BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RONALD C. RAY,
Petitioner,

and

HOLGER T. SOMMER,
PHYLLIS RAY, LIONEL CAMPBELL,
ROSE CLEARWATERS, DAVID CLEARWATERS,
SHAWN DAILY and NAOMI DAILY,
Intervenors-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

COPELAND SAND & GRAVEL, INC.,
Intervenor-Respondent.

LUBA No. 2004-209

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Ronald C. Ray, Grants Pass, filed a joint petition for review and argued on his own behalf. With him on the brief was Holger T. Sommer.

Holger T. Sommer, Merlin, filed a joint petition for review and argued on his own behalf. With him on the brief was Ronald C. Ray. Phyllis Ray, Murphy, Lionel Campbell, Rose Clearwaters, David Clearwaters, Shawn Daily and Naomi Daily, Grants Pass represented themselves.

No appearance by Josephine County.

James R. Dole, Grants Pass, filed response brief and argued on behalf of the intervenor-respondent. With him on the brief was Cauble, Dole and Sorenson.

BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,

participated in the decision.

AFFIRMED 03/07/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision approving a site plan for a rock crushing, processing and asphalt batching plant within the unincorporated community of Murphy.

REPLY BRIEF

Intervenor-petitioner Holger T. Sommer moves to file a reply brief to respond to waiver issues raised in the response brief. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is the same property at issue in the *Murphy Citizens Advisory Committee v. Josephine County* line of cases. *See generally*, *Murphy Citizens Advisory Committee v. Josephine County*, 325 Or 101, 934 P2d 415 (1997) (*Murphy IV*) for a then-current appellate history. The dispute underlying that line of cases began in 1991, when intervenor-respondent (hereafter Copeland) filed a site review application to establish various industrial and aggregate mining uses on a parcel zoned Rural Industrial. After protracted litigation that we do not detail here, the Supreme Court in *Murphy IV* remanded the county decision approving Copeland's site plan to LUBA. In turn, LUBA granted the county's motion for voluntary remand over the objection of the petitioners, based on the county's representation that it would conduct proceedings on remand and diligently consider all of the assignments of error in the petition for review. *Murphy Citizens Advisory Committee v. Josephine County*, 35 Or LUBA 117 (1998). In doing so, we rejected the petitioners' argument that the motion for voluntary remand was motivated by delay or for other improper reasons. *Id.* at 119.

For reasons that are not entirely clear, the county did not conduct any proceedings on remand. At some point following remand, the county apparently decertified the Murphy Citizens Advisory Committee. In 2001, Copeland and representatives from the Murphy

community entered into a mediated agreement governing operation of the mining site, which has apparently been on-going since the county's initial approval in 1992.

In 2003, Copeland filed the present application, which was styled a conditional use permit application, and which sought approval for crushing, processing and storing of aggregate, asphalt batching, raw material stockpiling, equipment maintenance and storage, and sale of rock and related products. The notice of hearing listed the standards for a conditional use permit and for site plan review among the applicable criteria. The planning commission conducted a hearing May 10, 2004, at which staff and Copeland took the position that the application is actually for site plan review, not for a conditional use permit, because the requested uses are permitted outright in the Rural Industrial zone. On June 28, 2004, the planning commission approved the application, styled as a request for site plan review, and adopted findings of compliance with the standards for site plan review. Petitioner appealed the planning commission decision to the county board of commissioners, which conducted a public hearing, and issued a decision denying the appeal and approving the application. This appeal followed.

MOTIONS TO STRIKE

Copeland moves to strike in part or in whole two sections of the petition for review, the section describing the nature of the challenged decision and the statement of facts, on the grounds that the disputed sections improperly include argument and fail to conform to the requirements of OAR 661-010-0030(4).

While we agree with Copeland that the disputed sections of the petition for review improperly include a great deal of argument and do not strictly conform to our rules, Copeland has not established that the noncompliance with our rules in this respect is a basis to strike or disregard the disputed sections. OAR 661-010-0005.

WAIVER

Copeland argues that petitioner failed to preserve most of the issues raised under the eight assignments of error, either by failing to raise them at all during the proceedings below, or by failing to assert those issues in the notice of local appeal filed to appeal the planning commission decision to the board of commissioners.

A. Statement of Appeal

Josephine County Rural Land Development Code (RLDC) 33.080(D) allows oral or written arguments on appeal to the board of commissioners "concerning any ground or reason for appeal specified in the statement of appeal," but prohibits submission of "new matters or evidence" unless allowed under RLDC 33.080(E).[1] Even more directly, RLDC 33.040(A) provides that the local appeal hearing on an appeal to the board of commissioners is "strictly limited to the items specified in the statement of appeal."[2]

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[1] RLDC 33.080 provides, in relevant part:

> "D. The parties to an appeal from any action by the Hearings Officer or Planning Commission shall be allowed to present oral or written arguments concerning any ground or reason for appeal specified in the statement of appeal, but no new matters or evidence shall be submitted unless permitted pursuant to Section 33.080.E.
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> "E. A party to an appeal from any action by the Hearings Officer or Planning Commission may request permission to submit evidence not contained in the record for an appeal when all of the following criteria are met:
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> "1. The evidence was not reasonably available to the party at the time of the original hearing, and the facts supporting this conclusion are documented by affidavit(s);
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> "2. The evidence is substantially relevant to issues raised in the appeal. Evidence is substantially relevant when, in the opinion of the Board, it has special value to prove relevant criteria, so that consideration of the new evidence is likely to alter deliberations;
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> "3. The evidence to be introduced was made available to all parties to the appeal at least 20 days prior to the hearing, and there is no significant prejudice or unfairness to another party. * * *"

[2] RLDC 33.040 provides, in relevant part:

Citing to RLDC 33.080(D), Copeland argues that almost all of the issues in the first assignment of error, and all of the issues in the third, fourth, fifth, sixth and seventh assignments of error, were not raised in the statement of appeal, and hence could not be considered by the board of commissioners or, by extension, LUBA. Copeland contends that the statement of appeal lists only three issues: (1) whether the notice to the planning commission hearing erroneously referred to the application as one for a conditional use permit; (2) whether the noise study complied with applicable regulations; and (3) whether the planning commission properly considered the mediated agreement between Copeland and representatives from the Murphy community. The only way to raise new issues not set out in the statement of appeal, Copeland argues, is pursuant to RLDC 33.080(E), which the opponents did not invoke.

Intervenor-petitioner (intervenor) disagrees that RLDC 33.080(D) limits issues before the board of commissioners to those raised in the statement of appeal. Intervenor argues that RLDC 33.080(D) does not expressly prohibit parties from raising arguments not listed in the statement of appeal. Further, intervenor argues that all of the issues raised below were based

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> "A. A statement of appeal shall be on a form supplied by the Planning Director and shall contain the following information:
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> "1. How the comprehensive plan, this code, or other applicable federal, state or local law or rule, or evidence, was incorrectly interpreted or applied in the decision;
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> "2. What information in the record of decision was pertinent to the decision, but was not considered by the review body. This may include the comprehensive plan, this code, applicable state law, or other evidence;
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> "3. Each ground or reason for appeal must be separately numbered and explained, and the appeal hearing will be strictly limited to the items specified in the statement of appeal;
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> "B. The ground or reason for the appeal must have been raised at the review or hearing body with sufficient specificity to allow the review or hearing body an opportunity to respond to the issue."

on evidence already in the record, so no proceedings under RLDC 33.080(E) were necessary to consider those issues.

Although RLDC 33.080(D) may not *expressly* prohibit parties from raising issues beyond those raised in the statement of appeal, read in context with RLDC 33.040(A)(3) it is clear that that is precisely the intent. At least if no statute or other authority provides otherwise, code provisions such as RLDC 33.040 and 33.080 that limit local appeal issues to those issues raised in the notice of local appeal also limit the issues that can be raised before LUBA. *See Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003) (a party may not raise an issue before LUBA when that party could have specified it as a ground for local appeal to the governing body, but did not do so, even if the issue was raised during the planning commission proceedings).

Intervenor does not dispute that most of the issues raised in the first assignment of error, and all the issues raised in the third, fourth, fifth, sixth and seventh assignments of error, were not raised in the statement of appeal. In the reply brief, however, intervenor argues that the notice of hearing before the planning commission failed to list the applicable criteria as required by ORS 197.763(3)(b), and therefore "new issues may be raised upon appeal." Reply Brief 4. Although intervenor does not cite it, we understand intervenor to rely on ORS 197.835(4)(a), which allows a petitioner to raise new issues before LUBA if the local government failed to list the applicable criteria as required by ORS 197.763(3)(b).[3] In that circumstance, ORS 197.830(4)(a) provides that the petitioner "may raise new issues

[3] ORS 197.835(4) provides, in relevant part:

> "A petitioner may raise new issues to the board if:
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> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

based upon applicable criteria that were omitted from the notice." However, intervenor does not explain what criteria were omitted from the notice of hearing. Even if criteria were omitted, intervenor could raise new issues only regarding those omitted criteria, not other matters that do not involve the omitted criteria.

Consequently, we agree with Copeland that the issues raised in the third, fourth, fifth, sixth and seventh assignments of error were waived, and therefore those assignments of error are denied. As far as we can tell, the only issues raised in the first assignment of error that were also raised in the local statement of appeal involve noise issues. Accordingly, we address the first assignment of error only to that extent, and deny the remainder of the first assignment of error without further discussion.

B. Waived Issues (ORS 197.763(1))

We understand Copeland to argue that the issue raised in the eighth assignment of error was never raised below, and therefore that issue is waived, pursuant to ORS 197.763(1).

The eighth assignment of error argues that the mediated agreement is unenforceable and void because it is against public policy. While issues were raised below regarding the mediated agreement, including an issue raised in the statement of appeal, petitioners do not cite to anywhere in the record where a party raised the issue of whether the agreement is void as contrary to public policy. Accordingly, we agree with Copeland that this issue is waived. The eighth assignment of error is denied.

We turn to those issues and assignments of error that were preserved below.

FIRST ASSIGNMENT OF ERROR

RLDC 91.030(H) provides:

> "All mining and processing of mineral and/or aggregate resources shall comply with OAR noise emission standards. Compliance for purpose of issuing a Development Permit can be demonstrated by a report from an acoustical engineer attesting that the circumstances of the site and/or proposed mitigation will bring the site into compliance."

To demonstrate compliance with RLDC 91.030(H), Copeland submitted a noise study from an acoustical engineer concluding that the operation complies with applicable standards in the Oregon Administrative Rules at OAR 340-035-0035. Record 337-41. Intervenor objected in relevant part that the study did not specify whether sound measurement procedures had conformed to the Sound Measurement Procedures Manual (NPCS-1), as required by OAR 340-035-0035(3).[4] The acoustical engineer responded, explaining that the NPCS-1 manual has not been revised since 1983 and since that time there have been significant advances in measuring noise levels. Record 282. Nonetheless, the engineer stated, the procedures followed in the study were "generally consistent with the procedures in the NPCS-1 manual[.]" *Id.*

In the first assignment of error, petitioner and intervenor (collectively, petitioners) argue that even if the NPCS-1 manual is outdated, the rule requires that sound measurement procedures conform to it. Petitioners argue that there is no evidence that the noise measurement procedures supporting the study conform to the NPCS-1 manual.

Copeland responds, and we agree, that the acoustic engineer's statement that the procedures followed were "generally consistent" with the NPCS-1 manual is sufficient to demonstrate consistency with OAR 340-035-0035(3)(a), for purposes of RLDC 91.030(H). Petitioners do not identify any aspect in which the noise procedures that the acoustic engineer used varied in any material way from those in the NPCS-1 manual.

Finally, petitioners briefly argue that there is no information in the record that "indicates the expected noise to be generated from the total operation on the site." Petition

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[4] OAR 340-035-0035(3)(a) provides:

> "Sound measurements procedures shall conform to those procedures which are adopted by the Commission and set forth in Sound Measurement Procedures Manual (NPCS-1), or to such other procedures as are approved in writing by the Department[.]"

for Review 21. We do not understand the argument. As Copeland points out, the noise study evaluated the actual level of noise generated by the proposed operation, which is currently on-going. If the study is defective in some regard, petitioners do not identify that defect in any way we can understand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The second assignment of error argues that the county improperly shifted the burden of proof from Copeland to the opponents, and that Copeland failed to carry its burden of proof.

However, almost the entire argument under this assignment of error consists of a quote of a lengthy passage from what appears to be the petition for review filed before LUBA on remand from *Murphy IV*, challenging procedural errors that allegedly occurred during the planning commission hearing on April 13, 1992. Petitioners argue that the "same error" occurred before the planning commission in the present application during the May 10, 2004 hearing. Petitioners then cite to Record 249, as evidence that a planning commissioner "asks for proof from the Public." Petition for Review 27.

Record 249 is part of the minutes of the May 10, 2004 planning commission hearing. During the commission's deliberation, two commissioners discussed conflicting evidence over whether Copeland had lived up to its obligations under the mediated agreement it entered into in 2001. One commissioner states "I want to see the proof that there is nothing that has been lived up to. Just a statement that [Copeland has not] lived up to it doesn't tell us anything." Record 249-50.

Copeland responds, and we agree, that petitioners have not established that the county shifted the burden of proof to the opponents. The quoted passage from the 1995 appeal has no relevance to anything in the present appeal, as far as we can discern. The commissioner's statement at Record 249-50 falls far short of demonstrating that the county improperly

shifted the burden of proof from the applicant to the opponents. For one thing, as far as petitioners have established the debate below regarding the mediated agreement has nothing to do with any approval criterion. As Copeland notes, the applicant carries the burden of proof below regarding compliance with applicable approval criteria. Petitioners do not explain what relevance the mediated agreement has to any approval criterion, or why Copeland carries the burden of proof with respect to issues raised regarding the mediated agreement. In any case, as far as we can tell the discussion between the two commissioners was simply a discussion regarding conflicting evidence, and nothing in that discussion suggests that the commission misunderstood where the burden of proof lies.

The second assignment of error is denied.

The county's decision is affirmed.