

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PHILLIP HAWMAN, LINDA MAUTZ,
5 TOM WATSON and GREG JUUL,
6 *Petitioners,*

7
8 vs.

9
10 UMATILLA COUNTY,
11 *Respondent,*

12
13 and

14
15 LEWIS AND CLARK COLLEGE,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2001-188

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Umatilla County.

24
25 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Reeve Kearns, P.C.

27
28 No appearance by Umatilla County.

29
30 Wendie L. Kellington, Lake Oswego, filed the response brief and argued on behalf of
31 intervenor-respondent.

32
33 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
34 participated in the decision.

35
36 REMANDED

05/29/2002

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners challenge a county decision that amends the county comprehensive plan map for 3,877.72 acres from North/South County Agriculture to Non Resource and amends the zoning map for the same property from Exclusive Farm Use (EFU) to Non Resource.

FACTS

The subject property is comprised of three non-contiguous areas located in the vicinity of the Oregon-Washington border in northwest Umatilla County. Approximately 91 percent of the soils on the property are rated Class VII or VIII in the Natural Resource Conservation Service soil survey. Other soils on the property, primarily rock outcroppings, are unrated. The property has been used for seasonal grazing.

In the 1990s, intervenor, the applicant below, applied for a permit to establish a vineyard on the property. That request was denied, in part because neighboring agricultural operators testified that the cost of their traditional agricultural activities would increase because of the precautions they would have to take to avoid pesticide and herbicide drift onto the vineyard.

In 1999, intervenor applied for a comprehensive plan amendment to establish a Non Resource zone, to recognize areas of the county that have limited agricultural value and are appropriate to be rezoned for large lot residential development. In 2000, the county adopted comprehensive plan and zoning ordinance amendments to authorize Non Resource zoning. Those post-acknowledgement amendments were not appealed and are deemed acknowledged. ORS 197.625(1).

In 2001, intervenor applied to rezone the subject property to Non Resource. Petitioners, primarily neighboring agricultural landowners, opposed the application, arguing that the property has agricultural value, even if the soils are not Class I-VI soils, and that residential uses on the property would interfere with the agricultural activities occurring on

1 their properties.¹ Those agricultural activities include a confined animal feeding operation
2 and cattle grazing.

3 Planning staff recommended approval of the application. The planning commission,
4 after holding a hearing on the application, recommended that the application be denied. The
5 board of county commissioners held a *de novo* hearing on the application on June 13, 2001.
6 At the close of the June 13, 2001 hearing, the board of county commissioners granted
7 intervenor's request to leave the record open to allow intervenor to provide an updated
8 rangeland report by a noted rangeland expert. The board of county commissioners required
9 that intervenor provide one copy of the rangeland report to the county and one copy to the
10 lead opponent by July 16, 2001.² That lead opponent was then responsible for making copies
11 of the report for all of the other opponents. After that, the opponents had until August 14,
12 2001, to submit any written testimony that they might wish to submit in response to the
13 report. The board of county commissioners then continued the hearing to August 21, 2001.
14 Prior to the county commissioners' vote on the motion to continue the hearing, the chairman
15 of the board of county commissioners advised the parties that they should

16 "be sure to specify * * * not later than the 14th [of August] whether you want
17 to make the request for testimony because that's going to determine how
18 much time we have to block out on the 21st." Petition for Review Appendix 4,
19 Transcript of the Proceedings of the Board of County Commissioners, June
20 13, 2001, 125.

¹"Agricultural lands" is defined in Statewide Planning Goal 3 as:

"[I]n eastern Oregon[,] * * * land of predominantly Class I, II, III, IV, V, and VI soils as identified in the Soil Capability Classification System of the United States [Natural Resources] Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event."

²The lead opponent is an attorney, and the parties dispute whether the lead opponent actually represented the other opponents in the proceedings before the board of county commissioners or whether he merely acted as a spokesperson. It is not necessary for us to resolve that question in addressing petitioners' arguments.

1 As directed, intervenor supplied the rangeland report (Gates Report) to the county
2 and the opponents' representative on July 14, 2001, with an eight-page cover letter from
3 intervenor's attorney. None of the opponents submitted written testimony or evidence in
4 response to the report. Nor did the opponents make a written request before August 14, 2001,
5 to submit oral testimony at the continued hearing on August 21, 2001.

6 On August 21, 2001, petitioners and others appeared in person to provide testimony
7 in opposition to the Gates Report. The board of county commissioners declined to hear the
8 oral testimony.³ The board of county commissioners did agree to strike the eight-page letter
9 from intervenor's attorney from the county's record of proceedings, after the opponents
10 argued that intervenor improperly appended the letter to the Gates Report. The board of
11 county commissioners then closed the record, continued deliberations to August 29, 2001,
12 and on August 29, 2001, voted to approve the application. This appeal followed.

13 **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

14 Pursuant to OAR 661-010-0045(1), petitioners request that we consider two
15 documents that are not in the record to support their argument in the first assignment of error
16 that the county erred in failing to provide an opportunity for opponents to testify on August
17 21, 2001, in opposition to the Gates Report.⁴ The first document is the eight-page cover letter
18 submitted by intervenor, where intervenor requests an opportunity to present testimony at the
19 August 21, 2001 hearing regarding the Gates Report. The second document is an affidavit

³According to the August 21, 2001 minutes and correspondence from the chairman of the board of county commissioners to the opponents, the board of county commissioners declined to allow testimony because none of the opponents filed a written request for an opportunity to testify before the August 14, 2001 deadline to submit such a request.

⁴OAR 661-010-0045(1) provides, in relevant part:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *”

1 from Robert T. Mautz (Mautz), the person who acted as spokesperson for the opponents.
2 According to petitioners, the two documents are essential to show that there was confusion
3 regarding the procedures that the county would follow after the Gates Report was submitted
4 and that petitioners reasonably expected to have the opportunity to submit oral testimony at
5 the August 21, 2001 hearing.

6 The county and intervenor (respondents) object to the motion, arguing that the eight-
7 page letter was originally included in the record of the county proceedings before LUBA, but
8 the Board, in an order resolving petitioners' record objection, determined that the document
9 is not properly part of the record. Respondents argue that petitioners cannot, at this point in
10 the proceedings, change their position with respect to that document in order to rely on the
11 contents of the document to support their arguments under the first assignment of error.
12 Second, respondents argue that petitioners have a more fundamental problem: they have not
13 alleged that there are disputed facts that must be considered in order to resolve the first
14 assignment of error. Respondents concede that there is a dispute regarding the inferences that
15 can be drawn from the evidence, but they contend that the fact that different conclusions may
16 be drawn from the same evidence is not the same thing as having disputed facts. Finally,
17 respondents argue that Mautz's affidavit contains speculation and is irrelevant to the
18 underlying issue to be addressed in the assignment of error: whether a reasonable person
19 would understand that the board of county commissioners required a written request to
20 provide testimony at the August 21, 2001 hearing prior to the hearing, and would deny any
21 request to provide testimony if the written request was not filed by August 14, 2001.

22 Petitioners' motion is an attempt, we understand, to establish two disputed facts not
23 shown in the record: (1) that intervenor submitted a written request, prior to the expiration of
24 the August 14, 2001 deadline for permission to present oral testimony at the August 21, 2001
25 hearing, and (2) that opponent Mautz understood that he and other opponents could offer oral
26 testimony at the August 21, 2001 hearing, without submitting a written request to do so by

1 August 14, 2001. However, the first alleged fact is both undisputed and already reflected in
2 the record. The decision itself indicates that intervenor's July 14, 2001 letter included a
3 request that it be allowed to present oral testimony at the August 21, 2001 hearing, and
4 intervenor's own brief informs us of that fact. Record 7; Intervenor-Respondent's Brief 16 n
5 3. While the parties dispute the inferences and legal conclusions that can be reasonably
6 drawn from intervenor's request, the fact that intervenor made that request is not disputed.
7 Accordingly, petitioners have failed to demonstrate that a motion to take evidence pursuant
8 to OAR 661-010-0045 is warranted to establish that fact.

9 As to the Mautz affidavit, petitioners offer it to establish that Mautz understood that
10 he and other opponents could offer oral testimony at the August 21, 2001 hearing, without
11 submitting a written request to do so. However, petitioners do not explain why evidence of
12 Mautz's understanding on that point is necessary to resolve the issue raised in the first
13 assignment of error, and we do not see that is. A motion to take evidence under OAR 661-
14 010-0045(1) is not warranted to establish Mautz's understanding of the procedures that
15 would be followed at the August 21, 2001 hearing.

16 Petitioners' motion to take evidence not in the record is denied.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioners argue that the county erred in failing to allow testimony regarding the
19 Gates Report during the board of county commissioners' meeting on August 21, 2001.
20 According to petitioners, they understood the board of county commissioners to require that
21 *written* responses to the Gates Report be submitted by August 14, 2001, but that the hearing
22 itself was *continued* to August 21, which petitioners understood to mean that oral testimony
23 would be accepted on that date. Petitioners emphasize that, with two minor exceptions, all
24 opponent testimony in this matter has been oral and, therefore, the county knew or should
25 have known that the opponents' response to the Gates Report would be oral as well.
26 Petitioners also contend that correspondence from the county during the interim between the

1 June 13, 2001 hearing and August 21, 2001, indicated only that written testimony in response
2 to the Gates Report needed to be submitted by August 14, 2001. In particular, petitioners
3 point to a June 15, 2001 letter from a county planner to intervenor to support their contention
4 that the August 14, 2001 deadline pertained only to written responses from opponents. The
5 letter stated in relevant part:

6 “This is to confirm the action taken by the Umatilla County Board of
7 Commissioners at their June 13, 2001 hearing * * *. After hearing testimony
8 from both proponents and opponents, the Board [of Commissioners] agreed to
9 leave the record open, and continue the hearing to Tuesday, August 21, 2001
10 at 9:00 a.m. in the Media Room of the County Justice Center in Pendleton.

11 “In the interim, your legal counsel is to provide Bob Mautz [opponents’
12 representative] a complete copy of the Gates [R]eport by July 16, 2001. Mr.
13 Mautz will then make copies of this report and distribute it to all interested
14 parties who expressed opposition at the hearing. Any written comments on the
15 Gates [R]eport are to be submitted to the Board [of Commissioners] by
16 August 14, 2001. * * *” Record 73 (emphasis in original).

17 Petitioners point out that the letter does not address oral testimony at the August 21, 2001
18 hearing or state that parties must file prior written requests to present such testimony.
19 Because of the confusion with regard to the procedures to be followed during the continued
20 hearing on August 21, 2001, petitioners argue that their right to a full and fair hearing was
21 prejudiced.

22 Intervenor responds that the transcript of the June 13, 2001 hearing makes it clear that
23 the parties were not to be automatically granted a right to testify at the August 21, 2001
24 meeting. Intervenor argues that the transcript shows that petitioners understood, or should
25 have understood, that they would need to provide the county with a list of people who
26 wished to testify regarding the Gates Report, so that the board of county commissioners
27 could allocate an appropriate amount of time for their testimony. In particular, intervenor
28 relies on the following colloquy between Mautz and Doherty, the chairman of the board of
29 county commissioners, at the close of the June 13, 2001 hearing to support its position:

1 “CHAIRMAN DOHERTY: Why don’t we continue the hearing. Here’s what
2 we’re thinking, Bob. As I told you, July is just basically a bust month for us
3 because the [board of county commissioners’] schedule is already made.

4 “Today is June 13th, we’re thinking we’ll give [intervenor] until July 16 to get
5 the report, and that’s all we’re keeping the record open for is the report.

6 “If there is insistence on further testimony in connection [with the report]
7 from either side, proponents or opponents, I think we’re obligated to permit
8 that. And then you will receive it and circulate it to all the people who have
9 appeared, and so forth. And if you folks want to have a response in writing to
10 that, or a request for testimony, you have that to us by the 25th [of July], which
11 I think is a Wednesday.

12 “MR. MAUTZ: *We do want to respond.*

13 “CHAIRMAN DOHERTY: Can you do that by the 24th and we’ll schedule
14 our next hearing—we would then continue this until the 31st [of July].

15 “MR. MAUTZ: That gives [intervenor] a month to prepare this and us less
16 than a week to answer.

17 “CHAIRMAN DOHERTY: How much time do you want?

18 “MR. MAUTZ: Same as they get.

19 “CHAIRMAN DOHERTY: Okay.

20 “MR. MAUTZ: So at 8/15 we’re due and [then the board of county
21 commissioners will] call the final hearing during [the Pendleton] Round-up?
22 * * *

23 “CHAIRMAN DOHERTY: We’ll go to the—okay, here’s the second revised
24 schedule. [Intervenor’s] report is in by July 16, [opponents’ response] is in by
25 August 14, we continue this hearing until August 21st. *But be sure to specify,*
26 *all of you before, not later than the 14th whether you want to make the request*
27 *for testimony because that’s going to determine how much time we have to*
28 *block out on the 21st.*

29 “MR. MAUTZ: Wednesday the 14th of August?

30 “CHAIRMAN DOHERTY: August.

31 “MR. MAUTZ: *14th of August request for testimony[.]*” Petition for Review
32 Appendix 4, Transcript of the Proceedings of the Board of County
33 Commissioners, June 13, 2001, 124-125 (emphases added).

1 Intervenor argues that petitioners participated in creating the procedure for reviewing
2 and commenting on the Gates Report and, as a result, cannot show that they were prejudiced
3 by their failure to follow the agreed-upon procedure.

4 ORS 197.763(6) sets out the following procedures for continuing quasi-judicial
5 proceedings. It provides, in relevant part:

6 “(a) Prior to the conclusion of the initial evidentiary hearing, any
7 participant may request an opportunity to present additional evidence,
8 arguments or testimony regarding the application. The local hearings
9 authority shall grant such request by continuing the public hearing
10 pursuant to paragraph (b) of this subsection or leaving the record open
11 for additional written evidence, arguments or testimony pursuant to
12 paragraph (c) of this subsection.

13 “(b) If the hearings authority grants a continuance, the hearing shall be
14 continued to a date, time and place certain at least seven days from the
15 date of the initial evidentiary hearing. An opportunity shall be
16 provided at the continued hearing for persons to present and rebut new
17 evidence, arguments or testimony. * * *

18 “(c) If the hearings authority leaves the record open for additional written
19 evidence, arguments or testimony, the record shall be left open for at
20 least seven days. Any participant may file a written request with the
21 local government for an opportunity to respond to new evidence
22 submitted during the period the record was left open. If such a request
23 is filed, the hearings authority shall reopen the record * * *.”

24 Under the statute, it is clear that if a person requests an opportunity to present
25 additional evidence, the hearings authority may either (1) grant a continuance of the hearing
26 to a date, time and place certain *or* (2) leave the record open for additional written evidence.
27 In the case before us, the county attempted a blend of the two approaches in
28 ORS 197.763(6)(b) and (c). While such a blend of approaches does not necessarily violate
29 the statute, it increases the possibility of confusion by the parties.

30 When a local government departs from the statutory procedures in this manner, it is
31 important that the revised procedures be clearly communicated to all of the parties and,
32 preferably, reduced to writing. Here, there is some question whether a critical element of the
33 revised procedure—the circumstances under which the county would allow oral testimony at

1 the continued hearing—was clearly communicated. While the county attempted to explain
2 the revised procedure in writing, that writing omits any mention of that critical element.
3 Further, the revised procedure fails to address what happens if some participants, but not
4 others, file a written request for oral testimony. As the challenged decision notes, one
5 participant, intervenor, filed a written request to present oral testimony at the August 21,
6 2001 hearing.⁵ It is unclear under such circumstances that other participants who also wish to
7 present oral testimony must file separate requests. If intervenor’s request was sufficient to
8 trigger a continued hearing within the meaning of ORS 197.763(6)(b), then it is arguable that
9 no additional prior requests by other parties were necessary to preserve those parties’ right to
10 appear and provide testimony at the continued hearing on August 21, 2001. In short, the
11 county’s attempted blend of ORS 197.763(6)(b) and (c), and its failure to clarify the extent it
12 was blending and revising those statutory approaches, created significant uncertainty
13 regarding the county’s and the parties’ obligations with respect to the hearing on August 21,
14 2001. Although the question is a close one, we believe there was sufficient uncertainty
15 regarding the opportunity to present oral testimony at the continued hearing that the county’s
16 refusal to allow oral testimony was error and resulted in prejudice to petitioners’ substantial
17 rights.

18 The first assignment of error is sustained.

19 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

20 In the second assignment of error, petitioners challenge the legal and evidentiary
21 basis for the county’s conclusion that the subject property is unsuitable for farm use and
22 therefore need not be zoned for exclusive farm use. In the third assignment of error,
23 petitioners argue that the county misconstrued the applicable law in finding that the subject
24 property is not needed to permit farm practices on adjacent and nearby property. Petitioners

⁵The county apparently denied intervenor’s request at the August 21, 2001 hearing. Record 7. No party assigns error to that disposition.

1 also argue in the third assignment of error that the county's findings are inadequate and not
2 supported by substantial evidence. Because these two assignments of error challenge the
3 merits of the county's decision, and we must remand the decision in any event for the county
4 to receive oral rebuttal testimony from petitioners, it is premature to address the second and
5 third assignments of error.

6 The county's decision is remanded.