BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEPHEN DONNELL,
Petitioner,

vs.

UNION COUNTY,
Respondent,

and

DON SHAW,
Intervenor-Respondent.

LUBA No. 2001-090

FINAL OPINION
AND ORDER

Appeal from Union County.

Stephen Donnell, La Grande, filed the petition for review and argued on his own behalf.

Russell West, La Grande, filed a response brief and argued on behalf of respondent.

Steven J. Joseph, La Grande, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 10/11/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a comprehensive plan amendment and a conditional use permit, which together authorize an aggregate mining operation on a 13-acre parcel in the county's A-4 Timber Grazing Zone.

FACTS

We remanded an earlier county decision granting comprehensive plan amendment and conditional use permit approval. *Donnell v. Union County*, 39 Or LUBA 419 (2001). In his prior appeal, petitioner alleged nine assignments of error. We sustained four of those assignments of error, in whole or in part. The decision at issue in this appeal is the decision that the county adopted to respond to our remand.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the county's response to the part of our remand that concluded the county violated ORS 197.610(1). That part of our prior opinion is set forth below:

> "ORS 197.610(1) requires that when the county amends its acknowledged comprehensive plan, it must forward that proposed amendment to the Director of the Department of Land Conservation and Development (DLCD) 'at least 45 days before the first evidentiary hearing on adoption.' ORS 197.610(2) provides that less than 45 days notice may be provided in emergency circumstances. In this case, the county provided only 19 days prior notice of its initial evidentiary hearing on May 22, 2000, and did not identify any emergency circumstances that justified giving less than the required 45 days prior notice. Record 225.
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> "Where the ORS 197.610(1) requirement for 45-day prior notice to DLCD applies, a local government's failure to comply with the statute is substantive error rather than procedural error. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993). ORS 197.610(1) applies to the disputed comprehensive plan amendment. As far as we can tell from the record, the county failed to provide the 45-day notice required by ORS 197.610(1) and provides no explanation for why only 19 days prior notice was given. Accordingly, we agree with petitioner that the county violated ORS 197.610(1) and the disputed plan amendment must be remanded." 39 Or LUBA at 423-24.

On remand the county adopted the following findings:

"LUBA does not provide any insight on how to remedy this error. Since the first evidentiary hearing was held on May 22, 2000 by the County Planning Commission, the Commissioners do not have an opportunity to turn back the clock. However, the Commissioners believe the intent of ORS 197.610 is to give DLCD adequate opportunity to participate early in the local review process. Therefore, in advance of the local remand hearing the County contacted [the] DLCD Eastern Oregon Field Representative * * * and offered to provide DLCD 45 days notice prior to the Commissioners' remand hearings.

> "[The DLCD representative] explained 'DLCD did not have any issues with the * * * applications, therefore they didn't need 45 days notice' * * *

"Again, in a March 8, 2001 letter [the DLCD representative] stated

> "'This letter is to inform the County that the department has received sufficient notice to allow us to review the subject proposal and to determine that our participation is not necessary at this time.'" Remand Record 10.[1]

We make two initial points, before considering whether the county took adequate steps to correct the error we found in our first opinion in this matter.

First, LUBA generally attempts to provide guidance when we remand a decision, if we believe guidance about how to correct the error is necessary and appropriate. However, there generally are a number of ways to go about correcting legal and procedural errors in a land use decision and, as a practical matter, we cannot explain each and every way the county might go about correcting errors in all cases. That is for the parties and the county to determine, based on a variety of factors, including how careful they wish to be to ensure that the action that is taken following remand will in fact correct the errors and that additional errors are not introduced.

[1]The record in the prior appeal is included in the record of this appeal. We refer to the former record as the "Record" and to the record following remand as the "Remand Record."

Second, we agree with the county that *one* of the purposes of ORS 197.610(1) is to allow DLCD an adequate opportunity to participate early in the local review process. The statute *also* requires that DLCD provide notice to other "persons who have requested notice that the proposal is pending." Presumably the required notice to other persons is to give those persons an adequate opportunity to participate in the local review process as well.

In this case the county is obviously correct that a continuation of the local proceedings on these applications, following our remand, cannot turn back the clock and provide notice of the first evidentiary hearing that occurred on May 22, 2000. Therefore the only way to correct the error *for certain* would be to start entirely over with new applications. We do not believe that was necessary.

A comparably safe approach would have been to again forward the proposed amendment to DLCD and request that DLCD again provide the notice that is required by ORS 197.610(1). The county did not do that either. Instead, the county sent the DLCD field representative a letter on February 15, 2001, and offered "to give DLCD 45 days prior notice if you feel such notice is necessary." Remand Record 139.

Here, the county provided DLCD a copy of the proposal before the board of commissioners adopted its first decision, which we remanded. Although it did so 19 days before the initial evidentiary hearing rather than 45 days before the initial evidentiary hearing as ORS 197.610(1) requires, no party disputes that DLCD received the proposal prior to the county's initial decision. Similarly, no party disputes that DLCD provided the notice required by ORS 197.610(1) to the persons entitled to such notice. Following our remand, the county offered to provide a second copy of the proposal following remand, and offered to wait 45 days before conducting the hearing on remand. The county made that offer on February 15, 2001, which was more than 45 days before the evidentiary hearing following remand. It is not clear whether DLCD provided notice of the county's proposed action on remand in accordance with ORS 197.610(1). However, petitioner does not contend that such

notice was not given by DLCD. Petitioner's argument focuses exclusively on whether DLCD received the proposal at the time specified in ORS 197.610(1). In the circumstances presented here, petitioner has not demonstrated that the procedures used by the county to correct the short notice that was initially provided to DLCD warrant reversal or remand of the county's decision.[2]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Union County Zoning, Partition and Subdivision Ordinance (UCZPSO) 21.07(3)(C)(2) imposes the following environmental limitations on mineral and aggregate extraction:

> "Contamination or impairment of the groundwater table, streams, rivers, or tributary bodies thereto shall not be permitted as a result of the extraction and/or processing activity *beyond that allowed by the rules and regulations administered by the Oregon Department of Environmental Quality*. All operations which include some form of washing process must make application with the Oregon Department of Environmental Quality and comply with applicable laws, rules and regulations." (Emphasis added.)

In our prior decision we agreed with petitioner that, in view of the concerns he and others expressed below concerning the potential for onsite and offsite water problems associated with the proposed mining, it was error for the county to fail to adopt any findings that

[2]We also note that the county correctly points out in its brief that the error that led to remand in *Oregon City Leasing, Inc.* was a complete failure to provide DLCD a copy of the proposed action. Here the error was providing the proposal to DLCD less than 45 days before the first evidentiary hearing. Our prior decision in this case and other decisions of this Board can be read to say that *Oregon City Leasing, Inc.* holds that *any* deviation whatsoever from the requirements of ORS 197.610(1) is a substantive error that will result in remand, without regard to whether the deviation results in any prejudice to a party's substantial rights. *See Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 91 (1997) ("failure * * * to comply with ORS 197.610(1) is substantive error"); *DLCD v. City of St. Helens*, 29 Or LUBA 485, 495 (1995) ("[t]he requirements of ORS 197.610 *et seq* are substantive, not merely procedural"); *Dorgan v. City of Albany*, 27 Or LUBA 64, 68 (1994) (same). We do not believe the holding in *Oregon City Leasing, Inc.* is so broad. We also now question whether our prior decision correctly concluded that remand was required based on the county's delay in providing the proposal to DLCD until 19 days before the initial evidentiary hearing. However, in view of our conclusion that the county's actions on remand were sufficient to correct any error it may have initially committed under ORS 197.610(1), we need not consider and resolve those questions here.

specifically addressed UCZPSO 21.07(3)(C)(2) and to summarily conclude "approval conditions [are] designed to mitigate environmental conflicts." 39 Or LUBA at 425.

Respondent notes in its brief that the language of UCZPSO 21.07(3)(C)(2) that is emphasized above was added to UCZPSO 21.07(3)(C)(2) in 1997. According to the county's decision on remand, this new language makes it clear that UCZPSO 21.07(3)(C)(2) only prohibits contamination that goes beyond, and presumably would violate, Oregon Department of Environmental Quality (DEQ) regulations. The county notes that in our prior opinion we relied on the earlier version of UCZPSO 21.07(3)(C)(2), which does not include the emphasized language and does not apply to this application. We note that the board of county commissioners also relied on the earlier version of UCZPSO 21.07(3)(C)(2) in its first decision in this matter. Record 3.

Although petitioner complains that he relied on the prior version of UCZPSO 21.07(3)(C)(2) because that was the version of UCZPSO 21.07(3)(C)(2) that the county gave him, petitioner offers no reason to question the county's representation that UCZPSO 21.07(3)(C)(2) was amended in 1997 to read as set out above. We agree with the county that the version of UCZPSO 21.07(3)(C)(2) that was in effect when the application for conditional use approval to mine was submitted must be applied. ORS 215.427(3).[3]

Petitioner's arguments under this assignment concern two issues, (1) potential groundwater pollution and (2) potential stream, river and tributary pollution. We consider those concerns separately below.[4]

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[3]ORS 215.427(3) generally provides that approval or denial of complete applications "shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[4]Petitioner also includes in his arguments under this assignment of error undeveloped contentions that the challenged decision violates Goal 6 (Air, Water and Land Resources Quality). We agree with respondent that petitioner could have raised the Goal 6 argument in his first appeal and waived any right to raise that argument here by failing to do so. *Beck v. City of Tillamook*, 313 Or 148, 155-56, 831 P2d 678 (1992). Petitioner also alleges the challenged decision fails to demonstrate the proposal complies with certain DEQ and Department of Geology and Mineral Industries (DOGAMI) administrative rules. As respondent points out, petitioner makes no attempt to demonstrate what those rules require or why the county is obligated in this proceeding to

A. Groundwater

The evidence the parties cite concerning potential contamination to the groundwater and area wells does not include testimony on the issue by a groundwater expert. No groundwater study has been prepared. The record includes a great deal of testimony by opponents expressing concern that the rock in the area is fractured and that the property may include springs, as well as concerns that water will accumulate in the mining pit and thereby contaminate groundwater, or that the mining will penetrate aquifers. However, the record also includes testimony by the applicant, which includes descriptions of conversations the applicant allegedly had with state officials and certain other experts, to the effect that such concerns are unwarranted.

The county's findings explain that the existing pit shows no evidence of springs or surface seeps. Although some water will be applied as necessary to control dust, processing activities will not use water and the mine will excavate horizontally into the rock ridge rather than downward into the aquifer. Only rainwater will have to be managed on-site. Therefore, the mining operation will not require underwater excavation that could create turbidity that might contaminate the aquifer. The findings also point out that existing wells in the area are located over one-half mile away and at different elevations.

We agree with respondent that the county's findings are adequate to justify its conclusion that the proposed extraction and processing activity will not impair groundwater in a way that violates UCZPSO 21.07(3)(C)(2), *i.e.*, goes beyond any impairment that may be allowed by DEQ's rules and regulations. We also agree with respondent that those findings are supported by substantial evidence, *i.e.*, evidence a reasonable person would believe. Petitioner speculates that dust and equipment fluids may contaminate the groundwater and points to the applicant's statements below that he was willing to provide additional evidence

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demonstrate that the proposal complies with the rules. For that reason we do not consider those arguments further.

to address concerns about potential groundwater impacts, as evidence that there will be groundwater contamination. However, given the conflicting and speculative nature of the evidence in the record concerning potential groundwater contamination, the county could reasonably have relied on the applicant's evidence in adopting the findings it adopted concerning potential groundwater contamination. *See Douglas v. Multnomah County*, 18 Or LUBA 607, 617 (1990) (where reasonable persons could draw different conclusions from the same evidence, LUBA may not substitute its judgment for that of the local government in choosing which evidence to believe).

B. Streams, Rivers, and Tributary Bodies

The county adopted the following findings:

> "The stream below the pit site was described and addressed in the July 9, 2000 * * * letter from Tom Thomas. Because of the existing conditions surrounding the pit site described in this letter no significant stormwater discharge is expected. At this point no rock crushing is permitted at this site. There will be no rock washing. [DEQ] has no air quality permit category for pits that do not operate a crusher on site. No dust abatement requiring water would be required within this pit by [DEQ], however dust abatement on the access road is planned when necessary.
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> * * * In the event that Owsley Canyon Road was to return to a gravel surface, the county would use the best management practices for transportation systems as outlined in the T.M.D.L. management plan to assure that adjacent streams are not impacted by a road with a gravel surface * * *. If wastewater discharge of any type is associated with this pit, [DOGAMI] will require a NPEDS General Permit 1200-A. This kind of permit covers all of the above mentioned wastewater discharges.
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> "Entered into new evidence is a memo from DEQ describing when permits are needed for rock mining operations. There is no evidence in the record that Mr. Shaw will be unable to obtain the appropriate permits for this site." Remand Record 13-14.

Petitioner has not shown why these findings are inadequate to demonstrate compliance with UCZPSO 21.07(3)(C)(2) with regard to streams, rivers and tributary bodies. We agree with respondent that the record includes evidence that a reasonable person could believe, which supports the above-quoted findings.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

UCZPSO 23.05(3) provides that an applicant for a comprehensive plan map amendment must demonstrate both of the following:

> "A. Community attitudes and/or physical, social, economic, or environmental changes have occurred in the area or related areas since plan adoption and that a public need supports the change, or that the original plan was incorrect.
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> "B. Alternative sites for the proposed uses will be considered *which are comparable with the other areas which might be available for the uses proposed*." (Emphasis added.)[5]

A. UCZPSO 23.05(3)(A)

We first note that the county argues that UCZPSO 23.05(3)(A) provides alternative bases for compliance. The county may demonstrate either (1) that the cited changes have occurred and that a public need supports the request, or (2) that "the original plan was incorrect." That interpretation is consistent with the language of UCZPSO 23.05(3)(A), and we agree with the county's interpretation of UCZPSO 23.05(3)(A). The county found that both of these alternative means of satisfying UCZPSO 23.05(3)(A) are satisfied.

1. Changes and Public Need

There is considerable local opposition to the proposed surface mining operation. Based on that opposition, and petitioner's contention that the county did not adequately consider alternatives, petitioner argues the applicant failed to carry his burden of proof concerning UCZPSO 23.05(3)(A).

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[5]We observed in our prior decision that UCZPSO 23.05(3)(B) is awkwardly worded and that the county's first decision did not attempt to interpret the provision. 39 Or LUBA at 429 n 11. That observation was based primarily on the emphasized language of UCZPSO 23.05(3)(B). Petitioner complains that the county did not specifically interpret UCZPSO 23.05(3)(B) in its decision on remand. The county's decision implicitly interprets UCZPSO 23.05(3)(B) to require that the county consider alternative sites to the subject property, when considering a proposed comprehensive plan amendment for the subject property, and find that the subject property is at least comparable. Remand Record 17-18. That interpretation is within the board of county commissioners' discretion under ORS 197.829(1).

The county's findings explain that much of the opposition to the proposal concerns increased truck traffic on Owsley Canyon Road and possible rock crushing, and conclude that such opposition has nothing to do with whether "[c]ommunity attitudes and/or physical, social, economic, or environmental changes" have occurred with regard to whether the comprehensive plan map should be amended to add the subject property to the basalt inventory.[6] The county finds that the changes required by UCZPSO 23.05(3)(A) have occurred, and that there is a public need, as follows:

> "The change in the social, economic and environmental conditions were shown in letters of support for this pit from Union County Public Works Department, [Oregon Department of Transportation], Union [Soil and Water Conservation District] and an [Army Corps of Engineers] memo detailing the type and quantity of rock that will be needed for the headcut stabilization project on the river. When the County's Land Use Plan was adopted, no one could have known that the large projects of this type would be common in Union County. These projects have developed with an increasing awareness for water quality and fisheries issues over the past few years. * * *" Remand Record 16.

Petitioner disputes the adequacy of the evidence to support these findings and contends the evidence is inadequate to show that rock is needed from the mine proposed for the subject property. However, the evidence need only demonstrate that "[c]ommunity attitudes and/or physical, social, economic, or environmental changes have occurred in the area or related areas since plan adoption and that a public need supports the change." The findings are adequate to explain why the county believes the changes specified in UCZPSO 23.05(3)(A) have occurred and why a public need supports the requested plan amendment. The evidence is sufficient to support the county's findings. The evidence need not show that

[6]In other words, the county views the question of whether the comprehensive plan should be amended to add the subject property to the aggregate inventory and the question of whether conditional use approval should be given for an aggregate mine as separate questions. According to the county, UCZPSO 23.05(3)(A) must be applied to answer the first question and the county's conditional use criteria must be applied to answer the second question.

a public need necessarily will go unmet without the requested change, only that the public need *supports* the requested change. The evidence is sufficient to show such support.

2. Original Plan is Incorrect

The county also found that UCZPSO 23.05(3)(A) is satisfied because the current plan is incorrect:

> "This pit was mined historically in the early nineteen hundreds. It was mapped by the [United States Geological Survey] (letter from Tom Thomas) and was overlooked by the county when the Land Use Plan was written because only active pits were placed on the county inventory. (Verbal communication with Hanley Jenkins, County Planning Director)[.] Just because the site was inactive at the time of Land Use Plan adoption should not have been justification for its elimination. The site had historical use and no evidence of being 'mine[d]-out.' Therefore, the original Land Use Plan was incorrect because it didn't include this pre-existing site on its inventory of basalt aggregate sites." Remand Record 17.

Petitioner does not challenge the adequacy of the above findings, but instead argues the cited letter and verbal communication with the planning director are not substantial evidence. Petitioner identifies no evidence in the record that would call the letter and verbal communication into question and does not argue that the adequacy of that evidence was questioned below. In view of the uncontroverted nature of the evidence, we conclude it is evidence a reasonable person could rely on to support the quoted findings.

Because we conclude that the county's findings adequately explain why both of the alternative methods of complying with UCZPSO 23.05(3)(A) are satisfied and that those findings are supported by evidence a reasonable person would believe, the portion of the third assignment of error that challenges the county's decision with regard to UCZPSO 23.05(3)(A) is denied.

B. UCZPSO 23.05(3)(B)

We note, initially, that petitioner faults the county for not specifically considering certain alternative sites that were identified below. As we explain later, the county identified the alternative sites that it considered. UCZPSO 23.05(3)(B) requires consideration of

alternatives; it does not require consideration of every alternative that may be identified by any participant in a local proceeding. Citing *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), petitioner argues the county is obligated to demonstrate that the subject property is the "best" of all the alternatives. No such obligation to show the subject property is the "best" alternative is imposed by the UCZPSO, and no such general requirement is imposed on the county by *Fasano*. *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979), *rehearing den* 288 Or 585 (1980); *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

In our prior decision, we explained that we were not sure what kind of an alternatives analysis UCZPSO 23.05(3)(B) requires and that we could not determine from the county's prior decision or the record how the county went about applying the alternatives analysis that is required by UCZPSO 23.05(3)(B) or what sites were considered.

As we previously noted, the county interprets UCZPSO 23.05(3)(B) to require that before adding the subject property to its comprehensive plan inventory of aggregate sites, it must first consider alternative sites and determine that the subject property is at least comparable to those alternative sites. *See* n 5. The county's decision on remand identifies a number of sites that were considered and finds that the subject property is at least comparable. Remand Record 17-18. The findings also cite and rely on a letter from the Army Corps of Engineers to establish that the rock on the subject property is not only comparable, it is the preferred site for riprap for the Grand Ronde River Restoration Project. Remand Record 42. These findings are adequate to demonstrate compliance with UCZPSO 23.05(3)(B), and they are supported by substantial evidence.

The portion of the third assignment of error that challenges the county's decision with regard to UCZPSO 23.05(3)(B) is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county's failure to adopt an express interpretation of UCZPSO 23.05(3)(A), which is discussed above under the third assignment of error, resulted in an improper shifting of the burden of proof from the applicant to petitioner. We reject the argument.

The fourth assignment of error is denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioner believes a mining operation on the subject property will constitute a public nuisance and that the county erred by not addressing that issue and considering whether the operation can be mitigated in ways that prevent it from being a public nuisance. In making his arguments under these assignment of error, petitioner also contends that several provisions of the Land Conservation and Development Commission's Goal 5 administrative rule are violated by the county's decision.

Citing *Beck*, 313 Or at 155-56, the county argues that the alleged public nuisance and Goal 5 rule issues are not among the issues that formed the basis for our remand and, therefore, are not among the issues the county was required to address on remand. The county is correct.[7]

The fifth and sixth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR

At the conclusion of the April 4, 2001 board of county commissioners' hearing on remand, both petitioner and the applicant requested and were allowed until April 12, 2001 to

[7]We also have some difficulty understanding how petitioner's concern about the *potential* for mining on the subject property to be a public nuisance could obligate the county to address that question in its findings. The county must apply the relevant approval criteria for the requested comprehensive plan amendment and mining permit. Petitioner does not argue that his concerns about the potential for the mining operation to be a public nuisance implicate any of the relevant approval criteria, much less indicate they would be violated. Unless petitioner's concerns about the proposal implicate one or more of the approval criteria, those concerns do not amount to "relevant" issues that must be addressed in the county's findings.

submit additional evidence and argument.[8] The applicant was then allowed until April 25, 2001, to submit final legal rebuttal, as required by ORS 197.763(6)(e).

Petitioner argues that the applicant's April 25, 2001 submittal improperly includes evidence. Petitioner argues that allowing this evidentiary submittal was improper and violated his substantial rights because he was not given an opportunity for rebuttal.

The disputed letter that the applicant submitted appears at Remand Record 29-30. The majority of that letter is legal argument that relies on evidence that was previously included in the record. The letter does include additional factual information about a well that might be available as a source of water for dust suppression. However, we agree with the county that petitioner makes no attempt to demonstrate why the specific *source* of any water that may be needed for dust suppression was a legally relevant issue on remand.

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[8]ORS 197.763(6) provides in relevant part:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "* * * * *
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> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period that the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
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> "* * * * *
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> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179."

Therefore, even if the information about the well was new evidence, its submittal does not constitute reversible error.

The seventh assignment of error is denied.

The county's decision is affirmed.