BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HERB OLSTEDT and BARBARA OLSTEDT,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

SAM WATERS and DONNA WATERS,
Intervenors-Respondents.

LUBA No. 2010-053

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns, PC.

No appearance by Clatsop County.

Michael F. Sheehan, Scappoose, filed the response brief and argued on behalf of intervenors-respondents.

BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

REMANDED 10/06/2010

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

Petitioners appeal a county decision approving a conditional use permit for a campground on land split-zoned for farm and forest use.

MOTION TO INTERVENE

Sam Waters and Donna Waters (intervenors), the applicants below, move to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

The subject property is a vacant 55-acre parcel consisting of tax lots 300 and 307. The 16 acres in the southern third of the property, tax lot 307, is zoned agriculture-forestry (AF). The northern two-thirds of the property, tax lot 300, is zoned exclusive farm use (EFU).

Intervenors filed an application with the county for a "primitive" campground with no facilities other than portable toilets. The initial application did not include detailed information about the proposal, but county staff eventually deemed the application complete, and issued a staff report recommending approval, with conditions. Greater detail about the proposed campground emerged during the first public hearing held by the planning commission, at which petitioners and other individuals appeared in opposition. The planning commission requested that intervenors supply a site plan and other information. In response to opposition testimony, intervenors proposed to limit the campground to 20 tent sites, with a 24-hour caretaker during the camping season, and limited water, toilet, and garbage facilities.

A campground is allowed as a conditional use in the AF and EFU zones, subject to code criteria that require, among other things, a finding that the proposed use is compatible with existing and projected uses on surrounding lands. The planning commission denied the application on the grounds that the campground would be incompatible with existing and projected uses in the area. Intervenors appealed the planning commission denial to the board

of commissioners. After a hearing, the board of commissioners upheld the appeal and approved the application, subject to modified conditions. The board of commissioners adopted the findings of fact and conclusions of law in the final January 4, 2010 staff report to the planning commission. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the findings that the county adopted to demonstrate compliance with two code approval standards are inadequate.

Clatsop County Land and Water Development and Use Ordinance (LWDUO) S3.509(1) requires a finding that conditional uses in farm land will not force a significant change in accepted farm or forest practices on surrounding land devoted to farm or forest use, or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.[1] In addition, S3.509(2) requires a finding that conditional uses on forest land will not significantly increase fire hazard, fire suppression costs or risks to fire suppression personnel. The January 4, 2010 staff report, which the county adopted as its only findings, addresses S3.509(1) and (2) by quoting the text of those code provisions and then marking "S" in a checkbox in the margin, indicating "Satisfied." Record 75.

LWDUO 5.015(2) lists a number of conditional use standards, and in relevant part LWDUO 5.015(2)(D) requires a finding that the "proposed use is compatible with existing and projected uses on surrounding lands, considering the factors in [LWDUO 5.015(2)(C)]."[2]

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[1] LWDUO S3.509(1) implements ORS 215.296(1).

[2] LWDUO 5.015(2) provides, in relevant part:

> "(C) The site under consideration is suitable for the proposed use considering:
>
> > "1) The size, design, and operating characteristics of the use, including but not limited to off-street parking, fencing/buffering, lighting, signage, and building location.

For LWDUO 5.015(2)(C), the January 4, 2010 staff report includes a checkbox notation of "CS" for "Conditionally Satisfied." The notation for LWDUO 5.015(2)(D) is "S," indicating "Satisfied." Record 74. In addition, the January 4, 2010 staff report includes the following statement in a separate text box: "The applicant's findings satisfactorily addressed the criteria detailed in [LWDUO 5.015(2)]. See Exhibit 3 for applicant's responses." *Id*.

Petitioners contend that the foregoing findings are grossly inadequate, because they completely fail to set out the facts relied upon, or explain how the facts lead to the conclusion that the proposal complies with the applicable approval standards. *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995). According to petitioners, S3.509(1) and (2) and 5.015(2)(C) and (D) are concerned with the kind of adverse impacts on surrounding properties that was the subject of significant opposition testimony, which the county's findings ignore.

A. The Issue of Adequacy of Findings Addressing LWDUO S3.509 was Not Preserved

Intervenors respond, initially, that no issue was raised below regarding compliance with LWDUO S3.509(1) and (2), and in particular no party below identified any farm or forest practices on surrounding lands or argued that the proposed campground would significantly increase impacts or costs of farm or forest practices on surrounding lands. On the contrary, intervenors argue, all of the opposition testimony submitted below focused on conflicts with residential uses in the area, which are not the kind of conflicts addressed in

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> "2) The adequacy of transportation access to the site, including street capacity and ingress and egress to adjoining streets.
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> "3) The adequacy of public facilities and services necessary to serve the use.
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> "4) The natural and physical features of the site such as topography, natural hazards, natural resource values, and other features.
>
> "(D) The proposed use is compatible with existing and projected uses on surrounding lands, considering the factors in (C) above."

LWDUO S3.509(1) and (2). Intervenors contend that because no issue was raised below regarding compliance with LWDUO S3.509(1) and (2), petitioners cannot now challenge before LUBA any inadequacy in the findings addressing those approval standards.

ORS 197.763(1) provides that:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

Generally, in order to preserve the right to challenge the adequacy of findings addressing an approval standard or the evidentiary support for such findings, a party must demonstrate that the issue of compliance with that approval standard was raised or challenged below with the specificity required of ORS 197.763(1). *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993); *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334, 352-53 (2003). While the particular findings ultimately adopted need not be anticipated or specifically challenged during the local proceedings, if no issue was raised below regarding compliance with an approval standard, then the issue of the adequacy of findings addressing that standard has not been preserved for purposes of LUBA's review. *Id.*

At oral argument, petitioners responded that the surrounding area is generally zoned for farm or forest use, and that at least some of the opposition testimony below concerned conflicts with farm or forest practices. However, petitioners identify no specific place in the record where any party raised issues regarding conflicts with farm or forest practices in general, or compliance with LWDUO S3.509(1) and (2) in particular.

We have reviewed the citations to opposition testimony in the petition for review, and the closest that anyone comes to raising even a very general issue regarding conflicts with farm or forest uses during the proceedings below is a statement made by an owner of nearby property that he is "concerned about wastes contaminating ground water, trash, and

interactions between livestock and people * * *." Record 89 (emphasis added). However, the property owner does not indicate that he conducts any kind of livestock operation on his property, and the mere reference to "interactions between livestock and people" is insufficient, in our view, to raise the issue of compliance with LWDUO S3.509 with the specificity required by ORS 197.763(1). Because no issue or challenge was apparently raised below regarding compliance with LWDUO S3.509, petitioners cannot now challenge the adequacy of the county's findings of compliance with LWDUO S3.509.

B. Compatibility with Existing Uses under LWDUO 5.015(2)

There is no dispute that the issue of compatibility with existing *residential* uses on surrounding lands was raised below. In response to petitioners' argument that the county's adopted findings addressing LWDUO 5.015(2) are inadequate, intervenors argue that more adequate findings are not necessary, because the county imposed a number of conditions intended to reduce or eliminate conflicts with existing residential uses on surrounding lands.

As noted above, the county's only findings regarding compliance with LWDUO 5.015(2)(C) and (D) consist of notations of "Conditionally Satisfied" and "Satisfied" and a reference to the applicant's findings. Record 74. We agree with petitioners that the findings of compliance with LWDUO 5.015(2)(C) and (D) are grossly inadequate. ORS 215.416(9) requires that approval or denial of a permit "shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." The county's checklist approach to findings falls far short of providing the explanation required by ORS 215.416(9).

It is not clear whether the staff report's reference to the "applicant's findings" is intended or sufficient to incorporate those "findings" into the staff report as additional findings. Even if that was intended, the "findings" apparently referenced consists of a single hand-written page that is also inadequate to explain why the proposed campground complies

with LWDUO 5.015(2)(C) and (D). For example, the "finding" that is apparently intended to address the compatibility standard in LWDUO 5.015(2)(D) states in its entirety: "This property is a beautiful example of Oregon's natural beauty. From wild life to wild flowers and song birds, it's a place to relax and enjoy nature." Record 144.

Finally, that the county imposed conditions intended to reduce conflicts between the campground and surrounding uses is not a substitute for adequate findings of compliance with LWDUO 5.015(2)(C) and (D). *Thomas v. Wasco County*, 30 Or LUBA 302, 315 (1996).

The first assignment of error is denied in part and sustained in part.

SECOND ASSIGNMENT OF ERROR

LWDUO 2.050(2) provides that the county planning director "shall not issue a development permit for the improvement or use of land that has been previously divided or otherwise developed in violation of this Ordinance * * * unless the violation can be rectified as part of the development."

The initial October 5, 2009 staff report included the following statement:

> "The subject property was created on March 23, 1944 with the recording of a warranty deed from David and Ellen Tweedle to Lloyd Carlson. On March 28, 1997, the effective date of Clatsop County Ordinance #80-14, which established the current minimum lot size for the EFU zoning, Ruth Nogle owned Tax Lots 8-01 and 8-02. Tax Lots 8-01 & 8-02 consists of Tax Lots 300, 307, & 308. Tax Lot 308 is currently held in the ownership of Emil & Phillis Rode. It is probable that Tax Lot 308 was illegally partitioned [from the subject property] without following the proper land use procedures; therefore the tract likely consists of all three Tax Lots. In accordance with HB 3327 Tax Lot 308 can be legitimized by the granting of this Land Use Approval, based on the fact that [intervenors] do not own Tax Lot 308 and it was held in separate ownership on January 1, 2007." Record 213.

At the October 13, 2009 planning commission hearing, staff discussed the illegal partition problem identified in the above statement. Record 199. In the January 4, 2010 staff report adopted by the board of commissioners as findings, staff added the following paragraph:

> "Essentially the application meets the criteria; however, as discussed at the October 13, 2009 public hearing, [LWDUO 2.050(2)] states: [quoting the code].
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> "Despite the language above the planning commission is not bound by the same restriction. Additionally, [intervenors] have included Emil & Phillis Rode as a part applicant on this request, thereby eliminating the aforementioned '*illegal partition*' and acknowledging co-ownership of the tract. * * *" Record 68 (emphasis original).

Petitioners challenge the foregoing staff finding, arguing that it fails to establish compliance with LWDUO 2.050(2). Further, to the extent the staff findings purport to legitimize the illegal partition involving the subject property under HB 3327, which was codified in relevant part at ORS 92.176, the findings do not explain how granting the conditional use permit for a campground on tax lots 300 and 307, or the fact that the owners of tax lot 308 became co-applicants, could possibly rectify the illegal partition or validate unlawfully created parcels.[3]

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[3] ORS 92.176 provides, in relevant part:

> "(1) A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for creation of a unit of land if the unit of land:
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> "(a) Is not a lawfully established unit of land; and
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> "(b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold.
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> "(2) Notwithstanding subsection (1)(b) of this section, a county or city may approve an application to validate a unit of land under this section if the county or city approved a permit, as defined in ORS 215.402 or 227.160, respectively, for the construction or placement of a dwelling or other building on the unit of land after the sale. If the permit was approved for a dwelling, the county or city must determine that the dwelling qualifies for replacement under the criteria set forth in ORS 215.755 (1)(a) to (e).
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> "(3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:
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> "(a) The dwelling or other building was lawfully established prior to January 1, 2007; and

Intervenors respond that the issue of compliance with LWDUO 2.050(2) was not raised during the proceedings below by any party, and that issue is therefore waived, pursuant to ORS 197.763(1). In addition, intervenors argue that no party included that issue in the notice of appeal to the board of commissioners.

Intervenors' last argument is apparently intended to invoke the holding in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), although intervenors do not cite the case. In *Miles*, the Court of Appeals held that that where a local ordinance requires that an appellant specify the grounds for local appeal, "a party may not raise an issue before LUBA when that party could have specified it as a ground for appeal before the local body, but did not do so." *Id.* at 510. The problem with intervenors' reliance on the reasoning in *Miles* is that the notice of local appeal was filed by intervenors, challenging the planning commission's denial of their application. Petitioners did not file a notice of local appeal, and it would have been strange to do so, since petitioners prevailed before the planning commission, the planning commission considered only compliance with LWDUO 5.015(2)(C) and (D), and its decision includes no determination regarding LWDUO 2.050(2) at all. Thus, there was no "issue" regarding compliance with LWDUO 2.050(2) that any party was in a position to appeal to the board of commissioners.

> "(b) The permit does not change or intensify the use of the dwelling or other building.
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> "(4) An application to validate a unit of land under this section is an application for a permit, as defined in ORS 215.402 or 227.160. An application to a county under this section is not subject to the minimum lot or parcel sizes established by ORS 215.780."

ORS 92.177 provides:

> "When a unit of land was sold before January 1, 2007, but was not a lawfully established unit of land, the governing body of the city or county or its designee shall consider and may approve an application for the creation of a parcel pursuant to ORS 92.176, notwithstanding that less than all of the owners of the existing lawfully established unit of land have applied for the approval."

The more difficult question is whether the issue of compliance with LWDUO 2.050(2) was raised during the proceedings below, as required by ORS 197.763(1). Petitioners do not contend that any participant to the proceedings below, other than staff, raised any issue regarding LWDUO 2.050(2) or more generally any issue regarding the problem with the illegal partition identified by staff in the October 5, 2009 staff report. However, local government planning staff are considered "participants" in a ORS 197.763 hearing and, at least in some circumstances, can raise issues for purposes of ORS 197.763(1). *Stewart v. City of Salem*, 231 Or App 356, 370, 219 P3d 46 (2009). The above-quoted language appears to raise with sufficient specificity the issue of an illegal partition and compliance with LWDUO 2.050(2).

Even if the above-quoted language in the staff reports was insufficient to raise the issue of compliance with LWDUO 2.050(2) for purposes of ORS 197.763(1), petitioners point out that the notices of hearing did not indicate that the proposal included the validation of an illegal partition, and the notices failed to list the criteria that would apply to such a validation. Petition for Review 12-13. Although petitioners do not cite it, ORS 197.835(4)(a) provides that a petitioner may raise "new issues" to LUBA if "[t]he local government failed to list the applicable criteria for a decision under ORS * * * 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice."[4] ORS 197.763(3)(b) requires the local government notice of

[4] ORS 197.835(4) provides:

> "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; or

hearing to "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue[.]" The county's notices of hearing did not list LWDUO 2.050(2) as an approval criterion. Moreover, as petitioner notes, the notices did not indicate that the proposed action would involve validation of an illegal partition. To the extent the county's final decision purports to validate an illegal partition, the decision would thus be "different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action." ORS 197.835(4)(b). We conclude that even if the staff reports were not sufficient to raise the issue of compliance with LWDUO 2.050(2), the issue is a "new issue" that can be raised to LUBA for the first time under either ORS 197.835(4)(a) or (b).

On the merits, intervenors argue that the staff report adopted by the county as findings correctly concluded that the subject property and tax lot 308 are legal lots or parcels, and that any illegality was cured by making the owners of tax lot 308 co-applicants on the campground application. We do not understand the argument, or the county's reasoning in the above-quoted findings. If the subject property was previously divided in violation of the county's ordinance to create tax lot 308, LWDUO 2.050(2) would apparently prohibit approval of the proposed campground unless the county finds that "the violation can be rectified as part of the development." The findings do not explain, and we do not understand, how making the owners of tax lot 308 co-applicants for intervenors' campground proposal could possibly rectify—or "eliminate" in the words of the county—the problem of the illegal partition. To the extent the county's decision is intended to validate unlawfully created parcels under ORS 92.176, the findings do not address the criteria in that statute and are inadequate to accomplish such validation.

> "(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

The second assignment of error is sustained.

The county's decision is remanded.