BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FAMILIES FOR A QUARRY
FREE NEIGHBORHOOD,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

DONALD J. OVERHOLSER
and RODNEY MATHEWS,
Intervenors-Respondents.

LUBA No. 2011-051

FINAL OPINION
AND ORDER

Appeal from Lane County.

Daniel J. Stotter, Corvallis, filed the petition for review and argued on behalf of petitioner.

Stephen Vorhes, Assistant County Counsel, Eugene, filed a joint response brief and argued on behalf of respondent.

Joseph J. Leahy and William A. Van Vactor, Springfield, filed a joint response brief and argued on behalf of intervenors-respondents. With them on the brief was Leahy, Van Vactor & Cox, LLP.

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

REMANDED 11/22/2011

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 seeks review of a county decision that grants site review approval for a rock quarry.

MOTION TO INTERVENE

Donald J. Overholser and Rodney Mathews (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues in the respondents' brief. The motion is allowed.

FACTS

Intervenors sought county site review approval to expand an existing rock quarry and extract 20,000 cubic yards of rock annually. Access to the quarry is via Mosby Creek Road, Quaglia Road and a roadway easement. Mosby Creek Road intersects with Quaglia Road approximately two miles southeast of the City of Cottage Grove. The subject property is located approximately one-half mile southwest of the intersection of Mosby Creek Road and Quaglia Road. Access to the subject 15-acre property from Mosby Creek Road is via Quaglia Road to its intersection with a private drive and then via that private drive over an easement that serves a number of rural residences and the subject property. The adequacy of Quaglia Road and its intersection with the private drive to carry the expected truck traffic between the subject property and Mosby Creek Road was an issue below. Quaglia Road does not have a uniform asphalt concrete surface, and apparently has substandard base rock as well. While Quaglia Road is generally adequate for the current low-volume residential traffic, it is not adequate to carry fully loaded dump trucks carrying aggregate material.

Intervenors filed their application for site plan review on February 23, 2007. The planning director elected to hold an evidentiary hearing on September 24, 2007. Approximately one year later, on October 31, 2008, the planning director's evidentiary hearing closed. Almost a year and a half after the planning director's evidentiary hearing closed, on March 18, 2010, the planning director approved the application with 17 conditions of approval.[1] Record 682-702.

Intervenors (the applicants) appealed the planning director's March 18, 2010, decision, challenging nine of the 17 conditions of approval. Record 663-69. Shortly before the May 6, 2010 appeal hearing before the hearings official, petitioner submitted a ten-page single-spaced letter seeking permission to participate in the appeal and defend the planning director's decision against intervenors' challenge to nine of the conditions of approval. Record 450-59. In that letter petitioner first requested that the hearings official conduct a *de novo* evidentiary hearing and allow petitioner to testify at the hearing. Record 452. Petitioner also asserted that even if the Lane Code (LC) did not entitle petitioner to a *de novo* hearing or allow petitioner to participate orally in an on-the-record hearing, the LC did require notice of the hearing to petitioner and permit petitioner to submit written testimony. *Id*. Over six pages of the ten-page letter are devoted to defending each of the nine conditions that were the subject of intervenors' appeal. Record 453-59. After the May 6, 2010 hearing, petitioner submitted a four-page single-spaced letter objecting to the planning director's recommendations that some of the nine conditions be eliminated and others modified. Record 272-75. Although both of those letters are included as part of the county's record in this appeal, the parties disagree regarding whether the hearings officer accepted and considered petitioner's letters.

[1] Most of the conditions address required roadway improvements, but others limit truck size, trips and speed.

The hearings official denied petitioner's request for a *de novo* hearing and denied petitioner's request to be allowed to participate in the May 6, 2010 on-the-record appeal hearing before the hearings official. Record 26. The hearings official ultimately affirmed the planning director's decision, but modified five of the nine conditions that intervenors challenged, deleted three of those conditions and kept one of those conditions with clarification. Petitioner sought review of the hearings official's decision by the board of county commissioners, which denied review, and this appeal followed.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Under ORS 197.825(2)(a), LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]" Intervenors and the county (together, respondents) suggest that because petitioner did not separately appeal the planning director's decision to the hearings official, petitioner failed to exhaust available remedies as required by ORS 197.825(2)(a), and this appeal should be dismissed. We reject the suggestion.

Petitioner agreed with the planning director's decision to approve the proposed site plan and impose the 17 conditions, and therefore had no reason to appeal that decision. As petitioner points out, even if petitioner had anticipated respondents' exhaustion argument and attempted to file its own appeal of the planning director's decision, it would have been difficult or impossible for petitioner to file a local appeal that complied with the LC. Under LC 14.515(3)(d), a local appeal must identify the bases for the local appeal. Because petitioner wishes to challenge the hearings official's decision, a decision that had not yet been adopted when intervenors filed their appeal, and did not wish to challenge the planning director's decision, it would have difficult or impossible for petitioner to comply with LC 14.515(3)(d) in an appeal of the planning director's decision.

ORS 197.825(2)(a) does not require a petitioner to file a local appeal to challenge a decision the petitioner agrees with, to preserve its right to appeal to LUBA if that initial

decision is locally appealed by others and a different decision—that the petitioner does not agree with—results from the local appeal filed by others. It is the hearings official's decision in intervenors' appeal that modified and removed several of the planning director's conditions that petitioner objects to. Petitioner appealed the hearings official's decision to the board of county commissioners. Record 74-79. Based on that local appeal to the board of county commissioners, petitioner complied with the ORS 197.825(2)(a) requirement that petitioner exhaust available local remedies before appealing to LUBA.

FOURTH ASSIGNMENT OF ERROR

The hearings official not only denied petitioner's request for a *de novo* evidentiary hearing in intervenors' appeal of the planning director's decision, he also denied petitioner the opportunity to participate in intervenors' appeal. As the hearings official interpreted the LC, only the intervenors were entitled to testify orally at the May 6, 2010 hearing and that testimony had to be limited to legal argument.

In this appeal there are two separate if related issues that seem to have been somewhat conflated by the hearings official and remain somewhat conflated on appeal. The first issue is whether the hearings official was obligated to allow a *de novo* evidentiary appeal where all parties to the planning director's evidentiary hearing would be entitled to a second chance to present evidence—as opposed to an on-the-record appeal with the parties entitled only to present legal argument regarding the bases for appeal set out in intervenors' notice of local appeal. We do not understand petitioner to assert in this appeal that the hearings official erred in failing to allow a *de novo* evidentiary appeal and we do not consider that question further.

However, a second issue is whether petitioner, as a party to the planning director's evidentiary proceeding, had a right to participate and present legal argument in intervenors' on-the-record appeal to the hearings official. That is the issue that we must resolve in this appeal. Resolving this issue is complicated by the lack of clarity in the hearings official's

decision regarding whether the hearings official accepted and considered petitioner's written argument in the two letters and only barred petitioner from presenting oral argument at the May 6, 2010 on-the-record appeal hearing.

The only evidence that petitioner's letters were accepted and considered is the presence of the letters in the record that the county filed in this appeal. We understand petitioner to take the position that the hearings official did not accept and consider those letters, and we understand respondents to argue that he did. The main difficulty with respondents' argument is that there is absolutely nothing in the hearings official's decision that suggests he accepted and considered petitioner's written legal argument and intended only to refuse to allow petitioner to present oral legal argument. The hearings official's decision seems to view the choice he had to make as being between allowing a full *de novo* evidentiary appeal hearing or finding that petitioner's right to participate at all terminated at the time the record closed in the planning director's evidentiary proceeding. In concluding petitioner would not be prejudiced by allowing intervenors' on-the-record appeal to proceed without petitioner, the hearings officer only mentions petitioner's testimony before the planning director, which would be available to the hearings official:

> "The hearing before the Lane County Hearings Official was held on May 6, 2010. This hearing was scheduled to be 'on the record' and restricted to 'parties' to the appeal. * * *
>
> "At the May 6 hearing, I ruled that the opponents would not be allowed to testify because an evidentiary hearing had already been held, essentially locking in the Code provisions that restricted appellate rights at the County level. Not allowing the opponents to testify at an 'on the record' hearing would not prejudice the opponents, as their testimony from the prior [planning director's] proceeding is already in the record and would be considered by the Hearings Official. * * *" Record 26.

Because the hearings official never acknowledged petitioner's letters and does not address them in his decision, we conclude that the hearings official did not allow petitioner to participate at all in intervenors' on-the-record appeal. We therefore consider whether barring

petitioner from participating in writing or orally in intervenors' on-the-record appeal was a procedural error.

Under ORS 197.835(9)(a)(B), LUBA is to reverse or remand a land use decision if a local government "[f]ailed to follow the procedures applicable to matter before it in a manner that prejudiced the substantial rights of the petitioner." Similarly, under OAR 661-010-0071(2)(c), LUBA is to remand a decision if "[t]he decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s)[.]" Petitioner must demonstrate both procedural error and prejudice to its substantial rights. *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd and rem'd on other grounds, Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). Under ORS 197.835(9)(a)(B), the "substantial rights" of parties that may be prejudiced by failure to follow required procedures are "the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioner's legal theory for why the county erred in failing to allow it to participate as a party in intervenors' appeal of the planning director's decision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petition for Review 15. Petitioner's constitutional argument is poorly developed. Respondents' ignore petitioner's Due Process argument and attempt to defend the hearings official's action as being a correct application of the LC. Of course if petitioner's constitutional argument has merit, it would not matter whether the LC is correctly interpreted to bar petitioner's participation in intervenors' on-the-record appeal. But before we reach petitioner's constitutional argument, we must first consider whether there is a subconstituional basis for resolving this assignment of error that would make it unnecessary to address and resolve the constitutional argument. *State v. Barrett*, 350 Or 390, 398, 255 P3d 472 (2011); *State v. Conger*, 319 Or 484, 490, 878 P2d 1089 (1994); *Zockert v. Fanning*, 310 Or 514, 520, 800 P2d 773 (1990).

LC 14.400 sets out procedures for on-the-record appeals. Respondents rely primarily on LC 14.400(9)(b) and 14.600(4).[2] Reading those sections together and in isolation, we agree with respondents and the hearings official that where the local appellant is the applicant, the parties entitled to participate in an on-the-record appeal before the hearings official under LC 14.400(9)(b) and 14.600(4) include only the applicant/appellant and the planning director. Because petitioner is neither the applicant, nor the planning director, nor the appellant, under LC 14.400(9)(b) and 14.600(4), petitioner arguably did not have a right to present legal argument in intervenors' on-the-record appeal.

However, LC 14.400(9)(b) and 14.600(4) must be read in context, and that context includes other subsections of LC 14.400 and 14.600 as well as the statutes that govern local quasi-judicial land use proceedings and local appeals. Turning first to LC 14.400, LC 14.400(2) authorizes the approval authority that hears a local on-the-record appeal to accept "additional evidence without holding a *de novo* hearing" in certain circumstances.[3]

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[2] LC 14.400(9)(b) provides that the hearings officer must:

> "Announce to all persons present that the hearing is on the record from the hearing of the previous Approval Authority, that only the persons identified in LC 14.600(4) will be allowed to participate in the on-the-record hearing, and that the issues discussed will be limited to those raised in the notice of appeal."

LC 14.600(4) provides:

> "Participation Criteria. Persons who may participate in a Board on-the-record hearing for an appeal are:
>
> "(a) The applicant and the applicant's representative.
>
> "(b) The Director.
>
> "(c) The appellant and the appellant's representative."

[3] LC 14.400(2) provides:

> "Limited Additional Testimony. The Approval Authority may admit additional testimony and other evidence without holding a *de novo* hearing, if it is satisfied that the testimony or other evidence could not have been presented at the initial hearing. In deciding such admission, the Approval Authority shall consider:

Although no party argues the hearings official accepted additional evidence in this case, he was authorized to do so under LC 14.400(2), and if he had done so petitioner potentially would have been denied the right it has under *Fasano v. Washington Co. Comm*, 264 Or 574, 588, 507 P2d 23 (1973) to rebut evidence.[4] Next, LC 14.400(9)(c)-(d) call for the approval authority conducting an on-the-record appeal to disclose any *ex parte* communications and give parties a right rebut any *ex parte* communications. LC 14.400(9)(c)-(d) appears to presume that all parties (including parties in the evidentiary phase of the proceeding) will be present to have an opportunity to rebut any *ex parte* communications. That context suggests the drafters of LC 14.400(9)(b) and 14.600(4) may not have intended to exclude non-applicant parties from the evidentiary phase of a proceeding from participating in local on-the-record appeals filed by an applicant.

Turning to the statutes, ORS 197.763 does not specifically envision quasi-judicial evidentiary land use hearings followed by on-the-record appeals. That statute provides for the applicant to get the opportunity to present final legal argument at the conclusion of a quasi-judicial evidentiary land use hearing. ORS 197.763(6)(e). But it is not consistent with

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> "(a) Prejudice to parties.
>
> "(b) Convenience or availability of evidence at the time of the initial hearing.
>
> "(c) Surprise to opposing parties.
>
> "(d) When notice was given to other parties of the intended attempt to admit the new evidence.
>
> "(e) The competency, relevancy and materiality of the proposed testimony or other evidence.
>
> "(f) Whether the matter should be remanded for a *de novo* hearing under LC 14.400(3) below."

[4] We recognize that two of the factors the hearings official must consider in deciding whether to allow additional evidence in an on-the-record appeal is whether any party will be prejudiced or surprised and based on those factors a hearings official might not allow new evidence in an on-the-record appeal. However, in reading the LC 14.400(2) factors, the fairest inference is that all the parties during the evidentiary phase of a proceeding would also be present in the on-the-record phase.

ORS 197.763 to authorize an applicant that does not prevail in that final legal argument at the conclusion of the quasi-judicial evidentiary hearing a second chance to present legal argument to another local decision maker in an on-the-record appeal, with all other parties forced to the sidelines and denied any right to present written or oral legal argument to the second decision maker. Another statute, ORS 215.422, specifically authorizes counties to adopt procedures for local appeals of decisions that are the product of a quasi-judicial evidentiary hearing and would appear to authorize either on-the-record appeals or appeals with another evidentiary hearing. But ORS 215.422, unlike LC 14.400 and 14.600, does not include any language that even arguably authorizes a procedure that would (1) permit an applicant to appeal a land use decision that is the product of a quasi-judicial evidentiary hearing and (2) prohibit any other party to the quasi-judicial evidentiary hearing from presenting any legal argument in the applicant's on-the-record appeal. In fact ORS 215.422(3), like LC 14.400(9)(c)-(d), expressly provides that the decision maker on appeal has the right to attempt to cure any *ex parte* contacts if the decision maker places the substance of any *ex parte* communications on the record and gives all parties an opportunity to rebut the substance of the *ex parte* communication. ORS 215.422(3), like LC 14.400(9)(c)-(d), presumes that petitioner, as a party to the quasi-judicial phase of this proceeding, could still be present as a party to have an opportunity to rebut any *ex parte* communications that might be disclosed in intervenors' on-the-record appeal.

Given the above code and statutory context, although it is a reasonably close question, we conclude that LC 14.400 and 14.600 are not correctly interpreted to bar non-applicant parties in the evidentiary phase of a proceeding from participating in an on-the-record appeal filed by the applicant. However, even if we are wrong and the text of LC 14.400(9)(b) and 14.600(4) is not overcome by the above-noted context, we do not believe ORS 197.763 and 215.422 can be interpreted to permit such a procedure, and the county cannot do away with rights that are protected by those statutes. As we explained in a case

with some similarities to this one, a county commits a procedural error that prejudices a party's substantial rights where it denies them a right to participate in land use proceedings that is guaranteed by statute. *Hugo v. Columbia County*, 34 Or LUBA 577, *aff'd* 157 Or App 1, 967 P2d 895 (1998).

On remand, the hearings official must provide petitioner a right to participate as a party in intervenors' on-the-record appeal. While that participation can be limited to presenting legal argument in the on-the-record appeal, petitioner may not be barred from participating at all.

The fourth assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

LC 16.257(4)(a) and (f) are two of the criteria that apply to the intervenors' proposal.[5] Like the parties we refer to LC 16.257(4)(a) as the compatibility criterion, and LC 16.257(4)(f) as the traffic criterion. In addressing these criteria, the planning director adopted the following findings:

> "Many of the comments in opposition to the proposal are related to traffic and road capabilities (or lack thereof) along the easement and nearby adjoining roads (Quaglia Rd., Pitcher Ln., and Mosby Crk. Rd.). These issues are discussed in depth under the standard of LC 16.257(4)(f) below. * * * In general, as explained under LC 16.257(4)(f), Quaglia Road in particular, and the easement intersection with Quaglia Road, is currently inadequate for the

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[5] LC 16.257(4) provides, in part:

> "Criteria for Site Review Evaluation. The following minimum criteria should be considered in evaluating Site Review Applications:
>
> (a) That the location, design, size, shape and arrangement of the uses and structures are sufficient for the proposal intent [sic] and are compatible with the surrounding vicinity.
>
> "* * * * *
>
> "(f) That, based on anticipated traffic generation, adequate additional right-of-way, road improvements, and on-site vehicular, bicycle and pedestrian improvements connecting directly to off-site roads, paths and sidewalks must be provided by the development in order to promote traffic safety and reduce traffic congestion."

> proposed use. *It is the Director's opinion and finding that the proposed use will be compatible with the surrounding vicinity <u>only</u> if the required conditions of this approval are implemented by the Applicant*." Record 90 (emphasis and underlining added).

Petitioner contends that the planning director's findings, which rely on the 17 conditions attached to his decision, are adequate to address and demonstrate that the proposed quarry expansion will comply with the LC 16.257(4)(a) and (f) compatibility and traffic criteria. Petition for Review 12 (lines 1-2) and 13 (lines 12-13). Petitioner contends that the issue it wished to raise in intervenors' appeal was whether those conditions could be eliminated or altered without causing the proposed quarry to violate the LC 16.257(4)(a) and (f) compatibility and traffic criteria. Petitioner contends the hearings official changed nine of the conditions, with "no findings whatsoever." Petition for Review 12, 13.

Petitioner is correct that the only explanation that the county has adopted to show that the proposed quarry is consistent with the LC 16.257(4)(a) and (f) compatibility and traffic criteria is the planning director's finding that the 17 conditions of approval are sufficient to ensure compliance with those criteria. Where a local government relies on conditions of approval to ensure that a proposed land use will comply with any relevant approval criteria, and thereafter decides to eliminate or alter one or more of those conditions, the local government must explain why the proposed land use continues to comply with relevant approval criteria, notwithstanding the altered or eliminated condition of approval. *Oh v. City of Gold Beach*, 60 Or LUBA 356, 363, *aff'd* 235 Or App 380, 231 P3d 1191 (2010). Petitioner's contention that the hearings official altered or eliminated conditions with "no findings whatsoever" is an overstatement. The hearings official did adopt some findings. Record 35-40, although the hearings official's decision does not respond in any direct way to petitioner's letters mentioned earlier in this opinion. However, because we sustain petitioner's fourth assignment of error we must remand the hearings official's decision, and petitioner will be given an opportunity to present legal argument to the hearings official on

remand. That will give the hearings official an opportunity to respond directly to petitioner's arguments.[6]

We do not consider the second and third assignments of error.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error petitioner makes a generalized substantial evidence challenge. Given our resolution of the balance of petitioner's assignments of error, the hearings officer will be considering additional legal argument and likely will be adopting additional findings. After that, petitioner will be in a position to identify any critical findings and will then be in a position to determine whether an evidentiary challenge to any of those critical findings is warranted. However, as this appeal now stands, petitioner's evidentiary challenge is simply too unfocused and undeveloped to provide a basis for remand.

The first assignment of error is denied.

The county's decision is remanded.

[6] We express no opinion on the merits of petitioner's arguments. But to provide some guidance on remand, it may be as the hearings official suggests that some of those conditions simply are no longer necessary and it may be that eliminating them would not implicate the compatibility and traffic criteria in any way. If so, the hearings official may simply provide that explanation in responding to petitioners' arguments. However, it appears that at least three of the conditions that limit truck size, daily truck trips and impose a speed limit (conditions 7-9) were modified to more closely align the conditions with the applicant's wishes, without considering the potential impact those changes might have on the compatibility and traffic criteria. It is not obvious to us that those conditions can be modified in the way that they were without potentially implicating the compatibility and traffic criteria.