

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 FAYNE L. TUCKER, BETTY L. TUCKER,)
5 CHARLEEN HENRY, BRIAN A. HENRY,)
6 and ELDONNA R. DYER,)
7)
8 Petitioners,)
9)

10 vs.)

11)
12 DOUGLAS COUNTY,)
13)
14 Respondent,)
15)

LUBA No. 94-083

FINAL OPINION
AND ORDER

16 and)
17)

18 CAROLINE TUGEL,)
19)
20 Intervenor-Respondent.)

21
22
23 Appeal from Douglas County.

24
25 Fayne L. Tucker filed the petition for review and
26 argued on his own behalf. Betty L. Tucker and Eldonna R.
27 Dyer argued on their own behalf.

28
29 No appearance by respondent.

30
31 Stephen Mountainspring, Roseburg, filed the response
32 brief and argued on behalf of intervenor-respondent.

33
34 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
35 Referee, participated in the decision.

36
37 REMANDED 10/11/94

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a board of county commissioners'
4 order approving a conditional use permit for a dog kennel.

5 **MOTION TO INTERVENE**

6 Caroline Tugel, the applicant below, moves to intervene
7 in this proceeding on the side of respondent. There is no
8 opposition to the motion, and it is granted.

9 **FACTS**

10 The subject property is zoned Exclusive Farm Use -
11 Grazing (FG) and is approximately 119 acres in size. Wiley
12 Creek flows across the western portion of the subject
13 property. The property contains a house, with attached
14 garage, shop, pumphouse and two-stall horse barn, all
15 located on the southeastern portion of the property. The
16 property has been used for cattle and hay production.
17 Intervenor purchased the property approximately three months
18 prior to filing the subject conditional use permit
19 application, and is in the process of moving her Quarter
20 Horse breeding operation to the property.

21 Rolling open pasture lands on properties to the east
22 and west of the subject property are also zoned FG.
23 Hillside to the north of the subject property are zoned
24 Timberland Resource (TR). Properties to the south of the
25 subject property, across South Myrtle Creek Road, are zoned
26 Farm Forest (FF). These neighboring properties are

1 generally in farm and residential use. The nearest dwelling
2 is approximately 1,000 feet west of the site of the proposed
3 kennel.

4 Intervenor raises Parson Jack Russell Terriers, an
5 uncommon English breed of terriers, as a hobby. On
6 October 7, 1993, intervenor filed a conditional use permit
7 application for a dog kennel to keep up to 20 Parson Jack
8 Russell Terriers on the subject property, for propagation
9 and sale. Intervenor proposes to keep the dogs in kennels
10 in the attached garage, with each dog alternating its time
11 between the garage and the house. The cement-floored shop
12 building is proposed to be used for grooming.

13 On November 5, 1993, the county planning director
14 approved intervenor's application. Petitioners appealed the
15 planning director's decision to the planning commission.
16 After a public hearing, the planning commission denied
17 intervenor's application on January 21, 1994. Intervenor
18 appealed the planning commission decision to the board of
19 commissioners.

20 On February 28, 1994, the board of commissioners held a
21 hearing on intervenor's appeal. The board of commissioners'
22 conducted a de novo review, based on the record before the
23 planning commission. On April 13, 1994, the board of
24 commissioners adopted an order approving intervenor's
25 conditional use permit application, with conditions. This
26 appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The board of commissioners' review of the planning
3 commission decision is governed by Douglas County Land Use
4 and Development Ordinance (LUDO) 2.700,¹ which provides in
5 relevant part:

6 "1. Review by the Board [of Commissioners] shall
7 be confined to the arguments of the parties
8 and the record of the proceeding below [.]

9 * * * * *

10 "2. Review by the Board [of Commissioners] shall
11 be a de novo review of the record limited to
12 the grounds relied upon in the notice of
13 review * * *.

14 * * * * *

15 Petitioners contend that with regard to several issues,
16 the board of commissioners (1) allowed intervenor to submit
17 new evidence, but refused to allow petitioners to respond to
18 such evidence; or (2) refused to allow petitioners to
19 present argument based on evidence in the planning
20 commission record. Petitioners contend their substantial
21 rights to present and rebut evidence and to a full and fair
22 hearing were prejudiced by the board of commissioners'
23 actions.

24 With regard to the first type of error alleged by

¹Under ORS 215.428(3), intervenor's conditional use permit application is governed by the version of the LUDO in effect when the application was first submitted to the county. Consequently, all references to the LUDO in this opinion are to the LUDO as revised on June 5, 1991.

1 petitioners, intervenor makes a general response.²
2 Intervenor argues because LUDO 2.700 limits the board of
3 commissioners' review to evidence in the planning commission
4 record, the first type of error alleged by petitioners is
5 harmless, unless the challenged decision demonstrates the
6 board of commissioners considered evidence outside the
7 planning commission record. See Cave v. Klamath County, 2
8 Or LUBA 69, 74 (1981). Intervenor points out several
9 instances during the hearing in which the board of
10 commissioners reminded the parties that no new evidence
11 would be accepted and ruled that certain evidence could not
12 be discussed because it was not in the planning commission
13 record. Petition for Review B1, B9, B11, B12. Intervenor
14 argues petitioners unreasonably demand a perfectly conducted
15 proceeding.

16 ORS 197.835(7)(a)(B) requires that LUBA reverse or
17 remand a challenged decision if a local government committed
18 a procedural error "that prejudiced the substantial rights
19 of the petitioner." However, we have repeatedly held that
20 where a party has the opportunity to object to a procedural
21 error before the local government, but fails to do so, that
22 error cannot be assigned as grounds for reversal or remand
23 of a local government decision in an appeal to this Board.
24 Mazeski v. Wasco County, 26 Or LUBA 226, 232 (1993);

²Intervenor's responses that are specific to each individual procedural error alleged are addressed separately below.

1 Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Dobaj
2 v. Beaverton, 1 Or LUBA 237, 241 (1980).

3 Under Fasano v. Washington Co. Comm., 264 Or 574, 588,
4 507 P2d 23 (1973), petitioners have a right to rebut
5 evidence placed before the local decision maker in a
6 quasi-judicial land use proceeding. Failure to provide
7 petitioners with an opportunity to rebut evidence placed
8 before the local decision maker constitutes a violation of
9 petitioners' substantial rights. Caine v. Tillamook County,
10 25 Or LUBA 209, 214 (1993); Angel v. City of Portland, 21
11 Or LUBA 1, 8-9 (1991). Therefore, where (1) a local
12 government decision maker makes a procedural error in
13 allowing new evidence (which is at least arguably relevant)
14 to be submitted during an on-the-record review,
15 (2) petitioners object to the receipt of that new evidence,
16 and (3) the local decision maker does not provide
17 petitioners with an opportunity to rebut the new evidence,
18 LUBA will remand the challenged decision for the local
19 decision maker to provide the required opportunity for
20 rebuttal, regardless of whether the challenged decision
21 expressly relies on the new evidence.³

³Cave v. Klamath County, supra, does not establish the broad principle asserted by intervenor. In Cave, the board of commissioners elected to proceed with its review hearing before obtaining a complete record of the planning commission proceeding. The board of commissioners announced that it would subsequently review the tapes of the planning commission proceeding, and that any comments made at the board of commissioners' review hearing which were outside the scope of the evidence received at the planning commission hearing would be ignored. Petitioner did not object to

1 **A. Statements Concerning Noxon Letter**

2 The Noxon letter is a letter dated October 5, 1987, by
3 Arthur M. Noxon, an acoustical engineer, which discusses the
4 noise impacts of a dog kennel proposed to be situated in a
5 rural area southwest of Roseburg. The Noxon letter is not
6 in the planning commission record. At the board of
7 commissioners' hearing, apparently in the mistaken belief
8 that the Noxon letter was in the planning commission record,
9 intervenor's attorney discussed the contents of the Noxon
10 letter and argued the letter supports a conclusion that the
11 proposed kennel will satisfy Department of Environmental
12 Quality (DEQ) noise standards, without any mitigation.
13 Petition for Review B6. Petitioner Fayne Tucker objected
14 that the decibel figures cited by intervenor's attorney as
15 supported by the Noxon letter were not in the record. Id.
16 at B9.

17 There is no dispute that the issue of noise impacts is
18 relevant to compliance with the approval standards for the
19 subject conditional use permit. Intervenor's attorney's
20 testimony describing the contents of the Noxon letter, which
21 was not in the planning commission record, constitutes new

this procedure. Neither did petitioner demonstrate to LUBA that any new evidence was received at the board of commissioners' hearing, or argue that petitioner was denied the right of rebuttal. In this circumstance, LUBA held that where there is nothing to show the board of commissioners considered improper evidence, LUBA could not find there was prejudice to petitioner's substantial rights. LUBA did not decide that the improper receipt of new evidence is prejudicial to petitioner's substantial rights only if the challenged decision demonstrates the decision maker relied on that evidence.

1 evidence. Petitioners objected to the receipt of this new
2 evidence and were not provided an opportunity for rebuttal.
3 Consequently, the challenged decision must be remanded.

4 This subassignment of error is sustained.

5 **B. DEQ Noise Enforcement**

6 Before the board of commissioners, petitioner Fayne
7 Tucker attempted to testify that DEQ's enforcement of its
8 noise regulations had been terminated, and that DEQ could
9 not be relied on to help enforce noise limits on the
10 proposed use. The board of commissioners determined this
11 was new evidence, and refused to allow testimony on this
12 issue. Petition for Review 10.

13 Petitioners do not demonstrate that the subject of
14 petitioner Tucker's testimony concerning DEQ's noise
15 enforcement capability is in the record of the planning
16 commission proceeding. Neither do petitioners demonstrate
17 that new testimony on this issue was received by the board
18 of commissioners from intervenor. Therefore, we agree with
19 intervenor that the board of commissioners properly declined
20 to allow petitioner Tucker to testify on this issue.

21 This subassignment of error is denied.

22 **C. Bird Sanctuary**

23 At the board of commissioners' hearing, intervenor's
24 attorney testified that a "neighbor said he had a bird
25 sanctuary in his backyard and that he plans to expand it and
26 any dog barking disturbs it." Petition for Review B5. The

1 attorney then argued that the existence of a bird sanctuary
2 is irrelevant to the approval criteria for the subject
3 permit.

4 Petitioners contend no neighbor made such a statement
5 before the planning commission and, therefore, intervenor's
6 attorney's statement constitutes new evidence which
7 petitioners should have an opportunity to rebut.
8 Petitioners argue their credibility was damaged by the
9 attorney's statement.

10 The audiotapes of the planning commission's
11 December 16, 1993 hearing that David Shepherd, an owner of
12 adjoining property, testified:

13 "I personally plan to retire where I live and make
14 a bird sanctuary out of about 20 acres of land in
15 that area. I got five now * * *. And a bird
16 sanctuary really wouldn't go well with a dog
17 kennel right next door to it." Intervenor's
18 Brief 4.

19 We agree with intervenor that the attorney's statement at
20 the board of commissioners' hearing does not constitute new
21 evidence, but rather comment and argument concerning
22 evidence in the planning commission record.

23 This subassignment of error is denied.

24 **D. Chicken Killed by Dog**

25 During the planning commission hearing, David Shepherd
26 testified that one of intervenor's dogs roamed on other
27 property and killed a chicken belonging to petitioner Dyer.
28 Shepherd also testified that intervenor offered to pay for

1 the chicken. Supp. Record 6; Intervenor's Brief 5. At the
2 board of commissioners' hearing, intervenor's attorney
3 testified that intervenor denied that one of her dogs killed
4 the chicken. Petition for Review B7. Petitioner Dyer
5 attempted to respond by stating that intervenor never denied
6 that her dog killed the chicken and, in fact, paid \$20 for
7 the chicken. Petition for Review 7. The county counsel
8 interrupted petitioner Dyer's comments and recommended that
9 the board of commissioners disregard her testimony, because
10 "the specifics of the chicken issue were not in the record."
11 Id. at 8. No party disputes that the board of commissioners
12 rejected petitioner Dyer's testimony on the chicken issue.

13 One of the approval criteria for the subject
14 conditional use permit is that "the proposed use is or may
15 be made compatible with existing adjacent permitted uses and
16 other uses permitted in the underlying zone."
17 LUDO 3.39.050.1. Whether one of intervenor's dogs roamed
18 onto neighboring property and killed a neighbor's chicken is
19 relevant to whether the proposed dog kennel is compatible
20 with adjacent uses. Intervenor does not identify any place
21 in the planning commission record where she denied that her
22 dog killed the neighbor's chicken. Therefore, intervenor's
23 attorney's statement that intervenor denied her dog killed
24 the chicken constitutes new evidence submitted to the board
25 of commissioners. Consequently, the board of commissioners
26 should have allowed petitioner Dyer an opportunity to rebut

1 the attorney's testimony that intervenor's dog did not kill
2 petitioner Dyer's chicken. This does not mean the board of
3 commissioners was required to accept additional new evidence
4 from petitioner Dyer on related issues (such as intervenor's
5 alleged payment of \$20 for the chicken). However, the board
6 of commissioners improperly cut off petitioner Dyer's
7 rebuttal altogether.

8 This subassignment of error is sustained.

9 **E. Sunkler Testimony**

10 Petitioners complain that Julie Sunkler, intervenor's
11 manager, was allowed to testify before the board of
12 commissioners concerning current use of an aviary to house
13 some of the dogs, even though she had not testified before
14 the planning commission and was not recognized as a party.
15 Petitioners point out that immediately after Sunkler's
16 testimony, David Shepherd was denied the right to comment on
17 the use of the aviary to house dogs. Petition for Review
18 B11-12.

19 In their brief and at oral argument, petitioners
20 conceded Sunkler's testimony concerning use of the aviary is
21 not relevant to the applicable approval criteria.
22 Therefore, even if the board of commissioners committed
23 error by allowing Sunkler to present new evidence on this
24 issue and refusing to allow Shepherd to respond, as appears
25 to be the case, the error was harmless.

26 This subassignment of error is denied.

1 The first assignment of error is sustained, in part.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners contend the challenged decision is not
4 supported by adequate findings or substantial evidence in
5 the record with regard to certain issues.

6 **A. Leptospirosis/Water Pollution**

7 Petitioners argue they raised the issue below that the
8 proposed kennel operation could cause leptospirosis from dog
9 feces and urine to contaminate Wiley Creek and groundwater
10 in the area, and that the disease caused by this organism
11 could be spread to humans. Petitioners complain the county
12 never consulted any health authorities on this issue.
13 Petitioners contend the county improperly shifted the burden
14 of proof on this issue to petitioners. Petitioners further
15 contend the county's findings on this issue are inadequate
16 and are not supported by substantial evidence in the record.

17 As mentioned above, LUDO 3.39.050.1. requires that the
18 proposed use "is or may be made compatible with" existing
19 adjacent uses. Concerning the leptospirosis and water
20 pollution issue, the findings state:

21 "Concerning the risk of water pollution from the
22 kennel, * * * the presence of 20 dogs will present
23 no greater potential for water pollution than does
24 the current presence of livestock and other
25 animals in the area, because the neighbors all run
26 cattle and all but Mr. Shepherd have dogs
27 themselves.

28 "Although there is no evidence in the record that
29 the proposed kennel will actually cause any
30 pollution, several remonstrators expressed fears

1 about leptospirosis. Any risk of water pollution
2 or disease can be adequately mitigated by
3 requiring [intervenor] to clean the kennel at
4 reasonable intervals and to dispose of the waste
5 at an approved landfill or transfer site and by
6 further requiring her to periodically test the
7 kennel dogs for leptospirosis and treat them with
8 appropriate medical treatment if any such disease
9 is found. [Intervenor] testified at the
10 [Planning] Commission hearing that she already
11 does these things and the Board [of Commissioners]
12 accepts this testimony as true." (Emphasis
13 added.) Record 12.

14 The challenged decision also imposes the following
15 conditions:

16 * * * * *

17 "6. [Intervenor] shall clean the kennel at
18 reasonable intervals and shall dispose of the
19 waste at an approved landfill or transfer
20 site; and

21 "7. [Intervenor] shall periodically test the
22 kennel dogs for leptospirosis and shall treat
23 them with appropriate medical treatment if
24 any such disease is found." Record 14-15.

25 We do not believe the sentence of findings emphasized
26 above reflects an improper shifting of the burden of proof
27 to petitioners, as they contend. Read in context, the
28 sentence simply describes the contents of the record.
29 Murphy Citizens Advisory Comm. v. Josephine County, 25
30 Or LUBA 312, 322 (1993). Petitioners do not identify any
31 other specific respect in which the findings on this issue
32 are deficient, and we do not see that they are.

33 The only evidence cited by petitioners is testimony by
34 petitioner Eldonna Dyer that surface runoff flows from the

1 knoll where the proposed kennel is located, across
2 intervenor's pasture, into Mrs. Dyer's backyard, where she
3 intends to sink a well. Mrs. Dyer further stated that
4 leptospirosis can be transmitted from dog feces and urine to
5 humans. Petition for Review C1. Intervenor cites a portion
6 of a staff report stating that dog wastes will be handled by
7 removing them to a county landfill, and that the possibility
8 of polluting Wiley Creek is unlikely. Record 52.
9 Intervenor also cites testimony by intervenor concerning her
10 sanitation practices with regard to dog wastes and her
11 practice of vaccinating her dogs for leptospirosis twice a
12 year, although veterinarians only require one vaccination
13 per year. Record 71-72; Intervenor's Brief 10. Finally,
14 intervenor cites evidence that the proposed kennel is
15 located 600 feet from the nearest stream and over 800 feet
16 from the Dyer property line. Record 84.

17 We are authorized to reverse or remand the challenged
18 decision if it is "not supported by substantial evidence in
19 the whole record." ORS 197.835(7)(a)(C). Substantial
20 evidence is evidence a reasonable person would rely on in
21 reaching a decision. City of Portland v. Bureau of Labor
22 and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State
23 Board of Education, 233 Or 601, 605, 378 P2d 558 (1963);
24 Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App
25 339 (1991). Based on the evidence described above, a
26 reasonable person could reach the conclusion that the

1 proposed kennel operation, as conditioned, will not cause
2 water pollution or the spread of leptospirosis.

3 This subassignment of error is denied.

4 **B. Noise**

5 Petitioners contend that concerning compliance with
6 LUDO 3.39.050.1, the challenged decision is not supported by
7 adequate findings and substantial evidence in the record
8 with regard to the noise impacts of the proposed kennel.
9 However, under the first assignment of error, we determined
10 the decision must be remanded to allow petitioners to rebut
11 new evidence submitted by intervenor on the noise issue.
12 Therefore, we cannot determine whether the challenged
13 decision adequately addresses the issue of noise impacts.

14 This subassignment of error is sustained.

15 **C. Property Values**

16 Petitioners complain the challenged decision fails to
17 address the issue of impacts of the proposed kennel on the
18 value of neighboring property, an issue petitioners raised
19 below.

20 The subject conditional use permit is governed by the
21 conditional use approval standards of LUDO 3.39.050 and
22 3.3.150. As indicated above, LUDO 3.39.050.1 requires
23 compatibility with "existing adjacent permitted uses and
24 other uses permitted in the underlying zone."
25 LUDO 3.39.050.2 simply requires compliance with specific
26 conditional use criteria in the FG zone. Such criteria are

1 found in LUDO 3.3.150, which requires compatibility with the
2 Agricultural Element of the Douglas County Comprehensive
3 Plan, the state agricultural policy in ORS 215.243 and the
4 purpose statement for the FG zone; that the proposed use
5 will not materially alter the stability of the land use
6 pattern of the area; and that the proposed use will not:

7 "a. Force a significant change in accepted farm
8 or forest practices on surrounding lands
9 devoted to farm or forest use; or

10 "b. Significantly increase the cost of accepted
11 farm or forest practices on surrounding lands
12 devoted to farm or forest use."
13 LUDO 3.3.150.2.

14 In the challenged decision, the board of commissioners
15 interpreted these LUDO provisions not to require
16 consideration of the impacts of a proposed conditional use
17 in the FG zone on the value of neighboring properties:

18 "As to property values, the Board [of
19 Commissioners] finds that this is not an
20 applicable decision making criteria [sic] for land
21 use review, because [LUDO] Article 39 and §3.3.150
22 speak in terms of compatibility with land uses
23 only -- not land values. * * *" Record 12.

24 This Board is required to defer to a local governing
25 body's interpretation of its own enactments, unless that
26 interpretation is contrary to the express words, purpose or
27 policy of the local enactment.⁴ ORS 197.829; Gage v. City

⁴There is no contention here that the board of commissioners' interpretation of LUDO 3.39.050 or 3.3.150 is contrary to a state statute, statewide planning goal or administrative rule which these provisions implement. See ORS 197.829(4).

1 of Portland, 319 Or 308, 316-17, ___ P2d ___ (1994); Clark
2 v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).⁵
3 This means we must defer to a local government's
4 interpretation of its own enactments, unless that
5 interpretation is "clearly wrong." Goose Hollow Foothills
6 League v. City of Portland, 117 Or App 211, 217, 843 P2d 992
7 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d
8 1354 (1992).

9 Here, no provision in either LUDO 3.39.050 or 3.3.150
10 specifically refers to impacts on property values. Rather,
11 these provisions refer to compatibility with "uses" and
12 "land use patterns" and changes in "accepted farm or forest
13 practices" or the costs of such practices. Consequently, we
14 believe the board of commissioners is within its discretion
15 under ORS 197.829 in interpreting LUDO 3.39.050 and 3.3.150
16 not to require consideration of the impacts of a proposed
17 conditional use in the FG zone on property values.

18 This subassignment of error is denied.

19 **D. Farm Protection**

20 The challenged decision finds the proposed kennel
21 complies with the "farm protection provisions" of
22 LUDO 3.3.150 because the kennel itself is a "farm use" under

⁵ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the supreme court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, ___ P2d ___ (1994).

1 the LUDO definition of that term. Record 13-14.
2 Petitioners contend this finding is inadequate to support a
3 determination of compliance with the criteria of
4 LUDO 3.3.150.

5 Intervenor contends the issue of compliance with
6 LUDO 3.3.150 was not raised below and, therefore, was waived
7 and cannot be raised before this Board. At oral argument,
8 petitioners conceded that this issue was not raised below.
9 We therefore agree with intervenor that under ORS 197.763(1)
10 and 197.835(2), the issue of compliance with LUDO 3.3.150
11 has been waived.

12 This subassignment of error is denied.

13 The second assignment of error is sustained, in part.

14 The county's decision is remanded.