursery related products, including sawdust, bark, mulch and chips." Record 405. Petitioners propose to deliver the stockpiled wood by-products to retail customers by truck. During the proceedings, it became clear the proposed use included the on-site processing (grinding) of wood by-products. However, at a later stage of the proceedings, petitioners offered to accept a condition that no on-site processing take place on the subject property. Record 15a.

On June 3, 1992, the planning commission adopted a decision approving the subject application with conditions. On June 24, 1992, intervenors appealed this decision to the board of commissioners. On June 25, 1992, the board of commissioners decided it would hear the appeal based solely on the record before the planning commission. Supp. Record 66-67. Intervenor Jones requested reconsideration of the June 25, 1992 decision. On July 31, 1992, the county received from intervenor Jones, by mail, a brief on the appeal (Jones Brief). Supp. Record 34-64. On August 6, 1992, the board of commissioners decided to hear the appeal

[2]Petitioners began their wood by-products business on another property, where their residence is located. The county denied petitioners' application for a conditional use permit to operate the business on that property. However, the county agreed not to take any enforcement action against petitioners' operation at the other site until the county made a final decision on the conditional use permit application that is the subject of this appeal. Record 41, 64a.

based on the planning commission record plus additional testimony. Supp. Record 29. The board of commissioners held a public hearing on the appeal on September 24, 1992, and made a tentative oral decision to deny the application.

On September 26, 1992, petitioners requested that the board of commissioners withdraw its tentative decision and reopen the hearing. Petitioners requested an opportunity to rebut written evidence submitted at the September 24, 1992 hearing that had not been available for review prior to or during the hearing. Record 29-31. The board of commissioners decided to reopen the hearing and, on October 15, 1992, held a hearing for the purpose of allowing the parties to rebut evidence submitted at the September 24, 1992 hearing. Record 16. On October 24, 1992, the board of commissioners adopted the challenged decision denying petitioners' application.

FOURTH ASSIGNMENT OF ERROR

> "Petitioners' lack of <u>any</u> opportunity to rebut evidence in [the Jones Brief] which was before the decision makers constitutes a denial of due process which resulted in prejudice to Petitioners' substantial rights." (Emphasis in original.)

Petitioners contend intervenor Jones submitted the Jones Brief to the county without service upon, or notice to, petitioners. Petitioners further contend the Jones Brief was not mentioned during the hearings before the board of commissioners. According to petitioners, they were

unaware of the existence of the Jones Brief until they received their copy of the supplemental record filed by the county in this appeal. Petitioners maintain the Jones Brief contains evidence and argument regarding each approval standard upon which the county based its denial of their application.

Petitioners argue that under these circumstances, they were provided no opportunity to rebut evidence (the Jones Brief) which was placed before the decision maker. According to petitioners, the absence of any opportunity to rebut evidence placed before the decision maker is sufficient to demonstrate prejudice to their substantial rights. Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 90-108, March 6, 1991). Petitioners further argue that "[d]ue process is denied where a party is not given the opportunity to review and rebut evidence which is before the decision maker. See Fasano [v. Washington Co. Comm.], 264 Or 574, 507 P2d 23 (1973) * * *." Petition for Review 30.

Intervenor Jones alleges that he served the Jones Brief on petitioners' attorney in mid-August 1992. Intervenor Jones also argues that except for a portion of the section relating to noise, which is not at issue in this appeal, the Jones Brief does not contain new evidence, but rather summarizes and discusses evidence in the record of the planning commission proceedings. According to intervenor Jones, petitioners had ample opportunities to rebut the

evidence submitted during the planning commission proceedings.

Petitioners phrase this assignment of error as being the denial of their right to "due process," presumably under the due process clause of the Fourteenth Amendment to the U.S. Constitution. However, petitioners provide no legal argument based on federal constitutional due process requirements.[3] Rather, petitioners rely on Fasano v. Washington Co. Comm., supra, and other Oregon cases based thereon.[4] We therefore will consider whether petitioners' rights under Fasano have been violated.

Fasano recognizes that participants in a quasi-judicial local government land use proceeding have a right to rebut evidence. Fasano does not recognize a right to be served with documents submitted to the local government by other parties. Petitioners identify no provision of state statute or county regulations requiring parties to serve the documents they submit to the county on other parties. We have previously held that parties to local government land

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[3]LUBA will not consider claims of constitutional violations which are unsupported by legal argument. Dolan v. City of Tigard, 20 Or LUBA 411, 426 (1991); Van Sant v. Yamhill County, 17 Or LUBA 563, 566-67 (1989); Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA 255, 269 (1987).

[4]The Oregon Supreme Court has explained that the procedural rights extended under Fasano are derived from the comprehensive land use planning statutory scheme in this state, not the due process clause of the Fourteenth Amendment to the U.S. Constitution. 1000 Friends of Oregon v. Wasco County Court, 304 Or 76, 81, 742 P2d 39 (1987); see Reed v. Clatsop County, ___ Or LUBA ___ (LUBA Nos. 91-088 and 91-089, January 21, 1992), slip op 10 n 7.

use proceedings have a duty to familiarize themselves with the record and the evidence in the local government file. Schellenberg v. Polk County, ___ Or LUBA ___ (LUBA No. 91-206, February 19, 1992), slip op 9 n 7; Sigurdson v. Marion County, 9 Or LUBA 163, 167 (1983).

Petitioners do not dispute that the Jones Brief was placed before the county decision maker. See Chauncey v. Multnomah County, ___ Or LUBA ___ (LUBA No. 91-212, Order on Record Objections, April 27, 1992). Neither do petitioners allege that they reviewed the items in the county file after the Jones Brief was received by the county on July 31, 1992.[5] If petitioners had done so, presumably they would have seen the Jones Brief and would have been able to rebut it at the September 24, 1992 board of commissioners hearing.[6] Thus, even if we assume that intervenor Jones did not serve the Jones Brief on petitioners, petitioners provide no basis on which to conclude their right to rebut evidence was violated thereby.

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[5]At oral argument, petitioners speculated that because the county submitted the Jones Brief to this Board as part of a supplemental record, perhaps petitioners would not have been able to find the Jones Brief, had they sought to review the items in the county's file during the county proceedings. We decline to draw such an inference from the fact that the county did not include the Jones Brief in the local record originally submitted in this appeal. Local government respondents with some frequency overlook certain items that are part of the local record and file a supplemental record to correct their oversight.

[6]We note that the county granted petitioners' request to reopen the hearing and provide additional rebuttal of evidence submitted at the September 24, 1992 hearing. Record 18-23.

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and made a decision without adequate findings and not supported by substantial evidence in finding that the proposed operation does not constitute a commercial activity in conjunction with farm use."

Multnomah County Code (MCC) 11.15.2012(B)(1) lists "commercial activities that are in conjunction with farm uses" as a conditional use in the EFU zone. The MCC does not further define commercial activities "in conjunction with farm uses." One basis for the county's decision denying petitioners' application is that the proposed wood by-products operation is not allowable under MCC 11.15.2012(B)(1) because it is not in conjunction with farm uses.

Craven v. Jackson County, 308 Or 281, 779 P2d 1011 (1989) dealt with whether a proposed winery and related retail activity were "commercial activities that are in conjunction with farm use," allowable in exclusive farm use zones under ORS 215.283(2)(a). In Craven, 308 Or at 289, the Oregon Supreme Court stated:

> "* * * We believe that, to be 'in conjunction with farm use,' the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land housing that commercial activity relates. * * *"

The parties generally agree that MCC 11.15.2012(B)(1),

which is virtually identical to ORS 215.283(2)(a),[7] should be interpreted in the manner expressed by the Oregon Supreme Court in the above quote. However, the parties disagree with regard to whether the county properly interpreted the term "local agricultural community" and whether the county's findings properly identify the local agricultural community it considered. Petitioners also challenge the evidentiary support for the county's determination that the proposed use is not a commercial activity in conjunction with farm use.

Petitioners contend the "local agricultural community" should include farm enterprises within a ten mile radius of the subject property. Petitioners argue that such an area was used to determine the extent of petitioners' service to the local agricultural community throughout the county proceedings, but that the board of commissioners relied for the first time in its findings on a much smaller approximately one square mile area as the "local agricultural community." Petitioners further argue the county's findings are inadequate because they do not provide any rationale for identifying this one square mile area as the "local agricultural community."

The county's findings on whether the proposed operation

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[7]The only difference is that the former uses the phrase "in conjunction with farm uses," whereas the latter uses "in conjunction with farm use." We do not believe there is any significance in the use of the plural in MCC 11.15.2012(B)(1). Further, we see nothing in the wording or context of the relevant MCC provisions to indicate any meaning different from that of ORS 215.283(2)(a) is intended.

is in conjunction with farm use refer to the "local agricultural community" as a particular portion of the Rock Creek valley, the "one square mile area" referred to by petitioners. Record 10. However, the county's findings on whether the proposed operation is in conjunction with farm use also consider whether the proposed operation would serve agricultural enterprises within a ten mile radius of the subject property. Record 9. In this case, we need not decide whether the county erred in determining the "local agricultural community" to be an area smaller than the ten mile radius advocated by petitioners. The county considered whether the proposed use would serve agricultural enterprises within a ten mile radius and, for the reasons explained below, the evidence in the record fails to demonstrate that, as a matter of law, the proposed operation is a commercial activity in conjunction with farm use, regardless of which area is considered to be the "local agricultural community."

To overturn the county's determination that an applicable approval criterion is not met, on evidentiary grounds, the "evidence must be such that a reasonable trier of fact could only say petitioner[s'] evidence should be believed." Morley v. Marion County, 16 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). In other words, petitioners must demonstrate that they

sustained their burden to establish compliance with the applicable criterion as a matter of law. Consolidated Rock Products, Inc. v. Clackamas County, 17 Or LUBA 609, 619 (1989); Van Mere v. City of Tualatin, 16 Or LUBA 671, 683 (1988); see Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979).

We have reviewed the evidence in the record cited by the parties. Record 15a-i, 41, 50, 58, 87-89, 94; Supp. Record 15-25; Petition for Review App. B, pp. 11-13. There is evidence that certain farm uses, including nurseries and Christmas tree farms, use the type of wood by-products sold by petitioners. Record 88; Supp. Record 24, 25, 50. There is testimony by petitioners that in the previous year, "51% of our business came from farmers and nurseries, 39% from homeowners, and 10% from other retailers." Record 87. Petitioners also testified that 90% of their business's sales are within ten miles of the subject property. Record 41-42, 89, 94. Petitioners' attorney submitted a list of 11 nurseries within a ten mile radius allegedly served by petitioners' business. Record 15c. However, the only support for this list is a single invoice from each of four nurseries on the list. Record 15g, 15h. The four invoices show orders of 4 units of barkdust and 13, 30 and 11 units of sawdust.[8]

[8]A "unit" is 7.4 cubic yards. Petition for Review, App. B, p. 12.

The record also shows that during the course of the county proceedings, the nature of petitioners' proposed business operation at the subject site has changed. Petitioners acquired another site, 26 miles distant, to which they have moved their grinding and processing operations. Petitioners will serve their major customers directly from this processing site. Petitioners will use semi-trucks to transport wood by-products to the subject site for stockpiling, and will serve their smaller customers, using smaller trucks, from the subject property.[9] Petition for Review App. B, pp. 11-13.

There is no evidence in the record regarding what quantity of wood by-products will be distributed from the subject site, what portion of the "smaller customers" to be served from the subject site are farm uses or what quantity of the wood by-products to be delivered from the subject site will be sold to farm uses.[10] Further, even if the bifurcation of petitioners' business between the subject and processing sites is overlooked, the evidence in the record does not establish the quantity of wood by-products delivered, or dollar amount of sales, by petitioners'

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[9]Petitioners use three dump trucks, which hold 10-12 cubic yards (approximately 1.5 units) apiece, and two semi-trucks. Record 257.

[10]However, we note that three of the four invoices submitted by petitioners showing sales to nurseries within ten miles are for 11 or more units of product, quantities which appear to be ill-suited for delivery from the subject site in petitioners' smaller trucks.

business to farm uses within a ten mile radius. We agree with respondent that in the absence of such evidence, petitioners cannot demonstrate as a matter of law that their proposed use of the subject site is a commercial activity in conjunction with farm use.

The first assignment of error is denied.[11]

The county's decision is affirmed.

[11]A single determination of noncompliance with an applicable approval criterion is sufficient to support a local government's decision to deny requested development approval. Adams v. Jackson County, 20 Or LUBA 398, 403 (1991); Van Mere v. City of Tualatin, 16 Or LUBA at 675 n 2. Accordingly, we do not address petitioners' second and third assignments of error.